

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

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the	)	MB Docket No. 17-318
Commission's Rules, National Television Multiple	)	
Ownership Rule	)	

**NOTICE OF PROPOSED RULEMAKING**

**Adopted: December 14, 2017**

**Released: December 18, 2017**

**Comment Date: [30 days after date of publication in the Federal Register]**

**Reply Comment Date: [60 days after date of publication in the Federal Register]**

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioners Clyburn and Rosenworcel dissenting and issuing separate statements.

**I. INTRODUCTION**

1. This Notice of Proposed Rulemaking (*NPRM*) seeks comment on the Commission's national television audience reach cap, including the discount afforded to UHF stations. The national television audience reach cap limits entities from owning or controlling television stations that, in the aggregate, reach more than 39 percent of the television households in the country. Earlier this year, the Commission reinstated a component of the rule, the so-called UHF discount, which provides a 50 percent discount to UHF stations for purposes of calculating compliance with the 39 percent audience reach cap. In reinstating the discount, the Commission found that the national audience reach cap and UHF discount are inextricably linked.<sup>1</sup> Thus the earlier decision to eliminate the discount, effectively tightening the cap without determining whether such tightening was in the public interest, was arbitrary and capricious and unwise from a public policy perspective.<sup>2</sup> This *NPRM* undertakes a broader assessment of the national audience reach cap as a whole, including the UHF discount, in light of increased video programming options for consumers, technological developments, and other factors. We seek comment below on the Commission's authority to modify or eliminate the national cap, including the UHF discount. We also seek comment on whether to modify or eliminate the current 39 percent national audience reach cap and how parties should determine compliance with the cap, including whether we should eliminate the UHF discount.

**II. BACKGROUND**

2. The national television audience reach cap and the related UHF discount are an outgrowth of television ownership restrictions dating back to the earliest days of broadcast television. The Commission first imposed national ownership restrictions for television stations in 1941 by limiting the number of stations that could be commonly owned, operated, or controlled to three.<sup>3</sup> This limit was

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<sup>1</sup> *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Order on Reconsideration, 32 FCC Rcd 3390, 3390-91, 3395, paras. 1, 13 (2017) (*UHF Discount Order on Reconsideration*), *pet. for rev. pending sub nom. Free Press, et al. v. FCC*, D.C. Cir. No. 17-1129 (filed May 12, 2017).

<sup>2</sup> *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3390-91, 3395, paras. 1, 13.

<sup>3</sup> *Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941).

eventually broadened to seven stations in 1954<sup>4</sup> and eventually to 12 stations in 1984.<sup>5</sup> In 1985, on reconsideration of its decision to relax the limit from seven to twelve stations, the Commission found that relaxation would serve the public interest and would not contravene the Commission's diversity and competition goals but nonetheless concluded that an incremental approach in the form of relaxation was preferable to outright elimination of the numerical limit.<sup>6</sup> The Commission also determined that a 25 percent nationwide audience reach cap, in addition to the twelve station limit, would help prevent a potentially disruptive industry restructuring.<sup>7</sup> Along with the creation of the 25 percent national audience reach cap in 1985, the Commission also adopted a 50 percent UHF discount to reflect the fact that, in the analog television broadcasting era, UHF signals reached a smaller audience in comparison with VHF signals.<sup>8</sup> The UHF discount provides that, for purposes of determining compliance with the national audience reach cap, stations broadcasting in the VHF spectrum are attributed with all television households in their Designated Market Areas (DMAs), while UHF stations are attributed with only 50 percent of the households in their DMAs.<sup>9</sup>

3. In the Telecommunications Act of 1996 (1996 Act), Congress directed the Commission to amend its rules to increase the national audience reach cap from 25 percent to 35 percent and eliminate the restriction on owning more than 12 broadcast television stations nationwide.<sup>10</sup> The Commission reaffirmed the 35 percent cap in its *1998 Biennial Review Order*,<sup>11</sup> but the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) later remanded that decision, finding that the Commission had failed to demonstrate that the 35 percent national audience reach cap advanced localism, diversity, or competition.<sup>12</sup> In the *2002 Biennial Review Order*, the Commission found that while a national

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<sup>4</sup> *Amendment of § 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations*, 43 FCC 2797, 2798, para. 3 (1954).

<sup>5</sup> *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, GN Docket No. 83-1009, Report and Order, 100 FCC 2d 17, 54-56, paras. 108-12 (1984) (*1984 Multiple Ownership Order*), recon. granted in part, Memorandum Opinion and Order, 100 FCC 2d 74 (1985) (*1985 UHF Discount Order*), recon. dismissed, 5 FCC Rcd 5338 (1990).

<sup>6</sup> *1985 UHF Discount Order*, 100 FCC 2d at 88, 90, 97, paras. 30, 38, 50.

<sup>7</sup> *Id.* at 90, 97, paras. 36-37, 52 (explaining that a numerical cap would prevent the acquisition of a large number of stations in small markets, while an audience reach cap would temper the ability of a single group owner to increase its audience base substantially by acquiring stations in the largest markets). A station's national audience reach was calculated by attributing to the owner the percentage of total households found in each market in which the owner held a commercial television station. *Id.* at 102, n.52.

<sup>8</sup> *Id.* at 88-94, paras. 33-44 (finding that the "inherent physical limitations" of analog UHF broadcasting should be reflected in the national television ownership rules). On June 13, 2009, the Commission completed the transition from analog to digital television broadcasting for full-power stations, and the Commission's experience since completion of the transition confirms that UHF channels are technically equal, if not superior, to VHF channels for the transmission of digital television signals. See *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3393, para. 8.

<sup>9</sup> 47 CFR § 73.3555(e)(2)(i).

<sup>10</sup> Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996) (1996 Act); see also *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, Order, 11 FCC Rcd 12374, 12374-75, paras. 2-3 (1996).

<sup>11</sup> *1998 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, Biennial Review Report, 15 FCC Rcd 11058, 11072-75, paras. 25-30 (2000) (*1998 Biennial Review Order*).

<sup>12</sup> See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040-49, modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002).

ownership cap was no longer needed to protect diversity and competition, the cap remained necessary to protect localism.<sup>13</sup> The Commission further concluded that raising the cap from 35 percent to 45 percent would strike an appropriate balance between the broadcast networks and the local affiliates by permitting some growth for the owners of the Big Four networks (i.e., ABC, CBS, Fox, and NBC) and allowing them to achieve greater economies of scale, while at the same time ensuring that the networks could not reach a larger national audience than their affiliates collectively.<sup>14</sup>

4. Following adoption of the *2002 Biennial Review Order*, and while an appeal of that order was pending, Congress partially rolled back the cap increase by including a provision in the 2004 Consolidated Appropriations Act (CAA) directing the Commission “to modify its rules to set the national cap at 39 percent of national television households.”<sup>15</sup> The CAA further amended Section 202(h) of the 1996 Act to require a quadrennial review of the Commission’s broadcast ownership rules, rather than the previously mandated biennial review. In doing so, however, Congress excluded consideration of “any rules relating to the 39 percent national audience reach limitation” from the quadrennial review requirement.<sup>16</sup> Prior to the enactment of the CAA, several parties had appealed the Commission’s *2002 Biennial Review Order* to the U.S. Court of Appeals for the Third Circuit (Third Circuit). In June 2004, the Third Circuit found that the challenges to the Commission’s actions with respect to the national audience reach cap and the UHF discount were moot as a result of Congress’s action.<sup>17</sup>

5. In August 2016, the Commission eliminated the UHF discount, finding that UHF stations were no longer technically inferior to VHF stations following the digital television transition and that the competitive disparity between UHF and VHF stations had disappeared.<sup>18</sup> Then-Commissioner Pai and Commissioner O’Rielly dissented from this decision. Then-Commissioner Pai noted, “[i]t is undeniable that eliminating the UHF discount has the effect of expanding the scope of the national cap rule. Companies . . . that are currently in compliance with the national cap ownership rule will be above the cap once the UHF discount is terminated. Yet, the Commission has refused to review whether the current national cap ownership rule is sound or whether there is a need to make it more stringent, which is precisely what [the *UHF Discount Elimination Order*] does.”<sup>19</sup> In April 2017, in response to a Petition for Reconsideration filed by ION Media Networks, Inc. (ION) and Trinity Christian Center of Santa Ana,

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<sup>13</sup> *2002 Biennial Review Order – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13815, 13842, paras. 501, 578 (2003) (*2002 Biennial Review Order*).

<sup>14</sup> *Id.* at 13843-44, paras. 581-83. In both the *1998* and *2002 Biennial Review Orders*, the Commission retained the UHF discount.

