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

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| In the Matter of | ) | |
| | ) | |
| Modernization of Media | ) | MB Docket No. 17-105 |
| Regulation Initiative | ) | |

# COMMENTS OF THE
# NATIONAL ASSOCIATION OF BROADCASTERS


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## COMMENTS OF THE NATIONAL ASSOCITION OF BROADCASTERS

## I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] submits these comments in response to the Commission's initiation of a proceeding to eliminate or modify regulations applicable to radio and television broadcasters that are "outdated, unnecessary or unduly burdensome."[2] We welcome this long-overdue proceeding to modernize the broadcast regulatory regime.

As an initial matter, NAB wants to make clear what broadcasters are *not* pursuing through this initiative. Local radio and TV stations are not seeking any diminution in their obligations to serve their communities of license. Rather, broadcasters support an updated regulatory regime enhancing local stations' ability to serve their listeners and viewers more effectively in today's competitive media marketplace. To accomplish that goal, NAB and its members urge the FCC to reduce or eliminate unproductive and competitively disparate

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

[2] *Commission Launches Modernization of Media Regulation Initiative*, Public Notice, MB Docket No. 17-105, FCC 17-58 (rel. May 18, 2017) ("Public Notice").

regulatory and administrative burdens that divert broadcast stations' scarce resources away from programming and other services that benefit the public. Such reform is especially important for smaller stations with fewer financial and personnel resources.

The modification or elimination of a number of broadcasters' existing regulatory burdens will in no way reduce radio and TV stations' incentives to serve their local audiences with responsive programming. Indeed, the incentives of broadcasters to offer programming attracting the widest possible audiences have never been greater, given intense and ever-increasing competition from multichannel and online audio and video providers.

These dramatic and continuing changes in the competitive environment over the past several decades obligate the Commission, under the Communications Act of 1934, to reexamine its existing broadcast regulations to ensure they still serve the public interest. The FCC also has an affirmative obligation under the Paperwork Reduction Act and the Regulatory Flexibility Act to reduce paperwork and administrative burdens on broadcast licensees and to minimize the economic impact of its regulations on small broadcasters.

Accordingly, in these comments, NAB sets forth proposals to reform or eliminate some of the reporting, recordkeeping and filing requirements currently imposed on radio and TV stations. We urge the FCC to create a combined annual compliance report to replace the currently separate quarterly issues/programs lists and quarterly reporting on children's educational TV programming and commercial matter in children's programs. This streamlined annual report would rely more on broadcaster certifications, rather than their unnecessary submission of pages and pages of granular details about individual programs that lack practical utility for consumers and impose undue burdens on local stations. We also believe that the costs and benefits of preparing and filing ownership reports would be more appropriately balanced by reducing their frequency of filing and requiring their

submission following changes in control of broadcast licensees, rather than biennially regardless of actual changes in ownership. In addition, NAB recommends eliminating other unnecessary administrative burdens, including filing with the Commission: (1) paper copies of numerous broadcaster contracts already identified via other FCC requirements; (2) an annual report on ancillary and supplementary digital TV services by thousands of stations that do not provide these services; and (3) the EEO Mid-Term Report, which requires the submission of information already available in stations' online public files.

As the Commission has previously done by modernizing certain broadcast regulations to take advantage of the Internet, it should reform other outdated rules to permit broadcasters to utilize online methods of providing notice, including giving the requisite public notices associated with various types of broadcast applications. And it is past time to update the retransmission consent/must carry election process by allowing TV stations to post their elections on a website readily accessible to multichannel video programming distributors (MVPDs), rather than sending those elections by certified "snail mail."

Due to the transformation of the video marketplace and significant changes in the investment landscape over the past two decades, the FCC also should modernize its children's educational TV requirements and its broadcast attribution rules. The existing children's TV regulatory framework, dating from 1996, reflects the analog-era concept of "appointment viewing," with its requirements to provide set amounts per channel per week of narrowly defined "core" educational/informational (E/I) programming. This rigid approach is not mandated by the Children's Television Act of 1990 and inhibits – rather than promotes – broadcasters' ability to serve young viewers in today's digital, online world. The Commission has both the duty and the authority to revise its current regulatory regime and, at a minimum, should modernize its rules to give broadcasters more flexibility in serving the

E/I needs of children. NAB specifically encourages the Commission: (1) to increase the types of educational programming that satisfy the definition of "core"; (2) provide broadcasters urgently needed flexibility in rescheduling preempted core E/I programs; and (3) reexamine how its children's TV rules apply to multicast channels, as the FCC had previously committed to doing.

Likewise, the Commission has not reviewed its broadcast attribution rules as a whole since the 1990s. NAB urges the FCC to update and simplify these rules, seeking to ensure that they count as attributable only those interests that actually confer a significant degree of influence over broadcast licensees and do not disparately disfavor investment in the broadcast industry. Among other measures, the FCC should: (1) reform or eliminate the overly complex equity-debt plus rule, given long-standing concerns that it discourages broadcast investment, especially in new entrants; (2) modernize and harmonize the insulation requirements for limited partners and members of limited liability companies so that broadcasters are not disfavored in attracting investment; (3) consider adopting attribution thresholds for limited partner and limited liability company interests in broadcast licensees, rather than treating all such interests, no matter how miniscule, as attributable unless insulated; (4) reconsider raising the attribution threshold for voting stock in corporate broadcast licensees from five percent to ten percent, as the FCC previously proposed but declined to adopt in the 1990s; and (5) reexamine the current 20 percent passive institutional investor attribution threshold for corporate licensees, given that standard's disparity with certain wireless attribution rules.

Finally, the Commission should continue its efforts to reduce unnecessary burdens on AM stations and barriers to broadcast innovation. NAB and other parties support further relaxation or elimination of AM antenna efficiency standards, which increase the costs of

constructing and barriers to operating AM stations. Clarifying and/or revising the current length of and renewal limits on broadcast experimental radio licenses also would help facilitate experimentation and innovation by broadcasters.

NAB looks forward to working with the Commission in future proceedings seeking comment on various proposals to reduce unproductive regulatory burdens on radio and TV stations and to promote their ability to serve local listeners and viewers. We encourage the FCC to expeditiously commence rulemakings to consider NAB's and other broadcasters' proposals.

## II. THE FCC SHOULD ELIMINATE UNNECESSARY AND REDUNDANT REPORTING AND FILING REQUIREMENTS AND STREAMLINE NEEDLESSLY BURDENSOME ONES

### A. The FCC Should Create a Combined Annual Programming Compliance Report to Replace Several Quarterly Reporting Requirements

Broadcast licensees currently must make multiple quarterly filings relating to their programming: (1) the issues/programs lists; (2) the children's television programming reports; and (3) the certifications, and supporting documentation, relating to limits on commercial matter in children's TV programming. NAB proposes that the Commission replace these separate filings with a combined and streamlined annual programming compliance report. An annual report relying more on certifications, rather than the quarterly submission of unnecessary granular detail about specific programs, would greatly reduce burdens on local stations, including small broadcasters, in accordance with the Paperwork Reduction Act (PRA) and the Regulatory Flexibility Act (RFA), without diminishing the duty of broadcasters to serve their local communities. As the D.C. Circuit emphasized in upholding previous FCC actions ameliorating the paperwork and administrative burdens on

broadcasters, the FCC is "statutorily authorized to reduce the regulatory burden on licensees."[3]

### 1. The Current Quarterly Issues/Programs Lists Are Not Necessary and Serve Little Apparent Purpose

Commercial and noncommercial AM, FM, TV and Class A television stations must every quarter place in their public files a list and description of the programs that have provided the station's most significant treatment of community issues during the preceding three-month period and retain those lists until the FCC takes final action on the station's next license renewal application.[4] As an initial matter, the need for quarterly reporting remains unclear.[5] In addition, the level and type of detail required to be reported is wholly unnecessary. The rule not only requires a narrative describing what issues were given significant treatment and the programming providing that treatment, the description must include the time, date, duration and title of each program in which the issues are treated.[6]

There is little justification for this type of reporting. Does the FCC or members of the public care (or check to confirm) that a particular story or series of stories about a local issue aired during a station's 6:00 p.m. newscast, rather than its 5:00 p.m. or 11:00 p.m. newscast? Does it really matter – *i.e.*, materially affect a station's service to the public – if a station mistakenly reports that a program or program segment aired on June 5, when in fact it aired on June 6? NAB is not aware of evidence showing that members of the public

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[3] *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 418 (D.C. Cir. 1983).

[4] 47 C.F.R. §§ 73.3526(e)(11)(i) & (12); 73.3527(e)(8).

[5] A quarterly requirement results in every station submitting 32 issues/programs lists during the course of its license term. To NAB's knowledge, no evidence indicates that 32 reports are necessary to ensure that local stations serve their communities of license, or that members of the public rely on quarterly reporting specifically.

[6] 47 C.F.R. §§ 73.3526(e)(11)(i) & (12); 73.3527(e)(8).

frequently – or even infrequently – look at stations' issues/programs lists. To our knowledge, moreover, members of the public have not typically relied on stations' identification of community responsive programming in their issues/programs lists as a basis for petitioning to deny the license renewal applications of those stations – one of the main purposes that the FCC's programming reporting requirements traditionally have been intended to serve.[7]

Certainly, the existing quarterly issues/programs lists should not be maintained for their own sake. Information gathering and reporting do not constitute independently significant regulatory goals, but are more properly regarded as a means to an end, such as addressing a specific problem or harm. The collection of information itself, without any identified problem that the FCC is seeking to solve, is not an appropriate use of regulatory authority.[8] Indeed, the Commission has an affirmative duty under the PRA and the RFA, respectively, to "reduce information collection burdens on the public"[9] and to "minimize the

[7] A recent examination of a number of FCC license renewal decisions showed that petitioners challenging renewal applications during the past two decades generally did not use issues/programs lists to support an argument that stations failed to serve their communities with responsive programming. To the extent that challenges to stations' renewal applications have included claims about stations' issues/programs lists, they typically have focused on the paperwork aspect, such as late or missing filings.

[8] *See, e.g., Trailer Marine Transport. Corp. v. Fed. Mar. Comm'n,* 602 F.2d 379, 398 (D.C. Cir. 1979) (an agency must "establish a basis to determine the relevance of the information to agency action and the reasonableness of the agency request . . . .[R]epeated assertions of a 'need to know,' with little more, cannot suffice."). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (invalidating certain FCC rules and observing that "a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist") (citations omitted).

