

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
2006 Quadrennial Regulatory Review -	)	MB Docket No. 06-121
Review	)	
of the Commission's Broadcast Ownership	)	
Rules and Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications Act	)	
of 1996	)	
	)	
2002 Biennial Regulatory Review - Review	)	MB Docket No. 02-277
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	)	MB Docket No. 01-235
Newspapers	)	
	)	
Rules and Policies Concerning Multiple	)	MB Docket No. 01-317
Ownership of Radio Broadcast Stations in	)	
Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

**REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE**

The Network Affiliated Stations Alliance (“NASA”), a coalition of the affiliate associations representing approximately 600 local television stations affiliated with the ABC, CBS, and NBC Television Networks, submits these reply comments in response to the Commission’s *Further Notice of Proposed Rule Making*,<sup>1</sup> specifically in connection with the

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<sup>1</sup> See *2006 Quadrennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 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* (continued...)

issue of whether the Commission should (1) “retain, modify or eliminate the UHF discount” for the four major networks after the digital transition and (2) retain the dual network rule for the four major networks. In its initial comments in this proceeding NASA stated its support for the post-digital transition sunset of the UHF discount for the four major networks, grandfathering of the networks’ existing audience reach under the national cap rule, and retention of the dual network rule for the four major networks.

**I. ELIMINATING THE UHF DISCOUNT FOR THE FOUR MAJOR NETWORKS BUT GRANDFATHERING THEIR EXISTING HOLDINGS WOULD CARRY OUT CONGRESS’S INTENT IN ENACTING THE 39 PERCENT CAP.**

NASA’s position with respect to the UHF discount under the national cap rule is long-standing; addresses the Commission’s concerns about the effect of the UHF discount in conjunction with the digital transition where the UHF handicap is no longer a reality and many stations will change from VHF channels to UHF channels and many will remain on UHF channels; and implements Congress’s intent in the 2004 Consolidated Appropriations Act where it established the 39% national cap.

In its 2003 Order the Commission adopted a 45% national cap, but also found that “the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized,” and therefore stated it would “sunset the application of the UHF discount for the stations owned by the top four broadcast networks as the digital transition is completed on a market by market basis. This sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be

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*Markets; Definition of Radio Markets*, Further Notice of Proposed Rule Making, MB Docket No. 06-121, July 24, 2006.

served by continuation of the discount beyond the digital transition.”<sup>2</sup> Congress stepped in after an outpouring of public concern about the Commission’s decision to raise the cap to 45%. In the 2004 Consolidated Appropriations Act, it set the national cap at 39%.<sup>3</sup> Thereafter, the Commission launched a proceeding inquiring what it could and should do with respect to the UHF discount once the DTV transition was completed (now scheduled for February 17, 2009). The dilemma the Commission faced, and continues to face, is illustrated by the following facts.

CBS currently has nine VHF stations on analog channels that after the transition will be converted to UHF channels. They are located in very large markets like New York City, Philadelphia, San Francisco and Boston. If the UHF 50% discount were newly applied to those new UHF channels, post-transition, CBS would have very large *additional* capacity to acquire many new stations in new markets and thereby thwart the intent of Congress’s 39% cap. On the other hand, CBS has ten markets where its stations occupy only UHF channels, and will continue to do so after the transition. If the UHF discount were terminated after the transition, CBS would exceed the 39% cap.

The comparable statistics for Fox are seven analog stations on VHF channels that would shift to UHF digital channels and eight UHF analog stations that would remain on UHF channels after the transition and, without grandfathering protection, would lose the benefit of the 50% discount. For NBC, the comparable statistics are seven stations that would go from Vs to Us after the transition and seven stations that would remain as Us and lose the 50% discount.

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<sup>2</sup> 2002 Biennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules, Report & Order, 18 FCC Rcd. 13620 at ¶ 591.

<sup>3</sup> Consolidated Appropriations Act of 2004, Pub. L. No. 108-109, § 629, 118 Stat. 3 (2004).

The affiliates' proposed solution is fair and non-disruptive. It would end the 50% discount for those major network stations that would go from VHF to UHF channels but at the same time would grandfather the networks' existing UHF stations that would retain UHF channels and would otherwise lose the benefit of the 50% UHF discount under the 39% cap.

