Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	))))	MB Docket No. 17-318

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

Miles S. Mason
Jessica T. Nyman
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 663-8000

Counsel for Sinclair Broadcast Group, Inc.

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Summary

Elimination of the national broadcast ownership cap is necessary to level the playing field between broadcasters and other media content providers, such as cable operators, direct-to-home satellite service providers, and Internet content providers—the latter of which do not face FCC restrictions on their national audience reach. In addition, the top four broadcast networks each reach 100% of the country through direct station ownership or affiliations, and provide nationally available news as a result.

The national ownership cap may have served to further the goals of the Communications Act when it was first established decades ago. But that was well before the proliferation of the Internet and nationally available 24/7 local and national news and other video content that is available wherever you are, whenever you want it, whether at home, at the office, or walking down the street. There is simply no longer any justification for the national ownership cap in today's video marketplace.

The benefits of eliminating the national ownership cap overwhelmingly outweigh any speculative or perceived harms. Economies of scale created by eliminating the cap would allow broadcasters to stay competitive with other content distributors by enabling them to purchase better programming at lower prices, which broadcasters in turn would make available for free to the public.

Allowing a national reach that is consistent with the national reach that MVPDs and other content distributors already enjoy would also incentivize broadcasters to develop more of their own original programming to compete with other media outlets and give them the scale needed to viably do so. Notwithstanding the many newcomers to the media landscape that have flourished since adoption of the national cap decades ago, broadcasters still take the lead in

curating and producing the great majority of local programming. Local stations would have no reason not to continue to take seriously their duty to cater to their local viewers' interests notwithstanding the nationwide reach of a station's owner. And in fact, the economies of scale would allow broadcasters to devote even more of their resources to producing better and more responsive local news coverage and public affairs programming

Further, a more national footprint would allow for a better coordinated rollout of ATSC 3.0 by creating a critical mass of households where the technology is available. This would encourage other broadcasters and electronics manufacturers to adopt the technology more quickly, to the benefit of the public.

If the Commission opts to retain a national ownership cap, it should—at a minimum—retain the UHF discount to preserve the status quo because there exists no justification for tightening the national ownership limit. If, however, the Commission decides to eliminate the UHF discount (which would effectively tighten the national ownership cap) or otherwise tighten the national ownership cap, it should grandfather, as of the effective date of such changes, not only existing station groups that currently, or due to pending transactions, would exceed the national ownership cap under the revised rule, but also the current national audience reach for each UHF station, so that its owner is attributed the 50 percent discounted audience reach for that station, until the owner sells the station. Further, grandfathered station combinations subsequently sold or transferred should continue to be entitled to such grandfathering relief.

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On December 18, 2017, the Commission issued a Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding, requesting comments on its rule related to the maximum national audience reach for television broadcast licensees (the "National Cap").[1] In the NPRM, the Commission seeks comment on, among other things, (i) whether it has authority to modify or eliminate the National Cap, (ii) whether to modify or eliminate the current National Cap, (iii) how parties should determine compliance with the National Cap, including whether the FCC should eliminate the UHF discount, and (iv) how the Commission should grandfather television owners with respect to any changes it might make to the National Cap and the application of UHF discount.[2] Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, hereby submits these Comments to the NPRM.

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[1] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, MB Docket No. 17-318, FCC (rel. Dec. 18, 2017; *see also* 83 Fed. Reg. 3661 (Jan. 26, 2018).

[2] *Id.* ¶¶ 2, 20.

I. BACKGROUND

The first iteration of the current "national audience reach cap" was adopted in 1985, and was set at 25 percent of U.S. television households.[3] Even then, "national audience reach" was defined in part by the UHF discount, which attributes to stations broadcasting in the UHF spectrum (i.e., over-the-air channels 14 and above) only 50 percent of the television households in their markets for purposes of calculating an entity's audience reach.[4] In 1996, Congress directed the FCC to raise the national audience reach limit from 25 percent to 35 percent, including the use of the UHF discount.[5]

The FCC subsequently reaffirmed the 35 percent limit and the UHF discount in 2000, when it concluded the 1998 review of its ownership rules.[6] Shortly thereafter, in its 2002 biennial ownership rule review, the FCC determined that a National Cap was no longer necessary to promote competition or diversity. Nevertheless, the FCC retained the National Cap after concluding that it remained relevant to promoting localism and, in so doing, again upheld the continued use of the UHF discount—both for technical reasons[7] and to continue to support

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[3] *Amendment of Section 73.3555 (Formerly Sections 73.35, 73.240 & 73.636) of the Commission's Rules Relating to Multiple Ownership of Am, Fm & Television Broad. Stations*, 100 FCC2d 74, 90–91 (1985) ("*1985 Order*").

[4] *Id.* at 93-94.

[5] *See* Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996) ("*1996 Act*"); *see also Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations),* Order, 11 FCC Rcd 12374 (1996).

[6] *See 1998 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*, 15 FCC Rcd 11058, ¶ 25 (rel. Jun. 20, 2000) ("*1998 Review*").

[7] *Id.* ¶ 588.

the ability of non-network broadcast ownership groups to compete with stations owned and operated by the major broadcast networks (i.e., ABC, CBS, NBC, and FOX).[8]

Since that time, the FCC has examined whether to retain the UHF discount but it has not undertaken any review of the National Cap itself—even as the media landscape has changed dramatically to the point where the National Cap has no justification or benefits. Several station groups would currently exceed the 39 percent national ownership limit absent the UHF discount, yet there has been no evidence in any market of a reduction in localism, competition or diversity compared to similar markets in which those station groups do not own any stations.

II. DISCUSSION

A. THE FCC HAS THE AUTHORITY TO CHANGE THE NATIONAL CAP

The reevaluation and elimination of the National Cap is well within the FCC's authority. The Communications Act grants the Commission broad authority to adopt, revise, or eliminate rules necessary to carry out the provisions of the Communications Act.[9] Title III of the Act expressly authorizes the FCC to make rules and regulations "as public convenience, interest, or necessity requires,"[10] and courts have repeatedly upheld the FCC's authority to adopt and revise its ownership rules on that basis.[11] And as is particularly relevant in this proceeding, courts have

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[8] *Id.* ¶ 590.

