

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

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

**COMMENTS OF CONSUMERS UNION,
THE ADVOCACY DIVISION OF CONSUMER REPORTS**

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I. INTRODUCTION

Consumers Union,¹ the advocacy division of Consumer Reports, offers comment on the questions presented in this Notice of Proposed Rulemaking² (*NPRM*) concerning the Federal Communications Commission's (FCC) national television audience reach cap and the so-called UHF discount. The cap, which has been in existence in some form since the 1940s, has a simple purpose: to ensure that no single entity owns a number of broadcast stations that, in the aggregate, reach more than a certain percentage (currently set at 39 percent) of American households.

Several difficult and interesting issues are raised in this proceeding. First and foremost, does the Commission even possess the legal authority to adjust the cap? Does that authority extend to eliminating the UHF discount? Despite the Commission concluding in 2016³ that it does have that authority, we revisit these questions again today. For our part, Consumers Union believes the FCC got it right two years ago, and that the Commission has the authority to both adjust the cap and do away with the UHF discount, based upon the statutory interpretation of the Consolidated Appropriations Act of 2004 (CAA),⁴ where Congress stepped in and adjusted the cap from 45 percent to its current level of 39 percent.

¹ Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, competition and consumer choice, health, food and product safety, energy, privacy, and financial services, among others. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumers Reports has over seven million subscribers to its magazine, website, and other publications.

² *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318, Notice of Proposed Rulemaking (December 14, 2017) (*NPRM*).

³ *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213, (2016) (*UHF Discount Elimination Order*).

⁴ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (CAA).

If the Commission agrees that it has this legal authority, we are then asked if the cap should be adjusted, or even eliminated altogether.⁵ We believe the cap should remain in place for valid and important public interest reasons. Various rationales have been used to justify the cap in the past—in particular, promoting diversity and promoting competition, both of which we believe are well-founded and beneficial for consumers. The most recent justification put forth by the FCC was in 2002, and maintained that the cap is necessary to protect localism in the nation’s broadcast markets—that is, better ensuring that there are broadcast station owners who are focused on concerns in the local community where the station is broadcasting.⁶

The *NPRM* asks if other or new goals are supported by the cap.⁷ ***We believe the answer is “yes” and that another important consumer interest is indeed protected by the cap, specifically that the national audience reach cap prevents broadcast station groups from growing so large as to further distort the retransmission consent fee regime in way that will lead to higher consumer prices.*** Consumers Union believes that this process, whereby broadcasters and multichannel video programming distributors (MVPDs, which include pay-TV providers such as cable companies and direct broadcast satellite operators) negotiate fee-for-carriage agreements, has long been broken. Broadcasters already demand higher and higher fees from MVPDs in return for access to programming. Naturally, these

⁵ *NPRM* at ¶ 6.

⁶ 2002 Biennial Review Order—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. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) (2002 Biennial Review Order).

⁷ *Id.* at ¶¶ 15, 17: “Have marketplace changes affected the relationships and business dealings between local broadcasters and other video distributors in ways that would justify retention, modification, or elimination of the national audience reach cap?”

increased costs are passed on to consumers, in the form of rate increases and new add-on fees created by MVPDs. Allowing broadcast station groups to grow larger, and unrestrained by a national television audience reach cap, will only make the situation worse, with even higher retransmission consent fees resulting in higher prices paid by consumers.

As for the UHF discount, it is a regulatory artifact from the analog television era, whereby a UHF station was deemed to count only half as much as a VHF station when calculating compliance with the national television audience reach cap—a discount that acknowledged the inferior signal strength of a UHF station that resulted in smaller audiences for those broadcasters in the over-the-air television past. We believe the Commission had the authority to eliminate the UHF discount in 2016, as the technical rationale for the regulation is no longer relevant in the digital television era. Though the current FCC reinstated the UHF discount last year⁸—an action we did not support, and which appeared designed to facilitate the pending Sinclair-Tribune merger—the Commission should abolish the discount once and for all in this proceeding.

At its core, the *NPRM* revives a debate over what is the FCC’s proper role in setting the national television audience reach cap, and questions whether the Commission even has a role at all in light of language Congress included in the CAA more than a decade ago.⁹ Whether through statutory interpretation of that law, or a reading of federal court precedent, many conflicting positions have been staked out, and no doubt will be restated in this proceeding’s record. Perhaps Commissioner O’Reilly is correct in his belief that only the

⁸ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Order on Reconsideration, 32 FCC Rcd 3390, (2017) (*UHF Discount Reinstatement Order*), *pet. for rev. pending sub nom. Free Press, et al. v. FCC*, D.C. Cir. No. 17- 1129 (filed May 12, 2017).

⁹ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (CAA).

courts or Congress can truly bring certainty to the tangle of complex legalities posed in the *NPRM*.¹⁰ But, Consumers Union shares the Commission’s earlier conclusions in 2016 that *the FCC does have the power to adjust the cap* and to address related issues such as the UHF discount. Though we do not address all the questions presented by the *NPRM*, we discuss several of them below.

