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## The UHF Discount: Shortchanging The Public Interest

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# The UHF Discount: Shortchanging The Public Interest

**Keywords**

Federal Communications Commission (“FCC”), public interest, broadcast ownership, Ultra-High Frequency (“UHF”), Telecommunications Act of 1996

## COMMENT

# THE UHF DISCOUNT: SHORTCHANGING THE PUBLIC INTEREST

CECILIA ROTHENBERGER\*

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## INTRODUCTION

On June 2, 2003, the Federal Communications Commission (the "FCC" or "Commission") handed down a decision to relax its broadcast ownership rules in a 3-2 vote along party lines.<sup>1</sup> This rulemaking will likely be remembered as among the most controversial in Commission history.<sup>2</sup> Perhaps the most contentious rule approved in this vote was a ten percent increase in the national ownership cap of broadcast stations.<sup>3</sup> Under this new limit, a company may own television stations that, in the aggregate, reach up to forty-five percent of the country's television households.<sup>4</sup> Concerned about the public outcry against the new broadcast rules and subsequent litigation efforts to put a stop to their implementation, Congress passed a new, thirty-nine percent national ownership limit within its next Appropriations Act.<sup>5</sup> On January 22, 2004, President George W. Bush signed this bill into law.<sup>6</sup>

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1. See Frank Ahrens, *FCC Eases Media Ownership Rules*, WASH. POST, June 3, 2003, at A1 (reporting that the new broadcast rules were contentious, and support for them was split along party lines, with the Republicans following the lead of Chairman Michael Powell).

2. See Commissioner Michael J. Copps, *Media Concentration Bench Remarks* (June 2, 2003), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A5.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A5.pdf) (on file with the American University Law Review) (noting that the Commission received over three quarters of a million comments on its proposed broadcast rules in advance of the June 2, 2003 vote, more than for any other proceeding in Commission history). The Commissioner further discusses the many public hearings he attended across the country, along with Commissioner Adelstein, in which Americans from across the political spectrum were opposed to the proposed broadcast rules.

3. See Mortimer B. Zuckerman, *A Sure-fire Recipe for Trouble*, U.S. NEWS & WORLD REP., June 23, 2003, at 52 (warning the public about the unprecedented media consolidation that will result from lifting the ownership cap from thirty-five percent to forty-five percent); COMMUNICATIONS DAILY (Warren Communications News, Wash., D.C.), June 3, 2003, at 1 (noting that the opposition to changes in the broadcast ownership rules by various organizations and Congress focused primarily on the increased ownership cap).

4. Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286, 46,327-28 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) [hereinafter 2002 Biennial Broadcast Review Ownership Rules].

5. Consolidated Appropriations Act of 2004, Pub. L. No. 108-109, 118 Stat. 3 (amending the 1996 Telecommunications Act by striking "thirty-five percent" and replacing it with "thirty-nine percent").

6. See Additional Comment Sought on UHF Television Discount, 69 Fed. Reg. 9216, 9216 (Feb. 27, 2004) [hereinafter 2004 UHF Discount Comment Request] (detailing the steps taken to change the national ownership cap to thirty-nine percent and calling for comments on eliminating the UHF discount). The passage of the Appropriations Act raising the ownership cap to thirty-nine percent prompted the Commission to reconsider maintaining the UHF discount, and the agency has taken comments on whether or not to keep this rule. *Id.* However, the Commission is considering only whether or not the language of the Appropriations Act signifies "approval, adoption, or ratification" of the UHF discount. *Id.*

The FCC calculates national ownership for broadcast companies by counting the number of households that receive a particular station against the number of households that receive television nationwide.<sup>7</sup> In this calculation, the FCC takes into account whether a station is on the Very-High Frequency (“VHF”) band, 86-408 MHz (channels 2-13), or the Ultra-High Frequency (“UHF”) band, 480-920 MHz (channels 14-83).<sup>8</sup> The Commission considers this frequency distinction pursuant to a provision called the UHF discount.<sup>9</sup> The UHF discount requires the FCC to attribute a UHF station with fifty percent of the nationwide reach of a VHF station when calculating a broadcast owner’s national ownership percentage.<sup>10</sup> The Commission created the UHF discount provision in the 1980s to help struggling stations on the UHF band.<sup>11</sup>

Over the past eighteen years, the Commission has transformed UHF television into a success story with regulatory assistance measures like the UHF discount.<sup>12</sup> Over the same period of time,

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7. 47 C.F.R. § 73.3555(d)(2)(i) (2003) (defining national audience reach as “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”).

8. *Id.* (explaining that for purposes of making a national ownership calculation, “UHF television stations shall be attributed with 50 percent of the television households in their DMA market”). See generally *The Darkened Channels: UHF Television and the FCC*, 75 HARV. L. REV. 1578, 1578-79 (1962) (examining the thirteen-year history of the Commission’s system of channel allocation).

9. See In the Matter of Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum, Opinion, and Order, 100 F.C.C.2d 74, ¶ 42 (1985) [hereinafter 1985 Amended Multiple Ownership Order]; Mark K. Miller & Dan Trigoboff, *Calm Before the Storm*, BROADCASTING & CABLE, Apr. 7, 2003, at <http://www.broadcastingcable.com> (on file with the American University Law Review) (explaining that the FCC method for calculating reach assumes that VHF stations (channels 2-13) reach every home in the market, but UHF stations (channels 14-83) reach only half as many homes). The article further notes that the FCC does not count the reach of any group’s second stations in a market when calculating national ownership levels. *Id.*

10. 47 C.F.R. § 73.3555(d)(2)(i); see Miller & Trigoboff, *supra* note 9 (noting that the FCC calculates national ownership by assessing the percentage of the 106.7 million homes with television sets that each broadcast company reaches with their various stations).

11. The Commission created the UHF discount of the National Broadcast Ownership Rule as a revision of a 1984 rulemaking on media ownership issues. 1985 Amended Multiple Ownership Order, *supra* note 9, ¶¶ 1-44. The UHF discount was a direct response to various petitions sent to the Commission during the rulemaking arguing that the FCC should give UHF stations special treatment that would account for the technical handicap between the signals and create incentives for companies and networks to purchase them. *Id.* For a more detailed discussion on the history of the UHF discount, see *infra* Part II.C.

12. See In the Matter of Review of the Commission’s Regulations Governing Television Broadcasting, Report and Order, 10 F.C.C.R. 4538, ¶¶ 18-24 (1995) [hereinafter 1995 Review of Broadcast Rules Order] (finding that, in 1995, there

however, technological advancements, the evolution of viewer behavior, and market realities have created a world in which the UHF/VHF distinction no longer exists.<sup>13</sup> In fact, the Commission itself has gathered sufficient findings showing the robust health of UHF television to eliminate every other regulatory assistance measure supporting UHF.<sup>14</sup> Keeping the UHF discount in the face of these findings contravenes a clear congressional mandate to eliminate broadcast rules that are no longer necessary in the public interest as a result of competition.<sup>15</sup>

Today, the UHF discount is anathema to a healthy media marketplace because it effectively raises the national ownership limit for companies choosing to acquire UHF television stations.<sup>16</sup> This provision encourages greater media concentration by authorizing some of the largest media companies to exceed the national ownership limits imposed by the Commission.<sup>17</sup> This kind of

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were more UHF television stations than VHF stations, and that the band grew by 235% between 1971 and 1994).

13. See *infra* Part III.A (discussing the technological improvements to UHF television).

14. See *infra* Part III.B (discussing the analytical inconsistency of the Commission's decisions to repeal all regulatory measures assisting UHF television except for the UHF discount). See, e.g., In the Matter of Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, Report and Order, 3 F.C.C.R. 638, ¶¶ 1-26, 31 (1998) [hereinafter 1988 Detrimental Effects Order] (eliminating the UHF Impact Policy and finding that UHF service had achieved enough comparability with the VHF service so as to repeal this assistance measure for fear that it may harm VHF stations if continued); *In re* Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, MM Docket No. 94-123, 11 F.C.C.R. 546, ¶¶ 1-4, 64-86 (1995) [hereinafter 1995 PTAR Order] (repealing the Prime Time Access Rule ("PTAR"), reasoning that UHF television had become so viable that it was attracting network affiliation on its own, and no longer required this regulatory assistance measure); 1995 Review of Broadcast Rules Order, *supra* note 12, ¶ 4 (repealing the Secondary Affiliation Rule based on the technical advancements to UHF television and the Commission's findings that these stations had become financially successful).

15. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (2003). Legislative history and the courts have interpreted Section 202(h) as carrying with it a presumption toward changing rules biennially. See, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1035-46 (D.C. Cir. 2002); *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002). The Commission has also acknowledged this presumption toward change. 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,287 (acknowledging the decisions in *Fox Television* and *Sinclair* in which the court found this presumption toward change). Furthermore, Congress has directed the Commission to issue a report including "full justification" for retaining any broadcast rules under its biennial review. See H.R. CONF. REP. NO. 106-464, at 148 (1999). The Commission failed to do this when it most recently chose to maintain the UHF discount. 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,328.

16. See *infra* Part III.C (discussing media concentration, the UHF discount, and how this provision further discourages smaller competitors from entering the broadcast market).

17. See Miller & Trigoboff, *supra* note 9 (stating that the UHF discount allows a

concentration poses a direct threat to the basic public interest tenets of American broadcast regulation; competition, localism, and diversity.<sup>18</sup>

This Comment argues that the Commission should eliminate or promptly phase out the UHF discount because it is contrary to the public interest. Part I describes the role of the public interest in communication law and especially in broadcast. Part II outlines the history of UHF stations and their role in the television broadcast industry. It also discusses the FCC and its efforts to foster the growth of UHF. Part III argues that advances in technology and changes in both viewer behavior and market realities have bridged the gap between UHF and VHF. Next, Part III highlights a line of FCC decisions repealing every other regulatory measure created to assist UHF based on findings showing the viability of UHF television. This Section argues that it is inconsistent to maintain the UHF discount in light of these findings. Finally, Part III asserts that the UHF discount encourages media concentration and argues that this phenomenon harms the public interest in broadcast. This Section also proposes some practical solutions for eliminating the UHF discount.

#### I. THE FCC AND THE PUBLIC INTEREST

The FCC's obligation to act in the public interest dates back further than the Commission itself. The Federal Radio Act of 1927 was passed under the premise that the right of the public to receive communications services is superior to the right of any individual.<sup>19</sup> The Communications Act of 1934 created the Federal Communications Commission and authorized it to grant licenses that

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company to own two UHF stations for every one VHF station under the national ownership limits). The clearest way to understand the effect of this rule is to calculate national ownership for the top media companies without the discount. *Id.* Thus, Paxson would reach 61.8% of U.S. homes, Viacom 44.8%, Fox 44.4%, Univision 41.8%, Tribune 40.1%, and NBC 38.3%, thereby allowing six of the top media markets to operate above the thirty-five percent national ownership limits. *Id.*

18. See *infra* Part III.C. See generally Telecommunications Act of 1996 § 202 (amending broadcast regulations while maintaining the public interest standard); Communications Act of 1934, 47 U.S.C. §§ 303, 307-308 (2003) (giving the Commission broad authority to make rules and grant licenses that serve the public interest, convenience, and necessity).

19. Radio Act of 1927 § 4, 69 Pub. L. No. 632, 44 Stat. 1162, 1163 (1927) (establishing the Federal Radio Commission, which allocates frequencies among applicants in a manner responsive to "public convenience, interest, or necessity"); see also 67 CONG. REC. 5479 (1926) (statement of Sen. White) (asserting that the Radio Act of 1927 provides a fundamental shift in communications law from allowing anyone to "transmit what they will" to the doctrine that "the right of the public interest to service is superior to the right of any individual").

serve the “public interest, convenience, and necessity.”<sup>20</sup> In addition, Section 303(r) of the Communications Act provides that:

The Commission from time to time, as public convenience, interest, or necessity requires, shall . . . [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 [the Act].<sup>21</sup>

The Commission has broad authority to regulate the broadcast industry according to this standard.<sup>22</sup> The FCC has long interpreted the public interest in broadcast to be that which fosters diversity, localism, and competition on the airwaves.<sup>23</sup> The primary theory underlying the Commission’s emphasis on diversity is that having the greatest possible number of owners in the mass media market promotes a variety of viewpoints and prevents the undue concentration of economic power.<sup>24</sup> Localism is a longstanding

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20. 47 U.S.C. §§ 307-308; *see also* FCC v. Nat’l Citizens Comm. for Broad., 436 U.S. 775, 795 (1978) (“[The] avowed claim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States.”) (internal citations and quotations omitted).

21. 47 U.S.C. § 303(r).

22. *See id.* § 151 (stating the purpose of the Federal Communications Commission); *id.* § 303 (granting the Commission broad authority to regulate the broadcast industry according to the public interest, convenience, and necessity); *id.* § 301 (authorizing the Commission to grant and revoke licenses in broadcast according to the public interest, convenience, and necessity).

