ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1129

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE PRESS, *et al.*,
Petitioners,
v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

OPENING BRIEF FOR PETITIONERS

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December 19, 2017

CERTIFICATES AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Petitioners state as follows:

(A) Parties and Amici

The Petitioners in this case are Free Press, Office of Communication of the United Church of Christ, Inc., Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition, and Common Cause.

The Respondents in this case are the Federal Communications Commission, and the United States of America.

The Intervenors for Respondents are Ion Media Networks, Inc., National Association of Broadcasters, Sinclair Broadcast Group, Inc., Tribune Media Company, Trinity Christian Center of Santa Ana, Inc., Twenty-First Century Fox, Univision Communications, Inc., and Nexstar Broadcasting, Inc..

(B) Rulings Under Review

Petitioners seek review of the Commission's Order on Reconsideration, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 32 FCCRcd 3390 (2017).

(C) Related Cases

This case has not previously been before this or any other Court. Another case before this Court, *Twenty-First Century Fox, Inc. v. FCC* (No. 16-01324), raises related issues, but has been held in abeyance pursuant to an Order issued

December 21, 2016. There are no other related cases currently pending in this Court or in any other Court of which counsel is aware.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, Petitioners state as follows:

Free Press, Office of Communication, Inc. of the United Church of Christ, Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition, and Common Cause respectfully state that each of them is a non-profit organization with no parent companies, subsidiaries or affiliates and that none of them have issued shares to the public.

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GLOSSARY

1996 Act	Telecommunications Act of 1996
ADI	Area of Dominant Influence
CAA	Consolidated Appropriations Act of 2004, Pub.L. No. 108–199.
DMA	Designated Market Area
DTV	Digital Television
FCC	Federal Communications Commission
NPRM	Notice of Proposed Rulemaking
UHF	Ultra-High Frequency
VHF	Very High Frequency

JURISDICTIONAL STATEMENT

This case is before the Court on a Petition for Review of a final order of the Federal Communications Commission released on April 21, 2017. *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 32 FCCRcd 3390 (2017). This Court has jurisdiction under 28 USC §2343.

ISSUES PRESENTED FOR REVIEW

1. Whether the Commission's decision to reinstate the UHF discount even though it was obsolete and served no public interest purpose was arbitrary and capricious in violation of Section 706 of the APA?

2. Whether the Commission's decision to reinstate the UHF discount on the ground that it plans to conduct a proceeding to consider repealing the UHF discount in tandem with raising the 39% national audience reach cap, where the Commission lacks the statutory authority to raise the cap, and even if it had authority, it could be years before this yet-to-be launched proceeding could be completed, was arbitrary and capricious in violation of Section 706 of the APA?

STATEMENT OF THE CASE

In August 2016, the Federal Communications Commission repealed the "UHF discount," a provision used to calculate audience reach for the purpose of

compliance with the Commission's national television ownership rule.[1] Despite the fact that no one seriously disputes that the policy basis justifying the adoption and continuation of the UHF discount has long since disappeared, a new FCC majority voted 2-1 in April 2017 to reinstate the UHF discount.[2] The new majority justified this decision on the basis that the Commission wished to consider the UHF discount in conjunction with a contemplated rulemaking to consider repealing or relaxing the current 39% cap on audience reach.

Petitioners contend that it is arbitrary and capricious for the Commission to restore a rule that no longer serves any public interest purpose when the FCC lacks the statutory authority to modify the national ownership cap. Even if the Commission had the authority, a new rulemaking can take years to complete. In the meantime, the broadcasters at or near the 39% cap could increase their reach well beyond the 39% established by Congress. In fact, Intervenor Sinclair Broadcast Group, Inc. has already sought FCC approval to acquire Intervenor

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[1] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 31 FCCRcd 10213 (2016) ("*2016 Repeal Order*") [JA 23].

[2] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 32 FCCRcd 3390 (2017) ("*2017 Reconsideration Order*") [JA 79].

Tribune Media Company's 42 television stations, thus creating the nation's single largest broadcast station with an actual audience reach of 72%.[3]

A. The UHF television service

Starting in 1945, the FCC licensed television stations to operate on the VHF television band (channels 2-13). Within a few years, almost all economically viable VHF allotments were claimed. In 1952, seeking to bring more stations on the air, the Commission began the process of awarding licenses to operate on the UHF band (originally, channels 14-83). However, UHF stations faced several obstacles to success; among other things, users had to acquire and attach a special receiver box to their sets, tuning was difficult,[4] the reception area was limited, and the need to transmit at higher power meant higher electric bills for station owners.[5]

Over the course of four decades, FCC and Congressional initiatives to foster UHF service bore fruit. These included rules that gave many non-network affiliated UHF stations access to higher quality programming[6] and the All-Channel

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[3] Cong. Research Serv., *Sinclair Broadcast Group Acquisition of Tribune Media: Competitive and Regulatory Issues* at 19 (2017).
[4] *See Elect. Indus. Ass'n Consumer Electrs. Group v. FCC*, 636 F.2d 689, 690-692 (D.C. Cir. 1980).
[5] *See* Rothenberger, *The UHF discount: Shortchanging The Public Interest*, 53 Am. U. L.Rev. 689, 696-704 (2004).
[6] *See Amendment to Rules Concerning Network Television Broadcasting*, 23 FCC2d 382, 394-95 (1970).

Receiver Act,[7] which empowered the FCC to require that TV sets contain built-in UHF receivers. Most importantly, the introduction of cable and satellite television substantially ameliorated the difficulty of viewing UHF stations over-the-air. In 1975, only about 14% of the nation's TV homes subscribed to cable,[8] compared to more than 85% that subscribed to cable or satellite in 2001.[9]

By 2009, the disadvantage faced by UHF stations was eliminated altogether when television stations completed their transition from analog to digital transmission.[10] From that point on, UHF channel transmission has generally proven to be more advantageous than VHF, "and some station owners have therefore opted to migrate their signals from VHF to UHF."[11]

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[7] All-Channel Receiver Act of 1962, Pub. L. 87-529.

[8] Levy, *et al.*, *Broadcast Television: Survivor in a Sea of Competition*, 41 (FCC Working Paper 37, 2002).

[9] *Eighth Annual Video Competition Report*, 17 FCCRcd 1244, 1339 (2002).

[10] Congress mandated the switchover to digital television transmission so that the spectrum could be used more efficiently. The transition enabled broadcasters to multi-cast several high-quality program channels using half the spectrum needed for analog broadcasting and the FCC to auction the remaining spectrum for wireless broadband use. *See generally* Cong. Research Serv., *Digital Televison: An Overview* (2008).

[11] *2016 Repeal Order*, 31 FCCRcd at 10219 [JA 29]. The Commission found that the "UHF spectrum is now highly desirable in light of its superior propagation characteristics for digital television....[UHF] stations have enhanced their coverage and audience reach as a result of the DTV transition, both because of the technical superiority of digital broadcasts on UHF channels and as a result of the chance to 'maximize' their signal coverage during the transition. The evidence clearly establishes that digital UHF operations do not suffer from the same technical

B. History of broadcast ownership limits

Creation of the UHF service provided one means for the FCC to further the Communications Act's public interest goals of diversity, competition, and localism. Another means of fostering these goals has been to limit the number of television stations under common control, both locally and nationally. In 1941, the FCC capped the number of stations controlled by a single entity at three.[12] As more stations went on the air, the FCC increased the cap to five, seven (with no more than five VHF), and eventually twelve stations. In 1985, the FCC decided to take into account that stations in large markets reached many more viewers than stations in small markets. It found that because "network owned and operated stations are generally concentrated in highly populated areas and therefore already have significant penetration, this reach restriction will preclude substantial network expansion."[13] Accordingly, it modified the national television rule, 47 CFR §73.3555(d), by adding subsection §73.355(d)(1)(B) prohibiting the grant, transfer or assignment of any license that would result in a party having a cognizable

limitations as analog UHF operations." *Id.* at 10227-28 (footnotes omitted) [JA 37-38].

