Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tribune Media Company	)	MB Docket No. 17-179
(Transferor)	)	
	)	
and	)	
	)	
Sinclair Broadcast Group, Inc.	)	
(Transferee)	)	
	)	
Consolidated Applications for Consent to Transfer Control	)	

APPLICANTS' SECOND CONSOLIDATED OPPOSITION TO PETITIONS TO DENY

Miles S. Mason
Jessica T. Nyman
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, D.C. 20036
202-663-8195

Counsel to Sinclair Broadcast Group, Inc.

Mace Rosenstein
Ann West Bobeck
COVINGTON AND BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
202-662-5460
Counsel to Tribune Media Company

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SUMMARY

As set out in the applications, the proposed transaction will result in more local news and high quality free, over-the-air content, at a time when more and more content is flowing to pay platforms and broadcasters are vying with a host of unregulated—and much larger—competitors for viewers' increasingly fragmented attention. Contrary to Petitioners' rhetoric, the sky is not falling. Sinclair's acquisition of Tribune will not radically disrupt the media marketplace or impede viewers' access to quality local news, nor will it violate any FCC rules or policies.

Petitioners ask the Commission to make decisions based on Petitioners' subjective disagreement with content that airs on Sinclair stations and to review this transaction as if it took place in a time when there were seven TV channels and phones were simply used to call someone to say hello, rather than to watch a full-length movie or live newscast. But today there are hundreds of TV channels, OTT video services are proliferating and being subscribed to by tens of millions of households, and the lines between telephone companies, internet providers, MVPDs, programmers and broadcasters have long since disappeared.

As the United States District Court for the District of Columbia recently recognized, the idea that Google, Facebook, YouTube and Netflix do not compete with traditional programmers and MVPDs "defies reality."[1] And it further defies reality to believe that broadcasters do not compete with these same new entrants, in addition to rapidly consolidating cable and satellite providers. Given the dramatic shifts in the video marketplace and rapid growth in competition from traditional MVPDs, virtual MVPDs, and SVODs, "[y]ou don't need a weatherman to know which way the wind blows."[2] Simply put, there have never been more voices available to

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[1] *United States v. AT&T Inc.*, Case No. 17-2511 (RJL), 2018 WL 2930848 *10 n.6 (June 12, 2018).

[2] *Id.* at *10 (citing Bob Dylan's *Subterranean Homesick Blues*).

consumers than exist today and the failure to acknowledge the rapid changes in the way consumers access video and other media today risks leaving broadcasters behind.

In just the past three weeks, AT&T closed its merger with Time Warner in an $85 billion transaction, Instagram (which was recently estimated to be worth more than $100 billion and predicted to reach two billion users within five years)[3] announced that it will launch a new long-form video service,[4] and Disney offered $71.3 billion to buy just a portion of Twentieth Century Fox's TV and film studio and cable network assets in an effort "to mount a challenge to tech giants such as Netflix, Inc., Alphabet Inc.'s Google and Facebook Inc."[5] If traditional MVPD giants are threatened by the emergence and exponential growth of these new video competitors, imagine the impact on independent broadcasters—the largest of which have valuations in the $3-4 billion range—who rely on the same eyeballs for ratings and ad revenues to acquire increasingly expensive content and to produce local programming.

Because Sinclair's acquisition of Tribune will neither violate any FCC rules or policies nor impede viewers' access to high-quality local news and information programming, petitioners resort to speculation, exaggeration and outright misstatement to conjure alleged harm. Petitioners' objections to the proposed transaction are not supported by the record in this proceeding or other observable facts, but are instead rooted in unfounded assumptions,

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[3] Emily McCormick, *Instagram is estimated to be worth more than $100 Billion*, Bloomberg.com, Technology (June 25, 2018), https://www.bloomberg.com/news/articles/2018-06-25/value-of-facebook-s-instagram-estimated-to-top-100-billion.

[4] Benjamin Mullin, *Instagram Could Soon Allow Users to Post Long-Form Video*, The Wall Street Journal (June 5, 2018), https://www.wsj.com/articles/instagram-could-soon-allow-users-to-post-long-form-video-1528236950.

[5] Shalini Ramachandran and Keach Hagey, *Two Titans' Rocky Relationship Stands Between Comcast and Fox*, The Wall Street Journal (June 21, 2018), https://www.wsj.com/articles/standing-between-comcast-and-fox-media-titans-rocky-relationship-1529617091.

misunderstandings of law, ignorance of the modern media landscape, a desire to silence voices with which they disagree and, in many instances, blatant self-interest.

And while the purpose of this additional comment period is to allow interested parties to address the application amendments and related divestiture applications that were filed subsequent to the original comment cycle, the majority of petitioners have improperly opted to rehash the same unsubstantiated arguments made in the original petitions and replies: namely, Sinclair will be "too big;" the merger will reduce viewpoint diversity and localism; and all consolidation causes retransmission consent fees to rise. Each of these assertions was thoroughly refuted in Applicants' Consolidated Opposition to Petitions to Deny.

To the extent petitioners raise any new arguments, they are equally unavailing. Petitioners provide no legal or other support for their request that the Commission await the outcome of the D.C. Circuit's review of the Commission's UHF discount reconsideration order before rendering its decision. They do not—and cannot—deny that the shared services arrangements to be entered into in connection with four of the transaction's 21 proposed divestitures (or options relating to these stations and two additional divestiture stations) comply with current law and are consistent with precedent. Petitioners base opposition to Sinclair's ownership of two top-four stations in the Indianapolis and St. Louis markets on the econometrically flawed allegation that these duopolies will result in higher retransmission consent fees and therefore are *per se* contrary to the public interest—notwithstanding the lack of reliable evidence for such allegation and the demonstrable benefits of these duopolies as measured against the criteria the Commission has established for evaluation of such combinations. In sum, petitioners' few new arguments—as their previous ones—are unsupported by the record in this proceeding and Commission precedent.

The proposed transaction complies with the Commission's rules and is in the public interest. Applicants have disclosed the details of their proposed divestitures to ensure compliance with the Commission's existing national and local ownership rules and have filed all the applications necessary to effectuate those divestitures—each of which also complies with the Commission's rules. The Commission has all the information it needs to evaluate the proposed transaction, and accordingly should expeditiously dismiss or deny the petitions in full and grant the applications.

