

**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	)	MB Docket No. 13-236
Television Multiple Ownership Rule	)	

**COMMENTS OF ION MEDIA NETWORKS, INC.**

John R. Feore  
Jason E. Rademacher  
**DOW LOHNES LLP**  
1200 New Hampshire Ave.  
Suite 800  
Washington, D.C. 20036

December 16, 2013

## SUMMARY

The FCC should not eliminate the UHF Discount because doing so would have drastic unintended anti-competitive and anti-consumer consequences. For nearly 30 years, station groups have relied on the UHF Discount and the FCC's encouragement to build new over-the-air networks, leading to a manifold increase in the diversity of programming choices for TV viewers nationwide. ION Media Networks, Inc. ("ION") is a case-in-point. ION built America's last truly independent over-the-air broadcasting network, unaffiliated with any foreign or domestic media conglomerate, by purchasing underperforming UHF stations and improving their facilities and programming.

ION's television networks, anchored by 60 local TV stations (59 of which are UHF), today reach nearly 90% of U.S. TV households. ION has converted once struggling, single-channel, and rarely viewed UHF stations into full service stations with three full-time channels of programming: ION TV, a top-15 general entertainment channel with particular appeal to the over-the-air and minority households; Qubo the nation's only 24/7 children's educational and informational programming channel; and ION Life, a cutting edge health and wellness channel. And because these services are available over-the-air, they are free to all viewers served by ION's stations, providing a much-needed dose of diversity to over-the-air only households. Other networks have accomplished similar leaps forward with foreign language, religious, and other niche programming. None of that would be possible without the UHF Discount, and the FCC should be recognizing this success story and trying to replicate it – not proposing to do away with the regulation that made these gains in service quality and diversity possible.

The NPRM wrongly treats eliminating the UHF Discount as a final "clean up" left over from the 2009 DTV transition; nothing could be further from the truth. First, when the FCC last

considered the UHF Discount in 2003, it decided to preserve the rule for most stations *after* the DTV transition. Congress had that decision in mind when it ordered the FCC to establish today's 39% national cap with the UHF Discount in 2004. The FCC has never found that the DTV transition eliminated the need for the UHF Discount and there is no basis for making such a finding today. Second, no rule concerning UHF stations can be considered merely a "clean up." Today UHF stations make up 80% of total TV station household coverage. The change suggested by the NPRM would be a wholesale tightening of the ownership rules affecting 8 out of every 10 stations in operation. Such a massive re-regulation of TV station ownership could only be considered based on a substantial factual record and a searching and thoughtful analysis demonstrating that a lack of competition requires more restrictive rules. The *NPRM* does not include any such record or analysis, nor does it seek either in its request for public comment. This *fait accompli* approach to a new large-sale ownership restriction will all but guarantee court reversal if the FCC adopts its current proposals.

An appropriately full and fair review of the UHF Discount would start and end with a proper analysis of the FCC's jurisdiction to change the rule. The *NPRM* mistakenly concludes that the FCC is free to change the UHF Discount using normal rulemaking procedures, but Congress's 2004 amendment to the FCC's rulemaking authority makes abundantly clear that any changes to the national audience reach cap and associated rules like the UHF Discount require further *Congressional* action. Even assuming the FCC has authority to change the UHF Discount – and that the agency could compile a record that justifies revising the rule – any change to the rule would still need to be consistent with Congress's command that the ownership cap be set at 39% with the UHF Discount in place. Since eliminating the UHF Discount would

reduce potential ownership of UHF stations by half, the FCC must consider a corresponding increase in the national ownership cap to remain faithful to Congress's intent.

The *NPRM* is correct to propose grandfathering of existing station combinations given broadcasters' rightful reliance on the rule, but the FCC's initial proposals are unfairly and unnecessarily restrictive. First, no basis exists for grandfathering only combinations that existed as of the date of the *NPRM*. The FCC cannot change its rules merely by proposing the change, and broadcasters that have been planning transactions should not be arbitrarily punished for not completing those transactions prior to the release of a proposed change of which they had no notice. If the FCC decides to change the UHF Discount, the appropriate grandfathering date would be the date of any order approving the change. Second, grandfathered combinations should be fully transferrable with the UHF Discount intact. Permitting the transfer of existing combinations is crucial to preserving the diversity gains that have accompanied the creation of new UHF-based networks. Transferability is also essential to extending basic fairness to broadcasters who relied on the FCC's encouragement to build these networks and the agency's prior statements that the UHF Discount would continue in the DTV world.

**TABLE OF CONTENTS**

I. BACKGROUND AND INTRODUCTION ..... 1

II. ELIMINATING THE UHF DISCOUNT WOULD BE ARBITRARY AND CAPRICIOUS.....6

    A. The UHF Discount Continues to Serve Its Initial Purpose of Remediating UHF Stations’ Historical Economic Handicap.....6

    B. The DTV Transition Did Not Fix the UHF Handicap.....9

III. CONGRESS HAS REVOKED THE FCC’S AUTHORITY TO CHANGE THE UHF DISCOUNT..... 11

IV. EVEN ASSUMING THE FCC COULD LAWFULLY CHANGE THE UHF DISCOUNT, IT WOULD HAVE TO MAKE CORRESPONDING CHANGES TO THE NATIONAL AUDIENCE REACH CAP. .... 14

V. IF THE FCC CHOOSES TO ELIMINATE THE UHF DISCOUNT, IT MUST PROTECT EXISTING STATION COMBINATIONS AND THEIR VIEWERS FROM THE NEGATIVE EFFECTS OF THIS CHANGE..... 16

    A. The FCC Should Permanently Grandfather UHF Station Combinations That Exist as of the Date of Any Order in This Proceeding. .... 17

