Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION TO DENY OF THE ATTORNEYS GENERAL OF THE STATES OF ILLINOIS, IOWA, AND RHODE ISLAND

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June 20, 2018

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The Attorneys General of the States of Illinois, Iowa, and Rhode Island submit this Petition to Deny the Applications of the Sinclair Broadcast Group, Inc. ("Sinclair") and the Tribune Media Company ("Tribune") (jointly "Applicants") to Transfer Control of Tribune's full-power broadcast televisions stations, low-power television stations, and TV translator stations to Sinclair. The requested transfer of control would make the "largest local news provider in the country"[1] even larger and remove independent voices from the marketplace, rather than promote the Commission's long-held principles of diversity, localism, and competition. As the chief consumer protection and law enforcement officers in our respective states, we are responsible for promoting and defending the public interest. The massive consolidation proposed in these applications violates the law and fails to further the public interest. We ask the Commission to grant our Petition to Deny the license and other transfers requested by Applicants in the Amendment to June Comprehensive Exhibit filed on April 24, 2018 ("Amendment to June Comprehensive Exhibit"),[2] and the Divestiture Trust Application filed on May 14, 2018 ("May Divestiture Amendment").[3]

I. CONTEXT AND IMPACT OF THE PROPOSED MERGER

For approximately 70 years, broadcast television has played a central and indispensable role in informing, challenging, and entertaining the American public. Throughout most of broadcast television's history, the Commission saw the importance of placing limits on the

[1] FCC, "Sinclair and Tribune, MB Docket 17-179," available at: https://www.fcc.gov/transaction/sinclair-tribune (accessed June 18, 2018).

[2] *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) (hereinafter "Amendment to June Comprehensive Exhibit").

[3] *Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License*, MB Docket No. 17-179 Divestiture Trust Application, Comprehensive Exhibit, File Nos. ETCCDT-20185014ABC, BALCDT-20180514ABW (filed May 14, 2018) (hereinafter "May Divestiture Amendment").

number of television stations that could be owned, operated, or controlled by one entity. In 1985, the Commission recognized the need to combat excessive broadcast television consolidation that could reduce the diversity of viewpoints available to the public and adopted a national television audience reach cap, limiting the number of households nationwide that a single owner is permitted to serve.[4] Congress enshrined the national audience reach limit in statute in the Telecommunications Act of 1996[5] and Consolidated Appropriations Act of 2004.[6]

The Commission and the Courts have recognized that limitations on broadcast television consolidation are necessary to preserve values fundamental to our democracy. Specifically, limits on media consolidation are based on preserving the "marketplace of ideas" upon which the freedoms of speech, of the press, and of association protected by the First Amendment to the United States Constitution are premised. The Commission has found that the principles of diversity, localism, and competition are core values that should be preserved to protect multiple sources of information and opinion and keep broadcast television relevant and accountable to local communities. Commission rules, such as the "Top-Four Prohibition," provide assurance to the public that the media marketplace will continue to serve the public interest consistent with the functioning of our democracy and provide station owners with clear guidance about the limits of consolidation.

The transfers requested by Applicants are not transfers that will enable struggling or economically challenged stations to create opportunities for more diversity, localism, and competition among the country's broadcast stations. Both Sinclair and Tribune are large

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[4] *See* Report & Order, *In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 31 FCC Rcd. 10213, 10214–15 ¶ 4 (Sept. 6, 2016) (hereinafter "2016 National Ownership Amendment").

[5] 47 U.S.C. §202(c)(1)(B); Pub. L. No. 104-104, 110 Stat. 111 (1996).

[6] Pub. L. No. 108-199, 118 Stat. 99 (2004).

companies. Sinclair *is already the largest local news provider in the country* and owns or operates 192 broadcast television stations, consisting of 611 channels, in 89 markets, with affiliations with all major networks.[7] Tribune owns 42 stations, including seven in the top ten markets.[8] The Applicants' Amendment to June Comprehensive Exhibit shows that Sinclair is seeking to increase its already substantial holdings and expand its reach into 105 markets, reaching 58.77% of the nation's television households, assuming all proposed divestitures go through.[9] The requested transfer of control would make the "largest local news provider in the country"[10] even larger while removing independent voices from the marketplace. The promised yet vague divestitures offered by the Applicants in an attempt to avoid the limitations that otherwise would preclude this massive consolidation should be rejected as inadequate by the Commission.

As presented below, the Commission should deny this over-sized media conglomeration because it:

(1) Creates excessive consolidation, unreasonably reducing the number of voices in the broadcast television marketplace, by allowing one company to reach 58.77% of the nation's television households, even assuming all proposed divestitures occur;[11]

(2) Violates the Commission's broadcast television consolidation rules;

(3) Compromises the values of localism, competition, and diversity; and

(4) Is not in the public interest.

