

Stephanie A. Roy  
202 429 6278  
sroy@steptoe.com



1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
202 429 3000 main  
www.steptoe.com

**REDACTED—FOR PUBLIC INSPECTION**

November 2, 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,<sup>1</sup> DISH Network L.L.C. submits the enclosed public, redacted version of its Comments dated November 2nd, 2017. 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,

A handwritten signature in blue ink that reads "Stephanie A. Roy".

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

Enclosure

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<sup>1</sup> *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")*.

**REDACTED—FOR PUBLIC INSPECTION**

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

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

**COMMENTS IN RESPONSE TO PUBLIC NOTICE**

Pantelis Michalopoulos  
Jonathan B. Sallet  
Stephanie A. Roy  
Andrew M. Golodny  
**Steptoe & Johnson LLP**  
1330 Connecticut Ave, N.W.  
Washington, D.C. 20036  
(202) 429-3000

*Counsel for DISH Network L.L.C.*

Jeffrey H. Blum, Senior Vice President  
& Deputy General Counsel  
Alison Minea, Director and Senior Counsel,  
Regulatory Affairs  
Hadass Kogan, Corporate Counsel  
**DISH Network L.L.C.**  
1110 Vermont Avenue, N.W., Suite 750  
Washington, D.C. 20005  
(202) 463-3703

November 2, 2017

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION AND SUMMARY .....	2
II. THE MEDIA BUREAU DID NOT REQUEST INFORMATION THAT WOULD BE ESSENTIAL FOR APPROVAL .....	8
III. THE APPLICANTS HAVE FAILED TO RESPOND TO THE MEDIA BUREAU’S REQUEST.....	12
IV. SINCLAIR REFUSES TO EXPLAIN HOW IT WILL COMPLY WITH THE NATIONAL AND LOCAL OWNERSHIP LIMITS .....	14
V. SINCLAIR IS WITHHOLDING RESPONSIVE DOCUMENTS.....	18
VI. SINCLAIR DOES NOT ADEQUATELY DEMONSTRATE ITS CLAIMED MERGER BENEFITS .....	19
VII. THE COMMISSION SHOULD MAINTAIN ITS SHOT CLOCK PAUSE .....	24
VIII. CONCLUSION.....	25

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**COMMENTS IN RESPONSE TO PUBLIC NOTICE**

**I. INTRODUCTION AND SUMMARY**

DISH Network L.L.C. (“DISH”) submits these comments in response to the Commission’s Public Notice<sup>1</sup> seeking additional comments in the proceeding for the transfer of control from Tribune Media Company (“Tribune”) to Sinclair Broadcast Group, Inc. (“Sinclair”). Sinclair has submitted an insufficient response to the set of questions propounded by the Media Bureau that were themselves insufficient to allow the Commission to discharge its responsibilities.<sup>2</sup> As a result, the Commission does not have enough information to conclude that Sinclair’s acquisition of Tribune will serve the public interest, convenience and necessity. There is no basis in the record for determining that the transaction will enhance competition, that it will

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<sup>1</sup> Public Notice, MB Docket No. 17-179, Media Bureau Pauses 180-Day Transaction Shot Clock in the Proceeding for Transfer of Control of Tribune Media Company to Sinclair Broadcast Group, Inc. to Allow For Additional Comment, DA 17-1026 (Oct. 18, 2017) (“Public Notice”).

<sup>2</sup> Letter from Michelle M. Carey, Chief, Media Bureau, to Miles S. Mason, Counsel for Sinclair and Mace J. Rosenstein, Counsel for Tribune, MB Docket No. 17-179 (Sept. 14, 2017) (“Media Bureau RFI”).

not produce anticompetitive effects, or that it will produce benefits offsetting its effects. Without this record, an approval of the transaction would be contrary to both the Communications Act and the Administrative Procedure Act.

**The Bureau’s Requests for Information are Insufficient, as They Do Not Ask About the Transaction’s Effects on Competition.** The Communications Act requires the Commission to determine that “the public interest, convenience, and necessity will be served” before authorizing a license transfer.<sup>3</sup> It is black letter law that the effect of a transaction on competition is a *sine qua non* portion of that public interest determination.<sup>4</sup> The competitive analysis is all the more essential here, where the Applicants have touted retransmission price increases as the transaction’s main benefit.<sup>5</sup> It is difficult to portray this price-raising aspiration

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<sup>3</sup> 47 U.S.C. § 310(d).

<sup>4</sup> Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership; for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327, 6338 ¶ 29 (2016) (“*Charter/TWC Order*”); Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd. 9816, 9821 ¶ 10 (2000); 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, 196 ¶ 35 (2017) (“*Nexstar/Media General Order*”); *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980).

<sup>5</sup> See Tribune Media Company and Sinclair Broadcast Group, Inc., Consolidated Opposition to Petitions to Deny at 7, MB Docket No. 17-179 (Aug. 22, 2017) (“*Opposition*”) (the merger will give New Sinclair the size necessary to take on “much larger companies.”). See also Sinclair Broadcast Group Inc. Conference Call to Discuss its Definitive Agreement to Acquire Tribune Media Company, Fair Disclosure Wire (May 8, 2017) (“*Moving to Slide 7. Substantial immediate and medium-term synergies. . . . And first on the list is net retrans revenue, which is the largest single category on this page.*”); Sinclair Broadcast Group Inc. at JP Morgan Tech, Media and Telecom Conference, Fair Disclosure Wire (May 22, 2017) (“*So 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.*”).

