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REDACTED—FOR PUBLIC INSPECTION

March 18, 2019

By ECFS

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

Re: Tribune Media Company and Nexstar Media Group, Inc. Consolidated Applications for Consent to Transfer Control, MB Docket No. 19-30

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,[1] DISH Network Corporation ("DISH") submits the enclosed public, redacted version of its Petition to Deny, including supporting exhibits. DISH has denoted with **{{BEGIN HCI END HCI}}** where Highly Confidential Information has been redacted. The Highly Confidential Information in the Petition to Deny and supporting exhibits is the Highly Confidential Information of DISH. A Highly Confidential version of this filing is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

Please contact me with any questions.

Respectfully submitted,

Pantelis Michalopoulos
Counsel for DISH Network Corporation

Enclosure

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[1] Tribune Media Company and Nexstar Media Group, Inc. Consolidated Applications for Consent to Transfer Control, *Protective Order*, MB Docket No. 19-30, DA 19-185 (Mar. 15, 2019) ("*Protective Order*").

REDACTED—FOR PUBLIC INSPECTION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Tribune Media Company	)	MB Docket No. 19-30
(Transferor)	)	
	)	
and	)	
	)	
Nexstar Media Group, Inc.	)	
(Transferee)	)	
	)	
Consolidated Applications for Consent	)	
to Transfer Control	)	

PETITION TO DENY OF DISH NETWORK CORPORATION

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March 18, 2019

TABLE OF CONTENTS

BEFORE THE
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WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Tribune Media Company	)	MB Docket No. 19-30
(Transferor)	)	
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PETITION TO DENY OF DISH NETWORK CORPORATION

DISH Network Corporation ("DISH")[1] respectfully petitions the Commission to deny the proposed acquisition of Tribune Media Company ("Tribune") by Nexstar Media Group, Inc. ("Nexstar") (collectively, the "Applicants").[2]

I. INTRODUCTION & SUMMARY

The proposed $6.4 billion transaction between Nexstar and Tribune would create the nation's largest broadcast group, with a combined 216 local TV stations in 118 markets across the country before divestitures. By operation of the UHF discount, the post-transaction Nexstar ("New Nexstar") would exceed the national ownership cap by 8.1%, and would reach 47.1% of

[1] DISH is a multichannel video programming distributor ("MVPD") that retransmits local broadcast stations in every one of the 210 designated market areas in the United States. DISH today has retransmission consent agreements with both Applicants, allowing it to retransmit certain local broadcast stations owned by the Applicants. DISH expects to negotiate with both Applicants in the future for continued retransmission of their stations. For these and other reasons described herein, DISH is a party in interest under Section 309(d)(1) of the Communications Act. *See* 47 U.S.C. § 309(d)(l).

[2] *See* Public Notice, Applications to Transfer Control of Tribune Media Company to Nexstar Media Group, Inc., MB Docket No. 19-30, DA 19-82 (Feb. 14, 2019).

the nation's population. Without that discount, New Nexstar would exceed the cap by about 33%, covering around 72% of the nation's population.[3] Substantial further consolidation in the broadcast industry threatens to harm localism and consumers, necessitating a careful review of whether this transaction serves the public interest. As currently proposed, this transaction does not.

To assess the impact of the transaction on consumers and distributors, DISH's economic experts at the Brattle Group have analyzed the retransmission rates that DISH pays to all broadcast groups, with a particular emphasis on the rates that DISH has agreed to pay in contracts signed after broadcast mergers, and on the rates that DISH has had to pay broadcast groups when subject to a blackout from another broadcast group.[4] Based on this empirical input, Brattle has reached the following conclusions:

- The national market for the purchase of retransmission consent is a relevant market for evaluating this transaction;[5]
- Other things equal, the larger the size of a broadcast group, the higher the rate commanded by that group;[6]
- After merging, broadcast groups have commanded rate increases that far outpace industry trends: more than 58% over the rates of the acquiring group, and as much as 366% over the rates of the target group;[7]
- When subject to a blackout, DISH is forced to negotiate above-market rates with other broadcast groups whose agreements come up for renewal during the

[3] Declaration of the William Zarakas and Dr. Eliana Garcés at 5, Table 1 (attached as Exhibit B) ("Brattle Decl.").

[4] *Id*. at 3-4.

[5] *Id*. at 3.

[6] *Id.*

[7] *Id*. at 23.

> blackout period, demonstrating that broadcasters compete with one another for retransmission fees in a national market.[8]

The merger will lead to price increases not only for Nexstar's own stations, but also for third party stations that have so-called "sidecar" agreements. Retransmission fees for sidecar stations tend to be closely aligned with the fees exacted by the groups with which they have those agreements. Conversely, sidecar station rates are substantially higher than those charged by comparable stations in the same market that do not have sidecar agreements with a larger broadcast group.

II. STANDARD OF REVIEW

Under Section 310(d) of the Communications Act ("the Act"), the Commission must determine whether the proposed transaction will serve "the public interest, convenience, and necessity."[9] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest.[10]

In reviewing a merger, the Commission "considers whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes."[11] For a broadcast merger, the Commission places particular emphasis on the values of localism and diversity.[12] In addition, before considering any benefits,

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[8] *Id*. at 3.

[9] 47 U.S.C. § 310(d).

[10] 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, 9139 ¶ 18 (2015) ("*AT&T/DIRECTV Order*").

[11] Applications of Level 3 Communications Inc. and CenturyLink for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 32 FCC Rcd. 9581, 9585 ¶ 9 (2017) ("*CenturyLink-Level 3 Order*").

[12] *See* Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc., from Shareholders of Media General, Inc., to Nexstar Media Group, Inc., *Memorandum Opinion and Order*, 32 FCC Rcd. 183, 196 ¶ 35 (2017) ("*Nexstar/Media General Order*") (citing

the Commission evaluates whether the transaction will harm competition.[13] If the Commission determines that the transaction will harm competition, it must consider whether such harms can be addressed by appropriate conditions on the transaction.[14] Thus, the Commission must examine the competitive effects of the transaction with special "reference to diversity, localism, [and] other public interest considerations."[15]

The Commission's role in merger review is more expansive than the Justice Department's analysis because of the Commission's expertise in communications and its public interest mandate.[16] Because the Commission must find that a transaction affirmatively serves the public interest before approving it, it must determine "whether a transaction would enhance,

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Applications for Consent to Transfer of Control from Shareholders of Belo Corp., *Memorandum Opinion and Order*, 28 FCC Rcd. 16867, 16879 ¶ 30 (2013) ("*Gannet/Belo Order*") ("[W]e must giv[e] careful attention to the economic effects of, and incentives created by, a proposed transaction taken as a whole and its consistency with the Commission's policies under the Act, including our policies in favor of competition, diversity, and localism."); *Gannet/Belo Order*, 28 FCC Rcd. at 16876 ¶ 22 ("Where, as here, 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.").

[13] *CenturyLink-Level 3 Order,* 32 FCC Rcd. at 9586 ¶ 10 ("If the Commission has determined that a transaction raises no public interest harms or any such harms have been ameliorated by narrowly tailored conditions, the Commission next considers a transaction's public interest benefits.").

[14] *CenturyLink-Level 3 Order,* 32 FCC Rcd. at 9585 ¶ 9.

[15] Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327, 6338 ¶ 29 (2016) ("*Charter/TWC Order*").

[16] Jonathan B. Baker, FCC, *Sector-Specific Competition Enforcement at the FCC*, at 5 (Sept. 2010), https://www.fcc.gov/osp/projects/baker-enforcement-091210.pdf.

rather than merely preserve, existing competition,"[17] and whether the merger will accelerate the decline of market power by dominant firms in relevant communications markets.[18]

Although the Commission's mandate is broader than that of the Justice Department, traditional antitrust principles also guide the Commission's analysis, especially in determining whether a transaction will harm competition.[19] The potential anti-competitive effects need not be defined with certainty for a merger to be challenged.[20]

If the Commission determines that a transaction will either not harm competition or the harm can be ameliorated by appropriate conditions, the Applicants must next prove that the transaction will provide affirmative benefits to the public.[21] The claimed benefits must be: 1)

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[17] *Charter/TWC Order*, 31 FCC Rcd. at 6338 ¶ 29; *see also* Applications of Comcast Corporation, General Electric Co. & NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4248 ¶ 24 (2011) ("*Comcast/NBCU Order*"); Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Domestic and International Authorizations and Application to Transfer Control of a Submarine Cable Landing License, *Memorandum Opinion and Order*, 15 FCC Rcd. 14032, 14046-47 ¶ 23 (2000) ("*Bell Atlantic/GTE Order*"); AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, *Memorandum Opinion and Order*, 14 FCC Rcd. 19140, 19147-48 ¶ 15 (1999) ("*AT&T Corp./British Telecom Order*").

[18] Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, *Memorandum Opinion and Order,*15 FCC Rcd. 9816, 9821 ¶ 10 (2000) ("*AT&T/MediaOne Order*"); *see also* Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 20035-36 ¶ 95 (1997).

[19] *CenturyLink-Level 3 Order*, 32 FCC Rcd. at 9585 ¶ 9.

[20] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1 (2010).

[21] *Comcast/NBCU Order*, 26 FCC Rcd. at 4249 ¶ 25; *see also Bell Atlantic/GTE Order*, 15 FCC Rcd. at 14046 ¶ 22; Application for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee,

transaction specific—meaning that the benefits will arise from the transaction and cannot be achieved by other practical means that have fewer anti-competitive effects; 2) verifiable—both in likelihood and magnitude; and 3) beneficial for the consumers, and not solely for the benefit of the Applicants.[22]

The Applicants have failed to meet their burden and make a public interest benefit showing. As currently proposed, the merger will substantially harm competition, which alone is a ground to either deny the merger or designate the application for a hearing.[23]

III. THE MERGER SHOULD BE EVALUATED IN BOTH THE LOCAL AND NATIONAL MARKETS FOR THE NEGOTIATION OF RETRANSMISSION CONSENT

The transaction should be evaluated both at the local level—where each network affiliate negotiates retransmission consent with each MVPD—and at the national level—where Nexstar negotiates retransmission consent with national MVPDs for carriage of all its owned and operated stations.

A. In Analyzing a Broadcast Merger, It Is Essential to Consider the National Market

As Brattle explains in the attached declaration, the national market is relevant for several reasons.[24] First, negotiations between an MVPD serving large regions or the entire nation and a broadcast group owning stations in several areas are national in nature.[25] This means that such MVPDs and broadcast groups typically negotiate and agree to a uniform retransmission fee per

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Memorandum Opinion and Order, 17 FCC Rcd. 23246, 23256 ¶ 28 (2002); *AT&T Corp./British Telecom Order*, 14 FCC Rcd. at 19147-48 ¶ 15.

[22] *Nexstar/Media General Order*, 32 FCC Rcd. at 192-93 ¶¶ 22-24.

[23] 47 U.S.C. § 309(e); *see also Nexstar/Media General Order*, 32 FCC Rcd. at 191-92 ¶ 19.

[24] Brattle Decl. at 10.

[25] *Id*. at 11.

subscriber for each station affiliated with one of the "Big 4" networks, and a uniform rate for each non-affiliated station, throughout the two parties' respective footprints, without regard to the location of each station.[26]

Second, the national character of retransmission negotiations is no accident, but rather is a direct consequence of distributors' needs.[27] National distributors such as DISH seek to offer local broadcast stations across their national footprint.[28] Each of the broadcast groups is a separate pathway for DISH to having enough broadcast retransmission agreements to preserve its reputation for providing local stations to each market throughout the nation, and to preserve its competitive position vis-à-vis DIRECTV and large cable operators.[29] It is important for DISH to be able to say to customers: you will be able to get local stations in most places where you are, and in most places where you may move.[30]

As a result, the merger of two large broadcast groups, such as Nexstar and Tribune (of which one is now the second largest in the nation), would reduce DISH's independent options for reaching a critical mass of local station availability throughout the nation. As Melisa Ordonez, Director of Local Programming for DISH, testifies:

- If DISH has to renegotiate a contract with a broadcaster at a time when it is subject to a blackout of another broadcast group's stations, it is more likely to accede to some of that first broadcaster's demands to avoid a second blackout and additional churn among its national subscriber base. Thus, an inability to retransmit a station in one market increases the price DISH is willing to pay for the right to retransmit a station in another market.[31]

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[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*; Declaration of Melisa Ordonez ¶ 3 (attached as Exhibit A) ("Ordonez Decl.").

[30] Ordonez Decl. ¶ 3.

[31] *Id.* ¶ 5.

- In fact, when Tribune forced DISH to black out all Tribune stations in the period June-September 2016, **{{BEGIN HCI**

  END HCI}}.[32]

- Conversely, if DISH has to renegotiate an expiring contract shortly after having secured a contract with a broadcast group without having experienced a blackout, that broadcaster may have an incentive to be more reasonable in its rate demands than it otherwise would be, because the specter of a "double whammy," where DISH is subject to blackouts of two groups' stations, is absent.[33]

- DISH, as well as the broadcast groups, attributes great importance to the sequencing of renewal negotiations: thus, DISH would want a difficult negotiation with a particularly large group to come after it has negotiated renewal with a number of smaller groups, and has already secured retransmission consent from them. The large broadcast group would want the opposite, in order to increase bargaining pressure on DISH.[34]

- Faced with the loss of either Nexstar's or Tribune's stations alone, DISH can take steps to avoid the loss of the other company's signal, and therefore be more able to resist significant price increases.[35]

- By contrast, the threat of simultaneously losing all of the Nexstar and Tribune stations would make DISH more likely to capitulate to a higher price increase than it would absent this transaction.[36]

A related reason for the national resonance of broadcast group mergers is that the simultaneous loss of a large number of stations in disparate geographic areas has worse reputational effects on DISH than the sum of non-simultaneous losses of the same number of stations.[37] This is validated by recent evidence for other distributors.[38]

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[32] *Id.* ¶ 6.

[33] *Id.* ¶ 7.

[34] *Id.* ¶ 8.

[35] *Id.* ¶ 9.

[36] *Id.*

[37] Brattle Decl. at 12.

[38] *Id.*

As an initial matter, media and news outlets report on blackouts once they are large enough or cause significant distress to sufficient people, which amplifies their negative commercial implications and give them reach beyond the actual markets affected.[39] For example, the proximity of the NFL playoffs gave notable publicity to the blackout imposed by Tegna on Verizon Fios. The Washington Post, a nationwide newspaper, carried the following headline on January 1, 2019: "Verizon TV customers suffer blackout of key channels days before the NFL playoffs."[40] Such headlines do not drive, and instead likely hurt, customer acquisition. Notice that the name of the broadcaster causing the blackout is not even mentioned in the title.

