Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

OPPOSITION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS
TO PETITIONS FOR RECONSIDERATION

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Executive Summary

Pursuant to Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which requires a comprehensive review of all its broadcast ownership rules every two years, the Commission on June 2, 2003 adopted a revised set of ownership regulations. A number of parties subsequently requested the Commission to reconsider many of the decisions made in this *Biennial Review Order.* NAB now opposes those reconsideration petitions calling for a retreat from the modest relaxation of the local ownership restrictions approved in the *Biennial Review Order*, and supports those petitions urging the Commission to take further action to ensure the continued viability of local broadcasters, especially small market television stations.

A number of parties urged the Commission to abandon its efforts to bring the broadcast ownership regulatory regime into the 21st century, and to reinstate outdated broadcast-only local ownership restrictions that were originally adopted in an era of broadcaster preeminence. The Commission should reject calls in these reconsideration petitions to "turn back the clock," because they are based on a disregard of both the competitive transformation of local media markets and the Commission's statutory obligations under the 1996 Act. More specifically, a number of parties urged the Commission to reverse its very modest relaxation of the television duopoly rule, reinstate the newspaper/broadcast cross-ownership ban, and cut back on the local radio ownership limits. These petitions are unconvincing in their calls for a complete reversal of course by the Commission because, *inter alia*, they uniformly ignored the significant decline in the dominance of traditional broadcasters in local media markets, especially in comparison to cable and satellite operators. Parties urging the Commission to completely reverse course on its reform of the local ownership rules also disregarded or misinterpreted the Commission's obligations under Section 202(h) of the 1996 Act to reexamine its ownership rules, in light of competitive changes in the marketplace, and to repeal or modify any regulation no longer in the public interest.

Beyond broad calls for a wholesale reversal of the Commission's efforts to modernize a woefully outdated ownership regulatory regime, several parties also asked the Commission to "turn back the clock" with regard to a range of more narrow decisions in the *Biennial Review Order*. These petitions set forth no reasons sufficient for the Commission to reinstate "re-regulatory" policies, such as the "flagging" of certain proposed radio transactions for further review or requirements that needlessly complicate obtaining a duopoly waiver for failed, failing and unbuilt television stations.

Rather than reinstating broadcast-only local ownership restrictions that are outdated in a digital, multichannel media marketplace, the Commission should instead grant those reconsideration petitions that would help ensure the continued viability of free, over-the-air broadcasting. In particular, the Commission should reconsider its prohibition on television duopolies formed among the top-four ranked stations in a market, at least in medium and small markets. Unrefuted evidence submitted by NAB and other broadcasters showed the severe financial pressures facing local television stations in smaller markets, and the Commission's various justifications for the top-four restriction simply do not apply outside the largest television markets. The removal of this restriction on smaller market television stations would enhance the ability of free, over-the-air broadcasters to compete with cable and satellite operators, to remain financially viable in ever more competitive local media markets, and to continue offering increasingly expensive local news to their communities.

NAB also agrees with those parties who requested the Commission to reconsider its needless adoption of more (rather than less) regulatory radio policies in the *Biennial Review*

Order. The Commission failed to present a convincing, or even legally adequate, case for jettisoning its long-standing contour overlap methodology for defining radio markets, and replacing that approach with the manipulable and inconsistent "metro" markets defined by Arbitron. And the Commission had no basis whatsoever to support its decision to attribute radio joint sales agreements ("JSAs") under the local radio ownership rules, especially in light of a contrary decision made just four years ago not to attribute JSAs. For all the reasons set forth in greater detail in NAB's opposition, the Commission should deny petitions calling for the reinstatement of outdated and unnecessary local broadcast ownership policies, and to grant petitions that would aid in ensuring the future viability of free, over-the-air broadcasters, particularly local television stations in medium and small markets.

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To: The Commission

OPPOSITION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS TO
PETITIONS FOR RECONSIDERATION

The National Association of Broadcasters ("NAB")[1] submits this opposition to certain petitions requesting reconsideration of the Commission's order revising its broadcast ownership rules.[2] Pursuant to Section 202(h) of the 1996 Telecommunications Act, which requires a comprehensive review of the ownership rules every two years, the Commission on June 2, 2003 adopted a revised set of broadcast ownership regulations. In this opposition, NAB urges the

[1] NAB is a nonprofit incorporated association of radio and television stations, which serves and represents the American broadcasting industry.

[2] *Report and Order* in MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317 and 00-244, FCC 03-127 (rel. July 2, 2003) ("*Biennial Review Order*").

Commission to reject those petitions calling for a retreat from the modest loosening of the local ownership restrictions approved in the *Biennial Review Order*. NAB also expresses support for those petitions urging the Commission to take further action to ensure the survival of local television broadcasters in small markets, and to reconsider the changes made to its methodology for defining radio markets.

I. The Commission Should Resist Broad Calls To Retreat From Its Reform Of The Local Broadcast Ownership Rules And To Reinstate An Outdated Regulatory Regime.

A number of petitions urged the Commission to abandon its efforts to bring the broadcast ownership regulatory regime into the 21st century, and to reinstate outdated broadcast-only local ownership restrictions that were originally adopted in an era of broadcaster preeminence. The Commission should reject calls by these petitions to "turn back the clock," because they are based on a disregard of both the competitive transformation of local media markets and the Commission's statutory obligations under the Telecommunications Act of 1996.

More specifically, various petitioners urged the Commission to reverse its very modest relaxation of the television duopoly rule, reinstate the newspaper/broadcast cross-ownership ban, and cut back on the local radio ownership caps.[3] These petitions are unconvincing in their calls for a complete reversal of course by the Commission because, *inter alia*, they uniformly ignored the significant decline in the dominance of traditional broadcasters in local media markets. For example, in criticizing the revised television duopoly rule as allowing "excessive concentration," UCC cited the allegedly high viewing shares of television station owners in several local markets. *See* Petition of UCC at 20-21. UCC, however, relied only on each owners' share of

[3] *See, e.g.,* Petitions for Reconsideration of Consumer Federation of America and Consumers Union ("CFA"); Office of Communication of the United Church of Christ, Inc., *et al.* ("UCC"); Future of Music Coalition.