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APPLICANTS' SECOND CONSOLIDATED OPPOSITION TO PETITIONS TO DENY

Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune," and together with Sinclair, the "Applicants") hereby oppose the comments and petitions to deny (the "Petitions")[6] filed in the above-referenced proceeding in response to the Media Bureau's May

[6] Petition to Deny of DISH Network, L.L.C. ("DISH"), MB Docket No. 17-179 (June 20, 2018) ; Petition to Deny of the American Cable Association ("ACA"), MB Docket No. 17-179 (June 20, 2018); Petition to Deny of NCTA- The Internet & Television Association ("NCTA"), MB Docket No. 17-179 (June 20, 2018); Comments of the American Television Alliance ("ATVA"), MB Docket No. 17-179 (June 20, 2018) ("ATVA Comments"); Petition to Deny of Communications Workers of America, National Association of Broadcast Employees and Technicians–CWA, The Newsguild–CWA ("CWA")), MB Docket No. 17-179 (June 20, 2018); Free Press Petition to Deny Divestiture Applications, MB Docket No. 17-179 (June 20, 2018); Petition to Deny of National Hispanic Media Coalition, Common Cause, and the United Church of Christ, OC Inc. ("NHMC"), MB Docket No. 17-179 (June 20, 2018); Petition to Deny of Cinémoi, Herndon-Reston Indivisible, International Cinematographers Guild, Latino Victory Project, National Association of Broadcast Employees and Technicians–CWA, NTCA – The Rural Broadband Association, Public Knowledge, RIDE Television Network, and Sports Fans Coalition ("Independent Programmers"), MB Docket No. 17-179 (June 20, 2018); Newsmax

21, 2018 Public Notice[7] seeking comment on Applicants' April 24, 2018 Amendment and May 14, 2018 Amendment to the applications (as amended, the "Applications") seeking FCC consent to the transfer of control of Tribune to Sinclair (the "Transaction"), related divestiture applications and Sinclair's requests to own two top-four stations in the Indianapolis and St. Louis television markets.[8]

I. INTRODUCTION

The Transaction complies with applicable FCC rules, is consistent with FCC precedent, and is in the public interest. So, instead of evaluating the Transaction under the rules, Petitioners ask the Commission to ignore or change them. But the Commission has stated repeatedly that where a petitioner urges the Commission to ignore the language of its rules in order to reach the result petitioner seeks, the appropriate forum is not an adjudicatory proceeding, but a rulemaking proceeding. The proposed divestitures, including those that contain sharing arrangements, are consistent with the rules and with other transactions previously approved by the Commission.

Media, Inc.'s ("Newsmax") Petition to Deny, MB Docket No. 17-179 (June 20, 2018); Petition to Deny of the Attorneys General of the States of Illinois, Iowa, and Rhode Island ("Attorneys General") (June 20, 2018); Comments of the Parents Television Council ("PTC") (June 20, 2018); Petition to Deny of Herndon Reston Indivisible ("Herndon"), MB Docket No. 17-179 (June 20, 2018) Comments of the American Civil Liberties Union ("ACLU"), MB Docket No. 17-179 (June 19, 2018). Each of DISH, ACA, NCTA, ATVA, CWA, Free Press, NHMC, Independent Programmers, Newsmax, Attorneys General, PTC, Herndon, and ACLU are collectively referred to herein as the "Petitioners."

[7] *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*, MB Docket No, 17-179, DA 18-530 (rel. May 21, 2018).

[8] *See* FCC File No. BTCCDT-20170626AGH *et al.*, as amended. It should be noted that if Sinclair ends up divesting KPLR-TV in St. Louis, a top-four showing is not even required as KDNL-TV was not a top-four station when the Applications were originally filed.

The proposed top-four combinations in St. Louis and Indianapolis are in the public interest and should be granted in accordance with the criteria set out in the *Ownership Order on Reconsideration*.[9] The UHF discount is in effect and must be applied in assessing national audience reach. Accordingly, the Commission should dismiss or deny the Petitions and approve the Applications.

II. ARGUMENT

A. Grant of the Transaction is in the public interest.

The Applications, Applicants' Consolidated Opposition to Petitions to Deny,[10] and Applicants' responses to FCC information requests[11] set forth in detail numerous public interest benefits of this Transaction, including but not limited to the following:

- The efficiencies and geographic reach created by this transaction will enable Sinclair to upgrade the stations' facilities, expand the stations' local coverage, offer greater value to multichannel video distributors ("MVPDs") and increase the stations' syndicated and original programming (including national news, entertainment and emergency programming) for free over-the-air reception;[12]

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[9] *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802 (Nov. 20, 2017) ("*Ownership Order on Reconsideration*").

[10] Applicants' Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 (filed Aug. 22, 2017) ("First Consolidated Opposition").

[11] *Responses of Sinclair Broadcast Group, Inc. to FCC Request for Information*, MB Docket No. 17-179 (filed Oct. 5, 2017); Applicants' Response to May 21, 2018 Information Request, MB Docket No. 17-179 (filed May 29, 2018).

[12] First Consolidated Opposition at 12-13; *see also* June Comprehensive Exhibit at 2. As noted in Applicants' earlier filings, Sinclair has a long tradition of investing in newly acquired stations and increasing headcount at many of these stations (including the number of investigative journalists) with the goal of improving the quality of their news and local programming. DISH's attempt to contradict Sinclair's proven track record relies exclusively on selectively abbreviated quotes from Sinclair's prior filings. *See* DISH Petition at 4 n.10. For example, the DISH Petition quotes Sinclair as saying "While there have been staffing reductions over the years…" to bolster an anti-localism argument, but disingenuously and misleadingly omits the rest of the

- The proposed divestitures will significantly boost minority ownership: three stations will be sold to Howard Stirk Holdings (owned by established broadcaster Armstrong Williams) and nine stations to Standard Media Group LLC (controlled by Soo Kim with industry veteran Deb McDermott as CEO).[13]

- Sinclair will be better able to develop greater strategic complements to its broadcast operations, including opportunities to expand digital content offerings and to deploy ATSC 3.0 more widely, efficiently, and quickly;[14]

- Sinclair's Washington, D.C. News Bureau, *Connect to Congress*, *Town Halls* and other unique news and public service initiatives will enhance news and public interest programming on the Tribune stations;[15]

- Grant of the proposed top-four combinations in Indianapolis and St. Louis will preserve existing station combinations and will lead to increased news and local programming under Sinclair's ownership.[16]

The Petitions raise no new arguments or evidence that refute these or any other public interest benefits of the Transaction. None of the Petitions dispute the critical fact that broadcasters face growing competitive pressures from online streaming services that produce their own compelling content, national or near-national MVPDs (such as DISH Network), consolidated cable programming networks, and other sources. Rather, many of the Petitioners

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sentence: "…consistent with a variety of different businesses in highly competitive fields, most if not all of the employees who have lost positions have by now been replaced so that staffing at many of the stations Sinclair has acquired, now exceed those original staff levels." *Cf.* DISH Petition at 10 n.4 *with* First Consolidated Opposition at 20.

