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

In the Matter of	)
	)
Sinclair Broadcast Group, Inc.	)
	)
Licensee of Digital Television Stations	)
	)
WJLA-DT (Washington DC)	)
WBFF-DT (Baltimore, MD)	)
WSET-DT (Lynchburg, VA)	)
WTVZ-TV (Norfolk, VA)	)

REPLY TO OPPOSITION

The American Cable Association hereby replies to Sinclair Broadcast Group, Inc.'s Opposition to ACA's Petition seeking early renewal applications for four of Sinclair's television stations.[1] The Commission recently found a "substantial and material question of fact" as to whether Sinclair lied about its divestitures in the *Sinclair-Tribune* proceeding—a charge that, if true, calls into question Sinclair's qualifications to

[1] Sinclair Broadcast Group, Inc.'s Opposition to ACA Petition to Require Filing of Early Renewal Applications, Undocketed Submission filed electronically in ECFS INBOX-1.41 (filed Dec. 10, 2018) ("Opp."); American Cable Association, Petition to Require Filing of Early Renewal Applications, Undocketed Submission filed electronically in ECFS INBOX-1.41 (filed Nov. 26, 2018) ("Petition"). Sinclair filed its response consistent with the deadlines set forth in Section 1.45 for administrative convenience, and we do the same here, without conceding that this proceeding should otherwise be governed by those rules.

hold any licenses. ACA urged the Commission to accelerate Sinclair's next license renewals so that these questions could be resolved speedily and once and for all by an administrative law judge.

Sinclair objects to ACA's petition on two bases. Substantively, it argues that lies about *some* of its licenses are irrelevant to renewal of its *other* licenses. Yet this is not and has never been the law. Sinclair's truthfulness *generally*—not with respect to particular licenses—was "at issue" in the Tribune-proceeding. And it will be "at issue" in every future transaction or license renewal, because the Commission must designate an application for hearing if there is an unresolved question about the applicant's qualifications—which will in turn require an administrative law judge to resolve them. Sinclair may wish to dispose of questions regarding its truthfulness without the public scrutiny of an ALJ process through some sort of private settlement with the Enforcement Bureau. We have significant questions about the legality of resolving this matter in this manner. Here, moreover, the issues designated by the Commission rank among the most visible accusations of wrongdoing in recent history. Ignoring them or disposing of them without input from the public would do enormous harm to the public interest and the Commission's institutional interests.

Procedurally, Sinclair argues that ACA has not shown that its members have been injured, in part because the Commission's rules protect them against the harm they allege. Sinclair thus asks the Commission to *assume* that it will follow the applicable rules—hardly appropriate in a proceeding centered around Sinclair's apparent willingness to ignore the Commission's rules and lie about doing so.

I. SINCLAIR FAILS TO ACKNOWLEDGE THE SERIOUSNESS OF THE ACCUSATIONS AGAINST IT.

Earlier this year, the Commission designated for hearing before an administrative law judge the question of whether Sinclair engaged in misrepresentation or a lack of candor when it attempted to acquire stations from Tribune.[2] More specifically, the Commission found "substantial and material questions of fact" regarding whether Sinclair had lied about being the "real party in interest" in three stations that it proposed to divest.[3]

Sinclair, however, argues that those issues have no bearing on its upcoming renewals because the licenses at issue here were not the ones about which the Commission accused it of misrepresentation in the *Sinclair-Tribune* proceeding.[4] Any misrepresentation in *Sinclair-Tribune*, it now argues, would be relevant only to the renewal of the licenses it sought to acquire from Tribune.[5] In support of this proposition, Sinclair notes that the Commission's *Hearing Designation Order* did not "automatically" prohibit Sinclair from acquiring new licenses because the Commission had not yet "determined" that the allegations "'bear on the operation of [Sinclair's] other facilities.'"[6] Thus, it concludes, Sinclair's qualifications to hold licenses more generally are "not at

---

2 *Tribune Media Co. and Sinclair Broad. Grp., Inc.*, 33 FCC Rcd. 6830 ¶ 28 n.75 (rel. July 19, 2018) ("*Sinclair-Tribune HDO*").

