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

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

To: The Commission

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

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Summary

The FCC does not have the authority to modify any aspect of the national television ownership cap, including the UHF discount. In establishing a 39 percent limit for the ownership cap in 2004, Congress set a precise limit and then took the extra step of removing this limit and any rule relating to it from the FCC's periodic review of its ownership rules. No action by Congress has changed these facts, and accordingly, the FCC should terminate this proceeding and halt its efforts to eliminate the UHF discount.

If the FCC, nonetheless, concludes that it has the authority to modify the ownership cap, Sinclair urges the FCC to eliminate the ownership cap and level the playing field between broadcasters and other media content providers, such as cable operators, direct-to-home satellite service providers, and Internet content providers – none of whom are similarly restricted in their national audience reach – or, in the alternative, to increase the cap. As Sinclair has demonstrated in numerous FCC proceedings, consumers in the modern media marketplace receive video programming from a wide range of media content providers, and there is no shortage of viewpoints, competition, and localism – however defined. Thus, it is simply absurd in this day and age to continue to believe that a national television ownership cap on broadcasters is necessary for any purpose.

Additionally, the FCC's focus on whether UHF stations are no longer at a technical disadvantage to VHF stations misses the mark and is too narrow an inquiry. The fact is the rule was designed and has survived over the years, not only for technical reasons but also because the FCC has sought to ensure that non-network broadcast ownership groups could compete with those stations owned and operated by the major broadcast networks, whose stations dominate ratings in almost every market, almost always operating in the VHF band, and have historically

had a practical advantage over other stations as a result of decades of viewing patterns. Such advantages continue to exist, and the FCC's narrow focus on just the technical justification for the UHF discount is improper. For these reasons, Sinclair agrees with Commissioner Pai that the FCC should not look at the UHF discount in a vacuum but to examine the national television ownership cap holistically.

More fundamentally, the 39 percent limit, on its face, is a direct abridgement on the freedom of speech – at its core, the rule is simple: a direct ban on any television licensee owning stations which provide programming (and thereby exercising its speech rights) to more than 39 percent of the population of the United States. In addition, given that competing media outlets, such as cable operators, direct broadcast satellite service providers, and Internet content providers, are under **no** FCC ownership limitations whatsoever, it is obvious that the television ownership cap raises serious Equal Protection Clause concerns. Finally, given that there is no record support for a national ownership cap at the precise 39 percent level, as compared to any other level, the limit is arbitrary and capricious, in violation of the Due Process Clause.

If the FCC does not eliminate the national television ownership cap, it should adopt policies that treat all broadcasters equally and do not prematurely judge the outcome of the NPRM. As Commissioner Pai has remarked, the FCC's conclusions in the NPRM are merely proposals. The APA requires that the FCC give reasoned consideration to the record developed in response to the NPRM. Accordingly, pending the effective date of any new rules, the FCC should continue to apply its existing rules to new and pending applications. The FCC should not establish the date of the NPRM as the cut-off for consideration of applications under the existing ownership rule. Such an action would be arbitrary and capricious and patently unfair to station

owners, who are in the process of or considering acquiring other stations and have acted in reliance on the current rules.

If the FCC eliminates the UHF discount, the FCC should, rather than simply grandfathering existing station groups that exceed the 39% Cap as a whole, grandfather the national audience reach for each UHF station and its owner should be attributed the 50 percent discounted audience reach for that station, for purposes of calculating compliance with the national ownership cap, until the owner sells the station. The FCC should not adopt its proposal to grandfather only the national audience reach for the handful of broadcast owners that presently exceed the ownership cap. Such a rule would be arbitrary and capricious and patently unfair to all other broadcasters with UHF stations. Finally, if the FCC eliminates the UHF discount, it should adopt a discount for VHF stations.

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Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, hereby submits these Comments to the Notice of Proposed Rulemaking ("NPRM") proposing changes to the 39% maximum audience reach for television broadcasters, i.e., the national television ownership cap (the "39% Cap").[1]

Background

On September 26, 2013, the FCC issued the NPRM requesting comments on its rules related to the maximum audience reach for television broadcast licensees.[2] Specifically, the FCC requests comment on whether it has authority to modify the 39% Cap, whether the proposal to eliminate the UHF discount adequately addresses the potential impact to existing broadcast station ownership groups, how the FCC should grandfather television owners with respect to the

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[1] *See In re Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, FCC 13-123 (rel. Sept. 26, 2013); *see also* 78 Fed. Reg. 68384 (November 13, 2013).

