

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581,
03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950 & 03-3951**

PROMETHEUS RADIO PROJECT v. FCC, et al.

Prometheus Radio Product, Petitioner in No. 03-3388
Media General, Inc., Petitioner in No. 03-3577
National Association of Broadcasters, Petitioner in No. 03-3578
Network Affiliated Stations Alliance, et al. Petitioner in No. 03-3579
Fox Entertainment Group, Inc., et al., Petitioners in No. 03-3580
Viacom, Inc., Petitioner in No. 03-3581
National Broadcasting Company, Inc., et al., Petitioners in No. 03-3582
Sinclair Broadcast Group, Inc., Petitioner in No. 03-3651
Media Alliance, Petitioner in No. 03-3665
Paxson Communications Corporation, Petitioner in No. 03-3675
National Council of the Churches of Christ in the United States, Petitioner in No.
03-3708
Tribune Company, Petitioner in No. 03-3894
Paxson Communications Corporation, Petitioner in No. 03-3950
Emmis Communications Corporation, Petitioner in No. 03-3951
(FCC No. 03-127)

**Review of an Order of an Administrative Agency:
Appeal from Rulemaking by the Federal Communications Commission**

**OPENING BRIEF OF INTERVENOR
CAPITOL BROADCASTING COMPANY, INC.**

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October 21, 2003

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JURISDICTIONAL STATEMENT

Intervenor Capitol Broadcasting Company, Inc. adopts the Jurisdictional Statement of the Citizen Petitioners.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Intervenor Capitol Broadcasting Company, Inc. will address the following issues:

1. Whether the Federal Communications Commission acted arbitrarily and capriciously by preserving the UHF Discount when the facts that drove adoption of the Discount eighteen years ago have largely ceased to exist, where the new basis asserted for the UHF Discount – the promotion of new broadcast networks -- has absolutely no basis in the record, and where the Commission's Order, *2002 Biennial Review*, 18 FCC Rcd 13620 (2003) ("the Order") did not even attempt to show how the UHF Discount advances that goal.
2. Whether the Commission acted arbitrarily and capriciously in preserving the UHF Discount at 50% without hearing any evidence, or presenting any reasoning, bearing on whether that level of discount, rather than some other, is appropriate in light of market realities, where the realities that drove adoption of the discount at a 50% level eighteen years ago have largely ceased to exist.
3. Whether the Commission's preservation of the UHF Discount at 50% is arbitrary and capricious in light of the fact that it is inconsistent with the

Commission's other policies governing the significance of any differences between UHF and VHF stations, given market realities.

4. Whether the Commission's preservation of the UHF Discount at 50% is arbitrary and capricious when it dramatically compounds the error of the Commission's decision to lift the National Cap on ownership of multiple television stations, by effectively doubling that cap.

STATEMENT OF THE CASE

Intervenor Capitol Broadcasting Company adopts the Statement of the Case of the Citizen Petitioners.

SUPPLEMENTAL STATEMENT OF FACTS

Capitol Broadcasting Company, Inc. (“CBC”) adopts Citizen Petitioners statement of facts, but presents additional facts relating to the obsolete distinction between UHF (off-air channels 14-69) and VHF (off-air channels 1-13) television stations in the national television multiple ownership rule (the “National Cap”).¹ In the Order here under review, *2002 Biennial Review*, 18 FCC Rcd 13620 (2002) (“the Order”), the Commission raises the percentage of United States (“U.S.”) television households that a broadcast television owner can reach from thirty-five (35) to forty-five (45) percent (“National Audience Reach”), but leaves unchanged the method of calculating that percentage, codified at 47 C.F.R. § 73.3555(d)(2).

- (i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at

¹ A UHF station operates at higher frequencies and is subject to greater terrestrial interference than a VHF station. “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.” *Memorandum Opinion and Order*, 100 FCC 2d 74, 93 (1985)(quoting UHF Comparability Task Force) (“*1985 Multiple Ownership Reconsideration Order*”); *See also Comparability for UHF Television: Final Report*, September 1980 at 2; *Report and Order*, 90 FCC 2d 1121, 1124 (1982).

the time of the grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

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

The Commission adopted the National Audience Reach method of limiting television ownership in 1985, adding the fifty (50) percent discount for UHF stations (the “UHF Discount” or the “Discount”) for a singular purpose – to compensate for the audience reach handicap of UHF stations. *Memorandum Opinion and Order (Multiple Ownership of Am, FM and Television Broadcast Stations*, 100 FCC 2d 74, 93 (1985) (“1985 Multiple Ownership Reconsideration Order”). Although each of the petitioners addressing the UHF issue during the 1985 reconsideration proceeding “requested that any UHF distinction be reflected by increasing the audience reach limit,” the Commission disagreed that the answer was merely to increase the National Cap. *Id.* at 93-94. It stated:

Consistent with the diversity objectives expressed in our ownership rules, we believe that a more appropriate indicator of the reach handicap of UHF stations is one that measures the actual coverage limitation inherent in the UHF signal. Therefore, with respect to the audience reach limit adopted herein, we believe that owners of UHF stations should be attributed with only 50% of . . . a market’s theoretical audience reach to account for this

disparity.... Furthermore, the discount approach provides a measure of the actual voice handicap and is therefore consistent with our traditional diversity objectives.

