Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2018 Quadrennial Regulatory Review of	)	MB Docket No. 18-349
The Commission's Broadcast Ownership Rules	)	
And Other Rules Adopted Pursuant to Section 202	)	
of the Telecommunications Act of 1996	)	

To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.

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The National Association of Black Owned Broadcasters, Inc. ("NABOB") submits these Comments in response to the Commission's Notice of Proposed Rulemaking issued in this proceeding.[1]

I. SUMMARY

NABOB opposes any changes in the Commission's broadcast ownership rules being reviewed in this proceeding. Increased consolidation of ownership in the broadcast industry reduces opportunities for minorities to enter the business or to grow. NABOB is particularly opposed to any changes in the local radio ownership rule, because most existing African American broadcast owners are in radio. Because radio stations sell for less than television stations, radio has been, and continues to be, the gateway to station ownership for most minority

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[1] *2018 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 18-349, Notice of Proposed Rulemaking, released December 13, 2018 ("*2018 Quad NPRM*").

entrepreneurs. Therefore, any change in the local radio ownership rule to allow increased consolidation will have a significant negative impact on African Americans and other minority station owners and entrepreneurs. Any elimination or relaxation of the Subcaps rule would be particularly damaging for the AM radio industry as a whole, in addition to being damaging to African American AM station owners. NABOB is not alone in opposing elimination or relaxation of the Subcaps rule. Several major broadcast companies also oppose the elimination of the Subcaps rule and recognize that it would be damaging to the AM industry.

II. AFRICAN AMERICAN BROADCAST STATION OWNERSHIP HAS DECLINED SINCE 1995

NABOB has participated in each of the Commission's Quadrennial Reviews. In each proceeding, NABOB has provided data showing that African American ownership of broadcast radio and television stations has been in steady decline ever since: (1) Congress repealed the minority tax certificate policy in 1995,[2] (2) the Supreme Court decided the *Adarand* case in 1995,[3] and (3) Congress passed the Telecommunications Act of 1996.[4] The repeal of the tax certificate policy and the *Adarand* decision resulted in the Commission having no meaningful programs to promote minority ownership -- a condition that has now existed for 24 years.[5]

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[2] See, *Deduction for Health Insurance costs of Self-Employed Individuals*, Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

[3] *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995).

[4] *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

[5] In August 2018, the Commission adopted its Incubator program designed to promote new entry into the radio industry. *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcast Services,* Report and Order (Aug. 3, 2018). The Incubator program has not yet been initiated. NABOB has been a long-time advocate for an incubator program. Unfortunately, the "comparable markets" definition adopted by the Commission in its Incubator program provides clear potential for abuse. Therefore, NABOB and the Multicultural Media, Telecom and Internet Council ("MMTC") appealed the order. *MMTC et al. v. FCC,* No. 18-1268, Document No. 1753058 (D.C. Cir. Sept. 27, 2018), now consolidated in the Third Circuit,

After the enactment of the Telecommunications Act of 1996, over the next decade a handful of major companies consolidated their ownership of the broadcast industry. This resulted in a precipitous decline in the number of African American companies owning broadcast stations. In the *2014 Quadrennial Review*, NABOB's data[6] showed the following declines for African American companies owning broadcast stations:

Year	Companies/Stations	Number
1995	Radio companies	146
	TV companies	10
	Radio stations	250
	TV Stations	23
2013	Radio companies	67
	TV companies	3
	Radio stations	212
	TV stations	4

The Commission's radio data[7] was consistent with NABOB's data. The Commission's data showed in 2013 African Americans owned:

Broadcast Stations	Number	Percentage
TV Stations	9	0.6%[8]
AM radio stations	93	2.5%
FM radio stations	73	1.3%

MMTC et al. v. FCC, Nos. 17-1109 and 18-3335, document No. 003003067217 (3rd Cir. October 22, 2018).

[6] NABOB Comments filed August 6, 2014 in *2014 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, et al *("2014 Quadrennial Review").*

[7] *2014 Quadrennial Review,* Report on Ownership of Commercial Broadcast Stations, DA 14-924, released June 27, 2014, at 6, 13, 15.

