

Before the
Communications C
Washington, DC 20554

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

To: The Commission

REPLY TO SINCLAIR'S OPPOSITION TO PETITION TO TERMINATE MEDIA BUREAU INVESTIGATION

Paul Lucci, (Mr. Lucci or Petitioner), by his attorneys, hereby files his response to the Opposition To Petition To Terminate Media Bureau Investigation (Opposition) filed by the law firm Pillsbury Winthrop Shaw Pittman LLP (Pillsbury) on behalf of WTVZ Licensee, LLC. and Sinclair Broadcast Group, Inc. (Sinclair). Pillsbury represents Sinclair along with several Sinclair front companies including Cunningham Broadcasting Corporation (Cunningham) and Deerfield Media, Inc. (Deerfield). The Hearing Designation Order (HDO) states that Sinclair sought to assign Tribune stations KDAF(TV), Dallas, Texas, and KIAH(TV), Houston, Texas, to entities controlled by Cunningham, and that it also sought to assign WGN-TV to entities controlled by Steven Fader, who is also represented by Pillsbury. Likewise Deerfield has close legal, business and financial connections with Sinclair and is represented by Pillsbury. Petitioner alleges with considerable evidentiary support that these companies are fronts for the controlling shareholders of Sinclair, thus allowing Sinclair to effectively own and control more television stations than the Commission's rules permit.

The Opposition wastes no time attacking the credibility of Paul Lucci. Perhaps because Mr. Lucci, as the owner of a television station that Sinclair programmed and sought to control, knows too much about the methods Sinclair uses to violate the Commission's rules. The Opposition claims "Petitioner and attached declaration make baseless (and demonstrably incorrect) allegations" relating to the time brokerage agreement, and that "Sinclair did not assume the TBA until 2005. *See*, TBA, as amended, available in WDKA online public inspection file." Opposition fn.3. It is worth noting that Sinclair did not support these statements with a declaration under penalty of perjury. Petitioner checked the WDKA online public file and found, publically available, a "Second Amendment to Time Brokerage" between Mr. Lucci's company, WDKA Acquisition Corp. and Sinclair as the "Programmer." (Attached hereto) The Agreement is date August 20, 1998. Mr. Lucci's statement that Sinclair commenced programming WDKA in 1998 pursuant to a Time Brokerage Agreement is demonstrably true.

The Opposition next asserts that the "the provision in the asset purchase agreement that Petitioner references in his declaration is a provision typical in most, if not all, broadcast station purchase agreements..." There is a kernel of truth in that statement. Sinclair fails to explain, however, that although the asset purchase agreement (APA) was executed in 2005, Sinclair did not exercise its right to purchase the station until 2016 and the transaction did not close until 2017. During this period 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." Had the parties executed an APA and moved to close the transaction soon after, Sinclair would be

correct in arguing that such a provision is typical. Relying on an unconsummated APA to deny the licensee the ability to dispose of assets or enter into contracts for twelve years is a further example of the methods Sinclair uses to control stations it operates. When Mr. Lucci balked at the restrictions Sinclair was attempting to impose, Sinclair went so far as to send a letter from its corporate counsel, Thomas and Libowitz P.A., threatening litigation.

Sinclair makes no attempt to answer the charges that it routinely and repeatedly ignored Mr. Lucci's instructions concerning negotiating and entering into agreements with MVPDs. Mr. Lucci states in his Declaration, "Sinclair negotiated with MVPDs without my knowledge or consent and bound WDKA to agreements I never had an opportunity to review or approve." Sinclair's failure to respond is evidence that any response would be unfavorable to Sinclair. See, *Tendler v. Jaffe*, 203 F.2d 14, 19 (D.C. Cir. 1953) ("The omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause."); See also, *International Union, UAW v. National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ; *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952-53 (Rev. Bd. 1988).

The Opposition states that it "has found no statutory or regulatory authority to demand that the Commission or its Bureau terminate a pending investigation of another party." This assertion ignores the authority referenced in Mr. Lucci's Petition to Terminate. The Bureau initiated its investigation under Section 308(b) and 403 of the Communications Act.¹ The Commission's authority to investigate essentially is limited to fact finding. Here, the Commission had already investigated Sinclair's conduct and determined, pursuant to Section

¹ 47 U.S.C. §§ 308(b) and 403.

309(e)² that there was a misrepresentation and lack of candor issue that must be resolved in a full hearing before an administrative law judge (ALJ). The HDO states unequivocally that “those questions cannot be otherwise resolved.” HDO para 27. As the ALJ and the Bureau’s letter of June 25, 2019, made clear, the misrepresentation and lack of candor issues survived the termination of the hearing following Sinclair’s withdrawal of its applications.

