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December 6, 2016

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Ex Parte Presentation; Applications of Nexstar Broadcasting Group, Inc., and  
Media General, Inc. for Consent to Transfer Control of Licenses, MB Docket No.  
16-57**

Dear Ms. Dortch:

On December 2, 2016, Ross Lieberman, Senior Vice President, Government Affairs, American Cable Association (“ACA”) and the undersigned met with Matthew Berry, Chief of Staff, Commissioner Pai, to discuss ACA’s opposition to the waiver requested by Nexstar Broadcasting Group, Inc. (“Nexstar”) and Media General, Inc. (“Media General”) (“Applicants”) of Sections 1.2204(b) and (d)(3) of the Commission’s Rules, 47 C.F.R. §§ 1.2204(b) & (d)(3), that bars the parties from consummating their proposed merger until after the conclusion of the broadcast television spectrum incentive auction (“Incentive Auction”).<sup>1</sup> During the meeting, ACA reiterated the reasons detailed in its Nov. 29<sup>th</sup> Ex Parte Letter (attached) why the Applicants’ request for waiver of the bar on transfers of control involving broadcast stations participating in the reverse auction should be addressed at the Commission, rather than Bureau, level, but that if it is to be decided at the Bureau level, it cannot be decided by the Media Bureau, and how Applicants have failed to carry their burden of showing why the extraordinary relief contemplated by the waiver should be granted.<sup>2</sup>

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<sup>1</sup> See Comprehensive Exhibit to FCC Form 315 and 314 Applications (as amended Mar. 16, 2016) at 37-38 (filed Feb. 10, 2016) (“Comprehensive Exhibit”); September 21, 2016 Supplement to Request for Waiver, MB Docket No. 16-57 (filed Sept. 21, 2016) (“Waiver Supplement”). Section 1.2204(b) requires that the applicant identified in the application to participate must be the broadcast television licensee that would relinquish spectrum usage rights if it becomes the winning bidder. 47 C.F.R. § 1.2204(b). Section 1.2204(d)(3) prohibits major amendments to an application to participate in the reverse auction after the deadline specified by public notice in of the Commission’s Rules. 47 C.F.R. § 1.2204(d)(3).

<sup>2</sup> Letter from Barbara Esbin, Counsel to the American Cable Association, to Marlene Dortch, Secretary, FCC, MB Docket No. 16-57 (filed Nov. 29, 2016) (“Nov. 29<sup>th</sup> Ex Parte Letter”); 47 C.F.R. § 1.3. The fact that Applicants have failed to demonstrate why they should receive extraordinary relief while other, smaller broadcast stations owners must patiently await the end of the Incentive Auction to pursue their business interests has been noted in the press. See Monty Tayloe, *Waiver Soon? Nexstar/Media General Still Likely to Be Approved*, COMMUNICATIONS DAILY, Dec. 1, 2016, at 7-8 (“Granting the waiver to Nexstar is unfair to numerous other broadcasters that are also unable to sell their stations due to the incentive auction, said Fletcher Heald broadcast attorney Peter Tannenwald. ‘Why should they get the waiver?’ Tannenwald said. Nexstar is likely to get more attention from the FCC because it’s bigger, but there are smaller companies in ‘very dire straits’ that should receive similar relief, he said.”).

In addition to reasons already provided, ACA informed the Commission that Applicants and some MVPDs are nearing the end of significant, on-going negotiations over retransmission consent agreements set to expire before year's end – information that Applicants have recently revealed to Wall Street analysts but so far appear to have failed to disclose in the record to the Commission.<sup>3</sup> ACA explained these carriage talks are likely to be disturbed by the Commission's approval of the Applicants' waiver request and transfer of control applications to the financial benefit of Nexstar, if they are granted before these carriage talks are concluded, and the Commission must consider this new information in determining whether and when it should grant such approvals, particularly whether grant of the waiver request is in public interest. If waivers and license transfers are to be approved without conditions as proposed by ACA and others, the existence and ongoing nature of negotiations set to expire by the end of the year weigh against their instant approval.

In Nexstar's most recent earnings call on November 8, its Chairman & Chief Executive Officer Perry Sook disclosed that the company is in the midst of negotiations over retransmission consent agreements that will expire prior to the end of 2016 that will impact millions of pay-TV subscribers and make up a significant percentage of the company's industry leading retransmission consent revenue totals in 2017 and beyond, information that is relevant to the Commission's consideration of Applicants' waiver request and the timing of that consideration and appears not to have been previously shared by Applicants:

At \$98.3 million in the quarter, retransmission fee revenue reached the highest-ever quarterly level in the Company's history. *With the renewal of retransmission consent agreements representing approximately 45% of our subscriber base to happen this year, we have excellent visibility on the revenue growth from this source into 2017 and 2018, given that the bulk of these agreements are two to three years in duration.*<sup>4</sup>

Given the existence of non-disclosure provisions in retransmission consent contracts which limit the ability of MVPDs to disclose information to the Commission, the Commission should require Nexstar to provide more data and information about the status of existing negotiations for the FCC to more fully understand to what extent the granting of the Nexstar's waiver request and approval of its license transfers impacts ongoing negotiations.

