BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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

To: The Commission

REPLY COMMENTS

Entravision Communications Corporation ("Entravision"), by its attorneys, hereby files these Reply Comments in the above-referenced proceeding[1] in which the Commission recently solicited comments on its national television audience reach cap (the "National Cap"),[2] including the discount applied to UHF stations in calculating a station group owner's compliance with the National Cap (the "UHF Discount").[3] As expected, commenters in this proceeding have documented the vast changes in media technologies, video markets and consumer expectations occurring since the Commission and Congress last visited the National Cap a decade-and-a-half ago. Entravision now seconds the many broadcasters and broadcaster groups contending that, to

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[1] *Amendment of Section 73.3555(e) of the Commission's Rules, National Multiple Ownership Rule,* Notice of Proposed Rulemaking, 32 FCC Rcd 10785 (2017) (the "*NPRM*"). The date for the submission of Reply Comments has been extended to this day. *Amendment of Section 73.3555(e) of the Commission's Rules, National Multiple Ownership Rule,* DA 18-139 (MB February 12, 2018).

[2] The FCC's application of the National Cap currently prohibits broadcast entities from owning or controlling television stations that, in the aggregate, reach more than 39 percent of the television households in the country. 47 C.F.R. § 73.3555(e)(1).

[3] Under the UHF Discount, the Commission attributes 50 percent of the television households in an UHF station's Designated Market Area ("DMA") to the station for purposes of determining compliance with the National Cap. 47 C.F.R. § 73.3555(e)(2). By contrast, the Commission currently attributes 100 percent of the television households in a VHF station's DMA to the station.

the extent the National Cap affects localism, it harms more than it helps. The National Cap chiefly affects localism by hindering broadcasters' abilities to compete with large and growing number of non-broadcast video programmers, including cable, satellite, and Internet-delivered content providers. Unlike broadcasters, these competitors are free to consolidate their businesses in order to achieve economies of scale without the constraint of outdated regulations.

Despite myriad changes in the video marketplace, broadcast television remains the indisputable standard-bearer for local community-oriented video content. The amount of resources broadcasters have on hand for local service and original programming obviously hinges on their competitive success. To better promote localism, the Commission should relax the National Cap to permit sufficient consolidation for the average broadcaster – an independent, mid-sized station group owner, such as Entravision – to compete fairly and effectively for viewers and ad dollars with its unregulated competitors.

Entravision believes the proposal submitted by the National Association of Broadcasters ("NAB") serves this objective. Maintaining the current 39 percent National Cap while extending the UHF Discount to VHF stations (the "NAB Proposal"), promises a balanced, administratively-efficient means of bringing the National Cap policy into line with the video marketplace and current technology. Bringing broadcasters into greater parity with other video providers through relaxation of the National Cap will help secure a vibrant and competitive localism amidst countervailing market forces that rarely, if ever, serve local interests.

Alternatively, and in order to support broadcasters that serve diverse audiences, Entravision submits that if the NAB proposal is not found acceptable the Commission must continue to apply a 50% discount to any station, whether VHF or UHF, that is not affiliated with a Big Four Network.[4] As the broadcast community knows, there is a clear and evident demarcation between Big Four Network affiliates and other broadcasters. Big Four Network affiliates benefit from the programming financed and delivered by their networks and do not have to rely on locally produced or syndicated programming. Owing to these advantages, the Big Four Networks are able to secure higher levels of advertising and retransmission consent revenues than their non-Big-Four competitors can ever expect. These two groups of stations simply do not stand as equals and it would be detrimental to stations not affiliated with these networks to be placed in a position of not being able to grow without ownership restrictions and being able to compete with the major networks and their affiliate.

As a preliminary matter, Entravision agrees with most commenters – and the prior conclusions of the Commission – that the Commission has the authority to modify or eliminate the National Cap. In 2016, when the Commission eliminated the UHF Discount, the Commission found that it retained such authority, despite congressional action in 2004 directing the Commission to set the National Cap at 39 percent.[5] In that decision, the Commission noted that Congress hadn't imposed the National Cap by amending the Communications Act or

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4 There is ample precedent for a termination of the UHF Discount that only applies to Big Four Network stations. In the *2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 12620, 13847 (2003) , the Commission adopted rules to phase out the UHF Discount for broadcast stations owned by the Big Four Networks on a market-by-market basis at the time the markets transitioned to DTV. The Commission indicated further that, for networks and station groups other than those stations owned and operated by the Big Four networks, it would decide in a subsequent biennial ownership review whether to extend the sunset to all other networks and station group owners. Likewise, other Commission rules, such as the video description rules in Section 79.3, treat Big Four Network affiliated stations differently from other stations.

