Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Raycom Media, Inc. and Gray Television, Inc. to Transfer Control of and Assign Licenses	)	MB Docket No. 18-230

REPLY COMMENTS

The American Cable Association hereby submits these Reply Comments in response to the proposed purchase of Raycom Media, Inc. ("Raycom") by Gray Television, Inc. ("Gray").[1] In our initial comments, we made two straightforward arguments:

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[1] *Media Bureau Establishes Pleading Cycle for Applications filed for the Transfer of Control and Assignment of Broadcast Television Licenses from Raycom Media, Inc. to Gray Television, Inc., Including Top-Four Showings in Two Markets, and Designates Proceeding as Permit-But-Disclose for Ex Parte Purposes*, DA 18-782, MB Docket No. 18-230 (rel. July 27, 2018) ("*Notice*"); *Applications for Consent to Transfer of Control and Assignment of Broadcast Television Licenses from Raycom Media, Inc. to Gray Television, Inc.*, File No. BALCDT-20180709ACV *et al.*, Comprehensive Exhibit (filed July 9, 2018) ("Exhibit"). The file numbers of the individual applications are: BALCDT-20180709ACV, BALCDT-20180709ACZ, BALCDT-20180709ADH, BALDTL-20180709ADJ, BALCDT-20180709ADF, BALDTA-20180709ADI, BALH-20180709ADG, BALCDT-20180709ADP, BALDTL-20180709ADR, BALDTL-20180709ADQ, BALCDT-20180709AEA, BALDTL-2018709AED, BALCDT-20180709ADY, BALDTL-20180709AEC, BALDTL-20180709AEE, BALCDT-20180709ADZ, BALCDT-20180709AEB, BALCDT-20180709AEW, BALCDT-20180709AEX, BTCCDT-20180709ABN, BALCDT-20180709ABP, BALCDT-20180709ABT, BALCDT-

- This transaction would increase the number of markets in which Gray operates, permitting it to command higher retransmission consent rates than can be commanded by Gray or Raycom today.
- Gray should not be allowed to temporarily "acquire" or "control" Raycom stations that it proposes to divest such that it triggers the operation of "after-acquired station" clauses.

Gray ignores our argument about retransmission consent fees almost completely. It contends instead that the proposed transaction complies with the national ownership rules and that this is not the place to consider retransmission consent more generally. These arguments are both correct, of course—but they have nothing to do with our main contention, which is about the *particular* harm stemming from this *particular* transaction.

With respect to our concerns about divestiture stations, Gray incorrectly suggests that we seek to involve the Commission in private contracts. That, too, is of course false—our concerns are with how the Commission allows Gray to structure its divestitures, not with the contracts between ACA members and MVPDs. In any event, Gray now states plainly that it "will *not* acquire" Raycom stations prior to divestiture. We take this to mean that no after-acquired station clause in any Gray retransmission

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20180709ABV, BALCDT-20180709ABZ, BALTTL-20180709ACA, BALTTL-20180709ACB, BALCDT-20180709ACH, BALDTL-20180709ACJ, BALH-20180709ACI, BALDTA-20180709ACT, BALCDT-20180709ACP, BALDTA-20180709ACQ, BALCDT-20180709ACS, BALCDT-20180709ADB, BALCDT-20180709ADD, BTCCDT-20180709ABS, BALCDT-20180709ADM, BALCDT-20180709ADU, BALCDT-20180709ADW, BALCDT-20180709AFB, BALCDT-20180709AEU, BTCCDT-20180709ACG, BALCDT-20180709ACU, BALCDT-20180709ACY, BALCDT-20180709ADK, BALCDT-20180709ADT, BALCDT-20180709AEG, BALCDT-20180709ABQ, BALCDT-20180709ABR, BALCDT-20180709ABY, BALCDT-20180709ACC, BALCDT-20180709ACD, BTCCDT-20180709ACL, BALCDT-20180709ACE, BALCDT-20180709ACF, BTCCDT-20180709ACO.

consent agreement applies with respect to any of these divested stations. We appreciate the clarification, and urge the Commission to note the same in any order approving the proposed transaction so as to avoid confusion and potential litigation in the future.

