

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. 13-236

NOTICE OF PROPOSED RULEMAKING

Adopted: September 26, 2013

Released: September 26, 2013

Comment Date: [30 days after date of publication in the Federal Register]
Reply Comment Date: [60 days after date of publication in the Federal Register]

By the Commission: Acting Chairwoman Clyburn and Commissioner Rosenworcel issuing separate
statements; Commissioner Pai dissenting and issuing a statement.

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I. INTRODUCTION

1. This Notice of Proposed Rulemaking ("NPRM") commences a proceeding to consider
elimination of the so-called "UHF discount" in the Commission's national television multiple ownership
rule. Currently, the national television ownership rule prohibits a single entity from owning television
stations that, in the aggregate, reach more than 39 percent of the total television households in the nation.<sup>1</sup>
In determining compliance with the 39 percent national audience reach cap, the rule provides that
television stations broadcasting in the UHF spectrum will be attributed with only 50 percent of the
television households in their Designated Market Areas ("DMAs"); this is termed the "UHF discount."<sup>2</sup>
The discount was adopted in 1985, in recognition of the technical inferiority of UHF signals as compared

<sup>1</sup> 47 C.F.R. § 73.3555(e)(1).

<sup>2</sup> 47 C.F.R. § 73.3555(e)(2)(i).

with VHF signals in analog television broadcasting and was intended to mitigate the competitive disadvantage that UHF stations experienced in comparison to VHF stations because of their weaker signals and smaller audience reach.<sup>3</sup> However, there is a serious question whether this justification for the UHF discount continues to exist in light of the transition of full-power television stations to digital broadcasting (the “DTV transition”) completed in June 2009.<sup>4</sup> While UHF channels were technically inferior to VHF channels for purposes of transmitting analog television signals, experience since the DTV transition suggests that, far from being inferior, they may actually be superior to VHF when it comes to the transmission of digital television signals, as discussed below.

2. It thus appears that the DTV transition has rendered the UHF discount obsolete and it should be eliminated.<sup>5</sup> We seek comment on that tentative conclusion. We also tentatively decide, in the event that we eliminate the UHF discount, to grandfather existing television station combinations that would exceed the 39 percent national audience reach cap in the absence of the UHF discount and seek comment on that proposal. Finally, we seek comment on whether a “VHF discount” should be adopted, as it appears that under current conditions VHF channels may be technically inferior to UHF channels for the propagation of digital television signals.

## II. BACKGROUND

3. In 1985, the Commission imposed the national audience restriction together with the UHF discount.<sup>6</sup> To protect localism, diversity, and competition, the Commission determined that both a station limit, restricting the total number of broadcast stations a single entity could own, and a nationwide audience reach limit were necessary.<sup>7</sup> Thus, in addition to reaffirming its prior decision to limit the number of AM, FM, and television broadcast stations that a single entity could own, operate, or control to twelve stations in each service, the Commission revised the national television multiple ownership rule to prohibit a single entity from owning television stations that collectively exceeded 25 percent of the total nationwide audience.<sup>8</sup>

4. At that time, the Commission recognized the “inherent physical limitations” of the UHF band.<sup>9</sup> It concluded that the technical limitations of UHF stations should be reflected in the implementation of the national audience cap.<sup>10</sup> The Commission specifically found that the delivery of television signals was more difficult in the UHF band because the strength of UHF television signals decreased more rapidly with distance in comparison to the signals of stations broadcasting in the VHF band, resulting in significantly smaller coverage area and audience reach.<sup>11</sup> To reflect the coverage

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<sup>3</sup> *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, GN Docket No. 83-1009, Memorandum Opinion and Order, 100 FCC 2d 74, 92-94, ¶¶ 42-44 (1985) (finding that the “inherent physical limitations” of UHF broadcasting should be reflected in the national TV ownership rules) (“*UHF Discount Order*”).

<sup>4</sup> See 47 U.S.C. § 309(j)(14)(A).

<sup>5</sup> See Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 14, 2011) (directing independent regulatory agencies to review their regulations to “determine whether any such regulations should be modified, streamlined, expanded, or repealed . . .”).

<sup>6</sup> *UHF Discount Order*, 100 FCC 2d at 88-94, ¶¶ 33-44.

<sup>7</sup> *Id.* at 88-92, ¶¶ 33-41. See also *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, GN Docket No. 83-1009, Report and Order, 100 FCC 2d 17, 54-56, ¶¶ 108-12 (1984) (establishing a 12 station multiple ownership rule).

<sup>8</sup> *UHF Discount Order*, 100 FCC 2d at 90-92, ¶¶ 38-40.

<sup>9</sup> *Id.* at 93, ¶ 43.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

limitations of the UHF band, the Commission determined that the licensee of a UHF station should be attributed with only 50 percent of the television households in its market area for purposes of the national audience restriction. The Commission concluded that this UHF discount reflected the historical concern for the viability of UHF television and provided a measure of the actual handicap of UHF “voices,” which was consistent with traditional diversity objectives.<sup>12</sup>

5. In the Telecommunications Act of 1996 (“1996 Act”), Congress directed the Commission to increase the national audience reach cap from 25 percent to 35 percent and to eliminate the rule restricting an entity to owning no more than twelve television stations nationwide.<sup>13</sup> The 1996 Act did not direct the Commission to amend the UHF discount.<sup>14</sup>

6. The Commission subsequently reaffirmed the 35 percent national audience reach cap in its *1998 Biennial Review Order*.<sup>15</sup> The Commission reasoned that it was premature to revise the audience cap because it had not had sufficient time to fully observe the effects of raising the cap from 25 to 35 percent.<sup>16</sup> The Commission retained the UHF discount, finding that it remained in the public interest.<sup>17</sup> But the Commission indicated that the UHF discount would not likely be necessary after the anticipated transition to digital television and stated that a Notice of Proposed Rulemaking would be issued in the future to propose phasing out the discount once the digital transition was complete.<sup>18</sup>

7. The Commission reexamined the issue in its *2002 Biennial Review Order*.<sup>19</sup> At that time, the Commission found that the national audience reach cap, while not necessary to promote competition and diversity, nonetheless remained necessary to promote localism.<sup>20</sup> Further, the Commission decided that an increase in the cap to 45 percent was justified.<sup>21</sup> The Commission concluded that a 45 percent cap would strike an appropriate balance, by permitting some growth for the big four network owners and allowing them to achieve greater economies of scale, while at the same time ensuring that the networks

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<sup>12</sup> *Id.* at 93-94, ¶ 44. When the Commission adopted the UHF discount in 1985, it calculated television households based on Arbitron’s Area of Dominant Influence (“ADI”) market rankings. Currently, the Commission relies on Nielsen’s Designated Market Areas (“DMAs”) to calculate television households in a given market.