[8] The Commission's data shows an increase in television station ownership over the past few years. This is due to an increase in television station purchases that include joint sales agreements ("JSAs") and shared services agreements ("SSAs"). NABOB has long questioned whether such JSA/SSA transactions (often referred to as "side car" transactions) constitute actual ownership now, and whether they will ever lead to independent ownership by minority buyers involved in such transactions. Moreover, even when the JSA/SSA stations are included, the ownership number is 0.6%, a level of ownership that is clearly unacceptable.

African Americans comprise 13.4% of the U.S. population.[9] The Commission's most recent Ownership Report in 2017[10] reflects:

Broadcast Stations	Number	Percentage
TV Stations	12	0.9%[11]
AM radio stations	87	2.5%
FM radio stations	72	1.3%

Thus, the Commission's own Ownership data regarding African American ownership confirms NABOB's data, which demonstrates that African Americans are woefully underrepresented in the ownership of broadcast stations.[12]

Today, NABOB members own approximately 180 commercial radio stations. Of these, approximately 76 are AM stations. Of these AM stations, 51 are Class C and D AM stations, and none are Class A AM stations. Thus, NABOB's members will be impacted significantly if they are placed in the position of competing against group owners operating up to eight or ten FM stations in a market.

It is clear that three factors were the principal causes of the decline in media ownership for African Americans: the loss of the tax certificate, the *Adarand* decision, and the relaxation of media ownership rules in 1996. The Commission only has a direct control over one of those

[9] U.S. Census Bureau website: https://www.census.gov/quickfacts/fact/table/US/PST045218.
[10] Third Report on Ownership of Commercial Broadcast Stations, Industry Analysis Division, Media Bureau, May 2017.
[11] As pointed out in note 8 above, even when the JSA/SSA stations are included, this number is unacceptable.
[12] This ownership decline between 1995 and 2013 was exacerbated by the 2008-2009 recession. From 2005 to 2009, at least 59 minority owned radio stations were transferred to bankruptcy trustees, trusts established for the benefit of creditors, or to trustees for debtors-in-possession attempting to reorganize under Chapter 11 of the Bankruptcy Code. Most of these bankruptcy cases resulted in the minority owners losing ownership of the stations. In addition, 18 minority owned stations requested permission from the Commission to cease operations due to financial difficulties. *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest,* by Catherine J. K. Sandoval, Assistant Professor, Santa Clara University School of Law, November 2009.

factors -- its media ownership rules. It cannot allow the decline of media ownership by African Americans to continue by throwing up its hand and blaming the Supreme Court or Congress.

Similarly, the Commission cannot suggest that the only solution is for minorities to find new ways to access capital. Certainly, lack of access to capital inhibits the ability of African American entrepreneurs to become broadcast station owners. But the Commission has no regulatory authority over any financial institution. Therefore, the Commission has no direct ability to make capital available to African American entrepreneurs. The Commission has only one direct tool available to help it slow the decline in African American broadcast ownership and give that ownership an opportunity to grow -- it must maintain the rules that slow industry consolidation.

Any relaxation of the Commission's ownership rules will further the ongoing precipitous decline in minority broadcast ownership. African Americans still own a small number of successful radio stations and allowing further consolidation in that industry could substantially undermine currently successful radio stations.

III. <u>THE SUBCAPS RULE WAS CREATED TO SERVE AN IMPORTANT PURPOSE</u>

In the NPRM, the Commission discussed submissions from the National Association of Broadcasters ("NAB") and other parties proposing relaxation or elimination of the local radio ownership rule, and in particular the Subcaps rule.[13] As a result, the Commission asked parties to address a number of questions regarding the rule, including whether any changes in the rule would impact minorities and women.[14] The answer to this question is that any relaxation or

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[13] *2018 Quad NPRM* at par. 13, citing a June 15, 2018 letter to Michelle Carey, Chief, Media Bureau from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, NAB ("*NAB Letter*").
[14] *Id.* at par. 37.

elimination of the local radio ownership rule will negatively impact African American radio ownership. In particular, any change in the Subcaps rule will have a serious negative impact on African American station ownership.

