

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

In re Application of)
)
Allbritton Communications Co.) MB Dcket No. 13-203
) BTCCDT-20130809ACD
For Transfer of Control of WJLA-TV, Washington, DC)
To Sinclair Television Group, Inc.)

TO THE COMMISSION

REPLY TO OPPOSITIONS TO PETITION TO DENY

The Rainbow PUSH Coalition (“RPC”) respectfully replies to the September 26, 2013 oppositions of Sinclair Television Group, Inc. (“Sinclair”) and of Perpetual Corporation *et al.* (“Allbritton”) to RPC’s September 13, 2013 Petition to Deny (“RPC 2013 Petition to Deny”) the above-referenced Form 315 application (the “Application”).¹

This week, two authoritative reports thoroughly documented the full extent of Sinclair’s present-day control of Cunningham.² A Wall Street Journal investigation documented how, in Columbus, OH, Sinclair programs and operates three stations (including one licensed to Cunningham), documents how, after Cunningham’s former principal Carolyn Smith passed away, she was replaced by a former Sinclair banker, and explains how Sinclair exercises a stranglehold on Cunningham by financing its operations and owning most of its assets needed for

¹ Proving that truly no good deed goes unpunished, Sinclair and Albritton fault RPC for simply trying to be fair by informing the Commission of its adversary’s good deeds. Sinclair objects to RPC’s acknowledgement that its EEO record has improved (!) (Sinclair Opposition at 15 and n. 37) and Albritton suggests that Sinclair’s contributions to broadcast engineering and its improved EEO record could immunize it from accountability for the Cunningham affair (Allbritton Opposition at 9). The Communications Act, however, does not authorize the Commission to consider, in issuing an HDO, evidence unrelated to the triable issues. See 47 U.S.C. §309(e). Perhaps in extraordinary cases such evidence can be considered upon review of the record of a hearing (see 47 C.F.R. §1.282(b)(1) (a final decision “shall contain ... law or discretion presented on the record.”))

² RPC respectfully incorporates these reports by reference herein.

broadcasting.³ And in a thorough analysis of consolidation in the television industry, Free Press explains in copious detail how Sinclair uses Cunningham “to skirt the FCC’s ownership rules” by exercising “de facto control ... over station operations in every meaningful way.”⁴ Here is how Free Press summarizes its findings:⁵

It shouldn’t take a lawyer (or even five FCC commissioners) to recognize this farce. Sinclair owns all the non-license assets of the stations it runs under LMAs and SSAs. Sinclair houses the operations of these stations in its own facilities (and Cunningham’s “corporate headquarters” are located in a Sinclair-owned station). Sinclair sells all the ad time for these stations. Sinclair is paid the overwhelming majority of revenues these stations earn. Sinclair produces all local content these stations air. These owners in name all have agreements with Sinclair that only it can purchase these stations. And the FCC has already found Sinclair to have illegally controlled its initial and largest partner.

The Sinclair Opposition

Sinclair suggests that because the misconduct complained of by RPC has gone on for so many years, RPC should simply “move on from disagreements that took place with Sinclair a decade ago.” Sinclair Opposition at 16.⁶ But nothing in the record suggests that Sinclair has suddenly, without telling anyone, liberated Cunningham from its control, or reformed even one of the multiple indicia of control that RPC pointed to in its still-unadjudicated 2002 and 2003 petitions to deny.

³ Keach Hagey, Sinclair Draws Scrutiny Over Growth Tactic: TV-Station King Uses “Sidecars” to Skirt Ownership Limits,” The Wall Street Journal, October 20, 2013.

⁴ S. Derek Turner, Cease to Resist: How the FCC’s Failure to Enforce Its Rules Created a New Wave of Media Consolidation,” Free Press, October 2013, pp. 4-5; see also id. at 21-30 (providing extensive detail on how Sinclair’s financial relationship with Cunningham is tantamount to ironclad control – the precise point RPC has been making for the past ten years).