<sup>13</sup> Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996) (“1996 Act”). See also *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, Order, 11 FCC Rcd 12374 (1996) (“*Implementation Order of Section 202(c)(1) of 1996 Act*”).

<sup>14</sup> *Implementation Order of Section 202(c)(1) of 1996 Act*, 11 FCC Rcd at 12375, ¶ 4.

<sup>15</sup> *1998 Biennial Review Order – 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, Biennial Review Report, 15 FCC Rcd 11058, 11072-75, ¶¶ 25-30 (2000) (“*1998 Biennial Review Order*”). The United States Court of the Appeals for the District of Columbia (“D.C. Circuit”) later remanded the *1998 Biennial Review Order* after finding that the decision to retain the national ownership rule was arbitrary and capricious. The D.C. Circuit found the Commission’s “wait-and-see” approach to be inconsistent with its mandate to determine on a biennial basis whether the rules were in the public interest. In addition, the court found that the Commission failed to demonstrate that the national audience reach cap advanced competition, diversity, or localism. See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040-49 (D.C. Cir. 2002).

<sup>16</sup> *1998 Biennial Review Order*, 15 FCC Rcd at 11072, ¶ 25.

<sup>17</sup> *Id.* at 11078, ¶ 35.

<sup>18</sup> *Id.* at 11079-80, ¶ 38.

<sup>19</sup> *2002 Biennial Review Order – 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. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13845-47, ¶¶ 585-91 (2003) (“*2002 Biennial Review Order*”).

<sup>20</sup> *Id.* at 13842, ¶ 578.

<sup>21</sup> *Id.* at 13814, ¶ 499.

could not reach a larger national audience than their affiliates collectively.<sup>22</sup> The Commission also found that setting the cap at 45 percent was consistent with past congressional action to increase the ownership limit by 10 percentage points.<sup>23</sup>

8. At the same time, the Commission upheld the UHF discount once again, finding that there continued to be a disparity between the household reach of UHF and VHF signals, which diminished the ability of UHF stations to compete effectively.<sup>24</sup> The Commission surmised, however, that “the digital [television] transition [would] largely eliminate the technical basis for the UHF discount because UHF and VHF signals [would] be substantially equalized.”<sup>25</sup> Accordingly, the Commission decided to sunset application of the UHF discount for stations owned by the top four broadcast networks (*i.e.*, ABC, CBS, NBC, and Fox) as the digital transition was completed on a market-by-market basis. The Commission noted that the sunset would apply unless it made an affirmative determination that the UHF discount continued to serve the public interest beyond the digital transition. The Commission indicated further that it would review the status of the UHF discount in a subsequent biennial review and decide at that time whether to extend the sunset to all other networks and station group owners.<sup>26</sup>

9. Subsequently, Congress superseded the Commission’s modification of the national audience reach cap in the *2002 Biennial Review Order*, including the increased 45 percent limit and the sunset of the UHF discount. The 2004 Consolidated Appropriations Act directed the Commission to modify its ownership rules to revise the national audience reach cap from 35 percent to 39 percent.<sup>27</sup> Further, it amended Section 202(h) of the 1996 Act to require a quadrennial review of the Commission’s broadcast ownership rules rather than a biennial review, but specifically excluded “any rules relating to the 39 percent national audience reach limitation” from the quadrennial review.<sup>28</sup>

10. Prior to the enactment of the 2004 Consolidated Appropriations Act, several parties had appealed the Commission’s *2002 Biennial Review Order* to the U.S. Court of Appeals for the Third Circuit (“Third Circuit”). In June 2004, the Third Circuit issued a decision in which it found that the challenges to the Commission’s actions with respect to the national audience reach cap and the UHF discount were moot as a result of Congress’s action.<sup>29</sup> The court determined that the Commission was under a statutory directive, following the 2004 Consolidated Appropriations Act, to modify the national audience reach cap to 39 percent, and that challenges to the Commission’s decision to raise the cap to 45 percent therefore were no longer justiciable.<sup>30</sup> The court found that challenges to the Commission’s decision to retain the UHF discount were likewise eliminated from the litigation by the language in the 2004 Consolidated Appropriations Act,<sup>31</sup> which insulated the UHF discount rule from the Commission’s

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<sup>22</sup> *Id.* at 13843-44, ¶¶ 581-83.

<sup>23</sup> *Id.* ¶ 582.

<sup>24</sup> *Id.* at 13845-46, ¶¶ 586-87. The Commission also determined that UHF stations required more expensive transmitters and incurred higher electricity costs, as much as 1.5 to 3 times greater than the electricity needed for a VHF station. The Commission concluded further that the UHF discount was still needed, in part, to encourage entry and competition among broadcast networks. *Id.* at 13846-47, ¶¶ 588-89.

<sup>25</sup> *Id.* at 13847, ¶ 591.

<sup>26</sup> *Id.*

<sup>27</sup> Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (“2004 Consolidated Appropriations Act”).

<sup>28</sup> *Id.*

<sup>29</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (3d Cir. 2004) (“*Prometheus I*”).

<sup>30</sup> *Id.* at 396.

