



Ross J. Lieberman
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August 3, 2016

Via ECFS

Jessica Almond, Office of Chairman Wheeler
David Grossman, Office of Commissioner Clyburn
Marc Paul, Office of Commissioner Rosenworcel
Matthew Berry, Office of Commissioner Pai
Robin Colwell, Office of Commissioner O'Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Ex Parte Communication; Amendment of Section 73.2555(e) of the Commission's Rules, National Television Multiple Ownership Rule, MB Docket No. 13-236

Dear Ms. Almond, Mr. Grossman, Mr. Paul, Mr. Berry, and Ms. Colwell:

On August 2, 2016, the American Cable Association filed the attached ex parte letter in the docket of the above captioned proceeding expressing its support for the elimination of the UHF discount from the Commission's local television ownership rule. We wish to bring this letter to your attention as the Commission continues to deliberate on adoption of this long-overdue change to its rules.

If you have any questions or require additional information, please do not hesitate to let me know.

Sincerely,

A handwritten signature in black ink that reads 'Ross J. Lieberman'. The signature is fluid and cursive, with the first name 'Ross' being particularly prominent.

Ross J. Lieberman

cc (via email): Jessica Almond
David Grossman
Marc Paul
Matthew Berry
Robin Colwell



Ross J. Lieberman
Senior Vice President of Government Affairs
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2415 39th Place, NW
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August 2, 2016

Via ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: American Cable Association Ex Parte Communication; Amendment of Section 73.2555(e) of the Commission's Rules, National Television Multiple Ownership Rule, MB Docket No. 13-236

Dear Ms. Dortch:

The American Cable Association (“ACA”) submits this letter in support of the elimination of the so-called “UHF discount” in the Commission’s national television multiple ownership rule proposed in 2013 and urges the Commission to take this important step to update its rules without further delay.¹

Under the Commission’s current rules, a single entity is prohibited from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the nation; however, in determining that number, those broadcasting in the UHF spectrum band are attributed with only 50 percent of the television households in their designated market areas.² The discount was adopted in 1985 to reflect the significantly smaller coverage area and audience reach of analog broadcast signals using the UHF spectrum band, which placed those stations in a weaker competitive position vis-à-vis stations broadcasting in the VHF band. It was aimed at promoting competition by compensating for the inherent technical limitations of UHF stations and furthering diversity objectives.³ Well over a decade ago, the Commission presciently recognized that the transition to digital broadcasting would likely equalize the reach of UHF and VHF stations, and put broadcasters on notice that it planned to eliminate the discount following the disappearance of its justification.⁴ Today, elimination of the UHF discount is justified by the facts, the record, and sound public policy.

¹ See *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 28 FCC Rcd 14234 (2013) (“NPRM”).

² See NPRM, ¶ 1; 47 C.F.R. § 73.2555(e).

³ See NPRM, ¶¶ 3-5.

⁴ *Id.*, ¶ 8.

As the NPRM notes,⁵ and the record reflects,⁶ the “discount” for viewers served by UHF stations in computing the reach of a television station for purposes of calculating compliance with the national ownership cap of audience size is a relic of the analog era when the reach of these stations’ signals was far less than that of VHF stations. When the discount was first introduced, both the technical capabilities of broadcast and competitive marketplace for diverse voices in media were limited. As predicted, following the DTV transition the technological justification changed. UHF station signals are no longer inferior to VHF station signals, and in some cases, are superior.⁷ In short, as the Commission has correctly recognized, “the DTV transition has rendered the UHF discount obsolete and it should be eliminated.”⁸

This fundamental change in the underlying facts undermines the policy goal once served by the discount. Now that the DTV transition has eliminated the weaker competitive position of UHF stations in the marketplace, the UHF discount only serves to allow for more consolidated ownership and brings several broadcast groups within a hair’s breadth of the congressionally-mandated 39 percent national ownership cap. It now gives owners of UHF stations an unfair advantage in the number of households their signals may lawfully reach and skews the broadcast marketplace. Although the broadcasters mount lengthy challenges to the Commission’s authority to eliminate the UHF discount,⁹ not one of them asserts that the original technical justification for

⁵ *Id.*, ¶¶ 1-2, 16-18.