<sup>15</sup> Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (CAA). The CAA amended section 202(c)(1)(B) of the 1996 Act “by striking ‘35 percent’ and inserting ‘39 percent,’” but otherwise used the same language that Congress used in 1996 when it directed the Commission to change its rules to set a 35 percent national cap. *Id.* § 629(1).

<sup>16</sup> *Id.* § 629(3).

<sup>17</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (3d Cir. 2004) (*Prometheus I*).

<sup>18</sup> *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213, 10226-33, paras. 28-40 (*UHF Discount Elimination Order*).

<sup>19</sup> *Id.* at 10248 (dissenting statement of then-Commissioner Pai). Commissioner O’Rielly noted, “This item stubbornly plows ahead in a similar cart-before-the-horse scheme to tinker with a calculation methodology without any consideration of the current validity [of] the overall rule it modifies.” *Id.* at 10251 (dissenting statement of Commissioner O’Rielly).

Inc. (Trinity),<sup>20</sup> the Commission reinstated the UHF discount, finding that the Commission's elimination of the discount, effectively tightening the cap without also determining whether the cap remained in the public interest, was arbitrary and capricious and unwise from a public policy perspective.<sup>21</sup> Because the UHF discount is used to determine licensees' compliance with the national audience reach cap, the Commission concluded that the UHF discount and the cap are inextricably linked, and eliminating the discount without considering the cap itself was in error.<sup>22</sup> In reinstating the UHF discount, the Commission committed to undertake a comprehensive rulemaking proceeding to determine whether to modify or eliminate the national cap, including the UHF discount.<sup>23</sup> We now undertake that broader inquiry.

### III. DISCUSSION

6. As noted above, the Commission previously has concluded that the national audience reach cap and the UHF discount are inextricably linked and that any review of one must include a review of the other.<sup>24</sup> As an initial matter, we seek comment below on whether the Commission has the authority to modify or eliminate the national cap, including the UHF discount. To the extent commenters believe that the Commission has this authority, we seek comment on whether to modify or eliminate the current 39 percent national audience reach cap. In addition, if a cap is retained, we seek comment on how we should calculate compliance with the cap, including whether we should modify or eliminate the UHF discount. Finally, to the extent any action we adopt would cause a station owner to no longer be in compliance with the national audience reach cap, we seek comment on whether, consistent with prior Commission action, we should grandfather such ownership combinations, and if so, whether there should be any restrictions on their further transferability.

#### A. Commission Authority to Modify or Eliminate the National Cap

7. We seek comment on the Commission's authority to modify or eliminate the national cap, including authority to modify or eliminate the UHF discount. The Commission previously concluded in the *UHF Discount Elimination Order* that the Commission has authority to modify or eliminate the 39 percent national audience reach cap, including the UHF discount (although it refrained from adjusting the cap).<sup>25</sup> As discussed further below, the Commission found that it had such authority based on its broad authority to adopt—and revise or eliminate—all necessary rules under the Communications Act.<sup>26</sup> By contrast, parties opposing reinstatement of the UHF discount on reconsideration argued variously that the Commission lacked authority to modify or eliminate the national cap, the UHF discount, or both.<sup>27</sup>

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<sup>20</sup> *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Petition for Reconsideration of ION Media Networks and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (filed Nov. 23, 2016) (Petition for Reconsideration).

<sup>21</sup> *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3390-91, 3395, paras. 1, 13.

<sup>22</sup> *Id.* at 3390-91, 3394, paras. 1, 10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 3390-91, para. 1.

<sup>25</sup> *UHF Discount Elimination Order*, 31 FCC Rcd. at 10222-24, paras. 21-24.

<sup>26</sup> *Id.* at 10223, para. 21.

<sup>27</sup> See e.g., *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Reply Comments of Univision Communications, Inc. in Support of Petition for Reconsideration at 5, 7 (filed Jan. 23, 2017) (Univision Reply Comments); Letter from Andrew Schwartzman, Institute of Public Representation (IPR) to Marlene H. Dortch, Secretary, FCC at 1 (filed April 11, 2017); Letter from Andrew Schwartzman, IPR to Marlene H. Dortch, Secretary, FCC at 2-3 (filed April 13, 2017). In the *UHF Discount Order on Reconsideration*, the Commission rejected such challenges because they were raised after the

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8. In reaching its earlier conclusion that the Commission has authority to modify or eliminate this rule, the Commission rejected arguments that, when Congress established the 39 percent national audience reach cap, it precluded the Commission from any adjustment of the cap or the discount.<sup>28</sup> The Commission reasoned that the 2004 CAA “simply directed the Commission to revise its rules to reflect a 39 percent national audience reach cap and removed the requirement to review the national ownership cap from the Commission’s quadrennial review requirement.”<sup>29</sup> The Commission concluded that the CAA “did not impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule.”<sup>30</sup> In addition, although the Third Circuit ultimately concluded in its review of the Commission’s 2002 *Biennial Review Order* that questions related to the UHF discount were moot as a result of the CAA, it “did not foreclose the Commission’s consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h).”<sup>31</sup> Further, Congress elected to use the same language in the 2004 CAA, instructing the Commission to “modify its rules,”<sup>32</sup> as it did when it instructed the Commission to change the cap from 25 to 35 percent as part of the 1996 Act.<sup>33</sup> Both the D.C. Circuit (in finding it was arbitrary and capricious for the Commission to *retain* that cap as part of the 1998 biennial review) and the Commission itself (in subsequently raising the cap from 35 to 45 percent) interpreted the identical language in the 1996 Act as preserving the Commission’s authority to modify the cap in the future.<sup>34</sup>

9. The Commission further based its finding of authority to modify the cap and discount on its broad authority to adopt rules necessary to carry out the provisions of the Communications Act, and its authority to revisit its rules and revise or eliminate them as appropriate.<sup>35</sup> Given continued questions regarding the Commission’s authority in this area, we seek further comment on the Commission’s prior conclusion that it has authority to modify or eliminate the national audience reach cap and the UHF discount. For example, was Congress’s exclusion of the national audience reach cap from the quadrennial review provision merely meant to relieve the Commission of the *obligation* to reconsider the cap every four years (as the Third Circuit concluded), or was it designed to withhold the Commission’s authority to change the cap as set by Congress? Did Congress’s decision to instruct the Commission to “modify its

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pleading cycle had closed, were unsupported, were inconsistent with prior submissions by the same parties in the same proceeding, and failed to acknowledge that, if the Commission was wrong about its authority to modify the cap, it would follow that the Commission lacked authority to eliminate the UHF discount in the first place, and the order eliminating the discount would need to be vacated for that reason. *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3398, n.60.

<sup>28</sup> See e.g., *UHF Discount Elimination Order*, 31 FCC Rcd at 10251 (dissenting statement of Commissioner O’Rielly).

<sup>29</sup> *Id.* at 10222, para. 21 (footnotes omitted).

<sup>30</sup> *Id.* See also *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Notice of Proposed Rulemaking, 28 FCC Rcd 14324, 14329, para. 13 (*UHF Discount Elimination NPRM*).

<sup>31</sup> *UHF Discount Elimination Order*, 31 FCC Rcd at 10224, para. 24, citing *Prometheus I*, 373 F.3d at 397. The Commission noted that the court further concluded that, barring Congressional intervention, “the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of [Section] 202(h).” *UHF Discount Elimination Order*, 31 FCC Rcd at 10224, n.89.

<sup>32</sup> See CAA, § 629.

<sup>33</sup> See 1996 Act, § 202(c)(1)(B).

<sup>34</sup> See *Fox Television Stations, Inc. v. FCC*, 280 F.3d at 1042-43; *2002 Biennial Review Order*, 18 FCC Rcd at 13818, para. 507.

<sup>35</sup> *UHF Discount Elimination Order*, 31 FCC Rcd at 10223, para. 24, citing 47 U.S.C. §§ 154(i), 303(r). See also *UHF Discount Elimination NPRM*, 28 FCC Rcd. at 14239-30, para. 14.

rules” in 1996 and 2004, rather than simply mandate a specific national audience reach cap, preserve the Commission’s traditional statutory authority to alter or eliminate the cap in a future rulemaking?

