

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Applications to Transfer
Control of NBI Holdings, LLC, And Cox
Enterprises, Inc., to Terrier Media
Buyer, Inc.

MB Docket No. 19-98

COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

The American Television Alliance (“ATVA”) hereby files comments regarding Apollo Global Management’s (“Apollo’s”) application to engage in a series of transactions, first acquiring the television stations owned by NBI Holdings, LLC (“Northwest”) and then acquiring stations owned by Cox Enterprises, Inc. (“Cox”).¹ The Applicants seek permission to transfer a

¹ The file numbers of the relevant applications are: BTCCDT-20190304ABL, BTCCDT-20190304ABM, BTCCDT-20190304ABP, BTCCDT-20190304ABR, BTC(DTL)-20190304ABS, BTC(DTL)-20190304ABT, BTCCDT-20190304ADU, BTC(DTL)-20190304ADZ, BTC(DTL)-20190304AED, BTC(DTL)-20190304ADX, BTC(DTL)-20190305AAR, BTC(DTL)-20190304ADY, BTC(DTL)-20190304AEG, BTC(DTL)-20190304AEA, BTC(DTL)-20190304AEE, BTC(DTL)-20190304AEC, BTC(DTL)-20190304ADV, BTC(DTL)-20190304ADW, BTC(DTL)-20190304AEB, BTC(DTL)-20190304AEC, BTC(DTL)-20190304ABX, BTC(DTL)-20190304ACA, BTC(DTL)-20190304ACC, BTC(DTL)-20190304ACB, BTC(DTL)-20190304ABZ, BTC(DTL)-20190304ABY, BTCCDT-20190304ACF, BTCCDT-20190304ACG, BTCCDT-20190304ACI, BTCCDT-20190304ACK, BTCCDT-20190304ACL, BTCCDT-20190304ACJ, BTCCDT-20190304ACN, BTCCDT-20190304ACO, BTCCDT-20190304ACP, BTCCDT-20190304ACT, BTCCDT-20190304ACV, BTCCDT-20190304ACW, BTCCDT-20190304ACU, BTCCDT-20190304ACX, BTCCDT-20190304ADE, BTCCDT-20190304ADF, BTCCDT-20190304ACS, BTCCDT-20190304ACZ, BTCCDT-20190304ADB, BTCCDT-20190304ADA, BTCCDT-20190304ADD, BAL-20190304AER, BALH-20190304AES, BALH-20190304AET, BALH-20190304AEU, BTCCDT-20190304ADH, BTCCDT-20190304ADJ, BTCCDT-

top-four quadropoly and two top-four duopolies that would, if allowed to continue, impede competition and diversity and raise prices for consumers. Yet they have not addressed these significant public-interest concerns in their Application. They have not even attempted to explain why, for example, it would serve the public interest to allow Apollo to acquire a top-four quadropoly in Greenville, Mississippi—a monopoly arrangement that has helped Northwest command among the highest retransmission consent fees in the nation. The Commission should require the Applicants to file a full public-interest statement addressing all the harms and benefits of the proposed transaction. The public should then be given an opportunity to comment on the Applicants’ public-interest filing. The Commission then will have a full opportunity to weigh the public-interest harms against the benefits of one broadcaster owning all four of the top-four stations in market.

BACKGROUND AND DESCRIPTION OF THE TRANSACTION

A. Northwest.

Northwest is a relatively small station group that maintains a top-four quadropoly in Mississippi and top-four duopolies in Eureka, California, and Yuma, Arizona.² As a result of

20190304ADK, BTCCDT-20190304ADQ, BTC(DTL)-20190304ADR, BTC(DTL)-20190304ADS, BTC(DTL)-20190304ADT, BTCCDT-20190304AEH, BTCCDT-20190304AEI, BTCCDT-20190304AEJ, BTCCDT-20190304AEK, BTCCDT-20190304AEL, BTCCDT-20190304AEM, BTCCDT-20190304AEN, BTCCDT-20190304AEO, BTCCDT-20190304AEP, and BTCCDT-20190304AEQ.