Another example, a USA Today story published on January 3, 2019, discussed Tribune's blackout of its stations on Charter. The article started with this sentence: "About 6 million Spectrum TV subscribers have lost local channels in New York, Los Angeles, Denver, St. Louis and 20 other markets amid a contract standoff between pay-TV provider Charter and the Tribune Media broadcast group."[41] Notably, the first sentence of this article gives potential subscribers the impression of a massive customer problem, over and above the loss faced by each affected customer.

Second, that effect is amplified due to the rise of social media—as the service loss affects a wider audience. And, as more frustrated people turn to social media, the news of the blackout

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[39] *Id.*

[40] Brian Fung, *Verizon TV Customers Suffer Blackout of Key Channels Days before the NFL Playoffs*, Washington Post (Jan. 1, 2019), https://www.washingtonpost.com/technology/2019/01/01/verizon-tv-customers-suffer-blackout-key-channels-days-before-nfl-playoffs-sec-college-championship-games/.

[41] Mike Snider, *Charter Spectrum-Tribune Dispute Cause TV Channel Blackout that Hits Millions Across US*, USA Today (Jan. 3, 2019), https://www.usatoday.com/story/money/media/2019/01/03/charter-spectrum-tribune-dispute-means-millions-lose-tv-channels/2470752002/.

may snowball and affect an even larger audience in a more negative way.[42] The Los Angeles Times picked up—and further amplified—this frustration on January 11, 2019, when it reported on the Tribune station's blackout on Charter. Here are the posts reproduced in the LA Times, a paper with nationwide reach: "What a joke! This just makes me want to go back to DirecTV! I switched a year ago only to be able to watch the Dodgers, but have found Spectrum service to be inferior," one Southern California customer wrote on Twitter. Another person complained: "This may be the last straw for me. I look forward to watching KTLA every morning. My bill has doubled in the last two years and now my favorite news station is missing."[43]

The reputational impact is clearly higher for the MVPD than for the broadcaster because the customer buys the service from the MVPD and largely blames the MVPD for a blackout.[44] Due to the effect of amplification, the higher the scope of the blackout in terms of content and geographic coverage, the disproportionately larger the potential commercial impact in terms of brand reputation.[45]

B. The Commission and the Justice Department Have Repeatedly Recognized the National Effects of Similar Transactions

In a series of transaction reviews, both the Commission and the DOJ have recognized the threat of national market effects arising from the merger-specific increase in bargaining power that exists above and beyond any adverse effects in local geographic markets.

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[42] Brattle Decl. at 13.

[43] Meg James, *Blackout Ends: Tribune Media TV Stations, Including KTLA, Return to Charter Spectrum*, Los Angeles Times (Jan. 11, 2019), https://www.latimes.com/business/hollywood/la-fi-ct-tribune-charter-blackout-over-20190111-story.html.

[44] Brattle Decl. at 13.

[45] *Id.*

Most recently, the Commission and the DOJ looked at circumstances where broadband providers with non-overlapping service areas participated in both local markets and a national market where distinct competitive effects would be the likely result of the transactions.

In the *Charter/Time Warner Cable* transaction, the Commission understood that, despite the merging companies not having overlapping presence in any local market and the fact that the geographic market for the purchase of residential broadband subscriptions was local, there was still a separate product market in "the market for access to wireline [broadband] subscribers via interconnection," which it titled the "interconnection market,"[46] and that the geographic market for interconnection was national. The relationship between broadband providers and content creators existed beyond the local geographic scope between the broadband providers and their local customers.

As the Commission explained, edge providers who seek to have their content transmitted to residential subscribers understood that the different broadband providers offering the ability to reach residential subscribers act "as substitute sources for eyeballs regardless of the portion of the United States each [broadband] provider serves."[47] The Commission also noted that "there is no indication that edge providers contract for direct or indirect interconnection with [broadband] providers on a local market-by-market basis[.]" Rather "the record indicates that whether an edge provider is contracting for [interconnection services], it provides access to its full

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[46] *Charter/TWC Order*, 31 FCC Rcd. at 6378-79 ¶ 104.

[47] *Id*. at 6379 ¶ 106.

footprint."[48] And the Commission concluded that the new company would be able "to impose higher costs on edge providers [and others] due to its increased market power."[49]

The analysis performed by the DOJ economists in the proposed *Comcast/Time Warner Cable* merger reached a similar conclusion. Again, the two applicants offered both local broadband services to consumers and distribution services through interconnection agreements to edge providers and, again, the two companies did not overlap in the local residential markets. The DOJ economists confronted the "question of how a merger that would have had no meaningful impact on concentration in the markets in which consumers purchase video or broadband services came to be viewed as problematic by the Antitrust Division."[50] As the DOJ economists explained, both firms participated in the interconnection market, and in that national market economic analysis provided "powerful evidence that content providers view [broadband] subscribers as substitutes, that the merger would reduce this competition amongst ISPs, and that the end result likely would be higher interconnection fees."[51]

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[48] *Id*. at 6379-80 ¶ 107.

[49] *Id*. at 6380 ¶ 108. Similarly, the DOJ, focusing on the video programming side of the business in the same proposed transaction found national effects without regard to the lack of local overlap. Like residential broadband, the geographic market for video programming distribution is local but the "anticompetitive effects of the proposed merger likely extend to the entire United States," Competitive Impact Statement, *United States v. Charter*, Case No. 1:16-cv-00759, at 7 (D.D.C. May 10, 2016), even though the merging companies "do not compete to provide video distribution services to consumers in the same local geographic markets . . . ." *Id.* at 10. The Department specifically alleged that, with its larger size, "programmers will be less likely to risk losing access to New Charter's considerable subscriber base . . . ." *Id.* at 13.

[50] Nicholas Hill, Nancy L. Rose, and Tor Winston, *Economics at the Antitrust Division 2014-2015*, 47 R. Indus. Org. 425, 427 (2015) ("*Rose Study*"). And, as with interconnection, economic analysis found that "the merged firm would have gained additional bargaining leverage over programmers by removing programmers' ability to substitute the stand-alone firms for one another." *Id.* at 429.

[51] *Id.* at 428. Similarly, looking at the national market for video distribution, the DOJ economists concluded that "while Comcast and Time Warner Cable are rarely substitutes for access to

Indeed, the idea that separate national effects can arise from the combination of local markets is well-established. As the DOJ complaints in both *United States v. AT&T* ("*AT&T/T-Mobile*") and *United States v. U.S. Airways, Group, Inc.* ("*U.S. Airways/American Airlines*") demonstrate, the exercise of market power in local markets can yield national effects. For example, in *AT&T/T-Mobile*, the government alleged the existence of local geographic markets for mobile wireless telecommunications services[52] but also recognized the "national decision-making" of the biggest four mobile companies[53] and the fact that existence of "nationwide competition affecting those markets" made it "appropriate to consider the competitive effects of the transaction at a national level."[54] Similarly, in *U.S. Airways/American Airlines*, the DOJ alleged that each "city pair" (which designates the cities between which a flight departs and arrives) constituted a separate geographic market[55] but that, in addition, the reduction of major domestic airlines from five to four would separately "threaten[] substantial harm to consumers,"[56] through the danger of increased coordination that would likely lead to higher ancillary fees, such as for the checking of baggage.[57]

The DOJ and the Commission performed the same type of analysis when they reviewed the *AT&T-MediaOne*[58] transaction in 2000—the merger of two cable operators that would have

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particular customers, they are substitutes when a programmer is trying to build a national audience for content." *Id.* at 428-29.

[52] Complaint, *United States v. AT&T*, Case No. 1:11-cv-01560, ¶ 17 (D.D.C. Aug. 31, 2011).

[53] *Id.* ¶ 19.

[54] *Id.* ¶¶ 14, 20.

[55] Amended Complaint, *United States v. US Airways Group, Inc.*, Case No. 1:13-cv-01236-CKK, ¶ 28 (D.D.C. Sept. 5, 2013).

[56] *Id.* ¶ 1.

[57] *Id.* ¶¶ 71-72, 77.

[58] *AT&T/MediaOne Order*, 15 FCC Rcd. at 9817-18 ¶ 1.

resulted in the combination of the Excite@Home and Road Runner broadband access portals. When the DOJ argued for the divestiture of the combined company's interest in one of the two portals, it defined a national market[59] for the "aggregation, promotion, and distribution of broadband content and services."[60] In the DOJ's view, the proposed combination of the two companies threatened competition in this market.[61] The DOJ specifically alleged that "AT&T would substantially increase its leverage in dealing with broadband content providers, enabling it to extract more favorable terms for such services."[62] The Commission reached a similar conclusion, stating that "the merged firm will control such a large portion of the broadband customer base that it could gain *de facto* power to dictate what content, products, and services are available to broadband customers generally, and at what price."[63]

In sum, the Commission and the DOJ have long understood that the cumulative impact of market power in many local markets is more than just the sum of its parts. That is the case here, where retransmission prices would rise as MVPDs would be forced to pay higher fees due to the combined power of the new company. The combined company would, as a result of the merger, have more power than is simply the sum of its parts.

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[59] Complaint, *United States v. AT&T*, Case No. 1:00-cv-01176, 2000 WL 1752108, ¶ 28 (D.D.C. May 25, 2000).

[60] *Id.* ¶ 25.

[61] *Id.*

[62] *Id.*

[63] *AT&T/MediaOne Order*, 15 FCC Rcd. at 9865 ¶ 111.

IV. THE MERGER WOULD INCREASE PRICES BY CREATING THE NATION'S LARGEST BROADCAST GROUP

A. The Merger Would Exacerbate an Already Serious Problem

The Commission regulates many industries. But in not one of those industries have prices risen at the frenetic pace of retransmission fee increases. Distributors paid about $214.6 million for local stations in 2006. By 2009, the number had risen to almost $1 billion a year for local stations. And that was just the start. In 2014, the Commission cited projections that retransmission fees for 2016 would be $2.6 billion, more than 12 times those for 2006.[64] In percentage terms, this is a 1,200% increase. The Commission also cited projections of $7.6 billion for 2019 and $9.1 billion for 2020.[65] Those sums are 3,500% and 4,200% of the 2006 number. The 2014 projections may have seemed high, but the reality proved even more extreme: broadcast retransmission fees reached $7.9 billion in 2016, or 3,591% of the 2006 number.[66] More recent projections estimate that, by 2023, retransmission fees will increase to $12.82 billion, or 5,880% of 2006 revenues.[67]

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[64] *See* Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd. 3351, 3363 ¶ 16 n.68 (2014) ("*2014 Retransmission Consent Order*") (citing record evidence that retransmission consent fees for MVPDs increased from $214.6 million in 2006 to $1.1 billion in 2010).

[65] *Id.*

[66] SNL Kagan, a media research group within the TMT offering of S&P Global Market Intelligence, *Broadcast Retransmission and Virtual Service Provider Carriage Fee Projections Through 2023* (June 2017); *see also* Letter from Mike Chappell, Executive Director, American Television Alliance, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 15-216 and 10-71, at 3 (Jan. 6, 2017) ("[R]etransmission consent prices rose 27 percent last year alone after three years of 40-percent increases.").

[67] Justin Nielson, *Retrans Projections Update: $12.8B by 2023*, SNL Kagan (June 14, 2017) (estimating $9.39 billion in retransmission fees in 2017).

No other sector of the U.S. economy has faced growth at this pace. The annual Producer Price Index increase over the same period (2006 to 2018) ranged from negative 5.1% to 7.8%.[68] Of industry specific indices, telecommunications increased by 2.2%[69] overall in the 12 years from 2006 to 2019; over the same period, broadcasting increased by 26.8%,[70] and hospitals increased by 33.8%,[71] while finance increased by 1.5%[72] overall.

As for consumer prices, the Consumer Price Index only rose 2.2% over the past year.[73] Housing prices climbed 3%, while the price of gasoline fell 10.1%.[74] In another area that the Commission regulates—wireless plans— prices have risen only 0.3% after several years of price decreases.[75] In other countries, even when undergoing record inflation, the rate has only hit 25%. The record inflation that has alarmed observers of the Turkish economy is dwarfed by

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[68] *See Top Picks*, Bureau of Labor Statistics, https://data.bls.gov/cgi-bin/surveymost?pc (last visited Mar. 17, 2019) (Check "Total Manufacturing Industries" and press "Retrieve Data." Under "More Formatting Options," select "12-Month Percent Change," "Specify Year Range" "2006" to "2019," and "Select One Time Period" to "Annual Data.").

[69] *See Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.55.Telecommunications (last visited Mar. 17, 2019) (showing price increase data for telecommunications from Jan. 2006 to Feb. 2019).

[70] See *Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.54.Broadcasting (last visited Mar. 17, 2019) (showing price increase data for broadcasting from Jan. 2006 to Feb. 2019).

[71] *See Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.50.Hospitals (last visited Mar. 17, 2019) (showing price increase data for hospital industry from Jan. 2006 to Feb. 2019).

[72] *See Producer Price Indexes, Text File, Industry Data*, Bureau of Labor Statistics, https://download.bls.gov/pub/time.series/pc/pc.data.57.Finance (last visited Mar. 17, 2019) (showing price increase data for Finance industry from Jan. 2006 to Feb. 2019).

[73] Jeff Kearns, *U.S. Inflation Remains Contained Amid Fed Patience on Rates*, Bloomberg (Feb. 13, 2019), https://www.bloomberg.com/news/articles/2019-02-13/u-s-inflation-remains-contained-amid-fed-patience-on-rates.

[74] *Id*.

[75] Sarah Krouse, *Cellphone Bills Go Up for First Time in Nearly Two Years*, Wall Street Journal (July 13, 2018), https://www.wsj.com/articles/cellphone-bills-go-up-for-first-time-in-nearly-two-years-1531492557.

inflation in the retransmission consent industry.[76] In fact, retransmission fee increases over the last decade exceed hyperinflation in Brazil (ranging from 1,600 to 2,500% between 1989 and 1994) and Argentina (with an average annual inflation rate of 300% in the 1980s).[77] The hyperinflation of retransmission fees more closely resembles the inflation currently suffered in Venezuela than anything else in the global economy.[78]

As a result of this pressure, many distributors have had to raise their prices.[79] The American Cable Association reports that retransmission fees have forced some distributors to raise their subscribers' bills by $4 per month or more.[80] DISH has long and justly been perceived as the low-cost distributor, and has fought the hardest of any MVPD to hold the line on its prices. But DISH is not immune to the reality that selling at a loss is not a viable business plan. DISH has thus been compelled to increase its prices for its America's Top 120, America's

[76] Daren Butler, *Turkey Inflation Surges to Nearly 25 Pct in Sept, Highest in 15 Years*, Reuters (Oct. 3, 2018), https://www.reuters.com/article/us-turkey-economy-inflation/turkey-inflation-surges-to-nearly-25-pct-in-sept-highest-in-15-years-idUSKCN1MD0TP.

