

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Status of Competition in the Marketplace for)	MB Docket No. 18-227
Delivery of Audio Programming)	
)	

JOINT COMMENTS

Connoisseur Media, LLC (“Connoisseur”), Townsquare Media, Inc. (“Townsquare”), Mid-West Family Broadcasting (Mid-West Family”), Midwest Communications, Inc. (“Midwest Communications”), and the Frandsen family stations (“Frandsen”) (together, “Joint Commenters”) hereby submit their comments in the above-referenced proceeding.¹ In its Public Notice in this proceeding, the Federal Communications Commission (the “Commission”) seeks comment on the state of competition in the communications marketplace, including competition to deliver audio service among broadcast stations, satellite radio, and entities that provide audio content via the internet and to mobile devices.²

As detailed below, there is a robustly competitive media marketplace in which innumerable companies participate. No longer are there silos, where radio stations compete only with each other for advertising revenue and listeners, and other sources of audio entertainment and information have minimal audience share, while broadcast radio occupies a dominant position. Instead, new marketplace entrants have fundamentally disrupted the competitive

¹ Connoisseur is the licensee of approximately 30 radio stations in Connecticut, New York, Pennsylvania and Montana. Townsquare is a public company and the licensee of approximately 320 radio stations across the country. Mid-West Family is a group of independent companies with interlocking ownership holding licenses for over 40 radio stations in a number of Midwestern states. Midwest Communications is the licensee of approximately 75 stations in the Midwest and in south-central states. Members of the family of M. Kent Frandsen hold the licenses for over 20 stations in Utah, Idaho and Wyoming.

² *Media Bureau Seeks Comment on the Status of Competition in the Marketplace for Delivery of Audio Programming*, Public Notice, MB Docket No. 18-227, DA 18-761 (rel. July 23 2018) (“Public Notice”).

landscape in the audio marketplace, much to the benefit of listeners across the nation, but in ways that have disrupted the economics of legacy participants. The nature and number of audio entertainment choices in the car, at work, and at home, have dramatically changed. The Joint Commenters offer these observations in hopes that the Commission and Congress take into account these dramatic changes when reviewing the regulatory framework that has governed the marketplace, and broadcast radio ownership in particular, where rules adopted before most of these new competitors came into being have become outdated in the current competitive environment.

While audio competition has dramatically increased, the costs of doing business in the audio marketplace are not all equal. Information provided below will show that the costs of business operations, and the barriers to entry into the marketplace, are significantly different for different market players. Most new entrants to the audio marketplace have low barriers to initial entry. Regulated legacy competitors in the industry, including over-the-air radio and satellite radio, have higher upfront costs for the transmission facilities they must provide and for the licenses they need to operate their businesses. In addition, over-the-air radio faces substantial regulatory burdens imposed by the Commission when radio was essentially the only source of mobile (and live) audio programming, including structural ownership rules that are outdated and have not been substantially updated since 1996 – a decade before many of the current marketplace competitors even commenced operations. These limits on growth are not placed on digital services, where many of the largest companies in the American economy have emerged as new and active competitors, and where on the date that this pleading was being finalized, it was announced that Sirius XM, the only significant US satellite radio service, is planning to acquire

Pandora, by far the largest non-interactive Internet radio service and also a significant player in delivering on-demand audio services.³

I. THE NUMBER OF AUDIO MARKETPLACE COMPETITORS CONTINUES TO INCREASE

In the Public Notice, the Commission seeks comment on the competitors that currently operate in the audio marketplace. Today, such competitors can be viewed in two different ways: competitors for actual listeners or audience and competitors for advertising revenues. Both are further discussed below.

A. Competitors for Listeners

Today, almost 93 percent of Americans tune into AM or FM radio each week.⁴ While this number has remained relatively constant in recent years, as detailed in Section II below, the time listeners spend with broadcast radio has decreased as a result of the fragmented marketplace for audio entertainment and the dizzying array of consumer choices. As has traditionally been the case, broadcast radio companies in the same or nearby marketplaces often compete fiercely with each other. In one given market, there may be several different stations offering the same format – news or talk, adult contemporary, top 40, adult hits, or classic hits. These stations compete with one another often for the same segment or niche of the listening population based on age, ethnicity, or background. Because of existing broadcast ownership rules, over-the-air radio owners cannot consolidate ownership of stations in a single market to rationalize and expand the format offerings in that market to better compete with multi-channel competitors, or to take advantage of economies of scale with respect to certain operations such as local news,

³ *SiriusXM to Acquire Pandora, Creating World's Largest Audio Entertainment Company* (Sept. 24, 2018), <http://investor.siriusxm.com/investor-overview/press-releases/press-release-details/2018/SiriusXM-to-Acquire-Pandora-Creating-Worlds-Largest-Audio-Entertainment-Company/default.aspx>.

