

**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)	

**COMMENTS OF
PAXSON COMMUNICATIONS CORPORATION**

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Dated: March 19, 2004

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SUMMARY

Congress has removed further consideration of the retention of the UHF Discount from this proceeding. In the Consolidated Appropriations Act of 2004 (the “CAA”), Congress established the national audience reach limitation at 39%, and, in so doing, endorsed the Commission’s methods of calculating compliance with that limitation. At the same time, Congress took the further steps of ensuring that DMA growth cannot push a station group owner over the 39% limit and removing from future quadrennial review the national audience reach limitation and all associated rules. Plainly, Congress intended the CAA to end the entire debate over the national audience reach cap and the UHF Discount.

The language and legislative history of the CAA are so clear as to obviate the need for any additional comment on retention of the UHF Discount. In effect, Congress has ordered that the UHF Discount be retained. As a result, the Commission must narrowly focus its inquiry on the CAA itself and ignore attempts by opponents of the UHF Discount to introduce additional evidence concerning substantive aspects of the UHF Discount. Congress has left no doubt that the UHF Discount is to be retained.

The only issue left to the Commission is the effect the CAA has on the Commission’s previous discussion of sunseting the UHF Discount. Currently, the Commission has stated that the UHF Discount will sunset as the digital transition is completed for stations that are owned by, operated by, and affiliated with one of the major networks. In its decision last July, the FCC had indicated that it would consider the future of the UHF Discount for other parties in a future ownership review. Since the CAA has removed the UHF Discount from evaluation in any future *quadrennial* review, additional consideration of the sunset issue must take place outside of that context and

must be informed and directed by Congress's most recent endorsement of the UHF Discount. Given that the record evidence in this proceeding strongly indicates that the DTV transition will not eliminate the need for the UHF Discount for many stations, the Commission should eliminate its network-station sunset and commit to holding a notice and comment rulemaking on such a concept at some point nearer the close of the DTV transition.

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Paxson Communications Corporation (“PCC”) hereby files these Comments in response to the Commission’s *Public Notice*¹ concerning the effect of the Consolidated Appropriations Act of 2004² on the Commission’s authority to continue considering the UHF Discount as part of its 2002 Biennial Media Ownership Review.³

¹ “Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap,” *Public Notice*, MB Docket No. 02-277, DA 04-320 (rel. February 19, 2004) (the “UHF Public Notice”). *See also* “Comment and Reply Comment Dates Set for Comments on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap,” *Public Notice*, MB Docket No. 02-277, DA 04-575 (rel. February 27, 2004).

² Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (the “CAA”).

³ In the Matter of 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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, and Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, *Report and Order*, 18 FCC Rcd 13620 (2003), *appeal pending sub nom., Prometheus Radio Project v. Federal Communications Commission; United States of America*, No. 03-3388, and consolidated cases (3d Cir. filed August 13, 2003) (the “Media Ownership Order”).

INTRODUCTION

The CAA explicitly and unequivocally removes any question about retention of the UHF Discount from this proceeding. Through the CAA, Congress established a new 39% national audience reach limit, and it endorsed the Commission's method of calculating national audience reach, which includes the UHF Discount. Congress's intent is so clear as to remove any need for additional notice and comment. The Commission's role at this point on the issue of retention should be merely to implement Congress's clear command – the CAA leaves no room for interpretation.

Having requested comment, the Commission must tightly focus this proceeding exclusively on the issue of whether the CAA removes retention of the UHF Discount from further Commission consideration in the 2002 Biennial Ownership Review. The Commission should resist any efforts by opponents of retention of the Discount to offer additional substantive evidence to support their case. The Commission already has indicated that it will consider the UHF Discount again closer to the end of the DTV transition, and the CAA does not require a change in that decision.

Thus, the only issue that is left to the Commission to determine at this point is whether its decision to sunset the Discount for stations owned and operated by the networks can survive passage of the CAA. PCC believes that the course most faithful to the CAA would be to eliminate the presumptive sunset in favor of considering the UHF Discount at some date closer to the end of the DTV transition.

