

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

In the Matter of	)	
	)	
<b>Tribune Media Company</b>	)	
(Transferor)	)	
	)	
and	)	MB Docket No. 17-179
	)	
<b>Sinclair Broadcast Group, Inc.</b>	)	
(Transferee)	)	
	)	
Consolidated Applications for Consent	)	
to Transfer Control	)	

**COMMENTS OF CONSUMERS UNION**

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## I. INTRODUCTION

Consumers Union,<sup>1</sup> the policy and mobilization division of Consumer Reports, welcomes this opportunity to comment upon the proposed \$3.9 billion transaction between Sinclair Broadcast Group (Sinclair) and Tribune Media Company (Tribune). Earlier this year, Sinclair announced its intention to purchase Tribune, increasing its ownership to more than 220 broadcast stations across the nation. The Federal Communications Commission (FCC) established a pleading cycle for the license transfer applications for the transaction in July,<sup>2</sup> and that initial comment and reply period concluded in August. The Commission then paused its 180-day merger review “shot clock” on October 17, 2017, to solicit further comments on the Sinclair-Tribune merger in light of Sinclair’s responses to the FCC’s requests for more information related to the deal.<sup>3</sup>

If approved by both the FCC and the Department of Justice, this transaction would expand Sinclair’s reach to 72 percent of American consumers—irrespective of whether one takes into account the so-called UHF discount, whereby a UHF television station counts only half as much as a VHF station when calculating compliance with the national media ownership

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<sup>1</sup> Consumers Union works for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves, focusing on the areas of telecommunications, health, food and product safety, energy, privacy, and financial services, among others. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumers Reports has over seven million subscribers to its magazine, website, and other publications.

<sup>2</sup> *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*, Public Notice, DA 17- 647 (Med. Bur. July 7, 2017).

<sup>3</sup> *Media Bureau Pauses 180-Day Shot Clock in the Proceeding to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc., to Allow for Additional Comment*, Public Notice, DA 17-1026 (Med. Bur. October 18, 2017).

cap, currently 39 percent. This past April, the Commission reinstated the UHF discount.<sup>4</sup> Then, just a few weeks later, Sinclair announced its plans to acquire Tribune. As an initial matter, we observe this deal never would have been possible had the FCC not resurrected the UHF discount, which many—including the current Commission—agree is technologically obsolete in today’s digital television marketplace.

Even when taking into account the UHF discount for legal purposes, the combined companies would still exceed the national media ownership cap.<sup>5</sup> If the goal is to limit what percentage of the national audience any one company is permitted to reach to ensure a diverse media and localism of content—a goal we agree with and believe benefits consumer choice—then at a minimum a combined Sinclair-Tribune would need to divest some of those stations to comply with the cap. Nothing in Sinclair’s unsatisfactory submission to the Commission in September suggests otherwise.<sup>6</sup> Excessive consolidation, which this deal represents when conceding that the new Sinclair will reach close to three-quarters of the entire national audience, harms consumers and threatens the benefits of a diverse media that are protected by the 39 percent national ownership cap.

The Sinclair-Tribune merger also will impact the current retransmission consent regime, a product of the 1992 Cable Act. Consumers Union believes that this process, whereby broadcasters and multichannel video programming distributors (MVPDs) negotiate fee-for-carriage agreements, has long been broken. Though broadcasters and MVPDs point fingers,

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<sup>4</sup> Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule, *Order on Reconsideration*, 32 FCC Rcd. 3390, 3395 ¶ 14 (2017) (“*UHF Discount Reinstatement Order*”).

<sup>5</sup> 47 C.F.R. § 73.3555(e).

<sup>6</sup> Responses of Sinclair Broadcast Group, Inc. to FCC Request for Information, *Tribune Media Company and Sinclair Broadcast Group, Inc.*, Consolidated Applications for Consent to Transfer Control, MB Docket No. 17-179 (Filed October 5, 2017).

fight, and blame one another, the real losers are consumers who are harmed by higher prices and station blackouts. Of particular concern here, Sinclair has developed a reputation for being one of the most difficult broadcast groups to negotiate with, and its executives boast of extracting the highest fees from cable and satellite operators.<sup>7</sup> We also know these increased costs are passed on to consumers in the form of “broadcast fees” by MVPDs—a direct consumer harm as a result of the flawed retransmission consent system.

Finally, parties to license transfers such as these bear the duty to demonstrate how the transaction serves the public interest. Consumers Union notes that the Commission made a formal request for more information from Sinclair on September 14, in furtherance of the Commission’s duty to assess whether these license transfers are in the public interest. Based upon the evidence we have seen thus far, the deal as proposed appears to fail this test. We urge the Commission to conduct a very thorough review to ensure consumers’ interests are protected.

In this regard, we are concerned with what some believe may be a recent narrowing of the FCC’s view of the public interest test,<sup>8</sup> through a “clarification” that may have tilted the balance in favor of merging parties instead of the broader public interest that includes consumers’ interests. Our concern is addressed more fully below.