### **B. Modification or Elimination of the National Audience Reach Cap**

10. If we determine that we have authority to modify or eliminate the national audience reach cap, we seek comment on the effects of marketplace changes on the previous justifications for the cap, as well as comment on the policy goals that should guide our determination. We seek comment on whether or not to retain the cap in light of the current marketplace. If the cap should be maintained, we further seek comment on the appropriate level at which the cap should be set, taking into account the current media landscape and the relevant policy goals. We next seek comment on how to calculate compliance with the cap, including whether to modify or eliminate the UHF discount, otherwise adjust our methodology for determining national audience reach, or adopt a limit based on factors other than, or in addition to, audience reach. We seek comment on any effect such a change would have on the continued operation or effectiveness of the national cap. We also seek comment on the costs and benefits associated with retaining, modifying, or eliminating the cap, including any changes to the rules governing compliance with the cap, and any effects on small entities. Lastly, we seek comment on the interplay between the national audience reach cap and other recent Commission actions affecting television broadcasters.

11. As an initial matter, we seek comment on whether there is still a need for a national cap that prevents ownership of stations that collectively reach more than a certain percentage of the television households in the country. Does such a cap serve the public interest?<sup>36</sup> We note at the outset that the video marketplace has changed considerably since the Commission last considered the national audience reach cap in the *2002 Biennial Review Order*, and since Congress instructed the Commission to set a 39 percent cap in 2004. The Commission’s most recent annual Video Competition Report describes, among other developments, the growth of video programming options available to consumers, including online alternatives to traditional video distribution,<sup>37</sup> reverse compensation fees paid by affiliates to broadcast networks,<sup>38</sup> common ownership of broadcast and cable networks,<sup>39</sup> consolidation among both MVPDs<sup>40</sup> and non-network owned station groups,<sup>41</sup> and continuing MVPD video subscriber losses.<sup>42</sup> Numerous commenters in the earlier UHF discount proceeding cited changes in the video marketplace over the past decade as evidence that prior conclusions about the national cap are no longer sound, or at the very least, need to be revisited.<sup>43</sup> The Commission concluded in the *UHF Order on Reconsideration* that the failure to consider these changes compounded the error of eliminating the UHF discount.<sup>44</sup>

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<sup>36</sup> For example, Sinclair has argued that the cap should be abandoned altogether. *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Sinclair Broadcast Group, Inc., Reply to Oppositions to, and in Support of Petition for Reconsideration of ION Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc. at 2 (filed Jan. 27, 2017) (Sinclair Petition for Reconsideration Reply). *See also* Sinclair Broadcast Group Inc. Comments at 8 (filed Dec. 16, 2013) (Sinclair UHF Discount NPRM Comments).

<sup>37</sup> *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighteenth Report, MB Docket No. 16-247, 32 FCC Rcd 568, 573-77, 621-23, 631-32, 640-42, paras. 17-21, 132, 153-55, 178-81 (2017) (*18<sup>th</sup> Video Competition Report*).

<sup>38</sup> *See id.* at 618, para. 124.

<sup>39</sup> *See id.* at 601-02, paras. 82-84.

<sup>40</sup> *See id.* at 582-84, paras. 34-39.

<sup>41</sup> *See id.* at 608, para. 100.

<sup>42</sup> *See id.* at 595-96, para. 68.

<sup>43</sup> *See e.g.*, Petition for Reconsideration at 3-4; Sinclair Petition for Reconsideration Reply at 2; Univision Reply Comments at 5-6; *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple*

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12. Accordingly, we now seek comment on how these marketplace changes, as well as any other changes not previously mentioned, should be considered in the context of the possible modification or elimination of the national audience reach cap. For instance, the Commission previously found in its *2002 Biennial Review Order* that a national audience reach cap set at some level is necessary in the public interest to promote localism.<sup>45</sup> Specifically, the Commission found that a percentage cap maintains the appropriate balance of power between broadcast networks and their local affiliate groups, in part by preventing the excessive accumulation of audience reach by network-owned groups, which are more likely to hold stations in multiple geographic markets with large populations.<sup>46</sup> Therefore, the Commission reasoned, a national audience reach cap preserves the leverage necessary for local affiliates to collectively negotiate to influence network programming decisions and to exercise their rights to preempt the airing of network programming in favor of programming the affiliates feel is better suited to local community needs.<sup>47</sup> In setting a 45 percent cap, the Commission found that a national audience reach cap set at that level would ensure that network-owned station groups could not achieve a level of direct audience reach that exceeds that of their local affiliates, while at the same time allowing for limited growth by each of the Big Four network owners, thereby allowing them to achieve better economies of scale and scope, and to remain competitive in the marketplace.<sup>48</sup>

13. We now seek comment on whether the existing cap is still necessary to promote localism. Do the Commission's previously articulated justifications—specifically, those related to collective influence and preemption by local affiliates—still hold true? Has localism increased, decreased, or remained roughly the same over time? Are there recent examples where local affiliates have influenced network programming to better serve local needs? In addition, how do recent affiliate preemption rates compare to those the Commission cited in the *2002 Biennial Review Order*?<sup>49</sup> Are there other metrics by which we can assess the effect of the national audience reach cap on localism? Moreover, even if preserving a national audience reach cap at some level would promote localism, would modifying or eliminating the cap nevertheless have offsetting benefits (for example, in promoting competition or diversity)?

14. Have other changes in the marketplace affected the network/affiliate relationship, such that the Commission would need to adjust assumptions made in previous reviews of the cap? For instance, how has the growth of independent station groups over the last two decades changed the dynamic between network-owned station groups and their affiliates? We note that the Commission's interest in preserving a national/local balance between networks and their local affiliates is predicated upon the Commission's prior conclusion that networks and their affiliates have different economic

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*Ownership Rule*, MB Docket No. 13-236, Nexstar Broadcasting Inc., Comments in Support of Petition for Reconsideration at 5 (filed Jan. 10, 2017).

<sup>44</sup> *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3396, para. 15. See also *UHF Discount Elimination NPRM*, 28 FCC Rcd. at 14344 (dissenting statement of then-Commissioner Pai).

<sup>45</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13815, 13842, paras. 501, 578.

<sup>46</sup> See *id.* at 13842-43, paras. 578-81; see also *1998 Biennial Review Order*, 15 FCC Rcd at 11074-75, para. 30; *1985 UHF Discount Order*, 100 FCC 2d at 87-92, paras. 30-41.

<sup>47</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13828-45, paras. 538-84; see also 47 CFR § 73.658(e). We note that in conducting the 2002 Biennial Review, the Commission compared network and affiliate preemption rates to support its decision to maintain a national cap. *2002 Biennial Review Order*, 18 FCC Rcd at 13833, para. 548. Further, while the Commission has found that the cap safeguards a local affiliate's ability to provide input on network programming decisions, the Commission has not found the cap necessary to encourage stations to air local news and public affairs programming. *Id.* at 18 FCC Rcd at 13841-42, para. 575.

<sup>48</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13844, para. 583.

<sup>49</sup> See *id.* at 13833, 13834-35, paras. 548, 554-55.

incentives when it comes to serving local interests. The Commission previously has found that broadcast networks primarily seek to air programming that will appeal to large national audiences, while local affiliates are more attuned to the needs of their local communities.<sup>50</sup> We seek comment on this prior conclusion, including whether the conclusion that local affiliates are more attuned to local needs is still valid today. To the extent it retains some validity, does it continue to apply equally to all local affiliates? For instance, does the size of the station group owner affect this conclusion?<sup>51</sup>

15. We also seek comment on whether there are other justifications for a national audience reach cap besides localism that we should consider. In the *2002 Biennial Review Order*, for example, the Commission noted in its competition discussion that, “[t]he current national ownership cap appears to encourage innovation in broadcast television by preserving a number of separately-owned station groups” and then concluded that “having a variety of owners has led to innovative programming formats and technical advances. . . .”<sup>52</sup> Specifically, the Commission pointed to new programming formats developed by non-network owned affiliates, such as all-news channels and local news magazines, and the potential for experimentation in the use of digital spectrum as part of the digital television transition.<sup>53</sup> We seek comment on whether these prior conclusions have proven true over time and whether they remain true today. Does the variety of owners on a national level produced by the national audience reach cap continue to promote innovation in the marketplace? Are there ways in which the national audience reach cap hinders innovation?

16. The Commission previously has found that a national television ownership restriction is not necessary to promote the goals of competition or diversity.<sup>54</sup> The Commission first reached this conclusion in 1984 when, regarding competition, it recognized the relevance of advertising to measuring competition in national and local television markets, and concluded that, for the local spot advertising market, the local television ownership rule rather than a national ownership rule would best address any risk of competitive harm.<sup>55</sup> Regarding diversity, the Commission concluded that, “national broadcast ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public.”<sup>56</sup> The Commission nonetheless set a national audience reach cap to avoid any rapid restructuring of the industry that might be caused by its decision the previous year to raise the numerical cap from seven to twelve stations.<sup>57</sup> Are these previous

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<sup>50</sup> *Id.* at 13833, 13842, paras. 547, 578. In this regard, we note that broadcast licensees are required to serve the needs and interests of their communities. *Id.* at 13642, para. 74.

