

**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)	
)	
)	
)	

MOTION OF DISH NETWORK, AMERICAN CABLE ASSOCIATION, AND PUBLIC KNOWLEDGE FOR ADDITIONAL INFORMATION AND DOCUMENTS AND EXTENSION OF TIME

I. INTRODUCTION AND SUMMARY

Pursuant to Section 1.46(b) of the Commission’s Rules,¹ DISH Network L.L.C., American Cable Association, and Public Knowledge (collectively, the “Petitioners”) respectfully request that the Commission require the Applicants in this proceeding² to furnish additional information and documents necessary for the Commission and the public to assess whether the proposed transaction is in the public interest. As even the Applicants appear to acknowledge, the proposed transaction raises substantial legal and policy issues—including compliance with media ownership rules and potential implications on retransmission consent negotiations. At the same time, the applications provide insufficient information for the Commission to validate, let alone quantify, the claimed public interest benefits. The applications and supporting documents thus

¹ 47 C.F.R. § 1.46(b).

² Public Notice, MB Docket No. 17-179, *Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose Ex Parte Status for the Proceeding*, DA 17-647 (July 6, 2017) (“Public Notice”).

fail to provide the information necessary to conduct a public interest analysis of this transaction. The Commission must address this shortcoming by requesting the Applicants' production of such information. Petitioners detail the types of information and analysis that should be sought of Applicants in Section II below.

In addition, because the information requested is necessary for meaningful public comment on the proposed transaction, Petitioners also request that the Commission extend the pleading cycle in this proceeding so that Petitions to Deny and other filings can be informed by the facts, and therefore most helpful to the Commission as it considers the issues raised by this transaction. Specifically, Petitioners ask that (i) initial Comments and Petitions to Deny be due no earlier than 30 days following participating parties' access to confidential material already filed or made available to the Commission by the Applicants; and (ii) Replies to Oppositions or Comments be due no earlier than 30 days following participating parties' access to Applicants' completed responses to the requests for additional information set forth below. Alternatively, in tandem with requesting the information necessary to evaluate the proposed transaction, the Commission should reconsider its requirement that commenters raise issues in their initial comments or within fifteen days of discovering them. Commenters must have the opportunity to analyze and respond to Applicants' information submissions—just as they have had in every other transaction in recent years.

II. APPLICANTS HAVE FAILED TO PROVIDE CRITICAL INFORMATION

The Applicants bear the burden of proving that their transaction is in the public interest.³ Their three pages on putative public interest benefits fail to meet this burden, especially in light of the concerns raised by the transaction, which the Applicants themselves appear to

³ 47 U.S.C. 310(d).

acknowledge. For the Commission to fulfill its obligations under Section 310(d) of the Communications Act, and for Petitioners and other commenters to evaluate and comment on the proposed transaction, the Commission should require the Applicants to supplement their applications with additional information, both to support their asserted public interest benefits and to address the potential harms of the transaction.⁴

This transaction presents substantial competition and media law questions at both the national and local level. At the national level, Sinclair proposes to create the single largest operator of local broadcast stations in the country. The combined Sinclair-Tribune entity would have substantial interests in broadcast stations covering over 70 percent of the nation's population, an unprecedented single ownership footprint for broadcast media and an outcome that raises important issues of both localism and competition. It would also violate the national ownership cap; by the Applicants' own calculation, the proposed transfers would place Sinclair some 6.5 percent above the 39 percent cap even after accounting for the reinstated UHF discount.⁵

In addition, the two groups overlap in a number of markets, and the Applicants have failed to detail how they propose to address such overlaps. The Applicants themselves concede that the proposed combination would violate the duopoly rule in at least 11 markets.⁶

⁴ See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Protective Order, MB Docket No. 15-149, 30 FCC Rcd. 10360 (2015) (“Petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.”).

⁵ *Applications of Tribune Media Company and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations*, Comprehensive Exhibit at 13-14 (filed June 28, 2017) (“Sinclair-Tribune Application”).

⁶ Sinclair-Tribune Application, Comprehensive Exhibit at 1.

