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February 23, 2018

Mr. David L. Hunt
Office of Inspector General
Federal Communications Commission
445 12th Street, S.W.
Room 2-C762
Washington, D.C. 20554

Re: Investigation of Sinclair Broadcast Group, Inc.

Dear Mr. Hunt:

I am writing on behalf of our client Askold Krushelnycky, a freelance journalist, who on September 1, 2017 and December 4, 2017 filed Freedom of Information Act Requests ("FOIA") concerning Sinclair Broadcast Group, Inc. ("Sinclair"). Copies of the two FOIA requests are attached to this letter.

Recently published newspaper articles state that the FCC's Office of Inspector General is investigating Chairman Ajit Pai's relationship with Sinclair.¹ Specifically, the newspaper articles state that the Office of Inspector General has opened an investigation into whether Chairman Pai and certain members of the FCC staff have improperly pushed for rule changes timed to benefit Sinclair.

The September 1st FOIA request generally sought two classes of documents. First, documents concerning a July 29, 2016 Consent Decree between Sinclair and the FCC's Media Bureau.² The second category of documents requested non-public communications between Sinclair and the FCC from January 1, 2016 to the present.

¹ See e.g. *F.C.C. Watchdog Looks Into Changes That Benefited Sinclair*
<https://www.nytimes.com/2018/02/15/technology/fcc-sinclair-ajit-pai.html>

² *Sinclair Broadcast Group, Inc.*, 31 FCC Rcd. 8576 (Media Bureau 2016) (Consent Decree)

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In discussions with Michael Perko, Chief, Office of Communications and Industry Information, Media Bureau, Mr. Perko stated to undersigned counsel that the reason for the delay in responding to the FOIA request was that there were outstanding approximately thirty FOIA requests concerning Sinclair. In response to Mr. Perko's statement, Mr. Krushelnycky on December 5, 2017 filed a second FOIA request. The second FOIA request seeks copies of all FOIA requests from January 1, 2016 to the present that reference or seek information concerning Tribune Media Company and/or Sinclair, as well as all documents produced in response to these requests.

Though well past due, the FCC has made no response to the December 5, 2017 FOIA request. In response to the September 1, 2017 request the Media Bureau produced some documents, but most relevant documents remain unidentified and not produced. For example, concerning requested Consent Decree documents, the FCC did not produce any of the documents that are known to exist and has only identified such documents as were made attachments to email correspondence between Sinclair and the FCC staff. See Mr. Krushelnycky's Application for Review, attached hereto.

According to the New York Times story referenced herein, "Pai had met with Sinclair executives right before President Trump elevated him to chairman and corresponded with Sinclair officials several times afterward..." This correspondence was well within the scope of the September 1, 2017 FOIA request. Yet the FCC has not identified or produced these documents.

The FCC's continuing refusal to comply with FOIA adds fuel to the growing speculation that the FCC is working for the benefit of Sinclair rather than the public. Clearly, there is a close relationship between Sinclair and Chairman Pai. In its limited response to Mr. Krushelnycky the Media Bureau provided one email document, apparently from a source other than Chairman Pai, which had been sent to his personal email address. The Media Bureau in its response did not state that it searched for records in Chairman Pai's private email account responsive to the FOIA request. Significantly, it did not identify or produce the correspondence between Sinclair officials and Chairman Pai.

Mr. Krushelnycky requests that the Inspector General, in the course of his investigation, examine Chairman Pai's personal email account and segregate those emails that are agency records relevant to the Inspector General's investigation of Sinclair. Such documents as are responsive to Mr. Krushelnycky's request should be produced posthaste.

