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

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)))	MB Docket No. 17-318

COMMENTS

AMERICAN CABLE ASSOCIATION

The American Cable Association[1] hereby comments on proposed revisions to the 39 percent national television audience reach cap and the discount afforded to UHF stations.[2] The Commission seeks comment both on its legal authority to adjust the national cap and the UHF discount and the wisdom of doing so.[3] No matter what legal authority courts ultimately determine the Commission might possess in this area, we

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[1] ACA represents more than 700 small- and medium-sized cable operators, incumbent telephone companies, and municipal utilities. ACA members offer broadband, video, and voice services. These providers offer service to homes and businesses in smaller communities and rural areas, as well as in urban and suburban areas by overbuilding other providers. These providers pass nearly 19 million homes in all 50 states and many U.S. territories, and serve about 7 million locations. More than half of ACA's members serve fewer than 1,000 subscribers each.

[2] *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 2017 WL 6507164, FCC 17-169, MB Docket No. 17-318 (rel. Dec. 18, 2017) ("*Notice*").

[3] *Id.* ¶¶ 7-9 (authority); *id.* ¶¶ 10-26 (policy).

believe that permitting greater consolidation will force the 90 percent of Americans that rely on multichannel video programming distributors ("MVPDs") [4] to receive broadcast signals to pay higher prices.

As ACA and others have repeatedly observed, broadcast consolidation increases a broadcaster's leverage in retransmission consent negotiations. This, in turn, leads to higher rates paid by MVPD subscribers and other harms to the public. Both economic theory and the best empirical evidence available to the Commission—in the form of two econometric studies submitted by DISH in the *Sinclair-Tribune* proceeding[5]—thus suggest that increasing the national cap beyond its current level will harm MVPD subscribers.

The Commission has suggested that it will engage in a cost benefit analysis with respect to the national cap.[6] In our view, this means the Commission cannot raise the cap without first (1) quantifying the magnitude of harm this will cause to MVPD subscribers; and (2) quantifying the benefits of such action that it believes would outweigh that harm.

To compare costs and benefits, the Commission's new Office of Economics and Analytics should conduct an econometric analysis based at least in part on DISH's *Sinclair-Tribune* analyses. Broadcasters seeking to relax the national cap possess the

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4 *Annual Assessment of the Status of Competition the Market for the Delivery of Video Programming*, 32 FCC Rcd. 568, 571 ¶ 7 (2017) (citing data regarding broadcast-only households).

5 *See* Petition to Deny of DISH Network L.L.C., Exh. D, Declaration of Janusz Ordover, MB Docket No. 17-179 (filed Aug. 7, 2017) ("Ordover Decl."); Reply Comments of DISH Network, L.L.C., Exh. C, Reply Declaration of Janusz Ordover, MB Docket No. 17-179 (filed Aug. 29, 2017) ("Ordover Reply Decl.").

6 *Notice* ¶ 23.

data necessary for such an analysis and the Commission should require them to produce it.

I. THE BEST AVAILABLE EVIDENCE SUGGESTS THAT CONSOLIDATION WILL HARM MVPD SUBSCRIBERS.

Simply put, the more of an MVPD's subscribers a broadcaster can reach, the more leverage it has in negotiations with that MVPD—and the more leverage a broadcaster has, the more harm it can do to the MVPD and its subscribers.[7] A broadcaster with leverage can raise prices for MVPDs. MVPDs, in turn, pass along at least some of those increases to their subscribers.[8] A broadcaster with leverage can

[7] Letter from Ross Lieberman to Marlene Dortch, MB Docket No. 13-236, at 3 (filed Aug. 2, 2016) ("ACA UHF Discount Letter"); *See, e.g.,* Petition of DISH Network, LLC, the American Cable Association, and ITTA to Deny or Impose Conditions, *Applications of Nexstar Broadcasting Group, Inc. and Media General, Inc. for Consent to Transfer Control of Licenses*, MB Docket No. 16-57 (filed Mar. 18, 2016) (explaining retransmission consent-related harms that would arise from national consolidation); Petition of the American Cable Association, DIRECTV LLC, and Time Warner Cable, Inc. to Deny, or In the Alternative, for Conditions, *Applications of Belo Corp., on Behalf of Its Subsidiaries, et al.*, File Nos. BALCDT-2013619AEZ, et al., at 3-4 (filed Jul. 24, 2013) (opposing the Gannett-Belo merger as not in the public interest because the resulting entity would have a nationwide broadcast ownership footprint "capable of reaching nearly a third of all U.S. households."); Petition for Expedited Rulemaking of Mediacom Communications Corp., *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, at 5 (filed Jul. 21, 2014) ("mega-mergers and continuing consolidation of content owners" justify the Commission amending its rules regarding retransmission consent). *See also* Letter from Joseph Young, Sr. VP & General Counsel, Mediacom, to Ruth Milkman, Chief of Staff, Office of the Chairman, FCC, MB Docket Nos. 10-71, 09-182, and 07-294, at 1-2 (filed Dec. 2, 2013) (unchecked consolidation in the local broadcast market is exacerbating the Commission's failure to update its retransmission consent rules).

