

decision to fine Sinclair and Glencairn \$40,000 each rather than designate the station transfers for hearing, the FCC referred to:

- “[R]eliance on past staff decisions” leading to apparent “miscalculations on the part of Sinclair and Glencairn as to what was permissible.”
- “Mr. Edwards, the party at the center of Glencairn’s temporary abdication of control, is leaving the company, thus mitigating the potential for future lapses.”
- “[T]he parties have cooperated in our investigation” and “manifested no palpable intent to deceive the Commission.”

Accordingly, the Commission fined the licensees for shifting control from Glencairn to Sinclair without Commission permission. And the Commission imposed conditions on the transfers to Glencairn with the expectation of preventing any further improper exercise of control over Glencairn by Sinclair. 16 FCC Rcd at 22255-56.

Not all the Commissioners agreed that fines and conditions were sufficient to protect the public interest against future misconduct by these licensees. In his partial dissent, Commissioner Copps warned that Sinclair’s “multiple ownership strategy” would lead it to persist in crossing over the lines of the Commission’s rules:

With the transactions before the Commission today, Sinclair has crossed the line into behavior that the majority has found to violate the Commission’s rules. In assessing a fine on Sinclair for this violation, the majority purports to stop the expansion of Sinclair’s forays into multiple ownership, but in fact it merely points out that lines have been crossed, while allowing Sinclair to run over these lines and to continue its multiple ownership strategy.

16 FCC Rcd at 22259. As discussed further below, Commissioner Copps’ warning was prophetic. The misconduct of Sinclair continues, with the acquiescence of Glencairn/Cunningham.

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licensee, Cunningham. We respectfully request the incorporation of that record into this proceeding.

The Copps partial dissent suggested that more investigation at the time – such as a designated hearing – might help to keep the Sinclair strategy in bounds:

What makes Sinclair's practices disquieting, however, are its maneuvers to acquire interests in multiple stations in local markets in seeming contravention – if not violation – of Commission rules. While in the past, Sinclair has entered into arrangements with Glencairn to acquire and manage multiple stations in local markets *that the Mass Media Bureau has found to fall just short of ownership arrangements*, the transactions presented here raise questions of fact requiring further investigation.

16 FCC Rcd at 22261, emphasis added.

True to the Copps forecast, Sinclair and Glencairn (now Cunningham) were not to be deterred by mere fines and conditions. After the publication of the Edwards Order, Sinclair actually tightened its operational control of Cunningham by (1) substituting family member Carolyn Smith in place of non-family member Edwin Edwards as the ostensible head of Cunningham, and (2) terminating independent counsel for Glencairn (which represented that company during the Edwards litigation) and returning legal representation of Cunningham to the same law firm that has long represented Sinclair.

Sinclair then brazenly applied to acquire *de jure* control by transfer from Cunningham of five stations (the “2002 Applications”) including one of the license renewals challenged here, WTAT of Charleston, SC. The record in that matter shows that the financial terms of the transaction and operating terms for the Cunningham stations – like those criticized by all of the Commissioners in the Edwards Order – were laughably unfavorable to Cunningham and one-sided in Sinclair's favor. (Rainbow/PUSH Petition to Deny, August 21, 2002)

The 2002 Applications were dismissed as defective because they did not comply with the

Commission's "anti-duopoly rule" at Section 73.3555(b), 47 C.F.R. §73.3555(b).<sup>12</sup> The Dismissal Order went to some pains to explain to the applicants their legal error in claiming that the rule restricting duopolies was invalid.<sup>13</sup>

The next year, still undeterred, Sinclair and Cunningham tried yet one more time to get the Commission to approve five license transfers from Cunningham to Sinclair. ("2003 Applications") This time, the Media Bureau Chief sounded annoyed:<sup>14</sup>

This is the third time these parties have been before the Commission seeking approval of transactions involving the sale of television stations. . . . Sinclair once again acknowledges that its ownership of the Cunningham stations would not comply with the 1999 television duopoly rule. . . .

Sinclair has once again prematurely sought to acquire stations that it may not own under the rules currently in place.

