Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Applications of Tribune Media Company and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations	MB Docket No. 17-179

COMMENTS OF THE AMERICAN TELEVISION ALLIANCE IN RESPONSE TO APPLICANTS' MAY AMENDMENT

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SUMMARY

Nearly a year after it first proposed to acquire Tribune, Sinclair has submitted its fourth amendment to its original application. This one seeks to demonstrate that the new combination of "top-four" stations in St. Louis and the continuation of a recent such combination in Indianapolis will serve the public interest. It does not come close to doing so. It neither addresses the impact of retransmission consent fees on consumers nor demonstrates that any benefits arising from the duopolies will outweigh the harms created by the transaction.

Both traditional and new legal standards govern the Commission's review here. Section 310(d) requires the Commission to balance the harms of a proposed transaction (including retail price increases) against claimed benefits. The new "case-by-case" exception to the local media ownership rules requires a similar balancing of the harms of the proposed duopoly against the claimed benefits of that duopoly—again, including retransmission consent and the potential for retail price increases. And as always, the Administrative Procedure Act ("APA") requires the Commission to provide a reasoned explanation before abandoning prior findings.

Taken together, these standards mean that the Commission cannot lawfully ignore retransmission consent-related harm to consumers in this proceeding. The Commission previously found that top-four duopolies lead to higher consumer prices (and did not abandon that finding when it amended its local media ownership rule last fall). New evidence in *this* proceeding confirms that prior finding. Logically, then, Applicants can succeed here only if (1) they can demonstrate that retransmission consent harms do not exist with respect to the particular duopolies they seek (or that conditions would ameliorate such harms); or (2) they can demonstrate that the benefits of these particular duopolies outweigh the harms. They have done neither:

- Applicants have failed to even address the issue of retransmission consent fees, notwithstanding the Commission's explicit suggestion that they do so. Here, they focus solely on questions of ratings and overall revenues—while earlier, they even suggested that price increases are a good thing. This is a remarkable omission where retransmission-consent and other distribution revenues now account for between 45 and 50 percent of Sinclair's revenue.
- Applicants have failed to show that their asserted benefits will outweigh retransmission consent-related harms. Indeed, these claimed benefits are not even cognizable under the Commission's transaction precedent because they are neither transaction-specific nor verifiable. They are simply *promises* that, if given duopolies, Sinclair will increase local news coverage post-merger. The Commission should not rely on such vague promises from a party that has become notorious for its efforts to make local news less local.

We are also concerned that Sinclair will maintain influence over stations it purports to divest—including the possibility that they may unlawfully conduct or influence joint retransmission consent negotiations. We are particularly concerned on this score in light of Sinclair's demonstrated and repeated abuses related to "sidecars" and its apparent withholding of key materials in this proceeding. The Commission should ensure that it and the public can review *all* of the arrangements between Sinclair and the divestiture parties that exist now, as well as any the parties enter into after closing. It should also consider prohibiting such sidecar arrangements, as the Department of Justice did when Nexstar and Media General divested stations, or at a minimum ensuring that those arrangements reflect genuine divestitures.

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The American Television Alliance ("ATVA") hereby provides its comments on Sinclair Broadcast Group, Inc.'s ("Sinclair's") latest amendment to its proposed acquisition of Tribune Media Company ("Tribune").[1] Sinclair originally proposed to create numerous "top-four

[1] *Media Bureau Establishes Consolidated Pleading Cycle for Amendments to the June 26, 2017, Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc., Related New Divestiture Applications, and Top-Four Showings in Two Markets*, Public Notice, DA 18-530, MB Docket No. 17-179 (rel. May 21, 2018) ("*May Public Notice*"). As specified therein, we submit these comments in connection with each of the transfer applications listed in the Public Notice. *See Applications of Tribune Media Co. and Sinclair Broadcast Group, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, May 14, 2018 Amendment to Comprehensive Exhibit (filed May 14, 2018) ("May Amendment"). As the *May Public Notice* sets forth, "this proceeding involves multiple transactions in multiple markets and requires, *inter alia*, coordinated timing to effectuate divestures of certain stations," so "consolidated processing of these applications will result in administrative efficiency and ensure a comprehensive record in this proceeding." *May Public Notice* at 1-2. The May Amendment represents Applicants' fourth such change to its original application. *Applications of Tribune Media Co. and Sinclair Broadcast Group, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, Amendment to June Comprehensive Exhibit (filed April 24, 2018) ("April Amendment"); *Applications of Tribune Media Co. and Sinclair Broadcasting Group, Inc. for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, Amendment to June Comprehensive Exhibit (filed March 8, 2018); *Applications of Tribune Media Co. and Sinclair Broadcast Group, Inc.*

duopolies."[2] Now, however, it seeks to create a new one in St. Louis[3] and to extend one that Tribune recently created in Indianapolis.[4] Applicants' May Amendment thus purports to contain

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for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 17-179, Amendment to June Comprehensive Exhibit (filed Feb. 20, 2018).

[2] By "top-four duopolies," we refer to ownership of two or more top-four, full power, overlapping stations specifically prohibited by the Commission's local ownership rules without a special showing. 47 C.F.R. § 73.3555. More broadly, we refer to combinations of the "Big Four" networks (ABC, CBS, NBC, and FOX) within a single market—whether or not they fall within the specific prohibition—as "Big Four combinations." The Commission's rules permit broadcasters to obtain Big-Four combinations through acquisition of low power stations, through multicast arrangements, through network affiliation changes, or through combinations that do not involve a top-four rated station.