[9] 44 U.S.C. § 3506(b)(1)(A).

significant economic impact" of regulations on "small entities."[10] As the Senate Committee on Government Affairs noted when amending the PRA in 1995,

> Particularly for small businesses, paperwork burdens can force the redirection of resources away from business activities that might otherwise lead to new and better products and services, and to more and better jobs. Accordingly, the Federal government owes the public an ongoing commitment to scrutinize its information requirements to ensure the imposition of only those necessary for the proper performance of an agency's functions.[11]

Accordingly, NAB proposes, in place of the unnecessarily detailed quarterly issues/programs lists, that the Commission create an annual programming compliance report, which would be included in stations' online public files. That report should include a certification that the licensee has provided programming responsive to issues of concern to its community of license during the past year. Licensees would be required to fully explain any inability to certify. Individual licensees would determine the programming records they wish to maintain to support their certifications and to address any consumer complaints, challenges to their license renewals, or FCC inquiries or enforcement actions. This certification approach is consistent with the FCC's general approach to legal compliance in

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[10] 5 U.S.C. § 604(a)(6).

[11] S. Rep. No. 104-8 (1995) (available at https://www.congress.gov/congressional-report/104th-congress/senate-report/8/1?q=%7B%22search%22%3A%5B%22%5C%22paperwork+reduction+act%5C%22%22%5D%7D&r=3).

other contexts.[12] It is also responsive to the FCC's statutory duty to reduce burdens on licensees, especially smaller ones.[13]

NAB emphasizes that this or other similar changes in reporting and recordkeeping would not alter the duty – and the incentive – of broadcasters to serve their communities. To compete and attract listeners and viewers in today's multichannel, multiplatform environment, broadcasters must provide programming relevant to their local audiences. The competitive incentives of broadcasters to be responsive to local listeners and viewers have only increased since the FCC adopted the quarterly issues/programs list requirement for radio and TV stations in the 1980s. In fact, the Commission at that time recognized that, as the media marketplace becomes more competitive in the future, market incentives would be even more clearly sufficient to ensure the provision of relevant programming, and the need for regulation would continue to decline.[14] Given the dramatic changes in the audio and video marketplaces and broadcasters' competitive position over the past three decades, the

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[12] *See, e.g.*, 47 C.F.R. § 64.905 (directing mid-sized incumbent local exchange carriers to annually certify compliance with rules requiring separation of their regulated costs from unregulated costs); 47 C.F.R. § 12.4(c) (requiring covered 911 service providers to make an annual reliability certification); 47 C.F.R. § 2.902 (defining a "verification" procedure where a manufacturer makes measurements to ensure that equipment complies with appropriate technical standards, but submittal of data to the FCC is not required unless specifically requested by the FCC); 47 C.F.R. § 2.906 (defining a "declaration of conformity" procedure where a responsible party makes measurements to ensure that equipment complies with relevant technical standards, but submittal of data to the FCC is not required unless specifically requested).

[13] *See, e.g., Black Citizens for a Fair Media*, 719 F.2d at 416-17 (approving FCC decision to reduce regulatory burdens on broadcasters, and stating "the reduction in regulatory burden which the FCC has effected is not just a result of FCC impulse, but rather stems directly from the Paperwork Reduction Act and congressional policy with respect to the FCC. There can be little doubt that this mandate provides further support for the FCC's decision.").

[14] *See, e.g.*, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 FCC 2d 1076, 1086, 1099 (1984).

Commission should initiate a proceeding to revise broadcasters' paperwork and administrative burdens, including the analog-era issues/programs lists, to ensure that they serve the public interest in a vastly different environment.[15]

### 2. The FCC Should Reform Its Reporting on Children's TV Programming and Commercial Limits

Currently, commercial TV licensees must complete the Children's Television Programming Report (Report) every quarter through the FCC's online Licensing and Management System (LMS) to document the programming they aired to meet their obligations to serve the educational and informational needs of children ages 16 and under.[16] Separately, licensees on a quarterly basis certify compliance with the FCC's limits on the amount of commercial matter in TV programming targeted to children ages 12 and under, and upload to their online public files records sufficient to permit substantiation of stations' certifications, in their license renewal applications, of compliance with these commercial limits.[17]

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[15] *See, e.g.*, *Geller v. FCC,* 610 F.2d 973, 979-80 (D.C. Cir. 1979) (finding under the Communications Act that the FCC was "statutorily bound to determine" whether certain previously adopted rules still served the public interest, given a change in relevant circumstances); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (finding that FCC had to address a broadcast license applicant's allegation that changes since the FCC first adopted a licensing criterion made continuing use of that criterion arbitrary and capricious, as "changes in factual and legal circumstances may impose upon [an] agency an obligation to reconsider a settled policy"); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) (stating that "where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach").

[16] 47 C.F.R. § 73.3526(e)(11)(iii) (also requiring placement of these reports in stations' online public files and their retention until final action on licensees' next license renewal application).

[17] 47 C.F.R. § 73.3526(e)(11)(ii).

Numerous member stations and broadcast attorneys have attested to NAB about the unnecessarily granular and overly burdensome nature of the current children's TV reporting requirements. The Reports require the submission of detailed information about the specific programs aired on stations' main and multicast channels and about the preemptions and rescheduling of specific program episodes. The Reports also require redundant reporting, as stations must identify every quarter the programs they expect to air in the next quarter, and then must report the following quarter on the programs actually aired.[18]

The extraordinary detail required by the Reports places undue burdens on TV stations. For example, in the first quarter of 2017, the Reports of the 15 TV stations owned by one group totaled 473 PDF pages, with the average being 31.5 pages per station. Based on the first quarter's numbers, this group's stations will file an estimated 1892 pages in 2017 detailing the children's TV programs they aired. Over the course of their eight-year license terms, the stations in this mid-sized group will file an estimated 15,136 pages with the FCC just to document their children's TV programming.[19]

The experience of this TV station group is entirely typical. Broadcast counsel estimate that the Reports of a station with four programming streams (one main and three multicast) typically range from 40-60 pages every quarter, depending mainly on the number of

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[18] In addition, our members and practitioners report numerous problems with the LMS version of the Reports, which increase the time and personnel burdens in completing them. For example, the system does not allow a form to be copied for another station, such as a satellite, which may air the same children's programming as its parent. Station personnel must fill out the same information multiple times by completing a separate form for each station.

[19] These numbers are likely conservative. According to broadcast counsel, the Reports in the third quarter of each year are generally five to ten pages longer than in other quarters, due to programming changes often made by broadcast networks in that quarter.

preempted programs.[20] The Reports of a station with three programming streams generally range from 30-40 pages every quarter, and stations with two streams usually have Reports about 25-30 pages in length. Thus, a single station – whether in a large or small market or owned by a large or small group – that provides multiple program streams, and whose Reports average 40 pages per quarter, will file 160 pages of programming details every year and approximately 1280 pages during its eight-year license term.

This recordkeeping and reporting burden is clearly excessive, particularly as it serves no significant purpose. How many members of the viewing public ever look at these Reports, despite their easy online accessibility? Even if a number of viewers did access the Reports, would they find the information – such as the granular detail on the preemption and rescheduling of program episodes in the last quarter – relevant and useful? Especially in this day of electronic program guides, no rational person would consult these Reports to plan their children's viewing; thus, requiring stations to report in detail on the programming they expect to air in the next quarter provides no public benefit and is contrary to the PRA, as it lacks "practical utility."[21] In sum, no cost/benefit analysis would support maintaining this quarterly filing requirement.[22] Consistent with the PRA and its duty to reduce the

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[20] The length of the Reports also depends on whether they are for a quarter in which network programming changes occurred (typically the third). In the third quarter of 2016, for example, the Report of a small market station in West Virginia that had experienced a number of preemptions totaled 54 pages.

[21] 44 U.S.C. § 3506(c)(3)(A) (requiring agencies to certify that their information collections are "necessary for the proper performance of the functions of the agency, including that the information has practical utility"). About eight to ten pages of each Report is a summary of the programs planned to be aired in the next quarter.

[22] The costs of children's TV reporting include burdens on the FCC, in terms of personnel time spent reviewing paperwork, rather than engaging in more substantive activities.

burdens on persons providing information to it, “including with respect to small entities,” the Commission should eliminate the quarterly Reports.[23]

To replace the current onerous reporting requirements, NAB proposes that the FCC include on the proposed annual programming compliance report discussed above a section on children’s television. Rather than requiring the submission of granular details about specific programs, this section should rely on certifications.[24] Broadcasters would need to disclose and explain any inability to make any of the required certifications. In addition, the licensee’s certification about compliance with commercial limits (and disclosure of any non-compliance) should be included in this streamlined annual report, rather than requiring licensees to upload this showing separately every quarter, as under current procedures.[25]

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[23] 44 U.S.C. § 3506(c)(3)(C). *See also Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984) (if data in a rulemaking record shows that the rule constitutes such an “unreasonable assessment” of costs and benefits as to be arbitrary and capricious, “the rule cannot stand”).

[24] For example, with regard to a station’s core educational and informational programming, this streamlined report could ask a licensee to state the average number of hours of core programming aired on each of its program streams, and to certify that this programming complied with any applicable core programming criteria (*e.g.*, aired during the specified hours, *etc*.). If, as the result of any future proceedings, the FCC’s rules regarding the definition of core programming or the ways in which broadcasters may fulfill their children’s programming obligations are amended, then the certifications on this proposed annual report would need to reflect such changes. *See infra* Section IV (proposing that the FCC increase the flexibility of licensees in meeting their children’s programming obligations). Licensees also could be required to certify, as they do today, that they provided information identifying the core programs it aired to the publishers of program guides, and complied with any applicable rules limiting the amount of repeated core programming. *See* 47 C.F.R. § 73.3526(e)(11)(iii).

[25] *See* 47 C.F.R. § 73.3526(e)(11)(ii). The FCC should eliminate the requirement for broadcasters to publicize the current Reports. *See* 47 C.F.R. § 73.3526(e)(11)(iii). This requirement predates the hosting of TV stations’ public files, which include the Reports, on the FCC’s web site. Because TV stations now must provide a link to their FCC-hosted online public files from the home page of their own web sites, there seems little need to retain a separate additional rule for publicizing children’s TV reports.

Licensees in their discretion would maintain programming records to support their certifications and to respond to any potential challenges to their license renewals, consumer complaints or FCC inquiries or enforcement actions.

NAB strongly urges the Commission to initiate a rulemaking to revise its children's television and commercial matter compliance reporting consistent with the approach discussed above. Maintaining the current unduly burdensome approach is not justifiable under any rational balancing of costs and benefits.