    B. Grandfathered Station Combinations Should Be Fully Transferrable and Permitted to Undergo Changes in Capital Structure. .... 21

VI. CONCLUSION..... 23

**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	)	MB Docket No. 13-236
Television Multiple Ownership Rule	)	

**COMMENTS OF ION MEDIA NETWORKS**

ION Media Networks, Inc. ("ION"), by its attorneys, hereby files these comments opposing the FCC's proposal to repeal the UHF Discount in the above-captioned proceeding.<sup>1</sup>

**I. BACKGROUND AND INTRODUCTION**

ION strongly opposes the FCC's proposal to summarily discard the UHF Discount as a final "clean up" of matters left over by the DTV transition. For nearly 30 years, the UHF Discount has been an engine of growth and diversity in TV programming, vastly expanding the important public services that over-the-air broadcasters provide. With the FCC's encouragement, companies like ION, Univision, and Trinity Broadcasting have built national networks based on the FCC's promise that they would be permitted to reach a larger over-the-air audience in exchange for acquiring and improving underperforming UHF stations. That formula has been a complete success, justifying congratulations to the FCC for conceiving the policy and to the entrepreneurs who made the policy work. The UHF Discount should be promoted and continued, not immediately repealed.

---

<sup>1</sup> See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Notice of Proposed Rulemaking*, 28 FCC Rcd 14324 (2013) (the "NPRM"); see also 47 C.F.R. §73.3555(e)(2)(i) (the "UHF Discount").

ION has a vested interest in this proceeding because the UHF Discount is the regulatory foundation upon which the company has built – with the FCC’s encouragement and approval – the nation’s last truly independent television broadcasting network. The core of ION’s network is its 59 UHF stations, which serve mostly large and mid-sized markets nationwide. ION was permitted to construct this national over-the-air platform only because of the UHF Discount.

Thanks to the UHF Discount, ION has been able to remain unaffiliated with any U.S. or foreign media conglomerate and free to pursue the kinds of forward-looking innovation that drive more diverse and competitive services for viewers. Through a combination of over-the-air, cable, satellite, and telco distribution, ION today delivers high-quality general entertainment, children’s, and lifestyle programming to nearly 90% of households in the United States.

Today, ION’s flagship ION Television network is a Top 15 television destination for viewers nationwide, with a strong following among over-the-air households, women, and minorities. ION Television offers an independent platform for general entertainment programming, including a mix of original and syndicated television series, movies, and sports programming, and which continues to generate substantial viewer growth year by year.<sup>2</sup>

In addition to providing an increasingly popular programming slate on its main channel, ION has introduced to independent and underserved audiences the following services:

- The Qubo network, the nation’s only 24/7 children’s educational and informational programming network – once referred to by a former FCC Chairman as the recognized “gold standard” in children’s programming and recognized by the United States Government Accountability Office in 2011 as one of the most trustworthy sources of children’s programming; and

---

<sup>2</sup> See Sara Bibel, *ION Television Continues Ratings Climb Among Key Demos Posting Year-Over-Year Growth in Households and Viewers*, TV By the Numbers, June 10, 2013, available at <http://tvbythenumbers.zap2it.com/2013/06/10/ion-television-continues-ratings-climb-among-key-demos-posting-year-over-year-growth-in-households-and-viewers/186456/>.

- The ION Life network, which focuses on lifestyle programming that showcases diversity and pro-social messaging, featuring topics like personal relationships, inspirational stories, community engagement, healthy and active living, and adventure.

Each of these networks is available free over-the-air in all of ION's station markets and through multichannel video distribution in many other areas. Between its flagship network, Qubo, and ION Life, ION broadcasts more hours of free programming to more Americans than the Big 4 networks combined. The FCC's proposal to eliminate the UHF Discount puts all of these independent viewer services suddenly at risk.

ION's success as an independent station group and network shows the wisdom of the FCC's adoption of the UHF Discount. That rule permitted TV broadcasters that were willing to nurture struggling UHF stations to acquire a larger number of those stations (with a larger footprint) than they could achieve by investing in more immediately lucrative VHF stations. This stimulated the formation of new over-the-air broadcast networks as companies like ION acquired UHF stations and invested much-needed capital into their operations. The stations ION acquired with the FCC's encouragement are the backbone of ION's over-the-air, digital, and mobile TV services today.

ION wasn't the only owner to use the UHF Discount to build new over-the-air networks. Univision saw the lack of nationwide Spanish-language programming and the exploding Spanish-speaking population in the United States and used the UHF Discount to build an over-the-air network to serve them.<sup>3</sup> Likewise, Trinity Broadcasting relied on the UHF Discount to create its nationwide religious broadcasting networks.<sup>4</sup> Even today, Tribune Company is seeking

---

<sup>3</sup> See Univision Communications, Inc., Univision Network, <http://corporate.univision.com/advertise/portfolio/univision-network/#.Uo0y7sRDsVA>.

<sup>4</sup> See Trinity Broadcasting Family of Networks, <http://www.tbn.org/>.

to use the UHF Discount to increase the scope of its independent broadcasting voice. The result of all these companies' network-building, coupled with the UHF Discount, has been stronger UHF stations, greater increases in the amount and diversity over-the-air of network programming, and more intense competition. All of this has resulted in significant improvements to the service that Americans receive from the nation's over-the-air TV broadcasting system, particularly for minority and underserved communities. By any measure the UHF Discount has been an unqualified success.

The *NPRM's* proposed elimination of the UHF Discount would threaten the competition and diversity gains that the UHF Discount has secured. The proposal would be fundamentally unfair to both viewers who enjoy improved services and to the broadcasters who have relied on the FCC's encouragement to build new networks. Moreover, the *NPRM* is based on an entirely untenable construction of the FCC's authority and a misunderstanding of the market realities facing UHF broadcasters and their viewers.