<sup>31</sup> *Id.*

quadrennial (previously biennial) review of its media ownership rules.<sup>32</sup> At the same time, the court indicated that its decision did not “foreclose the Commission’s consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h).”<sup>33</sup> The court concluded that, 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 [Section] 202(h).”<sup>34</sup>

11. In July 2006, the Commission issued a Further Notice of Proposed Rule Making as part of its 2006 quadrennial review of the media ownership rules.<sup>35</sup> Among other things, the *Further Notice* sought comment on the Third Circuit’s holding with respect to the UHF discount rule and whether the Commission “should retain, modify, or eliminate the UHF discount.”<sup>36</sup> In February 2008, the Commission concluded in the *2006 Quadrennial Review Order* that “the UHF discount is insulated from review under Section 202(h)” as a result of the 2004 Consolidated Appropriations Act.<sup>37</sup> But the Commission noted the Third Circuit’s 2004 decision had left it to the Commission to decide the scope of its authority to modify or eliminate the UHF discount outside the context of Section 202(h).<sup>38</sup> Accordingly, the Commission indicated that it would address the petitions, comments, and replies filed with respect to the alteration, retention, or elimination of the UHF discount in a separate proceeding.<sup>39</sup>

12. Since June 13, 2009, all full-power television stations have broadcast their over-the-air signals using only digital technology.<sup>40</sup> The DTV transition has enabled broadcasters to provide multiple programming choices and enhanced capabilities to consumers.<sup>41</sup> Yet the transition has posed more

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<sup>32</sup> *Id.* at 396-97 (reasoning that (1) elimination of the discount would effectively raise the limit above the statutory level of 39 percent, and (2) Congress excluded from the quadrennial review process any rule “relating to” the national cap, and the UHF discount is such a rule).

<sup>33</sup> *Id.* at 397.

<sup>34</sup> *Id.*

<sup>35</sup> *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 Rule Making, 21 FCC Rcd 8834 (2006) (“*Further Notice*”).

<sup>36</sup> *Id.* at 8848-49, ¶¶ 34-35. The *Further Notice* refreshed the Commission’s record on its authority to alter the UHF discount. Following enactment of the 2004 Consolidated Appropriations Act, the Media Bureau issued a Public Notice in February 2004 also seeking comment specifically on the Commission’s authority to modify or eliminate the UHF discount in light of the new statute. In particular, the Media Bureau sought comment on whether the “passage of the 39 [percent] cap [signifies] congressional approval, adoption, or ratification of the 50 [percent] UHF discount.” The comments and replies were filed in the docket for the *2002 Biennial Review Order. Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap*, MB Docket No. 02-277, Public Notice, 19 FCC Rcd 2599, 2600 (2004). See also *Comment and Reply Comment Dates Set for Comments on UHF Discount In Light of Recent Legislation Affecting National Television Ownership Cap*, MB Docket No. 02-277, Public Notice, 19 FCC Rcd 3917 (2004).

<sup>37</sup> *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, 2084-85, ¶ 143 (2008) (“*2006 Quadrennial Review Order*”), *aff’d in part, rev’d in part sub nom. Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011).

<sup>38</sup> *2006 Quadrennial Review Order*, 23 FCC Rcd at 2085, ¶ 144.

<sup>39</sup> *Id.*

<sup>40</sup> FCC, *Digital Television*, <http://www.fcc.gov/digital-television> (visited Aug. 6, 2013) (“DTV Website”). Congress established June 12, 2009 as the deadline for full-power television stations to stop broadcasting their analog signals. 47 U.S.C. § 309(j)(14)(A).

<sup>41</sup> See *supra* DTV Website.

challenges for VHF channels than UHF channels, because VHF spectrum has proven to have characteristics that make it less desirable for providing digital television service.<sup>42</sup> For instance, nearby electrical devices tend to emit noise that can cause interference to DTV signals within the VHF band, creating reception difficulties in urban areas even a short distance from the TV transmitter. The reception of VHF signals also requires physically larger antennas compared to UHF signals, making VHF signals less well suited for mobile applications.<sup>43</sup> For these reasons among others, television broadcasters generally have faced greater challenges providing consistent reception on VHF signals than UHF signals in the digital environment.<sup>44</sup>

### III. DISCUSSION

#### A. Authority to Modify the UHF Discount

13. We tentatively conclude that the Commission has the authority to modify the national television ownership rule, including the authority to revise or eliminate the UHF discount.<sup>45</sup> Specifically, we tentatively conclude that the 2004 Consolidated Appropriations Act does not preclude the Commission from revisiting the national television ownership rule or the UHF discount contained therein, in a proceeding separate from the quadrennial reviews of the broadcast ownership rules pursuant to Section 202(h) of the 1996 Act. Notably, in the 2004 Consolidated Appropriations Act, Congress directed the Commission to revise its rules to reflect a 39 percent audience reach cap. Congress did not directly establish that limitation by statute or amend the Communications Act of 1934 (the “Communications Act” or “Act”) to address the subject of national television ownership. Further, as the court in *Prometheus I* recognized, while Congress excluded the national television ownership rule from the quadrennial review requirement under 202(h), it did not foreclose Commission action to review or modify the rule in a separate context.<sup>46</sup>

14. In addition, the Communications Act provides the Commission with the statutory authority to revisit its rules and revise or eliminate them if it concludes such action is appropriate. Section 4(i) of the Act authorizes the agency to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”<sup>47</sup> Similarly, Section 303(r) provides that the FCC may “[m]ake such rules and regulations . . . not inconsistent with this law, as may be necessary to carry out the provisions of this Act . . . .”<sup>48</sup> Indeed, the courts have held that the Commission has an affirmative obligation to reexamine

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<sup>42</sup> See *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16511, ¶ 42 (2010) (“*Broadcast Innovation NPRM*”).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The Commission has taken a number of actions to help individual VHF stations cope with these difficulties. See, e.g., Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to ABC, Inc. and Freedom Broadcasting of New York Licensee, LLC (March 16, 2011), at [http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter\\_exh.cgi?import\\_letter\\_id=24962](http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=24962) (visited July 19, 2013) (permitting two television broadcasters to operate facilities exceeding the maximum power and antenna height in an attempt to resolve VHF reception issues).