[12] *Rules Applicable to Chain Broadcasting*, 6 Fed. Reg. 2282-89 (1941).

[13] *1985 TV Ownership Reconsideration*, 100 FCC2d 74, 87 (1985).

interest in "TV stations which have an aggregate national audience reach exceeding twenty-five (25) percent."[14]

To measure audience reach, the Commission had to decide how to calculate it. First, it opted to use the number of households reported in the Arbitron Area of Dominant Influence (ADI).[15] Second, recognizing that the "inherent physical limitations" of the UHF band reduced the audience reach of UHF stations, it decided to attribute only 50% of theoretical ADI audience reach to owners of UHF stations. It concluded that "the discount approach provide[d] a measure of the actual voice handicap."[16]

The Commission placed the two definitional provisions in subsection §73.3555(d)(3), which read as follows:

> (2) For purposes of subsection (d) of this section:
>
> (A) "national audience reach" means the total number of television households in the Arbitron Area of Dominant Influence (ADI) markets in which the relevant stations are located divided by the total national television households as measured by ADI 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

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[14] *Id.* at 100 (App. A). Subsection of §73.3555(d) was subsequently redesignated as §73.3555(e). *2006 Quadrennial Review Order*, 23 FCCRcd at 2094-95 (2008).
[15] *Id.* at 91. Arbitron ADIs were used by television stations for selling advertising. The Commission subsequently substituted a different commercial measurement known as Nielson Designated Market Areas (DMAs). *Definition of Markets*, 11 FCCRcd 6201, 6224 (1996).
[16] *1985 TV Ownership Reconsideration*, 100 FCC2d at 93-94.

with 50 percent of the television households in their ADI market.[17]

Thus, the UHF discount is not part of the cap, but sets forth how to measure the audience reach of UHF stations for purposes of assessing compliance with the cap.

C. FCC review of whether the UHF discount was still needed

By 1995, the Commission began to examine whether the actual audience reach of UHF stations was approaching parity with VHF stations and whether the UHF discount was still justified.[18] In 1996, Congress passed the Telecommunications Act of 1996. Section 202(c) of that act directed the FCC to eliminate its restriction on television station ownership based on the number of stations owned and increase the audience reach cap to 35%.[19] Section 202(h) of the act directed the FCC to review all broadcast ownership rules, including the national cap, biennially to determine whether they remained necessary in the public interest.[20]

The 1996 Act did not address the UHF discount. But in raising the cap to 35% as required by §202(c), the Commission warned broadcasters that the UHF

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[17] *Id.* at 100 (App. A).
[18] *Review of the Commission's Regulations Governing Television Broadcasting*, 10 FCCRcd 3524, 3568-69 (1995).
[19] Telecommunications Act of 1996, Pub. L. 104-104 ("1996 Act").
[20] *Id.*

discount was already under review and that "any entity which acquires stations during this interim period and which complies with the 35 percent audience reach provision only by virtue of [the UHF discount]…will be subject to the outcome in the pending television ownership proceeding."[21]

When the FCC launched its first biennial review of the broadcast ownership limits in 1998, it sought comment on whether the UHF discount should be modified or eliminated in light of the decreasing disparity between VHF and UHF.[22] It also asked whether it made "sense to retain such a discount at all once we have transitioned to digital television transmission? At that time, we expect broadcast television stations will be operating on 'core' channels, most of which are currently allotted to UHF television."[23]

In the *1998 Biennial Review Order*, the Commission retained the UHF discount for the time being because it found the handicap faced by UHF stations had not yet been overcome. It observed, however, that the UHF discount would no longer be needed once all television stations were broadcasting digitally. Thus, it planned to begin a rulemaking to phase out the UHF discount before the transition was completed.[24] Notably, it repeated its earlier 1996 admonition, warning

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[21] *Implementation of Section 202(c)(1) and 202(e) of the Telecommunications Act of 1996*, 11 FCCRcd 12374, 12375 (1996).
[22] *1998 Biennial Review Notice of Inquiry*, 13 FCCRcd 11276, 11285 (1998).
[23] *Id.*
[24] *1998 Biennial Review Order*, 15 FCCRcd 11058, 11080 (2000).

broadcasters that acquisitions which depended on the UHF discount for compliance with the national ownership cap will

> be subject to our eventual decision on the discount. This has remained the case during the pendency of the instant proceeding and *we will continue to follow this policy until such time as the UHF discount is modified or eliminated*.[25]

In the *2002 Biennial Review*, the Commission voted to raise the national audience cap to 45%. Recognizing that the then-contemplated digital television transition would "largely eliminate the technical basis for the UHF discount because UHF and VHF signals [would] be substantially equalized," it decided to phase out the UHF discount.[26] Because the plan at the time was for market-by-market TV transitions, the Commission decided to eliminate the UHF discount for stations owned by the four national networks as their markets went digital.[27] It promised to consider how to address discontinuation of the UHF discount to other stations in a subsequent proceeding.[28]

D. The Consolidated Appropriations Act amendment to the national ownership cap

The Commission's *2002 Biennial Review* decision to raise the national cap to 45% and the associated phase-out of the UHF discount was appealed to the

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[25] *Id.* at n.108 (emphasis supplied, citation omitted).
[26] *2002 Biennial Review Order*, 18 FCCRcd 13820, 13847 (2003).
[27] *Id.*
[28] *Id.*

Third Circuit. While judicial review was under way, Congress passed the Consolidated Appropriations Act of 2004 ("CAA"), which rolled that cap back to 39%.[29] Congress also removed future consideration of the national cap from the FCC's periodic reviews mandated by the 202(h) of 1996 Act and changed the frequency of those proceedings from biennial to quadrennial.[30]

Thus, prior to the CAA, the national cap for television stations reach was established by Section 202(c)(1)(b) of the 1996 Telecommunications Act, which directed the FCC as follows:

> The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—
>
> ****
>
> (B) by increasing the national audience reach limitation for television stations to 35 percent.

Section 629(1) of the CAA amended "Section 202(c)(1)(B) by striking '35 percent' and inserting '39 percent.'" Thus, as amended, 47 CFR §73.3555(d)(1) prohibited a licensee from

> having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

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[29] Consolidated Appropriations Act, 2004, Pub. L. 108-199, §629(1) ("CAA").
[30] *Id.* at §629(3) ("The Telecommunications Act of 1996 is amended as follows—(3) in section 202(h) by striking "biennially" and inserting "quadrennially.").

In addition to fixing the national ownership cap at 39%, §629(3) of the CAA explicitly removed the national TV ownership rule from the scope of those reviews by adding the following sentence to Section 202(h): "This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B)."

In light of the enactment of the CAA, the Third Circuit held that pending challenges to the FCC's adoption of a 45% cap were moot "[b]ecause the Commission is under a statutory directive to modify the national television ownership cap to 39%."[31] As to the UHF discount, it said that

> Although we find that the UHF discount is insulated from this and future periodic review requirements, we do not intend our decision to foreclose the Commission's consideration of its regulation defining the UHF discount in a rulemaking outside the context of Section 202(h). The Commission is now considering its authority going forward to modify or eliminate the UHF discount and recently accepted public comment on this issue. Barring congressional intervention, the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of §202(h).

