

ALERT

FCC Eliminates “UHF Discount” for National Television Ownership; Declines to Adopt “VHF Discount”

September 7, 2016

The Federal Communications Commission (FCC or Commission) today issued a Report and Order eliminating its longstanding policy of applying a 50% “discount” to market populations served by UHF stations when calculating compliance with the 39% national TV ownership cap, declaring that “the UHF discount cannot be justified in the digital world.” At the same time, the FCC declined to adopt a comparable VHF discount, finding that the circumstances that justified adoption of the UHF discount 30 years ago do not extend to VHF stations today.

When calculating a station’s compliance with the national TV ownership cap, the Commission considers the population of the market rather than the population served by an individual station’s contour. Recognizing the “inherent physical limitations” of the UHF band, the agency in 1985 adopted the UHF discount, explaining that the discount compensated for the fact that the signal strength of a UHF television signal decreased more rapidly with distance, resulting in smaller coverage areas and smaller audience reach. Although the actual national ownership cap has fluctuated since that time, the UHF discount has remained in place.

In its Order eliminating the UHF discount, the Commission found that, as a result of the digital transition, “UHF stations are no longer technically inferior in any way to VHF stations” and, accordingly, “there is no remaining technical justification for the UHF discount.” The FCC further stated that the discount “undermines the purpose of the national audience reach cap” by allowing a station group that only owns UHF stations to reach up to 78% of the population. The

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Commission provided limited grandfathering for station groups that would exceed the national TV ownership cap in the absence of a UHF discount. However, grandfathering only applies to combinations that existed, had applications pending before the Commission, or had received agency approval, as of September 26, 2013 (the date that the FCC proposed eliminating the discount). Moreover, grandfathering will expire upon assignment or transfer, at which point the combinations must comply with the then-current national ownership cap.

In support of its action, the Commission found that it has authority to revisit not only the UHF discount, but also the 39% ownership cap, which the FCC previously has attempted to raise as high as 45%. The agency declined to consider modifying the cap at this time, however, stating that: (i) it was not within the scope of the notice; and (ii) no party presented persuasive reasons for revisiting the cap.

Although some parties argued that the Commission should adopt a VHF discount due to the current technical inferiority of VHF signals, the FCC refused to do so. The agency found both that it has taken steps to mitigate technical concerns in the VHF band and that viewers rely less on over-the-air viewership than they did when the Commission adopted the UHF discount.

Commissioners Pai and O’Rielly issued dissenting statements. Commissioner Pai opined that the Commission “should not eliminate the UHF discount without also considering an adjustment to the national [ownership] cap to reflect today’s marketplace.” In eliminating the UHF discount, the Commission takes an arbitrary and capricious, “piecemeal action” that has the effect of making the national ownership cap more stringent “without examining whether tightening the [national ownership cap] as a whole is justified.” Commissioner Pai also stated that “[w]hile I appreciate the fact that companies no longer in compliance with the national cap due to elimination of the UHF discount will not be required to sell stations immediately, the Commission should also allow such station groups to be transferred to new ownership without requiring divestitures.” In his statement, Commissioner O’Rielly affirmed that he would support the rule change as a policy matter, but could not do so in this proceeding because the Commission lacks the “authority to modify the National Television Ownership Rule in any way, including eliminating the UHF discount.” Commissioner O’Rielly explained that the national ownership cap is set by statute, and can be modified only by Congress.