[2] *Id.*

application of the UHF discount, and whether the FCC should create a VHF discount to replace the UHF discount.[3]

The UHF discount is and has been an integral part of the FCC's national television ownership rule, which prohibits a single entity from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the nation.[4] In calculating an entity's audience reach, stations broadcasting in the UHF spectrum, i.e. over-the-air channels 14 and above, are attributed only 50 percent of the television households in their markets.[5] This is referred to as the UHF discount.

The UHF discount was adopted in 1985 in recognition of the technical inferiority of analog UHF signals, as compared with analog VHF signals, i.e., over-the-air channels 2-13.[6] In 1996, when Congress raised the national audience reach limit from 25 percent to 35 percent, it expressly approved the use of the UHF discount.[7]

The FCC subsequently reaffirmed the 35 percent limit and the UHF discount in 2000, when it concluded its 1998 review of its ownership rules.[8] The FCC recognized in its Order that changing its ownership cap could "influence the bargaining positions between broadcast

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[3] *Id.*, at ¶¶ 2, 20.

[4] *See* 47 C.F.R. § 73.3555(e)(1).

[5] *See* 47 C.F.R. § 73.3555(e)(2).

[6] *See Amendment of Section 73.35555 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, at ¶¶ 42-44 (1985).

[7] *See* H.R. Rep. No. 104-204 at 118 ("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.").

[8] *See 1998 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*, MM Docket No. 98-35, FCC 00-191, at ¶ 25 (rel. Jun. 20, 2000) ("*1998 Review*").

television networks and their affiliates."[9] The FCC elected to continue to apply its UHF discount noting not only the technical differences, but also the "competitive disparity between VHF and UHF television."[10] In the *1998 Review*, the FCC also remarked that the UHF discount would not likely be necessary after the transition to digital television and it would propose phasing out the discount once the transition was complete.[11]

In 2003, in the context of the FCC's 2002 biennial review of its ownership rules, the FCC concluded that the rule was no longer necessary to promote competition or diversity. However, the FCC stated that the cap remained necessary to promote "localism" and increased the limit to 45 percent.[12] As the FCC clarified, "preserving a balance of power between the networks and their affiliates serves local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities."[13]

In the *2002 Review*, the FCC also upheld the continued use of the UHF discount both for technical reasons[14] and to continue to support the ability of non-network broadcast ownership groups to compete with stations owned and operated by the major broadcast networks (i.e., ABC, CBS, NBC, and FOX).[15] For similar reasons, the FCC sunset the application of the discount for

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[9] *Id.*, at ¶ 30.

[10] *Id.*, at ¶ 36.

[11] *See id.*, at ¶ 38 ("In this regard, we note that the existing UHF discount will likely not work well for DTV . . . [a]ccordingly, at such time near the completion of the transition to digital television we will issue a Notice of Proposed Rulemaking proposing a phased-in elimination of the discount.").

[12] *See 2002 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, at ¶¶ 585–91 ("*2002 Review*").

[13] *Id.*, at ¶ 501.

[14] *Id.*, at ¶ 588.

[15] *Id.*, at ¶ 590 ("[W]e observe that the established broadcast networks generally have not sought to take advantage of the UHF discount to gain greater national reach through local stations. The four most established broadcast networks collectively own 67 stations, 12 of which are UHF stations.... This data indicates that the UHF discount

UHF stations owned and operated by the four major broadcast networks.[16] As a justification for that decision, the FCC repeated that "the digital transition [would] largely eliminate the technical basis for the UHF discount because the UHF and VHF signals [would] be substantially equalized."[17] Despite this broad claim, for all other non-major broadcast networks and station group owners, the FCC concluded the UHF discount would not automatically sunset and the FCC would "continue to examine the extent of competitive disparity between UHF and VHF stations as well as the impact on the entry and viability of new broadcast networks."[18]

