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

REPLY COMMENTS

The American Cable Association hereby responds to two broadcaster proposals to broaden the "UHF discount."[1] For years, the Commission's rules have specified that UHF stations "reach" only half of the households in their local markets for purposes of calculating compliance with the 39 percent national television audience reach cap.[2] The Commission based this discount on the inferior signal propagation characteristics of

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1 *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd. 10785 (2017) ("*Notice*");

2 47 C.F.R. § 73.3555(e)(2)(i); *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 31 FCC Rcd. 10213 (2016) ("*UHF Discount Order*") (eliminating UHF discount); *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd. 3390, ¶¶ 8-9 (2017) ("*UHF Discount Reconsideration Order*") (reinstating UHF Discount).

UHF stations delivering analog signals.[3] Although all parties now agree that this technical rationale no longer applies because of the transition to digital signals, broadcasters have resisted efforts to eliminate the discount.[4]

Indeed, the National Association of Broadcasters now wants to *expand* the discount, based on a new rationale having nothing to do with signal propagation. It argues that, because broadcast *ratings* have decreased in recent years, stations now "reach" a smaller audience than they did before—so *all* stations (UHF and VHF alike) should now receive a UHF discount.[5] The four affiliates associations agree but argue that network-owned stations should not receive the new discount.[6]

Both proposals for an "Everybody Discount" are ill-conceived as a matter of policy and impermissible as a matter of law. With respect to the former, the Everybody Discount is, of course, merely a more complicated alternative to raising the 39 percent cap directly—one that broadcasters presumably seek only because significant questions remain as to the Commission's authority to raise or eliminate the cap itself. As Chairman Pai once stated, "[i]t is undeniable that eliminating the UHF discount has

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3 *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 F.C.C.2d 74, ¶¶ 33-34 (1985) ("*1985 UHF Discount Order*").

4 Comments of the ABC Television Affiliates Association *et al.*, MB Docket No. 17-318, at 36 (filed Mar. 19, 2018) ("Affiliates Associations Comments") ("It is true that the technological rationale that supported the UHF discount at its inception no longer applies following the digital transition. UHF stations were at a disadvantage in the analog world, so the discount was essential to 'leveling the playing field.' Post-digital transition, the tables are turned, and UHF stations now actually enjoy an overall technical advantage.").

5 Comments of the National Association of Broadcasters, MB Docket No. 17-318, at 25-28 (filed Mar. 19, 2018) ("NAB Comments").

6 Affiliates Associations Comments at 36-39.

the effect of expanding the scope of the national cap rule."[7] Likewise, *expanding* the UHF discount has the effect of *diminishing* the national cap. As a matter of policy, then, the proposed Everybody Discount is exactly like the Commission's proposed increases to or elimination of the cap: broadcasters must shoulder the burden to demonstrate that any benefits of new consolidation permitted by an expanded discount would outweigh the harms, including the retransmission consent-related harms identified in our initial comments.[8] We remain skeptical that such a case can be made, and the recent revelations that allegedly "local" news anchors must read scripts delivered from Sinclair corporate headquarters have only deepened our skepticism.[9] We need not revisit those arguments here.

Even more fundamentally, though, if the Commission lacks authority to raise the ownership cap directly, it also lacks authority to circumvent the cap through creative changes to the UHF discount: *First*, the Commission has no discretion to change the existing UHF discount from one based on signal propagation to one based on ratings. *Second*, even if the Commission could lawfully adopt ratings-based discounts of some kind, it cannot rationally provide *all* stations with the *same* discount. We address these points in turn below.

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7 *UHF Discount Order*, dissenting statement of Commissioner Pai.

8 Comments of the American Cable Association, MB Docket No. 17-318 (filed Mar. 19, 2018) ("ACA Comments").

9 Timothy Burke, "How America's Largest Local TV Owner Turned Its News Anchors Into Soldiers In Trump's War On The Media," Deadspin (Mar. 31, 2018), https://theconcourse.deadspin.com/how-americas-largest-local-tv-owner-turned-its-news-anc-1824233490.

