Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

The American Television Alliance hereby provides its reply comments in response to the Second Consolidated Opposition filed by Sinclair Broadcast Group, Inc. and Tribune Media Company ("Applicants").[1] Applicants now concede that the Commission may not ignore retransmission consent fees in conducting its public interest analysis of their proposed top-four duopolies.[2] Yet they still do not provide any serious analysis of how their proposed duopolies will affect retransmission consent and consumer pricing. Applicants give the Commission no reason to depart from its prior conclusion that the creation of top-four duopolies *will* cause retransmission consent prices to rise, nor do they provide any basis to conclude that the benefits of the new top-four duopolies would exceed the harm to consumers in the form of increased prices. Therefore, the Commission should reject Sinclair's proposal to increase consumer prices

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1 Applicants' Second Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 (filed July 5, 2018) ("Opposition").

2 Opposition at 18.

through the creation of top-four duopolies, or it should impose conditions designed to prevent future abuses and increased consumer bills.

I. THE APPLICANTS CONCEDE THAT THE COMMISSION MAY NOT IGNORE RETRANSMISSION-CONSENT-RELATED HARMS.

In its Comments, ATVA described the basic legal framework applicable to the Commission's review of proposed top-four duopolies[3] and explained why retransmission consent fees must form a part of that review.[4] Applicants do not appear to dispute this basic framework. Indeed, they concede that the Commission must consider retransmission consent fees in considering top-four duopolies.[5] In doing so, however, they emphasize that retransmission consent fees "are just one component" of the top-four analysis and suggest that we think the Commission should ignore all issues other than retransmission consent.[6]

But ATVA has never suggested that retransmission consent fees are the *only* factor in the Commission's analysis of top-four duopolies. Our point is that the Commission must consider *all* relevant factors—including retransmission consent—in any such analysis. Because the Commission has already found that top-four duopolies *generally* cause retransmission consent-related harm, the only logical way to balance all the factors is to consider (1) whether there is some reason to think that those harms will not occur in the specific markets in question; or (2)

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3 ATVA also noted that retransmission consent issues must also factor into the Commission's review of the transaction more generally. Comments of the American Television Alliance in Response to Applicants' May Amendment, MB Docket No. 17-179, at 4 (filed Jun. 20, 2018) ("ATVA Comments"). Applicants did not dispute this in their Opposition.

4 *Id.* at 3-6 (noting that the Commission may approve this transaction only if the Applicants prove that the transaction is in the public interest generally *and* that the benefits of allowing top-four duopolies exceed the harms); *id.* at 6-7 (noting that the Commission must offer an explanation if it departs from its prior findings that joint negotiation of top-four stations will "invariably tend to yield" higher retransmission consent fees).

5 Opposition at 18.

6 *Id.* at 18; s*ee also id.* at iii.

whether the benefits outweigh them. If Applicants cannot make one of these showings—and the Applicants here have not—then they cannot demonstrate that their proposed duopolies serve the public interest.

II. THE APPLICANTS HAVE FAILED TO DEMONSTRATE THAT RETRANSMISSION CONSENT HARMS WILL NOT OCCUR IN ST. LOUIS AND INDIANAPOLIS.

Applicants make almost no attempt to show that the Commission's prior finding that top-four duopolies *generally* cause retransmission-consent-related harms does not apply in the two markets where they seek Commission approval to hold top-four duopolies: St. Louis and Indianapolis. They instead rehash arguments taking issue with the Commission's prior conclusion itself. This, of course, is not the "market-specific" showing that the Commission instructed Applicants to make.[7] And none of the arguments hold water on their own merits.

- Applicants argue that duopolies do not *generally* cause price increases because top-four stations are not close substitutes for each other.[8] Yet the Commission has specifically found that top-four stations *are* substitutes for one another,[9] and Applicants offer no evidence to the contrary.

- Applicants claim that duopolies do not *generally* cause price increases because "retransmission consent agreements are negotiated nationally."[10] But most retransmission consent agreements are *not* national in scope. Only those between the largest broadcasters and the largest MVPDs are "national" or anything close to it. And the fact that some retransmission agreements are negotiated nationally does not mean that duopolies do not increase prices. It simply means that those price increases would be

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7 *2014 Quadrennial Regulatory Review — Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, 32 FCC Rcd. 9802, ¶ 94 (2017).

