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REDACTED—FOR PUBLIC INSPECTION

August 7, 2017

By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: Tribune Media Company and Sinclair Broadcast Group, Inc., Consolidated Applications for Consent to Transfer Control, MB Docket No. 17-179

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,[1] DISH Network L.L.C. ("DISH") submits the enclosed public, redacted version of its Petition to Dismiss or Deny, including supporting exhibits. DISH has denoted with **{{BEGIN HCI END HCI}}** where Highly Confidential Information has been redacted. The Highly Confidential Information in the Petition to Dismiss or Deny and supporting exhibits is the Highly Confidential Information of DISH. A Highly Confidential version of this filing is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

Please contact me with any questions.

Respectfully submitted,

Stephanie A. Roy
Counsel for DISH Network L.L.C.

Enclosure

[1] *Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee) Consolidated Applications for Consent to Transfer Control*, MB Docket No. 17-179, *Protective Order*, DA 17-678 (July 14, 2017) ("*Protective Order*").

REDACTED – FOR PUBLIC INSPECTION

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	)	

PETITION TO DISMISS OR DENY OF DISH NETWORK L.L.C.

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August 7, 2017

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REDACTED – FOR PUBLIC INSPECTION

BEFORE THE
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In the Matter of	)	
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and	)	
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Sinclair Broadcast Group, Inc.	)	
(Transferee)	)	
	)	
Consolidated Applications for Consent	)	
to Transfer Control	)	

PETITION TO DISMISS OR DENY OF DISH NETWORK L.L.C.

DISH Network L.L.C. ("DISH")[1] respectfully petitions the Commission to dismiss or deny the proposed acquisition of Tribune Media Company ("Tribune") by Sinclair Broadcast Group, Inc. ("Sinclair") (collectively, the "Applicants").[2] The Application[3] seeks approval for station combinations that violate the current media ownership rules, and the Applicants fail to submit a single economic study or expert declaration supporting any of the claimed "benefits." The Applicants fail to demonstrate that the merger would serve the public interest. Nor are there

[1] DISH is a multichannel video programming distributor ("MVPD") that retransmits local broadcast stations in every one of the 210 designated market areas in the United States. DISH today has retransmission consent agreements with both Applicants, allowing it to retransmit certain local broadcast stations owned by the Applicants. DISH expects to negotiate with both Applicants in the future for continued retransmission of their stations. In addition, DISH's Sling TV, an Online Video Distributor ("OVD"), has started offering local broadcast stations in a number of markets **{{BEGIN HCI**

END HCI}}. For these and other reasons described herein, DISH is a party in interest under Section 309(d)(1) of the Communications Act. *See* 47 U.S.C. § 309(d)(l).

[2] *See* Public Notice, MB Docket No. 17-179, Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc., DA 17-647 (July 6, 2017).

[3] *See* Application of Tribune Media Company and Sinclair Broadcast Group, Inc., MB Docket No. 17-179 (June 28, 2017) ("Application").

countervailing benefits, conditions, or divestitures that would alleviate the substantial harms posed by the merger.

The proposed transaction is the largest in a Sinclair acquisition spree that has engulfed Fisher, Allbritton, and Bonten over the last four years. It would turn Sinclair into the nation's largest broadcast conglomerate and lead to higher prices, more station blackouts, less choice, and less local news for millions of consumers. The resulting company ("New Sinclair") would:

- own over 500 television stations (accounting for individual multicast feeds), including 117 stations affiliated with a "Big-4" network;
- reach 72% of American households;
- own television stations in 108 of the country's 210 television markets, including 40 out of the top 50 designated market areas ("DMA"s); and
- own more than one station in 37 markets.[4]

I. Introduction and Summary

Professor Janusz Ordover, a former Deputy Assistant Attorney General for Economics at the Antitrust Division at the Department of Justice ("DOJ") under President George H.W. Bush, has reviewed the proposed merger on DISH's behalf and has found that the transaction will likely lead to higher prices for multichannel video program distributors ("MVPDs"), higher prices for online video distributors ("OVDs"), and ultimately price increases for consumers. Professor Ordover bases this conclusion on empirical and econometric work he has done, in conjunction with Dr. Theresa Sullivan of Compass Lexecon and Mr. William Zarakas and Dr. Jeremy Verlinda of the Brattle Group (the "Ordover Study").[5] This first-of-its-kind analysis connects retransmission fees to the overall size of the broadcast group and to the number of

[4] *See* Exhibit A, List of Combined Sinclair/Tribune Stations and Affiliations.

[5] Professor Ordover and Mr. Zarakas/Dr. Verlinda submit complementary Declarations describing the Ordover Study.

markets where the group controls more than one station. The study also connects pay-TV subscriber losses in a local market during a blackout to the number of stations controlled by the same group in that market. The conclusion from these causal relationships is that the increased broadcast group size and number of local market duopolies that will result from this transaction will empower New Sinclair to demand higher prices with impunity – price increases that will ultimately be borne by the American consumer.

The key findings of DISH's experts are as follows:

- Other things being equal, the larger the broadcast station group, the higher the retransmission fee paid by the MVPD;
- Other things being equal, the more local station duopolies controlled by a broadcast group, the higher the retransmission fee paid by the MVPD;
- The blackout of two stations in a local market costs MVPDs greater customer losses than the loss of one station, and is a more effective weapon for the broadcaster to threaten distributors into capitulation;
- New Sinclair will likely demand and achieve greater price increases than each of Sinclair and Tribune standing alone;
- Part of these price increases would likely be passed through by DISH and other distributors to consumers; and
- One of the key factors contributing to rising retransmission fees is broadcaster consolidation. The Sinclair/Tribune merger would likely exacerbate the trend towards higher retransmission fees.

***Larger broadcast groups command higher rates*.** The economic data DISH's experts analyzed demonstrate that allowing Sinclair and Tribune to merge will likely raise prices for the American consumer. The Zarakas/Verlinda Declaration[6] shows that a broadcast group's size has a statistically strong effect on retransmission prices. The large groups overcharge, and not just

[6] Declaration of William P. Zarakas and Jeremy A. Verlinda ¶¶ 8-9 ("Zarakas/Verlinda Decl.") (Attached as Exhibit E).

by a difference of a few percentage points. The average "Big-4" retransmission rate attained by groups with annual revenues of $500 million or more is about **{{BEGIN HCI END HCI}}** more than the average rate charged by groups with less than $500 million in annual revenue. The difference is even more pronounced – about **{{BEGIN HCI END HCI}}** – when the size of the broadcast group is measured by the total number of DISH subscribers that each reaches.

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END HCI}}.

Why is size such an important factor for determining rates? DISH's Director of Local Programming, Melisa Ordonez, explains that MVPDs like DISH could successfully hold off above-normal price increases if threatened with a blackout by Sinclair *or* Tribune alone, but could not do so if threatened with a blackout of all New Sinclair stations at the same time.

The Ordover Study's discovery of the effect of size on rates sheds new light on the phenomenon of retransmission fee increases, which have been outpacing inflation thousands of times over in recent years. Broadcast industry consolidation is partly to blame. In 2005, the five largest owners of local stations (including Sinclair and Tribune) owned 179 full power television stations; in 2016, the five largest companies owned 443 stations. The Applicants should not be allowed to use the retransmission crisis to argue that no merger they propose can make it any worse. To authorize this transaction would be to add merger-specific fuel to the fire.

Groups with more local market duopolies can threaten greater subscriber losses in the event of a blackout. The Ordover Study also examined the effect of blackouts on DISH subscriber levels. It concludes that subscriber losses are both deeper and longer lasting when two stations are missing from DISH's local lineup, when compared to the loss of only one station in the same market. The study is based on the Tribune blackout from June to September 2016 and the Hearst blackout from March to April 2017, which permit a solid comparison between two and one station losses, as both groups control more than one station in certain DMAs. For Tribune, the data show that, in a six-month timespan, DISH lost **{{BEGIN HCI END HCI}}** of its subscribers due to the blackout in markets where two stations were blacked out compared to **{{BEGIN HCI END HCI}}** where only one station was missing. For the Hearst blackout, three months after it ended, the numbers were **{{BEGIN HCI END HCI}}** of subscribers lost for markets where Hearst controls two stations and **{{BEGIN HCI END HCI}}** of subscribers lost for one-station markets. This finding is important, because of New Sinclair's new duopolies, which may well compound each Applicant's existing ones. New Sinclair would, among other things, own more than one Big-4 signal in at least 21 markets and more than one station in at least 37 markets; the Application as presented would violate the duopoly rule in at least 11 markets.

The merger will likely also immediately lead to substantially higher prices for all Tribune stations. This is because **{{BEGIN HCI**

END HCI}}

Higher consumer prices likely would follow. Distributors likely cannot afford to absorb further retransmission price increases, and would instead likely have to pass a portion of them on to their customers. DISH has made its name as the low-price distributor, and has fought the

hardest of any MVPD to hold the line on its prices. But DISH is not immune to the reality that selling at a loss is not a viable business plan. DISH's local station package is priced at $10 per month. **{{BEGIN HCI**

END HCI}} If the price increases accelerate further, this likely leaves DISH with little choice but to raise the prices of the broadcast packages paid by its customers.

The transaction will harm localism – the main public benefit of free over-the-air broadcasting. Localism is the leading justification for allowing broadcasters to use the public airwaves for free.[7] Often, broadcasters have paid lip service to localism, honoring it in the abstract more than in the observance. But Sinclair's practices – which Sinclair proposes to export to the Tribune stations – amount to a systematic assault against local content. Localism depends on the delicate balance struck by the network-affiliate relationship. Thanks to it, local station viewers are offered a mix of national and local community news. This balance is disturbed when an owner of local stations superimposes yet another layer of national programming. Sinclair's "must-run" programming is such an additional national layer. In addition, some of the supposedly "local" content on Sinclair's stations is not genuinely local: under Sinclair's "Central Casting" initiative, the same scripts are repeated verbatim across Sinclair's stations each day by dozens of anchormen and women. They give the appearance of

[7] *See* T. Randolph Beard, George Ford, Lawrence Spiwak and Michael Stern, *An Economic Framework for Retransmission Consent*, Phoenix Center Policy Paper, at 18-19 (Dec. 2013) ("At its core, the social contract involves broadcasters providing society with 'public interest' programming in return for regulatory and legislative preferences. As the Supreme Court has repeatedly recognized, '[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.' For nearly eight decades, the concept of 'localism'—along with 'competition' and 'diversity of voices'—has been a core pillar of U.S. broadcasting 'public interest' policy priorities. The arrangement is explicit and continuing.").

having been produced in the local studio, when in reality, they have been written at Sinclair's corporate headquarters in Baltimore.

More national programming means less local programming. Indeed, Sinclair's business model seems based on the idea that one job in Baltimore makes more business sense than 100 jobs at news desks across the country. Sinclair has a long record of buying a station, hollowing out its talent, and replacing its locally-produced programming with centrally produced content. A list compiled by DISH details a practice of brutal job and cost cuts at no fewer than 27 Sinclair-owned stations. Sinclair has already done this with the stations it acquired from Allbritton and Fisher, and is doubtless implementing the practice now with its recently-acquired Bonten stations. If Sinclair had a station in Bruce Springsteen's "Hometown," the Boss might well still "be running with a dime in my hand . . . to pick up a paper for my old man."[8] Local news would be scarce on TV.

The Applicants' benefit claims are unsubstantiated. Given that Sinclair's practices are one of localism's greatest threats, it is therefore ironic that the Applicants tout localism as one of the transaction's principal benefits.[9] The Applicants' other benefit claims are also unpersuasive. They limit themselves to extolling the virtues of Sinclair – including Sinclair's capital investment, headcount, news/local programming, charity and digital passion, as well as various Sinclair programs such as "Sinclair Cares." But there is barely a word about how Tribune already scores on these categories, and how the merger will improve Tribune's performance. And what little is said about Tribune suggests the reason why the Applicants are not attempting to make such a comparison: Tribune does better than Sinclair, at least on localism. As just one

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[8] Bruce Springsteen, "My Hometown," on *Born in the U.S.A.* (Columbia Records 1984).

[9] Application at 2 ("[T]he Transaction will . . . expand the stations' local coverage (including local news)").

example, a Sinclair station in St. Louis has apparently not produced its own local newscast since 2001 – not an auspicious practice to export to the Tribune St. Louis station that Sinclair seeks to acquire. The Commission should not credit the Applicants' claimed benefits unless they supply actual evidence for them. Finally, it is not clear whether Sinclair plans to increase headcount, as the parties say to the Commission, or whether consolidating news operations would lead to "significant savings," as Sinclair's Chief Executive Officer said on the company's latest earnings call this month. Which is true, more jobs or job cuts? Sinclair's practice and its statements to investors suggest the latter.

Sinclair would export its take-no-prisoners conduct to Tribune stations. Broadcasters have generally been unrelenting in pursuing ever-higher retransmission fees and willing to cause blackouts to achieve them. But Sinclair is in a class of its own. In its most recent contract negotiation with DISH, "Sinclair's negotiating representative suggested that DISH would be more likely to rethink its position after losing 'a couple hundred thousand subscribers.'"[10] The work of the Ordover Study points to one reason why Sinclair can afford to make threats of this kind – its size, which will be substantially enlarged by this transaction. But the Commission should also take into consideration Sinclair's history of adjudicated violations, which go beyond technicalities and infect the core of its duties as a broadcaster. Not only did Sinclair form 36 unlawful joint negotiating arrangements with non-Sinclair stations in an attempt to gouge distributors,[11] but Sinclair also intimated to DISH at the time that, while it was aware of the

[10] Verified Amended and Restated Retransmission Complaint and Request for Preliminary Injunctive Relief, Declaration of Josh Clark, MB Docket No. 12-1 ¶ 6 (Aug. 26, 2015) ("Clark Decl.").

[11] Sinclair Broadcast Group, Inc., *Order*, 31 FCC Rcd. 8576, 8579 ¶ 4 (2016) ("*Consent Decree*").

illegality, negotiations would stop unless DISH tolerated its behavior.[12] And the joint negotiating arrangements did not breach some obscure rule buried in the Code of Federal Regulations. Sinclair formed them with the ink barely dry on a Congressional directive barring this very activity. This is not a question of character: it is a question of whether Sinclair should be offered a broader arena in which to display the same behavior.

The Application is premature. It rests on the Applicants' hope for a rulemaking that has not yet commenced, much less been completed. As the media ownership rules stand, the Applicants propose a transaction that violates the Commission's rules. The Applicants' preferred way of curing these rule violations is to do away with the rules. But what if there is no rule change? The Applicants offer a vague promise that they will do what it takes to bring the transactions into compliance. That is not enough. The Applicants should refile their Application accompanied by a waiver request or a divestiture commitment.

II. Sinclair Has Not Met Its Burden of Proving the Transaction is in the Public Interest

A. Standard of Review

The Applicants bear the burden of showing that the proposed transaction will serve "the public interest, convenience, and necessity."[13] This public interest determination encompasses the "broad aims of the Communications Act"[14] and requires an evaluation of whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act of 1934, as amended ("the Act").

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[12] *See* Declaration of Melisa Ordonez, Director of Local Programming for DISH ¶ 22 ("Ordonez Decl.") (attached as Exhibit C).

[13] 47 U.S.C. § 310(d); *see also* Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 30 FCC Rcd. 9131, 9134 ¶ 2 (2015) ("*AT&T/DIRECTV Order*").

[14] *AT&T/DIRECTV Order*, 30 FCC Rcd. at 9134 ¶ 2.

Particularly in the context of a broadcast merger, the Commission must take special consideration of the effects on the core tenets of diversity and localism as expressed in the Act.[15] In its review, the Commission employs a balancing process, weighing claimed benefits of the proposed transaction against any potential public interest harms.[16] It is not enough for the Applicants to prove that the transaction will not be harmful to consumers and competition; rather, they must prove that it would provide affirmative benefits to the public.[17] And any claimed benefits must be: 1) transaction specific – likely to occur as a result of the transaction but unlikely to be realized by other practical means having fewer anti-competitive effects; 2)

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[15] *See* Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc., to Nexstar Media Group, Inc., *Memorandum Opinion and Order*, 32 FCC Rcd. 183, 196 ¶ 35 (2017) ("*Nexstar/Media General Order*") (citing Applications for Consent to Transfer of Control from Shareholders of Belo Corp., *Memorandum Opinion and Order*, 28 FCC Rcd. 16867, 16879 ¶ 30 (2013) ("[W]e must giv[e] careful attention to the economic effects of, and incentives created by, a proposed transaction taken as a whole and its consistency with the Commission's policies under the Act, including our policies in favor of competition, diversity, and localism.")).

[16] *Nexstar/Media General Order*, 32 FCC Rcd. at 191-92 ¶ 19.

[17] Applications of Comcast Corporation, General Electric Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4248 ¶ 24 (2011) ("*Comcast/NBCU Order*"); *see also* Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14046-47 ¶ 23 (2000) ("*Bell Atlantic/GTE Order*"); Application for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, *Memorandum Opinion and Order*, 17 FCC Rcd. 23246, 23256 ¶ 28 (2002) ("*Comcast/AT&T Order*"); AT&T Corp., British Telecomm., PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Ltd Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, *Memorandum Opinion and Order*, 14 FCC Rcd. 19140, 19147-48 ¶ 15 (1999) ("*AT&T/British Telecom Order*").

verifiable – both in likelihood and magnitude; and 3) for the benefit of consumers, and not solely for the benefit of the Applicants.[18]

In assessing a transaction, the Commission's analysis is guided by, although not limited to, traditional antitrust principles. Where a merger is substantially likely to result in significant market concentration, the Horizontal Merger Guidelines require Applicants to demonstrate that "extraordinarily great cognizable efficiencies" exist to rebut the presumption that the merger will enhance market power.[19] The potential anti-competitive effects need not be defined with certainty for a merger to be challenged.[20]

Of course, "the Commission's competitive analysis under the public interest standard is broader" than that conducted by DOJ.[21] Thus, the Commission must examine the competitive effects of the transaction with special "reference to diversity, localism, [and] other public interest considerations."[22] Particularly in the context of a broadcast merger, the Commission must take special consideration of the effects on diversity and localism when reviewing the proposed

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[18] *Nexstar/Media General Order*, 32 FCC Rcd. at 192-93 ¶¶ 22-24.

[19] Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 10 (2010) ("Horizontal Merger Guidelines"); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720-21 (D.C. Cir. 2001) ("[H]igh market concentration levels . . . require, in rebuttal, proof of extraordinary efficiencies . . . . Moreover, given the high concentration levels, the court must undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those 'efficiencies' represent more than mere speculation and promises about post-merger behavior.").

[20] *See* Horizontal Merger Guidelines § 1.

[21] Applications of XO Holdings and Verizon Communications Inc. for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 12501, 12505 ¶ 10 (2016).

[22] Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership; for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327, 6338 ¶ 29 (2016) ("*Charter/TWC Order*").

acquisition.[23] Because the Commission must find that a transaction affirmatively serves the public interest before approving it, it must determine "whether a transaction would enhance, rather than merely preserve, existing competition,"[24] and whether the merger will accelerate the decline of market power by dominant firms in relevant communications markets.[25]

The Commission calculates the magnitude of the claimed benefits and the net cost of achieving them, and then employs a "sliding scale approach," under which the Applicants' demonstration of benefits must reveal a higher degree of magnitude and likelihood than the Commission would otherwise demand where, as here, the potential harms are both substantial and likely. If the Commission is unable to find that the alleged benefits do in fact outweigh the harms, or if there remain substantial and material questions of fact outstanding, the Commission must designate the application for a hearing.[26]

B. Sinclair Has Failed to Provide Key Information Necessary for a Full Evaluation of the Transaction

The Applicants' burden of proof is heavy. But the Applicants do not make even a perfunctory effort to carry it. The Application reads as if the Applicants deem themselves

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[23] *See Nexstar/Media General Order*, 32 FCC Rcd. at 196 ¶ 35 (citing 2013 *Gannet/Belo Order*, 28 FCC Rcd. at 16879 ¶ 30) ("[W]e must giv[e] careful attention to the economic effects of, and incentives created by, a proposed transaction taken as a whole and its consistency with the Commission's policies under the Act, including our policies in favor of competition, diversity, and localism.").

[24] *Charter/TWC Order*, 31 FCC Rcd. at 6338 ¶ 29; *see also Comcast/NBCU Order*, 26 FCC Rcd. at 4248 ¶ 24; *Bell Atlantic/GTE Order*, 15 FCC Rcd. at 14047 ¶ 23; *Comcast/AT&T Order*, 17 FCC Rcd. 23256 ¶ 28; *AT&T/British Telecom Order*, 14 FCC Rcd. 19147-48 ¶ 15.

[25] Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, *Memorandum Opinion and Order*,15 FCC Rcd. 9816, 9821 ¶ 10 (2000) ("*AT&T/MediaOne Order*"); *see also* Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 20035-36 ¶ 95 (1997).

[26] 47 U.S.C. § 309(e); *see also Nexstar/Media General Order*, 32 FCC Rcd. at 191-92 ¶ 19.

entitled to its approval and are merely going through the motions. They say nothing about the transaction's competitive effects. They do not offer any expert economic testimony on the harms, the benefits, or how the latter offset the former. Nor do they supply any factual declarations in support of their benefit claims. All they offer is two-and-a-half pages of rhetoric referring to unexplained operational efficiencies and to such asserted benefits as expansion of local content, which are directly contradicted by Sinclair's well-documented practice of doing precisely the opposite. This is a remarkably weak justification for a multi-billion dollar transaction.

For the Commission to fulfill its obligations under Sections 309(e) and 310(d) of the Communications Act,[27] and for DISH and other commenters to evaluate and comment on the proposed transaction, as they have the right to do, the Applicants must supplement their Application with substantial additional information, both to support their asserted public interest benefits and to address the potential harms of the transaction.[28]

DISH and other parties filed a motion on July 12 requesting that the Applicants be required to produce various categories of materials for review by the Commission and other parties to this proceeding.[29] As explained in the motion, the "Applicants bear the burden of proving that their transaction is in the public interest . . . For the Commission to fulfill its

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[27] 47 U.S.C. §§ 309(e), 310(d).

[28] *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*, 30 FCC Rcd. 10360, 10362-63 ¶ 7 (2015) ("[P]etitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications.").

[29] Motion of DISH Network L.L.C., American Cable Association, and Public Knowledge for Additional Info. and Documents and Extension of Time, Applications of Tribune Media Co. and Sinclair Broadcasting Group for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 17-179 (July 12, 2017) ("Motion for Additional Information").

obligations under Section 310(d) of the Communications Act, and for Petitioners and other commenters to evaluate and comment on the proposed transaction," the Applicants must supply the "information necessary to conduct a public interest analysis of this transaction."[30] Although the Commission dismissed the motion, stating that the initiative for making information requests of the Applicants lies with Commission staff,[31] DISH continues to believe that the requested information is integral to any proper evaluation of the proposed transaction, and respectfully requests that the Commission promptly require the Applicants to produce such information. Indeed, the Commission's disposition of the motion in question raises the following problem: the incomplete Application should not have been accepted for filing and placed on Public Notice in the first place. In any event, the Commission also noted that DISH and other parties will have an opportunity to address any issues raised by any supplemental information submitted by the Applicants through the *ex parte* process.[32] DISH looks forward to that opportunity.

III. The Transaction Will Lead to Higher Retransmission Fees and Higher Prices for Consumers

The proposed transaction would have substantial adverse competitive effects. These effects would go to the core of what the Commission's competition analysis is focused on – *higher prices.* The merger should not, and cannot, be approved unless the Applicants can, among other things, either rebut DISH's economic showings, or explain why consumers deserve to pay more for inferior content.

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[30] *Id.* at 2-3.

[31] Tribune Media Company and Sinclair Broadcasting Group, Inc., Consolidated Applications for Consent to Transfer Control, MB Docket No. 17-179, *Order*, DA 17-730, at 4 (Aug. 3, 2017).

[32] *Id.* at 3.

A. The Proposed Transaction Should Be Evaluated Both at the Local and National Level

1. The Transaction Would Have Both Local and National Effects

The market power commanded at the local level by each network affiliate, and at the national level by each large broadcast group controlling dozens of affiliates, is so great that it tends to obscure the question of substitutability. There are no perfect substitutes either at the local or at the national level: DISH cannot dispense with the local NBC affiliate because it carries the CBS affiliate in the same DMA, and it cannot do without Sinclair because it has, for example, a retransmission deal with Nexstar. Still, the competitive effects of this transaction should be analyzed at both the local level, where each network affiliate sells retransmission consent to each distributor and, primarily, the national level, where each large broadcast group provides retransmission consent to the national, or near-national, distributors.

In a DMA, each network station is to some extent, however imperfect, a substitute for another. This is shown by the blackout analysis conducted by DISH's experts. When two local broadcast stations are blacked out by DISH in a DMA, the resulting churn is higher than when only one is missing.[33] This is because, while many customers will leave if they cannot access all four network affiliates, there are also some with a strong preference for one out of the four, and they will leave or stay depending on whether that station is the one subject to the blackout.[34] The lack of two out of four makes more of these customers-with-a-preference inclined to leave. For others, the complement of three stations is enough to offset the missing one. For this class of customers, the lack of two network affiliates is the last straw.[35]

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[33] Zarakas/Verlinda Decl. ¶ 32-33.

[34] Ordonez Decl. ¶ 10.

[35] *Id.* ¶ 11.

At the national level, too, there is some, albeit imperfect, substitutability between the large broadcast groups. To each distributor such as DISH, each of the broadcast groups is a separate pathway to having enough broadcast retransmission agreements to avoid "bleeding" an excessive number of subscribers. For example, if DISH has to renegotiate a broadcaster's contract at a time when it is subject to a blackout of the Tribune stations, it is more likely to accede to some of that broadcaster's demands to avoid a second blackout and additional churn among its national subscriber base.[36] Conversely, if DISH has to renegotiate the expiring contract shortly after having secured a contract with Tribune, without having experienced a blackout, that broadcaster may have an incentive to be a little more reasonable in its rate demands than it otherwise would be, because the specter of a "double whammy," where DISH is subject to simultaneous blackouts of two groups' stations, is absent.[37]

Professor Ordover's economic analysis concludes that the proposed merger would have adverse competitive effects both locally and nationally.[38] In his analysis of national economic effects, Professor Ordover demonstrates that, in addition to any effects stemming from local geographic overlap, New Sinclair would have increased bargaining power in its negotiation of its national retransmission agreements (covering 72% of the nation), and that it would likely use that power to demand and get excessive retransmission rates charged to MVPDs, including DISH, a portion of which would be passed along to consumers in the form of higher subscription fees.[39]

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[36] *Id.* ¶ 4.

[37] *Id.* ¶ 6.

[38] Declaration of Janusz A. Ordover ¶¶ 29-30 ("Ordover Decl.") (Attached as Exhibit D); *see infra* at Section III.B.

[39] *Id.* ¶ 42; s*ee also infra* Section III.B.

2. The Commission and the Department of Justice Have Repeatedly Recognized the National Effects of Similar Transactions

Professor Ordover's analysis is not only correct as a matter of economics, but it is squarely within the line of analysis adopted by both the Commission and the DOJ in a series of transaction reviews in which the agencies have recognized the threat of national market effects arising from the merger-specific increase in bargaining power that exists above and beyond any adverse effects (or even no effect at all) in local geographic markets.

Most recently, the Commission and the DOJ looked at circumstances where broadband providers with non-overlapping service areas participated in both local markets and a national market where distinct competitive effects would be the likely result of the transactions. Both directly support the economic analysis set forth above and in Professor Ordover's declaration.

In the *Charter/Time Warner Cable* transaction, for example, the Commission recognized that the geographic market for the purchase of residential broadband subscriptions was a local market and that the two merging companies did not have overlapping presence in any local market. Nonetheless, the Commission found there to be a separate product market in "the market for access to wireline [broadband] subscribers via interconnection," which it titled the "interconnection market,"[40] and that the geographic market for interconnection was national. In other words, the economic relationship between the broadband providers and content creators had national implications beyond the geographic scope of the economic relationship between the broadband providers and their local customers.

As the Commission explained, edge providers who seek to have their content transmitted to residential subscribers understood that the different broadband providers offering the ability to reach residential subscribers act "as substitute sources for eyeballs regardless of the portion of

[40] *Charter/TWC Order*, 31 FCC Rcd. at 6378-79 ¶ 104.

the United States each [broadband] provider serves."[41] Of particular importance to the Commission was that "there is no indication that edge providers contract for direct or indirect interconnection with [broadband] providers on a local market-by-market basis;" rather, "the record indicates that [when] an edge provider is contracting for [interconnection services], it provides access to its full footprint."[42] And the Commission concluded that the new company would be able "to impose higher costs on edge providers [and others] due to its increased market power."[43]

The analysis of DOJ economists in the proposed *Comcast/Time Warner Cable* merger was comparable. Again, the two applicants offered both local broadband services to consumers and distribution services through interconnection agreements to edge providers and, again, the two companies did not overlap in the local residential markets. In an article co-authored by Nancy Rose, then the Deputy Assistant Attorney General for Economic Analysis, DOJ economists confronted the "question of how a merger that would have had no meaningful impact on concentration in the markets in which consumers purchase video or broadband services came to be viewed as problematic by the Antitrust Division."[44] As the DOJ economists explained, both

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[41] *Id*. at 6379 ¶ 106.

[42] *Id*. at 6379-80 ¶ 107.

[43] *Id*. at 6380 ¶ 108. Similarly, the DOJ, focusing on the video programming side of the business in the same proposed transaction, found national effects without regard to the lack of local overlap. Like residential broadband, the geographic market for video programming distribution is local, but the "anticompetitive effects of the proposed merger likely extend to the entire United States." *See* Competitive Impact Statement, *United States v. Charter*, Case No. 1:16-cv-00759, at 10 (D.D.C. May 10, 2016). The Department specifically alleged that, with its larger size, "programmers will be less likely to risk losing access to New Charter's considerable subscriber base . . ." *Id.* at 13.

[44] Nicholas Hill, Nancy L. Rose, and Tor Winston, *Economics at the Antitrust Division 2014-2015*, 47 R. Indus. Org. 425, 427 (2015) ("Rose Study"). And, as with interconnection, economic analysis found that "the merged firm would have gained additional bargaining

firms participated in the interconnection market, and in that national market the economic analysis provided "powerful evidence that content providers view [broadband] subscribers as substitutes, that the merger would reduce this competition amongst ISPs, and that the end result likely would be higher interconnection fees."[45]

That separate national effects can arise from the combination of local markets was well-established even before the two recent reviews of the proposed *Comcast/Time Warner Cable* and *Charter/Time Warner Cable* transactions. As the DOJ complaints in both *United States v. AT&T* ("*AT&T/T-Mobile*") and *United States v. U.S. Airways, Group, Inc.* ("*U.S. Airways/American Airlines*") demonstrate, the exercise of market power in local markets can yield national effects. For example, in *AT&T/T-Mobile*, the government alleged the existence of local geographic markets for mobile wireless telecommunications services,[46] but also recognized the "national decision-making" of the biggest four mobile companies[47] and the fact that the existence of "nationwide competition affecting those markets" made it "appropriate to consider the competitive effects of the transaction at a national level."[48] Similarly, in *US Airways/American Airlines*, the DOJ alleged that each "city pair" (which designates the cities between which a flight departs and arrives) constituted a separate geographic market,[49] but that, in addition, the

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leverage over programmers by removing programmers' ability to substitute the stand-alone firms for one another." *Id.* at 429.

[45] *Id.* at 428. Similarly, looking at the national market for video distribution, the DOJ economists concluded that, "while Comcast and Time Warner Cable are rarely substitutes for access to particular customers, they are substitutes when a programmer is trying to build a national audience for content." *Id.* at 428-29.

[46] Complaint, *United States v. AT&T*, Case No. 1:11-cv-01560 ¶ 17 (D.D.C. Aug. 31, 2011).

[47] *Id*. ¶ 19.

[48] *Id*. ¶ 20.

[49] Amended Complaint, *United States v. US Airways Group, Inc.*, Case No. 1:13-cv-01236-CKK, ¶ 28 (D.D.C. Sept. 5, 2013).

reduction of major domestic airlines from five to four would separately "threaten[] substantial harm to consumers,"[50] through the danger of increased coordination that would likely lead to higher ancillary fees, such as for the checking of baggage.[51]

Indeed, the same kind of analysis was applied when both the DOJ and the Commission reviewed the *AT&T/MediaOne*[52] transaction in 2000 – the merger of two cable operators that would have resulted in the combination of the Excite@Home and Road Runner broadband access portals. The DOJ, in pursuit of a divestiture of the combined company's interest in one of the two portals, defined a national market[53] for the "aggregation, promotion, and distribution of broadband content and services."[54] The DOJ viewed the proposed combination of the two companies as inimical to competition in this market.[55] The DOJ specifically alleged that, "AT&T would substantially increase its leverage in dealing with broadband content providers, enabling it to extract more favorable terms for such services."[56] And the Commission in its separate review of the transaction concluded that "the merged firm will control such a large portion of the broadband customer base that it could gain *de facto* power to dictate what content, products, and services are available to broadband customers generally, and at what price."[57]

In sum, the Commission and the DOJ have long understood that the cumulative impact of market power in many local markets would be more than just the sum of its parts. And that is

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[50] *Id*. ¶ 1.

[51] *Id*. ¶¶ 71-72, 77.

[52] *AT&T/MediaOne Order*, 15 FCC Rcd. at 9816 ¶ 1.

[53] Complaint, *United States v. AT&T*, Case No. 1:00-cv-01176 ¶ 28 (D.D.C. May 25, 2000).

[54] *Id*. ¶ 25.

[55] *Id.*

[56] *Id.*

[57] *AT&T/MediaOne Order*, 15 FCC Rcd. at 9865 ¶ 111.

the case here. Combining in one company many stations in many markets creates a risk of harm that is more than the sum of the risks of harm in each local market, threatening harm to consumers, to whom distributors would likely be forced to pass along a portion of the retransmission price increases.

B. The Transaction Will Lead to Higher Prices for DISH and Consumers

Based on DISH's contracts, DISH's experience in negotiating these contracts, and a number of regression analyses comparing these agreements, DISH's experts find that:

- Other things being equal, the larger the broadcast group, the higher the retransmission fee paid by the MVPD;
- Other things being equal, the more local station duopolies controlled by a broadcast group, the higher the retransmission fee paid by the MVPD;
- The blackout of two stations in a local market costs MVPDs greater customer losses than the loss of one station, and is a more effective weapon for the broadcaster to threaten distributors into capitulation;
- New Sinclair will likely demand and achieve greater price increases than each of Sinclair and Tribune standing alone;
- Part of these price increases will likely be passed through by DISH and other distributors to consumers; and
- One of the key factors contributing to rising retransmission fees is broadcaster consolidation. The Sinclair/Tribune merger will likely exacerbate the trend towards higher retransmission fees.

