

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Applications Filed for the Transfer of)	
Control and Assignment of Broadcast)	
Television Licenses from)	
)	
Media General, Inc.)	
)	
Transferor, Assignor)	MB Docket No. 16-57
)	
to)	
)	
Nexstar Broadcasting Group, Inc.)	
)	
Transferee, Assignee)	

REPLY OF COX COMMUNICATIONS, INC.

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SUMMARY

Applicants seek to avoid scrutiny of the significant anticompetitive effects and other consumer harms that would result from their proposed transaction. Indeed, Applicants fail to rebut Cox’s showing regarding the need for a targeted set of conditions to safeguard the public interest from the market power that the transaction would confer on the combined company. Cox has shown that the dramatic over-concentration of the combined Nexstar/Media General within Cox’s footprint, in which the post-transaction company would control broadcast stations reaching **55 percent** of Cox’s video subscriber base, would create undue bargaining leverage that Nexstar would exploit to consumers’ detriment in the absence of a dispute-resolution backstop.

Instead of addressing the merits of those arguments, Applicants engage in misdirection. They wrongly claim that the over-concentration concerns raised by Cox are foreclosed by inapposite precedent. And they predictably lean on the procedural objection that any harms flowing from post-transaction Nexstar’s abuse of the retransmission consent process must be addressed through the pending rulemaking exploring revisions to the good-faith negotiation rules. Not so. The harms at issue here—excessive prices, increased blackout risks, and other consumer harms caused by the substantial aggregation of market power by the merging parties—plainly are transaction-specific and may be remedied in this adjudicatory proceeding. Cox’s Petition appropriately seeks to address these transaction-specific harms through narrowly tailored conditions designed to prevent abuses of market power in the event the Commission approves the transaction.

More broadly, Applicants pretend that the Commission has extraordinarily narrow authority to impose conditions in broadcast transactions, when the Commission in fact has ample authority in this context. In addition to the Commission’s public interest authority under Sections 309(a) and 310(d) of the Communications Act, the mandate in Section 325(b) to “govern the exercise by television broadcast stations of the right to grant retransmission consent” leaves no doubt that the Commission can impose appropriately tailored conditions to prevent abuses of the retransmission consent process enabled by the transaction.

Indeed, based on such authority, the Commission in prior merger-review proceedings has imposed dispute-resolution conditions relating to retransmission consent in response to the same types of bargaining-power concerns raised by the Nexstar-Media General merger. Notwithstanding the Commission’s willingness to require binding arbitration in prior transactions, Cox has proposed only modest mediation procedures to mitigate Nexstar’s ability to use blackout threats to extract a market power premium during retransmission consent negotiations. Far from being precluded from remedying the transaction-specific harms presented, the Commission has a statutory obligation to ensure that the proposed license transfers promote the public interest.

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REPLY OF COX COMMUNICATIONS, INC.

Pursuant to Section 73.3587 of the Commission’s rules and Sections 309(a) and 310(d) of the Communications Act of 1934, as amended (the “Act”),¹ Cox Communications, Inc. (“Cox”) hereby submits this reply in support of its Petition for Conditions (“Petition”) and in response to the Consolidated Opposition to Petitions to Deny (“Consolidated Opposition”) filed jointly by Nexstar Broadcasting Group, Inc. (“Nexstar”) and Media General, Inc. (“Media General”).²

Applicants seek to avoid scrutiny of the significant anticompetitive effects and other consumer harms that would result from their proposed transaction. Indeed, Applicants fail to rebut Cox’s showing regarding the need for a targeted set of conditions to safeguard the public interest from the market power that the transaction would confer on the combined company. Cox has shown that the dramatic over-concentration of the combined Nexstar/Media General

¹ 47 C.F.R. § 73.3587; 47 U.S.C. §§ 309(a), 310(d).

² Petition for Conditions of Cox Communications, Inc., MB Docket No. 16-57 (filed Mar. 18, 2016); Consolidated Opposition to Petitions to Deny, MB Docket No. 16-57 (filed Apr. 14, 2016).

within Cox’s footprint, in which the post-transaction company would control broadcast stations reaching *55 percent* of Cox’s video subscriber base, would create undue bargaining leverage that Nexstar would exploit to consumers’ detriment in the absence of a dispute-resolution backstop.

