

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

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 WRGB Licensee, LLC)
(New Nevada LLC))
)
Accepted/Files) BALCT-20031107ABB
DOCKET FILE COPY ORIGINAL) BALCT-20031107ABM
NOV - 4 2014) BTCCT-20031107AAF
Federal Communications Commission) BTCCT-20031107AAP
Office of the Secretary

et al.

TO THE COMMISSION

REPLY TO RESPONSE

The Rainbow PUSH Coalition respectfully replies to the October 20, 2014 “Response to Reply of Rainbow PUSH Coalition” (“Response”) filed by Sinclair Television Group, Inc. Sinclair’s pleading is yet another step in its years-long campaign to intimidate and oppress public commenters who oppose its business practices. Although the Response is unauthorized, it should be considered because it contains very clear evidence of the lawless state of mind that has led Sinclair to create multiple sham operations throughout the past 24 years.

Sinclair claims to be offended that Rainbow PUSH characterized Cunningham Broadcasting as a “sham company” and accused Sinclair, through recidivism in the wake of *Glencairn, Ltd.*,¹ of “nose thumbing at the agency.” Rainbow PUSH stands by those characterizations. Rather than being “potentially defamatory” or “hysterical,” they are accurate assessments of Sinclair’s behavior based on the evidence of record. Such behavior is intolerable, as the FCC’s modern-day Ben Cardozo eloquently put it:²

¹ *Glencairn Ltd.*, 16 FCC Rcd 22236 (2001) (“*Glencairn*”), *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).

² *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4088 ¶8 (Rev. Bd., by Member Norman Blumenthal, 1988).

The Commission's application processes are currently plagued with fraudulent applications where in the real-parties-in-interest contrive to artificially structure an applicant entity around so-called principals who are, in fact, no more than false fronts interposed solely to increase that applicant's chances to prevail Unless sham applicants are stoutly rebuffed, the very fabric of the Commission's licensing process will be irreparably rent, and our broadcast license rolls reduced to a shabby sodality of frauds, mountebanks, and sundry speculators of the very lowest echelon.

Rainbow PUSH has long wondered why a large, closely regulated, public company would decide to create Cunningham Broadcasting – an even more egregious front operation than its previous one, Glencairn Ltd. Thanks to the Response, now we know. The reason Sinclair felt it could get away with its scheme is that Sinclair does not believe that the \$40,000 it was fined in *Glencairn* was really a “substantial forfeiture.”³ (!) In a frankly stunning admission, Sinclair states:

Sinclair disagreed with the Commission's conclusions in 2001, but chose to pay the fine simply because it was cheaper to pay the fine than to contest it.⁴

Let that percolate a moment.

Seldom, if ever, is so brazen a statement of disrespect for a tribunal made in writing by a public company. Sinclair is laughing in the face of a federal regulatory agency, saying that the agency's miserable \$40,000 forfeiture was so inconsequential that it was just a cost of doing business. Evidently Sinclair regards a forfeiture that small as a light slap on the wrist beckoning the company to continue and even expand upon its unlawful scheme. Sinclair is saying “we are above the law and we laugh at your pitiful, too-small-to-matter \$40,000 forfeiture orders.”

To fully appreciate what Sinclair is saying here, let's suppose a motorist was called into traffic court for a second speeding arrest - following an initial incident under which he had retained his driver's license but was fined \$40. Now suppose this motorist tells the judge, “Your Honor, you should disregard this second incident because the \$40 you fined me was not a substantial forfeiture. I chose to pay the fine simply because it was cheaper to pay it than to contest it.” Any judge in the

³ Response at 2.

⁴ *Id.*

nation would not only suspend the motorist's driver's license, he would hold the motorist in contempt and probably give him 30 days in jail to ponder the rule of law.

Thanks to Sinclair's Response, we know that Sinclair would be doing even more than just mocking the tribunal if it were brought before that judge: Sinclair would be trying to revise and contest the facts of its first arrest. We know this because, in its Response, Sinclair actually attempts to reopen, rearrange and revise the core conclusion of *Glencairn*. Sinclair now says that "the entire fine" was the result of "a mistake made by [Glencairn President Edwin Edwards] in describing a station acquisition, a mistake in recalling *details* that could be made by any senior executive who relies on *employees and advisors* to complete transactions."⁵

Let's carefully parse this attempt to rewrite history, because it reveals so clearly why Sinclair will never reform itself and is unqualified to hold a broadcast license.

