Before the Federal Communications Commission

Washington, D.C. 20554

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

Comments of Herndon-Reston Indivisible

Herndon-Reston Indivisible (“HRI”), by its counsel and pursuant to Sections 1.415 and 1.419 of the Commission’s rules, 47 CFR Sections 1.415 and 1.419, hereby respectfully submits its Comments in response to the Commission’s Notice of Proposed Rulemaking , FCC 17-169, released December 18, 2017, in MB Docket No.17-318 (the “*NPRM*”).

1. The Commission Manifestly Does Not Have The Authority To Override An Express Congressionally-Mandated Ownership Cap

The *NPRM* poses the critical issue of whether the FCC can unilaterally ignore the 39% national ownership limit adopted by the United States Congress in 2004.[[1]](#footnote-1) NPRM at 4-8. Congress’ adoption of that threshold was a hotly debated, carefully chosen compromise, rejecting the Commission’s more aggressive 45% cap. The latter cap was adopted by the agency in its *2002 Biennial Review Order*.[[2]](#footnote-2). Congress’ rollback was explicit, directing the Commission “to modify its rules to set the national cap at 39% of national television households.”

Moreover, as the Commission acknowledges, while Section 202 of the 1996 Telecommunications Act required the Commission to review its rules on a quadrennial basis to determine whether they should be eliminated in light of changing market conditions or other factors, Congress specifically excluded from this deregulatory mandate the national ownership cap. See *NPRM* at para. 4 and n.16. Further, as the Commission also concedes, the Third Circuit subsequently held in *Prometheus Radio Project v. FCC,*  373 F.3rd 372, 395-97 (3d. Cir. 2004) (“*Prometheus I*”) that challenges to the *2002 Biennial Review Order* were moot “as a result of Congress’ action [setting the 39 % cap]”. NPRM at para. 4. Thus, Congress and the Third Circuit have confirmed that Congress-not the Commission-will set the cap.

It is hornbook administrative and communications law that Congress can preempt the FCC at the former’s will. While the agency is independent of the Executive Branch except as to appointments, it is a creature of the Legislative Branch, which controls its budget , determines through legislation overarching communications policy, and conducts oversight of the agency’s actions and their compliance with Congressional intent. Had the Commission wished the cap to be raised or, as the *NPRM* intimates, junked, the Commission could easily have sought the required Congressional imprimatur. It did not. Instead, the agency seems to be inclined to forge ahead unilaterally. There could not be a more patent exercise of pointed Congressional intent than the *CAA* preempting FCC rulemaking regarding the cap. And there therefore could not be a more radical and arbitrary usurpation of Congressional power by an agency than substantially raising or even eliminating the cap. Such action would be unlawful. See cases cited in footnote 13 of the *Comments of the Attorneys General of the States of Illinois, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island and Virginia*, filed February 26, 2018 (“ *the AGs’ Comments*”).

Moreover, The Commission’s attempt to read alternative meanings into the appropriation language quoted above falls flat on its face when the legislative history of the *CAA* is reviewed. The legislative history makes manifest that the 39% cap is mandatory. Congress “forbade” the FCC to change the cap. See *AGs’ Comments* at 6.

2. Congress’ 39% Cap Reflects The Need to Avoid Further Consolidation of the Television Industry, Undermining the Core Elements of Localism, Diversity, and Competition.

The Commission also seeks comment on the question of whether the essential goal of localism will be undermined by removal or dilution of the cap. *NPRM* at 9. Commenters urge that the FCC confront reality here. Localism is about a concern for *local* issues and *local* problems, most often addressed by *local* programming. Large group owners, focused on efficiencies of scale, and seeking to present a branded national corporate message based on political views of the owner shaped in New York, Baltimore or Los Angeles, are most unlikely to be aware of or even care about local issues in Peoria or Birmingham or Seattle. And the more stations they are permitted to acquire, serving the more households nationally, the more likely economics and ideology will combine to mandate nationally produced, cookie cutter programming far less likely to ensure that localism will be preserved.

