

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
2018 Quadrennial Regulatory Review –)	MB Docket No. 18-349
Review of the Commissions Broadcast)	
Ownership Rules and Other Rules)	
Adopted Pursuant to Section 202 of the)	
Telecommunications Act of 1998)	

**REPLY COMMENTS OF MUSICFIRST COALITION
AND FUTURE OF MUSIC COALITION**

via electronic filing

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October 1, 2021

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INTRODUCTION AND SUMMARY

As advocates for music creators, the musicFIRST Coalition¹ and Future of Music Coalition (“FMC”)² respectfully submit this Reply Comment to the Federal Communications Commission (“Commission”) with the request that the Commission retain the Local Radio Station Ownership Caps (“LRSO Caps”) with respect to current numerical limits on commercial FM radio station ownership in local markets, as well as the current AM/FM subcaps. These rules remain necessary to promote diversity, competition, and localism in communities throughout the country. We appreciate the opportunity to share our perspective in this public record.

Our position is shared by many commenters in this proceeding: over-the-air broadcast radio has been transformed and harmed by the weakening of ownership rules and inadequate regulatory oversight. Spectrum is a scarce public resource. Broadcasters are granted broadcast licenses, for free, on the condition that they operate in the public interest. However, all too often the Commission has allowed public interest

¹ The musicFIRST Coalition is a national coalition of musicians, recording artists, singers, producers, engineers, managers, music businesses, musicians’ unions, record labels (big and small) and performance rights stakeholders that works to ensure that music creators receive fair compensation for their work on all media platforms. The founding members of musicFIRST include the Recording Academy, the Latin Recording Academy, American Association of Independent Music (“A2IM”), the American Federation of Musicians, SoundExchange, the Recording Industry Association of America (“RIAA”), the Screen Actors Guild-American Federation of Television and Radio Artists (“SAG-AFTRA”), the Society of Singers, Inc., the Christian Music Trade Association, the Music Managers Forum, Rhythm and Blues Foundation, and the Vocal Group. *The Coalition*, MUSICFIRST (2018), <https://musicfirstcoalition.org/the-coalition>.

² Future of Music Coalition is a nonprofit organization supporting a musical ecosystem where artists flourish and are compensated fairly and transparently for their work. FMC promotes strategies, policies, technologies, and educational initiatives that put artists first while recognizing the role music fans play in shaping the future and works to ensure that diversity, equality, and creativity drive artist engagement with the global music community, and that these values are reflected in laws, licenses, and policies that govern any industry that uses music as raw material for its business. See *About FMC*, FUTURE OF MUSIC COALITION, <http://futureofmusic.org/about> (last visited Oct. 1, 2021).

protections to be eroded. Accordingly, we call for policies that encourage a healthier and diverse local broadcasting marketplace. What we have observed at commercial FM radio in recent years confirms our long-held conviction that prior to rulemaking, the FCC should commission its own analysis—beyond just macroeconomics—incorporating cultural, artistic, labor, and other public interest concerns. Such analysis must authentically center on core policy principles of diversity, competition, and localism.

Understanding radio policy through an equity lens requires a serious reckoning with past and present inequities in all aspects of AM/FM policy. Music creators themselves are among the populations who have been harmed when extractive business models are allowed to go unchecked. Because of a long-standing injustice in U.S. law, music-driven AM/FM broadcasters, in particular, have been allowed to build businesses out of the uncompensated labor of recording artists. Our recordings attract listeners, yet the broadcasters do not compensate performers or sound recording rights-holders when broadcasting their recordings. This failure to compensate creators is unique among our peer nations, a national embarrassment that we have called on Congress to correct.

Beyond economic injustice, we've elsewhere described an array of harms to music communities that arise from consolidated station groups exercising unhealthy control. These concerns mirror consistent concerns from a range of stakeholders, including civil rights groups raising concerns about ownership and viewpoint diversity, public interest groups highlighting local communities' news and information needs, and unions representing radio workers connecting the dots between job losses and ownership concentration.

Nevertheless, the National Association of Broadcasters (“NAB”) obstinately insists on their most radical proposal yet. This raises the frightening possibility that a single company might be allowed to own every commercial radio station in many geographic markets, accelerating many of the harms already described by civil rights groups, unions, and media reformers. Having failed to establish consensus for their proposal even among struggling commercial FM station owners, they now desperately point solely to marketplace challenges facing the radio industry as justification for further drastic ownership deregulation while dodging accountability for their own anti-competitive actions and the impacts of their preferred deregulatory policies.

The Commission now faces a crucial choice and an exciting opportunity: it can chart a different course, recommitting to core broadcast policy goals of diversity, competition, and localism, rather than assenting to calls to further weaken important public interest protections on the flimsiest of justifications. It can define markets in ways that recognize the profound responsibilities that come with allocation of government spectrum. The Commission can choose to take a clear-eyed and comprehensive look at the impact of past policy decisions on racial equity. The Commission can use its own resources to close data gaps that have long limited its ability to truly understand and contextualize what is happening in the radio marketplace with respect to listeners, broadcast owners, and content creators, and make this crucial information available to the public and to other policymakers.

Our groups stand united in support of a more equitable future for radio: one that better serves local communities’ information and entertainment needs, reflects healthy competition, voices diverse perspectives, and recognizes the value of creative work.

DISCUSSION

I. THE NAB PROPOSES THAT THE COMMISSION ANNIHILATE NECESSARY RESTRICTIONS ON LOCAL FM RADIO OWNERSHIP

The NAB asks the Commission to completely eliminate current limits on the number of commercial FM radio stations that one entity can own in markets ranked in size below 76.³ Currently, the Commission's LRSO Caps allow a maximum of five co-owned FM stations in large markets, four co-owned FM stations in medium-sized markets, and three FM stations in the smallest markets.⁴ Under the NAB's proposal, the Commission could allow one entity to own every commercial FM radio station in small markets and many medium markets throughout the U.S. The NAB's proposal would allow common ownership of up to eight commercial FM stations in markets ranked 1-75.⁵ This proposal would be disastrous to the public interest if promulgated.⁶

The NAB re-asserts in its most recent comments that solely because competition for advertising revenue and audience has increased between various audio delivery platforms, it somehow follows that the Commission will protect the economic security of

³ See Comments of National Association of Broadcasters, MB Docket No. 18-349, at 5 (Sept. 2, 2021) [hereinafter NAB Initial Comments 9/2/21].

⁴ See 2018 Quadrennial Regulatory Review, Notice of Proposed Rulemaking, MB Docket No. 18-349, FCC 18-179, 7 ¶ 11 (Dec. 13, 2018).

⁵ See NAB Initial Comments 9/2/21, *supra* note 3, at 5 (Sept. 2, 2021). The NAB's proposed increased maximum of 8 co-owned commercial FM stations in any market ranked 1-75 does not include additional commercial FM stations allowed by waiver through the FCC's newly reinstated incubator program. As Adam Jacobson, Editor of Radio & Television Business Report stated in a recent op-ed, "the NAB and a group of nine radio broadcasting companies each submitted comments with the FCC that essentially offer the same plea to the Commission. They want a further loosening of the radio ownership rules, one that would allow one single company to own every AM radio station in a market, regardless of its size. . . . But, is it fair? Given the consolidation the industry has seen in the last 30 years, are we ready to see more when the argument is clearly about dollars, and not about consumers?" Adam Jacobson, *Deregulation Meltdown: Is More the Answer for Radio?*, RADIO + TELEVISION BUS. REP. (Sept. 3, 2021), <https://www.rbr.com/deregulation-meltdown-is-more-the-answer-for-radio>.