<sup>51</sup> *See infra* para. 18 (seeking comment on whether the national audience reach cap should apply equally to all types of station owners).

<sup>52</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13825-26, 13842-43, paras. 531, 579.

<sup>53</sup> *Id.* at 13825-26, paras. 529-32.

<sup>54</sup> *See id.* at 13818-19, 13842, paras. 508-509, 578; *1984 Multiple Ownership Order*, 100 FCC 2d at 27, 39-40, paras. 31-32, 67-71. Specifically, the Commission concluded that the national television ownership rule was not necessary to maintain competition in the national television advertising market, the national program acquisition market, or the local video delivery market. In addition, the Commission has concluded that the local community is the relevant market for promoting viewpoint diversity, and that the rule, which fosters a larger number of station owners on a national scale, is not needed to serve that goal. *2002 Biennial Review Order* at 13827, para 535; *1984 Multiple Ownership Order*, 100 FCC 2d at 27, paras. 31-32.

<sup>55</sup> *1984 Multiple Ownership Order*, 100 FCC 2d at 41, paras. 71-73.

<sup>56</sup> *Id.* at 37, para. 60. Regarding the potential impact on individual consumers, the Commission has concluded previously: “For an individual member of the audience, the richness of ideas to which he is exposed turns on how many diverse views are available within his local broadcast market. For that individual, whether or not some of those views are also disseminated in other local broadcast markets does not affect the diversity to which he is exposed.” *Id.*

<sup>57</sup> *1985 UHF Discount Order*, 100 FCC 2d at 90, 97, paras. 36-37, 52; *see also supra* para. 2.

conclusions still valid? Has the Commission previously identified any other goals supporting national limits in the Commission's prior orders that warrant consideration here?

17. In addition, we seek comment on whether changes in the marketplace warrant a fresh look at the rule's impact on competition or diversity at either the local or national level. How have marketplace changes affected competition in the local broadcast television market or any other relevant markets?<sup>58</sup> We note that other video distributors, including direct broadcast satellite providers and online video programmers, are not restricted by ownership limits. Does the cap, or the current level of the cap, have any negative impact on competition or diversity, and how might possible modification of the cap affect these goals? Have marketplace changes affected the relationships and business dealings between local broadcasters and other video distributors in ways that would justify retention, modification, or elimination of the national audience reach cap? We note that the Commission currently has rules in place related to the distribution of video programming and carriage negotiations between broadcast stations and MVPDs (e.g., local exclusivity and retransmission consent negotiation rules).<sup>59</sup> Does the existence of these rules in any way inform our consideration of whether to retain, modify, or eliminate the cap? For example, have the rules affected the relationships and business dealings between local broadcasters and other video distributors in ways that might affect the need for and operation of any national audience reach cap? In addition, does the cap serve any competition or diversity purpose related to the production or purchase of programming (e.g., syndicated programming)?

18. If we conclude that a national audience reach cap remains in the public interest, at what level should the cap be set? Does a 39 percent cap still make sense, or should it instead be set at a different level? As noted above, the Commission has not articulated a justification for the cap in well over a decade, and the last time it did, it concluded that the cap should be raised from 35 to 45 percent.<sup>60</sup> Congress subsequently scaled back the Commission's 45 percent cap to the current 39 percent level in 2004.<sup>61</sup> Commenters urging the Commission to retain the 39 percent cap or to adjust it either upward or downward should provide a reasoned basis for any proposed line-drawing.<sup>62</sup> Moreover, we seek comment on whether the national audience reach cap should apply equally to all ownership groups (e.g., groups that are network-owned or affiliated with cable networks versus those that are not).<sup>63</sup> Is audience reach the proper measurement to use for the cap (e.g., as opposed to some other measurement of a station group's size or influence, such as actual viewership, market share, or amount of advertising revenue)?<sup>64</sup> Should

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<sup>58</sup> See, e.g., *Application of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc. to Nexstar Media Group, Inc.*, MB Docket No. 16-57, Memorandum Opinion and Order, 32 FCC Rcd 183, 196-97, para. 35 (MB 2017) (noting the "changing nature of the broadcast marketplace" and leaving open the "possibility, in the future, of looking at rising retransmission fees, blackouts, and other related issues in a context broader than local markets").

<sup>59</sup> See 47 CFR §§ 76.64-65, 92, 122.

<sup>60</sup> See *2002 Biennial Review Order*, 18 FCC Rcd at 13843, para. 581 (stating that, "it is evident that networks can exceed a nationwide audience reach of 35% without harming affiliates' abilities to preempt network programming").

<sup>61</sup> CAA, § 629.

<sup>62</sup> See, e.g., *2002 Biennial Review Order*, 18 FCC Rcd at 13843-44, para. 582 (noting Congress's decision to take an incremental approach by increasing the limit by ten percentage points—from 25 percent to 35 percent—in the 1996 Act).

<sup>63</sup> See *supra* para. 14 (seeking comment on whether local affiliates associated with larger station groups are any more or less likely to prioritize local interests). The Commission previously has found that the national television ownership restriction should apply to all station owners, including those that are not networks. See *2002 Biennial Review Order*, 18 FCC Rcd at 13842-43, para. 579; *1985 UHF Discount Order*, 100 FCC 2d at 87, n.36; *1984 Multiple Ownership Order*, 100 FCC 2d at 50-54, paras. 97-107.

<sup>64</sup> See, e.g., *2002 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, Notice of Proposed Rulemaking, 17 FCC Rcd 18503, 18551-52, para. 155 (2002) (noting that, in the cable context, "[a] home

(continued...)

we consider alternatives with some built-in flexibility, for instance, alternatives that might employ the use of a threshold screen that would trigger a more detailed analysis, such as an automatic presumption or a safe harbor, either in lieu of or in addition to a bright line cap? In addition, if we were to modify the national audience reach cap would it affect any barriers to entry (either positively or negatively), including entry by women, minority, or small business owners?

19. *Determining Compliance with a National Cap.* Assuming we retain a national audience reach cap at some level, we seek comment on how to calculate compliance, including possible modification or elimination of the UHF discount.<sup>65</sup> If we determine that we have authority to adjust the national cap and that a national cap remains necessary in the public interest, what, if any, changes should we make to the rules governing determination of licensees' compliance with that cap?

20. As an initial matter, we seek comment on whether to eliminate the UHF discount. Notably, no commenter in our prior proceeding presented evidence that the original technical justification for the discount is still valid, and the Commission in the *UHF Discount Order on Reconsideration* did not disturb its earlier conclusion that "the UHF discount no longer has a sound technical basis following the digital television transition."<sup>66</sup> We seek further comment on this prior Commission conclusion, as well as on the importance of any non-technical justifications for the UHF discount that remain relevant. For example, the Commission noted in the *UHF Discount Order on Reconsideration* the industry's reliance on the UHF discount to develop long-term business strategies.<sup>67</sup> Parties seeking reinstatement of the UHF discount describe how they used the UHF discount to build new networks that provide innovative, competitive programming.<sup>68</sup> We seek comment on whether eliminating the UHF discount would, on balance, serve the public interest. Similarly, is the current UHF discount causing harm to consumers in any way or are there other drawbacks to retaining it?

21. As stated above, we also seek comment on whether the UHF discount should be modified or whether it should be supplemented or replaced with some other weighting method for determining compliance with any national limit on ownership of broadcast stations.<sup>69</sup> Are there other station or market characteristics that would warrant discounting or weighting a station's audience reach when determining compliance with a national cap? We note, for example, that the Commission previously sought comment on and declined to adopt a VHF discount.<sup>70</sup> In doing so, the Commission acknowledged that UHF spectrum is now generally considered more desirable than VHF spectrum for digital television broadcasting, but found that the record lacked sufficient evidence to conclude that VHF operations are universally inferior to UHF operations or that the economic viability of VHF stations was in jeopardy to such a degree that a VHF discount was warranted.<sup>71</sup> We seek comment on these previous conclusions as

(Continued from previous page) \_\_\_\_\_

is attributed to a multi-system cable operator only if that MSO actually serves the home, not simply because it is available to that home").

<sup>65</sup> The *UHF Discount Elimination Order* concluded that consideration of the national audience reach cap was beyond the scope of the *NPRM* in that proceeding. 31 FCC Rcd at 10233, para. 40. We address that deficiency today by issuing this *NPRM*.

<sup>66</sup> *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3395, para. 14.

