Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF THE NATIONAL CABLE TELEVISION COOPERATIVE

The National Cable Television Cooperative, Inc. ("NCTC") submits these comments on Sinclair Broadcast Group, Inc.'s ("Sinclair's") proposed acquisition of Tribune Media Company ("Tribune").[1]

INTRODUCTION AND SUMMARY

NCTC is a non-profit cooperative that represents over 800 independent cable and broadband operators, primarily midsize and small operators. Many of NCTC's members operate in rural and smaller markets, and serve older, lower-income communities. NCTC acts as a purchasing group that negotiates content distribution agreements on behalf of its members. NCTC's content agreements allow members the convenience of electing in to negotiated licensing arrangements if they are satisfied with the terms and conditions. Nearly half of NCTC's members serve fewer than 1,000 subscribers, and these members simply do not have the

[1] *See* Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose *Ex Parte* Status for the Proceeding, MB Docket No. 17-179, *Public Notice*, 32 FCC Rcd 5481 (2017); 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, *Public Notice*, MB Docket No. 17-179 (rel. Oct. 18, 2017).

resources to devote to increasingly complex and costly negotiations for content rights. NCTC effectively aggregates the subscriber counts of its members to realize transactional and other efficiencies, for both members and content providers, inherent in completing a single agreement, including centralized contracting, billing, collection, reporting and communication services.

NCTC has been negotiating content agreements for over thirty years and is well established and recognized in the industry, having negotiated master licensing agreements for hundreds of networks including agreements with all of the major cable programming network groups. NCTC historically has focused on the licensing of cable channels, but members have begun asking for NCTC's assistance in negotiating retransmission consent in light of the growing consolidation in the broadcast industry. While retransmission consent used to be a principally local matter, retransmission consent negotiations with large station groups increasingly have become national in scope. As a consequence, retransmission consent negotiations between individual NCTC members and large station groups have become significantly more challenging for the small, local companies that NCTC represents, prompting those members to seek NCTC's help.

NCTC rarely comments on FCC proceedings, and even more rarely on merger proceedings. However, in recent months NCTC attempted to negotiate a retransmission consent agreement with Sinclair, and those interactions have clearly demonstrated to NCTC that Sinclair uses its size and leverage to extract unreasonable and above-market terms through high-pressure tactics with small operators. We believe that Sinclair's approach is highly opportunistic—taking advantage of small operators in negotiations due to the enormous difference in size and the imbalance of power. If the proposed merger is approved, NCTC expects that these tactics will become even more magnified and significant. As the largest station group owner, Sinclair will drive a trend in the market for retransmission consent negotiations that is extremely discriminatory to smaller operators, rural markets and, ultimately, harmful to the consumers served by those operators.

In NCTC's experience, Sinclair's negotiating posture constitutes a blatant example of a broadcaster demanding unreasonable terms and conditions simply because it can, due to its size and leverage. During these negotiations, Sinclair has not demonstrated any genuine regard for small operators, local communities, or consumers. Sinclair's unreasonable demands have motivated NCTC to submit these comments in order to provide the Commission with a real-time perspective on Sinclair's conduct and the risks created by the proposed transaction.

DISCUSSION

I. Sinclair Already Exploits the Retransmission Consent Rules and Harms Distributors and Consumers

The record in this proceeding reveals the widespread view that Sinclair traditionally has employed unusually aggressive negotiating tactics in a manner that repeatedly has harmed consumers.[2] Having recently engaged in retransmission consent negotiations with Sinclair, NCTC understands why those views persist. Sinclair's demands have not merely been aggressive; they have been extraordinarily excessive and unreasonable. We believe that Sinclair has continued to escalate its aggressiveness in dealing with small operators during each successive negotiation cycle. In the current negotiations, Sinclair adopted an air of confidence