II. LEGAL AUTHORITY OF THE FCC TO ACT

The central question of this proceeding is whether the FCC has any authority to adjust the national television audience reach cap. One need not look any further than the record from the 2016 order that eliminated the UHF discount for an answer, where various legal theories and interpretations were put forth to resolve this very question.¹¹ Ultimately, one’s conclusion is dependent upon discerning what Congress intended when it lowered the FCC’s then-45 percent cap to 39 percent in the CAA. As cited in the 2016 order, the statutory language is terse, and plainly instructed the Commission to “modify its rules” to lower the cap.¹² The law further removed future consideration of the cap from the FCC’s quadrennial (adjusted from what was formerly a biennial) review of its media ownership rules.¹³

Various stakeholders arrived at different answers as to what exactly the language of the CAA meant for the FCC’s future authority to address the national television audience reach cap—no doubt influenced by what would best suit their interests. Nonetheless,

¹⁰ *NPRM* at pp. 24-25 (statement of Commissioner Michael O’Rielly).

¹¹ *UHF Discount Elimination Order* at ¶¶ 16-20.

¹² *Id.* at ¶ 21.

¹³ *Id.*

Consumers Union is most persuaded by the Commission’s conclusion that the statute did not restrict the FCC from adjusting the cap—and, by extension, eliminating the UHF discount—provided it did so in a separate rulemaking outside of its mandatory quadrennial review. Indeed, the order cites the Third Circuit decision in *Prometheus I*¹⁴ as further support for this position.¹⁵ If Congress had wanted to bar the FCC from ever considering the national television audience reach cap, it could have expressly done so. However, Congress did not, and we believe the Commission correctly outlined its authority on this matter in 2016.

III. RETENTION OF THE NATIONAL AUDIENCE REACH CAP

Assuming the Commission agrees that it has the legal authority to modify the national television audience reach cap in this proceeding—though that’s hardly a given when considering the stated positions of some Commissioners¹⁶—we believe the FCC should also retain the cap at its current level of 39 percent.

Despite the *NPRM*’s questioning whether the cap has outlived its usefulness amidst new online video offerings and competing platforms,¹⁷ Consumers Union believes that there are sound public policy reasons for keeping the cap, and that preserving it continues to serve the public interest. And although, as the *NPRM* asserts, the video programming landscape has changed in the short time since the cap was last adjusted, we must not forget that broadcasters are subject to public interest obligations as part of their use of valuable

¹⁴ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (3d Cir. 2004) (*Prometheus I*).

¹⁵ *UHF Discount Elimination Order* at ¶ 21, citing *Prometheus I*, 373 F.3d at 397 (“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).”).

¹⁶ *NPRM* at pp. 21-25, 27 (see statements of Commissioner Mignon L. Clyburn, Michael O’Rielly, and Jessica Rosenworcel).

¹⁷ *NPRM* at ¶ 1, 11.

spectrum. Therefore, regulatory measures like the cap seek to achieve and protect policy goals such as localism—which is the goal the FCC successfully supported to sustain and justify the cap in 2002.¹⁸

Moreover, the *NPRM* asks if other goals are furthered by the presence of a national television audience reach cap.¹⁹ Consumers Union believes that consumer harm, specifically higher prices paid for video programming, can be mitigated by the cap (in combination with the elimination of the UHF discount). As we expressed in our comments last fall in the Sinclair-Tribune license transfer proceeding,²⁰ we are deeply concerned with the effect that increased media consolidation has on competition and prices paid by consumers in the pay-TV market, through the way it skews the retransmission consent process.

As an article last year in *The Economist* points out, the larger a media group becomes by adding stations through mergers and acquisitions, the more leverage it gains in retransmission consent negotiations with MVPDs.²¹ The same article also reports that retransmission consent fees have grown dramatically in the last decade, and now represent nearly a quarter of the multi-billion-dollar revenues enjoyed by broadcasters. Other commenters in the Sinclair-Tribune proceeding further strengthened these conclusions with

¹⁸ *Id.* at ¶ 3, citing the 2002 Biennial Review Order – 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. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003).

¹⁹ *Id.* at ¶¶ 15, 17: “Have marketplace changes affected the relationships and business dealings between local broadcasters and other video distributors in ways that would justify retention, modification, or elimination of the national audience reach cap?”

²⁰ See Comments of Consumers Union, *Tribune Media Company and Sinclair Broadcast Group, Consolidated Application for Consent to Transfer Control*, MB Docket No. 17-179 (filed November 2, 2017).