broadcast viewing and excluded all viewing of cable and satellite channels/networks, thereby greatly exaggerating the level of viewership concentration in these markets. Such data cannot be seen as accurately reflecting the degree of viewership concentration in any local video market. Indeed, recent research provided in NAB's comments in this proceeding clearly showed that the viewing of in-market broadcast television stations has steadily decreased over the past five years, and that, in many markets, *well under half* of the total day viewing is attributable to local broadcast television stations.[4] Contrary to UCC's assertions, the revised television duopoly rule will not lead to local broadcasters possessing an "excessive" share of viewing in local television markets, but will in fact allow broadcasters to compete more effectively with cable and satellite operators for viewers. *See* Comments of NAB in MB Docket No. 02-277 at 15-21; 78 (filed Jan. 2, 2003); Reply Comments of NAB in MB Docket No. 02-277 at 23-28 (filed Feb. 3, 2003).[5]

Petitioners also supported reinstatement of newspaper/broadcast cross-ownership prohibitions because of perceived deficiencies in the "Diversity Index" that informed the Commission's judgment about structuring the new cross-media limits, which replaced the strict

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[4] *See BIA Financial Network, Out-of-Market Listening and Viewing: It's Not to be Overlooked* at 15-16, Attachment A to NAB Comments in MB Docket No. 02-277 (filed Jan. 2, 2003) (*"BIA Viewing Study")*. In the smallest Designated Market Areas (rank 101+), only 39.7% of those markets' total day viewing, on average, is attributable to in-market broadcast television stations, with the majority of the viewing attributable to cable/satellite channels, broadcast stations located in adjacent markets, and other market broadcast television stations carried on cable systems. In DMAs 51-100, only 50.0% of the total day viewing is attributable to in-market broadcast television stations, and in *no* market grouping does the percent of total day viewing attributable to local broadcasters reach 60%. Moreover, the viewing of in-market television stations has declined by *17%* in just the last five years.

[5] *See also* David D. Haddock and Daniel D. Polsby, *Bright Lines, The Federal Communications Commission's Duopoly Rule, and the Diversity of Voices*, 42 Fed. Comm. L.J. 331, 332-33 (1990) (arguing that the duopoly rule is in part responsible for the "feebleness of the competition offered" by television broadcasters to cable, and that competitive "pressure" on the "potentially monopolistic behavior of cable TV systems" could be intensified if the duopoly rule were modified).

newspaper cross-ownership ban and the radio/television cross-ownership limits. *See, e.g.*, Petitions of CFA at 14-24; UCC at 34-38. As an initial matter, NAB points out that, even assuming the particular criticisms of the Diversity Index to be valid, this does not mean that the absolute prohibition on common ownership of broadcast facilities and daily newspapers in local markets should be reinstated. As NAB and many others have shown in previous comments, the Commission has never adequately justified its prohibition on common ownership of newspapers and broadcast facilities in the same market. It has consistently failed to establish the existence of any competitive or other public interest harms arising from newspaper/broadcast cross-ownership. Certainly the FCC's entirely speculative diversity rationale for adopting the rule in 1975 can no longer support its retention, especially given consumers' ability today to access a much wider array of increasingly substitutable broadcast and nonbroadcast outlets to obtain news, information and entertainment. Indeed, commenters showed that the case for repealing this anachronistic ban was compelling because it inhibits the development of new innovative media services, especially digital and on-line services that have features of both the electronic and print media, and precludes struggling broadcast and newspaper entities, particularly those in smaller markets, from joining together to improve, or at least maintain, existing local news operations.[6] Given this overwhelming evidence, the Commission properly concluded that the newspaper cross-ownership ban was not "necessary to promote competition"; was likely to "hinder," rather than "promote," localism; and was not "necessary to preserve diversity of viewpoint." *Biennial Review Order* at ¶¶ 368-69. In light of these conclusions, there would be

[6] *See, e.g.,* Comments of NAB in MB Docket No. 02-277 at 60-67 (filed Jan. 2, 2003); Reply Comments of NAB in MB Docket No. 02-277 at 57-62 (filed Feb. 3, 2003); Comments of NAB in MM Docket No. 01-235 (filed Dec. 3, 2001); Reply Comments of NAB in MM Docket No. 01-235 (filed Feb. 15, 2002).

no basis in the record for reinstating the newspaper cross-ownership ban, even if some of the particularized criticisms leveled at the Diversity Index were valid.[7]

Moreover, the Commission only used the Diversity Index as a tool to help formulate the structure of the new cross-media limits across markets of varying size and type. Because the Diversity Index was merely a general guide for structuring these aggregate cross-media limits, the fact that the Diversity Index may arguably not reflect the actual competitive situation in certain individual markets has limited, if any, relevance. *See* Petition of CFA at 15 (complaining about "absurd results" when applying Diversity Index to certain specific markets). While petitioners criticized several elements of the Diversity Index, they certainly in no way established that the decades-old ban on newspaper/broadcast cross-ownership continued to be "necessary in the public interest as the result of competition."[8] Indeed, it would be the reimposition of the

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[7] And certainly all these criticisms are not valid. For example, UCC contended that the Diversity Index should simply not have counted broadcast outlets that receive small viewing or listening shares. *See* Petition of UCC at 36-37. The Commission has correctly concluded in the past that low-rated radio and television stations do contribute to diversity in local markets. *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6395 (1992) (low rated radio stations serve "limited or specialized audiences" and thereby contribute to the "diversity of voices available to listeners in a given locality"); *Memorandum Opinion and Second Order on Reconsideration* in MM Docket Nos. 91-221 and 87-8, FCC 00-431 at ¶ 44 (rel. Jan. 19, 2001) (even a low rated broadcast station is a "source of viable competition and diversity in a given market" and should therefore be considered as a "voice" under the radio/television cross-ownership rule). And while one may quibble about the weight accorded to the Internet under the Diversity Index, surely the Internet should not be discounted entirely, which some petitioners urged. *See* Petitions of CFA at 21; UCC at 36. The record in this proceeding was replete with evidence showing the growing use of the Internet as a news source (even for state and local news and information) and as a growing substitute for television. *See* Reply Comments of NAB in MB Docket No. 02-277 at 33-39 (filed Feb. 3, 2003) (citing, *inter alia*, the 2003 UCLA Internet Report showing that Internet users spend about 30% less time per week watching television than non-Internet users).

