Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

The American Television Alliance ("ATVA") hereby replies to the Consolidated Opposition filed by Applicants Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune").[1] Upon review of the Opposition, three things are clear:

- Applicants have taken concerns about new "top-four duopolies" off the table by clarifying that they will divest stations to comply with the local media ownership rules. Of course, ATVA will object if Applicants later amend their application to proceed without divestiture.

- Applicants' claim that the Commission cannot consider the effect of this transaction on retransmission consent fees—because *any* retransmission fee agreed to by a station and an MVPD, no matter the circumstances, reflects the public interest—strains credulity. The Commission's transaction review does not work this way and it never has. Sinclair knows this because it sought conditions on the Comcast-Time Warner Cable merger making some of the very arguments we have made here.

- Applicants argue that this transaction is no place to re-litigate general retransmission consent issues. But our concern here has nothing to do with general retransmission consent issues. We worry that, if *this transaction* creates new top-four duopolies, it will harm the public.

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[1] Applicants' Consolidated Opposition to Petitions to Deny (filed Aug. 22, 2017) ("Opposition"). Unless otherwise indicated, all documents referenced in these Reply Comments were filed in MB Docket No. 17-179.

In its initial comments, ATVA and others expressed concerns about the potential creation of new top-four duopolies in numerous local markets, and how those duopolies would affect retransmission consent negotiations.[2] Applicants respond by—again—conceding that license transfers in those markets would violate the Commission's local ownership rule.[3] They then state, more clearly than they did in their application, that they will divest stations in order to comply with the local ownership rule.[4]

We appreciate this clarification. It takes the duopoly issues we raised off the table. Of course, were the local ownership rules to change, and Applicants were *then* to "file amendments to the applications to address such changes,"[5] we would expect the Commission to grant parties

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2 Comments of the American Television Alliance (filed Aug. 7, 2017); Petition to Dismiss or Deny of DISH Network L.L.C. at 31 (filed Aug. 7, 2017); Petition to Deny of the American Cable Association at 13-18 (filed Aug. 7, 2017); Petition to Deny of Free Press at 7-9 (filed Aug. 7, 2017).

3 *See* Opposition at 22; *see also* "Comprehensive Exhibit" of Tribune Media Company and Sinclair Broadcast Group at 12, *attached to* Letter from Mace Rosenstein to Marlene Dortch (filed July 19, 2017) ("Application"); 47 C.F.R. § 73.3555(b)(1)(i) ("An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) if . . . [a]t the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service . . . .").

4 *See* Opposition at 21-22 ("Contrary to the protestations of many of the Petitioners, Applicants are not asking the Commission to approve a transaction that violates the FCC's ownership rules. Rather, Applicants make clear their intention to comply with both the FCC's local and national ownership rules. The Applications state that the Applicants will 'take actions in [overlap markets] as necessary to comply with . . . the Commission's local television ownership rules.' Applicants also acknowledge that, absent divestiture, the combined company would exceed the national audience reach limitation by approximately 6.5%, and further state that '[t]o the extent that divestitures may be necessary, applications will be filed upon locating appropriate buyers . . . .' The Commission's precedent in this area is quite clear. The Commission has long held that a 'divestiture pledge removes any concern as to a violation of Section 73.3555 of our Rules.'") (internal citations omitted).

5 Application at 12; *see also Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose Ex Parte Status for the Proceeding* at 2, DA 17-647 (rel. July 6, 2017) ("*Notice*") (same).

the opportunity to respond to such amendments. For the moment, however, Applicants' clarification suggests that a discussion about top-four duopolies is no longer germane to this proceeding. (So too, for that matter, are Applicants' lengthy attempts to explain why such duopolies are not as harmful as we contend.[6])

