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Jared S. Sher
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June 9, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Communication
MB Docket No. 13-236

Dear Ms. Dortch:

On June 7, 2016, the undersigned met separately with Jessica Almond of Chairman Wheeler's office, Marc Paul of Commissioner Rosenworcel's office, and Commissioner O'Rielly and his advisor Robin Colwell, in each case to discuss the above-referenced proceeding.

During the meetings, I reiterated arguments made in comments filed by 21st Century Fox, Inc. ("Fox") as part of this proceeding. Specifically, I explained that Congress has barred the Commission from modifying the national audience reach limitation (47 C.F.R. § 73.3555(e)) (the "Cap"), and therefore from eliminating or altering the UHF discount that is an inextricable element of the Cap. The 2004 Consolidated Appropriations Act unequivocally converted the Cap into a statutory limitation of 39% potential audience reach, inclusive of the UHF discount.¹ I added that if the Commission nonetheless concludes that it has authority to modify the Cap, it would be arbitrary and capricious for the FCC to exercise that authority to make an ownership limit *more* restrictive at a time when competition and diversity have never been more abundant.

Indeed, it would be unlawful for the Commission to eliminate the discount without even considering, let alone calling for comment on, whether the level of the Cap itself should be modified in the event that changes are made to the discount. As the Commission recognized in the Notice of Proposed Rulemaking in this proceeding, the FCC has an "affirmative obligation to examine its rules over time" and to "reexamine its approach" if facts and circumstances change.² If the Commission invokes that obligation here, it must do so in a rational manner by evaluating not only the future status of the UHF discount, but also the broader question of the Cap's viability in the current marketplace.

¹ See Public Law No. 108-199, § 629.

² *In re Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236 (Notice of Proposed Rulemaking) (rel. Sept. 26, 2013) (the "Notice") at para. 14.

The legal analysis described above was certainly evident when the Commission issued the Notice in 2013, but it is even clearer now in light of the recent decision issued by the United States Court of Appeals for the Third Circuit.³ In *Prometheus*, the court emphasized that the Commission cannot rationally decide whether to tighten a subset of an ownership rule without first determining whether the underlying rule itself continues to serve the public interest.⁴ In other words, the Commission cannot “put the cart before the horse.”⁵ Rather, it must determine first whether the underlying rule remains viable; if not, “then the public interest might not be served by closing loopholes to rules that should no longer exist.”⁶ During the meetings, I noted that it would be unwise for the Commission to make the same mistake with the UHF discount and the Cap as it made in the *Prometheus* case, especially so soon after the Third Circuit so pointedly explained the Commission’s legal obligation in a virtually identical context.

For all of these reasons, I urged the Commission not to pursue any order eliminating the UHF discount. I also said that if the Commission proceeds to consider changes at all, it should at least issue a further notice of proposed rulemaking to examine the state of the marketplace and to evaluate whether any limitation on national audience reach (let alone one set at 39%) possibly can withstand scrutiny in light of modern marketplace realities.

This letter is being submitted electronically in the above-referenced docket, which has been granted permit-but-disclose status, pursuant to Section 1.1206(b) of the Commission’s Rules. Should you have any questions concerning this submission, kindly contact the undersigned.

Respectfully submitted,

/s/

Jared S. Sher
Senior Vice President & Associate General Counsel

cc: Commissioner O’Rielly
Jessica Almond
Robin Colwell
Marc Paul

³ See *Prometheus Radio Project v. FCC*, Case Nos. 15-3863, 15-3864, 15-3865 & 15-3866 (rel. May 25, 2016) (“*Prometheus*”).

⁴ See *id.* at 52.

⁵ *Id.* at 54-55.

⁶ *Id.* at 52.