Emphatically, Dismissal Order II refused to overlook the noncompliance of the proposed transfers, nor would it accept the proposals as a request to waive the duopoly rule:

We find that Sinclair's request for waiver is really more an argument to change the 1999 television duopoly rule. That matter is part of the pending court challenge.<sup>15</sup>

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<sup>12</sup> Letter of W. Kenneth Ferree, Chief, Media Bureau, to Cunningham counsel, Kathryn R. Schmelzer, September 13, 2002. ("Dismissal Order").

<sup>13</sup> Briefly, in order for two stations in the same TV market to come under common ownership, one of the pair must be outside the top 4 in rated audience share. After the merger, there must remain in the market at least eight independent, full-power commercial and noncommercial TV stations. The rule has since been relaxed somewhat, but the relaxation is under stay. *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004). (subsequent history omitted). Thus, the duopoly restrictions remain as they have stood since 1999.

<sup>14</sup> Letter of W. Kenneth Ferree to counsel for Cunningham and Sinclair, February 26, 2004 ("Dismissal Order II"), at 1-2. (Petition for Reconsideration and Application for Review pending) The letter cited prematurity as a ground for dismissal; it might justifiably have added "repetitive" or "frivolous." *See, e.g.*, Section 1.401(e) of the Rules.

<sup>15</sup> Dismissal Order II, at 3.

Having chosen to dismiss the transfer applications once again, the FCC normally would have dismissed as moot a second Rainbow/PUSH petition to deny them. However, in order to try to resolve the disputed issues of license control raised in both 2002 and 2003 when Rainbow/PUSH challenged the LMAs as *de facto* transfers of the Cunningham stations to Sinclair and for “administrative efficiency,” Dismissal Order II (at 3-4) considered the petitions on the merits of the LMA claims and denied the claims.<sup>16</sup> That consideration, we submit, was cursory to the point of being dismissive, and was no true consideration of the merits.<sup>17</sup>

But our purpose here is not to re-argue Dismissal Order II. Rather, we submit that Dismissal Order II, like the Edwards Order, makes too light of a continuing pattern of illegal behavior by Sinclair in exercising control of other licensees in the same market beyond the scope of a normal LMA arrangement, after the Commission had explicitly rejected requests to approve outright purchase and transfer. Sinclair is behaving as if it had purchased those stations. And Dismissal Order II approving the LMAs is not controlling precedent. Dismissal Order II did not investigate all the relevant facts which demonstrate unlawful control by Sinclair. The illegal control should have been investigated in 2001, as Commissioner Copps suggested, but by all means must be closely examined before these licenses are renewed. The context here is appropriate. There is no business demand for quick FCC action on a particular station sale. This

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<sup>16</sup> Petitioners here respectfully ask that the full record in both dismissal orders be incorporated into this proceeding by reference.

<sup>17</sup> For example, Dismissal Order II engages in circular reasoning. As Dismissal Order II said, the Commission will not ordinarily look into “the purchase price in a station sale unless it appears from other facts that the arrangement may not have been an arm’s-length transaction between the parties.” The order found no “new” facts in this regard, and chose to ignore the continuing reality of the old facts— that these same parties who unlawfully transferred control were still engaged in a relationship controlled by Sinclair that used below-market sale prices and other tools to further the relationship.

should be a careful and deliberate examination of Sinclair and Cunningham station histories over the past eight years, to determine their worthiness for licenses running eight years into the future.

The Commission must face its statutory and leadership responsibilities. Sinclair has chosen to make its operation of these licenses a test of the Commission's own integrity and commitment to enforce Commission rules. Sinclair's behavior is common knowledge within the broadcast industry and within the communities of license. The Commission must examine this behavior in detail and decide whether it is behavior the Commission endorses as adequate to sustain the renewal of television broadcast licenses. The Commission must assure itself that its rules are obeyed, that real and serious consequences follow to any television broadcast licensee that does not obey the rules. Otherwise, lawbreakers will prosper, with competitive and economic advantages over law abiders. The Commission must ensure the opposite result. Law abiders should prosper and have the continued right to hold a license vested with the public interest. Law breakers who violate the public trust should lose the economic benefit of their behavior. Faced with a licensee that repeatedly and continuously challenges the validity of the Commission's rules, and then uses the denial of those challenges as an excuse to engage in the same course of action, the Commission must act.

