BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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TABLE OF CONTENTS

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NCTA – The Internet & Television Association ("NCTA") files these comments in response to the Consolidated Opposition to Petitions to Deny ("Joint Opposition")[1] submitted by Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune") (collectively, "the Applicants") in the above-captioned proceeding. Given the material risk of consumer and competitive harm based on past conduct and unprecedented size, NCTA has significant concerns with the transaction as currently proposed. We therefore strongly urge the Commission to ensure the transaction complies with existing ownership rules, and consider imposing appropriate conditions to address the significant issues of market power raised by the transaction before the Commission determines to approve the transfer.

I. INTRODUCTION AND SUMMARY

The proposed combination of Sinclair and Tribune would create a broadcast colossus (the "Combined Entity") of unprecedented size, scope, and reach. With more than 200 stations reaching over 70 percent of all households nationwide, including stations in most of the major markets; duopolies in more than 40 markets;[2] and the largest number of Fox, ABC, CW, and MyNetwork affiliates of any group owners of broadcast stations, the Combined Entity will have substantial market power. The holdings of the Combined Entity will give it exceptional leverage in business dealings with multichannel video programming distributors ("MVPDs"), programming suppliers, and advertisers. Without appropriate guardrails in place, the Combined

[1] *See* Applicants' Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 (filed Aug. 22, 2017) ("Consolidated Opposition").

[2] This figure includes markets where the Combined Entity would own two stations outright, markets where a Sinclair or Tribune station has a sidecar agreement, and markets where a Sinclair station was affiliated with two "top four" networks.

Entity will be uniquely positioned to exercise this leverage to the detriment of consumers and competition.

Even assuming the Applicants commit to the divestitures necessary to bring the transaction into compliance with the ownership rules—which, pointedly, the Applicants have not done—that is not the end of the Commission's inquiry in this proceeding. Rather, under the public interest standard, the Commission must consider whether the unprecedented transaction frustrates or impairs the objectives of the Act beyond just satisfying the ownership rules. That requires an examination of the impact of the transaction on upstream markets such as program production and downstream markets such as distribution by MVPDs, and consideration of *merger-specific* conditions to ensure that the Combined Entity does not abuse the enormous local and national market power that would be created by this transaction or repeat the conduct that resulted in a consent decree.

Finally, the Commission should decisively reject any effort by the Applicants to exceed the existing ownership rules unless and until the Commission actually changes those rules. Mere "proposals" to change the rules are an insufficient basis to permit Applicants to violate those rules, and the waiver process is wholly unsuited to such wholesale relief from Commission restrictions. The Commission should not approve a transaction that results in holdings above the current limits until the public has had an opportunity, through a rulemaking proceeding, to consider the consumer and competitive implications of further relaxation of the ownership rules, including the impact on MVPDs and their customers and on program suppliers.

Moreover, if the Commission does change the ownership rules during the pendency of this transaction and the Applicants wish to amend their application to take advantage of those changes, the Commission should require the Applicants to refile their amended application, restarting the shot clock and providing the public with a full opportunity to review and comment on what will essentially be a new application.

II. EVEN UNDER THE COMMISSION'S EXISTING MEDIA OWNERSHIP RULES, THE COMBINED ENTITY WILL HAVE SUBSTANTIAL MARKET POWER

The Applicants must commit to the divestitures necessary to bring the transaction within the Commission's existing media ownership rules. Even with such divestitures, however the Combined Entity would be uniquely positioned to exert substantial market power nationally and locally, contrary to the Applicants' assertions. Given these risks, and the Commission's obligation to ensure that the transaction serves the public interest, convenience, and necessity,[3] the Commission must scrutinize this transaction carefully and consider adopting transaction-specific conditions to minimize these adverse impacts.

The proposed combination of Sinclair and Tribune would create a broadcast colossus of unprecedented size, scope, and reach, controlled by a company that has a history of overly aggressive negotiating tactics.[4] If the Commission were to approve the transaction, the Combined Entity would own more than 200 full power stations nationwide post-merger, with at least one station in each of the nation's top five media markets (New York, Los Angeles, Chicago, Philadelphia, and Dallas).[5] The Combined Entity would reach more than 70 percent of television households;[6] control 28 percent of the nation's Fox affiliate stations, making it the

[3] 47 U.S.C. § 310(d).

[4] Petition to Deny of Competitive Carriers Association, MB Docket No. 17-179, at 22-23 (filed Aug. 7, 2017) ("CCA Petition").