<sup>45</sup> 47 C.F.R. § 73.3555(e).

<sup>46</sup> *Prometheus I*, 373 F.3d at 397 (holding the determination that the UHF discount is insulated from quadrennial review does not “foreclose the Commission’s consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h)”). See also Section 202(h) of the 1996 Act, 47 U.S.C. § 303 note.

<sup>47</sup> 47 U.S.C. § 154(i).

<sup>48</sup> 47 U.S.C. § 303(r).

its rules over time.<sup>49</sup> For instance, in *Bechtel v FCC*, the court observed that “changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so. In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach ‘if a significant factual predicate of a prior decision has been removed,’”<sup>50</sup> which is precisely the case here.

15. For these reasons, we believe the Commission retains the authority to modify both the national audience reach restriction and the UHF discount, provided such action is undertaken in a rulemaking proceeding separate from the Commission’s quadrennial review of the broadcast ownership rules pursuant to Section 202(h). We seek comment on our tentative conclusion and analysis. Does our tentative conclusion appropriately interpret the 2004 Consolidated Appropriations Act and the Third Circuit’s guidance in its 2004 decision? Is there additional statutory guidance or case law that supports or undermines our conclusion?

### **B. Elimination of the UHF Discount**

16. The Commission has recognized for more than a decade that the underlying basis for the UHF discount would likely disappear following the transition to digital television. As discussed above, even as the Commission determined in both the *1998 Biennial Review Order* and the *2002 Biennial Review Order* that the UHF discount was still necessary, it anticipated that the DTV transition would largely eliminate the technical basis for the UHF discount.<sup>51</sup> The Commission found that the digital transition would substantially equalize UHF and VHF signals, and, thus, it decided to sunset the discount for UHF stations owned by the top four broadcast networks (*i.e.*, CBS, NBC, ABC, and Fox).<sup>52</sup> As discussed above, the sunset provisions adopted by the Commission were superseded by Congress’s action in the 2004 Consolidated Appropriations Act. Nevertheless, the DTV transition has borne out the Commission’s expectation. Digital UHF stations do not suffer from the same comparative technical deficiencies *vis-à-vis* VHF facilities that characterized analog UHF stations.

17. The Commission has acknowledged that UHF spectrum is now highly desirable in light of its superior propagation characteristics for digital television, and that the disparity between UHF and VHF channels has if anything been reversed.<sup>53</sup> In fact, following the DTV transition, some stations that initially elected to operate on a VHF channel have sought to relocate to a UHF channel to resolve technical difficulties encountered in broadcasting on VHF.<sup>54</sup> The Commission has explored engineering options to increase the utility of VHF spectrum for digital television purposes.<sup>55</sup> Furthermore, the

<sup>49</sup> See, e.g., *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995), citing *Bechtel v FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 816 (1992) (“*Bechtel*”) (“[W]here the factual assumptions which support an agency rule are no longer valid, agencies ordinarily must reexamine their approach.”).

<sup>50</sup> *Bechtel*, 957 F.2d at 881, quoting *WWHT, Inc. v FCC*, 656 F.2d 807, 819 (D.C. Cir 1981).

<sup>51</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13845-47, ¶¶ 586-91; *1998 Biennial Review Order*, 15 FCC Rcd at 11078-80, ¶¶ 35-38.

<sup>52</sup> *2002 Biennial Review Order*, 18 FCC Rcd at 13847, ¶ 591.

<sup>53</sup> *Broadcast Innovation NPRM*, 25 FCC Rcd at 16511-13, ¶¶ 42-45.

<sup>54</sup> See, e.g., *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations. (Panama City, Florida)*, MB Docket No. 11-140, Report and Order, 26 FCC Rcd 14415 (Chief, Video Division, MB 2011) (substituting channel 18 for channel 7 for Gray Television Licensee, LLC); *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations. (Nashville, Tennessee)*, MB Docket No. 11-29, Report and Order, 26 FCC Rcd 7677 (Chief, Video Division, MB 2011) (substituting channel 25 for channel 5 for NewsChannel 5 Network, LLC); *Amendment of Section 73.622(i), Final DTV Table of Allotments, Television Broadcast Stations. (Oklahoma City, Oklahoma)*, MB Docket No. 10-19, Report and Order, 25 FCC Rcd 2276 (Associate Chief, Video Division, MB 2010) (substituting channel 39 for channel 9 for Griffin Licensing, L.L.C.).

<sup>55</sup> *Broadcast Innovation NPRM*, 25 FCC Rcd at 16513-17, ¶¶ 46-57.

Commission recently determined that annual regulatory fees for UHF and VHF stations will be combined into one fee category beginning in Fiscal Year 2014, eliminating a distinction based on the historical disadvantages of UHF.<sup>56</sup> Today, rather than offsetting an actual service limitation or reflecting a disparity in signal coverage, the UHF discount appears only to confer a factually unwarranted benefit on owners of UHF television stations. If left in place, the UHF discount could undermine the 39 percent national audience reach cap on the false predicate that UHF stations do not reach equivalent audiences to VHF stations.

18. Based on these findings, we tentatively conclude that the historical justification for the UHF discount no longer exists and the rule is therefore obsolete. We accordingly propose that the UHF discount should be eliminated from the national television multiple ownership rule.

