June 18, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Re: Ex Parte Filing
MB Docket No. 17-318

Dear Ms. Dortch:

Nexstar Broadcasting, Inc. writes to address recent submissions by certain broadcast television group owners urging the Federal Communications Commission ("FCC" or "Commission") to modify the national television ownership rule to set the national cap at 50 percent of all U.S. television households, while eliminating the UHF discount.[1] In their filings, these parties (the "50 Percent Proponents") claim that increasing the national cap to 50 percent is appropriate in light of increased competition in local video and advertising markets and the need to permit broadcast station groups to achieve the scale and scope necessary to ensure their ability to compete. Nexstar wholeheartedly agrees with the rationales that underlie the 50 Percent Proponents' filings, but believes those considerations compel a far greater degree of relief. As explained below, the 50 Percent Proponents' arguments in fact support the elimination of any cap at all on national television station ownership.

The intensifying competition in the video and advertising markets has been well-documented in this and other FCC proceedings, as well as in countless other forums.[2] The record in this proceeding and others shows that, in addition to cable and DBS with their nationwide reach, the

[1] *See* Hearst Television, Inc.; Scripps Media, Inc.; Raycom Media, Inc.; Gray Television, Inc.; Graham Media, Inc.; Quincy Media, Inc.; Dispatch Broadcast Group; and Morgan Murphy Media, Inc., *Ex Parte Filing*, MB Docket No. 17-318 (June 8, 2018) ("*June 8 Ex Parte*"); Hearst Television, Inc.; Scripps Media, Inc.; Raycom Media, Inc.; Gray Television, Inc.; Graham Media, Inc.; Quincy Media, Inc.; Dispatch Broadcast Group; and Morgan Murphy Media, Inc., *Ex Parte Filing*, MB Docket No. 17-318 (May 16, 2018) ("*May 16 Ex Parte*"); *see also* Mark R. Fratrik, Ph.D., *Raising the National Television Ownership Reach Cap to 50%: An Economic Analysis* (June 8, 2018) ("*BIA Report*").

[2] *See June 8 Ex Parte*; *May 16 Ex Parte* at 3-6; *BIA Report* at 3-6; *see also, e.g.*, Comments of Nexstar Broadcasting, Inc., MB Docket No. 17-318, at 15-21 (Mar. 19, 2018) ("*Nexstar Comments*"); Comments of the National Association of Broadcasters, MB Docket No. 17-318, at 11-19 (Mar. 19, 2018) ("*NAB Comments*"); Comments of Sinclair Broadcast Group, Inc., MB Docket No. 17-318, at 6-9 (Mar. 19, 2018) ("*Sinclair Comments*").

popularity of internet-based video has exploded in recent years.[3] Moreover, non-video competitors have made substantial gains in the advertising market.[4] "As a result of the rising influence of innovative, web-based competitors" such as Google and Facebook, "the advertising landscape has shifted away from reliance on television advertising offered by programmers to highly-targeted digital advertising."[5] Even the 50 Percent Proponents' own economic analysis acknowledges the significant impact that this trend has had on local broadcasters, and projects a continued increase in non-video competitors' share of advertising revenue in the future. Indeed, "Google, as a stand-alone generates $19 billion of locally targeted digital advertising revenue," which is "as much . . . as *all* the local television stations" generate from over-the-air advertising combined.[6] By 2022, digital advertising revenues are expected to exceed $73 billion, with Google projected to earn nearly two-fifths of those revenues.[7] The dramatic competitive evolution of the video market took center stage again in the last week. In rejecting the government's efforts to block AT&T's $85.4 billion merger with Time Warner, Judge Leon of the United States District Court for the District of Columbia described a video market that "has been, and is, in the middle of a revolution where high-speed internet access has facilitated a 'veritable explosion' of new, innovative video content and advertising offerings."[8]