How will those violations be cured? The Applicants offer a non-committal response, suggesting that their preferred way to fix the violations of the rules is to eliminate the rules themselves. In their words:

[T]he applicants intend to take actions in such markets as necessary to comply with the terms of the Merger Agreement and the Commission's local television ownership rules as required in order to obtain FCC approval of the Transaction. To the extent that there are changes, or proposed changes, to the local ownership rules that would permit acquisition of the Tribune licenses in any of these markets, the applicants may file amendments to the applications to address such changes. To the extent that divestitures may be necessary, applications will be filed upon locating appropriate buyers and signing appropriate purchase agreements.⁷

Beyond the media ownership rules, the increased national and local presences raise material competition issues in other areas, including with respect to Sinclair's increased retransmission consent bargaining power in its dealings with multichannel video programming distributors ("MVPDs"). This increased bargaining power could lead to merger-specific increases in the retransmission fees charged to MVPDs, resulting in higher prices to consumers. In addition, given the history of service disruptions during the course of negotiations over retransmission consent, consumers could be additionally harmed by being deprived of their local programming. The Applicants have not furnished any expert economic testimony to provide their view of these effects.

At the same time, the Applicants provide no information by which the Commission or interested parties could quantify the claimed public interest benefits.⁸ The Applicants, for

⁷ *Id.* at 12.

⁸ *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131, 9237 ¶ 274 (2015) ("[A] claimed [merger] benefit must be verifiable. Because much of the information relating to the potential benefits of a transaction is in the sole possession of the Applicants, they have the burden of providing sufficient evidence to support each claimed benefit to enable the Commission to verify its likelihood and magnitude.").

example, speak of Sinclair’s capital investment, headcount, news/local programming, charity and digital passion, as well as various Sinclair programs such as “Sinclair Cares.”⁹ Yet, absent evidence about how Tribune already scores on these categories, and how the merger will improve on Tribune’s performance, these claims provide no basis to conclude that the proposed transaction itself will serve the public interest. These questions are critical to understanding the public interest implications of this multi-billion dollar merger.

To address concerns with respect to these issues, among others, the Applicants should, at a minimum, produce:

1. All documents addressing the process by which each company considered the merits of this transaction, the reasons why the transaction would be advantageous, and, specifically, any information demonstrating any consideration in either company that the transaction could affect the going-forward rate of fees charged to MVPDs or OVDs and availability of streaming video services;
2. Analyses to support and quantify the Applicants’ contention that the transaction will facilitate investment in local content and production capabilities, including specific business synergies and efficiencies that will facilitate such investment or otherwise aid the operation of Sinclair were the transaction to be consummated;
3. All analyses and documents relating to historic and projected future capital expenditures, headcounts, and programming plans for each of Tribune and Sinclair, and for the proposed, consolidated company;
4. Documentation and data with respect to recently acquired stations and the addition of local and news programming, specifically breaking out, for each station, the weekly addition (or loss) of hours of 1) local news, 2) other local programming, and 3) news or interest segments not originated by the station;
5. A description of the relationship between centrally originated programming by Sinclair and any requirements for local stations to air such programming, including without limitation any written agreements or correspondence between Sinclair and the stations with respect to such programming;
6. All documents related to any shared services or local marketing agreements between Sinclair or Tribune stations and third-party stations;

⁹ Sinclair-Tribune Application, Comprehensive Exhibit at 2-4.

7. All documents or analyses addressing or relating to the use of “most-favored nation” (“MFN”) clauses in retransmission consent agreements to establish pricing floors for retransmission rates in retransmission negotiations with other MVPDs;
8. Identification of all changes in station ownership (stations acquired or sold) since 2010 and station affiliation;
9. Monthly data for 2010 to present on advertising revenues earned, sharing payments for advertising paid to station affiliates, and subscriber and/or viewer bases for advertising fees, by MVPD, by station;
10. All retransmission consent agreements with MVPDs and network affiliation agreements since 2010; monthly data (including both total fees and per-subscriber fees) for 2010 to the present on: (i) retransmission fee revenues earned, (ii) reverse retransmission fees paid (retransmission fees remitted to affiliated networks), and (iii) subscriber bases for retransmission fees, by MVPD, by station;
11. All documents relating or pertaining to retransmission consent strategy and negotiations with MVPDs and affiliated networks, including without limitation all documents relating to strategy and negotiations in connection with all blackouts of local programming in which Applicants have been involved since 2010; and
12. All documents and data with respect to the effects on advertising revenues of any blackouts of local programming in which Applicants’ stations have been involved on such revenues.