E. FCC consideration of the UHF discount after passage of the CAA

In the *2006 Quadrennial Review NPRM*, the Commission did not ask whether it should modify the national ownership cap, but it did inquire whether it

[31] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (3d Cir. 2004)("*Prometheus I*")(citations omitted).

"should retain, modify or eliminate the UHF discount."[32] The *2006 Quadrennial Review Order* concluded that the Third Circuit's *Prometheus I* decision precluded consideration of the discount in a proceeding conducted under Section 202(h).[33] However, it reiterated that it would "separately address" the matter in a different proceeding.[34]

On June 13, 2009, all full-power TV stations ceased analog broadcasting. As the Commission has found,

> the transition has posed more challenges for VHF channels than UHF channels because VHF spectrum has proven to have characteristics that make it less desirable for providing digital television service….For these reasons…television broadcasters generally have faced greater challenges providing consistent reception on VHF signals than UHF signals in the digital environment, and some station owners have therefore opted to migrate their signals from VHF to UHF.[35]

The industry was well aware that migrating from VHF to UHF when feasible not only improved signal coverage, but also enabled large broadcasters to evade the constraints of the national ownership cap. Indeed, even while acknowledging that "it's hard to make the case for the discount," *Broadcasting & Cable* editorialized for its retention, since, among other things, it allowed broadcasters to "us[e]

[32] *2006 Quadrennial Review FNPRM*, 21 FCCRcd 8834, 8848-49 (2006).
[33] *2006 Quadrennial Review Order*, 23 FCCRcd 2010, 2085 (2008).
[34] *Id.*
[35] *2016 Repeal Order,* 31 FCCRcd at 10219 [JA 29].

existing rules to try to provide the regulatory relief denied them by the decade of inaction on…loosening ownership limits."[36]

Most major broadcasters were quick to exploit the advantages afforded by migration to UHF after the digital transition. In September 2008, there were 706 commercial UHF stations and 582 commercial VHF stations. A year later, there were 1017 UHF stations and only 378 VHF stations.[37]

The change from VHF to UHF allowed broadcasters, especially larger ones that had owned the once-favored major market VHF stations, to claim a lower audience reach even though in fact no change had taken place, and to acquire additional stations. The *2016 Repeal Order* cited Fox as an example of "the absurd results created by the continued existence of the discount."[38] It found that

> just prior to the DTV transition, Fox owned 27 stations with a total national audience reach of 37.22 percent before application of the UHF discount and 31.20 percent after application of the UHF discount. In 2010, immediately after the DTV transition, Fox continued to own 27 stations with a total national audience reach of 37.10 percent before application of the UHF discount. However, because five of Fox's stations switched from analog VHF channels to digital UHF channels in the transition, Fox's national audience reach calculation suddenly decreased with the benefit of the UHF discount, which allowed the station group to calculate its audience reach as only 24.75 percent – despite the fact that Fox still

[36] *Editorial: Rethinking Cap*, Broadcasting & Cable (Aug. 12, 2013).
[37] *2016 Repeal Order*, 31 FCCRcd at 10228, n.115 (citations omitted)[JA 38].
[38] *Id.* at 10230 [JA 40].

> owned the same number of stations in the same markets reaching the same audiences.[39]

As a result, Fox was able acquire additional TV stations in the San Francisco and Charlotte markets after the transition.[40]

F. Repeal of the UHF discount in 2016

In September 2013, the Commission initiated the proceeding now before the Court, tentatively proposing to eliminate the UHF discount.[41] The Commission sought comment on its tentative conclusion that the Commission has authority to modify the 39% national ownership cap, including the UHF discount, outside of the quadrennial review process,[42] but it did not ask for comment on whether to modify the cap itself. Petitioners Free Press and others commented that the FCC not only had the authority, but the obligation to repeal the discount.[43] Others,

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[39] *Id.* at 10229-30 (footnotes omitted) [JA 39-40].

[40] Broadcast Actions, FCC Public Notice No. 48343 (Oct. 10, 2014)(Oakland, CA); Broadcast Actions, FCC Public Notice No. 47946 (Mar. 15, 2013)(Belmont, NC).

[41] *UHF Discount NPRM*, 28 FCCRcd 14324, 14331 (2013) [JA 8].

[42] *Id.* at 14329-30 [JA 6-7].

[43] Free Press's Comments pointed out that Congress enacted the 39% cap "because it believed that to be the appropriate reach for a single broadcaster" and that in setting the cap, Congress did not expressly reference the UHF discount. Because the former disparity between UHF and VHF no longer existed, "eliminating the discount [was] the only rational course for the Commission to take." Free Press Comments, Docket No. 13-236, at 6 (Dec. 16, 2013) [JA 137]. Similarly, on reply, Free Press, discussed the legislative history of the CAA and concluded that the sole intent of the CAA was to reduce the national ownership cap, and that the failure to repeal the UHF discount contravened this clear Congressional intent. Free Press Reply Comments, Docket 13-236 at 2-3 (Jan 13, 2014) [JA 197-198].

including Intervenors Ion, Fox, and Sinclair, argued the CAA froze both the cap and the UHF discount and stripped the FCC of authority to modify them in any context.[44]

In September 2016, by a vote of 3-2, the Commission eliminated the UHF discount and removed the last sentence of 47 CFR §73.3555(e)(2).[45] Without conducting a close textual analysis of the CAA, it nonetheless concluded that "[t]he CAA simply directed the Commission to revise its rules to reflect a 39 percent national audience reach cap and removed the requirement to review the national ownership cap from the Commission's quadrennial review requirement."[46]

Next, it proceeded to hold that

> The record is absolutely clear: UHF stations are no longer technically inferior in any way to VHF stations. Therefore, we find that the DTV transition has rendered the UHF discount technically obsolete, and we hereby eliminate it from the calculation of the national audience reach cap.[47]

It found that

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[44] *See* ION Comments at 12; Fox Comments at 2; Sinclair Comments at 6, Docket No. 13-236 (Dec. 16, 2013) [JA 157, 104, 179].

[45] *2016 Repeal Order,* 31 FCCRcd at 10241 (App. A) [JA 51].

[46] *Id.* As to the legislative history of the CAA, it observed that Congress was aware of the Commission's intent to phase out the discount, which the Commission had expressed in 1998 and again in 2002, and could have foreclosed the Commission from ever revising the UHF discount, but it chose not to. *Id.* at 10224 [JA 34].

[47] *Id.* at 10226 [JA 36].

> In fact, solely as a result of the DTV transition, the national cap is effectively 78 percent for a station group that includes only UHF stations, and for any station group that includes a UHF station, the effective national cap now exceeds the 39 percent level that Congress directed the Commission to establish. Rather than offsetting an actual service limitation or reflecting a disparity in signal coverage, the UHF discount serves only to confer a factually unwarranted benefit on owners of UHF television stations that undermines the purpose of the national audience reach cap.[48]

The Commission concluded "that failure to correct the distortion that the UHF discount causes in the calculation of the national audience reach as a result of the DTV transition creates an ongoing potential that additional transactions could undermine the national audience reach cap."[49] Although the Commission repealed the UHF discount, it grandfathered existing broadcast station ownership groups that would exceed the cap as a result of terminating the UHF discount.[50]

Then-Commissioner Pai dissented. While he agreed that "[t]o be sure, the technical basis for the UHF discount no longer exists," he objected because, he said, "the Commission should not eliminate the UHF discount without also

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[48] *Id.*
[49] *Id.*
[50] *Id.* at 10234 [JA 44]. Two petitions for Review of the Commission's decision were filed in this Court. One (No. 16-1375) was voluntarily dismissed. The second (No. 16-1324) was held in abeyance by Order of this Court on December 21, 2016.