Notwithstanding the benefit of having more information from Nexstar guiding its deliberations, based on the information that is available the Commission should take into account the fact that granting the waiver and permitting consummation of the merger while these talks are ongoing will impact longstanding retransmission consent negotiations, thus interfering with on-going market processes, with less than 25 days before contracts expire.<sup>5</sup> The Commission should also take note

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<sup>3</sup> ACA has reviewed all publicly available information in the docket and is aware of no publicly available representations from Applicants to the Commission regarding the fact that Nexstar or Media General are currently engaged in retransmission consent negotiations with multichannel video programming distributors over agreements that are set to expire before the end of the year.

<sup>4</sup> *Edited Transcript of NXST earnings conference call or presentation 8-Nov-16 3:00pm GMT*, YAHOO! FINANCE (Nov. 8, 2016), <http://finance.yahoo.com/news/edited-transcript-nxst-earnings-conference-195439608.html> (emphasis added).

<sup>5</sup> Due to the existence of after acquired station clauses in Nexstar's retransmission consent agreements, for MVPDs carrying Nexstar stations with a contract ending at the end of this year, approval of Nexstar's license transfer will instantly replace the prices, terms, and conditions of any Media General stations also carried by these MVPDs with the prices, terms and conditions of their agreements with Nexstar, including a December 31, 2016 contract expiration date. This means that after approval of the transfer of control, MVPDs who today are

of the fact that Nexstar would be the sole beneficiary of such interference because approval of the merger will instantly increase Nexstar's bargaining power in its negotiations over contracts set to expire by year's end, likely resulting in its ability to secure higher retransmission consent fees or cause massive blackouts, or both.

This deleterious impact on the public certainly must be balanced against Applicants' recited reasons why waiver of Sections 1.2204(b) and (d)(3) is in the public interest in determining whether and when Nexstar's waiver quest should be granted. Applicants claim that grant of the requested waiver creates public interest benefits.<sup>6</sup> However, ACA, as well as joint Petitioners DISH Network and ITTA have demonstrated that consummation of the Nexstar-Media General merger will result in public interest harms, such as sharply higher retransmission consent fees for millions of pay-TV subscribers due to the existence of after acquired station clauses, facts publicly confirmed by Nexstar,<sup>7</sup> and for other reasons.<sup>8</sup> Given that the public interest harms and benefits are at best roughly balanced, thus cancelling each other out, Applicants have failed to carry their affirmative burden of showing why waiver of the auction rule to permit more rapid consummation of their merger is in the public interest. Considering the new information provided in this letter about the existence of ongoing negotiations over retransmission consent contracts set to expire by year's end, and how approving the waiver and license transfer would disturb them in a way that would enrich Nexstar at the expense of MVPDs and millions of customers, the public interest weighs against granting Nexstar's waiver request, particularly while these negotiations continue, and certainly no sooner than December 31, 2016.

Finally, ACA urges the Commission should not let Nexstar use the Commission's processes to advantage itself in on-going retransmission consent negotiations in this manner. The Commission has traditionally refrained from interfering with the course of on-going negotiations in the absence of a showing of bad faith negotiating. It should show similar restraint in declining to allow its waiver and

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negotiating with Nexstar solely for retransmission consent for Nexstar stations, and understand the risk of not reaching a deal means the potential withdrawal of Nexstar's stations from their system(s), immediately will find themselves also negotiating with Nexstar for retransmission consent for the Media General stations as part of their expiring Nexstar deal. Of particular relevance is the fact that Nexstar will thus gain the ability to withdraw carriage of Media General stations as well as its own pre-merger stations in the event the MVPD does not accept the terms demanded by Nexstar. This is a significant alteration of bargaining dynamics, and would be particularly disruptive this late into negotiations.

<sup>6</sup> Applicants claim granting their waiver "will expedite numerous specific public interest benefits enumerated in the Applications," including "increased efficiencies" and the consummation of the divestitures of stations in prohibited duopoly markets to "female and minority-controlled applicants" through license assignments, as well as saving Nexstar money on financing costs associated with its acquisition of Media General. See Waiver Supplement at 16-17. ACA notes that while the Commission may find that both increased operating efficiencies for Nexstar and an increase in female and minority-controlled station ownership constitute cognizable public interest benefits, saving on lenders' "ticking fees" by borrowers would not. At most, it is a private benefit to the merging parties and the purchasers of the divestiture stations.

