

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

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

**REPLY TO OPPOSITIONS TO PETITIONS TO DENY OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

I. INTRODUCTION

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits this Reply to the Opposition to Petitions to Deny the Applications for transfer of control (“Opposition”)² filed by Tribune Media Company (“Tribune”) and Sinclair Broadcast Group, Inc. (“Sinclair,” jointly “Parties” or the “Applicants”) in in the above-captioned proceeding.³ The record shows numerous reasons why the Applications are deficient as they fail to demonstrate how the proposed transfer of control of would, as they attest, serve the public interest or somehow create “greater value” for small MVPDs, including NTCA members.

NTCA’s Petition to Deny⁴ the Applications in this proceeding observed that the Applicants failed to demonstrate, or even make a meaningful attempt to substantiate, how the

¹ NTCA represents nearly 850 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of communications services in the most rural portions of America. All of NTCA’s service provider members are full service rural local exchange carriers (“RLECs”) and broadband providers. Approximately 75 percent serve as multichannel video programming distributors (“MVPDs”) using a variety of technologies in sparsely populated, high-cost rural markets.

² Applicants’ Consolidated Opposition to Petitions To Deny, MB Docket No. 17-179 (August 22, 2017).

³ *Media Bureau Establishes Pleading Cycle For Applications To Transfer Control Of Tribune Media Company To Sinclair Broadcast Group, Inc. And Permit-But-Disclose Ex Parte Status For The Proceeding*, MB Docket No. 17-179, Public Notice (rel. July 6, 2017).

⁴ Petition to Deny of NTCA, MB Docket No. 17-179 (August 7, 2017) (“NTCA Petition”).

merger would serve the public interest or somehow create “greater value” for small MVPDs, including NTCA members. Instead, the marriage of Sinclair and Tribune, two of the largest local TV station owners in the U.S., would create a broadcasting behemoth that would result in higher consumer prices, increased blackouts, and substantial harms to small MVPDs, which provide the only means by which broadcasters like Sinclair and Tribune can reach rural consumers who are located outside of the range of over-the-air broadcast signals. The Applicants’ subsequent Opposition similarly fails to demonstrate benefits to the public interest, or refute evidence of harms. Accordingly, the Applications should be denied.

II. APPLICANTS HAVE FAILED TO MEET THE BURDEN OF PROOF SHOWING THE MERGER TO BE IN THE PUBLIC INTEREST

The record demonstrates that the Applicants have not, as required, established that the merger meets the required public interest test.⁵ Despite the Applicants’ attempt to turn the burden of proof upon opposing parties,⁶ it is incumbent upon the applying parties to show that the transaction is in the public interest. As DISH observes, the Applications “say nothing about the transaction’s competitive effects. They do not offer any expert economic testimony on the harms, the benefits, or how the latter offset the former. Nor do they supply any factual declarations in support of their benefit claims.”⁷

In their Opposition, the Applicants make a belated attempt at justifying some of their claims. In doing so, the Applicants from the outset in fact underscore how the merger would harm consumers in areas served by smaller MVPDs. Noting “profound changes in the media

⁵ NTCA Petition at 2-4; *see also, e.g.*, Petition to Deny of American Cable Association, MB Docket No. 17-179 (August 7, 2017) (“ACA Petition”) at 4-5; Petition to Deny of Competitive Carriers Association, MB Docket No. 17-179 (August 7, 2017) (“CCA Petition”) at 3-5; Petition to Dismiss or Deny of DISH Network LLC, MB Docket No. 17-179 (August 7, 2017) (“DISH Petition”) at 9-12; Petition to Deny of Public Knowledge, Common Cause, and United Church of Christ, OC Inc., MB Docket No. 17-179 (August 7, 2017) (“PK *et. al.* Petition”) at 1-2.

⁶ Opposition at 2-4.