⁶ See, e.g., Red Rock Broadcasting Letter to FCC Re: MB Docket No. 18-349, at 1 (Sept. 22, 2021).

all U.S. AM/FM broadcasters by loosening the LRSO Caps and eliminating current limits on the number of AM/FM radio stations that one entity can own in a given market.⁷ We refute this assertion because such actions would contravene the Commission's public interest obligations to serve AM/FM radio listeners by promoting diversity, localism, and competition between AM/FM broadcasters at local market levels.⁸

While neither musicFIRST nor FMC currently take a position on whether the Commission should ease restrictions on the number of AM stations that one entity can own in a given market, we believe that the numerical restrictions on local radio station ownership as related to FM stations must be preserved in order to promote local competition, diversity, and localism. As the Commission wraps up this 2018 Quadrennial Review pursuant to the Supreme Court's recent decision in *FCC v. Prometheus Radio Project*,⁹ it is obliged to do no harm and keep the FM portions of the LRSO Caps intact.

II. THE COMMISSION MUST CONSIDER THE PUBLIC INTEREST IN DIVERSITY, LOCALISM, AND COMPETITION RATHER THAN FINANCIAL BENEFITS TO AM/FM OWNERS WHO WANT TO BUY/SELL STATIONS

While NAB asserts that Section 202(h) of the Telecommunications Act of 1996 is presumptively deregulatory and designed only with global competition for revenue and

⁷ See generally NAB Initial Comments 9/2/21, *supra* note 3.

⁸ See, e.g., *In the Matter of Amendment of Section 73.3556 of the Commission's Rules Regarding Duplication of Programming on Commonly Owned Radio Stations; Modernization of Media Regulation Initiative*, Report and Order, 35 FCC Rcd 8383 (Aug. 6, 2020) (summarizing and explaining the Commission's mandate to promote diversity and localism); see also DANA A. SCHERER, CONG. RCH. SERV., R45338, FEDERAL COMMUNICATIONS COMMISSION (FCC) MEDIA OWNERSHIP RULES (2021).

⁹ See *FCC v. Prometheus Radio Project*, 141 S.Ct. 1150 (2021).

audience in mind,¹⁰ law and long-standing FCC policy require that the public interest is the sole criteria for applying that statute.¹¹ The Court of Appeals for the Third Circuit has held that the Commission must consider effects on ownership diversity and localism, as well as competition between radio clusters at local market levels, and that Section 202(h) does not carry a presumption in favor of deregulation:

While we acknowledge that § 202(h) was enacted in the context of deregulatory amendments (the 1996 Act) to the Communications Act, we do not accept that the ‘repeal or modify in the public interest’ instruction must therefore operate only as a one-way ratchet, *i.e.*, the Commission can use the review process only to eliminate then-extant regulations. For starters, this ignores both ‘modify’ and the requirement that the Commission act ‘in the public interest.’ What if the Commission reasonably determines that the public interest calls for a more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so absent clear congressional direction otherwise.¹²

The NAB unsuccessfully sought to reverse these specific conclusions in its recent case before the Supreme Court of the United States.¹³ Specifically, the NAB, along with Bonneville International Corporation, Connoisseur Media LLC, Fox Corporation, News Corporation, News Media Alliance, Nexstar Inc., The Scranton Times L.P., and Sinclair Broadcast Group, Inc.,¹⁴ argued that “the Third Circuit contravened Section 202(h) by elevating policy concerns over the competition analysis that congress specifically required,”¹⁵ and that “Section 202(h) requires the Commission to consider competition, not minority and female broadcast ownership.”¹⁶ However, the

¹⁰ See NAB Initial Comments 9/2/21, *supra* note 3, at 5.

¹¹ See *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155-56 (2021). See generally *id.* at 38-75.

¹² *Prometheus Radio Project v. FCC*, 373 F.3d 372, 394-395 (3rd Cir. 2004) (citations omitted).

¹³ See generally Opening Brief for Industry Petitioners at 25-38, *FCC v. Prometheus Radio Project*, 141 S. Ct. (2021).

¹⁴ See *id.* at ii.

¹⁵ *Id.* at 40.

¹⁶ See *id.* at 33-35.

Supreme Court declined to adopt the NAB's arguments that would have bound the Commission to this reading of the Communications Act or the Commission's long-standing precedent.¹⁷ Rather, the Supreme Court decision affirmed the Commission's broad authority in implementing the statutory mandate of Section 202(h). The Court elaborated: "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency. A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained its decision."¹⁸ Applying this standard, the Court held that the Commission did not violate the Administrative Procedures Act by basing its analysis on the admittedly sparse record before it, when determining whether the repeal of certain cross-ownership rules would detrimentally affect minority and female ownership of broadcast properties. In addition to establishing this standard of judicial review for Quadrennial Reviews, the Supreme Court reaffirmed the broad authority of the Commission in these proceedings: "The Federal Communications Commission possesses broad statutory authority to regulate broadcast media 'as public convenience, interest, or necessity requires.' . . . The FCC has long explained that the ownership rules seek to promote competition, localism, and viewpoint diversity *by ensuring that a small number of entities do not dominate a particular media market.*"¹⁹

¹⁷ See *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155 (2021).

¹⁸ *Id.* at 1158.

¹⁹ *Id.* at 1155 (emphasis added).

Thus, the Commission must still focus this proceeding on promoting local competition, diversity, and localism.²⁰ Such action is consistent with that portion of the Commission's most recently completed Quadrennial Review (2014) in which the Commission rightly concluded that the LRSO Caps promote competition.²¹ The Commission found that the benefits to the public interest as a result of keeping the LRSO Caps were a sufficient basis for retaining the current rule. The Commission affirmed previous findings that competitive local radio markets help promote viewpoint diversity and localism, and deemed the rule consistent with the Commission's goal of promoting minority and female broadcast ownership.²²

Local consolidation of FM ownership has a history of harming localism with respect to news and information²³ as well as music playlists.²⁴ In the wake of prior waves of ownership consolidation at terrestrial radio, smaller AM/FM clusters of commercial stations, independent commercial radio stations, and noncommercial stations remain the primary sources within local communities for airplay of local or regionally-based recording artists.²⁵

²⁰ *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004); see Leadership Conference on Civil and Human Rights Letter to FCC Re: MB Docket No. 18-349; FCC 18-179 – 2018 Quadrennial Regulatory Review Reply Comment (Sept. 5, 2019).

²¹ See *2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, MB Docket No. 18-349, FCC 18-179, 7 ¶ 11 (Dec. 13, 2018) (citing *2010/2014 Quadrennial Review*, Report and Order, 31 FCC Rcd at 9897, 9898-99, paras. 82, 87).

²² *2010/2014 Quadrennial Review Order*, 31 FCC Rcd at 9897, 9898-99, paras. 82, 87.

²³ See also Michael Copps & Newton Minow, *Journalists Must Make the Shrinking Free Press a Campaign Issue*, SEATTLE TIMES (Sept. 29, 2019, 12:01 PM), <https://www.seattletimes.com/opinion/journalists-must-make-the-shrinking-free-press-a-campaign-issue>.