The Subcaps rule limits the number of radio stations in a market that a licensee can own in either the AM or FM service. In the largest Nielsen markets, a licensee may own up to 8 radio stations, but the Subcaps rule limits that licensee to owning no more than 5 stations in either the AM or FM service.[15] The NPRM provides information on proposals to eliminate or radically limit that rule. As NABOB shall demonstrate below, elimination of the rule would undermine the Commission's efforts to revitalize AM radio and would have a disproportionately negative competitive impact on African American and other minority owned AM radio stations.

The Subcaps rule primarily affects competition between local radio stations in a market. The rule was put in place because the Commission recognized that AM and FM radio stations have technological and marketplace differences that disadvantage AM stations. In adopting the Subcap rule in 1992, the Commission said:

> The numerical limits also provide a significant safeguard against the possibility that one licensee could acquire a substantial market share, as measured by audience rating data, in any particular local market. In this regard, because stations in the FM service may in particular markets have an advantage over stations in the AM service, or vice versa, we have adopted separate limits for each. This approach will tend to prevent one entity from putting together a powerful combination of stations in a single service that may enjoy an advantage over stations in a different service. *We believe that this is particularly important with respect to the FM service, which in many markets enjoys significant competitive advantages.*[16] (emphasis added)

In 2013, recognizing that the competitive situation of AM radio with respect to FM radio had worsened since adoption of the 1992 *Subcap Order*, the Commission initiated the AM

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[15] 47 CFR § 73.3555(a)(1)(i).

[16] *Review of Radio Rules and Policies*, Report and Order, 7 FCC Rcd 2755, 2778, ¶ 44 (1992) ("*Subcap Order*").

revitalization proceeding to develop new proposals for improving AM radio's competitive position.[17] In the *AM Revitalization NPRM* the Commission began by recognizing that:

> The Commission's last comprehensive examination of the technical, legal, and policy issues relating to AM broadcasting took place a generation ago, in a proceeding that began with a 1987 Notice of Inquiry. In the more than quarter-century since, the challenges facing the AM band have increased dramatically. In the mid-1980s, AM radio represented 30 percent of the nation's radio listening hours. By 2010, that number had dropped to 17 percent, with AM radio comprising only 4 percent of listening hours among younger Americans.[18] (footnotes omitted)

The Commission went on to note:

> The causes of this decline are well-documented. As the Commission has previously stated, a combination of higher fidelity alternatives to AM radio and increased interference to AM radio have caused an erosion of the AM radio audience and the loss of young listeners to other programming outlets.[19]

The Commission specifically identified FM radio as one of the higher fidelity alternatives to AM radio.[20] The Commission noted that in recent years it had been allowing AM stations to utilize FM translators as a means to help improve the competitive position of AM stations with respect to FM stations.[21]

After receiving comments from the industry and public, in the *AM Revitalization Report and Order*,[22] the Commission announced a major modification of its rules to allow AM stations to move existing FM translators up to 250 miles to rebroadcast the AM station's signal.[23] The

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[17] *Revitalization of the AM Radio Service,* Notice of Proposed Rule Making, 28 FCC Rcd 15221 (2013) ("*AM Revitalization NPRM*").
[18] *Id.* at ¶ 2.
[19] *Id.*
[20] *Id.* at ¶ 4.
[21] *Id.* at ¶ 8.
[22] *Revitalization of the AM Radio Service,* First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145 (2015) ("*AM Revitalization Report and Order*")
[23] *AM Revitalization Report and Order* at 12150-51, ¶ 12.

Commission opened two filing windows for such FM translator modifications in 2016.[24] In 2017, The Commission opened two windows allowing AM station licensees to apply for new FM translators.[25]

At that time, then-Commissioner Pai was the leading voice on the Commission pushing for AM revitalization. In his statement associated with the *AM Revitalization NPRM* he stated:

> It's been over two decades since we last comprehensively reviewed our AM radio rules. Over that time, the AM band has struggled. Interference problems, declining listenership, and other factors have brought the band low. But millions of Americans—myself included—still rely on and believe in AM radio. So last September, I proposed that the FCC launch an AM radio revitalization initiative.[26]

And when the Commission adopted the *AM Revitalization Report and Order*, he issued a statement in which he stated:

> ...AM radio stations around this country...have informed and entertained listeners and created a sense of community—in some cases, for longer than the FCC itself has been around. But the AM band is struggling. Signal quality is low. Listenership is down. Advertising revenue is declining. And for a generation, the FCC has been on the sidelines. That's why, three years ago, I proposed that the Commission launch an initiative to revitalize AM radio. One year later, the FCC began its first comprehensive review of its AM radio rules in over two decades. And at long last, the Commission today is taking meaningful and concrete action to assist AM broadcasters across our country. This is a big victory for the American listening public.[27]

However, he also pointed out:

> [W]e afford AM broadcasters additional opportunities to acquire FM translators, including through two exclusive windows for AM stations to obtain new FM translators. Over the last two years, AM broadcasters from Kansas to Mississippi have told me about the importance of the FM translator window proposal. Translators have helped them boost listenership and advertising dollars in a major way. *Now, translators are not the answer for the technical problems plaguing the AM band. But those problems are not going to be solved overnight. An FM*

[24] *Id.* As NABOB requested, in 2016 and in 2017, the Commission opened a first filing window for licensees of Class C and D AM stations, and a second window for all AM licensees.
[25] *Id.*
[26] *AM Revitalization NPRM,* Statement of Commissioner Ajit Pai at 1.
[27] *AM Revitalization Report and Order,* Statement of Commissioner Ajit Pai.

> *translator can serve as a vital bridge to the future for an AM broadcaster as we work on fixing the AM band's long-term problems*.[28] (emphasis added)

This record clearly demonstrates that the Commission continues to recognize that AM radio is not now, and is not likely to be in the future, on an equal competitive level with FM radio.

IV. THE COMMISSION SHOULD NOT ELIMINATE OR RELAX THE SUBCAPS RULE

In the NPRM, the Commission noted that, contrary to the position of the NAB, some large broadcast companies have expressed their opposition to elimination or radical relaxation of the Subcaps rule.[29] On October 9, 2018, in a letter to Michelle Carey, Chief of the Media Bureau, Jessica Marventano, Senior Vice President, Government Affairs for iHeart Media, Inc., expressed iHeart's opposition to relaxing the Subcap rule to allow more local ownership of FM radio stations ("*iHeart Letter*"). She stated:

> By contrast, relaxing (much less eliminating) current limits on FM ownership would risk significant harm to the industry, particularly to AM radio, as it would trigger potential mass divestiture of AM stations in favor of FM station purchases. Such divestiture would result in a dramatic *devaluation* of and capital flight from AM radio stations, further undermining AM radio's economic challenges and potentially stranding millions of American who depend on AM radio for their local news, information, sports and weather. For those current owners of AM radio stations, including women and minority owners, it could destroy the financial underpinnings of their asset.[30] (emphasis in original)

This is a very serious assertion from the largest radio company in the U.S., owning 850 AM and FM radio stations. As iHeart explains, a further devaluation of AM stations in relation to FM stations would result in a loss of service to many Americans who rely on AM radio for

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[28] *Id.*
[29] *2018 Quad NPRM* at par. 19.
[30] *iHeart Letter* at 3.

local news, information, sports and weather. And for AM station owners, including women and minorities, it could destroy the financial value of their AM assets.

This concern was echoed by Salem Media Group in a June 29, 2018 letter to Chairman Pai from Edward Atsinger, Chief Executive Officer and David Santrella, President, Broadcast Group ("*Salem Letter*"). They explained that their company operates 118 radio stations, 70% of which are AM, which they use to broadcast Christian Teaching/Talk and Conservative News/Talk. They added that their network syndicates their programing to more than 2,500 stations throughout America, a great many of which are AM stations. They then stated:

> If the AM band ceases to be the destination for popular programming, AM traffic will greatly diminish and the value of AM radio will collapse....You have spent considerable time and energy to revive AM radio, but doing away with sub-caps cannot possibly further that end. Using great care and restraint on sub-caps is critical.[31]