⁷ DISH Petition at 12-13.

ecosystem,” Applicants point to the “presence of MVPDs with nationwide or virtually nationwide footprints, the consolidation of national programming networks, the rapidly increasing cost of programming, including from national broadcast networks, the fragmentation of viewership, and the entry of massive competitors, such as Apple, Google, Netflix and Facebook.”⁸ Indeed, these are the very same forces that are impeding the ability of small MVPDs to serve customers effectively in high-cost areas. Applicants would add a new broadcasting behemoth to the list of factors that are already forcing small MVPDs to raise prices, curtail investment in infrastructure, or exit the market altogether. As justification, the Applicants claim that other parties also attempted to acquire Tribune.⁹ In essence, the Applicants attempt to paint the merger as being in the public interest by saying “If we didn’t do this, someone else would have.” This does not meet any interpretation of the standard for a public interest determination, because it says nothing about whether *Sinclair* is the right party to do so. Consequently, the Commission should deny the Applications.

III. APPLICANTS’ CLAIM TO REQUIRE “SCALE” TO ENDURE HAS NOT BEEN DEMONSTRATED

Applicants claim that they must achieve “scale” in order to be successful.¹⁰ True to form, there is no substantiation for this assertion. Even if directionally accurate, there is absolutely no evidence in the record to suggest that Sinclair, which prominently declares itself to be the “largest and most diversified television broadcasting company in the country today,” with 173 stations operating 528 channels in 81 U.S. markets,¹¹ must grow so dramatically to evolve and endure. In fact, Sinclair further touts its current size, scale and scope:

⁸ Opposition at 5.

⁹ *Id.* at 6.

¹⁰ *Id.* at 6-7.

¹¹ See <http://www.sbgi.net>.

“Sinclair owns and operates, programs or provides sales services to more television stations than anyone and has affiliations with all the major networks. In addition, Sinclair is the leading local news provider in the country, as well as a producer of sports content. Sinclair owns a multicast network, four radio stations and a cable network. Sinclair’s broadcast content is delivered via multiple-platforms, including over-the-air, multi-channel video program distributors, and digital platforms.”¹²

In contrast, the Commission has long recognized the deleterious effects of a *lack* of scale on market power of the small MVPDs that serve high-cost rural areas:

“Moreover, we note that small cable operators and MVPDs are particularly vulnerable to [forced] tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.”¹³

If Sinclair’s impressive existing size and scale is insufficient for the Applicants’ desires, they must affirmatively demonstrate how becoming even larger is consistent with the public interest, convenience, and necessity. This includes showing how creation of an even larger broadcasting conglomerate will, at the very least, avoid harming rural MVPDs serving high-cost rural consumers. Applicants have not done so. Therefore, the Applications should be denied.

IV. APPLICANTS HAVE RIGHTLY ABANDONED THE CLAIM THAT THE MERGER WILL PROVIDE “GREATER VALUE” TO MVPDS, AS EVIDENCE DEMONSTRATES THAT THE MERGER WILL RESULT IN HARMS TO MVPDS, THEIR CUSTOMERS, AND THE PUBLIC INTEREST

As NTCA noted in its Petition to Oppose, Applicants claimed, without support, that the merger would result in “greater value” to MVPDs.¹⁴ Unsurprisingly, Applicants have offered no evidence to corroborate this statement. Nor did they even bother to repeat this hollow claim in their Opposition. The lack of any demonstration of how the merger will create “greater value”

¹² *Id.*

¹³ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, *Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, FCC 07-169 (rel. Oct. 1, 2007), ¶ 120.

¹⁴ NTCA Petition at 7-10, citing Application at 2.

for MVPDs as promised in the Application represents another factor justifying denial – particularly when the record reflects that the opposite is true.

