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

In the Matter of	)	
	)	
Applications of Raycom Media, Inc. and	)	MB Docket No. 18-230
Gray Television, Inc. to Transfer Control of	)	
and Assign Licenses	)	

COMMENTS

The American Cable Association hereby submits these Comments in response to the proposed purchase of Raycom Media, Inc. ("Raycom") by Gray Television, Inc.[1] We would like to raise two issues that we believe important to the Commission's review.

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[1] *Media Bureau Establishes Pleading Cycle for Applications filed for the Transfer of Control and Assignment of Broadcast Television Licenses from Raycom Media, Inc. to Gray Television, Inc., Including Top-Four Showings in Two Markets, and Designates Proceeding as Permit-But-Disclose for Ex Parte Purposes*, DA 18-782, MB Docket No. 18-230 (rel. July 27, 2018) ("*Notice*"); *Applications for Consent to Transfer of Control and Assignment of Broadcast Television Licenses from Raycom Media, Inc. to Gray Television, Inc.*, File No. BALCDT-20180709ACV *et al.*, Comprehensive Exhibit (filed July 9, 2018) ("Exhibit"). The file numbers of the individual applications are: BALCDT-20180709ACV, BALCDT-20180709ACZ, BALCDT-20180709ADH, BALDTL-20180709ADJ, BALCDT-20180709ADF, BALDTA-20180709ADI, BALH-20180709ADG, BALCDT-20180709ADP, BALDTL-20180709ADR, BALDTL-20180709ADQ, BALCDT-20180709AEA, BALDTL-2018709AED, BALCDT-20180709ADY, BALDTL-20180709AEC, BALDTL-20180709AEE, BALCDT-20180709ADZ, BALCDT-20180709AEB, BALCDT-20180709AEW, BALCDT-20180709AEX, BTCCDT-20180709ABN, BALCDT-20180709ABP, BALCDT-20180709ABT, BALCDT-20180709ABV, BALCDT-20180709ABZ, BALTTL-20180709ACA, BALTTL-20180709ACB, BALCDT-20180709ACH, BALDTL-20180709ACJ, BALH-20180709ACI, BALDTA-

- First, while Gray proposes divestitures that would limit the *local* consolidation caused by the proposed transaction, its purchase of 57 Raycom stations would result in considerable *national* consolidation. This, in turn, will raise retransmission consent prices. The Commission cannot ignore this harm, but rather must weigh it against the benefits of the transaction.
- Second, Gray's divestiture plans themselves raise concerns similar to those raised in the *Sinclair-Tribune* proceeding about how such divestitures would impact so-called "after-acquired clauses." ACA calls on the Commission to prohibit Gray from effectuating any after-acquired station clauses in retransmission consent agreements with MVPDs for acquired Raycom stations it commits to divest.

I. THE COMMISSION CANNOT IGNORE THE HARM TO CONSUMERS CAUSED BY NATIONAL CONSOLIDATION.

Gray already owns more than 100 television stations nationwide.[2] It seeks to acquire Raycom's 57 stations.[3] Upon closing (and after divestitures), Gray will own 124 television stations and two radio stations across 92 markets.[4] The company will own

20180709ACT, BALCDT-20180709ACP, BALDTA-20180709ACQ, BALCDT-20180709ACS, BALCDT-20180709ADB, BALCDT-20180709ADD, BTCCDT-20180709ABS, BALCDT-20180709ADM, BALCDT-20180709ADU, BALCDT-20180709ADW, BALCDT-20180709AFB, BALCDT-20180709AEU, BTCCDT-20180709ACG, BALCDT-20180709ACU, BALCDT-20180709ACY, BALCDT-20180709ADK, BALCDT-20180709ADT, BALCDT-20180709AEG, BALCDT-20180709ABQ, BALCDT-20180709ABR, BALCDT-20180709ABY, BALCDT-20180709ACC, BALCDT-20180709ACD, BTCCDT-20180709ACL, BALCDT-20180709ACE, BALCDT-20180709ACF, BTCCDT-20180709ACO.

[2] Exhibit at 3.

[3] *Id.*, Ex. A.

