DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50; *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182; *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294; *Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, MB Docket No. 04-256.

"The more things change, the more they stay the same." When French journalist Jean-Baptiste Alphonse Kerr first expressed that sentiment 167 years ago, he obviously didn't have the FCC's media ownership regulations in mind. But his words ring true as the Commission finally gets around to finishing the 2010 Quadrennial Review.

Congress instructed the FCC to reassess its media ownership regulations every four years. It also provided that the agency "shall" get rid of outdated rules.[1] This was because Congress recognized that regulations designed to promote localism, diversity, competition, and investment in media could have exactly the opposite effect if they didn't keep up with the times.

But here, the FCC has failed on both counts. In terms of timing, the Commission has thumbed its nose at Congress for the past eight-and-a-half years by refusing to complete a single quadrennial review. This is the regulatory equivalent of completing your figure-skating routine for the 2010 Vancouver Winter Olympics after the Olympic flame has been extinguished at the closing ceremony of the 2016 Games in Rio de Janeiro. What took us so long? Based on the "substance" of this *Order*, I have no idea, for the agency essentially does nothing but stick its head in the sand.

The changes to the media marketplace since the FCC adopted the Newspaper-Broadcast Cross-Ownership Rule in 1975 have been revolutionary. Over the last four decades, newspaper circulation and advertising revenue have plummeted, and hundreds of publications have gone out of business. The Internet has become the go-to source for news. National and regional cable news networks have flourished. The days of Americans waiting for the morning newspaper to learn about what is going on around them are long gone. Yet, instead of repealing the Newspaper-Broadcast Cross-Ownership Rule to account for the massive changes in how Americans receive news and information, we cling to it.

And over the near-decade since the FCC last finished a "quadrennial" review, the video marketplace has transformed dramatically. Especially with the rise of over-the-top video, the market is now more competitive than ever. Never before have Americans been able to choose from such a wide array of content. They now demand to view that content when they want and on the device of their choice. And high-profile news is increasingly made and distributed on online video networks that didn't

[1] *Compare* Telecommunications Act § 202(h) (FCC "shall" review media ownership rules on quadrennial basis, "shall determine whether any of such rules are necessary in the public interest," and "shall repeal or modify" any unnecessary regulations) *with* Letter from Tom Wheeler, Chairman, FCC, to the Honorable Anna Eshoo, U.S. House of Representatives (Mar. 18, 2016) ("Section 629 of the Communications Act is explicit: The Commission *shall* . . . adopt regulations to assure the commercial availability [of set-top boxes]."), *available at* http://go.usa.gov/xDjbA; Statement of Chairman Tom Wheeler, August 2016 Open Meeting Press Conference at 1:03:08, http://go.usa.gov/xDjbJ ("Make no mistake, we *will* obey the law. The law [section 629] says, 'the Commission *shall*' provide for competitive choice [in navigation devices]. We *will* obey the law.").

even exist just a few years ago.[2] Yet, instead of loosening the Local Television Ownership Rule to account for the increasing competition to broadcast television stations, we actually tighten that regulation.

And instead of updating the Local Radio Ownership Rule, the Radio-Television Cross-Ownership Rule, and the Dual Network Rule, we merely rubber-stamp them.

The more the media marketplace changes, the more the FCC's media regulations stay the same.

This ostrich of an *Order* is not at all what Congress envisioned. And it is a thumb in the eye of the United States Court of Appeals for the Third Circuit, too. Five years ago, the Third Circuit vacated the FCC's definition of "eligible entity."[3] Earlier this year, the Third Circuit said "enough is enough"[4] and demanded that the FCC take prompt action on its "stalled efforts to promote diversity in the broadcast industry."[5] So what does the Commission do here in response to the court? Precisely one thing: It re-adopts the *exact same* "eligible entity" definition that the Third Circuit rejected in 2011!

This proceeding is proof of this agency's plenary and purposeful abdication of its statutory duty. It shows that this Commission that does not believe it is accountable to Congress or the courts. And it is evidence that unless Congress or a court steps in and takes action, this is the way that it will continue to be: The Commission's media ownership regulations will never be relaxed. Efforts to promote diversity will remain stalled. The law, the marketplace, and common sense will continue to be ignored.

Today's result is all the more unfortunate because compromise was well within reach. For example, a bipartisan majority of commissioners was willing to repeal the outdated Newspaper-Broadcast Cross-Ownership Rule. But for some reason, we were told that this rule would not be repealed *unless all commissioners agreed*. And sadly, one chose to exercise that veto.

As someone who has been on the losing end of more 3-2 votes than I care to remember, I am baffled by this new requirement for unanimity. We've been told for years by the FCC's leadership that 3-2 votes are what democracy is all about. Except, I guess, when it isn't. Or more precisely, 3-2 votes are what democracy is all about so long as the commissioners are divided cleanly along party lines. As a result, we end up keeping a rule on the books that almost no one at the FCC actually believes make sense any longer. This is a shame because our regulations should always be shaped only by the facts and law—not crass political considerations.

If I were to detail all of this *Order*'s deficiencies, my dissenting statement would be almost as long as the *Order* itself (161 pages). In the interest of space, I'll focus on what I consider to be the *Order*'s most problematic aspects: (1) doubling down on the Newspaper-Broadcast Cross-Ownership Rule; (2) tightening, rather than loosening, the Local Television Ownership Rule; and (3) failing to take meaningful action to promote diversity.

