

In the Matter of)
)
 Sinclair Broadcast Group, Inc.)
)
 Licensees of Digital Television Station)
)
 WTVZ-TV Norfolk, Virginia)

¹ See attached Declaration of Paul Lucci.

investigating issues raised in the *Hearing Designation Order*.² In the *HDO* the Commission stated: “we designate for hearing the above-captioned applications because there exists a substantial and material question of fact as to whether Sinclair was the real party-in-interest to the WGN-TV, KDAF, and KIAH applications and if so, whether Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission.” *HDO* para. 17. As discussed herein, these are issues that should be addressed as part of Sinclair’s license renewal application process and not in a closed-door proceeding that bars participation by parties in interest and conceals information from the public. Such a procedure violates Petitioner’s right to participate in a full hearing on the matters raised in the *HDO*. Accordingly, the Commission must order the Media Bureau to discontinue its investigation of Sinclair.

Background

Sinclair has a history of operating television stations it cannot legally own. It does so by entering into agreements with entities with close business or family ties to the Sinclair family. These agreements permit Sinclair to control all aspects of the day-to-day operations of the stations, effectively giving Sinclair *de facto* control over the licensees, including the power to control daily operations; make policy decisions; hire, fire and control personnel; pay financial obligations, including operating expenses; and receive the profits from the operations of the stations.³ Sinclair’s failed attempt to acquire Tribune’s television assets is instructive as to the methods it uses to control and operate its sidecar entities. As part of the merger, Sinclair proposed to sell two stations to

² *Applications of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee) for Transfer of Control of Tribune Media Company and Certain Subsidiaries, WDCD(TV) et al., Hearing Designation Order*, 33 FCC Rcd 6830, 6840, para. 29 (2018) (*HDO*).

³ *See, Ronald Brasher*, Decision, 19 FCC Rcd 18462, at 16331, para. 8 (citing *Intermountain Microwave*, 24 RR 983 (1963)).

Cunningham Broadcasting Corporation (“Cunningham”). As set forth in the *HDO*, at paras. 22-26, Sinclair and Cunningham have an ongoing relationship that goes back at least 20 years. In 1998, Sinclair and Cunningham (then known as Glencairn) sought to acquire certain television stations. In 2001, the Commission found that, with respect to the sale of the stations at issue, the record indicated that Sinclair had exercised *de facto* control over Glencairn in violation of Section 310(d) of the Communications Act and the Commission's rules.⁴ The Commission found that Glencairn had permitted Sinclair to dictate the terms and conditions of the deal, thus ceding control. The Commission did not set the matter for hearing, believing it had taken sufficient remedial steps to prevent further rule violations. The Commission noted that it would give "appropriate consideration" to any further evidence of control by Sinclair should it be provided in future proceedings.

Until January 2018, the estate of Carolyn Smith, the mother of the controlling shareholders of Sinclair, owned the voting shares of Cunningham. Even when the voting shares were acquired in 2018 by Michael Anderson, Cunningham's former banker, the sales price for the shares - \$ 400,000 - was far below market value, and the non-voting shares continue to be held by trusts for the benefit of Carolyn Smith's grandchildren. Each son, the Smith brothers, holds options to buy the voting shares in the future.

In the Sinclair/Tribune transaction, Cunningham would have purchased the assets of two major market television stations, while at the same time entering into an option and Transition Services Agreement with Sinclair. Concerning this transaction the Commission in the *HDO* found: “In addition to the existing relationship between Sinclair

⁴ 47 USC §310(d)

and Cunningham, there exists a \$53.6 million intercompany guarantee listed in Sinclair's SEC Form 10Q. The guarantee suggests a layer of financial entanglement heretofore unexamined. Moreover, the combined executed sales price was far below the expected market price for stations in markets this size, suggesting that the transaction was not arms-length." Inter alia, the Commission designated issues to determine whether Sinclair is the real-party-in-interest behind the Cunningham applications and, if so, whether Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission.

Mr. Lucci has had extensive experience in owning and operating radio and television stations. As stated in his Declaration, he started in the broadcast business in 1966 and was the principal shareholder three radio stations and General Manager of five radio stations in Virginia. In 1979, he was one of the original founders of WTVZ-TV. Mr. Lucci was an independent station operator, with no prior connections to Sinclair. This did not stop Sinclair from attempting to control every aspect of station operations. As Mr. Lucci states in his Declaration, "Despite my best efforts, Sinclair treated WDKA as if it owned the station. I was rarely consulted concerning station operations. Even in situations where I specifically forbade Sinclair to take action, it did so, disregarding my wishes. For example, I specifically instructed Sinclair that any contract with a Multichannel Video Program Distributer (MVPD) and WDKA had to be with the licensee, WDKA Acquisition, and not Sinclair. I also stated that the final decision to accept or reject a contract is the responsibility of WDKA Acquisition and not Sinclair. Nonetheless, Sinclair negotiated with MVPDs without my knowledge or consent and bound WDKA to agreements I never had an opportunity to review or approve.

