

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	
)	
Amendment of Section 73.3555(e) of the)	MB Docket 17-318
Commission's Rules, National Television)	
Multiple Ownership Rule)	

**COMMENTS OF THE ATTORNEYS GENERAL OF THE STATES OF ILLINOIS,
IOWA, MAINE, MASSACHUSETTS, PENNSYLVANIA, RHODE ISLAND,
AND VIRGINIA**

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INTRODUCTION

The Attorneys General of the States of Illinois, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia submit the following Comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking regarding the national television audience reach limit and the discount available to television stations that utilize UHF signals.¹ As the chief consumer protection and law enforcement officers in our respective states, we are responsible for promoting and defending the public interest. Raising the national audience reach limit and/or maintaining the UHF discount fails to further the public interest.

For approximately 70 years, broadcast television has played a central and indispensable role in informing, challenging, and entertaining the American public. Throughout most of broadcast television's history, the Commission saw the importance of placing limits on the number of television stations that could be owned, operated, or controlled by one entity.² In 1985, for example, the Commission recognized the need to combat excessive consolidation that could hinder the diversity of viewpoints on broadcast television and added to its ownership restrictions the national television audience reach limit, which limits the number of households nationwide that any particular station is permitted to serve.³ Congress enshrined the national audience reach limit in statute in 1996 and 2004.⁴

¹ See Notice of Proposed Rulemaking, *In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Dkt. No. 17-318 (Dec. 18, 2017) (hereafter "2017 NPRM").

² See 2017 NPRM ¶ 2 (recounting national ownership restrictions from 1941 to the present).

³ *In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 31 FCC Rcd. 10213, 10214–15 ¶ 4 (Sept. 6, 2016) (hereafter "2016 Amendment").

⁴ See 2017 NPRM ¶¶ 3–4.

The Commission now appears poised to abandon the national audience reach limit, despite Congress's prior statutory mandates. The 2017 NPRM seeks comment on the Commission's authority to alter the limit and whether it should modify or eliminate the limit. The 2017 NPRM's defense of the Commission's authority to modify or eliminate the limit and discussion of the policies supporting the limit suggest that it is inclined to lift, if not eliminate, the limit.⁵

Contrary to what the Commission suggests, raising the national audience reach limit is beyond the authority of the Commission. As recently as 2004, Congress exercised its authority to set the national audience reach limit at 39% and exclude the limit from the Commission's periodic review of media rules. Congress left untouched the Commission's ability to undertake rulemaking in connection with the UHF discount, and the Commission itself has repeatedly admitted the UHF discount no longer serves its intended purpose. Maintenance of that rule would be unjustified and arbitrary.

Further, lifting or eliminating the national audience reach limit threatens diversity, competition, and localism. Indeed, large media companies advocating for lifting or eliminating the limit or maintaining the UHF discount seek the opportunity to reach—and thus influence—as many Americans as possible without concern for the implications for a diverse media landscape. Such an approach, if realized, would significantly reduce the number of independently owned and operated television stations, thereby limiting competition, reducing station ownership by women and minorities, and inhibiting the ability of stations to create and disseminate content that reflects the interests and preferences of individual localities. For example, Sinclair Broadcast Group—the largest owner of television stations in the United States—has distributed news stories and features

⁵ See *id.* ¶¶ 8–9, 11–18.

that all of its stations were required to run in their evening or morning newscasts.⁶ Local preferences could be lost in other contexts like sporting, religious, or scientific programming if, as a result of excessive consolidation, a large owner requires all of its stations to show particular sporting contests, religious celebrations, or scientific perspectives, regardless of the popularity of those sports, celebrations, or perspectives in certain areas.

Accordingly, we recommend that the Commission conclude that (1) the Commission lacks authority to modify or eliminate the national audience reach limit; (2) the Commission possesses the authority to modify or eliminate the UHF discount; and (3) the Commission should eliminate this discount based on recent, long-anticipated changes in television station signal usage that render the discount obsolete.