I.

The newspaper industry is in crisis. Since the FCC adopted the Newspaper-Broadcast Cross-Ownership Rule in 1975, approximately one-quarter of newspapers in the United States have gone out of

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[2] *See*, *e.g*., Daniel Victor & Mike McPhate, "Critics of Police Welcome Facebook Live and Other Tools to Stream Video," *The New York Times* (July 7, 2016) (discussing "the power of [online] video, especially when live, in drawing public attention"), *available at* http://nyti.ms/29lMKOS.

[3] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 437 (3d Cir. 2011).

[4] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 37 (3d Cir. 2016) (quoting *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 158 (3d Cir. 2002)) (emphasis and internal quotation marks omitted) (*Prometheus III*).

[5] *Id.*

business.[6] That's over 400 publications.[7] In the last decade, newspapers have shut down in Denver, Tucson, Cincinnati, Honolulu, Tampa, and other major cities.[8] Other newspapers, including the *New Orleans Times-Picayune* and the *Birmingham News*, no longer publish on a daily basis.[9] Still others, such as the *Seattle Post-Intelligencer*, have abandoned the print medium altogether and now exist only as a digital platform.[10]

Since 1975, the population of the United States has increased 49% while total newspaper circulation is down by one-third, with the substantial majority of that decline occurring since 2000.[11] Adjusting for inflation, newspaper advertising revenues, both print and digital, are down 64% since 2000, from $65.8 billion to $23.6 billion.[12] And since 2000, employment in newspaper newsrooms has dropped by 42%.[13]

Earlier this month, Warren Buffett, whose company owns 32 newspapers across the country, summarized the bleak picture: "[L]ocal newspapers continue to decline at a very significant rate. And even with the economy improving, circulation goes down, advertising goes down, and it goes down in prosperous cities, it goes down in areas that are having urban troubles, it goes down in small towns—that's what amazes me."[14]

Of course, newspaper reporters continue to do important work throughout our country each and every day. Many were recently reminded of the impact that their stories can have through the 2015 film *Spotlight*, which won the Academy Award for Best Picture. The movie focused on *The Boston Globe*'s investigation into widespread child sex abuse by Roman Catholic priests in and around Boston—reporting that ended up having a worldwide impact on the Catholic Church. But given the newspaper industry's profound financial troubles, it is becoming harder and harder for publications to do this type of investigatory journalism, hold our elected officials to account, and let Americans know what is going on in their communities.

That's why it makes no sense for the government to be discouraging investment in the newspaper industry. In this day and age, if you are willing to invest in a newspaper, we should be thanking you, not imposing regressive regulations. But that is precisely what the Commission is doing in this *Order* by maintaining the Newspaper-Broadcast Cross-Ownership Rule.

Our action (or, to be more accurate, lack of action) is particularly unfortunate because broadcasters are well-situated to partner with newspapers. The reason is simple. Investments in newsgathering are more likely to be profitable when a company can distribute information over multiple

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[6] *See* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50, 09-182, at 2 (July 7, 2016) (NAB July 7 *Ex Parte* Letter).

[7] *See id*.

[8] *See* Newspaper Death Watch: Chronicling the Decline of Newspapers and the Rebirth of Journalism, http://newspaperdeathwatch.com/ (Aug. 16, 2016).

[9] *See id*.

[10] *See* William Yardley and Richard Pérez Peña, "Seattle Paper Shifts Entirely to Web," *The New York Times* (Mar. 16, 2009), *available at* http://nyti.ms/2bM4ytt.

[11] Daily circulation was 60.655 million in 1975, 55.773 million in 2000, and 40.420 million in 2014. *See* Newspaper Association of America, Newspaper Circulation Volume, http://bit.ly/2b2r9f2 (linked spreadsheet) (Aug. 16, 2016).

[12] *See* NAB FNPRM Comments at 71.

[13] *See* NAB July 7 *Ex Parte* Letter at 3–4.

[14] Jake Sherman and Anna Palmer with Daniel Lippman, "EXCLUSIVE PLAYBOOK INTERVIEW: Warren Buffett!—Dem EMAIL HACK 'wider than believed'—KASIE HUNT engaged—B'DAY: David Brooks," *Politico*, http://politi.co/2aMjqC1 (Aug. 11, 2016).

platforms. This is not just a theory. Because the FCC grandfathered newspaper-broadcast combinations that predated the 1975 adoption of the Newspaper-Broadcast Cross-Ownership Rule, we have seen this theory play out in practice across the United States.

The National Association of Broadcasters has pointed to no fewer than 15 studies demonstrating that newspaper-television cross-ownership increases the quantity and/or quality of news broadcast by cross-owned television stations.[15] These studies span almost four decades, and some were commissioned by the FCC itself. For example, one FCC-sponsored study in 2007 found that newspaper cross-owned TV stations supply about 7–10% more local news coverage and about 25% more coverage of state and local politics, on average, than non-cross-owned stations.[16] And another FCC-sponsored study that same year found that cross-owned TV stations broadcast 11% more news programming than non-cross-owned stations.[17] The same is true with respect to newspaper-radio cross-ownership. An FCC-sponsored study found that a cross-owned radio station is four to five times more likely to have a news format than a non-cross-owned station.[18]

