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April 2, 2025

Maureen H. Dortch, Esq.
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: Written *Ex Parte* Communication, MB Docket No. 17-318

Dear Ms. Dortch:

The Commission has maintained rules strictly limiting the ownership of broadcast television stations nationally for nearly 85 years.[1] For more than two decades, the national TV rule has prohibited any entity from owning local commercial TV stations reaching, in the aggregate, more than 39 percent of the total number of TV households in the nation.[2] This outmoded rule prevents broadcasters – *but not any other video service providers* – from competing for audiences and vital advertising revenues across the county and harms the public's free, over-the-air (OTA) television service. The time to eliminate this harmful restriction is now.

While the FCC over seven years ago sought comment on modifying or eliminating the national audience reach limit, including its calculation methodology, in light of increased video program options for consumers, technological changes, and other factors, this rulemaking still remains pending.[3] At that time, then-Commissioner Carr observed that the FCC has had "rules on the books" limiting TV station ownership since the 1940s, and that, due to accelerating advances in technology and the advent of new offerings, broadcasters "now compete for eyeballs with YouTube stars, social media platforms, and streaming services like Hulu and Netflix—not to mention traditional cable and satellite offerings."[4] Given dramatic changes in the video and advertising markets since 2017, the National Association of Broadcasters (NAB)[5] now urges the Commission to expeditiously conclude this rulemaking and completely repeal the outdated and competitively harmful national broadcast TV ownership restriction.

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[1] *Broadcast Services Other than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (imposing a national ownership limit of three stations on the infant TV industry).

[2] 47 C.F.R. § 73.3555(e)(1). For purposes of calculating reach under the cap, the rule discounts the reach of UHF stations by 50 percent. *Id*., § 73.3555(e)(2).

[3] Notice of Proposed Rulemaking, 32 FCC Rcd 10785 (2017) (Notice).

[4] *Id*. at 10810, Statement of Commissioner Brendan Carr.

[5] NAB is a nonprofit trade association that advocates on behalf of free and local radio and television stations and broadcast networks before Congress, the Federal Communications Commission, and the courts.

At the start of this proceeding in 2017, NAB had advocated for the FCC to at least do no harm, and essentially preserve the status quo by either retaining the 39 percent cap and discounting all stations (not just UHF) at 50 percent of their reach, or in the alternative, if the Commission was intent on eliminating the discount, to raise the cap to 78 percent. But continued marketplace trends over the past seven years make clear there is simply no good reason to keep *any* artificial limits on TV station groups' audience reach. With Google and Facebook gobbling up local advertising revenues and stations competing with unconstrained streaming platforms for viewers' time and attention, the FCC must end this limitation and allow broadcasters to better serve the public interest. NAB's Television Board – with members ranging from those owning a handful of stations to the largest local broadcasting companies in the country – supports without opposition the position of broadcasters, including Nexstar, Sinclair, Univision, and others, which have persuasively argued in the record that the national TV rule in any form does not promote, but instead harms, competition, diversity, and localism and should be eliminated entirely.[6]

I. Introduction and Background

Over the past two decades, the media and advertising markets have grown vastly more competitive while the FCC's pending examination of the national TV rule remains stalled. This regulatory quicksand has real-world consequences. While TV station groups remain severely constrained, the giant technology platforms increased their dominance of online content discovery and the ad market; consumers further embraced internet-connected TV devices, smart TVs, and myriad video streaming services, both subscription and ad-supported; and digital advertising options, including connected-TV device advertising, notably increased their share of U.S. ad revenues.[7] In 2023, Alphabet's, Meta's, and Amazon's estimated U.S.

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[6] Comments of Nexstar Broad., Inc., MB Docket No. 17-318, at 12-25 (Mar. 19, 2018); Reply Comments of Univision Commc'n Inc., MB Docket No. 17-318, at 1-6 (Apr. 18, 2018); Comments of Sinclair Broad. Group, Inc., MB Docket No. 17-318, at 6-17 (Mar. 19, 2018); *see also* Written *Ex Parte* Communication of Ion Media Networks, Inc., Trinity Christian Ctr. of Santa Ana, Inc., Tribune Media Co., Northwest Broad., Inc., Univision Commc'n Inc., Nexstar Broad., Inc., Word of God Fellowship, Inc., Ramar Commc'n, Inc., Meruelo Media, Entravision Commc'n Corp., and Ellis Commc'n, MB Docket No. 17-318 (Mar. 11, 2019) (doubting a national cap "ever could be justified," but if FCC retains one despite the lack of "an empirical basis for any numerical limit[]," it must at the very least maintain the 78 percent status quo).

[7] *See, e.g.,* Comments of NAB, GN Docket No. 24-119 (June 6, 2024) (2024 NAB Communications Marketplace Comments); Comments of NAB, MB Docket No. 22-459 (Mar. 3, 2023) (NAB 2022 Quadrennial Public Notice Comments); Comments of NAB, GN Docket No. 22-203 (July 1, 2022) (2022 NAB Communications Marketplace Comments). NAB incorporates these comments into this proceeding. *See also* Written *Ex Parte* Communication of NAB, MB Docket No. 17-318 (May 13, 2022) (NAB National TV Rule Update); Comments of NAB, MB Docket No. 17-318 (Mar. 19, 2018) (NAB Comments); Reply Comments of NAB, MB Docket No. 17-318 (Apr. 18, 2018) (NAB Reply Comments).

advertising revenues *each* exceeded the ad revenues of *all* U.S. broadcast television and radio stations combined.[8] Streaming platforms that reach 100 percent of U.S. TV households now dominate viewing, very nearly equaling the share of total TV consumption garnered by linear TV (broadcast and cable combined) and, in some months, earning more than double the share of TV consumption garnered by broadcast.[9] And just two days ago, a leading media and technology research firm crowned YouTube as the "new king of all media."[10]

Given these marketplace realities, limiting the scale of broadcast TV station groups directly reduces their ability to compete and negotiate with digital program services and advertising platforms on an even remotely level playing field. It also substantially hinders local stations' provision of their most important public service – offering news, emergency information, and valued entertainment and sports programming in local communities across the country at no cost to the public. Accordingly, the Commission must overcome its historical reluctance to let go of antiquated restrictions on the broadcast industry and repeal the national TV ownership rule. A broadcast TV service fettered by asymmetric regulation simply cannot compete with other video services enjoying national or even international scale.

Slow incremental loosening of a rule adopted and maintained when the internet, video streaming services, video games, smart devices from phones to TVs, and giant tech platforms did not exist – and which remains unchanged since broadcast television was an analog service – will not suffice to address the profound changes in technology and consumption that have transformed the media marketplace. The World War II era three-station national TV cap increased to seven by 1954[11] -- and there it remained for three decades. Even though the number of TV stations increased from 199 to 1,169, and cable TV subscribership exploded from about 30,000 to 32-35 million, between 1953 and 1984,[12] the FCC in 1985 only raised the numerical TV station cap from seven to 12, and also imposed for the first time a national audience reach limitation (25 percent with a UHF discount).[13] Imposition of both a numerical cap and an audience reach cap simultaneously disadvantaged broadcasters with stations in large markets and in small markets. Broadcasters in the largest markets could not own up to 12 stations due to the 25 percent reach cap, and smaller market broadcasters' national audience reach was effectively limited to single digits due to the low numerical station cap.[14]

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[8] Based on BIA and eMarketer data; *see* Section II.B., *infra*.

[9] *See* Nielsen, *The Gauge* (Mar. 18, 2025); Section II.A., *infra*.

[10] T. Spangler, *YouTube Now Worth as Much as $550 Billion, Analysts Say: 'New King of All Media,'* variety.com (Mar. 31, 2025).

[11] *See* Report and Order, 100 FCC 2d 17, 21-22 (1984) (1984 Ownership Order), *modified on recon*., Memorandum Opinion and Order, 100 FCC 2d 74 (1985) (1985 National Cap Order).

[12] 1984 Ownership Order, 100 FCC 2d at 28.

[13] 1985 National Cap Order, 100 FCC 2d at 87.

[14] *See* 1985 National Cap Order, 100 FCC 2d at 89.

Citing concerns about OTA broadcasting "remain[ing] a vital element in the video market" due to the "explosion of programming distribution sources,"[15] Congress in 1996 directed the FCC to modify its rules to eliminate the numerical station cap -- after 55 years during which the cap was increased from only 3 to only 12 – and to modestly raise the national audience reach limit to 35 percent.[16] But this analog-era limit has barely budged in the subsequent three decades and not at all since 2004, when it was slightly raised to 39 percent.[17] Given that the "marketplace realities" of *1996* prompted Congress to act to "ensure the [broadcast] industry's ability to compete effectively in a multichannel media market,"[18] the Commission now must take bolder action to ensure the industry's competitive viability in today's online-focused, digital-only marketplace.

NAB's discussion below further documents the dominance of internet-based content and advertising platforms in the 21st century and demonstrates how TV broadcasters now struggle to support services offered free to the public. Given asymmetric limits on their scale, TV station groups can no longer effectively compete for audiences and advertisers, face serious challenges in producing and/or acquiring expensive, high-quality programming, and struggle to attract investment. Elimination of the national TV rule would benefit consumers across the country by enabling station groups to provide more and improved free OTA content.

The data provided herein and the evidence already in the record also reconfirm the FCC's previous, decades-old conclusion that a national TV ownership rule is not needed to promote competition or viewpoint diversity.[19] Indeed, that rule directly harms competition in the video marketplace by artificially constraining TV station groups. Nor does a national cap promote localism. Evidence indicates the exact opposite, showing that as the number of separately-owned TV station groups declined due to greater common ownership of stations, the total number of local news telecasts and local news hours significantly increased. Moreover, simply as a matter of logic, a rule economically and competitively impairing TV station groups cannot promote those groups' locally-focused programming and free OTA services to their communities. Thus, the Commission lacks any valid basis for retaining its national TV rule.

Notably, those advocacy groups and broadcast industry competitors (*i.e.*, pay TV interests) that oppose relaxation of the rule – or even support an effectively stricter one – ignore the realities of the current online, digital marketplace in their comments in this proceeding. They also fail to show why a stricter rule is justified or how the public would be harmed by repealing a limitation placed only on the broadcast participants in a market now characterized by

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[15] H.R. Rep. No. 104-204, at 55 (1995), *reprinted in* 1996 U.S.C.C.A.N. 18-19.

[16] § 202(c)(1), Telecommunications Act of 1996 (1996 Act).

[17] *See* § 629(1), Consolidated Appropriations Act, 2004 (Appropriations Act).

[18] H.R. Rep. No. 104-204, at 55 (1995), *reprinted in* 1996 U.S.C.C.A.N. 19.

[19] *See, e.g., 2002 Biennial Regulatory Review*, Report and Order, 18 FCC Rcd 13620, 13815, 13818, 13826 (2003) (2002 Biennial Review Order).

unprecedented competition and content diversity, overwhelming consumer choice, and abundant options for advertisers.

The Commission should summarily reject other nonsensical arguments offered by commenters supporting a tighter national TV rule via elimination of the UHF discount alone. Their pretense that the national TV cap and its associated calculation methodology are two distinct rules that can and should be examined in isolation from one another cannot be credited. The FCC previously and correctly found that the UHF discount was "inextricably linked" to the ownership cap and that elimination of the UHF discount would effectively and substantially tighten the national cap.[20] As NAB previously explained in detail and references again here, pretending that the UHF discount exists in a vacuum and can be eliminated without regard to the cap or whether a stricter limit serves any identifiable public interest goals is indefensible under the Communications Act of 1934 (Act) and the Administrative Procedure Act (APA).

Those commenters calling for a stricter national TV rule and/or opposing relaxation or repeal of the rule also failed to justify retention (let alone tightening) of a rule with a fundamentally faulty premise – that stations "reach" 100 percent of the TV households in the Designated Market Areas (DMAs) in which they are located. As NAB earlier explained and discusses in greater detail below, that premise was a fiction when the Commission first adopted a national audience reach cap in 1985[21] and is an even greater fiction today, as it exaggerates even more the competitively effective reach of TV stations whose actual audiences have been fragmented by a wide range of competing online and multichannel video providers. Given that the national TV ownership rule is based on an irrational premise, the record offers no rational basis for retaining the existing 39 percent cap, or a cap set at any other level, using the flawed 100 percent reach metric – or an arbitrary 75, 66, or pick-a-percentage reach metric – given the lack of a credible connection between the concept of "reach" and the FCC's competition or other goals. If one were needed, the defect in the rule's reliance on wholly "theoretical," but wholly unrealistic, audience reach is yet another reason for its elimination.

Finally, the record is clear that the Commission has statutory authority to repeal the national TV ownership rule. Since 2013, the FCC has consistently and correctly maintained it possesses authority to revise or eliminate the 39 percent cap and the UHF discount. As discussed in our earlier comments and elaborated on here, NAB agrees with the FCC's long-held position, which is the "best reading" of the relevant statutory provisions.[22]

Contrary to the claims of those calling for a tighter rule via elimination of the UHF discount, the Commission cannot "split the statutory baby" by asserting it has authority to eliminate the discount used to calculate national audience reach but does not have authority to revise or eliminate the 39 percent national audience reach cap. In other words, opponents of reform

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[20] Order on Reconsideration, 32 FCC Rcd 3390, 3394-95 (2017).

[21] *See* 1985 National Cap Order, 100 FCC 2d at 93 (recognizing that the newly-adopted national TV cap's conception of reach was "theoretical").

[22] *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2266 (2024) (*Loper Bright*).

contend that the FCC has statutory authority to modify the national TV rule by making it *more* restrictive but somehow lacks authority to modify the rule by making it *less* restrictive (or by eliminating it). The Commission must summarily reject this strained, illogical, and wholly outcome-determinative statutory reading.

As Chairman Carr has repeatedly said, this is a "break glass moment" for America's broadcasters.[23] The Commission should act quickly to repeal its harmful national TV ownership rule. No basis exists for its retention, and the FCC has authority to eliminate it.

II. The Video and Advertising Markets Are Now Dominated by Online Platforms, Eroding the Ability of Constrained Local TV Station Groups to Compete Effectively, Obtain Vital Investment, and Provide Free OTA Services

NAB already has documented in this and other proceedings the transformation of the media and advertising markets due to internet ubiquity; the widespread adoption of myriad digital devices for accessing almost infinite sources of online content available 24-7-365; and the remarkable growth of the giant technology platforms to dominate the advertising market. We also demonstrated how these fundamental market changes have profoundly affected the competitiveness of advertising-reliant free OTA broadcast stations.[24] Rather than repeat all those previous lengthy submissions, NAB summarizes and illustrates the extent to which competition from nonbroadcast sources – often exponentially larger than any TV broadcaster – now impacts the viewership, advertising revenues, and programming of local broadcast TV station groups.

A. Online Content Ranging from YouTube Videos to Multi-Billion-Dollar Netflix Series Dominates the Video Marketplace, While FCC Rules Prevent TV Station Groups from Reaching Audiences Nationwide

Any analysis of the modern media marketplace begins with the internet becoming the dominant communications medium, accessible via a range of digital and "smart" devices:

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[23] *E.g.*, Carr Statement on FCC's Denial of WADL TV's Application, at 2 (Apr. 23, 2024) (observing that broadcasters are "facing unprecedented headwinds and competition," including from unregulated Big Tech competitors, and that the FCC should be "mak[ing] it easier for broadcasters to attract the capital necessary for them to invest, compete, and serve their local communities"); Dissenting Statement of Commissioner Brendan Carr, *Political Programming and Online Public File Requirements for Low Power Television Stations,* Notice of Proposed Rulemaking, 39 FCC Rcd 6318, 6396 (2024) (stating that the FCC has "many legacy regulations on the books" preventing capital flowing to broadcasters, artificially raising their costs of doing business, and "forcing them to compete against unregulated Big Tech companies with one hand behind their backs").

[24] *See* 2024 NAB Communications Marketplace Comments; NAB 2022 Quadrennial Public Notice Comments; NAB National TV Rule Update; 2022 NAB Communications Marketplace Comments; Comments of NAB, MB Docket No. 18-349 (Sept. 2, 2021); Reply Comments of NAB, MB Docket No. 18-349 (Oct. 1, 2021); NAB Comments; NAB Reply Comments.

- Internet access is nearly universal. According to the Pew Research Center, 96 percent of U.S. adults were using the internet last year, while only 14 percent went online in 1995.[25] In early 2024, Parks Associates reported that 92 percent of U.S. households had broadband at home.[26]

- The first major social media platform (Facebook) launched in 2004. As of early 2025, 86 percent of the U.S. population ages 12+ use social media.[27] Among U.S. adults, 85 percent report using YouTube and 70 percent use Facebook.[28]

- Digital devices for accessing the internet and online content are now nearly universal, with 91 percent of Americans ages 12+ owning smartphones.[29] In 2024, Edison Research declared that the "'smart' device triumph is nearly total."[30]

- Nearly 80 percent of U.S. TV households own smart TVs, with 56 percent owning separate streaming media player devices such as Roku or FireTV. Sixty-two percent of TV households stream weekly via smart TVs, up from 47 percent in 2021.[31]

- According to Parks Associates, smartphone ownership surpassed TV ownership in 2023.[32] The average number of connected consumer electronics devices (*e.g.*, computers, mobile devices, smart speakers, and entertainment devices) per U.S. internet household reached about 11 in late 2023.[33]

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[25] *Internet, Broadband Fact Sheet*, Pew Research Center (Nov. 13, 2024); *Online Use*, Pew Research Center (Dec. 16, 1996).

[26] Press Release, *Ninety-two percent of US households now have broadband at home, according to Parks Associates*, parksassociates.com (Jan. 3, 2024).

[27] Edison Research, *The Infinite Dial 2025*, at 14 (Mar. 20, 2025).

[28] *Social Media Fact Sheet*, Pew Research Center (Nov. 13, 2024).

[29] Edison Research, *The Infinite Dial 2025*, at 6 (Mar. 20, 2025).

[30] Edison Research, *The Infinite Dial 2024*, at 7 (Mar. 28, 2024).

[31] Hub Entertainment Research, *Connected Home 2024* (Mar. 2024); G. Winslow, *Hub: Smart TVs Now in Nearly 8 of 10 Homes*, tvtechnology.com (Apr. 10, 2024).

[32] G. Winslow, *CES2024: Smartphone Ownership Surpasses TV Ownership in U.S. for the First Time*, tvtechnology.com (Jan. 11, 2024).

[33] Press Release, *At CES 2024, Parks Associates announces new research showing average number of connected devices per US internet household reached 17 in 2023*, parksassociates.com (Jan. 11, 2024) (counting consumer electronic, smart home, and health devices).