considering an adjustment to the national cap."[51] Commissioner O'Rielly also dissented, but on an entirely different basis. He, too, agreed that he "would support [repeal] as a policy matter, as [he] would be open to considering an increase in the national ownership limit, if the Commission had authority to do so."[52] He explained, however, that the language of the CAA

> was heavily negotiated and painstakingly crafted in order to settle a recurring and particularly contentious media ownership issue. I know since I was there at the time and helped reach the agreement....The result was a national ownership cap that remains one of the few media ownership rules specifically set by statute and the only one exempted from the Quadrennial Review...to protect a tenuous compromise from the whims of the Commission.[53]

Thus, he concluded that the Commission had no authority to modify the national TV rule in any way, including eliminating the UHF discount.[54]

G. Reinstatement of the UHF discount in 2017

Ion Media Networks, Inc. and Trinity Christian Center of Santa Ana, Inc., two companies that had benefitted from the UHF discount and had been grandfathered in the *2016 Repeal Order*, filed a petition for reconsideration on

[51] *Id.* at 10247 [JA 57].
[52] *Id.* at 10251 [JA 61].
[53] *Id.*
[54] *Id.*

November 23, 2016.[55] Acting with uncharacteristic speed, on April 21, 2017, the Commission voted 2-1 to grant the petition in all material respects, restoring the last sentence of 47 CFR §73.3555(e)(2).[56] It is this *2017 Reconsideration Order* that is now before the Court.

In reinstating the UHF discount, the majority did "not disagree with Opponents' assertion that the UHF discount no longer has a sound technical basis following the digital television transition."[57] However, it claimed that "with the exception of the [*2016 Repeal Order*], the Commission has always considered the UHF discount together with the national cap,"[58] and the Commission erred in eliminating the discount without considering the national cap as a whole.[59] Pointing to increased viewing options for consumers since passage of the CAA, it found that the *2016 Repeal Order* "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."[60]

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[55] They are also among the Intervenors in support of Respondents in this case.
[56] *2017 Reconsideration Order*, 32 FCCRcd at 3400 (App. A) [JA 89].
[57] *Id.* at 3395 (citation omitted) [JA 84].
[58] *Id.* at 3394 [JA 83].
[59] *Id.* at 3395 [JA 84].
[60] *Id.* at 3396 [JA 85].

Although Commissioner O'Rielly joined newly-named Chairman Pai to create the majority, he issued an enigmatic statement that read in its entirety as follows:

> 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. 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.[61]

Notably, Commissioner O'Rielly did not indicate whether he had changed his mind as to his prior statement that he would support repeal "as a policy matter."[62]

Commissioner Clyburn dissented. She said that reinstatement of the discount would

> invit[e] 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."[63]

As a result, "station groups will be able to buy scores of stations," thus "increasing the cap well beyond the 39% level, established by Congress in 2004."[64]

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[61] *Id.* at 3410 (citation omitted) [JA 99].
[62] *2016 Repeal Order*, 31 FCCRcd at 10251 [JA 61]. *See supra* p.17.
[63] *2017 Reconsideration Order,* 32 FCCRcd at 3406 (citations omitted) [JA 95].
[64] *Id.* at 3406-07 [JA 95-96].

Commissioner Clyburn further noted that the majority failed to cite "a single legal authority that limits review or modification of the UHF discount to simultaneous review of the national audience reach cap," and had "relie[d] on a selective history of the UHF discount."[65] She observed that 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. 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.[66]

Commissioner Clyburn concluded that "reinstatement of the discount will actually harm the public interest, by reducing diversity, competition and localism."[67] This petition for review followed.[68]

SUMMARY OF ARGUMENT

In 2016, the Commission properly determined that no policy justifications remained for the UHF discount and that its continued operation undermined Congressional intent to limit TV ownership to a maximum national audience reach of 39%.

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[65] *Id.* at 3407 [JA 96].
[66] *Id.* at 3408 (citations omitted) [JA 97].
[67] *Id.*
[68] Petitioners unsuccessfully sought a stay from this Court. Order, No. 17-1129 (June 15, 2017).

The new FCC majority's decision in 2017 to reverse this action and reinstate the UHF discount was arbitrary and capricious. The Commission failed to show how reinstating this concededly obsolete provision would serve the public interest. It incorrectly said that the earlier majority had not justified its decision to examine the UHF discount in conjunction with the possible modification of the 39% national cap, when in fact the *2016 Repeal Order* carefully explained that this would have delayed "the correction of the audience reach calculations necessitated by the DTV transition." Likewise, its claim that the Commission ignored the interests of broadcasters that acted in reliance on continuation of the UHF discount is unfounded. In fact, the *2016 Repeal Order* pointed out that broadcasters had been on notice of the Commission's plans to repeal the discount since the *2013 NPRM*, and that the Commission had been reviewing whether the UHF discount remained necessary as far back as 1995.

The *2017 Reinstatement Order* is also unsupported by the record. It cites no authority for the claim that the national cap and the UHF discount are "inextricably linked." And its assertion that the FCC has always considered the discount in tandem with the cap is flat out wrong. Similarly, the *2017 Reconsideration Order* falsely characterizes repealing the UHF discount as "tightening the cap" and wrongly claims that reinstating it was needed to restore the *status quo.*

The real impact of reinstating the UHF discount is to relax the 39% cap immediately without having to complete or even conduct a new rulemaking proceeding to consider the cap together with the UHF discount. The fact that within weeks after the discount was restored, Intervenor Sinclair announced plans to acquire Intervenor Tribune in a transaction which, if approved, would give it an audience reach of more than 70% without the UHF discount, is evidence of the impact of the *2017 Reconsideration Order*.

Additional evidence of the pretextual nature of the *2017 Reconsideration Order* is that it is premised on the Commission initiating a new proceeding to consider the UHF discount in conjunction with possible modification of the national ownership cap. This rationale is doubly flawed. First, the Commission lacks statutory authority to modify the 39% cap, as opposed to the UHF discount. The Commission's authority to modify the cap was not necessary to its decision to repeal the discount, was expressly outside the scope of the UHF discount proceeding, and thus was not subjected to public comment in an adversary context. In fact, the Intervenors that now say the Commission has authority to modify both had argued in their comments that the Commission lacked authority to do either. Thus, the Commission's unexplained assertion in both the *2016 Repeal Order* and the *2017 Reconsideration Order* was not adopted pursuant to the exercise of Congressionally-delegated authority and is entitled to no more than *Skidmore*

deference. The only reasonable reading of the Congressional directive in the CAA is that it was intended to fix the national cap at 39%, and that its silence as to the UHF discount manifested an understanding that the Commission would be able to modify the discount in light of the then-forthcoming digital TV transition.

Second, even if the Commission had statutory authority to modify the national cap, it was arbitrary and capricious to premise reinstatement of the discount upon an action that the Commission may or may not take in the future. The Commission cannot prejudge the outcome of a proceeding that does not yet exist based on a record that has not been developed that might not support legal or factual findings needed to modify the national cap. Significantly, it would appear that modification of the national cap would not garner a majority of the current Commission.

Even if it were likely that the Commission might someday vote to modify the national cap, the Commission failed to explain why it was necessary to reinstate the discount in the interim. The Commission's poor track record on promises to begin and complete future rulemakings suggests that the UHF discount could remain in place for a long time. Moreover, history demonstrates that, if the FCC approves transactions that would not be permitted but for the UHF discount, it is unlikely that it will ever require divestiture even if the UHF discount is ultimately repealed again.