And we need not rely on statistics alone. The record contains numerous unrebutted examples of how newspaper-broadcast cross-ownership has provided more comprehensive news coverage to communities throughout our nation, including Atlanta, Cedar Rapids, Milwaukee, Phoenix, South Bend, Spokane, Topeka, and Amarillo.[19] In Dayton, for example:

> Cox Media Group's cross-ownership of the *Dayton Daily News* and CBS affiliate WHIO-TV helped to uncover one of the most prominent stories of [2014]: the mismanagement of the Department of Veterans Affairs. Working together, journalists at the newspaper and television station analyzed the quality of care that veterans were receiving, and discovered that the Department had paid more than $36 million to settle claims resulting from treatment delays. Months of congressional inquiries, national and global media studies, and, ultimately, the resignation of the Secretary of Veterans Affairs followed. These treatment delays would not have come to light had it not been for the dogged efforts of *both* the newspaper and television reporters, working together.[20]

So in the face of all of this data and evidence, why does the Commission choose to retain the Newspaper-Broadcast Cross-Ownership Rule? It claims that this regulation remains necessary to promote viewpoint diversity.[21] But the evidence overwhelmingly shows that there is little if any connection between viewpoint diversity and ownership.[22] Most notably, a 2011 FCC-sponsored study found no statistically significant relationship between ownership and viewpoint diversity, and a 2012 update to that study actually found viewpoint diversity to be positively associated with the number of co-owned

[15] NAB FNPRM Comments at 75–76.

[16] *See* Jeffrey Milyo, The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News (2007).

[17] *See* Daniel Shiman, The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming (2007).

[18] *See* Craig Stroup, Factors that Affect a Radio Station's Propensity to Adopt a News Format (2007).

[19] *See* NAA FNPRM Comments at 3–10; Morris Communications Co., LLC FNPRM Comments at 17–23.

[20] NAA FNPRM Comments at 5–6 (emphasis in original).

[21] *Order* at para. 142.

[22] *See* NAB FNPRM Comments at 79–82, App. C (listing 15 studies).

television stations in a market.[23] Indeed, research generally shows that a media outlet's viewpoint is driven by the preferences of its audience rather than ownership.[24]

But the larger problem with the Commission's conclusion is that it ignores the realities of the modern media marketplace. This isn't the 1970s anymore. Most Americans don't wait for the morning newspaper or the 11:00 PM newscast to learn what's going on around the globe or at home. That world set sail with *The Love Boat*. Today, most Americans get the information they want when they want it by going online and scouring a wide variety of sources, including digital-only news outlets and social networks such as Facebook and Twitter. When it comes to news, we can now choose from an amazingly diverse array of options. Last year, for example, Pew Research Study counted 143 news providers in Denver alone.[25]

The record contains a plethora of statistics detailing how the Internet has transformed the American people's consumption of news and information, and I don't believe that it is necessary to review all of them here. Instead, I'll focus on two other glaring problems with the Commission's analysis that render its decision to retain the Newspaper-Broadcast Cross-Ownership rule in the name of viewpoint diversity fatally flawed.

First, the Commission contends that newspapers and broadcast television stations "continue to be the predominant providers of local news and information upon which consumers rely."[26] But then, in order to justify retaining the prohibition against common ownership of a newspaper and a radio station, the Commission also claims that "broadcast radio stations continue to be an important source of viewpoint diversity in local markets."[27]

These statements place the Commission on the horns of a dilemma. The only reason that the Commission performs a stunning about-face and suddenly claims that radio stations are a significant source of viewpoint diversity[28] is so that it can retain the Newspaper-Radio-Cross Ownership Rule (which generally prohibits cross-ownership). But if radio stations are an important source of viewpoint diversity, then they must be included in the total number of voices in the market. And if that is true, then there is no way that the agency's Newspaper-Broadcast Cross-Ownership Rule can survive.[29]

Take the New York City media market, for example. If there are five major newspapers, over twenty television stations, and about 60 radio stations in the market contributing to viewpoint diversity, then how can prohibiting a newspaper from purchasing a single one of those radio stations or television stations be necessary to preserve viewpoint diversity? With over 80 voices in the market, how can common ownership of just two cause a problem?

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[23] *See* Adam D. Rennhoff and Kenneth C. Wilbur, Local Media Ownership and Viewpoint Diversity in Local Television News (2011); Adam D. Rennhoff and Kenneth C. Wilbur, Further Revisions to Local Media Ownership and Viewpoint Diversity in Local Television News (2012).

[24] *See, e.g.*, Matthew Gentzkow and Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 ECONOMETRICA 35 (2010); Sendhil Mullainathan and Andrei Shleifer, *The Market for News*, 95 AM. ECON. REV. 1031 (2005).

[25] *See* Pew Research Center, *Local News in a Digital Age* at 4 (Mar. 5, 2015).

[26] *Order* at para. 142.

[27] *Id*.

[28] *See, e.g.*, *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4435–36, paras. 144–45 (2014) (*2014 Quadrennial Review Notice*).

[29] Conversely, if radio stations are *not* an important source of viewpoint diversity, then the Newspaper-Radio Cross-Ownership Rule must be eliminated.