Congress acted in 2004 to insulate the national audience reach cap and the UHF Discount from periodic FCC review, and, in so doing, removed the FCC's authority to change the UHF Discount without further Congressional action. Even if Congress meant to preserve the FCC's authority to revise the UHF Discount, the *NPRM's* tentative conclusion that the DTV transition solved the problems the UHF Discount was designed to address ignores FCC precedent, misconstrues the purpose and impact of the UHF Discount, and would clearly constitute arbitrary and capricious rulemaking. Moreover, the *NPRM's* apparent conclusion that the FCC has the authority to change the UHF Discount without adjusting the national audience reach cap defies Congress's express mandate of a 39% national cap with the UHF Discount intact. In addition,

the FCC's grandfathering proposals are inadequate to protect the improvements to the over-the-air broadcasting system brought about by the UHF Discount.

It should be noted that – contrary to the characterization by the FCC of this matter as a post-DTV transition “clean-up” item – nothing could be further from the truth. Since the 2009 DTV transition, 74% of America's TV stations are UHF stations, and 80% of the aggregate TV viewing population is served by UHF stations. These facts demonstrate that the so-called “clean-up” proposed by the FCC is tantamount to the Commission re-regulating the US broadcast industry, as the elimination of the UHF discount would be equivalent to reducing the national ownership cap from the current 39% to a mathematical industry average of approximately 23.4%.<sup>5</sup> Aside from placing an unfair and commercially infeasible burden on broadcasters in an environment where the FCC and the courts have eliminated the ownership caps of virtually every other type of video industry participant, this proposed FCC action also is in direct contradiction to the specific instructions that the FCC received from Congress very recently when it passed legislation to *increase* – not decrease – the national ownership cap. The prospect of “grandfathering” stands in no proportion to the business overhang created by such an arbitrary and capricious FCC intervention in utter disregard of specific instructions from Congress.

The FCC cannot lawfully move forward with the proposals included in the *NPRM* and must reconsider the UHF Discount in light of binding legal precedent and the realities of today's television marketplace. That analysis can lead only to the conclusion that the FCC must retain the UHF Discount.

---

<sup>5</sup> This is because the overwhelming majority of stations operating on UHF channels will have their permitted ownership share cut in half, while only the small minority of stations operating on VHF channels will be permitted to aggregate the full 39% national audience reach that Congress intended.

## **II. ELIMINATING THE UHF DISCOUNT WOULD BE ARBITRARY AND CAPRICIOUS.**

The *NPRM*'s proposal to eliminate the UHF Discount rests on two faulty premises, namely, that (1) the UHF Discount was implemented merely to remedy the signal strength disparity between UHF and VHF stations; and that (2) the DTV transition has solved the competitive imbalance between UHF and VHF stations. Each of these propositions misconstrues the purpose of the UHF Discount and the realities of UHF broadcasting and also disregards the FCC's 2003 decision to retain the UHF Discount for most stations *after the DTV transition*. Eliminating the UHF Discount based on the reasoning in the *NPRM* would be the height of arbitrary and capricious rulemaking in violation of the Administrative Procedure Act.<sup>6</sup>

### **A. The UHF Discount Continues to Serve Its Initial Purpose of Remediating UHF Stations' Historical Economic Handicap.**

The *NPRM* incorrectly states that the UHF Discount was designed solely to address the disparity in the analog world that UHF stations tended to reach fewer viewers than analog VHF stations.<sup>7</sup> In fact, the UHF Discount was just one part of a multi-faceted effort by the FCC and Congress in the 1970s and 1980s to promote ownership and improvement of economically struggling UHF stations as a means of fostering diversity and increasing competition in local television markets.<sup>8</sup> All of these efforts recognized that the technical signal strength disparity

---

<sup>6</sup> 5 U.S.C. § 551, *et seq* (the "APA").

<sup>7</sup> *See NPRM*, 28 FCC Rcd at 14325-29.

<sup>8</sup> *See, e.g.*, 47 U.S.C. § 303(s) (the "All-Channel Receiver Act"); H. Rept. No. 1559, 87th Cong., 2d Sess., p. 4 (1962) ("House Report") (finding that development of UHF broadcasting was "not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States"); Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, *Memorandum Opinion and Order*, 100 FCC 2d 74 (1985) ("*1985 Order*") (adopting UHF Discount); TV Broadcast Receiver Antennas, 62 FCC 2d 164 (1976) (requiring parity between

between UHF and VHF stations led to a persistent and unbridgeable economic disadvantage for UHF stations. The 50% UHF Discount was never intended to account for signal-strength disparity with anything approaching mathematical precision – it was a “rough and ready” approximation of the competitive handicap faced by UHF stations as compared to their VHF counterparts. The rule was designed and has functioned to provide opportunities for UHF stations that could not have been realized if they were treated the same as VHF stations under the ownership rules. By accomplishing these objectives, the UHF Discount has been an engine for substantial increases in competition and diversity.

Treating the UHF Discount as a mere technical rule designed solely to address UHF stations’ weaker signals also ignores the FCC’s decision in the *2003 Ownership Order* to retain the UHF Discount for most stations after the DTV transition.<sup>9</sup> In that proceeding, the FCC took a comprehensive look at the UHF Discount and compiled an extensive record on the relative technical and economic positions of UHF and VHF stations.<sup>10</sup> Based on this evidence, the FCC

---

VHF and UHF antennas provided by television set manufacturers); VHF-TV station Network Affiliations, 28 FCC 2d 169 (1971) (adopting secondary affiliation rule to prohibit one VHF station from affiliating with multiple national networks to the detriment of UHF stations’ affiliation opportunities); All-Channel TV Receivers, 21 FCC 2d 245 (1970) (requiring TV broadcast receivers to offer comparable manual or remote control tuning mechanisms for VHF and UHF channels); Rules Regarding Cable Television, *Second Report and Order*, 3 FCC 2d 725 (1966) (noting that independent UHF stations “might make possible a fourth national network . . . and also would be ‘valuable particularly for local programming and self-expression’”) (quoting House Report at 3; S. Rep. No. 1526, 87th Cong., 2d Sess. 4 (1962)); Rules Regarding Microwave-Served Cable TV, *First Report and Order*, 38 F.C.C. 683, 712, 713 (1965) (basing regulation of Cable TV in part on need for protection of UHF stations), *aff’d United States v. Southwestern Cable Co.*, 392 U.S. 157, 174-77 (1968).

