

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

2002 Biennial Regulatory Review –	)	
Review of the Commission’s	)	
Broadcast Ownership Rules and	)	MB Docket No. 02-277
Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications	)	
Act of 1996	)	
	)	
Cross-Ownership of Broadcast Stations	)	MM Docket No. 01-235
and Newspapers	)	
	)	
Rules and Policies	)	
Concerning Multiple Ownership of	)	MM Docket No. 01-317
Radio Broadcast Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

**OPPOSITION OF PAXSON COMMUNICATIONS CORPORATION  
TO PETITIONS FOR RECONSIDERATION**

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Dated: October 6, 2003

## SUMMARY

The Commission made the right decision to retain the UHF Discount. Since its inception, the UHF Discount has been a positive force in the development of the television broadcasting industry. Rarely has a regulatory initiative so successfully promoted diversity, localism, and competition. The Commission had before it a complete record demonstrating these contributions and the negative effect that eliminating the Discount would have on the parties that have relied upon it. Against this overwhelming evidence, the few critics of the UHF Discount provided only unsupported critiques of the rule. Presented with a clear case of a rule that so obviously continues to be necessary in the public interest, the Commission properly reaffirmed the UHF Discount.

In their Petitions for Reconsideration, the parties opposed to the UHF Discount continue their futile strategy of attacking the UHF Discount without evidentiary or logical support. These parties present no evidence refuting the Commission's conclusions that the UHF Discount promotes fair competition among UHF and VHF stations and the emergence of new over-the-air broadcast networks. Instead they offer clever sloganeering – such as referring to the UHF Discount as the “UHF Loophole” – and a repeat of the discredited argument that the UHF Discount turns the new 45% national ownership cap into a *de facto* 90% cap. While the Petitioners might score points for cleverness, however, they provide absolutely no basis for reversing the Commission's thoroughly sound ruling that the record requires indefinite retention of the UHF Discount. Accordingly, these Petitions for Reconsideration should be denied, and the Commission should affirm its decision regarding this rule.

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**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Paxson Communications Corporation (“PCC”), by its attorneys and pursuant to Section 1.429(f) of the Commission’s rules,<sup>1</sup> hereby files this Opposition to several Petitions for Reconsideration of the Commission’s decision to retain the UHF Discount in the above-captioned proceeding.<sup>2</sup>

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<sup>1</sup> See 47 C.F.R. § 1.429(f). See also Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding, *Public Notice*, Report No. 2630 (rel. September 15, 2003), published in the Federal Register on September 19, 2003, 68 Fed. Reg. 53740.

<sup>2</sup> See 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, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620 (2003) (the “Ownership Order”). See also Petition for Reconsideration of Office of Communication of the United Church of Christ, Inc., Black Citizens For a Fair Media, Philadelphia Lesbian and Gay Task Force, and Women’s Institute for Freedom of the Press, filed September 4, 2003 (the “UCC Petition”); Petition for Reconsideration: Capitol

## INTRODUCTION

In the *Ownership Order*, the Commission decided to retain the UHF Discount for at least as long as the DTV transition continues, finding that it remains an important palliative for the competitive handicaps faced by UHF broadcasters – handicaps that have not been cured by cable and DBS carriage.<sup>3</sup> The Commission also tentatively concluded that the DTV transition will eliminate the need for the discount for stations that are owned, operated, and affiliated with the Big 4 television networks – Fox, NBC, CBS, and ABC.<sup>4</sup> For these stations, the Commission decided that the UHF Discount would sunset at the close of the DTV transition on a market by market basis. Pending further Commission action, however, the audience reach all other stations, including, for example, NBC-owned Telemundo UHF stations, would still benefit from the UHF Discount as would Viacom-owned UPN UHF stations. Similarly, if any of the Big-4 owned UHF stations are not affiliated with their network, those stations also would be exempt from the sunset of the UHF Discount. Even for these stations, however, the Commission left open the possibility that it will reverse the sunset at some point before the close of the DTV transition.<sup>5</sup>

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Broadcasting Company, Inc., filed September 4, 2003 (the “CBC Petition”); Petition for Reconsideration of the Amherst Alliance and Virginia Center for the Public Press, filed August 19, 2003 (the “Amherst Petition”); Petition for Reconsideration: Consumer Federation of America and Consumers Union, filed September 4, 2003 (the “Consumer Groups Petition”). These parties are hereinafter are collectively referred to as the “Petitioners.”

