Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Applications Seeking Consent to	)	MB Docket No. 13-203
Assignment of Broadcast Station Licenses	)	
From Sinclair Television Group, Inc. to	)	BALCDT-20130809ADC
to Deerfield Media (Birmingham) Licensee	)	BALCDT-20130809ADE
LLC, Deerfield Media (Harrisburg)	)	BALCDT-20130809ADF
Licensee, LLC, and HSH Charleston	)	BALCDT-20130809ADG
(WMMP) Licensee, LLC	)	

REPLY TO OPPOSITIONS

Free Press and Put People First! PA (collectively, "Petitioners") hereby submit this Reply to the Oppositions separately filed by Sinclair Television Group ("Sinclair"); Shareholders of Perpetual Corporation, Charleston Television, LLC, and Allbritton Communications Company (collectively, "Allbritton"); Deerfield Media ("Birmingham") Licensee, LLC and Deerfield Media (Harrisburg) Licensee, LLC (collectively, "Deerfield"); and HSH Charleston (WMMP) Licensee, LLC ("HSH," and together with Sinclair, Albritton and Deerfield, "Applicants"), opposing Petitioners' Petition to Deny grant of the above-captioned applications.

INTRODUCTION AND SUMMARY

Petitioners provided clear evidence that, pursuant to proposed assignments and ancillary outsourcing agreements, Sinclair intends to control two or more television stations in the same markets in violation of the local ownership limits applicable therein. Applicants meagerly suggest that Deerfield and HSH will independently operate and control the stations in Charleston, Birmingham, and Harrisburg, but offered no objective support for this claim. Sinclair will be the effective owner and operator of Deerfield's and HSH's stations—using these shell companies to advance a decades long campaign to evade the Commission's ownership rules.

Perhaps in light of deficiencies in their substantive arguments, Applicants raise two procedural claims in a last-ditch effort to gain approval for these unlawful assignments: that the Commission may not address legitimacy of the proposed sharing agreements in a licensing proceeding; and that Petitioners lack standing. The Commission should reject these arguments of last resort. Petitioners illustrated that the license transfers would violate the duopoly rule and impede the public interest goals the rule is designed to protect. It follows that a licensing proceeding is the exact forum in which the Commission should address the unlawful assignments. What is more, declarations from television viewers who will be subject to Sinclair's duopoly and the harms that will inevitably result are sufficient to establish standing.

I. The Applicants' Proposed Transactions Violate the Duopoly Rule and Are Therefore *Per Se* Contrary to the Public Interest

Petitioners made a *prima facie* showing that the above-captioned assignments are not in the public interest. Applicants bear the burden of showing otherwise.[1] Sinclair must show that Deerfield and HSH would be independent entities with meaningful editorial and operational control over the stations assigned to them. However, Sinclair has not produced evidence that Deerfield and HSH are anything other than shell companies created to serve as nominal license holders. Applicants have thus fallen short of the burden imposed by the Communications Act, and therefore, the Commission must deny the applications or designate them for hearing.[2]

Sinclair has alleged that "nowhere in its Petition is Free Press able to site a single rule, policy or case showing that the proposed sharing arrangements...are in any way 'unlawful.'"[3] However, from the outset, we articulated that the sharing arrangements in Birmingham,

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[1] *See, e.g.*, *In the Matter of Applications for Consent to the Transfer of Control of Licenses XM*

[2] If the Commission is unable to find that a proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, the Commission must designate the application for hearing. 47 U.S.C. § 309(e).

[3] Sinclair Opposition at 3.

Charleston, and Harrisburg violate the local television multiple ownership rule, 47 C.F.R. § 73.3555(b)(1), which plainly prohibits a single entity from "directly or *indirectly*" owning, operating, or controlling two television stations in the same DMA if both stations are among the top four in the market or if eight independent voices would not remain post-merger.

When its deal with Allbritton was announced, Sinclair conceded that it would divest its licenses for WMMP(TV), WTTO(TV), WABM(TV), and WHP-TV in an attempt to comply with the Commission's rules.[4] Presumably, divestitures were necessary because Sinclair could not satisfy the top-four or eight-voices tests. Still, in order to maintain control, Sinclair entered into SSAs and JSAs with the stations' new owners. Because it will continue to indirectly own, operate, and control the above-named stations while acquiring direct control of Allbritton's stations in the same markets, Sinclair's attempt at compliance-by-evasion fails.