3 *Id.* ¶ 3.

4 Opp. at 6.

5 Sinclair thus seems to be suggesting that an entity's lying (or any other wrong doing) with respect to licenses it seeks and fails to acquire could never be an issue with respect to any other license it owns or seeks to own. We are unaware of any support for such an outlandish proposition.

6 *Id.*

issue" in the hearing pending before the ALJ, so ACA has not raised a question sufficiently "serious or compelling" to warrant early renewal.[7]

This is simply wrong. To begin with, the Commission did not adopt Sinclair's "license specific candor" theory in the *Hearing Designation Order* itself. The Hearing Designation Order accuses Sinclair of lying about divestitures of four specific stations. Yet it designates the *entire transaction* (80 applications) for hearing.[8]

Moreover, Sinclair's conduct will be "at issue" in every future transaction or license renewal. By statute, the Commission must "formally designate [an] application for hearing" if there is a "substantial and material question of fact" about the applicant's qualifications.[9] The Commission's renewal form requires applicants to disclose whether "licensee [or] any party to the application has or has had any interest in, or connection with . . . any broadcast application in any proceeding where character issues were left unresolved or were resolved adversely against the applicant or any party to the application."[10] By checking "yes" (as it must do), Sinclair will have conceded that there is a substantial and material issue of fact as to whether grant of an

---

7 Opp. at 7-8.

8 *Sinclair-Tribune HDO* ¶ 29 (designating for hearing: "(a) Whether, in light of the issues presented above, Sinclair was the real party-in-interest to the WGN-TV, KDAF, and KIAH applications, and, if so, whether Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission; (b) Whether consummation of the overall transaction would violate Section 73.3555 of the Commission's rules, the broadcast ownership rules; (c) Whether, in light of the evidence adduced on the issues presented, grant of the above-captioned applications would serve the public interest, convenience, and/or necessity, as required by Section 309(a) and 310(d) of the Act; and (d) Whether, in light of the evidence adduced on the issues presented, the above-captioned applications should be granted or denied.").

9 47 U.S.C. § 309(e) (requiring that any such hearing "shall be a full hearing"); *see also* 47 C.F.R. §§ 73.3591, 73.3593.

10 FCC Form 303-S, Section II Question 2.

earlier application is in the public interest, and that the issue has not been resolved. We do not understand how the Commission can find that an application serves the public interest in such circumstances without a hearing before an administrative law judge.[11]

Sinclair is, of course, correct when it argues that Commission has *not yet* determined conclusively that Sinclair lied in the *Sinclair-Tribune* proceeding and has *not yet* concluded that such lies relate to Sinclair's basic character qualifications—in no small part because Sinclair itself has sought to withdraw from the ALJ proceeding. But Sinclair cannot seriously maintain that, if the Commission ultimately concludes that Sinclair lied in the Tribune proceeding, such lies would be irrelevant here merely because they relate to other licenses. Again, misrepresentation and lack of candor rank among the most serious violations a licensee can commit. The Commission can find and has found that a party that engages in such conduct lacks the basic character qualifications to hold *any* FCC licenses.[12] It has held that "'[t]ruthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest" for which "[t]he Commission is authorized to treat even the most insignificant

---

[11] *See, e.g.*, *Applications of Benchmark Commc'ns. Corp.*, 9 FCC Rcd. 2319 (Audio Services Div. 1994) (designating for hearing character issues where the applicant had abandoned a prior application when similar issues were raised); *Applications of Barbara Key Peel*, 6 FCC Rcd. 2833 (Audio Services Div. 1991) (making a designation contingent on whether the applicant attempted to evade litigating the character issue by dismissing a different application); *Applications of Rev. J. Bazzel & Elizabeth Mull*, 5 FCC Rcd. 3070 (Audio Services Div. 1990) (designating for hearing character issues left unresolved when the applicant withdrew from prior proceedings); *Applications of Margaret Escriva*, 4 FCC Rcd. 5204 (Audio Services Div. 1989) (same).

