

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Sinclair Broadcast Group, Inc.)
)
Cunningham Broadcasting Corporation)
)
Deerfield, Media (Baltimore), Inc.)
)
Licensees of Television Stations:)
)
WBFF-DT Baltimore, MD)
)
WNUV-DT Baltimore, MD)
)
WUTB-DT Baltimore, MD)

To: The Commission

**REPLY TO SINCLAIR BROADCAST GROUP, INC.’S
CUNNINGHAM BROADCASTING CORPORATION’S AND
DEERFIELD MEDIA (BALTIMORE), INC.’S OPPOSITONS TO
PETITION TO TERMINATE MEDIA BUREAU INVESTIGATION
AND REQUIRE EARLY FILING OF RENEWAL APPLICATIONS**

Ihor Gawdiak, (Mr. Gawdiak or Petitioner) by his attorneys, hereby files this Reply to Sinclair Broadcast Group, Inc.’s Cunningham Broadcasting Corporation’s and Deerfield Media (Baltimore), Inc.’s Oppositions to Petition to Terminate Media Bureau Investigation and Require Early Filing of Renewal Applications.” (Sinclair Opposition, Cunningham Opposition, Deerfield Opposition or collectively Oppositions).

In the Oppositions, Sinclair, Cunningham and Deerfield contend that Mr. Gawdiak’s Petition should be treated as an informal petition. Mr. Gawdiak timely filed his Petition pursuant to Section 1.1 of the Commission’s rules. 47 CFR §1.1. The Petition meets the criteria for a formal petition. Petitioner has alleged a substantial and material question of fact, based on

matters the Commission can officially note and supported by the declaration of Petitioner, that, if true, would be prima facie inconsistent with the public interest.¹ Sinclair, Cunningham and Deerfield do not challenge Mr. Gawdiak's right to file a formal petition seeking to terminate the Media Bureau's investigation. Rather, Sinclair, Cunningham and Deerfield contend only that a request for early renewal should be treated as an informal petition. In support of its argument, Sinclair relies on *Leflore Broadcasting Company, Inc.* 36 FCC 2d 101 (1972). In *Leflore* the Commission resolves an issue concerning late filed pleading by treating the petition as an informal petition not subject to the requirements of Section 1.45. *Leflore* at n. 2. Significantly, in *Leflore* the Commission does not state that all petitions for early renewal are treated as informal petitions.

The Oppositions claim generally that the Petition adds nothing new, conveniently ignoring Petitioner's allegations of unlawful conduct. The Petition, at p. 4, for example, asserts with particularity that Sinclair exercises financial and operational control over stations in the Baltimore DMA licensed to Cunningham and Deerfield. More importantly, the Commission has found that Sinclair's conduct raises substantial and material questions of misrepresentation and/or lack of candor in its representations to the Commission, which survive the hearing on the Tribune applications.²

The investigation that Petitioner seeks to have the Commission terminate was initiated by letter dated June 25, 2019 from Barbara Kreisman, Chief, Video Division, Media Bureau to David Gibber, Senior Vice President/General Counsel Sinclair Broadcast Group, Inc. The letter

¹ See, e.g. *Greater Portland Broadcasting Corporation*, 3 FCC Rcd 1953, 1954 (1988).

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).

states unequivocally, “Specifically, we are investigating whether, in light of the issues presented in the HDO, Sinclair Broadcast Group, Inc. (Sinclair or Company) was the real party-in-interest to the associated WGN-TV, KDAF, and KJAH applications, and, if so, whether Sinclair engaged in misrepresentation and/or lack of candor in its applications with the Commission.”

The Sinclair Opposition appears to argue that the material misrepresentation and lack of candor issues raised by the *HDO* were relevant only to the applications that were the subject of the hearing. Judge Halprin’s Order, Petition, at p. 5, and the June 25, 2019 letter fully rebut any such argument, as the former advocates further investigation of these matters, and the latter purports to do so.