I. THE COMMISSION CANNOT LAWFULLY CREATE A NEW, RATINGS-BASED DISCOUNT.

If Commission has any legal authority to disturb the UHF discount, it still may not transmogrify the existing *signal-propagation* based discount into one based on ratings. Of course, significant questions exist as to whether the Commission possesses *any* authority to act with respect to the national cap.[10] And if the Commission cannot change the cap itself, further questions exist as to whether the Commission may nonetheless modify the UHF discount—or whether that, too, was frozen in place through Congressional ratification. In declaring moot certain challenges to the Commission's 2003 decision to retain the UHF discount, the Third Circuit's 2004 *Prometheus I* decision explained:

> Although the 2004 Consolidated Appropriations Act did not expressly mention the UHF discount, challenges to the Commission's decision to retain it are likewise moot. Congress instructed the Commission to "increase the national audience reach limitation for television stations to 39%." Since 1985 the Commission has defined "national audience reach" to mean "the total number of television households" reached by an entity's stations, except that "UHF stations shall be attributed with 50 percent of the television households" reached. We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning.[11]

The Third Circuit thus indicated that when Congress adopted the "administratively defined" term "national audience reach," it incorporated the Commission's then-existing definition of that term into law. Specifically, the court wrote, in "our reading" the legislation "endors[ed] the almost 20-year-old regulatory definition of 'national audience

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[10] *Notice*, ¶¶ 7-9.

[11] *Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 396 (2004) ("*Prometheus I*") (internal citations omitted).

reach'" underlying the UHF discount.[12] Once Congress did that, the Commission lacked authority to adopt a new definition inconsistent with the one adopted by Congress.

Yet *Prometheus I* does not squarely foreclose that the Commission *may* have *some* authority to modify the UHF discount. Even after advancing its own reading, the Third Circuit acknowledged that "[b]arring congressional intervention . . . the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount."[13] Plainly, however, even if *some* such authority exists—contrary to the Third Circuit's suggestion—that authority is circumscribed by Congress's intent in adopting the national cap and the discount.

As we briefly noted in our opening comments[14]—and Free Press recently argued at greater length to the D.C. Circuit[15]—Congress could reasonably have distinguished between the national cap itself and the UHF Discount. The national cap arguably represents a "pure" policy choice about ownership. The UHF discount, by contrast, appears to reflect 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. Under such a reading, the Commission could perhaps make a *different* engineering judgment based on new facts—so long as it were accompanied by a reasoned explanation of the justifications for the change. So, for example, the introduction of a new technical format with entirely different signal

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12 *Id.* at 397.

13 *Id.*

14 ACA Comments at 10 n.30.

15 *See Free Press v. F.C.C.*, No. 17-1129, Final Opening Brief for Petitioners (D.C. Cir., Dec. 19, 2017).

propagation characteristics might, as an engineering matter, justify adjusting or even eliminating the UHF discount to account for the change.[16]

But the fact that the Commission may have authority to act *within* certain bounds set by Congress does not mean that it may ignore those actions that Congress itself has already taken. In particular, as *Prometheus I* indicates, now that Congress has "endorsed" the Commission's "administrative definition" of audience reach, the Commission cannot abandon the term or redefine it so as to "undermine Congress's specification of a precise 39% cap."[17]

For this reason, the Commission's longstanding definition of audience reach squarely forecloses a ratings-based "Everybody Discount." The Commission has always defined "reach" in terms of whether a viewer can *physically access* broadcast signals. Thus, the UHF discount originally reflected the fact that fewer people could receive UHF signals over the air than could receive VHF signals with better propagation characteristics.[18] Ratings measures something very different—whether people who can physically access a particular station *choose to do so*. Ratings may thus have some relevance to the larger debate over media ownership—along with many other issues, of

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16 *See 2002 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,* 18 FCC Rcd. 13620, ¶ 591 (2003) ("2002 Biennial Review Order"); *Notice*, ¶ 2 n.8 ("[T]he Commission's experience since completion of the transition confirms that UHF channels are technically equal, if not superior, to VHF channels for the transmission of digital television signals.").