STANDING

The standing of the Petitioners is apparent from the administrative record because all participated in this rulemaking proceeding on review and have members who are harmed by the reinstatement of the UHF discount. To err on the side of caution, the Declaration of Matthew F. Wood attesting to Petitioners' standing is attached as Attachment A. The standing of Petitioners Prometheus Radio Project and Media Mobilizing Project is set forth in the administrative record.[69]

ARGUMENT

I. The Commission's decision to reinstate the UHF discount even though it was obsolete and served no public interest purpose was arbitrary and capricious in violation of Section 706 of the APA

Section 706 of the Administrative Procedure Act directs reviewing courts to "hold unlawful and set aside agency action, findings and conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that are "in excess of statutory jurisdiction, authority, or limitations."[70] Title III of the Communications Act gives the Commission authority to grant, renew, or approve the transfer of a broadcast license only when the Commission

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[69] See Ex Parte Letter from Institute for Public Representation, Docket No. 13-236 at 1, n.1 (Apr. 13, 2017) ("IPR April 13 Ex Parte") [JA 262].
[70] 5 USC §706.

determines that the "public interest, convenience, and necessity will be served."[71] Section 303(r) gives the FCC authority to adopt rules to carry out these responsibilities.[72]

A. The *2016 Repeal Order* properly concluded that the UHF discount should be repealed

The Commission used its rulemaking authority under §303(r) when it adopted the 25% audience reach cap in 1985 and discounted the reach of UHF stations to account for their smaller coverage areas. Almost thirty years later, the Commission's rules still imposed a cap, albeit the 39% cap mandated by Congress in the CAA, but any disparities between the audience reach of UHF and VHF stations had been eliminated with the digital transition in 2009. Thus, as it had contemplated since at least 1996, the Commission proposed to eliminate the UHF discount in 2013.

In repealing the UHF discount in 2016, the Commission found that the "UHF discount was forged in an analog world to address an analog coverage deficiency," and "there is no remaining technical justification" for it.[73] Moreover,

> Continued application of the UHF discount seven years after the DTV transition has the absurd result of stretching the national audience reach cap to allow a station group to actually reach up to 78 percent of television households,

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[71] 47 USC §§307-09.
[72] 47 USC §303(r).
[73] *2016 Repeal Order*, 32 FCCRcd at 10226 [JA 36].

> dramatically raising the number of viewers that a station group can reach and thwarting the intent of the cap.…[A]pplying the discount creates a loophole that allows owners to fail to count audience that the stations actually do reach.[74]

The Commission observed:

> Of course, this is not to say that all *stations* are now competitive equals. Disparities continue to exist between stations in terms of viewership, advertising revenue, retransmission consent fees, and programming, to name a few. But these competitive disparities are not the result of any current technical differences between UHF and VHF stations....Disparities between stations today are the result of market competition, programming choices, network affiliation, and capitalization. Moreover, we do not believe that retention of the UHF discount would resolve any of these competitive differences.[75]

In response to Sinclair's claim that repeal of the cap would frustrate the cap's purpose of preserving the balance of power between networks and affiliates, the Commission found that removing the discount would prevent networks from expanding, while at the same time broadcasters that otherwise would exceed the cap after the discount is eliminated–none of which are the Big Four networks–would be grandfathered and would not have to divest any stations.[76]

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[74] *Id*. at 10228-29 [JA 38-39].
[75] *Id.* at 10231 (emphasis in the original) [JA 41].
[76] *Id.* The Commission also found no evidence that the UHF discount was being used to build new broadcast networks. *Id.*

The Commission also rejected the broadcasters' reliance arguments, observing that repeal "should come as no surprise to industry participants" because it had "indicated repeatedly over the past two decades that the transition to DTV, completed for full-power broadcast television stations in June 2009, would undermine the basis for the UHF discount."[77] Nonetheless, the Commission grandfathered existing broadcast station groups exceeding the 39% cap solely as a result of the termination of the UHF discount rule, so that these owners would not have to divest any stations.[78]

B. On reconsideration, the Commission did not present any valid factual or legal basis for reinstating the UHF discount

In *FCC v. Fox Television Stations, Inc*., the Supreme Court held when an agency changes its policy, the APA requires that it "display an awareness that it is changing position," and "of course the agency must show that there are good reasons for the new policy."[79] In this case, the FCC changed its position in reinstating a rule that the Commission had repealed. However, it failed to show how reinstatement served the public interest, or indeed, that there were any good reasons for the new policy.

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[77] *Id.* at 10214 (footnote omitted) [JA 24].
[78] *Id.* at 10234 [JA 44].
[79] *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

When the new Commission majority reinstated the UHF discount in April 2017, it conceded that the "UHF discount no longer has a sound technical basis following the digital television transition."[80] Importantly, however, it did not find that the public interest was advanced in any way by calculating stations' audience reach differently depending on whether they were on UHF or VHF frequencies. Instead, the Commission merely found that in the *2016 Repeal Order*, 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."[81]

The Commission's decision to reinstate an obsolete and counterproductive rule violates Section 706 because it fails to draw a rational connection between the facts and record that show there is no need for the discount and the conclusion to reinstate the discount.[82] This decision was also in excess of the FCC's statutory authority because the Commission failed to establish that reinstatement of the UHF discount advances the public interest objectives of Title III, as is required by Section 303(r).

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[80] *2017 Reconsideration Order,* 32 FCCRcd at 3395 [JA 84].
[81] *Id.*
[82] *Motor Veh. Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983).

1. The *2016 Repeal Order* did not err in repealing the discount without also examining the national cap

One of the primary purposes of reconsideration is to give the agency the opportunity to correct its prior mistakes. Here, although the *2017 Reconsideration Order* characterizes certain findings of the earlier Commission decision as errors, in fact, they are not. For example, the Commission majority claims that the 39% cap and the UHF discount are "inextricably linked" and that the Commission "failed to provide a reasoned explanation for eliminating the discount without also conducting a broader review of the cap."[83] It added:

> 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. *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 retaining the cap while eliminating the UHF discount.[84]

In fact, the 2016 decision carefully explained and justified its decision to address the UHF discount as a standalone matter. It found that

> No party has presented persuasive reasons for revisiting the national cap at this time, and doing so would be far more complex than our decision today to eliminate the UHF discount....Initiating a new rulemaking proceeding to

[83] *2017 Reconsideration Order*, 32 FCCRcd at 3395 [JA 84].

[84] *Id.* (footnotes omitted, emphasis added).

> undertake a complex review of the public interest basis for the national cap....would only delay the correction of audience reach calculations necessitated by the DTV transition.[85]

The Commission added that keeping the UHF discount "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."[86] In contrast, repealing "the analog-era discount thus maintains the efficacy of the national cap."[87]

The *2016 Repeal Order* thus fully justified its decision to protect the integrity of its ownership rules by repealing the discount. While the Commission might have conducted a broader inquiry, its choice not to do so was neither arbitrary nor capricious. There is no requirement that agencies address all questions at the same time.[88] Moreover, as Commissioner Clyburn pointed out,

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[85] *2016 Repeal Order*, 31 FCCRcd at 10232 [JA 42].
[86] *Id.*
[87] *Id.* at 10232-33 [JA 42-43].
[88] *See* Pet. Reply to Opp. to Mot. for Stay at 12-13. *See also FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 522 (2009) ("Nothing prohibits federal agencies from moving in an incremental manner."); *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007)("Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop….They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."); *NAB v. FCC*, 740 F.2d 1190, 1208 (D.C. Cir. 1984)(finding that the FCC "is not constrained…to act in one

despite the majority's claim that the UHF discount and national cap are inextricably linked, it cites no authority requiring that they be considered in tandem.[89]

In fact, the Commission's claim that it "has always considered the UHF discount together with the national cap"[90] is flat out wrong. To the contrary, as discussed above, it previously examined the UHF discount in isolation from the ownership cap not once, but twice, in both 1998 and 2006. Finally, since the 2013 NPRM sought comment solely on whether to repeal or modify the UHF discount, modifying the 39% cap in that proceeding would have violated the APA's requirements of adequate notice.[91]

2. Broadcasters' purported reliance interests did not justify reinstatement of the UHF discount

The *2017 Reconsideration Order* also faulted the prior FCC majority for failing to consider the impact of the UHF discount repeal on the broadcast "industry's reliance on the UHF discount to develop long-term business strategies."[92] Any such reliance, however, was at the broadcasters' own risk. The

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transcendent blow, radically reshaping much of communications law, or not to act at all").