The FCC's determinations regarding the national television ownership cap and the UHF discount were challenged on appeal, but prior to court action on those matters, Congress enacted the 2004 Consolidated Appropriations Act ("CAA"), mooting the national ownership cap issues.[19] The CAA directed the FCC to set the ownership cap to exactly 39 percent[20] and specifically removed the FCC's statutorily mandated obligation to periodically review the 39% Cap and "any rules relating to the 39 percent national audience reach limitation."[21]

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plays a meaningful role in encouraging entry of new broadcast networks into the market. For these reasons, we retain the UHF discount.").

[16] *Id.*, at ¶ 591.

[17] *Id.*

[18] *Id*.

[19] *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004); *see also Prometheus Radio Project v. Federal Communications Commission*, 373 F.3d 372, 396 (2004) ("Because the Commission is under a statutory directive to modify the national television ownership cap to 39%, challenges to the Commission's decision to raise the cap to 45% cap are moot").

[20] 118 Stat. at 99.

[21] *Id.* at 100. The CAA also replaced the biennial review process with a quadrennial review process. *Id.*

Discussion

I. THE FCC DOES NOT HAVE AUTHORITY TO ELIMINATE THE UHF DISCOUNT OR MODIFY THE 39% CAP IN ANY WAY

The CAA expressly directs the FCC to set the national audience reach limit to exactly 39 percent.[22] While the CAA does not specifically identify the UHF discount, Congress was aware of the UHF discount in establishing the precise 39 percent limit. In enacting the CAA, Congress specifically used the term "national audience reach,"[23] which is expressly defined under the Commission's rules to include the UHF discount.[24] The legislative history of the CAA indicates that the 39 percent limit, as calculated with the UHF discount, was selected primarily to avoid the requirement of having certain parties divest existing broadcast interests.[25] Also, both the FCC and the court in *Prometheus* have acknowledged that the UHF discount and the 39% Cap are interrelated and that a change to the UHF discount would effectively alter the 39% Cap.[26] Thus, any change to the UHF discount policy would effectively permit the FCC to circumvent the precise numerical limit established by the CAA and undermine Congress's express directive to the FCC to establish a 39 percent ownership cap.

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[22] *Id.* at 99.

[23] *Id.* at 100.

[24] *See* 47 C.F.R. § 73.3555(e)(2); *see also Prometheus*, at 396 ("We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning.").

[25] *See* 150 Cong. Rec. Sl8 (daily ed. Jan.20, 2004) (statement of Sen. Kohl); 150 Cong. Rec. S78 (daily ed. Jan. 21, 2004) (statement of Sen. Byrd); 150 Cong. Rec. S83 (daily ed. Jan. 21, 2004) (statement of Sen. Durbin); 150 Cong. Rec. S86 (daily ed. Jan. 21, 2004) (statement of Sen. McCain).

[26] *See* NPRM, at ¶ 20 ("[E]limination of the UHF discount would impact the calculation of nationwide audience reach for broadcast station groups with UHF stations"); *Prometheus*, at 396 ("Furthermore, because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit, we cannot entertain challenges to the Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine the Congress's specification of a precise 39% cap."); *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*, MB Docket No. 06-121, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834, at ¶ 34 (2006) ("*2006 Review*") (noting that setting the national ownership cap at 39% "also addressed the Commission's UHF discount rule"); *Oversight of the Federal Communications Commission*,

The CAA also stripped the FCC of its authority to modify the 39% Cap by explicitly carving out the ownership cap from the FCC's statutorily-mandated review process.[27] This is in stark contrast to what Congress did in 1996 when it raised the limit from 25 percent to 35 percent, but required the FCC to review the restriction periodically and assess whether it continued to be in the public interest.[28]

Thus, under principles of statutory construction, the CAA taken as a whole strongly indicates that the FCC has no authority to modify or eliminate the UHF discount or the 39% Cap.[29] It simply makes no sense for Congress to go to such great lengths to set a specific 39 percent limit, forbid the FCC to make any changes to any rules relating to that limit and remove the FCC's authority to review that rule as part of its periodic ownership review, but allow the FCC to change the 39% Cap and related rules in any other proceeding the FCC initiates. Such a strained interpretation of the CAA, which creates a gaping loophole in the CAA, is not a rational interpretation of the statute.