[9] 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, as may be necessary in the execution of its functions.").

[10] 47 U.S.C. § 303(r) ("[T]he Commission from time to time, as public convenience, interest, or necessity requires, shall," *inter alia*, "[m]ake such rules and regulations … not inconsistent with law, as may be necessary to carry out the provisions of this chapter").

[11] *See, e.g., FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978) (upholding the FCC's cross-ownership rule pursuant to Section 303(r)'s grant of authority to "issue regulations codifying its view of (Section 303's) public-interest licensing standard"); *United States v. Storer Broad. Co.*, 351 U.S. 192, 203 (1956) ("the Multiple Ownership Rules, as adopted, are reconcilable with the Communications Act as a whole"); *Nat'l Broad. Co. v. United*

held that "[c]hanges in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so[.]"[12]

The Consolidated Appropriations Act of 2004 ("CAA"), by which Congress directed the FCC to set the national audience reach limit to 39 percent, does not prohibit the Commission from modifying or eliminating the National Cap.[13] As the Commission already concluded and aptly explained in 2016:

> no statute bars the Commission from revisiting the cap or the UHF discount contained therein in a rulemaking proceeding so long as such a review is conducted separately from a quadrennial review of the broadcast ownership rules pursuant to Section 202(h) of the 1996 Act. The CAA simply directed the Commission to revise its rules to reflect a 39 percent national audience reach cap and removed the requirement to review the national ownership cap from the Commission's quadrennial review requirement. It did not impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule. Thus, the Commission retains authority under the Communications Act to review any aspect of the national audience reach cap; it simply is not required to do so as part of the quadrennial review.[14]

In other words, the CAA itself neither required a national cap nor set a 39 percent national ownership limit; rather, it merely directed the FCC to update the limit at that time in its

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States, 319 U.S. 190, 218 (1943) (finding the FCC's chain broadcasting ownership rules to be a "particularization of the Commission's conception of the 'public interest' sought to be safeguarded by Congress in enacting the Communications Act of 1934").

[12] *See, e.g.*, *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995), citing *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 816 (1992) ("[W]here the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach."); *Geller v. F.C.C.*, 610 F.2d 973, 979 (D.C. Cir. 1979) ("[An] agency cannot sidestep a reexamination of particular regulations when ... circumstances make that course imperative.").

[13] Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004).

[14] *Amendment of Section 73.3555(e) of the Commission's Rules*, Nat'l Television Multiple Ownership Rule, 31 FCC Rcd 10213, 10222-23 (2016) ("*UHF Discount Elimination Order*") (footnotes omitted), *recon. in part,* Amendment of Section 73.3555(e) of the Commission's Rules, Nat'l Television Multiple Ownership Rule, 32 FCC Rcd 3390 (2017) (leaving undisturbed the Commission's findings on its authority to revisit the National Cap).

National Cap rule to 39 percent. [15] The FCC remains free to decide "the scope of its authority to modify or eliminate the UHF discount" outside of the quadrennial review process.[16]

A review of the circumstances leading up to the current 39 percent limit reveal the limited nature of Section 629's directive to the Commission. Prior to the CAA, Congress had directed the Commission to raise the National Cap from 25 percent to 35 percent, which the Commission did. The Commission subsequently took action in 2003 to raise the cap from 35 percent to 45 percent. At that time, Congress–fully aware of the Commission's actions—did not assert that the Commission lacked authority to raise the National Cap. Had Congress believed such a limit on the Commission's authority was necessary, it "could have foreclosed the Commission from ever revising the national audience reach cap or the UHF discount by making the national cap and the UHF discount a statutory restriction or by otherwise withdrawing Commission authority to modify the cap or the UHF discount." [17] Instead, Congress opted for a more limited measure that reduced the cap at that time from 45 percent to 39 percent.

Section 629's inherently limited nature evinces Congress's choice to preserve the Commission's authority to reevaluate its ownership rules, including its national ownership rules. To read into the CAA a reversal of the Commission's broad Section 303(r) authority would be to disregard established canons of statutory authority.[18] The Commission therefore has authority to

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[15] CAA, Pub. L. No. 108-199, § 629; *see also 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, Report and Order, 18 FCC Rcd 13620, ¶ 580 (2003) ("*2002 Review*").

[16] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 397 (2004).

[17] *UHF Discount Elimination Order*, 31 FCC Rcd at 10224.

[18] *See Chevron U.S.A. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

revisit and eliminate the National Cap if it determines that doing so would serve the "public convenience, interest, or necessity."[19]

The Commission not only has authority to revisit the National Cap, but an obligation to do so. As detailed more in the sections that follow, dramatic changes to the video marketplace have obviated the Commission's previous justifications for artificial restrictions on national broadcast ownership. Rather than serve the public interest, today the National Cap puts broadcasters at a severe and unwarranted competitive disadvantage relative to other content distributors.

B. THE FCC SHOULD ELIMINATE THE NATIONAL CAP ENTIRELY

The FCC should eliminate the National Cap entirely, removing all FCC restrictions on the maximum national audience reach of broadcast ownership groups to allow such entities to compete on equal footing with other media content providers, such as cable operators, satellite providers, and Internet content providers—all of which are unimpeded by similar restrictions. The National Cap is no longer justified to protect localism, competition or diversity, and the tangible benefits of eliminating the National Cap far exceed the speculative harms.

