

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Applications of)
Nexstar Broadcasting Group, Inc.)
and Media General, Inc.) MB Docket No. 16-57
)
For Consent To Transfer Control of Licenses)

PETITION TO DENY

The Communications Workers of America,¹ Free Press,² Common Cause,³ Public Knowledge⁴ and the Open Technology Institute at New America(OTI)⁵ (collectively, Petitioners)

¹The Communications Workers of America (CWA) represents some 700,000 workers in communications, media, manufacturing industries as well as airlines and public service. CWA members depend on a diverse media to learn about the beliefs and experiences of different people in their local communities and across the country to develop the understanding necessary to participate intelligently and emphatically in our increasingly globalized world. CWA affiliated unions include the National Association of Broadcast Employees and Technicians (NABET) and The Newspaper Guild, whose members are especially dependent on having access to diverse media and for the development of a robust media industry that creates diverse media opportunities. Most of CWA’s members are also television viewers and CWA appears here to represent them in that capacity as well.

²Free Press is a national, non-partisan organization working to promote diverse and independent media ownership, and to prevent the concentration of media markets and the harms that flow from it. Free Press has nearly a million members nationwide, many of whom who reside in areas served by television stations subject to these applications. Grant of the applications would harm Free Press and its members by causing a permanent loss of diversity of viewpoints available to them and a permanent decrease in competition in coverage of local news.

³Common Cause is a non-partisan, non-profit advocacy organization with more than 300,000 members founded in 1970 as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Cause actively participates in FCC proceedings to insure that broadcasters satisfy their public interest obligations it members, who include viewers in the service area of the stations subject to the pending applications.

⁴Public Knowledge is a nonprofit public interest organization that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works. Working to shape policy on behalf of the public interest, Public Knowledge frequently advocates for pro-competitive media policies before the FCC.

⁵Open Technology Institute at New America is a nonpartisan and nonprofit public policy institute based in Washington, D.C. New America is an intellectual venture capital fund, think

respectfully submit this petition to deny the applications for transfer of control and assignment of licenses from Media General, Inc. (Media General) to Nexstar Broadcasting Group, Inc. (Nexstar). Petitioners ask that the Commission dismiss the applications or designate them for hearing.⁶

Nexstar's proposed acquisition of Media General is manifestly contrary to the public interest and Nexstar has not even attempted to meet its affirmative burden of establishing that the public interest benefits outweigh the significant losses to diversity that would result from grant of the applications. Moreover, and specifically, Nexstar disingenuously appears to claim that there is no obstacle to its becoming the attributable owner of television stations in six markets notwithstanding the Commission's TV duopoly rule. In offhandedly making an alternative request for a *nine year* waiver of the Commission's ownership rule with respect to those stations, Nexstar does not even attempt to show how there would be any benefit to the public from grant of the applications.

Grant of the Applications Is Contrary to the Public Interest

Under Section 310(d) of the Communications Act, applicants for assignment or transfer of a broadcast license have an affirmative duty to establish that grant of each application will serve "the public interest, convenience and necessity."⁷ Even if - as is not the case here -

tank, technology laboratory, public forum, and media platform. OTI and its Wireless Future Project are committed to freedom and social justice in the digital age, as well as universally accessible and affordable broadband connectivity. To achieve these goals, OTI participates in media and technology policy debates, builds technology, and deploys tools with communities.

⁶This petition is supported by the Declaration of Anthony Markota, a CWA member, provided here as Attachment A.

⁷See, e.g., *Comcast Corporation*, 26 FCCRcd 4238, 4247 (2011) (citing *Sirius-XM*, 23 FCCRcd 12348, 12364 (2008)).

proposed transactions do not transgress specific Commission rules or policies, the Commission must still balance the harm and benefits, if any, of a transaction in making its public interest determination. As the Commission has explained,

If the transaction would not violate a statute or rule, the Commission considers whether a grant could result in public interest harms (by substantially frustrating or impairing the objectives or implementation of the Act or related statutes) or public interest benefits.⁸

Central to the Commission’s public interest determination is its fundamental policy goals with respect to broadcast ownership. Thus, because

the Commission has adopted rules to promote diversity, competition, localism, or other public interest concerns, those rules may form a basis for determining whether the transfer and assignment applications are on balance in the public interest.⁹

Nexstar currently “owns, operates, programs or provides sales and other services to 115 television stations and 36 related digital multicast signals reaching 62 markets or approximately 18.1% of all U.S. television households.” If the transaction were approved, Nexstar would have 171 full power stations (at least 115 of which are affiliated with the top four networks) in 100 markets with a reach that Nexstar claims not to exceed the Commission’s 39% national audience cap.¹⁰ Despite the massive scope that it seeks to obtain, Nexstar does not even attempt to demonstrate why allowing it to grow to that size is in the public interest.

