

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 19-30
Tribune Media Company	)	
and	)	
Nexstar Media Group, Inc.	)	
	)	
For Consent to the Transfer of Control and	)	
Assignment of Licenses	)	

**CONSOLIDATED OPPOSITION TO PETITIONS TO DENY AND COMMENTS**

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## SUMMARY

The Petitions to Deny and comments filed in this proceeding<sup>1</sup> should be dismissed, denied, or rejected, clearing the way for prompt approval of the applications (the “Applications”) for Commission consent to the transfer of control of the licenses of television stations currently owned and operated by Tribune Media Company (“Tribune”) to Nexstar Media Group, Inc. (“Nexstar”) without conditions.

As an initial matter, the Petitions are procedurally defective because the Petitioners have failed to establish standing as parties in interest, or to present “specific allegations of fact sufficient to show that . . . a grant of the application[s] would be prima facie inconsistent with” the public interest, convenience and necessity.

Regardless, the Applications contain a fulsome and persuasive demonstration that the Transaction complies with all applicable rules—including as a result of divestitures that have now been announced or are being actively negotiated<sup>2</sup>—and that its approval will serve the public interest by permitting the delivery of enhanced local service and improving competition. In the face of Nexstar’s extensive demonstration of rule compliance and public interest benefits, the Opposing Parties are left to seek evaluation of the Applications under rules that do not exist, alternatively asking the FCC to apply versions of Commission rules that are not in effect or suggesting that the agency “condition” its approval of the Applications on requirements of the Opposing Parties’ own making. But the FCC has a settled policy of refusing to address industry-

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<sup>1</sup> The parties filing Petitions to Deny and comments are collectively referred to herein as the “Opposing Parties.”

<sup>2</sup> It is anticipated that the final divestiture application will be submitted to the Commission within approximately the next week.

wide issues in an adjudicatory licensing proceeding such as this one, and it should therefore reject the Opposing Parties' attempts to end-run the rulemaking process.

The retransmission consent-related arguments presented by certain Opposing Parties suffer from this same defect and many more, representing gratuitous attempts to convince the Commission to single out Nexstar for unnecessary and restrictive regulations that these parties have requested and failed to obtain many times before. Even were these arguments properly considered here (which they are not), they are based on speculative assumptions and exaggerations that lack any basis in fact.

There is also no basis for the Commission to require the dismantling of Tribune's existing combination of two Top-Four stations in Indianapolis. The Applications establish that the application of the Top-Four Prohibition to this combination would not serve the public interest, and the Opposing Parties that discuss this showing fail to substantively address the Applicants' demonstration. Instead, they overlook the fact that competition-based concerns are irrelevant where a buyer is merely stepping into the shoes of a seller, and present retransmission consent-related claims that are not specific to the Indianapolis market.

In sum, the Applications demonstrate compliance with the Commission's rules and significant Transaction-specific public interest benefits, and the Opposing Parties' arguments are improper in this adjudicatory proceeding, based on surmise and speculation or outright falsehoods, or otherwise insufficient to overcome the substantial showing contained in the Applications. For these and the many other reasons discussed herein, the Petitions should be promptly dismissed or denied, the commenters' arguments rejected, and the Applications promptly granted without unnecessary and inappropriate conditions.