### **III. RECENT EVENTS PROVE A CONTINUING PATTERN OF ABUSE.**

Sinclair is engaged in direct and illegal violations of the Commission's rules requiring the Cunningham ownership to exercise direct and independent control of the Cunningham licenses. Dismissal Order II purported to resolve the merits of Rainbow/PUSH's petitions to deny the Cunningham-to-Sinclair attempted transfers in 2002 and 2003. In fact, the order only touched lightly on (1) under-priced station sales, (2) limits on Cunningham's ability to contract independently, (3) local marketing agreements, or LMAs (note 8, *supra*), and (4) the weight to

be given licensee web site information. A number of Rainbow/PUSH's arguments were never addressed and cannot be assumed resolved. We summarize these below, trusting to the incorporation of the entire record by reference. (notes 11, 16, *supra*)

Cunningham Leadership is not Independent. Sinclair's control over Cunningham and its stations is even tighter than it was previously, since now Cunningham lacks even the fig leaf of an unrelated person (Edwin Edwards) in charge. Cunningham is now headed by Carolyn Smith, the Smith brothers'<sup>18</sup> mother, and run by Robert Simmons.<sup>19</sup> While we do not dispute the Commission's general caveat that family relationships don't necessarily prove unlawful dependency (Edwards Order, 16 FCC Rcd at 22253, note 39), we point out the Review Board's warning to an aggrandizing broadcaster that it was "operating at the outer limits of what is permissible without an evidentiary hearing" and that other parallel proceedings were investigating the ownership concentration issues.<sup>20</sup> No such evidentiary hearing was opened after the Edwards Order.

So here, Sinclair and Cunningham have been operating beyond the outer limits of permissible LMA behavior. The stations are in fact a duopoly in each market, and this renewal proceeding offers a parallel opportunity – passed over by the Commission in 2001 – to examine these facts. If the Commission will hold a hearing, and consider the facts, it will conclude that the Sinclair business strategy does not comply with the FCC's station ownership rules.

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<sup>18</sup> The Smith brothers are associated with Sinclair Broadcast Group, and their titles, are: David D. Smith, President and Chief Executive Officer; Frederick G. Smith, Vice President; and J. Duncan Smith, Vice President and Secretary.

<sup>19</sup> Simmons controls less than 20% of the votes in Bay Television, licensee of WTTA-TV, St. Petersburg, FL, while the Smith brothers control the balance. Simmons worked for Sinclair from 1969 to 1989, and for three of those years served as its President. A prior FCC order in an unrelated matter found that Simmons followed closely the desires of Sinclair founder Julian Smith. *See, Signal Ministries*, FCC 87-68, released February 27, 1987, and underlying decisions.

Sinclair and Cunningham Have Identity of Interest. It is relevant, albeit not determinative,<sup>21</sup> that when the *mater familias*, Carolyn Smith, took control of Cunningham, she dropped the Cunningham stations' communications legal counsel in favor of the law firm then and now serving Sinclair. The relevance is grounded in more than FCC precedent. Lawyers are precluded from serving two clients with actual conflicting interests--clients cannot waive that prohibition. Only where there are *potential* differences or conflicting interests may clients consent to waive the *potential* conflict. We assert no claims of ethical breach here. In fact, we claim the opposite. No client waiver was required because there is no potential for conflict of interest because Cunningham and Sinclair have identical and inseparable interests. We believe the Commission must examine how Cunningham could retain common legal counsel and still claim independence from Sinclair. Cunningham is so certain of the absence of conflict between Sinclair and Cunningham's general aims or particular actions that it chooses common counsel.

Sinclair Has Purposely Caused the Demise of Localism through "News Central."

Sinclair has found unique ways to set itself apart from responsible colleagues in the television broadcast industry. One of the most striking techniques is to shrink local station news functions and substitute generic "local news" from a centralized studio located at the company's Baltimore headquarters. This certainly enhances the profitability of the licensees and the parent corporation.<sup>22</sup> It is also an abandonment of the licensees' responsibility to program to meet the needs of the local community of license and to give coverage to local news and events of

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<sup>20</sup> *Cannon's Point Broadcasting*, 93 FCC 2d 643, 656 (Review Board, 1983).