[77] *Brazilian Hyperinflation*, Encyclopedia of Money, http://encyclopedia-of-money.blogspot.com/2010/01/brazilian-hyperinflation.html (last visited Mar. 17, 2019); *Hyperinflation in Argentina*, Citéco https://www.citeco.fr/10000-years-history-economics/contemporary-world/hyperinflation-in-argentina (last visited Mar. 17, 2019).

[78] Steve Hanke, *Venezuela's Hyperinflation Hits 80,000% Per Year in 2018*, Forbes (Jan. 1, 2019), https://www.forbes.com/sites/stevehanke/2019/01/01/venezuelas-hyperinflation-hits-80000-per-year-in-2018/#159682394572.

[79] *See, e.g.*, Mike Farrell, *Cable Rates on the Rise*, Multichannel (Jan. 8, 2019), https://www.multichannel.com/news/cable-rates-on-the-rise ("Cable rates are on the rise again, with pricing for video and broadband service at the largest operators across the country increasing modestly as operators focus more on beefing up special charges to offset rising sports and retransmission consent costs."); Jon Brodkin, *Comcast Raises Cable TV Bills Again—Even if You're Under Contract*, Ars Technica (Nov. 26, 2018), https://arstechnica.com/tech-policy/2018/11/comcasts-controversial-tv-and-sports-fees-rise-again-hit-18-25-a-month/.

[80] Letter from Mary C. Lovejoy, American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 15-216, at 1 (Mar. 26, 2018).

Top 120+, America's Top 200 and America's Top 25 packages a number of times.[81] The ever increasing fee demands of the large networks caused DISH to create a separate broadcast package in 2016 to isolate network stations from the other content on its packages.[82] That package is priced at $12 a month.[83] This means retransmission fees are now approaching a crucial milestone—**{{BEGIN HCI**

END HCI}}. When all costs are factored in, **{{BEGIN HCI**

END HCI}}. If the price increases accelerate further, this likely leaves DISH with little choice but to raise the prices of the broadcast packages paid by its customers.[84]

These steeply rising costs are in turn a contributing factor to the subscriber losses faced by MVPDs.[85] Thus, rising retransmission fees have a ripple effect felt throughout the video distributor chain—an effect that ultimately harms consumers.

No rational reason exists for these fee increases. In fact, the ratings of the broadcast networks have slipped both as a percentage of total video consumption and relative to the ratings

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[81] *See* James K. Willcox, *Cable TV Fees Continue to Climb*, Consumer Reports (Feb. 21, 2019), https://www.consumerreports.org/tv-service/cable-tv-fees/; *see also* Daniel Frankel, *Dish Follows U-verse and DirecTV, Announces Rate Increases for 2016*, Fierce Cable (Dec. 18, 2015), http://www.fiercecable.com/cable/dish-follows-u-verse-and-directv-announces-rate-increases-for-2016.

[82] *See Finally, a Skinny Bundle! 'Don't Watch, Don't Pay' with DISH's New Flex Pack*, DISH Network (Aug. 4, 2016), http://about.dish.com/2016-08-04-Finally-a-Skinny-Bundle-Dont-Watch-Dont-Pay-with-DISHs-New-Flex-Pack.

[83] This package previously cost 10 dollars a month, but rising retransmission fees forced DISH to raise its price.

[84] Ordonez Decl. ¶ 12.

[85] Jon Brodkin, *Cable TV 'Failing' as a Business, Cable Industry Lobbyist Says*, Ars Technica (June 5, 2017), https://arstechnica.com/information-technology/2017/06/cable-tv-failing-as-a-business-cable-industry-lobbyist-says/.

of cable networks.[86] Instead of offering better service, broadcast groups are exercising their market power. While less popular than they once were, the four Big 4 networks are must-have staples for pay-TV customers. The Commission has recognized that fact, stating that "the top-four broadcast networks have a distinctive ability to attract, on a regular basis, larger primetime audiences than other broadcast and cable networks, which enables them to earn higher rates from those advertisers that are willing to pay a premium for such audiences."[87] While certain programming that non-affiliated broadcasters air "ha[s] become increasingly capable of attracting primetime audiences on par with, or even greater than, the top-four broadcast networks, no one cable network—let alone several—has been able to consistently deliver such audiences beyond individual programs or episodes."[88] As the Commission has further explained:

[86] Nellie Andreeva, *Broadcast Networks End Of 2018 Scorecard & Look Ahead To Midseason*, Deadline (Dec. 31, 2018), https://deadline.com/2018/12/broadcast-networks-end-of-2018-scorecard-abc-cbs-nbc-fox-the-cw-look-ahead-to-midseason-manifest-the-conners-last-man-standing-fbi-charmed-1202527029/ (discussing the "declining linear ratings" of broadcast networks); TV Network Summary, SNL Kagan (2017) (showing the decline of broadcast TV station ratings from 2006-2015 is greater than the overall decline in cable network ratings over the same period); *see also* Gerry Smith and Lucas Shaw, *Fed-Up Advertisers Stop Paying More for Smaller TV Audiences*, Bloomberg Technology (May 5, 2017), https://www.bloomberg.com/news/articles/2017-05-05/fed-up-advertisers-stop-paying-more-for-declining-tv-audiences ("In the [2017] TV season, the four major broadcasters have lost 8 percent of their audience . . . . TV ratings have dropped 33 percent in the last four years"); Anthony Crupi, *Where TV Ratings Go From Here*, Advertising Age (Apr. 18, 2016), http://adage.com/article/media/ratings/303574/ (charting the steady drop in Big 4 broadcast ratings and noting that strong performing shows from the previous season experienced some of the greatest rating drops); Jim Edwards, *BRUTAL: 50% Decline In TV Viewership Shows Why Your Cable Bill Is So High*, Business Insider (Jan. 31, 2013), http://www.businessinsider.com/brutal-50-decline-in-tv-viewership-shows-why-your-cable-bill-is-so-high-2013-1 ("[T]here has been a 50 percent collapse in broadcast TV ratings in the last decade."); Tim Arango and Bill Carter, *An Unsteady Future for Broadcast*, New York Times (Nov. 20, 2009), http://www.nytimes.com/2009/11/21/business/media/21network.html (describing the ratings decline of the big four broadcast networks compared to cable networks).

[87] 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, *Second Report and Order*, 31 FCC Rcd. 9864, 9958 ¶ 229 (2016).

[88] *Id*. at 9955 ¶ 225.

"[W]hile non-broadcast video programming may offer consumers additional programming options in general, they do not serve as a meaningful substitute in local markets due to their national focus."[89]

The Commission has long believed that "national programmers are not responsive to the specific needs and interests of local markets, and . . . competition among local rivals most benefits consumers and serves the public interest."[90] But this competition is not evident in practice: for distributors, the four network stations are complements to one another just as much they are substitutes for one another. Each network affiliate is the "only saloon in town" for its network, playing two, three or four distributors against one another.

This is why blackouts cause fewer problems for broadcasters as compared to distributors. During a blackout a distributor bleeds subscribers and their associated revenues, but those same subscribers go to other distributors and watch the network that is blacked out.[91] This means that, while distributors lose subscribers, networks lose a much smaller amount of viewers.[92] And, broadcasters do not even lose fees: they typically receive retroactive payment for each of the subscribers that stayed with DISH.[93] But the distributor never recovers the subscription revenues

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[89] *Id.* at 9874 ¶ 27.

[90] *Id.* (citing 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, 13716 ¶ 246 (2003)).

[91] *See, e.g.*, Todd Spangler, *Time Warner Cable Lost Subscribers During CBS Blackout*, Variety (Sept. 12, 2013), https://variety.com/2013/biz/news/time-warner-cable-lost-subscribers-during-cbs-blackout-1200608744/ ("[While] Time Warner Cable dropped an unspecified number of customers as a direct result of the 32-day blackout of CBS stations in major markets and the loss of Showtime nationwide . . . the TW Cable blackout did not inflict any financial damage on [CBS].").

[92] Ordonez Decl. ¶ 11.

[93] *Id.*

from customers who left during the blackout, and always loses a portion of those customers and their revenues for good.[94]

B. The Merger Would Raise Consumer Prices

This merger would further concentrate the broadcast market, leading to higher prices for consumers. Nexstar owns or operates 134 stations in 96 markets.[95] It now ranks second among the nation's broadcast groups, next only to Sinclair, with 193 stations.[96] Tribune owns 42 stations in 31 markets, making it the nation's seventh largest broadcast group.

The merger would cause Nexstar to leapfrog Sinclair and command the nation's largest group of stations, a sprawling empire of stations stretching from the Atlantic to the Pacific Ocean and from the Canadian to the Mexican border. Before divestitures, Nexstar would control 216 stations either outright or through an agreement. It would reach 118 DMAs, more than half of the 210 DMAs in the country. Its negotiating power would be unrivaled, as no nationwide MVPD could risk losing access to the full complement of Big 4 stations in half of the nation's DMAs in the event of a blackout.

This enhanced negotiating leverage will translate to higher retransmission fees, and in turn higher consumer prices. Brattle has updated its prior analysis of DISH's retransmission agreements, conducted in 2017 in connection with the proposed acquisition of Tribune by

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[94] *Id.*

[95] Because Nexstar's applications state that it owns and operates 134 stations, it likely has sidecar agreements with a remaining 40 stations, bringing the current total number of its stations to 174. *See* Other Authorizations, attached as Exhibit 18 to Application of Nexstar and Tribune (listing licenses for 134 stations)*; see also Nexstar Media Group, Inc.*, https://www.nexstar.tv/ (last visited Mar. 17, 2019) (describing itself as having the "reach of 174 full power television stations").

[96] Alvin Chang, *Sinclair's Takeover of Local News, in One Striking Map*, Vox (Apr. 6, 2018), https://www.vox.com/2018/4/6/17202824/sinclair-tribune-map ("In the United States, the Sinclair Broadcast Group owns 193 stations.").

Sinclair.[97] All in all, Brattle has now reviewed DISH's agreements with 80 broadcast groups. The 18-month period since the initial study has provided Brattle with a suitable opportunity to test the conclusions it reached in the 2017 analysis against the rates that DISH has been able to achieve recently. As Ms. Ordonez testifies, these rates were negotiated by DISH with the goal of achieving the lowest possible price from each broadcast group, and certainly not with the goal of fitting with a prior econometric study.[98] It is thus all the more notable that the recent agreements validate the conclusion that Brattle has drawn from its review of the previous ones: other things being equal, the larger the broadcast group, the higher the retransmission fee paid by the MVPD.[99]

Size is one of the primary drivers of rates. A larger group has more bargaining power, as the risk of a blackout that threatens 100 stations is greater than a blackout that only threatens 10 stations. Brattle has calculated that the rate for a group with annual revenues of $500 million or more is **{{BEGIN HCI** **END HCI}}** more than the average Big 4 rate charged by groups with less than $500 million in annual revenue.[100]

[97] Brattle Decl. at 22.

[98] Ordonez Decl. ¶ 13.

[99] Brattle Decl. at 3, 13.

[100] *Id*. at 16, Table 3.

Table 1: Average Retransmission Fee by Broadcast Group Revenue

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As Brattle explains,[101] the model on which the regression is based is:

$$RetransFee_g = \alpha + \beta_{size} \cdot BroadcasterSize + \beta_{age} \cdot ContractAge_g + f(Additional\ Controls) + \varepsilon_g$$

[101] *Id*. at 18-19.

In this model, the coefficient β_{size} on the size of the broadcast group, measured by the number of DISH subscribers reached by the Big 4 stations owned by the group and the 2016 revenues earned by those stations, is the primary variable of interest. In both cases, the coefficient is positive and statistically significant.

As Brattle explains, including the rates payable to the four networks' owned-and-operated station groups would yield similar results—large broadcast groups charge substantially higher rates than small ones, as shown by Table 2.

Table 2: Retransmission Fees by Broadcast Group Size Including Network Owned Broadcast Groups

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Brattle also considered alternative modeling specifications, a total of six, "ranging from a simple regression that does not include additional control variables (Model 1), to specifications

with various combinations of controls (Models 2 through 6)."[102] The results are shown in Table 3 below:

Table 3: Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group

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As Brattle explains, "[t]he regression analysis indicates that there is a strong relationship between broadcast group size and the monthly per-subscriber retransmission fees paid by DISH."[103]

[102] *Id*. at 19.

[103] *Id*. at 20.

Table 4 provides a summary of Big 4 network affiliate stations covered by these contracts.[104] The table provides summary information concerning the size of the 54 broadcast groups with which DISH currently has contracts in place to retransmit Big 4 local broadcast stations.[105]

[104] Stations that were owned by Nexstar and Media General prior to their merger are currently subject to contract terms that were signed prior to the merger's close in January 2017. Brattle has used these pre-merger contracts (i.e., terms and prices) in its present analysis.

[105] Data concerning local broadcast station ownership (i.e., its relationship, if any, to a broadcast group) and local broadcast station revenues (2016) from BIA/Kelsey Media Pro.

Table 4: Broadcast Group Size

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Table 5 provides the results of a simple statistical analysis concerning the relationship between broadcast group size and retransmission fees. Specifically, it shows the average retransmission fees, as well as standard deviations and standard errors (of the average), paid by DISH to "large" broadcast groups (i.e., local broadcast stations whose combined 2016 station revenues are equal to or exceed $500 million) as well as to "small" broadcast groups (i.e., local broadcast stations whose combined 2016 station revenues were less than $500 million). The table also provides a similar statistical breakdown by the number of DISH subscribers reached by the broadcast group (with the cutoff between "large" and "small" set at one and a half million DISH customers).[106]

Table 5: Average Retransmission Fee by Broadcast Group Size

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Revenue is not the only way in which size drives up rates. The total number of DISH subscribers reached by a broadcast group also drives up prices to an even larger extent—about

[106] Brattle Decl. at 16.

21%.[107] Again, this makes sense: an MVPD is more likely to capitulate to higher fees if the broadcaster reaches 50% of its subscribers than if the broadcaster reaches 10%.

Nexstar's Big 4 stations reach approximately **{{BEGIN HCI END HCI}}** DISH subscribers, more than twice the number of DISH subscribers reached by Tribune's Big 4 stations.[108] Table 6 provides the percentage by which the retransmission fees (on a per subscriber per month basis) charged by Nexstar for its Big 4 stations exceed those charged by Tribune. The table also provides these percentages in terms adjusted to account for the vintage of retransmission contract.

Table 6: Nexstar Big 4 Station Retransmission Fee Premium over Tribune

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[107] *Id*. at 17.

[108] *Id*.

