

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Media General Communications Holdings, Inc.)	
WNCT-TV, Greenville, North Carolina)	MB Docket No. 14-131
Facility Identification No. 57838)	CSR-8889-N
)	
Petition for Waiver of Sections 76.92(f) and)	
76.106(a) of the Commission's Rules)	

To: Office of the Secretary
Attn: Chief, Media Bureau

REPLY

By its attorneys and pursuant to Section 76.7(c) of the FCC's rules, Media General Communications Holdings, LLC ("Media General"), hereby replies to the Opposition to Petition for Special Relief filed by Capitol Broadcasting Company ("CBC") in the above-captioned proceeding.¹ The Opposition is without merit, and Media General requests that its petition be granted on an expedited basis for the reasons stated herein.

I. INTRODUCTION

Media General's Petition demonstrated, according to the FCC's well-established precedent, that WRAL-TV is not significantly viewed in the North Carolina communities of Greenville and Kinston (the "Communities").² The Opposition offers no evidence to the contrary and is little more than an attack on the FCC's decades-old standards for evaluating

¹ See 47 C.F.R. §76.7(c); see also Capitol Broadcasting Company, Inc., Opposition to Petition for Special Relief, MB Docket No. 14-131, CSR-8889-N, filed Sept. 17, 2014 (the "Opposition"). This reply is timely filed pursuant to Sections 1.3 and 76.7 of the FCC's rules. 47 C.F.R. §§ 1.3, 76.7.

² See Media General Communications Holdings, Inc., Petition for Special Relief, MB Docket No. 14-131, CSR-8889-N, filed Aug. 13, 2014 (the "Petition").

petitions for waiver of the significantly viewed exception to the FCC's network non-duplication and syndicated exclusivity rules.³

Rather than demonstrate -- as the rules require -- that viewers in the Communities continue to watch WRAL-TV over-the-air, CBC's entire argument is that, if the FCC enforces its rules as written, WRAL-TV will be dropped from cable systems in the Communities and viewers will lose local service.⁴ CBC's argument is speculative and disregards the purpose and effects of the significantly viewed, network non-duplication, and syndicated exclusivity rules. Those rules were designed to protect local stations' home economic markets, not to help stations like WRAL-TV use cable systems to expand their markets.⁵ Their application in this case would not require any cable operator to drop WRAL-TV's local programming in the Communities -- only WRAL-TV's network and syndicated programming that is duplicative of that available on WNCT-TV would be required to be blacked-out. The Bureau has encountered and specifically rejected all of CBC's arguments in recent cases.⁶ It should do so again here and grant Media General's Petition.

³ See 47 C.F.R. § 76.92(f), § 76.106; see also *KCST-TV, Inc.*, 103 FCC 2d 407, 413 (1986).

⁴ Opposition at 2-7.

⁵ See Cable Television, *Memorandum Opinion and Order*, 67 FCC 2d 1303 ¶ 10 (1978) ("1978 Order") ("these provisions . . . are designed to protect network affiliates from actual or potential economic loss due to importation of distant signals"), *recon. denied*, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v. FCC*, 619 F.2d 314 (4th Cir. 1980) ("Spartan").

⁶ See, e.g., *TVL Broadcasting of Rhode Island*, 28 FCC Rcd 15591 (MB 2013) ("TVL Broadcasting"); *WUPW Broadcasting LLC*, 25 FCC Rcd 2678 (MB 2010) ("WUPW").

II. THE BUREAU SHOULD REJECT CBC'S ATTACK ON ITS WELL-ESTABLISHED SIGNIFICANTLY VIEWED WAIVER STANDARDS.

CBC concedes that the Petition satisfies the FCC's standards for granting waivers of the significantly viewed exception.⁷ CBC nonetheless claims that the Petition should be denied based on a series of arguments that the Media Bureau has specifically and repeatedly denied.

First, CBC argues that grant of the Petition would be contrary to the public interest because it would cause the largest cable operator in the Communities to drop WRAL-TV, causing viewers there to lose access to its signal.⁸ In *TVL Broadcasting*, decided less than a year ago, the Media Bureau rejected precisely this argument:

[W]ith regard to the public interest arguments raised by all the parties, regarding the potential deletion of the valuable local programming provided by [the distant station], we point out that a grant of a waiver of the network nonduplication rules only requires the cable operator to delete the duplicating network programming carried by the competing station and not the entire station. Therefore, any programming that [the distant signal] carries that does not infringe on [the home station]'s rights in its market may still be made available to cable system subscribers.⁹

In 2010, a cable operator raised the same argument, claiming that grant of a significantly viewed waiver petition would force it to drop a distant signal. Again, the Bureau rejected this claim, noting that:

despite its contention, a grant of [the local station]'s waiver would not automatically require [the cable operator] to delete [the distant station] entirely from carriage within the city of Toledo, but only the . . . network programming for which [the local station] has network exclusivity rights.¹⁰

⁷ Opposition at 2.

⁸ See Opposition at 2-7.

⁹ See *TVL Broadcasting*, 28 FCC Rcd at 15601-02.

