

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Applications of) MB Docket No. 16-57
Nexstar Broadcasting Group, Inc.)
and)
Media General, Inc.)
)
For Consent to the Transfer of Control and)
Assignment of Licenses)

CONSOLIDATED OPPOSITION TO PETITIONS TO DENY

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SUMMARY

The Petitions filed in this proceeding by DISH Network L.L.C. *et al.*, Cox Communications, Inc., and the Communications Workers of America *et al.* (collectively the “Petitioners”) should be dismissed or denied, and the applications for Commission consent to the merger of Media General, Inc. (“MEG”) and Nexstar Broadcasting Group, Inc. (“Nexstar”) should be promptly approved without conditions.

As an initial matter, the Petitions are procedurally defective in that the Petitioners have failed to establish standing as parties in interest, or to present “specific allegations of fact sufficient to show that . . . a grant of the application[s] would be prima facie inconsistent with” the public interest, convenience and necessity.

In addition, the Petitioners’ arguments are entirely inappropriate in an adjudicatory proceeding like this one. Although the Petitioners contend that the merger is inherently problematic because it will permit Nexstar to grow “too big,” the Commission’s national cap rule is specifically designed to provide a bright line rule for broadcast acquisitions, and none of the Petitioners provides a shred of evidence demonstrating that the post-merger company will exceed the national cap or, for that matter, violate any other Commission rule. Indeed, as noted in the applications, the transaction will result in no increase in common station ownership in any local television market, while complying with the most restrictive variation of the national cap rule ever even suggested by the Commission.

Faced with that reality, the Petitioners focus their arguments on rehashing regulatory and business agendas that are unrelated to this transaction, and are already the subject of pending non-adjudicatory proceedings in which the Petitioners are participating. In this regard, the retransmission-related arguments of the petitioning MVPDs represent nothing more than gratuitous attempts to convince the Commission to single out Nexstar for unnecessary and

restrictive regulations outside of the pending rulemakings in which these petitioners have already actively advocated for similar proposals. Even were these arguments properly considered here (which they are not), they are based on speculative assumptions and exaggerations that lack any basis in fact. There is no basis for the Commission to impose any of the conditions sought by the MVPD petitioners, all of which would violate congressional intent by seeking to dictate the outcome of retransmission consent negotiations. Consistent with settled precedent, the Commission should reject the Petitioners' blatant attempts to end-run the rulemaking process via this adjudicatory proceeding.

Also unfounded is the suggestion of *CWA et al.* that continuing MEG's existing joint sales agreements ("JSAs") after the merger is improper. By the unambiguous terms of the 2016 Consolidated Appropriations Act, Congress grandfathered these "Legacy JSAs" through 2025, and Congress has since reaffirmed in multiple ways its specific intent that such JSAs remain grandfathered through transfers and assignments. To the extent that the Commission may have unofficially taken a contrary position, that position is inconsistent with the statutory language, conflicts with the Commission's own precedent and practices, and even if correct, would still mandate grandfathering the Legacy JSAs here. Finally, even if statutory grandfathering were not available, grandfathering these Legacy JSAs via Commission waiver is demonstrably in the public interest.

As is amply demonstrated in the applications, the transaction will generate substantial public interest benefits. Among other things, the efficiencies and economies that the merger will create will make possible investments in programming initiatives that are generally not economically feasible in the small and medium markets in which the combined company will operate. Further, as a result of their efforts to ensure that the transaction fully complies with the

Commission’s multiple ownership rules, Nexstar and MEG have committed to divest a dozen full-power television stations in a dozen markets, creating opportunities for new entrants to enhance diversity in each of those markets—an opportunity that would not exist but for the transaction proposed here. For these and the many other reasons discussed herein, the Petitions should be promptly dismissed or denied, and the applications granted, without the onerous and unnecessary conditions that Petitioners request.

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I. INTRODUCTION

Nexstar Broadcasting Group, Inc. (“Nexstar”) and Media General, Inc. (“MEG”) (collectively the “Applicants”) hereby oppose the Petitions filed in the above-referenced proceeding by: (1) DISH Network L.L.C., the American Cable Association, and ITTA (“DISH *et al.*”);¹ (2) Cox Communications, Inc. (“Cox,” and together with DISH *et al.*, the “MVPD Petitioners”);² and (3) the Communications Workers of America, Free Press, Common Cause, Public Knowledge, and Open Technology Institute at New America (“CWA *et al.*” and, together with the MVPD Petitioners, the “Petitioners”).³ The Petitions were filed in connection with applications seeking FCC consent to the transfer of control and assignment of the licenses of television stations currently owned and operated by MEG to Nexstar (the “Applications”), as necessary to permit a transaction (the “Transaction”) that will combine the television broadcast operations of Nexstar and MEG.⁴ As demonstrated below, Petitioners lack standing, and their objections to the Transaction are factually baseless, replete with speculation and exaggeration, and contrary to law and precedent. The Petitions should therefore be dismissed or denied, and

¹ Petition to Deny or Impose Conditions of DISH Network, L.L.C., the American Cable Association, and ITTA, MB Docket No. 16-57 (Mar. 18, 2016) (“DISH *et al.* Petition”).

² Petition for Conditions of Cox Communications, Inc., MB Docket No. 16-57 (Mar. 18, 2016) (“Cox Petition,” and together with the DISH *et al.* Petition, the “MVPD Petitions”).

³ Petition to Deny of Communications Workers of America, Free Press, Common Cause, Public Knowledge, and Open Technology Institute at New America, MB Docket No. 16-57 (Mar. 18, 2016) (“CWA *et al.* Petition,” and together with the MVPD Petitions, the “Petitions”).

⁴ The Applications seek consent to the transfer of control of 27 of the license subsidiaries of MEG to Nexstar, and the merger of the 28th license subsidiary of MEG, LIN Television Corporation, including its licenses, into Nexstar Broadcasting, Inc., a wholly owned subsidiary of Nexstar. Nexstar will change its name to Nexstar Media Group, Inc. upon consummation of the Transaction, and thus the Form 315 Applications specify Nexstar Media Group, Inc. as the transferee. *See* Comprehensive Exhibit to FCC Form 315 and 314 Applications (as amended Mar. 16, 2016) at 1 (“Comprehensive Exhibit”).

the Applications promptly approved without the onerous and unnecessary conditions that Petitioners request.

II. STANDING AND STANDARD OF REVIEW

A. Standing

The Petitioners have not established that they have standing as “part[ies] in interest” to object to the Transaction, as required under the Communications Act.⁵ To have standing to petition to deny, a party must show that: (1) “grant of the challenged application would cause the petitioner to suffer a direct injury,” (2) “the injury can be traced to the challenged action,” and (3) it is “likely, as opposed to merely speculative, that the injury would be prevented or redressed by the relief requested.”⁶ A petitioner to deny must support the factual allegations necessary to support standing (and a petition generally) with one or more affidavits submitted under penalty of perjury from persons with personal knowledge of those facts.⁷ An organization also must show that at least one of its members satisfies each requirement.⁸

CWA *et al.* lack standing because they have put forth nothing besides broad and conclusory assertions that the Transaction conflicts with Commission rules and policies (without identifying a single rule that the Transaction actually violates) and decreases diversity (without identifying how, while simultaneously ignoring that a dozen full-power stations will be divested

⁵ 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.939; *Local TV Holdings, LLC, Transferor, and Tribune Broadcasting Company II, LLC, Transferee*, Memorandum Opinion and Order, 28 FCC Rcd 16850, 16853, ¶ 7 (2013) (“*Tribune/Local TV Order*”) (“Under the Communications Act of 1934, as amended, only a ‘party in interest’ has standing to file a petition to deny.”).

⁶ *Alaska Native Wireless LLC*, Order, 18 FCC Rcd 11640, 11644, ¶ 10 (2003); see *Rockne Educational TV, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 14402, 14405, ¶ 7 (2011).

⁷ 47 U.S.C. § 309(d); 47 C.F.R. § 73.3584.

⁸ *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

as a part of the Transaction). Indeed, CWA *et al.* identify not a single direct, non-speculative injury they would suffer from grant of the Applications.⁹ Further, even if the speculations contained in the CWA *et al.* Petition were not utterly deficient on their face, the single declaration attached to that Petition is from an individual who claims to be a member of only one organization that signed the Petition and who is a viewer of only one MEG full-power and one MEG low-power station (both in the Youngstown, Ohio market) being transferred to Nexstar as part of the Transaction. The Commission has denied petitioner status to organizations—including, specifically, petitioner Free Press—where the petitioner’s allegations were not supported by appropriate affidavits.¹⁰ Where an organization provides an affidavit from a member residing in only one of the viewing areas affected by a transaction, the Commission has similarly denied petitioner status with respect to the remaining viewing area(s).¹¹ In light of its

⁹ *WFBM, Inc.*, 47 FCC 2d 1267 (1974) (“Hearsay, rumor, opinion or broad generalization do not satisfy the specificity requirement of Section 309(d.)”); *see also License Renewal Applications of Certain Broadcast Stations Licensed for and Serving the Metropolitan Los Angeles, California Area*, 68 FCC 2d 75 (1978) (“*Metropolitan LA*”) (dismissing petitions to deny based on the failure to satisfy Section 309(d), including lack of specific allegations of fact).

¹⁰ *Tribune/Local TV Order*, 28 FCC Rcd at 16853-54, ¶ 8 (finding that “by failing to include an affidavit or declaration from any members in this proceeding, PPF has failed to demonstrate that it has standing at all”); *see also In the Matter of Shareholders of Tribune Co., Transferors & Sam Zell, et al. Transferees & Applications for the Renewal of License of KTLA(TV), Los Angeles, California, et al.*, 22 FCC Rcd 21266, 21269, ¶ 7 (2007) (“*Tribune Co.*”) (“The requirement of an affidavit or declaration by a resident of the station’s service area who is a regular viewer of the station with personal knowledge of the facts alleged in order to establish standing is unambiguous.”).

¹¹ *See Tribune Co.*, 22 FCC Rcd at 21269, ¶ 7 (“[W]e do not find that standing to file a petition to deny against one application that forms part of a multi-station transaction automatically confers standing to oppose every single application that is part of the transaction[.]”); *In re Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, 7 FCC Rcd 1503, ¶ 4 (1992) (“The petition did not include statements from NAACP members concerning WFPR(AM)/WHMD(FM), Hammond, Louisiana, WCKW(AM), Garyville, Louisiana, and WCKW FM, LaPlace, Louisiana. Accordingly, we find that the petition to deny filed by the NAACP against these stations is insufficient to establish standing[.]”).

factual and other defects, this declaration cannot and does not establish CWA's standing even with respect to the Youngstown stations, let alone the multiple other stations involved in the Transaction.

The MVPD Petitioners similarly allege nothing more than “remote, speculative, conjectural, or hypothetical” risks that the combined company *might* engage in anticompetitive conduct.¹² Cox, in particular, also cannot claim standing to challenge the Transaction outside of the areas where it operates cable systems.¹³ Moreover, the Petitioners “cannot establish standing simply by asserting a role as public ombudsman.”¹⁴ The MVPD Petitions should, therefore, likewise be dismissed for lack of standing.

B. Standard of Review

A party challenging a transfer or assignment application through a petition to deny must first establish a *prima facie* case that grant of the application would be inconsistent with the public interest.¹⁵ The petition “must show the necessary specificity and support; mere

¹² See *Pub. Citizen v. NHTSA*, 489 F.3d 1279, 1293 (D.C. Cir. 2007); see also, e.g., *infra* Section VII; *J. Stewart Bryan III and Media General Communications Holdings, LLC (Transferor), Shareholders or New Young Broadcasting Holding Company, Inc., and its Subsidiaries (Transferor), and Post-Merger Shareholders of Media General, Inc. (Transferee)*, Memorandum Opinion and Order, 28 FCC Rcd 15509, 15518 ¶ 20 (2013) (“*MEG/Young Order*”) (finding an “impl[ication] that grant of [a broadcast] merger may result in higher retransmission fees” to be “speculative”); *High Maintenance Broad., Inc.*, Letter, FCC File No. BALCDT-20120315ADD (Aug. 28, 2012) (“*High Maintenance Letter Order*”) (finding similar claims to be factually unsupported); *Shareholders of AMFM, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 16062, 16077, ¶ 38 (2000) (“Roslin’s bare allegation that Clear Channel could, or would act in an anti-competitive manner in the future is purely speculative and unsupported, and thus is inadequate to establish the requisite injury.”).

¹³ See *supra* note 11.

¹⁴ *KERM, Inc. v. FCC*, 353 F.3d 57, 61 (D.C. Cir. 2004).

