

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

In the Matter of )
)
Consent to Transfer Control of Certain Subsidiaries ) MB Docket No. 22-162
of TEGNA Inc. to SGCI Holdings III LLC )
) LMS File Nos. 0000186355 et al.
Consent to Transfer Control of Certain Subsidiaries )
of Community News Media LLC to CMG Media )
Operating Company, LLC ) LMS File Nos. 0000186354 et al.
)
Consent to Transfer Control of Television Station )
WFXT(TV), Boston, MA, from a Subsidiary of ) LMS File No. 0000186353
CMG Media Operating Company, LLC to SGCI )
Holdings III LLC )
)
Consent to Assign Licenses from Certain ) LMS File Nos. 0000186458 et al.
Subsidiaries of TEGNA Inc. to Subsidiaries of )
CMG Media Corporation )
)

ORDER RE MOTION FOR CERTIFICATION

Issued: March 16, 2023

Released: March 16, 2023

1. The above-captioned hearing proceeding was initiated by the FCC’s Media Bureau on February 24, 2023, to consider issues raised by applications that seek consent to transfer control of FCC licenses held by TEGNA, Inc. to SCGI Holdings III, LLC (SGCI), as well as related transactions.1 On March 3, 2023, SGCI, TEGNA, and CMG Media Corporation filed a timely motion asking that the Presiding Judge forego conducting a hearing and instead certify to the full Commission an immediate application for review of the TEGNA/SGCI HDO.2 Oppositions were filed by The NewsGuild-CWA and National Association of Broadcast Employees and Technicians-CWA (TNG/NABET-CWA) and by the FCC’s Enforcement Bureau.3

1 Consent to Transfer Control of Certain Subsidiaries of TEGNA, Inc., et al., Hearing Designation Order, MB Docket No. 22-162, DA 23-149 (MB Feb. 24, 2023) (TEGNA/SGCI HDO).

2 SGCI, TEGNA, and CMG Media, Motion to Certify Application for Review of Hearing Designation Order, MB Docket No. 22-162 (filed March 3, 2023) (SGCI/TEGNA/CMG Motion).

3 TNG/NABET-CWA, Opposition to Motion to Certify Application for Review of Hearing Designation Order, MB Docket No. 22-162 (filed March 9, 2023) (TNG/NABET-CWA Opposition); Enforcement Bureau’s Opposition to Applicants’ Motion to Certify, MB Docket No. 22-162 (filed March 9, 2023) (EB Opposition). In addition, on March 7, 2023, the Enforcement Bureau asked for additional time to respond to the SGCI/TEGNA/CMG Motion. Enforcement Bureau’s Motion for Extension of Time to Respond to Motion to Certify, MB Docket No. 22-162 (filed March 7, 2023). As the Enforcement Bureau filed its Opposition by the original deadline, its motion for more time will be dismissed as moot.

2. Movants argue that this extraordinary relief is justified by section 1.115(e)(1) of the Commission's rules, 47 CFR § 1.115(e)(1), which includes an exception to the general rule that applications for review of an order designating issues for hearing that is released under delegated authority are deferred until after the hearing is conducted and exceptions to the Initial Decision are filed. That rule directs the Presiding Judge to certify a pre-hearing application for review to the Commission if she finds "that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation." Movants contend that the *TEGNA/SGCI HDO* raises questions that satisfy that standard, including the following:

- Whether Article II of the Constitution prevents the Presiding Judge from conducting the hearing;
- Whether the Media Bureau committed legal error in concluding that petitioners and commenters in this proceeding raised "substantial and material questions of fact" as to whether grant of the designated applications ... would be consistent with the public interest;
- Whether the Media Bureau lacks legal authority to effectively block a transaction *even if* it would result in retransmission consent fee increases by lawful application of after-acquired clauses; and
- Whether the Media Bureau lacks legal authority to effectively block a transaction based on its potential to reduce local station staffing.<sup>4</sup>

Movants submit that time is of the essence because they have no authority to extend the "Final Extension Date" of the underlying merger agreement, which is May 22, 2023. They assert that, "[i]f the FCC fails to grant the Applications before that date, the financing obligations of more than a dozen lenders helping to fund the transactions will expire as well."<sup>5</sup>

3. Opponents contend that the latter three of the four points Movants raise are not issues of law but represent an attempt to reassert factual arguments considered by the Media Bureau but resolved in a manner with which Movants do not agree.<sup>6</sup> Opponents also argue that Movants have not shown that there is a substantial difference of opinion questioning whether the Presiding Judge is authorized to conduct the hearing.<sup>7</sup> Moreover, they posit that it is immaterial to this inquiry that the financing for the underlying transactions will expire on May 22, 2023, and even if the matter were to be sent to the Commission, it is extremely unlikely that it could be fully resolved by that date.<sup>8</sup>

4. The narrow exception to the general review process provided by section 1.115(e)(1), which mirrors judicial procedures for interlocutory appeals,<sup>9</sup> is an exceedingly rare avenue of redress. While it might occasionally be appropriate and expeditious during the course of a hearing to certify certain unsettled individual questions of law to the Commission for resolution, a movant faces a

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<sup>4</sup> SGCI/TEGNA/CMG Motion at 2 (emphasis in original).

