

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.3555(e) of the) MB Docket No. 13-236
Commission’s Rules, National Television)
Multiple Ownership Rule)

ORDER ON RECONSIDERATION

Adopted: April 20, 2017

Released: April 21, 2017

By the Commission: Chairman Pai and Commissioner O’Rielly issuing separate statements;
Commissioner Clyburn dissenting and issuing a statement.

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I. INTRODUCTION

1. This Order on Reconsideration (Order) grants in part a Petition for Reconsideration (Petition) filed by ION Media Networks, Inc. (ION) and Trinity Christian Center of Santa Ana, Inc. (Trinity) (together, the Petitioners)¹ of the Report and Order eliminating the UHF discount² and reinstates the UHF discount. The UHF discount allows commercial broadcast television station owners to discount the audience reach of UHF stations when calculating their compliance with the national television ownership rule.³ It is thus inextricably linked to the national ownership cap. When the Commission voted to get rid of the discount, however, it failed to consider whether this *de facto* tightening of the national cap was in the public interest and justified by current marketplace conditions. This mistake

¹ *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Petition for Reconsideration of ION Media Networks and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236 (filed Nov. 23, 2016) (Petition). *See also Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Public Notice, 81 Fed. Reg. 89421 (Dec. 12, 2016).

² *Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213 (2016) (*UHF Discount Order*).

³ 47 CFR § 73.3555(e)(1).

renders our past action arbitrary and capricious. It also means that it was unwise from a public policy perspective. We thus are reinstating the UHF discount for the time being and will launch a comprehensive rulemaking proceeding later this year to determine whether to retain it and/or modify the national cap. Because we are reinstating the UHF discount, requests to reconsider and modify the grandfathering provisions applicable to broadcast station combinations affected by elimination of the discount are dismissed as moot.⁴ For the same reason, the claim that failure to consider the need for a VHF discount in conjunction with elimination of the UHF discount is in error is also dismissed as moot.⁵

II. BACKGROUND

2. 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 United States.⁶ “Reach” is defined as the number of television households in the television Designated Market Area (DMA) to which each owned station is assigned.⁷ No market is counted more than once, even if a station owner holds more than one station in the market.⁸ In determining compliance with the 39 percent national audience reach cap, stations broadcasting in the VHF spectrum have been attributed with all television households in their DMAs, while UHF stations have been attributed with only 50 percent of the households in their DMAs (*i.e.*, the “UHF discount”), in recognition of technical limitations that restricted the audience reach of analog UHF stations.

3. The Commission first adopted national ownership restrictions for television broadcast stations in 1941, with the imposition of a numerical cap on the number of stations that could be commonly owned.⁹ The numerical cap was increased several times, and the Commission eventually established a 12 station multiple ownership rule in 1984.¹⁰

4. In 1985, the Commission determined that both a station limit, restricting the total number of television stations a single entity could own, and a national television audience reach limit were necessary to protect localism, diversity, and competition.¹¹ Thus, in addition to reaffirming its prior decision to limit the number of television stations that a single entity could own, operate, or control to 12 stations, 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.¹² At the same time, the Commission adopted a 50 percent UHF discount to reflect the coverage limitations

⁴ Petition at 5-9; Univision Communications Inc., Reply Comments in Support of Petition for Reconsideration at 7-9 (filed Jan. 27, 2017) (Univision Reply).

⁵ Sinclair Broadcast Group, Inc., Reply to Oppositions to, and in Support of Petition for Reconsideration of ION Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc. at 5 (filed Jan. 27, 2017) (Sinclair Reply).

⁶ 47 CFR § 73.3555(e)(1).

⁷ *Id.* § 73.3555(e)(2)(i).

⁸ *Id.* § 73.3555(e)(2)(ii).

⁹ *Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (prohibiting common ownership of more than three television stations).

¹⁰ *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*, Report and Order, 100 FCC 2d 17, 54-56, paras. 108-12 (1984).

¹¹ *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*, Memorandum Opinion and Order, 100 FCC 2d 74, 87-92, paras. 30-41 (1985) (explaining that a numerical cap would prevent the acquisition of a substantial number of stations in small markets, while an audience reach cap would temper the ability of a single group owner to increase its audience base substantially by acquiring stations in the largest markets).

¹² *Id.* at 90-92, paras. 38-40.

faced by analog UHF stations.¹³ The discount was intended to mitigate the competitive disadvantage that UHF stations suffered in comparison to VHF stations, as UHF stations were technically inferior, producing weaker over-the-air signals, reaching smaller audiences, and costing more to build and operate.¹⁴ This technical inferiority, inherent in analog television broadcasting, was significant in 1985 because the vast majority of viewers received programming from broadcast television stations via over-the-air signals.

5. Eleven years later, in the Telecommunications Act of 1996 (1996 Act), Congress directed the Commission to modify its national television multiple ownership rule to increase the national audience reach cap from 25 percent to 35 percent.¹⁵ Congress also directed the Commission to eliminate the restriction on the number of stations that an entity could own, operate or control nationwide.¹⁶ Subsequently, the Commission reaffirmed the 35 percent national audience reach cap in its *1998 Biennial Review Order*, reasoning that it was premature to revise the cap until it had more time to observe the effects of raising the cap from 25 to 35 percent.¹⁷ The United States Court of 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.¹⁸ In the *2002 Biennial Review Order*, the Commission determined the cap should be raised to 45 percent.¹⁹ In both of these *Orders*, the Commission also considered and retained the UHF discount.

6. Following adoption of the *2002 Biennial Review Order* and while an appeal of that order was pending, Congress rolled back the cap increase by including a provision in the 2004 Consolidated Appropriations Act (CAA) directing the Commission to modify its rules to set the cap at 39 percent of national television households.²⁰ The CAA further amended Section 202(h) of the 1996 Act to require a quadrennial review of the Commission's broadcast ownership rules, rather than the previously mandated biennial review. In doing so, however, Congress excluded consideration of "any rules relating to the 39 percent national audience reach limitation" from the quadrennial review requirement.²¹

7. Prior to the enactment of the CAA, 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 found that the challenges to the Commission's actions with respect to the national

¹³ *Id.* at 88-94, paras. 33-44.

¹⁴ *Id.*

¹⁵ 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). The 1996 Act did not direct the Commission to amend the UHF discount. *Id.* at 12375, para. 4.

¹⁶ Telecommunications Act of 1996, Pub. L. No. 104-04, § 202(c)(1), 110 Stat. 56, 111 (1996).

¹⁷ *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) (*1998 Biennial Review Order*).

¹⁸ *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040-49, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

¹⁹ *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*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13814, para. 499 (2003) (*2002 Biennial Review Order*).

²⁰ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (CAA).