Sinclair claims nonetheless, implausibly, that it will not control the stations it proposes to transfer to Deerfield and HSH. Predictably, Deerfield and HSH also argue that Sinclair will not control the respective stations. All three entities, along with Allbritton mischaracterize Petitioners claims to the contrary as "speculative" and "unsupported."[5] That Applicants choose to ignore the evidence that Deerfield and HSH are shell companies over which Sinclair maintains *de facto* control does not render that claim "unsupported." Creating shell companies to exert unlawful influence in broadcast markets is Sinclair's *modus operandi*.[6] Applicants ask the

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[4] Sbgi.net, "Sinclair Broadcast Group Announces Agreement to Purchase Allbritton TV Stations," July 29, 2013, http://www.sbgi.net/site_mgr/temp/Allbritton%202_1fhrbvkt.shtml.

[5] Sinclair Opposition at 5; Allbritton Opposition at 5.

[6] Following a 2001 Commission finding that Sinclair illegally controlled Glencairn, Sinclair CEO David Smith wrote to investors taking credit for the invention of Local Marketing Agreements as a tool for circumventing ownership rules. *See* Sinclair Broadcasting Group, 2001 Annual Report to Shareholders, Dec. 31, 2011: ("[T]en years ago we created the first local marketing agreement (LMA), an alternative structure that allowed us to program another owner's television station while reaping the benefits of duopoly…. This past year, we once again introduced the industry to another innovative structure, which we termed as an "outsourcing agreement." Under this arrangement, one

Commission to blindly adhere to a "precedent" of approving SSAs while ignoring Sinclair's precedent of creating shell companies to evade the rules.

What is more, Sinclair has not provided any evidence to dispute Petitioners' assertions regarding the true nature of its relationships with Deerfield and HSH. Petitioners have pointed out that based on SNL Kagan estimates, Sinclair will likely retain most, if not all, of the profits generated by the Deerfield and HSH stations.[7] Sinclair has said "the basis upon which Free Press calculated its numbers is unclear, and appear to be a speculative estimate of a third party without access to the facts."[8] As iterated in the Petition to Deny, our calculations are derived from comparisons with the respective stations' estimated performances in the last year as reported by SNL Kagan, a source upon which Sinclair consistently relies when presenting to investors.[9]

Sinclair has not offered any figures to counter SNL Kagan's estimates or otherwise show that Deerfield and HSH earn any compensation other than a fee for acting as a licensee. Instead, Sinclair relies on conclusory statements and references to its SSAs to make its case. Furthermore, Deerfield and HSH were conceived for the sole purpose of sidestepping the Commission's rules and Sinclair is financing its shell companies' station purchases.[10] When this evidence is

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station provides the sales and operating services, but not the programming, to another station in that market. Similar to the joint sales agreements common in the radio industry, this structure enables us to more effectively compete in those markets where duopolies or LMAs are currently not permitted. As our industry matures, these types of structures that promote cooperation among broadcasters within their markets are even more important to enhancing broadcasters' economic and competitive positions. We have already entered into such arrangements in two of our markets and continue to look for added opportunities.").

[7] *See* Petition to Deny at 8.

[8] Sinclair Opposition at 7 n.16.

[9] *See* Sinclair Broadcast Group, September 26, 2013 (citing SNL Kagan at 9, 12, 15, 16), http://www.sbgi.net/site_mgr/temp/Sinclair%20Sept%202013.pdf; Sinclair Broadcast Group, Barclays HY Bond Conference, May 21, 2013 http://www.sbgi.net/site_mgr/temp/Sinclair%20Barclays%202013.pdf (citing SNL Kagan at 11-13).

[10] Sinclair is guarantor of all Deerfield debt, and Deerfield is the named owner of eleven stations Sinclair controls pursuant to outsourcing agreements. *See* Sinclair Broadcast Group, Inc., Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934, for fiscal year ended

considered alongside the likelihood that Sinclair would be primary beneficiary of the Deerfield and HSH stations' profits, it is obvious that Sinclair will control Deerfield and HSH, and by extension, the four stations in Charleston, Birmingham, and Harrisburg.

Allbritton's opposition also makes claims as to the legitimacy of the sharing arrangements,[11] but it is unclear how Allbritton is in any better position than the Petitioners to know the substance of the actual agreements between Sinclair, Deerfield and HSH, or the true nature of those business relationships. Allbritton is not a party to Sinclair's agreements or understandings with Deerfield and HSH, as Sinclair is transferring to those entities stations that Sinclair currently owns, not any to be acquired from Allbritton. Allbritton has not suggested that Sinclair granted it access to any documents or financial information on which the agreements with Deerfield and HSH are predicated, nor has Allbritton claimed to have been present for any negotiations. Therefore, Allbritton's self-serving speculation deserves no weight.