[3] Applicants hope to combine the ABC affiliate with a FOX affiliate in St. Louis if permitted to do so by the Department of Justice. *See* May Amendment at 1. They nonetheless maintain that they need not make a top-four showing. This, they argue, is because the ABC affiliate was the *fifth* ranked station in the market when the Applications were originally filed. April Amendment at 12. Of course, the only reason why the ABC affiliate was ranked so low is because it was an independent station for many years, and only recently became affiliated with the ABC network. And, to the extent the various amendments filed in this proceeding constitute "major" amendments, *Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (Other than Maritime Mobile),* 60 F.C.C.2d 549, ¶ 6 (1976) ("[W]e consider an application which is amended by a major amendment to be so changed as to be the equivalent of a newly filed application."), the appropriate date to consider would be the date the *amendment* was filed. 47 C.F.R. § 73.3555(b)(1)(i) (generally prohibiting combinations where, "[a]t the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service."). When the April Amendment was filed, the ABC affiliate had regained its place in the top four. April Amendment at 2 n.7 (noting that two St. Louis stations, an ABC affiliate and a CW affiliate, have switched rankings between the time the original application was filed and the time the April Amendment was filed). Regardless, applicants have purported to make a top-four showing, which we believe concedes the point that the Commission should not approve the proposed duopoly if the showing turns out insufficient.

[4] Tribune already controls WTTV, the CBS affiliate, and WXIN, the FOX affiliate. The combination became a duopoly in 2015, when WTTV changed its affiliation from CW to CBS. April Amendment at 5 n. 19. As Applicants concede, the Commission's rules generally prohibit Sinclair from acquiring this duopoly. *See* 47 C.F.R. § 73.3555(b)(1)(i) (permitting multiple ownership if, "at the time the application to acquire or construct the station(s) is filed," the requisite conditions exist). When the Commission has granted the approval of existing duopolies, it has done so by granting a six-month waiver, during which the company is required to divest its interest in one of the stations causing the violation of the local television ownership rule. *Clear Channel Broad. Licenses, Inc., Citicasters Co. Cent. NY News, Inc., CCB Texas Licenses, L.P., Capstar Tx Ltd. P'ship Bel Meade Broad. Co., Inc., Ackerley Broad. Operations, LLC, Ackerley Broad. Fresno, LLC & Newport Television LLC*, 22 FCC Rcd. 21196, ¶ 21 (2007). Moreover, as discussed in more detail in Part III, the fact that Tribune could

a "top-four showing," as discussed in last year's *Local Ownership Reconsideration* for both markets.[5] Yet Applicants have failed to demonstrate that the benefits of these two top-four duopolies will outweigh the acknowledged harms. The Commission should reject Applicants' requests.

I. LEGAL STANDARD

This proceeding represents the first opportunity for the Commission to undertake the "case-by-case" review for top-four duopolies that it announced in its *Local Ownership Reconsideration* last year.[6] In any such review, a combination of familiar and new legal standards governs the Commission's review.

The Commission's General Transaction Review Standard. Under the Communications Act, the Commission will approve a proposed license transfer only if it first concludes that the transfer will serve "the public interest, convenience, and necessity."[7] 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."[8] Applicants, not opponents,

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create a top-four duopoly without seeking Commission approval provides evidence of how the parties might seek to circumvent their divestitures.

5 *2014 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, 32 FCC Rcd. 9802 (2017) ("*Local Ownership Reconsideration*"). In St. Louis, ATVA objects primarily to joint ownership of KDNL-TV (ABC) and KTVI (Fox).

6 The Commission is simultaneously considering a similar showing submitted by Gray Broadcasting. *See Public Notice, Media Bureau Seeks Comment on Top-four Showing In, and Extends Petition to Deny Date for, Application to Assign Stations from Red River Broadcast Co., LLC to Gray Television Licensee*, *LLC,* Public Notice, DA 18-596 (rel. June 7, 2018).

7 47 U.S.C. § 310(d); *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131, ¶ 2 (2015) ("*AT&T-DIRECTV*").

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

bear the burden of demonstrating that the proposed transaction serves the public interest.[9] 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."[10] Whether a transaction will create or enhance pricing power, leading to consumer price increases and related harms, ranks among the foremost "public interest harms" of concern to the Commission.[11] Likewise, a powerful public interest benefit is the possibility that the transaction will *decrease* retail prices.[12] The Commission has not hesitated to reject or place conditions on transactions where retransmission consent-related harms outweighed claimed benefits.[13]

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9 *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.").

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

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

12 *AT&T and 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.").

13 *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,

The "Case-By-Case" Review for Top-Four Duopolies. The Commission's local ownership rules prohibit transactions that would combine two or more top-four, full power, overlapping television stations.[14] Since November, however, the rules permit the Commission to set aside the top-four prohibition if, upon an applicant's request, it finds that doing so serves the public interest, convenience, and necessity.[15] In this analysis, the Commission will consider the specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis.[16]

The *Ownership Reconsideration Order* lists a variety of information that parties can provide to help establish that application of the top-four prohibition is not in the public interest.[17] This information specifically includes retransmission consent fees.[18] The broad formulation of the rule, moreover, indicates that the Commission must make the same sort of finding with respect to a proposed top-four duopoly that it must already make about the transaction generally—*i.e.*, that the asserted benefits of the top-four duopoly outweigh the harms of that duopoly. Just as the Commission counts the possibility of retail price hikes as a "harm" when it

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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 . . . .").

14 *See* 47 C.F.R. § 73.3555.

15 47 C.F.R. § 73.3555(b)(2).

16 *Id.*

17 *Local Ownership Reconsideration* ¶ 82.

18 *Id.*

considers transactions more generally under the public interest standard, it must likewise count such potential harm when it considers top-four duopolies under the same standard.[19]

Adherence to Prior Findings. In all of its activities, including the transaction and top-four duopoly reviews, the Commission must comply with the Administrative Procedure Act. Under the APA's prohibition against arbitrary or capricious agency action,[20] the Commission may reverse an explicit finding only if it offers a satisfactory explanation for doing so.[21] An agency must provide a more detailed explanation when, for example, "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[22]

II. THE COMMISSION CANNOT IGNORE THE TRANSACTION'S EFFECT ON CONSUMER PRICES.

In applying the legal standards discussed above, the Commission cannot ignore the harm caused by higher retransmission consent and consumer prices. The Commission must balance the harms and benefits of top-four duopolies. It has already found that such duopolies will raise retransmission consent prices and thus will result in consumer price increases. Additional evidence in this proceeding confirms the Commission's prior finding. In order to approve the proposed duopoly, the Commission must therefore conclude either that: (1) retransmission

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[19] In Part III, below, we discuss what appears to be Applicants' narrower view of the rules.

