

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)
)
Tribune Media Company (Transferor))
)
and)
)
Sinclair Broadcast Group, Inc. (Transferee))
)
Consolidated Applications for Consent to)
Transfer Control)

MB Docket No. 17-179

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REPLY OF COMPETITIVE CARRIERS ASSOCIATION

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August 29, 2017

No. of Copies rec'd 10
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REPLY OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”)¹ respectfully submits this Reply in response to the Consolidated Opposition to Petitions to Deny of Tribune Media Company (“Tribune”) and Sinclair Broadcasting Group (“Sinclair”).²

I. INTRODUCTION.

Conservative media outlets and independent programmers,³ consumer groups,⁴ local broadcasters,⁵ multichannel video programming distributors (“MVPDs”),⁶ mobile broadband

¹ CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications ecosystem. CCA has standing to participate in this proceeding. *See* Petition to Deny of Competitive Carriers Association, MB Docket No. 17-179 at 6-7 (filed Aug. 9, 2017) (“CCA Petition”).

² Applicants’ Opposition to Petitions to Deny, MB Docket No. 17-79 (filed Aug. 22, 2017) (“Consolidated Opposition”).

³ *See* Petition to Deny of Newsmax Media, MB Docket No. 17-179 (filed Aug. 9, 2017) (“Newsmax Petition”); Comments of Cinemai, Ride Television Network, Awe—A Wealth of Entertainment, MavTV Motor Sports Network, One America News Network, TheBlaze, and

operators,⁷ members of Congress,⁸ and hundreds of citizens stand in opposition to Sinclair's acquisition of Tribune. Together, these parties extensively document the public-interest injuries that this Transaction will create: foregone mobile broadband competition; diminished independent programming; hollowed-out local newsrooms; concentration of upstream broadcast-related markets; inflated retransmission fees; and the continued evasion of the Commission's ownership rules.

The Transaction is likely to disrupt the 600 MHz incentive auction repack. While Sinclair views ATSC 3.0 as critical to enter wireless and video distribution markets, Sinclair's ultimate success in deploying this technology will depend on adoption by other broadcasters, equipment manufacturers, wireless carriers, handset companies, MVPDs, and online video distributors ("OVDs"). Despite the Commission's repeated statements that voluntary, market-

Eleven Sports Network, MB Docket No. 17-179 (filed Aug. 9, 2017) ("Independent Programmer Comments").

⁴ See Petition to Deny of Public Knowledge, Common Cause, and United Church of Christ, OC Inc., MB Docket No. 17-179 (filed Aug. 9, 2017) ("PK Petition"); Petition to Deny of Free Press, MB Docket No. 17-179 (filed Aug. 9, 2017) ("Free Press Petition"); Comments of Common Cause, MB Docket No. 17-179 (filed Aug. 9, 2017) ("Common Cause Comments").

⁵ See Petition to Deny of Steinman Communications, MB Docket No. 17-179 (filed Aug. 9, 2017) ("Steinman Communications Petition").

⁶ See Petition to Deny of DISH, LLC, MB Docket No. 17-179 (filed Aug. 9, 2017) ("DISH Petition"); Petition to Deny of American Cable Association, MB Docket No. 17-179 (filed Aug. 9, 2017) ("ACA Petition"); Petition to Deny of NTCA—The Rural Broadband Association, MB Docket No. 17-179 (filed Aug. 9, 2017) ("NTCA Petition"); Comments of the American Television Alliance, MB Docket No. 17-179 (filed Aug. 9, 2017) ("ATVA Comments").

⁷ See Comments of T-Mobile US, MB Docket No. 17-179 (filed Aug. 9, 2017) ("T-Mobile Comments"); CCA Petition.

⁸ See Letter from Reps. Frank Pallone, Mike Doyle, and Diana DeGette, U.S. House of Representatives, Committee on Energy and Commerce, to Chairman Ajit V. Pai, FCC (Aug. 14, 2017), <http://bit.ly/2wtQEEE> ("Congressional Letter").

driven demand should ultimately determine the viability of ATSC 3.0,⁹ Sinclair has long sought government approval to tilt the scales in favor of its proprietary standards. Most notably, Sinclair has attempted to manipulate the repack to unreasonably encourage others to finance and support ATSC 3.0. Sinclair's proposal to become the single largest owner of television gear through its acquisition of Tribune also creates an entirely different calculus. Sinclair will not tie physically and technically integrated products in ways that might improve the value of those goods to the public.¹⁰ Instead, Sinclair intends to use the area of its greatest market leverage – broadcast relocation – to force mobile broadband operators into paying the costs of incorporating ATSC 3.0 user equipment into mass-market consumer handsets. Sinclair's acquisition of Tribune would potentially impose a costly tax on consumers, who are less likely to afford these types of devices. Just as damaging, Sinclair's post-acquisition could impose a wireless tax on consumers that would extend to CCA members such as T-Mobile, DISH, US Cellular, C Spire and Viacro Wireless, but generally exclude Verizon, which acquired no spectrum in the 600 MHz auction and AT&T, which acquired only a comparatively small footprint. Thus, Sinclair's ability and incentive to leverage its unique market position in the 600 MHz clearing process against competitive carriers has the potential not only to make iPhones and other mobile broadband handsets costlier for consumers, but also to distort carrier-to-carrier competition in the wireless broadband market in ways that could diminish the benefits of robust price and quality competition that have characterized the wireless market for many years.

⁹ *In the Matter of Authorizing Permissive Use of the "Next Generation" Broadcast Television Standard*, Notice of Proposed Rulemaking, GN Docket No. 16-142 ¶ 3 (rel. Feb. 24, 2017) ("ATSC 3.0 NPRM").

¹⁰ See *United States v. Microsoft Corp.*, 253 F.3d 34, 90 (D.C. Cir. 2001) (distinguishing Microsoft's tying together of Internet Explorer and Microsoft Windows from prior decisions finding tying *per se* unreasonable based on the fact that "[i]n none of the [earlier] cases was the tied good physically and technologically integrated with the tying good.").

If Sinclair is allowed to proceed with its acquisition of Tribune, Sinclair's attempt to force inefficient, costly behavior from wireless carriers and their customers is likely to succeed. Wireless carriers would have no alternative to relocate the combined Sinclair-Tribune portfolio of stations to new channels outside of the 600 MHz broadband spectrum. Sinclair's existing portfolio is already important because the daisy-chain nature of interference means diversely held stations must relocate simultaneously or not at all. Allowing Sinclair to combine its portfolio with that of Tribune's holdings only enhances Sinclair's ability to block wireless broadband deployment in the 600 MHz band. And, unlike other tying arrangements, here no competitor exists and no competitors can emerge because only Sinclair would possess the power to release the 600 MHz spectrum that the market has valued at nearly \$20 billion.

