

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

In the Matter of)

Applications of Tribune Media Company)
and Sinclair Broadcast Group For Consent to)
Transfer Control of Licenses and Authorizations)

MB Docket No. 17-179

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association (“NCTA”) files these comments in response to the supplemental information submitted by Sinclair Broadcast Group, Inc. (“Sinclair”) in the above-captioned proceeding.¹ NCTA continues to believe that without the safeguards it proposed in its Reply Comments, the transaction presents a material risk of harm to consumers and competition because of inevitable upward pressure that the combined entity’s ownership of two “top four” stations in the same market will place on retransmission consent fees.² Nothing in Sinclair’s supplemental submission addresses our concerns.

In its Reply Comments, NCTA pointed to Sinclair’s lack of specificity regarding the plans it intends to take to comply with the Commission’s local and national media ownership

¹ Sinclair Response to the Request for Information, MB Docket No. 17-179 (Oct. 5, 2017) (“Sinclair Information Request Response”). Sinclair was responding to a request from the Commission for additional information regarding its acquisition of Tribune Media Company. Letter from Michelle M. Carey, Media Bureau Chief, FCC, to Miles S. Mason, Counsel for Sinclair Broadcast Group and Mace J. Rosenstein, Counsel for Tribune Media Company, MB Docket No. 17-179 (Sept. 14, 2017) (“Media Bureau Information Request”).

² See Reply Comments of NCTA – The Internet & Television Association, MB Docket No. 17-179, at 11-19 (Aug. 29, 2017) (“NCTA Reply Comments”); see also Comments of the American Television Alliance, MB Docket No. 17-179 (Aug. 7, 2017); Petition to Dismiss or Deny of DISH Network L.L.C., MB Docket No. 17-179 (Aug. 7, 2017); Reply Comments of the American Television Alliance, MB Docket No. 17-179 (Aug. 29, 2017); Reply of DISH Network L.L.C., MB Docket No. 17-179 (Aug. 29, 2017).

rules.³ The Media Bureau Information Request similarly requested details on this critical issue. Sinclair’s response, however, was wholly non-responsive. Rather than “[d]escrib[ing] in detail and provid[ing] documents that support and demonstrate what steps, if any, the Applicants have taken or plan to take to comply with” the ownership rules,⁴ Sinclair simply indicates that it has hired Moelis & Company, an investment bank, to provide advice and assist on any potential station sales; and asserts that it is “premature” for it to consider any license divestitures at this time due to the Department of Justice’s (“DOJ”) review of the transaction and the Commission’s potential reconsideration of its ownership rules.⁵ Sinclair’s blatant refusal to provide assurance that the transaction will comply with the Commission’s ownership rules deprives the Commission of information that it needs to conduct the public interest review of the transaction required by the Communications Act.⁶ Unless and until Sinclair presents a definitive plan for complying with the rules and the public has had an adequate opportunity to review and comment on that plan, the Commission cannot approve this transaction and should immediately cease conducting its review.⁷

Sinclair asserts that it “does not currently have any plans to request permission to place stations in divestiture trusts or to seek a waiver of” the local or national ownership rules, but reserves the right to do so under unspecified circumstances “depending on the resolution of” such matters as DOJ review and Commission proceedings addressing the ownership rules.⁸

³ See NCTA Reply Comments at 17-21.

⁴ Media Bureau Information Request at 3, 4.

⁵ See Sinclair Information Request Response at 2-8.

⁶ 47 U.S.C. § 310(d).

⁷ See NCTA Reply Comments at 17-21.

⁸ Sinclair Information Request Response at 3, 8. Such empty statements are indistinguishable from the vacuous assertions in the original application that presumably prompted the Media Bureau to seek additional clarification. See *Applications of Tribune Media Co. and Sinclair Broadcast Group for Consent to Transfer Control of Licenses*

Such non-statements do not provide any basis for the public interest finding required by law. In order to warrant approval of this transaction, Sinclair must demonstrate how it will comply with the Commission’s *existing* rules, not the rules as they may be modified. In view of its past practices, moreover, Sinclair should be required to show that it will comply with existing ownership rules without surreptitiously divesting stations to sidecars that they manage and control in all respects except on paper,⁹ or by carrying multiple “top four” affiliate signals on the same broadcast station as multicast signals.¹⁰

If the Commission modifies its media ownership rules, as it recently proposed to do,¹¹ and the applicants subsequently amend their pending applications to acquire additional television stations, such amendment is the kind of “substantial” change that warrants re-noticing of the application for public comment and a renewed shot clock.¹² As a threshold matter, this proposal is not even subject to Commission vote until November 16, and because it appears to involve an “information collection” would be subject to OMB review and approval before it becomes

and Authorizations, MB Docket No. 17-179, Comprehensive Exhibit, 12, 26 (June 2017) (“[t]o the extent that there are changes, *or proposed changes*” to either the Commission’s local or national television ownership limits, applicants “may file amendments to the applications to address such changes” (emphasis added)).