### B. The FCC Should Reduce Burdens Associated with Ownership Reports by Improving Their Online Filing and Requiring Their Submission Only Following Relevant Ownership Changes

Under Section 73.3615, commercial and noncommercial radio and TV licensees, and any entities that hold attributable interests in a licensee, must file Ownership Reports in all odd-numbered years; within 30 days of consummating assignments or transfers of permits and licenses; and in connection with the FCC's grant of a station's original construction permit and with the permittee's application for a station license.[26] The detailed information required to be submitted by so many entities and individuals makes the gathering of information for, and the filing of, Ownership Reports burdensome and time-consuming, especially for any licensees, including smaller ones, with multi-level ownership structures and many attributable interest holders. To lessen these burdens while still ensuring that the Commission has current ownership information about broadcast licensees, NAB offers two main proposals.

[26] 47 C.F.R. § 73.3615. The Ownership Report for Commercial Broadcast Stations is Form 2100, Schedule 323, and the Ownership Report for Noncommercial Broadcast Stations is Form 2100, Schedule 323-E (collectively, Ownership Reports).

First, NAB urges the Commission to ensure that the on-going migration of Ownership Reports to the Licensing and Management System (LMS) is successful and addresses the serious issues previously identified by broadcasters and their counsel with the electronic version of Forms 323 and 323-E in the Consolidated Database System (CDBS).[27] To ensure an efficient rollout of the LMS version of the Ownership Reports, the FCC needs to provide a period of time sufficient for broadcast industry representatives to test the new version, give feedback about any problems and offer suggestions for improvements. The Commission should address all problems and implement suggested improvements prior to requiring broadcast stations to utilize the LMS version of the Ownership Reports, even if this process results in a delay of the biennial filing scheduled for the fall of 2017. Implementing the revised online filing of Ownership Reports in this manner will avoid repetition of the technical

[27] For example, because the Form 323 in CDBS did not allow cross-referencing to information on other reports, extensive ownership information on parent and intermediate companies' forms had to be repetitively filed in reports for each of the licensees in which they held an attributable interest. The inability to cross-reference reports for entities holding interests in multiple licensees resulted in unnecessary and unproductive redundancies. *See, e.g.*, Comments of NAB, MB Docket No. 07-294, OMB Control No. 3060-0010, at 12-13 (Sept. 10, 2009). In addition, the sheer number of Form 323s required to be filed has unduly burdened broadcasters. Broadcast companies with interests in multiple licensees and whose corporate structure included intervening subsidiaries were required to prepare and file dozens – sometimes over 100 – separate reports. These burdens have impacted small broadcasters as well as larger ones, as complex ownership structures are common even for entities owning only a modest number of stations. *See id.*; Comments of Wiley Rein LLP on Proposed Information Collection Requirement, OMB Control No. 3060-0010 at 5-8 and Figures 1 and 2 (Sept. 10, 2009) (giving specific examples of the massive numbers of frequently duplicative Form 323 reports that some of its clients, including smaller radio broadcasters, were required to file). Broadcasters' legal fees associated with these multiple repetitive filings were significant. One publicly traded broadcast licensee reported that in 2015 it paid for over 100 hours in outside legal work, in addition to the time spent by the company's own employees collecting information for its Form 323 filings.

problems and delays that marred the rollout of the CDBS version of the revised Forms 323 and 323-E in 2009-2010.[28]

Second, the FCC should reexamine how frequently broadcasters must submit Ownership Reports. Given the number of licensees and attributable entities and individuals that must submit reports, the costs in terms of broadcasters' time and attorneys' fees exceed the benefits to be gained from overly frequent reporting. NAB members have explained the difficulties they face in even obtaining the required information from all attributable entities and individuals.[29] These relative costs are particularly high compared to the FCC's regulatory interest when licensees must prepare and file Ownership Reports even though there have been no changes in ownership affecting control of the licensee.

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[28] These serious problems forced the FCC in December 2009 to suspend its original filing deadline of January 2010 and set a new deadline for six months later, following the completion of technical improvements. *See Media Bureau Announces Revised Form 323 Will Be Available Online on April 9, 2010, and Sets New Filing Deadline of July 8, 2010,* Public Notice, DA 10-613 (rel. Apr. 8, 2010).

[29] For example, broadcast licensees with multi-level ownership structures need to obtain media ownership information and personal information from the many individuals (over 100 in some companies) that hold officer and director positions with the parent company and its broadcast subsidiaries. Distributing questionnaires, answering questions from and following up with individual respondents, and transcribing the information obtained into the Ownership Reports are all time-consuming activities. Our members report that it often takes weeks or even months for individuals to respond to these information requests, in part because the respondents may need to review their personal stock holdings to ensure they are providing accurate information. For officers and directors that have not appeared on prior Ownership Reports and have not previously obtain a CORES FRN, broadcast licensees also must explain the need for and obtain confidential personal information, such as social security numbers (SSNs) and residential addresses, that many individuals are reluctant to provide. Broadcasters may institute special procedures to maintain the security of this information (*e.g.*, SSNs may be collected over the phone and destroyed once an FRN is obtained). This process is time consuming for everyone involved. Our members also note that for their biennial Ownership Reports, they cannot simply recertify prior reports because attributable interest holders, including officers and directors of parent companies and subsidiaries, vary from year to year. Broadcast licensees and their employees certainly could spend their financial resources and time in more productive and publicly beneficial ways.

Accordingly, NAB proposes that broadcast permittees and licensees be required to submit Ownership Reports upon initial licensing and upon assignments or transfers of permits and licenses. Broadcasters also would be required to certify on their license renewal applications that they have submitted any required Ownership Reports to the FCC, similar to the certification required on renewal applications today. Such an approach would more appropriately balance the costs to licensees with the FCC's regulatory interests and would be more consistent with the requirements for ownership reporting by other FCC licensees.[30] We therefore urge the Commission to review its rules and policies regarding ownership reporting in a future proceeding.

### C. The Filing of Numerous Contracts with the FCC Is Not Necessary

Under 47 C.F.R. § 73.3613, commercial and noncommercial radio and TV stations must file with the FCC paper copies of numerous contracts, including those relating to ownership or control, certain personnel contracts and network affiliation contracts. To accomplish these paper filings, licensees either mail the contracts or have them delivered in person to the FCC.

The Commission should eliminate this outdated and unnecessary requirement for radio and TV licensees to submit copies of contracts totaling in the thousands. NAB seriously doubts that members of the public or FCC staff access these paper contracts with any frequency. This requirement, moreover, essentially duplicates other regulatory requirements. Section 73.3526(e)(5) requires licensees to retain in their public files either a copy of the

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[30] Wireless licensees, for instance, have ownership reporting obligations, but they have no requirement to file biennially. *See* 47 C.F.R. §§ 1.919.

contracts identified in licensees' ownership reports,[31] or an up-to-date list of such contracts, and licensees choosing to retain a list of contracts must provide a copy of any contracts to any party within seven days if requested.[32] Particularly given that interested parties have efficient access to information about broadcasters' contracts via stations' online public files, there is simply no need for thousands of stations to submit paper copies of contracts to sit on a shelf at the Commission.

### D. The FCC Should Eliminate the Unnecessary EEO Mid-Term Reports

Currently, 47 C.F.R. § 73.2080(f)(2) requires TV stations in station employment units (SEUS) with five or more full-time employees and radio stations in SEUS with more than ten full-time employees to file an EEO Mid-Term Report (Form 397) on the fourth anniversary of the deadline for filing their license renewal applications. Stations required to file this form must attach their annual EEO Public File Reports from the previous two years.[33]

NAB proposes elimination of Form 397. Given the move to online public files, the required information is already available on the FCC's website, as licensees' annual EEO Public File Reports are included in their online public files and are thus easily available to the public. The remainder of Form 397 contains only identification and contact information, which is already available in stations' online public files. Elimination of the mid-term

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[31] The contracts required to be identified in licensees' ownership reports are the same contracts that broadcasters must file in paper with the FCC under Section 73.3613.

[32] 47 C.F.R. § 73.3526(e)(5). The same rule applies to noncommercial stations. *See* 47 C.F.R. § 73.3527(e)(4).

[33] While other broadcasters with fewer employees are not required to file the Form 397, many of these licensees, pursuant to informal advice from the FCC and the advice of their counsel, file the first two pages of the form, which contain their identification information and confirm whether a licensee has the number of full-time employees required to submit the entire form.

reporting requirement will have no effect on broadcasters' obligations to comply with the substantive EEO requirements, or reduce licensees' other EEO recordkeeping and reporting requirements, including the retention of recruitment records, the annual EEO Public File Reports and the EEO Program Report (Form 396).[34]

### E. The FCC Should Not Pointlessly Require Thousands of TV Stations to File Form 317 Annually

Every commercial and noncommercial full power DTV licensee in the country, as well as low power TV, TV translator and Class A station DTV licensees, must annually report whether they provide ancillary and supplementary services (*e.g.*, datacasting, teletext, audio signals, subscription video, *etc*.), and, if so, describe these services, report the gross revenues received from all such feeable services and pay five percent of those revenues.[35] Because very few stations provide ancillary/supplementary services, the rule needlessly requires thousands of licensees to file Form 317 every year merely to state that fact. This requirement is an obvious waste of virtually all TV licensees' time and resources. The Commission should eliminate this filing requirement, *except* for those stations required to pay the five percent fee.

### F. The FCC Should Eliminate Obviously Obsolete Rules and Policies

The Commission should take advantage of this modernization proceeding to remove outdated provisions from the Code of Federal Regulations, including: (1) analog-specific TV rules in 47 C.F.R. Part 73 and rules specifically applicable to the long-completed transition to digital TV (*e.g.*, § 73.674, digital TV transition notices by broadcasters); and (2) Section

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[34] *See* 47 C.F.R. § 73.2080(f)(1). Removal of this single filing requirement also will have no practical effect on FCC enforcement of its EEO rules, including its compliance audits.

[35] 47 C.F.R. § 73.624(g).

73.4000, *et. seq*., an incomplete, inaccurate and woefully outdated listing of FCC policies. This listing includes policies that no longer exist (*see, e.g*., § 73.4255, issuance of tax certificates and § 73.4082, comparative broadcast hearings), and other contents are so outdated as to be misleading to broadcasters and members of the public (*see, e.g*., § 73.4075 on loud commercials, which identifies a 1984 order but not the FCC's order implementing the 2010 CALM Act). This listing of FCC policies has never been all-inclusive, with the inclusion or exclusion of policies in Section 73.4000, *et. seq*. appearing inconsistent, if not arbitrary. It is now obviously inaccurate and should be eliminated.

