

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Amendment of Section 73.3555(e) of the)	MB Docket No. 17-318
Commission's Rules, National Television)	
Multiple Ownership Rule)	

COMMENTS OF WRITERS GUILD OF AMERICA WEST, INC.

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March 19, 2018

I. Introduction

Writers Guild of America West, Inc. (“WGAW”) is pleased to submit the following Comments in response to the Federal Communications Commission’s (“FCC”) Notice of Proposed Rulemaking (“NPRM”), “Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule,” released December 18, 2017, MB Docket No. 17-318.

This NPRM seeks comment on the FCC’s national television audience reach cap (“cap”), including the UHF discount used in calculating compliance with that cap. Specifically, the FCC asks “whether there is still a need for a national cap that prevents ownership of stations that collectively reach more than a certain percentage of the television households in the country. Does such a cap serve the public interest?”¹ Currently, the FCC is charged by Congress² to ensure that one entity cannot own broadcast stations that reach more than 39% of American households. WGAW believes that this protection against excessive consolidation in broadcasting remains vital, and that the FCC’s mandate includes the obligation to ensure that the calculations used to determine market share, such as the UHF discount, are consistent with Congressional intent.

WGAW responds to this NPRM in its capacity as a labor organization that represents more than 8,000 professional writers of film, television, online video programming, local news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in theaters are written by WGAW members and the

¹ In the Matter of Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, *Notice of Proposed Rulemaking*, MB Docket No. 17-318, 32 FCC Rcd. 10785, 10790, ¶ 11 (Dec. 18, 2017) (“NPRM”).

² 47 C.F.R. §73.3555, as amended by Pub L. No. 104-199, 118 Stat. 99 (2004).

members of its affiliate, Writers Guild of America, East (jointly, “WGA”). WGA members also create broadcast network primetime programming, and local news for television and radio stations in Los Angeles.

The NPRM qualifies its initial question, whether a cap on the national reach of broadcast station owners is needed, with a litany of changes to the video marketplace over the last decade, such as the development of online alternatives to traditional television, common ownership of broadcast and cable channels, consolidation among multichannel video programming distributors (“MVPDs”) and independent station groups and MVPD subscriber losses.³ Though it is indisputable that the media landscape has changed in recent years, the companies who hold and profit substantially from broadcast licenses continue to enjoy a unique privilege that commits them to unique responsibilities. The FCC’s obligation to promote “the public interest, convenience and necessity” was established by the Communications Act of 1934, and affirmed by the Telecommunications Act of 1996, but the standard was first used in the Radio Act of 1927. In passing that law, Congressman Wallace H. White noted that, “If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.”⁴ Without a cap on the share of national audiences that a single owner of broadcast stations can reach, one company could (and likely would) dominate the public airwaves, reducing the diversity of information available and removing news operations from the communities they serve.

³ *NPRM*, 32 FCC Rcd. at 10790 ¶ 11.

⁴ 67 Cong. Rec. 5479 (1926), cited by FCC Working Group, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* at 280 (July 2011).

II. The UHF Discount Should Be Retired

As an initial matter, the UHF discount, which allows station owners to undercount the reach of UHF stations in market share calculations, is demonstrably irrelevant. WGAW has argued in previous filings⁵ that this discount has enabled consolidation and should be repealed. The discount allows station owners who can now reach 100% of television households in a local market because of the digital television transition to act, for purposes of the Commission's enforcement, as though they do not. As long as the technically obsolete discount remains in effect, the FCC is not upholding the intent of Congress in mandating the 39% cap, and is permitting an end-run around ownership limits. The FCC retains jurisdiction to close the loopholes in regulations that allow station owners to bypass the Congressionally-mandated ownership limits through acquisitions and mergers. In 2016, the FCC abolished the discount in recognition of its technical obsolescence, which "restore[d] meaning" to the national ownership cap.⁶ The decision to reinstitute the UHF discount, with no technical basis, appears solely to allow further consolidation among owners of broadcast stations.

⁵ Comments of the Writers Guild of America, West, Inc., in the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, WC Docket No. 13-236 (Nov. 4, 2013); Comments of the Writers Guild of America, West, Inc., in the Matter of 2014 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 2010 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership In the Broadcasting Services, Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (Aug. 6, 2014).