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expressed by the Applicants as anything other than a competitive harm. And, there is no information in the record that would allow the Commission to discount it or explain it away.

The Applicants' only defense of their hoped-for price hikes is that such increases would be a benefit because, in their mind, their signals are worth more than the Applicants are paid for these signals today.<sup>6</sup> But precedent establishes that this is an unavailing defense.<sup>7</sup> The only economic testimony filed by the Applicants is supposed to have been prepared in one day, after the Applicants' first choice of expert proved unable or unwilling to assist them. Just as important, that testimony is confined to criticizing the economic studies commissioned by DISH,<sup>8</sup> and does not rely on one fact supplied to the new expert *by* the Applicants.<sup>9</sup>

The Applicants have not provided, and so far have not been asked to provide, the documents that must underpin even the most rudimentary competition analysis: What is the

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<sup>6</sup> See Opposition at 26 (discussing the “historical undercompensation of broadcasters”).

<sup>7</sup> Higher prices are not a merger benefit. See, e.g., Application of EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., *Hearing Designation Order*, 17 FCC Rcd. 20559, 20629 ¶ 185 (2002) (designating proposed merger of EchoStar and DirecTV for a hearing because the transaction would likely raise prices); Applications of AT&T Inc. & Deutsche Telekom For Consent to Assign or Transfer Control of Licenses and Authorizations, *Order*, 26 FCC Rcd. 16184, 16196 ¶ 16 (2011) (“Mergers that result in both a highly concentrated market and the new firm controlling an undue share of that market are presumptively illegal. The antitrust laws do ‘not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the mergers create an appreciable danger of such consequences in the future.’”) (*quoting Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986)); Reply of DISH Network, L.L.C. MB Docket No. 17-179, at 23 (Aug. 29, 2017) (“DISH Reply”) (“DISH’s evidence of the likely price increases stands un rebutted.”).

<sup>8</sup> See Declarations of Janusz A. Ordovery and William P. Zarakas and Jeremy A. Verlinda, Exhibits D and E to Petition to Dismiss or Deny of DISH Network L.L.C., MB Docket No. 17-179 (Aug. 7, 2017) (“DISH Petition to Deny”).

<sup>9</sup> See DISH Reply at 14.

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planned timetable and amounts of the hoped-for retransmission price increases? What was the confidential rationale on which they decided to merge, especially since the public “raison d’être” for the transaction is a price hike? What are their plans with respect to other customers or suppliers (beyond distributors), such as advertisers and the networks? Do they plan to increase advertising prices, too? Do they plan to reduce the “reverse retrans” fees they pay the networks? If so, why don’t they plan to pass through the savings to distributors, but plan to increase retransmission fees instead? Do they view themselves as competing with one another today? And what of the many other competition-related questions set forth in DISH and other parties’ Motion for Additional Information?<sup>10</sup>

The Commission should request documents and information responsive to all of these questions. Otherwise, it is difficult to escape the fate of reversal or remand,<sup>11</sup> based on a line of court of appeals precedent criticizing the Commission for not adequately evaluating the effects of its actions on competition, or faulting the Commission for failing to engage in “reasoned decisionmaking.”<sup>12</sup> Seen in the glare of the Applicants’ plan to increase prices, a failure to assess competitive effects would be worse than the conduct in *Citizens for Jazz*, where the agency improperly denied a hearing on a broadcast renewal application on the ground that the

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<sup>10</sup> See Motion of DISH Network L.L.C., American Cable Association, and Public Knowledge for Additional Information and Documents and Extension of Time, MB Docket No. 17-179 (July 12, 2017) (“Motion for Additional Information”).

<sup>11</sup> See *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980); *Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (D.C. Cir. 1986); *Sprint Communications Co. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. 2001).

<sup>12</sup> See *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988); *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 987 (D.C. Cir. 2013); *Achernar Broadcasting Co. v. FCC*, 62 F.3d 1441, 1446-47 (D.C. Cir. 1995).

petitioners had not satisfied the statutory prerequisite of “a substantial and material question of fact.”<sup>13</sup> In then-Judge Scalia’s words:

The statute in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; the Commission has said that it will look into the possible existence of a fire only when it is shown the existence of a fire.<sup>14</sup>

Here, absent a more searching inquiry, the Commission would put itself in the position of not looking into the possible existence of a fire with the fire burning before it.

**Sinclair’s answers are insufficient.** The only conceivable justification for the Applicant’s plan to raise retransmission prices charged to distributors is that the merger will make their content so much better that distributors will be willing to pay more to retransmit it. The Media Bureau did ask the Applicants to supply information about the benefits of the proposed transaction, reflecting the fact that the Application was uncommonly barren of any plausible assertion of benefits, let alone documentation for them. But the Applicants have not taken the opportunity afforded by the Bureau’s request to establish a supportive record.

Sinclair still has not provided evidence that its proposed investments in Tribune would be merger-specific.<sup>15</sup> How much of the proposed capital expenditures that Sinclair cites would have happened anyway? What is Tribune planning to spend on capital expenditures? In fact, the information supplied by Sinclair, **{{BEGIN SINCLAIR HCI**

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<sup>13</sup> *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985) (remanding for further consideration).

<sup>14</sup> *Id.*

<sup>15</sup> *See* DISH Reply at 46-47.

**END SINCLAIR**

**HCI}}** Without a proper baseline to establish the non-merger *status quo*, Sinclair’s benefits claims cannot be analyzed, let alone credited.