Moreover, the FCC's stated basis for its proposed elimination of the UHF discount (i.e., the completion of the digital transition and inapplicability of the technical justification for the discount) was fully known to Congress in 2004, when it passed the CAA.[30] Yet, with the digital transition soft deadline, at that time, of December 31, 2006, Congress made no effort to create an exception for the FCC's lack of authority to eliminate or revise any rule relating to the 39% Cap

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Statement of Commissioner Pai before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce 10 (Dec. 12, 2013) ("Pai Comments") ("[T]he UHF discount [is a] portion of our national television ownership rule").

[27] 118 Stat. at 100 (stating that the quadrennial review process "does not apply to any rules relating to the 39 percent national audience reach limitation.)'' (emphasis added).

[28] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, Title II, § 202(h), 110 Stat. 56, 111–12.

[29] *See, e.g., Kokszka v. Belford*, 417 U.S. 642, 650 (1974) (when examining a clause of a statute, the court will "take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law").

[30] *See 2002 Review*, at ¶ 591; *1998 Review*, at ¶ 38.

after the digital transition, signaling that Congress simply had no intent to allow the FCC to modify the 39% Cap or the UHF discount in any way.

Additionally, the FCC's focus on whether UHF stations are no longer at a technical disadvantage to VHF stations misses the mark and is too narrow an inquiry. The fact is the rule was designed and has survived over the years, not only for technical reasons but also because the FCC has sought to ensure that non-network broadcast ownership groups could compete with those stations owned and operated by the major broadcast networks, whose stations dominate ratings in almost every market, regardless of whether they operate digitally in the VHF or UHF band, and have historically had a practical advantage over other stations as a result of decades of viewing patterns.

For example, in the *1998 Review*, the FCC acknowledged that the ownership cap was necessary to ensure the proper balance of power between major broadcast networks and their affiliates and further acknowledged that the UHF discount was necessary to account for competitive differences between UHF and VHF stations.[31] Similarly, in the *2002 Review*, the FCC upheld the continued use of the UHF discount, not only for technical reasons, but also to continue to support the ability of non-network broadcast ownership groups to compete with stations owned and operated by the major broadcast networks.[32] Tellingly, the FCC sunset the application of the discount only for UHF stations owned and operated by the four major

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[31] *1998 Review*, at ¶ 36 (recognizing the "competitive disparity between VHF and UHF television.").

[32] *2002 Review*, at ¶ 578 ("[A] national cap at some level is needed to promote localism by preserving the balance of power between networks and affiliates."); *Id. at* ¶ 590 ("[W]e observe that the established broadcast networks generally have not sought to take advantage of the UHF discount to gain greater national reach through local stations. The four most established broadcast networks collectively own 67 stations, 12 of which are UHF stations.... This data indicates that the UHF discount plays a meaningful role in encouraging entry of new broadcast networks into the market. For these reasons, we retain the UHF discount.").

broadcast networks, rather than all station group owners, despite the fact that technical reasons for the sunset of the discount applied to all stations.[33]

Viewing patterns are based on years of habit, and because digital stations may continue to identify themselves by their old "VHF" channel numbers, regardless of the channel they actually transmit on, these viewing patterns are almost impossible to break. Because these advantages or justifications continue to exist, the FCC's isolated focus on the absence of the historical technical disadvantage of UHF stations as a basis of eliminating the rule is improper. For all of these reasons, Sinclair submits that the FCC does not have authority to modify or eliminate the UHF discount or the 39% Cap, and the FCC must reject its illogical and strained interpretation of the CAA, to the contrary.

