Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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
	)	

REPLY COMMENTS OF PUBLIC INTEREST COMMENTERS

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Office of Communication, Inc. of the United Church of Christ, Common Cause, National Hispanic Media Coalition, and Public Knowledge ("Public Interest Commenters") respectfully submit these reply comments opposing proposals to raise or eliminate the 39% national reach cap for broadcast television stations.

At the outset, Public Interest Commenters note that a majority of the commenters oppose repealing or raising the cap either because it would not serve the public interest, would exceed

the FCC's statutory authority, or both. The five commenters that support repeal or relaxation are all self-interested owners of broadcast television stations.

I. The FCC should not adopt broadcasters' proposals to raise or eliminate the national cap

The National Association of Broadcasters ("NAB") proposes that "the Commission retain the 39 percent limit and determine compliance with it by accounting for all TV stations at 50 percent of their theoretical audience reach."[1] The effect of adopting NAB's proposal would be to raise the national cap to 78%. The Affiliates' request is even more self-interested, asking the Commission to loosen the cap and expand the 50% discount for non-network-owned stations, but urging the Commission to retain the 39% cap and repeal the discount for the big four networks.[2] This would result in even greater consolidation than NAB's proposal. And Nexstar urges the FCC to eliminate the 39% cap in its entirety.[3] Public Interest Commenters oppose each of these proposals. As discussed below, the FCC lacks the authority to raise or repeal the 39% cap set by Congress. But even if it had the authority, broadcasters have provided no good reasons to do so.

A. Raising the cap would undermine broadcasters' statutory obligation to serve local communities

NAB concedes that the "original technical purpose of accounting for UHF stations at half their presumed 100 percent reach is outdated."[4] Thus it tries to come up with alternative rationales for raising the cap, but these rationales do not hold up under close examination.

NAB argues that raising the cap will help large TV station groups better compete against "pay-TV/broadband companies and online video providers" and "social media giants" that are

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[1] Comments of NAB at 1-2 (emphasis omitted).
[2] Comments of Affiliates at viii.
[3] Comments of Nexstar at 12.
[4] Comments of NAB at 25.

not subject to national or local structural ownership rules.[5] This claim does not make sense because these other media companies do not compete with broadcast television in providing local new or other locally produced programming.

Moreover, NAB's assertion that the 39% cap limits station owners' ability to achieve economies of scale and scope in news production[6] actually underscores Public Interest Commenters' concern that increasing the cap would decrease the availability and diversity of local news. Relaxing the ownership cap would, as one commenter points out, "remove the regulatory underpinnings that keep broadcast television local."[7] Local news in New York is not the same as in Cincinnati. Thus, the only way that greater consolidation can achieve economies of scale and scope in "local news" is by cutting back on local news and other local programming and replacing it with centrally-produced programming.

In fact, a new study from two political scientists at Emory University supports this concern. The authors analyzed extensive data on local news programming and ratings to compare stations acquired by Sinclair Broadcast Group to other stations in the same DMA. It focused on Sinclair because of its purchase of the Bonten Media Group's stations in September 2017. The study found "that ownership matters for the content of local news. Following the acquisition of Bonten Media Group by Sinclair, the former Bonten stations' content shifted

[5] *Id.* at 11, 12-13.
[6] *Id.* at 13.
[7] Comments of Newsmax Media at 1. *See also* Comments of State Attorneys General at 3-4 (explaining how raising the cap would inhibit the ability of stations to serve local needs); Comments of Free Press at 4 (explaining how raising the cap would "shred localism commitments").

towards coverage of national politics at the expense of local politics, relative to other stations in the same media market."[8]

The authors explain that

> Media consolidation can produce cost efficiencies in the production of news, but these efficiencies are not neutral with respect to the content of news coverage. Consolidation changes the incentives of news providers, shifting coverage towards topics that can be distributed in multiple markets rather than those - such as local politics - that are market-specific. These content changes influence viewers' available information about local elections and elected officials, along with the ideological slant of news to which they are exposed.[9]