1. The current media landscape demonstrates that there is no need for a National Cap.

Although the original justification for a national ownership cap was to protect viewpoints and competition within the industry, the state of the market today makes it clear that such an ownership restriction is completely unnecessary. Consumers in the modern media marketplace receive video programming from a wide range of media content providers, and there is no shortage of viewpoints, competition, and localism—however defined. Thus, it is simply absurd

[19] 47 U.S.C. § 303(r).

in this day and age to continue to believe that a national television ownership cap on broadcasters is necessary for any purpose. In 2002, for example, when the Commission was last reviewing these rules, most viewers nationwide were still watching broadcast programming, direct broadcast satellite systems had not yet emerged as a serious competitor to cable, cable interconnects did not yet exist, and the smart TV and mobile devices viewers now use to watch online video programming had not yet been invented. More than ten years later, broadcast TV's all day audience share dropped from 53 percent in 2002 to 35 percent in 2015 (in contrast to cable's audience share, which has grown to more than 61 percent over the last decade), and broadcast is steadily losing advertising revenues to cable and ad-supported online video streaming.[20]

Pervasive ownership and reach of other media categories can be seen everywhere: DirecTV and DISH provide direct-to-home video satellite services to every market in the United States; the ten largest MPVDs control access to over 95% of subscribers nationwide, with the four largest MVPDs (AT&T/DirecTV, Comcast, Charter/Time Warner, and DISH) controlling access to over 85% of all subscribers nationwide.[21] Virtually all homes with cable or satellite access are served by CNN, FOX News, MSNBC, ESPN and numerous other national program networks. The Wall Street Journal, Washington Post, and New York Times (and most other local and regional newspapers) are available via the Internet throughout the nation, not in only

[20] Compare *Competition in the Video Programming Distribution Market*, Ninth Report, 17 FCC Rcd 26901 (2002) with *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568 (2017) ("FCC 18th Video Competition Report), ¶ 122 ("National advertisers may choose to advertise on broadcast stations but are more likely to utilize arrangements with broadcast networks, cable networks, television syndicators, or DBS.").

[21] *See* Statista, Pay TV providers ranked by the number of subscribers in the United States as of September 2017 (in millions), https://www.statista.com/statistics/251793/pay-tv-providers-with-the-largest-number-of-subscribers-in-the-us/ (last visited Mar. 16, 2018).

markets that reach 39 percent of U.S. households. And YouTube, Netflix, Amazon Prime and Hulu are household names in the Video-on-Demand Internet market and are available anywhere in the country with a broadband connection.

Independent broadcast station groups must compete against huge media conglomerates—companies like Disney, Comcast, Fox, Time Warner, and Viacom—not only for audience and advertising dollars, but also for a share of the licensing fees paid by MVPDs for programming. These media giants have much greater resources to buy high quality programming, especially highly valued sports programming, for which they can easily outbid not just local broadcast stations but even the major broadcast networks. They also have far more bargaining leverage in negotiating for programming fees given their overall size and wide range of programming. As a result, the cable networks owned by these large media conglomerates, especially their growing number of Regional Sports Networks, continue to command roughly 85% of the total programming fees paid by MVPDs, as compared to less than 15% for all 1400 local broadcast stations in the country.[22] Just this past week, for the first time in 36 years, the NCAA March Madness Selection Show was not available on free network television, but instead moved to cable channel TBS, and the Final Four and Championship games will also only be available on cable this year, as more and more sports and other highly desired programming has moved or is moving to cable and the Internet (Netflix, Amazon Prime, You Tube, and others).

Consolidation is therefore necessary in order for local broadcast stations to compete for programming with the giant media conglomerates that control the major cable networks and with

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[22] FCC 18th Video Competition Report; *see also* SNL Kagan, *Broadcast Retransmission Fees vs. Basic Cable and RSN Programming Fees* (June 2015), *available at* http://www.nab.org/documents/newsRoom/pdfs/070915_Kagan_retrans_cable_RSN_programming_costs.pdf.

the online video streaming services mentioned above, all of which have market capitalizations that are much larger than those of any independent broadcast group, and most of which have multiple other sources of revenue.[23]

In fact, television broadcasters are the only entities in the media industry subject to an express national ownership restriction. While the cable industry was at one time subject to a 30 percent ownership cap, the D.C. Circuit vacated that limit in 2009 finding that it was "arbitrary and capricious."[24] As the D.C. Circuit noted, "the dynamic nature of the communications marketplace" and the large number of competitors precluded the Commission from finding that market ownership in excess of 30 percent posed a danger to competition or diversity.[25]

Given today's vibrant media marketplace, retention of a national audience cap that applies to television broadcasters and not to their media competitors would be the epitome of arbitrary and capricious decision-making. The ownership restriction on television broadcasters impairs the ability of broadcasters to achieve the economies of scale to compete effectively with other media content providers. And it will only become increasingly difficult for broadcasters to serve their local communities successfully, without a level playing field with competitors. Accordingly, the public interest will be served best by eliminating the National Cap.

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[23] Based on market cap data available on Yahoo Finance on March 14, 2018, the market caps of the some of these competitors range from a low of $19 billion for DISH, to a high of $227 billion for AT&T/DirecTV. A few other examples are Comcast at $167 billion, Disney at $156 billion, Netflix at $149 billion, and Charter at $93 billion, to name a few. By contrast, the market cap of some of the largest public television station owners are $3.4 billion (Sinclair), $3.2 billion (Nexstar), and $3.6 billion (Tribune).

[24] *Comcast Corp. v. FCC*, 579 F.3d 1, 3 (D.C. Cir. 2009).

[25] *Id.* at 8.

2. **The National Cap is no longer justified to protect localism.**

Having already decided that the National Cap is not necessary to protect competition or diversity, the FCC retained the National Cap in its 2002 Review solely to protect localism.[26] As the FCC then explained, it measured "localism" as (i) the selection of programming responsive to local needs and interests and (ii) local news quality and quantity. At that time, the Commission retained the National Cap solely to protect the affiliates from the networks, an action that it saw as preserving localism.

Eliminating the National Cap will not harm localism because almost all programming decisions, even for larger station groups, are still made at the local level, responding to local needs and interests. The efficiencies of eliminating the National Cap will allow stations to spend more resources on local investigative reporting, increasing local news quality and quantity. By example, Sinclair employs almost 4,000 station-level employees to independently produce local news across numerous markets and employs less than 15 corporate-level news employees at its corporate office. In other words, more than 99% of Sinclair's news employees providing services to its local newscasts are in fact at its local stations. Further, though some news programming for these stations is generated outside the market, this news programming—which generally consists of nothing more than national and international news coverage that local markets do not have the resources to produce on their own—in total makes up only approximately 2.5% of the total average news minutes per week on its stations. The remaining 97.5% of the news program time is devoted to local news, developed and overseen by local station staff.

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[26] *2002 Review* ¶ 578 ("We have concluded that an audience reach cap of 35% is not necessary to promote diversity or competition in any relevant market.").