## TABLE OF CONTENTS

SUMMARY.....	i
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. THE PETITIONS ARE PROCEDURALLY DEFECTIVE.....</b>	<b>2</b>
A. The Petitioners Lack Standing. ....	2
B. The Petitions Fail To Satisfy The Applicable Standard Of Review. ....	5
<b>III. THE TRANSACTION COMPLIES WITH ALL APPLICABLE RULES.....</b>	<b>6</b>
<b>IV. THE TRANSACTION WILL SERVE THE PUBLIC INTEREST. ....</b>	<b>9</b>
<b>V. THE OPPOSING PARTIES IMPROPERLY SEEK TO HAVE THIS TRANSACTION EVALUATED UNDER RULES THAT DO NOT EXIST. ....</b>	<b>15</b>
A. Industry-Wide Issues Are Appropriately Addressed Through Rulemaking, Not Transaction Reviews. ....	15
B. Opposing Parties’ Contentions Regarding The National Television Ownership Rule Are Inappropriate In This Adjudicatory Proceeding.....	17
C. Calls for Conditions On Approval Of The Transaction Amount To Attempted End-Runs Around The Rulemaking Process. ....	18
<b>VI. THE RETRANSMISSION CONSENT-RELATED ARGUMENTS ARE INAPPROPRIATELY ADVANCED HERE, AND ARE OTHERWISE TIRED AND SPECULATIVE. ....</b>	<b>21</b>
A. The Petitions and Comments Merely Repeat Arguments From Pending Rulemaking Proceedings Which Are Not Proper For Consideration In An Individual Transaction Review. ....	21
B. The Opposing Parties’ Concerns About Retransmission Fees And Impasses Are Speculative And Exaggerated. ....	24
1. The Opposing Parties Present a Distorted and One-Sided View of the Retransmission Consent Marketplace.....	26
2. The Opposing Parties Exaggerate The Risk Of Additional Carriage Disruptions As A Result of the Transaction. ....	29
3. The Transaction Does Not Create Any New Sharing Arrangements and Will Not Affect Retransmission Consent Negotiations for Existing Sharing Stations.....	32
<b>VII. THE COMMISSION SHOULD PERMIT NEXSTAR TO ACQUIRE TRIBUNE’S EXISTING TOP-FOUR COMBINATION IN INDIANAPOLIS.....</b>	<b>33</b>
<b>VIII. CONCLUSION .....</b>	<b>37</b>

## I. INTRODUCTION

Nexstar Media Group, Inc. (“Nexstar”) and Tribune Media Company (“Tribune”) (collectively the “Applicants”) hereby oppose the Petitions to Deny filed in the above-referenced proceeding by: (1) Common Cause, Public Knowledge, United Church of Christ, OC, Inc., and Sports Fans Coalition (“Special Interest Groups” or “SIGs”);<sup>3</sup> (2) Frontier Communications Corporation (“Frontier”);<sup>4</sup> and (3) DISH Network Corporation (“DISH”).<sup>5</sup> The Applicants also hereby respond to the comments filed in this proceeding by (1) NCTA—The Internet & Television Association (“NCTA”);<sup>6</sup> and (2) the American Television Alliance (“ATVA”).<sup>7</sup> The Petitions and comments were filed in connection with applications seeking FCC consent to the transfer of control of the licenses of television stations currently owned and operated by Tribune to Nexstar

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<sup>3</sup> Petition to Deny of Common Cause, Public Knowledge, United Church of Christ, OC, Inc., and Sports Fans Coalition, MB Docket No. 19-30 (Mar. 18, 2019) (“SIG Petition”).

<sup>4</sup> Petition to Deny of Frontier Communications Corporation, MB Docket No. 19-30 (Mar. 18, 2019) (“Frontier Petition”).

<sup>5</sup> Petition to Deny of DISH Network Corporation, MB Docket No. 19-30 (Mar. 18, 2019) (“DISH Petition”). The SIGs, Frontier, and DISH will be collectively referred to herein as the “Petitioners.”

<sup>6</sup> Comments of NCTA—The Internet & Television Association, MB Docket No. 19-30 (Mar. 18, 2019) (“NCTA Comments”).

<sup>7</sup> Comments of American Television Alliance, MB Docket No. 19-30 (Mar. 18, 2019) (“ATVA Comments”). The Applicants also respond to selected arguments advanced in an *ex parte* notice filed by America’s Communications Association (formerly the American Cable Association) (“ACA”) after the deadline for petitions to deny. See ACA, Notice of Ex Parte, MB Docket No. 19-30; MB Docket No. 18-349; MB Docket No. 17-318; MB Docket No. 15-216; MB Docket No. 10-71 (Mar. 25, 2019) (“ACA Mar. 25 Ex Parte”). NCTA and ATVA will be collectively referred to herein as the “Commenters.” In addition, (1) the Petitioners and Commenters will be collectively referred to herein as the “Opposing Parties,” and (2) Frontier, DISH, NCTA, ATVA, and ACA will be collectively referred to herein as the “MVPD Parties.”