[13] *See* May 14 Amendment.

[14] First Consolidated Opposition at 13; *see also* June Comprehensive Exhibit at 2.

[15] First Consolidated Opposition at 10-12; *see also* June Comprehensive Exhibit at 3-4.

[16] *See* April 24 Amendment at Sections II(B)(1) and II(B)(2). In St. Louis, Applicants' may alternatively divest KPLR-TV and retain KDNL-TV (which was the fifth-ranked station at the time the Applications were filed), a combination that would yield its own substantial public interest benefits. *See* May 14 Amendment.

put self-interest ahead of the public interest, given their financial interest in the continued migration of viewers away from free-over-the-air television to their paid services.

Petitioners' allegations of harm continue to center around (a) a vague notion that Sinclair will be "too big"—ignoring that the proposed Transaction complies with the Commission's local and national ownership rules and that Sinclair will continue to pale in comparison to the size of companies like AT&T, Comcast, Netflix, Facebook, Google, Disney, etc., with which it competes; and (b) their subjective disagreement with Sinclair content, which they cherry-pick from less than 3% of the programming available on Sinclair stations and which in any case is protected by Commission rules and precedent and the First Amendment.[17]

Moreover, Petitioners ignore that, like most stations, the vast majority of local programing decisions of Sinclair-owned stations are made at the local station level, with substantial program time devoted to local news, local sports programming, network news and entertainment programming, syndicated programming, or other programming purchased or developed by Sinclair employees in the local markets where Sinclair owns television stations.[18]

[17] Sinclair's stations average more than 37 hours of news per week (of which all "must-run" news programming, including news from the Washington D.C. News Bureau, which simply replaces other national news sources (such as AP or national broadcast network content), on which local stations rely for non-local news coverage, takes up less than an hour total) and have received more than 700 awards and other recognition for their programming over the last few years. *See First Consolidated Opposition* at 15-16.

[18] Nowhere do Petitioners provide any evidence (because they cannot) that Sinclair's stations do not cover local issues at the local station level, or that such coverage is not in the public interest, preferring instead to repeat misleading anecdotes to support their predetermined conclusions. For example, Free Press relies on a single Emory University study. *See Ex Parte* of Free Press, MB Docket No. 17-179 at 2 (Apr. 17, 2018). But this study is flawed for a number of reasons including the short time frame it covered, the limited number of Sinclair stations and markets surveyed, the topics it chose to define as "local political stories," the inequivalent newsblocks it

Instead, by focusing on selected short commentaries and internally syndicated programming, Petitioners continue to paint an inaccurate and misleading picture of Sinclair as a company that runs all of its stations from a single national command center, disregarding the interests of its local stations' communities.[19] Sinclair's stations succeed in the marketplace precisely because they focus on the interests of the local communities they serve, a point which Petitioners have elected to overlook.

B. The proposed divestitures are in the public interest and consistent with well-settled precedent.

Consistent with the FCC's current ownership rules, Applicants filed applications to divest 21 stations to six different entities: Howard Stirk Holdings, Standard Media Group, LLC, Cunningham Broadcasting Corporation,[20] Fox Television Stations LLC, WGN TV LLC, and the Sinclair Divestiture Trust.[21] These proposed divestitures are in the public interest. Most of these

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compared, and that it was based on predictive algorithms created by the authors rather than actual viewing.

[19] As detailed in the First Consolidated Opposition, Petitioners' misleading claims revolve primarily around brief commentaries that are clearly labeled as such and that constitute less than 1% of the average total weekly news hours offered by Sinclair's stations. *See* First Consolidated Opposition at 16. Given the misinformation in the Petitions, we believe it is important to reiterate that Sinclair employs more than 3,850 station-level employees to independently produce local news at its stations across the country. It employs only 14 news employees at its corporate headquarters, and another 11 employees who staff Sinclair's on-air news operations at its Washington, D.C. News Bureau. In other words, more than 99% of Sinclair's news employees, who make editorial decisions, report from the field, and provide the many other inputs for its local newscasts, are employed in their local communities.

[20] Contrary to erroneous and misleading claims in some of the Petitions (*see* Newsmax Petition at 3, Herndon Petition at 3-4), Sinclair does not control or hold any attributable interest in Cunningham, nor do any of the Smith brothers own any stock, voting or non-voting, in Cunningham. Rather, Michael E. Anderson holds 100% of the voting shares of Cunningham. *See, e.g.*, FCC File No. BTCCDT-20130226AFW; *see also* 47 C.F.R. § 73.3555(e).

[21] *See* May 14 Amendment. As noted in the Applications, while applications were filed to divest two stations in St. Louis to the Divestiture Trust, upon receipt of approval from the Department

buyers are long-time FCC licensees, and the divestiture buyers include a new entrant, Standard Media Group, which will be controlled by Soo Kim with Deb McDermott serving as CEO, both of whom have former experience owning and running a large television station group. Petitioners do not, and cannot, provide any evidence that any of the proposed assignees are unfit to be FCC licensees, that they will not operate the stations in the public interest, or that any divestiture buyer's currently or previously owned stations have been operated in any manner inconsistent with the public interest.

Several Petitioners question the Joint Sales Agreements ("JSA"), Shared Services Agreements ("SSA"), and option agreements ("Options") to be entered into in connection with six of the divestitures. But Petitioners do not cite any law or precedent to support their claims and, indeed, do not dispute that JSAs, SSAs, and Options do not create an attributable interest under the Commission's ownership rules or that the agreements filed with the applications are entirely consistent with—if not identical to—JSAs, SSAs and Options that have been routinely approved by the FCC over a more than ten-year period.[22]

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of Justice as to which station to sell, Sinclair will withdraw the application for one of those stations prior to grant of the Transaction.

