

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
2006 Quadrennial Regulatory Review – Review)	MB Docket No. 06-121
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)	MB Docket No. 02-277
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)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in Local)	
Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	
To: The Commission)	

REPLY COMMENTS OF UNIVISION COMMUNICATIONS INC.

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Summary

In addressing the questions raised by the Commission in this proceeding with regard to the UHF discount, Univision Communications Inc. (“Univision”) noted in its Comments that the Commission lacks the procedural and substantive authority to eliminate or modify the UHF discount given the passage of the 2004 Consolidated Appropriations Act (the “CAA”) by Congress. Univision also noted that, even if the Commission did have such authority, there would be no reason to exercise it, as the UHF discount continues to serve the public interest.

Only a few parties filed comments in this proceeding advocating the modification or elimination of the UHF discount. However, none of these commenters is able to demonstrate that the Commission has the procedural authority to take such action in this proceeding. More importantly, none of these commenters is able to demonstrate that the Commission has the substantive authority to eliminate or modify the UHF discount given the CAA’s transformation of the UHF discount into a creature of statutory law. Instead, they offer tortured readings of the CAA meant to avoid the plain meaning of the statute, and seek to buttress these readings through an obvious misinterpretation of the Third Circuit’s opinion in *Prometheus Radio Project v. FCC*.

Even setting those matters aside, however, none of the commenters seeking modification or elimination of the UHF discount provides any plausible justification for the Commission to take such action. In fact, only a single commenter, Prometheus Radio Project (“Prometheus”), attempts to provide a justification. In its effort, Prometheus makes no affirmative showing that the UHF discount is harmful to the public interest, and at most alleges that *some* of the justifications for the UHF discount no longer apply. As demonstrated in these Reply Comments, however, those limited allegations are based on incorrect information, and would not overcome the many public interest benefits of the UHF discount in any event. In short, Prometheus

provides no basis for the Commission to conclude that eliminating or modifying the UHF discount would serve the public interest, convenience, and necessity, or that the Commission could undertake such action even if it were to reach a contrary conclusion. The Commission should therefore take no further action with regard to the UHF discount.

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REPLY COMMENTS OF UNIVISION COMMUNICATIONS INC.

Univision Communications Inc. (“Univision”), by its counsel, hereby submits these Reply Comments in response to the various comments filed in the above-captioned dockets in connection with the Commission’s June 21, 2006 *Further Notice of Proposed Rulemaking*. In Comments filed on October 23, 2006, Univision noted that following the passage of the 2004 Consolidated Appropriations Act (the “CAA”) by Congress, the Commission lacks the procedural and substantive authority to eliminate or modify the UHF discount.¹ Univision also established that even if the Commission did have the authority to eliminate or modify the UHF

¹ See Univision Comments at 2-6. See also Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004).

discount, there would be no reason to do so, since the UHF discount continues to serve the public interest by recognizing the substantial technical and operational disadvantages UHF stations face in seeking to geographically cover their entire DMA.²

Although the Commission received tens of thousands of Comments in response to its *Further Notice of Proposed Rulemaking*, only a handful of parties explicitly advocate modification or elimination of the UHF discount, these principally being Prometheus Radio Project (“Prometheus”), Capitol Broadcasting Company, Inc. (“Capitol”), and the Network Affiliate Station Alliance (“NASA”). Univision notes that NASA advocates elimination of the UHF discount only as it applies to stations affiliated with the major four English-language networks. However, none of these parties presents any plausible rationale granting the Commission the authority to eliminate or modify the UHF discount, nor do they provide any plausible justification for exercising such authority if it did exist. Accordingly, the Commission should not attempt any modification or elimination of the UHF discount.

I. The Few Commenters Advocating Modification of the UHF Discount Fail to Establish the Commission’s Procedural Authority to Do So

In its Comments, Univision noted that following the passage of the CAA, the Commission no longer has the procedural authority to consider the elimination or modification of the UHF discount.³ Specifically, Section 629 of the CAA amended Section 202(h) of the Telecommunications Act of 1996 to provide that the Commission’s regulatory reform review “does not apply to any rules relating to the 39 percent national audience reach limitation[.]”⁴ As the Third Circuit concluded in *Prometheus Radio Project v. FCC*, “[t]he UHF discount is a rule

² See Univision Comments at 6-17.