The study posits that a "conglomerate owner can reduce production costs . . . by substituting nationally-focused and ideologically unified content produced in a single studio for locally-focused and ideologically diverse content produced by many local journalists."[10] Moreover, even if "viewers would prefer locally-tailored politics content, the fact that politics coverage is bundled with other kinds of content - crime reporting, weather, sports, and so on - that are less affected by consolidation mutes the demand response."[11] Thus, allowing greater consolidation by allowing broadcast TV stations to extend their potential audience reach would undermine the public interest responsibility of broadcast stations to serve their community of license.

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[8] Gregory J. Martin and Josh McCrain, *Local News and National Politics* (Apr. 4, 2018) at 21, http://polisci.emory.edu/faculty/gjmart2/papers/localnews.pdf. A copy of this study is attached to these reply comments.
[9] *Id.* at 5.
[10] *Id.* at 4.
[11] *Id.* at 4-5.

B. Adoption of the broadcasters' proposals would be inconsistent with the FCC's statutory mandate

The FCC has the responsibility under the Communications Act to ensure that broadcast TV stations serve the public interest, and the public interest in turn, is served by promoting competition, diversity, and localism. Public Interest Commenters agree with the Writers Guild of America West (WGAW) that "companies who hold and profit substantially from broadcast licenses continue to enjoy a unique privilege that commits them to unique responsibilities."[12] As WGAW explains

> Broadcast television, unlike most other forms of professionally-produced video media, is available for free via the public airwaves. Station owners and networks are permitted by the government to profit from free use of a limited public resource, spectrum, in exchange for agreeing to special restrictions and obligations to serve the public interest. Broadcast stations also enjoy unique legal protections, such as retransmission consent and must-carry, allowing them to immediately gain access to all of a given MVPD's customers.[13]

Nothing in the Communications Act directs the FCC to ensure that television station owners are big enough to compete directly with the large firms cited by NAB, such as AT&T, Verizon, Comcast, and Netflix.[14]

Even if increasing broadcasters' ability to compete with online and social media were a valid public interest objective, NAB never explains how raising the cap to 78% would permit them to compete against much larger firms with holdings in a variety of different markets and industries. The large firms that own broadcast television stations, such as Comcast, are subject to the same ownership caps as other broadcast station owners. Similarly, should companies seek to acquire broadcast television stations, they too would be subject to the same ownership cap.

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[12] Comments of WGAW at 2.
[13] *Id.* at 5.
[14] Comments of NAB at 12.

Further, there is nothing in the FCC's rules that prohibits broadcast station owners from expanding by entering into these other businesses.

In any event, NAB exaggerates in portraying the broadcast TV industry as suffering from "continuing audience fragmentation and pressure on advertising revenues."[15] NAB painted a very different picture of broadcast TV at its recent NAB Show Senior Leadership Summit. There, SmithGeiger executives presented the results of a survey, which found that local TV remains the dominant source of news and information.

> Overall, 72% of adults 18-54 get their news and information from local TV stations via TV, their websites and news apps. The majority of all age groups are getting news and information each week from a broadcaster (59% of ages 18-24; 67% of ages 25-34; 75% of ages 35-44; and 81% of ages 45-54). . . . 53% of viewers "believe local news programs are their No. 1 most trusted source of news — dramatically outpacing any other outlet or platform — with very little differences across age groups (56% of ages 18-24, 53% of ages 25-34; 54% of ages 35-44; and 51% of ages 45-54.[16]

The survey further found that "TV viewers are spending an average of 3 hours and 13 minutes per day watching live TV, plus an additional 3:15 on streaming TV." "Although streaming, time shifting and non-linear is growing, 80% are still watching live TV."[17] In fact, 26% watched live TV more frequently than in the past.[18]

NAB's claim that raising the cap will help large TV station groups better compete against non-broadcast media companies is also contradicted by NAB's claim that adopting its proposal "would have a relatively limited overall effect" because it would only change the calculation for

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[15] Comments of NAB at 14.
[16] Mark K. Miller, *Media Leaders Bullish On Linear TV Future*, TVNewsCheck (Apr. 8, 2018), http://www.tvnewscheck.com/article/112614/media-leaders-bullish-on-linear-tv-future.
[17] *Id.*
[18] *Id.*

the 30 percent of full-power commercial DTV stations that are VHF stations.[19] NAB can't have it both ways.