⁸*Belo Corp., LLC*, 28 FCCRcd 16867, 16876 (2013). See also *Adelphia Communications Corporation, (And Subsidiaries, Debtors-in-possession)*, 21 FCCRcd 8203, 8207 (2006) (Footnote omitted.) (“If the transactions would not violate a statute or rule, the Commission next considers whether the transactions could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.”).

⁹*Id.*

¹⁰Nexstar does not provide support for that claim, and Petitioners do not concede its accuracy.

The entirety of Nexstar's argument that grant of the applications will promote the public interest is as follows:

The proposed Transaction will increase the merged company's operational efficiencies and capabilities in serving the public, ensure continuance of existing service to the public, and maintain current levels of competition and diversity in local television markets while creating opportunities for new entrants in a number of those markets. For those reasons, the Transaction also strongly serves the public interest,...

Nexstar does not even attempt to explain how the public, as opposed to its shareholders, might benefit from these claimed "efficiencies and capabilities...." Most notably, it does not mention a single way in which it will deploy its new scale to improve or expand the diversity of its programming or otherwise share its increased revenues with anyone except its shareholders, to whom it promises massively increased profitability.¹¹

Nexstar is palpably incorrect in claiming that the transaction will "maintain current levels of competition and diversity." Whether or not Nexstar will not actually exceed the Commission's 39% national ownership cap, the transaction would indubitably decrease diversity in national ownership and make at least 28 television stations unavailable to smaller companies or new entrants. Nexstar's expanded scope would also give it greater capacity to distort national television markets through manipulation of retransmission rights. Moreover, as Nexstar itself explains in its "Comprehensive Exhibit," the proposed transaction would result in new TV duopolies in Buffalo, Grand Rapids/Kalamazoo/Battle Creek, Indianapolis, Mobile/Pensacola,

¹¹See "A Compelling Combination to Become Nexstar Media Group: A Pure-Play Broadcasting and Digital Media Leader," <http://cdn.idstatic.com/cms/live/13/Nexstar-MEG-Transaction-with-Supplemental-Information-2-8-16.pptx?1454935794>

and Tampa-St. Petersburg/Sarasota.¹² In addition, Nexstar would also have new radio-television cross-ownerships in Columbus (Ohio), Indianapolis, Raleigh-Durham and Richmond-Petersburg.¹³ Notwithstanding Nexstar’s lame and euphemistic attempt to describe these as “Rule-Compliant Dupoly Markets” and “Rule-Compliant Radio-Television Cross-Ownership Markets,” it is indisputable that these new combinations clearly will not “maintain current levels of competition and diversity” but would instead represent a significant loss of competition and diversity to the detriment of the public. Using the national ownership cap, the duopoly rule and the cross-ownership rule as “a basis for determining whether the transfer and assignment applications are on balance in the public interest...,” it is clear that the transaction significantly impedes the Commission’s goals and that Nexstar has utterly failed to show, or even try to show, that there are countervailing public interest benefits.

**Nexstar’s Claim That It Can Continue Media General’s JSAs
in Effect Lacks Merit, As Does Its Waiver Request**

The most startling aspect of Nexstar’s application is its cavalier disregard for the Commission’s rules with respect to Joint Sales Agreements (JSAs). There are six JSAs attributable to Media General¹⁴ that do not comport with the Commission’s TV duopoly rule. In making television JSAs attributable, the Commission initially gave licensees two years to divest these properties. While Congress has recently afforded licensees until September 30, 2025 to divest affected properties,¹⁵ it has not changed the Commission’s regulations, including the fact

¹²Comprehensive Exhibit, pp. 18-19.

¹³Comprehensive Exhibit, pp. 19-21.

¹⁴The affected stations are WXXA-TV, Albany, New York, WAGT, Augusta, Georgia, WBDT, Springfield, Ohio, WLAJ, Lansing, Michigan, KTKA-TV, Topeka, Kansas, and WYTV, Youngstown, Ohio.

