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

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

REPLY TO OPPOSITION TO PETITION TO DENY OF AMERICAN CABLE ASSOCIATION

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EXECUTIVE SUMMARY

As the American Cable Association ("ACA") demonstrated in its Petition to Deny, the Commission should deny the applications of Tribune[1] by Sinclair[2] because the proposed transaction would violate existing Commission rules and the Applicants have failed to meet their obligation to demonstrate the deal serves the public interest. To the contrary, this massive new entity would harm consumers and the public interest by raising MVPDs'[3] subscription rates and in other ways.

The Applicants' Opposition[4] offers no better reason to approve the deal or explanation why the consumer harms would not materialize as predicted and, in fact, further demonstrates the fallacy of Applicants' arguments that are central to its advocacy. The Applicants mischaracterize the relevant burden of proof, suggesting that it falls on the petitioners rather than these Applicants themselves, and they offer virtually no explanation and no relevant evidence necessary to demonstrate that the transaction is in the public interest. Lack of evidence in support of the Applications is fatal. Even putting questions of evidence aside, the Commission must deny the applications because the Applicants' purported public interest "benefits" are based on market definitions that the Commission has repeatedly rejected, are not transaction-specific, and are actually harms in the form of higher prices.

In response to arguments of ACA and others, the Applicants have now at least made clear their commitment not to seek a waiver of FCC rules that currently make the proposed transaction unlawful. The Commission should hold them to this promise. However, by leaving open the possibility that the Commission could modify the National Cap Rule before acting on

[1] Tribune Media Company ("Tribune").

[2] Sinclair Broadcast Group, Inc. ("Sinclair," and with Tribune, the "Applicants").

[3] Multichannel video programming distributor ("MVPD").

[4] Applicants' Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179 (Aug. 22, 2017) ("Opposition").

their applications, the Applicants ignore that the 39 percent cap is statutory and cannot be altered by the Commission absent Congressional action. The Applicants also illogically claim that any hypothetical relaxation of the Commission's media ownership rules would mean that the proposed transaction is in the public interest. Even if the *per se* rule that forbids ownership of two top-four rated stations in the same market in *all* instances were no longer in the public interest, it does not follow that the combinations that would arise out of this particular transaction serve the public interest, regardless of the resulting harm. Accordingly, any change in the local television ownership rules should require the Applicants to subsequently modify their application and the Commission to establish a new pleading cycle for parties to weigh in on the modified application.

Finally, the Applicants wrongly contend that the Commission has no role in evaluating whether the resulting broadcasting behemoth will harm competition—a conclusion at odds with Sinclair's past advocacy in a merger proceeding involving a broadcast station owner. Analyzing competitive harm is at the heart of the Commission's public interest analysis, and—even if there were no *per se* rules prohibiting the proposed transaction—the applications should be denied under traditional antitrust principles.

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I. INTRODUCTION

The ACA files this reply to Tribune and Sinclair's Opposition to the numerous petitions to deny and comments filed in this proceeding.[1] In its Petition, ACA urged the Commission to deny the proposed acquisition of Tribune by Sinclair because the deal would violate existing Commission rules and the Applicants failed to meet their obligation to demonstrate the deal serves the public interest.[2] But even if the transaction were not *per se* unlawful, the combination of the two companies would create a broadcasting behemoth with unprecedented control over both the national and local television markets.[3] This new entity would be able to further increase already rapidly escalating retransmission consent fees by using its increased local power to extract supra-competitive fees.[4] Its vast national scale would similarly harm consumers by leading to higher retransmission consent fees and the triggering of after-acquired clauses in MVPDs' retransmission consent agreements to pay generally higher Sinclair rates, both of which will lead to higher consumer costs.[5] The massive new entity would also use its leverage to force carriage of programming that consumers do not want.[6] The result would be higher prices and fewer choices for consumers.[7]

The Applicants' Opposition does nothing to change these conclusions. To the contrary, it lays bare numerous fundamental flaws that require the Commission to deny the proposed transaction:

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[1] Opposition.

