Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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

JOINT COMMENTS OF ION MEDIA NETWORKS, INC., UNIVISION COMMUNICATIONS INC., AND TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.

ION Media Networks, Inc. ("ION"), Univision Communications Inc. ("Univision"), and Trinity Christian Center of Santa Ana, Inc. ("Trinity") (ION, Univision, and Trinity are herein collectively referred to as "Joint Commenters") hereby file these joint comments in response to the FCC's Notice of Proposed Rulemaking concerning the 39% national television audience reach cap and the UHF Discount.[1]

I. INTRODUCTION

For more than three decades, the Joint Commenters have relied on the UHF Discount exception to the National Cap to build new networks and enhance diversity and competition in the television marketplace. Their expectations and investments were upset, however, when the previous Commission took the unprecedented and unwarranted step of eliminating the UHF Discount without reviewing and appropriately modifying the National Cap.[2] In that same

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[1] *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Notice of Proposed Rulemaking*, 32 FCC Rcd 10785 (2017) ("*NPRM*"). These comments are timely filed pursuant to the Order extending the comment deadline to March 19, 2018. *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Order*, DA 18-139 (rel. Feb. 12, 2018). *See also* 47 C.F.R. §73.3555(e)(1) (the "National Cap"), (e)(2)(i) (the "UHF Discount").

[2] *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Ownership Rule, *Report and Order*, 31 FCC Rcd 10213 (2016) ("*UHF Discount Elimination Order*").

decision, the Commission also prevented companies like ION, Univision, and Trinity that relied upon the Commission's UHF Discount from freely transferring their station groups.[3] The Joint Commenters applaud the current FCC's decision to reverse course from the previous administration and consider changes to the UHF Discount only in the context of the rational, holistic review of the National Cap that the law requires.[4]

The *NPRM* poses numerous questions about its authority to revise the National Cap and the UHF Discount, but regardless of how the Commission resolves these questions, the Commission must protect the interests of companies like each of the Joint Commenters that the FCC encouraged for more than three decades to use the UHF Discount to expand their reach. To accomplish this, the FCC should retain the UHF Discount. If, however, the Commission determines that changes to the National Cap or the UHF Discount are needed, it should (1) permanently grandfather the ownership interests of station groups that have relied on the UHF Discount to assemble their current station groups and insulate these holdings from future rule changes; and (2) mandate full transferability of these grandfathered station groups to any future purchasers.

II. THE UHF DISCOUNT HAS BEEN INTEGRAL TO ENHANCING DIVERSITY AND COMPETITION IN THE BROADCAST INDUSTRY OVER THE PAST 30 YEARS.

Each of the Joint Commenters has depended upon the UHF Discount to build television networks that are able to compete with the largest incumbent broadcast television networks and the many non-broadcast competitors in the video distribution market. ION relied on the UHF

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[3] *Id.* at 10233-237 ¶¶ 41-53.

[4] Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Order on Reconsideration*, 32 FCC Rcd 3390 (2017) (finding the UHF Discount "inextricably linked" to the national television ownership cap) ("*Reconsideration Order*"), *pet. for rev. pending sub nom. Free Press, et al. v. FCC*, D.C. Cir. No. 17-1129 (filed May 12, 2017).

Discount to build America's last truly independent over-the-air broadcasting network, pursuing a strategy of purchasing underperforming UHF stations and investing in improving their viewer reach and their programming mix. ION's television networks, anchored by 63 local television stations (nearly all of which are UHF), today reach nearly 90% of U.S. TV households. ION used the UHF Discount to convert once-struggling, single-channel, and rarely viewed UHF stations into full service stations with three full-time channels of programming: ION TV, a top-15 general entertainment channel with particular appeal to the over-the-air and minority households; Qubo the nation's only 24/7 children's educational and informational programming channel; and ION Life, a cutting edge health and wellness channel. Because ION's networks are available over-the-air, they are free to all viewers served by ION's stations and provide a much-needed does of program diversity to over-the-air only households.

Similarly, Univision built a station group and launched two Spanish language broadcast networks in reasonable reliance on the UHF Discount, in order better to serve the unique needs of U.S. Hispanic viewers. Spanish-language television in this country began in 1955 on a UHF station in San Antonio, which is now Univision's KWEX-DT. Over many years, Univision expanded its original Univision Network service by acquiring additional UHF stations in new markets. Today, the Univision Network is one of the most watched networks in any language. In 2002, Univision acquired 13 UHF stations that had been broadcasting home shopping programming, using them to launch a second Spanish-language program network, now called Unimás. That acquisition extended the reach of Univision's station group into a number of new markets, including Boston, Atlanta, Cleveland, Orlando and Tampa. Because of the continuing availability of the UHF Discount, however, Univision's attributable reach remained well below the National Cap.

