

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

Applications of

LICENSEE SUBSIDIARIES OF ALLBRITTON
COMMUNICATIONS Co.,

TRANSFERORS AND ASSIGNORS

AND

SINCLAIR TELEVISION GROUP,

TRANSFeree AND ASSIGNOR,

AND

DEERFIELD MEDIA (BIRMINGHAM) LICENSEE,
LLC,

DEERFIELD MEDIA (HARRISBURG) LICENSEE, LLC,

HSH CHARLESTON (WMMP) LICENSEE, LLC,

ASSIGNEES,

FOR ASSIGNMENT AND TRANSFER OF CONTROL

MB Docket No. 13-203

WCFT-TV, Tuscaloosa, AL, Facility ID
21258 (File No. BTCCDT-20130809ABW)
WJSU-TV, Anniston, AL, Facility ID 56642
(File No. BTCCDT-20130809ABX)
WCIV(TV), Charleston, SC, Facility ID
21536 (File No. BTCCDT-20130809ACA)
KATV(TV), Little Rock, AR, Facility ID
33543 (File No. BTCCDT-20130809ACB)
KTUL(TV), Tulsa, OK, Facility ID 35685
(File No. BTCCDT- 20130809ACC)
WJLA-TV, Washington, DC, Facility ID
1051 (File No. BTCCDT-20130809ACD)
WHTM-TV, Harrisburg, PA, Facility ID
72326 (File No. BTCCDT-20130809ACE)
WSET-TV, Lynchburg, VA, Facility ID
73988 (File No. BTCCDT-20130809ACG)
WTTO(TV), Homewood, AL, Facility ID
74138 (File No. BALCDT-20130809ADC)
WABM(TV), Birmingham, AL, Facility ID
16820 (File No. BALCDT- 20130809ADE)
WHP-TV, Harrisburg, PA, Facility ID 72313
(File No. BALCDT-20130809ADF)
WMMP(TV), Charleston, SC, Facility ID
9015 (File No. BALCDT-20130809ADG)

**REPLY TO APPLICANTS' OPPOSITIONS TO PETITION TO DENY OR, IN THE
ALTERNATIVE, FOR CONDITIONS**

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INTRODUCTION AND SUMMARY

Pursuant to Section 73.3584(b) of the Commission’s rules and Sections 309(d) and 310(d) of the Communications Act of 1934, as Amended (the “Act”), the American Cable Association (“ACA”) submits its Reply to the Oppositions of the Applicants to ACA’s Petition to Deny of the above-captioned applications (“Applications”).¹ The Applicants seek approval

¹ Shareholders of Perpetual Corporation, Charleston Television, LLC & Allbritton Communications Company, Opposition to Petitions to Deny (“Allbritton Opposition”); Sinclair Television Group, Inc., Consolidated Oppositions to Petitions to Deny (“Sinclair Opposition”); HSH Charleston (WMMP) Licensee, LLC, Consolidated Opposition (“HSH Opposition”); Deerfield Media (Birmingham) Licensee, LLC and Deerfield Media (Harrisburg)

for the proposed acquisition of the television broadcast stations now owned by Allbritton Communications Co. (“Allbritton”) by Sinclair Television Group (“Sinclair”), and the concurrent assignment of stations now owned by Sinclair to Deerfield Media (Harrisburg) Licensee, LLC (“Deerfield”) and HSH Charleston (WMMP) Licensee, LLC (“HSH”),² (collectively, the “Applicants”) each of whom would receive “support services” from Sinclair on an ongoing basis (the stations to be assigned, the “Overlapping Sinclair Stations,” and their proposed assignees the “Support Service Assignees”).³

ACA’s Petition illustrated how the transaction described in the Applications would harm competition and consumers as a result of Sinclair effectively controlling the retransmission consent negotiations of two top-four rated television stations in the Charleston, SC and Harrisburg, PA designated market areas (“DMAs”), a violation of the purpose and intent the Commission’s local television ownership restrictions. As noted in the Petition, Sinclair is fully aware that the Commission’s rules would not permit its outright ownership of these stations, and therefore proposes to assign its own stations in these markets to third parties – “sidecar” companies – while continuing to provide “support services” to the stations through a variety of sharing agreements. Pursuant to Sinclair’s agreements with the respective Support Service

Licensee, LLC, Consolidated Oppositions (“Deerfield Opposition”) (collectively, “Oppositions” filed by “Applicants”; all filed Sept. 26, 2013); American Cable Association, Petition to Deny Or, In the Alternative For Conditions (filed Sept. 13, 2013) (“Petition”). The Petition is limited to four of the various applications filed in connection with this proposed acquisition, which are captioned above and relate to the following broadcast stations (“Stations”): WCIV(TV), Charleston, SC; WHTM-TV, Harrisburg, PA; WHP-TV, Harrisburg, PA; and WMMP(TV), Charleston, SC.