²⁴ *Radio Deregulation: Has it Served Musicians and Citizens?*, FUTURE OF MUSIC COALITION (Nov. 18, 2002), <https://futureofmusic.org/article/research/radio-deregulation-has-it-served-musicians-and-citizens>; see also Barack Obama & John F. Kerry, *Media Consolidation Silences Diverse Voices*, POLITICO (Nov. 7, 2007, 7:39 PM), <https://www.politico.com/story/2007/11/media-consolidation-silences-diverse-voices-006758>; PETER DICOLA, FUTURE OF MUSIC COALITION, *FALSE PREMISES, FALSE PROMISES: A QUANTITATIVE HISTORY OF OWNERSHIP CONSOLIDATION IN THE RADIO INDUSTRY* 50-81 (2006).

²⁵ See *2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Joint

According to Radio One’s comments in this proceeding, more local ownership consolidation can be expected to “lead to poorer service to radio listeners, fewer viewpoints being presented, and less localism.”²⁶ Broadcast company Sarkes-Tarzian, Inc., which owns stations in the Midwest, agrees: “[I]f the Commission loosens the current ownership limits to permit a large media conglomerate to expand broadcasting control to the majority of a single market’s limited frequencies, the incentive to create more particularized local programming dissipates in favor of maximizing revenue potential across the conglomerate’s full complement of stations. Industry employment numbers will continue to fall, consumers’ choices will shrink, localism will suffer, the lack of meaningful competition will promote homogeneity and stave off the innovation that is desperately needed for radio to co-exist with other 21st-century forms of media and advertising, and, ultimately, the long-term viability of free over-the-air broadcast radio in small markets will be endangered.”²⁷ Sarkes-Tarzian concludes: “The fact is the current ownership caps do more to promote competition and localism than further deregulation will.”²⁸

While the NAB would like the Commission to believe that the only relevant type of competition is between the AM/FM industry and every other platform that delivers content, the NAB’s proposal is really about pursuing a *reduction in local competition between owners of FM stations*.²⁹

Comment of musicFIRST Coalition & Future of Music Coalition, MB Docket No. 18-349, at ii (Apr. 29, 2019).

²⁶ Comments of Urban One, Inc., MB Docket No. 18-349, at 3 (Apr. 29, 2019); see also Reply Comments of Sarkes Tarzian, Inc., MB Docket No. 18-349, at 4-5 (May 29, 2019).

²⁷ Reply Comments of Sarkes Tarzian, Inc., MB Docket No. 18-349, at 4-5 (May 29, 2019).

²⁸ *Id.* at 5.

²⁹ See, e.g., Red Rock Broadcasting Letter to FCC Re: MB Docket No. 18-349 (Sept. 22, 2021); Comments of Urban One, Inc., MB Docket No. 18-349, at 3-4, 6 (Apr. 29, 2019).

As it is now, owners of one or two FM stations in a given local market already must compete locally against clusters of up to 5 co-owned FM stations in their marketplace and every global audio platform.³⁰ It would be devastating to those smaller local clusters to have to compete against outsized AM/FM local competitors. As Sarkes-Tarzian Inc. explains:

The practical effect of loosening the current ownership limits, particularly in smaller markets, would be to encourage further ownership consolidation in markets that already struggle to support a diversity of operators. To further solidify majority control by increasing larger broadcasters' already greater competitive advantages would likely render it impossible for smaller operators to compete or to ever again gain a foothold in such markets. . . . Sarkes Tarzian believes that small broadcasters, even in larger markets, bring a different sensibility to programming and community engagement than do larger broadcasters, and this diversity will be lost, and even greater homogenization will set in, when the big fish eat all the smaller ones.³¹

As Urban One³² expressed in this docket: "The plaintive plea now heard at the FCC for fewer radio ownership restrictions is the cry of large radio entities asking the government to assist in quashing the competition to aid them in expanding their clout."³³ Urban One argued that if the Commission were to eliminate the LRSO Caps, a reduction in the number of competitors in Urban One markets would occur, with one or two companies "ultimately owning most of the other stations."³⁴ Urban One concluded that the NAB's proposed changes to the LRSO Caps "would negatively impact diversity of ownership and would reduce competition in radio broadcasting."³⁵

³⁰ Reply Comments of Mount Wilson FM Broadcasters, Inc., MB Docket No. 18-349, at 3 (May 29, 2019).

³¹ *Id.*; see also Reply Comments of Sarkes Tarzian, Inc., MB Docket No. 18-349, at 1-2.

³² Urban One owns 54 music and talk AM/FM stations in 15 large and medium markets throughout the U.S. Their primary goal has long been and remains to provide diverse programming to largely Black American and urban audiences. See Comments of Urban One, Inc., MB Docket No. 18-349, at 5-6 (Apr. 29, 2019).

³³ See *id.* at 2-3.

³⁴ See *id.*

³⁵ Notice of *Ex Parte* Communication, Karen Wishart, MB Docket No. 18-349 (May 30, 2019).

In a jointly filed reply comment, Marshall Steinbaum, Public Citizen, Open Media and Information Companies Initiative, Artist Rights Alliance and Open Markets Institute explained that loosening the AM/FM ownership caps would significantly reduce competition in geographic markets, shutting out smaller clusters from control of media. “The result of that would be greater homogeneity and the exclusion of music and of musicians that represent diverse communities, cultural traditions, and points of view. Precedent demonstrates that consolidated media ownership has far-reaching consequences for women and minorities and is frequently misaligned with consumer interests.”³⁶

A. NAB incorrectly defines ‘marketplace’ as all content delivery platforms rather than local broadcast radio

For purposes of reviewing the current LRSO Caps, the applicable definition of the marketplace is still local radio,³⁷ notwithstanding the fact that nonbroadcast audio delivery platforms have grown recently and appear to have taken some revenue from the AM/FM industry.³⁸ The Commission has recognized that when determining the appropriate market definition for the LRSO Caps, it must determine whether nonbroadcast audio platforms “provide consumers with a meaningful substitute for local broadcast radio stations.”³⁹ We have acknowledged,⁴⁰ and continue to acknowledge

³⁶ Reply Comments of Marshall Steinbaum et al., MB Docket 18-349, at 1 (May 29, 2019).

³⁷ See *2018 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Joint Comment of musicFIRST Coalition & Future of Music Coalition, MB Docket No. 18-349, at 3-12 (Apr. 29, 2019).

³⁸ See generally Reply Comments of the National Association of Broadcasters, MB Docket Nos. 18-349 & 17-289, at 55-75 (May 29, 2019).

³⁹ See *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Second Report and Order, 36, para. 90 (2016) [hereinafter FCC Second Report and Order].

⁴⁰ Joint Reply of MusicFIRST Coalition and Future of Music Coalition, MB Docket No. 18-227, at 5, 7 (Oct. 9, 2018).

that audiences at digital audio platforms have grown in recent years.⁴¹ However, it is not clear that nonbroadcast audio platforms provide a meaningful substitute for local terrestrial radio.