<sup>67</sup> *Id.* at 3396, para. 15.

<sup>68</sup> Petition for Reconsideration at 1, 4; Univision Reply Comments at 2-3.

<sup>69</sup> See, e.g., *UHF Discount Elimination NPRM*, 28 FCC Rcd at 14332-33, paras. 22-34 (seeking comment on a VHF discount). See also Sinclair Petition for Reconsideration Reply at 5 (claiming that the Commission's failure in the *UHF Discount Elimination Order* to consider the need for a VHF discount in conjunction with elimination of the UHF discount was a material error or omission).

<sup>70</sup> *UHF Discount Elimination Order*, 31 FCC Rcd at 10237-39, paras. 54-56.

<sup>71</sup> *Id.* at 10238-39, para. 56.

well as whether there are other discounts or weights we should consider as part of a national ownership rule. How, if at all, should we account for the fact that many consumers today receive local broadcast stations via an MVPD, rather than over the air, in considering any discount or weight premised on a disparity in over-the-air coverage?

22. Furthermore, we seek comment on the impact that elimination of the UHF discount would have on the operation or effectiveness of a national audience reach cap. In the *UHF Discount Order on Reconsideration*, the Commission concluded that the elimination of the UHF discount would result in an effective tightening of the national audience reach cap.<sup>72</sup> Therefore, if we eliminate the UHF discount, should we simultaneously raise the national cap, assuming we find that we have authority to do so? If so, how much should we raise it? Does the UHF discount serve the underlying purposes of the national audience reach cap, namely, the preservation of a balance of power between broadcast networks and local affiliates? How, if at all, would elimination of the discount alter that network/affiliate dynamic? Does the UHF discount benefit certain types of station group owners more than others (e.g., non-Big Four networks versus Big Four networks), and how would its elimination affect such owners? Finally, we seek comment on how eliminating the UHF discount would affect not only the local television market, but the broader video marketplace as a whole.

23. *Benefit-Cost Analysis.* In addition, we seek comment on how to compare the benefits and costs associated with modifying or eliminating the national cap, including the UHF discount. We ask commenters supporting modification or elimination of the current 39 percent audience reach cap or the UHF discount to explain the anticipated economic impact of any proposed action and, where possible, to quantify benefits and costs of proposed actions and alternatives. Does the current national audience reach cap create benefits or costs for any segment of consumers? Does the cap create benefits or costs for any segment of the industry that should be counted as social benefits or costs rather than transfers from one segment of the industry to another? How does the cap create these benefits and costs, and what evidence supports this explanation? How can the value of these benefits and costs be measured for parties receiving them? What factors create uncertainty about the existence or size of these benefits and costs, and how should the Commission's economic analysis take these uncertainties into account?

24. How would elimination of the national audience reach cap alter these benefits and costs? What are the comparative benefits and costs of modifying the cap upward rather than eliminating it entirely? For instance, would allowing station groups to exceed the current 39 percent cap lead to any consumer benefits, such as increased competition, choice, innovation, or investment in programming? What amount of additional scale above the current ownership limit would be required to realize such benefits? What are the comparative benefits and costs of lowering the cap? We ask commenters to support their claims about benefits and costs with relevant economic theory and evidence, including empirical analysis and data.

25. Comparison of benefits and costs allows the Commission to identify the most economically efficient policy—that is, the policy that maximizes the value of resources from the perspective of consumers. Are there public interest reasons that the Commission should seek to preserve a level of localism or seek other policy outcomes that do not maximize economic efficiency or consumer welfare?<sup>73</sup> If so, what evidence justifies the elevation of these other public interest considerations over consumer welfare? What limiting principle should the Commission employ to determine when these alternative public interest considerations are satisfied? What evidence demonstrates that the commenter's preferred policy alternative is likely to achieve the appropriate level of localism or other desired outcome, as determined by these other public interest considerations?

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<sup>72</sup> See *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3390, 3395-96, paras. 1, 13-14.

<sup>73</sup> By consumer welfare, we mean consumer surplus as defined by standard welfare economics. For an explanation of how consumer surplus may differ from other social goals, see Joshua D. Wright and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham Law Review 2406-07 (2013).

26. *Relationship to Other Commission Rules.* Prior to 2004, when Congress expressly excluded review of the national audience reach cap from the Commission’s quadrennial review process,<sup>74</sup> the national cap typically had been considered in conjunction with the Commission’s other media ownership rules. For example, when the Commission raised the limit on the number of stations a broadcaster could own to twelve, it also adopted a limit on the total national audience reach of station groups as well.<sup>75</sup> Therefore, to ensure a comprehensive review, we also seek comment on the interplay between the national audience reach rule and other Commission ownership rules affecting television broadcasters. First, we seek comment on how, if at all, the Commission’s Local Television Ownership Rule, which limits consolidation within local markets, should be taken into account in analyzing whether to modify or eliminate the national audience reach cap, which limits consolidation on a national level.<sup>76</sup> Second, we invite comment on how, if at all, we should consider the decisions of television broadcasters going forward to adopt the “Next Generation” broadcast television transmission standard (or ATSC 3.0) on a voluntary basis.<sup>77</sup> Finally, we seek comment on whether we should consider the potential impact on any other Commission rule or action in analyzing whether to modify or eliminate the national cap or UHF discount.

### C. Grandfathering

27. To the extent that any rule we adopt as a result of this proceeding causes a station owner to no longer be in compliance with the national audience reach cap or to violate any new limit,<sup>78</sup> we seek comment on whether we should grandfather such ownership combinations as we have in the past. Further, we seek comment as to whether there should be any restrictions on the further transferability of any grandfathered stations. We note that, in the *UHF Discount Elimination Order*, the Commission grandfathered station combinations that would exceed the 39 percent cap as a result of elimination of the UHF discount, but would have required any grandfathered ownership combination subsequently sold or transferred to comply with the national ownership cap in existence at the time of transfer.<sup>79</sup> Then-Commissioner Pai dissented from that Order, arguing that grandfathered station groups should be allowed to be transferred without divestitures and that grandfathering should not have been triggered by the

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<sup>74</sup> CAA § 629 (3); *see also supra* para. 4.

<sup>75</sup> *1985 UHF Discount Order*, 100 FCC 2d at 88, 90, 97, paras. 30, 36-38, 50, 52; *see also supra* para. 2.

<sup>76</sup> *See 2014 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, Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services*, MB Docket Nos. 14-50, 17-289, Order on Reconsideration and Notice of Proposed Rulemaking, FCC 17-156 at 2-3, 30, 35, paras. 1-3,66, 78 (rel. Nov. 20, 2017).

<sup>77</sup> *See Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, GN Docket No. 16-142, Report and Order and Further Notice of Proposed Rulemaking, FCC 17-158 (rel. Nov. 20, 2017).

<sup>78</sup> For example, if we eliminate the UHF discount, this could cause some station groups to exceed the national cap should it remain at 39 percent, or even in some instances, if it were raised.

<sup>79</sup> *UHF Discount Elimination Order*, 31 FCC Rcd at 10234, para. 47. The Commission had noted in the *UHF Discount NPRM* that this limitation on the intact transfer of grandfathered station groups was generally consistent with prior Commission practice. *UHF Discount NPRM*, 28 FCC Rcd at 14332, n.59. The Commission also tied the grandfathering of existing or pending station combinations to the release date of the underlying *NPRM* (September 26, 2013) rather than the actual adoption of a new rule. *UHF Discount Elimination Order*, 31 FCC Rcd at 10234, para. 47. The Commission noted that no broadcast transactions since the release of the *NPRM* had resulted in an entity exceeding the national cap, and that all station groups exceeding the cap upon elimination of the discount had been grandfathered. *Id.* at 10234-35, para. 48. The Commission also based its choice of trigger date on “the long history of notice that the discount would be eliminated after the DTV transition and the potential for significant distortion of the national audience reach cap . . . .” *Id.*

release of the *NPRM* but rather when elimination of the UHF discount became effective.<sup>80</sup> Subsequently, the *UHF Discount Order on Reconsideration* reinstated the UHF discount and dismissed as moot requests to reconsider and modify grandfathering provisions.<sup>81</sup>

28. Given this history, and recognizing broadcaster interest in maintaining the economies of scale and scope achieved through station combinations, in the event that the Commission modifies the cap and/or the UHF discount, we seek comment on whether the Commission should allow full, intact transferability without divestitures of grandfathered station groups. If we adopt a rule change as a result of this proceeding that necessitates the grandfathering of existing, noncompliant station groups, we seek comment on the appropriate date for triggering such grandfathering. We also seek comment on any other alternatives to grandfathering and transferability of non-compliant station groups. Finally, we seek comment on any new grandfathering issues arising from the questions posed in this *NPRM* or presented in initial comments filed in response.

