Before the
Federal Communications Commission
Washington, D.C. 20554

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

PETITION TO DENY OF AMERICAN CABLE ASSOCIATION

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road Seven Parkway
Center, Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government
Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

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I. EXECUTIVE SUMMARY AND INTRODUCTION

The American Cable Association ("ACA") files this petition to deny in response to the Commission's Public Notice announcing its acceptance for filing of applications[1] seeking consent to the transfer of control of subsidiaries of Tribune Media Company ("Tribune") to Sinclair Broadcast Group, Inc. ("Sinclair") (collectively, "the Applicants") and establishing a pleading cycle for the proposed transaction.[2]

ACA urges the Commission to deny the proposed acquisition of Tribune by Sinclair. The combination of the two companies would create a broadcasting behemoth (the "Combined Entity") with unprecedented control over both the national and local television markets—inflicting tremendous harm to competition and consumers.

If the Commission approves the proposed transaction, the Combined Entity would own:

- more than 200 full power stations nationwide post-transaction, comprising over 72 percent of the national audience, and in violation of the National Reach Cap (including at least one station in some of the nation's top media markets, including New York, Los Angeles, and Chicago);
- two top-four affiliates in ten of the fourteen markets where Sinclair and Tribune operate, in violation of the Commission's Local Television Ownership Rules; and additional stations in three local markets, adding to the over twenty markets where Sinclair already owns multiple stations.

The Commission must deny the applications, which on their face propose to transfer all of Tribune's assets to Sinclair through a stock-purchase transaction, because this transaction

[1] *See* Tribune Media Co. Comprehensive Exhibit at 1, MB Docket No. 17-179 (July 19, 2017) ("Comprehensive Exhibit").

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

would violate the Commission's National Cap Rule and the Local Television Ownership Rules.[3] Although the Applicants may hope that the Commission will propose to alter the rules at some future date or obtain a waiver of them,[4] the Commission is required to evaluate the applications under the media ownership rules as they exist *today*. These rules—as the Applicant's acknowledge—mandate divestiture.[5] Nor could the Commission properly waive its National Cap Rule, which is statutory and non-waivable. Furthermore, the Applicants have failed to demonstrate that the deal is in the public interest—they have not submitted with their applications enough information to meet the minimum threshold.

To overcome the fact that the proposed transaction violates the Commission's rules, the Applicants appear to envision the Commission waiving or modifying its ownership rules. But even if the transaction were not per se unlawful, the Commission should still deny it because this massive consolidation is not in the public interest. By controlling two top-four rated stations in multiple markets, the massive conglomerate formed by the transaction would have even more leverage over retransmission consent fee negotiations in those markets than the Applicants already do. The Combined Entity's vast national scale would similarly harm consumers by leading to higher retransmission consent fees and the inclusion of after-acquired clauses in MVPD retransmission consent agreement, both of which will lead to higher consumer costs, and blackouts disrupting viewing for even more consumers. The massive new entity would also use its leverage to force carriage of programming it owns and stations to be named later that consumers do not desire and often have never even heard of before.

[3] 47 C.F.R. § 73.3555(b), (e).

[4] Comprehensive Exhibit at 12 (indicating that the Applicants may file amendment to the Applications "[t]o 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").

[5] 47 C.F.R. § 73.3555(e); *id.* § 73.3555(b); *see also* Comprehensive Exhibit at 1, 12.

II. STANDING

The ACA represents approximately 750 small and medium-sized cable operators, incumbent telephone companies, municipal utilities, and other local providers of multichannel video programming services, as well as voice and broadband Internet access services. ACA member companies negotiate retransmission consent for local broadcast television stations owned by Sinclair and Tribune in numerous designated market areas ("DMAs"), and expect to negotiate in the future for continued retransmission of these stations. ACA has standing to prosecute this Petition because its members would face threats of substantial harm if the proposed assignments were approved.[6]

To establish standing, a party must show an "actual [or] imminent" injury that is both "fairly trace[able]" to the proposed agency action and "likely" to be "redressed by a favorable decision."[7] Agency action that enables "transactions that have the clear and immediate *potential*" for adverse competitive impact qualifies as injury in fact.[8] Approving a transaction that will make it substantially more difficult for ACA members to negotiate on a level playing field with respect to retransmission consent fees in light of the Combined Entity's significantly larger size and scope and will trigger after-acquired station clauses with respect to Tribune stations that Sinclair seeks to acquire and that therefore will automatically increase the price of retransmission consent paid by ACA members pursuant to their Sinclair retransmission agreements satisfies this standard. And, as described in this Petition, such injury is traceable to the Commission's action and would be redressed by the requested relief.