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

[6] *See* Diana Marszalek, *Sinclair Inks Deal to Boy Tribune for $3.9B*, Broadcasting & Cable (May 8, 2017), http://www.broadcastingcable.com/news/local-tv/sinclair-inks-deal-buy-tribune-39b/165584 ("Marszalek article").

largest owner of local Fox stations in the country;[7] and own the largest number of ABC, CW, and MyNetwork affiliates.[8] The Combined Entity would also wield substantial market power at the local level, acquiring an additional station in at least three markets—the District of Columbia, New Orleans, and Denver[9]—to add to the twenty-plus markets where Sinclair already owns multiple stations.[10]

In addition to stations that it currently owns or would own if the transaction is approved, Sinclair and Tribune exercise substantial operational control over 50 stations through JSAs, LMAs and SSAs entered into with the station's beneficial owners.[11] Consideration of these agreements in the Commission's assessment of Sinclair's market power is critical given the Media Bureau's finding that, in violation of Commission rules, "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."[12] Sinclair entered into a *Consent Decree* to resolve the Commission's investigation of this matter and

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[7] *See* Alex Sherman, *Sinclair Buys Tribune in $3.9 Billion Deal, Creating TV Goliath*, Bloomberg (May 8, 2017), https://www.bloomberg.com/news/articles/2017-05-07/sinclair-said-close-to-buying-tribune-for-about-45-a-share.

[8] *See* Marszalek article.

[9] *See Applications of Tribune Media Co. and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179, Comprehensive Exhibit, 14-15 (2017) ("Comprehensive Exhibit").

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

[11] Sinclair has sidecar agreements with 43 stations, *id.* at 7-9, and Bonten has agreements with four stations. Adam Jacobson, *Sinclair Buys Bonten's 14 TV Stations in Multimillion Dollar Deal*, Radio + Television Business Report (Apr. 21, 2017), http://www.rbr.com/sinclair-buys-bonten/. Tribune has sidecar agreements with three stations. Tribune Media Company, Annual Report (Form 10-K) at 11 (Mar. 1, 2017).

[12] *In re Sinclair Broadcast Group, Inc.*, Order, 31 FCC Rcd 8576, 8576 ¶ 4 (MB 2016) ("*Consent Decree*"). This conduct warrants a condition on the transaction to prevent recidivism. *See infra* Section III.B.

agreed to make a substantial settlement payment.[13] As explained below, this egregious conduct warrants consideration of a condition on the transaction to prevent recidivism.[14]

Finally, Sinclair owns more than 25 low power television ("LPTV") stations in at least 15 markets where it also owns full power stations.[15] The LPTV stations are not attributable under the Commission's ownership rules, but under the Commission's channel sharing rules,[16] Sinclair could have its LPTV stations share a channel with its same market full power stations and give the LPTV stations full market over-the-air-coverage—potentially creating an avenue for evading the local ownership rules in markets where the rules would otherwise prohibit a duopoly or ownership of two "top four" stations.

III. THE COMBINED ENTITY'S MARKET POWER WOULD CREATE A MATERIAL RISK OF CONSUMER AND COMPETITIVE HARM

As noted above, post-transaction the Combined Entity will own multiple stations in more than 40 markets, and in nearly all of those markets, one station will be a network affiliate—and that's under the Commission's *current* ownership rules.[17] In addition, the Combined Entity will enhance Sinclair's negotiating leverage by increasing its existing national audience reach,

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[13] As part of the *Consent Decree*, Sinclair agreed to make a settlement payment of nearly $9.5 million. *See id.*, 31 FCC Rcd at 8582-83 ¶ 18.

[14] *See infra* Section III.B.

[15] Sinclair 10-K at 7-9 (Feb. 28, 2017); Ben Munson, *Sinclair buys Bonten's 14 stations for $240M*, Fierce Cable (Apr. 21, 2017), http://www.fiercecable.com/broadcasting/sinclair-buys-bonten-s-14-tv-stations-for-240-million. Nine of these stations are Class A stations. *Id.*

[16] *In re Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 32 FCC Rcd 2637, 2643-45 ¶¶ 10, 13 (2017) (authorizing channel sharing by full power stations and secondary stations); *id.* at 2657 ¶ 39 (permitting a secondary LPTV station that shares the channel of a full power television station to "operate with the technical facilities of the full power station, including at the higher power limit specified in Part 73 of the rules").

[17] Also as noted above, these numbers do not include markets where the Combined Entity carries a second network affiliate as the secondary stream of a full power network affiliate or as an LPTV station sharing a full power channel. In negotiations for retransmission consent of such dual stations, the Combined Entity will have the leverage borne of the ability to threaten to deprive MVPD subscribers of two network affiliates unless the MVPD agrees to unreasonable fees or other compensation.

growing it from 89 markets and approximately 38 percent of television households to 108 markets and approximately 72 percent of television households. This aggregation of assets will give the Combined Entity unprecedented leverage in market power negotiations with distributors, programmers, and advertisers that would harm both consumers and competition. Indeed, this is not a hypothetical concern given Sinclair's actions that led to its 2016 *Consent Decree*.[18]

Contrary to Applicants' claims,[19] the proposed transaction would exacerbate the Combined Entity's leverage in downstream distribution markets.[20] Indeed, a senior Sinclair executive has bragged that the transaction would enable Sinclair to "gain an edge in negotiating with [MVPDs]" and that it will "immediate[ly]" raise Tribune's retransmission consent fees to Sinclair's rates.[21] Not only would Sinclair's increased leverage and "track record of employing abusive negotiating tactics"[22] harm competition, but it would harm consumers by leading to

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[18] *See* Petition To Dismiss or Deny of Dish Network L.L.C., MB Docket No. 17-179, at 66-67 (Aug. 7, 2017) ("DISH Petition") (noting that the Media Bureau's findings in the *Consent Decree* are "consistent with DISH's own experience").

