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REDACTED—FOR PUBLIC INSPECTION

August 29, 2017

By ECFS

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

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

Dear Ms. Dortch:

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

Please contact me with any questions.

Respectfully submitted,

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

Enclosure

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

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

In the Matter of	)	
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Tribune Media Company	)	MB Docket No. 17-179
(Transferor)	)	
	)	
and	)	
	)	
Sinclair Broadcast Group, Inc.	)	
(Transferee)	)	
	)	
Consolidated Applications for Consent	)	
to Transfer Control	)	

REPLY OF DISH NETWORK L.L.C.

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August 29, 2017

Table of Contents

Page

Exhibit A: Sinclair Admissions and Unrebutted Arguments

Exhibit B: Reply Declaration of Melisa Ordonez

Exhibit C: Reply Declaration of Janusz A. Ordover

Exhibit D: Reply Declaration of William P. Zarakas and Jeremy A. Verlinda

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REPLY OF DISH NETWORK L.L.C.

DISH Network L.L.C. ("DISH") respectfully replies to the Consolidated Opposition to Petitions to Deny ("Opposition")[1] submitted by Tribune Media Company ("Tribune") and Sinclair Broadcast Group, Inc. ("Sinclair") (collectively, the "Applicants") in the above-referenced proceeding.[2]

I. INTRODUCTION AND SUMMARY

The Applicants' Opposition does not come close to meeting their heavy burden of proof, and indeed it does not even try. Among other things, the Applicants have chosen to leave critical arguments unrebutted, including evidence that the merger poses grave public interest harms. The transaction will likely raise prices for distributors and consumers: Sinclair already plans on it, and the Opposition reveals that the transaction's largest benefit in the Applicants' eyes is that it will give the resulting company ("New Sinclair") the size necessary to take on distributors—*i.e.*,

[1] Tribune Media Company and Sinclair Broadcast Group, Inc., Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 (Aug. 22, 2017).

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

increase its prices. And New Sinclair will likely charge more for less. Among DISH viewers, and adjusted for retransmission prices, **{{BEGIN HCI**

END HCI}} Under Sinclair's management, New Sinclair will likely drag the Tribune stations down to Sinclair's level. The Opposition fails to prove that this transaction will result in any merger-specific benefits to the public. Indeed, the Applicants set the bar improperly low for themselves by suggesting that Sinclair's performance of its fundamental duties as a broadcaster will be a "benefit" that will accrue to New Sinclair as a result of the company's ownership of Tribune. These claims in fact showcase Sinclair's current lack of commitment to its duties.

Diversity of Opposition. Unusually for such a transaction, the Applicants have not been able to enlist even one party to file formal comments in support of their proposed merger. By contrast, many have opposed it. The 21 parties filing 13 Petitions to Deny, letters, and opposing Comments come from an uncommonly broad spectrum of interests, views, and ideologies.[3] But

[3] Petition to Dismiss or Deny of DISH Network, L.L.C. ("DISH"), MB Docket No. 17-179 (Aug. 7, 2017) ("DISH Petition to Deny" or "Petition"); Petition to Deny of the American Cable Association ("ACA"), MB Docket No. 17-179 (Aug. 7, 2017) ("ACA Petition"); Petition to Deny of NTCA-The Rural Broadband Association ("NTCA"), MB Docket No. 17-179 (Aug. 7, 2017) ("NTCA Petition"); Petition to Deny of the Competitive Carriers Association ("CCA"), MB Docket No. 17-179 (Aug. 7, 2017) ("CCA Petition"); Comments of T-Mobile USA, Inc., MB Docket No. 17-179 (Aug. 7, 2017); Comments of the American Television Alliance ("ATVA"), MB Docket No. 17-179 (Aug. 7, 2017) ("ATVA Comments"); Petition to Deny of Free Press, MB Docket No. 17-179 (Aug. 7, 2017) ("Free Press Petition"); Petition to Deny of Public Knowledge, Common Cause, and the United Church of Christ, OC Inc. ("Public Knowledge"), MB Docket No. 17-179 (Aug. 7, 2017) ("Public Knowledge Petition"); Comments of Cinémoi, RIDE Television Network, Awe – A Wealth Of Entertainment, MAVTV Motor Sports Network, One America News Network, TheBlaze and Eleven Sports Network ("Independent Programmers"), MB Docket No. 17-179 (Aug. 7, 2017) ("Independent Programmer Comments"); Petition to Dismiss or Deny of Newsmax Media, Inc. ("Newsmax"), MB Docket No. 17-179 (Aug. 7, 2017) ("Newsmax Petition"); Petition to Deny of Steinman Communications, Inc. ("Steinman"), MB Docket No. 17-179 (Aug. 7, 2017) ("Steinman Petition"); Letter from Karl Frisch, Executive Director, Allied Progress to Ajit Pai, Chairman,

they are united in expressing serious concerns about a transaction that would have significant adverse effects on localism and competition, while producing no discernible benefits.

Insufficient Response. As for the Applicants, their Opposition shares some key characteristics with their Application: an apparent belief that they are somehow entitled to grant of their Application and a failure to meet their burden of proof. As a telling example, the Applicants essentially chose to waste one of the two weeks afforded to them for filing their Opposition by belatedly requesting the highly confidential version of DISH's petition. The Applicants' economic declaration, by Professor Gowrisankaran, is a product of even greater haste—it seems to have been written in a day, after the Applicants' first choice of expert, Professor Aviv Nevo, apparently proved unwilling or unable to submit a declaration in support of the Applicants' views. The Commission cannot accept such a perfunctory response, as it fails to answer basic questions raised about the public interest harms of this proposed merger.

Lack of Evidence. The lost time shows in the Applicants' Opposition. They fail to respond, or respond in a perfunctory fashion, to the majority of DISH's arguments. A review of their supposed denials shows that many are admissions or non-denials. And they offer hardly any evidence at all. In fact, uniquely for a merger proceeding, almost all of the Applicants' Opposition (and most of the exhibits) has been submitted in the public record, meaning it is almost entirely bereft of the type of sensitive information that major merger Applicants need to marshal in order to prove their case. DISH charts the Applicants' admissions and non-denials in

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FCC, MB Docket No. 17-179 (Aug. 7, 2017); Letter from Lonnie R. Stephenson, International President, International Brotherhood of Electrical Workers to Michelle M. Carey, Media Bureau Chief, FCC, MB Docket No. 17-179 (Aug. 7, 2017) ("Stephenson Letter").

Exhibit A to this Reply. The arguments of DISH that the Applicants have failed to rebut should be deemed admitted under Commission precedent.

New Sinclair's Enlarged Size Will Result in Higher Prices. The main point of the Applicants' Opposition is also one of their important, if unwitting, admissions. They argue that the merger will give New Sinclair the size necessary to take on "much larger companies"—the large "MVPDs with nationwide or near-nationwide footprints."[4] This illuminates Sinclair's true motivation for this transaction: that the merger will allow it to charge higher retransmission fees. Incredibly, the Applicants believe that this will be a good thing, because it will remedy what they call, inaccurately, the "historical *undercompensation* of broadcasters."[5] It reminds one of the lines in the movie "Dodgeball" when the "Average Joe's" team forfeits the championship and the sportscaster, played by Jason Bateman, quips, "It's a bold strategy Cotton, let's see if it pays off for them."[6]

Sinclair may think that the right price for its signal is two or three times what it charges today. But regardless of the merits of the Applicants' alternative version of history and Sinclair's future aspirations, consumers will beg to differ that a merger causing price increases is a good thing. Indeed, the only people that stand to benefit from these increased prices are New Sinclair's shareholders. This is hardly a public interest benefit. And, what is more, these claims of undercompensation do not matter under the applicable merger standard. If a merger is likely to increase prices, this is an adverse competitive effect that needs to be offset by countervailing benefits. Here there are none.

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[4] Opposition at 2-5, 7.

[5] *Id.* at 26.

[6] *Dodgeball* (Red Hour Films 2004).

DISH's economists have shown that greater broadcaster size leads to higher prices. The Ordover Study[7] found a statistically significant link between the size of the broadcaster and the retransmission prices it can command. The Applicants' response to DISH's economic testimony is the area where the Applicants' self-inflicted lack of time, compounded by the apparent last-minute change of experts, and by the apparent unavailability of evidence favorable to the Applicants, has taken its heaviest toll. The Applicants have at their disposal the information necessary to evaluate the Ordover Study's conclusions, and would have doubtless used that information if in fact it had contradicted those conclusions. They have all of Sinclair's and Tribune's agreements with distributors. They also have all of the agreements that had been reached by the broadcast groups either of them has acquired: Fisher, Bonten, and Allbritton for Sinclair; Local TV for Tribune. If these agreements supported their view, they could, and would, have said: "Professor Ordover is flat-out wrong: when we acquired Fisher, or Allbritton, the prices in our next round of agreements were lower, or at least were not higher, or at the very least did not outpace general retransmission fee increases." They did not say anything of the kind.

Moreover, DISH has now done what the Applicants could have done, and did not. DISH's experts have tracked what happened to retransmission rates after all of the ten large broadcast industry consolidations that took place during the last decade. In all cases, the first agreement following consummation of these transactions ushered in rate increases over the target company's rates that outpaced industry-wide price increases by a large **{{BEGIN HCI END HCI}}** in the case of the Sinclair/Allbritton deal, a stunning **{{BEGIN HCI END**

[7] Declaration of Janusz A. Ordover (Aug. 7, 2017) ("Ordover Declaration") (attached as Exhibit D to Petition to Deny); Declaration of William P. Zarakas and Jeremy A. Verlinda (Aug. 7, 2017) ("Zarakas/Verlinda Decl.") (attached as Exhibit E to Petition to Deny) (together, the "Ordover Study").

HCI}} in the case of the Sinclair/Fisher deal, and a meteoric **{{BEGIN HCI END HCI}}** in the case of the Tribune/Local TV deal. These findings corroborate the Ordover Study's conclusions.

The link between broadcaster size and prices (the larger the broadcaster, the higher the price) is also relevant because it implies the existence of a concave curve, a question about which Professor Gowrisankaran's report resorts to a lot of unnecessary theorizing to make up for the absence of evidence. The report's meditation on concavity does not fare better on the theoretical plane. Among other things, it directly collides with the views of Professor Nevo, the Applicants' other disclosed expert.

New Sinclair's Control of Two Stations in a Larger Number of Markets Would Also Lead to Greater Leverage. Most blatantly, the Gowrisankaran report twists the Ordover/Zarakas blackout study 180 degrees when it claims that DISH's "results show that losing two stations is *less* than twice as painful as losing one station."[8] This claim is based on a comparison between apples and oranges. Professor Gowrisankaran's report compares the loss of one big 4 station and one **non**-big 4 station in the same market, on the one hand, with the loss of one big 4 station in each of two markets, on the other. This is like comparing the combination of an elephant and a mouse to two elephants and wondering why one pair is lighter than the other. To compare apples to apples, the impact of losing one big 4 station and one non-big 4 station in one market should be compared to the sum of the impacts of losing a big 4 station and a non-big 4 station in two different markets. Alternatively, the impact of a non-big 4 station blackout should be adjusted to reflect the higher value of big 4 stations by using the rate that the

[8] Declaration of Gautam Gowrisankaran ¶ 55 (Aug. 22, 2017) ("Gowrisankaran Declaration" or "Gowrisankaran report") (attached as Exhibit E to Opposition).

broadcaster charges for each type of station (big 4 or non-big 4). Application of these methods shows that the loss of two stations in one market has more than the sum of the impacts of two equivalent stations in two markets —meaning the curve is concave.

No Cognizable Benefits and Demonstrable Harm to Localism. The Applicants offer empty rhetoric rather than meaningful, evidence-based responses when attempting to assert the benefits of this merger. DISH has shown, among other things, that Sinclair has abdicated its localism duties in a myriad of ways, by entirely eliminating news programming from certain local stations, drastically cutting local news hours and associated staffing at other stations, passing off nationally or regionally produced programming as "local," and replacing local programming with directed content from corporate headquarters. The Applicants do not deny these allegations. Rather, they complain that "Petitioners rely almost solely on news articles for their claims that the transaction is not in the public interest."[9] Petitioners naturally had to rely on documents available in the public record since the Applicants have failed to produce *any* underlying information to prove the transaction's benefits. The more important question is: are the news stories true? They must be, because, in most cases, Sinclair does not claim that they are false.

The Applicants' rhetoric is also meant to cushion the effect of many damaging admissions that they grudgingly make, as they must. For example, the Opposition does not deny, but attempts to minimize, Sinclair's widespread job cutting: "[w]hile anchors may have been replaced or staffing may have been reduced at some stations . . .";[10] and "[w]hile there have been

[9] Opposition at 14.

[10] *Id.* at 9.

staffing reductions over the years . . ."[11] The Applicants also effectively admit that they do not provide local news to St. Louis: "One such example is St. Louis, where Sinclair does not currently air a traditional local newscast, but due to the economics of the marketplace, offers more limited, albeit still locally produced, news programming."[12] The Applicants do not explain how the "economics of the marketplace" have prevented Sinclair from having a news desk in the country's 21st largest DMA for more than 15 years, why the same economics have allowed Tribune to do so, and why it should take a merger for Sinclair to perform its most elementary localism duties.

The Applicants also continue to extol Sinclair's virtues—its "strong ratings and numerous awards," the "over 700 awards," and Sinclair's "dedication to local viewers," without comparing them to the performance of Tribune or of other broadcasters in these areas. Thus, the Applicants tell us that Sinclair has invested $40 million in Fisher and Allbritton since it acquired them.[13] But, how much would Allbritton and Fisher have spent absent Sinclair's acquisition? There is no answer.

DISH, however, has performed some of the comparisons that the Applicants persist in avoiding. For the period 2015 to the present, DISH compared the hours of viewing by DISH customers for the Sinclair stations affiliated with each of the four networks and stations belonging to other broadcast groups and affiliated with the same network. It has weighted these ratings based on the retransmission fee that each broadcaster charges. The results show that Sinclair's pride in the quality of its programming is unjustified. **{{BEGIN HCI**

[11] *Id.* at 20.

[12] *Id.* at 12-13.

[13] *Id.* at 8, Exhibit A.

END HCI}}[14]

On other measures Sinclair fares no better. It has garnered awards, but not nearly as many as Tribune has on a station-by-station basis. It has invested in the former Fisher and Allbritton stations, but these investments merely continue the rate of investment put in place under the stations' prior owners. It is unclear, then, what (if any) cognizable benefit has resulted from Sinclair's recent acquisition spree.

As for ATSC 3.0, the Opposition's statement that "the merger will allow Sinclair to deploy ATSC 3.0 more widely, efficiently, and quickly, thereby accelerating its roll-out"[15] is contradicted by its own CEO's statement that "3.0 is moving forward regardless of this transaction . . . . I do not see us moving faster."[16] The Commission thus should not give any weight to purported benefits associated with ATSC 3.0.

<u>Sinclair's Conduct</u>. The Opposition offers virtually no rebuttal, and therefore no comfort for the Commission, on the subject of Sinclair's take-no-prisoners' conduct, which it is likely to export to Tribune's stations. Among other things, the Applicants never deny that, in its most recent contract negotiation with DISH, Sinclair gave voice to its view of using consumers

[14] Reply Declaration of William P. Zarakas and Jeremy A. Verlinda ¶ 46 (Aug. 29, 2017) ("Zarakas/Verlinda Reply Declaration.") (attached as Exhibit D).

[15] Opposition at 13.

[16] Sinclair Broadcast Group Inc. Conference Call to Discuss its Definitive Agreement to Acquire Tribune Media Company, Fair Disclosure Wire (May 8, 2017).

as negotiating pawns in the bluntest terms, suggesting that "DISH would be more likely to rethink its position after losing 'a couple hundred thousand subscribers.'"[17]

Media Ownership Rules. The Applicants also gloss over a key question when they contend that their treatment of the violations of media ownership rules implicated by the merger is akin to those found in previous broadcast applications. In the Applicants' words, it is "par for the course in similar recent transactions."[18] In fact, in its Petition, DISH's discussion of prior broadcast transactions showed that the opposite is true. The Applicants here offer less clarity, and make more vague commitments, than every other broadcast transaction that research has uncovered. But the Applicants do not have one word for this discussion. The Commission should not allow these questions to go unanswered.

II. OPPOSITION TO THIS TRANSACTION TRANSCENDS IDEOLOGY AND PRIVATE INTEREST

What is remarkable about the petitioners and commenters opposing this transaction is their diversity. They cover a wide spectrum of views, interests, and ideologies, but they are united in their profound concern about the proposed transaction. From liberal to conservative, from rural to urban, and from consumer to corporate, groups and companies from across the country have warned the Commission that a bigger Sinclair is a bad deal for America.

Companies such as One America News Network, TheBlaze, and Newsmax Media agree with DISH, the American Cable Association, the Competitive Carriers Association, NTCA—The Rural Broadband Association, Free Press, the International Brotherhood of Electrical Workers,

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[17] Petition to Deny at 67.

[18] Opposition at 22.

and Public Knowledge that Sinclair should not be allowed to acquire Tribune.[19] Such unity among this diverse group exists only because of the threat that a combined Sinclair/Tribune portends for expression, diversity, and market balance—direct harms to the public and the public interest.

As a group of independent programmers, including One America News Network and TheBlaze, wrote:

> The growing power of conglomerate networks has produced unprecedented leverage and control over content available to the public and has threatened the very freedom of expression cherished by people regardless of political persuasion. This transaction has the potential to further cripple the availability of diverse and independent voices in media. Regardless of political affiliation, we should agree that robust democracy demands a variety of viewpoints from a myriad of sources.[20]

Similarly, conservative programmer Newsmax Media explained:

> This transaction creates an unprecedented concentration of power in the hands of one broadcaster while setting the stage for other television broadcast networks to amass similar market penetration. A free and diverse press, a bedrock principle of American democracy, will be crippled by this proposed merger.[21]

NTCA—The Rural Broadband Association observed:

> NTCA's members report that 90 percent or more of their customers in their service areas cannot receive any over-the-air broadcast signals, and must rely on MVPD services in order to receive local news, weather reports, and similar benefits of local broadcasters . . . These consumers are thus at the complete mercy of broadcasters who are able to raise rates . . . With more negotiating power than it enjoys today, Sinclair has every incentive to bully small MVPDs into unfavorable retransmission contracts and the price will be paid by rural consumers.[22]

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[19] *See generally* ACA Petition; ATVA Comments; CCA Petition; NTCA Petition; Free Press Petition; Stephenson Letter; Public Knowledge Petition.

[20] Independent Programmer Comments at 1-2.

[21] Newsmax Petition at 1.

[22] NTCA Petition at 6-7, 10.

In comparison, while petitioners and commenters are striking in their diversity, Sinclair and Tribune stand out in their isolation. There were no substantive comments filed in support of the merger,[23] which is highly unusual for a merger of this size.[24]

Petitioners and commenters repeated several refrains, which bear directly on the public interest harms and questions of law implicated by this transaction:

- Both national and local ownership rules prohibit the transaction.[25]
- The Applicants have failed to explain how they would bring their holdings into compliance with Commission rules.[26]

[23] Only one letter in support seems to have been filed, by a lawyer apparently writing on behalf of himself. *See* Letter from Clyde Vanel to Michelle M. Carey, Bureau Chief, Media Bureau, FCC, MB Docket No. 17-179 (Aug. 5, 2017).

[24] *See, e.g.*, Letter from Reps. Cedric L. Richmond, Sheila Jackson Lee & Yvette Clarke to Tom Wheeler, Chairman, FCC, MB Docket No. 16-57 (Sept. 22, 2016) (urging the Commission to approve the Nexstar/Media General transaction); Letter of National Association of Broadcasters, MB Docket No. 16-57 (Oct. 5, 2016) (urging the Commission to approve the Nexstar/Media General transaction); Comments of the Competitive Enterprise Institute, MB Docket No. 15-149 (Oct. 13, 2015) (urging the Commission to "promptly and unconditionally approve" the Charter/Time Warner Cable transaction); Letter from Alexander P. Brown, President and CEO, One World Sports to Tom Wheeler, Chairman, FCC, MB Docket No. 15-149 (Oct. 8, 2015) (supporting the Charter/Time Warner Cable transaction); Comments of Digital Liberty and Americans for Tax Reform, MB Docket No. 15-149 (Oct. 13, 2015) (supporting the Charter/Time Warner Cable transaction); Comments of Cisco Systems, Inc., MB Docket No. 15-149 (Oct. 13, 2015) (supporting the Charter/Time Warner Cable transaction); Ex Parte Letter of TV One, LLC, MB Docket No. 15-149, 1 (May 4, 2016) (supporting the Charter/Time Warner Cable transaction); Comments of Broadcom Corp., MB Docket No. 14-57 (Aug. 18, 2014) (supporting the Comcast/Time Warner Cable transaction); Letter from Sue Ellspermann, Lieutenant Governor, Indiana to FCC, MB Docket No. 14-90 (Sept. 12, 2014) (supporting the AT&T/DIRECTV transaction); Letter from Sam Brownback, Governor, Kansas to Marlene Dortch, Secretary, FCC, MB Docket No. 14-90 (Oct. 6, 2014) (supporting AT&T/DIRECTV transaction); Letter from Mark Cuban, Chairman, AXS TV to Tom Wheeler, Chairman, FCC, MB Docket No. 14-90 (Oct. 1, 2014) (supporting AT&T/DIRECTV transaction); Letter of Small Business & Entrepreneurship Counsel, MB Docket No. 14-90 (Oct. 27, 2014) (supporting AT&T/DIRECTV transaction).

[25] *See* ACA Petition at 1; Independent Programmer Comments at 6; CCA Petition at 18-19; Free Press Petition at 7-9; NTCA Petition at 4.

- The Applicants have failed to provide any real evidence of their purported benefits from the transaction.
- The transaction means fewer voices, less local content, and less diversity in programming for local communities.[27]
- The transaction will imbalance the market by increasing Sinclair's ability to extract burdensome retransmission fees from MVPDs and their customers.[28]

In sum, the diversity of opposition and the uniform emphasis on harm to consumers puts to rest any notion that opposition to this merger is based on ideology or the lazy claim that opposition is motivated by private concerns only. In fact, concern for diversity of speech and localism has been voiced by conservative *and* liberal commenters alike. The repeated refrain of the commenters is that New Sinclair will harm competition and localism and is likely to force consumers to pay more for less. Those outcomes do not reveal self-interest; they demonstrate injury to the public interest.

III. THE OPPOSITION APPEARS TO REVEAL NO SERIOUS EFFORT AND LACKS CRITICAL REBUTTAL EVIDENCE

As for the Applicants, their Opposition shares some key characteristics with their Application: an apparent belief that they are entitled to grant of their Application. As a telling example, the Applicants were on full notice that DISH and other parties would oppose their Application: DISH, the American Cable Association, and Public Knowledge had already filed a

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[26] *See* ACA Petition at 6; CCA Petition at 18-19; Steinman Petition at 3-4.

[27] ACA Petition at 18-20; Letter of Karl Frisch, Exec. Director, Allied Progress, MB Docket No. 17-179, 1-2 (Aug. 7, 2017); CCA Petition at 27-29; Free Press Petition at 20-26; Independent Programmer Comments at 11-13; Newsmax Petition at 2-3; Public Knowledge Petition at 3-7.

[28] *See* ACA Petition at 11-2; CCA Petition at 21-25; ATVA Comments at 3-6; Free Press Petition at 36; Independent Programmer Comments at 7-9; Newsmax Petition at 3; NTCA Petition at 4-7; Public Knowledge Petition at 7-9.

motion for extension of time on July 12, nearly a month before the August 7 due date for Petitions. One would expect that, immediately upon learning this, Sinclair and Tribune would submit undertakings under the Protective Order so as to receive the highly confidential versions of the impending petitions as soon as they were filed on August 7, without having to wait the five business days provided by the rules.[29]

This did not happen. Instead, Tribune's outside counsel submitted their undertakings one day after DISH filed its Petition. Outside counsel for Sinclair waited one more day after that. Counsel for the two Applicants accordingly did not receive the highly confidential version until Monday, August 14, and Tuesday, August 15, respectively. Essentially, Sinclair and Tribune chose to waste one week out of the two weeks afforded by the filing schedule, a week that they could have devoted to preparing their Opposition to DISH's Petition.

The Applicants' 40-page economic declaration by Professor Gowrisankaran is a product of even greater haste – it seems to have been written in a day, after the Applicants' first choice of expert, Professor Nevo, apparently proved unwilling or unable to submit a declaration in support of the Applicants' views. Professor Gowrisankaran did not submit an undertaking under the Protective Order until Tuesday, August 14, and could not lawfully review the highly confidential version of DISH's Petition until Monday, August 21, one day before submitting his declaration, which relied substantially on the highly confidential information.[30] Without that information, Professor Gowrisankaran would not even have known what to attempt to rebut. The idea that the declaration was prepared in one day strains credulity.

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[29] Tribune Media Company and Sinclair Broadcast Group, Inc., *Protective Order*, MB Docket No. 17-179, DA 17-678 ¶ 7 (July 14, 2017).

[30] The Applicants requested a waiver to allow their new expert early access to the information. That waiver was not granted by DISH.