Unsurprisingly, Americans' wholesale adoption of digital devices has transformed how they consume video content and the type of content they consume:

- U.S. adults still predominantly view video content through their TV sets but not exclusively, as significant numbers also use smartphones, laptops, and tablets.[34] Six percent of U.S. households now watch "television" exclusively on mobile devices, a trend led by younger viewers and likely to grow.[35]

- According to Kantar, video streaming is nearly universal, now "reaching almost 100%" of U.S. households.[36] Households subscribed to 4.1 paid video streaming services on average in the third and fourth quarters of 2024.[37]

- An LG survey reported last year that nearly 70 percent of connected TV users prefer free, ad-supported streaming TV (FAST) content, instead of a paid subscription without ads.[38] The number of FAST channels is vast – reaching 1,189 in the U.S. earlier this year[39] – and FAST penetration grew from 45 percent of U.S. households in 2022 to 58 percent in Spring 2024.[40] More than two-thirds of millennials and Generation Z use FAST services.[41]

- The penetration of paid AVOD (ad-supported subscription streaming TV) has exploded from 17 percent of U.S. households in 2022 to 63 percent in Spring 2024, in large part due to Amazon Prime and Netflix instituting ad-supported

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[34] G. Winslow, *Survey: Streaming Is First Content Destination for 73% of Viewers*, tvtechnology.com (Mar. 5, 2024) (survey respondents reporting that in the past 30 days, 72 percent watched video content via their TV sets, but also consumed "TV" via their smartphones (59 percent), laptops (37 percent), and tablets (30 percent)).

[35] *Americans watching without a television*, informitv.com (June 21, 2024) (discussing data from the Advertising Research Foundation's DASH TV Universe Study).

[36] *Sports fuel Q4 streaming surge in the US*, kantar.com (Feb. 11, 2025) (reporting that streaming had reached a 96 percent U.S. household penetration rate).

[37] *Id*.

[38] E. Gruenwedel, *LG: Majority of Connected TV Users Prefer Free, Ad-Supported Streaming Video,* mediaplaynews.com (Apr. 4, 2024).

[39] Gracenote, *Beyond nostalgia: Tracking FAST channel evolution and the opportunities for platforms and advertisers*, at 2 (Mar. 2025).

[40] *TV Deconstructed: Latest Findings From The DASH Study*, The Advertising Research Foundation, at 2 (Nov. 2024).

[41] Deloitte Insights, *2025 Digital Media Trends: Social platforms are becoming a dominant force in media and entertainment*, deloitte.com (Mar. 25, 2025).

subscription tiers.[42] Ad-supported streaming services not only compete with broadcast TV for audiences, they also directly compete for advertising revenues.

- A 2024 streaming TV survey found that Americans now choose streaming as their default source for viewing content, with 73 percent reporting streaming as their first destination for content.[43] At the start of 2024, U.S. viewers had nearly 1.2 million program titles to choose from, with just over 85 percent available on streaming services.[44]

- Generation Z devotes much more time gaming, on social media sites, and viewing non-premium video than older generations. Fifty-six percent of Gen Zs and 43 percent of millennials report that social media content is more relevant to them than TV shows and movies. Gen Zs and millennials spend 54 percent more time than the average consumer per day on social platforms and watching user-generated content, and 26 percent less time than the average person watching TV and movies.[45] Nearly one in three Gen Zs say they never watch linear TV.[46]

These profound shifts in device usage and viewing patterns are reflected in Nielsen data on the declining total reach and usage of linear television, including broadcast. According to Nielsen, as shown below, the weekly reach of streaming among Americans ages 2+ now exceeds the weekly reach of traditional linear (live + time shifted) television.[47]

[42] *TV Deconstructed* at 2.

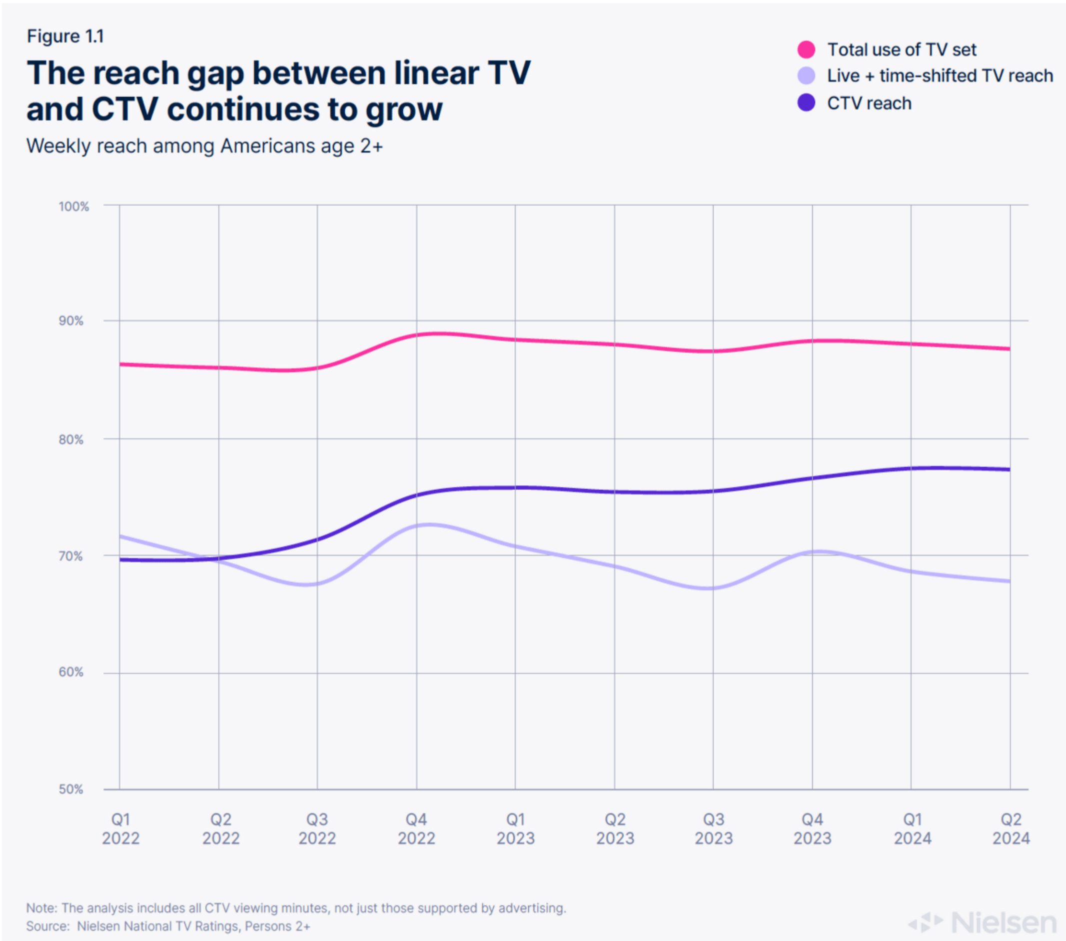
[43] G. Winslow, *Survey: Streaming Is First Content Destination for 73% of Viewers*, tvtechnology.com (Mar. 5, 2024).

[44] *TV audiences need more than recommendations; they need reasons to watch*, gracenote.com (Oct. 2, 2024).

[45] Deloitte, *2025 Digital Media Trends*.

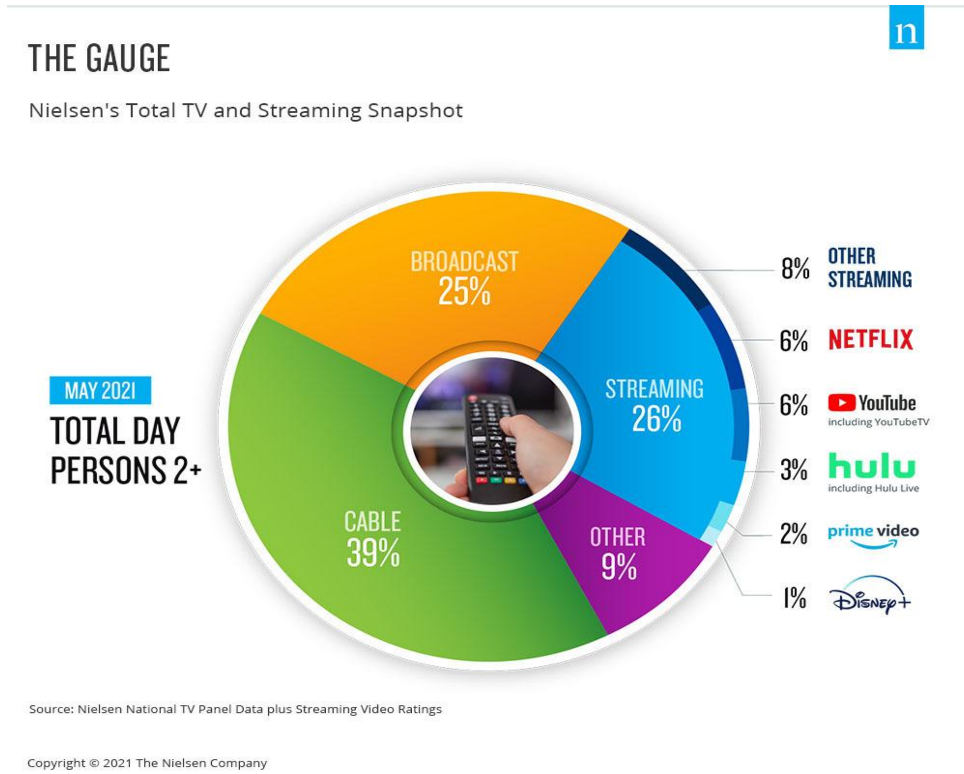
[46] S. Rand, *Understanding US Gen Z media consumption trends: Insights for brands*, askattest.com (Mar. 10, 2025).

[47] Nielsen, *Defy Media's Gravity: Your guide to cross-media and audience insights for the 2025-2026 Upfront/NewFronts planning season*, at 6 (2025).



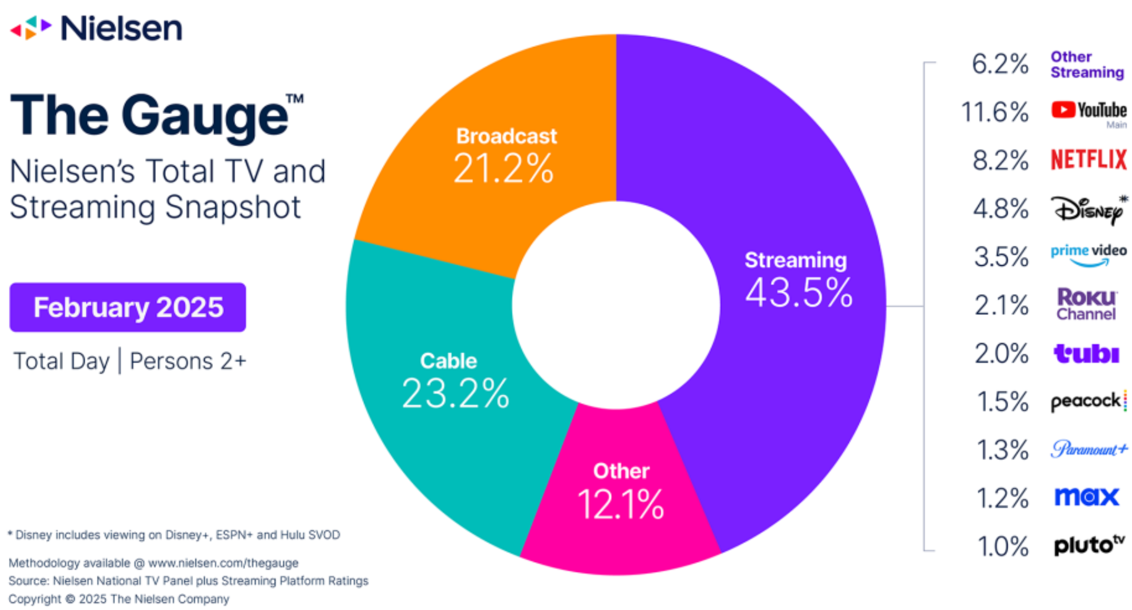
Nielsen's monthly snapshot of total TV usage, called "The Gauge," illustrates streaming services' rapid ascent to the top of the video marketplace. As seen below, The Gauge's initial release in May 2021 showed that cable still dominated, garnering 39 percent of all time spent on TV (total day, persons ages 2+), followed by streaming with 26 percent and broadcast with 25 percent.[48]

[48] The Gauge shows Total Usage of Television (TUT) for Broadcast, Cable, Streaming, and "Other," which includes VOD, Gaming, DVD playback, *etc*. About 60 percent of Americans spend an average of nine hours per week playing video games. Deloitte Insights, *2024 Digital Media Trends*, at 12 (Mar. 20, 2024).



Less than four years later, as shown below, streaming now rules the roost, garnering 43.5 percent of total TV usage – more than double broadcast's share of TV usage (21.2 percent). Notably, streaming now very nearly equals the share of *all* linear TV, broadcast and cable combined. In February, YouTube alone (not including YouTube TV, the vMVPD service) garnered 11.6 percent of total TV usage, over half of the share of all broadcast TV. This high and growing level of YouTube usage reflects the preferences of younger consumers for social media video content and short-form content.[49]

[49] Because The Gauge focuses on usage of "television," it does not take account of the viewing of video content on devices such as smartphones and tablets. As a result, The Gauge undercounts the share of viewing garnered by YouTube, not to mention TikTok and Instagram. Broadcasters increasingly compete for audiences with these platforms.



Given the intense competition for audiences from platforms as different as Netflix, YouTube, ESPN, and the Roku Channel, the ratings of even the most popular broadcast TV shows have declined substantially over time. Showing broadcast TV's dependence on live sports programming, especially football, to attract viewers, *Sunday Night Football* has been the top-rated regularly scheduled program on broadcast TV for years, and, as seen below, remained the top broadcast program in the 2023-2024 season.[50] But the ratings garnered by *Sunday Night Football* during the last season were **less than one-third of the ratings** earned by the top broadcast show during the 1985-1986 season. And the top-rated regularly scheduled scripted program on broadcast TV for the 2023-2024 season (*Tracker*) garnered **less than one-seventh of the ratings** earned by the top broadcast show in the mid-1980s. Looked at another way, the household rating of the top-rated scripted show on broadcast TV has fallen by 71.5 percent since 2004, when the national cap was last slightly raised.

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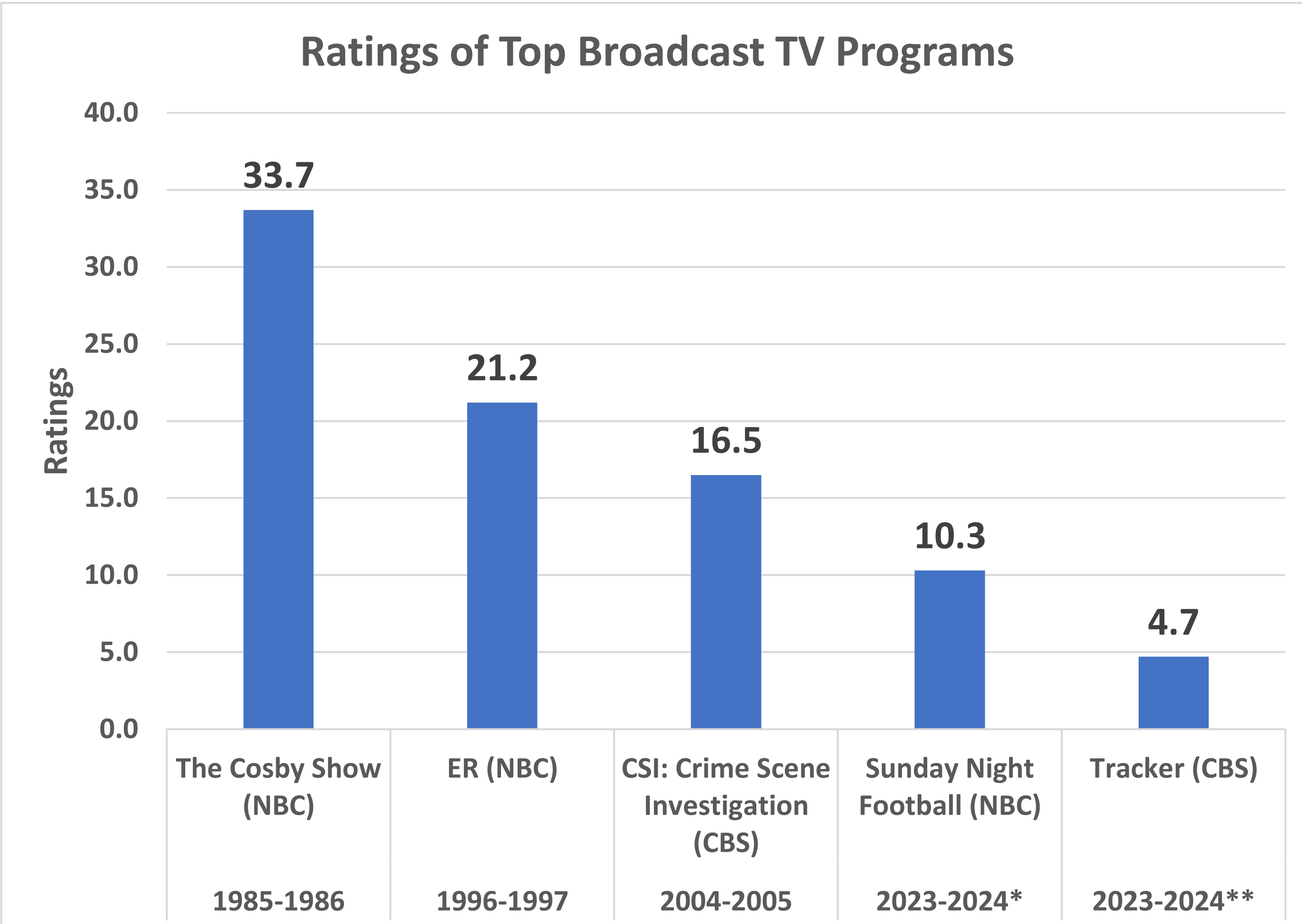
[50] Fully 75 percent of the 100 most-watched prime-time telecasts in 2024 were sportscasts, which included 45 NFL games (the same number as in 2023). M. Schneider, *The 100 Most-Watched Telecasts of 2024*, Variety (Dec. 27, 2024) (noting the unusually high number of sportscasts in the top 100 in 2024, due to the Paris Summer Olympics and a marquee Dodgers-Yankees World Series). Broadcast TV's share of total TV usage is usually lowest in the summer and rises in the fall, when the NFL and college football return to the airwaves, along with new scripted programming. According to The Gauge, broadcast TV garnered only 20.3 percent of total TV usage in July 2024, which rose to 24.0 percent in October 2024. *The Gauge*, nielsen.com (Aug. 20, 2024); *The Gauge*, nielsen.com (Nov. 19, 2024).



