

**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)	

COMMENTS OF FREE PRESS

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March 19, 2018

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INTRODUCTION AND SUMMARY

In 2004, Congress passed the Consolidated Appropriations Act (“CAA”), setting the national audience reach limitation for television stations at 39 percent and explicitly removing the Commission’s authority to adjust it. Yet despite the plain language of the statute, in the instant proceeding the Commission proposes to overrule Congress and asks if it might modify or eliminate the national audience reach cap altogether – all, apparently, to suit the interests of Donald Trump’s cronies at Sinclair Broadcast Group (“Sinclair”) and Fox Broadcasting Company (“Fox”). The Commission may waive its rules if such waiver is in the public interest, but Commission compliance with statutes is not optional.

Even if the proposal to modify the national cap were not in violation of the statute, it would remain patently contrary to the public interest and poorly justified. Over the past year, the Commission has rapidly and needlessly gutted local ownership protections including the main studio rule, the eight-voices test, and the newspaper broadcast cross-ownership limitations. Despite empirical evidence that these actions will harm the public interest, the Commission has aggressively pursued a pro-consolidation agenda that favors the Trump administration’s political allies. The Commission should preserve the last remaining scraps of the rules promoting competition, localism and diversity of broadcast ownership. The national television multiple ownership rule is one of the last pillars standing to prevent new waves of consolidation, which time and again have smothered viewpoint diversity and outsourced local news operations in the name of “efficiency.” This pending harm is not theoretical. Sinclair Broadcasting already is moving to buy Tribune, proposing to form a combination that is within the realm of possibility only because of the Commission’s decision to reinstate the obsolete UHF discount, yet that still

would exceed the national audience reach cap unless the Commission acts now to alter or remove that cap in contravention of the statute.

Contrary to the Commission's spurious assertions, while the national audience reach cap is indeed set by statute, Congress did not similarly freeze the calculation of the cap as regards to the UHF discount. Thus the Commission has authority to re-evaluate and eliminate the obsolete UHF discount, and to consider it independently of the national ownership cap as the Commission has done numerous times before. The Commission cannot have it both ways, finding on the one hand that it is free to raise or ignore a numerical limit set in statute, yet somehow mysteriously barred by Congress from revising a discount mechanism used to calculate audience reach when that mechanism is nowhere to be found in the statute.

If the Commission chooses to ignore statutory limitations and to raise or eliminate the national cap despite explicit congressional direction setting that figure, it would irreparably harm the public interest. Raising the cap would throttle competition, diminish viewpoint diversity, raise barriers to entry for diverse broadcasters and shred localism commitments. Previous mega-mergers have resulted in whole newsrooms of local reporters losing their jobs, as broadcasters shift towards jointly-operated stations airing the same newscast across several channels. There are no economic benefits or countervailing market forces that would outweigh these devastating harms. Similarly, retaining the UHF discount long after its technical justification has faded would merely distort the national cap and further encourage damaging consolidation. The UHF discount was established to account for technological differences alone. The Commission cannot reboot the discount for the digital era and retcon a new motivation for it now in a blunt and obvious attempt to circumvent the national cap set by Congress.

I. The Commission Does Not Have Authority to Modify or Eliminate the National Audience Reach Cap.

When Congress passed the CAA in 2004, it set the national television multiple ownership cap at 39 percent in the statute.¹ It also prohibited further consideration of the cap in the comprehensive Quadrennial Review,² thus removing the Commission’s independent authority to modify the national cap absent further congressional intervention. The CAA provided that subsection Section 202(h) of the Telecommunications Act of 1996 “does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).”³ The CAA further prohibited the Commission from using its forbearance authority in Section 10 of the Communications Act, 47 USC § 160, with respect to any entity exceeding the 39 percent cap.⁴ The decisions to explicitly remove the national cap from regular agency review and then to exclude the cap from the Commission’s forbearance authority clearly demonstrate that Congress removed the 39 percent cap from Commission review. As Sinclair noted in 2013, “[t]his is in stark contrast to what Congress did in 1996 when it raised the limit from 25 percent to 35 percent, but required the FCC to review the restriction periodically and assess whether or not it continued to be in the public interest.”⁵ Consequently, it’s plain that Congress intended the later rule modification to remove the Commission’s authority to consider modifying or eliminating the national ownership limitation.

¹ See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629(1), 118 Stat. 3 (2004) (“CAA”).

² See *id.* § 629(3).

³ *Id.*

⁴ *Id.* § 629(2).

⁵ Comments of Sinclair Broadcast Group, MB Docket No. 13-236, at 6 (filed Dec. 16, 2013) (“Sinclair Comments”).