<sup>3</sup> See *Ownership Order*, 18 FCC Rcd at 13845-86 ¶ 587.

<sup>4</sup> See *id.* at 13847 ¶ 591.

<sup>5</sup> See *id.* PCC notes that the Commission’s sunset provisions appear to be flexible enough to allow the Commission to reverse course if, as PCC expects,

The Commission further decided to defer to a future biennial review proceeding the question of whether the UHF Discount should continue to be applied to stations that are not Big 4 network owned and operated affiliates after the close of the DTV transition.<sup>6</sup> In a proceeding that has produced twenty-seven Petitions for Reconsideration and numerous appeals to the federal courts, the Commission's decision to retain the UHF Discount stands out as remarkably well-reasoned and prudent.

**I. THE COMMISSION'S RETENTION OF THE UHF DISCOUNT IS AMPLY SUPPORTED BY THE RECORD EVIDENCE IN THIS PROCEEDING AND THE PETITIONERS PROVIDE NO BASIS FOR REVERSING THEIR DECISION.**

This is the second time in three years that the Commission has found the continuing value of the UHF Discount to justify its retention.<sup>7</sup> The Commission again correctly concluded that the UHF Discount remains essential to (1) compensate for the competitive disadvantages placed on UHF broadcasters due to the technical inferiority of UHF stations and (2) promote the emergence of new over-the-air broadcast networks.<sup>8</sup> Both of these conclusions are unassailable based on the record before the Commission and none of the Petitioners have provided the Commission with any basis on which to reconsider its decision.

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the facts at the end of the DTV transition do not support elimination of the UHF Discount for network owned and operated affiliates.

<sup>6</sup> See *id.*

<sup>7</sup> 1998 Biennial Regulatory Review, *Biennial Review Report*. 15 FCC Rcd 11058, ¶ 25-30 (2000) ("1998 Biennial Review").

<sup>8</sup> See *Ownership Order*, 18 FCC Rcd at 13845-47 ¶¶ 586-89.

**A. The Record Demonstrates that the UHF Discount Remains Essential to Remedy Competitive Imbalances Between UHF and VHF Broadcasters Caused by the Technical Inferiority of UHF Broadcast Signals.**

The Commission determined that UHF broadcasters still labor under a substantial competitive handicap caused by the technical inferiority of UHF broadcast signals and the greater expenses that UHF broadcasters must incur to build and operate UHF stations.<sup>9</sup> In making this decision, the Commission had before it a substantial record demonstrating that:

- UHF stations continue to be more expensive to construct and operate than VHF stations;<sup>10</sup>
- UHF signals continue to be technically inferior to VHF signals;<sup>11</sup>
- UHF signals continue to be unable to reach over-the-air audiences comparable to those of VHF stations;<sup>12</sup>
- UHF stations still do not gain cable carriage comparable to VHF stations;<sup>13</sup>
- UHF stations still do not achieve ratings as high as those of VHF stations;<sup>14</sup>

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<sup>9</sup> See *id.* at 13845-46 ¶¶ 586-88.

<sup>10</sup> See Ex Parte Presentation of Paxson Communications Corporation, MB 02-277, filed May 16, 2003, Attachment 2 (originally submitted as Exhibit A to Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998.). See also, e.g., Univision Comments at 4; Paxson Comments at 17-18; Paxson Reply Comments at 8; Supplement to the Record Concerning Retention of the UHF Discount, MB Docket No. 02-277, filed May 7, 2003, Attachment C at 5-8 (“Paxson May 7 Ex Parte”). Accord, 1998 Biennial Review, 15 FCC Rcd at 11078.

<sup>11</sup> See Univision Reply Comments at 3; Granite Comments at 6; Paxson Comments at 15-16. See also 1998 Biennial Review, 15 FCC Rcd at 11078-79.

<sup>12</sup> See Paxson Comments at 17; Univision Reply Comments at 3-4.