8 Opposition at 14-15.

9 *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 13 (2014) ("*Joint Negotiation Order*") ("Because same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another, their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down.").

10 Opposition at 14-15.

"blended" into a national rate negotiated over many markets. The harm, in other words, does not disappear—it is merely spread over a larger customer base.

- Applicants claim that duopolies do not *generally* cause price increases because broadcasters are small, MVPDs are big, and there are many other competitors.[11] Yet it is simply not the case that all broadcasters are small and all MVPDs are big: there are both small and large broadcasters and small and large MVPDs. More importantly, Commission's prior judgment and the evidence in the record suggests that the size of the parties and the existence of other competitors does not constrain duopoly pricing.[12]

- Applicants dispute the evidence submitted by DISH in this proceeding, which shows that duopolies *generally* increase retransmission consent prices. But the Applicants' characterizations focus almost exclusively on DISH's initial submission, essentially ignoring a second submission in which DISH's economists *specifically* found price increases from duopolies.[13]

- Applicants argue retransmission consent price increases caused by a proposed merger are either not harmful or are affirmatively beneficial.[14] But as we have previously explained, this is both wrong on its face and contrary to decades of Commission precedent.[15]

Applicants *do* make one market-specific argument: that they seek merely to preserve the *status quo*.[16] But that is a misleading way to describe the situation in St. Louis. Tribune now owns both KTVI (FOX) and KPLR (CW), while Sinclair seeks permission to create a *different* duopoly consisting of KTVI (FOX) and KDNL-TV (ABC).[17] Nobody thinks that Tribune's current ownership of a FOX and a CW affiliate creates as much leverage as the proposed

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11 *Id.* at 15-16.

12 This is also why references to the *AT&T-Time Warner* case are inapposite. *Id.* at ii. In that *vertical* merger, the judge found that the government had not provided sufficient evidence for its theory that prices would raise. Here, the Commission has already found to the contrary.

13 ATVA Comments at 9-10.

14 Opposition at 17.

15 Reply of the American Television Alliance, MB Docket No. 17-179 at 3-5 (filed Aug. 29, 2017).

16 Opposition at 16 & n.48, 18.

17 Amendment to Comprehensive Exhibit, MB Docket No. 17-179 at 3 (filed Apr. 25, 2018); Amendment to Comprehensive Exhibit, MB Docket No. 17-179 at 2 (filed May 14, 2018).

combination of a FOX and an ABC affiliate. And the Commission has never had an exception for pre-existing duopolies.[18]

III. APPLICANTS HAVE FAILED TO SHOW THAT THE ALLEGED BENEFITS OF THE TRANSACTION OUTWEIGH ITS HARMS.

Having failed to refute the evidence that top-four duopolies increase retransmission consent fees, the Commission can grant such duopolies only if Applicants show that the benefits of these duopolies outweigh the harms. Here again, Applicants make absolutely no attempt to weigh the alleged benefits against harms. In a single sentence, Applicants list a number of benefits they claim will be created by their transaction. They then conclude: "On balance, these factors weigh decisively in support of permitting the proposed combinations."[19] But merely claiming that a transaction will have benefits does not demonstrate that these benefits exceed the harms—especially when Applicants have refused to recognize the significance of those consumer harms.[20]

More importantly, however, Applicants fail to explain why the Commission should credit them for alleged "benefits" that are neither transaction-specific nor verifiable. They claim that ATVA fails to refute the alleged public interest benefits of the transaction.[21] To the contrary, we

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18 *See, e.g.*, *Clear Channel Broad. Licenses, Inc., et. al and Newport Television LLC*, 22 FCC Rcd. 21196, ¶ 14, 21 (2007) (requiring divestiture of pre-existing duopoly in Jacksonville within six months of consummation); *see also Schurz Commc'ns, Inc. and Gray Television Grp., Inc.*, 31 FCC Rcd. 1113, 1113-14 (2016) (granting failing station waiver for sale of pre-existing duopoly that would otherwise have been prohibited by the local ownership rules).

19 Opposition at 18.

20 In the *AT&T-DIRECTV* case, for example, Applicants successfully demonstrated through merger simulations that any harm that the merger might cause by reducing competition in the stand-alone video market would be more than outweighed by the benefits of increased competition in the market for a video/broadband bundle. *AT&T, Inc. and DIRECTV*, 30 FCC Rcd. 9131, ¶¶ 108 *et seq.* (2015).