#### IV. PROCEDURAL MATTERS

##### A. *Ex Parte* Presentations

29. The proceeding this *NPRM* initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>82</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b), 47 CFR § 1.1206(b). In proceedings governed by rule 1.49(f), 47 CFR § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

##### B. Initial Regulatory Flexibility Analysis

30. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that a regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”<sup>83</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the

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<sup>80</sup> *UHF Discount Elimination Order*, 31 FCC Rcd at 10250 (dissenting statement of then-Commissioner Pai).

<sup>81</sup> *UHF Discount Order on Reconsideration*, 32 FCC Rcd at 3391, para. 1. ION, Trinity and Univision sought permanent grandfathering of their existing station groups. Petition for Reconsideration at 5-9, Univision Reply Comments at 7-9.

<sup>82</sup> 47 CFR §§ 1.1200 *et seq.*

<sup>83</sup> 5 U.S.C. § 603.

Small Business Act.<sup>84</sup> A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>85</sup>

31. With respect to this *NPRM*, an Initial Regulatory Flexibility Analysis (IRFA) under the RFA is contained in Appendix A. Written public comments are requested on the IRFA, and must be filed in accordance with the same filing deadlines as comments on this *NRPM*, with a distinct heading designating them as responses to the IRFA. In addition, a copy of this *NPRM* and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.

### C. Paperwork Reduction Act Analysis

32. This document seeks comment on whether the Commission should adopt new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens and pursuant to the Paperwork Reduction Act of 1995, Public Law 104-13, invites the general public and the Office of Management and Budget (OMB) to comment on these information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

### D. Comment Filing Procedures

33. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://apps.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

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<sup>84</sup> *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>85</sup> 15 U.S.C. § 632.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

34. *Additional Information:* For additional information on this proceeding, please contact Brendan Holland of the Media Bureau, Industry Analysis Division, [Brendan.Holland@fcc.gov](mailto:Brendan.Holland@fcc.gov), (202) 418-2757.

## V. ORDERING CLAUSES

35. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 2(a), 4(i), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303(r), 307, 309, and 310, the Notice of Proposed Rulemaking **IS ADOPTED**.

36. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA)<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Act Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this *Notice of Proposed Rulemaking (NPRM)*. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments specified in the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rules**

2. This *NPRM* seeks comment on the Commission's national television audience reach cap, including the discount afforded to UHF stations. Earlier this year, the Commission reinstated the so-called UHF discount, which provides a 50 percent discount to UHF stations for purposes of calculating compliance with the 39 percent audience reach cap. In reinstating the discount, the Commission found that the earlier decision to eliminate the discount had effectively tightened the cap without considering whether the overall cap remained in the public interest, particularly in light of changes to the video marketplace.<sup>4</sup> The Commission found this action to be arbitrary and capricious and unwise from a public policy perspective.<sup>5</sup> This *NPRM* seeks to rectify the Commission's prior error and undertake a broader assessment of the national audience cap, including the UHF discount. This *NPRM* asks whether the Commission should modify or eliminate the current 39 percent national audience reach cap, and whether to grandfather any newly non-compliant combinations and if so, how.

**B. Legal Basis**

3. The legal basis for any action that may be taken pursuant to this *NPRM* is contained in sections 1, 2(a), 4(i), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 303(r), 307, 309, and 310.

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

<sup>2</sup> 5 U.S.C. § 603(a).

<sup>3</sup> *Id.*

<sup>4</sup> *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Order on Reconsideration, 32 FCC Rcd 3390-91, 3395, paras. 1, 13 (2017) (*UHF Discount Order on Reconsideration*).

<sup>5</sup> *Id.* at 3390-91, para. 1.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rule revisions, if adopted.<sup>6</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>7</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act (SBA).<sup>8</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>9</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”<sup>10</sup> These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.<sup>11</sup> These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.<sup>12</sup> The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25,000,000 or less, 25 had annual receipts between \$25,000,000 and \$49,999,999 and 70 had annual receipts of \$50,000,000 or more.<sup>13</sup>

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<sup>6</sup> 5 U.S.C. § 603(b)(3).

<sup>7</sup> 5 U.S.C. § 601(6); *see infra* note 8 (explaining the definition of “small business” under 5 U.S.C. § 601(3)); *see* 5 U.S.C. § 601(4) (defining “small organization” as “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register”); 5 U.S.C. § 601(5) (defining “small governmental jurisdiction” as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand, unless an agency establishes, after opportunity for public comment, one or more definitions of such term which are appropriate to the activities of the agency and which are based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such definition(s) in the Federal Register”).

<sup>8</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632(a)(1)). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” *Id.*

<sup>9</sup> 15 U.S.C. § 632(a)(1)-(2)(A).

<sup>10</sup> U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>11</sup> U.S. Census Bureau, 2012 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>

<sup>12</sup> 13 C.F.R. § 121.201; 2012 NAICS code 515120.

<sup>13</sup> U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ4&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table).

Based on this data, we estimate that the majority of commercial television broadcasters are small entities under the applicable size.

6. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1,378.<sup>14</sup> Of this total, 1,263 stations (or about 91 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on May 9, 2017, and therefore these licensees qualify as small entities under the SBA definition.

7. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>15</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

8. If the Commission determines that it should modify or eliminate the current 39 percent national audience reach cap or permanently eliminate or modify the UHF discount, this action could require modification of certain FCC forms and their instructions, possibly including: (1) FCC Form 301, Application for Construction Permit for Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission may also have to modify other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303-S, Application for Renewal License for AM, FM, TV, Translator, or LPTV Station and Form 323, Ownership Report for Commercial Broadcast Station. The impact of these changes will be the same on all entities, and we do not anticipate that compliance will require the expenditure of any additional resources or place additional burdens on small businesses.

#### **E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered**

9. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather

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<sup>14</sup> Broadcast Station Totals as of September 30, 2017, Press Release (MB Oct. 2, 2017) (September 30, 2017 Broadcast Station Totals), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-345720A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-345720A1.pdf). In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 395. *Id.* The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities. The national audience reach cap, however, applies only to grants, transfers, and assignments of licenses for commercial television broadcast stations and therefore does not apply to the ownership of NCE stations. See 47 CFR § 73.3555(e)(1).

<sup>15</sup> “[Business concerns] are affiliates of each other when one [concern] controls or has the power to control the other, or a third party or parties controls or has to power to control both.” 13 CFR § 121.103(a)(1).

than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>16</sup>

10. The Commission has previously concluded that the national audience reach cap is intended to promote its public interest goal of localism. We seek comment on whether this rule or any modified rule is necessary at this time to serve localism and, if not, whether any rule is necessary to serve our goals of viewpoint diversity and competition in the video marketplace or other goals such as innovation. The *NPRM* seeks comment on the need for, and efficacy of, a national audience reach cap and UHF discount or other type of limit in light of significant changes in the video marketplace since the Commission last reviewed the cap and discount together. Assuming some limit is necessary, the *NPRM* seeks comment on whether the Commission should retain or modify the existing audience reach cap and UHF discount; retain the audience reach cap but adopt a different weighting methodology; adopt a limit based on some other measurement of a station group's size or influence, such as actual viewership, market share, or advertising revenue; or adopt a more flexible alternative such as a threshold screen that would trigger a more detailed analysis, an automatic presumption or safe harbor, either in lieu of or in addition to a bright line cap. The *NPRM* invites comment on the effects of any proposed rule changes on different types of broadcasters (e.g., independent or network-affiliated), the costs and benefits associated with any proposals, and any potential to have significant impact on small entities.<sup>17</sup> The Commission expects to further consider the economic impact on small entities following its review of comments filed in response to the *NPRM* and this IRFA.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

11. None.

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<sup>16</sup> 5 U.S.C. § 603(c).

<sup>17</sup> See *supra* paras. 10, 13, and 15.

**STATEMENT OF  
CHAIRMAN AJIT PAI**

Re: *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318.

The national television ownership cap and the UHF discount are inextricably linked. Any review of one must include a review of the other. What is the FCC’s authority to adjust this cap, and (assuming we have such authority), how should we adjust it? Should we eliminate the UHF discount? Those are the key questions we’re asking in this *Notice*. There are no tentative conclusions whatsoever. We’re just asking.