²¹ *Id.*

audience reach cap and the UHF discount were moot as a result of Congress's action.²² Specifically, the court held that the CAA rendered moot the challenges to the Commission's decision to retain the UHF discount.²³ The court found that the CAA insulated the national audience reach cap, including the UHF discount, from the Commission's quadrennial review of its media ownership rules.²⁴ In February 2008, the Commission similarly concluded in the *2006 Quadrennial Review Order* that "the UHF discount is insulated from review under Section 202(h)" as a result of the CAA, and thus beyond the parameters of the quadrennial review requirement.²⁵

8. On June 13, 2009, the Commission completed the transition from analog to digital television broadcasting for full-power stations. While UHF channels were inferior for purposes of broadcasting in analog, the DTV transition affirmed the Commission's longstanding belief that digital broadcasting would eliminate the technical disparity between UHF and VHF signals. In fact, experience has confirmed that UHF channels are equal, if not superior, to VHF channels for the transmission of digital television signals.²⁶ Therefore, the Commission opened this proceeding to consider eliminating the UHF discount in 2013.²⁷ Then-Commissioner Pai dissented from the *UHF Discount NPRM*. He contended that while it was appropriate to examine eliminating the UHF discount, any such rulemaking should and must also evaluate whether the national cap should be modified.²⁸ The *UHF Discount NPRM*, however, did not seek comment on that topic.

9. The Commission eliminated the UHF discount in August 2016, finding that UHF stations are no longer technically inferior to VHF stations following the digital television transition and that the competitive disparity between UHF and VHF stations had disappeared. Then-Commissioner Pai and Commissioner O'Rielly dissented from this decision. Then-Commissioner Pai noted, "It is undeniable that eliminating the UHF discount has the effect of expanding the scope of the national cap rule. Companies . . . 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 [the *UHF Discount Order*] does."²⁹ On November 23, 2016, ION and Trinity filed their Petition for Reconsideration (Petition).³⁰ Free Press, the National Hispanic Media Coalition, Common Cause, Media Alliance and the United Church of Christ Office of Communication, Inc. (Public Interest Opponents) and the American Cable Association (ACA) filed Oppositions to the Petition on January 10,

²² *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (3d Cir. 2004) (*Prometheus I*).

²³ *Id.*

²⁴ *Prometheus I*, 373 F. 3d at 396-97.

²⁵ *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*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010, 2084-85, para. 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).

²⁶ See, e.g., *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, Notice of Proposed Rulemaking, 25 FCC Rcd 16498, 16511, para. 42 (2010) (recognizing the utility of the digital UHF band while seeking comment on ways to improve reception of digital VHF channels); *2002 Biennial Review Order*, 18 FCC Rcd at 13847, para. 591; *1998 Biennial Review Order*, 15 FCC Rcd at 11080, para. 38.

²⁷ 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, 14327, para. 9 (2013) (*UHF Discount NPRM*).

²⁸ *Id.* at 14344.

²⁹ *UHF Discount Order*, 31 FCC Rcd at 10248.

³⁰ See *supra* note 2.

2017.³¹ The National Association of Broadcasters (NAB), Sinclair Broadcast Group, Inc. (Sinclair), Nexstar Broadcasting, Inc. (Nexstar), Univision Communications Inc. (Univision), and various TV licensees filed comments or replies supporting the Petition³² on January 10 and 23, 2017.³³

III. DISCUSSION

10. We find that the Petitioners and their supporters provide valid reasons to reconsider our decision to eliminate the UHF discount. The UHF discount and the national audience reach cap are closely linked, and we find that the Commission failed to provide a reasoned basis to eliminate the discount in isolation without also fully considering whether the cap should be modified. Accordingly, we reinstate the UHF discount. We will open a rulemaking proceeding later this year to consider whether the national audience reach cap should be modified and the UHF discount should be eliminated.

A. The UHF Discount and National Cap Should Have Been Considered In Tandem

11. Petitioners and others supporting reconsideration assert that the Commission should not have eliminated the UHF discount without adducing further evidence that this action would be in the public interest.³⁴ The Petitioners argue that in eliminating the discount the Commission actually harmed the public interest by increasing the competitive disparity between broadcasters and other video programming distributors.³⁵ CBS and Sinclair point further to a lack of evidence that the public interest would be harmed by retaining the UHF discount.³⁶ In addition, NAB argues that, by eliminating the UHF discount in isolation, the Commission was not able to determine whether the change promotes the public interest purposes of the cap itself.³⁷

12. The history of the UHF discount and national audience reach cap demonstrates that, with the exception of the *UHF Discount Order*, the Commission has always considered the UHF discount together with the national cap.³⁸ Referring to this history, Nexstar argues that, because the cap establishes

³¹ Free Press, the National Hispanic Media Coalition, Common Cause, Media Alliance and the United Church of Christ Office of Communication, Inc., Opposition of Public Interest Commenters to Petition for Reconsideration of ION Media Networks and Trinity Christian Center of Santa Ana, Inc. (filed Jan. 10, 2017) (Public Interest Opp.); American Cable Association, Opposition to Reconsideration (filed Jan. 10, 2017) (ACA Opp.).

³² National Association of Broadcasters, Reply to Oppositions to Petition for Reconsideration (filed Jan. 27, 2017) (NAB Reply); Nexstar Broadcasting Inc., Comments in Support of Petition for Reconsideration (filed Jan. 10, 2017) (Nexstar Comments), Reply Comments in Support of Petition for Reconsideration (filed Jan. 27, 2017) (Nexstar Reply); Mountain Licenses, L.P., Broadcasting Licenses, L.P., Stainless Broadcasting L.P., and Bristlecone Broadcasting LLC (TV Licensees), Comments (filed Jan. 10, 2017) (TV Licensee Comments). *See also* Sinclair Reply, Univision Reply.

³³ Separate from this proceeding, Twenty-First Century Fox filed two petitions for review of the *UHF Discount Order* with the District of Columbia Circuit Court of Appeals. *Twenty-First Century Fox, Inc. v. FCC*, No. 16-1324, D.C. Cir. (filed Sept. 16, 2016); *Twenty-First Century Fox, Inc. v. FCC*, No. 16-1375, D.C. Cir. (filed Oct. 28, 2016). The Court has granted the Commission's motion to hold its review in abeyance until the Commission acts on this Petition. Order, *Twenty-First Century Fox, Inc. v. FCC*, No. 16-1375, D.C. Cir. (Dec. 21, 2016).

³⁴ Petition at 4. *See also* Nexstar Reply at 4.

³⁵ Letter from Robert M. McDowell, Counsel to ION Media Networks to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 at 2 (filed Jan. 11, 2017) (ION Jan. 11, 2017, *Ex Parte* Letter).