<sup>13</sup> See Granite Comments at 6; Univision Reply Comments at 8-9; Paxson Comments at 16-17. See also 1998 Biennial Review, 15 FCC Rcd at 11078.

- and consequently, UHF stations still are not as financially successful as their VHF competitors.<sup>15</sup>

The Commission had before it a study that demonstrated that UHF stations garner lower ratings than their VHF competitors due to signal strength.<sup>16</sup> Further the Commission was presented with an uncontested declaration indicating that advertisers routinely discount the prices paid for advertising on UHF stations versus their VHF competitors.<sup>17</sup> From this evidence the Commission concluded, consistent with its decision in its 1998 Biennial Review proceeding, that competitive disparities continue to exist between UHF and VHF stations that must be remedied through the UHF Discount.<sup>18</sup> This was, in fact, the only conceivable and legally supportable conclusion to be drawn from the record evidence.

1. *Mandatory Cable Carriage Has Not Eliminated the Need for the UHF Discount.*

The Petitioners attack this mountain of evidence in several ineffective ways. Most simply, they argue that the UHF handicap no longer exists because

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<sup>14</sup> See Paxson May 7 *Ex Parte*, Attachment A (originally included as Appendices C to Comments of the National Association of Broadcasters, MM Docket No. 98-35, filed July 21, 1998).

<sup>15</sup> See Paxson May 7 *Ex Parte*, Attachments A-B (originally included as Appendices C to Comments of the National Association of Broadcasters, MM Docket No. 98-35, filed July 21, 1998).

<sup>16</sup> See *Ownership Order*, 18 FCC Rcd at 13846 ¶588 (citing Letter from John R. Feore, Counsel for Paxson, to Marlene Dortch, filed May 30, 2003, Attachment 2). As the Commission found, this study was able to isolate the cause of the disparity by controlling for every other relevant variable.

<sup>17</sup> See *Ownership Order*, 18 FCC Rcd at 13846 ¶586 (citing *Ex Parte* Presentation of Fox, filed May 20, 2003 and attached Declaration of Michael Ward, General Manager, WNCN(TV)).

<sup>18</sup> See *Ownership Order*, 18 FCC Rcd at 13845 ¶ 586.

it has been eliminated by mandatory cable carriage of UHF stations.<sup>19</sup> The Commission now has considered and rejected this argument several times because it ignores important facts, particularly (1) the added expense of operating UHF stations, and (2) the greater difficulty and expense incurred by UHF stations in placing a good quality signal over cable or DBS headends.<sup>20</sup> Cable carriage has done nothing to alleviate these two sources of competitive imbalance. And, of course, cable carriage does nothing for the television households without cable or for the television sets in cable households that still rely on over-the-air reception.

UCC erroneously argues that the Commission's recognition of these ongoing problems contradicts its finding elsewhere in the *Ownership Order* that all stations, including UHF stations, generally are carried on cable systems throughout their DMA.<sup>21</sup> The Commission's conclusions are not contradictory. UHF stations' weaker signals cannot reach distant headends with the ease of their VHF competitors. That is a fact. Nonetheless, UHF broadcasters are likely to take the extra expense of providing a good quality signals through the use of solutions such as microwave or fiber optic links in order to gain cable carriage. The competitive handicap is created by the extra expense that the UHF station

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<sup>19</sup> See Consumer Group Petition at 25; CBC Petition at 6.

<sup>20</sup> See *Ownership Order*, 18 FCC Rcd at 13845-46 ¶¶587-588.

<sup>21</sup> See UCC Petition at 40 (citing *Ownership Order*, 18 FCC Rcd 13675, 13692 ¶¶ 146, 187). The Commission made this finding in its consideration of the new cross-media ownership limits ("CML").

must bear, regardless of whether they ultimately attain cable carriage equal to the VHF competitor.