Worse, Sinclair's demand that wireless operators incorporate ATSC 3.0 technology into their handsets will not lead to countervailing public benefits that might outweigh the costly tax on wireless consumers, the risks to future spectrum-auction revenues and the potential long-term damage to the competitive nature of the wireless market. After all, if ATSC 3.0 were anything other than uncertain, costly and unproven, wireless operators would have already implemented the technology. Sinclair has a demonstrable history of pursuing very similar types of behavior and, as documented, has already leveled exactly this type of threat of relocation holdout against at least one wireless operator, who participated extensively in the 600 MHz auction.¹¹

Sinclair loses its leverage any time broadcasters promptly transition their facilities to new spectrum assignments, especially when they choose not to adopt ATSC 3.0 equipment. Further consolidation would entrench Sinclair's ability to delay the repack through holdout tactics that

¹¹ See Declaration of Dave Mayo, *attached to* Reply Comments of T-Mobile USA, Inc., GN Docket No. 17-179 (filed Aug. 29, 2017).

force others to pay for ATSC 3.0 broadcast and user fees necessary to carry an ATSC 3.0 signal. The Commission should uphold its commitment to ensure that ATSC 3.0 deployment does not “negatively affect the post-incentive auction transition process”¹² by denying this Transaction.

Although the Consolidated Opposition dismisses these concerns as speculative, they are anything but theoretical. Sinclair *admits in this proceeding* that it will employ its horizontal and vertical market power to force adoption of ATSC 3.0.¹³ Sinclair *is on the record* attempting to delay the repack.¹⁴ And Sinclair *has told its investors* that it promises to use this Transaction to inflate retransmission fees¹⁵ and dismantle local programming.¹⁶ The Consolidated Opposition also implausibly asserts that this Transaction is like every other broadcast transfer application that the Commission has previously approved. It is not. No broadcast transfer has ever threatened the cross-market competitive injuries—including to the mobile broadband industry—that the Transaction here does. Nor has the Commission addressed an application that egregiously violates the media ownership rules. Because these public interest harms and rule violations are incurable, the Commission must deny this Transaction.

¹² ATSC 3.0 NPRM ¶ 77.

¹³ See *Applications of Sinclair Broadcast Group, Inc. and Tribune Media Co. for Consent to Transfer Control of Licenses*, FCC Form 315, Comprehensive Exhibit, MB Docket No. 17-179, at 2 (filed June 28, 2017) (“Application” or “Comprehensive Exhibit”).

¹⁴ See CCA Petition at 12; T-Mobile Comments at 4-5.

¹⁵ See CCA Petition at 21-22 (quoting Sinclair CEO Christopher Ripley).

¹⁶ See Sinclair Broadcast Group Q2 2017 Results, Earnings Call Transcript (Aug. 2, 2017), <http://bit.ly/2xomoZK> (last visited Aug. 27, 2017).

II. THE APPLICANTS FUNDAMENTALLY MISUNDERSTAND THE PROCEDURAL MECHANICS OF THE COMMISSION'S REVIEW OF THE TRANSACTION.

The Applicants misunderstand the standard of review for the Transaction. The initial burden of proof falls on Applicants who must show, by a preponderance of the evidence, that the Transaction serves the public interest.¹⁷ The Commission's precedent on the burden of proof is well-established. Since the Communications Act (the "Act") was signed into law, the Commission has held that "it is necessary that we find public interest, convenience, and necessity will be served before we may grant an application and, unless an applicant maintains the burden of showing public interest, convenience and necessity will be served by granting an application, *we must deny it.*"¹⁸

The Applicants have failed to meet their threshold burden of proof that the Transaction would serve the public interest, convenience and necessity. The Applicants originally submitted a paltry, two-and-a-half-page statement of purported public interest benefits with their application that lacked specifics and was unsupported by any sworn testimony.¹⁹ The Applicants included some additional purported public interest benefits in their Consolidated Opposition but this latest evidence is insufficient to meet the Applicants' burden.

As an initial matter, the Applicants' latest evidence of purported public interest benefits is untimely. The FCC has previously asked parties filing transfer of control applications to "provide, *in their initial papers*, a complete and detailed public interest statement in order to

¹⁷ See, e.g., *Gen. Motors Corp. & Hughes Elecs. Corp., Transferors and The News Corp. Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 483 ¶ 15 (2003) ("Hughes-News Corp. Order").

¹⁸ *Sweetwater Broad. Co., Sweetwater, Texas*, Statement of Facts and Grounds for Decision, 4 F.C.C. 293, 296 (1937) (emphasis added).

¹⁹ See Comprehensive Exhibit at 2-4.

facilitate the Commission's analysis of the competitive effects of the proposed transaction."²⁰ According to the Commission, "[p]roviding the information in the initial application avoids unnecessary delay of our review process, and affords parties a meaningful opportunity to comment."²¹ Here, the Consolidated Opposition is the first instance where the Applicants have provided any meaningful details on the proposed public interest benefits of the Transaction.

In addition to the delayed response, the Applicants' explanation of the Transaction's purported public interest benefits is insufficient to outweigh the public interest harms. Indeed, some of the "public interest benefits" Sinclair claims will result from the Transaction do not benefit the public. The most brazen example of Sinclair's overreach is its claim that increased advertising revenues will produce "significant specific benefits to the public."²² This is nonsense. Commission precedent holds that benefits must inure to the benefit of consumers and not solely to the applicants themselves to qualify as a public interest benefit.²³ As discussed in greater detail below, Sinclair's plans to leverage the Transaction to force the hands of other industry segments to transition to ATSC 3.0 is more of a public interest harm than a benefit.

CCA has met the minimum evidentiary thresholds set out in Section 309(d) of the Act because they have made specific allegations of fact sufficient to make a *prima facie* showing that granting the application would harm the public interest. CCA made specific allegations of fact

²⁰ *Applications of Teleport Commc'ns Grp. Inc., Transferor, & AT&T Corp., Transferee*, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15262-63 n.154 (1998) (emphasis in original).

²¹ *Id.*

²² Consolidated Opposition at 14, 10.

²³ See, e.g., *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348, 12383 ¶ 75 (2008) ("Sirius-XM Order").

that it supported with a sworn declaration and a variety of evidence. The Applicants claim that Petitioners and the FCC cannot rely on newspaper articles and other journalism sources as evidence of public interest harm.²⁴ But the news stories CCA cited, by and large, recount statements of Sinclair officials and employees. For example, CCA cited to an article from May 2013 that extensively quoted Mike Aitken, Sinclair Broadcast Group VP of Advanced Technology, on Sinclair's efforts to delay 600 MHz broadband deployment until ATSC 3.0 is widely deployed.²⁵ Statements of a party-opponent are not hearsay as defined under the Federal Rules of Evidence.²⁶ The cases Applicants cite are inapposite to the facts presented here and are inapplicable to most of the newspaper articles cited to in CCA's (and others) filings. And, perhaps most tellingly, the Applicants repeatedly cited to newspaper articles in their Consolidated Opposition.²⁷ If the Applicants seek to disqualify opposition parties from using articles and trade publications to support factual claims, then the Applicants would receive the same treatment, which would render their already thin public interest claims in support of the acquisition moot.

²⁴ Consolidated Opposition at 3. The Commission has relied on newspaper articles in the past. *See, e.g., Amendment of Section 73.606(b) Table of Allotments, Television Broad. Stations (Clermont & Cocoa, Florida)*, Report and Order, 4 FCC Rcd 8320, 8323 ¶ 23 (Mass Media Bureau Nov. 28, 1989) (considering a newspaper article in its entirety); *Applications of Lamar Life Broad. Co., Jackson, Miss., et al.*, Memorandum Opinion and Order, 30 F.C.C. 2d 657, 658 ¶ 3 (1971) (finding that newspaper article and other evidence from "sufficiently reliable sources" that respondent failed to refute justified an evidentiary hearing).

²⁵ CCA Petition at 12, n.41 (*citing* Andrew Dodson, *Lake: FCC Won't Delay Auction For ATSC 3.0*, TVNewsCheck (May 9, 2013)).

