



July 29, 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:

In multiple comments and studies in the 2010 and 2014 quadrennial review proceedings, NAB demonstrated that the current local television ownership rule has no valid economic basis, and that its retention would violate Section 202(h) of the 1996 Telecommunications Act and would be arbitrary and capricious.<sup>1</sup> Despite overwhelming empirical evidence demonstrating the need to significantly reform its local TV ownership rule in light of competition, the Commission has declined to loosen the rule – or even to maintain the rule “as is” – but instead appears poised, once again, to make it even more restrictive by attributing most TV joint sales agreements (JSAs).<sup>2</sup> In light of the competitive transformation

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<sup>1</sup> See, e.g., Written *Ex Parte* Communication 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) (Economists Incorporated Study); Written *Ex Parte* Communication of NAB, MB Docket Nos. 14-50, 09-182, at 4-7 (June 21, 2016) (June 21 *Ex Parte*); Written *Ex Parte* Communication of NAB, MB Docket Nos. 14-50, 09-182 (June 6, 2016); Comments of NAB, MB Docket Nos. 14-50, *et al.* at 3-61 (Aug. 6, 2014), attaching, *inter alia*, Kevin Caves and Hal Singer, Economists Incorporated, “Competition in Local Broadcast Television Advertising Markets” (Aug. 6, 2014) and Mark R. Fratrick, BIA/Kelsey, “Local Television Station Revenue Share Analysis: An Update” (July 23, 2014); Reply Comments of NAB, MB Docket No. 09-182, at 2-19 (Apr. 17, 2012), attaching Mark R. Fratrick, BIA/Kelsey, “Reforming Local Ownership Rules: Station and Market Analyses” (Apr. 17, 2012); Comments of NAB, MB Docket No. 09-182, at 3-31 (Mar. 5, 2012), attaching, *inter alia*, “Television Station Financial Data 2000-2010: Pre-Tax Profits and News Expense”; Reply Comments of NAB, MB Docket No. 09-182, at 14-20 (July 26, 2010); Comments of NAB, 09-182, at 3-22; 46-71; 78-86 (July 12, 2010), attaching, *inter alia*, “The Economic Realities of Local Television News—2010” (Apr. 30, 2010).

<sup>2</sup> See *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527 (2014) (effectively prohibiting one TV station from selling more than 15 percent of another same-market TV station’s advertising time) (2014 TV JSA Order); FCC, “Fact Sheet: Updating Media Ownership Rules in the Public Interest,” at 1 (June 27, 2016) (stating the order circulating for vote by the full FCC would readopt the TV JSA attribution rule, following a court decision vacating its previous enactment).

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of the video marketplace and the record in the quadrennial review proceedings, a decision effectively preventing the formation of TV JSAs would be contrary to law.

### **A Decision to Attribute TV JSAs Would Be Arbitrary and Capricious**

The attribution of broadcast TV JSAs under the same terms as in 2014 would be arbitrary and capricious under the Administrative Procedure Act, for the reasons summarized below.

■ *Attributing TV JSAs involving more than 15 percent of a station’s advertising time is inconsistent with other FCC decisions concerning influence on and control of licensees.*

Shortly after the Commission originally determined to attribute TV JSAs, it found that other arrangements conferring far more influence (and even control) should *not* be equated with ownership. For example, in July 2014, the Commission waived certain attribution rules that apply to participants in spectrum auctions, deciding that a company leasing *100 percent* of its airwaves to third parties would not be “unduly influence[d]” by the lessors based on nothing more than the company’s representation that the “agreements at issue did not confer any” such influence.<sup>3</sup> In another decision, the FCC permitted small businesses to qualify as designated entities eligible to purchase auctioned spectrum at a 35 percent discount, determining that they could be deemed “fully in control” of their businesses even while leasing *100 percent* of that spectrum to other companies, including the largest wireless carriers.<sup>4</sup> These FCC decisions cannot be reconciled with a *per se* determination to treat any TV broadcaster that allows another station to sell more than 15 percent of merely its *advertising time* (not its spectrum capacity) as being owned by that station. Such blatantly inconsistent regulatory treatment is arbitrary and capricious.<sup>5</sup>

