Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	
Status of Competition in the Market for the Delivery of Video Programming	MB Docket No. 17-214

COMMENTS OF PUBLIC KNOWLEDGE

The Commission's inquiry into the state of video competition will be incomplete unless it takes account of the ongoing wave of horizontal and vertical consolidation that is reshaping the video industry.

In particular the Commission should be cognizant of the various kinds of harms that arise from media consolidation, including higher costs, lower quality, and less diversity (in terms of the ability of minority communities to access relevant programming, and in terms of other viewpoint diversity, as well). One lens through which to view these issues is the proposed acquisitions of Time Warner by AT&T, and of Tribune by Sinclair Media. To aid the Commission's analysis, this filing will include several documents that touch on these matters, demonstrating that Americans from (to say the least) a wide variety of political persuasions and perspectives see media concentration as harmful.

Already, the video marketplace is very consolidated, and the prospect of new competitive alternatives does not seem to have led to lower bills. Today, it is estimated that, compared with a competitive market, "Current [MVPD] rates are almost twice as high as they should be. Put more precisely, the current excess is about 44% of the current price based on the rate of inflation."[1] A more recent paper by the Mark Cooper and Public Knowledge's Gene Kimmelman notes that "On average, prices for cable, broadband, wired telecommunications, and wireless services charged by the telecommunications oligopoly in the United States are inflated by about 25

1 Mark Cooper, *Overcharged & Underserved*, Roosevelt Institute (2016), http://rooseveltinstitute.org/wp-content/uploads/2017/02/Overcharged-and-Underserved.pdf, at 164.

percent above what competitive markets should deliver, costing the typical U.S. household more than $45 a month, or $540 a year."[2]

Addressing the consumer harms that occur due to a market that is consolidated to such a degree, rife with incumbents with signifiant market power, will take more than simply preventing further consolidation. To truly improve matters for consumers, the Commission should use its authority to remedy the harms that result from vertical integration, harmful forms of bundling, and excessive market power. Taking full account of industry trends that threaten to make the Commission's job even harder down the road is an important part of this process.

I. Consolidation Leads to Higher Costs for Consumers

A. AT&T / Time Warner

The vertical integration of AT&T and Time Warner could lead to higher prices for consumers in a number of ways. A vertically-integrated company that combines distribution and programming production does not have the same costs or incentives as two independent companies. An independent Time Warner has the incentive to make the most money it can for its programming, which means, for the most part, making it available to distributors of all kinds at rates they are willing to pay. But combining a programmer and a distributor under one roof changes this incentive—while the combined company will still have the incentive to allow Time Warner programming to be available on competing distribution platforms, at the margin, the company may be more willing to leave money on the table, from a programming perspective, if it would benefit the distribution business. Thus, Time Warner may charge higher prices for its programming, knowing that a few distributors may choose to drop it. In addition to depriving some viewers of access to Time Warner programming at all, this directly leads to higher bills for viewers from distributors who have to pass higher costs along to their customers. New programming developed by Time Warner may increasingly exclusive to AT&T, as well—either

[2] Gene Kimmelman and Mark Cooper, *A Communications Oligopoly on Steroids*, Washington Center for Equitable Growth, July 2017, https://www.publicknowledge.org/assets/uploads/blog/071817-kimmelman-cooper2.pdf, at 5.

through its MVPD service, online platforms, or even through being tied to its broadband products (e.g., through mobile zero-rating). The Commission's current program access regime, which has eliminated most presumptions against vertical tying of programming (though a complaining party can still bring a claim under the statute itself), is in any case designed for an MVPD-centric world, and may not be up to the task of policing anticompetitive vertical arrangements that involve other kinds of video platforms.

Similarly, AT&T's customers themselves could be harmed by the changed incentives of the combined company. AT&T will no longer have an incentive to assemble a mix of programming determined by considerations of price and quality, since Time Warner programming will be guaranteed carriage. This eliminates important signals that keep cost and quality in line with customer expectations. Additionally, fewer industry players increases the likelihood of coordinated effects, which would harm consumers around the country.