³ See Univision Comments at 2-4.

⁴ CAA § 629.

‘relating to’ the national audience limitation.”⁵ Accordingly, the Commission lacks the authority to eliminate or modify the UHF discount in this proceeding.

Even Prometheus admits that “it is at least conceivable that [the caveat in Section 202(h)] could be read as precluding consideration of the UHF discount in the current docket.”⁶ The sole reason offered by Prometheus – and echoed by Capitol and NASA – for concluding otherwise is that in *Prometheus*, the Third Circuit noted the Commission’s pending review of the UHF discount and did not immediately quash that proceeding.⁷ However, this claim misinterprets the court’s decision to *abstain* from rendering a decision on the merits as being a decision on the merits in and of itself.

Critically, the question of the extent of the Commission’s authority to eliminate or modify the UHF discount in light of the CAA was not before the court in *Prometheus*.⁸ Consequently, the court properly refused to render an advisory opinion on the matter, and instead

⁵ 373 F.3d 372, 397 (3d Cir. 2004).

⁶ Prometheus Comments at 4.

⁷ *Id.* (citing the Third Circuit’s acknowledgment that “[t]he Commission is now considering its authority going forward to modify or eliminate the UHF discount and recently accepted public comment on this issue.”); Capitol Comments at 6 (claiming, without explanation, that “[t]he Third Circuit held that the Commission has the authority to modify or eliminate the UHF discount outside of the Section 202(h) periodic review mandate”); NASA Comments at 3 (claiming that “the Third Circuit in the *Prometheus* case acknowledged the issue, confirming that the Commission may decide the scope of its authority to modify or eliminate the UHF discount.”).

⁸ Among other things, the question of the Commission’s authority outside of the Section 202(h) context was not ripe. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (“Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.”).

deferred to the Commission to decide, “in the first instance,” whether it has such authority.⁹ The court’s factual acknowledgment of an ongoing Commission proceeding in no way implies that the Commission has authority to consider or act on specific matters at issue in that proceeding. In short, the court’s decision to allow the Commission to decide the scope of its authority to modify or eliminate the UHF discount *in the first instance* does not imply that the Commission has that authority, or waive the court’s obligation to intervene *in the second instance* if the Commission misinterprets the extent of its authority.

Prometheus’s reading is also at odds with the obvious intent of Congress in enacting Section 629 of the CAA. The only plausible reason for Congress to insulate the national audience reach limit from periodic review is to prevent the Commission from eliminating or modifying that limit – including the UHF discount aspect of it.¹⁰ Prometheus’s alternative explanation, that Congress wished to give the Commission “discretion to refrain from including the ownership cap in its quadrennial review,”¹¹ is illogical, and collapses under even the most cursory analysis.

As an initial matter, there is nothing discretionary about the caveat contained in Section 202(h). That caveat explicitly and absolutely prevents the Commission from considering “rules

⁹ Article III of the Constitution limits the court’s jurisdiction to “cases” and “controversies.” *See* U.S. CONST. Art. III. This limitation on the courts’ jurisdiction restricts the judiciary’s ability to assume the policymaking functions of the legislative and executive branches. The legislative and executive branches are more accountable to the public and thus the more “democratic” loci of the policymaking function. *See* GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 85 (4th ed. 2001) (“By limiting the occasions for judicial intervention into legislative or executive processes, the case or controversy requirement reduces the friction between the branches produced by judicial review.”).

¹⁰ The Commission must interpret the CAA “as a symmetrical and coherent regulatory scheme,” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), and “fit, if possible, all parts into an harmonious whole,” *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

¹¹ Prometheus Comments at 6.

relating to the 39 percent national audience reach limitation in subsection (c)(1)(B)” in a quadrennial review proceeding, while strongly implying that the Commission may not consider such rules in other contexts as well. As the Third Circuit made abundantly clear, the caveat demonstrates Congress’s intent “to insulate the UHF discount from periodic review, a position that is consistent with our reading of the legislation as endorsing the almost 20-year-old regulatory definition of ‘national audience reach’ that provides for the UHF discount.”¹²

Further, the interpretation urged by Prometheus would render the caveat in Section 202(h) a nullity, and as such must be dismissed.¹³ In order for the Commission to exercise its alleged “discretion” to exclude the national audience reach limit from quadrennial review, the Commission would need to conclude that the national audience reach limit continues to serve the public interest; any other basis for this decision would be arbitrary and capricious.¹⁴ This is the same conclusion that the Commission would need to reach to retain the national audience reach limit under Section 202(h). In other words, Prometheus’s interpretation renders the caveat meaningless, since the Commission would engage in the same inquiry, with the same results, whether it chooses to exercise its “discretion” or not.