(the “Applications”), as necessary to permit a merger of Nexstar and Tribune (the “Transaction”).<sup>8</sup>

As demonstrated below, the Petitioners lack standing, and the Opposing Parties’ objections to the Transaction are improperly presented in this proceeding, factually baseless, replete with speculation and exaggeration, and/or contrary to law and precedent. The Petitions should therefore be dismissed or denied and the arguments contained in the comments rejected, and the Applications promptly approved without the unnecessary conditions that certain Opposing Parties request.

## **II. THE PETITIONS ARE PROCEDURALLY DEFECTIVE.**

### **A. The Petitioners Lack Standing.**

The Petitioners have not established that they have standing as “part[ies] in interest” to object to the Transaction, as required under the Communications Act.<sup>9</sup> To have standing to petition to deny, a party must show that: (1) “grant of the challenged application would cause the petitioner to suffer a direct injury,” (2) “the injury can be traced to the challenged action,” and (3) it is “likely, as opposed to merely speculative, that the injury would be prevented or redressed by the relief requested.”<sup>10</sup> In the case of a petition based upon “viewer standing,” the petitioner must also “allege that [he or she] is a resident of the station’s service area and a regular viewer of the

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<sup>8</sup> See Comprehensive Exhibit to FCC Form 315 Applications at 1 (“Comprehensive Exhibit”). The Transaction is a cash merger transaction in which Nexstar will acquire all of the outstanding equity interests of Tribune. *See id.*

<sup>9</sup> 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.939; *Applications for Consent to Transfer Control of License Subsidiaries of Media General, Inc. from S’holders of Media General, Inc. to Nexstar Media Grp., Inc.*, Memorandum Opinion and Order, 32 FCC Rcd. 183, 189, ¶ 15 (2017) (“*Nexstar/Media General*”) (“Under the Act, only a ‘party in interest’ has standing to file a petition to deny.”); *see also, e.g., Local TV Holdings, LLC, Transferor, and Tribune Broad. Co. II, LLC, Transferee*, Memorandum Opinion and Order, 28 FCC Rcd. 16850, 16853, ¶ 7 (2013) (“*Tribune/Local TV*”).

<sup>10</sup> *Alaska Native Wireless LLC*, Order, 18 FCC Rcd. 11640, 11644, ¶ 10 (2003); *see Rockne Educational TV, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd. 14402, 14405, ¶ 7 (2011).

station.”<sup>11</sup> A petitioner to deny must support the factual allegations necessary to establish standing (and a petition generally) with one or more affidavits submitted under penalty of perjury from persons with personal knowledge of those facts.<sup>12</sup> An organization seeking to establish its standing to file a petition to deny also must show that at least one of its members satisfies each requirement.<sup>13</sup>

The SIGs lack standing because they have put forth nothing besides broad and conclusory assertions that the Transaction conflicts with Commission policies (without identifying a single rule that the Transaction actually violates) and will disserve the public interest (based upon speculative assertions that are either contrary to fact, irrelevant to this adjudicatory proceeding, or both). Indeed, the SIGs identify not a single direct, non-speculative injury they would suffer from grant of the Applications.<sup>14</sup> Further, even if the speculations contained in the SIG Petition were not utterly deficient on their face—which they are—the single declaration attached to that Petition is from an individual who claims to be a member of only one organization that signed the Petition and who is a viewer of only one television station (WGN-TV in Chicago) being transferred to Nexstar as part of the Transaction. The Commission has denied petitioner status to organizations

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<sup>11</sup> *E.g., Nexstar/Media General*, 32 FCC Rcd. at 189, ¶ 15.

<sup>12</sup> *Id.*; see 47 U.S.C. § 309(d); 47 C.F.R. § 73.3584.