The Commission is confronted with concrete evidence of these realities in the Sinclair merger docket. Evidence therein indicates that Sinclair mandates that *all* of its stations carry identical “must run” programming focused on national and international, not local, issues. This “one message fits all” approach means that Sinclair stations and managers in liberal, progressive Seattle are forced to ignore the interests and views of this coastal megalopolis. Instead, Sinclair airs programming reflecting a dramatically different viewpoint with programming packaged and presented within local news blocks. It is not locally produced, but rather at Sinclair’s Baltimore headquarters. Such programming is designed to resonate with voters in the Midwest or Rocky Mountain West. It then comes as no surprise that Sinclair’s regularly scheduled “Terrorism Alert” focuses on the threat of violence committed by Muslim terrorists. Yet, most of Sinclair’s audiences reside in communities with no or very few Muslim residents. If the ownership cap is abandoned, anomalies of this sort will become far more prevalent. Sinclair and other dominant national players will gobble up TV stations in “Pac Man” fashion and operate them like a national “network” with no legal boundaries.

Thus, the answer to the Commission’s question about how elimination of a cap would affect localism is a no-brainer. Likewise, regardless of the Commission’s claims that it resolved in the past that the cap does not encourage diversity and competition , *NPRM* at p.8, it is simply inconceivable that allowing a company owning and controlling hundreds of stations, including multiple stations in a market AND sidecars, would not subvert diversity of ownership and voices and undermine competition across the nation. Moreover, the more stations Sinclair, Tegna, Fox, and Nexstar accumulate, the less stations will be available for the very few adequately capitalized minority and female owned entrepreneurs left in the arena—an arena in which minorities and females currently own a pitiable share well south of 10% of the nation’s TV stations..

Congress lowered the FCC’s cap in 2004 because of the same concerns that should animate the outcome of this rulemaking. These are preservation of the diversity, competition and localism values that underpin the public interest standard underlying the Communications Act. The television industry is already substantially consolidated among a smattering of media conglomerates. If, in the absence of a national cap, those dominant players are allowed to swallow up as many local TV outlets as they wish, there is no doubt but that they will enthusiastically exploit the opportunity. The resulting “land grab” will leave smaller potential competitors with no feasible hope of ever effectively competing.

The *NPRM* utterly ignores the additional key factor here. As a result of the deregulation that the current FCC has conducted in the last 15 months, the proverbial horse is out of the barn. It may already be too late to save local TV. Elimination of the FCC’s main studio rule, failure to enforce rules and policies like the ban on unauthorized transfer of control, failure to scrutinize family fronts, and turning a blind eye to “sidecar” agreements that other Federal agencies treat as attributable make it especially important that the national cap be retained. Termination of the national cap will not serve the public interest. Rather, it will serve the business goals of conglomerates like Sinclair, who is now attempting to secure FCC and DOJ blessing for a 3.9 billion merger. The merger would add tens of additional stations to Sinclair’s portfolio, already the largest in the nation. According to credible trade press reports, Sinclair’s CEO told investors last year that Sinclair’s business plan contemplates only one strong, dominant operator and one news outlet in each major market—Sinclair. This doesn’t bode well for localism, diversity, or competition.

Further, it should be noted that much of the debate around the national cap over the past decade has been motivated by concern about maintaining a degree of equipoise among television networks and their affiliates, so as not to allow either to become dominant. See *NPRM* at 6, 14. The FCC’s rules prevent abuses by the networks of their power, such as limitations on the right to preempt. But termination of the national cap would potentially have adverse effects far more challenging. Here Sinclair, Nexstar, Tegna and other non-network behemoths *own* their stations. There are no network- affiliate balancing restrictions because no “network” rules apply to Sinclair and these other group owners. They are not “networks.” Yet, as noted above, Sinclair closely supervises its local outlets and requires they air “must run” commentaries within news blocks having no connection to local news. Station managers have no choice but to run this nationally produced programming *verbatim* as part of the local news, or risk consequences. No network could legally do that.