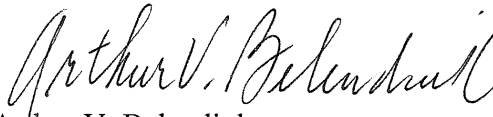
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February 23, 2018
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At this time, the FCC should immediately cease processing the Sinclair/Tribune application. The public has a right to know what was discussed behind closed doors and what deals were made in secret. The airways belong to the people of this country and not to a small group of media oligarchs and their bureaucratic lackeys. In the spirit of transparency this letter and its attachments is being filed in MM Docket 17-179.

Should any questions arise with regard to this matter, please communicate directly with this office.

Sincerely,

A handwritten signature in cursive script, reading "Arthur V. Belendiuk". The signature is written in dark ink and is positioned above the printed name and title.

Arthur V. Belendiuk
Counsel for Askold Krushelnycky

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September 1, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

ACCEPTED/FILED

SEP - 1 2017

Federal Communications Commission
Office of the Secretary

Re: **FREEDOM OF INFORMATION ACT REQUEST**

Dear Ms. Dortch:

This letter is written on behalf of our client, Askold Krushelnycky. As set forth below, Mr. Krushelnycky seeks documents concerning Sinclair Broadcast Group, Inc. ("Sinclair") and companies with which it has joint sales agreements ("JSAs") and local marketing agreements ("LMAs") agreements, including but not limited to Cunningham Broadcasting Corporation ("Cunningham").

On July 29, 2016, the Media Bureau ("Bureau") of the Federal Communications Commission ("Commission" or "FCC") and Sinclair entered into a Consent Decree.¹ The Consent Decree terminated an investigation into whether Sinclair violated its good faith negotiation obligation by engaging in prohibited joint negotiations on behalf of its JSA and LMA affiliates, including Cunningham.² In the course of the investigation, the Bureau found that Sinclair represented numerous Non-Sinclair Stations in retransmission consent negotiations with multichannel video programming distributors ("MVPDs") between April 2, 2015 (the effective date of the Commission's rule implementing the statutory prohibition on joint negotiation) and November 30, 2015.

The Consent Decree, as listed in the Appendix of that document, also resolved pleading, complaints, petitions to deny, a Notice of Apparent Liability for Forfeiture and granted the renewal of five of Sinclair's television stations.

¹ Order and Consent Decree, DA 16-856, released July 29, 2016.

² 47 U.S.C. §325(b)(2)(C).

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Ms. Marlene H. Dortch

September 1, 2017

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Concerning the Order and Consent Decree and the Media Bureau's investigation of the matters addressed in the Order and Consent Decree, Askold Krushelnycky respectfully requests copies of the following documents:

1. All documents reviewed or generated by the FCC. This includes, but is not limited to all documents provided by third parties;
2. All documents provided by Sinclair, Cunningham or any other Sinclair JSA or LMA affiliates to the FCC; and
3. All documents sent or provided by the FCC to Sinclair, Cunningham or any other Sinclair JSA or LMA affiliate.

On August 14, 2017, Congressional representatives, Frank Pallone Jr. (N.J.), Mike Doyle (Pa.) and Diana DeGette (Co.) sent FCC Chairman Ajit Pai a letter seeking information as to whether the FCC has shown a pattern of preferential treatment towards Sinclair. The letter provided specific examples where the Congressional representatives believe the FCC might have shown preferential treatment towards Sinclair.

Concerning the FCC's alleged preferential treatment towards Sinclair, Askold Krushelnycky respectfully requests copies of the following documents:

1. From January 1, 2016 to the present all documents provided by Sinclair to the FCC.
2. From January 1, 2016 to the present all documents provided by the FCC to Sinclair.

Documents excluded from this request are, (1) all public record documents, (2) all JSA and LMA agreements; and (3) all agreements Sinclair, Cunningham or any other Sinclair JSA or LMA affiliate entered into with any MVPD.