In addition to these potential impacts, an abandonment of AM by large numbers of companies would have another negative impact on smaller AM station owners. Currently, large companies seeking to maximize the number of stations they own in a market must own AM stations. As business owners seeking to maximize the value of their investments, such owners are most likely the principal purchasers of state-of-the-art AM equipment and most likely the principal employers of AM engineers and consultants. If these companies were given permission to abandon AM radio as part of their market maximization strategies, AM equipment suppliers, engineers and consultants would suffer a significant loss of their best customers and employers. As a result, many of these suppliers, engineers and consultants might abandon their AM

[31] *Salem Letter* at 1.

businesses altogether. The result would leave remaining AM licensees with few opportunities to obtain the best equipment, engineers and consultants.[32]

In spite of these facts, several parties have proposed that the Commission substantially relax or eliminate the Subcaps rule. One of the principal reasons given is because radio is having difficulty competing against Facebook, YouTube, Spotify and other internet and satellite services.[33] This argument was refuted in great detail by one of radio's leading journalists and entrepreneurs, Eric Rhoads, Chairman of Radio Ink. In an article he published August 2, 2018,[34] Mr. Rhoads disagreed with the NAB that competition from Facebook and Google justifies relaxation of the local radio rule. In the article, Mr. Rhoads states:

> The FCC is made up of very smart people who, hopefully, understand that giving radio more stations is not going to solve the Google, Facebook, Instagram, Snapchat problem. I dare say that ship has sailed and that radio's ability to compete with the Internet isn't going to be impacted one ounce by having more stations per owner….The only similarity between Google/Facebook and radio is that we're all in the advertising business. That's where it stops. Their approach to advertising is so utterly different that no one is going to spend more in radio because Company A or Company B has more stations.[35]

This point was also made by iHeart:

> [I]n truth the size of individual station portfolios has little, if any, relationship to the total dollars that an advertiser allocates to free, over-the-air broadcast radio. Owning more FM stations in a market will not make advertisers prefer radio over other options, and more FM stations is not a substitute for innovation, ideas, relationships, compelling programming and data solutions for our advertising partners. Indeed, an advertiser can already buy spots on all the stations in market regardless of who owns them.[36]

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[32] Some equipment suppliers, engineers and consultants have already left the AM business. However, an elimination of the Subcaps rule could turn those slow departures into a mass exodus.
[33] *NAB Letter* at 1-3.
[34] Radio Ink website: https://radioink.com/2018/08/02/radios-weak-argument-to-the-fcc-reveals-a-deeper-problem/.
[35] *Id.*
[36] *iHeart Letter* at 3-4.

This is a critical point. Advertisers now allocate separate budgets for digital and broadcast, because they recognize that these media reach consumers in very different ways and neither can reach consumers in the manner of the other. Whether all of the stations in a market are owned by ten owners or one owner the broadcast budget will be the same. Therefore, the need to compete against Facebook, Google and other internet companies is no justification for elimination or relaxation of the Subcaps rule.

This discussion of the Subcaps rule demonstrates that the local radio rule in its entirety should be left unchanged. The Commission has asked commenters to discuss whether the local radio ownership rule should be revised with respect to: (1) relevant product market, (2) market size tiers, (3) numerical limits, and (4) the Subcaps. If the Commission revises any of these other components of the local radio rule such that licensees are permitted to own additional FM radio stations in any markets, the impact would be the same as eliminating or relaxing the Subcaps rule in those markets. Therefore, the Commission should refuse to revise any of the other components of the local radio ownership rule.

V. <u>CONCLUSION</u>

The radio industry has many challenges in today's fast changing marketplace. However, the challenges faced by radio cannot be solved by eliminating or radically relaxing the radio Subcaps rule. The proponents of elimination or relaxation of the Subcaps rule have put forth justifications for these rule changes that are not supported by the facts. Advertisers are unlikely to shift dollars away from Facebook, Google and other internet companies to broadcast media, because advertisers recognize that the two media deliver audiences in very different ways. Advertisers seeking to buy radio can buy it now regardless of who owns the stations.

Allowing companies to own eight or ten FM stations in a market would lead to major consolidation of FM station ownership and would severely undermine the value of AM stations. Existing AM station owners would have the value of their existing assets severely reduced. This would undermine everything the Commission has been attempting to do to revitalize AM radio. The Commission should make no changes in the local radio rule.

Respectfully submitted,

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