[2] *See, e.g.*, Petition to Deny of DISH LLC, MB Docket No. 17-79, at 14-35, 65-68 (filed Aug. 7, 2017) ("DISH Petition") ("In DISH's experience, Sinclair exceeds industry norms in the aggressiveness of its negotiating tactics."); Petition to Deny of Competitive Carriers Association, MB Docket No. 17-179, at 21-25 (filed Aug. 7, 2017) ("CCA Petition") (noting Sinclair's track record of "abusive negotiating tactics to secure exorbitant retransmission fees" including blacking out 129 stations during its retransmission dispute with DISH and receiving a $9.4 million fine for failing to negotiate in good faith); *see also* Petition to Deny of NTCA—The Rural Broadband Association, MB Docket No. 17-179, at 4-7 (filed Aug. 9, 2017); Petition to Deny of Public Knowledge, Common Cause, and United Church of Christ, OC Inc., MB Docket No. 17-179, at 7-9 (filed Aug. 7, 2017) ("PK Petition"); Petition to Deny of American Cable Association, MB Docket No. 17-179, at 11-18 (filed Aug. 7, 2017).

that the merger will be approved, empowering it to ratchet up its aggressive, discriminatory approach to smaller cable operators, including leveraging assets they have not yet purchased.

A. Sinclair Has Made Persistently Unreasonable Demands in its Retransmission Consent Negotiations with NCTC

As an initial matter, Sinclair demanded significantly inflated rates and has not yet brought those rates anywhere close to market levels despite repeated negotiations. In addition to inflated rates, Sinclair made other demands that unfairly exploit the retransmission consent process, including excessive carriage requirements and cost implications for cable networks they own or will own if the Tribune merger closes. When NCTC did not accept these unreasonable rates and terms, Sinclair broke off negotiations with NCTC and imposed worse terms on members via individually proposed agreements. Just prior to this filing, Sinclair made a limited gesture to re-engage with the NCTC.

B. Sinclair Has Employed Coercive Tactics with NCTC Members

After walking away from NCTC, Sinclair pursued individual deals with NCTC's members. Members have informed NCTC that Sinclair provided them with a fully drafted retransmission consent agreement and an agreement for Tennis Channel, Sinclair's cable network, with a unilateral "take it or leave it" offer and a fifteen day clock to sign, as is, both agreements. Members report that Sinclair has made it clear that an attempt to negotiate any term of the agreements will automatically be met with much higher rates and may result in the member not even being entitled to Sinclair's "standard" rates, whatever those may be. While the "good faith" rules historically have not proven to provide significant constraints on broadcasters' conduct, Sinclair's tactics ignore even those minimal requirements.[3] Sinclair's strategy appears

[3] *Cf.* DISH Petition at 65-67 ("Sinclair's representatives went so far as to tacitly acknowledge that their tactics would violate the 'good faith' regulations, but nevertheless insisted that DISH either accept

to be an open attempt to evade the prohibition on offering a "single, unilateral proposal" by simply making such a unilateral proposal and then tacking on a subsequent offer to "negotiate" for exorbitant, supra-competitive rates.[4]

Sinclair's approach effectively penalizes small cable operators for making *any* attempt to push back against some of Sinclair's most aggressive demands. Because of Sinclair's tactics, a small operator that rejects even one term in the pre-drafted agreement faces even higher rates. The result is that small operators, serving rural and lower-income communities, face the prospect of unusually high rates and onerous conditions for carrying Sinclair's local broadcast channels, and these operators will be forced to carry cable content such as Tennis Channel that customers have not requested—all with a prospect of blackouts if they do not accede to Sinclair's demands.

Sinclair likely could not secure the same level of rates from large multichannel video programming distributors ("MVPDs"), and indeed Sinclair has acknowledged that it pushes for the highest fees possible from small operators to offset any lower fees negotiated by large MVPDs. Sinclair has also used the threat of blackouts with small operators, knowing that the loss would be greater to the operator than it would be to Sinclair. Sinclair thus has no apparent incentive or willingness to offer reasonable rates or other terms and conditions to small cable operators.