At the DMA level, size still drives up retransmission fees. Appendix A to the Brattle Report provides a list of 108 DMAs in which there is both at least one large broadcast group (reaching 1.5 million or more DISH subscribers) and at least one small broadcast group (reaching fewer than 1.5 million DISH subscribers), each of which provides a Big 4 network affiliated local broadcast station.[109] The data in Appendix A demonstrates that the large broadcast groups charge DISH higher retransmission fees for Big 4 stations (on a per subscriber per month basis) compared to the smaller broadcast groups in 94 of the 108 DMAs. Within those 94 DMAs, the fee premium is **{{BEGIN HCI END HCI}}** or more in roughly half (42) of them, and exceeds **{{BEGIN HCI END HCI}}** in roughly a third (25) of them.[110]

C. Mergers of Station Groups Produce Larger Price Increases than Industry-Wide Trends

The increasing concentration of the broadcast industry, which DISH previously described in connection with the failed Sinclair-Tribune transaction, has continued since then, with the 2018 consummation of Raycom's acquisition by Gray. That deal created the third largest broadcast group in the nation, with 142 full-power television stations in 92 markets.[111] As a result, each of the four largest groups in 2019 has more stations than the largest group did in 2008, and the gap has been growing. The following charts show snapshots of the industry in 2008 and 2017:

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[109] *Id*. at 34-36.

[110] *Id*. at 18.

[111] John Eggerton, *Gray Buying Raycom for $3.6B*, Broadcasting Cable (June 25, 2018), https://www.broadcastingcable.com/news/gray-buying-raycom-for-3-6b.

Top 10 Broadcast Groups 2008[112]

Broadcast Group	Number of Full Power Stations
ION	55
Sinclair	48
Univision	37
Raycom	36
Gray	31
Hearst	29
Nexstar	29
Trinity	24
LIN	24
Newport	24
Tribune	23

Top 10 Broadcast Groups 2017[113]

Broadcast Group	Number of Full Power Stations
Nexstar (Media General, LIN Media, Young)	130
Sinclair (Allbritton, Fisher, Bonten, Barrington)	118
Gray (Shurz, Hoak Media, Parker)	75
ION	60
Raycom (Drewry)	47
TEGNA/Gannett (Belo)	45
Tribune (Local TV)	41
Univision	38
Hearst	32
Scripps (Journal)	27

Broadcast group consolidation has only increased over the past two years.[114]

[112] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 2, 2009).

[113] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 26, 2017).

[114] Joe Flint and Miriam Gottfried, *Apollo to Buy Majority Stake in Cox TV Stations*, Wall Street Journal (Feb. 15, 2019), https://www.wsj.com/articles/apollo-to-buy-majority-stake-in-cox-tv-stations-11550259225 ("The spending spree comes as part of a wave of consolidation throughout the entertainment industry. Last year, Nexstar reached an agreement to acquire Tribune Media for $4.1 billion. Other broadcasters including Sinclair Broadcast Group Inc. and Tegna Inc. have said they are also on the hunt for more stations. Regulatory changes have also encouraged more consolidation. Under President Trump, the Federal Communications Commission has rolled back Obama-era limits on TV station ownership, paving the way for even the largest companies to continue to bulk up.").

Brattle's declaration shows that these combinations have directly led to higher retransmission fees. As with the size/rate analysis, Brattle has updated its merger/rate analysis, first conducted in 2017, to reflect post-merger agreements that have been negotiated since that study was undertaken. Specifically, Brattle's prior analysis covered ten major acquisitions, which had been followed by merger agreements in the period between August 20, 2013 and June 20, 2017. Brattle has updated its analysis by including the Sinclair-Bonten transaction, which had already occurred by June 2017 but was not followed by a new retransmission agreement until after that date.[115] Brattle compared the retransmission fee in the first year of each pre-merger contract with the retransmission fee that was specified in the associated first post-merger contract. By using the retransmission fees specified in contracts that were negotiated after the merger was completed, this comparative analysis avoids "step-up" fee increases.[116]

Table 7 shows that, for each of the acquisitions since August 2013, the actual retransmission consent fee that DISH paid the combined entity in the first year of the first contract after the acquisition (Column 6) exceeded the fee that DISH would likely have paid for the target's stations without the merger. On average, the actual retransmission fee is **{{BEGIN HCI END HCI}}**, or 141.8% higher than the retransmission fee that would have been expected based on inflation.

[115] The other major transaction consummated since that time (Gray-Raycom) has not yet resulted in a new retransmission agreement.

[116] Brattle Decl. at 22.

Table 7: Post-Merger Effects on Retransmission Fee Agreements – Target
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This table demonstrates that Tribune has used acquisitions to drive up its retransmission fees. Following the methodology described above, **{{BEGIN HCI**

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Table 8 also provides a comparison of retransmission fees for the acquiring media company, by comparing the retransmission fees included in the contract in effect at the time of the acquisition versus those fees included in the first contract signed post-merger. It shows that the retransmission fees charged to DISH by the specified acquiring broadcast groups are higher following six of the nine acquisitions included in the calculation. This is despite the acquisition of stations commanding lower rates would be expected to exert downward pressure on the rates

of the combined company. **{{BEGIN HCI**

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As for the Nexstar/Media General merger, the post-merger agreement reflected a

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Table 8: Post-Merger Effects on Retransmission Fee Agreements – Acquirer

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[117] Ordonez Decl. ¶ 16.

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And some of the expected rate increase will happen immediately upon consummation, rather than awaiting negotiation of a renewal agreement. This is because of after-acquired station clauses in retransmission consent agreements, which allow a broadcaster to bring newly acquired stations under its existing retransmission agreement, substituting the bigger broadcaster's higher rate for the rate actually negotiated by the MVPDs for the broadcast stations in question. This "rate reset"—which happens without any concomitant increase in the value of the acquired stations and their programming for the MVPD or consumers—is nothing but profit for the acquiring broadcaster.

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END HCI}}.[118]

[118] *Id.* ¶ 15.

D. DISH Pays Above-Market Rates to Broadcast Groups that Come Up for Renewal When DISH Is Already Subject to a Blackout by Another Group

Brattle has found that when DISH is subject to a blackout by one group, it will pay higher than market rates to another group to avoid a second, simultaneous blackout.[119] This in turn demonstrates that broadcast groups restrain one another's prices regardless of the lack of geographic overlap, and that the merger will eliminate that competition.

This is exactly what happened after DISH was faced with the Tribune blackout in June to September 2016. Brattle compared the prices to which DISH agreed when faced with that blackout against the "goalpost" rates that DISH estimates prior to each negotiation as the rates that the market justifies. Ms. Ordonez explains that, before entering into a retransmission negotiation, **{{BEGIN HCI**

[119] Brattle Decl. at 24.

END HCI}}.[120]

Table 9 below shows the goalpost rates set by DISH before the negotiation and the final rates agreed to for each of the station owners whose contracts expired while DISH was under the threat of the Tribune blackout.

Table 9: Results of Retransmission Negotiations under Threat of Tribune Blackout

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END HCI}}.[121]

[120] Ordonez Decl. ¶ 17.

[121] Brattle Decl. at 27.

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Table 10: Results of Retransmission Negotiations Before or After Tribune Blackout was a Factor

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[122] *Id.*

[123] Ordonez Decl. ¶ 18.

[124] Brattle Decl. at 27.

END HCI}}.[125]

Below is a comparison of the outcomes of the negotiations during the blackout and those shortly before or after the blackout was a factor.

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[125] *Id.*

END HCI}}.[126]

In summary, DISH estimated what it expected to pay for retransmission rates based on market factors and comparable station owners, but DISH paid significantly more than those rates when it negotiated during a blackout of the Tribune stations, even when there was no overlap between the Tribune DMAs and the DMAs of the station owner with which it was negotiating.[127]

Brattle has examined subsequent blackouts to determine whether they permit a similar analysis to that performed for the Tribune blackout. The most significant of these was the Hearst blackout, which lasted from March 2, 2017 to April 26, 2017. But, this blackout does not permit a similar analysis because no agreement seems to have come up for renegotiation during that time. Likewise, the CBS blackout is not suitable for this analysis because it lasted for only for 4 days (from Nov. 20 to Nov. 23, 2017).[128]

Brattle has been able to supplement its Tribune blackout analysis by examining shorter and smaller blackouts (whether in terms of duration or DMA coverage): the Quincy blackout, which lasted 46 days in August to October of 2018 and affected 12 smaller DMAs; and the SagamoreHill blackout, which lasted 85 days from May through August of 2018 and affected 11 DMAs. For each of these two blackouts and for the two blackouts combined, Brattle compared the ratio between the negotiated fee and the goalpost value for the contracts that went into effect during the respective blackout. **{{BEGIN HCI**

[126] *Id*. at 28.

[127] *Id*.

[128] *Id*. at 29.

END HCI}}.[131]

Table 11: Comparison of Goalpost and Retransmission Fees for Contracts Negotiated During Blackouts

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In addition, the goalpost documents show that DISH considers a broadcast group's size across all local markets as an important factor when setting rates. **{{BEGIN HCI**

[129] *Id*.

[130] **{{BEGIN HCI**

END HCI}}. *See id*. at 29-30 n.29.

[131] *Id*. at 30.

END HCI}}.[132]

DISH would find it difficult to resist the power of New Nexstar. Before the proposed merger, DISH likely could successfully hold off above-normal price increases if threatened with a blackout by Nexstar or Tribune alone or even by each separately, but if the merger were consummated, DISH likely could not do so if threatened with a blackout of all New Nexstar stations at the same time. Faced with the loss of either Nexstar's or Tribune's stations alone, DISH can take steps to avoid the loss of the other company's signal, and therefore be more able to resist significant price increases.[133] Even if DISH faced a blackout from both broadcast groups, the blackouts would likely occur at different times as each broadcast group's agreement

[132] *Id*. at 25-26.

[133] Ordonez Decl. ¶ 9.

would expire on different dates. By contrast, the threat of simultaneously losing all Nexstar and Tribune stations would make DISH more likely to capitulate to an unreasonable price increase.[134]

V. THE MERGER WOULD BRING ABOUT HIGHER FEES FOR SIDECAR STATIONS

Sidecar stations, too, can avail themselves of the high rates that New Nexstar is able to command, which would be far higher than the sidecar station could demand standing alone.[135] Abnormally high rates for sidecar stations have persisted despite the prohibition on same-market joint negotiations between large broadcasters and these stations.

In March 2014, the Commission amended its retransmission consent rules to bar joint negotiations among any of the Top Four stations in a market.[136] Congress endorsed and expanded the Commission's bar on such joint negotiations when it enacted the STELAR legislation later that year.[137] As the Commission explained, joint negotiation "diminishes competition and thus leads to supra-competitive increases in retransmission consent fees . . .

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[134] *Id.*

[135] The FCC has described a sidecar agreement as any "arrangement to share facilities, employees, and/or services or to jointly acquire programming or sell advertising, including a Joint Sales Agreement (JSA), a Local Marketing Agreement (LMA), or any other agreement or arrangement (written or oral) that would have the same practical operational or financial effect as any of these agreements." Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests, *Public Notice*, 29 FCC Rcd. 2647, 2647 (MB 2014), *rescinded by* Rescission of March 12, 2014 Broadcast Processing Guidance Relating to Sharing Arrangements and Contingent Interests, *Public Notice*, 32 FCC Rcd. 1105 (MB 2017).

[136] *2014 Retransmission Consent Order*, 29 FCC Rcd. at 3352 ¶ 1.

[137] 47 U.S.C. § 325(b)(3)(C) (*as amended by* Section 103 of the STELA Reauthorization Act of 2014, Pub. L. 113-200) (expanding the ban on joint negotiations from the Big 4 networks to any two TV stations in the same local market); Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014, *Order*, 30 FCC Rcd. 2380, 2381 ¶ 4 (2015) (amending the existing FCC rule governing joint negotiation of retransmission consent and replacing it with language from the STELA Reauthorization Act of 2014 and recognizing the latter's prohibition is "broader").

[b]ecause the threat of simultaneously losing the programming of the stations negotiating jointly gives those stations undue bargaining leverage in negotiations with MVPDs."[138]

But this ban has not been enough to restrain high rates charged by Nexstar's extensive collection of some 40 sidecar stations. Ms. Ordonez confirms the rates achieved by sidecar stations are clearly aligned to those commanded by the large groups with which they have a sidecar agreement, and are higher than the rates of comparable stations that do not have such a sidecar agreement.[139]

If the Commission were to approve the merger, it should confirm that neither Nexstar nor any of its sidecar groups have run afoul of the joint negotiation ban. The Commission should also ascertain the extent and kind of interaction between and among these entities. Relevant questions include:

- Does Nexstar and the sidecar stations use common outside counsel or consultants?
- What does Nexstar consider as prohibited joint negotiation?
- What measures has Nexstar adopted to avoid such negotiations?
- Are Nexstar's retransmission agreements, drafts or term sheets disclosed to the sidecar stations, and vice versa?
- Are there any common interest agreements among Nexstar and the sidecar stations?
- Does Nexstar communicate with sidecar stations regarding retransmission fees?

VI. ANY DIVESTITURES SHOULD BE ON AN ARM'S LENGTH BASIS AND UNACCOMPANIED BY ANY SIDECAR AGREEMENTS

Nexstar and Tribune propose over a dozen station divestitures in order to avoid duopolies in multiple markets and to bring New Nexstar under the national ownership cap. But they provide few details on these divestitures, claiming instead that, for each divestiture, "[a]n

[138] *2014 Retransmission Consent Order*, 29 FCC Rcd. 3359 ¶ 13 & n.49.

[139] Ordonez Decl. ¶ 19.

application to divest one [top four] station will be filed as soon as divestiture plans are finalized."[140]

The lack of detail makes evaluation of the merger application premature. If the Applicants cannot find a buyer for a station in an overlap market, do they intend to apply for a waiver? If so, for how long? The same omissions caused the Commission to pause the shot clock in the Sinclair-Tribune merger until the Applicants filed their divestiture applications, explaining that the "Commission has a strong interest in ensuring a full and complete record upon which to base its decision in this proceeding."[141]

The Sinclair-Tribune experience teaches another important lesson: the Commission needs to apply careful scrutiny to determine whether any proposed divestitures are genuinely at arm's length. The Commission laudably undertook this examination in Sinclair and reached the conclusion that these issues should be set for a hearing.[142] If anything, this means that conclusive evaluation of the genuineness of a divestiture takes time, and last-minute divestiture plans are almost certain to foreclose such evaluation.

The Commission should also ensure that the divestitures are not accompanied by any sidecar agreements. Even if the Applicants show that such agreements do not give New Nexstar control over the divested stations, the higher-than-market retransmission fees commanded by

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[140] Comprehensive Exhibit, Applications of Nexstar Media Group, Inc. for Transfer of Control of Tribune Media Company, MB Docket No. 19-30, at 25-28 (Jan. 28, 2019).

