FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF THE
CHAIRWOMAN

April 19, 2023

The Honorable Cathy McMorris Rodgers
Chair
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Ted Cruz
Ranking Member
Committee on Commerce, Science, and Transportation
United States Senate
512 Hart Senate Office Building
Washington, DC 20510

Dear Chair McMorris Rodgers and Ranking Member Cruz:

Thank you for your letter of April 5, 2023, regarding the Federal Communications Commission's consideration of the proposed transaction involving TEGNA Inc., Standard General LP, and Apollo Global Management, Inc.

It is important to note that this matter is the subject of active litigation before the Court of Appeals for the D.C. Circuit. The applicants have challenged the Commission's action in this proceeding and seek the Court's imposition of a writ of mandamus to direct the Commission to terminate the current proceeding and act by a date certain.[1] With that litigation pending and the prospect of forthcoming guidance from the Court, the Commission is limited in the information it can share at this time.

Equally important, and further restricting the Commission's ability to share information in this matter, is the fact that this proposed transaction remains active before the Commission itself. An essential part of the Commission's mission is to determine whether grant of the applications constituting this transaction serves the public interest consistent with Section 310(d) of the Communications Act. That determination remains ongoing. And, along with myself, the Commissioners and Commission staff remain decisionmakers in this matter. The further investigation undertaken by the presiding administrative law judge will allow the Commission to

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[1] *See* Pet. for Writ of Mandamus, *In re SGCI Holdings III LLC*, No. 23-1084 (D.C. Cir. filed Mar. 27, 2023) (Petition for Writ of Mandamus). In addition, the applicants sought judicial review of the Media Bureau's adoption of the Hearing Designation Order pursuant to 402(b) of the Communications Act of 1934, as amended, which was denied. *See* Order, *SCGI Holdings III LLC v. FCC*, No. 23-1083 (D.C. Cir. Apr. 3, 2023) (per curiam).

make a more informed assessment of the potential harms or benefits of the transaction and whether proposed safeguards are sufficient to protect the public interest.

With the commencement of the hearing before the administrative law judge, the Media Bureau has held the underlying applications in abeyance and this matter is now a restricted proceeding under the Commission's *ex parte* rules.[2] Addressing questions such as the theories advanced in the case, interpretation of Commission precedent, or the Commission's investigation thus far could harm the integrity of the Commission's process, or worse, prejudice the outcome of these ongoing proceedings. Furthermore, it is a longstanding practice that the Commission does not comment on transactions that are pending before us. Given the sensitivities of both the litigation and the ongoing nature of the Commission's review, it is even more important in this instance to allow the Commission's publicly available documents to speak for the agency.

With that in mind, however, I believe that many of the questions contained in your letter are addressed in either the Hearing Designation Order issued in this case or the Commission's Opposition to Petition for Writ of Mandamus filed recently with the Court of Appeals for the D.C. Circuit. Accordingly, attached is a copy of the Hearing Designation Order issued on February 24, 2023.[3] This Order designated certain questions related to the pending applications for hearing before the Commission's Administrative Law Judge. As detailed in the Order, the applications, pleadings, and record developed to that point raised substantial and material questions of fact that remained unsettled. In addition, attached is a copy of the Opposition to Petition for Writ of Mandamus filed by the Commission with the Court of Appeals for the D.C. Circuit on April 11, 2023.

I believe that these two documents address your questions regarding the Commission's concerns, authority, and precedent related to the issues raised in connection with the proposed transactions. As the Commission's recent opposition to the petition for writ of mandamus explained, "[t]he two concerns raised by the Media Bureau here—harm to consumer welfare from artificial increases in retransmission fees, and harm to broadcast localism through cuts to local journalism and newsroom staffing—fall comfortably within the Commission's established 'public interest goals' of 'competition, localism, and viewpoint diversity.' *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1155, 1156, 1157, 1158, 1160 (2021)."[4]

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[2] Consistent with the Commission's rules governing *ex parte* submissions in restricted proceedings, I have asked the Media Bureau to associate your letter and this response with the record of the hearing proceeding, and to serve each party to the hearing proceeding with your letter and this response.