1. Larger Broadcast Groups Command Higher Rates

***The regression analysis*.** The Ordover Study finds that a broadcaster's size has a statistically strong effect on retransmission prices. The average "Big-4" retransmission rate attained by groups with annual revenues of $500 million or more is over **{{BEGIN HCI END HCI}}** more than the average Big-4 rate charged by groups with less than $500 million in

annual revenue.[58] The effect is even more pronounced when the size of broadcast groups is measured by the number of DISH subscribers that each reaches. The average Big-4 rate for those reaching a million or more DISH subscribers is **{{BEGIN HCI END HCI}}** more than the average Big-4 rate for groups reaching less than 1 million subscribers.[59] The relationship of broadcast group size and rates is shown by Table 1 below:

Table 1: Comparison of 2017 Big-4 Retransmission Fees Paid by "Large" and "Small" Broadcast Groups (Excluding Network Owned-and-Operated Stations)

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Mr. Zarakas and Dr. Verlinda have also found that including the rates payable to the four networks' owned-and-operated station groups would yield similar results – large broadcast groups charge substantially higher rates than small ones, as shown by Table 2.

[58] Zarakas/Verlinda Decl. ¶ 8.

[59] *Id.* ¶ 8.

Table 2: Comparison of 2017 Big 4 Retransmission Fees Paid by "Large" and "Small" Broadcast Groups (Including Network Owned-and-Operated Stations)

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As Mr. Zarakas and Dr. Verlinda explain, the model on which the regression is based is:

$$RetransFee_g = \alpha + \beta_{size} \cdot BroadcastSubs_g + \beta_{age} \cdot ContractAge_g + f(Additional\ Controls) + \varepsilon_g$$ [60]

In this model, the coefficient β_{size} on the size of the broadcast group, measured by the number of DISH subscribers reached by the Big-4 stations owned by the group and the 2014 revenues earned by those stations, is the primary variable of interest. In both cases, the coefficient is positive and statistically significant.

Mr. Zarakas and Dr. Verlinda have also considered alternative modeling specifications, a total of seven, "ranging from a simple regression that does not include additional control variables (Model 1), to specifications with various combinations of controls (Models 2 through 7)."[61] The results are shown in Table 3 below:

[60] *Id.* ¶ 13.

[61] *Id.* ¶ 17.

Table 3: Regression of Big-4 Station Retransmission Fees on Size of Broadcast Group (Size Measured by DISH Subscribers Reached)

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As Mr. Zarakas and Dr. Verlinda explain:

In each case, the regression results indicate that, while each of the control variables add in explaining important variation across contracts, the retransmission fees paid by DISH are consistently higher the larger the broadcast group is.[62]

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[62] *Id.* ¶ 17.

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Table 4: {{BEGIN HCI

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A look at most local markets tells the same story – in 48 of the 57 DMAs where there is both at least one large broadcaster (reaching a million DISH subscribers or more) and at least one small one (reaching fewer than a million DISH subscribers), the rate charged by the largest broadcaster is the highest in the market; in 52 of these 57 DMAs, it is higher than the rate charged by the smallest broadcaster. The following table (Table 5) lists illustrative examples of the percentage by which the rate payable to the largest broadcaster in the market exceeds that rate payable to the smallest broadcaster in the market. A more comprehensive table covering all 57 DMAs is attached as Appendix B to the Declaration of Mr. Zarakas and Dr. Verlinda.

Table 5: Retransmission Fee Comparisons Between Broadcast Groups, by DMA
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The economic theory explaining the effect of size. Why is size such an important factor for determining rates? Professor Ordover's analysis suggests several reasons. Among other things, first, the transaction would combine two multi-station broadcasters with very large footprints that collectively cover 72% of U.S. households.[64] Second, DISH negotiates for the retransmission rates at a national level.[65] Like interconnection agreements, the pricing, terms, and conditions of retransmission consent agreements are established on a national basis, not negotiated on a market-by-market basis.[66] This conclusion is brought home by **{{BEGIN HCI**

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[63] The DMAs have been anonymized. Each DMA has been randomly assigned a number, which is not an indication of rank by size or any other metric.

[64] FCC, Sinclair and Tribune, MB Docket 17-179, https://www.fcc.gov/transaction/sinclair-tribune ("Applicants claim that under the proposed transaction, the combined company would reach 72 percent of U.S. television households").

[65] Ordover Decl. ¶ 35.

[66] *Id*.

END HCI}} Third, the fact that Sinclair and Tribune programming are (imperfect) substitutes at the local level carries over into aggregate substitutability at the broader, national level.[67] As Professor Ordover explains:

> [F]rom the business perspective, subscriber losses from failing to reach a retransmission agreement are costly to an MVPD, like DISH, irrespective of where they occur. **{{BEGIN HCI**
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> **END HCI}}**[68]
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> As such, while a loss of programming from Tribune's (say) local stations across its footprint could be "manageable," the loss of programming from combined Sinclair *and* Tribune local stations across the DISH footprint could be "superadditive" – meaning that, in terms of business consequences for DISH, the magnitude of the total negative effect from failing to reach an agreement with Sinclair or Tribune separately is smaller than the negative impact from failing to reach an agreement with both of them at the same time.[69]

In the same vein, the Ordonez Declaration explains that MVPDs like DISH could successfully hold off above-normal price increases if threatened with a blackout by Sinclair or Tribune alone or even by each separately, but could not do so if threatened with a blackout of all New Sinclair stations at the same time. It is much harder for DISH to weather a blackout affecting **{{BEGIN HCI END HCI}}** of its subscriber base (New Sinclair) than one affecting **{{BEGIN HCI END HCI}}** (pre-merger Sinclair) or **{{BEGIN HCI END HCI}}** (pre-merger Tribune) of that base.[70] Faced with the loss of either Sinclair's or Tribune's stations alone, DISH can take steps to avoid the loss of the other company's signal, and therefore

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[67] *Id.*

[68] *Id.*

[69] *Id.* ¶ 36.

[70] Ordonez Decl. ¶ 14.

be more able to resist significant price increases.[71] Moreover, DISH is more likely to manage the blackouts so as to limit subscriber loss even if it loses both companies' signals, but does so at different times, when each company's agreement expires. By contrast, the threat of simultaneously losing all Sinclair and Tribune stations would make DISH more likely to capitulate to an unreasonable price increase.[72] Professor Ordover picks up the thread to conclude:

> Thus, if DISH has been forced to a blackout by, say, Nexstar, and the Sinclair contract comes up for renewal during the blackout, DISH is more likely to agree to a high price demand by Sinclair. Conversely, if DISH has already secured from Nexstar the right to retransmit programming to all subscribers in its footprint, it will be in a better position to resist price demands by Sinclair.[73]

The Commission has recognized this phenomenon of distinct market power combined with substitutability by classifying the Big-4 stations in a local market as "partial substitutes."[74] By the same token, two national groups such as Sinclair and Tribune are partial substitutes for one another to a distributor such as DISH, as they are pathways to having a sufficient number of local stations nationwide to avoid excessive customer churn.

Professor Ordover also discusses a technical reason for the effect of size on prices: the value of the "last" broadcast station that is negotiating a retransmission consent agreement at any given time tends to be less than the value of the stations that have one already. But when a big broadcast group acquires that "lone wolf," the broadcast group gains the bargaining power to get more for it than when it was a standalone. As Professor Ordover explains:

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[71] *Id.* ¶ 7.

[72] *Id.* ¶ 8.

[73] Ordover Decl. ¶ 20.

[74] Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order*, 29 FCC Rcd. 3351, 3358-59 ¶ 13 (2014) ("*2014 Retransmission Consent Order*").

> To see this, consider an MVPD that has signed retransmission agreements with several stations, including Station A, and is now negotiating with Station B. If the surplus function is concave, then adding Station B raises the total surplus *but* contributes less to surplus (on a per-subscriber basis) than was added by Station A. Put more simply, the greater the number of stations that have already agreed to be retransmitted by the MVPD, the lower the incremental value to the MVPD of adding one more station. This does not mean that adding the new station does not increase the total surplus – it does. However, because it is less valuable, Station B is in a relatively weaker bargaining position. Now consider how the bargaining situation changes if Station A and Station B merge. In that case the bargaining position of Station B improves because it is merged with Station A that has higher (incremental) value and therefore a stronger bargaining position.[75]

In technical terms, the surplus from reaching an agreement is "concave," meaning that "as subscribers increase, surplus increases, but at a declining rate."[76] Professor Ordover concludes that the surplus function here is "very likely concave and thus a merger of Sinclair and Tribune would put upward pressure on retransmission rates."[77] Professor Ordover has tested this high likelihood through the regression analysis described above. His conclusion:

> My regression results indicate that retransmission fees increase with the size of the station owner, which confirms the supposition that DISH's surplus function is concave. The further implication is that the merger of Sinclair and Tribune will shift bargaining power toward the New Sinclair, likely resulting in higher retransmission fees.[78]

Professor Ordover alternatively uses traditional unilateral effects analysis: "[i]n the alternative, we can consider the effects of the merger through the lens of traditional diversion effects where the merged companies' products are imperfect substitutes."[79] It leads him to the same conclusion:

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[75] Ordover Decl. ¶ 25; *cf.* Rose Study at 428 ("Economic theory predicts that if there are decreasing returns to access to customers, a merger of ISPs is likely to increase their leverage over content providers.").

[76] Ordover Decl. ¶ 24.

[77] *Id.* ¶ 36.

[78] *Id.* ¶ 41.

[79] *Id.* ¶ 26.

> [B]ecause the balance of bargaining power shifts towards the merged firm, there will be an upward pressure on retransmission rates . . . This is standard unilateral effects analysis in the merger context and there's no real debate on whether this effect exists: the only question concerns the size of the impact, which is related to the degree of substitution between Sinclair- and Tribune-owned stations and other stations in MVPD's line up, the willingness of the MVPD's subscribers to switch to its rival distributors, and whether there are any countervailing efficiency effects that would mitigate the predicted effect on retransmission rates.[80]

The Applicants' recognition of the importance of size. The Applicants themselves acknowledge that size matters when they request a waiver of local ownership rules for two "failing stations," KXNW(TV) in Eureka Springs, Arkansas, and WCCT-TV in Waterbury, Connecticut. The Applicants admit that without the increased bargaining power due to Tribune's size, KXNW would "not be viable as a standalone outlet."[81] Without the support provided by Tribune, "the station would have experienced negative cash flow continuously over the past three years without . . . the retransmission consent revenues that it would not be able to attract as a standalone independently programmed station."[82] Applicants provide financial data that indicate that "without the cost synergies made possible" through Tribune's ownership, "KXNW would have reported net losses in 2014, 2015 and 2016 *even assuming (unrealistically) that a standalone KXNW(TV) would have received the same retransmission consent revenues*."[83] Similarly, in requesting a "special circumstances" exemption for WCCT-TV, the Applicants explain that Tribune's "diligent efforts" on behalf of the station "have included obtaining retransmission consent compensation for the station for the first time . . ."[84]

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[80] *Id.* ¶¶ 31-32.

[81] Application at 19.

[82] *Id.* at 20.

[83] *Id.* (emphasis added).

[84] *Id.* at 25.

The ability of these stations to obtain retransmission consent fees does not seem to be a function of some programming that Tribune has enabled them to produce. Rather, it seems to be a function of the bargaining power their parent company enjoys. Of course, that power does not only accrue to "failing" stations but also to successful ones.

2. The Blackout of Two Stations in a DMA Leads to Greater Subscriber Losses than the Blackout of One

DISH's experts have also studied the effect of blackouts on DISH subscriber levels. They observe that subscriber losses are deeper when two stations are blacked out from DISH's local offering, compared to the loss of only one station. They specifically studied the Tribune blackout of June to September 2016, and the Hearst blackout of March to April 2017. Both of these blackouts permit an assessment of the effects of "duopolies" on DISH subscriber losses.[85] This is so because both conglomerates control duopolies in some of their DMAs. Thus, Tribune controls two stations in seven out of the 33 DMAs affected by the blackout. Hearst, for its part, controls duopolies in two of the 26 DMAs affected by the blackout.

The result of the comparison is telling: in a six-month horizon, DISH lost **{{BEGIN HCI END HCI}}** of its subscribers due to the blackout in markets where more than one stations were blacked out compared to **{{BEGIN HCI END HCI}}** where only one station was missing – a difference of almost **{{BEGIN HCI END HCI}}** In the case of Hearst, in a three-month horizon, DISH experienced subscriber declines of **{{BEGIN HCI**

[85] The term "duopoly" is used here to signify two stations owned or controlled by the same group in a DMA. It does not include stations with which a group may have arrangements such as Shared Services Agreements ("SSAs"), Joint Sales Agreements ("JSAs"), or Local Marketing Agreements ("LMAs"), or in which the group may have other types of attributable interests.

END HCI}} due to the blackout in duopoly DMAs versus **{{BEGIN HCI END HCI}}** when only one station was missing, a difference of **{{BEGIN HCI END HCI}}**[86]

Why is that? As explained by Ms. Ordonez, while most DISH customers want a complement of all four network affiliates in each area, there are some subscribers with a strong preference for one of the four.[87]

Professor Ordover explains the implications:

> Because a station owner that can threaten the blackout of two stations rather than one can inflict more harm on the MVPD if a negotiating impasse is reached, the station owner with more than one station in an area has enhanced bargaining leverage over an MVPD. In the language of bargaining, the MVPD's disagreement point is worse when a blackout of two stations simultaneously can be imposed, rather than just one, this shifts bargaining leverage to the station owner.[88]

Regression analysis of the DISH retransmission agreements does not show a statistically significant effect from duopolies on rates, likely because such an effect is overwhelmed by other more important variables, primarily size. Nevertheless, the greater subscriber losses in the event of a two-station blackout are likely to lead to higher prices for duopolies, when all else is equal. To test this proposition, Mr. Zarakas and Dr. Verlinda reviewed the retransmission fees at two broadcast groups that are both large and comparably sized. They provide grounds for a controlled experiment, as one controls nine times as many duopolies as the other. Table 6 provides the percentage by which the rates of the group with more duopolies exceed those of the other group, both unadjusted and adjusted to account for the vintage of the two agreements.

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[86] Zarakas/Verlinda Decl. ¶ 33.

[87] Ordonez Decl. ¶ 10.

[88] Ordover Decl. ¶ 45.

Table 6: Multi-Station Ownership ("Duopoly") Retransmission Fee Premium Adjusted for Contract Age Difference

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The table indicates that the retransmission fees charged to DISH are consistently higher for the group with the greater number of duopolies. These higher prices may likely be the result of the higher degree of bargaining power that duopolies confer.[89]

DISH's experience and the Ordover Study's findings on the power of duopolies to inflict greater harm are consistent with the conclusions already reached by the Commission. In March 2014, the Commission amended its retransmission consent rules to bar joint negotiations among any of the Top Four stations in a market.[90] In reaching this conclusion, the Commission explained: "economic theory supports a conclusion that joint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield

[89] Zarakas/Verlinda Decl. ¶¶ 21-23.

[90] *2014 Retransmission Consent Order*, 29 FCC Rcd. at 3352 ¶ 1 (declaring that the prohibition on joint negotiations did not, of course, apply to stations that were already co-owned). In the STELAR legislation enacted later that year, Congress endorsed and expanded the Commission's bar on such joint negotiations. 47 U.S.C. § 325(b)(3)(C) (*as amended by* Section 103 of the Stela Reauthorization Act of 2014, Pub. L. 113-200) (expanding the ban on joint negotiations from the Big-4 networks to any two TV stations in the same local market); Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, *Order*, 30 FCC Rcd. 2380, 2381 ¶ 4 (2015) (amending the existing FCC rule governing joint negotiation of retransmission consent and replacing it with language from the STELA Reauthorization Act of 2014 and recognizing the latter's prohibition is "broader").

retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees . . . "[91] Joint negotiation thus "diminishes competition and thus leads to supra-competitive increases in retransmission consent fees."[92] Why? "Because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs."[93] The Commission found that its conclusions were amply supported by econometric analysis,[94] the experience of the antitrust agencies,[95] and empirical data in the record.[96]

In sum, the union of the two companies will create 11 new markets where New Sinclair will control more than one station, resulting in at least 21 markets where New Sinclair will own more than one Big-4 signal and at least 37 markets where it will own at least two stations, whether Big-4 or not. To the extent that New Sinclair does not divest itself of the second station, and the Application does not provide any assurance that this will happen, this will compound the "duopolies" enjoyed by each of the Applicants already. The transaction will thus increase New Sinclair's power to inflict harm by threatening a blackout, and thus to command higher prices.

C. Prices for Tribune Stations Would Likely Increase Automatically Upon Consummation of the Transaction

Increases in retransmission consent fees may come much sooner than the next three-year negotiation cycle if this transaction is approved. In fact, the effect may be immediate, thanks to

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[91] *2014 Retransmission Consent Order*, 29 FCC Rcd. at 3357-58 ¶ 10.

[92] *Id*. at 3358 ¶ 13 n.49.

[93] *Id*. at 3359 ¶ 13.

[94] The Commission relied heavily on a bargaining model created by Professor William Rogerson that found that the Top Four stations were partial substitutes for each other and that "coordinated activity permits broadcasters to negotiate higher retransmission consent fees." *Id*. at 3359 ¶ 13 n.50; *see also id*. at 3358-59 ¶¶ 13-14.

[95] *Id*. at 3359-62 ¶¶ 14-15.

[96] *Id*. at 3362-63 ¶ 15.

the so-called "after-acquired station clause."[97] An after-acquired station clause in a retransmission agreement allows a broadcaster to bring newly acquired stations under its retransmission agreement, substituting the bigger broadcaster's higher rate for the rate actually negotiated by the MVPDs for the broadcast stations in question.[98] This "rate reset" – which happens without any concomitant increase in the value of the acquired stations and their programming for the MVPD or consumers – is nothing but profit for the acquiring broadcaster.[99]

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D. The Consolidation of the Broadcast Industry Has Been an Important Factor Leading to Retransmission Price Increases

The Ordover Study sheds new light on the escalating harm to consumers associated with rising retransmission fees. The Commission regulates many industries. But in not one of those industries have prices been able to keep up with the pace of retransmission fee increases. To judge by revenue growth, broadcasters would be the telecom industry's premier growth industry

[97] Ordonez Decl. ¶ 15.

[98] *Id.*

[99] *Id.*

[100] *Id.* ¶ 16.

[101] *Id.*

[102] *Id.*

over the past 10 years, despite their struggling with lower ratings and having done nothing particularly new or different to foster that revenue growth other than demanding more money. In 2014, the Commission cited projections that retransmission fees for 2016 would be $2.6 billion, more than 12 times those for 2006 – $214.6 million.[103] In percentage terms, this is 1,200%. The Commission also cited projections of $7.6 billion for 2019 and $9.1 billion for 2020.[104] Those sums are 3,500% and 4,200% of the 2006 number. The 2014 projections may have seemed high, but the reality proved even more extreme: broadcast retransmission fees reached $6.4 billion in 2015 and 7.9 billion in 2016.[105] In 2016, therefore, they turned out to be 3591% of the 2006 number. Recent projections estimate that, by 2023, retransmission fees will increase to $12.82 billion, and *5,880%* of 2006 revenues.[106]

This growth rate is not normal. It is not only unheard of in the space regulated by the Commission, it is not found in any other sector in the U.S. economy. The annual Producer Price Index ("PPI") increase over the same period (2006 to 2016) ranged from negative 5.1% to 7.8%.[107] Of industry specific indices, telecommunications increased by 1.3%[108] overall in the 11

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[103] *See 2014 Retransmission Consent Order*, 29 FCC Rcd. at 3363 ¶ 16 n. 68 (citing record evidence that retransmission consent fees for MVPDs increased from $214.6 million in 2006 to $1.1 billion in 2010).

[104] *Id.*

[105] SNL Kagan, a media research group within the TMT offering of S&P Global Market Intelligence, *Broadcast retransmission and Virtual Service Provider Carriage Fee Projections Through 2023* (July 2017); *see also* Letter from Mike Chappell, American Television Alliance, to Marlene Dortch, FCC, MB Docket Nos. 15-216 and 10-71, at 3 (Jan. 6, 2017). ("[R]etransmission consent prices rose 27 percent last year alone after three years of 40-percent increases.").

[106] Justin Nielson, *Retrans Projections Update: $12.8B by 2023*, SNL Kagan (June 14, 2017) (estimating $9.39 billion in retransmission fees in 2017).

[107] *See Top Picks*, Bureau of Labor Statistics, https://data.bls.gov/pdq/SurveyOutputServlet (last visited July 24, 2017) (Check "Total Manufacturing Industries" and press "Retrieve Data."

years from 2006 to 2016; over the same period, broadcasting increased by 25.4%,[109] and hospitals increased by 27.7%,[110] while finance decreased by 11.3%[111] overall. In fact, retransmission fee increases over the last decade exceed hyperinflation in Brazil (ranging from 1,600 to 2,500% between 1989 and 1994) or Argentina (with an average annual inflation rate of 300% in the 1980s).[112]

These fee increases are unsupported by a rational explanation, such as dramatic investment in new creative content and commensurate ratings increases. Indeed, the ratings of the broadcast networks have slipped both as a percentage of total video consumption and relative to the ratings of cable networks.[113] Rather, the main reason is the power wielded by each

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Under "More Formatting Options," select "12-Month Percent Change," "Specify Year Range" "2006" to "2017," and "Select One Time Period" to "Annual Data.").

[108] *See Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.55.Telecommunications (last visited July 24, 2017) (showing price increase data for telecommunications from Jan 2006 to December 2016).

[109] *See Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.54.Broadcasting (last visited July 24, 2017) (showing price increase data for broadcasting from Jan 2006 to December 2016).

[110] *See Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.50.Hospitals (last visited July 24, 2017) (showing price increase data for hospital industry from Jan 2006 to December 2016).

[111] *See Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.57.Finance (last visited July 24, 2017) (showing price increase data for Finance industry from Jan 2006 to December 2016).

[112] *Brazilian Hyperinflation*, Encyclopedia of Money, http://encyclopedia-of-money.blogspot.com/2010/01/brazilian-hyperinflation.html (last visited July 24, 2017); *Hyperinflation in Argentina*, Citéco https://www.citeco.fr/10000-years-history-economics/contemporary-world/hyperinflation-in-argentina (last visited July 24, 2017).

[113] TV Network Summary, SNL Kagan (2017) (showing the decline of broadcast TV station ratings from 2006-2015 is greater than the overall decline in cable network ratings over the same period); *see also* Gerry Smith and Lucas Shaw, *Fed-Up Advertisers Stop Paying More for Smaller TV Audiences*, Bloomberg Technology (May 5, 2017), https://www.bloomberg.com/news/articles/2017-05-05/fed-up-advertisers-stop-paying-more-for-declining-tv-audiences ("In the [2017] TV season, the four major broadcasters have lost 8 percent of their audience. . . . TV ratings have dropped 33 percent in the last four years");

network affiliate. While less popular than they once were, the four networks are must-have staples for pay-TV customers. As the Commission has concluded, "the top-four broadcast networks have a distinctive ability to attract, on a regular basis, larger primetime audiences than other broadcast and cable networks, which enables them to earn higher rates from those advertisers that are willing to pay a premium for such audiences."[114] While certain programming that non-affiliated broadcasters air "ha[s] become increasingly capable of attracting primetime audiences on par with, or even greater than, the top-four broadcast networks, no one cable network – let alone several – has been able to consistently deliver such audiences beyond individual programs or episodes."[115] As the Commission has further explained: "[W]hile non-broadcast video programming may offer consumers additional programming options in general, they do not serve as a meaningful substitute in local markets due to their national focus."[116]

The Commission has long believed that "national programmers are not responsive to the specific needs and interests of local markets, and . . . competition among local rivals most

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Anthony Crupi, *Where TV Ratings Go From Here*, Advertising Age (Apr. 18, 2016), http://adage.com/article/media/ratings/303574/ (charting the steady drop in big four broadcast ratings and noting that strong performing shows from the previous season experienced some of the greatest rating drops); Jim Edwards, *BRUTAL: 50% Decline In TV Viewership Shows Why Your Cable Bill Is So High*, Business Insider (Jan. 31, 2013), http://www.businessinsider.com/brutal-50-decline-in-tv-viewership-shows-why-your-cable-bill-is-so-high-2013-1 ("[T]here has been a 50 percent collapse in broadcast TV ratings in the last decade."); Tim Arango and Bill Carter, *An Unsteady Future for Broadcast*, New York Times (Nov. 20, 2009), http://www.nytimes.com/2009/11/21/business/media/21network.html (describing the ratings decline of the big four broadcast networks compared to cable networks).

[114] 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Second Report and Order*, 31 FCC Rcd. 9864, 9958 ¶ 229 (2016).

[115] *Id*. at 9955 ¶ 225.

[116] *Id*. at 9874 ¶ 27.

benefits consumers and serves the public interest."[117] But this is not how it works in practice, because the four network stations are complements to one another just as much they are substitutes for one another. In other words, most of DISH's customers want a mix of all four stations, and they will not settle for one, two or even three of them.[118] Having only three out of the four Big-4 networks is worse for our customers than having all four, and having only two out of the Big-4 is less desirable than having three, let alone all four.[119] For these reasons, each network affiliate is the "only saloon in town" for its network, playing two, three, or four distributors against one another.

For the same reason, blackouts are not nearly as problematic for broadcasters as they are for distributors. The "pain" experienced by a network station and a distributor during and as a result of a blackout is asymmetric: while the distributor is bleeding subscribers and associated revenues, its subscribers flee to competitive distributors and, as a result, the network does not lose the same number of "eyeballs" as the distributor. In fact, the broadcaster has so much leverage that, when the blackout is over, it typically receives retroactive payment for each of the subscribers that stayed with DISH. But the distributor never recovers the subscription revenues from customers who left during the blackout, and always loses a portion of those customers and their revenues for good.[120]

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[117] *Id.* (citing 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, 13716 ¶ 246 (2003)).

[118] Ordonez Decl. ¶ 10.

[119] *Id.* ¶ 12.

[120] *Id.* ¶ 13.

The Ordover Study uncovers another important reason for the pace of retransmission fee increases – the increasing concentration of the broadcast industry and progressively larger size of the largest broadcast groups. Over the last decade, the Commission has approved 14 major transactions involving the 10 largest broadcast groups. This has resulted in the largest broadcast groups swelling in size since 2008. As shown in the following charts, each of the four largest groups in 2017 has more stations than the largest group did in 2008:

Top 10 Broadcast Groups 2008[121]

Broadcast Group	Number of Full Power Stations
ION	55
Sinclair	48
Univision	37
Raycom	36
Gray	31
Hearst	29
Nexstar	29
Trinity	24
LIN	24
Newport	24
Tribune	23

Top 10 Broadcast Groups 2017 (showing in parentheses the groups acquired)[122]

Broadcast Group	Number of Full Power Stations	Number of Full Power Stations if Transaction is Consummated
Nexstar (Media General, LIN Media, Young)	130	130
Sinclair (Allbritton, Fisher, Bonten, Barrington)	118	159
Gray (Shurz, Hoak Media, Parker)	75	75
ION	60	60
Raycom (Drewry)	47	47
TEGNA/Gannett (Belo)	45	45
Tribune (Local TV)	41	0
Univision	38	38
Hearst	32	32
Scripps (Journal)	27	27

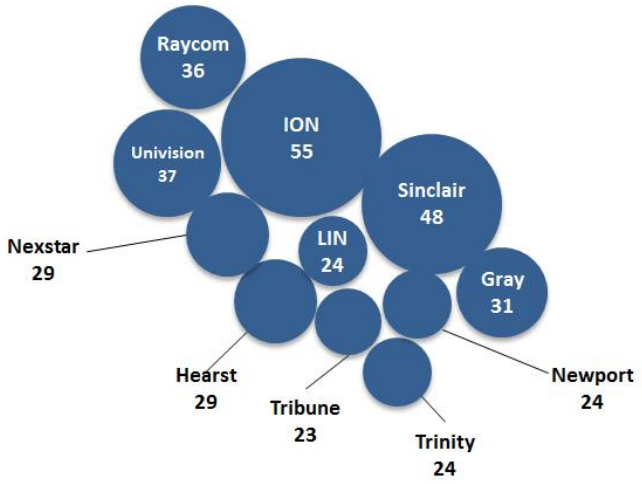
[121] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 2, 2009).

[122] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 26, 2017).

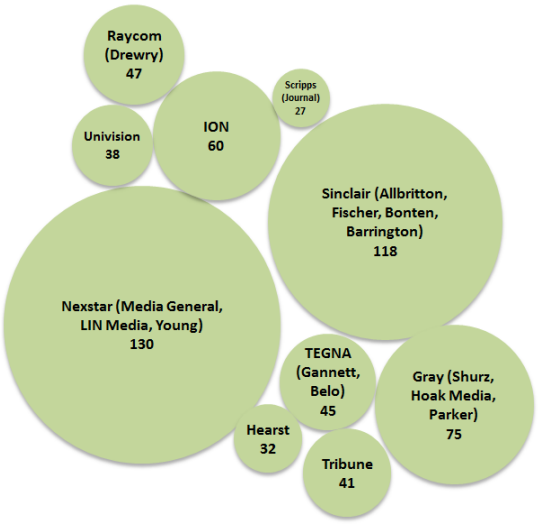
Here is a graphic demonstration:

The Big Bang of Broadcast Industry Consolidation

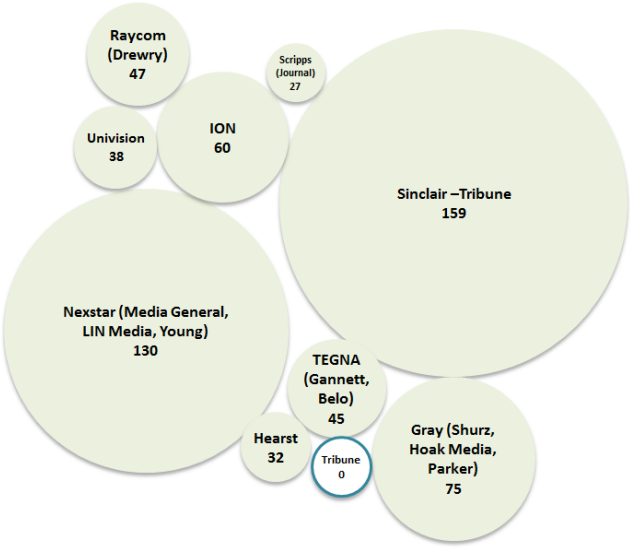
2008



2017



2017 (with Sinclair Tribune combined)



This has an important implication for this proceeding: the Applicants may say that their proposed transaction has nothing to do with the phenomenon of rising retransmission fees. They might even go a step further and recite the familiar defense of powerful incumbents: "we have

so much power already, and each of us commands such significant price increases standing alone, that this merger cannot possibly make things much worse." The Commission should not entertain such a defense. In fact, the effect of size on prices established by the Ordover Study demonstrates that the proposed transaction would exacerbate the crisis of rising retransmission costs. It would lead to additional, merger-specific price increases, resulting directly in higher prices to consumers.

Distributors simply cannot afford to absorb further retransmission price increases, and would instead have to pass them on to their customers. DISH has made its name as the low-price distributor, and has fought the hardest of any MVPD to hold the line on its prices. But DISH is not immune to the principle that selling at a loss is not a viable business plan. DISH has thus been compelled to increase its prices for its America's Top 120, America's Top 120+, America's Top 200, and America's Top 250 packages a number of times.[123] An important factor compelling the price increase has remained consistent: the progressively increasing fee demands of the four networks and the large broadcast groups. In fact, DISH created a separate broadcast package in 2016 to isolate network stations from the other content on its packages.[124] That package is priced at 10 dollars a month. This means retransmission fees are close to reaching a crucial milestone – **{{BEGIN HCI**

END HCI}} If the price

[123] *See* James K. Willcox, *Your Cable Bill Is Going Up More Than You Think This Year*, Consumer Reports (Feb. 4, 2017), http://www.consumerreports.org/tv-services/your-cable-bill-is-going-up-more-than-you-think-this-year; *see also* Daniel Frankel, *Dish Follows U-verse and DirecTV, Announces Rate Increases for 2016*, Fierce Cable (Dec. 18, 2015), http://www.fiercecable.com/cable/dish-follows-u-verse-and-directv-announces-rate-increases-for-2016.

[124] *See Finally, a Skinny Bundle! 'Don't Watch, Don't Pay' with DISH's New Flex Pack*, DISH Network (Aug. 4, 2016), http://about.dish.com/press-release/programming/finally-skinny-bundle-dont-watch-dont-pay-dishs-new-flex-pack.

increases accelerate further, this likely leaves DISH with little choice but to try to raise the prices of the broadcast packages paid by its customers.

IV. New Sinclair Would Have Both the Incentive and Ability to Harm OVDs and Traditional MVPDs

Online video distributors will face the same threat of fee increases as linear MVPDs.[125] But for them, the competitive effects from the transaction would be exacerbated by the fact that, because of technological advances, New Sinclair would now have the incentive to *compete* with OVDs, and would thus be both competitor and supplier to them. Sinclair, aided by the transaction, plans to deploy "fixed and mobile video services to the public."[126]

Sinclair's goal is reportedly for its stations to deliver a bundle of 25 to 30 channels that consumers can watch on their mobile devices without racking up cellular charges, or on their living room TVs without having to pay for a cable or satellite subscription.[127] This new business model will "modernize our industry to the age of the internet," and "allow [Sinclair] to use subscription-fee models and have an offering like a Netflix that exists over the air."[128]

Sinclair will thus be a provider of essential content to MVPDs and OVDs and would also become a competitor to both. Therefore, it will likely have both the incentive and ability to use its dual roles to harm both MVPDs and OVDs, which would diminish competition to the

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[125] While the retransmission consent requirement applies only to MVPDs and OVDs do not currently qualify as MVPDs, OVDs need copyright licenses from broadcasters.

[126] Application at 2.

[127] Felix Gillette, *The Sinclair Revolution Will Be Televised. It'll Just Have Low Production Values*, Bloomberg Businessweek (July 24, 2017), https://www.bloomberg.com/news/features/the-sinclair-revolution-will-be-televised-it-ll-just-have-low-production-values.

[128] Cynthia Littleton, *Inside Sinclair: CEO Nixes Fox News Rival Rumors, Talks Tribune and Big Ambition for Broadcast Biz*, Variety (July 25, 2017), http://variety.com/2017/tv/news/sirnclair-tribune-merger-boris-epshteyn-david-smith-news-1202504687/ (quoting Sinclair CEO Chris Ripley).

detriment of consumers. Among other things, New Sinclair would not only have the incentive to raise prices to improve its margins; it would also have the incentive to raise prices, price-discriminate, and impose packaging requirements that could "bust" an OVDs' business model, because it stands to compete with them. For example, in 2015, DISH's Sling TV pioneered a new form of OVD, carrying traditional live cable networks like ESPN and CNN. In 2017, Sling TV began to also offer local broadcast stations in selected markets **{{BEGIN HCI**

END HCI}}. It is critical, however, to DISH's business model for Sling TV that it have the ability to place content in tiers so that the price point for its basic service does not exceed consumer expectations, which would lead to fewer subscribers and lower revenue.