The “streamlining” of newsgathering that Sinclair touts cannot conceivably bring about improvements to the Applicants’ programming that would justify higher retransmission fees. It is a euphemism for newsroom job cuts. “[L]ocating the news resources into a shared newsroom,” which Sinclair claims as a benefit, is not likely to have the boasted-of effect of “developing distinct newscasts for each station.”<sup>16</sup> Rather, it will likely have the result already produced in San Antonio. While Sinclair cites San Antonio as an example of the efficiencies of the duopoly markets, the stations produce “carbon cop[y]” newscasts so similar that viewers have “to check which station [they are] watching.”<sup>17</sup>

Peculiarly, Tribune does not join in Sinclair’s response to the Bureau’s requests, which were directed to both Applicants.

Finally, the Media Bureau’s request also reflects the recognition of another serious lapse in the Application—the failure to explain how New Sinclair would comply with the national and local media ownership limits. Sinclair continues to refuse to cure this lapse.

DISH hereby renews its July 12th Motion for Additional Information, which DISH incorporates herein by reference.<sup>18</sup> The Commission has paused its transaction shot clock in this

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<sup>16</sup> See Letter from Miles S. Mason, Counsel to Sinclair Broadcast Group, Inc., to Marlene Dortch, Secretary, Federal Communications Commission, at 10, MB Docket No. 17-179 (Oct. 5, 2017) (“Sinclair RFI Response”).

<sup>17</sup> See DISH Petition to Deny at 52.

<sup>18</sup> See Motion for Additional Information.

proceeding to “ensure that commenters have additional time to review and comment” on Sinclair’s RFI response.<sup>19</sup> The Commission should not restart the clock until it receives sufficient responses to its questions, as well as the additional information requested in DISH’s motion.<sup>20</sup>

**II. THE MEDIA BUREAU DID NOT REQUEST INFORMATION THAT WOULD BE ESSENTIAL FOR APPROVAL**

DISH and other parties filed a motion requesting that the Applicants be required to produce various categories of materials that would allow the Commission and Petitioners to properly evaluate the proposed transaction.<sup>21</sup> The Commission dismissed this motion, indicating that the Media Bureau would “develop written requests for information that it determines are necessary based on its review of the Applications and the record.”<sup>22</sup> However, once issued, the information request failed to address key issues raised by DISH’s motion and developed during this proceeding. Thus, DISH is renewing the request for additional information.

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<sup>19</sup> Public Notice at 2.

<sup>20</sup> See Motion for Additional Information at 5-6.

<sup>21</sup> See Motion for Additional Information. This motion was subsequently supported by NTCA – The Rural Broadband Association, Newsmax, and Independent Programmers. See Comments of NTCA – The Rural Broadband Association in Support of DISH Network, et al. Motion for Additional Information and Documents and Extension of Time, MB Docket No. 17-179 (July 14, 2017); Comments of Newsmax Media, Inc in Support of the Motion of DISH Network, American Cable Association, and Public Knowledge for Additional Information and Documents and Extension of Time, MB Docket No. 17-179 (July 21, 2017); Comments of AWE – A Wealth of Entertainment, Cinémoi, MAVTV Motorsports Network, One America News Network, and RIDE Television in Support of the Motion of DISH Network, American Cable Association, and Public Knowledge for Additional Information and Documents and Extension of Time, MB Docket No. 17-179 (July 20, 2017).

<sup>22</sup> See Tribune Media Company and Sinclair Broadcasting Group, Inc., Consolidated Applications for Consent to Transfer Control, *Order*, 32 FCC Rcd. 5799, 5801 ¶ 10 MB Docket No. 17-179 (Aug. 3, 2017).

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Crucially, the information request does not account for one of the central issues raised by DISH in its Petition to Deny: that the proposed transaction will lead to higher retransmission consent fees for both MVPDs and OVDs, and that these price increases will ultimately be passed on to consumers. Some of the vital information missing from the information request includes:

- All retransmission consent agreements with MVPDs and network affiliation agreements since 2010; monthly data (including both total fees and per-subscriber fees) for 2010 to the present on: (i) retransmission fee revenues earned, (ii) reverse retransmission fees paid (retransmission fees remitted to affiliated networks), and (iii) subscriber bases for retransmission fees, by MVPD, by station; and
- All documents relating or pertaining to retransmission consent strategy and negotiations with MVPDs and affiliated networks, including without limitation all documents relating to strategy and negotiations in connection with all blackouts of local programming in which Applicants have been involved since 2010.

The information request also did not include requests for the following categories of information asked for in DISH's motion:

- Historical capital expenditure figures. This information is necessary to show whether and to what extent Sinclair's purported synergies are merger specific.
- Documentation and data with respect to recently acquired stations and the addition of local and news programming, specifically breaking out, for each station, the weekly addition (or loss) of hours of 1) local news, 2) other local programming, and 3) news or interest segments not originated by the station. This information is necessary to verify Sinclair's claims that it has added local news and other local programming after it acquires stations. Such data would show Sinclair's programming decisions in aggregate, and not allow it to cherry pick from select examples.
- A description of the relationship between centrally originated programming by Sinclair and any requirements for local stations to air such programming, including without limitation any written agreements or correspondence between Sinclair and the stations with respect to such programming. This information would illustrate the harms to localism because of Sinclair's "must-run" programming which is run nationally.
- Documentation relating to the use of "most-favored nation" ("MFN") clauses in retransmission consent agreements to establish pricing floors for retransmission rates in retransmission negotiations with other MVPDs. This information is necessary to show Sinclair's leverage in contract negotiations.

