

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

In the Matter of)
)
2010 Quadrennial Regulatory Review –) MB Docket No. 09-182
Review of the Commission’s Broadcast)
Ownership Rules and Other Rules Adopted)
Pursuant to Section 202 of the)
Telecommunications Act of 1996)

To: The Commission

**REPLY COMMENTS OF
UNIVISION COMMUNICATIONS INC.**

Univision Communications Inc. (“Univision”), by its attorneys, submits these Reply Comments in the captioned proceeding. Univision is the country’s leading Spanish-language media company, and owns and operates 41 full-power television stations throughout the United States, including Puerto Rico. Univision files these comments in response to the request of the Office of Communication of United Church of Christ, Inc., *et al.*, that the Commission modify the “UHF discount” embodied in Section 73.3555(e)(2)(i) of the Rules.¹ Contrary to UCC’s suggestion, Congress has expressly prohibited the Commission from reviewing the UHF discount, as both the Commission itself and the U.S. Court of Appeals for the Third Circuit have recognized. Even if the Commission had such authority, this is not the time to make permanent decisions about the future of the UHF discount.

¹ See Comments of Office of Communication of United Church of Christ, Inc., Prometheus Radio Project, Media Alliance, National Organization of Women, National Hispanic Media Coalition, Common Cause, and Benton Foundation (“UCC”), MB Docket No. 09-182, at 10-13 (July 12, 2010) (“UCC Comments”).

UCC is simply incorrect in asserting that the Commission may address the UHF discount in this proceeding.² In Section 202(h) of the Telecommunications Act of 1996, Congress directed the Commission to conduct a biennial (later amended to specify quadrennial) review of the media ownership rules,³ and to “repeal or modify any [ownership] regulation it determines to be no longer in the public interest.”⁴ But in codifying the national television reach limitation in the 2004 Consolidated Appropriations Act,⁵ Congress expressly exempted the UHF discount from periodic review, stating unambiguously that

Section 202(h) “does not apply to *any rules* relating to the 39 percent national audience reach limitation.”⁶

The UHF discount is obviously a rule “relating to” – indeed, it is a critical aspect of – the national audience reach limitation. The Commission adopted the UHF discount in 1985. It retained the UHF discount following the enactment of Section 202(h), and the UHF discount was in effect in 2004 when Congress amended the 1996 Act to bar the Commission from reviewing any rules relating to the national audience reach limitation. Congress thus incorporated all of the Commission’s “national audience reach” regulatory regime – including the UHF discount – into the statutory framework governing national television multiple ownership. UCC’s assertion that “[n]othing in the Consolidated Appropriations Act of 2004

² UCC Comments at 10,13.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”), at § 202(h).

⁴ *Id.*

⁵ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004) (“Appropriations Act”).

⁶ Appropriations Act at § 629(3) (emphasis added).

changed the FCC’s authority to modify or eliminate the UHF discount”⁷ is just wrong, as both the Commission and the U.S. Court of Appeals have recognized.

In interpreting Section 629(3) of the Appropriations Act, the Court of Appeals in *Prometheus Radio Project* explicitly held:

We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning. . . . [W]e cannot entertain challenges to the Commission’s decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress’s specification of a precise 39% cap.

The UHF discount is a rule “relating to” the national audience limitation. Congress apparently intended 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.⁸

The Commission acknowledged the constraints imposed upon it by Congress and the *Prometheus Radio Project* court during its last quadrennial review in 2008, concluding that it was “foreclosed from addressing the issue of the UHF discount in this proceeding by the 2004 Consolidated Appropriations Act.”⁹ There is no basis – and the Commission has no discretion – to revisit that conclusion in this proceeding. UCC’s reliance to the contrary on a 2002

⁷ UCC Comments at 13.

⁸ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396-97 (3d Cir. 2004) (citations omitted). “National audience reach” is also an established statutory term; Congress used it in the 1996 Act in setting a national multiple ownership limit of 35 percent. 1996 Act at § 202(c). Indeed, discussing its version of the 1996 Act, the House Committee on Commerce endorsed the Commission’s definition of “national audience reach” and stated that it did “not envision that the UHF discount calculation [would] be modified so as to impede the objectives of this section.” H.R. Rep. No. 104-204, at 118 (1995).