As NAB previously discussed,<sup>6</sup> the Commission also treats broadcasters inconsistently compared to their competitors in the video marketplace, which engage in the joint sale of advertising time locally, regionally and nationally. Multiple cable television providers long have used “interconnects” to jointly sell advertising time, and in recent years, they have “join[ed] forces” with telephone companies and satellite providers “to consolidate the advertising reach of all US MVPDs” for national and local television advertisers.<sup>7</sup> The growth of

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<sup>3</sup> *Grain Mgmt., LLC’s Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission’s Rules*, 29 FCC Rcd 9080, ¶¶ 13-14 (2014).

<sup>4</sup> *Updating Part 1 Competitive Bidding Rules*, WT Docket 14-170, FCC 15-80, at ¶ 25 (rel. July 21, 2015) (concluding that a designated entity could “remain[] fully in control” of its business, while entering into spectrum use agreements for its licenses that resulted in the leasing of all its acquired spectrum).

<sup>5</sup> See, e.g., *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968-70 (D.C. Cir. 1999) (finding FCC decision arbitrary and capricious where it failed to explain its disparate treatment of incumbent and new licensees).

<sup>6</sup> See *Ex Parte* Submission of NAB, MB Docket Nos. 09-182, *et al.*, at 5-6 (Mar. 18, 2014); *Ex Parte* Submission of NAB, MB Docket Nos. 09-182, *et al.*, at 5-6 (Mar. 21, 2014) (NAB March 21, 2014 *Ex Parte*).

<sup>7</sup> NCC Media News, “DISH and NCC Media Join Forces, Greatly Extending Consumer Reach and Targeting for National and Local Television Advertisers” (Aug. 26, 2013); see also NCC Media Impressions, “I+ Advertising Initiative, Linking Cable, Satellite and Telco Homes Grows to 50 of America’s Top Markets” (Mar. 11, 2015) (discussing how the linking of cable, satellite and telco companies’ ad inventory “means vastly greater local market advertising reach” available to local, regional and national advertisers, and observing that, as

interconnects has resulted in increased expenditures for both political and commercial advertising on pay TV providers, in direct competition to local broadcast TV stations.<sup>8</sup> In sharp contrast to its decision to essentially prohibit broadcast TV stations from jointly selling advertising time, the Commission does not restrict – and does not even require disclosures about – the joint sale of advertising time by the largest cable operators, the two satellite TV providers and the largest incumbent local exchange carriers. This disparate treatment is anti-competitive, unfair and arbitrary and capricious.

■ *The FCC cannot show that selling more than 15 percent of a TV station’s advertising time results in influence that should be equated to common ownership under the rules.*

To date, the Commission unsurprisingly has been unable to cite any real-world cases where a TV station selling more than 15 percent of another station’s ad time actually exerted the degree of influence indicating that the joint arrangement should be regarded as the legal equivalent of common ownership. The Commission also has failed to explain precisely how selling a low (or even a higher) percentage of a station’s advertising time conveys such influence over the station’s programming, personnel and finances as to warrant *per se* attribution. The record in fact shows that the sales agent in a JSA typically manages the conduct of advertising sales, subject to the licensee’s ultimate authority and control, including a right to reject advertising.<sup>9</sup> The FCC cannot simply rely on its “predictive judgment” (*i.e.*, speculation) about JSAs’ potential for influence over TV stations, but must offer factual support for its conclusion that selling 16 percent of a station’s ad time is tantamount to common ownership.<sup>10</sup>

■ *The FCC lacks a sufficient basis for treating TV JSAs identically to radio JSAs.*

The record also demonstrates that TV and radio JSAs are not the same. Notably, TV JSAs typically adhere to a different framework in which the sales agent is paid a commission and the licensee retains a substantial stake in the economic and ratings performance of its station, thereby making the FCC’s rationale for attributing radio JSAs inapplicable to TV JSAs.<sup>11</sup> It would be arbitrary and capricious for the FCC to presume a false equivalency

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“viewership continues to move from broadcast to cable programming, advertisers now have one-stop access” to place ads reaching local market households on a wide selection of cable networks).