⁹ As then-Commissioner Pai acknowledged, “the joint negotiation of retransmission consent agreements by separately-owned, top-four stations in the same market violates the statutory duty to negotiate in good faith” and “may result in supra-competitive increases in retransmission consent fees . . . suggest[ing] that such conduct is collusive and could be a ‘contract, combination . . . or conspiracy, in restraint of trade.’” *Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3429, Statement of Commissioner Ajit Pai (2014). Sinclair has already demonstrated its willingness to evade the Commission’s joint negotiation rules by misusing sidecar agreements. *See Sinclair Broadcast Group, Inc.*, Order, 31 FCC Rcd 8576, 8576 ¶ 4 (MB 2016).

¹⁰ *See* NCTA Reply Comments at 14-15.

¹¹ *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*, MB Docket No. 14-50, Order on Reconsideration and Notice of Proposed Rulemaking, FCC-CIRC1711-06 ¶¶ 66-85 (Oct. 26, 2017) (“*Media Ownership Circulation Order*”) (proposing to repeal the eight-voices test and revise the “top four” prohibition to include the opportunity for applicants to request a case-by-case examination of a proposed combination that would otherwise be prohibited by that prohibition).

¹² 47 C.F.R. §§ 73.3578, 73.3580.

effective—deferring the effective date well into 2018. Unless and until the effective date, the current “top four” rule continues to govern. If the Commission adopts the proposed rule and if applicants wish to take advantage of it, they must wait until the new rule becomes effective and then submit the required showing. Anything less would be a violation of the Administrative Procedures Act and the Commission’s public interest standard.¹³

As noted above, such a request must be considered a major amendment to the application, and the Commission should republish notice of the filing and restart the shot clock from the beginning to consider it. By definition, the request would propose greater consolidation and concentration of control, conferring even greater market power on Sinclair in its current and future negotiations with MVPDs, programmers, and networks. Particularly given the fact that this would likely be the first such request under the proposed “hybrid” approach to the “top four” rule, and that this initial request could have substantial market impact, the Commission must ensure that the public has sufficient time to carefully review the request and the supporting data submitted with it.

Adequate time for public and Commission review of the request is also warranted by the fact-intensive nature of the showing contemplated under the proposed case-by-case approach.¹⁴ Under this approach, the requesting parties will be required to demonstrate that the proposed combination is in the public interest—that the benefits of the proposed combination outweigh the harms—by providing such information as ratings data, revenue share data, and market characteristics.¹⁵ Such an extensive examination cannot be accomplished without the

¹³ See NCTA Reply Comments at 18.

¹⁴ See *Media Ownership Circulation Order* ¶ 81.

¹⁵ See *id.* ¶ 82.

opportunity for full public comment as well as sufficient time for the Commission to conduct a thorough review given the changed circumstances.

CONCLUSION

The proposed transaction raises serious concerns regarding its impact on consumers and competition. At every opportunity, Sinclair has resisted explaining how it plans to address these harms and also remain in compliance with the Commission's media ownership rules. The Commission therefore must, at minimum, not approve this transaction until Sinclair fully explains how it will comply with the Commission's longstanding rules and requirements. Further, if the Applicants seek to amend their pending applications given the Commission's recent proposal to modify its local television ownership rule, the Commission must republish notice of the filing and restart its shot clock in order to give the public a sufficient amount of time for notice and comment.

Respectfully submitted,

/s/ Rick Chessen

November 2, 2017

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CERTIFICATE OF SERVICE

I, Neal M. Goldberg, hereby certify that, on this 2nd day of November, 2017, I caused a copy of the foregoing *Comments of NCTA* to be filed electronically with the Commission through the ECFS system and caused a copy of the foregoing to be served upon the following individuals by electronic mail:

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