<sup>7</sup> Nexstar and Media General's own estimate that it will realize approximately \$24 million in net retransmission consent revenue in year one because MVPDs will be immediately billed for Media General stations at Nexstar rates. See Nexstar Broadcast Group – Media General, Supplemental Information, A Compelling Combination to Become Nexstar Media Group: A Pure-Play Broadcasting and Digital Media Leader, at 7 (Jan. 27, 2016) ("~\$24m – Media General Sub counts will be billed at Nexstar rates"), *available at* <http://www.nexstar.tv/wpcontent/uploads/2016/07/Nexstar-MEG-Transaction-with-Supplemental-Information-2-8-16.pdf>.

<sup>8</sup> See Petition to Deny or Impose Conditions of DISH Network L.L.C., the American Cable Association, and ITTA, MB Docket No. 16-57 (filed Mar. 18, 2016) ("Joint Petition to Deny or Condition"); Reply to Opposition of DISH Network L.L.C., the American Cable Association, and ITTA, MB Docket No. 16-57 (filed May 5, 2016) ("Reply to Opposition").

license transfer approval processes to be used by a negotiating party as a tool to augment its bargaining position.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,



Barbara Esbin

Attachment (1)

cc: Matthew Berry  
Jessica Almond  
David Grossman  
Robin Colwell  
Marc Paul  
Edward Smith  
Daudeline Meme  
Johanna Thomas  
Brendan Carr  
Erin McGrath  
William Lake  
Mary Beth Murphy  
Susan Singer  
Barbara Kreisman  
David Brown  
Jeremy Miller  
Jon Wilkins  
Margaret Weiner



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November 29, 2016

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Ex Parte Communication; Applications of Nexstar Broadcasting Group, Inc.,  
and Media General, Inc. for Consent to Transfer Control of Licenses, MB  
Docket No. 16-57**

Dear Ms. Dortch:

This letter is filed on behalf of the American Cable Association (“ACA”) in opposition to the waiver requested by Nexstar Broadcasting Group, Inc. (“Nexstar”) and Media General, Inc. (“Media General”) (“Applicants”) of Sections 1.2204(b) and (d)(3) of the Commission’s Rules, 47 C.F.R. §§ 1.2204(b) & (d)(3), that bars the parties from consummating their proposed merger until after the conclusion of the broadcast television spectrum incentive auction (“Incentive Auction”).<sup>1</sup> Applicants’ request involves significant policy judgments relating to an ongoing first-of-its-kind auction that was authorized by Congress and whose success has importance to American consumers and businesses in both rural and urban areas. Given the importance of the prohibition, any action on the waiver request must be considered by the full Commission rather than decided on delegated authority. If the matter nonetheless is going to be decided by one of the Commission’s bureaus on delegated authority, it cannot be decided by the Media Bureau, which has no delegated authority to waive spectrum auction rules. Finally, the Applicants have not met their burden to show why the extraordinary relief contemplated by the waiver is justified.

Applicants seek a waiver pursuant to Section 1.3 of the Commission’s Rules<sup>2</sup> of the spectrum auction rule prohibiting, until the conclusion of the Incentive Auction, any major ownership changes in stations subject to an Incentive Auction application that were not filed by the deadline for participation

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<sup>1</sup> See Comprehensive Exhibit to FCC Form 315 and 314 Applications (as amended Mar. 16, 2016) at 37-38 (filed Feb. 10, 2016) (“Comprehensive Exhibit”); September 21, 2016 Supplement to Request for Waiver, MB Docket No. 16-57 (filed Sept. 21, 2016) (“Waiver Supplement”). Section 1.2204(b) requires that the applicant identified in the application to participate must be the broadcast television licensee that would relinquish spectrum usage rights if it becomes the winning bidder. 47 C.F.R. § 1.2204(b). Section 1.2204(d)(3) prohibits major amendments to an application to participate in the reverse auction after the deadline specified by public notice in of the Commission’s Rules. 47 C.F.R. § 1.2204(d)(3).

<sup>2</sup> Section 1.3 of the Commission’s Rules provides that “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. § 1.3 (“The provisions of this chapter may be suspended, revoked, amended, or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”).

in the reverse auction (which was Jan. 12, 2016).<sup>3</sup> The auction rules in general seek to ensure the Commission's ability to "cond[uct] the reverse auction and enforce the rules associated therewith."<sup>4</sup> Although Media General filed to be a participant in the reverse auction,<sup>5</sup> Nexstar and Media General did not file their application for transfer of control of licenses held by Media General associated with their merger until after the reverse auction deadline had passed. Applicants want to move ahead with their merger despite knowingly having missed the cut-off date.