C. Extending the obsolete UHF discount to VHF would be arbitrary and capricious and would not offer any significant benefits

None of NAB's other claims justify application of the 50% discount to all stations. NAB asserts that it is "more equitable for VHF stations, which, in the digital TV environment, are not technically advantaged . . . vis-à-vis UHF stations."[20] But while Public Interest Commenters agree that the potential audiences of UHF and VHF stations should be measured using the same metrics, this goal is better achieved by simply eliminating the discount for UHF stations.

Repealing the UHF discount would result in more accurate measures of potential audience reach than extending the discount to all stations. NAB acknowledges that the FCC expressly established the cap in terms of potential audience instead of actual audience share, and it is not proposing that the FCC use audience share.[21] Yet, NAB provides no evidence that broadcast television stations are unable to reach large portions of DMAs such that they require across-the-board discounts. Moreover, because a majority of viewers receive their local broadcast signals via cable rather than over the air, any variation in the actual reach of stations would have little practical effect.

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[19] Comments of NAB at 5.

[20] *Id.* at 31.

[21] *Id.* at 26. As the FCC explained when it adopted an audience reach percentage cap, "a numerical approach may not give appropriate consideration to wide discrepancies in population coverage because a station in the largest market is deemed equivalent to a station in the smallest market for purposes of ownership regulation." *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM & Television Broad. Stations*, 100 F.C.C.2d 74, 89 (1985). Recognizing that the "inherent physical limitations" of the UHF band reduced the audience reach of UHF stations, it decided to attribute only 50% of theoretical ADI audience reach to owners of UHF stations. It concluded that "the discount approach provide[d] a measure of the actual voice handicap." *Id.* at 93-94.

Repealing the UHF discount instead of extending it to all stations would be consistent with the FCC's oft-repeated statements that after the digital television transition that the UHF discount would no longer be necessary.[22] Nor would it address, as NAB complains, the "disconnect between a rule calculated on presumed audience reach and the reality of TV stations' competitive position."[23] Discounting the reach of all broadcast television stations would neither reflect competitive position, which would require looking at actual audience shares, nor would it accurately measure potential audience reach.

Other NAB rationales are similarly lacking in logic and/or factual support. For example NAB claims that its proposal is "clear, simple and straightforward to apply."[24] However, it would be just as simple and straightforward to simply eliminate the UHF discount. NAB claims that its plan would "would prevent significant disruptions to TV station owners and their viewers, especially those who rely, in whole or in part, on OTA broadcasting, which include disproportionate numbers of younger, lower income and minority viewers."[25] But there is no reason to expect that eliminating the UHF discount will lead to significant disruptions if the Commission grandfathers existing station owners, as it did in its 2016 repeal decision. If anything, NAB's proposal is more likely to result in significant disruptions. By effectively raising the cap to 78%, many station owners would move to quickly increase their holdings, thus reducing the number of station owners competing at both the local and national levels. The loss

[22] *See, e.g., Implementation of Section 202(c)(1) and 202(e)*, 11 FCCRcd 12374, 12375 (1996); *1998 Biennial Review Order*, 15 FCCRcd 11058, 11080 (2000); *2002 Biennial Review Order*, 18 FCCRcd 13820, 13847 (2003).
[23] Comments of NAB at 27.
[24] Comments of NAB at 5.
[25] *Id.*

of competition, diversity, and localism caused by consolidation would particularly harm viewers that only have over-the-air access.