B. Sinclair / Tribune Media

A primary motivation for Sinclair's proposed takeover of Tribune appears to be a desire to charger higher fees for the same programming (which it already charges high fees for). Today, Sinclair can already leverage its position to demand high fees. As industry executive Charles Herring put it,

> They're able to ask for ask for excessive rates currently for their broadcast services. That raises prices for the consumer and consumes programming budgets, preventing independent sources of programming from being able to complete deals with MVPDs for the fees needed to sustain themselves.[3]

Herring further explained how the proposed deal would increase Sinclair's leverage, and that its higher fees could crowd out independent programming options.[4]Sinclair essentially concedes that a driving rationale behind its proposed merger is to allow it to charge higher rates. As Public Knowledge explained in one filing,

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3 Cynthia Littleton, *Sinclair-Tribune Merger Opponents Warn of 'Excessive, Unbalanced Market Power'*, Variety, Aug. 7, 2017, http://variety.com/2017/tv/news/sinclair-tribune-merger-opponents-1202517399.

4 Id.

> The Applicants state that the current retransmission consent market allows parties to respond to their private interests and negotiate accordingly. Further, the Applicants explain that the consolidation of several cable operators has allowed MVPDs to demand lower retransmission fees. The Commission should treat this rationale as a direct admission that Sinclair would use its newfound bargaining leverage to demand higher rates.[5]

It is important to put Sinclair's role in the video marketplace into context. Generally speaking, the most valuable content carried by its stations is not created by Sinclair, but by networks such as ABC, CBS, and Fox. For this programming, Sinclair serves as a middleman between creators and viewers, and it enjoys government-protected regional monopolies and statutory rights that allow it to profit from its privileged position. While the continued wisdom of the complex system for the distribution of network programming can be questioned even if it was working as intended, the fact is that large programming chains like Sinclair already take advantage of a weakness in the system. By negotiating for the carriage of multiple stations at once, across a large geographic area, broadcasting chains can greatly increase their leverage, particularly against smaller MVPDs, making blackouts much more costly. At the same time, while customers (and MVPDs) in a particular geographic market generally have no alternative sources for network programming beyond the local broadcast monopoly, they often do have alternative MVPDs (satellite providers, for instance, if they are cable customers, and vice versa) or online sources of programming. Thus if valuable programming is blacked out of one MVPD, they may be able to switch—putting an MVPD into the position of either accepting the broadcaster's terms and raising its rates to viewers, or losing customers to another MVPD (which in turn faces the same dynamic).

This is an ongoing issue in the programming industry and one major driver of rising cable bills. That said, the proposed Sinclair/Tribune deal represents a step change that could exacerbate this issue still further. The combined company would control over 200 local broadcast stations,

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5 Reply of Public Knowledge in Applications of Tribune Media Company and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 17-179, Aug. 29, 2017, at 7 (citing Sinclair Reply to Opposition at 31).

and as Public Knowledge and others have argued in the relevant docket, this would allow Sinclair to raise its fees, to the detriment of viewers.

II. Consolidation Harms Diversity

Media has become increasingly centralized, in terms of ownership, and in terms of access. Most internet users get their news from a handful of internet giants who wield disproportionate power in terms of shaping public opinion. Traditional local media is increasingly either being driven out of the market entirely, or put under the control of a handful of giants like Sinclair. This docket is not the place to address all of these issues. The Commission has, for instance, an open docket on how certain practices such as unconditional most-favored-nation clauses and unreasonable alternative distribution methods clauses in carriage agreements harm video diversity. However, in reviewing the state of video competition, the Commission must be cognizant of the effect that consolidation affects the ability of viewers to access diverse news sources and points of view.

As the comments in this docket demonstrate, Americans from all parts of the political spectrum are concerned with the direction of the video programming and distribution marketplace. In particular, there is widespread concern about the availability of high-quality, locally-focused news. National cable news obsessively focuses on a few high-profile stories and scandals, providing incremental updates and talking head commentary while letting stories of major importance go under- or un-reported. For issues of local concern, at least, viewers rely on local news to fill in the gap, particularly coverage provided by local broadcasters. But even this model is under threat. Ostensible local broadcast competitors have been permitted to collude, not only on ad sales, but to reduce spending on reporting, reducing local journalism jobs and the number of different viewpoints that reach the air.