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- Identification of all changes in station ownership (stations acquired or sold) since 2010 and station affiliation. This information is necessary to verify Sinclair’s assertions that stations improve under its management.
- Monthly data on advertising revenues earned, sharing payments for advertising paid to station affiliates, and subscriber and/or viewer bases for advertising fees, by MVPD, by station. This information is necessary to verify Sinclair’s claims about national advertising because of the merger.
- All documents and data with respect to the effects on advertising revenues of any blackouts of local programming in which Applicants’ stations have been involved on such revenues.

Without this information, the Commission cannot discharge its responsibility to evaluate whether the transaction is in the public interest. The Commission has correctly recognized that competitive effects are part and parcel of the analysis required under the public interest standard.<sup>23</sup> The courts of appeals have required the Commission to do no less. In the D.C.

Circuit’s words in *U.S. v. FCC*:

More than ten years ago this court made clear that competitive considerations are an important element of the public interest standard which governs federal agency decisions. We therefore required such agencies to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.<sup>24</sup>

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<sup>23</sup> See *Charter/TWC Order*, 31 FCC Rcd. at 6338 ¶ 29 (“[T]he Commission considers whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.”); *MediaOne Order*, 15 FCC Rcd. at 9821 ¶ 10 (“In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets.”); *Nexstar/Media General Order*, 32 FCC Rcd. at 196 ¶ 35 (“[W]e must giv[e] careful attention to the economic effects of, and incentives created by, a proposed transaction taken as a whole and its consistency with the Commission’s policies under the Act, including our policies in favor of competition, diversity, and localism.”) (citing Applications for Consent to Transfer of Control from Shareholders of Belo Corp., *Memorandum Opinion and Order*, 28 FCC Rcd. 16867, 16879 ¶ 30 (2013)).

<sup>24</sup> *United States v. FCC*, 652 F.2d 72, 70 (D.C. Cir. 1980).

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For that reason, the D.C. Circuit has found that failure to consider anticompetitive effects is sufficient grounds for a remand. In *Celcom*, for example, the Commission had summarily dismissed the allegation that grant of a cellular license would “wreak significant anticompetitive effects on the New York paging market.”<sup>25</sup> The court faulted the Commission for paying lip service to “its duty to consider potential anticompetitive effects of the joint venture,” but doing so in a “modest footnote.”<sup>26</sup> The court consequently remanded so that the Commission could “address this issue in a more thorough fashion.”<sup>27</sup> Similarly, in *Sprint*, the court remanded a Commission order when the agency failed to consider a party’s “price squeeze” argument in a proceeding arising under the 1996 Telecommunications Act.<sup>28</sup> The court agreed with the appellants that: “[w]ith a statute that proclaims competition as the congressional purpose, it follows a fortiori . . . that the Commission should pursue their price squeeze claim, or at the very least explain why the public interest does not require it to do so. After all, the words ‘public interest’ in a regulatory statute . . . take meaning from the purposes of the regulatory legislation.”<sup>29</sup>

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<sup>25</sup> *Celcom Communications Corp. v. FCC*, 789 F.2d 67, 70 (D.C. Cir. 1986)

<sup>26</sup> *Id.* at 71.

<sup>27</sup> *Id.* (“It is elementary, of course, that the Commission’s licensing decisions are bounded by the requirement of reasoned decisionmaking. This fundamental mandate means that the agency must consider the relevant evidence presented and offer a satisfactory explanation for its conclusion.”).

<sup>28</sup> *Sprint Communications Co. v. FCC*, 274 F.3d 549, 554 (D.C. Cir. 2001); *WorldCom, Inc. v. FCC*, 308 F.3d 1, 9 (D.C. Cir. 2002).

<sup>29</sup> *Sprint Communications Co.*, 274 F.3d at 554.

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A decision unmoored from an examination of the missing information on competitive effects would also violate the APA's requirement of reasoned decisionmaking and the long line of precedent countermanding agency actions based on it.<sup>30</sup> This examination is imperative, given the Applicants' avowed plan to raise prices.

### III. THE APPLICANTS HAVE FAILED TO RESPOND TO THE MEDIA BUREAU'S REQUEST

The Applicants have ignored the vast majority of the Media Bureau's modest request for additional information, declining to provide answers or documents even when requested. More specifically, Sinclair:

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<sup>30</sup> See *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988) (remanding order denying petition seeking a hearing on a proposed transfer of ownership of broadcast license because "the Commission in this case virtually ignored the issues raised by Astroline's request for an evidentiary hearing. Not only does the Commission's opinion evince no more than cursory consideration of Astroline's factual allegations, but it also exposes the Commission's failure to proceed analytically according to the statutory inquiry we have reviewed."); *Comcast Cable Communications, LLC v. FCC.*, 717 F.3d 982, 987 (D.C. Cir. 2013) (finding the Commission's determination that Comcast had discriminated against a sports programming network was not supported by substantial evidence: "the Commission has pointed to no evidence, and therefore obviously not to substantial evidence."); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 420 (3d Cir. 2004) ("The deference with which we review the Commission's line-drawing decisions extends only so far as the line-drawing is consistent with the evidence or is not 'patently unreasonable.' The Commission's numerical limits are neither. No evidence supports the Commission's equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share. The modified rule is similarly unreasonable in allowing levels of concentration to exceed further its own benchmark for competition – a glaring inconsistency between rationale and result. We remand the numerical limits for the Commission to support and harmonize its rationale."); *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001) (remanding so that the Commission may "examine the relevant data and articulate a satisfactory explanation for its action . . . [U]ntil the Commission has adequately explained the basis for this conclusion, it has not discharged its statutory obligation under the Administrative Procedure Act."); *Achernar Broadcasting. Co. v. FCC*, 62 F.3d 1441, 1446-47 (D.C. Cir. 1995) ("Failure to weigh the entire record would constitute reversible error . . . While agency expertise deserves deference, it deserves deference only when it is exercised; no deference is due when the agency has stopped shy of carefully considering the disputed facts.") (internal quotations omitted).