In addition, while the must-carry and retransmission consent regimes of the Communications Act do not apply to OVDs, an OVD must still negotiate copyright royalties with the content owners. Thus, New Sinclair could tie together different broadcast and non-broadcast content and force an MVPD or OVD to purchase it all as part of its basic tier of programming.[129] The basic Sling TV service – Sling Orange – is sold for $20 per month, and the premium Sling TV service – Sling Blue – sells for $25 per month. But a forced bundle of broadcast and non-broadcast content could easily force a significantly increased price, making

[129] Sinclair now owns the Tennis Channel; a wrestling network, Ring of Honor; a science-fiction network, Comet TV, a news network focusing on millennials, Circa, and Stadium, a sports network. If this transaction were approved it would also own WGN America, an entertainment channel. Felix Gillette, *The Sinclair Revolution Will Be Televised. It'll Just Have Low Production Values*, Bloomberg Businessweek (July 24, 2017), https://www.bloomberg.com/news/features/2017-07-20/the-sinclair-revolution-will-be-televised-it-ll-just-have-low-production-values; *see also* Cynthia Littleton, *Sinclair Plans Big Changes for WGN America, Eyes MVPD Offering With Tribune Media Deal*, Variety (May 8, 2017), http://variety.com/2017/tv/news/wgn-america-underground-sinclair-tribune-media-1202418701/ ("The Baltimore-based station owner has great ambition for using the heft of its expanded national footprint to launch new businesses, potentially even an MVPD-like bundle of channels").

Sling TV much less attractive for consumers who are looking for a lower-cost alternative to traditional pay-TV.[130]

V. The Proposed Transaction Would Undermine Localism

Localism is the main reason why broadcasters have received free access to the nation's airwaves. And localism remains the *sine qua non* of the public interest in the broadcast space. The proponents of a broadcast transaction that undermines localism are hard pressed to show that it advances the public interest. Indeed, recent empirical research has shown that media consolidation has been bad for localism, as the larger broadcast conglomerates *do not* invest freed resources into local content and coverage.[131] But Sinclair's own record tells a worse tale, one not of neglect, but of affirmative damage. Sinclair's practices amount to a systematic assault against localism – slashing local news staffs, consolidating regional news production, and imposing "must-runs" and "Central Casting" programming from its corporate headquarters – practices that Sinclair would undoubtedly export to the Tribune stations.

A. Only a Transaction that Advances Localism Can Serve the Public Interest

A broadcaster's connection to, and coverage of, its local community is a bedrock principle of broadcast television public policy. Indeed, Section 307(b) of the Communications Act requires the Commission to "make such distribution of licenses, frequencies, hours of

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[130] *See* Ordonez Decl. ¶ 20.

[131] *See e.g.*, Sandra Braman, *The Ideal v. the Real in Media Localism: Regulatory Implications*, 12 Comm. L. & Policy 231, 273 (2007) (citing Ronald Bishop and Ernest A. Hakanen, *In the Public Interest? The State of Local Television Programming Fifteen Years after Deregulation*, 26 J. of Comm. Inquiry 261 (2002)); Steven T. Barry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q.J. Econ. 1009 (2001); Michael Ortner, *Serving a Different Master: The Decline of Diversity and the Public Interest in American Radio in the Wake of the Telecommunications Act of 1996*, 22 Hamline J. Pub. L. & Policy 139 (2000); Jill Howard, *Congress Errs in Deregulating Broadcast Ownership Caps: More Monopolies, Less Localism, Decreased Diversity and Violations of Equal Protection*, 5 Comm. Law Conspectus 269 (1997); Patricia Aufderheide, *Public Television & the Public Sphere*, 8 Critical Stud. Mass Comm. 168 (1991).

operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[132] And the Commission licenses television broadcast stations "to the principal community or other political subdivision which it primarily serves."[133]

From its original codification under the 1927 Radio Act, and continuing under the Communications Act of 1934, localism has endured as a core tenet of broadcast public policy for a simple reason: service to the local community is the currency paid by broadcasters for the privilege of exclusive access to the public airways. And while the *how* of the pursuit of localism over the years may vary in part – from the Commission's "Blue Book" in the 1940s, to the 1960 Programming Policy Statement and the focus on market mechanisms under the 1996 Telecommunications Act – the *what* has remained the same: coverage, content, and news responsive to the local community's particular needs.

The Supreme Court has recognized the Commission's obligations and jurisdiction under the Communications Act to require broadcasters "to share [their] frequency with others and to conduct [themselves] as a proxy or fiduciary with obligations to present those views and voices which are representative of [their] communit[ies] and which would otherwise, by necessity, be barred from the airwaves."[134] The public interest analysis for any broadcast transfer of control proceeding must consider whether the proposed transaction advances (or conversely,

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[132] 47 U.S.C. § 307(b).

[133] 47 C.F.R. § 73.1120.

[134] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969). The broadcast industry often cites localism to justify any number of Commission regulations, from network non-duplication and syndicated exclusivity rules, to subsidizing broadcast licensees' repacking expenses after the incentive auction. *See* Broadcast Localism, *Report on Broadcast Localism and Notice of Proposed Rulemaking*, FCC Rcd. 1324, 1327 ¶ 5 (2008).

undermines) this core principle.[135] Only by advancing localism can a broadcast transaction possibly serve the public interest; and this assumes that any advancement of localism is also not outweighed by the harms of a particular transaction.

B. The Acquisition of Tribune Would Set Localism Back

Sinclair has historically undermined localism by a simple strategy: cost-cutting at the local station level, and creating national news programming to make up for the local shortfall. According to Bob Daraio, local representative for the News Guild of New York, CWA Local 31003:

> Sinclair's business model is going into a market, buying multiple stations, moving them all to one facility, and firing three quarters of the staff to get as much work with the fewest employees.[136]

Less investment at the local level naturally means fewer reporters, producers, camera operators, and other news team professionals, which in turn inevitably impacts the amount and quality of original reporting about a local community. Sinclair's solution is to supply national programming straight from its Baltimore headquarters. This programming has come in two flavors: "must-runs" – pre-recorded national stories or commentaries that all stations must air within a 24- or 48-hour period and that have little to do with each community;[137] and an

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[135] *See, e.g.*, *Comcast/NBCU Order*, 26 FCC Rcd. at 4240-42 ¶¶ 3, 5, 6; *see also* Applications of Shareholders of CBS Corporation and Viacom, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd. 8230, 8246 ¶ 46 (2000) ("*CBS/Viacom Order*").

[136] Joe Strupp, *Experts and Tribune Media Unions Raise Concerns about Sinclair's History of Pushing Conservative "Propaganda,"* Media Matters for America (May 22, 2017), https://www.mediamatters.org/blog/2017/05/22/experts-and-tribune-media-unions-raise-concerns-about-sinclair-s-history-pushing-conservative/216452.

[137] Sydney Ember, *Sinclair Requires Stations, Including KOMO, to Air Segments Tilting to the Right*, Seattle Times (May 15, 2017), http://www.seattletimes.com/seattle-news/sinclair-requires-tv-stations-including-komo-to-air-segments-that-tilt-to-the-right/ ("They are called 'must-runs,' and they arrive every day at television stations owned by the Sinclair Broadcast Group — short video segments that are centrally produced by the company. Station managers around the country are directed to work them into the broadcast over a period of 24 or 48 hours…. In interviews

approach Sinclair itself has nicknamed "Central Casting."[138] Under this approach, Sinclair's corporate headquarters writes scripts, which are then repeated verbatim by dozens of local anchors as if they are locally generated. In other cases, entire news segments have been produced at headquarters (including, for example, an inherently local segment like the weather) and, again, presented as local.[139]

Localism, of course, depends on the delicate balance struck by the network/affiliate relationship, a relationship that ensures viewers receive a mix of national and local news. Sinclair's must-runs put a thumb on the scale against localism by essentially superimposing a second national programming layer run by Sinclair onto the four major networks. And "Central Casting" is even more pernicious, as it often deceives viewers into believing the programming is local when it is nothing of the kind.

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over the past several days, eight current and former KOMO employees described a newsroom where some have chafed at Sinclair's programming directives, especially the must-runs, which they view as too politically tilted and occasionally of poor quality. They also cited features like a daily poll, which they believe sometimes asks leading questions. 'It is something that's very troubling to our members,' said Dave Twedell, a business representative for the union that represents photojournalists at KOMO. 'I have not found one of our members who is supportive of our company's position.'…. In late 2013, for instance, after The Seattle Times wrote an editorial criticizing Sinclair's purchase of KOMO, Sinclair ordered KOMO to do a story critical of the newspaper industry, and of The Seattle Times in particular, according to two of the people interviewed.").

[138] Jim Rutenberg and Micheline Maynard, *TV News that Looks Local, Even if it's Not*, New York Times (June 2, 2003), http://www.nytimes.com/2003/06/02/business/tv-news-that-looks-local-even-if-it-s-not.html; *see also* Robbie McBeath, *Sinclair's Tribune Purchase, Path Paved By Trump*, Benton Foundation (May 12, 2017), https://www.benton.org/blog/sinclairs-tribune-purchase-path-paved-trump; Shelby Hill, *Affiliates Spar with Parents on Distant Hubs*, Variety (June 5, 2013), http://variety.com/2013/tv/news/affiliates-spar-with-parents-on-distant-hubs-1200491954/.

[139] Jim Rutenberg and Micheline Maynard, *TV News that Looks Local, Even if It's Not*, New York Times (June 2, 2003), http://www.nytimes.com/2003/06/02/business/tv-news-that-looks-local-even-if-it-s-not.html.

One of the petitions the Commission addressed in one of its enforcement actions against Sinclair described the harmful effects on a rural North Carolina community:

> [Sinclair's] widely-publicized cost-cutting practice of replacing local news staff with centralized news . . . coupled with the fact that WLOS local news programs regularly rank last in the tri-city market – [made the station's] local news department especially vulnerable to downsizing or elimination by [Sinclair, and the] potential harm for [the] rugged mountain region, which is heavily dependent on WLOS for local weather and emergency announcements, [was] great.[140]

The Commission addressed this petitioner's concerns in a 2016 Consent Decree, discussed in detail in Section VII.A below.

But Sinclair's assault against localism extends beyond must-runs and Central Casting to cutting news programming altogether and outsourcing the productions of news to other stations – both in-market and out-of-state.

These practices go back to the 1990s. Shortly after acquiring Lexington, Kentucky FOX affiliate WDKY in 1996, Sinclair fired its news managers.[141] Similarly, at WGME in Portland, Maine, "employees ha[d] been worried about the possibility of layoffs and worsened working conditions ever since the station was bought in 1998 by Sinclair Broadcast Group, a large national chain with a reputation for extreme cost-cutting measures, including layoffs."[142] Sinclair made good on these worries by firing six newsroom staff. Similarly, shortly after purchasing Springfield's WICS from Guy Gannett in 1999, Sinclair offered a buyout to station employees who were 55 years and older and who had more than five years of experience under

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[140] Letter from Michael Hopping and Wally Bowen, Sinclair Media Watch, to FCC Video Division, Informal Objection to the Renewal of Broadcast License for WLOS, https://web.archive.org/web/20060627115012/http://www.sinclairwatch.net/WLOSIO2FCC.pdf (last visited Aug. 6, 2017).

[141] Annette Kondo, *2 Managers Leave WDKY in Shake-Up*, Lexington Herald Leader (June 21, 1996).

[142] Ray Routhier, *Wiggins Embarks on Career Change, Today's Telecast Will be the Last for WGME News Anchor Patsy Wiggins*, Portland Press Herald, Feb. 28, 2001.

the threat of future layoffs if they did not accept. Said a Sinclair memo: "we sincerely hope that this offer will be widely accepted and help us reduce the severity of future personnel and budget cuts."[143]

Sinclair seemingly intensified this practice in the next decade. In the 2000s, Sinclair first curtailed then eliminated newscasts on all of its WB stations, including those in Milwaukee, Wis., Tampa, Fla., and Buffalo, NY.[144] At the same time, Sinclair consolidated "local" newscasts on a regional basis for many other Big-4 network affiliates. At FOX affiliate WPGH in Pittsburgh, for example, Sinclair fired 35 members of the news team, including veteran journalists, and outsourced news programming to NBC affiliate, WPXI.[145] Sinclair also outsourced news operations at Birmingham's WTTO to then-Media General-owned WIAT.[146] One of Sinclair's stations, ABC affiliate KDNL in St. Louis, appears not to have had a local newscast since 2001 – *16 years ago,* making it the lone ABC, CBS, FOX or NBC affiliate in a top 25 market without a local newscast.[147]

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[143] *Back To Life; Hickman Plans To Speak His Mind During Retirement*, The State Journal-Register, Mar. 1, 2001, at 15 ("Many [employees] are aware of Sinclair's reputation for cold-heartedness when it comes to the bottom line. If they didn't take the early retirement, they feared they might be laid off."). Longtime news anchor Don Hickman along with other employees agreed to the offer.

[144] Allison Romano, *Sinclair Rethinks News Mission; Station Group Will Revamp Its Controversial Centralized Service*, Broadcasting and Cable (Mar. 20, 2006) http://www.broadcastingcable.com/news/news-articles/sinclair-rethinks-news-mission/79299.

[145] Michalel Yeomans, *Fox Affiliate Will Buy its News From WPXI, Lay Off 35*, Tribune Review (Jan. 12, 2006), http://triblive.com/x/pittsburghtrib/news/regional/s_412726.html ("Ratings for WPGH's 10 p.m. newscast began falling after the News Central concept was introduced.").

[146] Allison Romano, The Battle of Birmingham, Broadcasting and Cable (Dec. 9, 2005), http://www.broadcastingcable.com/news/news-articles/battle-birmingham/109068 ("Media General's CBS affiliate WIAT . . . started producing a 9 p.m. news for Sinclair's WB affiliate WTTO.").

[147] William M. Kurtz, Culture Conglomerates Consolidates in Motion Picture and Television Industries, at 93 (2007); *see also* Gail Pennington, *KDNL Will Launch 'Non-Traditional*

Cedar Rapids, Iowa was also afflicted. A report in 2005 contrasted staff reductions at Sinclair-owned KGAN in Cedar Rapids with staffing increases at another station in the market, KCRG, finding that "the size of the KGAN on-air news staff – thirteen – was 65% of the size of KCRG's twenty-person staff. By November 13th, that disparity became greater, with KGAN's staff size (twelve) amounting to only 57% of KCRG's staff of 21."[148] Sinclair stopped the 10 p.m. newscast at its other Buffalo, NY station, WNYO.[149] Sinclair fired the entire staff of 35 at WXLV-TV, the ABC affiliate in Greensboro, NC.[150] At KOKH-25, the FOX affiliate in Oklahoma City, Sinclair fired the entire sports department, the entire weather department, one photojournalist, one reporter and 6 other full and part-time staff.[151] At the FOX affiliate in Rochester, WUHF, Sinclair fired the entire news, weather, and sports anchor team, and half of the remaining news staff.[152] At Raleigh's WLFL-22-WB, approximately one-third of the news

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Newscast' in January, St. Louis Post Dispatch (Nov. 24, 2014), http://www.stltoday.com/entertainment/television/gail-pennington/kdnl-will-launch-non-traditional-newscast-in-january/article_063117bd-780b-5c58-9302-d01167353510.html (noting that KDNL, the ABC station in St. Louis, last produced its own local newscast in 2001, would begin airing what amounts to "an extension" of a local talk radio show as a "non-traditional newscast" in 2015).

[148] Iowans for Better Local Television, Report (2005), https://web.archive.org/web/20090201182702/http://www.ibltv.org/AboutSinclair2.htm.

[149] James Fink, *Plug Pulled on Channel 49 Newscast*, Buffalo Business First (Mar. 8, 2006), https://www.bizjournals.com/buffalo/stories/2006/03/06/daily22.html ("The Buffalo broadcast was making inroads with viewers with ratings slowly increasing as the station's reputation for breaking more local TV stories rising.").

[150] Free Press, *Sinclair and the Public Airwaves – A History of Abuse*, at 2 (Oct. 11, 2004), https://www.freepress.net/sites/default/files/resources/Sinclair_Report.pdf.

[151] *Id.*

[152] *Id.*

staff was fired.[153] Sinclair also fired 25% of the staff at Pittsburgh's FOX affiliate, WPGH-53, including a veteran weathercaster and several key reporters.[154]

These practices have continued unabated to date. Following Sinclair's purchase of Harrisburg's WHP-TV from Newport Television, Sinclair fired longtime station manager Holly Steuart.[155] Even worse, after acquiring San Antonio NBC affiliate WOAI in 2015, Sinclair decided to combine its news operations with Sinclair-owned KABB in the same city. The broadcasts were so similar that a local commentator wrote, "both stations' Saturday and Sunday newscasts looked to be virtual carbon copies of each other. They were so similar, in fact – scripts, story order – that I had to check which station I was watching."[156] That same year, Sinclair curtailed locally generated newscasts for WICD in Champaign, Illinois, instead carrying Springfield-based "market-wide" newscasts at 6 and 10 p.m. daily."[157] And just last year, Sinclair announced that it is moving Toledo's WNWO news operation out of Ohio altogether and producing news for that station out of Sinclair's WSBT station in South Bend, Indiana.[158]

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[153] *Id.*

[154] *Id.*; *see also* Rob Owen, *Tuned In: WPGH's Layoffs, 'News Central' Risky*, Post-Gazette (April 23, 2003), http://old.post-gazette.com/tv/20030423owen5 ("With 11 employees laid off – including meteorologist Matt Morano, weekend sports anchor Matt Fine and reporter Bill Clack – Sinclair will attempt to create a new broadcast model using News Central, a centralized news operation in Hunt Valley, Md.").

[155] David N. Dunkle, *Harrisburg CBS Affiliate Dismisses General Manager after Ownership Switch*, PennLive (Dec. 6, 2012), http://www.pennlive.com/midstate/index.ssf/2012/12/harrisburg_cbs_affiliate_dismi.html.

[156] Jeanne Jakle, *Shared Anchors Latest Step at WOAI/KABB*, San Antonio Express News (Feb. 11, 2015), http://www.mysanantonio.com/entertainment/entertainment_columnists/jeanne_jakle/article/Shared-anchors-latest-step-at-WOAI-KABB-6073752.php.

[157] Don Dodson, *Changes Coming to Local TV Scene*, The News-Gazette (March 13, 2015), http://www.news-gazette.com/news/local/2015-03-13/changes-coming-local-tv-scene.html.

[158] Mark Joyella, *Toledo Station WNWO to Outsource News, Layoff Staff*, Ad Week (Nov. 29, 2016), http://www.adweek.com/tvspy/toledo-station-wnwo-to-outsource-news-layoff-

In Portland, Oregon, Sinclair recently fired "prominent news anchor Natali Marmion" from ABC affiliate KATU as part of a "restructuring" by Sinclair.[159] Marmion had worked at KATU for nearly 20 years and "had been knighted as an honorary Royal Rosarian for her community work in Portland."[160] This was on top of "deep" cuts that Sinclair had made in 2013 at KATU after acquiring the station from Fisher, laying off 13 people, including nine in the newsroom, immediately after it acquired the station.[161]

This year, at ABC affiliate WBMA in Birmingham, Alabama, a station that Sinclair had acquired from Allbritton, Sinclair fired sports reporter Mike Raita and news anchor Linda Mays, both of whom had been with the station since it went on the air in 1996.[162]

Washington's WJLA and Seattle's KOMO are two particularly poignant cases because Sinclair cites these two stations as examples of the *benefits* that would befall Tribune if the transaction is approved. WJLA was acquired by Sinclair from Allbritton in 2013. It instantly became the crown jewel and largest station in the Sinclair network, giving Sinclair its first station among the nation's ten largest markets. It is also one of the nation's largest ABC affiliates not

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staff/182413 ("Sinclair-owned NBC affiliate WNWO announced Tuesday it would outsource its news production to the Sinclair station in South Bend, Indiana, resulting in layoffs for WNWO news staff.").

[159] Mike Rogoway, *KATU Lays off Longtime Anchor Natali Marmion, One Other in Newsroom; Dispute With Frontier Continues*, The Oregonian (Jan 10, 2017), http://www.oregonlive.com/business/index.ssf/2017/01/katu_lays_off_longtime_anchor.html.

[160] *Id.* An assignment manager who had been with the station since 2009 was also fired.

[161] Steve Duin, *As Sinclair Expands Nationwide, the Cuts Are Deep At KATU*, The Oregonian (Oct. 22, 2013), http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2013/10/steve_duin_katu.html ("'This was predictable, as soon as Sinclair bought the station,' said Norm Gunning, who retired in 2009 after two stints totaling 18 years at KATU. 'The layoffs at KOMO happened last week, and it was only a matter of time at KATU.'").

[162] Bob Carlton, *Sportscaster Mike Raita, News Anchor Linda Mays Let Go at Birmingham TV Station ABC 33/40*, AL.com (Jan. 13, 2017), http://www.al.com/entertainment/index.ssf/2017/01/longtime_birmingham_sportscast.html.

owned by the network. Under Allbritton, WJLA had become one of the nation's leading local news outlets after a hiring surge in the 2000s that brought a bevy of high-profile and valued local talent. This talent included anchors Maureen Bunyan and Gordon Peterson, and weatherman Doug Hill from the local CBS affiliate; weatherman Bob Ryan and film critic Arch Campbell from the local NBC affiliate; and anchor Leon Harris from CNN.

But under Sinclair, this outstanding news operation was almost instantly shredded. As soon as Sinclair took over, the "undisputed dean of Washington, D.C., anchors and one of the most respected local newsmen in the country," Gordon Peterson, left the station on principle, along with WJLA's news director.[163] Sinclair quickly began the firing process that comes with its broad strategy of cost-cutting. It terminated on-air talent, including legendary entertainment reporter Arch Campbell, longtime Washington sports anchor Tim Brant, anchor Leon Harris, and many behind-the-scenes news producers and photographers.[164] The bloodletting culminated this

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[163] John Eggerton, *Gordon Peterson Retiring from WJLA*, Broadcasting & Cable (Nov. 7, 2014), http://www.broadcastingcable.com/news/fates-and-fortunes/gordon-peterson-retiring-wjla/135460; *see also* Paul Farhi, *Here's What Happened the Last Time Sinclair Bought a Big-City Station*, Washington Post (May 8, 2017), https://www.washingtonpost.com/lifestyle/style/heres-what-happened-the-last-time-sinclair-bought-a-big-city-station/2017/05/08/92433126-33f7-11e7-b4ee-434b6d506b37_story.html ("'After taking a hard look at Sinclair Broadcasting,' Peterson said in January, 'I concluded that I would not be comfortable working in the new environment.'").

[164] Scott Jones, *Sinclair DC Turnover*, FTVLive (Jan. 10, 2017), https://www.ftvlive.com/sqsp-test/2017/1/10/sinclairs-dc-turnover ("When Sinclair took over WJLA in Washington, DC, it didn't take them long to start doing what Sinclair does best. Get rid of people with high salaries. Here's a list WJLA/NewsChannel 8 on-air employees let go since Sinclair takeover in August, 2014: Leon Harris, Tim Brant, Maureen Bunyan, Arch Campbell, Roz Plater, Greta Kreuz, Jennifer Donelan, Rebecca Cooper, Morris Jones, Jacqui Jeras. On-air staff that left on their own accord primarily because they disagreed with or simply feared Sinclair's approach: Kendis Gibson, Britt McHenry, Devon Lucie, Hatzel Vela, Kris Van Cleave, Diane Cho. Veteran anchor Gordon Peterson + reporter Jeannette Reyes also left on their own accord after the Sinclair takeover. Peterson on principal [sic], Reyes had a much better offer at WPVI in Philly."); *see also* Richard Prince, *Sinclair Group Ousting Longtime TV Anchor Maureen Bunyan*, The Root (Jan. 9, 2017), https://journalisms.theroot.com/sinclair-group-ousting-longtime-tv-anchor-maureen-bunya-1791134110 ("Sinclair's 'broad cost-cutting strategy'

January with the firing of Maureen Bunyan, a 44-year veteran and one of the first female African-American anchors in the nation.[165] In almost all cases, these reporters were either not replaced, or they were replaced with younger, cheaper employees with little to no experience in the DC market.[166]

A similar story unfolded in Seattle at KOMO. Like WJLA, the newsroom at KOMO is disappearing. After acquiring the station from Fisher in 2013, Sinclair laid off 18 news division employees.[167] This year, Sinclair cut additional positions at KOMO, including its investigative reporting team.[168] In addition, many of the station's award-winning journalists have revolted against Sinclair's management practices. KOMO's journalists have expressed concern about "intrusive direction from headquarters."[169] These current and former employees describe "a newsroom where some have chafed at Sinclair [corporate's] programming directives, especially

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previously led to terminations of entertainment reporter Arch Campbell, sports anchor Tim Brant and reporter Greta Kreuz, and that 'On Friday, in another cutback, the station laid off several behind-the-scenes news producers and photographers.'").

[165] Andrew Baeujon, *WJLA's TV Legends Are Vanishing. Does It Matter?*, Washingtonian (Mar. 15, 2017), https://www.washingtonian.com/2017/03/15/wjlas-tv-legends-are-vanishing-does-it-matter/ ("On January 31, staff at WJLA gathered around a pair of sheet cakes for a sendoff to a pair of Washington TV heavyweights: Maureen Bunyan, a 44-year veteran of local airwaves who in 1978 became one of the first female African-American anchors in the US, and Bruce DePuyt, who for 14 years hosted NewsTalk, the rare public-affairs show that was actually fun to watch. The cakes were, by this point, a familiar ritual. Anchors Leon Harris and Gordon Peterson, sports anchors Alex Parker and Tim Brant, and entertainment-reporter legend Arch Campbell are among those who have also exited over the past three years.").

[166] Scott Jones, *Sinclair DC Turnover*, FTVLive (June 10, 2017), https://www.ftvlive.com/sqsp-test/2017/1/10/sinclairs-dc-turnover.

[167] Steve Duin, *New Owners Swing the Ax at KATU and KOMO*, The Oregonian (Oct. 21, 2013), http://www.oregonlive.com/news/oregonian/steve_duin/index.ssf/2013/10/steve_duin_new_owners_swing_th.html.

[168] Rachel Lerman, *KOMO Cuts Positions in Newsroom*, Seattle Times (Jan. 5, 2017), http://www.seattletimes.com/business/technology/komo-cuts-positions-in-newsroom.

[169] Sydney Ember, *Sinclair Requires Stations, Including KOMO, to Air Segments Tilting to the Right*, Seattle Times (May 15, 2017), http://www.seattletimes.com/seattle-news/sinclair-requires-tv-stations-including-komo-to-air-segments-that-tilt-to-the-right.

the must-runs, which they view as too politically tilted and occasionally of poor quality."[170] And, in 2005, a local Sinclair producer said that working as a journalist in the local station, reporters "weren't reporting news" but rather "were reporting a political agenda that came down . . . from the top of the food chain [which ultimately meant Sinclair CEO] David Smith."[171]

In sum, Sinclair's pattern and practice have become a matter of record: buy a station, cut the local staff, move resources and decision-making to corporate headquarters, and let localism suffer. Sinclair's recent earnings call removes any lingering doubt over whether that pattern and practice will somehow abate with this acquisition. In the words of Sinclair's CEO: "right now there are three to five local players, and to us that doesn't make sense."[172] The CEO also reportedly stated that consolidating news operations would lead to "significant savings."[173]

VI. The Applicants' "Benefits" Actually Suggest Detriments to the Public Interest

The Applicants have failed to meet their burden of proving that this transaction is in the public interest. In total, they devote just two-and-a-half pages to describing the "benefits" that would flow from this multi-billion-dollar consolidation, but even these purported benefits are undercut by the facts. This scant effort evokes a scene from Spinal Tap:

> **Nigel Tufnel**: The sustain, listen to it.
>
> **Marty DiBergi**: I don't hear anything.
>
> **Nigel Tufnel**: Well you would though, if it were playing.[174]

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[170] *Id.*

[171] Eric Klinenberg, *Beyond Fair and Balanced*, Rolling Stone (Feb. 24, 2005), http://www.rollingstone.com/politics/news/beyond-fair-and-balanced-20050224.

[172] Diana Marszalek, *Sinclair's Ripley: Fewer Local TV News Teams Would Strengthen Output*, Broadcasting & Cable (Aug. 2, 2017), http://www.broadcastingcable.com/news/local-tv/sinclairs-ripley-fewer-local-tv-news-teams-would-strengthen-output/167631.

[173] *Id.*

[174] *This Is Spinal Tap* (Embassy Pictures 1984).

In those two-and-a-half pages, we learn about Sinclair's investment, headcount, news/local programming, charity, and digital passion. But we learn almost nothing about Tribune's performance in this area. And the little that is said seems to explain why the Applicants stay otherwise silent: Tribune seems to do better than Sinclair on every one of these metrics, meaning that the export of Sinclair's practices would be detrimental instead of a benefit. In fact, the rosy account of investments and headcount increases in the Application is belied by Sinclair's history of brutal cost-cutting and dismissing of local TV personalities.

In any event, the Applicants have failed to support what few asserted benefits they do claim with any supporting evidence, and so their purported benefits cannot be considered.[175] Applicants do not even attach a declaration attesting to the few facts put forth in the Application.[176] As the Commission has repeatedly admonished, merger applicants "have the burden of providing sufficient evidence to support each claimed benefit to enable us to verify its likelihood and magnitude."[177] The Commission will "discount or dismiss speculative benefits that [it] cannot verify."[178] Of course, even were the Applicants to provide actual figures for the Commission's consideration, they would have to provide the Commission with *all* investment, headcount, and programming data for all acquired stations, not just the few that fit into Sinclair's preferred narrative, because the Commission must "calculate the magnitude of benefits net of the

[175] Sinclair also has attempted to claim that its rollout of ATSC 3.0 is a benefit of this transaction. Such a claim is not merger-specific. In addition, if authorized, Tribune would likely transition to ATSC 3.0 absent this transaction. The Applicants have thus not met their burden to prove that this is a benefit of the instant transaction.

[176] *See* Application (listing only attachments as corporate structure charts, financial statements, list of authorizations, and reports about failing stations).

[177] *Nexstar/Media General Order*, 32 FCC Rcd. at 193 ¶ 23.

[178] *Id*.

cost of achieving them."[179] And this is precisely why the Commission should require the Applicants to produce the information set forth in Exhibit B attached, which was the basis of the Motion for Additional Information.[180]

A. The Transaction Would Undermine, Rather than Improve, the Quality of News and Local Programming in the Tribune Markets

The primary purported "benefit" of the transaction is improving the quality of news and local programming. Sinclair claims that it "has a long tradition of investing in newly acquired stations with the goal of improving the quality of their news and local programming."[181] Specifically, it claims to have made increases in capital investment, headcount, news and local programming, and digital programming.[182]

But, in fact, the merger-specific effects of this transaction would be the production of less local news, not more. The viewers in the 40 Tribune markets would suffer because Sinclair grows local news content at a demonstrably lower rate than does Tribune. And the claimed increases in capital investment, headcount, and digital programming are either contradicted by fact or are speculative and unsupported.

As a threshold matter, Sinclair's benefit claims in this case are belied by Sinclair itself. Sinclair makes contradictory statements to the Commission and to investors. The merger will increase headcount, says the Application.[183] But, during Sinclair's most recent earnings call, on the other hand, Sinclair's CEO reportedly said that consolidating news operations will lead to

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[179] *Id*. at 193 ¶ 24.

[180] *See* Motion for Additional Information at 5-6.

[181] Application at 2.

[182] *Id.* at 2-3.

[183] *Id.*

"significant savings."[184] Which is it? The Commission should give zero credence to Sinclair's benefit claims.

B. New Sinclair Would Scale Back on the Growth of Local News at Tribune Stations, Harming, Not Helping, Tribune Viewers

Today, viewers in Tribune markets enjoy robust and improving local news coverage.[185] They will be disadvantaged if Sinclair comes to town, which not only undercuts Sinclair's claim of benefit, but points to a merger-specific harm to the public interest.[186] This is because Tribune's commitment to local news is greater than Sinclair's. Sinclair claims that "almost half" of its stations acquired from Fisher Broadcasting and Allbritton Communications "have added local programming and/or newscasts."[187] But Sinclair fails to specify whether the "newscasts" added were locally produced and of local interest, and so they cannot be credited on the side of

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[184] Diana Marszalek, *Sinclair's Ripley: Fewer Local TV News Teams Would Strengthen Output*, Broadcasting & Cable (Aug. 2, 2017), http://www.broadcastingcable.com/news/local-tv/sinclairs-ripley-fewer-local-tv-news-teams-would-strengthen-output/167631.

[185] *See* Application at 3. Tribune-owned WGN-Channel 9 in Chicago added a 10pm local newscast in 2015 and a 6pm newscast in 2017. *See GN Chicago Adding News at 6 P.M*, Broadcasting & Cable (Mar. 3, 2017), http://www.broadcastingcable.com/news/local-tv/wgn-chicago-adding-news-6-pm/163794; Lewis Lazare, *Tribune Media's WGN-Channel 9, in Surprise Move, Adds 10 p.m. Local Newscast*, Chicago Business Journal (Aug. 18, 2015), https://www.bizjournals.com/chicago/news/2015/08/18/tribune-mediaswgn-channel-9-in-surprise-move-adds.html. Tribune-owned KDVR-TV in Denver won 13 National Academy of Television Arts and Sciences' Heartland Emmy's, including the prestigious overall excellence award for the second year in a row, as well as awards for investigative and environmental reporting. *See FOX31 News Awarded 13 Heartland Emmys Including Overall Excellence*, Tribune Media (July 17, 2017), http://www.tribunemedia.com/fox31-news-awarded-13-heartland-emmys-including-overall-excellence/. KSWB/FOX 5 in San Diego won three Emmy Awards by the National Academy of Television Arts and Sciences Pacific Southwest Chapter, including best morning newscast. *See KSWB/FOX 5 San Diego Wins 3 Emmy Awards*, Tribune Media (July 6, 2017), http://www.tribunemedia.com/kswbfox-5-san-diego-wins-3-emmy-awards/. WTVR/CBS 6 in Richmond, VA was awarded 13 Emmy Awards by the National Capital Chesapeake Bay Chapter of the National Academy of Television Arts and Sciences, including best morning newscast. *See WTVR/Richmond, VA Wins 13 Emmy Awards*, Tribune Media (July 5, 2017), http://www.tribunemedia.com/wtvrrichmond-va-wins-13-emmy-awards/.

[186] *See supra* Section V.

[187] Application at 3.

localism. And what about the other "half" of the Fisher/Allbritton stations? Sinclair says nothing about what happened with them, or indeed, how local news has been faring at the other hundred or so stations it fails to discuss in the Application.

Sinclair then states that, in 2016, it added "over five hours per week of news in eight markets, and [this year] has added over six hours of news per week in an additional seven markets."[188] But adding some form of unspecified news programming at 15 stations hardly counterbalances the documented cuts Sinclair made to news for at least 27 stations as described above. Sinclair also says that its stations produce "around 2,200 hours of local news per week."[189] Taking Sinclair's own numbers, then, the additional hours of news programming (not necessarily local news) represent just a 3.7 percent increase in news programming over the last two years.[190]

Tribune, by contrast, increased *local* news hours by 8.5% in the three years from 2014 to 2016, and has continued to expand news by over 3% in 2017, according to the Application.[191] Note that this is *local* news, not just any news. That suggests a pace that is almost double that of Sinclair on the general news front and even more than that with respect to actual local news once the "must runs" and central casting segments are taken into account. Thus, by the Applicants' own admission, it appears that Sinclair's commitment to local news pales in comparison to Tribune's, suggesting that new ownership by Sinclair will diminish, not increase, the rate at

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[188] *Id.*

[189] *Id.*

[190] Eight markets increasing by 5 hours per week equals 40 additional hours of news programming. Seven markets increasing by 6 hours per week equals 42 additional hours of news programming. Collectively, the 82 additional hours of news programming represent 3.7 percent of the 2,200 hours of news programming that Sinclair touts.