[12] *E.g.*, *Pass Word, Inc.*, 76 FCC.2d 465, ¶¶ 125, 127 (1980) (finding deliberate misrepresentations "demonstrated [a] lack of character qualifications to be a Commission licensee," requiring the revocation of all licenses) ("*Pass Word*").

misrepresentation as disqualifying."[13] In other words, "[t]he integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees."[14] If "even the most insignificant representation" can be "disqualifying" to an entity's fitness to hold Commission licenses, then lies with respect to four separate divestitures at the heart of the largest broadcast transaction in history surely do so—especially since the accusations involved a particular sidecar partner (Cunningham) with whom Sinclair remains engaged in two of the four markets to be renewed here.[15] For the Commission to hold otherwise without sufficient explanation would constitute reversible error.[16]

---

[13] *Broad. Practice & Procedure Relating to Written Responses to Comm'n Inquiries & the Making of Misrepresentations to the Comm'n by Permittees & Licensees*, 102 F.C.C.2d 1179, ¶ 60 (1986) ("*Character Qualifications Policy*").

[14] *Character Qualifications Policy* ¶ 61; *See also* Letter from Benton Foundation to Chairman and Commissioners at 5, Undocketed Submission filed electronically in ECFS INBOX-1.41 (filed Nov. 27, 2018) (citing cases).

[15] WNUV (Baltimore) and WVAH-TV (Charleston) are both owned by Cunningham and operated by Sinclair.

[16] *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Sinclair also misrepresents the early renewal precedent in our Petition. Sinclair states: "ACA identifies only two other instances where the Commission has directed a licensee to file an early renewal application . . . Neither case stemmed from a request for revocation or early renewal filings." Opp. at 9. Yet the *Narragansett* case states plainly that: "Bay State Broadcasting Company also petitioned the Commission either (1) to revoke the license of Station WALE, (2) to issue an order to show cause why the license should not be revoked or (3) to require Station WALE to file its application for renewal of license forthwith and to set such application for hearing in conjunction with the application of Bay State Broadcasting Company." *Application of Narragansett Broad. Co.*, 15 F.C.C. 887, 889 (1951). The other case, *Herbert Michels*, did not involve a petition to revoke and did result in the Commission ordering the party petitioning for reconsideration of an application grant to file early renewal applications for their stations. However, Sinclair elides the fact that the Commission did not limit itself to only considering the license at issue in the petition. The Commission ordered early renewal applications for *all* the licenses the petitioner held, neither of which were at issue in the petition, in order to fully consider the issues presented by the petition. *Application of Herbert Michels*, 44 F.C.C. 1346 (1958).

Of course, Sinclair may be seeking to "resolve" these issues without public scrutiny, such as through settlement privately negotiated with the Enforcement Bureau. Any such attempt would raise significant legal questions.[17] More importantly, any attempt by Sinclair to avoid public scrutiny here—in response to perhaps the highest profile allegations of lying in Commission history—would make a mockery of the Commission's institutional prerogatives and nearly a half century of precedent regarding the importance of truthfulness.

Make no mistake: parties will oppose Sinclair's next license renewals whenever they occur, and will raise issues related to Sinclair's character qualifications. If such issues merited designation in the *Sinclair-Tribune* proceeding, they will certainly merit designation at that point—meaning that Sinclair will find itself in much the same place

[17] Under the Commission's rules, "Consent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license." 47 C.F.R. § 1.93(b). That is because the Commission has a statutory obligation to resolve issues about an applicant's basic qualifications on the merits. *Application of Talton Broad. Co. for Renewal of License Station WHBB*, Memorandum Op. and Order, 67 F.C.C.2d 1594, ¶ 9 (1978) ("In renewal hearings the Commission has a duty to resolve the issues in a manner which satisfies its obligation to make a public interest determination on whether the application can be granted. Consent orders, on the other hand, are in the nature of settlement agreements. They are designed for cases where the benefit to be gained by securing an applicant's promise of future conduct outweighs any benefit that would be gained by making a determination on the matters at issue. Indeed, the essence of a consent order agreement is the requirement that issues be disposed of without a determination on the merits. Thus, if a consent order were employed to terminate a renewal hearing, it would not meet the statute's requirement that a public interest finding be made on the question whether the license should be renewed.") (internal citations omitted). *See also Applications of Kansas Broad. Ltd. P'ship et al.*, Hearing Designation Order, 4 FCC Rcd. 4640, ¶ 2 (Audio Services Div. 1989) (Where prior applications raised character issues about whether applicant was the real party in interest and those issues were not resolved because the applicant withdrew application, the "unresolved character issue calls into question KBLP's qualification be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.").