Instead of addressing the merits of those arguments, Applicants engage in misdirection. They wrongly claim that the over-concentration concerns raised by Cox are foreclosed by inapposite precedent. And they predictably lean on the procedural objection that any harms flowing from post-transaction Nexstar’s abuse of the retransmission consent process must be addressed through the pending rulemaking exploring revisions to the good-faith negotiation rules. Not so. The harms at issue here—excessive prices, increased blackout risks, and other consumer harms caused by the substantial aggregation of market power by the merging parties—plainly are transaction-specific and may be remedied in this adjudicatory proceeding. Cox’s Petition appropriately seeks to address these transaction-specific harms through narrowly tailored conditions designed to prevent abuses of market power in the event the Commission approves the transaction.

More broadly, Applicants pretend that the Commission has extraordinarily narrow authority to impose conditions in broadcast transactions, when the Commission in fact has ample authority in this context. In addition to the Commission’s public interest authority under Sections 309(a) and 310(d) of the Communications Act, the mandate in Section 325(b) to “govern the exercise by television broadcast stations of the right to grant retransmission consent” leaves no doubt that the Commission can impose appropriately tailored conditions to prevent abuses of the retransmission consent process enabled by the transaction. Indeed, based on such authority, the Commission in prior merger-review proceedings has imposed dispute-resolution conditions relating to retransmission consent in response to the same types of bargaining-power

concerns raised by the Nexstar-Media General merger. Notwithstanding the Commission's willingness to require binding arbitration in prior transactions, Cox has proposed only modest mediation procedures to mitigate Nexstar's ability to use blackout threats to extract a market power premium during retransmission consent negotiations. Far from being precluded from remedying the transaction-specific harms presented, the Commission has a statutory obligation to ensure that the proposed license transfers promote the public interest.

DISCUSSION

I. THE TRANSACTION-SPECIFIC HARMS THREATENED BY THE PROPOSED TRANSACTION WARRANT THE TAILORED CONDITIONS PROPOSED BY COX

A. Applicants Fail To Rebut the Transaction-Specific Harms Identified in the Cox Petition

Cox has demonstrated that, absent appropriate conditions, the proposed transaction would have a significant deleterious impact on Cox and its subscribers as a result of the dramatic over-concentration of post-transaction Nexstar within the designated market areas ("DMAs") served by Cox.³ As the Petition explains, a remarkable *55 percent* of Cox's video subscribers reside in DMAs with broadcast stations owned by Nexstar or Media General, whereas Cox's subscriber base would make up *less than five percent* of Nexstar-Media General's national audience share.⁴ The harms that would result from such a significant over-concentration of market power and

³ As a threshold matter, Applicants' half-hearted challenge to Cox's status as a party-in-interest is a makeweight. Applicants overlook the fact that Cox is not required to demonstrate standing to prosecute its Petition for Conditions, as the Petition was submitted pursuant to Section 73.3587 of the Commission's rules. 47 C.F.R. § 73.3587. In any event, Cox's standing is self-evident from the Petition and the supporting declaration, which describe in detail the injury that would result to Cox and its subscribers as a result of the proposed transaction, as well as the specific remedies through which the Commission would redress such injury. *See* Petition at 4-12.

⁴ Petition at 8-9.

imbalance of bargaining power are quintessentially transaction-specific, as the threat of these harms occurring on such a scale would not exist *but for* the transaction.

Cox's Petition further demonstrates that the harms threatened by Nexstar's proposal to become the largest independent broadcast station group in the nation are real and significant. For example, the Petition cites substantial evidence, including the Commission's own analysis, demonstrating that the aggregation of market power proposed by Nexstar would enable post-transaction Nexstar to wield blackout threats that drive up Cox's retransmission consent fees to unreasonable levels.⁵ As the Petition further explains, Nexstar's proposed over-representation within Cox's footprint would present an undue risk of causing actual blackouts that deprive millions of consumers of access to broadcast programming.⁶ Indeed, based on Nexstar's willingness to go dark as a means of extracting additional (supra-competitive) fees in its recent negotiations with Cox⁷—even *before* aggregating the Nexstar and Media General stations—there is no doubt that this transaction will exacerbate existing concerns about blackouts and unreasonable and ever-escalating rate hikes driven by market power.

⁵ See *id.* at 6-8.

⁶ See *id.*

⁷ See *id.* at 3 & Albert Declaration ¶ 9. The Consolidated Opposition grossly mischaracterizes Nexstar's recent negotiations with Cox in an apparent attempt to allay concerns about Nexstar's ability to exploit its market power. See Consolidated Opposition at 39-41 & n.127. For example, it is simply untrue that Nexstar proposed rates in its "first proposal to Cox in August 2015," or that "Cox waited until the eve of the Super Bowl to engage" in negotiations. Rather, Nexstar's alleged "first proposal" did not include *any* proposed rates, and Nexstar did not make any such rate proposal until the following month. Thereafter, the parties exchanged at least 11 rate proposals before coming to final agreement. Significantly, it was *Nexstar* that waited until the eve of the Super Bowl to re-engage in negotiations, delaying any formal response to Cox's January 15 offer until February 1 (less than one week before the Super Bowl), at which point Nexstar remarkably proposed an *even higher* rate than its previous offer. See Supplemental Declaration of Andrew Albert ¶¶ 3-5.