In any event, the lost time shows in the Applicants' Opposition, which does not deserve credence for that reason alone. They fail to respond, or respond in a perfunctory fashion, to the majority of DISH's arguments. They offer rhetoric, but a review of their supposed denials shows that many are admissions or non-denials. And they offer hardly any evidence at all. In fact, uniquely for a merger proceeding, almost all of the Applicants' Opposition (and most of the exhibits) has been submitted in the public record, meaning it is almost entirely bereft of the type of sensitive information major merger applicants always need to marshal to prove their case. In Exhibit A, DISH charts the Applicants' main admissions and non-denials. The arguments that the Applicants have failed to rebut should be deemed admitted under Commission precedent. These allegations and supporting evidence include:

- ***Size and retransmission consent prices***. DISH submitted first-of-its-kind econometric analysis showing that larger broadcast groups command higher retransmission consent prices based on size and size alone. The Applicants have failed to rebut this analysis with evidence of their own. In fact, they effectively admit that higher prices are a key goal of the transaction.

- ***Duopolies and retransmission consent prices***. DISH submitted first-of-its-kind econometric analysis showing that the control over two stations in a single DMA is likely to result in higher prices. The Applicants, again, offer no evidence in rebuttal, but merely attack the DISH economists' method. Those objections are put to rest in this submission.[31]

- ***Losses to localism.*** DISH and other petitioners have detailed substantial staff layoffs and across-the-board reductions in local content at 25-plus Sinclair stations. Sinclair failed to rebut the majority of these showings with any actual evidence, and what evidence it does proffer is so devoid of context that it cannot be countenanced.

It does not matter why Applicants failed to rebut DISH's and others' analysis and factual claims. The result is the same; the analysis and factual claims are deemed admitted consistent

[31] *See* discussion *infra* Section V.B.

with well-established Commission precedent. In enforcement proceedings, for example, the Commission consistently holds that a respondent's failure to deny an allegation constitutes an admission.[32] And the Commission treats unrefuted allegations in third-party complaints the same way: in complaints involving common carriers, failure to deny an allegation constitutes an admission.[33] Similarly, in the context of a carriage complaint, the Commission takes as true a broadcaster's assertion of its right to mandatory carriage, unless and until the cable company justifies its refusal to carry the station.[34]

This consistent treatment of unrefuted facts is no surprise. The Commission rules are inspired by Rule 8 of the Federal Rules of Civil Procedure, which allows the issues in controversy to be "more clearly drawn or narrowed for decisional purposes."[35] The policy is even more necessary in Commission proceedings than in a court, as Commission proceedings are

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[32] R.J.'s Late Night Entertainment Corp., *Memorandum Opinion and Order*, 30 FCC Rcd. 1121, 1122 ¶ 5 (2015) ("In its NAL Response, RJLNE did not deny that it operated its station's transmitter from an unauthorized location and failed to maintain required EAS equipment or its public inspection file. As a result, we find that RJLNE willfully violated the Rules."); *see also* Connect America Fund, *Order*, 29 FCC Rcd. 181, 207 ¶¶ 129-30 (2014) ("Windstream did not reply to Ellijay Telephone Company's filing. Therefore, we grant Ellijay Telephone Company's challenge in its entirety."); *see also* Hye Cha Kim, Licensee of Station WDGR(AM) Dahlonega, GA, *Forfeiture Order*, 28 FCC Rcd. 1439, 1439-40 ¶¶ 2-4 (2013) ("In response to the NAL, Mrs. Kim did not deny any of the facts in the NAL . . . [W]e affirm the NAL's undisputed finding that Mrs. Kim violated Sections 73.49 and 73.1745 of the Rules."); Time Warner Entertainment-Advance/Newhouse Partnership, Kansas City, MO, *Forfeiture Order*, 28 FCC Rcd. 15826, 15826-27 ¶¶ 3-5 (2013) ("Time Warner did not deny that, on July 18, 2011, it failed to make available these required records to agents from the Enforcement Bureau's Kansas City Office . . . We affirm the NAL's undisputed finding . . .").

[33] 47 C.F.R. § 1.724(d) ("Averments in a complaint or supplemental complaint filed pursuant to § 1.722 are deemed to be admitted when not denied in the answer.").

[34] Ellington Broadcasting, WHCQ-LD v. Cable One, Inc., *Memorandum Opinion and Order*, MB Docket No. 17-96, DA 17-710 (July 24, 2017).

[35] Amendment of Rules Governing Procedures to be Followed where Formal Complaints are Filed Against Common Carriers, *Notice of Proposed Rulemaking*, 2 FCC Rcd. 90, 92 ¶ 12 (1987).

based upon fact, and not mere notice, pleading.[36] The rules do not generally contemplate the type of voluminous discovery found in federal courts, making accurate statements of facts from the parties even more crucial.[37]

IV. THE APPLICANTS IMPROPERLY TRY TO SHIFT THEIR BURDEN ONTO PETITIONERS

The Applicants attempt to shift the evidentiary burden to the petitioners by reciting in detail the evidentiary requirements that the Commission has established for petitions to deny under certain circumstances.[38] They even title the section "Standard of Review." But this is rhetorical sleight-of-hand. The burden is on the Applicants, not the petitioners, to show that their proposed transaction is in the public interest. And as DISH demonstrated in its Petition, this requires an affirmative *showing* that the transaction, on net, portends benefits to the public at large, and not merely company shareholders.[39] Mere assertions, without evidentiary support, cannot meet the Applicants' burden.[40]

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[36] *See* Implementation of the Telecommunications Act of 1996, *Report and Order*, 12 FCC Rcd. 22497, 22550 ¶ 120 (1997) ("A significant difference exists in the procedural requirements of actions brought before the different fora. Federal court rules require notice pleading while the Commission's rules require fact pleading. Notice pleading anticipates the use of discovery to obtain evidence of the facts to support a complainant's claims, while fact pleading requires that a complainant know the specific facts necessary to prove its claim at the time of filing.").

[37] *See* Marpin Telecoms and Broadcasting Company Limited v. Cable & Wireless, Inc., Cable & Wireless USA, Inc., and Cable & Wireless, PLC, *Order on Reconsideration*, 18 FCC Rcd. 508, 510-11 ¶ 8 (2003).

[38] Opposition at 2-4.

[39] Petition to Deny at 9-12.

[40] Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc., to Nexstar Media Group, Inc., *Memorandum Opinion and Order*, 32 FCC Rcd. 183, 192 ¶ 19 (2017) ("*Nexstar/Media General Order*") ("If the Commission is unable to find that the proposed transaction serves the public interest, or if the record *presents* a substantial and material question of fact as to whether the transaction serves the

Petitioners and commenters in a proceeding can therefore do (at least) two things to help the Commission fulfill its duty under the Communications Act to review proposed changes of control:

1. They can point out the failures in Applicants' public interest case (for example, by noting that claimed benefits are not cognizable under the Commission's standards), thereby showing that the Applicants have failed to carry their burden; and
2. If the Applicants do provide a basis to believe that there are net benefits, they can offer their own evidence in tension with Applicants' evidence, thereby establishing a question of fact as to whether the transaction is in the public interest.[41]

It is only in the latter case that the *prima facie* case requirement arises, precisely because evidence is required to counter actual evidence of cognizable benefits already submitted in the record. But such counter-evidentiary support is not even needed if the Applicants have failed to carry their own, initial burden of showing that the transaction is in the public's interest. That is the case here.

To read Applicants' Opposition, the only citations in DISH's Petition were to unsupported and argumentative press coverage.[42] They make no mention in the Opposition's "Standard of Review" section to DISH's substantial evidentiary showing, which included not only testimony from a DISH programming executive, but extensive econometric analysis of actual industry data and associated declarations by not just one, but three respected economists in the field. Regardless of the Applicants' attempt at diversion here, DISH has proffered *both* (1)

public interest, Section 309(e) of the Act requires that the applications be designated for hearing.").

[41] *Id.*

[42] Opposition at 3 ("The Petitions instead rely on broad speculation, factually incorrect premises, and inaccurate, misleading, and clearly biased newspaper articles and similar sources.").

arguments about how Applicants have failed to carry their initial burden of proof; and (2) real, cognizable evidence that the transaction portends real harm to the public interest. Applicants cannot make it otherwise by wearing blinders (and inviting the Commission to do likewise) to the defects in their own public interest case and to the real evidence put forth by DISH and others.

V. THE TRANSACTION WOULD RESULT IN HIGHER PRICES

A. New Sinclair's Enlarged Size Would Likely Result in Higher Prices

The main point of the Applicants' Opposition is also one of their most important admissions. They argue that the merger will give New Sinclair the size necessary to take on "much larger companies,"[43] the large "MVPDs with nationwide or virtually nationwide footprints."[44] This shows what Sinclair believes: that the merger will allow it to charge higher retransmission fees. It is also consistent with the assurances Sinclair has given investors: "so the largest synergy, if you will, between the 2 companies is net retrans . . . it's a contractual step-up to our rates. Tribune generally had fairly low rates in the industry, and we have some of the highest, if not the highest, in the industry."[45] The Applicants believe that this will be a good thing, because it will remedy what they call, inaccurately, the "historical undercompensation of broadcasters."[46] They explain that the "eye-popping" retransmission price increases of recent years were necessary for broadcasters to catch up, as they started from an "artificially low

[43] *Id.* at 7.

[44] *Id.* at 5.

[45] Sinclair Broadcast Group Inc. at JP Morgan Tech, Media and Telecom Conference, Fair Disclosure Wire (May 22, 2017) (comments of Christopher S. Ripley).

[46] Opposition at 26.

baseline."[47] Their depiction of broadcasters as chronically underpaid and deserving of a more generous payday that this merger will finally enable is both wrong and, even if it were true, irrelevant for merger analysis.

<u>The Applicants' Version of Retransmission Consent History is Wrong</u>. The Applicants cite two grounds for their grievance of undercompensation. First, they state that distributors were initially able to retransmit signals "without paying them any compensation," "by law inconsistent with normal copyright protection."[48] This is far from accurate. What they mean is that, initially, broadcasters had only the rights of any other copyright holder. These rights were subject to a statutory copyright license, and the Copyright Office had set the royalty for the license at zero or near zero. But this is not the confiscatory level the Applicants imply because, as discussed below, the benefits from retransmission of broadcast signals travel in both directions. Second, the Applicants oddly, but properly, give credit to DISH for helping them achieve higher compensation: "[t]hat began to change only after the advent of MVPD competition, which eroded cable monopolies when two major direct broadcast satellite distributors developed the technology and gained the right to retransmit local-into-local signals in the early 2000s."[49]

It is, of course, true that DISH and DIRECTV eroded the dominance of cable operators. But neither legal constraints nor the dominance of cable operators explain why the price of retransmission consent remained at zero or near zero into the 2000s, when Congress had already created a retransmission consent right, and DISH and DIRECTV were competing with cable

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[47] *Id.* at 29.

[48] *Id.* at 36.

[49] *Id.* at 36-37.

operators. Rather, the reason is this: zero is not the crazy, exploitative price that the Applicants imply. It has long been recognized that the retransmission of broadcast signals by distributors is a synergistic, win-win relationship, as it confers benefits on both sides. It was precisely for that reason that the Copyright Office had set the copyright royalty for the local retransmission of super-stations at zero. In the words of the Copyright Arbitration Royalty Panel, "[l]ocal retransmission of broadcast stations benefits the broadcast station and the copyright owners of the programming."[50] The Copyright Librarian adopted that recommendation, and extended it to network stations, too.[51] It was subsequently codified by Congress.[52] In the words of Professor Ordover, which are not rebutted by the Applicants, "when a local station owner and an MVPD can come to a retransmission agreement, both can be better off (earn more profit) than if they do not come to an agreement."[53] The reason is obvious: the broadcaster gets more eyeballs to sell to advertisers as well as a higher-quality signal and broader reach than afforded by over-the-air reception; the MVPD gets more programming to sell to subscribers. Of course, it does not follow that the benefits conferred on one side exactly equal those received by the other, but that is an entirely plausible, and indeed likely, possibility that the Commission has recognized in other economic contexts.[54]

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[50] Rate Adjustment for the Satellite Carrier Compulsory License, Report of the Panel Before the Library of Congress Copyright Office, Docket No. 96-3 CARP-SRA, 51 (Aug. 28, 1997).

[51] Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55742 (Oct. 28, 1997) (codified at 37 C.F.R. § 258.3(b)(3), (4) (1998)).

[52] The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

[53] Ordover Decl. ¶ 15 (explaining that, in the absence of a retransmission agreement, each party still would earn positive operating profits).

[54] FCC, Connect America Fund & Intercarrier Compensation Reform Order and FNPRM Executive Summary at 7 ¶ 18 (2011), 2011 WL 5114855, *6 (recognizing the value of telephone

Sinclair cannot have it both ways—it cannot disavow the market as unfair when it was receiving zero and praise the market as the only possible arbiter of prices when it can demand—and command—a king's ransom. The reality is that market forces are the indisputable arbiter of prices when there is sufficient competition, but market prices can be distorted by the existence of bargaining leverage on the one or the other side of the table, such as when a cable operator is the only distributor in a local market, or when a very large owner of stations proposes to add significantly to its collection in a market characterized by robust competition among MVPDs.

The Applicants' Views as to the "Right Price" Are Irrelevant. Sinclair may think that the right price for its signal is two or three times what it charges today. But regardless of the merits of the Applicants' alternative version of history and Sinclair's future aspirations, consumers will beg to differ that a merger resulting in price increases is a good thing. And, what is more, these claims of undercompensation do not matter under the applicable merger standard.[55] If a merger is likely to increase prices, this is an adverse competitive effect that needs to be offset by countervailing benefits. Here there are none.

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traffic as roughly equal between two carriers, the FCC adopted "a uniform national bill-and keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC . . . [W]e reject the notion that only the calling party benefits from a call and therefore should bear the entire cost of originating, transporting, and terminating a call").

[55] In assessing whether a merger is in the public interest, the Commission reviews how the transaction will benefit consumers. One of the benefits the Commission considers is whether the transaction will result in lower prices for consumers. *See, e.g.*, Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc., to Nexstar Media Group, Inc., *Memorandum Opinion and Order*, 32 FCC Rcd. 183, 193 ¶ 24 (2017) ("[B]enefits must flow through to consumers, and not inure solely to the benefit of the company. For example, we will more likely find marginal cost reductions to be cognizable than reductions in fixed cost because reductions in marginal cost are more likely to result in lower prices for consumers.") (citations omitted).

DISH's Evidence of the Likely Price Increases Stands Unrebutted. DISH's economists have proven that broadcaster size leads to higher prices. The evidence that the proposed acquisition will result in higher prices is more direct here than in the typical transaction.[56] Usually, a transaction's future effect on prices must be estimated based on inferences from the increase in market share and in concentration that the transaction will entail. Typically, there is no evidence on whether past increases in concentration have led to higher prices.

That evidence is present here. The Ordover Study found a statistically significant link between the size of the broadcaster and the retransmission prices it can command. The Applicants' response to DISH's economic testimony is the area where the Applicants' self-inflicted lack of time, compounded by the apparent last-minute change of experts, has taken its heaviest toll. The Opposition's main criticism seems to be the Ordover Study's choice of $500 million in annual revenue as the dividing line between small and large groups. According to the Applicants, because each of the Applicants makes more than $500 million, the conclusions of the study do not show that they, too, will raise prices.[57] Professor Gowrisankaran makes similar criticisms, claiming that the rates paid to very small and one-station broadcasters should not matter.[58]

The Applicants do not suggest an alternative dividing line. Obviously, one is necessary because comparing the prices of a broadcast group with one billion in revenue to those of a

[56] *See* Zarakas/Verlinda Decl. ¶ 9.

[57] Opposition at 36.

[58] Professor Gowrisankaran criticizes the exclusion of small broadcasters. Gowrisankaran Decl. ¶¶ 85-87. That conclusion is rebutted thoroughly by Professor Ordover. *See* Reply Declaration of Janusz A. Ordover ¶¶ 26-29 (Aug. 29, 2017) ("Ordover Reply Declaration") (attached as Exhibit C).

group with one billion and one dollar in revenue would not have been meaningful, and any higher dividing line would have left too few groups on one side of the fence to make the results statistically significant. Nor does Professor Gowrisankaran offer a "floor" that would exclude small broadcasters. Just as important, Professor Gowrisankaran offers no support for the idea that even if large station owners have more bargaining power than small station owners and can therefore secure higher retransmission fees, both Sinclair and Tribune are already so large that combining them will have no additional effect on retransmission fees.[59]

New Analysis Further Buttresses the Link Between Broadcast Consolidation and Prices. More important, the Applicants have at their disposal the information necessary to evaluate the Ordover Study's conclusions, and would have doubtless used that information if in fact it had contradicted those conclusions. They have all of Sinclair's and Tribune's agreements with distributors. They also have all of the agreements that had been reached by broadcast groups either of them has acquired: Bonten, Fisher, and Allbritton for Sinclair; Local TV for Tribune. If these agreements supported their view, they could, and would, have said: "Professor Ordover is flat-out wrong. When we acquired Fisher, or Allbritton, the prices in our next round of agreements were lower, or at least were not higher, or at the very least did not outpace general retransmission fee increases." They did not say any of this, and the Ordover Study's conclusions should be deemed admitted for that reason alone.

Moreover, DISH has now done what the Applicants could have done, and did not (except that DISH has access only to its own agreements, and not agreements between either of the Applicants and any other distributor). DISH's experts have analyzed what happened to the

[59] *See* Ordover Reply Decl. ¶¶ 27-28.

retransmission rates after the ten large broadcast industry consolidations that took place during the last decade. In all but one of these cases, after-acquired clauses operated to cause a rate hike immediately upon consummation.[60] But this rate hike was only the beginning. In all cases, the first agreement following consummation of these transactions ushered in rate increases over the target company's rates that outpaced industry wide price increases by a stunning **{{BEGIN HCI END HCI}}** in the case of the Sinclair/Fisher deal, by **{{BEGIN HCI END HCI}}** in the Sinclair/Allbritton deal, and by a meteoric **{{BEGIN HCI END HCI}}** in the Tribune/Local TV deal.[61] This analysis corroborates the Ordover Study's conclusions.

<u>DISH's Prior Econometric Analysis Provides Strong Evidence</u>. The link between broadcaster size and prices (the larger the broadcaster the higher the price) is also relevant because it implies the existence of concavity,[62] a question about which Professor Gowrisankaran's report resorts to a lot of unnecessary theorizing to make up for the absence of evidence from his study. The question whether the curve of broadcaster size is concave (an incremental, "lone-wolf" broadcaster would achieve a lower fee per subscriber than the comparable per-station fee for each station in a group of stations) or convex (the lone-wolf broadcaster has more pricing power than the comparable per-station fee for each station in a group) is answered here with great precision, in dollars and cents. The larger broadcasters command higher prices on a per station, per subscriber basis than the smaller ones, and this fact standing alone implies that the transaction will harm consumers and the public interest. The

[60] The only exception was the **{{BEGIN HCI END HCI}}** combination, where DISH had a contractual right to choose which of the combining companies' rates would govern post-transaction. No matter: for that transaction, too, the rates rose precipitously in the first agreement following consummation.

[61] *See* Ordover Reply Decl. ¶ 19.

[62] *See id*. ¶ 4.

bottom line is that the increase in the broadcast industry's concentration has increased prices, and it will likely continue to do so. Theoretical discussions on the shape of the curve are relevant only where the direct evidence of a link between size and price is missing. They do not matter here because the Ordover Study did indeed find a statistically significant link between the size of the broadcaster and the retransmission prices it can command.

The Applicants also complain that they lack the information necessary to verify the Ordover Study.[63] Ironically, the Applicants were part of the programming coalition that challenged the Commission's request for third parties to produce internal information, including retransmission consent contracts, leading to the D.C. Circuit's decision in *CBS Corp. v. FCC*.[64] Be that as it may, DISH believes that the standard set out in the *CBS* decision is amply met here.[65] The *CBS* Court explained that information must serve as "a *necessary* link in a chain of evidence."[66] Here, the Applicants must meet the burden of persuasion. Given the paucity of their claims that the transaction would serve the public interest and the substantial analysis presented by DISH, Applicants would surely fail to meet this burden unless they can delve into the underlying data. DISH believes that they should have the opportunity to do so even though DISH believes that its analysis will carry the day. Moreover, DISH's programming agreements

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[63] Gowrisankaran Decl. ¶ 74.

[64] 785 F.3d 699 (D.C. Cir. 2015).

[65] *See* Motion of DISH Network L.L.C., American Cable Association, and Public Knowledge for Additional Information and Documents and Extension of Time, Applications of Tribune Media Co. and Sinclair Broadcasting Group for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 17-179, 6 (July 12, 2017) ("Motion for Additional Information") (explaining why disclosure of confidential documents under a protective order meets the *CBS* standard).

[66] 785 F.3d at 705.

typically allow disclosure in the event of a government order. DISH stands ready to comply with such a Commission directive.

<u>The Applicants' Theorizing Is Not Supported by the Academic Literature</u>. Professor Gowrisankaran's meditation on concavity does not fare better on the theoretical plane. As an initial matter, it collides with the views of Professor Nevo, the Applicants' other disclosed expert. Professor Gowrisankaran states that "[t]he definition of complements here is synonymous with the definition of convexity above."[67] Elsewhere, Professor Gowrisankaran essentially repeats the same assertion: the question "whether DISH's surplus function is concave or convex" is "equivalent to considering whether Sinclair and Tribune's stations are substitutes or complements for DISH."[68] Whether or not this was why Sinclair had to change experts, Professor Nevo disagrees. This is illustrated by Professor Nevo's discussion of the features available on a smartphone:

> A user of a Smartphone may care most about whether the phone can make calls and receive and send texts, but the user wants to have additional features. The phone manufacturer can make its phone more attractive by adding any number of features, say Bluetooth capability or face recognition. Either might add the same value to the phone, but from the manufacturer's point of view the marginal benefit of adding multiple features is decreasing. So while not direct substitutes both features could be in competition to be added to the phone in addition to basic functionality.[69]

So, in our negotiating context, even the merger of two programming groups that are not substitutes for one another would lead to higher prices if each of the two groups added equal

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[67] Gowrisankaran Decl. ¶ 37.

[68] *Id.* ¶ 45.

[69] Aviv Nevo, Deputy Assistant Att'y Gen. for Econ., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries: Mergers that Increase Bargaining Leverage, 5 (Jan. 22, 2014) ("Nevo Remarks").

value to the distributors' lineup, albeit by catering to different sets of a distributor's subscribers. This is a key insight of Professor Nevo's, which correctly contradicts Professor Gowrisankaran's belief in a total equivalence between concavity and substitutability, and has direct implications for this merger.[70]

Professor Gowrisankaran's declaration also ignores a key advantage enjoyed by the broadcast industry that, according to the Applicants' own expert Professor Nevo, tilts the balance in favor of higher bargaining leverage on the part of the content provider: the broadcaster's fear of losing access to the distributor's customer in the event of a blackout is moderated by the fact that many of the distributor's customers will leave for other distributors in order to watch the programming. DISH's Melisa Ordonez makes that point in her Reply Declaration,[71] and it was borne out by the blackout analysis of the Ordover Study. Professor Gowrisankaran's declaration does not even acknowledge it. But here is what Professor Nevo had to say at an earlier time:

> When a small provider bargains on its own it is reasonable for it to assume that in case of disagreement most consumers will not switch distributors and therefore it will lose all the consumers it currently gets from the distributor. However, when bargaining as part of a larger system, which imposes an "all or nothing" rule in disagreement, some of the consumers might switch to an alternative distributor and be recaptured by the provider. This makes the state of disagreement less painful to the provider and therefore gives it leverage in negotiation.[72]

Here, the "leverage" recognized by Professor Nevo is even greater: one of the solutions to which DISH resorts to mitigate the damage during a blackout is to supply customers with over-the-air antennas, further limiting the broadcaster's fear that it will lose eyeballs for purposes

[70] Professor Ordover discusses the smartphone example in his Reply Declaration. *See* Ordover Reply Decl. ¶ 13.

[71] Reply Declaration of Melisa Ordonez ¶ 10 (Aug. 29, 2017) ("Ordonez Reply Declaration") (attached as Exhibit B).

[72] Nevo Remarks at 5-6.

of advertising revenue. This means that distributors suffer a disproportionate amount of the pain during a blackout, a fact ignored by Professor Gowrisankaran.

The concavity of the size curve should come as no surprise in light of the traits of the industry. The negotiation between broadcasters and distributors over retransmission presents characteristics that place it more squarely on the "concavity" side of the fence than many other industries where a concavity curve has been detected. Therefore, mergers across geographic boundaries have been seen as threatening higher prices. These characteristics include strong and well-documented substitutability of large broadcast groups as different pathways for a distributor to avoid excessive losses, the negotiation of national pricing and contractual terms, and the unusually strong leverage wielded by the upstream content provider – the broadcaster.

Testimony by DISH establishes that "[e]ach of the broadcast groups is a separate pathway for DISH to having enough broadcast retransmission agreements to avoid 'bleeding' an excessive number of subscribers."[73] For example, Ms. Ordonez explains, "if DISH has to renegotiate a contract with a broadcaster at a time when it is subject to a blackout of the Tribune stations, it is more likely to accede to some of that broadcaster's demands to avoid a second blackout and additional churn among its national subscriber base."[74]

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[73] Declaration of Melisa Ordonez ¶ 4 (Aug. 7, 2017) ("Ordonez Decl.") (attached as Exhibit C to Petition to Deny).