then that it is now. We continue to believe that it will be better for all parties, including Sinclair, to begin that process now.

II. ACA HAS STANDING TO FILE ITS PETITION.

Sinclair also claims that, even if its alleged misrepresentations relate to its basic character qualifications, and even if administrative convenience would otherwise be served through early renewal, the Commission should reject ACA's petition because ACA lacks standing.[18] This argument too lacks merit.

To begin with, "[r]egardless of the formal status of a party, or the technical merits of a particular petition, the FCC 'should not close its eyes to the public interest factors' raised by material in its files."[19] This is why the Commission routinely assesses allegations made in *withdrawn* petitions to deny.[20] Upon further reflection, moreover, parties may not even need to show standing in order to file informal requests such as our Petition. To be sure, the *Greater Portland* case we cited in our Petition indicates that they do.[21] Yet later cases dealing with informal requests state otherwise.[22] And the

---

[18] Opp. at 3.

[19] *Retail Store Emp. Union, Local 880 v. FCC*, 436 F.2d 248, 254 (D.C. Cir. 1970); *see also MG-TV Broad. Co. v. F.C.C.*, 408 F.2d 1257, 1265 (D.C. Cir. 1968) ("Even if the technical nature of the pleadings was not crystal clear, the thrust of the substantive argument was unmistakable. Issues brought to the Commission's attention may not be so cavalierly disregarded."), *rev'd* on other grounds, *Coal. for Pres. of Hispanic Broad. v. FCC*, 931 F.2d 73 (D.C. Cir. 1991).

[20] *Applications of Stockholders of CBS, Inc.,* 11 FCC Rcd. 3733, ¶ 8 (1995); *Application of Booth American Co.*, 58 FCC.2d 553, ¶ 5 (1976).

[21] *Greater Portland Broad. Corp.*, 3 FCC Rcd. 1953, 1954 (1988) ("*Greater Portland*") ("We conclude, therefore, that persons seeking the extraordinary, discretionary action of calling for the early filing of a renewal application because of alleged 'compelling reasons' should, at a minimum, support their requests with factual allegations meeting the requirements of Section 309(d).").

[22] *See, e.g., Spectrum Networks Group, LLC*, 31 FCC Rcd. 8902, ¶ 4 n.17 (Wireless Telecommunications Bur. 2016) ("We agree . . . that the Petition is an informal request for

Commission may always decide to require early renewal on its own if it thought that doing so was appropriate.[23]

If *Greater Portland* indeed applies here, then Sinclair misstates the standard for filing a "party in interest" objection to a *broadcast* license renewal. "Under Section 309(d) of the Act, a party has standing to file a petition to deny if grant of the petitioned application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature."[24] "In the broadcast regulatory context, standing is generally obtained by a petitioner in one of three ways: (1) as a competitor in the market suffering signal interference; (2) as a competitor in the market suffering economic harm; or (3) as a resident of the station's service area or regular listener of the station."[25]

ACA *has* demonstrated specific economic injury to its members that would be caused by renewal. First, and perhaps most fundamentally, small cable system operators that carry the stations in question should not be required to engage an army of lawyers in order to verify the statements made by a broadcaster whose claims cannot be trusted.[26] If the allegations against Sinclair are true—as ACA suspects they are—

Commission action pursuant to section 1.41 of the Commission's rules, 47 CFR § 1.41, for which there is no formal standing requirement."); *DIRECTV Enterprises, LLC*, 25 FCC Rcd. 440, ¶ 5 (Int'l Bur. 2010) ("There is no standing requirement for informal objections.").

