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September 4, 2013

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Communication in GN Docket No. 12-268

Dear Ms. Dortch:

On August 30, 2013, Mark Aitken, Vice President, Advanced Technology of Sinclair Broadcast Group, Inc. (“Sinclair”), and I met with Dorann Bunkin, Alison Neplokh, John Gabrysch, Martha Heller, Mary Margaret Jackson, Kevin Harding and Evan Morris of the Media Bureau, Gary Epstein and Edward Smith of the Incentive Auction Task Force, and William Scher of the Office of the General Counsel to discuss aspects of the initial comments Sinclair submitted in this docket.¹

Specifically, we discussed Sinclair’s position, reflected in Section II.b. of its comments, that in planning and conducting the incentive auctions the FCC should anticipate, facilitate and support a robust, evolving television broadcast service. Mr. Aitken provided an update on the status of ATSC 3.0 development and explained that a new standard can be ready to implement sooner than is generally thought. He noted that investing \$1.75 billion of public funds to lock broadcasting further into an aging technology would be an enormous disservice to the public.

¹ [*Comments of Sinclair Broadcast Group, Inc.*](#), GN Docket 12-268, filed January 25, 2013 (“*Sinclair Comments*”).

In response to a question, Mr. Aitken and I outlined and elaborated on Sinclair's proposal regarding the flexible use waivers authorized by Section 6402(b)(4)(B) of the Spectrum Act.² We stated that Congress plainly intended for 6402(b)(4)(B) to be interpreted expansively, noting that broadcasters already have broad rights to provide ancillary and supplementary services under Section 47 U.S.C. § 336, which is titled "Broadcast Spectrum Flexibility". We said that Section 6402(b)(4)(B) flexible use is independent of ancillary and supplementary services provided pursuant to Section 336. We stated that Congress intended (subject to the requirement to continue providing a no charge broadcast program stream) that the waiver grant broadcasters the same flexibility in operations and services as is afforded to Part 25 licensees. This is apparent because Congress also used the phrase "flexible use" to describe licenses to be created from reallocated federal spectrum³ and licenses that the FCC may create from spectrum recovered in incentive auctions.⁴ We noted that a literal and consistent interpretation of the "flexible use" waiver in the television broadcasting context is entirely consistent with the broad purpose of the Spectrum Act to foster the development of newer, technically advanced services, including mobile services, for the American public.

In response to a question about whether flexible use waivers should permit use of a technology other than the currently approved generation of ATSC, we responded that the Spectrum Act naturally contemplates deployment of new technologies, for the same reasons explained above. We also noted that when the FCC adopted the ATSC A/53 standard it specifically contemplated a time when that standard might sunset. Although the FCC has the power to impose a specific broadcast standard, it is not obliged to do so.

In response to a question about what Congress intended by the phrase "service rules" we responded that the phrase grants the FCC expansive authority to waive any and all technical and operating rules subject to the obligation of a licensee to continue providing a free-to-air broadcast service. We stated the waivers must be permanent,

² Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Sections 6102, 6401-03, 125 Stat. 156 (2012) ("Spectrum Act"). provides that "[i]n lieu or reimbursement for relocation costs under subparagraph (A), a broadcast television licensee may accept, and the Commission may grant as it considers appropriate, a waiver of the service rules of the Commission to permit the licensee, subject to interference protections, to make flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services. Such waiver shall only remain in effect while the licensee provides at least 1 broadcast television program stream on such spectrum at no charge to the public."

³ See Spectrum Act § 6401(b)(1)(B).

⁴ See Spectrum Act § 6402.

again subject to the condition that free broadcasting service continue. If not permanent, the waivers will not permit broadcasters to make investments or long term business plans based on those waivers.