[74] *Id.*; *see also* Gregory S. Vistnes & Yianis Sarafidis, *Cross-market Hospital Mergers: A Holistic Approach*, 79 Antitrust L.J. 253, 270 (2013) ("Vistnes & Sarafidis") ("All else equal, a health plan will realize lower profits if its product becomes less attractive to employers and employees. Thus, the loss of one or more hospitals from a plan's provider panel can be expected to also reduce the plan's profits. *This is the source of hospitals' bargaining leverage*: the more that a health plan's profits will fall if it is unable to include a given hospital in its network, the greater the hospital's bargaining leverage, and thus the higher the price the hospital can negotiate.") (emphasis added).

Nor is DISH alone in having the national reach that makes it need as many pathways as possible to achieve a critical mass of retransmission agreements with broadcast groups. At least one other distributor, DIRECTV, is national, too. Each of DISH and DIRECTV has invested in multi-billion dollar satellite systems and spot beam configurations that reach the entire nation. DISH provides local broadcast stations to all 210 of the nation's DMAs, and DIRECTV comes close, providing local stations to 198 DMAs.[75] Many other distributors—Comcast, Charter, Verizon's FIOS, Altice—also have geographically broad reach.

Judged on these and other characteristics, the retransmission consent market also scores at least as well as other industries where a merger across local areas has been found to have national effects—precedent virtually ignored by the Applicants. Both the Commission and the Department of Justice have correctly found the merger of two landline ISPs (Comcast/Time Warner Cable, Charter/Time Warner Cable) narrows the range of substitute paths to a consumer that are available to an Online Video Distributor ("OVD"). The agencies have reached this conclusion even though, in the usual case, OVDs do not even directly negotiate with ISPs or pay ISPs for access. In the healthcare industry, the conclusion that the merger of two hospitals reduces the number of national substitutes rests on the idea that some employers demand broad coverage of some health care plans, which in turn need a broad array of hospitals, albeit located in different parts of the country, to choose from.[76] The evidence of substitutability is, if anything, stronger here.

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[75] *See* FCC, *Television Broadcast Stations on Satellite* (updated Feb. 19, 2016). https://www.fcc.gov/media/television-broadcast-stations-satellite.

[76] Vistnes & Sarafidis at 255-58.

Nor can it be said, as the Applicants imply, that the regression methodology is flawed because it does not take into account the different quality of the content each broadcaster group provides. The idea here would be that a large broadcaster such as Sinclair may be able to command higher rates not because it is large, but because the quality of its programming is superior. But, as discussed below, this idea is contradicted by reality. DISH conducted a comparison of hours viewed by DISH customers for Sinclair stations affiliated with each of the four networks and stations belonging to other broadcast groups and affiliated with the same network, adjusting these ratings by the retransmission fees that each broadcaster charges. The results show that Sinclair's pride in the quality of its programming is entirely unjustified. **{{BEGIN HCI**

END HCI}}[77]

This further fortifies the Ordover Study's conclusions: because Sinclair's stations are less popular than average, its size becomes an even weightier factor for its ability to command higher prices. Sinclair not only plans to raise prices; it plans to charge more for less.

Nor are Professor Ordover's conclusions at odds with his recognition of the "possib[ility]" that an MVPD "has to offer some minimum line-up of local stations in order to have a viable MVPD package in competition with its rival MVPDs."[78] Professor Gowrisankaran alleges that this implies convexity. In Professor Ordover's words:

> Although the existence of a minimum quality level as reflected in channel lineup may be required, there is no evidence that DISH or other MVPDs today are in

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[77] Zarakas/Verlinda Reply Decl. ¶¶ 44-46.

[78] Ordover Decl. ¶ 27.

danger of slipping below a competitive viability threshold due to the loss of a broadcast station.[79]

In his Reply Declaration, Professor Ordover debunks many more of Professor Gowrisankaran's unfounded claims.[80]

<u>Professor Gowrisankaran's Reliance on Market Concentration Uses the Wrong Tool in the Wrong Way</u>. Having no data to support the view that the curve is convex, Professor Gowrisankaran's declaration switches to a discussion of concentration, and concentration change, by using the well known Herfindahl-Hirschman Index. But there is a groundswell of academic literature criticizing this formulaic method as an ineffective tool for evaluating the effects of a transaction in which the main concern is about the increase in bargaining leverage, and even more particularly one that cuts across many local areas. In fact, this may be one more reason why the Applicants' first choice of expert proved unable or unwilling to offer a declaration—Professor Nevo has stated that the same concavity results "can be true when providers are not perceived as substitutes."[81]

Professor Gowrisankaran's report does not only use an inappropriate tool, but he also uses it inappropriately. Remarkably, the report suggests that concentration should be measured in a market that includes not only broadcast stations but also cable networks. Professor Gowrisankaran asserts that the two kinds of programming are substitutes for one another, on the sole basis of a chart that depicts an "x," with one line standing for the comparatively declining

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[79] Ordover Reply Decl. ¶ 42.

[80] *See id.*

[81] Nevo Remarks at 5.

ratings of broadcast networks and another for the comparatively rising ratings of cable networks.[82]

As the Commission knows, substitutability for the purpose of a market concentration analysis is a more rigorous test than the one Professor Gowrisankaran claims. Professor Gowrisankaran does not show that an increase in price for broadcast stations drives distributors to flock to cable networks instead. He does not because he cannot: despite what the Applicants themselves characterize as the "eye popping" retransmission fee increases of the past years,[83] not one distributor has elected to forgo carriage of broadcast signals and rely on cable networks to entice its customers instead. Notably, Sinclair owns a cable network, the Tennis Channel, and digital multicast networks Comet, Charge! and TBD. If any evidence existed that an increase in the price for its broadcast stations drives distributors to the sports programming of these other networks, Sinclair would possess and rely on that evidence.[84]

Moreover, Professor Gowrisankaran's assertion clashes directly with findings made by the Commission. In 2013, the Commission stated that "broadcast television alone is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence declined to broaden the MVPD product market. Accordingly, we treat

[82] Gowrisankaran Decl. ¶ 17, Exhibit 1.

[83] Opposition at 29.

[84] Further support that cable and broadcast networks are not substitutes can be found in the ad revenue each earns. A recent study suggests that broadcast TV commands almost 40 percent higher fees than cable TV. *See* Stephen Battaglio, *Broadcast and Cable TV Upfront Ad Sales End Slump with 4.5% Gain*, LA Times (July 12, 2016), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-network-upfront-20160712-snap-story.html ("Based on the dollars taken in, the average cost for reaching a thousand viewers in the 18 to 49 age group—the most coveted demographic for advertisers—will be $47 on broadcast TV in the 2016-17 season, up from $43 in the 2015-16 campaign. The average cost on a cable network will be $31, up from the current rate of $29, [a Media Dynamics Inc.] report said.").

broadcasters as part of a separate group."[85] Professor Gowrisankaran embraces the idea of an omnibus cable-broadcast market without explaining why the Commission has gotten it wrong in his view, even though he was aware of the relevant findings of the Commission, which had been cited by DISH in its Petition.

Professor Gowrisankaran's report also argues that retransmission consent fees constitute, by his estimate, under 10% of DISH's average revenue per subscriber.[86] This is not an economic analysis: it is an economic excuse. There is no authority—Commission, judicial, or otherwise—in competitive analysis for taking a price increase, calculating it as a percentage of overall revenue for a company, and concluding that it is not relevant because it is small. Under that calculation, even the most outrageous attempt to monopolize a component of production would pass competitive analysis muster on the ground that it constitutes a small fraction of the overall cost of the product. The standard approach in competition analysis is to ask whether a firm can increase price significantly over the competitive level for that particular product or service. That is because the fundamental question before the Commission is whether the proposed transaction will produce merger-specific harm to competition and consumers. Imagine that the Commission believed the proposed transaction would lead New Sinclair to gain retransmission fees bigger than the sum of the fees that Sinclair and Tribune could obtain pre-transaction, and that some or all of those higher fees were passed along to consumers, so that it could be predicted that consumer prices would be higher as a direct result of the transaction. It could not be seriously asserted that those merger-specific price increases to consumers should be excused or ignored

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[85] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, 28 FCC Rcd. 10496, 10498 ¶ 2 n.3 (2013).

[86] Gowrisankaran Decl. ¶ 19.

depending on whether retransmission fees constituted a lot or a little of DISH's (or any other MVPD's) revenues. Harm to consumers is harm to consumers.

That is why, for example, the Horizontal Merger Guidelines used by the Department of Justice and the Federal Trade Commission ("FTC") teach that "mergers should not be permitted to create, enhance, or entrench market power" and that "[a] merger enhances market power if it is likely to encourage one or more firms to *raise price[s]*, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives."[87] In other words, the "[g]uidelines emphasize that merger analysis ultimately is about competitive effects,"[88] which means that higher prices to consumers demonstrate precisely why a transaction should be blocked.

Indeed, nearly six decades ago, the Supreme Court rejected the premise of Professor Gowrisankaran's argument in *FTC v. Morton Salt*, where it analyzed a related provision of the Clayton Act, which prohibits price discrimination.[89] In that case, the defendant argued that the FTC was unjustified in finding that the defendant's actions "substantially lessen[ed] competition" because the product in question was a "small item" in the "budgets" of its customers.[90] The Supreme Court reasoned that, while "[t]here are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock," the goal of the Clayton Act was to "protect a merchant from competitive injury . . . on any or all goods

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[87] DOJ and FTC, Horizontal Merger Guidelines, 2 (2010) ("Horizontal Merger Guidelines") (emphasis added).

[88] Carl Shapiro, The 2010 Horizontal Merge Guidelines: From Hedgehog to Fox in Forty Years, 77 Antitrust L.J. 49, 56 (2010).

[89] 334 U.S. 37 (1948) (analyzing Clayton Act § 2, as amended by the Robinson-Patman Act, 15 U.S.C. § 13.).

[90] *Id.* at 49.

sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock."[91]

In any event, Professor Ordover's Reply Declaration conclusively rebuts Professor Gowrisankaran's concentration and substitutability discussion.[92]

B. New Sinclair's Control of Two Stations in a Larger Number of Markets Would Lead to Even Greater Leverage

DISH's Petition showed that the merger would exert upward pressure on prices for another reason, too— it would place a larger number of so-called duopolies in New Sinclair's hands. Most blatantly, Professor Gowrisankaran's report distorts the Ordover/Zarakas blackout study into its 180-degree opposite when it claims that DISH's "results show that losing two stations is *less* than twice as painful as losing one station."[93] As an initial matter, he confuses the question of a broadcaster's national size and the question of a broadcaster's control over two stations in the same market. The blackout study is only relevant to the latter – the question of so-called duopolies.[94]

But in any event, Professor Gowrisankaran's claim is wrong because it is based on a comparison between apples and oranges. He compares the loss of one big 4 station and one non-big 4 station in the same market (which was the case in all but one of the two-station blackouts)

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[91] *Id.*

[92] Ordover Reply Decl. ¶¶ 32-36.

[93] Gowrisankaran Decl. ¶ 55.

[94] Oddly, it is Professor Gowrisankaran who criticizes Professor Ordover for muddling the two, claiming that "Dr. Ordover conflates arguments for concavity of the surplus function within a DMA with concavity of the surplus function over the footprint of Sinclair and Tribune. In reality, his analysis does not show concavity either within a DMA or nationally." Gowrisankaran Decl. ¶ 40. Professor Gowrisankaran is wrong. But in any event, there appears to be agreement that the two should not be confused but rather should be treated separately.

to the loss of one big 4 station in each of two markets. This is like wondering why the combination of an elephant and a mouse is not heavier than the combination of two elephants. To compare apples to apples, the impact of losing one big 4 station and one non-big 4 station in one market should be compared to the sum of the impacts of losing a big 4 station and a non-big 4 station in two different markets. That comparison shows that the loss of two stations in one market has more than the sum of the impacts of two equivalent stations in two markets – meaning the curve is concave.

Professor Ordover, Mr. Zarakas, and Dr. Verlinda have specifically looked at the effects of the Tribune and Hearst blackouts on DISH. Below is a summary of their conclusions and methods:

- First, in assessing the "concavity" of an MVPD's surplus function, using subscriber cancellations as a proxy, it is essential to use comparable data. The test for concavity in a market involves determining whether or not subscriber cancellations increase at an accelerating rate when a media group controls two local broadcast stations in that market compared to a market where only one station is blacked out. Importantly, however, this test has to involve "like" stations. Using the combination of big 4 stations and non-big 4 stations, as Dr. Gowrisankaran has apparently done, would not yield meaningful results.

- With this in mind, we applied two methodologies to assess the concavity of DISH's surplus function. Under the first methodology, we conducted a regression analysis of subscriber cancellations in DMAs affected by a media group blackout. That analysis allowed us to compare (1) the combined impacts in a market where two stations were blacked out (even if they were unlike stations; i.e., one big 4 network and one non-big 4 station) to (2) the sum of the impacts in a market where the broadcaster controls a big 4 station and another market where the broadcaster controls a non-big 4 station. Under the second methodology, we adjusted the impact from the loss of a non-big 4 station to reflect the higher value of a big 4 station by using the ratio of the retransmission fees that the associated media groups charge for big 4 and non-big 4 stations, respectively.

- Application of these methods indicates strong evidence that DISH's surplus function was concave during the observed blackout periods. That is, the impact on subscriber cancellations resulting from the loss of two local broadcast stations in the same market is

> greater than the sum of the individual impacts associated with the blackout of one local broadcast station in one market and another station in another market.[95]

The Applicants also argue that DISH specifically, or DBS companies together, have been involved in a disproportionate share of blackouts when retransmission consent negotiations fail to produce an agreement.[96] Of course, the Applicants do not factor in the obvious point that the DBS companies are the *only* MVPDs that are truly national in their coverage, and therefore the only MVPDs that have to negotiate with essentially all, and in DISH's case all, of the nation's broadcast groups. With more broadcast group negotiations comes, of course, the risk of more negotiation failures.

DISH itself is in a different position from other MVPDs. Its customer base is more rural than cable MVPDs, and satellite pay-TV customers are "incredibly price sensitive."[97] Given the simple fact that higher retransmission fees inevitably generate higher consumer prices,[98] DISH is naturally going to bargain very hard against higher prices, because those higher prices are going to hit its consumers harder than other pay-TV consumers. To bargain on their behalf, of course, serves to fight against the tide of ever-increasing retransmission consent fees.

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[95] *See* Zarakas/Verlinda Reply Decl. ¶¶ 4-6; *see also* Ordover Reply Decl. ¶¶ 33-41.

[96] Opposition at 39-41.

[97] Testimony of DISH Network L.L.C. in Opposition to Raised House Bill 7312, An Act Concerning State Tax Administration Before the Finance, Revenue and Bonding Committee, Jan. 2017 Sess. 2 (Conn. 2017) (statement of Nicholas Green, DISH Network L.L.C.), https://www.cga.ct.gov/2017/FINdata/Tmy/2017HB-07312-R000411-Green,%20Nicholas-DISH%20Network-TMY.pdf.

[98] Petition to Deny at 16, 21.

And those higher consumer prices are the fundamental point.[99] Just as with the claim that higher fees are a small percentage of DISH's average revenue, the Applicants are raising a false issue. The fundamental question continues to be whether the transaction will raise prices for MVPDs and consumers. The fact that some MVPDs may choose to agree to higher prices more readily, while others choose to fight through a blackout, does not change the adverse effect to the public. Greater bargaining power in the hands of broadcasters inevitably leads to higher per-unit prices to MVPDs, and, as DISH has demonstrated, this transaction will increase retransmission consent prices even higher than they would otherwise be, which means that this transaction would require consumers to pay more.[100]

Professor Gowrisankaran's report also launches miscellaneous other criticisms of DISH's blackout analysis. DISH's data show that a significant portion of the subscribers lost during a blackout are indeed gone for good,[101] dispelling Professor Gowrisankaran's speculation that "[o]ne would expect those individuals to be likely to switch back to DISH when carriage of the station is restored, especially because they chose to subscribe to DISH in the first place."[102] As for Professor Gowrisankaran's complaint that the blackouts analyzed by DISH are not

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[99] The Applicants falsely claim that the Commission has determined that it will not address the threat of higher consumer prices as a result of merger-specific increases in retransmission consent fees. Opposition at 27. In fact, in *Media General/Nexstar*, 32 FCC Rcd. at 196 ¶ 35, the Commission specifically found that the petitioners in that case "do not provide any basis for the assertion that the merged entity will have 'market power' vis-à-vis MVPDs with national or at least broad coverage of their own." Of course, here DISH has demonstrated that such market power would create merger-specific price increases.

[100] Zarakas/Verlinda Reply Decl. ¶¶ 43-44.

[101] *See id.* ¶¶ 24-25.

[102] Gowrisankaran Decl. ¶ 97.

permanent,[103] there have been no permanent blackouts. This, of course, has not prevented the temporary blackouts that do frequently happen from being a subject of concern and study by the Commission and others. In fact, the Commission has long found that temporary blackouts are a more pernicious and effective technique in the hands of programmers than permanent ones,[104] essentially because the programmer can inflict harm while limiting its own cost of foreclosure and being effectively assured that its retransmission revenues will be restored – the equivalent of eating the cake and preserving most of it. Finally, Professor Gowrisankaran's complaint that DISH's analysis does not connect subscriber defections in one and two station markets to price effects is misguided. The analysis cannot do that for the simple reason that large broadcasters consistently negotiate uniform prices for each big 4 and non-big 4 station, and so the effect of a "duopoly" is not possible to isolate. But customer defections nevertheless remain a good measure of broadcaster leverage.

[103] *Id.* ¶ 96.

[104] *See, e.g.*, Implementation of Section 103 of the STELA Reauthorization Act of 2014 Totality of the Circumstances Test, *Notice of Proposed Rulemaking*, 30 FCC Rcd. 10327, 10329-30 ¶ 3 (2015) ("In addition, broadcast licensees that are affiliated with other programming networks may have additional leverage because they can integrate their retransmission consent negotiations with carriage of the other networks, and any negotiation impasses could result in the MVPD's loss of those other networks as well as the broadcast stations. Further, consumers today are increasingly accessing video programming from online video distributors that deliver content via the Internet. As a consequence of these marketplace changes, retransmission consent fees have steadily grown and are projected to increase further, thereby applying upward pressure on consumer prices for MVPD video programming services. Moreover, 'negotiations [for] retransmission consent have become significantly more complex in recent years, and . . . in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts.' ") (citing Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014)).

VI. THE APPLICANTS CONTINUE TO FAIL TO SHOW COGNIZABLE BENEFITS, AND THE OPPOSITION HIGHLIGHTS THE RISKS TO LOCALISM THROUGH NON-DENIAL AND ADMISSION

The supposed benefits of the proposed transaction are the area where the Applicants' practice of offering rhetoric instead of evidence is at its peak.

A. Unproven Scale Efficiencies Cannot Save an Otherwise Anticompetitive Merger

The Opposition makes a great deal out of the purported scale efficiencies that the proposed transaction will offer. The Applicants claim that the proposed transaction is necessary for Sinclair to compete against much larger rivals in the media sector because it will give New Sinclair the size and scale "to invest in local news and sports (among other programming) and to advance and leverage their technological innovation,"[105] accelerate the roll-out of ATSC 3.0 across "a more national spectrum footprint,"[106] and continue to "negotiate for compensation from MVPDs that more closely reflects the fair value off broadcast programming."[107] But once again—not surprisingly—the Applicants fail to even attach a single declaration attesting to their claimed efficiencies resulting from increased scale, because they cannot.

Nor do the Applicants offer any specific supporting evidence that such efficiencies are verifiable[108] or transaction specific:[109] they do not identify a single service, innovation or other

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[105] Opposition at 6.

[106] *Id.* at 13.

[107] *Id.* at 29.

[108] Efficiency claims will not be considered if they are vague, speculative, or otherwise cannot be verified by reasonable means. Horizontal Merger Guidelines at 29-31.

[109] Horizontal Merger Guidelines at 30 (only merger-specific efficiencies will be considered, which are "those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having

initiative that New Sinclair would be able to undertake, that Sinclair would not have been able to undertake without Tribune. Indeed, the Applicants fail to offer any evidence that, absent the transaction, Sinclair would be unable to invest in local news and sports or, as explained further below, deploy ATSC 3.0 in an efficient manner. Even if the Applicants' scale efficiency claims somehow withstood scrutiny—which they do not—they would not be nearly enough to justify this merger.[110]

As a result, all that is left of the Applicants' claimed scale efficiencies is the increased size and scale necessary to continue to "negotiate for compensation from MVPDs that more closely reflects the fair value off broadcast programming."[111] But, as explained above, far from being an efficiency, the Applicants' increase in scale will result in higher prices for MVPDs, like DISH, higher prices for OVDs, and ultimately price increases for consumers. Sinclair's statements to its investors make this clear: this transaction "does give us significant operating leverage versus much larger counterparts in our space, like the Comcasts of the world, AT&Ts, the Verizons."[112] But "a proffered efficiency cannot arise from anticompetitive effects."[113]

The Opposition provides the support and underpinnings for such a conclusion. Indeed, the Applicants complain that "broadcast stations are still paid much less for their programming

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comparable anticompetitive effects"); *Nexstar/Media General Order*, 32 FCC Rcd. at 192-93 ¶¶ 22-24.

[110] *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1089 (N.D. Ill. 2012) ("[D]efendants have failed to present sufficient proof of the type of 'extraordinary efficiencies' that would be necessary to rebut the FTC's strong prima facie case.").

[111] Opposition at 29.

[112] Sinclair Broadcast Group Inc. at JP Morgan Tech, Media and Telecom Conference, Fair Disclosure Wire (May 22, 2017) (comments of Christopher S. Ripley).

[113] *United States v. Anthem, Inc.*, 855 F.3d 345, 369 (D.C. Cir. 2017) (J. Millet, concurring), *cert. dismissed*, 137 S. Ct. 2250 (2017).

per-subscriber on a ratings point basis than the major cable networks are,"[114] that "broadcast stations are—if anything—undercompensated,"[115] and that broadcasters are challenged by "the consolidation and presence of MVPDs with nationwide or virtually nationwide footprints."[116]

The Applicants' admitted desire—and seemingly true motivation for the proposed transaction—to increase in size and scale to obtain even more bargaining power to negotiate higher prices from MVPDs is not a pro-competitive benefit: it is an admission that proves the Applicants believe that the proposed transaction will result in increased prices to MVPDs, a decidedly anticompetitive harm. In essence, the Applicants assert that they should be allowed to "bulk up" because, in their view, the marketplace is not functioning sufficiently well to provide them the higher prices that they believe it should. And, the Applicants believe that higher prices, both to MVPDs and then passed on to their subscribers, would benefit the public interest. This is wrong for two fundamental reasons:

First, the Applicants—by their express desire to achieve the necessary size and scale to be able to raise prices—have voluntarily seized hold of the third-rail of competition policy. As the Supreme Court has explained—in words equally applicable to the Commission's public-interest standard—competition law "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices*, the highest quality and the greatest material progress . . . "[117]

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[114] Opposition at 37.

[115] *Id.* at 30.

[116] *Id.* at 5.

[117] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) (emphasis added).

Second, neither the Commission's public interest standard nor the antitrust laws allow for an increase in negotiating power on the grounds that it would be used for some claimed social benefit. The Applicants do not explain, nor could they, how the Commission is supposed to get into the Goldilocks business of deciding whether a broadcast-group merger seeking to raise prices will be successful in raising prices that are too low, just right, or already above competitive levels. But, in any event, the notion of seeking governmental approval to increase in size and scale to obtain "significant operating leverage versus much larger counterparts" on the other side of a bargaining table is entirely invalid. For example, in the Apple/e-books case in the Second Circuit, the question arose whether the efforts of Apple and book publishers to seek higher prices could be justified because they enabled the publishers to take on Amazon. The Second Circuit squarely rejected the notion that an effort to raise prices by creating countervailing negotiating power could be justified in this way, labeling it a "concept of marketplace vigilantism that is wholly foreign to the antitrust laws."[118] The Applicants' assertion that New Sinclair should similarly be able to be bigger in size and scale to command higher prices is just as much a form of impermissible "marketplace vigilantism."

B. The Transaction Also Poses Vertical Risks to Competition

DISH further demonstrated that a distinct risk to competition arises from New Sinclair's ambition to become a competitor against DISH and other MVPDs and OVDs even as it continues to act as a critical supplier of programming to those very same companies.[119] This is a

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[118] *United States v. Apple*, 791 F.3d 290, 298 (2d Cir. 2015). Similarly, the Supreme Court refused to consider the claim of doctors that the creation of a maximum fee schedule would ultimately lower prices to patients. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 339, 341-42 (1982).