Second, the Commission discounts the rise of the Internet by arguing that most of the news found there is provided by websites affiliated with traditional providers, such as newspapers.[30] (This myopic conclusion itself would be news to a wide variety of popular online upstarts, ranging from locally-focused platforms such as *The Texas Tribune*, which earned two Online News Association awards last year for explanatory and topical reporting, and *Voice of San Diego*, which has won national awards for its investigative reporting, to more nationally-focused platforms like BuzzFeed, Vox Media, and Yahoo! News.) But the FCC's regulation only precludes the common ownership of a broadcast station and a newspaper *if the newspaper publishes at least four times a week*. So, for example, newspapers such as the *Patriot-News* of Harrisburg, Pennsylvania, or the *Press-Register* of Mobile, Alabama, which print only three days a week but update their websites constantly, may be commonly owned with a television station.

How does this make any sense? If the content that a newspaper provides on its website is critical to the retention of the Newspaper-Broadcast Cross-Ownership Rule, why should it matter how many days a week it circulates a print edition? So long as newspapers regularly update their websites with breaking news and information, why should a newspaper that offers a print edition seven days a week be treated differently than one that only distributes three print editions a week? Or a newspaper that has chosen to go entirely online? Why should we create an incentive for newspapers to cut back on print editions in order to get more favorable regulatory treatment? The *Order* offers no answers to these questions. That there are no good ones highlights how outdated the Newspaper-Broadcast Cross-Ownership Rule has become. At a time when more and more content is being consumed over the Internet, it makes no sense to base ownership regulations on whether a news outlet distributes a print edition and/or how many times a week it does so. The product, not pulp, is what matters.

Perhaps recognizing its difficulty in justifying the retention of the Newspaper-Broadcast Cross-Ownership, the Commission purports to "provide for a modest loosening" of it.[31] However, the modest steps that it sets forth are entirely inadequate and largely illusory.

To begin with, the Commission adopts an express exception "for proposed combinations involving a failed or failing newspaper, television station, or radio station."[32] But the newspaper industry has explained that this standard's specific criteria "will not open any opportunities for newspaper companies to obtain investment from the media industry, and certainly will not serve the public interest."[33] And there is an even more fundamental problem with this exception. By the time that a newspaper has failed or is failing, it might be too late to save and/or might not be an attractive investment opportunity for a broadcaster. Our goal should be to maintain newspapers as healthy and vibrant institutions. We shouldn't deprive them of the investment they need to thrive until they are at death's doorstep and then hope that someone will swoop in at the last minute to save them.

Additionally, the Commission states that companies may obtain a waiver of the Newspaper-Broadcast Cross-Ownership Rule if they are able "to show that their proposed combination would not unduly harm viewpoint diversity in the local market."[34] What does this mean? Who knows? Curiously, the Commission rejects re-adopting the four-factor test that applied to waiver requests under the vacated 2007 modification of the Newspaper-Broadcast Cross-Ownership Rule because it claims that those factors (*e.g.*, whether the combined entity would significantly increase the amount of local news in the market)

[30] *See Order* at para. 148 & note 389.

[31] *Order* at para. 130.

[32] *Order* at para. 173.

[33] Letter from Danielle Coffey and Kurt Wimmer, Newspaper Association of America, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, 07-294, at 2 (Aug. 9, 2016).

[34] *Order* at para. 187.

"would be vague, subjective, difficult to verify, and costly to enforce."[35] But the waiver standard adopted by the Commission today is far vaguer and more subjective than the 2007 standard for it lacks *any* objective criteria. "Knowing it when we see it" is hardly the stuff of administrative precision.

Moreover, we've seen this song-and-dance before. When the Commission adopted JSA restrictions two years ago, it set up a similar waiver process to preserve beneficial JSAs that it publicly touted when useful for defending its new policy.[36] But that process was a sham. For the entire time that the Commission's JSA restrictions were in effect, not one waiver request was granted. (That may have been one reason why Congress, in an overwhelming bipartisan vote, required that the FCC protect existing JSAs.[37]) I have little doubt that the same thing will happen here.

Where does that leave us? In the face of overwhelming evidence of the newspaper industry's dire condition, the benefits that newspaper-broadcast cross-ownership could bring, and a media marketplace transformed by the Internet, the Commission chooses to leave in place an absurdly antiquated rule that reduces investment in the newspaper business. The FCC's decision is not based on the law or the facts in the record. Nor is it based on common sense. For example, does anyone seriously believe that allowing a newspaper to buy a single radio station in any American city would harm anyone? But politics—in particular, fear of partisan special interests in the Beltway that have banged the same sad drum for years (ironically, mainly online)—has made it impossible for us to repeal this rule.

At this rate, absent congressional or judicial intervention, the Newspaper-Broadcast Cross-Ownership Rule will outlive print newspapers themselves.

II.

In this *Order*, the Commission refuses to relax its Local Television Ownership Rule. This rule prohibits anyone from owning two television stations in a Designated Market Area (DMA) unless at least one of those stations falls outside the top-four stations in the market (top-four prohibition) and there are at least eight independently-owned television stations in the DMA (eight-voices test).

However, record evidence demonstrates that the eight-voices test lacks any foundation in economics or the realities of today's television marketplace. Indeed, repealing that test would promote competition and localism in the video marketplace.

For one, the eight-voices test has no basis in modern competition theory and is inconsistent with fundamental antitrust principles.[38] The test often prohibits mergers that "are unlikely to have adverse competitive effects and ordinarily require no further analysis," according to the United States Department of Justice & Federal Trade Commission's Horizontal Merger Guidelines.[39] And it often prohibits transactions that do not create a presumption of increased market power according to those guidelines.[40] Simply put, in no other industry does the government condition mergers and acquisitions on the

[35] *Order* at note 542.

