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 Rule	)	MB Docket No. 17-318
	)	

REPLY COMMENTS OF DISH NETWORK L.L.C.

DISH Network L.L.C. ("DISH") submits these reply comments in the above-captioned proceeding to reiterate, consistent with the consensus of a diverse set of parties in the record, that the 39 percent national TV station audience reach cap (the "National Cap") remains in the public interest and the Commission does not have the statutory authority to modify it. In addition, the Commission lacks any rational basis for maintaining the UHF discount. DISH also urges the Commission to reject a proposal, put forth by the National Association of Broadcasters ("NAB"), which seeks to circumvent the statutorily mandated 39 percent cap by applying a discount to all digital signals.

The National Cap remains an important component of a vibrant and diverse media landscape. As DISH has shown, consolidation in the broadcast industry has only decreased investment in local newsrooms and diminished the quality and availability of programming that fits the needs of communities.[1] The National Cap now stands as one of the last guardians of localism.[2] Even if the Commission possessed the authority to modify the cap, which it does not,

---

[1] Comments of DISH Network L.L.C., MB Docket No. 17-318 at 11 (Mar. 19, 2018) ("DISH Comments").

[2] *Id.* at 11-12.

record evidence supports either maintaining or lowering it, not raising it. And, to preserve localism, the record supports permanently eliminating the UHF discount. In contrast, NAB's proposal to apply a 50 percent discount on all broadcasters' coverage calculations is nothing more than a proposal to circumnavigate the statute itself, and the Commission should reject it.

I. THE COMMISSION SHOULD LEAVE THE NATIONAL CAP UNCHANGED AND ELIMINATE THE UHF DISCOUNT

DISH joins the consensus of state attorneys general,[3] multichannel video programming distributors ("MVPDs"),[4] public interest groups,[5] independent programmers,[6] content creators,[7]

[3] *See* Revised Comments of the Attorneys General of the States of Illinois, California, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia, MB Docket No. 17-318 at 2 (Feb. 27, 2018) ("Raising the national audience reach limit and/or maintaining the UHF discount fails to further the public interest.") ("State AG Comments").

[4] *See* Comments of NTCA—The Rural Broadband Association, MB Docket No. 17-318 at 2 (Mar. 19, 2018) (opposing "any plan to increase the existing television broadcasters' ownership cap") ("NTCA Comments"); Comments of American Cable Association, MB Docket No. 17-318 at 2 (Mar. 19, 2018) ("[P]ermitting greater consolidation will force 90 percent of Americans that rely on [MVPDs] to receive broadcast signals to pay higher prices.") ("ACA Comments").

[5] *See* Comments of United Church of Christ, Common Cause, National Hispanic Media Coalition, and Public Knowledge, MB Docket No. 17-318 at 1 (Mar. 19, 2018) (stating that the Commission should "eliminate the obsolete UHF discount" and that raising or eliminating the National Cap "would not serve the public interest"); Comments of Free Press, MB Docket No. 17-318 at 3 (Mar. 19, 2018) (the proposal to modify the National Cap is "patently contrary to the public interest and poorly justified") ("Free Press Comments"); Comments of Consumers Union, MB Docket No. 17-318 at 3 (Mar. 19, 2018) ("The cap should remain in place for valid public interest reasons."); Comments of the Leadership Conference on Civil and Human Rights, MB Docket No. 17-318 at 4 (Mar. 19, 2018) ("We strongly oppose relaxation of the National TV Audience Reach cap [and] urge immediate repeal of the UHF discount….").

[6] *See* Comments of Newsmax Media, Inc., MB Docket No. 17-318 at 7 (Mar. 19, 2018) ("[t]he Commission has no choice but to enforce the 39 percent ownership cap" and must sunset the UHF discount).

[7] *See* Comments of Writers Guild of America West, Inc., MB Docket No. 17-318 at 10 (Mar. 19, 2018) (stating the Commission must maintain the National Cap and repeal the UHF discount) ("Writers Guild Comments").

and even certain broadcasters,[8] which urge the Commission to leave the National Cap unchanged and to eliminate the UHF discount.[9] The State AG Commenters are correct: "lifting or eliminating the national audience reach limit threatens diversity, competition, and localism,"[10] while "eliminating the UHF Discount to reflect the actual audience reach is necessary to further [these] three public-interest considerations."[11] Eliminating the 39 percent National Cap would harm competition by significantly reducing the number of independently owned and operated television stations, strengthening the grip of the largest, most dominant broadcasters, and further increasing the retransmission fees they can command.[12] Meanwhile, the UHF discount no longer reflects technical reality, nor serves its purpose of ensuring that calculations concerning audience reach are reasonably accurate.[13] Rather, it severely undercuts the 39 percent National Cap set by Congress; if applied to the proposed merger between Sinclair Broadcast Group and Tribune

---

[8] *See* Comments of the ABC Television Affiliates Association, CBS Television Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, MB Docket No. 17-318 at 4, 37 (Mar. 19, 2018) (stating the Commission should maintain the National Cap for the big four networks and eliminate the UHF discount for the big four networks going forward) ("Network Affiliate Comments").