[119] Petition to Deny at 43-45.

familiar vertical concern. For example, the Commission and the Department of Justice found the Comcast/NBCU transaction would provide the combined company with the ability to harm downstream competitors of Comcast through its control of the upstream NBC programming; harm that would flow through to consumers.[120] Here, New Sinclair's control of its broadcast stations together with its desire to compete against MVPDs and OVDs would lead New Sinclair to take actions that could include requiring DISH's Sling TV to carry bundles of broadcast and non-broadcast programming that would inevitably drive up the price of that service to consumers.[121] In their Opposition, the Applicants demonstrate this real vertical risk to competition. They boast that "it is precisely this [contemplated] size that will allow Sinclair to compete with much larger companies offering competitive programming for a fee,"[122] and that a goal of the transaction is for Sinclair to "attain[] the scale that increasingly is necessary to compete against much larger rivals in the media sector, including nationwide MVPDs like DISH, even when those transactions are fully consistent with U.S. antitrust laws."[123] Of course, what is consistent with both the U.S. antitrust laws and the Commission's precedent is that consumers and competition will be harmed where, as here, a company that competes with MVPDs and OVDs can simultaneously foreclose or otherwise limit those rivals from gaining access to broadcast-network content.

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[120] Applications of Comcast Corporation, General Electric Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4255-58 ¶¶ 38-44 (2011); Competitive Impact Statement, *United States et al. v. Comcast Corp. et al.*, 1:11-cv-00106, 23-27 (Jan. 18, 2011).

[121] Petition to Deny at 44-45.

[122] Opposition at 7.

[123] *Id.* at 6.

C. The Opposition Ironically Confirms the Risks to Localism

1. Lack of Context Continues to Undermine Benefit Claims

Much of Applicants' benefits case continues to fail for lack of context. The Applicants extol Sinclair's virtues without comparing them to the performance of Tribune or of other broadcasters in these areas. As a result, there is no basis to conclude that Sinclair's acquisition of the Tribune stations will actually improve those stations' performance or benefit localism in any larger sense.

For example, the Opposition touts Sinclair's investment of "$40 million" in the Fisher and Allbritton stations since 2013 and 2014, respectively. This time, at least, Applicants purport to provide evidence to back up their claim in the form of a highly confidential exhibit. **{{BEGIN SINCLAIR HCI**.

END SINCLAIR HCI}}[124] These expenditures amount to approximately $2 million per station; but, this is less than the per station capital expenditures that Allbritton made between 2010-12 ($2,273,000 per station),[125] and substantially less than Tribune's capital expenditures between 2014-2016 ($3,085,000 per station).[126] It is not at all clear, then, that Sinclair has invested anything that Fisher and Allbritton's former owners would not, or that it will even be able to match Tribune's own level of investment. Sinclair's track record, therefore, cannot be taken as evidence that it will embark on any meaningful additional investments in the Tribune stations.

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[124] *Id.* at Exhibit A.

[125] *See* Allbritton Communications Co., 2012 Annual Report, 31 (Form 10-K) (Dec. 13, 2012).

[126] Tribune Media Co., 2016 Annual Report, 93 (Form 10-K) (March 1, 2017).

The Opposition fares no better on the issue of local news. DISH noted that the 82 hours in weekly local news coverage added by Sinclair over 2016-2017 fell below the rate at which Tribune had added local news over that same time period (3.7 percent collectively over 2 years versus Tribune's 8.5 percent between 2014 and 2016 and 3 percent to date in 2017).[127] Instead of addressing this point head-on in their Opposition, Applicants attempt to obscure it by introducing a new metric, asserting that Sinclair has increased "local news *and other content*" by 221.5 hours per week over the past three years.[128] In Exhibit B to the Opposition, the 221.5 hours are characterized collectively as "local news/lifestyle" programming.[129] What portion of that 221.5 hours is actually news? Or local? Applicants fail to make the distinction, leaving unrefuted the fact that Tribune has performed better on the metric of local news growth. And whatever such "other/lifestyle" content may be within those 221.5 hours, it cannot be placed on the ledger in favor of Sinclair without a corresponding assessment of how Tribune has performed on "other/lifestyle content," an assessment the Applicants also have failed to place in the record.

Nor can Sinclair be credited with quality over quantity when it comes to third party recognition. The Opposition boasts of "over 700 awards Sinclair has won and other recognitions that Sinclair has received." But again, the Applicants have failed to provide any context for these "awards and other recognitions." It turns out, this figure includes many minor awards, third place finishes and honorable mentions.[130] Looking only at the regional Emmys and Edward

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[127] Petition to Deny at 60 n.90.

[128] Opposition at 9 and Exhibit B (emphasis added).

[129] *Id.* at Exhibit B.

[130] *See Awards,* Sinclair Broadcast Group, http://sbgi.net/awards/ (last visited Aug. 29, 2017).

R. Murrow awards, as Applicants did in the Application,[131] reveals that Tribune earns more awards on a per station basis than Sinclair. From 2015-2017, Sinclair earned 179 regional Emmys, 63 regional Edward R. Murrow awards, and 3 national Edward R. Murrow awards, for a total of 245 such awards. In that same time period, Tribune earned 152 regional Emmys, 42 regional Edward R. Murrow awards, and 2 national Edward R. Murrow awards, for a total of 196 awards. Sinclair has 126 broadcast television stations, meaning that it earned 1.94 awards per station. Tribune, however, only has 42 television stations, which means it earned 4.67 awards per station. Tribune earned well over *twice* as many regional Emmys and Edward R. Murrow awards per station as Sinclair. But even this understates the comparison. Sinclair earned 41 of these awards for KOMO and 59 for WJLA, stations it acquired from Fisher and Allbritton, respectively. That means that 100 of its 245 awards came from just two stations. Dropping those two stations would drop the awards per station to 1.16, less than one-quarter of Tribune's total. And both KOMO and WJLA won many awards before Sinclair acquired them in 2013 and 2014, earning 66 and 36 awards from 2012 to 2014, respectively.[132]

Many of the Applicants' other programming and local benefit assertions fail for similar reasons. They claim that Sinclair has added local sports programming, sponsored scholar athlete awards, and hosted public town halls. But they give no information on *what Tribune has done* on these fronts. Examples from recent months of local Tribune stations' public interest involvement in their local communities include:

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[131] Application at 3.

[132] *See Edward R. Murrow Awards*, Radio Television Digital News Association, https://www.rtdna.org/content/edward_r_murrow_awards; National Capital Chesapeake Bay Chapter, The National Academy of Television Arts and Sciences, www.capitalemmys.tv.

- sponsoring youth journalism competitions and scholarships;[133]
- awarding public school teachers with funds for classroom supplies and technology;[134]
- producing special programming on critical issues affecting local communities;[135]

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[133] *See, e.g.*, WTIC-TV, *Nominees are in for Fox61 Student News Awards Ceremony*, Tribune Media (May 25, 2017), www.tribunemedia.com/nominees-are-in-for-fox61-student-news-awards-ceremony/ (announcing nominees for the Fox 61 Student News program, which includes participation of children from over fifty schools from across Connecticut, and results in multiple scholarship awards from the station); Tribune Broadcasting, *FOX 61 Student News Kicks-Off on Super Bowl Weekend*, Tribune Media (Feb. 1, 2017), www.tribunemedia.com/fox-61-student-news-kicks-off-on-super-bowl-weekend/ ("FOX 61 Student News provides participating schools with the software and platform needed to produce and distribute stories and events that showcase the excellence in our schools. . . . 'I'm proud that FOX 61's commitment to education continues. We are excited to work with Connecticut's schools on our FOX 61 Student News program. Together we will empower students to receive a unique experience which will build character and touch lives in our community,' said Jon Hitchcock, General Manager.") WGN-TV, *WGN-TV Presents the 15th Annual "WGN-TV Back-To-School Kids Fair,"* Tribune Media (July 22, 2016), www.tribunemedia.com/wgn-tv-presents-the-15th-annual-wgn-tv-back-to-school-kids-fair/ (announcing the 15th annual "WGN-TV Back-to-School Kids Fair, . . . featur[ing] food, fun, health screenings, safety tips and everything parents need to get kids ready for school").

[134] *See, e.g.*, WPIX, *Brooklyn Gardens Elementary In East New York, Brooklyn to Receive $5K from PIX11 for School Supplies*, Tribune Media (March 21, 2016), www.tribunemedia.com/pix11-announces-first-winner-of-fuel-my-school-contest-for-nyc-public-schools/ ("PIX11 and Anchor Sukanya Krishnan announced Brooklyn Gardens Elementary as the winning school LIVE on the PIX11 Morning News on Friday, March 18 and presented Principal Irene Spence a $5,000 check to be used on school supplies or technology – the items the school cannot afford and feel would make a difference in the lives of their students."); WPIX, *William A. Morris I.S. 61 In Staten Island Received $5K From PIX 11 For School Supplies*, Tribune Media (March 28, 2016), www.tribunemedia.com/pix11-announces-middle-school-winner-of-fuel-my-school-contest-for-nyc-public-schools/ ("PIX11 established FUEL MY SCHOOL to help New York City public school students 'fuel their school.' During the month of February, elementary, middle school and high school students, teachers and parents from public schools in the 5 boros of New York City were invited to submit an essay explaining how their school makes a difference. PIX11 received nearly 600 school submissions.")

[135] *See, e.g.*, KFOR Honored With National Edward R. Murrow Award, Tribune Media (June 21, 2016), www.tribunemedia.com/kfor-honored-with-national-edward-r-murrow-award/ (announcing prestigious award for Oklahoma station's series, "Faces of the Bombing," a "multi-part profile of the survivors and family members of victims of the Oklahoma City Bombing"); WTIC-TV, *FOX 61 Hartford to Air Special "Faces of the Opioid Crisis" On April 25*, Tribune Media (Apr. 19, 2017), http://www.tribunemedia.com/fox-61-hartford-to-air-special-faces-of-the-opioid-crisis-on-april-25 ("FOX 61, Tribune Broadcasting's Connecticut station, continues

- hosting local forums;[136]
- raising awareness of critical health issues;[137] and

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its steadfast commitment to furthering the conversation about the ongoing opioid crisis by devoting an hour of programming entitled, "Faces of the Opioid Crisis," which examines the growing epidemic in Connecticut."); WGN-TV, *WGN-TV To Air News Series & Special "Hijacked – The Opioid Addiction Crisis,"* Tribune Media (March 13, 2017), www.tribunemedia.com/wgn-tv-to-air-news-series-special-hijacked-the-opioid-addiction-crisis/ (announcing four-part series, including feature on "how heroin, fentanyl and other dangerous substances spider web across the country and to the Chicago area"); WGN-TV, *WGN-TV To Air Special "Violence: The New Plague,"* Tribune Media (Aug. 2, 2017), http://www.tribunemedia.com/wgn-tv-to-air-special-violence-the-new-plague/ (announcing special on violence in Chicago "through a public health lens [] include[ing] in-depth reports as seen through the eyes of those on the front lines of this ongoing emergency"); WGN-TV, *WGN-TV To Air Special "Unforgettable: Living With Alzheimer's,"* Tribune Media (Nov. 16, 2016), www.tribunemedia.com/wgn-tv-to-air-special-unforgettable-living-with-alzheimers-2; KDAF-TV, *NewsFix Focuses on Teen Suicide in Dallas/Fort Worth Week-long series begins May 16*, Tribune Media (May 16, 2016), www.tribunemedia.com/newsfix-focuses-on-teen-suicide-in-dallasfort-worth-week-long-series-begins-may-16/ (announcing series and live discussion on teen suicide in North Texas).

[136] *See, e.g.*, *WHO-HD/Des Moines To Broadcast Three Special Iowa Forums*, Tribune Media (Nov. 11, 2015), www.tribunemedia.com/who-hddes-moines-to-broadcast-three-special-iowa-forums/ (announcing series of long-form discussions with presidential candidates to discuss education, health, and jobs, in partnership with the Des Moines Area Community College).

[137] *See, e.g.*, WPIX, *Sickle Cell Awareness Month: PIX11 News to Air 3-Part Series on Sickle Cell Disease*, Tribune Media (Sept. 14, 2015), www.tribunemedia.com/sickle-cell-awareness-month-pix11-news-to-air-3-part-series-on-sickle-cell-disease/ (announcing 3-part special on living with and managing sickle cell disease, hosted by local station reporter whose son suffers from the disease); *Chicago's Very Own WGN-TV Presents All-New "Stories of Hope: Facing Breast Cancer" In Support Of National Breast Cancer Awareness Month*, Tribune Media (Oct. 5, 2015), www.tribunemedia.com/chicagos-very-own-wgn-tv-presents-all-new-stories-of-hope-facing-breast-cancer-in-support-of-national-breast-cancer-awareness-month/ ("WGN's Dina Bair and Dean Richards will host the special that will feature inspiring survivor stories including an exclusive interview with singer-songwriter, guitarist and activist Melissa Etheridge about her battle with the disease. The special will also feature discussions with doctors and healthcare professionals about advancements in breast cancer diagnosis and innovative treatments, as well as regaining one's life after a diagnosis."); *WGN-TV To Air Special "Unforgettable: Living With Alzheimer's,"* Tribune Media (Aug. 13, 2017), www.tribunemedia.com/wgn-tv-to-air-special-unforgettable-living-with-alzheimers/ (" 'Unforgettable: Living with Alzheimer's' takes a look at the growing elder population and the growing trend that Alzheimer's disease is becoming a bigger factor in peoples' lives. Hosted by WGN's Dina Bair and Dean Richards, the special will feature discussions with doctors, patients, caregivers and support staff, including interviews.").

- helping to raise funds and other donations for charities serving local communities.[138]

Without a comparison, there is simply no basis to conclude that acquisition by Sinclair will improve the status of the Tribune stations in these areas. Indeed, the facts suggest the opposite: Sinclair will likely reduce the quality of the Tribune stations post-acquisition.

2. The Applicants' Rhetoric Cannot Disguise Their Admissions

Tellingly, the Applicants have not denied DISH's allegations that Sinclair has consistently abdicated its localism duties, including by eliminating news programming from certain local stations in their entirety, drastically cutting local news hours and associated staffing at other stations, passing off nationally or regionally produced programming as "local," and replacing local programming with directed content from corporate headquarters. Instead, they

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[138] *See, e.g.*, WGN-TV, *WGN-TV To Partner With Make-A-Wish® Illinois On May 25 From 7am-7pm On Their 'Make-A-Wish Miles Drive,'* Tribune Media (May 19, 2017), www.tribunemedia.com/wgn-tv-to-partner-with-make-a-wish-illinois-on-may-25-from-7am-7pm-on-their-make-a-wish-miles-drive ("Chicago's Very Own WGN-TV is proud to team up with Make-A-Wish Illinois for an airline miles drive to support wishes granted to Illinois children."); KDVR-TV, *FOX31 Denver Problem Solvers Toy Drive: Help Make the Holiday Season Bright for Colorado Children*, Tribune Media (Nov. 21, 2016), www.tribunemedia.com/fox31-denver-problem-solvers-toy-drive-help-make-the-holiday-season-bright-for-colorado-children/ ("This holiday season, FOX31 Denver, KDVR-TV, in a special partnership with The Salvation Army, Gordmans and Colorado State University-Global Campus (CSU-Global), will be collecting toys to help Colorado children in need with the FOX31 Problem Solvers Toy Drive. 'The FOX31 Problem Solvers are committed to helping Colorado children and families when they need it most,' said Joan Barrett, Vice President and General Manager of KDVR. 'Projects like this are the perfect opportunity for everyone in our community to come together and make a difference.' "); WGN-TV, *3rd Annual WGN Morning News Drive-Thru Food Drive Brings In Record 10,000 LBS of Food!*, Tribune Media (Nov. 17, 2016), www.tribunemedia.com/3rd-annual-wgn-morning-news-drive-thru-food-drive-brings-in-record-10000-lbs-of-food/ (announcing successful food drive in partnership with the Greater Chicago Food Depository, resulting in over 10,000 pounds of food donated and $5,000 in monetary donations by viewers); WGN-TV, *Chicago's Very Own WGN-TV To Host LifeSource Blood Drive On June 14 – World Blood Donor Day!*, Tribune Media (June 7, 2016), www.tribunemedia.com/chicagos-very-own-wgn-tv-to-host-lifesource-blood-drive-on-june-14-world-blood-donor-day/ (hosting blood drive at local Chicago station WGN-TV).

attempt to cover up their inability to deny DISH's claims by trying to shift the focus onto what DISH has done instead.

As DISH explains above, petitioners and commenters in a change of control proceeding can both point out the flaws in Applicants' arguments, as well as submit their own evidence in counterweight to Applicants' evidence. The latter, of course, presumes that Applicants have actually placed evidence in the record that requires a counterweight. Here, the Applicants have failed to place *any evidence* in the record that local stations fare better under Sinclair that under any of Sinclair's stations' prior owners or under Tribune.[139] There is nothing therefore to actually counter. DISH's citations to news coverage of Sinclair's many and myriad cuts to local news rooms over the past two decades provide context as to *why* Sinclair did not and cannot show that the public is better off following a Sinclair acquisition.

Ultimately the Applicants cannot deny DISH's claims and, despite the Opposition's rhetoric, they do not. Below is a list of the Applicants' failure to deny DISH's criticisms, together with explanations of why what they do say does not suffice to answer these criticisms:

- Local newscasts have been eliminated or reduced at many Sinclair stations, including at the St. Louis ABC affiliate and most if not all of its WB affiliates.
    - The Applicants say: *"One such example is St. Louis, where Sinclair does not currently air a traditional local newscast, but due to the economics of the marketplace, offers more limited, albeit still locally produced, news programming."*[140] This is a mystifying statement, betraying again the Applicants' sense of entitlement. St. Louis is the country's 21st largest DMA, and the Applicants do not explain how the "economics of the marketplace" have prevented Sinclair from having a news desk there for more than 15 years, why the same economics have allowed Tribune to do

[139] *See* Petition to Deny at 55-62 (detailing the Application's lack of any declarations, supporting documentation, or comparative information).

[140] Opposition at 12-13.

so, and why it should take a merger for Sinclair to perform its most elementary localism duties.

- The Applicants also say: *"[I]in some markets it is simply not economically viable to produce news on all of the stations Sinclair owns."*[141] Sinclair does not explain how it defines economic viability, nor provide evidence to back up its claim.

- Experienced news and reporting staff have been let go from many of the stations Sinclair as acquired.

  - The Applicants say: *"While anchors may have been replaced or staffing may have been reduced at some stations, Sinclair has added staff and news programming it has acquired."*[142] Of course, Sinclair has failed to tell us how many staff members were initially let go, how many have since been hired, and whether the "replacements" possess commensurate experience levels with their predecessors.

  - The Applicants also say: *"In general, all of the news-producing stations listed in DISH's Petition enjoy local news staff and operations appropriate for their market size."*[143] But Applicants provide no data on actual, market-level staffing.

  - The Applicants also say: *"While there have been staffing reductions over the years consistent with a variety of different businesses in highly competitive fields, most if not all of the employees who have lost positions have by now been replaced so that staffing at many of the stations Sinclair has acquired, now exceed those original staff levels."*[144] Sinclair knows how many employees it inherited when it acquired the Fisher and Allbritton stations and how many staff members they currently employ. The Applicants' failure to offer these numbers can only be taken as an admission that they are not favorable to Sinclair's arguments in this proceeding.

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[141] *Id.* at 19.

[142] *Id.* at 9.

[143] *Id.* at 20.

[144] *Id.*

- Sinclair has replaced local news content with centrally produced content and will do the same with Tribune stations.
  - The Applicants admit this point when they say: *"Sinclair plans to replicate this in the Tribune markets."*[145]
  - The Applicants also say: *"News stories from its Washington, D.C. News Bureau make up less than 1% of a Sinclair station's average weekly hours on its broadcast stations."*[146] But Sinclair fails to explain what potion of content is produced, scripted, or directed from corporate headquarters or its closely run Baltimore affiliate, operations that are distinct from its "Washington DC News Bureau."

3. Sinclair Does Not, and Cannot, Make a Case for Better Overall Quality

DISH has performed some of the comparisons that the Applicants persist in not drawing. It has compared the viewing hours per DISH household per retransmission dollar paid for the Sinclair stations affiliated with each of the big 4 networks with all other stations affiliated with the same network over the period 2015 to present. The results show that Sinclair's pride in the quality of its programming is unjustified. For all four networks, the Sinclair network affiliates are generally **{{BEGIN HCI**

END HCI}}[147]

For CBS-affiliated stations, for example, Tribune **{{BEGIN HCI**

END HCI}}[148] For NBC-affiliated stations, Tribune stands **{{BEGIN HCI**

END HCI}} boasting **{{BEGIN HCI** **END**

[145] *Id.* at 11.

[146] *Id.* at 19.

[147] Zarakas/Verlinda Reply Decl. ¶¶ 45-46.

[148] *Id.*

HCI}} as Sinclair stations.[149] A similar story can be told for FOX-affiliated stations, where Tribune enjoys **{{BEGIN HCI** **END HCI}}** while Sinclair **{{BEGIN HCI** **END HCI}}** For ABC-affiliated stations, too, Sinclair **{{BEGIN HCI** **END HCI}}**[150] A comparison of Sinclair stations with the average of all other stations yields similar results. Sinclair's dollar-adjusted ratings have been **{{BEGIN HCI** **END HCI}}**[151] For the fourth, NBC, the Sinclair stations rank **{{BEGIN HCI** **END HCI}}**[152]

Indeed, contrary to Sinclair's assertions in this proceeding,[153] the financial bottom line appears to be the sole driver for Sinclair's station-level decisions. How else do you explain repeated "house cleanings" of award-winning journalistic talent?[154] And while it is true that WJLA, for example, has come up substantially in overall ratings over that past 15 years, most of this increase came as a result of the prior ownership's investment in the newsroom, an investment that has waned under Sinclair, and the benefit from which appears to be diminishing.

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[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] Kevin Eck, *Why are Veteran Talent Leaving WJLA?*, Ad Week (Mar. 20, 2017), http://www.adweek.com/tvspy/sinclairs-washington-d-c-station-showing/187430.

[154] Petition to Deny at 47-56.

> Before 2001, WJLA-TV's newscasts had placed third in Washington's local TV news ratings. It hired popular former anchors from rival WUSA-TV and ratings soared in the mid-2000s. As of 2014, the station placed No. 2 in most local news time periods.[155]

In fact, Sinclair's acquisition of WJLA caused a ratings drop that caused WJLA to fall from within striking distance of top-ranked WRC to third place in the market by the start of 2017, with WJLA falling "to third behind WRC and Fox-owned WTTG (5) during the later hours in the coveted age 25-54 age demographic."[156] WJLA's overall ratings, accounting for all newscasts and viewers, remain second in the market.[157]

Whatever Sinclair has or has not done in Seattle at KOMO, its takeover of that station does not appear to have brought about any performance improvement in the local news market, which remains in substantial turmoil as three stations jockey for position. Indeed, KIRO, a Tribune station, has claimed a ratings lead for the first time in a decade.

> KIRO 7 in Seattle kicks off sweeps in a winning position. The CBS-affiliate took the number one spot in all the evening newscasts in April and two morning time slots. This is the first time the station has won the 5pm time slot in a decade. "April's numbers reaffirm that KIRO 7's commitment to Investigative Journalism and Breaking News – examined and conveyed by experienced reporters – is both relevant and resonating with the community," said Greg Bilte, vice president and

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[155] Faded Signals (May 7, 2015), http://fadedsignals.com/post/118403553774/the-washington-star-owner-of-washington-dcs.

[156] Andrew Baeujon, *WJLA's TV Legends Are Vanishing. Does It Matter?*, Washingtonian (Mar. 15, 2017), https://www.washingtonian.com/2017/03/15/wjlas-tv-legends-are-vanishing-does-it-matter; Paul Farhi, *Longtime D.C. Anchor Maureen Bunyan is Latest of Sinclair's Cuts*, (Jan. 9, 2017), https://www.washingtonpost.com/lifestyle/style/veteran-dc-tv-anchor-maureen-bunyan-out-at-wjla-possibly-ending-her-career/2017/01/08/8877aae8-d522-11e6-9cb0-54ab630851e8_story.html.

[157] Paul Farhi, *Longtime D.C. TV Anchor Maureen Bunyan is Latest Casualty of Sinclair's Cuts*, Washington Post (Jan. 9, 2017), https://www.washingtonpost.com/lifestyle/style/veteran-dc-tv-anchor-maureen-bunyan-out-at-wjla-possibly-ending-her-career/2017/01/08/8877aae8-d522-11e6-9cb0-54ab630851e8_story.html. WJLA's number one ranking is only for one newscast and has only been true for one sweeps period. *See* Paul Greeley, *Washington's WJLA Top Rated News at 6 P.M.*, TVNewsCheck (June 7, 2017), http://www.tvnewscheck.com/marketshare/2017/06/07/washingtons-wjla-top-rated-news-at-6pm.