[8] *See, e.g.*, *Amendment of the Commission's Rules Related to Retransmission Consent,* Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014) ("*Joint Negotiation Order*"). In the *Joint Negotiation Order*, the Commission explained that "a rule barring joint negotiation may, by preventing supra-competitive increases in retransmission consent fees, tend to limit any resulting pressure for retail price increases for subscription video services." *Id.* at ¶ 17. The Commission noted that its decision was "not premised on rate increases at the retail level," yet "artificially higher retransmission rates do increase input costs for MVPDs, and anticompetitive harm can be found at any level of distribution." *Id.*

impose more frequent and harmful blackouts. And it can force the MVPD to accept more onerous terms and conditions other than price. For example, increased leverage permits broadcasters to force ACA members both to carry unwanted programming and to carry niche programming in broadly distributed tiers—which in turn raises prices for the basic tier, limits cord cutting, and hinders broadband deployment.[9]

The Commission and others have repeatedly found that broadcast consolidation *within the same geographic market* leads to higher prices. In 2014, for example, the Commission determined that broadcast stations within a market are at least partial substitutes for one another—and, accordingly, that broadcasters could raise prices by negotiating jointly for retransmission consent within a single market.[10] (The Department of Justice made similar findings in requiring divestitures in the Nexstar-Media General merger.[11])

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[9] For much more detail on this phenomenon, *see, e.g.*, Joint Comments of the American Cable Association *et al.*, MB Docket No. 16-41 (filed Jan. 26, 2017).

[10] *Joint Negotiation Order* ¶ 10 (2014) ("[J]oint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees. . . .").

[11] *See* Competitive Impact Statement at 8, *United States v. Nexstar Broad. Grp.* (D.D.C. Sept. 2, 2016) (No. 1:16-cv-01772-JDB). Likewise, in the *Comcast-NBCU* merger proceeding, the Commission engaged in exactly this sort of analysis to determine that the horizontal combination of Comcast's and NBCU's programming—both sold in the same "geographic market" to MVPDs—could harm MVPDs under certain circumstances. *Comcast Corp., General Elec. Co. and NBC Universal, Inc.*, 26 FCC Rcd 4238, 4293 ¶ 136 ("*Comcast-NBCU Order*") ("If failing to reach an agreement with the seller will result in a worse outcome for the buyer—if its alternatives are less attractive than they were before the transaction—then the buyer's bargaining position is weakened and it can expect to pay more for the products. In this case, for example, prior to the transaction, if an MVPD did not reach an agreement with Comcast to carry the RSN, the NBC network programming would still be available; and if the MVPD did not reach an agreement to carry NBC, it could still carry the RSN. Post-transaction, if the MVPD does not reach an agreement with Comcast-NBCU, it will not be able to carry either. If not carrying either the NBC network or the RSN places the MVPD in a worse competitive position than not carrying one but still being able to carry the

Last summer, DISH's economic analyses took the Commission's general framework one step further—demonstrating that broadcast consolidation also leads to higher prices *even where geographic markets do not overlap*. More specifically, DISH presented two economic analyses using its own confidential data to demonstrate that, all else being equal, it pays more in retransmission consent fees to large broadcasters than it does to small ones. It concluded: "The larger is the broadcast station group, as measured by the total number of DISH subscribers reached by the stations controlled by the station group owner, the higher is the retransmission consent price paid by DISH."[12] DISH later presented a separate regression analysis measuring the effect of ten broadcast mergers since 2013 on the retransmission consent fees it pays, controlling for the industry-wide increase in such fees during that time. This analysis showed that prices increased in all ten cases.[13]

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other, the MVPD will have less bargaining power after the transaction, and is at risk of having to pay higher rates."); *id.* ¶ 138 ("We conclude that commenters have raised a legitimate concern about the effect the combination of Comcast's RSNs and the NBC O&O stations will have on carriage prices for both of those networks."); *id.* ¶ 139 ("We are also concerned that the horizontal integration of Comcast's cable network programming (including its RSNs) and NBCU's cable programming may confer greater bargaining power, resulting in anticompetitive harm. This possibility is suggested by the evidence presented in the Technical Appendix that if an MVPD were foreclosed from access to the bundle of NBCU cable networks, the subscriber loss would be at least as large as the departure rate from foreclosure to the NBC broadcast network. . . . We are unable to determine definitively on our record, however, whether the Comcast bundle of national programming networks being contributed to the joint venture is a substitute for the bundle of NBCU programming from the perspective of MVPDs, and thus whether the consolidation of Comcast-NBCU programming would be expected to increase the prices for these national programming bundles. We do not need to resolve this factual issue, because the program access conditions we impose will address this possibility as well.").