<sup>13</sup> *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

<sup>14</sup> *WFBM, Inc.*, 47 FCC 2d 1267 (1974) (“Hearsay, rumor, opinion or broad generalization do not satisfy the specificity requirement of Section 309(d).”); see *S’holders of AMFM, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 16062, 16077, ¶ 38 (2000) (“Roslin’s bare allegation that Clear Channel could, or would act in an anti-competitive manner in the future is purely speculative and unsupported, and thus is inadequate to establish the requisite injury.”); *License Renewal Applications of Certain Broadcast Stations Licensed for and Serving the Metropolitan Los Angeles, California Area*, 68 FCC 2d 75 (1978) (dismissing petitions to deny based on the failure to satisfy Section 309(d), including lack of specific allegations of fact).

where the petitioner's allegations were not supported by appropriate affidavits.<sup>15</sup> Where an organization provides an affidavit from a member residing in only one of the viewing areas affected by a transaction, the Commission has similarly denied petitioner status with respect to the remaining viewing areas, concluding that the organization's standing is "geographically limited to the market with respect to which viewer membership is identified in its declaration."<sup>16</sup> In light of its factual and other defects, the lone declaration attached to the SIG Petition cannot and does not establish standing for all of the organizations that are party to that Petition even with respect to the Chicago station, let alone the multiple other stations involved in the Transaction.

Neither Frontier nor DISH even attempt to establish standing in their Petitions. These parties, moreover, allege nothing more than "remote, speculative, conjectural, or hypothetical" risks that the combined company *might* engage in anticompetitive conduct.<sup>17</sup> Frontier, in particular, also cannot claim standing to challenge the Transaction outside of the areas where it

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<sup>15</sup> *Tribune/Local TV*, 28 FCC Rcd. at 16853-54, ¶ 8 (finding that "by failing to include an affidavit or declaration from any members in this proceeding, PFPF has failed to demonstrate that it has standing at all"); see *S'holders of Tribune Co., Transferors & Sam Zell, et al. Transferees & Applications for the Renewal of License of KTLA(TV), L.A., Cal., et al.*, 22 FCC Rcd. 21266, 21269, ¶ 7 (2007) ("*Tribune Co.*") ("The requirement of an affidavit or declaration by a resident of the station's service area who is a regular viewer of the station with personal knowledge of the facts alleged in order to establish standing is unambiguous.").

<sup>16</sup> *Nexstar/Media General*, 32 FCC Rcd. at 190, ¶ 18; see *Tribune Co.*, 22 FCC Rcd. at 21269, ¶ 7 ("[W]e do not find that standing to file a petition to deny against one application that forms part of a multi-station transaction automatically confers standing to oppose every single application that is part of the transaction[.]"); *Applications of Certain Broadcast Stations Serving Communities in the State of Louisiana*, 7 FCC Rcd. 1503, ¶ 4 (1992) ("The petition did not include statements from NAACP members concerning WFPR(AM)/WHMD(FM), Hammond, Louisiana, WCKW(AM), Garyville, Louisiana, and WCKW FM, LaPlace, Louisiana. Accordingly, we find that the petition to deny filed by the NAACP against these stations is insufficient to establish standing[.]").

<sup>17</sup> See *Pub. Citizen v. NHTSA*, 489 F.3d 1279, 1293 (D.C. Cir. 2007). As discussed in Section VI, *infra*, the MVPD Parties' predictions that Nexstar will increase its leverage in retransmission consent negotiations as a result of the Transaction are speculative.



operates cable systems.<sup>18</sup> Moreover, these Petitioners “cannot establish standing simply by asserting a role as public ombudsman.”<sup>19</sup> The Frontier and DISH Petitions should, therefore, likewise be dismissed for lack of standing.

**B. The Petitions Fail To Satisfy The Applicable Standard Of Review.**

A party challenging a transfer or assignment application through a petition to deny must first establish a *prima facie* case that grant of the application would be inconsistent with the public interest.<sup>20</sup> The petition “must show the necessary specificity and support; mere conclusory allegations are not sufficient.”<sup>21</sup> Even if a petitioner can satisfy this first step, the Commission must determine whether “on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice,” the petitioner has raised a “substantial and material question of fact” as to whether the grant of the application would serve the public interest.<sup>22</sup>

As demonstrated below, despite the Petitioners’ efforts to distract by mischaracterizing facts and rehashing arguments previously presented and repeatedly rejected by the Commission, Petitioners do not show, let alone show with sufficient specificity and support, that grant of the Applications would be inconsistent with the public interest in any manner whatsoever. Indeed, the Petitioners not only fail to provide any legitimate basis to question the Applicants’ showing that

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<sup>18</sup> See *supra* note 16.