[20] 5 U.S.C. § 706(2)(A); *see Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545-49 (1978).

[21] *See Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. . . .").

[22] *Fox, supra*, 556 U.S. at 515.

consent harms do not exist for these particular duopolies (or that conditions will sufficiently address them); or (2) these particular duopolies offer benefits that outweigh the harms. This is not, as broadcasters have suggested, a new "pay TV-centric hurdle on top of the existing generally applicable public interest standard."[23] It *is* the public interest standard to be applied to this transaction.

A. The Commission Has Already Determined that Top-Four Duopolies Cause Harms.

The Commission has already found that the sort of combination proposed by applicants will lead to higher consumer prices. In its *Joint Negotiation Order*, the Commission explicitly and at length found that permitting a single entity to negotiate retransmission consent on behalf of more than one top-four station in a single market will "invariably tend to yield" higher retransmission consent fees.[24] It stated that "same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another."[25] It also found that such increases may cause pressure for retail price increases,[26] a harm that "outstrip[s]

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[23] Letter from Rick Kaplan to Marlene Dortch, MB Docket No. 14-50 *et al.* at 5 (filed Nov. 9, 2017) ("NAB Nov. 9 Letter").

[24] *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 10 (2014) ("*Joint Negotiation Order*") ("[J]oint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees."). Of course, the *Joint Negotiation Order* contained rules about joint negotiation among non-commonly owned stations. As we explained in an earlier *ex parte*, however, the Commission had no reason to issue rules about joint ownership because the Commission's rules already prohibited common ownership of such stations absent a specific waiver showing. And the *harms* caused by joint negotiation and joint ownership of top-four stations are precisely the same. If a party can increase prices when it can negotiate on behalf of two non-commonly owned top-four stations in a market, it can also increase prices when it owns two top-four stations in that market and negotiates for both. *See* Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216 *et al.* at 3 n.13 (Nov. 3, 2017) (citing economic studies).

[25] *Joint Negotiation Order* ¶ 13.

[26] *Id.* ¶ 17.

any efficiency benefits" from joint negotiation.[27] Congress later codified and expanded this rule.[28] The Department of Justice then relied on similar conclusions when it required divestitures in the Nexstar-Media General merger.[29]

The Commission's *Local Ownership Reconsideration* did not abandon this prior finding. It merely rejected the notion that the prior finding prevented the Commission from engaging in a case-by-case review.[30] The Commission concluded, in part, that "common ownership of two top-four stations implicates a broader range of potential benefits and harms than a narrow agreement between two top-four stations to jointly negotiate retransmission consent so there is no inherent inconsistency between adopting a bright-line rule in the latter case and a case-by-case review in the former case."[31] This, however, does not say that retransmission consent does not matter. It states that retransmission consent stands *among* a "broader range of potential benefits and harms" that the Commission must consider in deciding whether to grant a proposed

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[27] *Id.* ¶ 10 ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers.").

[28] STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv) (subsequent legislation requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common *de jure* control permitted under the regulations of the Commission . . . .").

[29] *See* Competitive Impact Statement at 8, *United States v. Nexstar Broad. Grp., Inc.*, No. 1:16-cv-01772-JDB (D.D.C. Sept. 2, 2016), *available at* https://www.justice.gov/atr/case-document/file/910661/download.

[30] *Local Ownership Reconsideration* ¶ 82 n.239.

[31] *Id.*

top-four duopoly. In the final analysis, in considering harms and benefits, the Commission cannot ignore a harm that it has already found to exist.[32]

B. Additional Evidence Submitted in This Proceeding Confirms the Harms Caused by Duopolies.

Additional evidence submitted by ATVA and its members in the last six months provide further support for the Commission's prior conclusions regarding top-four duopolies and retransmission consent prices.[33] In the Media Ownership proceeding, for example, executives of ATVA member companies testified that entities controlling more than one of the FOX, CBS, ABC, and NBC network affiliates in a single market can—and do—increase prices.[34]

More importantly, ATVA member DISH has presented empirical evidence in this proceeding confirming the Commission's earlier findings.[35] In a series of economic reports,

[32] The Commission has, to our knowledge, taken into account the harms of retransmission consent related to local-market consolidation at least three times. In one such case, the Commission declined to take action *because* of divestitures ordered by the Department of Justice. *Media General, Inc. and Nexstar Media Grp., Inc.*, 32 FCC Rcd. 183, ¶ 35 (2017) ("With the divestitures, the transaction will not significantly change whatever bargaining leverage Applicants currently have in the affected local markets."). In the other, the Commission found that, subject to certain conditions related to retransmission consent, the combination met the "failing station" standard for a waiver—*i.e.*, that the benefits outweighed the harms. *Fireweed Commc'ns LLC and Gray Television Licensee*, LLC, 31 FCC Rcd. 6997 (2016). And in the third, petitioners had raised issues of joint negotiation among non-commonly owned parties—an issue that was then pending in a rulemaking. The Commission chose to address the issue in the rulemaking context instead. *Belo Corp. and Gannett Co., Inc.*, 28 FCC Rcd. 16867 ¶ 31 (2013). In none of these cases did the Commission simply dismiss the retransmission consent-related harm caused by duopolies.

[33] *State Farm*, *supra*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . .").

[34] *See* Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216 *et al.* (filed Oct. 25) ("ATVA Oct. 25 Letter"), *attached hereto* as Exhibit A.