With respect to the retransmission consent agreements, Petitioners are aware of the D.C. Circuit decision in *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015). In this case, production of the retransmission consent agreements under a protective order designating them as “highly confidential” meets the standard applied by the Court in *CBS*. There, the court found that to “make the persuasive showing necessary to disclose petitioners’ confidential documents, the Commission must explain (i) why disclosure is in the public interest, (2) why it is a good idea on balance and (3) why the information serves as a *necessary* link in a chain of evidence.” *Id.* at 705.

With respect to the first two prongs, the standard is satisfied here for the same reason the *CBS* court found it satisfied there. Disclosure would serve the public interest here because

“disclosure would serve the public’s interest in a thorough review process, and the benefits outweigh the harms.” *Id.* Third-party review of the highly confidential documents would “ensure a sounder decision.” *Id.* The Court emphasized that, if “a large number of documents were excluded from review...it would deprive commenters of the opportunity to argue that the documents have significance in ways that are not apparent to the Commission,” thus facilitating “informed decision making.” *Id.* Second, the Court concluded that the use of the Commission’s standards for limiting highly confidential information only to outside counsel and outside consultants not involved in competitive decision-making would mean that “[t]he risks involved in disclosure thus appear minimal.” *Id.*

The *CBS* court disagreed with the Commission only on the third prong of the standard in the case at bar. It found that the justification for the treatment of programming agreements was legally inadequate because the Commission had not demonstrated that review of the agreements, with a great deal of very sensitive information revealing the business operations of third parties, was “necessary,” by which, the Court explained, it meant that the Commission had not established whether other information would suffice. *Id.* at 707.

Here, however, there can be little doubt about the “necessity” of this information. The Applicants’ retransmission consent agreements are necessary to the analysis of whether the proposed transaction creates or enhances the Applicants’ market power or facilitates its exercise in the retransmission consent market. Where, as here, the outcome of the central issue in a merger must be predicted from precisely the same negotiations conducted in the past by the very same companies, there is no alternative source that can help the Commission and interested parties determine whether this transaction would serve, or harm, the public interest.

III. AN EXTENSION TO THE PLEADING CYCLE IS WARRANTED

Petitioners also respectfully request that the pleading cycle in this proceeding be extended. Specifically, Petitioners ask that the deadline for Comments and Petitions to Deny be set no earlier than 30 days following the public's access, subject to appropriate protections, to the confidential information already filed or made available to the Commission by the Applicants but not yet made available to interested parties. This material is central to Petitioners and other parties' abilities to evaluate the transaction, including with respect to Applicants' assertions that failing station waivers remain necessary for several stations in the Tribune portfolio. Petitioners also ask that Replies to Oppositions or Comments in this proceeding be due no earlier than 30 days following participating parties' access to Applicants' completed responses to the requests for additional information set forth above.

An extension will allow Petitioners and other commenters sufficient time to review the information provided by the Applicants and to fully develop the record in this proceeding. The Commission has previously granted extensions of time precisely so that commenters would have the information they need to be able to comment.¹⁰ When the Commission has *denied* such

