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

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)	MB Docket No. 13-236
	)	
	)	
	)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the *Notice* proposing to eliminate the "UHF discount," a methodology used for calculating compliance with the national television ownership limit.[2] NAB agrees with the *Notice's* tentative conclusion that the Commission has authority to reexamine and modify its national television ownership cap and the methodologies used to calculate compliance with that rule.[3] As discussed below, however, NAB believes that to rationally evaluate the public interest harms and benefits of modifying the method for calculating compliance with the national TV ownership rule, the Commission must also understand the impact of any change on the broader rule and on all the goals the FCC designed the rule to promote.[4]

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, FCC No. 13-123, MB Docket No. 13-236 (rel. Sept. 26, 2013) ("Notice").

[3] *Notice* at ¶ 13.

[4] In this regard, NAB agrees with Commissioner Pai that the scope of the *Notice* should be broader. *See Notice*, Dissenting Statement of Commissioner Ajit Pai.

Reconsidering the UHF discount on a stand-alone basis will hinder the Commission's ability to determine whether the proposed change effectuates the purposes of the national television ownership rule. Such an evaluation is crucial if the agency is to provide a rational explanation for the change, as required by the Administrative Procedure Act ("APA"). Accordingly, NAB urges the Commission to acknowledge and consider the full ramifications of its proposal to eliminate the UHF discount or to adopt any new discount in the context of the broader rule. In making this comment, NAB wishes to make clear that it takes no position on whether the Commission should eliminate, retain or modify the current national television ownership cap.

Discussion

NAB believes that it would be arbitrary and capricious to eliminate the UHF discount without simultaneously considering the impact of that change on the broader rule and its goals. The current national television ownership rule prohibits a single entity from owning television stations that reach more than 39 percent of the nation's television households.[5] The rule assumes that every station in a given Nielsen Designated Market Area ("DMA") "reaches" all the television households in that market, except that stations operating on UHF spectrum are attributed with only 50 percent of the households in their DMA.[6] As the text of the rule makes clear, the UHF discount exists only as a calculation methodology for the national cap. It is not a stand-alone rule.

The history of the national audience reach rule supports the notion that the UHF discount cannot be considered in isolation. The Commission established the UHF

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[5] 47 C.F.R. § 73.3555(e)(1).

[6] 47 C.F.R. § 73.3555(e)(2)(i).

discount at the same time it added the audience reach component to the then-existing nationwide limit on the number of television stations a single entity could own.[7] And, as the discussion in the *Notice* demonstrates, in every instance where the Commission has taken action on the UHF discount, it has done so in the context of a proceeding that also imposed, re-evaluated, reaffirmed, or modified the national television ownership cap.[8] This is important because the practical effect of eliminating the UHF discount would be to significantly increase the national audience reach of many broadcast licensees.

Where, as here, the effect of a proposed change would alter some licensees' rights and ability to acquire or sell stations in the future, the Commission must make an affirmative finding that such a result furthers the purpose of the rule. The Commission cannot alter the impact of a rule without at least acknowledging that it is doing so, and providing a reasoned analysis supported by the record that the change is consistent with the public interest.[9]

To make its public interest finding, the Commission must consider the goals of the rule. The Commission originally adopted the national television ownership limit to

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[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, GN Docket No. 83-1009, Memorandum Opinion and Order, 100 FCC 2d 74, 93 (1985) (finding that the "inherent physical limitations" of UHF broadcasting should be reflected in the national TV ownership rules) ("*National Cap Order*").

[8] *See Notice* at ¶¶ 6-8.

[9] *See, e.g., AT&T Co. v. FCC*, 974 F.2d 1351, 1354-55 (D.C. Cir. 1992) (court found FCC order to be arbitrary and capricious when agency insisted that its order merely "clarified," rather than changed, a prior rule and "failed to offer a reasoned explanation … supported by the record" for its action); *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1238-39 (D.C. Cir. 1993) (court concluded that FCC acted arbitrarily and capriciously in an interstate access rate case by "uncoupl[ing]" its "authorized return" number from its standard monitoring period and using a shorter time period, without explanation or justification); *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (FCC failed to establish "the requisite reasoned basis' for altering its long-established policy" on certain television commercial limits).

promote competition and viewpoint diversity.[10] In subsequent decisions, the Commission identified localism as a public policy goal for the national cap.[11] The *Notice* does not address these issues. This silence does not satisfy APA standards,[12] particularly where, as here, the practical effect of the UHF discount proposal is to make the national ownership rule that numerous broadcasters have relied upon more stringent.[13]

For all these reasons, the Commission should consider this proposed modification, as it has in the past, as part of a proceeding that also considers the public interest costs and benefits of the current national television ownership cap. By eliminating the UHF discount without even addressing the broader rule, the Commission would effectively alter the national cap without having determined whether such a change will promote or hinder its competition, diversity and localism goals. NAB agrees with the Commission's tentative conclusion that it faces no bar to evaluating its national television ownership rule in a proceeding separate from its broadcast ownership quadrennial reviews.[14] Failing to do so in this context would be arbitrary.

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[10] *National Cap Order* at ¶¶ 35-40.

[11] *See 1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 15 FCC Rcd 11058, 11074-75 ¶ 30 (2000); *2002 Biennial Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* 18 FCC Rcd 13620, 13828 ¶ 539 (2003).

[12] *See, e.g., FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009).

[13] *See Fox*, 129 S.Ct. at 1811 (agency must provide more detailed justification for changing policy "when its prior policy has engendered serious reliance interests that must be taken into account"); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("change that does not take account of legitimate reliance on prior interpretation may be 'arbitrary, capricious [or] an abuse of discretion'") (citations omitted).

[14] *Notice* at ¶¶ 13-15.

Conclusion

By re-evaluating its methods for calculating compliance with the national television ownership rule in the context of an examination of the rule itself, the Commission can develop a complete record and analyze whether the change proposed in the *Notice* would promote or hinder the policy goals undergirding the national ownership limit. While NAB takes no position on what the ultimate outcome of any such review should be, the analysis is essential to the Commission's ultimate determination regarding both the cap and any related calculation methodologies, if the agency is to be consistent with APA requirements.

Respectfully submitted,

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