[19] *See* Consolidated Opposition at 27.

[20] The Commission has recognized that the increase in competition among MVPDs has improved broadcasters' leverage in retransmission consent negotiations with MVPDs. *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). The Commission explained that in the current marketplace, MVPDs failing to reach retransmission consent agreements with broadcast stations "may permanently lose subscribers to rival MVPDs—including subscribers to its associated voice and broadband services." *Id.*

[21] *See* Diana Marszalek, *Sinclair, Tribune CEOs Push Advantage of Sizing Up*, Broadcasting & Cable (May 22, 2017), http://www.broadcastingcable.com/news/local-tv/sinclair-tribune-ceos-push-advantage-sizing/166006; *see also* Sinclair Broadcast Group, Investor Presentation at Slide 7 (May 8, 2017), http://sbgi.net/wp-content/uploads/2017/05/Sinclair_Tribune-Media-Investor-Presentation_vF.pdf (indicating that for net retransmission revenue there would be "[i]mmediate contracted step-ups to Sinclair's rates."); *cf.* Competitive Impact Statement, *United States v. Nextstar Broad. Group, Inc.*, No. 1:16-cv-01772-JDB, at 8-9 (D.D.C. Sept. 2, 2016), ECF No. 3.

[22] *See* CCA Petition at 23 (referencing Sinclair's 2015 blackout during its retransmission dispute with DISH, which led to emergency intervention by the Commission; Sinclair's 2016 violation of the Commission's good faith requirements; and Sinclair's use of opaque sidecar arrangements to operate stations.).

higher retransmission consent fees that will be passed on to consumers,[23] and possibly more widespread blackouts.[24]

The Commission has already recognized the leverage conferred on broadcasters in the same market that jointly negotiate retransmission consent agreements—by barring such joint negotiations among any of the "top four" stations in a market upon its finding that "joint negotiation gives such stations both the incentive and the ability to impose on MVPDs higher fees for retransmission consent than they otherwise could impose if the stations conducted negotiations for carriage of their signals independently."[25] Congress subsequently found that the same risk arises in joint negotiations by any two stations and amended Section 325 to prohibit the practice as a violation of the "good faith" standard applicable to such negotiations.[26] The Commission revised its rule accordingly.[27] As petitioners note, while commonly owned stations

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[23] Petition to Deny of American Cable Association, MB Docket No. 17-179, at 12 (Aug. 7, 2017) ("ACA Petition") (observing that "retransmission fees—which are ultimately passed on to customers—have risen by *tens of thousands* of percent in the last decade" and "have seen 40 percent annual increases over the last three years" and would likely increase further were Sinclair allowed to increase its market power); Dish Petition at 3 (concluding, based on empirical and economic data, 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"); *id.* at 14-43 (detailing the likely anticompetitive effects of the merger on retransmission consent negotiations); Petition to Deny of NTCA-The Rural Broadband Association, MB Docket No. 17-179, at 5-6 (Aug. 7, 2017).

[24] Notably, in light of the Combined Entity's larger national reach, Sinclair negotiates nationwide retransmission consent agreements, and has been willing to engage in multimarket blackouts. 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.

[25] *In re Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3358-59 ¶ 13 (2014) ("*2014 Retransmission Consent Order*").

[26] 47 U.S.C. § 325(b)(3)(C)(iv).

[27] 47 C.F.R. § 76.65(b)(viii).

are exempted from this rule, joint retransmission consent negotiations for multiple stations present the same risks to consumers whether or not the stations are commonly owned.[28]

MVPDs and their subscribers are not the only ones who may be at risk from Sinclair's increased market power. As a purchaser of content as well as a seller, the Combined Entity would be uniquely positioned to use its significant national and local footprint to gain increased leverage in negotiations with program producers and suppliers in upstream markets, including sellers of syndicated programming and broadcast networks. Despite Applicants' claims to the contrary,[29] in DMAs where the transaction would bring separate Sinclair and Tribune stations under common ownership, program suppliers would lose an alternative distribution outlet in the event they cannot reach an agreement with Sinclair. Sinclair's widely-reported efforts to become a provider of national video programming increases the risk that it would abuse this enhanced leverage to its own benefit.[30]

An empowered Sinclair may also be able to reduce the diversity of content available to subscribers by displacing rival programmers. As a number of independent programmers have

[28] ACA Petition at 15-16 & n.59 (citing *2014 Retransmission Consent Order*, 29 FCC Rcd at 3360 ¶ 14 n.58); Comments of the American Television Alliance, MB Docket No. 17-179, at 5 (Aug. 7, 2017).