[2] *See generally* Petition to Deny of American Cable Association, MB Docket No. 17-179 (Aug. 7, 2017) ("ACA Petition").

[3] *Id.* at 11-13.

[4] *Id*.

[5] *Id*.

[6] *Id.*

[7] *Id*.

- *First,* even after another round of briefing and nearly seven pages devoted to Sinclair and Tribune's apparent offense at those who oppose the proposed transaction, the Applicants offer virtually no explanation and no relevant evidence in support of the applications. The Applicants also mischaracterize the burden of proof in this matter—suggesting that it falls on the opponents when, of course, it falls on the Applicants.
- *Second*, the Applicants' case also fails because it cannot be justified on the merits with any amount of evidence. The Applicants' purported public interest "benefits" are based on market definitions that fly in the face of Commission precedent, are not transaction-specific, and are actually harms in the form of higher prices.
- *Third*, ACA is pleased that, in response to arguments of ACA and others, the Applicants have now made clear their commitment not to seek a waiver of FCC rules that currently make the proposed transaction unlawful. The Commission should also hold them to this promise.
- *Fourth*, by leaving open the possibility that the Commission could modify the National Cap Rule before acting on their applications, the Applicants ignore that the 39 percent cap is statutory and cannot be altered by the Commission absent Congressional action.
- *Fifth*, the Applicants traffic in faulty logic by claiming that any hypothetical relaxation of the Commission's media ownership rules would mean that the proposed transaction is in the public interest. Even if the *per se* rule that forbids ownership of two top-four rated stations in the same market in *all* instances were no longer in the public interest, it does not follow that all combinations, regardless of their extent and impact, serve the public interest and should be approved.

- *Finally*, the Applicants wrongly contend that the Commission has no role in evaluating whether the resulting broadcasting behemoth will harm competition. Analyzing competitive harm is at the heart of the Commission's public interest analysis, and—even if there were no *per se* rules prohibiting the proposed transaction—the applications should be denied under traditional antitrust principles.

Each of these flaws constitutes an independent basis to deny the applications in this proceeding. Moreover, this type of transaction—with its unprecedented scope—could not be justified under any theory. The Applicants may choose to believe that opposition to the proposed transaction is somehow personal, but nothing could be further from the truth. The sort of broadcasting giant that would arise out of the proposed transaction could never serve the public interest. As the Applicants themselves acknowledge, "the concerns about the impacts of the combined size of Sinclair and Tribune . . . would be true of any large television broadcaster that acquired Tribune."[8] ACA agrees.

II. THE APPLICANTS HAVE NOT COME CLOSE TO MEETING THEIR BURDEN TO DEMONSTRATE THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST

The applications must be denied for the simple reason that the Applicants have failed to demonstrate that the proposed transaction serves the public interest. To begin with, the Opposition attempts to sidestep the Applicants' burden of proof in this matter. Contrary to their attempts to claim the opposite,[9] the *Applicants* bear the burden to establish that the proposed transaction is in the public interest. Section 309(d)(1), which the Applicants cite, sets forth the basic procedural requirements for the filing of a petition to deny.[10] ACA and other petitioners

[8] Opposition at 5.

[9] *Id.* at 3-4 (urging denial of the petitions on the basis that "[p]etitioners have not met [their] burden" to establish a prima facie case that the grant of the applications would be in the public interest and to raise a material question of fact).

[10] *Id.* at 3 (citing 47 U.S.C. § 309(d)).

have cleared those hurdles by setting forth specific facts to establish standing and a material question (to say the least) regarding whether the proposed transaction would be prima facie inconsistent with the public interest.[11] The substantive standard governing whether a proposed license transfer shall be *approved* is governed by Section 310(d), which requires a "finding by the Commission that the public interest, convenience, and necessity will be served" by the transfer.[12] As the Commission has stated time and again, those seeking approval of a transaction bear the burden to put forth evidence sufficient to establish public interest benefits, and "each claimed benefit must be verifiable."[13]

No doubt realizing the inadequacy of their attempt to shift the evidentiary burden to petitioners, the Applicants do make some gestures toward showing, as they must under Section 310(d), that the proposed transaction would affirmatively serve the public interest.[14] But the Applicants' effort is woefully inadequate. To meet their burden under Section 310(d), license transfer applicants ordinarily provide to the Commission expert analysis and detailed

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[11] *See, e.g.*, ACA Petition at 3, 9-12.

