BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

MOTION REQUESTING TO HOLD PROCEEDING IN ABEYANCE

Public Knowledge and Common Cause (collectively, the "Petitioners") request that the above-captioned proceeding be held in abeyance pending the outcome of the D.C. Circuit's review of the Commission's order reinstating the UHF discount.[1, 2] The Court's consideration of the UHF Reinstatement Order has direct bearing on whether the proposed acquisition of Tribune Media Company ("Tribune") by Sinclair Broadcast Group, Inc. ("Sinclair") (collectively, the "Applicants") can be consummated as currently envisioned.

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[1] *See Free Press, et al. v. FCC*, Case No. 17-1129 (D.C. Cir. 2017); Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Order on Reconsideration*, 32 FCC Rcd. 3390 (2017) ("UHF Reinstatement Order"). Common Cause is one of the parties who filed Petitions for Review of the UHF Reinstatement Order.

[2] Petitioners have already urged the Commission to hold this proceeding in abeyance in comments filed in response to Sinclair's most recent divestiture proposal. *See* Petition to Deny of National Hispanic Media Coalition, Common Cause, and United Church of Christ, MB Docket No. 17-179 (filed June 20, 2018); Petition to Deny of Cinemoi, Herndon-Reston Indivisible, International Cinematographers Guild, Latino Victory Project, National Association Broadcast Employees and Technicians, CWA, NTCA—The Rural Broadband Association, Public Knowledge, Ride Television Network, and Sports Fan Coalition. Others have similarly urged the Commission. *See, e.g.,* Petition to Deny of The Attorneys General of the States of Illinois, Iowa and Rhode Island. Nevertheless, to remove any ambiguity and to exhaust all administrative remedies, Petitioners file this formal Motion to Hold In Abeyance.

As Commissioner Rosenworcel has stated, the Commission is "still waiting on a court decision about how many stations one company can own. No way it should rush ahead now before the court acts."[3] The Applicants have filed a complex set of divestiture applications in an attempt to comply with regulatory limits on their holdings that rely on the UHF discount to comply with Commission rules. Action on this matter has become urgent, since the Commission recently placed these divestiture applications on public notice.[4] While the Commission has stopped the transaction's shot-clock, only 13 days remain on the clock. If the Commission were to restart it at the close of the current pleading cycle, that could lead to action in this proceeding that would be uninformed by the Court's decision. The Commission should therefore hold this proceeding in abeyance to avoid the consummation of a transaction that may soon become unlawful in light of the Court's decision.

Specifically, the application and proposed divestitures rely on the existence of the UHF discount. It is discounting the Applicants' UHF holdings that reduces their combined station ownership reach from 71.22% to 45.52% (6.5% above the 39% cap), and that allows the divestitures proposed by the Applicants to reduce that reach further by 8.13% to 37.39%, only 1.61% below the cap.[5] If the Commission's reinstatement of the UHF discount is vacated by the

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[3] Jessica Rosenworcel (JRosenworcel), Twitter (May 21, 2018, 11:39 AM), https://twitter.com/JRosenworcel/status/998634289867776000. *See also* Letter to Ajit Pai from 22 Senators (April 26, 2018) https://www.commerce.senate.gov/public/index.cfm/pressreleases?ID=D157AC5E-1509-47FB-AE5A-6B0C2670554D (requesting that the Commission "pause consideration of all pending broadcast mergers" in light of the pending D.C. review of the UHF Reinstatement Order).

[4] *See* Public Notice, MB Docket No. 17-179, Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc., DA 18-530 (May 21, 2018).

