

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of

*Amendment of Section 73.555(e) of the
Commission's Rules, National Television
Multiple Ownership Rule*

)
)
) MB Docket No. 17-318
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)

**PETITION FOR STAY AND INJUNCTION PENDING JUDICIAL REVIEW OF
BROADBAND COMMUNICATIONS ASSOCIATION OF PENNSYLVANIA;
BROADBAND COMMUNICATIONS ASSOCIATION OF WASHINGTON;
COLORADO CABLE TELECOMMUNICATIONS ASSOCIATION; FLORIDA
INTERNET AND TELEVISION ASSOCIATION; INDIANA CABLE AND
BROADBAND ASSOCIATION; MICHIGAN CABLE TELECOMMUNICATIONS
ASSOCIATION; MINNESOTA CABLE COMMUNICATIONS ASSOCIATION;
MISSISSIPPI INTERNET & TELEVISION; NEW ENGLAND CONNECTIVITY AND
TELECOMMUNICATIONS ASSOCIATION; AND VCTA – BROADBAND
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PETITION FOR STAY AND

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MB Docket No. 17-318

INTRODUCTION

Commission adopted an order (“Order”) to eliminate the statutory 39 percent national average. However, as the record makes clear, the Commission expressly and repeatedly set the National Average, which the Commission could modify or waive.

² Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (“2004 CAA”).

station groups to exceed the National Cap, in the form of increased retransmission consent fees for multichannel video programming distributors (“MVPDs”) and higher monthly TV bills for consumers.

The Order is scheduled to take effect 60 days from Federal Register publication.

Petitioners intend to file a petition for review of the Order in the Court of Appeals once the Order is published in the Federal Register. Petitioners respectfully request that, pursuant to its authority under Section 10(d) of the Administrative Procedure Act, the Commission stay the effectiveness of the Order pending judicial review.³ **Petitioners further request that the Commission rule on this stay petition by the date on which the Order is published in the Federal Register**, to give Petitioners time to seek a stay in court, if necessary, and to give the court time to adjudicate the stay before the Order takes effect.⁴

Petitioners’ challenge to the Order satisfies the Commission’s criteria for a stay, which track the factors applied by federal courts.⁵ First and foremost, Petitioners’ challenge is likely to succeed on the merits. For the reasons set forth below, the Order violates Section 629 of the 2004 CAA, ignores Commission precedent acknowledging the mandatory nature of the Cap, and ignores substantial record evidence.

³ See 5 U.S.C. § 705 (“When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”); *Targeting and Eliminating Unlawful Text Messages; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Advanced Methods to Target and Eliminate Unlawful Robocalls*, Order, 40 FCC Rcd. 1054 ¶ 1 (CGB 2025) (granting a petition for stay of the effective date of certain rules “find[ing] that justice requires postponement of the effective date pending judicial review of the adopted rule.”).

⁴ Even if the Order were to be published in the Federal Register within one week, a stay ruling in that time would be supported by precedent. For example, in both 2015 and 2024, the Commission ruled on comparable stay requests within seven days. See *Protecting and Promoting the Open Internet*, Order Denying Stay Petitions, GN Docket No. 14-28, DA 15-563 (May 8, 2015); *Safeguarding and Securing the Open Internet Restoring Internet Freedom*, Order Denying Stay Petition, 39 FCC Rcd. 5870 (June 7, 2024).

⁵ See, e.g., *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadband Industries*, Order Denying Stay Request, 4 FCC Rcd. 6476 ¶ 6 (1989).

Despite the record clearly showing that retransmission consent fees and consumers' monthly TV bills will increase substantially as a result of increased broadcaster consolidation following the Order, the Commission dismissed these affordability concerns. Instead, the Commission determined that retransmission consent concerns are better handled in *transaction reviews*, inexplicably reversing course after months of Media Bureau-level orders indicating that such concerns were to be addressed in *industry-wide rulemakings*. While the Commission justified its decision to eliminate the Cap based on alleged benefits to network-affiliate relationships, it cited no evidence to support its claim that improving these relationships would mitigate the downstream harms to consumers. The Commission also failed to adequately address other substantial and material facts in the record, including the likelihood of public interest harms to localism and viewpoint diversity. As Commissioner Gomez summarized in her dissent: "I cannot support an action that so plainly exceeds the Commission's authority while simultaneously overlooking the real-world consequences for the public we serve."⁶

The remaining factors confirm the need for a stay. The broadcast consolidation unleashed by the Order will result in immediate irreparable harm in the form of higher retransmission consent fees, higher prices for MVPD customers, and increased risk of widespread blackouts of broadcast television stations on MVPD systems, to the detriment of consumers, MVPDs, and the public interest. Meanwhile, broadcasting groups would not be harmed by preserving the status quo consistent with Congress's clear directive.

BACKGROUND

In 1985, the Commission exercised its general rulemaking and licensing authority to set the National Cap at 25 percent. Afterward, Congress in the Telecommunications Act of 1996

⁶ Order (Dissenting Statement of Commissioner Anna Gomez).