Id. The Commission in 1985 was very clear in defining the problem as an audience reach issue, focusing on the “actual voice handicap” of UHF stations and flatly rejecting the UHF issue as a means to merely increase the National Cap. One petitioner even urged the Commission “to establish a ‘slightly higher’ market penetration cap for non-network group owners with substantial UHF interests.” *Id.* at 79. Again, the Commission rejected that approach.

UHF stations were in a very different competitive position in 1985 than in 2003. Technological advancements and cable and satellite carriage have had profound positive effects on the audience reach of UHF stations. In 1985, the full impact from the Commission’s actions in its *Improvements to UHF Television Reception Report and Order*, 90 FCC 2d 1121 (1982) (the “1982 UHF Order”) had not been felt. Having determined that “the quality of UHF television reception is under the control of broadcasters and viewers,” the 1982 UHF Order adopted new rules related to improving UHF television receiver standards² and giving UHF stations the ability to

² See 1982 UHF Order at 1127-49 (eliminating requirements related to Channels 70-83 at 1127 – “A chief barrier to improving UHF television is the difficulty involved in designing systems that operate consistently well

maximize power to eliminate much of their audience reach handicap. *Id.* at 1124. The practical effect of maximizing power is that a UHF and VHF station in the same market can achieve almost equivalent coverage (i.e. audience reach).³

As noted by the Commission in a number of proceedings since 1985 and outlined in Part I, Section A of this brief, the audience reach of UHF stations has improved significantly through technological and market advancements. Equally important to today's improved UHF audience reach is cable and satellite carriage. Today over 86% of all U.S. television

over bandwidths as wide as 70 television channels.”; allowing receiver manufacturers to offer improvements on the UHF portions of receivers without necessarily including the same improvements on VHF at 1132; making numerous improvements related to channel selection, integrated tuning, legibility of UHF channel readouts, minimum numbers of tuning positions, and other changes in comparable tuning rules at 1132).

³ *Ex Parte* Letter, Capitol Broadcasting Company, Inc., MB Docket No. 02-277 (fil. May 30, 2003) (“CBC 5/29/03 *Ex Parte* Letter”). As an example, CBC is the licensee of two analog stations in Raleigh, North Carolina – one UHF and one VHF located on the same tower (with the UHF antenna located 230 feet below the VHF antenna). Utilizing maximum power levels allowed by the Commission in its 1982 ruling, CBC achieves almost equivalent coverage for its two stations. According to a comparison prepared by Cohen, Dippell and Everist, P.C. in May 2003, there is less than a 6% off-air difference between CBC’s VHF and UHF signals based on the actual interference-free population reached within the Grade B service areas according to Longley-Rice. CBC’s VHF station reaches approximately 1.8 million people, while the UHF station reaches approximately 1.7 million. Therefore, the difference in off-air reach between the VHF and UHF signals is less than 6% – not 50% as implied by the current rule.

households subscribe to cable or satellite compared to 30% in 1985. *2002 Biennial Review Report and Order*, 18 FCC Rcd 13260, 13845 (2003); *1998 Biennial Review, Notice of Inquiry*, 13 FCC Rcd 11276, 11284 (1998). Mandatory cable and satellite broadcast carriage rules ensure that UHF stations can reach viewers the same as VHF stations within a market, resulting in no distinction between UHF and VHF stations. 47 U.S.C. § 534(a); 47 U.S.C. § 338(a).

The broadcast television industry is now undergoing a significant change that was only dreamed about in 1985 – the conversion of the entire broadcast industry from an analog system to a digital system. As evidence of the improvement in UHF signal coverage, 94% of all digital television stations will be UHF. *See Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders* in MM Docket No. 87-268, 14 FCC Rcd 1348, Appendix B (1998), *recon. dismissed*, DA 99-1361 (rel. July 12, 1999), *recon. dismissed*, FCC 00-59 (rel. Feb. 23, 2000). As stations move from analog to digital channels, almost all stations can elect to replicate their analog coverage and to maximize their market coverage.⁴

⁴ “[T]he Commission on December 7, 1999, issued a Public Notice giving DTV licensees until December 31, 1999, in which to file notice that they intend to seek maximization of their DTV service area.⁴ One thousand three

According to the Commission, today there are 1345 full-power commercial television stations in the U.S. (760 UHF, 585 VHF). FCC News Release, *Broadcast Station Totals as of June 30, 2003*, (July 2, 2003). More than 1200 of those will be UHF at the end of the digital transition. 14 FCC Rcd 1348, Appendix B. “At this point, however, it is clear that the digital transition will largely eliminate the technical basis for the UHF discount because UHF and VHF signals will be substantially equalized.” *2002 Biennial Review*, 18 FCC Rcd at 13847.

SUMMARY OF ARGUMENT

A single fundamental error underlies the Commission’s decision to preserve the 50% UHF Discount. The Discount policy was created 18 years ago, when most viewers received television signals over-the-air, and consequently when – because of technological limitations on the audience reach of UHF stations – such stations reached a dramatically smaller fraction of the public than VHF stations. Intervenor’s argument is that the facts have

hundred and sixteen letters of notification manifesting the intent to file to maximize DTV stations’ service areas were filed by that deadline. Accordingly, DTV licensees, including those operating on UHF channels, have been given the opportunity to maximize their DTV coverage areas, and not merely replicate their analog coverage.” *1998 Biennial Review*, 15 FCC Rcd at 11079.

changed dramatically but the Commission has arbitrarily and capriciously refused to acknowledge as much, and as a result its policy has not changed at all.