A swift Commission pronouncement on these points would be in the best interests of all parties to this proceeding and in the public interest, in part because it would speed appellate resolution of the *Media Ownership Order* currently pending

before the United States Court of Appeals for the Third Circuit.⁴ Accordingly, the Commission should issue an Order dismissing all Petitions for Reconsideration to the extent they request elimination or modification of the UHF Discount and holding that the CAA removed any questions concerning retention of the UHF Discount from further consideration in the 2002 Biennial Review and from all future periodic ownership reviews.

I. THE CAA REMOVES THE FCC'S AUTHORITY TO ALTER THE UHF DISCOUNT IN THIS PROCEEDING.

On January 22, 2003, President Bush signed the CAA into law. In the CAA, Congress amended Section 202 of the Telecommunications Act of 1996⁵ to provide as follows:

(c) Television Ownership Limitations. –

(1) National Ownership Limitations. – the Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555) –

* * * * *

(B) by increasing the national audience reach limitation for television stations to 39 percent.

CAA § 629. The term “national audience reach” is defined as follows:

National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50

⁴ *Prometheus Radio Project v. Federal Communications Commission; United States of America*, No. 03-3388, and consolidated cases (3d Cir. filed August 13, 2003).

⁵ Telecommunications Act of 1996, P.L. 104-104, § 202(c), 110 Stat. 56 (1996) (the “1996 Act”).

percent of the television households in their DMA market. (italics in original; underlining added).⁶

Although this represents only a slight change to Section 202(c), this minor modification is decisive with respect to the FCC's continued consideration of the UHF Discount in this proceeding. What Congress passed and what the president signed into law is a national audience reach cap of 39% calculated with a 50% UHF Discount. Under well established Supreme Court precedent, Congress's consistent reuse and readoption of the term "national audience reach" without modifying the UHF Discount as explained in the same definition of that term, 47 C.F.R. § 73.3555(e)(2)(i) (2002), constitutes its approval of the UHF Discount, and thus removes it from Commission reconsideration in this proceeding. This is clear and unambiguous!

A. The Plain Language and Legislative History of the CAA Can Only Be Interpreted as Approving the UHF Discount.

Two provisions of the CAA show conclusively that Congress intended the Commission to cease considering repeal of the UHF Discount in this proceeding. First, just as it did in the Telecommunications Act of 1996, Congress, through the CAA, enacted a limitation on the aggregate number of viewers that any single station group owner may reach by (1) adopting the Commission-defined term "national audience

⁶ 47 C.F.R. § 73.3555(e)(2)(i) (2002). Paxson refers herein to the 2002 codification of the Code of Federal Regulations, in which the UHF Discount is included in Section 73.3555(e)(2)(i). The 2003 codification, in which the UHF Discount is included in Section 73.3555(d)(2)(i), includes revisions that were made to Section 73.3555 by the *Media Ownership Order*, which has been stayed by the United States Court of Appeals for the Third Circuit. *Prometheus Radio Project v. Federal Communications Commission; United States of America*, No. 03-3388, and consolidated cases (3d Cir. filed August 13, 2003) (*Order granting stay issued September 3, 2003*).

reach,” and (2) limiting the number of viewers that may be reached to 39% of viewers, as calculated consistently with the methodology included within that defined term.