[191] Application at 3.

which the Tribune stations increase local news coverage. This means that Sinclair's commitment to local news is not a benefit to the transaction because, at best, there will be no improvement to the status quo and, more likely, the quality of the local news coverage on Tribune's stations will decline.

As for Sinclair's specific assertions about its local news programming, while Sinclair claims that its future intentions can be measured by its past actions, Sinclair has, in fact, failed to establish that any of its past actions were merger-specific. As proof of future public interest benefits, it relies on its claim to have invested more than $40 million in capital improvements and other upgrades in the stations it acquired from Fisher and Allbritton,[192] but there is no evidence that these investments were not already planned before Sinclair arrived or what they were spent on. In fact, it is likely these "investments" were items that have nothing to do with the quality of local news like new buildings,[193] furniture and station sets to make local stations have the identical feel to the Sinclair central office studio,[194] or already-scheduled equipment replacements.[195] Further, the claim regarding Sinclair's "investments" rings hollow when judged by what Sinclair has done at stations like WJLA in Washington, D.C., KOMO in Seattle, and KATU in Portland, where cost-cutting has reigned supreme.[196]

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[192] *Id.* at 2.

[193] *Id.*

[194] *See* Jim Rutenberg and Micheline Maynard, *TV News that Looks Local, Even if It's Not*, New York Times (June 2, 2003), http://www.nytimes.com/2003/06/02/business/tv-news-that-looks-local-even-if-it-s-not.html.

[195] Adam R Jacobson, *Is Sinclair Suffering From Big Debt?*, RBR (Jan. 11, 2017), http://rbr.com/sbgi-0111/.

[196] *See supra* Section V.B.

C. Sinclair Has Drastically Cut, Not Increased, Headcount

Sinclair's claim that it has added headcount in the local news operations it has acquired is refuted by fact. Ironically, the Applicants boast that headcount went up at WJLA with the hiring of a single investigative reporter,[197] which is far from an increase or even an offset given reports that Sinclair fired upwards of 20 news staff when it took over the station.[198] The other stations cited by Sinclair as examples of headcount increases – KTUL and WCIV – have also had issues with layoffs, firings, and turnover.[199] So it is not at all clear whether the "new hires" Sinclair references were headcount additions or merely replacements for staff previously let go or who had left. Using conservative estimates and the news reports cited earlier in this Petition, Sinclair has cut more than 250 local news positions in recent years; this is hardly offset by the mere 20 hires Sinclair references in the Application. In sum, the balance of evidence shows that decreasing headcount, not increasing it, is Sinclair's history.

D. Sinclair's Commitments to Digital Content and Awards Are Not Merger-Specific Benefits

Sinclair's other claims regarding its commitment to local news are unavailing. It claims to have a commitment to digital content.[200] But this is hardly a unique benefit of the transaction; every traditional media outlet – television, radio, newspapers, magazines, including every Tribune broadcast station – has a digital presence. As for the news awards trumpeted by Sinclair,[201] these stations were winning these awards long before Sinclair ever acquired them,

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[197] Application at 2-3.

[198] *See supra* Section VI.A.

[199] *See* Scott Jones, *They Fired Me*, FTVLive (Feb. 9, 2017), http://www.ftvlive.com/sqsp-test/2017/2/9/they-fired-me; *see also* Scott Jones, *Out the Door In Tulsa*, FTVLive (April 28, 2017), http://www.ftvlive.com/sqsp-test/2017/4/28/out-the-door-in-tulsa.

[200] Application at 3.

[201] *Id.*

and Tribune's record in this regard appears to be better than Sinclair's.[202] Again, there is no reason to believe that there will be merger-specific benefits.

E. Sinclair's History in News and Local Programming Demonstrates that the Public Interest is Harmed by Its Corporate Strategies

To understand the extent to which Sinclair seeks to parlay the harms that it has inflicted into benefits that Tribune expects to receive, it is useful to juxtapose the Application's treatment of WJLA in Washington and KOMO is Seattle with what has actually happened at those stations. Here is the Applicants' description: "WJLA in Washington D.C. recently added another investigative journalist to its growing staff and now has one of the largest investigative news teams in Washington, D.C. . . . Almost half of these stations have added local programming and/or newscasts under Sinclair's ownership. For example, five more hours of news per week were added to . . . KOMO in Seattle . . . "[203]

And here are the facts. At WJLA:

> When Sinclair came in and bought our company, things just continued to grow worse. Our best managers either left or were laid off. High turnover rate with little to no replacement – more added work and less flexibility to schedule time-off. The work environment is very hostile. Managers tend to play favorites and company morale is at an all-time low. Workplace bullying is also common but it tends to be more passive-aggressive so executives can get away with it . . . [204]

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[202] *Tribune Broadcasting*, Tribune Media, http://www.tribunemedia.com/our-brands/tribune-broadcasting/ (last visited Aug. 6, 2017).

[203] Application at 2-3.

[204] Richard Prince, *Sinclair Group Ousting Longtime TV Anchor Maureen Bunyan*, The Root (Jan. 9, 2017), https://journalisms.theroot.com/sinclair-group-ousting-longtime-tv-anchor-maureen-bunya-1791134110.

At KOMO: Current and former employees describe "a newsroom where some have chafed at Sinclair programming directives, especially the must-runs, which they view as too politically tilted and occasionally of poor quality."[205]

The following chart summarizes the harms inflicted by Sinclair at a total of 27 stations:

Station	**Market**	**Sinclair's Harm to Localism**
WJLA	Washington, DC	Firings of many news staff, including investigative and star veteran reporters. Little to no replacement of staff who leave and a "bullying" workplace environment
KOMO	Seattle	Fired 18 news division employees after acquiring station from Fisher; then fired the investigative reporting team
KATU	Portland, Oregon	Fired 13 news division employees after acquiring station from Fisher and made further cuts this year
KDNL	St. Louis	Has not had its own local newscast since 2001, making it the lone Big-4 affiliate in a top 25 market without a local news cast
WNWO	Toledo	Moved local news production to Sinclair's WSBT in South Bend, Indiana, resulting in layoffs for WNWO staff
WPGH	Pittsburgh	Sinclair fired 35 members of the news team, including veteran journalists, and outsourced news programming to WPXI
WOAI	San Antonio	Consolidated news operations with KABB
WICD	Champaign	Eliminated local news in favor of a "market-wide" broadcast
KTUL	Tulsa	Fired key news staff
WCIV	Charleston	Fired key news staff
WNYO	Buffalo	Eliminated 10:00 PM newscast
WXLV	Greensboro	Fired entire news staff of 35
KOKH	Oklahoma City	Fired the entire sports department, the entire weather department, and 8 other news staff
WUHF	Rochester	Fired the entire news, weather and sports anchor team, and half of the remaining news staff
WLFL	Raleigh	Fired one-third of the news staff
WBMA	Birmingham	Fired long-time anchors after acquiring station from Allbritton
WHP-TV	Harrisburg	Fired long-time station manager after acquiring station
WICS	Springfield	Bought out stations employees who were over 55 years old
WDKY	Lexington	Fired news managers shortly after acquiring station

[205] Sydney Ember, *Sinclair Requires Stations, Including KOMO, to Air Segments Tilting to the Right*, Seattle Times (May 15, 2017), http://www.seattletimes.com/seattle-news/sinclair-requires-tv-stations-including-komo-to-air-segments-that-tilt-to-the-right/ ("KOMO's staff also cited features like a daily poll, which they believe sometimes asks leading questions. 'It is something that's very troubling to our members,' said Dave Twedell, a business representative for the union that represents photojournalists at KOMO. 'I have not found one of our members who is supportive of our company's position.'").

WGME	Portland, Maine	Fired newsroom staff after acquiring station
KGAN	Cedar Rapids	News staff attrition cut size to 57% of same-market station KCRG
WLOS	Tri-Cities, NC	Made significant cuts to local news staff
WTTO	Birmingham	Outsourced news operations to WIAT
WB Stations	Milwaukee, Tampa, Las Vegas, Buffalo	Eliminated local newscasts and laid off staff

VII. Sinclair's Conduct Counsels Against Entrusting It with More Stations

As explained above, the proposed merger presents significant economic concerns about excess bargaining power and loss of localism as a result of the merger. But considering that Sinclair would be the surviving entity, the Commission must also consider Sinclair's past practice as evidence of its likely future behavior.

Over the last few years alone, Sinclair's transgressions run the gamut from failing to negotiate retransmission consent in good faith, to violating the broadcast ownership limits and broadcasting sponsored programming misleadingly titled as "news." On top of it all, Sinclair is singularly willing to use consumers as collateral damage in retransmission consent negotiations.

A. Sinclair Has Shown Disregard for the Commission's Rules

1. Sinclair and "Good Faith"

In July 2016, Sinclair had to agree to pay $9,400,000, to settle an enforcement proceeding with the Media Bureau after several parties filed complaints claiming that Sinclair deliberately violated good faith negotiations rules and federal broadcast ownership laws.[206] The good faith violations that led to the settlement provide particular insight into Sinclair's tactics. This was not the technical violation of some quaint rule buried in the Code of Federal Regulations. Coordination among broadcasters had become such a problem that Congress felt the need to step in, pointedly instructing the Commission in 2014 to "*prohibit* a television

[206] *See Consent Decree*, 31 FCC Rcd. at 8576 ¶ 1.

broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market."[207] The Commission promptly complied by revising its retransmission consent rules to incorporate Congress' directive virtually verbatim in February 2015.[208] The prohibition became effective on April 2, 2015. The ink had barely dried when Sinclair, undaunted, and despite the clarity in statute and code, negotiated on behalf of not one, not two or even three, *but 36* stations it did not own or control, showing not only a lack of good faith but a total disregard for federal regulations and the statute Congress had recently enacted to expressly govern such situations. Specifically, the Commission found that although the rules prohibited a broadcaster during retransmission consent negotiations to proffer terms and conditions on behalf of third-party owned stations:

> Sinclair negotiated retransmission consent on behalf of, or coordinated negotiations with, ***a total of 36 Non-Sinclair Stations*** with which it had JSAs, LMAs, or SSAs, concurrently with its negotiation for retransmission consent of at least one Sinclair Station in the same local market. These negotiations involved a total of six different MVPDs, and in some instances Sinclair represented the same Non-Sinclair Station in retransmission consent negotiations with multiple MVPDs.[209]

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[207] STELA Reauthorization Act of 2014, Pub. L. No. 113-100, § 103(a); *see also* 47 U.S.C. § 325(b)(3)(C)(iv) (emphasis added).

[208] 47 C.F.R. 76.65(b); *see also* Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, *Order*, 30 FCC Rcd. 2380, 2381 ¶ 4 (2015) (adopting 47 C.F.R. § 76.65(b)(1)(viii), among other changes to the Rules); Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, *Notice of Proposed Rulemaking*, 30 FCC Rcd. 10327, 10338-39 ¶ 14 n.65 (2015) (reminding parties that "stations operating under . . . 'sidecar' arrangements, even if attributable, cannot jointly negotiate retransmission consent with a station in the same market owned by the broker because they are not 'under common de jure control'").

[209] *Consent Decree*, 31 FCC Rcd. at 8579 ¶ 4 (emphasis added); *see also* Daniel Frankel, *Sinclair Fined $9.5M by FCC for Violating Good-Faith Retrans Bargaining Obligations*, Fierce Cable (Aug. 1, 2016), http://www.fiercecable.com/cable/sinclair-fined-9-5m-by-fcc-for-violating-good-faith-retrans-bargaining-obligations (The Commission "fined Sinclair Broadcast Group nearly $9.5 million in connection to a seven-month investigation into the broadcaster's retransmission licensing negotiations . . . . [alleging] in a number of circumstances that Sinclair didn't fulfill its obligations to negotiate in good faith, often including stations it doesn't control in its bargaining talks with pay-TV operators.").

The Media Bureau's findings are consistent with DISH's own experience. According to Ms. Ordonez, Sinclair's representatives went so far as to tacitly acknowledge that their tactics would violate the "good faith" regulations, but nevertheless insisted that DISH either accept Sinclair's demands on behalf of unaffiliated stations or agree to suspend all negotiations for one year.[210] As DISH explained in its complaint, it is impossible to conceive of an instance of worse faith in negotiating than a demand that the parties not negotiate.[211]

In DISH's experience, Sinclair exceeds industry norms in the aggressiveness of its negotiating tactics. Sinclair will threaten takedowns of its stations both earlier and more frequently in the negotiation cycle than other broadcasters.[212] It often places a "crawl" on its signal warning viewers that its programming might soon be unavailable much earlier in the negotiating cycle than other broadcasters.[213] During a recent negotiation, a Sinclair representative suggested "that DISH would be more likely to rethink its position after losing 'a couple hundred thousand subscribers.'"[214]

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[210] *See* Declaration of Melisa Ordonez, DISH Network Complaint ("DISH Complaint"), MB Docket No. 12-1 ¶ 9 (Aug. 15, 2015); *see also* Edwin L. Edwards and Carolyn C. Smith, *Memorandum Opinion and Order and Notice of Apparent Liability*, 16 FCC Rcd. 22236 (2001) ("*2001 Sinclair NAL*"); DISH Complaint at 2 ("Sinclair . . . has threatened to refuse to negotiate for at least one year if DISH does not submit to Sinclair's unilateral demands. Specifically, Sinclair has asked DISH to sign the reverse of a retransmission agreement—an agreement that neither party will engage in retransmission consent talks for at least a year, unless DISH signs a deal that unlawfully includes certain stations not under common de jure control with Sinclair. It is impossible to conceive of an instance of worse faith in negotiating than a demand that the parties not negotiate. All of these demands constitute per se bad faith under the Commission's rules.").

[211] *See* DISH Complaint ¶¶ 50-51.

[212] Ordonez Decl. ¶ 21.

[213] *Id.*

[214] Clark Decl. ¶ 6.

Even in the rough-and-tumble context of negotiations between a major MVPD and a large broadcaster, such behavior places Sinclair in a category of its own.[215] This is not only DISH's experience. Industry executives who have dealt with Sinclair say the company is known for "relentlessly grinding down partners on contract terms."[216]

2. Sinclair and the Limits on Broadcast Ownership

Sinclair has also played fast and loose with the Commission's limits on ownership interest in broadcast stations.[217] As described in the 2016 Consent Decree, MVPDs asserted that Sinclair knew that under the local duopoly rule, its ownership of WLOS in Greenville, South Carolina precluded direct ownership of WBSC in the same market. Therefore, the MVPDs surmised, the WBSC owner of record was the Cunningham Broadcasting Corporation, doing business through a wholly owned subsidiary, Anderson (WFBC-TV) Licensee, Inc., which in turn had a LMA with Sinclair.[218] The Media Bureau recognized that this arrangement violated its rules when it found that the subject LMA was not within the class of grandfathered LMAs excepted from the local duopoly rule.[219]

The conduct discovered in the Consent Decree was not a one-off occurrence. Indeed, Sinclair has a reputation for employing creative measures to avoid the Commission's local

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[215] Ordonez Decl. ¶ 23.

[216] Cynthia Littleton, Inside Sinclair: CEO Nixes Fox News Rival Rumors, Talks Tribune and Big Ambition for Broadcast Biz, Variety (July 25, 2017) http://variety.com/2017/tv/news/sirnclair-tribune-merger-boris-epshteyn-david-smith-news-1202504687 ("'They are not easy to deal with,' says a network executive with experience in negotiating affiliation deals with Sinclair.").

[217] *Consent Decree*, 31 FCC Rcd. at 8579-80 ¶ 5.

[218] Michael Hopping and Wally Bowen, Sinclair Media Watch, Letter to the FCC (2004), https://web.archive.org/web/20060627114920/http://www.sinclairwatch.net/WBSCIO2FCC.pdf (last visited Aug. 6, 2017).

[219] *Consent Decree*, 31 FCC Rcd. at 8580 ¶ 6.

broadcast ownership rules.[220] In 2001, for example, the Commission issued a Notice of Apparent Liability against Sinclair for violating local station ownership rules.[221] As one observer explained, Sinclair was:

> creative when it came to skirting federal rules that forbid broadcasters from controlling two television stations in the same market. The scheme was simple: [then-CEO David] Smith's mother, Carolyn, and Sinclair employee Edwin Edwards would buy a station in a market where the company already owned an outlet, and then promptly turn control of the new operation over to Sinclair.[222]

In the face of this history, the 2016 Consent Decree required Sinclair to appoint and maintain a Compliance Officer to administer and oversee a compliance plan specifically aimed at curbing any further Sinclair abuses of the retransmission consent or broadcast ownership rules.[223]

3. Sinclair and Sponsor Disclosure

Sinclair's recent rule violations echo earlier behavior addressed by the Commission in 2005 when it issued a notice reminding broadcast licensees of the critical role that broadcasters play in providing information to the audiences that they serve, and of their obligations under the sponsorship identification rules in connection with the airing of video news releases ("VNRs").[224] The Notice was spurred in part by a report detailing how broadcasters had been airing VNRs, essentially sponsored content cloaked as news reports, without disclosing the

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[220] Diane Farsetta and Daniel Price, *Still Not the News, Stations Overwhelmingly Fail to Disclose VNRs*, PR Watch, 1–72 (Nov. 16, 2006), http://www.prwatch.org/files/pdfs/CMD_Report_Public.pdf ("Farsetta and Price").

[221] *See 2001 Sinclair NAL*, 16 FCC Rcd. at 22341-42 ¶¶ 3-5.

[222] Eric Klinenberg, *Beyond 'Fair and Balanced,'* Rolling Stone (Feb. 24, 2005), http://www.rollingstone.com/politics/news/beyond-fair-and-balanced-20050224.

[223] *See Consent Decree*, 31 FCC Rcd. at 8581 ¶¶ 13-16.

[224] Public Notice, Commission Reminds Broadcast Licensees, Cable Operators and Others of Requirements Applicable to Video News Releases, and Seeks Comment on the Use of Video News Releases by Broadcast Licensees and Cable Operators, 20 FCC Rcd. 8593 (2005).

paying sponsors as required under the Commission's sponsorship identification rules.[225] Sinclair was among the worst offenders. The independent report listed Sinclair's multiple failures in 2006 to identify VNR sponsors, calling Sinclair's activities "Fake News."[226]

Just two years later, the Commission found that Sinclair had "willfully and repeatedly" violated the general requirement to disclose the identity of sponsors that paid for political content "involving the discussion of a controversial issue of public importance"[227] across nine of its stations.[228] The Commission ruled that, by airing segments featuring a political commentator promoting U.S. Department of Education programs while simultaneously receiving cash payments from the agency without disclosing such payments, Sinclair had violated the sponsorship identification rule.[229] The Commission emphasized that it "has placed particular importance on a licensee's obligation to identify to its viewers any and all sponsors of politically related messages."[230]

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[225] *See* Farsetta and Price at 65; *see also* Frank Ahrens, *FCC Queries TV Stations on Video News Releases*, Washington Post (Aug. 15, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/14/AR2006081401006.html.

[226] Farsetta and Price at 65.

[227] *See* 47 C.F.R § 73.1212(d).

[228] Sonshine Family Television, Inc., *Notice of Apparent Liability for Forfeiture*, 22 FCC Rcd. 18686, 18687 ¶ 2 (2007) ("*Sponsor ID NAL*"). The nine Sinclair stations were: WABM(TV), Birmingham, Alabama, KSMO-TV, Kansas City, Missouri, WVTV(TV), Milwaukee, Wisconsin, WUXP-TV, Nashville, Tennessee, KOCB(TV), WEAR-TV, Pensacola, Florida, WPMY(TV), Pittsburgh, Pennsylvania, KABB (TV), San Antonio, Texas, and WTWC-TV, Tallahassee, Florida.

[229] *See id*. at 18695 ¶ 17 ("Sinclair willfully and repeatedly violated Section 73.1212(d) of the Commission's rules by airing the ABF episode '2004 Election Countdown' over its stations on the respective dates noted above without airing proper sponsorship identification and that the imposition of a monetary forfeiture in redress of these failures is appropriate.").

[230] *See id.*

B. Sinclair Routinely Uses Consumers as Leverage

Sinclair's behavior as a broadcaster harms consumers not only when the company has violated Commission rules, as described above, but in its everyday business dealings. During the same retransmission consent negotiations that led to the Commission's $9.4 million settlement agreement with Sinclair, the company perpetrated the largest broadcast programming takedown in U.S. history, impacting millions of consumers and needlessly dragging consumers into an otherwise straightforward contract negotiation.

In August of 2015, just as the NFL pre-season was getting underway, Sinclair blacked out all of its local broadcast signals from DISH, pulling an unprecedented 129 stations in 79 markets.[231] The blackout was so extensive that then-Chairman Tom Wheeler called an emergency meeting between the two companies, stating that the Commission would "not stand idly by while millions of consumers in 79 markets across the country are being denied access to local programming."[232]

In January of this year, Sinclair also took its signal off Frontier systems in Oregon, Washington, Minnesota, North Carolina, and South Carolina.[233] Frontier tends to serve rural and small-town households, which meant that Sinclair's programming takedown again had a disproportionate impact on rural America. The same was true of Sinclair's half-year long

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[231] FCC, Press Release, Statement of FCC Chairman Tom Wheeler on Re-transmission Dispute between DISH Networks and Sinclair Broadcasting (Aug. 26, 2015); *see also* Rick Seltzer, *Sinclair Blacks out 129 Stations on Dish*, BizJournals.Com (Aug. 26, 2015), https://www.bizjournals.com/baltimore/news/2015/08/26/sinclair-blacks-out-129-stations-on-dish.html.

[232] FCC, Press Release, Statement of FCC Chairman Tom Wheeler on Re-transmission Dispute between DISH Network and Sinclair Broadcasting (Aug. 26, 2015).

[233] Data available upon request from the American Television Alliance.

programming takedown against small cable operator Buckeye Cable in Toledo, Ohio.[234] As in prior examples, this exceedingly long programming takedown suggests that Sinclair, far from being a champion of rural consumers in the markets it serves, willingly uses them as pawns in seeking its own commercial advantage.

VIII. The Application Is Premature

The Applicants seek to create an empire of 159 full-powered broadcast stations (including 117 Big-4 network affiliates) covering 72 percent of the nation's population. New Sinclair would be the largest broadcast group in the country by far. By comparison, Nexstar would be left behind in a distant second place, with 134 stations (114 of them Big 4 network affiliates).[235]

As the rules stand today, the proposed transaction violates Commission rules. The Applicants themselves concede that the combination would violate the duopoly rule in at least 11 markets.[236] 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 UHF discount, which was recently reinstated by the

[234] December 2013 – July 2014. Data available upon request from the American Television Alliance.

[235] *Nexstar Media Group, Inc. Station List*, SNL Kagan (2017). Figures are for digital full power television stations only.

[236] The duopoly rule generally prohibits one company from owning or operating two television stations in the same DMA (unless one of the two is not a top-4 station and there will remain at least eight independently owned and operated TV stations post-merger). 47 C.F.R. § 73.3555(b)(1). Commission rules also specifically prohibit owning or operating two television stations in the same DMA if the digital noise limited service contours of the station overlap. *Id*.

Commission even though the Commission agreed "that it no longer has a sound technical basis following the digital television transition,"[237] and which is being reviewed by the D.C. Circuit.[238]

True, other broadcasters in past proceedings have also proposed transactions that would implicate the media ownership rules. But the present Application is different from previous ones in three key respects. First, the degree to which the proposal would deviate from the rules is unprecedented. Diligent research has not uncovered any prior broadcast consolidation that would create a duopoly in 11 markets on top of the Applicants' existing duopolies, or one that would result in a national reach exceeding the cap by 6 percent even after application of the UHF discount without requesting a waiver, or proposing divestitures.

Second, the Applicants here offer a non-committal response to how they propose to cure the violations, suggesting that their preferred way is to eliminate the rules. 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.[239]

By contrast, the applicants in previous transactions have all offered a more concrete roadmap:

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[237] *See* Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Order on Reconsideration*, 32 FCC Rcd. 3390, 3395 ¶ 14 (2017) ("*UHF Discount Reinstatement Order*").

[238] *See Free Press, v. FCC*, Case No. 17-1129 (D.C. Cir. 2017).

[239] Application at 12. The applicants echo this language for their national cap violation. *See id.* at 26 ("The applicants will take such actions to the extent required to comply with the terms of the Merger Agreement and the national television ownership limit (including the UHF Discount), in order to obtain FCC approval of the Transaction. To the extent that there are changes, or proposed changes, to the national television ownership limit, the applicants may file amendments to the applications to address such changes.").

- In the Media General/Lin Media transaction, the applicants agreed in their applications to multiple divestitures to effectuate the transaction: "because the . . . duopoly rule does not permit common ownership of two Top Four stations in a market, the applicants will divest one Top Four station in each of these markets [where applicants owned two of the Top Four stations]."[240] The merger application specifically noted the DMAs where Media General intended to sell stations to third party buyers.[241]

- In the Media General/Nexstar transaction, the applicants proposed multiple divestitures to comply with the local and national ownership caps.[242] The application proposed divestitures for each of the eight markets where the duopoly rule would be violated: "the applicants will divest one Top Four station in each of these Overlap Markets."[243]

- Fox and Chris-Craft requested temporary waivers in their initial application to allow them to find buyers for stations where the transaction would violate the duopoly rule and to comply with the national reach cap,[244] even though the validity of the national ownership cap was being challenged at the D.C. Circuit at that time.[245]

- The application of CBS and Viacom requested a temporary waiver from the national ownership cap.[246]

- Fox and New World Communications Group requested permanent and temporary waivers for violations of the local duopoly rule.[247]

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[240] *See* Media General/Lin Application, FCC File No. BTCCDT-20140509AKR, at 3 (May 9, 2014).

[241] *See id*. at 20-22 (listing specific stations and DMAs including Birmingham, Alabama; Green Bay, Wisconsin; Mobile, Alabama; Providence, Rhode Island; and Savannah Georgia).

[242] *See Media General/Nexstar Order*, 32 FCC Rcd. at 197-98 ¶ 37-39.

[243] *See* Media General/Nexstar Merger Application, FCC File No. BTCCDT-20160210AAB, at 1, 16-18 (Feb. 10, 2016).

[244] *See* Applications for Assignment of Licenses from Subsidiaries of Chris-Craft Industries, Inc. to Fox Television Stations, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 14975, 14980-81 ¶ 21 (2001).

[245] *Id*. at 14982 ¶ 25.

[246] *CBS/Viacom Order*, 15 FCC Rcd. at 8235 ¶¶ 17-18.

[247] Applications of NWCG Holdings Corp. and NWCG Holdings Corp. and Fox Television Stations for Transfer of Control of New World Communications Group Inc., *Memorandum Opinion and Order*, 11 FCC Rcd. 16318, 16319 ¶ 2 (1996).

Even Sinclair itself previously proposed specific divestitures. In the Sinclair/Allbritton transaction, the applicants recognized that the proposed transaction violated the local television ownership rules for several DMAs and thus proposed assignments and various SSAs and JSAs to complete the transaction.[248] When the Commission rejected this proposal for violating the local ownership rules because it relied upon local marketing arrangements that would not receive grandfathering protection, Sinclair proposed surrendering licenses and divesting certain stations to comply with the rules.[249] In particular, Sinclair listed with specificity the licenses in each DMA that would be surrendered and the ones that would be sold.[250] By comparison with all of these prior applications, the vagueness of the Applicants' plans here is unprecedented.

Third, the Applicants' hope for a rule fix is misplaced, as it appears to collide with the dictates of the Administrative Procedure Act. While the duopoly rule has been raised in Petitions for Reconsideration of the Commission's *Second Report and Order* in the last triennial review proceeding, the Commission has recognized that, if it were to change the national ownership cap, it would need to do so in a separate rulemaking proceeding and could not use the quadrennial review process to do so.[251] That would instead require the issuance of a Notice of Proposed Rulemaking to allow interested parties the full opportunity to comment on the proposal. Therefore, even if the Commission were to take the legally dubious step of relaxing or

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[248] Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc., *Memorandum Opinion and Order*, 29 FCC Rcd. 9156, 9157-58 ¶ 6 (2014).

[249] *Id*. at 9158-59 ¶¶ 7-11.

[250] *Id*. at 9158-59 ¶¶ 8-13.

[251] Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Report and Order*, 31 FCC Rcd. 10213, 10232 ¶ 40 (2016); *see also Nexstar/Media General Order*, 32 FCC Rcd. at 197-98 ¶ 38 ("The Commission stated that, although it had the authority to revisit the cap, it must exercise that authority in a rulemaking proceeding outside the quadrennial review process.").

eliminating the duopoly rule on reconsideration of an existing order, the national cap would remain in place, at least until the commencement and conclusion of a brand new rulemaking. In fact, the combination of a relaxed duopoly rule and an intact national cap would lead to even greater uncertainty: the Applicants provide not a clue as to how they would bring their national reach from 45.5% to 39%, and this question would become even less capable of an answer if they do not have to start by divesting stations in the 11 markets where the acquisition would create duopolies.

IX. Conclusion

For the foregoing reasons, the Commission should dismiss the Application or deny it.

Respectfully Submitted,

/s/

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August 7, 2017

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Petition to Deny and its appended material, except for those facts for which official notice may be taken, are true and correct to the best of my information, knowledge and belief.

Executed on August 7, 2017

Jeffrey H. Blum
Senior Vice President & Deputy General Counsel
DISH Network L.L.C.

Exhibit A: Sinclair/Tribune Combined Stations

This Exhibit is derived from the station lists provided by the Applicants in their Public Interest Statement (filed June 2017). It lists the broadcast television stations that Sinclair will own if the transaction is approved, including all full power TV stations (regardless of affiliation) as well as class A and low power TV stations (to the extent they are affiliated with a top-four network or the CW). If the station falls in the later category, it is so labeled in the "notes" column and appears in ***ITALICS***. **GREY** highlighting indicates one of the 11 overlap markets where the combined company will have more than one Big 4 high power primary signal. **BOLD** font indicates a market where Sinclair already owns a Big 4 high power primary signal and also owns a different Big 4 signal as a high power multicast station.