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[7] Sinclair Broadcast Group, Inc., "About," available at: sbgi.net/#About (accessed June 13, 2018).

[8] Tribune Media Company, "About Tribune Media," available at: www.tribunemedia.com/about-tribune-media/ (accessed June 13, 2018).

[9] Amendment to June Comprehensive Exhibit, at Ex. J.

[10] See the FCC's description of the transaction at: https://www.fcc.gov/transaction/sinclair-tribune.

[11] *Id*.

In addition, the Applicants attempt to argue that despite the excessive reach of this transfer of control, Sinclair's plan to divest some stations addresses fundamental obstacles to approval. The Commission should grant this Petition to Deny despite the divestiture plan because Applicants' divesture plan is indefinite, does not demonstrate that the divested stations will not be controlled by Sinclair, and withholds the answers to key questions of control of the divested stations from the public and from the Commission.

II. STATES' INTERESTS

The Attorneys General of the States of Illinois, Iowa, and Rhode Island are responsible for protecting the public interest in their respective states, including the public interest in access to diverse, competitive and local broadcast media. Federal law establishes the scope of broadcast television consolidation and obligations, and state attorneys general represent the interest of their residents in ensuring that federal laws and regulations are applied to protect the public interest in their states.

The Applicants' proposed transfer of control will have a direct effect on the residents of the states represented in this Petition to Deny. Audiences served by broadcast markets in 36 states, including Illinois and Iowa, are affected by the proposed transfer of ownership. Stations serving audiences in Illinois and Iowa are the subject of divestiture plans, which raise additional questions about the terms of the divestitures, whether they are consistent with law, and whether they will reduce market consolidation. A shift in ownership of critical broadcast media of this scale requires a clear-eyed application of the law guided by principles established to protect the public interest both in a vibrant and diverse broadcast media market and in access to multiple voices, multiple viewpoints, and local freedom to broadcast locally relevant and locally desired content.

Sinclair has already demonstrated the danger of excessive consolidation limiting local options. Sinclair-owned stations receive news stories and features that are run in the local evening or morning newscasts, often without modification.[12] Local preferences are lost in both news and other contexts like sporting, religious, or scientific programming if, as a result of excessive consolidation, a large owner requires all of its stations to show particular news reports or opinions, sporting contests, religious celebrations, or scientific perspectives, regardless of the popularity of those news reports, sports, celebrations, or perspectives in various localities.

Our states also have an interest in ensuring that the rules applicable to transfer licenses are fairly and correctly applied and that any resulting transfers conform to the law. Given recent and ongoing rule changes, appeals, and policy discussions, the states have an obligation to participate in proceedings where these changes are being applied.

III. THE PROPOSED MERGER IMPROPERLY EXCEEDS THE NATIONAL AUDIENCE REACH LIMIT AND SHOULD BE REJECTED.

The proposed Sinclair-Tribune merger, if approved, would create the largest broadcast television ownership entity in the United States. This combined entity would reach nearly 70 million television viewers, constituting 58.77% of the national television audience, assuming certain stations are divested. Such unparalleled access by a single owner to more than half of the television viewing audience conflicts with federal law and would harm the public interest by reducing sorely needed competition, diversity, and localism in the broadcast television sphere.

[12] *See, e.g.,* PBS News Hour, "How Sinclair Broadcasting puts a partisan tilt on trusted local news," Oct. 10, 2017, available at: https://www.pbs.org/newshour/show/sinclair-broadcasting-puts-partisan-tilt-trusted-local-news; The New York Times, "Sinclair Made Dozens of Local News Anchors Recite the Same Script," April 2, 2018, available at: https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html; AdWeek, "Should Sinclair's Must-Runs Be Labeled Commentary, and Who Should Read Them on Air," Apr. 15, 2018, available at: https://www.adweek.com/tv-video/should-sinclairs-must-runs-be-marked-as-commentary-and-who-should-really-be-reading-them/.

By reaching 58.77% of United State television households, the Sinclair-Tribune merger would exceed the 39% national audience reach cap set by Congress in 2004.[13] The national audience reach cap, which was originally the creation of this Commission, is intended to protect "localism, diversity, and competition" by "temper[ing] the ability of the largest group owners to dramatically increase their national coverage area … while giving smaller group owners some opportunity to expand."[14] If allowed, this merger would greatly exceed the limits set by Congress in violation of these principles.