[89] *2017 Reconsideration Order,* 32 FCCRcd at 3407 (Clyburn dissent) [JA 96].

[90] *Id.* at 3394 [JA 83].

[91] 5 USC §553(b)(3).

[92] *2017 Reconsideration Order*, 32 FCCRcd at 3396 [JA 85].

Commission had repeatedly warned the industry since 1996 that the UHF discount should not be considered permanent.[93] And surely after the Commission specifically proposed to repeal the UHF discount in 2013, broadcasters had no reason to rely on it. In any event, to the extent that parties have acquired properties that place it over the 39% cap after repeal, the Commission protected them by grandfathering those acquisitions.

3. Repeal of the UHF discount did not "tighten" the national ownership cap but rather furthered its purpose

The *2017 Reconsideration Order* is simply wrong when it claims that repealing the discount "had the effect of substantially tightening the cap."[94] Nor does restoration of the UHF discount "reinstate the status quo, which had prevailed for more than 30 years," as the Commission asserted in its Opposition to the Motion for a Stay.[95] In fact, reinstatement of the discount blows a hole in the 39% cap. Because of the digital transition, it allows broadcasters to reach up to 78% of the nation's TV homes in an environment where UHF transmission is an advantage, not an obstacle. These facts suggest that the reasons offered by the

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[93] *See supra* pp.7-9.

[94] 32 FCCRcd at 3295 (footnote omitted) [JA 84].

[95] FCC Stay Opp. at 3. The Commission made a similar claim–that its action would "return[] broadcasters to the status quo ante for purposes of calculating their compliance with the cap"–in its Supplemental Regulatory Flexibility Analysis. 32 FCCRcd at 3401 [JA 90].

Commission for restoring the cap are merely pretextual, and the real reason is to allow increased consolidation whether or not the Commission ultimately finds that it can and should modify or repeal the national cap.

The best indication that reinstating the discount was not actually intended to maintain the *status quo* is the fact that, just two weeks after the Commission issued its decision reinstating the discount, Intervenor Sinclair announced plans to acquire Intervenor Tribune. As Bloomberg reported, the "deal to acquire Tribune Media Co. marks the first in what's expected to be a frenzy of media and telecom dealmaking."[96] Sinclair is already the largest station owner. It currently owns or operates more than 142 stations with an actual audience reach in excess of 37.7%.[97] Tribune currently owns or operates 42 TV stations with an audience reach of 44.8%, some of which overlap with Sinclair markets. This transaction would not have been possible until the Commission reinstated the discount; if the Commission approves the Sinclair Tribune transaction, after a few divestitures needed to comply with local ownership rules, the combined entity will likely have an audience reach in excess of 70%.[98]

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[96] Alex Sherman, *Sinclair Gobbles Up Tribune in First Big Media Deal of Trump Era*, Bloomberg (May 8, 2017).
[97] IPR April 13 Ex Parte at 8 [JA 269]. This calculation does not include the stations that Sinclair subsequently acquired from Bonten Broadcasting.
[98] Cong. Research Serv., *Sinclair Broadcast Group Acquisition of Tribune Media: Competitive and Regulatory Issues* at 19.

In sum, because the UHF discount is concededly technologically obsolete, serves no public interest purpose, and in fact undermines the purpose of the national TV ownership rule, reinstating the UHF discount was arbitrary and capricious in violation of Section 706 of the APA.

II. Reinstating the UHF discount so that the Commission might in the future consider raising the national cap at the same time is arbitrary and capricious

The Commission's reinstatement of the UHF discount premised on a future rulemaking to consider raising the national cap at the same time as the need for the discount is also arbitrary and capricious because the Commission lacks the statutory authority to repeal the national cap. And even if it had this authority, it would still be arbitrary and capricious to retain a policy that serves no legitimate purpose in anticipation of a future action that does not appear to have sufficient Commission votes and could take years to conclude, if ever.

A. The FCC lacks the statutory authority to modify the 39% cap

While the Commission stated in the *2016 Repeal Order* that it had statutory authority to modify the national audience reach cap, it did not exercise that authority in repealing the discount, nor did it argue that authority to modify the cap

was a prerequisite for repealing the UHF discount.[99] Thus, the Commission's assertion of jurisdiction to modify the cap, which is devoid of any explanation or consequence, is not entitled to anything more than *Skidmore* deference,[100] and this Court need not give weight to it.

Under *Mead*, an agency earns deference only when Congress has delegated authority to an agency to interpret a statute and "the agency interpretation...was promulgated in the exercise of that authority."[101] Here, Congress intended to fix the national ownership cap at 39%, and did not give the FCC power to alter it. Moreover, the Commission did not issue its interpretation in the context of a proposal to modify the cap where comments were solicited and all points of view were received and considered.[102] Thus, in issuing the statement in the *2016 Repeal Order*, the FCC failed to meet both of the prerequisites for deference established in

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[99] While then-Commissioner Pai complained that the Commission should have included this issue in its rulemaking in 2013, and complained again in his 2016 dissent and the 2017 reinstatement order that the Commission should have considered it, one thing all the Commissioners agree upon is that the Commission did not solicit comment on whether to modify the cap.

[100] *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

[101] *United States v. Mead Corp.,* 533 U.S. 218, 227 (2001).

[102] *See Barnhart v. Walton*, 535 U.S. 212, 222 (factors affecting the degree of deference afforded to a decision include "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question.").

Mead; it "act[ed] pursuant to an erroneous view of law and, as a consequence, fail[ed] to exercise the discretion delegated to it by Congress."[103]

The only reasonable reading of the CAA is that while it prohibits the FCC from raising the cap above 39%, it does not take away the FCC's ability to determine how to calculate the cap. This interpretation is supported by both the language and the Commission's interpretation of §202(c) of the 1996 Act. Section 202(c) directed the FCC to modify its national television rule §73.3555 "by increasing the national audience reach limitation to 35 percent." The Commission promptly increased the cap from 25% to 35%.[104] However, its subsequent actions show that the Commission understood that it retained authority to modify how it was calculated.