However, rather than take on the impossible task of explaining how the merger could create “greater value” for MPVDs when, in fact, the resulting higher retransmission fees and blackouts will damage MVPDs and the consumers they serve,¹⁵ the Applicants not only try to justify the rise of retransmission consent rates, but actually celebrate it. Without irony, Applicants describe opponents’ discussion of retransmission consent as “self-serving,”¹⁶ even as they raise a new, and again unsubstantiated, argument to claim that “historical *undercompensation*”¹⁷ is a valid reason for the astronomical rise of retransmission consent rates. In spite of the prodigious record of evidence showing the deleterious effects of steep increases in retransmission consent rates on the public interest,¹⁸ Applicants strain credulity by describing statements regarding these harms as “unsupported.”¹⁹

Among the most comprehensive evidence is found in DISH’s Petition.²⁰ Despite Applicants’ attempt to counter the economic analysis provided,²¹ the key conclusions found by the analyses contained in both the Ordover and Zarakas and Verlinda Declarations are consistent with the real-world experiences reported by NTCA’s small MVPD members. As NTCA stated in its Petition, data derived from a July 2017 survey of NTCA members demonstrates that the larger

¹⁵ *Id.*; see also ACA Petition at 10-13; Comments of the American Television Alliance, MB Docket No. 17-179 (August 7, 2017) (“ATVA”) at 3-6; DISH Petition at 14-35.

¹⁶ Opposition at ii, 44.

¹⁷ Opposition at 26 and 37, emphasis in the original.

¹⁸ See fn. 15, *supra*.

¹⁹ Opposition at ii.

²⁰ See DISH Petition, Exhibit D, Declaration of Janusz A. Ordover (“Ordover Declaration”); and Exhibit E, Declaration of William P. Zarakas and Jeremy A. Verlinda (“Zarakas and Verlinda Declaration”).

²¹ Opposition at 31-32.

the broadcaster, the greater the prospects for harm that would be especially damaging to small providers that lack economies of scope and scale.²²

The results of NTCA’s member survey mirrors important elements of the Ordover and Zarakas and Verlinda Declarations. Among other findings, both of these studies concluded that the larger the broadcast group, the higher the retransmission consent price.²³ Ordover further found that if the Transaction were to proceed, indications are that retransmission rates would increase, even in areas where Sinclair and Tribune stations do not overlap.²⁴

Applicants’ attempts to dismiss discussions of retransmission consent as “erroneous” and “irrelevant”²⁵ clearly miss the mark and drip with irony. While Applicants do make a theoretically correct statement in saying that when retransmission fees “are determined by the give and take of the marketplace, the public interest is served,”²⁶ it is well established that there is no meaningful “give and take” in the retransmission consent marketplace.²⁷ Yet even if, *arguendo*, a “free market” for retransmission consent existed, this is not the ultimate test of the public interest in the context of this specific Transaction.

The Commission is bound to determine what effects this Transaction would have on other public policy goals, including market entry, or exit, into or out of the MVPD space; investment in broadband infrastructure (especially in high-cost rural areas); higher consumer

²² NTCA at 7-8.

²³ Ordover Declaration at 18-26; Zarakas and Verlinda Declaration at 7-14.

²⁴ Ordover Declaration at 25-26.

²⁵ Opposition at 26.

²⁶ *Id.* at 28. Furthermore, Applicants attempt to divert the discussion by attempting to counter an argument that no one has made by noting that “the FCC does not have authority to regulate the rates MVPDs pay for programming.” (Opposition at 36). The argument is a red herring, as neither NTCA nor, to our knowledge, other Petitioners, have made such a request. Rather, NTCA and others seek to inject market forces into a regime that allows one party to dictate rates with virtual impunity.

²⁷ *See, e.g.*, Joint Reply Comments Of The Networks For Competition And Choice Coalition – Incompas, ITTA, NTCA, And Public Knowledge – And The Open Technology Institute At New America, MB Docket No. 15-216 (fil. Jan. 14, 2016); *see also*, Comments of NTCA, MB Docket No. 16-247 (fil. Sept. 21, 2016).

prices for video services, and similar considerations. Applicants' claim that these staggering increases in revenue will be placed towards the production of local news²⁸ or other lofty endeavors should be subject to the highest (and in the event of approval, enforceable) scrutiny. Even assuming that all such revenues were put towards public interest goals, the Commission remains bound to examine and balance the effects of this particular Transaction on *all* policy goals. Applicants have not only failed to demonstrate how the Transaction would provide "value" to MVPDs; they have also completely neglected to demonstrate how harms to other goals including competitive entry, broadband investment, consumer pricing, etc. would be counter-balanced by the alleged benefits offered by their insubstantial promises. Accordingly, the Applications should be denied.

