

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

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In the Matter of)	
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Amendment of Section 73.3555(e) of the)	MB Docket No. 13-236
Commission’s Rules, National Television)	
Multiple Ownership Rule)	
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REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The National Association of Broadcasters (NAB)¹ hereby replies to the oppositions of the American Cable Association (ACA) and Free Press *et al.*² to the petition for reconsideration of ION Media Networks, Inc. (ION) and Trinity Christian Center of Santa Ana, Inc. (Trinity) in the above-referenced proceeding (the “Petition” or “ION/Trinity Petition”).³ As the Petition explains, the Commission erred in eliminating the UHF discount⁴ and should reverse its decision to comport with the Communications Act of 1934, as amended (Act),

¹ NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² Opposition to Reconsideration, American Cable Association, MB Docket No. 13-236 (Jan. 10, 2017); Opposition of Free Press, National Hispanic Media Coalition, Common Cause, Media Alliance, and United Church of Christ Office of Communication, Inc. to Petition for Reconsideration of ION Media Networks and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (Jan. 10, 2017) (collectively, the “Oppositions”).

³ Petition for Reconsideration of ION Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (Nov. 23, 2016).

⁴ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Report and Order, FCC No. 16-116, MB Docket No. 13-236 (rel. Sept.6, 2016) (Order or UHF Order).

and the Administrative Procedure Act (APA). The Oppositions fail to identify a valid legal basis for elimination of the discount or even for their specious claim that the Petition is procedurally deficient.

I. ELIMINATION OF THE UHF DISCOUNT WAS ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW

The Commission in 2013 issued a Notice proposing to eliminate the “UHF discount,” a methodology used for calculating compliance with the national television ownership limit.⁵ Throughout this proceeding, NAB and others have urged the Commission to acknowledge and consider the full ramifications of its proposal to eliminate the UHF discount and to remove or revise the discount only in the context of the broader rule.⁶

More specifically, NAB previously observed that reconsidering the UHF discount on a stand-alone basis would make it impossible for the Commission to assess how this change impacts the national TV ownership rule itself, or to determine whether the proposed change effectuates the purposes of the national television ownership rule.⁷ We stated that such an evaluation was critical to the FCC’s ability to provide a rational explanation for the change, as required by the APA,⁸ and to any determination that the rule is in the public interest, as

⁵ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, FCC No. 13-123, MB Docket No. 13-236 (rel. Sept. 26, 2013) (Notice).

⁶ See, e.g., Comments of NAB, MB Docket No. 13-236 (Dec. 16, 2013) (NAB UHF Comments); Reply Comments of NAB, MB Docket No. 13-236 (Jan. 14, 2014); Letter from Rick Kaplan and Jerianne Timmerman of NAB to Marlene H. Dortch, FCC, MB Docket No. 13-236 (Jun. 23, 2016) (NAB Ex Parte). In so doing, NAB has taken (and continues to take) no position on whether the Commission should modify, maintain or eliminate its national television ownership cap. NAB UHF Comments at 2.

⁷ NAB UHF Comments.

⁸ NAB UHF Comments at 3-4. NAB discussed how the Commission could not alter the impact of a rule without at least acknowledging that it is doing so and providing a reasoned analysis supported by the record that the change is in the public interest. *Id.* at 3, *citing AT&T Co. v. FCC*, 974 F.2d 1351, 1354-55 (D.C. Cir. 1992) (court found FCC order to be arbitrary and capricious when agency

required by the Act.⁹ We observed that, from its inception, the UHF discount has been the subject of FCC action only in the context of action on the national TV cap itself.¹⁰ We cited the multiple policy goals of the national cap, including competition, diversity and localism, observing that there was no discussion in the Notice of whether the proposed elimination of the discount would hinder or advance these central goals.¹¹

The record in this proceeding also shows that, although the national TV ownership cap is not required to be reviewed quadrennially under Section 202(h) of the Telecommunications Act of 1996, all of the Commission's ownership rules must serve the public interest under the Act, because its "general rulemaking power is expressly confined to promulgation of regulations that serve the public interest."¹² Commenters updated the

insisted that its order merely "clarified," rather than changed, a prior rule and "failed to offer a reasoned explanation ... supported by the record" for its action); *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1238-39 (D.C. Cir. 1993) (court concluded that FCC acted arbitrarily and capriciously in an interstate access rate case by "uncoupl[ing]" its "authorized return" number from its standard monitoring period and using a shorter time period, without explanation or justification); *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (FCC failed to establish "the requisite reasoned basis" for altering its long-established policy" on certain television commercial limits). This is particularly important where, as here, the practical effect of its change is to make the national cap that broadcasters have relied upon more stringent. NAB UHF Comments at 4, *citing FCC v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1811 (2009) (agency must provide more detailed justification for changing policy "when its prior policy has engendered serious reliance interests that must be taken into account"); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996) ("change that does not take account of legitimate reliance on prior interpretation may be 'arbitrary, capricious [or] an abuse of discretion'") (citations omitted).

