Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	**)**	
	)	
Amendment of Section 73.3555(e) of the	**)**	**MB Docket No. 13-236**
Commission's Rules, National Television	**)**	
Multiple Ownership Rule	**)**	

PETITION FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

Each of the four factors the Commission employs strongly favor grant of a stay of the Commission's decision to reinstate the UHF Discount, pending judicial review. The circumstances here are stronger than those that the Third Circuit found sufficient to grant a stay of the Commission's 2003 decision that would have substantially relaxed most of the Commission's ownership rules.

First, Petitioners have a strong likelihood of success on the merits. No one, including the two members of the Commission majority, disputes that the original justification for the UHF Discount has long since disappeared. It is arbitrary and capricious to adopt a provision that lacks any independent technical or policy support, and which contravenes the statutory limit on national television ownership. The purported justification for reinstatement – that the UHF Discount should be operative until such time as the Commission initiates and completes a proceeding that would "consider" whether to modify the national television ownership rule – cannot possibly be the basis for adoption of a concededly unsupportable rule, especially when one of the two members of the Commission majority agrees with Petitioners that the Commission lacks statutory authority to change the national ownership rule. Moreover, and in any event, it is arbitrary and capricious to assume what the future membership of the FCC may do in an as-yet to be initiated hypothetical proceeding based on a record that does not yet exist and may not support the legal and factual conclusions necessary to do what the current majority of the Commission would like to do.

Second, Petitioners and the viewers they represent will incur immediate and irreparable harm because the Commission can approve assignment and transfer applications 30 days after publication of notice, and divestiture thereafter is effectively impossible. Even before the

reinstatement of the UHF Discount becomes effective, two major transactions that would not otherwise be permissible have been announced and news reports and investment analysts predict a wave of TV station acquisitions by parties that have been constrained until now.

Third, as the Third Circuit said in 2003, grant of a stay will not adversely affect third parties, since it will maintain the *status quo ante*.

Fourth, grant of a stay will significantly protect and promote the public interest. Maintaining a diversity of voices goes to the heart of the Commission's mission to promote competition and diversity, and all Americans will benefit from the grant of a stay.

ARGUMENT

Pursuant to 47 C.F.R. §1.43, Free Press, Office of Communication, Inc. of the United Church of Christ, Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition, and Common Cause ("Petitioners") respectfully petition the Commission to stay the effective date of the amendment to 47 CFR §73.3555(e) adopted in the Commission's *Order on Reconsideration*, Docket No. 13-236 (FCC 17-40, released April 21, 2017) ("UHF Reconsideration Order"), pending judicial review. This order reinstated a technically obsolete rule, the UHF Discount, which means the Commission is underestimating audience reach under the Congressionally-set 39% national television broadcast ownership cap.

The current Commission majority believes that the 39% statutory broadcast television ownership cap should be set at a different level. However, as one of the Commissioners in the majority concedes, the Commission lacks legal authority to modify the 39% cap. The Commission should stay the implementation of the UHF Discount reinstatement because it is founded on flawed legal premises and would result serious and irreparable harm to the interests of the viewing public.

The UHF Reconsideration Order was published in the Federal Register on May 5, 2017.[1] Accordingly, the revisions the Commission adopted will be effective on June 5, 2017. As discussed below, at least two major transactions based on reinstatement of the UHF Discount have already been announced, and there may well be many others announced in the next few weeks. Applications for transfer or assignment can be filed even before the new rules are effective, and the Commission can act on unopposed applications 30 days after they are placed on public notice. Petitioners expect to file a petition for review of the UHF Reconsideration

[1] 82 FR 21124 (May 5, 2017).

Order in the United States Court of Appeals prior to May 15, 2017. Thus, there is compelling need for prompt action on this petition and, in the event that the Commission does not grant this petition by May 23, 2017, petitioners will treat it as having been denied, and will file a motion for judicial stay immediately thereafter.

INTRODUCTION

The national ownership audience cap limits a licensee from ownership of TV stations reaching more than a specified proportion of the nation's television homes. In 2004, Congress codified the cap at 39% of the nation's TV homes. The UHF Discount does not affect the cap itself, but sets forth how to calculate the viewership of UHF television stations for the purpose of assessing compliance with the cap.

In September, 2016, the Commission repealed the UHF Discount because the rationale for its imposition has long since ceased to exist.[2] Seven months later, the UHF Reconsideration Order reinstated the UHF Discount. In that order, neither the majority nor the dissent identifies any legal or factual errors in the repeal of the UHF Discount. Rather, the majority states that it wished to maintain the *status quo ante* pending the initiation of a future notice and comment proceeding in which it might modify the national ownership cap, notwithstanding that one of the two member Commission majority believes that the Commission lacks statutory authority to do so. This extraordinary and novel action in reinstating a rule for which there is concededly no current legal or policy justification is an architype of arbitrary and capacious decisionmaking.