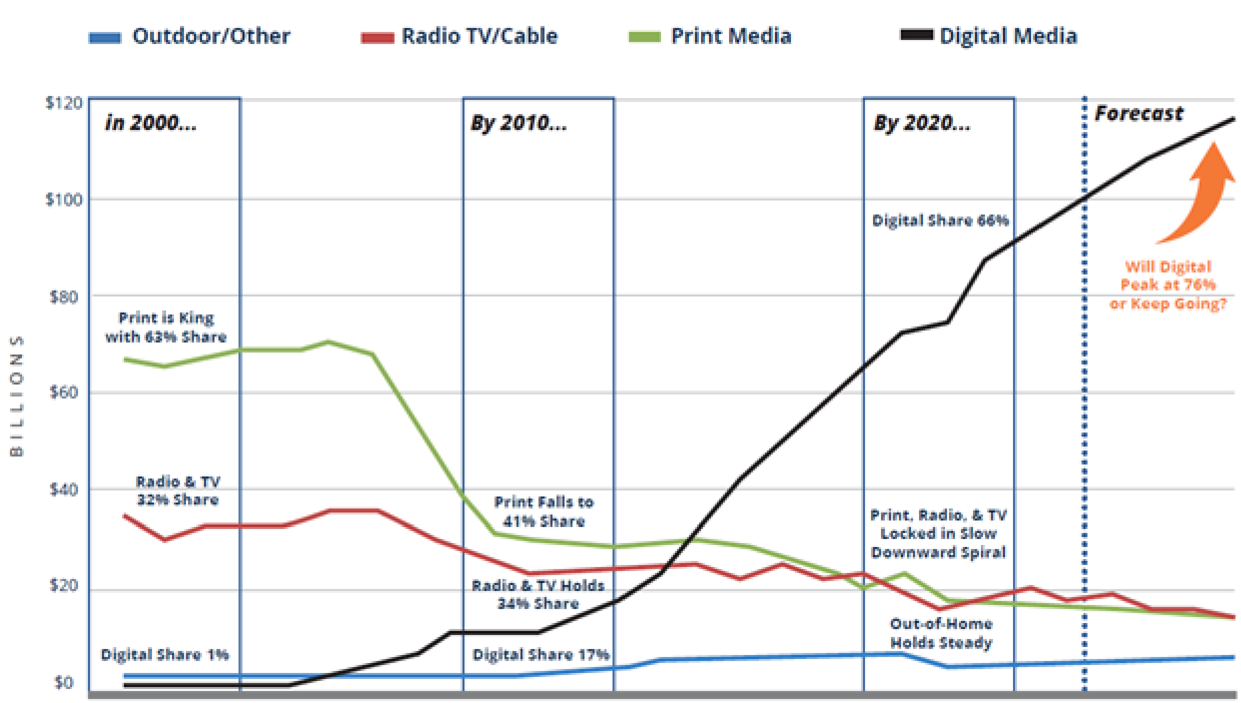
Sources and Notes:
1985-1986, 1996-1997, 2004-2005 Seasons*: Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present.*
Household ratings based on Live-Only viewing.
*2023-2024: *Nielsen,* Live +Same Day viewing, Sept. 10, 2023-Feb. 11, 2024. Regularly scheduled program; excludes pre- and post-game shows.
***Nielsen*, Live + Same Day viewing.

Broadcast stations clearly now face intense competition for viewers from video programming options ranging from user-generated content on YouTube and TikTok to multibillion-dollar series on Amazon Prime, Netflix, and Apple TV+. In this marketplace, the Commission has no basis for preventing TV station groups from offering their programming to audiences nationwide, just like their competitors. Strictly limiting the size of the audiences that broadcasters are permitted to serve necessarily also limits their advertising revenue base, which TV stations cannot afford when competing for ad dollars in today's digital dominated advertising marketplace.

B. Digital Advertising Platforms Led by the Technology Giants Dominate Today's Ad Market, While FCC Rules Prevent Broadcast Station Groups from Expanding Their Advertising Revenue Base that Supports Local TV Services

The growth and development of the internet, along with the ubiquity of digital devices, also have transformed the advertising market and undermined the economic bases supporting the public's free OTA TV services. As Borrell Associates shows in the graphic below, over the course of two decades, digital platforms have come to dominate advertising markets, with 71 percent of all local advertising estimated to go to digital platforms in 2024, with digital's share of all local ad dollars projected to rise to 76 percent by 2027.[51] The "lion's share" of that digital ad spend goes into the pockets of out-of-market internet "pureplay" companies – especially Google, Facebook, and Amazon – rather than being spent with local media outlets, which in 2024, were estimated to garner just 15.2 percent of "local" digital advertising spend.[52] Even a quick glance shows how the massive shift to digital advertising has shaken – if not destroyed – the financial ground beneath traditional local media, especially print but also increasingly local broadcast outlets.

FIGURE 1.1 The Long, Rocky Ride for U.S. Local Media Advertising, 2000-2027



Note: Print includes newspapers, direct mail, yellow pages, magazines, and other print publications; Radio & TV include both broadcast TV and cable TV advertising. Source: Borrell's Ad Spending Database, © 2024 Borrell Inc.

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[51] Borrell Associates, *2024 Annual Report Benchmarking Local Media's Digital Revenues*, at 5-6 (Apr. 23, 2024).

[52] *Id*. at 5, 9. That 15.2 percent figure represents a small increase over previous years.

This reshaping of the advertising market not only has undercut support for local media but also local journalism, as the fate of newspapers and the intensifying struggles of local broadcast stations illustrate.[53] The Commission has never grappled with what this fundamental reordering of the local advertising market means for the competitive viability of local broadcast stations and TV groups and, in turn, their ability to serve their local communities. With the newspaper industry's decline and the FCC's failure to repeal the newspaper/broadcast cross-ownership rule for decades as cautionary examples, the Commission now has no excuse to ignore the similar dangers facing local TV stations and the viability of their newsrooms.[54]

Looking at BIA data on local TV stations' total advertising revenue (OTA+digital), as summarized in the graphic below, those revenues fell 38.3 percent from 2000-2022, on an inflation-adjusted basis.[55] As NAB has explained before, adjusting for inflation reveals the real amount of the decline.[56] Declines in real revenue must necessarily harm the ability of local TV stations to pay for acquiring or producing programming, maintaining local news operations, hiring and retaining talented staff, and investing in improved technologies, including Next Gen TV. To show the yawning gap between the advertising revenues of Big Tech and local broadcast stations trying to produce quality local journalism, in 2023 the U.S. advertising revenues of Alphabet, Meta, and Amazon *each* exceeded the total amount of OTA and digital ad revenues earned by *all* local TV and radio stations in the country.[57]

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[53] Since 2005, more than 3,200 print newspapers have disappeared, meaning that more than one-third of the nation's newspapers have been lost since that year. Z. Metzger, *The State of Local News: The 2024 Report*, localnewsinitiative.northwestern.edu (Oct. 23, 2024).

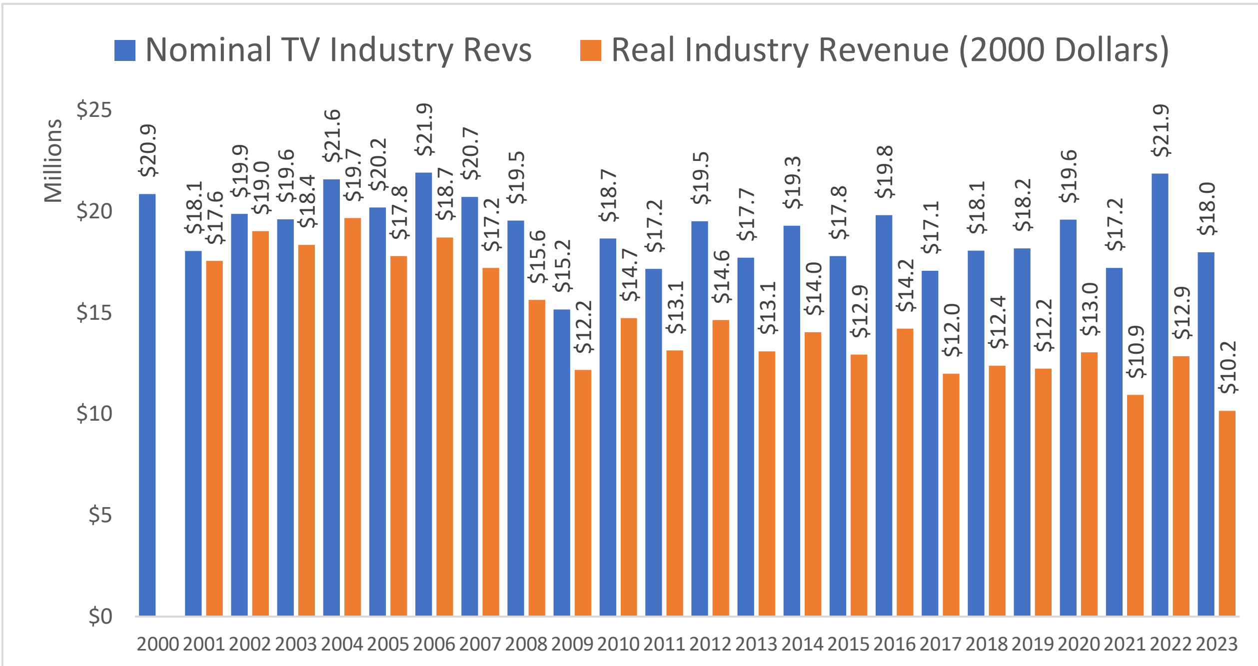
[54] *See*, *e.g.*, Luke Bouma, *More Layoffs Are Coming To Local ABC, CBS, FOX, & NBC Stations in 2025*, cordcuttersnews.com (Mar. 7, 2025); Tim Hanlon, *Why Some TV Stations May Start Ditching Local News*, tvrev.com (Mar. 20, 2025).

[55] From 2000-2023, the inflation-adjusted ad revenue decline was a much greater 51.2 percent, but comparing a Presidential election year to a non-election year can give a non-representative result. Comparing 2007 (broadcast TV's non-election year, pre-Great Recession advertising level) to 2023, TV station revenues have declined 13 percent even on a nominal basis. BIA's estimates for local TV stations' 2024 ad revenues have not yet been finalized and released.

[56] Inflation is often a significant component of apparent growth (or non-growth) in any series measured in dollars. Adjusting for inflation uncovers real revenue growth, if any, or the real amount of any decline over time. Comments of NAB, MB Docket No. 18-349, at 95 (Sept. 2, 2021).

[57] In 2023, the U.S. net digital advertising revenues of Alphabet (Google/YouTube), Meta (Facebook/Instagram), and Amazon were estimated by eMarketer at $78.86 billion, $51.35 billion, and $33.96 billion, respectively. E. Cramer-Flood, *US Ad Spending 2023*, eMarketer Insider Intelligence (May 2023). BIA estimated the combined OTA and digital ad revenues of

Nominal and Real TV Station Industry Advertising Revenue (OTA+Digital)



Source: BIA Advisory Services, LLC

Examining digital video advertising specifically, analysts confirm that this sector already far exceeds advertising on local broadcast TV stations and is growing rapidly. In 2023, total U.S. digital video ad revenues rose 17.3 percent to $57.25 billion, far outstripping the $18 billion in digital and OTA ad revenues gained by local TV stations.[58] NAB previously submitted an extensive empirical study by NERA Economic Consulting into the record here, which focused on local advertisers' substitution between advertising on broadcast TV stations and on digital media (examining Facebook and YouTube specifically). NERA concluded that digital platforms compete directly with broadcast TV stations for local ad dollars and that digital platforms have captured an increasing share of local advertising spend from local broadcasters and will

TV and radio stations to total $31.3 billion ($18 billion for TV and $13.3 billion for radio). *See* 2024 NAB Communications Marketplace Comments at 16, 19 and graphic below.

[58] S. Shafer, *US digital video ad projections through 2028*, S&P Global Market Intelligence Kagan (Apr. 26, 2024) (projecting that U.S. digital video ad revenue will reach nearly $90 billion by 2028). Digital video advertising includes instream and outstream video ads and primarily consists of connected TV (CTV) advertising (*i.e.*, advertising that appears on CTV devices) and mobile video advertising. Leaders in garnering digital video advertising revenues include YouTube, Meta, TikTok, Roku, Disney, and Amazon. *Id*.

capture a still greater share going forward.[59] Thus, as digital video advertising continues to grow, broadcast TV station ad revenues will likely continue to decline.[60]

One type of digital video advertising, CTV advertising, is the "fastest-growing major ad channel," according to eMarketer, and more advertisers are shifting away from linear TV toward CTV and streaming.[61] CTV is also the "fastest-growing medium for political ads," with the 2024 election estimated to see $1.5 billion in CTV marketing ad spend (nearly half of all political digital ad dollars).[62] Given TV broadcasters' dependence on receiving a badly-needed bump of ad revenue in election years, loss of political advertising represents another financial hit that station groups cannot afford.

Not only are local TV stations struggling – and failing – to maintain their advertising revenues, stations in mid-sized and small markets continue to earn only a small fraction of the ad revenues garnered by stations in the largest markets. As shown below, in 2023, the average TV station in DMAs 151-210 earned merely 10.8 percent of the revenues of the average station in the top-10 DMAs. Similarly, stations in DMAs 101-150 and 51-100 garnered only 15.3 percent and 21.7 percent, respectively, of the revenues earned by the average station in the ten largest DMAs. Even TV stations in DMAs 26-50 garnered only 37.6 percent of

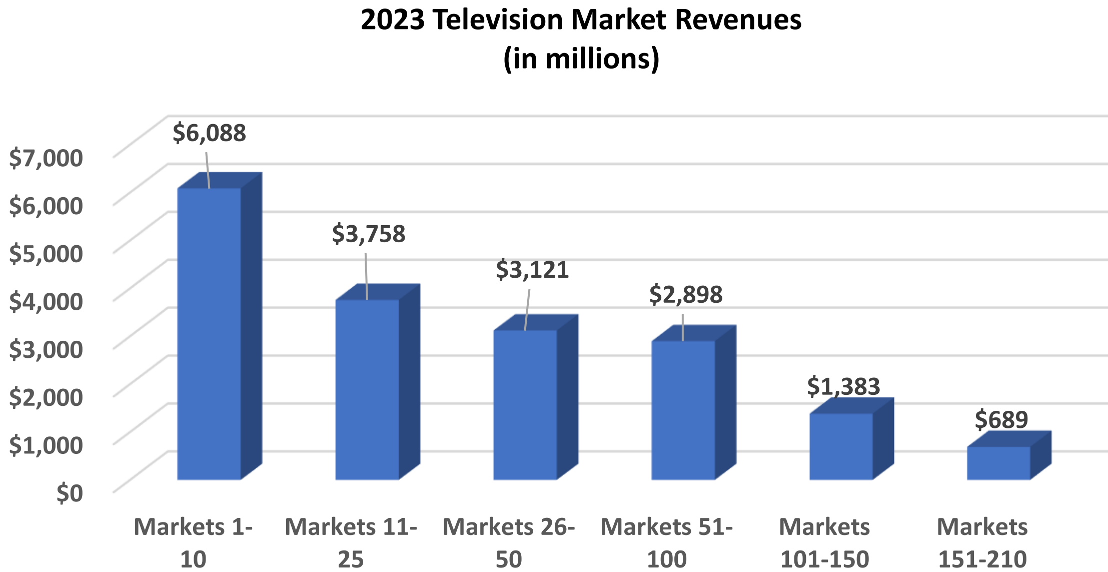
[59] J. Eisenach, *et al*., *The Evolution of Competition in Local Broadcast Television Advertising and the Implications for Antitrust and Competition Policy,* NERA (Oct. 2020), Attachment D to NAB National TV Rule Update.

[60] Borrell's estimates of local business advertising expenditures and surveys of local ad buyers clearly show that ad buyers see different types of advertising – including broadcast TV and various digital options – as substitutable at least in significant part and plan on increasing their digital ad spend. The vast majority of local ad buyers that already purchase broadcast TV ads also purchase a range of digital ad products; for example, 81 percent, 70 percent, 65 percent, and 45 percent of local TV ad buyers also purchase social media, website ads, search engine marketing (SEM), and streaming video/OTT, respectively. Notably, among those buying broadcast TV ads in 2023, only 16 percent planned to increase their TV station ad spending in 2024, while 35 percent, 34 percent, 28 percent, and 22 percent of TV ad buyers planned to increase their 2024 ad spending on SEM, social media, streaming video/OTT, and website ads. Borrell Associates, *2024 Annual Report Benchmarking Local Media's Digital Revenues*, at 24, 26 (Apr. 23, 2024).

[61] Gary Arlen, *CTV*: *TV's Latest Gold Rush*, tvtechnology.com (Jan. 6, 2025) (citing eMarketer prediction that CTV ad revenue will grow from $28.75 to $44.32 billion from 2024-2028).

[62] Experian Marketing Services, *Connected TV political advertising in 2024*, experian.com (May 7, 2024). *See also* E. Harrigan, *In 2024's Political Ad Climate, CTV is the Platform to Watch,* infillion.com (Sept. 18, 2024) (reporting that in 2024, political ad spend on digital platforms set to climb 156 percent compared to 2020, and that CTV particularly stands out for its rapid growth); G. Winslow, *New Data on Political Advertising Shows Growing Importance of CTV Ads,* tvtechnology.com (Mar. 17, 2025) (reporting that CTV ad impressions were up 24 percent in 2024 and its share of ad spend grew significantly).

revenues of the average station in the ten largest markets.[63] As a result, local stations in mid-sized and small markets face considerably greater challenges in program production and acquisition, investment in station plant, and employee training and retention. Group owners of stations in mid-sized and small markets especially need the efficiencies of national scale and the ability to expand their advertising base.



	Markets 1-10	Markets 11-25	Markets 26-50	Markets 51-100	Markets 101-150	Markets 151-210
Number of Commercial Stations	152	160	207	333	225	160
Avg. Revenue per Station (000)	$40,051	$23,485	$15,079	$8,702	$6,147	$4,307

Source: Analysis of BIA Media Access Pro data as of May 1, 2024. Analysis based on full power stations only. Satellites are excluded from analysis.