In raising the cap to 35%, as Congress directed in 1996, the FCC reminded broadcasters that the UHF discount was under review in a separate proceeding and that acquisitions above the 35% cap would be subject to the outcome of that proceeding.[105] Later that year, the Commission proposed to make changes to the

[103] *GTE Service Corp. v. FCC,* F.3d 768, 775 (D.C. Cir. 2000)(quoting *Prill v. NLRB,* 755 F.2d 941, 942 (D.C.Cir.1985)).
[104] *Implementation of Section 202(c)(1) and 202(e) of the Telecommunications Act of 1996*, 11 FCCRcd at 12374.
[105] *Id.* at 12375.

definition, noting that the 1996 Act "did not address the issue of the measurement of audience reach for the purposes of the new limits."[106]

As described above, in 2003, the Commission adopted its *2002 Biennial Review* decision, which would have raised the ownership cap to 45%, but also included a plan to phase out the UHF discount as TV markets transitioned to digital.[107]

A bipartisan Congress expressed broad disapproval of the FCC's decision to raise the cap to 45%. Concerned that "[t]his rule opens the gates to massive additional concentration, mergers, and acquisition to fewer and fewer companies owning more and more properties,"[108] Senator Dorgan sponsored a joint resolution under the Congressional Review Act to overturn the Commission's action. The Senate passed the resolution in September 2003 by a vote of 55 to 40.[109] Next, a subcommittee on appropriations of the House passed an Appropriations Bill that would have codified the 35% cap. At the conference, however, members agreed on a 39% cap. This version passed over the objections of many members, who wanted to keep the cap at 35%. Representative Obey, for example, characterized

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[106] *Broadcast Television National Ownership Rules NPRM*, 11 FCCRcd 19949, 19949 (1996).
[107] *See supra* at p.9.
[108] 149 Cong. Rec. S11383 (Sept. 11, 2003).
[109] *Disapproving Federal Communications Commission Broadcast Media Ownership Rule*, S.J. Res. 17, 108th Cong. (2003).

the conference agreement as "a backroom deal to strengthen the hands of the national media giants against local control of television. It allows ABC and NBC to acquire additional stations....and it takes Fox and CBS off the hook so that they do not have to divest."[110]

After passage of the CAA, the FCC sought comment as to "whether the enactment of the 39% cap affects our authority to modify or eliminate the UHF

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[110] 149 Cong. Rec. H12315 (Nov. 25, 2003). *See also* 149 Cong. Rec. H12766 (Dec. 8, 2003)(Rep. Kilpatrick)("Even though House and Senate conferees originally agreed to keeping the current (35 percent) limit, the White House forced a compromise at 39 percent, which would accommodate to giant media interests."); 149 Cong. Rec. S16087 (Dec. 9, 2003)(Sen. Byrd)("The practical effect of changes demanded by the White House is to protect Rupert Murdoch's Fox Television Network and CBS-Viacom from having to comply with the lower 35-percent ownership caps a congressional version of the bill would put in place. The White House is boosting special corporate interests at the expense of the people's interest for balanced news and information."); 150 Cong. Rec. S66 (Jan. 21, 2004)(Sen. McCain)("this provision is objectionable because while purporting to address public concerns about excessive media consolidation, it really only addresses the concerns of special interests. It is no coincidence, my friends, that the 39 percent is the exact ownership percentage of Viacom and CBS. Why did they pick 39 percent? So that these two major conglomerates would be grandfathered in."); 150 Cong. Rec. S129 (Jan. 22, 2004)(Senator Leahy)("This so-called 'compromise' would only serve to the advantage of media conglomerates-several of whom are already in violation of the 35-percent cap and who would otherwise be required to divest some assets in order to comply with the rule."); *Id.* (Sen. Feinstein)("The practical effect of changes demanded by the White House is to protect Rupert Murdoch's Fox television network and CBS-Viacom from having to comply with the lower 35 percent ownership caps that conferees had included in the original conference report. The White House is boosting special corporate interests at the expense of the people's interest for balanced news and information.").

discount."[111] Petitioner United Church of Christ's comments explained that it had no effect on the Commission's ability to modify the UHF discount. The language of §629(1) of the CAA merely amended §202(c)(1)(B) of the 1996 Act by striking "35 percent" and inserting "39 percent." It does not even mention the UHF discount. When Congress lowered the cap in response to the Commission raising the cap to 45% in the *2002 Biennial Review*, it well understood how the national cap and UHF discount were related, having considered them at a hearing just a few months earlier.[112] Because of this, if Congress had intended to lock in the UHF discount as well as the 39% cap, it surely would have said so. Moreover, since the purpose of the amendment was to roll back the overly-deregulatory 45% cap, interpreting the CAA as limiting the FCC's ability to modify the calculation of the cap in response to expanding UHF coverage would lead to the absurd result of effectively raising the cap.

On appeal, the Third Circuit vacated the Commission's order in the *2002 Biennial Review* so that the phase out of the UHF discount never took place. In reviewing the *2002 Biennial Review* decision, the Third Circuit found that the CAA removed the UHF discount from the purview of §202(h), and thus beyond

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[111] *Additional Comment Sought on UHF Discount*, 19 FCCRcd 2599, 2600 (2004).
[112] *See, e.g.*, *FCC Oversight: Media Ownership and FCC Reauthorization*, Hearing before the Senate Committee on Commerce, Science, and Transp., 108th Cong. 938 (2003).

the parameters of the (now) quadrennial review.[113] While expressing some doubt about the FCC authority to modify the national TV rule, it left it up to the Commission to decide in the first instance whether it had the authority to modify or eliminate the UHF discount outside the context of the reviews mandated by Section 202(h).

Thus, in the *2006 Quadrennial Review*, the Commission again asked whether the Commission "should retain, modify, or eliminate the UHF discount."[114] It decided to consider that question in a separate proceeding.[115] Unfortunately, it took the Commission some five years to commence that separate proceeding.

The Commission launched that separate proceeding in 2013 by issuing an NPRM. The NPRM sought comment on the Commission's tentative conclusion that it had "the authority to modify the national television ownership rule, *including the authority to revise or eliminate the UHF discount*."[116] As discussed above, Petitioners Free Press and others commented that the FCC not only had the

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[113] *2006 Quadrennial Review Order*, 23 FCCRcd at 2084-85, *aff'd in part, rev'd in part sub nom. Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011).
[114] *2006 Quadrennial Review FNPRM*, 21 FCCRcd at 8848-49. The *Further Notice* refreshed the Commission's record on its authority to alter the UHF discount.
[115] *2006 Quadrennial Review Order*, 23 FCCRcd at 2085.
[116] *UHF Discount NPRM*, 28 FCCRcd at 14329 (emphasis added) [JA 6].

authority, but the obligation to repeal the discount while others, including Intervenors ION, Fox, and Sinclair, argued the CAA barred the FCC from modifying both the cap and the UHF discount.[117]

With no discussion, the *2016 Repeal Order* affirmed the Commission's tentative conclusion that it had authority to modify both the cap and the UHF discount outside of the quadrennial review process.[118] However, since the Commission did not contemplate modifying the national cap and had not sought comment on it, its holding with respect to the national cap was in the nature of *dicta*.

On reconsideration, the Commission did not revisit the question of its statutory authority. Indeed, the issue comes up only in a footnote rejecting Petitioners' argument that it was arbitrary and capricious to reinstate the UHF discount pending action in a future proceeding on whether to modify the cap, because the Commission lacked the authority to do so. Even here, the Commission did not directly consider the issue of its statutory authority, but simply contended that

> if the [earlier] 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

[117] *See supra* nn.43 & 44.
[118] *2016 Repeal Order,* 31 FCCRcd at 10222 [JA 32].

> was part of the cap, and the *UHF Discount Order* would need to be vacated for that reason.[119]

But the Commission offers no support for this claim. Moreover, it is inconsistent with the Commission's prior actions. And as discussed above, the Commission has consistently considered the UHF discount as a separate question from the cap itself and has never before asserted that in lowering the cap Congress deprived the Commission of the ability to eliminate the UHF discount when the reason for it no longer existed and keeping the discount undermined the cap itself.

B. Assuming *arguendo* that the Commission has authority to modify the national ownership cap, it is unnecessary and contrary to the public interest to reinstate the discount pending the outcome of a rulemaking that has not yet been launched and may never be completed

When it reinstated the discount, the Commission said it would reconsider whether to retain the discount "as part of a broader reassessment of the national audience reach cap, which we will begin later this year."[120] That was in April 2017. Yet, as of September 25, the Commission has not begun the promised reassessment, and there is reason to expect that the Commission will not be in a hurry to complete such an inquiry.

