

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

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In re Applications of)
)
Allbritton Communications Co., for Consent to Transfer of) MB Docket No. 13-203
Control of WJLA-TV, Washington, DC, to Sinclair Television) BTCCDT-20130809ACD
Group, Inc.)
)
WRGT Licensee, LLC, for Assignment of License of) BALCT-20031107AAU
WRGT-TV, Dayton, Ohio, to WRG T Licensee, LLC)
(New Nevada LLC))
)
et al.) BALCT-20031107ABB
) BALCT-20031107ABM
) BTCCT-20031107AAF
) BTCCT-20031107AAP

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TO THE COMMISSION

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

The Rainbow PUSH Coalition respectfully replies to the September 9, 2014 Opposition to Application for Review ("Opposition") filed by Sinclair Television Group, Inc.

The facts could not be more straightforward. In 1991, Sinclair established a sham company, Glencairn Ltd., to own television stations Sinclair was not permitted to own under the multiple ownership rules, and to bamboozle the Commission into granting a minority tax certificate.¹ Rainbow PUSH challenged this arrangement in 1999. Two years later, in *Glencairn, Ltd.*, the Commission found that Sinclair unlawfully controlled Glencairn, and fined Sinclair and its controlled company \$40,000 each.²

Then, in an extraordinary case of nose-thumbing at the agency, Sinclair immediately established an *even more* closely controlled sham company, Cunningham Broadcasting,³ and

¹ See Petition to Deny, BALCT-20031107AAU, *et al.*, at 5-15 (Dec. 19, 2003) ("Rainbow PUSH 2003 Petition to Deny"); see also Petition to Deny BALCT-20020718ABH, *et al.*, at 13-33 (August 21, 2002) ("Rainbow PUSH 2002 Petition to Deny").

² *Glencairn Ltd.*, 16 FCC Rcd 22236 (2001), *aff'd without reaching the merits in Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539 (D.C. Cir. 2003), *rehearing denied*, 2003 U.S. Lexis 18829 (Sept. 10, 2003).

³ Glencairn's CEO was, at least, an experienced broadcast executive and not a family member of the Sinclair control group. Cunningham was placed in the name of Carolyn Smith, a close relative of the Sinclair control group who had no operating knowledge of broadcasting or any other business, had no ability to balance a checkbook, worked for Sinclair herself (in the mailroom), employed as Cunningham's President the only person in the nation who a judge had ever found to be controlled

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operated Cunningham as though *Glencairn, Ltd.* had never been decided. To this day, Sinclair has yet to point to a single decision Cunningham has ever made that was in its own interest rather than Sinclair's interest.

Rainbow PUSH first challenged the Sinclair-Cunningham arrangement in 2002,⁴ and the following year Rainbow PUSH again challenged the Sinclair-Cunningham arrangement by petitioning to deny the 2003 applications that are captioned above.⁵ Rainbow PUSH's contention was very clear: Sinclair had proven itself to be a serial recidivist and, if the Commission's enforcement program is to have any deterrent effect at all, the Commission must designate the applications for hearing under Section 309(e) of the Communications Act.⁶ Under well-established precedent governing ownership fraud cases, designation for hearing should have been routine.⁷

Instead, in 2004 the Bureau issued a cursory decision that ignored most of Rainbow PUSH's allegations.⁸ Rather than apply for review of a facially incomplete decision, Rainbow PUSH sought reconsideration,⁹ whereupon the Bureau waited *ten more years* before, at last, ruling on the underlying allegations¹⁰ – doing so only when it was faced with a petition to deny filed against a must-rule multibillion-dollar merger.¹¹

And what kind of ruling did the Bureau finally produce? A ruling that appears to mean that because the Commission in 2001 only *fined* Sinclair and did not revoke its licenses, Sinclair was entitled to believe that its conduct was lawful and could even be made more egregious.¹²

by Sinclair, and made every major decision in Sinclair's interest rather than Cunningham's interest. See Rainbow PUSH 2003 Petition to Deny at 4-14.

⁴ See Rainbow PUSH 2002 Petition to Deny. Sinclair voluntarily dismissed the 2002 applications.

⁵ See Rainbow PUSH 2003 Petition to Deny at 4-7.

⁶ *Id.*

⁷ See, e.g., *Trinity Broadcasting of Florida, Inc. (HDO)*, 8 FCC Rcd 2475 (1993).

⁸ *Kathryn R. Schmeltzer, Esq.*, Letter, 19 FCC Rcd 3897, 3899-3900 (2004).

⁹ Rainbow PUSH Petition for Reconsideration, BALCT-20031107AAU *et al.* (March 29, 2004) ("Rainbow PUSH 2004 Petition for Reconsideration") at 5-10 (detailing extensive evidence, ignored by the Bureau, that showed how Sinclair controls Cunningham).

¹⁰ *Allbritton Communications Co.*, MB Docket No. 13-203, DA 14-1055 (Media Bureau, released July 24, 2014) ("*Allbritton*").