<sup>8</sup> See, e.g., Economists Incorporated Study at 17 & n. 43-45; Kate Kaye, “Cable TV Sees 2.8M Political Spots Since January,” *Advertising Age* (June 18, 2016); Kate Kaye, “Data Drives Political Advertisers to Buy More Cable TV Than Ever (but Not the Cable You Might Think),” *Advertising Age* (Feb. 23, 2016).

<sup>9</sup> “Television and Radio JSAs Are Not the Same,” at 1, attached to *Ex Parte* Communication of NAB, MB Docket Nos. 09-182, *et al.* (Mar. 14, 2014).

<sup>10</sup> *Sorenson Communs. Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (finding FCC rule arbitrary and capricious and stating that, while an agency’s “predictive judgments” are entitled to deference, “deference to such . . . judgment[s] must be based on some logic and evidence, not sheer speculation”) (internal citations omitted); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 763 (6th Cir. 1995) (finding FCC decision concerning ownership limits in the wireless industry to be arbitrary, because the agency, “rather than showing *it actually had some factual support for its conclusions*, use[d] the ‘deference’ standard of review as if it were an ink blotter waiting for this Court’s rubber stamp”) (emphasis in original).

<sup>11</sup> “Television and Radio JSAs Are Not the Same,” at 1-2 (also citing to numerous comments in the quadrennial review proceeding explaining the differences between TV and radio JSAs).

between radio and TV JSAs and reflexively treat TV JSAs in the same manner as it determined in 2003 to treat radio JSAs.<sup>12</sup>

### **Given Dramatic Changes in the Video Marketplace, Section 202(h) Requires Reform of the Local TV Rule, Not Increased Restrictions**

Section 202(h) requires the Commission to determine every four years whether the broadcast ownership rules remain necessary in the public interest as the result of competition and to repeal or modify those that are not. NAB has demonstrated throughout the 2010 and 2014 quadrennial reviews – including submitting updated data in 2016 – that exponentially increased competition for viewers and advertisers in today’s digital, online video marketplace requires significant reform of the local TV ownership rule.<sup>13</sup>

Indeed, new evidence demonstrating the ever-growing competition TV broadcasters face from online and multichannel competitors becomes available seemingly on a weekly basis. Research released just last week found that 59 percent of all U.S. households have a subscription video on-demand (SVOD) service from Netflix, Amazon Prime and/or Hulu – video services that did not exist and could not divert audiences away from local TV stations in 1999, when the FCC last reformed the local TV ownership rule.<sup>14</sup> Last month, BIA/Kelsey estimated that location-targeted mobile ad spending – a type of local advertising that did not exist and could not divert advertising away from local TV stations in 1999 – would grow from \$9.8 billion in 2015 to \$29.5 billion in 2020, a 24.6 percent compound annual growth rate.<sup>15</sup> These trends will only continue, as pay TV operators continue to add channels of video programming and as their broadband subscribers continue to increase. The 17 largest cable and telephone broadband providers in the U.S. acquired nearly 1.1 million net additional high-speed Internet subscribers in the first quarter of 2016, after adding 3.1 million net broadband subscribers in 2015 (the most net additions in any year since 2010).<sup>16</sup>

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<sup>12</sup> See, e.g., *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (finding that FCC acted arbitrarily and capriciously by failing “to take account of circumstances that appear to warrant different treatment for different parties”).