23. *See* 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,287-88 (identifying diversity, competition, and localism as longstanding goals that would continue to be core agency objectives in broadcast). The Commission’s commitment to localism, diversity, and competition were evident long before these principals were articulated in the Telecommunications Act of 1996 or the 2003 Broadcast Rulemaking. *See* In the Matter of Petition for Rulemaking to Amend Television Tables of Assignments and to Add New VHF Stations in the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control, and Programming, Memorandum Opinion and Order, 63 F.C.C.2d 840, ¶¶ 21-24 (1977) [hereinafter 1977 Television Assignment Order] (revealing that the Commission allocated the first intermixed set of television stations according to five priorities demonstrating its desire to provide nationwide access to television, as well as competition and a diversity of viewpoints wherever possible); *see also* Nat’l Citizens Comm. for Broad., 436 U.S. at 781 (explaining that the FCC has considered a diversity in control of the media as “a factor of primary significance” in determining who should receive the initial license for a broadcast facility among competing applicants in a comparative proceeding); ROGER G. NOLL ET AL., ECONOMIC ASPECTS OF TELEVISION REGULATION 100-04 (1973) (illustrating that the Commission’s commitment to localism in television was most clearly demonstrated through its decision to use the still-experimental UHF band to expand television service). Noll also cites the role of the localism doctrine in regulations governing group ownership and cross-media ownership. *Id.* at 104-08. Noll suggests that the Commission chose to increase the number of television stations by using the UHF band because these stations and their lower-powered signals would remain local. *Id.* at 101-04.

24. *See* In the Matter of 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, 67 Fed. Reg. 65,751, 65,756 (Oct. 28, 2002) [hereinafter 2002 Biennial

objective for broadcast, and is based on the Commission's vision for television in which station owners, who are part of the community, serve their audiences with original content, produced by and for the community.<sup>25</sup> The third broadcast tenet has its roots in the principal that greater competition among television owners will produce better service for consumers. This became a major goal for the Commission through the passage of the Telecommunications Act of 1996.<sup>26</sup>

The Telecommunications Act of 1996 modernized the 1934 Communications Act by taking into account changes in technology and the dramatic increase in the variety of media sources.<sup>27</sup> With passage of this law, Congress lifted the national ownership cap and eased other media cross-ownership restrictions.<sup>28</sup> Nevertheless, the

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Broadcast Review NPRM] ("The Commission has considered four aspects of diversity: viewpoint diversity, outlet diversity, source diversity, and program diversity."); *see also* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 160 (D.C. Cir. 2002) (asserting that greater diversity eliminates the ability of one person or group to exert "an inordinate effect, in political, editorial, or similar programming sense, [or] on public opinion at the regional level") (internal quotations omitted).

25. *See* 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,760 ("[A] primary objective and benefit of our nation's system of regulation of broadcast television is the local origination of programming.") (quoting congressional findings and policy pursuant to the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, which would require cable operators to carry no less than a fixed number of local television stations in each market). For a detailed discussion of localism, *see infra* Part III.C.

26. *See* 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,291 (noting the Commission's duty, from the Communications Act of 1934, to serve the public interest by ensuring open competition in the use of broadcasting facilities); Telecommunications Act of 1996 § 202(h), Pub. L. No. 104-104, 110 Stat. 56 (2003) (mandating that the Commission review its rules biennially and determine whether any of such rules are "necessary in the public interest as a result of competition"). Competition became of primary importance under the 1996 Act because its focus was largely on deregulation. *Id.* The Act raised the national ownership limit to thirty-five percent and forced the Commission to reevaluate its rules biennially to foster competition. *Id.*

27. *See* Telecommunications Act of 1996 (adding provisions for the regulation of new technology and relaxing media ownership restrictions). While the 1996 Act was conceived to deregulate telecommunications markets to a large extent, it does not lose sight of the Commission's duty to regulate communications services in the public interest. *See* S. REP. NO. 104-23, at 16 (1995) ("[T]he purpose for the bill is to increase competition in all telecommunications markets and provide for an orderly transition from regulated markets to competitive and deregulated telecommunications markets consistent with the public interest, convenience, and necessity."); *see also* Judith C. Aarons, Note, *Cross-Ownership's Last Stand? The Federal Communications Commission's Proposal Concerning the Repeal of the Newspaper/Broadcast Cross-Ownership Rule*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 317, 329-30 (2002) (stating that the new Act aimed to increase competition and encourage deregulation based on changes in technology and new media sources).

28. *See* Telecommunications Act § 202(h) (authorizing the FCC to eliminate the cap on the number of television stations any one entity may own, while increasing the national ownership cap to thirty-five percent from twenty-five percent). The Act also repealed the telephone/cable and cable/broadcast cross-ownership rules, lifted remaining limits on cable/network cross-ownership, eliminated national and local caps on radio ownership, and eased the dual-network rule. *Id.*

1996 Telecommunications Act maintained the public interest focus of the 1934 Act by stating that “the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technical advancement and the promotion of the public interest, convenience and necessity.”<sup>29</sup> Thus, Congress mandated that the Commission continue to regulate broadcast television according to the same principals that guided it at its inception, despite the overwhelming growth in the number and types of media in this country over the past eighty years.<sup>30</sup>

## II. UHF TELEVISION: THE LONG ROAD TO SUCCESS

### A. *The History of UHF*

In 1945, the FCC began allocating television stations to the country's 140 largest markets, using channels on the VHF band.<sup>31</sup> By 1948, the television phenomenon had reached a competitive high point, and the VHF band was saturated.<sup>32</sup> Across the country, stations were suffering from overwhelming interference problems from this surge in station assignments.<sup>33</sup> The allotment of VHF stations had run its course, and there were no channels left for television stations.<sup>34</sup> The FCC subsequently put all pending applications for new television licenses on hold in a four-year “television freeze” while it searched for a solution to these problems.<sup>35</sup> The public wanted

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29. *Id.* § 257(b).

30. *See* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1042 (D.C. Cir. 2002) (“In the context of the regulation of broadcasting, the ‘public interest’ has historically embraced diversity (as well as localism) . . . and nothing in § 202(h) signals a departure from that historic scope.”) (internal citations omitted).

31. *See The Darkened Channels*, *supra* note 8, at 1 (explaining that the FCC distributed the broadcast licenses in order to foster fair and efficient television service).

32. *See* CHRISTOPHER H. STERLING & JOHN M. KITROSS, STAY TUNED: A CONCISE HISTORY OF AMERICAN BROADCASTING 295-99 (1978) (describing how the popularity of television transformed itself into a nationwide phenomenon); HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCASTING TECHNOLOGY IN THE UNITED STATES, 1920-1960 166 (2000) (recounting that manufacturers had been able to sell only 14,000 television sets in 1947, but sold 172,000 the very next year).

33. *See* STERLING & KITROSS, *supra* note 32, at 295 (stating that by 1948, the Commission was fighting a losing battle by trying to provide each community with their own television stations on the VHF band). Mutual interference between station signals in neighboring cities, such as Detroit and Cleveland, was making reception impossible in each. *Id.*

34. *See* 1977 Television Assignment Order, *supra* note 23, ¶¶ 21-24 (noting that the Commission froze the applications for television stations while it looked for a solution to interference problems on the VHF band).

35. *Id.*; *see also* STERLING & KITROSS, *supra* note 32, at 295-96 (reporting that several hearings took place during the time of the “freeze” involving five main television issues: “(1) color television standards, (2) reduction of tropospheric

more options on television, and the Commission was tasked with providing an environment where competition, localism, and diversity could flourish.<sup>36</sup> Ultimately, after much debate, the Commission chose to create more stations by using the still-experimental UHF band.<sup>37</sup> This expansion allowed more spacing between stations on the VHF band, and therefore less interference, while giving viewers more options on television.<sup>38</sup> Adding UHF stations to the broadcast lineup provided more communities with their own stations, satisfying the Commission's tripartite goal of encouraging competition, localism, and diversity.<sup>39</sup>

In 1952, with the Sixth Report and Order on this matter, the FCC lifted the "television freeze" order and proceeded to allocate seventy

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interference, (3) possible spectrum locations for additional channels, (4) city-by-city assignment of channels and criteria for these assignments, and (5) educational television channel reservations").

36. See *STERLING & KITROSS*, *supra* note 32, at 299 (noting that finding more channels for the television industry was the only way the Commission could provide for a competitive nationwide television system). When the Commission finally created more television stations in 1952, its allocation decisions were based on five priorities that underscored the Commission's concern with distributing television stations widely to create nationwide access and its attempt to provide the most diverse, competitive environment possible. See 1977 Television Assignment Order, *supra* note 23, ¶ 24. The priorities were, first, "to provide at least one television service to all parts of the United States"; second, "to provide each community with at least one television station"; third, "to provide a choice of at least two television services to all parts of the United States"; fourth, "to provide each community with at least two television stations"; and fifth, "any channels remaining unassigned under these priorities would be assigned . . . on the basis of the size of the population of the city, geographic location, and the number of TV services available from stations in other communities." *Id.* ¶ 25.

37. See *generally id.* ¶¶ 23-25 (reciting history of UHF television); Notice of Inquiry, In the Matter of Improvements to UHF Television Reception, 70 F.C.C.2d 1162, ¶¶ 5-7 (1978) [hereinafter 1978 UHF Television Improvement NOI] (discussing long-term struggles facing UHF television in its earliest years); *NOLL ET AL.*, *supra* note 23, at 100-04 (explaining the various failures of the UHF band when it began in 1954).

38. One proposed allocation plan at this time involved sacrificing some local stations to build regional stations that would carry network programming. The Commission rejected this plan in favor of finding ways to create as many local television stations as possible, and hence, eventually decided to explore the use of the UHF band rather than creating a fourth network. See *NOLL ET AL.*, *supra* note 23, at 101 (stating that one proposed allocation plan at this time involved sacrificing some local stations to build regional stations that would carry network programming).

39. See *id.* at 5 (explaining the Commission's view that "as many communities as possible should have the opportunity [to enjoy] the advantages that derive from having local outlets that will be responsive to local needs") (citing Sixth Report and Order, In the Matters of Amendment of Section 3.606 of the Commissions' Rules and Regulations; Amendment of the Commission's Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service, Utilization of Frequencies in the Band 470 to 890 Mcs. for Television Broadcasting, 41 F.C.C. 148, ¶ 79 (1952) [hereinafter 1952 Sixth Report and Order]).

UHF channels to broadcast television.<sup>40</sup> Initially, this solution had few allies.<sup>41</sup> The primary criticism of using UHF to create more television stations was that its signal had substantial technical limitations.<sup>42</sup> For example, a typical VHF station provides reliable reception in an area up to sixty-five to seventy miles, while UHF stations, at that time, reached only thirty to forty miles.<sup>43</sup> A new UHF station also faced the obstacle of American households, the vast majority of which had television sets capable of receiving only the VHF signal.<sup>44</sup>

Another major criticism of the Sixth Report and Order was the Commission's plan to "intermix" both VHF and UHF stations in the same markets.<sup>45</sup> Instead of allowing stations within a community to

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40. 1952 Sixth Report and Order, *supra* note 39, ¶ 79 (revising the 1948 "freeze order," which provided that "no new or pending applications for the construction of new television broadcast stations would be acted upon by the Commission"); *see also* 1977 Television Assignment Order, *supra* note 23, ¶ 24 (noting that the Sixth Report and Order of 1952 established the television system in place today, which began with twelve VHF and seventy UHF channels); *The Darkened Channels*, *supra* note 8, at 1579 (remarking that "[o]ver two thousand channel assignments were reserved for more than 1200 communities; [and that] 252 channels were reserved for educational use"). In total, the allocated UHF channels, 14-83, provided 1,433 additional station assignments. NOLL ET AL., *supra* note 23, at 4 (highlighting alterations that were made to this allocation plan in 1966).

41. *See* STERLING & KITROSS, *supra* note 32, at 299 (reporting that "even those in favor of greater access were not in favor of starting the untried UHF band").

42. *See generally* In the Matter of Improvements to UHF Television Reception, Report and Order, 90 F.C.C.2d 1121, ¶¶ 1-5, 20-27 (1982) [hereinafter 1982 UHF Development Policy Order] (reporting that the UHF signal has historically suffered from particular challenges, such as a weaker signal, poor signal and picture reception, and much higher operating costs than VHF stations because of the higher power levels that UHF requires). The Report also states findings from the efforts by the FCC to aid UHF stations and foster their growth. *Id.* *See generally* BRUCE M. OWEN ET AL., TELEVISION ECONOMICS 122 (1984) (citing tuning difficulties and technical limitations as two major obstacles to the success of UHF television stations).

43. *See* STERLING & KITROSS, *supra* note 32, at 324 (stating that a lower-frequency station, and thus a lower-numbered channel, provides better service than a higher-numbered channel because the signal of the lower-frequency will travel further).

44. *See id.* at 299 (citing receiver conversion problems as the primary technical obstacle facing potential UHF stations at that time); NOLL ET AL., *supra* note 23, at 102 (stating that UHF tuning was more difficult because it had poorer signals as compared with VHF stations).

