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GEORGETOWN LAW
INSTITUTE FOR PUBLIC REPRESENTATION

November 27, 2018

Chairman Ajit Pai
Commissioner Michael O'Rielly
Commissioner Brendan Carr
Commissioner Jessica Rosenworcel

Re: Sinclair Broadcast Group, Inc.
Renewal of Licenses

American Cable Association
Petition to Require Filing of Early Renewal Applications

Dear Mr. Chairman and Commissioners:

On behalf of The Benton Foundation (Benton), the Communications and Technology Law Clinic at Georgetown University's Institute for Public Representation respectfully submits this letter in support of the American Cable Association's November 26, 2018 *Petition to Require Filing of Early Renewal Application (Petition)*.¹ Benton asks that the Commission act without delay to grant the *Petition* and require Sinclair Broadcast Group, Inc. (Sinclair) immediately to file license renewal applications for its Maryland, Virginia, and District of Columbia television stations.

The Commission has already ruled that there are substantial and material questions as to whether Sinclair Broadcast Group, Inc. (Sinclair) is qualified to be a Commission broadcast licensee. There is only one way to resolve these questions in a transparent manner that allows public participation, which is to conduct an evidentiary hearing. Although the Commission has designated a hearing on Sinclair's applications to purchase stations owned by Tribune Media Company, that hearing will not go forward, since those applications have been withdrawn. As a consequence, Sinclair's right to continue operating its TV stations must necessarily be determined in its next license renewal proceedings.²

¹The Benton Foundation is a nonprofit organization dedicated to promoting communication in the public interest. These comments reflect the institutional view of the Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

²This is a matter of such importance that it can only be properly considered by the full Commission, and should not be determined by the Media Bureau acting alone.

It is impossible to overstate the importance of maintaining public confidence in the Commission's administration of broadcast license renewals. Because of its size and broad national footprint, there is an especially compelling public interest that the Commission employ a prompt and highly transparent process to adjudicate Sinclair's qualifications to remain a Commission licensee. Sinclair has been given exclusive access to scarce publicly-owned spectrum, essentially free of charge, conditioned on its agreement to place the public's interest ahead of its own pecuniary interests providing news, public affairs, and entertainment programming.³ It is, quite literally, an integral part of the electoral process, charged with making sure it provides non-discriminatory access to candidates for public office and that it charges them no more than the price paid by its best customers.⁴

The viewing public and Sinclair's competitors incur harm every day that an unqualified party is allowed to continue operating a broadcast station. So too, Sinclair's shareholders and employees are entitled to a rapid resolution of its status; a verdict that vindicates the company would lift the cloud of uncertainty that will loom over it so long as the outcome remains in doubt.

Given Sinclair's size and prominence, it is especially important that these questions be determined in a transparent proceeding in which there is an opportunity for full public participation. The proper vehicle for this is a hearing on the renewal of Sinclair's licenses. In the ordinary course, that process would not start until June, 2020,⁵ which, under these circumstances, is far too long to wait. As ACA explains in the *Petition*, the Commission's rules provide a mechanism to jump start this process, and this case is a perfect instance for invoking that provision.

There is no good alternative to requiring Sinclair to file its lead renewal applications as quickly as possible. Continued delay will undermine public confidence in the Commission's processes. Any other means of addressing Sinclair's qualifications, such as in an enforcement proceeding or in a different transfer proceeding, will create even more doubt and uncertainty and - importantly - will not provide for full public participation, thus removing the all-important need for transparency.

Background

Sinclair is the largest television group owner in the United States. It "own[s], provide[s] programming and operating services...or provide[s] sales services and other non-programming operating services...to 191 stations in 89 markets."⁶

In a Hearing Designation Order (HDO) released on July 19, 2018,⁷ the Commission unanimously found that there are substantial and material questions of fact as to whether Sinclair made material misrepresentations or lacked candor,⁸ in its statements to the Commission. If

³See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969)

⁴See 47 U.S.C. §315.

⁵467 CFR §73.1020(a)(1)(ii).

⁶Sinclair Broadcast Group, Inc. Form 10-Q, November 8, 2018, at p.10.

⁷*Tribune Media Co., (Transferor) & Sinclair Broad. Grp., Inc. (Transferee)*, Docket 17-179, 2018 WL 3495116, at *5 (July 19, 2018).