For purposes of this request the following terms are defined to mean:

"Document" is intended to include but not necessarily be limited to: the original, any copy of the original that differs from it because of notes written on or attached to such copy or otherwise associated with it, or any identical copy of the original if the original is not available, as well as any drafts of all or part of the original, or any written, preprinted, typed, or visually or aurally recorded material or other tangible piece of information of any kind, including computer data (whether located on a computer hard drive, floppy

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September 1, 2017

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discs, or other storage mechanism), and includes, but is not limited to, any and all writings, correspondence, memoranda, minutes, agendas, notices diaries, notes, emails, records, reports, statements, papers, lists, instructions, guidelines, affidavits, audio or visual tapes, transcripts or tapes of meetings or interviews, photographs, or other graphic or pictorial material.

"Public Record Document" includes all documents that are accessible through the FCC's web site, www.fcc.gov.

"Sinclair" includes any affiliate or parent company, any employee, officer or director, attorney, accountant, lobbyist or other consultant thereof. As used herein Sinclair also includes Cunningham and any Sinclair JSA or LMA affiliate.

"FCC, Commission or Bureau" includes its staff, employees, and commissioners including all Bureaus and Divisions thereof.

In preparing the FCC's response, please (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption.

Pursuant to 47 C.F.R. §0.470(a)(2), Askold Krushelnycky qualifies as a representative of the news media. He makes this request for the purpose of disseminating information and will not use the information disclosed to further his own commercial interests. See Declaration of Askold Krushelnycky attached hereto. Accordingly, no search or review fee is to be accessed.

Mr Krushelnycky requests that all documents be provided in electronic format only. Documents that do not exist in electronic format or cannot be converted to electronic format may be provided in hard copy.

Should any questions arise with regard to this matter, please communicate directly with this office.

Sincerely,

A handwritten signature in black ink, appearing to read "Arthur V. Belendiuk". The signature is fluid and cursive, with the first name "Arthur" and last name "Belendiuk" clearly distinguishable.

Arthur V. Belendiuk

Counsel for Askold Krushelnycky

DECLARATION

I, Askold Krushelnycky, declare under penalty of perjury that the following is true and correct:

I reside in Washington, D.C.

I qualify as a representative of the news media as set forth in 47 CFR §0.470 (a)(2).

I have worked in journalism most of my career.

In 1978 I was hired as a reporter and worked for The South London Press. Later I worked for The Sunday Telegraph, Mail on Sunday, The Sunday Times, and The European. Between 1980-1989 I spent long periods accompanying the Afghan (Mujahedin) guerrillas fighting the Soviet occupation. In 1988-1989 I was posted as Sunday Times South Asia correspondent based in New Delhi to cover India, Pakistan, Afghanistan and Sri Lanka.

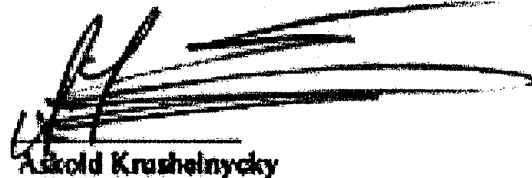
During the 1990s I reported on the fall of communism, political transformations and conflicts in the former USSR, satellite states and former Yugoslavia. Between 1997-2011 I lived in and reported from Moscow, Kyiv, and Prague.

Presently, I am a freelance journalist writing articles for various publications including Foreign Policy, Atlantic Council, Mail on Sunday, reaction.Com & The Kyiv Post amongst others.

I have read the FOIA request prepared by my attorney and wish to review the documents requested therein.

I certify pursuant to 47 CFR § 0.470 (c) that I will not use this information to further my own commercial interests.

Executed this 31 day of August, 2017.



Askold Krushelnycky

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MARK B. DENBO

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E-MAIL ADDRESS: abelendiuk@fccworld.com

RECEIVED - FCC

December 5, 2017

DEC -5 2017

Federal Communications Commission
Bureau / Office

Mr. Mark Stephens
Managing Director
Attn: FOIA Request
Federal Communications Commission
445 12th Street, S.W.
Room 1-A836
Washington, D.C. 20554

Re: **FREEDOM OF INFORMATION ACT REQUEST**

Dear Mr. Stephens:

This letter is written on behalf of our client, Askold Krushelnycky. As set forth below, Mr. Krushelnycky seeks documents concerning previously filed Freedom of Information Act Requests ("FOIA"), the Federal Communications Commission's ("FCC") responses and dispositions of those requests and all documents produced in response to those requests.