First, let's play back slowly what Sinclair is saying here about Mr. Edwards' blissful unawareness, as expressed in a written document Edwards signed - of the price of the station "his" company was buying. A commercial medium market television station's \$80 million price tag is just a "detail," under Sinclair's reading of history. And not knowing the price of the station was just a "mistake" that "could be made by "any senior executive" who "relies on employees and advisors to complete transactions."

Every element of Sinclair's historical revisionism is wrong. The price of the station - was it \$40.5M? \$80M? Who cares? - is never a mere "detail." Not knowing something so fundamental is never a silly "mistake." Rather, it is, and was correctly and unanimously found in *Glencairn* to be, a textbook example of what happens when a front man, in Sinclair's own words, "relies on employees and advisors to complete transactions." Math was just too hard for Mr. Edwards. How could he be expected to know the price "his" company was paying when he was surrounded and distracted by all those Sinclair-approved "employees and advisors" he "relie[d] on"?

⁵ *Id.* at 3 (emphasis supplied).

Recall, further, that in *Glencairn* there were two fines of \$40,000 each. Certainly Edwards' station price ignorance figured in the fine against Glencairn. But the other \$40,000 fine – which was levied against Sinclair - had nothing to do with Edwards' "mistake." The Commission fined Sinclair because "a combination of facts" led to the conclusion that Sinclair exercised *de facto* control of Glencairn, including, *inter alia*, "the structuring of the Sullivan III transaction to allow Sinclair to pay almost all of the purchase price of the Sullivan III stations and Glencairn to obtain these stations at a small fraction of their value"; the creation of a "debtor-creditor relationship between Glencairn and Sinclair" and Glencairn's agreement "to sell all but two of Glencairn's television stations to Sinclair immediately following adoption of the new multiple ownership rules" for "a small fraction of their value." This "combination of facts" meant that "Edwards was not in control of Glencairn and passively permitted *Sinclair to dictate the terms and conditions of the deal.*"⁶

Sinclair had every opportunity – and certainly had the ability and requisite litigiousness - to contest the forfeiture, or to appeal it to court. But Sinclair chose not to do so. Thus, although Sinclair apparently thought \$40,000 was so trivial that it was a license to continue its scheme, Sinclair is still bound by the Commission's findings in *Glencairn*. Sinclair should not be heard now, 13 years later, to play the historical revisionist and contend that the Commission's unanimous and damning 2001 findings were wrong.

Sinclair is not done, though. It also objects to Rainbow PUSH's assertion that Ms. Smith had no operating knowledge of broadcasting, believing this to be "totally unsupported" and "wholly irrelevant."⁷ It is neither. Credible and un rebutted evidence in the record showed that Ms. Smith had never held a broadcasting job, nor did she have any education in the field.⁸ Although ostensibly

⁶ See *Glencairn*, 16 FCC Rcd at 22249-50 ¶¶23-24 (emphasis supplied).

⁷ Response at 3.

⁸ See discussion and sources cited in Rainbow PUSH Reply to Opposition to Supplement to Petition for Reconsideration (April 14, 2005) ("Reply Opp. Supp. Recon.") Sinclair also claims that Rainbow PUSH's assertion that Carolyn Smith "had no ability to balance a checkbook" was "sexist

the head of the largest female-owned broadcast company in America, Mrs. Smith was never reported to have issued a statement, given a speech, joined an organization, served on an industry board or committee, conferred or accepted an award, or performed a single worthy function that any executive in as sociable a field as broadcasting would normally do. She didn't do these things because she didn't exercise control in any meaningful sense of the word. Among the first steps Ms. Smith took upon being made President of Cunningham were to (1) fire Glencairn's law firm and engage Sinclair's law firm in its place; (2) bring in a former President of Sinclair to be president of Cunningham – the only person in the world ever found by a court to be controlled by Sinclair; and (3) arrange to sell stations exclusively to Sinclair and for only about 10% of their value.⁹