45. *The Darkened Channels*, *supra* note 8, at 1579-80 (reporting strong opposition to intermixture by CBS and DuMont networks, as well as television manufacturers). The Commission initially chose to intermix UHF and VHF television in every market for two reasons: an all VHF market might restrict service in larger cities because of interference problems on the VHF band, while all-UHF communities would be deprived of the wider-reaching VHF service. *See* In the Matter of Table of Television Allotments, Notice of Proposed Rulemaking, 83 F.C.C.2d 51, ¶ 22 (1980) [hereinafter 1980 TV Allotments NPRM]. It is interesting to note that the President's Communications Policy Board Report of 1961 warned that intermixture would likely harm UHF stations for a considerable period of time because the technical differences of these two signals meant that UHF stations could not be comparable to VHF stations. STERLING & KITROSS, *supra* note 32, at 302-03. This report also acknowledged the early-comer status of VHF stations would mean that audiences would be unlikely to purchase additional receivers just to watch the newer

compete with others on the same frequency band, critics argued, the Commission sabotaged UHF stations by forcing them to compete with stations on the technically superior VHF band.<sup>46</sup> DuMont, the fourth major network at the time, set forth the following arguments against intermixture:

- (1) UHF transmitting equipment was inferior to available VHF equipment in power and efficiency;
- (2) large established VHF audiences would be withheld from UHF stations because of the need to buy adapters and in many cases to erect new receiving antennas for UHF;
- (3) UHF was not received as well in built-up or rough-terrain areas;
- (4) in large metropolitan markets, advertisers would prefer VHF stations with established receiver audiences and would prefer networks with VHF affiliates.<sup>47</sup>

Nevertheless, the FCC chose to support the “fiction of equivalence” of VHF and UHF.<sup>48</sup> They believed both that technology would improve and that viewer behavior would easily change.<sup>49</sup> It did not take long for the critics to prove UHF proponents wrong. Almost as soon as UHF stations began airing, most went dark.<sup>50</sup> In 1954, there were 121 UHF stations, over one-third of the total television stations on the air.<sup>51</sup> By 1960, forty-six of these had gone off the air.<sup>52</sup> All told,

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UHF stations. *Id.*

46. See 1978 UHF Television Improvement NOI, *supra* note 37, ¶ 7 (explaining that when UHF television began in 1952, it was competing with 108 well-established VHF stations, reaching two-thirds of nationwide households, as well as a majority of homes equipped with television sets that received only VHF television); see also STERLING & KITROSS, *supra* note 32, at 302-03 (illustrating how the critics’ predictions came true, with hundreds of UHF stations shutting down due to their inability to compete with the superior VHF stations).

47. *The Darkened Channels*, *supra* note 8, at 1580 (internal citations omitted).

48. STERLING & KITROSS, *supra* note 32, at 303.

49. 1952 Sixth Report and Order, *supra* note 39, ¶ 197.

[W]e are convinced that the UHF band will be fully utilized and that UHF stations will eventually compete on a favorable basis with stations in the VHF . . . . We are persuaded that the differences in propagation characteristics will not prevent UHF stations from becoming an integral part of a single service . . . . Further, there is no reason to believe that American science will not produce the equipment necessary for the fullest development of UHF.

*Id.*

50. STERLING & KITROSS, *supra* note 32, at 356. Those who argued that intermixture would destroy UHF stations were proven right almost as soon as these stations went on the air. Despite the Commission’s attempt to bring in viable competition to VHF stations, the intermixture plan created undeniable inequalities because of the status of the technology and viewer behavior at that time. See *id.* (stating that the large amount of VHF-only televisions put UHF at a serious disadvantage).

51. *Id.* at 102.

52. *Id.*

nearly fifty-five percent of the 165 stations that went on the air between 1952 and 1959 eventually failed.<sup>53</sup> UHF operators were battling all of the initial technical inequalities and discovering new difficulties along the way.<sup>54</sup>

Audiences were reluctant to start watching the new UHF stations, partly due to custom and partly because they found the quality of programming poor compared to the already-established VHF stations.<sup>55</sup> Television manufacturers were slow to produce UHF-VHF compatible sets, and they justified their foot-dragging by citing negligible demand for such sets, despite the fact that they had pledged to manufacture them.<sup>56</sup> Also, in an attempt to encourage localism, the FCC only authorized UHF stations to operate with enough power to serve small areas.<sup>57</sup> Regardless of this restriction, the technical limitations of the UHF signal, coupled with the inferiority of early transmitters and receivers, meant that it was difficult to receive a good UHF picture more than a few miles away from the transmitter.<sup>58</sup> This was true even if UHF stations were allowed to use several times more power than a VHF station.<sup>59</sup> Advertisers were turned off by UHF stations' small audiences, and many UHF station owners could not find a way to earn back the hundreds of thousands or millions of dollars they spent launching their new stations.<sup>60</sup> In addition, few networks were interested in

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53. See *id.* at 357 (citing these figures as evidence of the seriousness of the plight of UHF stations and noting that the FCC's first priority was to meet the needs of the television-hungry public by processing station applications).

54. See 1980 TV Allotments NPRM, *supra* note 45, ¶ 25 (explaining the Commission's assessment of the factors hindering UHF television in 1956, including the abundance of VHF-only television sets in homes; the performance deficiencies of UHF transmitters and receivers; and the resulting preference of program and money-making sources for VHF stations). The Commission also concluded that because most UHF stations could not attract an audience comparable to their competitors on the VHF band, they were forced to operate on a marginal basis or cease operating altogether. *Id.*

55. See NOLL ET AL., *supra* note 23, at 103 (noting some of the difficulties that UHF television faced at the outset, such as the fact that most television sets were built for VHF reception only, that UHF tuning was more difficult, and its signals were poorer).

56. See STERLING & KITROSS, *supra* note 32, at 356 (reporting that the production of all-channels sets peaked at thirty-five percent in early 1953 and dropped below nine percent by 1958). The absence of demand for all-channel sets gave manufacturers little incentive to produce sets with more features. *Id.*

57. See OWEN ET AL., *supra* note 42, at 122-23 (noting that the limitation placed on UHF stations with respect to their operating power was exacerbated by the existing technical handicap of poor signal quality, as well as viewers' preference for pre-existing VHF stations).

58. NOLL ET AL., *supra* note 23, at 103.

59. *Id.*

60. See STERLING & KITROSS, *supra* note 32, at 325 (noting that the first owners of UHF stations invested upwards of hundreds of thousands of dollars, only to find that

affiliating with UHF stations, and many of those who did so out of necessity changed their affiliation once the first VHF station appeared in the community.<sup>61</sup> Independent UHF stations could not take advantage of the economies of scale and the large audiences that their VHF counterparts had, and therefore, could not afford to air attractive programs.<sup>62</sup> Soon, UHF stations found themselves suffering from a vicious cycle of problems that managed to keep them in virtual ruin until the FCC focused its efforts on fostering their success.<sup>63</sup>

### B. *Cleaning Up the UHF Mess*

Reversing the overwhelming failure of UHF stations during their first ten years of existence required creative thinking. These stations had to overcome technical inequalities; market intermixture with technically superior and vastly-favored VHF stations; and lack of confidence in the capabilities and need for UHF television.<sup>64</sup> The Commission considered many potential solutions, but committed itself to only a fraction of these.<sup>65</sup>

At first, deintermixture was a fairly popular idea.<sup>66</sup> Despite its early resistance, the Commission seriously considered separating markets

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few advertisers cared about UHF stations and their tiny audiences). Sterling and Kittross compare many of the early difficulties of FM radio with those facing UHF stations because both services struggled to find network affiliation and advertiser interest in their early days, and both faced audiences who were content with their pre-existing stations on other frequency bands. *Id.*

61. *See id.* at 356 (stating that both networks and advertisers used a method called “circulation,” which counted “unique” viewers to determine where to award affiliations and contracts).

62. OWEN ET AL., *supra* note 42, at 122-23; *see also* NOLL ET AL., *supra* note 23, at 103 (noting that UHF stations often had difficulty generating revenue because their low budgets could only create low-quality programming, which resulted in a low volume of viewers, which in turn resulted in low advertising revenue).

63. *See* OWEN ET AL., *supra* note 42, at 122-23 (calling the UHF situation a “chicken and egg” problem because the absence of network affiliation for UHF stations at that time limited the advertising demand for them, and in turn, the weakness of UHF stations hindered the development of a fourth network).

64. *See* 1977 Television Assignment Order, *supra* note 23, ¶ 36 (noting that by 1955, over ninety percent of the population could receive service from at least one television station, but that the Commission still faced major obstacles to its goals of providing broad access to television across the country and competition in each television market by using both the UHF and VHF bands). In 1955, the major challenges facing struggling UHF stations were VHF-only receivers, VHF program and revenue preferences, and UHF transmitter and receiver deficiencies. *Id.*

65. *See* STERLING & KITTIROSS, *supra* note 32, at 357-58 (explaining that the Commission found that some proposals would not be effective to help UHF stations or to solve the interference problem between VHF stations, and that others were simply politically or technically infeasible); *see also* *The Darkened Channels*, *supra* note 8, at 1583-93 (outlining various Commission plans to remedy the ailments of unsuccessful UHF stations, such as deintermixture and VHF drop-ins).

66. *See* *The Darkened Channels*, *supra* note 8, at 1584 (naming Madison, Peoria,

such that some would receive all-UHF television, and some all-VHF.<sup>67</sup> Eventually, and perhaps ironically, this idea gave way to a proposal for an all-UHF television transition, which never became a reality.<sup>68</sup> The Commission also considered policies of selective deintermixture and “VHF squeeze-ins,” whereby VHF allocations would be taken from other uses and the entire band would be dedicated to television.<sup>69</sup> Pay or subscription television was yet another idea floated through the Commission.<sup>70</sup> Under that plan, UHF would operate like cable or like the subscription-based movie channels common today.<sup>71</sup> None of these ideas ever seriously took hold, and UHF television languished for some time.<sup>72</sup> It was almost a decade after the publication of the Sixth Report and Order of 1952 before Congress took an initiative to help the drowning UHF stations.

In 1962, Congress passed the All-Channel Receiver Act, giving the FCC the authority to require manufacturers to make television receivers capable of receiving both UHF and VHF channels.<sup>73</sup> This

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Hartford, and Evansville as cities that petitioned the FCC in 1954 and 1955 for deintermixture).

67. See 1977 Television Assignment Order, *supra* note 23, ¶¶ 36-37 (providing a short history of FCC solutions for struggling UHF television stations through 1977, and concluding that neither deintermixture nor squeeze-ins would adequately serve the Commission’s long-range objectives of making use of both UHF and VHF bands to provide a wide variety of well-spaced signals in each community).

68. See 1980 TV Allotments NPRM, *supra* note 45, ¶¶ 22, 26 (rejecting the all UHF-television move based on the absence of any specific showings that justified such extensive reallocation of television service); STERLING & KITTROSS, *supra* note 32, at 357 (asserting that although converting to an all-UHF system would equalize the competitive field among stations, it would be very expensive for VHF stations and would reduce the number of signals that rural areas could receive).

69. See 1977 Television Assignment Order, *supra* note 23, ¶¶ 36-37 (finding that “squeeze-in” VHF stations would ultimately not serve the public’s best interests). Prior to the surge in television popularity, the military controlled many spots on the spectrum. In 1939, for example, twenty-six percent of the frequencies below 162 MHz were allocated exclusively to government agencies, including the military. See SLOTTEN, *supra* note 32, at 146-48. Today, the FCC reserves some low-frequency assignments for government uses, allocating some channels specifically for emergency uses. *Id.*

70. STERLING & KITTROSS, *supra* note 32, at 326.

71. *Id.*

72. See *id.* at 359 (explaining that because Congress made most of the FCC’s policy decisions, it was improbable that any Commission decision in the UHF area would take hold until members of Congress and their constituents resolved their conflicting viewpoints). See generally 1977 Television Assignments Order, *supra* note 23 (detailing the history of the Commission’s efforts assisting UHF television); 1978 UHF Television Improvement NOI, *supra* note 37 (discussing various solutions to the problems facing UHF television).

73. All-Channel Receiver Act of 1962, Pub. L. No. 87-529, 76 Stat. 150. Under this authority the Commission required that all TV receivers be capable of UHF channel reception and adopted standards to make reception of UHF channels comparable with reception of VHF channels. 47 C.F.R. § 15.117 (2003). See also Fourth Further Notice of Proposed Rulemaking, Notice of Inquiry, Broadcast Services, Advanced Television Systems, 60 Fed. Reg. 42,130, 42,137 (Aug. 15, 1995)

legislation was the first truly effective government effort towards UHF channels. In the ten years after the All-Channel Act was passed, the UHF market grew by 111 stations while the VHF market added only forty-seven.<sup>74</sup> The Commission continued to favor UHF between 1970 and 1973 by requiring receivers to better tune into both UHF and VHF.<sup>75</sup> Throughout the 1970s the Commission created several additional regulations mandating the improvement of television receivers as an effort to bridge the technical gap between VHF and UHF.<sup>76</sup>

In 1978, the Commission created the UHF Comparability Task Force, which was dedicated to the improvement of UHF television service.<sup>77</sup> By this time, television sets were receiving UHF, and the stations on this band had been around for some time.<sup>78</sup> The challenges still facing UHF at this point were primarily technical.<sup>79</sup> A 1982 Report releasing the work of the UHF Task Force highlighted this challenge and indicated that if the technical gap could be

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[hereinafter 1995 Fourth NPRM, Advanced Television Systems].

74. Much of the burgeoning success of UHF after 1962 came directly from the Commission's efforts to encourage its growth. See 1980 TV Allotments NPRM, *supra* note 45, ¶ 42. In fact, the FCC concluded that the statutory enactment of the All-Channel Receiver Law was an implicit directive to foster UHF television development, even at the expense of VHF television. *Id.* This mentality gave rise to the UHF Impact Policy, which would consider potential harm to UHF television over potential success of a VHF station until its abolition in the 1980s. *Id.* See also STERLING & KITROSS, *supra* note 32, at 381 (citing the lack of desirable VHF channels as an additional factor in the rise in popularity of UHF channels between 1964-1974).