² *Media Bureau Announces Filing of Applications Seeking Consent to Transfer Control of Licensee Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc.*, Public Notice, MB Docket No. 13-203, 28 FCC Rcd 12213 (2013).

³ *See* Sinclair Television Group, Inc., FCC Form 315, Attach. 15 (Description of Transaction), File No. BTCCDT - 20130809ABW, at 3 n.5 (accepted for filing on Aug. 12, 2013). This Reply refers to WHP-TV and WMMP(TV) as the “Overlapping Sinclair Stations,” and Deerfield and HSH as the “Support Service Assignees.”

Assignees, Sinclair would retain many key station functions, including the ability to act as the stations' "agent" in retransmission consent negotiations.

This arrangement would permit the nominally separately owned stations to coordinate their retransmission consent negotiations, thereby enabling them to extract higher retransmission consent prices from local multichannel video programming distributors ("MVPDs") than each station could expect to secure if negotiating separately. This practice reduces competition between broadcast stations with regard to the sale of retransmission consent, and consumers are harmed when cable operators pass through the higher fees derived from the coordinated negotiations. The Petition asked the Commission to deny the Applications or, in the alternative, to impose conditions that would prevent the stations from coordinating their negotiation of retransmission consent agreements.

The Applicants make a futile attempt in their Oppositions to muddy the issues by arguing that pending industry-wide rulemaking proceedings and previous decisions by the Media Bureau on other license transfers prevent the Commission from granting the relief requested in the Petition. Notably, the Applicants neither dispute the evidence provided in the record that coordinated retransmission consent negotiations cause harm to competition and consumers, nor suggest there are any counterbalancing benefits that offset the harm. As illustrated below, the relief sought by the Petition addresses transaction-specific harm arising from the Applicants' blatant structuring of the agreements related to the transaction to evade the clear purpose and intent of the Commission's prohibition on duopoly ownership of the nominally non-commonly owned top-four rated stations at issue in the Harrisburg and Charleston DMAs. No Commission rule or policy stands in the way of prompt action in this proceeding to prevent Sinclair and the Support Service Assignees from coordinating their negotiation of retransmission consent either

by denying the Applications or as a condition of granting the requested license transfers. Here, the Petition seeks to have the Commission take action only to address specific harm to competition and consumers in the Charleston and Harrisburg DMAs to prevent harm to competition and consumers. The Petition should accordingly be granted.

ARGUMENT

I. PENDING RULEMAKINGS RELATED TO RETRANSMISSION CONSENT DO NOT PROHIBIT BUREAU ACTION IN THIS TRANSACTION.

The question before the Commission here is simple: whether it would serve the public interest for Sinclair to acquire the Allbritton stations in the Charleston and Harrisburg DMAs given all of their contemplated agreements, and absent any conditions. The Commission must honor its obligation to ensure that the broadcast license transfers and sharing agreements incident to *the instant transaction* will promote the public interest notwithstanding other pending proceedings.

As the Petition makes clear, the series of agreements – an Option Agreement, an Option Asset Purchase Agreement, Shared Services Agreement (“SSAs”) and Joint Sales Agreement (“JSAs”) related to this transaction will result in concrete, transaction-specific harms, as portions of these agreements enable the coordination of retransmission consent negotiations between and among Sinclair, and the ostensibly separately-owned stations spun off as “sidecars” to Deerfield, and HSH. Assignment of the Overlapping Sinclair Stations to the Support Service Assignees, while effectively retaining rights in those stations pursuant to sharing agreements, permits Sinclair to retain the benefits of duopoly ownership in DMAs where the Commission’s local television ownership rules would prohibit common ownership of two top-rated stations. This, in turn, will cause harm to competition and consumers no different than duopoly ownership by permitting the stations involved in this transaction in the Charleston and Harrisburg DMAs to

coordinate their retransmission consent negotiations and obtain retransmission consent prices that are significantly higher than those obtainable by each station negotiating on its own behalf. In particular, the Petition cites substantial evidence from multiple sources, including the Commission itself, demonstrating that coordinated retransmission consent negotiations involving more than one top-four station in a DMA raise the price for retransmission consent and impose other related consumer harms.⁴ The result will be no different if coordinated negotiations are permitted among the Applicants as a result of this transaction. While Sinclair's Opposition is long on rhetoric, it fails to cite any evidence refuting ACA's predictions of harm to competition and consumers that will result from coordinated negotiations by two top-four rated network-affiliated stations in a single market. The Commission commonly relies on its predictive judgments in assessing the public interest harms and benefits posed by a license transfer.⁵ The facts already contained in this record, and supplemented by this filing, are sufficient for the Commission to take remedial action in the Charleston and Harrisburg DMAs.⁶

Contrary to the Applicants' assertions, there is nothing that prevents the Commission from adopting transaction-specific conditions through an adjudicatory proceeding while a related

⁴ See Petition at 9-10 & nn.30-32 (collecting research, scholarly and economic studies, and other evidence).

