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

REPLY BRIEF FOR PETITIONERS

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GLOSSARY

ADI	Area of Dominant Influence
CAA	Consolidated Appropriations Act of 2004, Pub.L. No. 108–199, 118 Stat. 3.
DMA	Designated Market Area
DTV	Digital Television
FCC	Federal Communications Commission
NPRM	Notice of Proposed Rulemaking
UCC	Office of Communication Inc., United Church of Christ
UHF	Ultra-High Frequency
VHF	Very High Frequency

INTRODUCTION

Neither the governmental Respondents nor the broadcast industry Intervenors effectively respond to Petitioners' demonstration that it was arbitrary and capricious to reinstate the UHF discount for an indefinite period.[1] It is not hard to see that reinstatement of the concededly obsolete discount is a shrewd, but indefensible, mechanism to circumvent the Congressionally-mandated limit on national TV ownership.

SUMMARY

Perhaps sensing the weakness of their substantive arguments, Respondents belatedly attempt to avoid this Court's jurisdiction by arguing that Petitioners lack standing and that their arguments are barred because they were not timely presented to the Commission as required by 47 U.S.C. §405. However, the record is replete with evidence showing that Petitioners had identified the injuries that, under the law of this Circuit, establish cognizable injury, and that reversal of the FCC's decision would provide redress. The declaration appended to Petitioners' brief, submitted out of an abundance of caution, independently establishes Petitioners' standing.

[1] "Petitioners" refers to the following parties: Free Press, Office of Communications of United Church of Christ ("UCC"), National Hispanic Media Coalition ("NHMC"), Media Alliance, Prometheus Radio Project ("PRP"), Media Mobilizing Project ("MMP"), and Common Cause.

As to the merits, Respondents fail to support the FCC's position that the earlier Commission majority failed to take into account factors other than the conceded obsolescence of the UHF discount in deciding to repeal it, and that the Commission could properly assess repeal of the discount only if it were viewed in conjunction with the 39% national television ownership cap. In fact, the Commission had reasonably rejected other arguments in support of retaining the discount. So, too, its determination that long-overdue repeal of the discount was necessary to end use of the discount to evade the national cap and thus preserve its integrity was thoroughly and persuasively explained.

Respondents ineffectively attempt to justify the Commission's indefinite reinstatement decision pending the outcome of a new proceeding which will also consider possible changes to the national cap. They do not respond to Petitioners' showing that, under *Mead*, the FCC's statutory interpretation does not merit *Chevron* deference. With or without deference, they fail to overcome Petitioners' showing that Congress clearly intended to lock the 39% cap in place. Nor do they show that the Commission offered any reason, much less a persuasive one, to explain why it was necessary to restore the discount pending the outcome of a future proceeding, especially considering the likelihood that a majority of the Commission will not vote to modify the national cap.

ARGUMENT

I. THIS COURT HAS JURISDICTION.

Petitioners satisfy both associational and Article III standing. Each Petitioner has members who watch television and who will be harmed if the Commission's reinstatement of the UHF discount is upheld. Moreover, this standing is evident from the administrative record.

A. Petitioners represent their member-viewers.

An association may sue on behalf of its members when "its members would have standing to sue in their own right[,]" the issue is "germane to the organization's purpose[,]" and the relief requested does not require the members' participation.[2] Respondents do not dispute that media ownership is germane to the organizations' purposes, or contend that the participation of individual members is necessary. Nor do they seriously challenge Petitioners' claims to have members who view television.[3]

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[2] *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

[3] This fact is set forth in the record. *E.g.*, PRP and MMP both stated they have members who "regularly listen to and view commercial and non-commercial radio and television." April 13 Ex Parte at 1, n.1[JA 262]. In any event, if one party can establish standing, that is sufficient. *Hardaway v. DCHA*, 843 F.3d 973, 979 (D.C. Cir. 2016)(quoting *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228, 1232 (D.C. Cir. 1996)).

Viewer standing was first recognized in 1966. In *UCC v. FCC*, this Court held that since standing was "designed to ensure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience."[4] Subsequently, in *Llerandi v. FCC*, this Court held that "listeners are, by definition, 'injured'" when the Commission grants a license in violation of its ownership rules.[5]

In *NAACP v. FCC*, this Court found organizations representing viewers had standing to challenge an FCC rulemaking decision concerning broadcast ownership.[6] There, the NAACP and others (including UCC) sought review of the FCC's repeal of the Top 50 Policy, a provision related to national TV ownership. This Court found that "Petitioners, as a group of citizens interested in diverse programming sources and affected by ownership concentration patterns, have standing to bring this suit that seeks to preserve a policy originally designed to ensure diversity through multiple ownership limitations."[7] Thus, the *NAACP* decision is on all fours with this case and controls here.