The Bureau’s investigation serves no purpose other than to circumvent the full hearing requirement of Section 309(e) by negotiating a closed-door settlement with Sinclair. In *People v. McWhorter*, 113 Ill. 2d 374, 380 (Ill. 1986), the court observed that an administrative investigation violates due process if it is conducted arbitrarily or in excess of statutory authority or undertaken for an improper purpose. The current Bureau investigation exceeds the Commission’s statutory authority in that it admittedly seeks to bring closure to the character issue: “Media Bureau is in the process of resolving an outstanding issue regarding Sinclair’s conduct as part of the last year’s FCC’s review of its proposed merger with Tribune.” If there is any doubt as to the parties’ intentions, Sinclair said “this is part of an ongoing discussion initiated by Sinclair to work with the FCC to respond to certain allegations raised.”³

The Bureau has made it clear that it is seeking a resolution, i.e. it is negotiating a settlement with Sinclair. As such it is not investigating, rather it is adjudicating the misrepresentation and lack of candor issue. Courts have steadfastly maintained the distinction between general fact-finding investigations and adjudications. See, *Aponte v. Calderon*, 284 F.3d 184, 186 (1st Cir. 2002).

² 47 U.S.C. § 309(e).

³ <https://www.reuters.com/article/us-sinclair-ma-probe/fcc-probes-whether-sinclair-misled-agency-during-failed-tribune-deal-idUSKCN1TS300>

[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Hannah v. Larche, 363 U.S. 420, 442 80 S. Ct. 1502, 1502, 4 L. Ed. 2d 1307 (1960). The FCC has made the decision that a hearing is required to adjudicate the proceeding. There is no legal basis for the Bureau to investigate again. Rather, it is time to adjudicate the issue in a hearing, in which interested parties can participate.

Commission rules do not permit the Bureau and Sinclair to negotiate a settlement. Section 1.1 gives the Commission the authority to investigate, not adjudicate.⁴ Section 309(e) states that if, in the case of an application, “a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action...” The Commission’s authority to investigate in no way diminishes the requirements of Section 309(e).

Sections 1.93 and 1.94 govern consent decrees.⁵ Of relevance to this proceeding is the language of Section 1.93(b):

(b) Where the interests of timely enforcement or compliance, the nature of the proceeding, and the public interest permit, the Commission, by its operating Bureaus, may negotiate a consent order with a party to secure future compliance with the law in exchange for prompt disposition of a matter subject to administrative adjudicative proceedings. **Consent orders may not**

⁴ 47 C.F.R. §1.1.

⁵ 47 C.F.R. §§ 1.93 and 1.94

be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license (see 47 U.S.C. 308 and 309). (Emphasis added).

Section 1.93, prohibits a consent decree resolving Sinclair's misrepresentation and lack of candor as these go to the heart of Sinclair's qualifications to hold a license. See e.g., *In re Applications of Liberty Cable*, 13 FCC Rcd 10716 (ALJ 1998) *affirmed* 15 FCC Rcd 25050 (2000). See also, *La Star Cellular Telephone Co.*, 11 FCC Rcd 1059, 1060-61 (1996); *Charleston, West Virginia 25301 Licensee of Station KWU-204*, 11 FCC Rcd 8232, 8240-41 (1996). Sinclair's argument that the Bureau may investigate (and presumably resolve via consent decree) a major character issue that the Commission has already said requires a hearing and has so designated, is flat wrong. Inasmuch as the Bureau's "investigation" violates section 1.93 of the Commission's rules, *inter alia*, the Bureau must terminate any settlement negotiations with Sinclair. The character issue may be resolved only in a hearing in which interested parties participate.

Finally, to the extent the Bureau or the Commission should choose to continue discussions with Sinclair, Mr. Lucci and the other interested parties must be made part of those discussions. The key to determining whether ex parte obligations apply is to refer to the definition of a party in section 1.1202(d). If a "party" exists, as defined in that section, any presentations to the Commission regarding the proceeding would be constrained by the necessity of service or notice to that party. See, *In the matter of Amendment of 47 C.F.R. § 1.1200*, 12 FCC Rcd 7348, 7350 (1997). Section 1.1202(d) provides that a party is anyone who: "who files an application, waiver request, petition, motion, request for a declaratory ruling, or other filing seeking affirmative relief..." Once party status is attained, as it is in this case, it is a violation of

the ex parte rules for the Bureau and Sinclair to negotiate without according other parties the notice and the right to be present.

In conclusion, Sinclair operates through a number of front organizations. In the HDO the commission stated:

Based on our review of the record regarding the WGN-TV, KDAF, and KIAH applications, substantial and material questions of fact have been raised regarding whether Sinclair was the real party-in-interest to the WGN-TV, KDAF, and KIAH application and, if so, whether Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission. Since those questions cannot be otherwise resolved, and inasmuch as this precludes a determination pursuant to Section 309(a) of the Act that the public interest, convenience, and necessity would be served by a grant of the above-captioned applications, those applications must be designated for hearing pursuant to Section 309(e) of the Act.