¹⁵Consolidated Appropriations Act, 2016, H.R. 2029, 114th Cong. §628.

that ownership of the affected stations is attributable to a party which provides 15% or more of a second station's programming. Of particular relevance here, the Commission did not change established policy that when a station which is party to an attributable JSA is transferred or assigned, the JSA must be dissolved. This is critical to the Commission's goal of promoting diversity by making more stations available to smaller operators or new entrants.

Nexstar characterizes these six agreements as "legacy JSAs" and - without citing any authority - asserts that it can continue to maintain them in effect. It guilelessly promises to "bring these legacy JSA's into compliance by the new compliance deadline of September 30, 2025."¹⁶ This outrageous position flies in the face of Commission JSA policy on attributable JSAs as it was first adopted and as it has been enforced ever since. In its *2002 Biennial Review Order*, which was expressly upheld by the U.S. Court of Appeals for the Third Circuit,¹⁷ the Commission first adopted rules making certain radio JSAs attributable.¹⁸ Recognizing that a number of JSAs had been entered into at a time when they did not confer an attributable interest, the Commission allowed for a two year transition period to afford "licensees sufficient time to make alternative business arrangements where they have in-market JSAs entered into prior to the adoption date of this *Order*..."¹⁹ This emphatically did **not** allow the JSA relationship to be continued if the licensees were sold. In fact, the Commission specifically said,

if a party sells an existing combination of stations within the 2-year grace period, it may not sell or assign the JSA to the new owner if the JSA causes the new owner to exceed

¹⁶Comprehensive Exhibit, p. 36.

¹⁷See *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

¹⁸*2002 Biennial Regulatory Review, Report and Order*, 18 FCCRcd 13620, 13742-13747 (2003).

¹⁹*Id.*, 18 FCCRcd at 13746.

any of our ownership limits; the JSA must be terminated at the time of the sale of the stations.²⁰

Broadcasters challenged the Commission’s refusal to allow JSAs to be transferred, but the Third Circuit decisively rejected their appeal, holding that the “transfer restriction is ‘in the public interest.’”²¹ and that it was “reasoned decisionmaking” even though it adversely affected licensees which had previously entered into JSAs.²²

The Commission has consistently adhered to this policy before and after making television JSAs attributable in the same way that it treats radio JSAs.²³ It is consistent with the Commission’s goals of promoting diversity. It is also entirely logical, because when a party acquires a broadcasting license, that entity becomes the attributable owner to that licensee, creating a new ownership structure and abandoning the structure of the prior licensee.

Clearly recognizing the brazen nature of its claim that it would not be required under existing rules to dissolve the six JSAs, Nexstar almost offhandedly asks that “[t]o the extent necessary,” it receive a “temporary waiver to allow the legacy JSAs to this Transaction to continue until September 30, 2025....”²⁴ This, it says, “will serve the public interest and is consistent with Congress’ directive” in the 2016 Appropriations Act.²⁵

No applicant, including Nexstar, is entitled to a waiver of the Commission’s rules, especially its broadcast ownership rules, by simply saying it wants one. The Commission does

²⁰*Id.*

²¹*Id.*, 373 F.3d at 427.

²²*Id.*, 373 F.3d at 427-428 (“But an agency is not restricted in its rulemaking by the expectations of the regulated.”).

²³*See, e.g., Schurz Communications Inc.*, DA 16-154 (February 12, 2016) at 2.

²⁴Comprehensive Exhibit, p. 36.

²⁵*Id.*

grant waivers, but only when applicants meet the substantial burden of presenting evidence that there are public interest benefits from granting a waiver and that those benefits outweigh the detriments that are inherently present when the Commission chooses not to enforce rules which were, after all, adopted to promote the public interest.

The Commission has described its general policy with respect to waivers as follows: An applicant seeking a rule waiver has the burden to plead with particularity the facts and circumstances that warrant such action. The Commission must give waiver requests “a hard look,” but an applicant for waiver “faces a high hurdle even at the starting gate” and must support its waiver request with a compelling showing. Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule. Generally, the Commission grants a rule waiver only if the relief requested would not undermine the policy objective of the rule in question, and would otherwise serve the public interest.²⁶

Nexstar falls short on every element. It has not pled anything “with particularity.” It certainly has not surmounted the “high hurdle” it faces and made no showing how a waiver would be in the public interest, much less a “compelling one.” The waiver it seeks would unquestionably “undermine the policy objective” of the Commission’s duopoly rule and would not “otherwise serve the public interest.”