75. 1982 UHF Development Policy Order, *supra* note 42, at 35,975.

76. For example, in 1978, the Commission acted to improve the quality of UHF pictures by lowering the maximum "noise" figure allowed on each receiver, which would reduce the amount of "snow" in each UHF picture displayed on a television set. *Id.* The Commission also stated its commitment to opening new proceedings designed to improve other aspects of UHF television performance, stating:

These initiatives will provide us with the opportunity to review from television station studio to home video screen virtually all of the technical factors which influence quality of UHF home television reception. We believe that this is the best concentrated effort that we can undertake to help UHF television at this time.

In the Matter of UHF Television Receiver Noise Figures, 69 F.C.C.2d 1866, ¶ 2 (1978) [hereinafter 1978 UHF Receiver Noise Figures]. These efforts paid off: In 1974, forty-eight percent of the UHF television stations reported financial data indicating profitability that year. See 1980 TV Allotments NPRM, *supra* note 45, ¶ 49. The amount of households with UHF receivers increased by thirty-four percent in just five years, to eighty-nine percent of households nationwide by 1974. *Id.*

77. See 1978 UHF Television Improvement NOI, *supra* note 37, ¶ 1 ("Congress approved a \$750,000 appropriation and created five staff positions to examine comparability for UHF and VHF television. Pub. L. No. 95-431, 92 Stat. 1040 (October 10, 1978).")

78. See *id.* ¶ 7 (noting that the UHF television band was available for commercial use in 1952).

79. See *id.* ¶ 18 (listing the potential areas of improvement that the task force would evaluate, such as antenna height, quality of antennas and receivers, and technical improvements to television sets).

bridged, UHF had the potential to be quite profitable.<sup>80</sup> The subsequent efforts of the FCC to bridge this gap through regulation proved extremely effective, and UHF television quickly reached viability.<sup>81</sup>

### C. *Creating the UHF Discount*

In 1984, the Commission increased the national broadcast ownership limit on commercial television stations from seven to twelve.<sup>82</sup> Under the new rule, a company was permitted to own as many as twelve television stations, provided that these stations did not collectively reach more than twenty-five percent of the nation's viewing audience.<sup>83</sup> From this time until the Telecommunications Act of 1996, an entity could own television stations with an aggregate, national reach of twenty-five percent of television-ready households.<sup>84</sup> The stated purpose of these rules was to weigh all of the Commission's goals and strike a balance between proper regulation and healthy competition.<sup>85</sup> The Commission is dedicated to promoting competition from smaller or independent media owners and the "diversification of program and service viewpoints."<sup>86</sup> At the same time, the Commission has an interest in allowing common ownership of media outlets so that market power of companies can grow and allow "efficiencies to be realized."<sup>87</sup>

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80. See 1982 UHF Development Policy Order, *supra* note 42, at 35,975 (observing that perfect equality between UHF and VHF is not required in order to achieve a "diverse and competitive UHF television service," and advocating a "viable and profitable UHF service on its own merits, without comparison to VHF").

81. For a detailed discussion of the regulations created to foster the growth of UHF television see *infra* Part III.B.

82. See In the Matter of Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order, 100 F.C.C.2d 17, ¶¶ 4-10 (1984) [hereinafter 1984 Multiple Ownership Order] (concluding that the profound changes in American broadcasting over the three decades since the Commission adopted the Seven Station Rule necessitated a change in policy).

83. *Id.*

84. *Id.*; see also Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), 47 C.F.R. § 73.3555 (2003) ("Section 73.3555(e) of the Commission's Rules will be revised to reflect the changes directed by section 202(c)(1) of the Telecom Act... by increasing the national audience reach limitation for television stations to 35%."). National ownership was calculated then as it is today. However, the Commission has made a subtle shift in its definition of television markets, as it currently uses Designated Market Areas ("DMA"), which are assigned by Nielson Media Research. § 73.3555(b).

85. 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,752.

86. *Id.* at 65,768-69.

87. *Id.* The Commission justified the increase in the multiple ownership rule by contending that the threat of scarcity in media was largely outdated. In the 1984

When the Commission initially adopted this twelve station rule, it treated UHF stations and VHF stations identically in its calculation.<sup>88</sup> Three parties subsequently petitioned the Commission for reconsideration on this matter, asking that the rule give an extra audience reach for UHF stations.<sup>89</sup> The Commission considered the issue, taking into account the evaluation of its UHF Comparability Task Force, which found that the ultimate challenge facing UHF was its physical inability to reach viewers.<sup>90</sup> The Commission concluded that there was “demonstrable progress in the viability of UHF television,” but ultimately decided that the national multiple ownership rules should reflect the ongoing physical limitations of the UHF signal.<sup>91</sup>

The Commission reasoned that it could best compensate for UHF television’s technical weaknesses by expanding the authorized audience reach limit for UHF stations.<sup>92</sup> It found that this system would provide a measure of the actual voice handicap of UHF stations and, therefore, would be consistent with its traditional objectives of localism, diversity, and competition.<sup>93</sup> The rulemaking amending the national ownership calculation ordered that UHF stations should be attributed with only fifty percent of a recognized television market, or Area of Dominant Influence (“ADI”).<sup>94</sup> The rule provides that the Commission will count a station on the UHF band as fifty-percent of a station on the VHF band when calculating the aggregate national ownership percentage belonging to a media

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Report and Order increasing the station limit from seven to twelve, the Commission cited improvements in technology, changes in spectrum regulation, and expanding audience and advertising markets as evidence of this shift. *See* 1984 Multiple Ownership Order, *supra* note 82, ¶ 7. In addition, the Commission stated that FM radio stations and UHF television stations have emerged as thriving rivals of other broadcasting outlets. *Id.*

88. 1984 Multiple Ownership Order, *supra* note 82, ¶ 5.

89. 1985 Amended Multiple Ownership Order, *supra* note 9, ¶ 12 (“In establishing an audience reach cap, Group W, Cox and MPAA each propose that the Commission adopt rules which take cognizance of the difficulties faced by UHF stations. Both Cox and Group W propose an additional reach limit of 2.5% for UHF stations . . .”).

90. *See id.* ¶¶ 42-44 (“Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF. It should be recognized that actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength.”).

91. *Id.*

92. *See id.* (refusing to simply increase the number of stations a company may own with respect to UHF stations, reasoning that this does not adequately remedy the physical limitations of the UHF signal).

93. *Id.*

94. *Id.*

entity.<sup>95</sup> It assumes that the UHF signal only reaches half the distance, and therefore, half the viewers of a VHF signal.<sup>96</sup> For example, the theoretical ADI audience reach of the New York City market comprises 7.72% of all television households.<sup>97</sup> Under the UHF discount provision, the owner of a UHF station in this market would be attributed with an audience reach of only fifty percent of this 7.72%, which equals 3.86% points towards national ownership.<sup>98</sup> Accordingly, a broadcast company can own two UHF stations for every one VHF station under the national ownership cap limitation. Thus, the “two-for-one” deal of the UHF discount was born.

### III. IT IS TIME FOR THE FCC TO ELIMINATE THE UHF DISCOUNT

UHF stations have advanced considerably since the Sixth Report and Order of 1952. Technological change, especially UHF signal improvements and the advent of cable television, began to bridge the gap between UHF and VHF television as far back the 1970s.<sup>99</sup> Currently, there are approximately four times more UHF stations on the air than VHF stations.<sup>100</sup> Networks that primarily affiliate with UHF stations are among the most successful in the media marketplace.<sup>101</sup> The UHF discount reflects a market that existed over twenty years ago, and the Commission cannot justify maintaining a rule that reflects a world that no longer exists.<sup>102</sup> The Commission

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See Letter from Andrew Jay Schwartzman, President and CEO, Media Access Project, to Marlene Dortch, Secretary, Federal Communications Commission (May 29, 2003) (summarizing the Commission’s own findings of technical equality between UHF and VHF television). When Media Access Project filed this letter in opposition to the Biennial Broadcast Review Rules, it attached copied pages from the Economic Analysis relied upon by the Commission in its decision to repeal the Prime Time Access Rule. *Id.* This study states that “[t]here is no evidence that the UHF handicap persists today” and asserts that the government interference with these stations “makes society as a whole worse off.” ECONOMISTS INCORPORATED, PRIME TIME ACCESS RULE: A SUPPLEMENTARY ECONOMIC ANALYSIS 23, 58 (1995).

100. 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,755 (“Over-the-air outlets include 1,331 commercial TV stations (752 UHF, 579 VHF) and 381 non-commercial, educational TV stations (254 UHF, 127 VHF).”).

101. See Miller & Trigoboff, *supra* note 9 (ranking Viacom, which owns former CBS and UPN (United Paramount) Groups, the top-ranked network in America, with Fox coming in as the second-ranked network). The success of “baby networks” such as the WB and UPN, which affiliate primarily with UHF stations, is the kind of evidence that convinced the Commission to repeal other regulatory assistance measures designed to foster the growth of UHF television. See 1995 PTAR Order, *supra* note 14, ¶¶ 1-3, 70-80.

102. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (2003) (requiring the Commission to examine its rules biennially and retain only those “necessary in the public interest as a result of competition”). Courts have held

has repealed every other regulatory assistance to television stations on this band, and has amassed innumerable findings along the way showing the robust health of UHF television.<sup>103</sup> Keeping the UHF discount in the face of this evidence is an unacceptable inconsistency on the part of the FCC.<sup>104</sup>

The most egregious effect of the UHF discount today is its encouragement of ownership consolidation in broadcast television.<sup>105</sup> The largest media companies easily take advantage of the “two-for-one” deal on UHF stations under the current rules, and thereby own far more television stations than is allowed under the ownership cap. Media concentration on this level poses a direct threat to competition, diversity, and localism because it shuts smaller competitors and independent owners out of the media market.<sup>106</sup> Thus when the Commission voted to raise the national ownership cap to forty-five percent, it in fact elevated the cap much higher for broadcast owners with the greatest buying power.<sup>107</sup> If keeping the UHF discount posed a direct threat to the public interest before June 2, 2003, perpetuating this provision while raising the national ownership cap is a fatal blow to this principle.

A. *The Telecommunications Act of 1996 and the Commission’s Mandate to Update Broadcast Regulations*

Section 202(h) of the Telecommunications Act of 1996 provides that the Commission shall review its ownership rules on a biennial basis and “shall determine whether any of such rules are necessary in

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that this section carries with it a presumption toward change. See 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,287. Thus, unless the Commission issues a report detailing its justification for maintaining a broadcast rule, it must repeal or modify any existing rule. H.R. CONF. REP. NO. 106-464, at 148 (1999).

103. The Commission has issued various decisions over the past ten years repealing regulatory assistance measures designed to foster the growth of UHF stations. See, e.g., 1995 Review of Broadcast Rules Order, *supra* note 12, ¶ 4 (repealing the Secondary Affiliation Rule); 1995 PTAR Order, *supra* note 14, ¶¶ 1-4 (repealing the Prime Time Access Rule); 1988 Detrimental Effects Order, *supra* note 14, ¶¶ 1, 26-31 (repealing the UHF Impact Policy and the *Carroll* Doctrine).

104. See 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,340-41 (citing, in direct opposition to its previous findings, that UHF television has not reached viability, that it continues to suffer from a technical handicap with respect to VHF television, and that cable has not grown pervasive enough to justify eliminating the rule).

105. Six of the largest broadcast companies, all of which have taken advantage of the UHF discount, find themselves far above the ownership cap when the UHF provision is eliminated. See Miller & Trigoboff, *supra* note 9 (showing the top twenty-five TV-station groups and their national broadcast ownership with and without the UHF discount).

106. *Id.*

107. *Id.*

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."<sup>108</sup> The Court of Appeals for the D.C. Circuit, which has jurisdiction over the FCC, has determined that this provision of the 1996 Act carries with it a presumption in favor of repealing or modifying ownership rules.<sup>109</sup> If the Commission chooses instead to retain a rule under review, the Conference Report accompanying the Act demands that the agency issue a report that includes a full justification of the basis for so finding.<sup>110</sup> Thus, the Commission should eliminate the UHF discount if it has evidence of the viability of UHF television that could establish that this assistance is no longer in the public interest. This section argues that the Commission has exactly such evidence, and accordingly, should have repealed this rule in its most recent review.

The first major aid to UHF television since its inception fifty years ago came from the evolution of viewer behavior. Although viewers once shied away from the stations on UHF, evidence of the growth of stations on this signal proves that audience prejudice has changed.<sup>111</sup> In 1975, for example, there were only 344 UHF stations.<sup>112</sup> Today, that number has grown to 931.<sup>113</sup> There are approximately three times more UHF stations today than in the 1970s. VHF stations, by contrast, have only grown from 609 to 688.<sup>114</sup>

The primary developments that have equalized UHF and VHF television, however, are technological. Over the past thirty years, improvements in the design of television receivers substantially improved the quality of reception of UHF stations in over-the-air (non-cable) television.<sup>115</sup> These changes came largely through Commission regulations designed to bridge the technical gap between the two signals.<sup>116</sup>

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108. Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (2003).

109. See, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (concluding that the Commission may only retain a rule if it is necessary in the public interest).

110. H.R. CONF. REP. NO. 106-464, at 148 (1999).

111. For more figures showing the growth of UHF stations see *supra* Part III.A and *infra* Part III.B.

112. 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 18-26.