⁹ *In re 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*, 23 FCC Rcd 2010, MB Docket No. 06-121 *et al.*, ¶ 143 (rel. Feb. 4, 2008).

proceeding in which the Commission discussed the impact of the digital transition on the technical basis for the UHF discount therefore is inappropriate.¹⁰ Its reliance on a decision by the editors of *Broadcasting & Cable* to disregard the UHF discount in compiling their annual station group rankings is doubly so.¹¹

Nor may the Commission disregard Congressional intent by considering the modification or elimination of the UHF discount in a separate proceeding other than the quadrennial review. To do so would render Section 629(3) meaningless. Section 629(3) must be interpreted in light of “the whole statute,” as well as “the objects and policy of the law.”¹² Congress intended to place the national audience reach limitation and “any” related rules – including the longstanding UHF discount – outside the scope of Commission review.¹³ The Commission is barred from taking up the UHF discount in its quadrennial review and may not circumvent the intent of Congress by seeking to do so in any other context.

Even if Congress had left the Commission the authority claimed by UCC, this is not the time to make permanent decisions with respect to the future of the UHF discount. While UCC contends that UHF stations have strengthened their signals in the digital world,¹⁴ the Commission has indicated that it will be launching proceedings to consider reductions in the service areas of full power television stations – such as through reductions in geographic spacing

¹⁰ UCC Comments at 11.

¹¹ *Id.* at 11-12.

¹² *See Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 61 U.S. (19 How.) 183, 194 (1857)).

¹³ During floor debate, Representative Tauzin noted that the bill’s elimination of the FCC’s authority to review rules relating to the 39 percent national audience reach limitation meant that Congress would be responsible for any “fine-tuning” that became necessary. *See* 149 Cong. Rec. 32,091 (2003) (statement of Rep. Tauzin).

¹⁴ UCC Comments at 10.

requirements and relaxation of the interference protection rules, together with the relocation and collocation of stations – in order to implement the National Broadband Plan’s (“NBP”) recommendations to reallocate spectrum for wireless telecommunications uses.¹⁵ It is far too early to estimate precisely the acknowledged adverse impact of those proceedings on the coverage of any full power station.¹⁶ Meanwhile, notwithstanding UCC’s claims that some broadcasters have “relocated” stations to UHF channels – apparently a reference to the fact that the Commission assigned new channels to those stations in connection with the DTV transition – there is no evidence to support UCC’s implication that any group owner is seeking to exploit the UHF discount in order to acquire stations above the cap.

¹⁵ See News Release, “FCC Announces Broadband Action Agenda” and “Proposed 2010 Key Broadband Action Agenda Items (both rel. Apr. 8, 2010) (noting anticipated Third Quarter release of Notice of Proposed Rulemaking regarding “Broadcast TV Spectrum Innovation” in furtherance of NBP Recommendation 5.8.5 to reallocate 120 MHz of spectrum from the broadcast television service). See also OBI Technical Paper No. 3, “Spectrum Analysis: Options for Broadcast Spectrum,” June 2010, at 24 (“OBI Technical Paper”) (recommending that the FCC revise television service rules and channel assignments).

¹⁶ See OBI Technical Paper at 28 (television band repacking will result in service losses due to transmitter relocation and/or increased interference). A detailed analysis of repacking proposals presented at the FCC’s Broadcast Engineering Forum shows that repacking would result in substantial service losses. See Presentation of the Panel on Methodology for Repacking (June 25, 2010), available online at <http://reboot.fcc.gov/workshops/broadcast-engineering-forum>.

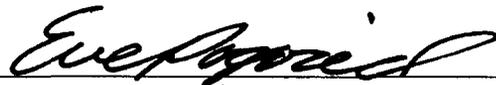
The Commission does not have authority to review the UHF discount in this or any other proceeding. Even if it did, in view of the likely further disruption of the broadcast television service resulting from spectrum reclamation initiatives currently under consideration by the Commission, now is most assuredly not the time to do so.

Respectfully submitted,

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