[2] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 31 FCCRcd 10213 (2016)(UHF Discount Repeal Order).

In evaluating stay petitions, the Commission uses the four-factor test established by the U.S. Court of Appeals for the District of Columbia Circuit in *Virginia Petroleum Jobbers*.[3] The Commission considers whether: (1) the petitioners are likely to prevail on the merits; (2) the petitioners will suffer irreparable harm if a stay is not granted; (3) other interested parties will be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay. In applying this test, the Commission has held that it need not accord each prong equal weight, and "[i]f there is a particularly overwhelming showing in at least one of the factors, the Commission may find that a stay is warranted notwithstanding the absence of another one of the factors."[4]

Strong and highly relevant precedent supports grant of a stay in this matter. In *Prometheus Radio Project v. FCC*, 2003 WL22052896 (3rd Cir. 2003), the Third Circuit stayed implementation of an FCC decision to substantially relax broadcast ownership rules. It found that the substantial "harm to petitioners absent a stay would be the likely loss of an adequate remedy should the new ownership rules be declared invalid in whole or in part."[5] By contrast, it found that "there is little indication that a stay pending appeal will result in substantial harm to the Commission or other interested parties."[6] The Court did not find it necessary to undertake an extensive analysis of the likelihood of success on the merits because "these harms could outweigh the effect of a stay on Respondent [FCC] and relevant third parties."[7] Thus, it

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[3] *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (1958) (*Virginia Petroleum*); *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

[4] *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 23 FCCRcd 1705, 1707, ¶4 (2008).

[5] *Prometheus Radio Project v. FCC*, 2003 WL22052896, 22052897 (3rd Cir. 2003).

[6] *Id*.

[7] *Id*.

concluded that "Given the magnitude of this matter and the public's interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial review."[8]

The harms that Petitioners face in this case are precisely the same as those that were faced in the Third Circuit. So, too, is the absence of harm to third parties exactly the same here. The only real difference in this case is that Petitioners here also demonstrate an unusually strong likelihood of success on the merits, making the case for a stay in this matter even stronger than was the case in *Prometheus*.

I. Petitioners are Likely to Prevail on the Merits of the Appeal.

Petitioners are likely to prevail on the merits because the Commission's UHF Reconsideration Order was arbitrary and capricious. Under 5 U.S.C. §706, a "reviewing court shall...hold unlawful and set aside agency action, findings, and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In general,

> an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[9]

The APA's requirement for rational decisionmaking "dictates that the agency simply cannot employ means that actually undercut its own purported goals."[10] In this case, the UFH Reconsideration Order is arbitrary and capricious because, *inter alia*, reinstatement of the concededly obsolete UHF discount "fail[s] to advance the Commission's own purported policy

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[8] *Id*.

[9] *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

[10] *Office of Communication of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985).

goals"[11] of limiting the audience reach of broadcast owners and promoting competition and diversity in ownership of broadcast media.

Petitioners, the Commission, and broadcasters all agree that the justification for allowing UHF stations a discount when calculating national audience reach no longer exists. Indeed, in the wake of the changed circumstances since the original adoption of the UHF Discount, including the transition to digital television as well as the recent incentive auction, reinstatement undermines the Congressional objective of adopting a 39% ownership cap. Moreover, no technical, policy, or other reasons support reinstating the outdated discount. The purported basis for reinstatement–that a future membership of the Commission may initiate a proceeding which may develop a record that would permit it to modify the national TV ownership cap–is not only highly speculative, but is based on what one member of the two member Commission majority agrees to be an erroneous legal premise. For all these reasons and more, reinstatement of the UHF Discount was arbitrary and capricious.

A. All agree the original justification for the UHF Discount no longer exists

The UHF Discount was created to modify calculation of a TV group owner's national audience reach to take into account the technical inferiority and limited reach of UHF stations as of the time it was adopted. In 1985, when the Commission set a maximum national audience reach cap (originally 25%) for TV station ownership,[12] it determined that only half of the audience in a UHF station's market should be counted towards the limit. As the Commission majority itself explains, without disagreement, in the UHF Reconsideration Order,

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[11] *Id*. 779 F.2d at 714.

[12] *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*, 100 FCC2d 74 (1985)("1985 TV Ownership Reconsideration").