(the “1996 Act”) directed the Commission to increase the National Cap to 35 percent, while also enacting Section 202(h), requiring periodic regulatory review of all of the Commission’s broadcast ownership rules.⁷ In the years following the 1996 Act, Congress shared control with the Commission over the National Cap, directing the Commission to include the National Cap in its periodic review process.⁸ However, in the 2004 CAA, Congress set the National Cap to 39 percent and codified a series of new provisions making express and repeated references to that “39 percent national audience reach limitation”⁹ and thus making crystal clear that the Cap was a statutory limitation and no longer subject to Commission adjustments. Specifically, Congress:

- Directed the Commission to increase the national audience reach limitation for television stations to 39 percent;¹⁰
- Prescribed that “[a] person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation”;¹¹
- Mandated that the divestiture requirement above “shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth”;¹²
- Made clear that the Commission’s forbearance authority in 47 U.S.C. § 160 “shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B)”;¹³ and

⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, §§ 202(c), 202(h) 110 Stat. 56, 111 (“1996 Act”).

⁸ See *id.* § 202(g); *Fox Television Stations v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002); S. Rep. No. 104-230 at 164 (1996) (underscoring the periodic-review process as the exclusive mechanism for revising ownership rules going forward).

⁹ 2004 CAA § 629.

¹⁰ 2004 CAA § 629(1); 1996 Act § 202(c)(1)(B).

¹¹ 2004 CAA § 629(2); 1996 Act § 202(c)(3).

¹² 2004 CAA § 629(2); 1996 Act § 202(c)(3).

¹³ 2004 CAA § 629(2); 1996 Act § 202(c)(4).

- Excluded the “39 percent national audience reach limitation” from the quadrennial review of broadcast ownership rules.¹⁴

When the Commission codified the 39 percent Cap into its rules, it dispensed with notice-and-comment procedures because it viewed adoption of the 39 percent Cap and divestiture procedures as a “nondiscretionary ministerial action” “mandated by” the 2004 CAA.¹⁵

In the more than two decades since the 2004 CAA, the Commission never waived or modified the National Cap.¹⁶ Rather, *in every case* where a proposed license transfer would result in a violation of the Cap, the FCC conditioned approval on mandatory divestitures to bring the new entity under the Cap, consistent with the requirements of the 2004 CAA.¹⁷ In March of this year, the Media Bureau for the first time asserted that it could, on delegated authority, waive the National Cap and allow the Nexstar/TEGNA transaction to proceed, in violation of the Cap.¹⁸ That Bureau-level order is still under consideration by the Commission, and the subsequent Nexstar/TEGNA transaction has been challenged extensively in the courts.¹⁹ In fact, the U.S.

¹⁴ 2004 CAA § 629(3); 1996 Act § 202(h).

¹⁵ *Implementation of Section 629 of the Consolidated Appropriations Act, 2004 (National Broadcast Television Ownership)*, Order, 22 FCC Rcd. 4245 ¶ 2 n.7 (2007) (invoking “good cause” exception to implement the Cap in a direct final rulemaking).

¹⁶ The Commission claimed in a 2016 order relating to the UHF discount that it had the authority to adjust the Cap, *see Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd. 10213 ¶ 21 (2016), but that order was reversed on reconsideration, *see Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd. 3390 ¶ 17 (2017), and the Commission reopened that question in the NPRM that gave rise to this Order. *See Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd. 10785 ¶ 7 (2017) (“We seek comment on the Commission’s authority to modify or eliminate the national cap, including authority to modify or eliminate the UHF discount.”).

¹⁷ *See, e.g., Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc., to Nexstar Media Group, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd. 183 ¶ 1 (MB 2017); *Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee), et al.*, Memorandum Opinion and Order, 34 FCC Rcd. 8436 ¶ 8 (2019) (“*Nexstar/Tribune Order*”).

¹⁸ *See generally Applications for Consent to the Transfer of Control of TEGNA Inc. to Nexstar Media Inc.*, Memorandum Opinion and Order, MB Docket No. 25-331, DA 26-267 (MB Mar. 19, 2026).

¹⁹ *See* Emergency Application for Review of Broadband Communications Association of Pennsylvania et al., MB Docket No. 25-331 (Mar. 20, 2026) (“*Nexstar/TEGNA AFR*”); *In re Nexstar-TEGNA Merger Litigation*, No. 2:26-cv-00976-TLNCKD (E.D. Cal. 2026); *see also* Opposition of FCC to Emergency Petitions for Writ of Mandamus at

District Court for the Eastern District of California found that the Nexstar/TEGNA transaction would result in higher retransmission consent fees, causing harm to consumers, and issued a preliminary injunction that keeps the companies separate to this day.²⁰

Despite this statutory backdrop and regulatory history, the Commission issued its Order, which, for the first time, finds that the Commission can eliminate the National Cap and ignores many of the harms raised in the record by a wide array of commenters. Following publication of the Order in the Federal Register, Petitioners intend to file a petition for review in the Court of Appeals. Petitioners now submit this petition for stay pending judicial review of the Order.

DISCUSSION

Under Commission precedent, petitioners must show that (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm if the stay is not granted; (3) other interested parties will not be substantially harmed if the stay is granted; and (4) the public interest favors granting a stay.²¹ Petitioners readily satisfy all four criteria.

I. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS

A. Eliminating the National Cap Violates the 2004 CAA

As Petitioners and many other parties repeatedly emphasized in this proceeding, the Commission has no authority to eliminate, modify, waive, or otherwise adjust the National Cap.²² Congress established the National Cap at 39 percent in the 2004 CAA *in direct response*

12, *Broadband Commc'ns Ass'n of Pa. et al. v. FCC*, No. 26-1062 (D.C. Cir. May 11, 2026) (“We are authorized to represent that the application for review of the Media Bureau’s Order is now under active consideration.”).

²⁰ See *In re Nexstar-TEGNA Merger Litigation*, Order, No. 2:26-cv-00976-TLNCCKD, at 29-31, 42-43 (E.D. Cal. April 17, 2026).

²¹ *Amendment of Parts 73 and 76 of the Commission’s Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Order Denying Stay Request, 4 FCC Rcd. 6476 ¶ 6 (1989) (citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 842, 843-44 (D.C. Cir. 1977)).

²² See State Cable Association 2025 Reply Comments at 7-19; Letter from Todd Eachus et al., to Marlene H. Dortch, Secretary, FCC (Jul. 29, 2026) (“State Cable Association July 2026 Letter”); see also ATVA 2025 Comments at 14-

to the FCC's attempt to aggressively raise the Cap to 45 percent and made repeated references to the 39 percent Cap in the statute. It is "hard to imagine a statutory term less ambiguous than . . . precise numerical thresholds."²³ As Petitioners explained, the CAA's removal of the Cap from the Commission's periodic review process and inclusion of a divestiture provision further signal Congress's intent to remove the Cap from Commission discretion.²⁴

Indeed, the statutory text itself references the 39 percent Cap as statutory, not regulatory: For example, with respect to the divestiture provision, Congress did not say "A person or entity that exceeds the 39 percent national audience reach limitation in 47 C.F.R. 73.3555 shall have not more than 2 years to divest"; it specified that someone exceeding "the 39 percent national audience reach limitation in paragraph (1)(B)" of "section 202(c)" of "[t]he Telecommunications Act of 1996" "shall have not more than 2 years to divest."²⁵

Likewise, Congress singled out the Commission's only mechanism for setting aside statutory requirements—the Commission's forbearance authority under 47 U.S.C. § 160—and made clear that it "shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation."²⁶ Here again, Congress underscored the statutory nature of the Cap, attributing the 39 percent limitation to paragraph (1)(B) of "section 202(c)" of "[t]he

22; ATVA 2025 Reply Comments at 2-3; CPAC – Center for Regulatory Freedom 2025 Comments at 2-5; Free Press 2025 Comments at 14-19; NABET-CWA 2025 Comments at 14-16; NABET-CWA 2025 Reply Comments at 10-12; NCTA 2025 Comments at 1-3; Newsmax 2025 Comments at 25-29; NTCA – The Rural Broadband Association 2025 Reply Comments at 4-6; Order (Dissenting Statement of Commissioner Anna Gomez) ("Most fundamentally, however, the Commission does not have the authority to raise or waive the 39 percent national audience reach limitation. . . . No amount of policy preference can substitute for statutory authority.").

²³ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 326 (2014).

²⁴ State Cable Association 2025 Reply Comments at 10-12; *see also* Tom DeLay, *I Helped Create The FCC's Ownership Cap. Here's How We Did It*, DAILY WIRE (Aug. 3, 2026), <https://www.dailywire.com/news/tom-delay-i-helped-create-the-fccs-ownership-cap-heres-how-we-did-it> ("DeLay Op-Ed") (As then-House Majority Leader and architect of the 2004 CAA Tom DeLay explained: "My end of the deal was that the cap would be raised to 39%, and in return, [Sen.] Stevens received certainty that the FCC wouldn't and couldn't raise it higher.").

²⁵ 2004 CAA § 629(2) (emphasis added).

²⁶ *Id.*

Telecommunications Act of 1996.”²⁷ The Commission’s interpretation cannot withstand scrutiny when it “would render” Congress’s rejection of the Commission’s attempt to raise the Cap to 45 percent “a largely meaningless exercise.”²⁸

The statutory history of the 2004 CAA confirms the logic of this construction of the statute. Congress’s decision to remove the National Cap from the periodic review process was a direct response to the D.C. Circuit’s 2002 *Fox Television* decisions, which concluded that the Commission retained authority to modify the Cap because the Cap remained within the ambit of the Commission’s Section 202(h) review process.²⁹ *The D.C. Circuit articulated that, to reassert control over the Cap, Congress could enact a hard cap, which is exactly what it did in the 2004 CAA.*³⁰ “Congress is presumed to be aware of an administrative or judicial interpretation of a statute,” and just as it presumably “adopt[s] that interpretation when it re-enacts a statute without change,”³¹ it equally intends any “amendment to have real and substantial effect.”³² Contemporaneous legislative history confirms the same.³³

²⁷ *Id.*

²⁸ *Rumsfeld v. Forum for Acad. and Inst. Rts.*, 547 U.S. 47, 57-58 (2006); see also *We Interrupt This Program: Media Ownership In the Digital Age: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 119th Cong. (2026) (statement of Sen. Ted Cruz, Chairman) (“Yes or no, on the day after the enactment of this 2004 law, did the FCC have the statutory authority to adopt rules that set the national television audience cap to say, 42 percent or 50 percent, or was the FCC instead bound to follow the 39 percent cap fixed by statute?”). The Commission’s efforts to address this hypothetical, see Order ¶ 95, do not withstand scrutiny.