As the Commission stated in its Second Report and Order for the 2014 Quadrennial Review, “the ability to access audio content alone is not sufficient to demonstrate substitution.”⁴² While localism has been decimated at many radio groups with large clusters who have increasingly piped in syndicated programming and harshly cut local content and jobs, particularly in the wake of the elimination of the Main Studio Rule,⁴³ FM radio *could* still be uniquely local if those radio owners were to take their public interest obligations seriously. Nothing about this has changed from listeners’ perspective.⁴⁴

Digital music platforms are also distinguishable from music-driven commercial FM radio insofar as the digital music platforms are often more customized to specific tasks of individual listeners than local commercial broadcast FM stations. Digital music platforms also often provide superior means of new music discovery for their listeners as compared to commercial FM stations.⁴⁵

⁴¹ See Comments of musicFIRST Coalition & Future of Music Coalition, GN Docket No. 20-60, at 12-14 (Apr. 27, 2020).

⁴² That is because terrestrial radio has the potential to be uniquely tailored to the needs of local markets and is free for listeners to access. See FCC Second Report and Order, *supra* note 39, at 36, para. 90.

⁴³ See *generally* Statement of Commissioner Jessica Rosenworcel, Re: Electronic Delivery of Notices to Broadcast Television Stations; Modernization of Media Initiative, MB Docket Nos. 19-165, 17-105, Report and Order (Feb. 1, 2020).

⁴⁴ See FCC Second Report and Order, *supra* note 39, at 37, para. 92. See *generally* Reply Comments of Common Cause and the National Hispanic Media Coalition, GN Docket No. 20-60, at 9 (May 29, 2020).

⁴⁵ CHRISTIAN L. CASTLE & CLAUDIO FEIJÓO, WORLD INTELLECTUAL PROP. ORG., STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS 26 (2021) (“[T]he digital music service is configured as a showcase for access to music provided by the platform, based on the tastes and interests identified by the system, ad-hoc proposals and / or user choices, trying to achieve the highest degree of alignment (customization) possible with the real preferences of each consumer. . . . [D]igital music platforms [also] conduct promotions of certain musical

In its current Quadrennial Review, the Commission reiterates, “Do non-broadcast audio services provide programming that responds to the needs and interests of local markets?”⁴⁶ Rather than answering this question, the NAB’s recent comment avoids it altogether. Instead, the NAB argues that evidence of recent decreased advertising revenue within the AM/FM radio industry as a whole is itself a sufficient reason to define the relevant “marketplace” as all audio providers.⁴⁷

In contexts other than this proceeding in which it is to NAB’s marketing or lobbying advantage to characterize broadcasting as local in nature, the NAB eagerly does so,⁴⁸ even though the deregulatory policies that it advocates for undermine localism. In its legislative advocacy, the NAB has cloaked itself in the banner of “local radio” while endorsing the so-called “Local Radio Freedom Act.” That bill, a non-binding resolution, encourages the continued practice of depriving music creators from being paid royalties for the use of their sound recordings on AM/FM radio.⁴⁹ But in *this* docket in which it is to the NAB’s advantage to downplay the fact that its potential for localism cannot be substituted by digital competitors, the NAB is conveniently silent when asked about how this factor should be analyzed with respect to potential substitution among platforms. The Commission should thus be skeptical of the NAB’s hypocritical

styles, artists, or themes that allow the platform to become an access point to discover new content with which to maintain the user's interest and build loyalty.”).

⁴⁶ *Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 179A1, at 22 (2018).

⁴⁷ See generally NAB Initial Comments 9/2/21, *supra* note 3, at 60-84.

⁴⁸ See, e.g., TVT Staff, *May 5 is Tower Technician Appreciation Day*, TV TECH, (May 4, 2021), (emphasis added), <https://www.tvtechnology.com/news/may-5-is-tower-technician-appreciation-day>. As NAB President Gordon Smith recently stated, “NAB salutes America’s tower technicians whose work is critical to the operation of broadcast radio and television stations. The particular skill set required, including working under dangerous conditions, is vitally important *in preserving broadcasting’s uniquely local* and resilient platform on which consumers and communities rely.” *Id.*

⁴⁹ Morgan Enos, Opinion, *Congress: It’s Time to Side with Music Creators Over Big Radio*, GRAMMY, Apr. 29, 2021; see also Richard James Burgess, Opinion, *The So-Called ‘Local Radio Freedom Act’ is Actually an Anti-Creator, Anti-Property-Rights Bill (Guest Column)*, BILLBOARD, Feb. 25, 2019.

arguments in this proceeding. The deregulatory policies that the NAB has advocated for, including its successful campaign to have the Commission eliminate the Main Studio Rule and current efforts to gut the LRSO Caps, are an attack on localism for the sole purposes of financially benefiting those AM/FM owners seeking further economies of scale.⁵⁰

The NAB's latest comments ignore the Commission's direct questions about how AM/FM radio is distinguishable from the other platforms.⁵¹ Instead, the NAB asserts that since competition between all audio platforms has increased, the Commission should be concerned only with the financial interests of those few AM/FM owners who either 1) can afford to buy more stations than are currently allowed under existing ownership restrictions, or 2) want to sell their station(s) to an entity that is already currently maxed out in their local market under the current LRSO Caps. Necessarily, these are the only two subcategories of AM/FM broadcast owners that could benefit from loosening current restrictions on FM ownership.⁵²

B. Further ownership consolidation is not the answer to terrestrial radio's competition woes

We dispute the NAB's argument that increased competition between the commercial AM/FM industry and all other content delivery platforms is a sufficient reason for the Commission to loosen restrictions on local FM ownership. Just because dissatisfied former FM listeners are now listening more to digital audio services, it does

⁵⁰ See Red Rock Broadcasting Letter to FCC Re: MB Docket No. 18-349 (Sept. 22, 2021).

⁵¹ See FCC Second Report and Order, *supra* note 39, at 37, para. 92.

⁵² See Addendum to Mt. Wilson Reply Comments in Response to NAB Reply Comments Pertaining to Local Radio Ownership Limits, MB Docket Nos. 09-182, 07-294, at 2 (July 3, 2012).

not follow that the Commission should lift local ownership restrictions.⁵³ From a competitive standpoint, those ownership restrictions protect smaller local commercial FM radio stations from those clusters that are currently maxed out of FM licenses under the LRSO Caps.⁵⁴

The NAB fails to acknowledge that AM/FM radio stations already enjoy a significant unfair competitive advantage over every other audio delivery platform because AM/FM radio is thus far exempt from the requirement that audio delivery platforms pay royalties to music creators for the use of sound recordings.⁵⁵ AM/FM is the only music-driven audio platform that does not pay recording artists and copyright owners for the use of their sound recordings.⁵⁶ Large AM/FM radio clusters already enjoy a competitive advantage over smaller counterparts by virtue of local market share while also holding an advantage over digital audio delivery platforms who, unlike AM/FM, pay for the privilege of using sound recordings.⁵⁷

⁵³ Reply Comments of Common Cause and the National Hispanic Media Coalition, GN Docket No. 20-60, at 13-14 (May 29, 2020); Comments of the American Economic Liberties Project and Open Markets Institute, GN Docket No. 20-60, at 5-6 (May 27, 2020).

⁵⁴ NAB Initial Comments 9/2/21, *supra* note 3, at 72-75.