Sinclair and WDKA Acquisition executed an Asset Purchase Agreement (APA) in 2005. Sinclair did not exercise its option to purchase until 2016, with the transaction closing in 2017. Nonetheless, Sinclair acted as if the APA gave it complete control of the station. In an email dated December 15, 2015, Barry Farber, General Counsel of Sinclair wrote: “As you are aware Mr. Lucci signed an asset purchase agreement to sell his station to Sinclair and that agreement includes covenants, such as a restriction on disposing of any of the assets or entering into any commitments that would be binding on the purchaser under the APA after closing.” Mr. Faber’s interpretation of the APA was that WDKA Acquisition had no authority to enter into any contract or sell any asset however insignificant, without Sinclair’s prior authorization. Sinclair at all times acted as if it was the owner of the station. Should the FCC designate Sinclair for hearing, on issues concerning its misrepresentations to the Commission and its unauthorized control of the sidecar stations it programs, Mr. Lucci is prepared to present documentary evidence and to testify before an administrative law judge.

Argument

The basic duty of broadcast licensees is reflected in the license renewal provisions of the Communications Act.⁵ Section 309(k)(1) of the Act provides that the Commission shall grant a license renewal application if it finds, with respect to the applying station, that during the preceding license term: (a) the station has served the public interest, convenience, and necessity; (b) there have been no serious violations by the licensee of the Act or the Rules; and (c) there have been no other violations by the licensee of the Act or the Rules which, taken together, would constitute a pattern of abuse. Section 309(k)(3) of the Act provides that if the Commission determines, after notice and opportunity for hearing, that the licensee has failed to meet the

⁵ 47 U.S.C. § 309(k).

standard of Section 309(k)(1) and that no mitigating factors justify the imposition of lesser sanctions, the Commission shall issue an order denying the license renewal application for the station. In the *HDO* the Commission determined that there are “substantial and material” questions concerning Sinclair’s qualifications to remain a Commission licensee.⁶ The Presiding Judge in terminating the hearing proceeding stated:

That is not to say that Sinclair’s alleged misconduct is nullified or excused by the cancellation of its proposed deal with Tribune. Certainly, the behavior of a multiple-station owner before the Commission “may be so fundamental to a licensee’s operation that it is relevant to its qualifications to hold any station license.” That broad inquiry, however, would be more appropriately considered in the context of a future proceeding in which Sinclair is seeking Commission approval, for example, involving an application for a license assignment, transfer, or renewal. At that time, it may be determined that an examination of the misrepresentation and/or lack of candor allegations raised in this proceeding is warranted as part of a more general assessment of Sinclair’s basic character qualifications to be a Commission licensee.⁷

Under Section 309(d) of the Act, “[i]f a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent [with the public interest, convenience, and necessity],” it must formally designate the application for a hearing in accordance with Section 309(e) of the Act,, which requires a “fully hearing” on the issues designated.

⁶ See, *Policy Regarding Character Qualifications in Broad. Licensing Amendment of Rules of Broad. Practice & Procedure Relating to Written Responses to Comm’n Inquiries & the Making of Misrepresentations to the Comm’n by Permittees & Licensees*, 102 F.C.C.2d 1179, ¶¶ 60-61(1986). “[T]he trait of “truthfulness” is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.

⁷ Order, released March 5, 2019, p. 4 (footnotes omitted)

Rather than wait for each license term to expire or call for early applications for renewals of the licenses,⁸ which would allow parties in interest to file petitions to deny, and, if successful, participate in an auction for the licenses, the Media Bureau has initiated its own investigation. This investigation is a closed-door proceeding on Sinclair's qualifications to remain a licensee. Such a procedure, which bars public input and participation, is contrary to the letter and spirit of the Administrative Procedure Act and Communications Act. See e.g. *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982). In *New South Media*, the Commission decided to hold a hearing that excluded competing parties. The court found that such a procedure was contrary to the full hearing requirement of Section 309(e). The Bureau's closed-door proceeding is a secret proceeding to resolve a major character issue that bears directly on Sinclair's fitness to remain a Commission licensee. It is essentially a private negotiation between the Bureau and Sinclair, which excludes evidence that could be presented by parties with knowledge of the facts, such as Mr. Lucci. It appears from its closed nature that the Bureau's purpose is to quietly let Sinclair off the hook, with a slap on the wrist and some monetary forfeiture, while avoiding the awkwardness of having to rationalize allowing this offender to retain its licenses, despite its flagrant violation of the Communications Act.