19. We seek comment on this proposal. In particular, does the UHF discount still serve the public interest? Does the discount promote market entry? Does it promote competition among broadcast networks? Are we correct in concluding that the technical limitations for UHF spectrum that existed for analog operations are not present in a digital environment? If so, are there other public policy justifications for maintaining the UHF discount despite the fact that the historical technical inferiority of UHF spectrum for television broadcasting no longer exists? Is any disparity between the broadcast coverage of UHF and VHF channels less important today than in 1985 given that many consumers receive local broadcast stations via a multichannel video programming distributor (“MVPD”) and not over-the-air? Are there any other market conditions that merit our consideration with regard to the UHF discount? Is there any factual basis to maintain the UHF discount in the current environment? What are the costs and benefits of eliminating the UHF discount?<sup>57</sup>

### C. Existing Broadcast Station Combinations

20. We recognize that the elimination of the UHF discount would impact the calculation of nationwide audience reach for broadcast station groups with UHF stations. We believe, however, that only a small number of broadcast station ownership groups have combinations that approach the current 39 percent ownership nationwide cap and that might exceed the cap if the UHF discount were eliminated. We therefore propose, in the event that we eliminate the UHF discount, to grandfather broadcast station ownership groups to the extent that they exceed the 39 percent national audience cap solely as a result of the termination of the UHF discount rule as of the date of the release of this NPRM.<sup>58</sup> We also propose to grandfather proposed station combinations that would exceed the 39 percent cap as a result of the elimination of the UHF discount for which an application is pending with the Commission or which have received Commission approval, but are not yet consummated, at that the time this NPRM is released.

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<sup>56</sup> See, e.g., *Assessment and Collection of Regulatory Fees for Fiscal Year 2013*, MD Docket No. 13-140, Report and Order, 28 FCC Rcd 12351, 12361-62, ¶¶ 29-31 (2013) (“Regulatory fees for full-service television stations are [currently] calculated based on two, five-tiered market segments for [UHF] and [VHF] television stations.”).

<sup>57</sup> To the extent possible, commenters should quantify the expected costs or benefits of eliminating the UHF discount and provide detailed support for any estimates.

<sup>58</sup> We note that industry participants have effectively been on notice since at least 2000, when the *1998 Biennial Review Order* was released, that the Commission expected to eliminate the UHF discount after completion of the DTV transition. See *supra* ¶ 6, note 18. Further, adoption of this grandfathering date is consistent with previous Commission decisions. See *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, 14 FCC Rcd 12559, 12628-31, ¶¶ 162-73 (1999) (determining interests acquired on or after the NPRM adoption date subject to the new equity/debt plus rules adopted in the order). See also *Review of the Commission’s Regulations Governing Television Broadcasting*, MM Docket No. 91-221, Report and Order, 14 FCC Rcd 12903, 12963, ¶ 139 (1999), clarified in Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067, 1085-88, ¶¶ 50-55 (2001) (grandfathering TV LMAs entered before the release date of the NPRM and not those entered after that date), *aff’d in part and remanded in part sub nom. Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 166 (D.C. Cir. 2002).

Further, we propose that any grandfathered ownership combination subsequently sold or transferred would be required to comply with the national ownership cap in existence at the time of the transfer.<sup>59</sup>

21. We seek comment on these issues. Do our proposals serve the public interest? What is the potential impact of our grandfathering proposals on broadcast ownership groups, the broadcast industry, local markets, and consumers? Do our proposals adequately address any potential impact on existing broadcast station ownership groups? Should we consider any specific circumstances in evaluating applications for waiver of the national ownership cap received from grandfathered station groups that enter into subsequent transactions, such as whether the application for waiver seeks to allow a corporate transformation of an existing station group – including a refinancing or restructuring – versus action that would circumvent the proposed rule change? Are there other strategies we should consider or employ to address existing broadcast station ownership groups that would exceed the 39 percent limit if the UHF discount were eliminated? Are there other alternatives we should consider with regard to pending applications? What are the costs and benefits of our grandfathering proposal and any other proposals offered by commenters?

#### **D. VHF Discount**

22. As noted above, the Commission has acknowledged that the DTV transition has made UHF spectrum, if anything, more desirable than VHF spectrum for purposes of digital television broadcasting.<sup>60</sup> While the Commission has proposed solutions to VHF reception challenges, it has acknowledged that the options for improving digital television service on VHF channels are limited, especially in the low-VHF band.<sup>61</sup> Unfortunately, it is often consumers using indoor antennas who tend to face reception difficulties most frequently.<sup>62</sup> For these reasons, some television stations, as previously indicated, have sought to relocate to UHF channels in order to resolve the technical difficulties experienced with their VHF channels.<sup>63</sup>

23. Given the challenges that VHF stations face in delivering digital television signals, we seek comment on whether it would be appropriate at this time to adopt a “VHF discount.” Could a VHF discount function similarly to the current UHF discount in that only a certain percentage of the television households in a DMA would be attributed to a VHF television station for purposes of calculating a station group’s national audience reach? We seek comment on whether a VHF discount is either warranted or advisable at this time. If a VHF discount is advisable, would it be appropriate to attribute to VHF stations only 50 percent of the TV households in their DMA? Would a different percentage be more appropriate? Is a discount more or less important than it was when the UHF discount was adopted in 1985, because many television consumers today receive local broadcast stations via an MVPD rather than over-the-air? Would a VHF discount run the risk of becoming obsolete as a result of market developments, as in the

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<sup>59</sup> We find this approach is consistent with common Commission practice with regard to grandfathering. *See, e.g., Review of the Commission’s Regulations Governing Television Broadcasting*, MM Docket No. 91-221, Report and Order, 14 FCC Rcd 12903, 12909, ¶ 11 (1999) (“Any transfer of a grandfathered combination after the adoption date of this Report and Order (whether during the initial grandfathering period [or] after a permanent grandfathering decision has been made) must meet the [existing] radio/TV cross-ownership rule.”); *Applications of Stauffer Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 5165, 5165, ¶ 3 (1995) (“[G]randfathered status under our multiple ownership rules terminates upon Commission approval of a transfer of control.”).

<sup>60</sup> *See supra* ¶ 12.

<sup>61</sup> *Broadcast Innovation NPRM*, 25 FCC Rcd at 16511-17, ¶¶ 42-57. *See also Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Report and Order, 27 FCC Rcd 4616, 4621, ¶ 10 (2012) (“[T]he record in this proceeding does not provide us [with] a clear direction with respect to significantly increasing the utility of the VHF bands for the operation of television services.”).

<sup>62</sup> *Broadcast Innovation NPRM*, 25 FCC Rcd at 16512, ¶ 43.