[29] Consolidated Opposition at 45 (stating that the transaction will not make it more difficult for program suppliers to get their programming carried).

[30] For instance, Sinclair has effectively developed a national feed by requiring all of its local broadcasting stations to air certain Sinclair-produced segments—known as "must-runs"—which often feature political commentary from commentators whose views may not match those of the local station's audience. Sydney Ember, *Sinclair Requires TV Stations to Air Segments That Tilt to the Right*, N.Y. Times (May 12, 2017), https://www.nytimes.com/2017/05/12/business/media/sinclair-broadcast-komo-conservative-media.html (detailing local resistance to Sinclair's acquisition of local station KOMO in Seattle). In addition, Sinclair has gradually been expanding its original programming portfolio in recent years through acquisitions (cable's Tennis Channel), digital multicast channels (sci-fi themed Comet, viral video-centric TBD and action-oriented Charge!), and digital content (the millennial-focused news site Circa). 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/ ("With a platform as big as the combined Sinclair-Tribune footprint, it's guaranteed that Sinclair will angle to become a bigger player in the national programming scene…".)

pointed out, displacement could result if Sinclair's demands for carriage of ATSC 3.0 signals[31] reduce the available capacity on cable systems.[32] Increased retransmission consent fees paid to the Combined Entity could also increase costs borne by consumers and reduce the budget that cable operators have to spend on cable programming affiliation fees,[33] adversely affecting the programming choices available to subscribers. The Commission should carefully review the impact of the transaction on the programming marketplace.

IV. THE COMMISSION SHOULD CONSIDER IMPOSING CONDITIONS ON THE TRANSACTION TO PREVENT THE COMBINED ENTITY FROM ABUSING ITS MARKET POWER

A. The Commission's Duty to Review the Proposed Transaction Goes beyond Ensuring Conformance with the Media Ownership Rules.

Section 310(d) of the Communications Act of 1934 ("the Act") provides that no station license shall be transferred unless the Commission determines that the public interest, convenience, and necessity will be served.[34] In its review of transactions, the Commission first determines whether a transaction would comply with the specific provisions of the Act, other applicable statutes, and the Commission's rules.[35] The Commission then considers whether the

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[31] Sinclair has a direct stake in using its leverage to require MVPDs to carry ATSC 3.0 signals. It was the "prime mover" in starting the process to develop a new television broadcast standard and has invested over $30 million developing ATSC 3.0 and preparing for its deployment. Cynthia Littleton, Inside Sinclair: CEO Nixes Fox News Rival Rumors, Talks Tribune and Big Ambition for Broadcast Biz, *Variety* at 1-2 (July 25, 2017), http://variety.com/2017/tv/news/sirnclair-tribune-merger-boris-epshteyn-david-smith-news-1202504687/. It also has announced plans to use ATSC 3.0 to launch a wireless over-the-top service directly to consumers. *See* Felix Gillette, *The Sinclair Revolution Will Be Televised. It'll Just Have Low Production Values*, Bloomberg Businessweek (July 20, 2017), https://www.bloomberg.com/news/features/2017-07-20/the-sinclair-revolution-will-be-televised-it-ll-just-have-low-production-values (reporting Sinclair's plans to "deliver a wireless bundle of 25 to 30 channels").

[32] Comments of Cinemoi et al., MB Docket No. 17-179, at 9-10 (Aug. 7, 2017) ("Independent Programmers Comments").

[33] *Id.* at 10.

[34] 47 U.S.C. § 310(d).

[35] *In re Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc. to Nextstar Media Group, Inc. et al.*, Memorandum Opinion and Order, 32 FCC Rcd 183, 191-92 ¶ 19 (2017) ("*Media General*").

transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.[36] Finally, the Commission employs a balancing process, weighing any potential public interest benefits of the proposed transaction against any potential public interest harms.[37]

NCTA urges the Commission to complete a full review of the proposed transaction that incorporates each of the steps described above. Even assuming the Applicants commit to the divestitures necessary to bring the transaction within the existing media ownership rules—which, pointedly, Applicants have not done—that is not the end of the inquiry. Applicants bear the burden of demonstrating that the transaction satisfies the "broad aims of the Communications Act," which includes a deeply rooted preference for preserving and enhancing competition.[38] And under its public interest standard, the Commission must consider whether the transaction frustrates or impairs the objectives of the Act beyond just satisfying the ownership rules.