[8] Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996).

newspaper cross-ownership prohibition that would lead to "absurd results" in today's media marketplace.[9]

Petitioners urging the Commission to "turn back the clock" in its media ownership policies not only, as discussed above, ignored the competitive transformation of local media markets but also disregarded or misinterpreted the Commission's obligations under the 1996 Telecommunications Act ("1996 Act"). Section 202(h) of the 1996 Act directs the Commission to review all of its ownership rules biennially to determine if they "are necessary in the public interest as the result of competition" and to "repeal or modify any regulation . . . no longer in the public interest." So even beyond the Commission's general "duty to evaluate its policies over time," especially if "changes in factual and legal circumstances" occur, *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), the Commission has an explicit statutory duty to reexamine its broadcast ownership rules, in light of competitive changes in the marketplace, to determine whether their retention serves the public interest. In interpreting Section 202(h) specifically, the D.C. Circuit Court of Appeals has found that the biennial review provision was designed "to continue the process of deregulation." *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002), *quoting Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

Some petitioners contending that the Commission "went too far" in its measured revisions to the local broadcast ownership rules simply made no mention of the 1996 Act and

[9] As NAB previously pointed out, the cross-ownership rule would prevent the owner of a single radio station from having an attributable interest in a daily newspaper in the same market -- even in remarkably diverse markets like New York City or Los Angeles -- while a cable system operator with a monopoly position in the local multichannel video programming distribution market faces no restriction in acquiring a daily newspaper in the same market. *See* Comments of NAB in MB Docket No. 02-277 at 19-20 (filed Jan. 2, 2003).

Section 202(h). *See, e.g.*, Petition of CFA. Other petitioners vainly attempted to argue that the Commission can somehow ignore the decisions of the D.C. Circuit Court of Appeals in the *Sinclair* and *Fox* cases concerning Section 202(h). *See* Petition of UCC at 10-17. At the risk of belaboring the obvious, NAB does not believe that the Commission can in this ownership proceeding disregard previous cases involving the broadcast ownership rules, in which a federal appellate court dealt at length with the Commission's obligations under Section 202(h) and expressly interpreted the language of, and congressional intent in adopting, that section.[10] NAB urges the Commission to disregard calls for reversing course on media ownership regulation coming from those petitioners who disregarded or flatly misinterpreted the Commission's statutory duty to reexamine its broadcast ownership rules in light of competition.[11]

Beyond ignoring the vast competitive changes in the media environment and the Commission's obligations under Section 202(h), petitioners supporting outdated broadcast-only

[10] UCC at one point also seemed to misinterpret the significance of the D.C. Circuit's decision on rehearing in the *Fox* case. *See* Petition of UCC at 16. In that rehearing, the court only amended language contained in one paragraph of the original decision that involved the precise meaning of the word "necessary" in Section 202(h). *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537 (D.C. Cir. 2002). The remainder of the *Fox* decision (and the *Sinclair* decision of course) stating that Congress intended the biennial review provision "to continue the process of deregulation" was unaffected by the decision on rehearing.

[11] In this regard, calls for the FCC to cut back on the local radio numerical ownership caps are particularly suspect. *See* Petitions of UCC at 26-28; Future of Music Coalition at 12-15. These petitions completely ignored the limits on the FCC's authority to override Congress' explicit judgments in Section 202(b)(1) of the 1996 Act about the appropriate levels of ownership consolidation in local radio markets. *See* Pub. L. No. 104-104, § 202(b)(1), 110 Stat. 56 (expressly establishing the number of radio stations that could be commonly owned in local markets of varying size). These petitions also disregarded the voluminous empirical evidence showing increases in radio programming diversity since 1996, and the variety of studies indicating that consolidated radio groups are unable to exercise undue market power in the radio marketplace, due to the volatility of ratings and audience shares received by radio stations, declining listening shares earned by even market leading stations, and increased competition from a variety of media outlets. *See* Comments of NAB in MM Docket No. 01-317 (filed March 27, 2002); Reply Comments of NAB in MM Docket No. 01-317 (filed May 8, 2002); Comments of NAB in MB Docket No. 02-277 at 84-98 (filed Jan. 2, 2003).

local ownership restrictions are reluctant to acknowledge the blindingly obvious fact that commercial broadcasters must be able to operate efficiently and profitably if they are to survive in the marketplace. Indeed, some petitioners appeared hostile to the entire U.S. system of commercial media. *See, e.g.*, Petition of Free Press at 3-5; 23 (stating that "the market is an improper mechanism for managing" the media system, and that "the commercial media system itself is at odds with the principles of the First Amendment").

Congress, however, decided decades ago that the United States would have a predominantly privately-owned commercial system of broadcasting, and broadcasters are therefore properly concerned with their ability to operate efficiently and profitably in a commercial marketplace.[12] If the Commission seeks to maintain a system of viable commercial broadcast stations offering free, over-the-air service, then the efficiency and the capability of local broadcasters to continue operating profitability must be a central concern of this proceeding. Only competitively viable broadcast stations can serve the public interest and effectively contribute to diversity in local markets by maintaining a significant local presence, including a local news operation. As the Commission concluded over a decade ago, the broadcast "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability." *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2760 (1992) (FCC loosened the radio ownership rules because the "bleak" revenue and profit outlook for radio stations "substantially threatened" radio's "ability to serve the public interest in the spirit of the Communications Act"). Petitions premised on the

[12] *See, e.g., FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940) (the Communications "Act recognizes that the field of broadcasting is one of free competition," and that "Congress intended" each licensee to "survive or succumb according to his ability to make his programs attractive to the public").

erroneous belief that the Commission should not be concerned with the profitability of broadcasters must accordingly be summarily denied. *See, e.g.*, Petition of UCC at 2 (criticizing FCC for being "unduly concerned with ensuring the profitability of broadcasters"). Indeed, NAB believes (*see* Section III. below) that the Commission has been *insufficiently* concerned with the ability of certain broadcasters, especially smaller market television stations, to operate profitably, remain viable local voices, or even survive in today's digital, multichannel environment.

II. Petitions Urging The Commission To "Turn Back The Clock" In A Variety Of More Narrow Ways Should Also Be Denied.

Beyond broad calls for a wholesale reversal of the Commission's efforts to modernize a woefully outdated ownership regulatory regime, several petitioners also asked the Commission to "turn back the clock" with regard to a range of other decisions in the *Biennial Review Order*. Those petitions should also be denied.