I. THE COMMISSION CANNOT IGNORE THE HARM TO CONSUMERS CAUSED BY NATIONAL CONSOLIDATION.

In our comments, we pointed out that Gray's proposed acquisition of Raycom would permit Gray to operate in numerous new markets. We pointed out this consolidation tends to increase retransmission consent rates, leading to higher prices for consumers, and we argued that the Commission must consider this harm in deciding whether allowing the transaction is in the public interest.

In its response, Gray offers no serious rebuttal to this core argument. Gray first attempts to change the subject, arguing that the Commission need not address retransmission consent because "the proposed transaction complies with the FCC's national audience reach cap."[2] This is a red herring. We have never argued that the transaction violated the Commission's national audience reach rules. Our point is that *even if it does not violate the national audience reach rules*, the transaction will cause retransmission consent prices to rise. And higher prices are one factor that the Commission must consider in its public-interest analysis of the proposed transaction.[3]

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[2] Joint Response to Comments of Raycom Media, Inc. and Gray Television, Inc. at 3, MB Docket No. 18-230 (filed Sept. 11, 2018) ("Opposition").

[3] *See, e.g.*, *EchoStar Commc'ns Corp., Gen. Motors Corp. and Hughes Elecs. Corp.*, 17 FCC Rcd. 20559, ¶ 169 (2002) ("*EchoStar HDO*") ("[The evidence] strongly suggests that, in the absence of any significant savings in marginal cost, the merger will result in a large increase in post-merger equilibrium prices. Given this likelihood, we cannot find that the Applicants have met their burden of demonstrating that the proposed merger will produce merger-

Gray next argues that issues related to retransmission consent are "generalized" concerns "to be appropriately addressed in rulemaking dockets, not station-specific assignment proceedings."[4] But we have never asked the Commission to resolve generalized retransmission consent issues in this proceeding. Instead, we are asking the Commission to apply the governing public-interest standard to the facts of *this* proposed transaction. In short, we have argued that *this* proposed transaction will increase retransmission consent rates, leading to higher prices for consumers. We have argued that in weighing the costs and benefits of the transaction, as it must under its public-interest standard, increased prices are one factor that the Commission must consider. That is not a "generalized" question that the Commission can address in its rulemaking dockets: it is an adjudicative question about how the law applies to the specific facts of *this* transaction.[5]

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specific public interest benefits of the magnitude the Applicants allege."); *XM Satellite Radio Holdings Inc. to Sirius Satellite Radio Inc.*, 23 FCC Rcd. 12348, ¶ 6 (2008) (*"XM Satellite-Sirius"*) ("We also conclude that, absent Applicants' voluntary commitments and other conditions discussed below, the proposed transaction would increase the likelihood of harms to competition and diversity. As discussed below, assuming a satellite radio product market, Applicants would have the incentive and ability to raise prices for an extended period of time."); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Commc'ns Corp. to Time Warner Cable Inc. and Comcast Corp.*, 21 FCC Rcd. 8203, ¶ 116 (2006) ("[W]e find that the transactions may increase the likelihood of harm in markets in which Comcast or Time Warner now hold, or may in the future hold, an ownership interest in RSNs, *which ultimately could increase retail prices for consumers* and limit consumer MVPD choice. We impose remedial conditions to mitigate these potential harms.") (emphasis added).

[4] Opposition at 5.

[5] 47 U.S.C. § 310(d) (requiring the Commission to find that proposed transactions serve the "public interest, convenience, and necessity").

Gray does not, and cannot, dispute that this transaction will increase its leverage in retransmission negotiations.[6] So it argues instead that the transaction will not give it "more leverage in retransmission consent negotiations than MVPDs many times Gray's size."[7] It also argues that the transaction will not give it "decisive retransmission consent leverage."[8] This, however, misses the point entirely. A party's ability to raise prices does not depend on whether it has *more* leverage than the other party or whether its leverage is "decisive." Parties negotiate based on their best alternative if negotiations fail. As we explained in our opening comments, owning more stations in more markets allows a broadcaster to withhold programming from more stations if negotiations fail, leaving MVPDs in those markets with a worse fallback position. In such circumstances, all other things equal, retransmission consent prices will rise.