Sinclair and Tribune contend that the new entity would reach 37.39% of television-viewing households (assuming all proposed divestitures occur)[15]—just below the 39% limit. Sinclair and Tribune are able to characterize their proposed merger as below the cap only by applying the so-called UHF Discount, which counts only 50% of the television households reached by UHF stations when calculating national audience reach. However, the UHF Discount—which the Commission eliminated in August 2016,[16] reinstated in April 2017,[17] and is currently reviewing again[18]—is outdated, does not reflect today's technical reality, and should not be used to calculate national audience reach.

In 1985, the Commission acted pursuant to the public interest when it adopted the UHF Discount. It did so during "the analog television broadcasting era, [in which] UHF signals

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[13] Pub. L. No. 108-199, 118 Stat. 99 (2004).

[14] 2016 National Ownership Amendment, 31 FCC Rcd. at 10214–15 ¶ 4.

[15] Amendment to June Comprehensive Exhibit, at Ex. J.

[16] 2016 National Ownership Amendment, 31 FCC Rcd. at 10214 ¶ 3.

[17] Order on Reconsideration, *In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, 32 FCC Rcd. 3390 (Apr. 21, 2017) (hereinafter "2017 National Audience Reach Order on Reconsideration").

[18] *See* Notice of Proposed Rulemaking, *In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Dkt. No. 17-318, 2017 WL 6507164 ¶ 5 (F.C.C.) (released Dec. 18, 2017) (hereinafter "2017 National Ownership NPRM").

reached a smaller audience in comparison with VHF signals."[19] At that time, UHF signals, relative to their VHF counterparts, "decreased more rapidly with distance … resulting in significantly smaller coverage areas and smaller audience reach."[20] But following the transition of television signals from analog to digital in 2009, the technical limitations upon which the UHF Discount had been based ceased to exist.[21]

Application of the UHF Discount is not justified here. The Commission eliminated the UHF Discount in 2016, and while a new administration reinstated it the following year, it did so on the narrow ground that the UHF Discount and national audience reach cap should have been evaluated together.[22] For both decisions, there was unanimity within the Commission that "the UHF discount no longer has a sound technical basis following the digital television transition."[23] Indeed, the Commission is currently re-evaluating the UHF Discount and the national audience reach cap.[24] Furthermore, the U.S. Court of Appeals for the D.C. Circuit is currently reviewing whether the Commission acted properly in reinstating the UHF Discount.[25] A transaction of this magnitude should not be permitted to proceed using a measurement that the Commission itself

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[19] *Id.* ¶ 2.

[20] 2016 National Ownership Amendment, 31 FCC Rcd. at 10215 ¶ 5.

[21] *See, e.g.*, *id.* at 10214 ¶ 3 ("But while UHF channels may have been inferior for purposes of broadcasting in analog, experience since the DTV transition demonstrates that UHF channels are equal, if not superior, to VHF channels for the digital transmission of television signals.").

[22] 2017 National Audience Reach Order on Reconsideration, 32 FCC Rcd. at 3390–91 ¶1.

[23] *Id.* at 3395 ¶ 14; *see also* 2016 National Ownership Amendment, 31 FCC Rcd. at 10226 ¶ 28 ("The record is absolutely clear: UHF stations are no longer technically inferior in any way to VHF stations."); *id.* at 10247 (Comm'r Pai, dissenting) ("To be sure, the technical basis for the UHF discount no longer exists."); *id.* at 10251 (Comm'r O'Rielly, dissenting) ("It is clear that UHF television stations are no longer less desirable or less technology-capable than VHF stations.").

[24] 2017 National Ownership NPRM at ¶ 5; *see also* Revised Comments of the Attorneys General of the States of Illinois, California, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia, *In the Matter of Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Dkt. No. 17-318 (filed Feb. 27, 2018) (arguing that the UHF Discount should be eliminated).

[25] *See* Petition for Review, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. filed May 12, 2017).

has recognized is technically archaic and that is currently under both judicial and administrative review.[26]

IV. THE PROPOSED MERGER WOULD NOT SERVE THE PUBLIC INTEREST AND SHOULD BE REJECTED.

In addition to exceeding the national audience reach cap, the proposed entity would not promote the three traditional "public interest" goals contemplated by the Communications Act. For one, the proposed merger would not promote competition. By setting the Cap at 35% in 1996 and at 39% in 2004, Congress has repeatedly affirmed the need to prevent broadcast television companies from reaching a majority of the television-viewing public.[27] But the proposed merger would ignore this restriction and enable the new entity to reach 58.77% of television households.