[12] Ordover Decl. ¶ 3.

[13] Ordover Reply Decl. ¶ 19; *see id.* ¶ 19 n.29 ("In the technical sense, this suggests that the post-merger aggregate value function for the MVPD (such as DISH) is concave.").

DISH's economist explained these results as follows: "[W]hile a loss of programming from Tribune's (say) local stations across [DISH's] footprint could be 'manageable,' the loss of programming from combined Sinclair *and* Tribune's local stations across the DISH footprint could be 'superadditive'—meaning that, in terms of business consequences for DISH, the magnitude of the total negative effect from failing to reach an agreement with Sinclair or Tribune separately is smaller than the negative impact from failing to reach an agreement with both of them at the same time."[14] Such a "substitutability" analysis is quite familiar to the Commission and, indeed, formed the basis of its earlier *intra-market* findings.[15] It does not, however, provide the only possible explanation for the relationship DISH found between broadcast size and retransmission consent prices.[16]

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14 Ordover Decl. ¶ 36; *see also* Ordover Reply Decl. ¶ 12 ("Several economists have written about the possibility that size—here measured as the number of stations owned—can affect bargaining leverage and outcomes even when products are not downstream substitutes in the usual sense, *i.e.*, that consumers are choosing between two products that compete based on relative prices, quality, and other characteristics. Instead, what is important here is that the MVPDs regard the products as having some substitutability. In the instant situation, subscribers to an MVPD are 'substitutable' in the sense that—all else being the same—a change in the number of subscribers in one DMA can be compensated by a change in the number of subscribers in another DMA.").

15 For discussions of this particular framework, *see, e.g.*, Ordover Decl. ¶¶ 16-28; Comments of the American Cable Association, Exh. A, William Rogerson, *Economic Analysis of the Competitive Harms of the Comcast-NBCU Transaction*, MB Docket No. 10-56 (filed June 21, 2010); Comments of DIRECTV, L.L.C., Exh. A, Kevin Murphy *et al.*, *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming*, MB Docket No. 10-56 (filed June 21, 2010).

16 In economic terms, DISH claims that its "surplus function" for the two sets of stations is "concave"—meaning that it would lose more if a merged broadcast entity withholds all of its stations *simultaneously* than if each merging party withholds its own stations *sequentially*. Yet larger broadcast groups might be able to impose higher prices even in cases where concavity does not exist. For example, it may be that increased size permits a broadcaster to claim a larger share of the joint gains from agreement—what economists call "bargaining power" or "bargaining skill." Or it may be that MVPDs are risk averse, and their marginal

The Commission need not reach a final determination about economic *theory* to conclude that the best *evidence* it has received to date shows that broadcast consolidation leads to higher prices—even where the stations in question do not overlap. And the Commission has already determined that MVPDs pass through at least some of these price increases.[17] The most reasonable conclusion one can draw from this evidence is that increasing the national cap will lead to higher prices for consumers.

II. THE COMMISSION'S NEW OFFICE OF ECONOMIC ANALYSIS AND ANALYTICS SHOULD EXAMINE THE EXTENT TO WHICH RAISING THE NATIONAL CAP WOULD INCREASE PRICES.

The *Notice* asks whether having a national ownership cap of 39 percent serves the public interest.[18] It asserts that eliminating the UHF Discount without a sufficient examination of the public interest in the national cap was reversible error.[19] And it contains an entire subsection seeking comment on "how to compare the benefits and costs associated with modifying or eliminating the national cap, including the UHF discount."[20] The Commission, in other words, has tasked itself with weighing the

disutility from lost income increases in the amount of income lost. In this case, the utility of surplus function could be concave even if the surplus function was not.

17 *Comcast-NBCU Order* ¶ 237; *Joint Negotiation Order* ¶ 17.

18 *Notice* ¶ 9.

19 *Id.* ¶ 1.