[22] *See, e.g., Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion & Order, 28 FCC Rcd 16867, 16878 ¶ 28 (2013); *see also Malara Broadcasting Group of Duluth Licensee LLC*, 19 FCC Rcd 24070 (Vid. Div. 2004) (SSA with programming not to exceed 15% of weekly broadcast hours, JSA, option, lease of facilities, and guarantee of debt); *SagamoreHill of Corpus Christi Licenses, LLC*, 25 FCC Rcd 2809 (MB 2010) (SSA with programming not to exceed 15% of weekly broadcast hours, JSA with 30 % of revenues going to broker, option, studio lease, guarantee); *Piedmont Television of Springfield License LLC*, 22 FCC Rcd13910 (Vid. Div. 2007) (SSA with programming not to exceed 15% of weekly broadcast hours, JSA, option, studio lease, guarantee and sale of non-license assets to broker). The NCTA questions whether certain of the Options may be reversionary interests, but neither the case law they cite nor other relevant precedent supports

On reconsideration of the most recent quadrennial ownership review order, the Commission eliminated the short-lived rule that had rendered certain JSAs attributable, determining that JSAs are beneficial and serve the public interest by allowing broadcasters to better serve their communities.[23] And neither shared services agreements nor options have ever been attributable under the Commission's rules.[24] Accordingly, Petitioners cannot claim that Sinclair will have an attributable interest in any of the stations to be divested or that these transactions violate the law.

Each of the agreements at issue here mirrors those the Commission has approved in multiple transactions over the last decade for a variety of broadcasters. And out-of-market-

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that argument. The Commission has consistently approved transactions with sharing agreements and options similar to these without finding a violation of the reversionary interest rule.

[23] *Ownership Order on Reconsideration*, 32 FCC Rcd at ¶¶ 96, 112-113 ("[W]e find that the Commission erred in its decision to adopt the Television JSA Attribution Rule. The underlying record . . . failed to properly consider the record evidence regarding the public interest benefits that television JSAs provide."). As detailed in the KUNS-TV, KMYU(TV), and KAUT-TV divestiture applications, the JSAs, SSAs, and Options will result in significant public interest benefits, specifically by increasing minority ownership by an experienced broadcaster who has a proven track record of serving the communities he reaches with other stations he has owned—a record that is unquestioned by any of the Petitioners. *See* FCC File Nos. BALCDT-20180426ABR, BALCDT-20180426ABQ, and BALCDT-20180426ABP at Assignee's Exhibit 13 ("Description of Transaction and Important Public Interest Benefits to Be Provided"), noting that the JSA, SSA, and Option with Sinclair are each "an enormous benefit and provides an appropriate way to increase the operational success of the Station[s], making real the advancement of minority ownership" and detailing how such agreements have historically "allowed Mr. Williams to obtain access to capital that would have otherwise been unavailable to him," enabling him "to fulfill his lifelong dream of being a TV station owner."

[24] *Nexstar Broadcasting, Inc.*, 23 FCC Rcd 3528, 3535 (Video Div. 2008) ("Shared services agreements covering technical and other back-office operations typically do not raise an issued under the Commission's attribution rules"); 47 C.F.R. § 73.3555 Note 2(e) ("[O]ptions and other non-voting interests with rights of conversion to voting interest shall not be attributed unless and until conversion is effected.").

sharing agreements and options have never been considered attributable for purposes of the Commission's national ownership limit. [25]

The Commission's rules and policies related to sharing agreements were promulgated to afford certainty and predictability to applicants in structuring transactions, and to the Commission in reviewing them. The proposals here are compliant with FCC rules and policy and Petitioners have provided no justification for the Commission to use this transaction as a vehicle to change the law with respect to such arrangements.[26]

Applicants reiterate that only one station (either KDNL-TV or KPLR-TV) ultimately will be placed in the Sinclair Divestiture Trust. The decision as to which one it will be is simply a

[25] 47 C.F.R. § 73.3555(e)(i) ("No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having *a cognizable interest* in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.") (emphasis added). "Cognizable interest" has been interpreted by the Commission to mean an attributable interest. *See also Local TV Holdings (Transferor) and Tribune Broadcasting Company II (Transferee) and Dreamcatcher Broadcasting, LLC (Transferee)*, Memorandum Opinion and Order, 28 FCC Rcd 16850, 16859 ¶ 21 (MB 2013) ("*Local TV Holdings*") (holding that because the Dreamcatcher stations were not attributable to Tribune, their "audience share will not play any part in any calculations Tribune might be required to make pursuant to the outcome of the *UHF Discount NPRM*."). Even the former policy statement on review of sharing agreements and options (which has been rescinded) limited its focus to the attribution of in-market sharing arrangements (JSAs and Local Marketing Agreements) and Options. *See Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 29 FCC Rcd 02647 (rel. Mar. 12, 2014), rescinded in full by *Rescission of March 12, 2014, Broadcast Processing Guidance Relating to Sharing Arrangements and Contingent Interests*, Public Notice, 32 FCC Rcd 1105 (rel. Feb. 3, 2017). It should be noted that even if WGN-TV were attributable to Sinclair (which it is not), such attribution would not cause Sinclair to be in violation of any FCC rules, as Sinclair does not have a cognizable interest in any other station in the Chicago market and Sinclair would still be under the National Cap despite such attribution.

[26] *See, e.g.*, *Local TV Holdings* at 16857 ¶ 16.

function of the Department of Justice, Antitrust Division's ("DOJ") review of the transaction. Upon closing, the divested station will be owned by the Trust, not Sinclair, and controlled by an independent trustee pursuant to a standard trust agreement pending divestiture of the station to the ultimate buyer, which will have been approved by the DOJ. [27] Contrary to concerns raised in some Petitions, Applicants have filed all the information that the Commission needs to approve a transfer of KPLR-TV to Sinclair and to approve divestiture of either station to the Trust.[28] The Commission will subsequently review—and all interested parties will have an opportunity to comment on—the application to assign the station from the Trust to the ultimate buyer, in accordance with the Commission's rules and standard procedures. Accordingly, there is no need to delay action on the Transaction pending identification of the station to be placed in trust or the ultimate buyer; indeed, doing so would be contrary to precedent and entirely negate the purpose of divestiture trusts.[29]

MVPD-aligned petitioners ACA and ATVA also use this proceeding to ask the Commission to entangle itself in the specific terms of freely negotiated retransmission consent agreements. In particular, they seek to establish precedent that would help protect them from contractually agreed upon obligations that they would prefer to avoid, such as after-acquired stations clauses. But as previously stated in the First Consolidated Opposition, and consistent with the FCC's order approving the *Media General/Nexstar* transaction, it is inappropriate for

[27] *See* FCC File Nos. BTCCDT - 20180514ABV and BLCDT-20180514ABW.

