In the
**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|---|---|---|
| FREE PRESS, *et al.*, | ) | |
| Petitioners, | ) | |
| | ) | |
| v. | ) | |
| | ) | No. 17-1129 |
| FEDERAL COMMUNICATIONS COMMISSION and UNITED | ) | |
| | ) | |
| STATES OF AMERICA, | ) | |
| Respondents. | ) | |

**REPLY OF FREE PRESS ET AL**
**IN SUPPORT OF EMERGENCY MOTION TO STAY**

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## INTRODUCTION AND SUMMARY

There may be no elephant in the FCC's meeting room, but there are, at present, three Commissioners, and neither the FCC nor the Intervenors want to talk about them. As of now, two of the three sitting Commissioners will not support modification of the FCC's 39% national ownership cap. Even so, the Oppositions simply do not address how it could be rational for the Commission to reinstate a concededly obsolete rule based on the mere possibility that the Commission will, in the future, open a proceeding to consider something that, as of now, a majority of the Commission believes it cannot or should not do.

Reinstating the discount now, rather than awaiting the outcome of this hypothetical future proceeding, will usher in a wave of media consolidation that undermines the agency's core statutory objectives. This consolidation will harm the public by reducing the diversity of voices in the national marketplace of ideas and limiting competition in program production and procurement, thereby lowering the quality and quantity of programming available to the public.

The Oppositions do not dispute that Intervenor Sinclair has already sought Commission consent for a transfer that could result in Sinclair exceeding the 39% cap but for the discount and that many similar transactions are expected. Instead, they attempt to minimize the rapid and dramatic impact of this action by claiming that it is possible that already announced and future television transactions may not be approved, even though they cannot point to a single example of such disapproval in this century. Similarly, their suggestion that if the Court were to reverse the Commission, the Commission might require divestiture of stations acquired during the pendency of this litigation also flies in the face of the reality that no mandated television divestiture has been effectuated in decades.

Unless this Court stays the FCC's order, the nation's television ownership structure will be significantly and irreparably altered well before this Court will have time to reach a determination on the merits. Granting a stay would maintain the *status quo* pending judicial review, would not harm broadcasters, and would protect the public interest during the course of this proceeding.

## I. Petitioners have Shown a Substantial Likelihood of Prevailing on the Merits

The Commission insists that it was reasonable to reinstate the discount notwithstanding the absence of any policy justification because the Commission should not have repealed it without also considering whether to change the 39% cap at the same time. FCC at 2-3, 10-12. The Commission, however, never explains why it was necessary, or even desirable, to reinstate the discount in the interim. It could have waited and considered whether to restore the discount in the same proceeding in which it decides whether to modify the 39% cap (assuming it has the authority to do so). This suggests that the Commission's real motive here was to approve as many transactions as possible as quickly as possible, realizing that, as Petitioners have shown, even if this Court reverses the Commission, divestures will not follow.

### A. The Commission's Decision Violates the CAA

The Consolidated Appropriations Act of 2004, P.L. 108-199 ("CAA") directed the Commission to roll back the 45% cap to 39%. At that time, as it had since 1985, the Commission calculated that UHF stations, due to their technical inferiority, reached half as many households in the same markets as VHF stations. Now that UHF stations are no longer technically inferior, no justification exists to permit these stations to exceed the existing Congressionally-set limit.

### B. It is Irrational to Reinstate the UHF Discount Premised on Future Action the Commission Lacks Authority to Take

The Oppositions do not address, much less rebut, Petitioners showing that the Commission as currently constituted, lacks the votes to modify the cap. If, as Petitioners–and Commissioner O'Rielly–believe, the Commission lacks legal authority to modify the 39% cap, then a promise to address the discount and cap together in a future proceeding is illusory. Commissioner O'Rielly has consistently maintained that the CAA bars the Commission from altering both the 39% cap and the UHF discount. And Commissioner Clyburn stated in her dissent: "besides there being no legal basis for such action, reinstatement of the discount will actually harm the public interest, by reducing diversity, competition and localism."[1]

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[1] *Reinstatement Order* at 19 (Clyburn dissent).

