March 24, 2022

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
45 L Street, NE
Washington, D.C. 20554

Re: *Written Ex Parte Communication on Contradictions in the NAB's Arguments Before the FCC in the 2018 Broadcast Ownership Proceeding, MB Docket No. 18-349, and Before Congress on the Journalism Competition and Preservation Act, as Compared to its Arguments Before Congress on the American Music Fairness Act*

Dear Ms. Dortch:

The National Association of Broadcasters, in seeking relaxed broadcast radio ownership rules, is asking the FCC to accept arguments directly contrary to those it makes in opposing the American Music Fairness Act.

In fighting the AMFA, the NAB continues to claim airplay has "promotional value" that eliminates the need for radio broadcasters to pay recording artists for the music the stations use to derive millions of advertising dollars. The promotion argument has never been a valid justification for refusing to pay musicians. Such a rationale could swallow all of copyright, as any use of content can be called "promotional." But even the NAB's own arguments before the FCC are showing the flaws with its promotion claim.

For example, the NAB argues in this proceeding that radio broadcasters need increased economies of scale to compensate for the significant audience share broadcast radio has lost. Yet, if radio broadcasters have lost so much audience share that they need government intervention, the promotional value they claim to provide recording artists cannot be adequate compensation.

The NAB also applies the promotion claim inconsistently. In addition to its argument about loss of broadcast radio audience, the NAB alleges here that broadcasters need increased economies of scale because online platforms refuse to fairly compensate broadcasters for content the platforms use to derive advertising revenue. The NAB is similarly arguing that platforms' inadequate compensation warrants passage of the Journalism Competition and Preservation Act.

The musicFIRST Coalition agrees with the NAB that distributors should adequately compensate content providers. But what is good for the goose must be good for the gander. Online distribution of broadcaster content can also be claimed to be promotional. If the NAB finds inadequate the combination of online promotion and the money online platforms *do pay* broadcasters, the alleged value of broadcast radio promotion combined with the lack of *any* money the radio broadcasters pay recording artists cannot possibly be adequate.

The FCC should not rely on a party's arguments when that party contemporaneously makes contrary arguments to other federal policy makers. The musicFIRST Coalition therefore requests that the FCC disregard NAB's arguments that radio stations' loss of audience share and online platforms' refusal to provide adequate compensation require the FCC to relax the broadcast radio ownership rules.

I. The FCC Should Disregard the NAB's Arguments That Radio Broadcasters' Loss of Audience Share and Online Platforms' Refusal to Provide Adequate Compensation Require the FCC to Relax the Broadcast Radio Ownership Rules

A. The NAB Says Radio Broadcasters Have Lost Audience Share … Yet Continues to Claim Airplay Has Promotional Value That Eliminates the Need to Pay Musicians

The NAB continues to claim airplay has promotional value that eliminates the need for broadcast radio stations to pay musicians.[1] At the same time, however, the NAB argues in this proceeding that the FCC must relax the broadcast radio ownership rules because broadcast radio stations' audience share has shrunk.[2] Both arguments cannot simultaneously be true.

According to the NAB, radio broadcasters today struggle to compete for audiences with other media outlets—especially digital platforms. It notes that:

> consumer adoption of digital devices that enable access to virtually unlimited audio and video content 24/7/365 has continued apace. Consumers are acquiring more smart devices, from phones to watches to speakers, and record numbers are now streaming audio (and video), paying for subscription music services and listening to podcasts. These trends have further fragmented the formerly mass audience for AM/FM broadcasting and reduced listening to terrestrial radio.[3]

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[1] *See, e.g.,* NAB, A PERFORMANCE TAX THREATENS LOCAL JOBS (March 2022) (claiming radio broadcasters need not compensate recording artists because airplay is free promotion), https://www.nab.org/documents/advocacy/performanceTax/PerformanceTaxIssueSheet.pdf.