These competitive developments would suffice on their own to warrant repeal of any limit on national television ownership, but such relief is made even more appropriate because none of local television broadcasters' multimedia competitors are subject to any limits on their nationwide reach. Google, Netflix, Amazon, Comcast, Charter, Verizon, AT&T/DirecTV/Time Warner, Hulu, DISH, and others are free to merge with each other, make other strategic acquisitions, and otherwise expand their reach without anything but the antitrust laws standing in their way. Given this reality, maintenance of antiquated restrictions on local television broadcasters alone is not only unnecessary, but would have the counterproductive effect of impeding innovation and growth in the industry.[9] Today more than ever, local broadcasters need scale to remain meaningful competitors.

The 50 Percent Proponents appropriately rest their position on the types of "tectonic changes"[10] in the communications marketplace discussed above and elsewhere. Incongruously, however, they

---

[3] *See, e.g.*, *Nexstar Comments* at 16-19; *NAB Comments* at 14-19; *Sinclair Comments* at 7-8.

[4] *See, e.g.*, *Nexstar Comments* at 19; *NAB Comments* at 16.

[5] *United States v. AT&T Inc.*, D.D.C. No. 17-2511 (RJL) (June 12, 2018) ("*AT&T-Time Warner*"), Slip Op. at 25.

[6] *BIA Report* at 5 (emphasis added).

[7] *Id.* at 5-6.

[8] *AT&T-Time Warner*, Slip Op. at 2 (citations omitted).

[9] Preston Padden, *The Perversity of the FCC's Ownership Limits*, THE WALL STREET JOURNAL (Nov. 13, 2017).

[10] *AT&T-Time Warner*, Slip Op. at 2 (citations omitted).

ignore the reality that such changes do not justify a national television ownership cap set at 50 percent, but instead a complete repeal of the cap. Beyond the mountainous and incontrovertible evidence of sea change in the record to date, the video and advertising marketplaces are standing at the precipice of yet another set of transformative developments. AT&T and Time Warner have been cleared to merge,[11] and 21st Century Fox's programming assets are the subject of competing bids by Disney and Comcast.[12] These companies are already behemoths when compared to the nation's largest local broadcasters *before* any of these market-altering transactions take place. After the anticipated consolidation occurs, they will even further dwarf local television station owners in size, revenue, and reach.[13]

In a world where (as Judge Leon found) AT&T and Time Warner executives logically concluded that their companies needed to merge in order to remain formidable competitors in the programming and advertising markets,[14] and where more marriages of major content producers and distribution platforms with 100% national reach are assuredly in the offing, it is irrational to suggest that local television broadcasters alone should be limited to reaching 50 percent of the nation's television households. Given the marketplace changes that have already occurred and those on the horizon, the time to make meaningful changes to the national cap is now. Continuing to hamstring television broadcasters' ability to achieve scale and scope by only modestly increasing the national cap to 50 percent would relegate the television industry to third class status behind merged content and distribution behemoths and data driven advertising giants. Such an absurd result would fly in the face of the public interest.

Moreover, each of the scale efficiencies that the 50 Percent Proponents argue will flow from adoption of their proposal would be even more dramatic, and would create far greater public interest benefits, if the Commission eliminated any cap on national television station ownership. Although allowing station groups to reach up to 50 percent of the nation's television households

---

[11] *See generally id.*

[12] *See, e.g.*, Comcast/NBCUniversal, Press Release, *Comcast Makes Superior All-Cash Proposal to Acquire Twenty-First Century Fox After Spinoff of "New Fox"*, https://www.cmcsa.com/news-releases/news-release-details/comcast-makes-superior-all-cash-proposal-acquire-twenty-first (June 13, 2018); The Walt Disney Company, Press Release, *The Walt Disney Company to Acquire Twenty-First Century Fox, Inc., after Spinoff of Certain Businesses, for $52.4 Billion In Stock*, https://www.thewaltdisneycompany.com/walt-disney-company-acquire-twenty-first-century-fox-inc-spinoff-certain-businesses-52-4-billion-stock-2/ (Dec. 14, 2017).