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[6] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[7] *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998).

[8] *Id.* (quoting *Associated Gas Distrib. v. FERC*, 899 F.2d 1250, 1258 (D.C. Cir. 1990)).

III. STANDARD OF REVIEW

Pursuant to Section 310(d) of the Communications Act ("the Act"), the Commission must determine whether the proposed transfer of licenses will serve the public interest, convenience, and necessity.[9] The first step in that determination is whether the proposed transaction complies with the Act, other applicable statutes, and the Commission's rules.[10] Only after determining that the transaction complies with applicable law will the Commission consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.[11]

The Commission must then balance any potential public interest harms of the proposed transaction against any potential public interest benefits, and the Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest on balance.[12] In other words, it is not enough for the Applicants to prove that the transaction will not be harmful; they must prove that it will affirmatively promote the "broad aims of the Communications Act," which include a deeply rooted preference for preserving and

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[9] 47 U.S.C. § 310(d); *see also In re 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, 6336-37 ¶ 26 (2016) ("*Charter-TWC-BrightHouse Order*"); *In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4247 ¶ 22 (2011) ("*Comcast-NBCU Order*").

[10] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6336-37 ¶ 26.

[11] *Id.*; *In re Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, 26 FCC Rcd 16,184, 16,185 ¶ 5 (WTB 2011).

[12] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6336-37 ¶ 26; *In re 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, 9139-40 ¶ 18 (2015) ("*AT&T-DIRECTV Order*").

enhancing competition.[13] Furthermore, those benefits must be transaction specific, verifiable, and for the benefit of consumers rather than just the companies.[14]

The Commission applies a "sliding scale approach" to evaluating benefits.[15] Where, as in this proceeding, potential harms appear both substantial and likely, the Applicants' demonstration of claimed benefits must show a higher degree of magnitude and likelihood than the Commission would otherwise demand.[16] If the Commission is unable to find that a proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, the Commission must designate the applications for a hearing.[17]

IV. THE COMMISSION MUST DENY THE PROPOSED TRANSACTION BECAUSE IT VIOLATES EXISTING RULES THAT PROHIBIT PRECISELY THIS TYPE OF MEDIA CONCENTRATION

A. The Current Rules Prohibit the Transaction

The applications in this proceeding must be denied for the simple reason that the proposed transaction would be unlawful. The Commission's existing, statutory National Cap Rule prohibits commercial television broadcast licensees from exceeding a national audience cap of 39 percent.[18] The Local Television Ownership Rules, moreover, prohibit a broadcaster from owning two stations with overlapping contours other than in the largest markets, and then

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[13] *Id.*

[14] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6479-80 ¶¶ 316-318; *Comcast-NBCU Order*, 26 FCC Rcd at 4330-31 ¶ 226.

[15] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6480 ¶ 319; *Comcast-NBCU Order*, 26 FCC Rcd at 4331 ¶ 227.

[16] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6480 ¶ 319.

[17] 47 U.S.C. § 309(e); *see also AT&T-DIRECTV Order*, 30 FCC Rcd at 9140 ¶ 18.

[18] *See* 47 C.F.R. § 73.3555(e).

only if one of the stations is not among the top-four rated stations in the market and there are at least eight independent "voices" within the market.[19]

The Applicants readily acknowledge in their public interest statement that the proposed transaction would violate both of these rules.[20] By the Applicants' own calculations, the Combined Entity's national audience would exceed the 39 percent maximum by 6.5 percentage points.[21] And, as the Applicants state themselves, the proposed transaction would also result in the Combined Entity's violation of the Local Television Ownership Rules in ten separate DMAs.[22]

This should be the end of the matter. Though they have paid lip service to possible divestitures of these numerous impermissible assets,[23] the Applicants have, in fact, applied for approval for transfer of *all* Tribune licenses to Sinclair, and the Applicants have been conspicuously non-committal as to how they would ultimately comply with the rules through divestiture.[24] The FCC appears to have recognized as much in its Public Notice for this transaction, noting that, as a result of the proposed transaction, all Tribune licensee subsidiaries

[19] *See Id.* § 73.3555(b).

[20] Comprehensive Exhibit at 1; *see also id.* at 13-14 (describing the markets "where current FCC rules would not allow Sinclair to acquire the Tribune licenses").

[21] *See id.* at 26.

[22] *See id.* at 12-14.

[23] Although divestiture would not solve the transaction's problems, which required it to be denied, ACA notes that the Applicants have not committed to any specific divestiture plans, including any relevant divestiture parties, agreements for those divestitures, or timing. Nor have the Applicants committed to submit any details that may emerge in the future for the Commission and other parties to review before the Commission reaches a decision on the merger.