[23] *See* 47 C.F.R. § 73.3539(c) (permitting the Commission to require early renewal "whenever [it] regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation").

[24] *Entercom License, LLC*, 31 FCC Rcd. 12196, ¶ 22 (2016) (internal citations omitted).

[25] *Id.*

[26] *Happy Broad. Co., Inc.*, Initial Decision, 88 FCC.2d 1580, ¶ 54 (ALJ 1978) ("To declare that the Commission cannot afford to tolerate anything less than complete candor by its licensees and applicants if it is to be successful in carrying out its mandated responsibilities without an army of enforcers at its beck and call is but to state the obvious.").

permitting Sinclair to retain these licenses would thus cause ACA members ongoing economic harm.[27] This harm would be particularly acute in markets (such as Baltimore and Charleston) where Sinclair has "sidecar" arrangements similar to those at issue in the Tribune proceeding. Sinclair makes no response to this claim.

Second, ACA has alleged that Sinclair charges higher prices than other broadcasters, and so would be harmed by Sinclair retaining its license. Sinclair's response is that higher prices are not a "cognizable" injury.[28] We find ourselves hard pressed to imagine what would constitute economic injury if not higher programming prices that must be passed along to subscribers.

Third, ACA has alleged that Sinclair charges higher prices in part because of arrangements it has with putatively independent stations. Sinclair responds that this ignores Commission rules prohibiting Sinclair from engaging in such conduct.[29] This is a curious response to a Petition animated entirely by questions about whether Sinclair—

---

[27] Petition at 6.

[28] Opp. at 4. Sinclair also responds that we did not specify that the ACA members operating in the markets affected were the ones paying higher prices. *Id.* at 5. We intended to indicate that the ACA members paying higher prices for Sinclair included members in the four markets in question here. Nevertheless, courts have held that where, "it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). In any event, in light of the confidentiality provisions that Sinclair insists upon, and the very real possibility of retaliation, ACA chose not to specifically identify individual member companies in its standing declaration. ACA and its members, (and, ACA suspects, other MVPDs as well), would be willing to do so, and provide additional details related to standing, at the Commission's formal request and subject to appropriate confidentiality protections.

[29] Opp. at 4 n.13.

already an adjudged violator of Commission rules[30]—has violated yet more such rules and lied about it.

* * *

Sinclair stands accused of lying to the Commission—conduct that, if established, calls into question its qualifications to hold any FCC licenses. All parties, including Sinclair itself, should want to resolve these questions as soon as possible. The Commission should grant ACA's Petition and institute early renewal proceedings.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: _____

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Michael D. Nilsson
Mark D. Davis
Harris, Wiltshire & Grannis LLP
1919 M Street, NW
The Eighth Floor
Washington, DC 20036
(202) 730-1300

Ross J. Lieberman
Senior Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Attorneys for the American Cable Association

December 17, 2018

[30] *Sinclair Broad. Grp., Inc.*, 31 FCC Rcd. 8576, ¶ 4 (Media Bur. 2016) (finding that Sinclair had impermissibly negotiated retransmission consent agreements on behalf of independent television stations); *see also In Re Edwards*, 16 FCC Rcd. 22236, ¶ 27 (2001) (finding that Sinclair had exercised unauthorized *de facto* control of putatively independent stations).

Certificate of Service

I, Michael Nilsson, hereby certify that on this 17th day of December, 2018, true and correct copies of the foregoing Petition were sent by electronic mail and first class mal to the following:

David Roberts
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, DC 20554
David.Roberts@fcc.gov

Miles S. Mason
Pillsbury Winthrop Shaw Pittman LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Attorney for Sinclair Broadcast Group, Inc.
miles.mason@pillsburylaw.com

Jeremy Miller
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, DC 20554
Jeremy.Miller@fcc.gov

David Brown
Federal Communications Commission
Video Division, Media Bureau
445 12th Street, SW
Washington, DC 20554
David.Brown@fcc.gov

Michael Nilsson