

**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)	

**COMMENTS OF
21ST CENTURY FOX, INC. AND FOX TELEVISION HOLDINGS, INC.**

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December 16, 2013

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21st Century Fox, Inc. and Fox Television Holdings, Inc. (together, “Fox”) respectfully submit these comments in response to the above-captioned Notice of Proposed Rulemaking considering changes to the National Television Ownership Rule (the “Cap”).¹

I. INTRODUCTION AND SUMMARY

The *Notice* tees up as its fundamental question whether the Commission should eliminate the UHF discount that is an inextricable element of the Cap, and in doing so, tighten a television ownership rule for the first time in the nearly 20 years since passage of the deregulatory 1996 Telecommunications Act. Fox submits that the FCC’s attention in the *Notice* is on entirely the wrong question. By targeting its inquiry on just one single element of the Cap – the UHF discount – the Commission willingly blinds itself to the far more important question of whether the Cap itself can bear any longer the intolerable burden that it places on broadcast television station owners. As a consequence, the *Notice* reflects an agency staring so hard at a single tree that it has lost sight entirely of the forest.

¹ See *In re Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, 28 FCC Rcd. 14324 (2013) (the “*Notice*”).

The answer to the Commission's overly narrow question – should the FCC eliminate the UHF discount – brooks no debate. Put simply, Congress has barred the FCC from modifying the Cap, and therefore from eliminating or altering the discount. The 2004 Consolidated Appropriations Act unequivocally converted the Cap into a statutory limitation of 39% potential audience reach, inclusive of the UHF discount.² If the Commission nonetheless concludes that it has authority to modify the Cap, it would be arbitrary and capricious for the FCC to exercise that authority to make an ownership limit *more* restrictive at a time when competition and diversity have never been more abundant. And there can be no question that elimination of the discount would be tantamount to making the Cap more restrictive.

All of this begs the question – why has the Commission even launched this proceeding at this time? The Notice is devoid of any articulation of what problem the FCC hopes to solve. The Commission invokes a purported obligation to reexamine its rules if facts and circumstances change, even as it inexplicably allows its *statutorily-mandated* broader review of all of the other media ownership rules to languish unresolved for years on end. In any event, a review of the marketplace as it exists today leads to only one logical outcome: The Cap itself should be eliminated in its entirety. At the very least, the Cap would have to be substantially raised if the FCC were to appropriately take account of the overwhelming competition and diversity that characterize the video marketplace today.

Moreover, should the Commission base a decision to eliminate the UHF discount on a conclusion about the improved signal propagation characteristics of the UHF band, logic dictates that the FCC simultaneously should adopt a VHF discount to account for the concomitant degradation of VHF stations' signals since the digital TV transition. The longstanding basis for

² See Pub. L. No. 108-199, § 629, 118 Stat. 3, 99 (the “Appropriations Act”).

the current discount has been that UHF stations suffer from diminished audience reach in comparison to their VHF counterparts. If the facts indicate that the relative positions of the bands have “reversed” in the digital era, as the Commission appears to have concluded, it would be arbitrary not to protect VHF stations today from the same audience reach disparities that for so long warranted different treatment of UHF stations for Cap calculations.³ If any vestige of the Cap remains after this proceeding, it should only be with a VHF discount in place.

Finally, Fox implores the Commission not to deprive broadcasters of their due process rights by acting, during the pendency of this proceeding, as if the rule changes proposed in the *Notice* already have been adopted. The proposal to eliminate the UHF discount is just that – a proffer and nothing more. Only after considering the record evidence and then voting on a final order can the Commission change its rules. If the FCC refuses to process transfer or assignment applications in the ordinary course before any final vote, it would force broadcasters to conform their behavior before any rule change actually has occurred. In doing so, the Commission would unjustly deprive all parties of the right to due process and signal that this entire proceeding is but an empty formality.

Because it lacks statutory authority to modify the Cap (and with it, the discount), Fox urges the Commission to abandon the approach envisioned by the *Notice*. Should the FCC advance down this path, however, Fox submits that the Commission should replace the current *Notice* with a comprehensive approach that more fairly looks at the entire media landscape as it relates to the Cap. If the FCC takes stock of the competitive forces that have upended the media marketplace, as it must, it will have to acknowledge how dramatically technology and innovation have transformed the choices that consumers have to use and interact with media. The Cap no

³ *Notice* at ¶ 17.

longer can be justified and indeed has corrosive effects that stymie broadcasters alone among the plethora of competing media – a result so irrational and arbitrary that it could never be squared with the Commission’s obligation to engage in reasoned decision-making.

II. CONGRESS STRIPPED THE FCC OF AUTHORITY TO MODIFY THE NATIONAL TELEVISION OWNERSHIP CAP, WHICH INCLUDES THE UHF DISCOUNT

First and foremost, this proceeding has been initiated on extremely shaky footing.

Although the FCC tentatively concludes in the *Notice* that it has authority to modify the national television ownership rule, including the UHF discount, the Commission is decidedly sparing in its explanation.⁴ Pointing to Section 629 of the Appropriations Act, the best the FCC can muster is the (incorrect) statement that the statute “does not preclude” the Commission from “revisiting” the rule.⁵ The statute itself, however, quite clearly was intended to do just that. A review of the plain text as well as the context of the Appropriations Act leaves little doubt that Congress intended for the Commission to set it and forget it when it comes to the 39% Cap.

A. There Can Be No Debate: Eliminating the Discount Would Be Tantamount to Lowering the National Cap

It is by now well-settled that the statutory term “national audience reach,” as used in the Appropriations Act, includes both the 39% potential audience size limitation and the UHF discount. The two elements are inseparable and together enable a broadcast television station owner to determine compliance with the law or how much headroom may be available for future transactions. Since 1985 the FCC has defined “national audience reach” to mean “the total number of television households” reached by an entity’s stations, except that “UHF television

⁴ See *Notice* at ¶ 13.