On September 1, 2017, Mr. Krushelnycky filed a FOIA request seeking specific documents concerning Sinclair Broadcast Group, Inc. ("Sinclair") and companies with which it has joint sales agreements ("JSAs") and local marketing agreements ("LMAs") agreements, including but not limited to Cunningham Broadcasting Corporation ("Cunningham"). As of this date, the FCC has only partially responded to Mr. Krushelnycky's request. The FCC's staff has advised undersigned counsel that up to 30 requests have been filed requesting information concerning Sinclair, its relationship to the FCC, and its proposed merger with Tribune Media Company ("Tribune").

Askold Krushelnycky respectfully requests copies of the following documents:

1. From January 1, 2016 to the present, all FOIA requests that reference or seek information concerning Sinclair, Cunningham, as well as companies with which Sinclair has JSA or LMA agreements, including but not limited to Cunningham;

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Mr. Mark Stephens
December 5, 2017
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2. From January 1, 2016 to the present, all FOIA requests that reference or seek information concerning Tribune or the proposed merger between Tribune and Sinclair;

3. All documents in which the FCC responded, resolved or disposed of any of the FOIA requests;

4. All documents produced in response to any of the FOIA requests.

Excluded from this request are all public record documents.

For purposes of this request the following terms are defined to mean:

“Document” is intended to include but not necessarily be limited to: the original, any copy of the original that differs from it because of notes written on or attached to such copy or otherwise associated with it, or any identical copy of the original if the original is not available, as well as any drafts of all or part of the original, or any written, preprinted, typed, or visually or aurally recorded material or other tangible piece of information of any kind, including computer data (whether located on a computer hard drive, floppy discs, or other storage mechanism), and includes, but is not limited to, any and all writings, correspondence, memoranda, minutes, agendas, notices diaries, notes, emails, records, reports, statements, papers, lists, instructions, guidelines, affidavits, audio or visual tapes, transcripts or tapes of meetings or interviews, photographs, or other graphic or pictorial material.

“Public Record Document” includes all documents that are accessible through the FCC’s web site, www.fcc.gov.

“Sinclair” includes any affiliate or parent company, any employee, officer or director, attorney, accountant, lobbyist or other consultant thereof. As used herein Sinclair also includes Cunningham and any Sinclair JSA or LMA affiliate.

“FCC, Commission or Bureau” includes its staff, employees, and commissioners including all Bureaus and Divisions thereof.

In preparing the FCC’s response, please (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the claimed exemption.

Pursuant to 47 C.F.R. §0.470(a)(2), Askold Krushelnycky qualifies as a representative of the news media. He makes this request for the purpose of disseminating

SMITHWICK & BELENDIUK, P.C.

Mr. Mark Stephens
December 5, 2017
Page 3

information and will not use the information disclosed to further his own commercial interests. See Declaration of Askold Krushelnycky attached hereto. Accordingly, no search or review fee is to be accessed.

Mr. Krushelnycky requests that all documents be provided in electronic format only. Documents that do not exist in electronic format or cannot be converted to electronic format may be provided in hard copy.

Should any questions arise with regard to this matter, please communicate directly with this office.

Sincerely,

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Arthur V. Belendiuk
Counsel for Askold Krushelnycky

DECLARATION

I, Askold Krushelnycky, declare under penalty of perjury that the following is true and correct:

I reside in Washington, D.C.

I qualify as a representative of the news media as set forth in 47 CFR §0.470 (a)(2).

I have worked in journalism most of my career.

