



July 28, 2016

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington DC 20554

Re: Written *Ex Parte* Communication, MB Docket Nos. 14-50, 09-182

Dear Ms. Dortch:

On July 22, Andrew J. Schwartzman and Angela J. Campbell filed a letter urging the Commission to reject NAB's *ex parte* submission of July 19, 2016, as "untimely substantive comments."<sup>1</sup> Rather than rejecting the submission of up-to-date empirical data supporting arguments NAB previously made in the 2010 and 2014 quadrennial review proceedings, the Commission should ignore the hypocritical, factually inaccurate and legally unmeritorious July 22 Letter. The fact that Schwartzman and Campbell are apparently unable to proffer current empirical evidence supporting their call for indefinite retention of the FCC's woefully outdated broadcast ownership rules is no reason for the Commission to reject other parties' submission of highly relevant data and information.

#### NAB's July 19 *Ex Parte* Submission

To set the record straight, NAB on July 19 submitted an empirical study by Economists Incorporated (EI Study) examining the "eight voices" standard in the FCC's local TV ownership rule, with a cover letter.<sup>2</sup> The EI Study provides up-to-date empirical support for NAB's

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<sup>1</sup> Notice of *Ex Parte* Communication by Andrew J. Schwartzman, Angela J. Campbell, Laura M. Moy and Drew M. Simshaw, for Office of Communication, Inc. of the United Church of Christ, et al., MB Docket Nos. 14-50, 09-182, at 1 (July 22, 2016) (July 22 Letter).

<sup>2</sup> Written *Ex Parte* Submission of NAB, MB Docket Nos. 14-50, 09-182 (July 19, 2016), attaching Kevin W. Caves and Hal J. Singer, Economists Incorporated, "An Economic Analysis of the FCC's Eight Voices Rule" (July 19, 2016). Schwartzman and Campbell characterize NAB's submission as a "28-page economic study along with 28 additional pages of appendices and a six page single spaced letter pleading." July 22 Letter at 1. To be clear, the "28 additional pages of appendices" consist of the *curriculum vitae* of the two economists who conducted the study, and most of the "six page single spaced" letter consists of a summary of the study. NAB further notes that, despite claims that the Commission and any interested parties would need additional time to respond to the study, see *id.* at 4, Schwartzman and Campbell submitted their four page single spaced letter only two days after NAB's study was posted on ECFS.

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arguments – made throughout the 2010 and 2014 quadrennial review proceedings – that the eight voices standard is wholly unrealistic; that the Commission offers no real rationale for its claim that eight independently owned stations are essential to maintaining competition; and that the eight voices test is arbitrary and contrary to Section 202(h).<sup>3</sup> Last month, NAB made these arguments again, stressing that the majority of DMAs do not even have eight independent TV stations; that neither the FCC nor any commenter has shown those markets suffer from a lack of competition harmful to viewers or advertisers; and that the FCC’s failure to identify and analyze any purported distinctions between markets with fewer than eight stations, and those with eight or more, renders the retention of the local TV ownership rule arbitrary and capricious.<sup>4</sup> Rather than presenting new substantive arguments, as Schwartzman and Campbell in part complain,<sup>5</sup> NAB repeated these same arguments in its July 19 *ex parte*, and provided a current economic study further supporting them.

NAB did not submit the EI Study as a “last-minute sneak attack,” as Schwartzman and Campbell ridiculously contend.<sup>6</sup> On May 25, 2016, the Third Circuit Court of Appeals released its decision finding that the FCC had failed to complete the 2010 and 2014 quadrennial reviews as mandated by Section 202(h), and warning the Commission that failure to complete those reviews by the end of 2016 would be “at its own risk.”<sup>7</sup> Since the Court’s decision, NAB has worked diligently to update the record, so that the FCC’s decision resolving the long-delayed reviews could be based on current data and evidence that better reflects the state of competition in today’s rapidly changing media marketplace, as Section 202(h) intends.<sup>8</sup> The EI Study, however, took longer to complete, given the extensive data acquisition from multiple sources needed to conduct the study. The mischaracterization of the EI Study as a “sneak attack” that should be disregarded likely stems from Schwartzman’s and Campbell’s inability to refute the empirical evidence in the Study or NAB’s arguments about the eight voices test. The logic of their position, moreover, implies that the FCC, in lengthy proceedings such as the quadrennial reviews, should make important decisions based on outdated information, even though more current data and evidence are available. That position is not consistent with rational decision-making.