The Petitioners apparently fail to grasp the UHF Discount. On the one hand, it does seek to remedy competitive disparities by providing a more accurate calculation of the number of homes each broadcast station actually reaches. On the other hand, however, it seeks to provide balance for those broadcasters that manage to reach most households in their DMA but that must go through much greater expense to do so than their competitors. The UHF discount therefore serves a dual purpose: first, it employs a rough and ready means of estimating the actual reach of UHF stations; and second, it makes the additional costs of competition faced by UHF broadcasters more manageable by encouraging group ownership, which can make up for the greater costs of competition by taking advantage of efficiencies of scale.

2. *The Increased Operating Costs Faced By UHF Broadcasters as a Class Justifies Partial Relief from the Restrictions of the National Ownership Cap.*

UCC shows a similar misunderstanding in attacking the Commission's conclusion that UHF stations are more expensive to operate than their VHF competitors.<sup>22</sup> UCC argues that the operating costs of each station are unique and that therefore if the Commission wishes to compensate for station operating costs in formulating its ownership rules it must do so for all stations that can

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<sup>22</sup> See UCC Petition at 41 & n.126.

show elevated operating costs.<sup>23</sup> Setting aside the impracticality of UCC's suggestion (now offered for the first time), the Commission is free to attempt to remedy general inequalities like the higher operating costs associated with UHF broadcasting, without granting general relief to all stations based on individual station difficulties.

The Commission, based on substantial evidence, found that as a class, UHF broadcasters are required to buy more expensive transmitters and antennas and then pay between 1.5 and 3 times as much in annual electricity costs to operate their stations.<sup>24</sup> These costs cannot help but impair UHF broadcasters' ability to compete with their VHF competitors. The idea that the Commission could not remedy this competitive imbalance because some VHF stations might also have higher operating costs is anathema to the rulemaking process. UCC's apparent belief that VHF stations with abnormally high operating costs should be granted relief from the national ownership cap commensurate with UHF stations would be better considered in the context of individual waiver requests than in a general rulemaking proceeding.

3. *The Weight of the Evidence Demonstrates that Analog UHF Stations Reach Smaller service Areas than their VHF Competitors.*

Taking a different tack, CBC attacks the core idea that UHF stations suffer from impaired signal reach, contending that by “[u]tilizing maximum power

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<sup>23</sup> See *id.* UCC sites several possible costs of elevated station operating costs, including labor costs and special environmental or interference sensitive equipment.

<sup>24</sup> See *Ownership Order*, 18 FCC Rcd at 13846 ¶ 588.

levels . . . UHF's and VHF's can now achieve almost equivalent coverage areas."<sup>25</sup> The only evidence that CBC sites for this proposition is that (1) it owns both a UHF station and a VHF station in Raleigh, North Carolina; and (2) they both reach approximately the same number of viewers.<sup>26</sup> CBC's representation regarding its own stations is undoubtedly true, but just as surely irrelevant. The evidence before the Commission overwhelmingly demonstrated that most broadcasters' experience is considerably different than CBC's. Indeed, the Commission cited evidence from Fox, NBC, Viacom, and PCC indicating that UHF stations often have coverage areas that are substantially lower than VHF stations in the same market, sometimes ranging as low as 35.7% of the service area of the leading VHF station in the market.<sup>27</sup> In the face of this evidence culled from the nationwide experience of several of the nation's largest broadcasters, the Commission could not have relied on CBC's extremely limited evidence to decide the issue of relative UHF/VHF signal strength. The overwhelming weight of the record evidence is against CBC.

Even without reference to the contrary evidence, CBC's assertion fails. As the Commission initially recognized in adopting the UHF discount in 1985, and has consistently affirmed, UHF signal strength declines more rapidly over distance than VHF signal strength. This means that UHF signals do not travel as far and are not as robust as comparable VHF signals. Indeed, the Commission cited evidence that while VHF signals can dependably reach a 72-76 mile radius,

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<sup>25</sup> See CBC Petition at 6 & n.16.

<sup>26</sup> See *id.*

<sup>27</sup> See *Ownership Order*, 18 FCC Rcd at 13845 ¶ 586.

UHF signals reach only 44.<sup>28</sup> Of course a lower-power VHF station and a maximum power UHF station might have the same coverage area, but that does not change the technical limitation that is at the core of the UHF Discount. Accordingly, CBC's anecdotal evidence cannot overcome the Commission's reasoned decision based on the comparative physics of UHF and VHF broadcasting.