¹⁰ See *WUPW*, 25 FCC Rcd at 2690.

Nothing in CBC's showing can lead the Bureau to a different result in this case.¹¹ To the contrary, substantial policy considerations reinforce the Bureau's approach. The Bureau should not involve itself in business decisions regarding retransmission of out-of-market stations by cable operators. WRAL-TV has no mandatory carriage rights in the Communities, and, absent such rights, the Bureau should not try to insert itself into carriage negotiations between broadcasters and cable operators.

Next, CBC argues that Media General's Nielsen study "understates the number of people in Greenville and Kinston who watch and value WRAL-TV's programming."¹² CBC's support for this claim, however, consists entirely of ratings data for the entire state of North Carolina and testimonials from viewers in the community.¹³ Not a single one of these viewers represents that he or she watches WRAL-TV's over-the-air signal.¹⁴ CBC nonetheless argues that these MVPD subscribers who watch WRAL-TV should somehow (CBC does not really explain how) call into question the accuracy of WNCT's Nielsen survey data and lead to denial of the Petition.¹⁵

CBC's attacks on the accuracy of Nielsen's survey are unsubstantiated. The Bureau has repeatedly reaffirmed use of Nielsen over-the-air survey data to support the showing necessary

¹¹ Media General notes that even if a cable operator's intentions with respect to future carriage of a duplicating system were relevant -- and it clearly is not -- the Bureau could hardly rely on CBC's hearsay claim that Suddenlink will drop the station.

¹² See Opposition at 4.

¹³ See *id.* at 3-5.

¹⁴ As best Media General can tell, these viewers may have been misled by CBC to believe that grant of the Petition would require local MVPDs to remove WRAL-TV from carriage. See *id.* at 4. It is highly unlikely that average TV viewers became aware of the Petition and concluded on their own that grant of the Petition would require MVPDs to drop WRAL-TV, since that is not true. More likely, they became aware of the issue through WRAL-TV's Internet poll of viewers, which asked viewers to "[p]lease help us get an accurate count of our viewers in Kinston so we can stay on your cable." See Wes Wolfe, *Media General, WNCT Want WRAL Out of Local Markets*, KINSTON.COM, Sept. 7, 2014, available at <http://www.kinston.com/news/local/media-general-wnct-want-wral-out-of-local-markets-1.369907?page=0>.

¹⁵ See Opposition at 6-7.

for waiver of the significantly viewed rule.¹⁶ The same Nielsen data and methodologies Media General relies on here have withstood far more sophisticated and rigorous objections than CBC raises here.¹⁷ The Bureau must reject CBC's claim that the Nielsen data submitted by Media General is unreliable.

Moreover, CBC's objection to using over-the-air viewership as the test for determining significantly viewed status contravenes the purpose of the rules and decades of FCC precedent. The significantly viewed list, which gives CBC special privileges to distribute duplicating network programming over cable systems in the Communities, was compiled in 1972 as a list of stations with significant over-the-air viewership in communities outside their home markets.¹⁸ At the time, the FCC was trying to promote the benefits of cable television for consumers without undermining the economics of the television broadcast industry and sought to balance reasonable consumer expectations against the threat to local stations of distant signal importation.¹⁹ The list, and the special privileges that attend inclusion on it, are and always have been based entirely on the idea that a station in a distant market enjoys substantial *over-the-air* viewership in another station's home market.²⁰ If a station no longer enjoys such over-the-air

¹⁶ See, e.g., *TVL Broadcasting*, 28 FCC Rcd at 15600; *Barrington Kirksville Licensee LLC*, 28 FCC Rcd 2843, 2849-50 (MB 2013) (rejecting arguments that a small sample size makes Nielsen's results unreliable); *WUPW*, 25 FCC Rcd at 2690; *KXAN, Inc.*, 25 FCC Rcd 3307, 3316 (MB 2010).

¹⁷ See, e.g., *Gulf-California Broadcast Company and Journal Broadcast Corporation*, 26 FCC Rcd 15027, 15033-35, 39-40 (2011) (rejecting use of sophisticated statistical analysis of station viewership even though that analysis "could theoretically produce more precise results") ("*Gulf-California*"); *WUPW*, 25 FCC Rcd at 2682-2686, 2688-90.

¹⁸ See *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

¹⁹ See *id.* at 164-65; see also n.5, *supra*.

²⁰ See 47 C.F.R. §76.54; see also, e.g., *WUPW*, 25 FCC Rcd at 2679 ("The significantly viewed exception to the exclusivity rules is based on it being established that an otherwise distant station receives a 'significant' level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the

viewership, no logical reason exists to continue affording it the benefits of stations that have such viewership. In fact, overwhelming policy reasons support Media General's requested relief because distant signal importation has the potential to negatively affect the economic health of an in-market station whose network programming is duplicated, weakening the over-the-air broadcasting system.²¹ There is simply no basis in reason or the FCC's precedent to consider WRAL-TV's cable viewership in determining whether the station is significantly viewed in the Communities.²²

CBC's claim that an enigmatic footnote in the FCC's decision on remand in the *KCST-TV* case should change the result here also misses the mark.²³ While the FCC posited in that now 28-year old decision that cable viewership might be relevant in some future instance, it did not say how or give the Bureau any discernable standard to apply to significantly viewed waiver cases. In the nearly three decades since that decision, the FCC has never revisited this issue, and the Bureau has wisely refrained from trying to divine what, if any, change the FCC may have contemplated in that footnote.