> general manager. "Another factor is KIRO 7's relentless efforts to execute a digital strategy that provides the people of Western Washington with more options and better access to local news content than any other station in the Seattle market." KIRO 7 is also leading in the online ratings.[158]

Longtime Seattle market leader, KING-TV,[159] still has a sizeable ratings lead in many areas, with KIRO in second and KOMO a distant fourth.[160]

4. Sinclair Cannot Claim Accelerated ATSC 3.0 Rollout as a Transaction Specific Benefit

Sinclair continues to insist that the transaction will accelerate ATSC 3.0 rollout. In the Applicants' words:

> The ATSC 3.0 benefits are real and transaction-specific. By giving Sinclair a more national spectrum footprint, rather than having to put together a patchwork of separate broadcast stations, the merger will allow Sinclair to deploy ATSC 3.0 more widely, efficiently, and quickly, thereby accelerating its roll-out.[161]

But this claim is contradicted by the CEO of Sinclair, Mr. Christopher Ripley, himself:

> 3.0 is moving forward regardless of this transaction. Once it gets approved by the FCC, broadcasters across the industry are using the repack to position their assets for 3.0. That's going to happen regardless of whether this transaction happens. So I don't see us spending more or accelerating our spending. The key to this is really

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[158] Stephanie Tsoflias, *KIRO Ties For First in 5pm Newscast in 25-54 Adults Demo*, TVSpy (April 28, 2017), http://www.adweek.com/tvspy/kiro-leads-the-5pm-newscast-for-first-time-in-a-decade/189292; Bill Recto, *KIRO-TV to Lead the 5pm News in a Decade in the Ratings*, West Coast, Television Insight Forums, Radio Insight (Apr. 30, 2017), https://radioinsight.com/ community/topic/kiro-tv-to-lead-the-5pm-news-in-a-decade-in-the-ratings. These reports contradict Sinclair's claim that KOMO is leading in the rankings, creating the need for the Commission, at a minimum, to seek third-party ratings information on the markets where Sinclair claims it is dominating the opposition. *See* Opposition at 20; Declaration of Scott Livingston ¶ 7 (Aug. 22, 2017) (attached as Exhibit H to Opposition).

[159] Stephanie Tsoflias, *KIRO Ties for First in 5pm Newscast in 25-54 Adults Demo*, TVSpy (April 28, 2017), http://www.adweek.com/tvspy/kiro-leads-the-5pm-newscast-for-first-time-in-a-decade/189292.

[160] Stephanie T. Siegel, *Tegna Station Leads Social Media Ratings In Seattle*, Ad Week (May 31, 2017), http://www.adweek.com/tvspy/tegna-station-leads-social-media-ratings-in-seattle/190746.

[161] Opposition at 13.

> not just the point 3.0 which I said is happening already and it's happening on an expedited fashion.
>
> [In response to question about pace of ATSC 3.0 rollout] No. I don't see us moving faster. We're already moving very quickly. In fact, we're looking to get some beta markets up this summer. So I don't see us spending more because of this transaction.[162]

VII. THE OPPOSITION DOES NOTHING TO ASSUAGE CONCERNS OVER SINCLAIR'S CONDUCT

The Opposition offers virtually no rebuttal on the subject of Sinclair's take-no-prisoners' conduct, which it is likely to export to Tribune's stations. Among many other things, the Applicants never deny that, in its most recent contract negotiation with DISH, Sinclair gave voice to its view of consumers as negotiating pawns in the bluntest terms, suggesting that "DISH would be more likely to rethink its position after losing 'a couple hundred thousand subscribers.'"[163] A Sinclair programming executive does deny that, when Sinclair engaged in prohibited joint negotiations, Sinclair's representatives "went so far as to acknowledge the violation."[164] But once again, Sinclair parses its denials carefully; what is left "undenied" by the Applicants is more important. Sinclair does not deny the other portion of the relevant statement made by DISH's Melisa Ordonez: "Sinclair representatives insisted that DISH either accept Sinclair's demands or agree to suspend all negotiations for one year."[165] These demands were

[162] Sinclair Conference Call to Discuss Definitive Agreement to Acquire Tribune Media Co., Fair Disclosure Wire (May 8, 2017).

[163] Petition to Deny at 67.

[164] Declaration of Barry Faber ¶ 24 (Aug. 22, 2017) (attached as Exhibit G to Opposition).

[165] Ordonez Decl. ¶ 22.

being made on behalf of two stations in the same market in eight different markets, in violation of law and Commission rules.[166]

In any event, both parts of Ms. Ordonez' statement are accurate. In 2015, Sinclair was trying to negotiate with DISH and other MVPDs on behalf of stations that were not owned by Sinclair—stations with which Sinclair had only Local Marketing Agreements ("LMAs"), Joint Sales Agreements ("JSAs"), or similar agreements.[167]

On July 21, 2015, Ms. Ordonez spoke by telephone with Sinclair. Warren Schlicting, Senior Vice President, Media Sales and Programming for DISH at that time, was also on the telephone call. During the call, Sinclair's negotiating representative indicated that he recognized that the Commission might agree with DISH's view that Sinclair does not have the right to negotiate for all of the non-Sinclair controlled stations. Sinclair's negotiating representative nevertheless stated that the current DISH-Sinclair retransmission consent agreement would expire before the Commission would rule on a retransmission consent complaint, if DISH were to file one. Sinclair's representative suggested that DISH should focus on signing a renewal with Sinclair rather than pursuing relief before the Commission. When Ms. Ordonez reiterated DISH's objection to including the non-Sinclair controlled stations in any new agreement, Sinclair's negotiating representative stated that if that was DISH's position, DISH and Sinclair

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[166] Supplemental Declaration of Melisa Ordonez, Verified Amended and Restated Retransmission Complaint of DISH Network L.L.C. and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, ¶ 5 (Aug. 26, 2015).

[167] Sinclair Broadcast Group, Inc., Consent Decree, 31 FCC Rcd. 8577, 8579 ¶ 4 (2016).

should issue a press release announcing that the two companies will not be doing business with one another and that the two companies would not negotiate again for a year.[168]

VIII. THE APPLICANTS CONCEDE THAT THEIR DISREGARD FOR EXISTING MEDIA OWNERSHIP RULES IS UNPRECEDENTED

The Applicants also gloss over a key question when they contend that their treatment of the violations of media ownership rules implicated by the transaction is akin to that found in previous broadcast applications. In the Applicants' words, it is "par for the course in recent transactions."[169] In fact, the discussion of prior broadcast transactions in DISH's Petition showed that the opposite is true.[170] The Applicants here offer less clarity, and make more vague commitments, than each and every other broadcast transaction research has uncovered. But the Applicants do not have one word for this discussion. They state that they have done what all others have done in the past, without denying DISH's showing that they have not.

As DISH and other petitioners explained, the Application is premature.[171] The Applicants themselves freely admit that the transaction will violate both the national and local ownership rules.[172] Yet Applicants fail to include any information about divestiture commitments or waiver requests necessary to bring the transaction into compliance with the rules. The Application included only a vague statement that: "the applicants intend to take

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[168] Declaration of Melisa Ordonez, Verified Amended and Restated Retransmission Complaint of DISH Network L.L.C. and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, ¶ 9 (Aug. 26, 2015); *see also* Verified Amended and Restated Retransmission Complaint of DISH Network L.L.C. and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, ¶¶ 15-38 (Aug. 26, 2015).

[169] Opposition at 22.

[170] *See* Petition to Deny at 74.

[171] *See id.* at 72; ACA Petition at 5; CCA Petition at 17; Independent Programmers Petition at 4; Free Press Petition at 17.

[172] Opposition at 22; Application at 12.

actions in such markets as necessary to comply with . . . the Commission's local television ownership rules . . . [and] the national television ownership limit."[173] Given this lack of detail on a crucial point of the proposed transaction, and the near-unanimous view among petitioners that the transaction in its current form would violate the rules, one would think that Applicants would have used their Opposition as an opportunity to cure this defect. Instead, Applicants double down on their nebulous non-response from the Application.[174] In the absence of any definitive waiver request or divestiture commitment, it seems that the Applicants hope to rely on changes to both the national and local ownership rules sufficient to bring New Sinclair into compliance. As no such rulemaking has even been proposed, the Application is premature.

The Applicants correctly note that "[t]he Commission has long held that a 'divestiture pledge removes any concern as to a violation of Section 73.3555 of our Rules.'"[175] However, the Applicants have made no such "divestiture pledge" with any level of specificity. Even in the example cited by Applicants, the broadcaster in question had made a specific divestiture commitment: "the principals of Four Jacks have pledged to divest their interests in WBFF(TV) if Four Jacks is the successful applicant."[176] It was this pledge that "removes any concern as to a violation of Section 73.3555 of our Rules."[177] But here, Sinclair refuses to make such commitments. What stations do the Applicants plan to divest? How will Sinclair comply with the national ownership cap? Sinclair's CEO has given more definitive guidance to investors than

[173] Application at 12, 26.

[174] *See* Opposition at 22 (parroting the vague and incomplete language from the Application).

[175] *Id.* (quoting Applications of Scripps Howard Broad. Co. for Renewal of License of Station WMAR-TV, Baltimore, Maryland, *Hearing Designation Order*, 8 FCC Rcd. 2326, 2326 ¶ 3 (1993) ("*Scripps Howard Broadcast Order*").

[176] *Scripps Howard Broadcast Order* at 2326 ¶ 3.

[177] *Id.*

he has to the Commission: "if I was to narrow it down to markets that were probably most likely to have a divestiture if we have any, they would be Wilkes-Barre, St. Louis and Salt Lake."[178] Contrast Sinclair's vagueness with the applicants in Media General/Lin Media, specifically noting the DMAs where Media General intended to sell stations to third party buyers, or the Media General/Nexstar transaction, where the application proposed specific divestitures in eight markets.[179]

Applicants suggest that they be allowed to wait until *after* review of the transaction by the Department of Justice and the Commission is completed for them to propose more specific divestitures.[180] Applicants state that, "[r]ather than being unusual, such timing, and notification of exactly which licenses might be divested, if necessary, is par for the course in similar recent transactions."[181] Yet Applicants have not cited any examples from prior transactions where specific divestiture information was not provided to the Commission until after the deal closed. DISH listed recent broadcast mergers where the Applicants provided detailed guidance on divestitures necessary to bring their transactions into compliance with the rules.[182] Additional examples abound even beyond the transactions previously referenced by DISH:

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[178] Sinclair Broadcast Group Inc. Conference Call to Discuss its Definitive Agreement to Acquire Tribune Media Co., Fair Disclosure Wire (May 8, 2017).

[179] *See* Media General/Lin Application, FCC File No. BTCCDT-20140509AKR, at 3 (May 9, 2014); *see* Media General/Nexstar Merger Application, FCC File No. BTCCDT-20160210AAB, at 1, 16-18 (Feb. 10, 2016).

[180] Opposition at 22.

[181] *Id.*

[182] *See* Petition to Deny at 74.

- In the Scripps/Journal transaction, Journal committed to divest one of the two top-four TV stations it owned in the Boise market "prior to completion of the Transaction."[183]
- Capital Cities and ABC proposed multiple divestitures of TV and radio stations and newspapers to comply with the multiple ownership rules.[184]
- Raycom's Acquisition of Liberty Media would have created four duopolies that violated the Commission's rules. Raycom not only requested a temporary waiver to divest one station in each of the four overlapping markets, it also committed to "maintain separate operations of the subject stations during the waiver period."[185]

In all of these cases, the divestiture commitments were provided *before* review of the transaction was complete, further confirming that the Applicants here have provided the Commission with less information than any other recent major broadcast transaction. And this is in spite of the fact that the proposed transaction deviates from the rules to an unprecedented degree.[186]

IX. FUNDAMENTAL EVIDENCE IS STILL MISSING AND SHOULD BE REQUESTED OF THE APPLICANTS

DISH and other parties filed a motion on July 12 requesting that the Applicants be required to produce various categories of materials for review by the Commission and other parties to this proceeding.[187] As explained there, the Applicants bear the burden of proving that the transaction is in the public interest and must supply "information necessary to conduct a

[183] Public Interest Statement, Application for Consent to Transfer Control of Journal Communications, Inc., Transferor to E.W. Scripps Co., Transferee, File No. BTCCDT-20140815AAG, 2-3 (Aug. 15, 2014).

[184] Applications of Capital Cities Communications for Transfer of Control of ABC; Petitions to Deny Merger Filed by TRAC, Martin-Trigona, Blake, Collier, Chambliss, Wilcher, *Memorandum Opinion and Order*, FCC 85-605, 1985 FCC Lexis 2247, *7-9 ¶¶ 7-8 (1985).

[185] Applications for Transfer of Control of The Liberty Corp. to Raycom Media, Inc., *Memorandum Opinion and Order,* 21 FCC Rcd. 6805, 6806 ¶ 4 (2006).

[186] *See* Petition to Deny at 73 ("Diligent research has not uncovered any prior broadcast consolidation that would create a duopoly in 11 markets on top of the Applicants' existing duopolies, or one that would result in a national reach exceeding the cap by 6 percent even after application of the UHF discount without requesting a waiver, or proposing divestitures.").

[187] *See* Motion for Additional Information.

public interest analysis of this transaction."[188] While the motion was denied, the Media Bureau's Order denying it suggests that the Commission would decide what information is necessary and then request it.[189] The time to request such information is now. The requested information[190] is necessary to address the claims raised, and the evidence put into the record, by DISH in both its Petition and this Reply. As also suggested by that Order, DISH looks forward to the opportunity to address any issues raised by any supplemental information submitted by the Applicants through the *ex parte* process.

X. CONCLUSION

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

Respectfully Submitted,

/s/

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

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

[190] *See* Petition to Deny, Exhibit B (listing information that DISH and others recommend the Commission request).

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Reply and its appended material, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission under the protection of the *Protective Order* in MB Docket No. 17-179, are true and correct to the best of my information, knowledge and belief.

Executed on August 29, 2017

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

EXHIBIT A

EXHIBIT A: Admissions and Unrebutted Arguments

On retransmission consent prices and blackouts:

- Applicants admit that there is a national market for retransmission consent.[1]

- Applicants admit that they hope to gain negotiating power through the transaction in order to take on "much larger companies," the large "MVPDs with nationwide or near-nationwide footprints."[2]

- Applicants fail to rebut DISH's economic analysis showing that broadcaster size, and size alone, allows larger broadcast groups to command higher retransmission consent fees.

- Applicants admit that they will use their enhanced negotiating power and increased size to raise retransmission prices.[3]

- Applicants offer no evidence to rebut DISH's economic analysis that the control over two stations in a single DMA is likely to result in higher prices.

- Applicants admit that after-acquired station clauses **{{BEGIN SINCLAIR HCI END SINCLAIR HCI}}** upon closing.[4]

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[1] Opposition at 34-35 ("This is true whether the geographic scope of the market is national, at the level at which retransmission agreements are negotiated with large MVPDs, or is local, at the level at which they are sometimes negotiated with small local cable operators.").

[2] Opposition at 2-5, 7 ("While the Petitioners make general allegations about the 'size' of the combined company, it is precisely this size that will allow Sinclair to compete with much larger companies offering competitive programming for a fee.").

[3] Opposition at 28-29 ("In particular, retransmission consent revenues are a crucial source of the funding needed for local broadcast stations to maintain and expand their local programming, including news, in the face of intense market pressures. With core advertising revenues essentially flat, and programming costs (such as network affiliation fees) increasing sharply, broadcasters cannot maintain—let alone expand—the local news and other valuable services they provide to the public *without continuing to negotiate for compensation from MVPDs that more closely reflects the fair value of broadcast programming*." (emphasis added)); Opposition at 30 ("Compared to the fees MVPDs pay lower-rated cable channels, broadcast stations area—if anything—undercompensated."); Opposition at 31 ("[S]o long as Sinclair (and the MVPDs with which it negotiates) conduct their negotiations in good faith, those higher rates reflect the marketplace at work.").

[4] Opposition at 37 n.97 ("DISH also apparently believes that the government should protect it from contractually agreed to obligations which DISH would prefer to avoid, such as the after acquired clauses included in retransmission consent agreements."); *see also* Sinclair Broadcast Group Inc. at JP Morgan Tech, Media and Telecom Conference, Fair Disclosure Wire (May 22,

- Applicants do not rebut DISH's evidence that many subscribers that leave an MVPD during a blackout seek service from a competing MVPD.
- Applicants offer no evidence to rebut DISH's economic analysis that blackouts in duopoly markets lead to more significant subscriber losses for MVPDs than single station blackouts in a market.
- Applicants admit that the transaction will provide duopoly power in a number of markets.[5]

On anticompetitive effects on online video distributors ("OVDs"):

- Applicants admit that they want to compete against distributors like DISH and Sling TV, distributors to which Sinclair currently provides programming or may provide programming in the future.[6]
- Applicants do not refute that New Sinclair will have both the incentive and the ability to raise prices on, and discriminate against, OVDs.

On harm to localism:

- Applicants do not refute that a broadcast transaction must advance localism to be found in the public interest.
- Applicants do not refute that Tribune has added more local news to its stations than Sinclair.
- Applicants admit that they reduced news staff at many of the stations they acquired from Fisher and Allbritton.[7]

2017) (comments of Christopher S. Ripley) ("[S]o the largest synergy, if you will, between the 2 companies is net retrans. . . . [I]t's a contractual step-up to our rates. Tribune generally had fairly low rates in the industry, and we have some of the highest, if not the highest, in the industry.").

[5] Opposition at 13.

[6] Applicants boast that "it is precisely this [contemplated] size that will allow Sinclair to compete with much larger companies offering competitive programming for a fee," and that a goal of the transaction is for Sinclair to "attain[] the scale that increasingly is necessary to compete against much larger rivals in the media sector, including nationwide MVPDs like DISH, even when those transactions are fully consistent with U.S. antitrust laws." Opposition at 6-7.

- Applicants do not refute that they have cut local news programming from many of their stations.
- Applicants admit that Sinclair does not provide local news to St. Louis (and has not done so since 2001).[8]
- Applicants do not refute that the Sinclair St. Louis station is the only Big-4 station in a top 25 market without a local newscast.
- Applicants admit that Sinclair requires local stations to run centrally produced "must run" programming.[9]
- Applicants admit that they believe it is a legitimate localism strategy to move news operations out of a local market.[10]
- Applicants do not refute Sinclair's practice of "central casting" to write scripts for local news broadcasts.

On Sinclair's conduct:

- Applicants do not deny that, in its most recent contract negotiation with DISH, Sinclair suggested that "DISH would be more likely to rethink its position after losing 'a couple hundred thousand subscribers.'"
- Applicants do not refute that Sinclair threatened to halt retransmission negotiations for a year if DISH did not give in to Sinclair's demands.[11]

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[7] Opposition at 9 ("[W]hile anchors may have been replaced or staffing may have been reduced at some stations. . . ."), 20 ("While there have been staffing reductions over the years. . . ."), Exhibit H ¶ 6 ("While Sinclair has had some staff reductions at many of the stations it acquired. . . .").

[8] Opposition at 12-13 ("One such example is St. Louis, where Sinclair does not currently air a traditional local newscast, but due to the economics of the marketplace, offers more limited, albeit still locally produced, news programming.").

[9] Opposition at 16 ("All 'must-run' news programming in total (including news from the Washington, D.C. News Bureau) makes up approximately 2.5% of the total average news minutes per week.").

[10] Opposition at 19.

[11] *See* Petition to Deny at 73-74.

- Applicants do not refute that they entered into an agreement with the Commission under which they paid money and in return the Commission closed a number of investigations into Sinclair's behavior.

On ownership rules violations:

- Applicants admit that the transaction will violate both the national and local ownership rules.[12]

- Applicants do not refute that prior merger applicants proposed divestitures before review of the transaction was complete when ownership limits were at issue.

- Applicants admit that they have not proposed specific divestures to bring the transaction into compliance with the Commission rules.[13]

[12] Opposition at 22; Application at 12.

[13] Opposition at 22 ("Applicants have indicated they will divest, but intend to wait for the outcome of the review of the Transaction by the Department of Justice ('DOJ'), as well as the ownership proceeding currently under reconsideration by the Commission.").

EXHIBIT B

REPLY DECLARATION OF MELISA ORDONEZ

REPLY DECLARATION OF MELISA ORDONEZ

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

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

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

3. This reply declaration responds to certain statements made by the Applicants in their Consolidated Opposition to Petitions to Deny and other questions I have been asked since I submitted my initial declaration in this proceeding regarding retransmission consent agreements.

Unitary Negotiations

4. Based on my experience and understanding, the major broadcast groups typically negotiate their retransmission consent agreements with multichannel video programming distributors ("MVPDs"), including DISH, DIRECTV and the major cable operators, on a unitary basis. That is, they negotiate agreements for all of their broadcast stations in all of an MVPD's markets at the same time, typically at a uniform rate for all big 4 stations.

WTTV

5. WTTV is Tribune's CBS affiliate in Indianapolis. It was sold to Tribune by Sinclair in 2002. At the time, it was affiliated with the WB Network. It became affiliated with CBS in January 2015.

6. **{{BEGIN HCI**

END HCI}}

National Subscriber Base

8. As a satellite carrier, DISH is a national distributor providing service to every community in the nation. Just as important, DISH has invested billions in satellites with "spot beams," which can reuse spectrum and thereby provide the local broadcast stations from each of the country's 210 markets back to that market. Thus, we must seek a national subscriber base. Unlike cable operators, which operate on a franchise-area-by-franchise-area basis, DISH cannot simply sell off markets where our subscriber rates may be low; it must operate nationally. And the most efficient and effective way to market DISH services is on a national basis. Thus, the most important metric in our success is the total number of subscribers we attract on a national basis, not the distribution of subscribers on a market-by-market basis, and the most important concern is gaps in our local TV station lineup across DMAs.

9. As a broadcast group becomes larger, especially through a merger, the variety of pathways for DISH to get to a sufficient national subscriber base becomes smaller. This makes DISH's dependence on the broadcast group that has become larger even greater, giving that group more leverage over DISH.

Blackouts

10. Blackouts generally pose a greater threat for the distributor than for the broadcaster. The distributor loses subscribers, many or most of them permanently. On the other hand, the broadcaster loses only temporary access to the distributor's customers. Importantly, even that temporary loss is mitigated by the fact that many of the distributor's customers will leave for other competing distributors that also retransmit the broadcaster's signals.

11. I believe that that the relative values of big 4 and non-big 4 stations are generally proportional to the different retransmission rates DISH pays for each of the two types of stations. Further, losing access to the big 4 stations results in higher levels of customer defections (i.e., subscriber cancellations) than is the case for the loss of a lesser valued (i.e., non-big 4 affiliated) station.

Discussions with Sinclair

12. In my Declaration, I stated that: "In 2015, Sinclair was trying to negotiate with DISH on behalf of 36 stations that were not owned by Sinclair – stations with which Sinclair had only Local Marketing Agreements ("LMAs"), Joint Sales Agreements ("JSAs") or similar agreements. When we protested that this negotiation would violate the Federal Communications Commission's ("FCC" or "Commission") good faith rules, Sinclair's representatives went so far

as to acknowledge the violation, but nevertheless insisted that DISH either accept Sinclair's demands or agree to suspend all negotiations for one year."[1]

13. In their Opposition, the Applicants state: "Melisa Ordonez's Declaration is false in its assertion that Sinclair's representatives went so far as to acknowledge violation of the Commission's good faith rules in its negotiations with DISH."[2] Barry Faber, the Executive Vice President and General Counsel for Sinclair, states in his declaration: "No representative of Sinclair ever made such an acknowledgment."[3]

14. I note that the Applicants do not attempt to deny the second part of my statement "Sinclair representatives insisted that DISH either accept Sinclair's demands or agree to suspend all negotiations for one year." In any event, both parts of my statement are accurate. A detailed account of what happened is included in the Verified Amended and Restated Retransmission Complaint filed by DISH Network L.L.C. on August 26, 2015.[4] This complaint, alongside many

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[1] Declaration of Melisa Ordonez, Exhibit C to Petition to Deny or Dismiss of DISH Network L.L.C., Tribune Media Company and Sinclair Broadcast Group, Inc., MB Docket No. 17-179, ¶ 22 (Aug. 7, 2017). The Commission would find that Sinclair 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 SSAs, concurrently with its negotiation for retransmission consent of at least on Sinclair Station in the same local market." Sinclair Broadcast Group, Inc., *Consent Decree*, 31 FCC Rcd. 8577, 8579 ¶ 4 (2016) ("*Consent Decree*").

[2] Opposition at 25 n.66.

[3] Declaration of Barry Faber, Exhibit G to Opposition, ¶ 24 (Aug. 22, 2017).

[4] *See* Verified Amended and Restated Retransmission Complaint of DISH Network L.L.C. and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, ¶¶ 15-38 (Aug. 26, 2015); Declaration of Melisa Ordonez, Verified Amended and Restated Retransmission Complaint of DISH Network L.L.C. and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, ¶ 9 (Aug. 26, 2015); Supplemental Declaration of Melisa Ordonez, Verified Amended and Restated Retransmission Complaint of DISH Network L.L.C. and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, ¶ 5 (Aug. 26, 2015).

others, led to an enforcement proceeding that was settled when Sinclair agreed to pay more than $9 million and to take a number of compliance measures.[5]

[5] *Consent Decree*, 31 FCC Rcd. at 8581-83 ¶¶ 13-18.

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

Executed on August 29, 2017

Melisa Ordonez

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

EXHIBIT C

REPLY DECLARATION OF JANUSZ A. ORDOVER

REPLY DECLARATION OF JANUSZ A. ORDOVER

I. INTRODUCTION AND ASSIGNMENT

1. I am Janusz A. Ordover, an Emeritus Professor of Economics and a former Director of the Masters in Economics Program at New York University. I filed an initial declaration in this matter on August 7, 2017.[1] My qualifications are attached to that declaration.