⁴ Nielsen, *State of the Media: Audio Today 2018* (Apr. 5, 2018), <https://www.nielsen.com/us/en/insights/reports/2018/state-of-the-media--audio-today-2018.html>.

sports, or weather. Instead, with the mandated diffuse ownership of stations in local markets, broader formats tend to be overrepresented, and more targeted formats are often less available to listeners.

Competing with the legacy broadcast radio audio marketplace participants, there are many new services that now vie for listeners. There are numerous on-demand or interactive audio services, which allow listeners to choose the songs that they want to hear. Because of royalty costs faced by interactive music services playing major label content, most of the new entrants offering interactive music services in the audio marketplace are substantial companies that offer these music services as an adjunct to other products or services. Pure play broadcast radio companies therefore compete today with a host of new entrants that include some of the biggest companies in the American economy, including companies such as Apple, Amazon, or Google. Longer term players in this market (though in each case they are companies that have existed for only about a decade) include Napster (formerly Rhapsody) and Spotify. Other audio services, that until recent years provided only non-interactive digital services, including Pandora and iHeart Media, have in the last three years, also been forced to offer an interactive service to compete with these on-demand players.

There are also many non-interactive or internet radio services, such as Pandora, iHeart, and AccuRadio. In many ways, non-interactive services mimic broadcast radio, since they do not give listeners the ability to choose the song that plays next, but listeners are often able to tailor their listening experiences much more than they would otherwise be able to through traditional broadcast radio. For example, they may have the option to select a station based on a new album or artist that they really enjoy listening to. Many of these services also provide a number of “skips” or, in some cases, the option to repeat a song one or more times.

In addition to the on-demand and non-interactive services described above which primarily though not exclusively feature music programming,⁵ listeners can select their entertainment or programming from podcasts, satellite radio, and video services. Podcasting in particular continues to drastically grow in popularity year after year. According to Nielsen, podcasting saw an increase of almost 24 percent from 2016 to 2017, as the number of homes identified as “avid fans” of podcasts increased from 13 million to 16 million.⁶ The number of podcasts now available in the United States is now approximately 550,000, covering almost any topic that any listener would potentially want to seek out.⁷

Satellite radio has also grown in recent years. It is now estimated that SiriusXM has more than 32 million subscribers.⁸ SiriusXM offers almost 1,000 channels of programming available throughout the United States, both through their satellite transmissions and streaming through Internet connections.⁹

The audio marketplace cannot be viewed in isolation, particularly as it relates to music. Video services clearly compete for the time and attention of music consumers and often target

⁵ To lessen music royalty costs, many of these services are now expanding their spoken word content. Pandora, for instance, began to feature talk programming, including the podcast *Serial* on its service approximately 3 years ago. See Ben Sisario, *Pandora to Stream Serial Podcast* (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/media/pandora-to-stream-serial-podcast.html>. Within the last two years, Spotify, too, has announced a major push into talk programming by providing podcast content on its platform. See Mitchel Broussard, *Spotify ‘Coming After’ Apple With Strong Push Into Podcasts* (July 31, 2017), <https://www.macrumors.com/2017/07/31/spotify-coming-after-apple-podcasts/>.

⁶ Nielsen, *What’s in Podcast Fans’ Shopping Carts?* (July 23, 2018), <https://www.nielsen.com/us/en/insights/news/2018/what-s-in-podcast-fans-shopping-carts.html>.

⁷ See Podcast Insights, *2018 Podcast States & Facts (New Research From June 2018)* (Sept. 18, 2018), <https://www.podcastinsights.com/podcast-statistics/>.

⁸ SiriusXM, Annual Financial Report, at 2, http://s2.q4cdn.com/835250846/files/doc_financials/annual2017/feffeb79-c5ff-492a-ad94-5fe58fbe6734.pdf (last visited Sept. 19, 2018).

⁹ SiriusXM, Channel Lineup, https://www.siriusxm.com/channellineup/?intcmp=seeOurChannels_0418 (last visited Sept. 19, 2018).

the same audiences. YouTube is currently the largest source of online music listening.¹⁰ While YouTube is thought of as a video site, many music videos on the site feature static images and music, and the service is used by many to find and listen to new music, with any video content being secondary. Indeed, YouTube is the world's second largest search engine and third most visited site after Google and Facebook.¹¹

The more diffuse offerings in the audio marketplace have resulted in some services beginning to look like others in an attempt to attract audience. For instance, companies such as Apple and Amazon have begun providing more digital service offerings that look and sound like radio. For example, Spotify has worked to promote its influential hip hop playlist, Rap Caviar, which attracts a high number of listeners and significant advertising revenue.¹² Amazon Prime Music, which is offered as part of Prime membership, features more than two million songs on-demand and many different preset stations or hand-curated playlists.¹³ Apple Music also offers hand-curated playlists and allows listeners to stream more than 50 million songs, which can be accessed offline across devices.¹⁴

Unquestionably, for many listeners, the amount of time previously spent listening to broadcast radio exclusively – at home, at work, and in the car – has been redistributed to a number of different listening services. Internet radio listenership has increased to 180 million

¹⁰ Hugh McIntyre, *Report: YouTube Is The Most Popular Site for On-Demand Streaming* (Sept. 27, 2017), <https://www.forbes.com/sites/hughmcintyre/2017/09/27/the-numbers-prove-it-the-world-is-listening-to-the-music-it-loves-on-youtube/#5b659a561614>.