[2] *See In re* 2018 Quadrennial Review, MB Docket No. 18-349, Comments of the NAB at 2-5, 56, 61-62, 65-75, 79-82 (Sept. 2, 2021) (2021 NAB Quadrennial Review Update Comments) (arguing that the FCC must allow local radio stations to benefit from greater economies of scale to offset their large loss of audience share to digital platforms); Reply Comments of the NAB at 32 (Oct. 1, 2021) (NAB Reply Comments) (stating that the FCC must relax the ownership rules because of "the unprecedented number of competing audio and video outlets and the technology platforms' increasing market dominance.").

[3] *2021 NAB Quadrennial Review Update Comments* at 4. *See also id.* at 56, 61, 68-69 (stating "that radio and TV stations struggle to compete with other media outlets and, especially, large digital ad platforms for the local ad revenues needed to support station operations and valued services"; quoting a radio broadcaster as saying that radio broadcasters compete against "'a long list: video games, Pandora, Spotify, TV stations and whatever app somebody just downloaded. … [A]nything people do with their time … has become our competition, because everything is readily available'"; noting that "[i]n earlier submissions, NAB discussed and provided extensive evidence detailing the digital transformation of the media and advertising markets and how it has splintered radio stations' audiences."); *NAB Reply* at 5, 63-64, 68 (stating that ten radio broadcasters provided updated data in their comments showing declines in broadcast radio listening, and arguing that broadcasters "increasingly struggle for a competitive share of the marketplace"; lamenting that the digital transformation "has splintered radio stations' audiences," resulting in "significant decrease in the amount of time Americans spend listening to

For example, 33 percent of Americans who are 12 years old or older owned a smart speaker by 2021, up from seven percent in 2017 according to the NAB.[4] Significantly, almost half of smart speaker owners' listening time just prior to the pandemic was spent on "pure play" streaming, compared to less than one fourth of their time spent on AM and FM radio.[5]

More broadly, the NAB reports that the average number of radios in homes shrank 50 percent to 1.5 in 2020, from 3 in 2008.[6] Conversely, the number of homes with no radios rose to 32 percent from 4 percent.[7] Incredibly, 52 percent of homes occupied by 18- to 34-year-olds now have no radios.[8] Today, smartphones are the device people most frequently use to listen to music, followed by car radios, desktop/laptop computers, smart speakers, and smart TVs, with standalone radios coming in last.[9] As a result, almost one-third of all U.S. audio listening now occurs on mobile devices, up 67 percent since 2014.[10] Fifty-three percent of all listening by Americans 13 and older took place on digital devices rather than traditional ones, as of summer 2020.[11]

This means, of course, that broadcast radio's audience share has dropped. Indeed, AM and FM's share of over-the-air and music streaming listening by Americans thirteen and older sank more than 10 percentage points between late 2015 and late 2020.[12] More specifically, weekly listening of AM and FM by adults 18 and older dropped two hours from 2014 to 2020, with those under 35 spending significantly less time than the average adult.[13] The average quarter-hour listening of FM

AM/FM radio"; observing that "[t]he two major metrics of competitive health for radio stations—advertising revenue and audience size/listening—thus show that the FM service faces formidable challenges in today's advertising market and in the modern audio marketplace"); Written Ex Parte Communication, MB Docket No. 18-349, at 18, 20, 21, 22, 26, 47-48, 49 (Feb. 16, 2022) (*NAB 2022 Ex Parte Comments*) (stating that "radio stations in local markets across the country have lost advertisers and vital ad revenues to digital competitors and audiences to non-broadcast providers that consumers routinely access through a still growing range of digital devices"; noting that "industry analysts have documented the direct competition between terrestrial radio stations and digital audio options for audiences' time and attention"; pointing to broadcast radio's "undisputed declines in audience levels" and agreeing that competition has "reduce[d] radio broadcasters' share of the market"; commenting that "[i]t is more likely to find a smartphone in a consumer's home than a traditional radio"; discussing "unprecedented levels of competition for both audiences and ad dollars from broadcast and non-broadcast sources"; lamenting "the entire radio industry's competitive struggles … for ad revenues and audiences presented by myriad audio (and video) content providers and advertising options, including digital"; pointing to "the declining ad revenues and listening levels of FM stations.").