[36] *See 2014 Quadrennial Review Notice*, 29 FCC Rcd at 4540, para. 364.

[37] *See* Consolidated Appropriations Act, 2016, § 628, Pub. L. No. 114-113 (2015).

[38] Kevin W. Caves and Hal J. Singer, An Economic Analysis of the FCC's Eight Voices Rule, at 9–16 (July 19, 2016) (Caves & Singer Study), *attached to* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jerianne Timmerman, Senior Vice President and Deputy General Counsel, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182 (July 19, 2016).

[39] *See* Caves & Singer Study at 12, 14.

[40] *See id*. at 14.

maintenance of eight independent competitors in a market. Indeed, under modern antitrust principles, the government does not impose any rigid screen at all.[41]

For this reason, economists Kevin Caves and Hal Singer have concluded that the eight-voices test "does not constitute a reliable competitive screening device. Instead, [it] imposes a presumption of anticompetitive effects over transactions that would not justify such a presumption under standard antitrust practice. [It] compounds this error by making its presumption impossible to overturn, regardless of evidence of procompetitive merger-driven efficiencies."[42]

Caves and Singer's analysis of advertising prices in all local television markets bears out their conclusion.[43] Controlling for other factors, they found no statistically meaningful difference between advertising rates in markets with eight or more independently owned and operated television stations and advertising rates in markets with fewer voices.[44] Moreover, their econometric analysis demonstrated that reducing the number of voices in a market has the impact of *lowering* advertising rates rather than *raising* them, and that this effect holds true whether or not there are fewer than eight voices in a market.[45] Specifically, in markets with fewer than eight voices, local advertising rates are expected to fall by 2.9% with each decrease in the voice count. And in markets with eight or more voices, such rates are expected to fall by 2.4% with each decrease in the voice count.[46]

These findings are fatal to the eight-voices test. First, they demonstrate that there is no meaningful competitive difference between markets with fewer than eight voices and those with eight or more. In each type of market, the response to the reduction in the voice count is similar; advertising rates are statistically the same controlling for other factors. There is no significance to maintaining eight independently owned and operated stations in a market. Thus, that number is entirely arbitrary.

Second, the Caves and Singer findings demonstrate that reducing the voice count by one in a market with fewer than eight voices leads to a more competitive market, not a less competitive one. As reviewed above, when the voice count is reduced by one in such markets, advertising prices fall, not rise, in a statistically significant way.[47]

[41] *See id*. at 13. Rather, the starting point for merger analysis is the Herfindahl-Hirschman Index (HHI), which is used to assess how much individualized scrutiny a transaction requires.

[42] *See id*. at 15–16.

[43] *See id*. at 21–28.

[44] *See id*. at 24–26.

[45] *See id*. at 26–28.

[46] *See id*. at 28.

[47] Unable to formulate a substantive response to the Caves & Singer Study, the Commission refuses to consider it, claiming that it was submitted too late. *See Order* at note 147. But this study merely provides additional empirical support for arguments that the National Association of Broadcasters (NAB) has advanced throughout the 2010 and 2014 Quadrennial Reviews. *See, e.g.*, NAB FNRPM Comments at 39, 55 (arguing that the eight-voices test is "arbitrary" and "makes no sense"). As such, the Commission may not simply disregard it, and the authority that the *Order* relies upon for doing so is inapposite. In *Verizon v. FCC*, 770 F.3d 961, 968 (D.C. Cir. 2014), for example, the D.C. Circuit said that the Commission was not obliged to consider a late-filed proposal for partial forbearance. Here, however, the Caves & Singer Study and NAB's accompanying *ex parte* letter advanced no new proposal. Rather, they provided support for the NAB's longstanding proposal in this proceeding for the FCC to eliminate the eight-voices test. Similarly, in *Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009), the D.C. Circuit ruled that a party had not provided the Commission with a fair opportunity to pass upon an argument by raising it the day an order had been adopted. That case, however, deal with an entirely new claim of inadequate notice. Here, by contrast, NAB merely submitted additional support for a claim that it has advanced for years during this proceeding. Moreover, the Caves & Singer Study was submitted weeks before this *Order* was adopted, not the day of adoption. While the Commission notes that UCC cites rule 1.415(d) ("No additional comments may be filed unless specifically requested or authorized by the Commission") in opposing consideration of the Caves & Singer Study,

(continued….)

Another indication that the eight-voices test impedes competition and localism in the video marketplace is the mass of record evidence showing that common ownership of television stations in local television markets leads to *more* local news and information programming.[48] According to the Commission, "[t]he data demonstrate that the duopolies permitted subject to the restrictions of the current rule have created tangible public interest benefits for viewers in local television markets that offset any potential harms associated with common ownership. Such benefits include substantial operating efficiencies, which potentially allow a local broadcast station to invest more resources in news or other public interest programming that meets the needs of its local community."[49] In other words, common ownership increases competition and localism by creating stronger, better-funded competitors.

But the eight-voices test denies those benefits produced by common ownership to viewers in most of our nation's television markets. And those markets are the ones where the efficiencies of common ownership can yield the greatest benefits: smaller markets where advertising dollars (typically the source of funding for local programming) are scarce.