Beyond localism, the justifications for the National Cap of competition and diversity have been expressly disavowed by the Commission, and the market place has not changed in any way that would warrant changing those conclusions.[27] The National Cap is simply not needed or constitutionally sound under any public interest justification (e.g., localism, diversity, or competition) when there are so many alternative forms of media available. The Supreme Court's previous willingness to allow ownership restrictions in the broadcast marketplace was based on the now obsolete premise that scarcity of such opportunities will lead to a shortage of information being presented to the public.[28] Such fears are clearly unfounded in light of the amount of information available from a variety of sources today.

3. The benefits of eliminating the National Cap exceed any speculative or perceived benefits of tightening or retaining the National Cap.

The National Cap hinders innovation and competition. A national footprint is critical for broadcast television to provide high quality programming that is competitive with video content available on cable, satellite, and digital providers. The greater reach will allow broadcasters to increase their investments in original programming and in licensing of higher-quality content. Economies of scale will facilitate the consolidation of newsgathering infrastructure. Lower costs will make it easier to expand and improve local news programming. Elimination of the National Cap will also have a positive impact on local content available free over the air. If broadcast companies, with their distinctly local focus and presence, are going to be able to continue to serve their communities, they will need to grow in size and scale to have the resources to invest

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[27] *Id.*

[28] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 400-01 (1969).

in local news and sports (among other programming) and to advance and leverage technological innovation.

a. A greater national reach will permit broadcasters to compete for better programming. Economies of scale resulting from a more national footprint make specialized programming possible that would otherwise not be financially feasible. The elimination of the National Cap will allow broadcasters to compete more effectively with cable networks and online streaming services —which already reach 100% of all households nationwide—for both entertainment and sports programming. It will make it more cost-effective for broadcasters to produce their own programming and will make their stations a more attractive venue for producers of syndicated programming and for sports leagues seeking to reach viewers nationwide. It is clear that broadcast stations are losing the competition for viewers to both the cable networks and online video services. Because of their national reach, cable networks and online video services have the audience and resources to consistently outbid local broadcast stations, and even the major broadcast networks, for high quality entertainment and live sports programming. The quality of their entertainment programming is illustrated by the extent to which cable and online streaming have dominated the Emmy awards the last few years, with hugely popular shows like *Game of Thrones.*[29] The ability of the cable networks, including the Regional Sports Networks, to outbid broadcasters for live sports programming is demonstrated by the fact that nearly 90% of all live sports programming is now available on cable, including most of the major professional sports leagues and the football and basketball games of most

[29] Sarah Perez, *Netflix and HBO Cleaned up at the Emmy's* (Sept. 18, 2017), https://techcrunch.com/2017/09/18/netflix-and-hbo-cleaned-up-at-last-nights-primetime-emmys/; Ellen Killoran, *Netflix Emmy Nominations Break Record, But HBO Still Dominates* (July 16, 2015), https://www.forbes.com/sites/ellenkilloran/2015/07/16/netflix-emmy-nominations-break-record-but-hbo-still- dominates/#cc1ffd72efeb.

major collegiate conferences.[30] In many cities with Major League Baseball teams, Regional Sports Networks that carry their regular season games regularly have higher ratings than any prime time shows on the Big-Four broadcast networks.[31]

By expanding nationwide reach, broadcasters can more cost-effectively purchase higher quality and unique programming that should make them more competitive with their broadcast, cable and digital rivals. The larger footprint also makes broadcasters more attractive to programmers and high-quality syndicators. The revenue and cost synergies from the elimination of the National Cap will allow broadcasters to compete financially for more highly rated shows, possibly allowing such shows to remain on free over-the-air broadcast television, rather than migrating to cable, OTT, or other pay TV platforms.

Further, by making additional programming options feasible, broadcasters could better compete with MVPDs and OTT providers by providing additional programming on their digital channels—essentially offering "skinny" bundles of a few channels or a bundle of channels aimed at a particular demographic. Through multicasting, each primary channel can support several digital sub-channels and will be able to support even more after the launch of ATSC 3.0. For example, a single station could broadcast a collection of sub-channels aimed at a specific demographic that might feature channels focused on sports, extreme sports, action movies,

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[30] *See* "No Days Off! Celebrating the Everyday Communal Experience of Sports," prepared by the Video Advertising Bureau, at slide 19 (2017), *available at* http://www.thevab.com/wp-content/uploads/2017/05/No-Days-Off-Sports- Report-Final.pdf (showing 86% of live sporting events in 2016 were on national cable television and 14% were shown on broadcast, and citing to a Nielsen NPower report from Jan 1, 2016 – Dec. 31, 2016 to support the data).

[31] Maury Brown, *Here are the 2016 MLB Prime Time Television Ratings for Each Team* (Sept. 28, 2016), https://www.forbes.com/sites/maurybrown/2016/09/28/here-are-the-2016-mlb-prime-time-television-ratings-for- each-team/#6f6dce974ce9.

comedy, and cars. And unlike a cable package, these skinny bundles could be available for free over the air.

b. A greater national reach will permit broadcasters to produce more of their own programming. By expanding its nationwide reach, broadcasters can also more cost-effectively produce more original content. Having a national footprint would allow broadcasters to expand congruous stations (e.g., stations like CWs and MYNetworkTVs that have similar programming needs across multiple markets), to reach a critical mass that can significantly reduce the financial risk of producing original content. Congruous stations are more attractive to advertisers seeking national or near-national penetration of their commercials. Also, although broadcasters may be able to produce attractive programming for less than the cost of most syndicated programming, such an investment is not profitable without a more nationwide reach. Besides bringing new original content to viewers—for free on broadcast television, unlike cable or many OTT services—the ability to create original programming or better bargain for syndicated programming will increase competition for show ideas and related talent (e.g., scriptwriters, producers, technical personnel). By giving a broadcaster the national exposure necessary to financially justify the risk inherent in original content production, broadcasters can compete with the networks and OTT services, which will lead to even more programming options for viewers.