⁵ See, e.g., *General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 151 (2003) (discussing "number of subscribers that can be predicted to shift from the affected MVPD to competitor DirecTV to access the foreclosed programming"); *Applications of Comcast Corporation General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, App. B ¶ 44 (2006) (predicting "estimated departure rates from losses of national cable programming based on the bargaining model").

⁶ See Sinclair Opposition at 14 ("ACAs argument [that transaction would result in collusive negotiations] is based on speculation and not fact.").

rulemaking is pending, as the Commission itself has argued previously.⁷ To do otherwise, “would insulate regulated entities from enforcement action whenever the agency is considering whether to make or revise rules in the same area, an absurd result.”⁸ The Commission has avoided this result previously by taking action in analogous situations and must accordingly act likewise here as well.⁹ There is therefore no basis for suggesting that ACA’s arguments carry any less weight because it has raised similar concerns previously, including in rulemakings, given that its current concerns are relevant to and appropriately raised in the instant transaction.¹⁰ The Commission’s paramount concern is to examine whether the Applicants’ transaction is in the public interest, including a review of the Applicants’ intentions in entering into their deal. An attack on the intentions of ACA as a petitioner is a thinly veiled attempt to distract from this primary analysis and should be disregarded.

Moreover, Sinclair’s contention that the Petition does not allege a “single rule violation” is equally unavailing and would not preclude grant of the relief sought by the instant Petition.¹¹

⁷ See, e.g., Brief for Respondents at 54, *Comcast Corp. v. FCC*, 600 F.3d 642 (2010) (No. 08-1291), 2009 FCC LEXIS 4986, at *73 (the Commission argued that Comcast is “wrong in suggesting that an agency may not conduct an adjudication while rulemaking proceedings involving similar issues are pending.”).

⁸ *Id.*

⁹ See, e.g., *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203 ¶¶ 5, 110, 155-65 (imposing a condition on Comcast’s acquisition of Adelphia cable systems to address concerns regarding Comcast’s incentive and ability to engage in discriminatory conduct in its distribution of regional sports networks, while rejecting a request that the Commission delay its decision until the cable ownership rulemaking is concluded); *Petition for Waiver of the Commission’s Price Cap Rules for Services Transferred from VADI to the Verizon Telephone Companies*, WC Docket No. 07-31, Order, 22 FCC Rcd 10259 ¶ 13 (2007) (finding that although “the underlying issue ... is already the subject of a pending rulemaking, ... in the interim, regulations may be fine tuned through [an adjudicatory] process”).

¹⁰ See Sinclair Opposition at 12 (“The use of identical and overlapping arguments here and in the rulemaking proceedings shows that the Petition is nothing more than an attempt by ACA to try another avenue (albeit an inappropriate avenue) to have its overall policy goals met.”); Allbritton Opposition at 7 (“Although ACA recites jargon about ‘transaction specific harms,’ the reality is that the ACA Petition is just another lobbying vehicle...”).

¹¹ Sinclair Opposition at 12.

At the outset, ACA agrees with the argument in the Free Press and Put People First! PA Petition to Deny that this transaction presents novel questions of law, fact, and policy, including the critically important issue regarding use of SSAs to circumvent the Commission’s ownership rules.¹² This matter cannot be resolved under existing precedents, and should be referred in the first instance to the full Commission for consideration rather than the Media Bureau.

If the Media Bureau nevertheless proceeds to decide this transaction on delegated authority and examines the deal for specific rule violations, the Bureau need not look any further than its *Raycom Hawaii* decision for a basis upon which to deny or condition the Application. The Bureau recognized in *Raycom Hawaii* that the “net effect of transactions” between two top-four rated stations in a market can be “at odds with the purpose and intent of the duopoly rule,” which is designed to only allow a stronger station to combine with a weaker station assuming a sufficient number of media voices in a market.¹³ As the Petition illustrates, Sinclair constructed the instant transaction to appear to technically comply with the Commission’s local television ownership rule by divesting stations to “sidecar” companies that appear nominally independent, but which maintain a close contractual relationship with Sinclair.¹⁴ These relationships result in one entity, Sinclair, maintaining substantial influence over multiple stations that are party to these transactions and stifling competition for retransmission consent fees between them. This result is clearly “at odds with the purpose and intent of the duopoly rule,” which sought to maintain the independence of two top-four rated stations in a market to prevent harm to

¹² See Free Press and Put People First! PA Petition to Deny at 11-12 (filed Sept. 13, 2013).