Finally, in its opposition, HSH relished the opportunity to point out a so-called "great irony" of the Petition, suggesting that our opposition is somehow antithetical to Free Press's mission to promote diversity and our unyielding work to that end because Armstrong Williams, who is African-American, would own the HSH station. This argument comes after HSH reiterated that "the gravamen of the Free Press Petition is that....Sinclair would in effect control HSH through the Services Agreements."[12] Given the "gravamen" of the Petition, there is no irony here. Sinclair would maintain control over WMMP. It is irrelevant that an African-

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Dec. 31, 2012, Commission file number: 000-26076, Mar. 12, 2013, p. F-11. ("We have determined that the Deerfield stations are VIEs and that based on the terms of the agreements, the significance of our investment in the stations and our guarantee of Deerfield's debt, *we are the primary beneficiary of the variable interests because*, subject to the ultimate control of the licensees, *we have the power to direct the activities which significantly impact the economic performance of the VIEs* through the sales and managerial services we provide *and we absorb losses and returns that would be considered significant to Deerfield*.") (emphases added).

[11] See Allbritton Opposition at 5-6.

[12] HSH Opposition at 4.

American would nominally hold the license. Sinclair employs SSAs to subvert Commission rules, and HSH now exploiting the Commission's diversity goals and low levels of minority ownership to aid in that subversion. In any event, a nominal transfer to an African-American licensee cannot absolve Sinclair from its responsibility to follow the Commission's rules.

II. The Commission's Public Interest Inquiry Considers Factors Beyond Whether a Transaction Violates a Commission Rule

Even if Sinclair could show that it has not violated the duopoly rule, the proposed assignments do not meet the Commission's public interest standard. Section 310(d) of the Communications Act requires that the Commission evaluate whether a proposed license transfer will serve the "public interest, convenience, and necessity."[13] Even if a transaction does not expressly violate a statute or a rule, the Commission must evaluate whether it would result in public interest harms by frustrating or impeding the goals or the implementation of the Act.[14]

The Applicants mistakenly assert that the "public interest inquiry is subsumed by the application process." This claim rests on a lazy and illogical interpretation of the case law. Applicants cite *Committee to Save WEAM v. FCC*[15] and *Office of Communications of the United Church of Christ et al. v. FCC*[16] to suggest that completing Form 314 is enough to prove that a proposed transfer is in the public interest.[17] However, *WEAM* and *UCC* merely conclude that once the Commission has completed a proper public interest inquiry, it need not spell out each step in its reasoning in a final order. Both cases involved challenges to Commission orders

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[13] 47 U.S.C. § 310(d) requires that the Commission consider applications for assignment under the same standard as if the proposed transferee were applying for licenses directly pursuant to 47 U.S.C. § 308. *See, e.g.*, *Sirius Satellite Radio*, ¶ 30; *In the Matter of SBC Comm. Inc, and AT&T Corp. Applications for Approval of Transfer of Control,* 20 FCC Rcd 18290, ¶16 (2005).

[14] *See, e.g., In the Matter of Verizon Communications Inc. and MCI, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 16 (2005).

[15] 808 F.2d 113 (D.C. Cir. 1986).

[16] 51 Fed. App'x. 21, 22 (D.C. Cir. 2002).

[17] Sinclair Opposition at 5 n.11.

approving license transfers. The appellants claimed that because it failed to articulate the reasoning behind its decision, the Commission erred in granting the respective applications. The Court found that reference to relevant sources (*e.g.*, Form 314) may serve as the "necessary articulation of basis for administrative action."[18]

Applicants failed to include a critical part of the *WEAM* court's guidance: "By requiring a proposed assignee to address the relevant facets of the public interest...on FCC Form 314, the Commission has incorporated consideration of these issues into its application process. Therefore, the FCC's approval of WEAM's application implies a finding on ample information that the public interest will be served by the assignment."[19]

WEAM and *UCC* held that the Commission's *consideration* of an application (and the veracity of the claims made therein), along with the implied balancing of public interest factors that accompanies that consideration, serves as a sufficient inquiry for purposes of a final order rendering a decision. Completing an application for transfer in itself, and self-reporting compliance with the rules, is not sufficient for approval. The Applicants essentially have posited that the Commission accept applications on their face without any consideration, such that submitting an application would automatically entail a grant.