The term “national audience reach,” which Congress used in the 1996 Act and readopted in the CAA, is defined in 47 C.F.R. Section 73.3555(e)(2)(i), and it specifically includes the UHF Discount as part of the methodology employed to calculate compliance with the national television ownership cap. The UHF Discount portion of the national audience reach definition has remained in constant use since its adoption in 1985⁷ and has been expressly reaffirmed both by the Commission and by Congress. The Commission has reaffirmed the rule twice in the past 4 years.⁸ Similarly, in 1996, when Congress initially enacted Section 202(c) to raise the national ownership cap from 25 percent to 35 percent, the legislative history expressed strong approval of the UHF Discount:

This section does not change the methodology for calculating “national audience reach” currently employed by the Commission. For example, currently, the audience reach of UHF stations is discounted. ***This “UHF discount” appropriately reflects the technical and economic handicaps applicable to UHF facilities and the Committee does not envision that the UHF discount calculation will be modified so as to impede the objectives of this section.***⁹

Congress did not change its view of the matter in passing the CAA, and there is absolutely no evidence to the contrary.

⁷ See 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*, 57 RR2d 966, 980-81 (1985).

⁸ See 1998 Biennial Regulatory Review, *Biennial Review Report*, 15 FCC Rcd 11058, 11072-74 (2000); *Media Ownership Order*, 18 FCC Rcd at 13845-47.

⁹ H.R. No. 104-204 at 118 (1995) (emphasis added).

The legislative history of the CAA confirms that Congress was aware of and approved the continued application of the existing UHF Discount. Several legislators in both the House and the Senate made speeches during floor debate noting that the 39% limit was specifically selected to allow group owners that currently own stations with a national audience reach greater than 35% to retain their holdings.¹⁰ That result would only be attained if the existing UHF Discount remained in force, because its elimination would push at least five station group owners – Viacom (44.8%), Fox (44.4%), PCC (61.8%), Tribune (40.1%) and Univision (41.8%) – over the national audience reach limit. Holding that the statute leaves the FCC free to reconsider its retention of the UHF Discount would be entirely unreasonable and directly contrary to Congress’s understanding of the CAA’s impact.

In addition, Congress obviously was aware of the UHF Discount and was fully capable of eliminating it if it had desired to do so. S. 1264, a bill, which was pending at the time the CAA was passed, proposed elimination of the Discount, but it was never enacted.¹¹ Congress’s rejection of a bill including language that would have eliminated the UHF Discount provides further evidence that Congress did not expect the CAA to

¹⁰ See 150 Cong. Rec. S18 (daily ed. Jan. 20, 2004) (statement of Senator Kohl); 150 Cong. Rec. S78 (daily ed. Jan. 21, 2004) (statement of Senator Byrd); 150 Cong. Rec. S83 (daily ed. Jan. 21, 2004) (statement of Senator Durbin); 150 Cong. Rec. S86 (daily ed. Jan. 21, 2004) (statement of Sen. McCain). As these legislators noted, several station owners’ national audience reach was near the 39% limit. The fact that these Senators opposed both the bill and its result only underscores Congress’s awareness that retention of the UHF Discount was integral to Congress’s purposes.

¹¹ FCC Reauthorization Act of 2003, S. 1264, 108th Cong. § 12 (2003).

have that effect.¹² Thus Congress, in passing the CAA, clearly reaffirmed and approved the existing UHF Discount.

The second provision of the CAA that confirms Congress's clear intention to remove the UHF Discount from the FCC's ownership proceeding is its amendment of Section 202(h), which governs the Commission's periodic review of its media ownership restrictions. Section 202(h), as amended by the CAA, provides as follows:

(h) Further Commission Review. – The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. ***This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).***

CAA § 629 (emphasis added). Section 73.3555(e)(2)(i), which includes the UHF Discount, is unquestionably a “rule[] relating to the 39 percent national audience reach limitation.” This additional change shows that in amending Section 202 of the 1996 Act, Congress intended both to raise the national audience reach cap – calculated consistent with existing Commission rules, e.g., the UHF Discount – to 39% **and** to insulate the entirety of the Commission's national television ownership restriction from further mandatory periodic review. Using the reconsideration phase of this Biennial Review to tinker with the UHF Discount and other mechanics of calculating compliance with the national ownership cap would be flatly contrary to Congress's intent, as reflected in the last sentence of Section 202(h), as amended, to insulate “any rules relating to the 39 percent national audience reach limits” from further periodic review.