In the local radio context, for instance, several petitioners argued that noncommercial radio stations should not be included when counting the total number of stations in a market, for purposes of applying the local radio ownership caps.[13] The Commission has recognized since at least 1999 that noncommercial broadcast stations are significant voices in local media markets.[14] Indeed, UCC specifically asked the Commission to reconsider this 1999 decision and not to count noncommercial television stations under the television duopoly rule. The Commission in early 2001 denied this request, concluding that noncommercial television stations "do contribute

[13] *See* Petitions of UCC at 28; National Association of Black Owned Broadcasters and Rainbow/Push Coalition ("NABOB") at 12; Future of Music Coalition at 10.

[14] *See Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903 at ¶ 64 (1999) (determining to count both commercial and noncommercial full power stations under the "eight voice" television duopoly rule).

to diversity" and should therefore not be "categorical[ly] exclu[ded]" from the count of television stations in a market.[15] The same reasoning supports the Commission's decision in the *Biennial Review Order* to count noncommercial radio stations, and the Commission should again reject UCC's request to exclude noncommercial stations, as it did in 2001. It would also be inconsistent to exclude noncommercial radio stations from the count of radio stations in a market for purposes of applying the local radio ownership cap, while at the same time counting noncommercial television stations under the duopoly rule and the new cross-media limits.

NABOB also requests the Commission to reinstate its policy of "flagging" certain proposed radio transactions. *See* Petition of NABOB at 8-9.[16] NAB urges the Commission not to reinstate this ill-considered policy because, *inter alia*, it contributed to competitive imbalances in local radio markets. Assume, for instance, that one entity has already acquired in an area the maximum number of stations permitted under the 1996 Act, and this entity consequently controlled approximately 45 percent of the advertising revenues in the relevant Arbitron radio market. If a smaller entity would then attempt to acquire another station(s) to compete with the "early consolidator," that entity's proposed transaction would be subject to flagging even if the transaction would result in the smaller entity accounting for only 25 percent of the radio advertising revenues in the same Arbitron market. And because flagged transactions in the past

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[15] *Memorandum Opinion and Second Order on Reconsideration* in MM Docket Nos. 91-221 and 87-8, FCC 00-431 at ¶ 21 (rel. Jan. 19, 2001).

[16] Under this policy, the Commission flagged proposed radio transactions for further review if they would result in a single radio group controlling 50% or more of the advertising revenues in the relevant Arbitron radio market, or two radio groups accounting for 70% or more of the advertising revenues in that market. These transactions were flagged for additional review even though they were compliant with the local radio ownership limits established by Congress in the 1996 Act.

were cast into administrative limbo and subject to delays so significant as to amount to *de facto* denials, the 50/70 screen and flagging policy have prevented transactions that would have enhanced competition by creating another station group able to compete more effectively with the early consolidator. The Commission's 50/70 screen has accordingly failed to serve the public's interest in effective competition, especially in smaller markets.[17] It is also fundamentally unfair for the Commission's policies to place smaller entities at a permanent competitive disadvantage vis-à-vis larger competitors that consolidated more quickly. NABOB has offered no convincing rationale for reinstating this policy, which in the past mainly served to impede transactions that fully complied with the local ownership caps set by Congress in 1996.[18]

With regard to the local television rule, several petitioners asked the Commission to reinstate another policy that similarly functioned to impede the legal transfer of stations. In 1999, the Commission determined to allow waivers of the duopoly rule for failed, failing and unbuilt stations. This waiver standard, however, required all waiver applicants to demonstrate that the "in-market" buyer was the only reasonably available entity willing and able to acquire and operate (or construct) the station, and that sale to an out-of-market buyer would result in an artificially depressed price. In the *Biennial Review Order* (at ¶ 225), the Commission revised its waiver standards and correctly dispensed with this requirement. Petitioners have now requested that this requirement be reinstated, arguing that its elimination undermines the opportunity for

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[17] This problem is more likely to occur in smaller markets where, due to the smaller number of radio owners, one owner may more frequently account for a larger percentage of the radio advertising revenues in those markets.

[18] NAB also notes that this flagging "policy" related to no specific radio rule and was not adopted pursuant to any formalized notice and comment.

new entrants in broadcasting, especially by minorities or women. *See* Petitions of Minority Media Telecommunications Council ("MMTC") at 32; UCC at 25.

The Commission should reject these requests to complicate the waiver process for failed, failing and unbuilt stations. Because the greatest economic benefits of common ownership occur between stations located in the same market, broadcasters trying to sell failed, failing or unbuilt stations are inherently unlikely to succeed in finding out-of-market buyers. Because in-market buyers would be best able to achieve the cost efficiencies associated with joint ownership that are needed to revive failed and failing stations, the Commission's previous requirement that owners of struggling, bankrupt or dark stations fruitlessly search for out-of-market buyers constitutes a sterile and burdensome exercise. This requirement seems particularly futile with regard to unbuilt stations, which obviously cannot contribute to diversity or competition. The Commission's priority under these circumstances should be to promote the rapid construction of any unbuilt station, and this goal was never served by requiring the holder of an unbuilt construction permit to hunt for an out-of-market buyer, if an in-market entity was ready and willing to purchase the permit and construct the station. Indeed, the fact that a station has remained unbuilt for a substantial period indicates that the market may be unable to support another separately owned broadcast facility and that an in-market buyer is likely to be the only viable purchaser.[19]

[19] For example, in the Hartford-New Haven Designated Market Area, the Commission granted a construction permit to WBNE-TV in 1954. WBNE's facility was not, however, constructed until 1995, 41 years later, and this construction was only made possible by WBNE's permittee entering into a local marketing agreement with the owner of another television station in the same market. Even a market as large as Hartford-New Haven was evidently unable to support the construction of a new television station until that unbuilt station formed a combination with a viable *in-market* television station.