Commissioner O’Rielly appears to agree that the Commission has no authority to modify or eliminate the national cap. Two years ago he dissented from the *UHF Discount Repeal Order*, stating 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.”⁶ Last year, the Commissioner reiterated his belief that the Commission has no authority to modify the national audience reach cap. He specifically rejected claims that Congress only meant to remove the cap from the Quadrennial Review proceeding, and not from other Commission revisions, because “such a reading is preposterous as it would effectively create one of the biggest backdoors in the history of legislating.”⁷

Free Press disagrees with Commissioner O’Rielly’s assertion that Congress implicitly rescinded the Commission’s authority to reevaluate the UHF discount in the process. We note the clumsy sleight-of-hand in his statement in this NPRM, which rightly reports that Congress set the 39 percent figure in statute, but then concedes that in the Commissioner’s view it was merely an unspoken “intent of Congress” to freeze the discount in place.⁸ We also marvel at his

⁶ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213, 10251 (2016) (Dissenting Statement of Commissioner O’Rielly) (“*UHF Discount Repeal Order*”).

⁷ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318, Notice of Proposed Rulemaking, 32 FCC Rcd 10785, 10808 (2017) (“NPRM”) (Statement of Commissioner O’Rielly).

⁸ *Id.* It is also worth noting that Commissioner O’Rielly’s NPRM statement improperly or sloppily ascribed to Free Press the position “that the Commission had the authority to both eliminate the UHF discount and modify the national audience reach cap.” *Id.* (emphasis added). Free Press did not take any such position in the proceeding that led to the proper elimination of the UHF discount in 2016. For instance, we noted that “the cap in the Commission’s national ownership rule refers to national audience reach without referencing the UHF discount,” and explained then as we do now that “Congress intended to, and did, enact a 39% cap on national ownership because it believed that to be the appropriate reach for a single broadcaster. Congress

decision to dissent from a change to the UHF discount – based on supposedly insufficient authority to modify a provision not set out in the statute – but a year later to vote for a proposal considering broader modifications to or even elimination of a figure plainly set forth in the statute. Yet we heartily agree that the Commission cannot consider revising, raising, or eliminating the national cap altogether, because the Commission simply does not have the authority to modify, let alone eliminate, this statutorily established audience reach limit.

On this matter, if on very little else, Free Press also finds itself in agreement with several major broadcasters. During the Commission’s 2013 proceeding contemplating elimination of the obsolete UHF discount, broadcasters mistakenly opposed its elimination on the broader ground that the Commission could make no changes whatsoever to the cap. For example, ION Media Networks argued that the national ownership cap was foreclosed from future revision by the Commission, explaining that Section 629 of the CAA “stands as an ongoing directive to the FCC to maintain the national ownership cap at 39%.”⁹ Fox similarly argued that the CAA “unequivocally converted the Cap into a statutory limitation of 39% potential audience reach,”¹⁰ and that “these efforts were designed to ensure that the FCC would have no further independent authority to modify the Cap.”¹¹ Sinclair echoed these sentiments, saying that “[t]he CAA also stripped the FCC of its authority to modify the 39% cap by explicitly carving out the ownership cap from the FCC’s statutorily-mandated review process.”¹²

did not expressly reference the UHF discount when setting it.” Comments of Free Press, MB Docket No. 13-236, at 5-6 (filed Dec. 16, 2013) (“Free Press Comments”).

⁹ Comments of Ion Media Networks, MB Docket No. 13-236, at 12 (filed Dec. 16, 2013).

¹⁰ Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc., MB Docket No. 13-236, at 2 (filed Dec. 16, 2013) (“Fox Comments”).

¹¹ *Id.* at 8.

¹² Sinclair Comments at 6.

All three of these broadcast entities mistakenly claimed that the CAA’s revocation of Commission authority also extended to the UHF discount. As discussed further below, the CAA failed to explicitly foreclose modification of the UHF discount despite having ample opportunity to do so. Yet it plainly does set the figure for the national audience reach limit, and the Commission has no power to revise or remove this limit.

II. Raising or Eliminating the National Cap Would Irreparably Harm the Public.

The Commission primarily seeks comment on how modifying or eliminating the national ownership cap might impact economic realities and market forces for broadcasters, to the point of ignoring the significant harms such changes would cause to broadcast competition, localism, and diversity. In fact the NPRM explicitly paints these longstanding public interest goals as “alternative public interest considerations” inherently counter to this current Commission’s preferred goals of “economic efficiency” and “consumer welfare.”¹³ Even were we to accept the Commission’s implicit prioritization of economic factors over public interest factors – which we don’t – the economic factors do not merit a change to the national ownership cap.

Market changes have by no means rendered the national ownership cap unnecessary. Over the past several decades, massive consolidation in the broadcast industry has resulted in shrinking competition and fewer local voices, with expanded reach and power for big industry players. Hundreds of trusted news sources have shuttered as conglomerates have drained

¹³ NPRM ¶ 25 (“Are there public interest reasons that the Commission should seek to preserve a level of localism or seek other policy outcomes that do not maximize economic efficiency or consumer welfare? If so, what evidence justifies the elevation of these other public interest considerations over consumer welfare?”) (citations omitted).