Notably, the *Repeal Order* specifically rejected the argument that it had to reexamine the national cap in conjunction with the examination of the UHF discount.[2] Only the current Chairman thinks that the Commission can and should modify the 39% cap in a new proceeding. Although the Commission tries to rely on the "undisturbed" finding in the *Repeal Order* that the Commission has authority to modify the cap, that finding was not necessary to repeal the discount. FCC at 14.[3]

### C. The Cap and the Discount Need Not be Addressed at the Same Time

The Commission also defends reinstatement of the discount on the grounds that the cap and the discount are "inextricably linked." FCC at 2. While they are not unrelated, the Commission overstates the role of the discount. It is simply one of two variables used in 47 C.F.R. §73.3555(e)(2) to calculate a station's national audience reach for the purposes of compliance with the 39% cap. The other factor is "the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located." Like the discount, the use of Nielsen DMA data is not something the Commission would have wished to

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[2] 31 FCCRcd 10213, 10232 (2016).

[3] Moreover, the fact that only one of the sitting Commissioners would have exercised this supposed power further undermines the Commission's suggestion that it would receive deference on this issue.

lock in permanently, as populations change, Nielsen might go out of business, or change its methodology such that the Commission would need another way to measure the size of a television market.

No one seriously disputes that the UHF Discount was established at a time when UHF stations were inferior to VHF stations, or that today it is no longer the case.[4] Thus, the Commission's insistence that reinstating the Discount simply maintains the *status quo* under which the industry has operated for 30 years is not supported by the facts.

The Commission has long recognized that increased cable penetration and technological change might eliminate the need for the UHF Discount. The *Repeal Order* found that:

> As early as 1988 the Commission noted that the disparities between UHF and VHF services had begun to decrease. And, as the disparity between the two services eroded during the 1980s and 1990s, the Commission repealed a number of rules and policies that had previously treated UHF stations differently…than their VHF counterparts. By the mid-1990s, the Commission went so far as to note that the disparities between UHF and VHF stations had been largely ameliorated and the

[4] Sinclair vainly argues at 7-8 that the discount is still justified. This is both irrelevant, since the Court could not affirm the Commission's decision on a different rationale*, see SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), and wrong. The 30 year-old authorities it cites predate the invention of digital television.

> ability of UHF stations to compete against VHF stations had greatly improved.[5]

In 1995, the Commission issued a NPRM seeking comment on whether the UHF discount should be modified or eliminated.[6] Before the Commission took action on this NPRM, however, Congress passed the 1996 Telecommunications Act, which directed the Commission to set the national cap at 35%. In implementing the new cap, the Commission left the UHF discount in effect pending the outcome of the NPRM. But it expressly cautioned that "any entity which acquires stations during this interim period" would be subject to the outcome in that proceeding.[7]

Later that year, observing that "both digital technology and the allotment of DTV channels may eventually diminish to a great extent the physical distinction between UHF and VHF signals," the Commission decided to postpone deciding whether to retain the UHF discount until the 1998 Biennial Review.[8]

In the 1998 Biennial Review, the Commission found that continued disparities warranted retention of the discount for the time being. But it cautioned

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[5] 31 FCCRcd at 10226-27.

[6] *Review of the Commission's Regulations Governing Television Broadcasting*, NPRM, 10 FCCRcd 3524, 3568 (1995).

[7] *Implementation of Section 202(c)(1)*, 11 FCCRcd 12374, 12375 (1996).

[8] *Broadcast Television National Ownership Rule*, 11 FCCRcd 19949, 19956 (1996).

that "the existing UHF discount will likely not work well for DTV," and declared that "the eventual modification or elimination of the discount for DTV will be appropriate."[9] It reiterated that entities acquiring stations in excess of the cap but for the discount, would be subject to its eventual decision on the discount.[10] Thus, the Commission repeatedly warned industry that the UHF discount would eventually be eliminated, and if they purchased stations putting them over the cap, they did so at their own risk.