² Northwest has used low-power stations and multicasting to create its Greenville, Mississippi “quadropoly,” which consists of one full-power station, one low-power station, and two multicast feeds. Although the Commission is considering in the Quadrennial Review proceeding whether to count low-power and multicast duopolies for purposes of its multiple ownership rules—an action that ATVA supports—that does not change the Commission’s obligation here to consider whether it is in the public interest for Apollo to acquire this particular top-four quadropoly and duopolies. Nor does it obviate Apollo’s obligation to demonstrate that the proposed transaction serves the public interest.

this *monopoly* over network programming in Mississippi and its two other top-four duopolies, Northwest now charges among the highest retransmission consent rates in the country, despite being a relatively small broadcaster that would otherwise be unable to command such high rates. Northwest also insists on including particularly aggressive “after-acquired station clauses” in its contracts with MVPDs.³

B. The Proposed Transaction.

Apollo Global Management is a New York-based private equity firm that bills itself as “one of the world’s largest alternative investment managers.”⁴ It is not in the business of broadcasting.⁵ It instead pursues “*opportunistic buyouts and build-ups, corporate carve-outs, and distressed investments. . .*”⁶ The proposed transaction is designed to extend Northwest’s high retransmission consent rates to other broadcast stations—Cox in this proceeding. If the Commission approves this proposed transaction, Apollo will purchase Northwest and then purchase Cox.⁷ Because of after-acquired-station clauses in Northwest’s contracts, this will

³ Letter from Mary C. Lovejoy to Marlene Dortch, MB Docket No. 18-349 *et al.* (filed Mar. 25, 2019).

⁴ Apollo Global Management, *About Apollo* (last visited May 10, 2019), <https://www.apollo.com/about-apollo>.

⁵ See Applications to Transfer Control of NBI Holdings, LLC, And Cox Enterprises, Inc., to Terrier Media Buyer, Inc., Comprehensive Exhibit, at 1 (“Comprehensive Exhibit”) (Apollo’s subsidiary, Terrier Media Buyer, Inc., is “a new entrant in the broadcast television market”).

⁶ Apollo Global Management, *Our Business* (last visited May 10, 2019), <https://www.apollo.com/our-business/private-equity> (emphasis in original).

⁷ Comprehensive Exhibit at 1 (“In the first transaction, Terrier Media Buyer, Inc. (‘Terrier Media’) will acquire companies owning all of the television stations owned by Northwest Broadcasting. After acquiring those companies, Terrier Media will acquire companies owning all of Cox’s television stations and the licenses and other assets of four of Cox’s radio stations.”).

cause Cox’s rates to “reset” to Northwest’s higher rates for MVPDs carrying both sets of stations. These price increases appear to be the main purpose of the transaction and why Apollo asked the Commission to approve its Northwest acquisition before its Cox acquisition. As a contemporaneous report on the acquisition noted:

According to multiple sources, Apollo is going to use the “after-acquired” clauses in its retrans contracts to immediately boost retrans fees for all the Cox stations . . . [s]o, what Apollo is really buying from Northwest is not TV stations . . . ; it’s buying [Northwest’s] retrans contracts.⁸

Thus, MVPD subscribers will soon pay higher fees for the same programming, with no apparent countervailing benefits.⁹

The Application fails to address these issues entirely. It does not even acknowledge Northwest’s top-four quadropoly in Mississippi or its top-four duopoly in Eureka. Nor does it explain why it would be in the public interest to transfer control of its quadropoly and this duopoly when doing so would ratify a broadcast monopoly in Mississippi and duopolies in several other markets. Moreover, although the Application purports to make a “top-four showing” for Northwest’s Yakima duopoly, that top-four showing does not address how this duopoly has affected, and would continue to affect, retransmission consent prices.

⁸ Harry A. Jessell, *Musings About Apollo-Cox-Northwest-Nexstar*, TVNewsCheck (Feb. 25, 2019), <https://tvnewscheck.com/article/top-news/230791/musings-apollo-cox-northwest-nexstar/>.

⁹ ATVA members and other MVPDs generally pass through some or all retransmission consent price increases, in many cases through consumer line-items—meaning that retransmission consent price increases almost always result in consumer price increases. *See* Comments of the American Television Alliance, MB Docket No. 15-216 (filed Dec. 1, 2015) (“ATVA Totality of the Circumstances Comments”).