[4] 359 F.2d 994, 1002 (D.C. Cir. 1966).
[5] 863 F.2d 79, 85 (D.C. Cir. 1988).
[6] 682 F.2d 993 (D.C. Cir. 1982).
[7] *Id.* at 999, n.5.

The Petitioners here routinely participate in appeals of Commission decisions affecting ownership and programming. These organizations are well known to Respondents, and their standing is rarely, if ever, challenged. Indeed, when PRP, UCC, and Media Alliance sought review of the Commission's 2002 Biennial Review of broadcast ownership rules, no one contested their standing.[8]

B. Petitioners have Article III standing.

Petitioners also meet the test for Article III standing, which requires a party to show (1) injury-in-fact, (2) causation, and (3) redressability.[9] Injury-in-fact requires Petitioners to show that the Commission action, *i.e.*, the reinstatement of the UHF discount, "[has] caused a traceable 'concrete and particularized' harm to their members that is 'actual or imminent.'"[10] This does not require Petitioners to

[8] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004). Likewise, neither this Court nor the Supreme Court questioned viewers' standing to challenge the FCC decision not to require divestiture of newspaper-broadcast cross-ownership combinations. *NCCB v. FCC*, 555 F.2d 938, 966 (D.C. Cir. 1977), *aff'd in part, rev'd in part*, *FCC v. NCCB*, 436 U.S. 775 (1978). Nor was standing an issue in *WNCN Listeners Guild v. FCC*, where listeners challenged the FCC's change in policy regarding format changes. 610 F.2d 838 (D.C. Cir. 1979), *rev'd on other grounds*, 450 U.S. 582 (1981). Similarly, UCC's standing to challenge the FCC's repeal of radio program guidelines was never questioned. *UCC v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983). Tellingly, when Fox sought review of the *2016 Repeal Order*, no one challenged the standing of groups representing viewers to intervene. *Twenty-First Century Fox, Inc. v. FCC*, D.C. Cir. No. 16-01375.

[9] *Sierra Club v. EPA*, 292 F.3d 895, 895 (D.C. Cir. 2002)(citing *American Petroleum Inst. v. EPA*, 292 F.3d 895, 63 (D.C. Cir. 2000)).

[10] *Id.* (citations omitted).

prove harm has in fact resulted from the rulemaking, but only "a 'substantial probability' that local conditions will be adversely affected and thereby injure a member of the organization."[11]

Here, the record shows that Petitioners will suffer injury-in-fact if the reinstatement of the UHF discount is upheld. Free Press' comments showed that although the UHF discount was intended originally to serve public interest objectives, today it actually "decreases competition, diversity, and localism rather than promoting these goals."[12] The comments explained that "[b]ecause of the discount, the companies with the greatest access to capital can acquire stations in excess of the 39% limit—up to as much as 78% of the country."[13] Retaining the UHF discount permits "large station groups to continue the wave of consolidation that has surfaced over the past year and a half," thereby undermining localism.[14]

Retaining the UHF discount also "strikes a blow to broadcast diversity nationwide and in local markets."[15] In concentrated markets, "small and single station owners are less able to compete with large conglomerates" and

[11] *Id.* (citations omitted).
[12] Free Press Comments at 2 (Dec. 16, 2013)[JA 133].
[13] *Id.* at 4[JA 135].
[14] *Id.*
[15] *Id*. at 5[JA 136].

consolidation tends to force out "the few broadcast licensees who are women or people of color."[16]

In Reply Comments, Petitioners Free Press, Common Cause, Media Alliance and UCC countered industry claims that competition had eliminated the need for the national cap.[17] They pointed out that 2013 was the biggest year for television consolidation since the turn of the century, with well over 200 full-power broadcast television stations sold.[18] Because a substantial majority of viewers continue to get news from their local television broadcast stations, viewers are harmed when large owners attempt to achieve "economies of scale," by replacing local news with "programming that is cheap to produce, like traffic, weather, and sports updates" and utilizing sharing arrangements in which stations in the same market show the same local news.[19]

Similarly, in their Opposition to Petitions for Reconsideration, Free Press, NHMC, Common Cause, Media Alliance, and UCC, opposed reinstatement of the UHF discount because it would allow station groups to dramatically increase the number of viewers they could reach.[20]

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[16] *Id.*
[17] Reply Comments of Public Interest Commenters (Jan. 13, 2014)[JA 201].
[18] *Id.* at 6-7[JA 201-202].
[19] *Id.* at 7-8[JA 202-203].
[20] Opposition of Public Interest Commenters to Petitions for Reconsideration at 4 (Jan. 10, 2017)("Opp.")[JA 239].

The *April 13 Ex Parte* filed by PRP and MMP shows how restoring the UHF discount would allow large station groups to acquire additional stations and increase their actual audience reach.[21] They cited numerous press reports predicting that reinstating the UHF discount would result in "a wave of deals among media companies" that would "diminish diversity in the mass media and harm the public's First Amendment right to have diverse sources of information."[22]

Thus, the record clearly shows that Petitioners' members would be harmed by reinstatement of the UHF discount, and they meet all of the requirements for standing.