<sup>63</sup> *See supra* note 54.

case of the UHF discount? Are there any other market conditions that merit our consideration with regard to a possible VHF discount? In the event that the Commission adopts a VHF discount, should we distinguish between high and low VHF channels? Are there options other than a discount to address the current inferiority of VHF signal propagation for purposes of the national audience reach cap? What are the costs and benefits of imposing a VHF discount and any other proposal offered by commenters?

#### IV. PROCEDURAL MATTERS

##### A. Ex Parte Presentations

24. The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>64</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

##### B. Initial Regulatory Flexibility Analysis

25. The Regulatory Flexibility Act of 1980, as amended (“RFA”), requires that a regulatory flexibility analysis be prepared for notice and comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

26. With respect to this Notice, an Initial Regulatory Flexibility Analysis (“IRFA”) under the Regulatory Flexibility Act<sup>65</sup> is contained in Appendix B. Written public comments are requested in the IFRA, and must be filed in accordance with the same filing deadlines as comments on this NPRM, with a distinct heading designating them as responses to the IRFA. The Commission will send a copy of this NPRM, including the IRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, a copy of this NPRM and the IRFA will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the *Federal Register*.

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<sup>64</sup> 47 C.F.R. §§ 1.1200 *et seq.*

<sup>65</sup> 5 U.S.C. § 603.

### C. Paperwork Reduction Act Analysis

27. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

### D. Comment Filing Procedures

28. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.
- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

29. *Additional Information:* For additional information on this proceeding, please contact Brendan Holland of the Media Bureau, Industry Analysis Division, [Brendan.Holland@fcc.gov](mailto:Brendan.Holland@fcc.gov), (202) 418-2757, or Johanna Thomas of the Media Bureau, Industry Analysis Division, [Johanna.Thomas@fcc.gov](mailto:Johanna.Thomas@fcc.gov), (202) 418-7551.

### V. ORDERING CLAUSE

30. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 2(a), 4(i), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303(r), 307, 309, and 310, this Notice of Proposed Rulemaking **IS ADOPTED**.

31. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Proposed Rule Change

## PART 73 – RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, 336 and 339.

2. Amend § 73.3555 by revising paragraph (e) to read as follows:

**§ 73.3555 Multiple ownership.**

\* \* \* \* \*

(e) National television multiple ownership rule.

(1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. ~~For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.~~

\* \* \* \* \*

## APPENDIX B

## Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”), the Federal Communications Commission (“Commission”) has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (“NPRM”).<sup>1</sup> Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).<sup>2</sup> In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

**A. Need for, and Objectives of, the Proposed Rule Changes**

2. The Commission seeks comment in this NPRM to consider elimination of the so-called “UHF discount” in the Commission’s national television multiple ownership rule. The national television ownership rule currently prohibits a single entity from owning television stations that, in the aggregate, reach more than 39 percent of the total television households in the nation.<sup>4</sup> The rule provides television stations broadcasting in the UHF spectrum with a discount by attributing those stations with only 50 percent of the television households in their Designated Market Areas (“DMAs”); this is termed the UHF discount.<sup>5</sup> The UHF discount was adopted in recognition of the technical inferiority of UHF signals in analog television broadcasting and was intended to mitigate the competitive disadvantages that UHF stations experienced in comparison to VHF stations because of their weaker signals and smaller audience reach.<sup>6</sup> However, there is serious question whether this justification for the UHF discount continues to exist in light of the transition of full-power television stations to digital broadcasting (the “DTV transition”) completed on June 12, 2009.<sup>7</sup> Our experience since the DTV transition suggests that UHF channels may actually be superior to VHF channels when it comes to the transmission of digital television.

3. This NPRM tentatively concludes that the UHF discount is obsolete since the DTV transition and should be eliminated. The Commission seeks comment on this tentative conclusion, as well as on our tentative decision to grandfather existing television station combinations that would exceed the 39 percent national audience reach cap in the absence of the UHF discount. Finally, we seek comment on whether a “VHF discount” should be adopted, as it appears that under current conditions VHF channels may be technically inferior to UHF channels for the propagation of digital television signals.

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> 5 U.S.C. § 603(a).

<sup>3</sup> *See id.*

<sup>4</sup> 47 C.F.R. § 73.3555(e)(1).

<sup>5</sup> 47 C.F.R. § 73.3555(e)(2)(i).

<sup>6</sup> *See Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, GN Docket No. 83-1009, Memorandum Opinion and Order, 100 FCC 2d 74, 92-94, ¶¶ 42-44 (1985).

<sup>7</sup> 47 U.S.C. § 309(j)(14)(A).

**B. Legal Basis**

4. The proposed action is authorized under Sections 1, 2(a), 4(i), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303(r), 307, 309, and 310.

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>8</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>9</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>10</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>11</sup>

6. *Television Broadcasting.* The SBA designates television broadcasting stations with \$35.5 million or less in annual receipts as small businesses.<sup>12</sup> Television broadcasting includes establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources.<sup>13</sup> The Commission estimates that there are 1,386 licensed commercial television stations in the United States.<sup>14</sup> In addition, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database as of June 10, 2013, 1,245 (or about 90 percent) of the estimated 1,386 commercial television stations have revenues of \$35.5 million or less and, thus, qualify as small entities under the SBA definition. We therefore estimate that the majority of commercial television broadcasters are small entities. The Commission has also estimated the number of licensed noncommercial educational (“NCE”)

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<sup>8</sup> 5 U.S.C. § 603(b)(3).

<sup>9</sup> 5 U.S.C. § 601(6).

<sup>10</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

<sup>11</sup> 15 U.S.C. § 632.

<sup>12</sup> The SBA raised its standards for television broadcasting stations in 2012. Previously, television broadcasting stations with no more than \$14 million in annual receipts were considered a small business pursuant to the SBA’s standards. Those standards have since increased to \$35.5 million in annual receipts. *See Small Business Size Standards: Information*, 77 Fed. Reg. 72702, 72705 (Dec. 6, 2012). *See also* 13 C.F.R. § 121.201, NAICS code 515120.