The ability to produce original programing also creates benefits with respect to the ability to reduce the cost of licensing syndicated programming. The potential for broadcasters to produce more of their own programming, instead of buying syndicated content, is an equalizing force that can help keep licensing fees low, which would benefit the public by providing new and more diverse programming options.

c. A greater national reach will permit broadcasters to better compete for advertising. Increasing their national reach will allow broadcasters to compete more effectively than they now can with the broadcast and cable networks in the $50 billion market for national advertisers who demand nationwide reach. In June 2014, Sinclair launched an unwired network,[32] called the Sinclair Audience Network ("SAN"), to compete with broadcast and cable networks for national advertising revenue. National advertising represents 64% of all TV advertising revenue. The SAN allows national advertisers to purchase spots across all of Sinclair's stations nationwide. Unlike cable or national broadcast network advertising, the SAN currently can only air ads across approximately 40% of households. Increasing nationwide reach, would therefore make the SAN a much more attractive alternative for national advertisers.

By increasing their national footprint, broadcasters will be better situated to sell advertising to national advertisers who are seeking a national platform. This will create an additional competitor in the network advertising space as well as benefit the advertisers and eventually the consumers of those advertisers' products.

d. A greater national reach will permit broadcasters to accelerate the roll out of ATSC 3.0. By giving broadcasters the potential for a larger spectrum footprint, the elimination of the National Cap will also accelerate the rollout of ATSC 3.0, which will help enable broadcasters to compete more directly with cable companies and digital providers. ATSC 3.0 will enable local broadcast stations to transmit their signals directly to viewers on their mobile devices, thereby reducing their need to subscribe to increasingly expensive cable and broadcast

[32] In an "unwired network," an operator aggregates spot advertising time on various television stations across the country and sells that time to national advertisers, thereby competing with national cable providers and broadcast networks.

satellite services. It will also enable broadcast stations to offer the type of targeted advertising now available only over cable and digital media.

The Commission's rule authorizing ATSC 3.0 for consumer use emphasizes that it intends to "facilitate private sector innovation and promote American leadership in the global broadcast industry."[33] Eliminating the National Cap will help achieve this goal by creating a critical mass of households where the technology is available, thereby encouraging other broadcasters and electronics manufacturers to adopt the technology more quickly.

Commitment to ATSC 3.0 from broadcasters with a broader reach will also incentivize manufacturers to develop products incorporating this technology. Consumers will require devices equipped with ATSC 3.0 tuners before they can take advantage of its enhanced features, but when asked by Consumer Reports, several television manufacturers refused to commit to when they would begin offering these devices.[34] By enabling more broadcasters to operate on closer to a national basis in the ATSC 3.0 standard, more manufacturers will be motivated to produce compatible products.

Eliminating the National Cap will also help facilitate the development of ATSC 3.0 to smaller broadcasters. BIA Kelsey estimates that the cost of building out the technology infrastructure (estimated to be $300,000 to $600,000 per station) will not be financially justifiable for small stations with annual revenues of less than $2 million.[35] The elimination of

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[33] *Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Final Rule, 83 Fed. Reg. 4998 (February 2, 2018), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-02-02/pdf/2018-01473.pdf.

[34] James K. Willcox, *Free Over-the-Air TV Is Going to Get Better*, Consumer Reports (May 19, 2017), https://www.consumerreports.org/tv-service/free-over-the-air-tv-is-going-to-get-better/.

[35] Tom Buono, Mark Fratrik, and Mark O'Brien, BIA Kelsey, *The Business Case for ATSC 3.0*, at 12 (Feb. 2017), available at https://shop.biakelsey.com/product/business-case-atsc-3-0.

the National Cap will help bring ATSC 3.0 to smaller stations in at least two ways: (1) larger broadcasters can leverage economies of scale for the small stations it owns to share the costs of infrastructure build-out across all of its stations, and (2) nation-wide implementation of the technology will accelerate its maturation, thereby likely bringing down the equipment costs to a price point affordable by smaller broadcasters.

C. IF THE FCC DECIDES TO RETAIN THE NATIONAL CAP, IT SHOULD ALSO RETAIN THE UHF DISCOUNT

The UHF discount was part of the Commission's original "national audience reach" definition in 1985, and has been an integral part of the National Cap ever since.[36] Eliminating the UHF discount, without significantly increasing the National Cap would create disruption to the current state of the industry and make it more difficult for broadcasters to compete in the current media marketplace.

As a threshold matter, if the FCC decides to retain the National Cap following a determination that the CAA limits its authority to change the National Cap (reversing its previous determination), it cannot eliminate the UHF discount because the two are inextricably linked. In enacting the CAA, Congress specifically used the term "national audience reach," which is defined under the Commission's rules to include the UHF discount.[37] The legislative history of the CAA indicates that the 39 percent limit, as calculated with the UHF discount, was selected primarily to avoid the requirement of having certain parties divest existing broadcast interests.[38] Also, both the FCC and the court in *Prometheus* have acknowledged that the UHF

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[36] *See 1985 Order*, 100 FCC2d at 93-94.

[37] *See* 47 C.F.R. § 73.3555(e)(2); *see also Prometheus*, 373 F.3dat 396 ("We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning.")

[38] *See* 150 Cong. Rec. Sl8 (daily ed. Jan.20, 2004) (statement of Sen. Kohl); 150 Cong. Rec. S78 (daily ed. Jan. 21, 2004) (statement of Sen. Byrd); 150 Cong. Rec. S83 (daily ed. Jan. 21, 2004)

discount and the National Cap are interrelated and that a change to the UHF discount would effectively alter the National Cap.[39]

Further, parties that have argued in favor of eliminating the UHF discount work from the flawed premise that the UHF Discount is "concededly obsolete," primarily relying on an inaccurate technical argument that VHF is no longer superior to UHF. Their focus principally on one misapplied technical basis for the UHF discount—and contention that the change to digital eliminated all material differences between UHF and VHF—ignores the technical and operational realities of the two standards and the Commission's policy reasons for the discount, which have not been eliminated by the transition to digital TV.[40]

(statement of Sen. Durbin); 150 Cong. Rec. S86 (daily ed. Jan. 21, 2004) (statement of Sen. McCain).