[24] Public Notice at 2. Notably, the proposed transaction is not one for the acquisition of specific assets; rather, it is a stock transaction by which Sinclair would acquire Tribune as a whole, including all of its licensees. *See* Agreement and Plan of Merger among Tribune Media Company and Sinclair Broadcast Group, Inc., Section 2.5 (May 8, 2017).

would become indirect subsidiaries of Sinclair and resorting to quoting verbatim the Applicants' precisely unclear declarations regarding divestiture.[25]

B. Waiver of the Commission's National Cap Rule Is Not Permissible Here

Despite acknowledging that the proposed transaction is unlawful, the Applicants state that, "[t]o the extent that there are changes, *or proposed changes*" to either the Commission's local or national television ownership limits, they "may file amendments to the applications to address such changes."[26]

The Commission should reject any attempt by the Applicants to avoid application of the National Cap Rule. To the extent the Applicants intend for the Commission to apply some other set of rules in reviewing the proposed transactions than the ones that apply, the Applicants' request is improper. In reviewing the transaction, the Commission's first task is to determine whether the transaction comports with applicable statutes and regulations. To skip over that analysis to consider—much less approve—whether the transaction would be permissible under different rules would be to disregard both the Commission's public interest standard[27] and

[25] *See, e.g.*, Public Notice at 2 (stating that Applicants "[i]ntend to take actions . . . 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" but "may file amendments" and will file applications "to the extent that divestitures may be necessary" (quoting Comprehensive Exhibit at 12).

[26] *See* Comprehensive Exhibit at 12, 26.

[27] *See* 47 U.S.C. § 310(d); *In re Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc. from Shareholders of Media General to Nexstar Media Group, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd 183, 191 ¶ 19 (WTB 2017) ("[T]he Commission must first determine whether the proposed transaction would comply with the specific provisions of the [Communications] Act, other applicable statutes, and the Commission's rules." (footnote omitted)).

proper agency rulemaking procedures.[28] The Commission's obligation is to consider the applications under the rules at the time the applications were filed.[29]

The National Cap Rule was established by statute and cannot be modified waived in order to approve a specific transaction.[30] Congress set out the 39 percent cap as part of the Consolidated Appropriations Act of 2004,[31] which was "heavily negotiated and painstakingly crafted in order to settle a recurring and particularly contentious media ownership issue."[32] As evidence that Congress intended for the rule to remain fixed, that statute removed the 39 percent cap from the Commission's review under Section 202(h) of the Act,[33] which otherwise permits the Commission to review and modify its media ownership rules. Thus, although the Applicants suggest that they could somehow bypass this rule through "changes or proposed changes,"[34] absent congressional action to change the current national ownership limit, the Commission lacks the authority to approve the license transfers the Applicants seek.

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[28] *See* 5 U.S.C. § 553(c) ("After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

[29] *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) ("The rule-making provisions of [the Administrative Procedures Act] . . . were designed to assure fairness and mature consideration of rules of general application. They may not be avoided by the process of making rules in the course of adjudicatory proceedings." (internal citation omitted)).

[30] *See* 5 U.S.C. § 706(2).

[31] Pub. L. No. 108-199, 118 Stat. 3, 99-100.

[32] *In re Amendment of Section 73.3555(e) of the Commission's National Television Multiple Ownership Rule*, Dissenting Statement of Commissioner Michael O'Rielly ("I know since I was there at the time and helped reach the agreement on behalf of a former employer with the staff of many Members of Congress, including former Senator Ted Stevens, who was the lead negotiator[.]"); *see also id*. ("I reject the assertion that the Commission has the authority to modify the National Television Ownership Rule in any way[.]").

[33] *Id.*

[34] Comprehensive Exhibit at 1.

C. The Applicants Have Failed to Provide Sufficient Information for the Commission to Engage in the Necessary Analysis

The applications should also be denied because the Applicants have failed to provide information sufficient for the Commission to fulfill its obligations under Section 310(d) and for petitioners and other commenters to evaluate and comment on the proposed transaction. The Applicants' three pages of putative public interest benefits fail to meet their burden to establish that the proposed transaction is in the public interest.