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- Refused to explain how it would comply with national and local ownership limits, despite the Bureau’s explicit request to do so, and
- Rebuffed the Bureau’s stated request for evidence to support Sinclair’s answers to the following questions, despite the fact that the Bureau required Applicants to “provide documents”:
  - Question 2 (documents about plans to comply with the national ownership limit),
  - Question 4 (documents about plans to comply with the local television ownership rules),
  - Question 5 (documents about efficiencies),
  - Question 6 (documents relating to greater audience reach),
  - Question 7 (documents regarding ATSC 3.0 implementation),
  - Question 8 (documents about proposed capital investments and plans for local programming), and
  - Question 9 (documents about value to MVPDs).

The absence of documents created by the Applicants in the period before the transaction was announced deprives the Commission and Petitioners the ability to review Applicants’ internal assessment of the transaction unfiltered by their current desire to have the transaction approved. Instead, the Commission is left with the self-serving and unsupported statements of Sinclair, which do not allow the Commission to evaluate whether the claimed public interest benefits are verifiable.<sup>31</sup>

While Sinclair’s response was deficient, Tribune did not even respond to the request at all. The Media Bureau’s September 14th letter was addressed to counsel for both Sinclair and

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<sup>31</sup> Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 30 FCC Rcd. 9131, 9237 ¶ 274 (2015) (“[A] claimed [merger] benefit must be verifiable. Because much of the information relating to the potential benefits of a transaction is in the sole possession of the Applicants, they have the burden of providing sufficient evidence to support each claimed benefit to enable the Commission to verify its likelihood and magnitude.”); *Nexstar/Media General Order*, 32 FCC Rcd. at 193 ¶ 23 (“We will discount or dismiss speculative benefits that we cannot verify.”).

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Tribune, and the request was titled “Request For Information From Sinclair and Tribune.”<sup>32</sup>

However, only counsel for Sinclair responded and Sinclair’s response was not styled as a joint response of both Applicants – it was from Sinclair only and signed only by Sinclair’s counsel.<sup>33</sup>

As the Media Bureau recognized in pausing the transaction shot clock in this proceeding, “[t]he Commission has a strong interest in ensuring a full and complete record upon which to base its decision in this proceeding.”<sup>34</sup> The Commission should therefore insist upon receiving more complete responses from the Applicants before considering their proposed merger any further.

**IV. SINCLAIR REFUSES TO EXPLAIN HOW IT WILL COMPLY WITH THE NATIONAL AND LOCAL OWNERSHIP LIMITS**

The Media Bureau’s September 14 letter specifically asked Sinclair to “describe in detail and provide documents” on how it will comply with both the national and local ownership rules.<sup>35</sup> Sinclair’s response ignored both requests, instead explaining that it is “premature” for Sinclair to explain how it will comply.<sup>36</sup>

If Sinclair cannot explain how it will comply with the Commission’s rules, then the entire application is premature, as DISH has pointed out.<sup>37</sup> The proposed transaction was announced six months ago. It defies belief that the Applicants still do not have any idea how they plan to

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<sup>32</sup> See Media Bureau RFI.

<sup>33</sup> See Sinclair RFI Response at 1 (“Sinclair Broadcast Group, Inc. hereby provides this response...”).

<sup>34</sup> Public Notice at 2.

<sup>35</sup> See Media Bureau RFI, requests 2 and 4.

<sup>36</sup> Sinclair RFI Response at 3, 8.

<sup>37</sup> See DISH Petition to Deny at 72-76; DISH Reply at 60-64.

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comply with the long-standing national and local ownership rules. It is Sinclair's responsibility to show that the transaction is both consistent with Commission rules and in the public interest. DISH and others have suspected from the beginning that Sinclair plans to comply with the rules only by hoping that the rules will change. This does not justify the lack of a compliance plan—an application should be filed with the Commission based on the rules in existence at the time the proposal is made, and the application must demonstrate compliance with these rules. Otherwise, the Commission should dismiss the application without prejudice to proposing a similar transaction in the future, if and when the rules do change.

Sinclair's apparent hope for a rule change is not an acceptable justification for its failure to articulate a compliance plan for an additional reason: not all the rules that would be violated by this proposed transaction can be changed without a new rulemaking. Specifically, it is true that the Commission may attempt to relax the local "duopoly" rule by action on pending reconsideration petitions of its Report and Order in the quadrennial regulatory review of the broadcast ownership rules,<sup>38</sup> an action whose propriety will likely have to be reviewed by a court of appeals. But there is no doubt that a new rulemaking would be required to relax the national ownership limit,<sup>39</sup> and there is equally no doubt that, even after reinstatement of the so-called UHF discount, the instant application still violates that limit.

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<sup>38</sup> See 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Second Report and Order*, 31 FCC Rcd. 9864, 9958 ¶ 229 (2016).