It is arbitrary and capricious to premise action today on something the Commission may or may not do in the future. The Commission cannot prejudge

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[119] *2017 Reconsideration Order*, 32 FCCRcd at 3398, n.60 [JA 87].
[120] *Id.* at 3396 [JA 85].

what the record will show. Nor can the Commission know who will be on the Commission or how they will vote. If anything, it would appear that opening a proceeding to modify the national cap could not garner a majority of the current Commission membership. Commissioner O'Rielly would support repeal as a policy matter,[121] but does not believe the Commission can modify the national ownership cap. Commissioner Rosenworcel, who has returned to the Commission for a new term, voted with Commissioner Clyburn to repeal the discount. Both Commissioners Clyburn and Commissioner Rosenworcel have expressed strong support for maintaining the national cap.

Even if it were likely that the Commission might someday vote to modify the national ownership cap, the Commission's reinstatement decision does not even attempt to justify why indefinite restoration of a provision that no longer has any valid policy justification can be in the public interest, or why it was necessary to reinstate the discount in the interim. This is especially so in light of the reality that the FCC has frequently been slow to initiate promised proceedings and even slower to complete them. The history of this case is a good example: in 2006, the Commission stated its intention to review the UHF discount after the digital television transition, but did not begin the process until 2013 and did not issue the repeal order until 2016.

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[121] *See supra* p.17.

The Commission's track record on fulfilling promises to begin and complete future rulemakings suggests that the UHF discount could remain in place for a long time. For example, the Commission initiated the *2010 Quadrennial Review* early in an effort to reassure the Third Circuit that it would move expeditiously in completing this review.[122] Even so, the Commission did not act until March 2014, when it determined it needed more information and consolidated the *2010 Quadrennial Review* with the *2014 Quadrennial Review*.[123] This Commission finally completed the 2010 review in August 2016, only after the Third Circuit found that the FCC had unreasonably delayed its action.[124]

This Court is well aware of other cases in which the FCC was unable, and perhaps even disinclined, to complete certain proceedings in a timely manner.[125]

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[122] *Media Bureau Announces Workshops to Begin the 2010 Quadrennial Review of the FCC's Media Ownership Rules,* 24 FCCRcd 12163 (2009). *See also Status Report of the FCC,* Docket No. 08-3078 (3d Cir., Oct. 1, 2009).
[123] *2010 Quadrennial Review Order*, 29 FCCRcd 4371 (2014), *reversed in part, vacated in part and remanded, Prometheus Radio Project v. FCC*, 824 F.3d 33 (2016).
[124] *2014 Quadrennial Review Order*, 31 FCCRcd 9864 (2016).
[125] *See, e.g., Amendment of the Emergency Alert System,* 31 FCCRcd 2414 (2016), *review pending sub nom. MMTC v. FCC*, No. 16-1222 (D.C. Cir.)(taking 14 years to promulgate a rule); *In re COMPTEL*, No. 11-1262 (D.C. Cir.)(mandamus petition challenging failure to act on rulemaking for 6 years); *Core Communications v. FCC*, 531 F.3d 849 (D.C. Cir. 2008)(7 years to complete a adopt a rule); *Business Data Services,* 32 FCCRcd 3537 (2017), *review pending sub nom. Citizens Telecommunications v. FCC*, No. 17-2296 (8th Cir.)(2017 decision finally resolving matter considered in *COMPTEL* after 6 more years); *Rates for Interstate Inmate Calling Services*, 28 FCCRcd 14107 (2013), *vacated in*

There are also numerous examples of Commission rulemaking proceedings that it has never completed.[126]

With the UHF discount back in place, the Commission may not see the need to hurry to lift the 39% cap. Indeed, CBS, which has an actual audience reach of 38%,[127] specifically urged the Commission to "act immediately to reinstate the UHF discount and that it *do so without waiting to launch any further proceeding* on other ownership issues."[128] CBS explained that "[t]ime is of the essence in providing broadcasters the ownership breathing room they so desperately need to compete with other video services."[129]

It is important to note that even if the Commission were to condition the grant of transfer applications on the applicants coming into compliance with the rules adopted in the future pending rulemaking, this would not adequately protect the public interest. The Commission has demonstrated a practice in similar cases

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*part and remanded sub nom. Global Tel*Link v. FCC*, 859 F.3d 39 (D.C. Cir. 2017), *petition for rehearing pending* ("interim" rules issued after 10 years, final rules issued 2 years later).

[126] *See, e.g.*, *Standardizing Program Reporting Requirements for Broadcast Licensees*, 26 FCCRcd 16525 (2011); *Sponsorship Identification Rules and Embedded Advertising*, 23 FCCRcd 10682 (2008); *Revision of the Public Notice Requirements of Section 73.3580*, 20 FCCRcd 5420 (2005); *Compatibility Between Cable Systems and Consumer Electronics Equipment*, 15 FCCRcd 17568 (2000).

[127] IPR April 13 Ex Parte at 8 [JA 269].

[128] CBS Ex Parte Communication, Docket 13-326 at 1 (Jan. 17, 2017)(emphasis added) [JA 244].

[129] *Id.*

of failing to follow through with enforcing conditions that would require divestitures.[130] Thus, it is both contrary to the Communications Act and arbitrary and capricious for the Commission to reinstate the UHF discount based on future action that is unlikely to ever take place, and at best, could take a long time.

CONCLUSION

Wherefore, Petitioners ask that the Court reverse and vacate the *2017 Reconsideration Order*, direct the FCC to remove the last sentence of 47 CFR §73.3555(e)(2), and grant all such other relief as may be just and proper.

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[130] *See, e.g, Fox Television Stations, Inc*. 29 FCCRcd 9578-99, 9583 (2014)(repeated "temporary waivers" from 2001 through the present); *2006 Quadrennial Review Order,* 26 FCCRcd 11149, n. 5 (2011)(17 successive extensions of divestiture requirement)*; Counterpoint Communications, Inc*., 20 FCCRcd 8582 (2005)(describing history of repeated extensions of divestiture requirement; the matter was ultimately mooted by the sale of the licensee's parent company for unrelated reasons).

STATUTORY AND REGULATORY ADDENDUM

47 USC §303(r) 1

47 USC §309(a) 2

Telecommunications Act of 1996, §§202(c) & 202(h), Pub. L. No. 104-104 3

Consolidated Appropriations Act, 2004, §629, Pub. L. No. 108-199...................4

47 CFR §73.3555(e) 5

47 USC §303(r)

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 USC §309(a)

Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Telecommunications Act of 1996, §§202(c) & 202(h)
Pub. L. No. 104-104

BROADCAST OWNERSHIP.

* * * *

(c) Television Ownership Limitations.—

(1) National ownership limitations.—The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)--

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 39 percent.

* * * *

(h) Further Commission Review.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).

Consolidated Appropriations Act, 2004, §629
Pub. L. No. 108-199

The Telecommunications Act of 1996 is amended as follows—

> (1) in section 202(c)(1)(B) by striking "35 percent" and inserting "39 percent";
>
> (2) in section 202(c) by adding the following new paragraphs at the end:
>
> > "(3) Divestiture.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.
> >
> > "(4) Forbearance.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B);"; and

(3) in section 202(h) by striking "biennially" and inserting "quadrennially" and by adding the following new flush sentence at the end:

> > "This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).".

47 CFR §73.3555(e)

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.

(ii) No market shall be counted more than once in making this calculation.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because this brief contains 10831 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(f).

Dated: December 19, 2017

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was filed with the Court via the Court's ECF system on December 19, 2017, and a copy of the brief was served on all counsel of record by operation of the ECF system on the same date.

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