21 Opposition at 4.

demonstrated that most of these "benefits" are not cognizable under Commission precedent because they are not transaction-specific or too speculative.[22] Applicants ignore this completely.

IV. APPLICANTS IGNORE CONCERNS ABOUT THE MANNER OF THEIR DIVESTITURES.

The Opposition also fails to respond to the concerns raised about the manner in which Sinclair proposes to divest stations. Applicants claim that divestiture Joint Sales Agreements ("JSAs") and Shared Services Agreements ("SSAs"), standing alone, are lawful because they are identical to those that have been deemed non-attributable under the national ownership rules.[23] Yet we have never disputed the *legality* of JSAs and SSAs that look like those proposed here. We argued instead that Sinclair's particular arrangements could permit information sharing and other conduct designed to evade rules regarding joint negotiation and should be examined closely in light of Sinclair's history of flouting these rules.[24] Applicants could have responded to these concerns by stating that none of their arrangements would permit Sinclair to do so. Yet Applicants did not do so.

ATVA member ACA also expressed concern that Applicants may have withheld other agreements or arrangements relevant to the transaction and to retransmission consent, which they unilaterally declared to be irrelevant.[25] But the Opposition does not address that concern, either. If there were no such agreements, Applicants would presumably have responded by assuring the Commission that no such agreements or arrangements exist. But they did not do so, instead saying that such withholding is standard industry practice.[26] Again, we have never disputed that

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22 ATVA Comments at 14-18.

23 Opposition at 7.

24 ATVA Comments at 20.

25 ATVA Comments at 22-23.

26 Opposition at 12 n.33.

withholding can be standard industry practice. Our position remains that, in reviewing a major transaction such as this, the Commission and interested parties must have the opportunity to review and comment on all arrangements related to the merger.

Finally, the Opposition fails to provide any meaningful response to our concerns that Sinclair may attempt to use after-acquired-station clauses to raise retransmission consent prices on the stations that it is required to divest.[27] ATVA asked the Commission to confirm that, under the *Phipps* precedent, Sinclair does not "acquire" or obtain "control" of Tribune stations divested immediately after the transaction closes—because Sinclair cannot lawfully do so under the Communications Act.[28] Applicants could have responded by confirming this longstanding understanding of the law. Yet here again, they did not do so. They argue instead that the Commission in *Nexstar-Media General* declined to examine after-acquired clauses because they are "freely negotiated" between the parties.[29] But this misses the point entirely. The *Nexstar* case involved after-acquired clauses related to stations the purchaser *actually acquired*. This involves the effect of such clauses on stations that the purchaser *cannot lawfully purchase*.

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27 See ATVA Comments at 25; *see also* Letter from Ross Lieberman to Marlene Dortch, MB Docket Nos. 17-179 *et al.*, at 6-8 (filed Jun. 20, 2018).

28 *John H. Phipps, Inc. (Assignor) and WCTV Licensee Corp. (Assignee)*, 11 FCC Rcd. 13053, ¶ 9 (1996) ("By amending the agreements to make the pass-through virtually instantaneous, we believe that the parties have made clear their intention that the intermediary will not acquire or maintain control of the licenses."); 47 U.S.C. § 310(d) ("No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.").

29 Opposition at 11, *citing Media General/Nexstar*, 32 FCC Rcd. 183, ¶ 36 (2017).

Moreover, we did not ask the Commission to opine on the clauses themselves. We simply asked that the Commission confirm its decades-old precedent that Sinclair cannot lawfully acquire or control the stations in question, even if they are transferred immediately upon closing.

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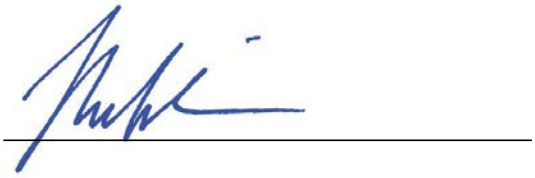
More than a year after Applicants first proposed to create the largest broadcaster in history, they have yet to demonstrate that doing so would serve the public interest. Record evidence shows that allowing Sinclair to operate top-four duopolies in St. Louis and Indianapolis will increase consumer prices. As the record now stands, the Commission has no basis on which to grant the proposed transaction.

Respectfully Submitted,



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