As the Applicants acknowledge, the proposed transaction, on its face, raises substantial legal and policy issues—including how (if at all) the proposed transaction will comply with relevant media ownership rules. The applications, however, provide only vague, non-committal, statements that they will cure those violations "as required," suggesting that the Applicants intend to attempt to skirt their obligations. The applications also fail to provide any testimony—or even explanation—as to the impact of the Combined Entity's increased bargaining power on competition, which, as discussed below, will be significant and harmful to the public. Nor do the applications provide any information by which the Commission or interested parties could quantify Applicants' claimed public interest benefits.[35] As such, and for the reasons ACA and others have explained previously, the applications are patently deficient.[36] This additional deficiency is another, independent basis on which the Commission should deny the proposed transaction.

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

[36] Motion of DISH Network, American Cable Association, and Public Knowledge for Additional Information and Documents and an Extension of Time at 2-7 (2017). Although the Commission denied ACA and other parties' request to require the Applicants to provide additional information in this proceeding, the Commission explained that the same arguments would be appropriate to raise through a petition to deny, which ACA does here. *See* Order, DA 17-731 (rel. Aug. 3, 2017).

V. THE COMBINED ENTITY'S COLLOSSAL SCALE AND INCREASED LOCAL PRESENCE WOULD HARM COMPETITION AND CUSTOMERS THROUGH DEMANDS FOR INCREASED RETRANSMISSION CONSENT FEES

A. The Combined Entity Would Be Substantially Larger and Have a Significantly Increased Presence in Local Markets

To overcome the fact that the transaction violates the Commission's rules, the Applicants appear to envision the Commission waiving[37] or modifying its ownership rules.[38] Even if the proposed transaction would not violate the Commission's rules, it would still fail the public interest component of the Commission's review. This proposed transaction—with its unprecedented scale and scope—would be contrary to the public interest because it would result in severe harm to competition and higher prices for consumers. Whether a proposed transaction would harm competition is at the heart of the Commission's public interest evaluation, and the "broad aims of the Communications Act" include a "deeply rooted preference" that competition be preserved and enhanced.[39] The Department of Justice ("DOJ") also reviews transactions for competitive harm and, in transactions smaller than this one, has required divestiture of local broadcast stations.

The proposed combination of Sinclair and Tribune would create a conglomerate with unprecedented control in local markets throughout the country. If the Commission were to approve this transaction, the Combined Entity would own more than 200 full power stations

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[37] It would not be appropriate to waive the Local Television Ownership Rules in this proceeding. Waivers may be granted only for "good cause shown," 47 C.F.R. § 1.3, and the Applicants have neither filed a waiver request, nor have they provided "a complete explanation as to why the waiver is desired," *id.* § 1.925(b)(1)-(2), meaning that the question is not properly before the Commission.

[38] The Commission should be sure not to short-circuit any input and review of the transaction should the Applicants make any modification to their application or seek a waiver, or should the Commission change any existing rule relevant to the transaction. The public—as well as the Commission—would need a full opportunity to consider such changes and their implications for the transaction.

[39] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6336-37 ¶ 26.

nationwide post-transaction, with at least one station in some of the nation's top media markets, including New York, Los Angeles, and Chicago.[40]

With this transaction, as is apparent from the applications, the Combined Entity would own two top-four rated affiliates in ten of the fourteen markets where Sinclair and Tribune overlap.[41] Moreover, the Combined Entity would also acquire an additional station in at least three markets—Washington D.C., Denver, and New Orleans[42]—adding to the over twenty markets where Sinclair currently owns multiple stations.[43] Given this significant growth and the likely effects of the transaction, the Commission must thoroughly review the impact of this transaction on the local broadcasting market. Failure to do so would harm the public interest, including small and rural cable operators and the communities they serve.

B. The Combined Entity Would Have Significant Market Power to Extract Higher Retransmission Consent Fees and Other Concessions

The proposed transaction would harm competition and consumers by empowering the Combined Entity to extract higher retransmission consent fees from cable operators and other MVPDs. Cable operators and other MVPDs have been at the losing end of retransmission consent fee negotiations for years. The Commission has recognized the shift in leverage toward broadcasters resulting from increased competition in the video distribution business since Congress first enacted retransmission consent as a means of ensuring that broadcasters received a share of the compensation that MVPDs received from carriage of local signals.[44]

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[40] *See* Robert Channick, *Sinclair to buy WGN owner Tribune Media for $3.9 billion plus debt*, Chicago Trib. (May 8, 2017), http://www.chicagotribune.com/business/ct-sinclair-acquires-tribune-media-0509-biz-20170508-story.html.

[41] Comprehensive Exhibit at 13-14.

[42] *See* Comprehensive Exhibit at 14-15.

[43] *See* Sinclair Broadcasting Group, Inc., Annual Report at 7-8 (Form 10-K) (Feb. 28, 2017).

[44] *In re Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10,327, 10,329-30 ¶ 3 (2015).