³⁶ Letter from Anne Lucey, CBS Government Affairs to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 at 1 (filed Jan. 17, 2017) (CBS Jan. 17, 2017, *Ex Parte* Letter), Letter from Anne Lucey, CBS Government Affairs to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 at 1 (filed Jan. 23, 2017) (CBS Jan. 23, 2017, *Ex Parte* Letter); Sinclair Reply at 2, 4.

³⁷ NAB Reply at 2-3; Letter from Rick Kaplan, General Counsel and Executive Vice President, National Association of Broadcasters to Marlene H. Dortch, Secretary, FCC at 1 (filed Feb. 9, 2017) (NAB Feb. 9, 2017, *Ex Parte* Letter).

³⁸ *See supra* paras 2-8; NAB Reply at 3.

a limit and the discount defines how to calculate whether the limit is reached, the cap and discount are “inextricably intertwined.”³⁹ Petitioners assert that the national cap and discount “go hand-in-hand; the FCC has no authority to change one without at least reviewing the impact that the change will have on the other.”⁴⁰ Sinclair similarly asserts that the Commission erred in eliminating the UHF discount without reviewing the national audience reach cap, and urges the Commission, in any review of the cap, to eliminate it entirely.⁴¹

13. While the Commission determined in the *UHF Discount Order* that it should eliminate the discount without simultaneously reassessing the cap,⁴² arguments presented by Petitioners and their supporters persuade us that the Commission erred. Any adjustment to the UHF discount affects compliance with the national audience reach cap, and the elimination of the discount has the effect of substantially tightening the cap in some cases.⁴³ In the *UHF Discount Order*, however, the Commission never explained why tightening the cap was in the public interest or justified by current marketplace conditions. It presented no examples of how the current cap, including the UHF discount, was harming competition, diversity, or localism. We therefore believe that eliminating the UHF discount on a piecemeal basis, without considering the national cap as a whole, was arbitrary and capricious. We also conclude that it was unwise from a public policy perspective.

14. Contrary to ACA’s claims that consideration of the discount without consideration of the cap was appropriate,⁴⁴ we find that the Commission erred by eliminating the discount and thus substantially tightening the impact of the cap, without considering whether the cap should be raised to mitigate the regulatory impact of eliminating the UHF discount. While we do not disagree with Opponents’ assertion that the UHF discount no longer has a sound technical basis following the digital television transition,⁴⁵ the Commission failed to provide a reasoned explanation for eliminating the discount without conducting a broader review of the cap, which it deferred indefinitely. Reliance on the self-imposed narrow scope of the *UHF Discount NPRM* was not a sound basis for the Commission to conclude that it could not consider the broader public interest issues posed by retaining the national cap while eliminating the UHF discount, which had the effect of substantially tightening the national cap.⁴⁶ Nothing prevented the Commission from issuing a broader notice at the outset or broadening the scope of the proceeding by issuing a further notice to consider whether the public interest would be served by

³⁹ Nexstar Reply at 7; *see also* Nexstar Comments at 2-3; NAB Reply at 3, NAB Feb. 9, 2017, *Ex Parte* Letter at 1; Univision Reply at 4-5.

⁴⁰ Petition at 2.

⁴¹ Sinclair Reply at 1-2. We dismiss as moot the further claim that the Third Circuit’s recent decision vacating the Commission’s joint sales agreement (JSA) attribution rule requires the Commission to review the discount and cap together. Petition at 3-4; NAB Reply at 4; Sinclair Reply at 6-7; Nexstar Reply at 8; TV Licensee Comments at 4; *UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10247-48, dissenting statement of Commissioner O’Rielly, 31 FCC Rcd at 10251, citing *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*). As we intend to review the discount and cap together as a matter of sound policy and logic, we need not reach the question of whether we are required do so as a result of *Prometheus III*.

⁴² *UHF Discount Order*, 31 FCC Rcd at 10232-33, para. 40 (“Continued application of the discount absent its technical justification simply distorts the operation of the national audience reach cap by exempting the portions of the audience that are receiving a signal from being counted and allowing licensees that operate on UHF channels to reach more than 39 percent of viewers nationwide. Removal of the analog-era discount thus maintains the efficacy of the national cap.”).

⁴³ *See UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10248.

⁴⁴ ACA Opp. at 5, 8-10, citing *UHF Discount Order*, 31 FCC Rcd at 10232-33, para 40.

⁴⁵ Public Interest Opp. at 1, 6; ACA Opp. at 6, 9-10.

⁴⁶ *See UHF Discount Order*, 31 FCC Rcd at 10232, para. 40, 10249, dissenting statement of then-Commissioner Pai.

retaining the cap while eliminating the UHF discount.⁴⁷ Indeed, one Commissioner at the time asked for these issues to be teed up in the *UHF Discount NPRM*.⁴⁸

15. This error is all the more problematic because, as Univision notes, the Commission has acknowledged, both in the record of this proceeding and in the most recent quadrennial media ownership review, the greatly increased options for consumers in the selection and viewing of video programming since Congress directed the Commission to modify the cap in 2004.⁴⁹ The *UHF Discount Order*, however, failed to adequately consider the impact of those changes on the appropriateness of eliminating the UHF discount while not adjusting the national cap. We agree with Nexstar that the Commission should have considered these changes and assessed the current need for a 39 percent national cap before eliminating the UHF discount and tightening the cap for some station groups, particularly in view of the industry's reliance on the UHF discount to develop long-term business strategies.⁵⁰ Although the Commission concluded that the digital transition eliminated the audience reach disadvantage for UHF stations, it failed to consider current marketplace conditions or whether taking an action that would have the impact of substantially tightening the cap was in the public interest.⁵¹ Accordingly, we find it necessary to rectify the Commission's error by reinstating the discount so that we can consider it as part of a broader reassessment of the national audience reach cap, which we will begin later this year.⁵²

B. Grounds for Reconsideration

16. The record in response to the Petition demonstrates disagreement on the factors that can support granting a petition for reconsideration. The Opponents claim that the Petition must be denied because it fails to present new facts or arguments not already considered and answered by the Commission in the underlying *UHF Discount Order*.⁵³ On the other hand, Nexstar claims that Section

⁴⁷ NAB Reply at 7-8; Sinclair Reply at 4-5; Nexstar Reply at 4-6, 7-8, Nexstar Comments at 2, 4. See also *UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10247-48.

⁴⁸ See *supra* para. 8.

⁴⁹ Univision Reply at 5-6, citing 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*, Second Report and Order, 31 FCC Rcd 9864 (2016). Univision claims that consideration of this competition would be consistent with the D.C. Circuit ruling overturning the Commission's ownership limit for cable operators. Univision Reply at 6-7, citing *Comcast Corp. v. FCC*, 579 F. 3d 1 (D.C. Cir. 2009). See also Petition at 3-4; Sinclair Reply at 2; Nexstar Comments at 5, Nexstar Reply at 4.