It’s amusing then (to use an unduly charitable construction) to hear such vociferous objections from this bench to simply asking the question whether we have authority, given that the same commissioners previously answered it—in the affirmative. In 2013, the FCC adopted the UHF Discount Notice of Proposed Rulemaking, which stated, “we believe the Commission retains the authority to modify both the national audience reach restriction and the UHF discount, provided such action is undertaken in a rulemaking proceeding separate from the Commission’s quadrennial review of the broadcast ownership rules pursuant to Section 202(h).”<sup>1</sup> Today’s minority expressed nary a doubt about that belief back then. And just last year, the FCC converted that belief into bedrock. It definitively “conclude[d] that [it] has the authority to modify the national audience reach cap, including the authority to revise or eliminate the UHF discount.”<sup>2</sup> And it went even further, stating that the Communications Act does “not impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule.”<sup>3</sup> Yet again, the current minority voted wholeheartedly for that proposition.

I understand the literary appeal of Oscar Wilde’s dictum that “consistency is the last refuge of the unimaginative.” But our work typically demands a modicum of consistency—boring though it may be.

It’s also amusing that those who have repeatedly voiced their strong opposition to the UHF discount in recent months are now voting against seeking comment on eliminating it. Make no mistake: A vote against this *Notice* is effectively a vote in favor of keeping the UHF discount in place.

Getting back to the substance of this *Notice*, we need to take a holistic look at the national cap rule, including the UHF discount. The marketplace has changed considerably due to the explosion of video programming options and various technological advances that have occurred since the cap was last considered in 2004. So we need to examine whether our rules should change accordingly. That’s an important discussion that will be informed by the facts in the record—not anything else.

I’d like to thank the dedicated staff who worked on this *Notice*: Ty Bream, Michelle Carey, Brendan Holland, Mary Beth Murphy, and Julie Saulnier from the Media Bureau; and Dave Konczal, Bill Richardson, and Royce Sherlock from the Office of General Counsel.

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<sup>1</sup> *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 28 FCC Rcd 14324, 14330 (2013).

<sup>2</sup> *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd 10213, 10222 (2016).

<sup>3</sup> *Id.*

**DISSENTING STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

Re: *Amendment of Section 73.355(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318

“Television, like newspapers and like radio, works best when it speaks with many voices, and as these companies swallow one another up, there is the frightening possibility of it all speaking with one voice.”<sup>1</sup> Those sage words, delivered by broadcast journalist Linda Ellerbee in 2000, still ring true today.

In any other month, a proposal giving massive media companies the chance to have an even greater share of the local programming market, would generate substantial attention and wide-spread public concern. While admittedly, this is not your typical month at the FCC, the reality is that such a proposal is before us for consideration, and it is a big deal with substantial implications for the future of localism, diversity, and competition.

Broadcasters are intricately woven in the fabric of our local communities. They cover local officials and when at their best, hold them accountable. While cable news or online platforms are more likely to paint broad strokes, local broadcasters distinguish themselves through their ability to fill in the fine lines. Local broadcasters often go to great lengths to stay on the air during a natural or man-made crisis, providing on-the-ground coverage when news breaks, including the delivery of emergency information that no doubt, has saved countless lives.

In 2004, Congress passed and President George W. Bush signed into law, a provision that no single broadcaster, through its combination of local stations owned, collectively should be able to reach more than 39% of U.S. television households. While I cannot say for certain that the sentiments expressed by the late-William Safire, reflected the legislative mood of the day, it is striking that fourteen years ago he was motivated to write through a New York Times Op-Ed: “The effect of the media’s march to amalgamation on Americans’ freedom of voice is too worrisome to be left to three unelected commissioners.” Soon after, Congress, through Section 629(1) of the Appropriations Act of 2004, specifically “exempted the 39% cap on national audience reach from review.”<sup>2</sup>

This was evidently the prevailing view because in 2004, NAB President Edward Fritts said, “We’re pleased the national television ownership cap issue appears to be resolved by the passage of this legislation.”<sup>3</sup> Press accounts at the time, including a January 2004 story in *Broadcasting & Cable* affirmed, that one of the new features of the law was that “Only Congress (not the FCC) can change the [39%] limit.”<sup>4</sup>

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<sup>1</sup> The Freedom Forum Online, *Ellerbee critiques changes in TV news* (June 6, 2000).

<sup>2</sup> Congressional Research Service (CRS): *Legal Challenge to the FCC’s Media Ownership Rules: An Overview of Prometheus Radio v. FCC and Recent Regulatory Developments at Footnote 29* (February 1, 2010).

<sup>3</sup> The Washington Post, *Senate Adopts TV Station Limit; Measure Modifies FCC’s Rule Raising Broadcasters’ Reach* (January 23, 2004).

<sup>4</sup> *Broadcasting & Cable*, *New Ownership Cap Fits Fox, CBS Perfectly* (January 25, 2004).

Facing a challenge from broadcasters who sought to maintain a 45% national ownership cap, the Third Circuit issued its opinion in June 2004. In the Court's decision, it wrote, "Because the Commission is under a statutory directive to modify the national television ownership cap to 39%, challenges to the Commission's decision to raise the cap to 45% are moot."<sup>5</sup> This decision should have once and for all, put to rest any question that the FCC could independently increase the cap.

But no. The current Administration, in its quest to green light even greater media consolidation, has found a way to rewrite history and ignore the Third Circuit decision. Earlier this year, over my vociferous objection, the FCC majority reinstated the UHF discount, giving their blessing for a single company to reach over 70% of U.S. television households, while claiming to be compliant with the 39% national ownership cap. In 2004, when Congress enacted the cap, the DTV transition was still five years away, but thanks to the transition to digital television, UHF stations are no longer inferior to VHF. This can mean nothing else but that broadcasters, with the blessing of the FCC majority, are using this arbitrary loophole to expand their reach far beyond what Congress ever envisioned.

How did we get to this point? Hearken back to June 2003, when the FCC voted along party lines to increase the national ownership cap from 35 to 45%. The decision was not without significant controversy. Even the National Rifle Association at the time came out in opposition, arguing that the loosening of the FCC's media ownership rules should be rejected "for the sake of our democracy."<sup>6</sup>

Leading into the Fall of that same year, Congress continued to debate the issue and there were bipartisan House and Senate resolutions introduced that disapproved of the FCC's deregulation of the media ownership rules. There were also multiple Congressional hearings that year. Senator Trent Lott, in describing his opposition to raising the cap, said "that the Nation is in danger of losing the localism and diversity of viewpoints that are offered under the current ownership cap structure if the current cap is raised."<sup>7</sup> Strong words from the former Senate leader and he was not alone.

A deeply fought battle ultimately resulted in a compromise between Congressional leadership and the White House.<sup>8</sup> That November an agreement was reached and a 39% national ownership cap was established that would be put into law just two months later. While many remained unhappy, the purpose was to put this debate to rest—or so they thought.

Fast forward to last month, when Democratic Leader Pelosi along with Reps. Pallone and Doyle wrote in a letter to the Commission that, "[b]y explicitly excluding review of the cap from the Congressionally-mandated quadrennial review of broadcast ownership rules, we made clear that the FCC is not permitted to change or evade that national cap."<sup>9</sup> I agree. Localism, diversity and competition are bedrock principles of our national media policy, and indeed our democracy. Giving a single broadcaster the means to buy up enough local stations to exceed the 39% cap is inconsistent with the statute and should be rejected.

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<sup>5</sup> *Prometheus Radio Project v. FCC*, 373 F.3d at 396 (3d Cir. 2004) (Prometheus I).

<sup>6</sup> The Washington Post, *Unlikely Alliances Forged in Fight Over Media Rules* (May 20, 2003).

<sup>7</sup> Statement of Senator Trent Lott before the U.S. Senate Committee on Commerce, Science, and Transportation Hearing on Media Ownership (May 13, 2003).

<sup>8</sup> The Washington Post, *Compromise Puts TV Ownership Cap at 39%* (November 25, 2003).

<sup>9</sup> Letter of Democratic Leader Pelosi and Representatives Pallone and Doyle to FCC Chairman Pai, Commissioner Clyburn, Commissioner O'Rielly, Commissioner Carr and Commissioner Rosenworcel (November 20, 2017). Available at: <https://democrats-energycommerce.house.gov/newsroom/press-releases/congressional-leaders-warn-fcc-against-ignoring-law-on-tv-station-ownership>.

FCC Chairman Michael Powell once said that the FCC is “constitutionally bound to comply — willingly or not — with Congress’ direction, as expressed by the text of the statute.”<sup>10</sup> Maybe today will be the day the majority will heed those words and join me in opposing today’s proposal because if nothing else is clear when it comes to this item, it is that we have absolutely no authority to act.

I dissent.