4. *The Petitioners Misunderstand the Importance of the Ratings Data for Demonstrating the Technical Inferiority of the UHF Signal and the Competitive Handicaps UHF Broadcasters Face.*

UCC and CBC both attack the Commission's reliance on ratings data to confirm the competitive handicap faced by UHF stations.<sup>29</sup> PCC submitted two studies (one reflecting data from 1997 and the other reflecting data from 2002) showing that each of the Big 4 networks' affiliated UHF stations achieve, as a group, lower average ratings than those of network-affiliated VHF stations.<sup>30</sup> As the Commission noted, the structure of this study answered the typical arguments – raised again by the Petitioners – that the reason UHF stations gain lower ratings is because they offer less desirable programming.<sup>31</sup> CBC filed a separate study that included only a comparison of Fox's UHF and VHF affiliates in the top 50 markets. Although CBC's limited data shows a somewhat smaller

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<sup>28</sup> See *id.*

<sup>29</sup> UCC Petition at 41; CBD Petition at 7.

<sup>30</sup> See *id.* at 13846 ¶ 588.

<sup>31</sup> See UCC Petition at 41, CBC Petition at 7.

18% ratings gap<sup>32</sup> than that shown by PCC's study, the difference is still highly significant and does nothing to undermine PCC's argument or the Commission's conclusions.

UCC and CBC fundamentally misunderstand the relevance of PCC's ratings data to the retention of the UHF Discount. UCC, for example states that considering ratings information in evaluating the UHF handicap elevates station profitability above the public interest.<sup>33</sup> Similarly, CBC "questions the appropriateness of ratings as a justification for the UHF" Discount.<sup>34</sup> The ratings data is an obvious proxy confirming the effect of the differential signal strength of UHF and VHF stations. Thus the ratings data first of all confirms that the theoretical technical inferiority of UHF stations has practical effect.

Second, by comparing stations airing identical programming in similar markets, a picture emerges of the extent to which limited over-the-air reach impacts the number of viewers a station can expect to receive their programming, and consequently how much revenue they can expect to produce. The UHF/VHF ratings disparity indicates that the UHF stations will, on average, reach fewer viewers, and will be, on average, less profitable. These stations therefore require owners that have greater resources or the ability to spread costs through the efficiencies of scale of group ownership. As the UHF Discount recognizes, a

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<sup>32</sup> See CBC Petition at 7. CBC claims that this data shows only an 8.6% difference in ratings between Fox's UHF and VHF, but because the UHF stations post a 7.5% rating and the VHF stations post an 8.9% rating, the VHF stations' ratings are 18.6% higher than those of the UHF stations.

<sup>33</sup> See UCC Petition at 41.

<sup>34</sup> See CBC Petition at 7.

national ownership cap that does not take account of the competitive handicaps faced by UHF stations has the potential to impede UHF stations from being owned by the operators that are best qualified to provide quality service. The Discount does its job by overcoming these obstacles to make UHF stations an attractive investment. Because they provide plain evidence of the UHF/VHF competitive disparity, ratings data are wholly appropriate evidence in this proceeding.

**B. The Record Demonstrates That the UHF Discount Encourages the Entry of New Over-the-Air Broadcast Networks, Increasing Diversity and Localism**

The Commission's other main justification for retaining the UHF Discount – the promotion of new over-the-air broadcasting networks – also is well supported in the record. The Commission long has recognized that the UHF Discount provides a powerful incentive to build new networks through station acquisition by giving the network owner access to both local and national advertising revenue.<sup>35</sup> The Commission reviewed evidence that these incentives apparently had encouraged both FOX and PAXTV to build their networks through the acquisition of numerous UHF stations.<sup>36</sup> Without the UHF Discount, these networks would have exceeded the national ownership cap, and, they probably would not have been built; certainly they would not have been built as quickly or effectively as they were. Moreover, the Commission was presented with evidence that even networks that have not been built by acquiring owned stations

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<sup>35</sup> See *Ownership Order*, 13847 ¶ 590.

<sup>36</sup> See Paxson Comments at 19.