²⁶ *See* Fed. R. Evid. 801(d)(2)(C) (excluding from the definition of hearsay statements offered against an opposing party and made by the party's agent or employee on a matter within the scope of that relationship while it existed).

²⁷ *See, e.g.,* Consolidated Opposition at 29, nn. 73-74; *id.* at 39, n.102; *id.* at 44, nn. 115-116.

In sum, the Applicants misunderstand the evidentiary standards and process the FCC must use to evaluate the public interest benefits of the Transaction. The Applicants' failure to apply the correct analytical framework for evaluating the Transaction may explain their disregard for the ample record of evidence demonstrating how the proposed transaction would harm the public.

III. THE TRANSACTION WOULD ARM SINCLAIR WITH GREATER LEVERAGE TO HARM THE PUBLIC INTEREST BY DELAYING THE AVAILABILITY OF BROADBAND SPECTRUM TO THE PUBLIC.

Copious evidence demonstrates that (i) Sinclair has the intent and incentive to interfere with the availability of 600 MHz spectrum for broadband deployment, (ii) the Transaction would give Sinclair the horizontal and vertical market power to grind the 600 MHz repack to a halt, and (iii) interfering with the transition to the latest mobile technologies would harm the public interest by impairing competition in multiple product markets, particularly mobile broadband.²⁸ These harms provide sufficient basis for the Commission to deny this Transaction.

A. Sinclair has the Incentive to Interfere with the Repack.

The Consolidated Opposition accuses petitioners of speculating about Sinclair's motive to stall the repack.²⁹ But no guesswork is required. Sinclair's intent and incentives are well documented.

Sinclair's long-term business strategy involves transitioning from local broadcasting to nationwide mobile broadband and video distribution.³⁰ ATSC 3.0 represents a key element of

²⁸ T-Mobile Comments at 4-12; PK Petition at 9-11.

²⁹ See Consolidated Opposition at 42-44 (characterizing Sinclair's intention to use the Transaction as leverage to delay the repack as speculative).

³⁰ CCA Petition at 13.

this vision.³¹ This IP-based technology is intended to offer broadcasters the ability to reach mobile devices and deliver a variety of data streams alongside traditional video programming. Sinclair formed a consortium among its major competitors to set standards. And through hardware patents held by Sinclair's affiliate, ONE Media, ATSC 3.0 promises Sinclair billions of dollars in royalty fees³² and the ability to monitor the consumption activity of its viewers.³³

Sinclair cannot become a national wireless and video distribution player unless a critical mass of the media and telecommunications ecosystem adopts and supports the new ATSC 3.0 standard through a massive investment in technology.³⁴ Broadcasters must agree on a common technical protocol and invest in new transmitters, excitors, transmission lines, antennas and other physical transmission layer equipment to support the standard. Manufacturers must build equipment to transmit the signal. Smartphone manufacturers must be willing to shoulder the costs of embedding ATSC 3.0 receivers. Wireless carriers must find it financially viable to sell more expensive devices with downgraded operation of their primary task of mobile broadband transmission and that drain their battery more quickly. And MVPDs must be willing to receive and retransmit the signal to their consumers. As with any new technology, a diverse assortment

³¹ Doug Halonen, *Billions Of \$ At Stake In ATSC Next-Gen Effort*, TVNewsCheck (Feb. 18, 2015) ("Halonon Article") (reporting the statement of Sinclair Vice President Mark Aitken that "our future depends on [ATSC 3.0]"), <http://bit.ly/2fXda2q>.

³² See Congressional Letter at 6; Halonen Article.

³³ Ben Munson, Sinclair, *One Media will use ATSC 3.0 to collect user data*, FierceWireless (Nov. 1, 2016), <http://bit.ly/2wf8UC6>.

³⁴ Mike Dano, *With ATSC 3.0, TV broadcasters might try to steal some wireless business after FCC's incentive auction*, FierceWireless (Nov. 9, 2015) ("Dano Article"), <http://bit.ly/2fXPUBn>.

of industry stakeholders must find that the putative benefits and anticipated consumer demands justify the financial costs of supporting the ATSC 3.0 standard.³⁵

Sinclair claims that current transmitters are ATSC 3.0-compatible, and Sinclair only wants the speediest transition possible because the more ATSC 3.0 transmitters that are available in the field, the more likely they are to achieve the scale they need to deploy.³⁶ Not true. Sinclair and members of its ATSC 3.0 Consortium have expressed doubt that other broadcasters will rebuild their facilities with ATSC 3.0 equipment.³⁷ Contrary to its claims in this proceeding, moreover, Sinclair has elsewhere recognized that smaller broadcasters are less likely to retrofit (or replace) their facilities years after the repack to support ATSC 3.0. Because the repack represents potentially the only near-term opportunity to shift the risk associated with deploying ATSC 3.0 broadcast facilities, any outcome short of delay would pose grave risk to Sinclair's long-term business objectives.

³⁵ See Sinclair Broadcast Group Q4 2016 Results, Earnings Call Transcript, Q4 2016 (Feb. 22, 2017), <http://bit.ly/2x0NY1t> (statement of Sinclair CEO Christopher that “a certain level of receiver penetration [is needed] for there to actually be a business within 3.0, and that’s the part that’s a little bit harder to predict. . . . [I]t will have a big impact on us on the longer term.”).

³⁶ See Consolidated Opposition at 43.

³⁷ See, e.g., Comments of ONE Media, LLC, GN Docket No. 16-142, at 54 (filed May 9, 2017) (“The Commission and broadcasters must (and we believe they do) recognize that some efficiencies can be achieved with modest efforts to coordinate [] repacking with ATSC 3.0 deployment” and the FCC should “approve voluntary use of A/321 so that affected broadcasters in each market can incorporate that flexibility into their equipment purchase planning. Flexibility in approving modification requests to repacking phases, where possible, will enable market-wide deployment activities on an accelerated and efficient basis.”); Comments of Univision, GN Docket No. 16-142, at 8 (filed May 10, 2017) (“In particular, the Commission should continuously reassess the 39 month repack timeframe in light of the challenges of the post-Incentive Auction repack, and with the goal of facilitating deployment of ATSC 3.0 so that broadcasters are not forced to upgrade equipment twice (once for the repack and once for the ATSC 3.0 transition) based on an artificial timetable.”).

Sinclair's argument also ignores all of the other components that are necessary to make transmitting in ATSC 3.0 a reality. Even if, as Sinclair states, all broadcast *base station* equipment were ATSC 3.0 compatible, no ATSC 3.0 *user equipment* is available in the mass-market. And ATSC 3.0 user equipment appears to be Sinclair's real concern because competitive carriers do not want to incur the expense of deploying ATSC 3.0 equipment in their handsets on an unproven business model that relies on an unproven technology with significant opportunity costs.³⁸ Indeed, Sinclair has gone so far as to attempt to give away ATSC 3.0 receiver chips to mobile device manufacturers who will commit to adding them to their devices.³⁹ But these efforts appear to have fallen flat because, according to Mark Aitken, Sinclair's VP of Advanced Technology, "[w]hen you talk about these mobile devices, the fact of the matter is they are power-constrained, space-constrained and performance demanding."⁴⁰

To overcome the morass of achieving scale for ATSC 3.0 user equipment, Sinclair has sought to unlawfully exercise its market power by withholding equipment and cooperation in the 600 MHz transition to force mobile broadband operators to deploy ATSC 3.0-compatible technology in their widely distributed handsets. Sinclair's acquisition of Tribune allows Sinclair to exercise even more market power through its unlawful restraint of trade because the Tribune acquisition will provide Sinclair with access to more markets, and more populous markets, across the country that broadband providers need cleared to realize their investment-backed expectations from the 600 MHz incentive auction.