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<sup>7</sup> Reply Comments of DISH Network, *Tribune Media Company and Sinclair Broadcast Group, Inc.*, Consolidated Applications for Consent to Transfer Control, MB Docket No. 17-179 (Filed August 29, 2017) *citing on p. 19, footnote 45: Sinclair Broadcast Group Inc. at JP Morgan Tech, Media and Telecom Conference, Fair Disclosure Wire* (May 22, 2017) (comments of Christopher S. Ripley).

<sup>8</sup> *Applications of Level 3 Communications, Inc. and CenturyLink, Inc. for Consent to Transfer Control of Licenses and Authorizations*, WC Docket No. 16-403, Memorandum Opinion and Order, (October 30, 2017). (CenturyLink Order) *See Statements of Commissioner Clyburn and Commissioner Rosenworcel.*

## II. THE REINSTATEMENT OF THE UHF DISCOUNT

The UHF discount is a 1980s regulation that permits broadcasters to count only one half of a UHF station's audience reach for purposes of determining compliance with the 39 percent national ownership cap. The discount was originally adopted in recognition of the diminished reach and technological capability of a UHF station in the analog, over-the-air broadcast era of the past. We believe the FCC was correct to eliminate the UHF discount last September, as the technical rationale for the regulation is no longer relevant in the digital television era.

However, less than a year later, the current Commission repealed the repeal of the UHF discount, and this outdated regulation is, unfortunately, back on the books. Consumers Union is concerned that resurrecting the discount will promote and enable further media consolidation by providing a loophole to the 39 percent national ownership cap. This cap has served as an important safeguard to ensure media diversity and competition that benefit consumers. As the Commission originally observed when repealing the UHF discount last year:

Without any current technological justification, the continued application of the UHF discount distorts the calculation of a licensee's national audience reach and undermines the intent of the cap. Continued application of the UHF discount seven years after the DTV transition has the absurd result of stretching the national audience reach cap to allow a station group to actually reach up to 78 percent of television households, dramatically raising the number of viewers that a station group can reach and thwarting the intent of the cap.<sup>9</sup>

The goals of the national ownership cap are not met when the glaring end-around that the UHF discount represents is allowed to persist. Consumers Union strongly believes the FCC erred when it reinstated the UHF discount in April. We have endorsed legislation, H.R. 3478, the Local and Independent Television Protection Act, which would permanently eliminate it. In

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<sup>9</sup> *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, Report and Order, 31 FCC Rcd 10213 at ¶ 34 (2016).

our view, the UHF discount serves only to enable further increases in media consolidation—as represented by the Sinclair-Tribune merger considered in this proceeding—that hurts consumers’ choices and pocketbooks, and threatens to limit the diversity of viewpoints we enjoy in a free and open society. The FCC should promote competition in the broadcast television market and the benefits it provides consumers, versus enabling increased consolidation.

### **III. RETRANSMISSION CONSENT AND CONSUMER HARM**

Consumers Union is also deeply concerned with the effect that increased media consolidation has on competition and prices paid by consumers in the pay-TV market through the way it skews the retransmission consent process. As a recent article in *The Economist* points out, the larger a media group becomes by adding stations through mergers and acquisitions, the more leverage it gains in retransmission consent negotiations with MVPDs.<sup>10</sup> The same article points out that retransmission consent fees have grown dramatically in the last decade, and now represent nearly a quarter of the multi-billion dollar revenues enjoyed by broadcasters. Other commenters further strengthen these conclusions with a detailed analysis of how consolidation in the broadcaster market has led to skyrocketing retransmission consent fees.<sup>11</sup>

Unfortunately, the increased costs borne by MVPDs have been passed on to consumers in the form of add-on fees (e.g., a “broadcast TV fee” or a “regional sports fee”) in their monthly service bill. Even worse, these fees to consumers have risen by 50 percent in some

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<sup>10</sup> *Sinclair Broadcast Buys Tribune Media*, *The Economist* (May 13, 2017) <https://www.economist.com/news/business/21721966-americas-media-regulator-aids-consolidation-tv-stations-sinclair-broadcast-buys-tribune>.

<sup>11</sup> See Comments of DISH Network, *Tribune Media Company and Sinclair Broadcast Group, Inc., Consolidated Applications for Consent to Transfer Control*, MB Docket No. 17-179 (Filed August 7, 2017).

markets just in the past year.<sup>12</sup> A larger Sinclair could be expected to gain even more leverage in retransmission consent negotiations, so we would fully expect these add-on fees to consumers to increase even more as MVPDs pay higher rates for Sinclair’s programming.

Of further concern, Sinclair was fined by the Commission for acting in bad faith during retransmission consent negotiations little more than a year ago.<sup>13</sup> It strains credulity, as well as basic economics, to think that a larger Sinclair will become a better actor with more stations and negotiating power under its control, or that this merger will benefit consumers with more choice and lower prices. To the contrary, if Sinclair’s audience reach is allowed to get even bigger and more powerful, costs for consumers will only increase.