⁹ See, e.g., NAB Ex Parte.

¹⁰ NAB UHF Comments at 2-3 ("in every instance where the Commission has taken action on the UHF discount, it has done so in the context of a proceeding that also imposed-, re-evaluated, reaffirmed, or modified the national television ownership cap").

¹¹ NAB UHF Comments at 3-4.

¹² NAB Ex Parte at 2-3, *quoting Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979)(citing Section 303(r) of the Act, which provides that the Commission from time to time, as public convenience, interest, or necessity requires, shall, "inter alia," "[m]ake such rules and regulations . . . not inconsistent with the law, as may be necessary to carry out the provisions of this chapter"). The FCC's multiple and cross-ownership rules specifically were adopted under its authority to make rules and regulations, including those regarding the licensing of broadcast stations, in the public interest –

record to reflect recent developments in court, observing that a change to the discount with no analysis of the national cap itself would repeat the very error that resulted in vacatur of changes to its TV attribution rules in *Prometheus III*.¹³ Just as the court found that “[a]ttribution rules do not exist separately from the ownership rules to which they relate,” the UHF discount would not exist absent the national television ownership cap.¹⁴ Observing that the television joint sales agreement (JSA) attribution rule made the local TV rule more stringent, the *Prometheus III* court held that “unless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that an expansion is in the public interest.”¹⁵ Similarly, commenters observed, the Commission cannot show that making the national TV ownership cap more stringent by removing the UHF discount serves the public interest without considering the cap itself and determining whether it promotes its stated goals of competition, diversity and localism.¹⁶

Unfortunately, the UHF Order disregards and misreads much of the record, barreling down the same path as the Notice. The Order does not acknowledge or consider the impact of eliminating the discount on the national cap, does not analyze whether modifications to the discount will ensure that the rule continues to serve its intended purposes and does not analyze whether the rule, with its modified calculation methodology, continues to serve the

and a number of Supreme Court cases have upheld the FCC’s authority to adopt ownership rules on that basis. NAB Ex Parte at 3 & n. 14 (citing cases).

¹³ NAB Ex Parte at 2, citing *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) (*Prometheus III*); Letter from Jared S. Sher, Senior Vice President and Associate General Counsel, 21st Century Fox, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-326, at 2 (Jun. 9, 2016).

¹⁴ NAB Ex Parte at 2, quoting *Prometheus III* at 53.

¹⁵ NAB Ex Parte at 2, quoting *Prometheus III* at 52.

¹⁶ NAB Ex Parte at 2; Letter from Jared S. Sher, Senior Vice President and Associate General Counsel, 1st Century Fox, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-326, at 2 (Jun. 9, 2016).

public interest. To comply with its obligations under the APA and the Act, the Commission should reverse the UHF Order and reinstate the UHF discount.

The Order offers little explanation for elimination of the discount – and certainly not a reasoned explanation based on the record. Instead of fully acknowledging the impact of its decision, the Order repeats the mantra that the discount no longer has a technical justification, discussing the elimination of the UHF discount as a mere update or “correction” necessitated by the digital television transition.¹⁷ It states that consideration of the national cap was outside the scope of the Notice,¹⁸ but the Commission could easily have determined that it would issue a further notice of proposed rulemaking that included the national cap itself, or otherwise declined to act on the discount unless and until it determined there was a reason to re-evaluate the national television ownership cap. Incredibly, the Order states that re-evaluating the national cap would be “far more complex than our decision today to eliminate the UHF discount”¹⁹ and points out that the FCC would need to “[i]nitiat[e] a new rulemaking proceeding to undertake a complex review of the public interest basis for the national cap, which is the media ownership limit that Congress examined most recently.”²⁰ Far from providing any justification for the Commission’s decision to act on the UHF discount on a standalone basis, these statements are strong reasons for the Commission to have changed course and evaluated the discount only in tandem with the national cap itself. The statements underscore the complexity and

¹⁷ UHF Order at ¶¶ 28, 40.

¹⁸ UHF Order at ¶ 40.

¹⁹ UHF Order at ¶ 40.

²⁰ UHF Order at ¶ 40. NAB observes that Congress’ “recent” examination of the national TV ownership cap was 13 years ago.

significance of the national television ownership cap, its public interest underpinnings and the level of potential interest in the cap by Congress and affected parties. The Commission's clear awareness of the significance and complexity of direct modifications to the national cap make its indirect modifications through changes to the UHF discount more patently arbitrary and capricious.