³⁸ Chipsets are only one piece to the puzzle of implementing ATSC 3.0 technology in a mobile device. Antennas, switches, filters, and other radio frequency components also are needed to implement ATSC 3.0 in mobile devices. *See, e.g.*, T-Mobile Comments at 3.

³⁹ *See* Phil Kurz, *Sinclair Free Chips Offer Key to Mobile Future*, TVNewsCheck (May 25, 2017).

⁴⁰ *Id.*

In addition to their market power, Sinclair's tactics are anticompetitive and unlawful. And Sinclair's ability to execute its current anticompetitive and unlawful practices will only increase if the FCC permits the company to exercise control over more stations that can delay equipment orders. Ultimately, this could likewise delay the FCC's 600 MHz incentive auction repack period, and negate efforts by competitive carriers to access and deploy the 600 MHz spectrum they acquired.

These concerns are not theoretical or speculative. Sinclair *already has* delayed the auction and repack by unsuccessfully appealing the 39-month transition timeline.⁴¹ By raising legal challenges to the use of the 600 MHz spectrum for broadband deployment in the United States, Sinclair inflicted hundreds of millions of dollars in economic loss onto consumers and competitive carriers. Even before tying things up in court, Sinclair asked the FCC to postpone the auction until ATSC 3.0 was complete.⁴² In addition, as T-Mobile notes, Sinclair has repeatedly lobbied the Commission to delay the 39-month repack timeframe "before even one station has been transitioned."⁴³ T-Mobile also reviewed Sinclair's past statements, and in its comments, found that the Applicants offer "little hope that Sinclair will adopt a cooperative or constructive posture in meeting the Commission's 39-month timeline to repack the television

⁴¹ See T-Mobile Comments at 4 (citing *Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165, 180-82 (D.C. Cir. 2015)).

⁴² See Comments of Sinclair Broadcast Group, Inc., GN Docket No. 12-268, at 7 (filed Jan. 25, 2013) ("But a rush to complete the auction and repacking years before the statutory window closes would squander the opportunity for broadcasters to deploy, at their option and to the benefit of the American public, new technology at the time of the repacking."). The Commission properly recognized that ATSC 3.0 is unrelated to the incentive auction or the displacement of broadcast facilities. See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6573 ¶ 13, 6585 ¶ 44 & n.92 (2014) ("Incentive Auction Report and Order").

⁴³ T-Mobile Comments at 5.

band.”⁴⁴ The delays Sinclair has generated in the past and planned for the future are intended to help ensure that Sinclair does not lose its best and only near-term opportunity to deploy ATSC 3.0, at the expense of consumers and the economy.

Sinclair also views the repack as an opportunity to evade market pressures by obtaining government subsidies for ATSC 3.0.⁴⁵ It has repeatedly lobbied the Commission to use relocation reimbursement funds to cover ATSC 3.0 equipment,⁴⁶ which would shield Sinclair and other broadcasters from the business risks associated with rolling out a completely new technical standard. Here again, delay aids Sinclair’s objectives. As T-Mobile has explained, Sinclair’s foot-dragging buys the company more time “to press the Commission to devote more of the TV Broadcaster Relocation Reimbursement Fund to compensate stations for the purchase of ATSC 3.0 equipment” and more opportunities to force competitive carriers into incorporating ATSC 3.0 technology into their ubiquitously deployed handsets.⁴⁷

Sinclair has other incentives to interfere with the repack, too. Each day that CCA members cannot use their 600 MHz spectrum won at auction represents a benefit for Sinclair.⁴⁸

⁴⁴ *Id.*

⁴⁵ See Sinclair Broadcast Group Q1 2017 Results, Earnings Call Transcript (May 3, 2017), <http://bit.ly/2wIQjEq> (statement of Sinclair CFO Lucy Rutishauser noted that by timing the rollout of ATSC 3.0 with the repack, Sinclair estimates that “a lot of the ATSC 3.0 costs will be covered in the repack.”); Sinclair Broadcast Group Q4 2016 Results, Earnings Call Transcript (Feb. 22, 2017), <http://bit.ly/2x0NY1t> (statement of Sinclair CEO Christopher expressing expectation to deploy ATSC 3.0 in 2018 take advantage of the “nice synergy of rolling out 3.0 in conjunction with the repack”).

⁴⁶ CCA Petition at 25; T-Mobile Comments at 6.

⁴⁷ T-Mobile Comments at 6.

⁴⁸ *Id.* at 7 (“And Sinclair has announced plans to use ATSC 3.0 to launch a wireless over-the-top service that would directly compete with other facilities-based video providers, including T-Mobile and other forward auction winners, thus providing Sinclair with an additional incentive to delay T-Mobile’s access to its newly acquired 600 MHz spectrum.”).

That risk is particularly acute because Sinclair's mobile broadband ambitions will depend on whether wireless carriers and their device manufacturers decide to install ATSC 3.0 technology in smartphones.⁴⁹ Nor does Sinclair have any reason to cooperate with its broadcast competitors during the repack. Indeed, Sinclair's media consolidation strategy has the potential to cripple its financially vulnerable rivals, which may end up selling their stations to Sinclair or ceding control through local marketing agreements or sidecar arrangements at some future date. If Sinclair has an opportunity to weaken its rivals during the repack by raising their costs through delay tactics, it will have every incentive to act on that opportunity following its acquisition of Tribune.

B. This Transaction Would Greatly Amplify Sinclair's Ability to Act on Its Incentive to Interfere with the Repack.

Sinclair says that CCA has not shown how the Transaction will interfere with the broadband transition.⁵⁰ Here again, Sinclair is wrong.

The Commission has previously acknowledged the unique, negative effects vertical integration can have on competition in communications markets. For example, in the Hughes-News Corp. Order the Commission described how News Corp.'s proposed acquisition of a 34 percent interest in Hughes (including DirectTV Holdings, LLC, a wholly owned subsidiary of Hughes) and the ensuing vertical integration would affect the broader marketplace:

By combining News Corp.'s programming assets with DirecTV's national distribution platform, the proposed transaction creates a vertically integrated content/distribution platform. It thereby changes the nature of News Corp.'s relationship with all other MVPDs from that of solely a programming supplier to that of both a supplier of crucial inputs and a direct competitor in the end user

⁴⁹ See Dano Article ("The truth is that the only way any kind of ATSC 3.0 mobile TV service will be successful is if ATSC 3.0 receivers are embedded directly into smartphones and tablets and the service is completely free to users—the only reason anyone would choose to watch local TV broadcasts over cable TV or Netflix is because local TV broadcasts are free.").

⁵⁰ See Consolidated Opposition at 42-43.