¹¹ Kit Smith, *39 Fascinating and Incredible YouTube Statistics*, Brandwatch (Apr. 12, 2018), <https://www.brandwatch.com/blog/39-youtube-stats/>.

¹² Spotify, Rap Caviar, <https://open.spotify.com/user/spotify/playlist/5volys8XG4q7YfjYGI5Lff> (last visited Sept. 19, 2018). See also Craig Marks, *How a Hit Happens Now* (Sept. 18, 2017), <https://www.vulture.com/2017/09/spotify-rapcaviar-most-influential-playlist-in-music.html> (calling RapCaviar the “most influential playlist in music”).

¹³ Amazon Music, <https://www.amazon.com/gp/dmusic/promotions/PrimeMusic> (last visited Sept. 19, 2018).

¹⁴ Apple Music, <https://www.apple.com/apple-music/> (last visited Sept. 19, 2018).

Americans, or 64 percent of Americans older than the age of 12 – as compared to only five percent of Americans in 2000.¹⁵ Pandora dominates the online radio space, with more than 30 percent of Americans reporting that they have used Pandora to listen to music in the past month.¹⁶ Even among heavy radio listeners (defined as those who listened to more than one hour of radio in the last day) with a smartphone, streaming has also become a part of their habits – according to Edison Research, their most commonly downloaded audio application was Pandora, at 40 percent, followed by Spotify at 25 percent.¹⁷

Radio's audience reach remains high, with 63 percent of music listeners accessing radio each week according to one report on music listening trends. Even with those under the age of 25, almost 60 percent of music listeners access radio each week.¹⁸ For music listeners above 45, radio remains the most listened to service. In this survey, radio's share of time spent listening to music (31 percent) is still the greatest among all of the audio services, though its share has decreased slightly over the last three years. On-demand streaming has increased over that period (from 24 to 27 percent), while internet-radio offerings have gone from 10 to 12 percent. The streaming of broadcast stations has also increased, from 4 to 5 percent of music listening hours.¹⁹

It is clear that the marketplace for audience is a very competitive one, where consumers benefit with a diversity of program choices. From all of these statistics, one thing becomes very clear – the marketplace for audience is a fluid one, where all participants are competing for the

¹⁵ Edison Research, *The Infinite Dial 2018*, at 23 (Mar. 8, 2018), <https://www.slideshare.net/webby2001/infinite-dial-2018> (“Infinite Dial Report”).

¹⁶ Infinite Dial Report.

¹⁷ See Edison Research, *The Infinite Dial, The Heavy Radio Listeners Report*, at 9 (Apr. 2018), <http://www.edisonresearch.com/wp-content/uploads/2018/04/Heavy-Radio-Listeners-Document.pdf> (“Heavy Listeners Report”).

¹⁸ AudienceNet, *Audio Monitor U.S. 2018, the Overall Music Landscape*, at 17-18 (Sept. 2018), available at https://musicbiz.org/wp-content/uploads/2018/09/AM_US_2018_V5.pdf.

¹⁹ *Id.* at 12-13.

listener's ear. The silos between these segments of the market are gone – there is one large competitive market for audience share, not discreet, segmented markets defined by content delivery systems.

B. Competition for Advertising Revenue

Not only has the competition for audience share increased, but so has the competition for advertising revenue on both a national and local basis. Although total advertising revenue has been increasing, broadcast radio's share of the national advertising marketplace has been affected by the migration of national advertisers to digital platforms such as Google and Facebook, as well as digital audio services. On a national basis, marketing through newer methods such as video or online audio is gaining traction because these methods are seen by some as more measurable and more precisely targeted. Internet advertising revenues for 2017 totaled \$88.0 billion, up more than 20 percent from \$75.5 billion in 2016,²⁰ with the mobile portion of these revenues increasing at an even faster rate of 36 percent.²¹ In contrast, over-the-air radio advertising has remained relatively stable at approximately \$14 billion for several years, and has not benefitted from overall growing advertising expenditures, or been a beneficiary of the explosive growth in digital advertising.²²

This change in the advertising marketplace has also been felt in local advertising. Radio receives the bulk of its advertising from local advertisers. While this remains true, the competition in recent years has drastically changed, and digital services that barely existed a

²⁰ Interactive Advertising Bureau, *IAB Internet Advertising Revenue Report*, at 7 (May 10, 2018), https://www.iab.com/wp-content/uploads/2018/05/IAB-2017-Full-Year-Internet-Advertising-Revenue-Report.REV2_.pdf.