<sup>21</sup> 93 FCC 2d at 655, citing Alan K. Levin, FCC 80-67, 45 Fed.Reg. 85512, December 29, 1980, ¶9, a hearing designation order.

<sup>22</sup> Declaration of Robert D. Phillips, Exhibit A, hereto.

importance. In other words, the company wins and the viewers lose. This is Sinclair's view of the "public interest."

Sinclair uses its "News Central" to camouflage its cutbacks in local community coverage. And it then inserts commentary disguised as news reporting, often failing to disclose that the commentary is not from someone in the local community. At hearing, the Commission will see a parade of facts and viewers, from all political points of view, who are confused about the origin of the "news and commentary" information carried on Sinclair stations, angered by the lack of relevance of the "News Central" inserts to the local community of license, and incensed about the lack of local event and news coverage.<sup>23</sup>

In the words of its own web site (<http://www.sbgnet.com>), Sinclair "owns and operates, programs or provides sales services to 62 stations in 39 markets," comprising nearly a quarter of U.S. television households. Thus, the reach of its programming is substantial. Two years ago, Sinclair launched a centralized television news operation that it claims makes local news more affordable, particularly in smaller markets. This is the description from the broadcast group's web site:<sup>24</sup>

In October 2002, SBG launched a local news network operating in conjunction with a centralized news operation. This revolutionary news model will allow SBG to build its local news franchise and local market share by introducing local news programming in markets that otherwise could not support news. Stations in the following markets currently air news programming on a daily basis.

The North and South Carolina stations up for renewal at this time are, to the best of our knowledge, distributors of this centralized product.

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<sup>23</sup> Declarations of Robert Phillips, Thomas Coulson and Merrill Chapman, Exhibit A, hereto. *See also*, excerpts from viewer letters at Exhibit B.

<sup>24</sup> <http://sbgweb2.sbgnet.com/business/news.shtml>



In its gradual deregulation of broadcasting and its increasing reliance on “market forces” to spur stations to serve the public interest, the Commission has eliminated previous requirements that licensees “ascertain” the needs and interests of their communities to be addressed by programming and has removed guidelines applicable to news and public affairs coverage, sometimes called “non-entertainment programming.”<sup>25</sup> Spurred in part by renewed viewer and Congressional interest in the extent of concentration in broadcast and other media, the Commission has begun to rethink the limits of deregulation and market influence:

We seek additional comment on the issue of how broadcasters currently are serving the needs of their communities and whether the Commission could or should take action to better ensure that broadcasters air programming to serve their communities’ needs and interests. Does “local” programming best serve this goal? If so, what would qualify as “local” programming? Locally originated or locally produced programming? Or should locally oriented programming, meaning programming of particular interest to the local community, count regardless of its source?<sup>26</sup>

As the Commission itself has said, even as it ponders its role in relation to the broadcast licensee as a First Amendment speaker, the FCC must continue to rely on the ultimate regulatory persuasion of license renewal – including the petition to deny -- to evaluate broadcaster performance. (Localism Inquiry, ¶9)<sup>27</sup>

For viewers and other critics of Sinclair station operations, the economies of centralized news – which ultimately enrich the shareholders -- have created parallel harms to the

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<sup>25</sup> *In the Matter of Broadcast Localism, Notice of Inquiry*, FCC 04-129, released July 1, 2004, ¶12 (“Localism Inquiry”). Comment and reply dates were extended to November and December 1, 2004, respectively. Over 70,000 individuals have filed comment in this open NOI. An estimated 50,000 of those comments relate directly to the issue of Sinclair and its deficient attention to localism. This is a highly unusual response to a Commission proceeding and certainly adds to the need for an evidentiary hearing on the NC and SC licenses at issue.