With duopoly concerns no longer at issue, we limit these Reply Comments to more general issues raised in the Opposition. First, Applicants suggest that the Commission can—or even must—ignore retransmission consent issues entirely. They state that such issues "are not relevant to the public interest determination the Commission must make."[7] Congress, they argue, has already created a "marketplace" for retransmission consent.[8] When fees "are determined by the give and take of the marketplace, the public interest is served."[9] So even if this transaction permits Sinclair to increase retransmission consent fees significantly, "those higher rates reflect the marketplace at work."[10] Put another way, according to Applicants, "[t]he free market rate *is* the rate that best serves the public interest."[11]

Think about what Applicants are suggesting here. According to them, even if the Commission finds that this transaction will give Sinclair additional market power, and even if it *then* finds that consumer bills will increase substantially as a result, "[i]t is not up to" the Commission to even consider such harms.[12] Nonsense. If Applicants' "free market rate" theory

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[6] Opposition at 31-38.

[7] *Id.* at 27.

[8] *Id.* at 28.

[9] *Id.*

[10] *Id.* at 31.

[11] *Id.* at 40 (emphasis added).

[12] *Id.* at 28.

were correct, the Commission would be powerless to consider the effect of even a merger to monopoly—because the higher prices charged by such a monopoly would "reflect the marketplace at work."

To begin with, the premise of Applicants' position is incorrect, because retransmission consent is not now and has never been a "free market."[13] Retransmission consent itself is a regulatory construct that exists in conjunction with a host of other regulations that operate to give broadcasters considerable market power.[14] No reasonable observer believes that this is a "free market."

More importantly, the Commission's transaction review authority has never worked the way Applicants suggest it does. For decades, the Commission has fulfilled its statutory directive to examine whether a proposed transaction will serve "the public interest, convenience, and necessity."[15] In its review, the Commission employs a balancing process, weighing claimed benefits of the proposed transaction against any potential public interest harms.[16] The Commission's analysis is "informed by, but not limited to" merger analysis under the Clayton Act, in which the government may seek to enjoin a merger that "substantially lessen[s]

13 *See* Comments of the American Television Alliance at 4-5, MB Docket No. 15-216 (filed Dec. 1, 2015) (listing regulations applicable to broadcast television).

14 *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014), Separate Statement of Commissioner Ajit Pai ("[T]he harms [of joint negotiation by non commonly-owned stations] outweigh any such benefits. The record indicates that joint negotiations may result in supracompetitive increases in retransmission-consent fees. . . . The anti-competitive potential of joint negotiations here is only amplified by the regulatory context for video carriage, including the compulsory copyright license, network non-duplication rule, and syndicated exclusivity rule.").

15 47 U.S.C. § 310(d); *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131, ¶ 2 (2015) ("*AT&T and DIRECTV*").

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

competition."[17] Among the foremost "public interest harms" of concern to the Commission—under Democratic and Republican administrations alike—is the potential that a transaction will create or enhance pricing power, leading to retail price increases and related harms.[18] Likewise, a powerful public interest benefit is the possibility that the transaction will *decrease* retail prices.[19] The Commission has not hesitated to reject or condition transactions where retransmission consent-related harms outweighed claimed benefits.[20]

Sinclair, at least, knows this. It made these very points when it sought to condition Comcast's merger with Time Warner Cable.[21] In that proceeding, Sinclair asked the

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[17] *AT&T and DIRECTV* ¶¶ 20-21 (citing 15 U.S.C. § 18).