C. Attacks on Petitioners' Declaration are irrelevant and unjustified.

Because Petitioners' standing is apparent from the record, they did not need to include a declaration with their brief, but did so in an abundance of caution.[23] Thus, the Court need not address allegations by Respondents and Intervenors that the declaration is insufficient.[24]

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[21] For example, NBC-owned stations currently reach 36.6% of the national audience, but if the UHF discount is restored, NBC's reach would be calculated at only 19.4%, thus permitting it to purchase many more television stations. April 13 Ex Parte at 5[JA 266].
[22] *Id.* at 9-12[JA 270-273].
[23] Pet. Br. at 24.
[24] Resp. Br. at 20; Int. Br. at 17-21.

In any event, the declaration is sufficient to establish standing. Petitioners do not claim "automatic" standing based simply on having members that are viewers or as "public ombudsmen."[25] Free Press' declaration clearly establishes that it has many "members that are regular television viewers" and that its mission is "to promote diverse and independent media ownership, and to prevent the concentration of media markets and the harms that flow therefrom."[26]

In arguing that Free Press' declaration did not show "concrete and particularized" evidence of actual injury, Respondents cite two cases that arise under a provision of the Communication Act, 47 U.S.C. §309, that does not apply here.[27] Section 309 requires parties opposing a license application to file a declaration making "specific allegations of facts sufficient to show" that grant of the license would not serve the public interest. In *Rainbow/PUSH I*, the Court found Petitioners' declarations failed to show that the harm to its member-viewers was caused by the FCC's decision to impose a lower fine for the unlawful transfer of control of a license.[28] In *Rainbow/PUSH II*, the Court found petitioners' declarations failed to show injury-in-fact because listeners were not the intended

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[25] Resp. Br. at 22; Int. Br. at 20.
[26] Decl. at 1.
[27] Resp. Br. at 22, citing *Rainbow/PUSH Coal. v. FCC*, 330 F.3d 539, 544 (D.C. Cir. 2003)("*Rainbow/PUSH I*") and *Rainbow/PUSH Coal. v. FCC*, 396 F 3d 1235, 240 (D.C. Cir. 2005)("*Rainbow/PUSH II*"); 47 U.S.C. §309.
[28] 330 F.3d at 544.

beneficiary of the FCC's rules against employment discrimination.[29] It distinguished *Llerandi* because:

> the "ultimate point" of the duopoly rule was "to assure (or at least enhance) diversification of viewpoints within the broadcast industry. Thus, this court had little difficulty finding that a listener, who would be directly affected by the programming diversity the rule was designed to promote, had standing to challenge the Commission's alleged violation of the rule."[30]

Here, because Petitioners are the intended beneficiaries of the national television ownership limit, and reinstatement of the UHF discount reduces program diversity, Petitioners have shown injury-in-fact.

D. Section 405 does not bar judicial review.

The Court should reject Respondents' argument that §405 bars consideration of Petitioners' argument that reinstating the UHF discount while the FCC considers whether to modify the 39% cap was arbitrary and capricious because the Commission lacks the authority to modify the cap.[31]

Section 405 "'codif[ies] the exhaustion of administrative remedies doctrine,' which requires those challenging the Commission's action 'to give the FCC a fair

[29] 396 F.3d at 1242.
[30] *Id.* at 1243 (quoting *Llerandi*, 863 F.2d at 84).
[31] Resp. Br. at 33-34.

opportunity to pass on a legal or factual argument.'"[32] It bars jurisdiction only when the Commission "has been afforded no opportunity to pass" on questions of law or fact.[33] This standard is not particularly demanding. It does not require that "the issue be raised with '[a]bsolute precision,' and 'judicial review is permitted so long as the issue is necessarily implicated by the argument made to the Commission.'"[34] Nor does it require "the party seeking judicial review of an issue be the same party that provided the Commission with opportunity to pass on the issue."[35]

Here, the Commission had a fair opportunity to consider this issue because it was explicitly raised in *ex parte* presentations in April 2017.[36] In a meeting with Commission staff on April 7, 2017, UCC and Common Cause argued that it was

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[32] *Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1460 (D.C. Cir. 1996)(citations omitted); *See also*, *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997)("The purpose of section 405 is to require complainants to give the FCC a 'fair opportunity' to pass on a legal or factual argument before coming to this court.").

[33] 47 U.S.C. §405(a); *Time Warner Entm't Co., L.P. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998).

[34] *All American Telephone Co. v. FCC*, 867 F.3d 81, 93 (D.C. Cir. 2017), citing *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2013) (citation and internal quotations omitted). Section 405 is not an impediment to review if the issue was raised in dissent. *Time Warner Entm't* 144 F.3d at 80, *citing UCC v. FCC*, 465 F.2d 519, 524 (D.C. Cir. 1972).