[35] *See* Declaration of Janusz Ordover, *attached to* Petition to Deny of DISH Network L.L.C., MB Docket No. 17-179 (filed Aug. 7, 2017) ("DISH Petition") ("Ordover Decl."); Declaration of William P. Zarakas and Jeremy A. Verlinda , *attached to* DISH Petition ("Zarakas and Verlinda Decl."); Reply Declaration of Janusz Ordover ¶ 11, *attached to* Reply Comments of DISH Network, L.L.C., MB Docket No. 17-179 (filed Aug. 29, 2017) ("DISH Reply") ("Ordover Reply Decl."); Reply

DISH used its own confidential data to confirm the Commission's findings that top-four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another. Thus, DISH demonstrated that an MVPD would lose more by the combined entity withholding both top-four stations simultaneously than by each party withholding its own top-four station separately.[36]

Applicants have not rebutted these findings. Applicants' economist did file an initial submission, in which he agreed with the economic theory presented by DISH but disputed aspects of DISH's evidence.[37] Yet Applicants have never responded to DISH's reply declarations containing the econometric analyses described above. Nor did Applicants submit their own analysis using their own data—data that would surely shed light on duopoly pricing issues.

Declaration of William P. Zarakas and Jeremy A. Verlinda *attached to* DISH Reply ("Zarakas and Verlinda Reply Decl.").

36 First, DISH conducted a regression analysis of subscriber cancellations in DMAs affected by a media group blackout. It compared (1) the combined impacts in a market where two stations were blacked out (even if they were unlike stations; i.e., one top-four network and one non top-four station) to (2) the sum of the impacts in a market where the broadcaster controls a top-four station and another market where the broadcaster controls a non-top-four station. DISH Reply at 37. It then adjusted the impact from the loss of a non top-four station to reflect the higher value of a top-four station by using the ratio of the retransmission fees that the associated broadcaster charges for top-four and non-top four stations, respectively. *Id.* DISH found that the impact on subscriber cancellations resulting from the loss of two local broadcast stations in the same market is greater than the sum of the individual impacts associated with the blackout of one local broadcast station in one market and another station in another market. *Id.* at 37-38.

37 Declaration of Gautam Gowrisankaran ¶ 38, *attached to* Applicants' Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 at 27 (filed Aug. 23, 2017) ("Applicants' Consolidated Opp.") ("Gowrisankaran Dec.") ("I agree with Dr. Ordover's general use of a bargaining model . . . .").

III. APPLICANTS FAIL TO SHOW THAT THE DUOPOLIES THEY SEEK WILL NOT INCREASE CONSUMER PRICES.

Acknowledgement of the consumer harms generally stemming from top-four duopolies does not end the analysis. Those seeking top-four duopolies can demonstrate that the harm the Commission has found to exist *generally* does not exist in particular markets—either because of peculiarities of the market itself or because Applicants propose conditions to address these harms.[38] This is why the Commission suggested in its *Local Ownership Reconsideration Order* that applicants submit data related to retransmission consent fees,[39] and why the Media Bureau last month specifically requested additional retransmission consent-related data.[40]

Here, however, Applicants make no attempt to address retransmission consent-related harms at all, including the harms found in the *Joint Negotiation Order*. Instead, the Applicants only provide ratings share data and revenue (including retransmission consent revenue) along with an overview of other competitors in the market. But they do not even attempt to argue (nor does their data show) that their proposed top-four duopolies would not cause retransmission consent prices to rise or that there is anything special about the markets in Indianapolis or St. Louis that should cause the Commission to deviate from its prior conclusions that joint negotiations by top-four stations will cause retransmission consent prices to rise.

Rather than show that their top-four duopolies would not affect retransmission consent prices, Applicants appear to suggest that the Commission should approve the proposed duopolies

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38 *Gen. Motors Corp. & Hughes Elecs. Corp., Transferors*, 19 FCC Rcd. 473, 510-13 (2004) (News Corp. proposes to be bound by the program access rules as a condition of purchasing DIRECTV). As discussed in Part IV, below, parties can also show that the purported benefits of their transaction outweighs the harms.

39 *Id.* ¶ 82.

40 *See, e.g.*, Letter from Michelle M. Carey to Miles S. Mason and Mace J. Rosenstein, MB Docket No. 17-179 (May 21, 2018) (requesting information related to retransmission consent revenues).

because they comport with two factors discussed in the *Local Ownership Reconsideration Order:* (1) they allegedly will not result in the merged entity holding outsize market share compared to other broadcasters; and (2) pre-merger, there is not a huge gap between the fourth and fifth ranked station.[41] But while those two factors may be relevant to the public-interest analysis,[42] the Commission has never suggested that those factors—or any other set of factors—are outcome determinative without regard to other harms caused by the proposed duopoly.[43] On the contrary, the applicants "must demonstrate that the benefits of the proposed transaction would outweigh the harms,"[44] which they cannot do without addressing the effect of their duopolies on retransmission consent.

Applicants' failure to address retransmission consent and consumer prices appears deliberate, as they earlier argued that retransmission consent issues "are not relevant to the public interest determination the Commission must make."[45] Congress, they argue, has already created a marketplace for retransmission consent.[46] When fees "are determined by the give and take of the marketplace, the public interest is served."[47] So even if this transaction permits Sinclair to increase retransmission consent fees significantly, "those higher rates reflect the marketplace at

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41 May 14 Amendment at 3; April Amendment at 6, 14.

42 *Local Ownership Reconsideration* ¶¶ 79, 80.

43 *Id.* ¶82 (2017) ("Given the variations in local markets and specific transactions, however, we do not believe that applicants would be well served by a rigid set of criteria for our case-by-case analysis.").

44 *Id.* at ¶82. Even if the Commission were to agree with Sinclair's view of the legal standard for a top-four showing—*i.e.*, that it is limited to the two factors raised by Sinclair—it would still have to consider retransmission consent and retail price increases as part of its broader transaction review, or explain why it is abandoning decades of precedent.

45 Applicants' Consolidated Opp. at 27.

46 *Id.* at 28.

47 *Id.*

work."[48] This position, however, ignores the most rudimentary aspects of any transaction review.[49] The facts demonstrate that this transaction will lead to higher consumer prices by increasing Applicants' leverage in retransmission consent negotiations. That Applicants characterize such negotiations as taking place in a marketplace has no bearing on whether this transaction will *change* that marketplace in a way that harms consumers and disserves the public interest.

In any event, Applicants ignore retransmission consent-related harms to consumers from the two duopolies entirely. In light of the failure to address consumer pricing at all, the Commission must conclude that the transaction will place upward pressure on retransmission consent rates in these markets, and ultimately will raise consumers' bills.