[5] Petitioners believe that the proposed amendment to Sinclair's application would not genuinely reduce New Sinclair's reach, not least because the divestitures it proposes are accompanied by joint service agreements and shared service agreements that would keep Sinclair's hands at the

court, bringing the reach of the transaction under the 39% cap would require divestitures that account for 33% of national reach—more than four times more than the currently proposed divestitures. To be blunt, this would mean that the transaction would have to be undone if consummated. The Commission should not approve this merger before the court has a chance to rule because disassembling a transaction that has been consummated, or bringing it in compliance with a significantly lower ownership cap, would be very difficult or impossible. Indeed, one of the judges on the panel hearing the UHF discount case, Judge Millet, cautioned the Commission at oral argument that "no one likes to do" post-consummation divestitures.[6]

Jumping the gun here would have perverse consequences: for one thing, New Sinclair would be able to obtain long-lasting concessions from distributors (e.g., multi-year agreements) based on a heft that it will have to shed shortly thereafter. For another, the circumstances would place pressure on the Commission to approve willy-nilly a disassembly that would take a long time to effectuate if it can be done at all, and would not truly reduce the combined company's reach, contrary to the court's intent. As Judge Millet also said, "maybe what the Commission would do is just not authorize anything while its going through this process…."[7]

The need for the Commission to hold its hand has been made even more imperative by two developments: the oral argument in the UHF case demonstrates that the D.C. Circuit's panel has serious concerns about the appropriateness of the UHF discount's reinstatement. Coupled with the D.C. Circuit's order directing petitioners to further demonstrate their standing, it shows

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wheel or very close to it. For other reasons, too, the proposed amendment does not serve the public interest any more than does the underlying application.

[6] *See* Transcript of Oral Argument at 46:14, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. April 20, 2018) ("Oral Argument Transcript").

[7] *Id.* at 46, 14:16.

that the merits of the Commission's order are in serious peril. Second, the divestitures proposed by Sinclair do not take into account the distinct possibility that the discount will go away. Even if they were genuine and effective, the divestitures would reduce the reach of transaction by only 8.13 percent, which is just enough to fall under the cap if the discount exists, and woefully insufficient if it does not.

I. Repeal of the UHF Discount Post-Merger Would Require New Sinclair to Make Substantial Additional Divestitures

In August 2016, the Commission repealed the UHF discount, which allowed broadcast television station owners to discount by 50% the coverage of UHF stations when calculating their compliance with the national audience reach cap.[8] On reconsideration, the Commission reinstated the UHF discount on April 21, 2017.[9] Sinclair and Tribune announced their merger only three weeks later, on May 8, and filed their initial application on June 28. The UHF Reinstatement Order is currently being reviewed by the D.C. Circuit, which heard oral arguments on the merits on April 20, 2018.

Sinclair's latest proposed merger plan (its fourth attempt to come into compliance with the Commission's rules) depends entirely on the UHF discount to be compliant with the national television ownership cap of 39%. Even after the proposed divestitures, Sinclair estimates that it will have a national audience reach of 37.39%, taking into account the UHF discount.[10] Without

[8] See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, *Report and Order*, 31 FCC Rcd. 10213 (2016) ("UHF Repeal Order").

[9] *See generally* UHF Reinstatement Order.

[10] Sinclair Broadcast Group, Amendment to FCC Form 315, *Amendment to Comprehensive Exhibit* at 20 (April 24, 2018) ("Amended Application"). If Sinclair does not successfully divest WGN-TV, New Sinclair would have a national reach of 38.86%. *Id.*

the UHF discount, New Sinclair acknowledges that it would have a national reach of 58.77%.[11] This means that if the D.C. Circuit eliminates the UHF discount after the merger has been approved, New Sinclair would be forced to divest an additional **20% percent** of its combined stations to be in compliance with the 39% national ownership cap.[12]

Sinclair of course recognizes the importance of the appeal of the UHF Reinstatement Order to its proposed acquisition. Sinclair moved to intervene in the appeal because Sinclair's "interests will be affected by any change in the national audience reach cap."[13] Sinclair also acknowledged that its "pending transaction" would be "significantly harmed" by a stay of the UHF discount rule.[14] During a recent investor conference, Sinclair's CEO explicitly linked the outcome of the UHF proceeding to whether the proposed merger can even proceed as currently contemplated: "if by some scenario they [the Commission] don't [win], and we have not been approved by then . . . the other alternative is obviously that the deal would just expire."[15]

II. Abeyance is Warranted by Precedent and Prudence

[11] Amended Application, Exhibit J.