<sup>19</sup> *KERM, Inc. v. FCC*, 353 F.3d 57, 61 (D.C. Cir. 2004).

<sup>20</sup> See, e.g., *Nexstar/Media General*, 32 FCC Rcd. at 192, ¶ 20; *Astroline Commc’ns Co., Ltd. P’ship v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988); 47 U.S.C. § 309(d).

<sup>21</sup> *Kola, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 14297, 14305, ¶ 15 (1996) (quoting *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 507 (D.C. Cir. 1988)).

<sup>22</sup> E.g., *Nexstar/Media General*, 32 FCC Rcd. at 192, ¶ 20; *Astroline*, 857 F.2d at 1561; 47 U.S.C. § 309(e).

the Transaction complies with all relevant Commission rules and policies and will serve the public interest, but also do not provide a single supported (non-speculative) specific harm to either Petitioners' or the public's interest.

### **III. THE TRANSACTION COMPLIES WITH ALL APPLICABLE RULES.**

Decisions on broadcast acquisitions have historically (and still primarily) come down to compliance with media ownership rules and policies.<sup>23</sup> Although the FCC is obligated to examine whether every transaction that comes before it also serves the public interest, compliance with the Commission's broadcast rules is the primary consideration. This is because, in the broadcast context, the FCC has in place an extensive array of age-old bright-line rules that are designed as proxies to address the traditional public interest concerns of diversity and competition. Indeed, in adopting bright-line standards governing media ownership matters, the Commission's very goal was to make sure that its rules "are clear to [its] broadcast regulatees, provide reasonable certainty and predictability to allow transactions to be planned, ensure ease of processing, and provide for the reporting of all of the information [it] need[s] in order to make [its] public interest finding with respect to broadcast applications."<sup>24</sup> Nexstar has taken all appropriate steps to ensure that the Transaction complies with the Commission's media ownership rules.

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<sup>23</sup> See, e.g., *Nexstar/Media General*, 32 FCC Rcd. at 191, ¶ 19 ("[T]he Commission must first determine whether the proposed transaction would comply with the specific provisions of the Act, other applicable statutes, and the Commission's rules."); *Applications for Consent to Transfer Control from S'holders of Belo Corp.*, Memorandum Opinion and Order, 28 FCC Rcd. 16867, 16876, ¶ 22 (2013) ("*Gannett/Belo*") (recognizing that "the Commission has adopted rules to promote diversity, competition, localism, or other public interest concerns" and that, accordingly, "those rules may form a basis for determining whether the transfer and assignment applications are on balance in the public interest").

<sup>24</sup> *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, 14 FCC Rcd. 12559, 12563, ¶ 5 (1999) (quoting *Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, Notice of Proposed Rulemaking, 10 FCC Rcd. 3606, 3610, ¶ 5 (1995)).

The effect of the Commission’s local and national television ownership rules on the Transaction and Nexstar’s plans to ensure compliance with those rules are straightforward. Where the Transaction would create new or transfer existing non-Top Four duopolies in local markets, the Applications demonstrate the compliance of those combinations.<sup>25</sup> In the two markets where Nexstar is acquiring existing parent-satellite combinations, the Applications provide full and complete showings justifying reauthorization of the satellite waivers.<sup>26</sup> In one market where Tribune owns an existing combination of two Top Four stations that Nexstar seeks to acquire, Nexstar has provided a comprehensive demonstration—as permitted by the Commission’s current duopoly rule—that the public interest would be served by allowing Nexstar to acquire that combination while divesting the two stations it currently owns.<sup>27</sup> And, in each of the other markets where the Transaction would create a combination of new Top Four stations, as well as to ensure compliance with the national television ownership rule, Nexstar committed in the Applications to make appropriate divestitures.<sup>28</sup>

To the extent that certain Opposing Parties attempt to use Nexstar’s divestiture pledges as an excuse to delay the Commission’s processing of the Transaction,<sup>29</sup> they ignore hornbook law that a “divestiture pledge removes any concern as to a violation of Section 73.3555 of [the FCC’s]

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<sup>25</sup> See Comprehensive Exhibit at 28-31.

<sup>26</sup> See *id.* at 31-33.