⁵⁵ *AM/FM Radio Royalty Loophole*, SOUND EXCHANGE (2021), <https://www.soundexchange.com/advocacy/closing-the-amfm-radio-royalty-loophole>; see also Randolph J. May & Seth L. Cooper, *Considering Copyright on Constitution Day*, FEDERALIST SOCIETY (Sept. 17, 2021) (“First, Congress could recognize full ‘public performance’ rights to owners of copyrighted sound recordings. The law generally secures to copyright owners a ‘public performance’ right to receive royalties when their creative works are transmitted to the public or performed before audiences. But sound recording owners are denied those rights whenever terrestrial AM/FM radio stations play their music over the air. The law unfairly gives those stations a special exemption from having to pay royalties. As a result, copyright owners receive nothing when radio stations play their music to attract listeners and generate ad revenues.”); *No Basis for Allowing Radio to Play Music for Free*, AM. FED’N MUSICIANS (Nov. 18, 2016), <https://www.afm.org/2016/11/study>.

⁵⁶ SOUND EXCHANGE, *supra* note 55.

⁵⁷ See *SoundExchange, Inc. v. Copyright Royalty Board*, 904 F.3d 41, 45 (DC Cir. 2018); *id.*; John Villasenor, *Why Artists Should Always Get Paid By Broadcasters Who Play Their Songs*, FORBES (July 2, 2012), <https://www.forbes.com/sites/johnvillasenor/2012/07/02>. Note that the NAB has long argued that its television broadcasters should be better compensated for the retransmission of their shows. In that context, they claim that their entertainment creators should be paid fairly for the use of their TV shows, while the NAB has hypocritically fought the music industry, claiming that terrestrial radio should remain exempt from paying anything for the use of sound recordings. See Comments of the National Association of Broadcasters, MB Docket 18-349, at 97 (Sept. 2, 2021).

Some of AM//FM's loss of audience share is simply due to proliferation of competing platforms who provide listeners fewer ads, customizable playlists of music, and, in many cases, broader playlists of music.⁵⁸ Some AM/FM clusters' loss of audience is somewhat self-inflicted by parent owners so focused on cost savings that they have culled on-air talent and programming staff, and replaced locally programmed content with nationally syndicated programming and products that are increasingly homogenous with other geographic markets.⁵⁹ The NAB and owners of AM/FM clusters in many markets have a history of arguing that cost-savings caused by ownership consolidation leads to investment in local programming.⁶⁰ It hasn't.⁶¹

⁵⁸ See Reply Comments of Mount Wilson FM Broadcasters, Inc., MB Docket No. 18-349 (May 29, 2019); Reply Comments of the National Association of Broadcasters, MB Docket Nos. 18-349 & 17-289, 61-63 (May 29, 2019); see also *BIA Revises Local Radio Advertising Estimates Down to \$12.8 B in 2020 Due to Pandemic: Transition to Digital Accelerating*, BIA ADVISORY SERV. (June 25, 2020), <http://www.biakelsey.com/bia-revises-local-radio-advertising-estimates-12-8-b-2020-due-pandemic-transition-digital-accelerating>.

⁵⁹ See, e.g., Richard Wagoner, *What's Wrong with KROQ 106.7 FM, and What Can Be Done to Fix It*, L.A. DAILY NEWS, June 22, 2021; Elias Leight, *'The Culling Has Begun': Inside the iHeartMedia Layoffs*, ROLLING STONE, Jan. 15, 2020; Adam Jacobson, *A Third Reduction in Force Claims Many iHeartRadio PDs*, RADIO + TELEVISION BUS. REP. (Nov. 3, 2020); Rodney Ho, *Power 96.1 Cuts All Local Talent as the Bull Loses Afternoon Host*, ATL. J.-CONST. (Dec. 2, 2020); Adam Jacobson, *Audacy Stock in a Funk as CHR Stations Cut Staff*, RADIO + TELEVISION BUS. REP. (July 15, 2021); Lance Venta, *Townsquare Makes Cuts in Portland & the Jersey Shore*, RADIO INSIGHT (Dec. 1, 2020); Jeff Blumenthal, *iHeart Layoffs Hit Longtime Philadelphia Radio Executive, On-Air Personalities*, PHILA. BUS. J. (Nov. 4, 2020); Lance Venta, *Large Round of Layoffs Hit Cox Media Group Stations*, RADIO INSIGHT (Sept. 24, 2021); "Doc" Walker, *Who Worked at WTEM for 27 Years, Among Layoffs at D.C. Radio Station*, CAPITOL COMMUNICATOR (Nov. 23, 2020).

⁶⁰ See, e.g., Comments of the National Association of Broadcasters, MB Docket No. 18-349, at 14-15 (Sept. 2, 2021); see also, e.g., *Prepared Testimony of Richard Weening Executive Chairman Cumulus Media Inc. Before the House Committee on the Judiciary Subject - H.R.2533, the "Fairness in Telecommunications License Transfers Act of 1999*, 106th Cong. (1999), where Cumulus' then-chairman Richard Weening stated, "We acquire independently owned radio stations and combine them into a cluster to share infrastructure resources like engineering, accounting, physical facilities and the like. This allows us to reduce operating costs anywhere from 10% to 20%. We are then able to use the cost-savings and efficiencies gained through consolidation to help fund increased investments in research, programming and sales. Our general approach is to enhance the quality of radio for listeners, which in turn strengthens the power and utility of the radio medium for advertisers." Cumulus completed bankruptcy restructuring in 2018.

⁶¹ See Fisher Jack, *Special Edition: The Living Legends Foundation Presents the Living Legends Series with David C. Linton*, EURWEB (Oct. 4, 2016); see also Motley Fool Staff, *Is Cumulus the Most Financially Irresponsible Company in Media?*, FOX BUS. (May 10, 2017); *The Inside Story on How Cumulus Ended Up in Bankruptcy Court*, INSIDE RADIO (Dec. 14, 2017) ("From 1998-2013 Cumulus closed on roughly \$5 billion in acquisitions to grow its radio empire, with the \$2.5 billion purchase of

Indie FM broadcaster Red Rock Broadcasting, an independent owner of four FM stations in St. George, Utah, argues vociferously against the NAB's proposal, explaining:

If 1 owner is permitted to own all of the radio stations in a market, opportunities for local employment would be severely reduced and unemployment would increase. Consolidation of ownership always results in the reduction of employment opportunity because of perceived savings through economic "scale". This "scale" comes at the expense of local employment opportunity. We have seen this job "consolidation" strategy this past year in the actions taken by I Heart Radio, Audacy, and Cumulus Media among others who are trying to boost their stock prices by drastically reducing overhead through eliminating employees. If ownership of all of the radio stations in a community was permitted by 1 company, the diversity of programming, news and public affairs programming and community service would end because the checks and balances provided through competition would no longer exist. The impetus that local owners have to carry local football games, high school events, charity causes and town hall discussions, does not exist in the playbook of the large groups who plug in their national programming as a substitute for genuine local community service programming.⁶²

According to Jerry Colliano's blog *Inside Music Media*, "Apollo's Cox Media Group, a mere shadow of its former self, saw at least 13 programming firings" in September, 2021.⁶³ Hedge fund Apollo had purchased Cox Media Group in 2019, promising "a new partnership to drive future investment, innovation and growth," making long time radio executive Kim Guthrie the group's president.⁶⁴ But Guthrie, the "glue

Citadel Broadcasting in 2011 its biggest purchase. . . . The cash flow the company was generating couldn't support the high prices it paid for all those acquisitions, which also included the 2013 purchase of Dial Global (now Westwood One) for \$260 million. That drove up the company's leverage to excessive levels."); Glenn Peoples, *How Major Music Companies on Debt and Credit to Weather the Pandemic*, BILLBOARD (July 8, 2020); Comments from the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), MB Docket Nos. 18-349 et al., at 5 (Sept. 2, 2021).