[12] 47 C.F.R. § 310(d).

[13] *Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6479 ¶ 317 ("Because much of the information relating to the potential benefits of a transaction is in the sole possession of the Applicants, they have the burden of providing sufficient evidence to support each claimed benefit to enable [the Commission] to verify its likelihood and magnitude.*")*; *see also Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order*, 30 FCC Rcd 9131, 9237 ¶ 18 (2015) ("*AT&T-DIRECTV Order*"); *News Corporation and the DIRECTV Group, Inc. (Transferors), and Liberty Media Corporation (Transferee), For Authority to Transfer Control*, 23 FCC Rcd 3265, 3330 ¶ 140 (2008); *General Motors Corporation and Hughes Electronics Corporation (Transferors) and The News Corporation Limited (Transferee), For Authority to Transfer Control*, 19 FCC Rcd 473, 610 ¶ 317 (2004) ("*News Corp.-Hughes Order*"); *Application of EchoStar Communications Corp. (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corp. (a Delaware Corporation) (Transferee)*, 17 FCC Rcd 20,559, 20,630 ¶ 189 (2002); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp. (Transferors) to AT&T Comcast Corp. (Transferee)*, 17 FCC Rcd 23,246, 23,313 ¶ 173 (2002); *Applications of Ameritech Corp. (Transferor) and SBC Communications, Inc. (Transferee)*, 14 FCC Rcd 14,712, 14,825 ¶ 255 (1999); *Applications of NYNEX Corp. (Transferor) and Bell Atlantic Corp. (Transferee)*, 12 FCC Rcd 19,985, 20,063 ¶ 158 (1997).

[14] Opposition at 1.

declarations. For example, the applicants in the Charter-Time Warner Cable-BrightHouse and AT&T-DirecTV transactions provided substantial economic studies of proffered public interest benefits with their public interest statements, as well as further benefits studies with their oppositions.[15] They also provided detailed executive declarations—six in the case of AT&T-DirecTV for the public interest statement alone.[16]

Here, the Applicants have offered scant evidence—besides their own brief, non-specific, and unsupported assertions—to justify the benefits they claim will arise out of the proposed transaction. The Applicants' Public Interest Statement contains *no evidence whatsoever* that substantiates their public interest claims, which are themselves only briefly sketched out. And with the exception of two short declarations and summaries of Sinclair's pre-transaction investments and public-service initiatives, the evidence that the Applicants include with their Opposition deals exclusively with rebutting the arguments of petitioners, primarily DISH.[17] These materials tout Sinclair's history of alleged investment, but they do not even *address* the claimed synergies on which all the other putative benefits depend.[18] Many critical questions

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[15] *See, e.g.*, *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Public Interest Statement, Exhibits D, MB Docket No. 15-149 (June 25, 2015) ("Charter-TWC-BrightHouse Public Interest Statement"); *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Opposition to Petitions to Deny and Response to Comments, MB Docket No. 15-149 (Nov. 2, 2015); *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations,* Public Interest Statement, Exhibit A, MB Docket No. 14-90 (June 11, 2014) ("AT&T-DRECTV Public Interest Statement"); *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations,* Joint Opposition of AT&T and DIRECTV to Petitions to Deny and Condition and Reply to Comments, MB Docket No. 14-90 (Oct. 16, 2014).

[16] AT&T-DRECTV Public Interest Statement, Exhibit A; Charter-TWC-BrightHouse Public Interest Statement, Exhibit C.