MVPD market. As discussed more fully below, our analysis of the principal allegations of competitive harm in the record demonstrates that this vertical integration has the potential to increase the incentive and ability of News Corp. to engage in temporary foreclosure bargaining strategies⁵¹

A similar principle applies here. As CCA noted in its comments, Sinclair owns Dielectric, the largest manufacturer of broadcast antenna equipment in the United States.⁵² Acquiring Tribune, a major purchaser of broadcast antenna equipment, provides more market power to Dielectric, the largest seller of such equipment. The Transaction would “potentially [set] back Tribune’s pre-merger efforts to acquire equipment for the repack from other sources.”⁵³ Similarly, ONE Media, Sinclair’s affiliate, is one of the major manufacturers of ATSC 3.0 technology.⁵⁴ In addition, as T-Mobile notes, Sinclair is vertically integrated through its ownership of tower facilities.⁵⁵ T-Mobile explains that, through this Transaction, Sinclair “could also use its control over tower ownership to delay the repack by depriving a repacking station of its current location through the consolidation of transmission sites or refusal to renew tenant leases for broadcasters that currently share a Sinclair site.”⁵⁶

The Transaction would delay the repack by giving Sinclair leverage over the 600 MHz licensees. This Transaction would not only grow Sinclair’s station count by 22 percent, but

⁵¹ Hughes-News Corp. Order ¶ 4.

⁵² By Sinclair’s own estimate, Dielectric “has supplied more than two-thirds of the TV industry’s high power antennas” Press Release, Sinclair Broadcast Group, *Sinclair Broadcast Group Announces Agreement to Purchase the Assets of Dielectric* (June 18, 2013), <http://bit.ly/2u2Dm0X>.

⁵³ T-Mobile Comments at 9.

⁵⁴ Deborah D. McAdams, *ONE Media 3.0, Saankhya Labs to do ATSC 3.0 Chipset Development*, TVTechnology (Mar. 28, 2017), <http://bit.ly/2nLEPrJ>.

⁵⁵ T-Mobile Comments at 10.

⁵⁶ *Id.*

would also give Sinclair direct control over 26 stations in top-50 markets. With this market power, it is not difficult to envision the anticompetitive conditions that Sinclair could secure from its future wireless competitors—*e.g.*, demanding large sums of money, forcing operators to install ATSC 3.0 technology in user equipment, mandating carriage of Sinclair programming—just to clear the 600 MHz band. All of these conditions further Sinclair’s grand plans to enter the wireless and video distribution markets by forcing somebody else to pay for, and to adopt, ATSC 3.0 technology.

While the Consolidated Opposition says this could never happen,⁵⁷ commenters have shown precisely how it would. MVPDs and independent programmers have extensively chronicled Sinclair’s history of abusing its size to jointly negotiate exorbitant retransmission fees.⁵⁸ DISH’s economist, Dr. Janusz A. Ordover, Emeritus Professor of Economics and former Director of the Masters in Economics Program at New York University, conducted a thorough regression analysis on past retransmission consent agreements and concluded that “the larger the broadcast group, the higher the retransmission fee paid by the MVPD”⁵⁹ because broadcasters negotiate fees at a national level.⁶⁰ In addition, DISH’s economist found that “the threat of simultaneously losing all Sinclair and Tribune stations would make [MVPDs] more likely to

⁵⁷ Consolidated Opposition at 42-44.

⁵⁸ DISH Petition at 14-35; NTCA Petition at 4-7; ATVA Comments at 3-6; PK Petition at 7-9; ACA Petition at 11-18.

⁵⁹ DISH Petition at 21.

⁶⁰ *Id.* at 26.

capitulate to an unreasonable price increase.”⁶¹ For its part, the Commission has repeatedly noted the inflationary effect of joint negotiations in the retransmission context.⁶²

The same mechanism applies to the broadband transition of the 600 MHz band. CCA’s members have found that Sinclair has negotiated transitioning its facilities on a nationwide basis. Member companies also have found a broadcaster with a greater number of stations is more likely to extract higher rents before it agrees to relocate. And competitive carriers have identified Sinclair as particularly recalcitrant in cooperating with voluntary efforts to accelerate clearing the 600 MHz band for broadband use. The new Sinclair, in other words, could easily effectuate a broadband “blackout” by preventing wireless carriers from deploying on the 600 MHz spectrum they won. As in the retransmission context, a broadband blackout would harm wireless carriers and their subscribers, but not Sinclair.

The Transaction would deprive competitive carriers of another large, independent broadcaster that may be willing to transition out of the 600 MHz band expeditiously. Similar to retransmission consent blackouts, broadband blackouts in any one of Tribune’s 42 DMAs would have nationwide ramifications.⁶³ As T-Mobile notes, “[r]epacking must take into account the complex interference relationships among television stations in adjacent markets (the ‘daisy-chain’).”⁶⁴ Complex daisy-chains can consist of hundreds of stations; the tight interrelationship of stations means that “a delay by one station group, or even one station, could jeopardize the

⁶¹ DISH Petition at 28.

⁶² *Amendment of the Commission’s Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014).

⁶³ Of note, six of Tribune’s 42 GMAs are in top ten markets.

⁶⁴ T-Mobile Comments at 9.

entire repacking process.”⁶⁵ It is well-documented how Sinclair has already frustrated the repack of 98 stations in Phase 5 of the transition through its failure to make one of its stations accessible.⁶⁶ Tellingly, Sinclair has remained silent in the face of detailed factual allegations of patterns and practices Sinclair threatens to implement should the FCC approve the company’s proposed acquisition of Tribune.⁶⁷

Allowing more extensive station holdings in a market increases Sinclair’s ability to extract unwarranted and uneconomic concessions from 600 MHz licensees. The more stations Sinclair holds, the more leverage it has to force uneconomic behavior from a wide variety of parties, including wireless licensees. Notwithstanding Sinclair’s claims, CCA never once suggested that “big is bad.”⁶⁸ Under the right conditions, additional concentration in a market can lead to substantial efficiencies and deliver meaningful consumer benefits. In Sinclair’s case, however, the company has done nothing to demonstrate how or even whether these efficiencies would appear. Just as important, Sinclair’s post-acquisition leverage is as much a product of Sinclair’s favorable *regulatory* power as it is a product of Sinclair’s market power in the broadcast sector. That is, Sinclair’s leverage arises from a combination of its unprecedented size post-acquisition *and* a raft of regulatory benefits the FCC has conferred on broadcasters when these licensees were considerably smaller than ever remotely contemplated by Sinclair’s proposed acquisition of Tribune. Paternalistic policies that benefit broadcasters may never have been warranted in the first instance. But until the FCC curtails or eliminates interventionist

⁶⁵ T-Mobile Comments at 9.

⁶⁶ *Id.* at 10-11.

⁶⁷ *See generally* Consolidated Opposition.

⁶⁸ *See id.* at 14.

policies that award broadcasters special rights over programming and entitlements to new facilities that allow broadcasters to extract economic concessions by threatening to postpone broadband deployment, the FCC needs to act aggressively to prevent abuses of power. Sinclair has an extensive history of exercising market power and regulatory leverage against a wide variety of parties and will have all the more incentive to exercise this power following its acquisition of Tribune. Willful blindness to Sinclair's unique position in this broadcast sector would, as Newsmax aptly summarized, "demonstrate a politicization of the Commission that seriously harms the public interest."⁶⁹

C. This Transaction Would Impair Competition in Multiple Product Markets.

Despite the well-founded concerns of numerous stakeholders, the Consolidated Opposition refuses to acknowledge a single public interest harm arising from this Transaction. The Transaction not only would impair mobile broadband competition, but also injure effective competition in other product markets.