¹² Cf. *National Public Radio v. FCC*, 254 F.3d 226, 231 (D.C. Cir. 2001) (“[W]here Congress includes limiting language in an earlier version of a bill but deletes it prior to

B. Supreme Court Precedent and Traditional Canons of Statutory Construction Compel the Commission To Remove Consideration of the UHF Discount from This Proceeding.

Under Supreme Court precedent and well established principles of statutory construction, Congress's repeated re adoption and reuse of the term "national audience reach" without changing the UHF Discount provisions in Section 73.3555(e)(2)(i) conclusively demonstrates that Congress has approved the existence and continued use of the UHF Discount.¹³ These principles establish as a matter of law the common sense proposition that Congress presumes a stable regulatory regime when it adjusts agency policy determinations. Given the constancy of the UHF Discount since its adoption in 1985, changing it now, so soon after Congress's decision to raise the national ownership cap to 39% would eviscerate the intent behind Congress's carefully crafted statute.

In addition, Congress's amendment to Section 202(h) exempting the national ownership rule and all associated rules from further periodic review is additional significant evidence of a Congressional imprimatur on the propriety of those rules, including the UHF Discount. As the Commission is aware, established canons of statutory construction require it to read Section 629 of the CAA as a whole, taking into

enactment, it may be presumed that the limitation was not intended.").

¹³ See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("*Bragdon*") ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *Commissioner of Internal Revenue v. Noel's Estate*, 380 U.S. 678, 681-82 (1965) ("*Noel*") ("We have held in many cases that such a long-standing administrative interpretation, applying to a substantially reenacted statute, is deemed to have received congressional approval and has the effect of law.").

consideration the interaction of all its parts.¹⁴ PCC submits that consideration of the entirety of the CAA removes any doubt that Congress intended to insulate the UHF Discount from further Commission consideration in this and any other periodic consideration of the media ownership rules.

The Supreme Court's decisions and the other authorities cited above make clear that the Commission now lacks the authority to eliminate or alter the UHF Discount in this biennial review proceeding. The Commission's definition of "national audience reach" incorporating the UHF Discount has been explicitly approved by Congress and signed into law by the President, and it may not be amended by the Commission at this time.

C. Any Finding That the UHF Discount Remains Open to Commission Consideration at This Time Would Be Illogical.

For the Commission to make a contrary finding and proceed to some sort of substantive evaluation of the UHF Discount, it would have to conclude that Congress adopted a 39% cap without any certainty as to what that cap would mean. Such a finding would be not only contrary to Congressional directive under any circumstances, but it also would be completely illogical here because Congress has demonstrated in the past a full understanding of the inner workings of the national ownership cap and its relationship with the UHF Discount. Moreover, in the CAA, Congress delved deep into the details when it decided to maintain the current level of permitted ownership. For example, Section 629(2) requires divestiture by parties that exceed the new 39% cap

¹⁴ See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995); SUTHERLAND STATUTORY CONSTRUCTION § 46:05 (2002 ed.) ("each part or each section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole").

but specifically exempts from this requirement any entity that exceeds the national ownership cap due only to increases in population in the DMAs in which the entity's stations are located. It is simply inconceivable that Congress would go to this level of detail and specificity to maintain the *status quo* while simultaneously leaving an integral part of the national ownership rules like the UHF Discount open to immediate Commission reconsideration. There is absolutely no legislative history to support such an anomalous result.

Congress's plain intention was to maintain the existing mechanics of the national television ownership rules with a slight increase in the overall permitted ownership level to 39%. The Commission needs no reminder that it lacks authority to construe statutes in a manner that frustrates Congress's purposes.¹⁵ The Commission is bound by Congress's manifest intent, and it must cease entertaining petitions for reconsideration urging elimination or modification of the UHF Discount. To do otherwise would be to violate a clear Congressional enactment and would thus be unlawful.