113. *Id.*

114. *Id.*

115. See OWEN ET AL., *supra* note 42, at 123 (noting that thirty years ago the UHF handicap was waning, due partly to the rise in popularity of cable, and in part because FCC regulations mandated improvements to UHF receivers).

116. See *supra* Part II.C (discussing the Commission's regulations and policies throughout the 1970s and 1980s that were designed to improve the technical qualities of the UHF signal).

Cable television finally closed the gap between UHF and VHF television. Most Americans today likely could not distinguish between stations on these two bands because of cable. Approximately eighty-five percent of households nationwide receive their television through some kind of cable or satellite service.<sup>117</sup> Further, cable now “passes” through over ninety-seven percent of all homes, which means that almost every household in America is able to receive cable if desired.<sup>118</sup> This figure is up from seventy-five percent in 1985.<sup>119</sup> Over cable, VHF and UHF channels are equal, both in the distance of each signal’s reach and in picture quality.<sup>120</sup> Additionally, in order to ensure equal treatment of UHF and VHF over cable, Congress passed the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to carry a certain number of local over-the-air broadcast signals.<sup>121</sup> In short, cable is the great

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117. Currently over 106 million television households in United States are served by a variety of video outlets. See Comments of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women’s Institute for Freedom of the Press, In the Matter of 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rule and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, at 57 (Jan. 2, 2003) (on file with the American University Law Review) [hereinafter UCC et al. Comments] (placing the number of households subscribing to standard cable at 69 million nationwide); 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,755 (citing Nielson Media Research).

118. Statement of Commission Kevin Martin, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 17 F.C.C.R. 1244, ¶ 17 (2001).

119. Only thirty-seven million households subscribed to cable in 1985, while sixty-nine million subscribe today. See UCC et al. Comments, *supra* note 117, at 57 (citing JONATHAN LEVY ET AL., BROADCAST TELEVISION: SURVIVOR IN A SEA OF COMPETITION 41 (2002)).

120. See In the Matter of Broadcast Television National Ownership Rules—Review of the Commission’s Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, Notice of Proposed Rulemaking, 11 F.C.C.R. 19,949, ¶¶ 11-16 (1996) [hereinafter 1996 Broadcast Ownership NPRM] (describing the narrowing gap between the two frequency bands); 1995 Review of Broadcast Rules Order, *supra* note 12, ¶ 20 (noting that the role of cable carriage has decreased the gap between UHF and VHF stations).

121. Pub. L. No. 102-385, 106 Stat. 1460 (“Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section . . .”); FCC Broadcast Radio Services, 47 C.F.R. § 76.56 (2001) (mandating the carriage of noncommercial television stations). At one time, the precarious constitutional standing of these must-carry rules served as an argument for retaining the UHF discount. See 1996 Broadcast Ownership NPRM, *supra* note 120, ¶¶ 9-16. ALTV and Silver King, commenting in favor of retaining the UHF discount, contended that the then-uncertain state of the must-carry rules required that the UHF discount remain in effect because without a must-carry requirement, UHF stations would be at a greater disadvantage due to the additional and expensive technical requirements they must overcome. *Id.* However, the Supreme Court has since upheld the constitutionality of

equalizer of television signals, and the vast majority of Americans have cable. Thus, the Commission is perpetuating the UHF discount for approximately three percent of the country—hardly a regulation in the name of the public interest.

Notably, as early as 1989, the Commission sought comments on whether the UHF discount itself was becoming unnecessary because of the pervasiveness of cable.<sup>122</sup> At that time, just over sixty percent of households subscribed to cable, a level of access sufficient for the Commission to begin seriously considering eliminating this rule at that time.<sup>123</sup>

Ironically, the majority stated throughout the 2002 Broadcast Review that changes in technology and within the marketplace call for changes in broadcast rules.<sup>124</sup> Nevertheless, the empirical evidence demonstrating the advancement of UHF television, in addition to the Commission's own findings of technological improvements and UHF viability, were ineffective to convince the Commission to eliminate the UHF discount.<sup>125</sup>

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these rules in *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997), noting:

Must-carry was designed to serve three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming market.

*Id.* at 189 (internal quotations omitted).

122. See 1988 Detrimental Effects Order, *supra* note 14, at ¶¶ 1, 26-31 (repealing the UHF Impact Policy).

123. See *id.* (confirming that the ever-decreasing difference between UHF and VHF was enough to repeal the provision); see also Bill McConnell, *Capitol's Goodmon Urges End to UHF Discount*, BROAD. & CABLE, May 30, 2003, at <http://www.broadcastingcable.com/article/CA302578> (on file with the American University Law Review) (reporting that the head of Capitol Broadcasting Company asserted that the discount is no longer necessary and is in fact harmful to the public interest, citing the negligible difference between a station signal on each band as support for his position).

124. See Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 18 F.C.C.R. 13,620, ¶ 3 (2003).

Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic.

*Id.*; see also *FCC Sets Limits on Media Concentration*, 2003 WL 21251881 (June 2, 2003) (noting the FCC's findings that Americans rely on a variety of media outlets, not just broadcast television, for news and information).

125. See Statement of Commissioner Jonathan Adelstein, Dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission's Broadcast

The Commission has evidence of changes to UHF television that render the UHF discount unnecessary. According to the presumption in favor of change that Section 202 carries, the Commission should have eliminated this rule. Giving evidence different weight in different situations, as it appears the Commission does with facts showing technological advancements and a changed marketplace, creates analytical inconsistency. Greater still is the inconsistency between the Commission's hands-off approach to the UHF discount and the line of decisions eliminating other regulations that assisted once-ailing UHF stations.

*B. Maintaining the UHF Discount is Inconsistent with a Line of Decisions Eliminating Regulatory Assistance Measures for UHF Television*

The Commission's findings throughout the 1980s and 1990s indicated that the gap between UHF and VHF television was drawing to a close.<sup>126</sup> Throughout those decades, the Commission began repealing regulations designed to aid UHF stations based on evidence showing their technical improvement and economic viability.<sup>127</sup> These Orders show the years of findings that spurred the rescission of many rules, providing logical support for the elimination of the UHF discount. Inexplicably, the Commission has failed to consider this evidence as grounds to do so.

A close look at the history of FCC rulemakings shows that the Commission began to change its attitude toward protecting UHF

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Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 (Jun. 2, 2003), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A8.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf) (on file with the American University Law Review) ("If the purpose of this exercise is to update our rules in light of technological developments, we can't ignore some just because we don't like the outcome of more stringent limits."); Owen Gibson, *U.S. Plans Radical Revamp of Media Ownership Rules*, GUARDIAN, May 13, 2003 (citing Gene Kimmelman of the Consumer's Union: "If the theory behind changing the rules is that the FCC needs to keep up with market conditions, to preserve a significant discount for UHF stations is simply a fraud on the regulatory process . . ."), available at <http://media.guardian.com/Uk/Print/0,3858,4667699-105240,00.html>. Another controversial argument regarding the Commission's inconsistency in its most recent Broadcast Order is that the Commission chose to maintain the UHF discount provision for the television duopoly rule, but discarded it in media cross-ownership regulations and for the local ownership rule. See Adelstein, *supra* (calling this phenomenon the Commission's "most inexplicable inconsistency"). But see 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,299 (arguing that these rules regulate different media entities and different ownership situations, and should thus be construed differently).

126. See 1996 Broadcast Ownership NPRM, *supra* note 120, ¶¶ 1-16 (describing the narrowing gap in signal quality between UHF and VHF signals and how it requires a review of existing law).

127. See 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,348-49 (describing how the FCC's biennial reviews take into account the changing technology in the decision to change existing rules).

stations as early as 1977.<sup>128</sup> In 1960, the Commission sought to protect UHF stations with the UHF Impact Policy, which restricted the competition presented by new VHF television stations to UHF stations.<sup>129</sup> Under the UHF Impact Policy, a UHF station owner could prevent the Commission from granting a license to a new VHF station by proving that building this station would cause the UHF station economic harm.<sup>130</sup> Subsequent technical advancements to television sets and UHF receivers fostered the growth of UHF television, and by the mid 1970s, the Commission substantially relaxed this competitive restriction.<sup>131</sup>

In 1988 the Commission eliminated the UHF Impact Policy, finding that the UHF service had achieved a sufficient degree of comparability with the VHF service to obviate the need for this restriction.<sup>132</sup> Findings showed that UHF television had improved “dramatically,” and that the signal disparities between UHF and VHF service had been largely eliminated.<sup>133</sup> Numerous findings like this kindled a wave of rulemakings in the late 1980s and throughout the 1990s eliminating provisions that were designed to compensate for the technical and market handicaps of UHF television.<sup>134</sup> The Commission found that restricting competition from VHF stations against UHF stations was no longer necessary in the public interest.<sup>135</sup>

In 1995, the Commission repealed the Secondary Affiliations rule, which was created in 1971 to encourage greater access to network programming for then-struggling UHF stations.<sup>136</sup> When the

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128. See 1977 Television Assignment Order, *supra* note 23, ¶¶ 2-5, 47-48 (reexamining UHF Impact Policy restrictions in light of the health of UHF television).

129. See *id.*

130. See 1988 Detrimental Effects Order, *supra* note 14, ¶ 1.

131. See 1977 Television Assignments Order, *supra* note 23, ¶ 48 (changing the UHF Impact Policy to favor VHF stations by holding that “regardless of the characterization of the impact on UHF, a VHF applicant may now demonstrate by countervailing evidence, that, overall, the weight of the public interest favors the grant of an application . . .”).

132. See 1988 Detrimental Effects Order, *supra* note 14, ¶¶ 1, 26-31, 47 (concluding that continuing this policy would likely produce negative effects on the public interest by hindering the introduction of new VHF service).

133. See *id.* ¶ 27 (concluding that the “dramatic improvement” to UHF television resulted from the continuing growth of the television market and Commission requirements for changes in television receiver designs that significantly eradicated the technical handicap of the UHF signal service).

134. See 1995 PTAR Order, *supra* note 14, ¶¶ 1-3, 76-80 (repealing the Prime Time Access Rule); 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 1, 4-26 (repealing the Secondary Affiliation Rule and the Network Station Ownership Rule).

135. See 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 1, 4-26.

136. See 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 1, 12-26 (ordering the elimination of both the Secondary Affiliation Rule and the Network Station Ownership Rule). The Network Station Ownership rule was not specifically

Secondary Affiliation Rule was adopted, there were certain markets with two VHF network affiliates and one UHF independent station. In such markets, the third network would choose to place its programs on one or both of the VHF stations on a secondary basis rather than to affiliate with the UHF station.<sup>137</sup> The provision restricted a station from acquiring a second network affiliation by directing that a network first offer affiliation to an independent, unaffiliated station.<sup>138</sup> The basic goal underlying the Commission's adoption of the Secondary Affiliation Rule was to increase the likelihood that UHF television would develop into a viable and competitive service.<sup>139</sup>

By the mid 1990s, however, the Commission could not ignore the improvement of UHF television, and repealed the Secondary Affiliation Rule based on two major factors: (1) the improvement of UHF reception; and (2) the increased availability of programming and competition for affiliates.<sup>140</sup> The Commission concluded that these developments removed the factors for which the Secondary Affiliation Rule was designed to compensate.<sup>141</sup> It found that independent UHF stations had become more competitive despite their lack of affiliation with the traditional networks and concluded that they no longer appear to need regulatory assistance to attract affiliations of new networks.<sup>142</sup>

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created to assist UHF stations, and thus is not treated in the text of this Comment. *See id.* ¶¶ 1-11. This rule was created to preserve localism of television in rural areas. *Id.* The Commission decided to eliminate this rule based on technological advancements since its inception in 1946 and the growth of media outlets in rural areas, reasoning that both have rendered this limitation on networks unnecessary and overly restrictive. *Id.*

137. *Id.* ¶¶ 12-14.

138. *Id.* ¶ 12. The Secondary Affiliate Rule required that in TV markets where two of the three traditional networks already have an affiliate, a network with no affiliate in the market must offer prime-time programs and weekend sports events to independent stations with facilities comparable to the other network affiliates (UHF or VHF) before offering the programs to either of the two affiliated stations. *Id.*

139. *See id.* ¶¶ 12-26 (recounting the difficulty that UHF stations had attracting network affiliation in 1971).

140. *Id.* ¶¶ 18-26. The Order asserted that advances in television design and the role of cable carriage had decreased the gap between UHF and VHF stations, and that these developments had "substantially alleviated" the technical disadvantages facing UHF receivers. *Id.* ¶ 20.

141. *Id.*; *see also supra* Part III.A (describing the Commission's findings of the growth and viability of UHF stations).

142. *See* 1995 Review of Broadcast Rules Order, *supra* note 12, ¶ 22 (finding that of Fox's 140 primary affiliates, 121 (86%) are UHF stations; of United Paramount's 95 affiliates, 78 (82%) are UHF stations; and of Warner Brothers 43 affiliates, 34 (79%) are UHF stations). Notably, the successful affiliation of UHF stations was not a result of the Secondary Affiliation Rule, because none of the newer networks, such as Fox, United Paramount, and Warner Brothers, were subject to the rule. Rather, these networks chose to affiliate with UHF stations of their own accord. *Id.*

The 1995 Review of Broadcast Rules Order is a powerful piece of evidence showing the Commission's acknowledgement of UHF viability and foreshadows a general movement away from regulations assisting UHF television. Specifically, the Commission found a 250% growth in the number UHF stations over the previous two decades as well as a tripling of profits over the previous year.<sup>143</sup> The Order noted the recent elimination of the Secondary Affiliation rule, and previewed its request for comments on the comparability between UHF and VHF television.<sup>144</sup> While this Order did not do away with all regulatory assistance measures for UHF television, the fact that the Commission was seeking comment on the topic is proof of the Commission's inference, almost ten years ago, that UHF television could be healthy enough to stand on its own.