II. IF THE FCC CONCLUDES IT HAS AUTHORITY TO MODIFY THE 39% CAP, THE FCC SHOULD ELIMINATE THE CAP ENTIRELY

Sinclair believes the FCC does not have the authority to alter the 39% Cap. Nonetheless, if the FCC concludes to the contrary, Sinclair urges the FCC to eliminate the 39% Cap entirely, removing all FCC restrictions on the maximum national audience reach of broadcast ownership groups to allow such entities to compete on equal footing with other media content providers, such as cable operators, satellite providers, and Internet content providers – all of which are unimpeded by specific FCC ownership restrictions. To the extent the FCC is unwilling to eliminate the ownership cap entirely, Sinclair urges the FCC to raise the limit of the cap. Such a proposal is consistent with the statements of Commissioner Pai, who has encouraged the FCC "not [to] modify the UHF discount without simultaneously reviewing the national audience cap,"

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[33] *Id.*, at ¶ 591 (The FCC "will continue to examine the extent of competitive disparity between UHF and VHF stations as well as the impact on the entry and viability of new broadcast networks.").

given their "interdependent relationship," and to consider "whether it is time to raise the 39 percent cap."[34]

a. The current media landscape demonstrates that there is no need for an ownership cap

Although the original justification for a national ownership cap was to protect viewpoints and competition within the industry,[35] the state of the market today makes it clear that such an ownership restriction is completely unnecessary. As Sinclair has demonstrated in numerous FCC proceedings, consumers in the modern media marketplace receive video programming from a wide range of media content providers, and there is no shortage of viewpoints, competition, and localism – however defined.[36] Thus, it is simply absurd in this day and age to continue to believe that a national television ownership cap on broadcasters is necessary for any purpose.

Pervasive ownership and reach of other media categories can be seen everywhere: the Wall Street Journal and USA Today newspapers are available throughout the nation, not in only 39% of markets; DirecTV and Dish provide direct-to-home video satellite services to every market in the United States; and YouTube, Netflix, and Hulu are household names in the Video-on-Demand Internet market and are available anywhere in the country with a broadband connection. Similarly, Comcast and Time Warner are not constrained by national audience cap limits, and virtually all homes with cable or satellite access are served by CNN, MSNBC, ESPN and numerous other national program services.

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[34] Pai Comments at 10–11.

[35] *See* NPRM, at ¶ 3.

[36] *See, e.g.*, Comments of Sinclair Broadcast Group, Inc. on Further Notice of Proposed Rulemaking, MB Docket No. 01-317, at 13 (submitted Oct. 23, 2006) ("The wide availability of local and national news and entertainment programming on the Internet and through non-broadcast media platforms ensures viewpoint and program diversity."); Comments of Sinclair Broadcast Group, Inc. on Notice of Proposed Rulemaking, MB Docket No. 00-244, at 60 (submitted Jan. 2, 2003) ("Local and national cable channels, broadcast television, direct broadcast satellite, newspapers, and the Internet are all vigorous competitors in today's media market.").

In contrast, television station licensees are limited to a 39% national audience reach and, indeed, are the only entities in the media industry subject to an express FCC national ownership restriction.[37] While the cable industry was at one time subject to a 30% ownership cap, in 2009 the D.C. Circuit vacated that limit, which the court found to be "arbitrary and capricious."[38] As the D.C. Circuit noted, "the dynamic nature of the communications marketplace" and the large number of competitors precluded the Commission from finding that market ownership in excess of 30% posed a danger to competition or diversity.[39] To apply a national audience cap to television broadcasters, and not to their media competitors, is the epitome of arbitrary and capricious decision-making, particularly in today's vibrant media marketplace.

The ownership restriction on television broadcasters impairs the ability of broadcasters to achieve the economies of scale to compete effectively with other media content providers. Indeed, it will become increasingly difficult for broadcasters to serve their local communities successfully, without a level playing field with competitors. Accordingly, the public interest will be served best by eliminating the ownership cap.

b. The 39% Cap is unconstitutional

The 39% Cap is, on its face, a direct abridgement on the freedom of speech, given that it is, at its core, a ban on any television licensee owning the means of distributing programming (speech) to more than 39 percent of the population of the United States. In addition, given that

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[37] With respect to other ownership rules, in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), the Court vacated the cable/broadcast cross-ownership rule, and the FCC itself subsequently reaffirmed that no such rule was necessary in the public interest. Similarly, the newspaper/broadcast cross-ownership has been all but eliminated via the waiver process. *See, e.g., 2006 Quadrennial Regulatory Review of the Broadcast Ownership Rules*, Report and Order and Order on Reconsideration, MB Docket No. 06-121, 23 FCC Rcd 2010, ¶ 77 (rel. Feb. 4, 2008).