¹⁵ See, e.g., *Astroline Communications Co., Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); 47 U.S.C. § 309(d).

conclusory allegations are not sufficient.”¹⁶ Even if a petitioner can satisfy this first step, the Commission must determine whether “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a “substantial and material question of fact” as to whether the grant of the application would serve the public interest.¹⁷

As demonstrated below, despite the Petitioners’ efforts to distract by mischaracterizing facts and rehashing arguments presented in unrelated proceedings, Petitioners do not show, let alone show with specificity and support, that grant of the Applications would be inconsistent with the public interest in any manner whatsoever. Indeed, the Petitioners not only fail to provide any legitimate basis to question the Applicants’ showing that the Transaction complies with all relevant Commission rules and policies and will serve the public interest, but also do not provide a single supported (non-speculative) specific harm to either Petitioners’ or the public’s interest.

III. THE PETITIONERS’ ARGUMENTS ARE UNSUITED TO AN APPLICATION PROCEEDING.

Petitioners’ characterizations of this Transaction as designed to produce a “behemoth” company “of unprecedented size and scope” are not just vastly overstated, they are both legally irrelevant and empirically wrong.¹⁸ The MVPD Petitioners claim that post-Transaction Nexstar will be too big nationally (with Cox claiming Nexstar will be too big within Cox’s footprint) for fair retransmission consent negotiations, and CWA *et al.* claim that Nexstar will be just plain too

¹⁶ *Kola, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 14297, 14305, ¶ 15 (1996) (quoting *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988)).

¹⁷ *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

¹⁸ *See, e.g.*, DISH *et al.* Petition at 2-3; Cox Petition at 1, 6; CWA *et al.* Petition at 3.

big. However, although the Transaction encompasses the acquisition of a number of small and medium market television stations, it fully complies with applicable rules and will not, in fact, produce the largest (or even second or third largest) television company in terms of national reach.¹⁹

Indeed, the Commission has a national cap rule specifically designed to establish what “too big” is²⁰ and, as demonstrated in the Comprehensive Exhibit and further discussed below, the Transaction not only easily complies with that rule as written, but complies with every more

¹⁹ ION Media Networks’ owned stations reach more than 60% of the nation’s television households (without application of the UHF discount), and Tribune Broadcasting Company reaches 44% of the nation’s television households without the UHF discount. *See* BIA/Kelsey TV Database (as of Mar. 27, 2016); Nielsen Local Television Market Universe Estimates, 2015-2016, <http://www.tvb.org/media/file/2015-2016-dma-ranks.pdf> (last visited Mar. 28, 2016); Tribune Media Co. SEC Form 10-K (2015), at 6, 22 <http://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=10779291&type=PDF&symbol=TRCO&companyName=Tribune+Media+Co.&formType=10-K&dateFiled=2016-02-29&cik=0000726513> (“*Tribune 2015 10-K*”). Univision similarly reaches more than 39% of the nation’s television households if the UHF discount is not applied. *See* Univision Holdings, Inc., Amendment No. 5 to SEC Form S-1 (Jan. 12, 2016), at 34, <http://d11ge852tjjqow.cloudfront.net/CIK-0001640579/4e71501a-c145-43d6-9d2c-0f810c02b424.pdf?noexit=true> (“*Univision S-1*”). So, too, does Trinity Broadcasting. *See* Doug Halonen, *Big Owners Worried Over UHF Discount*, TV NewsCheck Focus on Washington (Aug. 21, 2013), <http://www.tvnewscheck.com/article/69860/big-owners-worried-over-uhf-discount>. Other station groups also reach high percentages of the nation’s television households, including CBS, which reports that it reaches 38% of the nation’s households, Sinclair, which reports reaching 37.4%, and Fox, which reports reaching 37.1%, all without application of the UHF discount. *See* CBS Corporation SEC Form 10-K (2015), at I-16, <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzIzMtK5fENoaWxkSUQ9LTF8VHlwZT0z&t=1&cb=635908778558358719> (“*CBS 2015 10-K*”); Sinclair Broadcast Group, Inc. SEC Form 10-K, (2015), at 15, http://sbgi.edgarpro.com/redirect_frames.asp?filename=0000912752%2D16%2D000020%2Etxt&filepath=%5C2016%5C02%5C26%5C&cols=0%2C3%2C4%2C7%2C8&SortBy=receivdate&AD=D&startrec=11&res=10&pdf=0 (“*Sinclair 2015 10-K*”); 21st Century Fox SEC Form 10-K (2015), at 10, www.21cf.com/sites/default/files/uploaded/investors/annual-reports/2015_annual_report.pdf (“*Fox 2015 10-K*”).

²⁰ 47 C.F.R. § 73.3555(e) (expressly permitting a party to own television stations with an aggregate national audience reach up to 39%).

restrictive variation of that rule ever suggested by the agency.²¹ The Applicants have voluntarily agreed to divest stations so that, post-Transaction, Nexstar’s television stations will reach less than 39% of the nation’s television households *without* taking the UHF discount—which remains part of the national television ownership rule today²²—into account.²³ If the UHF discount is applied, post-Transaction Nexstar’s national audience reach would be less than 27%, well below the 39% limit; and factoring in the divestitures, the aggregate audience reach of the combined company will be even lower.²⁴ The Commission has permitted other television broadcasters to exceed these percentages, and there is no rational basis for treating this Transaction differently by setting for hearing (or denying) a transaction that will be in full compliance with the rule.²⁵

Further, Nexstar serves—and will continue to serve—mostly small and medium-sized markets. Post-Transaction Nexstar will own television stations in 20 of the top 50 markets,²⁶

²¹ See Comprehensive Exhibit at 45-46; see also *infra* Section IV.

²² See 47 C.F.R. § 73.3555(e)(2)(i).

²³ See Comprehensive Exhibit at 45-46.

²⁴ See *id.* at 2-3, 45-46.

²⁵ For example, the Commission has approved transactions allowing ION and Tribune to grow larger than post-Transaction Nexstar will be. The Commission is not permitted to disparately treat similarly situated parties. See, e.g., *Indep. Petrol. Ass’n v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996); *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); *Melody Music v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

²⁶ See Nexstar Broadcasting Group, Inc. SEC Form 10-K (2015), at 7-9, http://www.sec.gov/Archives/edgar/data/1142417/000156459016013630/nxst-10k_20151231.htm#Business (“Nexstar 2015 10-K”) (reporting a presence in 6 top 50 markets before any divestitures); Media General, Inc. SEC Form 10-K (2015), at 4-6, http://mediageneral.com/investor/sec/8k/2016/meg201600229_10k.pdf (“MEG 2015 10-K”) (reporting a presence in 15 top 50 markets before any divestitures).

while some of its competitors already far exceed that level.²⁷ In addition, as a matter of overall revenue, post-Transaction Nexstar will be on par with its competitors, but still fall well short of the revenues earned by “behemoth” MVPDs.²⁸

The Petitioners’ emphasis on the total number of stations²⁹ and Big-4 network affiliates³⁰ that the combined company will own is likewise misplaced; neither the Commission nor

²⁷ In the top 50 markets, Tribune has television stations in 26, *see Tribune 2015 10-K* at 10, 11, Sinclair has television stations in 24, *see Sinclair 10-K* at 8, and ION Media Networks has television stations in 39, *see ION Media Networks Owned Stations*, <http://www.ionmedianetworks.com/business/stations> (last visited Apr. 13, 2016) (“ION Station List”). In fact, ION has stations in 26 of the top 30 markets, including every top 20 market. *See ION Station List*. Looking beyond pure-play television broadcasters, the comparison is even starker. CBS Corporation, which owns and operates not only television stations but also the CBS television network and a number of other diversified media businesses, has television stations in 25 of the top 30 markets, including all of the top 20 markets. *See CBS 2015 10-K* at I-12 – I-14. Similarly, 21st Century Fox owns and operates numerous cable networks along with 28 television stations; it has stations in 16 of the top 50 markets, including 9 of the top 10. *See Fox 2015 10-K* at 10. Univision reports owning stations in 22 of the top 30 Hispanic markets and 24 of the top 50 Hispanic markets; in overall DMA rankings, Univision has stations in 22 of the top 50 markets, including every top 10 market and 18 top 30 markets. *See Univision S-1*, at 102-03 (reporting market presence and Hispanic DMA rankings); Nielsen Local Television Market Universe Estimates, 2015-2016, <http://www.tvb.org/media/file/2015-2016-dma-ranks.pdf> (last visited Mar. 28, 2016) (listing overall DMA rankings).

²⁸ The combined Nexstar-MEG total revenues in 2015 were approximately \$2.3 billion. Total revenues for Sinclair Broadcast Group in 2015 were approximately \$2.2 billion, *see Sinclair 2015 10-K* at 33, and operating revenues for Tribune Media Company in 2015 were approximately \$2.0 billion, *see Tribune 2015 10-K* at 54. Tegna, Inc., a multi-media company whose television operations reach nearly one-third of all television households, had net revenue for its television operations of approximately \$1.7 billion, with total overall operating revenue in excess of \$3 billion. *See Tegna, Inc. SEC Form 10-K (2015)*, at 3-4, 64 <http://www.sec.gov/Archives/edgar/data/39899/000003989916000034/tgna-20151231x10k.htm>. In comparison, the revenues for large national MVPDs range from \$6.5 billion net revenues in the case of Cablevision to \$146.8 billion operating revenues in the case of AT&T. *See Cablevision Systems Corp. SEC Form 10-K (2015)* at 31, <http://phx.corporate-ir.net/phoenix.zhtml?c=102703&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdIPTEwNzY5Njc4JkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVEIPTI9FTIRJUkUmc3Vic2lkPTU3>; AT&T Inc. 2015 Annual Report, at 10, http://www.att.com/Investor/ATT_Annual/2015/downloads/att_ar2015_completeannualreport.pdf.

Congress set any limit on the number of such stations or affiliates that a single entity may own nationally. Nor do the Commission's rules support restricting the number of stations that a party can own within a single MVPD's footprint, as Cox suggests they should.³¹ Instead, the national television ownership cap (with which the Transaction fully complies) provides the relevant benchmark against which to measure appropriate national ownership levels.

Putting aside Petitioners' overblown rhetoric regarding the size of the Transaction, the Petitions consist largely of efforts to rehash regulatory and business agendas that are unrelated to this Transaction, are already the subject of pending proceedings in which the Petitioners are participating, and which provide no basis whatsoever to conclude that approval of the Transaction will not serve the public. As Petitioners are well aware, transfer and assignment proceedings are not the proper forum to address industry-wide issues such as the media

²⁹ See, e.g., CWA *et al.* Petition at 3; Cox Petition at 1-2, 4-6, 11-12.

³⁰ See, e.g., CWA *et al.* Petition at 3; Cox Petition at 4-6, 11; DISH *et al.* Petition at 3, 9.

³¹ See, e.g., Cox Petition at 2, 8-11. Indeed, the Commission adopted a regional concentration rule in 1977 and eliminated it in 1984. See *Repeal of the Regional Concentration of Control Provisions of the Commission's Multiple Ownership Rules*, Notice of Proposed Rule Making, 96 FCC 2d 578, 585, 587, ¶¶ 14, 19 (1984) (proposing to repeal the rule because, among other things, it "d[id] not appear to have produced rational results," "impose[d] significant costs on both the public and the broadcast industry," had been "obviated" by "dramatic changes in the telecommunications marketplace" as of 1984, and "restricts various economies of scale inherent in the multiple ownership of stations that, were they available, might actually contribute to diversification of viewpoints"); *Repeal of the Regional Concentration of Control Provisions of the Commission's Multiple Ownership Rules*, Order, 101 FCC 2d 402, 415, ¶ 29 (1984) (repealing rule because "the larger audience and advertising bases available to a multiple owner may enable such an entity to produce or to acquire programming that each station, acting separately, could not," for example, by "facilitat[ing] the creation of a regional newsgathering and public information capability, which could enhance service to the public" and creating "economies" that "may even be sufficient to facilitate the creation of new regional networks, with the resources to provide programming of special regional interest").

ownership and retransmission consent-related matters the Petitions raise, because such issues are better suited to rulemaking.³²

Indeed, as the Supreme Court has observed, “rulemaking is generally a ‘better, fairer, and more effective’ method of implementing new industry-wide policy than is the uneven application of conditions in isolated” licensing decisions.³³ The D.C. Circuit has similarly recognized the impropriety of seeking to apply new requirements within licensing proceedings, highlighting the “arbitrariness of retroactive application and the inherent constraints of the adjudicatory process.”³⁴ Consistent with this precedent, the Commission has a “long . . . practice [of] mak[ing] decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rulemaking proceedings,” rather than in the course of acting on individual applications.³⁵ There is nothing about this Transaction that requires special consideration or

³² See, e.g., *Tribune/Local TV Order*, 28 FCC Rcd at 16856, ¶ 13 n.51 (“The proper forum in which to seek changes in the way the Commission treats SSAs in general is a rulemaking.”); *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16867, 16880, ¶ 31 (2013) (“*Gannett/Belo Order*”) (rejecting calls to address retransmission consent issues raised in an application proceeding, stating that “[w]e decline to address in this licensing order an issue posed in th[e] retransmission consent] rulemaking proceeding, at the behest of parties that petitioned to commence it”); see also, e.g., *High Maintenance Letter Order*, at 2 & n.9 (declining to address arguments regarding retransmission consent reforms in the context of an adjudicatory licensing proceeding); *Acme Television, Inc.*, Letter, 26 FCC Rcd 5189, 5192 (2011) (“*Acme Television Letter Order*”) (same); *Acme Television Licenses of Ohio, LLC*, Letter, 26 FCC Rcd 5198, 5200-01 (2011) (“*Acme Licenses Letter Order*”) (same); *Free State Communications, LLC*, Letter, 26 FCC Rcd 10310, 10312 (2011) (“*Free State Letter Order*”) (same).