17 *Prometheus I*, 373 F.3d at 396.

18 *1985 UHF Discount Order*, ¶¶ 33-44 (finding that the "inherent physical limitations" of analog UHF broadcasting should be reflected in the national television ownership rules).

course. But ratings have nothing to do with a station's "reach,"[19] at least as the Commission has always understood that term.[20] And the Commission cannot now change that understanding—which, since at least 2004, has been Congress's understanding too.

II. THE COMMISSION CANNOT RATIONALLY IMPOSE THE SAME RATINGS-BASED DISCOUNT FOR ALL STATIONS.

Even if the Commission could lawfully modify how the UHF discount approaches "audience reach" from one based on physical availability to one based on ratings, it would be arbitrary and capricious to create a ratings-based rule giving *all* stations the

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[19] Broadcasters' attempt to contrast former cable rules are thus unavailing. *See* NAB Comments at 26. For one thing, those cable rules derived from a separate statutory provision regarding whether the "size" of an operator or operators could "impede . . . the flow" of programming. *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 3 (D.C. Cir. 2009) ("The Cable Television Consumer Protection and Competition Act of 1992 directed the FCC, '[i]n order to enhance effective competition,' 47 U.S.C. § 533(f)(1), to 'prescrib[e] rules and regulations ... [to] ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer.'"). In the context of the analysis required by that statute, one must examine cable subscribers, not homes passed. More importantly, cable programming *is not* "available" to a non-subscriber, even one who lives in a "home passed" by cable. The very point of encrypted "pay-television" is to render cable programming *unavailable* to such non-subscribers. Broadcast television, by contrast, *is* available to anybody who can receive it over the air or through a multichannel provider. All a viewer needs to do in order to watch a particular station is to change the channel.

[20] *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (where "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *United States v. Ramirez-Ferrer*, 82 F.3d 1131, 1137 (1st Cir. 1996) ("Courts must presume that Congress knows of prior judicial or executive branch interpretations of a statute when it reenacts or amends a statute."); *Casey v. Commissioner of Internal Revenue*, 830 F.2d 1092, 1095 (10th Cir. 1987) ("When Congress is, or should be, aware of an interpretation of a statute by the agency charged with its administration, Congress's amendment or reenactment of the statutory scheme without overruling or clarifying the agency's interpretation is considered as approval of the agency interpretation.").

same 50-percent discount *regardless of ratings*.[21] The broadcasters claim that lower broadcast ratings mean that broadcasters now have a smaller "competitively effective reach" than they used to—and thus should receive a larger "discount" to account for this reduced "reach."[22] If this rationale were valid, then presumably stations with the lowest ratings (*i.e.*, the "smallest competitively effective reach") should receive the largest discount. And those with the highest ratings (*i.e.*, the highest "competitively effective reach") should receive the smallest discount or no discount at all.

The broadcasters' Everybody Discount, however, simply applies the same number—50 percent—to all stations, with no explanation of why the number reflects an appropriate ratings-based "discount" for *any* station, much less why it should apply to *all* stations regardless of their actual ratings. Indeed, the Everybody Discount has it entirely backwards: because existing law already gives UHF stations a discount, the proposal would give a new discount only to the VHF stations that, historically, have enjoyed the *highest* ratings. The broadcasters' proposals would thus increase the discount only to those stations with the largest "competitively effective reach"—that is, the stations least deserving of a discount according to the broadcasters' own logic. Such an outcome could only be described as capricious.[23]

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[21] The Administrative Procedure Act prohibits agency action that is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). Under this standard, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

[22] NAB Comments at 27.

[23] The Affiliates Associations extend this capriciousness even further by suggesting an additional criterion for the discount—network ownership—having nothing to do with the purported logic for the discount. Affiliates Associations Comments at 36-39.

ACA continues to believe that the Commission should—indeed must—carefully balance the asserted benefits of raising the national cap against what we believe are the very real harms that would stem from doing so. What the Commission cannot do is sidestep that debate through unwarranted and unlawful revisions to the UHF discount.

Respectfully submitted,

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