communities of resources for local broadcast news.¹⁴ Raising or eliminating the national cap would only exacerbate these trends by spurring a new wave of consolidation – just as the Commission’s previous decision to reinstate the UHF discount prompted Sinclair Broadcasting’s purchase of Bonten Media’s television stations.¹⁵ As Bloomberg reported, Sinclair’s next proposal to purchase Tribune Media less than a month later “mark[ed] the first in what’s expected to be a frenzy of media and telecom dealmaking under the looser regulatory climate of the Trump administration.”¹⁶ Another flurry of mega-mergers prompted by relaxing or eliminating the national ownership cap would further imbalance the market, tightening the grip of a few unquestionably dominant players over the entire broadcast industry, and freezing out smaller broadcasters and new entrants alike – including persons of color, women, and other types of owners historically and presently under-represented among broadcast licensees.¹⁷

¹⁴ See generally S. Derek Turner, Free Press, *Cease to Resist: How the FCC’s Failure to Enforce Its Rules Created New Wave of Media Consolidation* (Mar. 2014) (“*Cease to Resist*”), https://www.freepress.net/sites/default/files/resources/Cease_to_Resist_March_2014_Update.pdf ; Pew Research Center, *America’s Shifting Statehouse Press: Can New Players Compensate for Lost Legacy Reporters?* (July 10, 2014), http://www.journalism.org/files/2014/07/Americas-Shifting-Statehouse-Press_full_report.pdf (“Fully 86% of local TV news stations do not assign even one reporter — full time or part time — to the statehouse.”).

¹⁵ See, e.g., David Lieberman, “Sinclair Agrees To Buy Bonten Media After FCC Eases TV Station Mergers,” *Deadline Hollywood*, (Apr. 21, 2017), <http://deadline.com/2017/04/sinclair-agrees-buy-bonten-mediafcc-ease-tv-station-merger-1202073744/>.

¹⁶ Alex Sherman & Gerry Smith, “Sinclair Gobbles Up Tribune in First Big Media Deal of Trump Era,” *BloombergQuint* (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 Matt Daneman & Jonathan Make, “Sinclair Doesn’t Foresee Major Station Sales in \$6.6 Billion Tribune Buy; Regulatory OK Seen,” *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.’”).

¹⁷ See generally S. Derek Turner, Free Press, *Off The Dial: Female and Minority Radio Station Ownership in the United States* (June 2007), https://www.freepress.net/sites/default/files/fp-legacy/off_the_dial_summary.pdf; S. Derek Turner & Mark Cooper, Free Press, *Out of The*

The proliferation of online video and digital news sources does not counterbalance these anti-competitive trends. Local television continues to be the most popular platform for news consumption,¹⁸ and marginalized communities – specifically people of color and low-income households – rely disproportionately on local broadcasters as news sources.¹⁹ This is due in part to the fact that for many of these families, a home broadband connection is not affordable: Only 49 percent of households making less than \$20,000 annually have adopted home broadband, and people of color lag behind whites in broadband adoption even when one accounts for systemic income differences.²⁰ Of non-adopting Hispanic households, 39 percent cite “can’t afford it” as a reason and 33 percent say they would subscribe if broadband access were offered at a lower price. Similarly, 35 percent of non-adopting Black households cite “can’t afford it” as a reason and 28 percent would adopt at a lower price.²¹ It is extremely hypocritical for the Commission to pay lip service to the seriousness of the digital divide while also suggesting in this proceeding that online news alternatives provide sufficient competition to consolidating broadcasters when people on the wrong side of that divide cannot access such alternatives.

Picture 2007: Minority & Female TV Station Ownership in the United States (Oct. 2007), <https://www.freepress.net/sites/default/files/resources/otp2007.pdf> (“*Out of the Picture*”).

¹⁸ See Amy Mitchell, Jeffrey Gottfried, Michael Barthel & Elisa Shearer, Pew Research Center, *The Modern News Consumer: News attitudes and practices in the digital era*, (July 7, 2016), <http://www.journalism.org/2016/07/07/pathways-to-news/>.

¹⁹ Press Release, Nat’l Ass’n of Broadcasters, *Over-the-air TV Viewership Soars to 54 Million Americans*, (June 18, 2012), <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2761>. The survey found that while just under 18% of all television households were broadcast-only, 23% of African-American households and 28% of Latino households relied exclusively on broadcast. Similarly, 26% of lower-income households with an annual income under \$30,000 live in broadcast-only homes.

²⁰ See S. Derek Turner, Free Press, *Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption*, at 4 (Dec. 2016), https://www.freepress.net/sites/default/files/resources/digital_denied_free_press_report_december_2016.pdf.

²¹ *Id.* at 86.

Moreover, even where accessible, digital news operations often fail to fulfill critical functions of local broadcast media. According to studies conducted during the last several years, local television newsrooms provide significantly more local news coverage than online media platforms,²² and remain the public’s most trusted source of news.²³ Additionally, online news sources overwhelmingly play the role of news aggregators, collecting and repackaging the reporting done by broadcast and newspaper reporters rather than investing scarce resources in reporting on the issues independently.²⁴ Although online aggregators may compete with broadcast newsrooms for eyeballs and ad dollars, they rely heavily on those newsrooms for access to original reporting, and thus cannot be said to be true substitutes for local broadcasters.