[4] *2021 NAB Quadrennial Review Update Comments* at 69-70.

[5] *Id*.

[6] *Id.* at 70.

[7] *Id*.

[8] *Id*.

[9] *Id.* at 70-71.

[10] *Id*.

[11] *Id*.

[12] *Id.* at 74-75.

[13] *Id*.

stations dropped 23.5 percent from 2016 to 2021, according to Nielsen.[14] Time spent listening to broadcast radio is expected to have dropped 10 percent from 2019 to 2023.[15] Although the pandemic was not without impact, the NAB says COVID-19 just accelerated the trends, rather than causing them, and that the end of the pandemic will not result in a reversal.[16]

The NAB also says that audience fragmentation has had an impact on what businesses will pay radio stations for advertising, further evidence that broadcast radio has lost reach. Indeed, according to the NAB:

> [i]n a media landscape marked not by scarcity, but by unprecedented abundance of content and advertising options, all outlets—whether traditional or digital, audio or video—compete for audiences' limited time and attention and advertisers' finite ad dollars. In today's "attention economy," the Commission can no longer maintain ownership rules premised on the view that local TV and radio stations exist in markets hermetically sealed against the vast array of media outlets and advertising platforms accessible by audiences from virtually anywhere, at any time, via any device.[17]

The NAB says all of this has diminished broadcast radio's role in music discovery. Indeed, "[b]eyond diverting advertisers—and crucial revenue—away from local broadcast stations throughout the country, the digital platforms also control the technologies that power both content discovery (search) and digital advertising."[18] Thus, today, "YouTube is the leader by a very large margin among free music streaming services and is a top source for discovering new music."[19]

But if the NAB now says that fragmentation has so reduced broadcast radio listenership that stations need government relief, and that platforms control content discovery, then its argument about how significant broadcast radio's role is in delivering audiences to musicians cannot be true. And if broadcast radio is not providing as much discovery and promotion of music, then, even under the NAB's own rationale, airplay does not justify broadcast radio refusal to pay musicians.

To be clear, the musicFIRST Coalition does not believe the promotion claim has ever justified broadcasters' refusal to honor a performance right. Copyright pirates similarly claim that their taking of others' content without compensation is "helpful" to creators because it serves as

[14] *NAB Reply Comments* at 67.

[15] *2021 NAB Quadrennial Review Update Comments* at 72.

[16] *Id.* at 74-75; *NAB Reply Comments* at 64 (citing joint comments of 10 broadcasters for the same proposition).

[17] *2021 NAB Quadrennial Review Update Comments* at 62. *See also id*. at 65 (stating that "[t]he U.S. local ad market is now 'completely dominated' by digital advertising, which will comprise an even higher share of the local and national ad market in the coming years.").

[18] *2021 NAB Quadrennial Review Update Comments* at 25-26.

[19] *Id.* at 73.

promotion.[20] The broadcasters' and pirates' rationale would swallow all of copyright, as any use of content can be called "promotional." For example, satellite and internet radio providers could also claim they are promoting music, yet they appropriately must still pay recording artists.[21] It is also worth noting that the United States is an outlier, with virtually every other industrialized nation requiring broadcast radio stations to pay recording artists.[22] The NAB's own argument here only further shows the fallacy of its promotion claims.

B. The NAB Says That Online Platforms' Failure to Compensate Broadcasters Fairly Warrants Relaxation of the Broadcast Radio Ownership Rules … Yet Claims That Radio Broadcasters' Refusal to Provide Recording Artists Any Monetary Compensation Warrants No Government Intervention

The NAB also argues in this proceeding and elsewhere that online platforms' refusal to adequately compensate broadcasters for content warrants government intervention.[23]

In a February speech, NAB CEO Curtis LeGeyt complained that platforms "offer [broadcasters] 'take it or leave it' compensation terms that significantly devalue [broadcasters'] product."[24] And just days before that, in Senate testimony for the NAB, radio broadcaster Joel Oxley said platforms "simply take [broadcaster] coverage and profit from it, and virtually nothing comes back to [broadcasters]."[25] In particular, the NAB contends that "the platforms unilaterally determine which content is eligible to be monetized and decide the share of revenue they retain versus the amounts passed on to the content providers that bear all the costs of producing the quality content that financially benefits the platforms."[26]

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[20] *See, e.g.*, Ernesto Van der Sar, *"Movie Piracy Brings in Millions of Extra Revenue Through Promotion,"* TORRENTFREAK, Dec. 2, 2018, https://torrentfreak.com/movie-piracy-brings-in-millions-of-extra-revenue-through-promotion-181202/

[21] *See* 17 U.S.C. §§ 106(6), 114(d).