In contrast, the *Order*'s justification for maintaining the eight-voices test is utterly devoid of factual support. Indeed, all the Commission can muster in support of the eight-voices test is two paragraphs of unsupported assertions. In the first, the *Order* says:

> Nearly every market with eight or more full-power television stations—absent a waiver of the Local Television Ownership Rule or unique circumstances—continues to be served by each of the Big Four networks and at least four independent competitors unaffiliated with a Big Four network. Competition among these independently owned stations serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming. This competition is especially valuable during the parts of the day in which local broadcast stations do not transmit the programming of affiliated broadcast networks and rely on local content uniquely relevant to the stations' communities.[50]

Let's unpack this. The Commission begins by arguing that competition between stations affiliated with the Big Four networks and at least four independent competitors unaffiliated with a Big Four network "serves an important function by motivating both the major network stations and the independent stations to improve their programming, including increased local news and public interest programming."[51] But what evidence does the Commission cite to support this proposition? What evidence does it marshal to show that the presence of stations unaffiliated with a Big Four network improves the quality of programming in a television market? What evidence does it produce to show that

(Continued from previous page)
see Order at note 147 (citing 47 C.F.R. § 1.1415(d)), the note to that rule specifically provides that in some rulemaking proceedings, "interested persons may also communicate with the Commission and its staff on an *ex parte* basis, provided that certain procedures are followed." In this proceeding, *ex parte* communications were specifically allowed by the Commission. *See 2014 Quadrennial Review Notice*, 29 FCC Rcd at 4546, para. 378. Indeed, this *Order* is replete with references to *ex parte* communications. *See, e.g.*, *Order* at note 204. Moreover, NAB indisputably complied with all relevant procedures in submitting the Caves & Singer Study. Finally, it is important to recognize that the Commission frequently accepts and relies upon data and studies that it receives shortly before an order is adopted. *See, e.g.*, *Amendment of Part 15 of the Commission's Rules for Unlicensed Operations in the Television Bands, Repurposed 600 MHz Band, 600 MHz Guard Bands and Duplex Gap, and Channel 37 et al.*, ET Docket No. 14-165, Report and Order, 30 FCC Rcd 9551, 9636, 9639, nn.523, 539 (2015) (citing and relying upon a 128-page technical study and a 16-page technical study that had been submitted to the Commission as an *ex parte* filing seventeen days before the *Order*'s adoption).

[48] *See, e.g.*, *Order* at note 86.

[49] *Order* at para. 38.

[50] *Order* at para. 56 (footnotes and citations omitted).

[51] *Id*.

such independent stations lead to increased local news and public interest programming? The answer to each of these questions is the same: None.[52]

And even if the Commission were able to offer some evidence to back up its assertions, the question would then become: Why is it important to have at least four independent competitors unaffiliated with a Big Four network in a market? Why wouldn't two or three suffice? Or, on the other hand, why not five or six? The *Order* makes a feeble attempt to address those questions in its next paragraph:

> We continue to believe the minimum threshold maintained by the eight-voices test helps to ensure robust competition among local television stations in the markets where common ownership is permitted under the rule. The eight-voices test increases the likelihood that markets with common ownership will continue to be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks. Also, because a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets—demonstrating the dominant position of the top-four-rated stations in the market—we continue to believe that it is appropriate to retain the eight-voices test, which helps to promote at least four independent competitors for the top-four stations before common ownership is allowed. Accordingly, we retain the eight-voices test.[53]

This explanation brings to mind the classic Peggy Lee song: *Is That All There Is*?

To be sure, I agree that the eight-voices test "increases the likelihood that markets with common ownership will continue be served by stations affiliated with each of the Big Four networks as well as at least four independently owned and operated stations unaffiliated with these major networks."[54] But again, the key question is: Why is it important to have "four independently owned and operated stations unaffiliated with these major networks?" The only justification the Commission provides is the assertion that "a significant gap in audience share persists between the top-four stations in a market and the remaining stations in most markets."[55] But even assuming that to be true, how does this justify the choice of maintaining "four independently owned and operated stations unaffiliated with the major networks," as opposed to two, three, five, or six? The *Order* offers no explanation, cites no evidence, and refers to no economic theory. It appears that the number four, and thus the eight in the "eight-voices test," was plucked out of thin air. Moreover, if there is a significant gap in audience share between the top-four stations and the other stations in a market, wouldn't that suggest common ownership of non-top four stations would be pro-competitive, insofar as it would allow for stronger competitors to the top-four stations to emerge?

But it gets even worse. The Commission readopts the restrictions on joint sales agreements (JSAs) that were vacated by the Third Circuit in *Prometheus III*—restrictions which have the practical effect of tightening the Local Television Ownership Rule. The Commission provides little new analysis to justify these limits. Rather, it "incorporate[s] by reference the rationale articulated" in its 2014 *Order*.[56] As such, rather than repeat at length the arguments that I advanced against the Commission's

[52] Neither does the *Order* offer any explanation for why stations unaffiliated with a Big Four network play a distinct competitive role in the marketplace than those affiliated with a Big Four network. Many of these stations, after all, are not independent stations. Rather, they are affiliated with a national network, such as the CW or Univision.

[53] *Order* at para. 57 (footnotes and citations omitted).

[54] *Id*.

[55] *Id*.

[56] *Order* at para. 62.