Notably, the ownership rules are primarily aimed at preventing undue consolidation and concentration of ownership in the broadcast industry in order to promote localism and a diversity of viewpoints in broadcasting.[39] But limiting consolidation *within* the broadcasting industry is a far different matter than preventing a broadcaster at the very limit of the ownership rules from

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[36] *Id*. (citing *In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18,290, 18,300 ¶ 16 (2005)).

[37] *Id*.

[38] *In re Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Memorandum Opinion and Order, 31 FCC Rcd 6327, 6337 ¶ 27 (2016) ("*Charter-TWC-BrightHouse Order*") (quoting *Western Union Division, Commercial Telegrapher's Union, A.F. of L. v. United States*, 87 F. Supp. 324, 335 (D.D.C. 1949), *summarily aff'd*, 338 U.S. 864 (1949); *In re Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4248 ¶ 23 (2011) ("*Comcast-NBCU Order*").

[39] *See 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, 9865, 9870 ¶¶ 3, 16 (2016) ("*2014 Media Ownership Order*").

exercising the resulting market power in upstream markets such as program production or downstream markets such as distribution by MVPDs. To be able to make the required finding that this transaction serves the public interest, convenience, and necessity, the Commission must consider the impact of this transaction on those adjacent markets. In particular, given Sinclair's demonstrated willingness to violate the good faith negotiation rules and engage in brinksmanship tactics in negotiations with cable operators and programming providers, the Commission must take appropriate *merger-specific* steps to mitigate the Combined Entity's ability to abuse its market power in its negotiations with distributors, programmers, and others.

B. The Commission Should Consider Adopting Safeguards to Prevent the Combined Entity from Abusing its Market Power.

NCTA urges the Commission to consider adopting targeted conditions to mitigate the Combined Entity's ability to abuse its market power in negotiations with distributors and programming providers. In addition to the conditions proposed below, other measures may be warranted to adequately address the Combined Entity's unprecedented combination of national and local market power.

1. The Commission should extend the ban on joint retransmission consent negotiations to the Combined Entity's stations in a local market.

The Combined Entity's combination of maximum national audience reach, its duopolies in dozens of markets, and its extensive sidecar relationships and past history of using those relationships to engage in unlawful joint negotiations warrant extending the bar on joint retransmission consent negotiations to the Combined Entity even with respect to commonly owned stations in the same local market. Against this unique, merger-specific backdrop, extending the bar on joint negotiations to the Combined Entity's commonly owned stations is necessary to limit the enhanced market power that the Combined Entity could otherwise exercise in each Designated Market Area ("DMA"), and would address the market power concerns at the local level. Likewise, the Combined Entity should be prohibited from negotiating with program providers on behalf of multiple stations in a DMA, to limit opportunities for the Combined Entity to exert unfair leverage in those negotiations.

In furtherance of its duty to ensure that a license transfer is in the public interest,[40] the Commission has the authority to impose conditions designed to address specific harms that would result from a transaction.[41] Specifically, Section 303(r) of the Act authorizes the Commission to "prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act]."[42] The Commission has previously used this authority to adopt a specific merger-related condition where it found that the generally applicable provision addressing the matter was "not a remedy for the transaction-specific harms."[43] Given the unique market power that would be exercised by the Combined Entity, the generally applicable prohibition on joint negotiations is clearly insufficient. Extending the ban on joint negotiations to commonly owned Sinclair stations would not be "inconsistent" with law because

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[40] 47 U.S.C. 310(d).

[41] 47 U.S.C. § 310(d); *See Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6339 ¶ 30 ("[O]ur extensive regulatory and enforcement experience enables us, under this public interest authority, to impose and enforce conditions to ensure that the transaction will yield net public interest benefits."); *Comcast-NBCU* Order, 26 FCC Rcd at 4249 ¶ 25 ("[O]ur public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits. In exercising this broad authority, the Commission generally has imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions and that are related to the Commission's responsibilities under the Act." (footnote omitted)).

[42] 47 U.S.C. § 303(r).

[43] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6389 ¶ 131 (imposing mandatory interconnection conditions on Charter Communications in excess of the interconnection rules for all other internet service providers adopted by the *Open Internet Order* based on a finding that the "general statutory provision against unjust or unreasonable conduct is not a remedy for the transaction-specific harms presented by the transaction," and imposing a "limited set of conditions related to interconnection…[to] ensure a competitive market."). The Commission did not apply its *Open Internet* rules to interconnection, and did not require mandatory interconnection for other internet service providers. *See In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5685-86 ¶ 193 (2015).

the Commission has the responsibility under Section 310(d) to ensure that transfers of control serve the public interest, convenience, and necessity.