STATE(S)	MARKET NAME	CALL SIGN	PRIMARY AFFILIATION	DIGITAL MULTICAST NETWORK(S)	CURRENT OWNER	DMA RANK	NOTES
AL	*Birmingham-Anniston-Tuscaloosa*	*WBMA-LD*	*ABC*	*ABC, Weather, American Sports Network*	*Sinclair*	*45*	*Digital Low Power Television Station*
AL	Birmingham-Anniston-Tuscaloosa	WTTO	CW	CW, Antenna TV, Com, TBD	Sinclair	45	
AL	Birmingham-Anniston-Tuscaloosa	WABM	MyNetworkTV	MyNetworkTV, ABC, AccuWeather	Sinclair	45	
AL	Huntsville-Decatur-Florence	WHNT	CBS	CBS, Independent, Antenna TV	Tribune	79	
AL+FL	Mobile-Pensacola	WEAR	ABC	ABC, TBD, Charge!	Sinclair	60	
AL+FL	Mobile-Pensacola	WFGX	MyNetworkTV	MyNetworkTV, GetTV, Comet	Sinclair	60	
AR	Ft. Smith-Fayetteville-Springdale-Rogers	KFSM	CBS	CBS, MyNetworkTV	Tribune	99	
AR	Ft. Smith-Fayetteville-Springdale-Rogers	KXNW	MyNetworkTV	MyNetworkTV, Antenna TV	Tribune	99	
AR	Little Rock-Pine Bluff	KATV	ABC	ABC, Comet, Charge!, TBD	Sinclair	57	
CA	**Bakersfield**	**KBAK**	**CBS**	**CBS, Charge!, FOX**	**Sinclair**	**126**	
CA	Chico-Redding	KRCR	ABC	ABC, Me-TV, Movies!	Sinclair (from Bonten)	132	
CA	Eureka	KAEF	ABC	ABC, Me-TV, Movies!	Sinclair (from Bonten)	195	
CA	Fresno-Visalia	KFRE	CW	CW, FOX, Charge!, TBD	Sinclair	54	
CA	Fresno-Visalia	KMPH	FOX	FOX, This TV, Comet	Sinclair	54	
CA	Los Angeles	KTLA	CW	CW, Antenna TV, This TV	Tribune	2	
CA	Sacramento-Stockton-Modesto	KTXL	FOX	FOX, Antenna TV, This TV	Tribune	20	
CA	San Diego	KSWB	FOX	FOX, Antenna TV, This TV	Tribune	28	
CA	*Bakersfield*	*KBFX-CD*	*FOX*	*FOX, Comet, TBD*	*Sinclair*	*126*	*Digital Class A Television Station*
CO	Denver	KWGN	CW	CW, This TV, Comet	Tribune	17	
CO	Denver	KDVR	FOX	FOX, Antenna TV	Tribune	17	
CO	Denver	KFCT	FOX	FOX, Antenna TV	Tribune	17	
CT	Hartford-New Haven	WTIC	ABC	ABC, Decades, Movies!	Tribune	100	
CT	Hartford-New Haven	WCCT	CW	CW, This TV, Comet	Tribune	30	
DC	Washington	WJLA	ABC	ABC, Charge!, Comet, TBD	Sinclair	7	
DC	Washington	WDCW	CW	CW, Antenna TV, This TV	Tribune	7	
FL	Miami-Ft. Lauderdale	WSFL	CW	CW, Justice Network, Antenna TV, This TV	Tribune	16	
FL	West Palm Beach-Ft. Pierce	WPEC	CBS	CBS, WeatherNation TV, Comet	Sinclair	38	
FL	West Palm Beach-Ft. Pierce	WTVX	CW	CW, Azteca, MyNetworkTV, LATV	Sinclair	38	
FL+GA	**Tallahassee-Thomasville**	**WTWC**	**NBC**	**NBC, FOX, Charge!**	**Sinclair**	**107**	
GA	Albany	WFXL	FOX	FOX, TBD, Comet, Charge!	Sinclair	152	
GA	**Macon**	**WGXA**	**FOX**	**FOX, ABC, Comet**	**Sinclair**	**121**	
GA	Savannah	WTGS	FOX	FOX, Comet, Antenna TV, TBD	Sinclair	91	
IA	Cedar Rapids-Waterloo-Iowa City-Dubuque	KGAN	CBS	CBS, GetTV, Comet	Sinclair	90	

IA	Des Moines-Ames	KDSM	FOX	FOX, Comet, Charge!, TBD	Sinclair	69	
IA	Des Moines-Ames	WHO-DT	NBC	NBC, Weather, Antenna TV, This TV	Tribune	69	
IA	Sioux City	KPTH	FOX	FOX, MyNetworkTV, Charge!	Sinclair	149	
IA+MO	**Ottumwa-Kirksville**	**KTVO**	**ABC**	**ABC, CBS**	**Sinclair**	**200**	
ID	Boise	KBOI	CBS	CBS, CW Plus, Charge!	Sinclair	106	
ID	*Boise*	*KYUU-LD*	*CW*	*CW, TBD, Comet, GetTV*	*Sinclair*	*106*	*Digital Low Power Television Station*
ID	Spokane	KLEW	CBS	CBS, Charge!, Comet	Sinclair	73	
IL	Champaign-Springfield-Decatur	WICD	ABC	ABC, Comet, TBD, Charge!	Sinclair	86	
IL	Champaign-Springfield-Decatur	WICS	ABC	ABC, Comet, TBD, Charge!	Sinclair	86	
IL	Chicago	WGN	Independent	Unclear	Tribune	3	
IL	Peoria-Bloomington	WHOI	Comet	Comet, TBD, Charge!	Sinclair	118	
IL+IA	Davenport-Moline-Rock Island	WQAD	ABC	ABC, Antenna TV, MyNetworkTV	Tribune	101	
IL+MO+IA	**Quincy-Hannibal-Keokuk**	**KHQA**	**CBS**	**CBS, ABC, Comet**	**Sinclair**	**170**	
IN	Indianapolis	WTTK	CBS	CBS, Independent, Comet	Tribune	27	
IN	Indianapolis	WTTV	CBS	CBS, Independent, Comet	Tribune	27	
IN	Indianapolis	WXIN	FOX	FOX, Antenna TV, This TV	Tribune	27	
IN	**South Bend-Elkhart**	**WSBT**	**CBS**	**CBS, FOX**	**Sinclair**	**96**	
KS	Wichita-Hutchinson	KAAS	FOX	FOX, TBD, Comet	Sinclair	66	
KS	Wichita-Hutchinson	KOCW	FOX	FOX, Antenna TV	Sinclair	66	
KS	Wichita-Hutchinson	KSAS	FOX	FOX, TBD, Comet	Sinclair	66	
KY	Lexington	WDKY	FOX	FOX, Comet, Charge!, TBD	Sinclair	63	
KY+MO+IL	Paducah-Cape Girardeau-Harrisburg-Mt. Vernon	KBSI	FOX	FOX, MyNetworkTV, Comet	Sinclair	83	
KY+MO+IL	Paducah-Cape Girardeau-Harrisburg-Mt. Vernon	WDKA	MyNetworkTV	My Network TV, Charge!, TBD, GetTV	Sinclair	83	
LA	New Orleans	WGNO	ABC	ABC, Antenna TV, Escape	Tribune	50	
LA	New Orleans	WNOL	CW	CW, This TV, Comet	Tribune	50	
MD	Baltimore	WBFF	FOX	FOX, WeatherNation TV, This TV	Sinclair	26	
ME	Portland-Auburn	WGME	CBS	CBS, TBD, American Sports Network	Sinclair	81	
MI	Flint-Saginaw-Bay City	WSMH	FOX	FOX, Antenna TV, Comet	Sinclair	72	
MI	Grand Rapids-Kalamazoo-Battle Creek	WWMT	CBS	CBS, CW, Comet	Sinclair	44	
MI	Grand Rapids-Kalamazoo-Battle Creek	WXMI	FOX	FOX, Antenna TV,This TV	Tribune	44	
MI	**Traverse City-Cadillac**	**WPBN**	**NBC**	**NBC, ABC, Comet**	**Sinclair**	**119**	
MI	**Traverse City-Cadillac**	**WTOM**	**NBC**	**NBC, ABC, Comet**	**Sinclair**	**119**	
MN	Minneapolis-St. Paul	WUCW	CW	CW, Comet, Charge!, TBD	Sinclair	15	
MO	Columbia-Jefferson City	KRCG	CBS	CBS, Comet, Charge!, TBD	Sinclair	136	
MO	Kansas City	WDAF	FOX	FOX, Antenna TV, This TV	Tribune	33	
MO	St. Louis	KDNL	ABC	ABC, TBD, Charge!	Sinclair	21	
MO	St. Louis	KPLR	CW	CW, This TV, Comet	Tribune	21	
MO	St. Louis	KTVI	FOX	FOX, Antenna TV, Escape	Tribune	21	

MT	Butte-Bozeman	KTVM	NBC	NBC, Me-TV, Movies!	Sinclair (from Bonten)	185	
MT	Missoula	KCFW	NBC	NBC, Me-TV, Movies!	Sinclair (from Bonten)	164	
MT	Missoula	KECI	NBC	NBC, Me-TV, Movies!	Sinclair (from Bonten)	164	
NC	Greensboro-High Point-Winston Salem	WXLV	ABC	ABC, American Sports Network, TBD	Sinclair	46	
NC	Greensboro-High Point-Winston Salem	WMYV	MyNetworkTV	MyNetworkTV, GetTV, Comet	Sinclair	46	
NC	Greensboro-High Point-Winston Salem	WGHP	FOX	FOX, Antenna TV, This TV	Tribune	46	
NC	Greenville-New Bern-Washington	WCTI	ABC	ABC, Decades, Movies!	Sinclair (from Bonten)	100	
NC	Raleigh-Durham-Fayetteville	WLFL	CW	CW, American Sports Network, TBD	Sinclair	24	
NC	Raleigh-Durham-Fayetteville	WRDC	MyNetworkTV	MyNetworkTV, Charge!, Comet	Sinclair	24	
NE	**Lincoln-Hastings-Kearney**	**KHGI**	**ABC**	**ABC, FOX, TBD**	**Sinclair**	**105**	
NE	**Lincoln-Hastings-Kearney**	**KWNB**	**ABC**	**ABC, FOX**	**Sinclair**	**105**	
NE	*Lincoln-Hastings-Kearney*	*KWNB-LD*	*ABC*	*ABC*	*Sinclair*	*105*	*Digital Low Power Television Station*
NE	Lincoln-Hastings-Kearney	KFXL	FOX	FOX	Sinclair	105	
NE	*North Platte*	*KHGI-CD*	*ABC*	*ABC*	*Sinclair*	*209*	*Digital Class A Television Station*
NE	Omaha	KPTM	FOX	FOX, MyNetworkTV, Comet	Sinclair	74	
NM	*Albuquerque-Santa Fe*	*KKNJ-LP*	*CBS*	*CBS, ABC, Charge!, Comet, TBD*	*Sinclair*	*48*	*Analog Low Power TV + TV Translators*
NV	Las Vegas	KVCW	CW	CW, MyNetworkTV, TBD, This TV	Sinclair	40	
NV	Las Vegas	KSNV	NBC	NBC, Estrella TV, Charge!	Sinclair	40	
NV	Reno	KRXI	FOX	FOX, Charge!, Grit	Sinclair	112	
NY	Albany-Schenectady-Troy	WRGB	CBS	CBS, TBD, Comet	Sinclair	59	
NY	Albany-Schenectady-Troy	WCWN	CW	CW, Charge!, CBS	Sinclair	59	
NY	Buffalo	WUTV	FOX	FOX, TBD	Sinclair	53	
NY	Buffalo	WNYO	MyNetworkTV	MyNetworkTV, American Sports, Network, Comet, GetTV	Sinclair	53	
NY	New York	WPIX	CW	CW, Antenna TV, This TV	Tribune	1	
NY	Rochester	WUHF	FOX	FOX, Antenna TV, Comet, TBD	Sinclair	76	
NY	*Syracuse*	*WSTQ-LP*	*CW*	*CW*	*Sinclair*	*85*	*Analog Low Power TV + TV Translators*
NY	Syracuse	WSTM	NBC	NBC, CW, Comet	Sinclair	85	
OH	Cincinnati	WKRC	CBS	CBS, CW, American Sports Network	Sinclair	36	
OH	Cleveland-Akron-Canton	WJW	FOX	FOX, Antenna TV	Tribune	19	
OH	Columbus	WSYX	ABC	ABC, MyNetworkTV, Antenna TV	Sinclair	32	
OH	Dayton	WKEF	ABC	ABC, American Sports Network, Antenna TV, TBD	Sinclair	64	
OH	Toledo	WNWO	NBC	NBC, American Sports Network, Comet, TBD	Sinclair	78	
OK	Oklahoma City	KOCB	CW	CW, TBD, Comet	Sinclair	41	
OK	Oklahoma City	KOKH	FOX	FOX, Charge!, WeatherNation TV	Sinclair	41	
OK	Oklahoma City	KAUT	Independent	Independent, This TV, Escape	Tribune	41	
OK	Oklahoma City	KFOR	NBC	NBC, Antenna TV	Tribune	41	

OK	Tulsa	KTUL	ABC	ABC, Comet, Antenna TV, TBD	Sinclair	58	
OR	Eugene	KCBY	CBS	CBS, TBD, Charge!	Sinclair	117	
OR	Eugene	KPIC	CBS	CBS, TBD, Charge!	Sinclair	117	
OR	Eugene	KVAL	CBS	CBS, TBD, Charge!	Sinclair	117	
OR	Medford-Klamath Falls	KTVL	CBS	CBS, CW Plus, Comet, TBD	Sinclair	139	
OR	Portland	KATU	ABC	ABC, Me-TV, Comet	Sinclair	25	
OR	Portland	KUNP	Univision	Univision, Charge!	Sinclair	25	
OR	Portland	KRCW	CW	CW, Antenna TV, This TV	Tribune	25	
PA	Harrisburg-Lancaster-Lebanon-York	WHP	CBS	CBS, MyNetworkTV, CW	Sinclair	43	
PA	Harrisburg-Lancaster-Lebanon-York	WPMT	FOX	FOX, Antenna TV, This TV	Tribune	43	
PA	Johnstown-Altoona-State College	WJAC	NBC	NBC, Me-TV, Comet, TBD	Sinclair	104	
PA	Philadelphia	WPHL	MyNetworkTV	MyNetworkTV, Antenna TV, This TV, Comet	Tribune	4	
PA	Pittsburgh	WPGH	FOX	FOX, Antenna TV, Charge!	Sinclair	23	
PA	Pittsburgh	WPNT	MyNetworkTV	MyNetworkTV, American Sports Network, Comet, TBD	Sinclair	23	
RI	Providence-New Bedford	WJAR	NBC	NBC, Me-TV, Comet, TBD	Sinclair	52	
SC	Charleston	WCIV	MyNetworkTV	MyNetworkTV, ABC, Me-TV	Sinclair	94	
SC	Columbia	WACH	FOX	FOX, American Sports Network, Comet, TBD	Sinclair	77	
SC	Myrtle Beach-Florence	WPDE	ABC	ABC, Weather, Comet, TBD	Sinclair	102	
SC+NC	Greenville- Spartanburg-Asheville-Anderson	WLOS	ABC	ABC, MyNetworkTV, Antenna TV	Sinclair	37	
TN	**Chattanooga**	**WTVC**	**ABC**	**ABC, FOX, TBD**	**Sinclair**	**89**	
TN	Memphis	WREG	CBS	CBS, Independent, Antenna TV	Tribune	51	
TN	Nashville	WZTV	FOX	FOX, TBD, Antenna TV	Sinclair	29	
TN	Nashville	WUXP	MyNetworkTV	MyNetworkTV, GetTV, Comet	Sinclair	29	
TN+VA	Tri-Cities	WCYB	NBC	NBC, CW, Decades	Sinclair (from Bonten)	98	
TX	Abilene-Sweetwater	KTXS	ABC	ABC, CW, Me-TV	Sinclair (from Bonten)	165	
TX	Amarillo	KVIH	ABC	ABC, CW Plus, Comet	Sinclair	131	
TX	Amarillo	KVII	ABC	ABC, CW Plus, Comet	Sinclair	131	
TX	Austin	KEYE	CBS	CBS, Telemundo	Sinclair	39	
TX	Beaumont-Port Arthur	KFDM	CBS	CBS, CW Plus, Charge!	Sinclair	141	
TX	Corpus Christi	KUQI	FOX	FOX, TBD	Sinclair	128	
TX	Dallas	KDAF	CW	CW, Antenna TV, This TV	Tribune	5	
TX	Harlingen-Weslaco-Brownsville-McAllen	KGBT	CBS	CBS, Azteca, Comet	Sinclair	84	
TX	Houston	KIAH	CW	CW, Antenna TV, Comet	Tribune	8	
TX	*San Angelo*	*KTXE-LD*	*ABC*	*ABC, CW*	*Sinclair*	*196*	*Digital Low Power Television Station*
TX	San Antonio	KABB	FOX	FOX, Comet, TBD	Sinclair	31	
TX	San Antonio	WOAI	NBC	NBC, Antenna TV, Charge!	Sinclair	31	
TX+NM	El Paso-Las Cruces	KDBC	CBS	CBS, TBD, Me-TV	Sinclair	92	
TX+NM	El Paso-Las Cruces	KFOX	FOX	FOX, Comet, Charge!	Sinclair	92	

UT	Salt Lake City	KUTV	CBS	CBS, MyNetworkTV	Sinclair	34	
UT	Salt Lake City	KJZZ	Independent	Independent, Comet, TBD, Charge!	Sinclair	34	
UT	Salt Lake City	KMYU	MyNetworkTV	MyNetworkTV	Sinclair	34	
UT	Salt Lake City	KSTU	FOX	FOX, Antenna TV, Justice Network	Tribune	34	
UT	*Salt Lake City*	*KKRP-LD*	*FOX*	*FOX*	*Tribune*	*34*	*Digital Low Power Television Station*
VA	Norfolk-Portsmouth-Newport News	WTVZ	MyNetworkTV	MyNetworkTV, American Sports Network, Comet, TBD	Sinclair	42	
VA	Richmond-Petersburg	WRLH	FOX	FOX, MyNetworkTV, Comet, Charge!	Sinclair	55	
VA	Richmond-Petersburg	WTVR	CBS	CBS, Antenna TV, Independent	Tribune	55	
VA	Roanoke-Lynchburg	WSET	ABC	ABC, American Sports Network, Comet, TBD	Sinclair	67	
WA	Seattle-Tacoma	KOMO	ABC	ABC, Comet, Charge!	Sinclair	14	
WA	Seattle-Tacoma	KUNS	Univision	Univision, TBD	Sinclair	14	
WA	Seattle-Tacoma	KCPQ	FOX	FOX, This TV, Escape	Tribune	14	
WA	Seattle-Tacoma	KZJO	JOEtv	JOEtv, FOX, Antenna TV	Tribune	14	
WA	Yakima-Pasco-Richland-Kennewick	KEPR	CBS	CBS, CW Plus, Grit	Sinclair	122	
WA	Yakima-Pasco-Richland-Kennewick	KIMA	CBS	CBS, CW Plus, Grit	Sinclair	122	
WI	Green Bay-Appleton	WCWF	CW	CW, Comet, Charge!	Sinclair	68	
WI	Green Bay-Appleton	WLUK	FOX	FOX, Antenna TV, TBD	Sinclair	68	
WI	Madison	WMSN	FOX	FOX, Comet, Charge!, TBD	Sinclair	80	
WI	Milwaukee	WVTV	CW	CW, GetTV	Sinclair	35	
WI	Milwaukee	WCGV	MyNetworkTV	MyNetworkTV, Comet, Grit	Sinclair	35	
WI	Milwaukee	WITI	FOX	FOX, Antenna TV	Tribune	35	
WV	Charleston-Huntington	WCHS	ABC	ABC, Antenna TV, Charge!, TBD	Sinclair	70	
WV-OH	**Wheeling-Steubenville**	**WTOV**	**NBC**	**NBC, FOX, Me-TV**	**Sinclair**	**158**	

Exhibit B: Information that DISH and Others Recommend the Commission Request

To address the Application's large informational and evidentiary gaps and permit an evaluation of the proposed transaction, DISH, American Cable Association, and Public Knowledge requested in their July 12 motion[1] that the Applicants, 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;

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;

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[1] Motion of DISH Network, American Cable Ass'n, and Public Knowledge, Applications of Tribune-Media Co. and Sinclair Broadcasting Group for Consent to Transfer Control of Licenses and Authorization, MB Docket No. 17-179 (July 12, 2017).

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.

EXHIBIT C

DECLARATION OF MELISA ORDONEZ

DECLARATION OF MELISA ORDONEZ

I, Melisa Ordonez, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge or based on information provided to me, in connection with the proposed acquisition of Tribune Media Company ("Tribune") by Sinclair Broadcast Group, Inc. ("Sinclair"), and the likely effects of this acquisition on DISH Network L.L.C. ("DISH").

2. I am currently the Director of Local Programming for DISH. In that capacity, I am responsible for the negotiation of retransmission consent contracts on behalf of DISH with every local broadcast group and local broadcast station in the United States. I was the lead negotiator in DISH's effort to renew its retransmission consent agreement with Sinclair in 2015 and Tribune in 2016. I have negotiated more than a thousand retransmission consent agreements in the last nine years.

3. As a general matter, when other things are equal, the larger the broadcast group, the higher the retransmission rates it will be able to command from distributors such as DISH. In fact, the number of DISH subscribers reached by a broadcast group is the most accurate metric of the leverage enjoyed by that group over DISH.

4. The combination of Sinclair and Tribune reduces our options and substantially increases Sinclair's leverage over DISH. Each of the broadcast groups is a separate pathway for DISH to having enough broadcast retransmission agreements to avoid "bleeding" an excessive number of subscribers. For example, if DISH has to renegotiate a contract with a broadcaster at a time when it is subject to a blackout of the Tribune stations, it is more likely to accede to some of that broadcaster's demands to avoid a second blackout and additional churn among its national subscriber base.

5. In fact, when Tribune forced DISH to black out all Tribune stations in the period June-September 2016, **{{BEGIN HCI**

END HCI}}.

6. Conversely, if DISH has to renegotiate an expiring contract shortly after having secured a contract with Tribune without having experienced a blackout, that broadcaster may have an incentive to be a little more reasonable in its rate demands than it otherwise would be, because the specter of a "double whammy," where DISH is subject to blackouts of two groups' stations, is absent.

7. Faced with the loss of either Sinclair's or Tribune's stations alone, DISH can take steps to avoid the loss of the other company's signal, and therefore be more able to resist significant price increases.

8. By contrast, the threat of simultaneously losing all of the Sinclair and Tribune stations would make DISH more likely to capitulate to a higher price increase than we would absent this transaction.

9. As a general matter, when other things are equal, the more duopolies controlled by a broadcast group, the higher the rates.

10. While most of our customers want a mix of all four stations, and they will not settle for one, two or even three of them, there is a subset of customers for whom one of the network stations is, to some extent, an imperfect substitute for another. Thus, while many customers will leave if they cannot access all four network affiliates, there are also some with a strong preference for one out of the four, and they will leave or stay depending on whether that

station is the one subject to the blackout. The lack of two out of four makes more of these customers-with-a-preference inclined to leave.

11. For others, the complement of three stations is enough to offset the missing one. For this class of customers, the lack of two of the Big-4 networks is the last straw.

12. Having only three out of the four Big-4 networks therefore is worse for our customers than having all four, and having only two out of the Big-4 is less desirable than having three, let alone all four. When DISH is missing two stations in a local market, the resulting churn is worse than when it is missing only one.

13. Blackouts are not nearly as problematic for broadcasters as they are for distributors. The "pain" experienced by a network station and a distributor during and after a blackout is asymmetric: while the distributor is bleeding subscribers and associated revenues, these subscribers flee to competitive distributors and, as a result, the network does not lose the same number of "eyeballs" as the distributor. The distributor never recovers the subscription revenues from customers who left during the blackout, and always loses a portion of those customers and their revenues for good.

14. I believe that the creation of a larger Sinclair with the acquisition of Tribune will lead to higher prices for consumers. It will be much harder for DISH to weather a blackout **{{BEGIN HCI**

END HCI}}.

15. If consummated, this transaction would result **{{BEGIN HCI**

END HCI}}. An after-acquired station clause in a retransmission consent agreement allows a broadcaster to bring newly acquired stations under its retransmission

agreement, substituting the bigger broadcaster's higher rate for the rate actually negotiated by the MVPDs for the broadcast stations in question. This "rate reset"—which happens without any concomitant increase in the value of the acquired stations and their programming for the MVPD or consumers—is nothing but profit for the acquiring broadcaster.

16. **{{BEGIN HCI**

END HCI}}.

17. While DISH has resisted these demands to date, the heft that Sinclair hopes to acquire through the proposed transaction is bound to make future resistance much more difficult.

18. Sinclair's use of its increased size could also harm online video distributors ("OVD"). In 2017, DISH began to offer local broadcast stations in selected markets as part of its Sling TV OVD service. **{{BEGIN HCI**

END HCI}}.

19. It is critical to DISH's business model that it have the ability to place content in tiers so that the price point for its basic service does not exceed consumer expectations, which would lead to fewer subscribers and lower revenue.

20. The basic Sling TV service – the Orange Package – is sold for $20 per month, and the premium Sling TV service – Sling Blue – sells for $25 per month. But a forced bundle of broadcast and non-broadcast content could easily force a significantly increased price, making Sling TV much less attractive for consumers who are looking for a lower-cost alternative to traditional pay-TV.

21. Sinclair exceeds industry norms in the aggressiveness of its negotiating tactics. Sinclair will threaten takedowns of its stations both earlier and more frequently in the negotiation cycle than other broadcasters. It often places a "crawl" on its signal warning viewers that its programming might soon be unavailable much earlier in the negotiating cycle than other broadcasters.

22. In 2015, Sinclair was trying to negotiate with DISH on behalf of 36 stations that were not owned by Sinclair – stations with which Sinclair had only Local Marketing Agreements ("LMAs"), Joint Sales Agreements ("JSAs") or similar agreements. When we protested that this negotiation would violate the Commission's good faith rules, Sinclair's representatives went so far as to acknowledge the violation, but nevertheless insisted that DISH either accept Sinclair's demands or agree to suspend all negotiations for one year.

23. Even in the rough-and-tumble context of negotiations between a major MVPD and a large broadcaster, such behaviors place Sinclair in a category of its own.

24. In August of 2015, for example, just as the NFL pre-season was getting underway, Sinclair blacked out all of its local broadcast signals on DISH, pulling an unprecedented 129 stations in 79 markets. **{{BEGIN HCI**

END HCI}}.

25. The impact was exacerbated by the fact that Sinclair's over-the-air signals often fail to reach the farthest corners of DMAs, leaving satellite TV as rural households' only means of receiving local emergency weather or news reports.

26. As a result, **{{BEGIN HCI**

END HCI}}.

The forgoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge, and belief.

Executed on August 7, 2017

Melisa Ordonez

Melisa Ordonez
Director, Local Programming
DISH Network L.L.C.

EXHIBIT D

DECLARATION OF JANUSZ A. ORDOVER

DECLARATION OF DR. JANUSZ A. ORDOVER

I. ASSIGNMENT AND SUMMARY OF OPINION

1. I am Janusz A. Ordover, an Emeritus Professor of Economics and a former Director of the Masters in Economics Program at New York University. I served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice under President George H. W. Bush. While at the Antitrust Division, I served on the White House de-regulation task force, guided economic analyses of antitrust enforcement and acted as a liaison between the Justice Department and various regulatory agencies. At the Division, I was one of the main drafters of the 1992 Horizontal Merger Guidelines. I have served as an advisor to the Organization for Economic Cooperation and Development (OECD) in Paris, the World Bank, and the Inter-American Bank for Development on matters of privatization, regulation, international trade policy, and competition policy. I have advised the governments of Poland, Czech Republic, Russia, Hungary, Argentina, and others on regulation and competition matters, as well as on privatization strategies. I have published over 100 articles in economics and law journals on various antitrust issues, including predation, access to bottleneck facilities, and vertical integration, as well as the overlap between intellectual property rights and competition policy. I am a frequent lecturer on antitrust policy in the U.S. and abroad. I was voted "The Economist of the Year" in 2010 in a poll organized by the Global Competition Review and was named "Competition Economist of the Year" by Who's Who Legal in 2015, 2016, and 2017. My curriculum vitae, which includes a list of my publications, is attached as Exhibit 1 to this declaration.

2. I have been asked by counsel for DISH Network L.L.C. ("DISH") to analyze how the proposed merger of Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune") would likely impact the outcome of bargaining for retransmission rights, and, in particular, whether the proposed merger would likely result in an increase in retransmission fees charged by the merged company to multichannel video programming distributors ("MVPDs") (or the imposition of other onerous terms on MVPDs as conditions for granting of retransmission rights). I also have been asked to comment on the consequences for consumers of potential increases in retransmission rates.

3. Based on my years of experience in studying the media and related markets, conversations with DISH programming staff, the declaration of DISH Director of Local Programming Melisa Ordonez, my review of DISH's retransmission agreements with Sinclair, Tribune, and other broadcast station owners, and data analyses commissioned by me and conducted by the Brattle Group under my supervision, I have reached the following conclusions:

- The larger is the broadcast station group, as measured by the total number of DISH subscribers reached by the stations controlled by a station group owner, the higher is the retransmission price paid by DISH. Both simple calculations and my regression analysis show that the level of the retransmission fee per subscriber increases as the station group increases in size. This indicates that the merger of Sinclair and Tribune, which will combine the MVPD subscribers reached by each company and allow the merged company to negotiate retransmission agreements based on a larger pool of subscribers, can be expected to raise retransmission fees nationwide.

- A blackout of two stations in a local area (Designated Market Area or "DMA")) causes MVPDs greater customer losses than a blackout of one station. An increase in the number of DMAs in which the broadcast station group can black out two stations enhances the group's leverage in retransmission rate negotiations.

- Based on my analysis and the information available to me, I conclude that the Sinclair-Tribune merger will enable the resulting company ("New Sinclair") to demand and likely negotiate higher nationwide retransmission fees with DISH than the merging parties would have been able to obtain absent the transaction.

- Because retransmission fees are marginal costs to the MVPD, an increase in retransmission charges will be passed through, at least in part, by DISH and other distributors to consumers.

- Broadcast retransmission fees have been rising during the past decade. It is likely that broadcaster consolidation has contributed to that trend. The Sinclair-Tribune merger will only exacerbate this trend.

II. INDUSTRY BACKGROUND AND RECENT HISTORY OF RETRANMISSION CONSENT

4. In this section, I provide some key facts of the video industry and the retransmission consent regime that are helpful as background to the economic analysis below.

5. Under the retransmission consent regulations in place since 1992, an owner of a local broadcast station can either (a) require that an MVPD in its local area carry (retransmit) its signal while foregoing any compensation for the retransmission; or (b) negotiate with an MVPD in its local area to receive compensation in exchange for retransmitting the local broadcast signal.[1] The local station owner must decide every three years as to whether to negotiate for compensation or invoke its must-carry right. I understand that if the local station owner opts to negotiate for retransmission compensation, those negotiations must be conducted in "good faith." In addition, a retransmission agreement with an MVPD cannot require exclusivity, i.e., the local station owner remains free to negotiate for retransmission compensation with other MVPDs in the same local area. If a local station owner opts to negotiate for retransmission compensation but there is a negotiating impasse, a "blackout" may occur, where the MVPD is forced to stop carrying the station's signal, until an agreement is reached and the blackout is lifted.[2]

6. Viewer demand for a local broadcast station depends on both local content (e.g., local news) and the programming content of the affiliate's national network (e.g., NBC evening programming).[3] Stations in a DMA compete with each other for local viewers on the basis of this programming content, and potentially other features.[4] Stations also compete for advertisers based on the number and the demographics of viewers the stations attract, as well as the

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[1] Direct Broadcast Satellite ("DBS") MVPDs such as DISH did not initially have the technology to provide local channels but have since developed the necessary technology and now provide local broadcast stations to the vast majority of their subscribers.

[2] The MVPD cannot retransmit a broadcast station's signal without the permission of the local station owner.

[3] Such content is typically available, at least in real time, only through the local affiliate.

[4] Federal Communications Commission, Eighteenth Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, January 17, 2017, ¶¶ 106-113 ("*18th Video Competition Report*").

advertising rates that they charge.[5] Local station owners enter into agreements with MVPDs (or opt for carriage under the must-carry option) to obtain wider distribution—and the opportunity to attract more viewers—thus increasing the amount of advertising revenue they can earn.[6] Despite the existence of a large number of cable networks and online video programming, network affiliated broadcast stations still account for nearly a third of the viewing audience in prime time.[7]

7. An MVPD's demand for retransmission of a local broadcasting station is a "derived demand," i.e., it depends on the MVPD subscribers' demand for a local station's content. MVPDs compete for subscribers based on content offerings (including not only local broadcast content but also content sourced from other providers or, in some instances—though not in the case of DISH—produced by the MVPD) and the price of those offerings (and potentially other features such as technology and other products/services offered). This competition occurs at the local level, which typically is taken to mean the DMA. Because consumers generally can choose among several MVPDs, an MVPD that does not reach a retransmission agreement with a local station owner likely would lose subscribers to a rival MVPD that does offer the local station's programming; in addition, the MVPD without a retransmission agreement may find it difficult to attract new subscribers.

8. Local station ownership is not "atomistic." A single entity can own or control multiple stations in one DMA.[8] Moreover, the large broadcast groups own stations in multiple DMAs, thus attaining a regional or even national footprint. Indeed, there has been an increase in station owner concentration with media companies such as Sinclair, Tribune, Nexstar, and others having acquired local broadcast stations across the United States. In 2005, the five largest owners of

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5 *18th Video Competition Report*, ¶¶ 74-75.

6 *18th Video Competition Report*, ¶¶ 75, 101.

7 *18th Video Competition Report*, ¶ 117.

8 Restrictions on ownership generally prevent a single company from owning more than one Big-4 station (ABC, CBS, FOX, and NBC) in a DMA. But an owner of a Big-4 station may own another Big-4 station under certain exceptions to the ownership rules, and an owner of a Big-4 station in a DMA can own a non-Big-4 station in the same DMA if certain requirements are met.

local stations (including Sinclair and Tribune) owned 179 full power television stations; in 2016, the five largest companies owned 443 stations.[9]

9. Media companies such as Sinclair and Tribune that own stations in multiple DMAs (and/or multiple stations within the same DMA) sell bundles of retransmission rights—across different stations (including network affiliates such as ABC, CBS, etc. and other stations) and different DMAs (e.g., Nashville, Los Angeles)—to MVPDs. They typically negotiate one contract with each MVPD that covers the whole package of stations they own. My examination of DISH retransmission agreements shows that the retransmission rate **{{BEGIN HCI**

END HCI}}. The average rates charged by the four network owned-and-operated stations ("O&O") are **{{BEGIN HCI** **END HCI}}** than the average rates for independently owned stations, perhaps because independently owned stations pay reverse retransmission fees to their affiliated networks. As shown in the table below, there is some spread in the retransmission fees charged to DISH in 2017, with the highest rate for Big-4 stations (**{{BEGIN HCI** **END HCI}}** per subscriber, per month) being **{{BEGIN HCI** **END HCI}}** times as large as the lowest rate for Big-4 stations (**{{BEGIN HCI** **END HCI}}**).

[9] Katerina Eva Matsa (2017), "Buying spree brings more local TV stations to fewer big companies," Pew Research Center, *available at*: http://www.pewresearch.org/fact-tank/2017/05/11/buying-spree-brings-more-local-tv-stations-to-fewer-big-companies/.

Retransmission Rates Paid by DISH to Big-4 Station Owners, 2017

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10. When the retransmission consent system was instituted, many local broadcast station owners initially opted to require carriage without compensation, but since then broadcasters "have increasingly sought and received monetary compensation in exchange for retransmission consent."[10] Retransmission fees have accounted for an increasing share of local station revenues; in 2006, prior to the widespread payment of retransmission fees, local broadcast stations were estimated to earn in excess of 95 percent of their revenue from advertising and one percent from retransmission fees. In 2016, advertising accounted for an estimated 69 percent of local station revenues while retransmission fees had increased to 24 percent of revenues.[11]

11. The video marketplace has seen an explosion in the amount of video content available to consumers. Not only has the amount of non-broadcast programming on MVPDs increased, but also consumers today can turn to non-MVPD options for video content. These options include OVD offerings (such as Netflix and Amazon Prime) that can be streamed to computer or mobile screens and that allow some consumers to forgo MVPD subscriptions altogether.[12] This growing

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[10] Federal Communications Commission, Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket 10-71, FCC 14-29, March 31, 2014, ¶ 2.

[11] SNL Kagan, U.S. TV station industry total revenue projections, 2006-2022, in "The Economics of Broadcast TV Retransmission Revenue." SNL Kagan does predict that the increases may moderate in the future. As far as I can tell, this forecast does not explicitly account for any changes in concentration at the broadcaster level.

[12] Broadcast networks also have tried to reach consumers directly by offering streaming versions of some of their programming, though those services often require an MVPD subscription.

number of non-broadcast options might have been expected to reduce demand for broadcast network offerings, putting pressure on retransmission rates to decline. But that is not borne out in the data. Instead, we see that retransmission rates have continued to increase.

12. SNL Kagan estimates that gross retransmission fees paid by cable, DBS, and telco MVPDs increased from $215 million in 2006 to $7.968 billion in 2016.[13] Over this same time period, MVPD subscribers rose only slightly, from 95 million to 97.9 million.[14] Thus, according to Kagan estimates, the average total retransmission fee per subscriber, per month (across all station owners) rose from $0.19 in 2006 to $6.79 in 2016.[15] Because these fees are marginal costs to the MVPD, as these fees have risen, they are acknowledged to have resulted in higher MVPD subscription prices.[16]

13. We can see this increase in fees also in the rates charged in specific DISH retransmission contracts. The graphs below show the fees charged for the Big-4 stations by six large station owners for which I have contracts covering at least two three-year periods. I have indexed the fees so that they are equal to 100 in the initial period for each station owner. Each contract features annual increases in the retransmission fee per subscriber, per month, and a larger step up in the per-subscriber fee is seen at the beginning of each new contract.

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[13] SNL Kagan (2017), Broadcast retransmission and virtual service provider carriage fee projections through 2023, in "The Economics of Broadcast TV Retransmission Revenue."

[14] Ibid.

[15] Ibid.

[16] See, e.g., the DOJ's discussion of MVPD subscribers' indirect payments for broadcast content through subscription fees. ("…MVPDs typically pay per-subscriber fees to retransmit the broadcaster's signal, known as retransmission consent fees. The size of these fees affects the rates that consumers are charged for an MVPD subscription.) (Ex Parte Submission of the United States Department of Justice, *In the Matter of 2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket 09-182, February 24, 2014, at 9.)

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III. THE ECONOMICS OF RETRANSMISSION RATE DETERMINATION

14. In this section, I apply principles from the economic theory of bargaining to the negotiation between a local station owner and an MVPD over retransmission rights.[17] The economic theory of bargaining identifies the factors that influence the outcome of a negotiation, and thus can be used to examine how a merger changes those factors and how it may change the outcome of a negotiation after a merger on one side of the negotiating table or the other.