In the years since 1985, the methods of reception employed by the American television-watching public has dramatically changed: whereas in 1985, when the Discount was created, 30% of U.S. households were connected to cable and Direct Broadcast Satellite (“DBS”) did not exist at all, today 86% of households receive their television signals through either cable or DBS.

The FCC simply refused to come to terms with this dramatic change when it evaluated the UHF Discount, notwithstanding the fact that differences in audience reach between UHF and VHF stations were the only reason advanced for the Discount when it was created. Instead, the Commission has acted arbitrarily and capriciously by clinging to the Discount after the reasons for it have fallen away.

Rather than confronting the dramatic changes in the audience reach factors that once drove the Discount and acknowledging that audience reach realities now require the policy’s abandonment, the Commission has invented a new policy to justify the Discount – the promotion of “new networks.” The Commission has attempted to protect the Discount policy

by tying it to this newly invented goal even though the current record, and the Order under review, are both completely silent on the extent to which the Discount actually serves this newly-articulated objective.

The Commission compounds this refusal to acknowledge market realities by failing to reconsider even the appropriate level of the Discount. If a 50% discount was appropriate in 1985, when 30% of U.S. households got their television signal through cable, then that level of discount cannot possibly be appropriate – assuming any discount is still rational – when 86% of households receive either cable or DBS. Yet the Commission refused even to ask the question whether the level of the Discount should be changed.

The arbitrary and capricious quality of the Commission's action is also apparent because it is inconsistent with the Commission's other policies governing UHF and VHF stations, and the significance of differences – or their absence – in audience reach. With respect to policies other than the UHF Discount the Commission has bowed to the facts, and acknowledged the changes in audience reach that have made UHF and VHF stations virtually indistinguishable. The Commission's recognition of these facts outside of the UHF Discount policy further demonstrates the arbitrary and

capricious nature of the agency's refusal to acknowledge the same realities when it comes to the UHF Discount policy.

Finally, CBC argues that the Commission's failure to confront market realities affecting the UHF Discount dramatically compounds the error, discussed in other briefs, of the Commission's decision to lift the National Cap on multiple ownership of television stations from 35% to 45%. While that determination is weak enough on its own, the Commission's simultaneous adherence to the 50% UHF Discount, in a market where most stations are UHF and where the audience reach of such stations is essentially the same as VHF, effectively transforms the national cap from 45% to 90%. De facto adoption of a "cap" of 90% is tantamount to abandonment of the very concept of a cap on multiple ownership, and has absolutely no basis in the record amassed by the Commission.

ARGUMENT

Under the Administrative Procedure Act (the "APA"), at 5 USC § 706(2)(A), a reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." When reviewing a contention that an agency rule is arbitrary and capricious, "the court generally examines whether the Commission has considered the relevant

factors and has provided a reasoned explanation for its action that does not ‘run[] counter to the evidence before [it].’” *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002)(quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. 29, 43 (1983)). CBC concurs with the arguments of Citizen Petitioners and Interveners that the Commission’s Order here under review is arbitrary and capricious in numerous aspects, including the Commission’s decision to retain the UHF discount. Additionally, this now obsolete loophole in the national television ownership rule is not in accordance with the public interest standard in § 307(b) of the Communications Act of 1934, Pub. L. No. 416, 418 Stat. 1064, 47 U.S.C. § 307(b), and in derogation of § 202(h) of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, which states:

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it no longer finds to be in the public interest.

See also Fox Television Stations, Inc. v. FCC, 293 F.3d 537, 539 (D.C. Cir. 2002). Based on marketplace changes, the UHF discount is no longer

“necessary in the public interest,” and is in fact harmful to the public interest.

I. THE COMMISSION PROFFERED NO VALID RATIONALE FOR PRESERVING THE UHF DISCOUNT

A. The Historical Rationale of Audience Reach Can No Longer Justify The Discount, Because The Basis For That Rationale Has Almost Entirely Ceased To Exist

Until the Order here under review, the Agency has consistently relied upon exactly one rationale for the UHF Discount. The Discount came into being, as the Agency explained in 1985 when it created the concept, for one reason and one reason only: “attributing UHF stations with 50 percent of an ADI market’s audience reach⁵ was intended to address the fundamental disadvantage of UHF television in reaching viewers.” *1998 Biennial Review*, 15 FCC Rcd at 11058 (2000)(“*1998 Biennial Review*”), citing 100 FCC 2d at 98 (“Because the fundamental limitation of UHF television involves its ability physically to reach viewers, we believe the audience reach limit adopted herein is the more appropriate vehicle for expressing our continued concern with this medium.”). As it did when creating the Discount, the Agency proffered the same technological rationale – and *only*

⁵ ADI has since been replaced by the Nielsen DMA audience reach calculation in the current statute. *See* C.F.R. § 73.355(d).

that rationale – when it chose in 1998 to preserve the discount. It then explained:

UHF stations have greater difficulty in reaching these viewers and cable head ends – thereby hindering their ability to obtain cable carriage – because of their weaker signal. While the Commission has observed in other contexts that this UHF signal disparity has been ameliorated over the years it has not yet been eliminated.

1998 Biennial Review, 15 FCC Rcd at 11078 (footnote omitted). As in the discussion explaining why the Discount was created in the first place, this explanation for its preservation says absolutely nothing about new network creation, or any other rationale apart from the audience reach problem resulting from technological constraints facing UHF broadcasters. The same is true for all other statements of the reasons for this policy, until the Order here under review.