[9] While DISH agrees with the majority of commenters that the Commission lacks authority to modify the 39 percent National Cap, the Commission does have authority to eliminate the UHF discount. *See* State AG Comments at 7 (modifying the National Cap "would run afoul of Congress's express adoption of the national audience reach limit in the 1996 Act and in the 2004 Amendments," but "the Commission can modify or eliminate implementing regulations like the UHF Discount that affect the accuracy of the calculation of audience reach.").

[10] State AG Comments at 3.

[11] *Id.* at 11.

[12] *Id.* at 3; *see* Free Press Comments at 9, 11-12.

[13] State AG Comments at 10-11.

Media Company, for example, it would allow for an actual audience reach of 72% of U.S. television households.[14]

Changes to the media landscape since passage of the Consolidated Appropriations Act in 2004 do not undermine the ability of broadcasters to compete, and cannot justify loosening or elimination of the National Cap.[15] Broadcasters continue to derive an unfair advantage from their entitlement to use valuable airwaves for free, to take advantage of a statutory copyright license and market exclusivity protections, and to be able to choose between demanding retransmission consent fees and asserting must-carry rights. Even more important, broadcasters that are affiliated with one of the four major networks can keep raising the retransmission consent fees they charge to MVPDs by playing the competing distributors operating in each market against one another. And the larger broadcasters become, the more leverage they gain in negotiations, and the greater the fee increases they can extract.[16] The 39 percent cap already ensures that broadcasters can enjoy extraordinary bargaining advantages and is a necessary ceiling to ensure that these entities don't gain even greater leverage, and the ability to demand even steeper price increases.[17]

---

[14] *Id.* at 11. Removing or loosening barriers on broadcaster consolidation will also harm both viewpoint and ownership diversity. *Id.* at 12 ("[S]maller stations that are more likely to be female or minority owned are less likely to be included in acquisitions if there is less consolidation nationally.").

[15] Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("CAA"). The CAA required the Commission to reduce the National Cap from 45 to 39 percent, and excluded from the quadrennial review "any rules relating to the 39 percent national audience reach limitation."

[16] Petition to Dismiss or Deny of DISH Network, L.L.C., MB Docket No. 17-179 at 3, 21 (Aug. 7, 2017) ("A broadcast group's size has a statistically strong effect on retransmission prices.").

[17] *See* Writers Guild Comments at 5-6.

Nexstar asserts that the number of viewers a broadcaster reaches nationwide has no effect on how the broadcaster serves viewers in a local market.[18] This is factually incorrect. As commenting parties recognize, smaller station groups better "reflect local preferences, interests, and sensitivities" than the largest broadcast station groups, who often favor "must-run" and other nationally-focused programming that undercuts localism.[19] And, consolidation by large broadcast groups leads to the slashing of local news staffs, consolidating of regional news production, and shifting of news production to corporate headquarters, all to the detriment of localism and the public interest.[20] The Commission has a duty, as the network affiliates recognize, to "jealously guard" against such centralization and to ensure that localism and the public interest at large is not sacrificed for the sake of economic efficiency interests.[21]

Retaining the National Cap and eliminating the UHF discount further serves the public interest by limiting cost increases that are passed along to consumers as a result of increased retransmission consent fees paid by MVPDs. Retransmission consent rates for MVPDs are already exorbitant because of the asymmetry of bargaining power between a network station and distributor in each local designated market area.[22] These claims are not theoretical; they are

---

18 Comments of Nexstar Broadcasting, Inc., MB Docket No. 17-318 at 2 (Mar. 19, 2018).

19 State AG Comments at 12-13.

20 DISH Comments at 11; *see* Comments of Sinclair Broadcast Group, Inc., MB Docket No. 17-318 at 10 (Mar. 19, 2018) (recognizing some news programming for local stations is generated outside the local market, but failing to discuss the effects of consolidation on the centralization of news programming).