NAB further questions the extent to which this requirement effectively contributes to "new entry" in the broadcast industry. Petition of UCC at 25. There is no reason to assume that an out-of-market buyer will necessarily be a new entrant to the broadcast industry (or a minority or female-controlled entity). In fact, given the financial and other difficulties with purchasing and then operating a failed, failing or unbuilt station, it would seem more likely that any out-of-market buyer would be an existing broadcaster with sufficient resources and experience to take on a marginal station. For all these reasons, the Commission should affirm its decision to eliminate this extra burden on broadcasters trying to obtain waivers of the duopoly rule.[20]

NAB also wishes to address two issues relating to the national television ownership cap. First, the Commission should deny petitions asking it to eliminate the UHF discount. *See* Petitions of Capitol Broadcasting Co. at 3; UCC at 39. As empirically demonstrated by NAB in earlier studies, UHF stations still suffer from both ratings and financial disadvantages vis-à-vis VHF stations.[21] The Commission should instead wait to consider the future of the UHF discount

[20] UCC's more general desire to "turn back the clock" on local television ownership is shown by its request for the FCC to reconsider its use of Designated Market Areas in the duopoly rule. *See* Petition of UCC at 22. NAB observes that, in 1999, UCC opposed the FCC's initial and very modest relaxation of the television duopoly rule, and urged the FCC to return to the Grade B contour standard. *See* Petition of UCC for Reconsideration (at 3-15) of *Report and Order* in MM Docket Nos. 91-221 and 87-8 (filed Oct. 18, 1999). The Commission denied UCC's 1999 request to reinstate the version of the duopoly rule first adopted in 1964, and the Commission should similarly reject requests by UCC and other petitioners such as CFA to return to outdated regulatory policies for local television that are no longer in the public interest as the result of competition.

[21] *See* Comments of NAB in MM Docket No. 98-35 at 12-13 and Appendices C and D (filed July 21, 1998). The first study focused on the "penalty" suffered by UHF stations in terms of ratings. After analyzing UHF and VHF network affiliated prime-time ratings (and taking into account network affiliation and market size), this study concluded that UHF stations continued to face a penalty in ratings due to the fact that they are UHF stations. Across all markets and networks the average UHF affiliate had a 6.4 rating as compared to the average VHF affiliate rating of 9.8. The second study examined the financial difficulties faced by UHF stations due to the smaller audiences that typically watch those stations. This study found that, during the 1990's, UHF

until the transition to digital television is complete when it can better assess the competitive position of UHF stations. Second, NAB reiterates its support for a national television ownership cap set at the 35 percent level expressly approved by Congress in 1996. For all the reasons set forth in joint comments by the Network Affiliated Stations Alliance and NAB in this proceeding,[22] the cap (like the television duopoly rule discussed below) directly promotes the Commission's important goal of localism, and NAB therefore supports returning the cap to the congressionally-approved level of 35 percent.

III. Rather Than Turning Back The Clock, The Commission Should Take Further Action To Ensure The Continued Viability Of Free, Over-The-Air Local Broadcasting.

In this proceeding, NAB urged the Commission, in light of the declining financial performance of medium and small market television stations, to reform the television duopoly rule to allow the formation of duopolies in these markets. A number of factors – including increasing competition from cable and other sources, the costs of the digital transition, and the decline of network compensation – have combined to squeeze the profits of local television broadcasters in medium and small markets like never before. An uncontradicted study prepared by NAB clearly demonstrated the declining financial position of smaller market television stations in recent years, particularly for those stations not among the ratings leaders in their markets.[23] Certainly the financial pressures on these low-rated stations are sufficiently severe to

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network affiliates generated significantly lower net revenues, cash flow and pre-tax profits than VHF network affiliates.

[22] *See* Comments of NAB and NASA in MB Docket No. 02-277 (filed Jan. 2, 2003); Reply Comments of NAB and NASA in MB Docket No. 02-277 (filed Feb. 3, 2003) (showing, *inter alia*, that the programming decisions of independently-owned affiliates are more closely attuned to the interests of local viewers than the programming decisions of network-owned stations and that the national cap limits the ability of networks to control programming on local stations).

[23] *See* Attachment C to NAB Comments in MB Docket No. 02-277, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Dec. 2002) ("*TV Financial*

call into question their continued viability as independent operations. And given the considerable and growing expense of maintaining local news operations, as documented by two NAB studies, some television stations have already and greater numbers in the future will be forced by financial considerations to forego providing local news in medium and small markets.[24] Reform of the duopoly rule to allow smaller market television stations to combine should therefore enhance both diversity and localism.

Although NAB welcomed the Commission's modest relaxation of the duopoly rule in the *Biennial Review Order*, the Commission's limited action, for the reasons set forth in our initial and reply comments in this proceeding,[25] will fail to ensure the continued viability of television broadcasters (and their local news operations) in medium and small markets. NAB accordingly

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Report"). This *Report* examined the profitability of ABC, CBS, Fox and NBC affiliated television stations in DMAs ranked from 51-175 in 1993, 1997 and 2001. It showed that the average low-rated affiliated station in these markets not only experienced declining profitability from 1993 to 2001, but, as of 2001, the average low-rated station experienced *negative* profitability. More specifically, in markets 101-125, the average low-rated station suffered an astounding *581% decline* in pre-tax profits from 1993 to 2001, and low-rated stations in markets 76-100 and 126-150 experienced average *declines of 320% and 301%*, respectively. And even the highest-rated stations in many medium and small markets experienced declining profits from 1993 to 2001. *See TV Financial Report* at 5-9 (showing declining profits for the average high-rated affiliated stations in markets 51-75, 76-100 and 126-150).

[24] *See TV Financial Report* at 5-9 (showing that from 1993 to 2001, the average news costs of affiliated stations in DMAs 51-176 increased 71%, 104%, 58%, 56% and 82%, respectively, in market groupings 51-75, 76-100, 101-125, 126-150 and 151-175); Attachment D to NAB Comments in MB Docket No. 02-277, Smith Geiger, *Newsroom Budgets in Midsize (51-100) and Small Markets (101-210)* at 2, 13-15 (Dec. 2002) ("*Newsroom Report"*) (because acquiring alternative programming, such as syndicated programming, "represents a much lower cost than news production," one can only expect more local stations to "forego" their increasing costly local news for the "cheaper, less financially risky, and often more profitable option of acquired programming"). Commenters in this proceeding also documented the considerable number of cut backs in local television news operations that have already occurred. *See* Comments of Media General, Inc. in MB Docket No. 02-277 at Appendix Three, Attachment B (filed Jan. 2, 2003).

supports the petitions of broadcasters calling on the Commission to reconsider its prohibition on combinations among the top-four ranked stations in medium and small markets. *See* Petitions of Nexstar Broadcasting Group, LLC ("Nexstar") at 4-14; LIN Television Corporation and Raycom Media, Inc. ("LIN") at 3-13.