15. In the absence of an agreement for retransmission of a local station owner's signal over an MVPD, each party still would earn positive operating profits. In particular, the station owner can enter (and likely already has entered) into agreements with other MVPDs for distribution into a particular area; and the MVPD can contract (and likely already has contracted) with other providers for video content to sell to subscribers, including content offered by other local stations. Retransmission of a local television station's signal over the MVPD's system creates incremental (gross) benefits by combining assets from both parties to create a video service that is more valuable to consumers and to advertisers than the video service would be without retransmission.[18] From this perspective, the inclusion of the local signal improves the quality of the MVPD offer, which attracts subscribers and raises advertising revenues. To create this incremental value, the MVPD contributes access to its distribution network and to the consumers that subscribe to it. However, because there is generally more than one MVPD serving a local area, the local broadcast station has more than one pathway to potential viewers, which gives it valuable bargaining leverage. The local network affiliate contributes the programming carried on the station's signal, which is typically a mixture of local content such as news, local sports, and local public interest programming, and a national broadcast network feed that typically includes entertainment, news, and sports programming. Because retransmission rights grant the

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[17] For more discussion, see Michael L. Katz, Jon Orszag, and Theresa Sullivan (2009), "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime," attachment to Comments of the National Cable and Telecommunications Association, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket 07-269.

[18] Of course, the MVPD aggregates content from many different content providers, so the local station is not the only source of valuable content. And because retransmission agreements cannot be exclusive, the local station owner may license its content to all available MVPDs and is not restricted to creating (or permitted to create) value with only one MVPD.

MVPD additional programming to offer its subscribers, the retransmission of a local station increases the amount of content the MVPD can offer and so may allow the MVPD to sell the service to more consumers and to charge a higher subscription price than it otherwise would be able to charge. Similarly, retransmission on an MVPD's system gives the local station owner wider distribution than it would otherwise enjoy and so may allow it to earn higher advertising fees—both per unit (CPM, or, cost per thousand) and in total—than it otherwise would be able to earn. This, in turn, gives the distributor some bargaining leverage. Thus, when a local station owner and an MVPD can come to a retransmission agreement, both can be better off (earn more profit) than if they do not come to an agreement. Here, the proposed merger of Sinclair and Tribune will enhance the amount of leverage the merged entity can bring to a negotiation over retransmission rights. As such, the merger will likely result in the terms of such agreements shifting more in favor of the station owner as compared to what they would be absent the merger.

16. The economic effects of the proposed Sinclair-Tribune merger depend in part on the extent to which Sinclair and Tribune retransmit content that is substitutable at least to some MVPD subscribers or to distributors (who are the direct buyers of retransmission consent). In economics, substitutability is generally gauged by the extent to which an increase in the price of product A affects demand for product B. We say that A and B are substitute products if an increase in the price of A will cause some diversion of demand to product B. If an increase in the price of A leads to a decrease in demand for product B, the two products are complements. In the instant case, viewers do not pay separate prices for content retransmitted from local stations. Consequently, the extent to which the local stations are substitutes (or complements) cannot be inferred from subscribers' price responses. However, evidence of substitutability can be obtained from consumers' viewing behavior, including responses to station (or programming) blackouts. In particular, in the event of a blackout of station X, if more viewers switch to station A than station B, then we would say that A is a better substitute for X than is B. In the same vein, we would say that stations X and A are complements, if adding A to the MVPD's channel line-up stimulates demand for X.

17. Most plausibly, from the standpoint of an MVPD, overall, different local broadcast stations are (imperfect) substitutes; and from the standpoint of a station, different MVPDs are (imperfect) substitutes as well. Here, what this means is that if a local station becomes unavailable (due to a black-out, for example), some (but not all) of the MVPD's subscribers who

wanted to view the lost station will switch their viewing to another station offered by the MVPD. Thus, from the standpoint of the MVPD, content from different broadcasters available on different stations offered by the MVPD are, to some extent, substitutes. In addition, faced with the loss of a local station, some subscribers will not switch stations but will instead switch from the MVPD to another MVPD that offers the local station. Because the local station will recapture some (but not all) of its viewers following the churn to a rival MVPD, the MVPDs are substitutes from the standpoint of the station owner. Obviously, all else being equal, both the MVPD and the local station would prefer to have access to all content and pathways.

18. Because each network affiliate is the exclusive source of each network's content in the local market, while there are (usually) multiple MVPDs that operate in any given local market, the station owner potentially has significant bargaining power in a negotiation over retransmission rights. For those subscribers who want the ability to access the programming of the four major broadcast networks, the absence of the ABC station may drive them to an MVPD that has ABC content, assuming such programming is locally available. In this sense, a CBS station is not a substitute for an ABC station for such a consumer. For other consumers, not having access to the ABC station need not be very harmful, as long as CBS or NBC are available in the MVPD's channel lineup. Similarly, because each broadcast group owns different network stations even in a market where it overlaps with another group and because viewers' preferences are heterogeneous, a distributor such as DISH benefits from being able to offer both groups' content to its subscribers. Be that as it may, what matters to the economic analysis of this and similar transactions is not whether a given subscriber must have all local stations available but whether, on the whole, subscribers to the MVPD, and the MVPD itself, view local stations (together with their affiliated programming) as substitutable.

19. Stated another way, although the different stations are not perfect substitutes, there is still a margin of substitutability across stations, both at the local and at the national level. At the local level, if DISH has secured a retransmission agreement with a station owner in one DMA, it (DISH) is comparatively less likely to accede to a high price demanded by another station owner in that DMA. And if DISH has secured retransmission for three out of the four top network stations, it is comparatively less likely to accede to a high price demanded by the fourth. This also implies that the threat of losing two out of the four network stations (for example, after a

merger results in joint ownership) will likely make DISH more inclined to agree to the high price demand than the threat of losing one network station.

20. Similar dynamics operate at the national level because retransmission contracts are negotiated for all the DMAs that DISH serves.[19] Thus, if DISH has been forced to a blackout by, say, Nexstar, and the Sinclair contract comes up for renewal during the blackout, DISH is more likely to agree to a high price demand by Sinclair. Conversely, if DISH has already secured from Nexstar the right to retransmit programming to all subscribers in its footprint, it will be in a better position to resist price demands by Sinclair.

21. The ideas discussed above can be cast in the language of economic bargaining theory. From that perspective, a negotiation for the right to retransmit a local station owner's signal may be characterized as a negotiation over the distribution of the joint incremental value or gross profit created by retransmission of programming content that appeals to subscribers and also generates advertising revenues, *i.e.*, the combination of the incremental subscriber fees that the MVPD earns due to retransmission and the incremental advertising revenue that the local broadcast station earns due to retransmission.[20] The local station and the MVPD will only come to an agreement on retransmission if each finds it to be in its commercial interests to strike a deal. In other words, neither will sign an agreement that makes it worse off than if it does not sign an agreement.[21]

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[19] Obviously, a station owner can only negotiate for retransmission rights in the DMAs in which it owns stations. Because of network affiliate territorial exclusivity, a station owner in Topeka cannot generally sell the rights to retransmit the station's signal in New York.

[20] To be precise, the joint value created is not the entire amount of incremental revenue but is instead the incremental profit, after deducting any incremental costs incurred in implementing the retransmission agreement and in distributing the contracted programming.

[21] This calculation depends on certain assumptions. Among other things, it depends on the assumptions regarding the deals reached by other MVPDs with local broadcast stations. A tractable way to proceed is to assume that the MVPD simultaneously negotiates (bargains) with all the local broadcast stations. Each individual bargain satisfies the technical precepts of Nash bargaining. In equilibrium of such a multi-player bargaining game, no local station and no MVPD have an incentive to re-contract, given the Nash bargaining outcomes reached by all the other bargainers. For this reason, the outcome is often termed a Nash-in-Nash bargaining equilibrium. In such equilibrium, no party has an incentive to deviate from the Nash bargaining payoff that it secured via one-on-one contracting. Importantly, no player is advantaged/

22. To determine whether an agreement is in its commercial interests, the local station owner must determine what its profit would be if it did not come to an agreement. Similarly, the MVPD must determine what its profits would be in the absence of an agreement. A negotiating party's profit in the absence of an agreement is known as a "disagreement point" in the bargaining literature. If the parties cannot agree, then each "walks away" with the profits associated with their disagreement points. If they can agree, then each receives the profits associated with their disagreement points plus a share of the surplus created by agreeing.

23. Given that the joint incremental value of a retransmission agreement is always positive, one would expect that the parties will always find a way to divide the created benefit in a way that is mutually beneficial. Although we expect the parties to find a way to reach a mutually beneficial agreement, negotiations may break down before an agreement is reached, leading to a "blackout" whereby the content owner withholds the broadcast signal from the MVPD. If each party is fully informed about the other's disagreement points (i.e., the amount each would earn in the absence of an agreement), economic theory predicts that the negotiation will be resolved very quickly and without a blackout. However, under conditions of imperfect information, a resolution can take much longer, if the parties use offers and counteroffers to signal their bargaining strength (or to bluff).

24. In retransmission agreements, division of the net surplus generally entails a payment from an MVPD to a local station owner.[22] How a merger of station owners affects the outcome of a negotiation, e.g., the amount of the retransmission fee, depends on a technical condition concerning how the MVPD's total surplus from a retransmission agreement changes after a

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disadvantaged because it is the "first" (or "last") one to bargain with an MVPD or a local broadcast station. Of course, market realities are much more complicated than the model assumes. Still, there is no reason to assume that these assumptions bias the analysis in a way that is disadvantageous to the merging parties.

[22] Negotiated retransmission rates, to my knowledge, have always been positive, that is, the MVPD agrees to pay the local station owner for the right to retransmit the signal. I note that, in the absence of regulation, this is not an inevitable outcome. Because a retransmission negotiation splits the joint surplus created, retransmission payments could just as well be negative, i.e., the local station owner could, in theory, pay the MVPD for carriage. The must-carry provision of the retransmission regime, however, prevents this outcome. The lowest retransmission rates can be is zero, since the local station owner can demand to be carried without compensation.

merger.[23] A merger increases the number of potential subscribers or viewers of the merged firms' content relative to the level each firm had separately.[24] The surplus from an agreement increases as the number of subscribers increases, but a critical question is whether the surplus increases at a faster rate as the number of subscribers grows or increases at a slower rate as the number of subscribers grow. If the surplus from reaching an agreement is "convex" in the number of subscribers, then as the number of subscribers increases, surplus increases at an increasing rate. And if the surplus from reaching an agreement is "concave" in the number of subscribers, then as subscribers increase, surplus increases, but at a declining rate.

25. These "technical" conditions imply that if the MVPD's surplus function is concave (that is, as more subscribers are added, surplus increases at a declining rate) then a merger of station owners results in upward pressure on retransmission rates.[25] To see this, consider an MVPD that has signed retransmission agreements with several stations, including Station A, and is now negotiating with Station B. If the surplus function is concave, then adding Station B raises the total surplus *but* contributes less to surplus (on a per-subscriber basis) than was added by Station A. Put more simply, the greater the number of stations that have already agreed to be retransmitted by the MVPD, the lower the incremental value to the MVPD of adding one more station.[26] This does not mean that adding the new station does not increase the total surplus – it does. However, because it is less valuable, Station B is in a relatively weaker bargaining position. Now consider how the bargaining situation changes if Station A and Station B merge.

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[23] For a discussion of the general theory, see, e.g., Tasneem Chipty and Christopher M. Snyder (1999), "The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry," *The Review of Economics and Statistics*, 81(2):326–340.

[24] I assume that the merged firm negotiates for the jointly owned stations together. **{{BEGIN HCI**

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[25] I abstract here from all the other economic factors that can weaken or elevate the magnitude of this upward pressure on retransmission rates.

[26] To be clear, the difference in the relative values of the stations that I am referring to here is not linked to the attractiveness of the programming they carry but rather stems from the fact that the incremental station provides programming that is incremental to the programming already offered on the MVPD. The more content that is already available to subscribers, the less likely it is (despite the heterogeneity of subscribers' preferences) that the additional programming will fill some large, unmet demand and stimulate viewership.

In that case the bargaining position of Station B improves because it is merged with Station A that has higher (incremental) value and therefore a stronger bargaining position. The opposite would occur if the MVPD's surplus function were convex. In that situation, Station B would have a higher (incremental) value than Station A (or the average station that has already agreed to be retransmitted by an MVPD). Station B, negotiating on its own, is in a stronger bargaining position than it would be after it merges with Station A and negotiates for a common retransmission rate.[27] In a sense, in that case, the merger would dilute the station owner's bargaining power, which tends to push down retransmission rates. Importantly, as we argue below, the same logic applies in a situation in which the two stations do not overlap completely. The reason is that from the standpoint of the MVPD which bargains for rates that apply to its overall footprint, what matters is the impact on its overall surplus, as it relates to its total subscriber base.

26. In the alternative, we can consider the effects of the merger through the lens of traditional diversion effects where the merged companies' products are imperfect substitutes. If (pre-merger) one station is dropped, due to a breakdown in negotiation, some subscribers would drop DISH, but many would simply divert their viewing time to the remaining offerings provided by the MVPD, including the other local broadcast stations. Indeed, inasmuch as local broadcast stations are substitutes from the viewer's (MVPD subscribers') perspective, this also means that local broadcast stations will be substitutes from the MVPD's perspective. Post-merger, however, a bargaining impasse leads to the loss of both stations owned by the merged company. When a merged firm blacks out two stations, more MVPD (e.g., DISH) subscribers would drop DISH and move to another MVPD than would have dropped when only one station was lost. When subscribers drop DISH, many of them will switch to another MVPD and be recaptured by the station owner through the other MVPD; the merged firm thus recaptures the retransmission fee

[27] If the surplus function is linear, then a merger would not have an impact on bargaining power and so would not impact retransmission rates.

on those subscribers. Therefore, upward price pressure is generated both when the surplus function is concave, and in the event of a merger between two products that are substitutes.[28]

27. Of course, this discussion of the local stations as imperfect substitutes does not mean that it is not desirable for the MVPD to have access to the full complement of the local stations, provided the retransmission rates are not excessive. Because viewers' preferences are differentiated, being able to offer the full complement of local stations makes the MVPD more attractive to potential subscribers, for any given level of MVPD subscription rates. In fact, it is also possible that an MVPD has to offer some minimum line-up of local stations in order to have a viable MVPD package in competition with its rival MVPDs. This need to have a minimum line-up—especially of local broadcast stations—tends to weaken the MVPD's bargaining position.

28. As we shall see below, similar reasoning applies to the circumstances where the owners of the merging stations do not have 100% overlapping footprints.

IV. EMPIRICAL EVIDENCE INDICATES THAT THE MERGER WILL RAISE RETRANSMISSION RATES

A. APPLICATION OF THE FRAMEWORK TO THE SINCLAIR-TRIBUNE MERGER

29. We now apply the framework described above to two situations relevant to the proposed merger of Sinclair and Tribune. First, where Sinclair and Tribune own stations in the same DMA and therefore may reasonably be considered to be partial substitutes in the eyes of MVPD subscribers, and thus the MVPD—even if these are not perfect substitutes—economic theory indicates that, in the absence of efficiencies, the merger would raise retransmission rates.

30. Second, we consider whether the merger will likely result in higher retransmission rates nationwide, i.e., even in those areas where Sinclair and Tribune do not overlap. DISH's experience in negotiating retransmission agreements, DISH's perception of broadcast groups as (imperfect) substitutes for one another, and the actual agreements and our study of them strongly suggest that rates will increase post-merger across the board. The basic intuition is the same as

[28] See Aviv Nevo (2014), "Mergers that Increase Bargaining Leverage," Remarks as Prepared for the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries.

at the local level: namely, not reaching an agreement with Sinclair (resp. Tribune) that covers all of its DMAs is likely to be less harmful to DISH's profitability when it can still reach a deal with Tribune (resp. Sinclair), as compared to the situation where the option of an independent negotiation for retransmission rights with either one of the station owners had been extinguished due to the merger. In this section, we also examine empirical evidence suggesting that rates increase with station owner size.

1. DMAs where Sinclair and Tribune have overlapping station ownership

31. In DMAs where Sinclair and Tribune have overlapping Big-4 stations that can be considered substitutes,[29] losing the Sinclair station would lead some MVPD subscribers to switch to another MVPD; other subscribers would not switch MVPDs but instead would shift their viewing to other stations, including the Tribune station. After the merger, and faced with a loss of both a Sinclair and Tribune station in these DMAs, the MVPD's subscriber loss would be greater because some subscribers that would have switched from Sinclair to Tribune will now leave the MVPD as neither station is available. Thus, the loss of both stations is more harmful to the MVPD than the loss of one, which gives the merged entity more bargaining power than either station owner had individually pre-merger. Of course, if the merged station owner loses access for both of its stations at the same time, due to an impasse in the negotiations, the direct impact on its profits can also be substantial. However, because the subscribers who leave the MVPD likely divert to other MVPDs on which the local stations are available, the *net* impact on the merged local broadcaster is mitigated; although retransmission fees are lost on the first MVPD, they are at least partially recovered by retransmission fees charged to the other MVPDs to which the station's viewers switch.[30] There is no such mitigation from the vantage point of the MVPD. Thus, because the balance of bargaining power shifts towards the merged firm, there will be an upward pressure on retransmission rates.

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[29] As noted above, just because the Sinclair and Tribune stations are substitutes does not mean that the total quality of the MVPD's offering does not improve when it can offer both stations, rather than only one of them. In fact, it is just the opposite: when the MVPD cannot offer both stations, the aggregate quality falls, which leads to higher subscriber churn.

[30] Because MVPDs pay different retransmission fees, the station owner could earn a lower margin on subscribers who switch MVPDs, or conversely it could earn a higher margin. The result depends on the station owner's retransmission fee charged to different MVPDs.

32. This is standard unilateral effects analysis in the merger context[31] and there's no real debate on whether this effect exists: the only question concerns the size of the impact, which is related to the degree of substitution between Sinclair- and Tribune-owned stations and other stations in MVPD's line up, the willingness of the MVPD's subscribers to switch to its rival distributors, and whether there are any countervailing efficiency effects that would mitigate the predicted effect on retransmission rates.[32] Because it is likely that the Big-4 stations are closer substitutes for each other (in the eyes of viewers) than are a Big-4 station and a non-Big-4 station, we would expect that Big-4 station overlap would cause more of an increase in retransmission fees as compared to the overlap between a Big-4 and non-Big-4 station. The Commission has in the past viewed affiliates of the major networks as "partial substitutes." In its 2014 Order barring certain joint bargaining in local markets, the Commission agreed that joint negotiation involving Big-4 stations in a local market led to increased retransmission fees:[33]

> 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. The record also demonstrates that joint negotiation enables Top Four stations to obtain higher retransmission consent fees because the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs.

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[31] Gowrisankaran, Nevo, and Town (2015) discuss the effects of merger of two hospitals in the same market where prices are set via negotiation between the hospitals and a downstream managed care organization (MCO). They note that if consumers (patients, in their model) view the hospitals as substitutes, then that will tend to make the surplus function of the MCO concave and prices will rise after a merger of hospitals. (Gautam Gowrisankaran, Aviv Nevo, and Robert Town (2015), "Mergers When Prices Are Negotiated: Evidence from the Hospital Industry," *American Economic Review*, 105(1): 172–203.) In the present context, this is equivalent to the situation where MVPD subscribers view two stations as (at least partial) substitutes, with the result that the surplus function of the MVPD is concave and a merger of station owners in the same local market results in increased retransmission fees.

[32] I abstract here from any efficiency effects that can potentially mitigate the "unilateral" effects.

[33] Federal Communications Commission, Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket 10-71, FCC 14-29, March 31, 2014, ¶ 13.

If retransmission rates are pushed up when owners of Big-4 stations jointly negotiate for retransmission, then a merger of those Big-4 stations, absent efficiencies, would also push up retransmission rates. Although Sinclair and Tribune negotiate a common rate over a set of DMAs, not all of which feature overlapping Big-4 stations, the common retransmission rate would be expected to rise post-merger.[34]

2. National Market Effects

33. The effects of the transaction can extend beyond the local markets in which the merging parties both have local stations. I have just noted one avenue by which these effects may be realized: when retransmission fees are negotiated over a set of local markets, some of which feature overlap, a merger of the overlapping owners can put upward pressure on the retransmission fee negotiated over the whole set of local markets. But these broader effects have been recognized by the Department of Justice in other transactions that combined parties that do not overlap geographically in some downstream markets. For example, in the *Comcast-Time Warner Cable* merger, the DOJ acknowledged that the merging companies had "disjoint service areas,"[35] but found that the merged company would have additional bargaining leverage in upstream markets due to its larger combined customer base.[36]

> Comcast's proposed merger with Time Warner Cable would have created by far the largest cable company in the US. Cable companies tend to operate in distinct geographic territories, and some argued that this meant no competitive impact from the merger. But disjoint retail territories were only a piece of the picture. These firms are two of the largest providers in the market for content distribution through traditional multichannel video "pipes" and broadband Internet access. As such, the merger posed a potential risk to the competition that currently dilutes each firm's leverage in bargaining with content providers for distribution access.

34. The conclusion that a merger can have impacts beyond narrowly defined local markets does not necessarily require that there be a broad geographic, or "national," market in a technical

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[34] My understanding is that it is an industry standard practice to negotiate a single rate for all stations under common ownership.

[35] Nicholas Hill, Nancy L. Rose, and Tor Winston (2015), "Economics at the Antitrust Division 2014–2015: Comcast/Time Warner Cable and Applied Materials/Tokyo Electron," *Review of Industrial Organization*, 47:425–435, at 430.

[36] Ibid, at 426.

sense as presented in the 2010 Horizontal Merger Guidelines.[37] Rather, what is required is that there are economic (or market) forces that can affect competitive interactions (such as bargaining options) at a higher, more aggregated level, such as across all the DMAs in which the MVPD participates. My goal here is not to debate whether the assessments made by the DOJ in the investigations of the other mergers such as *Comcast/Time Warner Cable* were empirically correct or not. The key point that emerges from this discussion is that one must recognize the possibility of geographically broad-ranging competitive effects that extend beyond the narrower geographic markets in which traditional competitive concerns are present, irrespective of whether there is a national market.

35. In the instant case, such national competitive effects are likely to be present, at least as far as DISH is concerned.[38] This is so for several reasons. First, as already described, the transaction combines two multi-station broadcasters with very large footprints, which would cover 72 percent of U.S. households post-merger.[39] Second, DISH bargains over retransmission rates at a national level. That is, the retransmission rates that it will secure with the merged company will cover all DMAs in which the merged company will be present, if and when the transaction is completed. Third, the fact that Sinclair and Tribune programming are (imperfect) substitutes at the local level carries over into aggregate substitutability at the broader, national level.[40] I don't mean by this that a DISH subscriber residing in a DMA that has no Sinclair-owned station can watch—or even be interested in watching—non-network programming from a Sinclair-owned local station located in another DMA. What I mean is that, from the business perspective, subscriber losses from failing to reach a retransmission agreement are costly to an

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[37] U.S. Department of Justice and the Federal Trade Commission (2010), "Horizontal Merger Guidelines," § 4.2.

[38] Because the merged company will bargain with each MVPD separately, it is appropriate to postulate the possibility of price discrimination markets that admit differentiated retransmission rates across MVPDs.

[39] Petition to Dismiss or Deny of DISH Network L.L.C., *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, at 2 (Aug. 7, 2017).

[40] Ms. Ordonez describes how the different broadcast groups are different pathways that DISH can use to assemble its service and avoid subscriber loss, and that the loss of a group reduces the options DISH has in assembling content for its service. Ordonez Decl. ¶ 4.

MVPD, like DISH, irrespective of where they occur. **{{BEGIN HCI**

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36. Thus, from DISH's business perspective, what matters first and foremost is the loss of aggregate profits due to the aggregate loss of subscribers if DISH fails to reach a retransmission agreement with Sinclair (or Tribune) or, after the transaction closes, with both. Given that the negotiation is at the national level, the impact of failure to reach an agreement is felt at the national level, that is, at the level of aggregate loss in the numbers of subscribers and the consequences of such a loss on the overall profitability of DISH and the dynamic incentives to invest in the evolution of its network. That is, the impact is gauged not merely as a sum of foregone profits (due to lost subscribers) in affected DMAs, but also as the aggregate financial impact on its overall business. This concern flows from the fact that DISH's operations are characterized by significant fixed costs that are also sunk. As such, while a loss of programming from Tribune's (say) local stations across its footprint could be "manageable," the loss of programming from combined Sinclair *and* Tribune local stations across the DISH footprint could be "superadditive" – meaning that, in terms of business consequences for DISH, the magnitude of the total negative effect from failing to reach an agreement with Sinclair or Tribune separately is smaller than the negative impact from failing to reach an agreement with both of them at the same time. Put differently, DISH's surplus function aggregated over the DMAs in which at least one of the merging parties is present, is very likely concave and thus a merger of Sinclair and Tribune would put upward pressure on retransmission rates.

37. Whether or not there is a national geographic market that satisfies the 2010 Horizontal Merger Guidelines test, the impact of this transaction should be examined both at the local and at the national level. This is especially pertinent to the impact on DISH which is present in all 210 DMAs and bargains for a retransmission rate that applies to every DISH DMA in which the station owner is present.

38. Although DISH's view of negotiations with station owners (as described in the Ordonez Declaration) supports the idea that station owners are, at some level, substitutes for DISH in piecing together video content to sell to subscribers, we also should look to empirical evidence

for further confirmation. As described above, if the merger will lead to an increase in station owner bargaining leverage due to the greater number of DISH subscribers that will be covered by the merged entity, then this implies that we should see a positive relationship between subscribers and retransmission fees today.

B. EXAMINING CONTRACT DATA FOR EVIDENCE OF A RELATIONSHIP BETWEEN RETRANSMISSION FEES AND STATION OWNER SIZE

39. To test for this positive relationship, I collected information from 43 retransmission contracts signed between DISH and station owners which are in effect in 2017.[41] These contracts cover Big-4 stations owned by the networks (O&Os) as well as independent station owners. All of the largest station owners are represented in the contract data, and the data include at least one Big-4 station in 207 of the 210 DMAs in which DISH is present. First, I simply examine the data for evidence of a relationship between retransmission fees and size. In the graph below, each dot represents one contract between DISH and a station owner;[42] the total number of DISH subscribers in the DMAs covered by the contract is measured along the horizontal axis, and the 2017 retransmission fee for Big-4 stations on a per subscriber, per month basis is measured along the vertical axis. The graph shows a positive relationship between the number of DISH subscribers reached by the station owner and the level of the retransmission fee. Of course, this is not determinative since such a simple representation does not control for other factors that may affect the level of the retransmission fee.

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[41] This data is described in Declaration of William P. Zarakas and Jeremy A. Verlinda, August 7, 2017 ("Zarakas/Verlinda Declaration").

[42] In most cases, the contracts in my data cover more than one local station (either within a DMA or across DMAs) under common ownership. One contract is a JSA arrangement with eight stations that are separately owned but that negotiated a single contract.

2017 Retransmission Fee for Big-4 Stations and DISH Subscribers Covered

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40. Next, I regressed the 2017 retransmission fee for Big-4 stations in each of the 43 DISH contracts against the number of DISH subscribers covered by the Big-4 stations in each contract. Because contracts have different effective dates, they differ in the date on which the fee adjusts each year; I used the average fee in effect for 2017 from each contract. I control for whether the station owner is the network itself (O&O stations) rather than an independent owner. My results from this base specification, shown in the first column of the table below, indicate a positive and statistically significant relationship between fees and subscribers. Because retransmission fees have increased over time, I next account for these "vintage effects" by using as a regressor (i.e., an explanatory variable) the number of years since the contract was signed. This reduces the magnitude of the impact of subscribers on the retransmission fee, but the coefficient is still positive and statistically significant. In this specification (in the second column of the table below), an increase of 100,000 subscribers is associated with an increase in the retransmission fee of **{{BEGIN HCI** **END HCI}}** cents per subscriber per month. This finding of a positive and significant relationship between the retransmission fee and DISH subscribers is robust to

alternative specifications; in the table below I report additional results excluding the O&O contracts, controlling for average reverse retransmission fees (estimated by SNL Kagan),[43] using a log specification, and using the average retransmission fee over the life of the contract.

Retransmission Fee Regressions

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41. My regression results indicate that retransmission fees increase with the size of the station owner, which confirms the supposition that DISH's surplus function is concave. The further implication is that the merger of Sinclair and Tribune will shift bargaining power toward the New Sinclair, likely resulting in higher retransmission fees.

[43] The Kagan estimates of reverse retransmission fees are provided in SNL Kagan (2017), "The Economics of Broadcast TV Retransmission Revenue." I calculated a subscriber-weighted average of these fees for each contract, using data on DISH subscribers by DMA and station affiliation information.

C. EFFECTS ON CONSUMERS[44]

42. Because retransmission fees are levied on a per-subscriber, per-month basis, they are a marginal cost of providing MVPD service to subscribers. Economic theory teaches that, except in limited circumstances, an increase in marginal cost is passed through to consumers, in whole or in part, resulting in an increase in the MVPD subscription fee.[45] As such, increases in retransmission fees paid to the merged company can be expected to harm subscribers to MVPD services.

V. MVPD LOSSES FROM BLACKOUTS ARE MORE SEVERE WHEN MULTIPLE STATIONS ARE LOST

43. When negotiating with a station owner, an MVPD faces the prospect of a blackout if an agreement is not reached. As described above, when one station is blacked out, some MVPD subscribers will switch viewing to a different station and others will drop their MVPD subscription and switch to an alternative provider. If two stations are blacked out, however, it is likely that even more subscribers will leave, especially those for whom the second station was the closest substitute for the first station.[46]

44. DISH's experience during blackout events provides empirical evidence of this effect. A study of the Hearst blackout in March-April, 2017 reported in the Zarakas/Verlinda Declaration shows that the blackout reduced the growth of DISH subscribership in DMAs where Hearst owned stations, compared to similar DMAs where Hearst did not own stations (and thus where

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[44] I also note that although I have focused on the effect of the proposed merger on retransmission fees, the increased bargaining leverage that results from the proposed merger could manifest itself in other onerous contract terms, which could also harm consumers.

[45] Pass-through of higher programming costs to MVPD subscribers has been recognized in previous mergers. (Federal Trade Commission, Analysis of Proposed Consent Order to Aid Public Comment, *In the Matter of Time Warner, Inc., Turner Broadcasting System, Inc. Tele-Communications, Inc. and Liberty Media Corporation,* at 3; Federal Communications Commission, Memorandum Opinion and Order, *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Tranferors, and the News Corporation, Transferee, for Authority to Transfer Control*, MB Docket 03-124, December 19, 2003, ¶ 208.)

[46] Ms. Ordonez discusses the problem of additional subscriber churn that occurs when two stations are lost. Ordonez Decl. ¶ 12.

there was no blackout).[47] Moreover, the analysis shows that the decline was much more severe in DMAs where Hearst owned—and therefore blacked out—two stations compared to DMAs where Hearst owned—and therefore blacked out—only one station.[48] Similar evidence is provided by the Tribune blackout of DISH in June-September 2016. DISH subscriber growth was lower in the DMAs affected by the blackout than in similar DMAs that were unaffected by the blackout, and the impact of the blackout was more severe in DMAs where Tribune owned two stations rather than one.[49]

45. Subscriber losses (or diminished subscriber growth) directly harm the MVPD through a loss of current and future MVPD subscription revenue.[50] Because a station owner that can threaten the blackout of two stations rather than one can inflict more harm on the MVPD if a negotiating impasse is reached, the station owner with more than one station in an area has enhanced bargaining leverage over an MVPD. In the language of bargaining, the MVPD's disagreement point is worse when a blackout of two stations simultaneously can be imposed, rather than just one, this shifts bargaining leverage to the station owner.

VI. VERTICAL EFFECTS

46. Sinclair and Tribune claim that an efficiency of the proposed merger is that they will create a new service that will provide access to the broadcast signal and other, non-broadcast content to consumers on a paid basis, thus providing more competition for MVPDs.[51] This raises the question as to whether the merged company's planned status as a competitor to DISH for subscribers as well as an input supplier to DISH will cause it to raise retransmission fees even more.

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47 Zarakas/Verlinda Decl. Table 6b.

48 Zarakas/Verlinda Decl. Table 7.

49 Zarakas/Verlinda Decl. Tables 6a and 7.

50 Ordonez Decl. ¶ 13.

51 Petition to Dismiss or Deny of DISH Network L.L.C., *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, at 45-46 (Aug. 7, 2017).

47. Vertical effects are a familiar concern in markets involving content production and distribution. The concern stems from the simple proposition that the firm that produces and distributes content may have an incentive either to thwart the distribution of rival content or to raise the price of its content to rival distributors. The ability to engage in conduct that raises rivals' costs or lowers the quality of rivals' products does not mean that a vertically integrated firm necessarily will engage in such conduct. The reason is that there are costs associated with these anti-rival strategies and it is therefore important to gauge—based on data—whether these strategies make business sense.[52] Nevertheless, it is important to account for the possibility of such adverse effects in assessing the public benefits from a transaction.

48. In the instant case the concern is centered around Sling TV, which is DISH's OVD service that includes local broadcast stations in some areas **{{BEGIN HCI**

END HCI}} and is offered at a price as low as $20 per month.[53] The current retransmission arrangements demonstrate that stations owners, in particular Sinclair, have the ability to bundle different stations together. With the enhanced bargaining power of the New Sinclair and the potential incentive to harm a rival distributor, it is possible that the New Sinclair will have the ability to bundle together and require carriage on Sling TV other non-broadcast channels with its broadcast stations; this would drive up the cost Sling TV. If the price of Sling TV is driven up, it will be less attractive to the consumers for whom it was designed: those who do not want to purchase (or cannot afford) a higher-priced, traditional MVPD service.[54] The existing ability to bundle and the potential incentives of the merged company to engage in behavior that would raise DISH's (or other rival's) costs post-merger, with adverse effects on MVPD subscribers, cannot be dismissed and should be examined.

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[52] There are also direct benefits from vertical integration, such as elimination of double-marginalization.

[53] Ordonez Decl. ¶ 20.

[54] Ordonez Decl. ¶¶ 20-22.

VII. INFORMATIONAL AND CONTRACTUAL SPILLOVERS

49. So far my discussion implicitly assumed that broadcast station owners have reasonably detailed information about the MVPD's resistance point as well as about the retransmission rates charged by rivals. In fact, the station owners do not have complete information, although it is not obvious what sorts of implications and complications follow if one were to dispense with this assumption. Interestingly, it can be shown that when bargaining takes place under conditions of imperfect information (e.g., one or both sides are not well-informed about their negotiating partner's resistance pay-offs), negotiations may, in fact, break down. Such breakdowns do not make economic sense because during the blackout both parties are foregoing the gains from trade that are, in principle, achievable. Thus, in the simplest of bargaining models, recalcitrance makes no economic sense and the parties should strive to reach an agreement as quickly as possible.

50. However, when information is asymmetric, the parties may use offers and counteroffers to better gauge each other's resistance points.[55] In addition, a local broadcaster may not be aware of the offer(s) made by rival broadcasters, which (as we have seen) have a bearing on how recalcitrant the MVPD might be. Here, a merger provides information about the contract terms reached by the merging parties with the MVPD. Armed with such information, the merged firm may be able to better tailor its offers (and counteroffers) and thus exploit its newly-obtained information to raise retransmission rates even higher insofar as that this newly-obtained information would ameliorate the risks and concerns about running into the MVPD's willingness-to-pay constraint.