JSA decision two years ago, I similarly incorporate by reference the relevant portions of my 2014 dissenting statement.[57] However, it is worth emphasizing three points.

First, just as the Commission is unable to point to any evidence to justify retaining the eight-voices test, neither is it able to cite any evidence supporting its decision to readopt JSA restrictions. Back in 2014, the Commission based its decision on its hypothesis that a JSA allows one station to exert undue influence over another station's programming decision and operations. But as I pointed out at the time, the Commission couldn't come up with "a single example of a station in a JSA exercising undue influence over another station."[58] Indeed, it couldn't round up "a single instance where a JSA has allowed one station to influence *a single programming decision* of another station."[59]

Flash forward two years. Despite the fact that numerous television stations across the country have participated in JSAs for many years, the Commission *still* cannot find a single case in which one station in a JSA has exercised undue influence over another station or influenced a single programming decision of another station. The Commission's JSA analysis remains unjustified jabberwocky.

Second, in my 2014 dissenting statement, I reviewed at length all of the public interest benefits that have been produced by JSAs.[60] In this *Order*, the Commission does not contest any of those benefits. Instead, it claims that "[t]he arguments that television JSAs should not be attributed because they produce public interest benefits are essentially indistinguishable from arguments that the ownership limits should be relaxed because common ownership produces public interest benefits. We acknowledge and address these arguments throughout; however, we ultimately determine that the Local Television Ownership Rule should be retained with a minor modification to the contour standard."[61]

But here's the problem with that evasion. Maintaining the status quo with respect to JSAs is *not* the equivalent of relaxing the Local Television Ownership Rule. Rather, as the Third Circuit recognized, "[a]ttribution of television JSAs modifies the Commission's ownership rules by making them more stringent."[62] And the Commission's JSA decision here does not contain any rationale whatsoever for why the local television ownership rule should be tightened. In fact, it concludes that the benefits of making the rule more stringent are outweighed by the harms of taking that step.[63]

So on one side of the ledger, we have uncontested evidence of the public interest benefits yielded by JSAs. And on the other side of the ledger, the Commission points to no evidence of any corresponding harms and does not advance any argument for why the Local Television Ownership Rule should be made any stricter. Yet, it does just that. This deliberate refusal to make a "rational connection between the facts found and the choice made" defines arbitrary and capricious decision-making.[64]

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[57] *2014 Quadrennial Review Notice*, 29 FCC Rcd at 4590–95, 4597–99 (Dissenting Statement of Commissioner Ajit Pai).

[58] *Id*. at 4597.

[59] *Id*. (emphasis in original).

[60] *See id*. at 4592–95.

[61] *Order* at note 176.

[62] *Prometheus III*, 824 F.3d at 58.

[63] *See Order* at para. 38.

[64] *Prometheus III*, 824 F.3d at 40 (quoting *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Third, the decision to attribute television JSAs is fundamentally inconsistent with the Commission's other recent attribution decisions.[65] Consider, for example, last year's repeal of the attributable material relationship (AMR) rule in the context of wireless spectrum. The AMR rule used to require that the revenues of any company leasing or reselling more than 25% of the spectrum capacity of a small business's wireless license must be attributed to that small business. In 2015, however, the same Commission majority as here concluded that the AMR rule was "overbroad" and "we no longer need[ed] a bright-line, across-the-board, attribution rule to ensure that a small business makes independent decisions about its business operations."[66] This followed a 2014 decision where the same Commission majority as here waived the AMR rule for a private equity firm that leased 100% of its spectrum capacity to our nation's two largest wireless carriers. There, the Commission reasoned that the firm in question would not necessarily be "unduly influence[d]" by the wireless carriers leasing all of their spectrum capacity because of the firm's representation that the "agreements at issue did not confer any" such influence.[67]

So here is where we are today. Under the Commission's rules, a small business can lease 100% of its spectrum capacity to a Fortune 50 wireless carrier—that is, engage in pure, profitable arbitrage—without *any* attribution requirement being triggered. Yet, as a result of today's *Order*, attribution will automatically kick in whenever one television station sells more than 15% of another television station's advertising time.

How does this make any sense? The Commission purports to attribute television JSAs because selling 16% of a station's advertising inventory gives licensees "the opportunity, ability, and incentive to exert significant influence over the brokered station."[68] Yet, one company leasing *all* of another company's spectrum does not give rise to the same concerns regarding undue influence? A company depending upon a 100% spectrum lease is plainly more subject to undue influence than a television station that agrees to let another station sell 16% of its advertising. However, the *Order* offers no reason why the latter relationship, but not the former, triggers an attribution requirement. As I've written before in commenting upon the 2014 waiver of the AMR rule, "A foolish consistency may be the hobgoblin of little minds, but a deliberate inconsistency is the ogre of arbitrariness."[69]

III.

The Commission spends almost 50 pages discussing the issue of ownership diversity in this *Order*. That's certainly a lot of talk. But what concrete action does this Commission take to advance diversity in the *Order*? One thing: It reinstates the very same "eligible entity" definition that the Third Circuit rejected five years ago. To describe this decision is to discredit it.

During my time at the Commission, I have made it a priority to encourage greater diversity in the broadcast industry. Each summer, for example, I meet with those participating in the Broadcast Leadership Training (BLT) Program, run by the National Association of Broadcasters Education Foundation. The BLT program educates a diverse group of executives who aspire to be station owners or

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[65] *See* Letter from Rick Kaplan, General Counsel and Executive Vice President, and Jeannine Timmerman, Deputy General Counsel and Senior Vice President, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 14-50, 09-182, at 2–3 (July 29, 2016).