²⁹ See *Fox Television Stations v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir. 2002); *opinion modified on reh’g* 293 F.3d 537 (D.C. Cir. 2002).

³⁰ *Fox Television Stations*, 293 F.3d at 540 (“Had the Congress wished to insulate the [National Cap] from review under § 202(h), it need only have enshrined the 35% cap in the statute itself.”).

³¹ *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993).

³² *Stone v. INS*, 514 U.S. 386, 397 (1995).

³³ See State Cable Association 2025 Reply Comments at 12-13; State Cable Association July 2026 Letter at 4 n.15 (citing former Chairman Michael O’Rielly’s amicus brief describing the “significant backlash” following the FCC’s attempt to raise the Cap to 45 percent and Congress’ actions in the 2004 CAA to settle once and for all in the statute this “recurring and particularly contentious media ownership issues.”); see also DeLay Op-Ed (“Regulatory agencies cannot defy or modify laws enacted by Congress. If Chairman Carr wants to raise the statutory cap, he should ask Congress to pass a law giving him authority to do that. As former Republican FCC Chairman Mike O’Rielly put it, the 39% cap is ‘a statute, not a suggestion.’ As someone who helped create that statute, I agree.”); 149 Cong. Rec.

Accordingly, until now, the Commission has never modified, nor sought to eliminate, the National Cap in the aftermath of the 2004 CAA. Rather, when presented with proposed transactions that would exceed the Cap, the Commission has *always* required divestitures. While the Media Bureau approved the Nexstar/TEGNA transaction and granted a waiver of the National Cap earlier this year, that Bureau-level order has no precedential effect and, as referenced above, is subject to a pending Application for Review.³⁴ At the very least, under the Major Questions Doctrine, the Commission would need to provide a very good explanation for “discover[ing]” “an unheralded power” to eliminate the Cap and allow national audience reaches beyond 39 percent.³⁵ As further discussed below, it has not come close to providing the requisite explanation for eliminating the Cap.

In sum, the Commission’s general rulemaking authority cannot circumvent the text of the 2004 CAA.³⁶ Not only has Congress addressed the Commission’s authority to eliminate or otherwise adjust the Cap directly, but Congress has also specified in the Administrative Procedure Act that the agency may not act contrary to or “in excess of statutory jurisdiction,

H12838 (2003) (statement of Rep. Billy Tauzin) (“[T]his bill will forbid the FCC from raising or lowering the 39 percent limit . . . Eliminating the FCC’s discretion over the national audience-reach limit in this manner is unwise.”); 150 Cong. Rec. S148 (2004) (statement of Sen. Dianne E. Feinstein quoting Sen. Robert Byrd) (“[T]he one-year limitation on the FCC media ownership rule was turned into a permanent cap at 39 percent.”); 150 Cong. Rec. S141 (2004) (statement of Sen. Patrick J. Leahy) (“[T]he White House successfully lobbied for last-minute increase of a permanent cap at 39%.”).

³⁴ See *supra* note 19.

³⁵ *Util. Air Regul. Grp.*, 573 U.S. at 324; see also *Biden v. Nebraska*, 600 U.S. 477, 519 (2023) (Barrett, J., concurring) (“A longstanding ‘want of assertion of power by those who presumably would be alert to exercise it’ may provide some clue that the power was never conferred.”); see also Newsmax 2025 Comments (“The Supreme Court’s Major Questions Doctrine explains that agencies lack authority to adopt ‘basic and fundamental changes in [a] scheme’ designed by Congress. There could be no greater ‘basic and fundamental change’ in a limit established by Congress than abolishing it altogether.”) (citing *Biden*, 600 U.S. at 494).

³⁶ See State Cable Association 2025 Reply Comments at 14-19 (noting Supreme Court precedent holding that “statutory permission to ‘modify’ does *not* authorize ‘basic and fundamental changes in the scheme’ designed by Congress”) (quoting *Biden*, 600 U.S. at 494); State Cable Association July 2026 Letter at 5; see also Petition to Deny of Broadband Communications Association of Pennsylvania et al., MB Docket No. 25-331, at 17-21 (Dec. 31, 2025); Nexstar/TEGNA AFR at 1-5.

authority, or limitations.”³⁷ Indeed, *Loper Bright* requires the Commission to defer to Congress, not the other way around³⁸—a requirement that applies with even more force now that the Supreme Court has dispelled the fiction that the FCC might serve some “quasi-legislative” function.³⁹ Even to the extent a court looks to the Commission’s prior interpretations for guidance under *Skidmore v. Swift*,⁴⁰ as the Order suggests should be the case,⁴¹ doing so would only underscore both the novelty of the Commission’s approach and the strength of Petitioners’ interpretation.⁴²