ARGUMENT

I. The Commission Lacks the Authority to Modify or Eliminate the National Audience Reach Limit.

In 1985, the Commission amended its rule on broadcast station ownership by inserting the national audience reach limit (“Cap”), which prohibited individuals and entities from owning broadcast television stations that could, in the aggregate, reach more than 25% of the national television audience.⁷ In doing so, the Commission intended to protect “localism, diversity, and competition” by “temper[ing] the ability of the largest group owners to dramatically increase their national coverage area ... while giving smaller group owners some opportunity to expand.”⁸ In

⁶ See Paul Farhi, *How the Nation’s Largest Owner of TV Stations Helped Donald Trump’s Campaign*, WASH. POST (Dec. 22, 2016), https://www.washingtonpost.com/lifestyle/style/how-that-nations-largest-owner-of-tv-stations-helped-donald-trumps-campaign/2016/12/22/02924864-c7af-11e6-8bee-54e800ef2a63_story.html.

⁷ *In the Matter of Amendment of Section 73.3555 (formerly Sections 73.35, 73.240 and 73.636) of the Commission’s Rules Relating to Multiple Broadcast Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74, 90–91, ¶ 39 (Feb. 1, 1985) (hereafter “1985 Amendment”).

⁸ *2016 Amendment*, 31 FCC Rcd. at 10214–15 ¶ 4.

creating the Cap, the Commission also noted the existence of “two Congressional proposals which would establish an audience reach limit” ranging from 22.5% to 30% depending on whether the owner possessed stations with VHF and/or UHF signals.⁹

Eleven years after the Cap was first adopted, Congress passed the Telecommunications Act of 1996 (“1996 Act”) in which it directed the Commission to increase the Cap from 25% to 35%.¹⁰ To the extent there was any ambiguity regarding Congress’s role as the sole decider regarding Cap-setting, that ambiguity disappeared in 2004. Following an attempt by the Commission to increase the Cap from 35% to 45%,¹¹ Congress passed the Consolidated Appropriations Act of 2004 (“2004 Amendments”), which, among other things, set the Cap at 39%.¹² In doing so, Congress established that it—and not the Commission—was responsible for setting the Cap.¹³

Notably, the 2004 Amendments distinguish the Cap from rules needed to calculate the Cap in ways that underscore the Commission’s lack of Cap-setting authority. Specifically, Congress

⁹ *Id.* at 90 ¶ 39 & n.45 (referencing S. 2962, 98th Cong., 2d Sess. (1984); H.R. 6134, 98th Cong., 2d Sess. (1984)).

¹⁰ Pub. L. No. 104-104, 110 Stat. 111 (1996).

¹¹ See *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, 13814, ¶ 499 (2003) (hereafter “2002 Biennial Regulatory Review”).

¹² Pub. L. No. 108-199, 118 Stat. 99 (2004).

¹³ Compare with *Bellevue Hosp. Ctr. v. Leavitt*, 443 F.3d 163, 168–69 (2d Cir. 2006) (concluding that Congress removed the discretion of the Secretary of Health and Human Services to adjust payment rates for certain categories of medical treatment); *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep’t of Educ.*, 393 F.3d 1158, 1164 (10th Cir. 2004) (observing that Congress amended the federal Impact Aid statute, which provides federal assistance to school districts where a federal presence burdens the district’s ability to finance public education, by rescinding the Secretary of Education’s power to define “equalize expenditures” and replacing it with a statutory instruction based on whether the entity falls within particular expenditure and revenue percentiles), *vacated on other grounds*, 437 F.3d 1289, 1163–64 (10th Cir. 2006); *Admin. of the State of Ariz. v. EPA*, 151 F.3d 1205, 1211 (9th Cir. 1998) (observing that, in the 1977 Amendments to the Clean Air Act, Congress sharply limited the EPA Administrator’s authority to reject redesignation requests from states and Native American tribes); *Pub. Citizen v. Nuclear Regulatory Comm’n*, 901 F.2d 147, 154–56 (D.C. Cir. 1990) (concluding that, when it passed the Nuclear Waste Policy Act of 1982, Congress removed the discretion of the Nuclear Regulatory Commission to encourage but not require power plant licensees to comply with certain training requirements).

excluded “rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B)” from certain review mechanisms under the 1996 Act.¹⁴ The fact that Congress referred to the Cap as a “limitation” and not merely a “rule” is telling.¹⁵

