

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 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	)	

**REPLY COMMENTS OF FREE PRESS**

Dana J. Floberg, Policy Analyst  
Free Press  
1025 Connecticut Avenue, NW  
Suite 1110  
Washington, DC 20036  
202-265-1490

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## INTRODUCTION

Initial comments in this docket confirm what former Commissions and public interest advocates have long understood: (1) the Commission must not attempt to adjust or eliminate the national audience reach cap; and (2) to accurately calculate broadcasters' reach under that cap, the Commission must return the UHF discount to its rightful place in the dustbin of discarded regulatory policies. Virtually all commenters agree with the NPRM's initial conclusion that there no longer exists any technical basis for retaining the discount. A majority of commenters also oppose any weakening of the cap, and agree the Commission has no authority to modify it. Unsurprisingly, some broadcasters continue to lobby for further relaxation of the media ownership limits, but the only arguments they muster are inconsistent, irrelevant, and ill-advised.

### **I. There Exists No Rational Justification for Retaining the UHF Discount.**

When the Commission initially established the UHF discount in 1985, its intent was to account when calculating compliance with the national cap for the technical disadvantage UHF stations faced relative to VHF stations. Since the completion of the digital television transition, however, this technical disadvantage has disappeared. Virtually all commenters recognize that the UHF discount has outlived its initial technical justification and been rendered technologically obsolete in the digital era.<sup>1</sup>

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<sup>1</sup> Comments of Public Interest Commenters, MB Docket No. 17-318, at 2-3 (filed Mar. 19, 2018) ("Public Interest Comments"); Comments of Leadership Conference on Civil and Human Rights, MB Docket No. 17-318, at 2 (filed Mar. 19, 2018) ("Leadership Conference Comments"); Comments of Writers Guild of America West, Inc., MB Docket No. 17-318, at 4 (filed Mar. 19, 2018) ("Writers Guild Comments"); Comments of Dish Network, LLC, MB Docket No. 17-318, at 13-14 (filed Mar. 19, 2018) ("Dish Comments"); Comments of Newsmax Media Inc, MB Docket No. 17-318, at 4-5 (filed Mar. 19, 2018) ("Newsmax Comments"); Comments of Consumers Union, The Advocacy Division of Consumer Reports, MB Docket No. 17-318, at 9 (filed Mar. 19, 2018) ("Consumers Union Comments").

Joint comments filed by the Attorneys General of eight states consequently conclude that “[i]f the Commission revisits the UHF Discount in this proceeding and maintains the rule in its current form, it will be making a determination wholly unsupported by fact and effectively engaging in arbitrary rulemaking.”<sup>2</sup>

Even major broadcasters who may benefit from this recently exhumed regulatory loophole acknowledge that it no longer serves any valid technical function. NAB concedes that the “original technical purpose of accounting for UHF stations at half their presumed 100 percent reach is outdated,” and that “maintaining a discount for UHF stations based on an analog-era technical rationale is no longer appropriate.”<sup>3</sup> Comments filed by the ABC, CBS, FOX and NBC affiliate associations (“Affiliates”) similarly note that “the technological rationale that supported the UHF discount at its inception no longer applies following the digital transition.”<sup>4</sup> In fact, as the Affiliates explain, “UHF stations now actually enjoy an overall technical advantage.”<sup>5</sup> These assertions echo the conclusions the Commission has already drawn in the current NPRM: that the UHF discount no longer serves any valid technical purpose in the calculation of national audience reach cap compliance.<sup>6</sup>

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<sup>2</sup> Comments of the Attorneys General of the State of Illinois, California, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island and Virginia, MB Docket No. 17-318, at 11 (errata version filed Feb. 27, 2018) (“Attorneys General Comments”).

<sup>3</sup> Comments of the National Association of Broadcasters, MB Docket No. 17-318, at 25, 29 (filed Mar. 19, 2018) (“NAB Comments”).

<sup>4</sup> Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, MB Docket No. 17-318, at 36 (filed Mar. 19, 2018) (“Affiliate Comments”).

<sup>5</sup> *Id.*

<sup>6</sup> *Amendment of Section 73.355(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, MB Docket No. 17-318, 32 FCC Rcd 10785, 10808, ¶ 20 (2017) (“NPRM”).