IV. APPLICANTS HAVE NOT DEMONSTRATED THAT THE BENEFITS OF THIS TRANSACTION WILL OUTWEIGH THE HARMS.

Having failed to show that their proposed duopolies would not cause retransmission consent-related harms (or that conditions would ameliorate those harms), Applicants can succeed in only one way—by establishing public-interest benefits from the duopolies that outweigh these harms. Here again, however, they come short.

- In St. Louis, Sinclair claims that formerly-independent KDNL (now Tribune's ABC affiliate) offered limited news for years and now offers no local news.[50] It states that, if permitted to combine KDNL with KTVI (Sinclair's Fox affiliate), Sinclair would plan to

[48] *Id.* at 31.

[49] As ATVA member ACA has suggested, the most generous reading of Sinclair's remarkable assertion is not that higher prices don't cause harm, but instead that any consumer harms from higher prices are outweighed by public interest benefits purportedly stemming from such increases. Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 17-318 (filed June 16, 2018).

[50] April Amendment at 16.

add newscasts and staffing to KDNL.[51] This, in turn, would result in simultaneous and distinct newscasts on the two stations "to produce community-driven and hyper-local news."[52] Alternatively, Sinclair claims that if the Commission permits it to own KTVI and KPLR-TV, it would continue to produce news and local programming that Tribune is already producing.[53]

- In Indianapolis, Sinclair argues that Tribune's duopoly of WTTV and WXIN has been able to produce more news and local programming since WTTV obtained its CBS affiliation in 2015.[54] Permitting Sinclair to own both of these stations would "simply maintain the status quo" with respect to these claimed benefits.[55]

These claimed benefits, however, do not come close to outweighing the retransmission consent harms the Commission has previously found and which DISH's economic analysis reiterates.[56] Indeed, these claimed benefits are not cognizable under long-established Commission precedent because they are neither transaction-specific nor verifiable.

The Claimed Benefits are Not Transaction-Specific. Claimed public interest benefits must be transaction-specific. "That is, the claimed benefit must be *likely* to occur as a result of

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51 *Id.*

52 *Id.*

53 May Amendment at 4-5.

54 April Amendment at 9.

55 *Id.* at 11.

56 *Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶227 (2011) ("The Commission applies a 'sliding scale approach' to its ultimate evaluation of benefit claims. Where potential harms appear both substantial and likely, the Applicants' demonstration of claimed benefits must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand. On the other hand, where potential harms appear less likely and less substantial, we will accept a lesser showing.").

the transaction but *unlikely* to be realized by other practical means having less anticompetitive effect."[57] Applicants have demonstrated neither that the benefits they cite are likely to occur as a result of the transaction nor that they are unlikely to be realized otherwise.[58]

First, Sinclair's promise of more local news is not a quantifiable and enforceable commitment.[59] In the past, the Commission has relied on enforceable commitments in weighing asserted benefits.[60] Without such specific and enforceable commitments, however, the Commission has no basis to ensure that the public actually receives the benefits of the promised news offerings. Particularly in cases of significant harm (such as here), the Commission should not rely on "mere speculation and promises about post-merger behavior."[61]

Nor can the Commission conclude that the more money Sinclair makes from its duopolies, the more money it will spend on local news. The Commission has no basis to conclude that Sinclair would spend its increased revenues on improving local news. Here,

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57 *AT&T-DIRECTV* ¶ 273 (emphasis added).

58 *Id.*

59 Indeed, Sinclair cites *maintenance* of the *status quo* as a claimed benefit in Indianapolis.

60 *AT&T-DIRECTV* at 9277-79; *XM Satellite-Sirius* at 12394-417; *Qwest Commc'ns Int'l Inc. & Centurytel, Inc. d/b/a Centurylink for Consent to Transfer Control*, 26 FCC Rcd. 4194, 4211 (2011) ("CenturyLink's broadband deployment and adoption commitments constitute public interest benefits. We emphasize that these voluntary commitments rely on private investment, and do not rely on public funding sources such as universal service support. This type of private-sector investment in broadband, and the competition it will promote among providers, is critical to ensuring a healthy and innovative broadband ecosystem and to encouraging new products and services that benefit American consumers and businesses of every size. These commitments are consistent with the Applicants' asserted benefit of focusing on local communities and rural customers; accordingly, we accept these commitments and make them binding and enforceable conditions of our approval.").

61 *Echo Star Commc'ns Corp.*, 17 FCC Rcd. 20559, ¶ 102 (2002) ("Moreover, given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior.") (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001)).

Sinclair's past and recent conduct seems especially relevant. It has made headlines lately precisely because of attempts to replace local news with regional or national segments dictated from corporate headquarters.[62] The record in this proceeding, moreover, shows that Sinclair has a long history of shedding local news assets after acquiring stations.[63] Sinclair seems particularly *unlikely* to devote additional revenues to improving local news coverage in light of this evidence to the contrary.

Even if one were to believe Sinclair's promises, Sinclair cannot show that such improvements are "unlikely to be realized otherwise."

- As DISH has shown, Tribune has a much better record on news issues than does Sinclair.[64] It thus remains likely that Tribune *on its own* would offer better news programming than a combined Sinclair-Tribune.
- Sinclair claims that efficiencies caused by the proposed duopolies will permit extra news coverage.[65] Sinclair nowhere explains, however, why it could not obtain these particular efficiencies (sharing of news facilities, for example) through contract—even though Sinclair claims that this is what it uses "sidecars" for.[66] Nor, for that matter,

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62 Timothy Burke, *How America's Largest Local TV Owner Turned Its News Anchors Into Soldiers In Trump's War On The Media*, Deadspin (Mar. 31, 2018), https://theconcourse.deadspin.com/how-americas-largest-local-tv-owner-turned-its-newsanc-1824233490.

63 DISH Petition at 49-56, Free Press PTD at 22-23.

64 DISH Petition at 59.

65 April Amendment at 16 ("The merger of KDNL-TV's newsroom with the KTVI newsroom would enable Sinclair to leverage Tribune's existing news operations and to add news in the DMA.").