The facts relating to audience reach, however, have changed dramatically since the Discount was created in 1985. Whereas in that year cable – on which UHF stations are indistinguishable from VHF – reached 30% of households, today cable and DBS (which did not even exist in 1985) reach 86% of households. *2002 Biennial Review Report*, 18 FCC Rcd at 13845; *1998 Biennial Review, Notice of Inquiry*, 13 FCC Rcd at 11284.

It follows necessarily that the audience reach facts that justified a UHF discount in 1985 cannot possibly justify the discount 18 years later,

when market realities are so different. The facts are simply too different. And indeed, the Commission makes no serious attempt to argue that currently existing differences in audience reach between UHF and VHF provide a sufficient rationale for preservation of the Discount.

B. The Agency's New "New Network" Rationale Has No Basis in Agency History and No Basis in the Record

In a nation where 86% of households receive their television signals through cable or satellite, the limitations on UHF broadcasting are largely irrelevant. Bowing to this fact, if not to its true impact, the Commission therefore now asserts for the first time since the Discount's creation in 1985 that the UHF discount exists not only because of the limitations on UHF audience reach, which had previously been the exclusive basis for the Discount's justification, but also because the Discount allegedly "promotes entry by new broadcast networks." *2002 Biennial Review*, 18 FCC Rcd at 13845.

Yet the "new network" rationale lacks any basis in the record -- a fact that jumps out at any reader of the Order, because even when it mentions this rationale for the first time, the Order cites absolutely nothing in support of this contention. Differences between UHF and VHF power, reach, and consequently in the value of such stations, have been a subject of Agency examination and regulation for over 50 years. *Sixth Report and Order*,

Dockets 8736, 8975, 8976, 9175, 41 FCC 148 (1952) (creating the UHF television service); *The All-Channel Receiver Act of 1962*, PL 87-529, July 10, 1962 (giving the Commission the authority to require that television receivers be capable of receiving UHF as well as VHF channels); *Report and Order in Docket 18433*, 21 FCC 245 (1970); *Memorandum, Opinion and Order in Docket 18433*, 23 FCC 2d 793 (1970); *Report and Order in Docket 19268*, 32 FCC 2d 612 (1971); *Report and Order in Docket 19722*, 43 FCC 2d 395 (1973)(Rulings between 1970 and 1973 required TV receivers to have more comparable tuning for UHF television stations); *Report and Order in Docket 20839*, 62 FCC 2d 164 (1976) (stipulating that television receivers must have a new UHF receiving antenna if supplied with a VHF receiving antenna); *Report and Order in Docket 21010*, 69 FCC 2d 1866 (1978); *Memorandum Opinion and Order in Docket 21010*, 70 FCC 2d 1176(1978)(Noise figure is a measure of the effectiveness of television receivers in displaying a weak television signal. The Commission's action required a noise figure of 14 dB for new receiver models in 1979 and for all receiver models in 1981, and a noise figure of 12 dB for new receiver models in 1982 and for all receiver models in 1984. However, the 12 dB noise figure standard was overturned in the U.S. Court of Appeals for the D.C. Circuit. See *Electronic Industries Association v. Federal*

Communications Commission, 686 F.2d 689 (D.C. Cir. 1980)); *Appropriations for Departments of State, Justice, Commerce, Judiciary and Related Agencies*, 92 Stat. (Oct. 10, 1978)(appropriating funds for the Commission to create the UHF Comparability Task Force); *Improvements to UHF Television Reception Report and Order*, 90 FCC 2d 1121 (1982); *Memorandum Opinion and Order*, 100 FCC 2d 74 (1985); *1998 Biennial Review Report*, 15 FCC Rcd 11058, 11284 (2000); *2002 Biennial Review*, 18 FCC Rcd 13620 (2003).

Yet the Agency's explication of the reasons for its action here contains not a single reference to a single fact, factual finding, earlier regulatory proceeding – or anything else. The “new network” promotion rationale is put forward as nothing but an assertion, with no support of any kind. Even in the remainder of its (very short) discussion of the Discount, the Agency cites nothing other than the recent submissions of litigants who wish to see the Discount preserved, at least for themselves. See Order at *2002 Biennial Review*, 18 FCC Rcd at 13846-47 (citing the comments of Paxson and Univision). Indeed, one would look in vain anywhere else in the Order, or in the entire the record of this proceeding, for evidence that the Discount “promotes entry by new broadcast networks.”

By nonetheless relying on this rationale as a basis for its action, the Commission acted arbitrarily and capriciously. *Marshall v. Lansing*, 839 F.2d 933, 944 (3d Cir. 1988) (rejecting agency's "new 'statement of reasons' [because it] did not provide the crucial missing *reasoning*")(emphasis in original). As stated by Judge Wilkie in his dissent in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976):

[I]f indeed the Administrator had discovered a new basis for the regulations, then responsible, practical administrative procedure demanded that the interested parties be given the same opportunity to comment on the new basis as they had on the old. It certainly, as a practical matter, does no good for an agency to propose an action, support it with data which is severely criticized, abandon that supporting data for new, fail to subject the new data to informed comment, and then promulgate the same proposed regulations on the basis of new data. Nor is it valid thereafter to claim that full opportunity for comment has been afforded.