The Order also disregards the obvious legal parallels between its vacated decision to attribute television JSAs without simultaneously re-examining the local TV ownership rule, and its decision to modify the UHF discount without re-examining the national cap.²¹ The Order states that its elimination of the UHF discount is “unlike” its adopt of the TV JSA rule because the local TV rule is subject to the Section 202(h) periodic review requirement, and the national TV ownership cap is not.²² While it is true that Commission review of the national TV ownership cap is not required quadrennially by Section 202(h), it does not exist in a legal vacuum. As the UHF Order itself states, the Commission's authority to reconsider and affirm or modify the national television ownership cap stems only from the Act's grant of statutory authority²³ – and that authority is constrained by the Commission's obligation to adopt only those regulations that serve the public interest.²⁴ Thus, the Commission cannot

²¹ UHF Order at n. 139.

²² *Id.*

²³ UHF Order at ¶ 21, *citing* 47 U.S.C. § 154(i) and 47 U.S.C. § 303(r).

²⁴ 47 U.S.C. § 303(r) (“the Commission from time to time, as public convenience, interest, or necessity requires” shall, *inter alia*, “[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this chapter”). See NAB Ex Parte at 3, *citing Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (the “Commission is statutorily bound to determine” whether the “vital link between [its] regulations and the public interest” exists); *Radio-Television New Dirs. Ass'n v. FCC*, 184 F.3d 872, 881-82 (D.C. Cir. 1999) (stating that the “FCC is bound to regulate in the public interest” and rejecting the FCC's explanation of “why the public would benefit” from two rules challenged by broadcasters).

modify the national television ownership cap without making the public interest determination required by the Act. Modifying the UHF discount without analyzing whether the national cap serves the public interest violates Section 303(r) in the same manner that the Third Circuit found the TV JSA rule to violate Section 202(h).

Because eliminating the UHF discount without fully evaluating the impact of this change on the national television ownership rule and its purposes contravenes the APA and the Communications Act, the UHF Order must be reversed.

II. THE OPPOSITIONS OFFER NO VALID BASIS FOR UPHOLDING THE UHF ORDER OR DENYING THE PETITION

The Oppositions of ACA and Free Press do little to defend the elimination of the UHF discount, as they merely restate the Commission's empty rationales discussed in the UHF Order. As explained above, these arguments are inadequate under the APA and the Act. The Oppositions also contend that the ION/Trinity Petition is procedurally deficient. As discussed below, the Oppositions present no valid legal basis for upholding the UHF Order or otherwise denying the relief requested in the Petition.

The Oppositions contend that the Petition is deficient because it does not identify a "material error, omission or any other reason" for reconsideration.²⁵ The Petition clearly explains, however, that the Commission erred in eliminating a methodology for calculating compliance with a rule without considering the effect of this decision on the rule itself and the policy goals underlying that rule.²⁶ It discusses how this violates both the

²⁵ ACA Opposition at 8-11; Free Press *et al.* Opposition at 2.

²⁶ Petition at 1-4.

Communications Act²⁷ and the APA.²⁸ It is difficult to imagine an agency error more “material” than one which violates the very Act that is the source of all of its substantive authority, as well as the APA.

The Oppositions also state that the Petition is procedurally deficient because it presents arguments that Opponents believe the FCC has considered and rejected.²⁹ Even assuming that the UHF Order reflects serious FCC consideration of the arguments raised in the Petition (which it does not), the Oppositions’ claim presents no bar to FCC consideration of the Petition. The FCC certainly has discretion under its rules to reject petitions that are not meritorious under Section 1.429(l), but this authority is permissive, not mandatory. The Oppositions suggest that the FCC can only consider petitions that present new arguments or evidence not raised before the agency in a rulemaking proceeding. However, this is the exact opposite of what the Commission’s rules dictate. The rules expressly state that petitions for reconsideration that rely on new arguments or evidence can only be granted under specific limited circumstances – making them the exception, not the rule.³⁰

III. CONCLUSION

For the foregoing reasons, the FCC should reverse the UHF Order and reinstate the UHF discount as requested in the ION/Trinity Petition for Reconsideration.

²⁷ Petition at 3 (discussing Congress’ amendment of the Communications Act with the adoption of the current national television ownership cap).

²⁸ Petition at 3-4 (citing *Prometheus Radio Project v. FCC*, 824 F.3d 33, 50 (3d Cir. 2016) and discussing how agency modification to an attribution rule without consideration of related ownership rule was deemed unlawful); *id.* (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and discussing how agency decisions must offer reasoned analysis to be lawful).

²⁹ Free Press *et al.* Opposition at 2-5; ACA Opposition at 5-8.

³⁰ 47 C.F.R. 1.429(b)(1)-(3).

Respectfully submitted,

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Certificate of Service

I, Erin L. Dozier, HEREBY CERTIFY that on this 23rd day of January, 2017, a true and correct copy of the foregoing Reply to Oppositions to Petition for Reconsideration in the matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule (MB Docket No. 13-236), was submitted electronically to the Federal Communications Commission and served via First Class mail upon the following:

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