

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Amendment of Section 73.355(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 17-318

I support today's item, which initiates a defined process to review the Commission's National Television Multiple Ownership Rule, commonly referred to as the national audience reach cap. This is a topic I have spent too much time over the years working on, so I would like to clear up many of the misconceptions surrounding it.

First, I want to be absolutely clear on my position on this matter. As I have stated previously, I do not believe that the Commission has the authority to modify the national audience reach cap, which also extends to eliminating the UHF discount. While the discount may no longer be technologically justified, it is up to Congress to make that determination, not the Commission. This was the clear intent of Congress when it partially rolled back the FCC's proposed cap increase of 45 percent in 2004. While many lawyers have their own interpretations of the 2004 Consolidated Appropriations Act (CAA), I want to provide a little history.

After extensive debate and too many meetings to count, Congress enacted the relevant portions of the CAA.¹ The language in the law cannot be clearer: it statutorily sets the national ownership limit and correspondingly removes it from the quadrennial review under section 202(h) of the Telecommunications Act. Some, including the Third Circuit Court of Appeals, have argued that Congress only meant to remove consideration of the national audience reach cap from the biennial review, not to prohibit it from being changed as part of any other effort. But such a reading is preposterous as it would effectively create one of the biggest backdoors in the history of legislating. At the same time, the view ignores the deal that was struck in those bitterly heated Member meetings and huddles. In exchange for the hard cap, those who supported former Chairman Powell's work obtained an ownership level that prevented any station group from being forced to sell off any stations and a commitment that the UHF discount would still apply going forward.

I realize that some people don't have a high opinion of Congressional experience. But, I will forever have etched in my mind former Senator Ted Stevens screaming that, if some station group wanted to go above 39 percent, they could come to Congress to try to get the cap amended. That was a different day and a different Congress and maybe it relied on Senator Stevens serving forever, but it should count for something. It certainly does to me – even if I intellectually agree that both the cap and discount are archaic and in need of reform.

Despite my firsthand experiences, there is broad disagreement among interested parties over the Commission's authority in this space. During the prior Commission's proceeding to eliminate the UHF discount, NAB and Free Press argued that the Commission had the authority

¹ Consolidated Appropriations Act, 2004, Pub. L. No. 108-109, § 629, 118 Stat. 3, 99–100 (2004) (CAA).

to both eliminate the UHF discount and modify the national audience reach cap.² The Commission ultimately agreed, with the support of two of my colleagues here today. On the other hand, Fox, Sinclair, ION and Trinity Broadcast Network all challenged the Commission's authority.³ I appreciate the irony that my views are aligned with those previously filed by Sinclair – who outside critics mistakenly believe I am currently in cahoots with – that the Commission was devoid of authority to take action that, as fate would have it, supposedly would “help” Sinclair today. Specifically, Sinclair stated in 2013:

The FCC does not have the authority to modify any aspect of the national television ownership cap, including the UHF discount. In establishing a 39 percent limit for the ownership cap in 2004, Congress set a precise limit and then took the extra step of removing this limit and any rule relating to it from the FCC's periodic review of its ownership rules. No action by Congress has changed these facts, and accordingly, the FCC should terminate this proceeding and halt its efforts to eliminate the UHF discount.⁴

In perhaps a more curious twist, it appears that my same colleagues that previously supported changes in 2016 now also question the Commission's authority.

For these reasons, I believe it is time for the courts to opine on this matter. We need certainty, in a way that only the courts or Congress can provide, as to where the Commission's authority begins and ends. Since it doesn't appear Congressional action is forthcoming, I look forward to reviewing the record that will result from this proceeding. If the Commission believes after such review that it has the authority to modify the cap, I will happily support that item. That is not to suggest my position has changed, but only that I believe in getting to finality and am willing to cast a vote that will allow the Commission to take the needed step to get this to court review.

Second, outside the authority question, I think it is also important to put this order in context. The truth is, the last fight over the national audience reach cap generally occurred not because of its potential impact on consumers but rather to safeguard an important balance between the Big Four broadcast networks (ABC, CBS, NBC, and Fox) and their local affiliates. Prior to Congressional action in 2004, the Commission found that these rules did not promote competition or diversity. For these reasons, the Commission increased the current cap from 35 percent to 45 percent to allow the broadcast networks to achieve greater economies of scale without surpassing the audience reach of their collective affiliates. Congress later scaled this back to 39 percent, with the same focus in mind: maintaining the appropriate balance between the networks and their affiliates.

It is also worth noting that even if the national audience reach cap is increased or eliminated, the practical effects will likely be limited, assuming the Commission complies with Congressional direction on the UHF discount. Today, the majority of the top ten TV station

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, 10220–23, paras. 17, 21 (UHF Discount Elimination Order).

³ *Id.* at paras. 18–20.

⁴ Sinclair Broadcast Group Inc. Comments at i (filed Dec. 16, 2013) (Sinclair UHF Discount NPRM Comments).

groups do not even come close to the cap. For example, CBS Corporation, which ranks fifth, only has a national audience reach of 25.5 percent. Hearst Corporation, at tenth, has an audience reach of 13.3 percent. All this is to say, while I support asking questions and ultimately resolving the issue of the Commission's authority on this matter, whether we maintain or alter the cap is likely to have little real-world impact in the near future.

I thank the Chairman for teeing up this item and asking a broad range of questions. I approve.