Id. At 87-88 (footnote omitted).⁶

⁶ The D.C. Circuit's reprimand of the Commission for ignoring its previous positions on the National Ownership Cap, unfortunately, bears repeating in this context:

The Commission's failure to address its 1984 Report in the course of its contrary 1998 Report is yet another way in which the decision to retain the NTSO Rule was arbitrary and capricious. Recall that in the 1984 Report the Commission concluded the NTSO Rule should be repealed because it focuses upon national rather than local markets and because even then any need for the Rule had been undermined by competition. 1984 Report P 108. Indeed, even when the Commission subsequently reconsidered its decision to eliminate

State Farm permits adoption of a new policy **only** if there is a “rational connection between the facts found and the choice made.” 463 U.S. at 43. Here, by sharp contrast, there is **only** a choice made – there simply are **no** facts found relating to the newly discovered rationale of “new network” promotion. This is clearly inadequate, and cannot stand. See generally *National Resources Defense Council v. Environmental Protection Agency*, 790 F.2d 289, 298 (3d Cir. 1986):

Where, as here, an agency has reversed its established interpretation of a statute, the degree of deference accorded to the agency may be somewhat lessened. As this court has said, “sharp changes of agency course constitute ‘danger signals’ to which a reviewing court must be alert.” *NRDC v. EPA*, 683 F.2d [752,][], 760 [3d Cir. 1982](citation omitted). See also *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual*, 463 U.S. 29, 41-42, 103 S. Ct. 2856, 2866, 77 L. Ed. 2d 443 (“A

the national ownership cap -- as necessitated by the moratorium the Congress imposed upon implementing the 1984 Report -- it expressly re-affirmed the conclusions reached in the Report. Amendment of Multiple Ownership Rules, Mem. Op. & Order, 100 F.C.C.2d 74, P 3 (1984). To retain the cap in 1998 without explanation of the change in the Commission's view is, therefore, to all appearances, simply arbitrary. The Commission may, of course, change its mind, but it must explain why it is reasonable to do so. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983) (“An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.”); *Telecomm. Research and Action Ctr. v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986).

Fox TV Stations, Inc. v. FCC, 280 F.3d 1027, 1044-45 (D.C. Cir. 2002).

'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.'" (citation omitted)); *Sierra Club v. United States Army Corps of Engineers*, 772 F.2d 1043, 1046 (2d Cir. 1985)("A change in something from yesterday to today creates doubt. When the anticipated explanation is not given, doubt turns to disbelief.") An agency is, of course, free to change its position, but it must supply adequate data and a reasoned analysis to support the change.

Here, of course, the Commission has completely failed to collect or discuss **any** "data * * * to support the change" in policy said to underlie and justify the UHF Discount.⁷

As this Court has recently explained:

Although an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without "announcing a principled reason" for the departure. *Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3d Cir. 1998) (noting the well-established rule that an agency can depart from precedent only with explanation); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983); *Chisholm v. Defense Logistics Agency*, 656 F.2d 42, 47 (3d Cir. 1981) (agencies must follow, distinguish, or overrule their own precedent). Numerous courts have applied this principle in the immigration context, as we do

⁷ The cases cited here deal with an agency's reversal of position, carried out without an adequate review of the facts to justify that change. The instant situation is different in one respect: here the agency has maintained its course, when the factual basis that underlay that choice has by all accounts fallen away. The distinction is irrelevant, however: what matters is that the new rationale – here, new network promotion – was settled upon with no factual record and no explanation of how the policy chosen advances this new goal.

here. Further, if it departs from an announced rule without explanation or an "avowed alteration," such action could be viewed as "arbitrary, capricious, [or] an abuse of discretion." *INS v. Yang*, 519 U.S. 26, 32, 136 L. Ed. 2d 288, 117 S. Ct. 350 (1996). Here, the Board has not announced an alteration of the policy set forth in Patel. Thus, if the Board did in fact depart from Patel, it acted arbitrarily and we should overturn its ruling.

Johnson v. Ashcroft, 286 F.3d 696, 700 (3d Cir. 2002)(footnote omitted).

Here the Commission committed both sins: it presented the new rationale of "new network promotion" without acknowledging that it is new, and it relied on that new rationale without any basis for it in the record. *See generally Salameda v. INS*, 70 F.3d 447, 450 (7th Cir. 1995)("An agency may not abandon an interpretation without an explanation. . . Agencies do not have the same freedom as courts to change direction without acknowledging and justifying the change."); *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994)(requiring the BIA to "confront the issue squarely and explain why the departure is reasonable" when it departs from its own precedents); *Johnson*, 286 F.3d at 700(citing *Salameda* and *Davila-Bardales*); *see also Mazza v. Secretary of Health and Human Services*, 903 F.2d 953 (3d Cir. 1990)(rejecting change in Social Security Administration policy not grounded in adequate reasoning, even though policy adopted was not, considered in isolation, irrational).

II. THE AGENCY PRESERVED THE DISCOUNT AT 50% WITHOUT MAKING ANY EFFORT TO SHOW THAT A 50% DISCOUNT WAS APPROPRIATE, BY REFERENCE TO ANY RATIONALE

There is no dispute that the UHF Discount was created when only 30% of households received cable, while today the percentage is a vastly different 86%. *2002 Biennial Review Report*, 18 FCC Rcd at 13845; *1998 Biennial Review, Notice of Inquiry*, 13 FCC Rcd at 11284. The Commission refuses to accord *any* impact to this dramatic change, but for reasons that simply do not make sense. Thus, the Commission dismisses the importance of the 86% multi-channel penetration number on the ground that 30% of television sets are not connected to cable, satellite or other multi-channel video services. *2002 Biennial Review*, 18 FCC Rcd at 13845. But this is clearly a deficient response.