⁶ Letter from Allan J. Block, Chairman, Block Communications, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236, at 2 (filed Dec. 16, 2013) (“Block Communications Ex Parte Letter”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Reply Comments of Common Cause, Free Press, Media Alliance, and Office of Communication, Inc. of the United Church of Christ, at 3 (filed Jan. 13, 2014) (“Public Interest Commenters Reply Comments”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of Free Press, at 3-4 (filed Dec. 16, 2013) (“Free Press Comments”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of the Writers Guild of America, West, Inc., at 2, 7 (filed Nov. 4, 2013) (“WGAW Comments”).

⁷ NPRM, ¶ 16 (“Digital UHF stations do not suffer from the same comparative technical deficiencies vis-a-vis VHF facilities that characterized analog UHF stations.”). Block Communications Ex Parte Letter at 2.

⁸ NPRM, ¶ 2.

⁹ *Id.*, ¶¶ 13-15. See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 397 (3d Cir. 2004). See also Free Press Comments at 2; Public Interest Commenters Reply Comments at 2-4. See, e.g., *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of the National Association of Broadcasters, at 2 (filed Dec. 16, 2013) (“NAB Comments”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Reply Comments of the National Association of Broadcasters, at 2-4 (filed Jan. 13, 2014) (“NAB Reply Comments”); Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236, at 1 (filed June 23, 2016) (“NAB June 23 Ex Parte Letter”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of ION Media Networks, Inc., at 6-11 (filed Dec. 16, 2013) (“ION Comments”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of Sinclair Broadcast Group, Inc., at 10 (filed Dec. 16, 2013) (“Sinclair Comments”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc., at 2 (filed Dec. 16, 2013) (“Fox Comments”); *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Comments of Univision Communications, Inc., at 9 (filed Dec. 16, 2013) (“Univision Comments”). None of these claims are persuasive. There is no statutory bar to the Commission updating its rules to reflect changing facts. As the NPRM notes, nothing in the 2004 Consolidated Appropriations Act precludes the Commission from revising the national television ownership rule or the manner in which it calculates its application – the UHF discount – in a rulemaking separate and apart from its

the discount remains valid.¹⁰ Accordingly, with its factual justification lost, and its policy goal undermined, the discount is no longer in the public interest and therefore it would be arbitrary and capricious for the Commission not to update its broadcast television multiple ownership rule to reflect today's reality.¹¹

Moreover, retention of the now unjustified UHF discount will exacerbate the harmful effects of the large scale consolidation occurring in the broadcast industry by potentially allowing some of the largest station groups to maintain a greater share of the national audience than Congress intended. This will adversely impact localism and diversity¹² and increase the already significant bargaining power that large station groups possess in retransmission consent negotiations, further disrupting competition in the marketplace for retransmission consent and harming consumers with supra competitive fees and more impact blackouts.¹³ ACA and its members have raised concerns about broadcaster consolidation and their increasing leverage in negotiating retransmission consent that is being used to the detriment of smaller distributors and their subscribers.¹⁴ Action in this proceeding will be a step in mitigating the increased dominance

quadrennial reviews of broadcast ownership pursuant to Section 202(h) of the 1996 Act. NPRM, ¶ 13. To the contrary, the Commission can and should periodically review and update its rules to reflect changing facts and the failure to do so in the face of a demonstrable and unchallenged factual change like the improved audience reach of UHF stations post-DTV transition would be arbitrary and capricious.

¹⁰ Fox Comments at 2-3; ION Comments at 9-11; NAB Comments at 2; Sinclair Comments at 7; *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Reply Comments of Tribune Company, at 3-4 (filed Jan. 13, 2014) ("Tribune Reply Comments"); Univision Comments at 14-15; NAB June 23 Ex Parte Letter. *But see* Block Communications Ex Parte Letter at 1-3 (owner of several independent broadcast stations in favor of elimination of obsolete UHF discount to preserve localism and effectuate Congress' intent to limit broadcast multiple ownership by enacting the 39 percent national ownership cap).

¹¹ See Public Interest Commenters Reply Comments at 2.

¹² See Free Press Comments at 4 ("Thus, the discount encourages local media market consolidation, and in turn, stifles competition, hampers localism, and decreases diversity."); WGAW Comments at 7 ("The UHF discount enables further consolidation in the local news market by allowing owners to acquire stations beyond the current cap of 39% of television households. To the extent that these transactions lead to duopolies or to foreign ownership of local stations, the quality of local news will suffer.").