[17] *See* Declaration of Gautam Gowrisankaran, Opposition, Exhibit E; Market Cap Chart, Opposition, exhibit F; Declaration of Barry Faber, Opposition, Exhibit G.

[18] *See* Investments in Allbritton and Fisher, Opposition, Exhibit A; Investments in Local News, Opposition, Exhibit B; Sample of *Connect to Congress* interviews, Opposition, Exhibit C; Sample of Town Halls,

remain unanswered: How will these synergies be achieved? How can the Commission know they are likely and verifiable? Are the ways the synergies would allegedly be achieved in the public interest, or will they eliminate employment or cause other harms?

In short, the record here is devoid of a detailed explanation—let alone evidence to prove it—regarding how this transaction would allow the combined firm to achieve sufficient synergies not otherwise achievable to enable it to invest in the claimed benefit-producing programs. While the Applicants fault some petitioners for relying on news articles to illustrate public interest harm,[19] the Applicants themselves apparently cannot be troubled to gather evidence beyond public sources in support of their own deal.[20]

Without evidence affirmatively demonstrating the benefits that the Applicants claim, the Commission cannot determine that the proposed transaction is in the public interest under Section 310(d). This deficiency is particularly troubling in light of the tremendous harm that would result from the proposed transaction identified by ACA and other petitioners and is grounds for denying the applications outright. At a minimum, the Commission cannot proceed on the basis of the current record. When additional evidence is needed to evaluate a proposed transaction's purported benefits, the Commission has halted the proceedings and required the record to be supplemented.[21] The Commission should not give the Applicants the rubber stamp review they apparently seek.

Opposition, Exhibit D; Declaration of Barry Faber, Opposition, Exhibit G; Declaration of Scott Livingston, Opposition, Exhibit H.

[19] *See* Opposition at 3 (arguing that petitioners' arguments should not be taken into account for their reliance on "newspaper articles and other similar sources").

[20] *See id.* at 5 n.12 &13, 6 n.14, 7 n.15.

[21] *See, e.g., In re Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc.*, Order, MB Docket No. 10-56 (Apr. 16, 2010) (suspending filing deadlines and stopping the Commission's informal 180-day shot clock for the applicants to submit additional requested economic reports). In the Comcast-NBCU proceeding, the applicants had already provided two expert reports addressing potential transaction harms before the Commission suspended the pleading cycle and stopped the clock. The Commission requested additional evidence, including a report specifically evaluating the public interest benefits the applicants claimed would arise out of the transaction.

III. THE APPLICANTS CANNOT DEMONSTRATE THAT THIS TRANSACTION IS IN THE PUBLIC INTEREST

In addition to revealing that the Applicants will not or cannot supply sufficient detail and evidence to satisfy their burden of proof, the Opposition demonstrates that, substantively, the Applicants cannot demonstrate that this transaction is in the public interest. The Opposition relies on market definitions directly contrary to Commission precedent, claims a public interest harm (higher prices) as a benefit, and neglects to show why any of the claimed benefits are transaction-specific.

The Applicants' linchpin for why the proposed transaction is allegedly in the public interest is that it would "support[] the survival of free and local over-the-air television."[22] This claim boils down to the assertion that, because some MVPDs have grown in recent years, it is necessary that broadcast television companies grow too.[23] But the argument that broadcasters must grow to compete with MVPDs is wrong because broadcasters and MVPDs do not compete as a matter of law.[24] The Commission has determined repeatedly that broadcast television station service is not substitutable with MVPD service and that broadcasters and MVPDs are therefore not in the same distribution market.[25] The Applicants' public interest case is therefore illusory.

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[22] Opposition at 4-5.

[23] *Id.* at 1, 5-6 (highlighting "the consolidation and presence of MVPDs with nationwide or virtually nationwide footprints" as among the "challenges" that justify approval of the proposed transaction).