Long gone are the days when "most cable television subscribers ha[d] no opportunity to select between competing cable systems."[45] Whereas cable operators held 98 percent of MVPD market share in 1992 when the Cable Act was passed to ensure broadcasters could survive,[46] customers today have ever increasing options for consuming content, such as DBS, telco, and OVD services. As the Media Bureau recognized recently, "MVPD subscriber losses of the last few years have been driven by the 'increasingly elusive affordability of the legacy multichannel package and the fast-expanding availability of professional content outside the traditional channel bundle on legacy multichannel video delivery platforms.'"[47]

Partly as a result of this industry sea change, retransmission fees—which are ultimately passed on to customers—have risen by *tens of thousands* of percent in the last decade. Broadcasters have benefited from their market power for more than a decade by extracting skyrocketing retransmission consent fees, which have seen 40 percent annual increases over the last three years.[48] The rise is projected to continue. SNL Kagan predicts that retransmission consent fees could nearly double in the next five years, to $11.6 billion, up from a total of $28 million in 2005.[49] The number of blackouts has also increased, with over a hundred in 2016 alone, illustrating broadcasters' willingness to use their leverage to extract ever higher fees.

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[45] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a), 106 Stat. 1460, 1460.

[46] *Id.*; *see also* 138 Cong. Rec. 966, 982 (1992) (statement of Sen. Daniel Inouye) ("Today . . . local stations are totally at the mercy of local cable operators. There presently are absolutely no assurances that any local stations will be carried on a cable system.").

[47] *In re Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 596 ¶ 68 (2017) (citation omitted).

[48] Press Release, American Television Alliance, Bonten Media Group Pulls Plug on Consumers in 8 States (Jan. 20, 2017) ("According to an ATVA analysis of publicly available industry data and SNL Kagan data, fees have grown an astonishing 22,400 [percent] since 2005).

[49] *Id.*

Increased leverage also encourages broadcasters to demand the inclusion of "after-acquired station" clauses, particularly from smaller MVPDs.[50] These clauses typically entitle a broadcaster to roll into its existing retransmission consent agreement with an MVPD any other local broadcast stations it subsequently acquires, manages, or on whose behalf it otherwise obtains the rights to negotiate retransmission consent. This means that, when a broadcast station is purchased or enters into a management agreement, MVPDs lose the contract terms that they previously negotiated, and retransmission consent rates are reset at the higher level of the acquiring or managing company. These increased costs result in higher prices for consumers. Increased leverage also permits broadcasters to force carriage of programming it owns and stations to be named later that consumers often don't know or want.[51]

Allowing Sinclair to grow by acquiring more stations would only exacerbate these trends, giving the Combined Entity even greater leverage over negotiations than the Applicants already have.

1. The Combined Entity's Control of Two Top-Four Rated Stations in Multiple Markets Would Further Skew Negotiation Leverage to the Detriment of the Public

The harm to competition and to the public from the transaction as proposed would be particularly stark in the local markets where the Combined Entity would own two top-four rated stations, because of the Combined Entity's ability to increase retransmission consent fees. The Commission, Congress, and the Department of Justice have all recognized this harm in the past and taken steps to address.

The Commission has recognized that coordinated negotiation for stations in the same market is detrimental to MVPDs and, ultimately, customers and competition. In the

[50] *In re Implementation of Section 103 of the STELA Reauthorization Act*, MB Docket No. 15-216, Letter from Barbara Esbin to Marlene H. Dortch, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC (Mar. 7, 2016).

[51] *Id.*

Commission's 2014 Retransmission Consent Order, the Commission drew from Commission precedent and economic and antitrust literature—including, most prominently, an analysis of bilateral bargaining conducted by Professor William P. Rogerson and submitted by ACA—to analyze how joint negotiations result in higher retransmission consent fees.[52] Quoting from Professor Rogerson's paper, the Commission explained that, "if two broadcasters can collectively threaten to withdraw their signals unless they are each satisfied, then they will be able to negotiate higher fees for everyone than if each broadcaster can only threaten to withdraw its own signal unless the broadcaster is satisfied."[53] Such behavior harms competition "by increasing the potential for firms to coordinate over price or other strategic dimensions, and/or by reducing incentives of firms to compete with one another."[54]

The Commission went on to highlight the empirical evidence in the record, which revealed that, where a single entity controls retransmission consent negotiations for more than one top-four station in a single market, the average retransmission consent fees paid for such stations are significantly higher and supra-competitive.[55] As ACA pointed out at the time, "where a single entity controls retransmission consent negotiations for more than one Top Four station in a single market, the average retransmission consent fees paid for such stations was more than twenty percent higher than the fees paid for other Top Four stations in the same

[52] *See In re Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3359-64 ¶¶ 14-17 (2014) ("*Retransmission Consent Order*") (citing Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market, William P. Rogerson, May 27, 2011).