V. APPLICANTS FAILED TO ADDRESS IN ANY WAY THE EFFECTS OF THE PROPOSED MERGER ON CONSUMERS THAT RELY ON MVPDS FOR BROADCAST SIGNALS

NTCA's initial Petition noted that the Applicants had made no attempt to address the key factor of how the proposed merger might impact consumers who must rely on MVPDs to obtain broadcast signals at all.²⁹ Since the transition to digital television reduced the effective range of many over-the-air broadcast stations, nearly one-fourth of NTCA's members report that 90 percent of more of the customers in their service areas cannot receive broadcast signals and must rely on an MVPD to receive local news, weather reports, and other benefits of local broadcasts.³⁰ As NTCA stated, small rural MVPDs pay (and keep paying more) for the "privilege" of carrying content that Sinclair or Tribune otherwise could not deliver to consumers in rural America, leaving these consumers at the mercy of broadcasters who are able to dictate increased rates or

²⁸ Opposition at 28.

²⁹ NTCA Petition at 6-7.

³⁰ See Comments of NTCA – the Rural Broadband Association, MB Docket No. 15-216, at 3 (filed Dec. 1, 2015).

punitively remove MVPDs' access to signals, even when rural consumers have no other way to access these signals.³¹ In a real “market,” where the seller could not reside behind an outdated regulatory monopoly, this dynamic would not and could not logically exist. This is not a “market” – it is a one-way regulatory regime that has long outlived its applicability and usefulness in identifying in the light of day and negotiating fair prices for content. The public interest dictates not allowing exacerbation of this problem via merger.

NTCA's Petition stated that these circumstances clearly contravene the public interest, convenience, and necessity.³² While Applicants touted the benefits of “free over-the-air” broadcasts,³³ neither the original Applications, nor the Applicants' subsequent Opposition addressed how they anticipate the proposed merger will impact the vulnerable consumers who cannot obtain signals over the air. The Commission should deny the Applications due to this omission.

VI. CONCLUSION

Applicants have failed to demonstrate how the proposed merger would benefit anyone but themselves, rather than further the public interest, convenience, and necessity as required. Nor have they demonstrated the reasons behind their claimed need to grow larger, despite their current prodigious scale. They have apparently, and rightly, abandoned earlier claims that the merger would provide MVPDs with “greater value,” as the record clearly shows that MVPDs, and particularly small ones serving rural consumers, will be harmed. They have utterly failed to address effects the merger will have on consumers who are out of range of over-the-air broadcast signals, and must rely on MVPDs for any signal at all. Each of these reasons, individually, merit

³¹ NTCA Petition at 6-7.

³² *Id.*

³³ Opposition at 45-46.

rejection of proposed merger. Taken in total, there is no reason for the Commission to consider such deficient and flawed Applications any further.

Respectfully submitted,



By: /s/ Stephen Pastorkovich
Stephen Pastorkovich
Vice President, Technology &
Business Development
spastorkovich@ntca.org
703-351-2000 (Tel)

By: /s/ Richard J. Schadelbauer
Richard J. Schadelbauer
Manager, Economic Research and Analysis
rschadelbauer@ntca.org
703-351-2000 (Tel)

By: /s/ Jill Canfield
Jill Canfield
Vice President, Legal & Industry
Assistant General Counsel
jcanfield@ntca.org
703-351-2020 (Tel)

4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203

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CERTIFICATE OF SERVICE

I, Barbara Fitzpatrick, hereby certify that on August 29, 2017, I caused true and correct copies for the foregoing to be served by electronic mail upon the following:

Mace J. Rosenstein
Covington & Burling LLP
One City Center
850 Tenth Street, NW
Washington, D.C. 20001
mrosenstein@cov.com

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

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

/s/ Barbara Fitzpatrick
NTCA–The Rural Broadband Association