In light of Congress’s decision to impose a “39 percent national audience reach limitation” in statute, along with other provisions clearly signifying its intent to make this cap permanent, any Commission interpretation finding authority to eliminate, modify, waive, or otherwise adjust the Cap is simply incorrect.⁴³ The best interpretation of the statute is that

³⁷ 5 U.S.C. § 706(2)(C); see also Kannon Shanmugam & William Marks, *The FCC Lacks Statutory Authority to Revise the Telecommunications Act’s 39% National Ownership Cap for Television* 11 n.17 (2025), available at https://americantelevisionalliance.org/wp-content/uploads/2025/12/NationalOwnershipCapWhitePaper_12-15-25.pdf (Given the directive in the Administrative Procedure Act that an agency may not act contrary to or in excess of statutory jurisdiction, authority, or limitations, the FCC is barred from using its waiver authority as “an end run to Congress’s statutory commands in the 2004 amendments, including the prohibition on FCC forbearance from the 39% cap.”).

³⁸ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024).

³⁹ *Trump v. Slaughter*, 146 S. Ct. 2283, 2302 (2026) (“When an agency ‘executes’ a congressional mandate against private parties, it exercises executive power—no ifs, ands, or quasies about it.”).

⁴⁰ 323 U.S. 134 (1944)

⁴¹ See Order ¶ 92 (“[T]he Commission has consistently maintained that it retains authority to repeal or revise both the national cap and the UHF discount [since the 1996 Act].”). The Commission specifically cites its statements in the 2016 *UHF Discount Elimination Order* in support of repeal of the Cap. See *id.* ¶¶ 88, 96.

⁴² See *Encino Motorcars v. Navarro*, 579 U.S. 211, 221-22 (2016).

⁴³ See Order (Dissenting Statement of Commissioner Anna Gomez) (“Simply put, the 39 percent national audience reach limitation was established by a statute and only Congress has the authority to raise or eliminate it. The Consolidated Appropriations Act of 2004 (2004 CAA) directed the Commission to set the national audience reach limitation at 39 percent, removed this limitation from the congressionally created review process, established an ongoing divestiture requirement for any entity that exceeds the 39 percent limitation, and not only failed to provide the Commission with authority to modify, waive, or raise the limitation, it affirmatively stated that the Commission was prohibited from forbearing from enforcing the statutory provision. These steps were deliberate, explicit, and binding.”).

Congress intended for the 39 percent Cap to remain in place unless and until it decides to change it in the future via legislation.

B. The Order Is Arbitrary and Capricious

Administrative law makes clear that “an agency is under an obligation to follow, distinguish, or overrule its own precedent.”⁴⁴ When an agency overrules its own precedent, “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁴⁵ Furthermore, an agency order is arbitrary and capricious if it “offer[s] an explanation for its decision that runs counter to the evidence before the agency.”⁴⁶ Here, the Order fails to properly engage with the substantial evidence submitted in the record, much less rebut it, and contradicts prior precedent, particularly on retransmission consent harms, and therefore is arbitrary and capricious.

There are myriad reasons why eliminating the Cap will exacerbate the harms that Petitioners and others have detailed in the record. First, removing the Cap will lead to higher retransmission consent-related costs for MVPDs and consumers. As thoroughly demonstrated on the record, large station groups routinely leverage their nationwide footprints to threaten station blackouts and force MVPDs to accede to skyrocketing retransmission consent fees and higher prices for consumers for what is supposed to be free over-the-air television.⁴⁷ The Commission’s Order will super-charge that trend as large station groups expand into new markets without any constraint. The Nexstar-TEGNA merger, which would create a broadcast

⁴⁴ *Steger v. Dep’t of Def.*, 717 F.2d 1402, 1406 (1983).

⁴⁵ *FCC v. Fox TV Stations*, 556 U.S. 502, 515-16 (2009).

⁴⁶ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁴⁷ See, e.g., State Cable Association 2025 Reply Comments at 5; NCTA 2025 Comments at 3-4; ATVA 2025 Comments at 2-9; Cincinnati Bell Extended Territories LLC (d/b/a altafiber) 2025 Comments at 8-9; NTCA – The Rural Broadband Association 2025 Comments at 1-2.

station group behemoth reaching 80 percent of U.S. television households, is merely a preview of the further massive broadcast industry consolidation and higher consumer prices that will follow if this Order is not stayed.⁴⁸

Yet, the Order summarily dismisses retransmission consent concerns by arbitrarily stating they should be addressed elsewhere, including on a case-by-case basis in individual transactions.⁴⁹ As Petitioners have explained, this is cold comfort for consumers who will be subject to significant price increases as a result of the Order.⁵⁰ Moreover, the Commission's statements are squarely inconsistent with how it has handled retransmission consent-related issues in recent broadcast transaction approval orders. In those orders, the Commission (acting through its Media Bureau) dismissed transaction-specific retransmission consent-related affordability harms, finding that "issues of broad applicability, such as the effect of broadcast industry consolidation on the retransmission consent process, are best handled in a rulemaking of