The next UHF assistance measure that met its end in 1995 was the Prime Time Access Rule ("PTAR").<sup>145</sup> PTAR prohibited network-affiliated television stations in the top fifty television markets from broadcasting more than three hours of network programs during the four prime time viewing hours.<sup>146</sup> This rule was created in 1970 in response to a concern that the three major television networks—ABC, CBS, and NBC—dominated the program production market and inhibited the development of competing program sources.<sup>147</sup> The rule was seen as a way to promote the growth of independent stations by preventing them from competing with Top 50 Market Affiliates in acquiring off-network programs.<sup>148</sup> The Commission found that the rule did not address the technical disparity between UHF and VHF, but rather provided a competitive advantage to independent stations by limiting the programming options available to Top 50 Market Affiliates, even in cases where the affected network affiliates were themselves UHF stations.<sup>149</sup> Ultimately, the FCC

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143. *Id.* ¶ 23. The Commission found that in 1971, there were 179 commercial UHF television stations on the air and as of December 31, 1994, the number of commercial UHF stations had risen to 601, an increase of 235 percent. *Id.* It further stated that profits for UHF independents, on average, have risen dramatically since that year. *Id.* In 1992, average profits were \$552,000, and in 1993, average profits tripled to \$ 1.5 million. *Id.*

144. *See* 1995 Review of Broadcast Rules Order, *supra* note 12, ¶ 23. Here, the Commission recognized that the UHF service had achieved enough comparability with VHF to eliminate the Secondary Affiliation Rule and noted the elimination of the UHF Impact Policy in 1987. It asserted that this degree of comparability may not be enough to warrant the rescission of all rules designed to promote UHF stations, but asked for comment on the issue of VHF/UHF comparability. *Id.*

145. *See* 1995 PTAR Order, *supra* note 14, ¶¶ 77-80.

146. *Id.* ¶ 1.

147. *Id.*

148. *Id.*

149. *Id.* ¶ 79.

concluded that the UHF handicap did not justify continuing the Prime Time Access Rule.<sup>150</sup>

In the Review of the Prime Time Access Rule Order, the Commission recognized the robust growth of UHF television, as well as the vast improvements to quality of the UHF signal, and found that the pervasiveness of cable removes all disparities between UHF and VHF television in almost every home in the nation.<sup>151</sup> The Commission also found that the development of the new networks, such as United Paramount Network (“UPN”) and Warner Brothers’ WB network were indications of the health of UHF television, as these networks affiliate primarily with UHF stations.

In 1996, Congress passed the Telecommunications Act.<sup>152</sup> This law made sweeping changes to broadcast ownership rules, and mandated that the Commission review its broadcast rules biennially.<sup>153</sup> The Act was explicitly silent with respect to the UHF discount.<sup>154</sup> However, growing evidence of unprecedented media concentration, and the role that the UHF discount played in this concentration, became a concern for the Commission.<sup>155</sup> As a result, in its first Notice of Proposed Rulemaking after the Telecommunications Act of 1996, the Commission sought comments on retaining the discount based on its findings that technological advancements and the high penetration rate of cable may have rendered the provision unnecessary.<sup>156</sup>

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150. *Id.*

151. *Id.* ¶¶ 76-80; *see also* Letter from Andrew Jay Schwartzman to Marlene H. Dortch, *supra* note 99 (summarizing many arguments in favor of repealing the UHF discount, such as the inconsistency of its use in Commission rules, as well as the advances in technology and viewer behavior that have rendered it unnecessary).

152. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

153. Before the 1996 Act, media entities were not allowed to own more than twelve television stations, or own stations that would, in the aggregate, result in national aggregate ownership of more than twenty-five percent. 1996 Broadcast Ownership NPRM, *supra* note 120, ¶¶ 1-16.

154. Telecommunications Act of 1996; 1996 Broadcast Ownership NPRM, *supra* note 120, ¶¶ 1-16.

155. *See* Sinclair Broad. Group v. FCC, 284 F.3d 148, 160 (D.C. Cir. 2002) (discussing the Commission’s recognition of growing consolidation, as well as the findings that put them on notice). The Court further noted that since the passage of the 1996 Telecommunication Act there has been a “resultant downward trend in the number of station owners in each market.” *Id.* This consolidation prompted the Commission to “engage in an exercise in line drawing” between allowing broadcasters to realize economic efficiencies on one hand, and ensuring diversity and competition on the other hand. *Id.*

156. 1996 Broadcast Ownership NPRM, *supra* note 120, ¶¶ 1-16. This Notice also sought comments on whether the Commission should impose supplementary limitations on the national ownership reach until the UHF discount issue was resolved. *Id.* Thus, the Commission acknowledged in this Notice that the UHF discount encouraged media concentration by effectively raising the national ownership cap. The Commission cautioned that an owner who was allowed to own thirty-five percent of the national audience could exercise too much control over the

In 1998, the Commission reconsidered the status of the UHF discount but concluded that the technical disparity between the signals had not been completely ameliorated and did not justify repealing the UHF discount, despite growing evidence from commentators that the handicaps facing UHF television had largely disappeared.<sup>157</sup> Companies like ABC, CME Press Broadcasting, and Greater Media argued that the pervasiveness of cable, along with vast technical improvements in the industry had almost completely eliminated the reasons for the creation of the UHF discount.<sup>158</sup>

The Commission is currently taking comments regarding the elimination of the discount based on whether or not the language of the 2004 Appropriations Act signifies “congressional approval, adoption or ratification” of the UHF discount.<sup>159</sup> Beyond this consideration of congressional intent, the Commission’s posture on the UHF discount in the 2002 Biennial Review suggested that it will consider applying a sunset provision to the UHF discount once the transition to digital television is nearly complete, although it declined to fix a date for that transition.<sup>160</sup> The Commission reasoned that digital television will “substantially equalize” UHF and VHF signals, but failed to explain how this “substantial equality” is more significant or persuasive than the “substantial alleviation” of the technical

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media by virtue of the UHF discount. *Id.*

157. *See* In the Matter of 1998 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order, 15 F.C.C.R. 11,058, ¶¶ 35-38 (2000) [hereinafter 1998 Biennial Broadcast Review Order] (concluding that the UHF discount remains necessary in the public interest because the handicap experienced by UHF stations has not yet been fully eliminated).

158. *Id.* In addition, these companies proposed plans such as calculating the disparity on a market-by-market basis, or implementing a discount that properly reflects the large number of households who subscribe to cable, and thus, do not experience disparities between signals. *Id.*

159. 2004 UHF Discount Comment Request, *supra* note 6, at 9215.

160. *See* 2002 Biennial Broadcast Review Rules Order, *supra* note 4, at 43,337 (reasoning that roughly thirty percent of televisions in the United States receive only free over-the-air television, and that UHF stations still cover smaller areas than VHF stations). The Commission found that this technical inequality continues to effect UHF television’s ability to compete with VHF television. *Id.* The Commission further found that the UHF discount has promoted the entry of new broadcast networks into the market, which have improved consumer choice and program diversity for those with and without cable and satellite television service. *Id.* Notably, the Commission has not confirmed that it will eliminate this provision after the transition to digital cable. *Id.* Rather, it plans to sunset the application of the UHF discount for the stations owned by the top four broadcast networks (i.e., CBS, NBC, ABC and Fox) as the transition to digital television draws to a close, on a market-by-market basis. *Id.* It further noted that “this sunset will apply unless, prior to that time, the Commission makes an affirmative determination that the public interest would be served by continuation of the discount beyond the digital transition.” *Id.* at 46,341.

inequalities the Commission found in 1995.<sup>161</sup> Likewise, the Commission failed to explain why the equality brought to UHF and VHF by digital television is more persuasive than its 2002 finding that UHF and VHF signals were “largely equalized” over cable.<sup>162</sup> This about-face is more inexplicable given that the Commission took comments on eliminating the UHF discount in the 2002 Biennial Review.<sup>163</sup>

The Commission has gathered abundant evidence on the performance of UHF television, the growth of cable, and the effects of its own regulations to foster the growth of UHF stations. Despite the strength of its findings on the health of UHF television, the Commission has failed to apply this evidence to the UHF discount. The improvements to UHF television that justified repealing three prior auxiliary regulations had not disappeared.<sup>164</sup> Nevertheless, the Commission has refused to apply this evidence to the question of retaining the UHF discount. Although the Commission designed each UHF-assistance rule to compensate for a different aspect of the UHF handicap,<sup>165</sup> it should define viability consistently when describing UHF television in the marketplace. From one order to the next, the Commission inconsistently evaluates UHF television stations

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161. In its 1995 Order eliminating the Secondary Affiliation rule, the Commission asserted that advances in television design and the role of cable carriage had decreased the gap between UHF and VHF stations, and that these developments “substantially alleviated” the technical disadvantages facing UHF receivers. 1995 Review of Broadcast Rules, *supra* note 12, ¶ 20.

162. In the 2002 Biennial Review, the Commission refused to apply this evidence of signal equality or the advent of cable to the arguments for repealing the UHF discount. 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,341.

163. 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,768. In the Biennial Review the Commission questioned the extent of the UHF handicap today, noting that over eighty-six percent of consumers receive video programming, which equalizes UHF and VHF signals, and that the must-carry rules ensure that cable subscribers receive local UHF stations. *Id.*

164. See 1998 Biennial Broadcast Review Order, *supra* note 157, ¶¶ 35-38 (conceding that evidence of improvements to UHF television proved sufficient to repeal other regulatory assistance measures to these stations). The order cites the repeal of the Prime Time Access Rule and the repeal of the Policy under which applications to initiate VHF service were considered contrary to the public interest if they threatened adverse economic impact on existing or potential UHF stations. *Id.* ¶ 35. This Order fails to mention the repeal of the Secondary Affiliation rule discussed above, but it also falls in the same line of reasoning. See 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 1, 12-26 (repealing the Secondary Affiliation rule based on significant improvements to UHF television).

165. The Secondary Affiliation Rule was designed to help UHF stations attract network affiliates. See 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 1, 12-26. The UHF Impact Policy was designed to give UHF stations preference over VHF stations in license applications and renewals. See 1988 Detrimental Effects Order, *supra* note 14, ¶¶ 1, 26-31. The UHF discount was initially designed to compensate for the technical handicap of the UHF signal. See 1985 Amended Multiple Ownership Order, *supra* note 9, ¶ 5.

and the networks affiliated with them. The Commission also inconsistently evaluates the viability of UHF television with respect to each rule. For example, in the orders repealing the Secondary Affiliation Rule, UHF Impact Policy, and Prime Time Access Rule, the Commission asserts the viability of UHF television as justification for its decision.<sup>166</sup> By contrast, the 2002 Biennial Review Order insists that disparities in economic and technical viability continue to exist between UHF and VHF stations sufficient to support the continuation of the UHF discount.<sup>167</sup>

*C. The UHF Discount Harms the Public Interest by Encouraging Media Concentration*

Ownership consolidation in the media marketplace decimates competition, localism, and diversity by centralizing the control of media outlets in the hands of very few. The UHF discount encourages media concentration by effectively increasing the national ownership cap for broadcast companies that choose to purchase UHF stations.<sup>168</sup> By allowing a “two-for-one” deal on UHF stations as compared to VHF stations, this provision allows broadcast companies with the greatest buying power to own far more stations than the national ownership cap permits.<sup>169</sup> In the interest of preserving competition, localism, and diversity, the Commission should have eliminated the UHF discount while the ownership cap was at thirty-five percent. After the 2002 broadcast review and subsequent amendments to the elevated ownership cap levels, it is more critical than ever to eliminate this provision in order to serve the public interest.<sup>170</sup>

A close look at the holdings of the most powerful broadcast companies shows how severely the UHF discount distorts ownership

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166. See 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 1, 18-26 (repealing the Secondary Affiliation rule); 1988 Detrimental Effects Order, *supra* note 14, ¶¶ 1, 26-31 (eliminating the UHF Impact Policy); 1995 PTAR Order, *supra* note 14, ¶¶ 1-4, 18-25 (repealing the Prime Time Access Rule).

167. See 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,340-41.

168. By counting each UHF station as one half of a VHF station, the discount allows media companies to own twice as many UHF stations as VHF stations, and, in total, many more stations than they could own if the rules counted both UHF and VHF stations as whole stations. Zuckerman, *supra* note 3; Miller & Trigoboff, *supra* note 9.

169. See Miller & Trigoboff, *supra* note 9.

170. Note that the current national ownership cap is set at thirty-nine percent according to the Consolidated Appropriations Act of 2004, Pub. L. No. 108-109, § 629, 118 Stat. 3.

calculations under Commission rules.<sup>171</sup> When the ownership cap sat at thirty-five percent, some broadcast companies, like Fox and Viacom, violated these rules even with the UHF discount intact.<sup>172</sup> For example, Viacom has 39% coverage nationwide and Fox sits at 37.8% when UHF stations are counted as one-half of VHF stations.<sup>173</sup> If the Commission had eliminated the UHF discount while maintaining the cap at thirty-five percent, many more companies would have found themselves in violation. Paxson, without the UHF discount, has 68% national coverage; Viacom owns 44.8%, Univision 41.8%, Tribune 40.1%, and NBC 38.3%.<sup>174</sup> Thus, well before the Commission acted to allow greater national ownership, broadcast companies with serious buying power were taking advantage of the UHF discount to stay within the rules. This level of concentration, encouraged by the UHF discount, runs counter to the public interest.