[18] *See, e.g.*, *Echo Star Commc'ns Corp., Gen. Motors Corp. and Hughes Elecs. Corp.*, 17 FCC Rcd. 20,559, ¶ 169 (2002) ("*EchoStar HDO*") ("[The evidence]strongly suggests that, in the absence of any significant savings in marginal cost, the merger will result in a large increase in post-merger equilibrium prices. Given this likelihood, we cannot find that the Applicants have met their burden of demonstrating that the proposed merger will produce merger-specific public interest benefits of the magnitude the Applicants allege."); *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc.*, 23 FCC Rcd. 12348, ¶ 6 (2008) ("We also conclude that, absent Applicants' voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity. As discussed below, assuming a satellite radio product market, Applicants would have the incentive and ability to raise prices for an extended period of time."); *Adelphia Commc'ns Corp., Time Warner Cable Inc. and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 116 (2006) ("[W]e find that the transactions may increase the likelihood of harm in markets in which Comcast or Time Warner now hold, or may in the future hold, an ownership interest in RSNs, *which ultimately could increase retail prices for consumers* and limit consumer MVPD choice. We impose remedial conditions to mitigate these potential harms.") (emphasis added).

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

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

[21] Petition to Deny of Sinclair Broadcast Group, Inc. at 1, MB Docket No. 14-57 (filed Aug. 25, 2014) ("[Applicants] must show that the merger: (a) does no harm, and (b) will affirmatively benefit the public."); *id.* ("The Commission must examine the public interest, convenience, and necessity, ensuring that the merged company will promote competition in the marketplace."); *id.* at 3 ("[Competitive concerns raised by Sinclair] could lead to higher consumer prices…").

Commission to impose nondiscrimination and arbitration conditions on Comcast to address—to use Sinclair's own words—the potential that the transaction would allow Comcast to engage in "take it or leave it" bargaining.[22] Sinclair's view of the law was correct then, and its newly asserted "free market" exception to the Commission's transaction review authority is wrong now.

Applicants can, of course, seek to show that the proposed transaction will not raise prices or cause related harms. Or they can seek to show that other aspects of the transaction outweigh the harms it would cause. But they cannot sidestep all consideration of this transaction's impact by suggesting that *any* rate agreed to between a broadcaster and an MVPD "best serves the public interest" no matter the circumstances. Nor can they evade consideration of this issue by arguing that price increases are inherently good because broadcasters (allegedly) will use the proceeds to serve the public rather than to reward management and shareholders.

Applicants also claim that generalized arguments are inappropriate in a transaction such as this and should be made instead in a rulemaking.[23] Yet ATVA raised a transaction-specific concern about the potential harm that would result from top-four duopolies.[24] Our point here is

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[22] *Id.* at 15.

[23] *See, e.g.*, Opposition at ii ("Moreover, the Commission has consistently ruled that the proper forum to make such arguments is a rulemaking proceeding, and not a transaction-specific docket such as this one.").

[24] Given their position, we do not understand why applicants devote ten pages of their Opposition to making precisely the sort of generalized arguments they say have no place here. *See* Opposition at 28-29 (claiming that retransmission consent revenues are important for broadcasters to obtain quality programming and invest in news); *id.* (claiming that retransmission consent pricing started from an artificially low baseline so claims of increases are misleading); *id.* at 30 (claiming that retransmission consent fees are small part of MVPD costs—and smaller than they should be given broadcast ratings); *id.* at 33 (claiming that MVPDs are big and broadcasters are small); *id.* at 39-40 (claiming that blackouts are rare and mostly DISH's fault anyway). We have, of course, rebutted each of these arguments many times before. *See, e.g.,* Comments of the American Television Alliance, MB Docket No. 15-216 (filed Dec. 1, 2015); Reply Comments of the American Television Alliance, MB Docket

very simple: absent divestiture, *this transaction* could permit Sinclair to raise prices and otherwise harm the public interest by creating new top-four duopolies. If and when Applicants "file amendments" seeking approval of this transaction without such divestiture, we expect the opportunity to raise these objections in greater detail.

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No. 15-216 (filed Jan. 14, 2016); Letter from Michael Nilsson to Marlene Dortch, MB Docket No. 15-216 *et al.* (filed Feb. 17, 2017).

CERTIFICATE OF SERVICE

I, Laura Owsiany, hereby certify that on August 29, 2017, I caused true and correct copies of the foregoing to be served by electronic mail upon the following:

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