### **THE WAIVER REQUEST RAISES SIGNIFICANT POLICY ISSUES THAT MERIT FULL COMMISSION REVIEW**

The issue presented by Applicants' request concerns waiver of the Commission's rules (i) requiring that an applicant on a reverse auction application must be the broadcast licensee that would relinquish spectrum usage rights if it becomes a winning bidder in the auction and (ii) barring changes in control of an applicant after the auction application filing deadline if such changes would "constitute an assignment or transfer of control."<sup>6</sup> In cases involving transfers of control, such as the Nexstar-Media General applications, these rules effectively prevent a participating broadcast licensee from changing hands after the application is filed during the pendency of the Incentive Auction. Among the important safeguards established by the prohibition on major changes in ownership after the reverse auction participation cut-off date is the identification to the Commission prior to the commencement of the auction of all relevant parties who, if the winning bidders, will be bound by its consequences.<sup>7</sup> Thus, the Commission's auction rules carefully limited the period of time for applicants to make major amendments to their applications, including amendments concerning transfers of control, and established cut-off dates for making such changes to preserve the integrity of the auction process. Applicants claim their situation is unique because the deal was in the works prior to the major amendments cut-off and is no different substantively from transactions that were permitted to go through by virtue of the *sua sponte* waiver granted under the Prohibited Communications Guidance PN only weeks before Applicants had filed their transfer of control application.<sup>8</sup> They further claim

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<sup>3</sup> 47 C.F.R. § 1.2204(b) & (d)(4).

<sup>4</sup> *Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, ¶ 433 (2014) ("Incentive Auction Order"). See also *Guidance Regarding the Prohibition of Certain Communications During the Incentive Auction, Auction 1000*, Public Notice, 30 FCC Rcd 10794, ¶¶ 21-22 (2015) ("Prohibited Communications Guidance PN").

<sup>5</sup> See Waiver Supplement at 2.

<sup>6</sup> 47 C.F.R. § 1.2204(b) & (d)(4). Subsection (b) provides, in relevant part, that "the applicant identified on an application to participate must be the broadcast television licensee that would relinquish spectrum usage rights if it becomes a winning bidder." Subsection (d) governs application processing. Subsection (d)(4) provides that "Applicants that fail to correct defects in their applications to participate in a timely manner as specified by public notice will have their applications to participate dismissed with no opportunity for resubmission." The Public Notice establishing Jan. 12, 2016 as the deadline was released on Nov. 12, 2015. *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269*, Public Notice, 30 FCC Rcd 12559 (2015) ("We hereby announce a revised filing window for FCC Form 177, the reverse auction application form. Specifically, the FCC Form 177 filing window will open at 12:00 noon Eastern Time on December 8, 2015, and close at 6:00 p.m. Eastern Time on January 12, 2016. Applications must be filed prior to the closing of the filing window.").

<sup>7</sup> See Prohibited Communications Guidance PN, ¶¶ 22-24.

<sup>8</sup> See Waiver Supplement at 2-3.

that their waiver request meets the key criterion for waiver cited in in the Prohibited Communications Guidance PN for applications accepted for filing as of January 12, 2016.<sup>9</sup>

ACA submits that the question whether Applicants have shown that special circumstances warrant a waiver during the pendency of the Incentive Auction is a substantial question of first impression, and one that should be made at the Commission rather than Bureau level.<sup>10</sup> Contrary to Applicants' claims, the instant situation is not analogous to the Wireless Telecommunications Bureau's October 2015 *sua sponte* waiver of the bar on transfers of control of reverse auction applicants granted by the Prohibited Communications PN for the simple reason that that waiver was granted in advance of the start of the reverse auction.<sup>11</sup> It is for the Commission to decide whether different considerations about auction integrity come into play with respect to major ownership changes of broadcast stations participating in the reverse auction *after* the auction is in progress than would pertain to such changes *prior* to the auction's commencement. Moreover, if the Applicants' situation is truly "unique" as they claim, that would undermine, rather than support, action on delegated authority. A unique situation would suggest that the matter is one of first impression not capable of being decided under existing precedents, and, under the Commission's rules, any bureau confronted with such a situation would be required to refer the matter for disposition by the Commission. These considerations strongly indicate that Commission-level review of whether good cause has been shown in this case is appropriate.

For jurisprudential and policy reasons, the proper course of action for a significant petition for waiver like this is to have it decided by the full Commission. Commissioner Pai has raised objections to the delegations of authority to the various bureaus that were contained in the Incentive Auction Order, signaling out several of the delegations to the Media Bureau as improper because they involved matters and policy judgments that should be made by the Commission, stating that "[t]oday's item moves too much responsibility away from the five Commissioners who have been appointed by the President and confirmed by the Senate, and who theoretically 'direct' the agency."<sup>12</sup> These concerns were echoed by Commissioner O'Rielly, who found inappropriate the extent of authority delegated to the various bureaus and offices to make important decisions to implement the statute, specifically citing the service rule waiver authority delegated to the Media Bureau.<sup>13</sup> Commissioner O'Rielly has been particularly vocal about the need for reexamination and reform of the Commission's rules on delegated authority in general, advocating the need for limiting the scope of delegated authority and standardizing procedure for notice and review of decisions under delegated authority.<sup>14</sup> Notably, Commissioners Pai and O'Rielly have jointly expressed their

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<sup>9</sup> See Waiver Supplement at 10.

<sup>10</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157, 1158 (D.C. Cir. 1969) (because "the very essence of waiver is the assumed validity of the general rule," and applicant for a waiver "faces a very high hurdle even at the starting gate"); *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) ("waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest").

