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

In the Matter of 2018 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	MB Docket No. 18-349

FURTHER REPLY COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

The American Television Alliance offers these brief further reply comments on the Commission's *Quadrennial Review* of local media-ownership rules.[1] Several commenters agree with ATVA that the Commission should close loopholes to the rules that have permitted broadcasters to create duopolies, triopolies, and quadropolies—increasing leverage and raising retransmission consent prices.[2] As for the broadcasters that seek to preserve such loopholes, they offer very little that is new.[3] Broadcasters again assert, for example, that local news faces a "crisis" that can only be resolved through the creation of duopolies, triopolies, and

[1] *2018 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 33 FCC Rcd. 12111, ¶ 44 (2018) ("*Notice*"); *Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, Public Notice, DA 21-657 (rel. June 4, 2021) ("*Public Notice*"). Unless otherwise noted, all comments referenced herein appear in MB Docket No. 18-349 on September 2, 2021.

[2] *See, e.g.*, Comments of NCTA—The Internet & Television Association; Comments of Free Press.

[3] *See, e.g.,* Comments of the National Association of Broadcasters ("NAB Comments").

quadropolies.[4] ATVA has already explained both why no such crisis exists and, even if it did, why local consolidation would not be needed to address it.[5] Broadcasters once again argue that the market for local television advertising is competitive.[6] ATVA has explained that, whatever the merits of this argument,[7] it fails to address the entirely separate product market for retransmission consent—one in which the Department of Justice has repeatedly found that consolidation will reduce competition.[8] And broadcasters continue to insist that the Commission must focus solely on competition in this proceeding.[9] ATVA has explained why this is not so and, even if it were, that the Commission should eliminate loopholes based on competition considerations alone.[10]

These reply comments, then, focus solely on the handful of new arguments raised by broadcasters:

1. The Commission Has No Duty to Subsidize Profitable Broadcasters. According to broadcasters, the Commission's job in this proceeding is to

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[4] *Compare* NAB Comments at 20 *et seq*. *with* Gray Television, Inc., *Proposed Initiatives To Support Local Television Journalism, May 2021* at 3, *attached to* Letter from Robert McDowell to Marlene Dortch (filed May 25, 2021).

[5] ATVA Comments at 4–8.

[6] *Compare* NAB Comments at 55 *et seq. with* Comments of the National Association of Broadcasters at 50 (filed Apr. 29, 2019) ("NAB 2019 Comments").

[7] NAB argues, for example, that advertising revenues have decreased dramatically since 2000. NAB Comments Att. J. Yet very little of this decrease occurred during the past decade. This does not indicate that broadcasters have suddenly become less successful in competing in the advertising market.

[8] *E.g.*, Competitive Impact Statement at 1–2, *United States v. Gray Television, Inc.*, No. 1:21-cv-02041-CJN (D.D.C Jul. 28, 2021) ECF No. 3.

[9] *Compare* NAB Comments at 38 *et seq. with* NAB 2019 Comments at 57–58; Opening Brief for Industry Petitioners, *FCC v. Prometheus Radio Project,* 141 S. Ct. 1150 (2021) (No. 19-1231 & 19-1241).

[10] ATVA Comments at 24–25.

"ensure" that they "remain economically viable."[11] This is a notable assertion for an industry to make to its regulator. It is even more notable coming from an industry whose largest members continue to report considerable profits[12]—and which, in other contexts, extols the virtues of the unfettered marketplace. If broadcasters now want the government to "ensure" their profitability in perpetuity as if they were a public utility, then they should seek funds from taxpayers generally (rather than from a shrinking base of MVPD subscribers).[13] In exchange, they should accept public utility regulation, such as making their signals universally available on all platforms at regulated prices and without interruption.

2. Few Markets are Truly "Short" Markets. ATVA and broadcasters both agree that, in truly "short" markets, a single entity should be allowed to affiliate with more than one top-four rated network so that residents may receive all four major networks. Broadcasters,

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[11] NAB Comments at 7; *see also* Comments of Nexstar at 15; Comments of TEGNA 6.

[12] *Nexstar Media Group Reports Record Second Quarter Net Revenue of $1,131.6 Million,* Nexstar Media Group, Inc. (Aug. 4, 2021), https://www.nexstar.tv/wp-content/uploads/2021/08/NXST-2Q21-PR-FINAL-8-4-21.pdf ("Overall, our record second quarter net revenue of $1.13 billion, net income of $199.8 million and Adjusted EBITDA of $418.8 million were well ahead of consensus expectations, while free cash flow of $181.2 million was impacted by the timing of 2021 operating cash tax payments. With our year-to-date operating results pacing ahead of internal forecasts, we are raising our pro-forma average annual free cash flow guidance for the 2021/2022 cycle by $60 million to approximately ~$1.33 billion"); *TEGNA Inc. Announces Record Second Quarter Results and Provides Third Quarter Guidance,* TEGNA (Aug. 9, 2021), https://investors.tegna.com/node/28146/pdf ("Second Quarter Highlights…Total company revenue was $733 million in the quarter, up 27 percent year-over-year, driven by record second quarter subscription revenue and advertising and marketing services ("AMS") revenue; Subscription revenue was $375 million in the second quarter, up 16 percent driven by rate increases.").