[3] *Consent to Transfer Control of Certain Subsidiaries of TEGNA Inc. to SGCI Holdings III LLC*, Hearing Designation Order, MB Docket 22-162, DA 23-149 (MB rel. Feb. 24, 2023) (HDO).

[4] Resp. FCC's Opp'n to Pet. for Writ of Mandamus, *In re SGCI Holdings III LLC*, No. 23-1084 (D.C. Cir. filed Apr. 11, 2023) at ¶ 17 (Opposition to Petition for Writ of Mandamus).

In particular, with regard to the potential public interest harm pertaining to retransmission consent fees charged to cable operators and other multichannel video programming distributors (MVPDs), the Hearing Designation Order explains:

> 21. […]The Commission has recognized […] that supra-competitive increases in retransmission consent fees can result in pressure for retail price increases for subscription video services to the detriment of consumers, and therefore, the public interest. As such, the Commission has been alert to the potential for public interest harms arising from retransmission consent rates, particularly in the context of transactions involving large broadcast television companies or MVPDs. And, in previous transactions, the Commission has found that such increases and the resulting increased retail rates are not in the public interest.
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> 22. Even decisions that have not found a public interest harm related to alleged increases in retransmission consent fees in connection with a transaction have acknowledged the potential for such harms. For example, in *Nexstar/Media General*, the [Media] Bureau and the Wireless Telecommunications Bureau addressed concerns that a merger between two large broadcast television companies would increase retransmission consent fees and trigger after-acquired station clauses to the detriment of consumers and the public interest. While *Nexstar/Media General* did not find that the transaction would result in undue leverage in the negotiation of retransmission consent fees, it noted that the Bureaus did "not foreclose the possibility, in the future, of looking at rising retransmission fees, black outs, and other related issues in a context broader than local markets," emphasizing that "such harms must be demonstrably transaction-specific and not industry-wide in nature to be addressed in the context of a transfer of control proceeding."
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> 23. More recently, in *Nexstar/Tribune*, the Commission expressed concern about increases in retransmission consent fees that are not the result of "competitive marketplace considerations." In that case, the Commission addressed allegations that a proposed merger would harm MVPDs and consumers by causing increases in retransmission consent fees, thereby harming the public interest. While the Commission ultimately held in that case that an increase in retransmission consent rates, by itself, was not necessarily a public interest harm, it was careful to qualify its holding. There, the Commission noted that a public interest harm would be more likely if a rise in rates was not the result of a functioning retransmission consent marketplace or was the product of market power. Further, the Commission specifically discussed after-acquired station clauses, which allow a broadcaster to bring newly acquired stations under its existing retransmission consent agreement, substituting the acquiring broadcaster's retransmission consent fee for the rate previously negotiated by the MVPDs for the broadcast stations in question. While the Commission found that there was no apparent reason to step in and deny one party the benefit of the negotiated bargain of after acquired clauses in that case,

> it suggested that such intervention would be appropriate if there was "evidence of anticompetitive practices or other wrongdoing."
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> 24. Thus, the caselaw makes clear that increases in retransmission consent rates can constitute a public interest harm if such increases are not simply the product of a properly functioning competitive marketplace. In particular, evidence that anticompetitive practices or other wrongdoing could distinguish what would perhaps constitute a market-driven rate increase from one that is anti-competitive, unwarranted, and harmful to consumers and the public interest. In the instant matter, we find that there is a substantial and material question of fact as to whether any increase in retransmission fees as a result of this transaction is the result of a properly functioning, competitive marketplace, or, alternatively, whether such rate increases would be the result of: (1) the unique structure of the Transactions in which the various assignments and/or transfers of control are closed sequentially in order to take advantage of after-acquired station clauses and maximize retransmission revenue, or (2) some other anticompetitive practices or other wrongdoing, and accordingly, the impact of any such rate increases on the viewing public, including MVPD subscribers.[5]

