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.

In this *Order*, the Commission votes to substantially tighten the national audience reach cap ("national cap"), which restricts the percentage of households in the United States that a single company can serve through commercial television broadcast stations. Currently, the rule states that no entity can own commercial television stations in markets containing more than 39% of U.S. television households.[1] But there's a catch. For purposes of calculating compliance with the national cap, a UHF television station is "attributed with 50 percent of the television households" in its market.[2]

This is called the UHF discount, and today the Commission decides to eliminate it. That will substantially change the impact of the national cap. Consider the example of Univision. Right now, Univision's national audience reach for purposes of the national cap is only 22.8%, which is well below 39%. This means that under our current regulations, Univision has room to purchase television stations in many new markets. With the termination of the UHF discount, however, Univision's national audience reach will rise to 44.8%, a figure above the national 39% cap. Accordingly, Univision will not have the ability to purchase television stations in *any* new market.

To be sure, the technical basis for the UHF discount no longer exists. In the analog era, UHF stations were technically inferior to VHF stations. But with the digital transition, that is no longer true. Indeed, UHF stations are now technically superior to VHF stations. Therefore, I would have supported eliminating the UHF discount in the context of a general review and adjustment of our 39% national cap. But the Commission should not eliminate the UHF discount without also considering an adjustment to the national cap to reflect today's marketplace. Indeed, I believe that the Commission is acting unlawfully by taking that step.

Why is this *Order* arbitrary and capricious? Recall the Commission's failed attempt to restrict joint sales agreements (JSA) between television stations. Back in 2014, the Commission tried to attribute these JSAs. This meant that a station selling more than 15% of another television station's advertising time would be counted as owning that station for purposes of the Commission's ownership rules.[3]

As the Third Circuit observed when reviewing the Commission's decision, "attribution of television JSAs modifie[d] the Commission's ownership rules by making them more stringent."[4] In particular, the decision to attribute JSAs had the effect of tightening the local television ownership rule, which limits the number of television stations that a single company can own in a given television market. At the time that the Commission decided to attribute television JSAs, however, it expressly declined to decide whether the local television ownership rule was still in the public interest. And it certainly did not set forth any case for why the local television ownership rule should be made more stringent.

Therefore, the Third Circuit vacated the television JSA attribution rule. The court reasoned that "unless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that expansion is in the public interest."[5] The same is true here. It is undeniable that

---

[1] *See* 47 C.F.R. § 73.3555(e)(1).

[2] *Id*. § 73.3555(e)(2)(i).

[3] *See 2014 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 et al.*, MB Docket No. 14-50, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527–42, paras. 340–67 (2014).

[4] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3d Cir. 2016).

[5] *Id*.

eliminating the UHF discount has the effect of expanding the scope of the national cap rule. Companies, such as Univision, that are currently in compliance with the national cap ownership rule will be above the cap once the UHF discount is terminated. Yet, the Commission has refused to review whether the current national cap ownership rule is sound or whether there is a need to make it more stringent, which is precisely what this *Order* does.

The Commission attempts to distinguish this *Order* from the JSA precedent by noting that the local television ownership rule is subject to the quadrennial review obligation set forth in section 202(h) of the Telecommunications Act of 1996, while the national cap rule is not.[6] But this, in my view, is not a decisive distinction. The Commission may not have a legal obligation to review the national cap every four years, but once it chooses to review it, it cannot take piecemeal action that would substantially tighten it without examining whether tightening the rule as a whole is justified.[7]

Here, for example, it has been over seven years since the completion of the digital television transition. And during those seven years when the UHF discount has been on the books, is there any evidence that the national cap has been insufficiently stringent? Is there any indication that any of the core objectives of the Commission's media ownership policies—competition, diversity, and localism—have been harmed? Tellingly, the Commission is unable to point to any such evidence.

Moreover, even absent the specific legal requirement to review particular media ownership regulations every four years pursuant to section 202(h) of the Telecommunications Act of 1996, "courts have held that the Commission has an affirmative obligation to reexamine its rules over time."[8] And the agency's obligation surely applies to the national cap rule given both the rule's unique history and the Commission's elimination of the UHF discount, thus substantially tightening the cap.

In 1998, the Commission chose to retain the 35% national cap that it had adopted two years earlier.[9] But the D.C. Circuit found the FCC's decision arbitrary and capricious. Specifically, it stated that "the Commission ha[d] adduced not a single valid reason to believe the [35% national cap rule] [was] necessary in the public interest, either to safeguard competition or to enhance diversity."[10] On remand, the Commission in 2003 found that a 35% national cap could not be justified and raised the cap to 45%.[11] The next year, Congress instructed the Commission to adjust the cap down to 39%,[12] and it has remained there ever since.

---

[6] *See Order* at note 139.