²¹ Interactive Advertising Bureau, *Digital Ad Spend Reaches an All-Time High of \$88 Billion in 2017, With Mobile Upswing Unabated, Accounting for 57% of Revenue* (May 10, 2018), <https://www.iab.com/news/digital-ad-spend-reaches-all-time-high-88-billion-2017-mobile-upswing-unabated-accounting-57-revenue/>.

²² BIA Advisory Services, *Digital Revenues for U.S. Radio Industry Continue to Rise As OTA Numbers Remain Steady* (Mar. 28, 2017), <http://www.biakelsey.com/digital-revenues-u-s-radio-industry-continue-rise-ota-numbers-remain-steady-14-1-b-2016-according-new-biakelsey-report/>.

decade ago now take over half of the local advertising in most radio markets, at the expense of traditional media, particularly print and television, but also including broadcast radio.^{23 24} Even in the smallest markets, competitors like Facebook and Google have been growing their advertising offerings and their share of revenue.²⁵ Such digital services are seen as appealing by some advertisers because of the perception (whether true or not) that advertisers are able to reach a more targeted and measurable listening audience, in some cases (for instance, with advertising placed with Google and other search engines), at a perceived lower cost. While trends are not always precisely measurable, based on one annual local advertiser survey, 52 percent of advertisers plan to use video for more of their advertising in the next year and 29 percent of advertisers plan to use online audio for more of their advertising during the same period of time.²⁶ Sixteen percent of advertisers plan to use radio for more of their advertising and 25 percent of advertisers say that they plan to use radio for less advertising, with the remaining advertisers apparently sticking with their current advertising allocation.²⁷ In that same survey, radio topped traditional media as being a new source for the placement of advertising by those that are not currently using a medium, with 5.1 percent of local small and mid-sized businesses

²³ Magna, *Magna Advertising Forecasts Digital Advertising Soon to Grab 50% of All Ad Dollars*, (Mar. 21, 2018), <https://www.magnaglobal.com/wp-content/uploads/2018/03/MAGNA-US-Advertising-Forecast-March-2018-Summary.pdf>.

²⁴ The Mid-West Family has obtained data from Borrell Associates, Inc. that demonstrates digital's growth in local advertising sales. Borrell, a media research organization noted for its studies of digital media habits, compiled data on local advertising sales in the radio markets in which the Mid-West Family operates. In this data accumulated over the last six years, over-the-air radio's share of the advertising dollars in its markets has remained relatively stable, but has decreased as a percentage of total advertising revenue from 12-14 percent of the market in 2012, to about 8 or 9 percent in 2017. At the same time, the share of local advertising dollars captured by digital services has increased from approximately 20 percent in 2012 to almost 50 percent in 2017.

²⁵ Interactive Advertising Bureau, *Digital Ad Spend Reaches an All-Time High of \$88 Billion in 2017, With Mobile Upswing Unabated, Accounting for 57% of Revenue* (May 10, 2018), <https://www.iab.com/wp-content/uploads/2018/05/IAB-Internet-Advertising-Revenue-Report-FY-2017-Draft-Media-Alert-v9.pdf> (stating that digital audio advertising is up 39 percent in 2018 to \$1.6 billion from \$1.1 billion in 2016).

²⁶ Borrell, *Master SMB Index: What's Hot, What's Not* (Aug. 27, 2018), https://borrellassociates.com/promo/loac2019/wp-content/uploads/sites/6/2018/08/borrell_chart_week-8-27-18c.pdf.

²⁷ *Id.*

planning to use radio when they had not done so in the past.²⁸ This exceeded the figures of those who planned to use online audio (4.4 percent) or banner ads (4.9 percent) for the first time, but was topped, however, by those businesses who plan to use search (7.2 percent), text messaging (5.4 percent) and email marketing (5.8 percent).²⁹

Separately, cable interconnects give advertisers the option to reach all cable households within a given market with one buy and one contact. Even though this would seem to be video competition rather than competition for radio, because these interconnects can offer to local advertisers video advertising inserted into cable network programming at prices competitive with radio, this service offers competition for advertising dollars that is also relatively new. Thus, this has also impacted the revenue broadcast radio can collect in any given market.³⁰ Even broadcast television can be competitive with radio, as rates have been declining on some stations resulting in some TV programming being more competitive with radio, and this is expected to be more pronounced as ATSC 3.0 allows for more digital video subchannels and even ads targeted to specific geographical portions of a TV market.

The competition for advertising dollars is not restricted to the large urban markets. In the last three years, Midwest Communications has experienced the loss of local advertising accounts worth over \$100,000 each in markets including Duluth, Fargo, Wausau-Stevens Point and *even Hibbing, Minnesota* where advertisers have been directed by their advertising agencies to redeploy their advertising dollars to digital services like Pandora and Google AdWords. This represents significant lost revenue to local radio stations that has gone directly to digital

²⁸ Inside Radio, *What's New With Advertisers? Radio Tops Traditional Media List* (Sept. 20, 2018), http://www.insideradio.com/free/what-s-new-with-advertisers-radio-tops-traditional-media-list/article_7551de54-bca0-11e8-be6c-77c3f8fc9c2c.html.

