

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Tribune Media Company
(Transferor)
and
Sinclair Broadcast Group, Inc.
(Transferee)
Consolidated Applications for Consent to
Transfer Control
MB Docket No. 17-179

ORDER

Adopted: August 3, 2017

Released: August 3, 2017

By the Chief, Media Bureau:

1. On July 12, 2017, DISH Network L.L.C. (DISH), American Cable Association (ACA), and Public Knowledge (collectively Movants) filed a Motion for Additional Information and Documents and Extension of Time (Motion) in the above-docketed matter. On July 19, 2017, Sinclair Broadcast Group, Inc. (Sinclair) and Tribune Media Company (Tribune, collectively Applicants) filed a Joint Opposition to the Motion (Opposition). The Movants filed a Reply to the Opposition (Reply) on July 25, 2017. For the reasons stated below, we dismiss the Motion as set forth below, and deny in all other respects.

2. Background. On July 6, 2017, the Commission released a Public Notice seeking comment on the joint applications (Applications) of Tribune and Sinclair for Commission consent to the transfer of control of Tribune to Sinclair. The Public Notice established August 7, 2017, as the date for filing comments and petitions to deny; August 22, 2017, as the deadline for filing responses to comments and oppositions to petitions to deny; and August 29, 2017, as the deadline for filing replies to responses and oppositions to petitions to deny.

3. The Motion. The Movants request that the Commission require the Applicants to furnish additional documents they claim are necessary for the Commission and the public to assess whether the

1 Comments in support of the Motion were filed separately by NTCA-The Rural Broadband Association on July 14, 2017; Common Cause on July 17, 2017; AWE - A Wealth of Entertainment, Cinémoi, MAVTV Motorsports Network, One America News Network, and RIDE on July 20, 2017; and Newsmax Media on July 21, 2017. No new facts were presented or issues raised in these additional comments.

2 The Public Notice also established the proceeding as permit-but-disclose for ex parte purposes. 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, Public Notice, MB Docket No. 17-179, DA 17-647 (MB July 6, 2017) (Public Notice).

3 Id. at 1.

proposed transaction is in the public interest.⁴ Specifically, the Movants contend that the Applicants have failed to provide information that: (1) quantifies the public interest benefits that would be provided by the proposed transaction; (2) demonstrates how the combined entity would cure any violations of the Commission's television ownership rules, or (3) addresses retransmission consent issues raised by the transaction.⁵ Movants request that the Commission require the Applicants to produce twelve categories of material, most of it highly confidential and much of it involving third parties, including documents related to: public interest claims; historic and future expenditure plans by both companies; programming plans by both companies; Sinclair's programming data; station sharing agreements; and retransmission consent negotiations and agreements.⁶

4. Movants "ask that the deadline for Comments and Petitions to Deny be set no earlier than 30 days following the public's access, subject to appropriate protections, to the confidential information already filed or made available to the Commission by the Applicants but not yet made available to interested parties....Petitioners also ask that Replies to Oppositions or Comments in this proceeding be due no earlier than 30 days following participating parties' access to Applicants' completed responses to the requests for additional information set forth above."⁷ Alternatively, Movants assert that in tandem with requesting the information that they specify in their Motion, the Commission should "reconsider its requirement that commenters raise issues in their initial comments or within fifteen days of discovering them."⁸

5. *Applicants' Opposition.* In their Opposition, the Applicants argue that the Movants' request for additional information and documents is contrary to the Commission's well-established procedures for developing the record when reviewing transactions.⁹ As described by the Applicants, after the staff has reviewed an application and determined that it is acceptable for filing, it establishes a pleading cycle during which third parties may file petitions to deny or comments and the applicants may respond.¹⁰ Applicants note that based upon the staff's own evaluation of the applications and the record, it may issue written requests for additional information and documents which it concludes are necessary for its review, including proprietary or confidential information which may be covered by a protective order.¹¹ The

⁴ Motion at 1.