[24] *See, e.g.*, *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*, 31 FCC Rcd 9864, 9874 ¶ 27 (2016) ("*2014 Quadrennial Regulatory Review*") ("[W]hile non-broadcast video programming may offer customers additional programming options in general, they do not serve as a meaningful substitute in local markets due to their national focus"); *Competition, Rate Deregulation, and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5003, ¶ 69 (1990).

[25] *See, e.g.*, *Comcast-NBCU Order*, 26 FCC Rcd at 4255-56 ¶ 40 ("We decline to include broadcast television in the definition of MVPD services."); *News Corp.-Hughes Order*, 19 FCC Rcd at 509 ¶ 75 (concluding that "broadcast television is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases" and that "broadcast signals are an input used to

Similarly misplaced is the Applicants' claim—which is also at the core of the Applicants' public interest argument—that the proposed transaction is necessary as a bulwark against content providers that the Applicants consider "competitors," like Apple, Google, Netflix, and Facebook.[26] As with MVPD services, online video distributors do not compete in the same market as broadcast stations.[27] The same is true for content provided by cable networks, which the Applicants assert "should be" considered as part of the same content market for the purposes of evaluating industry consolidation.[28] Whatever market definitions the Applicants believe "should" drive the Commission's analysis, the Commission has already determined that the content offered by cable networks is not a substitute for programming offered by broadcasters.[29]

Nor should the Commission credit the Applicants' assertion that consolidation is a verifiable public interest benefit because broadcasters are in need of greater revenue streams.[30] As ACA discussed at length in its Petition, the retransmission consent regime has allowed broadcasters to reap tremendous profits in recent years from retransmission consent fees, which are growing at an astronomical rate and are projected to nearly double in the next five years to $11.6 billion, up from a total of $28 million in 2005.[31] Whatever the Applicants may

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produce a downstream product—MVPD service"); *id.* at 565 ¶ 202 (remarking that the signals of local television broadcast signals are "without close substitutes").

[26] Opposition at 5.

[27] *2014 Quadrennial Regulatory Review*, 31 FCC Rcd at 9955 ¶ 223 (concluding that, even though "some online providers have started offering original programming that may [ ] attract sizeable audiences," online providers "have not assembled a platform of programming that is consistently of the same broad appeal and audience share, on the whole, as primetime entertainment programming provided by the top-four broadcast networks").

[28] Opposition at 34-35.

[29] *2014 Quadrennial Regulatory Review*, 31 FCC Rcd at 9955 ¶ 223 (distinguishing broadcast programming from content offered by cable networks).

[30] Opposition at 6.

[31] *Id.*

believe regarding whether those fees are reasonable (despite the sky-high growth of those fees in recent years), they cannot credibly recast revenue that will flow directly to the combined entity at the expense of consumers as a public interest *benefit*, as the Applicants attempt to do.[32]

Because all of the purported public interest benefits rely on synergies or increased prices to fund them, they are all revealed as illusory in light of these defects. The Applicants also fail to explain how any are transaction specific. The Applicants tout, for example, Sinclair's investment in broadcast engineering,[33] but nothing in either the Applicants' Public Interest Statement or their Opposition indicates why Tribune could not make the same investments as an independent entity. The same is true with respect to Sinclair's claimed commitment to local news and sports programming and various local initiatives—the Applicants do not articulate how the proposed transaction is necessary to accomplish those goals. This total failure to explain how the proposed transaction would benefit the public, paired with the absence of any evidence to back-up the Applicants' already generic claims, is fatal under any meaningful public interest analysis.

IV. THE COMMISSION SHOULD HOLD THE APPLICANTS TO THEIR CLARIFIED COMMITMENT NOT TO SEEK A WAIVER

As ACA explained in its Petition, because the applications seek approval for the transfer of *all* Tribune licenses to Sinclair, the proposed transaction on its face would violate two of the Commission's existing ownership rules: the statutory National Cap Rule, which prohibits commercial television broadcast licensees from exceeding a national audience cap of 39

[32] *Id.* at 5 (cloaking the combined entity's future increased revenue as a public interest benefit), 27-28 (suggesting that rapid growth in retransmission consent fees is necessary to support local news). The Applicants' characterization of increased retransmission consent fees as a public interest benefit is particularly trying in light of the Applicants' attempt to dismiss petitioners' arguments out of hand as "self-serving." *Id.* at ii; *see also, e.g.*, *Comcast-NBCU Order*, 26 FCC Rcd at 4330-31 ¶ 26 (explaining that credited benefits redound to consumers rather than just the merging companies for the purposes of the Commission's Section 310(d) public interest analysis).