As the Commission's mandamus opposition further articulated:

> There is no merit to Applicants' contention (Pet. 27–28) that the Commission somehow lacks authority, in assessing whether the transactions are in the public interest, to examine whether the transactions would harm consumer welfare by allowing Applicants to artificially increase retransmission fees. On the contrary, this Court has affirmed that "competitive considerations are an important element of the 'public interest,'" and that the Commission may consider "pertinent antitrust policies * * * along with other public interest considerations." *N. Nat'l Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968); *see United States v. FCC*, 652 F.2d 72, 81–82 (D.C. Cir. 1980) (en banc).[6]

With regard to the proposed transaction's potential impact on jobs, journalism, and local programming, the Hearing Designation Order similarly explains the Media Bureau's basis and authority for exploring issues related to localism:

> 33. Localism, along with competition and diversity, is a longstanding core Commission broadcast policy objective, which together forms the cornerstone of broadcasting. The Commission has consistently interpreted the localism obligation to require that broadcasters air material that is responsive to the needs and interests of the communities that their stations are licensed to serve, including local news, information, and public affairs programming.

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[5] HDO at ¶¶ 21-24 (footnotes and citations omitted).

[6] Opposition to Petition for Writ of Mandamus at p. 22.

> 34. In discussing its localism goal, the Commission has emphasized that "[b]roadcasters, who are temporary trustees of the public's airwaves, must use the medium to serve the public interest, and the Commission has consistently interpreted this to mean that licensees must air programming that is responsive to the interests and needs of their communities of license." This principle, that a "broadcast licensee's authorization to use radio spectrum in the public interest carries with it the obligation that the station serve its community, providing programming responsive to local needs and interests" is a crucial and oft-stated maxim aimed at ensuring that licensees use the broadcast spectrum consistent with the intent of Congress and to the benefit of local communities.
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> 35. In reiterating the importance of localism and its primacy to the Commission's ownership rules, the Commission has explained previously that it typically looks to two measures when seeking to assess localism: the selection of programming responsive to local needs and interests, and local news quantity and quality. In particular, the Commission has noted that the airing of local news and public affairs programming by local television stations is an important and useful measure of a station's effectiveness in serving the needs and interests of its local community.[7]

After detailing the various factual issues raised in connection with the proposed transaction's potential impact on localism, the Hearing Designation Order stated: "In order to assess the impact of SGCI Holdings' planned operations on the TEGNA Stations' ability to serve the needs and interests of their local communities, further examination of New TEGNA's evident plans to gather and broadcast local news remotely is necessary."[8] Further, as the Commission's recent filing with the Court noted: "Applicants' contention that the FCC lacks authority even to consider whether the transactions would undermine broadcast localism through planned cuts to local journalism and newsroom staffing (Pet. 27–28) is unfounded. The Supreme Court has explained that it is 'vital' that broadcast licensees 'serve the needs of the local community,' *Nat'l Broad. Co.*, 319 U.S. at 203, and this Court likewise has recognized the need for the FCC '"to assure [that licensees have] familiarity with community problems and then develop programming responsive to those needs,"' *see Citizens Comm. to Save WEFM*, 506 F.2d at 267–68."[9]

With regard to the Media Bureau's issuance of the Hearing Designation Order, I note that the Commission's rules delegate broad authority to the Media Bureau to handle various matters including the assignment and transfer of broadcast licenses.[10] While the rules contain a

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[7] HDO at ¶¶ 33-35 (footnotes and citations omitted).

[8] HDO at ¶ 50.

[9] Opposition to Petition for Mandamus at pp. 28-29 (footnote and additional citations omitted).