When Congress directed the FCC to lower the cap to 39% in 2004, it was well aware of the need to address the discount in the context of the forthcoming digital transition. There was repeated discussion of the UHF discount in the Senate hearing that preceded enactment of the CAA.[11] The industry, too, clearly understood that modification of the discount was both inevitable and necessary after the digital transition. This understanding is evinced throughout comments filed with the Commission. Intervenor NAB, for example, filed comments with the Commission in 2004 about the impact of the CAA stating:

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[9] *1998 Biennial Regulatory Review,* 15 FCCRcd 11058, 11079-80 (2000).
[10] *Id.* at 11080 n.108.
[11] *E.g., FCC Oversight: Media Ownership and FCC Reauthorization*, S. Comm. on Commerce, Science and Transp., 108th Cong. at 106 (FCC Chairman Powell states that the UHF discount "matter[s] until the digital transition comes along"); 105 (statement of Senator Sununu); and 68 (statement of Senator Inouye) (June 4, 2003).

> It is likely that many stations now operating on VHF channels will ultimately be assigned to UHF channels for their final DTV channel assignments...In those circumstances, *the Commission would have to modify the UHF discount so that the change in channel assignments would not have the unintended effect of allowing an increase in station ownership levels beyond those existing today.*[12]

Similarly, when the Commission revisited whether to repeal the UHF discount in the 2006 Quadrennial Review,[13] Intervenor Ion urged the Commission to initiate a separate proceeding to consider the future of the UHF discount following the DTV transition.[14] The Commission concluded that the CAA foreclosed changing the UHF Discount in the 2006 Quadrennial Review, but stated it would address its authority to modify the discount in a separate proceeding.[15]

In 2013, the Commission launched a separate proceeding to eliminate the UHF Discount and repealed it in September 2016. The *Repeal Order* found that the "discount has outlived its purpose and intent and…acts only to undermine the national audience reach cap."[16] It found that the discount effectively allowed

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[12] NAB Comments, MB Docket No. 02-277, at 2 (Mar. 19, 2004) (emphasis added). The NAB added that the "failure to do so–it could be argued–would equally violate Congress' intent to leave national ownership levels as they are today." *Id.*

[13] *2006 Quadrennial Review NPRM*, 21 FCCRcd 8834, 8849 (2006).

[14] Ion Comments at 9, MB Docket No. 06-121 (Oct. 23, 2006).

[15] *2006 Quadrennial Review,* 23 FCCRcd 2010, 2085 (2006).

[16] 31 FCCRcd at 10213-14.

expansion "even beyond the level that Congress determined was too high when it enacted the CCA."[17] It explained that continuing to apply the UHF discount "seven years after the DTV transition has the absurd result of stretching the national audience reach cap to allow a station group to actually reach up to 78 percent of television households, dramatically raising the number of viewers that a station group can reach and thwarting the intent of the cap."[18]

The Commission's 2017 decision to reinstate the discount because repealing the discount "substantially tightened" the cap thus represents a complete change of position and a radical departure not only from the *status quo,* but from what the Commission has been saying for over twenty years.

### D. *Prometheus III* does Not Require that the Discount be Considered Simultaneously with the Cap

The Commission's stunning departure is not mandated by the Third Circuit's decision in *Prometheus III.* FCC at 10-11, citing 824 F.3d at 54-60. In *Prometheus III*, the Court found the Commission had "put the cart before the horse" when it decided to attribute certain contractual agreements between same-market television stations known as Joint Services Agreements ("JSAs") for purposes of the local television rule. Specifically, the Court found the Commission

[17] *Id.* at 10228.
[18] *Id.*

violated §202(h), which requires reexamination of the need for all broadcast ownership limits except the 39% cap every four years, because attributing television JSAs had the effect of making the local television rules more stringent without first determining whether the existing local television rules were in the public interest.[19]

By contrast here, repealing the UHF discount did not make the 39% cap more stringent, but merely changed how the Commission measured station reach to make it accurate. The Commission explicitly rejected the argument that *Prometheus III* required it to address the cap when it repealed the UHF Discount:

> The Local TV ownership rule clearly is subject to periodic review under section 202(h), whereas the national television ownership cap is not subject to that obligation. In addition, unlike our action on TV JSAs, we are grandfathering station groups that will exceed the national cap after we eliminate the UHF discount, so elimination of the UHF discount will not require divestitures by station owners. Finally,…retention of the UHF discount is indefensible, regardless of the level of the cap, because it is irrational in light of the digital transition.[20]

Yet another difference is that in *Prometheus III*, the Commission's review of the continued need for the local television rule had been ongoing since 2009, while

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[19] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 59 (2016).
[20] 31 FCCRcd at 10232, n.139.

here, the Commission has only promised to begin a proceeding to review the cap within the next year.