The Commission must interpret the CAA and the Telecommunications Act “as a symmetrical and coherent regulatory scheme,”¹⁵ and “fit, if possible, all parts into an harmonious whole.”¹⁶ As Univision noted in its Comments, in order for the caveat contained in Section

¹² *Prometheus*, 373 F.3d at 397.

¹³ A basic principle of statutory interpretation is that courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

¹⁴ *See Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁵ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)

¹⁶ *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

202(h) to have its intended effect, in a manner that is consistent with the larger regulatory structure imposed by Congress, it must be read as a broad constraint on the Commission's plenary rulemaking authority.¹⁷ As a result, the Commission is statutorily barred from conducting a proceeding to modify the UHF discount, whether that proceeding is a quadrennial review pursuant to Section 202(h), or any other type of Commission proceeding.

II. The Few Commenters Advocating Modification of the UHF Discount Fail to Demonstrate that the Commission Has the Substantive Authority to Modify the UHF Discount

Even if the Commission had the procedural authority to consider the elimination or modification of the UHF discount in this proceeding, the Commission would lack the substantive authority to do so. As Univision noted in its Comments, Congress has unambiguously expressed its intent to retain the UHF discount in its current form, depriving the Commission of authority or discretion to alter the substance of the discount through administrative regulation.¹⁸ Under established principles of statutory interpretation, Congress's inclusion in a statute of a term that has been defined by an administrative agency, without changing the definition provided by the administrative agency, effectively incorporates the agency's definition into the statute.¹⁹ In

¹⁷ Univision Comments at 3.

¹⁸ Univision Comments at 4-6. *See also Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (if "the intent of Congress is clear, that is the end of the matter; for . . . the agency . . . must give effect to the unambiguously expressed intent of Congress.").

¹⁹ *See, e.g., Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184, 193-94 (2002) ("Congress' repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."); *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("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, 682 (1965) ("We have held in many cases that such a longstanding administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received congressional approval and has the effect of law."); *Strickland v. Commissioner Maine Department of Human Services*,

enacting the CAA, Congress incorporated the Commission’s existing definition of “national audience reach,” including the UHF discount, thereby transforming the UHF discount into a creature of statutory law that cannot be freely eliminated or modified by the Commission.²⁰

Prometheus itself acknowledges as much.²¹

Congress’s specification of a precise national audience reach limit of 39% also indicates that Congress intended a precise result, in accordance with the Commission’s existing standards for measuring national audience reach. In doing so, Congress preempted the Commission from eliminating or modifying the UHF discount – a key component of those standards.²² Congress’s intent would be frustrated if the Commission were permitted to alter those standards after the fact by repealing or modifying the UHF discount. As the Third Circuit explained in *Prometheus*, any action by the Commission “reducing or eliminating the discount for UHF station audiences

48 F.3d 12, 20 (1st Cir. 1995) (“When Congress codifies language that has already been given meaning in a regulatory context, there is a presumption that the meaning remains the same.”).

²⁰ As Univision noted in its Comments, by using the term “national audience reach” in the CAA, Congress incorporated the Commission’s existing definition of this term – including an explicit UHF discount of 50%. Consequently, the Commission no longer has the discretion to modify or eliminate the UHF discount as though it remained purely a creature of administrative law.

²¹ Prometheus Comments at 3-4 (“The cross-referenced section [Section 202(c)(1)(B)] implicitly refers to the UHF discount.”).