## III. THE FCC SHOULD MODERNIZE CERTAIN OUTDATED RULES BY ALLOWING BROADASTERS TO TAKE ADVANTAGE OF ONLINE METHODS OF PROVIDING NOTICE AND OF OBTAINING INFORMATION ABOUT FCC RULES

### A. The FCC Should Modernize the Public Notice Rules Applicable to Broadcast Applications

Section 73.3580 is a complicated and confusing rule requiring different types of public notice to be given for different FCC applications filed by different types of broadcast licensees.[36] The Commission should simplify these rules, looking to reduce burdens and update methods of providing notice about FCC applications by utilizing station websites and online public files. The FCC, for example, should consider reducing the length and text of required on-air notices about various types of applications (including license renewals) by referring listeners/viewers to station websites, where the requisite text could be posted along with a link to the stations' online public file containing the relevant application.

At the very least, the FCC should permit broadcasters to place any requisite notices that today must be published in a local newspaper on their station websites. For instance, applicants who file for assignment or transfer of a full-power station license are currently

[36] 47 C.F.R. § 73.3580.

required to give newspaper notice of their filings, as well as broadcasting specified notices several times.[37] Those broadcasters choosing to utilize their station websites, rather than newspaper publication, also should be permitted, when making their required on-air announcements, to state that the licensee has filed an assignment or transfer application with the FCC and that further information about this application can be found on the station's website. This approach will permit licensees to provide all required details about the application and the applicants (e.g., the names of all officers and directors and those persons holding ten percent or more of the stock or other ownership interest, if the applicant is a corporation) on the station's website, rather than reciting detailed information on air.

This proposed approach is consistent with the FCC's 2015 modernization of its contest rules allowing broadcasters to disclose the material terms of contests on their stations' websites, which the FCC found would inform consumers more effectively than periodic and often very quick recitations of those terms over the air.[38] Because the "Internet has become a fundamental part of consumers' daily lives and now represents the medium used most by the public to obtain information instantaneously," the FCC similarly should bring its public notice rules into "alignment with current consumer expectations" and permit online posting of notices consistent with its prior decision on licensee-conducted contests.[39]

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[37] *See* 47 C.F.R. §§ 73.3580(c), (d)(3) & (f).

[38] *Amendment of Section 73.1216 of the Commission's Rules Related to Broadcast Licensee-Conducted Contests*, Report and Order, MB Docket No. 14-226, FCC 15-118 at ¶ 3 (rel. Sept. 17, 2015) (stating that the updated rule would advance the public interest by giving consumers "improved access" to contest information) (Broadcast Contest Order).

[39] *Id*. at ¶ 8.

### B. The FCC Should Allow Broadcasters to Provide Notice of Their Retransmission Consent/Must-Carry Elections on a Website Readily Available to All MVPDs

The Communications Act requires TV broadcasters to make an election of retransmission consent or must-carry status every three years.[40] Under the FCC's rules implementing that statutory requirement, broadcasters must send to each cable system via certified mail a copy of its election, and must put copies of those statements in their public files.[41] This process is antiquated and unnecessarily burdensome. The Commission should modernize this rule by permitting stations to place one copy of their election(s) on a website readily accessible to all MVPDs, rather than utilizing certified mail.

The Commission has taken similar modernizing steps in a variety of other contexts, including broadcasters' online public files,[42] cable headend locations,[43] the CALM Act[44] and

[40] 47 U.S.C. § 325(b)(3)(B).

[41] 47 C.F.R. § 76.64(h). *See also* 47 C.F.R. § 76.66(d) (television stations must also send their election to each "satellite carrier's principal place of business, by certified mail, return receipt requested").

[42] *See Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Second Report and Order, 27 FCC Rcd 4535, 4540 (2012) (moving broadcasters' local paper public files to an online database hosted on the FCC's website, and stating that "the online revolution that has improved the delivery of products and services across our economy, as well as the availability of government services and government information to the public").

[43] *See Revisions to Public Inspection File Requirements – Broadcaster Correspondence File and Cable Principal Headend Location*, Report and Order, 32 FCC Rcd 1565, 1573 (2017) (permitting cable system operators to post principal headend location information online for the FCC and broadcasters to access the information as needed, saying the move would result in "long-term cost-savings and other efficiencies associated with an online file.").

[44] *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, 17243 (2011) (permitting programmers to certify compliance with the CALM Act in any manner that is available to all stations and MVPDs, including on a website accessible to program distributors).

closed captioning quality rules.[45] As the FCC recognized in these contexts, regulations should keep pace with the times, and online notice is obviously more in tune with the times than "snail mail."[46] Rather than requiring broadcasters to expend resources tracking down each MVPD retransmitting their signals and finding out where, and to whom, to send a certified letter, the FCC should follow its own precedent and allow broadcasters to make an election and provide notice on a website easily accessible to all MVPDs.[47] Done correctly, such a modernization effort will benefit both broadcasters and MVPDs: saving broadcasters time and resources and providing a more reliable source of information for MVPDs.

### C. Requirements for Broadcasters to Retain Hard Copies of FCC Rules Should be Eliminated

Certain broadcast entities are currently required to maintain hard copies of FCC rules. Under 47 C.F.R. § 74.769, low power TV, TV translator and TV booster stations must "have a current copy of Volume I and Volume III" of the rules on hand. Section 74.1269 requires the same of FM broadcast translator stations and FM broadcast booster stations.[48]

The apparent purpose of this obligation is to help ensure that broadcasters are familiar with the rules governing their service. However, given the immediate availability of

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[45] *See Closed Captioning of Video Programming,* Second Report and Order, 31 FCC Rcd 1469, 1489 (2016) (establishing a central, online FCC database to house all required certifications by video programmers, thereby "providing greater transparency and ease of reference for video programmers, consumers and VPDs").

[46] Statement of Commissioner Michael O'Rielly to Public Notice (stating that the retransmission consent/must carry election process could be more easily accomplished online).

[47] Some broadcasters, concerned about sending a certified letter to the wrong MVPD contact, duplicate their efforts and send certified letters to both local offices and corporate headquarters. An online notice system would eliminate these redundancies.

[48] 47 C.F.R. § 74.1269. Both of these provisions state that copies of the FCC's rules may be obtained from the Government Printing Office in Washington DC.

online access to the FCC's rules, requiring broadcasters to retain hard copies of the rules is no longer needed to fulfill this goal.[49] Broadcasters can easily access and review the rules online, and download and print copies of any rules as needed. A requirement to obtain and keep hard copies of FCC rules is woefully outdated and should be eliminated.

## IV. THE FCC SHOULD MODERNIZE ITS CHILDREN'S TV PROGRAMMING RULES TO REFLECT TODAY'S MEDIA MARKETPLACE AND ENHANCE BROADCASTERS' ABILITY TO SERVE YOUNG VIEWERS EFFECTIVELY

The Commission established the current children's television programming regulatory regime in 1996, adopting, pursuant to the Children's Television Act of 1990 (CTA), specific obligations for broadcasters to serve the educational and informational needs of children.[50] The FCC, however, went beyond the terms of the CTA in a number of ways. Perhaps most notably, the Commission essentially required TV broadcasters to provide three hours per week of "core" educational/informational (E/I) children's programming, which was subsequently expanded to require an additional three hours per week of core programming for each full-time multicast stream aired by a station.[51]

The FCC's 1996 rules reflect a bygone era where "appointment viewing" – that is, viewing series of programs aired every week at the same time for set periods of time on the same channel via a television set – represented the only way to access quality video programming. But as study after study of the current marketplace confirms, viewers today consume video programming very differently than in the analog world. Linear TV viewing has

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[49] *See* Broadcast Contest Order at ¶ 8 (the Internet is the "medium used most by the public to obtain information instantaneously").

[50] *Policies and Rules Concerning Children's Television Programming*, Report and Order, 11 FCC Rcd 10660 (1996) (1996 Order).

[51] *See Children's Television Obligations of Digital Television Broadcasters*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 22943 (2004) (2004 Order).

significantly declined with the rise of time shifting and binge viewing, and consumers routinely access video programming across multiple platforms via multiple devices.[52] This is particularly true for younger viewers, including teenagers.[53] As Chairman Pai recently

[52] Deloitte's Technology, Media & Telecommunications practice recently found that the movement of consumers away from traditional media viewing and toward streamed online content continues to accelerate. *See* Deloitte, *Digital Democracy Survey: A Multigenerational View of Consumer Technology, Media and Telecom Trends*, 11th Edition (2017) (Deloitte Survey). Due to this shift, the "traditional" TV viewing (*i.e.*, live *plus* DVR/time-shifted viewing) of consumers under the age of 50 declined significantly from 2011 to 2016, and rose only among the oldest consumers, especially those 65 and older. *The State of Traditional TV: Updated With Q4 2016 Data*, MarketingCharts (Apr. 24, 2017). Nearly three-quarters of U.S. consumers overall also report having binge-watched video content. Deloitte Survey at 7, Executive Summary. Very high percentages of adults (except those 65 and older) consume video via smartphones. Nielsen, *The Nielsen Total Audience Report, Q4 2016* (reporting that 81 percent of those ages 35-49 and 77 percent of those ages 50-64 use smartphones to view video, with 84 percent of young adults ages 18-24 doing so). *Id*. at Table 3A. Based on a survey conducted in early 2017, 95 percent of those ages 12-24 reported owning a smartphone, with 89 percent and 60 percent of those ages 25-54 and 55+, respectively, owning smartphones. Edison Research and Triton Digital, *The Infinite Dial 2017*. Eighty-two percent of U.S. TV households have a DVR, get Netflix or use on-demand from a cable or telco provider. Sixty-four percent of households subscribe to Netflix, Amazon Prime and/or Hulu. Leichtman Research Group, Press Release, *82% of U.S. TV Households Have a DVR, Netflix, or Use VOD* (Mar. 6, 2017). Nearly 70 percent of U.S. TV households have at least one TV set connected to the Internet via a smart TV or other means, such as a stand-alone device like Roku or Apple TV. Leichtman Research Group, Press Release, *69% of U.S. TV Households Have a Connected TV* (Apr. 27, 2017).