Moreover, as we explained in our opening comments, this is not just a theoretical possibility. DISH's economic analysis is strong evidence that in the real world, "The larger the broadcast station group . . . the higher is the retransmission consent price paid by DISH."[9] Gray attempts to brush the DISH study aside, noting that it was prepared for "a different proceeding."[10] But the fact that the study was prepared for a different proceeding does not diminish its force. Our point is that both economic theory

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6 Gray candidly acknowledges that the proposed transaction may increase its leverage, conceding that the transaction "may" give it "a stronger negotiating position than the Commenters would like Gray to have." Opposition at 7.

7 Opposition at 6, Heading B.

8 Opposition at 7.

9 Comments of the American Cable Association at 6, MB Docket No. 18-230 (filed Aug. 27, 2018).

10 Opposition at 5 n.16.

and economic data from other transactions suggest that retransmission consent prices will rise as a result of this transaction.

Gray offers no serious response to this argument. Its only response—that it has "every incentive" to avoid blackouts—is beside the point.[11] By giving Gray the *ability* to threaten blackouts involving more stations, this transaction will allow Gray to demand higher prices in retransmission consent negotiations. The Commission must consider that point in its public-interest analysis, and nothing in Gray's response changes that.

II. GRAY CONCEDES THAT DIVESTITURES WILL NOT TRIGGER AFTER-ACQUIRED STATION CLAUSES.

In our comments, we noted that Gray is proposing to divest nine stations in order to comply with the Commission's local media ownership rules. We argued that Gray should not be permitted to structure these divestitures so that it can claim that it "acquired" these stations for the purposes of triggering after-acquired station clauses. To do otherwise would permit Gray to obtain benefits from temporarily owning a station that even it concedes it cannot own permanently. Moreover, it would set a precedent that broadcasters may structure their divestitures to trigger after-acquired-station clauses if doing so is advantageous but to avoid triggering those clauses if it is not advantageous.

In its initial application, Gray said simply that it had "elected to divest television stations" and that it had "initiated a formal process to market the stations listed below to qualified third parties."[12] This, of course, does not speak to the possibility that Gray

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[11] *Id.* at 8

[12] Exhibit at 2; *see also id.* at 26 ("Gray is proposing to divest stations in nine (9) of these markets to ensure compliance with the duopoly rule. Indeed, the Applicants commenced a

might *temporarily* acquire the Raycom stations during the divestiture process. Now, however, Gray asserts that "it *will not acquire* the Raycom stations in eight overlap markets" and represents that "there is not even an application before the FCC or DOJ that, if granted, would allow Gray to *acquire or control* any of the Raycom divestiture stations."[13] We take this new assertion in response to our concerns to mean that Gray "will not acquire" such stations at any time including by operation of waiver or as part of a divestiture "virtually instantaneous" with closing.[14] Furthermore, we take Gray's statement as a concession that it will not "acquire" divestiture stations for any purpose, including triggering after-acquired station clauses. We are pleased to hear that Gray is taking this position, and to the extent the Commission allows the transaction, it should make clear that it is conditioning its approval of the transaction on that representation.[15]

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divestiture auction process immediately upon announcing the Transaction through which the Applicants will divest stations in each of the nine markets.").

[13] Opposition at 9 n.26. Gray also adds that it had previously "made clear" its intention not to acquire the divested Raycom stations "in multiple press releases, filings with the FCC, SEC, and DOJ, and public statements" and that ACA had either failed to check its facts or did not care about them. *Id.* at 9. This, of course, is nonsense. Neither ACA nor any other party could ascertain what "initiat[ing] a formal process" to divest stations—the sole information Gray provided in its initial application—meant with regard to *how that divestiture would proceed.*

[14] *John H. Phipps, Inc. and WCTV Licensee Corp.*, 11 FCC Rcd. 13053, ¶ 9 (1996) ("By amending the agreements to make the pass-through virtually instantaneous, we believe that the parties have made clear their intention that the intermediary will not acquire or maintain control of the licenses.")

[15] Contrary to Gray's filing, we have not asked the Commission to "insulate [our] members from the natural consequences of their own freely negotiated agreements." Opposition at 10. On the contrary, we have asked only that, when a party is required to divest stations in order to secure approval for a transaction, it should not subsequently be able to argue that it temporarily acquired stations it was not legally permitted to own.

Respectfully submitted,

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Certificate of Service

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