51. In this case, in addition to the benefit to Sinclair of gaining additional information from Tribune that may help in future negotiations, **{{BEGIN HCI**

END HCI}}. As DISH's Director of Local Programming, Ms. Melisa Ordonez, testifies, **{{BEGIN HCI**

[55] For a discussion, see Janusz A. Ordover and Ariel Rubenstein (1986), "A Sequential Concession Game with Asymmetric Information," *The Quarterly Journal of Economics*, 101(4): 879-888.

END HCI}}.[56] **{{BEGIN HCI**

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VIII. CONCLUDING REMARKS

52. The instant transaction raises important competitive concerns. In particular, basic economic logic and empirical evidence indicate that the transaction will likely create upward pressure on retransmission fees across the full footprint of the combined company. This is especially so across all the DMAs in which DISH operates. That is, the economic effects of the transaction will be felt not only in the media markets in which Sinclair and Tribune compete for viewers but also in other local markets in which only one of the merging parties is present.

53. Because retransmission fees are "marginal costs" to the MVPDs, their increase can be expected to be passed on—in full or in part—to MVPD subscribers.

54. **{{BEGIN HCI**

END HCI}}. Moreover, gaining access to Tribune's rates and other relevant information should enable the New Sinclair to better calibrate its rates, thereby adding to the already demonstrated concerns regarding the upward pressure on retransmission rates.

55. The New Sinclair will have the ability and perhaps also incentives to impair competition in the OVD space.

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[56] **{{BEGIN HCI**

END HCI}}. Ordonez Decl. ¶¶ 16-17.

[57] Ordonez Decl. ¶ 16.

The forgoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my current information, knowledge, and belief.

Executed on August 7, 2017

Janusz A. Ordover
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EXHIBIT 1: CURRICULUM VITAE OF DR. JANUSZ A. ORDOVER

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EDUCATION

1968-1973	Columbia University, New York, New York Graduate Department of Economics and European Institute of the School of International Affairs Doctoral Dissertation: Three Essays on Economic Theory (May 1973), Ph.D. 1973
1967-1968	McGill University, Montreal, Canada Departments of Economics and Political Science
1963-1966	Warsaw University, Warsaw, Poland Department of Political Economy, B.A. (equiv.), 1966

HONORS

2016	"2016 Competition Economist Individual Expert of the Year," voted by Who's Who Legal
2015	"2015 Competition Economist Individual Expert of the Year," voted by Who's Who Legal
2011	"The Economist of the Year 2010" voted by the Global Competition Review
1973	Columbia University: Highest distinction for the doctoral dissertation
1971-1972	Columbia University: Honorary President's Fellow
1969-1971	Columbia University: President's Fellow
1967-1968	McGill University: Honors Student
1964, 1965	Warsaw University: Award for Academic Achievement, Department of Political Economy
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PROFESSIONAL EXPERIENCE

September 2015 present	Emeritus Professor of Economics Department of Economics, New York University, New York, New York
June 1982 - 2015	Professor of Economics Department of Economics, New York University, New York, New York
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Summer 1996-2000	Lecturer International Program on Privatization and Reform Institute for International Development, Harvard University, Cambridge, Massachusetts
Aug. 1991 - Oct. 1992	Deputy Assistant Attorney General for Economics Antitrust Division United States Department of Justice, Washington, D.C.
Sept. 1989 - July 1990	Visiting Professor of Economics School of Management, Yale University, New Haven, Connecticut
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Mar. 1984 - June 1988	Visiting Professor of Economics Universita Commerciale "Luigi Bocconi," Milan, Italy
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Sept. 1982 - June 1986	Adjunct Professor of Law (part-time) Columbia University Law School, New York, New York
Feb. 1982 - June 1982	Acting Director of Graduate Studies Department of Economics, New York University
June 1978 - June 1982	Associate Professor of Economics Department of Economics, New York University
Sept. 1979 - May 1990	Lecturer in Economics and Antitrust New York University Law School
Sept. 1977 - June 1978	Member, Technical Staff Bell Laboratories, Holmdel, New Jersey
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Sept. 1973 - Aug. 1977	Assistant Professor of Economics New York University

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Summer 1976	Visiting Researcher Bell Laboratories, Holmdel, New Jersey

OTHER PROFESSIONAL ACTIVITIES

2011	Organizer Session on the 2010 Agencies Horizontal Merger Guidelines, 2011 Spring Meetings, Antitrust Section, American Bar Association, Washington DC
2010 – present	Member ABA Section of Antitrust Law, Economics Task Force
2006 - present	Special Consultant Compass Lexecon (formerly Compass), an FTI Company, Washington, D.C.
2003 - 2006	Director Competition Policy Associates, Inc. ("Compass"), Washington, D.C.
1997 – 1999	Consultant Inter-American Development Bank, Washington, D.C.
1997 – 2009	Board of Editors *Antitrust Report*
1995 – 2001	Consultant The World Bank, Washington, D.C.
1998 – 2004	Senior Consultant Applied Economic Solutions, Inc., San Francisco, California
1995 - 2000	Senior Affiliate Cornerstone Research, Inc., Palo Alto, California
Various	Testimony at Hearings of the Federal Trade Commission
1994 - 1996	Senior Affiliate Law and Economics Consulting Group, Emeryville, California
1994 - 2000	Senior Affiliate Consultants in Industry Economics, LLC, Princeton, New Jersey
1993 - 1994	Director Consultants in Industry Economics, Inc., Princeton, New Jersey
1992 - 1993	Vice-Chair (*pro tempore*) Economics Committee, American Bar Association, Chicago, Illinois
1990 - 1991 1992 - 1995	Senior Consultant Organization for Economic Cooperation and Development, Paris, France
1991	Member

	Ad hoc Working Group on Bulgaria's Draft Antitrust Law The Central and East European Law Initiative American Bar Association
1990 - 1991	Advisor Polish Ministry of Finance and Anti-Monopoly Office Warsaw, Poland
1990 - 1991	Member Special Committee on Antitrust Section of Antitrust Law, American Bar Association
1990 - 1991	Director and Senior Advisor Putnam, Hayes & Bartlett, Inc., Washington, D.C.
1990 - 1996	Member Predatory Pricing Monograph Task Force Section of Antitrust Law, American Bar Association
1989	Hearings on Competitive Issues in the Cable TV Industry Subcommittee on Monopolies and Business Rights of the Senate Judiciary Committee Washington, D.C.
1989	Member EEC Merger Control Task Force, American Bar Association
1988 - present	Associate Member American Bar Association
1987 - 1989	Adjunct Member Antitrust and Trade Regulation Committee, The Association of the Bar of the City of New York
1984	Speaker, "Industrial and Intellectual Property: The Antitrust Interface" National Institutes, American Bar Association, Philadelphia, Pennsylvania
1983 - 1990	Director Consultants in Industry Economics, Inc.
1982	Member Organizing Committee Tenth Annual Telecommunications Policy Research Conference, Annapolis, Maryland
1981	Member Section 7 Clayton Act Committee, Project on Revising Merger Guidelines American Bar Association
1980	Organizer Invited Session on Law and Economics American Economic Association Meetings, Denver, Colorado
1978 - 1979	Member Department of Commerce Technical Advisory Board Scientific and Technical Information Economics and Pricing Subgroup
1978 – present	Referee for numerous scholarly journals, publishers, and the National Science Foundation

MEMBERSHIPS IN PROFESSIONAL SOCIETIES

American Economic Association
American Bar Association

PUBLICATIONS

A. Journal Articles

"FRAND and the Smallest Saleable Unit," with J. Kattan and A. Shampine, *Antitrust Chronicle*, September, vol. 1, Autumn 2016, available at www.competitionpolicyinternational.com

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EXHIBIT E

DECLARATION OF WILLIAM P. ZARAKAS AND JEREMY A. VERLINDA

DECLARATION OF WILLIAM P. ZARAKAS AND JEREMY A. VERLINDA

I. QUALIFICATIONS

1. **William P. Zarakas.** My name is William P. Zarakas. I am a Principal with The Brattle Group, an economics consulting firm, where I work primarily on economic and regulatory matters concerning the communications and energy industries. I have been involved in the economic analysis of issues facing these industries for roughly 30 years. I have provided reports and/or testimony before the Federal Communications Commission (FCC), the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), the Copyright Royalty Judges (Library of Congress), the U.S. Congress, state regulatory agencies, arbitration panels, foreign governments and courts of law. I have previously provided testimony to the FCC on a range of issues and proceedings, including market share and churn analyses, cost models, foreclosure and bargaining models, and pole attachments matters. My CV is attached as **Attachment A**.

2. **Jeremy A. Verlinda.** My name is Jeremy A. Verlinda. I am a senior associate at The Brattle Group, specializing in competition issues in both antitrust and regulatory contexts. I have supported and prepared testimony and analysis presented to courts, regulatory agencies, and arbitration proceedings around the world. I have particular expertise in energy markets, telecommunications, transportation, payments, and advertising. Prior to joining The Brattle Group, I spent 8 years as a staff economist at the Antitrust Division of the U.S. Department of Justice. My CV is attached as **Attachment B**.

II. ASSIGNMENT

3. We have been asked by counsel for DISH to review DISH subscribership data across designated market areas ("DMAs"),[1] and the prices that DISH pays broadcast groups for the right to retransmit local broadcast television stations within those DMAs.[2] Specifically, counsel has asked us to examine 1) the relationship between the prices paid by DISH for retransmission (*i.e.*, retransmission fees) and the size of the supplying broadcast group and 2) the relationship between subscribership losses during and following a blackout incident in a DMA and the extent to which broadcast groups in that DMA control (and can black out) more than one local broadcast station.

4. The results of our analyses indicate that: 1) DISH pays higher monthly per-subscriber retransmission fees to larger sized broadcast groups than to their smaller broadcast group counterparts, and 2) DISH suffers greater subscriber losses when it temporarily loses programming from (*i.e.*, is blacked out by) broadcast groups with two or more local broadcast stations in a DMA than it does when programming is temporarily lost for only one station in a DMA.

III. RETRANSMISSION FEES

5. Retransmission fees are the prices per subscriber that a multichannel video programming distributor ("MVPD") pays a programmer for the right to include the station in its lineup for subscribers residing in the station's DMA. DISH has provided us with retransmission contracts that it has signed with 43 broadcast groups, which operate local broadcast stations that are retransmitted to a sizable majority of DISH's direct broadcast satellite

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[1] The term Designated Market Area, or DMA, is trademarked by Nielsen Media Research and is commonly referred when describing the geographic reach of television stations to reach viewers in a given region.

[2] One or more individual local broadcast stations may be owned by a single media company (e.g., Sinclair). We refer to a company that owns one or more individual local broadcast station as a "broadcast group."

("DBS") subscribers. We have reviewed these contracts for information on the identified stations covered and applicable retransmission fees.

6. Typically, such contracts include information concerning the retransmission fees associated with a specific local broadcast station and its network affiliation, if any. For example, DISH may have a contract with a broadcast group that covers the period of time from, say, January 1, 2016 through December 31, 2018 (*i.e.*, a period of three years) in which monthly subscriber fees are specified as are network affiliations, if any. Each of the retransmission contracts provided to us by DISH covers local broadcast stations that are affiliated with the "Big-4" networks (*i.e.*, ABC, CBS, Fox, and NBC) and often, other, non-Big 4 stations.

7. Table 1 provides a summary of Big 4 network affiliate stations covered by these contracts.[3] The table provides summary information concerning the size of the 43 broadcast groups with which DISH currently has contracts in place to retransmit Big-4 local broadcast stations.[4]

[3] Stations that were owned by Nexstar and Media General prior to their merger are currently subject to contract terms that were signed prior to the merger's close in January 2017. We have used these pre-merger contracts (*i.e.*, terms and prices) in our present analysis.

[4] Data concerning local broadcast station ownership (*i.e.*, its relationship, if any, to a broadcast group) and local broadcast station revenues (2014) from BIA/Kelsey Media Pro.

Table 1: DISH's 2017 "Big 4" Retransmission Fees, by Broadcast Group

Broadcast Group	Stations	DMAs	Total Dish Subscribers (thousands) **{{BEGIN HCI**	Total Station Revenues (millions $)
Block Communications, Inc.	6	3		41.7
Bonten Media Group, LLC	8	8		41.4
California Oregon Broadcasting, Inc.	2	2		9.9
CBS Corporation	14	14		1321.0
Citadel Communications, LLC	2	2		15.9
Coastal Television Broadcasting Company LLC	2	2		7.1
Comcast Corporation	11	11		1079.5
Cowles Company	11	7		36.3
Cox Enterprises, Inc.	11	11		648.5
Draper Communication, Inc.	2	1		14.4
E. W. Scripps Company	24	24		610.8
Esteem Broadcasting, LLC	4	4		13.4
GCI, INC	3	2		10.9
Glendive	2	1		0.7
Gray Television, Inc.	82	51		602.7
Hearst Corporation	26	25		773.6
Heritage Broadcasting Group	1	1		10.8
Lake Superior Community Broadcasting	4	2		3.1
Lilly Broadcasting, LLC	3	2		9.4
Mark III Media, Inc.	1	1		1.1
Marquee Broadcasting Inc	1	1		3.1
Max Media	2	1		2.1
Media General, Inc.	53	46		855.6
Meredith Corporation	14	12		382.6
Midwest Television, Inc.	1	1		45.8
Mission Broadcasting, Inc.	16	16		74.2
Morgan Murphy Media	4	4		37.8
NBI HOLDINGS LLC/ Brian Brady	14	10		42.8
News-Press and Gazette Company	19	10		76.2
Nexstar Broadcasting Group, Inc.	65	58		462.5
OTA Broadcasting	1	1		4.2
Paxton Media Group	1	1		9.6
Raycom Media, Inc.	45	40		694.3
Saga Communications, Inc.	4	2		15.7
Silverton Broadcasting Company, LLC	2	2		1.6
Sinclair Broadcast Group, Inc.	91	79		1138.5
Sinclair-JSA	12	12		87.3
Tegna, Inc.	41	39		1354.9
Tribune Company	23	22		659.9
Twenty-First Century Fox, Inc.	16	16		1330.5
Walt Disney Company	8	8		1132.5
Waypoint Media	5	3		3.4
WMDN TV, LLC	1	1		2.4
			END HCI}}	

Source: DISH data and contracts, BIA/Kelsey Media Pro
Note: Station revenues are aggregated across stations from reported values in BIA/Kelsey for 2014.

8. Table 2 provides the results of a simple statistical analysis concerning the relationship between broadcast group size and retransmission fees. Specifically, it shows the average retransmission fees, as well as standard deviations and standard errors (of the average), paid by DISH to "large" broadcast groups (*i.e.*, local broadcast stations whose combined 2014 station revenues are equal to or exceed $500 million) as well as to "small" broadcast groups (*i.e.*, local broadcast stations whose combined 2014 station revenues were less than $500 million). The table also provides a similar statistical breakdown by the number of DISH subscribers reached by the broadcast group (with the cutoff between "large" and "small" set at one million DISH customers).

Table 2: Comparison of 2017 Big 4 Retransmission Fees Paid by "Large" and "Small" Broadcast Groups (excluding network owned-and-operated stations)

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9. The table indicates that DISH has paid lower retransmission fees (on a per subscriber per month basis) to the smaller broadcast groups than to larger ones, irrespective of whether broadcast group size is measured by combined local broadcast station revenues or the number of DISH subscribers reached. The average retransmission fees paid by DISH to

smaller sized broadcast groups are **{{BEGIN HCI END HCI}}** and **{{BEGIN HCI END HCI}}** per subscriber month in terms of 2014 station revenues and subscribers reached, respectively, while comparable numbers for the average retransmission fees paid to the larger broadcast groups are **{{BEGIN HCI END HCI}}** and **{{BEGIN HCI END HCI}}**, respectively. The difference in retransmission fees paid to larger versus smaller broadcast groups is highly statistically significant (p-values less than 0.001). We have also examined the results when the "cutoff" for small versus large broadcast groups is modified to test the validity of these findings. We found that the results remain robust, irrespective of the cutoff selected.

10. We have also examined the effect of size as shown between the Applicants. Sinclair's Big-4 stations reach approximately **{{BEGIN HCI END HCI**}} DISH subscribers, more than **{{BEGIN HCI**

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Table 3: **{{BEGIN HCI**

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12. This finding of larger sized broadcast group charging higher retransmission fees than do smaller sized groups also holds true at the DMA level. **Appendix B** provides a list of 57 DMAs in which there is both at least one large broadcast group (reaching one million or more DISH subscribers) and at least one small broadcast group (reaching fewer than one million DISH subscribers), each of which provides a Big 4 network affiliated local broadcast station.[5] The data in the appendix demonstrates that the large broadcast groups charged DISH higher retransmission fees (on a per subscriber per month basis) than the smaller broadcast groups in 52 of the 57 DMAs. Within those 52 DMAs, the fee

[5] The DMAs have been anonymized to maintain the confidentiality of DISH's agreements. Each DMA has been randomly assigned a number, which is not an indication of rank by size or any other metric.

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13. The results of this analysis are relatively clear. However, we have also conducted a regression analysis to determine whether or not other factors may be responsible for the above observations. The regression equation is specified as follows:

$$RetransFee_g = \alpha + \beta_{size} \cdot BroadcasterSize_g + \beta_{age} \cdot ContractAge_g + f(Additional\ Controls) + \varepsilon_g.$$

14. The left-hand (or dependent) variable in the above regression is the retransmission fee paid by DISH to broadcast group g for the right to include Big 4 local broadcast stations in its channel lineup, as recorded from the contract between DISH and the broadcast group. On the right hand side, the variable $BroadcasterSize_g$ is a proxy for the size of the broadcast group. For analytic sensitivity, it is measured in two different ways: (1) by the number of DISH subscribers reached by the Big 4 local broadcast stations owned by the broadcast group, and (2) by the 2014 revenues realized by those stations. The results of the regression analysis using the number of DISH subscribers reached as an indicator of broadcast group size (method 1) is presented below in the body of this Declaration. Similar results were obtained when we used 2014 local broadcast station revenues as an indicator of broadcast group size (method 2). The results of the regression using station revenues as a variable are provided in **Appendix C**.

15. The right hand variables also include additional factors that might influence the observed retransmission fees that DISH is paying the broadcast groups. These factors include contract age, which is singled out in the above specification (older contracts tend to have lower monthly per subscriber retransmission fees, as such fees have tended to increase

over time), as well as other variables. Notably, these include ownership arrangements (mainly whether the local broadcast station is owned and operated by the upstream programming network)[6] and whether or not the broadcast group controls more than one local broadcast station in a DMA.

16. We have also considered alternative modeling specifications (e.g., "log-log" regression versus linear). The results of our regression analyses (using DISH subscribers reached as an indicator of broadcast group size) are shown in Table 4 below.

[6] The Big-4 networks also own and operate local broadcast stations. Each of the Big 4 qualifies as a large broadcast group. They separately charge "reverse retransmission fees" to affiliate stations. In any event, as mentioned below, their inclusion or exclusion in the large group category does not materially affect the results of our analysis.

Table 4: Regression of Big-4 Station Retransmission Fees on Size of Broadcast Group (Size Measured by DISH Subscribers Reached)

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17. The regression analysis indicates that there is a robust relationship between broadcast group size and the monthly per-subscriber retransmission fees paid by DISH.[7] Specifically, it indicates that DISH pays more for retransmission fees (on a per subscriber per month basis) to larger broadcast groups than it does to smaller groups. Table 4 provides regressions results for seven regression specifications, ranging from a simple regression that does not include additional control variables (Model 1) to specifications

[7] We have conducted regression analyses measuring broadcast group size by both DISH subscribers and station revenues, although we only show the DISH subscriber results in this declaration. All of the statistical regression relationships described below when using DISH subscribers to measure group size are essentially replicated when measuring group size by station revenues instead.

with various combinations of controls (Models 2 through 7). In each case, the regression results indicate that, while each of the control variables add in explaining important variation across contracts, the retransmission fees paid by DISH are consistently higher the larger broadcast group is.

18. The results for Model 1 (*i.e.*, no control variables) indicate that the monthly per-subscriber retransmission fees paid by DISH increase by **{{BEGIN HCI END HCI}}** cents (on a per subscriber per month basis) for each increase of 100,000 DISH subscribers reached by the broadcast group's stations. Introducing control variables leads to a range of (statistically significant) estimates of **{{BEGIN HCI END HCI}}** cents increase in retransmission fees for each 100,000 subscriber increase in broadcast group size (Models 2 through 5).[8] Model 6 examines possible nonlinearities in the relationship between retransmission fees and subscribers reached, introducing a subscribers-squared term, but there is no strong evidence for any nonlinearity of this form and the effect of a subscriber increase remains comparable to the linear models. Model 7, where the regression is performed in natural logs for both retransmission fees and for broadcast group size, shows a **{{BEGIN HCI END HCI}}** increase in retransmission fees for each 1% increase in subscribers reached by the broadcast group's stations; this value is approximately equivalent to **{{BEGIN HCI END HCI}}** cents per 100,000 subscribers, in line with the linear model estimates.[9]

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[8] In order to test sensitivity to inclusion of the network owned-and-operated stations, Model 4 displays the results of a regression that omits the network groups (ABC/Disney, NBC/Comcast, Fox/Twenty-First Century Fox, and CBS Corp.) from the set of broadcast groups analyzed. Inclusion or exclusion of these network groups has no material effect on the coefficients of the other control variables (*cf.* Model 3).

[9] {{**BEGIN HCI**

19. Each of the control variables included in the regressions tends to be sensible and relatively invariant to model specification. To be complete and provide a check on the robustness of this analysis, we include a brief discussion of three important control variables: contract age; network owned-and-operated local broadcast stations; and, multi-station ownership within a DMA. First, we found that contract age is an important factor to take into consideration when analyzing retransmission fees. On average, older contracts appear to have lower per subscriber per month retransmission fees to the order of **{{BEGIN HCI END HCI}}** cent per year of contract age, controlling for other variables. Therefore, contracts with different contract dates can be adjusted by a factor of **{{BEGIN HCI END HCI}}** cents per year (or **{{BEGIN HCI END HCI}}** per year of contract age) to improve the comparability of their retransmission fees.

20. Second, network owned-and-operated stations are a large segment of local broadcast stations and, as such, may exert a strong influence on results. The regression analysis indicates that the network owned-and-operated broadcast group variable does not have a statistically significant direct effect on retransmission fees (Models 2 and 3), although the effect of the broadcast group size variable (*i.e.*, total DISH subscriber in contract) changes somewhat when the network owned-and-operated station control is included in the regression equation. Omitting the network owned-and-operated station control variable (Model 4) does not have a material effect (compare to Model 3).

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21. Third, including a multi-station ownership control variable may be particularly important because it may provide insight into the degree of bargaining power held by broadcast groups during negotiations with MVPDs. Model 5 introduces the number of DISH subscribers that are exposed to multi-station ownership within DMAs covered by the broadcast group, but indicates that multi-station ownership does not appear to have a statistically significant effect on retransmission fees. Nonetheless, it is distinctly possible that the impact of this variable is statistically overwhelmed by other more prominent variables, particularly the variable for size of the broadcast group. Also, the risk of significant and higher levels of subscriber losses from a blackout of two local broadcast stations (as opposed to a single station blackout) can place greater pressure on the MVPD and increase the bargaining power of the broadcast group, which could lead to higher retransmission fees. Additional exploration of this issue is therefore warranted.

22. To do this, we reviewed the retransmission fees charged by two broadcast groups that are both large and comparably sized. They provide the basis for a controlled experiment because one of the broadcast groups controls two local broadcast stations, or has a "duopoly",[10] in nine times as many DMAs as does its comparably sized counterpart.[11] Table 5 provides the percentage by which the retransmission fees charged by the broadcast group that has the large number of such "duopolies" exceed those charged by

[10] The colloquial use here of the term "duopoly" refers to multi-station control in a DMA. Use of the term "duopoly" in this way deviates from its meaning in many economics textbooks (where a duopoly is understood to indicate that two firms control most or all of the assets or sales in a given "market".) We adopt the colloquial FCC usage here for expositional ease. By the term "duopoly" we do not refer to stations with whom a group has arrangements such as Joint Sales Agreements, Local Marketing Agreements, Shared Services Agreements or other attributable interests.

[11] These include Big 4 and CW stations. Counting just Big-4 stations, the broadcast group has six times as many "duopolies" as its counterpart.

the broadcast group with notably fewer "duopolies." The table also provides these percentages in terms adjusted to account for the vintage of retransmission contract.

Table 5: Multi-Station Ownership ("Duopoly") Retransmission Fee Premium Adjusted for Contract Age Difference

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23. The table indicates that the retransmission fees charged to DISH are consistently higher for broadcast groups that control two or more local broadcast stations. These higher prices may likely be the result of the higher degree of bargaining power that "duopolies" confer.

IV. PROGRAMMING BLACKOUTS

24. Bargaining over the contract terms that govern retransmission of local stations by DISH sometimes results in temporary programming disputes. During such disputes, a broadcast group will typically prohibit retransmission of, or force a "blackout" of, all of the local broadcast stations that it owns. When this happens, each DISH subscriber residing in a DMA affected by a blackout will be unable to view any blackout stations through DISH's DBS service. Some affected DISH customers may respond by canceling their subscriptions and switching to another MVPD.

25. We have been asked by counsel for DISH to analyze DISH's subscriber data in order to determine: 1) the extent of subscriber losses resulting from programming blackouts in particular; and, 2) whether such subscriber losses are higher when more than one local broadcasting station is blacked out (compared to when only a single station is blacked out).

26. Subscriber counts at the DMA level before, during, and after blackout periods can be used to estimate the effect of blackouts in a statistically meaningful way. We can isolate the effect of the blackout on DISH subscribership for an affected DMA by comparing it to a set of "control" DMAs that did not experience a blackout but are otherwise comparable to the affected DMAs. The difference between the subscriber losses in the blackout DMAs and the subscriber losses realized in the control DMAs provide an estimate of the effect of the blackout.

27. We use monthly DISH subscriber counts by DMA (provided by DISH) in order to examine two recent large blackouts: (1) the Tribune retransmission dispute, which covered a 12 week period from June 12, 2016 through September 5, 2016, and (2) the Hearst retransmission dispute, which covered an eight week period from March 3, 2017 through April 26, 2017. The Tribune blackout affected 33 DMAs[12] and the Hearst blackout affected 26 DMAs. We also identify "control" DMAs for these blackouts that are similar to the affected DMAs in terms of number of households, number of DISH subscribers, and pre-blackout monthly subscribership growth rates.[13]

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[12] The Tribune blackout also resulted in a nationwide DISH blackout of Tribune's cable network, WGN America.

[13] We use the Mahalanobis distance metric for identifying control DMAs for each blackout DMA. The effect of the blackout on subscribership is the average of the difference between the blackout DMAs and their controls. See Imbens, Guido W., and Donald B. Rubin. *Causal inference in statistics, social, and biomedical sciences*. Cambridge University Press, 2015, at 342, 349, and 424-425.

28. The growth rates of DISH subscribers were generally similar in the respective blackout and control DMAs (for the Tribune and Hearst blackouts) prior to the blackout events. Table 6a shows that, prior to the blackout, the change in DISH subscribers was about **{{BEGIN HCI END HCI}}** per month in the DMAs that were eventually blacked out by Tribune and was **{{BEGIN HCI END HCI}}** in the associated control DMAs. Table 6b shows that the change in DISH subscribers was about **{{BEGIN HCI END HCI}}** per month in the DMAs that were eventually blacked out by Hearst and was about **{{BEGIN HCI END HCI}}** in the associated control DMAs prior to the blackout event. The similarity of these pre-blackout numbers demonstrates the validity of the matching process to identify appropriate control DMAs.

Table 6a: Tribune Blackout Effect on DISH Subscribers

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Table 6b: Hearst Blackout Effect on DISH Subscribers

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29. Table 6 also shows that subscriber growth in the blacked out DMAs was markedly different during the blackout period and in the months following it (labeled "post-blackout" in the table). Following the Tribune blackout, the change in DISH's subscriber base was **{{BEGIN HCI END HCI}}** lower in the blacked out DMAs than in the control DMAs. The effect of blackouts on subscribership was even more pronounced for

the Hearst blackout. The difference in monthly subscriber numbers in the blacked out DMAs between the affected and control DMAs following the Hearst blackout was **{{BEGIN HCI END HCI}}** compared to a change of **{{BEGIN HCI END HCI}}** pre-blackout; that is, the **{{BEGIN HCI END HCI}}**

30. The differences in subscriber numbers between the blacked out and control DMAs can be quite considerable when the effect is presented on a cumulative basis. The impact of the blackouts extends for periods longer than just the blackout event itself. Over a six month period (three months of blackout plus three subsequent months), DISH's subscriber growth rates were **{{BEGIN HCI END HCI}}** lower in the blackout DMAs versus the control DMAs. That is, *if* the Tribune blackout DMAs had continued to mirror the growth rates observed in their control DMAs, *then* DISH would have preserved **{{BEGIN HCI END HCI}}** percent more of its subscriber base (over the six months during and following the blackout) compared to what was actually observed. Similarly, over the three month period during and following the start of the Hearst blackout, we estimate that DISH's subscribership was lowered by **{{BEGIN HCI END HCI}}** percent in the Hearst blackout DMAs relative to their control DMAs.[14]

31. We also segmented the DMAs that were blacked out during the Tribune and Hearst retransmission dispute in terms of the number of blacked out local broadcast stations in a given DMA. In most cases, both Tribune and Hearst control a single local broadcast station in the blacked out DMAs. However, both broadcast groups own two local

[14] The Hearst blackout began on March 3, 2017. At this time, it has been less than six months since its initiation. We selected three months as the basis for a cumulative calculation based on the elapsed time since the initiation of the blackout and on the reporting of monthly data by DISH. The cumulative effect would almost certainly be higher if we calculated it using six months of data.

broadcast stations in a few of the blacked out DMAs. Specifically, Tribune controlled and blacked out two local broadcast stations in seven of the DMAs that were blacked out to DISH subscribers, and Hearst controlled and blacked out two local broadcast stations in three of the DMAs that were blacked out to DISH subscribers.

32. A comparison of the percentage point changes in DISH's monthly subscriber growth rates for the blacked out DMAs in which Tribune and Hearst controlled and blacked out two local broadcast stations versus the percentage point changes for DMAs in which they controlled and blacked out one local broadcast station is provided in Table 7.[15]

[15] More than one Big 4 affiliated local broadcast station may be transmitted in some large DMAs, both of which may be owned by a broadcast group such as Sinclair or Hearst. We do not count such circumstances as "duopolies" in this table.

Table 7: Post-blackout Period Subscribership Losses by Number of Stations Lost in DMA

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33. The table confirms that, in all cases, the percentage point changes in DISH's monthly subscriber growth rates in the blacked out DMAs are lower than the comparable rates in the control DMAs. In addition, the table indicates that the difference between the blackout and control DMAs is larger for the DMAs in which Tribune and Hearst blacked out two local broadcast stations than is the case for DMAs in which they controlled and blacked out only one local broadcast station. Cumulatively, over a six month period, this means that DISH experienced subscriber declines of **{{BEGIN HCI END HCI}}** in the DMAs where Tribune controlled and blacked out two local broadcast stations, and realized declines of a lesser extent **{{BEGIN HCI END HCI}}** in the DMAs where Tribune controlled and blacked out only one local broadcast station over

the same period. For the Hearst blackout, DISH experienced subscriber declines of **{{BEGIN HCI END HCI}}** (cumulatively over a three month period) in the DMAs where Hearst controlled and blacked out two local broadcast stations, compared to a decline of **{{BEGIN HCI END HCI}}** in the DMAs where Hearst blacked out only one local broadcast station.

APPENDIX A: RETRANSMISSION FEES BY DMA

Table 8: Comparison of 2017 Big-4 Retransmission Fees Paid by "Large" and "Small" Broadcast Groups (including network owned-and-operated stations)

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APPENDIX B: RETRANSMISSION FEES BY DMA

Table 9: Retransmission Fee Comparisons between Broadcast Groups, by DMA

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Table 9: Retransmission Fee Comparisons between Broadcast Groups, by DMA

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APPENDIX C: REGRESSION ANALYSIS BASED ON REVENUES FOR SIZE OF MEDIA GROUPS

Table 10: Regression of Big-4 Station Retransmission Fees on Size of Broadcast group Contract – Size Measured by Station Revenues

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The forgoing declaration has been prepared using facts of which we have personal knowledge or based upon information provided to us. We declare under penalty of perjury that the foregoing is true and correct to the best of our current information, knowledge, and belief.

Executed on August 7, 2017

William P. Zarakas
Principal
The Brattle Group

Jeremy A. Verlinda, Ph.D.
Senior Associate
The Brattle Group

ATTACHMENT A: WILLIAM P. ZARAKAS CV

WILLIAM P. ZARAKAS

Principal

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William P. Zarakas is a Principal with The Brattle Group, an economics consulting firm, and an expert on economic, strategic and regulatory matters involving the energy, telecommunications and media industries. Mr. Zarakas heads Brattle's retail energy practice, which covers Brattle's work in infrastructure, grid modernization and smart grid initiatives, the integration of distributed energy resources, and evolving utility business and regulatory models, including investment incentive structures and performance based regulation.

In addition, Mr. Zarakas leads Brattle's team in analyzing the competitive and economic impacts concerning communications and media infrastructure and markets, including analyses associated with recent telecom and media mergers and proceedings concerning competition in telecom markets. This work has encompassed the application of vertical foreclosure and Nash bargaining models (to estimate market and price impacts) and market share and competitive effects in the business data service (BDS) market. He also leads Brattle's work concerning the economics and financial feasibility of building-out broadband infrastructure. In addition, Mr. Zarakas has also performed valuations of wireless spectrum, and developed methodologies for the distribution of royalties and retransmission fees in the cable and satellite television industries.

Mr. Zarakas has provided testimony and expert reports before the Federal Communications Commission, the Federal Energy Regulatory Commission, the Securities and Exchange Commission, the Copyright Royalty Judges (Library of Congress), the U.S. Congress, state regulatory agencies, arbitration panels, foreign governments and courts of law. He has led (and authored reports concerning) special investigations on behalf of corporate boards of directors and audits of management practices and operational and financial performance on behalf of regulatory commissions. He holds an M.A. in economics from New York University and a B.A., also in economics, from the State University of New York.

Competition Analysis

- Directed comprehensive analysis and provided testimony concerning market shares and competitive effects in the U.S. business data service (BDS, formerly referred to as special access) market in FCC WC Docket No. 16-143, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593.
- Directed comprehensive analysis and provided testimony concerning market shares, vertical foreclosure and Nash bargaining in the Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Comcast to Assign or Transfer Control of Licenses,

Before the Federal Communications Commission, MB Docket No. 10-56. (December 2014 and March 2015).