[12] New Sinclair would not be protected by the "grandfather" provision of the UHF Repeal Order. Under that provision, the Commission grandfathered broadcast owners that would exceed the 39% national audience reach cap as of September 26, 2013, or proposed station combinations for which an assignment or transfer application was pending as of that date. *See* UHF Repeal Order at ¶ 47.

[13] Motion of Sinclair Broadcast Group, Inc. for Leave to Intervene, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. May 26, 2017).

[14] *See* Opposition of Intervenor-Sinclair Broadcast Group, Inc. to Emergency Motion For Stay, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. June 1, 2017).

[15] Sinclair Broadcast Group, Q1 2018 Earnings Call, Fair Disclosure Wire (May 9, 2018).

Abeyance is necessary to guard against the substantial "unscrambling of the eggs" in the form of station divestitures by New Sinclair so significant that they would amount to an undoing of the merger.

Precedent. Courts have repeatedly recognized the formidable difficulty of disassembling two merging companies after their merger has been consummated and the companies have combined their operations. As the Supreme Court has found, "administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture,"[16] and that "where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock."[17] Once a merger is approved, the previously separate companies begin actions that that "preclude effective relief…if divestiture is ordered."[18] An abeyance of this proceeding would have the same rationale as an injunction placing a merger temporarily on hold pending judicial review—to avoid the difficulty of trying to undo a merger once the applicants begin to combine their operations. As the D.C. Circuit noted, "the whole point of a preliminary injunction is to avoid the need for intrusive relief later, since even with the considerable flexibility of equitable relief, the difficulty of unscrambl[ing] merged assets often precludes an effective order of divestiture."[19]

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[16] *FTC v. Dean Foods Co.*, 384 U.S. 597, 607 n. 5 (1966).

[17] *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944). *See also*, *U.S. v. First City Nat. Bank of Houston*, 386 U.S. 361, 371 (1967) ("The legislative history is replete with references to the difficulty of unscrambling two or more banks after their merger.").

[18] *FTC v. Warner Comm. Inc.*, 742 F.2d. 1156, 1165 (9th Cir. 1984).

[19] *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008). *See also Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 261 (2d. Cir. 1989) ("Erring on the side of granting the injunction becomes especially imperative in corporate control contests because once the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to unscramble the eggs."). "Hold separate" orders are often insufficient to protect against interim competitive harm or ensure the adequacy of eventual relief,

During the oral argument about the UHF Reinstatement Order, Judge Millet expressed those misgiving in a colloquy with Commission counsel:

> Mr. Carr: I will say to the extent if there are any applications for acquisitions during this period that are granted, and if the Commission adopts a cap and those acquisitions are out of alignment with the new cap, the Commission certain has authority to require unwinding of the transactions through divestiture.
> Judge Millet: No, but no one likes to do that, so maybe, maybe what the Commission would do is just not authorize anything while it's going through this process, that might make it speed things up, too.
> Mr. Carr: That certainly would be a possibility, as well.[20]

The Commission too has previously held proceedings in abeyance pending the outcome of related cases. The Commission does so for reasons of judicial and administrative efficiency when the issue being considered in a related proceeding has a direct bearing on the outcome of the Commission's determination. For example, when related proceedings at the California Public Utility Commission and in the Tenth Circuit "could have a direct impact upon the Commission's decision," the Commission agreed to hold its proceeding in abeyance "to wait for final resolution of the CPUC and Tenth Circuit decision[s] and therefore limit expenditures of additional time and resources by the parties and the Commission."[21] The Commission also held a petition for preemption of state law in abeyance where the request for relief involved "certain

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if divestitures later become necessary. *See FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986). Especially where, like the broadcast industry, advanced technology is involved or the "competitiveness of firms… turns, in large part, on aggressive or innovative management initiatives," "hold separate" orders do not adequately prevent against irreversible transfers of trade secrets and other confidential information that, if transferred, prevent divestiture from fully restoring competition to pre-merger levels. *Id.*

[20] Oral Argument Transcript at 46 8:19.