The Federal Communications Commission defines the public interest as that which maximizes competition, localism, and diversity in broadcast media.<sup>175</sup> These tenets have provided the bedrock of the Commission's broadcast rules since the advent of television.<sup>176</sup> Localism, for instance, has operated as a goal for broadcast television since its development in the 1940s and 1950s.<sup>177</sup> In fact, the FCC issued most of its early broadcast regulations to maintain localism in mass media.<sup>178</sup> The original Radio Act of 1927 focused on providing

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171. See Miller & Trigoboff, *supra* note 9 (ranking the top twenty-five TV-station groups by using the FCC method of calculating national ownership reach).

172. See *id.* (explaining that these stations sit above the current cap because they were allowed to "grandfather" in these ownership relationships pending review of the ownership rules).

173. *Id.*

174. *Id.*

175. For a more detailed discussion of the FCC and the public interest see *supra* Part II.A.

176. See 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,756 (identifying the Commission's three important public interest goals as "diversity, competition, and localism," and asserting that the commission long embraced these values as the foundation of its ownership regulations and policies).

177. See NOLL ET AL., *supra* note 23, at 97-100 (asserting that a "local service doctrine" shaped the Commission's early vision for broadcast, in which the Commission hoped that "[s]tations would be owned and operated by local residents, and would devote considerable broadcast time to information and commentary on important local issues"). According to the Commission's vision, "stations would be instruments for community enlightenment and cohesion, much like the hometown newspaper of an earlier era." *Id.* at 100.

178. See 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,760 (explaining that "[f]rom the earliest days of broadcasting, federal regulators sought to foster the provision of programming that meets local communities' needs and interests"); see also NOLL ET AL., *supra* note 23, at 97-128 (citing the role of the localism doctrine in regulations governing group ownership and cross-media ownership and suggesting that the Commission's "localism doctrine" drove the promotion of UHF as a way to increase both competition and localism). The

communications equally throughout the five original broadcast zones.<sup>179</sup> Another major statutory basis for the primacy of localism in broadcasting is Section 307 of the Communications Act of 1934,<sup>180</sup> which has evolved into the Commission's "local service" doctrine, marked by the Commission's work to establish radio and television stations in as many communities as possible.<sup>181</sup>

UHF television was a locally-minded answer to the television freeze of the 1950s because it created television stations for more communities.<sup>182</sup> The FCC envisioned the television station owner as "a kind of latter-day Mark Twain who understands the needs and concerns of his community in an imaginative and sensitive way."<sup>183</sup> Creating UHF television was the ideal way to reduce interference between existing stations and to unsaturate the VHF band while encouraging more communities to own local outlets.<sup>184</sup>

The FCC's efforts to develop UHF stations into healthy competitors fell in step with this notion of localism.<sup>185</sup> Indeed, creating the UHF discount was another way to encourage localism by fostering the growth of these once-local stations.<sup>186</sup> However, the ultimate effect of

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Commission chose to increase the number of television stations by using the UHF band in addition to VHF, and chose to limit the power at which these new stations could operate in order to keep them as local as possible. *Id.* at 101-04.

179. See NOLL ET AL., *supra* note 23, at 98-99 (noting a 1928 amendment to the Act that "required 'equality' of radio reception and transmission in each of the five broadcast zones set up in the original act").

180. This provision of the Communications Act dates back to the Radio Act of 1927, with modifications over time. 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,760.

181. NOLL ET AL., *supra* note 23, at 98-99. Today, this provision states:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. § 307(b) (2003).

182. See NOLL ET AL., *supra* note 23, at 101-04 (explaining that the key issue during the television freeze was the choice between local and regional television stations, forced by the limited amount of VHF spectrum that was dedicated to television, and stating that the Commission made its preference for localism clear when it chose to authorize more local stations at lower powers rather than to allow the creation of a fourth network that would provide options regionally).

183. See *id.* at 104.

184. See *id.* at 101-03.

185. See generally 1982 UHF Development Policy Order, *supra* note 42 (dedicating a task force to study UHF television and make recommendations to the Commission as to how to improve this service so that more communities may have their own television outlets).

186. See 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,760-61.

[T]he Commission has licensed stations to serve local communities, pursuant to section 307(b) of the 1934 Act, and it has obligated them to serve the needs and interests of their communities. Stations may fulfill this obligation by presenting local news and public affairs programming and by

this rule has created too much concentration among the largest broadcast companies.<sup>187</sup> When a network owns the majority of commercial television stations in the country, it creates an absentee owner situation that runs contrary to the FCC's vision for television. In short, the Commission's "latter-day Mark Twain" is now sitting on the eighty-first floor in midtown Manhattan.

Another major concern in this arena is the overwhelming power that the networks have over local affiliates. Rules that encourage greater network ownership of stations threaten to leave communities without local programming or a diversity of voices because large networks wield more power in their negotiations over station programming.<sup>188</sup> Networks naturally prefer to run content that will attract the most viewers at the lowest cost to them.<sup>189</sup> Such programming is network programming, not local programming.<sup>190</sup> The advertising revenue a program earns depends on the size of its audience or the number of viewers that the advertiser can reach.<sup>191</sup> It is far less costly to show *Friends* or *Seinfeld* than community shows or locally produced programs.<sup>192</sup> Local shows are expensive to create

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selecting programming based on the particular needs and interests of the station's community.

*Id.* (internal citations omitted). UHF stations were limited to operating at lower power levels in order to maintain their localism. See NOLL ET AL., *supra* note 23, at 103; OWEN ET AL., *supra* note 42, at 122-23. Thus, fostering the growth of these local outlets is a way to further a doctrine of localism.

187. See Miller & Trigoboff, *supra* note 9 (calculating national ownership for the top media companies without the UHF discount). Without the UHF discount provision, Paxson would reach 61.8% of U.S. homes, Viacom 44.8%, Fox 44.4%, Univision 41.8%, Tribune 40.1%, and NBC 38.3%. *Id.* at 2-3. The UHF discount therefore allows six of the top media markets to operate above the thirty-five percent national ownership limits. *Id.*

188. See Matthew Rose & Joe Flint, *Behind Media-Ownership Fight, An Old Power Struggle is Raging*, WALL ST. J., Oct. 15, 2003, at A1 (reporting on the struggle by affiliate station owners against networks who try to force network-preferred television lineups on affiliates); 1996 Broadcast Ownership NPRM, *supra* note 120, ¶ 7 (noting a petitioner's warning "that retaining the UHF discount [allows] developing networks, which affiliate primarily with UHF stations, to 'subvert' [the national ownership restrictions] and actually to reach double the audience of operators with mostly VHF stations" and thereby allows networks to gain enough market power to pressure a small-station affiliate to show network programming over local programming, regardless of that station's preference); see also UCC et al. Comments, *supra* note 117, at 52 ("[D]iversifying station ownership at the national level helps to ensure that local needs and program preferences are met.").

189. See NOLL ET AL., *supra* note 23, at 60-61 (discussing the economics of network programming).

190. See *id.* ("Networks thus acquire, and offer to affiliates, programming more appealing than that available from nonnetwork sources . . .").

191. See *id.* at 60.

192. See *id.* ("[T]he greater the popularity of network programs the smaller the share of revenue required to make them more popular to a station."); Joe Flint, *Death of Network Sitcoms Hurts Stations Seeking Reruns*, WALL ST. J., Jan. 21, 2004, at B1 (noting that large syndication revenues for popular network programs make these

and only bring in a fraction of the advertising revenue that network programming attracts.<sup>193</sup> Local station owners often run into trouble in today's broadcast market when they choose to run local programming to serve the community. Networks can threaten to cut payments to local stations and thereby usurp station decisions.<sup>194</sup> Alarming, local stations are often forced to air programming that is offensive to community standards instead of local or "family-friendly" programming.<sup>195</sup> In fact, stations are suffering from these strong-arm tactics ever more frequently.<sup>196</sup>

Media concentration also stifles ownership and viewpoint diversity. Diversity has its roots in the public interest concerns of the Radio Act of 1927,<sup>197</sup> but was explicitly designated as the primary safeguard of the public interest in broadcast by both the Federal Radio Commission and the Federal Communications Commission.<sup>198</sup> Diversity also plays a critical role in the advancement of First Amendment values by ensuring a broad variety of speech over the airwaves.<sup>199</sup>

The Commission's goal of diversity of ownership derives from a theory that a variety of owners in broadcast will produce the greatest array of viewpoints, as well as prevent an undue concentration of

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programs more profitable and relatively less expensive to produce).

193. See Flint, *supra* note 192; UCC et al. Comments, *supra* note 117, at 52-58 (arguing that allowing the networks to own more local stations will make these stations more likely to broadcast content based on the financial interests of the networks, not the preferences of local viewers).

194. Networks frequently force local stations to air the shows that networks prefer, regardless of the station's efforts to serve the needs and tastes of their local communities. See Rose & Flint, *supra* note 188.

195. See *id.* (explaining how networks gain the upper hand against broadcast stations through "preemption deals" by forcing them to show the program that networks want aired).

196. Capital Broadcasting Company is one example of stations fighting back against network pressure. See Rose & Flint, *supra* note 188 (discussing Capitol Broadcasting Company CEO John Goodman's fight to select programming that he feels is in the best interest of his own community over network protests).

197. See Radio Act of 1927 § 4, 69 Pub. L. No. 632, 44 Stat. 1162, 1163 (1927) (establishing the Federal Radio Commission to allocate frequencies among applicants in a manner responsive to the "public interest, convenience, or necessity").

198. See *Red Lion Broad. v. FCC*, 395 U.S. 367, 377 (1969) (citing the Commission's view in 1929 that the "public interest requires ample play for the free and fair competition of opposing views . . .") (internal citation omitted); 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,756 (contending "[t]he diversity of viewpoints, by promoting an informed citizenry, is essential to a well-functioning democracy").

199. 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 18,516 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945) for the proposition that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public").

economic power.<sup>200</sup> The Supreme Court, in *Red Lion Broadcasting Co. v. FCC*, found that the First Amendment's purpose is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."<sup>201</sup>

Different owners are likely to have different political and economic interests, and the public benefits from this variety by being better informed.<sup>202</sup> Those fighting media concentration contend that the media's failure to cover recent corporate scandals, such as those at Enron and WorldCom, had much to do with concentration of ownership in media corporations because so many of the large media companies were concerned with making business deals to merge or acquire these very companies.<sup>203</sup> The concentration encouraged by rules like the UHF discount stifles independent voices and compromises community values<sup>204</sup> and community needs.<sup>205</sup>

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200. See 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,287-89 (outlining the five types of diversity that comprise a major policy objective in broadcast, including viewpoint, outlet, program, source, and minority and female ownership diversity).

201. 395 U.S. 367, 390 (1969).

202. A recent survey by the Pew Research Center for the People & the Press found widespread concern among journalists that certain news stories were being manipulated or avoided altogether because of the effects these stories have on the interests of media companies. UCC et al. Comments, *supra* note 117, at 4 n.13. "More than one-third of the respondents said that news that hurt the financial interests of the news organization often or sometimes went unreported while 29% said that news that adversely affected advertisers often or sometimes went unreported." *Id.*

203. See *id.* at 7 n.28 (citing a story that reported that "media companies failed to watchdog the finance industry [because] media conglomerates were involved in the very same 'orgy' of mergers and acquisitions during the late '90s"). One commentator suggested that "had AOL and the Washington Post had common ownership, the Post may never have reported AOL's improper accounting practices, which ultimately ignited an SEC investigation of AOL." *Id.* at 7 (citing Alicia Mundy, *Media Under Review*, CABLE WORLD, Sept. 16, 2002).

204. Increasing media concentration, by allowing networks to purchase more stations than ever, currently takes the decision-making power from stations and gives it to networks. See Rose & Flint, *supra* note 188 (reporting that station owners, like Jim Goodman of Capital Broadcasting, are pleading with the FCC to reign in the size of networks and their ability to overpower affiliates). Networks' growth allows them not only to reduce the amount they pay to local affiliates to run their programming, but in some instances, to actually require the affiliates to pay the networks for carrying their shows. *Id.* Networks have also gained the upper hand in preemption deals. They frequently force local stations to air the shows that the networks prefer, and that the local stations find offensive to community standards, over local or "family-friendly" programming. *Id.*

205. See Ted Turner, *Monopoly or Democracy?*, WASH. POST, May 30, 2003, at A23 (writing about the dangers of media consolidation).

When you lose small businesses, you lose big ideas. People who own their own businesses are their own bosses. They are independent thinkers . . . . [Large media corporations] kill local programming because it's expensive, and they push national programming because it's cheap—even if it runs

The Commission's focus on encouraging competition among media outlets came explicitly from the Telecommunications Act of 1996, but has its roots in the principle of viewpoint diversity.<sup>206</sup> Indeed, the Commission has long found that encouraging a wide variety of television stations benefits the public interest because a competitive environment engenders improved service among competitors.<sup>207</sup> Healthy competition also ensures various viewpoints on television, which helps advance First Amendment values.