⁴⁸ See *In re Nexstar-TEGNA Merger Litigation*, Order, No. 2:26-cv-00976-TLNCKD (E.D. Cal. April 17, 2026). In April, Scripps, too, sought a waiver to exceed the 39 percent Cap as part of its acquisition of 23 INYO stations. See *Media Bureau Establishes Pleading Cycle For Application For Consent To The Assignment Of Broadcast Television Licenses From Inyo Broadcast Licenses, LLC To Ion Television License, LLC, And Permit-But-Disclose Ex Parte Status For The Proceeding*, Public Notice, MB Docket No. 26-85, DA 26-376 (MB Apr. 16, 2026). In late June, Scripps filed an amendment to "remove[] and withdraw[]" six stations from its pending FCC applications to "bring[] the Transaction into compliance with the [Cap] by reducing the post-transaction national audience reach below 39 percent of television households nationwide" to 38.96 percent. Applications of ION Television License, LLC and INYO Broadcast Licenses, LLC, FCC File Nos. 0000290962, et seq., Amendment Explanation and Notice of Withdrawal of Option Exercise (filed June 25, 2026). Although Scripps' national audience reach would remain under the Cap for the time being, Scripps still retains the option to reacquire those six INYO stations in the future, leaving a question of not if but when it will resume consolidation beyond the 39 percent Cap. See Option Agreement by and between Scripps Media, Inc., Inyo Broadcast Holdings, LLC, and Inyo Broadcast Licenses LLC § 2 (Jan. 7, 2021) (establishing an option period effective through January 7, 2028); *Id.* §§ 4(b)(vii), 9, 10 (providing no set closing date but instead requiring closing no later than three days after the satisfaction of various conditions, including Commission consent).

⁴⁹ Order ¶¶ 67-68.

⁵⁰ See State Cable Association July 2026 Letter at 7.

industry-wide effect.”⁵¹ The Order arbitrarily and capriciously doubles down on this shell game at the expense of due process, consumer affordability, and the broader public interest.⁵²

The Order similarly dismisses concerns that repealing the Cap will diminish broadcast competition by harming smaller, independent broadcasters and impeding larger broadcast groups from competing amongst each other.⁵³ Rather, the Commission takes broadcasters at their word that they need repeal of the National Cap to compete with “Big Tech,” ignoring broadcasters’ continued profitability.⁵⁴ Likewise, the Order dismisses extensive record evidence of the harms that repeal and the resulting industry consolidation will cause to localism via news duplication

⁵¹ See *Applications to Assign Licenses to Gray Television Licensee, LLC*, Memorandum Opinion and Order, DA 26-427 ¶ 31 (MB Apr. 30, 2026) (“[I]ssues of broad applicability, such as the effect of broadcast industry consolidation on the retransmission consent process, are best handled in a rulemaking of industry-wide effect.”); Letter from Chief, Video Division to Sinclair, Inc. et al., Letter Order, DA 26-108, at 9 (MB Feb. 3, 2026) (same); Letter from Chief, Video Division to Sinclair, Inc. et al., Letter Order, DA 26-177, at 6 (MB Feb. 20, 2026) (same); Letter from Chief, Video Division to Cox Television Jacksonville et al., Letter Order, DA 26-304, at 5 (MB Mar. 30, 2026) (same); Letter from Chief, Video Division to Gray Television Licensee, LLC et al., Letter Order, DA 26-417, at 5 (MB Apr. 28, 2026) (same); Letter from Chief, Video Division to Gray Television Licensee, LLC et al., Letter Order, DA 26-441, at 13 (MB May 6, 2026) (same); Letter from Chief, Video Division to Cadillac Telecasting Co. et al., Letter Order, DA 26-612, at 5-6 (MB June 18, 2026) (same); Letter from Chief, Video Division to WTVQ-TV LLC et al., Letter Order, DA 26-755, at 5-6 (MB July 20, 2026) (same).

⁵² See Order ¶ 69 & n.237 (acknowledging but failing to reconcile the inconsistency between the recent Media Bureau orders and the Order regarding the proper forum to raise retransmission consent-related harms); Order (Dissenting Statement of Commissioner Anna Gomez) (“Clearly the Commission does not want to address the challenging questions retransmission consent raises, but *passing the buck to another proceeding when the impact is significant, direct, and current can only go so far without becoming the very essence of arbitrary and capricious. The Commission has crossed that line here. This is indefensible.*”) (emphasis added).

⁵³ See, e.g., Hispanic Technology & Telecommunications Partnerships 2025 Reply Comments at 1; Multicultural Media, Telecom and Internet Council et al. 2025 Reply Comments at 3-5; NABET-CWA 2025 Reply Comments at 3-5; National Action Network 2025 Reply Comments at 2; Newsmax 2025 Reply Comments at 2-4; 2042 Media USA Nov. 2025 Comments at 1-2.