Statements from multiple House and Senate lawmakers underscore Congress’s intent to supplant the Commission’s rulemaking authority regarding the Cap. Representative Wilbert Tauzin (R-LA), for example, noted that the 2004 Amendments “will forbid the FCC from raising or lowering the 39 percent limit as market conditions continue to change.”¹⁶ Senator Robert Byrd (D-WV) likewise observed that the 2004 Amendments turned “the one year limitation on the FCC media ownership rule ... into a permanent cap at 39 percent.”¹⁷ And Senator Patrick Leahy (D-VT) stated that “the White House successfully lobbied for last-minute increase of a permanent cap at 39 percent.”¹⁸

Putting aside the plain text of the 2004 Amendments and its legislative history, interpreting the 2004 Amendments to allow the Commission to modify or eliminate the Cap would lead to absurd results. Indeed, Congress would have had no need to set the Cap at 39% if the Commission could initiate a rulemaking at its discretion to adjust the Cap. For example, if the Commission retains this authority, it could have initiated a rulemaking to increase the Cap to 45% immediately

¹⁴ 118 Stat. 100.

¹⁵ See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading which renders some words altogether redundant.”).

¹⁶ 149 Cong. Rec. H12838 (daily ed. Dec. 8, 2003) (statement of Rep. William Tauzin) (emphasis added).

¹⁷ 150 Cong. Rec. S148 (daily ed. Jan. 22, 2004) (statement of Sen. Diane Feinstein, quoting a letter from Sen. Robert Byrd) (emphasis added).

¹⁸ 150 Cong. Rec. S141 (daily ed. Jan. 22, 2004) (statement of Sen. Patrick Leahy) (emphasis added).

after the 2004 Amendments went into effect.¹⁹ More fundamentally, an agency cannot adopt a rule that contradicts or is inconsistent with its governing statute.²⁰

In sum, without new direction from Congress, the Commission lacks the authority to increase, decrease, or eliminate the Cap. Such action would run afoul of Congress's express adoption of the national audience reach limit in the 1996 Act and in the 2004 Amendments discussed above.²¹

II. The Commission Possesses the Authority to Modify or Eliminate the UHF Discount.

When the Commission created the Cap in 1985, it included a discount for stations utilizing UHF signals (as opposed to VHF signals) to reflect the fact that, in 1985, UHF station signals were inferior to VHF signals. By attributing only 50% of the television households in the applicable market as reached by UHF stations ("UHF Discount"), the Commission assured that the Commission accurately counted the number of households that could access UHF stations for purposes of the Cap.²² Although the Commission lacks the authority to modify the Cap, the Commission can modify or eliminate implementing regulations like the UHF Discount that affect the accuracy of the calculation of audience reach.

¹⁹ See, e.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

²⁰ See, e.g., *United States v. Mead*, 533 U.S. 218, 227 (2001) (observing that regulations are fatally defective when they are "manifestly contrary to the statute").

²¹ See 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter" (emphasis added)); *id.* § 303(r) (empowering the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter" (emphasis added)).

²² *1985 Amendment*, 100 F.C.C.2d at 93 ¶ 44.

Federal law empowers the Commission to distribute licenses for the operation of television stations.²³ Federal law further empowers the Commission, “from time to time, as public convenience, interest, or necessity requires ... [to] [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this [Wire and Radio Communication] chapter.”²⁴ In the context of broadcast services, the Commission views “public interest” as relating to the “traditional goals of promoting competition, diversity, and localism.”²⁵ The Commission acted pursuant to these traditional goals when, in 1985, it implemented the UHF Discount.²⁶

In the 1996 Act, while Congress established the audience reach cap, it did not address the Commission’s ability to revise the rules necessary to administer the Cap. Congress used the 1996 Act to direct the Commission to revisit media rules, including the UHF discount, every two years,²⁷ underscoring Congress’s recognition that there were ongoing changes in the media landscape that justified ongoing regulatory review.