[39] *See Prometheus*, 373 F.3d at 396 ("Furthermore, because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit, we cannot entertain challenges to the Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine the Congress's specification of a precise 39% cap."); *2006 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. 06-121, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834, ¶ 34 (2006) ("*2006 Review*") (noting that setting the national ownership cap at 39% "also addressed the Commission's UHF discount rule"); *Oversight of the Federal Communications Commission*, Statement of Commissioner Pai before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce 10 (Dec. 12, 2013) ("Pai Comments") ("[T]he UHF discount [is a] portion of our national television ownership rule").

[40] While the transition from the analog broadcast standard to digital did not eliminate the technical differences resulting in the inferiority of UHF signals as compared to VHF signals, in reality, the UHF discount was not an inherently technical rule, but rather a policy decision to attribute half of the population of a market to each UHF station while attributing 100% of the market population to each VHF station. The audience reach attributed to a VHF station does not generally reflect the actual percentage of the population the VHF station covers. The Commission's rule attributes to a VHF station 100% of the population in a station's "Designated Market Area" (as determined by a TV ratings agency), whether a station covers the entire market or only a fraction of it. *See* 47 C.F.R. §73.3555(e)(2)(i).

As the Commission has acknowledged, "VHF channels are likely always to remain somewhat superior to UHF for television broadcasting due to fundamental laws of physics over which we have no control."[41] The transition to digital did not change the laws of physics. UHF signals and VHF signals continue to have the same propagation characteristics as they did before: UHF stations in general still have smaller service areas than VHF stations; unlike VHF signals, UHF signals are line of sight and stop at the horizon; and UHF stations need far more power to reach the same distance.[42] So even when it is theoretically possible for a UHF station to match a VHF station's service area, doing so can be prohibited by costs or the operating parameters of its license.

Although the Commission order that initially eliminated the UHF discount noted limitations VHF stations may face following the digital transition, it never explained how the transition eliminated the "inherent physical limitations" of UHF. Instead, it skirted the required analysis by simply citing comments that incorrectly claimed, without support, that "the disparity that UHF stations once faced has been eliminated."[43]

In any event, the alleged inapplicability of the technical justification for the discount—which had been touted as the main basis for elimination of the UHF discount—was fully known to Congress when it passed the CAA in 2004.[44] Yet even in the face of the approaching digital

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[41] *Improvements to UHF Television Reception*, 90 FCC2d 1121, 1124 (1982); *1985 Order*, 100 FCC2d at 93-94 (citing Comparability for UHF Television: Final Report, September 1980 at 2) ("Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF.").

[42] *See* "The UHF discount concept and TASO method" white paper prepared by Sid Shumate, Principal, Givens & Bell, Inc., attached as Exhibit A hereto.

[43] *See UHF Discount Elimination Order*, 31 FCC Rcd at 10225 (citing Comments of Free Press, at 3, CCA Comments at 2, WGAW Comments at 3).

[44] *See 2002 Review* ¶ 591; *1998 Review* ¶ 38.

transition soft deadline (at that time set for December 31, 2006), Congress made no effort to carve out the Commission's authority over the UHF discount as separate from its authority over the National Cap.

Additionally, the focus on whether UHF stations are no longer at a technical disadvantage to VHF stations misses the mark and is too narrow an inquiry. The rule was designed and has survived over the years not only for technical reasons, but also because the FCC has sought to ensure that non-network broadcast ownership groups could compete with those stations owned and operated by the major broadcast networks, whose stations dominate ratings in almost every market, regardless of whether they operate digitally in the VHF or UHF band, and have historically had a practical advantage over other stations as a result of decades of viewing patterns. [45]

D. IF THE FCC TIGHTENS THE NATIONAL CAP, PENDING TRANSACTIONS AND EXISTING OWNERSHIP SHOULD BE GRANDFATHERED

If the UHF discount is eliminated or the National Cap is otherwise tightened, any combination in existence or pending as of the date such order becomes effective should be grandfathered. Failure to grandfather FCC licensees who currently do not exceed the National Cap and are in the process of or considering acquiring additional stations would be unfair as it would disrupt the settled business expectations and plans of such owners and investors, all of whom have acted in reliance on the rules at the time they took action (and still in effect now).[46]

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[45] *2002 Review* ¶ 578 ("[A] national cap at some level is needed to promote localism by preserving the balance of power between networks and affiliates.").

[46] *Exclusive Service Contracts for Provision of Video Services*, 22 FCC Rcd 20235, ¶ 56 ("[T]he extent to which the regulation has interfered with distinct investment-backed expectations" is a factor in determining whether the government has effected a regulatory taking) (*citing Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986)).

It ignores the business reality that such parties developed business plans to acquire additional stations (including raising money to fund such acquisitions and incurring associated costs) based on rules adopted before they made such decisions.

Thus, upon adoption of any changes to the rule that may eliminate the UHF discount or otherwise effectively tighten the national ownership limit, the national audience reach for each UHF station, either owned or subject to a pending application for acquisition, should be grandfathered and attributed the audience reach as of the date the station was acquired, or if the acquisition is pending, the day prior to the effective date of the new rules, and its owner should be attributed the 50 percent discounted audience reach for that station, for purposes of calculating compliance with the national ownership cap, until the owner sells the station

In addition, grandfathered combinations that exceed the 39 percent national ownership limit should retain their grandfathered status where they are subsequently sold or transferred (whether by assignment or transfer of control) in a transaction that would not otherwise increase the assignee's/transferee's national reach. Such grandfathering would have no detrimental impact on localism, competition or diversity, because it would simply maintain the status quo.

III. CONCLUSION

For the aforementioned reasons, Sinclair urges the Commission to eliminate the National Cap. In the event the Commission retains a National Cap, Sinclair requests that the Commission do so in a manner consistent with these Comments.

Respectfully submitted,

/s/ *Miles S. Mason*

Miles S. Mason
Jessica T. Nyman
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 663-8000

Counsel for Sinclair Broadcast Group, Inc.

March 19, 2018

EXHIBIT A

The UHF Discount Today

Sid Shumate
Life Member, IEEE; Senior Member, SBE
Principal, Givens & Bell, Inc.
27 December, 2017

BACKGROUND

The national television ownership rule prohibits a single entity from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the United States. “Reach” is defined as the number of television households in the television Designated Market Area (DMA) to which each owned station is assigned. No market is counted more than once, even if a station owner holds more than one station in the market. In determining compliance with the 39 percent national audience reach cap, stations broadcasting in the VHF spectrum have been attributed with all television households in their DMAs, while UHF stations have been attributed with only 50 percent of the households in their DMAs (i.e., the “UHF discount”), in recognition of technical limitations that restricted the audience reach of analog UHF stations.