³³ *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983).

³⁴ *California Ass’n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 96-97 (D.C. Cir. 1988).

³⁵ *Application of Sunburst Media L.P. (Assignor), and Clear Channel Broadcasting Licenses, Inc. (Assignee) for Assignment of Licenses of Station KSLI(AM), Abilene, Texas et al.*, Memorandum Opinion and Order, 17 FCC Rcd 1366, 1368, ¶ 6 (2002); see, e.g., *Acme Television Letter Order*, 26 FCC Rcd at 5192 (“Issues of broad applicability . . . are more suited to a rule-making than to adjudication, and the Commission has long refused to develop broad

special conditions, let alone the extraordinary remedies of designation for hearing or denial that some of the Petitioners have requested. Accordingly, the Commission should dismiss Petitioners' attack on this Transaction for what it is—nothing more than an improper attempt to convince the Commission to ignore rules that were created through extensive notice and comment rulemaking and are aimed precisely at determining bright lines for what is in the public interest—an end-run around the rulemaking process.

new rules in an adjudicatory context.”); *Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees*, Memorandum Opinion and Order, 21 FCC Rcd 7358, 7364-65, ¶ 15 (2006) (stating that “concerns” raised by petitioner “are more properly addressed in the Commission’s pending . . . rulemaking proceeding,” in which the petitioner “ha[d] raised its concerns and public interest arguments in support of changes to the Commission’s rules and policies”); *Echo Star Communications Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 20559, 20583, ¶ 48 (2002) (in transfer of license proceeding, declining to consider conditions requested by a commenter “that have application on an industry-wide basis”); *Comcast Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23257, ¶ 31 (2002) (“The Commission’s pending rulemaking on cable horizontal ownership is the more appropriate forum for consideration of the potential effects of industry-wide clustering on the distribution of programming by MVPDs to consumers.”); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3183, ¶ 43 (1999) (“We find that digital broadcast signal carriage requirements should be addressed in the Commission’s pending rulemaking proceeding and not here. . . . [T]his is like other cases where the Commission has declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings before the Commission.”); *Spanish Radio Network*, 10 FCC Rcd 9954, 9956, ¶ 9 (1995) (citing *Patteson Brothers, Inc.*, 8 FCC Rcd 7595, 7596, ¶ 6 (1993)) (“Insofar as Miami Petitioners would have the rule recast so as to prohibit broadcast concentration in a market defined by language comprehension, the appropriate course of action is to request that the Commission institute a generic rule making proceeding to change its multiple ownership rules and policies.”); *Morton Jerome Victorson, Bankruptcy Trustee*, 10 FCC Rcd 9499, 9500, ¶ 6 (1995) (“Insofar as Mills is requesting that the Commission consider alternative definitions for determining the relevant market for audience share purposes, the appropriate course of action would be a request for rulemaking.”); *WANV(AM), Waynesboro, VA and WANV-FM, Staunton, VA*, 8 FCC Rcd 8474, 8477 (1993) (“Petitioners’ arguments as to the validity of this procedure amount[] to a request to reconsider the radio ownership rulemaking proceeding and is not appropriate in the context of this case.”).

IV. THE TRANSACTION COMPLIES WITH ALL APPLICABLE COMMISSION RULES.

Contrary to CWA *et al.*'s deliberate misstatement of the information contained in the Comprehensive Exhibit to the Applications,³⁶ the Transaction fully complies with all applicable rules. Indeed, the Comprehensive Exhibit provides a detailed market-by-market showing of the Transaction's compliance with the local television ownership and radio/television cross-ownership rules (subject to certain divestitures and extension of certain satellite exemptions and failing station waivers), as well as the national television ownership cap without taking into consideration the UHF discount.³⁷

Notwithstanding CWA *et al.*'s baseless contention,³⁸ no new duopolies are being created.³⁹ Indeed, in each of the accurately described "Rule-Compliant Duopoly Markets," the two stations that the post-closing company will own are already jointly owned by MEG, and Nexstar owns no stations in these markets. The Commission found these local station

³⁶ See CWA *et al.* Petition at 5 (referring to showings of compliance with all applicable rules as "lame" and "euphemistic"); see also *id.* at 2.

³⁷ See Comprehensive Exhibit at 27-46.

³⁸ See, e.g., CWA *et al.* Petition at 4-5; Cox Petition at 9.

³⁹ In Davenport, Iowa-Rock Island-Moline, Illinois, Nexstar currently owns both WHBF-TV and KGCW pursuant to a failing station waiver, and MEG owns KWQC-TV. The Applicants have committed to divest either WHBF-TV or KWQC-TV, and only in the former case will a renewal of the failing station waiver be required. See Comprehensive Exhibit at 36. In no situation, however, would the Transaction permit Nexstar to own more than two stations in the Davenport, Iowa-Rock Island-Moline, Illinois DMA, as it does today.

combinations to comply with its multiple ownership rules as recently as 2014,⁴⁰ and the merger with Nexstar does not alter these existing combinations.⁴¹

Indeed, *CWA et al.* appear to fundamentally misunderstand the Transaction. As shown in the Comprehensive Exhibit, the Transaction will result in *no* increase in common ownership in *any* local television market.⁴² With the exception of a few overlap markets, the Applicants do not currently operate in the same local markets, and in those few overlap markets, the Applicants have pledged to divest an overlapping station.⁴³ The Commission has long held that a “divestiture pledge removes any concern as to a violation of Section 73.3555 of [its] Rules.”⁴⁴

⁴⁰ *Shareholders of Media General, Inc. and Shareholders of LIN Media, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 14798, 14803, ¶ 9 (2014) (“*MEG/LIN Order*”).

⁴¹ The Applicants included a discussion of the “Rule-Compliant Duopoly Markets” in the Applications because demonstrating such compliance is a requirement of the application forms, not because the parties are out of compliance, are creating new station overlaps, or require a waiver in these markets. It is therefore accurate to refer to these markets as “Rule-Compliant Duopoly Markets”, and this term was in fact used by the FCC itself in describing these exact station combinations in its decision approving the LIN/MEG merger in 2014. *Id.* at 14800, ¶ 5 n.10, 14803, ¶ 9.

⁴² Comprehensive Exhibit at 2 (“No new combination is created in these markets by the proposed merger of the MEG and Nexstar stations.”).

⁴³ *Id.* at 25 (“As noted, the applicants each own stations in several markets where common ownership of the combined stations would exceed the limits imposed by the Duopoly Rule. Accordingly, the applicants have committed to divest one Top Four station in each Overlap Market, as described below, to ensure the post-merger company will comply with the Duopoly Rule.”).

⁴⁴ *Scripps Howard Broadcasting Co.*, 8 FCC Rcd 2326, 2326, ¶ 3 (1993).

Further, contrary to CWA *et al.*'s suggestion,⁴⁵ Nexstar is not taking ownership or control of any radio stations.⁴⁶

Similarly, although CWA *et al.* and Cox imply that the Transaction does not comply with the 39% national television ownership cap,⁴⁷ neither provides any credible explanation as to how this is so. To the contrary, the Comprehensive Exhibit confirms that the Transaction will fully comply with the national television ownership limit, with the Applicants proposing station divestitures to ensure that the combined company's national reach will not exceed 39% without application of the UHF discount.⁴⁸ Indeed, even without these divestitures, the Transaction would easily comply with the national cap if the existing UHF discount were taken into account.⁴⁹ Thus, the Applicants have proposed divestitures such that the post-Transaction company will be a fraction of the size of grandfathered companies whose applications preceded

⁴⁵ CWA *et al.* Petition at 5 (alleging that "Nexstar would also have new radio-television cross-ownerships" in three markets).

⁴⁶ Two members of Nexstar's seven-member board of directors—who have no day-to-day involvement in Nexstar's television stations—are also members of the board of directors of Radio One, Inc. ("Radio One") (which also has seven members), and Radio One owns stations in four MEG markets. Although the Transaction will cause the two overlapping board members to have attributable interests in the MEG television stations already present in the markets, these cross-interests fully comply with the Commission's radio/television cross-ownership rule. *See* Comprehensive Exhibit at 28-30. Moreover, Nexstar's television stations and Radio One's radio stations will continue to be operated in the ordinary course by the respective management teams of both companies. *See* Declaration of Elizabeth Ryder ¶ 3 ("Ryder Dec."). Based on the relevant stations' continued separate ownership and operation by two separate, publicly-traded companies, there will be no diminution of diversity in any of these markets.

⁴⁷ *See, e.g.,* CWA *et al.* Petition at 3, 4; Cox Petition at 2, 9-11.

⁴⁸ *See* Comprehensive Exhibit at 45-46. Applicants will provide the supporting calculations of national ownership compliance in an amendment upon the submission of the various divestiture applications, which will be filed in the near future.

⁴⁹ *See* 47 C.F.R. § 73.3555(e)(2)(i); *see also supra* Section III.

the FCC’s announcement that it might eliminate the UHF discount.⁵⁰ These divestitures may well turn out to be unnecessary and harmful to the post-Transaction company should the FCC ultimately maintain the discount, elect to grandfather post-2013 acquisitions, or adopt a VHF discount as proposed in the 2013 UHF discount Notice of Proposed Rulemaking.⁵¹ As a result, the post-closing company will not only comply with the national cap as in effect today with massive room to spare; it also will comply with the most restrictive *potential* version of the national cap ever proposed. In any event, just as in the local ownership context, the Applicants’ “divestiture pledge removes any concern as to a violation of Section 73.3555 of [the FCC’s] Rules.”⁵²

CWA *et al.* further claim that the Transaction will “make at least 28 television stations unavailable to smaller companies or new entrants.”⁵³ CWA *et al.* provide no explanation of how they arrived at this number or how these “at least 28 stations” would be available to “smaller companies and new entrants” in the absence of the Transaction. There is no such scenario. Moreover, the Communications Act expressly prohibits the Commission from considering this contention; Section 310(d) provides that, in acting upon a transfer or assignment application,

⁵⁰ *In the Matter of Amendment of Section 73.3555(e) of the Commission’s Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 28 FCC Rcd 14324, 14331-32, ¶¶ 18-19 (2013).

⁵¹ Even if the UHF discount is eliminated, the Applicants will likely have over-divested to meet the 39% cap, as the NPRM proposing to eliminate the UHF discount also proposed to replace it with a VHF discount. *See id.* at 14332-33, ¶¶ 22-23. If the UHF discount were replaced with a VHF discount, the post-merger company, without making any divestitures at all, would own stations reaching approximately 38% of national TV households. With the Applicants’ planned divestitures, that percentage drops even further. And, should MEG or Nexstar sell spectrum in the Commission’s ongoing broadcast incentive auction, the post-merger company’s percentage of national TV households could drop further still.

⁵² *Scripps Howard Broadcasting Co.*, 8 FCC Rcd at 2326, ¶ 3.

⁵³ CWA *et al.* Petition at 4.

“the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”⁵⁴ Even if the Commission could consider this argument, due to the divestitures that the Applicants have committed to make, a dozen full-power stations will be sold to new owners, thereby resulting in an *increase* in diversity.⁵⁵

V. BEYOND BEING RULE-COMPLIANT, THE TRANSACTION WILL GENERATE SUBSTANTIAL PUBLIC INTEREST BENEFITS.

In an effort to distract from their inability to present specific allegations of fact sufficient to show that the grant of the Applications would be *prima facie* inconsistent with the public interest, Petitioners assert that in some transactions the Commission has looked beyond compliance with FCC rules and policies to apply a general “public interest” test,⁵⁶ which they claim the Applicants fail to satisfy. However, as even CWA *et al.* acknowledge, decisions on broadcast acquisitions have historically (and still primarily) come down to compliance with media ownership rules and policies.⁵⁷ This is because, in the broadcast context, the Commission

⁵⁴ 47 U.S.C. § 310(d). In the “Avco” policy announced by the Commission in 1945, the Commission proposed to compare the purchasers specified in an assignment application with other possible purchasers. *See Powel Crosley, Jr.*, 11 FCC 3, 12-14 (1945). The Commission abandoned that policy just four years later, *see Amendment of Section 1.321*, 14 Fed. Reg. 3235 (1949), and Congress slammed the door on it by adding the language quoted above to Section 310(d), *see Public Notice of Intent to Sell Broadcast Station*, Report and Order, 43 RR2d 1 n.3 (1978) (“Congress added this language to Section 310 in 1952, because it wished to make sure that the Commission did not reinstate its former ‘Avco’ rule.”).