Raising or eliminating the national ownership cap would also harm industry innovation by encouraging broadcasters to pursue the least-innovative business growth strategy: consolidation.²⁵ As consolidation forces out smaller competitors and strips local communities of choice, big broadcasters have less to gain by investing in innovative newsgathering strategies and resources that benefit communities. Communities have already seen this strategy play out: Broadcast conglomerates have reaped great financial rewards from consolidation, owing to

²² See Matthew Hindman, “Less of the Same: The Lack of Local News on the Internet,” at 10 (Apr. 6, 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-307476A1.pdf (“The big picture is that there is little evidence . . . that the Internet has expanded the number of local news outlets. And while the Internet adds only a pittance of new sources of local news, the surprisingly small audience for local news traffic helps explain the financial straits local news organizations now face.”).

²³ Media Insight Project, “The Personal News Cycle: How Americans choose to get their news” (Mar. 17, 2014), <https://www.americanpressinstitute.org/publications/reports/survey-research/how-americans-get-news/>.

²⁴ Pew Research Center, “How News Happens” (Jan. 11, 2010), <http://www.journalism.org/2010/01/11/how-news-happens/>.

²⁵ See, e.g., NPRM ¶ 24 (“For instance, would allowing station groups to exceed the current 39 percent cap lead to any consumer benefits, such as increased competition, choice, innovation, or investment in programming?”).

explosive growth in retransmission consent fees, political advertising dollars, and rising stock prices.²⁶ As previously prohibited acquisitions became more permissible (thanks to the Commission’s loosening of rules and its unwillingness to enforce those it retains) and more lucrative, large broadcasters have ramped up spending on media mergers²⁷ even while newsroom salaries stagnated.²⁸ Instead of competing for the approval of viewers by investing in news and other local programming, broadcasting conglomerates would likely take any relaxation of the national ownership cap as encouragement to compete for scale alone – pursuing mergers that swallow up the last semblance of diverse voices in the broadcasting marketplace, and pocketing the savings for shareholders rather than spending them on viewers.

In the interest of supposedly conducting a “comprehensive review,” the NPRM also seeks comment on the “interplay” between the national ownership cap and other media ownership regulations.²⁹ Considering the series of unfortunate ideological decisions the Commission has made over the past year to gut local ownership protections, there is little interplay left to examine, and the national ownership cap has become more important than ever. Specifically, the Commission reinstated the obsolete UHF discount without any legal justification; eliminated the main studio rule that ensured broadcasters would maintain the barest physical presence in local communities they purport to serve; and granted a 10-month-old petition for reconsideration to gut the local television multiple ownership rule with zero analysis regarding the impact such an

²⁶ Pew Research Center, “2014 State of the News Media,” at 8-11 (Mar. 26, 2014) (“*2014 State of the News Media*”).

²⁷ See Brian Stelter, “Political Ad Spending Spurs Local TV Mergers,” N.Y. Times (Nov. 8, 2011), <http://www.nytimes.com/2011/11/09/business/media/political-ad-spending-helps-drive-a-consolidation-of-local-tv.html>.

²⁸ Bob Papper, “TV salaries fall, radio stagnant,” RTDNA/Hofstra University Annual Survey (July 1, 2013), http://www.rtdna.org/article/tv_salaries_fall_radio_stagnant.

²⁹ NPRM ¶ 26.

irresponsible move would have on communities.³⁰ This headlong race to the bottom in terms of consumer protections has left the national cap as the last barrier holding back unprecedented, unconscionable and unchecked media consolidation by just a handful of owners nationwide. Any comprehensive assessment of ownership rules must conclude that in the context of rampant deregulation, the maintenance of the national cap has become an urgent regulatory necessity to preserve the remotest fragments of localism, diversity and competition in broadcasting.³¹

Competition would suffer tremendously should the national audience reach limit be increased or scrapped.³² Allowing already-massive broadcasters to achieve even greater scale would prompt a new wave of big media buyouts, as incumbent broadcast conglomerates swallow smaller competitors rather than innovating to compete with them. Each such buyout would likely reduce the number of independent broadcast voices to which the national audience has access – an outcome both Republican- and Democrat-led Commissions have recognized as antithetical to the agency’s core goal of promoting competition.³³ As discussed above, online news sources

³⁰ See generally *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Order on Reconsideration, 32 FCC Rcd 3390 (2017) (“*UHF Discount Order on Reconsideration*”); *Elimination of Main Studio Rule*, MB Docket No. 17-106, Report and Order, 32 FCC Rcd 8158 (2017); *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017) (“*2017 Order on Reconsideration*”).

³¹ Free Press has members who regularly watch over-the-air television stations who would be irreparably harmed by the consolidation that must follow any relaxing of the national cap, because it would reduce their ability to access diverse sources of information. Our members benefit from expanded broadcast ownership by women and people of color, and raising or eliminating the national ownership cap would allow a small handful of deep-pocketed owners to buy more stations and foreclose opportunity for new entrants, particularly marginalized entrants, to become station owners.

³² See *Cease to Resist* at 35.