> The discount was intended to mitigate the competitive disadvantage that UHF stations suffered in comparison to VHF stations, as UHF stations were technically inferior, producing weaker over-the-air signals, reaching smaller audiences, and costing more to build and operate.[13]

In defining the national audience cap in this manner,

> [t]he Commission concluded that this "UHF discount" provided a measure of the actual reduction in audience reach experienced by UHF stations. It also concluded that the discount supported the viability of UHF television, which was consistent with traditional diversity objectives.[14]

The Commission originally justified the UHF discount as an "indicator of the reach handicap of UHF stations[, which] measures the actual coverage limiation inherent in the UHF signal," and found "that the discount system...provides a measure of the actual voice handicap."[15] In requiring that the cap be calculated to include a UHF Discount, the Commission considered and rejected broadcaster proposals that would have undermined the cap and permitted further consolidation through separate VHF and combined VHF/UHF caps,[16] because it did "not believe that the [UHF] incentive should be structured so as to merely increase the [audience] reach cap."[17]

The digital transition, completed in 2009, eliminated the technical differences between VHF and UHF signals. In the years leading up to the digital transition, the Commission recognized that this change obviated the UHF Discount and that it would need to repeal it to reflect this reality. Thus, in 2000, it promised to issue, near the completion of the digital

[13] UHF Reconsideration Order at 3, ¶5 (citation omitted).
[14] UHF Discount Repeal Order, 31 FCCRcd at 10215, ¶5 (citations omitted).
[15] 1985 TV Ownership Reconsideration, 100 FCC2d at 93-94, ¶44.
[16] 1985 TV Ownership Reconsideration, 100 FCC2d at 90 n.44, ¶39.
[17] *Id*., 100 FCC2d at 93, ¶44.

transition, an "[NPRM] proposing a phased-in elimination of the discount."[18] In 2003, the Commission likewise re-affirmed that "it is clear that the digital transition will largely eliminate the technical basis for the UHF discount"[19] and ordered that a phased-in elimination of the discount would begin following the transition to digital.[20] The phase-in requirement, however, never took effect because the entire decision was later reversed on other grounds.[21]

Broadcasters agreed that the UHF discount would need to be modified as a result of the transition to digital television, and that this modification was appropriate, even required, in order to maintain the accuracy of Congress' 39% cap. Although the National Association of Broadcasters ("NAB") argued in 2004 that the Commission should not "abandon[] or significantly alter[] the UHF discount at this time," it added that "[t]his does not mean that the UHF discount should not be modified in light of future changes in television assignments."[22] It continued,

> It is likely that many stations now operating on VHF channels will ultimately be assigned to UHF channels for their final DTV channel assignments. The Commission's objective in developing the DTV assignment plan was to replicate stations' analog service areas. It would be appropriate for the Commission to consider whether a station that has moved to a UHF channel that replicates the coverage area it had with a VHF channel would suffer from the same handicap as many UHF analog stations do today. 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. Indeed, failure to do so–it could be argued–would equally violate Congress' intent to leave national ownership levels as they are today.[23]

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[18] *Report in the Matter of 1998 Biennial Regulatory Review*, 15 FCCRcd 11058, 11080, ¶38 (2000)("1998 BR").

[19] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules*, 18 FCCRcd 13620, 13847, ¶591 (2003)("2002 BR").

[20] *Id*.

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

[22] Comments of NAB, MB Docket No. 02-277 (Mar. 19, 2004).

[23] *Id*.

Whatever disparity has continued to exist between VHF and UHF spectrum has actually converted UHF's liability into a technological and financial advantage as demonstrated by Congress' treatment of UHF spectrum when it authorized the recently-completed TV incentive auction. In the Middle Class Tax Relief and Job Creation Act of 2012, Congress voted to realign TV channel allocations to free up UHF spectrum so that it could be repurposed and auctioned off for non-broadcast uses.[24] The superiority of UHF spectrum was recognized by compensating broadcasters that sell their UHF spectrum and move to an inferior VHF position.[25]

The Commission, which has been subjected to criticism for its "troubling" unwillingness to deal with issues pertaining to its broadcast ownership rules,[26] finally commenced a separate proceeding to evaluate the UHF Discount in 2013, four years after the completion of the transition to digital.[27] The Commission acknowledged that experience had shown that in a world of digital broadcasting, the UHF signal was no longer inferior for reaching local broadcast TV audiences.[28] Indeed, during the initial comment period, in which the Commission heard from

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[24] P.L. 112-96; *see* "The Broadcast Television Spectrum Incentive Auction: A Staff Summary," at 5, https://www.fcc.gov/document/broadcast-television-spectrum-incentive-auction-staff-summary ("The particular suitability of UHF spectrum for mobile broadband is why the incentive auction process holds such promise. Through the incentive auction, a portion of the spectrum currently occupied by broadcast television licensees will be made available for mobile broadband. The FCC will use its unique authority to replace the broadcast licenses that it reclaims in the reverse auction with flexible use licenses for the cleared spectrum that may cover large geographic areas that were previously occupied by numerous individual stations. Without the FCC's authority and coordination, the creation of such licenses suitable for deploying mobile broadband service nationwide would be impossible.").

[25] Rosston and Skrzypacz, "Moving from Broadcast Television to Mobile Broadband: The FCC's 2016 Incentive Auction," https://publicpolicy.stanford.edu/news/moving-broadcast-television-mobile-broadband-fcc%E2%80%99s-2016-incentive-auction (describing how incentive auction creates incentives to move from UHF to VHF); Milgrom, "Discovering Prices: Auction Design in Markets with Complex Constraints" (2017)(similar).