⁵⁵ *See infra* Section V.

⁵⁶ *See CWA et al.* Petition at 3; *DISH et al.* Petition at 4-6.

⁵⁷ *See CWA et al.* Petition at 3 (“[B]ecause ‘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.’”) (quoting *Gannett/Belo Order*, 28 FCC Rcd at 16876, ¶ 22); *see also Sinclair/Allbritton Order*, 29 FCC Rcd at 9163, ¶ 24. *DISH et al.* rely wholly on decisions outside of the broadcast context. *See DISH et al.* Petition at 4-6.

has in place an extensive array of age-old bright-line rules designed as proxies to address diversity and competition concerns—a regulatory scheme that does not exist in the case of non-broadcast mergers. Indeed, in adopting bright-line standards governing media ownership matters, the Commission’s very goal was to make sure that its rules “are clear to [its] broadcast regulatees, provide reasonable certainty and predictability to allow transactions to be planned, ensure ease of processing, and provide for the reporting of all of the information [it] need[s] in order to make [its] public interest finding with respect to broadcast applications.”⁵⁸ At the end of the day, Petitioners’ purported “public interest” arguments boil down to a desire for more stringent regulation, and the issues they raise are more appropriately addressed in the ongoing rulemaking proceedings concerning such matters.⁵⁹

Moreover, substantial public interest and competitive benefits are readily apparent on the face of the Applications and, prior to the deadline for filing petitions to deny in this proceeding, the Applicants amended the Applications to further expand upon the benefits that will result from the Transaction.⁶⁰ As explained in the revised Comprehensive Exhibit to the Applications, television broadcasters today face ever-increasing competition from other media, including programming networks carried by cable operators and other multichannel video programming distributors, not to mention new digital competitors.⁶¹ Among other benefits, the Applications

⁵⁸ *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd 12559, 12563, ¶ 5 (1999) (quoting *Review of the Commission’s Regulations Governing Attribution of Broadcast Interests*, Notice of Proposed Rulemaking, 10 FCC Rcd 3606, 3610, ¶ 5 (1995)).

⁵⁹ See *supra* Section III; *infra* Section VII.A.

⁶⁰ The Applications were amended, and a revised Comprehensive Exhibit filed, on March 16, 2016.

⁶¹ See Comprehensive Exhibit at 4-5.

demonstrated that the Transaction will produce efficiencies that will be reinvested in programming, enhancing the combined company's ability to provide high-quality local and national programming, including local news.⁶² Indeed, as a result of the Transaction, Nexstar expects to realize more than \$75 million in synergies and efficiencies within the first year after closing.⁶³ In addition, since the combined company's stations will be primarily located in small and mid-sized markets, the public interest will be particularly served by allowing the delivery of innovative new services, including programming made possible by new state capitol-focused news "hubs."⁶⁴ These types of initiatives are generally not economically feasible in small and medium markets due to the significant financial commitments that they require, but the Transaction will create efficiencies that make them possible to sustain.⁶⁵ The Applicants also explained that the merged company will be both (i) a more attractive programming partner to highly-consolidated MVPDs through reduced transaction costs and greater audience reach, and (ii) a more attractive distribution partner to consolidated programming suppliers in an age of rising content costs, allowing it to deliver highly desired programming to viewers.⁶⁶

CWA *et al.* decry a perceived lost opportunity for new entrants to purchase television stations in MEG markets.⁶⁷ However, the Applications plainly demonstrate that there will be myriad opportunities for new entrants in those markets—opportunities that would not exist *but*

⁶² *See id.* at 5-10.

⁶³ *See id.* at 5.

⁶⁴ *See id.* at 9.

⁶⁵ *See id.*

⁶⁶ *See id.* at 10-12.

⁶⁷ *See CWA et al. Petition* at 2, 4.

for the Transaction. First, the Applicants will divest a Top Four station in each of the Overlap Markets, allowing as many as seven new owners to enter the Overlap Markets.⁶⁸ Second, the Applicants will voluntarily over-divest additional stations in *yet more* markets, to comply not only with the current national cap rule, but also with the most restrictive variation of the national cap rule that has ever been suggested to date.⁶⁹ With regard to the national cap divestitures, it should also be noted that these entail the addition of a new entrant purchasing the divested station, and the departure of both MEG and Nexstar from the markets in which the national cap stations are located. Indeed, perhaps the best way of expressing the breadth of opportunity for new entrants that exists solely because of the Transaction is to note that for every 4 ½ MEG full-power TV stations actually acquired by the post-merger company, one station is being sold to a divestiture buyer. In light of that fact, it is hard to imagine why CWA *et al.* would prefer the Commission not approve the Transaction, preventing these opportunities for new entrants from occurring.

In sum, the Applicants have demonstrated that the Transaction complies with all applicable rules, that it will enhance the combined company's ability to compete in the video programming, advertising, and distribution marketplaces, that it will provide public interest benefits in the form of enhanced services to local television viewers, and that it will substantially increase diversity by producing new owners of a dozen full-power television stations.

⁶⁸ See Comprehensive Exhibit at 25.

⁶⁹ *Id.* at 46; see also *supra* Section IV.

VI. THE JSA-RELATED ARGUMENTS SHOULD BE REJECTED.

CWA *et al.* allege that the Applicants’ proposal to continue MEG’s existing joint sales agreements (“JSAs”) in five television markets⁷⁰ (the “Legacy JSAs”) until the 2025 expiration of the congressionally-mandated grandfathering period for such agreements “lacks merit” and reflects an “outrageous position.”⁷¹ Notwithstanding their hyperbole, it is CWA *et al.* that are wrong.

A. By Statute, the Legacy JSAs are Grandfathered Until 2025.

In December 2015, Congress weighed in on the public interest merits of JSAs, determining through legislation that the public interest is served by maintaining existing JSAs through September 30, 2025.⁷² Speaking in unequivocal terms, the statute states that, until September 30, 2025, the Commission’s JSA attribution rules “*shall not apply* to a joint sales agreement . . . that was in effect on March 31, 2014,” and adds that “[a] party to a joint sales agreement that was in effect on March 31, 2014, *shall not be considered to be in violation of the ownership limitations of section 73.3555* of title 47, Code of Federal Regulations, by reason of the application of the rule in Note 2(k)(2) [the JSA attribution rule], as so amended, to the joint sales agreement.”⁷³ The statute does not create an exception to this legislative finding for situations where the JSA is assigned or transferred, and none can be implied.

⁷⁰ The Comprehensive Exhibit to the Applications listed six MEG JSAs in effect at the time of the Applications’ filing. The JSA involving WAGT(TV), Augusta, Georgia, is no longer operational.

⁷¹ CWA *et al.* Petition at 5, 6.

⁷² Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 § 628 (2015) (“*2016 Appropriations Act*”).

⁷³ *Id.* (emphasis added).

Thus, at the explicit direction of Congress, the five Legacy JSAs at issue here do not convey any attributable media interests to MEG now and will not convey any to Nexstar post-Transaction. With specific regard to assignments and transfers, it is important to note that the statute is carefully worded, stating that an “*agreement . . . that was in effect on March 31, 2014*” is what is grandfathered, and not merely those who were *parties* to that agreement on March 31, 2014. To the extent CWA *et al.* seek a different result, their appeals to the Commission are misplaced; Congress has spoken.

In addition to the abundantly clear statutory language, Congress has since reaffirmed in multiple ways its specific intent to preserve grandfathered JSAs through transfers and assignments, including in a recent bipartisan letter to Chairman Wheeler from twelve Senators who helped enact the grandfathering legislation. In this letter, the Senators state that they “are extremely disturbed to learn the FCC is now requiring parties to unwind these agreements in connection with broadcast license transfers,” and caution the FCC that it must not use authority to review such transfers as a backdoor way “to undermine Congress’ clear intent to preserve JSAs that were lawfully executed prior to the FCC’s 2014 rule changes.”⁷⁴ To that end, the *Senate Letter* directs the FCC to “eliminat[e] any conditions imposed on previously approved license transfers that require the termination of JSAs in existence prior to March 31, 2014” and to “respect[] the statutory grandfather of JSAs when evaluating any assignments and license transfers in the future.”⁷⁵

⁷⁴ Letter from Sen. Blunt, Sen. Schumer, Sen. Mikulski, Sen. Gardner, Sen. Durbin, Sen. Boozman, Sen. Johnson, Sen. Gillibrand, Sen. Wicker, Sen. Casey, Sen. Scott, and Sen. Cardin to FCC Chairman Wheeler (Mar. 11, 2016) (“*Senate Letter*”); *see also* John Eggerton, *Senators Slam Wheeler Over Unwinding JSAs*, *Broadcasting & Cable* (Mar. 11, 2016), <http://www.broadcastingcable.com/news/washington/senators-slam-wheeler-over-unwinding-jsas/154569>.

⁷⁵ *Senate Letter* at 1.

Recent congressional appropriations hearings have drawn even sterner statements from members of Congress. To cite but a few examples, Representative Yoder stated during the March 15, 2016 Financial Services and General Government Budget Hearing for the FCC that the statutory language extending JSA grandfathering “didn’t say ‘unless the parties change hands’ or ‘unless the legal entities change’.”⁷⁶ Similarly, Representative Long stated at a March 22, 2016 FCC oversight hearing that “I thought that when Congress passed the law, it would have been the end of the conversation on JSAs, but unfortunately to my surprise, I see the FCC has decided to use the merger process to circumvent our recently passed law.”⁷⁷

Most recently, during the April 5 Senate Appropriations hearing on the FCC budget, Senator Boozman stated:

It’s been troubling to see what appears to be an obvious disregard of the intent of language on joint sales agreements, including last year’s omnibus appropriations bill. At no time was I or my staff informed that the FCC planned to evade the specific language of that provision through the operation of a merger or acquisition. Your agency knew of the significant bipartisan support for that language. . . . Yet, the FCC consciously found a way to write your way out of it. Does Congress again need to work in a bipartisan fashion to close every conceivable JSA loophole or are you convinced of the need to follow Congressional intent?⁷⁸

Later in the hearing Senator Boozman asked the Chairman: “Given the strong bipartisan support and Congress’s clear intent, why are you ignoring these provisions and instead relying on past

⁷⁶ Federal Communications Commission Budget Hearing before the Subcomm. on Financial Services and General Government of the House Comm. on Commerce, 114th Cong. (2016), video available at <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394443>.

⁷⁷ Oversight of the Federal Communications Commission Hearing before the House Comm. on Energy and Commerce Comm, 114th Cong. (2016), video available at <https://energycommerce.house.gov/hearings-and-votes/hearings/oversight-federal-communications-commission-4>.

⁷⁸ FY17 FCC Budget Request Review Hearing before the Senate Subcomm. on Appropriations Financial Services and General Government of the Senate Comm. on Appropriations, 114th Cong. (2016).

precedents at the agency to supersede this law?” After hearing the Chairman’s summary of the agency position on JSAs in transfer/assignment contexts (discussed more fully below), Senator Boozman observed: “Well, we’re the ones that crafted the bill, so I can tell you what our intent was. And it’s not as you perceive it.” Chairman Wheeler appeared to receive this message, observing with a laugh: “[B]elieve me, I’ve heard that now.”⁷⁹ In short, there is no doubt what the plain language of the statute means and what Congress intended the FCC to do (and not do) upon its passage. Each of the Legacy JSAs is “a joint sales agreement . . . that was in effect on March 31, 2014.”⁸⁰

In addition, the statute provides that “[a] party to a joint sales agreement that was in effect on March 31, 2014, shall not be considered to be in violation of the ownership limitations of section 73.3555”⁸¹ This language exempts from the JSA attribution rule “[a] party” to a pre-2014 JSA, and not just “the original parties” to it. At what point a buyer becomes a party to a grandfathered JSA is irrelevant. The statute is clear and CWA *et al.* merely choose to ignore it, making the false and irrelevant statement that the statute “has not changed the Commission’s regulations, including the fact that ownership of the affected stations is attributable to a party which provides 15% or more of a second station’s *programming*.”⁸² By statute, the Legacy JSAs are grandfathered until 2025, and the Transaction does not alter that fact.

⁷⁹ *Id.*

⁸⁰ 2016 Appropriations Act, § 628.