While there exists contention regarding the nature of this “UHF discount”, the facts that underlie the reasoning still exist. Given the FCC’s assumptions with respect to the nature of service area (coverage), how that is determined and is used to determine “reach”, VHF service area (coverage) can be shown to extend the “reach” versus UHF. Understanding the facts, assumptions and techniques used by the FCC provides a firm technical argument to maintain the “UHF discount”, and contrary to a popular misconception, the change from analog to digital transmission did not eliminate the inferiority of UHF stations versus VHF stations with the application of the same criteria.

SUMMARY

The FCC's current technical rules, and the assumptions that underlie the allocations of channels on a national basis and the coverage afforded such allocations, clearly identify an advantage in coverage for VHF stations. It is not possible to arbitrarily avoid that fact unless one wishes to argue as well that the underlying 'science' employed by the FCC to define coverage (service area) is flawed. Without a review of all the facts, without a reapplication of 'modern science' as it pertains to the notions of "reach", facts are facts. Current rules that attribute to the FCC's understanding of "reach" clearly favor VHF station allocations of 'coverage' (service area).

DISCUSSION

In the recent discussions as to whether or not the UHF discount should be retained, some have argued that the UHF discount was rendered technically outdated and scientifically obsolete by the digital transition. Such arguments bear little relevance when the facts are presented and understood.

It is quite improper to categorically deny that VHF and UHF spectrum bands have different properties. The determination as to the efficacy of using one or the other spectrum band is highly dependent on the specifics of a desired use case and link budgets allowed. Isolated facts can be used to argue just about any case one wants. All of the facts provide an encompassing and different story.

Free Space Propagation

It is quite easy to understand that the Free Space Propagation Loss (FSPL) of VHF, both Low-VHF and High-VHF, is significantly lower than that of UHF and provides better propagation efficiency. One can truly say this is an advantage for all VHF Channel allocations. Let me work through a few examples.

$$FSPL = 20\, log_{10}(d) + 20\, log_{10}(f) + 20 log_{10}\left(\frac{4\pi}{c}\right) - G_{Tx} - G_{Rx}$$

Where:

FSPL = Free Space Path Loss

d = Distance between the antennas.

f = Frequency

G (Tx) = The Gain of the Transmitting Antenna.

G (Rx) = The Gain of the Receiving Antenna.

C = Speed of light in vacuum (Meters per Second)

If we derive a few representative FSPL results at a Distance (d) of 40 miles we get the following:

Low-VHF Channel 2 = 103.7dB

Low-VHF Channel 6 = 107.2dB

High-VHF Channel 7 = 113.6dB

High-VHF Channel 13 = 115.2dB

UHF Channel 14 = 122.1dB

UHF Channel 36 = 124.2dB

To put this into perspective, and state the results another way. The FSPL difference between Channel 36 and Channel 2 in this example is 20.5dB, a factor of more than 100 to 1! Channel 36, for a distance between the transmit and the receive antenna of 40 miles, must operate at a power level 100 times that of Channel 2.

Let's take a look at the science behind the UHF discount and compare it to TASO (Television Allocations Study Organization).

The Dipole Factor

One of the elements considered in the UHF discount is the scientific principle of the Dipole Factor. The size of the resonant antenna elements, of the transmitting antenna that creates the transmitted radio frequency (RF) field, and of the receive antennas that pick up the field, are determined by the length of the radio wave. This principle is as valid and current today as it was a century ago and the beginnings of broadcasting.

The service area of a DTV station[1] is the geographic area within the station's noise-limited F (50,90) contour where its signal strength is predicted to exceed the noise-limited service level. The current application of this principle by the FCC for DTV is found in OET 69, Table 2 [2], where we find that the Field Strength argued by the FCC for defining DTV service for half (50%) of locations, for 90% of the time, are given as:

- 28 dBu for Low-VHF Channels 2 - 6
- 36 dBu for High-VHF channels 7 - 13
- 41 dBu minus 20log[615/(channel mid-frequency in MHz)] for UHF channels 14 to 69

OET 69 Figure 2 goes back to the time there were 68 TV channels, from Channel 2 to 69, and has been updated for digital reception.

Calculating the defining Field Strength requirement as specified by the FCC for certain channels, we obtain:

Dipole Factor		
Channel	Signal Required dBu	Relative Field Ratio
2 to 6	28.0	-2.0
VHF average	32.0	Reference
7 to 13	36.0	2.0
Channel 14	38.7	3.4
future UHF ave. Ch. 14-36	39.9	4.0
Channel 36	40.9	4.5
current UHF ave. Ch. 14-51	41.5	4.8
Channel 51	42.1	5.1
old UHF ave. Ch. 14-69	42.2	5.1
Channel 69	43.3	5.7
original UHF ave. Ch. 14-83	41.9	4.9
Channel 83	44.2	6.1

[1] 47CFR 73.522 “Digital television table of allotments” https://www.ecfr.gov/cgi-bin/text-idx?SID=99b11460962befd7acb5bd0cdb2051e3&mc=true&node=pt47.4.73&rgn=div5#se47.4.73_1622

[2] OET BULLETIN No. 69, Longley-Rice Methodology for Evaluating TV Coverage and Interference, February 06,2004 https://transition.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet69/oet69.pdf

From this, we can see that the received field at the future UHF average (post repack), for Ch. 14 to 36, requires ***<u>four times</u>*** as much field strength as the average for lowband and High-VHF. The OET 69, Table 2 consideration of the Dipole Factor is notably dated, as it takes the value for the analog video carrier for Ch. 38, a soon to be no-longer extant TV channel, and adjusts the dipole factor based on the channel mid-frequency of the remaining channels.