<sup>9</sup> 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13845-47 (2003) (the “2003 Ownership Order”).

<sup>10</sup> See, e.g., Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277, *et al.*, dated May 30, 2003 (attaching study entitled *The “UHF Penalty” Still Exists: Update to 1998 NAB Study*, by Richard Ducey, Ph.D., Executive Vice President, Strategic Consulting, BIA

recognized that UHF stations continued to suffer from an economic handicap when compared to VHF stations in the same markets.<sup>11</sup> The *2003 Ownership Order* expressly acknowledged that the over-the-air signal coverage handicap led to lower ratings, less cable and satellite carriage, less network affiliation, and less advertising revenue for UHF stations.<sup>12</sup> The Commission concluded, based on the substantial record evidence, that “even after controlling for factors such as programming and market size, UHF stations continue to experience a competitive handicap compared with VHF stations.”<sup>13</sup> The Commission further found that “[i]n addition to strengthening competition between UHF and VHF stations, the UHF Discount promotes entry by new broadcast networks.”<sup>14</sup> Because the FCC determined that the UHF Discount continued to play an important role in the health of the over-the-air broadcasting system, the FCC determined that the rule should be retained.

The FCC cannot today completely ignore its 2003 determination that the UHF Discount was designed to (and had successfully served to) equalize the competitive playing field for UHF

---

Financial Network, dated May 30, 2003), Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277, *et al.*, dated May 23, 2003 (summarizing, collecting, and attaching all record evidence submitted in support of the UHF Discount and the small amount of evidence submitted by a single party in opposition to the UHF Discount); Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277, *et al.*, dated May 16, 2003 (highlighting continued disparity of station assigned power and population coverage for UHF stations *even after the DTV transition* and attaching Letter from Lowell W. Paxson and Dean M. Goodman to The Honorable John D. Dingell, dated May 8, 2003); Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 02-277 *et al.*, dated May 7, 2003 (comparing volume of record evidence submitted in support of the UHF Discount and the scant record evidence supporting repeal).

<sup>11</sup> *2003 Ownership Order*, 18 FCC Rcd at 13845-47.

<sup>12</sup> *See id.* at 13845-46.

<sup>13</sup> *Id.* at 13846.

<sup>14</sup> *Id.*

stations.<sup>15</sup> Instead, and to satisfy the reasoned decision making required by the APA, the FCC must compile a record and provide a thorough explanation of why its 2003 evaluation of the UHF Discount is no longer valid.<sup>16</sup> But the agency cannot satisfy this standard because facts are facts – the UHF Discount is and always was far more than a mere technical rule addressing the weakness of analog UHF stations. Eliminating the rule will weaken the economic position of small and independent stations and networks and reduce competition and diversity, with minority and local, underserved communities being collaterally damaged. The *NPRM*, which will stifle the creation of new networks like those created by ION, Univision, and Trinity, suggests no explanation for how these changes could possibly be in the public interest, and ION submits that no such explanation exists. It is imperative that the FCC maintains its commitment to diversity in providing viewing opportunities to as many Americans as possible.

**B. The DTV Transition Did Not Fix the UHF Handicap.**

The *NPRM* next claims that the DTV transition eliminated any need for the UHF Discount by equalizing UHF and VHF signal strength.<sup>17</sup> In reality, four years of signal parity – or even, as the *NPRM* suggests *signal superiority* – is not nearly enough to remedy the economic

---

<sup>15</sup> The Consolidated Appropriations Act, 2004 and the decision of the Third Circuit Court of Appeals in *Prometheus Radio Project v. FCC* mooted court review of the 2003 *Ownership Order* and removed consideration of the UHF Discount from subsequent periodic reviews of the FCC’s media ownership rules. See Consolidated Appropriations Act, 2004, H.R. 2673, 108th Cong. § 629 (2004) (the “CAA”); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (“*Prometheus*”). But neither the CAA nor *Prometheus* annulled the fact-finding or reasoned analysis of the UHF Discount included in the 2003 *Ownership Order*. The FCC cannot ignore those findings now.

<sup>16</sup> *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41 (1983); *Telecommunications Research & Action Center v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986).

<sup>17</sup> See *NPRM*, 28 FCC Rcd at 14328-29.

disparity between UHF and VHF stations that took root and grew for more than 40 years.<sup>18</sup> Over that time, analog VHF stations used their commanding market position to build their audiences, reputations, and relationships with national networks and advertisers. Also over that time, cable penetration grew and viewers came to rely less and less on over-the-air signals, so the importance of signal strength in determining market position largely waned. By the time of the DTV transition in 2009, stations' market positions were largely established and equalizing their over-the-air signal coverage was not likely to alter those positions. The commercial advantages built up by VHF stations during the analog era have survived the DTV transition and will continue to shape local TV markets and the economic condition of historical UHF stations well into the future. In short, the competitive handicap that the UHF Discount was designed to ameliorate still exists, and eliminating the UHF Discount will only exacerbate the problem.