²⁹ *Id.*

³⁰ See Video Advertising Revenue, *Local Frequently Asked Questions*, https://www.thevab.com/wp-content/uploads/2016/01/local_Frequently-Asked-Questions-Final.pdf (last visited Sept. 19, 2018).

competitors, again demonstrating that competition in the audio marketplace is no longer just with other radio stations, but instead it is among a much broader universe of players – including most importantly, a large number of digital media companies.

II. TECHNOLOGICAL CHANGES RESULT IN A MORE COMPETITIVE AUDIO MARKETPLACE

Technological changes are affecting the audio marketplace. Almost 30 percent of Americans over the age of 12, and 50 percent of Americans between the ages of 18 and 34, no longer own an FM or AM radio in their home.³¹ Although these people can encounter broadcast radio channels through other devices (including their smartphones and smart speaker devices), the AM/FM radio – a device tailored for broadcast radio listening – is no longer ubiquitous.

At the same time, voice-controlled devices such as the Amazon Echo and Google Home have entered the marketplace and are entering more homes than ever before. Today, 18 percent of Americans, or approximately 51 million people, have at least one smart speaker at home.³² This represents a more than double increase from just one year ago, and faster adoption than the early days of the smartphone.³³ Last December, Amazon reported that the Alexa-enabled Echo Dot was the top-selling product on Amazon.com during the 2017 Holiday season for the second year in a row, selling out before Christmas Day.³⁴ Almost 90 percent of all smart speaker users have asked their smart speakers to play music and nearly half of those same users have used the speakers to listen to an AM or FM radio station.³⁵ The environment for listening, and consumer

³¹ Infinite Dial Report at 11-12.

³² *Id.*

³³ *Id.*

³⁴ Bret Kinsella, *Echo Dot Top Selling Product on Amazon During Holiday 2017* (Dec. 27, 2017), <https://voicebot.ai/2017/12/27/echo-dot-top-selling-product-amazon-holiday-2017/>.

³⁵ Emily Reigart, Radio World, *Smart Speaker Owners Listen to More Audio (But Not Necessarily Radio)* (July 20, 2018), <https://www.radioworld.com/news-and-business/smart-speaker-owners-listen-to-more-audio-but-not-necessarily-radio>.

choices available through smart speaker devices, are significantly broader than the options available through an AM/FM radio. In this environment, broadcast radio will compete on a more or less even footing with digital audio services and should, therefore, be able to compete from the same regulatory footing, including ownership restrictions.

Radio listening in the car and at work has also changed. In the car, more Americans are listening to online radio, podcasts, or other sources of talk radio. In response to a 2018 survey, more than 40 percent of Americans said that they had listened to online radio in the car at some point in time, up from only 6 percent in 2010.³⁶ Nearly 30 percent of Americans said they had listened to online radio in the car during the last month and 23 percent said they had listened to podcasts or satellite radio, respectively.³⁷

In-car listening is increasingly being controlled by smart dashboards and in-car entertainment systems running on platforms developed by the same companies that are offering interactive music services that compete with over-the-air radio. Last week, it was announced that Android was developing the dashboard entertainment systems for Renault-Nissan.³⁸ The Android entertainment system is found in many other car dashes. Apple also has its own “Carplay” entertainment system,³⁹ and Amazon’s Alexa is already being launched in many Ford vehicles.⁴⁰ Music services are also bundled with other products through partnerships between these services and companies that want to expand their offerings, such as Spotify partnerships

³⁶ Infinite Dial Report at 27.

³⁷ *Id.* at 39.

³⁸ Associated Press, *Renault-Nissan to Use Android System in its Dashboards* (Sept. 18, 2018), <https://www.ecnmag.com/news/2018/09/renault-nissan-use-android-system-its-dashboards>.

³⁹ Apple, CarPlay, <https://www.apple.com/ios/carplay/> (last visited Sept. 19, 2018).

⁴⁰ Ford, Ford+Alexa: Frequently Asked Questions, <https://owner.ford.com/support/applink/ford-plus-alexa-faq.html> (last visited Sept. 19, 2018).

making available their service on Samsung Smart TVs and with Hulu subscriptions.⁴¹ With all of these companies also providing music services, it is hard to believe that these services will not have a prominent place on the new car dash, again affecting the primacy of place that broadcast radio has typically enjoyed.

At work, listening habits are also changing as more work environments bring in smart speakers and as more people spend time connected to computers or tablets.

III. THE AMOUNT OF COMPETITION IN THE MARKETPLACE IS AT A RECORD HIGH

A. Extent of Competition Between Services

As described above, the number of audio marketplace competitors, and the amount of competition for listeners and advertising revenues, continues to increase each year. Although Americans are spending more time per week listening to music (and no doubt other audio content),⁴² that amount can only grow by so much, whereas the number of competitors entering the marketplace does not appear to be slowing in the near future.