⁵ Id. at 30.

⁶ Sinclair states that it is “curious why RPC has waited until now, a decade later, to dredge up these stale old complaints.” Sinclair Opposition at 18. Actually, although it was not required to do so, RPC has repeatedly reminded the Commission of its obligation to rule on RPC’s 2003 Petition to Deny. See RPC 2013 Petition to Deny, pp. 6-7.

Relatedly, Sinclair is also incorrect in suggesting that because RPC's allegations have been pending for some time without a ruling, they are "stale." No "staleness" exception can be found in the Communications Act's provision governing petitions for reconsideration.⁷ Further, and especially given its long delay in producing a ruling, the Commission has considerable discretion in choosing which application(s) to designate for the hearing it is required to hold.⁸

Sinclair also suggests that the Cunningham allegations are not germane to the current transaction involving WJLA-TV. Sinclair Opposition at 18. Nothing could be more incorrect. Through its control of Cunningham – itself one of the nation's largest (putative) major market licensees – Sinclair has seized the national market power that has enabled it to pursue transactions such as the Albritton acquisition and enter lucrative markets like Washington, D.C. Misbehavior such as the Cunningham affair, by a company in the business of journalism, diminishes public confidence in the Fourth Estate, thereby undermining one of the core foundations of our democracy.⁹

Nor is there any merit to Sinclair's apparent suggestion that Ms. Smith's passing mooted any such misconduct that might have taken place during the years she was ostensibly operating

⁷ 47 U.S.C. §405(a). Sinclair correctly notes that the applications Rainbow PUSH challenged in 2003 are still pending. See Sinclair Opposition at 17; see also the instant Application at Exhibit 24 (correctly noting that "a number of Sinclair's applications remain pending before the Commission.")

⁸ RPC's original allegations were made in pleadings filed with respect to stations in Charleston, WV, Charleston, SC, Columbus, OH, Dayton, OH and Baltimore, MD. The underlying applications are still "live" inasmuch as they remain subject to RPC's 2004 Petition for Reconsideration and Sinclair's 2004 Application for Review. Thus, the Commission could designate those five 2003 applications for hearing, or it could grant the instant WJLA-TV Application for hearing, or both. There is clear precedent for holding a hearing on any application filed by the alleged wrongdoer if the misconduct's impact was not specific to a single market. See, e.g., Trinity Broadcasting of Florida, Inc. (HDO), 8 FCC Rcd 2475 (1993) (designating a Miami, FL renewal application for hearing to consider allegations initially raised in a petition to deny an assignment application for a station in Wilmington, DE).

⁹ See Steven Smith Declaration (appended to the RPC 2013 Petition to Deny). One need only recall the British newspaper scandal to appreciate how the public's confidence in the Fourth Estate is diminished when news providers engage in behaviors that betray the public trust.

Cunningham. See Sinclair Opposition at 16. Ms. Smith's complete lack of involvement in running the stations, and her rendering only of decisions favorable to Sinclair, were key elements of Sinclair's misconduct in controlling Cunningham.¹⁰ Sinclair points to no changes in Cunningham's relationship with Sinclair since Ms. Smith passed away; indeed, Cunningham appears to have exactly the same purpose, and the same methods of evasion, that Glencairn had from 1991 to 2001 when Glencairn enabled Sinclair to evade the television duopoly rule. A party cannot deliberately mislead the FCC, create a huge equity base by doing so, be sanctioned, then immediately do it again even more aggressively than before,¹¹ and then claim that the passage of time or a change in the identities of the individuals operating the scheme somehow has wiped out the misconduct. Otherwise there would be no incentive for broadcasters ever to observe the rules, since they would know that if they were ever called to question, they could just replace the persons involved and continue to enjoy the fruits of the improper business arrangements the new personnel inherited.