21 Network Affiliate Comments at 5-6 (citing 47 U.S.C. §§ 307(b), 310(d)).

22 DISH Comments at 3-4; *see* NTCA Comments at 3 ("Clearly, when it comes to small, rural MVPDs 'negotiating' with broadcast groups that can reach up to 39 percent of all television households in the U.S., it is not hard to predict which side has more bargaining power."); ACA Comments at 3 ("[T]he more of an MVPD's subscribers a broadcaster can reach, the more leverage it has in negotiations with that MVPD—and the more leverage a broadcaster has, the more harm it can do to the MVPD and its subscribers."). Additionally, retransmission rates have

supported by DISH's rigorous study of hundreds of its own retransmission agreements – the "best empirical evidence available to the Commission."[23] As Consumers Union recognizes, and as discussed above, without a National Cap, larger station groups can be expected to gain even more leverage in retransmission consent negotiations;[24] if retransmission consent fee increases do accelerate further, this leaves DISH and other MVPDs with little choice but to raise prices for consumers.[25]

II. THE COMMISSION SHOULD REJECT NAB'S PROPOSAL TO DETERMINE COMPLIANCE WITH THE NATIONAL CAP

NAB claims that the National Cap is based on the flawed premise that stations reach all the TV households in the DMAs in which they are located, erroneously equating "reach" with "viewers."[26] NAB contends that a 50 percent discount for all stations better accounts for the number of viewers who actually watch a station, consistent with TV attribution in the cable context. NAB further argues that such a calculation is supported because, among other things, it is straightforward and would not significantly expand current permitted ownership levels.[27] But, NAB's proposal is flawed. Among other things, such a discount would eviscerate Congress'

---

skyrocketed despite any differences in market capitalization between MVPDs and the largest broadcasters. *See* Comments of the National Association of Broadcasters, MB Docket No. 17-318 at 12 (Mar. 19, 2018) (arguing that broadcasters must compete with larger pay-TV/broadband companies and online video providers) ("NAB Comments").

[23] ACA Comments at 2; *see* DISH Comments at 5-10. DISH agrees with ACA that, if the Commission decides to raise the National Cap, it must account for DISH's "best evidence" by: (1) quantifying the magnitude of harm this will cause to MVPD subscribers; and (2) quantifying the benefits of such action that it believes would outweigh that harm. ACA Comments at 2.

[24] Consumers Union Comments at 8.

[25] *See* ACA Comments at 2 ("[B]roadcast consolidation increases a broadcaster's leverage in retransmission consent negotiations. This, in turn, leads to higher rates paid by MVPD subscribers and other harms to the public.").

[26] NAB Comments at 3.

[27] *Id.* at 25-29.

mandate that the Commission set the "national audience *reach* limitation" at 39 percent, by allowing all station groups to reach double that amount, or 78 percent.[28] The Commission lacks the statutory authority to make this change.[29] Congress explicitly removed from Commission review "any rules relating to the 39 percent national audience reach limitation."[30] Viewership, which varies based on the quality of the station and the popularity of its content, is substantially different than, and not interchangeable with, reach, which varies depending on the station's propagation characteristics. Moreover, NAB's proposal would undercut Congress' goal of "preclud[ing] substantial network expansion" for broadcast stations "already hav[ing] significant population penetration," "attenuat[ing] the alleged detrimental impact of network expansion,"[31] and "prevent[ing] excessive consolidation in the broadcast market."[32] Further, and ironically, NAB is trying to reap a significant advantage by relying on the broadcasters' own failure to build antennas with enough strength to reach all households in their communities.

III. CONCLUSION

For the foregoing reasons, and those stated in the comments of DISH and many others, the Commission should maintain the National Cap, and should eliminate the UHF discount.

---

[28] *See* Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996) *as amended by* CAA, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100.

[29] State AG Comments at 6 (citing statements from multiple House and Senate lawmakers underscoring Congress' intent to supplant the Commission's rulemaking authority regarding the National Cap).

[30] CAA, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100.

[31] Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Memorandum Opinion and Order,* 100 F.C.C.2d 74, 87-88 ¶ 31 (1985).

[32] Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Report and Order,* 31 FCC Rcd. 10213, 10224 ¶ 23 (2016).

Respectfully Submitted,

_____________/s/_________________

Jeffrey H. Blum, Senior Vice President
& Deputy General Counsel
Alison Minea, Director and Senior Counsel,
Regulatory Affairs
Hadass Kogan, Corporate Counsel
DISH Network L.L.C.
1110 Vermont Avenue, N.W., Suite 750
Washington, D.C. 20005
(202) 463-3703

Pantelis Michalopoulos
Stephanie A. Roy
Matthew R. Friedman
Steptoe & Johnson LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000

Counsel for DISH Network L.L.C.

April 18, 2018