In *MSG Radio, supra*, the Commission applied these criteria in granting a duopoly waiver. There, it found that “special circumstances warrant a deviation from the general rule,”²⁷ and that “such deviation will serve the public interest.”²⁸ There are no special circumstances

²⁶*Albert Catalano*, 27 FCCRcd 2109, 2111 (2012)(footnotes and citations omitted); *MSG Radio*, 27 FCCRcd 7066, 7072 (2012).

²⁷In that case, the Commission found that “the unique characteristics of the Puerto Rico Arbitron Metro, including the extreme topography and unusual economic circumstances, justified a waiver....” *Id.* 27 FCCRcd at 7073.

²⁸The Commission found, among other things, that grant of a waiver would preserve competition in a market with 70 different station owners. *Id.* 27 FCCRcd at 7075.

here, and no benefit to the public interest. To the contrary, the requested waivers would decrease the diversity of voices in six markets. Nexstar does not point to any public interest benefit that would outweigh that consideration.

The recent decision in *Quincy Newspapers, Inc.* is especially instructive.²⁹ In that case, the Commission did grant short, temporary waivers of the duopoly rule. However, it did so because it found that

based on the specific facts and nature of the transaction before us...[a] temporary waiver would not only not undermine any of these [public interest] goals, but would actually be pro-competitive.³⁰

Accordingly, it said that “strict application of the rule to deny a short period of temporary non-compliance in this case would not serve the purpose of the local television ownership rule.”

Specifically, in the *Quincy* case, the parties agreed

to voluntarily terminate the JSAs within nine months of consummation, well in advance of the statutory deadline that would have applied to the existing JSAs had this transaction not been entered into.³¹

In addition, the Commission “agreed with the Applicants that grant of the proposed transaction will increase the independence of ownership of” stations in two of the three affected markets by removing certain contingent financial interests.³²

Neither of the factors which justified waiver in *Quincy* are present here. Far from seeking a short waiver that would result in more rapid dissolution of the JSAs, Nexstar seeks to delay the effectiveness of the Commission’s rules for almost 10 years. Grant of a waiver to Nexstar will

²⁹*Quincy Newspapers, Inc.*, 30 FCCRcd 9987 (2015).

³⁰*Id.*, 30 FCCRcd at 9991.

³¹*Id.*, 30 FCCRcd at 9991 (footnote omitted).

³²*Id.*

actually diminish the independence of the brokered stations because of the massive economic power Nexstar will gain through the acquisition of dozens of additional TV stations.

The only case that Nexstar cites as authority is wholly inapposite. In *Media General Inc.*, 29 FCCRcd 14798, 14805-06 (2014), the Commission granted short two year waivers to allow the orderly dissolution of three JSAs because in that particular case, new media voices were being added to an affected market. That is not the case here. Indeed, what is most remarkable about Nexstar's waiver request is the absence of *any* effort to show, much less demonstrate that grant of the extraordinary 10 year waiver would bring any public interest benefits. Unlike Media General, Inc., no new media voices will be generated. Nor are there any commitments to improve service to the public or otherwise outweigh the loss of new ownership diversity that would result from grant of the requested waiver.

CONCLUSION

Wherefore, Petitioners respectfully ask that the Commission dismiss the applications or designate them for hearing and grant all such other relief as may be just and proper.

Respectfully submitted,



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March 18, 2016

ATTACHMENT A

DECLARATION OF ANTHONY MARKOTA

My name is Anthony Markota. I am a resident of Struthers, Ohio and reside in the service area of WYTV, WYFX and WKBJ. I am a viewer of these television stations.

I am a member of The Newspaper Guild/Communications Workers of America.

This declaration is prepared in support of a petition to deny the transfer of control and assignment of licenses from Media General, Inc. to Nexstar Broadcasting Group, Inc.

I am familiar with the content of the petition to deny. The factual assertions contained in it are true to the best of my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Anthony Markota", written over a horizontal line.

Executed on: March 15, 2016

CERTIFICATE OF SERVICE

I certify that on this date, March 18, 2016, the foregoing Petition to Deny has been served by United States Mail, postage prepaid, and by email, upon the following:

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