[66] *Updating Part 1 Competitive Bidding Rules et al.*, WT Docket Nos. 14-170 et al., Report and Order, Order on Reconsideration of the First Report and Order, Third Order on Reconsideration of the Second Report and Order, Third Report and Order, 30 FCC Rcd 7493, 7504, para. 21 (2015).

[67] *Grain Management, LLC's Request for Clarification or Waiver of Section 1.2110(b)(3)(iv)(A) of the Commission's Rules et al.*, WT Docket Nos. 05-211 et al., Order, 29 FCC Rcd 9080, 9084–85, paras. 13–14 (2014) (*Grain Waiver Order*).

[68] *2014 Quadrennial Review Notice*, 29 FCC Rcd at 4527, para. 340.

[69] *Grain Waiver Order*, 29 FCC Rcd at 9091 (Dissenting Statement of Commissioner Ajit Pai).

managers by exposing them to "the fundamentals of purchasing, owning, and running a successful operation of radio and television stations."[70] Each time, I come away inspired by their spirit and optimistic about the future of broadcasting. These sessions also reinforce my determination to do what I can at the FCC to expand opportunities in the industry.

Occasionally, I have been successful. For example, the progress that the FCC has been able to make in revitalizing AM radio, the nation's most diverse broadcast service, has been a big step forward. But too often, the Commission has fallen short. The FCC's leadership has prioritized setting aside spectrum for unlicensed operations in the post-auction television band over saving low-power television stations that often serve minority communities. It has allowed the Advisory Committee for Diversity in the Digital Age to lay dormant. And in this *Order*, it falls short once again.

I am particularly disappointed that the Commission refuses once again to adopt an incubator program, which would allow established broadcasters to provide financing and other forms of assistance to new entrants looking to break into the broadcasting business. This proposal enjoys the support of civil rights organizations, including the National Urban League, LULAC, the Rainbow/PUSH Coalition, the National Council of La Raza, the Minority Media and Telecommunications Council, and the Asian American Justice Center.[71] It enjoys the support of industry.[72] One would think that moving forward with this initiative would be a no-brainer.

The Commission claims that an incubator program would be too difficult to administer and consume too many staff resources.[73] But it is difficult to take that argument seriously. When the FCC's leadership thinks that an issue is important, it is more than willing to adopt regulations that are difficult to administer and consume an enormous amount of staff resources, far more than any incubation program would. Moreover, as detailed in the *Order* itself,[74] the Commission has expended a lot of staff resources *studying* the broadcast diversity issue. If we think that diversity is important, why not spend less time researching the issue and more time actually *doing* something to make things better?

In my view, the real reason why the Commission refuses to adopt an incubator program is ideological in nature. In order to incentivize broadcasters to incubate a new entrant, the FCC would allow participating broadcasters to own one more radio station in a market than they otherwise could under the local ownership rule. A small number oppose this because they fear that this slight and targeted relaxation of our ownership rules would promote concentration in the radio industry. But my response to them is simple. The benefits of incubating a new voice in a market would far outweigh any such harm, especially since an incubator is likely to be most valuable in small-town markets where finding broadcast spectrum is easy but the economics of the broadcast business are hard.

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As we bring our 2010 Quadrennial Review to an end, it is worth stepping back and looking at the FCC's actions over the past few years from a broader perspective. In the many years in which the 2010 Quadrennial Review has been pending, the Commission has approved the $13.8 billion purchase by our nation's largest cable operator (Comcast) of one of our nation's top four broadcast networks (NBC). It has signed off on the $49 billion merger of our nation's second and fifth largest multichannel video programming distributors (AT&T and DIRECTV). And it has blessed a single $79 billion transaction

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[70] *See* National Association of Broadcasters Education Foundation, Broadcast Leadership Training, http://nabef.org/blt/default.asp (last visited Aug. 18, 2016).

[71] *See, e.g.*, Initial Comments of the Diversity and Competition Supporters in Response to the Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, at 19–21 (July 30, 2008).

[72] *See, e.g.*, NAB FNPRM Comments at 92–93; NAA FNRPM Comments at 15.

[73] *See Order* at paras. 319–21.

[74] *See Order* at paras. 246–70.

combining our nation's second, third, and sixth largest cable providers (Charter, Time Warner Cable, and Bright House).

Yet today, after many years of delay and "deliberation," the FCC tells us the prospect of a newspaper purchasing a single television or radio station for relative pocket change still shocks the conscience? One television station selling more than 15% of another's advertising inventory in order to cut costs is a dire threat to competition? A program to incubate diverse voices in the broadcast industry is a bridge too far because it would allow some companies to own an additional radio station in a market? It makes no sense at all.

Soon, I expect outside parties to deliver us to the denouement: a decisive round of judicial review. I hope that the court that reviews this sad and total abdication of the administrative function finds, once and for all, that our media ownership rules can no longer stay stuck in the 1970s consistent with the Administrative Procedure Act, the Communications Act, and common sense. The regulations discussed above are as timely as "rabbit ears," and it's about time they go the way of those relics of the broadcast world. I am hopeful that the intervention of the judicial branch will bring us into the digital age.

For all of these reasons, I dissent.