[26] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 37 (3rd Cir. 2016).

[27] *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 28 FCCRcd 14324 (2013).

[28] *Id*., 28 FCCRcd at 14330, ¶16.

diverse parties representing public, broadcast, network, and wireless telecommunications interests, not a single commenter contended that the original justification for the UHF discount was still valid.[29] In his dissent to the UHF Discount Repeal Order, now-Chairman Pai did not dispute that the technical basis for the UHF discount no longer exists, noting that the UHF spectrum may actually be superior for DTV broadcasting.[30]

In 2016, the Commission finally eliminated the UHF Discount in light of these technical changes. Even as it now reinstates the UHF Discount, the Commission concedes that the discount was created "in recognition of the technical limitations that restricted the audience reach of analog UHF stations."[31] The UHF Discount Reconsideration Order acknowledges that the digital transition was completed in 2009[32] and finds again that "experience has confirmed that UHF channels are equal, if not superior to, VHF channels for" reaching an audience with digital transmissions.[33] Reinstating the discount even though its original justification no longer exists can only be characterized as arbitrary and capricious.

B. There are no technical, policy or other reasons to reinstate the UHF Discount

The UHF Reconsideration Order makes the Commission's calculation of each broadcaster's national audience reach substantially less accurate. In repealing the discount in 2016, the Commission correctly found that "the UHF discount does not appropriately reflect the technical and economic reality of UHF facilities today," and found that "without any current technological justification, the continued application of the UHF discount distorts the calculation

[29] *See* Reply Comments of Public Interest Commenters at 1, MB Docket No. 13-236 (Jan. 13, 2014).

[30] UHF Discount Repeal Order, 31 FCCRcd at 10247 (Commissioner Pai, dissenting).

[31] UHF Reconsideration Order at 2, ¶2.

[32] *Id*. at 4, ¶8.

[33] *Id*.

of a licensee's national audience reach and undermines the intent of the cap."[34] The UHF Reconsideration Order makes no contrary findings. Instead, the Commission's sole basis for reinstating the UHF Discount is the claim that to modify the UHF Discount, the Commission must also consider modifying the national cap, and it promises to initiate a rulemaking to address the cap in the future. As explained in more detail below, this is an impermissible justification for reinstating the discount, because the Commission does not have the power to modify the 39% cap.

Reinstatement of the outdated UHF Discount also undermines the Commission's public interest standard in broadcasting, which embodies the objectives of competition, localism, and diversity.[35] As markets become more concentrated, artificial economies of scale are created, driving away potential new entrants in favor of existing large chains.[36] Today, by design, the discount does not promote new entry or competition because it reduces the number of stations available to new entrants and reduces the number of competitors nationwide.[37]

C. Reinstatement of a technologically obsolete provision contravenes the statutory limit on national television ownership

The UHF Reconsideration Order is arbitrary and capricious because it incorrectly, and without acknowledgement or explanation, reconceives the 39% national cap as a de facto 78% cap. Congress' goal in passing the Consolidated Appropriations Act ("CAA")[38] was to limit the power of large group owners in order to protect broadcast ownership diversity at a time when

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[34] UHF Discount Repeal Order, 31 FCCRcd at 10228, ¶34.

[35] *See, e.g., 2002 Biennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules*, 18 FCCRcd 13620, 13624, ¶8 (2003)("2002 BR").

[36] *See* Comments of Free Press at 4, MB Docket No. 13-236 (Dec. 16, 2013)(citing Turner, Out of the Picture 2007: Minority & Female TV Station Ownership in the United States (2007).

[37] *Id*.

[38] Pub. L. No. 108-199, §629(1), (3) (2004)("CAA").

ownership of UHF stations afforded much less power, and not to create a perpetual "half off sale" for the national ownership cap as if it were a mall department store. Neither did Congress enact the CAA to invite station owners to convert their VHF stations to UHF, claim the 50% UHF discount, and gain room for further expansion and consolidation.

Congress's overarching goal in 2004 was to prevent further media consolidation.[39] After the Commission voted to increase the national ownership cap to 45%, both houses passed legislation to return the cap to 35%. The Conference Committee reported a final bill with a 39% cap as a political compromise designed to avoid forcing Fox and CBS to divest any properties.[40] Congress did not adopt the 39% cap with the expectation that licensees would convert stations from VHF to UHF to take advantage of the discount and increase their national reach above the 45% cap it viewed as too high.[41]

Although it was not what Congress intended, Fox and CBS did convert or swap many of their stations from VHF to UHF after the 2009 digital transition, when the technical limits of UHF no longer existed. The UHF Discount Repeal Order explains how Fox exploited the UHF Discount to evade the 39% national cap:

> Fox's national audience reach calculation suddenly decreased with the benefit of the UHF discount...despite the fact that Fox still owned the same number of stations in the same markets reaching the same audiences....[Converting stations to UHF] had the effect of greatly reducing Fox's national audience reach

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[39] CAA, §629, 99-100.