2. I have been asked by counsel for DISH Network L.L.C. ("DISH") to review and respond to the Consolidated Opposition to Petitions to Deny filed by Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune") on August 22, 2017 ("Joint Opposition"),[2] and, in particular, to the declaration filed by Sinclair's economic expert, Professor Gautam Gowrisankaran (Gowrisankaran Declaration).[3]

3. This declaration contains my responses to the main criticisms raised in the Gowrisankaran Declaration and the Joint Opposition. Nothing in the Joint Opposition or the Gowrisankaran Declaration changes my opinion as expressed in my initial Declaration, namely, that the proposed merger of Sinclair and Tribune is likely to result in increased retransmission fees to multichannel video programming distributors (MVPDs) **{{BEGIN HCI**

END HCI}} These fee increases, which would not be present in the absence of the merger, are larger than what either party could obtain acting individually. And these increased fees, because they are marginal costs to the MVPD (i.e., they are charged on a per-subscriber, per-month basis) would then be passed through to consumers in the form of higher subscription

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[1] Declaration of Janusz A. Ordover, Exhibit D to Petition to Dismiss or Deny of DISH Network L.L.C., *In the Matter of Applications of Tribune Media Company and Sinclair Broadcast Group For Consent to Transfer Control of Licenses and Authorizations,* MB Docket No. 17-179 (Aug. 7, 2017) (hereinafter, "Ordover Decl.").

[2] Applicants' Consolidated Opposition to Petitions to Deny of DISH Network L.L.C., *In the Matter of Applications of Tribune Media Company and Sinclair Broadcast Group For Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179 (Aug. 22, 2017) (hereinafter, "Opp."*).*

[3] Declaration of Gautam Gowrisankaran, Exhibit E to *Joint Opposition*, August 22, 2017 (hereinafter "Gowrisankaran Decl.").

fees for MVPD services. I reserve the right to supplement my opinion if additional information becomes available to me.

4. Professor Gowrisankaran's criticism of my declaration stems from his assertion that I have assumed the result that I am trying to prove, and that the empirical work I performed does not offer proof. As I describe in more detail below, these assertions are simply incorrect. Professor Gowrisankaran first asserts that I have assumed that the MVPD's surplus is concave and that this assumption drives my conclusion that larger station owners will extract higher retransmission fees.[4] I made no such assumption; instead, I examined the data available to me for direct evidence of a positive relationship between size and bargaining outcomes, which would demonstrate merger-specific harm and imply the existence of a concave surplus function. I presented several analyses that demonstrated that the proposed merger would not be in the public interest because it would likely lead to an increase in retransmission fees negotiated with DISH and other MVPDs. My analyses included an examination of how retransmission fees change over time in individual DISH contracts with station owners and upon the expiration of one contract and the signing of another, and a cross-section regression analysis showing that larger station owners receive higher retransmission fees. In contrast, in his declaration, Professor Gowrisankaran does not offer any independent empirical analyses that directly rebut these findings. Although he criticizes my empirical analysis demonstrating a positive relationship between station owner size and retransmission fees, which bears on the question of the competitive effects of this transaction, he offers no analysis or arguments showing that station owner size *is not* a factor in setting retransmission fees. His omission is especially telling given that he presumably had access to information from Sinclair and Tribune concerning their own negotiations for retransmission fees over time as they grew in size organically and through acquisitions.

5. In his criticism of the blackout analysis in the Zarakas/Verlinda declaration, Professor Gowrisankaran claims that the results do not show that the loss of two stations would be worse for the MVPD than the sum of the losses of two stations individually because the decline in subscribership in DMAs with two stations blacked out is not more than double the decline in

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[4] Gowrisankaran Decl., ¶ 41.

DMAs where one station is blacked out.[5] Therefore, he claims there can be no adverse effect on retransmission fees even when there is overlap within a DMA.[6] This analysis is incorrect because in the particular examples analyzed in the Zarakas/Verlinda Declaration, the DMAs where two stations were blacked out almost all contained one big 4 and one non-big 4 station, rather than two big 4 (or two non-big 4) stations. As I explain below, this mix is important in interpreting the results of the blackout analysis.

6. Professor Gowrisankaran also relies on several pieces of data or analysis that are irrelevant to the question at hand. For example, Professor Gowrisankaran attempts to create the impression that broadcast station owners are one drop in a vast sea of competing video options and that these options constrain the behavior of the broadcast station owners. The implication is that even if this merger could in theory improve the New Sinclair's bargaining position or power, there are sufficient constraints on its behavior such that retransmission fees would not increase. But Professor Gowrisankaran does not offer any convincing facts or analysis showing that cable programming is a close substitute for broadcast programming from the standpoint of consumers within DMAs or MVPDs either within or across DMAs. And he ignores the findings of the Federal Communications Commission ("Commission") in other matters that cable networks are not a sufficient competitive constraint on the behavior of broadcast station owners. Nor does he offer any analysis to support his use of Herfindahl-Hirschman indexes ("HHIs") in assessing the likely impact of the merger on bargaining over retransmission fees.

II. SINCLAIR'S ECONOMIC EXPERT INCORRECTLY ASSERTS THAT THERE IS NO EVIDENCE THE PROPOSED MERGER WILL HAVE AN EFFECT ON RETRANSMISSION RATES "ACROSS DMAS"

7. As a threshold matter, the Joint Opposition incorrectly claims that a merger which impacts bargaining leverage is not a matter for the Commission to concern itself with so long as contracts are entered into in "good faith." In fact, the Joint Opposition agrees with the notion that the size of the negotiating partner affects the terms of the agreement reached, albeit suggesting that this relationship only goes one way. For example, in discussing negotiations

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5 Gowrisankaran Decl., ¶¶ 80-81.

6 Gowrisankaran Decl., ¶ 75.

with MVPDs, the Joint Opposition claims that "as [MVPDs] have gotten larger, they have demanded lower retransmission fees."[7] The Joint Opposition also claims that the merger will not give the New Sinclair "unequal leverage" because MVPDs are larger than station owners—implying again that size and bargaining leverage are linked.[8] In addition, the Joint Opposition takes the view that—historically and currently—retransmission fees undercompensate the broadcast station owners[9] and that this merger will allow the New Sinclair to "attain[] the scale that increasingly is necessary to compete against much larger rivals in the media sector, including nationwide MVPDs like DISH."[10] It is evident from these statements that the merging parties believe that this merger will allow them to demand higher retransmission fees, but that, for some unexplained reason, they are entitled to higher fees and the public interest will not be harmed by them. The merging parties are wrong when they state that they have been undercompensated because retransmission fees have been, in their view, "low." Indeed, as I described in my initial declaration,[11] broadcast station owners receive valuable compensation in the form of advertising revenue, which is greatly enhanced by the fact that they are distributed on MVPD systems rather than having to rely only on the use of over-the-air transmission of their signal. Retransmission fees are thus only one part of the compensation that broadcast station owners receive from their bargain with the MVPDs, and, were it not for regulation which effectively sets a floor of $0 for retransmission, retransmission fees could in theory be negative – that is, the market could dictate that broadcast station owners pay MVPDs for distribution rather than the other way around.[12] I also disagree with the merging parties that any price increase, as long as it is the product of negotiating in "good faith," is not a concern for the Commission and that the Commission can somehow establish the appropriate level of retransmission consent fees

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7 Opp. at 31.

8 Opp. at 33.

9 Opp. at 29-30.

10 Opp. at 6.

11 Ordover Decl., ¶ 6.

12 Ordover Decl., note 22. Such outcomes are familiar in multi-sided platform markets in which one side of the platform "cross-subsidizes" the other side of the platform and which are familiar to Professor Gowrisankaran, who states he is an expert on such two-sided markets. Gowrisankaran Decl., ¶ 6.

(without resorting to lengthy regulatory hearings) in order to permit these applicants to use bargaining leverage to raise prices to MVPDs and, consequently, to consumers, above the level they would otherwise obtain. And their assertion that the effects of this proposed merger on prices are not merger-specific because any similar merger would produce the same effect[13] is nonsensical; if this merger produces outcomes that would not occur absent the merger, then, as a matter of economics, those outcomes are merger-specific. Furthermore, the evaluation of the public interest benefits of a merger where prices are likely to increase must include an adequate description and proof of the consumer benefits that may offset the higher prices. Sinclair and Tribune have provided no convincing description of the benefits to consumers from this transaction. (I discuss this further in Section V below.)

A. PROFESSOR GOWRISANKARAN'S ATTACKS ON MY ANALYSIS ARE SPECULATIVE AND UNMOORED FROM ANY EVIDENCE

8. Professor Gowrisankaran asserts, incorrectly, that I have assumed that the MVPD's surplus function is concave and that this assumption drives my conclusion that larger station owners will extract higher retransmission fees.[14] To the contrary, I made no such assumption but instead noted that a consequence of such concavity is that larger station owners would, all else equal, be able to secure higher retransmission fees. Then I examined data on retransmission fees and station owner size to see whether the data support the idea that there is a positive relationship between size and bargaining outcomes. Professor Gowrisankaran also argues that I have offered no credible argument for why the conditions that would lead to concavity of the surplus function (and a positive relationship between size and retransmission fees) would hold in the current matter.

9. Despite Professor Gowrisankaran's criticisms, not only is there good reason to expect that station owner size impacts the level of negotiated retransmission fees, but there is ample empirical evidence in my declaration demonstrating the positive relationship between size and fees. As I have already discussed, the very likely impact of an increase in the number of stations owned by a broadcaster within a DMA is to increase retransmission fees. Given that

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[13] Opp. at 14.

[14] Gowrisankaran Decl., ¶ 41.

retransmission negotiations are system-wide, covering all of the DMAs where a broadcast station owner has properties, it is evident that there will be an adverse effect on retransmission fees across the combined Sinclair-Tribune footprint. But there can be separate merger effects due solely the broadcast station owner's size, without regard to overlaps.

10. I note first that the Commission has not ruled out the possibility that a merger that increases station owner size will result in increased retransmission rates (over and above any increase attributable to overlaps within DMAs). If such a relationship between size and fees were theoretically impossible, the Commission had the opportunity in the Nexstar/General Media matter to say so. Instead, when the Commission found that the Nexstar/General Media merger would not have an impact on retransmission rates stemming from increased size (the aggregation of stations in non-overlapping DMAs), it clearly stated that its finding pertained only to that merger:[15]

> We are, however, cognizant of the changing nature of the broadcast marketplace, and we do not foreclose the possibility, in the future, of looking at rising retransmission fees, black outs, and other related issues in a context broader than local markets — though we stress that such harms must be demonstrably transaction-specific and not industry-wide in nature to be addressed in the context of a transfer of control proceeding.

11. The Commission thus has properly taken the view that concerns about the effect of station owner size on retransmission rates, even in the absence of local market overlaps, should be examined when transaction-specific. And the effects that I discuss here are, in fact, transaction-specific. An effect is transaction-specific if it would not have occurred without the transaction. Thus, future increases in retransmission consent fees that would occur in the "but for" world in which there was no transaction would reflect industry trends and would not be transaction specific. But my focus is on additional, merger-specific increases that would occur only because of the transaction, which is to say that they are transaction-specific.

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

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15 Nexstar-General Media Order, ¶ 35.

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. For DISH, overall profitability depends on the total numbers of subscribers, especially in the light of the fact that a significant share of its costs is joint and common across the DMAs. Another way of stating this point is that DISH regards losses of subscribers anywhere as the object of competitive concern. As such, it is motivated to try to retain subscribers, provided it makes business sense to do so.

13. Consistent with this view, in a speech given by Professor Aviv Nevo as the Deputy Assistant Attorney General for Economics at the Department of Justice, he discussed the analysis of "mergers that increase bargaining leverage."[16] Professor Nevo addressed bargaining between a provider and a distributor, where the distributor purchases products from more than one provider and resells packages of products to downstream consumers. He discusses how a merger of providers can increase the bargaining leverage of the providers, resulting in an increase in the negotiated price. Specifically, whenever the incremental gain to the distributor from adding a provider is diminishing (i.e., it is less than the gain from the previous provider added), then a merger of providers increases prices.[17] Professor Nevo goes on to explain that when consumers view two products as substitutes, it is the case that adding an incremental provider to the bundle adds value at a diminishing rate, and thus a merger of providers will raise prices. This is the typical situation in which we analyze unilateral effects from a merger of substitutes. But Professor Nevo also discusses the situation where the providers are not viewed as substitutes by consumers. Using an example of a smartphone to which the manufacturer adds many features, Professor Nevo makes the case that adding additional features may increase the total value of the smartphone to consumers, but by smaller and smaller amounts.[18] Professor Nevo concludes that

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

[17] Nevo speech at 5.

[18] Nevo speech at 5.

in such situation, economic theory tells us that a merger of providers of smartphone features, all else equal, leads to increased prices for those features, even though the features themselves are not substitutable and do not serve the same function. The key point is that the phone manufacturer views the available features as substitutes that it can package in various bundles to create a product that is attractive to consumers. A reduction in the manufacturer's ability to create these bundles (due to a merger of feature providers) would raise the price of features, which can be expected to be passed on to consumers.

14. Professor Nevo's assessment that products need not literally be substitutes for consumers to generate the conditions under which a merger of the two products increases bargaining leverage and pushes up negotiated prices is not new. Other economists have discussed the possibility that mergers among noncompeting products can result in increased bargaining leverage. For example, in an analysis of the effect of hospital mergers on prices charged to health insurers, Vistnes and Sarafidis describe how employers that buy health insurance care about hospitals in different geographic areas because they have employees in different areas.[19] So even though a hospital in New York and one in California don't compete for patients in the traditional sense—they are not substitutes from the standpoint of the individual patient—their merger may bestow additional bargaining leverage on the combined hospital because employers have workers that need hospital coverage in both areas.[20] Similarly, Peters describes how, even when consumers do not view the products of two suppliers as substitutes, the suppliers can gain by not individually negotiating with the intermediary that sells both products to consumers but

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19 Gregory S. Vistnes and Yianis Sarafidis (2013), "Cross-Market Hospital Mergers: A Holistic Approach," *Antitrust Law Journal* 79(1); 253-93.

20 In the broadcast station context, some purchasers cross DMA boundaries. For example, hotel chains with locations in different cities (DMAs) or employers with multiple sites may purchase television services from one MVPD in multiple local geographic areas. In that situation, the MVPD wants to assemble a set of stations across all of the DMAs that they serve, in part to satisfy the needs of these cross-DMA purchasers. This is similar to a health insurer that assembles a set of hospitals in various cities to compete for employers with geographically dispersed employees.

instead negotiating jointly (for example, via a merger).[21] Peters describes the mechanism by which joint negotiation tips the negotiation in the favor of the suppliers as follows:

> If joint negotiation causes an intermediary [here, an MVPD] to lose more of its consumers to competing intermediaries [other MVPDs] in the event of disagreement, and if the suppliers [station owners] sell their products through these competing intermediaries, the suppliers will be able to recapture more of the sales that they would otherwise have lost in the event of disagreement. As a result, joint negotiation reduces the suppliers' losses from disagreement, and thus enhances their bargaining power.

15. In the same vein, Professor Nevo recognizes that diversion of end users to other middlemen who also provide the upstream supplier's service can tilt the balance of negotiating leverage in favor of the supplier. In Professor Nevo's words:[22]

> When a small provider bargains on its own it is reasonable for it to assume that in case of disagreement most consumers will not switch distributors and therefore it will lose all the consumers it currently gets from the distributor. However, when bargaining as part of a larger system, which imposes an "all or nothing" rule in disagreement, some of the consumers might switch to an alternative distributor and be recaptured by the provider. This makes the state of disagreement less painful to the provider and therefore gives it leverage in negotiation.

16. Professor Gowrisankaran appears to take a different view of this, claiming that products must be substitutes in the eyes of the final consumers (i.e., subscribers) for there to be a merger effect. Although this is a frequent case that economists confront, it is not the only case, as described by Professor Nevo and the other economists discussed above. Here, the issue seemingly arises because the Sinclair and Tribune properties do not overlap everywhere. This means that viewers who prefer the Sinclair station in their DMA cannot switch to viewing a Tribune station in some other DMA. Indeed, they cannot switch to viewing a retransmission feed from another Sinclair station in some other DMA, which makes the two Sinclair stations non-substitutable from a subscriber's perspective. However, this uncontroversial fact does not mean that the economic consequences of blackouts across non-overlapping DMAs cannot have a super-additive impact on DISH. They can, and they do. This is so because, among other things,

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21 Craig T. Peters (2014), "Bargaining Power and the Effects of Joint Negotiation: The 'Recapture Effect,'" Economic Analysis Group Discussion Paper 14-3.

22 Nevo speech at 5-6.

DISH (i) negotiates retransmission rates on a system-wide basis; (ii) needs to grow (or at least maintain) its total subscriber base on a national scale (and not just in one DMA or another); and (iii) has to present an attractive distribution channel to third party content suppliers. Professor Gowrisankaran also claims that sunk costs have no impact on DISH's bargaining leverage,[23] but the fact that the investments that DISH has made, and continues to make, in its distribution system are largely sunk makes DISH more vulnerable to attempts by broadcast station owners to hold up DISH and extract surplus. To the extent that the proposed merger strengthens Sinclair's hand in retransmission negotiations, a close examination of the adverse effects of the merger on vulnerable MVPDs and, by extension, on consumers, is warranted.

17. Department of Justice economists, in analyzing the Comcast/Time Warner merger, provided another rationale for how a merger of firms that did not compete in local markets could lead to increased prices.[24] In that case, MVPDs that did not compete in downstream markets for consumers did compete in upstream markets for programming content and, therefore, that different MVPDs were substitutes "when a programmer is trying to build a national audience for content."[25] The same basic approach was used by the Department in the Charter transaction.[26] As DISH has described, it similarly tries to build a national subscriber base, using its satellite distribution technology and programming content from various sources, including broadcast stations. Even when those stations are located in different geographic areas, they each contribute to the national subscriber base and, to some extent, are seen as substitutes by DISH for that purpose. DISH believes that the most important ingredient in its success is the total number of subscribers nationally, not the distribution of subscribers on a market-by-market basis, and thus

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23 Gowrisankaran Decl., ¶ 67.

24 I was not involved in any of these transactions and am not expressing any opinions on the empirical findings themselves.

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

26 Complaint, *U.S. v. Charter Communications, Inc., Time Warner Cable Inc., Advance/Newhouse Partnership, and Bright House Networks, LLC*, 1:16-cv-00759, April 25, 2016, ¶¶ 5, 29.

is dependent on broadcast groups across DMAs to be able to assemble a full package.[27] The New Sinclair, with the ability to reach more than 70% of the households in the country, will have additional bargaining leverage of the kind that the Department of Justice analyzed in Comcast and Charter.[28]

18. Furthermore, beyond the general arguments about whether such effects can or cannot occur, I have provided empirical evidence in the current proceeding that larger station owners—measured by the number of DISH subscribers to which a station owner has access—are able to negotiate higher retransmission fees. In my initial declaration, I offered a regression analysis that demonstrated that the retransmission fees currently paid by DISH are higher, by a statistically significant amount, the larger is the broadcast station owner. I discuss below Professor Gowrisankaran's criticisms of this empirical analysis.

19. Finally, additional analyses performed by Mr. Zarakas and Dr. Verlinda under my supervision have analyzed the effect of the ten large broadcast industry transactions consummated since 2013 on retransmission fees paid by DISH. This was done by comparing the first-year fee under the last pre-merger agreement of the target company with the first-year fee under the first post-merger agreement of the combined company, after adjusting the pre-merger target company fee based on average retransmission fee increases to reflect its older vintage. The analysis shows that prices increased in all ten cases.[29] In the case of the Sinclair/Fisher transaction, the additional price increase (beyond the industry-wide average price increase) was **{{BEGIN HCI END HCI}}** of the expected price. In the case of the Sinclair/Allbritton acquisition, it was **{{BEGIN HCI END HCI}}**. In the case of the Tribune/Local TV transaction, it was **{{BEGIN HCI END HCI}}**. These large increases further confirm the

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27 Declaration of Melisa Ordonez, Exhibit C to Petition to Dismiss or Deny of DISH Network L.L.C., *In the Matter of Applications of Tribune Media Company and Sinclair Broadcast Group For Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 17-179 (Aug. 7, 2017), ¶ 4.

28 Professor Gowrisankaran notes that reaching 70% of the nation's households is not the same as having a 70% market share. That is true but irrelevant because, as I have shown, larger station owners are able to obtain higher retransmission fees.

29 In the technical sense, this suggests that the post-merger aggregate value function for the MVPD (such as DISH) is concave.

link between size and price levels, and specifically suggest a link between consolidations and larger-than-standard price increases.

20. In sum, Professor Gowrisankaran incorrectly asserted that I assumed concavity, when I made no such assumption. Instead, in my initial Declaration I provided empirical analysis that demonstrated that there is a positive relationship between size and retransmission fees (an implication of concavity). This result is not surprising, given DISH's view of its negotiations with station owners and its vulnerability to subscriber losses, on a system-wide basis. And the economic literature offers various explanations for how an increase in the size of a company can tilt bargaining leverage in the company's favor. Beyond the empirical analysis I have already offered, additional empirical analysis described in the Zarakas/Verlinda declaration establishes that, following recent station owner transactions, retransmission fees of the acquired company have increased by far more than would be expected based on industry average increases.

B. SINCLAIR'S ECONOMIC EXPERT INCORRECTLY ASSERTS THAT MY ANALYSES OF THE RELATIONSHIP BETWEEN RETRANSMISSION FEES AND STATION OWNER SIZE ARE FLAWED

21. In my declaration, I presented empirical evidence on the changes in retransmission fees over time in individual DISH contracts with station owners, and increases in fees upon the expiration of one contract and the signing of another. I also presented a cross-section regression analysis showing that larger station owners receive higher retransmission fees, which is the relationship one would expect if the MVPD's surplus function were concave, and it is indicative that the proposed merger would likely increase retransmission fees—which ultimately would be passed through to consumers. In contrast, in his rebuttal, Professor Gowrisankaran does not offer any independent empirical analyses that directly rebut these findings. I discuss here his theoretical criticisms of my analysis.

1. Professor Gowrisankaran erroneously criticizes my analysis for omitted variables

22. Professor Gowrisankaran criticizes the specification of my fee-size regression, stating that "DISH's experts appear to not be controlling for factors that one would expect to be important determinants of retrans fees for Big 4 stations and may be correlated with broadcast station group size, including the portfolio mix of stations (e.g., what percentage of the broadcast

station group's stations are Big 4 stations versus non-Big 4 stations)." Professor Gowrisankaran offers no other examples of variables that he claims I have omitted.

23. In my analysis, I focused on the retransmission fee charged for the big 4 stations and the number of DISH subscribers in the big 4 stations' DMAs based on the observation that the retransmission contracts specify a separate fee for non-big 4 stations—and that fee is usually much smaller than the big 4 fee. This strongly implies that the negotiated *relative* fees for the two categories of broadcast stations reflect the *relative* valuations to DISH of different types of stations and associated networks. This is confirmed by the Reply Declaration of Melisa Ordonez.[30] Because the fee for the big 4 stations and the other stations (independent stations and those affiliated with the CW or MNT networks) are negotiated together in one contract, however, it is possible that the big 4 fee is influenced by the presence of these non-big 4 stations, that is, that the big 4 fee is not independent of the portfolio mix.

24. Although portfolio mix clearly varies across station owners, Professor Gowrisankaran offers no justification for why the portfolio mix of stations would vary systematically with station owner size, and he offers no evidence to show that it does.[31] I have not claimed that quality differences need not be factored in to the extent possible when assessing the competitive effects of the transaction. However, Professor Gowrisankaran has offered no evidence that large station owners (like Sinclair) have a better *national* mix of broadcast feeds, which might impact retransmission fees, as compared to smaller station owners. **{{BEGIN SINCLAIR HCI**

END SINCLAIR HCI}}[32] Moreover, Mr. Zarakas and Dr. Verlinda have conducted an analysis of Sinclair's and Tribune's viewership among DISH viewers. They have concluded that, for most times and networks, viewership ratings of Sinclair network affiliates, per dollar paid by DISH in

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[30] Reply Declaration of Melisa Ordonez, August 29, 2017, ¶ 11.

[31] Of course, a station owner that is present in just one DMA will have at most one big 4 station in its portfolio. We are here concerned with the merger of Sinclair and Tribune, both of which are present in multiple DMAs.

[32] Opp. at 35.

retransmission fees, are worse than Tribune and worse than the average ratings of all network affiliates other than Sinclair.[33]

2. The Applicants' criticism of using annual revenues of $500 million a year as the dividing line between large and small broadcast groups is unsupported.

25. The Joint Opposition criticizes the analysis presented in the Zarakas/Verlinda Declaration that demonstrates that small and large broadcast station owners receive very different retransmission fees by dividing station owners into two groups using annual revenues of $500 million as a dividing line.[34] This analysis is simply one demonstration of the fact that small and large owners fare quite differently in their retransmission negotiations; the exact choice of the dividing line for this simple demonstration is not important. But the Joint Opposition's assertion that both Sinclair and Tribune are already in the large group and that "Petitioners offer no analysis or evidence to show that a further increase in their size through this Transaction would be likely to enable them to increase their retransmission rates because of their increase in size alone" ignores the other empirical evidence in my initial declaration and that of Zarakas/Verlinda.[35] It is also an effective admission on their part of the fact that at least up to some point size matters, without explaining why this should be so given that size comes from assembling stations in non-overlapping DMAs.

3. Professor Gowrisankaran incorrectly asserts that small station owners should be excluded from the analysis

26. Professor Gowrisankaran claims that my fee-size regressions:[36]

> are driven by a comparison of the retrans fees that DISH pays to certain very small (including many single-station) owners to substantially larger broadcast station groups. Even if there were a difference between the amount paid per subscriber to station owners with less than **{{BEGIN HCI END HCI}}**

[33] Reply Declaration of William P. Zarakas and Jeremy A. Verlinda, August 29, 2017, ¶¶ 45-46 and Figure 3.