<sup>26</sup> Localism Inquiry, ¶14.

communities of license by reducing the amount, quality, and relevance of the broadcast information to viewers in each local market.<sup>28</sup> Citizens and viewers both care and are outraged. Multitudes of WLOS-TV viewers on both sides of the political equator were angered by Sinclair's centralized decisions regarding the film "Stolen Honor." The number that chose to write the Asheville (NC) *Citizen-Times* in October of 2004, were so numerous that the newspaper used its internet web site to print letters from readers that it did not have space to reproduce in the paper.<sup>29</sup> While the immediate occasion for the posting was the outpouring of interest in the Sinclair-sponsored film, "Stolen Honor," which WLOS-TV of Asheville and WBSC-TV of Anderson SC and other Sinclair stations in North and South Carolina were ordered to broadcast, the readers did not confine their views to that controversy alone.<sup>30</sup>

For many of the letter-writers, the Sinclair plan to air the documentary was simply part of an abusive pattern of biased commentary often presented as news. There was frequent reference to a nightly commentary, "To the Point," by a Sinclair corporate relations vice president, Mark Hyman, who appears -- from Sinclair headquarters in Baltimore -- in the middle of scheduled newscasts. A husband and wife, Steven and Melissa Savino of Brevard, NC, self-styled "registered independent voters," wrote that "our local access to ABC programming is limited to

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<sup>27</sup> In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court identified free speech rights of viewers and listeners as well as free speech protections for TV and radio broadcasters.

<sup>28</sup> Phillips and Coulson Declarations, Exhibit A.

<sup>29</sup> We have attached a few letters at Exhibit B, designed to show a range of views. Although the Asheville paper says it takes down such postings in seven days, they were still available on the web site as of the morning of November 1, 2004, <http://www.citizen-times.com/cache/article/letters/63639.shtml>

<sup>30</sup> "Stolen Honor" attacks Presidential candidate John Kerry for his Vietnam War views of the early 1970s. After a firestorm of criticism, Sinclair stood down on the showing of the film in its entirety and reportedly asked Kerry to appear on a special program. The issue is discussed in more detail, *infra*.

WLOS-Asheville” and that watching ABC locally “would be supporting Sinclair and its political agenda.” Thus, the Savinos said they intended to notify WLOS advertisers to try another network if they wanted to reach their home in Brevard.

Other *Citizen-Times* readers were more concerned with programming Sinclair headquarters decided to delete from WLOS-TV than with the addition of “Stolen Honor.” They thought the decision reflected the lack of responsiveness to the local community. Many criticized the Sinclair refusal to run an ABC Nightline program from April 2004 featuring the reading of the names of servicemen and women killed in Iraq. The appended Declarations reinforce these criticisms.

Matt Mulhern of Clyde, NC, a professed Republican who criticized Sinclair’s decision not to run “Stolen Honor,” perhaps unwittingly makes an essential point the Commission must consider as it reviews Sinclair’s renewal applications. WLOS is the only big-network television signal in Asheville, so the Baltimore headquarters can ignore the interests of Asheville viewers and advertisers with impunity: “The boycotts [of Sinclair advertisers] are empty, too. What else are they going to watch locally? Where else are the advertisers going to place ads? It’s not like we have hundreds of other outlets here in [western North Carolina].” A Weaverville, NC resident, Paul Janiczek, criticized the decision to pull the film and suggested that critics of the Hyman commentary could always turn him off and flip to Bill Moyers on public television. He also noted Sinclair even acknowledged that it received “weekly, mostly negative reactions, with many from WLOS viewers,” to the Hyman commentaries. It is one thing, of course, to acknowledge negative viewer opinion, but quite another to respond to it by actually providing balanced or responsive programming.

Sinclair Compels the Licensees to Engage in News Bias and Violations of the Political

Broadcast Rules. The criticism from journalist-observers of WLOS-TV and its Sinclair siblings is sharper and more specific. (Exhibit C hereto) Among the critics is a former insider, Jon Lieberman, who was fired as Washington bureau chief for Sinclair. The Associated Press reported October 19, 2004 that Lieberman was let go for publicly criticizing the plan to air "Stolen Honor." The same wire service report quoted Lieberman as saying he was "escorted out of the building" by Sinclair's vice president for news, Joseph DeFeo, and has been denied relief from a non-compete agreement that prevents his working for another licensee in any Sinclair market.<sup>31</sup>

Separately, Lieberman said he was prepared to accept the airing of "Stolen Honor" if it were labeled as commentary, but that Sinclair "went too far" in planning to categorize the film as "news" in order to escape political "equal-time" obligations.<sup>32</sup> Lieberman added:

At Sinclair headquarters, nobody was happy with the project, as far as I could tell. But there was no room for dissension. Everyone was afraid for their jobs.