STANDARD OF REVIEW

Under the Communications Act, the Commission approves a proposed license transfer if it serves “the public interest, convenience, and necessity.”¹⁰ In this review, the Commission “employs a balancing process, weighing any potential public interest benefits of the proposed transaction against any potential public interest harms.”¹¹ Applicants, not opponents, bear the burden of demonstrating the public-interest benefits.¹² The Commission’s analysis is “informed by, but not limited to” merger analysis under the Clayton Act, in which the government may seek to enjoin a merger that “substantially lessen[s] competition.”¹³ Whether a transaction will lead to consumer price increases, ranks among the foremost “public-interest harms” of concern to the Commission.¹⁴ Likewise, a powerful public-interest benefit is the possibility that the transaction

¹⁰ 47 U.S.C. § 310(d); *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131, ¶ 2 (2015) (“*AT&T-DIRECTV*”).

¹¹ *Media General, Inc. and Nexstar Media Grp., Inc.*, 32 FCC Rcd. 183, ¶ 19 (2017).

¹² *E.g.*, *AT&T-DIRECTV* ¶ 18 (“The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.”).

¹³ *Id.* ¶¶ 20-21 (citing 15 U.S.C. § 18).

¹⁴ *See, e.g.*, *EchoStar Commc'ns Corp., Gen. Motors Corp. and Hughes Elecs. Corp.*, 17 FCC Rcd. 20559, ¶ 169 (2002) (“*EchoStar HDO*”) (“[The evidence] strongly suggests that, in the absence of any significant savings in marginal cost, the merger will result in a large increase in post-merger equilibrium prices. Given this likelihood, we cannot find that the Applicants have met their burden of demonstrating that the proposed merger will produce merger-specific public interest benefits of the magnitude the Applicants allege.”); *XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, 23 FCC Rcd. 12348, ¶ 6 (2008) (“*XM Satellite-Sirius*”) (“We also conclude that, absent Applicants' voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity. As discussed below, assuming a satellite radio product market, Applicants would have the incentive and ability to raise prices for an extended period of time.”); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Commc'ns Corp. to Time Warner Cable Inc. and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 116 (2006) (“[W]e find that the transactions may increase the likelihood of harm in markets in which Comcast or Time Warner now hold, or may in the future hold, an ownership interest in RSNs, which ultimately could increase retail prices for consumers and

will *decrease* retail prices.¹⁵ The Commission has not hesitated to place conditions on transactions where retransmission consent-related harms would otherwise have outweighed the claimed benefits.¹⁶

REQUEST FOR RELIEF

The Commission should not act until the Applicants have filed a public-interest analysis that is made available for public comment, including an analysis of the impact of a top-four quadropoly and two top-four duopolies on consumer prices.¹⁷

Such an analysis is especially important here because Northwest has not previously been required to seek or obtain a public-interest determination for the Eureka duopoly, much less the Mississippi quadropoly. Therefore, this is the Commission's first opportunity to review the

limit consumer MVPD choice. We impose remedial conditions to mitigate these potential harms.") (emphasis added).

¹⁵ *AT&T-DIRECTV* ¶ 4 ("We find that the combined AT&T-DIRECTV will increase competition for bundles of video and broadband, which, in turn, will stimulate lower prices, not only for the Applicants' bundles, but also for competitors' bundled products—benefiting consumers and serving the public interest.").

¹⁶ *See, e.g., Gen. Motors Corp. & Hughes Elecs. Corp.*, 19 FCC Rcd. 473, ¶ 201 (2004); *Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 48 (2011) (each imposing conditions related to retransmission consent). Sinclair made these very points when it sought to condition Comcast's merger with Time Warner Cable. Petition to Deny of Sinclair Broadcast Group, Inc. at 1, MB Docket No. 14-57 (filed Aug. 25, 2014) ("[Applicants] must show that the merger: (a) does no harm, and (b) will affirmatively benefit the public."); *id.* ("The Commission must examine the public interest, convenience, and necessity, ensuring that the merged company will promote competition in the marketplace."); *id.* at 3 ("[Competitive concerns raised by Sinclair] could lead to higher consumer prices . . .").

¹⁷ Although the Commission is considering in the Quadrennial Review proceeding whether to ban low-power and multicast duopolies, triopolies, and quadropolies *generally*, that does not change the Commission's obligation here to consider whether it is in the public interest for Apollo to acquire *these particular* top-four quadropolies and top-four duopolies. Nor does it obviate Apollo's obligation to demonstrate that the proposed transaction serves the public interest.

extent to which these combinations serve the public interest—especially where, as here, the proposed transaction will extend the high prices charged by that quadropoly to other stations.