NAB agrees with these petitioners that the justifications cited by the Commission for the top-four restriction (whatever its merit, if any, in the largest markets) clearly do not apply outside the largest television markets. There is not, for example, a natural "break point" between the audience shares of the top four-ranked stations and the audience shares of other stations in medium and small markets. *See* Petition of Nexstar at 5-6. Evidence previously submitted by NAB confirms that, in smaller markets, one or two stations often have a significant ratings lead and that a very substantial audience share drop-off occurs after the first- or second-ranked (not the fourth-ranked) station in medium and small markets.[26] Thus, the top-four ranked restriction on forming duopolies cannot be justified, at least in markets 50+, on some "general separation

[25] *See* Comments of NAB in MB Docket No. 02-277 at 70-84 (filed Jan. 2, 2003); Reply Comments of NAB in MB Docket No. 02-277 at 46-57 (filed Feb. 3, 2003).

[26] *See* NAB *Ex Parte* in MB Docket No. 02-277 (filed May 15, 2003), attaching audience share data for stations in all DMAs. An examination of DMAs 51-175 shows that, in the considerable majority of these markets, one or two stations are clear leaders in terms of audience share. *See* DMAs 51, 52, 53, 54, 60, 61, 62, 63, 64, 65, 66, 70, 74, 76, 77, 79, 80, 83, 84, 85, 87, 88, 89, 90, 92, 93, 94, 95, 96, 97, 98, 99, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, 120, 121, 122, 123, 124, 126, 129, 130, 131, 132, 134, 136, 137, 138, 139, 144, 145, 146, 147, 148, 149, 150, 152, 153, 155, 156, 157, 158, 159, 160, 161, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, and 175. And even in markets where audience shares are more evenly distributed among multiple stations, there are generally only three (not four) arguably competitive stations, and there is a significant drop-off in ratings between the third- and fourth-ranked stations. *See* DMAs 56, 57, 58, 59, 67, 68, 71, 73, 75, 78, 81, 82, 86, 91, 101, 104, 115, 119, 125, 127, 128, 135, 140, 141, 142, 143, 151, 154, and 162. (Markets 176-210 more often have only one, two or three stations, so these comparisons cannot be reliably made in the smallest markets.)

between the audience shares of the top four-ranked stations and the audience share of other stations in the market." *Biennial Review Order* at ¶ 195.[27]

In addition, the Commission's assertion that the top-four stations can better afford the transition to digital television ("DTV") is certainly not true outside the largest markets. *See* Petitions of Nexstar at 11; LIN at 10-11. NAB submitted unrefuted evidence that even the *highest*-rated stations in many medium and small markets experienced declining profits from 1993-2001 and that lower-rated stations were facing serious financial difficulties. *See TV Financial Report* at 5-9. Moreover, the evidence relied upon by the Commission to support its claim that the top-four ranked stations can afford the transition to digital broadcasting relates only to the affiliates of ABC, CBS, Fox and NBC in the 25 largest DMAs. *See Biennial Review Order* at ¶ 199 and footnote 417.[28] Thus, the top-four restriction in forming duopolies cannot be justified on grounds that the top-four ranked stations in medium and small markets are financially able to complete the DTV transition in a timely manner.

The Commission also erred in its claim that "top four-ranked stations already provide local news programming," so that a combination among top-four stations would be unlikely to

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[27] Indeed, NAB notes a number of markets in the top 50 that do not demonstrate this natural break point and have, in fact, only one or two clear ratings leaders. *See, e.g.*, DMAs 18, 19, 24, 25, 28, 29, 30, 34, 35, 37, 39, 40, 43, 46, and 49. Other top 50 markets show a substantial drop-off in audience share after the third-ranked station. *See, e.g.*, DMAs 9, 10, 12, 13, 14, 17, 20, 21, 23, 27, 31, 32, 33, 36, 41, 44, 45 and 47.

[28] And NAB has previously provided compelling evidence that the financial position of large and small market broadcasters are not in any way comparable, due to the rapid decline in revenues per market outside the 10 largest markets. *See* NAB *Ex Parte* in MB Docket No. 02-277 (filed April 30, 2003). *See also* Petition of LIN at 10-11 (citing NAB's April 30th submission, pointing out that the 2002 average gross revenues of stations in markets 101-125 were only 4% of the average gross revenues of stations in the top 10 DMAs, and that station revenues in markets 126-150, 151-176 and 176-210 were just 2.6%, 1.9% and 0.85%, respectively, of those in the top 10 DMAs).

result in new or enhanced local news offerings. *Biennial Review Order* at ¶ 198. While the top-four ranked stations in large markets generally do offer local news programming, many smaller markets are not currently served by four separate local news operations. Recent research has shown that the 160 markets from 51-210 have, on average, only 2.49 newscasts per market. Thus, there are many markets below the top 50 that have only one, two or three newscasts. *Small-Market Angst*, Broadcasting and Cable at 35 (July 14, 2003).[29] And NAB has shown that, due to the growing expense of starting a new local news operation, these small and medium market stations currently without local newscasts are highly unlikely to initiate them, unless they are allowed to combine with stations that already have local news operations. *See Newsroom Report* at 2, 13-15. In fact, the record shows that allowing more duopolies would not somehow constrict the production of local news programming but would encourage increases in local news service.[30] For all these reasons, the Commission cannot justify its top-four duopoly restriction on the grounds that these higher-rated stations all offer independent local news programming to consumers in smaller markets.

The Commission furthermore cannot support its overly restrictive duopoly rule with a study purporting to show that the top-four ranked television stations in a number of markets "control a combined total of at least 75% of each market's audience share." *Biennial Review*

[29] *See also* Petition of Nexstar at 9-10 (in markets below the top 50, 69 of the fourth-ranked stations do not produce their own news, and in markets below the top 90, 44 of the third-ranked stations do not produce their own local news); Petition of LIN at 9-10 (according to one study submitted in this proceeding, in only two of every five DMAs between markets 101-150 do all four of the top-ranked stations carry local news, and only *eight* markets between 151-210 are served by four local news operations).

[30] *See* Petition of LIN at 7-8 (summarizing evidence in record showing the increases in local news service that have resulted from joint operations where allowed); Reply Comments of NAB in MB Docket No. 02-277 at 49-53 (filed Feb. 3, 2003) (summarizing record evidence about improvements in news and other programming made possible by local market combinations).