66 *E.g.*, Letter from Barry Faber to Marlene Dortch, MB Docket No. 09-182 (Dec. 6, 2012) (suggesting that cost savings from JSAs "generally result from the efficiencies inherent in combining operations in a single location and from requiring fewer employees to perform combined tasks for two television stations (such as management, engineering, finance, master control, traffic, etc.)" and arguing that "such arrangements have prevented the demise of numerous failing stations and have allowed

does Sinclair explain why the other alleged efficiencies from this transaction in *non*-duopoly markets could not be directed to pay for additional news coverage in duopoly markets.

Applicants' showing is not transaction-specific for yet another reason. The Commission did not eliminate the top-four duopoly prohibition. Rather, it created an exception to the general rule meant to apply "based on the circumstances in a particular market or with respect to a particular transaction."[67] Accordingly, the Commission should not consider alleged benefits claimed to be true *generally*. Benefits that hold true across many or most local markets cannot logically form the basis of a showing that is supposed to be specific to *a particular* market or markets. They are, at best, evidence that the Commission should permit duopolies more generally—a conclusion that the Commission rejected last year. Here, Applicants make no effort to explain why the benefits they cite are specific to St. Louis or Indianapolis. They make, instead, *generalized* claims that they will spend more money on news if permitted to merge. Such "benefits," even if they existed, could not be used as a justification for a "market-specific" exception to the general rule. Were the Commission to permit a duopoly based on such a showing, the exception would quickly swallow the rule itself.

The Claimed Benefits are Not Verifiable. Claimed benefits must also be verifiable.[68] Applicants have the burden of providing sufficient evidence to support each claimed benefit to enable the Commission to verify its likelihood and magnitude. The Commission discounts

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licensees to take advantage of improved financial situations to bring diverse programming to the video marketplace, which benefits the viewing public.").

67 *Local Ownership Reconsideration Order* ¶ 78.

68 *AT&T-DIRECTV* ¶ 274.

speculative benefits that it cannot verify. Moreover, "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present."[69]

Sinclair has made no claims as to the timing of its promised improvements to St. Louis and Indianapolis news services. Accordingly, all such claims are "speculative" in that they may occur only in the "distant future." More generally, while some of the claimed news improvements are sufficiently specific for the Commission to verify,[70] others are not. Some claims of news improvements—such as the promise to "expand the stations' investigative reporting" in Indianapolis[71]—are far too vague to be verified by the Commission. Likewise, the Commission should ignore claims of a new, "hyper-local" focus for news, as Sinclair has provided no basis by which the Commission can verify this claim.[72] Sinclair has failed to explain, for example, how much news must be "hyper-local" to validate this clam. Nor has it explained what counts as "hyper-local" for these purposes.

V. SINCLAIR SHOULD NOT BE ALLOWED TO CIRCUMVENT THE COMMISSION'S LOCAL OWNERSHIP RULES AND ITS PROHIBITION ON JOINT RETRANSMISSION CONSENT NEGOTIATIONS.

When Sinclair first proposed to acquire Tribune, it sought to create numerous top-four duopolies in violation of the Commission rules. After a year of different proposals, Sinclair has now settled on a plan to divest stations in most of those markets, seeking to create or maintain

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[69] *Id.* (citing *Echostar HDO*, 17 FCC Rcd. at 20630-31 (2002)).

[70] April Amendment at 16 (listing specific newscasts "planned" for St. Louis).

[71] *Id.* at 11.

[72] *Id.* at 16 (discussing "hyper-local" strategy for St. Louis).

duopolies only in St. Louis and Indianapolis.[73] Just as the Commission examines the duopolies Sinclair officially seeks, it should examine each of Sinclair's purported divestitures in what otherwise would be duopoly markets to ensure that they are genuine—particularly in light of Sinclair's past conduct involving allegedly "independent" television stations.

To begin with, some of Applicants' proposed divestitures contemplate an official ongoing commercial relationship between Sinclair and the proposed divestiture party through Joint Sales and Shared Services agreements. These agreements, on their face, place responsibility for retransmission consent issues in the hands of the divestiture party.[74] For example, the "Form of Shared Service Agreement" with Armstrong purports to give Sinclair responsibility only for technical issues, promotions, and back office management, while leaving authority to negotiate retransmission consent with Armstrong.[75] Yet this alone does not prevent Sinclair and Armstrong from engaging in a wide variety of coordination with respect to retransmission consent, including through informal, non-binding, and secret arrangements. Indeed, the agreement seems to facilitate such prohibited retransmission consent coordination. Under this agreement, Sinclair gets paid only after *it* delivers to Armstrong a "monthly statement" of "net

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73 May Amendment, Attachment 1 (listing divestitures).

74 *E.g.*, Joint Sales Agreement, available at https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101784249&qnum=5040&copynum=1&exhcnum=2 ("Armstrong Form JSA"); (requiring station to elect retransmission consent); Shared Services Agreement, available at https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101784249&qnum=5040&copynum=1&exhcnum=3 ("Armstrong Form of SSA") ("Station Licensee shall retain the authority (a) to make elections for must-carry or retransmission consent status, as permitted under the FCC Rules, and (b) to negotiate, execute, and deliver retransmission consent agreements with cable, satellite, and other multichannel video providers ("MVPDs") for which Station Licensee has provided timely notice of its election of retransmission consent.").