<sup>39</sup> *Media General/Nexstar Order*, 32 FCC Rcd. at 198 ¶ 38 (if the Commission were to revise the national ownership cap, "it must exercise that authority in a rulemaking proceeding outside the quadrennial review process.").

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As the Applicants themselves have acknowledged, the proposed transaction would place Sinclair 6.5 percent above the 39 percent national ownership cap, even after accounting for the UHF discount.<sup>40</sup> In its RFI Response, Sinclair states that it “would need to divest licenses in at least two markets to comply with the FCC’s national ownership limit.”<sup>41</sup> However, the actual number of markets Sinclair will need to divest is likely to be higher than just two. For Sinclair’s statement to be correct, it would need to divest Tribune’s WPIX in New York (with 6.31% national audience reach) and one additional station.<sup>42</sup> But a divestiture of WPIX seems unlikely in light of its importance to Sinclair.<sup>43</sup> Without further information from Sinclair, it is impossible to know the company’s intentions.<sup>44</sup> In any event, transfer of control proceedings are no place to play a guessing game. The burden remains on Sinclair to show how it will comply with existing Commission rules, a burden it has thus far failed to carry.

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<sup>40</sup> See Application of Tribune Media Company and Sinclair Broadcast Group, Inc., at 1, 26, MB Docket No. 17-179 (June 28, 2017).

<sup>41</sup> Sinclair RFI Response at 2.

<sup>42</sup> See Sinclair RFI Response, Exhibit 2.

<sup>43</sup> See Comments of Christopher Ripley, Sinclair Broadcast Group Inc. at Deutsche Bank Leveraged Finance Conference, Fair Disclosure Wire (Oct. 3, 2017) (“Tribune was a very unique set of assets . . . It had the largest markets of any other target. And specifically, it had . . . 7 out of the top 10 markets that had stations and 7 of the top 10 DMAs with news presence in each of those markets. So that access to large DMAs isn’t found in any other group, and it was really a strategic asset for us.”).

<sup>44</sup> Indeed, Sinclair has been more forthcoming with investors than it has been with 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.” Sinclair Broadcast Group Inc. Conference Call to Discuss its Definitive Agreement to Acquire Tribune Media Co., Fair Disclosure Wire (May 8, 2017).

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At the local level, Sinclair lists ten markets where both it and Tribune own a Big-4 station.<sup>45</sup> To comply with the local ownership rule, Sinclair would need to either request a waiver or divest stations in each of these ten markets.<sup>46</sup> But Sinclair does not indicate which stations in these markets it intends to divest, nor does Sinclair say that it will request waivers for all of these markets.<sup>47</sup> The burden is on Sinclair to provide the necessary evidence for the record.

Instead, Sinclair hides behind the Department of Justice's ("DOJ") review of the transaction as a reason why it cannot be forthcoming with the Commission.<sup>48</sup> This position is inconsistent with the Commission's statutory duty to pass on proposed transfers of control. DISH has identified numerous broadcast mergers, including those in which Sinclair was the acquiring party, where the applicants made specific divestiture commitments before the deal closed.<sup>49</sup> These included instances where the DOJ reviewed the proposed transaction in

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<sup>45</sup> Sinclair RFI Response at 4-7. For each of the non-compliant overlap markets, Sinclair states that there will remain "independently owned and operating full-power commercial and noncommercial TV stations in the market Post-Transaction." But it is unclear how Sinclair calculated the number of remaining stations. The stations listed in Sinclair's Exhibit 3 are not consistent with the narrative response to Request 3.

<sup>46</sup> 47 C.F.R. § 73.3555(b).

<sup>47</sup> Sinclair's statement regarding its intentions to seek a waiver leaves a loophole large enough to drive a truck through: "Sinclair does not currently have any plans to request permission to place stations in divestiture trusts or to seek a waiver of 47 C.F.R. § 73.3555(b), though that could change depending on the resolution of the factors discussed above." Sinclair RFI Response at 8.

<sup>48</sup> Sinclair RFI Response at 3, 8.

<sup>49</sup> See DISH Petition to Deny at 74-75, DISH Reply at 63 (listing transactions where applicants disclosed detailed information about planned divestitures or waivers including the Media General/Lin Media, Sinclair/Allbritton, Media General/Nexstar, Fox/Chris-Craft, CBS/Viacom, Fox/New World Communications, Scripps/Journal, Capital Cities/ABC, and Raycom/Liberty Media transactions).

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conjunction with the Commission, but the applicants nonetheless had to be, and were, much more forthcoming with the Commission than Sinclair is here. For example, in the Media General/Nexstar transaction, the DOJ required divestiture of six of the seven markets that the Commission required divestiture from under the local ownership rules, so the DOJ's order would not have been a surprise to the applicants there or even an additional burden.<sup>50</sup> Without further explanation of Sinclair's compliance plan, the Commission should reject Sinclair's proposed acquisition of Tribune.