⁵⁰ Nexstar Comments at 5-6, citing *UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10249; ION Jan. 11, 2017, *Ex Parte* Letter at 1 (asserting that the elimination of the UHF discount without adequate grandfathering relief "was entirely inconsistent with the Commission's decades-long policy of encouraging competition and diversity in the video marketplace by allowing and urging groups such as ION and Trinity to utilize the UHF Discount to create new broadcast stations and networks to challenge the big established players").

⁵¹ The argument that VHF-to-UHF conversions at the end of the digital transition afforded some station groups additional "headroom" to acquire more stations is more appropriately considered in the rulemaking that will be initiated later this year and is not relevant to the question of whether we should have considered eliminating the UHF discount in tandem with a broader evaluation of the national ownership cap. See Letter from Andrew Schwartzman, Institute for Public Representation to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 at 2, 7-11 (filed April 13, 2017)(IPR April 13, 2017, *Ex Parte* Letter). Moreover, as noted above, the *UHF Discount Order* failed to evaluate whether current marketplace conditions justified implementing a policy that would have the impact of tightening the cap, even though the *UHF Discount Order* was adopted more than seven years after the digital transition.

⁵² We note that this is consistent with the approach advocated by CBS and Univision to avoid delay in reinstating the UHF discount, but still consider the discount and the national audience reach cap in tandem. CBS Jan. 17, 2017, *Ex Parte* Letter at 1, CBS Jan. 23, 2017, *Ex Parte* Letter at 1; Univision Reply at 7. See also NAB Feb. 9, 2017, *Ex Parte* Letter at 1.

⁵³ Public Interest Opp. at 1, 6, 7; ACA Opp. at 2, 4-5, 8, 11.

1.429 of our rules, which governs petitions for reconsideration, should not be interpreted to “preclude a petitioner for reconsideration from raising any argument that was mentioned in the underlying Commission order or a dissenting statement.”⁵⁴ Neither the Communications Act nor Commission rules preclude the Commission from granting petitions for reconsideration that fail to rely on new arguments.⁵⁵ Commission precedent establishes that reconsideration is generally appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to respond.⁵⁶

17. The Petition, while reiterating some arguments made in response to the *UHF NPRM*, nonetheless provides valid grounds for the Commission to reconsider its previous action eliminating the UHF discount.⁵⁷ As discussed above, we find that the Commission failed to fully consider important arguments and lacked a reasoned basis for its conclusion that action on the discount should not be combined with a broader review of the national cap. These are sufficient grounds under Section 1.429 for the Commission to reconsider its previous action even absent new facts or arguments.⁵⁸ We therefore

⁵⁴ Nexstar Reply at 2.

⁵⁵ See 47 U.S.C. §405 (“[I]t shall be lawful for . . . the Commission . . . , in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. . . . The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate”); 47 CFR § 1.429 (i) (“The Commission may grant the petition for reconsideration in whole or in part or may deny or dismiss the petition. Its order will contain a concise statement of the reasons for the action taken.”).

⁵⁶ See, e.g., *Petition for Reconsideration by Acadiana Cellular General Partnership*, Order on Reconsideration, 20 FCC Rcd 8660, 8663, para. 8 (2006); *Universal Serv. Contribution Methodology Fed.-State Joint Bd. on Universal Serv. Glob. Conference Partners, A+ Conference Ltd., Free Conferencing Corp., & the Conference Grp.*, 27 FCC Rcd 898, 901 (2012), *rev. dismissed in part and denied in part*, *Conference Grp., LLC v. FCC*, 720 F.3d 957, 958 (D.C. Cir. 2013) (“Reconsideration of a Commission’s decision may be appropriate when the petitioner demonstrates that the original order contains a material error or omission, or raises additional facts that were not known or did not exist until after the petitioner’s last opportunity to present such matters. If a petition simply repeats arguments that were previously considered and rejected in the proceeding, the Commission may deny them for the reasons already provided.”). Even if a petition is repetitious, the Commission can, in its discretion, consider it. See *id.* (Commission “may deny” repetitious petition); *Application of Paging Sys., Inc.*, 22 FCC Rcd 4602, 4604 n.23 (WTB 2007) (considering repetitious petition on the merits, even though staff could dismiss it); *Sequoia Cablevision*, 58 FCC 2d 669 (1976) (decision by the full Commission partially granting a repetitious petition for reconsideration of an order denying reconsideration despite the alleged procedural defect because “the language of Section 1.106(k)(3) of the Rules [applicable to petitions for reconsideration of orders denying reconsideration] is permissive, not mandatory”). See also NAB Reply at 8 (stating that dismissal of “repetitious” petitions is permissive, not mandatory).

⁵⁷ We note that NAB, Sinclair and Nexstar analyze Section 1.429(l) of the Commission’s rules, which states that, among other reasons, petitions for reconsideration may be denied by the relevant bureau if they “[f]ail to identify any material error, omission, or reason warranting reconsideration”, or “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding.” 47 CFR § 1.429(l). The parties supporting reconsideration argue that this section permits, but does not require, Commission bureaus and offices to deny petitions on such procedural grounds. NAB Reply at 8; Sinclair Reply at 3-4; Nexstar Reply at 2-3. Section 1.429(l) delegates authority to the relevant bureau or office to dismiss petitions for reconsideration of Commission action “that plainly do not warrant consideration by the Commission,” and provides examples of such petitions. That section has no relevance here, where the full Commission is reviewing a petition for reconsideration and finds that it provides valid reasons for reconsideration.

⁵⁸ 47 CFR § 1.429.

reinstate the UHF discount,⁵⁹ and will open a proceeding later this year to consider whether it is in the public interest to modify the national audience reach rule, including the UHF discount.⁶⁰

⁵⁹ Because we are reinstating the UHF discount, we also consider moot and do not address in this Order the suggestion made in Sinclair's Reply to Opposition that we establish a VHF discount in connection with the elimination of the UHF discount. Sinclair Reply at 5. PMCM opposes reinstatement of the UHF discount but states that, if it is reinstated, the Commission should also adopt a VHF discount. *Ex Parte* Comments of PMCM TV, LLC, at 1, 2-3, MB Docket No. 13-236, filed April 3, 2017. Letter from Donald J. Evans, Counsel for PMCM TV, LLC to Marlene H. Dortch, Secretary, FCC at 1-2, MB Docket No. 13-236, filed April 13, 2017. PMCM has not previously participated in this proceeding and raises a new argument for the first time in an *ex parte* comment filed well after the close of the pleading cycle on the petition for reconsideration. In effect, PMCM's *ex parte* is an out-of-time opposition to the petition for reconsideration, and we reject it for that reason. 47 CFR 1.429(f) (oppositions to a petition for reconsideration must be filed no later than 15 days after public notice of the petition). PMCM offers no reason it could not have raised this issue in a timely manner. Moreover, PMCM's proposal that the Commission adopt a VHF discount in conjunction with reinstatement of the UHF discount is inconsistent with our conclusion above that the Commission should consider the UHF discount in the context of a broader review of the national cap in a rulemaking proceeding to be initiated later this year. We are reinstating the UHF discount for that purpose. We will not prejudge that review by adopting a VHF discount in conjunction with our reinstatement of the UHF discount.