The Sinclair/Tribune merger raises signifiant concerns in this regard. Violating the principle of localism that is at the foundation of the Commission's broadcasting policies, Sinclair is increasingly dictating a uniform point of view and controlling local coverage of issues in ways that more resemble a centralized programming network than a chain of local stations. As Public Knowledge argued in its Petition to Deny,

> Sinclair believes that centralized news operations for national and international news is an effective cost-savings model. Further, it is well-documented that Sinclair engaged in the practice of "central casting" – substituting centrally originated programming for local programming. Central casting gets to the core of what the Commission's localism principles seek to prevent. Indeed, the FCC's chain broadcast rules prohibit two or more connected stations from simultaneously running the same program. The principles the Commission adopted in its 2008 Declaratory Ruling granting broadcast affiliates more control and autonomy would also be violated. Indeed, if Sinclair is allowed to merge, the company could potentially run "pseudo-networks" – controlling the local programming of hundreds of broadcast stations.[6]

Customer's ability to access diverse sources of news programming could also be harmed in the wake of an AT&T/Time Warner merger. Time Warner owns CNN, and AT&T customers who wish to access other news sources, such as MSNBC, Fox News, or the BBC, may find it more difficult. This does not need to rise to the level of outright foreclosure: AT&T's distribution platforms may still carry competing news sources and they would still be available for the diligent viewer. But if AT&T uses neighborhooding to prioritize CNN over other channels in its MVPD lineups, zero-rates its own news programming on AT&T's mobile networks but not programming from other sources, or some other strategy, typical viewers may be more likely to access news from CNN or other AT&T properties than otherwise.

III. Other Matters

A. The Status of OVDs

While still developing, the OVD marketplace has begun to segment in interesting ways. New OVD services that offer linear streams of programming roughly comparable to those available through traditional MVPDs have arisen. Such services include DirecTV Now, Sling

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6 Petition to Deny of Public Knowledge et al. in Applications of Tribune Media Company and Sinclair Broadcast Group for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 17-179 (Aug. 8, 2017), at 6.

TV, YouTube TV, and Playstation Vue.[7] Despite their limitations (which are due in part to legacy regulations, discussed below, as well as limited device availability, and performance over broadband) they come closer to offering viewers a full MVPD alternative than OVD options heretofore. However, this new category of OVD does not yet appear to pose a significant competitive threat to traditional MVPDs. For example, AT&T's DirecTV Now, which is one of the more successful of these services[8] has under 500,000 customers and is facing slowing growth, compared with a customer base of over 20 million for AT&T's traditional DirecTV satellite service.[9]

At the same time, it is becoming ever-clearer that the most popular categories of OVD are not competitors to cable, but something more complementary. For instance, Netflix and Amazon have put an increasing focus on original programming, rather than offering the largest-possible catalog of programming from various sources. While the on-demand model does necessitate that they function as aggregators to a certain degree, their emphasis (and pricing) is not consistent with video services that attempt to be all things to all people, or to offer all the programming even a single viewer might want to access. Instead, they have become something closer to cable networks, as opposed to cable systems, or are simply a new kind of complementary video service entirely. There may be customers who are happy to cut the cord and access video only from one or more OVDs of this kind, but in large part these OVDs are complementary, not substitute products for traditional MVPDs. (OVDs that specialize in user-generated content such as YouTube are even further afield.)

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7 *See Hulu Live vs. YouTube TV vs. Sling vs. Vue vs. DirecTV Now: Face-Off!*, Tom's Guide, (Oct. 4, 2017), https://www.tomsguide.com/us/youtube-tv-vs-cable-tv-replacements,news-24578.html, for a recent overview.

8 Kevin Tran, *It's Still Early Days for Hulu Live*, Oct. 6, 2017, http://www.businessinsider.com/still-early-days-for-hulu-live-2017-10.