⁸See pp. 4-5, *infra*.

there is an adverse determination as to those issues, it would call into question whether, as a matter of law, Sinclair has the requisite character to remain a Commission licensee,⁹ much less to hold more TV licenses than any other company in the United States.

Broadcast licenses are awarded for a term not to exceed eight years.¹⁰ The FCC's ordinary procedures direct licensees to file renewal applications four months before expiration of their current license.¹¹ However, the Commission's rules expressly provide that the Commission can, in its discretion, order that a renewal application be filed at an earlier date.¹² This procedure allows the Commission to address the circumstance where it becomes aware that there may be significant issues about whether a current licensee will be entitled to renewal and permit it to initiate the renewal process and thereby expedite consideration of the licensee's status. This mechanism is all the more important today than it was in prior years, since license terms, which were once three years, are now eight years.

In the unusual circumstances present here, it has already been established that there are substantial and material questions that would preclude grant of any Sinclair renewal or transfer application without a hearing.¹³ Since a hearing designation is a foregone conclusion, there is no good reason for delay, and every good reason to begin the renewal proceedings as quickly as possible.

The Importance of Transparency and Public Participation

Under the license renewal process that the Petition seeks to expedite, competitors and members of the public may participate in the Commission's review of Sinclair's renewal applications by filing petitions to deny or informal objections.¹⁴ This participation is critical to insuring that the public has confidence in the FCC's actions. It also permits the introduction of important information and arguments that may not be otherwise available to the FCC and its staff.

The now-abandoned Sinclair/Tribune Media Company transaction was one of the most controversial and widely watched broadcast license proceedings in many years. In recognition of the importance of transparency and public participation in the proceeding, immediately after the

⁹See 47 U.S.C. §308(b)(directing the Commission to prescribe regulations "as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station.")

¹⁰47 USC §307(c).

¹¹"Unless otherwise directed by the FCC, an application for renewal of license shall be filed not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed,..." (Emphasis added.)

¹²47 CFR §3539(c)("Whenever the FCC regards an application for a renewal of license as essential to the proper conduct of a hearing or investigation, and specifically directs that it be filed by a date certain, such application shall be filed within the time thus specified.")

¹³The Commission has already indicated that the questions designated in the HDO may apply to other Sinclair licenses. HDO at 6 n.40 (directing staff to hold remaining transfer applications in abeyance); see *Grayson Enterprises, Inc.*, 79 FCC 2d 936, 940-41, ¶10 (1980). See also *Commission Announces Modification of Grayson Enterprises Policy on Transferability of Broadcast Licenses*, 53 RR 2d 126 (1983).

¹⁴See 47 CFR §73.3584.

parties filed their applications, acting on authority delegated by the Commission, the Media Bureau issued a *Public Notice* requiring that all filings in the case be placed in a public docket under the permit-but-disclose procedures ordinarily employed for rulemakings.¹⁵ This step, the Media Bureau said, was necessary “to assure the staff’s ability to discuss and obtain information needed to resolve the issues presented” in the proposed transfer applications.¹⁶ It is especially notable in this regard that the Sinclair/Tribune matter not only attracted a number of petitions to deny,¹⁷ but that the hearing designation order demonstrates that those parties presented important information that was not otherwise available to the Commission. Indeed, the Commission relied on these submissions in finding that grant of the applications without a hearing would not be in the public interest.¹⁸

The Commission further recognized the importance of public participation in reviewing Sinclair’s qualifications by expressly denominating 12 parties that filed petitions to deny the Sinclair/Tribune applications as parties to the hearing pursuant to 47 CFR §1.222(d).¹⁹

Licensee Truthfulness Is Essential to the Commission’s Licensing System

In the HDO, the Commission found that Sinclair may have made material misrepresentations and/or lacked candor in its presentations to the FCC. If proven, these are serious violations of the U.S. Code and FCC regulations and might well justify denial of renewal of some or all of Sinclair’s licenses.

In executing the Commission’s application for transfer (Form 315), Sinclair signed the following statement:

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith. I acknowledge that all certifications and attached Exhibits are considered material representations.