In 1978 I was hired as a reporter and worked for The South London Press. Later I worked for The Sunday Telegraph, Mail on Sunday, The Sunday Times, and The European. Between 1980-1989 I spent long periods accompanying the Afghan (Mujahedin) guerrillas fighting the Soviet occupation. In 1988-1989 I was posted as Sunday Times South Asia correspondent based in New Delhi to cover India, Pakistan, Afghanistan and Sri Lanka.

During the 1990s I reported on the fall of communism, political transformations and conflicts in the former USSR, satellite states and former Yugoslavia. Between 1997-2011 I lived in and reported from Moscow, Kyiv, and Prague.

Presently, I am a freelance journalist writing articles for various publications including Foreign Policy, Atlantic Council, Mail on Sunday, reaction.Com & The Kyiv Post amongst others.

I have read the FOIA request prepared by my attorney and wish to review the documents requested therein.

I certify pursuant to 47 CFR § 0.470 (c) that I will not use this information to further my own commercial interests.

Executed this 31 day of August, 2017.



Askold Krushelnycky

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

In re:)
)
ASKOLD KRUSHELNYCKY) FOIA Request No. 2017-981
)
FREEDOM OF INFORMATION ACT)
)
To: Office of the General Counsel

APPLICATION FOR REVIEW

Askold Krushelnycky (“Requester”) files this application for review of the January 16, 2018 letter decision (“Decision”) of the Chief, Office of Communications and Industry Information, Media Bureau (“Bureau”) on the referenced Freedom of Information Act (“FOIA”) Request. The Bureau erred in withholding much of the requested material. Not only does the Bureau Decision contravene established legal standards,¹ its overly protective approach violates Chairman Pai’s stated commitment to transparency in government.² As discussed herein, the Bureau’s decision fails to comply with FOIA requirements. The media and Congress have questioned the Federal Communications Commission’s (“FCC” or “Commission”) impartiality

¹ The Courts have held that there is a “strong presumption in favor of disclosure,” *Dep’t. of State v. Ray*, 502 U.S. 164, 173 (1991).

² Chairman Pai has stated that: “One of my priorities as Chairman of the Federal Communications Commission (FCC) will be to make the agency’s operations more transparent. . . I want this Commission to be as open and accessible as possible to the American people. I want us to do a better job of communicating with those we are here to serve. FCC News Release, Statement Of FCC Chairman Ajit Pai, released February 2, 2017.

in its dealings with Sinclair Broadcast Group, Inc. (“Sinclair”).³ The Bureau’s decision can only fuel this speculation.

Background

On September 1, 2017, Askold Krushelnycky, a freelance journalist, filed a FOIA request with the FCC. Askold Krushelnycky requested two categories of documents:

The first category of documents Requester is seeking concerns the recent Consent Decree⁴ between Sinclair and the FCC:

On July 29, 2016, the Media Bureau... and Sinclair entered into a Consent Decree. The Consent Decree terminated an investigation into whether Sinclair violated its good faith negotiation obligation by engaging in prohibited joint negotiations on behalf of its JSA and LMA affiliates, including Cunningham.⁵ In the course of the investigation, the Bureau found that Sinclair represented numerous Non-Sinclair Stations in retransmission consent negotiations with multichannel video programming distributors (“MVPDs”) between April 2, 2015 (the effective date of the Commission’s rule implementing the statutory prohibition on joint negotiation) and November 30, 2015.

The Consent Decree, as listed in the Appendix of that document, also resolved pleading, complaints, petitions to deny, a Notice of Apparent Liability for Forfeiture and granted the renewal of five of Sinclair’s television stations.

Concerning the Order and Consent Decree and the Media Bureau’s investigation of the matters addressed in the Order and

³ See, e.g., the August 14, 2017, letter from Congressional representatives, Frank Pallone Jr. (N.J.), Mike Doyle (Pa.) and Diana DeGette (Co.) sent to FCC Chairman Ajit Pai seeking information as to whether the FCC has shown a pattern of preferential treatment towards Sinclair.