[4] *Id.*

"62 television stations ranked first in all-day Nielsen ratings in their local markets, which is the highest number of top-ranked television stations owned by any broadcaster."[5] In nine markets where Gray and Raycom each own one or more "top-four" stations, Gray proposes to divest one or the other station.[6] In two markets, Raycom already has a top-four duopoly, and Gray proposes to acquire that duopoly.[7] Thus, as currently formulated, the transaction would not increase *local* consolidation.

It would, however, increase *national* consolidation considerably. As ACA and others have repeatedly observed, national consolidation can also place upward pressure on retransmission consent rates—leading to higher prices for consumers. The more of an MVPD's subscribers a broadcaster can reach, the more leverage it has in negotiations with that MVPD—and the more leverage a broadcaster has, the more harm it can do to the MVPD and its subscribers.[8] MVPDs, in turn, pass along at least some

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[5] Raycom Media, *Gray and Raycom to Combine in a $3.6 Billion Transaction* (June 25, 2018), https://www.raycommedia.com/gray-and-raycom-to-combine-in-a-3-6-billion-transaction/.

[6] *Notice* at 1.

[7] *Id.* at 1-2.

[8] Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 17-318, at 3 (filed June 15, 2018) ("ACA UHF Discount Letter"); *See, e.g.*, Petition of DISH Network, LLC, the American Cable Association, and ITTA to Deny or Impose Conditions, *Applications of Nexstar Broadcasting Group, Inc. and Media General, Inc. for Consent to Transfer Control of Licenses*, MB Docket No. 16-57 (filed Mar. 18, 2016) (explaining retransmission consent-related harms that would arise from national consolidation); Petition of the American Cable Association, DIRECTV LLC, and Time Warner Cable, Inc. to Deny, or In the Alternative, for Conditions, *Applications of Belo Corp., on Behalf of Its Subsidiaries, et al.*, File Nos. BALCDT-2013619AEZ, et al., at 3-4 (filed Jul. 24, 2013) (opposing the Gannett-Belo merger as not in the public interest because the resulting entity would have a nationwide broadcast ownership footprint "capable of 'reaching nearly a third of all U.S. households'"); Petition for Expedited Rulemaking of Mediacom Communications Corp., *Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, at 5 (filed Jul. 21, 2014) ("mega-mergers and continuing consolidation of content owners" justify the Commission amending its rules regarding retransmission consent). *See also* Letter from Joseph Young, Sr. VP & General Counsel, Mediacom, to Ruth Milkman, Chief of Staff, Office of the Chairman, FCC, MB Docket Nos. 10-71, 09-182, and 07-294, at

of those increases to their subscribers.[9] Harm can occur in other ways. A broadcaster with leverage can impose more harmful blackouts. And it can force the MVPD to accept more onerous terms and conditions other than price. For example, increased leverage permits broadcasters to force ACA members both to carry unwanted programming and in broadly distributed tiers,[10] and to carry prospective programming, such as unidentified programming networks and after-acquired broadcast stations[11]—which in turn raises prices for the basic tier, limits cord cutting, and hinders broadband deployment.[12]

The Commission and others have repeatedly found that broadcast consolidation *within the same geographic market* leads to higher prices. In 2014, for example, the Commission determined that broadcast stations within a market are at least partial substitutes for one another—and, accordingly, that broadcasters could raise prices by

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1-2 (filed Dec. 2, 2013) (unchecked consolidation in the local broadcast market is exacerbating the Commission's failure to update its retransmission consent rules).

9 *See, e.g.*, *Amendment of the Commission's Rules Related to Retransmission Consent,* Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014) ("*Joint Negotiation Order*"). In the *Joint Negotiation Order*, the Commission explained that "a rule barring joint negotiation may, by preventing supra-competitive increases in retransmission consent fees, tend to limit any resulting pressure for retail price increases for subscription video services." *Id.* ¶ 17. The Commission noted that its decision was "not premised on rate increases at the retail level," yet "artificially higher retransmission rates do increase input costs for MVPDs, and anticompetitive harm can be found at any level of distribution." *Id.*

10 *See* Letter from Mary C. Lovejoy to Marlene Dortch, MB Docket Nos. 15-216, 10-71, 14-50, 09-182, 07-294, 04-256, 17-318, 17-179, GN Docket No. 16-142 (filed Mar. 26, 2018); *see* Letter from Barbara Esbin to Marlene Dortch, MB Docket Nos. 15-216, 16-41, GN Docket No. 16-142 (filed Apr. 3, 2017).