[22] *See* Respecting Artists with the American Music Fairness Act: Hearing Before the H. Comm. on the Judiciary, 117th Cong., *Testimony of Nashville Musicians Association* President *Dave Pomeroy* (Feb. 2, 2022), https://docs.house.gov/meetings/JU/JU00/20220202/114358/HHRG-117-JU00-Wstate-PomeroyD-20220202.pdf.

[23] *See, e.g., 2021 NAB Quadrennial Review Update Comments* at 2-3, 20, 23-28 (arguing that the FCC must allow radio broadcasters to benefit from economies of scale in light of the duress online platforms have created in the ability of stations to derive advertising revenue).

[24] NAB, Press Release, *Curtis LeGeyt Speech at Media Institute Communications Forum Luncheon* (Feb. 15, 2022), https://www.nab.org/documents/newsRoom/pressRelease.asp?id=6403.

[25] Breaking the News–Journalism, Competition, and the Effects of Market Power on a Free Press, Hearing Before the S. Comm. on the Judiciary, 117th Cong., *NAB Testimony of Joel Oxley* (Feb. 2, 2022), https://www.judiciary.senate.gov/imo/media/doc/Oxley%20Testimony.pdf.

[26] *2021 NAB Quadrennial Review Update Comments* at 26.

The NAB argues that because broadcasters lack negotiating power when dealing with the platforms, broadcasters cannot recoup fair compensation from online platforms for use of broadcasters' content.[27] Indeed, the NAB says that:

> a study commissioned by NAB and conducted by BIA Advisory Services quantified the economic losses to broadcasters from certain practices of the big tech platforms. Specifically, this study [modeled] the value that local broadcasters' news content creates for the tech platforms but that broadcasters are unable to monetize due to the platforms' practices. … Its research led BIA to conclude that no platform currently offers a viable economic model for broadcast news, *i.e.*, one that would pay or enable broadcasters to earn equitable revenue on their news content.[28]

The NAB says that to remedy this: a) the FCC must relax the broadcast radio ownership rules so that broadcasters can gain economies of scale;[29] and b) Congress should pass the Journalism Competition and Preservation Act granting broadcasters an antitrust exemption so broadcasters can negotiate collectively for fair compensation from online platforms.[30]

We agree with the NAB that creators must be compensated and distribution platforms should not derive revenue from content they neither create nor license. But the NAB cannot have it both ways. It cannot argue that the government must intervene because of radio stations' lack of bargaining power and platforms' failure to adequately compensate broadcasters, and still claim radio broadcasters need not pay recording artists.[31]

In fact, recording artists are in an even worse predicament than radio broadcasters.

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[27] *Id.* at 27. *See also NAB Senate Testimony of Joel Oxley, supra* note 25 (stating that "the vast market power of these platforms ensures that broadcasters must simply accept whatever terms are handed to them, regardless of whether they represent a fair or appropriate approximation of the value local broadcast content offers these platforms and the American consumers who use them. For example, not only is WTOP not being compensated by Facebook and Google for its content, WTOP is actually paying to make sure its content is being accessed on their platforms.").

[28] *2021 NAB Quadrennial Review Update Comments* at 27-28.

[29] *Id.* at 28 (arguing that the FCC must allow radio broadcasters to leverage economies of scale to remedy the duress created by online platforms' refusal to pay fair compensation).