[13] For instance, AT&T's market cap is $199.7 billion and Time Warner's is $77.27 billion, while Nexstar's is only $3.391 billion. *See* Bloomberg Markets, AT&T, Inc., https://www.bloomberg.com/quote/T:US; Bloomberg Markets, Time Warner, Inc., https://www.bloomberg.com/quote/TWX:US; Bloomberg Markets, Nexstar Media Group, Inc., https://www.bloomberg.com/quote/NXST:US (each as of June 14, 2018); *see also* Nexstar Comments at 20 & nn. 74-75.

[14] *See AT&T-Time Warner*, Slip Op. at 2-3.

could enhance group owners' ability to generate in-house content and expand news coverage,[15] permitting greater expansion by eliminating the national cap entirely would only increase broadcasters' ability to produce innovative new programming and increase the amount and quality of news. Similarly, while the 50 Percent Proponents argue that a 50 percent cap will allow broadcasters to compete more effectively for advertising dollars,[16] station group owners would compete even more effectively if they could achieve nationwide reach. The 50 Percent Proponents also claim that a 50 percent cap would increase efficiencies with regard to equipment and programming purchasing and central office consolidation,[17] but these efficiencies, too, would be even more significant in the absence of any cap at all. And, finally, local broadcasters' ability to innovate and offer new services using ATSC 3.0 might well improve with an increase in the cap to 50 percent,[18] but elimination of the cap would maximize group owners' capacity to support the development and delivery of new applications using the new television broadcast standard.

At bottom, the 50 Percent Proponents' only justification for adoption of a 50 percent cap rather than complete repeal is an abstract concern that allowing "too much consolidation" among local television broadcasters would cause unsubstantiated harm, and their asserted view that a 50 percent cap presents a "fair compromise."[19] But their "too much consolidation" argument is based upon concerns related to diversity and competition,[20] which the FCC abandoned as rationales for a national television ownership cap in 1984, and which Nexstar has explained certainly cannot justify a cap today.[21] And, while the 50 Percent Proponents claim that the Commission is likely to receive deference regarding its line-drawing here, even the cases that they cite recognize that an agency decision that "pluck[s] a number out of thin air" is arbitrary and capricious.[22] Adopting a 50 percent cap would amount to just that type of action and, accordingly, would constitute the sort of arbitrary line-drawing that does not receive judicial deference.[23] For these reasons and for the

[15] *See BIA Report* at 15-18.

[16] *See id.* at 18-19.

[17] *See id.* at 20.

[18] *See id.*

[19] *See, e.g.*, *id.* at i, 11.

[20] *See, e.g.*, *id.*; *May 16 Ex Parte* at 4-5.

[21] *See, e.g.*, Nexstar Comments at 12-15.

[22] *May 16 Ex Parte* at 5 n.12 (quoting *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (in turn, quoting *WJG Tel. Co. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982)).

[23] *See, e.g.*, *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001) (holding 40% cable vertical integration limit unlawful and noting that "to pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made") (citations and internal quotation marks omitted); *San Antonio, Texas v. United States*, 631 F.2d 831, 851-52 (D.C. Cir. 1980) (reversing agency selection of a 7% figure where the agency admitted that its choice "depended on no more than a 'policy judgment,'" and "its

reasons provided in Nexstar's comments and reply comments in this proceeding, the FCC should move forward to repeal the national cap rule in its entirety.

Respectfully submitted,

/S/ Elizabeth Ryder
Elizabeth Ryder
Executive Vice President & General Counsel
Nexstar Broadcasting, Inc.
545 E. John Carpenter Freeway
Suite 700
Irving, TX 75062

rationale could be put forth just as readily in an attempt to justify a 1%, 21%, 45%, or even a 99%" figure) (subsequent history omitted).