⁶ In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Report and Order*, MB Docket No. 13-236, 32 FCC Rcd. 10213, ¶ 1 (Sept. 7, 2016).

III. Pervasive Consolidation Threatens Independent Programming and Diversity of Content

WGAW has documented the negative impact of consolidation on media markets in numerous FCC proceedings over the past three decades, illustrating its threat to independent programming, diverse voices and creativity. Our comments on the 14th, 15th and 16th Annual Video Competition reports made clear how the repeal of the Financial Interest and Syndication rules in 1993 resulted in vertical integration between networks and programmers, the sweeping loss of independent programming from broadcast in primetime, and the rise of in-house production, which forecloses independent competitors from the market for the most valuable programming.⁷

A significant amount of consolidation in numerous media markets has also occurred in the past several years. MVPDs have consolidated both horizontally and vertically, including Charter Communications' purchase of Time Warner Cable in 2015, AT&T's purchase of DirecTV and its attempted purchase of Time Warner, Inc. The trend towards consolidation is taking place among programmers as well, with Discovery Communications' in-process purchase of Scripps Networks Interactive, CBS's possible consolidation with Viacom, Disney's announced purchase of Fox and Comcast-NBCUniversal's possible attempts to join the fray.

These mergers give media conglomerates greater control over must-have programming, allowing

⁷ Comments of the Writers Guild of America, West, Inc., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 14-16, at 4-9 (Mar. 21, 2014); Comments of the Writers Guild of America, West, Inc., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 12-203, at 3-9 (Sept. 10, 2012); Comments of the Writers Guild of America, West, Inc., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269, at 2-8 (June 8, 2011).

them to reduce output, raise prices and restrict competitors' access to customers. The result is less diversity of content, creativity and innovation.

In response and in tandem with this consolidation among MVPDs and programmers, large broadcast station owners continue to grow through acquisitions: Sinclair Broadcast Group, Nexstar Media Group and Gray Television are the most active buyers of stations and account for almost 90% of the total deal volume of the past three years.⁸ At present, the only thing stopping further consolidation appears to be the FCC's media ownership rules. Research service S&P Global Market Intelligence (formerly SNL Kagan) expects this trend to continue as station groups try to increase their leverage for negotiations with ever-more-powerful MVPDs. Consolidation is occurring at every level, in every configuration and market within media. While it is already part of the FCC's mandate to protect and promote the public interest by blocking harmful consolidation, broadcast television is a unique market requiring additional protection.

IV. Broadcast Television Remains Dominant and Unique

Broadcast television, unlike most other forms of professionally-produced video media, is available for free via the public airwaves. Station owners and networks are permitted by the government to profit from free use of a limited public resource, spectrum, in exchange for agreeing to special restrictions and obligations to serve the public interest. Broadcast stations also enjoy unique legal protections, such as retransmission consent and must-carry, allowing them to immediately gain access to all of a given MVPD's customers. Broadcast stations have

⁸ Justin Nielson, *Media ownership rule changes could spur more large-scale M&A for broadcasters*, S&P Global Market Intelligence (Oct. 30, 2017), <https://www.snl.com/web/client?auth=inherit#news/article?id=42414504&KeyProductLinkType=24>; Justin Nielson, *Broadcast TV retrans consent: history and outlook*, S&P Global Market Intelligence (Jan. 24, 2018), <https://www.snl.com/web/client?auth=inherit#news/article?id=43267419&KeyProductLinkType=24>.

influence on what information, what stories and what perspectives reach the audiences in their local markets. Broadcast networks offer key original programming, produce local content, cover events relevant to public interest, such as political elections, and air must-have sports programming. That many consumers access broadcast content through a distributor, such as traditional MVPD service or a new online live TV service like Sling TV, does not negate the need for specific rules governing ownership of television stations.

The rumors of live and over-the-air broadcast's demise are also greatly exaggerated. Nielsen's most recent Total Audience Report found that the US population spends an average of 27 hours and 44 minutes per week watching live and time-shifted television, compared to 50 minutes of video on smartphones, and just under two hours on computers.⁹ In addition, Nielsen has reported that the number of broadcast-only households in the US increased 16% between Q2 2016 and the same period in 2017, from 13.6 million to 15.8 million. This includes a 21% increase in households with broadcast and broadband internet access.¹⁰ Free, over-the-air distribution of broadcast television retains relevance despite the availability of alternative paid services.