²² NASA’s claim that such preemption runs counter to the “presumption against repeals by implication” is misplaced. See NASA Comments at 4. First, nothing in the CAA seeks to *repeal* the Commission’s authorizing statute or the Commission’s regulatory definition of “national audience reach.” At most, the CAA limits the Commission’s discretion to exercise the powers granted by that statute in a manner that would *alter* the *existing* definition of “national audience reach” to conflict with the stated intent of Congress. In addition, the presumption is overcome where Congress’s intent to repeal is manifest, *or* there is an irreconcilable conflict between the two statutes. See, e.g., *TVA v. Hill*, 437 U.S. 153, 190 (1978) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”). Congress has manifested a clear intent to limit the Commission’s authority to eliminate or modify the national audience reach limit and the UHF discount, and any attempt to exercise such authority would necessarily conflict with clearly expressed Congressional policy.

would effectively . . . undermine Congress’s specification of a precise 39% cap”²³

Accordingly, such action is beyond the Commission’s authority.

Notwithstanding, Prometheus and NASA argue that the Commission may freely eliminate or modify the UHF discount. Prometheus claims, in perfunctory fashion, that “[t]he same general powers which the Commission invoked to adopt the UHF discount give it more than ample authority to repeal or modify the discount.”²⁴ This argument overlooks what should be obvious – the Commission’s authority to adopt regulations and its authority to repeal those regulations are not symmetrical where Congress has effectively endorsed the Commission’s regulations, and converted those regulations into creatures of statutory law. A superseding act of Congress that decides a question of policy in this fashion necessarily restricts the authority and discretion of the affected agency.²⁵

NASA claims that “[i]t does not follow . . . that Congress’s use of the phrase ‘national audience reach limitation’ was intended to freeze the meaning of that term forever.”²⁶ The premise of NASA’s argument – that denying the Commission authority to eliminate or modify the UHF discount would somehow “freeze” the meaning of the term “national audience reach limitation” – is false. *Congress* may modify that definition at any time; the CAA merely precludes the Commission from doing so. To the extent that the meaning of the term “national audience reach limitation” is frozen from the perspective of the *Commission*, however, this result

²³ *Prometheus*, 373 F.3d at 396.

²⁴ Prometheus Comments at 5.

²⁵ This scenario is markedly different from that in which an agency claims that a statute implicitly *enlarges* the agency’s authority. Compare *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001) (refusing to interpret a statute to *enlarge* Congress’s delegation of authority to the Environmental Protection Agency). See also Prometheus Comments at 6 (citing *Whitman*).

²⁶ NASA Comments at 4.

is fully consistent not only with judicial precedent but with fundamental precepts of representative government.²⁷

NASA also claims that following the issuance of the *2002 Biennial Review Order* “there was no ‘settled’ or ‘longstanding’ agency position in favor of retaining the UHF discount” because the Commission determined that “upon completion of the digital transition, the UHF discount should sunset for stations owned by the four major networks.”²⁸ First, NASA’s claims have no relevance with respect to stations not owned by “the four major networks.” Second, and critically, in enacting the CAA, Congress incorporated the definition of “national audience reach” as it was fixed *at that time*; Congress did not incorporate the Commission’s intent as to how the *application* of the UHF discount would change *in the future*. Since in 2004, as today, the Commission’s definition of “national audience reach” included a UHF discount that applied to all UHF stations, the definition of “national audience reach” incorporated into the CAA includes a UHF discount that applies to all UHF stations. The CAA effectively rendered the Commission’s intent to sunset certain aspects of the UHF discount moot.

III. The Few Commenters Advocating Modification of the UHF Discount Fail to Demonstrate That Eliminating or Modifying the UHF Discount Would Serve the Public Interest, Convenience, and Necessity

The record contains ample evidence demonstrating that the UHF discount continues to serve the public interest. In addition to Comments filed in this proceeding by Univision and

²⁷ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (if “the intent of Congress is clear, that is the end of the matter; for . . . the agency . . . must give effect to the unambiguously expressed intent of Congress.”).