¹³ *KHNL/KGMB License Subsidiary, LLC; Licensee of Stations KHNL(TV) and KGMB(TV), Honolulu, Hawaii And HITV License Subsidiary, Inc.; Licensee of Station KFVE(TV), Honolulu, Hawaii*, NAL Acct. No. 201141410015; FRN No. 0016152480, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 26 FCC Rcd 16087 ¶ 23 (2011) (“*Raycom Hawaii*”).

¹⁴ Petition at 4-6.

competition in local television markets. The Bureau in *Raycom Hawaii* suggested that it may evaluate individual licensing proceedings to examine just this type of situation for consistency with the public interest standard, and the instant Applications offer an ideal opportunity for it to do so.¹⁵

II. THE BUREAU’S PREVIOUS DECISIONS DO NOT CONTROL REVIEW OF THIS TRANSACTION.

Applicants are wrong to suggest that previous Bureau decisions dismissing other complaints about coordinated retransmission consent negotiations control review of the instant transaction.¹⁶ This transaction involves far more brazen planned coordination than what was at issue in *Free State Communications*. In *Free State Communications*, the buyer of a television station in Topeka, KS (PBC) planned on entering into “an agreement for the sale of commercial time” and an SSA with the owner of another television station in the Topeka DMA (New Vision); these companies had similar arrangements in other markets where both have stations and they engaged in coordination of retransmission consent negotiations in those markets.¹⁷ Although there was no direct evidence submitted in the record that PBC and New Vision would coordinate retransmission consent negotiations, ACA permissibly inferred the likelihood of retransmission consent coordination by these companies in the Topeka DMA.¹⁸ The Bureau found this inference unsubstantiated.¹⁹ Although ACA disagrees with this assessment in *Free*

¹⁵ *Raycom Hawaii*, ¶ 23 (Bureau found it could not take remedial action in this transaction, where a single entity would effectively control two top-four rated stations, because a technicality excused the filing of an application, but noted that the decision “does not preclude [the Bureau] from considering whether ... similar transactions are consistent with the public interest within the context of individual licensing proceedings”).

¹⁶ See Allbritton Opposition at 7; Deerfield Opposition at 11; HSH Opposition at 11-12; Sinclair Opposition at 12.

¹⁷ *Free State Communications, LLC, PBC Broadcasting of Topeka License, LLC, Re: KTKA-TV, et al.*, 26 FCC Rcd 10310, 10311 (2011) (“*Free State Communications*”).

¹⁸ *Id.*

¹⁹ *Id.*, 26 FCC Rcd at 10311 n.2.

State Communications, if more evidence is required to support remedial action in the current transaction, such evidence exists. The Applicants' JSA *explicitly* contemplates that Sinclair will coordinate negotiation of the retransmission consent agreements of the Overlapping Sinclair Stations with the Support Service Assignees.²⁰ In each case, the relevant JSA provides that the putative assign must "consult and cooperate" with Sinclair in the negotiation of retransmission consent agreements, and may even direct Sinclair to act as its agent in such negotiations.²¹ These facts clearly illustrate that Applicants' agreements reflect their unmistakable intent to coordinate the retransmission consent negotiations of the stations in this deal, resulting in higher prices in the Charleston and Harrisburg DMAs, and therefore leading to undeniable transaction-specific harm. Furthermore, there are more instances in other markets where Sinclair coordinates retransmission consent negotiations between nominally separately owned same-market top four-rated, Big-4 network affiliates, than there were involving PBC when the Bureau considered its license transfer in *Free State Communications*.²² In sum, this transaction presents both the

²⁰ See WHP Licensee, LLC/WMMP Licensee L.P, Form 314, Attach. 13 (Joint Sales Agreement), File Nos. BALCDT - 20130809ADF/BALCDT - 20130809ADG, at § 5.1(g) (accepted for filing on Aug. 12, 2013) (directing licensee to "consult and cooperate with [Sinclair] in the negotiation, maintenance and enforcement of retransmission consent agreements" and permitting Sinclair to "act as Station Licensee's agent with respect to the negotiation of any such retransmission consent agreements") ("JSA"); *but see id.*, Attach. 13 (Shared Services Agreement) at § 4.1 (providing that licensee will retain authority over retransmission consent elections and negotiations) ("SSA"). Although the SSA purports to place authority over retransmission consent negotiations with the licensee, it is reasonable to believe that Sinclair can exert substantial pressure in ensuring that the licensee "cooperates" with Sinclair in its retransmission consent negotiations and achieves the highest possible retransmission consent price. ACA's statement in its Petition that the licensee can "direct Sinclair to act as its agent" in negotiations is entirely consistent with these provisions, contrary to Sinclair's suggestion. See Petition at 14; Sinclair Opposition at 14.

