Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)	MB Docket No. 13-236
	)	
	)	

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these reply comments concerning the proposed elimination of the "UHF discount," a methodology used for calculating compliance with the national television ownership limit.[2] In our comments, NAB observed that this calculation methodology is not a stand-alone rule and that the Commission has not previously substantively modified the UHF discount outside the context of a proceeding that examined the national television ownership rule itself. While taking no position on whether the Commission should eliminate, retain or modify the current national television ownership cap, we urged the Commission to reevaluate the UHF discount only within the broader context of an examination of the national cap. This approach would allow the Commission to properly evaluate the public interest harms and benefits of modifying the method for calculating compliance with the cap and to comport with applicable Administrative Procedure Act ("APA") requirements.

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, FCC No. 13-123, MB Docket No. 13-236 (rel. Sept. 26, 2013) ("Notice").

A review of the record shows that most commenters focused on whether the Commission should or should not modify the discount for reasons related to the discount, or at least to their views of broadcast ownership policy. The Competitive Carriers Association ("CCA"), however, supported elimination of the discount simply because it hopes that this change will push broadcasters to participate in the upcoming spectrum incentive auction. The suggestion that this would be a lawful rationale for modifying the UHF discount—or any other FCC rule—should be rejected out of hand. Such an approach would be contrary to the statute authorizing the incentive auction. CCA's approach also would fail to serve the public interest and would be arbitrary and capricious, as it would fail to analyze whether the underlying purposes of the UHF discount and the national ownership cap would be served by changes to these standards.

Discussion

CCA states that the FCC should eliminate the UHF discount to ensure that "broadcasters are incented to participate in the reverse auction, so that the maximum amount" of spectrum currently licensed for television services can be "made available for wireless broadband services in the forward auction."[3] CCA further states that the Commission should "examine other rules applicable to broadcast stations" such as rules governing broadcast ownership or retransmission consent and "carefully consider how the existing rules and proposed reforms would affect broadcast stations' incentives to relinquish spectrum … and adopt reforms in light of that vital consideration."[4]

[3] Comments of CCA in MB Docket No. 13-236 at 1 (filed Dec. 16, 2013) ("CCA Comments").

[4] CCA Comments at 4.

CCA is quite literally urging the Commission to modify a range of rules to discourage television broadcast licensees from continuing to operate their stations and serve their viewers. This approach would be unlawful for multiple reasons. First, the rationale for CCA's proposed rule changes—incentivizing auction participation—has no relationship to the purposes of any of the rules CCA has identified. FCC rules governing retransmission consent negotiations, for example, were not established to encourage or discourage continued operation of stations or participation in spectrum auctions. They were adopted to effectuate a standard established by statute that requires good faith negotiation by both broadcasters and multichannel video programming distributors. The Supreme Court has made clear that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[5] It would thus be an utter abuse of discretion for the FCC to eliminate, adopt or modify any rules for reasons that have absolutely no relationship to their intended purpose.[6]

Second, the auction that Congress intends for the Commission to hold already has provisions for appropriate and necessary incentives. CCA's proposals for further "incentivizing" broadcasters to participate would actually be unlawful coercion to discontinue operating in direct contravention of the statutory requirement that auction

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[5] *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal citations omitted).

[6] *See, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) (court found FCC rule to be arbitrary and capricious because FCC's decision "has 'no relationship to the underlying regulatory problem'") (internal citations omitted); *Bechtel v. FCC*, 10 F.3d 875, 880-81 (D.C. Cir. 1993) (court found FCC policy to be arbitrary and capricious because FCC had no evidence that it accomplished the agency's purposes); *Geller v. FCC*, 610 F.2d 973, 979-80 (D.C. Cir. 1979) (FCC regulations initially promulgated for one purpose cannot, once that justification has "evaporated," subsist without a fresh determination that they serve the public interest in another way).

participation be *voluntary*. Congress did not give the Commission the authority—explicitly or implicitly—to alter its rules, including the UHF discount, to purposefully diminish the broadcasting business so that more stations would participate in the incentive auction process. As Congress has made clear[7] and as the Commission has expressly recognized, the incentive auction is a "voluntary, market-based means of repurposing spectrum."[8] Moreover, Congress directed the Commission to preserve the current coverage areas and population served of licensees choosing to continue offering broadcast television service following the auction.[9] It is solely the province of broadcasters to decide whether or not they will relinquish spectrum usage rights in the auction. Congress did not intend that voluntary decision to be influenced by an artificial diminution of the broadcasting business through regulatory changes, and, thus, any FCC rule changes based on such reasons would be arbitrary and capricious.[10]

Conclusion

NAB again urges the Commission to evaluate its UHF discount in the context of a broader examination of the national television ownership limit, both to satisfy APA requirements and to fully analyze whether the changes to the discount would serve the

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[7] *See* Title VI of The Middle Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"), Pub. L. No. 112-96, at § 6403(a)(1) ("The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept for *voluntarily* relinquishing some or all of its broadcast television spectrum usage rights.") (emphasis added).

[8] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, Docket No. 12-268 (rel. Oct. 2, 2012) ("Auction NPRM") at ¶ 3. *See also id.,* Separate Statement of Commissioner Mignon Clyburn ("the word *voluntary* is the most important word contained in all of the pages that comprise this document").

[9] Spectrum Act § 6403(b)(2). *See also* Auction NPRM at ¶ 10 (a central goal of the incentive auction process is to maintain "a healthy, diverse broadcast television service").

[10] *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . .").

public interest goals underlying the ownership cap. Additionally, NAB urges the Commission to ignore the calls of CCA. If Congress had intended the Commission to create a regulatory environment inhospitable to broadcasting so as to recruit auction participants, it would have directed the Commission to do so. Rather, Congress directed the Commission to develop a voluntary auction that preserved the coverage area and population served by each remaining full power and Class A television station. The only incentives envisioned by Congress for "encouraging licensees to voluntarily relinquish spectrum usage rights" is "a share of the proceeds from an auction of new licenses to use the repurposed spectrum."[11] This balance of incentives and voluntary participation set forth in the Spectrum Act is entirely inconsistent with the proposals advanced by CCA here.

Respectfully submitted,

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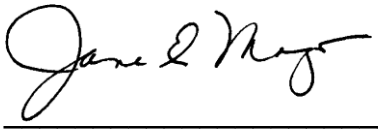

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[11] Auction NPRM at ¶ 3. *See also* Spectrum Act § 6402, 6403(a)(1).