II. THIS ISSUE MUST BE RESOLVED WITHOUT FURTHER SUBSTANTIVE COMMENT FROM THE PARTIES.

The CAA is so clear on its face that the Commission would have been well within its authority under the Administrative Procedure Act to dismiss the Petitions for Reconsideration requesting repeal of the UHF Discount without requesting further comment.¹⁶ That is the course the Commission followed when Congress last directed

¹⁵ See, e.g., *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1525 (D.C. Cir. 1995) ("The FCC cannot abandon the legislative scheme because it thinks it has a better idea.").

¹⁶ See 5 U.S.C.A. § 553(b)(3)(B) (" . . . [T]his subsection does not apply . . . when the agency for good cause finds . . . that notice and public procedure thereon are

the Commission to revise the national audience reach limitation,¹⁷ and that would have been the legally appropriate course this time as well. The Commission should take such action once it has reviewed these comments and any subsequent replies.

In any event, having sought comment, the Commission must absolutely narrowly focus its inquiry on the question at hand, which is whether the CAA removes the UHF Discount from further consideration in MB Docket No. 02-277. As shown above, it clearly does. The Commission should ignore any attempt by opponents of the UHF

impracticable, unnecessary, or contrary to the public interest.”); Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership) 47 CFR Section 73.3555, *Order*, 11 FCC Rcd 12368, 12371 (1996) (revising local and national ownership rules in accordance with 1996 Act without first seeking comment); Amendment to Section 73.1020 of the Commission's Rules: Station License Period, *Order*, 88 FCC 2d 355, 356 (1981) (“ . . . [T]he Administrative Procedures Act requires that a general notice of proposed rule making be published in the Federal Register and interested parties be given an opportunity to comment upon or participate in any rule making. However, these requirements do not apply when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. Sec. 553(b)(B). Section 73.1020 of the Commission's Rules merely implements the intent of Congress in passing the subject legislation. Moreover, in that Congress determined that extended license renewal terms are in the public interest, immediate implementation of revised Rule 73.1020 is appropriate. Thus, good cause is established for waiver of the 30 day effective period. 5 U.S.C. Sec. 553(d)(3).”). See Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992: Indecent Programming and Other Types of Materials on Cable Access Channels, *Memorandum Opinion and Order*, 12 FCC Rcd 6390, 6393 n.10 (1997) (amending rules without notice and comment in response to Supreme court decision striking down portions of congressionally enacted leased access provisions without notice and comment and noting previous implementation of congressional provisions into Commission rules without notice and comment).

¹⁷ Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations) 47 CFR Sections 73.658(g) and 73.3555, *Order*, 11 FCC Rcd 12374, 12377 (1996) (“We are revising these rules without providing prior public notice and an opportunity for comment because the rules being modified are mandated by the applicable provisions of the Telecom Act. We find that notice and comment procedures are unnecessary, and that

Discount to convert the Commission's request for comment on this narrow issue of statutory construction into another excuse to introduce evidence suggesting that the UHF Discount is no longer necessary.

As noted above, in the past four years, the Commission has twice determined that the UHF Discount remains necessary in the public interest,¹⁸ and in each case, that finding was supported by extremely extensive evidence.¹⁹ Congress plainly meant for the CAA to end discussion about the scope of the national audience reach cap and utilization of the UHF Discount in making that determination. The Commission is bound by law to respect Congress's command. Not only is the evidence supporting the Discount overwhelming, but nothing presented to the Commission at this time could overcome Congress's expressed will that the UHF Discount remain integral to the calculation of broadcasters' national audience reach.

this action therefore falls within the "good cause" exception of the Administrative Procedure Act . . .").

¹⁸ See *supra* n.8.