⁸¹ *Id.* (emphasis added).

⁸² CWA *et al.* Petition at 5-6.

B. The Commission’s Unofficial Position on JSA Grandfathering Is Flawed.

Neither the Commission nor its delegated authorities have thus far set forth, in any formal, published, adjudicatory or rulemaking context, an explanation of how the agency’s apparent position on JSA grandfathering in the context of assignments and transfers squares with the grandfathering provision of the *2016 Appropriations Act*. Indeed, Congress’s upbraiding of the Commission in recent weeks on its disregard of the statutory JSA grandfathering appears to have arisen from a February 2016 Media Bureau Order that approved Gray Television’s acquisition of Schurz Communications, Inc.’s television stations while requiring termination of JSAs under which Schurz provided or received sales services.⁸³

Notably, the Media Bureau made no attempt in its decision to explain how its JSA conditions accorded with the *2016 Appropriations Act*, but relied upon its perception that “Gray acknowledges that the ‘grandfathering’ afforded to such JSAs in effect on March 31, 2014, would be terminated by the station’s assignment . . .,” and then proceeded to its decision based purely on that “acknowledge[ment].”⁸⁴ During a March 15, 2016 FCC budget oversight hearing before the House Appropriations Subcommittee on Financial Services and General Government, Chairman Wheeler essentially confirmed that the agency’s position on JSA grandfathering in transactions was not based upon any independent legal analysis performed outside the specific context of that transaction.⁸⁵ As a result, the most comprehensive explanation of the

⁸³ See *Schurz Communications, Inc.*, DA 16-154, 2016 WL 561930 (Feb. 12, 2016).

⁸⁴ *Id.* at 2 (citing *2016 Appropriations Act*).

⁸⁵ At the March 15, 2016 hearing, Chairman Wheeler explained that “I guess I just agree with Gray—Gray Broadcasting—who was involved in this transaction, who filed with us and said ‘the new law does not automatically grandfather the KDCU-TV JSA because Gray was not a party to the KDCU JSA, or any other JSA that was in effect.’” Financial Services and General Government, Budget Hearing – FCC (Mar. 15, 2016), video available at <http://appropriations.house.gov/calendar/eventsingle.aspx?EventID=394443>.

Commission's position is found in Chairman Wheeler's response to the *Senate Letter*, which summarizes the agency's position as follows:

When a license is sold, however, a new license is issued to a new owner. The former licensee of the station, who was the party to the original JSA, no longer has an interest in the license. The new licensee of the station is not a party to the original JSA, and any resulting new JSA was not "in effect on March 31, 2014." Therefore, there is nothing to grandfather.⁸⁶

At the outset, it should be noted that there is no connection between a station's FCC license and a contract relating to that station. In fact, a party to a JSA will frequently be an entirely different entity from the one that holds a station's license, usually because of lender covenants that require the license be held separately. Thus, whether the licensee company has a "new" license upon assignment (a dubious proposition, as shown below) is irrelevant to a station's contracts, including its syndication agreements, network affiliation contracts, tower leases, etc., all of which ordinarily survive an assignment or transfer if the station is being sold as a going concern. Contracts are tied to the entities entering into them, not to FCC licenses. The claimed issuance of a new FCC license would therefore leave unchanged the fact that the station buyer is becoming "a party to a joint sales agreement that was in effect on March 31, 2014," and is subject to the congressional directive that the agreement be grandfathered until 2025.

In any event, the assertion that a new license is issued upon grant of a transfer or assignment application is contrary to the Commission's own precedent. Nexstar and MEG have been parties to many broadcast transactions, and their FCC counsel have been involved in many more. In their collective experience, it has never been the practice of the Media Bureau to issue a new license upon consummation of a broadcast assignment or transfer. In fact, the Media Bureau has, even when requested, routinely refused to issue a new *copy* of the license reflecting

⁸⁶ Letters from Chairman Wheeler to Sen. Blunt, *et al.* (Mar. 15, 2016), at 1.

the assignee as the licensee. Instead, applicants receive a Form 732, a form which indicates only that the FCC has approved a proposed transaction, and which explicitly requires in the case of assignments that “[u]pon consummation *the assignor must deliver the permit/license, including any modifications thereof to the assignee.*”⁸⁷ Moreover, closing documents in broadcast assignment transactions customarily include assignments of the FCC licenses of the stations being sold from the seller to the buyer. This would be a meaningless and unnecessary action if the FCC issued “new licenses” to assignees.

The Commission itself has in fact “reject[ed] the notion that a license assignment should be treated as synonymous to an initial grant or a license renewal”⁸⁸ in response to an applicant arguing that the Commission violated the Administrative Procedure Act in failing to do so. When a proposed assignee argued “that the Commission erred in not treating his assignment application . . . as a ‘new’ application for the facilities associated with the expired license,” the Commission found his arguments “to be misplaced.”⁸⁹ The Commission’s decision was subsequently upheld by the U.S. Court of Appeals for the D.C. Circuit, which explained that “applications for license renewals and new licenses . . . *are distinct from applications for license assignments.*”⁹⁰

⁸⁷ FCC Form 732 (emphasis added). This is consistent with the underlying forms for seeking Commission approval of an assignment/transfer (FCC Forms 314 and 315) which are titled an “Application for Consent to *Assignment* of Broadcast Station . . . License” and “Application for Consent to *Transfer* Control of Entity Holding . . . License” (emphasis added). There is no reference in either to terminating the old license and seeking issuance of a new one.

⁸⁸ *Application for Consent to Assign the License for Conventional SMR Station WNXR890, Newbury Park, California*, 18 FCC Rcd 7585, 7587, ¶ 6 (2003).

⁸⁹ *In Re Application of Kay*, 16 FCC Rcd 20183, 20183-84, ¶ 6 (2001).

⁹⁰ *Kay v. FCC*, 525 F.3d 1277, 1279 (D.C. Cir. 2008) (rejecting applicant’s argument that there is “no significant difference between an assignment of license application and an application for a new license,” and noting that the applicant “did not apply for ‘a renewal or a new license.’”

Moreover, the Transaction before the Commission here is a *merger* involving Nexstar's acquisition of MEG's stock. Of the 68 full-power television licenses and additional dozens of low-power and television translator station licenses covered in the Applications, all but two full-power and two low-power licenses are the subjects of FCC Form 315 transfer of control applications. The remaining four licenses are held by a MEG subsidiary that will ultimately be merged into a Nexstar entity, with the Nexstar entity being the surviving company. As the FCC's application forms do not provide for that option, the Applicants filed for approval of this portion of the merger on an FCC Form 314, which permits specifying a different name for the surviving entity licensee. There will be no "new licensees" to which "new licenses" need to be issued. Thus, not only is the agency's "new license" justification fatuous in an assignment context, it is non-existent in the transfer of control context of a merger.

Yet another flawed aspect of the Commission's response to the *Senate Letter* is the notion that since "[t]he new licensee of the station is not a party to the original JSA . . . , any resulting new JSA was not 'in effect on March 31, 2014.'" That assertion ignores fundamental contract law, which holds that "[t]he transfer of a contract right is not a contract. It is called an *assignment*."⁹¹ Unlike a novation, where new consideration is required and a new obligation is created, "[a]n assignment does not modify the terms of the underlying contract. It is a separate agreement between the assignor and the assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party charged. . . . Insofar as an assignment

Rather, he is a potential assignee who applied for assignments of *existing* licenses.") (emphasis added).

⁹¹ 9 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 47.1 (rev. ed., 2007) (emphasis added).

touches on the obligations of the other party to the underlying contract, the assignee simply moves into the shoes of the assignor.”⁹²

An assignment of a JSA therefore does not create a new agreement, but instead, as a matter of basic contract law, merely continues an existing agreement that must now be performed by the assignee. The assertion that an assignment creates a “new JSA” has no basis in contract law, and the *2016 Appropriations Act* authorizes no exceptions to grandfathering merely because a JSA has been assigned or transferred.⁹³ As a result, *CWA et al.*’s assertion that

⁹² *Medtronic AVE Inc. v. Advanced Cardiovascular Sys.*, 247 F.3d 44, 60 (3d Cir. 2001) (citing *Citibank, N.A. v. Tele/Res., Inc.*, 724 F.2d 266, 269 (2d Cir.1983) (“[A]n assignment is intended to change only who performs an obligation, not the obligation to be performed.”)).

⁹³ While the Commission’s response to the *Senate Letter* also discusses how the FCC has handled grandfathering under its own rules, that is of course irrelevant in the face of a statutory directive on grandfathering from Congress. In any event, the non-transferability of grandfathered interests is *not* an “established policy” of the FCC, as claimed by *CWA et al.* *CWA et al.* Petition at 6. Rather, the FCC has varied in its treatment of grandfathered interests, and for this reason has explicitly stated in its rulemakings if it intends to impose limitations on transferability. For example, when the FCC decided to attribute television local marketing agreements (“LMAs”) in 1999, it decided to grandfather all TV LMAs entered into prior to November 5, 1996, but to grandfather existing radio LMAs on a case-by-case basis. *Compare Attribution of Broadcast and Cable/ MDS Interests*, 14 FCC Rcd 12559, 12601, ¶ 91 (1999), with *Local Television Ownership Rules*, 14 FCC Rcd 12903, 12965, ¶ 146 (1999). At that time, the FCC also concluded that while grandfathered radio LMAs could not be transferred or renewed, grandfathered TV LMAs “may continue in full force and effect, and may also be transferred and renewed by the parties.” *Local Television Ownership Rules*, 14 FCC Rcd at 12965, ¶ 146. If “precedent” is at all relevant to how the Commission should treat the Legacy JSAs (which the Applicants, as discussed above, believe it is not), the guiding “precedent” should be the Commission’s treatment of pre-November 5, 1996 television LMAs, another type of sharing agreement between television broadcasters. Regardless, when the FCC later issued its Radio JSA Attribution Order, it explicitly stated that JSAs between radio broadcasters would lose their grandfathered status upon transfer or assignment. *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13746, ¶ 325 (2003), *aff’d in part, remanded in part sub nom. Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005) (“[I]f 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 any of our ownership limits; the JSA must be terminated at the time of the sale of the stations.”). It is therefore telling (but now irrelevant given subsequent congressional action), that the FCC did not

continuation of the Legacy JSAs is impermissible is incorrect. In fact, *restricting* their continuation would be impermissible under the plain language of the statute.

C. Even the Narrow View of Grandfathering Presented in the Commission’s Response to the *Senate Letter* Requires Grandfathering of the Legacy JSAs.

Fortunately, to approve the Transaction here, the Commission need not choose between the plain language interpretation of the grandfathering statute and the narrower view presented in its response to the *Senate Letter*. Specifically, that response stated:

When a license is sold, however, a new license is issued to a new owner. *The former licensee of the station, who was the party to the original JSA, no longer has an interest in the license.* The new licensee of the station is not a party to the original JSA, and any resulting new JSA was not “in effect on March 31, 2014.” Therefore, there is nothing to grandfather.⁹⁴

As the italicized language indicates, even this narrow view recognizes that JSA grandfathering continues unless “the party to the original JSA[] no longer has an interest in the license.” That will not be the case in the proposed Transaction, which involves a merger. The licensees of the stations receiving services under all of the Legacy JSAs will remain unchanged and, as detailed in the Comprehensive Exhibit to the Applications, the existing shareholders of MEG will continue to have an interest in the post-merger company, owning 33.4% of the post-merger company.

Chairman Wheeler reiterated the importance of this key factor in his recent testimony at the Senate appropriations hearing:

include any transfer restrictions upon grandfathered TV JSAs when announcing the grandfathering of such JSAs. *2014 Quadrennial Regulatory Review — Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 4371, 4532-43, ¶¶ 349-67 (2014).

⁹⁴ Letters from Chairman Wheeler to Sen. Blunt, *et al.* (Mar. 15, 2016), at 1 (emphasis added).

When a license transfers—is sold—it takes on a new owner and becomes a new license. All of our precedents, broadcast television, radio, have always held that. I was concerned about this so I went to the language that you all enacted last year, and it says “a party to a joint sales agreement that was in effect on March 31 etc. etc. shall not be considered to be in violation of the ownership limitations. *When a sale takes place, that party goes away. And a new party comes in.*”⁹⁵

In the proposed merger, the MEG shareholders are not “going away,” and the MEG companies will become subsidiaries of the post-merger company in which the MEG shareholders will hold 33.4% of the shares. As a result, the Transaction does not fall into even the hypothetical exception to congressional grandfathering posited by the Commission in response to congressional inquiries. For this additional reason, the Legacy JSAs are merely one more set of contracts, like tower leases or program contracts, which are incidental to the merger, and require no consideration by the Commission in processing the Applications. Under any reasonable interpretation of the congressional provisions governing grandfathering, the Legacy JSAs are grandfathered through 2025.