⁵ *Id.* The *Notice* does not even attempt to argue that the Appropriations Act affirmatively gives the Commission power to modify the Cap or discount.

stations shall be attributed with 50 percent of the television households” reached.⁶ In Section 629 of the Appropriations Act, Congress directed the Commission to increase the “national audience reach limitation for television stations” to 39%.⁷ By using the term “national audience reach,” Congress incorporated the FCC’s existing definition of that term. “[W]hen Congress uses an administratively defined term, it intended its words to have the defined meaning.”⁸

Although the Appropriations Act did not use the words “UHF discount,” as the Commission and the Third Circuit have stressed, the discount is a “rule ‘relating to’ the national audience limitation.”⁹ The FCC therefore has correctly concluded that the two elements are interdependent and that “the statutory 39 percent national cap would be altered if the UHF discount were modified.”¹⁰ Even the *Notice* in this proceeding acknowledges that “elimination of the UHF discount would impact the calculation of nationwide audience reach for broadcast station groups with UHF stations.”¹¹

⁶ 47 C.F.R. § 73.3555(e)(2)(i); *Multiple Ownership of AM, FM and Television Broadcast Stations*, 50 Fed. Reg. 4666, 4676 (1985).

⁷ Appropriations Act, § 629 (*amending* Pub. L. No. 104-104, Title II, § 202(c)(1)(B) (1996)).

⁸ *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004) (*citing* *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998)). *See also* *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 193-94 (2002), *overturned in part on other grounds by* Pub. L. 110-325, 122 Stat. 3553 (2009) (“Congress’ repetition of a well-established term generally implies that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations”).

⁹ *Prometheus*, 373 F.3d at 397; *In re 2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, 23 FCC Rcd. 2010, ¶ 142 (2008).

¹⁰ *In re 2006 Quadrennial Regulatory Review*, 23 FCC Rcd. at ¶ 143.

¹¹ *Notice* at ¶ 20.

This should come as no surprise, for eliminating the discount without simultaneously raising the 39% figure effectively would result in a substantial reduction in the Cap itself. Depending on a particular station owner's holdings, elimination of the discount could wreak havoc on carefully-planned compliance measures and future business planning. It is self-evident that changing one part of a linear equation affects the remainder of the equation, so simply dropping the UHF discount from the math would have substantial consequences for many group owners. The practical result would be that a station owner – despite absolutely no change in its assets – could see its TV household coverage figure careen forward by 10%, 15% or more. A hypothetical owner comfortably under the Cap today, with stations potentially reaching approximately 25% of United States TV households, could see its safety net evaporate in the face of a Cap calculation that skyrockets its coverage to 39% or more overnight.

Ultimately, eliminating the discount would be for all intents and purposes the equivalent of reducing the 39% Cap to a limitation with a much lower “effective” rate (perhaps 25% or less). For an owner that suddenly loses a large portion of its available headroom, any carefully laid plans for future expansion would be cast into disarray.

B. Congress Ordered the Commission to Establish a Precise 39% National Cap and Expressly Eliminated the FCC's Ability to Modify the Cap in Future Rule Reviews

Section 629 of the Appropriations Act explicitly directs the FCC to change its rules so that the Cap equals 39% of a station owner's potential audience reach, inclusive of the UHF discount.¹² The Commission takes false comfort from the fact that the law directed the FCC to “revise its rules” rather than “directly establish” an audience reach limitation.¹³ But the

¹² Appropriations Act § 629.

¹³ *Notice* at ¶ 13.

Commission's exceedingly narrow reading of this language leaves the FCC with an interpretation that would compel clearly unintended consequences. Upon closer inspection, the only plausible construction of this provision is that Congress effectively converted the Cap rule into a statutory standard.

This must be so, since any attempt by the FCC to modify the Cap, which would be the result of eliminating the UHF discount, would stand in direct contradiction to the statutory directive that the Commission amend its rule so that the reach limitation is set precisely at 39%. A rule change that modifies the Cap to something other than 39% (after accounting for the discount) would make it impossible for the Commission to comply with the plain text of the statute. If the contrary approach envisioned by the *Notice* were permissible, the FCC theoretically would have been able to comply with the language in the Appropriations Act by setting the Cap in its rules at 39% on Day 1, while then starting a rulemaking the very next day to change the figure to some other level. That possibility would eviscerate Congress's specification of a 39% limitation.

In the 1996 Telecommunications Act, Congress used the same language to direct the FCC to change the Cap to 35%, but with one all-important difference: At that time the statute also expressly permitted – in fact obligated – the Commission periodically to review and modify (or eliminate) the Cap if found to be no longer necessary in the public interest as the result of competition (the “202(h)” obligation).¹⁴ In the Appropriations Act, Congress used an identical approach, directing the FCC to reset the limitation in its rule to 39%. This time, however, Congress also took great pains to expressly insulate the Cap from any FCC alteration. Thus, Congress explicitly carved the rule out from the 202(h) obligation that the Commission

¹⁴ Pub. L. No. 104-104, Title II, § 202(h).

otherwise has to review its media ownership rules every four years.¹⁵ Moreover, Congress went a step further and also shielded the Cap from the forbearance authority that the FCC otherwise has to refrain from enforcing certain rules.¹⁶

Collectively, these efforts were designed to ensure that the FCC would have no further independent authority to modify the Cap. Since statutory provisions must be interpreted in light of the “whole statute,” as well as “the objects and policy of the law,” the FCC must broaden its perspective in analyzing the scope of its authority.¹⁷ The “whole” Appropriations Act, in the context of the statutory scheme, makes clear that the Cap – and with it the discount – are beyond the FCC’s purview. It would not make any sense for Congress to direct the establishment of a 39% cap by statute, and in the process to preclude the FCC from altering that decision in two specific types of reviews – only to leave the Commission with *carte blanche* to completely overhaul the Cap using its general rulemaking authority.