⁴ *Sinclair Broadcast Group, Inc.*, 31 FCC Rcd. 8576 (Media Bureau 2016) (Consent Decree).

⁵ 47 U.S.C. §325(b)(2)(C).

Consent Decree, Askold Krushelnycky respectfully requests copies of the following documents:

1. All documents reviewed or generated by the FCC. This includes, but is not limited to all documents provided by third parties;
2. All documents provided by Sinclair, Cunningham or any other Sinclair JSA or LMA affiliates to the FCC; and
3. All documents sent or provided by the FCC to Sinclair, Cunningham or any other Sinclair JSA or LMA affiliate.

The second category of documents Requester is seeking concerns non-public communications between Sinclair and the FCC:

1. From January 1, 2016 to the present all documents provided by Sinclair to the FCC.
2. From January 1, 2016 to the present all documents provided by the FCC to Sinclair.

To facilitate the FCC's search, Askold Krushelnycky excluded from the FOIA request, "(1) all public record documents, (2) all JSA and LMA agreements; and (3) all agreements Sinclair, Cunningham or any other Sinclair JSA or LMA affiliate entered into with any MVPD."

On October 21, 2017, the Bureau submitted its Initial Response.⁶ The Bureau released 54 records, consisting of email communications between Commission personnel and employees or representatives of Sinclair. On January 16, 2018, the Bureau released its Final Response.⁷ In the Final Response the Bureau states that it "review[ed] approximately 70 additional records." The Bureau goes on to state that "The records consist of 41 email communications between

⁶ See Letter from Michael Perko, Chief, Office of Communications and Industry Information, Media Bureau (October 21, 2017) (Initial Response).

⁷ See Letter from Michael Perko, Chief, Office of Communications and Industry Information, Media Bureau (January 16, 2018) (Final Response).

Commission personnel and employees and/or representatives of Sinclair; 21 draft excerpts and versions of a consent decree and associated withdrawal letters; two compliance reports submitted by Sinclair pursuant to the Consent Decree; one confidential response to a Letter of Inquiry; and two application exhibits...” The Bureau released only 10 records with redactions. The Bureau withheld the remaining records pursuant to Exemption 4, material containing commercial or financial information. It withheld one email address pursuant to Exemption 6.

Legal Standard

FOIA, 5 U.S.C. §552, requires federal agencies to make certain records available to any person upon request. The Agency must determine within twenty business days of receipt whether to comply with a request and shall immediately notify the requester of its determination and reasons therefore. *Id.* § 552(a)(6)(A).

Should an agency deny a FOIA request, in whole or in part, the agency must “make a reasonable effort” to estimate and provide to the requester “the volume of any requested matter the provision of which is denied” 5 U.S.C. § 552(a)(6)(F). Additionally, to the extent an exemption is invoked, any “reasonably segregable portion of a record shall be provided” after deletion of the exempt portions. *Id.* § 552(b). The “amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record” *Id.*

The Bureau Failed to Conduct an Adequate Search

Under FOIA, the agency bears the burden of showing “beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *DeBrew v. Atwood*, 792 F.3d 118, 122 (D.C. Cir. 2015) (internal citations omitted). The FCC plainly did not meet its obligation to conduct a search “reasonably calculated to uncover all relevant

documents.” *DeBrew*, 792 F.3d at 122. A search’s failure to uncover material known to be in the possession of the agency “raises a legitimate question as to thoroughness of the search.” See *Bagwell v. U.S. Dep’t of Justice*, No. 15-cv-00531, 2015 WL 9272836, at *2 (D.D.C. 2015) (finding doubt as to the adequacy of a search where it failed to uncover a record of communication alluded to in public). The exiguous records the FCC located and produced cannot possibly constitute the universe of responsive records.