Nor does Section 325 preclude the imposition of such a condition. Section 325(b) gives the Commission broad authority over the manner in which broadcasters exercise their retransmission consent rights.[44] While Section 325(b)(3)(C) lists regulations that the Commission *must* ("shall") impose in furtherance of this objective, including the ban on joint negotiations by non-commonly owned stations, it does not prevent the Commission from adopting other restrictions or conditions on the exercise of a station's retransmission consent rights.[45] In the specific context of this transaction, it is also worth noting that Congress enacted the ban on joint negotiations by non-commonly owned stations against the backdrop of the Commission's rule barring common ownership of two "top four" stations, which effectively precluded joint negotiations by two such stations. To the extent the Commission now permits Sinclair to own two "top four" stations, it retains the authority to preserve the status quo ante with respect to joint negotiations by conditioning the acquisition on continued compliance with the ban.

If the Commission decides not to extend the joint negotiation ban to stations in a DMA that would be commonly owned by the Combined Entity, then the Commission should order the Applicants to divest stations that would otherwise give the Combined Entity duopolies in local markets where neither Applicant currently holds more than one station, and require Sinclair and

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[44] 47 U.S.C. § 325(b)(3)(C) (granting the Commission the ongoing authority to "revise" its regulations governing "the exercise by television broadcast stations of the right to grant retransmission consent").

[45] Section 325(b)(3)(C) also establishes a clear legislative objective for additional requirements—ensuring the good faith exercise by broadcasters of retransmission consent rights—on which the Commission relied to adopt the original ban on joint negotiations. *2014 Retransmission Consent Order*, 29 FCC Rcd at 3371-72 ¶ 31. Only afterward did Congress expand and codify the ban. The Commission retains the authority it had prior to enactment to impose a "revise[d]" ban to address the merger-specific concerns presented by the proposed transaction. *Id*.

Tribune to negotiate for retransmission consent and programming using separate negotiating teams. By preventing the creation of new duopoly markets or broadening Sinclair's overall control of joint negotiations, this condition will at least ensure that the transaction does not exacerbate the risk of consumer and competitive harm that would arise out of the Applicants' ability to engage in joint negotiations post-merger.

To permit the Combined Entity to jointly negotiate retransmission consent agreements, particularly for two "top four" stations in a market, would be to expose consumers to the substantial harms that the Commission identified as the bases for barring such negotiations.[46] There is no record evidence for the Commission to depart from its prior findings of harm, and to do so without first seeking and obtaining probative supporting evidence would be arbitrary and capricious[47] given the lack of reasoned explanation for such a departure based on record evidence.[48]

At a minimum, the Commission should require Sinclair to divest one of its affiliations with a "top four" network in markets where it currently broadcasts a second network feed via a multicast stream, and bar the Combined Entity from entering into such dual affiliation arrangements. Sinclair currently owns at least seven stations that multicast more than one of the

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[46] *2014 Retransmission Consent Order*, 29 FCC Rcd at 3357-58 ¶ 10 ("joint 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*" (emphasis added)); *id.* at 3358 ¶ 10 ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers." (footnote omitted)).

[47] 5 U.S.C. § 706(2)(A); *see Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545-49 (1978).

[48] *See Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. . . . Sometimes [an agency must provide a more detailed explanation]—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account." (internal citations omitted)).

four major broadcast networks on their digital signal.[49] For example, WTWC-TV, a Sinclair station in Tallahassee, FL, multicasts both NBC and Fox on its signal. Although the Commission has not applied the local ownership rules to the multicast of two "top four" network signals as a general matter,[50] allowing a single owner to control the broadcast of two of those networks creates the same concentration of market power regardless of whether the combination arises from dual ownership or dual affiliation. The Combined Entity's unprecedented scale and scope particularly warrants a prohibition on dual affiliations and would prevent it from circumventing divestitures of "top four" stations otherwise required by the Commission in order to comply with the rules.

2. Conditions need to be placed on the Combined Entity to prevent joint sales and shared service agreements from becoming a backdoor vehicle for prohibited joint retransmission consent negotiations

The Commission also should consider placing conditions on the Combined Entity that would limit its ability to use JSAs, LMAs, or SSAs to engage in prohibited joint retransmission consent negotiations. As noted above, Sinclair has previously used JSAs, LMAs, and SSAs as an end-run around the Commission's joint negotiation rules.[51] Because the Combined Entity will have even greater incentive and ability to use these methods to violate the Commission's rules than Sinclair did in 2015, the Commission should extend the terms of the *Consent Decree* that it entered into with Sinclair to the Combined Entity to ensure that it cannot use its increased market power to engage in anticompetitive conduct. The Commission should also extend the

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[49] Sinclair 10-K at 7-9.

[50] *2016 Media Ownership Order*, 31 FCC at 9891 ¶ 68.

[51] *See supra* Section II.

terms of the *Consent Decree* to include any sidecar agreements that have been entered into by Tribune or any of its stations, and should adopt stringent policies for any violations.