<sup>27</sup> See *id.* at 1-2; FCC File No. BTCCDT-20190107ACF, Exhibit 20 (the “Indianapolis Top-Four Showing”). The flawed attacks of several Opposing Parties on Nexstar’s Indianapolis Top Four Showing are addressed in Section VII below.

<sup>28</sup> See Comprehensive Exhibit at 25-28, 33-34.

<sup>29</sup> See ATVA Comments at 2-3; NCTA Comments at 21; DISH Petition at 44-46.

Rules.”<sup>30</sup> In ten markets where the Transaction would create a new combination of Top Four stations, Nexstar has pledged to divest one of those stations.<sup>31</sup> Nexstar has signed binding agreements in nine of those markets, and is in active negotiations to divest two stations in the tenth.<sup>32</sup> Nexstar has also pledged—and now has signed binding agreements—to divest stations in three markets in order to bring its nationwide audience reach at closing of the Transaction below the limit prescribed by the national television ownership rule.<sup>33</sup> All in all, within a period of less than three months after filing the Applications, Nexstar has negotiated and entered into contracts to divest nineteen full power television stations to ensure the Transaction’s compliance with the Commission’s local and national broadcast ownership rules. Nexstar anticipates finalizing an agreement to sell the remaining two stations that must be divested to ensure compliance, and filing an application for that divestiture, in the imminent future. None of the divestiture buyers will receive services from Nexstar (beyond customary short-term transition services) after they are divested. There cannot be any legitimate question that the Transaction and related divestitures are designed to ensure clear compliance with the Commission’s rules.

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<sup>30</sup> *Scripps Howard Broad. Co.*, 8 FCC Rcd. 2326, 2326, ¶ 3 (1993).

<sup>31</sup> See Comprehensive Exhibit at 25-28. With respect to Indianapolis, where Nexstar’s acquisition of the Tribune stations would result in the ownership of four stations, two of which would be in the top-four, the Applications explain that: “If NBI is permitted to acquire both WXIN(DT) and WTTV(DT), then it will divest the other two stations owned in the market. Applications to divest stations sufficient to comply with the Duopoly Rule will be filed as soon as divestiture plans are finalized.” *Id.* at 27.

<sup>32</sup> See *id.*; Nexstar, Press Release, *Nexstar Media Group Enters into Definitive Agreements to Divest Nineteen Stations in Fifteen Markets for \$1.32 Billion* (Mar. 20, 2019), [https://www.nexstar.tv/nexstar\\_tribune\\_divestiture\\_agreements/](https://www.nexstar.tv/nexstar_tribune_divestiture_agreements/) (“Nexstar Divestiture Press Release”).

<sup>33</sup> See Comprehensive Exhibit at 33-34; Nexstar Divestiture Press Release.

#### IV. THE TRANSACTION WILL SERVE THE PUBLIC INTEREST.

The Applications further establish that the Transaction will produce substantial public interest benefits. Specifically, the Transaction will produce efficiencies that Nexstar will reinvest in programming, enhancing the combined company's ability to provide high-quality programming—including local news—and to increase investments in innovative new technologies and service offerings.<sup>34</sup> Indeed, as a result of the Transaction, Nexstar expects to realize more than \$160 million in synergies and efficiencies within the first year after closing.<sup>35</sup> These efficiencies will ensure that Nexstar is equipped to thrive in the increasingly fragmented media marketplace, in which it competes not only with other broadcasters but also with cable programming and a seemingly never-ending supply of new digital services.<sup>36</sup>

In addition, the Tribune stations will gain access to Nexstar's Washington, D.C. news bureau, which provides breaking news, political news and analysis, in-depth and investigative reporting, and other stories of interest to local communities.<sup>37</sup> This is a resource that Tribune stations would not otherwise have; as explained in the Applications, Tribune previously had a Washington, D.C. news bureau but shut down its operations based upon concerns regarding the cost-effectiveness of maintaining that bureau in the face of the increased availability of other news sources for consumers.<sup>38</sup> Nexstar also operates multiple state news bureaus, which provide local viewers with increased access to state lawmakers and their opinions on critical issues, state agency

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<sup>34</sup> See Comprehensive Exhibit at 3-13.

<sup>35</sup> See *id.* at 13.