[53] For Generation Z (those born after the mid-1990s) and Millennials, TV viewing means accessing programs through online sources, such as smart TVs, multi-media devices or game consoles. Tremor Video/Hulu, *How Gen Z Connects to TV: Exploring the Generational Divide in the Future of TV,* at 5 (May 2017). About 90 percent of Gen Z and Millennials say they have binge-watched video content. Deloitte Survey at 7. Most teenagers (71 percent) ages 13-17 report spending three hours or more per day watching online video on their phones. Think with Google Report, *Generation Z: New Insights into the Mobile-First Mindset of Teens* (Mar. 2017). The average "youth" (ages 13-24) consumes 12.1 hours per week of "free" digital video (*e.g.*, YouTube, Facebook, *etc*.), surpassing their viewing of traditional TV, as does their consumption of subscription digital video (*e.g*., Netflix, Amazon, Hulu). DEFY Media, *Acumen Report: Youth Video Diet* (2016). According to recent reports, Facebook plans to offer a slate of TV-quality video content as soon as this summer, aimed at teenagers and young adults. Joe Flint and Deepa Seetharaman, *Facebook Is Going Hollywood, Seeking Scripted TV Programming*, Wall Street Journal (June 25, 2017). Unsurprisingly, traditional TV viewing (live plus DVR/time-shifted) has declined very significantly among young viewers. In the fourth quarter of 2016, traditional TV viewing by

remarked, "When I was growing up, Sesame Street was a show that you watched on a television set at the same time each day. To my children, Sesame Street is a collection of videos and apps that they can interact with on numerous devices whenever they want."[54]

Since the 1990s, moreover, non-broadcast electronic media have dramatically expanded the universe of educational programming available for children. The Internet did not exist for parents or children when the CTA was passed in 1990 or when the FCC adopted the existing rules in 1996 – now the Internet is nearly ubiquitous.[55] According to SNL Kagan, MVPD penetration was under 58 percent in 1990; in 2016, it was 81.4 percent. Consequently, children's educational, informational and entertainment content accessible to parents and children via these platforms has proliferated in recent years.[56]

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teenagers (ages 12-17) had dropped 10.9 percent from Q4 of 2015 and had declined 37.5 percent over the previous five years. Among those aged 18-24, traditional TV viewing had dropped 7.1 percent from Q4 of 2015 and had declined by 39 percent since 2011. *The State of Traditional TV: Updated With Q4 2016 Data*, MarketingCharts (Apr. 24, 2017).

[54] Remarks of FCC Chairman Ajit Pai at the NAB Show, Las Vegas, NV (Apr. 25, 2017).

[55] *See, e.g.*, Broadcast Contest Order at ¶ 8 (stating that the "Internet has become a fundamental part of consumers' daily lives"); *The 2015 Digital Future Report: Surveying the Digital Future, Year Thirteen*, at 15-16, Center for the Digital Future, USC Annenberg School for Communication and Journalism (2015) (reporting that 91 percent of Americans used the Internet and that usage was 100 percent in younger demographic groups).

[56] For example, myriad full-time children's cable channels are flourishing (*e.g.*, Nickelodeon, Nick Jr., Teen Nick, Disney Channel, Disney Junior, Disney XD, *etc.*), as are other channels (*e.g.*, Discovery, Discovery Family, National Geographic, National Geographic Wild, Animal Planet, History Channel, Smithsonian Channel, *etc.*) that provide educational and informational programming attractive to viewers of all ages. Numerous major Internet sites exist where parents may obtain educational content both free and via subscription (*e.g.*, LeapFrog, National Geographic Kids, PBS Kids, Scholastic Kids, Smithsonian Kids, Time for Kids, Funbrain, Coolmath, Apple iTunes U, Kids.gov, *etc.*). Over seven years ago, NAB compiled a nine-page chart detailing a number of these sites, and there are undoubtedly many more today. *See* Comments of NAB, MB Docket No. 09-194, at Attachment A (Feb. 24, 2010). These online materials may be accessed 24/7 via a range of devices.

Given these changes in the video environment, the time is ripe for the Commission to consider changing its programming rules to harmonize them with the public's actual viewing habits and to provide TV stations with appropriate flexibility that accounts for modern technology. Indeed, the FCC not only has the opportunity, but also the duty to reconsider its outmoded children's TV rules and policies.[57] The CTA, which only requires the FCC at license renewal time to consider the extent to which a licensee has "served the educational and informational needs of children,"[58] clearly provides sufficient authority and discretion to allow the Commission to modernize its children's TV programming rules.

In light of this factual and legal landscape, the Commission should examine the degree to which the current regulatory regime remains necessary and, at the very least, update its rules to give broadcasters more flexibility in serving the E/I needs of children. The existing options available to broadcasters for satisfying their obligations fail to offer even the flexibility that the FCC meant to provide in 1996. The Commission should revise its definition of "core" E/I programming to bring it into alignment with the current marketplace and consumer expectations. The FCC's very restrictive policy on addressing core programming preemptions needlessly burdens broadcasters and impairs their programming flexibility, and the current rules applicable to multicast channels also should be reexamined "in light of technological developments," as the FCC previously committed to doing.[59] NAB requests the

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[57] *See, e.g., Bechtel*, 957 F.2d at 881 (stating that "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so"); *Geller,* 610 F.3d at 979-80 (finding that FCC was "statutorily bound to determine" whether certain previously adopted rules still served the public interest, given a change in relevant circumstances); *Cincinnati Bell Tel*., 69 F.3d at 767 (stating that "where the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach").

[58] 47 U.S.C. § 303b(a)(2).

[59] 2004 Order, 19 FCC Rcd at 22966.

Commission to initiate a proceeding to modernize these aspects of the children's TV rules and otherwise ensure that all its rules and policies effectively serve their intended purpose in a digital, online world.

### A. The Commission Must Reaffirm the Viability of "Category B" Compliance, Which Was Intended to Offer Flexibility to Stations in Meeting Their CTA Obligations, and Should Modernize the Definition of Core Programming

Today, television stations uniformly satisfy their children's E/I programming obligations by relying on "Category A" compliance, which requires the airing of an average of three hours per week, per full time channel, of core children's educational and informational programming.[60] Among other additional criteria, E/I programming is "core" if it airs between the hours of 7:00 a.m. and 10:00 p.m.; is a regularly scheduled weekly program; and is at least 30 minutes in length.[61] The Media Bureau is authorized to approve the children's TV portion of the license renewal application of a broadcaster fulfilling these Category A requirements.[62]

Category A, however, is not the only compliance approach recognized by the Commission. Stations that do not meet Category A's three-hour processing "guideline" may, at least theoretically, instead rely on Category B by providing:

> a package of different types of educational and informational programming that, while containing somewhat less than three hours per week of Core Programming, demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of Core Programming. In this regard, specials, PSAs, short-form programs, and regularly scheduled non-weekly programs with a significant purpose of

[60] *See* 47 C.F.R. § 73.671(d)-(e).

[61] 47 C.F.R. § 73.671(c). In its 1996 Order, the FCC also observed that "[t]elevision series typically air in the same time slot for 13 consecutive weeks," 11 FCC Rcd at 10711, which is not necessarily true in 2017.

[62] *See* 47 C.F.R. § 73.671(d), (e)(1); 1996 Order, 11 FCC Rcd at 10718, 10723.

> educating and informing children can count toward the three hour per week processing guideline.[63]

Despite their existence, virtually no stations have taken advantage of the other two options established in the 1996 Order for demonstrating compliance with the CTA. The fact that broadcasters, for over two decades, have uniformly avoided Category B suggests it is ineffective in providing the "measure of flexibility" that the FCC meant that option to provide to licensees in meeting their obligations.[64] The FCC should reform its requirements to make this illusory flexibility real. While a future proceeding can and should consider a range of proposals to expand broadcasters' options for serving viewers today with children's and other public interest programming, NAB offers several initial proposals here.

If the Commission elects to retain the three-hour programming "guideline," it should adequately define (or revise if needed) Category B to increase its certainty and predictability. The vague "somewhat less than three hours per week" requirement creates uncertainty as to how much core programming a broadcaster is expected to provide. It is also not clear how the FCC counts non-core Category B programming, such as short-form programs, PSAs and specials (*e.g.*, on a "minute-for-minute" basis or in some other manner to determine

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[63] *Id*. In addition, renewal applications that do not meet either Category A or Category B are referred to the full Commission. In such a situation, the broadcaster has an opportunity to demonstrate fulfillment of its children's E/I programming obligations by relying in part on sponsorship of core programs on other stations in the market that increases the amount of core programming on the station airing the sponsored program and/or on "special nonbroadcast efforts" that enhance the value of children's educational programming. *See* 47 C.F.R. § 73.671(e)(1); 1996 Order, 11 FCC Rcd at 10719.

[64] 1996 Order, 11 FCC Rcd at 10723 (stating that the FCC specifically established Category B "to create a measure of flexibility as to how broadcasters may qualify for routine staff processing of their [renewal] applications").

equivalency to the three-hour standard?). Until these and other questions are clarified,[65] Category B will not represent the viable option for broadcasters that the FCC intended, especially given the significant penalties for stations violating the children's TV rules.

The Commission also should revise its rules so that broadcasters can realistically satisfy, at least in part, their children's TV obligations by sponsoring core E/I programming on other commercial or noncommercial in-market stations and/or by special nonbroadcast efforts enhancing the value of E/I programming.[66] FCC staff, rather than the full Commission, should be permitted to approve the children's TV portion of the renewal applications of licensees relying on these different options. Like the "rational" holders of any "government-issued license," broadcasters "avoid the inconvenience and expense of being subjected to further review."[67] No prudent broadcaster would deliberately subject its license to non-routine, full FCC review, nor would a rational broadcaster increase the risk to its license renewal by relying on a vague, uncertain option for fulfilling its obligations.[68] The Commission needs to give clear guidance as to what "special nonbroadcast efforts"

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[65] For instance, the FCC stated in 1996 that airing children's programming, whether core or non-core, during prime time would be a relevant factor under Category B, as would investing a substantial amount of money in developing core programming aired on the broadcaster's channel. But it remains unclear how much of a "plus" or how FCC staff would treat such factors in its equivalency evaluation. *See* 1996 Order, 11 FCC Rcd at 10724.

[66] *See* 47 U.S.C. § 303b(b)(1) & (2) (expressly permitting the FCC to consider these efforts, in addition to consideration of a licensee's programming, in evaluating whether the licensee has served the educational and informational needs of children).

[67] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998).

[68] *See id*.; *see also Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407 (D.C. Cir. 1975) (statement of Judge Bazelon) (because broadcast "licensees are dependent on the FCC and the government for their economic well-being," no broadcaster will act in a manner that puts its license at risk).

enhancing the value of E/I programming actually means and how such efforts would be counted,[69] matters left unresolved in the 1996 Order.

In addition, the Commission should increase the flexibility of broadcasters to meet their CTA obligations by amending the definition of core programming. NAB encourages the FCC to solicit comment on whether more types of children's E/I programming should count as core, including regularly-scheduled non-weekly series, short series, specials, programs and segments shorter than 30 minutes and PSAs. In initially implementing the CTA in 1991, the Commission recognized that short-form programming, including PSAs and vignettes, can serve the educational and informational needs of children.[70] Moreover, the 1996 determination that only weekly-scheduled programs 30 minutes or longer count as core has predictably driven other types of educational programs from the air.[71] This reduction in the variety of children's educational programming does not promote the public interest.