<sup>11</sup> See Waiver Supplement at 2-3; Prohibited Communications Guidance PN, ¶ 23.

<sup>12</sup> Incentive Auction Order, Dissenting Statement of Commissioner Ajit Pai, Section V.

<sup>13</sup> Incentive Auction Order, Dissenting Statement of Commissioner Michael O'Rielly.

<sup>14</sup> See, e.g., Statement of Michael O'Rielly, FCC Commissioner, Before the Subcommittee on Communications and Technology, House Energy and Commerce Committee, "Oversight of the Federal Communications Commission," 3 (Nov. 17, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-336456A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-336456A1.pdf) (advocating standardization of a 48-hour notice rule for items decided under delegated authority); Statement of Michael O'Rielly, FCC Commissioner, Before the Subcommittee on Communications and Technology, House Energy and Commerce Committee, "FCC Reauthorization: Improving Commission Transparency" (Apr. 30,

continuing objections to the Commission's "continued effort to delegate decisionmaking authority to the bureaus."<sup>15</sup>

For these reasons, the full Commission should consider and act upon Applicants' waiver request. Nonetheless, as explained below, if the decision on a waiver of this spectrum auction rule is to be made at the bureau level, it cannot be ruled upon by the Media Bureau, which does not have delegated authority to waive spectrum auctions rules.

### **IF THE WAIVER IS TO BE DECIDED ON DELEGATED AUTHORITY, IT CANNOT BE DECIDED BY THE MEDIA BUREAU**

A bureau may act on a request for waiver only if it has been delegated such authority by the Commission by rule or order. The Media Bureau, however, may *not* proceed to decision on the waiver request on its own accord for the simple reason that the Media Bureau has not been delegated authority to waive the prohibition on major amendments to applications subject to the Incentive Auction during the pendency of the auction.

As a preliminary matter, it is unclear that Applicants have properly filed a petition for waiver pursuant to Section 1.3 of the Commission's Rules.<sup>16</sup> Rather, Applicants have engaged in a bootstrapping exercise whereby they included an informal "precautionary" request for waiver of the bar on major amendments involving transfers of control of reverse auction applications during the Incentive Auction in a document styled, "Comprehensive Exhibit," that was filed with the Media Bureau in early February with their FCC Form 315.<sup>17</sup> This "precautionary" request for waiver was

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2015), <http://docs.house.gov/meetings/IF/IF16/20150430/103399/HHRG-114-IF16-Wstate-ORiellyM-20150430.pdf> (opposing the inconsistent procedures and increasing reliance upon delegated authority to allow staff-level decisions of controversial items and advocating for holistic reform to reassess what items or proceedings should be done at the Commission versus the Bureau level, with the default to the Commission level, and to set a 48-hour notification period for delegated decisions to the Commissioners); Press Release, Statement of Commissioner Michael O'Rielly on H.R. 2593 (Apr. 28, 2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-339097A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-339097A1.pdf) (commending Representative Latta's effort to bring the FCC's abuse of delegated authority as a means of bypassing public input to the public's attention); Michael O'Rielly, Commissioner, *Snapshot of Process Reform Ideas*, FCC BLOG (Jul. 8, 2016, 1:00 PM), <https://www.fcc.gov/news-events/blog/2016/07/08/snapshot-process-reform-ideas> (proposing FCC procedural reform, including codifying the 48-hour rule for notification of Commissioners of each item to be approved under delegated authority, allowing a Commissioner to elevate a decision or item from the Bureau to the Commission level, and establishing specific limits on the use of delegated authority); Michael O'Rielly, Commissioner, *Delegated Authority: Serious Objections and Solutions*, FCC BLOG (Feb. 2, 2015, 3:47 PM), <https://www.fcc.gov/news-events/blog/2015/02/02/delegated-authority-serious-objections-and-solutions> (expressing desire to reform delegated authority by limiting the scope of delegated authority and standardizing procedure for notice and review of decisions under delegated authority).

<sup>15</sup> Press Release, Joint Statement of Commissioners Ajit Pai and Michael O'Rielly on the Abandonment of Consensus-Based Decision-Making at the FCC (Dec. 18, 2014), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-331140A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-331140A1.pdf).

<sup>16</sup> 47 C.F.R. § 1.3.