[28] *See id*.; *see also* FCC File Nos. BTCCDT-20170626AGO.

[29] *See, e.g., Entercom Communications Corp.*, Memorandum Opinion and Order, 32 FCC Rcd 9380 ¶ 16 (MB 2017); *See also, The E.W. Scripps Company*, Letter, 29 FCC Rcd 14870, DA 14-1824 (MB 2014).

the Commission to base its decisions on assignment applications on the impact of such transactions on freely negotiated contractual rights and obligations.[30]

Lastly, some Petitioners oppose the Transaction because, despite the proposed divestitures, Sinclair would own more than one station in some markets with fewer than eight television-station "voices."[31] But the Commission has eliminated the "eight voices" test, finding that it lacked any reasoned basis and was out of sync with competitive realities. This reform allowed more broadcasters to realize the public interest benefits of common ownership, particularly the potential for synergies that enable broadcasters to invest more resources in news and other public interest programming to better serve the needs of their local communities.[32]

In sum, Petitioners' opposition to the proposed divestitures is rooted in their dissatisfaction with the Commission's current ownership rules and attribution standards, rather than in any specific deal terms.[33] As we have stated before, the appropriate forum for Petitioners

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[30] First Consolidated Opposition at 37 n.97 (citing *Media General/Nexstar*, 32 FCC Rcd at 197 ¶ 36 (holding that "after-acquired station clauses are negotiated by the parties outside of this transaction, and there is no apparent reason for the Commission to step in and deny one party the benefit of the negotiated bargain absent evidence of anticompetitive practices or other wrongdoing not apparent here."). The *Phipps* case that ACA cites for support does not hold otherwise. *See John H. Phipps, Inc.*, 11 FCC Rcd 13053 (1996) (holding only that single long-form applications contemplating near instantaneous pass-through does not violate Section 310(d) of the Communications Act.).

[31] *See, e.g.*, Free Press Petition at 8.

[32] *Ownership Order on Reconsideration* ¶ 8.

[33] We note Petitioners make other unsubstantiated claims regarding the Applications, including claims about the purchase price of some of the stations, the application of the debt/equity rule, and the sufficiency of disclosures. All are without merit or support.

Petitioners rely on speculation in the trade press, rather than real world due diligence, to question certain stations' purchase prices. *See, e.g.*, ATVA Petition at 20-21 (citing 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).

to seek rule modifications is a rulemaking proceeding, not an adjudicatory proceeding to review a specific transaction.[34]

But the article on which they rely undercuts their argument that stations are being sold for below-market prices, as the media brokers interviewed for the piece provided vastly different estimates. For example, one broker opined that the Cunningham deal "could have left as much as $40 million on the table, though [this] would be on the high end," but that the WGN deal was "roughly in the ballpark," whereas the other broker concluded the exact opposite ("he judged the Cunningham deals as relatively fair, but the WGN one as 'very low.'"). In addition to acknowledging the variation in individual appraisals among brokers, it is important to note that both the brokers and Petitioners are engaging in pure guesswork and have not performed any due diligence or reviewed specific market information or potential buyers. For example, the Newsmax Petition tries to use the KPLR-TV purchase price in the Meredith application that was withdrawn to undercut the fairness of the prices for stations in Dallas and Houston. Besides failing to account for differences in the markets, this analysis also fails to account for substantial synergies that Meredith would have been able to take advantage of to warrant a higher purchase price. It is likely a sale of KPLR-TV to another buyer who will not have such cost savings would result in a substantially lower purchase price for that station.

Despite some Petitioners' suggestions to the contrary, none of the sharing arrangements implicates the Commission's "debt/equity plus" rule because Sinclair will not be lending money to any buyers of the divesture stations. Sinclair may guarantee the financing of the stations sold to Howard Stirk Holdings and WGN TV LLC, but such guarantees are consistent with law, non-attributable and not applicable for equity-debt-plus calculations. *See, e.g.*, *Nexstar Broadcasting, Inc.*, 23 FCC Rcd 3528, 3535 (Video Div. 2008) ("[T]he Commission has previously determined that loan guarantees do not confer an interest upon the guarantor requiring attribution, but that, instead, any consideration paid for the guarantee would be considered as part of the calculation under the equity plus debt attribution rule."); *see also* 47 C.F.R. 73.3555 Note 2(i).

Lastly, ACA disingenuously insinuates that Sinclair is "hiding the ball" by "withholding" more than 250 documents from its divestiture filings, and other Petitioners have glommed on to that theory. But as ACA is fully aware, the redaction of certain documents (e.g., forms of assignments, bill of sale, schedules relating to employees, assumed contracts, taxes, and similar schedules and agreements) is standard industry practice and consistent with the Commission's holding in *Luj, Inc. and Long Nine, Inc.*, which expressly confirmed that applicants are permitted to omit from applications "schedules [that] contain proprietary information that is not germane to the subject application." 17 FCC Rcd 16980 (2002) (noting that "it has been longstanding staff practice to accept assignment and transfer of control applications containing sales contracts that omit schedules and exhibits that are not material to our review.").

[34] The Commission has stated that its practice is to "make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rulemaking proceedings, not adjudications." *Hispanic Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 18834, 18841(2003) (rejecting claims that the EDP rule is a sham) (quoting *Sunburst Media*

C. The proposed top-four combinations would serve the public interest.

Consistent with the criteria set forth in the Commission's *Ownership Order on Reconsideration*, Applicants provided a detailed showing in the April and May Amendments supporting grant of top-four combinations in Indianapolis and St. Louis. Rather than raise any credible concerns or address each of the criteria laid out in the Applications, Petitioners' arguments against granting these combinations rely primarily on the flawed argument that (i) the combinations will give Sinclair the ability to obtain higher retransmission consent fees due to an increase of in-market negotiating power solely as a result of owning two top-four television stations in a market; and (ii) broadcasters' receipt of increased retransmission fees generally is inherently contrary to the public interest. Petitioners DISH, ACA and ATVA wrongly imply that any increase in retransmission consent fees would be dispositive of the Commission's two top-four review. Their arguments directly contradict the Commission's findings in the *Ownership Order on Reconsideration* that some top-four combinations may be justified.[35] Moreover, they fail to apply the criteria the Commission established for evaluation of top-four combinations, and ignore the status quo of the two markets at issue in this Transaction. Under Petitioners' logic, if

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L.P. , 17 FCC Rcd 1366, 1368 (3002); *see also Spanish Radio Network*, 10 FCC Rcd 9954, 9556 ¶ 9 (1995) ("Insofar as Miami Petitioners would have the rule recast so as to prohibit broadcast concentration in a market defined by language comprehension, the appropriate course of action is to request that the Commission institute a generic rulemaking proceeding to change its multiple ownership rules and policies.") (citing *Patteson Brothers, Inc.*, 8 FCC Rcd 7595, 7596 (1993)).