For that matter, if the FCC were permitted to modify the Cap anytime outside of its 202(h) obligation, it would rob of any meaning the specific language of the Appropriations Act precluding consideration of the Cap in a quadrennial review.¹⁸ Why would Congress have

¹⁵ See Appropriations Act § 629(3).

¹⁶ See *id.* § 629(2). The reference to Section 10 forbearance in the Appropriations Act represents the epitome of a “belt and suspenders” approach, for the forbearance authority provided in Section 10 (47 U.S.C. § 160) by its terms applies only to laws governing telecommunications carriers or services. Section 10 thus has no relevance to the media ownership rules, including the Cap, which apply only to broadcast stations. The inclusion of Section 10 in the Appropriations Act can only reflect one thing: Congress’s desire to think of – and close off – any conceivable avenue that the FCC might consider using in an attempt to modify the Cap.

¹⁷ *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (internal citation omitted).

¹⁸ Appropriations Act § 629. A basic principle of statutory construction is that courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the

barred the Commission from modifying the Cap during a quadrennial review if the legislature meant for the FCC to be free to do so at *all other times*? The *Notice* appears to suggest that Congress merely wanted to keep the Commission from looking at the Cap during every fourth year, but this defies common sense and cannot logically be the will of Congress. Congress should not be presumed to legislate with such an obvious blind spot. As the Supreme Court repeatedly has emphasized: “Congress . . . does not, one might say, hide elephants in mouseholes.”¹⁹ If Congress had wanted the FCC to remain free to modify the Cap using its general rulemaking authority, it would have said so.

In four different places in the Appropriations Act, Congress amended the 1996 Act to add explicit references to what it called “the 39 percent national audience reach limitation.”²⁰ These repeated references bolster the view that Congress thought of the Appropriations Act as establishing a firm, statutory 39% Cap (inclusive of the UHF discount). The phrase “the 39 percent national audience reach limitation” belies any notion that Congress intended for the Appropriations Act to effectuate only a temporary rule change, since there would be no such thing as a “39%” limitation if the FCC were free to change that number (or effectively change it

language it employed.” *Inhabitants of the Township of Montclair, Cnty. of Essex v. Ramsdell*, 107 U.S. 147, 152 (1883).

¹⁹ *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 468 (2001).

²⁰ See Appropriations Act § 629(2) (amending Telecommunications Act § 202(c) to add a divestiture provision that applies to “[a] person or entity that exceeds the 39 percent national audience reach limitation”) (emphasis supplied); *id.* (exempting from the new divestiture requirement “persons or entities that exceed the 39 percent national audience reach limitation through population growth”) (emphasis supplied); *id.* (mandating that forbearance not apply to “any person or entity that exceeds the 39 percent national audience reach limitation”) (emphasis supplied); *id.* § 629(3) (providing that the quadrennial review “does not apply to any rules relating to the 39 percent national audience reach limitation”) (emphasis supplied).

by altering the discount). In particular, the Appropriations Act specifies that a station owner that exceeds “the 39 percent national audience reach limitation” by acquiring additional licenses shall have up to two years to come back into compliance with the Cap.²¹ This statutory provision would make no sense if the FCC were permitted at any time to change the Cap.²²

C. Third Circuit Precedent and Legislative History Confirm That Adjusting the Discount Would Undermine Congress’s Specification of a 39% Cap

The Third Circuit explained in *Prometheus* that Congress instructed the Commission to increase the “national audience reach limitation for television stations to 39%.”²³ Because eliminating the UHF discount “would effectively raise” stations’ audience reach percentages, the court refused to “entertain challenges to the Commission’s [prior] decision to retain the 50% discount,” noting that “[a]ny relief” for those demanding changes “would undermine Congress’s specification of a precise 39% cap.”²⁴ Moreover, the court found that “Congress apparently intended to insulate the UHF discount from periodic review.”²⁵ The fact that Congress shielded the Cap and the discount from the 202(h) obligation provided “additional evidence” to the court that the Appropriations Act “endorses [the] almost 20-year-old regulatory definition of ‘national audience reach’ that provides for the UHF discount.”²⁶

²¹ Appropriations Act § 629(2).

²² Tellingly, Congress did not direct the Commission to implement a “reasonable” limitation or to establish a cap taking certain factors into account. Rather, it directed that the Cap be set precisely at 39% – strong evidence of Congress’s desire for a specific outcome.

²³ *Prometheus*, 373 F.3d at 396 (internal quotation marks omitted).

²⁴ *Id.*

²⁵ *Id.* at 397.