The Commission also should expand the time period in which programs must be shown to count as core. The FCC originally proposed to define this period as 6:00 a.m. to

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[69] Counting the sponsorship of core programming on another in-market station should be on a straightforward "minute-for-minute" basis.

[70] Report and Order, 6 FCC Rcd 2111, 2115 (1991). *See also* Notice of Proposed Rule Making, 10 FCC Rcd 6308, 6300 (1995) (1995 NPRM) (even when proposing to define core as programming of substantial length, the FCC "recognize[d] that short-segment programming can play a useful role in serving the needs of children and we do not wish to give broadcasters a disincentive to air educational short segments").

[71] Some of these pre-1996 short-form programs and interstitials have had lasting influence. For example, an entire generation of viewers seems to remember *Schoolhouse Rock*, with its lessons on civics, history, math, science and grammar taught in songs, such as "I'm Just a Bill" (on the legislative process) and "Conjunction Junction" (on the functions of conjunctions in language). *In the News* was another notable interstitial, a long-running TV news program geared toward children and young people, narrated by award-winning newsman Christopher Glenn.

11:00 p.m.,[72] and it should at the least return to this broader period. Particularly given the vastly increased flexibility of viewers to time shift, download and/or acquire video programming today, the grant of limited additional flexibility to broadcasters in their airing of core programming is entirely reasonable. Other commenters in this proceeding may have additional suggestions for increasing the flexibility of the core programming definition.

In a media environment in which many viewers, especially younger ones, do not understand the concept of – let alone engage in – appointment viewing,[73] counting as core only those E/I programs of a particular length aired on a set weekly schedule on the same channel between certain hours is anachronistic. Increasing broadcasters' flexibility in providing E/I programming should enhance their ability to serve the intended audience of that programming more effectively, given young viewers' and their parents' preferences for accessing video content today. NAB accordingly strongly urges the Commission to modernize its outdated and unduly narrow definition of core programming.

### B. The Current Preemption Policy Is Overly Restrictive and Burdensome and Must Be Reformed

Given consumers' changed patterns of video programming consumption, TV stations require more flexibility to address preemptions of core E/I programming. As a general matter under the current policy, if a TV station preempts an episode of a core E/I program for any

[72] 1995 NPRM, 10 FCC Rcd at 6329-30 (noting that children watch television through the entire period of prime time and that "not an insignificant number" of children are in the audience at 6:00 a.m.).

[73] Generation Z is the first generation to have grown up with on-demand TV content available for most of their lives. They are not driven by the type of network (broadcast or cable), time of day (DRV or live viewing) or location (the room with a cable connection), and expect to be "able to watch any show anytime, without an appointment." Tremor Video/Hulu, *How Gen Z Connects to TV: Exploring the Generational Divide in the Future of TV* at 3-4, 13 (May 2017).

reason other than breaking news, the station's rescheduling of that show will not count toward compliance with the three-hour guideline unless the show is rescheduled to a restrictively-defined "second home."[74] This analog-era preemption policy – like the definition of core programming itself – reflects an appointment viewing mindset inconsistent with the realities of current technology and consumer behavior.

The FCC's outdated "second home" policy significantly burdens broadcasters and impairs their programming flexibility to the detriment of viewers. In recent years, broadcasters have responded to consumer demand by substantially expanding the amount of local and national news and live sports programming they air.[75] In contrast to other types

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[74] To be a "second home," the rescheduled time slot must be between 7:00 a.m. and 10:00 p.m.; it must be within seven days of the date on which the episode was scheduled to air; it must be consistent (*i.e.*, it must be the same day/time each week that the program is preempted and rescheduled, for example, the second home of a show regularly scheduled at 9:00 a.m. on Saturday is at 7:00 a.m. on Sunday); and it must be publicized on air. This second home policy is not in any rule, but is set forth in letters sent 20 years ago from the Chief of the Mass Media Bureau to several broadcasters. *See* July 11, 1997 Letters from Roy J. Stewart, Chief, Mass Media Bureau, FCC to Martin D. Franks, Senior Vice President, Washington, CBS, Inc.; Alan N. Braverman, Senior Vice President & General Counsel, ABC, Inc.; Rick Cotton and Diane Zipursky, NBC, Inc.; *see also* Second Order on Reconsideration and Second Report and Order, *Children's Television Obligations of Digital Television Broadcasters*, MM Docket No. 00-167, FCC 06-143 at ¶ 28 (rel. Sept. 29, 2006) (referencing the second home policy previously developed by FCC staff).

[75] In 2016, TV stations originating local news aired, on average, 2.1 hours of local news on both Saturdays and Sundays and 5.7 hours on weekdays. Stations in large markets (ranked 1-50) aired considerably greater amounts of local news in 2016, averaging nearly 3.0 hours of local news on Saturdays, about 3.1 hours on Sundays and over 6.5 hours on weekdays. Bob Papper, *RTDNA Research: Local News by the Numbers* (June 5, 2017). In contrast, according to an RTDNA/Ball State University Survey in 2004, stations aired, on average, 1.4 hours of local news on Saturdays, 1.3 hours of local news on Sundays and 3.7 hours on weekdays. Network affiliated stations today also air expanded amounts of national news and public affairs programming on weekends and weekdays. Network news programming, especially morning shows, have significantly expanded their length in recent years, as well as expanding to seven days a week. In 2015, more than 127,000 hours of sports programming were available on broadcast and cable TV, and viewers spent more than 31

of video programming where time-shifting, streaming and binge viewing are common, consumers value live viewing of sports programming, which, according to Nielsen, is the one type of "DVR-resistant" programming.[76]

This growth in popular live and public interest programming has significantly squeezed the schedules of TV stations and their ability to reschedule preempted core E/I programming, given the restrictiveness of the second home policy. This problem is particularly acute for stations outside the Eastern time zone.[77] Indeed, some stations over the past couple of years—years that saw a significant election cycle and unprecedented viewing audience engagement in news coverage addressing race relations, police/civilian relations, and other significant socio-cultural developments—felt they had little choice but to

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billion hours watching sports, up 160 percent and 41 percent, respectively, from 2005. Nielsen Insights, *Catch It Live: Sports Viewing Scores a Programming Goal* (Feb. 22, 2016).

[76] Nielsen Insights, *Catch It Live: Sports Viewing Scores a Programming Goal* (Feb. 22, 2016). According to Nielsen, among adults ages 18-54, all the top 25-rated live TV events in 2016 were sports programs, as were 49 of the top 50. *See also* Daniel Holloway, *How 'Sunday Night Football' Became TV's Ratings King,* Variety (Sept. 8, 2016) (anticipating that *Sunday Night Football* would finish its sixth straight season as primetime's most-watched show, a "testament to the growing power of live sports" at a time when viewing habits are rapidly evolving and many viewers now wait days or even weeks to watch most shows).

[77] A network-affiliated station on the East coast, for example, often will broadcast both network and local news on a Saturday morning and then air multiple live sporting events, such as college football, frequently starting with games as early as noon or 1:00 p.m. eastern time, with additional games scheduled later in the afternoon and even into prime time. Such packed programming schedules increase the likelihood of preemptions in other types of programming in all time zones, particularly given that the length of live sports events can only be estimated. Stations further west are especially affected, as sports events shown live beginning around mid-day in the East interrupt morning program schedules in other time zones, and live events airing near or in prime time in the East interrupt late afternoon program schedules in the West. Finding a set and consistently available second home for preempted core programs is increasingly challenging, as available slots at other times on Saturdays or on other days of the week are scarce. Sunday mornings, for instance, are occupied by expanded amounts of national and local news and public affairs programming, and Sunday afternoons are dominated by live sports much of the year.

preempt local newscasts to satisfy the unnecessarily rigid second home policy. In light of these challenges and the decline (if not disappearance) of appointment viewing for nearly all program genres, the FCC should modernize its preemption policies to give more flexibility to stations in rescheduling core programming.

For these reasons, NAB requests the Commission to eliminate its rigid second home policy. We suggest that the FCC instead permit broadcasters to air preempted core E/I programs – and still have those programs count as core – on the day/time and over-the-air channel of their choice (within the appropriately broadened core window), provided that the broadcaster gives adequate notice of the rescheduled time.[78] At the very least, the FCC should substantially loosen the restrictions on its second home policy.[79]

Beyond the factual circumstances and practical reasons for the FCC to modernize its second home policy, its "duty" to do so is "even more pressing" because that "policy is embodied not in a binding regulation issued after notice and comment,"[80] but, as noted

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[78] The FCC should consider a range of methods for providing this notice, including online methods such as station websites, given that the Internet is now "the medium used most by the public to obtain information instantaneously." Broadcast Contest Order at ¶ 8. The question of notice can be further explored in a future proceeding.

[79] For instance, the FCC could (i) allow 21 days, rather than seven, to air the preempted core program; (ii) clarify that broadcasters incur no obligation to reschedule a preempted children's program, if that preemption is caused by the provision of non-regularly scheduled local or national news or public affairs programming (rather than just a narrow category of "breaking" news); and (iii) allow more flexibility in defining what constitutes a second home (*e.g.*, removing the requirement that a second home must be at the exact same time/day for every preemption of the same program).

[80] *Bechtel*, 957 F.2d at 881. *See also Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 519 (D.C. Cir. 1997) (stating that the court had "often affirmed" that agencies must "be prepared to explain and justify general policies not codified in a regulation" where their application to specific cases are challenged).

above, is set forth in several Bureau letters from the 1990s.[81] It is therefore time for the Commission to "evaluate its [preemption] policies" to "ascertain whether they work" effectively and without undue burden in the current environment.[82]

### C. The FCC Should Reexamine How It Applies the Children's TV Requirements to Multicast Channels

In its 2004 Order, the Commission extended its 1996 three-hour children's programming "guideline" to multicast channels so that, to comply with Category A, TV stations must provide three hours of core E/I programming per week per each full-time multicast stream they air. This extension compounded an already overly rigid approach to broadcasters' provision of children's and other public interest programming. NAB accordingly urges the Commission to reexamine the application of analog-era children's TV requirements to digital broadcasting by belatedly initiating the proceeding it promised to conduct in the 2004 Order, which stated that the FCC would revisit "in the next three years" the issues addressed in that Order and consider whether its determinations "should be changed in light of technological developments."[83]

To inform this future proceeding, NAB observes as an initial matter that the CTA in no way requires the Commission to impose additional children's programming requirements per each channel a broadcaster may air. The CTA speaks in terms of a "licensee's overall programming," not the programming on any particular channel.[84] And certainly the FCC is not mandated to impose equivalent obligations (*i.e.*, three hours of core E/I programming)

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[81] *See supra* note 74.