²¹ See Petition at 5; JSA, ¶ 5.1(g). See also Letter from Barry M. Faber, Vice President/General Counsel, Sinclair Broadcast Group to Lisa Asher, CFO, Cunningham Broadcasting Company, Jan. 24, 2007, available at [https://stations.fcc.gov/collect/files/416/Must-carry%20or%20retransmission%20consent/Cunningham-Sinclair%20Agreement0001%20\(13506567365253\).pdf](https://stations.fcc.gov/collect/files/416/Must-carry%20or%20retransmission%20consent/Cunningham-Sinclair%20Agreement0001%20(13506567365253).pdf) (memorializing agreement for Sinclair to negotiate retransmission consent agreements on behalf of Cunningham, licensee of WTAT in Charleston, SC).

²² See Letter from Ross J. Lieberman, VP of Govt. Affairs, ACA to Marlene H. Dortch, Secretary, FCC (filed June 3, 2013 in MB Docket Nos. 09-182, 10-71), Attach. ("ACA June 3, 2013 Ex Parte"). The evidence shows that Sinclair now engages in retransmission consent coordination more often than PBC did at the time it filed its application (40% more often). The likelihood of Sinclair engaging in coordinated negotiations in Charleston and

existence of agreements that explicitly contemplate or require the coordination of retransmission consent between Sinclair and the Support Services Assignees, as well as evidence showing a higher frequency of Sinclair engaging in the practice of coordination. The Bureau’s critique in *Free State Communications* that the evidence ACA “marshal[ed] in support” of its position consisted only of “reports and comments” filed in the Retransmission Consent proceeding is accordingly inapplicable here.²³

There is also a factual difference that exists between the instant case and *Free State Communications* that undermines its precedential value. In *Free State Communications*, the applicant, PBC, was purchasing a single Topeka station, KTKA; PBC did not own any existing stations in the Topeka DMA, and the transaction did not involve the transfer of any other station other than KTKA.²⁴ In contrast, Sinclair is not only seeking to purchase top-four rated stations from Allbritton in DMAs where it already owns stations or controls the retransmission consent negotiations of a top-four rated station, it is also seeking permission to transfer its already-owned stations to another company – Deerfield in the case of Harrisburg and HSH in the case of Charleston. These transactions allow Sinclair to feign compliance with the Commission’s duopoly ownership prohibition and still effectively act as the sole owner of the two top-four rated stations in each market for retransmission consent purposes. This is a new, bolder license transfer scheme designed to evade the intent of the Commission’s local television ownership restrictions that is distinct from the transactions that have been criticized in the past. Moreover, the Applicants’ request for the Commission’s simultaneous approval of an acquisition and

Harrisburg is therefore greater than the likelihood of coordinated negotiation between the stations at issue in *Free State Communications*.

²³ *Free State Communications*, 26 FCC Rcd at 10312.

²⁴ *Id.*, 26 FCC Rcd at 10310-311.

transfer of two separate stations in the same market when there is submitted evidence that the new owners will then enter into far-ranging coordination agreements is unprecedented for a challenged transaction in recent years, if ever; it would draw the Commission into signing off on one of the most transparent evasions of the duopoly rule. It should not be tolerated by the Commission as it is blatantly inconsistent with the public interest in competitive local television markets, and approving the deal would make a mockery of the Commission's enforcement of its own broadcast ownership rules. This transaction would permit Sinclair to retain all the benefits of common ownership of two top-four rated stations in each market, while on paper owning only a "virtual" rather than an "actual" duopoly in markets where such duopoly ownership is prohibited.²⁵

Moreover, despite Applicants' attempts to suggest otherwise, the Petition advances more targeted objections and requests narrower relief than previous cases.²⁶ For example, in opposing the *ACME-LIN Transactions*, the petitioners sought to impose requirements such as interim carriage and dispute resolution in response to those retransmission consent disputes.²⁷ These conditions would have applied somewhat broad behavioral remedies to the anticompetitive agreements in those transactions. The instant Petition, however, seeks only to apply the

²⁵ See Keach Hagey, *Sinclair Draws Scrutiny Over Growth Tactic, TV-Station King Uses "Sidecars" to Skirt Ownership Limits*, Wall Street Journal, Oct. 20, 2013 (describing long-standing web of Sinclair ownership and affiliation with ostensibly separately owned "sidecar" companies run by Sinclair family members or known associates, including HSH and Deerfield, that hold broadcast licenses for stations owned in name by the sidecars but are actually managed by Sinclair under various sharing agreements for the purpose of evading the Commission's prohibition on duopoly ownership in certain television markets; quoting former FCC Commissioner Michael Capps: "This is a shell game, and an end run around the media-ownership rules.")