³³ See Press Release, Federal Communications Commission, “FCC Sets Limits on Media Concentration” (June 2, 2003); *Promoting the Availability of Diverse and Independent Sources*

have yet to develop into fully-fledged competitors, as they are still forced to rely heavily on broadcasters for original news production and also are inaccessible to millions trapped on the wrong side of the digital divide. The Commission cannot pretend to be encouraging broadcast competition while blessing yet another dramatic reduction in the number of competitors.

Competitive harms incurred by upward modification or elimination of the national ownership cap would necessarily serve to undermine the Commission's other public interest goals of promoting both viewpoint diversity and ownership diversity. Fewer competing broadcasters means fewer competing viewpoints, delivering yet another body blow to opportunities for diverse voices already struggling to be heard. Marginalized communities, particularly women and people of color, are dismally under-represented among the nation's broadcasters. In 2007, women owned less than 6 percent of commercial broadcast television stations while racial and ethnic minorities owned just over 3 percent, despite making up 51 percent and 34 percent of the population respectively.³⁴ Seven years later, the Commission's own research found a less than 1 percent bump in women's ownership, and a nearly 1 percent decline in ownership by racial and ethnic minorities.³⁵ Owners of color are not among those established broadcasters whose holdings are pushing the 39 percent national cap. In fact, as the Commission has noted in other proceedings, women and people of color struggle to obtain equal access to the capital resources necessary to benefit from major broadcast acquisitions.³⁶ Rather obviously, any

of Video Programming, MB Docket No. 16-41, Notice of Inquiry, 31 FCC Rcd 1615, ¶¶ 1-2 (2016).

³⁴ See *Out of the Picture* at 2.

³⁵ See *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, Report on Ownership of Commercial Broadcast Stations, ¶¶ 5-7 (2014).

³⁶ See *2017 Order on Reconsideration* ¶ 124.

benefits of lifting the national cap will accrue only to large broadcasters, leaving a few powerful companies with unprecedented national reach and gatekeeper control over broadcast channels. Diverse owners and potential new entrants will have even fewer opportunities to purchase any stations whatsoever as established conglomerates expand their scale.

Lifting the national ownership cap would also harm localism. The “efficiencies” that bigger broadcasters may achieve through scale have inevitably resulted in dwindling local news coverage, both in terms of quantity and quality.³⁷ While stations continue to air more news overall than in previous years in terms of sheer hours, much of this news is simply re-broadcasts of stale coverage.³⁸ Rampant covert consolidation has simultaneously resulted in a serious decline in the number of stations producing original local news.³⁹ Instead of having three stations producing competing original coverage, consolidated markets may have one station producing an outsized amount of news, and then airing that same coverage across three stations repeatedly through the day. That may create a net gain in the number of hours of news programming aired, but a net loss in the quantity of original news produced – as well as a loss of competition and viewpoint diversity. Without sufficient competition, broadcasters have very little incentive to do

³⁷ See *2014 State of the News Media* at 17 (“According to a Pew Research study from 1998 through 2002, some 31% of all the stories on local television news excluding traffic, sports and weather were more than a minute long while 42% were under 30 seconds in length. In 2012, the percentage of stories over a minute long shrank to 20% while the percentage of those that lasted less than half a minute grew to 50%.”); Lee Hood, “Taking the ‘Local’ out of Local News: Implications for an Informed Public,” 3 *Journalism and Mass Communication* 549, 550-51 (2013).

³⁸ See Katerina Eva Matsa, Pew Research Center, “5 facts about the state of local news” (July 23, 2014), <http://www.pewresearch.org/fact-tank/2014/07/23/5-facts-about-the-state-of-local-tv-newsrooms/>

³⁹ Bob Papper, “Local news by the numbers,” RTDNA/Hofstra University Annual Survey (June 5, 2017) (“The total keeps going up, but it’s doing so because a smaller number of newsrooms are running news on more and more outlets.”).

the resource-intensive work of reporting on local communities, particularly in communities of color, low-income and rural areas where typically white, metropolitan-based journalists may not provide fair and accurate coverage.⁴⁰ The resulting outsourced journalism has repeatedly failed to serve local community information needs.⁴¹ As Free Press and other public interest advocates noted in a filing supporting the elimination of the outdated UHF discount, “[p]ermitting large national group owners, who are completely divorced from any local community and its information needs, to monopolize a market cannot possibly serve localism. Furthermore, localism is about programming for and by the community, and consolidation has been proven to reduce newsroom employment.”⁴²

The Commission seeks comment on what measures it may use to reasonably assess localism,⁴³ demonstrating a baffling lack of understanding of the agency’s history.⁴⁴ To assess whether the broadcast industry is successfully serving local community needs, the Commission must ask local communities. Previous Commissions have worked diligently to engage the public,

⁴⁰ See Justin Fox, “The Geographic Concentration of the Media,” Bloomberg View (Sept. 8, 2016), <https://www.bloomberg.com/view/articles/2016-09-08/the-geographic-concentration-of-the-media>; Eric Deggans, “Why ethics and diversity matter: The case of Trayvon Martin coverage,” Poynter (Oct. 23, 2012), <https://www.poynter.org/news/why-ethics-and-diversity-matter-case-trayvon-martin-coverage>; Josh Stearns, “In 2017, Journalists Have to Partner, Not Parachute,” MediaShift (Jan. 18, 2017), <http://mediashift.org/2017/01/2017-journalists-partner-not-parachute/>.