⁶⁰ The Institute for Public Representation (IPR), Common Cause, and the United Church of Christ Office of Communication, Inc., (UCC) Prometheus Radio Project, and Media Mobilizing Project belatedly assert that the Commission lacks authority to modify the cap and that therefore it would be arbitrary and capricious for the Commission to reinstate the discount in order to consider in a future rulemaking proceeding whether the cap and discount should be modified. Letter from Andrew Schwartzman, IPR to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 at 1 (filed April 11, 2017)(IPR April 11, 2017, *Ex Parte* Letter); IPR April 13, 2017 *Ex Parte* Letter at 2-3. These parties raise this argument and others for the first time well after the close of the pleading cycle on the petition for reconsideration and offer no reason why they could not have raised these arguments earlier. Prometheus Radio Project and Media Mobilizing Project have not previously participated in this proceeding. In effect, these *ex parte* filings are out-of-time oppositions, and we reject them for that reason. 47 CFR 1.429(f). Alternatively and independently, however, we find that these new arguments lack merit. First, the parties fail to support their assertion that the Commission lacks authority to modify the cap, ignoring the Commission's prior analysis and conclusion that it has such authority, which remains undisturbed. IPR April 11, *Ex Parte* Letter at 1; Eshoo Letter at 1. *See also UHF Discount Order*, 31 FCC Rcd at 10222-24, paras. 21-24. Furthermore, if the Commission was wrong about its authority to modify the cap, then it follows that the Commission does not have authority to eliminate the discount, which was part of the cap, and the *UHF Discount Order* would need to be vacated for that reason. Indeed, while the parties principally cite Commissioner O'Rielly's dissenting statement in support of their argument, they fail to mention that Commissioner O'Rielly specifically said in his statement that the Commission lacked the authority to eliminate the UHF discount. IPR April 11, 2017, *Ex Parte* Letter at 1. *See also UHF Discount Order*, dissenting statement of Commissioner O'Rielly, 31 FCC Rcd at 10251. Second, we disagree with the argument that, even if the Commission has authority to modify the cap, it would be arbitrary and capricious to reinstate the UHF discount when the Commission may decide at the conclusion of the new rulemaking proceeding not to adjust the cap. IPR April 11, 2017, *Ex Parte* Letter at 1-2. As IPR, Common Cause and UCC suggest, the full Commission may decide not to adjust the cap, but they fail to show that our rationale for considering these issues in tandem is flawed. *Id.* Further, we are unpersuaded by the unsupported claim that reinstating the UHF discount pending a broader review of the cap is analogous to deciding whether to waive a rule based on hypothetical future decisions and therefore would conflict with our waiver policies. *Id.* at 2. The two situations are readily distinguishable. In this case, we are reconsidering the elimination of one part of a rule so that we can re-assess the rule in light of relevant factors that the Commission erroneously failed to consider earlier. When we consider waiver petitions, in contrast, we must determine whether to forgo enforcement of a rule based on a balancing of public interest considerations weighing for and against waiver. The IPR, Common Cause and UCC analogy is inapposite. Finally, the prospect of additional consolidation following reinstatement of the cap (IPR April 13, 2017, *Ex Parte* letter at 2, 7-11; Eshoo Letter at 1) does not negate the rationale for our action, as explained above at paras. 14-15. The relative harms and benefits of future consolidation will be addressed in the rulemaking proceeding to be initiated later this year. Moreover, it is important to note that the Commission did not examine marketplace conditions when it decided to eliminate the UHF discount.

IV. PROCEDURAL MATTERS**A. Supplemental Final Regulatory Flexibility Analysis**

18. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁶¹ the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (FRFA) relating to this Report and Order in MB Docket No. 13-236. The Supplemental FRFA is set forth in Appendix B.

B. Paperwork Reduction Analysis

19. 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).

C. Congressional Review Act

20. The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

V. ORDERING CLAUSES

21. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Section 405(a) of the Communications Act of 1934, 47 U.S.C. § 405(a), and Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, the Petition for Reconsideration filed by ION Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc. on November 23, 2016, **IS GRANTED IN PART** and otherwise **IS DISMISSED AS MOOT**, to the extent provided herein.

22. **IT IS FURTHER ORDERED** that pursuant to the authority contained in Sections 1, 2(a), 4(i), 4(j), 303(r), 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 154(j), 303(r), 307, 309, and 310, this Order on Reconsideration **IS ADOPTED**. The rule modification discussed in this Order on Reconsideration and set forth in Appendix A attached hereto shall be effective thirty (30) days after publication of the text or summary thereof in the *Federal Register*.

23. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Order on Reconsideration to Congress and to the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

24. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶¹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

APPENDIX A**Final Rule****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

Supplemental Final Regulatory Flexibility Analysis

1. In compliance with the Regulatory Flexibility Act (RFA),¹ this Supplemental Final Regulatory Flexibility Analysis (SFRFA) supplements the Final Regulatory Flexibility Analysis (FRFA) included in the *UHF Discount Order*,² to the extent that changes adopted on reconsideration require changes in the conclusions reached in the FRFA. As required by the RFA,³ the FRFA was preceded by an Initial Regulatory Flexibility Analysis (IRFA) incorporated in the *UHF Discount NPRM*, which sought public comment on the proposals in the *UHF Discount NPRM*.⁴

A. Need for, and Objective of, the Order

2. This Order on Reconsideration reinstates the UHF discount in the Commission's national television multiple ownership rule. The national television multiple 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.⁵ At the time the cap was first established, when all broadcasting used analog technology, UHF broadcasting was considered technically inferior to VHF broadcasting. Therefore, the UHF discount provided 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.⁶ The *UHF Discount Order* eliminated the UHF discount, finding that UHF stations are no longer technically inferior to VHF stations following the transition to digital television broadcasting, and that the competitive disparity between UHF and VHF stations had disappeared.⁷

3. In this Order on Reconsideration we reinstate the UHF discount, finding that it impacts the 39 percent national audience reach cap established by Congress in 2004.⁸ We further determine that, because the UHF discount affects calculation of compliance with the national audience reach cap, the discount and cap are linked and the public interest is better served by considering the discount and cap in tandem.⁹ Rather than potentially tightening the national audience reach cap in some cases by eliminating the UHF discount, the reinstatement of the discount returns broadcasters to the status quo ante for purposes of calculating their compliance with the cap. The Commission will initiate a rulemaking proceeding later this year to consider whether it is in the public interest to modify the national audience reach rule, including the UHF discount.