²⁶ *Id.*

The FCC erroneously finds reassurance in the Third Circuit’s statement that it did not intend to “foreclose” the Commission from considering whether it has general authority to review the Cap.²⁷ The court, however, was merely relying upon the time-honored doctrine of judicial avoidance by refusing to decide the extent of the FCC’s authority to modify the Cap in a general rulemaking proceeding. Since the question of plenary authority was not before it, the court said that the “Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context” of the 202(h) obligation.²⁸ The court never suggested that the FCC actually has general authority to modify the Cap. The *Notice* mistakes the court’s invocation of avoidance principles for an affirmative judicial blessing of authority that simply does not exist. Quite the contrary, the court left no mystery as to how it expected the FCC to decide the matter. As noted, the court specifically characterized the Appropriations Act as an “instruct[ion]” from Congress that the Cap be set at 39% and likewise made clear that it was powerless to take action that would “undermine Congress’s specification of a precise 39% cap.”²⁹

The legislative histories of the Appropriations Act (and the 1996 Telecommunications Act before it) strongly reinforce the conclusion that the Appropriations Act converted the Cap from a rule into a statutory standard. The House report accompanying the 1996 Telecommunications Act indicated that Congress intended for the Cap to continue to be calculated with a UHF discount: “the Committee does not envision that the UHF discount

²⁷ *Notice* at ¶ 13 (citing *Prometheus*, 373 F.3d at 397).

²⁸ *Prometheus*, 373 F.3d at 397.

²⁹ *Id.* at 396.

calculation will be modified so as to impede the objectives of this section.”³⁰ Later, during floor debate on the Appropriations Act, Rep. Tauzin noted that the statute “will forbid the FCC from raising or lowering the 39 percent limit as market conditions continue to change.”³¹ According to Rep. Tauzin, the statute “requir[es] *Congress to act* whenever fine-tuning becomes necessary.”³² Furthermore, Members of both the House and the Senate acknowledged that Section 629 was designed to avoid forcing any station owner to divest assets as a result of the new level of the Cap. Several legislators noted that, but for the UHF discount, some owners would have been above the 39% limitation at the time of the Appropriations Act (a fact that remains true today).³³ The Members noted that the “practical effect” of calculating the Cap as a precise percentage inclusive of the UHF discount was to avoid forced divestitures – a result that would have been impossible without the UHF discount.³⁴

In short, the plain text of the Appropriations Act, especially when read in the context of the statutory scheme, confirms that Congress stripped the Commission of authority to modify the Cap and the UHF discount. If there are to be changes to the Cap, or the way that it is calculated going forward, it should be a matter for Congress to decide.

³⁰ H.R. Rep. No. 104-204, at 118 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 10, 86.

³¹ 149 Cong. Rec. H12,838 (daily ed. Dec. 8, 2003) (statement of Rep. W.J. Tauzin).

³² *Id.* (emphasis supplied).

³³ *See, e.g.*, 150 Cong. Rec. S148 (daily ed. Jan. 22, 2004) (statement of Sen. Diane Feinstein, quoting a letter from Sen. Robert Byrd); 150 Cong. Rec. S141 (daily ed. Jan. 22, 2004) (statement of Sen. Patrick Leahy); 150 Cong. Rec. S86 (daily ed. Jan. 21, 2004) (statement of Sen. John McCain); 149 Cong. Rec. H12,315 (daily ed. Nov. 25, 2003) (statement of Rep. David Obey).

³⁴ 150 Cong. Rec. S78 (daily ed. Jan. 21, 2004) (statement of Sen. Robert Byrd).

III. EVEN IF THE FCC HAD AUTHORITY TO MODIFY THE CAP BY ELIMINATING THE DISCOUNT, IT WOULD BE UTTERLY ARBITRARY AND HIGHLY CAPRICIOUS TO TIGHTEN A MEDIA OWNERSHIP RULE IN AN ERA OF ABUNDANT AND INCREASING COMPETITION

Elimination of the UHF discount would effectuate a substantial new restriction on media ownership, in contravention of the deregulatory approach to ownership rules embedded in the Telecommunications Act of 1996. Before proceeding down this path, the FCC should formulate a rational justification for its action and explain why it issued the *Notice* in the first place. Aside from noting technological changes to UHF signal characteristics, however, the *Notice* simply skips any articulation of what problem it believes is necessary to solve in this proceeding. The Commission similarly skirts any obligation to explain what it intends to accomplish by maintaining – indeed strengthening – a national audience reach limitation on broadcasters. These are not aimless questions, for the D.C. Circuit has twice in the last 15 years overruled FCC ownership limits at the national level for deficiencies in reasoned decision-making. The absence of any explanation in the *Notice* puts the Commission on the same treacherous path that already has been thoroughly rejected by the courts.

A. No Effort to Lower the Cap Could Be Reconciled With the Realities of Widespread Competition and Diversity In the Marketplace

The Commission historically justified the Cap as necessary to preserve competition and diversity.³⁵ The FCC did not base the Cap on localism.³⁶ Today, in a world in which broadcast television is just one of a plethora of media options, the Cap cannot be considered necessary to promote competition or diversity. If anything, it perversely harms localism and thwarts competition by excluding some of the most effective owners from competing in particular

³⁵ See *In re Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broad. Stations*, 100 F.C.C.2d 17, ¶ 20 (1984).

³⁶ See *id.*

markets. Consequently, reducing the Cap by eliminating the UHF discount would be a direct violation of the Administrative Procedure Act's requirement that agencies engage in reasoned decision-making.

As early as 1984, the FCC concluded that the Cap had outlived its usefulness.³⁷ In fact, the Commission explained that, even as of the time of the rule's inception, the assumption that viewpoint diversity would be enhanced through limiting broadcast television ownership at the national level "was not based on hard evidence in the record."³⁸ Rather, as the FCC found consistently between 1984 and 1995, the *national* Cap is simply irrelevant to diversity from the standpoint of consumers who only view television stations in *local* markets. When the Commission abruptly departed from these findings and tried to justify retention of the rule in 1998, the D.C. Circuit reversed the agency and said that because the FCC's 1984 findings remained "unrebutted," the Commission had "not fulfilled its obligation . . . to give a reasoned account of its decision."³⁹

As to competition, the FCC had before it as early as 1984 the comments of the Department of Justice, which stated that "elimination of the rule [would] pose[] no risk in any market relevant to antitrust analysis."⁴⁰ The Commission reached a similar conclusion at that time: "the record establishes that there is no danger of excessive economic concentration in the relevant competitive markets and that there are potential efficiency gains from repeal of the

³⁷ See *id.* at ¶¶ 4, 20.