The core question is how will localism, diversity of voices, and effective competition be achieved by Sinclair requiring must run programming across the country? And how will competition be enhanced or the interests of “small entities”, *NPRM* at p. 6, be served by opening the regulatory floodgates to Sinclair and its fellow conglomerates to acquire 100% of the station inventory in major markets? It’s a practical impossibility. Thus, Commenters respectfully submit that the only “fresh look”, *NPRM* at p. 9, the Commission should take at the national cap now is to realize that it is nonsensical to conclude that its elimination would be any less destructive to the public interest triad than elimination of the local ownership caps.

3. The Existence Of Other Non-Broadcast Media Voices Does Not Eliminate The Need For Structural Regulation Of The Television Industry

As it has repeatedly done to justify recent deregulatory moves, the Commission relies heavily on a “considerably” changing media marketplace with a proliferation of alternative sources of programming from the Internet, cable and satellite sources. *NPRM* at 6. But the fallacy of this construct has been demonstrated by pleadings and *ex parte* comments filed in the Sinclair-Tribune merger docket (MB 17-179) and in earlier proceedings. Only one medium of communications and information in this country is *free*. Only one medium is regulated by a federal agency because it received *gratis* massive amounts of spectrum owned by the American citizenry and in return assumed a public trusteeship as to that spectrum. Only one media source must serve the “public interest” and answer to the Commission. To treat unregulated cable operators, Facebook, Google and Twitter as fungible with local broadcasters is therefore illogical and astoundingly superficial.

Moreover, Commenters have demonstrated in their comments and pleadings in the Sinclair merger docket and other regulatory dockets that the Commission’s suggestion that the advent of cable and the Internet have eliminated the need for regulatory actions like the national cap is undermined by critical facts the Commission ignores.

First, studies show that at least 40 million Americans depend *exclusively* upon local stations for their news. Comparing the three principal types of television news, that is network, cable and local, at least 55 million adults rely *exclusively* rely on local television. The FCC’s 2016 Brodband Progress Report found 34 million Americans do not have access to broadband and 23 million rural residents do not. Amricans over the age of 50 rely heavily on local news and few turn to online services. [[3]](#footnote-3)American viewers do not have access to the Internet or cable because of the remoteness of their rural homes from populated areas or their inability or unwillingness to pay for increasingly expensive, non-broadcast service in lieu of *free*, over-the-air TV. These viewers, many elderly, rural, minority, and/or economically disadvantaged, need access to multiple, competitive, diverse sources of local broadcast news and information just as much as Americans who get their “news” from Twitter or Facebook or Google.

It is also the case that, based on studies by the Pew Foundation and other respected analysts, a majority of Americans rely on and trust local television outlets more than any other source of local news. This includes cable news, network news, newspapers and government. It also includes of course Internet sources like Facebook, Google and Twitter, which do not originate local programming for the most part. Rather, these companies cannibalize and regurgitate programming from traditional sources or parrot social media or Russian bots. To remove the ownership cap based on the existence of these “alternatives” would constitute regulatory arbitrariness of the highest order.

The UHF Discount Should Be Once Again Eliminated Because It Is Obsolete And It Is A Regulatory Tool Whose Rationale Is No Longer Valid.

The Commission answers its own question regarding the UHF Preference in the *NPRM*. It states:

“Notably, no commenter in prior proceeding presented evidence that the original technical justification for the discount is still valid, and the Commission in the *UHF Order on Reconsideration* did not disturb its earlier conclusion that ‘the UHF Discount no longer has a sound technical basis following the digital television transition’”. *UHF Discount Order On Reconsideration,* 32 FCC Rcd at 3395, para. 14. *NPRM* at 10.