[35] *See, e.g., Ownership Order on Reconsideration*, 32 FCC Rcd at 9838 ¶ 82 ("Given the variations in local markets and specific transactions . . . we do not believe that applicants would be well served by a rigid set of criteria for our case-by-case analysis. The record does, however, suggest the types of information that applicants could provide to help establish 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 benefits. . . .").

the Commission determined that the owner of a top-four combination might in the future receive increased retransmission fees, the Commission would never be able to approve that combination regardless of which stations or markets were involved, the other revenues or the rankings of such stations, or the potential public interest benefits that would be realized through common ownership—all of which are to be evaluated on a facts and circumstances basis under the criteria set out in the *Ownership Order on Reconsideration*.[36] Clearly this is not the result the Commission intended; otherwise, why amend the rule at all (notably, while simultaneously eliminating the eight-voices test)?

These arguments are not new or specific to the proposed top-four combinations, as they largely repeat the same retransmission consent arguments that were raised in the initial round of petitions and have been raised repeatedly in multiple other FCC proceedings. While we have already addressed these arguments in earlier filings,[37] we will briefly respond again here.

First, there is no evidence that owning two top-four stations in a market will automatically result in greater leverage during retransmission consent negotiations or increased retransmission fees—for several reasons, including that the significant majority of retransmission

[36] *Id.*; *see also id.* at 9838 n.239 (disagreeing with ATVA's "contention that affording licensees a case-by-case opportunity to seek approval of top-four combinations cannot 'be squared' with the bright-line rule adopted in the Commission's 2014 Retransmission Consent Report and Order. . . . [C]ommon 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.").

[37] *See* First Consolidated Opposition at 26-42; *see also Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Reply Comments of Sinclair Broadcast Group, Inc., MB Docket 17-318 (filed Apr. 18, 2018).

consent agreements are negotiated nationally,[38] top-four stations are not close substitutes for each other,[39] and broadcasters compete not only with other intra-market broadcasters, but also with hundreds of national cable networks.[40] Moreover, the ownership of two top-four stations in a market means the owner has more to lose if an agreement is not reached and both stations are dropped by an MVPD.[41]

The flawed DISH economic study that MVPD Petitioners rely on was refuted in the First Consolidated Opposition. As Applicants' econometric expert explained, DISH's study failed to provide any evidence that the transaction would result in upward pressure on retransmission fees.[42] Indeed, DISH conceded that its own "[r]egression analysis of the DISH retransmission agreements does not show a statistically significant effect from duopolies on rates" in the local markets within its national footprint.[43] Moreover, as of the beginning of 2018, each of the top

[38] *See* First Consolidated Opposition at 33.

[39] *See* Declaration of Gautam Gowrisankaran, Ph.D. ("Gowrisankaran Decl.") at ¶¶ 32-37, 78-84, attached at Exhibit E to First Consolidated Opposition.

[40] *See* First Consolidated Opposition at 34; *see also* Gowrisankaran Decl. ¶¶ 11, 18.

[41] *See* First Consolidated Opposition at 41; *see also* Gowrisankaran Decl. ¶¶ 83-84.

[42] *See* First Consolidated Opposition at 32-41; *see also* Gowrisankaran Decl. For example, at most, DISH's study shows only that broadcast groups with "annual revenues of $500 million or more" receive higher rates for their top-four stations than small broadcast owners with revenues below $500 million. *Id.* (citing DISH Petition at 4). Because each of Sinclair and Tribune already exceed that benchmark, the DISH study provides absolutely no support whatsoever for the allegation that retransmission consent rates will increase as a result of the proposed combinations.

[43] Petition to Dismiss or Deny of DISH Network, L.L.C., MB Docket No. 17-179 (filed Aug. 7, 2017) at 32. While DISH attempts to explain away this inconsistency by suggesting that the absence of any such relationship may "likely" be due to other variables such as size, that explanation appears to be nothing more than a guess and is not based on any statistical data.

five MVPDs[44] has both a market capitalization and annual revenues many times greater than the combined company resulting from this proposed transaction.[45] The four largest MVPDs (AT&T/DirecTV, Comcast, Charter, and DISH) control access to over 85% of all subscribers nationwide, and the ten largest control access to over 95%.[46] And broadcasters are highly dependent on MVPDs to deliver their signals to viewers, as nearly 90% of all households nationwide receive their television signals via cable or satellite.[47] The idea that a top-four combination in Indianapolis or St. Louis will give Sinclair leverage over these MVPDs is absurd. It also ignores the fact that Tribune *already owns* two top-four stations in each of these markets and has done so for years without having any unique impact on retransmission consent fees.[48]

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[44] Mike Farrell, *Top 25 MVPDs*, Multichannel News (Feb. 27, 2017), http://www.multichannel.com/top-25-mvpds/411157.

[45] As stated in Sinclair's reply in the National Cap proceeding and according to Google Finance, as of April 17, 2018, AT&T/DIRECTV had a market cap of $219 billion and 2017 annual revenue of $161 billion Verizon had a market cap of $197 billion and 2017 annual revenue of $126 billion, Comcast had a market cap of $156 billion and 2017 annual revenue of $85 billion, Charter Communications had a market cap of $73 billion and 2017 annual revenue of $42 billion, and DISH had a market cap of $18 billion and 2017 annual revenue of $14 billion. In contrast, Sinclair had a market cap of $3 billion and 2017 annual revenue of $2.7 billion.

[46] *See* Statista, *Pay TV providers ranked by the number of subscribers in the United States as of September 2017 (in millions)*, https://www.statista.com/statistics/251793/pay-tv-providers-withthe-largest-number-of-subscribers-in-the-us/ (last visited July 1, 2018).