## **II. THE COMMISSION MAY CONSIDER THE UHF DISCOUNT ISSUE CONSISTENT WITH *PROMETHEUS* AND PURSUANT TO ITS GENERAL RULEMAKING AUTHORITY.**

In initial comments, Fox favored retaining the UHF discount.<sup>4</sup> Pointing to language in *Prometheus*,<sup>5</sup> it argued that the Commission lacks authority to consider the discount in the present § 202(h) quadrennial proceeding. However, the *Prometheus* Court also made clear that its decision “did not foreclose the Commission’s consideration of its regulation defining the UHF discount in a rulemaking *outside* the context of 202(h).”<sup>6</sup> As NASA pointed out in its initial comments, the Consolidated Appropriations Act did not affect the Commission’s authority to implement its decision to sunset the discount for the major networks.<sup>7</sup>

It is clear, therefore, that the Commission can, consistent with *Prometheus* and under its general rulemaking authority, consider the UHF discount in a proceeding concurrent with the

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<sup>4</sup> See Fox Comments at 28-31. See also Entravision Comments at 20-22; ION Media Comments at 4-6; Univision Comments at 2-4. NASA does *not* propose elimination of the UHF discount for Univision or ION.

<sup>5</sup> See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004) (because the Consolidated Appropriations Act amended 202(h) to read “[t]his subsection does not apply to any rules relating to the 39% national audience limitation,” and “the UHF discount is a rule ‘relating to’ the national audience limitation,” “Congress apparently intended to insulate the UHF discount from periodic review”).

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> See NASA Initial Comments at 3-5.

present 202(h) quadrennial review.<sup>8</sup> Alternatively, the Commission may wish to make clear that it will consider the UHF discount issue as part of this proceeding but under its general rule making authority and not under § 202(h). The Commission has recognized in the past that Congress’s use of the phrase “national audience reach limitation” does not divest it of authority to modify the UHF discount under its general rulemaking powers.<sup>9</sup> The Third Circuit made clear that, barring congressional intervention, “the Commission may decide, in the first instance, its authority to modify or eliminate the UHF discount outside the context of § 202(h).”<sup>10</sup> Nothing in the Consolidated Appropriations Act or *Prometheus* decision supports the conclusion that the Commission no longer has the authority to consider the discount.

### **III. NO COMMENTS ADVOCATED CHANGE IN THE DUAL NETWORK RULE FOR THE FOUR MAJOR NETWORKS.**

The Commission’s *Further Notice of Proposed Rulemaking* also asked whether the Commission’s dual network rule, which prohibits a merger between or among the top four networks, remains necessary in the public interest. In the Commission’s last 202(h) proceeding, it found the dual network rule was necessary in the public interest; no *Prometheus* petitioner appealed the Commission’s retention of the rule. In the present proceeding, NASA’s initial comments illustrated that the dual network rule preserves competition, protects diversity, and

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<sup>8</sup> See *Prometheus Radio Project Comments* at 4-5 (noting *Prometheus* did not forbid consideration of the UHF discount in a docket that also implements 202(h)).

<sup>9</sup> See *In the Matter of Broadcast Television National Ownership Rules*, Notice of Proposed Rulemaking, MM Docket Nos. 96-222, 91-221, 87-8, FCC 96-437, 11 FCC Rcd 19949, 19950 (Nov. 7, 1996); *In the Matter of 1998 Biennial Regulatory Review - Review of the Commission’s Broadcast Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, MM Docket No. 98-35, FCC 00-191, 15 FCC Rcd 11058, 11079 (June 20, 2000).

<sup>10</sup> See *Prometheus Radio Project*, 373 F.3d at 397.

benefits localism.<sup>11</sup> No party in this proceeding argued the Commission should modify or eliminate the dual network rule. Since the reasons in support of the rule remain valid, it should be retained.

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NASA urges the Commission to act on the UHF discount issue in a manner that would honor Congress's intent in setting the national ownership cap at 39%. Adopting NASA's "elimination with grandfathering" proposal for the four major networks -- an action the Commission clearly has the authority to take -- would achieve this goal.

Respectfully submitted,

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<sup>11</sup> See NASA Initial Comments at 7.