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<sup>3</sup> Comments of NAB, MB Docket Nos. 14-50 *et al.*, at 38-39, 55-59 (Aug. 6, 2014) (NAB 2014 Quadrennial Comments); see also Comments of NAB, MB Docket No. 09-182, at 27-29 (Mar. 5, 2012) (NAB 2010 Quadrennial Comments).

<sup>4</sup> Written *Ex Parte* Communication of NAB, MB Docket Nos. 14-50, 09-182, at 4-5 (June 21, 2016) (NAB June 21 *Ex Parte*).

<sup>5</sup> See July 22 Letter at 2-3.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Prometheus Radio Project v. FCC*, Nos. 15-3863, 15-3864, 15-3865 & 15-3866, at 42 (May 25, 2016) (*Prometheus III*) (referencing FCC counsel’s statement at oral argument that the Chairman intended to circulate an order to the other Commissioners by June 30, with the expectation that a final order resolving the two reviews would be adopted “by the end of the year,” a deadline the Court “fully anticipate[d]” that the FCC would meet).

<sup>8</sup> See, e.g., Written *Ex Parte* Communication of NAB, MB Docket Nos. 14-50, 09-182 (June 6, 2016) (submitting updated data and empirical evidence concerning TV broadcasters’ competition for viewers and advertisers).

## The Myriad Mistakes and Misstatements in the July 22 Letter

Schwartzman and Campbell first contend that the Commission should reject NAB's July 19 *ex parte* submission and study because they "actually" are late-filed initial comments, which were (supposedly) due on July 7, 2014, and that Section 1.415(d) of the FCC's rules requires substantive arguments to be made in initial comments.<sup>9</sup> As an initial matter, Schwartzman and Campbell did not even cite the correct dates for filing initial or reply comments in the 2014 quadrennial review proceeding. Those dates were, in fact, August 6, 2014 and September 8, 2014.

More significantly, Schwartzman and Campbell blatantly misstate the terms of Section 1.415. That section does *not* state "that substantive arguments shall be provided in initial comments," as they assert.<sup>10</sup> Rather, Section 1.415 requires the Commission to afford interested parties the opportunity to participate in rulemaking proceedings by providing reasonable time for the submission of comments and replies.<sup>11</sup> This section does *not* say that "substantive arguments" must be included in initial comments, rather than reply comments or any other submission; indeed, the term "substantive" is not used at all in Section 1.415. While Section 1.415(d) says, as Schwartzman and Campbell state, that additional comments may not be filed unless requested or authorized by the Commission, the Note to that subsection specifically provides that interested parties may also communicate with the Commission and its staff on an *ex parte* basis, if certain procedures are followed.<sup>12</sup> The actual terms of Section 1.415 do not support the rejection of NAB's July 19 *ex parte*.

NAB further notes a certain hypocrisy in Schwartzman's and Campbell's position here. The Commission's ECFS system shows that they and their clients have made approximately 17 *ex parte* filings in MB Docket No. 14-50 (the 2014 quadrennial review proceeding) *after* the September 8, 2014 date for filing reply comments (and seven of those filings were made *after* the Third Circuit's decision in *Prometheus III* on May 25, 2016). Interested parties routinely make *ex parte* submissions to the Commission in rulemaking proceedings after the date for submitting reply comments, including "substantive" ones. There is no basis for rejecting them all as invalid "sneak attacks."

Beyond misstating Section 1.415, Schwartzman and Campbell also engage in revisionist factual and legal history with regard to the eight voices test. They first assert that the Commission adopted the test in its current form in the 2006 quadrennial review, which the Third Circuit then upheld<sup>13</sup> – conveniently ignoring the fact that the Commission actually adopted the existing local TV ownership rule, with the same eight voice/top four standards in force today, in 1999 and that the D.C. Circuit Court of Appeals found the rule arbitrary and

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<sup>9</sup> July 22 Letter at 1-2 & n. 3 (also stating that the date for filing reply comments was August 4, 2014).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> 47 C.F.R. §§ 1.415(a), (b) & (c).