Order at ¶ 196 and footnote 409. As NAB previously pointed out, that study only examined local market commercial broadcast television stations, and excluded viewing of out-of-market television stations, all noncommercial stations, and, most significantly, all cable channels/networks. *See* Reply Comments of NAB in MM Docket No. 01-235 at 29-30 (filed Feb. 15, 2002). Thus, this study relied upon by the Commission seriously undercounted the number of television "voices" available in local markets, and overestimated the level of viewership concentration in these markets.[31] Such a study cannot be seen as accurately reflecting the degree of viewership concentration in any local video market, and it cannot support any conclusion that television broadcasters still dominate the mass media marketplace, as it ignores the competition provided by multichannel video programming distributors ("MVPDs"). Indeed, NAB has clearly demonstrated the dramatic decline in the viewing shares of local television stations so that today, in many markets, *less than 40 percent* of the total day viewing is attributable to all of the local television broadcasters in the market. *See supra* footnote four; *BIA Viewing Study*. The Commission simply cannot continue to rely on "evidence" that completely ignores the competition provided by MVPDs in order to retain its duopoly restrictions on local television broadcasters.[32]

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[31] It should be obvious that, if cable and noncommercial broadcast station viewing is completely disregarded, then the top commercial broadcast television stations will receive a significantly higher share of the remaining television viewing that is counted.

[32] Beyond competition for viewers, cable also offers competition to local broadcasters for advertising at the local level. NAB agrees with Nexstar that the *Biennial Review Order* improperly brushed off the effects on local television broadcasters of competition in advertising from local cable interconnects. *See* Petition of Nexstar at 7.

Clearly, the evidence in this proceeding does not support the top-four restriction in the revised duopoly rule, at least not in medium and small markets.[33] The Commission's continued retention of an overly restrictive duopoly rule in light of unrefuted evidence about competition from MVPDs in local video markets also cannot be reconciled with the opinion of the D.C. Circuit Court of Appeals in *Sinclair*.[34] In light of both applicable judicial precedent and the evidence in this proceeding, NAB urges the Commission to grant the petitions for reconsideration of Nexstar and LIN and to eliminate the top-four restriction in the duopoly rule, at least in medium and small markets.[35] The removal of needless regulatory restrictions on local television stations would enhance the ability of free over-the-air broadcasters to compete with cable and satellite television operators,[36] to remain financially viable in an ever more competitive media environment, and to continue offering increasingly expensive local news to their communities.

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[33] Indeed, one may doubt whether the top-four restriction is needed even in some or all of the top 50 markets. After all, in DMAs 26-50, only 53.4% of total day viewing is attributable to all of the in-market broadcast television stations, and even in the top 10 DMAs, only 59.4% of total day viewing is attributable to the dozen or more of the in-market broadcast television stations in those markets. *See BIA Viewing Study* at 16.

[34] *Sinclair*, 284 F.3d at 152 (remanding duopoly rule because FCC failed to demonstrate that its disregard of "non-broadcast media" was "not arbitrary and capricious").

[35] Even if the Commission declines to reconsider its top-four restriction, it should at the least allow the free transferability of duopoly combinations formed through waivers of that restriction. *See* Petitions of Nexstar at 14; LIN at 13-18 (showing that restrictions on the transfer of duopolies would exact severe penalties on duopoly owners who succeeded in transforming a formerly weak station into a top-four rated station).

[36] A cable television operator controlling dozens if not hundreds of channels and with a dominant position in the MVPD marketplace can, of course, acquire without any restrictions a broadcast television station in the same local market, while a local television broadcaster is still highly restricted in obtaining a license for a second television channel in the same market.

Finally, NAB agrees with those petitioners who urged the Commission to reconsider its needless adoption of more (rather than less) regulatory radio policies in the *Biennial Review Order*. Specifically, NAB supports those petitioners calling on the Commission to reconsider the changes made to its methodology for defining radio markets and the decision to attribute radio joint sales agreements under the multiple ownership rules. *See Biennial Review Order* at ¶¶ 239, 317.

Several petitioners asked the Commission to reconsider its decision to replace the long-standing contour overlap method of defining radio markets with Arbitron "metro" markets. *See, e.g.*, Petitions of Cumulus Media Inc.; Saga Communications, Inc.; Monterey Licenses, LLC. These and other petitioners argued, as NAB did in earlier comments,[37] that Arbitron data and market definitions lack the neutrality and consistency needed for a regulatory tool to be used by the Commission for purposes of applying the multiple ownership rules. More specifically, these petitioners pointed out that Arbitron market definitions can be manipulated by subscribers and that the use of Arbitron markets will result in a greater number of anomalous radio markets than the continued use of station contours to define radio markets.[38]

In the absence of evidence that Arbitron will in fact produce more rational and coherent and less anomalous radio markets than the Commission's previous approach, the Commission had no basis for making a change. After all, if the Commission rejects a "time-tested traditional

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[37] *See* Comments of NAB in MM Docket No. 00-244 at 13-24 (filed Feb. 26, 2001); Comments of NAB in MB Docket No. 02-277 at 89 (filed Jan. 2, 2003).

[38] *See, e.g.*, Petitions of Cumulus Media at 14-15 (identifying specific anomalies produced by the use of Arbitron metro markets); Saga Communications at 7-8 (contending that Commission has failed to adopt policies that will prevent the manipulation of Arbitron metro boundaries and "home to metro" status by subscribers); Arso Radio Corp. (pointing out the particularly anomalous treatment that Arbitron affords to Puerto Rico); Monterey Licenses at 14-15 (Arbitron

procedure," such as its well-established contour overlap methodology for defining radio markets, and replaces it with a new procedure, then the Commission must be able to show that this "new procedure is superior" because, "if not, why the change?"[39] Especially because the Commission was unable to demonstrate that the very limited number of anomalies that it identified with its contour-overlap approach had caused any actual harm to radio listeners or advertisers, NAB believes that the Commission clearly failed in the *Biennial Review Order* to offer a "reasoned analysis" for "change."[40]

NAB therefore agrees with petitioners who argued that the Commission simply failed to present a convincing, or even legally adequate, case for jettisoning its long-standing contour overlap methodology for defining radio markets and replacing that approach with manipulable and inconsistent Arbitron metro markets. The Commission's radical action seems particularly unwarranted, given the obvious availability of a less drastic solution to the limited number of anomalies produced by the contour overlap methodology. *See Biennial Review Order* at ¶ 285 (making two adjustments to the contour overlap approach to correct the "problematic aspects" of that methodology, and determining to use this adjusted contour overlap methodology at least on an interim basis to define radio markets in areas located outside of Arbitron metros). Given the

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market definitions lack objectivity and certainty and may easily be manipulated, and the Commission's station counting methodology will produce yet more anomalies).