³⁸ *Id.* at ¶ 20.

³⁹ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1045 (D.C. Cir. 2002).

⁴⁰ Reply Comments, Department of Justice, GEN Docket No. 83-1009, at 1.

rule.”⁴¹ The agency’s attempt to take a different tack in 1998 was summarily rejected by the D.C. Circuit.⁴² As the court summed up: “The Commission has adduced not a single valid reason to believe the [Cap] is necessary in the public interest, either to safeguard competition or to enhance diversity.”⁴³

The D.C. Circuit again in 2009 struck down a national ownership limit, this time applicable to cable operators, because the FCC had failed to take account of dynamic competitive forces.⁴⁴ As the court made clear, the Commission had “failed to demonstrate that allowing a cable operator to serve more than 30% of all cable subscribers would threaten to reduce either competition or diversity”⁴⁵ The D.C. Circuit chastised the agency for failing to take account of a record “replete with evidence of ever increasing competition” as well as a “dramatic increase” in the number of contributors to diversity.⁴⁶ Among other defects, the Commission had relied upon competition data that omitted the most recent six years. This corresponded to a time of markedly growing competition, leaving the court to note that “[t]here can be no doubt that consumers are now able to receive far more channels than they could in 1999, let alone 1992.”⁴⁷ Taking “[c]onsideration of the marketplace as it is today and the many

⁴¹ *Amendment of Section 73.3555 of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broad. Stations*, 100 F.C.C.2d 74, 101 (1985).

⁴² *Fox*, 280 F.3d at 1041-43.

⁴³ *Id.* at 1043. The FCC’s effort to respond to the court’s remand was interrupted by Congress’s inclusion of the Cap provision in the Appropriations Act.

⁴⁴ *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009).

⁴⁵ *Id.* at 8.

⁴⁶ *Id.*

⁴⁷ *Id.*

significant changes that have occurred since 1992,” the D.C. Circuit concluded that the FCC “failed to ‘examine[] the relevant data and articulate[] a satisfactory explanation for its action”⁴⁸ Thus, the court vacated the limitation.

If the Commission could not justify retention of *any* Cap based on the world as it existed in 1998, it cannot possibly hope to defend a *reduction* in the Cap today. It would be the height of arbitrary and capricious decision-making for the FCC to lower the Cap given the dramatic changes that have transformed the media marketplace, which are more fully detailed below. Yet the *Notice* oddly does not even ask for comment on whether the level of the Cap itself should be modified in the event that changes are made to the discount. This despite prodding from Commissioner Pai, who recognized the “interdependent relationship between” the Cap and the discount and urged the Commission not to review one without the other.⁴⁹ And despite the *Notice*’s invocation of the FCC’s purported “affirmative obligation to reexamine its rules over time” and to “reexamine its approach” if facts and circumstances change.⁵⁰ The *Notice* bafflingly invokes this responsibility even as it implicitly disclaims any duty to look at the broader question of the Cap’s viability.⁵¹

⁴⁸ *Id.* (quoting *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 968 (D.C. Cir. 1999)).

⁴⁹ *Notice*, Dissenting Statement of Commissioner Pai.

⁵⁰ *Id.* at ¶ 14.

⁵¹ Equally inexplicable is that, even as the FCC contorts itself to assert a legal obligation to review the UHF discount *now*, it ignores that it has allowed its review of *all of the other* media ownership rules to stagnate, even though those rules are subject to the *still incomplete* 202(h) obligation *from 2010*. Really, the rules remain stuck in a *still incomplete* 202(h) obligation *from all the way back to 2002*, since the Commission has never managed to complete action in response to the Third Circuit’s original remand in *Prometheus*. See 373 F.3d at 372.

Moreover, although localism has not served as a basis for the Cap, there can be no question that the rule is unnecessary to protect this component of the Commission's three main policy goals. Quite the opposite – the Cap has long served to frustrate the localism goal by restricting group owners best able and most willing to serve local communities. Group owners historically have demonstrated a tangible commitment to localism by investing in news and public affairs programming in the local markets in which they operate. Fox, for example, submitted data as part of the Commission's 2002 media ownership review showing that it had increased the amount of weekly local news hours on its owned stations by 57% compared to the time period prior to Fox's ownership (when many of those stations aired no local news at all).⁵² Other group owners submitted similar information, together with evidence of the substantial number of awards and accolades consistently bestowed on these owners' news outlets.⁵³

In truth, the vast majority of television stations are not owned locally; rather, licenses generally are held by entities with headquarters in, at best, one of the markets in which owned stations operate. But these owners put in place capable local managers whose job it is to ensure that their stations serve the needs and interests of the communities they serve. Succeeding in this endeavor is, of course, a business imperative, as failure means loss of viewers and, ultimately, untenable economic loss as well. Elimination of the discount would not result in any sudden shift away from group ownership, nor would it really have an effect on purported media consolidation. It would have little impact, for instance, on the national ambitions of a group

⁵² See Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. et al., *2002 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*, MB Docket No. 02-277, Joint Commenters' News Programming Exhibit No. 1, at 1 (Jan. 2, 2003).

⁵³ See *id.* at Joint Commenters' News Programming Exhibits.

owner that wanted to expand into smaller or mid-sized markets, where lower TV household levels would be more likely to fit within even a significantly lower Cap. Because larger group owners tend to hold stations in the largest markets, lowering the Cap would serve only to exclude capable station owners from the markets where competition is most robust and where consumers have ample choices.