11 Comments of the American Cable Association, MB Docket No. 15-216, at 71-76 (filed Dec. 1, 2015); Reply Comments of the American Cable Association, MB Docket No. 15-216, at 80-82 (filed Jan. 14, 2016).

12 For much more detail on this phenomenon, *see, e.g.*, Joint Comments of the American Cable Association *et al.*, MB Docket No. 16-41 (filed Jan. 26, 2017).

negotiating jointly for retransmission consent within a single market.[13] The Department of Justice made similar findings in requiring divestitures in the Nexstar-Media General merger.[14] Concerns about local consolidation apparently also formed the core of the Department of Justice's resistance to the proposed Sinclair-Tribune merger.[15]

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[13] *Joint Negotiation Order* ¶ 10 (2014) ("[J]oint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees. . . .").

[14] *See* Competitive Impact Statement at 8, *United States v. Nexstar Broad. Grp.* (D.D.C. Sept. 2, 2016) (No. 1:16-cv-01772-JDB). Likewise, in the *Comcast-NBCU* merger proceeding, the Commission engaged in exactly this sort of analysis to determine that the horizontal combination of Comcast's and NBCU's programming—both sold in the same "geographic market" to MVPDs—could harm MVPDs under certain circumstances. *Comcast Corp., General Elec. Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 136 ("*Comcast-NBCU Order*") ("If failing to reach an agreement with the seller will result in a worse outcome for the buyer—if its alternatives are less attractive than they were before the transaction—then the buyer's bargaining position is weakened and it can expect to pay more for the products. In this case, for example, prior to the transaction, if an MVPD did not reach an agreement with Comcast to carry the RSN, the NBC network programming would still be available; and if the MVPD did not reach an agreement to carry NBC, it could still carry the RSN. Post-transaction, if the MVPD does not reach an agreement with Comcast-NBCU, it will not be able to carry either. If not carrying either the NBC network or the RSN places the MVPD in a worse competitive position than not carrying one but still being able to carry the other, the MVPD will have less bargaining power after the transaction, and is at risk of having to pay higher rates."); *id.* ¶ 138 ("We conclude that commenters have raised a legitimate concern about the effect the combination of Comcast's RSNs and the NBC O&O stations will have on carriage prices for both of those networks."); *id.* ¶ 139 ("We are also concerned that the horizontal integration of Comcast's cable network programming (including its RSNs) and NBCU's cable programming may confer greater bargaining power, resulting in anticompetitive harm. This possibility is suggested by the evidence presented in the Technical Appendix that if an MVPD were foreclosed from access to the bundle of NBCU cable networks, the subscriber loss would be at least as large as the departure rate from foreclosure to the NBC broadcast network. . . . We are unable to determine definitively on our record, however, whether the Comcast bundle of national programming networks being contributed to the joint venture is a substitute for the bundle of NBCU programming from the perspective of MVPDs, and thus whether the consolidation of Comcast-NBCU programming would be expected to increase the prices for these national programming bundles. We do not need to resolve this factual issue, because the program access conditions we impose will address this possibility as well.").

[15] Complaint ¶¶ 61-94, *Tribune Media Co. v. Sinclair Broad. Grp.*, No. 2018-0593 (Del. Ch. filed Aug. 9, 2018) (describing Sinclair's resistance to DOJ position that Sinclair had to divest stations in all "top-four duopoly" markets).

Last summer, DISH's economic analyses took the Commission's general framework one step further—demonstrating that broadcast consolidation also leads to higher prices *even where geographic markets do not overlap*. More specifically, DISH presented two economic analyses using its own confidential data to demonstrate that, all else being equal, it pays more in retransmission consent fees to large broadcasters than it does to small ones. It concluded: "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 consent price paid by DISH."[16] DISH later presented a separate regression analysis measuring the effect of 10 broadcast mergers since 2013 on the retransmission consent fees it pays, controlling for the industry-wide increase in such fees during that time. This analysis showed that prices increased in all 10 cases.[17]

DISH's economist explained these results as follows: "[W]hile a loss of programming from Tribune's (say) local stations across [DISH's] footprint could be 'manageable,' the loss of programming from combined Sinclair *and* Tribune's 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

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[16] *Tribune Media Company and Sinclair Broadcast Group, Inc. Consolidated Applications for Consent to Transfer Control*, Petition to Dismiss or Deny of Dish Network, LLC, MB Docket No. 17-179, Ex. D, Declaration of Janusz A. Ordover ¶ 3 (filed Aug. 7, 2017) ("Ordover Decl.").