Applicants suggest that the Commission’s repeal of its former “regional concentration of control” rules prevents the over-concentration associated with the transaction from being recognized as cognizable harm.⁸ That argument is unavailing for several reasons. The “regional concentration of control” rules prohibited a single broadcaster from owning or controlling three broadcast AM, FM, or television stations “where any two [were] located within 100 miles of the third, and where there [was] primary service contour overlap between any of the stations.”⁹ Cox’s proposed conditions are not remotely analogous. Cox has not proposed a flat ban on owning multiple broadcast stations in a given region, but rather has sought a modest backstop of mediation and interim carriage in the event of a retransmission consent dispute arising from Nexstar’s extraordinary aggregation of market power.

In any event, the Commission’s repeal of the “regional concentration of control” rules long pre-dates the current era of broadcast and cable regulation, making Applicants’ attempt to compare the purpose of those rules with the concerns raised in the Cox Petition even more inapt. As Applicants acknowledge, the “regional concentration of control” rules were eliminated in 1984¹⁰—long before the 1992 Cable Act and the creation of the retransmission consent right that the transaction would enable Nexstar to exploit to consumers’ detriment, not to mention the advent of robust competition in the marketplace for video services. The Commission’s decision to repeal rules from a different era, and which bear no resemblance to the relief sought by Cox in its Petition, therefore is irrelevant to the Commission’s consideration of the Cox Petition.

⁸ Consolidated Opposition at 9 & n.31.

⁹ *Repeal of the “Regional Concentration of Control” Provisions of the Commission’s Multiple Ownership Rules*, Report and Order, MM Docket No. 84-19, RM-4564, FCC 84-156 ¶ 1 (rel. May 1, 1984), 49 Fed. Reg. 19670 *et seq.* (“*Regional Concentration of Control Rules Repeal Order*”).

¹⁰ Consolidated Opposition at 9 n.31.

The Consolidated Opposition also misleadingly suggests that, by repealing rules that limited the regional concentration of broadcast ownership interests, the Commission abandoned any interest in addressing harms associated with such concentration.¹¹ That simply is not the case, as the Commission’s media ownership policies continue to focus on preventing *any* over-concentration that undermines the core values of competition, localism, and diversity.¹² Furthermore, in repealing the “regional concentration of control” rules, the Commission merely determined that the particular rule at issue (which as described above imposed a flat ban on certain ownership combinations) “was not serving its ultimate objectives of promoting greater diversity of viewpoints and economic competition,”¹³ acknowledging, among other concerns, that the rule often produced anomalous results.¹⁴

Equally unavailing is Applicants’ argument that their prospective over-concentration within the areas served by very small cable operators detracts from Cox’s showing of harm.¹⁵ Situations in which a small cable operator “serves only a single DMA,” such that any broadcast station within that DMA would reach all of the cable operator’s subscriber base, are readily distinguishable. Where cable operators or other multichannel video programming distributors (“MVPDs”) have such a limited geographic footprint, a broadcast station group’s complete (or

¹¹ *Id.* at 8-9 & n.31.

¹² *See, e.g., 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 et al.*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371 ¶ 359 n.1108 (2014) (explaining that “the Commission’s local television ownership limits” are based on “broad[] concern[s] with promoting competition, localism, and diversity”); *id.* ¶ 359 (“[L]ocal broadcast television ownership rules ... are designed to promote competition.”).

¹³ *Repeal of the “Regional Concentration of Control” Provisions of the Commission’s Multiple Ownership Rules*, Memorandum Opinion and Order, 100 FCC 2d 1544 ¶ 12 (1984).

¹⁴ *Regional Concentration of Control Rules Repeal Order* ¶ 4.

¹⁵ Consolidated Opposition at 43.

nearly complete) coverage of some small cable operators' subscriber base is all but inevitable. And, in such scenarios, there is no question that the small cable operator is significantly disadvantaged based on the vastly unequal bargaining power possessed by a large station group,¹⁶ just as Cox will be in the wake of this transaction. But such scenarios, *unlike* the harm to Cox, are unlikely to result from *this transaction*, because the Nexstar-Media General combination generally will aggregate market power *across* multiple DMAs, not *within* them.¹⁷ Indeed, unlike the facts presented in the Cox Petition, the fact that Nexstar or Media General *today* serves the entirety of a small cable operator's footprint likely will not change as a result of the transaction, only the identity of the broadcaster (in the case of Media General).