The UHF Discount also played an important role in Trinity's development and growth. Trinity was created in 1973 with the purpose of providing a religious and Christian inspirational television service. In 1974 it acquired channel 40, Fontana, California, which became its flagship station, KTBN-TV, Santa Ana, California. For 45 years, Trinity has grown its service throughout the country by acquiring additional UHF stations in new markets. Today, Trinity has 30 UHF stations and numerous UHF affiliates. The UHF Discount not only expanded the allowable national audience reach, it also enabled the development and delivery of new competitive programming services through multicasting. Trinity's multicast streams include: "TBN," "Smile of a Child TV" (a service providing significant Children's educational programming); "The Hillsong Channel" (a service crossing denominational lines and providing access to the best and most popular church services and live events and concerts); "Enlace USA" (a service for the religious programming needs and interests of Spanish-speaking viewers); "TBN Salsa" (a service providing English and Spanish language programming serving the wider Hispanic community and culture); and "JUCE TV" (a service for the 13-29 year old age groups, combining music video programming, sketch and stand-up comedy, talk shows, action- and extreme-sports programming, and other subject matter of interest to teens and young adults). Trinity could not have launched any of these multicast programming streams without the economies of scale created by the larger national audience reach permitted via the UHF Discount.

After decades of encouraging competition and diversity in the video marketplace by allowing and urging groups such as ION, Trinity, and Univision to utilize the UHF Discount to create new broadcast networks and challenge the established industry giants, the Commission should not now take any action that would result in dissolution of these new networks – now or in the future – solely to satisfy a new regulatory requirement.

III. THE COMMISSION MUST RETAIN THE UHF DISCOUNT OR PERMAENTLY GRANDFATHER EXISTING STATION GROUPS ASSEMPLED IN RELIANCE ON THE DISCOUNT.

As in all its ownership rule proceedings, the Commission should ensure that any National Cap actually serves to encourage and protect competition and diversity in the television industry. The Commission cannot accomplish those goals by tightening the structural national ownership limits currently in place in any way. Seismic changes in the competitive media landscape render the National Cap entirely outmoded, and reducing broadcasters' potential audience reach is an unfair restraint on their ability to compete with increasingly national – and indeed global – players in the television programming industry. Accordingly, if it does retain the existing cap, the Commission also should retain the UHF Discount. However, if it does not retain the Discount, the Commission should permanently grandfather all station groups that rely on the UHF Discount today, allowing owners to sell such groups intact to future buyers.

A. Tightening the National Cap By Eliminating the UHF Discount Would Ignore the Realities of Today's Competitive Media Marketplace.

In today's media marketplace, it borders on the ridiculous that the Commission last year tightened the National Cap by eliminating the UHF Discount, and the current Commission wisely rescinded that obvious misjudgment. The FCC adopted structural ownership rules like the National Cap at a time when only a few sources of video programming were available in each local market. Today's video distribution marketplace is characterized by dozens of programming distributors offering their customers hundreds of programming channels in every market across the country. The idea that broadcast television groups that can reach more than 39% of American households threatens diversity or competition in this marketplace is impossible to sustain.

In fact, the opposite is true. Forcing broadcasters to remain small while their competitors achieve national (and in some cases, global) scale threatens to eliminate broadcasters' ability to successfully compete with their practically unregulated rivals. On the one hand, traditional media behemoths own or operate almost nationwide cable networks; nationwide broadcast networks, nationwide cable channels and regional sports networks; programming production houses; and online video streaming companies with potentially worldwide reach. This allows broadcast TV's competitors to leverage their ownership of these diverse media and entertainment properties to create and share content between the different platforms, create financial synergies, and reach hundreds of millions of viewers around the world. Yet ownership of these distribution channels is unregulated and they operate nationwide.

On the other hand, new online video programming distributors like Netflix, Hulu, and Amazon Prime Video fiercely compete with broadcasters, can reach every household in the country (and, indeed, the world), and operate entirely free of any structural ownership restrictions.[5] Even social networking site Twitter paid approximately $10 million dollars to stream 10 NFL games during the 2016 NFL season and Amazon used its Prime Video service to stream games during the 2017 NFL season.[6] In other words, broadcasters face vigorous competition from video distribution companies that are able to compete on a nationwide (or even

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[5] Take Netflix for example. In the third quarter 2011, Netflix had 22.93 million subscribers worldwide. *See Number of Netflix Streaming Subscribers Worldwide from 3rd Quarter 2011 to 4th Quarter 2017 (in millions)*, Statista (2018), https://www.statista.com/statistics/250934/quarterly-number-of-netflix-streaming-subscribers-worldwide/. In the little more than six years since, that number has more than quintupled to 117.58 million subscribers, of which, 54.75 million are from the United States. *See id.* Netflix has seen this tremendous growth in subscribers because it has been able to compete on a global basis and because it also generates original content that competes directly with broadcasters' program offerings.