– such as UPN and the WB – nonetheless benefited from the Discount’s promotion of UHF station ownership because the majority of their affiliates are UHF stations.<sup>37</sup> The Commission also recognized the value of new networks, which tend to add to the diversity in local television markets by reaching traditionally underserved communities such as foreign-language viewers and those looking for more family-oriented fare than that typically aired by the Big 4 networks or on cable television today.<sup>38</sup>

The Petitioners reject this ground for retention of the UHF Discount as well. While conceding that the promotion of new broadcast networks is a “laudable goal,” CBC suggests that the consolidation that will be brought from ownership deregulation makes it unlikely that any new network will launch.<sup>39</sup> Remarkably, UCC claims that the role of the UHF Discount in promoting new networks is not supported by the record.<sup>40</sup> UCC also claims that no new networks are likely to emerge because most stations already are affiliated with networks.<sup>41</sup>

PCC rejects the notion that no new over-the-air broadcast networks will emerge. PCC constructed PAXTV in response to public demand for a wholesome family network with which people could trust their children. If the idea is right, there always will be room for another network. Even if no new networks do emerge, however, that does not mean that the Commission should

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<sup>37</sup> See Paxson Comments at 19.

<sup>38</sup> See *Ownership Order*, 13847 ¶ 590.

<sup>39</sup> See CBC Petition at 8.

<sup>40</sup> See UCC Petition at 41.

<sup>41</sup> See *id.* at 41.

jettison the UHF Discount and dismantle the new networks that have emerged already. Elimination of the UHF Discount could sound the death knell for PAXTV and Univision at least, while making over-the-air distribution more difficult for all of the other networks. The public has a strong interest not only in the creation of new networks but in the survival of those that currently exist as well. A great deal of program diversity depends on the preservation of the networks that already exist. The UHF Discount continues to serve that cause, which, together with the competitive handicaps faced by UHF broadcasters, provides more than sufficient justification for its retention.

**II. THE COMMISSION'S TREATMENT OF UHF STATIONS UNDER THE LOCAL AND NATIONAL OWNERSHIP CAP IS CONSISTENT.**

CBC, UCC, and the Consumer Groups each attack the Commission's decision to retain the UHF Discount while also counting each UHF stations as a full voice in its DMA for purposes of calculating compliance with the new local ownership rules and CML.<sup>42</sup> Any intuitive appeal of this argument, however, evaporates upon close inspection. First, the Commission was well aware of the "disparate treatment" of UHF stations in determining compliance with the national ownership cap, and the local ownership rules.<sup>43</sup> This differential treatment was explained fully in the *Ownership Order*, which instructs that each rule deals with

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<sup>42</sup> See CBC Petition at 8-9; Amherst Petition at 8; Consumer Petition at 25-26; UCC Petition at 39-40. See also, *supra*, n.22.

<sup>43</sup> See *Ownership Order*, 18 FCC Rcd at 13949 n.1 (Statement of Commissioner Martin).

competitive disparities among stations in the manner appropriate to the context of the rule.<sup>44</sup>

Specifically, the Commission noted that it is appropriate to discount the audience reach value of signal-handicapped UHF stations by a specified percentage because national ownership cap is a percentage audience reach limitation.<sup>45</sup> Such a limitation works to allow station owners to aggregate a larger number of UHF stations than they would otherwise be able, thereby offsetting the competitive handicap experienced by each station through efficiencies derived from the economies of scale produced by group ownership. As the Commission explained, the UHF Discount is an exception to the Commission's general conclusion that the national ownership cap is not justified based on its effects on competition.<sup>46</sup> This exception is necessitated by the competitive disparities between UHF and VHF stations described in Part I.

The context of the local ownership rule is entirely different. The Commission noted that the appropriate means of dealing with competitive disparities among stations at the local level is primarily through the restriction on ownership of two of the top 4 stations in a market.<sup>47</sup> Given the ratings disparities and signal strength characteristics described above, the top 4 stations are likely to be VHF stations in the larger markets and a mix of UHF and VHF stations in smaller markets. Consequently, in most markets, the top 4 ranked restriction will

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<sup>44</sup> See *id.* at n.411.