<sup>36</sup> See *id.* at 10.

<sup>37</sup> See *id.* at 3-4.

<sup>38</sup> See *id.* at 4.

activities, and state supreme court proceedings, as well as special programming on state issues.<sup>39</sup> As explained in the Applications, a number of these existing bureaus are located in states that Tribune stations serve and, consistent with its proven track record of strategically expanding news bureaus as it acquires new stations, Nexstar intends to examine its footprint post-Transaction to determine the viability of establishing new bureaus or enhancing existing bureaus in additional locations.<sup>40</sup> The Applicants also explained that the merged company will be both (i) a more attractive programming partner to highly-consolidated multichannel video programming distributors (“MVPDs”) through reduced transaction costs and greater audience reach, and (ii) a more attractive distribution partner to consolidated programming suppliers in an age of rising content costs, allowing it to deliver highly desired programming to viewers.<sup>41</sup>

In response to the evidence provided in the Applications that the Transaction will deliver public interest benefits to viewers, the SIGs baldly assert that increased access to news bureaus will not enhance localism and speculate that Nexstar may cut news staff and consolidate news functions, which the SIGs contend will result in duplication of content across stations and harm to localism.<sup>42</sup> With respect to facilitating access to Nexstar’s Washington, D.C. and state news bureaus, the SIGs’ claim is contrary to Nexstar’s actual practices, which the Applications explain involve providing the greatest possible array of content from which local stations may choose to use, based on the particular needs and interests of the communities that they serve.<sup>43</sup> When stations

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<sup>39</sup> See *id.* at 4-5.

<sup>40</sup> See *id.* at 5.

<sup>41</sup> See *id.* at 14-15.

<sup>42</sup> See SIG Petition at 6-8.

<sup>43</sup> See Comprehensive Exhibit at 4-5.

are able to select from among a greater amount of content, they can offer their viewers coverage of issues and events, such as state-level legislative issues, national issues of particular concern to local communities, and political debates, that are relevant and of interest to their viewers and that would not be practical for a single station to cover alone. The SIGs’ contention that this somehow *harms* the public interest is illogical and contrary to prior decisions in which the Commission has found that expanded access to Washington, D.C. and state news bureaus as a result of a transaction “provide[s] transaction-specific, public interest benefits” to viewers.<sup>44</sup> And it overlooks the Commission’s specific rejection of challenges to the benefit of having multiple stations reporting from the same news bureau in the context of other recent transactions, based on a recognition that “providing . . . [s]tations with access to a news source to which they did not have prior access” can produce public interest benefits even though the news source is shared.<sup>45</sup> The SIGs provide no basis for the Commission to depart from these prior decisions, and there is none.

As for the SIGs’ other purported localism-related concerns, the SIGs’ speculation that cuts will likely occur as a result of this Transaction is baseless, as is their extrapolation that staff cuts may lead to less local content.<sup>46</sup> To the contrary, as explained in the Applications, Nexstar has a

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<sup>44</sup> *Applications for Consent to Transfer of Control of Certain License Subsidiaries of Raycom Media, Inc. to Gray Television, Inc.*, Memorandum Opinion and Order, MB Docket No. 18-230, DA 18-1286, ¶ 14 (rel. Dec. 20, 2018) (“*Gray/Raycom*”); *see id.* at ¶ 31; *Nexstar/Media General*, 32 FCC Rcd. at 194-196, ¶¶ 26-29, 33.

<sup>45</sup> *Gray/Raycom*, ¶ 31.

<sup>46</sup> *See* SIG Petition at 6-8. The SIGs mischaracterize the purpose of Nexstar’s “regional hub” approach, SIG Petition at 6, and thus overlook its recognized benefits. That approach is related to “master control, business and trafficking.” Nexstar has established no hubs, and has no plans to establish hubs, for local news production (unless the Commission considers the state and Washington, D.C. bureaus to be hubs, which Nexstar does not). George Winslow, *Nexstar Expands Little Rock Hub*, Broadcasting and Cable (May 16, 2011), <https://www.broadcastingcable.com/news/nexstar-expands-little-rock-hub-42889>. Upgrades to