⁵⁴ Order ¶¶ 47-51. *But see* State Cable Association 2025 Reply Comments at 20. The FCC notes that “[a] number of commenters assert that elimination of the national cap will harm competition and viewpoint diversity,” but only directly addresses Newsmax, saying Newsmax has confused source diversity with viewpoint diversity. Order ¶ 27 n.89.

and cuts to local journalism.⁵⁵ Here again, the Commission accepts broadcasters' counterfactual arguments that repealing the Cap will somehow protect and promote local news.⁵⁶

The Commission largely attempts to justify repeal on the alleged benefits to network-affiliate relationships (i.e., repeal will give large station groups added leverage in negotiations with networks over reverse retransmission consent payments).⁵⁷ However, the Commission fails to explain, let alone demonstrate, that such changed dynamics in network-affiliate relationships will in any way mitigate the harms presented in the record.⁵⁸ For example, the Order asserts that “additional leverage to negotiate reverse compensation fees could put downward pressure on the retransmission consent fees that MVPDs pay to owners of affiliated stations.”⁵⁹ There is no evidence for this assertion in fact or economic theory.⁶⁰

⁵⁵ See, e.g., NABET-CWA 2025 Reply Comments at 4, 7-9; National Action Network 2025 Reply Comments at 2-4; United Church of Christ Media Justice Ministry et al. 2025 Reply Comments at 3-4.

⁵⁶ Order ¶¶ 55-57, 60-63. *Contra* DISH 2018 Comments at 11-12; Free Press 2018 Comments at 11-12; Herndon-Reston Indivisible 2018 Comments at 2-4; Newsmax 2018 Comments at 5-7; WGAW 2018 Comments at 7-10; Free Press 2018 Reply Comments at 10-11; DISH 2018 Reply Comments at 5; UCC et al. 2018 Reply Comments at 2-4; WGAW 2018 Reply Comments at 2-4; Free Press 2025 Reply Comments at 32-52; NewsGuild-CWA et al. 2025 Reply Comments at 1-3; Newsmax 2025 Reply Comments at 2-3, 9-13; ATVA 2025 Reply Comments at 19-23; HTTP 2025 Reply Comments at 2; UCC et al. 2025 Reply Comments at 3-4; National Action Network 2025 Reply Comments at 2, Appx; NABET-CWA 2025 Reply Comments at 7-10.

⁵⁷ Order ¶¶ 41 & n.155, 61.

⁵⁸ See State Cable Association July 2026 Letter at 7.

⁵⁹ Order n.152.

⁶⁰ The Commission now caveats that this theory is “not a basis for our action today,” Order n.152, but its inclusion in the Order nonetheless flies in the face of market realities. In fact, numerous large affiliate station groups have boasted positive *net* retrans growth (i.e., more money coming in from MVPDs than money going out to the networks). See Transcript of Nexstar Media Group, Inc. Presentation at UBS Global Media and Communications Conference (Dec. 8, 2025) (“Historically, we’ve been able to . . . deliver positive growth in net retrans growth. And we think that, again, we’ll see a continuation of that trend. . . . [W]e do expect that we will continue to show growth in both gross and net retrans in ’26.”); Janet Stilson, *Despite Uncertainty, Sinclair Sees Reasons To Be Optimistic Going Forward*, TVNEWSCHECK (May 7, 2025), <https://tvnewscheck.com/business/article/despite-uncertainty-sinclair-sees-reasons-to-be-optimistic-going-forward/> (reporting Sinclair’s “net retransmission revenue grew by mid-single-digits year over year in the quarter, and Sinclair expects a mid-single-digit compound annual growth rate for net retrans over a two-year period that ends with the close of this year”); Press Release, Gray Media, Gray Media Reports Fourth Quarter Results Exceeding Guidance, Feb. 26, 2026, <https://graytv.gcs-web.com/static-files/e21486e5-7317-4873-aab5-2246b37f38cb> (reporting a 3 percent year-over-year increase in net retransmission consent revenue). This comes all while the largest broadcasters like these are commanding higher fees from MVPDs. See, e.g., State Cable Association 2025 Reply Comments at 21-29.

For all of these reasons, the Order is unsupported by and does not flow logically from the record evidence and is therefore arbitrary and capricious.

II. THE REMAINING FACTORS DECISIVELY SUPPORT A STAY

The remaining factors likewise support a stay. Petitioners will face serious and irreparable injury if the Order is not stayed; and the balance of harms and the public interest favors a stay.

Petitioners' injuries from eliminating the Cap are clear cut, certain, and irreparable. As noted, eliminating the National Cap would compound the problem of spiraling retransmission consent-related costs.⁶¹ Numerous commenters in the record have highlighted how retransmission consent fees paid to TV broadcast stations have grown exponentially over the past two decades—and especially in the wake of increasing broadcast consolidation—and would immediately grow further as station groups expand into new markets without constraint once the Cap is repealed.⁶² The record in this and other broadcast ownership-related dockets reinforces this conclusion.⁶³

The public interest also favors a stay. As numerous commenters explained, the Cap prevents the type of broadcast consolidation that leads to job cuts, a reduction in local news,

⁶¹ See State Cable Association 2025 Reply Comments at 20.