In fact, the only naysayer in this industry/public interest consensus is Sinclair Broadcast Group. Sinclair inexplicably argues that despite the digital television transition, important technological differences persist between UHF and VHF stations.<sup>7</sup> The broadcaster provides zero evidence to support these baffling claims, apart from citing two Commission statements dating back to the mid-1980s – seemingly unaware that both the world and the Commission have moved on to reflect the technical realities of the digital era. Sinclair’s counter-factual claims contradict the wisdom of many of its own stations, clearly expressed in the Affiliates’ filing, that UHF stations may now have marginally superior technical characteristics to VHF stations.<sup>8</sup>

Several industry commenters scramble to generate new policy justifications for this regulatory holdover, but these efforts rely on a misreading of the Commission’s history and a misguided drive to promote deregulation and continued, harmful consolidation. ION, Univision, and Trinity Christian Center of Santa Ana claim in joint comments that the Commission must retain the UHF discount (or scrap the cap altogether, or radically expand the “grandfathering” exemptions granted to these stations) all to avoid doing harm to owners who were “encouraged” to rely on the discount when making critical business decisions to grow and invest.<sup>9</sup> But as Free Press and others noted in initial filings, the Commission long ago put broadcasters on notice regarding the impending elimination of the UHF discount.<sup>10</sup> The Commission’s repeated

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<sup>7</sup> Comments of Sinclair Broadcast Group, Inc., MB Docket No. 17-318, at 18-19 (filed Mar. 19, 2018) (“2018 Sinclair Comments”).

<sup>8</sup> Affiliate Comments at 36.

<sup>9</sup> Comments of ION Media Networks, Inc., Univision Communications Inc., and Trinity Christian Center of Santa Ana Inc., MB Docket No. 17-318, at 2 (filed Mar. 19, 2018) (“ION, Univision & Trinity Christian Center Comments”).

<sup>10</sup> Public Interest Comments at 2; Consumers Union Comments at 9; Comments of Free Press, MB Docket No. 17-318, at 24 (filed Mar. 19, 2018) (“Free Press Initial Comments”).

warnings, along with its recent decision to scrap the discount in 2016 before illogically resurrecting it a year later, have long discouraged any broadcaster reliance on the UHF discount. The Commission has no obligation to maintain a thoroughly outmoded regulatory antique to mitigate risks that broadcasters chose to take with full and repeated forewarning.

NAB takes a different tack, arguing that in the face of competition from MVPDs and online video, the UHF discount provides critical relief from the industry-specific national cap.<sup>11</sup> In complaining about these unique limits, however, NAB fails to acknowledge the unique benefits broadcasters also receive relative to cable and digital content producers, such as the option to elect must-carry or retransmission consent, and to transmit over the public airwaves. As Newsmax Media points out, “[i]f station groups find localism too constraining on their business plans, they can simply relinquish their spectrum rights and offer their content on any number of new and unregulated platforms or they can become national cable channels and seek carriage without the benefit of retransmission consent rights.”<sup>12</sup> Broadcast is still the most-watched and most-trusted source of local news, and although online news sources may be creeping up in popularity, communities most frequently rely on the digital arms of local television stations rather than independent online sources of news production, which remain very rare.<sup>13</sup>

The industry-specific national cap regulation is therefore amply justified, and there is no rational policy justification for the Commission to maintain the UHF discount as an explicit loophole to this statutory limitation. The record confirms that the UHF discount should be permanently consigned to the annals of analog history.

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<sup>11</sup> NAB Comments at 13.

<sup>12</sup> Newsmax Comments at 6.

<sup>13</sup> Free Press Initial Comments at 10-11; Public Interest Comments at 4.

## **II. Most Commenters Assert the Commission Must Not Modify or Eliminate the National Audience Reach Limitation.**

The majority of commenters agree that the Commission must leave the national cap in place. A plurality of commenters also rightly assert that the Commission has no authority to modify or eliminate the cap.<sup>14</sup> As the Leadership Conference on Civil and Human Rights clearly states, “Congress set the current national ownership cap in 2004 via statute, and the Commission does not have authority to change it now.”<sup>15</sup> Opponents make fruitless arguments that Congress did not intend to freeze in place the numerical cap that it explicitly set. Yet it’s plain that the congressional decision to bar the Commission from reexamining the cap extends beyond just the bar on doing so in a Quadrennial Review process, in order to avoid creating what Commissioner O’Rielly has termed “one of the biggest backdoors in the history of legislating.”<sup>16</sup>