Despite the faulty logic of this theory that filing alone proves a public interest benefit, Sinclair does attempt in vain to make a showing with its employment record[20] and exhibits from prominent African-Americans lauding its diversity initiatives.[21] However, the accuracy and

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[18] *See WEAM*, 808 F.2d at 118 (quoting *Environmental Defense Fund v. EPA*, 465 F.2d 528, 537 (D.C. Cir. 1972)).
[19] *Id*.
[20] Sinclair Opposition at 6.
[21] *See* Letter from Dr. Allan J. Kennedy, Ph.D., Retired Professor of Telecommunications, Morgan State University to Mr. Mark Hyman, Sinclair Broadcast Group (Sept. 21, 2013) (Exhibit 1); Letter from Delegate Aisha N. Braveboy, Esq., Chair of the Legislative Black Caucus of Maryland, to Mr. William Fanshawe, General Manager, WBFF-TV (Sept. 20, 2013) (Exhibit 2).

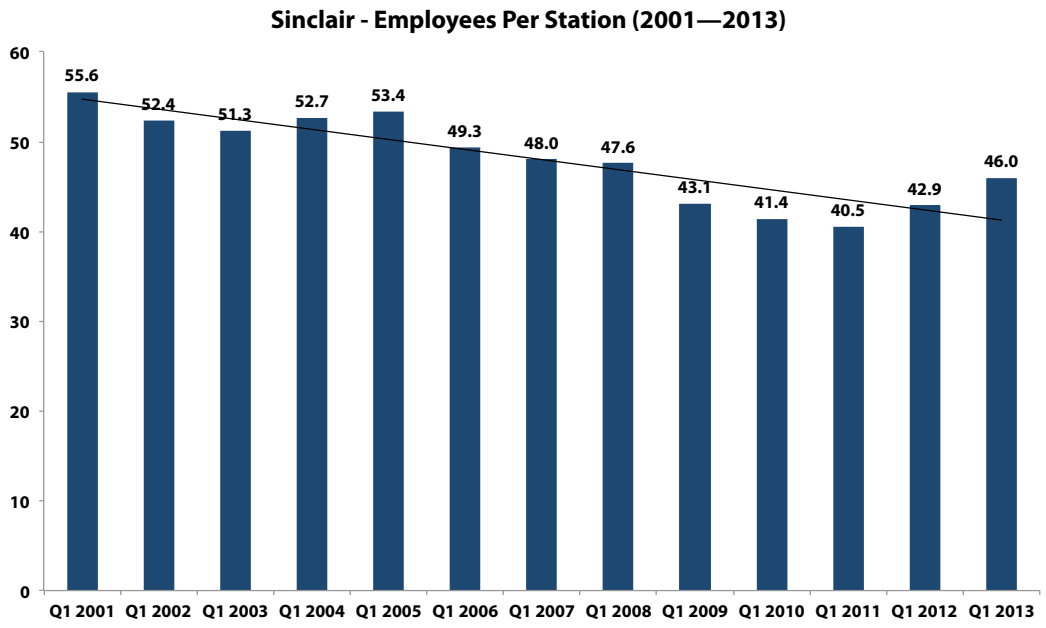
relevance of these submissions to the instant proceeding is tenuous at best.[22] And Sinclair's charge that Petitioners' filing is "an affront" to its employees does nothing to hide the fact that the company's business model is predicated on consolidating newsrooms and firing staff.

Sinclair pats itself on the back for employing "reporters, anchors, producers, directors and other news staff," as if this is some sort of charitable effort. As Sinclair knows well, its news broadcasts bring in a major portion of the company's advertising revenues. Of course Sinclair employs staff to cover local events, such as sports, traffic, weather, and disasters that compel coverage (and produce good ratings). This is its business. This is the broadcasting business.

But before Sinclair wears itself out with this self-praise, it should understand Petitioners' concern: that covert consolidation, the cornerstone of Sinclair's business model and the cause for our objection to these transactions, harms local communities by depriving them of quality journalism produced by the greatest number of diverse and antagonistic sources. Sinclair's model results in fewer independent voices, and fewer journalists, thereby frustrating the Act's goals.

One only need look at Sinclair's employment levels over the past decade to see the company's long track record laying off workers and reducing staff at each of its stations. In early 2001, Sinclair employed 3,500 workers at its 63 owned or operated stations, an average of 55.6 jobs per station. By March of this year, that number had declined nearly 20 percent to 46 workers per station (see Figure below). This most recent figure may be artificially high, as Sinclair takes steps to thin the herd at its recently acquired properties and may not have completed its staff reductions at its many recently acquired stations. The Commission should reject Sinclair's misleading job claims and weigh instead the harm to diversity and news production accompanying covert consolidation.