Today, of the 1,248 commercial television stations operating in 2000, over 1,000 are affiliated with one of the seven largest U.S. commercial networks.<sup>208</sup> The UHF discount provision allows the largest media companies, which have the greatest purchasing power, to acquire most of the channels on the air, and thus become large, powerful media conglomerates.<sup>209</sup> At the same time, the smallest media companies and independent owners are being shut out of the market by these ever-growing media giants.<sup>210</sup> The outcry against the Commission's decision to allow greater broadcast ownership is so widespread that leaders of some of the biggest companies were compelled to protest it. Ted Turner, founder of CNN and Chairman

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counter to local interests and community values.

*Id.*

206. See Aarons, *supra* note 27, at 329-30 (explaining that the 1996 Telecommunications Act further embraced the spirit of deregulation in media that began in the 1980s, and that the Commission's shift towards deregulation stemmed from a desire to encourage the development of new media outlets). According to Aarons, the Commission reasoned that competition would allow consumers to choose from a variety of broadcast alternatives, thereby making it unnecessary for the government to protect the public interest through regulation. *Id.*

207. See, e.g., 1980 TV Allotments NPRM, *supra* note 45, ¶ 10 ("Increasing the number of television competitors is likely to (1) put pressure on competitors to be more responsive to the wants and needs of consumers; (2) increase the total amount of service available to consumers; and (3) increase the diversity of service offered.")

208. See 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,755 (noting that "[o]ver sixty percent of commercial TV stations are affiliated with one of the top four networks (ABC, CBS, Fox, NBC) . . . [a]nother 19% are affiliated with the smaller national networks: (United Paramount (UPN), Warner Brothers (WB), and Paxson Network) . . . [and] [t]he remaining stations are affiliated with other smaller networks or are independents.")

209. See Turner, *supra* note 205 (reporting that the current climate of media consolidation forced him to sell Turner Broadcasting to Time Warner, and threatens the survival of small companies).

210. See *id.*; see also Martin Peers, *How Media Giants are Reassembling the Old Oligopoly*, WALL ST. J., Sept. 15, 2002, at A1.

Entertainment giants such as Viacom, NBC parent General Electric Co., and Walt Disney Co., which owns ABC, now reach more than 50% of the primetime TV audience through their combined broadcast and cable outlets. The total rises to 80% if you include the parents of newer networks—such as News Corp.'s Fox and AOL Time Warner Inc.'s WB—and NBC's pending acquisitions of Vivendi Universal's cable assets. . . .

*Id.*

of Turner Enterprises, Inc., claims that if the rules approved by the Commission had existed in 1970, he could not have established Turner Broadcasting or CNN.<sup>211</sup> He asserts that all of the UHF stations have been bought, and that even an acquisition of an available station would not provide an independent owner with the opportunity to succeed.<sup>212</sup> To compete, Turner states, “you have to have good programming and good distribution. Today both are owned by conglomerates that keep the best for themselves and leave the worst for you—if they sell anything to you at all. It is hard to compete when your suppliers are owned by your competitors.”<sup>213</sup>

In its most recent broadcast review, the Commission chose to maintain the UHF discount while voting to raise the ownership cap to forty-five percent.<sup>214</sup> By so doing, the Commission turned a blind eye to the fact that this allows the largest media companies to amass the majority of stations on the air.<sup>215</sup> The media ownership rules advanced by the 2002 Biennial Broadcast Review allow one company to own UHF TV stations in 199 of 210 markets currently existing in the United States, almost ninety-five percent of U.S. markets, “the equivalent of owning stations in every television market in the entire country except California.”<sup>216</sup> This is even more troubling when one considers that maintaining the UHF discount in this new regulatory environment enables companies like News Corp’s Fox, Viacom’s UPN

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211. See Turner, *supra* note 205 (arguing that the FCC rules that extend the market dominance of the largest media corporations render it “virtually impossible” for an independent owner to enter the television market). The theory that consolidated media ownership eliminates local programming and independent ideas underlies Turner’s warning against allowing media concentration. *Id.*

212. See *id.* (“If a young media entrepreneur were trying to get started today under these proposed rules, he or she wouldn’t be able to buy a UHF station, as I did. They’re all bought up.”).

213. *Id.*

214. See 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,286, 46,327-28 (maintaining the UHF discount but raising the national ownership cap from thirty-five percent to forty-five percent); see also Zuckerman, *supra* note 3 (stating that the FCC’s recent decision will deliver “a body blow to American democracy,” because the decision allows large media companies “to buy up more TV stations and newspapers, becoming more powerful and reaping a financial bonanza”).

215. The UHF discount allows a company to own twice as many UHF as VHF stations, and there are many more UHF than VHF stations on the air today. See 2002 Biennial Broadcast Review NPRM, *supra* note 24, at 65,755. Thus, the UHF discount has allowed companies to obtain a massive number of UHF stations, without exceeding the national ownership cap.

216. See Zuckerman, *supra* note 3 (reporting that, due to the new rules, “a single company could influence the elections for 98 U.S. senators, 382 members of the House of Representatives, 49 governors, 49 state legislatures, and countless local races”).

and AOL Time Warner's WB to reach ninety percent of the population.<sup>217</sup>

The Commission's justification for keeping the UHF discount intact was that it found this rule necessary to promote entry and competition among broadcast networks.<sup>218</sup> Paradoxically, because the provision effectively raises the national ownership cap, the largest media companies are making it impossible for smaller networks to enter the field.<sup>219</sup> The Commission also argues that without this provision, UHF stations will find themselves back in economically unfavorable situations without networks to support them.<sup>220</sup> However, the Commission's findings show that UHF stations are not having any trouble acquiring network affiliation.<sup>221</sup>

The Commission's plan for the UHF discount conceived in the 2002 Broadcast Review is not logical. It proposes to put off consideration of a sunset provision for the UHF discount until a transition to Digital Television is near completion.<sup>222</sup> It asserts that digital television equalizes UHF and VHF signals by eliminating the analog signal altogether.<sup>223</sup> However, cable equalizes the UHF and VHF signal just as effectively.<sup>224</sup> Still, the Commission argues that a substantial amount of the American public is not a subscriber of cable.<sup>225</sup> To the contrary, over eighty-six percent of American households receive television over some kind of cable or satellite service, and over ninety-seven percent of American households are cable-ready.<sup>226</sup> It is simply not justifiable to regulate broadcast

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217. See *id.*; see also Owen Gibson, *US Plans Radical Revamp of Media Ownership Rules*, *GUARDIAN*, May 13, 2003 (quoting Gene Kimmelman, director of the Consumer's Union, who charges that retaining the UHF discount while raising the national ownership cap is "total hypocrisy"), available at <http://media.guardian.co.uk./city/story/0,7497,955024,00.html>.

218. See 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, 46,340-41 (claiming that UHF continues to experience a competitive handicap as compared with VHF).

219. See Turner, *supra* note 205 (warning that the current level of media concentration is crippling competition in the broadcast industry).

220. 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,341.

221. See, e.g., 1995 Review of Broadcast Rules Order, *supra* note 12, ¶¶ 1, 12-26 (repealing the Secondary Affiliation Rule based on evidence that UHF stations have had remarkable success attracting affiliates without the help of this regulation). In fact, the 2003 Broadcast Ownership Rules cite statements from Univision and Paxson detailing their success in affiliating with UHF stations. 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,341.

222. 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,341.

223. *Id.*

224. 1995 PTAR Order, *supra* note 14, ¶¶ 73-80 (noting the EI Study's finding that cable has eliminated the UHF signal disadvantage).

225. 2002 Biennial Broadcast Review Ownership Rules, *supra* note 4, at 46,340-41.

226. See *id.*; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 66 Fed. Reg. 7,912, 7,912 (Jan. 26, 2001)

television based on a public interest that ignores all but three percent of the public.

The Commission must act to eliminate or promptly phase out the UHF discount, especially given the increase in the national ownership cap promulgated by the 2002 Broadcast Review, and subsequently, the Appropriations Act of 2004. Supporters of the provision could argue that eliminating the UHF discount would disrupt the market at the expense of owners and consumers because many media entities would be forced above the thirty-five percent national ownership cap. However, the Commission's traditional reluctance to force divestiture suggests that many current ownership situations would likely be "grandfathered" into the new rules.<sup>227</sup> Indeed, through a 1989 Notice of Proposed Rulemaking, the FCC requested comments on whether or not to grandfather ownership relationships that would exceed the rules in the case of UHF discount elimination.<sup>228</sup> One caveat to this theory is that, according to the Consolidated Appropriations Act of 2004, broadcast companies that exceed the new thirty-nine percent national ownership cap have two years to divest their excess interests.<sup>229</sup> Thus, the Commission could interpret this language in a way that prompts it to enforce divestiture if and when it decides to eliminate the UHF discount. Nonetheless, repealing this provision is the only way to ameliorate the effects of gross media concentration in the future.

The most effective solution is to eliminate the UHF discount and encourage divestiture, pursuant to a proposal like Senator McCain's Telecommunications Ownership Diversification Act of 2003.<sup>230</sup>

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(estimating that homes "passed" by cable, or cable-ready, was 97.1% as of June 2001).

227. *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 786-88, 792 (1978) (finding that a small gain in diversity was not enough justification for an across-the-board divestiture requirement in the cross-ownership restriction rule because that level of divestiture would cause disruption for the industry and hardship for individual owners). In the rulemaking that became the subject of this proceeding, the Commission held that divestiture was warranted only in the most egregious cases of cross-ownership monopoly. *See id.* at 787.

228. *Id.*

229. Consolidated Appropriations Act of 2004, Pub. L. No. 108-109, § 629, 118 Stat. 3.

230. *See* Telecommunications Ownership Diversification Act of 2003, S. 267, 108th Cong. § 6(b) (2003). The Minority Media and Telecommunications Council filed Comments in opposition to the 2002 Biennial Broadcast Review Order and a Petition for Reconsideration, urging the Commission to adopt the "SDB [socially and economically disadvantaged businesses] Transfer Option" set forth in Senator John McCain's proposed Telecommunications Ownership Diversification Act of 2003. *See* Comments of the Minority Media and Telecommunications Council, In the Matter of Broadcast Ownership Omnibus Proceeding, MB Docket No. 02-277 (May 27, 2003) (on file with the American University Law Review); Petition for Reconsideration of the Minority Media and Telecommunications Council, In the Matter of 2002

According to this plan, broadcast companies exceeding the national ownership cap after the UHF discount is eliminated would sell “clusters” of stations, intact, to socially and economically disadvantaged businesses (“SDB”). This “SDB Transfer” would provide a way to keep the largest media companies under the national ownership cap without disrupting the market by forcing them to break up station groups.<sup>231</sup> The plan would additionally benefit minority owners by allowing them to take advantage of the efficiencies of a pre-created group of stations in a cluster. The Commission has already made numerous efforts over the past several years to encourage this kind of diversity in broadcast ownership.<sup>232</sup> This solution is ideal, as it eliminates some of the most egregious broadcast television concentration while maintaining market efficiencies.<sup>233</sup> Most importantly, by fostering the growth of disadvantaged, minority-owned, and female-owned businesses, this solution also serves the public interest goals of encouraging greater diversity and competition in the media marketplace.

#### CONCLUSION

As an agency entrusted to protect the public interest, the Commission has a duty to create and enforce rules that truly serve the tenets of its public interest mandate. Without examining market

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Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area, MB Docket Nos. 02-277, 03-130, MM Docket Nos. 01-235, 01-317, 00-244 (Sept. 4, 2003) (on file with the American University Law Review).

231. See Letter from David Honig, Executive Director, Minority Media and Telecommunications Council, to Michael Powell, Kathleen Abernathy, Jonathan Adelstein, Michael Copps, and Kevin Martin, Commissioners, Federal Communications Commission 3 (May 27, 2003) (on file with the American University Law Review) (urging the FCC to adopt the SDP Transfer plan).

232. See In the Matter of Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 7 F.C.C.R. 6387, ¶ 5 (1992) (concluding that encouraging investment in small businesses and minority broadcasters is a worthy goal). Chairman Sikes proposed a plan to allow those who incubated minority-owned companies to acquire additional stations beyond the ownership caps. *Id.* ¶ 6; see also 1985 Amended Multiple Ownership Order, *supra* note 9, at ¶¶ 50-53 (expressing hope that the Commission’s national ownership rules will also encourage minority ownership).

233. S. 267 § 2(a). Although this bill contemplates that the Treasury Department would be responsible for conducting a rulemaking to determine which groups, like Hispanics or women, are socially and economically disadvantaged in the telecommunications industries, the Commission could also engage in its own case-by-case determination of eligible small or minority-owned businesses to find the best buyers for these clusters. *Id.*

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data, it is easy to believe that the Commission is abiding by these mandates and regulating communications consistent with its own findings. By maintaining an outdated provision like the UHF discount, especially in the face of an increased national ownership cap, the Commission is choosing instead to eviscerate the principles that founded its creation in 1934. The FCC must give broadcast television back to the people. The best way to do this is to eliminate the UHF discount and distribute media interests to a diversity of owners. While the Congress of 1934 could never have envisioned the technologies and variety in today's media, it would wholeheartedly support any plan that would ensure that the American public has airwaves "of, by, and for the people."<sup>234</sup>

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234. Statement of Commissioner Michael Copps, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, at 23 (June 2, 2003), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-235047A9.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A9.pdf) (on file with the American University Law Review).