While the 2004 Amendments removed implementing regulations from the Commission’s quadrennial review process, it left untouched the Commission’s authority to revisit the methods for calculating compliance with the Cap. For example, it did not change the Commission’s authority to determine (i) whether the Cap is best calculated using Nielsen Designated Market Area

²³ See 47 U.S.C. § 307(a).

²⁴ *Id.* § 303(r).

²⁵ *E.g.*, 2002 Biennial Regulatory Review, 18 FCC Rcd. at 13624 ¶ 8.

²⁶ See 1985 Amendment, 100 F.C.C.2d at 94 ¶ 4 (“[T]he discount approach provides a measure of the actual voice handicap and is therefore consistent with our traditional diversity objectives.”).

²⁷ See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 111–12.

households²⁸; (ii) whether the UHF Discount should remain in effect²⁹; (iii) whether a television market may be counted more than once in calculating the Cap³⁰; or (iv) whether two years is the proper amount of time within which a non-compliant station owner must comply with the Cap.³¹ Having authority to address these rules is necessary so that the Commission can ensure that Congress's 39% Cap reflects current technology and markets and is properly effectuated.

Accordingly, the Commission continues to possess the authority to review the UHF Discount under its general rulemaking authority granted by 47 U.S.C. §§ 154(i) and 303(r).³² The Third Circuit recognized this in *Prometheus Radio Project v. FCC*, when it stated:

Although we find that the UHF discount is insulated from this and future periodic review requirements, we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h).... Barring congressional intervention ... the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of § 202(h).³³

Thus, the 1996 Act and 2004 Amendments leave intact the Commission's authority to modify or eliminate the UHF Discount so that the Commission's calculation of audience reach reflects the technical capability of television station signals today, and that the Cap is properly implemented.

²⁸ 47 C.F.R. § 73.3555(e)(2)(i).

²⁹ *Id.* § 73.3555(e)(1).

³⁰ *Id.* § 73.3555(e)(2)(ii).

³¹ *Id.* § 73.3555(e)(3).

³² 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter"); *id.* § 303(r) (empowering the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter").

³³ 373 F.3d 372, 397 (3d Cir. 2004).

III. The Commission Should Exercise Its Rulemaking Authority by Eliminating the Outdated UHF Discount.

The purpose of the UHF Discount was to ensure that calculations concerning audience reach were reasonably accurate, given the “fact that, in the analog television broadcasting era, UHF signals reached a smaller audience in comparison with VHF signals.”³⁴ Performing these calculations accurately in turn ensures that the Cap is applied in accordance with congressional intent—specifically, that no single entity owns one or more broadcast stations that collectively are capable of reaching more than 39% of U.S. television households. There is no dispute that today UHF stations no longer operate at a disadvantage and in fact are comparable if not superior to VHF stations in quality and in audience reach. Clearly, the UHF Discount no longer serves its intended purpose.

When the Commission implemented the Discount in 1985, it did so on the grounds that “the inherent physical limitations of [UHF television] should be reflected in our national multiple ownership rules.”³⁵ Relative to their VHF counterparts, UHF signals “decreased more rapidly with distance ... , resulting in significantly smaller coverage areas and smaller audience reach.”³⁶ However, following the transition of television signals from analog to digital in 2009, the technical limitations upon which the UHF Discount had been based ceased to exist.³⁷ Indeed, there has been and continues to be unanimity within the Commission that “the UHF discount no longer has a

³⁴ 2017 NPRM ¶ 2.

³⁵ 1985 Amendment, 100 F.C.C.2d at 93 ¶ 43.

³⁶ 2016 Amendment, 31 FCC Rcd. at 10215 ¶ 5.

³⁷ See, e.g., *id.* at 10214 ¶ 3 (“But while UHF channels may have been inferior for purposes of broadcasting in analog, experience since the DTV transition demonstrates that UHF channels are equal, if not superior, to VHF channels for the digital transmission of television signals.”).

sound technical basis following the digital television transition.”³⁸ If the Commission revisits the UHF Discount in this proceeding and maintains the rule in its current form, it will be making a determination wholly unsupported by fact and effectively engaging in arbitrary rulemaking.