B. Ratings, Subscribership, and Revenues

Today, approximately 243.4 million Americans use AM or FM radio each month.⁴³ Although this listenership is still quite steady, it has not increased like digital or satellite audio sources. For example, in 2017, SiriusXM finished 2017 at an all-time high with 32.7 million

⁴¹ Cherie Hu, *Paid Music Streaming Subscribers Surpass 50 Million in US, But There's a Twist: Exclusive* (Sept. 11, 2018), <https://www.billboard.com/articles/business/8474560/paid-music-streaming-subscribers-surpass-50-million-us-exclusive>.

⁴² Hugh McIntyre, *Americans Are Spending More Time Listening to Music Than Ever Before* (Nov. 9, 2017), <https://www.forbes.com/sites/hughmcintyre/2017/11/09/americans-are-spending-more-time-listening-to-music-than-ever-before/#2124161e2f7f> (explaining that in 2017, Americans spent more than 32 hours a week listening to music, in comparison to only 26.6 hours in 2016).

⁴³ Nielsen Research, *How America Listens: The American Audio Landscape* (Apr. 5, 2018), <https://www.nielsen.com/us/en/insights/news/2018/how-america-listens-the-american-audio-landscape.html>.

total subscribers.⁴⁴ Pandora streamed 20.61 billion hours of content and had 74.7 million active users during the trailing 30-day period and 5.48 million paid subscribers.⁴⁵ Further, as of June 30, 2018, Spotify had 83 million premium subscribers and 180 million monthly active users on a global scale.⁴⁶ A recent study indicates that Americans stream music from free services including those offered by Spotify and YouTube for 151 minutes each day.⁴⁷ Approximately 51 million U.S. residents are subscribers to on-demand music services, double the number at the end of 2016. More than 80% of those subscribers are to Spotify and Apple Music. Most subscribers to Amazon's music services are not included in the paid subscriber figures, as the service is bundled with an Amazon Prime subscription. The study estimates that as many as 20 million people have access to Amazon music through their Prime membership.⁴⁸

It is clear that the newer entrants to the audio marketplace view radio as their competitor. This past month, in a conference call with investors, Spotify's Chief Revenue officer suggested that his "freemium" service (combination of free and subscription) would "eat" radio:

The 20-year trend here is linear dies, everything on-demand wins. Instead of free / paid, it's paid plus free, and free eats broadcast radio ... I don't know what happens to news and I don't know what happens to sports, but for sure, the combination of your phone plus a voice-activated interface enables the car, and the car is the principal user experience for broadcast radio. Broadcast radio,

⁴⁴ SiriusXM, Annual Financial Report, at 2, http://s2.q4cdn.com/835250846/files/doc_financials/annual2017/feffeb79-c5ff-492a-ad94-5fe58fbe6734.pdf (last visited Sept. 19, 2018).

⁴⁵ Pandora, 2018 Annual Report, at 41 (Feb. 26, 2018), <http://investor.pandora.com/Cache/1001235489.PDF?O=PDF&T=&Y=&D=&FID=1001235489&iid=4247784>.

⁴⁶ Spotify, Q2 2018 Financial Statements, https://s22.q4cdn.com/540910603/files/doc_financials/quarterly/2018/q2/6K-July-2018.pdf (last visited Sept. 19, 2018).

⁴⁷ Daniel Sanchez, *Americans Listen to 151 Minutes of Music Each Day* (Sept. 17, 2018), <https://www.digitalmusicnews.com/2018/09/17/latest-music-biz-audiencenet-music-listening-time/>.

⁴⁸ Cherie Hu, *Paid Music Streaming Subscribers Surpass 50 Million in US, But There's a Twist: Exclusive* (Sept. 11, 2018), <https://www.billboard.com/articles/business/8474560/paid-music-streaming-subscribers-surpass-50-million-us-exclusive>.

SiriusXM are extremely threatened by the growth and evolution of streaming services.⁴⁹

Pandora's CEO Roger Lynch, at a recent conference, made a very similar comment:

[Pandora wants] to take shares from terrestrial radio, which we're well positioned to do. It's a \$15 billion advertising market. ... In many major markets, we'd generally be the largest radio station. And we do have the scale to go into local content. What Pandora did for music discovery is invented music discovery in the digital age – we think we can do that for podcasts. We'll start with national content but as we build out that capability we'll go more and more local. To do that you need monetization capability and I think we're well positioned for that.⁵⁰

It is clear from these comments, and a plethora of similar statements from tech companies and industry observers, that this is not a siloed marketplace where over-the-air radio only competes with other radio stations, and digital only competes with digital. In both the marketplace for listeners, and the marketplace for advertising, it is an intensely competitive environment.