[17] *Tribune Media Company and Sinclair Broadcast Group, Inc. Consolidated Applications for Consent to Transfer Control*, Reply of Dish Network, LLC, MB Docket No. 17-179, Ex. C, Reply Declaration of Janusz A. Ordover ¶ 19 (filed Aug. 29, 2017) ("Ordover Reply Decl."); *see id.* ¶ 19 n.29 ("In the technical sense, this suggests that the post-merger aggregate value function for the MVPD (such as DISH) is concave.").

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."[18] Such a "substitutability" analysis is quite familiar to the Commission and, indeed, formed the basis of its earlier *intra-market* findings.[19] It does not, however, provide the only possible explanation for the relationship DISH found between broadcast size and retransmission consent prices.[20]

The Commission need not reach a final determination about economic *theory* to conclude that the best *evidence* it has received to date shows that broadcast consolidation leads to higher prices—even where the stations in question do not overlap. And the Commission has already determined that MVPDs pass through at

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[18] Ordover Decl. ¶ 36 (emphasis in original); *see also* Ordover Reply Decl. ¶ 12 ("Several economists have written about the possibility that size—here measured as the number of stations owned—can affect bargaining leverage and outcomes even when products are not downstream substitutes in the usual sense, *i.e.*, that consumers are choosing between two products that compete based on relative prices, quality, and other characteristics. Instead, what is important here is that the MVPDs regard the products as having some substitutability. In the instant situation, subscribers to an MVPD are 'substitutable' in the sense that—all else being the same—a change in the number of subscribers in one DMA can be compensated by a change in the number of subscribers in another DMA.").

[19] For discussions of this particular framework, *see, e.g.*, Ordover Decl. ¶¶ 16-28; Comments of the American Cable Association, MB Docket No. 10-56, Ex. A, William Rogerson, *Economic Analysis of the Competitive Harms of the Proposed Comcast-NBCU Transaction* (filed June 21, 2010); Comments of DIRECTV, Inc., MB Docket No. 10-56, Ex. A, Kevin Murphy *et al.*, *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming* (filed June 21, 2010).

[20] In economic terms, DISH claims that its "surplus function" for the two sets of stations is "concave"—meaning that it would lose more if a merged broadcast entity withholds all of its stations *simultaneously* than if each merging party withholds its own stations *sequentially*. Yet larger broadcast groups might be able to impose higher prices even in cases where concavity does not exist. For example, it may be that increased size permits a broadcaster to claim a larger share of the joint gains from agreement—what economists call "bargaining power" or "bargaining skill." Or it may be that MVPDs are risk averse, and their marginal disutility from lost income increases in the amount of income lost. In this case, the utility of surplus function could be concave even if the surplus function was not.

least some of these price increases.[21] The most reasonable conclusion one can draw from this evidence is that a broadcast station group that acquires more stations in more markets will lead to higher prices for consumers.

The Commission may not simply ignore this harm. Under the Communications Act, the Commission will approve a proposed license transfer only if it first concludes that the transfer will serve "the public interest, convenience, and necessity."[22] In this review, the Commission "employs a balancing process, weighing any potential public interest benefits of the proposed transaction against any potential public interest harms."[23] Applicants, not opponents, bear the burden of demonstrating that the proposed transaction serves the public interest.[24] The Commission's analysis is "informed by, but not limited to" merger analysis under the Clayton Act, in which the government may seek to enjoin a merger that "substantially lessen[s] competition."[25] Whether a transaction will create or enhance pricing power, leading to consumer price increases and related harms, ranks among the foremost "public interest harms" of concern to the Commission.[26] Likewise, a powerful public interest benefit is the

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21 *Comcast-NBCU Order* ¶ 237; *Joint Negotiation Order* ¶ 17.

22 47 U.S.C. § 310(d); *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131, ¶ 2 (2015) ("*AT&T-DIRECTV*").

23 *Media General, Inc. to Nexstar Media Grp., Inc.*, 32 FCC Rcd. 183, ¶ 19 (2017).

24 *E.g.*, *AT&T-DIRECTV* ¶ 18 ("The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.").