If Lieberman were the only witness to an atmosphere of intimidation and fear in the newsroom, his testimony could be discounted as that of a disgruntled employee who chose an unwise method of complaint. But other journalists have written to similar effect.

In its coverage of the "Stolen Honor" controversy, the *Washington Post* mentioned the ABC Nightline blackout and added: "Sinclair also yanked ABC's 'Politically Incorrect' after

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<sup>31</sup> Essentially the same story appeared on the front page of the *Baltimore Sun* for October 18, 2004, written by a *Sun* reporter.

<sup>32</sup> "Why I stood up to Sinclair," Guest Commentary, *Broadcasting & Cable*, October 25, 2004, Exhibit C hereto.

host Bill Maher made controversial remarks about the U.S. war on terror.”<sup>33</sup> As did the Asheville letter-writers, the *Chicago Tribune* couched one story on the anti-Kerry film in terms of Sinclair news patterns and practices:

Sinclair’s practices as a television operator have also been criticized for removing local control. The company increasingly utilizes “distance-casting” whereby local news, sports and weather is uniformly broadcast to its many stations from Sinclair’s headquarters in suburban Baltimore.

Television viewers receive on-camera reports from “News Central” that appear to be coming from local stations. Sinclair spokesman Mark Hyman delivers conservative commentary that must be carried on local news reports.<sup>34</sup>

The Tribune story also quoted Andrew Schwartzman of the Media Access Project as saying of Sinclair: “They fake the localism by presenting the hometown station feel but without any of the presence and journalism that local communities deserve.”

The on-line magazine, Salon.com, reported that in pursuit of news centralization Sinclair had fired “the entire 47-person news team at KDNL in St. Louis, making it among the first major-market television stations to broadcast without local news.”<sup>35</sup> A similar mass discharge was reported at the group’s Rochester, NY station.<sup>36</sup> The Salon article continued by describing the public affairs consolidation:

Dubbed “News Central,” the maneuver is first and foremost a money-saving enterprise. But an indirect consequence of beaming uniform newscasts across the country is that it has given Sinclair

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<sup>33</sup> “Family’s TV Clout in Bush’s Corner,” by Howard Kurtz and Frank Ahrens, Tuesday, October 12, 2004, page 1.

<sup>34</sup> “Media Firm Accused of Dodging FCC Rules,” by Leon Lazaroff, October 16, 2004, page 1.

<sup>35</sup> “Sinclair’s Disgrace,” by Eric Boehlert, October 14, 2004.

<sup>36</sup> Sinclair counters that it “has hired 350 news employees and launched 13 newscasts on stations that didn’t previously carry news.” “Controversy Over Kerry Film Only the Latest for Sinclair,” by Elizabeth Jensen and Walter F. Roche, Jr., October 24, 2004, page 1.

some political clout. “I don’t think they anticipated the power they would generate with News Central,” says one news industry source. “They created a political animal.”

Sinclair Owners Engage in Other Unlawful Behavior.

On December 16, 2002 Rainbow/PUSH submitted a “Supplement to Application for Review” raising serious issues of misconduct that we believe have not received a proper analysis. These included (Supplement, at ii) “misrepresenting or withholding critical facts; soliciting illegal ex parte communications; corrupting an election; and concealing a private interest in a monumentally critical news story.” We have asked for incorporation here by reference the record in the Rainbow/PUSH challenges of 2002 and 2003, and we believe these allegations deserve to be included in any order designating hearing on the license renewals at issue. These and additional charges are elaborated upon at pages 7-9 of the Rainbow/PUSH Petition to Deny of December 19, 2003.