The Sinclair Opposition also argues that the Petition “mischaracterizes the June 25 letter as an investigation into Sinclair’s ‘qualifications to remain a licensee.’ ” (footnote omitted) The Sinclair Opposition, at p. 5, contends that the *HDO* did not question Sinclair’s fitness to remain a Commission licensee. The Commission cannot take this semantic dodge seriously, as it is well established that violations of the sort under investigation, if substantiated, surely bear on Sinclair’s qualifications to remain a licensee and may well warrant denial of its applications for renewal and revocation of all of its licenses. See Petition, at p. 5 and n. 7.

The Sinclair Opposition, at p. 3, states that the Commission will require the early filing of a renewal application only for “serious” or “compelling” reasons. See also, Cunningham Opposition at p. 4. Rather than attempt to explain why the misrepresentation and lack of candor questions in the *HDO* and the June 25 letter do not rise to the level of “serious” or “compelling,” the Sinclair Opposition asserts weakly, at n. 17, “Of course, not every allegation of misrepresentation or violation of the Act or rules constitutes a “compelling reason” to require early license renewal application filings.”

As for the Petitioner's argument that a closed-door investigation deprives parties of the right to participate in a public hearing, the Sinclair Opposition claims that the cases cited by Petitioner are inapposite because they involved comparative hearings and therefore have no bearing on Sinclair's licenses. Sinclair gives no other reason for disregarding this important precedent. Nor does it attempt to rebut Petitioner's argument that Section 309(e) of the Communications Act gives him the right to participate in a full hearing. 47 U.S.C. §309 (e).

Typically, in a closed-door proceeding the Commission or Bureau works out a settlement with the entity under investigation on an ex parte basis and the public sees only the order and consent decree. The Commission or Bureau customarily agrees to forgo any action on the other party's qualifications as a Commission licensee.³ In this case, such an outcome would violate Petitioner's right to be heard and to participate in a hearing. Petition at pp. 6-7.

As Commissioner Rosenworcel said about the June 25 investigation, "any settlement negotiated behind closed doors will leave us with more questions than answers about one of the nation's largest broadcasters. The FCC should hold a hearing in public on these questions and do it now."⁴

Petitioner asks the Commission to terminate this newly-initiated investigation out of concern that resolution of these closed-door proceedings will prejudice his right to file petitions

³ *Sinclair Broadcast Group, Inc.*, 31 FCC Rcd. 8576 at para. 12. "The Bureau also agrees that, in the absence of new material evidence, it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute any proceeding concerning, or to set for hearing, the question of Sinclair's basic qualifications to be a Commission licensee or hold Commission licenses or authorizations, and that it will not recommend that the Commission take any such action."

⁴ FCC probes whether Sinclair misled agency during failed Tribune deal. Reuters Business News June 27, 2019.

to deny Sinclair's renewal applications (and those of Cunningham and Deerfield) and to participate in hearings on their fitness to hold Commission licenses. Petitioner asks the Commission to require the early filing of renewal applications as a timely surrogate for this investigation that will allow public participation. The seriousness of Petitioner's allegations and the questions of material misrepresentation and lack of candor raised in the *HDO* and the June 25 letter do indeed provide a compelling reason for the Commission to order the early filing of renewal applications.

The Oppositions claim that Petitioner lacks standing. The right of a viewer to challenge the license renewal of a television station is well established. In *Office of Communication of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994, 1000-01 (D.C. Cir. 1966) ("*UCC*"), the Court stated that the "traditionally narrow view of standing" should not preclude aggrieved members of the listening public from challenging Commission actions. In challenging an application a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show that a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. §309(d)(1). See also, *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

Sinclair argues that, "the declaration attached to the Petition purporting to support Mr. Gawdiak's standing does not support any of the allegations contained in the Petition with personal knowledge." Sinclair Opposition at p.4; see also Cunningham Opposition at p. 3. Section 309 (d)(1) unequivocally provides: The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. §309 (d)(1) (emphasis added). The facts set forth in the Petition are all taken from FCC records and documents. As such, Petitioner's personal knowledge is not

required. It is enough that Petitioner has pled specific facts of public record concerning his own allegations about the Baltimore DMA, as well as the unresolved character issues raised in the *HDO*.