Sinclair is also wrong in suggesting that Ms. Smith's lack of day-to-day knowledge of broadcasting is "irrelevant" because broadcast investor Warren Buffett lacks such knowledge too.¹⁰ While having day-to-day knowledge of broadcasting is one factor relevant to whether a party exercises control of a station, the far more critical factor is whether a party ever renders decisions that are in her own company's interest rather than the other party's interest. Warren Buffett surely makes decisions in his own economic interest, and he hires television station managers who will do that for him. On the other hand, in 13 years Sinclair has not offered even one example of a decision Mrs. Smith (or her successors) made that was in Cunningham's interest rather than Sinclair's

and beneath contempt." Response at 2. This is silly posturing inasmuch as this assertion was untethered to Ms. Smith's gender. A witness and former Sinclair insider, David Williams, with personal knowledge of the facts, provided the information. *See* Statement of David Williams, April 13, 2005 (attached to the Reply Opp. Supp. Recon.) (It does not speak well of the Bureau's two decisions that they never mentioned Rainbow PUSH's key witness or even that Rainbow PUSH had a key witness.)

⁹ *See* Rainbow PUSH 2003 Petition to Deny (December 19, 2003) at 22-30, discussed in Rainbow PUSH's Reply to Oppositions to Petition to Deny (January 28, 2004) at 4-5. Cunningham's defense was that the price of these transactions don't matter because Cunningham is not publicly traded and thus owes no fiduciary duty to shareholders. (!) Cunningham Opposition to Petition to Deny (January 16, 2004) at 8. The Bureau's decisions in this case do not address this - and most other - critical points that overwhelmingly demonstrate Sinclair's domination of Cunningham. *See* Rainbow PUSH Petition for Reconsideration, and for Other Relief (March 29, 2004) at 2, 6-9.

¹⁰ Response at 3 and n. 2.

interest. Sinclair has provided not even one example of a purpose fulfilled by Cunningham other than to hold broadcast licenses Sinclair is not allowed to hold, and to operate those stations in Sinclair's interest and to its satisfaction. In response to this core question, Sinclair has demurred since it first created Glencairn in 1991. But in FCC practice there is no such thing as a demurrer.¹¹ Rather, a party – especially a television licensee that has complete and exclusive access to nearly all of the facts needed to determine its qualifications – is expected to be forthcoming and answer critical questions. And there is no more critical question than “what were the decisions Cunningham's putative executives made, and in whose interest were they made?”

Yes, it is true that the *Glencairn* decision found Sinclair to have the “qualifications to be a Commission licensee”, as Sinclair puts it.¹² But what *Glencairn* did not do was authorize Sinclair to continue and worsen the same pattern of misconduct that led to *Glencairn*. Sinclair is saying that since there was no HDO in *Glencairn*, Sinclair's subsequent behavior is irrelevant – it has been given a get-out-of-jail-free card. What the Commission should clearly take away from this assertion, then, is that Sinclair will never stop operating sham operations.

Finally, a word needs to be said about “sidecars” and the Commission's two-year untangling of them.¹³ The fact that the Commission has found them troubling and has reined them in going forward must not be used to immunize Sinclair and thus reward it for the fact that the ownership abuse it masterminded eventually was stopped. The earlier rules may have been light touch, but

¹¹ See, e.g., *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3953 ¶17 (Rev. Bd.), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988), *affirmed*, 5 FCC Rcd 5561 (1990) (“if a party has it peculiarly in its power to produce witnesses whose testimony would elucidate the transaction, the fact that it does not do it creates the presumption that the testimony, if produced, would be unfavorable”) (quoting *McCormick on Evidence* §2272 (1984); *Voce Intersectario Verdad America, Inc.*, 100 FCC2d 1607, 1613 (Rev. Bd. 1985) (it is reasonable to infer that “evidence not produced would be adverse to the party with peculiar access to the evidence”) (quoting C. Wright and K. Graham, *Federal Practice and Procedure* §5124 at 587 (1977)).

¹² Response at 4.