9 Todd Spangler, *AT&T Loses Record Number of Traditional TV Subscribers in Q2*, Jul. 25, 2017, http://variety.com/2017/biz/news/att-q2-2017-earnings-directv-time-warner-1202506255.

Given the diversity of models of OVD, a division of the video marketplace into MVPDs, OVDs, and broadcast television stations may not capture the full dynamics of the marketplace. As an initial step, the Commission may wish to at least consider live, linear, aggregation-based OVDs as a different kind of product offering than other OVDs—while, at the same time, recognizing the ways they continue to differ from traditional MVPDs.

B. Regulations Affecting Competition

At some point, the Commission (or Congress) must rationalize the rules that govern the distribution of video programming. Most obviously, the entire edifice of the compulsory license, network/affiliate, retransmission consent regime for the distribution of broadcast network content should be rethought in light of changed technologies and consumer expectations. Online linear OVDs often have holes in their programming lineups in some markets, and not others, because they are outside of the retransmission consent regime.[10] If these new kinds of OVD are to be viewed as competitors to MVPDs, they should be subject to the same rules (including public interest rules like the transmission of emergency alerts and accessibility), and have the same kind of access to programming. As Public Knowledge has repeatedly recommended, the cleanest way for the Commission to deal with these issues would be to simply recognize that MVPD-like services are, in fact, MVPDs under the statute.

Additionally, programming exclusives are on the rise, and it remains to be seen if they are a a natural part of competition between programmers (like Game of Thrones' exclusivity to HBO and Twin Peak's exclusivity to Showtime) or a potentially anti-competitive tactic that makes it impossible for viewers to access a full range of content without subscribing to redundant services (for example, if the NBA were exclusive to Comcast and the NFL were exclusive to DISH). The latter kind of exclusivity is precisely what Congress sought to prevent when it passed Section

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10 Specifically, most of the linear OVDs only carry major networks in markets where the local station is owned & operated by the network. OVDs may prefer to minimize their transaction costs by only dealing with a centralized network, and local affiliates may lack the ability to grant rights to non-OVDs, who are outside the compulsory copyright license system.

628 of the Communications Act. The Commission has broad authority under the law to craft rules that address the anti-competitive use of programming exclusives, and it should study the contexts in which it is appropriate to do so.

The Commission also has broad power to address some of the anti-competitive harms that result from vertical integration by means of its program carriage authority. Among other things, Congress has directed the Commission to adopt rules

> designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[11]

The Commission's implementation of this directive has so far been inadequate, with even successful complaints before an ALJ overturned by the Commission.[12] The Commission should adopt rules and evidentiary standards for program carriage more in keeping with the clear Congressional intent to benefit independent programmers.

Finally, instead of simply addressing mergers on a case-by-case basis, the Commission should reinvigorate its ownership and other pro-competition rules. First, the Commission has "broad and sweeping"[13] power to

> promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

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[11] 47 U.S.C. § 536.

[12] Hal Singer, *Paid Prioritization and Zero Rating: Why Antitrust Cannot Reach the Part of Net Neutrality Everyone Is Concerned About*, The Antitrust Source, Aug. 2017, https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug17_singer_8_2f.authcheckdam.pdf.

[13] *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 664 (DC Cir. 2009).

This power goes far beyond simply enacting tough program access rules, and the Commission should use it. The Commission is also directed by Congress to

> (A) to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest;
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> (B) to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest; and
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> (C) to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming.[14]

In light of the changing circumstances of the video marketplace, the Commission should initiate a proceeding to modernize and strengthen its ownership rules to benefit consumers and promote diversity of programming, while taking account of the changing video marketplace, and the market power of cable, broadband, programming, and internet companies.

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When evaluating the state of video competition, the Commission should take note of the increasing trend toward horizontal and vertical concentration, pending mergers, and the possible beneficial effects of reinvigorating its media rules to serve the public interest, protect consumers, and promote diversity in the 21st Century.

Respectfully submitted,

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14 47 U.S.C. § 533(f).