Moreover, small cable operators typically respond to their unequal bargaining power by negotiating as part of a larger buying group, such as the National Cable Television Cooperative ("NCTC"). It is far more difficult for larger MSOs such as Cox to participate in such buying groups, given significant differences between the business models and strategic needs of large and small cable operators. The severe over-concentration and bargaining asymmetry in Cox's service areas therefore threatens greater harm to Cox and its subscribers than to other MVPDs. But to the extent that Applicants' core point is that over-concentration enabled by the transaction is likely to disadvantage other MVPDs, *in addition to Cox*, the appropriate response is that the Commission should apply mediation and interim-carriage conditions to retransmission consent

¹⁶ See Reply Comments of American Cable Association, MB Docket No. 15-216, at 7 (Jan. 14, 2016) ("When the impact of not reaching a retransmission consent agreement with a broadcaster means that 100 percent of an MVPD's subscribers will lose access to a top four-rated station, the only choice for the MVPD is to agree to the broadcasters' supra-competitive demands.").

¹⁷ Consolidated Opposition at 13 ("[T]he Transaction will result in *no* increase in common ownership in *any* local television market.").

disputes between Nexstar and all (or a broader array of) MVPDs, not that the Commission should ignore the injuries Cox and its subscribers will suffer.

Applicants also assert that Cox’s Petition “impl[ies] that the Transaction does not comply with the 39 percent national ownership cap.”¹⁸ This is a facile mischaracterization of the reason that Cox cited the national cap. The point is that Congress established 39 percent as a meaningful measure at the national level of whether there would be harm to competition, localism, and diversity. A transaction affecting *55 percent* of Cox’s video subscriber base in a much more constrained geographic area obviously constitutes a significant expansion of such harms for Cox’s customers, and clearly implicates the identical congressional policy concerns that motivated the enactment of the cap at the national level.¹⁹

B. Applicants Cannot Use the Pending Retransmission Consent Rulemaking as a Shield for Transaction-Specific Harms

Predictably, because Applicants cannot rebut the serious harms that the transaction poses to Cox and its subscribers, they assert that Cox’s Petition (together with other Petitioners’ proposals relating to retransmission consent) is procedurally improper. But in doing so, they misconstrue the arguments advanced in the Petition and misstate the applicable law. Contrary to Applicants’ misleading assertions, Cox is *not* asking the Commission to address the broader concerns presented by the retransmission consent regime in this adjudicatory proceeding.²⁰ Nor does the Petition “repeat” arguments made in the Commission’s rulemaking proceeding considering comprehensive reforms to the retransmission consent regime.²¹

¹⁸ *Id.* at 14.

¹⁹ *See* Petition at 8-11 (discussing the history and purpose of the national television ownership limit).

²⁰ *See* Consolidated Opposition at 32-33.

²¹ *Id.* at 33.

The focus of the pending rulemaking proceeding is the totality of circumstances test under the good-faith negotiations standard.²² Cox’s advocacy in that proceeding covers a broad set of issues relevant to reform of the Commission’s broadcast carriage rules, with a focus on the good-faith standard and how it should be applied to all ordinary-course negotiations.²³ By contrast, Cox’s arguments here are limited to the specific effects of Nexstar’s proposal to acquire stations reaching more than half of Cox’s video subscriber base, and the vast disparity in bargaining leverage that Nexstar would hold as a result of such proposed acquisitions.

By the same token, the conditions proposed by Cox are carefully tailored to the excess concentration and vast disparity in bargaining leverage that a combined Nexstar/Media General would wield within Cox’s service areas. Those conditions also vary significantly in substance from anything Cox has put forth in the ongoing retransmission consent reform proceeding, given that the transaction-specific harms at issue justify a greater degree of Commission intervention (including the availability of interim carriage during mediation of a dispute between Cox and Nexstar/Media General) than Cox has proposed for ordinary-course negotiations between broadcast stations and MVPDs.²⁴

²² See *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327 ¶ 1 (2015) (“By this Notice of Proposed Rulemaking (“NPRM”), ... we review the totality of circumstances test for evaluating whether broadcast stations and [MVPDs] are negotiating for retransmission consent in good faith.”).

²³ See Comments of Cox Enterprises, Inc., MB Docket No. 15-216 (filed Dec. 1, 2015) (“Cox Good-Faith Reform Comments”).

²⁴ Compare Petition at 12-16 with Cox Good-Faith Reform Comments.