Concerning the Consent Degree, Requester has requested all documents “reviewed or generated by the FCC;” “provided by Sinclair, Cunningham or any other Sinclair JSA or LMA affiliates to the FCC”; and “provided by the FCC to Sinclair, Cunningham or any other Sinclair JSA or LMA affiliate.” The FCC has not produced any of these documents that are known to exist and has only identified such documents as were made attachments to email correspondence between Sinclair and the FCC staff. The FCC’s investigation of Sinclair and its affiliates included letters of inquiry, responsive declarations and responsive documents.⁸ None of these letters, declarations or documents has been identified or produced. Beyond doubt, the Bureau’s search was inadequate to find and identify the requested documents.

Further evidence of the inadequacy of the Bureau’s search is its failure to search for emails sent to or from Chairman Ajit Pai’s personal email address. The Bureau provided one email, apparently from another source than Chairman Pai, which had been sent to his personal email address. It redacted the address under Exemption 6. In *Competitive Enterprise Institute v. Office of Science & Technology Policy*, 827 F.3d 145 (D.C. Cir. 2016), the court determined that if an official “possesses what would otherwise be agency records [*e.g.*, work-related email], the

⁸ See *e.g.* September 12, 2016 email from Martha Heller, Chief, Policy Division, Media Bureau to Eve Klindera Reed, Wiley Rein LLP, which references LOI and closure letters.

records do not lose their agency character just because the official . . . takes them out the door [e.g., to a private account][.]" *Id.* at 149. Thus, if a personal email account may contain agency records, the agency cannot categorically refuse to conduct a search of that private account. The Bureau in its Final Response did not state that it searched for records in Chairman Pai's private email account responsive to the FOIA request. Nor did it say that it searched other FCC employees' private email servers for responsive records. As such, the search the Bureau conducted was inadequate.

The Bureau Erred in Withholding Documents Based on Exemption 4

The Bureau Decision cites Exemption 4 as the basis for withholding almost all of the requested material, yet it fails to provide a basis for doing so. 5 U.S.C. §552(b)(4) The Bureau states that a number of email chains between the Commission's staff and Sinclair's counsel relate to settlement negotiations as well as drafts of the Consent Decree and associated withdrawal letters. The Bureau, without further explanation, concludes, "this material reveals aspects of Sinclair's business strategy and concerns information in which Sinclair would properly have a commercial interest." Final Response p.2. The Bureau further states that the records include two confidential compliance reports submitted by Sinclair in accordance with the terms of the Consent Decree, a response from Sinclair, dated January 18, 2016, to a Letter of Inquiry and two exhibits with an accompanying request for confidential treatment, to the application filed by Tribune Media Company on June 26, 2017. Again the Bureau claims that the compliance reports contain commercial information, in particular they describe ongoing retransmission consent negotiations to which Sinclair is a party.

The FCC has failed to show that records it withheld are exempt from disclosure under Exemption 4, which protects from disclosure "trade secrets and commercial or financial

information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). As the Bureau has not asserted that any redacted information contains trade secrets, the Requester only addresses the test for “commercial or financial” information. Such information is exempt only if it is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. See *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983).

The terms “commercial” or “financial” in Exemption 4 “are to be given their ‘ordinary meanings’ . . .” and are construed broadly. *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 38 (D.C. Cir. 2002). Commercial information need not be limited to information that “reveal[s] basic commercial operations,” but may include any information in which the submitter has a “commercial interest,” see *Public Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. (1983) such as business sales statistics, research data, overhead and operating costs, and financial conditions, see *Landfair v. U.S. Dep’t of Army*, 645 F. Supp. 325, 327 (D.D.C. 1986).

For Exemption 4 to apply to the material requested, an agency must make a determination that disclosure would cause Sinclair and/or its affiliate companies to suffer the “likelihood of substantial competitive injury.” *Gulf & Western Industries, Inc. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) In withholding the vast majority of documents identified, and not identifying numerous other records, the Bureau has not made this determination. Its sweeping, generalized assertion of the Exemption is insufficient under established legal standards.