[21] *MCI Telecom Corp. v. Pacific Bell*, Order, File No. E-97-18, DA 99-1863 (Sept. 13, 1999). *See also Unicare Corp. v MCI Worldcom, Inc.*, File Nos. E-99-02 E-99-03, DA 99-1430 (July 20. 1999) (granting motion to hold proceeding in abeyance pending resolution of related issues in a California state court).

outstanding issues regarding the operation of the new federal universal service program."[22] It also has held petitions for reconsideration of various rules in abeyance where they "may be rendered moot" by the rules under consideration in a related proceeding.[23]

Indeed, the Commission itself has frequently filed motions to hold cases in the D.C. Circuit in abeyance pending further agency action on reconsideration or rulemakings.[24] Courts have likewise frequently granted motions to hold proceedings in abeyance pending the outcome of a related proceeding in other courts or at administrative agencies.[25]

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[22] American Commc'ns Svcs., Inc. and MCI Telecomms. Corp., CC Docket No. 97-100, *Memorandum Opinion and Order*, 14 FCC Rcd. 21579, 21581 ¶ 3 (1999).

[23] Rules and Policies on Foreign Participation in the U.S. Telecom Market, IB Docket No. 97-142, *Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 7847, 7849 n.2 (1997).

[24] *See, e.g.,* Motion to Hold in Abeyance and to Defer Filing of the Record, *USTA v. FCC*, Case No. 15-1322 (D.C. Cir., Oct. 14, 2015) ("Both of the petitions for review raise issues that are the subject of pending proceedings before the Commission. Until those proceedings are completed, the Court should hold these cases in abeyance."); Motion to Hold Case in Abeyance, *Secrus Tech. Inc. v. FCC*, Case No. 13-1280 (D.C. Cir., Dec. 10, 2014) (requesting case be placed in abeyance pending issuance of final rules); Motion to Hold Case in Abeyance, *AT&T v. FCC*, Case No. 15-1038 (D.C. Cir. July 2, 2015) (requesting abeyance pending resolution of related administrative proceedings); Motion to Hold in Abeyance, *Prometheus Radio Project v. FCC*, Case No. 17-1107 (3d. Cir. Feb. 15, 2017) (seeking to hold case considering media ownership rules in abeyance because the Commission was considering a petition for reconsideration "that overlaps in substantial part with the issues presented by the petitions for review.").

[25] *See e.g., Sw. Bell Tel. Co. v. FCC*, No. 93-1779, 1994 U.S. App. LEXIS 14160, at *1 (D.C. Cir. Mar. 14, 1994) ("Strong considerations of judicial and administrative efficiency counsel in favor of deferring consideration of the petition for review until agency reconsideration is complete."); *Columbia Assocs., L.P. v. FCC*, No. 93-1409; 93-1723, 1994 U.S. App. LEXIS 9997, at *1 (D.C. Cir. Feb. 3, 1994) (holding proceeding in abeyance pending reconsideration at FCC); *Order, Nat'l Assoc. of Broadcasters v. FCC*, No. 12-1225 (D.C. Cir. February 12, 2013) (granting NAB request to hold proceeding in abeyance pending FCC reconsideration); Order, *National Association of Broadcasters v. FCC*, Nos. 08-1135 *et al.* (D.C. Cir., July 11, 2008) (same); *Naegele v. Albers*, 355 F. Supp. 2d 129 (D.D.C. 2005) ("Litigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interests"); *IBT/HERE Emple. Representatives' Council v. Gate Gourmet Div. Ams*., 402 F. Supp. 2d 289, 292 (D.D.C. 2005) (granting motion to hold case in abeyance for reasons of judicial economy when "pending matters in front of the arbitrator may affect the future scope and necessity of litigation in this court").