5 *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd 10213, 10222-24 (2016) ("*UHF Discount Elimination Order*"). *See also* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("CAA").

otherwise prohibited the Commission from evaluating it; rather, Congress had directed the Commission to modify its rules to include a 39 percent Cap and had removed consideration of the Cap from the Commission's quadrennial review process.[6] This limited directive from Congress in no way vitiated the broad grant of authority to the Commission in the Communications Act to make, or unmake, rules and regulations "from time to time, as public convenience, interest, or necessity requires…"[7] Further, as noted in the *NPRM*, Congress used identical language in the 2004 CAA as it had used in the Telecommunications Act of 1996.[8] Significantly, the D.C. Circuit Court, like the Commission, interpreted this language as leaving intact the Commission's authority to modify the National Cap.[9] As these previous decisions demonstrate, the Commission retains the authority to modify or eliminate the National Cap and opposing arguments are both contrary to reason and applicable precedent.

Returning to the substance of this proceeding, as early as 1984, and again 2002, the Commission dropped competition and diversity as plausible rationales for the National Cap, relying instead solely upon the principle of localism to justify retaining a restrictive Cap.[10] Since 2002, of course, non-broadcast video providers have only proliferated, such that competition and diversity cannot reasonably be invoked to justify tightening the National Cap, only to relaxing it.

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6 *UHF Discount Elimination Order*, 31 FCC Rcd at 10222.

7 47 U.S.C. § 303(r).

8 *See NPRM*, 32 FCC Rcd at ¶ 8. *See also* Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996) ("1996 Act").

9 *Id.* (citing *Fox Television Stations, Inc. v FCC*, 280 F.3d 1027, 1042-1043 (modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002); *2002 Biennial Review*, Report and Order, 18 FCC Rcd 13620, 13818 (2003)).

10 *See NPRM* at ¶ 16 (citing *Amendment of Section 73.3555 [formerly 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, Report and Order, 100 FCC 2d 17, 27, 39-40 (1984), *recon. granted in part*, Memorandum Opinion and Order, 100 FCC Rcd 2d 74 (1985), recon. dismissed, 5 FCC Rcd 5338 (1990); *2002 Biennial Review* 18 FCC Rcd at 13818-19, 13842.

The largest subscription television services, a number of which have corporate ties to the largest broadband providers or broadcast networks, possess resources and market clout on a vastly different scale from even the largest non-Big Four Network broadcasters.[11] Over-the-top services, such as Netflix and Amazon Prime, while stand-alone entities, dwarf broadcast television in size and the financial ability to procure original programming.[12] Some of the social media companies entering the video fray, such as Facebook, are even more colossal.[13] Such giant media conglomerates are well-positioned to invest in high-quality original programming and to command correspondingly high programming fees. For instance, according to the Commission's 18th Video Competition Report, MVPDs paid approximately 85 percent of their total programming fees to cable networks owned by these media conglomerates and only 15 percent to local broadcast stations.[14]

The capitalization and market power differentials between broadcast and non-broadcast video providers are reflected in recent video market trends: with viewers and advertisers migrating to online and mobile platforms, especially younger audiences, the competitive challenges facing traditional broadcast television are immense.[15] For example, traditional TV

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11 *See* National Association of Broadcasters Comments, MB Docket No. 17-318 (submitted March 19, 2018) ("NAB Comments"), at 12 (comparing market capitalizations of AT&T/DirecTV ($225.8 billion), Verizon ($196.92 billion), Comcast ($171.57 billion) to Sinclair ($3.43 billion) and Nexstar ($3.29 billion).

12 *Id.* (citing Netflix's market cap as $127.7 billion).

13 *Id.* at 13 (citing Facebook's market cap in excess of $528 billion). See Bloomberg, *TV's Troubles Just Go Real*, www.bloomberg.com/gadfly/articles/2018-03-29/cbs-disney-and-tv-chums-need-digital-rethink.