First, if a discount of 50% was the appropriate size in 1985, because 30% of households then received cable, then it simply cannot be that the same discount is still appropriate when the percentage with cable or cable-equivalent connections has risen to 86%. And indeed, the Commission makes no effort to defend the appropriateness of the discount's size by reference to anything, including the fraction of the public that receives cable or satellite.

In any event, the number of cable-receiving televisions is, standing on its own, meaningless, because it is clear that roughly half of these unconnected sets are in homes that do in fact have cable or satellite connections. *See 2001 Video Competition Report*, 17 FCC Rcd 1244, 1282 (2002). The Commission does not note the percentage of television **viewing** occurring over these unconnected sets to determine the actual competitive disadvantage.⁸ The Commission's refusal to consider these statistics, when they are available and plainly relevant, is arbitrary and capricious. *Humphreys v. Drug Enforcement Agency*, 96 F.3d 658, 662-63 (3d Cir. 1996)(reversing and vacating agency decision which consciously ignored relevant and available evidence).

The Commission also defends its position on the Discount generally by pointing out that weaker UHF signals make it more difficult to put a Grade B signal over cable head ends and, thus, qualify for cable carriage. But here again, the Commission says nothing about any specific data showing how many UHF stations actually fail to qualify for carriage on cable systems within their markets. And even if the Commission's factual claim were completely true, this silence of the Order regarding the **impact** of

⁸ Nielsen Media Research gathers this data for every U.S. TV market, which the Commission could have examined if it deemed the issue significant. As matters stand, the record contains no evidence on the issue at all. <http://www.nielsenmedia.com/> <visited October 18, 2003>

this fact makes the Commission's reliance upon it arbitrary and capricious. In the absence of any evidence on impact, how is anyone to know whether a discount of 50%, as opposed to some other figure, is appropriate? The Commission's Order makes no effort to address this question.

Though the Commission is silent in its Order on the evidence, the record itself is not. There is actual evidence on the issue – and that evidence makes it impossible to believe that either or both of these findings result in a 50% handicap. Certainly, in the face of this evidence, the Commission has acted arbitrarily and capriciously in remaining silent on impact, while sustaining the 50% discount figure. In 1998, the Commission stated:

While the technical and engineering evidence submitted by commenters continues to support the UHF discount, *we believe that it will likely not continue to do so in the future.* The information received in the proceeding suggests that the reach disparity between VHF and UHF stations differs from market-to-market and station-to-station. In addition, we agree with commenters arguing that advances in technology now provide us with the tools to more accurately measure the household reach for each UHF station. (Emphasis added.)

1998 Biennial Review, 15 FCC Rcd at 11078-11079; *Memorandum Opinion and Order*, 100 FCC 2d at 93 (recognizing that the best indicator of the reach handicap is one that measures the actual coverage limitation inherent in each UHF signal).

An engineering analysis prepared by Denny & Associates, P.C. demonstrates what the Commission in 1985 and 1998 recognized, but what the Commission in the Order under review ignored. The Denny analysis notes that “interference-free population coverage, not square mileage, is the more appropriate means for measuring the number of viewers that can receive a station’s Grade B signals, and hence, its audience reach.” *Ex Parte* Letter, Cox Enterprises, Inc., MB Docket No. 02-277 (fil. May 30, 2003) (“Cox 5/29/03 *Ex Parte* Letter”). Applying this logic advocated by the Commission in the *1998 Biennial Review*, the signal disparity numbers between same market UHF and VHF stations cited by the Commission based on data it received from Fox, NBC and Viacom changes dramatically. The networks noted that the UHF stations covered only 56-61% of the area covered by the VHF stations, but the Denny analysis shows that number to be 92.7-94.7% based on interference-free population coverage. *Compare 2002 Biennial Review*, 18 FCC Rcd at 586, with Cox 5/29/03 *Ex Parte* Letter.

The Commission concludes that differences in ratings between UHF and VHF stations result from UHF stations’ diminished coverage areas, citing two studies from Paxson. *2002 Biennial Review*, 18 FCC Rcd 13846. In contrast, CBC examined Nielsen Media Research’s ratings in the top 50

television markets comparing FOX, UHF, and VHF affiliates during February 2003 indicating a 4.2% to 8.6% difference, not 50%. CBC 5/29/03 *Ex Parte* Letter.

The Commission's failure to confront this evidence – particularly when coupled with its failure even to address the question that the evidence bears on – is arbitrary and capricious.⁹ *See Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) (“The Commission's failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious. Unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned.”)

III. IN OTHER AREAS AFFECTING VHF AND UHF STATIONS, THE COMMISSION HAS ABANDONED THE DISTINCTION BETWEEN THE TWO, AS THE MARKET REALITIES HAVE CHANGED

One strong indicator that an agency's action is arbitrary is its inconsistency with other actions taken by the same agency. Indeed, the Commission has been chastised by the courts twice in the recent past for

⁹ It bears noting that in the cited discussion as well, the Commission justifies its discrimination between treatment of UHF and VHF stations on “UHF stations' diminished coverage areas.” There is nothing here about new network creation, or any other rationale.

acting inconsistently in contexts closely related to the one here at issue.¹⁰ See *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 162-65 (D.C. Cir. 2002)(stating that Commission must provide a reasoned explanation for its action in defining voices differently in the cross-ownership and local ownership rules); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1052 (D.C. Cir. 2002), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002)(faulting the Commission for making no attempt to harmonize seemingly inconsistent decisions).