25 *Id.* ¶¶ 20-21 (citing 15 U.S.C. § 18); Brief of Federal Communications Commission as Amicus Curiae in Support of Neither Party at 4, *United States v. AT&T Inc.* (D.C. Cir. Aug. 13, 2018) (No. 18-5214) ("While it is correct that the Commission's 'public interest' review is broader in certain respects than traditional antitrust analysis, the Commission has historically included competition analysis as one component of its public interest review.").

26 *See, e.g.*, *EchoStar Commc'ns Corp., Gen. Motors Corp. and Hughes Elecs. Corp.*, 17 FCC Rcd. 20559, ¶ 169 (2002) ("*EchoStar HDO*") ("[The evidence] strongly suggests that, in the

possibility that the transaction will *decrease* retail prices.[27] The Commission has not hesitated to reject or place conditions on transactions where retransmission consent-related harms outweighed claimed benefits.[28] Thus, the Commission must weigh the likelihood that Gray's acquisition of Raycom's stations will lead to increased retail rates against the asserted benefits of the transaction. An Order of approval or denial that fails to do so would be arbitrary and capricious.[29]

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absence of any significant savings in marginal cost, the merger will result in a large increase in post-merger equilibrium prices. Given this likelihood, we cannot find that the Applicants have met their burden of demonstrating that the proposed merger will produce merger-specific public interest benefits of the magnitude the Applicants allege."); *XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, 23 FCC Rcd. 12348, ¶ 6 (2008) (*"XM Satellite-Sirius"*) ("We also conclude that, absent Applicants' voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity. As discussed below, assuming a satellite radio product market, Applicants would have the incentive and ability to raise prices for an extended period of time."); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Commc'ns Corp. to Time Warner Cable Inc. and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 116 (2006) ("[W]e find that the transactions may increase the likelihood of harm in markets in which Comcast or Time Warner now hold, or may in the future hold, an ownership interest in RSNs, *which ultimately could increase retail prices for consumers* and limit consumer MVPD choice. We impose remedial conditions to mitigate these potential harms.") (emphasis added).

[27] *AT&T and DIRECTV* ¶ 4 ("We find that the combined AT&T-DIRECTV will increase competition for bundles of video and broadband, which, in turn, will stimulate lower prices, not only for the Applicants' bundles, but also for competitors' bundled products—benefiting consumers and serving the public interest.").

[28] *See, e.g.*, *Gen. Motors Corp. & Hughes Elecs. Corp.*, 19 FCC Rcd. 473, ¶ 201 (2004); *Comcast Corp., Gen. Elec. Co. & NBC Universal, Inc.*, 26 FCC Rcd. 4238, ¶ 48 (2011) (each imposing conditions related to retransmission consent).

[29] *Motor Vehicle Mfrs. Assoc. of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency . . . .").

II. THE COMMISSION SHOULD PROHIBIT GRAY FROM TRIGGERING AFTER-ACQUIRED STATION CLAUSES FOR ACQUIRED STATIONS IT COMMITS TO DIVEST.

Gray proposes to divest nine stations in order to comply with the Commission's local media ownership rules.[30] It states that "[a]n application to assign the license of the station identified for divestiture will be filed as soon as a buyer is selected and a purchase agreement signed."[31] That *should* mean that each of the Raycom divestiture stations will be transferred *directly* to the transfer party (after, of course, public notice and an opportunity to comment). Nevertheless, Gray has not been entirely clear about its intentions: it is possible that Gray intends to acquire all of Raycom's stations and then divest the stations that are to be sold.

The Commission should prohibit Gray from effectuating any after-acquired station clauses in retransmission consent agreements with MVPDs for acquired stations it commits to divest. This restriction is necessary to prevent Gray from asserting that these stations "pass through" Gray's ownership—either for a fleeting moment at the

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30 Exhibit at 27.