[33] Opposition at 7-8.

percent;[34] and the Local Television Ownership Rules, which prohibit a broadcaster from owning two stations with overlapping contours other than in the largest markets—and then only if one of the stations is not among the top-four rated stations in the market and there are at least eight independent "voices" within the market.[35] In their Public Interest Statement, the Applicants offered only the vague, carefully worded statement that they "intend to take actions . . . as necessary to comply with the . . . Commission's local television ownership rules *as required in order to obtain FCC approval* of the Transaction" but "may file amendments" and will file applications "to the extent that divestitures may be necessary."[36]

In their Petitions to Deny, ACA and others emphasized that approving the proposed transaction without divestiture would be unlawful, and that the Commission should not allow the Applicants to circumvent the Commission's rules through waiver.[37] In response, the Applicants feign surprise that they were not sufficiently clear about their commitment and have now stated that they "are not asking the Commission to approve a transaction that violates the FCC's ownership rules" and, further, that they "have agreed to voluntarily divest as necessary to comply with the local and national ownership cap rules."[38]

ACA applauds the Applicants for their now clearly stated commitments, and urges the Commission to hold them to it and not permit the Applicants to later circumvent them through a request for waiver. As ACA noted in its Petition, the Applicants have neither sought a waiver of the Commission's rules, nor would a waiver of either the National Cap Rule or the Local

[34] 47 C.F.R. § 73.3555(e).

[35] *See Id.* § 73.3555(b).

[36] Comprehensive Exhibit at 12 (emphasis added).

[37] *See, e.g.*, ACA Petition at 1-2, 5-6.

[38] Opposition at 2, 21.

Ownership Rules be appropriate.[39] On top of that, any request for a waiver would now be at odds with the Applicants' clear representations to the Commission and should not be entertained for that additional reason.

Moreover, because the Applicants now clearly anticipate that the proposed transaction will be evaluated on rules that do not yet exist,[40] it is difficult to envision how the public can meaningfully evaluate the effect of the proposed transaction on the public interest. If the Commission were to change its media ownership rules, and particularly if the Applicants subsequently amend their pending applications to remove the commitment to divest or to acquire additional television stations, the Commission should provide the full opportunity for public review by putting out a new public notice, providing interested parties sufficient time for a new full round of petitions and comments, and adding time to the shot clock to account for the this extra process. The public needs a full opportunity to consider such a transaction and its implications, and the Commission should subject it to a thorough review.

V. THE APPLICANTS' ARGUMENTS REGARDING THE IMPACT OF CHANGES TO THE COMMISSION'S RULES FLY IN THE FACE OF LAW AND LOGIC

A. The Applicants' Opposition Ignores that the National Ownership Cap Is Statutory and Therefore Non-Waivable

As ACA explained in its Petition to Deny, the 39 percent National Cap Rule was established by statute as part of the Consolidated Appropriations Act of 2004 and cannot be modified administratively.[41] The Applicants, however, seem to suggest that the Commission

[39] ACA Petition at 7-8 & 10 n.37.

[40] Opposition at 22-23.