Sinclair has also demanded that members continue to pay retransmission consent fees even in the event that the Sinclair station in their Designated Market Area loses its affiliation with a "big four" network. Being forced to pay retransmission consent fees, albeit at a lower rate, even if a station subsequently loses its big four affiliation effectively requires NCTC

Sinclair's demands on behalf of unaffiliated stations or agree to suspend all negotiations for one year" in a 2015 dispute that led to a $9.4 million fine).

[4] 47 C.F.R. § 76.65(b)(1)(iv).

members to agree in advance to pay retransmission consent fees without knowing anything about the station's content, and therefore without knowing anything about the value of that content.

Based on NCTC's decades of experience in hundreds of negotiations, Sinclair's conduct has gone far beyond merely aggressive bargaining and has constituted an exploitation of the retransmission consent rules. Sinclair's actions with respect to individual small operators have been excessively abusive. Sinclair's negotiations do not reflect consideration for the small operators who are the target of its coercive tactics, or for the consumers—including the many lower-income consumers served by NCTC members—who will be harmed by rapidly escalating fees.

II. The Combination of Sinclair and Tribune Would Magnify the Risk of Harms to MVPDs and Consumers

NCTC is concerned that Sinclair's conduct in retransmission consent negotiations already is contrary to the public interest, and that the combination of Sinclair and Tribune would exacerbate the risk of harms to small operators and consumers. Combining Sinclair with Tribune will create an entity with an audience reach of over 70 percent of television households and multiple stations in over 40 markets.[5] Sinclair already leads the nation in using blackouts to squeeze higher fees from consumers, and in NCTC's view, this transaction will give the combined entity substantially greater leverage in programming negotiations.

There can be little question that the result of the transaction will be higher prices for MVPDs, and ultimately their customers. Sinclair has persistently demonstrated a willingness and ability to use its market power to extract above-market rates, and the combination will aggravate the problem. The dramatic increase in retransmission consent fees in recent years has

[5] *See* Reply Comments of NCTA – The Internet & Television Association, MB Docket No. 17-179, at 1 (filed Aug. 29, 2017) ("NCTA Reply"); *id.* (noting the combined entity will have the largest number of Fox, ABC, CW, and MyNetwork affiliates of any group owners of broadcast stations, giving it "substantial market power").

already reached an unsustainable level[6]; the combined entity will push those fees even higher. Sinclair's own executives have openly acknowledged that driving up retransmission consent fees is the largest "revenue synergy" that they see from this transaction,[7] and indeed after-acquired station provisions in retransmission consent agreements would make those price increases immediate. These "revenue synergies" in the form of increased prices are an implicit acknowledgment that the transaction will enhance Sinclair's market power and enable it to charge supra-competitive retransmission consent rates. It is difficult to see how that purported "benefit" is in the public interest or creates any actual value for consumers. It is telling that even with a pending transaction and pending review by the Commission and Department of Justice, Sinclair has continued to push unreasonable demands for some of the highest fees in the industry and engaged in other highly questionable conduct in the course of negotiations.

The combined entity also will have greater leverage to tie non-broadcast stations to retransmission consent negotiations, as Sinclair demonstrated with its efforts to tie not only the unwanted Tennis Channel to its retransmission consent negotiations, but also to begin making demands regarding WGN America, which is not even yet owned by Sinclair. Sinclair also has been willing to use the prospect of blackouts, and a corresponding risk of lost subscribers, as a negotiating tactic. Sinclair in effect is using the threat of consumer harm as a tool to extract high rates, with little regard to what outcome actually is best for viewers. The transaction will

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6 According to SNL Kagan, retransmission consent fees rose from negligible levels in 2005 to $7.7 billion in 2016, and are estimated to reach $11.6 billion in 2022. *See* Mike Farrell, *Kagan: Retrans Fees to Reach $11.6b by 2022*, MULTICHANNEL NEWS, June 29, 2016, http://www.multichannel.com/news/networks/kagan-retrans-fees-reach-116b-2022/406026.