<sup>12</sup> 47 C.F.R. § 1.415(d).

<sup>13</sup> July 22 Letter at 2-3, citing *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011).

capricious.<sup>14</sup> More absurdly, Schwartzman and Campbell contend that NAB’s arguments about the eight voices test now should be disregarded to the extent that the Commission and the Third Circuit rejected them in the 2006 quadrennial review.<sup>15</sup> This argument depends on ignoring both the significant competitive changes in the video marketplace since the 2006 review and the requirements of Section 202(h). As the Third Circuit has recognized, the “very purpose” of Section 202(h) is “to function as an ‘*ongoing*’ mechanism to ensure that the Commission’s regulatory framework would keep pace with the competitive changes in the marketplace.”<sup>16</sup> The fact that the FCC included an eight voices test as part of its local TV ownership rule and that rule passed judicial muster a number of years ago does not mean that the Commission can maintain the same rule indefinitely, regardless of competitive changes in the marketplace. We understand why Schwartzman and Campbell want to ignore the requirements of Section 202(h) – remarkably, their July 22 Letter makes no reference whatsoever to it – but the Commission cannot similarly stick its head in the proverbial sand.

Finally, Schwartzman’s and Campbell’s sole argument relating to the substance of NAB’s July 19 *ex parte* is unmeritorious. They inaccurately criticize the EI Study as being “based on the unjustifiable assertion that the only permissible measure of competition in the local television market is whether there is adequate competition in *local advertising rates*.”<sup>17</sup> The EI Study makes no such assertion, and NAB observes that the Study’s utilization of advertising rate data as a measure of competition is entirely appropriate. Schwartzman and Campbell assert that the local TV ownership rule is also intended to promote competition in video programming, “especially local news and other local programming,” and that the EI Study does not address that justification for retaining the rule.<sup>18</sup> While the EI Study focuses on advertising rates, NAB previously specifically refuted the argument that the eight voices rule promotes competition in local news programming.<sup>19</sup> As the Commission itself has recognized for many years, the leading four stations in a market (generally the four major network affiliates) are the ones much more likely to offer local news and maintain a local news operation.<sup>20</sup> It is simply a fiction to contend that local markets have additional multiple, independently owned stations able to effectively compete with the leading stations, particularly in the provision of news and other locally-oriented programming.<sup>21</sup>

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<sup>14</sup> *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

<sup>15</sup> July 22 Letter at 3.

<sup>16</sup> *Prometheus III* at 36, quoting *Prometheus Radio Project v. FCC*, 373 F.3d 372, 391 (3d Cir. 2004) (emphasis added).

<sup>17</sup> July 22 Letter at 3 (emphasis in original).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., NAB June 21 *Ex Parte* at 5; NAB 2010 Quadrennial Comments at 27.

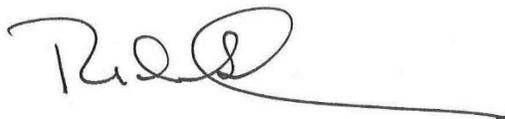
<sup>20</sup> *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 at ¶ 41 & n. 92-93 (2011); see also *Review of the Commission’s Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903, 12933 (1999) (in its order adopting the existing local TV ownership rule, FCC stated that its “analysis had indicated that the top four-ranked stations in each market generally have a local newscast, whereas lower-ranked stations often do not have significant local news programming, given the costs involved”).

<sup>21</sup> See, e.g., NAB 2014 Quadrennial Comments at 55-56.

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For all these reasons, the Commission should reject Schwartzman's and Campbell's attempt to prevent the submission of updated information and evidence highly relevant to the FCC's decision-making in the 2010 and 2014 quadrennial reviews. Their apparent fear of up-to-date empirical evidence may reflect the fact that – unlike data from, say, 1975 or 1999 – current data do not support the continued retention of the newspaper/cross-ownership rule, the radio/television cross-ownership rule or the local TV ownership rule.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rick Kaplan", with a long horizontal flourish extending to the right.

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