[30] *See* S. 673, 117th Cong. (2021); H.R. 1735, 117th Cong. (2021); *NAB Senate Testimony of Joel Oxley*, *supra* note 25 (stating that Congress must pass the Journalism Competition and Preservation Act because online platforms' "anticompetitive terms of service and a 'take it or leave it' approach leave local broadcasters with a below-market sliver of those advertising revenues that are derived through their products" and that "[t]he JCPA would level the playing field to allow broadcasters and other journalists the ability to seek adequate compensation for the tremendous value they provide these platforms and the millions of Americans who use them.").

[31] *See* Michael Huppe, *Radio Broadcasters Need to Get Their Story Straight on Creator Compensation*, BILLBOARD, Feb. 3, 2022, https://www.billboard.com/pro/radio-broadcasters-need-to-get-their-story-straight-on-creator-compensation-guest-op-ed/.

The NAB-commissioned BIA study mentioned above notes that Google and Facebook don't pay broadcasters when users view broadcaster content on the online services but do not click through to the broadcasters' web sites.[32] However, the study also acknowledges that in other circumstances Apple, Facebook, and Google pay *between 30 and 85 percent* of the revenues the platforms collect in connection with content.[33]

By contrast, musicians' economic loss from radio broadcasters' airing of sound recordings is 100 percent. The broadcasters decide what music gets airtime, and then pay the musicians absolutely nothing for the performances.[34]

Recording artists lack bargaining power when dealing with radio broadcasters because the NAB has secured and continues to defend an unjust statutory provision that allows stations to deny artists compensation when the stations air sound recordings. Adding insult to injury, recording artists do not have a right to withhold their content from broadcast radio. Thus, while broadcasters can refuse to make their content available to online platforms if they don't like the terms, recording artists have no such option regarding radio broadcasters under the current statutory regime.

Nonetheless, the NAB continues to oppose the American Music Fairness Act, which would finally allow recording artists to obtain fair compensation from radio broadcasters.[35]

The NAB claims airplay has promotional value that eliminates the need for radio broadcasters to pay musicians.[36] But online platforms similarly claim they provide "promotional value" to broadcasters.[37] Yet the NAB continues to complain that online platforms are not adequately compensating broadcasters.

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[32] BIA Advisory Services, Economic Impact of Big Tech Platforms on the Viability of Local Broadcast News at 13, 15, 17, 19, 21, 23 (2021) (NAB Big Tech Study), https://www.nab.org/documents/newsRoom/pdfs/Economic_Impact_Tech_Platforms_Broadcast_News.pdf.

[33] *Id.* at 15-19, 24-25 (stating that Apple gives 30 percent of Apple News "back fill" ad inventory and 50 percent of "pooled" ad revenue, as well as 70-85 percent of App Store revenue; that Facebook gives 70 percent of "Attributable News Feed Revenue" and 55 percent of Facebook Watch revenue; that Google gives 70 percent of search revenue, 68 percent of "AdSense for content" revenue, 51 percent of "AdSense for search" revenue, 60 percent of AdMob revenue, and 70-85 percent of Google Play revenue).

[34] *See* 17 U.S.C. §§ 106(6), 114 (excluding non-subscription broadcast radio transmission of sound recordings from the performance right).

[35] *See* H.R. 4130, 117th Cong. (2021).

[36] *See supra* note 1.

[37] *See, e.g.,* NAB Big Tech Study, *supra* note 32, App. A at 23 (stating that "[b]roadcasters are not compensated by Google when their content appears in the search results" but "Google argues that its search returns refer valuable direct traffic to broadcasters' digital news websites and apps where [broadcasters] can monetize these audiences.").

In fact, when this promotional shoe is on the other foot, the NAB argues not that the promotion has value, but instead that it cannibalizes broadcasters' own ability to monetize their content.[38] By the same token, the uncompensated availability of sound recordings on broadcast radio reduces the revenue that recording artists can collect elsewhere.[39]

Indeed, audiences are less likely to pay as much for streaming services or other music sources—or to purchase music at all—because they can gain free access over broadcast radio. In turn, the "zero rate" radio broadcasters pay drives down what providers of other distribution models are likely to pay recording artists because they know audiences have that free, broadcast alternative.