[40] *See* 149 Cong.Rec. H12315 (Nov. 25, 2003)(statement of Rep. Obey).

[41] Indeed, just one year before the passage of the CAA, the Commission found that "the established broadcast networks generally have not sought to take advantage of the UHF discount to gain greater national reach through local stations." 2002 BR, 18 FCCRcd at 13847, ¶590. It further found that the four national networks had not "replac[ed] their VHF stations with UHF stations" to increase their allowed reach, but "instead...sought elimination of the national ownership cap." *Id*. At the time, the largest station owner, CBS, had a discounted audience reach of 38.90%, and actual audience reach of 43.35%–representing extra headroom of 4.45%. *See* Winslow, *The Top 25 Station Groups: How They Rank and Why*, Broadcasting & Cable 38 (April 18, 2005).

> calculation and potentially allowing significant additional consolidation, although it had no effect on its actual national audience reach. This example demonstrates the absurd results created by the continued existence of the discount.[42]

Reinstatement of the UHF Discount provides many broadcasters with additional headroom before they bump up against the cap, even though otherwise they would not be permitted to acquire more licenses. For example, CBS and Fox gained extra headroom of 12.6% and 12.7%, respectively.[43] Absent a stay, this difference will be even more significant because these companies could now acquire additional UHF stations with the benefit of the UHF Discount. In 2005, 4.45 points in headroom represented room to acquire the equivalent of VHF stations in Chicago and Miami. In 2017, 12.6 points would allow the acquisition of UHF stations in Chicago and Miami–but also all of New York City, Boston, Denver, Philadelphia, Baltimore, Minneapolis, San Francisco, Atlanta, and Orlando. The difference is striking.

Broadcast licensees have acknowledged that Congress did not create a statutory "time bomb" to authorize mega-mergers once digital technology allowed the top four networks to transition to UHF. In 2006, several filed comments acknowledging as much. For example, Fox made clear that it did "not suggest[] that the UHF discount be made applicable to analog VHF stations that ultimately become digital UHF stations," and rather believed "only that the discount should continue to apply to formerly analog UHF stations even after the completion of the digital transition."[44] Similarly, Fox, CBS, NBC, and The Walt Disney Company jointly acknowledged in 2006 that "major networks [will not] attempt to increase their station holdings by claiming the UHF discount for legacy VHF stations that wind up operating in the UHF band post transition,"

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[42] UHF Discount Repeal Order, 31 FCCRcd at 10230, ¶36.

[43] *See* Sherman and Shields, *Changes Under Republican FCC Seen Leading to TV Deal Frenzy*, Bloomberg News (March 8, 2017), https://www.bloomberg.com/news/articles/2017-03-08/new-tv-rules-under-gop-led-fcc-could-lead-to-m-a-free-for-all.

[44] Fox Comments at 34 n.122, MB Docket No. 06-121 (Oct. 23, 2006).

and to the contrary, recognized that "legacy VHF stations should be attributed their full audience reach post transition."[45] However, following the digital transition, Fox converted many of its legacy analog VHF stations to UHF, and in 2013 Fox complained that attributing the full audience reach to its stations in places like New York City and Washington, D.C., would cause its compliance figures to "careen forward," and that it would "see its safety net evaporate."[46]

The UHF Discount Repeal Order properly characterized this extra, post-digital transition headroom as an "unwarranted windfall."[47] Yet, as Commissioner Clyburn explained in her dissent to the UHF Reconsideration Order, this unwarranted windfall could not be relied on as the basis for deals because the industry had been on notice for nearly 20 years that the UHF Discount may be eliminated.[48] Reinstatement of the UHF Discount opens the door for rapid and massive consolidation despite a Congressional directive that there should be a limit on the scope of national ownership.

D. The Commission majority's purported justification for reinstatement is arbitrary and capricious

The Commission majority's sole justification for reinstating the UHF Discount is that the matter should be "consider[ed]...as part of a broader reassessment of the national audience reach cap, which we will begin later this year."[49] Most notably, the Commission majority does not find any flaw in the findings or conclusions of the UHF Discount Repeal Order other than that

[45] Reply Comments of CBS Corporation, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., and The Walt Disney Company at 17 n.60, MB Docket No. 06-121 (Oct. 23, 2006).

[46] Fox Comments at 13, MB Docket No. 13-236 (Dec. 16, 2013).

[47] UHF Discount Repeal Order, 31 FCCRcd at 10229, ¶35.

[48] UHF Reconsideration Order at 17 (Commissioner Clyburn, dissenting).