CBC nonetheless asks the Bureau to rely on *KCST-TV* as support for finding that CBC's anecdotal evidence of cable viewership in the Communities constitutes a demonstration that WRAL-TV is significantly viewed in the Communities.²⁴ CBC offers no principled way for the Bureau to incorporate cable viewership -- let alone anecdotal evidence thereof -- into the

application of the exclusivity rules because it has established that it is viewed over the air in the subject community.”).

²¹ See *1978 Order* at ¶ 10.

²² The Bureau also should recognize that CBC has provided no cable ratings data indicating that WRAL-TV enjoys significant cable viewership in the Communities. Such data would be irrelevant to the analysis in any event, but CBC has failed to establish any factual predicate for its claim that its cable viewership justifies denial of the Petition.

²³ See *Opposition* at 6-7.

²⁴ See *id.*

significantly viewed analysis. Instead, CBC simply asks the Bureau to use the *KCST-TV* footnote to declare it the winner in this case.²⁵ CBC's proposed approach to this case is a veritable blueprint for arbitrary and capricious decision making, and the Bureau should reject it.

The proper course, and the one even CBC acknowledges the Bureau has always followed in significantly viewed cases, is to continue applying the logical, precedent-supported approach of judging significantly viewed waiver cases based on over-the-air viewership.²⁶ Despite CBC's unsupported claim that the Bureau can change the rules without direction from the full FCC,²⁷ the Bureau is not free to depart from the precedent the FCC established in *KCST-TV* based merely on a footnote and CBC's belief that the public interest somehow requires denial of the Petition.²⁸ The Bureau should reject CBC's request that the Bureau adopt and apply a new and standardless test in order to deny the Petition.

Finally, no basis exists to grant CBC's request that the Bureau hold this case in abeyance while the FCC considers whether to eliminate the programming exclusivity rules in an ongoing rulemaking.²⁹ The Bureau's long-standing policy is to process applications and petitions

²⁵ See *id.* at 9.

²⁶ See Opposition at 8 (citing *Gulf-California*, 26 FCC Rcd 15027, 15039 (MB 2011) ("*Gulf Power*")).

²⁷ See Opposition at 8-9.

²⁸ CBC wrongly claims that "none of the decisions" that have led the Bureau to uphold the traditional over-the-air viewership test for significantly viewed waiver cases "has been decided at the Commission level." Opposition at 8. In *Gulf Power*, the case cited immediately prior to this claim, the Bureau cited two full Commission cases: *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326 (1972) and *KCST-TV*, and Section 76.54 of the FCC's rules. See *Gulf Power*, 26 FCC Rcd at 15039. The Bureau is not permitted to depart from any of these precedents absent direction from the full FCC. See, e.g., *Michael Couzens, Esq.*, 25 FCC Rcd 13672 (Aud. Div. 2010) (citing *RB Schools*, 21 FCC Rcd 6945, 6946 (MB 2006); *WLDI, Inc.*, 17 FCC Rcd 14750, 14752 (EB 2002)); see also 47 C.F.R. §§ 0.283, 0.61 (delegating authority to the Media Bureau to implement -- not make -- FCC policy).

²⁹ See Opposition at 9 & n.23 (citing Amendment to the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351, 3384-95 (2014)).

consistent with current rules rather than delay decisions that might be affected by future FCC decisions.³⁰ Given the uncertainty of both the timing and the results of ongoing policy deliberations, the Bureau's policy is sound, and CBC provides no basis for deviating from it here.

III. CONCLUSION

Given that CBC does not contest that the Petition satisfies the FCC's existing standards governing significantly viewed waivers and fails to identify any legitimate and sustainable basis for denying the Petition, Media General respectfully requests that the Opposition be rejected and the Petition granted expeditiously.

Respectfully submitted,

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³⁰ See, e.g., *AT&T Services Inc. and AT&T California v. CoxCom, Inc.*, 24 FCC Rcd 2859, 2864 (2009) (denying program access complaint despite pending rulemaking proposing to change precise rule the Bureau applied to deny the complaint); *Local TV Holdings, LLC*, 28 FCC Rcd 16850, 16858-59 (MB 2013) (conditioning grant of transfer application on future outcome of rulemaking); *J. Stewart Bryan III and Media General Communications Holdings, LLC*, 28 FCC Rcd 15509, 15518 (MB 2013) (same).

CERTIFICATE OF SERVICE

I, Rayya Khalaf, a secretary at Cooley LLP, certify that on this 1st day of October, 2014, I caused the foregoing Reply to be served by first-class mail, except where email delivery is indicated (*), on the following:

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