[47] *See* FCC, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247 ¶ 116 (Jan. 17, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-17-71A1_Rcd.pdf.

[48] As noted above, at the time the Application was filed KPLR, rather than KDNL, was the number four station in the St. Louis market. As a result, if Sinclair sells KPLR, the transaction will actually result in the elimination of a top-four combination. Alternatively, if Sinclair sells KDNL, it will simply preserve the status quo in the market, which is also the case in Indianapolis.

Second, even if one accepts the argument (which we do not) that retransmission fees will increase solely as a result of a top-four combination, the Petitions make the giant leap, without any support, that any such increase is inherently bad for consumers. This argument (i) assumes that MVPDs would pass these increases on to consumers rather than negotiating lower fees with cable networks and other programmers or dipping into their profit margins, and places the blame for this MVPD choice squarely on broadcasters, and (ii) ignores that retransmission consent fees started from an artificially low baseline and that increasing fees to achieve fair market-based compensation for broadcasters benefits the public by supporting high quality local news and other programming. As we stated in the Applications and the First Consolidated Opposition, retransmission consent revenues are a crucial source of funding needed for local broadcast stations to maintain and expand their local programming, including news, in the face of intense market pressures.[49] The Commission has correctly rejected these self-interested arguments before,[50] and they are no more persuasive here.

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[49] *See, e.g.*, First Consolidated Opposition at 29 ("With core advertising revenues essentially flat, and Programming costs (such as network affiliation fees) increasing sharply, broadcasters cannot maintain—let alone expand—the local news and other valuable services they provide to the public without continuing to negotiate for compensation from MVPDs that more closely reflects the fair value of broadcast programming.").

As we described in detail in the First Consolidated Opposition at pp. 29-30, these Petitioners rely on a distorted picture of the retransmission consent market, which ignores key contextual factors such as the fees paid to non-broadcast programmers, the historical *under-compensation* of broadcasters (which Congress sought to address by establishing the retransmission consent regime), and the effects of consolidation among the major MVPDs. Pay-TV interests—including many of these same Petitioners—have been rehashing the same arguments about broadcasters' supposed market power for years, most recently in the Commission's review of the national ownership rule, good-faith negotiation rules, and of the Nexstar-Media General transaction.

[50] *Media General/Nexstar*, 32 FCC Rcd at 197 ¶ 35 ("With regard to the claims that the Applicants will increase their bargaining leverage by the common ownership of multiple stations

Third, the Petitions ignore that retransmission fees are just one component (together with other revenues of the stations) of just one of the factors the Commission has said it will consider when reviewing a proposed top-four combination. Petitioners fail to address any of the other criteria set forth in the *Ownership Order on Reconsideration* and detailed in the Amendments: i.e., ratings share data, advertising revenues, market characteristics, the likely effects on programming meeting the needs and interests of the community, and other circumstances impacting the market.[51] On balance, these factors weigh decisively in support of permitting the proposed combinations.

Approval of the proposed combinations would be particularly appropriate here, given that the WTTV/WTTK combination in Indianapolis would merely continue a current combination that has produced quantifiable public interest benefits without any evidence of harm,[52] and that in St. Louis, each of the potential second stations (to be owned in combination with KTVI) has a

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in a region broader than the local market, the Commission has not previously found that, with regard to retransmission consent negotiations, where the ownership of multiple stations does not violate the national audience reach cap, increasing the number of stations owned at the regional or national level leads to public interest harms, and we decline to do so here based on the evidence before us. Moreover, we find Petitioners' claims fail to raise substantial and material questions of fact as to why the public interest would not be served by grant of the applications, because Petitioners do not provide any basis for the assertion that the merged entity will have 'market power' vis-à-vis MVPDs with national or at least broad coverage of their own.").

[51] *See Ownership Order on Reconsideration* ¶ 82; *see also* April 24 Amendment at Sections II(B)(1) and II(B)(2); May 14 Amendment at 1-5.

[52] NCTA mischaracterizes the current WTTK/WTTV combination as taking advantage of a "loophole" that the "Commission closed in 2016." This is a blatant and purposely misleading mischaracterization of the rule change. The "loophole" to which NCTA refers concerned affiliation swaps effected through agreements between stations intending to thwart the ownership rules. In contrast, Tribune, did not "swap" affiliations, but instead acquired the CBS affiliation for WTTV in 2015 as the result of CBS's negotiating impasse with WISH-TV. Months after WTTV acquired the CBS affiliation, it ultimately decided to sell its CW affiliation to WISH-TV rather than move the CW to its digital subchannel (which would also have been permissible).

unusually small market share for a top-four station.[53] And contrary to the arguments of the Attorney General Petitioners, the fact that KPLR-TV and KDNL-TV frequently alternate between fourth and fifth in ratings is one of the circumstances the Commission considered as a basis for changing the rule, as rigid adherence to a bright-line test at four is arbitrary when the number four station is very weak and close in ratings to the fifth-ranked station.

D. Delaying review of the Transaction pending conclusion of the UHF Discount appeal would be inappropriate and inconsistent with precedent.

Petitioners' claims that the Transaction as proposed would violate the national audience reach limit are flatly wrong.[54] The FCC's Television Multiple National Ownership Rule permits an entity to own television stations reaching up to 39% of TV households (The "National Cap"). For purposes of calculating compliance with the National Cap, the Commission attributes to UHF stations 50% of a market's TV households (the "UHF Discount"). Except for a few months between late 2016 and early 2017, the UHF Discount has been continuously in effect since 1985 (when the Commission adopted the first iteration of the National Cap), and remains in effect. When this Transaction is evaluated under the current rule, at closing, Sinclair will have a national reach of 37.39%—without doubt falling under the 39% cap. As noted above and in our First Consolidated Opposition, where a petitioner urges the Commission to ignore the language

[53] *See* April 24 Amendment at 12-13.