This is evident not only in statements made by corporate officers and industry analysts, but also on the ground in radio markets. Townsquare conducted interviews with advertisers in some of its radio markets around the country. One advertising agency in Utica, New York reported that a decade ago, they were called on by about 11 companies looking to sell them advertising – mostly traditional media companies. That same agency now has over 50 companies calling on them for advertising dollars – most selling digital advertising products. The survey over a number of markets and advertisers revealed that, on average, most advertisers have three times the numbers of advertising companies calling on them to buy advertising than they did a decade ago. Clearly, as these companies are seeking the same advertising dollars, they are competitors.

⁴⁹ Stuart Dredge, *Spotify CFO on Apple: 'It's not a software culture: it's a hardware culture'* (Sept. 17, 2018), <https://musically.com/2018/09/17/spotify-cfo-apple-software-culture/>.

⁵⁰ Jem Aswad, *Pandora CEO Roger Lynch Discusses Forthcoming Label Negotiations* (Sept. 12, 2018), <https://variety.com/2018/digital/news/pandora-ceo-roger-lynch-discusses-forthcoming-label-negotiations-1202938086/>.

C. Capital Investment, Innovation, and New Technologies

The Public Notice seeks comment on capital investment, innovation, and new technologies. Investment in audio delivery systems from huge integrated companies such as Amazon, Apple and Google are difficult to parse out of their overall financial statements. This is particularly true as these companies often package access to their audio services with other services that they provide – whether it be smartphones, smart speakers, or in-car entertainment systems – or revenue from search, on-line sales, or “prime” memberships. Companies that are making revenues from these diverse sources, and have market capitalizations some approaching a trillion dollars, clearly have the wherewithal and incentive to promote their audio entertainment delivery systems and the new technologies that promote those systems.

Most traditional radio companies, on the other hand, are generally pureplay investments – companies that simply operate in the radio sphere. While radio companies increasingly offer their own digital services, perhaps with the exception of that offered by iHeart Media, none of radio’s digital content offerings has yet broken through on a national scale in the digital entertainment landscape. With government constraints on the growth of radio companies in their own markets, it has become increasingly difficult to attract investment to the radio industry. AM radio, as the FCC has itself recognized, has been particularly hard-hit, as the number of AM licenses has decreased over time.⁵¹

It is important to recognize the scale of the companies now involved in the audio marketplace. Any one of the large tech companies that are now providing audio entertainment dwarfs the size of the entire over-the-air radio industry. Amazon’s market cap has been flirting

⁵¹ See Federal Communications Commission, Broadcast Station Totals, <https://www.fcc.gov/media/broadcast-station-totals> (last visited Sept. 19, 2018) (showing a steady drop in AM licenses from 4,988 to 4,680 since 1991) (“FCC Broadcast Station Totals”).

with a trillion dollars in recent weeks, and Apple's already exceeds that mark.⁵² Alphabet (Google) has a market cap of about \$816 billion.⁵³ Even Spotify and Sirius, with market caps each at about \$30 billion, each have five times the total market cap for all of the publically traded radio companies.⁵⁴ Thus, the ability to access capital and other resources to innovate and expand are vastly different among competitors in this audio marketplace. As noted earlier, in audio entertainment, the relatively small number of local radio broadcasting companies are competing against some of the most well-capitalized and largest technology companies in the world.

IV. THE COST OF ENTRY FOR MARKET PARTICIPANTS VARIES

The Public Notice requests comment on marketplace practices or characteristics that pose a barrier to competitive entry into the marketplace. Most significant is the cost of entry for participants, which varies greatly. For traditional AM/FM broadcast radio entrants, it is necessary to obtain a license from the Commission prior to operation. The demand for AM stations has dramatically declined, and there are licenses being surrendered to the FCC (or stations that are silent) all the time.⁵⁵ FM has retained more value over time, yet because of obstacles to entry and competition, the values have not increased in recent years. Current FCC ownership limits restrict the number of stations in any market that one company can own. While in any market one company can own one AM and one FM station, in no market may a company own more than that if they would own more than half the stations in that market. Even in the largest radio markets where there can be over one hundred over-the-air radio stations operating,

⁵² Yahoo! Finance, Amazon.com, Inc., <https://finance.yahoo.com/quote/AMZN> (last visited Sept. 20, 2018); Yahoo! Finance, Apple Inc., <https://finance.yahoo.com/quote/AAPL> (last visited Sept. 20, 2018).

⁵³ Yahoo! Finance, Alphabet Inc. (Google), <https://finance.yahoo.com/quote/GOOG/> (last visited Sept. 20, 2018).

⁵⁴ See Yahoo! Finance, Spotify Technology S.A., <https://finance.yahoo.com/quote/SPOT> (last visited Sept. 20, 2018); see also Yahoo! Finance, Sirius XM Holdings, Inc., <https://finance.yahoo.com/quote/SIRI> (last visited Sept. 20, 2018). In computing the market capitalization of the broadcast radio industry, a \$2.5 billion value has been imputed for the largest radio company, iHeart, now under bankruptcy protection.