⁶² See Red Rock Broadcasting Letter to FCC Re: MB Docket No. 18-349, at 1 (Sept. 22, 2021).

⁶³ Jerry Del Colliano, *Apollo's New Plans For Cox Radio*, INSIDE MUSIC MEDIA (Sept. 24, 2021), <https://insidemusicmedia.com/subscription-options/?redirecting=https://insidemusicmedia.com/apollos-new-plans-for-cox-radio>.

⁶⁴ *Done Deal: Apollo Affiliates Cinch Purchase of Cox Radio, TV Stations*, INSIDE RADIO (Dec. 18, 2019), <http://www.insideradio.com/done-deal-apollo-affiliates-cinch-purchase-of-cox-radio-tv-stations>.

that held the company together,” resigned in May 2020 after realizing that the hedge fund owner had no interest in investment, innovation, and growth, and instead was doing what hedge fund radio owners do: slashing costs dramatically and firing programming staff.⁶⁵

Urban One commented in this docket that if local competitors are “eliminated due to no radio ownership limits, broadcasters would have no incentive to invest their resources into great programming or localism. Rather, broadcasters would most likely look to decrease overhead and increase revenue, particularly if their debt obligations have substantially increased.”⁶⁶

This reality has been attested by a multitude of commenters from across the radio and public interest landscape, including but not limited to the National Association of Black Owned Broadcasters,⁶⁷ Urban One,⁶⁸ Taxi Productions, Inc. (owner of KJLH-FM Los Angeles),⁶⁹ Multicultural Media, Telecom & Internet Council,⁷⁰ National Hispanic Media Coalition,⁷¹ the Leadership Conference on Civil and Human Rights,⁷² Sarkes-

⁶⁵ Del Colliano, *supra* note 63.

⁶⁶ *2018 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of Urban One, Inc., MB Docket No. 18-349, at 3, para. 5 (Apr. 29, 2019).

⁶⁷ See *generally* Comments of National Association of Black Owned Broadcasters, MB Docket No. 18-349 (Sept. 1, 2021); Notice of *Ex Parte* Communication, James L. Winston, President of National Association of Black Owned Broadcasters, MB Docket No. 18-349 (May 31, 2019).

⁶⁸ Notice of *Ex Parte* Communication, Karen Wishart, Chief Administrative Office for Urban One, MB Docket No. 18-349 (May 30, 2019); Comments of Urban One, Inc., MB Docket No. 18-349 (Apr. 29, 2019).

⁶⁹ See Reply Comments of Taxi Productions, Inc., MB Docket No. 18-349, at 1 (May 29, 2019).

⁷⁰ See *generally* Further Comments of MMTTC, MB Docket No. 18-349 (Aug. 31, 2021); Comments of the Multicultural Media, Telecom & Internet Council, MB Docket No. 18-349 (Apr. 28, 2019).

⁷¹ See *generally* Reply Comments of Common Cause and National Hispanic Media Coalition, MB Docket No. 20-60 (May 29, 2020).

⁷² See *generally* Comments of the Leadership Conference on Civil and Human Rights et al., MB Docket No. 18-347 (Sept. 5, 2019).

Tarzian, Inc.,⁷³ SAG-AFTRA,⁷⁴ United Church of Christ, OC Inc., Common Cause, National Association of Broadcast Employees and Technicians, Communications Workers of America,⁷⁵ American Economic Liberties Project, Open Markets Institute,⁷⁶ iHeart Media, Inc.,⁷⁷ Free Press,⁷⁸ Salem Media Group,⁷⁹ Marshall Steinbaum, Public Citizen, Open Media and Information Companies' Initiative, Artist Rights Alliance,⁸⁰ Mt. Wilson Broadcasters, Inc. (owner of KKGO-FM Los Angeles),⁸¹ Writers Guild of America East, AFL/CIO,⁸² and many more.⁸³ Many of these commenters attest to the fact that eviscerating current limits on local commercial FM ownership would result in grave harms to diversity, localism, and competition at local market levels, which have already suffered in the wake of the elimination of the National Radio Station Ownership Caps in 1996 and Main Studio Rule in 2017.⁸⁴

⁷³ See Reply Comments of Sarkes Tarzian, Inc., MB Docket No. 18-349, at 3 (May 29, 2019).

⁷⁴ See *generally* Comments from the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), MB Docket Nos. 18-349 et al. (Sept. 2, 2021).

⁷⁵ See Comments of United Church of Christ et al., MB Docket No. 18-349, at 2 (Sept. 2, 2021).

⁷⁶ See *generally* Comments of the American Economic Liberties Project & Open Markets Institute, GN Docket No. 20-60 (May 27, 2020).

⁷⁷ See Notice of *Ex Parte* Communication, Dan Dukes, MB Docket Nos. 18-349, 20-401 (Sept. 20, 2021); Comments of the American Economic Liberties Project & Open Markets Institute, GN Docket No. 20-60 (May 27, 2020).

⁷⁸ See *generally* Comments of Free Press, MB Docket No. 18-349 (Sept. 2, 2021); Reply Comments of Free Press, MB Docket No. 18-349 (May 29, 2019).

⁷⁹ See *generally* Reply Comments of Salem Media Group, MB Docket 18-349 (May 29, 2019).

⁸⁰ See Reply Comments of Marshall Steinbaum et al., MB Docket 18-349 (May 29, 2019).

⁸¹ See *generally* Reply Comments of Mount Wilson FM Broadcasters, Inc., MB Docket No. 18-349 (May 29, 2019).

⁸² See Comments of the Writers Guild of America, East, AFL-CIO, MB Docket No. 18-349, at 3 (Feb. 8, 2019).

⁸³ For example, over 1,400 express comments are in ECFS from individual radio listeners and music creators expressing these concerns.

⁸⁴ See, e.g., Comments of National Association of Black Owned Broadcasters, MB Docket No. 18-349, at 9 (Sept. 1, 2021); Comments of Urban One, Inc., MB Docket No. 18-349, at 1 (Apr. 29, 2019); Reply Comments of Taxi Productions, Inc., MB Docket No. 18-349, at 2-3 (May 29, 2019); Comments of the Multicultural Media, Telecom & Internet Council, MB Docket No. 18-349, at 1 (Apr. 28, 2019); Reply Comments of Sarkes Tarzian, Inc., MB Docket No. 18-349, at 3 (May 29, 2019); Comments of United Church of Christ et al., MB Docket No. 18-349, at ii (Sept. 2, 2021); Comments of Free Press, MB Docket No. 18-349, at 7 (Apr. 29, 2019); Reply Comments of Salem Media Group, MB Docket 18-349, at 2-3 (May 29, 2019); Reply Comments of Marshall Steinbaum et al., MB Docket 18-349, at 2 (May 29, 2019); Reply Comments of Mount Wilson FM Broadcasters, Inc., MB Docket No. 18-349, at 4 (May 29, 2019).

The NAB argues that the AM/FM industry’s advertising revenues are not projected to regain their pre-pandemic levels and that this compels further ownership deregulation at local market levels.⁸⁵ In fact, the few AM/FM owners who are currently hitting the LRSO Caps appear to be bouncing back nicely.⁸⁶ Permanent ownership deregulation is not the right remedy.⁸⁷

We indeed empathize with owners of radio stations who lost revenue in the last two years in particular. We want radio—especially music-driven radio—to thrive. We understand what it’s like to have a pandemic take away a substantial portion of one’s revenue. For many music performers, the most significant source of their incomes was lost during the pandemic, as live touring was shut down.⁸⁸ We simply don’t think that the way to fix the financial woes of the entire AM/FM industry is to allow those with the largest local clusters of FM stations to acquire monopolies.