This simple conclusion should end the discussion about whether a technical policy put into place decades ago to reflect the impact of television coverage on ownership regulation should now remain on the books solely because of “non-technical justifications that remain relevant.”  *Id*. UHF stations counted less because they operated at a significant technical disadvantage. Once that disadvantage was removed by digitalization, the universal consensus is that the UHF discount makes no sense technically to any rational policy maker. Continuation of the preference would be arbitrary and capricious.

VHF facilities are now universally understood to have problematic coverage and be inferior. See *NPRM* at p.10. In the recent FCC Incentive Auction, many VHF stations were not invited to join or were offered so little to give up their spectrum that they elected not to be sold. Many are now available at bargain-basement prices months after the auction. Meanwhile, UHF stations, even in lesser markets, fetched hundreds of millions of dollars. Indeed, Sinclair recently amended its merger applications to propose a spin-off divestiture of WPIX-TV (VHF) in the nation’s largest market for 15 million dollars!!

The Commission’s curious reluctance to accept this incontrovertible reality is inexplicable. The preference, now being challenged in the D. C. Circuit, must end. Its persistence adds fuel to the fire that the only purpose of the UHF Preference is to allow Sinclair, burdened with a surfeit of UHF’s, to exploit the UHF Preference to stay within the national cap. An agency may not continue to apply a technical preference whose legitimacy is gone, to achieve non-technical objectives strikingly aligned with the business objectives of a broadcaster.

It is no doubt true that termination of the irrational UHF preference will affect the national cap and the ability of large group owners to comply with it. However, any inequity visited on these stakeholders is far outweighed by the need for an accurate measure of audience reach to protect localism, diversity, and competition. As the Attorneys General point out at page 13, only a very few large group owners would be affected by elimination of the Preference. Even they have been aware of the non-existent basis for the Preference for years and the FCC’s consequent concerns about it. Thus, they cannot claim surprise. Most importantly, American television consumers would benefit from ending the Preference because it would protect them from further consolidation of the TV industry, a prospect no one could wish for except the media barons who own the largest broadcasters.

1. Any Grandfathering of Rule Changes In This Docket Should Be Limited And Require Arms- Length Divestitures During The Grandfathering Period

The Commission solicits comments regarding possible grandfathering of enforcement should a party find itself above the ownership cap due to elimination of the UHF Preference. *NPRM* at 12-13. Commenters submit that limited grandfathering may be appropriate in the interests of fairness and to avoid disruption. But, given the critical public interest concerns at risk here, grandfathering should be limited to one year from the date of release of the Report And Order herein and tightly enforced. No extensions should be permitted in the absence of a compelling showing, such as an arms-length sale to a minority or female. It is critical that the divestiture and arms- length requirements be enforced rigorously in order to avoid scams like those being advanced in the Sinclair merger docket, wherein Sinclair proposes to convey Tribune’s NYC and Chicago stations to a Sinclair family trust and a close business associate of Sinclair’s principal.

1. Conclusion

As recently as 1984, the Commission limited broadcasters to 12 stations nationally. This rulemaking signals a potentially dangerously radical, step by step progression from that 12-station cap to unlimited group ownership. Conglomerates like Sinclair could own 300 to 400 stations and operate hundreds more within markets through sidecar deals. Such an unprecedented alteration of the television landscape contravenes the Commission’s bedrock tenets. Indeed, it reflects a belief that the government should not be regulating structural ownership in media *at all*. The Commission should firmly reject this approach, retain the Congressionally mandated 39% cap, and facilitate a well-deserved burial for the long-discredited UHF discount.

Respectfully submitted,

HERNDON RESTON INDIVISIBLE

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Date: March 19, 2018

Howard M. Weiss

1. See *Consolidated Appropriations Act* (the”*CAA*”), Pub. L. 108-199, Section 629, 118 Stat.3, 99-199 (2004). [↑](#footnote-ref-1)
2. 18 FCC Rcd 13620, 13815, 13842 (2002)(“*2002 Biennial Review Order*”). [↑](#footnote-ref-2)
3. These data are based on the last Census and the Pew Foundation Study in 2016. [↑](#footnote-ref-3)