[82] *Bechtel*, 957 F.2d at 881.

[83] 2004 Order, 19 FCC Rcd at 22966.

[84] 47 U.S.C. § 303b(a)(2).

per each and every stream a broadcaster may offer, regardless of how many streams the broadcaster airs.

At a minimum, the Commission should provide more flexibility to broadcasters to determine on which programming streams they air any required hours of children's programming.[85] For example, the current rules require multicasting stations to air the requisite three hours on their main program stream, regardless of the programming they may offer on other streams. Even if a station devotes a significant portion or the entirety of another stream to children's educational programming, it must still air E/I programming on its main stream. Such a requirement appears overly burdensome and unnecessarily restrictive, if not irrational. Notably, the FCC specifically pledged that its future proceeding revisiting its 2004 determinations would, "[i]n particular," address "whether broadcasters should be given more flexibility to determine the program stream on which core programming is placed."[86] Given technological developments, changes in how consumers access video programming and the growth in child-oriented content online and on-demand over the past two decades, the FCC should initiate this long overdue proceeding forthwith.

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[85] Broadcasters offering multiple streams can choose to air their additional core programming (beyond the three hours required on the main channel), either on one free channel or distribute it across multiple free channels, so long as the stream(s) on which the core programming is aired have comparable carriage on MVPDs as the stream whose programming generates the core programming obligation. 2004 Order, 19 FCC Rcd at 22952; 47 C.F.R. § 73.671(e)(2)(ii).

[86] 2004 Order, 19 FCC Rcd at 22966. *Accord id.* at 22953.

## V. THE FCC SHOULD REEXAMINE AND UPDATE ITS BROADCAST ATTRIBUTION RULES TO REFLECT THE CURRENT INVESTMENT LANDSCAPE

The attribution rules determine what types of interests are "counted" as common ownership under the FCC's multiple and cross ownership limits.[87] Unlike the ownership rules, which must be reviewed every four years pursuant to Section 202(h) of the 1996 Telecommunications Act, the Commission has not examined its attribution rules as a whole since the 1990s.[88] NAB urges the FCC to initiate a rulemaking to review its attribution rules and update them as appropriate. In particular, the Commission should conduct a proceeding to ensure that its rules count as attributable only those interests that confer a significant degree of influence over a licensee; do not discourage investing in the broadcast industry and reflect the current investment landscape; are not needlessly complex or overly prescriptive; and are consistent with the current broadcast ownership rules. Chairman Pai also recently stressed the importance of relaxing rules and streamlining FCC procedures to "ensure that different sectors of the communications industry can compete for investment on a level playing field."[89]

With these goals in mind, NAB offers several proposals as ones to address in a future proceeding.[90] As an initial matter, the Commission should eliminate all references to "cable television systems" in its attribution rules. Since 2002, no restrictions have been imposed

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[87] *See* 47 C.F.R. § 73.3555 Note 2.

[88] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, MM Docket Nos. 94-150, *et al*., FCC 99-207 (rel. Aug. 6, 1999) (1999 Attribution Order).

[89] Statement of Commissioner Ajit Pai, Report and Order, GN Docket No. 15-236, FCC 16-128 (rel. Sept. 30, 2016) (2016 Foreign Ownership Order).

[90] Given the length and complexity of the attribution rules and policies, the following list should not be regarded as exhaustive.

on the common ownership of broadcast TV stations and cable TV systems in the same market.[91] There is no need to define attributable interests for purposes of an ownership rule that no longer exists, and the FCC should ensure that its attribution rules actually reflect its current ownership restrictions.

Second, the Commission should reexamine the equity/debt plus (EDP) rule.[92] The FCC adopted this rule in 1999, and the basis for its initial adoption was not particularly strong.[93] The EDP rule is overly complex and difficult to apply. It restricts investment in broadcast stations for otherwise non-attributable debt and non-voting equity interests,[94] despite the FCC's recent acknowledgement that "limited access to capital is a concern in the broadcast industry, especially for small business entities and new entrants, including minorities and women."[95]

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[91] In February 2002, the D.C. Circuit vacated the cable/broadcast cross-ownership rule and directed the FCC to repeal the rule, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002), which the FCC did in 2003. Order, 18 FCC Rcd 3002 (2003).

[92] *See* 47 C.F.R. § 73.3555 Note 2i.

[93] For example, rather than showing that the EDP rule would address a specific problem or harm, the FCC stated that its "holding that such an interest should be attributable does not rest not rest on a specific finding that it is harmful *per se*, but rather on a finding that it is the sort of interest that should be counted in applying the multiple ownership rules." 1999 Attribution Order at ¶ 40. This reasoning is circular, as the FCC essentially asserted that EDP interests should be attributable because they are the sort of interests that should be attributed.

[94] Even though non-voting stock and other non-voting interests, such as debt, warrants and options, are generally deemed nonattributable, under the EDP rule a party has an attributable interest in a media entity if it holds debt and equity (including all stockholdings, whether voting or nonvoting) interests that in the aggregate exceed 33 percent of the total asset value (defined as the aggregate of all equity plus all debt) of the entity and either (i) has an attributable interest in a broadcast station, cable TV system or newspaper in the same market, or (ii) provides over 15 percent of the total weekly programming to the broadcast station in which the equity/debt interests are held. 47 C.F.R. § 73.3555 Note 2i.

[95] 2016 Foreign Ownership Order at ¶ 8.

In fact, the Commission previously amended the EDP rule due to concerns that the rule prevented small businesses, including those owned by minorities and women, from obtaining investment needed to acquire broadcast stations.[96] While this amendment made the EDP rule even more complicated, NAB is not aware of evidence showing that the amendment materially increased the acquisition of stations by small and/or diverse entities, which continue to struggle to obtain adequate financing. Especially given clear and consistent concerns with the EDP rule's adverse effects on broadcast investment generally and on new entrants specifically since its adoption, NAB urges the Commission to consider its elimination. At the very least, the EDP rule should be made significantly less restrictive and less complex.

Third, NAB urges the FCC to reform the insulation requirements for limited partnerships (LPs), limited liability companies (LLCs) and registered limited liability

[96] In 2007, the Multicultural Media, Telecom and Internet Council led an effort to amend the rule to apply a less strict EDP standard where doing so would enable an "eligible entity" to acquire a station. *See* Report and Order, MB Docket Nos. 07-294 *et al*., FCC 07-217, at ¶ 17 (rel. Mar. 5, 2008). Under the amended EDP rule, an interest holder may exceed the 33 percent debt/equity threshold without triggering attribution where holding such interest would enable an eligible entity to acquire a broadcast station, provided that (i) the combined equity and debt of the interest holder is less than 50 percent, or (ii) the total debt of the interest holder in the eligible entity does not exceed 80 percent of the asset value of the station being acquired by the eligible entity and the interest holder does not hold any equity interest, option or promise to acquire an equity interest in the eligible entity or any related entity. An "eligible entity" is a small business under applicable Small Business Administration size standards that, at the time the transaction is approved by the FCC, holds: (A) 30 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the media outlet; or (B) 15 percent or more of the stock or partnership interests and more than 50 percent of the voting power of the corporation or partnership that will own the outlet, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (C) more than 50 percent of the voting power of the corporation that will own the outlet if such corporation is a publicly traded company. 47 C.F.R. § 73.3555 Note 2i.

partnerships (RLLPs). Under the current rule, all LP, LLC and RLLP interests, regardless of their size and no matter how miniscule, are attributable, unless they are insulated.[97] The criteria for adequate insulation are set forth in a 1985 order and the time has come for them to be reexamined.[98] These criteria were designed and may be more appropriate for LPs rather than LLCs, which did not even exist in the mid-1980s; the 1999 Attribution Order extended the existing LP insulation criteria to LLCs and RLLPs "without modification."[99]

The 1980s-era insulation criteria also are overly prescriptive, requiring LP and LLC agreements to contain a number of specific provisions with particular language in order for the limited partners or LLC members to qualify as insulated, non-attributable investors in a broadcast licensee.[100] While the agreements of many LPs and LLCs make clear that their limited partners and members are passive investors only, these agreements often do not contain the specific, prescribed language that qualifies those partners/members for insulation under the 1985 Attribution Order.[101] As a result, broadcasters can face barriers in attracting investment from private equity funds and other entities organized as LPs or LLCs

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[97] *See* 47 C.F.R. § 73.3555 Note 2f.

[98] *See id.*, referencing Memorandum Opinion and Order, MM Docket No. 83-46, FCC 85-252 (rel. June 24, 1985) (1985 Attribution Order), as modified on reconsideration, Memorandum Opinion and Order, MM Docket No. 83-46, FCC 86-410 (rel. Nov. 28, 1986).

[99] 1999 Attribution Order at ¶ 138.

[100] *See* 1985 Attribution Order at ¶¶ 47-50 (identifying multiple provisions that must be included in LP agreements, relating to limits and/or prohibitions on the voting rights, employment, performance of services and communications engaged in by the limited partners, for them to be exempt from attribution).

[101] Unsurprisingly, investment entities today (*e.g.*, private equity funds) do not prepare their agreements with obscure FCC policies in mind, contrary to the assumptions the FCC made about limited partnerships when adopting its LP insulation policies in 1985. *See* 1985 Attribution Order at ¶¶ 44, 47.

whose passive limited partners and members prefer to avoid investments raising regulatory complications, such as those raised by being an attributable investor in an FCC licensee.

Given the significant changes in the investment landscape and developments in the business forms of investing entities since the 1980s, the Commission should modernize and harmonize its insulation criteria so that broadcasters can effectively compete to attract vital investment dollars from all types of entities, including LPs, LLCs and RLLPs. As NAB previously discussed, the FCC should consider simplifying its broadcast insulation standards consistent with certain wireless standards, under which limited partners and LLC members are treated as insulated if the partners/members are prohibited by the LP and LLC agreement from, and in fact are not engaged in, active involvement in the management or operation of the partnership or LLC.[102]

Fourth, the FCC should consider further reducing barriers on LP and LLC investment in broadcast entities by adopting attribution thresholds (*e.g.*, must reach a five or ten percent interest to be attributable), rather than treating all LP and LLC interests – no matter how miniscule – as attributable unless insulated, as the rule does today.[103] It seems unlikely that very small LP interests (regardless of their insulation) could exercise substantial influence over broadcast licensees, particularly if those LP interests have no significant

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[102] *See* 47 C.F.R. § 1.5003(a) & (b) (setting forth such an insulation standard in the context of foreign investment in common carrier licensees). This straightforward approach focuses on the crux of the matter for passive investment, without requiring LP and LLC agreements to include a lengthy list of very specific prohibitions and limits on the limited partners or LLC members. In the FCC's recent foreign ownership rulemaking, NAB recommended that the FCC initiate a rulemaking to harmonize the insulation criteria applicable to wireless licensees and broadcasters, asserting that broadcasters should be permitted to benefit from the enhanced flexibility offered by the wireless licensee insulation standard. *See* Comments of NAB, GN Docket No. 15-236, at 22-24 (Dec. 21, 2015).