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

result in greater opportunities for multiple UHF station ownership than for multiple VHF ownership. Thus, both the national and local ownership rule are likely to result in an increase in opportunities and incentives for UHF station ownership, despite the different means used to arrive at those results.

To the extent that those incentives are less pronounced at the local level, however, that result also is consistent with the Commission's reasoning in retaining the UHF Discount because there is no "new network" justification for relaxing the ownership rules at the local level.<sup>48</sup> Finally, to the extent that UHF stations are disadvantaged by the Commission's decision to treat them as if their programming is available throughout the DMA, the Commission introduced a waiver standard that will allow top-4 combinations so long as the stations have no grade B contour overlap and are not carried by cable operators to the same geographic areas.<sup>49</sup>

Thus, the methods of counting UHF stations in the local and national ownership rules are consistent in that they each are designed to achieve the objective of the rule while encouraging UHF station ownership generally. To the extent that the Petitioners argue that the rules are inconsistently reasoned, they are simply wrong. As PCC described above, it is likely that UHF stations will go through the expense of gaining carriage on the cable systems in their DMA, even though that expense will put them at a competitive disadvantage with respect to

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<sup>48</sup> *See id.*

<sup>49</sup> *See id.* at 13692.

VHF stations in their market. Thus, it was reasonable for the Commission to assume that most UHF stations are generally available throughout their DMAs.

At the same time, it was equally reasonable for the Commission to presume, in evaluating the UHF Discount, that (1) UHF stations will reach fewer viewers, and/or (2) they will incur additional costs delivering their signal to cable headends. In either case, the 50% UHF Discount, which is supposed to compensate for the competitive disparity between UHF and VHF stations, would be entirely appropriate. The Commission has made clear that the UHF Discount is about both compensating for reduced signal coverage and associated handicaps. Even if a UHF station with a smaller coverage area attains cable carriage on every cable system in a DMA, if it had to incur extra costs to do so, the UHF handicap remains and so should the UHF Discount.

### **III. THE PETITIONERS' UHF DISCOUNT "PARADE OF HORRIBLES" CAN BE SAFELY IGNORED.**

Having failed to locate any evidentiary or legal deficiency in the Commission's retention of the UHF Discount, the Petitioners fall back on the strategy of trying to frighten the Commission into agreement with their position by describing all the destructive results that retaining the Discount will cause. The most common tactic is to repeat that the UHF Discount gives station owners the opportunity to reach double the number of viewers than would otherwise be possible under the national ownership cap.<sup>50</sup> CBC extends this argument to construct a number of "doomsday" scenarios in which parties utilize the UHF Discount and the Commission's other rule changes to construct such unlikely

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<sup>50</sup> See UCC Petition at 39-40; CBC Petition at 3; Amherst Petition at 7-8.

entities as a conglomerate of 369 UHF television stations in 208 markets – or at least one station in every market except New York and Los Angeles.<sup>51</sup>

The Commission already has answered this “45% = 90%” argument in the *Ownership Order*. As the Commission noted, the Big 4 networks never have attempted to exploit the UHF Discount opportunity to reach more than the 35% of the audience permitted by the old national ownership cap.<sup>52</sup> Citing evidence that of the 67 stations owned by the Big 4 networks, only 12 are UHF stations,<sup>53</sup> the Commission observed that “the established broadcast networks generally have not sought to take advantage of the UHF discount to gain greater national reach through local stations.”<sup>54</sup>

Despite CBC’s dire predictions, there is no reason to believe that the networks will begin buying up UHF stations now, either. Still less is there any indication that CBC’s fears are well founded of a station owner taking control of these numerous stations in an effort to “exert tremendous influence on the political process.”<sup>55</sup> There is not one single example of this having happened in the past, and the Commission cannot regulate the broadcast industry based on unsupported nightmare speculation.<sup>56</sup>

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<sup>51</sup> See CBC Petition at 11.

<sup>52</sup> See *Ownership Order*, 18 FCC Rcd at 13847 ¶ 591.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See CBC Petition at 11.