II. THE COMMISSION CAN AND SHOULD CONDITION ANY APPROVAL OF THE PROPOSED TRANSACTION TO SAFEGUARD THE PUBLIC INTEREST

A. The Commission Possesses Ample Legal Authority To Adopt the Conditions Proposed by Cox To Address the Harms Threatened by the Proposed Transaction

Nexstar and Media General oddly suggest that broadcast transactions—uniquely among transactions involving Commission licensees—do not warrant close scrutiny by the Commission and that conditions are appropriate only where actual rules violations are manifest.²⁵ Yet as Chairman Wheeler has emphasized, “[t]he FCC reviews *every* merger on its merits and determines whether it would be in the public interest. In applying the public interest test, an absence of harm is not sufficient. The Commission will look to see how American consumers would benefit if the deal were to be approved.”²⁶ And broadcast transactions certainly are not exempt from that general rule, especially given the broad authority the Commission possesses to ensure that stewards of the public airwaves operate in the public interest.²⁷

Applicants also miss the mark in claiming that the Commission lacks authority to impose the specific conditions proposed by Cox and other parties relating to retransmission consent. To the contrary, the Commission has ample authority under Sections 309(a), 310(d), and 325(b) (and, as necessary, ancillary authority) to provide the requested relief.²⁸ Indeed, pursuant to

²⁵ Consolidated Opposition at 33.

²⁶ Statement of Chairman Wheeler on the Charter/Time Warner/Bright House Announcement (May 26, 2015) (emphasis added), <https://www.fcc.gov/document/fcc-chairman-tom-wheeler-statement-chartertime-warnerbright-house>.

²⁷ See, e.g., *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 216-17 (1943) (explaining that the “touchstone” of FCC broadcast regulation is the public interest, convenience, and necessity, which includes, among other things, ensuring “the ability of the licensee to render the best practicable service to the community reached by his broadcasts” (internal citations omitted)).

²⁸ Cox’s Petition, and its request for relief, are premised on the Communications Act—namely, Sections 309, 310, and 325. 47 U.S.C. §§ 309(a), 310(d), 325. Applicants’ assertion that Cox does not allege the proposed transaction would violate “any existing Commission rule”

Sections 309(a) and 310(d) of the Act, which charge the Commission with ensuring that license transfers advance the public interest, the Commission not only is empowered but *required* to address harms arising from the proposed license transfers within the context of its transaction-review process.²⁹

Section 325(b) provides additional authority to impose conditions requiring mediation and interim carriage in the event of a retransmission consent dispute. Section 325(b)(3)(A) directs the Commission “to govern the exercise by television broadcast stations of the right to grant retransmission consent,” to consider “the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier,” and “to ensure that the rates for the basic service tier are reasonable.”³⁰ Those clear directives plainly justify remedial conditions designed to prevent abuses of market power that would result in service interruptions and excessive rate hikes that compromise the reasonableness of basic cable rates.

Contrary to Applicants’ suggestion,³¹ Section 325(b)(1)(A) does not pose any impediment to the Commission’s adoption of conditions requiring mediation and interim carriage. Although Section 325(b)(1)(A) prohibits *MVPDs* from retransmitting a broadcaster’s signal without consent,³² that prohibition in no way deprives the *Commission* of its well-

therefore is a red herring, as no such allegation is required. Consolidated Opposition at 33. Cox takes no position as to whether the proposed transaction, if approved, would violate any Commission rules.

²⁹ 47 U.S.C. §§ 309(a), 310(d) (requiring that the Commission grant broadcast station license applications and requests to assign or transfer station licenses only upon a determination that such grant would serve the public interest, convenience, and necessity).

³⁰ *Id.* § 325(b)(3)(A).

³¹ Consolidated Opposition at 42-43, 44.

³² Notably, the Petition in no way suggests that Applicants should be deemed to have “waived” their retransmission consent rights under Section 325. *See id.* at 44. Rather, as discussed above, Cox’s Petition requests only that the *Commission* exercise its independent

established equitable authority to protect the public interest in retransmission consent disputes, as Chairman Wheeler recently confirmed.³³ Moreover, the legislative history of Section 325(b) and subsequent congressional correspondence further confirm that this grant of authority empowers the Commission to take the steps necessary to protect consumers affected by retransmission consent disputes.³⁴ And as the Supreme Court has acknowledged, the Commission’s ancillary authority includes the power to require parties to maintain the status quo in cable carriage disputes where “the public interest demands interim relief.”³⁵

Based on these statutory powers, the Commission has imposed dispute-resolution remedies and interim carriage obligations in other adjudications—including in the specific context of transactions involving broadcast stations.³⁶ Thus, the statement that “[n]ever before

authority under Section 325 to prevent abuses in the context of a retransmission consent dispute between Cox and post-transaction Nexstar that would harm Cox and its subscribers.