²⁸ NASA Comments at 5. NASA also claims that “the Commission has long been on record that Congress’s use of the phrase ‘national audience reach limitation’ in the Telecommunications Act of 1996 did not divest it of authority to modify the UHF discount under its general rulemaking powers.” NASA Comments at 4-5. In support of this claim, NASA cites only the Commission’s biennial review decisions from *1996* and *2000*, which predate the CAA by eight and four years, respectively, and thus lack any precedential value in interpreting the scope of the Commission’s authority under the CAA.

other parties, the Commission’s findings in the *2002 Biennial Review Order* remain valid.²⁹ In contrast, only Prometheus’s Comments even attempt to offer a justification for the elimination or modification of the UHF discount; Capitol and NASA focus exclusively on the Commission’s authority to do so.³⁰ Prometheus, though, fails to offer any explanation of how the UHF discount is harming the public interest; at most, Prometheus alleges that *some* of the justifications for the UHF discount no longer apply. However, even if it otherwise had the authority, the Commission is barred from eliminating or modifying the UHF discount absent record evidence that doing so will serve the public interest, convenience, and necessity.³¹ Here, Prometheus fails to provide any justification for eliminating or modifying the UHF discount, leaving the Commission with no basis to even contemplate such an action.

A. The Commenters Fail to Establish That the UHF Discount Is No Longer Necessary to Correct for the Inferior Signal Coverage of UHF Stations

Prometheus claims that there is no longer a meaningful disparity between UHF and VHF signals since “86% of households now subscribe to cable, DBS or another MVPD service.”³² Notably, though, neither Prometheus nor any other party disputes that there is currently a

²⁹ *2002 Biennial Review Order*, 18 FCC Rcd 13620 (2003) at ¶¶ 585-591, *other parts remanded in Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

³⁰ Capitol incorporates by reference the contents of a petition for reconsideration filed in 2003, without attempting to address any of the events of the intervening past four years. *See* Capitol Comments at 6-7.

³¹ *See Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 US 29, 43 (1983) (“Normally agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”). Congress has directed the Commission to use its discretion “as public convenience, interest, or necessity requires” 47 U.S.C. § 303.

³² Prometheus Comments at 8.

significant signal coverage disparity between *over-the-air* analog UHF and VHF signals.³³ As Univision explained in its Comments, it is only this disparity that is relevant in the context of the national audience reach limit.³⁴ The availability of MVPD service has absolutely no relevance to this rule, which was designed to ensure a robust and healthy broadcast service for *over-the-air* viewers who do not have MVPD service.

In focusing on MVPD delivery, Prometheus ignores the 20.5 million American households that must rely exclusively on over-the-air television.³⁵ The inferior reach of UHF stations continues to be highly relevant to these households, as well as to the millions more that rely on over-the-air reception for at least some of the television sets in their homes.³⁶ While the UHF discount has absolutely no adverse impact on MVPD subscribers, who benefit from a multitude of programming options,³⁷ the elimination or modification of the UHF discount would have substantial negative implications for over-the-air viewers.

³³ As the FCC has previously stated, “[d]ue to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF,” and, therefore, “actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength.” *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*, 57 RR 2d 966 (1985), at ¶ 43 (“1985 Order”).

³⁴ Univision Comments at 9.

³⁵ The fact that 86% of Americans now subscribe to an MVPD service does not imply that 86% of Americans are capable of receiving all UHF stations in their DMA. To the contrary, as Univision explained in its Comments, in the real world UHF stations rarely receive carriage equivalent to their VHF counterparts. Since UHF stations have weaker signals, and are required to provide a stronger signal to the headend, they often do not qualify for MVPD carriage. See 47 C.F.R. § 76.55(c)(3); 47 C.F.R. § 76.66(g).

³⁶ *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11, MB Docket 05-255 (2006) at ¶ 8.

³⁷ If MVPD services are factored in as relevant delivery mechanisms, it makes no sense to exclude from the Commission’s competition/diversity analysis the other programming networks delivered by MVPD. Thus, where viewers benefit from MVPD carriage of hundreds of programming networks, the need for a national audience reach limit on any one of those

Nor has MVPD carriage eliminated the disparity even in MVPD households. As discussed in Univision's Comments, UHF stations typically are carried on fewer MVPD systems for a multitude of reasons, one of which is the greater difficulty of delivering an adequate UHF signal to the headends of MVPD systems.³⁸ As a result, many MVPD viewers have just as much difficulty watching UHF signals as their over-the-air brethren.