### E. The Commission was Permitted to Proceed One Step at a Time in Repealing the UHF Discount

Finally, the Commission's generic argument that it was unreasonable for the prior Commission to "restructure [an] entire industry on a piecemeal basis" is unfounded. FCC at 11, quoting *NAB v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984). This Court recognizes that "reform may take place one step at a time."[21] Although the FCC relies on *NAB* to support its position, that case actually concluded that the agency need not address all problems "in one fell swoop."

The *NAB* decision noted that whether an agency's decision to defer consideration of an issue was reasonable was "in essence a pragmatic" judgment.[22] Recognizing that "administrative action generally occurs against a shifting background in which facts, predictions, and policies are in flux," the Commission could reasonably decide to defer the resolution of related issues so long as its action did not amount to restructuring an industry on a piecemeal basis. In determining whether the agency acted reasonably, the Court considers whether it made some estimation as to the nature and magnitude of the problem it would have

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[21] *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001)(citations omitted).
[22] 740 F.2d at 1210.

to confront when resolves the postponed issue and whether its predictions were plausible and flowed from the record compiled in the proceeding.[23]

Eliminating the UHF discount cap hardly constituted a "wholesale restructuring" of television markets. Moreover, the Commission substantially reduced the magnitude of any problems that might otherwise be created by grandfathering existing station ownership groups that would exceed the 39% audience cap.

## II. Petitioners will be Harmed in the Absence of a Stay

The Commission does not dispute that Petitioners will incur harm if it approves television acquisitions that reduce the number of media voices. The Commission instead claims that Petitioners have not established that they will incur harm because they wrongly "assume[] that the Commission will approve" acquisitions that depend on the UHF discount, and that any harm is remediable because the Commission could condition approval of transaction upon the outcome of judicial review and has the authority to require divestiture. FCC at 18-19.

The Commission depicts an alternate universe in which it sometimes grants petitions to deny, refuses to approve facially complete transfer applications and, if necessary, requires divestitures. As Petitioners demonstrated in the Stay Motion at 18-19, & Att. G, the Commission never grants petitions to deny, always approves

[23] *Id.*

transfer applications, and even where it conditions approval on the grant of a temporary waiver, lacks the will to enforce divestiture mandates.

Petitioners' claims are hardly hypothetical. Sinclair confirms it has already sought approval of one transaction that would depend on the UHF Discount and it will soon seek approval of its acquisition of Tribune. Sinclair at 14, 18. Even if petitions to deny are filed, they will have been acted upon (and inevitably denied) well before this Court can render a decision on the merits in this case. Neither the Commission nor the Intervenors take issue with Petitioners' showing that it has been many years since the Commission designated a hearing, much less denied, any of the thousands of transfer applications it has received.

Unable to find even a single example to the contrary in this century, Tribune points to a petition to deny filed 20 years ago where the applicant later voluntarily withdrew without explanation. This actually confirms Petitioners' position. The withdrawal was ***not*** based on anything the Commission did; it did not decide on the petition to deny, much less designate it for hearing, and there is absolutely no basis to speculate about what the Commission might have done had it ever considered the merits. It is entirely possible, perhaps even likely, that the application was withdrawn for unrelated business reasons, such as financing problems.

The possibility that the Commission would require divestiture of a previously approved transaction is almost laughable. Seemingly oblivious to irony, the Commission at 20 cites *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002), for the proposition that, theoretically, it has power to order divestiture of a television station.[24] However, none of the parties can cite to a single such example since the late 1970's when the Commission required several divestitures after a Supreme Court decision upholding the newspaper-broadcast cross-ownership rule.