The above chart notes the changing technical requirements; after the current channel realignment, the necessary field increase, on average, drops relative to the VHF average, as the highest UHF channel drops from 51 to 36. (*Channels 52-69 and 70-83 were lost to previous auctions.*)

There are additional factors, beyond the Dipole Factor, affecting the power limits allowed to UHF Stations in an *attempt* to duplicate the coverage areas of VHF stations. From FCC rules, 47CFR 73.622 we find that the ERP allowed for Low-VHF stations can be as low as 10 kW. The maximum ERP for High-VHF stations is 30 kW [3]. The maximum power allowed for UHF stations is 1,000 kW. These allowances are dependent on a number of other factors (geographic area, height and many others) and far from a guaranteed possibility.

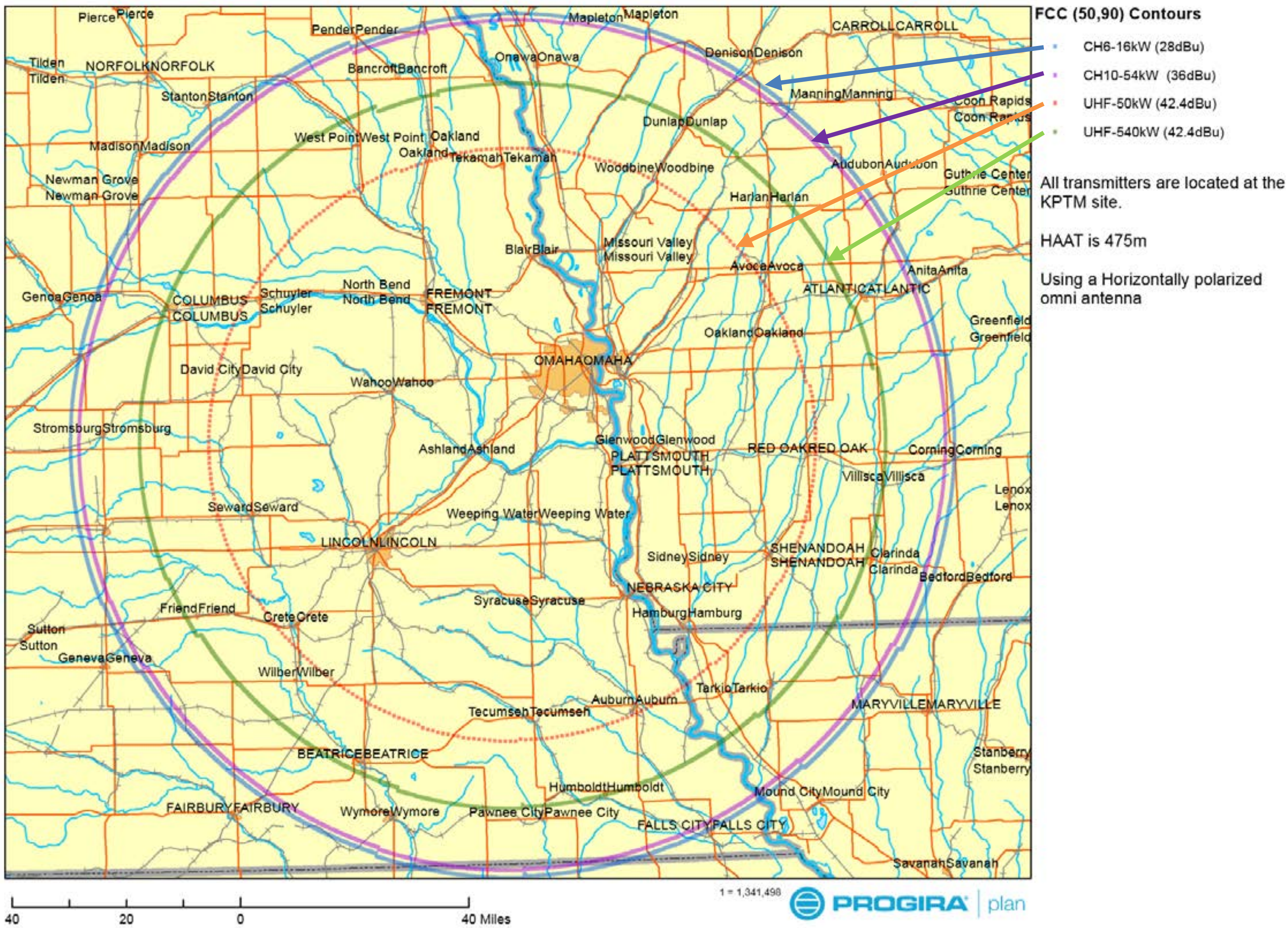
While UHF transmitting antennas often have higher gains than VHF antennas, the transmitter power requirements of UHF stations can be many times the requirement of an average VHF station, in order to *attempt* to duplicate the coverage area of a VHF station. On this technical basis alone, the UHF discount is still valid.

Also now worthy of consideration for a “UHF-like discount” are the stations that transitioned from being VHF stations to UHF stations during the digital transition. Those transitioning back to VHF were assigned coverage areas based on their UHF coverage. The assigned digital UHF coverage, even after maximization, was less than the old VHF coverage. When asked about this subject at the 2015 NAB Show, William Lake, now retired from the FCC, said “they are not getting their (VHF) coverage back”.

[3] From 47CFR73.622 “…for a HAAT of 610 meters”.

The following graphic is the depiction of contours derived from the FCC methodology. It shows an example for a DTV stations geographic service area defined by the station's noise-limited F (50,90) contour comparisons where signal strength is predicted to exceed the noise-limited service level. From this example, just one of many possible, it is quite easy to see that the ‘service area’ for the VHF stations exceed, in all cases, the service area granted under FCC rules for UHF allocations.

VHF/UHF Contours



CONCLUSION

It is quite improper to categorically deny that VHF and UHF spectrum bands have different properties. The facts speak for themselves and belie a different reality. The determination as to the efficacy of using one or the other spectrum band is highly dependent on the specifics of a desired use case and link budgets allowed. Without a complete and thorough reassessment of the technical realities as known today, choosing a single ‘fact’ out of the complete body of facts is arbitrary and bad science. Given the constraints within which the FCC chooses to determine “reach” (coverage), the facts as a whole embrace every reason to conclude that the “UHF discount” is as justified and as real today as when it was adopted.