### V. SINCLAIR IS WITHHOLDING RESPONSIVE DOCUMENTS

Sinclair's RFI Response and recent statements from its executives admit that Sinclair has been examining potential divestitures. Sinclair's RFI Response states that, since July, Sinclair has engaged investment bank Moelis & Company to provide advice on potential sales: "Moelis has contacted a substantial number of potential buyers, consisting of both broadcasters and financial investor/management teams, many of which have signed non-disclosure agreements

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<sup>50</sup> See Competitive Impact Statement, *United States v. Nexstar Broadcasting Group, Inc., and Media General, Inc.*, 1:16-cv-01772-JDB, 2, (D.D.C. Sept. 2, 2016); *Nexstar/Media General Order*, 32 FCC Rcd. at 185 ¶ 2 n.8. The DOJ also reviewed other transactions where the applicants disclosed divestitures to the Commission including Capital Cities/ABC, Clear Channel/Bain Capital, and Raycom/Liberty Media. See, e.g., Applications of Capital Cities Communications Inc. and American Broadcasting Companies, Inc., Transferor, and Scripps Howard Broadcasting Company, Transferee, for Consent to the Transfer of Control, *Memorandum Opinion and Order*, FCC 85-605, 1985 FCC Lexis 2247, \*47-51 ¶¶ 36-38 (1985) (indicating that the DOJ was reviewing the transaction); Applications for Transfer of Control of The Liberty Corp. to Raycom Media, Inc., *Memorandum Opinion and Order*, 21 FCC Rcd. 6805, 6806-07 ¶¶ 5-6 (2006) (noting DOJ review); Competitive Impact Statement, *United States v. Bain Capital, LLC et al.*, 1:08-cv-00245, 2 (D.D.C. Feb. 13, 2008).

and have accessed the data room and/or submitted preliminary information requests.”<sup>51</sup> But Sinclair has refused to provide the Commission with any of these materials.

This likely means that an extensive internal paper trail about these deliberations is at Sinclair’s disposal. In fact, the company has elsewhere confirmed that Sinclair has internal documents and studies regarding divestitures. Sinclair’s CEO has said, “we factored in a worst-case scenario in our [divestiture] analysis . . . but we did agree to sell to the extent we needed to. So that’s why there’s a process that we may launch in anticipation of that.”<sup>52</sup> Similarly, in an October 3rd session with investors, Sinclair indicated that it “ha[s] an ongoing auction where we’re showing the assets to the other broadcasters.”<sup>53</sup> Yet Sinclair has failed to provide the Commission with any of these materials.

**VI. SINCLAIR DOES NOT ADEQUATELY DEMONSTRATE ITS CLAIMED MERGER BENEFITS**

**Sinclair Confirms that the Transaction Will Result in Layoffs.** While being vague on various other aspects of the proposed transaction, Sinclair’s response was clear on one thing: the merger will result in layoffs. Indeed, the “synergies” created by job terminations is one of the benefits touted by the Applicants. Sinclair states that “higher level corporate positions” will be eliminated “immediately after the Transaction closes.”<sup>54</sup> Sinclair also unmistakably insinuates

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<sup>51</sup> Sinclair RFI Response at 2, 8.

<sup>52</sup> Sinclair Broadcast Group Inc., Q2 2017 Earnings Call, Fair Disclosure Wire (Aug. 2, 2017).

<sup>53</sup> Sinclair Broadcast Group Inc. at Deutsche Bank Leveraged Finance Conference, Fair Disclosure Wire (Oct. 3, 2017).

<sup>54</sup> Sinclair RFI Response at 9.

plans to make “station-level staffing” cuts once it has further reviewed Tribune’s operations.<sup>55</sup> Sinclair only promises not to make such cuts “immediately.”<sup>56</sup> Such layoffs are an inevitable result of Sinclair’s plan to “streamline” newsgathering infrastructure. Indeed, Sinclair admits that, while this process may not reduce the number of employees “substantially,” it “does expect to realize an overall savings in costs.”<sup>57</sup> The Commission’s public interest analysis includes consideration of whether a proposed transaction will result in job cuts.<sup>58</sup>

Sinclair states that it will realize a total of **END SINCLAIR HCI** “in corporate overhead synergies over the first two years after it acquires Tribune.”<sup>59</sup> The company goes on to note that **END SINCLAIR HCI** of this will come from “elimination of duplicative higher level corporate positions immediately after the Transaction closes, and the remainder from the elimination of

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *See, e.g., Charter/TWC Order*, 31 FCC Rcd. at 6526 ¶ 443 (“As part of its public interest analysis, the Commission historically has considered employment-related issues such as job creation, commitments to honor union bargaining contracts, and efficiencies resulting from workforce reduction . . . [W]hen applicants can demonstrate that a number of U.S. jobs will be created as a result of a proposed transaction, the Commission will consider this as part of its public interest analysis.”); Applications of Altice N.V. and Cablevision Sys. Corp. to Transfer Control of Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 4365, 4378 ¶ 27 (2016) (considering whether job cuts associated with the transaction would be a public interest harm); Applications of Frontier Communications Corp. and Verizon Communications Inc. for Assignment or Transfer of Control, *Memorandum Opinion & Order*, 30 FCC Rcd. 9812, 9825 ¶ 30 (2015) (finding that “Frontier has provided sufficient assurances that the transaction is unlikely to result in public interest harms related to loss of employment”).

<sup>59</sup> Sinclair RFI Response at 9.



purchasing original content would mean that the transaction would achieve the opposite of “increas[ing] competition for show ideas and related talent.”<sup>64</sup> Without review of Sinclair’s internal documents, it is impossible to know which is accurate: its statements to investors or its unsupported statements to the Commission.