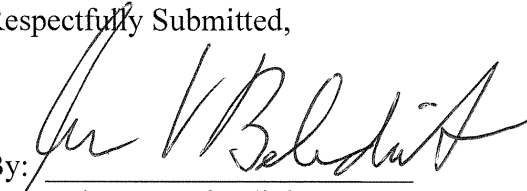
The real party-in-interest issues presented here include a potential element of misrepresentation or lack of candor.... We note that Sinclair represented to the Commission that it would comply with our broadcast ownership rules by seeking approval of its application—in part based on the proposed divestitures to Cunningham and Fader—and did not fully disclose facts such as the pre-existing business relationships between Fader, Smith, and Sinclair nor the full entanglements between Cunningham, Smith, and Sinclair. As such there is a substantial and material question of fact as to whether Sinclair affirmatively misrepresented or omitted material facts with the intent to consummate this transaction without fully complying with our broadcast ownership rules.

HDO paras. 27-28 (Footnotes omitted) Mr. Lucci must be given the opportunity to present evidence concerning Sinclair's multiple abuses of the Commission's rules, its use of front organizations and its multiple misrepresentations to the Commission. 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 Radio Corp. v. FCC*, 326 U.S. 327, 330, 90 L. Ed. 108, 66 S. Ct. 148 (1945).

Accordingly, the Commission must order the Media Bureau to terminate its investigation and commence a hearing on Sinclair's qualifications to remain a Commission licensee.

Respectfully Submitted,

By: 
Arthur V. Belendiuk

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October 4, 2019

SECOND AMENDMENT
TO
TIME BROKERAGE AGREEMENT

This Second Amendment to Time Brokerage Agreement ("Second Amendment") is made as of August 16th, 1998, by and among WDKA ACQUISITION CORP., a Virginia corporation ("Licensee"), and SINCLAIR PROPERTIES, LLC (formerly called Max Media Properties, LLC), a Virginia limited liability company ("Programmer").

RECITALS:

A. Licensee and Programmer entered into an Amended and Restated Time Brokerage Agreement dated as of December 15, 1995 (the "Original Agreement"), which has been amended one time by the First Amendment to the Original Agreement (the "First Amendment"). Capitalized terms used in the Second Amendment and not otherwise defined shall have meanings ascribed to them in the Original Agreement.

B. The parties wish to clarify certain matters, relating to the compensation of the employees of Licensee.

NOW, THEREFORE in consideration of the covenants and agreements contained herein intending to be legally bound, Licensee and Programmer hereby agree as follows:

2. Amendments to Original Agreement. Effective as of July 1, 1998, Section 2.1 of the Original Agreement is amended by deleting the proviso to the last sentence of Section 3.1, which sentence was added by the First Amendment, so that such sentence shall read as follows:

Programmer shall reimburse (or advance to) Licensee for all amounts reasonably paid or payable by Programmer for Licensee's obligations under this Section 3.1.

3. Ratification of Other Terms. Except as amended hereby, the terms, provision, conditions and agreements of the Original Agreement, as amended by the First Amendment, are ratified and confirmed and shall remain in fully force and effect.

4. GOVERNING LAW. THIS AMENDMENT AND ALL QUESTIONS RELATING TO ITS VALIDITY, INTERPRETATION, PERFORMANCE AND ENFORCEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE COMMONWEALTH OF VIRGINIA, WITHOUT GIVING EFFECT TO PRINCIPLES OF CONFLICTS OF LAWS.

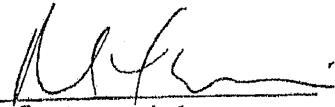
5. Execution: Counterparts and Facsimile. This Amendment may be executed in any number of counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, and all of which shall together constitute one and the same instrument. This Amendment shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all of the parties reflected hereon as

the signatories. Delivery of an executed counterpart of a signature page to this Amendment by facsimile shall be as effective as delivery of a manually executed counterpart of this Amendment.

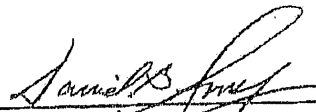
8. Reference to the Original Agreement. On and after the date of this Amendment, each reference in the Original Agreement to "this Agreement," "hereunder," "hereof," "herein" or words of like import, and each reference to the Original Agreement in any Schedule of Exhibit or in any other document executed and delivered pursuant to the Original Agreement shall be deemed a reference to the Original Agreement as amended by the First Amendment and hereby.

IN WITNESS WHEREOF, the parties have caused this Second Amendment to Time Brokerage Agreement to be duly executed by their duly authorized signatures, all as of the day and year first above written.

WDKA ACQUISITION CORP.

By: 
Its: PRESIDENT

SINCLAIR PROPERTIES LLC

By: 
Its: Secretary

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 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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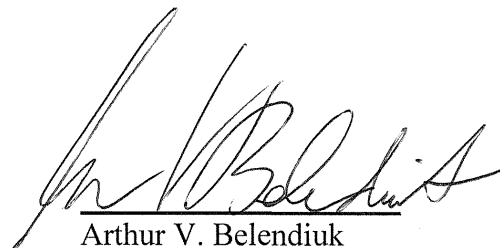
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