



March 19, 2018

Chairman Ajit V. Pai
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Chairman Pai:

On behalf of The Leadership Conference on Civil and Human Rights and its Media/Telecommunications Task Force, we write to oppose any efforts by the Federal Communications Commission to loosen the National TV Audience Cap.¹ Not only is the Commission prohibited from changing the National TV Audience Cap, relaxing media ownership limits will further exacerbate already-low ownership diversity. Moreover, relaxing media ownership rules without collecting data and analyzing the impact on diversity both violates directives of the U.S. Court of Appeals for the Third Circuit and abrogates the Commission's core duty to promote media diversity.

The Leadership Conference is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States. Media diversity has long been a top priority of The Leadership Conference and its Media/Telecommunications Task Force because we understand that meaningful protection of civil rights relies in great measure on an accurate, independent, and diverse media that serves the constituencies we represent.

The Commission Cannot Change the National TV Audience Cap

The Leadership Conference has long supported the Commission's ownership rules because media ownership rules are a critical means to promoting ownership diversity. Ownership caps prevent individual companies from dominating national or local markets. When there are more owners, it is more likely that a woman or person of color, or a member of any other underrepresented group, can purchase a station. Congressional and Commission policy has always favored broadcasting as a local medium and has long been concerned with ensuring that a vibrant marketplace exists for the creation and purchase of content serving local needs and the needs of diverse audiences.²

The Commission should not change the national ownership cap because Congress set the current national ownership cap in 2004 via statute, and the Commission does not have authority to change it now.³ Congress not only set the cap at its current 39 percent, it

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removed the cap from the quadrennial review process and prohibited the Commission from using its forbearance authority on the national cap,⁴ demonstrating that Congress did not intend the Commission to change the national ownership cap.

The Commission Should Not Have Reinstated the Technologically-Obsolete UHF Discount

The congressionally-set National TV Audience Cap must be implemented accurately—but last year’s decision to reinstate the technologically obsolete ultra-high frequency (“UHF”) discount does the opposite. The reinstatement of the UHF discount permits broadcast station owners using UHF spectrum to unfairly exceed the national ownership cap and to serve an audience share that is twice as large as their very-high frequency (“VHF”) counterparts.⁵ The rule originated at a time—in the 1980s—when UHF stations were technically inferior to VHF stations. At that time, in implementing that national ownership rule the Commission rightly took into account the technical differences between the two services and measured the reach of UHF stations at a 50 percent discount of VHF stations. However, all policymakers, including Chairman Pai, now agree that the need to account for this technical limitation on UHF stations disappeared when the United States transitioned to digital television in 2009.⁶ In fact, UHF stations perform better than VHF stations using digital transmission.⁷ In 2016, the Commission finally eliminated the discount, concluding that the “UHF discount was forged in an analog world to address an analog coverage deficiency,” and “there is no remaining technical justification” for it.⁸

Reinstating the UHF discount, which is currently being challenged in federal court, permits existing broadcast owners to exceed the statutorily-set limit, and circumvents the Commission’s obligation to study the impact of ownership consolidation on media diversity before permitting additional consolidation. As Commissioner Clyburn explained, reinstatement of the discount “harm[s] the public interest, by reducing diversity, competition and localism.”⁹ We oppose the UHF discount because it is technologically incorrect and it permits consolidation in excess of the National TV Audience Cap.

Current Ownership Diversity is Dismal

Any decision to relax media ownership caps is particularly alarming given that the most recent data released by the Commission demonstrates the continued severe underrepresentation of women and people of color in broadcasting:

- In the Full Power TV service, women comprise 7.4 percent of licensees and people of color and Hispanics comprise a total of 7.1 percent of licensees;
- The second most diverse service is Class A TV, where 9.3 percent of licensees are women and 15.2 percent are people of color and Hispanics;
- For the most diverse service, Low Power TV—which is about to be drastically scaled back after the post-incentive auction transition—women control 11 percent of licenses and people of color and Hispanics control 15.8 percent.¹⁰

At the same time, people of color significantly rely on over-the-air broadcasting. According to the National Association of Broadcasters, more than 7.7 million African-Americans, 14.6 million Hispanics,

and 2.6 million AAPI households rely on over-the-air broadcast TV.¹¹ This reliance is particularly dramatic in particular markets. In Detroit, for example, nearly 35 percent of African-American households are broadcast-only, as compared to 14 percent of total households in that market that are broadcast-only.¹² A similar pattern holds in Dallas-Fort Worth, where one-third of Hispanic homes rely on broadcast-only TV, compared to one-fifth of total homes in the market.¹³ And in Minneapolis, nearly 20 percent of Asian-American and Pacific Islander (AAPI) households are broadcast-only.¹⁴

The Commission Has an Obligation to Promote Media Diversity

The Commission's obligation to promote media diversity is set forth in Section 1 of the Communications Act directs the FCC "to make available ... to all people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide and world-wide wire or radio communications service...."¹⁵ Section 257 of the Communications Act also speaks to the importance of diversity,¹⁶ and the Supreme Court has reaffirmed the Commission authority and duty to act.¹⁷ Despite these directives, the Commission's response to intolerably low minority and female broadcast ownership levels has been woefully inadequate for decades.