[49] UHF Reconsideration Order at 7, ¶15.

the earlier Commission had failed to "review whether the current national cap ownership rule is sound"[50] and to "fully consider[] whether the cap should be modified."[51]

This rationale is as extraordinary as it is arbitrary and capricious. The majority restores a concededly unjustifiable provision not because what the prior Commission did was wrong, but because the Commission should have taken a step one of its supporters believes it lacks the statutory authority to do in the first place.[52] Moreover, assuming for purposes of argument that the Commission did have the legal power to act, it is unreasonable for it to assume that it will be able to develop a factual record supporting relaxation or repeal of the cap and that in the future, the Commission, which will likely have different members, would adopt the proposal.

E. The FCC lacks the statutory authority to raise the national audience reach beyond 39%

Regardless of whether the current or future membership of the Commission is inclined to initiate a comprehensive proceeding in which it might propose to modify the 39% national ownership cap, it does not have the power to make such a change. The UHF Reconsideration Order is therefore arbitrary and capricious because it is predicated on an action that, if it occurs, will undoubtedly be reversed.

The CAA adopted the 39% national ownership cap by amending Section 202(c)(1) of the 1996 Telecommunications Act and excluding that cap from the regular ownership review by the

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[50] UHF Reconsideration Order at 4, ¶9.

[51] *Id*. at 5, ¶10.

[52] In his dissent to the repeal of the UHF Discount, Commissioner O'Reilly said that "I reject the assertion that the Commission has authority to modify the National Television Ownership Rule in any way, including eliminating the UHF discount, and therefore I dissent." UHF Discount Repeal Order, 31 FCCRcd at 10251 (Commissioner O'Rielly, dissenting). The Commission did not base its new decision on the rationale articulated by Commissioner O'Reilly.

Commission.[53] The CAA provided that subsection 47 U.S.C. §202(h) "does not apply to any rules relating to the 39% national audience reach limitation in subsection (c)(1)(B)."[54] The CAA further prohibited the Commission from using its forbearance authority in Section 10 of the Communications Act, 47 USC §160, with respect to the 39% cap.[55]

Commissioner O'Rielly, who worked in the office of U.S. Senator John E. Sununu at the time of the passage, has repeatedly expressed his belief that the Commission is prohibited from changing the national reach cap. For example, last year he dissented from the order eliminating the UHF Discount because of his belief that the national ownership cap "remains one of the few media ownership rules specifically set by statute and the only one exempted from the Quadrennial Review process governing the other ownership rules, in order to protect a tenuous compromise from the whims of the Commission."[56] Thus, he "reject[ed] the assertion that the Commission has authority to modify the National Television Ownership Rule in any way, including eliminating the UHF discount."[57] Notably, the UHF Reinstatement Order is based on the entirely contradictory premise that the Commission can modify *both* the UHF Discount and the national ownership cap.

While Petitioners believe that the Commission can modify the UHF Discount, they agree with Commissioner O'Reilly that the Commission cannot "consider[] whether the [national] cap should be modified,"[58] because it simply does not have the power to modify the cap. It is

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[53] Section 202(h), as amended in 2004, directs the FCC to conduct a quadrennial review of its broadcast ownership rules. *See Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004).

[54] CAA, §629(3).

[55] CAA, §629(2).

[56] UHF Discount Repeal Order, 31 FCCRcd at 10251 (Commissioner O'Reilly, dissenting).

[57] *Id.*

[58] UHF Reconsideration Order at 5, ¶10.

arbitrary and capricious to base the reinstatement on a prohibited action. The UHF Reconsideration Order is further arbitrary and capricious because it does not address the question of the Commission's authority to change the national ownership cap at all. Additionally, it was arbitrary and capricious because it was premised on the assumption that the Commission may modify the national cap, a premise rejected by one member of the two member majority.

F. The UHF Discount is not intrinsically linked to the 39% limit

The UHF Reconsideration Order asserts that "the UHF discount and the national audience reach cap are closely linked,"[59] and that, therefore, the Commission cannot modify or eliminate the discount without also considering adjusting the 39% cap. Leaving aside the fact that Commissioner O'Reilly believes that the Commission cannot modify either the cap or the UHF Discount, the statement is incorrect as a matter of law.

In the leadup to the digital transition, which became effective in 2009, both the Commission and broadcasters acknowledged that the resulting elimination of UHF stations' technical inferiority to VHF should result in the phasing out and eventual elimination of the discount. In 2000, the Commission promised to issue an "[NPRM] proposing a phased-in elimination of the discount" near the completion of the transition.[60] In 2003, finding that "it is clear that the digital transition will largely eliminate the technical basis for the UHF Discount, because UHF and VHF signals will be substantially equalized,"[61] and out of concern that the largest group owners could become too powerful if it were retained, the Commission voted to repeal the UHF Discount for the four major TV networks as of the date of the digital transition. It also stated that it would initiate a further proceeding to "determine whether to include stations