[103] *See* 47 C.F.R. § 73.3555 Note 2f.

voting rights. In addition, LLCs are a hybrid business form that have many of the same characteristics as corporations, so a corporate-like attribution threshold may be appropriate, rather than automatically attributing even the smallest LLC interests.[104] These issues should be further explored in a future proceeding.

Fifth, NAB believes that the stock attribution thresholds applicable to corporate licensees should be reexamined. As the Commission previously recognized, "changes in the broadcast industry and in the investment community" can justify changes in these attribution benchmarks.[105] Clearly, both the broadcast industry and the investment community have experienced significant technological, economic and competitive changes, since the FCC last examined these benchmarks in the 1990s. With regard to the voting stock attribution threshold specifically,[106] many broadcast industry participants, including NAB, have previously supported raising that threshold from the current five percent to ten percent,[107] which the FCC itself proposed in 1992[108] before declining to adopt that proposal in 1999.[109] NAB continues to believe that a voting stock threshold of ten percent would

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[104] In several wireless contexts, for example, LP and LLC member interests are treated in a more practical manner, consistent with their actual equity and distribution rights. *See* 47 C.F.R. §§ 1.2110(c)(2)(ii)(*2*)(B), (E) (treatment of LPs in designated entity context); 47 C.F.R. § 20.6(d)(6) (treatment of LP interests for purposes of spectrum aggregation); 47 C.F.R. § 20.22(b)(4)(v) (treatment of LP interests in rules governing mobile spectrum holdings).

[105] *Review of the Commission's Regulations Governing Attribution of Broadcast Interests,* Notice of Proposed Rulemaking, 10 FCC Rcd 3606, 3616 (1995) (1995 Attribution NPRM).

[106] 47 C.F.R. § 73.3555 Note 2a (attributing voting stock interests amounting to five percent or more of the outstanding voting stock of corporate broadcast licensees).

[107] 1995 Attribution NPRM, 10 FCC Rcd at 3617.

[108] *Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry*, Notice of Proposed Rulemaking and Notice of Inquiry, 7 FCC Rcd 2654, 2655 (1992).

[109] 1999 Attribution Order at ¶ 10.

attribute those interests with the potential to significantly influence corporate broadcast licensees.[110] The Commission should take the opportunity of a proceeding on its attribution rules to revisit this question.

Under the current passive institutional investor attribution threshold, investment companies as defined in 15 U.S.C. § 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts are deemed to have a cognizable interest only if they hold 20 percent or more of the voting stock of a corporate broadcast licensee.[111] In the wireless attribution rules for spectrum aggregation limits, however, that institutional investor threshold is 40 percent of the outstanding voting stock.[112] This substantial disparity suggests that increasing the passive institutional investor threshold in the broadcast context may be warranted.

Based on the above discussion, NAB believes there is ample reason for the Commission to initiate a rulemaking to reexamine and, where appropriate, modernize its broadcast attribution rules and policies.

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[110] Even a ten percent attribution threshold could be conservative. Both U.S. Generally Accepted Accounting Principles and International Financial Reporting Standards "presume that significant influence exists at 20% ownership (that is, when the investor owns 20% or more of the voting stock of the investee)." Clyde P. Stickney, Roman L. Weil, Katherine Schipper and Jennifer Francis, *Financial Accounting: An Introduction to Concepts, Methods and Uses,* 617 (2010). *See also, e.g.,* Stephen Fraidin and Radu Lelutiu, *Strategic Alliances and Corporate Control*, 53 Cas. W. Res. L. Rev. 865, 886 (2003) (While the "ability to exercise 'significant influence' is presumed to exist in investments of 20% or more and is presumed not to exist for investments of less than 20%," this presumption "can be overcome" by facts and circumstances that indicate the contrary, including evidence that the investor and investee entered into an agreement under which the investor surrendered significant shareholder rights).

[111] 47 C.F.R. § 73.3555 Note 2b.

[112] 47 C.F.R. § 20.6(d)(3).

## VI. THE FCC SHOULD CONTINUE ITS EFFORTS TO REDUCE UNNCESSARY BURDENS ON AM STATIONS AND REMOVE BARRIERS TO BROADCAST INNOVATION

### A. The FCC Should Consider Further Relaxing or Eliminating the AM Antenna Efficiency Standards and Rely Instead on Existing Interference Standards

The Commission took several important steps in its 2014 AM revitalization order to improve the economic health and future of AM radio, including reducing AM antenna efficiency standards by 25 percent.[113] Radio broadcasters appreciate this first step, but as other parties have previously advocated, the FCC should go farther. [114] We urge the Commission to consider in a future proceeding the further reduction or elimination of the AM antenna efficiency standards.

The United States is believed to be the only country in the world with minimum AM antenna efficiency standards.[115] These standards increase the costs of constructing and barriers to operating an AM station. Because of these standards, AM broadcasters are faced with looking farther and farther away from population centers for land, and they must construct towers that have 120 "radials," or copper wires, buried in a radiating circle around the antenna. Copper is expensive, burying copper is expensive, and finding land where copper can be buried can be both difficult and expensive. And as commenters described in

[113] *See Revitalization of the AM Radio Service*, First Report and Order, Further Notice of Proposed Rule Making, and Notice of Inquiry, 30 FCC Rcd 12145, 12166 (2015).

[114] *See, e.g.*, MMTC Radio Rescue Petition for Rulemaking, RM-11565, at 17-21 (July 19, 2009); Comments of the Puerto Rco [sic] Broadcasters Association, MB Docket No. 13-249, at 3 (Jan. 21, 2014) (Puerto Rico Comments); Comments of the Association of Federal Communications Consulting Engineers (AFCCE), MB Docket No. 13-249, at 6-7 (Jan. 21, 2014); Letter of James L. Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters, Inc., MB Docket No. 13-249, at 2 (Nov. 5, 2014).

[115] *See* Benjamin F. Dawson III and Stephen S. Lockwood, *Revisiting Medium-Wave Ground-System Requirements*, IEEE Antennas and Propagation Magazine, Vol. 50, No. 4, Aug. 2008, at 112 (available at: http://www.hatdaw.com/papers/Dawson%20&%20Lockwood%20-%20MW%20Ground%20System.pdf).

the AM revitalization proceeding, in some cases it is nearly impossible to find land near their listeners due to issues including zoning restrictions and land scarcity.[116] Though the standards may once have been needed, today they do not serve a purpose that cannot be accomplished by simply requiring AM broadcasters to comply with other existing rules, including interference standards.

The 25 percent reduction was a good start, but the antenna standards remain an impediment to AM revitalization. There are more targeted ways to achieve the FCC's goal of protecting AM radio service from interference, and further relaxing or eliminating the efficiency standards would provide greater flexibility to AM broadcasters to enter the market and serve their listeners.

### B. The FCC Should Clarify and Relax the Five-Year Renewal Limit for Broadcast Experimental Radio Licenses

The Commission has the authority to issue several categories of experimental radio licenses and has issued such licenses across a range of industries for a variety of purposes.[117] Broadcast experimental radio licenses allow licensees to research and experiment with new broadcast "technolog[ies], equipment, systems or services."[118] These broadcast experimental licenses are issued for one year and can be renewed "for an additional term not exceeding five years, upon an adequate showing of need," although

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[116] *See* Comments of Butte Broadcasting Company, Inc., MB Docket No. 13-249, at 5-6 (Jan. 22, 2014); Puerto Rico Comments at 3.

[117] *See* 47 C.F.R. § 5.54. For example, experimental licenses are issued for specific research or product development projects, for ongoing programs of research and experimentation, for testing experimental medical devices and for testing the compliance of radio frequency devices and equipment.

[118] 47 C.F.R. § 5.54(b).

other experimental radio licenses have longer terms.[119] Broadcasters rely on these licenses to develop new and better means of serving the public, but the stated term limit on these licenses, combined with the FCC's ad-hoc and at times inconsistent grant of renewals beyond the five-year period, has hampered some efforts to improve services and may discourage investment in broadcast innovation.[120]

NAB requests that the Commission reform the broadcast experimental license period rule to provide greater clarity to licensees. Broadcasters should be able to apply for and, upon an adequate showing of need, consistently receive renewals of their experimental licenses for additional terms beyond the five-year limit in Section 5.71(c). The FCC could also consider revising Section 5.71(c) to make the initial one-year period applicable to broadcast experimental licenses longer, consistent with other types of experimental radio licenses. Rather than discouraging experimentation, the FCC should incentivize and facilitate investments in broadcast innovation by increasing regulatory predictability.

## VII. CONCLUSION

NAB believes that the Commission should undertake rulemaking proceedings to examine modifying or eliminating the rules and policies discussed in detail above. We look

[119] 47 C.F.R. § 5.71(c). For instance, program, medical testing and compliance testing licenses are issued for a term of five years and may be renewed for up to five years upon an adequate showing of need.

[120] Just last year, for instance, the FCC shut down an AM synchronous booster operation in Puerto Rico that was using three boosters to extend the programming of two main stations to more listeners. *See Request to Suspend License Cancellation Order to WA2XPA, WI2XSO and WI3XSO Until the FCC Determines the Future of Experimental AM Synchronous Boosters (RM-11779)*, 1800B3-TSN (Mar. 25, 2017). The Puerto Rico broadcaster had been operating its stations for 13, 14 and 17 years, respectively, when the FCC abruptly cancelled its licenses. The FCC took this action despite the broadcaster having petitioned for a rulemaking to permanently authorize the licensing of AM synchronous boosters. That petition remains pending. *See Amendment of Part 73 to Permit Permanent Licensing of AM Synchronous Booster Stations*, Petition for Rulemaking, RM-11779 (Nov. 29, 2016).

forward to working with the Commission in these future proceedings to reduce unnecessary burdens on local radio and TV stations while safeguarding the public interest.

Respectfully submitted,

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