¹ See 5 U.S.C. § 604.

² *UHF Discount Order*, 31 FCC Rcd at 10242-45, App. B, paras 1-13.

³ 5 U.S.C. § 603.

⁴ *UHF Discount NPRM*, 28 FCC Rcd at 14337-40, App. B, paras. 1-11.

⁵ 47 CFR § 73.3555(e)(1).

⁶ 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*, Memorandum Opinion and Order, 100 FCC 2d 74, 92-94, paras. 42-44 (1985).

⁷ *UHF Discount Order*, 31 FCC Rcd at 10213, para. 1, 10214, para. 3, 10219, para.14, 10220, para. 16, 10226, para. 28, 10227-28, para. 33, 10230-31, para. 37.

⁸ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (CAA). See also *supra* para. 11.

⁹ See *supra* para. 11.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA and FRFA

4. No public comments were submitted in response to the IRFA or FRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

5. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which this Order will Apply

6. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted in this Order on Reconsideration.¹⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹² 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.¹³ The FRFA accompanying the *UHF Discount Order* described and estimated the number of small entities that would be affected by elimination of the UHF discount.¹⁴ Reinstatement of the UHF discount in this Order on Reconsideration applies to the same entities affected by elimination of the discount.

7. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”¹⁵ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.¹⁶ 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. The SBA has created the following small business size standard for such businesses: those having \$38.5 million or less in annual receipts.¹⁷ The 2012 Economic Census reports that 751 firms in this category operated in that year. Of that number, 656 had annual receipts of \$25,000,000 or less, 25 had annual receipts between \$25,000,000 and \$49,999,999 and 70 had annual receipts of \$50,000,000 or more.¹⁸

¹⁰ 5 U.S.C. § 603(b)(3).

¹¹ *Id.* § 601(6).

¹² *Id.* § 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).

¹³ 15 U.S.C. § 632.

¹⁴ 31 FCC Rcd at 10243-44, App. B, paras. 7-9.

¹⁵ U.S. Census Bureau, 2017 NAICS Definitions, “515120 Television Broadcasting,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (last viewed Feb. 28, 2017).

¹⁶ *Id.*

¹⁷ 13 CFR § 121.201; 2017 NAICS code 515120.

¹⁸ U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (515120 Television Broadcasting). https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table (visited Feb. 28, 2017).

Based on this data we therefore estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size.

8. The Commission has estimated the number of licensed commercial television stations to be 1,384.¹⁹ Of this total, 1,275 stations (or about 92 percent) had revenues of \$38.5 million or less, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on February 24, 2017, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 394.²⁰ Notwithstanding, the Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

9. We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations²¹ 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.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

10. The FRFA accompanying the *UHF Discount Order* stated that elimination of the UHF discount modified calculation of compliance with the national audience reach cap and would affect reporting, recordkeeping, or other compliance requirements.²² Specifically, the Commission would have potentially needed to modify FCC forms or related instructions pursuant to the *UHF Discount Order*.²³ This Order on Reconsideration reinstates the UHF discount, thereby maintaining the current methodology for calculating compliance with the cap. Therefore, no changes to FCC forms or instructions will be necessary and the reporting, recordkeeping, and other compliance requirements will not be affected. Thus, reinstatement of the UHF discount will not impose additional obligations or expenditure of resources on small businesses.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

11. In this Order on Reconsideration we reinstate our previous rule allowing television stations broadcasting in the UHF spectrum a discount in calculating compliance with the national audience reach cap. This action reinstates prior reporting, recordkeeping and other compliance requirements for all television broadcasters, including small entities.

¹⁹ *Broadcast Station Totals as of December 31, 2016*, Press Release (MB, rel. January 5, 2017) <https://www.fcc.gov/document/broadcast-station-totals-december-31-2016> (visited Feb. 28, 2017).

²⁰ *Id.*

²¹ “[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 CFR § 121.103(a)(1).

²² *UHF Discount Order*, 31 FCC Rcd at 10243, App. B, para. 10. The FRFA further stated that the impact of these changes would be the same on all entities, compliance was not anticipated to require the expenditure of any additional resources, or place any additional obligations on small businesses. *Id.*

²³ *Id.*

12. We will open a new proceeding within the year to consider the UHF discount and national cap in tandem. We determined in this Order on Reconsideration that the discount and cap were linked and that considering them in tandem would better serve the public interest than simply eliminating the discount alone.²⁴ We anticipate that examining the discount and cap together will positively impact broadcasters, including small entities, and avoid the potential harms described by Petitioners and their supporters.²⁵

G. Report to Congress

13. The Commission will send a copy of this Order on Reconsideration, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act²⁶ and to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Order on Reconsideration and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.²⁷

²⁴ See *supra* paras. 11, 14-15.

²⁵ See *supra* paras. 14-15. We note that one of the two Petitioners, Trinity, may qualify as a small entity. See Small Business Size Standards: Information, 77 Fed. Reg. 72702, 72705 (Dec. 6, 2012). See also 13 CFR § 121.201, NAICS code 515120.

²⁶ 5 U.S.C. § 801(a)(1)(A).

²⁷ 5 U.S.C. § 604(b).

**STATEMENT OF
CHAIRMAN AJIT PAI**

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

Some things are inextricably linked. Penn Jillette will be forever tied to Teller. Daryl Hall will forever be tied to John Oates. Toni Tennille will forever be tied to the Captain. And the Cleveland Browns will forever be tied to . . . well, not-success, shall we say.

So, too, is the Ultra High Frequency (UHF) discount inextricably linked to the national television ownership cap. The FCC's national television multiple ownership rule prohibits a single entity from owning television stations that, in the aggregate, reach more than 39% of the total television households in the United States.¹ And until late last year, for purposes of calculating compliance with the 39% cap, a UHF television station was attributed with 50% of the television households in its market. For decades, this UHF discount was a critical component of the national cap. As one party pointed out in the record, the cap establishes a limit, and the discount defines how to calculate whether the limit is reached.²

In 2016, the FCC eliminated the UHF discount on a party-line vote. This effectively tightened the rule.³ For example, companies that were previously under the national cap suddenly went over it. But in reaching this decision, the Commission did not examine whether the facts justified a more stringent cap. Nor did it analyze whether the cap should have been raised at the same time as the UHF discount was eliminated. This was illogical and likely unlawful.