<sup>17</sup> Nexstar and MEG (collectively "Applicants") first made an informal request waiver as part of their February 10, 2016 application for transfer of Media General licenses to Nexstar, stating that "to the extent that the applications related to this Transaction are ripe for grant prior to the conclusion of the auction, the applicants request a waiver of the Commission's stated policy [of not acting upon licenses subject to reverse auction] so that the parties may consummate the Transaction promptly after grant of the applications, whether or not the anticipated public notice announcing the successful conclusion of the reverse and forward auctions has been

followed six months later by a document styled “Supplement for Request for Waiver” (“Waiver Supplement”) filed pursuant to Section 1.3 of the Commission’s Rules that is *explicitly directed* to “the Commission.”<sup>18</sup> The Waiver Supplement was filed in the instant transaction review docket and recites the Applicants’ justification for waiver of the Incentive Auction rule prohibiting transfers of control of licenses held by stations participating in the Incentive Auction that were not filed by the deadline for participation in the reverse auction and requests that “the Federal Communications Commission (“FCC” or “the Commission”) waive” the pertinent auction rules.<sup>19</sup> That is, rather than file their request for waiver with the Wireless Telecommunications Bureau – which has delegated authority regarding spectrum auctions<sup>20</sup> – Applicants wrongly filed their request for waiver in the docket for the Media Bureau’s review of the transfers of control of Media General’s broadcast television licenses to Nexstar.<sup>21</sup>

Even assuming Applicants’ “precautionary” request for waiver, together with their subsequent Waiver Supplement constitute a properly filed waiver request, the Media Bureau cannot act on the request because the Commission has not delegated to the Media Bureau authority with respect to spectrum auction rules. Thus, among the various bureaus of the Commission, only the Wireless Telecommunications Bureau may act on delegated authority upon a request to waive a spectrum auction rule.

The Commission is permitted by statute to delegate certain of its functions to its subordinate bureaus and offices.<sup>22</sup> The Commission’s rules provide that while functions “of a continuing or recurring nature are delegated by rule,” functions “pertaining to a particular matter or proceeding are delegated by order.”<sup>23</sup> The Commission’s rules set forth the functions of the Media Bureau and delegate to the Media Bureau authority to carry out the specified functions.<sup>24</sup> The subject matter of the delegation to the Media Bureau involves “regulation of media, including cable television, broadcast television and radio, and satellite services in the United States and its territories,”<sup>25</sup> and,

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released, or any other event related to the auction has occurred that would otherwise require delaying consummation of the Transaction.” Comprehensive Exhibit at 37-38. See Waiver Supplement at 4.

<sup>18</sup> Waiver Supplement at 1.

<sup>19</sup> See *id.* at 1-5, 8-15.

<sup>20</sup> See 47 C.F.R. § 0.131(c) (it is a specific function of the Wireless Telecommunications Bureau to serve “as the Commission’s principal policy and administrative staff resource with regard to spectrum auctions”).

<sup>21</sup> *Media Bureau Announces Permit-But-Disclose Ex Parte Status for Applications filed for the Transfer of Control and Assignment of Broadcast Television Licenses from Media General, Inc. to Nexstar Broadcasting Group, Inc.*, Public Notice, 31 FCC Rcd 1345 (2016).

<sup>22</sup> 47 U.S.C. § 155(c) (delegation of functions).

<sup>23</sup> 47 C.F.R. § 0.201(d)(1) & (2) (the Commission by majority vote may delegate its functions by rule or order; functions of a continuing nature are delegated by rule, published in the Federal Register; functions pertaining to a particular matter or proceeding are delegated by order and the order is published in the Federal Register and associated with the record of that matter or proceeding).

<sup>24</sup> See 47 C.F.R. §§ 0.61 (Functions of the Bureau) and 0.283 (Authority Delegated).

<sup>25</sup> The functions of the Media Bureau include developing, recommending and administering the policy and licensing programs for the “regulation of media, including cable television, broadcast television and radio, and satellite services in the United States and its territories,” and advising and recommending to the Commission, or acting “for the Commission on delegated authority, in matters pertaining to multichannel video programming distribution, broadcast radio and television, direct broadcast satellite service policy, and associated matters.” 47 C.F.R. § 0.61. Specific activities with respect to these services include processing applications, conducting rulemakings, studies and analyses, administering and enforcing EEO rules and polices and political

within these areas, the functions of the Media Bureau include processing and acting upon “waiver requests.”<sup>26</sup> The delegated authority rule provides that the Media Bureau must refer, *inter alia*, actions taken in rulemaking proceedings and inquiries, applications for review of actions taken pursuant to delegated authority, and matters that present novel questions of law, fact or policy, and forfeitures for action by the Commission en banc.

Authority with respect to spectrum auctions has been delegated to the Wireless Telecommunications Bureau, which has broad functional authority under Section 0.131 of the Commission’s Rules regarding spectrum auctions,<sup>27</sup> including acting on waivers.<sup>28</sup> Like the Media Bureau, the Wireless Telecommunications Bureau is not delegated authority to act on petitions or requests that present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedent.<sup>29</sup>

Thus, while Section 0.61(h) delegates recurring authority to the Media Bureau to waive Commission rules with respect to the regulation of media without the need for an additional specific delegation in a rulemaking order in the ordinary course of business, it is evident that this general rule confers *no* delegated authority upon the Media Bureau to waive a spectrum auction rule. That recurring delegated authority has been bestowed upon the Wireless Telecommunications Bureau,