Many of the documents requested simply do not fall under the rubric of Exemption 4. For example, Letters of Inquiry prepared by the FCC staff do not constitute documents “obtained from a person” and as such are not protected under Exemption 4. See *Bd. of Trade v. CFTC*, 627

F.2d 392, 404 (D.C. Cir 1980). Likewise, Sinclair and its affiliate companies' responses to the Letters of Inquiry, in general, do not fall within the parameters of Exemption 4. The FCC was conducting an inquiry into, *inter alia* whether Sinclair had violated the good faith negotiation requirements of Section 325 of the Communications Act. 47 U.S.C. §325(b)(2)(C). Specifically, whether Sinclair had engaged in joint negotiations in violation of the Section 325. Presumably, the FCC was interested in the joint nature of any negotiations and not commercial nature of the agreements themselves. The parties responses, most likely, were focused on the nature of the negotiations between Sinclair and MVPDs, rather than specific business terms negotiated with the MVPD's for the carriage of Sinclair and its affiliate companies' television stations. Likewise, the compliance reports are supposed to verify that Sinclair is complying with the terms of the Consent Decree and as such they do not focus on financial and commercial information protected under Exemption 4. The Bureau states that the records withheld also include an application filed by Tribune Media Company on June 26, 2017. The Bureau fails to further describe this application or explain how the release of this document would cause Sinclair competitive harm.

Finally, the Bureau withheld a number of email chains between the Commission staff and Sinclair's counsel relate to settlement negotiations as well as drafts of the Consent Decree and associated withdrawal letters. Settlement negotiations are not entitled to distinct protection under FOIA. In *County of Madison v. Department of Justice*, 641 F. 2d 1036, 1040-41 (1st Cir. 1981), it was held that settlement proposals submitted to an agency by "past and potential adversaries" must be disclosed. See also *Norwood v. FAA*, 580 F. Supp. 994, 1002-03 (W.D. Tenn. 1984). As the Bureau states, "The communications and drafts contain the concessions and statements that Sinclair was willing to make (or not make) in order to obtain, by consent, dismissal of ongoing investigation(s)." Final Response, p.2. This is not financial or commercial

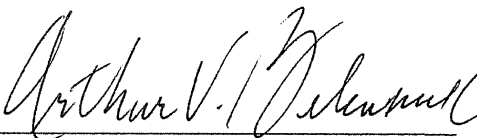
information and is, in fact, just the type of information Requester is seeking to review. The record does not support the Bureau's conclusion that disclosing the requested documents will cause Sinclair substantial competitive harm. Also to the extent the Bureau asserts that disclosure is likely to impede its ability to obtain information from Sinclair or other licensees in the future, it fails to explain why this is so, given the non-voluntary, compulsory nature of the records at issue.

Conclusion

In the first few days of his tenure, Chairman Pai stated that he wanted to make the FCC's operations more transparent and to make the agency as open and accessible as possible to the American people. Yet the Bureau's response to Requester's FOIA request shows that it has no intention of actually letting the American public know about its inner workings and relationships with Sinclair. Sinclair is free to communicate with the FCC at will, even to the point of having access to the Chairman's private email account. When Sinclair violates the Communications Act, it can negotiate in secret and reach a private, confidential agreement with the FCC. When a journalist files a FOIA request seeking the details of that agreement, his request is delayed for months. The FCC does not use these months to conduct an adequate search. Rather, the Requestor finally is told that most of what he has requested will not be produced, despite a clear mandate under FOIA to disclose.

This application for review gives the Commission a chance to make good on the Chairman's promise of transparency. FOIA does not justify the Bureau's wholesale withholding of information from the public. The documents requested should be released without redaction or further delay.

Respectfully submitted,

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