Prometheus claims that "the fact that Congress has now set a 'hard date' for the digital TV transition provides overwhelming additional reason to repeal the discount."³⁹ As Univision demonstrated in its Comments, however, the DTV transition will not mitigate the technical inferiority of UHF signals, and thus far has actually increased the UHF handicap.⁴⁰ While the Commission in 2003 stated that it was "clear that the digital transition will largely eliminate the technical basis for the UHF discount . . . ," subsequent events have shown that prediction to be optimistic at best.

Similarly, the continued unwillingness of MVPD operators to carry broadcast stations' digital multicast channels means that "MVPD carriage" will be a yet weaker argument for modifying the UHF discount after the DTV transition than it is today. Even a UHF station that receives broad MVPD carriage for its "primary" multicast channel will still be disadvantaged in reaching viewers throughout the DMA with its other multicast channels, as viewers will still have to receive those signals solely through over-the-air UHF reception.

networks evaporates entirely. It is only with respect to over-the-air reception that the national audience reach limit remains significant in the first place, and thus it is only with respect to over-the-air reception that the propriety of the UHF discount should be assessed.

³⁸ Univision Comments at 10. *See also* 47 C.F.R. §§ 76.55(c)(3) and 75.66(g).

³⁹ Prometheus Comments at 8.

⁴⁰ Univision Comments at 10-12.

Finally, the point of the UHF discount is that it makes no sense to attribute the entire population of a DMA to a UHF station in calculating national ownership compliance if that station cannot be viewed *throughout* the DMA. The mere fact that there will be more UHF stations after the DTV transition than there were before the transition is therefore irrelevant. UHF stations will still have difficulty providing service to all of their DMA, particularly since the DMA boundaries were drawn in recognition of the “reach” of VHF stations. It would be arbitrary and capricious to attribute all of the viewers in a DMA to a UHF station for purposes of calculating compliance with the national ownership cap, when in fact significant numbers of viewers in that DMA cannot actually view the station’s signal. The DTV transition will not repeal the laws of physics that originally led to the creation of the UHF discount, and the DTV transition therefore provides no basis for the elimination or modification of the UHF discount.

B. In Asserting UHF/VHF Parity, the Commenters Fail to Explain Why UHF Stations Have Significantly Lower Ratings Than VHF Stations

Prometheus claims, in passing, that there is no meaningful ratings disparity between UHF and VHF stations.⁴¹ The only evidence cited by Prometheus in support of this claim is an *ex parte* filing made by Capitol in 2003. As an initial matter, the Capitol study contained obvious mathematical errors that resulted in the study greatly understating the UHF/VHF ratings disparity. Prometheus has long been aware of this error; Univision noted the mistakes in the study over three years ago in the course of the Third Circuit's review in *Prometheus Radio Project v. FCC*.⁴² For example, in comparing the ratings of certain UHF and VHF Fox-affiliated stations, Capitol stated that the February 2003 average rating for VHF Fox affiliates was 8.9,

⁴¹ Prometheus Comments at 8.

⁴² See Reply Brief for Intervenor Univision Communications Inc. and Petitioner Paxson Communications Corporation, No. 03-3388 (3d. Cir. Jan 5. 2004), at 15.

while the average rating for UHF Fox affiliates was 7.5.⁴³ Capitol then incorrectly stated that the VHF Fox ratings were only 8.6% higher than the UHF Fox ratings, when simple math reveals that the VHF ratings were actually 18.7% higher. Capitol repeated the error when its stated that in February 2003 the shares for VHF Fox affiliates were 8.2% higher than the shares for UHF Fox affiliates (13.0 vs. 11.0), when a correct calculation reveals the VHF shares were actually 18.2% higher than the UHF shares.⁴⁴ Inexplicably, Prometheus continues to cite the statistics in Capitol's study as though they were valid.⁴⁵

While even the limited study submitted by Capitol therefore indicates a nearly 20% ratings advantage for VHF stations over UHF stations, the tiny sample used understates the actual disparity. Specifically, Capitol only examined the ratings data of *Fox affiliates* in the *Top 50 markets* during *one ratings period*. In contrast, the ratings data relied upon by the FCC in the *2002 Biennial Review Order* examined *all Top 4 Network affiliates* in *all markets* and included measurements taken *four years apart*.⁴⁶ This more comprehensive study indicated that network-affiliated UHF stations suffered a 57% ratings handicap compared to network-affiliated VHF stations.⁴⁷ The disparity would have been even greater had the study also considered ratings data for the many UHF stations not affiliated with a “Top 4” network, as an additional disadvantage of operating a UHF station is the difficulty of obtaining an affiliation with a Top 4 network.