75 Armstrong Form of SSA ¶ 6.

sales revenue"—a term defined to include retransmission consent revenue.[76] Moreover, Sinclair's payments appear to depend in part on how high such revenues are.[77] Here, in other words, the four corners of the document contemplate Sinclair having information related to Armstrong's retransmission consent pricing. This would violate the prohibition on joint negotiation within a market, which prohibits "any informal, formal, tacit or other agreement and/or conduct that signals or is designed to facilitate collusion regarding retransmission terms or agreements between or among . . . broadcast television stations that are not commonly owned and that serve the same DMA."[78]

Other details about divestitures meant to comply with the *national* ownership cap raise serious doubts about whether Sinclair's proposed *duopoly* divestitures are real. According to recent press reports, a number of Sinclair's proposed national-cap divestitures involve sales to

[76] *Id.* Schedule A ¶ 3 (incorporating by reference JSA Schedule 3.1); Armstrong Form JSA Schedule 3.1, ¶ 1. ("Net Sales Revenue. For purposes of this Agreement, the term 'Net Sales Revenue' means (i) all gross revenue received by Sales Agent or Station Licensee for all Advertisements, less agency, buying service or other sales commissions paid to or withheld by an advertiser, agency or service, as the case may be, (ii) any network compensation or other similar payments (net of any expenses for reverse retransmission payments other expenditures paid by Station Licensee or otherwise paid in respect of the Station pursuant to applicable network agreements) made to Station Licensee or otherwise paid in respect of the Station or its programming, (iii) any retransmission fees or other similar payments (net of any expenditures paid pursuant to applicable retransmission consent agreements and/or OTT agreements) made to Station Licensee or otherwise paid in respect of the Station or its programming or other payments made to Station Licensee pursuant to any retransmission consent agreements and (iv) any other amounts designated for inclusion in the calculation of Net Sales Revenue pursuant to the terms and subject to the conditions of this Agreement.").

[77] *Id.*

[78] *Joint Negotiation Order* ¶ 27. The Commission replaced its original joint negotiation rules after Congress enacted its own version of the rule in STELAR, which is not limited to top-four combinations. 47 C.F.R. § 76.65(b)(1)(viii) (prohibiting joint negotiation among non-commonly broadcasters within a single local market). The Commission described the new version as "broader than, and thus supersed[ing], the Commission's [then-] existing prohibition." *Implementation of Sections 101, 103 & 105 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd. 2380, ¶ 4 (2015). We thus understand the new rule to encompass the prior rule's prohibition on information sharing.

close friends of its CEO at prices that are significantly below market value. For example, Sinclair proposes to sell three stations to Armstrong Williams, "a longtime friend of Sinclair Executive Chairman David Smith" for about $4.95 million—a price that is "$45 million to $55 million less than what Justin Nielson, a senior research analyst who tracks the broadcast sector for the data and research firm Kagan, said he would have expected."[79] The same report notes that Sinclair plans to sell another group of stations to Cunningham, "a company with close ties to the Smith family" in a deal that "could have left as much as $40 million on the table." Of course, profit-maximizing businesses do not ordinarily leave tens of millions of dollars on the table, which suggests that something else is going on here. If Sinclair is "selling" stations to allies for fractions of their fair-market value, that strongly suggests that it is not truly ceding control or that it expects to receive something else in return.[80] Nor is it any mystery what Sinclair stands to gain by retaining influence or control over stations they divest to comply with the Commission's rules: keeping "divested" stations "close at hand" gives Sinclair "increased leverage in negotiating the fees that cable companies pay to carry their stations, as well as the fees Sinclair pays networks for their affiliations."[81]

More broadly, in light of Commission findings that Sinclair has impermissibly negotiated retransmission consent agreements on behalf of putatively independent stations,[82] we are

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[79] Jason Schwartz, *Armstrong Williams got 'sweetheart' deal from Sinclair*, Politico (June 13, 2018), https://www.politico.com/story/2018/06/13/sinclair-broadcasting-armstrong-williams-642997.

[80] *Edwin L. Edwards, Sr (Transferor) and Carolyn C. Smith (Transferee) for Consent to the Transfer*, 16 FCC Rcd. 22236, ¶24 (2001) ("Further, the structuring of the Sullivan III transaction to allow Sinclair to pay almost all of the purchase price of the Sullivan III stations and Glencairn to obtain these stations at a small fraction of their value underscores the fact that it was Sinclair, and not Edwards, that made the decision as to what stations Glencairn should acquire and at what price.").

[81] Schwartz, *supra.*

[82] *See Sinclair Broad. Grp., Inc.*, 31 FCC Rcd. 8576, ¶ 4 (2016).

concerned about the possibility that Sinclair might have engaged in undisclosed "understandings" with divestiture partners, or may enter into agreements after obtaining Commission approval, that would enable it to engage in prohibited joint negotiation in putative duopoly markets. Two years ago, the Commission found that Sinclair had violated the prohibition on joint retransmission consent negotiations in a single market and announced a consent decree in which Sinclair paid nearly $10 million to settle the proceeding.

- "Sinclair represented numerous Non-Sinclair Stations in retransmission consent negotiations with MVPDs between April 2, 2015 (the effective date of the Commission's rule implementing the statutory prohibition on joint negotiation) and November 30, 2015."[83]
- "More specifically, during this time period, Sinclair negotiated retransmission consent on behalf of, or coordinated negotiations with, a total of 36 Non-Sinclair Stations with which it had JSAs, LMAs, or SSAs, concurrently with its negotiation for retransmission consent of at least one Sinclair Station in the same local market."[84]
- "These negotiations involved a total of six different MVPDs, and in some instances Sinclair represented the same Non-Sinclair Station in retransmission consent negotiations with multiple MVPDs."[85]

Unfortunately, Sinclair's cavalier approach to the Commission's rules appears to be continuing in this proceeding. ATVA member ACA noted that Sinclair has unilaterally withheld numerous agreements, schedules, exhibits, and related documents, including materials that

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[83] *Id.*

[84] *Id.*

[85] *Id.*

appear to contemplate ongoing relationships between Sinclair and the parties to whom it will putatively divest stations.[86] Sinclair determined *not* to supply many of these materials because it unilaterally concluded that they either "contain proprietary information" (notwithstanding procedures in place for protecting such information from disclosure[87]) or "are not germane to the Commission's consideration of this application."[88]

Of course, stations routinely enter into any number of arrangements (including JSAs, SSA, and LMAs) for perfectly valid reasons. Yet, even if the Commission permits such arrangements generally, it should not permit parties to use them to circumvent media ownership and joint retransmission consent negotiation rules—particularly with a party that has a recent history of violating these very rules. Accordingly:

- The Commission should, as an initial matter, require Applicants to submit for review *all* agreements, arrangements, and understandings among themselves and divestiture parties with respect to the divested stations. This should, of course, apply to all such arrangements that exist now. It should also apply, as a condition of approval, to arrangements that the parties enter into after closing.
- Second, the FCC should adopt the approach the Department of Justice took in a much smaller merger—prohibiting most such arrangements between Applicants and their

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[86] *See* Letter from Ross Lieberman to Marlene Dortch, MB Docket No. 17-179 (filed May 24, 2018).