In any event, tightening the Cap while ignoring the plentiful competition and diversity that characterize the national video market would lead the Commission inexorably down the same path to judicial reversal on which the agency found itself in 1998 and 2009. The FCC should not make the same mistake for a third time in 15 years.

B. If Anything, Competitive Forces Should Impel the FCC Immediately to Initiate a Proceeding to Abolish the Cap Altogether, Or At Least Substantially Raise It

For the reasons set forth above, Fox believes that the Appropriations Act deprives the Commission of authority to modify the Cap or the UHF discount in this proceeding. If, notwithstanding the law, the Commission concludes that it has authority to lower the TV household reach limitation by modifying the discount, then the agency necessarily must also find that it has authority to eliminate or raise the Cap itself. The *Notice* recognizes as much, positing that the FCC “retains the authority to modify [] the national audience reach restriction.”⁵⁴ This is only logical; it cannot be that the law gives the FCC power sufficient to tighten a media ownership restriction, but not power to relax or eliminate that rule if necessary to account for marketplace realities. Quite the contrary, the Administrative Procedure Act mandates that the Commission behave in a reasonable manner and avoid arbitrary and capricious decision-

⁵⁴ *Notice* at ¶ 15.

making.⁵⁵ In light of the transformative impact of the Internet, and given the multitude of additional channels competing for television viewers' attention, the only reasoned approach available to the Commission is to exercise whatever power it may possess to eliminate or raise the Cap.

It has been a decade-and-a-half since the D.C. Circuit found in *Fox* that the Cap was not rationally related to competition or diversity. Even in just the four years since the D.C. Circuit rejected the cable ownership limit in *Comcast*, competition has increased and flourished and there continues to be widespread video diversity at the national level. Today, as the court took note in *Comcast*, literally hundreds of national and regional programming networks compete for television viewers' attention.⁵⁶ Aside from this striking increase in television viewing options, the media changes since 1998 can be most obviously measured by the widespread adoption of the Internet as perhaps the most powerful medium of communication in history. These additional online and on-television voices compete vigorously with broadcast stations, while simultaneously providing a level of diversity of content and viewpoints that would have been unimaginable to the Commission just a few years ago.

When the FCC analyzed the marketplace prior to the *Fox* decision in 1998, only 22% of American adults used the Internet, and only about half of those users looked for news online.⁵⁷ At that time, the Internet's impact, its ability to inform the public, and most especially its contribution to localism, diversity and competition were negligible. Today, in contrast, the

⁵⁵ See 5 U.S.C. § 553.

⁵⁶ See *Comcast*, 579 F.3d at 8.

⁵⁷ See Eric C. Newburger, U.S. Census Bureau, *Computer Use in the United States: October 1997*, at 10 (Sept. 1999) (detailing percentage of people using the Internet to get "news, weather, or sports" information), available at <http://www.census.gov/prod/99pubs/p20-522.pdf>.

Internet is regularly used by hundreds of millions of Americans as an incredibly dynamic platform for both receiving and distributing immense amounts of diverse information. Online video distribution has burgeoned into a fierce competitive force. Netflix (with more than 31 million U.S. subscribers), YouTube, Amazon and Hulu, among many others, each now distributes tens of thousands of video programming options, and all of them have begun to invest heavily in original content as well. The latest figures from comScore indicate that Americans watched nearly *50 billion* online videos in the month of October 2013 alone.⁵⁸

The Commission itself consistently has acknowledged the magnitude of the Internet's impact. In the 2002 media ownership review, the FCC pointed out that "via the Internet, Americans can access virtually any information, anywhere, on any topic" and stated that the Internet's ubiquity casts doubt on the continued status of radio and television broadcasters as "America's information gatekeepers."⁵⁹ In the 2006 media ownership review, the FCC further noted that "Internet use . . . is changing how traditional news media operate" and that "the diminishment of mainstream media power over information flow is real."⁶⁰ And in 2010, the Commission once more noted that "[t]he proliferation of broadband Internet and other new technologies has had a dramatic impact on the media marketplace."⁶¹ Chairman Wheeler

⁵⁸ See Press Release, comScore, comScore Releases October 2013 U.S. Online Video Rankings (Nov. 15, 2013), http://www.comscore.com/Insights/Press_Releases-/2013/11/comScore_Releases_October_2013_US_Online_Video_Rankings (last visited Dec. 10, 2013).

⁵⁹ *In re 2002 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 et al.*, 18 FCC Rcd. 13620, ¶ 3, 4 (2003).

⁶⁰ *In re 2006 Quadrennial Regulatory Review*, 23 FCC Rcd. at ¶ 36.

⁶¹ *In re 2010 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 et al.*, 26 FCC Rcd. 17489, ¶ 2 (2011).

recently described the Internet as “the fourth great network revolution,” an “information age” upheaval that is “hurl[ing] new realities at us with an ever-increasing velocity.”⁶² And the Commission is now in the midst of a complex incentive auction proceeding designed for the very purpose of reallocating broadcast spectrum to increase wireless Internet access.⁶³

The current Cap was last reviewed more than 10 years ago and is long overdue for a check-up to determine whether it remains an appropriate constraint on broadcast ownership. If the FCC determines that Congress has given it power to conduct a review of the discount, then the Commission should exercise that power logically and in a comprehensive manner to evaluate the entire picture. Any reasonable review of the ample competition and diversity that characterize the video marketplace today would leave the Commission no choice but to conclude that the Cap should be eliminated altogether. At the very least, the FCC should find that it is obligated to substantially increase the level well above the current 39% figure. The growth of video choices, both more traditional and those fostered by the digital, online and mobile revolutions, obviate any rational basis for a national limitation on station ownership. Certainly no unique limitation on broadcast station ownership could survive review in this era of competition and diversity when no other medium of communication is subject to a national ownership restriction.