²⁶ The Applicants rely on the *ACME-LIN Transactions* as one of their primary cases to contend that previous transactions conclusively control the outcome of the instant transaction. See Deerfield Opposition at 11; HSH Opposition at 12; Sinclair Opposition at 12 n.27; Allbritton Opposition at 7 n.22.

²⁷ See Letter from Barbara A. Kreisman, Chief, Video Division, FCC to Counsel, Re: WCWF(DT), 26 FCC Rcd 5189, 5190 (2011) ("WCWF Letter"); Letter from Barbara A. Kreisman, Chief, Video Division, FCC to Counsel for ACME Television, Inc., LIN of Wisconsin, LLC, Time Warner Cable Inc., Buckeye Cablevision, Inc., Re: WBDT(DT), 26 FCC Rcd 5198, 5199-5200 (2011) ("WBDT Letter") (collectively referring to "*ACME-LIN Transactions*").

Commission's well-established public interest policy of safeguarding competition in local television markets through narrowly-tailored remedies: (i) denial of the Application; or (ii) conditioning of approval of the Application in a manner that would prevent the coordination of retransmission consent negotiations among the non-commonly owned stations in the two affected markets.

Moreover, the *ACME-LIN Transactions* are distinct from the instant transactions because they involved concerns about tying together retransmission consent of a strong top-four rated station with a weaker CW-network affiliate in the Dayton, Ohio and in the Green Bay, Wisconsin DMAs, thereby enabling the broadcasters to extract higher prices for the weaker station by threatening to withhold both stations from MVPDs.²⁸ The instant transaction presents a more clearly harmful scenario whereby Sinclair would coordinate retransmission consent negotiations for *two* top-four rated, Big 4 network-affiliated stations in the Harrisburg and Charleston DMAs. There is more theoretical and empirical evidence available to suggest that the coordination of retransmission consent involving separately owned, top-four rated stations results in higher fees than when retransmission consent is coordinated with at least one lower-rated station. Moreover, the Commission recognized in crafting its duopoly rule that combinations between stronger and weaker stations may benefit the public in larger markets, but it has held firm that combinations between two top-four rated stations in all markets would create

²⁸ See WCWF Letter, 26 FCC Rcd at 5190 (petitioner argued that CW-affiliated WCWF could extract higher transmission consent fees when paired with Fox-affiliated WLUK and an MVPD could be threatened with losing both stations if it did not agree to the terms presented by a coordinated retransmission consent offer); WBDT Letter, 26 FCC Rcd at 5199 (petitioner argued that CW-affiliated WBDT could extract higher transmission consent fees when paired with NBC-affiliated WDTN and an MVPD could be threatened with losing both stations if it did not agree to the terms presented by a coordinated retransmission consent offer).

substantial competition concerns.²⁹ The *ACME-LIN Transactions* therefore presented the significantly different issue of anticompetitive retransmission consent coordination among stations whose combination, in a larger market, would have been permissible, whereas the instant transaction involves the creation of virtual duopolies of two top-four rated stations, under the control of Sinclair, where actual duopoly ownership would always be prohibited under the Commission’s rules. This is precisely the sort of rule evasion the Bureau identified in *Raycom Hawaii* as clearly “at odds with the purpose and intent of the duopoly rule.”³⁰ In this case, the Bureau has before it the practice of nominally separately owned, top-four rated stations coordinating retransmission consent and thereby lessening local station competition and driving retransmission consent fees higher than they would be if negotiations were conducted individually, ultimately resulting in harm to consumers through increased prices, all without any offsetting competitive or consumer benefit.

High Maintenance Broadcasting is also distinguishable. In that instance, Time Warner Cable lodged an informal objection to a license assignment based on a provision in the relevant SSA permitting one top-four rated station to negotiate retransmission consent on behalf of the other in the Corpus Christi DMA.³¹ According to the Bureau decision, the petitioner had merely reiterated its “long expressed concerns about SSAs” rather than providing factual support for its allegations of collusion and price fixing.³² In this transaction, ACA filed a Petition to Deny that explains how the Applicants’ JSAs explicitly contemplate that Sinclair will coordinate

²⁹ *Review of the Commission’s Regulations Governing Television Broadcasting*, MM Docket Nos. 91-221, 87-8, Report and Order, 14 FCC Rcd 12903 ¶¶ 65-66, *subseq. hist. omitted* (1999).

³⁰ *Raycom Hawaii*, ¶ 23.

³¹ Letter from Barbara A. Kreisman, Chief, Video Division, FCC to Counsel, Re: KUQI(DT), File No. BALCDT-20120315ADD, at 1-2 (dated Aug. 28, 2012) (“*High Maintenance Broadcasting*”).