⁴¹ See *Broadcast Localism*, MB Docket No. 04-233, Report on Broadcast Localism & Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶¶ 1-2 (2008) (“*2008 Broadcast Localism Report*”).

⁴² Reply Comments of Common Cause, Free Press, Media Alliance, and Office of Communication, Inc. of the United Church of Christ, MB Docket No. 13-236, at 8 (filed Jan. 13, 2014).

⁴³ NPRM ¶ 13.

⁴⁴ See *2008 Broadcast Localism Report* ¶ 5 (noting that “the concept of localism has been a cornerstone of broadcast regulation for decades. The concept derives from Title III of the Communications Act of 1934 . . . and is reflected in and supported by a number of current Commission policies and rules.”).

including by holding hearings in communities across the country.⁴⁵ This Commission has, inexplicably, refused to do so – even while making sweeping and dramatic changes to the broadcast ownership regulatory framework. Perhaps the Commission suspects that the public would echo the same testimonials they have offered in years past: that broadcasters are abandoning their commitments to local communities and failing to serve the public interest.⁴⁶ Instead of engaging in public dialogue that almost surely would generate comments countering the Chairman’s ideological preferences for consolidation and nationalization of “local” media, the Commission seeks other measurements. But there is no economic calculation and no industry approximation that can replace the invaluable input of the public.

III. The Commission Has Authority to Eliminate the Obsolete UHF Discount.

The Commission’s argument that the UHF discount is “inextricably linked” with the national ownership cap, and thus must be modified in tandem with that cap, is weak and without any legal basis. The Commission majority wrongly treats the “undeniable relationship” between the discount and cap as the equivalent of a mandate to evaluate them together.⁴⁷ As Commissioner Clyburn rightly noted last year in her dissent from the Commission order restoring the UHF discount, the Commission “fails to cite a single legal authority that limits review or modification of the UHF discount to simultaneous review of the national audience

⁴⁵ *See id.* ¶ 8. In addition to soliciting public comment for a report on broadcast localism in 2008, the Commission held six field hearings across the nation over the course of four years to engage in dialogue with communities regarding how broadcast stations were succeeding or failing to meet their localism obligations.

⁴⁶ *See id.* ¶ 34.

⁴⁷ *See Reply Brief for the Petitioners*, at 20, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. filed Dec. 19, 2017).

reach cap.”⁴⁸ This failure no doubt stems from the unavoidable fact that no such legal authority exists.⁴⁹ It is ridiculous to suggest that by setting the national audience reach limit in statute, and limiting Commission authority to modify or even review that limit, Congress also intended to cement in place without naming it the outdated discount mechanism the Commission had used to calculate that figure for analog broadcast signal coverage in years past.

Instead of citing any valid legal authority, the Commission mistakenly supports its claims of inextricable linkage by relying on arguments made by broadcasters such as Fox and Sinclair. They suggest that Congress “implicitly” accounted for the UHF discount when it set the national cap, and thus revoked the Commission’s legal authority to modify the discount when Congress removed the Commission’s authority to revise the numerical cap.⁵⁰ Nothing in the statute supports this self-serving interpretation. The Commission also falsely asserted when it restored the discount last year that it “has always considered the UHF discount together with the national cap.”⁵¹ In fact, the Commission previously examined the UHF discount in isolation from the ownership cap not once, but twice, in both 1998 and 2006.⁵² And even if it were true that the

⁴⁸ *Amendment of Section 73.355(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318, Notice of Proposed Rulemaking, 32 FCC Rcd 10785, 10808 (2017) (Dissenting Statement of Commissioner Clyburn).

⁴⁹ Opening Brief for the Petitioners at 30, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. filed Dec. 19, 2017).

⁵⁰ See Fox Comments at 4; Sinclair Comments at 5.

⁵¹ *UHF Discount Order on Reconsideration* ¶ 12.

⁵² See *1998 Biennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, Notice of Inquiry, 13 FCC Rcd 11276, 11285 (1998) (inquiring about whether to eliminate the UHF discount at that time or after the DTV transition, but not considering modification of the national ownership cap); *2006 Quadrennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834, 8848-49 (2006) (seeking comment on whether to modify the UHF discount, but not asking whether to modify the national ownership cap).