Again, the FCC recognized in the *2003 Ownership Order* that the DTV transition would not eliminate the need for the UHF Discount. In the *2003 Ownership Order*, the FCC determined that the DTV transition would “largely eliminate the *technical basis* for the UHF Discount.”<sup>19</sup> For this reason, the FCC announced that it would preserve the UHF Discount after the DTV transition for all UHF stations that are unaffiliated with the Big 4 Networks, as those stations are most likely to continue suffering from the persistent economic handicap afflicting UHF stations.<sup>20</sup> For all independent UHF stations, the FCC stated its intention to “continue to

---

<sup>18</sup> The *NPRM* suggests that due to difficulties encountered by VHF stations engaged in DTV broadcasting, it will consider replacing the UHF Discount with a VHF Discount. See *NPRM*, 28 FCC Rcd at 14332-33. While ION has no objection to adoption of a VHF Discount, it cannot replace the UHF Discount, which already has been relied upon by many broadcasters to establish their business plans and increase diversity and competition in local markets.

<sup>19</sup> *2003 Ownership Order*, 18 FCC Rcd at 13847 (emphasis supplied).

<sup>20</sup> *Id.*

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 . . . [i]n a subsequent biennial review.”<sup>21</sup> Thus, in 2003, the FCC concluded, based on substantial record evidence and contrary to the premise for the *NPRM*, that the DTV transition *would not* end the need for the UHF Discount for most UHF stations. The *NPRM* ignores the FCC’s 2003 pronouncements, and before the FCC can repeal the UHF Discount, it must demonstrate why it now believes it was wrong in 2003 when it determined that the UHF Discount would still be necessary for most stations after the DTV transition.<sup>22</sup>

### **III. CONGRESS HAS REVOKED THE FCC’S AUTHORITY TO CHANGE THE UHF DISCOUNT.**

The foregoing presumes that the FCC retains the authority to repeal the UHF Discount, but ION disputes the *NPRM*’s tentative conclusion that the FCC has that authority.<sup>23</sup> As the *NPRM* acknowledges, the *CAA* directs to the FCC to revise its rules to include a 39% audience reach limitation and prohibits the FCC from reviewing the national cap or “any rules related to” the 39% cap during its periodic ownership review process.<sup>24</sup> The *NPRM* tentatively concludes that the *CAA* leaves it with full authority to repeal the UHF Discount outside the periodic review process, but none of its rationales for this tentative conclusion withstand scrutiny.

First, the FCC incorrectly assumes that by directing the FCC to change its rules rather than adopting the 39% cap as a separate statutory measure, Congress intended to leave the rule

---

<sup>21</sup> *Id.*

<sup>22</sup> *Motor Vehicle Manufacturers Ass’n*, 463 U.S. at 41.

<sup>23</sup> *See NPRM*, 28 FCC Rcd at 14329-30.

<sup>24</sup> *See id.* at 14329; *see also CAA* § 629.

open to future revision by the FCC.<sup>25</sup> Nothing in Section 629 of the *CAA* supports this result; in fact, that section stands as an ongoing directive to the FCC to maintain the national ownership cap at 39%. The *CAA* amended Section 202 of the Telecommunications Act of 1996, which had directed the FCC to establish a number of specific local and national multiple ownership rules, including a 35% cap on national multiple ownership.<sup>26</sup> Specifically, Section 202(h) of the *1996 Act* directed the FCC to evaluate the Congressionally-established ownership limits every two years and to eliminate rules that were no longer necessary as a result of competition.<sup>27</sup> But the *CAA* revoked the FCC's Section 202(h) authority with respect to the 39% ownership cap and associated rules like the UHF Discount.<sup>28</sup> The *CAA* therefore establishes the 39% ownership cap and freezes the UHF Discount, and it provides the FCC with no legitimate procedural avenue for amending the rule.

Next, the *NPRM* tentatively concludes that Congress's decision to remove the national cap and the UHF Discount from Section 202(h) still leaves the FCC with the authority to review the UHF Discount under its general rulemaking authority granted by Sections 4(i) and 303(r) of the Communications Act.<sup>29</sup> But analysis of Section 202 of the *1996 Act*, as amended by the *CAA*, actually leads to the opposite conclusion. The only reasonable construction of Section 202 of the *1996 Act* is that Congress intended the Section 202(h) review process to be the sole avenue

---

<sup>25</sup> *NPRM*, 28 FCC Rcd at 14329.

<sup>26</sup> Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(a)-(g), 110 Stat. 56, 111 (1996) (the "*1996 Act*").

<sup>27</sup> *See id.* at § 202(h).

<sup>28</sup> *See CAA*, § 629.

<sup>29</sup> *See NPRM*, 28 FCC Rcd at 14329-30; 47 U.S.C. §§154(i); 303(r). Prior to the *1996 Act*, all the FCC's media ownership rules, including its limitation on national audience reach and the UHF Discount, were established entirely through the FCC's general rulemaking authority under Sections 4(i) and 303(r) of the Communications Act, pursuant to the APA.

for the FCC to review and update its media ownership rules. Congress could not have intended both to retain the FCC's pre-*1996 Act* rulemaking authority over the ownership rules and require the agency to conduct additional, biennial periodic reviews of such ownership rules. The potential result of such overlapping rulemaking authority would be to multiply rulemaking proceedings and increase regulatory uncertainty, which would directly contradict the *1996 Act's* purpose to promote competition and reduce regulation.<sup>30</sup> The FCC may not adopt a construction of the *1996 Act* that would ascribe to Congress this absurd result.<sup>31</sup> Instead, the FCC should recognize that (1) the *1996 Act* removed the media ownership rules from the agency's general rulemaking authority under Section 4(i) and 303(r), replacing it with the periodic review authority conferred by Section 202(h), and (2) the *CAA* removed the national ownership cap and the UHF Discount from Section 202(h), effectively insulating it from further FCC revision.