³² *Id.* at 2.

negotiation of the retransmission consent agreements of the Overlapping Sinclair Stations and the Support Service Assignees. Accordingly, the relief that ACA requests is not controlled by the Bureau's *High Maintenance Broadcasting* decision.

Further, contrary to Sinclair's suggestion, ACA's Petition does not object to the SSAs and JSAs involving the Support Service Assignees, nor has ACA ever objected to stations entering into facilities and services sharing agreements to achieve operational efficiencies.³³ ACA has never argued that JSAs and SSAs in general are inherently anticompetitive. In fact, ACA has consistently acknowledged that such agreements can create operational efficiencies for the participants and takes no issue with the agreements *per se*.³⁴ ACA's sole concern is and has been with the collusive practice of top-four ranked, same market stations that are separately owned and coordinating their retransmission consent negotiations as if under common ownership for the purpose of extracting higher fees than the stations could obtain if negotiating independently. The station acquisitions, spin-offs and related agreements in the instant transaction clearly contemplate such coordination of retransmission consent. ACA's relief is not targeted at prohibiting the sharing arrangements *per se*, but is a narrowly tailored remedy of prohibiting the practice of coordinated negotiations that these agreements clearly would permit in the Charleston and Harrisburg DMAs. The fact that the Bureau has approved other transactions involving JSAs and SSAs that lacked coordinated retransmission consent provisions are accordingly inapplicable to ACA's arguments, and to the extent those transactions contained agreements with such provisions, we distinguish those cases above.³⁵

³³ Sinclair Opposition at 13 ("ACA's Petition objects to the SSAs and JSAs in two markets: Harrisburg and Charleston").

³⁴ ACA Media Ownership Comments at 26; ACA NPRM Reply Comments at 15, 35-36.

³⁵ See Sinclair Opposition at 11.

The case that Sinclair fails to persuasively distinguish, however, is *Corpus Christi*.³⁶ Sinclair argues that *Corpus Christi* is inapplicable because there all the top-four rated network affiliates jointly negotiated for retransmission consent “without any other arrangement that might have created efficiencies justifying such joint negotiation” and that “it is a far cry from the established principle that a single party can negotiate for more than one station where their market share is non-dominant.”³⁷ Sinclair therefore implies that (i) the agreements in the instant transaction have efficiencies that offset the anticompetitive effects of broadcasters colluding in their retransmission consent negotiations, and (ii) two top-four rated stations in the Charleston and Harrisburg DMAs can theoretically collude, but not three stations, as in *Corpus Christi*. Sinclair is wrong on both counts. First, there is no reason why broadcasters must jointly negotiate retransmission consent to achieve the efficiencies of local shared services agreements. In no sense is anticompetitive collusion therefore “justified” by easily separable components of sharing agreements that otherwise generate efficiencies, even assuming *arguendo* that coordination of retransmission consent generates any significant efficiencies, which ACA does not believe to be the case.³⁸ Second, antitrust laws generally state that it is *per se* illegal for any number of independently owned competitors to collude on pricing; this principle squarely applies

³⁶ *See id.* at 15 n.35.

³⁷ *Id.*

³⁸ ACA NPRM Reply Comments at 36 (“the expected efficiencies from coordinated negotiations are quite modest compared to the cost savings achieved through sharing of other activities such as advertising or studio facilities; they are likely limited to the cost of hiring a negotiator and related administrative expenses”).

here.³⁹ It is therefore inconsequential whether all four or just two top-four network affiliates in a market decide to collude – the action is still highly anticompetitive.⁴⁰

Finally, Sinclair attempts to distract the Bureau by suggesting both that it had no agreement concerning coordinating retransmission consent in the Charleston DMA with Fox-affiliated WTAT, and that the Petition erroneously accused Sinclair of failing to reveal its grandfathered Time Brokerage Agreement with WTAT, which “does not include any terms regarding retransmission consent,” and was disclosed as Exhibit 20 of the Application.⁴¹ There are two problems with these assertions. First, the Time Brokerage Agreement was not disclosed in Exhibit 20 of the Application at the time of its filing.⁴² Second, ACA did not refer to a Time Brokerage Agreement in its Petition, but rather noted that, “Sinclair did not disclose its pre-

³⁹ See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (finding horizontal price-fixing agreement *per se* illegal).

⁴⁰ Sinclair also states that ACA does not describe the harm to viewers. Sinclair Opposition at 11 (arguing that ACA’s petition is does not address “harm to program diversity or competition for viewers resulting from these agreements.”) ACA’s Petition is focused on harms to local television competition that permit coordinating stations to raise their prices to MVPDs above the level that each station could obtain by negotiating individually. The lessening of competition and consequent wholesale price increase to MVPD is then passed through to their subscribers in the form of higher retail rates. These harms directly affect consumers because they lead to consequences such as higher cable bills, fewer cable plant upgrades, and may even lead these systems to shut down, thereby lessening MVPD service and competition. See ACA June, 3 2013 Ex Parte at 6 (broadcasters are able to extract at least at least 22% higher retransmission consent fees in markets where stations coordinate negotiations); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496 ¶ 78 (2013) (programming costs can lead to small system closures). Accordingly, the harm to viewers is evident though the direct and immediate harm to MVPDs is also sufficient to grant the Petition.