¹⁹ See *Ex Parte* Letter of Paxson Communications corporation, MB Docket No. 02-277, filed May 23, 2003 (collecting evidence in favor of and against UHF Discount). See also *Ex Parte* Letter of Paxson Communications Corporation, MB Docket No. 02-277, filed May 7, 2003; *Ex Parte* Letter of Paxson Communications Corporation, MB Docket No. 02-277, filed May 16, 2003; *Ex Parte* Letter of Paxson Communications Corporation, filed May 30, 2003; *Ex Parte* Letter of Fox Entertainment Group, Inc., et al., MB Docket No. 02-277, filed May 20, 2003; Comments of Paxson Communications Corporation, MB Docket No. 02-277, at 15-27, filed January 2, 2003; Reply Comments of Paxson Communications Corporation, MB Docket No. 02-277, at 7-14, filed February 3, 2003; Reply Comments of Univision Communications, Inc., MB Docket No. 02-277, at 2-11, filed February 3, 2003; Reply Comments of Granite Broadcasting, MB Docket No. 02-277 at 2-7, filed February 3, 2003.

III. THE CAA DOES NOT FORBID THE COMMISSION FROM CONSIDERING THE UHF DISCOUNT AT A LATER TIME NEAR THE END OF THE DTV TRANSITION.

In addition to removing the Commission's discretion to consider and eliminate the UHF Discount in this proceeding, the CAA also affects the Commission's plans for future consideration and sunset of the Discount. In the *Media Ownership Order*, the Commission tentatively concluded that the DTV transition will eliminate the need for the UHF Discount for stations that are owned by, operated by, and affiliated with the four major television networks (Fox, NBC, CBS, and ABC) and for these stations, the Commission decided that the UHF Discount would sunset at the close of the DTV transition.²⁰ Even for these stations, however, the Commission left open the possibility that it would reverse the sunset at some point before the close of the DTV transition.²¹

A. The Commission Should Announce That It Will Conduct a Notice and Comment Rulemaking Proceeding Before Eliminating the UHF Discount for Any Station.

Because the extent to which the DTV transition may ameliorate the UHF Discount is still very much in doubt, the Commission wisely deferred action on phasing out the UHF Discount for most stations until a future Biennial Review.²² As described above, however, the CAA removes consideration of rules relating to the national

²⁰ Pending further Commission action in a future Biennial Review proceeding, the Commission found that other stations owned by the four major networks, but not affiliated with them, including, for example, NBC-owned Telemundo UHF stations and Viacom-owned UPN UHF stations, would still benefit from the UHF Discount as would all other UHF stations. *Media Ownership Order*, 18 FCC Rcd at 13847.

²¹ *See id.*

²² *See id.*

ownership cap from future ownership rule reviews.²³ In effect, then, the CAA forbids the Commission from carrying out its intention to consider the impact of the DTV transition on the UHF Discount as part of a future periodic ownership review. Consequently, the Commission should clarify its intentions regarding future consideration of the UHF Discount.

PCC never has agreed with the proposition that “the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized.”²⁴ To the contrary, throughout this proceeding, PCC and others have presented evidence that the DTV transition will not remove the need for the UHF Discount.²⁵ As PCC has shown, the Commission’s DTV replication and maximization rules will perpetuate current analog signal coverage disparities in the DTV world, leaving in place the origin of the competitive handicaps UHF broadcasters now face.²⁶ PCC presented evidence of numerous instances in which the FCC allotted power levels to its UHF stations that are a small fraction of those allotted to competing VHF stations,²⁷ and that these power disparities translate into smaller signal coverage area and fewer viewers served.²⁸ Nonetheless, PCC accepted the Commission’s prudent and flexible decision to consider the continued effectiveness of the UHF

²³ See *supra* Section I.

²⁴ See *Ownership Order*, 18 FCC Rcd at 13847.

²⁵ See, e.g., Letter from Counsel for Paxson, to Marlene Dortch, dated May 7, 2003; Letter from Counsel for Paxson, to Marlene Dortch, dated May 30, 2003.

