

**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.¹ 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.² 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.³ And as today’s item indicates, “the DTV transition has borne out the Commission’s expectation.”⁴ 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.”⁵

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to take its place in the history books alongside the Fairness Doctrine, the Morse Code exam requirement, and other outdated regulations.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.⁶ 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 with UHF stations.”⁷ Or, to put the matter succinctly, eliminating the UHF discount would substantially

¹ *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).

² *Id.* at 93, paras. 43–44.

³ *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”).

⁴ NPRM at para. 16.

⁵ *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).

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

⁷ NPRM at para. 20.

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."⁸

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

⁸ *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)).