(i) *Harms to Wireless Competition.*

The Commission has long recognized that a timely and efficient repack is critical to promote investment by wireless carriers and accelerate the deployment of next-generation services.⁷⁰ This is consistent with the economic literature, which has demonstrated that delays in the repack would result in lost consumer welfare that comes from greater competition and the more productive use of valuable low-band spectrum.⁷¹

⁶⁹ Newsmax Petitions at 5.

⁷⁰ Incentive Auction Report and Order ¶ 572.

⁷¹ See, e.g., Coleman Bazelon & Giulia McHenry, *Staying on Track: Realizing the Benefits from the FCC's Incentive Auction Without Delay* (Feb. 20, 2015), reproduced in Comments of LocusPoint Networks, LLC, AU Docket 14-252 (filed Feb. 20, 2015).

Beyond delays to the repack, Sinclair's attempt to consolidate would frustrate mobile broadband competition in other ways. Sinclair has proposed allowing broadcast stations to commandeer vacant channels in the 600 MHz band dedicated to unlicensed uses during the lengthy periods of time stations will need to transition from ATSC 1.0 to ATSC 3.0. Similar to its repack delay strategy, Sinclair has proposed to tie up vacant channels *indefinitely* until the ATSC 3.0 transition is complete, which may not occur for years, if at all.⁷² Sinclair has asked that in markets where vacant channels are available, the FCC allow broadcasters to use them as "dedicated transition channels [while continuing to broadcast in ATSC 1.0] to ensure maximum continuity of service."⁷³ According to Sinclair and ONE Media, "[t]he Commission should give broadcasters proposing to use a vacant channel for 3.0 deployment priority over applicants for new television stations and acknowledge that such stations retain priority over displacement applications of LPTV and translator stations,"⁷⁴ as well as unlicensed uses.⁷⁵ By expanding its broadcast spectrum rights, Sinclair would upend the FCC's rules permitting unlicensed use in vacant channels. In acquiring Tribune's stations, Sinclair could block unlicensed use by occupying vacant channels in New York, Chicago, and other top DMAs. As Public Knowledge notes, further empowering Sinclair to block alternative internet access platforms would "undermine the long-promised nationwide availability of TV White Spaces for rural broadband

⁷² See Reply Comments of Sinclair Broadcast Group, Inc., GN Docket No. 16-142, at 13-14 (filed June 8, 2017); see also Reply Comments of ONE Media, LLC, GN Docket No. 16-142, at 7 (filed June 8, 2017) ("ONE Media ATSC 3.0 Reply Comments").

⁷³ See *Ex Parte* Letter from Jerald N. Fritz, Executive Vice President, Strategic and Legal Affairs, ONE Media, LLC to Marlene H. Dortch, Secretary, FCC, GN Docket No. 16-142 at 2 (filed July 3, 2017).

⁷⁴ *Id.*

⁷⁵ See ONE Media ATSC 3.0 Reply Comments at 4-8.

and other innovative new uses.”⁷⁶ The Transaction would therefore contravene the Commission’s longstanding commitment to remain neutral with respect to theoretical ATSC 3.0 services.⁷⁷

(ii) *Harms to Localism and Diversity.*

The likely loss of mobile broadband competition is related to similar injuries in other product markets. Take, for example, local programming, which Sinclair has treated as unnecessary and inconvenient overhead for many years. Commenters have documented Sinclair’s history of slashing independent programming, hollowing-out news staff, and piping homogenized “must-run” programming through Sinclair’s national headquarters.⁷⁸ DISH detailed Sinclair’s “practice of brutal job and cost cuts at no fewer than 27 Sinclair-owned stations,” including “the stations it acquired from Allbritton and Fisher, and is doubtless implementing the practice now with its recently-acquired Bonten stations.”⁷⁹

Sinclair concedes that it has reduced staff at many of the stations it has acquired but in response offers nothing more than a vague statement, without any supporting evidence, that staff

⁷⁶ PK Petition at 11-12.

⁷⁷ ATSC 3.0 NPRM ¶ 77. Sinclair’s recent agreement with Nexstar Media to enter into channel sharing agreements to use some spectrum for ATSC 1.0 transmission and other spectrum for ATSC 3.0 in the 43 markets where both companies hold station licenses shows that Sinclair has alternatives to using vacant channels to transition to ATSC 3.0. See Press Release, Sinclair Broadcast Group and Nexstar Media Group, Inc., Sinclair Broadcast and Nexstar Media Announce Agreement on Market Transition from ATSC 1.0 to ATSC 3.0 “NextGen” Services (July 20, 2017), <http://bit.ly/2vIPk7g> (last visited Aug. 28, 2017). Sinclair and Nexstar “plan to spearhead the transition for shared ‘NextGen’ services in the 54 markets where only one of the Companies owns or operates stations.” *Id.*

⁷⁸ DISH Petition at 49-56.

⁷⁹ *Id.* at 7.

levels at an indeterminate number of stations “now exceed original levels.”⁸⁰ Sinclair’s description of its local news programming is similarly opaque. Sinclair claims that its stations air “[o]n average . . . approximately 37.5 news program hours” per week.⁸¹ But Sinclair provides no information on how it calculated this figure. Are all stations counted equally, or did Sinclair place more weight on the amount of programming aired in more densely populated markets? What programs did Sinclair classify as “news” programs, and what criteria did Sinclair use for this classification? Was commercial airtime considered part of the news program or excluded from it? Did Sinclair follow the same classification standard in every market? And over what period of time was the analysis conducted?

Despite the numerous questions that Sinclair’s putative local news programming tally raises, Sinclair nonetheless concedes that an hour’s worth of programming aired during each local station’s news broadcasts each week is centrally produced by Sinclair, presumably during prime-time viewing hours when viewership is highest.⁸² Sinclair appears poised to push this centrally produced content down to the Tribune stations it hopes to acquire.⁸³ As a result, allowing Sinclair to consolidate more power will result in a loss of unique and diverse voices.⁸⁴

WGN-TV remains a prime example of how Sinclair’s business practices will choke off viewpoint diversity. While Sinclair’s plans for flagship Tribune broadcast station WGN-TV in

⁸⁰ Consolidated Opposition at 20, Ex. H ¶ 6.

⁸¹ *Id.* at 16, Ex. H ¶ 9.

⁸² *Id.* at Ex. H ¶ 10.

⁸³ *Id.* at 11.

⁸⁴ Newsmax Petition at 2.

Chicago remain uncertain,⁸⁵ press reports indicate that “WGN employees are worried.”⁸⁶ WGN-TV staff has good reason to worry. Sinclair’s CEO, Christopher Ripley, made the company’s plans for future local broadcasting crystal clear during Sinclair’s most recent earnings call:

Overall, we think the industry needs to consolidate to two or three large broadcasters, and really just one to two strong local players in each market. And right now, in some of the larger and even medium-sized markets, you’ve got anywhere from three to five local players, and to us, it doesn’t make sense. And so, if there’s relaxation, there’ll be a consolidation at the local level, there’ll be greater scale at the national level. And there’s significant savings to be had putting local content players together on a local level. We’re talking anywhere from 20% to 50% of the expense load that can be synergized and made more efficient.⁸⁷

The economic logic of undermining broadcast localism and diversity makes perfect sense in the light of Sinclair’s plan to compete with wireless carriers, MVPDs, and OVDs. Sinclair’s business model is based on regulatory arbitrage: its long-term plan to monetize broadcast spectrum for ancillary services permits little, if any, meaningful role for local broadcast services. No wonder, then, that Sinclair has ruthlessly eliminated community-tailored content at every available opportunity. As Public Knowledge notes, while Sinclair “received [its] broadcast licenses for free, and for the express purpose of providing free, over-the-air broadcasting to their local communities,” it plans to use those licenses to reap a “windfall [that] would come at the

⁸⁵ See Felix Gillette, *The Sinclair Revolution Will Be Televised. It’ll Just Have Low Production Values*, BLOOMBERG BUSINESSWEEK (July 20, 2017), <https://bloom.bg/2tta9ga> (last visited Aug. 27, 2017).