[35] *All American Telephone*, 867 F.2d at 94.

[36] *Amendment of Section 73.3555(e)*, 32 FCCRcd at 3398, n.60 (2017)("*2017 Reconsideration Order*")[JA 87].

"arbitrary and capricious to leave a concededly obsolete and irrational policy in place on the assumption that prejudges the outcome of a future proceeding, likely to be voted upon by a newly composed five member Commission."[37] Shortly thereafter, PRP and MMP filed a written *ex parte* elaborating on this argument.[38]

In footnote 60 of the *2017 Reinstatement Order*, the Commission rejects these filings claiming they are untimely petitions for reconsideration under 47 CFR 1.429(f). However, Section 1.429(f) does not apply because the April *ex partes* were filed in response to the March 30, 2017 draft order, in which the Commission first revealed its intent to reinstate the UHF discount pending the outcome of a proceeding to examine whether the cap continues to serve the public interest. The draft order clearly invited *ex parte* presentations in the first footnote when it stated:

> the Commission's ultimate resolution of those issues remain under consideration and subject to change….The Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration by the Commission, the public interest would be served by making this document publicly available. The FCC's ex parte rules apply and presentations are subject to "permit-but-disclose."[39]

[37] April 11 Ex Parte at 1-2 (April 11, 2017)[JA 260-261].
[38] April 13 Ex Parte[JA 262].
[39] 2017 Draft Order, *Amendment of Section 73.3555(e)* 1, n.* (Mar. 30, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344155A1.pdf.[JA 64].

The Commission only began releasing draft orders in February 2017 as a pilot program that was expanded to include all agenda items in March 2017.[40] Chairman Pai initiated this pilot program so that the public, not just "[l]obbyists with inside-the-Beltway connections" would know what was in the draft and could comment on it.[41]

Moreover, the *2017 Reconsideration Order* goes on to address Petitioners' arguments: "Alternatively and independently, however, *we find that these new arguments lack merit*."[42] It claims the parties ignored "the Commission's prior analysis and conclusion that it has such authority, which remains undisturbed."[43] It adds that if the Commission lacked authority to modify the cap, it would also lack authority to eliminate the discount. Finally, it rejects the argument that it was

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[40] FCC Chairman Ajit Pai, *Springing Forward for the Public Interest: The FCC's March Agenda* (Mar. 2, 2017), https://www.fcc.gov/news-events/blog/2017/03/02/springing-forward-public-interest-fccs-march-agenda.
[41] Statement of FCC Chairman *Ajit Pai, Announces Pilot Program to Release Commission Documents to the Public*, FCC News (Feb. 2, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343303A1.pdf; *See also Statement of Commissioner Michael O'Rielly on Chairman's Release of Open Meeting Documents* (Feb. 2, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-343306A1.pdf (releasing drafts will "be a significant upgrade in terms of quality of feedback, quality of process, and ultimately quality of the Commission's work product").
[42] *2017 Reconsideration Order*, 32 FCCRcd at 3398, n.60 (emphasis added)[JA 87].
[43] *Id.*

arbitrary and capricious to reinstate the UHF discount when the Commission may decide at the conclusion of the new rulemaking proceeding not to adjust the cap.

Even before the *ex parte letter* was filed, the Commission had multiple opportunities to address its statutory authority. The NPRM specifically sought comment on the FCC's tentative conclusion that it retained "authority to modify both the national audience reach restriction and the UHF discount," and specifically asked if this "tentative conclusion" was consistent with the CAA.[44] Petitioners commented that while the Commission could eliminate the UHF discount, it had no authority to modify the cap.[45] Other parties, including Intervenors now supporting reinstatement of the discount, commented that the Commission lacked authority to modify both the discount and the cap.[46] Thus, the Commission had a fair opportunity to pass, and did pass, on the extent of its authority to modify the discount and the cap.

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[44] *Amendment of Section 73.3555(e),* 28 FCCRcd 14324, 14329-30 (2013)("2013 NPRM")[JA 6-7].

[45] Free Press Comments at 6[JA 137]; Reply Comments of Public Interest Commenters at 3[JA 198].

[46] For example, Sinclair flatly argued that the "FCC does not have the authority to modify any aspect of the national television ownership cap, including the UHF discount." Sinclair Comments at i (Dec. 16, 2013)[JA 170]. *See also* Fox Comments at 6 (Dec. 16, 2013)[JA 108]; Trinity Comments at 2 (Dec. 16, 2013)[JA 191].

Finally, Respondents argue that it lacked a fair opportunity to pass on Petitioners' arguments because Petitioners took conflicting positions in earlier stages of this proceeding.[47] Respondents contrast the April 2017 *ex parte* letters, which argued that the Commission lacked authority to modify the cap, with statements from earlier filings, which they characterize as "asserting that the FCC had authority to change the cap."[48] Respondents cite only two sentences, both taken out of context, to support this false assertion. In fact, these filings actually argued the opposite of what the Respondents' claim.[49]

In any event, even if some Petitioners had taken inconsistent positions in prior filings, Section 405 would not bar the Court from considering their arguments. The FCC overstates the holding in *Busse,* in which station owners

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[47] Resp. Br. at 34.