Contrary to the conclusions drawn by the *NPRM*, the Third Circuit's *Prometheus* decision provides no support for the FCC's assumption of authority to modify the UHF Discount. The issue before the *Prometheus* Court was whether the *CAA* mooted appeals of the FCC's decisions in the *2003 Ownership Order* increasing the national audience reach cap to 45% and sunseting the UHF Discount for Big-4 affiliates.<sup>32</sup> The Court held that the *CAA* did moot these challenges to the *2003 Ownership Order*.<sup>33</sup> In dicta, the Court noted that it did not necessarily intend to "foreclose" future FCC consideration of the UHF Discount, finding only

---

<sup>30</sup> See *1996 Act*, Preamble.

<sup>31</sup> See, e.g., *In re Airdigm Communications, Inc.*, 616 F.3d 642, 664 (7th Cir. 2010) (citations omitted).

<sup>32</sup> *Prometheus*, 373 F.3d at 395-97.

<sup>33</sup> The Court also held that the UHF Discount is clearly a rule "related to" the national audience reach cap and therefore insulated from periodic review. See *id.* at 397.

that “the Commission may decide, in the first instance, the scope of its authority” to modify the rule.<sup>34</sup> Thus, when the Third Circuit refrained from making any pronouncement regarding the FCC’s jurisdiction to consider the UHF Discount, it did not suggest that the FCC in fact had such authority – it merely left the issue to the FCC to analyze. The FCC must conduct that analysis based on the plain language of the *CAA* and the amended Section 202 of the *1996 Act*, and the *Prometheus* decision adds nothing to that analysis. As described above, the plain language of the *CAA* and amended Section 202 of the *1996 Act* provide the FCC with no authority to revise the UHF Discount, and the *Prometheus* decision does not undermine that reading of the statute.

**IV. EVEN ASSUMING THE FCC COULD LAWFULLY CHANGE THE UHF DISCOUNT, IT WOULD HAVE TO MAKE CORRESPONDING CHANGES TO THE NATIONAL AUDIENCE REACH CAP.**

The *NPRM*’s proposal to eliminate the UHF Discount without considering a commensurate change to the national audience reach cap would disregard Congress’s manifest intent and would therefore be an arbitrary and capricious result.

Both the Third Circuit and the FCC have recognized that the *CAA* represents Congress’s judgment that the national cap with the UHF Discount should be set at 39%.<sup>35</sup> And the *Prometheus* Court also recognized that any change in the UHF Discount would result in a very real tightening of the Congressionally-established national audience reach cap.<sup>36</sup> Eliminating the UHF Discount will reduce by as much as half the number of U.S. households that a station group owner would be permitted to reach under Congress’s 39% ownership cap by doubling the audience reach that is ascribed to each UHF station. Indeed, eliminating the UHF Discount

---

<sup>34</sup> See *id.*

<sup>35</sup> See *Prometheus*, 373 F.3d at 395-97; 2006 Quadrennial Regulatory Review, *Report and Order and Order on Reconsideration*, 23 FCC Rcd 2010, 2084 (2008) (“2008 Order”).

<sup>36</sup> See *Prometheus*, 373 F.3d at 396.

would amount to an unprecedented tightening of the national audience reach cap despite the fact that Congress's most recent direction to the FCC was to increase the cap and refrain from periodically reviewing the national cap rule.

The FCC cannot meet its heavy burden to establish that deviating from Congress's clear instructions is in the public interest, much less necessary in light of the competition that UHF broadcasters face today. Cutting in half the number of households a new network might reach is essentially the same thing as saying the FCC wants to curtail over-the-air broadcast competitiveness, at a time where no other comparable industry – notably cable, telco and DBS providers -- have such limitations. That is unjustifiably inconsistent with every action the FCC has taken with respect to the UHF Discount over the years and would constitute an abandonment of the TV viewers that the UHF Discount has always been presumed to serve. Absent an adjustment of the national cap to account for elimination of the UHF Discount, adoption of the proposal included in the *NPRM* would ignore the will of Congress, the FCC's own precedent, and the welfare of viewers. Such a decision would never withstand judicial scrutiny.

To remain even arguably consistent with the *CAA*, the *2003 Ownership Order*, and the Commission's traditional policies of promoting diversity and competition, the FCC could eliminate the UHF Discount only if it simultaneously and proportionately raises the national audience reach cap. When Congress enacted the *CAA* and established the national cap at 39%, it did so in full knowledge that the UHF Discount permitted a single station holder to theoretically reach double that percentage if that owner purchased only UHF stations.<sup>37</sup> If the FCC seeks to

---

<sup>37</sup> See *Goodyear Atomic Corp v. Miller*, 486 US 174, 184 (1988) (Congress is “presum[ed] knowledgeable about existing law pertinent to the legislation it enacts”).

eliminate the UHF Discount, it must double the national audience reach cap. Anything less would ignore the express will of Congress.

In the modern media marketplace, there is no justification for tightening the national audience reach cap. Broadcasters compete for viewers with numerous sources of video programming content and for advertisers with a rapidly increasing number of potential ad platforms. For a variety of political reasons, neither the FCC nor Congress has decided to do away with the national audience reach cap. But by approving the *CAA*, Congress took the step of authorizing station groups to construct nearly nationwide networks composed of UHF stations. It is not the FCC's role to second-guess Congress's decision. The FCC's choice in implementing the *CAA* is simple. It can either abide by the statute's terms and retain the UHF Discount, or it can eliminate the UHF Discount and increase the national audience reach cap.