³³ Press Release, FCC, Statement of FCC Chairman Tom Wheeler on Retransmission Dispute Between DISH Networks and Sinclair Broadcasting (Aug. 26, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DOC-335057A1.pdf, (explaining Chairman Wheeler’s direction to the Media Bureau to “bring back local programming to consumers” and stating that the Commission “will not stand idly by” while a dispute is ongoing).

³⁴ See Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007) (explaining that that Section 325’s directives mean, “[a]t a minimum,” that “Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]”); see also 138 CONG. REC. S14615-16 (statement of Sen. Lautenberg) (“[I]f a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC.”).

³⁵ *United States v. Southwestern Cable*, 392 U.S. 157, 180 (1968); see 47 U.S.C. §§ 154(i), 303(r).

³⁶ See, e.g., *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 222 (2004) (providing for compulsory arbitration and interim carriage while interim carriage is ongoing); *News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, App. B § IV (2008) (“*DIRECTV-Liberty Order*”) (same); *Applications of Comcast Corporation, General Electric*

has the Commission imposed specific, prophylactic negotiating requirements based on the relative size of the parties to a negotiation” is demonstrably incorrect.³⁷

Likewise, the argument that the Commission should simply ignore the harmful potential effects here of increased concentration of Nexstar’s market power within Cox’s regional footprint is specious. In assessing potentially harmful effects on the video programming marketplace that could be caused by particular merger transactions, the Commission has often considered the effects of increased size on bargaining leverage, with express consideration of the geographic area and any effects in regional markets.³⁸ Furthermore, the Commission has not hesitated to condition approval of transactions for the express purpose of addressing unequal bargaining leverage that otherwise would result.³⁹ That is precisely what Cox has asked the Commission to analyze and remedy here.

Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, 26 FCC Rcd 4238, App. A §§ II, VII.5 (2011) (“*Comcast-NBCU Order*”) (same). Significantly, Cox has requested only mandatory *mediation* with interim carriage during the pendency of mediation.

³⁷ Consolidated Opposition at 43.

³⁸ See, e.g., *Applications of AT&T Inc. and DIRECTV for Consent To Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131 ¶¶ 220-24 (2015).

³⁹ See, e.g., *Comcast-NBCU Order* ¶ 73 (taking steps to protect online video distributors after concluding that “Comcast-NBCU will have increased leverage to negotiate restrictive online rights from third parties”); *DIRECTV-Liberty Order* ¶ 90 (adopting arbitration and interim carriage conditions in the DIRECTV-Liberty transaction and citing Commission precedent of imposing dispute resolution and interim carriage conditions “to mitigate harms that would likely arise if the transfer occurred absent restrictions,” including such conditions in the News Corp.-Hughes transaction and Comcast’s and Time Warner Cable’s acquisition of Adelphia cable systems); *AOL-Time Warner Order* ¶¶ 126-27, 61 (supplementing an FTC condition that required AOL Time Warner to give unaffiliated ISPs open access to its cable system, to require that such access also be provided on nondiscriminatory terms, based on concerns that the combined company would leverage the market power of AOL “to discriminate against unaffiliated ISPs on its own cable platform, and to obtain exclusive carriage for its Internet access services on the networks of other cable providers”).

Nexstar and Media General make the novel suggestion that, because broadcasters must comply with “an extensive array of age-old bright-line rules designed as proxies to address diversity and competition concerns,” the Commission has no business imposing remedial conditions in the context of a proposed broadcast transaction.⁴⁰ That is nonsensical. As the foregoing discussion makes clear, the Commission has the necessary authority to scrutinize transactions involving broadcast licensees.

Broadcasters of course are not the only entities subject to comprehensive regulatory requirements. Cable operators likewise must comply with extensive, generally applicable regulatory duties, and yet mergers of cable operators are routinely subject to substantial remedial conditions,⁴¹ or even blocked outright,⁴² when deemed to entail the aggregation of market power sufficient to threaten anticompetitive effects. Vertical transactions involving MVPDs also have prompted significant conditions, including dispute-resolution conditions relating to retransmission consent and carriage of other programming services.⁴³ While Applicants seek to distinguish the conditions imposed in the Comcast-NBCU merger on the ground that they were prompted by “unprecedented aggregation of video programming content” that threatened to

⁴⁰ Consolidated Opposition at 17.

⁴¹ See Statement of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Networks (Apr. 25, 2016) (describing conditions included in circulated order recommending approval of the Charter-Time Warner Cable-Bright House Networks transaction).