Sinclair's claim that Petitioner has not suffered any direct injury is likewise without merit. Sinclair Opposition at p.3. Petitioner is a regular viewer of the three Sinclair operated stations licensed to the Baltimore DMA, WBFF-DT, WNUV-DT and WUTB-DT. The likelihood that Sinclair has de facto control of three television stations in the Baltimore DMA, in violation of the FCC's multiple ownership rules, has caused and continues to cause a direct injury to the Petitioner and the residents of the Baltimore DMA. *See*, Section 73.3555 (b). Sinclair's control of the Deerfield and Cunningham stations has resulted in a diminution of competing voices and points of view not only in the Baltimore DMA, but also in many other television markets. These injuries include, but are not limited to, Sinclair's repeated abuses in its news operations.⁵ Sinclair has used its news programming as a vehicle to sell advertising disguised as news content. During the current license renewal period, the Commission issued a Notice of Apparent Liability and Forfeiture ("NAL") charging Sinclair with engaging in repeated violations of the Communications Act of 1934, as amended, and Commission rules regarding paid-for broadcast programming.⁶ The NAL states that Sinclair aired "compensated stories as news content" on behalf of an advertiser and failed to disclose that the advertiser paid for those stories. The Commission found that Sinclair apparently broadcast such programming at 64 of its stations—collectively more than 1,400 times—without airing the required sponsorship identification announcements. The investigation further showed that Sinclair provided the paid programming

⁵ See e.g. <https://www.npr.org/2018/04/02/598916366/sinclair-broadcast-group-forces-nearly-200-station-anchors-to-read-same-script>

⁶ *Sinclair Broadcast Group, Inc.*, 32 FCC Rcd 10853 (2017).

to 13 non-Sinclair stations (i.e. Deerfield and other Sinclair affiliates) more than 280 times. Simply stated, the Enforcement Bureau found that Sinclair had broadcast “pay for play” commercials disguised as bona fide news segments. Based on information and belief, Sinclair has yet to pay the forfeiture amount.

In violating the multiple ownership rules, Sinclair uses its market power to increase costs to the residents of Baltimore, paid to multichannel video programming distributors (MVPDs). For example, a Consent Decree⁷ entered into between Sinclair and the Commission terminated an investigation into whether Sinclair violated its good faith negotiation obligation by engaging in prohibited joint negotiations with MVPDs on behalf of Cunningham, Deerfield and other affiliated entities. By negotiating on behalf of Cunningham, Deerfield and other affiliate entities, Sinclair was exercising a measure of control over these entities in violation of the Communications Act. In addition, Sinclair’s unlawful negotiating tactics resulted in higher fees paid to Sinclair by MVPDs. These fees, no doubt, were passed on to viewers in the Baltimore DMA. Despite the fact that the Commission admonished Sinclair for its actions and had it pay a penalty of over nine million dollars, it appears that Sinclair, through its affiliated entities, continues to violate the good faith negotiation obligations of the Communications Act. For example, on June 18, 2019, AT&T filed a “bad faith” complaint with the Commission against nine TV station owners that had removed 20 stations in 17 cities across AT&T’s DirecTV platform.⁸ These entities, including Deerfield, are all affiliated with Sinclair, which according to AT&T, Sinclair appears to “manage and control.” Here again is real and ongoing injury to Petitioner and all viewers within the Baltimore DMA.

⁷ *Sinclair Broadcast Group, Inc.*, 31 FCC Rcd. 8576 (2016) (“Consent Decree”).

⁸ <https://www.tvtechnology.com/news/at-t-argues-sinclair-owned-stations-negotiating-retrans-in-bad-faith>

The Oppositions argument that Petitioner lacks standing lacks merit. Petitioner has the requisite standing to file his Petition and to participate in a hearing on the issues designated in the *HDO* and raised by Petitioner. Petitioner alleges [1] personal injury (lack of media diversity, loss of reliable news programming and higher MVPD rates) [2] fairly traceable to Sinclair's unlawful conduct and [3] likely to be redressed by the requested relief, i.e. a full hearing. See e.g. *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984).

Finally, Sinclair's argument that the Ex Parte rules do not apply to Petitioner is based on the assumption that Petitioner is not a party-in-interest. Petitioner has standing and is a "party" within the meaning of Section 1.1202(d) of the rules. As such Petitioner has every right to receive service and to be present at oral presentations. To do less would be to violate Petitioner's rights to a full hearing within the meaning of Section 309(e).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 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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