14 *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568 (2017).

15 *Id.* at 15 (citing Leichtman Research Group, Press Release, *69% of U.S. TV Households Have a Connected TV* (Apr. 27, 2017); Leichtman Research Group, Press Release, *84% of U.S. Households Get an Internet Service at Home* (Dec. 13, 2017); Lee Raine, *About 6 in 10 young*

viewership has declined 25-33 percent in recent years among adults 18-34;[16] one report cites a 45.5 percent decline in the amount of time young people ages 12-17 spent watching traditional TV from 2012 to 2017.[17] In response, advertisers are devoting ever-greater percentages of their ad buys, the financial lifeline for broadcasters, to online and mobile outlets.[18]

As these trends demonstrate, broadcasters face extraordinary competition from a diverse array of video programmers and platforms, that reach every home through the Internet, in today's video market. Audiences and advertisers exercise a degree of choice that was inconceivable in 2004 when Congress directed the Commission to set the National Cap at 39 percent. With video competition and diversity at unprecedented levels, the National Cap question in this proceeding boils down to localism.

Entravision agrees with its fellow broadcasters that the Commission's localism objectives are best served by competitive local markets and the Commission rules aimed at local markets impact local competition more effectively than broad-brush rules, such as the National Cap.[19]

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adults in U.S. primarily use online streaming to watch TV, Pew Research Center (September 13, 2017).

16 *See id.* at 16, Attachment C.

17 *Id.* at 16 (citing J.C. Lupis, *The State of Traditional TV: Updated with Q2 2017 Data*, marketingcharts.com (Dec. 13, 2017).

18 *Id.* (citing BIA/Kelsey analysis of 2018 ad market showing 24.3 percent of total local ad revenue to mobile/online, 13.7 percent broadcast TV).

19 For example, the Commission's recent revision of the local television multiple ownership rules provides a more direct means of helping more "local television stations achieve economies of scale and improve their ability to serve their local markets in the face of an evolving video marketplace" than the National Cap. *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et. al*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC 9802, ¶77 (2017) (eliminating eight-voices element of rules because it "prevents combinations that would likely produce significant public interest benefits," particularly in "revenue-scarce small and mid-sized markets"). Similarly, enforcement at the local level, including enforcement of rules that ensure market-based negotiation of retransmission consent and enforcement of local program exclusivity arrangements, protects and

Nonetheless, whatever the magnitude of the National Cap's impact on localism, the nature of that impact remains the main issue in this proceeding: is localism better served by continuing to deny broadcasters the benefits of consolidation exploited by its competitors, or is localism more likely to flourish under conditions that permit broadcasters to achieve economies of scale similar to those enjoyed by their non-broadcast competitors? Entravision strongly supports the latter view.

Local content – programming responsive to local community interests and needs – is the distinguishing feature of the broadcast industry, as important to a broadcaster's bottom line as it is to the Commission's public interest conception of the broadcaster's role. Entravision has made every effort to provide that local content through its local news and public affairs programming.

Viewers expect community news, sports and weather on their local television stations, and reward locally-oriented stations with regular viewership. Advertisers follow the audience. Contrary to the speculations of MVPD interest groups,[20] relaxation of the National Cap will not change the enduring incentive of broadcasters to produce quality local content, because quality local service is simply sound business. In other words, the National Cap is neither responsible for broadcasters' commitment to localism, nor will its relaxation cause broadcasters to abandon practices that have consistently defined their role and determined their success for generations.

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advances localism more effectively than broader and more generalized regulations. *See* NAB Comments at 20.

[20] MVPD comments in this proceeding combine speculative claims regarding localism's dependence on a strict National Cap with complaints about rising retransmission consent fees. With regard to the latter, Entravision would simply echo NAB's point that MVPDs have an obvious interest in keeping broadcasters competitively weak, and that MVPDs' interests and the public interest are not the same thing. Broadcasters increasingly rely on retransmission consent fees to fund the local programming viewers demand and to compensate network program distributors for network programming supplied to them *See* NAB Comments at 36-37.