<sup>5</sup> *Id.* at 3.

<sup>6</sup> EB Opposition at paras. 10-12; TNG/NABET-CWA Opposition at 5-7, 11-14.

<sup>7</sup> EB Opposition at para. 8; TNG/NABET-CWA Opposition at 8-10.

<sup>8</sup> EB Opposition at paras. 9, 13; TNG/NABET-CWA Opposition at i, 4.

<sup>9</sup> *See, e.g.*, 28 U.S.C. § 1292 (b).

substantial burden in showing that an entire case should be certified without hearing.<sup>10</sup> The Presiding Judge agrees that Movants raise only one issue that might be considered a “controlling issue of law,” and that is the matter of her authority to conduct this hearing. The other three points that Movants put forward are not issues of law, but concern how the Media Bureau interpreted the relevant facts in concluding that it was unable to find that the proposed transactions are in the public interest. Pursuant to section 309 of the Communications Act, 47 U.S.C. § 309, the Media Bureau released the *TEGNA/SGCI HDO* designating two factual issues for consideration by the Presiding Judge regarding the impact of the proposed transaction on retransmission consent fees and on affected local communities. The *TEGNA/SGCI/TMG Motion* does not present justification under section 1.115(e)(1) to bypass the hearing process on these factual issues.

5. The remaining question regarding the constitutionality of removal protections for Administrative Law Judges (ALJs) is a question of law that has recently been raised in a number of fora. The argument is based on the fact that a federal ALJ may only be removed for good cause by the employing agency after a hearing by the Merit Systems Protection Board (MSPB),<sup>11</sup> and that MSPB members may only be removed by the President for “inefficiency, neglect of duty, or malfeasance in office.”<sup>12</sup> Movants and others submit that this double layer of removal protection for federal ALJs violates the constitutional separation of powers because it constrains the President’s ability to remove ALJs from office. Indeed, Movants argue that the FCC’s ALJ enjoys a third layer of protection in that FCC Commissioners are term appointees who cannot be removed at will.<sup>13</sup>

6. This complex constitutional issue is the subject of a pending petition for certiorari before the United States Supreme Court and accordingly will not be analyzed here.<sup>14</sup> Movants contend that because this is “an outcome-dispositive issue of law on which there is room for substantial difference from the views espoused by the Media Bureau,” certifying this matter to the Commission without hearing is required.<sup>15</sup> Conceding solely for the sake of argument that this is the type of controlling question of law that satisfies 1.115(e)(1), the Presiding Judge finds that Movants neglect the second part of the exception, which requires a showing that certifying this matter to the Commission would materially expedite resolution of the litigation. To be sure, certification would provide the Commission the opportunity to weigh in on the extent of the Presiding Judge’s authority, and may moot the question, but that simply resolves that one issue. Even if all four issues posited by the *SGCI/TEGNA/CMG Motion* had been qualifying legal questions, Movants fail to explain how certification would materially speed resolution of this case, especially in light of the Final Extension Date, other than to cut out an entire level of review that is mandated by the Communications Act and the Commission’s rules. As that could be argued with respect to any hearing proceeding, it is not adequate justification for the extraordinary relief that Movants seek.

7. Accordingly, **IT IS ORDERED** that the Motion to Certify Application for Review of

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<sup>10</sup> See, e.g., *Sound Broadcasting Company*, 6 FCC Rcd 6903, 6903-04 (1991) (denies waiver of section 1.115(e), holding that “[a] party asking to proceed in a manner other than proscribed [sic] by our procedural rules, including 47 CFR § 1.115(e)(1), has a heavy burden of establishing that the resulting disruption of the proceeding is outweighed by compelling and urgent circumstances which could not be considered by their timely presentation in accordance with those rules”).

<sup>11</sup> 5 U.S.C. § 7521.

<sup>12</sup> 5 U.S.C. § 1202(d).

<sup>13</sup> *SGCI/TEGNA/CMG Motion* at 10, 12-13 (citing, *inter alia*, 47 U.S.C. § 154(c)(1)).

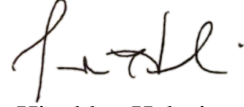
<sup>14</sup> *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *petition for cert. filed* (U.S. March 8, 2023) (No. 22-859), 2023 WL 2478988.

<sup>15</sup> *SGCI/TEGNA/CMG Motion* at 3.

Hearing Designation Order, filed on March 3, 2023, by SGC I Holdings III LLC, TEGNA Inc., and CMG Media Corporation **IS DENIED**.

8. **IT IS FURTHER ORDERED** that the Enforcement Bureau's Motion for Extension of Time to Respond to Motion to Certify, filed on March 7, 2023, **IS DISMISSED AS MOOT**.

FEDERAL COMMUNICATIONS COMMISSION



Jane Hinckley Halprin  
Administrative Law Judge