As demonstrated herein, Petitioner is a party-in-interest and has standing to file petition to deny the renewal application of Sinclair owned station WTVZ-TV. This includes standing to participate in a hearing to adjudicate Sinclair's qualifications to remain a licensee. Any action taken by the Bureau in the course of its closed-door proceeding will prejudice Petitioner's rights

⁸ On November 26, 2018 the American Cable Association filed a Petition to Require the Filing of Early Renewal Applications. On July 22, 2019, Ihor Gawdiak also file a Petition, which, inter alia, requested that Sinclair and certain sidecar entities file early renewal applications. The Commission has not acted on these Petitions.

to file a petition to deny, and to participate in the hearing. Such an outcome would violate Petitioner's *Ashbacker* rights. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L. Ed. 108, 66 S. Ct. 148 (1945). For the Media Bureau to hold a closed-door proceeding and then reach a decision either through a Notice of Apparent Liability or through a Consent Decree would make Petitioner's right to participate in the renewal process "an empty thing." *Ashbacker*, 326 U.S. at 330.

Finally, whereas Petitioner is a party-in-interest, has filed this petition placing the Commission on notice, and is seeking to file a petition to deny, Petitioner is a party within the meaning of the Ex Parte rules. See, Section 1.1202(d) of the Rules. As such, any communications between Sinclair and the Media Bureau or the Commission concerning the designated issues, may transpire only with the knowledge of and participation by the Petitioner.

Accordingly, the Commission must order the Media Bureau to terminate its investigation.

Respectfully Submitted,

By: 

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September 17, 2019

Declaration of Paul Lucci

I, Paul Lucci, declare under penalty of perjury, that the following information is true and correct:

I am a resident of Carrollton, Virginia and a regular viewer of WTVZ-TV, Norfolk, Virginia. As part of the license renewal process, it is my intention to file a petition to deny the license of WTVZ-TV.

I was the sole shareholder of WDKA Acquisition Corp., which was the licensee of WDKA-DT, Paducah, Kentucky. I have had extensive experience in owning and operating radio and television stations. I started in the broadcast business in 1966 and was the principal shareholder of three radio stations and General Manager of five stations in Virginia. In 1979, I was one of the original founders of WTVZ.

Sinclair programmed WDKA pursuant to the terms of a Time Brokerage Agreement (TBA) from 1998 until it acquired that station in 2017. I am not related to the Smith family, nor had I had any dealing with Sinclair, prior to the TBA. Ours was an arms length agreement; still Sinclair repeatedly abused the programmer/licensee relationship. Sinclair treated WDKA as if it owned the station, with little consideration for my responsibilities as a Commission licensee or the Commission rules.

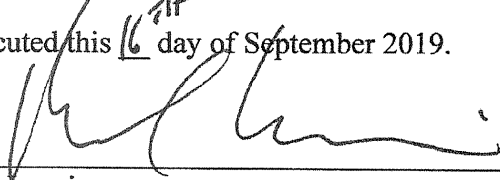
I was rarely consulted concerning station operations. Even in situations where I specifically forbade Sinclair to take action, it did so, disregarding my wishes. For example, I specifically instructed Sinclair that any contract with a Multichannel Video Program Distributer (MVPD) and WDKA had to be with the licensee, WDKA Acquisition, and not Sinclair. I also stated that the final decision to accept or reject a contract is the responsibility of WDKA Acquisition and not Sinclair. Nonetheless,

Sinclair negotiated with MVPDs without my knowledge or consent and bound WDKA to agreements I never had an opportunity to review or approve.

Sinclair and WDKA Acquisition executed an Asset Purchase Agreement (APA) in 2005. Sinclair did not exercise its option to purchase until eleven years later in 2016, with the transaction closing in 2017. Nonetheless, Sinclair acted as if the APA gave it complete control of the station. In an email dated December 15, 2015, Barry Farber, Sinclair's General Counsel wrote: "As you are aware Mr. Lucci signed an asset purchase agreement to sell his station to Sinclair and that agreement includes covenants, such as a restriction on disposing of any of the assets or entering into any commitments that would be binding on the purchaser under the APA after closing." Mr. Farber's interpretation of the APA was that WDKA Acquisition had no authority to enter into any contract or sell any asset however insignificant, without Sinclair's prior authorization. Sinclair at all times acted as if it was the owner of the station.

Should the FCC designate Sinclair for hearing, on issues concerning its misrepresentations to the Commission and its unauthorized control of the sidecar stations it programs, I am prepared to present documentary evidence and to testify before an administrative law judge.

Executed this 16th day of September 2019.



Paul Lucci

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2019, a true and correct copy of the forgoing was caused to be served on the following via electronic mail, as indicated:

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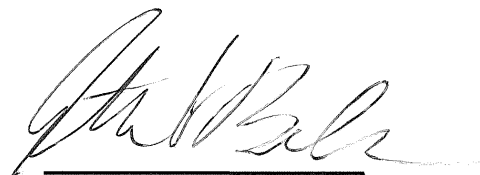
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