[59] *Id*.
[60] 1998 BR, 15 FCCRcd at 11080, ¶38.
[61] 2002 BR, 18 FCCRcd at 13847, ¶591.

owned by these other networks and station group owners in the sunset provision we have established for stations owned by the top four broadcast networks."[62]

When Congress fixed the national cap at 39% in 2004, it did so in a context in which the Commission contemplated adjusting the UHF Discount. It did not mention the UHF Discount,[63] much less express any intent to preempt the Commission's authority to modify or eliminate it. The notion that Congress cemented the discount as the method for assessing the ownership limit cannot be squared with established principles of statutory interpretation, which recognize that, "[t]o freeze an agency interpretation, Congress must give a strong affirmative indication that it wishes the present interpretation to stay in place."[64] There is no such affirmation in the CAA, despite Congress being on notice since the 1998 Biennial Review that the Commission intended to repeal the discount, and despite the Senate holding a hearing on the Commission's media ownership rules in June of 2003, where members raised the UHF discount issue.[65]

G. It is unreasonable to assume a future Commission will raise the audience reach limitation in a future proceeding based on a record that does not yet exist

It is arbitrary and capricious to assume what the future membership of the FCC may do in an as-yet to be initiated hypothetical proceeding based on a record that does not yet exist and may not support the legal and factual conclusions necessary to do what the current majority of the Commission would like to do.

The premise of the Commission's reinstatement of the UHF Discount is that the prior Commission decision "lacked a reasoned basis for its conclusion that action on the discount

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[62] *Id*.

[63] *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3rd Cir. 2004).

[64] *AFL-CIO v. Brock*, 835 F.2d 912, 916 (D.C. Cir. 1987); *see also*, Reply Comments of Public Interest Commenters at 4-5, MB Docket No. 13-236 (Jan. 13, 2014).

[65] *Media Ownership Rules, Hearing of the Senate Commerce, Science, and Transportation Committee*, Federal News Service (Jun. 4, 2003).

should not be combined with a broader review of the national cap."[66] To address this purported failing, the majority said that it "will open a proceeding later this year to consider whether it is in the public interest to modify the national audience reach rule, including the UHF discount."[67]

As noted above, the Commission not only has no legal or policy basis to reinstate the UHF Discount, but it also lacks the authority to modify the national audience reach cap. In any event, it is arbitrary and capricious to reinstate a provision that lacks any current policy justification based on the promise that the Commission will conduct a future proceeding, the outcome of which cannot possibly be known.

The Commission majority may well be able to fulfill the promise to initiate a proceeding, but even that is not certain. The majority also assumes that the legal and factual record of this as yet to be conceived proceeding will garner a majority vote to modify the national ownership rules. Unless he changes his mind on the Commission's power to change those rules, Commissioner O'Rielly will not be part of such a majority. Thus, the votes for this hypothetical vote on a hypothetical future decision based on a hypothetical record will have to come from two new members who have not yet been nominated, much less confirmed, one of whom will not be from the same party as Commissioner O'Rielly and the Chairman.

Basing a major policy change that will have immediate and dramatic impact on such a highly speculative basis is utterly irrational and unsustainable.

[66] UHF Reconsideration Order at 8, ¶17.

[67] UHF Reconsideration Order at 9, ¶17 (footnote omitted).

II. Petitioners and the Viewers they Represent will be Irreparably Harmed in the Absence of a Stay Because Major Station Owners will Immediately Start Buying More Stations that will Give Them an Actual Audience Reach Well Beyond 39%.

The announcement that the Commission was considering reinstatement of the UHF Discount led to a flurry of news[68] and investment analysts' reports[69] that this would generate numerous otherwise prohibited transactions. Even before the Commission's decision was published in the Federal Register, Sinclair Broadcast Group announced that it would take advantage of the reinstatement of the UHF Discount to buy Bonten Media's TV stations.[70] Then, on May 8, 2017, Sinclair announced that it would purchase Tribune Media to create what would be–by far–the nation's most powerful TV group. This is the beginning of what is likely to be a wave of consolidation. As Bloomberg reported it, the "deal to acquire Tribune Media Co. marks the first in what's expected to be a frenzy of media and telecom dealmaking under the looser regulatory climate of the Trump administration."[71]

Commission policy is that in the absence of opposition, facially complete applications for transfer or assignment will be granted. Staff does not undertake independent review of such applications once it is determined that an applicant is qualified and approval will not violate any

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[68] *See, e.g.*, "FCC Tees Up Rule Change That Could Spur Wave of TV Industry Mergers," Wall Street Journal, Mar. 30, 2017, https://www.wsj.com/articles/fcc-to-vote-on-relaxing-obama-era-rule-on-tv-ownership-1490825750.

[69] *See, e.g.*, "Fitch: TV Broadcast Consolidation to Begin (Again)," Apr. 24, 2017, https://www.fitchsolutions.com/site/pr/1022617.