[10] *See* 47 CFR §§ 0.61, 0.283. Furthermore, section 1.115(e) of the Commission's rules expressly contemplates that hearing designation orders can be issued under delegated authority. 47 C.F.R. § 1.115(e).

restriction in connection with certain matters (namely, the imposition or cancellation of forfeitures involving amounts of more than $20,000) it does not contain any similar guidance with regard to the type or size of transactions or any other type of licensing matter that must be handled by the full Commission.[11] Indeed, a review of the Commission's records readily shows numerous large transactions handled by the Media Bureau on delegated authority, including transactions valued in the billions of dollars,[12] as well as the designation of matters for hearing by both the Commission and its various bureaus. With respect to some prior transactions that have been designated for hearing, the proposed merger between EchoStar Communications Corp. and DirecTV in 2002,[13] and Sinclair Broadcast Group, Inc.'s proposed acquisition of Tribune Media Company in 2018[14] were both designated for hearing by the full Commission, while others, such as the proposed assignment of licenses to Lake Broadcasting in 2014[15] and the transfer of radio stations involving Entertainment Media Trust in 2019[16] were designated for hearing by the Media Bureau.

Whether on delegated authority or considered by the full Commission, the Commission has an informal guideline that strives to process transactions within 180 days. As explained in our recent court filing, however, that guideline is aspirational, and sometimes, given the complexity of a transaction, the issues involved, the need to produce additional documents, or the need to coordinate approval for foreign ownership (as required here where the transaction, as proposed, includes ownership by non-U.S. entities, requiring review by the Committee for the Assessment of Foreign Participation in the United States Telecommunications Sector),[17] the Commission's review can take longer than 180 days. As the Commission's recent brief stated:

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[11] 47 CFR § 0.283.

[12] *See*, *e.g.*, *Applications of Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee) et al*., Memorandum Opinion and Order, 34 FCC Rcd 8436 (MB 2019); *Consent to Transfer Control of Certain License Subsidiaries of Raycom Media, Inc. to Gray Television, Inc.*, Memorandum Opinion and Order, 33 FCC Rcd 12349 (MB 2018); and *Applications of Media General, Inc.(Transferor) and Nexstar Media Group, Inc. (Transferee) et al*., Memorandum Opinion and Order 32 FCC Rcd 183 (MB/WTB 2016).

[13] *EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., and EchoStar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd 20559 (2002).

[14] *Applications of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee)*, Hearing Designation Order, MB Docket No. 17-179, 33 FCC Rcd 6830 (2018).

[15] *Patrick Sullivan and Lake Broadcasting, Inc., Application for Consent to Assignment of License of FM Translator Station W238CE, Montgomery, Alabama*, Hearing Designation Order, 29 FCC Rcd 5421 (MB 2014).

[16] *Applications of Entertainment Media Trust*, Hearing Designation Order and Notice of Opportunity for Hearing, 34 FCC Rcd 4351 (MB 2019).

[17] For example, the instant transaction proposes ownership by several non-U.S. entities, which under the Commission's rules requires the filing of a separate Petition for Declaratory Ruling to seek authority for such foreign ownership. *See Media Bureau Announces Filing of Petition for Declaratory Ruling by Teton Parent Corp*, Public Notice, MB Docket 22-166, DA 22-446 (rel. April 22, 2022). The applicants' request to exceed the foreign ownership benchmark set by the Communications Act was coordinated with other federal entities through the Committee for the Assessment of Foreign Participation in the United States Telecommunications Sector, a process that took approximately six months in this case.