[13] In the past month, for example, NAB has urged its members to support the "Local Journalism Sustainability Act," which would provide tax credits for television and radio stations that hire local journalists for broadcast newsrooms, as well as provide tax credits to small businesses that advertise with broadcast stations. If policy makers really thought that a crisis faced local television news, then surely such a broad-based solution would be more appropriate than attempting to fund local news solely through a shrinking base of MVPD customers.

however, define "short markets" to include any market in which *four full-power stations* do not *currently* offer the four major networks. This is plainly wrong.

First, it makes no sense to look solely at which networks stations are currently carrying.[14] A market is "short" if there is *no room* for four separately-owned network stations—that is, fewer than four *total stations* exist in the market. Under NAB's formulation, however, a market can have ten full-power stations and still be considered "short." Indeed, a market would become "short" every time a broadcaster obtained a duopoly by using one of the loopholes no matter how many stations can be found there. Thus, under NAB's criteria, even some of the largest markets—such as Boston, the 10th-ranked market in the country with 20 stations[15]—can be described as "short."[16]

NAB's formulation would specifically classify as "short" those markets with four, five, or even six full-power stations but in which stations have chosen to affiliate with religious, independent, or Spanish language programming rather than major networks.[17] This, NAB says, is because there is "no benefit to depriving communities of either 'Big Four' network programming or other locally-valued programming."[18] Yet nobody says that such communities must be deprived of anything. Religious, independent, and Spanish language stations are now and have always been free to carry Big Four network programming on their multicast channels without implicating the local ownership rule at all. Likewise, affiliates of the Big Four networks

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[14] NAB Comments at 101.

[15] *Boston TV Channels,* Station Index: Broadcasting Information Guide, https://www.stationindex.com/tv/markets/boston.

[16] NAB Comments Att. M.

[17] *Id.* at 102.

[18] *Id.* at 103.

could also add such programing to their multicasts. In such markets, viewers do not need duopolies to receive all four major networks.

Second, NAB ignores low-power stations altogether. Thus, NAB would describe as "short" those markets where low-power stations can carry major network programming—even in markets where they have done so for years.[19] NAB argues that such stations are "not the equivalent of full-power stations and should not be treated as such."[20] Low-power stations, NAB observes, generally lack must-carry rights, operate on a secondary basis and have limited coverage areas and restricted power.[21] Yet broadcasters cannot have it both ways. If low-power stations are so inferior that the Commission can ignore them for purposes of "short" markets, then surely broadcasters should not be allowed to create duopolies by placing top-four rated programming on such stations.[22] If, on the other hand, such stations are robust enough for broadcasters to move major-network programming to them, then they must count for purposes of determining whether a market is "short" or not.

3. There Is No "Downward Pressure" on Retransmission Consent Fees. NAB suggests that streaming and cord-cutting places "downward pressure" on retransmission consent fees.[23] It even suggests that retransmission consent fee increases "will approach zero and, in real

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[19] *Id.* Att. M ("Source: BIA Media Access Pro data as of March 4, 2021. Analysis takes into consideration the following service types: *full power, satellites, and multicast*. (*i.e.*, those markets that do not receive the full complement of ABC, CBS, FOX, NBC *affiliates via one of those service types* is considered a short market.") (emphasis added).

[20] *Id.* at 104.

[21] *Id.*

[22] The same holds true for NAB's arguments about multicast channels. NAB suggests that multicast carriage is not the same as station ownership because multicast do not qualify for must-carry and generate lower revenue than primary feeds. If true, this suggests that stations should not be permitted to create duopolies by moving top-rated feeds to multicast carriage.

[23] NAB Comments at 30.

terms, even become negative during the next five years."[24] The idea that price increases have slowed comes to a surprise to ATVA members, who have seen no evidence of such "downward pressure." It may also come as a surprise to station groups who believe that retransmission consent "still has 'headroom' for growth."[25] And NAB is using the wrong figures in any event. NAB's figures reflect *total* retransmission consent fees received by all television stations from all MVPDs.[26] Yet MVPDs pay retransmission consent fees on a *per-subscriber* basis and MVPDs have lost subscribers in recent years.[27] Per-subscriber fees—that is, the actual bill that subscribers pay each month—are what should matter to the Commission. And when measured on this basis, fees continue to skyrocket: Retransmission consent fees per-subscriber increased by 20% from 2018–2019,[28] while from 2013–2019, the compound average annual increase was 32.3%.

CONCLUSION

Nothing in the initial comments alters ATVA's view that the Commission should close the low-power and multicast loopholes and investigate broadcasters' abuse of sharing arrangements. ATVA urges the Commission to do so expeditiously.

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[24] *Id.* at 98; *see also* Nexstar Comments at 15 (citing similar data).

[25] Jennifer Pallanich, *Station Group Chiefs: There's Common Cause For Broadcast And Cable*, TV News Check (Sept 28, 2021), https://tvnewscheck.com/business/article/station-group-chiefs-theres-common-cause-for-broadcast-and-cable/ (quoting Jordan Wertlieb, president of Hearst Television, who adds: "We have yet to see rates commensurate with the audiences that broadcasters bring to the ecosystem."); *see also id.* ("Pat LaPlatney, president and co-CEO of Gray Television, agreed that the rates paid to broadcasters 'don't square up' with the 'extraordinary' numbers local broadcasters deliver.").

[26] NAB Comments Att. K.

[27] *2020 Communications Marketplace Report*, 36 FCC Rcd. 2945 ¶ 228 (2020).

[28] *Id.* ¶ 236.

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