<sup>56</sup> The Amherst Petition twice mentions that the Commission should eliminate the UHF Discount to keep broadcasters from being able to achieve a 68% “real market share” based on ownership of stations covering 45% of households, half of which are UHF stations. See Amherst Petition at 7-8. Amherst does not

The reality is that the increase in the national ownership cap to 45% is not likely to alter the audience reach calculus much for the national broadcast networks, because the UHF Discount is retained. Indeed, two of the Big 4 never even approached 35%, let alone 45%. The fact that the Big 4 networks did not sell their VHF stations in a rush to reach 70% of the audience makes it reasonable to expect that they will not do so to reach 90% of the audience.

Even if a station owner eventually does own enough stations to reach the effective 90% UHF cap, there is no reason at this point to think that eventuality would be contrary to the public interest. PCC, for example, long has exceeded a 60% audience reach, which has had no apparent negative effect on either PCC's local or the national television markets. Given that the primary focus of the national ownership cap now is to ensure that the Big 4 networks do not dominate their affiliates, it is hard to see what negative effect would be created by a non-network owner accumulating UHF stations that approach 90% audience reach. Certainly, the Commission has not identified what public interest would be thereby threatened. The Commission should therefore reject the Petitioners' appeals to fear.

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explain why this scenario would be worse than a station under the old 35% cap owning all UHF stations and reaching 70% of households. Amherst neither offers any evidence of what harms such ownership arrangements would cause nor any specific examples that any parties are pursuing such an ownership strategy.

**IV. THE COMMISSION CLEARLY IS CORRECT THAT THE UHF DISCOUNT IS NECESSARY IN THE PUBLIC INTEREST UNDER SECTION 202(H).**

In retaining the UHF Discount, the Commission necessarily decided that the Discount remains necessary in the public interest under Section 202(h) of the 1996 Telecommunications Act.<sup>57</sup> This conclusion was compelled by the preponderance of the evidence and the overwhelming public interest benefits that the UHF Discount promotes. Indeed, as PCC has noted before, with its stunning record of encouraging new and diverse programming in local television markets, and the facts regarding UHF broadcasting's continuing technical and financial handicaps, it is hard to understand why the UHF Discount came under any review in this proceeding.

One thing is certain. The Petitioners completely failed in the rulemaking proceeding and have failed again here to provide the Commission with the evidence necessary to overcome the strong deregulatory presumption of Section 202(h) and justify the re-regulation of UHF broadcasters.<sup>58</sup> Congress did not create the biennial review process as a vehicle for increasing ownership restrictions on the most vulnerable broadcasters. To enact such a new restriction, the Commission would be under the doubly heavy burden of (1) justifying

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<sup>57</sup> Section 202(h) of the Telecommunications Act of 1996, requires the Commission to: "review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and . . . determine whether any of such rules are necessary in the public interest as the result of competition . . ." and to ". . . repeal or modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996).

<sup>58</sup> See *Fox Television Stations v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2000).

reversal of its 1998 Biennial Review decision to the contrary,<sup>59</sup> and (2) describing the public interest harms that have flown from maintenance of the UHF discount.<sup>60</sup> As PCC has demonstrated – and as the *Ownership Order* confirms – no such harms exist. In any case, none were entered into the record of this proceeding, and none are contained in Petitioners submissions.

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<sup>59</sup> As noted above, the Commission reaffirmed the continuing need for the Uhf Discount just three years ago in its Report following its 1998 Biennial Review. See *supra*, n.8

<sup>60</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending 2-year old rule without reasoned explanation).

## CONCLUSION

For the foregoing reasons, PCC requests that the commission deny the Petitions for Reconsideration of the retention of the UHF Discount as described above.

Respectfully submitted,

**PAXSON COMMUNICATIONS CORPORATION**



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Dated: October 6, 2003

## CERTIFICATE OF SERVICE

I, William L. Watson, hereby certify that I provided a copy of the foregoing "Opposition of Paxson Communications Corporation to Petitions for Reconsideration," via first-class U.S. mail, on October 6, 2003, to the following:

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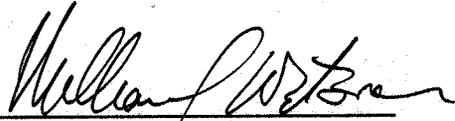
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