Several commenters that do not address the question of the Commission’s authority nonetheless argue that any upward adjustment or elimination of the national cap would be disadvantageous to the public. The Writers Guild of America, West explains the severe harms that such loosening of the national cap would pose to media diversity and localism: “Without a cap on the share of national audiences that a single owner of broadcast stations can reach, one company could (and likely would) dominate the public airwaves, reducing the diversity of information available and removing news operations from the communities they serve.”<sup>17</sup> Since the NPRM suggests that the Commission would rather focus on the narrow indicator of

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<sup>14</sup> Public Interest Comments at 1-2; Dish Comments at 12-13; Attorneys General Comments at 4-7; Newsmax Comments at 3.

<sup>15</sup> Leadership Conference Comments at 1.

<sup>16</sup> NPRM (Statement of Commissioner O’Rielly).

<sup>17</sup> Writers Guild Comments at 2.

consumer benefit over more comprehensive public interest concerns, it is worth drawing attention to the economic analysis performed by commenters such as the American Cable Association, which asserts that “[t]he most reasonable conclusion one can draw from this evidence is that increasing the national cap will lead to higher prices for consumers.”<sup>18</sup>

The handful of commenters who argue that the Commission can or should adjust the national ownership cap are almost exclusively broadcasters who would directly benefit from this change. Rather than strong legal support or public interest analysis, the foundation of these claims is blatant self-interest. Perhaps the most stunning example of this exorcism of argumentative credibility in the name of profit can be found in the comments of Sinclair, which systematically undercut the very arguments it made less than five years ago to oppose the Commission’s attempt to eliminate the UHF discount. For instance, are we to believe:

Sinclair in 2013: “The FCC does not have the authority to modify any aspect of the national television ownership cap”<sup>19</sup>; or

Sinclair in 2018: “The reevaluation and elimination of the National Cap is well within the FCC’s authority.”<sup>20</sup>

Then there’s also the question of whether we must listen to:

Sinclair in 2013: “It simply makes no sense for Congress to go to such great lengths to set a specific 39 percent limit, forbid the FCC to make any changes to any rules relating to that limit and remove the FCC’s authority to review that rule as part of its periodic ownership review, but

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<sup>18</sup> Comments of the American Cable Association, MB Docket No. 17-318, at 7 (filed Mar. 19, 2018).

<sup>19</sup> Comments of the Sinclair Broadcast Group, Inc., MB Docket No. 13-236, at i (filed Dec. 16, 2013) (“2013 Sinclair Comments”).

<sup>20</sup> 2018 Sinclair Comments at 3.



allow the FCC to change the 39% Cap and related rules in any other proceeding the FCC initiates. Such a strained interpretation of the CAA, which creates a gaping loophole in the CAA, is not a rational interpretation of the statute.”<sup>21</sup> Or, on the other hand –

Sinclair in 2018: “In other words, the CAA itself neither required a national cap nor set a 39 percent national ownership limit; rather, it merely directed the FCC to update the limit at that time in its National Cap rule to 39 percent.”<sup>22</sup>

Despite this blatant hypocrisy, Sinclair does not even acknowledge its dramatic change of course. Evidently its latest claims are not motivated by a “rational interpretation of the statute.” Perhaps they stem instead from the company’s own prospects for financial gain, should the Commission once again fail to uphold its obligation to protect the public from rampant media consolidation, all in order to greenlight this devastating proposal to modify or eliminate the national cap.

None of the commenters supporting modification or elimination of the national cap succeed in presenting a compelling policy argument for how such a gutting of these congressionally established protections would serve the public interest. However, even if the Commission were to lend undue credence to these hypocritical and thoroughly transparent policy arguments, Commissioner O’Rielly has rightly stated that with regard to the Commission’s authority to adjust the cap “the only acceptable venue for these arguments is Congress.”<sup>23</sup>

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<sup>21</sup> 2013 Sinclair Comments at 6.

<sup>22</sup> 2018 Sinclair Comments at 4-5.

<sup>23</sup> *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd 10213, 10251 (2016) (Dissenting Statement of Commissioner O’Rielly).

### **III. Proposals to Expand the UHF Discount to Include VHF Stations for Some or All Broadcasters Would Not Serve the Public Interest.**

NAB and the Affiliates offer alternative proposals to expand the UHF discount to apply to VHF stations for some or all broadcasters. Under no circumstances would these proposals mitigate the obvious harms and illogic of retaining the discount in any form.