Finally, NAB's suggestion that applying the 50% discount across the board somehow is necessary to eliminate distinctions between cable TV service and broadcast TV has no basis in reality.[26] NAB claims that broadcasters are treated unfairly as compared to cable providers, because cable providers only have to report the number of households served and not the number of households passed.[27] But this distinction has no effect, since cable operators are no longer subject to any horizontal ownership limits.[28]

II. The Commission lacks the authority to raise or repeal the audience reach cap.

Even if broadcasters had provided sound reasons to modify or repeal the 39% cap, the FCC lacks the statutory authority to do so.[29] The Commission should reject NAB's tortured argument that in directing the FCC to establish a 39% cap, Congress did not take away the FCC's authority to change it because "if Congress had intended to prohibit the FCC from modifying or eliminating its national audience reach rule in the future, it could easily have done so by establishing the 39 percent limitation in the CAA or by amending the Communications Act of 1934 (Act) to address national TV ownership."[30]

[26] Comments of NAB at 4 (arguing that the FCC attributes TV household to cable operators only when the home subscribes to cable).
[27] *Id.* at 26.
[28] Even when cable was subject to ownership limits, it made sense to count subscribers rather than homes passed because subscribers must pay hefty cable fees before watching TV on their cable service. By contrast, virtually every household within a DMA can watch over the air television for free.
[29] Comments of Public Interest Commenters at 1-3; Petitioner's' Brief, *Free Press v. FCC*, D.C. Cir. No. 17-1129, at 34-42.
[30] Comments of NAB at 7.

As Commissioner O'Rielly has pointed out, the clear understanding at the time the CAA passed was that the FCC could not change the cap in the future.[31] This understanding of Congressional intent has been affirmed by both Republican and Democratic members of Congress. On March 29, 2018, just a few days before he retired, Senator Thad Cochran, a Republican who had served on the Senate Appropriations Committee since 1981, sent a letter to Chairman Pai in which he states that the CAA "prohibits the FCC from modifying the 39 percent national audience reach."[32] He goes on to observe that at the time,

> the broadcasting industry had not completed the digital transition and UHF signals remained inferior to VHF signals. If the Commission determines that UHF signals are no longer technologically inferior to VHF signals, it should sunset the discount accordingly. The Appropriations Committee did not intend for the UHF discount to be used as a loophole to the 39 percent national audience reach limitation.[33]

Similarly, an earlier letter signed by 24 Senators objected to the FCC's reinstatement of the UHF discount, noting that "[r]einstating this historical relic directly contradicts Congress' intent in adopting a statory national media ownership cap."[34]

III. Raising or repealing the 39% will harm consumers

In addition to the harms to localism, diversity and competition discussed above and by many other commenters, DISH, Consumers Union, and others show that broadcasters already exercise substantial leverage with pay-TV providers in retransmission negotiations.[35] Allowing broadcasters to further consolidate by raising the cap will only exacerbate this problem. When

[31] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, Report and Order*, 31 FCCRcd 10213, 10251 (2016).
[32] Letter to Ajit Pai, Chairman, FCC (March 29, 2018).
[33] *Id.*
[34] Letter to Ajit Pai, Chairman, FCC (Sept. 29, 2017).
[35] *See, e.g.*, Comments of DISH Network at 2-3; Comments of Consumers Union at 8-9.

broadcasters are able to demand higher retransmission fees from pay-TV providers, those providers must necessarily pass those costs on to consumers.[36] When pay-TV providers refuse to be held hostage by broadcasters' "take it or leave it" retransmission offers, it has resulted in "blackouts" in local broadcast programming.[37] Either way, the public loses—pay-TV subscribers will either see an increase in their monthly dues or go without local news and content.

Conclusion

For the reasons stated above, the Commission should retain the 39% cap established by Congress and repeal the UHF discount. Since no significant distinction remains between UHF and VHF stations, the FCC's rules should use an accurate measure of potential reach that treats all broadcaster stations in the same manner.

Respectfully submitted,

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[36] Comments of DISH Network at 10.
[37] *Id.*
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April 18, 2018