Yet once again the Commission has failed to apply the same principles in closely related contexts. For notwithstanding its failure to consider the realities of cable and satellite access with respect to the UHF Discount, in a variety of other contexts the Commission used to maintain – but has steadily eliminated – differences in treatment between UHF and VHF stations.

¹⁰ In fact, the Order here under review demonstrates the inconsistencies among the Commission’s various media ownership rules. The national television ownership rule is the Commission’s only ownership rule that makes a distinction between UHF and VHF television stations for counting purposes. Both the local television ownership rule and the cross-media rule count UHF and VHF stations the same for voices purposes. Therefore, for National Cap purposes, a UHF station is assumed to only reach 50% of the population in its DMA, but for the local television ownership rule and the cross-media rule, the same UHF station is assumed to reach 100% of the population. This argument is treated thoroughly in other Citizen Petitioners and Interveners opening briefs.

For example, until 1988 the Commission conducted licensing proceedings for the two types of stations differently. In that year, however, the Commission eliminated the UHF impact policy from consideration in licensing proceedings. *Report and Order*, MM Docket No. 87-68, 3 FCC Rcd 638 (1988), clarified, *Memorandum Opinion and Order*, MM Docket No. 87-68, 4 FCC Rcd 276 (1989). Under this policy, applications to initiate or improve VHF service had been considered contrary to the public interest if the proposals threatened adverse economic impact on existing or potential UHF stations. *Report and Order*, MM Docket No. 87-68, 3 FCC Rcd 638 (1988), clarified, *Memorandum Opinion and Order*, MM Docket No. 87-68, 4 FCC Rcd , 276 (1989). At 642, the Commission noted:

[T]he disparities between the UHF and VHF services have been largely eliminated. This improvement has resulted from the continuing growth of the television market and Commission requirements for changes in television receiver designs that have reduced significantly the technical handicap of the UHF service.

The Commission further stated “the UHF service has become, by and large, a healthy and profitable sector of the television industry.” *Id.* Given these findings, the Commission found that “it is no longer reasonable to assume that there is a public interest need to restrict competition” from VHF stations as a means of fostering growth of UHF stations. *Id.*

“Even back in 1995, the Commission found that various regulatory and statutory policies to ease UHF reception had ‘substantially alleviated the technical disadvantages faced by UHF television receivers.’” Statement of Commissioner Jonathan S. Adelstein Dissenting accompanying the *2002 Biennial Review Report* (quoting *Review of the Commission’s Rules Governing Television Broadcasting*, 10 FCC Rcd 4538, 4542 (1995)). See also *Review of the Prime Time Access Rule*, 11 FCC Rcd 546, 583 (1995) (concluding that the UHF handicap has been reduced due to technological improvements and the growth of cable penetration). In making its 1995 Prime Time Access decision, the Commission relied on an Economists, Incorporated (“EI”) study submitted by the networks, which found that “the handicap of UHF independents carried on cable has disappeared entirely.” *Prime Time*, 11 FCC Rcd at 585. The Commission “conclude[d] that EI’s study provides additional evidence that cable has reduced the UHF handicap.” *Id.*

Similarly, during the 1998 Biennial Review, the Commission concluded that the UHF discount remained in the public interest, but stated “we believe it will likely not do so in the future.” *1998 Biennial Review*, 15 FCC Rcd at 11078-11079. The Commission previously recognized that the best indicator of the reach handicap is one that measures the actual coverage

limitation inherent in each UHF signal. 100 FCC 2d at 93. Looking forward to the digital transition, the Commission in the 1998 report also concluded, “the eventual modification or elimination of the discount for DTV will be appropriate.”¹¹ *1998 Biennial Review*, 15 FCC Rcd 11078-11079.

¹¹ 1998 Biennial Review at 11079 (“In this regard, we note that the existing UHF discount will likely not work well for DTV. Our efforts to replicate existing signal coverage provide DTV stations the ability to reach approximately the same number of television households they currently reach with NTSC stations. Thus, it is not clear that a VHF NTSC station assigned a UHF DTV channel should be permitted a UHF discount if the station reaches the same number of households as did its NTSC counterpart. Nor is it clear that a UHF NTSC station assigned a VHF DTV channel should lose the discount if the DTV station does not reach more households. In this regard, however, we note that, pursuant to Section 5009(c) of Pub. Law 106-113, 113 Stat. 1501, Appendix I (1999), the Commission, on December 7, 1999, issued a Public Notice giving DTV licensees until December 31, 1999, in which to file notice that they intend to seek maximization of their DTV service area. One thousand three hundred and sixteen letters of notification manifesting the intent to file to maximize DTV stations’ service areas were filed by that deadline. Accordingly, DTV licensees, including those operating on UHF channels, have been given the opportunity to maximize their DTV coverage areas, and not merely replicate their analog coverage. This should ameliorate at least some of the disparities between UHF and VHF stations’ access to viewership in the digital context. Additionally, unlike analog signal reception, where picture quality gets progressively worse as distance from the antenna increases, digital reception is characterized by the so-called “cliff effect.” That effect is characterized by DTV television receivers obtaining the same quality of reception at a distance from the transmitting antenna as is obtained close to it until such a point as the data stream is no longer useable by the receiver. At that point reception “falls off a cliff” and no picture or sound is produced. In other words, the reception quality remains high when an adequate signal is available. Effectively, as the average DTV signal strength gets weaker at the