⁶² For example, NCTA observed that “[r]etransmission consent revenue increased by 31% from 2019 to 2023 (\$11.5 billion to \$15.1 billion) and more than 135% when compared to 2015 levels (\$6.4 billion)—despite MVPDs’ decline in subscribership.” See, e.g., NCTA 2025 Comments at 4 (citing *2024 Communications Marketplace Report*, Report, 39 FCC Rcd. 14116 ¶ 263 (2024); *2020 Communications Marketplace Report*, Report, 36 FCC Rcd. 2945 ¶ 216 fig. II.D.17 (2020)). Likewise, DISH stated that “the average total retransmission fee per subscriber, per month (across all station owners) rose from \$0.19 in 2006 to \$6.79 in 2016.” DISH 2018 Comments at 4.

⁶³ See ATVA 2025 Comments at 4-9 (recapping retransmission consent-related harms established on the record to date); Letter from Michael Nilsson, DIRECTV, to Marlene H. Dortch, Secretary, FCC, at Exh. A (filed Sept. 19, 2025) (submitting a report by economist Dr. Allan Shampine finding a positive relationship between retransmission consent fees and station group size).

reduced competition, and decreased viewpoint diversity.⁶⁴ Additionally, the Commission has previously concluded that price hikes—resulting from the exercise of market power rather than a properly functioning retransmission consent marketplace—harm the public interest.⁶⁵

Conversely, broadcasters cannot plausibly claim such harms from a stay. A stay merely requires the Commission to abide for a few more months a rule that went 20 years without question,⁶⁶ and that the station groups themselves acknowledge has not been an impediment to their growth.⁶⁷ Moreover, there will be no harm when it comes to recent mergers that would exceed the Cap, as Nexstar and TEGNA must remain separate due to the preliminary injunction in the Eastern District of California, at least through July 6, 2027, when the merits trial begins.⁶⁸

⁶⁴ See, e.g., Hispanic Technology & Telecommunications Partnerships 2025 Reply Comments at 1; Multicultural Media, Telecom and Internet Council et al. 2025 Reply Comments at 3-5; NABET-CWA 2025 Reply Comments at 3-5, 7-9; National Action Network 2025 Reply Comments at 2-4; Newsmax 2025 Reply Comments at 2-4; United Church of Christ Media Justice Ministry et al. 2025 Reply Comments at 3-4.

⁶⁵ Specifically, the Commission has made clear that “a public interest harm” exists “where an increase [in retransmission consent fees] is not the product of ‘competitive marketplace considerations.’” *Nexstar/Tribune Order* ¶ 29; see also *Consent to Transfer Control of Certain Subsidiaries of TEGNA Inc. to SGCI Holdings III LLC*, Hearing Designation Order, DA 23-149, ¶ 24 (MB Feb. 24, 2023) (“[T]he caselaw makes clear that increases in retransmission consent rates can constitute a public interest harm if such increases are not simply the product of a properly functioning competitive marketplace.”). When analyzing this issue, the Commission has distinguished between rates that “rise over time pursuant to a functioning retransmission consent marketplace,” on the one hand, and those that rise “as a product of market power,” on the other. *Nexstar/Tribune Order* ¶ 29.

⁶⁶ See also *Nken v. Holder*, 556 U.S. 418, 435 (2009) (equities and public interest “merge” against the federal government). And even if a stay were to delay a public-interest-advancing merger, there is no reason the merger could not happen with alacrity if the Court ultimately lifts the stay. See *FTC v. HJ Heinz*, 246 F.3d 708, 726-27 (D.C. Cir. 2001) (“If the merger makes economic sense now, the appellees have offered no reason why it would not do so later.”).

⁶⁷ See generally State Cable Association 2025 Reply Comments at 29-31; Free Press 2025 Comments at 52-58; altafiber 2025 Comments at 5-7. To the extent broadcast station groups are experiencing any financial issues, they are a function of the heavy debt loads the groups incurred to pay for station acquisitions in recent years—not the National Cap. See Newsmax 2025 Comments at 22-23 (“The largest broadcast television groups that used the relaxed UHF discount to go on station-buying binges saddled themselves with enormous debt loads. . . . It is important to note that without these debt loads, the broadcast licenses would provide enormous profits. For example, in 2024, Nexstar reported net income of \$722 million, but interest payments on its debt were more than half that amount, \$444 million. Similarly, Sinclair’s net income in 2024 was \$310 million, but its interest expense was almost that much at \$304 million.”).

⁶⁸ See *In re Nexstar-TEGNA Merger Litigation*, Order Amending the Initial Pretrial Scheduling Order, Setting Trial, and Entering Stipulated Discovery Protocol, No. 2:26-cv-00976-TLNCKD (E.D. Cal. July 9, 2026) (setting a trial date of July 6, 2027).

There is thus little indication that harms will result from maintaining the status quo that has been in place for decades pending judicial review of the Commission's Order.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission stay the effectiveness of the Order pending judicial review. **If the Commission has not ruled on this stay petition by the date on which the Order is published in the Federal Register, Petitioners will conclude that the agency has “denied the motion or failed to afford the relief requested”⁶⁹ and seek a judicial stay.⁷⁰**

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⁶⁹ Fed. R. App. P. 18(a).

⁷⁰ *Id.*

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October 2, 2026