Moreover, at least one of Sinclair’s principal owners is accused of engaging in explicit racial discrimination in an unrelated, but co-owned business.<sup>37</sup> Mr. Fred Smith operates a trailer park at Todd Village in Carroll County, Maryland, out of Sinclair’s headquarters office building near Baltimore. A federal district court lawsuit complaint asserts that the trailer park affirmatively discriminates against African Americans by discouraging them from renting space in the trailer park.

In an earlier day allegations that a principal of a broadcast company was involved in intentional racial discrimination in an unrelated business would not always give rise to hearing.<sup>38</sup>

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<sup>37</sup> *Hyacinth Walker, et al. v. Todd Village, LLC*, Civil Action No. AMD 04-CV-3169, U.S. District Court for the District of Maryland (Northern Division), October 19, 2004.

<sup>38</sup> *See, Chapman Radio and Television Company*, 24 FCC2d 282, 284-85 (1970) (holding that “[t]he refusal by the principal of an applicant for a broadcast facility to permit the burial of an

Those days are over. A hearing should be designated if there is evidence of racial discrimination by a principal of the licensee. *See, e.g. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018, 24078 (2003) (reconsideration in part pending) (Separate Statement of Chairman Michael K. Powell) (“[i]f the public interest benefit means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived.”)

#### **IV. THE PUBLIC INTEREST IN RENEWAL OF THESE LICENSES REQUIRES A HEARING.**

The criticisms recounted above are voluminous but unsworn. On information and belief, they are reinforced by letters other Sinclair and Cunningham station viewers have sent to the FCC directly. Taken together with the questions remaining unanswered from the Edwards Order and its aftermath of repeated station transfer attempts, the letters and print media reports raise substantial and material issues of fact about the licensees' service to their communities through the important measure of news and public affairs programming.

As in *Monroe Communications, Inc. v. FCC*, 900 F.2d 351, 357 (D.C. Cir. 1990), there is significant “record evidence of a strong downward trend in [Sinclair and Cunningham’s] responsiveness to community needs in the form of news and non-entertainment programming.”<sup>39</sup> Just as the court there remanded the Commission’s grant of renewal to the incumbent TV licensee, so here the FCC should designate a hearing to “focus on the downward trend in [the present applicants’] non-entertainment programming through the latter stages of the license

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individual solely because of the color of that individual’s skin raises a serious question as to the applicant’s qualifications to be a Commission licensee”; finding that factors including legal advice concerning restrictive covenants mitigated against designation of a hearing issue on the discrimination itself, but designating for hearing the misrepresentation of the applicant concerning its principal’s involvement in the segregated cemetery.

period.” 900 F.2d at 359. The court elaborated on the importance of performance in these “latter stages”:

Where a licensee has instituted a dramatic and permanent format change, its programming following that change is more probative of its future performance than its programming prior to that change.

Judging by Sinclair’s own description of “News Central” and by the reports of mass firings of local news staffs in St. Louis and Rochester, the change in news operations of two years ago surely qualifies as “dramatic.” The shift also has proven disturbing for many viewers in the Asheville market and elsewhere, and has been severely criticized by professional journalists.

Whether Sinclair’s claims of countervailing economic benefit outweigh these drawbacks is seriously controverted and should be resolved in an evidentiary hearing. One way to approach this examination would be to look at the quantity and quality of non-entertainment programming before the advent of News Central in comparison to the product afterward. Station profitability might also be an index by which to measure the competing claims of Sinclair that News Central makes non-entertainment programming more affordable to more stations versus the critics’ and viewers’ assertions that centralization is a cost-cutting, command-and-control endeavor.

The continuing intra-family and control issues here – mother Carolyn Smith presiding over Cunningham licenses, her sons heading up Sinclair – are very like the scenario in *Astroline Communications v. FCC*, 857 F.2d 1556 (DC Cir. 1988), where the court remanded to the agency for closer study the question whether – if the TV station were not independent – the combination of TV and AM-FM radio in Hartford, CT would be contrary to the public interest. The *Astroline* panel quoted approvingly from *Citizens for Jazz*, 775 F.2d 392 (D.C. Cir. 1985), at 397:

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<sup>39</sup> See, especially, Phillips Declaration, Exhibit A.