For this reason, the Commission should not relax any media ownership rule without conducting studies to analyze the impact of such a change on ownership by women and people of color.¹⁸ As the Third Circuit has made clear on multiple occasions, the Commission must obtain data to analyze the impact of any rule change in light of the Commission's legal obligation to promote ownership by women and people of color.¹⁹ As stated above, we do not believe that the Commission has the authority to relax the national ownership cap, but if it nonetheless decides to do so, it must conduct studies analyzing the impact of that change. The same is true for the consolidation authorized by the reinstatement of the UHF discount. Studies have shown that consolidation causes harm to smaller entities and those owned by women and people of color.²⁰

The Current News Environment Requires Local, Reliable Fact-Checked Journalism

The American public is just beginning to assess the impact of so-called fake news and propaganda on our elections and public policy debates. Recent trends reinforce the need for reliable fact-checked journalism such as the news offered by locally owned broadcast television stations. A *New York Times* investigation, for example, found evidence that suspected Russian operators – working with, for, or on behalf of the Russian government – created thousands of social media profiles to spread stolen or inaccurate information.²¹ The full scale and ultimate goal of this operation are unknown, but Facebook shut down hundreds of accounts believed to be created by a company linked to the Russian government²² and Twitter reports that approximately 1.4 million of its users interacted with "Twitter accounts potentially connected to a propaganda effort by a Russian government-linked organization."²³ Within this environment of weaponized misinformation and fake news, Americans, more than ever, need an accurate, reliable, and trusted news source. Local journalists, including local news broadcasters, abide by professional standards to produce timely, reliable, fact-checked news for their communities. And local journalism remains vital to American news consumers. According to a 2016 Pew study on the modern news consumer, 46 percent of U.S. adults often get their news from local TV.²⁴



While the impact of recent social media trends is not yet clear, an extensive body of literature has documented the important role of broadcasting plays with respect to voting, a core civil right currently under attack through a variety of voter suppression efforts. Niche audiences and non-majority communities benefit particularly from media outlets that serve their needs. A series of studies in the Commission's media ownership dockets have demonstrated that a broadcast outlet that covers politics for a particular audience, such as a Hispanic audience or African American audience, will increase the likelihood that such a community will vote.²⁵ Rules permitting additional consolidation will lead to fewer owners and thus fewer women owners and owners of color. Given the core civil rights concerns at stake, the Commission must proceed with caution.

A commitment to promote diverse media ownership is a fundamental component of our nation's communications policy. We strongly oppose relaxation of the National TV Audience Reach cap, urge immediate repeal of the UHF discount, and insist that any further loosening of media ownership rules be studied for their impact on ownership diversity before they are adopted. Should you require further information or have any questions regarding this issue please contact Media/Telecommunications Task Force Co-Chairs Cheryl Leanza, United Church of Christ, OC Inc., at 202-904-2168 or cleanza@alhmail.com, or Michael Macleod-Ball, on behalf of the American Civil Liberties Union, at 202-253-7589 or macleod@627consulting.com, or Corrine Yu, Leadership Conference Managing Policy Director at 202-466-5670 or yu@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
Asian Americans Advancing Justice – AAJC
American Civil Liberties Union
Common Cause
Communications Workers of America
NAACP
National Consumer Law Center, on behalf of its low-income clients
National Hispanic Media Coalition
OCA – Asian Pacific American Advocates
United Church of Christ, OC Inc.

cc: Commissioner Mignon Clyburn
Commissioner Michael O'Rielly
Commissioner Brendan Carr
Commissioner Jessica Rosenworcel

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 (rel. Dec. 18, 2017) ("*National Cap NPRM*")

² From the beginning of broadcasting until the present day the Commission has never wavered from its commitment to localism. See, e.g., Public Service Responsibilities of Broadcast Licensees, 11 FCC 1458 (1946); Broadcast Localism, Notice of Inquiry, 19 FCC Rcd 12425 (2004). The Commission continues to see the relevance of localism in its questions in the present NPRM. *National Cap NPRM* at paras. 13-14. The Supreme Court has affirmed that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 663 (1994).

³ Consolidated Appropriations Act, 2004, Pub. L. 108-199, §629(1) (setting the cap at 39% and removing the national cap from the quadrennial review and from the forbearance provision).

⁴ *Id.* (while the forbearance provision applies only to telecommunications provisions, it none-the-less demonstrates Congress’ intent to prevent the Commission from changing the national cap).

⁵ *UHF Discount Reconsideration Order*, 32 FCC Rcd 3390, 3395 (2017).

⁶ *Id.* (“UHF discount no longer has a sound technical basis following the digital television transition.”); Pai dissent, *UHF Discount Repeal Order*, 31 FCC Rcd 10213, 10247 (2016) (“the technical basis for the UHF discount no longer exists”). The Commission began suggesting it would eliminate the discount after the DTV transition as early as 1998. *1998 Biennial Review Notice of Inquiry*, 13 FCC Rcd 11276, 11285 (1998).