This situation was avoidable. Back in 2013, when the Commission began this proceeding, I had a simple request. I asked my colleagues to seek comment on both eliminating the UHF discount *and* adjusting the national television ownership cap.⁴ I specifically argued that we could not do one without the other.⁵ Unfortunately, my plea fell on deaf ears. Among other things, I was told that the proceeding would take too long to complete if it included a broader examination of the national cap. Ironically, it then took the Commission almost three years to take action and release an *Order* actually eliminating the UHF discount. We easily could have reviewed the national cap during those three years.

Today, the FCC is wiping the slate clean. And later this year, we will begin a new proceeding to review comprehensively the future of the national cap, including the UHF discount. Going forward, I will do everything within my power to ensure that this review does not similarly take three years to complete. And to get that done, we will be relying heavily on the dedicated staff of the Media Bureau, including Michelle Carey, Brendan Holland, Mary Beth Murphy, and Julie Saulnier, whose hard work made today's *Order* possible.

¹ 47 CFR § 73.3555(e)(1).

² Nexstar Broadcasting Inc., Reply Comments in Support of Petition for Reconsideration (Jan. 27, 2017).

³ *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213 (2016) (Dissenting Statement of Commissioner Ajit Pai).

⁴ *See 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, 28 FCC Rcd 14324, 14343–44 (2013) (Dissenting Statement of Commission Ajit Pai).

⁵ *Id.* at 14343 (stating that the FCC cannot “modify the UHF discount without simultaneously reviewing the national cap”).

**DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN**

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

Earlier this year, Chairman Pai stated that one of his primary goals is “to remove unnecessary or counterproductive regulations from the books,” and “make sure that our regulations match the realities of the modern marketplace.”¹ Just last month, citing to Section 11 of the Communications Act, he stressed the importance of “modernizing our rules” by eliminating regulations when “the policy [is] not only superfluous but counterproductive,”² and promised to ensure going forward, that “requirements are functions of actual need, not agency inertia.”³ The Chairman was so energized, and so eloquent as he declared that “times are changing,”⁴ that even I got a little excited, and for a fleeting moment was somewhat hopeful.

But just like beauty, change is in the eye of the beholder. Take the UHF discount, a rule that everyone, including the majority, admits has no place in a post-digital transition era. Lo and behold, it has been snatched from the regulatory crypt. Outdated and divorced from the technical realities of broadcast television in the digital age, the UHF discount has been resurrected and in just a few moments, it will be reinstated. Inertia is not the culprit here, rather it is an overzealous, misguided willingness to ignore the realities of today's marketplace, to the detriment of the viewing public.

There is broad, industry-wide agreement that the UHF discount has outlived its purpose. Yet, the oft-heard rallying cries for eliminating outdated rules, are muzzled this morning. The Commission is making an about face, is firmly embracing the past, and is reinstating a relic of a bygone era, for the benefit of a few large media companies. If you failed to catch my greeting on social media last week, allow me to welcome you all, once again, to Industry Consolidation Month at the FCC.

For those who do not follow us closely, back in 1985, the FCC adopted the UHF discount, to address the competitive disadvantages facing UHF stations, including being technically inferior, producing weaker over-the-air signals, reaching smaller audiences, and costing more to build and operate compared to VHF stations. Fast forward to nearly eight years after the completion of the transition for full-power television stations to digital broadcasting, and the technical shortcomings of UHF signals no longer exist. In fact, UHF is now equal, if not superior to VHF channels.

Simply put, in just a few minutes, this agency will flash its deregulatory neon lights, inviting broadcast station groups to actually distort the calculation of their national audience reach, and take advantage of “a loophole that allows owners to fail to count audience that the stations actually do reach.”⁵ In other words, when you hear the majority voting yea on MB Docket No. 13-236, station groups will be able to buy scores of stations and “undermine[] the intent of the [existing media ownership] cap.”⁶ This

¹ David Shepardson, *New FCC Chair Vows to Shrink Industry Regulations*, Reuters (Jan. 31, 2017), <http://www.reuters.com/article/us-fcc-regulations-idUSKBN15F26Z>.

² *Section 43.62 of Reporting Requirements of U.S. Providers of International Services; 2016 Biennial Review of Telecommunications Regulations*, IB Docket Nos. 17-55, 16-131, Notice of Proposed Rulemaking (2017), Statement of Chairman Pai.

³ *Id.*

⁴ *Id.*

⁵ *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213, 10228, para. 34 (2016) (*UHF Discount Order*).

⁶ *Id.*

will have the effect of increasing the cap well beyond the 39 percent level, established by Congress in 2004.

The result of “stretching the national audience reach cap, [could] allow a station group to actually reach up to 78 percent of television households,”⁷ though the discount would lead you to believe that the reach is much lower. This absurd result is not hyperbole or a hypothetical. In fact, after the digital television (DTV) transition, stations moved some of their VHF stations to UHF channels, in order to take advantage of both the technical superiority of UHF channels, as well as the 50 percent reduction in audience reach attributed to UHF stations by the discount.⁸ This type of practice was clearly not the intent.

I mentioned earlier that the Commissioners unanimously agree that the “technical basis for the UHF discount no longer exists.”⁹ Indeed, as Commissioner O’Rielly acknowledged last year, “the stations are rather interchangeable and shouldn’t be treated differently for purposes [of] our market audience reach calculations.”¹⁰ Why then is the UHF discount being reinstated?

From a procedural, legal, and policy perspective, this action is extremely troubling. Chairman Pai has repeatedly made clear that the “video industry has undergone revolutionary change.”¹¹ I do not disagree with this assertion. Yet, rather than issue a notice of proposed rulemaking to seek comment on adjusting the national audience reach cap, as Chairman Pai has called for since 2013,¹² the Commission returns us to an outdated state of play, with rules made for the analog era.

This Order argues that the Commission’s decision in 2016 to eliminate the UHF discount was flawed, because the agency did not examine the UHF discount and national audience reach cap in tandem. In advancing this argument however, the majority performs in the words of Chairman Pai, “convoluted gymnastics.”¹³

Although repeatedly stating, that the UHF discount and national audience reach cap are “inextricably linked,” and must be examined in tandem, the Commission here fails to cite a single legal authority that limits review or modification of the UHF discount to simultaneous review of the national audience reach cap. Instead, the majority relies on a selective history of the UHF discount, and unsupported arguments of petitioners, that “the FCC has no authority to change one without at least reviewing the impact the change will have on the other.”¹⁴

With respect to “grandfathering,” Representatives Fred Upton and Greg Walden urged the Commission in a 2013 letter, “to ensure that any changes it [made] to the UHF discount rule respect the

⁷ *Id.*

⁸ *Id.* at 10229-30, para. 36.

⁹ *UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10247. *See UHF Discount Order*, dissenting statement of Commissioner O’Rielly, 31 FCC Rcd at 10251.