[34] Opp. at 36.

[35] Opp. at 36.

[36] Gowrisankaran Decl., ¶ 85.

> DISH subscribers and larger station owners, such a difference would not be relevant for this transaction.

I note first that Professor Gowrisankaran has offered no principled reason for his contention that station owners with less than **{{BEGIN HCI END HCI}}** DISH subscribers should be excluded from the analysis. The evidence from smaller station owners can provide information that should not be discarded without reason.

27. I disagree that the experience of small station owners is not relevant here. If one wanted to account for a possibly different relationship between fees and size for "small" and "large" owners, an adjustment in the regression specification can be made. I have specified a regression equation where I allow the slope describing the relationship between retransmission fees and size to be different for "small" and "large" station owners, using **{{BEGIN HCI END HCI}}** DISH subscribers as the break point since that is a natural break in the data, with no station owners in the immediate vicinity of that level of subscribers. That regression still shows that the retransmission fee is positively associated with the number of DISH subscribers. The table below shows the third specification that I reported in my original Declaration, which controls for the age of the contract and whether the station owner is one of the networks (O&O), along with a modified specification that allows the relationship between size and fees to be different for large station owners. The relationship between retransmission fees and size is the sum of the coefficients "Total DISH Subs in Contract" and "Subs Interaction," and it is similar in magnitude to the coefficient from my original regression, and significantly different from zero.[37]

28. Moreover, Professor Gowrisankaran appears to be saying that even if large station owners have more bargaining power than small station owners and can therefore secure higher retransmission fees, both Sinclair and Tribune are already so large that combining them will have no additional effect on retransmission fees. It is theoretically possible that the effect of size on fees changes as station owners grow by acquisition and may die out at some scale. But this theoretical possibility is not enough to make a difference here for several reasons. First, Professor Gowrisankaran has not demonstrated that Sinclair and Tribune have already reached

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[37] I obtain similar results in the other regression specifications that I originally reported by allowing large station owners to have a different slope (relationship between fees and size).

that scale. Second, there is a risk that they have not yet reached that scale (if it exists) and therefore the retransmission fees will go up post-merger. Third, as I noted earlier, even if *arguendo* Professor Gowrisankaran is right about the relationship, he has in fact admitted that fees can increase (up to a point) due to an increase in the number of stations owned by a broadcaster, even though these stations are located in non-overlapping DMAs. In fact, he has implicitly accepted an obvious explanation for the observed finding that "size"—as measured by the number of reachable subscribers or stations—influences fee-setting power. That obvious explanation is that the ability of a broadcaster to threaten blackout across numerous *non-overlapping* DMAs does enhance the broadcaster's bargaining leverage.

Table 1:

{{BEGIN HCI

END HCI}}

29. Finally, the regressions I have discussed were the basis for only one of the arguments—albeit a new and important one—that have been presented regarding the possible competitive effects of the transaction. Other intervenors offered various other arguments why this transaction could be problematic for a variety of reasons. Obviously, my submission focuses on economic concerns, but these are not the only cognizable concerns. In addition, economic theory (e.g., the work of Nevo, Vistnes, and others cited above) supports the contention that, under some circumstances, merging to achieve greater size can lead to adverse competitive effects and the perspective of DISH personnel is that the station owner's size influences the degree to which DISH can push back on the station owner in negotiations. The regressions that I have offered are just one piece of evidence, but they are consistent with other evidence presented.

4. Professor Gowrisankaran's assertion that large station owners get higher fees because they have been receiving fees longer is without basis

30. Professor Gowrisankaran agrees that retransmission fees increase over time and ratchet up at the start of a new contract. That is certainly consistent with the contractual evidence that I presented in my initial Declaration. But he then argues that this means that the date when a broadcast station owner signed its first retransmission contract is what is driving the fees today. "[I]f it is the case that some broadcast station groups (like Sinclair) started getting retrans fees earlier because they negotiated harder and earlier for increases in retrans fees, they will be 'ahead' of other broadcast station groups in their time path of retrans fees—for reasons unrelated to market power."[38]

31. Professor Gowrisankaran appears to have in mind a set of parallel lines describing a path retransmission fees over time. In this scenario, each station owner, once it decides to bargain for retransmission fees, starts at the bottom and makes its way upward over time. But he presents no theory for this nor for why the initial retransmission fees (in a station owner's first retransmission agreement), and the fee increases when subsequent contracts are negotiated, would be constrained in such a way that firms that began negotiating later are perpetually behind firms that started negotiating earlier. To my knowledge, there is no requirement that a firm that

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[38] Gowrisankaran Decl., ¶ 90.

signed its first contract in 2015 would necessarily start at a lower fee than a firm that signed its second or third contract in that year. And he provides no empirical evidence to support the idea that there is a positive relationship between the date at which a station owner first signed an agreement and his fees today.

III. PROFESSOR GOWRISANKARAN'S DISCUSSIONS OF VIDEO CONTENT IN A BROAD MARKET ARE NOT INFORMATIVE

32. Professor Gowrisankaran's attempts to muddy the waters by reciting facts on the availability of non-broadcast video content or measures of concentration in a broad, ill-conceived "video programming market"[39] are unconvincing as a matter of economics.

A. THE FACT THAT THERE ARE OTHER VIDEO PROVIDERS DOES NOT NEGATE THE POSSIBILITY THAT BROADCAST STATION OWNERS HAVE BARGAINING POWER THAT MAY BE ENHANCED BY ACQUIRING ADDITIONAL STATIONS

33. Professor Gowrisankaran claims that there is a great deal of video competition everywhere. He notes that video "markets" are unconcentrated at the DMA and national level.[40] Although he does not draw any specific conclusions from his evidence, presumably Professor Gowrisankaran's assertion that there is a lot of competition in the provision of video content would mean that broadcast station owners are constrained by cable channels and other video providers—and thus would not demand high retransmission fees—and that MVPDs could easily drop broadcast stations if the retransmission fees demanded are too high. These conclusory claims presumably imply that the proposed merger should raise no competitive issues.

34. I agree that there is a great deal of video content available, in many different forms, e.g., linear versus on-demand. I agree that these various types of video content compete with each other for viewers' attention, although some are closer competitors than others. But despite this competition, a finding that broadcast station owners would be constrained by cable channels or other sources of video is not supported by past findings of the Commission or any empirical evidence in the Gowrisankaran Declaration.

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39 Gowrisankaran Decl., ¶ 3 and § III.

40 Gowrisankaran Decl., § III.D

35. Previous Commission findings support the idea that, although there are many video competitors, broadcasters' closest competition is other broadcasters. For example, the most recent Video Competition Report indicates that "[i]ndividual commercial stations compete primarily with other commercial broadcast stations within their local markets (DMAs) for audiences and advertising revenue."[41] The same Report finds that local programming distinguishes broadcast stations from other content providers: "Local and exclusive news programming and features are other sources of product differentiation for broadcast television stations in their competition for advertisers and viewers."[42] And the Department of Justice, in its recent Complaint regarding the Nexstar-Media General merger, found that broadcast station owners were sufficiently differentiated from cable channels that an increase in the concentration of broadcast station owners in local markets (DMAs) would adversely affect competition in the sale of television spot advertising.[43] Although differences in prices – such as advertising rates on cable and broadcast networks – are not sufficient to establish the existence of two separate markets, they are suggestive that these two advertising channels do not effectively constrain each other's pricing.[44]

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41 18th Video Comp Rept. ¶ 75.

42 18th Video Comp Rept. ¶ 110.

43 "Like broadcast television, other satellite and cable television networks, such as those carried by MVPDs, combine elements of sight, sound, and motion, but they are not a desirable substitute for broadcast television spot advertising for two important reasons. First, broadcast television can reach well over 90 percent of homes in a DMA, while other satellite and cable television networks carried by MVPDs often reach many fewer homes….As a result, an advertiser can achieve greater audience penetration through broadcast television spot advertising than through advertising on satellite and cable television networks that MVPDs distribute. Second, because MVPDs may offer more than 100 channels, they fragment the audience into small demographic segments. Because broadcast television programming typically has higher rating points than other cable and satellite television networks that MVPDs distribute, broadcast television provides a much easier and more efficient means for an advertiser to reach a high proportion of its target demographic in a broad area." Complaint, *U.S. v. Nexstar Broadcasting Group, Inc. and Media General Inc.*, Sept. 2, 2016, ¶ 18.

44 A recent study suggests that broadcast TV commands almost 40 percent higher fees than cable TV. *See* Stephen Battaglio, "Broadcast and Cable TV Upfront Ad Sales End Slump with 4.5% Gain," *Los Angeles Times* (July 12, 2016), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-network-upfront-20160712-snap-story.html

B. HHI CALCULATIONS ARE NOT INFORMATIVE

36. Professor Gowrisankaran proffers concentration calculations in the form of HHIs at the national level and in some DMAs, but fails to explain how these relate to the competitive concerns engendered by the proposed transaction. It is well-known that the probative value of the HHIs is quite limited in the context of mergers that raise so-called unilateral effects and is irrelevant in markets in which prices are determined via bargaining and are populated by two-sided platforms, which is how Professor Gowrisankaran, himself, describes the video marketplace at issue in this transaction. It also is unclear how the concentration of video distribution, for which he provides HHIs based on MVPD shares, is relevant to the current inquiry which focuses on a consolidation of broadcast station owners.

IV. SINCLAIR'S ECONOMIC EXPERT INCORRECTLY ASSERTS THAT THERE IS NO EVIDENCE THAT THE PROPOSED MERGER WILL HAVE AN EFFECT ON RETRANSMISSION RATES WITHIN DMAS

37. Professor Gowrisankaran criticizes the analysis in the Zarakas/Verlinda Declaration that uses information on DISH subscriber responses to blackouts to shed light on the concavity or convexity of the MVPD's surplus function within a DMA and therefore the likely effects on the proposed merger on bargaining leverage and retransmission fees. He first states:[45]

> If one accepts the Zarakas/Verlinda methodology as capturing the true causal effect of an exogenous drop in carriage, then this provides evidence on the shape of DISH's surplus function. This evidence comes from comparing the subscriber losses when one station is disrupted to the subscriber losses [when] two stations are disrupted.

38. Professor Gowrisankaran's criticisms of the analysis misinterprets a critical detail of the underlying data which invalidates his argument. Additional analysis on more disaggregated data, described in the Zarakas/Verlinda Reply Declaration, demonstrates that the condition under

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("Based on the dollars taken in, the average cost for reaching a thousand viewers in the 18 to 49 age group—the most coveted demographic for advertisers—will be $47 on broadcast TV in the 2016-17 season, up from $43 in the 2015-16 campaign. The average cost on a cable network will be $31, up from the current rate of $29, [a Media Dynamics Inc.] report said.").

[45] Gowrisankaran Decl. ¶ 79.

which one would expect a merger to enhance station owner bargaining leverage and raise retransmission fees, namely, that the MVPD's surplus function is concave, is present within DMAs. And since the proposed merger will result in an increased number of DMAs where more than one broadcast station is owned by the New Sinclair, the merger would push retransmission fees upward, which provides another, independent reason why the merger will likely push retransmission rates up.

39. The Zarakas/Verlinda Reply Declaration responds more fully to Professor Gowrisankaran's criticisms. But in my opinion, their empirical work is consistent with and supports my overarching conclusions regarding the likely competitive effects of the transaction. Professor Gowrisankaran claims that the initial blackout analysis of Zarakas/Verlinda demonstrates that the loss of two stations together is not worse than the sum of the losses of two stations individually. But in that analysis, the DMAs where two stations were blacked out almost all contained one big 4 and one non-big 4 station, rather than two big 4 stations. Thus the comparison Professor Gowrisankaran attempts to make is not correct; the non-big 4 stations typically are less valuable to consumers and thus less valuable to MVPDs. This is reflected in the fact that the retransmission rates for non-big 4 stations are typically far below the retransmission rates for big 4 stations, and indeed, the Joint Opposition claims that the acquisition of Tribune will "burden" Sinclair because Tribune has so many non-big 4 stations.[46] Given these facts, the Zarakas/Verlinda finding makes economic sense: losing two stations (one big 4 and one non-big 4) will cause less than twice the harm of losing one big 4 station.

40. To determine whether the relevant curve is convex or concave, likes must be compared to likes. The Zarakas/Verlinda Reply Declaration employs two methodologies to achieve this. First, comparing DISH cancellations experienced in various DMAs during the Tribune blackout, they find that the blackout of a big 4 station leads to a **{{BEGIN HCI END HCI}}** increase in cancellations (relative to similar, control DMAs where there was no blackout), the blackout of a non-big 4 station leads to a very small increase in cancellations **{{BEGIN HCI**

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[46] Opp. at 35. I disagree that the transaction will weaken or "burden" Sinclair. And although mergers may be undertaken for many reasons, the fact that Sinclair has agreed to buy Tribune and is willing to pay $3.9 billion for it suggests that Sinclair also does not really think it will be weaker with Tribune than without.

END HCI}} and the blackout of both a big 4 and a non-big 4 lead to a **{{BEGIN HCI END HCI}}** increase in cancellations. This is exactly the result that one expects if the MVPD's surplus function is concave: the impact of losing two stations together exceeds the sum of the individual impacts. (This method cannot be applied to the Hearst blackout because there is only one market with one non-big 4 station.) Second, Mr. Zarakas and Dr. Verlinda seek to estimate the impact from the loss of two big 4 stations along the lines of "hedonic analysis" by adjusting the impact from losing a non-big 4 station to reflect the non-big 4 station's comparatively lesser appeal. They do that by utilizing the ratio of the retransmission fees charged by the broadcaster for the two types of stations—big 4 and non-big 4. Application of this method to the Tribune and Hearst blackouts suggests that the MVPD surplus function is concave.

41. While the relative retransmission fees commanded by big 4 and non-big 4 stations may be imprecise proxies for their relative values, I would expect that the impact of losing two big 4 stations would be far worse than losing a big 4 and a non-big 4 together, given the relative value to an MVPD of the big 4 and non-big 4 stations. And even a cursory examination of retransmission agreements reveals that in almost all cases, a big 4 stations command a retransmission fee that is many times larger than the retransmission fee for a non-big 4 station. There is no reason to doubt—and Professor Gowrisankaran offers no arguments to the contrary—that some of that difference reflects the fact that a big 4 station can inflict a more severe economic harm on the MVPD by making its signal unavailable to the MVPD. On the flip side, a big 4 station will likely recapture some of the "eyeballs" lost during the black out through other MVPDs, which will dampen the effect of a blackout on the station owner's advertising revenue. This tends to make the big 4 station's negotiating demands more credible and, in a bargaining equilibrium, ensures a better license fee than what a non-big 4 station can command.

42. Finally, Professor Gowrisankaran asserts that my discussion of minimum channel line-ups required for an MVPD to compete effectively gives reason to expect that the surplus function would be convex even within a DMA.[47] Although the existence of a minimum quality level as reflected in channel lineup may be required, there is no evidence that DISH or other MVPDs

[47] Gowrisankaran Decl., ¶ 50.

today are in danger of slipping below a competitive viability threshold due to the loss of a broadcast station.

V. THE MERGER EFFICIENCIES CLAIMED BY SINCLAIR-TRIBUNE AND ITS ECONOMIC EXPERT ARE NOT COGNIZABLE

43. The evaluation of the public interest benefits of a merger where prices are likely to increase must include an adequate description and proof of the consumer benefits that may offset or compensate for the higher prices. Sinclair and Tribune have provided no convincing description of such benefits to consumers from this transaction.

44. Under the standards used by both the Commission and the Federal antitrust agencies, claimed efficiencies from a merger must satisfy several criteria to qualify as cognizable efficiencies that are credited in an evaluation of the impact of a merger on consumers. The efficiencies must be likely to be achieved and not merely speculative, they must accrue to the benefit of consumers or the public, and they must be merger specific, that is, they must be unlikely to be achieved in the absence of the merger.[48] The Commission and the antitrust agencies recognize that the benefits of a merger to consumers may come in a variety of forms, including lower prices, higher quality, or new products.[49]

45. Sinclair and Tribune claim that the merged company will be able to invest in local stations, including their local news organizations, with the cost savings that it will generate post-merger due to its larger scale.[50] In its Joint Opposition, Sinclair provides no details that quantify the magnitude of the savings, and provide no estimate of the magnitude of the efficiencies they have achieved in past acquisitions, which could provide valuable information on whether the efficiency claims in this transaction are likely to be realized. They simply assert that scale economies will generate some (unspecified) quantity of dollar savings, which they then assert they will invest in local programming.

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48 See, Memorandum Order and Opinion, In the Matter of Nexstar-Media General, MB Docket 16-57, rel. January 11, 2017, ¶¶ 22-24; U.S. Department of Justice and the Federal Trade Commission (2010), *Horizontal Merger Guidelines*, §10.

49 Nexstar-Media General Order, ¶ 24; HMG, § 10.

50 Opp. at 6.

46. The Joint Opposition does not fare much better in its discussion of evidence that the New Sinclair will invest in local stations. They provide a list of expenditures they made following previous acquisitions of Fisher Broadcasting and Allbritton Communications, including various pieces of studio equipment, computers, automobiles and news vans, and building improvements.[51] This list of expenditures, however, is not meaningful for gauging cognizable efficiencies from the transaction since Sinclair does not estimate how much would have been invested in the absence of the acquisition. Without an estimate of the amount of the local investment that is incremental, Sinclair's spending on previously acquired stations is not informative on the question of whether the Sinclair-Tribune merger is likely to result in incremental investment in local stations. Similarly, the Joint Opposition describes an increase in the number of broadcast hours devoted to local issues (news or "lifestyle" programming), and lists an additional 221.5 hours per week across 36 stations that is claims it has added or will add soon; this is an average of less than one hour per day for each of the 36 stations listed.[52] Very little information is provided as to what the programming is, other than the assertion that it is "local news." It is difficult to assess this type of claimed efficiency when so little information is provided.

47. In another example of the parties supplying incomplete information regarding its claimed efficiencies and past track record, Sinclair, in its Public Interest Statement, pointed to its addition of news staff at a few stations, including one investigative journalist at WJLA in Washington, DC as evidence of its investments in local news.[53] But other actions that Sinclair took apparently led to departures of veteran news staff at WJLA;[54] again, the net effect of all of these changes,

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51 Opp. at 8, Exhibit A.

52 Opp. at 9, Exhibit B.

53 Tribune Media Company and Sinclair Broadcast Group, Inc. Consolidated Applications for Consent to Transfer Control, MB Docket No. 17-179 (July 19, 2017), at 2. In the Joint Opposition, Sinclair states that it "did not let go any full-time investigative journalists" and that it made "staff changes at all levels" in an attempt to improve the stations quality. Opp., note 53.

54 Paul Farhi, "Longtime D.C. TV anchor Maureen Bunyan is latest casualty of Sinclair's cuts," *Washington Post*, January 9, 2017, https://www.washingtonpost.com/lifestyle/style/veteran-dc-tv-anchor-maureen-bunyan-out-at-wjla-possibly-ending-her-

relative to what the situation would have been absent the merger, are the true measure of whether that merger served the localism objective of the public interest and thus whether it gives any prediction about the public benefits of the Sinclair-Tribune merger.

48. Moreover, Sinclair does not appear to be more devoted to local news operations than an average broadcast station. Sinclair's most recent 10K reported that it produces 2,200 hours of news each week for broadcast over 112 of its stations; on average, this amounts to just under 20 hours of local news programming per station, per week; or less than 3 hours per day.[55] This is, on average, less than the amount of local news programming reported in a 2016 survey. The 2016 RTDNA/Hofstra University survey of news directors[56] found that local stations averaged 5.7 hours of local news programming per weekday—implying an average of 28.5 hours during the work week—and an additional 4.2 hours on average on weekends. The survey found that local news programming was greater in larger markets, so one must be cautious in comparing Sinclair's self-reported average across 112 of its stations (many of which are in smaller markets) to the survey averages; but the comparison does not, on its face, provide any support for the idea that Sinclair is especially local news oriented.

49. Furthermore, the details of how economies of scale are to be exploited are important in determining whether consumers will benefit. Sinclair has provided no details, but eliminating overhead could be achieved by consolidating operations and centrally-producing content to be distributed to local stations to broadcast. Sinclair provides such centrally produced content today; Sinclair's 10K states that its "national news desk and Capitol Hill bureau news teams produce daily unique stories unavailable from other sources and focused on government accountability storytelling that provides a significant point of difference for our stations." Sinclair has also placed "must-run" commentaries on its local news broadcasts which are

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career/2017/01/08/8877aae8-d522-11e6-9cb0-54ab630851e8_story.html?utm_term =.e61e0809cd7f.

55 Sinclair Broadcast Group Inc., Form 10-K Annual Report for the fiscal year ended December 31, 2016, at 5.

56 "RTDNA Research: Local news by the numbers," June 5, 2017, https://www.rtdna.org/article/rtdna_research_local_news_by_the_numbers_2017.

centrally scripted and produced.[57] Post-transaction, the same content will be extended to the former Tribune stations, which is entirely consistent with economic incentives to spread the fixed programming costs across a broad range of distribution channels, but, on its face, does not advance the goal of "localism."

[57] Paul Farhi, "Under new ownership, WJLA-TV takes a slight turn to the right," *Washington Post*, September 16, 2014, https://www.washingtonpost.com/lifestyle/style/under-new-ownership-wjla-tv-takes-a-slight-turn-to-the-right/2014/09/16/a21ffa6e-3ac8-11e4-9c9f-ebb47272e40e_story.html?utm_term=.f0e6c89b0e9d.

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

Executed on August 29, 2017

J A Ordover

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Janusz A. Ordover
Emeritus Professor of Economics
New York University

EXHIBIT D

REPLY DECLARATION OF WILLIAM P. ZARAKAS AND JEREMY A. VERLINDA

REPLY DECLARATION OF WILLIAM P. ZARAKAS AND JEREMY A. VERLINDA

1. My name is William P. Zarakas. I am a Principal with The Brattle Group, an economics consulting firm, where I work primarily on economic and regulatory matters concerning the communications and energy industries. I have previously submitted a declaration and my professional credentials in this proceeding.

2. My name is Jeremy A. Verlinda. I am a senior associate at The Brattle Group, specializing in competition issues in both antitrust and regulatory contexts. I have also previously submitted a declaration and my professional credentials as part of this proceeding.

3. In this declaration, we respond to assertions made by Dr. Gautam Gowrisankaran in his declaration (August 22, 2017) concerning the analysis and conclusions presented in the Zarakas/Verlinda Declaration (August 7, 2017). Specifically, we respond to Dr. Gowrisankaran claims that the Ordover and Zarakas/Verlinda analyses 1) do not empirically demonstrate concavity in DISH's surplus function in duopoly markets, and 2) do not provide empirical evidence that retransmission fees will likely increase following the combination of Sinclair and Tribune into New Sinclair. In addition, we provide an analysis of the changes in the retransmission fees charged to DISH by various broadcast groups following the completion of mergers or acquisitions. We also provide an analysis of DISH viewership of big 4 local broadcast stations. Our conclusions are summarized as follows:

4. First, in assessing the "concavity" of a multichannel video programming distributor's (MVPD's) surplus function in duopoly markets, using subscriber cancellations as a proxy, it is essential to use comparable data. The test for concavity in a market involves determining whether or not subscriber cancellations increase at an accelerating rate when a broadcast group blacks out two local broadcast stations in that market compared to a market where only one station is blacked out. Importantly, however, this test has to

involve "like" stations. Using the combination of big 4 stations and non-big 4 stations, as Dr. Gowrisankaran has apparently done, would not yield meaningful results.

5. With this in mind, we applied two methodologies to assess the concavity of DISH's surplus function. Under the first methodology, we conducted a regression analysis of subscriber cancellations in designated market areas (DMAs) affected by a broadcast group blackout. That analysis allowed us to compare 1) the combined effects in a market where two stations were blacked out (even if they were unlike stations; i.e., one big 4 network and one non-big 4 station) to 2) the sum of the effects in a market where the broadcaster controls a big 4 station and another market where the broadcaster controls a non-big 4 station. Under the second methodology, we adjusted the effect from the loss of a non-big 4 station to reflect the higher value of a big 4 station by using the ratio of the retransmission fees that the associated broadcast groups charge for big 4 and non-big 4 stations, respectively.

6. Application of these methods indicates strong evidence that DISH's surplus function was concave during the observed blackout periods. That is, the effect on subscriber cancellations resulting from the loss of two local broadcast stations in the same market is greater than the sum of the individual effects associated with the blackout of one local broadcast station in one market and another station in another market.

7. Second, we analyzed the changes in retransmission fees charged to DISH by broadcast groups that were involved in the ten major broadcast industry transactions (i.e., mergers or acquisitions) that have taken place (and been consummated) since August 2013. In all cases, the retransmission fee that DISH paid the combined (post-merger) broadcast group in the first year of the first post-merger contract was greater than the retransmission fee that it would have paid—based on the retransmission fees specified in the first-year under the last pre-merger agreement (between DISH and the target company), even after adjusting for industry-wide retransmission fee increases (which we refer to as "inflation").