Nor would the proposed merger promote diversity. Allowing this type of consolidation decreases the opportunities for minority and female ownership of local television broadcast stations, opportunities that this Commission specifically seeks to encourage.[28] Moreover, the new Sinclair-led entity would not promote viewpoint diversity, as evidenced by the "must run" scripts that Sinclair periodically requires its local news stations to read.[29] Indeed, as recently as

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[26] At least one media outlet has reported that the Commission is planning to vote on whether to modify the existing Cap and UHF Discount in the near future. ***See*** Bloomberg, "FCC Plans Rule Change Before Court Can Upend Sinclair Bid, Sources Say," June 13, 2018, available at: https://www.bloomberg.com/news/articles/2018-06-13/fcc-said-to-plan-rule-change-before-court-can-upend-sinclair-bid. The petitioners strongly urge the Commission to refrain from such action. The vote is allegedly scheduled to occur on July 12, 2018—the same day that reply comments are due with regard to petitions to deny the proposed merger. Such scheduling, should it occur, would improperly deny the petitioners and other interested parties the opportunity to comment on the propriety of the proposed merger based on a revised Cap and/or UHF Discount.

[27] *Cf.* 149 Cong. Rec. H12838 (daily ed. Dec. 8, 2003) (statement of Rep. William Tauzin) (noting that the 2004 Amendments "will forbid the FCC from raising or lowering the 39 percent limit as market conditions continue to change"); 150 Cong. Rec. S148 (daily ed. Jan. 22, 2004) (statement of Sen. Diane Feinstein, quoting a letter from Sen. Robert Byrd) (observing that the 2004 Amendments turned "the one year limitation on the FCC media ownership rule … into a permanent cap at 39 percent").

[28] ***See*** Remarks of FCC Chairman Ajit Pai at MMTC's 9th Annual Broadband and Social Justice Summit (Feb. 6, 2018), available at https://docs.fcc.gov/public/attachments/DOC-349033A1.pdf.

[29] *See, e.g.*, Washington Post, "How the Nation's Largest Owner of TV Stations Helped Donald Trump's Campaign," Dec. 22, 2016, available at: https://www.washingtonpost.com/lifestyle/style/how-that-nations-largest-

March of this year, Sinclair distributed a "must-run" script to multiple stations that contained politically charged sentiments about the increased "sharing of biased and false news" and the purported tendency of "some members of the media [to] use their platforms to push their own personal bias and agenda to control 'exactly what people think.'"[30]

Such actions also display a lack of commitment to localism, as the must-run scripts typically are identical in all markets, and are devoid of any reference to a specific news story or media member whatsoever, much less stories or individuals linked to the media markets where the script was aired. In short, the new entity would reduce, rather than enhance, opportunities for broadcast television stations to air programming that reflects local preferences, interests, and sensitivities.

The proposed merger of Sinclair and Tribune would allow the new entity to reach a substantial majority of the television viewing public in the United States. Such extraordinary access would violate the congressionally-mandated national audience reach cap, while failing to promote the traditional public interest goals of competition, diversity, and localism. The petitioners strongly urge the Commission to reject this unprecedented consolidation.

V. THE PROPOSED MERGER DOES NOT INCLUDE SATISFACTORY DIVESTITURES IN LOCAL MARKETS AND VIOLATES THE COMMISSION'S TOP-FOUR PROHIBITION IN THE ST. LOUIS, MO MARKET.

While the April Amendment to June Exhibit identifies 20 local stations that the Applicants indicate they plan to divest, the details of the divestitures are in many cases

owner-of-tv-stations-helped-donald-trumps-campaign/2016/12/22/02924864-c7af-11e6-8bee-54e800ef2a63_story.html.

[30] Seattle Post-Intelligencer, "KOMO Attacks "Biased and False News" in Sinclair-Written Promos," Apr. 3, 2018, available at: https://www.seattlepi.com/seattlenews/article/KOMO-fake-news-Sinclair-promos-12792032.php.

unknown.[31] For example, in Sacramento and San Diego, California, and Tacoma, Washington the purchasers are "to be determined," presenting uncertainty about the terms of the divestiture and when a divestiture would occur. Questions include whether there will be joint sales agreements ("JSAs"), shared services agreements ("SSAs"), or other options or agreements that effectively give control of resources, programming, advertising and other revenues to the new largest owner of local stations. And in one specific market, St. Louis, Missouri, the proposed divestiture plan does not satisfy the Commission's local television multiple ownership rules.

A. The Local Television Multiple Ownership Rule Furthers the Public Interest in Diversity, Localism, and Competition and Any Waiver Must Also Further These Goals.

