

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

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

In a perfect world, the Commission ought to be able to thoughtfully update its media ownership rules to reflect current marketplace realities. Such a universe doesn't exist at this Commission on these issues, as politics has become more important than substance. With this item, the majority continues that practice.

It is clear that UHF television stations are no longer less desirable or less technology-capable than VHF stations. The conversion of television stations from analog to digital, the excessive prevalence of multichannel video programming distributors, changing personal media consumption habits, and other factors have essentially eliminated the original differences between the two frequencies. The stations are rather interchangeable and shouldn't be treated differently for purposes for our market audience reach calculations. While making this rule change may have little practical impact, I would support it as a policy matter, as I would be open to considering an increase in the national ownership limit, if the Commission had the authority to do so.

However, I reject the assertion that the Commission has authority to modify the National Television Ownership Rule in any way, including eliminating the UHF discount, and therefore I dissent. The pertinent language ultimately included in the 2004 Consolidated Appropriations Act ("CAA") was heavily negotiated and painstakingly crafted in order to settle a recurring and particularly contentious media ownership issue. I know since I was there at the time and helped reach the agreement on behalf of a former employer with the staff of many Members of Congress, including former Senator Ted Stevens, who was lead negotiator, a detail that helps explain why the provision ended up in an appropriations bill. The result was a national ownership cap that remains one of the few media ownership rules specifically set by statute and the only one exempted from the Quadrennial Review process governing the other ownership rules, in order to protect a tenuous compromise from the whims of the Commission. Since enactment, many parties have advocated changes in different elements of this compromise for a wide variety of reasons, including those cited here. But the only acceptable venue for these arguments is Congress. The need, yet again, for the Commission to resort to generic provisions like 4(i) or 303(r) for authority belies its disingenuous interpretation of the CAA.

Even if the Commission had authority to change the National Television Ownership Rule, this Order would be the wrong way to go about it. Having apparently learned nothing from past efforts to prematurely change attribution rules for JSAs before the Quadrennial Review of media ownership rules was complete, the Commission is replicating the same flawed approach. This item stubbornly plows ahead in a similar cart-before-the-horse scheme to tinker with a calculation methodology without any consideration of the current validity the overall rule it modifies. Just consider the simple fact that the Commission seems to have no hesitation altering the market realities of UHF stations despite that these are some of same stations participating in the broadcast incentive auction. As one of the commenters observed, the Commission's move "reflects an agency staring so hard at a single tree that it has lost sight entirely of the forest."<sup>1</sup>

Meanwhile, the "forest" of the current media marketplace is thriving, proliferating and changing at a breathtaking rate. But the Commission seems to be affected by some sort of tunnel vision that blinds

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<sup>1</sup> Fox Comments 1.

it to the many radical changes in the way media is produced and consumed. Thus, impervious to any intrusion of reality, the media ownership rules now operate as a one-way ratchet that can only be tightened, never relaxed, despite the overwhelming evidence that broadcasters are operating in a much more competitive environment than ever before.