- Led analysis and provided testimony concerning the merger of TECO Energy, New Mexico Gas Company, and Continental Energy Systems, Before the Public Regulation Commission Utility Case No. 13-00231-UT (March 2014).
- Directed analysis and authored report regarding the effects of changes in regulatory fees and taxes on mobile prices, penetration and the macro economies of 22 countries in the Middle East and Africa. Study, conducted on behalf of a major mobile operator, involved detailed analysis of the relationships between marginal cost and prices, market structure and concentration, and empirical relationships concerning mobile penetration and GDP.
- Led analysis and authored expert reports concerning prospective merger savings and divestiture losses for electric and gas utilities. Scope of work included analyses involved in determining the operating and capital impacts of mergers under multiple scenarios, and also involved the anticipated economic inefficiencies resulting from forced divestiture. Reports authored included studies of merger efficiencies and reports concerning Economic Loss Studies included in U-1 filings before the U.S. Securities and Exchange Commission. Economic Loss Studies are required under PUHCA Section 11 (b) (1) Clauses A, B, and C when utility merger results in the establishment of a registered holding company with electric and gas businesses. Work in these areas included detailed analyses of current and hypothetical future electric and gas utility operations.

Utility Business Models and Investment Analysis

- Advised New York's Reforming the Energy Vision (REV) architects (i.e., the NYPSC chair and NYSERDA leads) on implementation and utility transformation issues. Led comprehensive modeling and scenario analysis concerning the impact of distributed energy resources (DERs) on utility sales, revenues, capital and operating cost structures and financing, and on utility rate base and customer rates and bills. Project also involved developing scenarios for energy and related service based transactions occurring over a utility platform and the most appropriate scope of a platform in the near term.
- Modeled and advised New York's six investor owned utilities on matters relating to regulatory incentive structures. The New York REV created earnings adjustment mechanisms (EAMs) intended to provide a bridge from the traditional regulatory model to a (still evolving) next generation model. The State's utilities are responsible for specifying the

new EAMs. Brattle worked with the utilities to design EAMs and also conducted scenario analysis that projected likely outcomes in key REV areas (e.g., peak reduction, asset utilization and integration of DERs).

- Led strategic analysis of next generation (i.e., utility of the future) regulatory frameworks for a Midwestern electric utility. Specifically, Brattle was asked to opine on the future of utility platforms (highly transactive two-sided markets vs. less transactive / more informational) recommend the appropriate regulatory framework for the near to intermediate term. Brattle's analysis included a review of DER feasibilities and transactive platform requirements. It also included a comprehensive assessment of regulatory incentive frameworks, including performance based regulation and the U.K.'s RIIO model.
- Led system reliability and resilience investment analysis for a large combination electric and gas utility. Customer concern (and political pressure) following a series of weather-induced large scale and long duration outages led to the utility developing an extensive and relatively expensive resilience investment program. Brattle advised the company on benefits and costs, and employed a value of lost load (VOLL) methodology to estimate customer willingness to pay for higher reliability in extreme circumstances. The company modified the scope of its investment program accordingly. Brattle analysis and reports were also included in the company's regulatory filings. (Public Service Electric & Gas (PSE&G) in NJ BPU Docket No. EO13020155 and GO13020156)
- Advised board of trustees and executive management on strategic and organizational direction for the Long Island Power Authority (LIPA). LIPA assumed a municipal corporate structure following the decommissioning of a nuclear power plant. The utility had among the highest rates in the U.S. and the lowest customer approval ratings. Brattle was retained to advise the utility and the Governor's office on ways to improve cost structure (e.g., through privatization, municipalization and outsourced management services arrangements) and ways to better understand and meet customer needs (e.g., community energy programs and resilience improvements). Options were evaluated based on rate impacts and risk factors, including risks associated with organizational transformation. Project required extensive modeling of LIPA operations and financing scenarios, as well as analysis of power and transmission markets.
- Advised board of directors of a major generation and transmission (G&T) cooperative and its member electric distribution cooperatives on matters concerning: asset valuations, risk management strategy, merger and acquisition options, and outlook for retail electric markets.

Cost, Rate and Incentive Analyses

- Led analysis and authored report and testimony concerning the specifications, targets and incentive structure for performance regulatory measures for use by the Hawaiian Electric Companies. Before the Public Utilities Commission of the State of Hawaii, In The Matter of Public Utilities Commission Instituting an Investigation to Reexamine the Existing Decoupling Mechanisms Docket No. 2013-104. September 15, 2014
- Led analysis and authored report and testimony concerning incentive regulatory frameworks and targeted performance incentives for electric and natural gas utilities in Massachusetts. Massachusetts D.P.U. 12-120. March 2013.
- Led and authored report concerning comprehensive analysis of approaches to setting electric distribution reliability standards on behalf of the Australian Energy Market Commission (AEMC).
- Directed and provided expert testimony on price cap frameworks and productivity analysis applied to telecommunications business data services (BDS, previously referred to as special access) in proceedings before the U.S. Federal Communications Commission. WC Docket No. 16-143, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593.
- Directed and provided testimony concerning pole Attachment rates in Virginia Cable Telecommunications Association v. Virginia Electric and Power (December 21, 2001) and FCC Docket No. 15-90, File No. EB-15-MD-006 (November 18, 2015).
- Analyzed costs and value of retransmitted television programming in cable and satellite video markets and determined distribution of copyright royalty fees among content providers. Authored expert report Before The Copyright Royalty Judges, Library of Congress, Washington D.C. In The Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-20. June 1, 2009
- Directed comprehensive modeling and analysis and provided testimony in multiple U.S. state regulatory proceedings concerning analysis of rates for unbundled network elements (UNEs), undertaken in fulfillment of requirements associated with the Telecommunications Act of 1996, using the Total Element Long Run Incremental Cost (TELRIC) methodology.
- Led analysis and provided testimony concerning incentive systems to be applied to incumbent local exchange telephone carriers (ILECs) on behalf of the New York State Department of Public Service; involved modeling determining total factor productivity (TFP)

based on empirical analysis and consideration of projected performance improvement initiatives.

- Conducted cost-of-service and marginal cost analyses for an international broadband company spanning the U.S., European and Asian markets.
- Directed cost of service and feasibility analysis for a municipality planning on deploying a broadband Wi-Fi network.
- Directed analysis and authored white paper on empirical analysis concerning the impact of changing the price of wholesale access and levels of investment in the U.S. telecommunications market. Results reported in white paper entitled: "Structural Simulation of Facility Sharing: Unbundling Policies and Investment Strategy in Local Exchange Markets."

Broadband Modeling and Business Planning

- Developed and authored report concerning the costs of deploying wireless broadband in rural areas. Before The Federal Communications Commission In The Matter Of Connect America Fund and Universal Service Reform – Mobility Fund. WC Docket No. 10-90 and WT Docket No. 10-208A. (February 2013, and updated analysis May 2016.
- Directed comprehensive financial analysis for a U.S .national broadband provider including: developing projections of demand, price elasticities, revenue and capital and operating costs, and pricing points.
- Performed comprehensive business case analysis of entry into the broadband market (including voice, internet access and video services) on behalf of a major U.S. electric utility. Scope of work included technology assessment and detailed financial modeling. Work included customer and geographic segmentation, pricing scenarios and elasticity analysis.
- Led comprehensive financial analysis concerning the deployment of a broadband communications network for an Asian electric utility. Related work included assessing transfer pricing methodologies regarding the use of utility assets, resources and easements by the broadband affiliate.
- Directed and led analysis of business diversification for multiple electric utilities. Business opportunities analyzed included dark fiber construction and third party use of utility poles, towers and conduit. Scope of analysis included financial modeling and transfer pricing.

Spectrum Valuations

- Conducted analyses and authored expert report estimating value of Mobile Satellite Service (MSS) spectrum (i.e., the 2 GHz Band from 2000-2020 MHz and 2180-2200 MHz, the Big LEO from 1610-1626.5 MHz and 2483.5-2500 MHz, and the L-band from 1525-1559 MHz and 1626.5-1660.5 MHz) in several matters, including matters involving the Terrestar bankruptcy. Analyses included impact of incorporating FCC authorized ancillary terrestrial component (ATC) into MSS mobile broadband networks.
- Analyzed spectrum values in the 2.3 and 2.5 GHz bands for the U.S. market.
- Analyzed value of Advanced Wireless Services (AWS; 1.7 / 2.1 GHz) band for the U.S. market.
- Analyzed value of unpaired 2.1 GHz spectrum for the U.S. market.
- Analyzed value of 2.3 GHz (WCS) 3.5 GHz (FWA) spectrum in Canadian market.
- Authored report concerning market comparable analysis of U.S. PCS market.
- Provided expert testimony concerning potential value of wireless spectrum in the 700 MHz band.
- Analyzed value of Specialized Mobile Radio (SMR) and Private Land Mobile Radio Services (PLMRS) spectrum on behalf of utility operating companies in the U.S. market.
- Analyzed value of narrowband PCS and IVDS spectrum portfolio.
- Directed, led analysis and authored report concerning valuations of wireless spectrum in the Middle East-North African (MENA) region for an international wireless operator.
- Directed, led analysis and authored report concerning impact of additional wireless operators on spectrum values for the telecommunications regulator in the Kingdom of Jordan.

Arbitration, Special Investigations and Commercial Litigation

- International Arbitration (satellite communications): Authored expert report concerning the impact of an alleged breach of contract on lost profits in a 23 country business operation concerning a satellite communications business. Performed detailed financial modeling to determine revenues, net income and net present value using risk adjusted discount rates for a satellite service provider.
- Forensic Analysis and Special Investigation: Directed consulting team and authored report for the forensic analysis of the economics, financial reporting and accounting associated with allegation of accounting and financial improprieties by Global Crossing. Worked on behalf of

the Special Committee on Accounting Matters composed of a subset of (and reporting to) the Board of Directors of Global Crossing Ltd. Analysis involved determination of basis for revenue recognition for concurrent (i.e., "swap") transactions. Analysis included in report by the Special Committee entitled "The Concurrent Exchange of Fiber Optic Capacity and Services Between Global Crossing and its Carrier Customers." January 2003.

- Commercial Litigation: Directed expert consulting team in litigation matter concerning the deployment schedule of bandwidth on a major undersea cable project. Case involved allegations of breach of contract. Case work involved modeling of undersea fiber optic bandwidth in major undersea crossings and financial analysis of project viability.
- Forensic Analysis and Securities Litigation: Directed consulting team and led technical analysis concerning accounting and financial disclosure on behalf of the defendant in a class action against corporate officers, directors, controlling shareholders and the company's outside auditors alleging violations of the Securities Act of 1993 and the Securities Exchange Act of 1934. Scope of case involved accounting and disclosure treatment of complex leases.
- Special Investigations and Audits: Directed project teams, led technical analysis and authored reports in multiple special investigations and audits of management, operations and finance and accounting on behalf of regulatory utility commissions. Special investigations and audits involved allegations of improper cross subsidization and/or transfer pricing practices by regulated utilities (telecommunications, electric and/or natural gas) and their effect on rates charged to consumers. Special investigations and audits were conducted for regulatory commissions in Alabama, Kentucky, Maryland, New York and Pennsylvania.
- Commercial Litigation (broadband communications): Provided expert testimony concerning the estimate of commercial damages stemming from an alleged breach of contract associated with relocating infrastructure assets. Public Service Company of New Mexico vs. Smith Bagley, Inc. and Lite Wave Communications LLC In The United States District Court For The District of New Mexico. March 2007.
- Commercial Litigation (wireline communications): Developed analysis and supported expert testimony concerning damages associated with cable breaks and disruption of wholesale transport services. Analysis involved estimating lost profits and determining replacement cost of temporarily lost capacity. MCI WorldCom Network Services, Inc. v. MasTec, Inc. before the United States District Court Southern District of Florida, Case No. 01-2059-CIV-GOLD. May 2002.

TESTIMONY

Declarations of William P. Zarakas Before the Federal Communications Commission In the Matter of Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 16-143, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593. Declaration of William P. Zarakas and Susan M. Gately (January 27, 2016); Supplemental Declaration of William P. Zarakas (March 24, 2016); Declaration of William P. Zarakas and Jeremy Verlinda (June 28, 2016, Attachment D to Comments of Sprint Corporation); Declaration of David E. M. Sappington and William P. Zarakas (June 28, 2016, Attachment E to Comments of Sprint Corporation); Further Supplemental Declaration of William P. Zarakas (August 9, 2016, Attachment A of Reply Comments of Sprint Corporation).

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Declarations Before the Before the Federal Communications Commission In the Matter of Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Comcast to Assign or Transfer Control of Licenses, Federal Communications Commission, MB Docket No. 10-56. Analysis of the FCC's Vertical Foreclosure and Nash Bargaining Models Applied To The Proposed Comcast-Time Warner Cable Transaction (December 21, 2014) and Supplemental Declaration: Analysis of the FCC's Vertical Foreclosure and Nash Bargaining Models Applied To The Proposed Comcast-Time Warner Cable Transaction (March 5, 2015).

Before the Public Utilities Commission of the State of Hawaii, In The Matter of Public Utilities Commission Instituting an Investigation to Reexamine the Existing Decoupling Mechanisms for Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited, Docket No. 2013-1041, On Behalf of the Hawaiian Electric Companies. Report: "Targeted Performance Incentives: Recommendations to the Hawaiian Electric Companies," Prepared For The Hawaiian Electric Companies, William P. Zarakas and Philip Q Hanser, September 15, 2014.

Before the New Mexico Public Regulatory Commission, In The Matter Of The Application of TECO Energy, Inc., New Mexico Gas Company, Inc. and Continental Energy Systems, LLC, For Approval of TECO Energy Inc.'s Acquisition of New Mexico Gas Intermediate, Inc. and For All Other Approvals and Authorizations Required To Consummate and Implement The Acquisition, Utility Case No. 13-00231-

UT, On Behalf of TECO Energy, Inc., New Mexico Gas Company, Inc. and Continental Energy Systems, LLC, Joint Applicants. March 2014.

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"Review and Analysis of Service Quality Plan Structure In The Massachusetts Department of Public Utilities Investigation Regarding Service Quality Guidelines For Electric Distribution Companies and Local Gas Distribution Companies." Philip Q Hanser, David E. M. Sappington and William P. Zarakas, Massachusetts D.P.U. 12-120, March 2013.

"Alaska Mobile Broadband Cost Model, Before The Federal Communications Commission In The Matter Of Connect America Fund and Universal Service Reform – Mobility Fund. WC Docket No. 10-90 and WT Docket No. 10-208A." William P. Zarakas and Giulia McHenry, February 2013

Expert Report of William P. Zarakas In The United States District Court For The Northern District of Florida MCI Communications Services, Inc., Plaintiff v. Murphree Bridge Corporation, Defendant, Case No. 5:09-cv-337, February 19, 2010.

Testimony of William P. Zarakas Before The Copyright Royalty Judges, Library of Congress, Washington D.C. In The Matter of Distribution of the 2004 and 2005 Cable Royalty Funds, Docket No. 2007-3 CRB CD 2004-20. June 1, 2009.

Declaration of William P. Zarakas In The Circuit Court of Fairfax County, Virginia In The Matter of Sharon Dougherty, Plaintiff Vs. Thomas J. Dougherty, Defendant Case No. CL 2007-008757. October 2008.

Expert report provided in Public Service Company of New Mexico vs. Smith Bagley, Inc. and Lite Wave Communications LLC In The United States District Court For The District of New Mexico. March 2007.

Expert report entitled "Comparative Market Value Analysis of Upper 700 MHz Public Safety Spectrum" in FCC WT Docket no. 96-86 (In the Matter of The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010). June 2006.

Expert report entitled "Analysis of Potential Lost Profits Associated With The Alleged Breach of Contract Between Orbcomm and Orbcomm Asia Limited" before the American Arbitration Association. May 2006.

Direct testimony before the Federal Communications Commission in the matter of *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended, for*

Forbearance from Sections 251(c)(3) and 251(d)(1) In the Anchorage LEC Study Area, WC Docket No. 05-281, January 9, 2006.

Expert report co-authored with Dorothy Robyn Before the U.S. House of Representatives Committee on Energy and Commerce and the U.S. Senate Committee on Commerce, Science and Transportation regarding the value of wireless spectrum in the 700 MHz band. Letters, May 18, 2005.

Direct and rebuttal testimony before the Federal Communications Commission in the matter of *Virginia Cable Telecommunications Association v. Virginia Electric and Power Company, d/b/a Dominion Virginia Power and Dominion North Carolina Power*, PA No. 01-005, December 21, 2001.

Expert report Before the U.S. Securities and Exchange Commission included in Form U-1 Application/ Declaration Under The Public Utility Holding Company Act of 1935 in the combination of Energy East Corporation with RGS Energy Group, Inc. (June 20, 2001) in Exhibit J-1, entitled "Analysis Of The Economic Impact Of A Divestiture Of The Gas Operations Of Rochester Gas And Electric Corporation," May 15, 2001.

Expert report Before the U.S. Securities and Exchange Commission included in Form U-1 Application/ Declaration Under The Public Utility Holding Company Act of 1935 in the acquisition by Sierra Pacific Resources of Portland General Electric Company, 2000 in Exhibit H-1, entitled "Analysis Of The Economic Impact Of A Divestiture Of The Gas Operations Of Sierra Pacific Resources," January 31, 2000.

Before the U.S. Securities and Exchange Commission included in Form U-1 Application/ Declaration Under The Public Utility Holding Company Act of 1935 in the combination of Energy East Corporation with CMP Group, Inc. and with CTG Resources, Inc. in Exhibit J-1, entitled "Analysis Of The Economic Impact Of A Divestiture Of The Gas Operations Of Energy East," October 29, 1999.

Before the Supreme Court of the State of New York, County of Niagara, Supplemental Affidavit in *Village of Bergen, et al. vs. Power Authority of the State of New York*, February 1999.

Rebuttal Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the North Carolina Utilities Commission, Docket No. P-100, SUB 133D, Filed March 9, 1998; *In Re: Proceeding to Determine Permanent Pricing for Unbundled Network Elements*.

Direct Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the North Carolina Utilities Commission, Docket No. P-100, SUB 133D, Filed December 15, 1997; *In Re: Proceeding to Determine Permanent Pricing for Unbundled Network Elements*.

Rebuttal Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the South Carolina Public Service Commission, Docket No. 97-374-C, Filed November 25, 1997; *In Re: Proceeding to Review BellSouth Telecommunications, Inc.'s Cost Studies for Unbundled Network Elements*.

Direct Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Florida Public Service Commission, Docket Nos. 960757-TP/960833-TP/960846-TP/960916-TP/971140-TP, Filed November 13, 1997; *In Re: Petition of AT&T, MCI, and MFS for Arbitration with BellSouth Concerning Interconnection, Rates, Terms and Conditions of a Proposed Agreement*.

Direct Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the South Carolina Public Service Commission, Docket No. 97-374-C, Filed November 3, 1997; *In Re: Proceeding to Review BellSouth Telecommunications, Inc.'s Cost Studies for Unbundled Network Elements*.

Rebuttal Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Tennessee Regulatory Authority, Docket No. 97-01262, Filed October 17, 1997; *In Re: Contested Cost Proceeding to Establish Final Cost Based Rates for Interconnection and Unbundled Network Elements*.

Direct Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Tennessee Regulatory Authority, Docket No. 97-01262, Filed October 10, 1997; *In Re: Contested Cost Proceeding to Establish Final Cost Based Rates for Interconnection and Unbundled Network Elements*.

Rebuttal Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Alabama Public Service Commission, Docket No. 26029, Filed September 12, 1997; *In Re: Generic Proceeding: Consideration of TELRIC Studies*.

Rebuttal Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Georgia Public Service Commission, Docket No. 7061-U, Filed September 8, 1997; *In Re: Review of Cost Studies, Methodologies and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services*.

Rebuttal Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Louisiana Public Service Commission, Docket Nos. U-22022/22093, Filed September 5, 1997; *In Re: Review of Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies to Determine Cost of Interconnection Services and Unbundled Network Components, to Establish Reasonable, Non-Discriminatory, Cost-Based Tariff Rates*.

Direct Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Alabama Public Service Commission, Docket No. 26029, Filed August 29, 1997; *In Re: Generic Proceeding: Consideration of TELRIC Studies*.

Direct Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Louisiana Public Service Commission, Docket Nos. U-22022/22093, Filed July 11, 1997; *In Re: Review of Consideration of BellSouth Telecommunications, Inc.'s TSLRIC and LRIC Cost Studies to Determine Cost of Interconnection Services and Unbundled Network Components, to Establish Reasonable, Non-Discriminatory, Cost-Based Tariff Rates*.

Direct Panel Testimony of William P. Zarakas and D. Daonne Caldwell before the Georgia Public Service Commission, Docket No. 7061-U, Filed April 30, 1997; *In Re: Review of Cost Studies,*

Methodologies and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services.

Direct and rebuttal testimony Before the Virginia State Corporation Commission on behalf of United Telephone - Southeast, Inc. and Centel Corporation, May 1994.

Direct and rebuttal testimony Before the Tennessee Public Service Commission on behalf of United Telephone - Southeast, Inc., Docket No. 93-04818, January 28, 1994.

Direct and rebuttal testimony Before the Florida Public Service Commission on behalf of Southern Bell Telephone & Telegraph Company, Docket No. 920260-TL, December 10, 1993.

Direct and rebuttal testimony Before the Tennessee Public Service Commission on behalf of South Central Bell, Docket Nos. 92-13527 and 93-00311, March 22 and March 29, 1993.

PAPERS AND PUBLICATIONS

Forthcoming in *The Electricity Journal*: "Two-Sided Markets and the Utility of the Future, How Services and Transactions Can Shape the Utility Platform."

"DER Incentive Mechanisms as a Bridge to the Utility of the Future," by William P. Zarakas, Frank C. Graves and Heidi Bishop, presented at SNL Knowledge Center's Energy Utility Regulation Conference: Strategies for Profit and Reliability, December 14, 2016.

Electric Utility Services and Evolving Platforms in the Mid-Atlantic Region," by William Zarakas, presented at the Mid-Atlantic Conference of Regulatory Utilities Commissioners (MACRUC) 20th Annual Education Conference, Williamsburg, VA, June 23, 2015.

"Growth Prospects and Shifting Electric Utility Business Models: Retail, Wholesale and Telecom Markets," by William P. Zarakas, *The Electricity Journal*, Volume 28, Issue 5, June 2015.

"Do We Need a New Way to Regulate Electric Utilities?," by William P. Zarakas, presented at the Energy Bar Association 2015 Annual Meeting, Washington, DC, May 6, 2015.

"Investing In Electric Reliability and Resiliency," by William P. Zarakas, presented at the NARUC 2014 Summer Meeting - Joint Electricity and Critical Infrastructure Committees, Dallas, TX, July 15, 2014.

"Utility Investments in Resiliency: Balancing Benefits with Cost in an Uncertain Environment," by William P. Zarakas, Sanem Sergici, Heidi Bishop, Jake Zahniser-Word and Peter S. Fox-Penner, *The Electricity Journal,* Volume 27, Issue 5, June 2014.

"Infrastructure and Competition in the Electric Delivery System," by William P. Zarakas, *The Electricity Journal*, Volume 26, Issue 7, September 2013.

"Low Voltage Resiliency Insurance, Portable small-scale generators could keep vital services on line during a major power outages," by William Zarakas, Frank Graves, and Sanem Sergici, forthcoming *Public Utilities Fortnightly* September 2013.

"Finding the Balance Between Reliability and Cost: How Much Risk Should Consumers Bear?," by William P. Zarakas and Johannes P. Pfeifenberger, presented at the Western Conference of Public Service Commissioners, Santa Fe, NM, June 3, 2013

"The Utility of the Future: Distributed or Not?," by William P. Zarakas, presented at Advanced Energy 2013, New York, NY, April 30, 2013

"Rates, Reliability, and Region," by William P. Zarakas, Philip Q Hanser, and Kent Diep, *Public Utilities Fortnightly*, January 2013

"Approaches to Setting Electric Distribution Reliability Standards and Outcomes," by Serena Hesmondhalgh, William P. Zarakas, and Toby Brown, The Brattle Group, Inc., January 2012

"Measuring Concentration In Radio Spectrum License Holdings," presented at the Telecommunications Policy Research Conference (TPRC), George Mason University, September 26, 2009 (with Coleman Bazelon).

"Structural Simulation of Facility Sharing: Unbundling Policies and Investment Strategy in Local Exchange Markets," White Paper, July 2005 (with Glenn A. Woroch, Lisa V. Wood, Daniel L. McFadden, Nauman Ilias, and Paul C. Liu).

"Betting Against The Odds? Why broadband over power lines (BPL) can't stand alone as a high-speed Internet offering." *Public Utilities Fortnightly*, April 2005, pp. 41-45 (with Kenneth J. Martinian).

"The Impact of the Number of Mobile Operators on Consumer Benefit," White Paper, March 2005 (with Kenneth J. Martinian and Carlos Lapuerta).

"Wholesale Pricing and Local Exchange Competition", Info, Volume 6, Number 5, 2004, pp. 318-325 (with Lisa V. Wood and David E. M. Sappington).

"Regulatory Performance Measurement Plans and the Development of Competitive Local Exchange Telecommunications Markets", Working Paper, November 2003 (with David E. M. Sappington, Lisa V. Wood and Glenn A. Woroch).

ATTACHMENT B: JEREMY A. VERLINDA CV

JEREMY A. VERLINDA

Senior Associate

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Dr. Verlinda specializes in competition issues in both antitrust and regulatory contexts. He has provided and supported testimony in competition matters before U.S. district courts, federal regulatory agencies, and various state public utilities commissions, as well as before competition and regulatory agencies in Canada and Australia. He has also supported damages analyses in price fixing and arbitration proceedings around the world. He has particular expertise in energy markets, telecommunications, media markets, transportation, financial markets, health care, and advertising.

Dr. Verlinda has provided direct consulting services to firms around the world regarding antitrust risks associated with planned or potential acquisitions and also has assisted them with subsequent merger proceedings in front of the reviewing agencies. Dr. Verlinda has prepared white papers on vertical integration risk and co-authored a series of reports evaluating the competitiveness of the Canadian wireless telecommunications industry in joint filings with the Canadian Competition Bureau before the Canadian Radio-television and Telecommunications Commission.

Prior to joining The Brattle Group, Dr. Verlinda spent 8 years at the *Antitrust Division* of the U.S. *Department of Justice*, where his casework focused on monopolization claims in the payments and electricity industries, criminal price fixing in air cargo and financial markets, and merger analysis in the consumer goods, airlines, entertainment, and electricity industries. In electricity markets, Dr. Verlinda has particular expertise in merger simulation, including incorporation of system dispatch accounting for transmission grid and plant operating characteristics.

Dr. Verlinda received his Ph.D. in Economics from the University of California – Irvine, where his primary research examined the relationship between pricing dynamics and market structure in retail gasoline markets. Dr. Verlinda also specialized in econometrics, focusing in particular on demand estimation, market simulation, and the application of Bayesian methods to discrete choice analysis and panel and time series data.

EDUCATION

Ph.D. Economics, University of California – Irvine, June 2005
Dissertation: Essays on Pricing Dynamics, Price Dispersion, and Nested Logit Modelling
B.S. Economics, University of Washington, March 1999
B.A. Business Administration, University of Washington Business School, March 1999

AREAS OF EXPERTISE

- Competition & Antitrust (including merger and conduct analysis)
- Econometrics and Statistics (including demand estimation, merger and entry simulation, and damages calculations)
- Industrial Organization

SELECTED EXPERIENCE

- Provide ongoing expert support on antitrust risks for potential acquisitions in various industries.
- Provide ongoing expert support for defendants facing fines for anticompetitive coordinated conduct in foreign exchange markets.
- Provide ongoing expert support for a third party in DOJ and state agency review of a merger in the telecommunications industry.
- Provide ongoing expert support and testimony in an alleged monopolization claim in the oil transportation industry.
- Provide ongoing expert support for defendants facing damages claims resulting from a multinational price fixing cartel, including preparation of expert reports.
- On behalf of a global investment bank in connection with a European Commission investigation of alleged collusion to manipulate foreign exchange benchmarks during 2008-2012, co-authored a report submitted to the EC on calculating the value of sales in foreign exchange transactions for determination of possible cartel fines.
- On behalf of merging parties, provided expert support and drafted a white paper submitted to the Canadian Competition Bureau in a wireless telecommunications merger.
- On behalf of Sprint Corporation, submitted testimony and support in a regulatory proceeding before the Federal Communications Commission on competition issues in dedicated internet bandwidth services.
- On behalf of Australian natural gas pipeline operator APA Group, prepared a white paper (with co-authors) on a framework for antitrust review of integration in network industries.

- On behalf of merging electric and gas utilities, provided direct expert support on antitrust and regulatory review risk. Prepared analyses for direct presentation before the Federal Trade Commission. Oversaw preparation of expert testimony before state utility commission regarding competitive effects of the merger.
- On behalf of merging electric utilities, supported various experts' testimonies in multiple state public utility commission proceedings, including issues of horizontal and vertical market power as well as incentives and ability to deter innovation, deter entry, or otherwise raise rivals costs.
- On behalf of an acquisition target in the aerospace industry, provided support on global antitrust risks associated with unilateral effects in bargaining markets, as well as conglomerate issues associated with bundling.
- For the Canadian Competition Bureau, provided analysis of risk of foreclosure and raising rivals costs concerns regarding vertical integration in an acquisition review in the mobile telecommunications industry.
- Provided consulting services to a third party intervener in a state public utility commission electric-utility merger review proceeding. Gave expert advice on corporate governance issues, incentives for the merged firm to raise rivals costs, and incentives to deter entry.
- For the Canadian Competition Bureau in proceedings before the Canadian Radio-television and Telecommunications Commission, co-authored a series of reports on the competitiveness of the wireless communications industry. Evaluated the structural performance of the market's pricing, concentration, and degree of wireless penetration. Conducted demand estimation and developed a model to simulate effects of de novo entry, including consumer surplus benefits, losses to incumbent carriers, and expected profits and viability of the entrant. Presented estimates of network operators' vertical incentives to raise wholesale costs of small carriers and mobile virtual network operators.
- On behalf of plaintiff-interveners in the DOJ's challenge of Texas voter ID laws, supported expert testimony that estimated racial disparity in costs and impact of obtaining an ID.
- For a private antitrust suit before a U.S. district court, supported defendants' expert testimony in support of a *Daubert* challenge of plaintiffs' expert. Evaluated complex econometric simulation models of consumer demand and entry and demonstrated the irrational behavioral assumptions for consumers and firms in plaintiffs' expert's economic model.

- For a foreign owner of a gas-fired energy facility in international arbitration proceedings, supported expert testimony calculating damages from forced early termination of a gas supply agreement. Evaluated expected economic dispatch over the life of the contract and constructed a cash flow model to predict lost profits.
- For a private antitrust suit before a U.S. district court, supported plaintiff's expert testimony regarding alleged monopolization claims. Evaluated issues of disparate pricing in two-sided markets and the potential market distortions from price discrimination and exclusive agreements.
- While at the *Department of Justice*, conducted **merger review** in the following investigations: Exelon/PSEG (energy), Delta/Northwest (airlines), LiveNation/Ticketmaster (entertainment), Mirant/RRI (energy), Allegheny/First Energy (energy), Exelon/Constellation (energy), 3M-Avery (consumer products), Flowers/Hostess Brands (consumer products).
- While at the *Department of Justice*, investigated claims of **monopolization** conduct in the following cases: Google/Yahoo (search and advertising); American Express/Visa/MasterCard (payments), Visa (payments), Entergy (energy), BlueCross/BlueShield of Michigan (health insurance).
- While at the *Department of Justice*, evaluated claims of **price discrimination** and calculated damages and volume of commerce in the following industries and/or cases: municipal bonds, air cargo shipments, and LIBOR manipulation.

REPORTS

Comments of Romkaew Broehm, Jeremy Verlinda, and James Reitzes, Docket No. RM16-21-000 (filed November 28, 2016), Modifications to Commission Requirements for Review of Transaction Under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act.

Declaration of William Zarakas and Jeremy Verlinda, attached at Exhibit D in Comments of Sprint Corporation, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593 (filed June 28, 2016), In the Matter of Special Access for Price Cap Local Exchange Carriers AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services.

Benefits and Costs of Integration in Transmission/Transportation Networks: An Application to Eastern Australia Gas Markets. Prepared for APA Group in ACCC proceeding *Inquiry into the east coast gas market*, April 2016 (July 2016; with Toby Brown, Paul Carpenter, James Reitzes, and Neil Lessem).

Canadian Wireless Market Performance and the Potential Effect of an Additional Nationwide Carrier. Prepared for Canadian Competition Bureau for CRTC Proceeding 2014-76 (May 2014; with Kevin Hearle, Giulia McHenry, James Reitzes, and Coleman Bazelon) (Available from the CRTC).

Vertical Foreclosure in Canadian Wholesale Services Markets: Supplemental Filing. Prepared for Canadian Competition Bureau for CRTC Proceeding 2014-76 (Aug 2014; with Kevin Hearle, Giulia McHenry, James Reitzes, and Coleman Bazelon) (Available from the CRTC).

Canadian Wireless Market Performance and the Potential Effect of an Additional Nationwide Carrier: Response to Intervener Filings and Oral Testimony. Prepared for Canadian Competition Bureau for CRTC Proceeding 2014-76 (Oct 2014; with Kevin Hearle, Giulia McHenry, James Reitzes, and Coleman Bazelon) (Available from the CRTC).

PUBLICATIONS

Do Rockets Rise Faster and Feathers Fall Slower in an Atmosphere of Local Market Power? Evidence from the Retail Gasoline Market, Journal of Industrial Economics (September 2008).

A Comparison of Two Common Approaches for Estimating Marginal Effects in Binary Choice Models, Applied Economics Letters (February 2006).

A Bayesian Analysis of Tree Structure Specification in Nested Logit Models, Economics Letters (April 2005).

Mimeographs

The Effect of the Internet on Pricing in the Airline Industry (with Leonard Lane) (Available on SSRN)

The Effect of Market Structure on the Empirical Distribution of Airline Fares (Available on SSRN)

Works in Progress

The Intersection of Antitrust and Market Manipulation Law (with Shaun D. Ledgerwood), submitted for publication (December 2016).

Calculating Reasonable Royalty Damages Using Conjoint Analysis (with Greg Allenby, Peter Rossi, Lisa Cameron, and Yikang Li), submitted for publication (September 2016).

A review of the airline hub effects from the Delta-Northwest Merger

Estimating the effects of entry in the wireless telecommunications industry in Canada

Merger Analysis in Nodal-Price Electricity Markets: Residual Demand from Powerflow Models

On the Implications for Geographic Market Definition in Nodal-Price Electricity Markets

ACADEMIC HONORS AND FELLOWSHIPS

University of California Transportation Center Fellowship: Fall 2003 to Spring 2004
School of Social Sciences Predissertation Fellowship: Winter 2003
School of Social Sciences Summer Research Fellowship: Summer 2001, 2002, 2004
Institute for Mathematical Behavior Sciences Summer Fellowship: Summer 2002
Invited Panelist to the Teaching Assistant Professional Development Program, Instructional Resources Center, UC, Irvine: Summer 2003
National Scholar Fellowship: UC, Irvine: Fall 1999 to Spring 2001

OTHER HONORS AND AWARDS

"Award of Distinction" – Antitrust Division, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of August 2017, I caused a copy of the foregoing public, redacted version of the Petition to Deny of DISH Network L.L.C. to be filed electronically with the Commission using the ECFS system and caused a copy of the foregoing to be served upon the following individuals by First Class Mail and electronic mail.

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