Further, eliminating the UHF Discount to reflect the actual audience reach is necessary to further the three public-interest considerations referenced in Section II. Elimination of the Discount will promote competition by assuring that no one owner can actually reach more than 39% of the national audience, thereby protecting the independence of smaller stations, preserving competition, and promoting multiple voices and localism.

Critically, the fact that a station owner may exceed the Cap is not a theoretical or outdated concern. If the UHF discount is applied to the proposed merger between Sinclair Broadcast Group and Tribune Media Company, for example, it would appear on paper to have an audience reach of only 45.2 percent.³⁹ But because UHF stations now equal the reach of VHF stations, the true reach resulting from the combined company would be 72 percent of U.S. television households, and the combined company “would own and operate the largest number of broadcast television stations of

³⁸ Order on Reconsideration, 32 FCC Rcd. 3390, 3395 ¶ 14 (2017); *see also 2016 Amendment*, 31 FCC Rcd. at 10226 ¶ 28 (“The record is absolutely clear: UHF stations are no longer technically inferior in any way to VHF stations.”); *id.* at 10247 (Comm’r Pai, dissenting) (“To be sure, the technical basis for the UHF discount no longer exists.”); *id.* at 10251 (Comm’r O’Rielly, dissenting) (“It is clear that UHF television stations are no longer less desirable or less technology-capable than VHF stations.”).

³⁹ Responses of Sinclair Broadcast Group, Inc. to FCC Request for Information, *In the Matter of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee) Consolidated Applications for Consent to Transfer Control*, Ex. 2, MB Docket No. 17-179 (Oct. 5, 2017). The propriety of this proposed merger has recently be called into question, as the Commission’s Inspector General “is probing whether the agency’s chairman improperly pushed for rule changes that helped clear the way for Sinclair Broadcast Group’s proposed purchase of Tribune Media Co.’s television stations.” Todd Shields, *FCC Watchdog Investigates Chairman’s Role in Easing Way for Sinclair’s Acquisition of Tribune Media*, *Congressman Says*, CHI. TRIB. (Feb. 15, 2018), <http://www.chicagotribune.com/business/ct-biz-fcc-ajit-pai-sinclair-tribune-media-20180215-story.html>.

any station group.”⁴⁰ The true effect of this combination would put a single company well above the statutory 39% Cap.

Eliminating the UHF Discount and enforcing an accurately calculated audience reach also promotes diversity, as there will be opportunities for prospective owners who are female and/or minorities to acquire and retain stations. Indeed, smaller stations that are more likely to be female or minority owned are less likely to be included in acquisitions if there is less consolidation nationally.⁴¹ One recent example involves Gray Television, Inc., which, when it divested itself of six stations in 2014, transferred each of those stations to an ownership team that was comprised of either women or minorities.⁴²

Finally, elimination of the UHF Discount promotes localism by preserving locally owned stations that are more likely to reflect local preferences, interests, and sensitivities. For example, Sinclair Broadcast Group—the largest owner of television stations in the United States—has distributed news stories and features that all of its stations were required to run in their evening or morning newscasts.⁴³ Local preferences could be lost in other contexts like sporting, religious, or scientific programming if, as a result of excessive consolidation, a large owner requires all of its

⁴⁰ *Sinclair and Tribune*, MB Docket 17-179, FED. COMMC’NS COMM’N, <https://www.fcc.gov/transaction/sinclair-tribune> (last visited Feb. 9, 2018).

⁴¹ Cf. Comments of Free Press, *In the Matter of 2010 Quadrennial 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 Nos. 09-182 & 07-294, at 17–23 (filed Dec. 21, 2012) (citing statistics demonstrating that minority ownership of stations is declining due to an increasingly consolidated market, including the fact that “over the past six years there were nearly three minority-owned stations lost for every minority-owned station added”); Kristal Brent Zook, Op-Ed., *Blacks Own Just 10 U.S. Television Stations. Here’s Why*, WASH. POST (Aug. 17, 2015) (reporting on the link between increased consolidation and decreased ownership diversity).

⁴² Press Release, National Hispanic Media Coalition, *FCC Move to Reduce Consolidation, Close Media Ownership Loopholes, Already Increasing Diverse Ownership* (Aug. 28, 2014), <http://www.nhmc.org/fcc-move-reduce-consolidation-close-media-ownership-loopholes-already-increasing-diverse-ownership/>.