[87] *See Tribune Media Co. & Sinclair Broad. Grp., Inc.*, 32 FCC Rcd. 5612 (MB 2017) (issuing protective order).

[88] *Application for Consent to Assignment of Broad. Station Construction Permit or License*, File No. BALCDT-20180514AAU (filed May 14, 2018) ("KCPQ Transfer") (transfer of KCPQ from Tribune to Fox).

divestiture counterparties.[89] (While the FCC's local media ownership rules were different then, the competitive harm that DOJ sought to remedy—namely, ensuring that prevented the merging parties from raising retransmission consent prices to consumers—was exactly the same as that faced here.[90])

- Third, if the Commission does not prohibit these arrangements altogether, Sinclair should not be allowed to retain significant influence over the divested station's finances,

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89 Final Judgment at 16, *United States v. Nexstar Broad. Grp., Inc.*, No.1:16-cv-01772-JDB (D.D.C., Nov. 16, 2016), *available at* https://www.justice.gov/atr/case-document/file/925071/download ("Defendants may not (1) reacquire any part of the Divestiture Assets, (2) acquire any option to reacquire any part of the Divestiture Assets or to assign the Divestiture Assets to any other person, (3) enter into any local marketing agreement, joint sales agreement, other cooperative selling arrangement, or shared services agreement, or conduct other business negotiations jointly with the Acquirers with respect to the Divestiture Assets, or (4) provide financing or guarantees of financing with respect to the Divestiture Assets, during the term of this Final Judgment. The shared services prohibition does not preclude Defendants from continuing or entering into agreements in a form customarily used in the industry to (1) share news helicopters or (2) pool generic video footage that does not include recording a reporter or other on-air talent, and does not preclude Defendants from entering into any non-sales-related shared services agreement or transition services agreement that is approved in advance by the United States in its sole discretion.").

90 Competitive Impact Statement at 8-9, *United States v. Nexstar Broad. Grp., Inc.*, No. 1:16-cv-01772-JDB (D.D.C., Sept. 2, 2016), *available at* https://www.justice.gov/atr/case-document/file/910661/download ("The proposed merger would also diminish competition in the negotiation of retransmission agreements with MVPDs in the DMA Markets. The acquisition would provide Nexstar with the ability to threaten MVPDs in each of the DMA Markets with the simultaneous blackout of at least two major broadcast networks: its own network(s) and Media General's network(s). That threatened loss of programming, and the resulting diminution of an MVPD's subscribers and profits, would significantly strengthen Nexstar's bargaining position. Prior to the merger, an MVPD's failure to reach a retransmission agreement with Nexstar for a broadcast television station might result in a blackout of that station and threaten some subscriber loss for the MVPD. But because the MVPD would still be able to offer programming on Media General's major network affiliates, which are at least partial substitutes for Nexstar's affiliates, many MVPD subscribers would simply switch stations instead of cancelling their MVPD subscriptions. After the merger, an MVPD negotiating with Nexstar over a retransmission agreement could be faced with the prospect of a dual blackout of major broadcast networks (or worse), a result more likely to cause the MVPD to lose subscribers and therefore to accede to Nexstar's retransmission fee demands. For these reasons, the loss of competition between the Nexstar and Media General stations in each DMA Market 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.").

personnel and programming, the traditional indicia of control employed by the Commission.[91] The Commission should examine all relevant information in making this determination, including the price at which divestiture stations are sold, the identity of the buyer, and the nature of any ongoing relationships between the parties. In doing so, it should prohibit any arrangements that violate the prohibition on joint retransmission consent negotiation, including those that permit or facilitate unlawful information sharing, or in which one party is paid based on another party's retransmission consent revenues.

- Fourth, the Commission should clarify that, to the extent *Tribune* stations are being divested, Sinclair should not acquire or obtain control of such stations prior to transfer, regardless of whether the transfer takes place immediately before or immediately after closing.[92] As ACA has explained, if Sinclair were to obtain control of such stations, it could cause those station's rates to "jump" to higher, Sinclair-imposed rates through the operation of "after-acquired station" clauses between Sinclair and MVPDs. Under existing precedent, Sinclair would not obtain such control.[93] Yet additional clarity would be useful, particularly in light of Sinclair's past behavior.

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91 *Stereo Broadcasters*, 87 F.C.C. 2d 87, ¶ 29 (1981); *see also, e.g.*, *News International PLLC*, 97 F.C.C. 2d 349, ¶ 20 (1984) (describing finances, personnel, and programming as "the three most important factors in determining control"); 47 C.F.R. § 73.3555 notes 2(j) and (k) (specifying that time brokerage and joint sales agreements, respectively, must leave stations with ultimate control over "facilities including, specifically, control over station finances, personnel and programming").

92 *See* May Amendment at 6 n.16 ("Stations marked with a * will be divested immediately after consummation of the Transaction. Stations marked with a ** will be divested immediately prior to consummation of the Transaction.").

93 *John H. Phipps, Inc. and WCTV Licensee Corp.*, 11 FCC Rcd. 13053, ¶ 9 (1996) (permitting non-substantive "essentially instantaneous" transfers to complete complex transactions).

CONCLUSION

For the reasons stated herein, and in ATVA's August 2017 Comments, the Commission should reject Sinclair's proposal to increase consumer prices through the creation of top-four duopolies. At a minimum, it should impose conditions designed to prevent future abuses and increased consumer bills.

Respectfully Submitted,

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June 20, 2018

CERTIFICATE OF SERVICE

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