Specifically, NAB proposes expanding the discount so that UHF and VHF stations alike are counted towards the cap at 50 percent of their audience reach for all broadcasters.<sup>24</sup> This would only compound the serious error of the UHF discount, which was meant to account for a particular technical disadvantage UHF stations once experienced. Now that this disadvantage has been effectively eliminated, the obvious solution is to remove the redundant discount instead of expanding it to two categories of stations for which no disadvantage exists. It is not enough to put UHF stations and VHF stations on a level playing field to reflect their digital-era technical parity while doubling down on the inaccuracy of the national audience reach cap calculation.

NAB attempts to forestall this obvious critique by arguing that expanding the discount would ensure that the national ownership calculation better assesses a broadcaster's realistic viewership.<sup>25</sup> However, the national cap was never intended to measure actual viewership; it was intended to measure the maximum potential reach of broadcasters' stations.<sup>26</sup> The Commission applied the discount to UHF stations because of the likely discrepancy between a UHF and a VHF station's maximum reach – not because UHF stations were less popular with viewers.

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<sup>24</sup> NAB Comments at 25.

<sup>25</sup> *Id.* at 29.

<sup>26</sup> *Id.* at 26 (“Over 15 years ago, the D.C. Circuit acknowledged that the broadcast TV national cap is expressed in terms of potential audience reach”).

Effectively, NAB is proposing that the Commission eliminate the existing national cap (which the Commission has no authority to do) and replace it with a national ratings cap that would serve an entirely different purpose. Expanding the UHF discount to VHF is a poorly justified and painfully transparent end-run around the Commission's clear lack of authority to revise the cap.

The Affiliates also urge the Commission to expand the UHF discount to apply equally to VHF stations, but only for non-network broadcasters.<sup>27</sup> While more limited in scope, this proposal is equally ill-advised, particularly in conjunction with Affiliates' corresponding suggestion that the national cap also be loosened for non-network broadcasters.<sup>28</sup> Affiliates rightly note that despite the growth of online video, marketplace changes have given large broadcasters such as network owners outsized power in the broadcast industry.<sup>29</sup> This consolidatory trend has encouraged the already-big to get even bigger and far outstrip smaller competitors, while also crowding out local voices and resulting in lower quality news and media production.<sup>30</sup> Any loosening of the national cap or retention of the UHF discount past its technical usefulness would clearly exacerbate this power differential and further harm local voices and local news.<sup>31</sup>

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<sup>27</sup> Affiliate Comments at 36-37.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* at 7 (“The balance of power between the networks and affiliates continues to shift in favor of the networks, which enjoy marked economies of scale and scope and assert ever-increasing control in access to programming and agreements with programming distributors. Local stations are relatively disadvantaged from the outset. And as the pace of change in the marketplace accelerates, that imbalance grows, skewing further in favor of national networks as new OTT entrants provide more and more opportunities for networks to control the avenues for distribution of affiliates’ local programming—and the resulting revenues.”).

<sup>30</sup> *See id.* at 26.

<sup>31</sup> *Id.* at 25 (“The current national ownership cap serves as a bulwark against an excessive accumulation of power in the relationship between the networks and their affiliates.”).

However, the dividing line between massive media conglomerates and small local outlets does not lie exclusively along the O&O versus non-network axis. Sinclair is the largest broadcaster in the United States and has regularly used its tremendous reach to shutter and consolidate local newsrooms, draining resources from local communities and silencing diverse voices. Allowing large owners like Sinclair to take advantage of an expanded discount, as well as a potentially weakened national cap, would result in exactly the types of devastating harms that commenters fear. Any broadcaster large enough to take advantage of loosening media ownership protections – be they network or affiliate owners – already wields outsized market power. Independent local broadcasters struggling to compete with these goliaths do not stand to benefit from the retention or expansion of the UHF discount, or the elimination of the national cap.

#### **CONCLUSION**

The Commission must not raise or eliminate the national audience reach limitation, which commenters agree it has neither legal authority nor adequate public policy reason to do. Similarly, the docket offers the Commission no rational justification for retaining the antiquated UHF discount. It must be eliminated once again.

Respectfully Submitted,

/s/ Dana J. Floberg

Dana J. Floberg, Policy Analyst  
Free Press  
1025 Connecticut Avenue, NW  
Suite 1110  
Washington, DC 20036  
202-265-1490

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