Sinclair's final argument is that there is no "convincing reason why Sinclair should be singled out and prohibited from providing services to other licensees when its competitors are free to do so. That would be a valid point if Sinclair were really just "providing services." See Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965). The problem is that Sinclair wrongly

¹⁰ Contrary to Sinclair's suggestion, Ms. Smith's age was not the reason RPC objected to Cunningham's controlled by Sinclair. See Sinclair Opposition at 16. Rather, the record showed that Ms. Smith had no operating knowledge of broadcasting or any other business, had no ability to balance a checkbook, worked for Sinclair herself (in the mailroom), employed as Cunningham's President the only person in the nation who a judge had ever found to be controlled by Sinclair, and made every major decision in Sinclair's interest rather than Cunningham's interest. See RPC 2003 Petition to Deny at 4-14. Despite many opportunities to do so, Sinclair produced no evidence showing that Ms. Smith made a single decision in Cunningham's interest and adverse to Sinclair's conflicting interest, or performed a single act evidencing her independent control of the huge broadcast enterprise she supposedly headed.

¹¹ Ms. Smith was a non-broadcast-experienced relative of the members of the Sinclair control group, whereas Glencairn's CEO was a broadcast-experienced Sinclair employee but not a family member of the control group.

provides services to a company over which it exercises de facto control – a company that, as far as the record shows, has never made a major decision in its own interest and adverse to Sinclair’s interests. Thus, Sinclair’s “everyone else does it too” defense should be rejected.

The Albritton Opposition

Albritton has been an outstanding licensee, and thus it is with the greatest respect that RPC must take issue with its erroneous characterization of the issues RPC has brought before the Commission. The allegations are certainly not, as Albritton suggests, “long-resolved[.]” See Allbritton Opposition at 8. Not only are the allegations very much alive, they were not even initially adjudicated. The reason RPC sought reconsideration before the Bureau rather than applying for review to the Commission was that the Bureau simply ignored, and did not rule upon, several of the specific indicia of control of Cunningham by Sinclair. These indicia, which as in any veil-piercing control case must be read together, demonstrated overwhelmingly not only that Sinclair controls Cunningham but that Sinclair was a pure recidivist in exercising control of Cunningham in an even more egregious manner than the manner by which it controlled Glencairn, Ltd. from 1991 to 2001.

Conclusion

For ten years, the Commission has had before it a massive pile of evidence demonstrating that Sinclair – now the nation’s largest television broadcaster - exercises control of virtually every element of Cunningham’s operations, employees, finances, programming, and business strategy. Better late than never, the Commission should designate a hearing on these allegations of unlawful and recidivist behavior. These allegations go to the heart of the FCC’s duty to protect the public from anti-competitive conduct by its licensees.¹²

Respectfully submitted,



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October 24, 2013

¹² Sinclair’s suggestion that RPC lacks standing is without merit. The declaration of RPC local member Steven Smith is in a form congruent with the form that the Commission has approved dozens of time in the face of administrative standing challenges – including one in this very case (see Letter to Kathryn R. Schmeltzer, 19 FCC Rcd 3897 (2004)). Rainbow/PUSH Coalition v. FCC, 330 F.3d 539, 544, 556 (D.C. Cir. 2003), cited in the Sinclair Opposition at 18 n. 41, is inapposite as it addresses judicial standing. Finally, Sinclair maintains that RPC’s claim in support of standing - that public confidence in news coverage diminishes in the wake of a news provider’s misconduct – was offered in the wrong place (*i.e.*, in the standing declaration, rather than earlier in the document in the narrative). Sinclair Opposition at 18-19. No case establishes that the location of a plainly articulated assertion within a document impacts a party’s standing.

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 24th day of October, 2013 caused a copy of the foregoing "Petition to Deny, and for Other Relief" to be delivered by U.S. First Class Mail, postage prepaid, and by e-mail, to the following:

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A handwritten signature in blue ink, appearing to read "David Honig", is placed on a light pink rectangular background.

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