⁴² Statement from FCC Chairman Tom Wheeler on the Comcast-Time Warner Cable Merger (Apr. 24, 2015) (praising the decision to abandon the proposed transaction, because, among other reasons, “[t]he proposed transaction would have created a company with the most broadband and video subscribers in the nation alongside the ownership of significant programming interests,” thus posing “an unacceptable risk to competition and innovation” in the online video services marketplace in particular).

⁴³ See, e.g., note 36, *supra*.

“‘raise distribution competitors’ costs,’”⁴⁴ the proposed acquisition of Media General by Nexstar poses precisely the same concerns within Cox’s service territories, where post-transaction Nexstar would become the largest broadcast station group in the nation and would control stations covering 55 percent of Cox’s video subscriber base. Thus, for the same reasons articulated in the *Comcast-NBCU Order*, the instant broadcast transaction requires remediation. Nexstar and Media General have no basis to assert that their transaction should be subject to special treatment that immunizes the parties from a rigorous review process.

B. Applicants Fail To Rebut Cox’s Arguments for the Adoption of Targeted Conditions Requiring Mediation and Interim Carriage, and Prohibiting Divestitures to “Sidecar” Entities

Cox requests the adoption of a limited set of conditions that are narrowly tailored to the harms identified in the Petition, namely:

- The Commission should order that, in the event of a retransmission consent dispute between Cox and post-transaction Nexstar, Nexstar must submit to mediation overseen by the Commission;
- During the pendency of such dispute resolution, the Commission should require interim carriage of Nexstar’s broadcast signals on the terms set forth in the expiring agreement(s), subject to a true-up provision in the event successor rates established via mediation are higher than the previously applicable rates; and
- Finally, the Commission should prohibit Nexstar or Media General from spinning off any stations in overlap markets to any “sidecar” entity, including Mission Broadcasting, White Knight Broadcasting, Vaughan Media, Super Towers, Inc., or any other such entity in which Nexstar or Media General has a significant

⁴⁴ Consolidated Opposition at 42 (quoting *Comcast-NBCU Order* ¶¶ 3, 29).

interest (and/or post-transaction Nexstar would have a significant interest), rather than operating independently.⁴⁵

As the Petition demonstrates, these targeted conditions are needed because Nexstar's proposed acquisition of Media General would increase post-transaction Nexstar's bargaining leverage based on the aggregation of market power, thus enhancing the combined company's ability to extract inflated rents, levy blackout threats, and carry out such threats to the detriment of affected consumers.⁴⁶

Applicants do not seriously dispute this basic proposition. Nor do Applicants contest Cox's showing that the effects of such enhanced bargaining leverage would be particularly pronounced within Cox's footprint, where Applicants concede that post-transaction Nexstar would own stations covering more than half of Cox's video subscriber base, in contrast to Cox's minimal overlap with Nexstar's national audience.⁴⁷ Nexstar and Media General instead assert that it is their right to demand ever-increasing fees for retransmission consent as compensation for the "value that they deliver to viewers."⁴⁸

Such unsupported claims are wholly insufficient to satisfy the burden Applicants bear to demonstrate that the proposed transaction would serve the public interest, convenience, and necessity in the absence of conditions. Indeed, Applicants do not point to any facts to support the proposition that increased retransmission consent fees would be justified by increased investments in, or the enhanced value of, the combined company's broadcast programming.⁴⁹

⁴⁵ Petition at 12-15.

⁴⁶ *See id.* at 4-12.

⁴⁷ Consolidated Opposition at 43.

⁴⁸ *Id.* at 36.

⁴⁹ *See id.* at 18.

To the contrary, the record indicates that such fee increases would represent a brazen market power premium, not any improvement in quality.⁵⁰ Especially given that the value of Nexstar/Media General’s Big Four-affiliated signals is primarily dependent on *network* programming, this station-group merger is unlikely to produce any transaction-specific benefits for consumers.