The Commission's local television multiple ownership rule permits an entity to "own, operate, or control two television stations licensed in the same Designated Market Area (DMA) … if … at 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."[32] This rule—known as the Top-Four Prohibition (also referred to as the Duopoly Rule)—encourages localism, diversity, and competition in local media markets. A 2017 modification of the rule permits an applicant to request a waiver of the Top-Four Prohibition on a case-by-case basis.[33]

The local television multiple ownership rule is intended to promote the public interests of diversity, localism, and competition. In 2017, the Commission affirmed the Top-Four Prohibition limitation on multiple television station ownership, with a modification to allow stations to seek a waiver of the previously bright-line rule prohibiting common ownership of two

[31] April Amendment to June Exhibit at Ex. I.

[32] 47 C.F.R. § 73.3555(b)(1).

[33] *Id.* § 73.3555(b)(2).

top-four ranked stations in the same market.[34] The new rule provides that the Top-Four Prohibition "shall not apply in cases where, at the request of the applicant, the Commission makes a finding that permitting an entity to directly or indirectly own, operate, or control two television stations licensed in the same DMA would serve the public interest, convenience and necessity. The Commission will consider showings that the Top-Four Prohibition should not apply due to specific circumstances in a local market or with respect to a specific transaction on a case-by-case basis."[35] Pursuant to this provision, the Commission will analyze, on a case-by-case basis, whether "application of the [Top-Four] prohibition may be unwarranted given certain factors affecting a particular market or a particular transaction."[36] The Commission concluded that these modifications reflected an "assessment of both the current video marketplace and the continued importance of broadcast television stations in their local markets."[37]

The Commission did not set clear guidelines for when it would conclude that "application of the Top-Four Prohibition is not in the public interest because the reduction in competition is minimal and is outweighed by public interest."[38] It recognized, however, several types of information that a waiver-seeker could provide to make their case: (1) ratings share data, (2) revenue share data, (3) market characteristics, (4) effects on programming, and (5) any other circumstances.[39] As the Commission stated, this information must be used to show that the waiver is in the public interest: "In the end, applicants must demonstrate that the benefits of the

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[34] Order on Reconsideration, *In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996*, MB Dkt. No. 17-156, 32 FCC Rcd. 9802, 9831–33, ¶¶ 66, 71 (Nov. 16, 2017) (hereinafter "2017 Quadrennial Review Reconsideration Order").

[35] 47 C.F.R. § 73.3555(b)(2).

[36] 2017 Quadrennial Review Reconsideration Order, 32 FCC Rcd. at 9831 ¶ 66.

[37] *Id.* at 9832 ¶ 69.

[38] *Id.* at 9838–39 ¶ 82.

[39] *Id.*

proposed transaction would outweigh the harms, and we will undertake a careful review of such showings in light of the record with respect to each such application."[40]

In assessing a waiver request, the Commission should look at each of these data points to determine whether granting the waiver would promote "ownership diversity generally by limiting common ownership of broadcast television stations."[41] The Commission has stated that the use of waiver should "promote robust competition in local markets while also facilitating transactions, in appropriate circumstances, that will allow broadcast stations to achieve economies of scale and better serve their local viewers."[42] The waiver should not be based solely on the convenience of the applicants or on the inability to find an adequate buyer to divest. Thus any request for a waiver that does not preserve competition and serve the needs of local viewers should be rejected.

B. Sinclair's Amended Application and Divesture Plan Violates Top-Four Prohibition for the St. Louis, Missouri Market

The Applicants' Amendment to the June Comprehensive Exhibit and May Divestiture Amendment establish that the proposed merger would violate the Top-Four Prohibition for the St. Louis media market.[43] Most importantly, Sinclair has not demonstrated how it will divest the necessary stations, precluding the Commission from determining whether the transaction complies with the Top-Four Prohibition. For those reasons, the Commission should deny the merger application.

[40] *Id.*

[41] *Id.* at 9839–40 ¶ 84.

[42] *Id.* at 9837–38 ¶ 81.

[43] The St. Louis, MO media market includes several counties in Illinois, east of the Mississippi River.