Local TV stations, moreover, cannot count on growing retransmission consent revenues to compensate for falling ad revenues, including as a source of support for maintaining local news operations. Analysts have warned that local TV news is becoming a "casualty of the streaming wars," as cord cutters not only cut their cable channels but also the local TV

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[63] NAB documented similar – or even greater -- disparities between the ad revenues of large and small market stations in many earlier filings. *See, e.g.*, 2022 NAB Communications Marketplace Comments at 49 and Attachment F; Comments of NAB, MB Docket No. 18-349, at 33-34 and Attachment D (Sept. 2, 2021); Comments of NAB, MB Docket No. 18-349, at 70-71 and Attachment G (Apr. 29, 2019).

stations included in their cable/satellite bundles.[64] As a result, local stations lose viewers and the retransmission consent fees associated with those viewers. "Some 40 million households for which local stations used to be compensated as part of the cable bundle . . . now provide no local station revenue."[65] This is yet another threat to the viability of local TV stations and local journalism that the FCC has yet to recognize, let alone address.

As NAB has urged, the Commission should begin to address this problem by refreshing the record in its long-pending virtual MVPD proceeding.[66] The current inability of local TV stations and station groups to negotiate with vMVPDs for compensation for those vMVPDs' re-use of stations' signals to attract paying subscribers – just as local stations negotiate for retransmission consent with traditional cable and satellite MVPDs – causes clear economic harm to local broadcasters and their continuing ability to pay for valued local programming, including news. Due to the unresolved nature of vMVPDs' status as "MVPDs" for purposes of retransmission consent, individual broadcast stations and station groups cannot negotiate for or earn retransmission-type fees from vMVPDs with millions of subscribers, the largest of which, YouTube TV, passed eight million subscribers last year and has been projected will become the most widely used pay TV subscription service in the U.S., surpassing Comcast and Spectrum (Charter).[67] The status quo only further enhances the already-dominant position of Google/YouTube in the marketplace, at the expense of much smaller and poorer local broadcast stations and groups that lack the scale to negotiate with YouTube TV.[68]

The market capitalization comparison below illustrates the absurdity of today's broadcast-only regulatory paradigm. The market caps of the technology giants, as well as the leading OTT and multichannel video/broadband providers, dwarf those of even the largest TV station groups.

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[64] Tom Rogers, *Local News Is Being Pushed Up a Creek as a Casualty of the Streaming Wars,* Newsweek (Apr. 4, 2024). Cord-cutting is projected to continue in 2025, thereby increasing downward pressure on broadcast stations' retransmission consent fees. *See* G. Winslow, *Study: Total U.S. TV Station Revenue to Decline in 2025*, tvtechnology.com (Jan. 6, 2025).

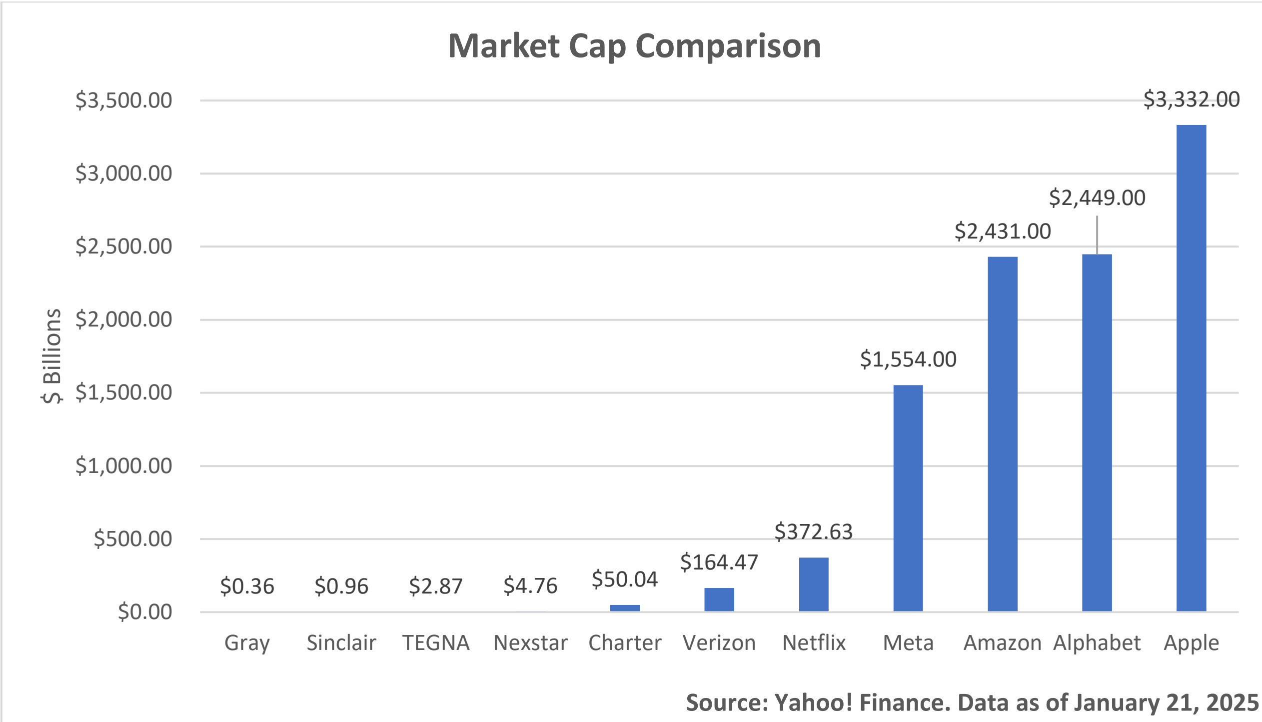
[65] Rogers, *Local News Is Being Pushed Up a Creek*. *See U.S. TV Station Retransmission Projections, 2024*, Kagan, the media research group of S&P Global Market Intelligence (showing the growth rate of retransmission fees paid by MVPDs falling sharply after 2021, becoming negative, and projecting to remain negative through 2029).

[66] *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014); *see, e.g.*, NAB Notice of Ex Parte Communication, MB Docket No. 14-261 (Feb. 7, 2023).

[67] B. Schoon, *YouTube TV estimated to have more subscribers than Comcast and Spectrum by 2026*, 9to5google.com (Apr. 2, 2024) (citing MoffettNathanson); J. Goldman, *YouTube TV price hike follows platform's massive living room growth*, emarketer.com (Dec. 12, 2024).

[68] Chairman Carr already has questioned how Alphabet/Google/YouTube uses its power to determine which video content providers have access to YouTube TV's millions of subscribers. *See* Letter from FCC Chairman Brendan Carr to Sundar Pichai, CEO, Alphabet, Inc. and Neal Mohan, CEO, Google LLC, d/b/a YouTube (Mar. 7, 2025).

Again, the Commission has yet to come to terms with the adverse role it plays in the marketplace by imposing strict structural ownership and other regulations only on broadcast station participants in the video marketplace.



Beyond dwarfing TV station groups – indeed, the entire broadcast industry – in size and resources, the Big Tech platforms, as NAB earlier explained in detail, also control the technologies that power both content discovery (search) and digital advertising. Whether consumers use search engines, social networks, voice or video platforms, or even broadcasters' own apps to access news and other content, decisions made unilaterally by a few dominant digital technology giants impede local broadcasters' ability to connect with their audiences online through the platforms' ranking algorithms, which determine what sources, articles, and clips appear, or are "surfaced," to viewers.[69] The platforms' technological control

[69] NAB National TV Rule Update at 29-30 and Attachment A, NAB Written Statement for the Record, *Online Platforms and Market Power, Part 1: The Free and Diverse Press*, House of Representatives, Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law, at 10-14 (Sept. 2, 2020). Among other problems identified, those algorithms consistently favor national sources over local sources and often make it difficult for smaller, local publishers to reach audiences at all.

and lack of transparency additionally permit them to impose advertising limits and policies that impede stations' ability to effectively monetize their own content online.[70]

In short, broadcasters lack bargaining power when dealing with the digital giants that have become gatekeepers for content providers, including local TV stations, seeking to reach audiences and monetize their content online. The leading platforms' market power thus increasingly impairs broadcasters' ability to earn the ad revenues needed to help recoup the considerable costs of producing locally-oriented news and information in the first place. A 2021 BIA study quantified the economic losses to broadcasters from certain practices of the Big Tech platforms.[71] Examining only Google Search and Facebook News Feed, BIA estimated close to $2 billion in annual loss of value to broadcasters, concluding that no platform currently offered a viable economic model for broadcast news, *i.e.*, one that would pay or enable broadcasters to earn equitable revenue on their news content.[72] In this environment, the Commission has no rational basis for retaining a national ownership rule keeping TV station groups artificially small, weak, and less able to pay to provide the local content that the FCC professes to value.

C. The National Ownership Cap Impedes TV Station Groups' Acquisition and Production of Content, Thereby Inhibiting Their Ability to Attract Viewers, Earn Advertising Revenues, Obtain Investment, and Better Serve Their Communities

The national cap limits TV broadcasters from entering into combinations allowing them to leverage joint resources, better manage their costs, and, most importantly, offer content they produce or acquire to viewers in all markets across the country. Under the 39 percent limit, broadcast TV station groups lack the national scale needed to create or acquire and launch programming because those groups cannot distribute their programming to the number of markets and viewers needed to attract the advertising revenues required to cover the high costs of that programming's production or acquisition. It is a vicious competitive circle – the national TV rule impedes station groups from producing or acquiring the expensive TV content that they require to attract the viewers and, ultimately, the advertising dollars needed to create or purchase attractive content in the first place.

Television broadcasters' competitors, however, including global streaming, Big Tech, and social media platforms such as Netflix, Amazon Prime, Apple TV+, YouTube, and TikTok can provide their content nationally and even internationally. These giant video marketplace players face no meaningful restrictions on achieving economies of scale and can reach

[70] NAB National TV Rule Update at 30 and Attachment A at 14-16. For instance, the platforms determine which content is eligible to be monetized and decide the share of revenue they retain versus the amounts passed on to the content providers that bear all the costs of producing the quality content that financially benefits the platforms.

[71] *See* NAB National TV Rule Update at 30-31 and Attachment E, BIA Advisory Services, *Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News* (May 2021).

[72] NAB National TV Rule Update at 30-31 and Attachment E at ii-iii, 21-22.

audiences and attract advertisers without regulatory encumbrances, giving them tremendous advantages over constrained TV station groups in their ability to produce and acquire programming. Eliminating the national cap would enable station groups to expand nationally and produce or purchase more and better programming, thereby increasing marketplace competition and providing more free OTA video content to consumers.

Whether local and national news, popular entertainment and sports programming, weather, or important emergency information, TV stations need to produce or acquire compelling content to lure viewers and advertisers to their channels, especially given intense competition from myriad other video content providers. But producing or acquiring quality video content is not cheap – it requires substantial upfront capital investment due to the significant fixed and sunk costs entailed in making the "first copy" of televised content. As multiple economists have explained, the "'first copy' aspect of intellectual property means that high-quality programming is expensive to obtain (or produce), while the marginal costs of distributing that programming to incremental viewers is extremely small."[73] Television is different from most media markets in "the magnitudes of the fixed costs and that they are often sunk."[74] Beyond TV stations' significant fixed operating costs, many of their content-related expenditures are "sunk costs," meaning "programming investments that prove unpopular cannot be recovered, as cannot many administrative and marketing costs."[75]

Even before a show is produced, a producer needs to invest in script development, casting, location scouting, hiring a crew, legal fees, insurance, and initial marketing expenses.[76] Once production starts, the producer will need to pay for cast and crew salaries, equipment rentals, set design and building, transportation, and permits.[77] And finally, in post-production, the producer will need to pay for editing, visual effects, sound design, music composition, and color grading.[78] Most – if not all – of these expenses cannot be recovered if the show is never aired or if it fails in the market, and all of these expenses will be incurred before airing. As a

[73] J.A. Eisenach & K.W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 6 (June 2011) (Economies of Scale Study), attached to NAB Reply Comments, MB Docket No. 10-71 (June 27, 2011).

[74] G.S. Crawford, The Economics of Television and Online Video Markets, at 308-09, Handbook of Media Economics (2015). Launching a channel, for example, requires "a multi-year programming commitment, as well as administrative, technical, and marketing infrastructures that can easily push the fixed costs over $1 billion." *Id*. at 309.

[75] *Id*. at 309.

[76] J. Stebleva, *TV Production Budgets: Strategies for Effective Planning*, Filmustage Blog (Aug. 22, 2024).

[77] *Id*.

[78] *Id*.

result, substantial upfront capital is needed to cover the investment in production costs or the costs of acquiring such expensive programming.

To purchase or produce original video content, media companies now invest extraordinary sums of money. In North America in 2023, approximately $48 billion was spent on original content, and $36 billion was spent on acquired content.[79] Streaming platforms, in particular, spent remarkable sums on content. Disney led the way in global content spending with $32.1 billion in 2024.[80] Netflix kept pace by spending $18.9 billion globally in 2023 on original programming and another $12.7 billion on licensed programming.[81] For scripted content, FilmLA estimated in 2018 that the per-episode production cost for a TV series ranged from $3.1 million to $15 million.[82] Broadcast groups also face additional upward pricing pressure in acquiring syndicated programming, as streaming platforms pay hundreds of millions of dollars for popular syndicated content.[83]

As noted above, broadcast TV stations are increasingly dependent on live sports programming to attract viewers, but broadcasters are struggling to retain rights to that astronomically expensive programming. After losing significant sports programming to cable, broadcasters are now losing that vital programming to streaming services, including those owned by the giant tech platforms.[84] Sports media rights payments in the U.S. approached $30 billion in

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[79] *Original vs. Acquired TV Content Spending, 2023* at 16, Variety VIP+, *The Death of Peak TV* (Mar. 4, 2024).

[80] *2024 Global Content Spend Forecast* at 13, Variety VIP+, *The Death of Peak TV* (Mar. 4, 2024).

[81] *Netflix Produced vs. Licensed Content Assets* at 13, Variety VIP+, *The Death of Peak TV* (Mar. 4, 2024).

[82] FilmLA, 2018 Television Report, at 5 (2018).

[83] For example, Netflix paid $500 million for five years to host *Seinfeld* on its platform, and WarnerMedia paid $425 million in 2019 to host *Friends* on the HBO Max streaming platform. A.R. Chow, *How Seinfeld Became One of TV's Great Moneymakers*, Time.com (Oct. 1, 2021). Sony Pictures Entertainment reportedly is seeking bids from streaming platforms to air new episodes of *Wheel of Fortune* and *Jeopardy* just after they first air on broadcast TV. J. Koblin, '*Jeopardy!' and 'Wheel of Fortune' to Leap to Streaming*, nytimes.com (Feb. 27, 2025).

[84] Amazon has moved strongly into sports programming, gaining exclusive rights to Thursday night NFL games and successfully bidding to become the NBA's third national partner. *See* https://advertising.amazon.com/blog/prime-video-nba-2025-deal. Netflix showed two NFL games on Christmas Day in 2024, as well as landing WWE's "Raw" and exclusive U.S. rights to the FIFA Women's World Cup in 2027 and 2031. Apple TV streams all U.S. Major League Soccer games, and YouTube secured the NFL Sunday Ticket package in 2023. *See, e.g.*, A. Islam, *Streaming platforms spent US$10bn on sports rights in 2024*, SportsPro.com (Jan. 8,

2024, up from $14.6 billion in 2015, and are projected to rise to nearly $35 billion by 2027.[85] While larger broadcast TV station groups recently have acquired rights, especially local rights, to air at least some live sports programming, including some MLB, NHL, NBA, and WNBA games, broadcasters desperately need to achieve greater scale to have even a chance to continue competing for popular sports programming.[86]

Notably, operating a local broadcast TV station with an independent news operation requires additional capital investment and human-resource expenditures that streaming services and cable networks and operators do not incur. To maintain a local news operation and regularly air local news programming, a station requires: a news director and assistants to manage the newsroom; a business manager for budgeting; an executive producer and other supporting producers to create the news programs; assignment desk personnel that help manage the news operations and stay abreast of the news to decide what stories to cover; on-air-talent including news anchors, sports directors, weathercasters, field reporters, and traffic reporters; engineers who maintain and run the broadcast equipment; and studio and in-the-field camera operators.[87] Unsurprisingly, local TV stations – especially in larger markets with higher available advertising revenues – spend millions annually just on their local news operations. From 2013-2018, for example, major English language network-affiliated stations in the top

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2025); A. Kumar, *Tech Giants Disrupting the Sports Broadcasting Landscape*, iSportConnect.com (Feb. 5, 2025).

[85] S. Robson, *Sports rights in the US approach $30 billion*, S&P Global Market Intelligence (Apr. 2, 2024).

[86] The decline of Regional Sports Networks on cable, primarily due to cord cutting, has allowed some TV groups to obtain rights to limited sports programming. For example, Scripps' TV stations in Las Vegas reached a deal in 2023 to air games of the NHL's Vegas Golden Knights and recently signed an agreement with the WNBA's Las Vegas Aces to air all the team's non-nationally televised games free OTA. G. Winslow, *Scripps Sports to Air Las Vegas Aces Games on Vegas 34*, tvtechnology.com (Mar. 14, 2025); *Golden Knights Going 'Back to the Future' with OTA Broadcast Deal*, johnwallstreet.com (May 11, 2023). Late last year, Gray Media signed a deal to simulcast 15 regular season Atlanta Braves games, as well as exclusively air 10 spring training games, on Gray's TV stations in Atlanta and throughout the Southeast. Gray also has the local rights to air 10 games apiece of the NBA's Atlanta Hawks and other NBA teams, and it is the primary local broadcast rights holder to the NBA's Phoenix Suns and New Orleans Pelicans, as well as the WNBA's Phoenix Mercury and Atlanta Dream. G. Winslow, *Gray Media To Simulcast 15 Regular-Season Atlanta Braves Games*, tvtechnology.com (Dec. 18, 2024); M. Reynolds, *Gray boosts local sports presence via MLB, NHL simulcast deals*, spglobal.com (Dec. 20, 2024). In 2023, the CW Network, owned by Nexstar, began showing LIV Golf tournaments and some ACC football and basketball games, and starting this year will be airing the NASCAR Xfinity Series. D. Rumsey, *Streaming Might Be The Future, But Over-The Air Sports Aren't Going Away*, frontofficesports.com (Nov. 12, 2023).