<sup>13</sup> U.S. Census Bureau, *2012 NAICS Definition, 515120 Television Broadcasting*, <http://www.census.gov/eos/www/naics/index.html> (visited July 16, 2013).

<sup>14</sup> *See Broadcast Station Totals as of June 30, 2013*, Press Release (rel. July 10, 2013), at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2013/db0710/DOC-322079A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0710/DOC-322079A1.pdf) (visited July 15, 2013).

television stations to be 396.<sup>15</sup> These stations are non-profit, and therefore considered to be small entities.<sup>16</sup>

7. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>17</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

8. The NPRM tentatively concludes to modify the national television multiple ownership rule as set forth in paragraph 3 above, which would affect reporting, recordkeeping, or other compliance requirements. The conclusion, if ultimately adopted, would modify several FCC forms and their instructions: (1) FCC Form 301, Application for Construction Permit For Commercial Broadcast Station; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 315, Application for Consent to Transfer Control of Corporation Holding Broadcast Station Construction Permit or License. The Commission may have to modify other forms that include in their instructions the media ownership rules or citations to media ownership proceedings, including Form 303-s and Form 323. The impact of these changes will be the same on all entities, and we do not anticipate that compliance will require the expenditure of any additional resources as the proposed modification to the national television multiple ownership rule will not place any additional obligations on small businesses.

#### **E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered**

9. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>18</sup>

10. The tentative conclusions and specific proposals on which the NPRM seeks comments, as set forth in paragraph 3 above, are intended to achieve our public interest goal of competition. By recognizing the technical advancements of the UHF band after the DTV transition, this NPRM seeks to create a regulatory landscape that reflects the current value of UHF spectrum in order to better assess national television ownership figures. Further, this NPRM complies with the President’s directive for independent agencies to review their existing regulation “to determine whether such regulations should be

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<sup>15</sup> *See id.*

<sup>16</sup> 5 U.S.C. §§ 601(4), (6).

<sup>17</sup> “[Business concerns] are affiliates of each other when one [concern] controls or has the power to control the other, or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

<sup>18</sup> 5 U.S.C. § 603(c).

modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."<sup>19</sup> As such, our proposed rule seeks to reduce costs on firms generally, including small business entities, by removing outdated regulations. In addition, the grandfathering and VHF discount proposals seek to create a more effective regulatory landscape by addressing current market realities. The NPRM also requests comment on whether any alternatives to the Commission's tentative conclusions or specific proposals exist, which provides small entities with the opportunity to indicate any disagreement with our findings and conclusions.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

11. None.

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<sup>19</sup> Exec. Order No. 13579, 76 Fed. Reg. 41587 (July 14, 2011).

**STATEMENT OF  
ACTING CHAIRWOMAN MIGNON CLYBURN**

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

I am pleased today to issue a Notice of Proposed Rulemaking that initiates a proceeding to consider the elimination of the UHF discount.

The Commission adopted the UHF discount nearly 30 years ago, when UHF signals were considered to be technically inferior to VHF signals in analog television broadcasting. The rule was a means to address the competitive disadvantages experienced by UHF stations at the time. Yet with the transition of full-power stations to digital broadcasting completed in June 2009, the technical inferiority of UHF channels for the transmission of digital television signals appears to be a thing of the past. Thus, the technical justification for the UHF discount no longer appears valid.

The Commission and the television industry have anticipated the elimination of this discount for well over a decade. It is our task as regulators to ensure that our rules reflect current market realities. While it also may be appropriate to undertake the significant task of reexamining the national cap at some point in the future, we cannot in the meantime ignore the impact the DTV transition has had in the marketplace, changes that everyone must acknowledge currently stand this rule on its head.

The questions we ask today are ones the Commission promised to raise many times in written orders and should not surprise any market participant. The Notice specifically reflects the Commission's intent to consider fairly and accommodate as appropriate existing television station combinations, pending applications, and any future transactions that present special circumstances. The common sense action outlined in this NPRM should help to ensure that our rules reflect the current technical realities of television broadcasting. It is also consistent with the President's directive in his Executive Order to review significant regulations and determine whether they still serve the public interest.

I wish to thank Bill Lake and the staff in the Media Bureau, particularly Hillary DeNigro, Brendan Holland, and Johanna Thomas, for their hard work on this Notice.

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL**

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

The mechanics of this rulemaking may seem complex, but the underlying purpose is simple. Time advances, technology changes, and this agency must update its policies and rules.

Remember 1985? In 1985, broadband was a pipe dream. Dial up meant making a call on a phone—a hefty thing that was attached to the wall. Wireless handsets were the stuff of science fiction. Computing power on your desk probably involved a Commodore. A Walkman with a tape cassette was the portable way to listen to your tunes. On television, we watched Dallas, Dynasty, and Miami Vice. By any measure, it was a long time ago.

In 1985, the Commission first put its Ultra-High Frequency (UHF) discount for television in place. It was a product of the analog world. At the time, it compensated for the technical shortcomings of UHF signals used by television stations allocated to channels above 13. In the analog era, UHF stations had weaker propagation, limiting audience size. Their signals simply did not travel as far as Very-High Frequency (VHF) band signals allocated to channels 13 and below. As a result, it was the low VHF stations that were most desirable—because their signals reached the most viewers. To reflect the more limited scope of UHF signals and their less desirable status in the marketplace, they counted only half as much for the purposes of our television ownership rules. By all accounts, this was a fair approach to analog technology.

However, all of our full-power television stations have now converted to digital technology. The analog era is over. This is the digital age. With respect to UHF and VHF signals, this means the world is now upside down. The very UHF signals that had the least reach in analog broadcasting have the furthest reach in digital broadcasting. Conversely, the once-desirable VHF signals now have the weakest reach in digital broadcasting. We should here, as elsewhere, update our policies, to reflect current technologies. Our rules should not be grounded in technical constraints that no longer exist. That is what this rulemaking is all about.

Still, as we proceed, we must be practical about the impact on the marketplace today. That is important. I look forward to the record that develops and thank the Media Bureau for their hard work.