Despite its assertion that a Top-Four showing is not legally required in the St. Louis media market,[44] the Applicants' amended plan will result in a newly merged entity that violates the Top-Four Prohibition. Sinclair currently owns KDNL-TV, an ABC affiliate which Sinclair alleges was the fifth-highest rated station at the time the initial application was filed.[45] Tribune currently owns two stations in the St. Louis market: KTVI(TV), a Fox affiliate that Sinclair alleges is the third-highest rated station, and KPLR-TV, a CW affiliate that Sinclair alleges is the fourth-highest rated station.[46] Sinclair acknowledges that KDNL-TV (5th) and KPLR-TV (4th) frequently fluctuate between the fourth and fifth spots in the market.[47]

Because the proposed combination would result in a newly merged entity with licenses for the third, fourth, and fifth-rated stations in this market—a clear violation of the Top-Four Prohibition—divestitures are required, but the Applicants have not made sufficient commitments to do so. In their Amendment to June Comprehensive Exhibit, Applicants represented that they had entered into a purchase agreement to sell Tribune's KPLR-TV (4th) to Meredith Corporation and simultaneously filed a divestiture application with the Commission.[48] Meredith Corporation currently owns KMOV in St. Louis, which is the highest rated station in the St. Louis market. Weeks later, on May 14, 2018, Sinclair withdrew the application to divest KPRL-TV (4th) to Meredith,[49] and the next day filed its May Divestiture Amendment.[50] In that divesture application, Sinclair states:

[44] Amendment to June Comprehensive Exhibit, at 13.

[45] *Id.* at 12.

[46] *Id.*

[47] *Id.* at 13.

[48] *Id.*

[49] Public Notice, "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," Fed. Commc'ns Comm'n, DA 18-1530, MB Dkt. No. 17-179, n.2 (May 21, 2018).

> In order to comply with the Duopoly Rule in the St. Louis DMA, the parties will be required to divest either KDNL-TV or KPLR-TV in the St. Louis market (the Station to be divested, the "Divestiture Station"). Because the parties will not know which of these Stations will be divested until the Department of Justice, Antitrust Division, approves a proposed buyer for KPLR-TV or, if no buyer is approved for KPLR-TV, a proposed buyer for KDNL-TV, the parties are filing applications seeking consent to assign or transfer each of the Stations to the Trust pending completion of such review. Accordingly, **once Applicants know which Station will be divested, Applicants will, prior to grant (i) amend the Divestiture Trust Applications to specify which Station will be placed in the Trust, and (ii) withdraw the Divesture Trust Application for the Station that will not be divested."**[51] (emphasis added).

This divestiture plan does not commit to a particular divesture that brings it into compliance with the Top-Four Prohibition. It is impossible to determine whether the ultimate transfer of ownership will be permissible under the Top-Four Prohibition without a full analysis of the terms and the effect of the ultimate divestiture and remaining consolidation.

Regardless of which station Applicants ultimately decide to divest, it is unlikely that the resulting combination—of the third-ranked station with either the fourth- or fifth-ranked stations—could satisfy the Top-Four Prohibition because of the closeness in rankings of the fourth- and fifth-ranked stations. The Top-Four Prohibition is intended to prevent "the harm to competition where a single firm obtains a significantly larger market share through a combination of two top-four stations."[52] Drawing a distinction between the fourth- or fifth-ranked stations for purposes of the Top-Four Prohibition will not prevent excessive consolidation in that market. Applicants' Amended Application to June Comprehensive Exhibit notes that "[o]ver the 2014-2017 period, KDNL-TV and KPLR-TV switched places thirteen times based on

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[50] May Divestiture Amendment, Comprehensive Exhibit at 2.

[51] *See id.*

[52] Second Report & Order, *2014 Quadrennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al*., 31 FCC Rcd. 9864 at ¶ 44 (2016); *see also* 2017 Quadrennial Review Reconsideration Order 32 FCC Rcd. at 9835-36 ¶¶ 78–79.

9 a.m.-midnight monthly data, and seven times based on 3 a.m. – 3 a.m. sweeps data."[53] While Applicants argue that this closeness indicates that application of "the Top-Four Prohibition may not be warranted,"[54] the contrary is true.

The closeness of these two stations is also evident in audience share revenues, which can be used as a proxy for more detailed audience share data. The revenue reports show that the combination of either of the lowest ranked stations, KPLR-TV (4th) or KDNL-TV (5th), with the currently Sinclair-owned KTVI (3rd), would result in a station with substantially greater estimated ad revenue and estimated retransmission revenue than the existing first and second ranked stations (KMOV and KSDK respectively) (see Table 1).[55] Consolidation of this magnitude would harm competition among the top stations and result in a reduction in independent ownership and a single firm obtaining a significantly larger market share than is currently the case. If the Applicants retain some control over the all three of these stations, the new owner would have revenues that exceed the currently first-ranked station by 55%. Such a consolidation would frustrate the principles underlying the Commission's rule, and should be denied.

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[53] Amendment to June Comprehensive Exhibit, at 13.