Prudence. Even setting aside this abundant precedent, the Commission should hold its hand as a matter of prudence. If the merger is consummated, but the D.C. Circuit later invalidates the UHF Reinstatement Order, New Sinclair would be able to take advantage of its temporarily increased size (20% above the 39% cap) to obtain much longer-lasting benefits. Nor can this risk be discounted on an assumption that the Commission could order New Sinclair to implement the required divestitures in a short time. Since Sinclair first filed its original application to acquire Tribune in June 2017, it has filed three major "amendments" (really almost entirely new applications) to its application in an effort to comply with the *existing* Commission rules and find buyers for its current proposed divestitures. Even in its April 2018 amendment, Sinclair still could not identify a buyer for eight stations, necessitating it to file yet another amendment in May 2018, almost a year after the transaction was initially announced.[26] As of the May 2018 amendment, Sinclair does not have buyers for two stations.[27] It is likely that New Sinclair would face similar difficulties and claim that it will require a significant period of time to offload a further 20% worth of stations. The circumstances would place pressure on the Commission to approve problematic arrangements such as divestiture trusts or joint operating agreements that would not truly reduce the combined company's reach or would otherwise not serve the public interest. Indeed, stations often linger in divestiture trusts for years before they are eventually sold. For example,

[26] *See* Amended Application (indicating that Sinclair was still in negotiations to sell KCPQ, KSTU, WSFL-TV, KTXL, WJW, KSWB-TV, KDVR(TV) and KFCT(TV)); Sinclair Broadcast Group, Amendment to FCC Form 315, *Amendment to Comprehensive Exhibit* at 6-7 (May 24, 2018) (identifying Fox as the buyer).

[27] *See id.* at 1 (requesting approval to place KPLR-TV and KDNL-TV in a divestiture trust).

KBZU(FM) (nearly six years before being sold out of the divestiture trust),[28] KFWB(AM) (6 years),[29] KWHY-TV (eight years),[30] KINB(FM) (ten years),[31] and WFMD(AM) (still in trust nine years later)[32] show the difficulty inherent in selling stations—a problem that will be increased many times over if Sinclair needs to sell a significant percentage (20%) of its holdings to come into compliance with a cap without the benefit of the UHF discount.

While a motion panel of the D.C. Circuit (not the merits panel) had denied a stay of the UHF Reinstatement Order,[33] abeyance of a Commission action on a proposed transaction is a

[28] Citadel Broadcasting Co. for Renewal of Licenses for Stations; Existing Shareholders of Citadel Broadcasting Corp. and of the Walt Disney Co. (Transferors) and Shareholders of Citadel Broadcasting Corp. and of the Walt Disney Co. (Transferees) for Consent to Transfers of Control; Citadel Broadcasting Co. (Assignor) and The Last Bastion Station Trust, LLC (Assignee) for Consent to Assignment of Licenses, *Memorandum Opinion and Order and Notice of Apparent Liability*, 22 FCC Rcd. 7083, Appendix at 7117 (2007) ("Citadel Order"); Consent to Assignment from The Last Bastion Station Trust, LLCS, As Trustee, to Radio License Holding CBC, LLC, Call Sign KBZU, File No. BALH-20130104ABG (granted Mar. 13, 2013).

[29] Broadcast Actions, Public Notice, Report No. 47166 (rel. Feb. 4, 2010); Consent to Assignment from KFWB License Trust to Universal Media Access KFWB-AM, LLC, Call Sign KFWB, File No. BAL-20160106AAH (granted Feb. 22, 2016).