[48] *Id.* at 33, n.13.

[49] The first sentence is from the Opposition at 3. That sentence quotes language from the *2013 NPRM*, 28 FCCRcd at 14329[JA 6], that the FCC "has the authority to modify the national television ownership rule, including the authority to revise or eliminate the UHF discount." The Opposition does not argue that the FCC can or should modify the ownership rule; indeed, it explicitly objected to reinstating the discount because it would effectively raise the cap to 78% in contravention of the CAA. Opp. at 4[JA 239]. The second sentence comes from a paragraph in the Reply Comments of Public Interest Commenters at 7 making the point that broadcast commenters were being inconsistent in arguing that the FCC could modify the cap but not the discount. This comes after the Reply Comment argues that retaining the UHF discount would be arbitrary and capricious because it was inconsistent with Congress' sole intent to reduce the national ownership cap. *Id.* at 2-5 [JA 197-200]. In any case, Petitioners PRP and MMP did not join these earlier filings.

challenged the approval of a competitor's license applications on the condition that the competitor air ABC network programming on the new station.[50] The mere fact that Appellants took inconsistent positions before the FCC, this Court found, did not mean the FCC lacked a fair opportunity to consider their argument on appeal. Rather, it found that the FCC lacked the opportunity because at the time it made its decision it was "not at all clear" whether the competitors actually opposed the condition, and their "most recent" filing had "implicitly encouraged" the FCC to enforce the condition.[51]

By contrast, Petitioners here have never advocated for repeal or relaxation of the national ownership cap. At most, some did not disagree with the *2016 Repeal Order*'s assertion that the Commission had authority to modify both the UHF discount and the cap, when in fact, only modification of the discount was at issue. To the extent the Commission was unsure of Petitioners' views, the most recent expression in the April *ex parte* letters should have cleared up any misconceptions. Thus, Section 405 does not bar review by this Court.

[50] *Busse*, 87 F.3d at 1461.
[51] *Id.*

II. REINSTATEMENT OF THE UHF DISCOUNT WAS ARBITRARY AND CAPRICIOUS.

Turning to the merits, Respondents try, but fail, to justify the Commission's decision to reinstate the concededly obsolete UHF discount.

A. The *2016 Repeal Order* justified repeal of the UHF discount.

Having conceded that the original policy justification for the UHF discount no longer exists,[52] Respondents nonetheless insist that reinstatement was required because the earlier Commission failed to consider other reasons for retaining the discount.[53] However, the *2016 Repeal Order* did address those considerations and properly found them inadequate to justify maintaining the discount.[54]

Respondents first assert that the harm to broadcasters' reliance interests outweighs possible benefits.[55] The *2016 Repeal Order*, however, thoroughly explains why no broadcaster could have reasonably relied on continued application of the discount; its demise was inevitable.[56] As early as 1996, the Commission expressly warned broadcasters that future acquisitions made in reliance on the

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[52] Resp. Br. at 26.
[53] Resp. Br. at 26-27.
[54] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 31 FCCRcd 10213, 10230-31, 10235-36 (2016)("*2016 Repeal Order*")[JA 40-41, 45-46].
[55] Resp. Br. at 27.
[56] Pet. Br. at 27 (citing *2016 Repeal Order*, 31 FCCRcd at 10214[JA 24]).

discount were at their own risk.[57] The Commission repeated this admonition in the *1998 Biennial Review Order*.[58] In 2003, the Commission adopted a decision, later mooted by the Consolidated Appropriations Act ("CAA") that partially repealed the discount and set the stage for full repeal since digital television would "largely eliminate the technical basis for the UHF discount."[59] The *2006 Quadrennial Review Order* reiterated that repeal would be the subject of a future proceeding.[60] In 2013, the Commission initiated the proceeding now before the court and proposed eliminating the discount.[61] Thus, the *2016 Repeal Order* concluded, "the Commission had indicated repeatedly over the past two decades that the transition to DTV…would undermine the basis for the UHF discount."[62] No broadcaster could have reasonably relied on its continued application.[63]

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[57] *Implementation of Section 202(c)(1) and 202(e) of the Telecommunications Act of 1996*, 11 FCCRcd 12374, 12375 (1996)("[A]ny entity which acquires stations during this interim period and which complies with the [cap] only by virtue of [the UHF discount] will be subject to the outcome in the pending television ownership proceeding.").
[58] *1998 Biennial Review Order*, 15 FCCRcd 11058, 11080, n.108 (2000)("[W]e will continue to follow this policy until such time as the UHF discount is modified or eliminated.").
[59] *2002 Biennial Review Order*, 18 FCCRcd 13620, 13847 (2003).
[60] *2006 Quadrennial Review Order,* 23 FCCRcd 2010, 2085 (2008).
[61] *2013 NPRM,* 28 FCCRcd at 14331[JA 8].
[62] *2016 Repeal Order*, 31 FCCRcd at 10214[JA 24].
[63] *See infra* p.27.