¹¹ Rainbow PUSH Petition to Deny Application for Transfer of Control of WJLA-TV, Washington, DC, BTCCDT-20130809ACD (Sept. 13, 2013) (Rainbow PUSH 2013 Petition to Deny"). Who knows how much longer Rainbow PUSH would have to wait had it not forced the issue by challenging the WJLA-TV assignment application.

¹² *Allbritton* at 11 ¶32, asserting that "Sinclair's 2002-2003 behavior "had been favorably reviewed by the Commission in *Glencairn Ltd.*"

This turn of events is nothing less than stunning. Of course the Commission in *Glencairn Ltd.* gave Sinclair no dispensation to continue to break the law. Instead, in *Glencairn, Ltd.* the Commission yielded up a scathing analysis of Sinclair's control of every element of Glencairn, and imposed a substantial forfeiture.¹³

Suffice it to say that the *Allbritton* decision was not the Bureau's finest hour. Due to the decision's extreme tardiness and inherent illogic, as well as the stakes involved as the Commission restores meaningful structural enforcement, the Commission should review the entire record *de novo*. Indeed, it should strike the Commission as rather disturbing that, under six successive chairmanships, a bureau failed to act on extensive and thoroughly pled allegations, by the nation's pre-eminent social justice organization, to the effect that the nation's largest broadcast licensee has perpetrated a fraud on the public for 23 years.¹⁴

What does Sinclair have to say about all of this? It says that:

1. Rainbow PUSH "has not raised any new issues that were not already fully considered by the Media Bureau." Opposition at 2. That's true. A party is not permitted to raise new issues in an application for review.¹⁵
2. The Bureau has ruled on "all of the allegations." Opposition at 3. Yes, at last. But not rationally. Ratification of recidivism is not a credible ruling.
3. Rainbow PUSH "simply can't take no for an answer." Opposition at 2.¹⁶ True again. A party is not expected to abandon its case simply because a decision-maker has failed to issue a ruling. American tribunals do not practice adjudication by pocket veto.
4. Rainbow PUSH's contention that Sinclair controls Cunningham is "without any factual support." Opposition at 2. *But see* the Rainbow PUSH 2003 Petition to Deny at 4-14

¹³ See *Glencairn Ltd.*, 16 FCC Rcd at 22249-50 ¶¶23-24.

¹⁴ See Rainbow PUSH 2013 Petition to Deny at 3 n. 13 for several examples of long-delayed action on social justice cases. Fortunately, the Commission has not hesitated to grapple with long-ignored major policy issues when its staff has failed interminably to act upon them. See, e.g., *Statement of Acting Chairwoman Mignon Clyburn, re: Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375 (FCC 13-113, released Sept. 26, 2013).

¹⁵ 47 C.F.R. §1.115(c).

¹⁶ Sinclair also makes the strange and baseless suggestion that Rainbow PUSH was awaiting "a change in political winds at the Commission." Sinclair has forgotten that the Bureau, not Rainbow PUSH, locked the case down for a decade. For its part, Rainbow PUSH brought the allegations during the Powell administration and tried to secure a ruling during the Martin administration (see Petition to Deny Application for Assignment of License of WNAB-TV, Nashville, TN, File No. BALCT-20050721ABW (August 25, 2005)). Sinclair's suggestion that the current commissioners would consider "political" factors in ruling on a media ownership fraud case is unfortunate and irresponsible.

(providing massive factual support). Sinclair's grip on Cunningham is far more constricted than the typical "sidecar" arrangements involving law abiding group owners.¹⁷

5. The record is "absurdly out of date" inasmuch as Carolyn Smith, who Sinclair installed to supposedly manage Cunningham in 2001, is now deceased. Opposition at 2-3. That is not relevant to whether disqualifying misconduct must be adjudicated – especially since there never came a time when Sinclair decided to acknowledge its misconduct and bring Cunningham's operation into compliance with the law. In any event, Rainbow PUSH cannot be blamed for the incompleteness of the record, since Rainbow PUSH has no access to Sinclair's internal records.¹⁸ At a hearing, the record can be brought up to date.
6. In recent years "Sinclair has acquired dozens of television stations in multiple transactions, all with the full consent of the Commission." Opposition at 4. That is correct, although this does not reflect well on the agency. On *four* occasions, Rainbow PUSH has sought a *Grayson* determination,¹⁹ but the Bureau ignored every one of these requests and continued to permit Sinclair and Cunningham to acquire more and more stations - with no regard for whether Sinclair or Cunningham had the character qualifications to own any of them.
7. Finally, Sinclair suggests that the WJLA-TV transaction is not well suited as a vehicle for the Commission to address the Cunningham allegations, since Cunningham is not a party to the transaction. Opposition at 4-5. However, as Rev. Steven Smith stated in his Declaration accompanying Rainbow PUSH's 2013 Petition to Deny:²⁰