<sup>13</sup> NAB urges the FCC to eliminate the unrealistic eight voices test and reform the top-four restriction to allow a single entity to own up to two of the top-four rated stations in a local market. See June 21 *Ex Parte* at 4-7. See also n. 1, *supra*, for a partial listing of NAB filings and studies in the quadrennial review proceedings.

<sup>14</sup> Only 47 percent of U.S. households subscribed to an SVOD service in 2014. Leichtman Research Group, Press Release, “59% of U.S. Households have an SVOD Service” (July 20, 2016) (also finding that, among those who have an SVOD service today, 47 percent have more than one service).

<sup>15</sup> BIA/Kelsey, Press Release, “Location-Targeted Mobile Ad Spend to Reach \$29.5B in the U.S. in 2020” (June 16, 2016).

<sup>16</sup> Leichtman Research Group, Press Release, “Nearly 1.1 Million Added Broadband in 1Q 2016” (May 16, 2016); Leichtman Research Group, Press Release, “3.1 Million Added Broadband from Top Providers in 2015” (Mar. 11, 2016). Even before the most recent growth in subscribership, a Leichtman Research Group survey reported in late 2015 that 81 percent of U.S. households get a broadband Internet service at home, an increase from 26 percent in 2005. Leichtman Research Group, Press Release, “Over 80% of U.S. Households Get Broadband at Home” (Dec. 3, 2015) (also finding that, overall, 84 percent of households get an Internet service at home, and 69 percent of adults access the Internet on a smartphone).

While the FCC's only rational response to the incontrovertible evidence of intense competition in today's video marketplace would be to substantially loosen the local TV ownership rule, the Commission apparently plans to do the exact opposite. Maintaining this outdated rule "as is" – let alone making it more restrictive through attribution of JSAs – is contrary to the record in these proceedings, inconsistent with Section 202(h) and arbitrary and capricious.<sup>17</sup>

### **Tightening Local TV Ownership Restrictions by Prohibiting Most JSAs Is Not in the Public Interest and Is Therefore Contrary to Law**

To justify the attribution of JSAs, the Commission must show that tightening the local TV ownership rule is in the public interest. As the Third Circuit Court of Appeals expressly concluded, "[a]ttribution of television JSAs modifies the Commission's ownership rules by making them more stringent,"<sup>18</sup> and Section 202(h) requires that any decision to "retain, repeal, or modify" the ownership rules must be done "in the public interest" and supported "with a reasoned analysis."<sup>19</sup> The Commission cannot pretend that retaining the eight voices/top-four local TV ownership rule, while attributing TV JSAs, merely maintains the status quo. The Third Circuit has specifically rejected that position, finding that attributing TV JSAs "expand[s] the reach of the ownership rules."<sup>20</sup> Given the transformation of the video marketplace since 1999, as discussed above and in numerous previous submissions, the Commission will be unable to provide a "reasoned analysis" that the current local TV ownership rule has kept "pace with the competitive changes in the marketplace,"<sup>21</sup> let alone that a stricter rule is "necessary in the public interest as the result of competition."<sup>22</sup>

Beyond failing to comply with Section 202(h) of the 1996 Act, tightening the local TV ownership rule without establishing that such change serves the public interest also would violate the Communications Act of 1934 (Act). All of the FCC's ownership rules must serve the public interest under the Act. The "Commission's general rulemaking power is expressly confined to promulgation of regulations that serve the public interest."<sup>23</sup> The Commission adopted the ownership rules specifically under its authority in Title III of the Act to make rules

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<sup>17</sup> An agency action is arbitrary and capricious if its decision "runs counter to the evidence before the agency." *Motor Vehicles Manufacturers' Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The courts have overturned FCC decisions where, *inter alia*, the agency offered no reasoned basis for ignoring relevant data and studies in the record, adopted a rule contrary to record evidence, and/or failed to have factual support for its conclusions. See, e.g., *Sorenson*, 755 F.3d at 708-10; *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008); *Cincinnati Bell*, 69 F.3d at 763-64.