[6] Peter Kafka, *Amazon Will Stream Thursday Night NFL Games This Year*, recode (Apr. 4, 2017), https://www.recode.net/2017/4/4/15184100/nfl-amazon-football-games-thursday-streaming-watch-live-prime-twitter.

global) basis, while the National Cap hamstrings U.S. broadcasters from meeting on a level playing field.

Moreover, in the last few years, there has been substantial convergence in the marketplace that allows large companies to gain even more leverage over their competitors and in business negotiations. For example:

- AT&T acquired DIRECTV during the summer of 2015 for more than $67 billion.
- Charter merged with Time Warner Cable and acquired Bright House Networks in May 2016 for more than $89 billion.
- AT&T announced a proposed merger with Time Warner Inc. for $108.7 billion.
- Late last year, Disney announced a deal to acquire 21st Century Fox for more than $66.1 billion.

This explosion in consolidation among broadcasters' competitors that are not subject to national audience reach limitations, coupled with the exponential growth of new nationwide competitors, should end all discussion of eliminating the UHF Discount or tightening the National Cap. Indeed, a fundamental question is whether the National Cap has outlived any usefulness it ever may have had, at least as applied to the station groups operated by the Joint Commenters. In any event, the answer certainly is not that the National Cap should be lower in any way, and certainly not by removing the UHF Discount.

The Joint Commenters simply would not be able to compete in this new media landscape if the Commission eliminates the UHF Discount. Local broadcasters offer substantial programming diversity in an environment increasingly dominated by national, non-broadcast networks. Broadcasters' ability to survive and thrive depends on their ability to reach the kind of national scale that is permitted by relaxation of the 39% National Cap – exactly the kind of relaxation that always has been permitted by the UHF Discount. The Commission should protect

this interest by retaining the UHF Discount or increasing the National Cap to levels currently permitted by the National Cap with the UHF Discount.

B. The Commission Should Protect Networks Built in Reliance on the UHF Discount by Granting Full Grandfathering to Existing UHF-Dependent Station Groups.

If the Commission nonetheless chooses to tighten the National Cap by eliminating the UHF Discount (regardless of whether elimination of the discount is coupled with an increase in the National Cap), the Commission should adopt protections that will permanently preserve the networks created and fostered by relatively small companies like the Joint Commenters as a result of the UHF Discount. Station groups that comply with the National Cap rule today should be fully grandfathered. They should be permitted to (1) retain their current holdings irrespective of future rule changes; and (2) sell their station groups intact to a single buyer that will continue to realize the benefits of this grandfathering.

First, the Commission should order that current holders of UHF Discount-dependent station groups will be permitted to retain those holdings in the future without the threat that future rules could require divestitures. Permanent grandfathering is necessary to remove the cloud that hangs over the Joint Commenters and similarly situated companies with respect to the National Cap and the UHF Discount and allow these station groups to engage in normal financing, refinancing, recapitalization, and other significant commercial endeavors that allow them to organize their businesses to best serve the public interest.

Second, the Commission should make UHF Discount-dependent holdings fully transferrable to future potential purchasers. When the Commission tried to eliminate the UHF Discount in 2016, Chairman Pai rightly objected to the agency's failure to fully grandfather existing UHF Discount-dependent combinations and permit their sale, stating that

> the Commission should also allow such station groups to be transferred to new ownership without requiring divestitures. Station groups such as ION and Univision have been good for competition in the video market by facilitating the creation of new broadcast networks to challenge established networks. And I do not see what harm would be alleviated or purpose would be served by requiring these station groups to be broken up in the event of a sale.[7]

Chairman Pai was clearly correct, and the prior Commission offered no rational reason for rejecting his reasonable permanent grandfathering proposals. This Commission should not repeat the inexplicable mistakes of the previous administration. The Commission gave the Joint Commenters the tools they needed to compete in today's hyper-competitive marketplace and encouraged their use. The Joint Commenters built their business in reliance on these tools and expanded programming diversity in the face of industry developments that would have made such expansion otherwise impossible. As Chairman Pai recognized, it makes no sense to take those tools away and then punish companies that relied on the UHF Discount by stripping out the value of their holdings by forcing them to sell their stations piecemeal in the event of a future sale. If a UHF network owner were forced to split up the network in order to sell it to another owner, the diversity and competition benefits of the combination would be effectively negated. Accordingly, the Commission should and confirm that all station combinations are permanently grandfathered and fully transferable.

IV. CONCLUSION

For the reasons set forth herein, the Joint Commenters encourage the FCC to protect and preserve the ownership structures for ION, Trinity, and Univision, which relied upon the current National Cap with the UHF Discount to grow competitive television groups and programming.

Respectfully submitted,

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[7] *UHF Discount Elimination Order*, 31 FCC Rcd at 10250.

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