7 *See, e.g.*, CCA Petition at 21-25 (noting Sinclair CEO Christopher Ripley's own assertion that "the largest [synergy] bucket" of the Transaction is "on the net retrans side."); *see also See* Diana Marszalek, *Sinclair, Tribune CEOs Push Advantage of Sizing Up*, BROADCASTING & CABLE, May 22, 2017, http://www.broadcastingcable.com/news/local-tv/sinclair-tribune-ceos-push-advantage-sizing/166006 (senior Sinclair executive boasting that the transaction will enable Sinclair to "gain an edge in negotiating with [MVPDs]" and Sinclair will "immediate[ly]" raise Tribune's retransmission consent fees to Sinclair's rates).

substantially increase Sinclair's ability to pursue such brinksmanship tactics and will increase the risk of harm to consumers from blackouts.[8]

While these anticompetitive effects will harm the entire industry, they would disproportionately harm small and midsized MVPDs and their customers, many of which are in rural, older, and lower-income markets. Small operators will be forced to negotiate individually against a much larger conglomerate that treats these negotiations as a cash-grab rather than an effort to serve local communities. That dynamic will become much worse after the proposed transaction since Sinclair will be present in more markets (and with more stations in some markets). As a result, the transaction effectively would establish a tax on rural America and small businesses.

In addition, NCTC's members, as small and midsized operators, have unusually strong ties to their local communities. Unlike large cable operators with systems across the country, NCTC's members are especially dedicated to connecting with each local community that they serve. In light of that local focus, NCTC is concerned about Sinclair's efforts to replace genuinely local news coverage with more national content that is far less tied to local, more rural communities. Sinclair claims that "a wide geographic footprint is critical for broadcast television to provide high quality general interest and entertainment programming…"[9] For NCTC's members, local broadcasters traditionally have been partners in serving local communities, and the notion of pursuing a national footprint in order to provide national broadcast programing is inconsistent with that commitment to localism. Sinclair claims that it will combine national programming with locally-focused programming, but the record establishes that Sinclair's

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8 *See*, *e.g.*, DISH Petition, Declaration of Dr. Janusz A. Ordover; NCTA Reply at 6-7; PK Petition at 8-9.

9 Responses of Sinclair Broadcast Group, Inc. to FCC Request for Information, MB Docket No. 17-179, at 12 (filed Oct. 5, 2017).

historical track record with respect to its investment in local programming is poor.[10] The acquisition of Tribune would carry that dynamic to far more stations and markets, and would harm consumers in the local communities that NCTC's members serve.

CONCLUSION

In light of these concerns, NCTC strongly urges the Commission to consider steps that would ameliorate the harms that NCTC and its members have experienced, and to prevent those harms from magnifying with a combined Sinclair/Tribune. In particular, NCTC is concerned that the burdens of this transaction will fall disproportionately on the small MVPDs that serve rural America and smaller, lower-income communities. A national conglomerate with Sinclair and Tribune's combined leverage negotiating against a small operator with 1,000 subscribers is not a fair fight. The result will be soaring fees and increased risk of blackouts, with consumers ultimately suffering the consequences. In NCTC's view, the transaction as currently proposed would create a net negative outcome for consumers, local communities, and the public interest.

Respectfully submitted,

/s/ Rich Fickle

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10 *See, e.g.*, Dish Petition at 46-56; CCA Petition at 27-29; Petition to Deny of Free Press, MB Docket No. 17-179, at 20-26 (filed Aug. 7, 2017); Reply Comments of Public Knowledge, MB Docket No. 17-179, at 4 (filed Aug. 29, 2017).

CERTIFICATE OF SERVICE

I, Rich Fickle, hereby certify that, on November 2, 2017, I caused a copy of the foregoing Comments of the National Cable Television Cooperative to be filed electronically with the Commission via the ECFS system and caused a copy to be served upon the following individuals by electronic mail.

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