Sinclair also claims a transaction benefit from combining newsgathering operations in markets where Sinclair and Tribune both own stations by “locating the news resources into a shared newsroom and developing distinct newscasts for each station.”<sup>65</sup> The company uses the San Antonio market as an example of how it will be “able to harness efficiencies in duopoly markets.”<sup>66</sup> It is curious that Sinclair would point to San Antonio as a success story for the development of “distinct” newscasts because, as DISH has previously noted, the broadcasts of WOAI and KABB have prompted one local commentator to write: “both stations’ Saturday and Sunday newscasts looked to be virtual carbon copies of each other. They were so similar, in fact – scripts, story order – that I had to check which station I was watching.”<sup>67</sup>

**The Purported Benefits Are Not Merger Specific.** The Commission has yet to receive any evidence that the merger’s purported benefits would be transaction specific. Tribune’s financial statements **{{BEGIN SINCLAIR HCI** **END SINCLAIR HCI}}**

For example, Sinclair expects its capital expenditures in Tribune stations to be **{{BEGIN**

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<sup>64</sup> Sinclair RFI Response at 14.

<sup>65</sup> *Id.* at 10.

<sup>66</sup> *Id.* at 10 n. 7.

<sup>67</sup> Jeanne Jakle, *Shared Anchors Latest Step at WOAI/KABB*, San Antonio Express News (Feb. 11, 2015), [http://www.mysanantonio.com/entertainment/entertainment\\_columnists/jeanne\\_jakle/article/Shared-anchors-latest-step-at-WOAI-KABB-6073752.php](http://www.mysanantonio.com/entertainment/entertainment_columnists/jeanne_jakle/article/Shared-anchors-latest-step-at-WOAI-KABB-6073752.php).

SINCLAIR HCI                      END SINCLAIR HCI}} per year.<sup>68</sup> Until when? How much of the proposed investments in Tribune stations would Tribune have made anyway? Sinclair admits that it “has no specific plans for capital investments in any particular Tribune station.”<sup>69</sup>

According to Tribune’s most recent Annual Report, Tribune spent \$59.1 million in 2016 on capital expenditures for “Television and Entertainment.”<sup>70</sup> This is {{BEGIN SINCLAIR HCI  
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**The Transaction Poses Vertical Risks to Competition.** Sinclair’s response and recent executives’ statements enhance concerns that the combined Sinclair/Tribune would compete directly with the very customers with whom it has a supply relationship today—MVPDs and OVDs. DISH welcomes competition, but competition is liable to be distorted by a new distributor that has the power to suffocate others by shutting down the oxygen of content.

Sinclair recently confirmed that it intends to compete against OVDs while simultaneously negotiating with them:

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<sup>68</sup> Sinclair RFI Response at 18.

<sup>69</sup> *Id.*

<sup>70</sup> Tribune Media Co., 2016 Annual Report, F-93 (Form 10-K) (March 1, 2017). Tribune lists capital expenditures for its “Television and Entertainment” segment, defined as Tribune’s news, entertainment, and sports programming on Tribune’s local television stations as well as content produced for WGN America. Tribune separately lists additional capital expenditures for its “Corporate and Other” segment. This category includes real estate assets and administrative expenses associated with the corporate office. In 2016, Tribune spent \$16.9 million for capital expenditures in the “Corporate and Other” category, for a total of \$76 million in capital expenditures when combined with “Television and Entertainment.” It is unclear how Sinclair defines its proposed capital spending in Sinclair stations, but to the extent that any of its proposed {{BEGIN SINCLAIR HCI  
END SINCLAIR HCI}} on Tribune includes such corporate expenses, then an apples-to-apples comparison of its plans to what Tribune spends {{BEGIN SINCLAIR HCI  
END SINCLAIR HCI}} Again, without more detail, it is impossible for the Commission to determine whether this is a merger-specific benefit.

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We're very active in this space, cutting deals with YouTube, CBS All Access, Sony Vue, DIRECTV NOW. We're in discussions with all the major [over-the-top] players. We're also active in producing our own direct-to-consumer experiences like NewsON and more to come next year. And then, of course, ATSC 3.0, for us, is the ultimate culmination of direct-to-consumer or over-the-top as it is a pipeline directly into people's TVs and devices for us to have that one-to-one relationship with our viewers.<sup>71</sup>

New Sinclair's control of its broadcast stations, together with its desire to compete against MVPDs and OVDs, would provide the company with the incentive and ability to curtail competition from newly-rival OVDs. For example, New Sinclair could foreclose access to its programming by requiring DISH's Sling TV and other OVD services to carry bundles of broadcast and non-broadcast programming that would inevitably drive up the price of these services to consumers. Or New Sinclair could simply raise the rates of its programming to supra-competitive rates as part of a scheme to use its power as a key supplier of programming to curb competition from OVDs.<sup>72</sup>

### **VII. THE COMMISSION SHOULD MAINTAIN ITS SHOT CLOCK PAUSE**

Until it receives information from the Applicants sufficient to address the concerns raised above, the Commission should not restart the paused transaction shot clock. If the additional information from the Applicants is not forthcoming, the Commission should reject the merger. Based on the incomplete record currently before it, the Commission cannot conclude that this transaction would be in the public interest.

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<sup>71</sup> Sinclair Broadcast Group Inc. at Deutsche Bank Leveraged Finance Conference, Fair Disclosure Wire (Oct. 3, 2017) ("We have all of our big fours on [YouTube]. We have Tennis Channel on that, DIRECTV NOW. We have all of our ABCs and Tennis Channel on that. In Vue, we have all of our CBSs and Foxes on Vue . . . ultimately, we see all of our channels on these distributors.").

<sup>72</sup> See DISH Petition to Deny at 43-45; DISH Reply at 44-45.