<sup>18</sup> *Prometheus Radio Project v. FCC*, Nos. 15-3863, 15-3864, 15-3865 & 15-3866, at 52 (May 25, 2016) (*Prometheus III*).

<sup>19</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004) (*Prometheus I*).

<sup>20</sup> *Prometheus III* at 51.

<sup>21</sup> *Id.* at 36, 52, quoting *Prometheus I*, 373 F.3d at 391, 395 (discussing the requirements of Section 202(h)).

<sup>22</sup> Section 202(h), Telecommunications Act of 1996.

<sup>23</sup> *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (citing Section 303(r) of the Act, which provides that "the Commission from time to time, as public convenience, interest, or necessity requires, shall," *inter alia*, "[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this chapter").

and regulations, including those regarding the licensing of broadcast stations, in the public interest – and the courts have upheld the FCC’s authority to adopt ownership regulations on that basis.<sup>24</sup>

Under the Act and long-standing precedent, as well as the more recent *Prometheus* decision, the Commission accordingly cannot tighten the local TV rule without conducting the statutorily-required public interest analysis and demonstrating, despite dramatic increases in competition in the video marketplace, that a *more* restrictive local TV rule nonetheless is needed to promote the FCC’s goals and the public interest.<sup>25</sup> The Commission, moreover, cannot attempt to make such a determination by simply refusing to consider evidence relevant to the legally-required public interest analysis, including the substantial record evidence demonstrating the public interest benefits of TV JSAs.<sup>26</sup> Indeed, the Commission recognized in its 2014 TV JSA Order that JSAs have public interest benefits,<sup>27</sup> and it would defy logic and the law to ignore those admitted benefits when conducting the required public interest analysis.

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For all the reasons set forth above, making the local TV ownership rule more restrictive by attributing TV JSAs would be contrary to Section 202(h), the Communications Act and the Administrative Procedure Act.

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<sup>24</sup> See, e.g., *FCC v. NCCB*, 436 U.S. 775, 793-94 (1978) (upholding adoption of the newspaper/broadcast cross-ownership rule under the FCC’s authority to “issue regulations codifying its view of the public-interest licensing standard”); *NBC v. U.S.*, 319 U.S. 190, 215-18 (1943) (stating that the “criterion governing the exercise of the Commission’s licensing power is the ‘public interest, convenience, or necessity,’” and upholding adoption of the FCC’s chain broadcasting rules as a permissible exercise of that authority); *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956) (concluding that the FCC had authority to impose rules limiting the multiple ownership of AM, FM and TV stations under its public interest rulemaking and licensing authority).

<sup>25</sup> NAB again notes that the FCC since 2006 has stated that the local TV rule is intended to promote competition and is not needed to promote diversity. See *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, ¶¶ 97, 100 (2008); *2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, ¶ 55 & n.140 (2014).

<sup>26</sup> See, e.g., *Ex Parte* Submission of NAB, MB Docket Nos. 09-182, *et al.*, at 11-16 (Mar. 21, 2014) (discussing the benefits to viewers of TV JSAs and referring to numerous filings in the record that describe those benefits in more detail); Notice of *Ex Parte* Communication of NAB, MB Docket No. 09-182 (Feb. 18, 2014) (attaching a list of TV JSAs in numerous markets and summarizing some of the benefits that each provide). The FCC ignored such evidence in its 2014 TV JSA Order, contending that this evidence should be considered in the context of the local TV ownership rule. 2014 TV JSA Order, 29 FCC Rcd at 4537-38. The FCC now has no excuse for failing to consider the benefits of TV JSAs.

<sup>27</sup> 2014 TV JSA Order, 29 FCC Rcd at 4537-38 (recognizing that cooperation among stations may have public interest benefits, “particularly in small to mid-sized markets,” and that JSAs may “facilitate cost savings and efficiencies that could enable the stations to provide more locally oriented programming”).

Respectfully submitted,



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