[87] L. Chuday, NAB's Guide to Careers in Television (2d ed. 2004).

ten markets spent an average of nearly $15.8 million annually on local news,[88] with those stations' news expenses reaching an average of over $16.6 million in 2019.[89] News costs routinely represent around one third of many stations' total annual expenses.[90]

Local TV broadcasters also incur significant capital investment costs when first establishing a news operation before any programming can be produced or aired. Stations, for example, must acquire production and editing equipment, construct/remodel studios, news sets, and newsrooms, purchase weather radar equipment, and buy station vehicles. Some stations also purchase drones and expensive satellite trucks. Initial capital costs for a station's news operations can reach approximately $6.5 million in top-50 markets, with additional annual costs of supporting and maintaining capital equipment running to hundreds of thousands of dollars.[91] And of course, these costs do not include the millions (often many millions) required to obtain an FCC license allowing the TV station to operate; to build, acquire and/or lease and then maintain expensive infrastructure including transmitters, towers, antennas, and real property to house them; and incur the substantial costs (*e.g.*, electricity) of transmitting an OTA signal to the station's community of license – costs that broadcasters' streaming competitors do not bear.

Once, however, stations make the fixed- and sunk-cost investments associated with distributing video content, including news, the marginal costs of distributing that content are extremely low.[92] Specifically, once the infrastructure has been deployed and the programming produced or acquired, the cost of transmitting that programming to an additional viewer is "zero or close to zero."[93] As a result, broadcast stations have high breakeven points: They

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88 Comments of NAB, MB Docket No. 18-349 at 29 (Sept. 2, 2021) (citing NAB Television Financial Reports 2014 to 2019).

89 *Id.* (citing NAB Television Financial Report 2020, at 36, 38). NAB did not publish this annual TV report after 2020.

90 *See* BIA Advisory Services, *The Impact on the Amount of News Programming From Consolidation in the Local Television Station Industry*, at 6-7 (Sept. 23, 2020), attached to *Ex Parte* Communication, Gray Television, Inc., MB Docket No. 18-349 (Oct. 13, 2020).

91 *Id*. at 7-8.

92 Economies of Scale Study at 5, n.5 ("[O]nce a television program is produced, the marginal cost of an additional viewer is effectively zero."); *see also* B.M. Owen & S.S. Wildman, Video Economics at 176 (1992) ("The expansion of local news broadcasts allow[s] the fixed costs of the local station's news efforts to be spread over more hours."); FCC Study, Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming* at 10 (July 24, 2007) ("In general there are significant fixed costs to producing news programming, and much lower physical costs to distributing the programming using the equipment the station has invested in.").

93 Economies of Scale Study at 5, n.5.

must generate a significant amount of capital to cover those initial fixed and sunk costs, but after crossing the breakeven point, they can earn healthy margins on every additional household that watches their content.[94] Unfortunately, broadcast TV stations, hampered by FCC ownership rules, are strictly limited in the number of households they can serve and thus have an artificially limited revenue base.

Even larger TV station groups lack the revenue base and investment capital necessary to effectively compete with their exponentially better-financed rivals in the multi-billion-dollar programming production arms race.[95] Due to their lack of scale, moreover, broadcast TV station groups are less attractive than other distribution platforms to video content producers. For example, Trifecta Entertainment & Media, Tornante Television, and Scott Sternberg Productions produced a half-hour true crime series, *Crime Exposé with Nancy O'Dell*. But to achieve the requisite scale, the production studios had to syndicate the show through Fox Television Stations, Sinclair Broadcast Group, CBS Stations, Gray Television, Tegna, Scripps, Mission Broadcasting, Imagicomm, and Cox Media Group to reach 95 percent of the United States.[96] Forcing content producers to enter such elaborate syndication deals to reach the entire country is extremely cumbersome and makes TV station groups much less desirable as distribution platforms for quality programming than their competitors with national reach. Many program producers will not even consider broadcast TV station groups as the primary or exclusive distribution partners for these reasons.

Finally, the national TV ownership cap (and the local ownership restrictions) not only severely impede TV station groups' ability to invest in programming, but the rules also make broadcasters themselves less attractive to investors than their communications industry competitors. The idea that the asymmetric regulation of one industry vis-à-vis other competing industries impedes investment in the more regulated industry is hardly new. Economic literature showcases the litany of harm that undue regulation can inflict on an industry.

Specifically, empirical work has shown that asymmetric regulation can undermine innovation[97] and suppress investment.[98] As NAB highlighted in previous comments, studies

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[94] *Id*. at 5.

[95] *See* Section II.B., *supra*, comparing the massively greater market capitalizations of Netflix and the tech giants to the market caps of even the largest broadcast TV station groups.

[96] J. Lafayette, *'Crime Exposé with Nancy O'Dell' To Launch Sept. 23 on Major Market Fox Stations*, Broadcasting & Cable (June 27, 2024).

[97] *E.g.,* P. Aghion, A. Bergeaud & J.V. Reenen, *The Impact of Regulation on Innovation*, 113 (11) Am. Econ. Rev. 2894 (2023) (finding that significant increases in labor regulations resulted in sharp drops in innovation and discouraged incremental innovation after demand shocks).

[98] *E.g.,* T.W. Hazlett & A. Caskan, *Natural Experiments in U.S. Broadband Regulation*, 7(4) Rev. of Network Econ. 460 (Dec. 2008). The FCC recognized over a decade ago that the

have shown that retaining asymmetric regulations in the face of new competition creates regulatory distortions, drives up the regulated industry's costs, causes already scarce capital to flow to less regulated industries, deters new firm entry, and disadvantages the heavily regulated firms in relation to competitors that face fewer regulations.[99] On the other hand, reforms that reduce regulatory-related entry barriers have been shown to stimulate capital accumulation[100] and customer acquisition.[101] Regulation that generates uncertainty in an

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broadcast industry, especially smaller businesses and new entrants, suffers from a lack of investment capital. *See Commission Policies and Procedures Under Sec. 310(b)(4) of the Commc'n Act, Foreign Investment in Broad. Licensees*, Declaratory Ruling, 28 FCC Rcd 16244, 16249 (2013).

[99] *See* Comments NAB, MB Docket No. 18-349, at 15-19 (Sept. 2, 2021); *see also* S. Pociask and J.P. Fuhr, Jr., *Concentration by Regulation: How the FCC's Imposition of Asymmetric Regulations Are Hindering Wireline Broadband Competition in America*, The American Consumer Institute Center for Citizen Research, at 2 (Jan. 2016) (demonstrating that asymmetric regulations on incumbent telecommunications service providers providing broadband services "affects broadband competition, reduces broadband investment, increases wireline concentration and reduces consumer choice"); G.S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center Perspectives (Apr. 25, 2017) (showing that the threat of Title II reclassification reduced investment in broadband by at least 20 percent between 2011 and 2015); E. Ehrlich, *A Brief History of Internet Regulation*, Progressive Policy Institute, at 16-17 (Mar. 2014) (examining the impact of uneconomic broadband regulations imposed on incumbent services compared to less regulated systems and observing that "investment goes where regulation guides it by making it either welcome or unwelcome," with such regulations having the ability to "throttle the flow of capital into the sector and are therefore implemented at a potentially great cost" to overall investment in the broadband sector); R. Frieden, *Regulatory Opportunism in Telecommunications: The Unlevel Competitive Playing Fields*, 10 Commlaw Conspectus 81 (2001) (describing how "[a]symmetries in regulatory burdens create incentives to find ways to exploit artificial competitive advantages and avoid regulatory classifications that create a bias toward more pervasive and costly regulatory burdens" and have "the potential to tilt the competitive playing field in favor of one class of telecommunications carriers or service providers"); J. Bailey and D. Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, 52 J. of Reg. Econ. 237 (2017) (finding that more regulated industries experience fewer new firm births and slower employment growth and that small firms are more likely to leave a heavily regulated industry).

[100] A. Alesina, S. Ardagna, G. Nicoletti & F. Schiantarelli, 3(4) *Regulation and Investment*, J. of the European Econ. Ass'n 791 (June 2005) (finding that deregulation can spur entry and investment).

[101] T.W. Hazlett & A. Caskan, *Natural Experiments in U.S. Broadband Regulation*, 7(4) Rev. of Network Econ. 460 (Dec. 2008) (finding that DSL deregulation led to a significant increase in the number of subscribers).

industry also can impede investment and entry,[102] and as demonstrated in other contexts, laws or regulations that suppress mergers and acquisitions will create uncertainty around an investor's ability to freely exit after spending to grow and develop a business.[103] Here is yet another vicious circle – asymmetric ownership restrictions reduce investment in broadcast TV stations that then struggle to invest in more attractive programming to garner viewers, which in turn further reduces the attractiveness of TV station groups to investors.

Allowing TV broadcasters to combine to reach national scale de-risks the exorbitant costs to produce or acquire content by allowing stations to distribute their content to a much larger viewing audience. Station groups with national reach also may be able to leverage their nationwide audience base to secure upfront advertiser commitments to sponsor new programming. At a minimum, national station groups can amortize their fixed and sunk costs across a larger revenue-generating base of viewers, which again, reduces the risk of making upfront investments in programming. Elimination of the national TV rule thus will promote competition in the video marketplace and benefit consumers.

III. The National TV Rule Is Not Needed to Promote the FCC's Public Interest Goals in the Modern Media Marketplace

The Commission has *twice* concluded that a national TV ownership rule – at any level – is not needed to promote its competition or viewpoint diversity goals that traditionally underlaid all broadcast ownership rules.[104] Notably, the FCC first reached this conclusion *in 1984*, when the media and advertising markets were vastly less competitive and diverse than today.

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[102] A.K. Dixit & R.S. Pindyck, Investment Under Uncertainty 345 (1994) (noting that regulatory uncertainties can make costs unpredictable, which can deter entry).

[103] G.M. Phillips & A. Zhdanov, *Venture Capital Investments, Merger Activity, and Competition Laws around the World*, 13(2) Rev. of Corp. Fin. Stud. 303 (2024) (finding the creation of pro-takeover laws spurring greater venture capital activity as compared to jurisdictions that have stricter antitakeover laws); *see also* X. Gao, J.R. Ritter & Z. Zhu, *Where Have All the IPOs Gone?*, 48(6) J. of Fin. & Quantitative Analysis 1663 (Dec. 2013) (finding that many firms sell to larger corporations to gain the benefits of faster "speed to market" and greater economies of scope).

[104] *See* 2002 Biennial Review Order, 18 FCC Rcd at 13815, 13818, 13826, 13828 (additionally finding that the national cap was not necessary to foster "program diversity"); 1984 Ownership Order, 100 FCC 2d at 30-31, 38-39, 46. *See also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041-45 (D.C. Cir. 2002), *modified in part on other grounds*, 293 F.3d 537 (D.C. Cir. 2002) (finding the 1998 biennial review's retention of the 35 percent national TV cap arbitrary and capricious because FCC failed to demonstrate that the national cap advanced competition, diversity, or localism, and failed to address or explain its departure from the 1984 Ownership Order's conclusions about the lack of necessity of a national cap to promote viewpoint diversity or competition).

If the national TV rule was not necessary to preserve viewpoint diversity and economic competition in the last century before the expansion of cable TV channels, the launch of satellite TV and radio, the development and exponential growth of the internet and online video and audio content providers, and the emergence of behemoth technology platforms dominating both advertising and online content discovery, then that rule is not necessary to promote competition and diversity now.[105] Certain commenters' arguments to the contrary do not even pass the laugh test today,[106] given that all broadcast television as a whole garners each month only 20-24 percent of total TV usage and that any single station group's share of viewing would be a tiny fraction of that fraction.[107] No broadcast station group's share of total TV consumption even approaches the share garnered by YouTube, which alone routinely garners around half of the amount of usage of *all* broadcast television in the country.[108] That fact alone demonstrates the irrationality of limiting the national reach of broadcast TV station owners – but not their competitors' reach – in the modern media marketplace.

The national cap, moreover, is not needed to "encourage local stations to air local news and public affairs programming," and can even "diminish[] localism" by restraining more effective purveyors of local news from using their resources in additional markets.[109] The record here supports these earlier FCC conclusions. In our initial comments, NAB documented that TV stations originating local news increased the amount of local news aired by 54 percent from

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[105] In 2018, NAB and other commenters submitted information and data showing any competition and diversity justifications that had once underpinned the national TV ownership rule had eroded even further over time. *See, e.g.,* NAB Comments at 14-22, 27-29, and Attachments A-E. And the video and ad markets have only become more diverse and competitive since 2018, as NAB documented above and in other filings. *See, e.g.,* 2024 NAB Communications Marketplace Comments at 5-21; 2022 NAB Communications Marketplace Comments at 5-15, 37-46; NAB National TV Rule Update at 2-13, 27-32, Attachments A-E.

[106] *See* NAB Reply Comments at 14-19 (refuting several public advocacy groups and MVPD parties whose comments included *no* references to online video or the internet or, at best, made only passing references to the internet, while blinking reality with fictional claims about alleged broadcast TV dominance).

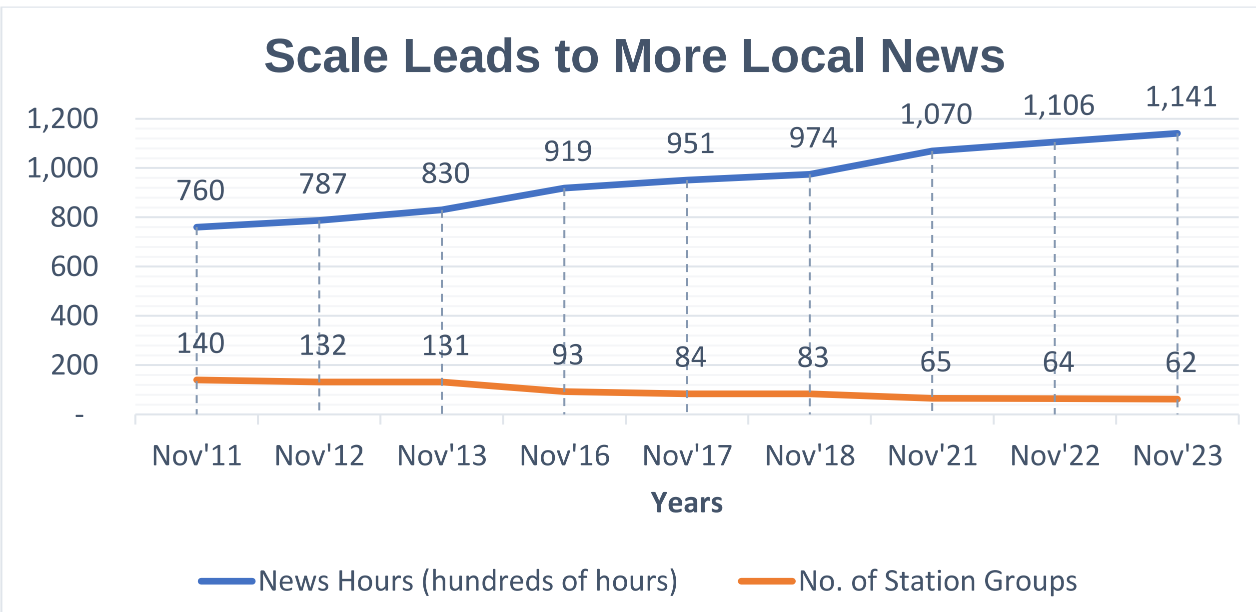
[107] *See* Section II.A., *supra*; see *also 2022 Communications Marketplace Report*, 37 FCC Rcd 15514 at ¶¶ 254, 257, 280, 284 (2022) (referencing the "ascendance of OVDs"; noting that in 2021, about "80% of U.S. households were consuming AVOD, even excluding video served on social media sites" like TikTok; finding that households "commonly subscribe to more than one SVOD service"; and reporting that in July 2022, broadcast TV captured only about 22% of viewing time, well behind both OVD and cable services); *2024 Communications Marketplace Report*, GN Docket No. 24-119, FCC 24-136 at ¶¶ 238-40, 243-44 (2024) (discussing high and increasing use of online video distributors, both advertising-based and subscription, and growing ownership and use of smart TVs and other digital devices).

[108] *See* Section II.A., *supra*.

[109] 2002 Biennial Review Order, 18 FCC Rcd at 13841.

2003 (when the cap was 35 percent) to 2016.[110] According to the Radio Television Digital News Association's 2024 report, 2023 saw another record high amount of local TV news, with stations that provide news airing an average of 6.7 hours of local news each weekday, 2.5 hours on Saturday, and 2.4 hours on Sunday, for an average total of 38.4 hours of local news per week.[111] That represents an 81.1 percent increase in the amount of local news aired from 2003, showing that scale encourages, not discourages, local news production.[112]

Additional data illustrated in the graphic below also show that greater common ownership of TV stations has significantly increased the number of local news telecasts and hours of local news provided to audiences. In November 2011, 939 stations controlled by 140 different TV station groups aired 113,772 individual local news telecasts totaling 76,328 hours. In November 2023, 1,139 stations controlled by 62 different groups aired 161,238 local news telecasts totaling 114,089 hours. While the number of separate TV station groups producing/airing news decreased by 55.7 percent over this time period due to consolidation, the number of local news telecasts and hours of local news increased by 41.7 percent and 49.7 percent, respectively.[113]



110 NAB Comments at 21.

111 B. Papper and K. Henderson, *Another record amount of local TV news*, RTDNA/Syracuse University Newhouse School of Public Communications, at 2 (July 31, 2024).

112 In 2003, TV stations aired, on average, 3.7 hours of local news on weekdays, 1.4 hours on Saturday, and 1.3 hours on Sunday, totaling an average of 21.2 hours of local news per week. *See* NAB Comments at 21, citing 2004 RTNDA/Ball State University newsroom survey.

113 NAB Staff Analysis of Nielsen and BIA MAPro data.

Especially given these data, it makes no sense to claim that ownership limits – rather than market forces or other FCC rules and policies under the Communications Act requiring stations to serve their communities – actually incentivize TV stations to provide community responsive programming, including local news. NAB and broadcasters have previously explained that broadcast stations have strong market incentives to offer locally-oriented content, which helps them stand out in a crowded media landscape, thereby maximizing their audiences and advertising revenues.[114] The Commission itself has noted the importance to local stations of the advertising presented alongside TV news programming,[115] and found "evidence that being local is *the* defining value proposition that many radio stations see themselves as providing to consumers."[116] The FCC's own findings, then, undercut erroneous claims that ownership rules restricting scale are somehow needed to promote provision of local news or other locally-oriented programming.[117] In fact, unrefuted studies have shown that structural ownership rules hamper news production.[118] One should "be skeptical when regulatory agencies" (or commenting parties) "promote organizational forms that private enterprise would not otherwise adopt," especially when the agencies are trying to accomplish something "essential to the survival and prosperity of firms in an ordinary market – such as

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[114] *See, e.g.*, Comments of NAB, MB Docket No. 18-349, at 59-60 (Apr. 29, 2019); Comments of NAB, MB Docket No. 18-349, at 92-93 (Sept. 2, 2021); Reply Comments of Entravision Commc'n Corp., MB Docket No. 17-318, at 7 (Apr. 18, 2018); Nexstar Comments at 23-24; NAB Comments at 19-20.