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programming, and administering and enforcing rules and policies regarding the enumerated services, as well as preemption of restrictions on devices used for over-the-air reception devices; commercial availability of navigation devices; accessibility of video programming to persons with disabilities; program access and carriage; the Satellite Home Viewer Improvement Act and post-licensing for satellite consumer broadcast services (DBS, DTTH and DARS); pole attachments; and to “[c]arry out the functions of the Commission under the Communications Act of 1934, as amended, except as reserved to the Commission under § 0.283.” Section 47 C.F.R. § 0.283, in turn, provides that “[t]he Chief, Media Bureau, is delegated authority to perform all functions of the Bureau, described in § 0.61, provided that the following matters shall be referred to the Commission en banc for disposition: (a) Notices of proposed rulemaking and of inquiry and final orders in such proceedings, with the exception of rulemaking proceedings involving the allotment of FM and television channels; (b) Application for review of actions taken pursuant to delegated authority; (c) Matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines; (d) The imposition, reduction or cancellation of forfeitures pursuant to section 503(b) of the Communications Act of 1934, as amended, in amounts of more than \$20,000.” 47 C.F.R. § 0.283.

<sup>26</sup> 47 C.F.R. § 0.61(h) (“Process and act on all applications for authorization, petitions for special relief, petitions to deny, waiver requests, requests for certification, objections, complaints, and requests for declaratory rulings and stays regarding the areas listed.”).

<sup>27</sup> 47 C.F.R. § 0.131(c) (“Serves as the Commission’s principal policy and administrative staff resource with regard to spectrum auctions. Administers all Commission spectrum auctions. Develops, recommends and administers policies, programs and rules concerning auctions of spectrum for wireless telecommunications. Advises the Commission on policy, engineering and technical matters relating to auctions of spectrum used for other purposes. Administers procurement of auction-related services from outside contractors. Provides policy, administrative and technical assistance to other Bureaus and Offices on auction issues.”). Within the Wireless Telecommunications Bureau, the Auctions and Spectrum Access Division “is responsible for implementing the FCC’s competitive bidding authority through a fair and transparent auction process.” See Auctions & Spectrum Access Division, Wireless Telecommunications Bureau, FCC, <https://www.fcc.gov/general/auctions-spectrum-access-division-wireless-telecommunications-bureau> (last visited Nov. 28, 2016).

<sup>28</sup> 47 C.F.R. § 0.131(a) (“Advises and makes recommendations to the Commission, or acts for the Commission under delegated authority, in all matters pertaining to the licensing and regulation of wireless telecommunications, including ancillary operations related to the provision or use of such services; and any matters concerning wireless carriers that also affect wireline carriers in cooperation with the Wireline Competition Bureau. These activities include . . . acting on waivers of rules . . .”).

<sup>29</sup> 47 C.F.R. § 0.331(a)(2).

which, as noted above, has functional authority under Section 0.131 of the Commission's Rules regarding spectrum auctions, including acting on waivers. It is instructive, in this regard, to note that Applicants place heavy reliance upon the precedent set in the Prohibited Communications PN whereby a *sua sponte* waiver was granted with respect to assignment and transfer applications that were accepted for filing by January 12, 2016, including transactions in which the actual license of the station changed.<sup>30</sup> That action, however, was taken, not by the full Commission, as Applicants suggest in their Waiver Supplement,<sup>31</sup> but rather by the Wireless Telecommunications Bureau.<sup>32</sup>

Nor has the Commission delegated authority to the Media Bureau pertaining to the particular matter of spectrum auctions by order. The Incentive Auction Order established a comprehensive set of rules governing the Incentive Auction, including participation in the forward and reverse auctions, band plans, repurposing the UHF spectrum, and guiding the broadcast spectrum repacking process, functions largely to be administered by the Wireless Telecommunications Bureau, the Media Bureau and the Office of Engineering and Technology. It contains numerous specific delegations of authority to one or more of these Bureaus and Offices, including the Media Bureau, which received delegations of authority with respect to the reimbursement fund; modifications of FCC Forms; establishing pre-auction deadlines with respect to new full power facilities under construction permits that were not yet licensed; defining station filing priority; and making new channel allotments and post-auction assignment.<sup>33</sup> The Incentive Auction Order also contains one specific delegation of waiver authority to the Media Bureau with respect to "service rule waiver requests on a case-by-case basis, applying the Commission's general waiver standard when considering such requests," and directing the Bureau "to ensure that the applicant will protect against interference and provide at least one television program stream at no charge to the public."<sup>34</sup>

Not one of these delegations involves a specific delegation of authority to the Media Bureau to act on petitions for waiver of the rules prohibiting major ownership changes to stations participating in the reverse auction during the pendency of the Incentive Auction. It would make little sense to assume that even though the Commission carefully specified the scope of Media Bureau delegated authority in the Incentive Auction Order and took pains to craft one specific and limited delegation to the Media Bureau of waiver authority, the Media Bureau nonetheless may rule on requests for waiver of other spectrum auction rules under its general grant of delegated authority. Moreover, the Media Bureau's general grant of delegated authority to act on waiver requests may be broad insofar as those requests are for waivers of the media rules it administers under Parts 73 and 76 of the Commission's Rules, but in no way does it extend to the conduct of spectrum auctions under Part 1,

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<sup>30</sup> Waiver Supplement at 2.