[54] Sinclair argues that the closeness between the 4th and 5th ranking stations indicates that "the Top-Four Prohibition may not be warranted where there is no 'significant 'cushion' of audience share percentage points that separates the top four stations from the fifth ranked stations' that would warrant a bright-line between the third and fourth stations and the rest of the stations in this DMA." April Amendment to June Comprehensive Exhibit at 14 (quoting the 2017 Quadrennial Review Reconsideration Order 32 FCC Rcd. at 9836 ¶ 79 n. 230).

[55] Amendment to June Comprehensive Exhibit, at Exs. F.2 & H.2.

TABLE 1 – Station Revenues (In Millions) in the St. Louis Market

Rank (a)	Station (b)	Ad Revenue 2016 (c)*	Retransmission Revenue 2016 (d)*	Total Revenue 2016 (e)**	Combined Revenue with KTVI (f)***	Combined Revenue: Percentage Larger than KMOV (g)****
1	KMOV[56]	$56,300	$15,100	$71,400		
2	KSDK	$56,000	$18,600	$74,600		
3	KTVI	$55,500	$14,600	$70,100		
4	KPLR-TV	$15,000	$2,000	$17,000	$87,100	21%
5	KDNL-TV	$15,900	$7,500	$23,400	$93,400	30%
NA	*KPLR-TV + KDNL-TV*			*$40,400*	*$110,500*	*55%*

*Source: Amendment to June Comprehensive Exhibit, Exhibit H.2
**Sum of Columns C+D
***Sum of Column E with KTVI Total Revenue 2016
**** Difference between Combined Revenue with KTVI and KMOV Total Revenue 2016, divided by KMOV Total Revenue 2016.

The same results occur when using the percentage of total revenue share for 2017 for each of the top five St. Louis stations (see Table 2).[57] This transaction will result in significant consolidation in the St. Louis market and will not advance competition or diversity. If two of the top four stations are consolidated, the harms to competition and diversity may be significant. If the Applicants fail to wholly divest either KPLR-TV or KDNL-TV, the harms would be magnified, with common control of three of the top five stations generating revenue that would overwhelm the revenue of the currently number one-ranked station:

[56] Applicants characterize KMOV as "the market leader in on-air advertising, with a 27.6% share, followed closely by TEGNA's KSDK at 27.4%." *Id.* at 15.

[57] *Id.* at Ex. F.2

TABLE 2 – Station Revenues (%) in the St. Louis Market:

Rank (a)	Station (b)	Total Revenue Share 2017 (c)*	Combined Total Revenue Share with KTVI (d)**	Combined Revenue: Percentage Larger than KMOV (e)
1	KMOV	26.4%		
2	KSDK	24.9%		
3	KTVI	20.2%		
4	KPLR-TV	9.2%	29.4%	11%
5	KDNL-TV	17.3%	37.5%	42%
NA	*KPLR-TV + KDNL-TV*	*26.5%*	*46.7%*	*77%*

*Source: Amendment to June Comprehensive Exhibit, Exhibit F.2
** Sum of Column C with KTVO Revenue Share
*** Difference between Combined Revenue with KTVI and KMOV Total Revenue Share 2017, divided by KTVI Total Revenue Share 2017.

C. There Is No Basis upon Which to Grant Sinclair a Waiver from the Top-Four Rule.

Since the proposed transfers present a clear violation of the Top-Four Prohibition, Sinclair has asked the Commission to conclude that permitting the Applicants to combine either KPLR-TV(4th) or KDNL-TV(5th) with KTVI (3rd), would "preserve the public interest, convenience, and necessity" and that "the Top-Four Prohibition should not apply due to specific circumstances in a local market."[58] In support of its request for a waiver to the Top-Four Prohibition, Sinclair relied on its then pending sale of KPLR-TV (4th) to Meredith Corporation to remove the third station from the consolidated entity.[59] It is unknown whether a buyer can be found that will not result in additional consolidation in the St. Louis market.

Notwithstanding the uncertainty associated with its divestiture options and the significant consolidation that would result if either KPLR (4th) or KDNL (5th) is combined with the third

[58] 47 C.F.R. § 73.3555(b)(2).

[59] Amendment to June Comprehensive Exhibit, at 12.

ranked station, KTVI, Sinclair argues that ratings share data, revenue share data, market characteristics, and the effects on programming meeting the needs and interest of the community somehow support a waiver of the Top-Four Prohibition.[60] None of the information included therein justifies granting a waiver from the bright-line Top-Four Rule.