[41] ACA Petition at 7-8; *see also* Pub. L. No. 108-199, 118 Stat. 3, 99-100; *In re Amendment of Section 73.3555(e) of the Commission's National Television Multiple Ownership Rule*, Dissenting Statement of Commissioner Michael O'Rielly ("I know since I was there at the time and helped reach the agreement on behalf of a former employer with the staff of many Members of Congress, including former Senator Ted Stevens, who was the lead negotiator[.]"); *see also id*. ("I reject the assertion that the Commission has the authority to modify the National Television Ownership Rule in any way[.]").

may alter the National Cap Rule before acting on the applications, thereby allowing the Applicants to consummate the proposed transaction without divestiture.[42] Not so. Altering the 39 percent cap established by Congress would be contrary to law and beyond the Commission's authority. Unlike other media ownership rules, the 39 percent cap does not fall under the Commission's review under Section 202(h) and therefore must remain fixed absent Congressional action. The Applicants provide no analysis and cite no authority for the proposition that the Commission could modify the cap. To the degree the Applicants nevertheless expect the rule to be altered, they entirely ignore ACA's arguments, Congressional intent, and the fundamental tenant of administrative law that the Commission cannot enact rules that are contrary to statute.[43]

B. The Applicants' Arguments for Approval Fail Even Basic Logical Scrutiny

Even with respect to the Local Ownership Rules, the Applicants' arguments fail because they indulge a basic logical fallacy. In their Petitions to Deny, ACA and others pointed out that the proposed transaction would not be in the public interest, even if the Commission relaxed the Local Ownership Rules.[44] In response, the Applicants insist that "it would be nonsensical for the Commission to conclude that the public interest mandates that it revise its ownership rules and then insist on applying a rule it has found to no longer be in the public interest to a pending application."[45]

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[42] Opposition at 21-23 & n.60 (arguing that the Commission should take into account any rule changes to its ownership rules when acting on the applications and quoting a statement by Chairman Pai regarding review of the National Cap Rule).

[43] *See* 5 U.S.C. § 706(2).

[44] *See, e.g.,* ACA Petition at 10-20. Of course, the Commission should *not* relax its current Local Ownership Rules, which are necessary to prevent the harm that would result from joint negotiations, as the Commission and the Department of Justice have repeatedly recognized. *See* ACA Petition at 13-18.

[45] Opposition at 23.

That argument is specious. As a matter of logic, even if a *per se* rule of general applicability that forbids a certain business combination *in every instance, without exception* were no longer in the public interest, it hardly follows that all combinations regardless of their extent and impact serve the public interest and should be approved. Indeed, the proposed transaction here would cause significant public interest harm by creating a broadcast behemoth with unprecedented control over both the national and local television markets, harming both competition and consumers. Even if the Commission were to modify the Local Ownership Rules to permit *some* further consolidation in the broadcast market as a general matter (and it should not), it would still be necessary to evaluate whether *this particular transaction* affirmatively serves the public interest, especially in light of resulting harm to competition.

C. The Applicants' "Market" Arguments Ignore Fundamentals of the Commission's Public Interest Analysis, which Is Based in Antitrust Law

Regarding the inevitable increase in retransmission consent fees that would flow from the proposed transaction, which is one of the proposed transaction's purported "benefits,"[46] the Applicants assert that the Commission should not concern itself with this public interest harm because it would merely be the work of the "market" in action.[47] The Applicants go so far as to suggest it would be inappropriate for the Commission to examine such effects of the transaction, asserting that "[i]t is not up to the . . . Commission, or anyone else, to extract certain facts and statistics and construct arguments that the marketplace rates do not serve the public interest."[48] But this ignores that it is the Commission's obligation under Section 310(d) to scrutinize the effect of a proposed license transfer on the public interest. It is not enough to say that the "market" will determine prices. As the Commission has stated many times, competition

[46] *Id.* at 5, 27-28.

[47] *Id.* at 27-28.