[53] *Retransmission Consent Order*, 29 FCC Rcd at 3360 ¶ 14 (quoting Rogerson Consolidated Negotiation Analysis at 3, 11).

[54] *Id.* at 3361 ¶ 14.

[55] *Id.* at 3362-63 ¶ 16.

markets."[56] Based on that and other data showing that broadcasters that control more than one station exert leverage that leads to supra-competitive retransmission consent fees, the Commission found that there was "ample support" to adopt a rule barring intra-market joint negotiation.[57] Soon after the Commission prohibited joint negotiations among big-four stations, Congress expanded the rule by statute to prohibit joint negotiation among *all* non-commonly owned broadcast stations.[58]

These same principles that drove the Commission and Congress to protect competition in local markets apply here. Although these protections address situations in which two different station owners collude in their negotiation tactics, the logic is equally relevant where the same entity owns both stations, as the Commission's Order makes clear.[59] In the Retransmission Consent Order, relying again on Rogerson, the Commission explained that the "collective withdrawal" mechanism, by which two owners threaten to blackout their stations, "is analogous

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[56] *Id.* (citing Rogerson at 11-12).

[57] *Id*. While the Commission examined data from 2014, there is no reason to believe that the owners who control negotiations for multiple stations in the same market exercise any less leverage today—quite to the contrary. In one recent example, Cable One faced demands of retransmission consent rate increases of more than *100 percent* over the previous contract for four different stations. The owner of those stations, Northwest Broadcasting, denied Cable One's request for an extension to continue negotiations and pulled all four channels from Cable One's lineup at midnight on December 31, 2016, coinciding with a national holiday weekend and just hours before the start of the final day of the National Football League's regular season. *See* CableOne, *Northwest Broadcasting in Carriage Negotiations for ABC, NBC, CBS and FOX* (Dec. 23, 2016), http://www.cableone.net/AAU/pressrelease/Pages/Cable-ONE,-Northwest-Broadcasting-in-Carriage-Negotiations-for-ABC,-NBC,-CBS-and-FOX.aspx; CableOne, *Northwest Broadcasting Drops Channels from Cable One Line-Up* (Jan 1, 2017), http://www.cableone.net/AAU/pressrelease/Pages/Northwest-Broadcasting-Drops-Channels-from-Cable-ONE-Line-Up.aspx; Charles McDonald, *Retransmission Consent: Time to Repeal and Replace*, Morning Consult (Jan. 24, 2017), https://morningconsult.com/opinions/retransmission-consent-time-repeal-replace/.

[58] STELA Reauthorization Act § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv) (requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission").

[59] *Retransmission Consent Order*, 29 FCC Rcd at 3360 ¶ 14 n.58.

to the ability of two merged, formerly competing sellers to prevent a buyer from playing one against the other."[60] The Commission therefore concluded that the Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines* were informative and provided further support of the prohibition on joint negotiations.[61]

The Commission reaffirmed its view that consolidation of local broadcast ownership is detrimental to competition as part of the Commission's regular reviews of its media ownership rules. Based on the combined record compiled in the 2010 and 2014 Quadrennial Review process, the Commission found that the Local Television Ownership Rule—which the proposed transaction would violate absent divestiture—"remains necessary to promote competition," and "will continue to promote viewpoint diversity by helping to ensure the presence of independently owned broadcast television stations in local markets and is consistent with our localism goal."[62] Competition among broadcast stations in local markets, the Commission found, motivates those stations to invest in better programming and to provide programming tailored to the needs and

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[60] *Id.*

[61] *Id.* (citing U.S. Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines*, § 6.2, issued August 19, 2010); *see also Ex Parte* Filing of Department of Justice, at 10, *In re 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 Nos. 09-182, 07-294, 04-245 (Feb. 20, 2014) ("DOJ Feb. 20 Ex Parte") ("Where a proposed cooperative agreement essentially combines the operations of two rivals and eliminates all competition between them . . . [the Department of Justice] analyzes the agreement as it would analyze a merger, regardless of how the arrangement has been labeled . . . .").