Applicants are incorrect that there is a "lack of countervailing competitive harm" in granting a waiver because KDNL-TV is not in the top four stations, but rather sometimes is the fifth ranked station.[61] While the fluidity between the fourth and fifth ranked station is significant, it demonstrates that the St. Louis market is somewhat different from most markets because there is not a "significant 'cushion' of audience share points that separates the top-four stations … from the fifth-ranked station."[62] Unlike the situation where the stations ranked below the top four have a significant gap in audience share, which may potentially justify common ownership to form a better competitor to the top four stations, in the St. Louis market a combination of two or three of the top five stations would not aid stations with significantly smaller market shares. Instead, it would simply reduce the number of viable competitors and reduce the choices available to consumers for programming and news.

In requesting a waiver of the Top Four Prohibition, Applicants are essentially telling the Commission it should only be concerned with consolidation of the Top 3 stations in the market, and allow the elimination of the top fifth station. As discussed above, the correct assessment of the St. Louis market should include the effect that any consolidation among the top five stations would have on competition, diversity of ownership, and diversity of viewpoints. The

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[60] *Id.* at 13–17.

[61] *Id.* at 13.

[62] Second Report & Order, *2014 Quadrennial Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, 31 FCC Rcd. 9864 ¶ 43 (Aug. 25, 2016).

Commission should closely review of combinations of the top five stations, particularly when other stations in the market are remarkably smaller and clearly do not present robust competition to the top five.[63]

Further, it would be an abuse of discretion to grant a waiver without a clear divestiture plan that sets forth which station Applicants will divest, what entity will purchase that station (if any), and what the terms of that divestment will be. The U.S. Department of Justice has not yet approved a divesture proposal in the St. Louis market.[64] The Commission cannot conclude that a waiver would preserve the public interest if the Applicants cannot demonstrate what the impact on audience share and revenues will truly be.

There are many ways in which the lack of a divesture plan could conceal the ultimate impact on a market. For example, if the Applicants divest either station to an entity that already owns a station in the St. Louis media market, there will be additional consolidation that the Commission should consider. If either station is sold to an entity with close ties to Sinclair and continues to operate the station using some combination of JSAs or SSAs, then the impact on diversity of viewpoint and ownership could be severe. If Sinclair divests either station to an entity that cannot viably operate it, there will be both additional consolidation and a reduction in the number of stations available to the public. Applicants' assertion that the waiver would not result in "reduced incentives for commonly owned local stations to compete for programming, advertising, and audience shares" cannot be analyzed without knowing what influence Sinclair will have over the divestiture of its stations. The Commission cannot reasonably expect to waive

[63] Amendment to June Comprehensive Exhibit, at Exs. F.2 & H.2 (reporting revenues for the St. Louis market).

[64] Public Notice, "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," Fed. Commc'ns Comm'n, DA 18-1530, MB Dkt. No. 17-179, n.13 (May 21, 2018).

the Top-Four Prohibition without information to fully evaluate the impact on the St. Louis market and on competition, diversity, and localism of what are today uncertain and unspecified divestitures.

Applicants' assertion that transferring common ownership of KTVI (3rd) and KDNL-TV (5th) to Sinclair will essentially mirror the market effects of the existing common ownership of KTVI (3rd) and KPLR-TV (4th) by Tribune ignores the reality of Sinclair's operations. It is widely known that Sinclair exerts significant influence on the local news programs of the stations that it owns.[65] Permitting Sinclair to obtain influence over two of the top four stations, rather than one in any given market, while also leaving open the possibility of influence over the soon-to-be divested mystery station through contractual obligations, increases the likelihood that Sinclair will be permitted to exert its viewpoint over three of the four top stations in the St. Louis DMA. This directly contradicts the Commission's interest in preserving diversity of ownership, diversity of viewpoints, and diversity of programming.

Sinclair itself acknowledges a likely impact on programming in its amended application: "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] The stations that remain in Sinclair's possession after the divestiture are likely to see a further alignment of viewpoints and news coverage. Applicants' assertion that "the stations would be able to provide expanded local, regional, and statewide news and other programming of interest to the St. Louis DMA"[67] ignores Sinclair's history of using various agreements and must-run programming to

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[65] *See, e.g.*, *supra* note 12.

[66] Amendment to June Comprehensive Exhibit, at 16.

[67] *Id.*

exert its influence on local news operations, undermining the goals of competition, diversity of ownership, and diversity of viewpoints.

V. CONCLUSION

The Applicants have not demonstrated that they are in compliance with the Commission's national and local ownership regulations. Nor have they demonstrated any public benefits to allowing this massive merger to go forward. Because of these reasons, the States request that the Commission deny the Applicants' request for consent to the merger of Sinclair and Tribune.

Respectfully submitted,

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