[141] Letter from Michelle M. Carey, Media Bureau, Federal Communications Commission, to Miles S. Mason, Counsel for Sinclair Broadcast Group, 33 FCC Rcd. 148, 148 (MB 2018).

[142] Applications of Tribune Media Company and Sinclair Broadcast Group, Inc. for Transfer of Control of Tribune Media Company and Certain Subsidiaries, WDCW(TV) et al. and for Assignment of Certain Licenses from Tribune Media Company and Certain Subsidiaries, *Hearing Designation Order*, 33 FCCR 6830, 6830 ¶ 2 (2018) ("[M]aterial questions remain because the real party-in-interest issue in this case includes a potential element of misrepresentation or lack of candor that may suggest granting other, related applications by the same party would not be in the public interest.").

sidecar stations mean that the harm of higher rates, intended to be ameliorated by means of the divestitures, would still be done.

To the same end, if the Commission approves the merger, it should require termination of Nexstar's JSAs, which is one of the agreements under the scope of sidecar arrangements. While the Commission determined in 2017 that it would not count JSAs towards the national ownership cap,[143] such a condition is warranted here. Whether or not the JSAs were a vehicle for Nexstar to exert control over these stations makes little practical difference. Since JSA stations can command rates that are close to those exacted by Nexstar and higher than those received by their peers, for all practical purposes these stations behave as if they were one with Nexstar in the retransmission market, and they succeed in that market as if they were one.

VII. CONCLUSION

For the foregoing reasons, the Commission should deny the Application as currently proposed.

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[143] 2014 Quadrennial Regulatory Review, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd. 9802, 9846 ¶ 96 (2017) ("On reconsideration, we find that the Commission erred in its decision to adopt the Television JSA Attribution Rule. The underlying record did not support a finding of attribution and the Commission failed to properly consider the record evidence regarding the public interest benefits that television JSAs provide."). The Television JSA Attribution Rule was adopted in 2014. In the *2014 Quadrennial Order*, the FCC stated that "we will count television stations brokered under a same-market television JSA that encompasses more than 15 percent of the weekly advertising time for the brokered station toward the brokering station's *permissible ownership totals*, just as we long have done with respect to radio stations." 2014 Quadrennial Regulatory Review, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd. 4371, 4527 ¶ 340 (2014) (emphasis added). Several petitions for reconsideration and judicial challenges were made to the 2014 Order. The FCC reconsidered the Television JSA Attribution Rule in its 2017 Order.

Respectfully Submitted,

/s/

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March 18, 2019

* * * *

DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Petition to Deny and its appended material, except for those facts for which official notice may be taken, are true and correct to the best of my information, knowledge and belief.

Executed on March 18, 2019

Jeffrey H. Blum, Senior Vice President, Public Policy and Government Affairs
DISH Network Corporation

CERTIFICATE OF SERVICE

I, Georgios Leris, hereby certify that on March 18, 2019, I caused a copy of the foregoing public, redacted version of the Petition to Deny of DISH Network Corporation to be filed electronically with the Commission using the ECFS system and caused a copy of the foregoing public, redacted Petition to Deny to be served upon the following individuals by electronic mail. Individuals marked with an asterisk were also served by First Class mail.

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EXHIBIT A

DECLARATION OF MELISA ORDONEZ

I, Melisa Ordonez, being over 18 years of age, swear and affirm as follows:

1. I make this declaration using facts of which I have personal knowledge of, or based on information provided to me, in connection with the proposed acquisition of Tribune Media Company ("Tribune") by Nexstar Media Group, Inc. ("Nexstar"), and the likely effects of this acquisition on DISH Network Corporation ("DISH").

2. I am currently the Director of Local Programming for DISH Network Corporation ("DISH"). In that capacity, I am responsible for the negotiation of retransmission consent contracts on behalf of DISH with every local broadcast group and local broadcast station in the United States. I have been the lead negotiator in DISH's effort to renew its retransmission consent agreements with numerous broadcasters, including with each of Nexstar and Tribune in 2016. I have negotiated more than a thousand retransmission consent agreements in the last decade.

3. ***Large Broadcasters' National Reach.*** National distributors such as DISH seek to offer local broadcast stations across their national footprint. Each of the broadcast groups is a separate pathway for DISH to having enough broadcast retransmission agreements in order to preserve its reputation for providing local stations to each market throughout the nation, and to preserve its competitive position vis-à-vis DIRECTV and large cable operators. It is important for DISH to be able to say to customers that they will be able to get local stations in most places where they are, and in most places where they may move.

4. So the merger of two large broadcast groups, such as Nexstar and Tribune, of which one is now the second largest in the nation, would drastically reduce DISH's independent options for reaching a critical mass of local station availability throughout the nation.

5. If DISH has to renegotiate a contract with a broadcaster at a time when it is subject to a blackout of another broadcast group's stations, it is more likely to accede to some of that first broadcaster's demands to avoid a second blackout and additional churn among its national subscriber base. Thus, an inability to retransmit a station in one market increases the price DISH is willing to pay for the right to retransmit a station in another market.

6. In fact, when Tribune forced DISH to black out all Tribune stations in the period June-September 2016, **{{BEGIN HCI**

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7. Conversely, if DISH has to renegotiate an expiring contract shortly after having secured a contract with a broadcast group without having experienced a blackout, that broadcaster may have an incentive to be more reasonable in its rate demands than it otherwise would be, because the specter of a "double whammy," where DISH is subject to blackouts of two groups' stations, is absent.

8. DISH, as well as the broadcast groups, attributes great importance to the sequencing of renewal negotiations: thus, DISH would want a difficult negotiation with a particularly large group to come after it has negotiated renewal with a number of smaller groups, and has already secured retransmission consent from them. The large broadcast group would want the opposite, in order to increase bargaining pressure on DISH.

9. DISH would find it difficult to resist the power of New Nexstar. Before the proposed merger, DISH likely could successfully hold off above-normal price increases if threatened with a blackout by Nexstar or Tribune alone or even by each separately, but if the merger were consummated, DISH likely could not do so if threatened with a blackout of all New Nexstar stations at the same time. Faced with the loss of either Nexstar's or Tribune's stations alone, DISH can take steps to avoid the loss of the other company's signal, and therefore be more able to resist significant price increases. Even if DISH faced a blackout from both broadcast groups, the blackouts would likely occur at different times as each broadcast group's agreement would expire at a different time. By contrast, the threat of simultaneously losing all Nexstar and Tribune stations would make DISH more likely to capitulate to an unreasonable price increase.

10. The simultaneous loss of a large number of stations in disparate geographic areas also has worse reputational effects on DISH than the sum of non-simultaneous losses of the same number of stations. First of all, media and news outlets will report on blackouts once they are large enough or cause significant distress to sufficient people, which amplifies their negative commercial implications and give them reach beyond the actual markets affected. Second, that effect is amplified due to the rise of social media—as the service loss affects a wider audience and more frustrated people turn to social media, the news of the blackout may snowball and affect an even larger audience in a more negative way.

11. Each network affiliate is the "only saloon in town" for its network, playing two, three or four distributors against one another. Blackouts thus cause fewer problems for broadcasters as compared to distributors. While a distributor is bleeding subscribers and their associated revenues, those same subscribers go to other distributors and watch the network that is

blacked out. This means that, while distributors lose subscribers, networks lose a much smaller amount of viewers. Broadcasters do not even lose fees: they typically receive retroactive payment for each of the subscribers that stayed with DISH. But the distributor never recovers the subscription revenues from customers who left during the blackout, and always loses a portion of those customers and their revenues for good.

12. Retransmission fees have skyrocketed in the last decade. DISH has long and justly been perceived as the low-cost distributor, and has fought the hardest of any MVPD to hold the line on its prices. But DISH is not immune to the reality that selling at a loss is not a viable business plan. DISH has thus been compelled to increase its prices for its America's Top 120, America's Top 120+, America's Top 200 and America's Top 25 packages a number of times. The ever increasing fee demands of the large networks caused DISH to create a separate broadcast package in 2016 to isolate network stations from the other content on its packages. That package is priced at $12 a month (it previously cost 10 dollars a month, but rising retransmission fees forced DISH to raise its price). This means retransmission fees are now approaching a crucial milestone—**{{BEGIN HCI**

END HCI}}. When all costs are factored in, **{{BEGIN HCI**

END HCI}}. If the price increases accelerate further, this likely leaves DISH with little choice but to raise the prices of the broadcast packages paid by its customers.

13. As part of this proceeding, I understand that the Brattle Group has reviewed DISH's agreements with 80 broadcast groups. Thee retransmission rates in these agreements

were negotiated by DISH with the goal of achieving the lowest possible price from each broadcast group, and certainly not with the goal of fitting with a prior econometric study.

14. ***After-Acquired Station Clauses.*** In merger proceedings, some of the expected rate increases—occurring because a larger broadcaster with better negotiating leverage is acquiring a smaller one—will happen immediately upon consummation rather than awaiting negotiation of a renewal agreement. An after-acquired station clause in a retransmission consent agreement allows a broadcaster to bring newly acquired stations under its retransmission agreement, substituting the bigger broadcaster's higher rate for the rate actually negotiated by the MVPDs for the broadcast stations in question. This "rate reset"—which happens without any concomitant increase in the value of the acquired stations and their programming for the MVPD or consumers—is nothing but profit for the acquiring broadcaster.

15. **{{BEGIN HCI**

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16. ***Nexstar/Media General Merger.*** In the Nexstar/Media General merger,

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17. Before entering into a retransmission negotiation, **{{BEGIN HCI**

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18. **{{BEGIN HCI**

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19. ***Sidecar agreements.*** Based on my experience, the rates achieved by sidecar stations are clearly aligned to those commanded by the large groups with which they have a sidecar agreement, and are higher than the rates of comparable stations that do not have such a sidecar agreement.

*   *   *   *

The forgoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best my current information, knowledge, and belief.

Executed on March 18, 2019

Melisa Ordonez

Melisa Ordonez
Director, Local Programming
DISH Network Corporation

EXHIBIT B

DECLARATION OF WILLIAM ZARAKAS AND DR. ELIANA GARCÉS

Table of Contents

I. Qualifications and assignment

I am Mr. William Zarakas, a Principal with The Brattle Group, an economics consulting firm. I, am an expert on economic and regulatory matters in the telecommunications, media and energy industries. I hold leadership positions in Brattle's practices in telecommunications and energy.

I have provided expert reports and testimony before the Federal Communications Commission (FCC) with respect to: the economics and feasibility of deploying broadband networks; competitive analysis, notably concerning the market for business service data (BDS); analysis of network access and regulatory pricing; and pole attachments matters. I have also applied market share and churn analysis, cost models, horizontal and vertical foreclosure analyses, and bargaining modeling to telecom and media mergers, and have worked extensively on matters concerning the markets for and value of wireless spectrum.

I also lead Brattle's work in the regulation of energy utilities, and have presented and testified on matters concerning regulatory frameworks, incentive and performance based regulation, and evolving utility platform and business models. In addition to my testimonies before the FCC, I have testified before the Federal Energy Regulatory Commission (FERC), the Securities and Exchange Commission (SEC), the Copyright Royalty Judges (Library of Congress), the U.S. Congress, state regulatory agencies, arbitration panels, foreign governments, and courts of law.

Prior to joining The Brattle Group, I held senior positions at economic consulting firms and was an economist for the New York Power Authority. I hold masters and bachelors of arts degrees in economics from New York University and the State University of New York, respectively.

My name is Dr. Eliana Garcés, and I am a Principal with The Brattle Group. I am an expert in antitrust and regulatory matters with a long experience in both government and private practice. I was a member of the cabinet of European Commission Vice President Joaquín Almunia, who was responsible for EU competition policy during 2010-2014. In that position I oversaw antitrust and merger investigations in information technology, telecommunications, and energy markets. I have served as a member of the European Commission Competition Chief Economist Team and was the Deputy Chief Economist in the European Commission's Directorate General for Internal Market and Industry. From 2016 to 2017, I was a Visiting Senior Fellow at George Mason University. I co-authored the widely-used textbook *Quantitative Methods in Antitrust and Competition Analysis* published by Princeton University Press. I hold a Ph.D. in Economics from the University of California, Los Angeles and a Licenciatura in Economics from Universidad Autónoma of Madrid, Spain.

We have been asked by DISH Network Corporation to evaluate the impact of the proposed transaction between Nexstar Broadcasting Group, Inc. (Nexstar) and Tribune Media Company (Tribune) on the retransmission consent fees that DISH pays to the parties.

II. Executive Summary

The proposed acquisition of Tribune by Nexstar will produce the nation's largest broadcast group owning 216 local TV stations operating in 118 markets, before divestitures. TV broadcasting has been consolidating over time and this merger would exacerbate a trend of increased concentration that has coincided with a sharp increase in retransmission consent fees paid by Multichannel Video Programming Distributors (MVPDs). Also, the number of viewers experiencing blackouts due to adversarial negotiations has increased with time.

Evidence indicates that approval of the proposed merger will result in higher retransmission prices for DISH, leading to higher prices for consumers. Although broadcast groups consist of bundles of local TV stations, their operation is national in scope, and thus prices are set nationally.

Per subscriber retransmission fees of local stations are determined by the aggregate size and geographic coverage of a broadcast group. Large broadcaster groups demand and obtain higher rates because of the leverage they enjoy through ownership of a large bundle of stations. National MVPDs, such as DISH, must offer a consistent product across their footprint, which they can build with a series of contracts with local broadcast groups. As the broadcast groups become larger, they become increasingly essential. The data show that larger broadcast groups with a higher number of local TV stations across the country covering a larger total amount of viewers are able to extract higher per subscriber retransmission fees.

A review of the retransmission rates DISH has paid after large broadcast mergers shows that the post-merger rates are materially higher than those predicted by industry trends. A review of 10 mergers between 2013 and 2017 shows that after the acquisition, retransmission broadcast fees increased above industry trend by an amount of 27% for the acquiring broadcast group and 142% for the target broadcast group.

The bargaining power that allows large broadcast groups to charge higher fees can be explained with the disproportionate damage that a large blackout can cause to an MVPD like DISH. The data indicate that DISH is willing to incur a cost in order to avoid simultaneous blackouts. **{{BEGIN HCI**

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Contracts renegotiated in that timeframe, but not during periods where DISH was experiencing a significant third-party blackout produced rates that were on average **{{BEGIN HCI**

END HCI}} This rate difference is indicative of the disproportionate damage that blackouts impose.