⁵ *Id.* at 3-5. *See also* 47 U.S.C. §310(d); 47 C.F.R. § 73.3555(b)(e). Movant's allege that Applicants appear to acknowledge that the three pages of the putative public interest benefits of the transaction in the Applications fail to meet the burden of proving that the proposed transaction is in the public interest, while Applicants state in the Opposition that the Applications "are complete as filed." Motion at 2-3. Opposition at 4.

⁶ Motion at 2-6. Recognizing the high bar to the disclosure of confidential documents set by the D.C. Circuit in *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015), the Movants argue that it is necessary that all the information on retransmission consent negotiations should be made available to "interested parties" in the proceeding so that they can determine how the proposed transaction affects the Applicants' market power. They also argue that there is no other source for the information except the same companies who conducted the negotiations in the past. *Id.* at 6-7.

⁷ Motion at 8. Applicants state that on the day of the filing of their Opposition they provided Movants with all of the Confidential or Highly Confidential Information already submitted to the Commission pursuant to the terms of *Tribune Media Company and Sinclair Broadcast Group, Inc., Consolidated Applications for Consent to Transfer Control*, Protective Order, DA 17-678 (July 14, 2017) (*Protective Order*). Opposition at 4. The material, which is not voluminous, consists of the documents Applicants submitted in support of their two requests for failing stations waivers. *Id.*

⁸ *Id.* at 2, 9. *See* Public Notice at 3 ("Submissions after the pleading cycle has closed that seek to raise new issues based on new facts or newly discovered facts should be filed within 15 days after such facts are discovered. Absent such a showing of good cause, any issues not timely raised may be disregarded by the Commission.")

⁹ Opposition at 2.

¹⁰ *Id.*

¹¹ *Id.*

Applicants point out that, in this case, the Media Bureau issued a *Public Notice* establishing a timeline for petitions and comments and a *Protective Order* to govern the submission of confidential and highly confidential documents.¹²

6. Applicants argue that in this case Movants seek to dictate the pleading cycle and the information requests themselves.¹³ Applicants further contend that Movants may appropriately raise their concerns about the Applications in a petition to deny or comments based on the Applications as filed and submit replies to any oppositions filed by the Applicants.¹⁴ Furthermore, the Applicants state that the Movants and others will have the opportunity to make *ex parte* presentations to the Commission after the formal pleading cycle has ended.¹⁵ Finally, Applicants maintain that the Commission's rules governing broadcast transaction reviews do not provide any mechanism for third parties to propound discovery.¹⁶

7. *Reply*. In their Reply, the Movants concede that the "Commission's 'well-established procedures' include the development by Commission staff of 'written requests for specific additional information from the applicants.'"¹⁷ Movants claim they have no desire to change this procedure and are not seeking to engage in third party discovery, but they claim that the information that they specify is "necessary for the Commission's evaluation of the proposed transaction."¹⁸

8. **Discussion.** *Motion for Additional Information and Documents*. We deny the Movants' request for additional information and documents. If they believe that the Applications are substantially incomplete or that they fundamentally lack the information to establish that the proposed transaction is in the public interest, the proper procedure is for Movants to file a petition to deny on those grounds.¹⁹ Thus, their Motion for Additional Information and Documents is misplaced. Further, we find that the Movants do not need access to the wide-ranging and highly confidential information Movants request the Commission to demand in order to file a petition to deny.

9. If the Applicants amend their Applications or supplement it in response to requests for information by Commission staff, Movants and other third parties will be able to file submissions based on new or newly discovered facts, as set out in the Public Notice. In addition to those procedures, participants in the proceeding also will be able to present their arguments to the Commission as part of the *ex parte* process.²⁰

10. We also note that the Media Bureau staff has not yet issued an information request in this proceeding. As both sides concede, it is the staff, not other potential parties to the proceeding, that will develop written requests for information that it determines are necessary based on its review of the Applications and the record. That includes any potential proprietary or highly confidential information. Despite the extent of information sought in their Motion, Movants appear to understand the role of

¹² *Id.*

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 3.

¹⁵ *Id.*

¹⁶ *Id.* at 5. Applicants point to Movants' request to have the deadline for reply comments extended until after the Applicants respond to their suggested requests for information, but before these issues have been raised in a petition to deny or comments, as support for their argument that Movants are attempting to create their own method for such discovery. *Id.*

¹⁷ Reply at 1.