Absent a compelling justification, the Commission should find that the transfer of Northwest’s duopolies and quadropoly disserves the public interest and should be divested. The Commission does not ordinarily allow duopolies and has yet to approve a new one under its new “case-by-case” exception to the top-four prohibition. It has never before indicated that a triopoly serves the public interest—much less a quadropoly that controls all four of the major, most-watched network affiliates in a market. Indeed, if faced with an application for a full-power triopoly or quadropoly, the FCC would dismiss it out of hand.

As ATVA has explained many times before, top-four duopolies, triopolies, and quadropolies raise prices for consumers.¹⁸ The reason is straightforward. If a broadcaster can threaten to black out the programming of two or more of the four top-rated networks at the same time, it has more ability to generate the anger of consumers, who have the ability to drop their MVPD provider in favor of a competitor who still has this top programming available. Rather than risk losing customers, MVPDs will often accept higher prices and less favorable terms. The result: the duopoly, triopoly, or quadropoly broadcaster can command higher prices than those without such combinations—and broadcasters with multiple such combinations can command the highest prices of all. And ultimately, the customers of MVPDs end up paying “monopoly rents” for their favorite programming.¹⁹

¹⁸ See, e.g., Comments of the American Television Alliance at 8, MB Docket No. 18-349 (filed Apr. 29, 2019) (“ATVA Quadrennial Review Comments”).

¹⁹ See ATVA Totality of the Circumstances Comments.

The evidence collected in other proceedings overwhelmingly shows the anticompetitive effects of local broadcast consolidation. The harm from top-four duopolies, triopolies, and quadropolies has been confirmed by the Commission’s own analysis,²⁰ by independent analysts,²¹ and by broadcasters’ own conduct.²² Moreover, the Department of Justice has repeatedly challenged mergers that would create top-four duopolies, recognizing that top-four duopolies raise retransmission consent fees and lead to higher prices for consumers.²³

²⁰ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, ¶ 16 n.66 (2014) (“*Joint Negotiation Order*”) (citing evidence that joint negotiation by top-four stations in the same market increased retransmission consent prices by 20 percent (or, in some cases, as high as 43 percent)); *id.* at ¶13 (concluding that the record “demonstrates that joint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs. This leverage is heightened because MVPDs may be prohibited from importing out-of-market broadcast stations carrying the same network programming as the broadcast stations at issue in the negotiations.”) (citations omitted).

²¹ Paul Gallant, Positive Outlook for Broadcast TV M&A—But Courts & Grassroots Are Important (Jan. 19, 2017) (describing the relaxation of the Commission’s ownership rules as having “the potential for an improved retrans trajectory from dual ownership of two must-have TV stations”); David B. Wilkerson & Jonathan Guilford, *Proposed TV Rule Change Could Power M&A*, Forbes (Aug. 18, 2017), <https://www.forbes.com/sites/mergermarket/2017/08/18/proposed-tv-rule-change-could-power-ma/#7c817b686e1e> (explaining that owning a top-four duopoly “add[s] to [a broadcaster’s] negotiating strength with pay-TV operators who must pay fees to retransmit the stations’ signals”); Mike Farrell, *Kagan: Retrans Fees to Reach \$11.6B by 2022*, Multichannel News (Mar. 28, 2018), <https://www.multichannel.com/news/kagan-retrans-fees-reach-116b-2022-406026> (stating that “station groups in smaller markets with multiple Big Four broadcast affiliations could attract even higher rates” than other stations).

²² ATVA Quadrennial Review Comments at 11-13.