<sup>31</sup> See, e.g., *id.* at 2-3, 10-11.

<sup>32</sup> See *Application Procedures for Broadcast Incentive Auction Scheduled to Begin on March 29, 2016, Technical Formulas for Competitive Bidding*, AU Docket No. 14-252, GN Docket No. 12-268, WT Docket No. 12-269, Public Notice, 30 FCC Rcd 11034, ¶ 49, n.98 (2015) (reiterating the bar on major modifications after the filing of the initial FCC Form 177 filing deadline; noting that in "the Prohibited Communications PN, the Wireless Telecommunications Bureau *sua sponte* waived the bar on assignments of licenses that are the subject of an auction application, or transfers of control of reverse auction applicants, during the incentive auction provided that the assignment or transfer application: (1) has been accepted for filing with the Commission as of the deadline for submitting reverse auction applications; and (2) includes the express representation that the party will hold the license(s) upon consummation and agrees to be bound by the original applicant's actions in the auction with respect to the license(s). *Prohibited Communications PN* at 9-10, paras. 23-24.").

<sup>33</sup> Incentive Auction Order, ¶¶ 35, 183, 195, 544, 554, 556, 558, 560, 563, 599, 618, 619, 650, 659, 661.

<sup>34</sup> *Id.* at ¶ 640.

Subpart Q, governing competitive bidding procedures, unless the Commission specifies that in an order, which it has not.

Accordingly, the Media Bureau has no recurring or specific delegated authority to rule on Applicants' request to waive the spectrum auction provisions at issue, and the Incentive Auction Order granted it no such specific delegated authority. This means the waiver request may not be acted upon by the Media Bureau in the context of its review of the transfers of control associated with the merger of Nexstar and Media General.

### **APPLICANTS HAVE NOT JUSTIFIED THE EXTRAORDINARY RELIEF REQUESTED**

Whether the decision is made by the full Commission or a Bureau on delegated authority, the waiver should not be granted. Applicants have not cleared the high hurdle of showing why the extraordinary relief contemplated by the waiver is justified.<sup>35</sup> Applicants seek to liken their situation to transactions that were permitted to go through by virtue of the *sua sponte* waiver granted under the Prohibited Communications Guidance PN weeks before Applicants had filed their transfer of control application.<sup>36</sup> They further claim that their waiver request meets the key criterion for waiver cited in the Prohibited Communications Guidance PN for applications accepted for filing as of January 12, 2016. But Applicants fail to adequately address any considerations the Commission may have about major amendments made during the course of the reverse auction that may differ from those animating decisions concerning major amendments made prior to its commencement. Moreover, Applicants proposal that their waiver should be granted because other applications that were timely filed were granted by the Commission *sua sponte* calls into question the entire reason for establishing the filing deadline itself – thus calling into question the validity of the general rule rather than demonstrating why deviation from a valid rule will nonetheless serve the public interest. Accordingly, Applicants have not carried their burden of proof to demonstrate that waiver is in the public interest.

### **CONCLUSION**

For the foregoing reasons, Applicants' waiver request raises significant questions that are best resolved by the full Commission. Given the unprecedented situation Applicants' request presents, sound policy requires a decision to be issued by the full Commission. Waiver of rules aimed at ensuring the Commission's ability to "cond[uct] the reverse auction and enforce the rules associated therewith" in the midst of the ongoing reverse auction is a matter best resolved by the full Commission. Should the Commission decide otherwise, it is the Wireless Telecommunications Bureau, rather than the Media Bureau, that has been delegated authority with respect to spectrum auctions. In no event is the Media Bureau the appropriate locus of decision making on this matter.

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<sup>35</sup> The proposed Nexstar-Media General merger, if allowed to proceed, will have a profound effect on the competitive landscape for broadcasters and pay-TV distributors, among others. See Petition to Deny or Impose Conditions of DISH Network L.L.C., the American Cable Association, and ITTA, MB Docket No. 16-57 (filed Mar. 18, 2016) ("Joint Petition to Deny or Condition"); Reply to Opposition of DISH Network L.L.C., the American Cable Association, and ITTA, MB Docket No. 16-57 (filed May 5, 2016) ("Reply to Opposition"). Post-merger, Nexstar would control the highest number of Big-4 affiliated stations in the United States. This is not a routine transaction, and the Applicants have certainly not demonstrated the need to rush review of the merger by granting the extraordinary relief contemplated by the requested waiver.

<sup>36</sup> See Waiver Supplement at 2-3.

This letter is being filed electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,



Barbara Esbin

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