Broadcast networks and programming also remain the most valuable segment of television, despite the addition of basic cable and online video. Total broadcast retransmission fees were estimated to reach \$8.6 billion in 2017 and \$10.7 billion in 2020.¹¹ Broadcast television continues to claim the highest ratings: the four broadcast networks' 2017 average

⁹ Nielsen, The Total Audience Report, Q2 2017, at 14, tbl.1A (2017). "Video on a Smartphone" population is P18+; others are P2+.

¹⁰ *Id.*, at 26, tbl.7.

¹¹ S&P Global Market Intelligence Projection, Multichannel Programming Fees as a Percentage of Multichannel Revenue, 2009-2020 (Apr. 13, 2017).

primetime ratings ranged for 1.08 for Fox to 1.87 for CBS, while the most-watched basic cable channel, Fox News, averaged only 0.69.¹² The four major networks averaged net advertising revenue of \$3.4 billion in 2017, while ESPN had the highest net advertising revenue of any basic cable network at \$2.1 billion.¹³ All but three of the top-rated primetime telecasts of 2017 were on broadcast television.¹⁴

V. Broadcast Television's Local News Offerings Are Singular

Local news is a vital aspect of our democracy, and the provision of local news is a key requirement of broadcast television's public interest obligation. The hyper-local nature of news delivered by broadcast stations is invaluable, and is threatened by consolidation that moves decision-making further from the local communities served by the stations. Despite the market changes cited by the Commission,¹⁵ Nielsen reported in 2017 that local broadcast television remains the most common source of news for Americans.¹⁶ Nielsen's Q1 2017 Local Watch Report found that local news still enjoys the highest reach among adults across all television news consumption, including local and national broadcast news and cable news, and that adults also spend more than twice as long watching local news as they do watching national broadcast

¹² Nielsen National TV View, P2+ Live Ratings for Jan. 1, 2017 through Dec. 31, 2017. Broadcast network ratings are Broadcast Primetime; Basic Cable network ratings are Cable Primetime.

¹³ S&P Global Market Intelligence, TV Network Summary, 2017 Net Advertising Revenue for Basic Cable and Broadcast.

¹⁴ Rick Porter, *The 100 most-watched TV programs of 2017: Super Bowl LI laps the field*, TV By the Numbers (Dec. 28, 2017), <http://tvbythenumbers.zap2it.com/more-tv-news/the-100-most-watched-tv-programs-of-2017-super-bowl-li-laps-the-field/>.

¹⁵ *NPRM*, 32 FCC Rcd. at 10790 ¶ 11.

¹⁶ *It's All About Local News*, Nielsen (Sept. 14, 2017), <http://www.nielsen.com/us/en/insights/news/2017/its-all-about-local-news.html>.

news.¹⁷ Local television news also reached four times as many adults as news on smartphones and computers.¹⁸

While increasing numbers of Americans report getting news online,¹⁹ closer inspection reveals how little of it represents new voices at the national or local level. Online aggregators of news content do not produce original reporting, and the most popular online news providers are often legacy news outlets repurposing content from other media, rather than adding new diverse or local voices to the news landscape. Pew noted in 2016 that four of the top ten online newspapers measured by American web traffic are news providers based in the United Kingdom.²⁰ Of the top twenty U.S. news websites as of August 2017, half are owned either by legacy newspaper operations or by media conglomerates such as Time Warner or CBS.²¹

Concentration in station ownership undermines the localism that is central to responsible, community-focused news production. For example, stations owned by Sinclair are required to air segments produced by the national headquarters regardless of the judgements of local journalists

¹⁷ *Q1 2017 Local Watch Report: TV Trends in Our Cities*, Nielsen (Sept. 14, 2017), <http://www.nielsen.com/us/en/insights/reports/2017/q1-2017-local-watch-report-tv-trends-in-our-cities.html>.

¹⁸ *Id.*

¹⁹ Jeffrey Gottfried and Elisa Shearer, *American's online news use is closing in on TV news use*, Pew Research Center (Sept. 7, 2017), <http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/>.