Commission had always considered the two together, the courts have provided guidance on this point: In light of the passage of the CAA, the Third Circuit held that all objections to the Commission's order instituting a 45 percent national ownership cap were rendered moot by congressional action to establish 39 percent cap instead, and noted further that the Commission still had authority to consider regulation defining the UHF discount outside of the context of the quadrennial review.⁵³

The UHF discount was not intended as an economic modification of the national ownership cap, but a technological modification reflecting the technical differences in audience reach that then existed between UHF and VHF stations. When the discount was established in 1985, analog UHF signals reached a much smaller audience than VHF signals, and consequently the Commission adopted a 50 percent discount for UHF stations when calculating compliance with the national cap in order to account for that technical disadvantage.⁵⁴ This signal coverage disparity persisted until the Commission completed the digital television broadcasting transition in 2009, when the new technology eliminated the technological disadvantage previously faced by UHF stations.⁵⁵ In its decision to eliminate the UHF discount in 2016, the Commission relied on this evidence to conclude that “experience since the DTV transition demonstrates that UHF

⁵³ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004) (“*Prometheus I*”) (“Although we find that the UHF discount is insulated from this and future periodic review requirements, we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h). The Commission is now considering its authority going forward to modify or eliminate the UHF discount and recently accepted public comment on this issue. Barring congressional intervention, the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of §202(h).”)

⁵⁴ See *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, GN Docket No. 83-1009, Memorandum Opinion and Order, 100 FCC 2d 74, 88-94, ¶¶ 33-44 (1985) (“*1985 UHF Discount Order*”).

⁵⁵ See *UHF Discount Order on Reconsideration* ¶ 8.

channels are equal, if not superior, to VHF channels for the digital transmission of television signals. Thus, as a result of the DTV transition, the UHF discount can no longer be supported on technical grounds.”⁵⁶ This gave the Commission ample justification to reexamine and consequently eliminate the obsolete rule.

Congress established the 39 percent national audience cap in 2004, before the digital television transition was completed, when the UHF discount attempted to roughly account for the actual technical disparities in audience reach of UHF and VHF channels. At the time, Congress was well aware of the Commission’s long-stated intentions to eliminate the UHF discount after the digital television transition.⁵⁷ Yet when crafting legislative language directing the Commission to establish a 39 percent cap, Congress was silent on the UHF discount.⁵⁸ Thus there is no evidence to suggest that Congress intended to freeze the Commission’s method of calculation – including the UHF discount – in place regardless of changing technical realities.

Consequently, the Commission’s decision to eliminate the UHF discount after the digital television transition (in keeping with its previous conclusions and intentions) rightly preserved the technical reality of Congress’s 39 percent cap by more accurately accounting for the new signal propagation characteristics of digital television over UHF channels. Repealing the discount did not modify the numerical audience reach limit set by Congress, but merely balanced

⁵⁶ See *UHF Discount Repeal Order* ¶ 2.

⁵⁷ See *1998 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, 15 FCC Rcd 11058, 11080 (2000) (“*1998 Biennial Review Order*”) (considering a plan to eliminate the UHF discount upon the completion of the digital television transition); *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules*, GC Docket No. 02-390, Report and Order, 18 FCC Rcd 13620, ¶ 591 (2003) (“*2002 Biennial Review Order*”) (“It is clear that the digital transition will largely eliminate the technical basis for the UHF discount.”).

⁵⁸ See generally CAA.

the equation. Chairman Pai’s assertion that eliminating the UHF discount “effectively lowers”⁵⁹ the cap is therefore utterly nonsensical: The digital television transition artificially raised and distorted the 39 percent cap by eliminating the disadvantage UHF stations previously faced. Eliminating the UHF discount in 2016 returned to the status quo Congress intended to preserve.

IV. Eliminating the UHF Discount is Necessary to Serve the Public Interest.

The digital television transition made the UHF discount obsolete by eliminating the technical disadvantage for which the discount was meant to account. The Commission originally justified the UHF discount as an “indicator of the reach handicap of UHF stations[, which] measures the actual coverage limitation inherent in the UHF signal,” and explicitly stated that it did “not believe that the [UHF] incentive should be structured so as to merely increase the [audience] reach cap.”⁶⁰ It is plain that the discount was never meant to encourage economic scale or artificially “loosen” the national ownership cap, and thus maintaining the discount beyond its technological usefulness only serves to pervert and distort the national cap.

There is no reasonable explanation for resurrecting or retaining the analog UHF discount in a digital world. Exhuming this obsolete regulation without any justification, as the Commission did in the reconsideration order, was arbitrary and capricious.⁶¹ There are no technical grounds or policy rationales to maintain this regulatory antique, and the Commission failed to offer any. The only ground the Commission cites for its conclusion that eliminating the UHF discount was “unwise from a policy perspective,” was the prior Commission’s failure to

⁵⁹ *UHF Discount Repeal Order* (Dissenting Statement of Commissioner Ajit Pai).

⁶⁰ *1985 UHF Discount Order* ¶ 44.