31 *Id.* Gray's August 20 Amendment states that it has reached agreements to sell these stations and that "Gray anticipates that the applicable parties will submit the necessary assignment applications for these transactions in the next several days." *See* Gray Television August 20, 2018, Amendment at 1. Moreover, Gray commits that after divestiture, "it will not have any joint sales, joint retransmission, shared services, or local marketing arrangements with any of the above-referenced divested stations. Additionally, Gray will not hold an option to repurchase any such divested station, nor will Gray finance or guarantee any purchaser's indebtedness." *Id.* This is a laudable first step but falls short of stating that Gray will have no ongoing relationship with the divested stations. In light of revelations from the *Sinclair-Tribune* proceeding, the Commission should seek information regarding any ongoing relationship Gray intends to have with purported divestiture stations. Gray should make expressly clear whether it will have any ongoing relationships with the divested stations, and to the extent there will be any ongoing relationships between the parties, Gray and Raycom should submit those agreements in the record. If they do not do so voluntarily, the Commission should compel such contracts.

time of the acquisition or for longer. Under an after-acquired-station clause the rates for any station acquired by Gray adjust to match the rates that an MVPD pays for Gray's other stations. For stations Gray commits to divest, it should not have a choice to subject them to after-acquired clauses on a station-by-station and MVPD-by-MVPD basis.[32] The Commission should make clear that any acquired stations that Gray commits to divest do not trigger any of Gray's after-acquired station clauses.

As described in earlier correspondence,[33] here's one way that such "laundering" could play out:

- Suppose that SmallTown Cable Company carries Raycom Station A for $1.00 per month. Suppose further that SmallTown Cable also carries a Gray Station B for $2.00 per month.

- Now suppose that SmallTown Cable's agreement with Gray contains an after-acquired station clause so that it applies to any station Gray purchases.

- Suppose Gray transfers Raycom Station A to Divestiture Buyer sometime *after* consummation of the transaction. Gray could then argue that it "acquired" Raycom Station A during the intermediate period, even if such period is very short. In such case, the after-acquired station clauses would apply—meaning that the station's rate would increase from $1.00 to $2.00.

- If Divestiture Buyer assumes Raycom Station A's contracts, and no other contract between SmallTown Cable and Divestiture Buyer governs, then SmallTown Cable would pay $2.00 going forward, instead of the $1.00 it would have paid had Divestiture Buyer obtained the station immediately before closing.

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[32] For some Raycom stations carried by some MVPDs, triggering the after acquired clause could result in retransmission fees rising to match Gray's rates, and for other Raycom stations carried by other MVPDs, triggering the clause could cause the opposite effect.

[33] *See* Letter from Ross Lieberman to Marlene Dortch, MB Docket No. 17-179, at 2-3 (filed Mar. 12, 2018).

Of course, Gray *itself* would not obtain higher retransmission consent rates under this scenario, so one might question its incentive to argue that it had acquired Raycom Station A. Yet Raycom Station A is more valuable to Divestiture Buyer at the "Gray rate" than at the "Raycom rate," and Gray might account for this additional value in setting the station's divestiture price.[34]

Longstanding Commission precedent states that Gray does not obtain "control" of a station for purposes of the Communications Act through an "essentially instantaneous" transaction.[35] Yet this Commission precedent may not stop a dispute from emerging over whether these after-acquired-station clauses apply.[36] Gray may take a bolder approach and structure its divestitures to give it ownership and control for longer than such fleeting moment for the purpose of strengthening its case that an after-acquired-station clause was triggered. The Commission should clarify that Gray must not "acquire" or obtain "control" of Raycom divestiture stations for *all* purposes, and specifically prohibit Gray from triggering any after-acquired-station clauses for any acquired stations that it divests voluntarily or by government mandate as part of getting its acquisition of Raycom approved.

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[34] Indeed, allegations from Tribune's complaint against Sinclair illustrate that acquirers like Gray or Sinclair have incentives to try to keep or increase a station's retransmission fees even after divestiture. *See* Complaint ¶105, *Tribune Media Co. v. Sinclair Broad. Grp.* (Del. Ch. Aug. 9, 2018) (No. 2018-0593).

[35] *See, e.g.*, *John H. Phipps, Inc. (Assignor) and WCTV Licensee Corp. (Assignee)*, 11 FCC Rcd. 13053, ¶ 9 (1996) (permitting non-substantive "essentially instantaneous" transfers to complete complex transactions).

[36] Small cable operators would likely be forced to agree with the position of any large broadcast conglomerate if such a dispute arose because the upfront cost of litigating the matter would be beyond their means, and would not be outweighed by the benefits of prevailing.

Respectfully submitted,

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Certificate of Service

I, Michael Nilsson, hereby certify that on this day, true and correct copies of the foregoing Comments were sent by electronic mail and first-class mail to the following:

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