III. The merger exacerbates a trend of larger size and pricing power of broadcast groups

A. The proposed merger would produce the nation's largest broadcast group

TV broadcasting has been subject to increased concentration in the past decade. Broadcast groups have become larger, with the largest groups owning increasingly more channels and covering increasingly more television households. Public records show at least 11 significant mergers of broadcast groups between 2013 and 2017, with yet another planned, and many other smaller ones. If allowed to proceed, the Nexstar acquisition of Tribune would create the largest TV broadcast group in the United States, owning, before divestitures, 216 stations in 118 markets, a presence in the top 50 designated market areas (DMAs) and an annual revenue of about $4.6 bn.[1] As demonstrated in the following table, the merged entity would have a combined reach of 79.7 million households, almost three fourths of the country.[2]

1 Nexstar Media Group Inc., "Acquisition of Tribune Media Company," December 3, 2018, accessed March 15, 2019, https://www.nexstar.tv/wp-content/uploads/2018/12/Nexstar-Tribune-Investor-Presentation-FINAL-12-3-18.pdf.

2 After applying the UHF discount, the combined company's reach would be 51.6 million households, or roughly 47% of the nation's television households. Note that this analysis does not account for possible divestitures.

Table 1: Audience Reach of Nexstar, Tribune, and Merged Company, With and Without the UHF Discount

	Nexstar	Tribune	Combined Entity (Nexstar/Tribune)
Discounted Reach (Millions of households)	29.1	27.8	51.6
Non-discounted Reach (Millions of households)	47.6	42.4	79.7
Total US TV households (Millions)	110.2	110.2	110.2
Audience Reach (with UHF Discount)	26.4%	25.2%	46.8%
Audience Reach (without UHF Discount)	43.1%	38.5%	72.3%

Sources: BIA Kelsey Media Pro data as of March 13, 2019; Nielsen TV Households data.

Notes: Non-discounted reach equals the sum of TV households in DMAs with at least one station owned by the given entity (Nexstar, Tribune, or the proposed merged company). Discounted reach equals the sum of TV households in DMAs with at least one VHF station owned by the given entity plus half the sum of TV households in DMAs with at least one UHF and no VHF stations owned by that entity. Discounted and non-discounted shares equal the discounted and non-discounted reach, respectively, divided by the total number of US TV households in 2018.

Consumers do not appear to have reaped benefits from past consolidation among TV broadcast groups. If we take the Nexstar merger as an example, most cost savings from the acquisition relate to fixed costs, the reduction of which are not generally passed on to consumers.[3] In its presentation to investors, Nexstar's stated objective appears to be increasing retransmission fees, not increasing viewership with better content.[4] Indeed, there is evidence that large broadcast groups may have implemented costs savings that have decreased the amount of local content available to viewers.[5] In short, whatever efficiencies may have resulted from the consolidation of

[3] Nexstar Media Group Inc., "Acquisition of Tribune Media Company," December 3, 2018, accessed March 15, 2019.

[4] Nexstar Media Group Inc., "Acquisition of Tribune Media Company," December 3, 2018, accessed March 15, 2019.

[5] Pew Research Center, "5 facts about the state of local TV newsrooms," Matsa, Katerina, July 23, 2014, http://www.pewresearch.org/fact-tank/2014/07/23/5-facts-about-the-state-of-local-tv-newsrooms/.

Continued on next page

broadcast TV does not seem to have benefited consumers. In the following section, we show that retransmission fees have in fact increased during the years of TV broadcast group consolidation.

One driver of mergers in the TV broadcasting industry might be to increase advertisement efficiency and revenues. Research has found advertisement revenues increasing disproportionately with the number of subscribers.[6] But advertisement revenues are not mentioned as a driver for revenue growth in Nexstar's presentation of the planned acquisition of Tribune to investors.[7] Instead, Nexstar mentions an increase in "non-traditional revenue streams" as the source of planned increase profitability. These include, again according to this presentation to investors, the exploitation of digital media as well as higher retransmission fees.

B. Retransmission fees have increased over time

Retransmission fees are paid by MVPDs to TV broadcast groups for the right to retransmit their stations, otherwise available for free over the air, via cable or satellite to the MVPD's subscribers. Each broadcast station is offered by the MVPD to subscribers in its DMA. In the past decade, retransmission revenues have greatly increased over time, from close to zero in the early part of the 2000s to $10 billion in 2018.[8]

Continued from previous page

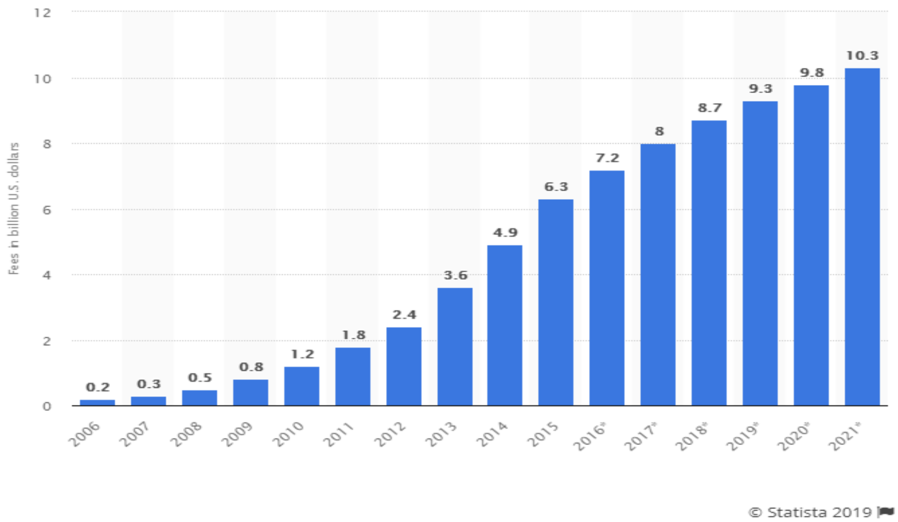
The article states: 'One of the key impacts of last year's barrage of acquisitions has been the consolidation of local TV newsrooms, a number of which now share operations in news production.'

6 Chipty, T., & Snyder, C. M. (1999). The role of firm size in bilateral bargaining: A study of the cable television industry. Review of Economics and Statistics, 81(2), 326-340.

7 Nexstar Media Group Inc., "Acquisition of Tribune Media Company," December 3, 2018, accessed March 15, 2019.

8 American Television Alliance, "Broadcasters Pocket $10.1 Billion for 'Free' TV in 2018," Blog Post, January 1, 2019.

Figure 1: Broadcast retransmission fees in the United States from 2006 to 2021 (Billion U.S. dollars)



Source: Statista, "Broadcaster retransmission fees in the United States from 2006 to 2021," accessed March 15, 2019, https://www.statista.com/statistics/256358/broadcast-retransmission-fees-in-the-us/.

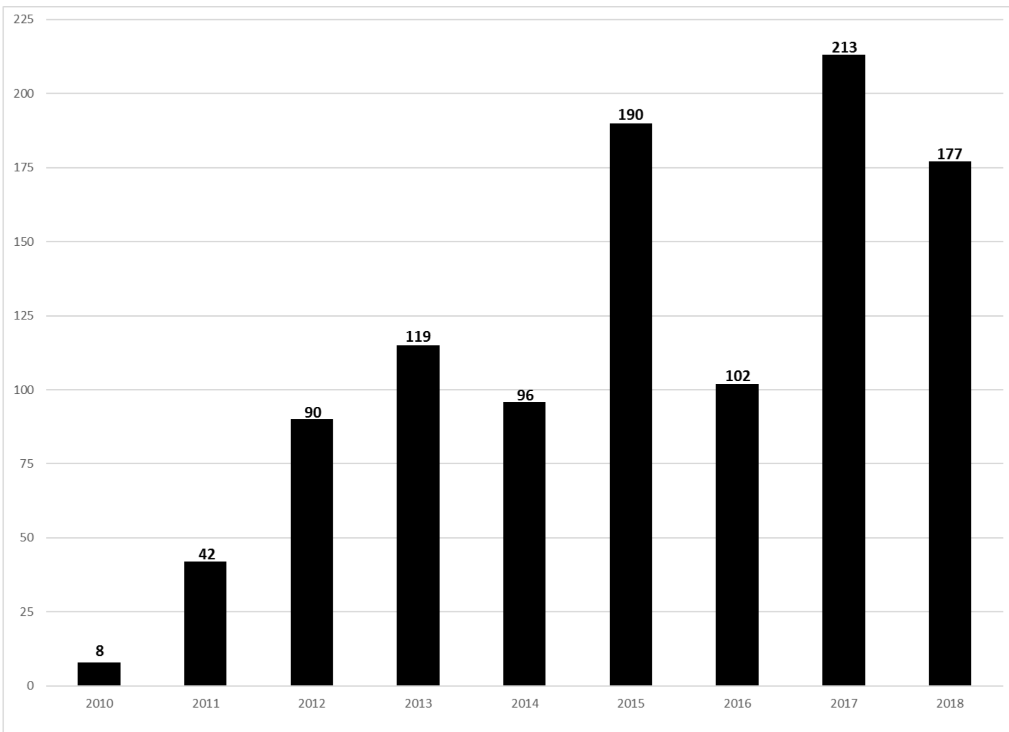
This high rate of revenue increase cannot be explained by an increase in the amount of viewers and can only be the result of increases in the level of transmission fees.

Neither the MVPD nor the broadcast groups are price takers in the broadcast retransmission industry. The retransmission fee is a result of a bilateral negotiation that is determined to a large extent by the relative bargaining position of the two sides. The MVPD is interested in offering sufficient TV content to its subscribers and the TV broadcast group is interested in obtaining both viewers, whom it sells to advertisers, as well as distribution channels for its programs. The simultaneous increase in the retransmission fee revenues and in the consolidation of the TV broadcast industry raises the question of what effect consolidation has on broadcast groups' bargaining power and their disproportionate ability to raise fees. In the next section, we describe the mechanisms that generate this increase in bargaining power and empirically demonstrate their relevance.

C. Larger broadcast groups coincide with more viewers being exposed to blackouts nationwide

Large broadcast groups have not been shy in leveraging their undue bargaining power; the increases in broadcast groups' sizes have coincided with an overall increase over time in the number of DMAs affected by blackouts. This increase is shown in Figure 2, which indicates that blackouts have become an increasing problem. The figure specifically shows that while in 2010 there were 8 blackouts impacting DMAs, in 2018 a DMA blackout was observed 177 times.

Figure 2: Number of DMAs Affected by Blackouts



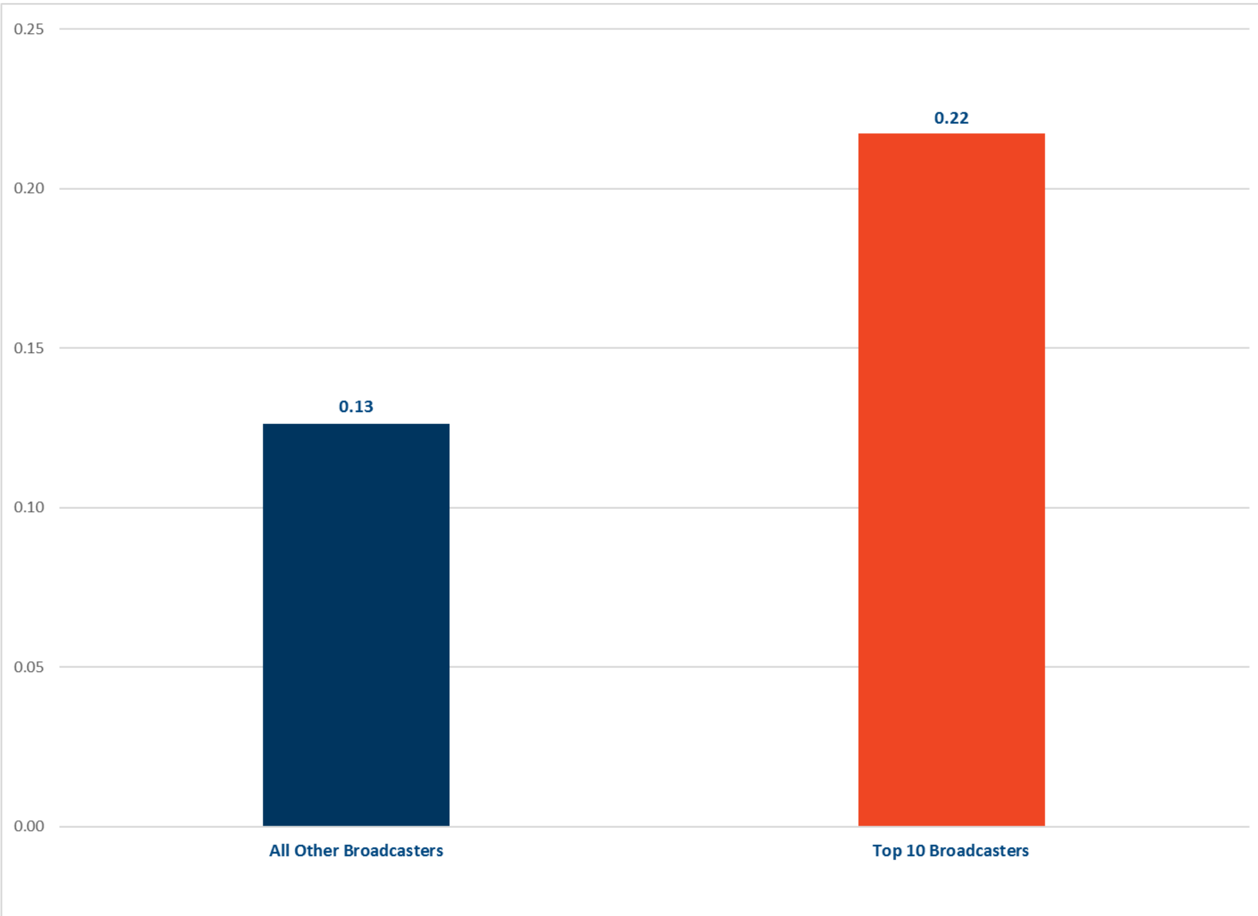
Source: American Television Alliance, "Retrans Blackouts 2010-2018," accessed March 15, 2019, https://www.americantelevisionalliance.org/retrans-blackouts-2010-2018/ .

Note: Includes DMAs in U.S. territories, commonwealths, and insular areas.

Data obtained from the American Television Alliance on blackouts also indicate that they are caused more frequently by large broadcast groups. Figure 3 provides the average number of blackouts per broadcast group and corroborates that the top ten broadcast groups, measured in terms of total number of stations nationally, tend to impose blackouts more frequently compared to smaller broadcast groups. The comparison demonstrates that while the top ten broadcast

groups imposed an average 0.22 blackouts each in 2018, only 0.13 blackouts were recorded per broadcaster in the smaller broadcast groups on average.