¹⁷ See Derek Turner, *Cease to Resist: How the FCC's Failure to Enforce its Rules Created a New Wave of Media Consolidation*, Free Press (October 2013), at 4-5 ("Sinclair owns all the non-license assets of the stations it runs under LMAs and SSAs. Sinclair houses the operations of these stations in its own facilities (and Cunningham's 'corporate headquarters' are located in a Sinclair-owned station). Sinclair sells all the ad time for these stations. Sinclair is paid the overwhelming majority of revenues these stations earn. Sinclair produces all local content these stations air. These owners in name all have agreements with Sinclair that only it can purchase these stations"); Keach Hagey, Sinclair Draws Scrutiny Over Growth Tactic: TV-Station King Uses "Sidecars" to Skirt Ownership Limits, *The Wall Street Journal*, October 20, 2013 (documenting how, in Columbus, OH, Sinclair programs and operates three stations (including one licensed to Cunningham), and how, after Cunningham's former principal Carolyn Smith passed away, she was replaced by a former Sinclair banker; and explains how Sinclair exercises a stranglehold on Cunningham by financing its operations and owning most of its assets needed for broadcasting.)

¹⁸ In such a case, the Commission is expected either to designate for hearing or make appropriate pre-designation discovery available. See *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 595 F.2d 621, 629-30 (D.C. Cir. 1978).

¹⁹ In *Grayson Enterprises, Inc.*, 79 FCC2d 936, 940 (1980) ("*Grayson*"), modified in *Transferability of Licenses*, 53 RR2d 126 (1983), the Commission established a test under which applications of co-owned stations by an entity designated for hearing will also be designated for hearing or held abeyance pending the outcome of the hearing). Rainbow PUSH requested a *Grayson* Determination in its 2002 Petition to Deny (at 35 n. 95), its 2003 Petition to Deny (at 15), its 2004 Petition for Reconsideration (at 10), and its 2013 Petition to Deny (at 7). The Bureau ignored all four requests.

²⁰ Declaration of Rev. Steven Smith, Sept. 13, 2013 (appended to the Rainbow PUSH 2013 Petition to Deny).

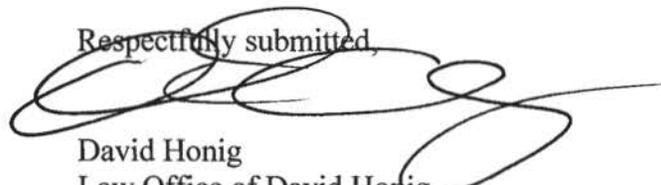
Sinclair has engaged in a host of practices that call into question its credibility and trustworthiness as a source of information. Sinclair's ownership or potential ownership of WJLA-TV would diminish my ability to rely with confidence on the accuracy and reliability of WJLA-TV's local programming, particularly including the station's news, which I have watched for decades and which I trust in great measure because its owner, Allbritton, has an unimpeachable reputation for transparency and lawful dealing.

Already there are indications that Sinclair is operating WJLA-TV in exactly the manner Rev. Smith predicted.²¹ Since the character impact of a group owner's broadcast stewardship is seldom cabined to a particular station or market, the Commission has not hesitated to designate any currently pending broadcast application for hearing on a licensee's basic qualifications.²²

What jumps out of the Opposition is that Sinclair has neither remorse nor a defense.

Critically, Sinclair has failed to identify any decisions by its captive entities that were in their interests rather than in Sinclair's interests. Sinclair has had 23 years to make this essential showing. Since it has failed to do so yet again, the Commission should designate for hearing.

Respectfully submitted,



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September 23, 2014

²¹ Paul Farhi, "Under new ownership, WJLA-TV takes a slight turn to the right," *Washington Post*, Sept. 16, 2014) ("[WJLA-TV News] staffers say some of the stories ordered by Sinclair on a 'must-run' basis don't meet the station's long tradition of non-partisan reporting... [and] were alarmed last month by comments made by [Sinclair CEO] David Smith in an introductory staff meeting. According to several employees, Smith repeatedly said the station's newsroom would 'work for' its advertising-sales department. The station surprised and disappointed some employees, who said newsroom decisions had been independent of advertising concerns under Allbritton's managementThe apparent blending of news and advertising has been evident in some parts of the station's newscasts." (Other portions of this account, about political leanings, are irrelevant.) So much for Sinclair's promise that it "will provide a broadcast and news service [no] less exemplary than Allbritton has provided." Sinclair Consolidated Opposition to Petitions to Deny, MB Docket No. 13-203 (Sinclair/Allbritton Merger) (Sept. 26, 2013) at 19.

²² See, e.g., *Trinity Broadcasting of Florida, Inc. (HDO)*, *supra* (designating a Miami, FL renewal application for hearing to consider allegations initially raised in a petition to deny an assignment application for a station in Wilmington, DE).

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 23rd day of September, 2014, caused a copy of the foregoing "Reply to Opposition to Petition for Review" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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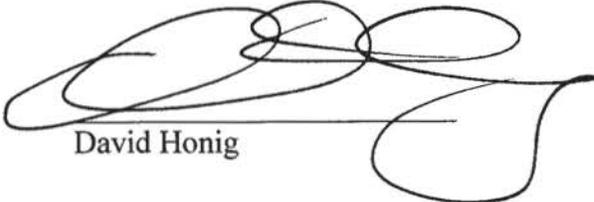
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