We also clarified the proposal Sinclair made on page 9 of its comments that “the FCC should provide that . . . any licensee is entitled to the waiver simply by requesting it” and that any licensee should be entitled to request the waiver even before it knows if it will be repacked. We made five points:

- (1) We reiterated that a broad interpretation of the flexible use waiver provision is consistent with the broad purposes of the Spectrum Act. We elaborated on a point made in Sinclair’s comments, noting that the waivers benefit the public by bringing advanced services to the public as Congress intended and do not harm or burden anyone.
- (2) The FCC should strongly encourage broadcasters to seek waivers, because widespread grant of waivers would materially reduce claims on the repacking fund, increasing prospects for the auction to close.
- (3) The FCC should establish a “standard waiver” that any broadcaster in good standing may be granted simply by requesting it. Those waivers could be sought in advance of the reverse auction, even before a broadcaster knows whether it will be repacked. If the auction closes, all licensees that requested the waiver and committed to forego reimbursement of repacking costs should be entitled to receive the waiver regardless of whether the station is repacked. This will encourage broad participation and could result in a very substantial reduction in claims on the relocation fund.
- (4) Elaborating on the point above, we observed that, as a practical matter, the broadcasters that would elect to forego relocation fees are financially strong and unlikely candidates to participate in the auction. We explained that for a hypothetical commonly owned group of 25 stations, only a portion of those stations would likely be repacked. For a group operator, a waiver for five, ten or a dozen stations would be of no practical value and would not lead to service evolution for the public. A group will want the flexibility to pursue technical improvements or deploy improved services at all of its stations, or at least, at a rational subset of those stations, rather than an arbitrary group based on the FCC’s repacking plan. Among other things, without critical mass, broadcasters will not deploy new services and device makers will not support them. Allowing broadcasters willing to forego repacking costs the ability to choose a standard waiver in advance is probably the best approach to incentivizing substantial participation. We reiterated that the waivers cost the FCC nothing, reduce burdens on the repacking fund, serve the broad purposes of the Spectrum Act, and allow service to the public to be improved. Therefore, they should be granted liberally.

- (5) The FCC should (and under the legislation must) accept and consider individual waivers requested post-auction by stations that will be repacked. But that approach alone will not result in a discernible curb on relocation fund claims and probably will not lead to meaningful new services.

In response to a question about whether stations operating pursuant to a waiver would disenfranchise consumers because of incompatible equipment, we noted that the entire point of deploying new technology is to reach more consumers more easily more often on more screens. The notion of universal reach is an illusion when the existing technical standard is difficult for many consumers to use even on television sets, and is not available at all on hundreds of millions of mobile screens.⁵ Strain on mobile networks because consumers like to use those devices for television and video is one of the main drivers of the incentive auctions. Mr. Aitken stated that Sinclair believes the FCC should *encourage* broadcasters to deploy services that are useful to consumers on the viewing devices they are choosing today as well as on legacy devices. The strong broadcasters that would be willing to forego relocation costs must have expansive reach to cover extremely high operating costs, including programming and talent. Those broadcasters will find ways to transition without disenfranchising consumers (although the FCC's local ownership rules and the deletion of some assignments post-auction will hinder the process).

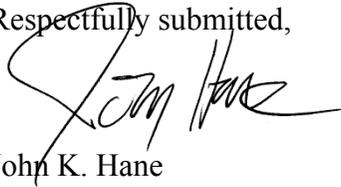
We also noted that simply because the waivers are granted does not mean each licensee with the waiver will abruptly build new facilities or radically change business plans. The broadcast industry relies on widespread reach. Broadcasters will not deploy prematurely or in an ad hoc way. The waivers, though, will allow broadcasters to develop and pursue improved technologies and services.

We briefly discussed how interference protection would work for stations operating with waivers. We stated that the type of rules generally applicable in Part 25 provide a good template. We suggested another approach would be to provide that a station operating pursuant to a waiver would be prohibited from causing more interference to other stations than it would if it were not operating pursuant to a waiver, and would only be able to claim protection from interference that would apply if it was operating conforming facilities.

⁵ Sales of *See CNNMoney, With new TVs, size matters*, (June 26, 2013) projecting dismal sales of only 36.6 million television sets in 2013 (available at <http://money.cnn.com/2013/06/26/technology/innovation/tv-sales/index.html>), versus *DRG Forecasts 62.3 Million US Tablet Unit Sales in 2013*, (June 24, 2013), (available at <http://www.prweb.com/releases/DRGTabletForecast/01/prweb10857238.htm>).

Please contact me if you have any questions about this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John K. Hane". The signature is stylized and cursive.

John K. Hane

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