⁷ *UHF Discount Repeal Order*, 31 FCC Rcd at 10219, 10227-28 (2016).

⁸ *Id.* at 10226.

⁹ *UHF Discount Reconsideration Order*, 32 FCC Rcd at 3406.

¹⁰ Individual racial and ethnic group totals in many services border on zero. For example, in the full power TV service, totals for Asians, African-Americans, Native Americans, and Native Hawaiians are less than 1 percent. Women control only 8 percent of FM radio stations, Hispanics 4.2 percent, African-Americans 1.3 percent, and Asians 0.4 percent. Media Bureau, Third Report on Ownership of Commercial Broadcast Stations (May 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344821A1.pdf.

¹¹ The National Association of Broadcasters, “Broadcast Television and Radio in African-American Communities,” Jan. 2017; “Broadcast Television and Radio in Hispanic Communities,” January 2017; “Broadcast Television and Radio in Asian-American Communities,” January 2017.

¹² The National Association of Broadcasters, “Broadcast Television and Radio in African-American Communities,” January 2017.

¹³ The National Association of Broadcasters, “Broadcast Television and Radio in Hispanic Communities,” January 2017.

¹⁴ The National Association of Broadcasters, “Broadcast Television and Radio in Asian-American Communities,” January 2017.

¹⁵ 47 U.S.C. § 151 (emphasis added).

¹⁶ “The Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity.” 47 U.S.C. § 257.

¹⁷ The Supreme Court has reaffirmed again and again that “it has long been a basic tenet of national communications policy that ‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,’” and that “assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment.” *Turner Broadcasting System, Inc. v. FCC*, 512 US 622, 663 (quoting *United States v. Midwest Video Corp.*, 406 US 649, 668 n.27 (1972)(plurality opinion)(quoting *Associated Press v. United States*, 326 US 1, 20 (1945)). The Court has upheld FCC policies in the past to promote gender diversity in ownership. *Metro Broadcasting Inc. v. FCC*, 497 US 547 (1990).

¹⁸ See, e.g., Letter from the Leadership Conference on Civil and Human Rights to FCC Chairman Wheeler, MB Docket No. 09-182 et al (2014) (We urge the Commission to take further action to improve its data collection about the ownership of women and people of color, to undertake more research how to increase that ownership, and to take the steps necessary to ensure more ownership diversity, such as closing loopholes, reducing ownership caps, and addressing equal employment opportunity.”); Letter from Marc H. Morial, Janet Murguia, Mee Moua, Hilary O. Shelton to Chairman Julius Genachowski, MB Docket No. 09-182 (filed Dec. 6, 2012) (“The Commission should not move ahead with any changes to the NBCO until a credible, objective and data-based analysis of the impact of such changes is completed.”)

¹⁹ *Prometheus v. FCC*, 824 F.3d 33, 48 (3d Cir. 2016)(citing 47 U.S.C. §§ 309(i), (j)).

²⁰ S. Derek Turner, *Out of the Picture*, Free Press (2007) at 4 (“[M]inority-owned stations thrive in more competitive, less concentrated markets. Even if the size of the market is held constant, markets with minority owners are significantly less concentrated than markets without minority owners.”)

²¹ Scott Shane, “The Fake Americans Russia Created to Influence the Election,” *New York Times* (Sept. 7, 2017). Available at: <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>

²² Scott Shane and Vindu Goel, “Fake Russian Facebook Accounts Bought \$100,000 in Political Ads,” *New York Times* (Sept. 6, 2017). Available at: <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>

²³ “Update on Twitter’s Review of the 2016 US Election,” Twitter (Jan. 31, 2018). Available at: https://blog.twitter.com/official/en_us/topics/company/2018/2016-election-update.html

²⁴ Pew Research Center, “The Modern News Consumer” (July 2016). Available at: <http://www.journalism.org/2016/07/07/the-modern-news-consumer/>

²⁵ See Media Ownership Study 8B, Diversity in Local Television News, by Lisa M. George and Felix Oberholzer-Gee, FCC Docket 14-50 (2011); Media Ownership Study 7 by Joel Waldfogel and J. Berry, Radio Station Ownership Structure and the Provision of Programming to Minority Audiences: Evidence from 2005-2009, MB Docket 14-50 (2011); S. Berry, J. Waldfogel. Do Mergers Increase Product Variety? Evidence from Radio Broadcasting. *Quarterly Journal of Economics*, 116, 1009-1025 (2001); Gentzkow, Matthew. "Television and Voter Turnout." *Quarterly Journal of Economics* 121, no. 3(2006): 931-72; George, Lisa M. and Joel Waldfogel, “National Media and Local Political Participation: The Case of the New York Times” in Roumeen Islam, ed., *Information and Public Choice: From Media Markets to Policymaking*. Washington, DC: World Bank Publications, pp. 33-48 (2008); Oberholzer- Gee, Felix, and Joel Waldfogel. "Media Markets and Localism: Does Local News *En Español* Boost Hispanic Voter Turnout?" *American Economic Review*, 99, no. 5 (2009): 2120-28.