²⁰ Dailymail.co.uk, theguardian.com, telegraph.co.uk and independent.co.uk. Pew Research Center, *State of the News Media 2016* (June 2016), available at <http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf>.

²¹ *Most popular news websites as of August 2017, by unique monthly visitors*, Statista <https://www.statista.com/statistics/381569/leading-news-and-media-sites-usa-by-share-of-visits/>. WGAW analysis.

about their quality or ideological slant.²² In numerous other instances, consolidation has demonstrably harmed local markets. In 2012, Nexstar acquired control of two stations via a partnership in the Little Rock, Arkansas market where they already owned the local NBC and MyNetworkTV affiliates and proceeded to consolidate the operations of all four stations and fire 30 employees.²³ One of the worst examples of media consolidation's harm to a local community occurred in Minot, North Dakota in 2002. A nighttime train derailment spread toxic fumes over the town, where all six of the commercial radio stations were owned by a single national company, Clear Channel. Local staffing had been deprioritized as the radio stations' feeds were piped in remotely, leaving only one employee at the designated emergency station who failed to broadcast an emergency alert as hundreds of people were exposed to the fumes and one died.²⁴

WGAW members have experienced firsthand the harmful effects of broadcast station consolidation. After the FCC relaxed restrictions on TV station duopolies in 1999, CBS acquired the Los Angeles station KCAL. CBS proceeded to combine the in-market newsrooms of KCBS and KCAL in 2002. Writers at the two stations describe a race to the bottom, in which news staffs were cut to balance station budgets, news hours increased to fill out the schedule, and news content was frequently repurposed between the two stations. The acquisition resulted in the loss of positions including KCAL's Education and City Hall reporters, both of which had provided

²² Sydney Ember, *Sinclair Requires TV Stations to Air Segments That Tilt to the Right*, NY Times (May 12, 2017), <https://www.nytimes.com/2017/05/12/business/media/sinclair-broadcast-komo-conservative-media.html>.

²³ Free Press, *Cease to Resist: How the FCC's Failure to Enforce Its Rules Created a New Wave of Media Consolidation at 35-36* (Oct. 2013), available at https://www.freepress.net/sites/default/files/resources/Cease_to_Resist_Oct._2013_0.pdf

²⁴ Matthew Lasar, *Clear Channel still haunted by Minot toxic spill disaster*, Ars Technica (May 24, 2010), <https://arstechnica.com/tech-policy/2010/05/will-clear-channel-ever-live-down-the-minot-toxic-spill-disaster/>.

dedicated coverage of local issues. The staff reductions and combined newsroom have made the news coverage and reporting from KCBS and KCAL almost indistinguishable, leaving the Los Angeles market with fewer unique, local sources of news content.

VI. Conclusion

In 1961, Former FCC Chairman Newton Minow told the National Association of Broadcasters,

“[T]he public interest is made up of many interests. There are many people in this great country, and you must serve all of us. You will get no argument from me if you say that, given a choice between a Western and a symphony, more people will watch the Western. I like Westerns and private eyes too—but a steady diet for the whole country is obviously not in the public interest. We all know that people would more often prefer to be entertained than stimulated or informed. But your obligations are not satisfied if you look only to popularity as a test of what to broadcast...You must provide a wider range of choices, more diversity, more alternatives. It is not enough to cater to the nation’s whims—you must also serve the nation’s needs.”²⁵

Though the world in which Chairman Minow was speaking offered only three broadcast networks, the need for diversity of information and for a broadcast industry that will fulfill its unique obligations to the American public is as crucial as ever. Cable networks and online video services have added entertainment options for consumers, but neither offers a full substitute for the distinct attributes of broadcast television. Consolidation among owners of broadcast stations harms the public interest through the loss of diversity and of localism, and is restrained only by the FCC’s rules, such as the national television reach cap. The FCC must retain protections for this unique market by maintaining the cap, and ensure that those protections are meaningful by repealing the UHF discount.

²⁵ Newton Minow, Chairman, FCC, Address to the National Association of Broadcasters (May 9, 1961), *available at* http://www.terramedia.co.uk/reference/documents/vast_wasteland.htm.