[38] *Comcast Corp. v. FCC*, 579 F.3d 1, 3 D.C. Cir. (2009).

[39] *Id.* at 8.

competing media outlets, such as cable operators, direct broadcast satellite service providers, and Internet content providers are under no national limitation whatsoever, it is obvious that the 39% Cap raises serious Equal Protection Clause concerns. Finally, given that there is no record support for a national ownership cap at the precise 39 percent level, as compared to any other level, the limit is arbitrary and capricious, in violation of the Due Process Clause.

Each of these rights – freedom of speech,[40] equal protection,[41] and due process[42] – are fundamental rights established by the United States Constitution. If a court were to apply the most rigorous standard of constitutional review, strict scrutiny, it would have to conclude that there is no current compelling government interest in limiting television ownership at the national level. The justifications of competition and diversity have been expressly disavowed by the Commission.[43] Similarly, the scarcity rationale underpinning *Red Lion*,[44] no longer reflects the modern media marketplace and cannot continue to provide a basis for television station ownership restrictions. Government intervention under any public interest justification (e.g., localism, diversity, or competition) is simply not needed or constitutionally sound when there are so many alternative forms of media by which speakers are able to present their views to the public. The Supreme Court's willingness to allow ownership restrictions in the broadcast marketplace has been based on the now obsolete premise that scarcity of such opportunities will

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[40] U.S. Const. amend. I.

[41] U.S. Const. amend. XIV.

[42] U.S. Const. amend V.

[43] *2002 Review*, at ¶ 578 ("We have concluded that an audience reach cap of 35% is not necessary to promote diversity of competition in any relevant market.").

[44] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

lead to a shortage of information being presented to the public.[45] Such fears are clearly unfounded in light of the information overload that exists today.

Not only is there no fundamental government interest underlying the 39% Cap, but that requirement is neither narrowly tailored nor the least restrictive means to achieve any government interest underlying the 39% Cap. Under the circumstances, any review of the constitutionality of the 39% Cap would involve strict scrutiny, a standard which the limitation cannot survive. Accordingly, Sinclair submits that, if given the opportunity, it is likely that the Courts would find that the 39% Cap is an unlawful intrusion on free speech and violates the Equal Protection and Due Process Clauses of the Constitution. The Commission should publicly recognize that the 39% Cap is subject to Constitutional infirmities and cease to enforce the Cap.

III. IF THE FCC DOES NOT ELIMINATE THE 39% CAP, THE FCC SHOULD ADOPT POLICIES THAT TREAT ALL BROADCASTERS FAIRLY AND DO NOT PREMATURELY JUDGE THE OUTCOME OF THE NPRM

a. The FCC should continue to apply its current ownership rules until new rules, if any, are adopted

The NPRM is silent on how the Commission proposes to process applications for transactions that may be filed prior to the adoption of any new rules in this proceeding. Its proposal, however, to grandfather only those ownership interests that were in existence or were pending in an application filed prior to the date of the NPRM suggests that ownership interest in applications filed after the date of the NPRM would not be grandfathered.[46]

The FCC's proposal is patently unfair to FCC licensees, who currently do not exceed the 39% Cap and are in the process of or considering acquiring additional stations. The proposal

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[45] *Id.* at 400–01.

[46] NPRM, at ¶ 20.

disrupts the settled business expectations and plans of such owners and investors, all of whom have acted in reliance on the current rules in effect at the time they took action (and still in effect now).[47] The proposal ignores the business reality that such parties may have developed business plans to acquire additional stations (including raising money to fund such acquisitions and incurring associated costs), have been in negotiations to purchase additional stations or have options to purchase additional stations prior to release of the NPRM.