That the Commission grandfathered existing holdings proves that it not only considered broadcasters' reliance interests, but took equitable action to account for them.[64] This approach was consistent with longstanding Commission ownership policy seeking greater diversity over time as once-grandfathered properties are divested.[65]

Respondents also claim that changes in the competitive landscape could justify maintaining the UHF discount.[66] However, as Commissioner Clyburn said, "[it] was never intended to address competitive disparity…the sole purpose of the UHF discount was to remedy a technological disparity."[67] In any event, as Petitioners explained, the earlier Commission fully addressed competitive differences, finding they were not the result of technical differences between UHF and VHF stations, and retention of the discount would not resolve them.[68]

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[64] Pet. Br. at 27.
[65] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 426-29 (3d Cir. 2004), quoting *2002 Biennial Review*, 18 FCCRcd at 13810. (Upholding restriction on transferring grandfathered combinations because this "'afford[s] new entrants the opportunity to enter the media marketplace' and 'could give smaller station owners already in the market the opportunity to acquire more stations.…'"); *FCC v. NCCB*, 436 U.S. 775, 809 (1978)(upholding restrictions on transferring grandfathered combinations).
[66] Resp. Br. at 26.
[67] *2017 Reconsideration Order*, 32 FCCRcd at 3408 (Clyburn dissent)[JA 97].
[68] Pet. Br. at 26.

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

Respondents insist that the earlier Commission acted arbitrarily and capriciously by considering the UHF discount independently of the cap.[69] However, the earlier Commission amply justified its decision to limit its rulemaking to protecting the integrity of the ownership rules by addressing what had become a gaping loophole.[70]

1. The choice to consider the UHF discount independently of the ownership cap was wholly justified.

After a longwinded and irrelevant reiteration of how the discount is calculated, Respondents claim an "undeniable interrelationship" and "inextricable link" between the two.[71] However, they wrongly assert that the 2016 decision "ignored their integral connection."[72] Indeed, the very reason for repeal was the FCC's awareness that the discount distorts enforcement of the national cap.[73]

Respondents treat the "undeniable relationship" between the discount and cap as the equivalent of a mandate to evaluate them together.[74] However the

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[69] Resp. Br. at 25.
[70] *2013 NPRM*, 28 FCCRcd at 14331[JA 8].
[71] Resp. Br. at 22-25.
[72] Resp. Br. at 25.
[73] Pet. Br. at 25-26.
[74] Respondents' footnote citation to *Prometheus I* is inapposite. Resp. Br. at 27, n.9. There, the Third Circuit was ruling on its jurisdiction, not the wisdom of

Commission had long-considered modifying the discount and it was not necessary, feasible, or desirable to complicate the process by broadening the scope. Thus, to avoid unnecessarily delaying restoration of integrity to the cap, the Commission reasonably decided to solely consider the discount.[75]

Petitioners thoroughly demonstrated that the Commission evaluated the discount and the cap separately in 1998 and 2006, and issued several warnings that it would be modifying or repealing the discount, but not the cap.[76] Feebly, Respondents bury a cursory response in the last paragraph of their discussion stating "the FCC merely sought comment" and "neither of these proceedings resulted in any change."[77] That observation is irrelevant. What is relevant is that the Commission has consistently considered the discount and cap as separate matters and twice conducted proceedings examining the discount independently of the cap. Furthermore, the inaction in those dockets was entirely unrelated to any requirement that the discount be considered in conjunction with the cap.

Respondents concede "agencies are not always required to 'address all questions at the same time,'"[78] but nonetheless argue that interim reinstatement of

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considering the discount and the cap separately or together. *See Prometheus Radio Project v. FCC*, 373 F. 3d, 372, 395-397 (3d. Cir. 2004).

[75] *See infra* at Part III.

[76] *See supra* p.18.

[77] Resp. Br. at 32.