Figure 3: Number of Blackouts per Broadcast Group, 2018

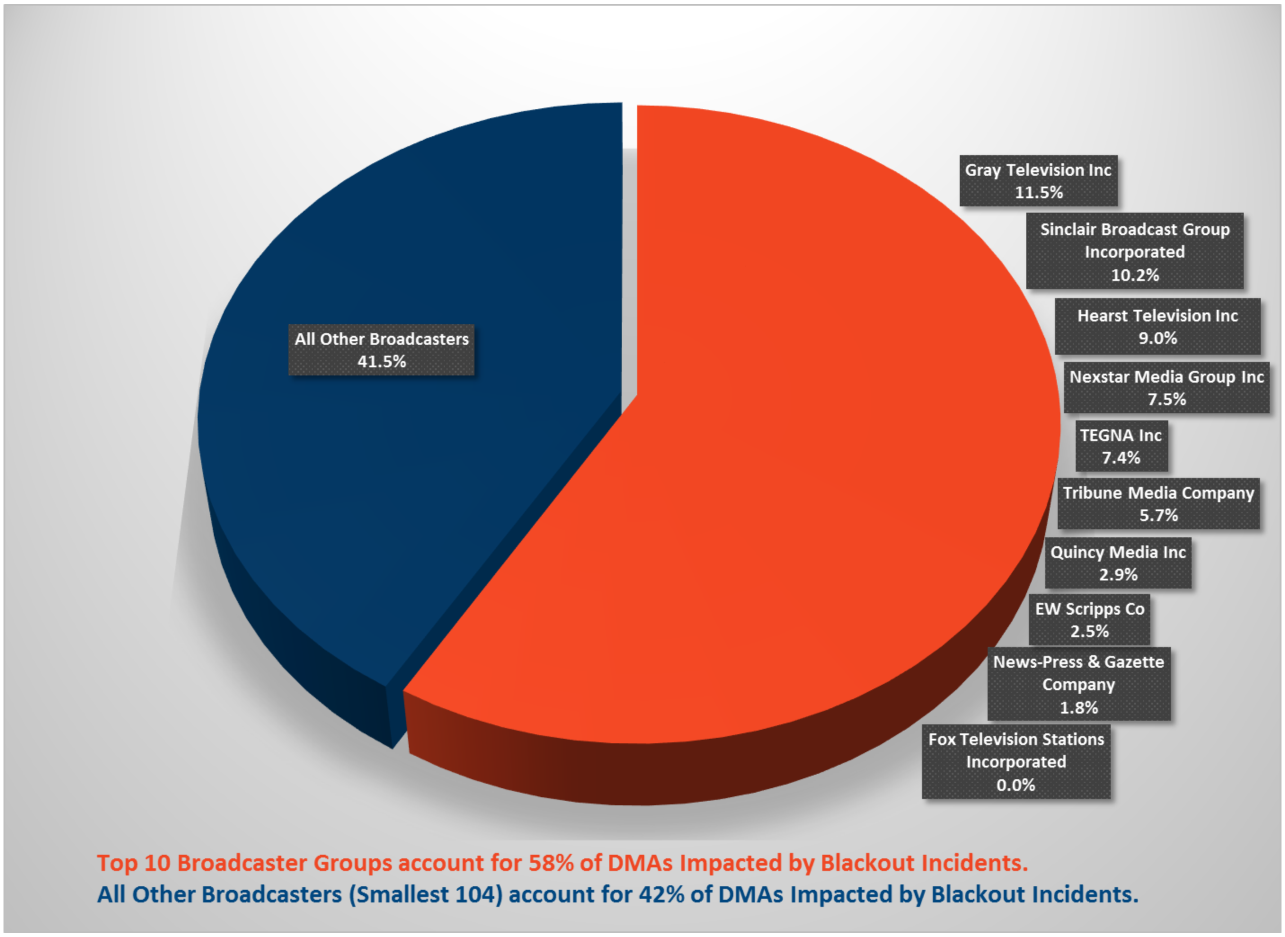


Sources: American Television Alliance, "Retrans Blackouts 2010-2018," accessed March 15, 2019, https://www.americantelevisionalliance.org/retrans-blackouts-2010-2018/; BIA Kelsey Media Pro data as of March 13, 2019.

Note: Includes DMAs in U.S. territories, commonwealths, and insular areas.

Moreover, not only is a large broadcast group more likely to impose a blackout, the blackout also tends to impact a larger number of DMAs. This is demonstrated in Figure 4, which provides a summary of all blackouts reported in 2018. The figure shows that while the top 10 broadcast groups represent only 9% of all broadcast groups, they were at the origin of 58% of all DMAs blackouts.

Figure 4: Share of DMA Blackouts by broadcast groups (2018)



Source: American Television Alliance, "Retrans Blackouts 2010-2018," accessed March 15, 2019, https://www.americantelevisionalliance.org/retrans-blackouts-2010-2018/; BIA Kelsey Media Pro data as of March 13, 2019.

One would expect that large broadcast groups would exercise the bargaining power that results from their ability to simultaneously black out a large number of stations in different DMAs. But a blackout could also be interpreted as an MVPD being able to resist demands of higher prices. However, we see that large broadcast groups consistently manage to obtain higher retransmission fees and that blackouts are costly to MVPDs.

IV. The relevant market to analyze broadcast groups' fees is the national one

In analyzing the effect of a broadcast merger on retransmission prices, it is not enough to consider only those local markets where the two groups have broadcast stations. Rather, it is essential to assess the effect of such a transaction in the national market, for several reasons.

First, retransmission fees are set nationally. The negotiation between an MVPD serving large regions or the entire nation and a broadcast group owning stations in several areas is 'unitary.' This means that such MVPDs and broadcast groups typically negotiate and agree to a uniform retransmission fee per subscriber per station affiliated with one of the "Big 4" (ABC, CBS, FOX, NBC) networks, and a uniform per subscriber rate per non-affiliated station, throughout the two parties' entire overlapping geographic footprint.

Second, large or national MVPDs require consistency in the product they offer across the country. This means that the service offered by large or national MVPD is multi-territory or national in nature. Building such an offering requires retransmission consent for many broadcast stations in their territory, and in the case of national distributors such as DISH and DIRECTV this means agreements covering the country. This provides an element of essentiality to very large TV broadcast groups. As Ms. Ordonez testifies in her accompanying declaration,

> Each of the broadcast groups is a separate pathway for DISH to having enough broadcast retransmission agreements in order to preserve its reputation for providing local stations to each market throughout the nation, and to preserve its competitive position vis-à-vis DIRECTV and large cable operators.[9]

And so, a merger of two large broadcast groups, such as Nexstar and Tribune (of which one is now the second largest broadcaster in the nation), reduces DISH's independent options for reaching a critical mass of local station availability throughout the nation.

Third, the bargaining power of TV broadcast groups accrues with their geographical coverage. The biggest threat in the context of a negotiation between a TV broadcast group and an MVPD is that of a blackout, when permission for retransmission in withheld by the broadcast group after the expiration of the existing contract. Blackouts are costly because they can lead to loss of subscribers. For example, **{{BEGIN HCI**

END HCI}}. [10] Also, if an MVPD has to renegotiate a contract with a broadcast group at a time when it is subject to a blackout, it is more likely to accede to some of that broadcast group's demands to avoid a second blackout and additional churn among its subscriber base. This works to increase the blackout costs as the impact spills over to increase other local broadcast groups' retransmission fees and affect even more DMAs. Ms. Ordonez testifies that when Tribune forced DISH to black out all Tribune stations in the period June-September 2016, DISH was careful to reach renewals for retransmission consent deals with other broadcast groups that came up during that period, even if it meant capitulating on rates, terms, and/or conditions that were important to DISH to close

9 Declaration of Melisa Ordonez ¶ 3 ("Ordonez Decl.").

10 Information Sheets received from DISH Network Corporation.

the deal.[11] Faced with the loss of either Nexstar's or Tribune's stations alone, DISH can take steps to avoid the loss of the other company's signal, and therefore be more able to resist significant price increases.[12]

Finally, a related reason for the national impact of broadcast group mergers is that the simultaneous loss of a large number of stations in several geographic areas has worse reputation effects on DISH than the sum of non-simultaneous losses of the same number of stations. The reputational impact of a loss of service is likely to be amplified with the content affected and the blackout's geographical reach. This is validated by recent evidence for other distributors. First, a blackout that is larger in geographical scope is more likely to hit a critical TV event, such as a notable sport event or a show critical episode, the loss of which will generate strong reactions and churn. Second, media and news outlets will report on blackouts once they are large enough or cause significant distress to sufficient people, which amplifies their negative commercial implications and give them reach beyond the actual markets affected.

For example, the proximity of the NFL playoffs gave notable publicity to the blackout imposed by Tegna on Verizon Fios. *The Washington Post*, a nationwide newspaper, carried the following headline on January 1, 2019:

> Verizon TV customers suffer blackout of key channels days before the NFL playoffs.[13]

Such headlines are clearly not a driver of customer acquisition. Notice that the name of the broadcast group causing the blackout is not even mentioned in the headline.

In another example, *USA Today* published on January 3, 2019 an article about Tribune's blackout of its stations on Charter. The article started with this sentence:

> About 6 million Spectrum TV subscribers have lost local channels in New York, Los Angeles, Denver, St. Louis and 20 other markets amid a contract standoff between pay-TV provider Charter and the Tribune Media broadcast group.[14]

Notably, the first sentence of this article gives potential subscribers the impression of a massive customer problem, over and above the loss faced by each affected customer.

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[11] Ordonez Decl. ¶ 6.

[12] Ordonez Decl. ¶ 9.

[13] Brian Fung, "Verizon TV customers suffer blackout of key channels days before the NFL playoffs," *The Washington Post*, January 1, 2019.

[14] Mike Snider, "Charter Spectrum-Tribune dispute causes TV channel blackout that hits millions across US," *USA Today*, January 3, 2019.

In fact, the compounding nature of the reputational effect is even more pronounced due to social media. As the service loss affects a wider audience and more frustrated people turn to social media, the news of the blackout may snowball and affect an even larger audience in a more negative way. The *Los Angeles Times* picked up and amplified this frustration on January 11, 2019, when it reported on the Tribune station's blackout on Charter. Here are the posts reproduced in the *LA Times*, a paper with nationwide reach:

> "What a joke! This just makes me want to go back to DirecTV! I switched a year ago only to be able to watch the Dodgers, but have found Spectrum service to be inferior," one Southern California customer who identified himself as Robert Ramirez wrote on Twitter.

Another person complained:

> "This may be the last straw for me. I look forward to watching KTLA every morning. My bill has doubled in the last two years and now my favorite news station is missing."[15]

The reputational impact is clearly higher for the MVPD than for the broadcast group because the customer buys the service from the MVPD. Due to the effect of amplification, the higher the scope of the blackout in terms of content and geographic coverage, the disproportionately larger the potential commercial impact in terms of brand reputation.

V. Large broadcast groups increase retransmission rates nationally

A. Large TV broadcast groups charge higher transmission fees across their entire footprint

In this section, we discuss analysis undertaken using DISH contractual data to examine the relationship between the size of a broadcast group and the per-subscriber retransmission fees that it charges. DISH retransmission agreement contracts provide information on applicable retransmission fees for the stations operated by the group. These are local broadcast stations that are retransmitted to a sizable numbers of DISH's subscribers in the various DMAs where they operate. Typically, these contracts include information concerning the retransmission fees associated with all local broadcast station covered by the contract as well as the name of the

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15 Meg James, "Blackout ends: Tribune Media TV stations, including KTLA, return to Charter Spectrum," *Los Angeles Times*, January 11, 2019.

stations and network affiliation, if any. For example, DISH may have a contract with a broadcast group that covers the period from January 1, 2016 through December 31, 2018 (*i.e.*, a period of three years) which specifies monthly subscriber fees both for stations that are affiliated with the Big 4 networks as well as for non-Big 4 stations.

Table 2 provides summary information concerning the size of the 54 broadcast groups with which DISH currently has contracts in place to retransmit Big 4 local broadcast stations.[16]

[16] Data concerning local broadcast station ownership (i.e., its relationship, if any, to a broadcast group) and local broadcast station revenues are from BIA Kelsey Media Pro data as of March 13, 2019. Current (as of March 1, 2019) retransmission fees were provided in 45 of these contracts.

Table 2: Broadcast Group Size

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Table 3 provides the results of a simple statistical analysis concerning the relationship between broadcast group size and retransmission fees. Specifically, it shows the average retransmission fees paid by DISH to “large” broadcast groups (i.e., local broadcast stations whose combined 2016 station revenues are equal to or exceed $500 million) as well as to “small” broadcast groups (i.e., local broadcast stations whose combined 2016 station revenues were less than $500 million). Figures are also presented with a classification based on the number of DISH subscribers reached, where the cutoff used was 1.5 million subscribers.

Table 3: Average Retransmission Fee by Broadcast Group Size

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The table indicates that DISH has paid lower retransmission fees (on a per subscriber per month basis) for the Big 4 stations of the smaller broadcast groups compared to those of larger ones. This result holds whether broadcast group size is measured by combined local broadcast station revenues (smaller or larger than $500 million) or the number of DISH subscribers reached (smaller or higher than 1.5 million). The average retransmission fees DISH pays to smaller sized

broadcast groups are **{{BEGIN HCI END HCI}}**, while comparable numbers for the average retransmission fees paid to the larger broadcast groups are **{{BEGIN HCI END HCI}}**.[17] These numbers compare to those obtained when we define size by the number of DISH subscribers. The difference in retransmission fees paid to larger versus smaller broadcast groups is highly statistically significant, with p-values equal to or less than 0.01. Appendix A presents a figure illustrating this size effect, as well as an alternate analysis that also includes the network-owned broadcast groups. They are all large, but differ in that they do not have to transfer fees to an affiliated network.

We also examined the effect of size as shown between the Applicants. Nexstar Big 4 stations reach approximately **{{BEGIN HCI END HCI}}** DISH subscribers, more than twice the number of DISH subscribers reached by Tribune's Big 4 stations.[18] Table 4 provides the percentage by which the retransmission fees (on a per subscriber per month basis) charged by Nexstar for its Big 4 stations exceed those charged by Tribune. Since retransmission fees have steadily increased over time, the table also provides these percentages in terms adjusted to account for the vintage of the retransmission contracts.

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17 The four network owned and operated groups are excluded from the analysis. Similar tables included in Appendix A include these four groups.

18 DISH subscriber totals are as of 2016.

Table 4: Nexstar Big 4 Station Retransmission Fee Premium Over Tribune

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This finding that larger broadcast groups charge higher retransmission fees than do smaller groups also holds true at the DMA level. Appendix A provides a list of 108 DMAs in which there is both at least one large broadcast group (reaching 1.5 million or more DISH subscribers) and at least one small broadcast group (reaching fewer than 1.5 million DISH subscribers), each of which provides a Big 4 network affiliated local broadcast station.[19] Large broadcast groups charged DISH higher retransmission fees for Big Four-affiliated broadcasting (on a per subscriber per month basis) compared to the smaller broadcast groups in 94 of the 108 DMAs, that is in 87% of cases. Within those 94 DMAs, the fee premium is **{{BEGIN HCI END HCI}}** or more in roughly half (42) of them, and exceeds **{{BEGIN HCI END HCI}}** in roughly a third (25) of them.