Under the *Consent Decree*, Sinclair must appoint a Compliance Officer responsible for developing and implementing a Compliance Plan.[52] The Compliance Plan requires Sinclair to engage independent counsel familiar with the retransmission consent rules to advise it in connection with Sinclair's retransmission consent negotiation, and also requires Sinclair to consult with such counsel prior to proposing any non-industry-standard, non-price term for the purpose of ensuring Sinclair's compliance with its obligation to bargain in good faith. In addition, Sinclair is required to report any noncompliance with the retransmission consent rules and the ownership rules within thirty calendar days after discovery of such noncompliance. Finally, Sinclair is required to file compliance reports with the Commission every six months.[53] Sinclair is subject to these conditions until July 29, 2019.[54]

Given Sinclair's history of violating the statute and the Commission's rules regarding joint negotiations,[55] the Commission should adopt three conditions to prevent the Combined Entity from using JSAs, LMAs, or SSAs as a backdoor vehicle for joint negotiations. First, the Commission should extend the *Consent Decree* for an additional seven years beyond its current expiration date. Extending the *Consent Decree* would ensure that the Combined Entity, which will have even greater market power than Sinclair did when the violations occurred in 2015, could not use its power to engage in the same types of conduct.

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[52] *See Consent Decree*, 31 FCC Rcd at 8581 ¶ 13.

[53] *Id*. at 8581-82 ¶¶ 14-16.

[54] *Id.* at 8582 ¶ 17.

[55] For a detailed discussion of Sinclair's utter disregard for the Commission's rules in negotiating retransmission consent agreements, *see* DISH Petition at 65-69.

Second, the requirements of the *Consent Decree* should be applied to the acquired Tribune stations. The newly acquired Tribune stations will be under Sinclair's control while the *Consent Decree* is still in effect. If the Commission does not apply the terms of the *Consent Decree* to the acquired Tribune stations, the Combined Entity could use those stations to engage in the same types of anticompetitive conduct that led the Media Bureau to conduct its investigation in the first place.

Finally, the Commission should adopt stringent penalties for any violation of the rules of the *Consent Decree*. Such penalties should be substantial enough to deter the Combined Entity from engaging in any anticompetitive conduct involving JSAs, LMAs, or SSAs to engage in anticompetitive, prohibited joint negotiations.

V. THE COMBINED ENTITY MUST BE REQUIRED TO ADHERE TO *EXISTING* MEDIA OWNERSHIP RULES, NOT HOPED-FOR RELAXATIONS OF THOSE RULES

Currently, the Commission's national television ownership rule mandates that a commercial television broadcast station licensee cannot have an attributable interest in television stations that have a national audience reach of greater than 39 percent.[56] Similarly, the local ownership rules prohibit a broadcaster from owning two stations with overlapping contours other than in the largest markets, and then only if one of the stations is not among the "top four" stations in the market.[57] Applicants acknowledge in their public interest statement that the proposed transaction would exceed the Commission's national ownership cap by 6.5 percent[58] and, in ten DMAs, the local ownership rules.[59] Despite this acknowledgement, they state that,

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[56] *See* 47 C.F.R. § 73.3555(e).

[57] *See* 47 C.F.R. § 73.3555(b).

[58] *See* Comprehensive Exhibit at 26.

[59] *See id.* at 12-13.

"[t]o the extent 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."[60] In response to concerns about this open-ended representation, Applicants selectively quote from their application, conveniently omitting their reservation of the right to amend the application in response to *proposed* rule changes, and claiming that they are asking the Commission only to "apply any rule changes it adopts prior to acting on the Applications."[61]

As petitioners have pointed out, it would be a blatant disregard of the Commission's public interest standard[62] and the Administrative Procedures Act[63] to consider—let alone approve—a proposed transaction under rules that are not yet final.[64] The Commission must review a transaction under the rules in place at the time of filing.[65] The Combined Entity therefore should not be allowed to exceed the Commission's ownership rules merely upon the issuance of a proposal to amend them.[66]

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[60] *See id.* at 12, 26.

[61] Consolidated Opposition at 23.

[62] *See* 47 U.S.C. § 310(d); *Media General*, 32 FCC Rcd at 191 ¶ 19 ("[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)).

[63] *See* 5 U.S.C. § 553(c) (requiring an agency to provide notice and opportunity for public comment prior to adopting or modifying generally applicable rules).

[64] ACA Petition at 7-8; DISH Petition at 75.

[65] *See N.L.R.B. 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)).