¹⁰ See, e.g., Media Bureau Seeks Comment on Issues Raised By Certain Programmers & Broadcasters Regarding the Production of Certain Documents in Comcast-Time Warner Cable-Charter & AT&T-DIRECTV Transaction Proceedings, *Public Notice*, 29 FCC Rcd. 11519 (2014); Application of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC for Consent to Assign Licenses, *Order*, 27 FCC Rcd. 2368, 2369 ¶¶ 3-4 (2012) (granting an extension of time because several commenters “had not been able to fully review the Applicants’ Opposition due to delays associated with obtaining access to the confidential version of the Opposition.”); Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, *Order*, 25 FCC Rcd. 10201, 10202 ¶ 5 (2010) (granting an extension of time because it would “enable interested parties to fully review the filings and submit their views in their replies,” given the Applicants’ voluminous material submitted); Consolidated Application for Consent to Transfer Control of Stratos Global Corporation’s FCC-Authorized Subsidiaries and Petition for Declaratory Ruling, *Order*, 22 FCC Rcd. 13072, 13073 ¶¶ 4-5 (2007) (granting an extension of time for commenters to “review and respond to the [confidential] material” filed by Applicants after their

requests, it has done so because its deadlines already gave the parties the opportunity to review confidential information.¹¹

Alternatively, in tandem with requiring the Applicants to produce the information necessary for the Commission and other interested parties to evaluate the potential competitive effects of the transaction, the Commission should reconsider the requirement stated in its *Public Notice* that all issues must be raised in the initial pleading or within fifteen days of discovery of newly-discovered facts; otherwise the Commission may find that they need not be considered on the merits.¹² When the Applicants submit information requested by the Commission, interested parties will need to analyze that information and comment on it—just as they have done in every

Oppositions); Implementation of the Pay telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Order*, 22 FCC Rcd. 2547, 2548 ¶ 3 (2007) (granting an extension of time because, considering the Applicants’ delay in filing initial comments and other filing irregularities, “providing additional time to file reply comments [would] facilitate the development of a more accurate and complete record in this proceeding”); Application of Media General Broadcasting of South Carolina Holdings, Inc. for Renewal of License for Station WMBB(TV), Panama City, FL, *Order*, 20 FCC Rcd. 5176, 5176 ¶¶ 2-3 (2005) (granting an extension of time because the Applicant’s Opposition was received late by the commenters and “contain[ed] a substantial number of new facts that must be reviewed,” and an extension “[would] allow for the submission of a more thorough response to the matters raised.”); Letter from W. Kenneth Ferree, Chief, Media Bureau, to Pantelis Michalopoulos, Counsel for EchoStar Communications Corporation, and Gary M. Epstein, Counsel for General Motors Corporation and Hughes Electronics Corporation, CS Docket No. 01-348 (July 23, 2002) (restarting the merger clock review due to, *inter alia*, the “substantial amount of information submitted in response to [the Commission’s Initial Information and Document Request].”).

¹¹ See, e.g., *AT&T Inc. & DIRECTV*, 29 FCC Rcd. 10318 ¶ 5 (MB 2014) (“For this reason, we have established a relatively lengthy three-month pleading cycle, consisting of three rounds of pleadings, initial comments and petitions to deny, responses and oppositions, and replies to responses and oppositions, which, *together with the Commission’s ex parte process and the opportunity for parties to comment on the Applicants’ responses to information requests*, provides interested parties with substantial time and multiple opportunities to participate in the proceeding.”) (emphasis added).

¹² Public Notice at 3.

proposed transaction the Commission has reviewed in recent years.¹³ If the Commission sets the comment cycle after Applicants respond to the Commission’s information request, as we suggest, such a “use it or lose it” rule might make sense. If the Commission insists that pleadings be filed before Applicants have submitted their information, such a rule both precludes the public’s right to comment on the proposed transaction and the Commission’s ability to reasonably analyze it.

¹³ *See, e.g.*, Supplemental Declaration of Roger J. Lynch, attached to Letter from Stephanie A. Roy, Counsel to DISH Network, to Marlene Dortch, FCC, MB Docket No. 14-57 (Apr. 22, 2015) (analysis relying on Applicants’ confidential information).

IV. CONCLUSION

For these reasons, Petitioners respectfully request that the Commission require the Applicants to provide additional information and data, and extend the pleading cycle in this proceeding, both as set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew Golodny, hereby certify that on July 12, 2017, I caused true and correct copies of the foregoing to be served by electronic mail upon the following:

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