²⁶ See *id.*

²⁷ See *Ex Parte* Letter of Paxson Communications Corporation, MB Docket No. 02-277, filed May 16, 2003, at Attachment 1.

²⁸ See *id.* at Attachment 3.

Discount for most owners during a biennial review near the close of the DTV transition.²⁹

The CAA now forecloses any periodic review, but the evidence in this proceeding still demands that the effect of the DTV transition on the UHF Discount be considered further before the Commission decides to implement any permanent sunset. Indeed, the record in this docket includes uncontradicted evidence that many current UHF stations will labor under the same or an even greater competitive handicap than they currently face, even after the DTV transition ends.³⁰ Accordingly, the Commission should commit now to conducting a notice and comment rulemaking proceeding analyzing the effect of the DTV transition on the need for the UHF Discount before it finds that the DTV transition is complete in any market and before it permanently sunsets the UHF Discount for any non-network owned stations.

B. The Commission Should Revisit Its Decision To Sunset the UHF Discount for Any Network Owned and Operated Stations.

The CAA's support of the UHF Discount also should lead the Commission to revisit its decision to sunset the UHF Discount for certain network owned and operated stations. PCC always was leery of the Commission's decision to sunset the UHF Discount on any blanket basis, even for this small subset of stations. As PCC noted in its Opposition to Petitions for Reconsideration in this proceeding, the Commission's sunset provisions appear to be sufficiently flexible to allow the Commission to reverse

²⁹ See Opposition to Petitions for Reconsideration of Paxson Communications Corporation, MB Docket No. 02-277, at 3 & n.5, filed October 6, 2003 (the "Paxson Opposition").

³⁰ *Ex Parte* Letter of Paxson Communications Corporation, MB Docket No. 02-277, filed May 16, 2003.

course if, as PCC expects, the facts at the end of the DTV transition do not support elimination of the UHF Discount for network owned and operated stations.³¹ If the Commission remains committed to the sunset provisions, however, it should explicitly state its willingness to reconsider the issue at an appropriate time near the end of the DTV transition in a notice and comment rulemaking proceeding at the request of any affected station group owners.

At this time, however, Congress's renewed endorsement of the UHF Discount should change the Commission's calculus on the sunset issue. By retaining the UHF Discount, Congress essentially endorsed the Commission's determinations over the years that UHF stations' signal handicaps lead to a competitive disadvantage that has not been remedied by industry developments such as mandatory cable carriage. Congress's confidence in these time-tested conclusions should prompt the Commission to look more seriously at its current conclusion that the DTV transition will eliminate the need for the UHF Discount for any station in any market. As described above, there is ample evidence that the DTV transition will not ameliorate the handicaps that make the UHF Discount so important to so many stations. Under these circumstances, the most legally sustainable course would be for the Commission to leave the UHF Discount in place for all stations and consider sunseting it nearer the close of the DTV transition. This course also would be most consistent with Congress's clear intention to allow the continuation of existing television station groups.

³¹ PCC did not petition the Commission for reconsideration on this issue because it has maintained before the Third Circuit a Petition for Review of the *Media Ownership Order*, and federal court precedent barred a simultaneous Petition for Reconsideration. See *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997).

CONCLUSION

The CAA, passed by Congress and signed into law by the President, has settled the issue of the national ownership cap, and in so doing, it has settled the issue of the UHF Discount. The Commission is bound to continue to employ the UHF Discount until it can show conclusively at some future time that the Discount is no longer necessary to ensure competitive parity in the television industry. The record compiled in this proceeding is unequivocal that the UHF Discount remains not only in the public interest, but *necessary to* the public interest. The Commission must follow Congress's direction and issue an order as soon as possible recognizing Congress's approval of the UHF Discount and dismissing all petitions for reconsideration in this proceeding to the extent that they request elimination or change in the existing UHF Discount.

Respectfully Submitted,

PAXSON COMMUNICATIONS CORPORATION

By: /s/ William L. Watson
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