[66] Nor is this an instance where a waiver of the rules is appropriate. The Commission has granted waivers of its media ownership rules to permit a transferee to retain licenses in a handful of markets, *See In re Telemundo Communications Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 6958, 6977 ¶ 49 (2002), or to avoid a "fire sale" of assets that the Commission has required to be divested, *See Applications of UTV of San Francisco, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 14,975, 14,984 ¶ 33 (2001), but waivers are only granted for "good cause shown." 47 C.F.R. § 1.3. This burden cannot be satisfied when parties request wholesale violations of those rules while the rules are subject to a rulemaking proceeding. *See In re Shareholders of Tribune Co., Transferors and Sam Zell et al., Transferees for Consent to the Transfer of Control of the Tribune Co. and Applications for the Renewal of License KTLA(TV), Los Angeles, California, et al.*, Memorandum Opinion and Order, 22 FCC Rcd 21,266, 21,276 ¶ 30 (2007) ("The applicants are engaging in speculation when they take the position that their particular newspaper/broadcast combinations will comply with whatever rules are ultimately

Even with respect to changes to the rules that the Commission may actually adopt during the pendency of this transaction, Applicants should not be permitted to simply amend their applications and treat such a change as a minor amendment. If the Commission modifies the national ownership rule, the local television ownership rules, or both, and the Applicants wish to modify the transaction in accordance with those changes, they should be required to resubmit their application under a restarted shot clock so that the public has a full opportunity to comment on the revised transaction and the Commission can conduct the thorough review required by law.

A. Relaxation of the Current Media Ownership Limits Raises Issues of Significant Public Importance.

Any potential relaxation of the Commission's media ownership rules opens the door to the likelihood of even greater consolidation within the broadcasting industry. Under current law,[67] a single entity is permitted to own commercial broadcast television stations reaching more than three-quarters of the U.S. population, or approximately 252 million people. Relaxing the restraints on the local ownership rules, including allowing the common ownership of two "top four" television stations and the ownership of two stations in any market, regardless of the number of "voices," will lead to greater concentration of the local media marketplace.

These changes, in turn, could have a significant impact on both negotiations for retransmission consent and network affiliate fees by titling the balance in favor of those television station owners who have the ability to exercise control over a larger number of stations nationwide and more duopolies. With respect to retransmission consent fees, for instance, the Commission has noted that, "[l]arge station groups . . . may have more leverage than other

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adopted. Such speculation is not sufficient to overcome our long-standing policy against granting waivers pending the outcome of rulemakings, particularly in light of the fact that such rulemakings last for an indefinite period of time.").

[67] *See In re Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd 3390, 3390-91 ¶¶ 1-2 (2017).

station owners, because they can combine retransmission consent for multiple stations" and that "[g]roup owners may be able to earn more than individual station owners, because they have more experience and leverage with MVPDs."[68]

The far-reaching consequences of altering the ownership rules in ways that will likely increase concentration in the media marketplace merits a thorough review by the Commission, which extends beyond the scope of the proposed transaction. The Commission's review of the proposed transaction then is not the appropriate forum to consider any modifications to its media ownership rules.[69] Congress has mandated that the Commission review these rules every four years to assess "whether any such rules are necessary" and to "repeal or modify any regulation it determines [is] no longer in the public interest."[70] Thus, the proper forum for considering the impact of any ownership rule modifications on diversity and competition, including retransmission consent, is in a rulemaking proceeding—not a specific transaction. Unless and until the Commission's media ownership rules are modified, it is inappropriate and inconsistent with the public interest for the Applicants to force the issue through this proposed transaction.

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[68] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 619 ¶ 126 (2017).

[69] *Cf.* Dissenting Statement of Commissioner Ajit Pai, *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 9133, 9366 (2015) (criticizing certain conditions imposed on the AT&T-DIRECTV merger as "nothing more than policymaking through the merger review process"). Nor is it appropriate to make significant changes to the ownership rules in response to the pending petitions for reconsideration of the *2016 Media Ownership Order*. Rather, given the interests at stake in any such changes, transparency, fairness, and sound administrative practice demand that the Commission first provide notice of its intentions and a full opportunity for public comment.

[70] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act). In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. *See* Appropriations Act § 629, 118 Stat. at 100.

B. The Public and the Commission Should Have the Opportunity to Thoroughly Review an Amended Application under New Ownership Rules.

In the event the Commission modifies its ownership rules and the Applicants subsequently amend their pending applications to acquire additional television stations, the Commission should treat that amendment as a new application, requiring the Applicants to restart the shot clock, and provide the same opportunity for public review as it did for the initial application. An amended application will only propose greater consolidation and concentration of control, conferring even greater market power on the Combined Entity in its negotiations with MVPDs, programmers, and networks. Such an amendment is therefore the kind of "substantial" change or major amendment that warrants re-noticing of the application for public comment and a renewed shot clock.[71] The public needs a full opportunity to consider such a transaction and its implications, and the Commission must subject it to a thorough review.

VI. CONCLUSION

For the foregoing reasons, the Commission should evaluate the proposed transaction carefully and consider adopting conditions to prevent the Combined Entity from exercising the additional market power it will gain through this transaction to the detriment of consumers and competition. The Commission also should reject any request by the Applicants to exceed the current media ownership rules.

[71] 47 C.F.R. §§ 73.3578, 73.3580.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Neal M. Goldberg, hereby certify that, on this 29th day of August, 2017, I caused a copy of the foregoing *Reply Comments of NCTA* 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 electronic mail:

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