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[24] The Commission has a history of not enforcing divestitures even when it has granted a temporary waiver specifically for that purpose. Ironically, Fox, which is currently in violation of another ownership limit provides a dramatic example. In 2001, Fox, owner of the *New York Post* and a New York television station pursuant to an earlier permanent waiver of the newspaper broadcast cross-ownership rule, applied to acquire a second television station serving New York. The Commission found the acquisition violated the cross-ownership rule, but approved it conditioned on Fox coming into compliance with the rule within 24 months. *UTV of San Francisco, Inc.*, 16 FCCRcd 14975 (2001). This Court upheld the Commission's findings that a temporary waiver served the public interest and that 24 months was an appropriate time period. *Office of Communication of the United Church of Christ v. FCC,* D.C. Cir. 01-1374 (Nov. 8, 2002). However, after Fox's temporary waiver expired in 2003, the Commission took no steps to enforce its decision until October 2006, when it retroactively gave Fox a new temporary waiver through December 2008. *K. Rupert Murdoch*, 21 FCCR 11499 (2006). When that waiver expired, the Commission did nothing until 2014, when it gave Fox another retroactive temporary waiver, which remained in effect until March 1. 2017. *Fox Television Stations, Inc.*, 29 FCC Rcd 9564 (2014). The day before expiration, Fox filed yet another waiver request, which remains pending.

The Commission's effort to distinguish the Third Circuit's *Prometheus* stay decision also falls short. While it emphasizes that the Court had not made any finding of likelihood of success on the merits, Petitioners cited the decision for its determination on harm to the petitioners and the absence of harm to other parties.[25] The fact that the Third Circuit later reversed the Commission certainly suggests that there would have been ample reason to have found a likelihood of success had the Court found it necessary to make such a determination.[26]

## III. A Stay Would Not Harm Other Parties

The Commission makes no serious attempt to argue that a stay would harm broadcasters, but merely observes that a stay could undermine broadcasters' long term business strategies. FCC at 21. Sinclair complains at 19 that the pendency of this appeal will increase costs for its pending transactions, but that is due to Sinclair's choice to "jump the gun" by moving to acquire more stations before the *Reinstatement Order* became final. Ion worries that a stay "will have an immediate adverse effect on its market value." Tribune at 19. But if that were to happen, it would be a function of stock market speculation rather than the FCC's

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[25] Tribune (at p. 16) and Sinclair (at p. 16) question whether Petitioners will be harmed by consolidation. The Supreme Court has found otherwise. *FCC v. NCCB*. 436 U.S. 775, 780 (1978).

[26] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

decision. Tribune's claim at 20 that a stay would require some owners to break up their stations groups in order to recapitalize or refinance is simply false.[27]

Opponents do not dispute that small broadcasters and other small businesses will be hurt by reinstatement of the discount.[28] Sinclair instead contends at 20 that even if small broadcasters might benefit from the availability of stations that in the absence of a stay would be acquired by large broadcasters, "does not negate the harm to those broadcasters with pending transactions." But this misses the point that the Court must balance Sinclair's rather dubious concerns against the more certain harms faced by other third parties.

### IV. A Stay Would Serve the Public Interest

Although Petitioners presented compelling reasons why a stay would promote the public interest, the Opponents had nothing to say in response.

## CONCLUSION

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[27] Tribune cites ¶52 of the *Repeal Order* (misidentified as the *Reconsideration Order* which has no ¶52) where the Commission actually said that the "grandfathering rule we adopt today preserves existing combinations, like ION's." The other case cited by Tribune, *K. Rupert Murdoch*, 24 FCC Rcd 5824 (2009), in fact allowed a company to engage in recapitalization without having to divest pre-existing assets that violated a different ownership rule.

[28] For example, the American Cable Association, which represents small cable operators, warned that "retention of the now unjustified UHF discount will exacerbate the harmful effects of the large scale consolidation…in the broadcast industry….This will…increase the already significant bargaining power that large station groups possess in retransmission consent negotiations." ACA Ex Parte Letter, Docket No. 13-236, at 3 (Aug. 3, 2016).

Wherefore, this Court should grant the Stay Motion and all such other relief as may be just and proper.

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**CERTIFICATE OF COMPLIANCE**

1. This pleading complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 3838 ords, which is less than the 3900 word maximum set forth in this Court's June 1, 2017 Order

2. This pleading complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word with a proportionally spaced typeface in 14-point font.

Respectfully submitted,

/s/ Andrew Jay Schwartzman

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May 26, 2017

**CERTIFICATE OF SERVICE**

I, Andrew Jay Schwartzman, hereby certify that on June 7, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Andrew Jay Schwartzman
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