¹³ 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 (Further NPRM and R&O)*, 29 FCC Rcd 4371, 4527-41 ¶¶ 340-365 (2014) (*2014 Quadrennial Review FNPRM and R&O*).

they were never unclear, and *Glencairn* was crystal clear. No constable would let a neighborhood burglar go free simply because the neighborhood eventually created a successful security system.

It's true that a few other broadcasters besides Sinclair have also pushed the ownership policy envelope. In her statement accompanying the *2014 Quadrennial Review FNPRM and R&O*, Commissioner Clyburn reported that the Commission, in its review of sidecars,

uncovered some glaring abuses. In some markets, JSAs masked a threadbare ownership structure, where the brokered station owned little else beyond the FCC license. We found arrangements that masked full-scale control of the brokered station, right down to the same programming, the same talent, the same management, and the same studio. More egregiously, we have seen arrangements where the second station was little more than an orphan of the first, including veiled single ownership schemes.¹⁴

But Sinclair is unique. Sinclair is the nation's only broadcaster that would be proud to tell a law enforcement body that it regards a \$40,000 fine as so insignificant that "it was cheaper to pay the fine than to contest it." And Sinclair is the nation's only broadcaster that would regard the absence of an HDO as a license to commit recidivism.¹⁵

In closing, it must be pointed out that the Commission could entirely have avoided the "sidecars" issue had it listened to Commissioner Copps' partial dissent in *Glencairn*.

Commissioner Copps accurately predicted exactly what was going to happen:

¹⁴ *2014 Quadrennial Review FNPRM and R&O*, 29 FCC Rcd at 4584 (Statement of Commissioner Mignon L. Clyburn).

¹⁵ Only a brief word needs to be said about Sinclair's self-congratulatory discussion of its television content, and its surreal attack on the Washington Post for its reporting on Sinclair's operations. See Response at 4-5. Suffice it to say that TV News Check, which unlike the Post is not "an economic and news competitor of Sinclair's Washington D.C. station," confirmed the Post's story that several employees of WJLA-TV reported that Sinclair President David Smith "repeatedly said the station's newsroom would 'work for' its advertising-sales department." Diana Marszalek, Interesting Times for Sinclair in Washington, TV News Check, October 21, 2014. Viewers like Rainbow PUSH's Rev. Steven Smith have every reason to be worried that Sinclair, in its programming, will not exhibit the character and trustworthiness that viewers expect of the handful of companies in Washington that are authorized by the FCC to hold television licenses.

The assessment of a fine combined with the approval of the transfers at issue is incongruous. The finding that an illegal transfer of control occurred at least raises questions about the control of Glencairn on an ongoing basis, and about the independence of Glencairn from Sinclair once Glencairn is controlled by the mother of Sinclair's owners and owned in trust for their minor children. These questions require designation for hearing. *With each transaction over the years, Sinclair has stretched the limits of the Commission's local television ownership rules.*

In each of several transactions that have come before it, the Mass Media Bureau has reviewed the transaction and the Petitions to Deny filed alleging illegal transfers of control, and has permitted the transaction to go through. The transactions before the Commission today raise issues that prompted the majority to find that there has been an illegal transfer of control and to assess a fine. But the Commission nonetheless has allowed the transaction to go through without further review. *Each transaction moves the line to which all of our licenses are subject. And this decision moves it further still.*¹⁶

Now, with the benefit of 13 years of hindsight, the Commission can correct the Bureau's mistakes. If ever there was a case of ownership structure abuse where the deployment of the Commission's Section 309(e) authority is manifestly justified, it is Right Here, Right Now, and At Last.

Respectfully submitted,



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November 4, 2014

¹⁶ *Glencairn*, 16 FCC Rcd at 22262 (Statement of Commissioner Michael J. Copps, Dissenting in Part and Approving in Part) (emphasis supplied).

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 4th day of November, 2014, caused a copy of the foregoing "Reply to Response" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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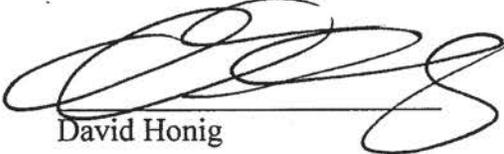
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