**V. IF THE FCC CHOOSES TO ELIMINATE THE UHF DISCOUNT, IT MUST PROTECT EXISTING STATION COMBINATIONS AND THEIR VIEWERS FROM THE NEGATIVE EFFECTS OF THIS CHANGE.**

If the FCC chooses to modify or eliminate the UHF Discount, it should adopt a modified version of its proposal to grandfather existing UHF station combinations. Two principles should underlie any grandfathering rule in this case: (1) basic fairness to companies like ION that have relied on the UHF Discount and used the rule to greatly improve the nation's over-the-air television system; and (2) preservation of the benefits to diversity and competition that UHF station combinations have created. The FCC's proposal to grandfather only UHF combinations that existed as of the date of the *NPRM* and to make such combinations non-transferrable would

not accomplish either of these goals and would substantially and unnecessarily weaken existing UHF station groups.<sup>38</sup>

**A. The FCC Should Permanently Grandfather UHF Station Combinations That Exist as of the Date of Any Order in This Proceeding.**

Basic fairness requires that the FCC's grandfathering regime protect companies that have relied on the existing rules, with the FCC's encouragement, to build UHF station networks. When ION began building its independent over-the-air broadcast business, only the Big 4 networks and the old WB and UPN networks offered affiliation opportunities and additional viewing options in most markets. Before Univision constructed the largest Spanish-language over-the-air network, all free over-the-air network television was English-language programming. Building these networks was a huge financial risk, but their success has been an even greater benefit to television viewers. The FCC can rightly take credit for its role in promoting these developments, and it should not adopt rules that would snatch these diversity gains away from viewers who have come to enjoy and depend on them.

Because broadcasters have relied on the UHF Discount and the Commission's support for UHF-dependent new networks, grandfathering only those combinations in place as of the date of the *NPRM* would be fundamentally unfair. Broadcasters have factored the UHF Discount into their long-term business plans and the FCC's retention in 2003 and Congress's 2004 ratification of the rule justifies those plans. Deals that were contemplated or in process can take months to negotiate and complete, and broadcasters were caught entirely off guard by the *NPRM*'s proposal for immediate repeal. At the very least, broadcasters should be given sufficient time to execute plans that they have in process while the FCC is considering the future of the UHF Discount.

---

<sup>38</sup> See *NPRM*, 28 FCC Rcd at 14331-32.

Broadcasters also have a right to expect an orderly process of modifying in any way the UHF Discount pursuant to standard APA procedures. The extraordinary approach proposed in the *NPRM* would effectively change the rule by proclamation rather than through the notice-and-comment process, thereby throwing UHF broadcasters' business plans, made in good-faith reliance on the FCC's rules, into disarray. The wisdom of the notice-and-comment rulemaking process is that it gives businesses and consumers a chance to adjust their expectations as the FCC considers what is appropriate and necessary. The only fair approach is to make whatever new rule the FCC adopts effective upon its adoption by the full FCC.

The FCC offers two justifications for proposing to make the new rule effective upon the date of the *NPRM*. First, the *NPRM* asserts that cutting off grandfathering as of the date of the *NPRM* is appropriate because prior orders going back to 2000 indicated that the Commission anticipated eliminating the UHF Discount following the DTV transition.<sup>39</sup> This is pure revisionist history. The last time the Commission took a close look at the UHF Discount in the *2003 Ownership Order*, it chose to retain the rule for all stations unaffiliated with the Big-4 Networks.<sup>40</sup> In that case the FCC noted its previous statements that the technical basis for the UHF Discount would be greatly diminished following the DTV transition. But the agency also recognized the substantial evidence in the record that the UHF Discount remained necessary in the public interest because it fosters programming diversity and the formation of new competitive over-the-air TV networks.<sup>41</sup> The FCC stated only that it would re-examine these issues in its next ownership rule review; it expressed no opinion on the outcome of that

---

<sup>39</sup> See *NPRM*, 28 FCC Rcd at 14331 & n.58.

<sup>40</sup> See *2003 Ownership Order*, 18 FCC Rcd at 13847.

<sup>41</sup> See *id.*

consideration.<sup>42</sup> In the *2006 Ownership Review*, the FCC stated that the only UHF Discount issue under consideration would be the FCC’s authority to modify or eliminate the rule – not the substantive question of whether to eliminate it.<sup>43</sup> These orders provided absolutely no hint to UHF broadcasters that the FCC intended to propose immediate elimination of the rule. In other words, UHF broadcasters had essentially no notice that the FCC would propose to eliminate the UHF Discount for all stations with a limited grandfathering exception.

The FCC next argues that in past cases where it has changed its ownership rules, the FCC has made those changes effective as of the date of the *NPRM*.<sup>44</sup> Each of the cases the FCC cites is quite distinguishable – and the differences show why the FCC’s proposal in this case is so unjust. The cases cited in the *NPRM* dealt with the introduction of new ownership attribution rules that clarified existing uncertainty about whether certain types of financial interests in media companies would be deemed attributable.<sup>45</sup> The FCC’s action in those cases bore no resemblance to what is being proposed here, namely the FCC’s reversal of a nearly 30-year old rule that has been central to several companies’ business planning and was most recently upheld by the FCC and endorsed by Congress less than a decade ago.

The FCC cites its 1999 changes to the rules governing TV local marketing agreements (“LMAs”) as proof that it has taken this approach before. But the FCC’s action in that case

---

<sup>42</sup> *See id.*

<sup>43</sup> *2008 Order*, 23 FCC Rcd at 2084.

<sup>44</sup> *See NPRM* at n.58.