If "online promotion" and a 30 to 85 percent share of online platform revenue is too little for broadcasters, then so, too, is the "promotion" and *zero percent share* of revenue that radio broadcasters provide recording artists.

II. Conclusion

Making millions of advertising dollars off the backs of recording artists without compensating them is a shameful, longtime practice that was never appropriate. Continuing this injustice today is even harder to defend in light of developments the NAB itself points to—and arguments it itself makes—in this proceeding.

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[38] *See 2021 NAB Quadrennial Review Update Comments* at 25-26 (stating that "[b]eyond diverting advertisers—and crucial revenue—away from local broadcast stations throughout the country, the digital platforms also control the technologies that power both content discovery (search) and digital advertising. Whether consumers use search engines, social networks, voice or video platforms, or even broadcasters' own apps to access news and other content, decisions made unilaterally by a few dominant digital technology giants impede local broadcasters' ability to connect with their audiences online. … The platforms' technological control and lack of transparency also permit them to impose advertising limits and policies that impede stations' ability to effectively monetize their own content online."); *NAB Senate Testimony of Joel Oxley*, *supra* note 25 (stating that "[t]he market power of the tech platforms undermines the online advertising model for local broadcast journalism in two significant ways. First, the tech platforms' role as content gatekeepers stifles our ability to generate user traffic independent of their services. Second, anticompetitive terms of service and a "take it or leave it" approach leave local broadcasters with a below-market sliver of those advertising revenues that are derived through their products."); *NAB Big Tech Study*, *supra* note 32, at 17 (quoting SimilarWeb for the proposition that "Zero-click searches may mean that users' queries are resolved right on the results page. By displaying ads or its own products, Google can extract value from zero-click searches, while other sites might not. This can be especially troublesome considering Google sources much of the content that appears on its results pages from publishers, and as the proportion of zero-click searches increase, publishers may be losing out on traffic.").

[39] *Cf. NAB 2022 Ex Parte Comments* at 33 (stating that "numerous studies have shown that retaining asymmetric legacy regulations in an era of increased competition creates regulatory distortions").

The NAB says that "technological changes have revolutionized the creation and distribution of media content and the advertising marketplace"[40] and that it would be "arbitrary and capricious … to ignore marketplace changes and the rapid growth in and consumer usage of nonbroadcast audio and video options."[41] It therefore contends that the broadcast radio ownership rules must account for modern realities so stations can earn fair compensation for their content, especially in light of COVID-19's impact.[42]

For the NAB to make those arguments yet steadfastly oppose fixing the zero rate that radio broadcasters pay recording artists is hypocritical. Recording artists operate in the same, radically changed marketplace as radio broadcasters. Those changes, as well as the shuttering of live venues during the pandemic, similarly increase the need to revisit the lack of a broadcast radio performance right in sound recordings.

Whether one believes that the broadcast radio ownership rules should be relaxed, strengthened, or left alone, we should all agree that content creators deserve fair compensation when someone uses their content for commercial gain. And we should also agree that important public policy decisions should not be based on self-interested assertions by parties that change their story with the wind.

Thus, as the FCC conducts the quadrennial review, it should take notice that the NAB's arguments in support of relaxing the broadcast radio ownership rules and passing the Journalism Competition and Preservation Act on the one hand, and its arguments against the American Music Fairness Act on the other, cannot simultaneously be true. The FCC should not entertain the NAB's contemporaneously contradictory positions before federal policymakers, especially when those positions are being used to support policy changes that will affect the public interests in media competition, localism, and diversity.

Respectfully submitted,

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Coalition Members

American Association of Independent Musicians
Christian Music Trade Association
Music Managers Forum—US
Recording Industry Association of America
SAG-AFTRA
The Vocal Group
American Federation of Musicians
The Latin Recording Academy
Recording Academy
Rhythm & Blues Foundation
SoundExchange

[40] *2021 NAB Quadrennial Review Update Comments* at 68.
[41] *NAB 2022 Ex Parte Comments* at 29.
[42] *2021 NAB Quadrennial Review Update Comments* at 1-2.