⁴³ See Farhi, *supra* note 6.

stations to show particular sporting contests, religious celebrations, or scientific perspectives, regardless of the popularity of those sports, religions, or perspectives in certain areas.

In its *2002 Biennial Regulatory Review*, the Commission sunset the application of the UHF Discount for the stations owned by ABC, CBS, FOX, and NBC, and in doing so suggested that there might exist certain non-technical reasons for maintaining the Discount for owners of certain stations.⁴⁴ To date, however, no such non-technical reasons exist and the UHF discount has only become less justified by technology. It is generally accepted that after the DTV transition, UHF stations are equal, if not superior, to VHF stations, and as noted in the Commission’s 2016 Order, many stations have traded VHF signals for UHF signals.⁴⁵ There is simply no technical justification for the Discount, and no non-technical reasons were identified other than to freeze the rules and allow stations to in fact exceed the 39% audience reach cap.⁴⁶

Finally, the industry cannot credibly claim that eliminating the UHF Discount would unfairly impact its long-term business strategies, given the lack of technological basis for the Discount and the Commission’s long history of calling the Discount into question. Moreover, as of September 2016, only four companies would have exceeded the Cap if the UHF Discount were eliminated—ION Media Networks, Tribune Media Company, Trinity Christian Center, and Univision Communications.⁴⁷ All four entities are large and sophisticated media organizations that were (or should have been) aware of the Commission’s intention to eliminate the Discount. Federal

⁴⁴ *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. at 13846–47 ¶¶ 589–91.

⁴⁵ *2016 Amendment*, 31 FCC Rcd. at 10219 ¶ 14.

⁴⁶ *Id.* at 10224–33 ¶¶ 25–40; *see also* 2017 NPRM ¶ 20 (“[N]o commenter in our prior proceeding presented evidence that the original technical justification for the discount is still valid”).

⁴⁷ *2016 Amendment*, 31 FCC Rcd. at 10234 ¶ 45.

law and the well-established national interests in competition, diversity, and localism appropriately apply a statutory audience cap that sets the parameters for national consolidations. To the extent that companies’ “carefully laid plans for future expansion would be cast into disarray” by elimination of the Discount,⁴⁸ that disarray is of their own making and does not support a technically outdated rule that effectively negates Congress’ determination that a 39% Cap is the maximum for a single owner of television stations. And even if such concerns were valid—they are not—the Commission could implement grandfathering along the lines of what the Commission allowed in its September 6, 2016 Order.^{49, 50}

CONCLUSION

Based on a plain reading of the applicable federal statutes, and in light of the public interests of localism, diversity in broadcasting, and marketplace competition, we encourage the Commission to recognize (1) that it lacks the authority to revise the 39% national audience reach limit established by Congress, and (2) that it can and should exercise its general rulemaking authority to eliminate the UHF Discount so that audience-reach calculations accurately reflect the true reach of each station, whether or not they utilize UHF signals.

⁴⁸ Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc., *In the Matter of Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Dkt. No. 12-236, at 6 (Dec. 16, 2013).

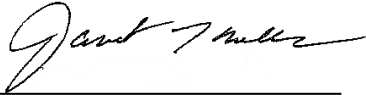
⁴⁹ *2016 Amendment*, 31 FCC Rcd. at 10234 ¶ 47.

⁵⁰ The Court of Appeals for the District of Columbia Circuit currently is reviewing the Commission’s decision to reinstate the UHF Discount. *See Free Press v. FCC*, No. 17-1129 (D.C. Cir. filed May 12, 2017). If the Court finds that the reinstatement order was not valid and upholds the original order eliminating the UHF Discount, the Commission should amend its rules accordingly and remove the Discount consistent with the Court’s decision and with the arguments contained in these Comments. If the Court affirms the reinstatement order, the Commission should conclude in this docket that the Discount should be eliminated, as discussed above.

Respectfully submitted,



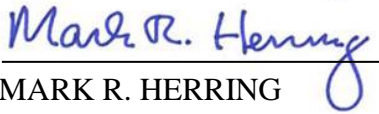
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