**DISSENTING STATEMENT OF  
COMMISSIONER AJIT PAI**

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

When the Commission issued its 1985 national television multiple ownership rule prohibiting a single entity from owning television stations that collectively reached more than 25 percent of the national television audience, it recognized the “inherent physical limitations” of analog television signals in the UHF band as compared to VHF signals.<sup>1</sup> Because these limitations placed licensees of UHF stations at a competitive disadvantage vis-à-vis VHF licensees, the Commission determined that UHF stations should be attributed with only 50 percent of the television households in their Designated Market Areas for purposes of calculating nationwide audience reach.<sup>2</sup> And for the last 28 years, this “UHF discount” has been an integral component of the Commission’s national television ownership rule.

However, our nation’s transition from analog to digital television has eroded the basis for the UHF discount. The Commission recognized more than a decade ago that the DTV transition likely would eliminate the physical characteristics that made UHF spectrum less desirable than VHF spectrum for television broadcasting.<sup>3</sup> And as today’s item indicates, “the DTV transition has borne out the Commission’s expectation.”<sup>4</sup> Indeed, it now appears that UHF spectrum is *more* compatible with digital television signals than VHF spectrum. As the Commission has previously stated, “the disparity between UHF and VHF channels has if anything been reversed.”<sup>5</sup>

For these reasons, I agree with my colleagues that the time probably has come for the UHF discount to take its place in the history books alongside the Fairness Doctrine, the Morse Code exam requirement, and other outdated regulations.

Nevertheless, I am dissenting from this morning’s Notice of Proposed Rulemaking (NPRM) for two reasons.

*First*, I believe that we cannot modify the UHF discount without simultaneously reviewing the national audience cap, which currently stands at 39 percent.<sup>6</sup> The NPRM recognizes the interdependent relationship between the national audience cap and the UHF discount, acknowledging that “elimination of the UHF discount would impact the calculation of nationwide audience reach for broadcast station groups

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<sup>1</sup> *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Stations*, GN Docket No. 83-1009, Memorandum Opinion and Order, 100 FCC 2d 74 (1985).

<sup>2</sup> *Id.* at 93, paras. 43–44.

<sup>3</sup> *See, e.g., 2002 Biennial Review Order – 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. 02-277, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13847, para. 591 (2003) (predicting that “the digital transition [would] largely eliminate the technical basis for the UHF discount”).

<sup>4</sup> NPRM at para. 16.

<sup>5</sup> *See Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16511–13, paras. 42–45 (2010).

<sup>6</sup> *See, e.g., 2004 Consolidated Appropriations Act*, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (2004).

with UHF stations.”<sup>7</sup> Or, to put the matter succinctly, eliminating the UHF discount would substantially tighten the national ownership limit. For example, one company that is now more than 19 percentage points under the cap would be only three points below the cap if the UHF discount were eliminated.

But while today’s item proposes to tighten the national cap, it does not seek comment on whether doing so would be a good idea. The NPRM therefore misses the forest (the overall national cap) for the trees or rather dwells on a single tree (the UHF discount). To be sure, one could argue that Congress took away our authority to change the cap in 2004 when it instructed us to increase the national cap to 39 percent. But today’s NPRM rightly rejects that position and expressly states that the Commission has the authority to “modify both the national audience reach restriction and the UHF discount.”<sup>8</sup>

Consistent with that view, because we are proposing to end the UHF discount, we should ask whether it is time to raise the 39 percent cap. Indeed, this step is long overdue notwithstanding any change to the UHF discount. The Commission has not formally addressed the appropriate level of the national audience cap since its *2002 Biennial Review Order*, and it has been nearly a decade since the 39 percent cap was established. The media landscape has changed dramatically in the many years since. I’ve spoken a lot about the importance of reviewing our rules to keep pace with changes in technology and the marketplace, and I wish today’s item had done so with respect to this issue in a comprehensive manner. I also wish that today’s item sought comment about the impact of this proposal on diversity. Given that companies such as Univision benefit from the UHF discount, I am disappointed that the NPRM does not explore this important issue. I nonetheless encourage commenters to address it.

*Second*, I have concerns about how the NPRM addresses grandfathering. I am certainly pleased that the item at least proposes to grandfather existing combinations that would exceed the 39 percent cap if the UHF discount were eliminated as well as combinations that would exceed such a cap because of an application that is currently pending with the Commission. But this does not go far enough. In my view, any combination that is in existence or pending with the Commission as of the date the UHF discount rule is eliminated should be grandfathered.

Remember what today’s item does. It only *proposes* to eliminate the UHF discount. It does not actually end the UHF discount. The UHF discount will be the law of the land tomorrow and every day after that unless the Commission votes to repeal it. Through its grandfathering proposal, however, today’s NPRM effectively tells the private marketplace to behave as if the UHF discount has already been eliminated, treating the rest of the rulemaking process like an empty formality. The practical results of this “sentence first, verdict afterward” approach will be to dampen the market for broadcast transactions and depress station values. Perhaps that’s the point, but it won’t serve either private or public interests well.

In conclusion, I was willing to compromise and support today’s item if either of my two major concerns were addressed. But because the NPRM we adopt this morning proposes to dramatically tighten

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<sup>7</sup> NPRM at para. 20.

<sup>8</sup> *Id.* at para. 15. This is because the 39 percent cap was neither a direct statutory limitation on the Commission’s authority nor a revision of the Communications Act of 1934. *Id.* at para. 13. As such, the Commission has the statutory authority under the Communications Act to “revisit its rules and revise or eliminate them if it concludes such action is appropriate.” *Id.* at para. 14. The Commission specifically highlights section 4(i) of the Communications Act, which authorizes the Commission to make any and all rules “as may be necessary in the execution of its functions.” *Id.* The Commission goes even further, recognizing that “the courts have held that the Commission has an affirmative obligation to reexamine its rules over time.” *Id.* (citing *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995)).

our national television ownership cap and to essentially make that rule change effective immediately, I must respectfully dissent.