⁸⁶ *Id.*

⁸⁷ See Sinclair Broadcast Group Q2 2017 Results, Earnings Call Transcript (Aug. 2, 2017), <http://bit.ly/2xomoZK> (last visited Aug. 27, 2017). While Applicants are correct in noting that Ripley referred to massive cuts in WGN’s cable operations rather than its broadcast operations during a recent conference call, *cf.* CCA Comments at 28, damning cuts at Chicago’s flagship broadcast station WGN-TV seem all but inevitable if Sinclair is allowed to proceed with its acquisition of Tribune – a point Applicants nowhere contest.

public's expense.”⁸⁸ While Sinclair is free to use its broadcast spectrum for ancillary ATSC 3.0 services, it may not do so at the expense of the Commission's expectation that broadcasters serve their communities of license. This Transaction, however, promises that Sinclair will do just that.

(iii) *Harms to MVPD and OVD Consumers.*

Regulatory arbitrage also would threaten higher prices and reduced output in the MVPD and OVD markets.⁸⁹ As DISH notes, Sinclair intends to “be a provider of essential content to MVPDs and OVDs and would also become a competitor to both. Therefore, [Sinclair] will likely have both the incentive and ability to use its dual roles to harm both MVPDs and OVDs, which would diminish competition to the detriment of consumers.”⁹⁰ Sinclair could achieve this anticompetitive outcome through a tying arrangement using its retransmission consent rights. As the Independent Programmers note, “Sinclair's increased size could empower it to condition retransmission consent for its ATSC 1.0 signals on MVPDs' carriage of Sinclair's planned ATSC 3.0 signals (including multicast signals), resulting in higher retransmission consent costs for MVPDs, and requiring MVPDs to undertake capital expenditures to upgrade cable systems before they are prepared to do so. Consumers will ultimately pay for these added costs.”⁹¹ Here again, Sinclair's motivations are not hidden; it has urged the Commission to mandate carriage of ATSC 3.0 and to ignore anticompetitive tying arrangements involving ATSC 1.0.⁹²

⁸⁸ PK Petition at 10.

⁸⁹ ACA Petition at 10-20; PK Petition at 7-8; Independent Programmer Comments at 7-9; ATVA Comments at 4-7.

⁹⁰ DISH Petition at 43.

⁹¹ Independent Programmer Comments at 9 & n.20.

⁹² Comments of ONE Media, LLC, GN Docket No. 16-42, at 7 (May 10, 2017).

Sinclair's efforts to delay broadband spectrum clearing in the 600 MHz band could exacerbate this scenario. As noted above, Sinclair has sought to use the incentive auction to circumvent the Commission's policy that ATSC 3.0 must be a voluntary, market-driven standard. If Sinclair succeeds in obtaining federal funding for ATSC 3.0 or, worse, forcing competitive carriers to support the standard, it will be all the easier to execute a tying arrangement under which OVDs and MVPDs are forced to support or even pay for ATSC 3.0 carriage as a condition of obtaining retransmission consent.

IV. THE COMMISSION SHOULD DENY THIS TRANSACTION OR POSTPONE ITS REVIEW.

A. This Transaction Involves Unprecedented Rule Violations.

The Consolidated Opposition tries to assure the Commission that this Transaction is no different than past transactions that received approval. Unlike recent approvals, such as Sinclair-Bonten, Sinclair-Allbritton, or Nextsar-Media General, however, this Transaction involves unambiguous violations of the media ownership rules by exceeding the national ownership cap and the local ownership limits in at least 11 markets.

These defects are incurable. Sinclair cannot seek a waiver of the Commission's media ownership rules.⁹³ Even if a waiver were possible, Sinclair has not sought a waiver or identified the stations that it proposes to divest. Sinclair also does not seem to intend to comply with the FCC's ownership rules. Sinclair's CEO has candidly said: "We don't think we need to sell any of [the stations] ... When you take a look at all the overlaps, they really have no impact on overall competition, and we hope the regulators will agree with us."⁹⁴ In its Application,

⁹³ ACA Petition at 7.

⁹⁴ See, e.g., Robert Channick, *Sinclair to buy WGN owner Tribune Media for \$3.9 billion plus debt*, CHI. TRIB., May 8, 2017, <http://trib.in/2qSFZOm>.

meanwhile, Sinclair states: “To the extent that there are changes, or proposed changes, to the local ownership rules that would permit acquisition of the Tribune licenses in any of these markets, the applicants may file amendments to the applications to address such changes.”⁹⁵ As DISH notes, the Applicants’ “non-committal response to how they propose to cure the violations” suggests “that their preferred way is to eliminate the rules.”⁹⁶

B. No Set of Divestitures or Conditions Can Cure the Public Interest Harms.

The Commission has a robust body of evidence demonstrating that divestitures or conditions are unlikely to restrain Sinclair’s anticompetitive behavior. As Free Press notes, “[t]he Commission’s previous attempts at conditions have proven to be inadequate tools for ameliorating the serious harms posed by broadcast consolidation in general and by Sinclair’s merger mania specifically.”⁹⁷ Shortly after the Commission approved the Sinclair-Allbritton transaction, for example, Sinclair used sidecar arrangements to circumvent the Commission’s requirement to divest, surrender, or relinquish control over certain stations.⁹⁸ Sinclair has repeatedly violated the broadcast ownership rules⁹⁹ and used sidecar arrangements since 1991 to conceal the stations over which it exercises *de facto* control.¹⁰⁰ The pending Application

⁹⁵ Comprehensive Exhibit at 12.

⁹⁶ DISH Petition at 73; *see also* ACA Petition at 7.

⁹⁷ Free Press Petition at 16-17.

⁹⁸ Sinclair claims it has complied with the terms of the Allbritton merger. Consolidated Opposition at 25. However, Sinclair makes no attempt to dispute Free Press’s allegation that several entities holding licenses that should have been divested or surrendered under the Allbritton transaction, such as Howard Stirk Holdings II, LLC and Cunningham Broadcasting Corporation are, for all intents and purposes, considered the same company as Sinclair under the SEC’s rules. *See* Free Press Petition at 15-16.

⁹⁹ DISH Petition at 68-69.

¹⁰⁰ Free Press Petition at 11-17.

likewise fails to disclose Sinclair's sidecar arrangements in the Dreamcatcher and One Media stations.¹⁰¹ Conditions or divestitures simply cannot remedy these failings.