D. Were Grandfathering of the Legacy JSAs Not Statutorily Mandated, a Waiver to Permit Their Continuation Would Clearly Be in the Public Interest.

Of course, even if the Legacy JSAs were not grandfathered by statute, their grandfathering is demonstrably in the public interest and would merit any necessary waivers to permit their continuation in the post-merger company. In the *MEG/LIN Order*, which involved the merger of MEG and LIN Media, LLC (“LIN”) (and was issued prior to the *2016 Appropriations Act*), the FCC explained that “[i]n order to facilitate large multi-station transactions the Commission has previously found that temporary waiver of its ownership rules is appropriate so long as such waiver does not undermine the underlying goals of the

⁹⁵ Review of the FY17 FCC Budget Request Hearing before the Subcomm. on Financial Services and General Government of the Senate Comm. on Appropriations, 114th Cong. (2016).

Commission’s ownership rules: competition, localism, and diversity.”⁹⁶ With respect to LIN’s JSAs in three markets (Youngstown, Dayton, and Topeka) being assumed by MEG, the Commission found that “providing a temporary waiver to facilitate this large multi-station transaction outweighs any potential harm that may result from continuation of three attributable ‘legacy’ JSAs for the remainder of the compliance period already adopted by the Commission in the 2014 Quadrennial Review Order and extended by Congress”⁹⁷—which at that time was December 19, 2016.

The Commission’s logic in granting a waiver in the *MEG/LIN Order* carries even more weight here, as the Legacy JSAs are incidental to a much larger transaction than that in the MEG/LIN merger, and the facts are otherwise similar in this merger. As was the case in the *MEG/LIN Order*, no new JSAs are proposed, and roughly twice as many opportunities for new entrants will be created by divestitures here. Given not just the similarities of this Transaction to the LIN/MEG merger, but the substantially identical affected stations and facts, it would be difficult to justify a different treatment for this transaction.⁹⁸ Indeed, all five of the Legacy JSAs here were also subject to applications approved in the *MEG/LIN Order* (three by long form applications, two by pro forma applications), are the exact same agreements that the FCC permitted to continue post-merger in the *MEG/LIN Order*, and nothing has changed that would justify denial of a waiver here, particularly in light of Congress’s subsequent affirmation of the public interest benefits of JSAs through the *2016 Appropriations Act*.

⁹⁶ *MEG/LIN Order*, 29 FCC Rcd at 14805, ¶ 14.

⁹⁷ *Id.* at 14805, ¶ 15.

⁹⁸ *See Melody Music, Inc. v. FCC*, 345 F.2d 730 (1965).

Thus, not only does the present Transaction involve a small number of Legacy JSAs, but those JSAs represent an even smaller proportion of the post-merger company's stations than was the case in the *MEG/LIN Order*. As a result, they are just an “incidental aspect of a large, multi-station, multi-market transaction.”⁹⁹ To the extent a waiver is required, the FCC should, consistent with precedent, grant a temporary waiver of its rules to permit the continuance of the Legacy JSAs “for the remainder of the compliance period already adopted by the Commission in the 2014 Quadrennial Review Order and extended by Congress.”¹⁰⁰

VII. THE RETRANSMISSION CONSENT-RELATED ARGUMENTS SHOULD BE REJECTED.

The MVPD Petitions are nothing more than gratuitous attempts to cajole the Commission into adopting unnecessary and restrictive regulations to be imposed only on a single broadcaster outside of the pending rulemaking proceedings in which the MVPD Petitioners have been active participants.¹⁰¹ The Commission consistently has rebuffed prior efforts to inject rulemaking

⁹⁹ *MEG/LIN Order*, 29 FCC Rcd at 14805, ¶ 15.

¹⁰⁰ *Id.*

¹⁰¹ *See e.g.*, Comments of American Cable Association, MB Docket No. 15-216 (Dec. 1, 2015) (“ACA 2015 Retrans Comments”); Reply Comments of American Cable Association, MB Docket No. 15-216 (Jan. 14, 2016) (“ACA 2016 Retrans Reply”); Reply Comments of DISH Network L.L.C., MB Docket No. 15-216 (Jan. 14, 2016) (“DISH 2016 Retrans Reply”); Comments of ITTA, MB Docket No. 15-216 (Dec. 1, 2015) (“ITTA 2015 Retrans Comments”); Comments of Cox Enterprises, Inc., MB Docket No. 15-216 (Dec. 1, 2015) (Cox 2015 Retrans Comments”); Comments of American Cable Association, MB Docket No. 10-71 (May 27, 2011) (“ACA 2011 Retrans Comments”); Reply Comments of American Cable Association, MB Docket No. 10-71 (June 28, 2011) (“ACA 2011 Retrans Reply”); Comments of DISH Network L.L.C., MB Docket No. 10-71 (May 27, 2011) (“DISH 2011 Retrans Comments”); Reply Comments of DISH Network L.L.C., MB Docket No. 10-71 (June 27, 2011) (“DISH 2011 Retrans Reply”); Comments of ITTA, *et al.*, MB Docket No. 10-71 (May 27, 2011) (“ITTA 2-11 Retrans Comments”); Comments of Cox Enterprises, Inc., MB Docket No. 10-71 (May 27, 2011) (“Cox 2011 Retrans Comments”).

concerns into a transactional proceeding, and it should do so here.¹⁰² However, even if the Commission were to entertain their arguments, the MVPD Petitioners have not identified any harms specific to *this* Transaction—instead presenting arguments that are speculative, exaggerated, and grounded in falsehoods.

A. The MVPD Petitions Merely Repeat Arguments From Pending Rulemaking Proceedings Which Are Not Proper for Consideration in an Individual Transaction.

The MVPD Petitioners essentially are asking the Commission to prejudge the outcome of its pending “totality of the circumstances” and other retransmission consent proceedings to apply restrictions (that the Commission may never adopt generally) to post-Transaction Nexstar alone. The MVPD Petitioners are not arguing that the proposed Transaction violates (or will cause Nexstar to violate) any existing Commission rule; rather, they simply recast their rulemaking arguments as notional “transaction-specific” harms.

The MVPD Petitioners’ proposed remedies to these speculative harms are merely repetitive demands for actions the Commission has previously determined it has no authority to adopt or otherwise has declined to adopt in a rulemaking proceeding. For example, DISH *et al.* ask the Commission to: (1) provide MVPDs with the unilateral ability to strip Nexstar of its statutory right to grant retransmission consent by forcing it into binding arbitration; (2) require Nexstar to grant retransmission consent during the pendency of MVPD-compelled arbitration proceedings; and (3) prohibit Nexstar from enforcing mutually negotiated (and reciprocal) provisions addressing the terms of retransmission consent for after-acquired properties.¹⁰³ Not coincidentally, one or more of the MVPD Petitioners have argued for each of these proposals in

¹⁰² See *supra* Section III and notes 32-35; see also *infra* Section VII.A.

¹⁰³ See DISH *et al.* Petition at 14.

the pending retransmission consent proceedings.¹⁰⁴ Cox also utilizes this opportunity to reiterate its request, made previously in the rulemaking context, for mandatory, FCC-governed mediation.¹⁰⁵

Setting aside the question of whether the Commission has the authority to impose the conditions requested, the Commission repeatedly has rejected similar calls to discriminate against rule-compliant transactions by prematurely applying pending rulemaking proposals put forth by self-interested parties. For example, when The Walt Disney Company applied to acquire Capital Cities/ABC, Inc. and its affiliates, the Small Business and Cable Association (predecessor to Petitioner ACA) petitioned to deny the transfer applications, contending that “post-merger Disney will wield considerable market power that will enable it to impose even greater burdens on small operators during the next round of retransmission consent negotiations.”¹⁰⁶ In response, the Commission declared that “[t]he Commission’s transfer and assignment process is not the appropriate forum to consider changes in its rules.”¹⁰⁷

¹⁰⁴ See ITTA 2011 Retrans Comments at 13 & n.43 (advocating for binding arbitration); DISH 2011 Retrans Comments at 21 (advocating for “‘baseball-style’ mandatory arbitration”); ACA 2015 Retrans Comments at 8 & n.20 (urging the FCC to impose interim carriage provisions); ACA 2016 Retrans Reply at 9-10 (supporting mandatory interim carriage); ACA 2011 Retrans Comments at 71-76 (urging the FCC to mandate interim carriage during disputes); DISH 2011 Retrans Reply at 3 (supporting mandatory interim carriage and mandatory arbitration); ITTA 2011 Retrans Comments at 24 (supporting interim carriage during dispute resolution proceedings); ACA 2015 Retrans Comments at 73 (arguing that “[i]n many cases, the broadcasters’ after acquired broadcast stations provisions require the operator to pay higher rates than the operator had previously negotiated with the after-acquired station”); ACA 2016 Retrans Reply at 80-82 (arguing that after-acquired clauses require higher prices).

¹⁰⁵ See Cox Petition at 13-15; Cox 2011 Retrans Comments at 4-7 (describing proposed FCC-governed mediation)

¹⁰⁶ See *Applications of Capital Cities/ABC, Inc. (Transferor) & The Walt Disney Co. (Transferee)*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5856, ¶ 16 (1996).

¹⁰⁷ *Id.* at 5861, ¶ 27.

In numerous transactions since, the Commission has rebuffed efforts by the MVPD Petitioners and other MVPDs to shift the balance in retransmission consent negotiations under the guise of a public interest determination where, as here, the proposed transactions did not violate any rules and the claimed harms were speculative.¹⁰⁸ The MVPD Petitioners fail to even acknowledge the overwhelming precedent against their attempt to impose rulemaking conditions on this Transaction, much less offer any basis for the Commission to depart from that precedent here. As in prior cases, “it is apparent that [the MVPD Petitioners’] real concern is [their] desire for reformation of the must-carry and retransmission consent process”¹⁰⁹ and that “rulemaking proceedings are the proper forum for consideration of the issues raised.”¹¹⁰

¹⁰⁸ See e.g., *Gannett/Belo Order*, 28 FCC Rcd at 16880, ¶ 31 (denying petitions where “MVPD Petitioners fail to demonstrate that the proposed assignments and related cooperative agreements violate our rules or our policies as embodied in precedent”); *Affiliated Media, Inc. FCC Trust, et al.*, Memorandum Opinion and Order, 28 FCC Rcd 14873, 14877, ¶ 11 (2013) (finding “that the Applications do not propose a transaction that would violate any Commission[] rule or policy, and that the objections advanced by its proponents are more appropriate for industry-wide proceedings, are unsupported, or are otherwise speculative with regard to future harms.”); *MEG/Young Order*, 28 FCC Rcd at 15518, ¶ 20-21 (calling claim that transaction will increase retransmission consent fees “speculative and . . . improper in the context of this adjudicatory proceeding” and stating that it “will not take action in the context of this limited proceeding that will pre-judge the outcome of another proceeding pending before us”); *Acme Television Letter Order*, 26 FCC Rcd at 5191 (refusing to impose conditions where “TWC has not argued that any supposedly increased bargaining position that it contends would be gained by the combined stations violates our rules”); *Acme Licenses Letter Order*, 26 FCC Rcd at 5200 (denying petition where “TWC makes no effort, beyond its generalized arguments, to demonstrate that the proposed assignment and related cooperative agreements violate our rules and precedent”); *Free State Letter Order*, 26 FCC Rcd at 10312 (“We will not address here the substance of the Retransmission Consent Proceeding, and we decline to reach a decision that would effectively pre-judge the outcome of a pending rulemaking in favor of one of the parties that petitioned to commence it.”).

¹⁰⁹ *Acme Licenses Letter Order*, 26 FCC Rcd at 5200.

¹¹⁰ *High Maintenance Letter Order* at 2.

B. The MVPD Petitioners' Concerns About Retransmission Fees and Impasses Are Speculative and Exaggerated.

Not only do the MVPD Petitioners fail to identify any rule that the proposed Transaction violates, but they offer no evidence that a grant of the Applications will result in increased fees for consumers or cause any other actual “harms.” The gist of the MVPD Petitioners’ arguments is that by owning additional stations, Nexstar may be able to obtain higher retransmission consent fees.¹¹¹ Compensating broadcasters for the value that they deliver to viewers, however, is not against the public interest, and is a market driver for those broadcasters to increase the value they bring to viewers, benefitting both MVPD subscribers and over-the-air viewers.¹¹² Furthermore, the MVPD Petitioners’ arguments are speculative and misleading (or just plain factually incorrect), and, under established precedent, the hypothetical notion that a specific transaction will alter retransmission consent negotiations in a manner that causes consumer harm is not properly considered in an adjudicatory proceeding such as this one.¹¹³

The MVPD Petitioners, which include DISH and Cox, the nation’s third and seventh largest MVPDs, respectively,¹¹⁴ do not identify any specific basis for their contention that the Transaction will shift bargaining power in a way that will lead to retransmission consent fees that

¹¹¹ See DISH *et al.* Petition at 3, 10-12; Cox Petition at 6-12.