<sup>45</sup> *See Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Report and Order*, 14 FCC Rcd 12559 (1999) (noting that grandfathering as designed so as not to disrupt existing arrangements in light of new rules).

couldn't be more different from what it proposes here.<sup>46</sup> In the LMA case, the FCC grandfathered all LMAs that were *entered into* prior to a second further notice of proposed rulemaking that was adopted four years after the FCC first proposed attributing LMAs.<sup>47</sup> And that proposal came three years after the initial notice of proposed rulemaking suggesting that attribution of TV LMAs was a policy the FCC would consider.<sup>48</sup> Interested parties had *seven years* to organize their affairs to conform to the upcoming rule change and to complete any pending agreements.<sup>49</sup> In this case, the last time the FCC addressed the UHF Discount, it found that the rule remains necessary in the public interest for all but Big 4 affiliates, so UHF broadcasters had no notice this change would be coming and no opportunity to plan accordingly or complete planned transactions. And, unlike the LMA case, where one qualified for grandfathering merely by entering into a contract prior to release of the NPRM, here the FCC proposes to grandfather only those combinations that received FCC approval before the *NPRM* or were pending before the FCC. The FCC's grandfathering proposal would exclude even broadcasters that had entered into transactions to acquire UHF stations as of the date of the *NPRM* if the applications to the Commission seeking approval of those transactions had not yet been filed. For these reasons, the FCC's decisions concerning attribution of LMAs and

---

<sup>46</sup> See Review of the Commission's Regulations Governing Television Broadcasting, *Report and Order*, 14 FCC Rcd 12903, 12963 (1999).

<sup>47</sup> See Review of the Commission's Regulations Governing Television Broadcasting, *Further Notice of Proposed Rule Making*, 10 FCC Rcd 3524 ¶ 133-140 (1995).

<sup>48</sup> Review of the Commission's Regulations Governing Television Broadcasting, *Notice of Proposed Rule Making*, 7 FCC Rcd 4111 ¶ 21 (1992).

<sup>49</sup> The FCC's LMA grandfathering policy remains in place today and has never been changed. See *Ace TV, Inc.*, 27 FCC Rcd 10864, 10864 & n.2 (citing 2002 Biennial Regulatory Review, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13812 (2003)).

grandfathering of prior combinations provide no supporting precedent for what the Commission has proposed in this case.

The FCC's grandfathering proposal is unfair and unprecedented. Rather than cut-off grandfathering as of the date of the *NPRM*, the FCC should respect the reasonable business needs and expectations of UHF broadcasters that have used the UHF Discount to improve diversity in the public interest. Grandfathering should protect proposed UHF station combinations that have filed assignment or transfer applications that the FCC has not yet granted as well as parties that have entered into agreements to purchase stations or made plans to place bids on stations prior to the *NPRM*. The FCC's proposal would not provide basic fairness in these situations.

If the FCC adopts changes to the UHF Discount, the simplest and fairest way to protect UHF broadcasters' legitimate business interests would be to cut off grandfathering as of the date of an FCC order addressing the UHF Discount. That would provide UHF broadcasters with adequate time to complete deals that are currently contemplated and to alter their business plans accordingly. Broadcasters that have utilized the UHF Discount to improve over-the-air broadcasting at the FCC's behest deserve and are entitled to no less.

**B. Grandfathered Station Combinations Should Be Fully Transferrable and Permitted to Undergo Changes in Capital Structure.**

The FCC also should adopt grandfathering rules that preserve the diversity and competition gains brought about by UHF broadcasters. To accomplish this goal, the FCC should not adopt its proposal to make UHF station combinations non-transferrable.<sup>50</sup> Instead, the FCC should adopt a rule whereby UHF station combinations can be transferred stations to future purchasers with the UHF Discount intact.

---

<sup>50</sup> See *NPRM*, 28 FCC Rcd at 14331-32.

Permitting transfer of grandfathered UHF station combinations is crucial to preserving the competition and diversity benefits that networks composed of UHF stations have created. If a UHF network owner were forced to split up the network in order to sell it to another owner, the diversity and competition benefits of the combination would be effectively negated. A non-transferability rule would force UHF station owners to break up their holdings and dissolve the networks that the FCC encouraged them to build. Breaking up networks like ION, Univision, and Trinity would serve no public interest purpose whatsoever, and the FCC should not adopt rules that would encourage or require it.

Permitting transferability also would serve the principle of basic fairness to station groups that constructed new UHF-based networks with the FCC's encouragement. As the FCC knows, a large part of the value of a station group results from the economies of scale the group achieves *as a group*. The FCC should not undermine ION's station group footprint, which it has gradually assembled -- in reliance on the UHF discount -- to compete as one of the very few remaining independent TV groups.

To both preserve the diversity and competition gains created by UHF networks and be fair to companies that relied on the FCC's promotion of UHF network formation, the FCC should permit free transferability of UHF station combinations based on the following guidelines:

- First, as of the date the new rule is adopted, the FCC should establish that for existing station groups, the national audience reach for each group will be determined using the UHF Discount.
- Second, stations that are subject to the UHF Discount on that day will continue to be subject to the UHF Discount as long as they remain a part of that same group of stations and, specifically, irrespective of changes in ownership and/or capital structure.

- Third, if a grandfathered UHF station owner seeks to sell all or a group of its UHF stations to a new owner, the new owner will be permitted to continue owning the stations with the UHF Discount intact for those stations.
- Fourth, acquisitions or divestitures of individual stations by a grandfathered station group do not alter the grandfathered UHF status of the incumbent stations in such portfolio, even if the individual stations being acquired or divested may be treated absent such UHF discount.

This approach would promote maximum fairness to broadcasters that have relied on the FCC's long-standing, pro-UHF policies and also permit viewers to continue to realize the benefits that UHF station groups like ION have created.

## **VI. CONCLUSION**

For the foregoing reasons, ION requests that the Commission abandon its proposal to eliminate the UHF Discount or, at a minimum, adopt the comprehensive grandfathering proposal described herein.

Respectfully submitted,

**ION MEDIA NETWORKS, INC.**

/s/

---

John R. Feore  
Jason E. Rademacher  
Dow Lohnes LLP  
1200 New Hampshire Ave.  
Suite 800  
Washington, D.C. 20036

December 16, 2013