⁶¹ See Opening Brief for the Petitioners, at 2, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. filed Dec. 19, 2017), where petitioners contend, “it is arbitrary and capricious for the Commission to restore a rule that no longer serves any public interest purpose when the FCC lacks the statutory authority to modify the national ownership cap.”

consider that modification in the explicit context of modifying the national cap – a supposed error that the current Commission compounded by restoring the discount long before it opened the instant proceeding and failing to consider any public interest objectives whatsoever in its reconsideration order.⁶² The current NPRM acknowledges that zero evidence exists to support retaining the UHF discount based on its original justification, and then proceeds to cast aimlessly about for “any non-technical justifications for the UHF discount that remain relevant.”⁶³ This transparent attempt to generate a new justification for an obsolete rule runs directly counter to the quadrennial review mandate – wise or unwise as it may be – to repeatedly evaluate broadcast ownership rules for their continued need and relevance.⁶⁴

Furthermore, eliminating the UHF discount does not necessitate raising the national cap (which, as described above, the Commission lacks authority to do) because the discount was only meant to accurately reflect the pre-DTV reality of a 39 percent national audience reach. Since the digital transition successfully remedied UHF signal propagation issues, the discount would now allow an owner with exclusively UHF stations to effectively reach 78 percent of television households. When Congress established the 39 percent cap, it did not expressly reference the UHF discount in any way, although as discussed above it was well aware of the Commission’s intention to phase out the discount.⁶⁵ The Commission’s failure to repeal the UHF discount contravenes clear congressional intent by maintaining a distorted and inaccurate national audience reach calculation that fails to preserve the statutory national audience limit.

⁶² See *UHF Discount Order on Reconsideration* ¶ 1.

⁶³ NPRM ¶ 20.

⁶⁴ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56.

⁶⁵ See *Prometheus I*, 373 F.3d at 396.

Retaining the UHF discount also invites the same harms addressed above by undermining the national cap and providing an unjustifiable loophole for big broadcasters to consolidate further. As markets become more concentrated, economies of scale are created, driving away potential new entrants in favor of existing large chains.⁶⁶ This is not hypothetical: After the digital television transition but before the Commission rightly eliminated the UHF discount in 2016, broadcasters began switching their VHF stations to UHF in order to reduce the calculation of their national reach while maintaining the exact same functional reach. The example of Fox is illustrative. Fox switched five of its stations from analog VHF channels to digital UHF channels during the transition. This reduced its total calculated national audience reach from 31 percent to less than 25 percent, courtesy of the UHF discount – despite the fact that Fox still owned the same number of stations in the same markets reaching the same audiences.⁶⁷ Fox was then able to acquire additional stations in San Francisco and Charlotte – a move that would have been far more difficult prior to the DTV transition when Fox still broadcast on analog in those five markets and saw its audience reach in them count fully against the cap.⁶⁸

Eliminating the UHF discount would alleviate serious harms to the public interest from runaway consolidation on the national level, and respect clear Congressional intent. Despite the current Commission’s concerns that large broadcasters may be caught unaware by the change in regulatory calculations, broadcasters have been on notice since 1996 that any acquisitions made in reliance on the UHF discount would likely come into question after the digital television

⁶⁶ See generally *Out of the Picture*.

⁶⁷ *UHF Discount Repeal Order* ¶ 36.

⁶⁸ See Broadcast Actions, FCC Public Notice No. 48343 (Oct. 10, 2014) (Oakland, CA); Broadcast Actions, FCC Public Notice No. 47946 (Mar. 15, 2013) (Belmont, NC).

transition.⁶⁹ The Commission repeated these warnings in 1998,⁷⁰ 2003,⁷¹ 2008,⁷² and 2013⁷³ before eventually eliminating the discount in 2016. Any broadcaster who claims that once again sunsetting the UHF discount would unduly burden them cannot be taken seriously, as acquisitions made in reliance on a discount long-targeted for elimination were made with full, longstanding knowledge of the possibility of such elimination. This reality renders the Commission’s cost-benefit analysis remarkably simple: Wiping the obsolete UHF discount from the books would preserve substantial, critically important benefits for the public without leveling any undue costs on broadcasters.

CONCLUSION

Despite the Commission’s ill-conceived assertion of an “inextricable link” that requires the national cap and UHF discount to be considered in tandem, they are two separate rules with two entirely different purposes and two entirely different sources. The Commission does not have the authority to raise or eliminate the national ownership cap explicitly set in statute – and even if it did, lifting the cap would cause egregious and irreparable harms to the public interest by squashing competition, diversity and localism. On the other hand, the Commission has ample

⁶⁹ See *Implementation of Section 202(c)(1) and 202(e) of the Telecommunications Act of 1996*, MB Docket No. 13-236, Order, 11 FCC Rcd 12374, 12375 (1996) (“[A]ny entity which acquires stations during this interim period and which complies with the [cap] only by virtue of [the UHF discount] will be subject to the outcome in the pending television ownership proceeding.”).

⁷⁰ See *1998 Biennial Review Order* ¶ 108 (“[W]e will continue to follow this policy until such time as the UHF discount is modified or eliminated.”).

⁷¹ See *2002 Biennial Review Order* ¶ 591.

⁷² See *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2085 (2008).

⁷³ See *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MM Docket No. 98-35, Notice of Proposed Rulemaking, 28 FCC Rcd 14324, 14331 (2013).

authority and responsibility to repeal the obsolete UHF discount cited nowhere in the statute that sets the cap. Eliminating the discount would preserve the 39 percent national cap that Congress established before the digital television transition and protect the public from the dangers of further media consolidation.

The Commission should not raise or eliminate the national cap, and should instead return the UHF discount to its rightful place in the annals of antiquated regulatory history.

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March 19, 2018