C. This Transaction is not Ripe for Review.

Commenters demonstrate how Sinclair has utterly failed to meet its burden to show that the Transaction serves the public interest.¹⁰² In response, the Consolidated Opposition cherry-picks a handful of arguably favorable services Sinclair has previously offered to the public.¹⁰³ But the existing programming Sinclair already produces, such as the content from its D.C. news bureau and its *Connect to Congress* series, is irrelevant; past actions unrelated to the Transaction do not prove Transaction-specific benefits. The Applicants also claim that broadcasters like Sinclair and Tribune will need to grow in size and scale to survive.¹⁰⁴ Even assuming that broadcast stations need to increase in size to remain competitive, the Applicants have failed to make such a showing in this case. Despite the Applicants' implications to the contrary, Tribune

¹⁰¹ Free Press Petition at 10-12.

¹⁰² CCA Petition at 20-27; *see also* Free Press Petition at 26 ("The illusory public interest benefits cited in the application are non-cognizable, non-verifiable, and non-merger-specific, and would not in any case outweigh the public interest harms of this transaction."); ACA Petition at 9 ("The Applicants' three pages of putative public interest benefits fail to meet their burden to establish that the proposed transaction is in the public interest."); PK Petition at 2 ("In their three pages outlining putative public interest benefits, the Applicants fail to meet their burden of proof by making no effort to address [the] public interest harms."); DISH Petition at 57 ("In any event, the Applicants have failed to support what few asserted benefits they do claim without any supporting evidence, and so their purported benefits cannot be considered."); Steinman Communications Petition at 3 ("[Not only do the Tribune-Sinclair Transfer Applications fail to establish the public interest benefit of the proposed transaction, but [the] Applications are critically cryptic in the outcomes sought by the applicants"); NTCA Petition at 4 ("Although the Applicants assert that the merger between Sinclair and Tribune would benefit the public interest, they have not met their burden of proof to demonstrate this claim. In fact, the Parties offer little to substantiate their declaration that the Transaction benefits the public.").

¹⁰³ Consolidated Opposition at 10-13.

¹⁰⁴ *Id.* at 6.

is by no means a failing operation. On the contrary, Tribune is one of the largest and most successful broadcast companies in the country.¹⁰⁵ The Applicants even go so far as to assert that increased economies of scale in equipment purchasing and installation services for ATSC 3.0 are a public interest benefit.¹⁰⁶ Here too, however, “scale” for the Applicants has become simply a euphemism for executing anticompetitive tying arrangements regarding the incentive auction repack, equipment distribution, and retransmission consent. By any measure, the Applicants have failed to provide sufficient evidence to evaluate conclusory assertions of public-interest benefit.

At a minimum, the Commission should defer any decision on the Transaction until it completes its related rulemaking proceedings. The Commission has previously rejected calls to “take action in the context of [a] limited [merger] proceeding that will pre-judge the outcome of another proceeding pending before us.”¹⁰⁷ The Commission should refrain from approving this

¹⁰⁵ Before Tribune agreed to merge with Sinclair, Tribune announced increase in consolidated operating revenues for all four quarters in 2016 and that “[c]onsolidated operating profit increased 129% . . . for the fourth quarter [of 2016] and increased 261% . . . for the full year.” See Press Release, Tribune Media Co., Tribune Media Co. Reports Fourth Quarter and Full-Year 2016 Results (Mar. 1, 2017), <http://bit.ly/2wH0kMD> (last visited Aug. 29, 2017). Cf. *Application of San Diego Television, Inc., Debtor-in-Possession, (Assignor) and KTTY, Inc. (Assignee)*, Memorandum Opinion and Order, 11 FCC Rcd 14689, 14693 ¶ 13 (1996) (granting a waiver of the duopoly rule where station KTTY(TV) was in Chapter 11 for two years and had been unable to meet its payment obligations on a multi-million dollar line of credit for five years); *Applications Filed by Altice N.V. and Cablevision Sys. Corp. to Transfer Control of Authorizations from Cablevision Sys. Corp. to Altice N.V.*, Memorandum Opinion and Order, 31 FCC Rcd 4365, 4372-75 ¶¶ 18-21 (2016) (describing Cablevision’s claim that, prior to entering into its proposed transaction with Altice, that it “needed financing to support its expected capital expenditures and meet its obligations . . . and that the company might have to engage in ‘extraordinary transactions that involve the incurrence of large amounts of debt.’”).

¹⁰⁶ Consolidated Opposition at 13.

¹⁰⁷ See *Media General Comm’cns Holdings, LLC et al.*, Memorandum Opinion and Order, DA 13-2140 ¶ 21 (2013) (declining to address Dish Network’s concerns that the New Young Broadcasting/Media General merger would result in higher retransmission fees due to Dish’s

Transaction until it comprehensively revisits its media ownership rules.¹⁰⁸ By permitting Sinclair's proposed duopolies without revisiting its local ownership rules, the FCC would be effecting an unlawful change in policy in the guise of approving a transaction that violates the Commission's rules. The only proper course of action is: *first*, the Commission must decide whether to relax the national ownership cap and its local media ownership rules; *next*, to the extent that the Commission decides to relax its rules, then the Applicants must file amendments seeking approval to create new duopolies or exceed the national ownership limit; *and finally*, the Commission must place those amendments on public notice to permit public comment.¹⁰⁹

D. Denying the Transaction is Fully Consistent with Viewpoint Diversity.

The Commission should quickly dispense with Sinclair's last-ditch attempt to invoke viewpoint diversity as a reason to ignore the public interest harms associated with this Transaction. Antitrust injuries, including competitive impairment of the mobile broadband market, represent content- and viewpoint-neutral reasons to deny the Transaction. Commenters have presented many other reasons for denying the Transaction that are completely unrelated to Sinclair's programming choices, including the abuse of retransmission consent negotiations.

pending *Verified Retransmission Complaint*); see also *Free State Commc'ns, LLC, et al.*, Letter, 26 FCC Rcd 10310, 10312 (Video Division, Media Bureau, July 21, 2011) (declining to reach a decision on an issue that would pre-judge the substance of a pending rulemaking proceeding.).

¹⁰⁸ Independent Programmer Comments at 4-7; Newsmax Petition at 4-5.

¹⁰⁹ ATVA Comments at 2.

Moreover, groups on both sides of the political aisle have opposed the Transaction.¹¹⁰ Sinclair's viewpoint discrimination argument has no basis in fact or law.¹¹¹

V. CONCLUSION.

Parties with divergent economic interests and diverse political views stand together in their opposition to this Transaction. A coherent mosaic emerges from the seemingly disparate public-interest harms on the record. Delaying competitive carriers' access to much-needed broadband spectrum furthers Sinclair's interests by serving as a vehicle to extract anticompetitive concessions to finance and support Sinclair's competing ATSC 3.0 standard. Likewise, horizontal and vertical concentration gives Sinclair the unchallenged power to promulgate its patented ATSC 3.0 technology without the risk of competing market alternatives or consumer choice. And Sinclair's efforts to dismantle community newsrooms and independent programming represent the logical outcome of a business strategy that places little, if any, priority on local broadcasting.

¹¹⁰ Compare Newsmax Petition and Independent Programmer Comments, with Free Press Petition and PK Petition.

¹¹¹ In any event, under settled Supreme Court precedent, the Commission acts well within the bounds of the First Amendment when ensuring that broadcasters, which use scarce spectrum they obtained for free, meet their public interest obligations to promote localism and diversity. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

Because these harms transcend the Transaction's patent unlawfulness or the existence of duopoly markets, no divestitures or conditions can cure them. The Commission must deny this Transaction.

Respectfully submitted,

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August 29, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2017, I caused a copy of this Petition to Deny to be served by U.S. First Class mail, postage prepaid, upon the following:

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