[115] *See 2022 Communications Marketplace Report*, 37 FCC Rcd 15514 at ¶ 273 (2022).

[116] *2018 Quadrennial Regulatory Review*, Report and Order, MB Docket No. 18-349, FCC 23-117, at ¶ 36 (Dec. 26, 2023) (emphasis in original).

[117] *See, e.g.*, Comments of Writers Guild of America West, Inc., MB Docket No. 17-318, at 7-8 (Mar. 19, 2018); Comments of Office of Commc'n, Inc. of the United Church of Christ, Common Cause, Nat'l Hispanic Media Coal., and Public Knowledge (Public Interest Commenters), MB Docket No. 17-318, at 3 (Mar. 19, 2018).

[118] Multiple economists have concluded that TV broadcasting generally, and local news production specifically, are "subject to strong economies of both scale and scope," which are, by definition, "associated with falling unit costs of production" and "hence are *prima facie* welfare enhancing." Economies of Scale Study at 1-2; *accord* Decl. of M. Israel and A. Shampine, NAB Comments, MB Docket No. 10-71, at Appendix B ¶¶ 49-51 (June 26, 2014) (finding that large economies of scale and scope exist in production of TV programming and that both lead to "increased investment in news programming"). As a result, placing limits on broadcasters' ability to achieve scale economies through ownership restrictions "result[s] in higher costs, lower revenues, reduced returns on invested capital [and] lower output," including "significantly reduc[ed]" local news output. Economies of Scale Study at 2-3.

ensuring that a business identifies and fills available market niches [and] is responsive to its customers."[119]

National scale also can enhance the regionally- and locally-oriented news programming, including political news and information, offered by station groups in their various markets, including smaller ones.[120] Ahead of the 2022 mid-term elections, for example, Nexstar hosted about 50 local and statewide candidate forums and debates. In several states with competitive races, Nexstar had the scale necessary to bring candidates together for live broadcasts carried in almost every county in those states.[121] In 2024, Gray Media provided comprehensive daily coverage of the Republican and Democratic national conventions, utilizing the resources of its Washington, DC bureau and news teams from 13 Gray stations from different states to report on the local impact of the presidential and vice-presidential

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[119] *Bechtel v. FCC*, 10 F.3d 875, 881 (D.C. Cir. 1993). *Bechtel* found an important FCC criterion for licensing new broadcast stations arbitrary and capricious. That "integration" criterion had significantly favored prospective licensees who intended to be personally involved in the management and operation of the new station over "absentee" owners, because such "on-site" owners (supposedly) would have increased incentives to respond to community needs and to comply with FCC rules and would be better positioned than absentee owners to gather relevant information about whether the station is satisfying community needs and complying with rules. *Id*. at 878-79. The court found this integration preference arbitrary and capricious because, *inter alia*, the FCC failed "over a 28-year period to generate a shred of supporting evidence" indicating that it achieved any of the benefits attributed to it. *Id*. at 880-81. Interestingly, the claimed benefits of the integration criterion resemble the benefits of local ownership often alleged by proponents of retaining (or even tightening) the national TV cap. *See*, *e.g*., Comments of Free Press, MB Docket No. 17-318, at 16 (Mar. 19, 2018). The record in this proceeding, however, does not provide the evidence needed to support retaining or tightening the rule based on a localism rationale that stations owned by groups of some (un)specified size are less responsive to community needs and interests than stations owned by individual local owners or by smaller groups. Such a claim made without substantial evidence would meet the same fate as the FCC's integration criterion.

[120] *See*, *e.g*., NAB Reply Comments at 22-23 and n.79 (documenting that larger station groups use their joint resources to create public service initiatives and programming of regional interest, as well as to support news bureaus in Washington, D.C. and in various states, which enhance the coverage of national and state political and other issues that impact local markets across the country); Univision Reply Comments at 2-6 (pointing out that its greater national scale enabled creation of two broadcast networks and introduction of "new Spanish language local news services to additional markets across the country").

[121] TVN Staff, *Nexstar Media Hosts Nearly 50 Candidate Debates, Forums Ahead Of Midterm Election*, tvnewscheck.com (Oct. 13, 2022).

nominations and party platforms.[122] On election night, Gray used its Local News Live studios in Washington, DC, with access to live reporters on the ground across dozens of markets, to cover the results from the local perspective of communities nationwide, including in all the battleground states.[123]

NAB members report, moreover, that broadcast groups owning TV stations in both large and small markets use the greater revenues earned by large market stations to help subsidize the operations, including local news, of stations in small markets with significantly lower levels of available advertising revenue. NAB has demonstrated time and again the vastly differing economics of TV broadcasting in large and small markets,[124] which the FCC has acknowledged for years.[125] Given concerns about declines in profitability of local TV news operations and the continued viability of news operations at stations in small markets and/or with weak ratings, the Commission must finally allow TV station groups to enhance their economic efficiencies and increase their ad revenue base by attaining national scale.[126]

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[122] G. Winslow, *Gray Outlines Coverage Plans for Republican National Convention*, tvtechnology.com (July 10, 2024); G. Winslow, *Gray Unveils Coverage Plans for Democratic National Convention*, tvtechnology.com (Aug. 19, 2024). This extensive coverage was available on Gray's local affiliates and Local News Live, Gray's 24/7 national news network that provides live streaming coverage on more than 500 Gray station websites, connected TV apps, and mobile apps.

[123] M. Miller, *Local News Live Announces Election Night Coverage*, tvnewscheck.com (Oct. 28, 2024).

[124] *See* Section II.B., *supra*.

[125] *See, e.g., 2014 Quadrennial Regulatory Review*, Order on Recon. and Notice of Proposed Rulemaking, 32 FCC Rcd 9802, 9836 (2017) (stating that small and mid-sized markets "have less advertising revenue to fund local programming" and noting the high operational costs of providing local news programming); 2002 Biennial Review Order, 18 FCC Rcd at 13698 (finding that small market TV stations compete for "disproportionately smaller revenues than stations in large markets" and that record data demonstrated the "different economics of station ownership depending on market size" such that the ability of stations to compete successfully "is meaningfully (and negatively) affected in mid-sized and smaller markets").

[126] According to RTDNA's annual TV news surveys, 52% of responding news directors reported that their news operations showed a profit for 2023, down from 59.8% for 2022 and 60.7% for 2019. B. Papper and K. Henderson, RTDNA/Syracuse University Newhouse School of Public Communications, *TV news faces profit drop*, at 1 (Sept. 10, 2024) (also showing for 2023, an increase in the number of respondents reporting losses or breaking even and an increase in the number reporting "don't know"). The total number of stations broadcasting local news increased very slightly from 1,109 to 1,111 in 2023, but more stations (414, up from 402) were receiving news from other producers, rather than producing their own news, reflecting the financial stresses facing local stations and their news operations, particularly in smaller markets. *See Another record amount of local TV news* at 1. *See also* T. Hanlon, *Why*

In its 2022 update to the record in this proceeding, NAB showed in detail how greater scale and resources enable station groups to improve their local and regional news services.[127] More recent reports reconfirm the benefits audiences gain from the extensive news and information provided by better resourced station groups.[128] And as NAB has explained, TV broadcasters – even large station groups – seriously struggle to reach online audiences with their local content, including news, and to derive ad revenue from that content, due to the giant technology platforms' dominance of both content discovery and digital advertising.[129] Permitting TV station groups that provide local news and emergency journalism in local markets to reach greater scale would promote localism by safeguarding the quality and even

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Some TV Stations May Start Ditching Local News, tvrev.com (Mar. 20, 2025) (concluding that, due to high production costs and declining ad revenues, local TV stations, especially smaller ones with weak ratings, will inevitably be unable to sustain local news); L. Bouma, *More Layoffs Are Coming To Local ABC, CBS, FOX, & NBC Stations in 2025*, cordcuttersnews.com (Mar. 7, 2025) (describing financial pressures facing local TV stations from declining ad revenues and shift of viewer attention and ad dollars to digital platforms, which "threaten[] the viability of local newsrooms that rely heavily on ad revenue to fund operations").

[127] NAB National TV Rule Update at 13-19 (explaining how scale facilitated station groups' establishment of news bureaus in Washington, DC and in state capitals; increased investigative reporting; enhanced election and political coverage; promoted reporting relevant to minority communities; and enabled in-depth reporting on issues important to specific localities and regions and initiatives on special topics).

[128] *See, e.g.*, G. Winslow, *Gray Stations Add 'Local News Live' to Daily Programming Lineup*, tvtechnology.com (Mar. 19, 2025) (discussing Gray adding a one-hour "Local News Live" afternoon newscast to dozens of stations, which features top stories from local journalists in Gray newsrooms across the country); M. Stahl, *Tegna Snaps Gun Violence Out Of Its Fog*, tvnewscheck.com (June 27, 2023) (collaborating journalists at eight Tegna stations took a deeper look at gun violence in an initiative called *7 Days, 1,000 Shootings*, examining the aftermath of shootings from the previous year on people and communities, as well as casting light on possible solutions); M. Stahl, *Cox's NeighborhoodTV Looks To Reboot Hyperlocal*, tvnewscheck.com (Sept. 19, 2023) (discussing Cox Media's digital news channel focused on micro-markets within large markets where Cox owns TV stations and featuring information about local government, the local impact of extreme weather, local sporting and cultural events, new restaurants and hot spots, and community heroes); M. Shahl, *Telemundo Stations' "Night Edition" Puts Regional Collaborations In FAST Gear*, tvnewscheck.com (May 23, 2023) (describing a new live regional news show aired on Telemundo's FAST channel serving the Northeast and created by Telemundo stations' local newsrooms in New York, Philadelphia, Washington, DC, Boston and Hartford).

[129] *See* Section II.B., *supra*; NAB National TV Rule Update at 27-32 and Attachments A & E.

the viability of broadcast journalism in markets (especially smaller ones) across the country in today's Big Tech dominated marketplace.[130]

The Commission can no longer maintain a rule based on public interest premises dating from an era when broadcasting was the only electronic medium and very limited numbers of broadcast stations existed. Rather than scarcity in the number of media outlets, programming options, viewpoints, and information providers, the abundance of choice is now overwhelming audiences.[131] None of the FCC's traditional public interest goals supports maintaining any national TV ownership cap.

IV. Calls for Eliminating the UHF Discount Alone Must Be Rejected as Inconsistent with FCC Precedent and Contrary to the APA and the Act

To restate the obvious, the Commission cannot credit certain commenters' position that the UHF discount is somehow separate from the national TV ownership rule as a whole and can (and should) be repealed without regard to the impact on the national cap.[132] As NAB and others have explained, the UHF discount exists only as part of the calculation methodology used to determine compliance with the national TV rule. It is not a stand-alone rule, and there would be no reason to define a methodology discounting the audience reach of UHF (or any other) stations in the absence of a rule limiting the audience reach of TV station owners.[133]

Notably, the FCC adopted the UHF discount in the same order that it first approved a national TV audience reach cap.[134] The discount is contained within paragraph (e) of 47 C.F.R. § 73.3555, which is entitled "National television multiple ownership rule" and which sets forth the 39 percent audience reach cap. Indeed, the definition of "national audience reach," including the UHF discount, is contained within a subsection immediately following a subheading stating "[f]or purposes of this paragraph (e)," and shows that the UHF discount exists "[f]or purposes of making this [national audience reach] calculation" under the national

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[130] Broadcast commenters agreed that greater national scale permits greater investment in high quality programming and local content, including news, and in new services, such as those enabled by ATSC 3.0. *See, e.g.,* Sinclair Comments at 11-17; Univision Reply Comments at 2-6; Entravision Reply Comments at 7-9; Nexstar Comments at 22-24.

[131] *E.g.*, Nielsen, *Streaming is the future of TV, but the abundance of platform choice is overwhelming for viewers* (Apr. 11, 2022); L. Holmes, *There's too much TV to keep up. Have we hit the limit?*, npr.org (May 3, 2022); C. Melore, *Content overload: Streaming audiences plagued by far too many options*, studyfinds.org (Dec. 22, 2024).

[132] *See, e.g.*, Free Press Comments at 21-24; Public Interest Commenters at 2-3.

[133] *See* NAB Reply Comments at 12-13; *accord* Reply Comments of Nexstar Broad., Inc. in Support of Petition for Reconsideration, MB Docket No. 13-236, at 7 (Jan. 23, 2017).

[134] 1985 National Cap Order at 88-93; *see* NAB Reply Comments at 13.

TV ownership rule.[135] In short, the UHF discount has no independent existence separate from calculating compliance with the national TV ownership cap.[136]

The FCC, moreover, has repeatedly noted the linkage between the UHF discount and the national TV ownership limit, and recognized that modifying or repealing the UHF discount necessarily impacts the national TV ownership rule and station groups' compliance with it:

- The order concluding the 2006 quadrennial ownership review cited the Third Circuit's decision in *Prometheus I* as (1) "holding that the UHF discount is a rule 'relating to' the national audience limitation" under the terms of the 2004 Consolidated Appropriations Act, and (2) observing that the 39 percent cap "would be altered if the UHF discount were modified."[137]

- The 2013 rulemaking notice adopted to consider eliminating the UHF discount referred to the discount as "contained" within the national TV ownership rule and recognized that "the elimination of the UHF discount would impact the

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[135] 47 C.F.R. §§ 73.3555(e)(2) and (e)(2)(i).

[136] Although Free Press has claimed that the national TV cap and UHF discount are two distinct rules, their actions (and those of other advocacy groups vociferously arguing for the UHF discount's elimination) say otherwise. *See* Free Press Comments at 24 (asserting that the cap and the discount are "two separate rules"); *but see* Reply Comments of Common Cause, *et al*., MB Docket No. 13-236, at 3 (Jan. 13, 2014) (admitting the linkage between the audience reach cap and the UHF discount by erroneously claiming that maintaining the UHF discount would somehow "effectively raise the national ownership cap"). Free Press and the other advocacy groups know full well that repealing the discount would significantly tighten the national audience reach cap and restrict the level of common TV station ownership permitted nationwide. Indeed, that is the very reason those advocacy groups, which have in the past opposed and continue to oppose reform of the FCC's outdated ownership rules, even care enough about the UHF discount to have participated in the FCC's 2013 proceeding on the discount and the current proceeding examining the national TV ownership rule. If the UHF discount were truly a rule separate from the national cap, or were its elimination just a minor technical tweak to the rule, these various groups would not have bothered to file multiple comments in two FCC proceedings, let alone a court suit. *See* Judgment, *Free Press*, *et al*. *v*. *FCC*, No. 17-1129 (D.C. Cir. July 25, 2018) (dismissing petition of Free Press and others challenging FCC's 2017 reinstatement of UHF discount).

[137] *2006 Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2084 (2008), citing *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396-97 (3d Cir. 2004) (*Prometheus I*).

calculation of nationwide audience reach for broadcast station groups with UHF stations."[138]

- Even the 2016 order eliminating the UHF discount (subsequently reversed on reconsideration) described the discount as "contained" in the national TV audience reach cap and as one of the "elements" of the rule, and repeated that repealing the discount would affect the calculation of national audience reach for station groups with UHF stations.[139]

- The 2017 reconsideration order reinstating the UHF discount, pending a proceeding to examine the national TV rule as a whole, found that the discount was "inextricably linked" to the national ownership cap and that they should be considered "in tandem"; stated that "[a]ny adjustment to the UHF discount affects compliance with the national audience reach cap"; repeatedly said that elimination of the discount had the effect of "substantially tightening" the cap; stated that the discount "was part of the cap"; and most importantly, concluded that repealing the discount, without considering whether "this *de facto* tightening of the national cap was in the public interest and justified by current marketplace conditions," rendered the 2016 order "arbitrary and capricious" and "unwise from a public policy perspective."[140]

- The 2017 Notice on the national TV audience reach cap, "including" the UHF discount, referred to the discount as "a component of the rule"; found again that, because the "UHF discount is used to determine licensees' compliance with the national audience reach cap," the discount and cap were "inextricably linked" and "any review of one must include a review of the other"; reiterated that the FCC's 2016 order was arbitrary and capricious because it had eliminated the discount and "effectively tighten[ed]" the cap without determining whether such tightening was in the public interest; and observed

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[138] Notice of Proposed Rulemaking, 28 FCC Rcd 14324, 14329, 14331 (2013) (2013 UHF Discount Notice). In its background section, this notice also showed that in every instance where the FCC had taken action on the UHF discount, it had done so in the context of a proceeding that also imposed, reevaluated, reaffirmed, or modified the national TV ownership cap. *See id*. at 14325-27.

[139] Report and Order, 31 FCC Rcd 10213, 10222-23, 10233 (2016) (2016 UHF Discount Order).

[140] Order on Reconsideration, 32 FCC Rcd 3390-91, 3394 Heading A, 3395, 3398 n.60 (2017) (2017 UHF Discount Recon Order).

> that eliminating the UHF discount would cause some station groups to exceed the national cap if it remained at 39 percent.[141]

Given all these previous findings, and the terms and operation of the national TV ownership rule, the UHF discount cannot be treated as separate from that rule. Commenters seeking to end the discount alone fail to justify the results: imposing an effectively stricter cap on TV station groups; causing a number of groups to become noncompliant with the existing audience reach cap; preventing many broadcasters from acquiring or selling TV stations; making it impossible for broadcasters to achieve economies of scale and attract the investment necessary to compete with much larger and unregulated video service providers; and further undercutting the economic bases for TV broadcasters' free OTA services to the public. In sum, those parties supporting removal of the UHF discount alone have failed to present any case – let alone a legally sufficient one under the APA and the Act – for the FCC to reverse course and repeal the discount while ignoring the national TV rule as a whole.[142]

The 39 percent national ownership cap, calculated with the UHF discount, now has been in effect for 21 years.[143] Rather than the UHF discount harming the public's programming

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[141] Notice, 32 FCC Rcd at 10785, 10788, 10796 n.78.