¹⁸ *Id.*

¹⁹ 47 U.S.C. § 310(a),(d)(1). We find that the standing issue raised by Applicants is premature and should be considered in the context of petitions to deny.

²⁰ See *In the Matter of AT&T and DirectTV*, 29 FCC Rcd 10318, 10320 (MB 2014).

Commission staff when they assert in their Reply that they are not trying to usurp the normal investigatory process and state that the Commission is not “waiting for litigants to choose the information it will consider.”²¹ Therefore, finding no basis presented for the Motion for Additional Documents and Information, we dismiss it.²²

11. *Motion for Extension of Time.* We also deny the motion for extension of time. Section 1.46(a) of the Commission’s Rules states that “[i]t is the policy of the Commission that motions for extensions of time shall not be routinely granted.”²³ Movants have failed to establish any basis for granting the extension they seek. Although movants ask that the Commission extend the petition to deny deadline to at least 30 days following the public’s access,²⁴ to the confidential material already filed or made available to the Commission by the Applicants,²⁵ Movants and any other party who sought access to such confidential information could have requested it promptly after the Applications were put on public notice.²⁶ This would have given them most, if not all, of the full 30-day petition-to-deny period to review the limited amount of confidential information that was filed. They were not required to wait for the issuance of the Protective Order to make a request. In any event, Movants received the information, which was not voluminous, on the same day that the Opposition was filed.²⁷ Movants have not demonstrated why it would be unduly burdensome for them to consider this information prior to the petition to deny date. Having denied Movants’ Motion for Additional Information and Documents, their request for an extension of time to file replies to oppositions and replies to comments until the material requested in that part of the Motion has been provided is denied as moot. Thus, we find that under the circumstances presented here, Movants’ requested extension of the pleading cycle is not justified.

12. We also deny, without prejudice, Movants’ request that the Commission should “reconsider its requirement that commenters raise issues in their initial comments or within fifteen days of discovering them” as premature. If Movants request an extension of time following Applicants’ filing of an opposition to a petition to deny or reply to comments or Applicants’ response to an information request, such a request will be appropriately considered at that time.

²¹ Reply at 3.

²² Because we find no basis for this part of the Motion and dismiss it, we do not reach the parties’ arguments regarding the applicability of *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015), to the documents or types of documents sought by Movants.

²³ 47 C.F.R. § 1.46(a).

²⁴ Motion at 8. Elsewhere the Movants state that they seek the extension until “no earlier than 30 days following participating parties’ access,” but do not define “participating parties.” Prior to the filing of petitions to deny and comments, the meaning of “participating parties” in a docketed transaction proceeding is unclear. *Id.* at 2.

²⁵ *Id.* at 8. Applicants state that on the day of the filing of their Opposition they provided Movants with all of the Confidential or Highly Confidential Information already submitted to the Commission pursuant to the terms of the *Protective Order*. Opposition at 4.

²⁶ As noted above, *supra* at fn. 7, the confidential material that has already been filed in the case is related to the Applicants’ requests for two continuing failing station waivers. The material constitutes Attachments V and VII to the Comprehensive Exhibit. In the unredacted version of the Applications as filed, each Exhibit says that it is “Submitted under a Request for Confidentiality.” Those requests were filed pursuant to 47 C.F.R. § 0.459. Immediately after the filing of the Applications, Movants could have requested access to the information pursuant to 47 C.F.R. § 0.461, which they did not do. They also could have approached the Applicants about access to the information and there is no evidence in the record that they did so.

²⁷ Opposition at 4.

13. **ACCORDINGLY, IT IS ORDERED**, That the Motion for Additional Information and Documents and Extension of Time filed on July 12, 2017, by DISH Network L.L.C., American Cable Association, and Public Knowledge in the above captioned matter is hereby DISMISSED in part and DENIED in part. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's Rules.²⁸

FEDERAL COMMUNICATIONS COMMISSION

Michelle M. Carey
Chief
Media Bureau

²⁸ 47 C.F.R. § 0.283.