²³ Competitive Impact Statement at 9, *United States v. Nexstar Broad. Grp., Inc. et al*, No. 1:16-cv-01772-JDB (D.D.C. Sept. 2, 2016), ECF Dkt. No. 3 (noting that the creation of these duopolies “would likely lead to an increase in retransmission fees in those markets and, because increased retransmission fees typically are passed on to consumers, higher MVPD subscription fees”); Competitive Impact Statement at 2, *United States v. Gray Television, Inc. et al*, No. 1:18-cv-02951-CRC (D.D.C. Dec. 14, 2018), ECF Dkt. No. 3 (noting that the creation of top-four duopolies likely would have caused a “loss of competition” resulting in

A top-four *quadropoly* is more pernicious than a top-four duopoly, which is why the Commission has never found the creation of one to serve the public interest.²⁴ A top-four quadropoly allows a broadcaster to threaten the simultaneous blackout of all top-four stations in a market—an event that is difficult for an MVPD to sustain. Such a blackout could result in a significant loss of MVPD subscribers, who would lose access to all of the most popular sports and entertainment content on television and would likely lose access to all local television news, as well. This, in fact, is exactly what happened when Northwest blacked out all four network feeds from Cable ONE in Greenwood-Greenville, Mississippi.²⁵ After a month-long blackout during the NFL playoffs, Cable ONE agreed to pay Northwest among the highest retransmission consent fees in the country, despite Northwest being much smaller than other broadcast groups carried by Cable ONE.²⁶

The ability to charge higher fees conferred in such circumstances is not limited to the market where the quadropoly exists. Because broadcasters negotiate rates on a nationwide basis, higher prices extend to every station owned by the broadcaster. This, in turn, leads other broadcasters (who seem to know the rates charged by other companies) to demand similar pricing, pointing to the “market price” established by such quadropoly/triopoly/duopoly broadcasters.

“an increase in retransmission consent fees charged to MVPDs, much of which would be passed through to subscribers”).

²⁴ As far as we can ascertain, the Commission did not review either of the two other existing quadropolies—those in Greenwood-Greenville, Mississippi and Lima, Ohio.

²⁵ See Letter from Mary C. Lovejoy to Marlene Dortch, MB Docket No. 18-349 *et al.*, at 6 (filed Mar. 25, 2019). Northwest created its Greenwood-Greenville quadropoly using two loopholes: the low-power loophole and the “multicast” loophole, which permits a single station to carry multiple top-rated feeds.

²⁶ *Id.*

Accordingly, the Commission should require the Applicants to address whether it is in the public interest for Apollo to own a top-four quadropoly and two top-four duopolies, including a discussion of the impact on competition and diversity in the market, the impact on local television news, and the impact on consumer prices. Unless and until the Applicants address these issues, they cannot possibly have met their burden of demonstrating that the proposed transaction is in the public interest.

Respectfully Submitted,



Mike Chappell
THE AMERICAN
TELEVISION ALLIANCE
1155 F Street, N.W.
Suite 950
Washington, DC 20004
(202) 333-8667

Michael D. Nilsson
Mark D. Davis
William B. Sullivan
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
The Eighth Floor
Washington, DC 20036
(202) 730-1300
*Counsel for the
American Television Alliance*

May 10, 2019

CERTIFICATE OF SERVICE

I, Michael Nilsson, hereby certify that on May 10, 2019, I caused true and correct copies of the foregoing to be served by overnight or first-class or (where indicated by an asterisk) electronic mail upon the following:

Dennis P. Corbett, Esq.
Telecommunications Law Professionals
PLLC
1025 Connecticut Ave., NW
Suite 1011
Washington, DC 20036
dcorbett@telecomlawpros.com
Counsel for NBI Holdings, Inc.

Jennifer A. Johnson
Covington & Burling LLP
One Citycenter
850 Tenth Street, NW
Washington, DC 20001
jjohnson@cov.com
Counsel for Cox Enterprises, Inc.

*Jeremy Miller
Video Division, Media Bureau
Room 2-A821
Federal Communications Commission
445 12th St SW
Washington, DC 20554
Jeremy.Miller@fcc.gov

*Jim Bird
Transaction Team
Office of General Counsel
Room 8-C862
Federal Communications Commission
445 12th St SW
Washington, DC 20554
Jim.Bird@fcc.gov

Michael D. Basile, Esq.
Cooley LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004
mdbasile@cooley.com
Counsel for Terrier Media Buyer, Inc.

*David Brown,
Video Division, Media Bureau
Room 2-A662
Federal Communications Commission
445 12th St SW
Washington, DC 20554
David.Brown@fcc.gov

*Chris Robbins
Video Division, Media Bureau
Room 2-A847
Federal Communications Commission
445 12th St SW
Washington, DC 20554
Chris.Robbins@fcc.gov

/s/ Michael Nilsson
Harris, Wiltshire & Grannis LLP