[142] As NAB explained in detail in previous filings, to satisfy the APA and the Act, those commenters advocating for only the discount's elimination would need to (1) acknowledge that they are proposing to effectively alter the ownership cap itself; (2) provide a reasoned analysis – including consideration of all important aspects of the problem – supported by the record for tightening the national cap; and (3) demonstrate that a stricter cap would serve the FCC's public interest goals today, given that all FCC regulations, including its ownership rules, must serve the public interest. *See* NAB Comments at 23-24; Written *Ex Parte* Communication of NAB, MB Docket No. 13-236, at 1-3 (June 23, 2016); NAB Reply to Oppositions to Petition for Reconsideration, MB Docket No. 13-236, at 2-7 (Jan. 23, 2017); Comments of NAB, MB Docket No. 13-236, at 2-4 (Dec. 16, 2013).

[143] It also has been 16 years since completion of the digital TV transition in 2009. While the FCC in 2016 contended that the DTV transition, and accompanying increase in the number of UHF stations, conferred an "unwarranted benefit" on UHF TV station owners that "undermine[d] the purpose of the national audience reach cap," 2016 UHF Discount Order, 31 FCC Rcd at 10226, it was unable to cite evidence of harm in its 2016 order. *See* 2017 UHF Discount Recon Order, 32 FCC Rcd at 3395 (criticizing the 2016 order repealing the UHF discount for failing to present evidence as to "how the current cap, including the UHF discount, was harming competition, diversity, or localism"). NAB additionally disputes the FCC's 2016 claim that the DTV transition caused the effective national cap to "exceed[] the 39 percent level that Congress directed the Commission to establish." 2016 UHF Discount Order, 31 FCC Rcd at 1022; *see, e.g.,* Writers Guild Comments at 3; Comments of Consumers Union, MB Docket No. 17-318, at 9-10 (Mar. 19, 2018) (agreeing with the FCC's erroneous 2016 position). In actuality, Congress' direction in 2004 for the FCC to change its national TV ownership rule clearly envisioned that the national reach of TV groups would continue to be

services during this period by allowing greater consolidation, the video marketplace has undergone a competitive transformation resulting in viewing options unprecedented in diversity, thereby benefiting consumers.[144] These indisputable marketplace facts support the cap's *elimination*, rather than imposition of a stricter, or retention of the existing, rule.

V. Retention of the Current 39 Percent Cap – or One Set at a Different Level – Cannot Be Justified Because Any National TV Ownership Rule Based on Audience "Reach" Is Fundamentally Flawed

As an initial matter, defenders of the current ownership cap face a daunting task in explaining *how* a cap set at the 39 percent level promotes any identifiable public interest value in 2025.[145] The Commission itself has never justified the 39 percent level, which, with the UHF discount included, dates from 2004. When the FCC last considered the national cap in the analog-era 2002 biennial, it determined that a higher cap (45 percent with the UHF discount) was appropriate.[146] In the last court decision addressing the level of the national cap, the D.C. Circuit Court of Appeals soundly rejected the FCC's decision in the 1998 biennial review to retain a 35 percent cap, concluding that the Commission over a quarter century ago had "adduced not a single valid reason to believe" the national TV ownership rule was needed to serve the public interest.[147] And no one can pretend that the video and advertising markets

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calculated with the UHF discount. As the Third Circuit found, when "Congress instructed the Commission to 'increase the national audience reach limitation for television stations to 39%,'" the FCC had for many years defined "national audience reach" to include the UHF discount and Congress's use of that "administratively defined term" showed it "intended its words to have the defined meaning." Thus, the Court concluded that "reducing or eliminating" the UHF discount would effectively change the audience reach limit and undermine Congress's specification of a 39 percent cap. *Prometheus I*, 373 F.3d at 396.

[144] *See* Section II.A., *supra*; *see also* NAB Comments at 17-19; 2022 NAB Communications Marketplace Comments at 10-15, 37-46; NAB 2022 Quadrennial Public Notice Comments at 10-11, 15-20; NAB National TV Rule Update at 2-9 and Attachments B & C; 2024 NAB Communications Marketplace Comments at 5-7.

[145] *See, e.g.*, *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1055 (7th Cir. 1992) (vacating financial interest and syndication rules and finding, *inter alia*, that FCC did not "explain how" its restrictions on broadcast network participation in programming actually promoted program diversity); *Qwest Corp. v. FCC*, 258 F.3d 1191, 1202 (10th Cir. 2001) (finding FCC did not provide a reasoned explanation for its actions because, *inter alia*, it "failed to explain how" its chosen benchmark would help achieve its stated goals).

[146] 2002 Biennial Review Order, 18 FCC Rcd at 13828. This 45 percent cap never took effect, as Congress subsequently directed the FCC to modify its rules by increasing the cap from 35 to 39 percent. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).

[147] *Fox*, 280 F.3d at 1043.

have not grown tremendously more competitive and diverse since those FCC and court decisions. As shown by prior ownership and other cases rejecting FCC benchmarks, the retention or setting of a restrictive cap here will be met with judicial skepticism.[148]

Beyond failing this challenge of justifying 39 percent (or any other specific level) for a national cap, no commenters supporting retention of a national TV rule even tried to justify maintaining an audience reach metric as the basis for an ownership restriction. The Notice specifically asked whether "audience reach" was the "proper measurement to use for the cap."[149] NAB urged the Commission to reevaluate the purpose of its method for calculating compliance with the cap, observing that the audience reach methodology was merely an accounting metric – and not a sound one tethered to reality.[150] As NAB pointed out, the national audience reach cap has been based since its inception on the fiction that stations "reach" *all* TV households in the DMA where they are located.[151] Even when adopting a cap based on 100 percent TV household reach in 1985, the Commission acknowledged that this conception of reach was "theoretical,"[152] and over 20 years ago, the D.C. Circuit Court of Appeals recognized that the broadcast TV cap is expressed in terms of potential audience and that, in practice, stations cannot achieve an audience share that approaches their potential reach.[153] And NAB previously explained that this disconnect between a rule calculated on potential audience reach and the reality of TV stations' competitive position had only become more glaring over time, such that the theoretical reach of a station or station group now says virtually nothing relevant about the competitively effective reach of the station or group in the

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[148] *See*, *e.g*., *Comcast Corp*. *v*. *FCC*, 579 F.3d 1 (D.C. Cir. 2009) (finding 30 percent cable horizontal ownership cap arbitrary and capricious due to FCC's failure to account for competitive impact of satellite and fiber optic companies); *Time Warner Entm't Co*. *v*. *FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001) (opining that the "FCC seems to have plucked" the 40 percent cable vertical ownership limit "out of thin air"); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (finding wireless ownership restrictions preventing an entity with a 20 percent or higher interest in a cellular telephone provider from acquiring a PCS license to be arbitrary, given the FCC's lack of evidentiary support or an economic rationale for its rule); *Fox*, 280 F.3d at 1045 (finding FCC's retention of 35 percent national broadcast TV ownership cap arbitrary and capricious); *Qwest Corp*., 258 F.3d at 1202 (finding universal service funding benchmark of 135 percent of the national average arbitrary and capricious, noting that FCC had apparently adopted the benchmark "without explicit empirical findings").

[149] Notice, 32 FCC Rcd at 10793 (suggesting other metrics to use, such as actual viewership, market share, or amount of ad revenue).

[150] NAB Comments at 25.

[151] NAB Comments at 25-26, citing 1985 National Cap Order, 100 FCC 2d at 92; 47 C.F.R. § 73.3555(e)(2)(i).

[152] NAB Comments at 26, quoting 1985 National Cap Order, 100 FCC 2d at 93.

[153] *Fox*, 280 F.3d at 1041.

marketplace.[154] Indeed, the difference between the fictional presumption of stations' 100 percent audience reach and broadcast TV's actual *single digit* reach is profound and stark (even during peak viewing hours, *i.e.*, prime time).[155] In light of these data and other extensive evidence, the record shows no basis for retaining a national TV cap – set at any level – on an entirely inaccurate presumption of 100 percent reach.

Parties supporting the current cap have ignored the wholly unrealistic presumption of 100 percent reach and thus also failed to address, even more fundamentally, why *any* audience reach metric is appropriate, even though the Notice inquired whether "some other measurement of a station group's size or influence" is instead appropriate.[156] National audience reach under the rule is simply a measure of the proportion of the TV households in the markets in which an entity owns TV stations in relation to the number of TV households in the United States. This measurement does not appear to be a proxy rationally related to the FCC's goals. Potential audience reach is clearly not a measure of viewership or market power or any other relevant competitive factor and seems to have little to do with promoting diversity or localism in the real world. Viewers in local markets care about the programming offered in their markets, not the number of TV households some TV station owners potentially may serve in other markets or how those owners may serve those other markets.[157] Audience reach, as conceived under the national TV rule, also would not seem relevant to advertisers, who presumably would be more interested in market share.

Indeed, the operation of the rule's audience reach metric is counterproductive to the FCC's traditional goals. For example, broadcasters – including those such as Univision or Telemundo that target a narrower audience segment than others – can run afoul of the national TV cap through their mere presence in multiple markets, without having high viewership or advertising shares or raising competitive concerns nationally or in any local

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[154] *See* NAB Comments at 27-29 and Attachments A-E; NAB National TV Rule Update at 3-13 and Attachments B & C.

[155] Among the average 11,184,113 people ages 18-49 using TV (counting broadcast, cable, and DBS, but not streaming or SVOD) during any given minute of prime time in 2024, an estimated 3,514,036 people were viewing broadcast stations – and those 3,514,036 people represent just **2.6 percent** of the estimated total 134,063,191 people ages 18-49 in U.S. TV households. Similarly, the average 19,172,924 people ages two and older who viewed broadcast TV during any given minute of prime time in 2024 represent only **six percent** of the estimated total 317,024,656 people ages two and older in U.S. TV households. *See* Nielsen, U.S. Live + Same Day 2024.

[156] Notice, 32 FCC Rcd at 10793 (referencing viewership, market share, and ad revenues).

[157] *See* 1984 Ownership Order, 100 FCC 2d at 37 (explaining that for individual audience members, the relevant factor is how many diverse views are available within his or her local market; whether or not some of those views are also disseminated in other local markets does not affect the diversity available in the individual's local market); *accord* 2002 Biennial Review Order, 18 FCC Rcd at 13826-27.

market. Basing the national rule on "theoretical" audience reach (whether 100, 75, 66 or some other percent) prevents broadcasters from bringing their programming, including specialized or targeted programming, into more local markets, contrary to the public interest.

In short, the wholly unrealistic presumption underlying a national audience reach cap is another reason for eliminating the rule. Continuing to use an audience reach metric is increasingly arbitrary and capricious, especially when the irrationality of that metric is exacerbated by the fiction that TV stations reach 100 – or some other unrealistic – percent of the TV households in every DMA in which they are located. A reviewing court will defer to neither the selection of an irrational point on a scale or to an irrational scale itself.[158]

The maintenance of an irrational metric is made only more fraught due to the speech implications of the national cap. A national TV rule based on audience reach prevents a broadcaster from even potentially speaking to audiences in many markets because that broadcaster speaks to other potential audiences in other markets. The record does not show how this restriction effectively promotes the public interest in the current marketplace. Even assuming courts continue to review structural broadcast ownership rules under only a rational basis test, there is no guarantee a national cap based on the fictional 100 percent (or other arbitrary percent) audience reach metric would pass First Amendment muster if challenged, and it certainly would never be upheld under any level of heightened scrutiny. No one can reasonably contend that any national audience reach cap – especially one that vastly exaggerates broadcasters' actual reach – is needed in 2025 to prevent TV station groups from becoming competitively dominant in any market, including the marketplace of ideas, drowning out other voices, or impeding a wide range of viewpoints.[159]

The Supreme Court, moreover, has long rejected the idea that the government may restrict speech by powerful or influential entities or people because such speech may be too persuasive or may dominate the public debate.[160] The concept that the government may limit

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[158] *See ALLTEL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) (declining to "defer to the Commission's selection of a precise point on a scale when the scale itself" lacked relevance).

[159] The FCC first concluded *in 1984* that the national market had an abundance of diverse viewpoints; that the geographic market relevant to viewpoint diversity was local; and that national ownership rules were "not pertinent" to assuring a diversity of views to the American public. 1984 Ownership Order, 100 FCC 2d at 25-31, 37; *accord* 2002 Biennial Review Order, 18 FCC Rcd at 13826-27. In the internet age, any concern that a TV station group with stations in (supposedly) too many markets has the potential to speak (and potentially provide news and information) to too many people would not pass even a rational basis test.

[160] *See*, *e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) (finding unconstitutional a state statute that restricted business corporations from making certain contributions or expenditures to influence votes on referendum proposals, rejecting the argument that the views of powerful corporations would "drown out" other viewpoints and exert "an undue influence" on votes).

the speech of some to enhance the relative voice of others is "wholly foreign to the First Amendment,"[161] even when some private entities possess "enviable vehicle[s]" for expression.[162] Reiterating that it has said in "many contexts" that the government cannot restrict the speech of some to enhance others' voices, the Court recently concluded that the government may not pursue such an interest "consistent with the First Amendment."[163]

In 2018, NAB offered a conservative proposal that would have essentially maintained the status quo.[164] But marketplace realities in 2025 and the record here now require eliminating the national cap to reflect the disadvantages broadcast TV groups face in competing for audiences, advertising dollars, and programming against unregulated online content providers and digital ad platforms enjoying national or even international reach but not providing any local news or emergency journalism. Retaining limits on nationwide TV station ownership in this proceeding only would serve to disadvantage broadcast participants in the video market in relation to other participants.[165] Such inaction risks degrading the quality of OTA broadcast TV services, as asymmetric regulation continues to discourage investment in broadcast TV, drives content to other unregulated platforms, and reduces broadcasters' ability to earn advertising revenues and provide increasingly expensive programming.[166] It also would be arbitrary and capricious and raise questions about irrational restrictions on the speech of TV broadcasters, particularly given that broadcasters alone provide video services free to the public in local communities across the nation.

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[161] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[162] *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 577 (1995).

[163] *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2407-2408 (2024).

[164] *See* NAB Comments at 1-2, 25-35 (stating that, if the FCC maintains a 39 percent national cap, it should determine compliance with it by accounting for all TV stations at 50 percent of their theoretical audience reach, and explaining that the effect of this approach would be limited, given the relatively low numbers of VHF stations and that the considerable majority of TV stations (*i.e.*, UHF stations) are already accounted for at 50 percent). A number of broadcasters were already calling for repeal of the national TV cap in 2018. *See* Sinclair Comments at 6; Nexstar Comments at 12; Univision Reply Comments at 1.

[165] *See, e.g., 2020 Communications Marketplace Report*, 36 FCC Rcd 2945, 3047 (2020) (concluding that the "video marketplace continues to be dominated by the three categories of participants that have defined the market for the past decade: multichannel video programming distributors (MVPDs), online video distributors (OVDs), and broadcast television stations"); *2022 Communications Marketplace Report*, 37 FCC Rcd 15514, 15652 (2022) (finding that there were "three primary categories of participants in the video marketplace," MVPDs, OVDs, and broadcast TV stations, and that "competition among both these participants and video programming options have evolved").

[166] *See* Section II.C., *supra*; 2024 NAB Communications Marketplace Comments at 30-34.

VI. The Record in this Proceeding and Past FCC Decisions Are Clear that the Commission Has Authority to Repeal the National TV Ownership Rule

A. As NAB Previously Explained, the FCC Has Statutory Authority to Eliminate or Amend the National TV Audience Reach Cap and Associated Calculation Methodology

In 2018, NAB explained in detail that Congress never enshrined the national TV ownership cap into statute and that the specific language used by Congress in both the 1996 Act and the 2004 Appropriations Act did not prevent the Commission from modifying or repealing the current 39 percent cap or its method of calculating compliance with the cap.[167] The Commission thus retained its authority to eliminate or amend the national audience reach cap and associated calculation methodology. This interpretation is the "best reading" of the relevant statutes.[168]

NAB reemphasizes here that Congress in Section 202(c)(1)(B) of the 1996 Act did not set a statutory cap, but merely directed the Commission to "*modify its rules* for multiple ownership set forth in section 73.3555 of its regulations . . . by increasing the national audience reach limitation for television stations to 35 percent."[169] Indeed, the whole point of Section 202 of the 1996 Act was to direct the Commission to revise various ownership rules (including but not limited to the national TV cap) and then to require the Commission to review, and potentially "repeal or modify," all those rules every two (now four) years going forward.[170] The Commission therefore had clear authority to repeal or modify the 35 percent cap under the "original" Section 202(c)(1)(B). Notably, the D.C. Circuit Court of Appeals agreed with this interpretation of Section 202, as the court concluded in 2002 that the 1996 Act had *not* "enshrined the 35% cap in the statute itself" and that the FCC's *retention* of the 35 percent cap in the 1998 biennial review was arbitrary and capricious.[171]

Then in 2004, after the Commission had raised the national cap to 45 percent in its 2002 biennial review, Congress did not question the FCC's authority to change the cap. All Congress did in Section 629 of the 2004 Appropriations Act was direct the Commission to amend

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[167] *See* NAB Comments at 6-10; NAB Reply Comments at 5-14; *accord, e.g.,* Sinclair Comments at 3-6; Nexstar Comments at 6-12.

[168] *Loper Bright*, 144 S. Ct. at 2266.

[169] 1996 Act, Pub. L. No. 104-104, § 202(c)(1)(B), 110 Stat. 56, 111 (emphasis added).

[170] 1996 Act, § 202(h) (directing the FCC to review its rules adopted pursuant to Section 202 and all its ownership rules biennially, determine whether any of them remain necessary in the public interest as the result of competition, and "repeal or modify any regulation it determines to be no longer in the public interest").

[171] *Fox Television Stations, Inc. v. FCC,* 293 F.3d 537, 540 (D.C. Cir. 2002).

Section 202(c)(1)(B) of the 1996 Act by inserting "39 percent" in place of "35 percent."[172] To be clear, Section 629(1) directed the Commission, again, to merely *modify its rules* for multiple ownership by increasing the national audience reach limitation for television stations, this time to 39 percent, as Congress left untouched the original language of Section 202(c)(1)(B) that had only directed the Commission to amend its regulation. In neither 2004 nor in 1996 did Congress enshrine a numerical cap into statute.