⁶² Tom Wheeler, Commissioner, FCC, Prepared Remarks at The Ohio State University (Dec. 2, 2013), available at <http://www.fcc.gov/document/remarks-fcc-chairman-tom-wheeler-ohio-state-university> (last visited Dec.10, 2013).

⁶³ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6402 *et seq.*, 125 Stat. 224 (2012); *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Docket No. 12-268, Notice of Proposed Rulemaking (rel. Oct. 2, 2012).

C. Should the Commission Find That Changes in Digital Signal Propagation Characteristics Make UHF Stations Superior, the Only Rational Response Would be to Adopt a VHF Discount

The UHF discount originally was predicated on the notion that the delivery of television signals was more difficult in the UHF band because the strength of UHF signals decreased more rapidly with distance in comparison to the signals of stations broadcasting in the VHF band.⁶⁴ The discount reflected the smaller audience reach available to UHF stations. Since the DTV transition, the Commission has determined that UHF stations no longer suffer from inferior signal characteristics.⁶⁵

At the same time, however, VHF stations now have signal attributes that make them less desirable. These include the need for larger antennas in the VHF band and an increased susceptibility to interference. Consumers, especially those using indoor antennas, find it much more difficult to receive digital VHF signals over-the-air. The result is that VHF stations today suffer from the same diminished audience reach that once afflicted the UHF band. Thus, the FCC has recognized that the “disparity” between UHF and VHF signals has been reversed.⁶⁶

To the extent that the Commission justifies elimination of the UHF discount on the technical characteristics of the UHF band, it would be arbitrary and capricious to ignore that those same characteristics now make VHF stations inferior. Accordingly, if it does not get rid of the Cap altogether, the FCC at a minimum should adopt a 50% VHF discount.

⁶⁴ See Notice at ¶ 1.

⁶⁵ See *id.*

⁶⁶ See *id.* at 17.

Incidentally, adoption of a VHF discount also could facilitate the Commission's goals as part of the broadcast spectrum incentive auction proceeding.⁶⁷ A VHF discount might encourage UHF station owners to move to the VHF band in connection with the auction, which would allow the owners to continue to avail themselves of a reduction in their Cap counts while enabling the Commission to repurpose more UHF spectrum for auction.

IV. AT THE VERY LEAST, FUNDAMENTAL FAIRNESS AND THE ADMINISTRATIVE PROCEDURE ACT DICTATE THAT THE FCC NOT PRE-JUDGE THE OUTCOME OF THIS PROCEEDING BY SUBJECTING INDUSTRY TO THE STRICTURES OF A PROSPECTIVE RULE BEFORE IT HAS BEEN ADOPTED

The *Notice* indicates that the Commission tentatively has decided to grandfather existing station ownership that would not comply with any new Cap level only if the ownership was in place or the subject of an FCC assignment or transfer application as of September 26, 2013.⁶⁸ The *Notice* is silent with regard to how the Commission plans to process applications for transactions that may be filed between now and the date of any further action in this proceeding. The implication of the FCC's tentative conclusion, however, is that newly proposed transactions simply will not be processed at all or, at best, may be processed subject to onerous compliance conditions. Neither of these results would be fair, and neither could be harmonized with broadcast owners' due process rights. Indeed, refusing to act on applications while the *Notice* is pending would for all practical purposes convert a mere rulemaking proposal into the equivalent of a final rule. Likewise, imposing on applications an onerous condition, such as mandatory divestiture of stations, would essentially treat prospective transactions as if a proposed new rule already has gone into effect.

⁶⁷ See *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Docket No. 12-268.

⁶⁸ *Notice* at ¶ 20.

A. If the FCC Fails to Process Transactions During the Pendency of the Rulemaking, It Would Unlawfully Force Licensees to Conform Their Behavior Before Any Rule Change Has Occurred

Quite clearly, the *Notice* is nothing more than a Commission *proposal* to change its rules. Unless and until any change actually is adopted, the Cap by law continues to be a calculation of “the total number of television households in the [DMA] in which the relevant stations are located divided by the total national television households as measured by DMA data at the time For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.”⁶⁹ Any contrary interpretation or approach would, as Commissioner Pai has explained, “effectively tell[] the private marketplace to behave as if the UHF discount has already been eliminated, treating the rest of the rulemaking process like an empty formality.”⁷⁰

A rulemaking process cannot, however, legally be an “empty formality.” Rather, the Commission is obligated to adopt new rules only after providing notice and an opportunity for comment, and then giving due consideration to the record developed in response. An FCC refusal to treat broadcast transaction applications under a “business as usual” approach during the pendency of this proceeding would deprive broadcast owners and would-be investors of the right to due process under the law. It is axiomatic that the Administrative Procedure Act “requires agencies to provide notice and an opportunity to comment on proposed rules.”⁷¹ The D.C. Circuit has made clear that this requirement obliges agencies to “provide a *meaningful opportunity* for comments, which means that the agency’s mind must be open to considering

⁶⁹ 47 C.F.R. § 73.3555(e)(2)(i).

⁷⁰ *See Notice*, Dissenting Statement of Commissioner Pai.