[48] *Id.* at 28.

analysis is the heart of its public interest review.[49] And it is the Applicants' burden to establish that competition will not be harmed.[50]

Indeed, Sinclair endorsed the Commission's role in protecting competition against marketplace abuses when it filed a petition to deny in 2014 in the Comcast-Time Warner Cable proposed merger review.[51] At that time, Sinclair was less enamored with the infallibility of the marketplace and asked the Commission to establish conditions that would restrain the combined entity's ability to negotiate for market-based prices and terms.[52] Yet, now that the shoe is on the other foot, the Applicants seek to ignore the Commission's critical legal role in judging whether the market will continue to function adequately following a proposed license transfer.[53]

As ACA and others have explained, if the proposed transaction were permitted to go forward, competition and consumers would be harmed by empowering the combined entity to extract higher retransmission consent fees from cable operators and other MVPDs. This would be particularly true if the combined entity were permitted to control multiple top-four rated

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[49] *See, e.g.*, *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, 31 FCC Rcd 6327, 6336-37 ¶ 26 (2016) ("*Charter-TWC-BrightHouse Order*") (explaining that the "broad aims of the Communications Act" include a "deeply rooted preference" that competition be preserved and enhanced).

[50] *See, e.g.*, *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, 23 FCC Rcd 12,348, 12,446 (2008) ("In contrast to antitrust review, where the DOJ would have borne the burden of proving that the proposed transaction 'substantially lessens competition,' the Commission's standard of review requires merger applicants to prove that the transaction will serve the greater public interest, informed by the core values of competition, diversity, and localism.") (dissenting statement of Commissioner Adelstein).

[51] *Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and Spinco to Assign and Transfer Control of FCC Licenses and Other Authorizations*, Petition to Deny of Sinclair Broadcast Group, Inc., MB Docket No. 14-57 (Aug. 25, 2014).

[52] *Id.* at 15.

[53] *See Charter-TWC-BrightHouse Order*, 31 FCC Rcd at 6337 ¶ 28 ("Our competitive analysis, which forms an important part of the public interest evaluation, is informed by . . . traditional antitrust principles."); *AT&T-DIRECTV Order*, 30 FCC Rcd at 9140 ¶ 20.

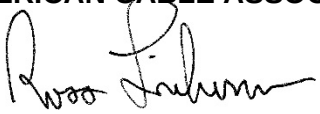
stations in multiple markets in violation of the Commission's current Local Ownership Rules, or to somehow exceed the national 39 percent cap, for reasons ACA has explained.[54] The same competitive harm would result, from an antitrust perspective, whether or not the proposed transaction were to violate an explicit Commission rule, as the FCC and DOJ have repeatedly recognized.[55]

VI. CONCLUSION

For the foregoing reasons, the Commission should deny the applications.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: 

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August 29, 2017

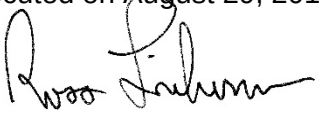
[54] ACA Petition at 11-18.

[55] *See* Nexstar Competitive Impact Statement at 8, *United States v. Nexstar Broadcasting Group, Inc.*, No. 16-cv-01772 (D.D.C. Sept. 2, 2016) (concluding under traditional antitrust principles that ownership of two Top-Four broadcast networks in the same DMA would result in competitive harm to MVPDs, because they would face the threatened loss of programming for two stations simultaneously through blackouts if retransmission consent fee negotiations were to fail); *see also In re Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3359-64 ¶¶ 14-17 (2014) ("*Retransmission Consent Order*") (citing Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market, William P. Rogerson, May 27, 2011); *In re 2010 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 Nos. 09-182, 07-294, 04-245 (Feb. 20, 2014) ("DOJ Feb. 20 Ex Parte") ("Where a proposed cooperative agreement essentially combines the operations of two rivals and eliminates all competition between them . . . [the Department of Justice] analyzes the agreement as it would analyze a merger, regardless of how the arrangement has been labeled . . . .").

DECLARATION

The foregoing *Reply to Opposition to Petition to Deny of American Cable Association* has been prepared using facts of which I have personal knowledge or upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on August 29, 2017

By: 

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association

CERTIFICATE OF SERVICE

I, Ross Lieberman, hereby certify that, on this 29th day of August, 2017, I caused a copy of the foregoing *Reply to Opposition to Petition to Deny of American Cable Association* 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 First Class or electronic mail:

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