> Applicants cite (Pet. 10, 34, 35–36) an FCC webpage stating that the agency has an "informal" "goal" of deciding transfer applications within six months. But that same webpage warns that, "[a]lthough the Commission will endeavor to meet its 180-day goal in all cases, several factors could cause the Commission's review of a particular application to exceed" that time. It further emphasizes that the Commission's "statutory obligation to determine that an assignment or transfer serves the public interest takes precedence over the informal timeline." Parties who fail to allow sufficient time to accommodate a longer process thus do so at their own risk. As this case illustrates, the determination of the public interest, especially in complex and highly disputed cases, can sometimes take longer and necessitate further inquiry.[18]

Ultimately, what is most important is that the Commission take the time necessary to properly assess the impact of a proposed transaction and to ensure that it serves the public interest, consistent with the statute.

In addition to the information found in the Opposition to the Petition for Writ of Mandamus, certain information responsive to your questions is available publicly from the Commission's websites or databases. This includes information regarding the length of time the Commission has taken to review various transactions. The Commission handles hundreds, if not thousands, of license transfers annually, and not every transaction considered by the Commission is tracked formally using the 180 day shot-clock. Typically a webpage is created for the transactions with higher profiles and are tracked using the 180 day clock. Of those cases, a review of the Commission's website shows that in the past two decades at least seven significant transactions have taken longer than 375 days to process, with another dozen taking longer than 300 days, as summarized below.

Transaction	**Date of PN Accepting for Filing**	**Date of Order**	**Days on clock**	**Total time**
T-Mobile – Sprint	6/15/2018	11/5/2019	317	508
CenturyLink - Level3	12/21/2016	10/30/2017	195	313
Charter - Time Warner Cable - Bright House	6/23/2015	5/5/2016	221	317
Comcast - Time Warner Cable - Charter3	4/8/2014	4/29/2015	165	386
Sinclair – Allbritton (delegated authority)	8/14/2013	7/24/2014	327	344
GCI - ACS Wireless	8/22/2012	7/16/2013	279	328
AT&T-Qualcomm	2/9/2011	12/22/2011	204	316
Nexstar-Media General (delegated authority)	2/17/2016	01/11/2017	329	329
Tribune Company (delegated authority)	5/13/2010	11/6/2012	177	908
Verizon Wireless-AT&T/Centennial	8/31/2009	8/20/2010	175	354

[18] Opposition to Petition for Mandamus at pp. 36-37 (footnote and additional citations omitted).

AT&T-Verizon Wireless/Alltel	6/19/2009	6/22/2010	368	368
Harbinger-SkyTerra (delegated authority)	5/1/2009	3/26/2010	329	329
Liberty Media- DirecTV	2/21/2007	2/25/2008	369	369
Clear Channel	12/20/2006	1/8/2008	384	384
Citadel Broadcasting-Disney	3/7/2006	3/22/2007	380	380
Comcast/TimeWarner-Adelphia	6/2/2005	7/13/2006	406	406
Univision-Hispanic Broadcasting	8/2/2002	9/22/2003	258	416
New Iridium	4/4/2001	2/8/2002	230	310
Fox-ChrisCraft	9/27/2000	7/25/2001	261	301

(Except where indicated, these transactions were addressed by the full Commission.)

Finally, with regard to the request for documents related to the Commission's internal and external communications (and in some cases its internal deliberations), producing such materials would take more time than afforded by your letter, but more importantly, producing such materials in the middle of this ongoing restricted proceeding could be problematic. In light of the fact that this is still an open proceeding, as well as the subject of active litigation, I am concerned that providing such materials could affect the staff or Commissioners' ability to render a decision in this matter. It is essential that the Commission remain an impartial decisionmaker as it completes its work to determine whether the pending applications would further the public interest consistent with 310(d) of the Communications Act. Once the proceeding is finalized, however, I'd be happy to provide additional information as appropriate.

I note, however, that the Commission is well-aware of the clear guidance of Section 310(d) of the Communications Act prohibiting consideration of an alternative transferee or assignee when reviewing an application for assignment or transfer of license. Similarly, the Commission's applicants, licensees, and practitioners are quite familiar with this well-established principle.

I hope this is helpful. Please let me know if I can be of any further assistance.

Sincerely,

Jessica Rosenworcel