See *generally* Statement of Commissioner Jessica Rosenworcel, Re: Electronic Delivery of Notices to Broadcast Television Stations; Modernization of Media Initiative, MB Docket Nos. 19-165, 17-105, Report and Order (Feb. 1, 2020) (“One of the very first media modernization projects taken up by the FCC was the elimination of the Main Studio Rule. This rule required that stations maintain a physical presence in the community they serve. It has a long history in broadcasting but under the guise of saving radio, this agency—over my objection—gutted the Main Studio Rule. My colleagues said this would save costs and keep stations on air. Here’s what it really did: Two weeks ago the largest radio company laid off hundreds of on-air hosts in small and medium-sized markets across the country. That’s because they had the green light from this agency to cut employees, shutter operations, and pipe in content from far away but still claim the station is local.”).

⁸⁵ See NAB Initial Comments 9/2/21, *supra* note 3, at 75-84.

⁸⁶ See *Radio Shows Strong Growth During Continued Economic Recovery*, INSIDE RADIO (July 20, 2021), <http://www.insideradio.com/free/radio-shows-strong-growth-during-continued-economic-recovery>; Paul Mclane, *U.S. Local Ad Revenue to Grow in '21, BIA Predicts*, RADIO WORLD (Dec. 3, 2020), <https://www.radioworld.com/news-and-business/programming-and-sales>; see also e.g., *Fourth Quarter 2020 Investor Presentation*, IHEARTMEDIA (Feb. 25, 2021).

⁸⁷ Explains Adam Jacobson, Editor of Radio & Television Business Report, “Conjecture is one thing. But amending rules that open the avenues to what’s ludicrous today but a probable deal in nine years is dangerous. For radio to truly capitalize on its reach story, and recoup those lost dollars to local digital, it needs to look in the mirror and ask itself the toughest question no one wants to posit: *Is our content as good as it can be so we can fully triumph over the scourge of local digital?*” Adam Jacobson, *Deregulation Meltdown: Is More the Answer for Radio?*, RADIO + TELEVISION BUS. REP. (Sept. 3, 2021), <https://www.rbr.com/deregulation-meltdown-is-more-the-answer-for-radio>.

⁸⁸ See CHRISTIAN L. CASTLE, ESQ. & CLAUDIO FEIJÓO, WORLD INTELL. PROP. ORG., *STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECON. AND LEGAL CONSIDERATIONS* 17 (2021).

III. LACK OF CAPITAL OFTEN HINDERS DIVERSITY AND COMPETITION ON FM AIRWAVES, WHILE RESTRICTIONS ON COMMON OWNERSHIP OF STATIONS PROMOTE IT

The NAB falsely claims that a reason why minority and female ownership are underrepresented among AM/FM owners is somehow the LRSO Caps make it even harder for minority and female prospective owners to get capital. Despite a long string of citations, none of the sources provided by the NAB actually support this assertion. Instead, these sources support a different, accurate proposition that minority and female broadcast owners have difficulty in getting access to capital at all.⁸⁹ Not one of the NAB's citations actually support the far-fetched notion that *current LRSO Caps contribute to minority and female radio broadcasters' long-documented difficulty obtaining capital.*

However, the NAB alleges without support that minority and female prospective FM owners who want to purchase FM stations are stymied in those efforts because lenders/investors—who would otherwise provide financing to these new buyers—won't do so unless the current LRSO Caps on the number of commercial FM stations in the applicable local market is lifted.⁹⁰ Here, the NAB uses the very real and vexing problem of dismal representation of minority and female broadcast ownership as a justification for eliminating the same LRSO caps that have helped protect what little ownership diversity remains. This repugnant argument is even more galling when one recalls that the NAB recently argued to the Supreme Court of the United States that “Section 202(h)

⁸⁹ See *Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, Report and Order, MB Docket No. 17-289 (Aug. 3, 2018).

⁹⁰ See NAB Initial Comments 9/2/21, *supra* note 3, at 10-19.

requires the Commission to consider competition, not minority and female broadcast ownership.”⁹¹

NAB’s comments argue that the LRSO Caps should be eviscerated because those ownership limits have not promoted ownership diversity.⁹² That assertion is entirely false. The LRSO Caps have been crucial in protecting what little is left of ownership diversity in commercial FM radio in the wake of national ownership consolidation.⁹³ This fact has been attested to in comments by a multitude of commenters including but not limited to the National Association of Black Owned Broadcasters,⁹⁴ Urban One,⁹⁵ Taxi Productions, Inc. (owner of KJLH-FM Los Angeles),⁹⁶ Multicultural Media, Telecom & Internet Council (“MMTC”),⁹⁷ National

⁹¹ See Opening Brief for Industry Petitioners at 33-35, *FCC v. Prometheus Radio Project*, 141 S. Ct. (2021).

⁹² NAB Initial Comments 9/2/21, *supra* note 3, at 9-19.

⁹³ See Comments of Urban One, Inc., MB Docket No. 18-349, at 6 (Apr. 29, 2019); see also David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S. J. POL’Y & JUST. 44, 98-99 (2018); Comments of the American Economic Liberties Project & Open Markets Institute, GN Docket No. 20-60, at 5 (May 27, 2020) (“[C]oncentrated ownership of radio stations poses the danger of stifling media diversity and exacerbating the marginalization of women and queer artists.”).

⁹⁴ See *generally* Comments of National Association of Black Owned Broadcasters, MB Docket No. 18-349 (Sept. 1, 2021); Notice of *Ex Parte* Communication, James L. Winston, President of National Association of Black Owned Broadcasters, MB Docket No. 18-349 (May 31, 2019).

⁹⁵ Notice of *Ex Parte* Communication, Karen Wishart, Chief Administrative Office for Urban One, MB Docket No. 18-349 (May 30, 2019); Comments of Urban One, Inc., MB Docket No. 18-349 (Apr. 29, 2019).

⁹⁶ See Reply Comments of Taxi Productions, Inc., MB Docket No. 18-349, at 1 (May 29, 2019) (“Ownership limits go at least part way to prevent large companies from having such an overwhelming market share that they can price some of their advertising products below cost, leaving smaller operators unable to compete and survive, and they can pressure advertisers to deal exclusively with only them. No one has shown that adding a few more stations to a conglomerate mix will make the difference between survival and going out of business for companies constrained by today’s caps, but independent broadcasters like KJLH know that adding those stations could break the backs of small station owners.”).

⁹⁷ See *generally* Further Comments of MMTC, MB Docket No. 18-349 (Aug. 31, 2021); Comments of the MMTC, MB Docket No. 18-349 (Apr. 28, 2019).

Hispanic Media Coalition,⁹⁸ the Leadership Conference on Civil and Human Rights,⁹⁹ and Sarkes-Tarzian, Inc,¹⁰⁰ among others.