8. The retransmission fees charged to DISH by Sinclair for the Fisher stations (after the Fisher acquisition) were **{{BEGIN HCI END HCI}}** higher than the fees that

Fisher would be expected to have charged DISH absent the acquisition, after adjusting for inflation. Also, the retransmission fees charged to DISH by Sinclair for the Allbritton stations (after the Allbritton acquisition) were **{{BEGIN HCI END HCI}}** higher than the fees that Allbritton would be expected to have charged DISH absent the acquisition, after adjusting for inflation. The retransmission fees charged to DISH by Tribune for the Local TV stations (after the Local TV acquisition) were **{{BEGIN HCI END HCI}}** higher than the inflation-adjusted fee that Local TV stations would be expected to have charged DISH absent the acquisition. We also examined changes in retransmission fees for the *acquiring* broadcast group. That analysis indicated that, in most cases, the post-merger rate is higher after adjusting for inflation than the pre-merger rate of the acquiring company. This is so even though the acquisition of stations with lower rates would be expected to exert downward pressure on the rates of the combined company. The analysis indicated that, after adjusting for inflation, the retransmission fees charged to DISH by Sinclair and Tribune were more than **{{BEGIN HCI END HCI}}** higher than they would have been if they had not acquired Fisher, Allbritton and Local TV, respectively.

9. We also examined the "value" of DISH subscriber viewing of big 4 affiliated local broadcast stations by broadcast group, as measured by the average viewing per DISH household divided by the retransmission fees paid by DISH. This provides an indicator of the subscriber viewing (of big 4 local broadcast stations) in terms of hour per retransmission dollar spent. Arguably, higher retransmission fees charged for comparable stations (e.g., among NBC affiliated stations) may be justified and make economic sense if the station draws more viewers than its peers. Our analysis indicates that the hours viewed by DISH subscribers per retransmission dollar for big 4 local broadcast stations that are owned by Sinclair are generally below the average for all of the other broadcast groups which charge DISH for retransmission of big 4 stations. They are also conspicuously below the levels shown for Tribune.

I. DISH SURPLUS CONCAVITY ANALYSIS

10. Combining two broadcast groups (either through merger or joint negotiations) will enhance their combined bargaining power if the loss to the MVPD from failing to reach an agreement with both is greater than the sum of the losses from failing to reach an agreement with each broadcast group individually.[1] In terms of the economic literature, this means that a combined broadcast group will have greater bargaining power with an MVPD if the MVPD's value function is concave.

11. As Dr. Ordover and Dr. Gowrisankaran both point out, concavity of an MVPD's value function indicates that an MVPD realizes increasing value from adding local broadcast stations to its lineup, but at a decreasing rate. This means that, if bundles of stations were added sequentially by an MVPD, the second set of stations added would add less value than the first set of stations added, and so on.

12. For the case at hand (concerning the possibility of a broadcast group withholding access to a bundle of local broadcast stations), it is helpful to think of an MVPD's surplus function after its local broadcast station lineup is in place and being offered to its customers. In that case, the MVPD's concave value function can be viewed in reverse. That is, losing an initial bundle of stations (due to a blackout or due to some other reason) causes a loss in the MVPD's value function. Losing a second bundle of local broadcast stations causes the MVPD to realize incrementally greater losses; that is, the loss in MVPD value specifically associated with blackout of a second set of stations exceeds the loss of value specifically associated with the blackout of the first bundle of stations.

13. We address the issue of the concavity of DISH's surplus function by expanding upon the regression analysis provided in our prior declaration. In the following section, we summarize the data set used for that analysis and also provide some statistics and graphic

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[1] This definition follows closely the discussion in Craig T. Peters, "Bargaining Power and the Effects of Joint Negotiation: The 'Recapture Effect,'" Department of Justice Economic Analysis Group Discussion Paper EAG14-3 (September 2014). Although that discussion is in the context of hospitals and insurers, the framework can be adapted to that of MVPDs and media companies.

representations of the level of subscriber cancellations experienced by DISH before, during and after the blackout of certain local broadcast stations by Tribune and Hearst.

A. DISH Subscriber Analysis

14. DISH provided us with information concerning weekly subscriber cancellations data in the DMAs that were affected by blackouts of local broadcast stations, as well as similar data for comparable non-blacked out DMAs during the same time period.[2] This data provides a reasonable proxy for DISH's value function in that the level of subscriber defections in reaction to the loss of a bundle of local broadcast stations are correlated with the value that subscribers (and, derivatively, DISH) place on those stations. This data allows us to estimate the concavity of DISH's value function.

15. A breakdown of these affected DMAs by the categories of local broadcast stations affected is provided in Table 1.

Table 1
Number of Tribune and Hearst DMAs
by Network Affiliate Types in DMA

Affiliates in DMA	Tribune	Hearst
One Big 4 Only	15	20
One Non-Big 4 Only	9	1
Big 4 & non-Big 4	8	5
Two Big 4	1	0
Total	33	26

Source: Tribune and Hearst contract data, provided by DISH.

16. Table 1 shows that, under the Tribune blackout, a two station blackout was experienced in nine DMAs, eight of which involved one big 4 station and one non-big 4 station; the ninth DMA involved a blackout of two big 4 stations. The table also shows that five DMAs

[2] The Tribune Blackout occurred June 12, 2016 through September 5, 2016. The Hearst Blackout occurred March 3, 2017 through April 26, 2017. DISH provided weekly subscriber data from April 28, 2013 through July 23, 2017.

experienced a two station blackout as part of the Hearst blackout, all of which involved one big 4 station and one non-big 4 station.

17. DISH's weekly cancellation data for the period preceding, during and following the blackout events can be compared among 1) DMAs in which the blackout agent (i.e., Tribune or Hearst) owned and operated a single local broadcast station; 2) DMAs where the blackout agent owned and operated two stations; and 3) DMAs that were identified as comparable or controls against which to assess the effects of the blackout DMAs.[3] For expositional purposes, these data are presented in a "de-meaned" format, which allows the cancellation data to be comparable over time.[4]

18. The changes in DISH's subscriber cancellations surrounding the Tribune blackout are presented in Figure 1:

[3] Throughout this analysis, we utilize the same control DMAs for the Tribune and Hearst blackout DMAs that we used in our August 7 declaration.

[4] "De-meaned" observations are calculated by subtracting the aggregate cancellations within the group over the time period from each week's (within-group) aggregated cancellation value. For example, if there were on average 1,000 cancellations per week summed across the control DMAs in the pre-blackout period, this value would be subtracted from each week's value of combined cancellations across the control DMAs.

Figure 1
Cancellations before, during, and after Tribune Blackout

{{BEGIN HCI

END HCI}}

19. Two local broadcast stations (one big 4 and one non-big 4) were blacked out by Tribune in eight of those DMAs. Figure 1 indicates that there is a sharp increase in cancellations by DISH subscribers in the treatment DMAs relative to the control DMAs (shown in the "No Blackout" line) as soon as the blackout began in all cases. In addition, the figure shows **{{BEGIN HCI**

END HCI}}

20. Additionally, in the Indianapolis DMA, Tribune owns and operates two big 4 local broadcast stations that were simultaneously blacked out, which we show separately in the line labeled "Indianapolis."[5] Figure 1 also demonstrates that, for the Indianapolis DMA, the cancellations by DISH subscribers **{{BEGIN HCI** **END HCI}}** including the DMAs in which two local broadcast stations (one big 4 and one non-big 4) were simultaneously blacked out. However, this finding may understate the effect on subscriber cancellations of a blackout of two big 4 stations, based on DISH's analysis of the affected stations in this market. As described in the Declaration of Melisa Ordonez, viewership of Tribune's **{{BEGIN HCI** **END HCI}}**[6] which would reduce the effect that a blackout would have on subscriber cancellation levels.

21. Figure 2 provides a similar analysis with respect to the Hearst blackout, and demonstrates similar results:

[5] The two blacked out big 4 local broadcast stations were WTTV, a CBS network affiliate and WXIN, a FOX network affiliate.

[6] Reply Declaration of Melisa Ordonez ¶ 6 (Aug. 29, 2017) ("Ordonez Reply Decl.") (attached as Exhibit B of DISH Reply to Applicants' Opposition).

Figure 2
Cancellations before, during, and after Hearst Blackout

{{BEGIN HCI

END HCI}}

22. For the Hearst blackout, **{{BEGIN HCI**

END HCI}} Also, during this peak period, **{{BEGIN HCI**

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23. Our analysis of DISH's weekly cancellations data demonstrates that DISH's subscriber cancellations **{{BEGIN HCI**

END HCI}} However, by itself, this analysis of subscriber cancellations is not sufficient to determine whether DISH's surplus function is concave, or not. We expanded the regression analysis that was presented in our prior declaration to answer this question.

24. Dr. Gowrisankaran also argues that subscriber losses during a blackout are not a good indicator of DISH's loss of surplus because customers would likely switch back to DISH after the blackout event. However, this is not borne out in the blackouts that we have reviewed. In our August 7 declaration, we examined subscriber losses that DISH experienced during the Tribune and Hearst blackouts as well as after these blackout events. In the case of Tribune, we examined the effect of the blackout on DISH for the blackout period (June through August 2016) plus the 10 months following the blackout, through June 2017. (The entire period is referred to as the "post-blackout case" in Table 6a.) As shown in the table, we found that the average monthly blackout effect across the entire period was **{{BEGIN HCI END HCI}}** percentage points (a decline in subscribership), indicating that DISH did not recover its blackout-induced subscriber losses.

25. The analysis of the Hearst blackout showed the same type of result. Our analysis of the Hearst blackout (shown in Table 6b) covers the blackout period (March through April 2017) as well as the three months following the blackout. (Again, we refer to this entire period of the post-blackout case.) As shown in the table, we found that the average monthly blackout effect across the entire period was **{{BEGIN HCI END HCI}}** percentage points (an even larger decline in subscribership), also indicating that DISH did not recover the subscribers it lost because of the blackout.

B. Regression Analysis

26. It is well-established that subscribers tend to value big 4 stations higher than they do other stations (i.e., not affiliated with one of the big 4 networks). The observations of changes

in DISH's subscriber cancellations, while showing the significantly greater effect from losing two stations in a market, were not intended to evaluate the shape of the curve. They were thus based on blackout events that were not fully comparable, which may understate (or overstate) results. Dr. Gowrisankaran based his assessment of concavity in DISH's surplus function using the test that losing two stations must cost DISH more than twice as much value as losing only one station.[7] We would agree with Dr. Gowrisankaran's test if the stations under study were comparable, but they are not. The value placed on big 4 stations by viewers (and by MVPDs) is much greater than that placed on non-big 4 stations, which is why a broadcast group charges much more for the retransmission of the former than of the latter.

27. A different test for concavity is therefore required, as is provided in the economic literature, starting with a paper by Chipty and Snyder (1999).[8] As was demonstrated there (and applied to the surplus function for MVPDs), when dealing with local broadcast stations of different value, concavity requires that the incremental loss in surplus associated with the blackout of a big 4 station (during a two-station blackout) must be greater than the loss in surplus associated with the blackout of the big 4 station by itself.[9] Alternatively stated, a finding that the total effect on surplus of blacking out two stations is greater than the sum of the two individual blackout effects is evidence in itself of concavity in the surplus function.

28. It is also possible to compare stations on a like basis and thus determine the effects of different station types by adjusting the effect of the non-big 4 station when there is the blackout of both a big 4 and a non-big 4 station.

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[7] Gowrisankaran Declaration at para.55: "these results show that losing two stations is *less* than twice as painful as losing one station."

[8] Tasneem Chipty and Christopher M. Snyder, "The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry," Review of Economics and Statistics Vol. 81, No. 2 (May 1999), 326-340.

[9] As stated in Chipty and Snyder (1999), bargaining power of the merging firm increases if $[V(Q^* - q_2) - V(Q^* - q_1 - q_2)] - [V(Q^*) - V(Q^* - q_1)] > 0$, where V is DISH's surplus function, Q* is DISH's purchases of broadcasting from networks, and q_1 and q_2 are the sizes of a big 4 and non-big 4 station, respectively. $V(Q^* - q_2) - V(Q^* - q_1 - q_2)$ is DISH's increased loss from the blackout of a big 4 station if a non-big 4 station is already in progress **{{BEGIN HCI END HCI}}** and $[V(Q^*) - V(Q^* - q_1)]$ is DISH's loss from a big 4 station alone **{{BEGIN HCI END HCI}}**

29. First, we conducted a regression analysis using the difference-in-differences regression methodology. This regression was specified to assess the relationship among changes in DISH's subscriber cancellations and the number of local broadcast stations that were blacked out in the associated DMAs during the Tribune blackout. The regression compares the effect on subscriber cancellations by the type of local broadcast stations blacked out in the DMAs, as categorized in Table 1 (i.e., a big 4 network affiliated local broadcast station, a station not affiliated with a big 4 network, and DMAs in which both a big 4 station and a non-big 4 station were both blacked out).

30. We applied this approach to the Tribune blackout. The results of that regression analysis are provided in Table 2, which shows that the effect on DISH's subscriber cancellations stemming from the combined blackout of a big 4 local broadcast station and a non-big 4 station is **{{BEGIN HCI END HCI}}**. The table also shows that the effect of the Tribune blackout from a big 4 station by itself is **{{BEGIN HCI END HCI}}**, and the effect of the blackout from a non-big 4 station (also by itself) is **{{BEGIN HCI END HCI}}**. That is, the combined loss to DISH from the blackout of a big 4 station and a non-big 4 station in the same market **{{BEGIN HCI END HCI}}** has a larger effect on cancellations than the sum **{{BEGIN HCI END HCI}}** of the effects from the individual losses from the blackout of a big 4 station and a non-big 4 station in separate markets, evidencing that DISH's surplus function was concave during the Tribune blackout.

Table 2
Blackout Station Type Effect on Cancellations
Tribune Blackouts

{{BEGIN HCI

END HCI}}

31. We also applied the second methodology to our analysis of the Tribune blackout discussed above. As discussed above, it is possible to estimate whether DISH's surplus function during the blackout was concave by estimating the effect of a blackout of two big 4 stations on subscriber cancellations by adjusting the coefficient for the big 4 station and non-big 4 station. This would allow us to assess whether the effect of the blackout of two big 4 stations exceeded two times the effect associated with the blackout of a single big 4 station.

32. With respect to the Tribune blackout, the differential between the effects on subscriber cancellations stemming from the blackout of a single big 4 station and the effect associated with the blackout of a big 4 station plus a non-big 4 station is restated in Table 3; it is **{{BEGIN HCI END HCI}}**.

Table 3
Non-Big 4 Adjustment to Two-Station Blackout Subscriber Cancellations
Tribune Blackouts

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33. In order for DISH's surplus function to be concave, the blackout of two big 4 stations must have at least a **{{BEGIN HCI END HCI}}** effect on cancellations, or stated another way, the incremental effect of the second big 4 station must be greater than **{{BEGIN HCI END HCI}}**. Table 3 also sets forth an adjustment of the value of the non-big 4 stations based on the relative retransmission fees of big 4 and non-big 4 stations.

34. Tribune charges DISH **{{BEGIN HCI END HCI}}** for its big 4 local broadcast stations compared to about **{{BEGIN HCI END HCI}}** for its non-big 4 stations. That is, Tribune charges and DISH pays about **{{BEGIN HCI END HCI}}** times as

much for the right to retransmit a big 4 network affiliated local broadcast station than it charges and DISH pays for a non-big 4 station. These relative prices are in line with the findings above that local broadcast stations that are affiliated with the big 4 networks are more highly valued by MVPD subscribers, and that losing access to them results in higher levels of customer defections (i.e., subscriber cancellations) than is the case for the loss of a lesser valued (i.e., non-big 4 affiliated) station. This is also confirmed by Ms. Ordonez's Reply Declaration.[10]

35. Assuming that viewers' valuations of big 4 and non-big 4 stations **{{BEGIN HCI**

END HCI}},[11] the incremental effect of a non-big 4 blackout can be adjusted by this ratio to estimate the effect of a second big 4 blackout. Adjusting the estimated effect on DISH's subscriber cancellations of increment **{{BEGIN HCI END HCI}}** shown in Table 3 by the differentials in retransmission fees **{{BEGIN HCI END HCI}}** would result in a proxy for a blackout of two big 4 stations in the same DMA whose effect would be significantly greater than two times as large as the effect estimated (in the regression) for a blackout of a single big 4 station—an indication that DISH's surplus function was concave during the Tribune blackout. This means that, properly adjusted, the Tribune results indicate concavity. Specifically, the ratio implies an adjusted increment effect of **{{BEGIN HCI END HCI}}** for the second station, which exceeds the **{{BEGIN HCI END HCI}}** incremental effect for one station.

36. Turning to the Hearst blackout, it is not possible to apply the first of the two tests for concavity discussed above. This is because only one DMA experienced a blackout of a single non-big 4 station, which makes it impossible to meaningfully estimate the effect on subscriber cancellations for the blackout of a non-big 4 local broadcast station.[12] However, it is possible to estimate whether DISH's surplus function during the Hearst blackout was concave or not by adjusting the coefficient for the combined impact on subscriber cancellations of a big 4 station and non-big 4 station blackout to be more

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[10] *See* Ordonez Reply Decl. ¶ 11.

[11] *See id.*

[12] Thus, this DMA (Tampa) was excluded from the data used in the regression analysis.

representative of the combined impact of two big 4 stations. We were able to use a regression analysis to estimate coefficients for the effect on DISH's subscriber cancellations of the Hearst blackout of a big 4 station and, also, the combined effect of a big 4 station and a non-big 4 station (though not the individual effect of a non-big 4 station).

37. The coefficient for the individual effect on DISH's subscriber cancellations during the Hearst blackout of a big 4 station is **{{BEGIN HCI END HCI}}**. The coefficient for the combined effect on DISH's subscriber cancellations during the Hearst blackout of a big 4 station and a non-big 4 station is **{{BEGIN HCI END HCI}}**. Both coefficients are at statistically significant levels.

38. We then use these estimates as the starting point for the adjustment analysis for Hearst. As was the case for Tribune above, this analysis allows us to assess for the Hearst blackout, too, whether the effect of the blackout of two big 4 stations would exceed two times the effect associated with the blackout of a single big 4 station. In order for DISH's surplus function to be concave, the blackout of two big 4 stations must have at least a **{{BEGIN HCI END HCI}}** effect on cancellations, or stated another way, the incremental effect of the second big 4 station must be greater than **{{BEGIN HCI END HCI}}**.

Table 4
Non-Big 4 Adjustment to Two-Station Blackout Subscriber Cancellations
Hearst Blackouts

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39. The retransmission fee per subscriber that Hearst charges DISH is **{{BEGIN HCI END HCI}}** for its big 4 local broadcast stations compared to **{{BEGIN HCI END HCI}}** Thus, Hearst charges and DISH pays about **{{BEGIN HCI END HCI}}** times as much for the right to retransmit a big 4 network affiliated local broadcast station than it charges and DISH pays for a non-big 4 station. Again, these relative prices are in line with the findings above that local broadcast stations that are affiliated with the big 4 networks are more highly valued by MVPD subscribers, and that losing access to them results in higher levels of customer defections than is the case for the loss of a lesser valued (i.e., non-big 4 affiliated) station.[13] This means that, properly adjusted, the Hearst results, too, indicate concavity. Specifically, the ratio implies an adjusted incremental effect of **{{BEGIN HCI END HCI}}** for the second station, which exceeds the **{{BEGIN HCI END HCI}}** for one station.

[13] *See also* Ordonez Reply Decl. ¶ 11.

II. CHANGE IN RETRANSMISSION FEES

40. The change in retransmission prices following mergers of broadcast groups may also be indicative of concavity in DISH's surplus function. That is, higher prices than would have been the case absent a merger suggest that the combined entity was able to take advantage of the concave value function to increase its bargaining power post-merger. DISH provided us with its contracts with certain broadcast groups (i.e., those that were parties to a merger or acquisition since August 2013), which included pre- and post-merger schedules for retransmission fees.[14] To determine the effect that a broadcast group combination had upon the level of these fees, we compared the retransmission fee in the first year of each pre-merger contract with the retransmission fee that was specified in the associated first post-merger contract. By using the retransmission fees specified in contracts that were negotiated after the merger was completed, this comparative analysis avoids "step-up" fee increases.

41. In order to compare the retransmission consent fees across two contracts that were executed at different times,[15] we adjusted the initial fee for the differences in the vintages of the contracts. Specifically, we increased the retransmission fee that the acquired firm received in the first year of the contract by the inflation rate estimated in the Zarakas/Verlinda Declaration to the date when DISH signed its first contract with the combined entity after the acquisition. In the Zarakas/Verlinda Declaration, we estimated that a given year's retransmission consent fee increased by **{{BEGIN HCI END HCI}}** for each year between contract dates.[16]

42. Table 5 provides the comparison of retransmission fees of the acquired media company. The table shows that for each of the ten acquisitions since August 2013, the actual

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[14] Contracts include fee schedules which cover multiple years. For example, a contract executed in 2014 may specify the retransmission fees for 2014, 2015 and 2016.

[15] Comparing retransmission fees for a common contracted term (say, 2015) is not as direct as it may initially appear because each term may be associated with contracts that were executed at different times (say, 2013 and 2014).

[16] In the Zarakas/Verlinda Declaration, we estimated that the retransmission consent fee for, say, 2017 would be **{{BEGIN HCI END HCI}}** higher in a contract signed in 2016 than the 2017 fee would be in a contract signed in 2015.

retransmission consent fee that DISH paid the combined entity in the first year of the first contract after the acquisition (Column 6) exceeded the fee that would likely have been based on the retransmission consent fee that DISH paid the target firm in the first year of the contract in effect at the time of the acquisition (Column 5). On average, the actual retransmission fee is **{{BEGIN HCI END HCI}}**, or **{{BEGIN HCI END HCI}}** higher than the retransmission fee that would have been expected based on inflation.

Table 5
Retransmission Consent Fees Before and After Acquisitions
Comparison of Target's Fee with Combined Entity's Fee

{{BEGIN HCI

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43. The table also includes retransmission fee comparisons for acquisitions involving Sinclair and Tribune, each of which acquired another broadcast group. Following the methodology described above, the retransmission fees charged by Tribune to DISH following the Local TV acquisition were roughly **{{BEGIN HCI END HCI}}** higher than what would have been expected post-merger if Local TV had not been combined with Tribune. Likewise, the retransmission fees charged to DISH by Sinclair were higher than what Fisher and Allbritton would have been expected to charge if these broadcast groups were not acquired by Sinclair by **{{BEGIN HCI END HCI}}**, respectively.

44. Table 6 provides a comparison of retransmission fees for the *acquiring* media company, by comparing the retransmission fees included in the contract in effect at the time of the acquisition versus those fees included in the first contract signed post-merger. It shows that the retransmission fees charged to DISH by the specified acquiring broadcast groups are higher following five of the nine acquisitions included in the panel for which we have data. This is so even though the acquisition of stations commanding lower rates would be expected to exert downward pressure on the rates of the combined company. The table also shows that the retransmission fees charged to DISH by Sinclair and Tribune were more than **{{BEGIN HCI END HCI}}** higher than they would have been (based on the above described price adjustment methodology) if they had not acquired Fisher, Allbritton and Local TV, respectively.

Table 6
Retransmission Consent Fees Before and After Acquisitions
Comparison of Acquirer's Contracts Before and After Acquisition

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III. DISH VIEWERSHIP DATA

45. We also reviewed DISH's viewership data for its retransmitted big 4 local broadcast stations for each station, by broadcast group. Such a comparison provides an indication concerning the quality of the broadcast group's programming in the eyes of consumers. Figure 3 presents the average number of hours that DISH subscribers spent watching each of the big 4 network affiliated local broadcast stations by broadcast group, divided by the retransmission fee that each group charges.[17] The figure shows the dollar-adjusted

[17] DISH provided a monthly breakdown of its viewing households and hours of viewing for each big 4 station owned by the **{{BEGIN HCI**

monthly hours per viewing household for Sinclair, Tribune, major broadcast groups (Media General and Nexstar), all other broadcast groups, and the overall average of all broadcast groups except Sinclair.[18]

46. Viewership for Sinclair is shown as a bright red line in Figure 3. The figure indicates that viewing per dollar of retransmission fee of Sinclair-owned big 4 stations is **{{BEGIN HCI END HCI}}** viewing per dollar of retransmission fee for Tribune, for all four networks. It is also **{{BEGIN HCI END HCI}}** the weighted average of all other media groups for three of the four networks **{{BEGIN HCI END HCI}}**

END HCI}}. As such, we are describing DISH viewing households as subscribers.

18 Monthly hours per viewing household per big 4 station for a broadcast group-network pair is calculated as the sum of viewing hours divided by the sum of DISH viewing households across stations affiliated with that network and owned by the broadcast group.

Figure 3
Monthly Viewing Hours Per Viewing Household Per Dollar of Retransmission Consent Fees, by Broadcast Group

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REDACTED – FOR PUBLIC INSPECTION

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

Executed on August 29, 2017

William Zarakas

William P. Zarakas
Principal
The Brattle Group

Jeremy Verlinda

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

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of August 2017, I caused a copy of the foregoing public, redacted version of the Reply of DISH Network L.L.C. to be filed electronically with the Commission using the ECFS system and caused a copy of the foregoing to be served upon the following individuals via electronic mail.

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