#### **IV. THE FCC’S PUBLIC INTEREST TEST**

For decades, the Commission has been obligated by § 310(d) of the Communications Act to consider the so-called “public interest test” when evaluating applications for license transfers. The text of § 310(d) reads, in part:

(d) ASSIGNMENT AND TRANSFER OF CONSTRUCTION PERMIT OR STATION LICENSE

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.<sup>14</sup>

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<sup>12</sup> James K. Wilcox, *Your Cable Bill Is Going Up More Than You Think This Year*, Consumer Reports (February 4, 2017) <http://www.consumerreports.org/tv-services/your-cable-bill-is-going-up-more-than-you-think-this-year/>.

<sup>13</sup> Daniel Frankel, *Sinclair Fined \$9.5M by FCC for Violating Good-Faith Retrans Bargaining Obligations*, Fierce Cable (Aug. 1, 2016), <http://www.fiercecable.com/cable/sinclair-fined-9-5m-by-fcc-for-violating-good-faith-retrans-bargaining-obligations>.

<sup>14</sup> 47 U.S.C. § 310(d).

To be sure, a spirited debate persists to this day as to what sort of review standard the public interest test represents, with varying opinions expressed by past Commissioners and academic journals alike. But, as recent scholarship points out, the public interest test has always been “amorphous” and the Supreme Court itself has granted the FCC wide discretion to interpret the standard, which extends beyond the more focused competition review conducted by the Department of Justice under antitrust law:

As the Supreme Court has said, the “standard no doubt leaves wide discretion and calls for imaginative interpretation.” It is “[n]ot a standard that lends itself to application with exactitude.”<sup>15</sup>

We believe the broad latitude afforded by the public interest test benefits consumers, as the Commission is able to take into account the full range of harms that a merger may have on potential competition, consumer choice, diversity of viewpoints, and other important values that extend beyond antitrust.

However, the Commission’s recent approval of the CenturyLink-Level 3 Communications merger suggests the public interest test may be narrowed in its application moving forward, despite the Chairman’s insistence that the review standard has not been changed.<sup>16</sup> By first “determining the transaction does violate the Act, other statutes, or Commission rules”—which presently the Sinclair-Tribune transaction, as proposed, would appear to do by exceeding the national ownership cap—the license transfer would then identify any public interest harms. And only if those are found, the Commission will consider (not require) “narrowly-tailored, transaction-specific conditions to remedy the harm.”

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<sup>15</sup> Barkow, Rachel E. and Huber, Peter W. () “A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers,” University of Chicago Legal Forum: Vol. 2000: Iss. 1, Article 4, p. 42. Citing *FCC v RCA Communications, Inc.*, 346 US 86, 90 (1953) Full text of the article available at: <http://chicagounbound.uchicago.edu/uclf/vol2000/iss1/4>

<sup>16</sup> CenturyLink Order, *See Statement of Chairman Pai*, (October 30, 2017).



Perhaps this is nothing more than an attempt at a distilled articulation of past applications of the public interest test; but, we are concerned that this articulation could lead to a departure from the broader interpretation of the public interest as used to consider consumer, marketplace, and public harm and benefits in past reviews, and led to ensuring that consumers were appropriately protected. Certainly, the Commission did not unanimously agree to this new articulation of the public interest test and how it is applied to license transfer reviews.<sup>17</sup> We agree with Commissioner Rosenworcel's concern, stated simply as, "Moreover, I worry that our capricious disregard for precedent is simply part of a larger effort to speed the way for the next billion-dollar transaction before us."<sup>18</sup> Indeed, we are concerned that the transaction she refers to is the very one the FCC is considering in this proceeding. Will the Commission be satisfied with the simple finding that the Sinclair-Tribune merger's only public interest harm is that it violates the national ownership cap, easily remedied by a few divestitures? To do so would ignore the other potential harms this transaction poses to competition and consumers.

## **V. CONCLUSION**

Consumers Union is troubled by the Sinclair-Tribune merger and how, if approved, it will harm consumers with higher prices. Aside from our particular concerns regarding the UHF discount and the FCC's public interest test, we strongly believe this merger is likely to exacerbate the harms caused by a dysfunctional retransmission consent system, a system where fees charged by broadcast groups like Sinclair have risen at many times the rate of inflation in just the past ten years, and where station blackouts to extract higher retransmission fees have

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<sup>17</sup> *Id.*, See *Statements of Commissioner Clyburn and Commissioner Rosenworcel*.

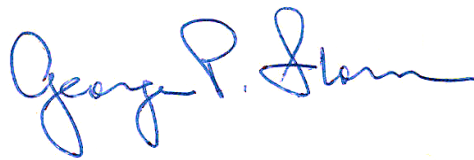
<sup>18</sup> *Id.*, See *Statement of Commissioner Rosenworcel*.

become too common. Though MVPDs have endured increased costs on the losing side of the bargaining table, it is consumers who have lost the most when those rate increases are passed on to them in the form of company-imposed add-on fees. We believe the Commission must consider remedies that effectively address these concerns as part of its public interest review of this transaction.

Respectfully submitted,



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