[62] *In re 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, 9870-71 ¶ 17 (2016) ("*Media Ownership Order*"); *see also In re 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*, Notice of Proposed Rulemaking, 26 FCC Rcd 17,489, 17,492 ¶ 5 (2011) (describing the Commission's "fundamental goals" of "competition, localism, and diversity"), *vacated by*, *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016).

interests of the local community.[63] Conversely, "mergers involving two of the top-four stations in a market *would be the most deleterious to competition*."[64]

These findings as to competition in local markets are rooted its view as to the harms associated with dual control explicitly in DOJ antitrust analysis.[65] DOJ, for its part, has also been clear that broadcasters have significantly higher leverage when they own two stations in the same DMA market.[66] For example, as part of its review of the Nexstar-Media General merger last year, DOJ required the combined company to divest from seven stations as a condition of approval, specifically on the grounds that the merger would "diminish competition in the negotiation of retransmission agreements with MVPDs" in those DMA markets.[67] As DOJ explained,

> The acquisition would provide Nexstar with the ability to threaten MVPDs in each of the DMA Markets with the simultaneous blackout of at least two major broadcast networks: its own network(s) and Media General's network(s). That threatened loss of programming, and the resulting diminution of an MVPD's subscribers and profits, would significantly strengthen Nexstar's bargaining position.[68]

DOJ correctly concluded that the upshot of Nexstar's increased bargaining position would be increased retransmission fees and, ultimately, higher MVPD subscription fees. The FCC agreed with DOJ's analysis, remarking that divestitures were necessary in light of "rising

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[63] *Media Ownership Order*, 31 FCC Rcd at 9873 ¶ 25.

[64] *Id.* at 9879 ¶ 40 (emphasis added); *see also id.* at 9881 ¶ 44 (reaffirming the conclusions in the FNPRM).

[65] *Retransmission Consent Order*, 29 FCC Rcd at 3359-61 ¶ 14.

[66] DOJ Feb. 20 Ex Parte at 17 (cited in *Retransmission Consent Order*, 29 FCC Rcd at 3360 ¶ 16).

[67] Nexstar Competitive Impact Statement at 8, *United States v. Nexstar Broadcasting Group, Inc.*, No. 16-cv-01772 (D.D.C. Sept. 2, 2016).

[68] *Id.* at 8-9.

retransmission consent fees as a potential competitive harm posed by the transaction in certain local markets."[69]

The same reasoning that led the Commission to bar joint negotiation by separately owned stations in the same market and to maintain the local ownership restrictions—and which motivated DOJ in Nexstar-Media General—applies equally here.[70] If approved, this transaction would create a major broadcast conglomerate with substantial market power locally.

2. Exceeding the Statutory National Cap Would Further Harm Competition and Would Stifle Diversity and Localism

As described above, the Commission's current, statutory National Cap Rule cannot be waived and therefore flatly prohibits approval of the proposed transaction on its face. That fact is definitive and prohibits approval of the license transfers that the Applicants seek. Even more, however, approving the proposed transaction to allow the Applicants to exceed the 39 percent cap would harm the public, without any corresponding, verifiable benefits.

Approving the transaction would enhance Sinclair's negotiating leverage by increasing its existing national audience reach, growing it from 89 markets and approximately 38 percent of television households to 105 markets and approximately 72 percent.[71] Even under the

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[69] *In re Consent to Transfer Control of License from Subsidiaries of Media General, Inc. from Shareholders of Media General, Inc. to Nexstar Media Group*, 32 FCC Rcd 183 ¶ 35 (2017).

[70] To the extent the Commission intends to relax its Local Television Ownership Rules, doing so would be a mistake for reasons ACA and others have detailed elsewhere. *See generally, e.g.*, American Cable Association, Opposition to Reconsideration, *In re 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50 (Jan. 24, 2017); Letter from Michael Nilsson, Counsel to the American Television Alliance, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-50 (Feb. 17, 2017); American Cable Association, Comments on FNPRM, *In re 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50 (Aug. 6, 2014).

[71] Although the Applicants suggest the deal will only slightly exceed the statutory 39 percent cap, this number relies upon the UHF discount. Without the discount, the actual reach of the combined entity is 72 percent. The Commission's decision in April 2017 to reinstate the UHF discount, under which only 50 percent of the television households in a market area are counted toward the audience reach of a UHF station for purposes of the national ownership cap of 39 percent, effectively doubles the national ownership cap to 78 percent. And though this rule has been changed, the technological basis originally

Commission's *current* ownership rules, post-transaction Sinclair would almost certainly reach well over half of the national audience and would own multiple stations in more than 25 markets, and in nearly all of those markets, one station would be a network affiliate. This increased presence would allow the Combined Entity to exercise precisely the sort of anti-competitive negotiation leverage that the Commission's joint-negotiation and ownership rules are intended to remedy.[72]