¹³ Following the transition to digital television broadcasting, retaining the now-unjustified discount potentially turns a 39% cap on national audience reach into a 78% cap. See Block Communications Ex Parte Letter at 2. This allows station groups to engage in even greater consolidation of broadcast stations, effectively exceeding the cap set by Congress. Moreover, broadcasters would have greater ability to harm MVPDs and their customers that refuse their demands.

¹⁴ See, e.g., Petition of DISH Network, LLC, the American Cable Association, and ITTA to Deny or Impose Conditions, *Applications of Nexstar Broadcasting Group, Inc. and Media General, Inc. For Consent to Transfer Control of Licenses*, MB Docket No. 16-57 (filed Mar. 18, 2016) (alleging retransmission consent-related harms of allowing combination that will vest ownership of the most Big-4 affiliation broadcast stations in the hands of a single owner); Petition of the American Cable Association, DIRECTV LLC, and Time Warner Cable, Inc. to Deny, or In the Alternative, For Conditions, *In Re Applications of Belo Corp., on Behalf of Its Subsidiaries, et al.*, File Nos. BALCDT-2013619AEZ, et al., at 3-4 (filed Jul. 24, 2013) (opposing the Gannett-Belo merger as not in the public interest because the resulting entity would have a nationwide broadcast ownership footprint "capable of reaching nearly a third of all U.S. households"); Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors, Mediacom Communications Corp., RM-11728, at 5-6 (filed Jul. 21, 2014) ("mega-mergers and continuing consolidation of content owners" justify the Commission amending its rules regarding retransmission consent). See also Letter from Joseph Young, Sr. VP & General Counsel, Mediacom, to Ruth Milkman, Chief of Staff, Office of the Chairman, FCC, MB Docket Nos. 10-71, 09-182, and 07-294, at 1-2 (filed Dec. 2, 2013) (unchecked consolidation in the local broadcast market is exacerbating the Commission's failure to update its retransmission consent rules).

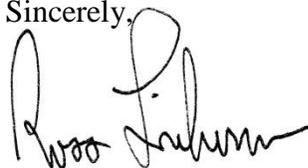
of the largest stations groups in retransmission consent negotiations, particularly for cable operators serving multiple local markets.

The Commission proposes to grandfather existing broadcast groups to the extent they exceed the 39 percent national audience cap solely as a result of the termination of the UHF discount rule as of the date of the release of the NPRM, and those for which an application is pending with the Commission or which have received Commission approval, but were not yet consummated, at the time this NPRM is released. If this is done, ACA supports the Commission's proposal that any grandfathered ownership combination subsequently sold or transferred would be required to comply with the national ownership cap in existence at the time of the transfer.¹⁵ For the past 15 years or so, industry participants have effectively been on notice that the Commission expected to eliminate the UHF discount following the completion of the DTV transition.¹⁶ They purchased their stations with that risk factor squarely before them and have benefitted from their ownership in the intervening years. Requiring grandfathered ownership combinations to comply with the national ownership cap in existence at the time of any transfer is consistent with Commission precedent in other areas.¹⁷ These stations have profited from the discount long after its technical justification had evaporated, unjustifiably increasing their competitive position vis-à-vis digital VHF stations. Moreover, under the Commission's proposal, they may continue to benefit from the effect of the abandoned discount so long as they retain ownership of the UHF stations. Given the complete lack of a factual or policy basis for the discount, should the Commission choose to grandfather the UHF discount for UHF stations owned by station groups meeting certain criteria, that is a more than fair and reasonable outcome.

Due to the fact that continuation of the UHF discount harms competition, localism, and diversity in media ownership and is no longer in the public interest, and harms MVPDs and their customers in the retransmission consent market, the Commission is well within its statutory authority to eliminate the discount from the national media ownership cap. ACA encourages the Commission to do so at this time.

This letter is being filed pursuant to Section 1.1202(b) of the Commission's rules, 47 C.F.R. § 1.1202(b). If you have any questions, or require further information, please do not hesitate to contact me directly.

Sincerely,



Ross J. Lieberman

¹⁵ NPRM, ¶ 20.

¹⁶ *Id.*, ¶ 20 n.58.

¹⁷ *Id.*, ¶ 20 n.59.