⁵⁵ See FCC Broadcast Station Totals.

one company can own no more than eight radio stations, no more than five of which can be in the AM or FM service. In addition, radio services have the burden of FCC regulations restricting the promotion of certain products on the air, compelling lowest unit rates to political candidates, and otherwise imposing regulatory compliance costs on entities operating broadcast stations. Thus, while competing digital technologies can offer hundreds of channels of programming with little or no direct regulation – including programming directed to the smallest niche market (or to a market of one for personalized music services) – radio’s offerings are limited by, and its costs are increased by, regulation.

Satellite providers also have an extremely high cost to entry. As a result of these high costs, the only true competitor in this marketplace is Sirius. But it offers almost 1,000 channels of programming available throughout the nation.

For digital services, on the other hand, the cost of entry tends to be low, as these services do not need to provide the system to deliver their programming to the consumer, as that is provided by the Internet. Talk services, like podcasts, have very low entry costs. Aside from the primary expenses of purchasing equipment and internet connection, there is very little cost to continue operating a podcast that features primarily the spoken word.

Some music-based services, on the other hand, while having low technical and regulatory barriers to entry, can face issues if they provide services featuring major-label music content. Non-interactive, radio-like services have a mandatory minimum fee of \$500 to SoundExchange and about double that for the performing rights organizations that represent songwriters.⁵⁶ However, the royalties, particularly those payable to SoundExchange, increase on a per song per

⁵⁶ Commercial Webcaster 2018 Rates, <https://www.soundexchange.com/service-provider/rates/commercial-webcaster/> (last visited Sept. 20, 2018).

user basis, no matter the revenue of the service.⁵⁷ Thus, the royalties can quickly add up before a service amasses anywhere near the audience to be attractive to advertisers. This metric has led to most internet radio services, even the largest like Pandora, remaining unprofitable, and cuts off significant new entry by truly new players, and has even restrained aggressive offerings from most broadcast companies.

Interactive services, where there is no statutory music royalty for sound recordings, can face daunting royalty barriers to entry for those services that feature major label music content. For example, Spotify had to give significant equity to record labels before it could launch its service in the United States, and it remains unprofitable despite the large audience that it has developed.⁵⁸ Because of these costs, most of the significant newer entrants to the audio industry are companies among the largest in the country, like Apple, Amazon, and Google, that have access to large amounts of capital, and use music services to promote other parts of their businesses.⁵⁹

V. THE MARKETPLACE CONTINUES TO EVOLVE

The Public Notice requests comment on recent entry into and exit from the marketplace. As explained above, many new sources of audio entertainment and programming are now available to listeners. The number of podcasts available has risen to approximately 550,000 and in 2018, six million more Americans listen to podcasts weekly versus in 2017.⁶⁰ New on-demand or interactive services have also entered the market, many of which are from large

⁵⁷ *Id.* (stating rates increase on a “per perform” basis).

⁵⁸ See Amy Wang, *Spotify Hits 180 Million Users — and Loses Even More Money* (July 26, 2018), <https://www.rollingstone.com/music/music-news/spotify-hits-180-million-users-and-loses-even-more-money-703781/>.

⁵⁹ See *supra* Section III.C.

⁶⁰ See Jay Baer, *The 13 Critical Podcast Statistics of 2018*, <https://www.convinceandconvert.com/podcast-research/the-13-critical-podcast-statistics-of-2018/> (last visited Sept. 19, 2018).

companies with significant amounts of capital. For example, Google has produced Google Play Music and Amazon has introduced Amazon Prime Music. Facebook, too, has been rumored to be about to launch a music offering.⁶¹ There has been a lot less growth in non-interactive music digital services, with Pandora continuing to lead. And, as noted above, because of the high cost of entry, there have been no new satellite players in the marketplace. Sirius, who began offering commercial satellite radio services in 2001, is the only satellite-based digital radio service currently available.

VI. CONCLUSION

As set forth above, the audio marketplace is extremely competitive, much to the benefit of consumers across the nation as it provides a dizzying array of choice. However, new entrants to the marketplace for both listeners and advertisers have come at the cost of legacy providers – particularly traditional AM or FM radio, which is no longer the dominant source of audio entertainment and informational programming. Over-the-air radio, which provides often essential local news, particularly in emergency situations like hurricanes or natural disasters, is constrained in its growth potential and competitiveness against multi-channel digital competitors by antiquated ownership regulations that were adopted for a far different audio marketplace. These regulatory barriers are not applicable to digital competitors. There is no longer a siloed audio marketplace, where companies in each silo should be evaluated on their competitive

⁶¹ Sky News, *Facebook Watch: Social media giant launches rival to streaming sites* (Aug. 20, 2018), <https://news.sky.com/story/facebook-watch-social-media-giant-launches-rival-to-streaming-sites-11484943>.

position in that silo, but instead companies are aggressively competing in the greater marketplace, and regulations must recognize that fact.

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