The Combined Entity's larger size as a result of the proposed transaction is also significant because Sinclair negotiates nationwide retransmission consent agreements, and has been willing to engage in multimarket blackouts.[73] The Combined Entity's vast scale would also harm consumers by leading to more and more widespread blackouts and ultimately to higher retransmission consent fees that will be passed to consumers in the form of higher subscription fees. Allowing the creation of such a massive conglomerate would snuff out any hope that small

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underpinning the rule has long been obsolete. In fact, since the successful completion of the DTV transition in 2009, it has become evident that UHF stations are now equal, if not superior, to VHF stations. Nonetheless, this change now allows a single entity to own commercial broadcast television stations reaching more than three-quarters of the U.S. population, or approximately 252 million people. This is like the case here, where the Combined Entity will reach 72 percent of television households. *See* Diana Marszalek, Sinclair Inks Deal to Buy Tribune for $3.9B, Broadcasting & Cable (May 8, 2017), http://www.broadcastingcable.com/news/local-tv/sinclair-inks-deal-buy-tribune-39b/165584.

[72] Recent history suggests there is a risk that Sinclair, in particular, would abuse its market power in retransmission consent negotiations. Last year, the Media Bureau found that Sinclair, in violation of the Commission's rules, had "negotiated retransmission consent on behalf of, or coordinated negotiations with, a total of 36 Non-Sinclair Stations with which it had JSAs, LMAs, or SSA, concurrently with its negotiation for retransmission consent of at least one Sinclair Station in the same local market." *In re Sinclair Broadcast Group, Inc.*, Order, 31 FCC Rcd 8576, 8579 ¶ 4 (MB 2016). To terminate the Bureau's investigation into Sinclair's practices, Sinclair agreed, among other things, to a settlement payment of $9.495 million and to be subject to a compliance plan requiring semi-annual reporting for three years.

[73] In 2015, for instance, Sinclair blacked out 129 stations in 79 markets in a dispute with DISH. Todd Spangler, *Dish Loses 129 Sinclair Stations in Biggest Blackout Ever*, Variety (Aug. 26, 2015), http://variety.com/2015/biz/news/dish-sinclair-tv-blackout-1201578634/; Carrie Wells & Colin Campbell, *Dish and Sinclair close to deal after blackout, FCC intervention*, Balt. Sun (Aug. 26, 2015), http://www.baltimoresun.com/business/bs-bz-sinclair-dish-20150826-story.html. Earlier this year, it blacked out six stations in six markets for 24 days in a dispute with Frontier. *Sinclair, Frontier End Blackout*, Broadcasting & Cable (Feb. 9, 2017), http://www.broadcastingcable.com/news/local-tv/sinclair-frontier-end-blackout/163230.

and rural providers could negotiate on a level playing field, giving the Combined Entity increased leverage to demand unwanted programming and stations to be named later that customers do not want and often have never even heard of. These higher costs and greater channel carriage demands, in turn, will hinder MVPDs' efforts to carry other diverse programming,[74] further harming the public.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny the applications.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: Ross Lieberman

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road Seven Parkway
Center, Suite 755
Pittsburgh, PA 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government
Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

August 7, 2017

[74] *See, e.g.*, *In re Promoting the Availability of Diverse and Independent Sources of Video Programming*, Joint Comments of the American Cable Association, MAVTV Motorsports Network, One America News Network and AWE, and Ride TV at 2-7, MB Docket No. 16-41 (Jan. 26, 2017).

DECLARATION

The foregoing *Petition to Deny of American Cable Association* has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on August 7, 2017

By: Ross Lieberman

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association

CERTIFICATE OF SERVICE

I, Ross Lieberman, hereby certify that, on this 7th day of August, 2017, I caused a copy of the foregoing *Petition to Deny of American Cable Association* to be filed electronically with the Commission through the ECFS system and caused a copy of the foregoing to be served upon the following individuals by First Class or electronic mail:

Mace Rosenstein Covington & Burling LLP One City Center 850 Tenth Street, NW Washington, DC 20001-4956 *Counsel for Tribune Media Company*	Miles S. Mason Pillsbury Winthrop Shaw Pittman LLP 1200 Seventeenth Street, NW Washington, DC 20036 *Counsel for Sinclair Broadcast Group, Inc.*
David Brown* Federal Communications Commission Media Bureau 445 12th Street, SW Washington, DC 20554 David.Brown@fcc.gov	David Roberts* Federal Communications Commission Media Bureau 445 12th Street, SW Washington, DC 20554 David.Roberts@fcc.gov

By:
Ross J. Lieberman

* Denotes service by electronic mail.