Applicants also ignore Cox’s proposed divestiture condition almost entirely, asserting that the proposed restriction is “premature” and “unnecessary” because Nexstar and Media General “have not yet announced which stations they will be selling and who the assignees will be.”⁵¹ Tellingly, neither Nexstar nor Media General disclaims an intent to sell stations to sidecar entities. If Applicants were willing to allay concerns about sham transactions, they could easily have indicated that buyers of divested stations will be *bona fide* third-party broadcasters. Moreover, far from Cox’s divestiture condition being premature, this proceeding provides the best opportunity to impose such a limitation. While any divestiture transaction eventually would

⁵⁰ See, e.g., Dave Seyler, *Nexstar Talks Growth, Political, Auction*, TVNEWSCHECK (May 3, 2016), <http://www.tvnewscheck.com/article/94443/nexstar-talks-growth-political-auction?ref=search> (reporting that “retrans has been part of the motivation for [Nexstar’s] aggressive M&A strategy,” because consolidation enhances its bargaining position vis-à-vis MVPDs, and that Nexstar expects retransmission consent revenue to continue to see “significant” growth); Mark K. Miller, *Nexstar Revenue Hits 1Q Record \$255.7M*, TVNEWSCHECK (May 3, 2016), <http://www.tvnewscheck.com/article/94436/nexstar-revenue-hits-1q-record-2557m> (attributing, in part, Nexstar’s net revenue gains in the first quarter of 2016 to a 46.2 percent climb in retransmission consent fees and quoting Perry Sook as stating that Nexstar will “continue to benefit from ... the ongoing renewal of ... retransmission consent agreements,” among other factors); *Mission Buying 5 Stations for \$103M*, TVNEWSCHECK (Sept. 16, 2013), <http://www.tvnewscheck.com/article/70502/nexstar-mission-buying-5-stations-for-103m> (quoting Perry Sook as stating that Nexstar expects to “realize additional retransmission consent revenues” through a proposed broadcast transaction); Perry Sook and Tom Carter, UBS 43rd Annual Global Media & Communications Conference, *Nexstar Broadcasting Group, Inc.: Keeping it Local*, at 9 (Dec. 8, 2015), attached to Petition as Exhibit 2 (describing growth in retransmission consent revenue of Nexstar, which has been driven, in significant part, by station acquisitions).

⁵¹ Consolidated Opposition at 47.

come before the Commission, it makes little sense to wait until the end of such a subsequent review process to find out if the buyer will be considered qualified. All parties—potential purchasers of stations subject to a divestiture requirement, MVPDs that negotiate retransmission consent agreements with the broadcasters in question, and even Applicants themselves—would benefit from *upfront* guidance that resolves the (in)eligibility of sidecar entities to purchase divested stations.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Cox Petition, Cox urges the Commission to condition any approval of the proposed Nexstar-Media General transaction consistent with the proposals described in the Petition.

Respectfully submitted,

/s/ Matthew A. Brill

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May 5, 2016

CERTIFICATE OF SERVICE

I, Kayla K. Ernst, hereby certify that on this 5th day of May, 2016, a true and correct copy of the foregoing Reply of Cox Communications, Inc. was served, via first-class mail, upon the following:

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/s/ Kayla K. Ernst
Kayla K. Ernst

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Applications Filed for the Transfer of)	
Control and Assignment of Broadcast)	
Television Licenses from)	
)	
Media General, Inc.)	
)	
Transferor, Assignor)	MB Docket No. 16-57
)	
to)	
)	
Nexstar Broadcasting Group, Inc.)	
)	
Transferee, Assignee)	

SUPPLEMENTAL DECLARATION OF ANDREW I. ALBERT

I, Andrew I. Albert, state as follows:

1. I am employed by Cox Communications, Inc. (“Cox”) as Senior Vice President of Content Acquisition. My business address is 6205-B Peachtree Dunwoody Road NE, Atlanta, Georgia 30328. In my position, I am familiar with Cox’s negotiation of retransmission consent agreements with broadcast television stations, including Cox’s recent negotiations with Nexstar Broadcasting Group, Inc. (“Nexstar”).

2. I have knowledge of the facts set forth herein, and I make this declaration in support of the Reply of Cox Communications, Inc. filed in connection with the above-captioned matter, which relates to the proposed acquisition of Media General, Inc. (“Media General”) by Nexstar.

3. Nexstar grossly mischaracterizes its recent negotiations with Cox in the Consolidated Opposition to Petitions to Deny filed by Nexstar and Media General.

4. Nexstar's alleged "first proposal" to Cox in August 2015 did not include *any* proposed rates, and Nexstar did not make any such rate proposal until the following month. Thereafter, the parties exchanged at least 11 rate proposals before coming to final agreement.

5. Contrary to Nexstar's allegations, it was *Nexstar* that waited until the eve of the Super Bowl to re-engage in negotiations, delaying any formal response to Cox's January 15 offer until February 1 (less than one week before the Super Bowl), at which point Nexstar remarkably proposed an *even higher* rate than its previous offer.

6. To the best of my knowledge and belief, all other assertions of fact that are contained in the Petition are true and correct.

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

Executed May 5, 2016.



Andrew I. Albert
Senior Vice President, Content Acquisition
Cox Communications, Inc.