It is a violation of the Commission’s rules to make false or misleading statements to the FCC. Indeed, willfully making a false statement to the Commission may be a felony. Thus, Form 315 warns applicants in all capital letters that

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S.

¹⁵*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*, 32 FCCRcd 5481 (2017).

¹⁶*Id.*, 32 FCCRcd at 5482.

¹⁷See HDO at 3, n.8. (“Throughout the transaction review process, there has been widespread participation by parties-in-interest, competitors, non-profit groups, industry associations, and members of the public who have filed comments and letters in the docket. Multiple parties have also made *ex parte* presentations to the Commission and the staff.”)

¹⁸See, e.g., HDO at 9, ¶24 nn. 61-66 (citing petitions to deny of Newsmax, NCTA, Cinemoi and NHMC.)

¹⁹HDO at 6, ¶32 and Exhibit 1. See 47 CFR §1.222(d). (“The Commission will on its own motion name as parties to the hearing any person found to be a party in interest.”)

CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

The FCC lacks the resources to scrutinize each statement a licensee makes to the Commission. Thus, “[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing. See *Leflore Broad. Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir.1980) (“[E]ffective regulation is premised upon the agency's ability to depend upon the representations made to it by its licensees....”).” *Contemporary Media, Inc. v. FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000).

The importance of licensee truthfulness and candor has increased over time. “The Commission must rely on the absolute candor of applicants - more so now than ever because our license application forms rely increasingly on bare representations and on documentation.” *Superior Broadcasting of Virginia*, 94 FCC2d 904, 909 (Rev. Bd. 1983).

Intentional misrepresentation of material facts to the Commission is an extremely serious matter which “can result, by [itself], in disqualification.” *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994). The Commission places heavy reliance on the “completeness and accuracy of the submissions made to it.” *RKO General v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981). “The act of willful misrepresentation not only violates the Commission’s rules; it also raises immediate concerns over the licensee’s ability to be truthful in any future dealings with the Commission.” *Character Policy Statement*, 102 FCC2d 1179, 1209 (1986).

Lack of candor is the failure of an applicant “to be fully forthcoming as to all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited.” *Swan Creek, supra*, 39 F.3d at 1222. Notably, the Commission regards lack of candor as a form of misrepresentation which is of equal consequence:

Misrepresentation and lack of candor can indeed be distinguished in their manifestations: the former involves false statements of fact, while the latter involves concealment, evasion, and other failures to be fully informative. But both misrepresentation and lack of candor represent deceit; they differ only in form. * * * * We also disavow the suggestion that lack of candor is inherently less serious than misrepresentation. The seriousness of either offense depends on the facts and circumstances of the particular case.

Fox River Broadcasting, Inc., 93 FCC2d 127, 129 (1983). See also *Character Policy Statement, supra*, 102 FCC2d at 1196 (“Deceit is equated with fraud.”). For this reason, the Commission has said that it “view[s] misrepresentation and lack of candor in an applicant’s dealings with the Commission as serious breaches of trust.” *Id.*, 102 FCC2d at 1211.

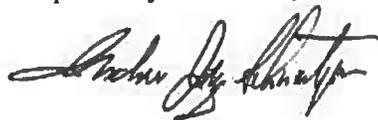
The fact that a presentation may be truthful when viewed in isolation does not resolve a candor question because the statement may be incomplete or misleading in context. As the Commission said in *RKO General, supra*, 670 F.2d at 230, “We need not decide whether RKO’s pleadings were affirmatively misleading - it is enough to find that they did not state the facts.”

Conclusion

Sinclair's continued operation as a broadcast licensee raises questions of the highest importance. It would be a gross abuse of the Commission's duty to the public if it were to delay adjudicating Sinclair's qualifications by adhering to the normal license renewal schedule and it were ultimately determined that Sinclair is not entitled to remain a Commission licensee. Sinclair, its employees and shareholders are also entitled to a swift determination of its status; if Sinclair is found to be qualified, such a decision will remove the cloud of doubt which currently hangs over it.

Fortunately, the Commission's rules set out a procedure that can expedite the process by almost two years. The Commission should grant ACA's petition and direct Sinclair immediately to file renewal applications for its Maryland, District of Columbia, and Virginia television stations.

Respectfully submitted,\



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