¹⁰ *UHF Discount Order*, dissenting statement of Commissioner O’Rielly, 31 FCC Rcd at 10251.

¹¹ *UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10249. *See also 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, 28 FCC Rcd 14324 (2013) (*Notice*), dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 14344.

¹² *See Notice*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 14344. *See also UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10249.

¹³ Statement of FCC Chairman Ajit Pai, FCC, On the Latest D.C. Circuit Rebuke of FCC Overreach (Mar. 31, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344186A1.pdf.

¹⁴ Order on Reconsideration, para. 12.

holdings of existing licensees and applications pending.”¹⁵ And the Commission took this very action in 2016. To prevent broadcast station ownership groups from being harmed by elimination of the UHF discount, the Commission grandfathered broadcast station ownership groups that exceeded the 39 percent national audience reach cap, as well as proposed station combinations, for which an assignment or transfer application was pending. The grandfathering provision ensured that broadcast station ownership groups in existence as of September 26, 2013, would not be required to divest stations, because they exceeded the national audience reach cap solely, as a result of elimination of the UHF discount.

The grandfathering included in the *UHF Discount Order*, undercuts the Commission’s argument in today’s Order, that the elimination of the UHF discount was all the more problematic, given the industry’s reliance on the UHF discount to develop long-term strategies. For nearly 20 years, the industry has been on notice, that the Commission may eliminate the UHF discount.¹⁶ On more than one occasion, the Commission has sought comment on the modification or elimination of the UHF discount.¹⁷ Indeed, in 2004, broadcasters acknowledged that the UHF discount may need to be modified, in light of the DTV transition.¹⁸ Even the Chairman himself acknowledged that since 2013, broadcasters have been operating as if the UHF discount had been eliminated.¹⁹

But the Commission goes one step further than simply reinstating the UHF discount – it attempts to create a new purpose for the UHF discount to justify its reinstatement. The UHF discount was never intended to address competitive disparity, between broadcasters and other operators, such as video programming distributors. The sole purpose of the UHF discount was to remedy a technological disparity between two types of broadcast stations.²⁰ By rebirthing the UHF discount for this new purpose, the Commission is working hard to ensure that the UHF discount benefits a select group of broadcasters, in a manner that neither the Commission nor Congress, ever intended.

Perhaps most troubling about the Commission’s action today, is that besides there being no legal basis for such action, reinstatement of the discount will actually harm the public interest, by reducing diversity, competition and localism. The Commission just wrapped up and put a bow on a huge gift for those large broadcasters with ambitious dreams of more consolidation.

Now I am not a betting woman, but mark my word: this Order will have an immediate impact, on the purchase and sale of television stations. In the words of Leslie Moonves, Chairman, President and CEO of CBS Corporation, “Look, we know Ajit Pai very well. I think he will be very beneficial to our business. As you said, he’s deregulation, and we would be very interested in the cap moving up . . . I can

¹⁵ Letter from Representatives Fred Upton and Henry Waxman, to Mignon Clyburn, Acting Chairwoman, Federal Communications Commission (Sept. 13, 2013).

¹⁶ See *Notice*, 31 FCC Rcd at 14330, para. 16.

¹⁷ See *Notice*, FCC Rcd at 14328, para. 11, nn. 35-36.

¹⁸ In comments submitted in 2004, the National Association of Broadcasters (“NAB”) stated: “This does not mean that the UHF discount should not be modified in light of future changes in television assignments . . . It would be appropriate for the Commission to consider whether a station that has moved to a UHF channel that replicates the coverage area it had with a VHF channel would suffer from the same handicap as many UHF analog stations do today. In those circumstances, the Commission would have to modify the UHF discount so that the change in channel assignments would not have the unintended effect of allowing an increase in station ownership beyond those existing today. Indeed, failure to do so-it could be argued-would equally violate Congress’ intent to leave national ownership levels as they are today.” NAB Comments, MB Docket No. 02-277, at 2 (Mar. 19, 2004).

¹⁹ “Following 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 over the 39% cap as calculated without the UHF discount.” *UHF Discount Order*, dissenting statement of then-Commissioner Pai, 31 FCC Rcd at 10250.

²⁰ See *Amendment of Sections 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, 93-94, paras. 43-44 (1985).

tell you in the right circumstance, if the cap is lifted, we would strategically want to buy some more stations . . .²¹ And Mr. Moonves is far from alone in that sentiment.²² In a recent filing before the U.S. Securities and Exchange Commission, Sinclair Broadcast Group disclosed that “[i]f the UHF discount is restored . . . it would expand our ability, to make television station acquisitions in the future.”²³

Broadcast television continues to play a vital role in communities around the country, but this Order will enable the largest broadcast station owners to grow even larger. And those aspiring station owners that we meet and try to give hope to at conferences and everywhere I travel, in just a matter of minutes, your dream of owning and competing as a new entrant or a smaller broadcast owner will become a nightmare.

Because no justification exists for this Order, I strongly dissent. I dissent because I recognize that consumers benefit from competition, which motivates broadcast stations to invest in higher quality programming, and provide programming tailored to their local communities. I also recognize, that communities are enriched by a diversity of viewpoints and that consolidation would limit programming options for viewers, and impact local news editorial operations. And as regulators, we are supposed to be the public interest torchbearer for this nation. Today I am sad to report that we have failed miserably.

And while I strongly disagree with the outcome of this Order, thanks are due to the hard-working staff of the Media Bureau. Additionally, I want to recognize and thank Jaime Petenko, one of our law clerks this semester, for her extensive work on this item.

²¹ Leslie Moonves, Chairman, President and Chief Executive Officer of CBS Corporation, Q4 2016 CBS Corp. Earnings Call, Edited Transcript, Feb. 15, 2017.

²² *See, e.g.*, Perry Sook, Chief Executive Officer of Nexstar Media Group, Inc., stated, “The UHF discount being re-imposed and then ultimately a raising or elimination of the national ownership cap would be very helpful to growing our scale.” Nexstar Media Group, Q4 2016 Earnings Call Transcript, Feb. 28, 2017. He also told investors and analysts that Nextsar is “already in discussions should the rules change about opportunities that might be available to us...” *Id.*

²³ Sinclair Broadcast Group, Inc. (SBGI), Form 10-K, Annual Report (Feb. 28, 2017).

**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 recognition of the busy day, I'm not going to rehash all of the arguments I made when the previous Commission addressed this issue just last year.¹ Suffice it to say, I do not believe the Commission has authority presently to alter the UHF Discount, and certainly not separate from the National Television Ownership rule. I appreciate this item reverting the Commission's rule back to its proper position.

¹ See *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, 31 FCC Rcd 10213, 10251-52 (2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-116A3.pdf.