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<sup>10</sup> Testimony of FCC Chairman Michael Powell before the U.S. Senate Committee on Commerce, Science, and Transportation (June 4, 2003).

**STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

Re: *Amendment of Section 73.355(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318

I support today's item, which initiates a defined process to review the Commission's National Television Multiple Ownership Rule, commonly referred to as the national audience reach cap. This is a topic I have spent too much time over the years working on, so I would like to clear up many of the misconceptions surrounding it.

First, I want to be absolutely clear on my position on this matter. As I have stated previously, I do not believe that the Commission has the authority to modify the national audience reach cap, which also extends to eliminating the UHF discount. While the discount may no longer be technologically justified, it is up to Congress to make that determination, not the Commission. This was the clear intent of Congress when it partially rolled back the FCC's proposed cap increase of 45 percent in 2004. While many lawyers have their own interpretations of the 2004 Consolidated Appropriations Act (CAA), I want to provide a little history.

After extensive debate and too many meetings to count, Congress enacted the relevant portions of the CAA.<sup>1</sup> The language in the law cannot be clearer: it statutorily sets the national ownership limit and correspondingly removes it from the quadrennial review under section 202(h) of the Telecommunications Act. Some, including the Third Circuit Court of Appeals, have argued that Congress only meant to remove consideration of the national audience reach cap from the biennial review, not to prohibit it from being changed as part of any other effort. But such a reading is preposterous as it would effectively create one of the biggest backdoors in the history of legislating. At the same time, the view ignores the deal that was struck in those bitterly heated Member meetings and huddles. In exchange for the hard cap, those who supported former Chairman Powell's work obtained an ownership level that prevented any station group from being forced to sell off any stations and a commitment that the UHF discount would still apply going forward.

I realize that some people don't have a high opinion of Congressional experience. But, I will forever have etched in my mind former Senator Ted Stevens screaming that, if some station group wanted to go above 39 percent, they could come to Congress to try to get the cap amended. That was a different day and a different Congress and maybe it relied on Senator Stevens serving forever, but it should count for something. It certainly does to me – even if I intellectually agree that both the cap and discount are archaic and in need of reform.

Despite my firsthand experiences, there is broad disagreement among interested parties over the Commission's authority in this space. During the prior Commission's proceeding to eliminate the UHF discount, NAB and Free Press argued that the Commission had the authority to both eliminate the UHF discount and modify the national audience reach cap.<sup>2</sup> The Commission ultimately agreed, with the support of two of my colleagues here today. On the other hand, Fox, Sinclair, ION and Trinity Broadcast Network all challenged the Commission's authority.<sup>3</sup> I appreciate the irony that my views are aligned with those previously filed by Sinclair – who outside critics mistakenly believe I am currently in cahoots

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<sup>1</sup> Consolidated Appropriations Act, 2004, Pub. L. No. 108-109, § 629, 118 Stat. 3, 99 –100 (2004) (CAA).

<sup>2</sup> *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213, 10220–23, paras. 17, 21 (UHF Discount Elimination Order).

<sup>3</sup> *Id.* at paras. 18–20.

with – that the Commission was devoid of authority to take action that, as fate would have it, supposedly would “help” Sinclair today. Specifically, Sinclair stated in 2013:

The FCC does not have the authority to modify any aspect of the national television ownership cap, including the UHF discount. In establishing a 39 percent limit for the ownership cap in 2004, Congress set a precise limit and then took the extra step of removing this limit and any rule relating to it from the FCC’s periodic review of its ownership rules. No action by Congress has changed these facts, and accordingly, the FCC should terminate this proceeding and halt its efforts to eliminate the UHF discount.<sup>4</sup>

In perhaps a more curious twist, it appears that my same colleagues that previously supported changes in 2016 now also question the Commission’s authority.

For these reasons, I believe it is time for the courts to opine on this matter. We need certainty, in a way that only the courts or Congress can provide, as to where the Commission’s authority begins and ends. Since it doesn’t appear Congressional action is forthcoming, I look forward to reviewing the record that will result from this proceeding. If the Commission believes after such review that it has the authority to modify the cap, I will happily support that item. That is not to suggest my position has changed, but only that I believe in getting to finality and am willing to cast a vote that will allow the Commission to take the needed step to get this to court review.

Second, outside the authority question, I think it is also important to put this order in context. The truth is, the last fight over the national audience reach cap generally occurred not because of its potential impact on consumers but rather to safeguard an important balance between the Big Four broadcast networks (ABC, CBS, NBC, and Fox) and their local affiliates. Prior to Congressional action in 2004, the Commission found that these rules did not promote competition or diversity. For these reasons, the Commission increased the current cap from 35 percent to 45 percent to allow the broadcast networks to achieve greater economies of scale without surpassing the audience reach of their collective affiliates. Congress later scaled this back to 39 percent, with the same focus in mind: maintaining the appropriate balance between the networks and their affiliates.

It is also worth noting that even if the national audience reach cap is increased or eliminated, the practical effects will likely be limited, assuming the Commission complies with Congressional direction on the UHF discount. Today, the majority of the top ten TV station groups do not even come close to the cap. For example, CBS Corporation, which ranks fifth, only has a national audience reach of 25.5 percent. Hearst Corporation, at tenth, has an audience reach of 13.3 percent. All this is to say, while I support asking questions and ultimately resolving the issue of the Commission’s authority on this matter, whether we maintain or alter the cap is likely to have little real-world impact in the near future.

I thank the Chairman for teeing up this item and asking a broad range of questions. I approve.

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<sup>4</sup> Sinclair Broadcast Group Inc. Comments at i (filed Dec. 16, 2013) (Sinclair UHF Discount NPRM Comments).

**STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318.

Since the 1940s, the FCC has had rules on the books that limit the number of television stations any single entity can own. Over the decades, as the media landscape has evolved, the Commission has revisited these rules to account for new competitors and advances in technology. Those changes have only accelerated in recent years with the advent of online offerings. Broadcasters now compete for eyeballs with YouTube stars, social media platforms, and streaming services like Hulu and Netflix—not to mention traditional cable and satellite offerings.

In light of these changes, I am glad that we are launching this proceeding, which will examine whether we can and should modify our rule that limits broadcasters—but not others in the video marketplace—from reaching more than 39% of television households in the country. Answering these questions will help ensure that our media ownership rules are neither outdated nor counterproductive.

At the same time, I am surprised that the issue of the Commission's legal authority in this area has generated so much controversy. After all, the FCC determined in 2016 that “the Commission has the authority to modify the national audience reach cap[.]” Continuing, the Commission found that “no statute bars the Commission from revisiting the cap.” Congress did not, according to the FCC, “impose a statutory national audience reach cap or prohibit the Commission from evaluating the elements of this rule.” All three Democrats on the Commission, including two of my colleagues here today, voted for that order. No one in the majority concurred, wrote a separate statement, or otherwise qualified their support for the FCC's 2016 determinations. While several seats up here have changed since then, the law has not. So the suggestion by some that the FCC now lacks authority to do exactly what my colleagues said the Commission could do in 2016 is curious, to say the least.

Today's Notice asks simply whether my colleagues got it right in 2016 when they determined that the FCC has authority to modify the cap. So far, I have not seen anything that convinces me they got it wrong. But I look forward to reviewing the record as it develops in this proceeding.

**DISSENTING STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

Re: *Amendment of Section 73.355(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318

For decades, the FCC has built its media policies around the idea that localism, diversity, and competition matter. These values have their origin in the Communications Act. They may not be trendy, but they have stood the test of time. They continue to support journalism and jobs. They play a critical role in helping advance the mix of facts we all need to make decisions about our lives, our communities, and our country.

Today the FCC seeks to dismantle these values. At a time when real facts get casually derided as fake news, algorithms are ascendant, and what is viral is often not verifiable, this is neither prudent nor wise.

It is also unlawful. At the direction of Congress in the Consolidated Appropriations Act of 2004, the FCC is statutorily prohibited from allowing a single company from acquiring stations that reach more than 39 percent of the national television audience. The FCC lacks authority to change this law. Doing so is the exclusive province of Congress.

But somehow, somehow, we have this rulemaking anyway. And somehow, we are still talking about the UHF discount—a concept that should have been retired nearly a decade ago when the introduction of digital television rendered it technically outdated and scientifically obsolete. Still, here we are. This effort, on the heels of this agency's repeal of the Main Studio Rule, elimination of the eight voices test, and giving the green light for waivers of common ownership of the top four stations in a market, is ultimately destructive. We are destroying our most basic values and tearing apart the rules that have helped keep our media markets local, diverse, and competitive. I dissent.