[78] Resp. Br. at 29 (quoting Pet. Br. at 30).

the discount "is firmly supported by judicial precedent."[79] However, the *2017 Reinstatement Order* expressly disclaimed reliance on the case they now cite—"we need not reach the question of whether we are required to do so by *Prometheus III*."[80] As such, the Commission may not rely upon it here.[81] Moreover, reliance on *Prometheus III* is unavailing. In *Prometheus III*, there was no question that the Commission had jurisdiction, in fact a duty, to complete the statutorily mandated inquiry into "all" of the broadcast ownership rules.[82] Under that provision, from which the national cap is expressly exempted, the Court held that having requested and received comment on the FCC's local ownership rules and a new "JSA" rule, the Commission should not have addressed one without the other.[83]

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

Respondents say that the *2016 Repeal Order* decision erroneously failed to consider "why tightening the cap was in the public interest."[84] The premise is wrong, as is the conclusion drawn from it. Contrary to what Respondents say, the effectiveness of the cap does not "depend on whether the cap is set at an

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[79] Resp. Br. at 28.
[80] *2017 Reinstatement Order*, 32 FCCRcd at 3395 n.41[JA 84].
[81] *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).
[82] Telecommunications Act of 1996, PL 104–104, §202(h).
[83] *Prometheus Radio Project v. FCC*, 824 F.3d 33, 60 (3d. Cir. 2016).
[84] Resp. Br. at 26 (citing *2017 Reinstatement Order*, 32 FCCRcd at 3395[JA 84]).

appropriate level," but turns on whether calculation of compliance with the cap is accurate. The UHF discount simply makes the calculation accurate, furthering the underlying Congressional purpose. Whether the current cap is appropriately set is a separate question, and if it were determined that the cap needs to be increased, and that the Commission has power to do so, nobody would propose to accomplish that by allowing UHF stations an unwarranted advantage over VHF stations.

Moreover, the fact that the Commission grandfathered existing station combinations insured that the cap was not "tightened" as to them.[85] In contrast, the *2017 Reconsideration Order* signaled to broadcasters they should feel free to buy more stations. As Commissioner Clyburn pointed out, CEOs of CBS, Sinclair, and Nexstar have told investors that they will each likely acquire more stations after repeal of the discount.[86]

III. THE DECISION TO REINSTATE THE UHF DISCOUNT FOR AN INDEFINITE PERIOD WAS ARBITRARY AND CAPRICIOUS.

Petitioners are not alone in believing that the Commission does not have the power to modify the cap. Although the Chairman circulated a draft order on

[85] Resp. Br. at 24

[86] *2017 Reconsideration Order*, 32 FCCRcd at 3408-09 (Clyburn dissent)[JA 97-98].

November 22 for a vote on December 14, 2017,[87] the draft offers no tentative conclusions about the Commission's statutory authority. Nor does it propose whether or how the cap might be changed. It is unlikely that a majority of the current Commission will ultimately vote to modify the cap. As Petitioners' brief showed, Commissioner O'Reilly thinks the Commission lacks the power to do so.[88] Commissioners Rosenworcel and Clyburn, who both voted to repeal the discount, have recently expressed their view that the Commission lacks authority to modify the cap.[89]

A. Respondents improperly rely on arguments that were not made below.

The centerpiece of Respondents' statutory argument is that the Commission found in the *2016 Repeal Order* that neither the CAA nor any other statute barred the Commission from revisiting the cap outside of the quadrennial review process.[90] It bases this interpretation on the fact that the CAA used the same

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[87] *2017 Draft NPRM*, MB Docket No. 17-318 (Nov. 22, 2017) http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1122/DOC-347933A1.pdf.

[88] Pet. Br. at 43.

[89] Statement of FCC Commissioner Rosenworcel (Nov. 21, 2017) http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1121/DOC-347895A1.pdf.; *Draft Ownership Cap NPRM Has No Tentative Conclusions, Not Seen Leading to FCC Action*, Communications Daily, 2017 WLNR 36652831 (Nov. 22, 2017).

[90] Resp. Br. at 36 (citing *2016 Repeal Order*, 31 FCC Rcd at 10223-24[JA 33-34]).

language directing the Commission to modify its national audience reach limitation to a specific percentage as Congress did when it "directed the FCC in 1996 to amend its rules to set the audience reach cap at 35 percent."[91] However, the Commission never made this argument in either the *2016 Repeal Order* or the *2017 Reinstatement Order*. Similarly, the claim that the Commission's interpretation of the CAA is "entirely consistent with past Congressional and agency practice under" under §202(c)(1)(B) of the 1996 was not made below.[92] Accordingly, these arguments are waived, and Respondents may not rely upon them here.[93]

In any event, this interpretation of the CAA ignores the sequence of events leading to its adoption. As Petitioners showed, there was bipartisan disapproval of the Commission's attempt to raise the cap to 45%. Congress was on the verge of invoking the Congressional Review Act to negate the entire *2002 Biennial Review Orde*r when a compromise was reached to limit legislative action to the national cap. While the House initially voted to restore the earlier 35% cap by means of an appropriations rider, the conference allowed for a slight expansion to 39%. Viewed in that light, the rescission of the 45% cap and removal of the cap from the

[91] *Id.* at 35-37; *see also id*. at 8.
[92] *Id.* at 37-38.
[93] *See Chenery,* 318 U.S. 80.

quadrennial review process show that the intent of Congress was to leave the cap in place unless and until it is changed by Congress.