On the other hand, the change to the national cap proposed by NAB would give broadcasters the chance to compete more effectively with their video competitors by allowing broadcasters to achieve some of the economies of scale enjoyed by their rivals. As pointed out by NAB, the Commission's current methodology – attributing 100 percent of viewers in a DMA to VHF television stations, and 50 percent to UHF stations – does not provide anything like an empirical snapshot of stations' true viewership. Rather, it is an accounting metric that greatly overstates the reach of television stations in their markets, one that has become more and more removed from reality as the years have gone by.[21] No other competitors in the video market are subject to ownership limits based on attribution of theoretical viewership.[22] The NAB Proposal restores a semblance of reality and equity to this regulatory imbalance. Further, because 70 percent of current television stations are already UHF, the corrective recommended by the NAB is actually quite modest – changes in common ownership would be fairly limited.[23]

What these limited changes would allow is for a number of broadcasters, including small and mid-sized broadcasters, without ties to the Big Four Networks, such as Entravision, to achieve economies of scale and scope with respect to programming, news production, technological innovation and station operations. These efficiencies will enable broadcasters to devote more resources to local service, through greater investment in original content, such as

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[21] *See* NAB Comments at 4 (the methodology "significantly exaggerates the competitively effective reach of TV station groups whose actual audiences and advertising revenues have been fragmented by ever-increasing competition from a growing range of multichannel and online video providers").

[22] While Congress mandated that the Commission set vertical and horizontal limits on cable in 1992, those limits were vacated by the D.C. Circuit in 2001 and 2009, respectively. *See Time Warner Entertainment Co. v FCC,* 240 F.3d 1126 (D.C. Cir. 2001); *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

[23] *See* NAB Comments at 5, 34 (noting as of December 31, 2017, there were 364 VHF stations and 1013 UHF stations).

local news and local sports, as well as through licensing of higher-quality programming. At the same time, these efficiencies will help boost broadcasters' market clout and enhance their ability to negotiate and compete with MVPDs and other video market providers. Broadcast television remains the leading source of local programming, and by helping to make traditional television stations more competitive, the NAB Proposal will thus further the Commission's localism goals.

If the Commission – against the preponderance of the evidence – should elect to tighten the National Cap by eliminating the UHF Discount, then the Commission must grandfather non-compliant ownership combinations in existence at the time such order becomes effective. Like many broadcasters, particularly independent station group owners serving diverse minority populations, Entravision has built its business in part by utilizing the UHF Discount. As the Commission itself has recognized, broadcasters have invested billions of dollars and now provide service to millions of television as the result of long-term business strategies predicated on the UHF Discount.[24] Courts have overturned agency decisions that fail adequately to consider such reliance interests.[25] Accordingly, the Commission must protect the legitimate reliance interests of broadcasters and the public interest of viewers by grandfathering station combinations that violate the National Cap in the event the Commission eliminates the UHF Discount.[26]

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[24] *See Amendment of Section 73.3555(e) of the Commission's Rules National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd 3390, 3396 (2017) (noting industry reliance on UHF Discount).

[25] *See, e.g., Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) (finding agency justification for new policy inadequate given "decades of industry reliance on [the agency's] prior policy).

[26] One of the benefits of the NAB Proposal, of course, is the avoidance of the administrative costs associated with significant rule changes and related grandfathering issues.

In sum, to better promote localism, the Commission should relax the National Cap in order to allow the average broadcaster enough consolidation to compete fairly and effectively with its unregulated competitors. The NAB Proposal promises a balanced, administratively-efficient means of updating the National Cap policy to bring it into line with today's competitive video marketplace.[27] In the event that the Commission decides not to retain or expand the UHF Discount to VHF licensees, Entravision urges the Commission to retain the UHF Discount and apply it to VHF licensees, while limiting the applicable licensees to those that are not affiliates of the Big Four Networks.

WHEREFORE, Entravision Communications Corporation respectfully requests that the Commission adopt the proposal set forth by the National Association of Broadcasters and amend the 39 percent National Cap and associated UHF Discount by applying the fifty percent discount to VHF stations as well or, in the alternative, to continue to apply a 50% discount to any station that is not affiliated with a Big Four network.

Respectfully submitted,

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[27] Should the Commission elect to remove the UHF Discount, Entravision requests that the Commission consider and determine how such an action would impact on the changes in multiple ownership rules since the adoption of the UHF Discount. For example, would the acquisition of a permitted second station in a DMA affect a Station's television household count or should its household count be grandfathered owing to its existing presence in the DMA.