edge of a station's service area, the picture and sound will be produced for smaller percentages of time, until reception is considered unacceptable. Generally, DTV UHF viewers should have better quality reception at greater distances from the station than is currently the case with respect to analog UHF reception. This, too, should allow DTV UHF stations to obtain better access to off-the-air viewers and should rectify the VHF/UHF disparity to an extent. We believe that under these circumstances, the eventual modification or elimination of the discount for DTV will be appropriate. Accordingly, at such time near the completion of the transition to digital television we will issue a Notice of Proposed Rulemaking proposing a phased-in elimination of the discount.”) (footnotes omitted).

IV. PRESERVING THE UHF DISCOUNT COMPOUNDS THE ERROR OF LIFTING THE NATIONAL CAP

The Network Affiliated Stations Alliance (“NASA”) Petitioners have argued to this Court that the Commission erred gravely in lifting the National Cap for multiple ownership of television stations. CBC concurs in that argument, and in the value it places on localism and the diversity of ownership and viewpoint. CBC respectfully submits that the Commission’s preservation of the UHF Discount, and its refusal to address even the extent of the Discount given the current state of the marketplace, dramatically compounds the error of lifting the National Cap.¹²

¹² The Agency is also silent about a variety of issues that will have to be resolved for the actual impact of its decision about the Discount to be assessed: who is to be covered by the sunset provisions? Who, if anyone, is to be grandfathered under the Discount? As matters now stand, the Networks have a tremendous incentive to acquire UHF stations, for two reasons: they enable them to evade the 45% cap now, and such stations may – if grandfathering is applied – enable the Networks to continue to evade the cap even after the Discount itself is abolished, whenever that actually occurs. The Commission’s failure to address these issues now compounds uncertainty in this area, and risks the creation of perverse incentives that clearly work at odds with the Commission’s goals of consistency as well as the diversity of ownership and viewpoint. As an illustration of the importance of this issue now, Paxson argued to the Commission that the sunset provisions do not apply to stations owned by, but not affiliated with, one of the four major networks that will be affected by the sunset when it takes effect. See http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515282702 <visited October 20, 2003>.

The National Cap increase would be a sufficiently vulnerable determination on its own, even if the UHF Discount did not exist, for all of the reasons set forth in the NASA Opening Brief. But the impact of that decision is dramatically increased by preservation of the UHF Discount at its current 50% level at the same time that UHF stations are, as a practical matter virtually indistinguishable in reach from VHF stations because of widespread cable and satellite access. The interaction of these two decisions by the Commission means that the effective National Cap is not 45% but close to 90%. Needless to say the Commission has not proffered any justification for a cap on ownership just a step away from no cap at all. Because that is so, the Commission's adoption of the new National Cap, at the same time that it has preserved the UHF Discount, is arbitrary and capricious.

The fact that, at some point left largely undefined by the Commission, when "digital transition" is achieved, the UHF Discount will sunset – for some parties, themselves left undefined – does nothing to save the discount's irrationality now. For the future sunset provision does nothing to erase the fact that *now*, and for at least the next several years, widespread cable and satellite access means that in reality, UHF stations are in fact the virtual equivalent of VHF stations. Because this is so, the market realities now

mean that an entity owning multiple UHF stations can achieve ownership of stations that, as an actual matter, reach close to 90% of viewers. Indeed, according to the Commission, of the 1345 full-power commercial television stations now in the U.S., a majority – 760 -- are UHF. FCC News Release, *Broadcast Station Totals as of June 30, 2003*, (July 2, 2003). This necessarily means that the 45% cap the Commission has approved is in reality substantially higher.¹³

¹³ Finally, no matter what justification the Commission can point to in this Court for its decision to preserve the Discount, and to preserve it at 50%, there is just nothing anywhere in the record upon which the Agency can hang its determination to phase out the Discount at some later date for some networks, while allowing others to continue to benefit from it, apparently forever. The record is simply barren of any fact explaining why other networks and group owners who enjoy this special privilege are entitled to it, while for the other major networks it is appropriate to end the privilege at some date to be named later.

CONCLUSION

CBC respectfully submits that the gaps in the record here under review require this Court to vacate the Commission's decision to preserve the 50% UHF Discount. The only historical rationale for the Discount, of differences in audience reach, plainly does not justify the policy any longer. Yet the new justification, of new network promotion, lacks any factual basis in the record and is totally unconnected in the Commission's Order to the policy it is said to rationalize.

Given these failings, the appropriate course is a directive from this Court that the Commission start over on this issue. The Commission should be required to identify the policy or policies it believes should be served by its position on this issue; collect data and allow affected parties and the public to be heard on the policies and on the impact of the Commission's Discount rule in advancing such policies; and to settle on a rule rationally related to those policies, on the basis of actual data in the record.

In contrast to what the Commission has done thus far on this issue, the result will be a reasoned analysis, based on a developed record that can stand up on appeal to a reviewing court's scrutiny.

Respectfully Submitted,

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Dated: October 21, 2003