From a procedural standpoint, as Commissioner Pai has reminded the Commission, the NPRM merely contains proposals to change a rule and that the FCC cannot "treat[] the rest of the rulemaking process as an empty formality."[48] Specifically, the Administrative Procedure Act requires that there be a notice and comment period,[49] and that failure to provide a real opportunity for notice and comment violates the Due Process Clause.[50] Because the Commission's conclusions in the NPRM must necessarily be tentative, the FCC's proposal to grandfather ownership interests only as of the date of the NPRM is improper. Instead, the FCC should apply any grandfathering protection as of the effective date of any new order. Such a system would be more fair to broadcast owners and allow parties with settled and established business plans to finalize them.

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[47] *Exclusive Service Contracts for Provision of Video Services*, 22 FCC Rcd 20235, ¶ 56 ("[T]he extent to which the regulation has interfered with distinct investment-backed expectations" is a factor in determining whether the government has effected a regulatory taking) (*citing Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986)).

[48] Pai Comments at 11.

[49] *See* 5 U.S.C. § 553 (2012).

[50] *See Air Transport Ass'n of America, Inc. v. National Mediation Board*, 663 F.3d 476, 487 (D.C. Cir. 2011) ("Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments").

b. A station's national audience reach should be grandfathered based on the date on which it was granted, transferred or assigned, consistent with the FCC's current rules

Sinclair agrees with Commissioner Pai that the grandfathering protection in the NPRM "did not go far enough . . . [and] any combination that is in existence or pending with the Commission as of the date the UHF discount rule is eliminated should be grandfathered."[51] This proposal is supported by the plain language of the current ownership rule, which indicates that each station's national audience reach is assessed at the time when it is acquired.[52] Thus, upon adoption of any new rules, the national audience reach for each UHF station should be grandfathered as of the date the station was acquired, or if the acquisition is pending, the day prior to the effective date of the new rules, and its owner should be attributed the 50 percent discounted audience reach for that station, for purposes of calculating compliance with the national ownership cap, until the owner sells the station. This proposal would be fair to all broadcasters.[53]

The FCC should not adopt its proposal to grandfather only the national audience reach of the handful of broadcast ownership groups that presently exceed the 39% Cap.[54] Adoption of such a proposal would be arbitrary and capricious and patently unfair to all other broadcasters

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[51] Pai Comments at 11.

[52] 47 C.F.R. § 73.3555(e)(2)(i) (measuring the number of households in a market "at the time of a grant, transfer, or assignment of a license").

[53] Alternatively, Sinclair proposes that the FCC identify the entity receiving the highest grandfathered national audience reach, as calculated without the UHF discount, and permit all participants to reach that ownership level. This ensures that all broadcast owners are treated equally and that everyone can benefit from the most permissive national reach percentage.

[54] NPRM, at ¶ 20.

with UHF stations, whose own national audience reach percentages would increase without having done anything and who would be impaired in acquiring new stations, as a result.[55]

c. If the FCC eliminates the UHF discount, then it should apply a discount for VHF stations

As discussed above, Sinclair believes the UHF discount should not be eliminated. Nonetheless, if the FCC believes it should do so because the technical justification for the discount is no longer applicable, the FCC should adopt a VHF discount for the same technical reasons the FCC adopted the UHF discount. VHF stations now have signal attributes that make them less desirable than UHF stations in the digital world, including the need for larger antennas and increased interference.[56] It is much more difficult, particularly using indoor antennas, to receive digital VHF signals over-the-air, which is why most television broadcasters have moved to UHF stations, where possible.[57] Most VHF stations today suffer from the same diminished audience reach that once afflicted the UHF band.[58] If the justification for the elimination of the UHF discount is based primarily on the technical characteristics of the UHF band, then it would be arbitrary and capricious to ignore that those same characteristics now make VHF stations technically inferior. Accordingly, if the FCC eliminates the UHF discount, then the FCC should apply a discount to VHF stations.

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[55] *See* 5 U.S.C. § 706(2)(A) (2012) (providing reviewing courts with authority to "hold unlawful and set aside agency action . . . found to be arbitrary [or] capricious").

[56] NPRM, at ¶ 12.

[57] *Id.*, at ¶ 22.

[58] *Id.*, at ¶ 11.

IV. CONCLUSION

For the aforementioned reasons, Sinclair urges the FCC to take action consistent with these Comments.

Respectfully submitted,

/s/
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