⁷¹ *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 467 (D.C. Cir. 1998) (citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988)).

them.”⁷² Moreover, decision-makers “violate the Due Process Clause . . . when they act with an ‘unalterably closed mind’ and are ‘unwilling or unable’ to rationally consider arguments.”⁷³

Given that the UHF discount will remain the law of the land unless there is an affirmative vote to change it, the Commission cannot lawfully apply undefined and unadopted rules to transactions that may be proposed while the *Notice* is pending. Indeed, the parameters of any final rule are uncertain at best – an uncertainty only underscored by the fact that the *Notice* proposes consideration of a VHF discount that may or may not be adopted. If the Commission does not yet know what the final rules of the road will be, it cannot logically begin to apply indeterminate obligations on licensees. Otherwise, the agency would forsake its obligation to make up its mind only *after* receiving and reviewing comments and the record evidence.

In addition, a failure to process applications in the ordinary course would constitute a regulatory taking. The law makes clear that if agency action would cause a significant economic impact and would interfere with distinct investment-backed expectations, and if the action is extraordinary, that action would constitute a “regulatory taking” under the Fifth Amendment.⁷⁴ There can be no question that elimination of the UHF discount would have a significant economic impact, throwing into turmoil the business and strategic planning of a wide array of broadcast station owners and prospective investors. Departure from the normal processing of applications in the coming months would accelerate this economic disruption and directly

⁷² *Id.* at 468 (emphasis supplied).

⁷³ *Air Transp. Ass’n of Am., Inc. v. Nat’l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (quoting *Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979)).

⁷⁴ *In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235, ¶ 56 (citing *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25 (1986)).

interfere with investment-backed expectations. For example, an entity or investor that has expended money negotiating a purchase or sale transaction, or to obtain an option in anticipation of a transaction, may now find itself unable to go forward. Beyond causing immediate economic damage (i.e., loss of money paid for an option or down payment, or a requirement to pay a break-up fee), an FCC refusal to consider applications under current law also would destroy the long-term investment opportunity represented by the foiled transaction. Equally significant, it would be extraordinary for an agency to force regulated entities to conform their behavior based on no more than a proposed rule.

In short, the *Notice* does not represent the considered judgment of the Commission after an opportunity to assess and consider the views of industry or members of the public. Just the opposite, the *Notice* is no more than a decision that the UHF discount warrants further examination. If the FCC imposes the draconian sentence of regulatory limbo before it has even had the chance to make a determination of the proper verdict, the result would be the essence of unfair, not to mention arbitrary and capricious, agency action.

B. Refusing to Act on Applications Would Send a Signal to the Investment Community That Bolsters the Perception That Broadcasting Is a Disfavored Participant In the Modern Media Marketplace

Wholly apart from the legal ramifications, an FCC decision to confound the transaction markets would engender the type of regulatory uncertainty that yields extremely harmful chilling effects on investment, leading to economic retrenchment and, potentially, job losses.

Chairman Wheeler's first blog post upon being sworn in at the Commission pointed to promoting economic growth as one of the FCC's key responsibilities.⁷⁵ In an economy still

⁷⁵ See Tom Wheeler, Commissioner, FCC, *Opening Day at the FCC: Perspectives, Challenges, and Opportunities*, Official FCC Blog (Nov. 5, 2013), <http://www.fcc.gov/blog/opening-day-fcc-perspectives-challenges-and-opportunities> (last visited Dec. 10, 2013).

recovering from years of recession, the Commission is wise to focus on investment and job creation as potential drivers of economic growth. It should not now precipitate an environment of uncertainty by signaling to investors that broadcast transactions may be placed indefinitely on hold merely because of a *proposal* to change a rule. Yet at precisely the time that the capital markets are enabling committed businesses to consider reinvesting billions of dollars in the broadcast industry, the FCC would be throwing up a massive road block and effectively telling investors to direct their money elsewhere.

All of this would be to the detriment of consumers and broadcasters. Broadcasters continue day in and day out to provide exemplary news, information and emergency service to their communities, not to mention world-class entertainment and sports programs. At the same time, though, broadcast stations have never faced competition from more sources. Between pay television networks and the Internet, these competitors have grown not only more plentiful, but also more formidable. More and more content distributors are competing with broadcasters for access to top-notch content (including live sports rights) as well as top-notch content creators (such as writing, directing and acting talent), leading to a veritable explosion in new viewing options for American households. And yet, no other industry competitor – be it video distributors, cable programming networks, online video programmers, or whatever new entrant may rise up next – is subject to an ownership limitation similar to the Cap. If the Commission continues to shackle broadcasters with ownership restrictions unique among all media, it will reinforce the perception that the FCC views broadcasting as a less significant participant in the media marketplace – all the while sidelining jobs and investment in a still-fragile economy.

V. CONCLUSION

For all of the reasons set forth herein, Fox urges the Commission to abandon the approach contemplated by the *Notice*. Through the Appropriations Act, Congress has divested

the FCC of power to modify the Cap. And because the level of the Cap is inextricably intertwined with the UHF discount, the same law precludes the FCC from eliminating the discount. If the Commission nonetheless proceeds to consider changes at all, it should turn its attention to a more comprehensive analysis of whether a national limitation on broadcast station ownership can possibly withstand scrutiny in light of modern marketplace realities. Fox respectfully submits that it cannot. Maintenance of the Cap serves only to deprive those most willing to invest in broadcasting of the opportunity to participate as they see fit in an incredibly competitive and diverse video market.

Regardless of the ultimate decision on the merits, Fox also urges the Commission not to pre-judge the outcome of this proceeding by refusing to process broadcast transaction applications in accordance with current law. Unless and until the FCC votes to change it, the UHF discount remains the law of the land. Fundamental fairness and due process dictate that the Commission should not use a mere proposal to change a rule to force regulated entities to conform their behavior.

Respectfully submitted,

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December 16, 2013