⁴¹ See Sinclair Opposition at 13 n.31 (ACA “erroneously claims that Sinclair failed to disclose its grandfathered Time Brokerage Agreement with WTAT-TV”; that “this arrangement is disclosed in Exhibit 20 of the Application”; “obviously ACA did not look very hard since the grandfathered Time Brokerage Agreement is on file at the FCC and is publicly available.”).

⁴² Neither of Sinclair’s applications relevant to Charleston, SC – i.e., regarding WCIV and WMMP – refer to the WTAT Time Brokerage Agreement anywhere in their applications, let alone in Exhibit 20. See BTCCDT - 20130809ACA, FCC Form 315 (regarding WCIV transfer of control), Exhibit 20 (disclosing Sinclair’s attributable interest in WMMP); BALCDT - 20130809ADG, FCC Form 314 (regarding WMMP assignment), Exhibit 20 (stating that neither HSH nor its attributable interest holders have media interests in Charleston, SC DMA). Further, the Time Brokerage Agreement in WTAT’s Public File appears to have only been uploaded to the FCC’s website on September 27, 2013 – the *day after* Sinclair filed its Opposition and two weeks after ACA filed its Petition on September 13, 2013; it is disingenuous to suggest that ACA did not “look very hard” for an agreement that was not publicly available when its Petition was filed. See FCC, WTAT Station Profile, https://stations.fcc.gov/station-profile/wtat-tv/more-public-files/browse-%3Etime_brokerage_agreements (last visited on Oct. 24, 2013).

existing arrangement with WTAT.”⁴³ Moreover, in its Opposition, Sinclair fails to acknowledge the only truly important fact – that it maintains an arrangement with Cunningham, the licensee of WTAT-, the Charleston FOX affiliate, by which it not only operates the station under a sharing arrangement as stated in the Petition, but under which it also explicitly holds the right to negotiate retransmission consent. Evidence of this sharing arrangement concerning retransmission consent is contained in the station’s Public File, and which Sinclair completely failed to acknowledge in the Application.⁴⁴ The combination of this agreement and its JSA with HSH fully enables Sinclair to coordinate retransmission consent negotiations of two top-four rated stations in the Charleston DMA and will lead directly to the transaction-specific harms identified in the Petition.

III. ACA HAS SUFFICIENT STANDING TO BRING THE PETITION AS ITS MEMBERS WOULD SUFFER SUBSTANTIAL HARM FROM THE TRANSACTION

Applicants fail in their attempts to suggest that ACA lacks standing.⁴⁵ The Petition conclusively illustrates that ACA has standing to prosecute the Petition based on the threat of harm its members face in the event the transaction is approved without appropriate conditions, notwithstanding Applicants’ suggestions to the contrary.⁴⁶ The likelihood of higher fees and the increased prospect of blackouts to the ACA member MVPDs in the Charleston and Harrisburg DMAs constitute harm sufficient to establish standing in this proceeding.

⁴³ Petition at 5 n.12.

⁴⁴ See Letter from Barry M. Faber, Vice President/General Counsel, Sinclair Broadcast Group to Lisa Asher, CFO, Cunningham Broadcasting Company, Jan. 24, 2007, available at [https://stations.fcc.gov/collect/files/416/Must-carry%20or%20retransmission%20consent/Cunningham-Sinclair%20Agreement0001%20\(13506567365253\).pdf](https://stations.fcc.gov/collect/files/416/Must-carry%20or%20retransmission%20consent/Cunningham-Sinclair%20Agreement0001%20(13506567365253).pdf) (“memorializ[ing the companies’] prior oral agreement to extend the term of the agreement... regarding the negotiation and grant of retransmission consent on behalf of [stations including WTAT]”).

⁴⁵ See Allbritton Opposition at 2 n.2; Deerfield Opposition at 13; HSH Opposition at 13.

⁴⁶ See Petition at 6-7.

IV. CONCLUSION

For the foregoing reasons, the Applicants' Oppositions should be dismissed and ACA's Petition to Deny granted to avoid unwarranted and anticompetitive collusion between broadcasters in the Charleston and Harrisburg DMAs.

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CERTIFICATE OF SERVICE

I, Alma Hoxha, hereby certify that on this 24th day of October, 2013, a true and correct copy of the foregoing Reply was served, via first-class mail, upon the following:

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