²¹ *Sinclair Broadcast Buys Tribune Media*, *The Economist* (May 13, 2017)

<https://www.economist.com/news/business/21721966-americas-media-regulator-aids-consolidation-tv-stations-sinclair-broadcast-buys-tribune>.

a detailed analysis of how consolidation in the broadcaster market has led to skyrocketing retransmission consent fees.²²

Enforcing a national television audience reach cap of 39 percent would help limit the creation of large station groups—the pending Sinclair-Tribune merger notwithstanding—that would gain even greater market power to further raise retransmission consent fees paid by MVPDs. All of which ultimately leads to higher prices paid by consumers. We need look no further than the Department of Justice’s complaint challenging the pending AT&T acquisition of Time Warner Inc., to be reminded that “video distributors aim to cover programming cost increases by raising the prices they charge their customers,” and “[b]ecause video distributors pass through most of their cost increases to their customers, *these increased costs would likely result in higher monthly bills for consumers.*”²³

Specifically, we have seen that the increased costs borne by MVPDs are passed on to consumers in the form of add-on fees (e.g., a “broadcast TV fee” or a “regional sports fee”) in their monthly service bill. Even worse, these fees to consumers have risen by 50 percent in some markets just in the past year.²⁴ Without a cap, larger station groups can be expected to gain even more leverage in retransmission consent negotiations, so we would fully expect

²² See Comments of DISH Network, *Tribune Media Company and Sinclair Broadcast Group, Inc.*, Consolidated Applications for Consent to Transfer Control, MB Docket No. 17-179 (Filed August 7, 2017).

²³ Complaint, *United States v. AT&T, Inc., et al*, Nov. 20, 2017, <https://www.justice.gov/atr/case-document/file/1012916/download> (emphasis added). See also (for discussion of how increased consolidation in the video distribution market harms consumers): Dept. of Justice press release, Comcast/ NBC Universal merger consent decree, Jan. 18, 2011, <https://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions>; Dept. of Justice press release, Abandonment of Comcast/ Time Warner Cable merger, Apr. 24, 2015, <https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department>.

²⁴ James K. Wilcox, *Your Cable Bill Is Going Up More Than You Think This Year*, Consumer Reports (February 4, 2017) <http://www.consumerreports.org/tv-services/your-cable-bill-is-going-up-more-than-you-think-this-year/>.

these add-on fees to consumers to increase even more as MVPDs pay higher rates for broadcasters' programming. Therefore, keeping a national television audience reach cap can help restrain price increases and limit further consumer harm.

IV. ELIMINATION OF THE UHF DISCOUNT

The UHF discount is a 1980s-era regulation that permits broadcasters to count only one half of a UHF station's audience reach for purposes of determining compliance with the 39 percent national ownership cap. The discount was originally adopted in recognition of the diminished reach and technological capability of a UHF station in the analog, over-the-air broadcast era of the past. We believe the FCC was correct to eliminate the UHF discount in 2016, after more than ten if not twenty years of warning that its days were numbered.²⁵ Quite simply, the technological rationale for the regulation is no longer relevant in the digital television era, where the technological capability and audience reach of a UHF station is equal, if not superior, to a VHF station.

However, less than a year later, the current Commission reinstated the UHF discount, and this outdated regulation is, unfortunately, back on the books. Consumers Union is concerned that resurrecting the discount will promote and enable further media consolidation by providing a loophole to the 39 percent national television audience reach cap. Indeed, if the Sinclair-Tribune merger is approved, the UHF discount would have already succeeded in doing so, and we believe consumers will be harmed with higher prices paid for video programming (as explained above). As the Commission observed when repealing the UHF discount 18 months ago:

²⁵ See *UHF Discount Elimination Order* at footnotes 24-25, and ¶ 10.

Without any current technological justification, the continued application of the UHF discount distorts the calculation of a licensee's national audience reach and undermines the intent of the cap. Continued application of the UHF discount seven years after the DTV transition has the absurd result of stretching the national audience reach cap to allow a station group to actually reach up to 78 percent of television households, dramatically raising the number of viewers that a station group can reach and thwarting the intent of the cap.²⁶

The goals of the national television audience reach cap are not met when the glaring end-around that the UHF discount represents is allowed to persist. Consumers Union strongly believes the FCC erred when it reinstated the UHF discount last April. The FCC should promote competition in the broadcast television market and the benefits it provides consumers, versus enabling increased consolidation. Accordingly, we strongly urge the Commission—and we believe it has the legal authority to do so—to again eliminate the UHF discount as part of this proceeding.

V. CONCLUSION

Today's proceeding addresses legal questions that have bedeviled policymakers and lawyers alike for decades. We look forward to reviewing the comments submitted in this record, and hope to see others joining in support for keeping the national television audience reach cap intact, as well as for permanently eliminating the UHF discount. Consumers Union does not believe the cap is an antiquated notion from a bygone era; rather, that is how we view the UHF discount. In the face of increased media consolidation and relaxation of other media ownership rules, we strongly believe that the cap can and will protect consumers from even worse outcomes and price increases posed by a broken retransmission

²⁶ *UHF Discount Elimination Order* at ¶ 34.

consent system. Until Congress or the FCC takes on an overhaul of how retransmission consent fees are bargained for and paid for, the cap is one measure that can protect consumers.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JS' followed by a stylized flourish.

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