¹¹² See 138 Cong. Rec. H8649-05 (daily ed. Sept. 17, 1992) (statement of Rep. Markey) (“If they have to . . . pay some of these other channels a little less in order to get revenues over to Channel 4, 5, 7, and 9 so that the local children’s programming, the local news and public affairs programming that the rest of us watch on free television is there, fine.”).

¹¹³ See *MEG/Young Order*, 28 FCC Rcd at 15517, ¶ 20 (finding that claim by DISH that grant of the merger may result in higher retransmission fees is “speculative” and “improper in the context of this adjudicatory proceeding”); *Acme Television Letter Order*, 26 FCC Rcd at 5200 (rejecting as “speculative” concerns that broadcaster will “gain bargaining leverage” and “garner higher carriage fees as a result”).

¹¹⁴ See Industry Data, National Cable & Telecommunications Association, <https://www.ncta.com/industry-data> (last visited Mar. 30, 2016).

reflect anything other than the market value of the programming aired on Nexstar's stations. Indeed, the MVPD Petitions are premised on many of the same exaggerated claims about retransmission consent negotiations that MVPD interests have repeated in numerous rulemaking and adjudicatory proceedings. These claims were untrue and misleading then, and they remain untrue and misleading today. For example, DISH *et al.* cite to the oft-repeated MVPD claim that retransmission consent fees have increased by “more than 22,000 percent since 2005.”¹¹⁵ In 2005, however, it was a novel concept for broadcasters to receive *any* cash compensation for their valuable programming, and few broadcasters received monetary payments in exchange for retransmission consent. In real dollars, retransmission fees for broadcasters remain grossly below the value that broadcasters deliver. Although broadcast programming accounts for 47 of the 50 highest-rated television series,¹¹⁶ the retransmission fees received by broadcasters account for just 3% of MVPDs' total programming costs and 2% of their revenues.¹¹⁷ In addition, and notwithstanding the MVPD Petitioners' attempts to advance their own self-interests in the name of “consumer protection,”¹¹⁸ the Commission consistently has recognized that there is no direct

¹¹⁵ DISH *et al.* Petition at 6.

¹¹⁶ See Comments of Media General, Inc., MB Docket No. 15-216 (Dec. 1, 2015) (“MEG 2015 Retrans Comments”) (citing TV Insider, *These are the 50 Most-Watched TV Shows of the 2014-15 Season*, at <http://www.tvinsider.com/article/1989/top-50-tv-shows-2014-2015-highest-rated-winners-and-losers/>).

¹¹⁷ See Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216 (Dec. 1, 2015) (“Nexstar 2015 Retrans Comments”) (citing Harvey Haney, *Repeal Satellite Television Law*, The Technology Liberation Front, Mar. 4, 2014, <https://techliberation.com/2014/03/04/repeal-satellite-television-law/>).

¹¹⁸ See DISH *et al.* Petition at 3, 6-8, 10, 15; Cox Petition at 2, 11-13.

correlation between retransmission consent fees and consumer prices for video programming service.¹¹⁹

Equally untrue is the MVPD Petitioners' assertion that there is an "alarming propensity" for Nexstar to use consumers as pawns in its post-Transaction negotiations.¹²⁰ Because DISH *et al.* have no evidence whatsoever to support their speculative claims of imminent blackouts as a result of this Transaction, they merely cite to an exaggerated contention by the American Television Alliance that "in 2015, broadcasters blacked out their programming nearly 200 times."¹²¹ However, as Nexstar previously has pointed out, this number is vastly overstated because it counts disputes between a single broadcaster and a single MVPD as multiple disputes based on the number of stations owned by the broadcaster: "Looking at the ATVA reported disputes between a single broadcaster and a single MVPD for 2015, the number of impasses is only 28 (not 200) or less than 0.2 percent of all agreements negotiated in the three year period covering 2013-2015."¹²² More importantly, not a single one of those impasses involved

¹¹⁹ *In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, 10330, ¶ 3, n.21 (2015) ("We acknowledge that MVPDs are not required to pass through any savings derived from lower retransmission consent fees and that any reductions in those fees thus might not translate to lower consumer prices for video programming service."); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Report & Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3363, ¶ 17 (2014) ("Cable operators are not required to pass through any savings derived from lower retransmission consent fees, and fee increases resulting from joint negotiation may not compare in magnitude to other costs that MVPDs incur.").

¹²⁰ DISH *et al.* Petition at 13. Although Nexstar (like most other broadcasters and MVPDs) has had a small handful of negotiations in the last ten years go right up to the wire, the majority of its negotiations have been completed in advance of the expiration time.

¹²¹ DISH *et al.* Petition at 6.

¹²² Nexstar 2015 Retrans Comments at 5-6 (citing ATVA Blackout List 2010-2015).

Nexstar,¹²³ rendering the figure wholly irrelevant to the Commission’s consideration of this Transaction.

As to Nexstar’s and MEG’s alleged “history of causing blackouts,” before pointing the finger at others, the MVPD Petitioners should make sure their own hands are clean. Of the aforementioned 28 impasses in 2015, nearly half (13) involved DISH.¹²⁴ Cox, for its part, has dropped local stations due to retransmission disputes five times since 2012.¹²⁵ Nexstar, meanwhile, has negotiated thousands of retransmission consent agreements with only a single material service interruption since 2006—its recent dispute with Cox—related to a carriage agreement.¹²⁶

Although Nexstar’s preference is not to comment publicly on the specifics of any retransmission negotiation, since Cox has not just raised the matter, but also mischaracterized the parties’ actual negotiations, Nexstar will comment here for the limited purpose of responding to

¹²³ See Ryder Dec. ¶ 4.

¹²⁴ Nexstar 2015 Retrans Comments at 5-6 (citing ATVA Blackout List 2010-2015).

¹²⁵ *Nexstar Broadcasting Statement on Cox Communications’ Action to Drop Network and Local Community Programming in Nine Markets* (Jan. 30, 2016), available at http://www.nexstar.tv/story/d/story/nexstar-broadcasting-statement-on-cox-communicatio/57989/RjD0J2RSbkO8oleGm_-Jwg.

¹²⁶ *Id.* The claim by DISH *et al.* that “in 2013, Nexstar pulled its signal for MTC Cable subscribers in Binghamton New York for 17 days” is simply wrong. See Ryder Dec. ¶ 5. The MTC Cable systems at issue are on the outskirts of the Binghamton Designated Market Area, and MTC made a business decision to carry the ABC and NBC stations from New York City rather than pay Nexstar fair value for its Binghamton stations. See *id.* In short, Nexstar did not “pull” its Binghamton signals from MTC; rather, MTC abandoned negotiations with Nexstar and, as of the date hereof, has not elected to negotiate for retransmission of Nexstar’s stations. See *id.* Nexstar presumes that—notwithstanding DISH *et al.*’s statement to the contrary—MTC Cable did not recommence carriage of its stations after 17 days without an agreement in place. See *id.* Moreover, in the event MTC Cable would like to engage in negotiations for retransmission of Nexstar’s Binghamton stations at fair market rates, Nexstar has been and remains willing to have such negotiations. See *id.*

the Cox allegations. Cox follows the traditional MVPD playbook, accusing Nexstar of using “brinksmanship” to “extract” retransmission consent fees, but the facts do not bear this out.¹²⁷ Nexstar made its first proposal to Cox in August 2015, offering the same initial rates that Nexstar offered as initial rates to every other MVPD with which Nexstar was negotiating a new agreement to begin on January 1, 2016.¹²⁸ That Cox did not like the initial rates proposed by Nexstar is not indicative that Nexstar was not negotiating in good faith.¹²⁹ However, unlike the other MVPDs, Cox chose not to make a market-rate counter-offer until January 2016, after Nexstar already had granted a 30-day extension in an attempt to avoid the disruption that eventually ensued.¹³⁰ Indeed, and notwithstanding the fact that Cox had not engaged in constructive rate negotiations, Nexstar granted the 30-day extension precisely to avoid “New Year’s Eve brinksmanship” and viewer disruption.¹³¹ Although Nexstar may be overly naïve, it firmly believes that had Cox engaged in actual constructive rate negotiations in the months prior

¹²⁷ Cox’s claim that Nexstar uses the threat of blackouts as brinksmanship to extract higher fees is both speculative and false. *See Cox Petition at ii, 3.* Cox’s conjecture on Nexstar’s actions in any other negotiation is nothing more than self-serving speculation. Moreover, despite Cox’s months-in-advance knowledge of the impending agreement expiration, Nexstar went out of its way to avoid “brinksmanship” in extending its agreement with Cox for an additional 30 days. *See Ryder Dec. ¶ 6.* That Cox waited until the eve of the Super Bowl to engage does not translate to Nexstar using brinksmanship tactics. Moreover, Nexstar does not understand how an impasse can be “brinksmanship” when all parties are well aware and negotiating in advance of an agreement’s expiration.

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.*

to expiration, not only would an extension of negotiating time have been unnecessary, but the parties would not have had an impasse.¹³²

Thus, if “history” suggests anything, it suggests that after the Transaction, Nexstar will continue to timely negotiate new retransmission consent agreements that continue to allow MVPDs to provide their viewers with access to Nexstar’s valuable and highly desirable local programming without interruption.

C. There Is No Basis for the Commission to Impose Any of the Conditions Sought by the MVPD Petitioners.

As the Commission is well aware, Congress never intended for the Commission to adopt requirements that dictate the outcome of retransmission negotiations or serve as a back door inquiry into the parties’ negotiations.¹³³ Nonetheless, the MVPD Petitioners are seeking just that with their requests for the Commission to impose a litany of conditions—to be imposed on no other television broadcaster—that would materially alter the nature of Nexstar’s post-Transaction retransmission consent negotiations and result in the Commission’s dictation of terms in Nexstar’s agreements. Furthermore, even if the Commission had authority to consider the MVPD Petitioners’ desired conditions, the MVPD Petitioners have not provided any legal or factual basis upon which the Commission may rationally consider doing so here.

¹³² Among the numerous misleading and self-serving statements throughout the Cox Petition that bear little resemblance to the parties’ actual negotiations, Cox’s statement of concern for its 1.2 million subscribers, *see id.* at 7, that were impacted is particularly noxious as Cox spent the vast majority of the negotiations seeking to drop carriage of the Nexstar CW and MyNetwork stations, thereby depriving its more than 500,000 Phoenix subscribers and its more than 100,000 Baton Rouge subscribers of CW programming, *see* Ryder Dec. ¶ 6.

¹³³ 47 U.S.C. §325(b)(1); 47 U.S.C. §325(b)(3)(C). *See also* S. Rep. No. 92, 102 Cong. 1st Sess. 1991, reprinted in 1992 U.S.C.C.A.N. 1133, 1169 (“[I]t is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace negotiations.”); *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5458, ¶ 32 (2000) (“*Good Faith Order*”).

Mandatory Arbitration. There is no legal or factual basis for the Commission to force Nexstar to participate, at the behest of MVPDs, in “baseball-style arbitration.”¹³⁴ The Commission previously has concluded that it lacks statutory authority to require binding dispute resolution.¹³⁵ Nothing about this proceeding allows a different conclusion. Although the Commission required baseball-style arbitration in the merger of Comcast (the second largest MVPD and owner of numerous cable programming channels) and NBCUniversal (the owner of two television networks, numerous cable programming channels, and 28 television stations), that transaction resulted in the creation of “an unprecedented aggregation of video programming content” and provided Comcast-NBCU with “control over the means by which video programming is distributed to American viewers offline and, increasingly, online as well.”¹³⁶ None of these considerations is present in *this* Transaction.

The Commission further determined that an arbitration remedy was necessary to prevent Comcast-NBCU from employing “exclusionary strategies” to “raise *distribution* competitors’ costs or diminish the quality of the content available to them.”¹³⁷ The Commission has refused to extend this precedent even to other vertical mergers, let alone a merger (like the Transaction)

¹³⁴ DISH *et al.* Petition at 14.

¹³⁵ *In the Matter of Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727, ¶ 18 (2011) (“*Retrans NPRM*”).

¹³⁶ *Comcast Corporation*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4239, ¶ 3 (2011).