[70] *See, e.g.*, Deadline.com, "Sinclair Agrees To Buy Bonten Media After FCC Eases TV Station Mergers," Apr. 21, 2017, http://deadline.com/2017/04/sinclair-agrees-buy-bonten-media-fcc-ease-tv-station-merger-1202073744/.

[71] "Sinclair Gobbles Up Tribune in First Big Media Deal of Trump Era," May 8, 2017, https://www.bloombergquint.com/business/2017/05/08/sinclair-gobbles-up-tribune-in-first-big-media-deal-of-trump-era. *See also,* Communications Daily, May 9, 2017 ("'The UHF discount returning to status quo helps a number of parties, they have room to acquire stations,' said TV station lawyer David O'Neil of Rini O'Neil, which isn't involved in Sinclair/Tribune. 'This is obviously the largest one, but I think there will be many deals like this over the course of this year.'").

Commission rule or policy.[72] Thus, absent a stay, these transactions will likely be approved after the 30 day public notice period has passed.

Because this consolidation will reduce competition and diminish the diversity of voices in the marketplace of ideas, Petitioners and the viewers they represent will be irreparably harmed if the new rules are not stayed. Even if the Commission were to condition approval upon the outcome of judicial review, history demonstrates that the Commission has not forced required divestures to enforce its ownership rules.

The race to snap up the most attractive properties mirrors what happened after the 1996 Telecommunications Act rescinded the national limit on radio station ownership.

> This overhaul of the ownership restrictions triggered an unprecedented merger and product-repositioning wave that completely reshaped the radio industry. In the first week after the Telecommunications Act of 1996 was passed, radio station owners closed nearly $700 million in merger deals.[73]

Facing similar conditions, the Third Circuit issued a stay after the FCC adopted rules that would have authorized substantial relaxation of the Commission's local TV and cross-ownership rules.[74] The Commission should heed this precedent and issue a stay of the new rules.

III. Issuance of the Stay would Not Substantially Harm Other Parties.

Grant of a stay will maintain the status quo. It will not harm the parties to new transactions, as they can continue to operate their businesses as before pending judicial review.

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[72] *See Committee To Save WEAM v. FCC*, 808 F.2d 113, 118 (D.C. Cir. 1986)("By requiring a proposed assignee to address the relevant facets of the public interest, convenience, and necessity on FCC Form 314, the Commission has incorporated the consideration of these issues into its application process. Therefore, the FCC's approval of WEAM's application implies a finding on ample information that the public interest will be served by the assignment.").

[73] Jeziorski, "Estimation of cost efficiencies from mergers: application to U.S. radio," 45 RAND Journal of Economics 816, 818 (2014).

[74] *See Prometheus Radio Project v. FCC*, 2003 WL22052896 (3rd Cir. 2003); *see* pp. 3-4, *supra*.

Thus, as was the case in 2004, "there is little indication that a stay pending appeal will result in substantial harm to the Commission or other interested parties."[75] In the event that the UHF Discount were reinstated after judicial review, new entrants and smaller broadcasters would be able to bid on the purchase of the affected TV stations, which would benefit these stations as well as the public.

IV. Grant of a Stay Pending Judicial Review Would Serve the Public Interest.

Grant of a stay will serve the public interest. Application of the four part *Virginia Petroleum* test typically places the greatest weight on the likelihood of success on the merits and the possibility of immediate and irreparable harm to the moving parties. As shown above, these factors, along with the absence of harm to third parties, strongly favor grant of a stay. However, in this case, the fourth factor–whether a stay is in the public interest–provides an unusually strong additional basis for staying the new rules. Maintaining a diversity of voices in the broadcast media goes to the heart of the FCC's statutory obligation to regulate in the public interest. This affects all Americans, not just those represented by Petitioners.

Members of the public have a First Amendment right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences...." [76] Section 257(b) of the 1996 Telecommunications Act declares that the "policies and purposes of this Act [are to] favor[] diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." As the Supreme Court has held,

> In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting

[75] *Id*.

[76] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *See also* 1992 Cable Act, §2(a)(finding that "a substantial governmental and First Amendment interest exists in promoting a diversity of views,...").

> diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.[77]

Accordingly, the FCC has said that

> Our ownership rules,...serve a vital public interest by promoting competition and diversity in the mass media. These are bedrock goals–reaffirmed by Congress and the Supreme Court on numerous occasions–in carrying out our statutory mandate of ensuring that broadcast licensees serve the "public interest, convenience, and necessity."[78]

For this reason, the public interest factor unquestionably dictates that a stay should be granted.

CONCLUSION

The Commission should stay the UHF Reconsideration Order pending finality of all judicial review, and grant all such other relief as may be just and proper.

Respectfully submitted,

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[77] *FCC v. NCCB*, 436 U.S. 775, 780 (1978).

[78] *Review of the Commission's Regulations Governing Television Broadcasting,* 14 FCCRcd 12903, 12905 (1999).