As Urban One explained, “Radio ownership diversity is not fostered by FCC rules that favor anti-competitive blocks of station ownership that will dominate local markets—such local radio behemoths have the ability to take actions that make entering and staying in the business of operating competing stations financially imprudent and challenging.” David Honig, President Emeritus of MMTTC, explained in his 2018 law review article, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused* that, “Throughout the history of broadcasting, minority broadcasters have almost never bumped up against the limits that govern how many television or radio stations a company can own in a market or nationwide. When those limits are lifted, competing companies benefit, and capital flows to them and away from companies unable to take advantage of consolidation.”¹⁰¹

The NAB argues: “Maintaining structural ownership limits fails to promote new entry into broadcasting because those limits do not address the primary obstacle facing new entrants, particularly minorities and women - a lack of access to capital.”¹⁰² This assertion conflates the very real issue of minority and female broadcasters’ lack of access to capital with what Supreme Court of the United States has said the LRSO

⁹⁸ See generally Reply Comments of Common Cause and National Hispanic Media Coalition, MB Docket No. 20-60.

⁹⁹ See generally Comments of The Leadership Conference on Civil and Human Rights et al., MB Docket No. 18-347 (Sept. 5, 2019).

¹⁰⁰ See Reply Comments of Sarkes Tarzian, Inc., MB Docket No. 18-349, at 3 (May 29, 2019).

¹⁰¹ David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S. J. POL’Y & JUST. 44, 98 (2018).

¹⁰² NAB Initial Comments 9/2/21, *supra* note 3, at 11.

Caps are about: promoting “competition, localism, and viewpoint diversity by ensuring that a small number of entities do not dominate a particular media market.”¹⁰³

The NAB cites Grant Co. Broadcasters, Inc., owner of two classic country FM stations in Kentucky (“Grant”), for the noncontroversial proposition that a significant problem with “independent and minority ownership” is a lack of access to capital.¹⁰⁴

The NAB then cites Grant for the more controversial assertion that it is “easier to get a 100 million dollar deal done than a \$10 million dollar deal,” such that deregulation would “help create further demand for sellers.”¹⁰⁵

The NAB goes on to falsely assert, without support in its inapplicable string-cites, the proposition that *a problem that minority and female prospective owners have when trying to obtain such capital is that would-be investors/lenders think that current numerical limits on local commercial FM ownership are too restrictive.*¹⁰⁶ In other words, the NAB argues that minority and female prospective owners would have an easier time getting capital if only they could buy far more stations in a given market than the current LRSO Caps allow. If this proposition were true, then presumably the NAB would have cited some authority actually supporting the proposition. It did not.¹⁰⁷

The problems that prospective minority and female FM owners have with obtaining capital are related to difficulty getting any access to capital of any kind or

¹⁰³ *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155 (2021) (emphasis added).

¹⁰⁴ NAB Initial Comments 9/2/21, *supra* note 3, at 17-18 (citing WNKN and WNKR Reply Comments, MB Dockets 18-349, at 2 (May 13, 2019)).

¹⁰⁵ *Id.*

¹⁰⁶ NAB Initial Comments 9/2/21, *supra* note 3, at 10-18.

¹⁰⁷ *See id.* at 12-15.

amount.¹⁰⁸ Indeed, the current numerical restrictions on local commercial FM radio station ownership are a key tool to help preserve what little ownership diversity exists.¹⁰⁹

We believe, along with a multitude of other commenters, including public interest groups, civil rights groups, many broadcasters, and the NAB, that one way for minority and female broadcast ownership could be increased may be for Congress to pass a bill requiring the Commission to reinstate the minority tax certificate program and for the Commission to implement such a program.¹¹⁰ We encourage further discussion about how such actions could be expected to benefit minority and female broadcast owners and prospective owners.

In our joint reply comments in Docket 20-60 on May 28, 2020, we recommended that the Commission devote resources to studying and analyzing intramodal competition between AM/FM broadcasters.¹¹¹ We reiterate our request here, consistent with many fellow commenters,¹¹² that the Commission collect data and commission studies on the harms that consolidation causes to ownership diversity, localism, and intramodal competition. Those studies should also account for effects of prior consolidation on

¹⁰⁸ See *2018 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of the National Hispanic Media Coalition et al., MB Docket No. 18-349, at 15 (Apr. 29, 2019); *2018 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of Multicultural Media, Telecom and Internet Council, MB Docket No. 18-349, at 6-8 (Apr. 29, 2019); *2018 Quadrennial Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of National Association of Black Owned Broadcasters, Inc., MB Docket No. 18-349, at 5 (Apr. 29, 2019).

¹⁰⁹ See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd. Cir. 2004); see also Comments of The Leadership Conference on Civil and Human Rights et al., MB Docket No. 18-347 (Sept. 5, 2019).

¹¹⁰ Letter from MMTC to FCC Special Advisor Sanford Williams Re: Seven Powerful Initiatives for Racial Justice in Media, 6-7 (Aug. 4, 2021).

¹¹¹ We specified that when identifying stakeholders such AM/FM listings should provide key data including local and national market share, at the very least. We also indicated that such studies should include an analysis of local and national concentration ratio measures over time. See Reply Comments of MusicFIRST Coalition and Future of Music Coalition, GN Docket No. 20-60, at 23-25 (May 28, 2020).

¹¹² See, e.g., Comments of Free Press, MB Docket No. 18-349, at 8 (Sept. 2, 2021).

viewpoint diversity as expressed in music, as well as news and information. Such studies should specifically include analysis of the impacts of the elimination of the Main Studio Rule on localism, diversity, and intramodal competition. Finally, we agree with Free Press that the Commission should conduct a race equity impact assessment that examines the Commission's history and the impact of its anti-minority policies.¹¹³

The Commission now has the opportunity to conduct its own meaningful studies on the impacts of prior decisions. The Commission should not engage in hasty rulemaking without having analyzed potential effects of drastic and permanent rulemaking (as was certainly the case with the Commission's sudden elimination of the FM portion of the Radio Duplication Rule).¹¹⁴ Rather, the Commission should engage in rulemaking only after investing resources in creating and analyzing relevant data sets.

IV. CONCLUSION

As advocates for the music community who create much of the central content broadcast over these radio stations, we respectfully request that the Commission do no harm and retain all portions of the Local Radio Ownership Rule, as related to the FM band. Current maximums on the number of FM radio stations that one entity can own in a single market, as well as the AM/FM subcap, remain necessary in order to promote diversity, competition, and localism. The Commission should not expand its current definition of the relevant product market beyond broadcast radio stations for purposes of analyzing the LRSO Caps. Moreover, the Commission's public interest obligations to

¹¹³ *See id.*

¹¹⁴ *See generally* Petition for Reconsideration of Rec Networks, MusicFIRST Coalition and Future of Music Coalition, MB Docket Nos. 19-310, 17-105 (Nov. 20, 2020).

authentically promote diversity, localism, and competition within FM radio, for the benefit of listeners, must be paramount in this proceeding.

We also call upon the Commission to conduct its own meaningful studies about the effects of deregulation of commercial FM ownership on diversity, localism, and both intramodal and intermodal competition for use in its upcoming 2022 Quadrennial Review. Such studies should include analysis of effects on the public interest of the elimination of the Main Studio Rule, with an eye toward determining whether the Main Studio Rule should be reinstated in the public interest.

We thank the Commission for this opportunity to comment in these important proceedings and make ourselves available to assist the Commission in its effort to promote the public interest in diversity, competition, and localism as it relates to the portions of the LRSO Caps applicable to the FM band.

Respectfully Submitted,

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