[7] The Commission also claims that this *Order* differs from the television JSA attribution rule because it grandfathers station groups that will exceed the national cap after the elimination of the UHF discount while the Commission allowed for no such grandfathering in the JSA context. *See id*. But this distinction is also irrelevant. What matters is that the Commission is making the national cap rule more stringent. Companies that currently have the ability to purchase television stations in new markets won't be able to do so once this *Order* takes effect. And as the Third Circuit indicated, the Commission cannot "logically demonstrate that an expansion [of the rule] is in the public interest" "unless[it] demonstrates that the preexisting ownership rule[] is sound." *Prometheus*, 824 F.3d at 58.

[8] *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 28 FCC Rcd 14324, 14329–30, para. 14 (2013) (*Notice*).

[9] *See 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*, Biennial Review Report, 15 FCC Rcd 11058, 11072–75, paras. 25–30 (2000).

[10] *Fox Television Stations Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002).

[11] *See 2002 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13814–45, paras. 499–584 (2003).

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

So we are now facing a 39% national cap that has not been adjusted or reviewed for a dozen years. During that time, the video industry has undergone revolutionary change. In particular, the rise of over-the-top video has transformed the video marketplace. For instance, Netflix, YouTube, Amazon, and Hulu all did not offer Internet video when the national cap was set at 39%. We are confronting a 39% national cap that the Commission itself has never justified. Indeed, the last time that the Commission reviewed the merits of the national cap it concluded that a 45% cap was justified. And we are dealing with a 39% cap that approximates the cap that the D.C. Circuit rejected over a decade ago.

Of course, one might object that all of this is irrelevant because Congress told the Commission to set the national cap at 39% in 2004, and that's reason enough to leave it unchanged in 2016. That argument might have some force had the Commission been content to leave the national cap rule alone. But having fiddled with one critical component of the rule—the UHF discount—the FCC can't obstinately refuse to review another, especially when the Commission affirms that doing so is within its power.[13]

Given this history and the vast changes in the media marketplace since the 39% cap was set, the Commission's assertion that "[n]o party has presented persuasive reasons for revisiting the national cap at this time"[14] rings hollow. And indeed, that claim is undermined to the extent that eliminating the UHF discount effectively tightens the national cap dramatically.

Turning to the other reasons provided by the Commission for refusing to reexamine the national cap, the *Order* notes that such reexamination "is not within the scope of the *Notice*,"[15] and that "[i]nitiating a new rulemaking proceeding to undertake a complex review of the public interest basis for the national cap . . . would only delay the correction of audience reach calculations necessitated by the digital transition."[16] This is the administrative equivalent of the teenager who murders his parents and then pleads for judicial mercy as an orphan.

When the Commission took up the *Notice* in this proceeding, I asked my colleagues to simultaneously seek comment on eliminating the UHF discount and adjusting the national cap.[17] Back then, I specifically argued that we could not "modify the UHF discount without simultaneously reviewing the national audience cap."[18] Unfortunately, my plea fell on deaf ears.

Now, almost three years later, we are told that reviewing the national cap would delay elimination of the UHF discount. But had we sought comment on adjusting the national cap in the *Notice* as I requested, we would have had more than enough time to complete that review over the course of the last 35 months.

Moreover, it is worth noting that when it comes to eliminating the UHF discount, the FCC has not exactly embraced what President Obama has referred to as the fierce urgency of now. If time is of the essence and delay can't be tolerated, then why did it take almost three years to complete this rulemaking? The Commission offers no explanation.

Finally, I disagree with the *Order*'s approach to grandfathering. While I appreciate the fact that companies no longer in compliance with the national cap due to elimination of the UHF discount will not be required to sell stations immediately, the Commission should also allow such station groups to be transferred to new ownership without requiring divestitures. Station groups such as ION and Univision

[13] *See Order* at para. 21.

[14] *Order* at para. 40.

[15] *Id*.

[16] *Id*.

[17] *Notice*, 28 FCC Rcd at 14343–44 (Dissenting Statement of Commissioner Ajit Pai).

[18] *Id*. at 14343.

have been good for competition in the video market by facilitating the creation of new broadcast networks to challenge established networks. And I do not see what harm would be alleviated or purpose would be served by requiring these station groups to be broken up in the event of a sale.

I also believe that the grandfathering of station groups should be pegged to the date this *Order* becomes effective rather than the date that the *Notice* was adopted—almost three years ago. As I said when the Commission proposed its approach in the *Notice*:

[*The Notice*] 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.[19]

And sure enough, I was right. Following the adoption of the *Notice*, the private sector behaved as if the UHF discount had already been eliminated. No company sought to purchase any television station that would have put it above the 39% cap as calculated without the UHF discount. The UHF discount, as a practical manner, was eliminated without the Commission actually repealing it. The rest of the rulemaking process, which ended up taking almost three years, was in fact an empty formality. This "sentence first, verdict afterwards" process makes a mockery of the notice-and-comment rulemaking process and sets a disturbing precedent for future proceedings.

For all of these reasons, I dissent.

[19] *Id*. at 14344.