B. The Commission is not entitled to Chevron deference here.

Should the Court nonetheless consider these arguments, it should reject Respondents' claim that the FCC's interpretation should be afforded *Chevron* deference.[94] Petitioners demonstrated that *Chevron* deference does not attach when the Commission did not need to exercise authority to modify the cap to repeal the discount.[95] Respondents have no response. Their brief does do not even try to show that the Commission needed authority to modify the cap to consider modifying the UHF discount or explain how the Commission's decision was "promulgated in the exercise" of delegated authority, as contemplated in *Mead.*[96] Nor do they make the slightest effort to show that their reliance was not based on "an erroneous view of law," and therefore unqualified for deference, as this Court held in *GTE Service Corp. v. FCC* and *Prill v NLRB.*[97]

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[94] *Id.* at 39.
[95] Pet. Br. at 34-36; *Chevron Inc. v. NRDC Inc.*, 467 U.S. 837 (1984).
[96] Pet. Br. at 36 (citing *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).
[97] *Id.* at 35-36 (citing *GTE Service Corp. v FCC*, 224 F.3d 768, 775 (D.C. Cir. 2000)(quoting *Prill v. NLRB*, 755 F.2d 941, 942 (D.C. Cir. 1985)).

IV. EVEN IF THE COMMISSION HAS AUTHORITY TO MODIFY THE CAP, ITS UNEXPLAINED DECISION TO REINSTATE THE DISCOUNT PENDING THE OUTCOME OF A RULEMAKING THAT MAY NEVER BE COMPLETED WAS ARBITRARY AND CAPRICIOUS.

Even assuming the Commission could lawfully modify the cap, Respondents do not even try to address Petitioners' argument that it was arbitrary and capricious to indefinitely reinstate a provision that no longer has any valid policy justification.[98] Instead, they half-heartedly rehash the argument that reinstatement in the *2017 Reconsideration Order* merely "maintained the status quo."[99]

As an initial matter, since 2013, broadcasters had been operating as if the UHF discount had been eliminated.[100] Chairman Pai acknowledged as much in his dissent to the *2016 Repeal Order*:

> 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.[101]

In addition, CBS asked the Commission to "act immediately to reinstate the UHF discount and that it do so without waiting to launch any further proceedings." It said that "our industry has been frozen in time for more than three years, dating

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[98] *Id.* at 43.
[99] Resp. Br. at 40-42.
[100] *2017 Reconsideration Order*, 32 FCCRcd at 3408 (Clyburn dissent)[JA 97].
[101] *2016 Repeal Order*, 31 FCCRcd at 10250 (Pai dissent)[JA 60].

back to September 2013 when the NPRM was launched and we were effectively foreclosed from applying the UHF discount."[102]

The 2013 "freeze" was defrosted by the *2017 Reinstatement Order*. Just two weeks after its release, a huge transaction was announced that would otherwise not have been possible. This belies the assertion that the 2016 repeal decision signaled a drastic shift. The *status quo* had long been that the life of the discount was limited and it was on its death bed since 2013.[103] What changed the *status quo* was the reinstatement of the discount.[104]

Respondents take umbrage at Petitioners' skepticism that the forthcoming rulemaking will proceed quickly.[105] They reiterate that "the Commission has committed to commencing a rulemaking in 2017 to conduct a joint review."[106] However, "commencing" a proceeding is not the same as completing one. The record here is replete with examples of how the Commission has slow walked ownership proceedings.

Recent trade press reports reinforce Petitioners' expectation that now the discount has been repealed, the Commission will not hurry to complete its promised review. Under the headline "Draft Ownership Cap NPRM Has No

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[102] CBS Ex Parte Letter (Jan. 17, 2017)[JA 244].
[103] *See supra* pp.17-19.
[104] Resp. Br. at 40.
[105] Pet. Br. at 46.
[106] Rep. Br. at 43.

Tentative Conclusions, Not Seen Leading to FCC Action," *Communications Daily* reports that Commissioner O'Rielly intends to vote to open the rulemaking, but that "he's seen as unlikely to support action to alter the cap, which would leave Chairman Ajit Pai without enough votes."[107] It quotes "a broadcast industry official" as saying that the matter is "likely 'to end up in the freezer.'"[108] A communications lawyer told the publication that, in light of other pending matters, "it makes sense the agency would take its time on the national cap."[109]

Speculation in a trade journal is hardly binding authority, but where the Commission has restored a loophole that invites consolidation of broadcast ownership based on an unenforceable and vague promise to do something that it seemingly does not have the power or the votes to do, this report validates Petitioners' concern that an action for which the agency sets forth no viable public interest justification is arbitrary and capricious and contrary to the public interest.

[107] *Draft Ownership Cap NPRM Has No Tentative Conclusions*, *supra* p.24, n.89.
[108] *Id.*
[109] *Id.*

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CERTIFICATE OF COMPLIANCE

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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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