The descriptive analysis is clear about the relation between broadcast groups' size and the retransmission fee they charge. We explore further whether there might be other factors explaining this correlation. To do this, we run a regression of fee on size accounting for other possible explanatory factors. We specify the following regression:

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19 The DMAs have been anonymized to maintain the confidentiality of DISH's agreements. Each DMA has been randomly assigned a number, which is not an indication of rank by size or any other metric.

$$Retransmission\ Fee_g = \alpha + \beta_{size} \times Broadcaster\ Size_g + \beta_{age} \times Contract\ Age_g +$$

$$f(Additional\ Controls) + \varepsilon_g$$

The left-hand (or dependent) variable in the above regression is the retransmission fee paid by DISH to broadcast group g for the right to include Big 4 local broadcast stations in its channel lineup, as recorded from the contract between DISH and the broadcast group. On the right hand side, the variable $Broadcaster\ Size_g$ is a proxy for the size of the broadcast group. For analytic sensitivity, it is measured in two different ways: (1) by the monthly average number of DISH subscribers reached by the Big 4 local broadcast stations owned by the broadcast group in 2016, and (2) by the 2016 revenues realized by those stations. The results of the regression analysis using the number of DISH subscribers reached as an indicator of broadcast group size are presented in Table 5 below. Similar results are obtained in the specifications using 2016 local broadcast station revenues as an indicator of broadcast group size. These results are provided in Appendix A.

The right hand variables also include additional factors that might influence the observed retransmission fees that DISH is paying the broadcast groups. Notably, these include contract age and ownership arrangements (mainly whether the local broadcast station is owned and operated by the upstream programming network). [20]

We also considered alternative modeling specifications (e.g., "log-log" regression versus linear). The results of our regression analyses (using DISH subscribers reached as an indicator of broadcast group size) are shown in Table 5. The table present results for six regression specifications, ranging from a simple regression that does not include additional control variables (Model 1) to specifications with various combinations of controls (Models 2 through 6). All of the statistical regression relationships described below when using DISH subscribers to measure group size are essentially replicated when measuring group size by station revenues instead

[20] Owning more than one local station in a DMA was initially included but found to have no effect. Because it is correlated with size and seemed to capture a nonlinearity in impact of size, we have omitted the result.

Table 5: Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group
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The regression analysis indicates that there is a strong relationship between broadcast group size and the monthly per-subscriber retransmission fees paid by DISH. Specifically, it indicates that DISH pays more for retransmission fees per subscriber to larger broadcast groups than it does to smaller groups. This results holds for all the specifications presented.

The results for Model 1 (i.e., no control variables) indicate that the monthly per subscriber retransmission fees paid by DISH increase by about **{{BEGIN HCI END HCI}}** (on a per subscriber per month basis) for each increase of 100,000 DISH subscribers reached by the broadcast group's stations. Introducing control variables leads to a range of (statistically significant) estimates of **{{BEGIN HCI END HCI}}** increase in retransmission fees

for each 100,000 subscriber increase in broadcast group size (Models 2 through 4).[21] Model 5 examines possible nonlinearities in the relationship between retransmission fees and subscribers reached, introducing a subscribers-squared term. The impact on size seems non-linear and the results indicate that the impact of 100,000 additional subscribers on the retransmission fee charged by an average sized broadcast group is **{{BEGIN HCI END HCI}}**, with the impact being larger for smaller broadcast groups and smaller for larger ones. Model 6, where the regression is performed in natural logs for both retransmission fees and for broadcast group size, shows a **{{BEGIN HCI END HCI}}** increase in retransmission fees for each 1% increase in subscribers reached by the broadcast group's stations; this value is approximately equivalent to **{{BEGIN HCI END HCI}}** per 100,000 subscribers, in line with the linear model estimates.[22]

Each of the control variables included in the regressions is sensible and relatively invariant to model specification. First, we confirm that contract age is an important factor to take into consideration when analyzing retransmission fees. On average, older contracts appear to have lower per subscriber per month retransmission fees on the order of **{{BEGIN HCI END HCI}}** per year of contract age, controlling for other variables. This is consistent with the reports of increasing transmission fees over time discussed in Section II. Contracts with different contract dates are adjusted by **{{BEGIN HCI END HCI}}** per year of contract age in this report to improve the comparability of their retransmission fees.

Second, network owned-and-operated stations are a large segment of local broadcast stations and, as such, may exert a strong influence on results. The regression analysis indicates that the network owned-and-operated broadcast group variable has a negative and statistically significant direct effect on retransmission fees (Model 2), although the effect disappears when we take into account contract age (Model 3).

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21 In order to test sensitivity to inclusion of the network owned-and-operated stations, Model 4 displays the results of a regression that omits the network groups (ABC/Disney, NBC/Comcast, Fox/Twenty-First Century Fox, and CBS Corp.) from the set of broadcast groups analyzed. Inclusion or exclusion of these network groups has no material effect on the coefficients of the other control variables (cf. Model 3).

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B. DISH retransmission fees increase after large broadcast groups' acquisitions

In connection with the Nexstar-Tribune proposed merger, we also determined the effect that a merger of broadcast groups had upon the level of retransmission fees.

We compared the retransmission fee of each of the merging parties' pre-merger contract with the retransmission fee that was specified in the associated first post-merger contract. In order to compare the retransmission consent fees across two contracts that were executed at different times,[23] we adjust the fees for the differences in the age of the contracts. Specifically, we increased the retransmission fee that the acquired firm received in the first year of the contract by the inflation rate of 16.5% per year that is estimated in Table 5.

Table 6 shows that, for each of the ten acquisitions since August 2013, the actual retransmission consent fee that DISH paid the combined entity in the first year of the first contract after the acquisition (Column 6) exceeded the fee that would likely have been paid for the target's stations, given the retransmission fee that DISH paid pre-merger and the industry inflationary trend (Column 5).[24] On average, the actual retransmission fee post-merger in our sample is **{{BEGIN HCI** **END HCI}}**, or 141.8% higher than the retransmission fee that the target would have been expected to receive based on inflation.

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23 Comparing retransmission fees at a particular date (say, 2017) is not as direct as it may initially appear because each term may be associated with contracts that were executed at different times (say, 2015 and 2016).

24 We omit the information on the Nexstar/ Media General acquisition. Ms. Ordonez testifies, **{{BEGIN HCI** **END HCI}}** Ordonez Decl. ¶ 16.

Table 6: Post-Merger Effects on Retransmission Fee Agreements – Target

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The table also includes retransmission fee comparisons for acquisitions involving Tribune, which acquired another broadcast group. Following the methodology described above, **{{BEGIN HCI**

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Table 7 also provides the impact of the mergers on the fees charged by the acquiring media company. This is done by comparing the retransmission fees included in the contract in effect at the time of the acquisition versus those fees included in the first contract signed post-merger. It shows that the retransmission fees charged to DISH by the specified acquiring broadcast groups are **{{BEGIN HCI** **END HCI}}** higher on average. This is so even though the acquisition of stations commanding lower rates would be expected to exert downward pressure on the rates of the combined company. The table also shows that the retransmission fee charged to DISH **{{BEGIN HCI**

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Table 7: Post-Merger Effects on Retransmission Fee Agreements – Acquirer

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The impact of mergers on retransmission fees is consistent with our prior finding that broadcast group's size affects retransmission fees. We demonstrated in Section IV.A that the monthly per subscriber retransmission fees paid by DISH increase by **{{BEGIN HCI END HCI}}** on average (on a per subscriber per month basis) for each increase of 100,000 DISH. These results are consistent with our review of a subset of recent mergers for which retransmission fee data is available. These results indicate that retransmission fees have increased on average by between **{{BEGIN HCI END HCI}}** and **{{BEGIN HCI END HCI}},** depending on whether subscribers were affiliated with the acquiring or the target broadcast group.

C. Large MVPDs such as DISH pay higher fees to avoid simultaneous blackouts

Large broadcast groups are more prone to cause blackouts compared to smaller ones and they obtain higher retransmission fees. But the impact of blackouts extends beyond the contracting price of the parties involved in the dispute. This is because an MVPD such as DISH will incur costs to avert a second blackout when it is already suffering one. For example, when renegotiations with a broadcasting group coincide with an ongoing blackout, DISH will accept relatively higher rates than originally intended. There are two reasons for this. First, as explained earlier, nationwide MVPDs such as DISH have various paths to obtain the content they need for a national offer of services. Reaching agreements with a broadcast group makes reaching an agreement with some other ones less essential. In this way, nationwide MVPDs let broadcast groups compete to become an integral part of their offer across the country, resulting in a

particular combination of contracts that fits their need. Conversely, a lack of agreement with a broadcast group increases the importance of signing a contract with the remaining ones. This reduced bargaining power is reflected in the willingness to accept higher rates in negotiation that occur during a blackout, when one of the possible agreements becomes uncertain.

Another reason why blackouts decrease an MVPD's bargaining power nationally is the desire to avoid subscriber losses. The impact of viewership changes in terms of brand and reputation may disproportionately increase with size. This means that a nationwide MVPD will take pains to avoid losing many subscribers at any one time. Faced with the loss of subscribers generated by a blackout, DISH will concede higher rates to prevent additional losses.

The above factors lead to price concessions during blackouts that extend beyond the affected DMAs and are a testimony of the nationwide costs of large blackouts. These cross-DMA effects are also an illustration of the national scope of broadcasting retransmission fee negotiations.

DISH documentary evidence supports the existence of these cross-market effects during blackouts. Before entering into a retransmission negotiation, DISH estimates the retransmission fee that it is willing to pay to a broadcast group based on prevailing relevant market factors. Factors that determine this 'goalpost' fee include **{{BEGIN HCI**

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The goalpost documents show that DISH considers a broadcast group's size across all local markets as an important factor when setting rates. **{{BEGIN HCI**

25 The colloquial use here of the term "duopoly" refers to multi-station control in a DMA. Use of the term "duopoly" in this way deviates from its meaning in many economics textbooks (where a duopoly is understood to indicate that two firms control most or all of the assets or sales in a given "market".) We adopt the colloquial FCC usage here for expositional ease.

END HCI}} This supports the evidence described above that larger broadcast groups obtain higher per subscriber rates, **{{BEGIN HCI END HCI}}**

The Tribune blackout provides an example of how blackouts affect the transmission rate agreed with third party broadcast groups that happen to enter renegotiations in the same timeframe irrespective of the degree of overlap between broadcast groups. Tribune blacked out all of its stations from June 12, 2016 – September 3, 2016, during a contract dispute with DISH. In the period covering both the blackout and the 10 days beforehand (when the threat of the blackout was imminent), DISH agreed to retransmission rates with other stations that were substantially above the rates it had anticipated (the goalpost rates), with only one exception.

Table 8 shows the goalpost rates set by DISH before the negotiation and the final rates agreed to for each of the station owners whose contracts expired while DISH experienced the Tribune blackout.

Table 8: Results of Retransmission Negotiations under Threat of Tribune Blackout

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In fact, the difference is even more pronounced, because the rate for one small broadcast group artificially increases the average agreed-upon rate for the "before/after" stations. **{{BEGIN HCI**

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Table 9: Results of Retransmission Negotiations Before or After Tribune Blackout was a Factor

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Figure 5 presents a graphical comparison of the outcomes of the negotiations during the blackout and those shortly before or after the blackout was a factor.

26 Ordonez Decl. ¶ 18.

27 *Id.*

Figure 5: Effect of the Tribune Blackout on Retransmission fees

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END HCI}} Evidence shows that DISH makes costly concessions to all types of broadcast groups when DISH is renegotiating during or under the threat of large blackout events – irrespective of geographic overlaps. This is indicative of the bargaining power of larger broadcast groups and of the national dimension of retransmission fees negotiations.

A threatened blackout across a broader set of DMAs and a larger number of subscribers, as DISH would confront in the event of the Nexstar-Tribune merger, would result in retransmission rates that exceed what DISH would otherwise expect to pay. This would happen not only in the DMAs where the merged entity would be present but also across a wider territory. Put another way, the threat of a simultaneous blackout across a bigger number of subscribers puts additional

pressure on DISH to accede to higher retransmission rates. The proposed merger of Nexstar and Tribune gives the combined company the power to use the threat of simultaneous blackouts of all Nexstar and Tribune stations to extract higher retransmission rates than either company could obtain individually.

We have examined subsequent blackouts to determine whether they permit a similar analysis to that performed for the Tribune blackout. The most significant of these was the Hearst blackout, which lasted from March 2, 2017 to April 26, 2017. But this blackout does not permit a similar analysis because no agreement seems to have come for renegotiation during that time.

We have been able to supplement that analysis by examining shorter and smaller blackouts: the Quincy blackout, which lasted 46 days in August to October of 2018 and affected 12 smaller DMAs; and the SagamoreHill blackout, which lasted 85 days from May through August of 2018 and affected 11 DMAs. The CBS blackout is not suitable for this analysis because it lasted only for 4 days (from November 20 to November 23, 2017). For each of the two blackouts considered and for the two blackouts combined, we compared the ratio between the negotiated fee and the goalpost value for the contracts that went into effect during the respective blackout. {{BEGIN HCI

END HCI}} The results of this supplementary goalpost analysis are presented in Table 10. Details of the contracts are provided in Appendix B.

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Table 10: Comparison of Goalpost and Retransmission Fees for Contracts Negotiated During Blackouts

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VI. Appendices

A. Retransmission Fees

Table 11: Retransmission Fees by Broadcast Group Size Including Network Owned Broadcast Groups

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Figure 5: Average Retransmission Fees by Broadcast Group Size

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Table 12: Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group, as Measured by Total Station Revenues

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Table 13: Retransmission Fee Premium of Largest Broadcast Groups over Smallest Broadcast Groups in DMA

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Table 13: Retransmission Fee Premium of Largest Broadcast Groups over Smallest Broadcast Groups in DMA (continued)

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B. Blackouts and Goal Post Negotiations

Table 14: Comparison of Goalposts and Actual Agreed-upon Rates for Recently Negotiated Retransmission Contracts (2017-Present)

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The forgoing declaration has been prepared using facts of which I have personal knowledge or based upon information provided to me. I declare under penalty of perjury that the foregoing is true and correct to the best my current information, knowledge, and belief.

Executed on March 18, 2019

Eliana Garcés
Principal
Brattle Group

William Zarakas
Principal
Brattle Group