⁴³ Letter from Marvin Rosenberg, Counsel for Capitol Broadcasting Company, Inc. to Marlene H. Dortch, MB Docket No. 02-277 (May 30, 2003), at 4.

⁴⁴ *Id.*

⁴⁵ Prometheus Comments at 8.

⁴⁶ *2002 Biennial Review Order*, 18 FCC Rcd 13620 (2003) at ¶ 588, *other parts remanded in Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

⁴⁷ *Id.*

As a result, the wisdom of the Commission's original decision to set the UHF discount at 50% has been borne out by experience. Indeed, when considered in light of these long-term ratings disparities, the 50% discount actually understates the true extent of the cumulative disadvantages faced by UHF stations.⁴⁸ The perpetual ratings disparity between UHF and VHF stations therefore also supports retention of the UHF discount.

C. The Commenters Fail to Establish that the UHF Discount Is No Longer Necessary in Light of the Benefits Noted by Univision and Recognized by the Commission

In its Comments, Univision provided numerous additional justifications for retaining the UHF discount. For example, Univision noted that the UHF discount helps to counteract the significant competitive disadvantages faced by UHF stations. Specifically, Univision noted that: (i) UHF stations face significantly higher operating expenses than VHF stations, stemming largely from the need to pay electricity costs that are 1.5 to 3 times as high; and (ii) UHF stations have lower revenues than VHF stations, since advertisers typically pay less for advertising time on UHF stations than on VHF stations as a direct result of the limited audience reach and audience share of UHF stations.⁴⁹

Univision also reiterated the Commission's previous finding that "the UHF discount plays a meaningful role in encouraging entry of new broadcast networks into the market" by enabling these networks to obtain the critical mass of nationwide viewers in order to attract both national and local advertising, and to obtain the economies of scale necessary to effectively

⁴⁸ FEDERAL COMMUNICATIONS COMMISSION NETWORK INQUIRY SPECIAL STAFF, *NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION*, (1980) Vol. 1 at 76.

⁴⁹ *See* Univision Comments at 12-15.

produce quality programming.⁵⁰ Univision explained that the UHF discount is particularly important in fostering new networks to serve minority viewers, who are more dependent on over-the-air broadcast television.⁵¹

These benefits were duly noted by the Commission in the *2002 Biennial Review Order*, and as such are already a matter of record. The commenters seeking modification or elimination of the UHF discount make no effort to question the continued importance or relevance of these justifications. Accordingly, the Commission would be fully justified in retaining the UHF discount on the basis of these benefits alone.

Conclusion

Those few parties advocating modification or elimination of the UHF discount fail to demonstrate that the Commission has the procedural or substantive authority to alter the UHF discount in light of passage of the CAA. Moreover, there is no reason to modify what has been a singularly successful policy of the Commission, and no commenter has demonstrated that the UHF discount has had anything but beneficial effects for the public, particularly with regard to the UHF discount's encouragement of new broadcast networks. The Commission should

⁵⁰ Univision Comments at 15-17; *2002 Biennial Review Order*, 18 FCC Rcd 13620 (2003) at ¶ 590, *other parts remanded in Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

⁵¹ Univision Comments at 15-17. According to statistics from the National Association of Broadcasters, approximately 23 percent of African-American and 27.7 percent of Hispanic television households rely exclusively on over-the-air broadcasting. Among households where Spanish is the primary language, 43.2 percent rely solely on free, over-the-air television broadcasting. Comments of the National Association of Broadcasters, MB Docket 05-255 (Sep. 19, 2005) at 3.

therefore recognize the continuing benefits of the UHF discount, as well as its elevation to a statutory provision, and take no further action with regard to the UHF discount.

Respectfully submitted,

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