20 *Id.* ¶ 23; *see also id.* ("We ask commenters supporting modification or elimination of the current 39 percent audience reach cap or the UHF discount to explain the anticipated economic impact of any proposed action and, where possible, to quantify benefits and costs of proposed actions and alternatives. Does the current national audience reach cap create benefits or costs for any segment of consumers? Does the cap create benefits or costs for any segment of the industry that should be counted as social benefits or costs rather than transfers from one segment of the industry to another? How does the cap create these

asserted benefits of any reduction in the national cap against any harms caused thereby. Having done so, it would be arbitrary and capricious for the Commission to relax the national cap *without* such an analysis.[21]

As discussed above, the best and most comprehensive evidence now before the Commission shows that relaxing the national cap will lead to higher fees for MVPDs, which, in turn, will result in higher prices for their subscribers.[22] Some broadcasters, however, dispute this evidence.[23] And the Commission has yet to definitively resolve the question—although, again, it *has* resolved multiple related issues.[24]

Fortunately, the Commission has the tool it needs to help answer this question. It recently established a new Economics Office in order to "provide economic analysis, including cost-benefit analysis, for rulemakings," among other things.[25] Chairman Pai promised that the new office would "conduct a rigorous cost-benefit analysis for rulemakings estimated to have over $100 million of economic impact" and hoped that it

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benefits and costs, and what evidence supports this explanation? How can the value of these benefits and costs be measured for parties receiving them?").

21 *See* 5 U.S.C. § 706 (requiring agencies to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . .failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency. . . .").

22 *See Notice* ¶ 23 ("Does the cap create benefits or costs for any segment of the industry that should be counted as social benefits or costs rather than transfers from one segment of the industry to another?").

23 Applicants Consolidated Opposition to Petitions to Deny, Exh. E, Declaration of Gautam Gowrisankaram ¶¶ 30-47; 59-72, MB Docket No. 17-179 (filed Aug. 22, 2017) (disputing DISH's claims of a concave surplus function).

24 *See supra* notes 10-11 and accompanying text.

25 *Establishment of the Office of Economics and Analytics*, Order, FCC 18-7, MD Docket No. 18-3 at 1 (rel. Jan. 31, 2018).

would "reignit[e] the culture of big-picture policy thinking that used to be so common among economists at the FCC."[26] "Far from rejecting the public interest standard," Chairman Pai argued, the Office's "cost-benefit analysis allows us to intelligibly apply it."[27]

The new Economics Office should conduct an industry-wide version of the econometric analyses engaged in by DISH in the *Sinclair-Tribune* proceeding to determine with more precision the relationship between broadcaster size and retransmission consent prices. Such an analysis would permit the Commission to conclude whether DISH's findings—that retransmission consent prices go up as broadcaster size increases—hold true throughout the industry.[28] A broader economic analysis could also help assess certain alleged benefits of increasing the national cap beyond its current level to determine whether the costs exceed the benefits.

The data necessary to conduct such analyses—retransmission consent agreements—is held by both broadcasters and MVPDs. And historically, broadcasters have gone to great lengths to keep this data secret.[29] Yet the responsibility for providing this data to the Economics Office should fall upon broadcasters, in all fairness. If *broadcasters* seek to change the Commission's rules to their benefit, they should

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[26] *Id.*, Statement of Chairman Pai at 10.

[27] *Id.* at 11.

[28] Of course, we are not suggesting that *any* involvement by the Economics Office would be sufficient to justify increasing or eliminating the national cap. To the contrary, in light of DISH's previous submissions, the Economics Office should either adopt the same approach or explain why it chooses a different path.

[29] *See, e.g.*, *CBS Corp. v. F.C.C.*, 785 F.3d 699 (D.C. Cir. 2015) (resolving concerns by broadcasters about the disclosure of their programming carriage agreements). In light of the Office's particular expertise, moreover, it should consult publicly with outside economists in deciding how to structure its econometric analysis.

provide the data enabling the Commission to "intelligibly apply" the public interest standard to their proposal. The Commission accordingly should require broadcasters to submit such data, subject to appropriate confidentiality protections.[30]

[30] With respect to the Commission's legal authority, ACA has previously suggested that the Commission has authority both to change the national cap *and* to eliminate the UHF Discount. *See* ACA UHF Discount Letter at 2-3 n.9. After reviewing the brief recently filed by Free Press on the subject at the D.C. Circuit, *see Free Press v. F.C.C.*, No. 17-1129, Final Opening Brief of Petitioners (D.C. Cir., Dec. 19, 2017), we have become open to the possibility that Congress intended to distinguish between the national cap itself and the UHF Discount. The national cap itself represents a "pure" policy choice about ownership. The UHF discount, by contrast, reflects an *engineering* judgment about signal propagation—a judgment at the very heart of the Commission's expertise, and one about which Congress might not necessarily think it had anything useful to say. It now strikes us as reasonable to conclude that Congress intended to remove the Commission's discretion with respect to the former, while maintaining its discretion with respect to the latter.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: _________________________

Michael D. Nilsson
Harris, Wiltshire & Grannis LLP
1919 M Street, NW
The Eighth Floor
Washington, DC 20036
(202) 720-1300

Attorney for the American Cable Association

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

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