[30] *See* Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4345 ¶ 263 (2011) ("Despite the passage of eight years, NBCU has yet to divest the necessary station to bring itself into compliance with the local television ownership rule in the Los Angeles market"); Consent to Assignment from Bahia Honda LLC to Meruelo Media Holdings, LLC, Call Sign KWHY, File No. BALCDT-20110207AEK (granted Apr. 27, 2011).

[31] Citadel Order, 22 FCC Rcd. 7083, Appendix at 7117; Consent to Assignment from The Last Bastion Station Trust, LLCS, As Trustee, to Perry Media Group, LLC, Call Sign KINB, File No. BALH-20170324AAK (granted May 23, 2017).

[32] WFMD – Existing Shareholders of Clear Channel Communications, Inc. (Transferors) and Shareholders of Thomas H. Lee Equity Fund VI, L.P., Bain Capital (CC) IX, L.P., and BT Triple Crown Capital Holdings III, Inc. (Transferees), *Memorandum Opinion and Order*, 23 FCC Rcd. 1421, Appendix B at 1462 (Jan. 24, 2008); Renewal of License by Aloha Station Trust, LLC, Call Sign WFMD, File No. BR - 20110524ABJ (granted Dec. 12, 2017).

[33] *See* Order, Free Press v. FCC, Case No. 17-1129 (D.C. Cir. June 15, 2017).

less drastic step than an across-the-board stay. Oral arguments in the D.C. Circuit show that the court has serious concerns about the UHF Reinstatement Order. As Judge Millet said, "[i]t doesn't seem that there's any option for keeping [the discount] in its current form that seems at least plausible at this stage . . . I don't understand the point of keeping this thing alive when everyone has said it's obsolete, it's harmful, there's no point to it, it's way outdated, it needs to be gone."[34] Judge Pillard expressed the same misgivings: "it seems to me that if one looks at the UHF discount, and . . . if one were to see it as separable from the cap then the rule-making that looked at its factual foundation and said it is gone would have only one conclusion, which is to get rid of it."[35] In the same vein, Judge Katsas said, "You are affirmatively reinserting into the Code of Federal Regulations something that on its own terms doesn't make sense."[36] These indications from the court show that the UHF Reinstatement Order is in serious peril. These signs are reinforced by the court's decision to give the petitioners an opportunity to further demonstrate their standing.[37] Second, the April 2018 Amended Application, as further amended by the May 2018 amendment, finally reveals Sinclair's plans to divest stations to comply with the local and national ownership limits; the initial application and its two subsequent amendments did not indicate with any degree of certainty what stations Sinclair planned to divest.[38] These plans are lackluster; even if the proposed divestitures were genuine

[34] Oral Argument Transcript at 32, 1:10.

[35] *Id.* at 24, 20:25.

[36] *Id.* at 41, 15:19.

[37] *See* Per Curiam Order, *Free Press v. FCC*, No. 17-1129 (D.C. Cir. April 25, 2018) (granting petitioner's request to submit supplemental affidavits in support of standing).

[38] *See* Application of Tribune Media Company and Sinclair Broadcast Group, Inc., MB Docket No. 17-179 at 12 (June 28, 2017) (saying only that "to the extent that divestitures may be

and arm's length, which they are not, they would be just sufficient to squeeze New Sinclair under the cap based on the existence of the UHF discount. In other words, the Applicants have not at all taken into account the possibility that there will not be such a discount.

III. CONCLUSION

While Petitioners continue to maintain that the proposed transaction should be denied in its entirety,[39] for the foregoing reasons, the Commission should place further consideration of the transaction in abeyance until the D.C. Circuit issues a mandate in the UHF discount proceeding.

Respectfully Submitted,

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necessary, applications will be filed upon locating appropriate buyers and signing appropriate purchase agreements.").

[39] *See* Petition to Deny of Public Knowledge, Common Cause, and the United Church of Christ, OC Inc., MB Docket No. 17-179 (Aug. 7, 2017).