

**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 Outdated and divorced from the technical realities of broadcast television in the digital age, the UHF discount has been resurrected and in just a few moments, it will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 Yet, the oft-heard rallying cries for eliminating outdated rules, are muzzled this morning.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.

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.*

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 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 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

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.*

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.

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 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

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.

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).

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 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.

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 Red 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).

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 reimposed 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 Nexstar 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).

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.