[22] Neither Sinclair's effort to engage Baltimore residents in race discourse at a town hall or any service in nurturing the careers of Morgan State University students could exempt Sinclair from complying with the local ownership rules.



Source: Sinclair Broadcast Group 10-K filings

In its Opposition, Sinclair, without citation, also claims that its sharing arrangements led to an improvement in news, and that similar benefits will manifest if the Commission approves these transfers to Deerfield and HSH. According to Sinclair, its acquisition of NewsChannel8 in Washington, DC would increase news diversity and "[e]ven Free Press would have to admit that such an outcome is presumptively in the public interest."[23] Of course, Petitioners' filing does not challenge the acquisition of NewsChannel8. Any presumption by the Commission (let alone Free Press) that Sinclair's ownership of NewsChannel8 would somehow increase news diversity has no bearing on Sinclair's evasion of the duopoly rule in Charleston, Birmingham, and Harrisburg.

"Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest."[24] Sinclair has not and cannot meet it burden, nor show that these arrangements are any more than transfers in name only.

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[23] Sinclair Opposition at 6-7, n.4.
[24] *See, e.g.*, *Sirius Satellite Radio Inc.*, ¶5.

III. The Commission is Not Limited to Addressing Petitioners Claims in a Rulemaking

Each Applicant erroneously accuses Petitioners of improperly seeking a rule change through adjudication.[25] The Applicants primarily, and mistakenly, rely on *ACME Television Licenses of Ohio, LLC* and *Free State Commc'ns* to support their claim that the Commission must deny the Petition as improper. In both *ACME* and *Free State*, the Commission denied cable providers' petitions to deny founded on the harms that flow from joint negotiation retransmission consent. Applicants cite Commission language indicating that the denials were based on the fact that the "gravamen" of the cable petition in *Free State Commc'ns* was speculative joint retransmission consent harm, a topic being addressed in the retransmission consent proceeding.

In highlighting the Commission's "gravamen" language, Applicants have distinguished this Petition in our stead. They repeat *ad nauseam* that the gravamen of this Petition is that Sinclair will indirectly control the stations it has proposed to transfer to Deerfield and HSH. Whether that would violate Commission rules is wholly appropriate for a licensing adjudication. Furthermore, nothing in the rules or case law precludes the Commission from promulgating SSA policy pursuant to a licensing decision. Administrative law guidance dictates that agencies may make policy through rulemaking or adjudication.[26] Indeed, the Commission routinely establishes policy through adjudications, and the Supreme Court has upheld its authority to do so.[27]

IV. Applicants' Claim that Petitioners Lack Standing is Without Merit

Having failed on substance, Deerfield and HSH allege that Petitioners lack standing to challenge these transfers. Section 309(d) outlines requirements for standing to bring a petition to deny, which must contain specific allegations of fact sufficient for a *prima facie* showing of the

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[25] *See, e.g.*, Sinclair Opposition at 8.
[26] *See Hatch v. Fed. Energy Regulatory Comm'n*, 654 F.2d 825, 834 (D.C. Cir. 1981).
[27] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 520 (2009) ("[T]he agency's decision to consider the patent offensiveness of isolated expletives on a case-by-case basis is not arbitrary or capricious.").

challenged applications' inconsistency with the public interest, convenience, and necessity.[28] The declarations attached to the Petition assert that Sinclair's common and unauthorized control of multiple stations within the same market would harm the declarants by depriving them of quality news and programming responsive to the community. Petitioners have demonstrated injury-in-fact in declarations from their respective members in each of these markets. The declarations specifically allege harm that would result from Commission approval of the assignments.

CONCLUSION

For the foregoing reasons, the Commission should reject the Applicants' Opposition and grant the Petition to Deny. Permitting Applicants to effectuate Sinclair's common control of multiple broadcast stations within these DMAs violates the Commission's rules and is an affront to the goals of the Act. Whether the Commission chooses to adopt broad SSA attribution policy, it should address the transaction-specific harms presented in these three markets.

Respectfully Submitted,

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[28] 47 U.S.C. § 309(d).

CERTIFICATE OF SERVICE

I, Matthew F. Wood, Policy Director for Free Press, certify that on October 24, 2013, the foregoing Reply to Opposition was deposited via first class mail, postage prepaid (except as otherwise indicated below) and served by electronic mail, on the following:

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