¹³⁷ *Id.* at 4250, ¶ 29 (emphasis added); *see also General Motors Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 473, 476-77, ¶ 4 (2004) (responding to creation of “vertically integrated content/distribution platform” that “has the potential to increase the incentive and ability of News Corp. to engage in temporary foreclosure bargaining strategies during carriage negotiations with competing MVPDs”); *In the Matter of Revision of the Commission’s Program Access Rules*, Notice of Proposed Rulemaking, 27 FCC Rcd 3413, 3424, ¶ 20 (2012) (explaining that baseball-style arbitration rules were designed to combat the risk of vertical integration).

that includes no vertical component.¹³⁸ Nexstar and MEG are local market-based television companies without commonly-owned national networks, major production studios, or dominant national distribution platforms. There is not even the suggestion that Nexstar will have the incentive or the means to engage in exclusionary strategies. Rather, like other non-vertically integrated broadcasters, Nexstar will continue to have the same ongoing “economic incentive” to reach agreements with MVPDs.¹³⁹ As such, there is no authority for the Commission to force Nexstar to enter into binding arbitration with MVPDs.

Mandatory Mediation. Cox’s call to require Nexstar to submit to “mediation overseen by the Commission” for its benefit is likewise problematic and unjustified.¹⁴⁰ The foundation of this argument—that Cox, the seventh largest MVPD in America, requires special protection because Nexstar stations will serve 55% of Cox’s subscriber base—is fundamentally flawed. Never before has the Commission imposed specific, prophylactic negotiating requirements based on the relative size of the parties to a negotiation, and there is no basis for doing so here. Under Cox’s theory, the Commission not only would need to adopt special rules for every cable operator that serves only a single DMA (such that any station would reach 100% of its subscriber base), but also for broadcasters like Nexstar that have a “staggering” 90-100% of their viewers residing in the footprints of large MVPDs like DirecTV and DISH.

In addition, based on Cox’s actions in its just-concluded negotiations, a mandatory mediation right would do no more than add unnecessary expense without any benefit. As stated

¹³⁸ See *Ketchikan TV, LLC*, Memorandum Opinion and Order, 29 FCC Rcd 5183, 5186, ¶ 10 (2014) (refusing to mandate arbitration where the “concerns of vertical foreclosure [we]re not on par with the market foreclosure concerns addressed by the Comcast-NBCU Order”).

¹³⁹ See MEG 2015 Retrans Comments at 10 (quoting *Good Faith Order*, 15 FCC Rcd at 5462-63, ¶ 240 (recognizing the “economic incentive for each side to reach an agreement”)).

¹⁴⁰ Cox Petition at 13-14.

above, Cox was unwilling to make credible rate offers to Nexstar without the opportunity for mediation,¹⁴¹ and there is no reason for the Commission to believe Cox will make credible offers knowing it will have a right (that no other MVPD will have) to pursue mandatory mediation. Moreover, assuming *arguendo* that Cox would have had a mediation right with respect to its just-concluded Nexstar negotiations, such right would not have avoided the agreement's termination at the end of January as it did following Nexstar's 30-day extension.

Cox has provided no facts to establish either a need for imposing such an approach in the context of this Transaction or a finding that mandatory mediation will result in anything other than needless expense to the parties.

Interim Carriage. The MVPD Petitioners' request to force Nexstar to consent to carriage during the pendency of a retransmission consent dispute also is beyond the Commission's authority.¹⁴² The Commission has previously and properly concluded that it "lacks authority to order carriage in the absence of a broadcaster's consent due to a retransmission consent dispute."¹⁴³ The filing of rule-compliant transfer and assignment applications does not waive a broadcaster's right under Section 325(b) "to control retransmission and to be compensated for others' use of their signals."¹⁴⁴ Indeed, if application filings created such a waiver, the MVPD Petitioners' demands that the Commission require interim carriage in the context of this Transaction would be unnecessary. In that hypothetical circumstance, interim

¹⁴¹ See *Ryder Dec.* ¶ 6.

¹⁴² *DISH et al. Petition* at 14; *Cox Petition* at 14-15.

¹⁴³ *Retrans NPRM*, 26 FCC Rcd at 2727, ¶ 18.

¹⁴⁴ S.Rep.No. 92, 102nd. Cong., 1st. Sess. 1991, reprinted in 1992 U.S.C.C.A.N. 1133, 1169.

carriage obligations would already apply to the majority of the stations involved in this Transaction because they have each been the subject of a prior transaction.

Nexstar's prior negotiations have all been in compliance with the Commission's regulations requiring good faith negotiations¹⁴⁵ and the MVPD Petitioners have provided not one shred of truthful evidence to the contrary. In addition, despite the rampant supposition otherwise, Nexstar will continue to negotiate and meet its good faith obligations after the Transaction is complete.¹⁴⁶ Accordingly, there is no basis for the Commission to impose Transaction-specific requirements that are contrary to law, that have never been imposed on any television broadcaster, and that would needlessly inject the Commission into the middle of private business negotiations.

After-Acquired Station Clauses. There is also no basis for the Commission to attempt to retroactively void mutually-negotiated provisions of Nexstar's retransmission consent agreements that define the applicability of the agreements to stations acquired by Nexstar during their terms.¹⁴⁷ The sole justification that the MVPD Petitioners provide for such unprecedented intrusion into private contracts is that, after the Transaction, the retransmission consent fees for some MEG stations will increase to match the rates under Nexstar's agreements.¹⁴⁸ Nexstar is uncertain how ACA and ITTA can make this claim since, as they are trade associations, neither is a party to a single agreement involving Nexstar or MEG television stations. In addition, for agreements that MEG has negotiated more recently than Nexstar, it is quite possible that after-

¹⁴⁵ See Ryder Dec. ¶ 7.

¹⁴⁶ See *id.*

¹⁴⁷ See DISH *et al.* Petition at 14-15.

¹⁴⁸ See *id.* at 10.

acquired clauses will *reduce* the post-Transaction rates for the MEG stations to the *lower* Nexstar rates.

Further, despite the MVPD Petitioners' convenient pleas of duress, the "after-acquired station" provisions have been included in Nexstar's agreements since its very first agreements in 2005, generally without objection.¹⁴⁹ The clause merely provides for administrative convenience by avoiding the need for the parties to negotiate which contract applies after a station acquisition (just as after-acquired systems provisions provide similar convenience in the case of an MVPD merger). Such provisions also avoid unintended "no agreement" periods which can occur (and have occurred) when an agreement for one station expires but the agreement for multiple other stations does not. Nor will the clause cause "sudden and unpredictable rate changes" in the context of this Transaction because the merger was announced months in advance of any actual closing, and any rate change can be easily established by an MVPD merely reviewing its contracts.¹⁵⁰

These provisions also are not unique to Nexstar's agreements.¹⁵¹ And as noted above, the MVPD Petitioners omit the fact that these provisions typically are not a one-way ratchet, meaning that if Nexstar's rates on a system are lower than what the MVPD currently is paying

¹⁴⁹ See Ryder Dec. ¶ 8.

¹⁵⁰ Indeed, the MVPD Petitioners' claim of surprise is not credible, given their filing of Petitions with respect to the Transaction. Moreover, unless any other MVPD has had its head buried in the sand, it will have had at least six months' notice of this Transaction before the after-acquired clauses will apply.

¹⁵¹ See Letter from Tom Larsen, Sr. VP Gov't and Public Relations, Mediacom, to William T. Lake, Chief, Media Bureau (Feb. 3, 2016), *available at* <http://apps.fcc.gov/ecfs/comment/view?id=60001391226> (recognizing that it is "common" for retransmission consent agreements to extend "to any stations in which the broadcaster subsequently acquires an attributable ownership interest").

MEG, the MVPD would benefit from this provision.¹⁵² Finally, the MVPD Petitioners exaggerate the costs of after-acquired station clauses as more than 55% of subscribers covered by MEG's retransmission consent agreements will adjust to new rates over the next year due to expiration by their terms even in the absence of an after-acquired station clause. Accordingly, there is no basis for the Commission to attempt to deprive Nexstar of the benefits of its carefully negotiated contractual rights. To do so would be counterproductive, requiring many additional retransmission negotiations (and the attendant risk of carriage disruption), while also raising serious constitutional concerns.¹⁵³

Divestiture Restrictions. Cox's request to restrict the parties to whom Nexstar and MEG may sell divested stations is premature and, in any event, unnecessary. Nexstar and MEG have not yet announced which stations they will be selling and who the assignees will be. The Commission should evaluate the proposed divestitures on actual facts before it, not hypothetical concerns about the entities to which the divested stations might or might not be sold. In any event, the FCC's rules already prohibit Nexstar from negotiating retransmission consent agreements for the divested stations.¹⁵⁴ Therefore, Cox's proposed condition is unwarranted.

VIII. CONCLUSION

As demonstrated above, the Petitioners have failed to meet their statutory burden to present "specific allegations of fact sufficient to show that . . . a grant of the [A]pplication[s]

¹⁵² See *Ryder Dec.* ¶ 8.

¹⁵³ See *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."); *Eastern Enters. v. Apfel*, 524 U.S. 498, 529-530 (1998) (plurality opinion); *U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 418 (5th Cir. 2000) (finding that retroactivity is "generally disfavored in the law" even in the case of a regulated industry).

¹⁵⁴ See 47 C.F.R. § 76.65(B)(1)(viii) (prohibiting joint negotiation for stations not subject to common ownership).

would be prima facie inconsistent with [the public interest, convenience and necessity],” let alone that there is a “substantial and material question of fact as to whether the grant of the [A]pplication[s] would serve the public interest” as necessary to warrant a hearing.¹⁵⁵ For these reasons, the Petitions filed by CWA *et al.*, DISH *et al.* and Cox should be promptly dismissed or denied, and the Applications should be granted without imposition of the conditions requested by the Petitioners.

¹⁵⁵ 47 U.S.C. § 309(d)-(e).

Dated: April 14, 2016

Respectfully submitted,

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DECLARATION OF ELIZABETH RYDER

I, Elizabeth Ryder, under penalty of perjury, declare as follows:

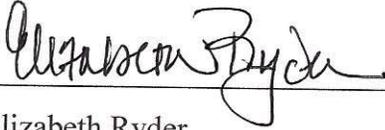
1. I am the Senior Vice President & General Counsel of Nexstar Broadcasting Group, Inc. (“Nexstar”).
2. I have read the foregoing “Consolidated Opposition to Petitions to Deny,” and the facts stated therein of which the Federal Communications Commission may not take official notice are true and correct to the best of my knowledge and belief. In particular:
 3. Nexstar does not (and will not upon closing of the Transaction) hold any attributable or non-attributable interest in Radio One, Inc., any of its subsidiaries or any stations owned by Radio One, Inc. or its subsidiaries. Nexstar’s board of directors is currently composed of seven members (and will be composed of nine members upon consummation of the Transaction). No member of the board of directors is involved in the day-to-day operations of Nexstar.
 4. Nexstar was not a party to a single retransmission consent-related impasse in 2015. Nexstar’s impasse with Cox occurred in 2016.
 5. With respect to MTC Cable (“MTC”), Nexstar did not “pull” its signal from MTC subscribers in Binghamton, New York for 17 days in 2013. MTC made a business decision to carry the ABC and NBC stations from New York City rather than pay Nexstar fair value for its Binghamton stations. MTC abandoned negotiations with Nexstar and, as of the date hereof, has not elected to negotiate for retransmission of Nexstar’s stations. In the event MTC would like to engage in negotiations for retransmission of Nexstar’s Binghamton stations at fair market rates, Nexstar has been and remains willing to have such negotiations.
 6. With respect to Cox Communications, Inc. (“Cox”), Nexstar made its first proposal to Cox in August 2015, well in advance of the December 31, 2015 expiration of the

parties' then-existing agreement. Nexstar offered Cox the same initial rates that Nexstar offered as initial rates to every other MVPD with which Nexstar was negotiating a new agreement to begin on January 1, 2016. Cox did not accept these rates (or any subsequent rates offered by Nexstar). Nexstar agreed to a 30-day extension in an attempt to avoid disruption to Cox's subscribers. Only after the extension was in place did Cox make a market-rate counter-offer in January 2016. Cox spent the vast majority of the negotiations seeking to drop carriage of the Nexstar CW and MyNetwork stations, thereby depriving its more than 500,000 Phoenix subscribers and its more than 100,000 Baton Rouge subscribers of CW programming.

7. I believe that Nexstar's prior negotiations have all been in compliance with the Commission's regulations requiring good faith negotiations, and Nexstar will continue to negotiate and meet its good faith obligations in the future.

8. So-called "after-acquired station" provisions have been included in Nexstar's retransmission consent agreements since its very first agreements in 2005, generally without objection. These provisions typically are not a one-way ratchet, meaning that if Nexstar's rates on a system are lower than what the MVPD currently is paying Media General, Inc., the MVPD would benefit from this provision.

April 14, 2016


Elizabeth Ryder

CERTIFICATE OF SERVICE

I, Eve Klindera Reed, hereby certify that on this 14th day of April, 2016, I caused a true and correct copy of the foregoing Consolidated Opposition to Petitions to Deny to be served upon the following via first-class mail or email as indicated:

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