[39] *Mountain States Telephone and Telegraph Co. v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991) (court vacated FCC order altering certain accounting requirements applicable to telecommunication service companies).

[40] *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Ins. Co*., 463 U.S. 29, 42 (1983) ("an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). *See also ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that FCC had failed to establish "the requisite 'reasoned basis' for altering [a] long-established policy" relating to television stations).

Commission's correction of the only anomalies that have been shown to occur with any frequency when utilizing contours to define radio markets, NAB urges the Commission to reconsider its adoption of Arbitron metros. Instead, the Commission should retain its contour overlap approach to defining radio markets, as adjusted in the *Biennial Review Order*. If the Commission declines to reconsider its utilization of Arbitron to define radio markets, it should at the least allow the free transferability of radio station clusters, which were properly formed under long-standing Commission policy but which were made noncompliant under the local radio ownership caps by the adoption of Arbitron. *See* Petition of Cumulus Media at 19 (prohibiting transferability undermines the efficiencies gained by consolidation and deprives group owners of the chance to recoup their investments in existing clusters upon transfer).[41]

NAB also agrees with petitioners that the Commission should not have determined to attribute radio joint sales agreements ("JSAs"). *See* Petition of Monterey Licenses at 2-7. As Monterey Licenses pointed out, the record in this proceeding contains no evidence that would support attributing JSAs, especially in light of the Commission's contrary decision in 1999 not to attribute JSAs. The Commission was unable to cite any concrete evidence supporting this change in policy, but merely asserted that its "experience administering the local radio ownership rule convinces us that we need to modify our attribution policy with regard to JSAs." *Biennial Review Order* at ¶ 322. However, despite this claim of "experience," the *Biennial Review Order* failed to include even a single example of a JSA whose operation in a "real world" radio market

[41] Certainly the Commission should not require, as one petitioner urged, the divestiture of existing radio station groups that were made noncompliant with the local radio ownership limits by the Commission's action. *See* Petition of NABOB at 9-10. Such unprecedented action would be unfair to group owners who formed station clusters in good faith reliance on long-standing Commission policies, and would deprive them of much of the value of their investments in their station groups.

would support the conclusion that all JSAs should be attributable. Instead, the *Biennial Review Order* contained only speculation about the possibility of JSAs being able to convey sufficient influence or control over a station to be considered attributable.[42]

Moreover, even if the Commission had evidence that individual licensees were utilizing JSAs to obtain control over stations in circumvention of the local ownership limits, such evidence of individual abuse of JSAs can best be dealt with through the enforcement process, rather than by altering the attribution policy toward all JSAs. Properly formed JSAs concern only the joint sale of advertising, and do not affect the core operations of broadcast stations – programming, personnel and finances. Thus, the Commission should have refrained from unnecessarily attributing all radio JSAs, especially in light of at least some evidence showing that JSAs "may actually help promote diversity by enabling smaller stations to stay on the air."[43] In sum, the Commission has simply failed to offer a "reasoned analysis" for "changing its course" with regard to attributing radio JSAs. *State Farm*, 463 U.S. at 42.

IV. Conclusion.

In considering all the petitions filed in this proceeding, the Commission should reject those urging the Commission to abandon its efforts to bring the broadcast ownership regulatory regime into the 21st century, and to reinstate outdated broadcast-only local ownership restrictions that were originally adopted in an era of broadcaster preeminence. These broad calls to "turn

[42] *See, e.g., Biennial Review Order* at ¶ 320 (JSAs have "*potential*" to "convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution"); ¶ 322 ("JSAs *may* convey sufficient influence or control over advertising to be considered attributable") (emphasis added).

[43] *Report and Order* in MM Docket Nos. 94-150, 92-51 and 87-154, 14 FCC Rcd 12559, 12612 (1999). *See also* Petition of Monterey Licenses at 5-6 (arguing that JSAs promote diversity and localism by permitting smaller broadcasters to aggregate sufficient advertising offerings to

back the clock" should be resisted because they are based on a disregard of both the competitive transformation of local media markets and the Commission's statutory obligations under the biennial review provisions of the 1996 Act.

Rather than returning to an era of outmoded broadcast ownership regulation, the Commission should instead grant those petitions for reconsideration that would help ensure the continued viability of free, over-the-air local broadcasting. In particular, the Commission should reconsider its prohibition on television duopolies formed among the top-four ranked stations in a market, at least in medium and small markets. Unrefuted evidence in this proceeding demonstrated the severe financial pressures facing local television broadcasters in smaller markets, and the justifications offered by the Commission for the top-four restriction do not apply outside the largest DMAs. The removal of this top-four restriction would enhance the ability of free, over-the-air broadcasters to compete with MVPDs, to remain financially viable in ever more competitive local media markets, and to continue offering increasingly expensive local news to their communities.

NAB also agrees with those petitioners who urged the Commission to reconsider its needless adoption of more (rather than less) regulatory radio policies in the *Biennial Review Order*. The Commission failed to present a convincing, or even legally adequate, case for jettisoning its long-standing contour overlap methodology for defining radio markets and replacing that approach with manipulable and inconsistent Arbitron metro markets. And the record in this proceeding contained no evidence that would support attributing radio JSAs, especially in light of the Commission's contrary decision in 1999.

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compete against highly consolidated media companies, without sacrificing editorial control over programming).

For all the reasons set forth above, NAB requests that the Commission deny petitions calling for the reinstatement of outdated and unnecessary local broadcast ownership policies, and to grant petitions that would aid in ensuring the future viability of free, over-the-air broadcasters, particularly local television stations in medium and small markets.

Respectfully submitted,

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October 6, 2003

CERTIFICATE OF SERVICE

I, Patricia Jones, Legal Secretary for the National Association of Broadcasters, hereby certify that a true and correct copy of the foregoing Opposition of the National Association of Broadcasters was sent this 6th day of October, 2003, by first class mail, postage prepaid, to the following:

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