[54] *See, e.g.*, CWA Petition at 4; Attorneys General Petition at 5-6; Newsmax Petition at 6 (ignoring proposed divestitures to claim that "the proposed transaction places the company in violation of the Duopoly Rule and National Television Multiple Ownership Rule."); Free Press Petition at 15 (ignoring the long-standing UHF Discount to claim that "the instant transaction would result in a broadcast combination reaching 58.8 percent of the national television audience with its owned stations alone, far exceeding the congressionally mandated 39 percent cap.").

of its rules in order to reach the result petitioner seeks, the appropriate forum is a rulemaking proceeding.[55]

Petitioners further argue that the Commission should not act on the Applications until the D.C. Circuit Court of Appeals issues a decision in the pending appeal of the Commission's decision to reinstate the UHF Discount. Not only do Petitioners provide no legal support or precedent for this argument—as there is none—but they know that such an outcome would bring the Commission to a standstill and delay or chill future transactions.[56] There has hardly been a time over the past twenty years when there was not an FCC rulemaking pending or subject to appeal. When the ownership rules were being reviewed by the Third Circuit for years—as they are today—the Commission did not halt all related business. To the contrary, it applied the rules that were in effect at the time. This is consistent with the FCC's long history of granting applications based on new ownership and licensing rules while those rules are being challenged in court.[57] There is no basis for departing from that precedent here.[58]

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[55] *Spanish Radio Network*, 10 FCC Rcd 9954, 9556 (1995).

[56] *See Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004); s*ee also Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011); *see also Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016).

[57] *See, e.g.*, *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations*), FCC Docket No. 79-778, 75 F.C.C.2d 585 (1979); *Second Baptist Church*, Memorandum Opinion and Order, 18 FCC Rcd 22724 (2003) (granting an application for a construction permit for a new noncommercial educational television station based on the NCE point system while this system was pending in *American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156 (D.C. Cir. 2004)).

[58] Free Press notes that it has appealed the *Ownership Order on Reconsideration* (which, among other things, eliminated the eight-voices test and modified the Top-Four Prohibition), and urges the Commission to withhold action on the Transaction pending the outcome of that case; but it neglects to mention that the reviewing court denied a related petition for mandamus in the consolidated docket and stayed the appeal for at least six months. *See Prometheus Radio Project et al. v. FCC*, Case No., 18-1167, Doc. No. 003112846874 (Feb. 7, 2018) (Order denying

Courts have declined to enforce repealed rules that are the subject of judicial review.[59] Instead, where a court determines that application of an FCC rule under review could lead to irreparable harm, it generally will grant a stay to enjoin application of the rule pending judicial review.[60] Here, notably, Free Press and other parties appealing reinstatement of the UHF Discount requested a stay—specifically referencing this Transaction to support their claim of irreparable harm. The court summarily denied their request, and the Commission should do the same here.[61]

emergency petition for writ of mandamus and staying petitions for review for a period of six months). Given the procedural posture of that case, it would be unreasonable for the Commission to withhold approval of transactions that comply with the rules currently in effect.

[59] *Washington Ass'n for Television and Children v. FCC*, 665 F.2d 1264, 1269 (D.C. Cir. 1981) ("That the FCC's repeal of its policy currently is being appealed before this court does not disturb our conclusion [to render moot a challenge to a license grant]. *To hold that a repealed policy must be applied pending judicial review would tie an agency's hands for the frequently long periods during which appeals await disposition in the courts*.") (emphasis added).

[60] *See, e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382 (3rd Cir. 2004) (staying implementation of cross-ownership rules pending the Court's decision); *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003).

[61] Order, *Free Press et al. v FCC*, Case No, 17-1129 (June 15, 2017) (denying motion for stay pending judicial review).

III. CONCLUSION

For the foregoing reasons, Applicants request that the Commission dismiss or deny the Petitions in full and grant the Applications.

Respectfully submitted,

/s/ *Miles S. Mason*
Miles S. Mason
Jessica T. Nyman
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street, NW
Washington, D.C. 20036
202-663-8195

Counsel to Sinclair Broadcast Group, Inc.

/s/ *Mace Rosenstein*
Mace Rosenstein
Ann West Bobeck
COVINGTON AND BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001
202-662-5460
Counsel to Tribune Media Company

July 5, 2018

CERTIFICATE OF SERVICE

I certify that on this 5th day of July, 2018, I caused a true and correct copy of the foregoing **Applicants' Second Consolidated Opposition to Petitions to Deny** to be served via email on the following:

David Roberts
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, D.C. 20554
David.Roberts@fcc.gov

David Brown
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, D.C. 20554
David.Brown@fcc.gov

Jeremy Miller
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, D.C. 20554
Jeremy.Miller@fcc.gov

Faiz Shakir
National Political Director, ACLU
915 15th Street, NW
Washington, D.C., 20005
fshakir@aclu.org

Ross J. Lieberman
Senior Vice President of Government Affairs,
American Cable Association
2415 39th Place, NW
Washington, D.C. 20007
rlieberman@americancable.org

Howard M. Weiss
Howard M. Weiss Law Firm
3061 Mt. Vernon Ave., Suite N-405
Alexandria, VA 22305
h.weiss496@gmail.com
Counsel for Herndon Reston Indivisible

Dana J. Floberg
Policy Analyst, Free Press
1025 Connecticut Ave, NW
Suite 1110
Washington, D.C. 20036
dfloberg@freepress.net

Brian Thorn
Communications Workers of America
501 Third Street, NW
Washington, D.C. 20001
bthorn@cwa-union.org

Michael Nilsson
Harris, Wiltshire & Grannis LLP
1919 M Street, NW
The Eighth Floor
Washington, D.C. 20036
mnilsson@hwglaw.com
Counsel for the American Television Alliance

Timothy F. Winter
President, Parents Television Council
707 Wiltshire Blvd., Suite 2075
Los Angeles, CA 90017
twinter@parentstv.org

Rick Chessen
NCTA – The Internet & Television
Association
25 Massachusetts Ave. NW, Suite 100
Washington, DC 20001
rchessen@ncta.com

Pantelis Michalopoulos
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036
pmichalopoulos@steptoe.com
Counsel for DISH Network L.L.C.

Susan L. Satter
Public Utilities Policy Counsel,
Illinois Attorney General's Office
100 West Randolph Street, 11th Floor
Chicago, IL 60601
ssatter@atg.state.il.us

Jonathan D. Schiller
Boies Schiller Flexner LLP
575 Lexington Ave. 7th Floor
New York, NY 10022
jschiller@bsfllp.com
Counsel for Newsmax Media, Inc.

Carmen Scurato
National Hispanic Media Coalition
65 South Grand Avenue, Suite 200
Pasadena, CA 91105
cscurato@nhmc.org

Harold Feld
Senior Vice President, Public Knowledge
1818 N Street NW
Suite 410
Washington, D.C. 20036
hfeld@publicknowledge.com

/s/ Jessica T. Nyman
Jessica T. Nyman