As NAB previously pointed out, moreover, Congress in 2004 easily could have prevented the Commission from ever altering the national cap in the future by establishing a 39 percent limit in the Appropriations Act or by amending the 1934 Act.[173] In either case, a very simple statutory provision would have sufficed: "The Commission shall not grant any application or construction permit for a full-power commercial TV station license to any entity if doing so would result in that entity owning or controlling TV stations that, in the aggregate, reach more than 39 percent of U.S. TV households nationwide." Congress, however, did not do that, but only once again directed a rule modification, and the FCC's general rulemaking powers under Sections 303(r) and 4(i) of the Act encompass the authority to revise, eliminate or adopt regulations, including broadcast ownership rules.[174] The Supreme Court, moreover, has interpreted the FCC's licensing and rulemaking authority under these provisions to uphold Commission enactment of a range of ownership rules.[175] In sum, Congress's action in Section 629(1) of the Appropriations Act – referencing back to the 1996 Act and its direction to modify a Commission rule rather than establishing a statutory national reach limit – did not usurp the FCC's clear rulemaking authority under the Act in this area.[176]

Nor does Section 629(3) of the Appropriations Act strip the Commission of its authority to modify or repeal the 39 percent cap, as NAB earlier showed. By its terms, this provision simply

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[172] Appropriations Act, § 629(1).

[173] NAB Comments at 7.

[174] *See* 47 U.S.C. § 303(r) (providing that the FCC "from time to time, as public convenience, interest, or necessity requires, shall," *inter alia*, "[m]ake such rules and regulations . . . as may be necessary to carry out the provisions of this chapter"); § 154(i) (authorizing FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions").

[175] NAB Comments at 7-8, citing, *inter alia*, *FCC v. NCCB*, 436 U.S. 775, 793-94 (1978); *NBC v. U.S.*, 319 U.S. 190, 214-218 (1943). Congress is well aware of the FCC's authority under the Act and long history of regulating broadcast ownership and did not in the 2004 Appropriations Act call into question or even reference agency authority under these provisions of the Act. *See* H.R. Rep. No. 104-204, at 54 (1995) (noting that FCC regulation of broadcast ownership dates to the 1940s); *Hall v. U.S.*, 566 U.S. 506, 516 (2012) ("We assume that Congress is aware of existing law when it passes legislation.") (citation omitted).

[176] *See* NAB Comments at 6-8; NAB Reply Comments at 5-7; *accord, e.g.,* Sinclair Comments at 4-6; Nexstar Comments at 8-12.

relieves the FCC of its mandatory duty under Section 202(h) of the 1996 Act to review the national TV ownership rule every four years. Specifically, Section 629(3) does not *prohibit* the Commission from reviewing the cap, but only provides that Section 202(h)'s affirmative obligation to review all the broadcast ownership rules quadrennially "does not apply" to the national audience reach limit.[177] The plain language of Section 629(3), then, says nothing about the Commission reviewing the national TV rule other than as part of the required quadrennial reviews and, thus, leaves untouched the FCC's authority under the Act to do so outside the quadrennial review process.

NAB additionally stresses that the exemption of the 39 percent national cap from mandatory quadrennial reviews cannot be viewed as any implied repeal of the FCC's powers under the 1934 Act to make, revise, and repeal rules, including broadcast ownership regulations. The Supreme Court has made clear that any such implied repeals are strongly disfavored.[178] Given that Congress in no way addressed "preexisting law" (*i.e.*, the FCC's broad rulemaking authority under the Communications Act) in the 2004 Appropriations Act, the "normal operations" of the 1934 Act thus remain intact, permitting the Commission to exercise its discretionary authority to modify the national TV ownership rule.[179] In the context of the Communications Act, moreover, the Court has found that the FCC's general rulemaking authority under Section 201(b) of the Act[180] was not displaced by later provisions of the 1996 Act entrusting various tasks to state commissions.[181] Here, the fact that Section 629(3) of the

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[177] Appropriations Act, § 629(3) (stating that subsection 202(h) "does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B)"). Given that Congress clearly knows how to prohibit – and has in the past prohibited – the FCC from taking various and numerous specific actions, the absence of any prohibition in Section 629(3) should be regarded as intentional and purposeful. As NAB discussed earlier, no prohibition on the FCC's authority to review and update the national TV rule should be inferred, given the absence of specific prohibitory language in Section 629. *See* NAB Reply Comments at 8-9; NAB Comments at 9.

[178] "When confronted with two Acts of Congress allegedly touching on the same topic . . . [courts] come armed with the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (internal quotations omitted).

[179] *Id.*; *see* 47 U.S.C. § 303(r) (empowering the "Commission from time to time, as public convenience, interest, or necessity requires," to make "rules and regulations . . . .").

[180] 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.").

[181] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 383-85 (1999) (concluding that the 1996 Act's local competition provisions entrusting several jobs, including establishing rates, to state commissions were "not enough to displace" the FCC's general discretionary rulemaking

Appropriations Act exempted the national audience reach limit from mandatory quadrennial reviews did not "displace" the FCC's permissive power to review and revise that rule under Sections 303(r) and 4(i) of the Act.[182] Anyone seeking to suggest that Section 629(3) "displaces" provisions of the 1934 Act would "bear[] the heavy burden of showing a clearly expressed congressional intention that such a result should follow."[183]

Finally, NAB reemphasizes that its interpretation of Section 629 is consistent with the FCC's own interpretation (as detailed below) and in no way makes Congress's action ineffective or superfluous.[184] Section 629, properly interpreted as exempting the national ownership rule from required quadrennial reviews under Section 202(h), serves a clear and significant regulatory purpose – it allows the FCC to leave the national TV rule intact without examining it on a regular basis.[185] The 39 percent cap now has been in effect for over two decades, despite the vast changes in the video marketplace and the indisputably altered competitive position of TV broadcasters in it.

B. The FCC Has Consistently and Correctly Maintained It Possesses Authority to Revise the National TV Ownership Cap

Notably, certain commenters' claims that the Commission lacks authority to change the 39 percent cap, or that it has authority to repeal the UHF discount but not alter the cap,[186] are wholly inconsistent with previous FCC decisions under former Acting Chairwoman Clyburn, former Chairman Wheeler, and former Chairman Pai:

- The 2013 rulemaking notice approved to consider eliminating the UHF discount tentatively concluded that the FCC had the "authority to modify the national ownership rule, including the authority to revise or eliminate the UHF discount." Specifically, the FCC tentatively concluded that the 2004 Appropriations Act did not preclude it from "revisiting the national television ownership rule or the UHF discount contained therein" in a proceeding separate from the quadrennial

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authority in Section 201(b) and that the FCC therefore retained authority to promulgate pricing and other local competition rules, despite the states' contrary claims).

182 *Id*. at 384-85.

183 *Epic Sys. Corp*., 138 S. Ct. at 1624 (internal quotation omitted).

184 *See* NAB Comments at 9-10.

185 *See Prometheus I*, 373 F.3d at 395 (declaring that Section 202(h)'s requirement for the FCC "periodically to justify its existing regulations" – an "obligation it would not otherwise have" – is what "makes § 202(h) 'deregulatory'").

186 *See*, *e.g*., Free Press Comments at 5-7, 17-21; Public Interest Commenters at 1-2; Comments of DISH Network, LLC, MB Docket No. 17-318, at 12-15 (Mar. 19, 2018).

reviews of the broadcast ownership rules under § 202(h) of the 1996 Act.[187] After discussing statutory authority, the 2013 notice reiterated that "we believe the Commission retains the authority to modify both the national audience reach restriction and the UHF discount," provided such action is undertaken separately from a quadrennial ownership review.[188]

- In the (subsequently reversed) 2016 order eliminating the UHF discount, the FCC concluded it had the "authority to modify the national audience reach cap, including the authority to revise or eliminate the UHF discount." It further found that "no statute bars the Commission from revisiting the cap or the UHF discount contained therein" in a proceeding separate from a Section 202(h) quadrennial review.[189] This order characterized the 2004 Appropriations Act as simply directing the Commission to revise its rules to reflect a 39 percent national audience reach cap and removing the requirement to review the national television rule from the quadrennial ownership review requirement. According to the FCC, the Appropriations Act "did not impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule"; thus, the FCC "retains authority under the Communications Act to review any aspect of the national audience reach cap," but is merely not required to do so as part of the quadrennial review.[190] The Commission went on from there to emphasize that Congress was aware of the FCC's "broad authority – indeed, its obligation – [under the Act] to reevaluate its rules periodically and revise any that no longer serve the public interest" and, in the Appropriations Act, "could have foreclosed" the FCC from ever revising the national audience reach cap or the UHF discount by making the national cap and the discount "a statutory restriction or by otherwise withdrawing" FCC authority to modify the cap or the discount. Congress "did not do so," but instead opted for a limited measure reducing the cap from 45 to 39

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[187] 2013 UHF Discount Notice, 28 FCC Rcd at 14329 (stating that Congress in the Appropriations Act directed the FCC to revise its rules to reflect a 39 percent cap and did not establish that limitation by statute or amend the 1934 Act to address national TV ownership, and noting that the Communications Act provides the FCC with authority to revisit its rules and revise or eliminate them if appropriate).

[188] *Id.* at 14330.

[189] 2016 UHF Discount Order, 31 FCC Rcd at 10222.

[190] *Id*. at 10222-23. This 2016 order also cited the FCC's 2014 sports blackout order, which found that, despite a statute stating that the FCC "shall" apply the sports blackout rule to DBS and online video services, the Commission could repeal the rule under its general rulemaking power under the 1934 Act. *Id*. at n.79, citing *Sports Blackout Rule*, Report and Order, 29 FCC Rcd 12053, 12058 (2014).

percent and relieving the FCC of its obligation to reevaluate the national audience reach cap in the mandated quadrennial ownership reviews.[191]

- Responding to certain parties' belated claims that the FCC lacked authority to modify the national audience reach cap, the 2017 reconsideration order reinstating the UHF discount stated that these parties failed to support their assertions and ignored the FCC's "prior analysis and conclusion that it has such authority, which remains undisturbed." The FCC also explained that "if the Commission was wrong about its authority to modify the cap, then it follows that the Commission does not have authority to eliminate the discount, which was part of the cap," and the 2016 UHF Discount Order repealing the discount "would need to be vacated for that reason."[192]

- In the 2017 Notice seeking comment on the national TV rule as a whole, the FCC again sought comment on its authority to modify or eliminate the national cap, including the UHF discount, but explained in detail its previous conclusions that it had such authority and noted the consistency of those conclusions with previous court decisions, including the Third Circuit in *Prometheus I*.[193]

Unsurprisingly, those parties claiming that the Commission lacks authority to alter the 39 percent cap provide no remotely convincing basis upon which the Commission could now justify a 180-degree reversal in its (correct) view of its authority under the 2004 Appropriations Act, the 1996 Act, and the 1934 Act. After all, the relevant terms of these Acts have not changed since 2013, 2016, or 2017. A "rational person acts consistently, and

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[191] 2016 UHF Discount Order, 31 FCC Rcd at 10224. The FCC in this order also found that its interpretation of the Appropriations Act was consistent with the Third Circuit's conclusion in *Prometheus I*. *Id*. at 10218, 10224.

[192] 2017 UHF Discount Recon Order, 32 FCC Rcd at 3398, n.60.

[193] Notice, 32 FCC Rcd at 10788-89. The 2017 Notice cited the reasoning and conclusions of the 2016 UHF Discount Order and the 2013 UHF Discount Notice and the Third Circuit's conclusion that the 2004 Appropriations Act did not "foreclose" the FCC's consideration of the UHF discount in a rulemaking outside Section 202(h). *Prometheus I*, 373 F.3d at 397. Notably, the Notice further observed that Congress used the same language in the Appropriations Act, instructing the FCC to "modify its rules," as it did when it instructed the FCC to change the cap from 25 to 35 percent in the 1996 Act. Notice, 32 FCC Rcd at 10789. Both the D.C. Circuit (in finding it arbitrary and capricious for the FCC to retain the 35 percent cap in the 1998 biennial review) and the FCC itself (in later raising the cap from 35 to 45 percent in the 2002 review) interpreted the identical language in the 1996 Act as preserving the FCC's authority to modify the cap in the future. *Id*., citing *Fox*, 280 F.3d at 1042-43; 2002 Biennial Review Order, 18 FCC Rcd at 13818.

therefore changes course only if something has changed."[194] In his statement on the 2017 Notice, then-Commissioner Carr referenced the FCC's 2016 determination that it had authority to modify the national cap and observed that "the law has not" changed.[195]

The Supreme Court's criticisms of the now-defunct *Chevron* doctrine demonstrate judicial hostility to what certain commenters urge the FCC to do here: "flip-flop" on its interpretation of its statutory authority to repeal or amend the national cap. Prior to *Chevron*'s overturning in *Loper Bright*, several Justices had been especially critical of affording deference to agencies changing their interpretation of unchanged statutes. Given that in such cases the "law hasn't changed, only an agency's interpretation of it," they objected to the courts, charged with interpreting the laws Congress enacted, "defer[ring] to such bureaucratic pirouetting."[196] During the oral arguments in *Loper Bright* and its companion case, the Justices expressed concern about *Chevron* enabling agencies to "flip-flop" in their interpretation of unchanged statutes, citing in particular the FCC's multiple changes in its classification of broadband services under the Act.[197]

Although *Loper Bright* emphasized courts exercising their "independent judgment" to determine the "best reading" of statutory provisions, the Supreme Court made clear that "courts may – as they have from the start – seek aid from the interpretations of those responsible for implementing particular statutes." The Court stressed that agency interpretations issued contemporaneously with the statute in question and "*remain[ing] consistent over time*" may be "especially useful in determining the statute's meaning."[198] Accordingly, a reviewing court may regard the FCC's consistent interpretation that it possesses authority to repeal or revise both the national cap and the UHF discount as useful guidance in determining the meaning of the relevant provisions of the 1996 Act, the 2004 Appropriations Act, and the 1934 Act.

C. Arguments that the FCC Can Split the Statutory Baby Are Inconsistent with Statutory Language, Precedent, and Logic

Certain commenters offer the nonsensical argument that the Commission should tighten the national TV ownership rule by eliminating the UHF discount and then circumvent its obligation to justify a stricter cap under current marketplace conditions by asserting that it lacks statutory authority to alter the 39 percent limit – all the while ignoring the fact that repealing the discount does alter the cap. This "split the statutory baby" approach is entirely outcome

[194] *Schurz Communications*, 982 F.2d at 1053.

[195] Notice, 32 FCC Rcd at 10810.

[196] *Guedes v. BATFE*, 140 S. Ct. 789, 790-91 (2020) (Gorsuch, J., concurring in denial of petition for writ of certiorari).

[197] *See, e.g., Relentless, Inc. v. Dep't of Commerce,* No. 22-1219, Transcript of Oral Argument, at 23-24 (Sup. Ct. Jan. 17, 2024).

[198] *Loper Bright*, 144 S. Ct. at 2262, 2273 (emphasis added).

determinative and contrary to FCC precedent, the terms of the 2004 Appropriations Act, and common sense.

NAB previously explained that this argument, supported by some public advocacy groups and broadcast industry competitors, does not reflect the terms of the 2004 Appropriations Act and is logically incoherent.[199] To be clear, these commenters are effectively contending that the FCC lacks statutory authority to modify the cap by making it *less* restrictive, but somehow possesses the authority to modify the cap by making it *more* restrictive. This statutory reading should be summarily rejected, as it reflects these parties' longstanding goal to increase restrictions on TV broadcasters and not the actual language and effect of the Appropriations Act and the 1996 Act. An ideological or anti-competitive desire to impose stricter asymmetric ownership rules on broadcast TV stations does not constitute a valid basis for the FCC to alter its interpretation of an unchanged statute.

Even assuming one could rationally contend the FCC has authority to repeal the UHF discount but not touch the 39 percent cap, the Commission still would have no statutory excuse (or other basis) for ignoring today's fiercely competitive and diverse marketplace and effectively tightening the cap. After all, if the FCC has authority to modify its calculation of national audience reach by repealing the UHF discount, then it also would have authority to change the method of calculating national audience reach in other ways.[200]

First, the Commission, while repealing the UHF discount and leaving the 39 percent limit intact, could account for all stations at an audience "reach" level significantly lower than the wholly unrealistic 100 percent, given the highly competitive nature of the current marketplace and the arbitrariness of pretending that TV stations effectively reach any level even approaching 100 percent of the TV households in their markets. Or, given that national audience reach is a flawed metric lacking connection to the FCC's public interest goals,[201] the Commission could replace presumed audience reach with a different metric for determining

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[199] *See* NAB Reply Comments at 5-14 (refuting arguments by, *e.g.*, Free Press, DISH, and Public Interest Commenters).

[200] *See* NAB Reply Comments at 10-11.

[201] *See* Section V, *supra*.

compliance with the cap, such as actual viewership, market share, or amount of advertising revenues, as the Notice suggested.[202] Third, the Commission could adopt a VHF discount.[203]

While a few commenters suggested that the *only* change the Commission could make to its calculation methodology would be repealing the UHF discount,[204] that position again shows the entirely outcome determinative nature of their arguments. The relevant language of the Appropriations Act cannot reasonably be twisted into an argument that the FCC (1) lacks authority to modify the 39 percent audience reach cap and (2) possesses the authority to tighten the cap by eliminating the UHF discount, but (3) cannot make other changes to its method of calculating compliance with the cap, especially if doing so would allow greater common ownership of TV stations. Such a tortured interpretation cannot be regarded as the "best reading" of the statutory language under *Loper Bright*.

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"Each [FCC] regulation must be in the 'public interest'. . . and none can be 'arbitrary' or 'capricious.'"[205] For all the reasons set forth above, retaining any national audience reach limit under current video and advertising market conditions would violate both these strictures. Marketplace and technological changes since the FCC began this proceeding in 2017 have made reform of the national TV ownership cap more urgent than ever, and the record here supports expeditious repeal of the rule.

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[202] Notice, 32 FCC Rcd at 10793. Such metrics appear more closely connected to traditional FCC competition and diversity concerns. *See*, *e.g.*, Letter from Mace Rosenstein, Covington & Burling, to Marlene Dortch, Secretary, FCC, Notice of *Ex Parte* Communication, MB Docket No. 17-318, at 1-2 (Mar. 30, 2018) (discussing the logical inconsistency and inherent inaccuracy of a methodology for calculating national reach based solely on theoretical reach, rather than "penetration," *i.e.*, the number of TV households in a market actually watching a station, and urging the FCC to use an objective measure of actual reach, *e.g.*, ratings, for calculating reach under the national TV cap).

[203] *See* 2016 UHF Discount Order, 31 FCC Rcd at 10238 (declining to adopt a VHF discount "at this time," but not due to a lack of authority to do so); Notice, 32 FCC Rcd at 10794 (seeking comment on the FCC's previous conclusions about adopting a VHF discount).

[204] *See* NAB Reply Comments at 11-12 (refuting claims by, *e.g.*, Free Press).

[205] *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 883 (D.C. Cir. 1999).

Respectfully submitted,

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