history of significantly increasing news output on stations that it acquires by a measure of approximately 30 percent.<sup>47</sup> In response to this particular evidence of enhanced local service, the SIGs claim that the increase in news content is irrelevant based upon their subjective contention that the additional news is not “locally-originated and catered” to the viewers of the stations, and consists of the “same stories and voices across multiple channels.”<sup>48</sup> ACA raises a similar argument, incorrectly asserting—based upon statements made by a representative of TDS—that Nexstar imports out-of-market newscasts from stations that it does not own for broadcast on Nexstar stations in New Mexico.<sup>49</sup> This claim is as bizarre as it is false; all of the news that the Nexstar New Mexico stations air is produced in-market by Nexstar itself.<sup>50</sup> And this is not only the case in New Mexico, but across the entire Nexstar station group.<sup>51</sup> The SIGs’ supposition that

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Nexstar hubs in the past have produced public interest benefits, such as allowing additional stations to broadcast news in high definition. *Id.*

<sup>47</sup> See Comprehensive Exhibit at 5.

<sup>48</sup> SIG Petition at 7-8.

<sup>49</sup> ACA Mar. 25 Ex Parte at 8.

<sup>50</sup> See Declaration of Elizabeth Ryder (“Ryder Decl.”), ¶ 3.

<sup>51</sup> See *id.* ¶ 4. Of course, some content aired within Nexstar station newscasts may come from other sources, such as network news services, CNN, the Associated Press, and the like, as well as Nexstar’s own Washington, D.C. and state news bureaus, based upon decisions made by local news personnel regarding the content that is most compelling for their local audiences. See *id.* But claims that Nexstar “pumps” in newscasts from remote locations, see ACA Mar. 25 Ex Parte at 8; SIG Petition at 8, are demonstrably untrue.



Nexstar “would potentially eliminate” local sports programming<sup>52</sup> is equally erroneous, as Nexstar has no plans to do so.<sup>53</sup>

More generally, Nexstar’s deep commitment to localism is borne out by the success of its stations in actually satisfying the needs and interests of the local communities that they serve. Indeed, Perry Sook, Nexstar’s CEO, has been recognized as “all about local TV stations producing local content,” and has explained that being “in a local service business . . . [is] really [Nexstar’s] only reason to exist.”<sup>54</sup> The superior local service that Nexstar stations provide is further substantiated by the many awards that those stations have received from multiple local and national organizations, which number in the thousands since 2013 alone.<sup>55</sup> Neither the SIGs nor ACA provide anything beyond groundless and abstract assertions in an attempt to demonstrate otherwise.

The heart of the SIGs’ argument seems to be that it would be better for the Tribune stations to be owned by multiple separate owners and not by Nexstar. But Section 310(d) of the Communications Act provides that in evaluating a potential license transfer the Commission “*may not consider* whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a *person other than the proposed*

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<sup>52</sup> SIG Petition at 8.

<sup>53</sup> Ryder Decl. ¶ 5. Nexstar has invested significantly in its coverage of local sports teams on the professional, collegiate and high school levels. *Id.* Indeed, Nexstar even preempts late-night network programming for the broadcast of its Friday night high school football wrap-ups. *Id.*

<sup>54</sup> Lynne Market, *Nexstar CEO expects WGN will team with other Illinois stations*, Crain’s Chicago Business (Dec. 7, 2018), <https://www.chicagobusiness.com/marketing-media/nexstar-ceo-expects-wgn-will-team-other-illinois-stations>.

<sup>55</sup> Ryder Decl. ¶ 6; *see* Comprehensive Exhibit at 2.

*transferee or assignee.*”<sup>56</sup> Furthermore, to the extent that the SIGs suggest that the Commission should examine the particular local news content aired on Nexstar’s stations and determine for itself whether that news content is sufficiently “local” in evaluating the Transaction, their position is a direct affront to the First Amendment and the Communications Act.<sup>57</sup>

With respect to competition, the SIGs resort to histrionics regarding the alleged local impact of the Transaction, implying that it will create a substantial number of new duopolies<sup>58</sup> when, in reality, it will only create two.<sup>59</sup> In the markets where Nexstar is acquiring Tribune’s existing station combinations, Nexstar “will simply step into” Tribune’s “shoes, with no change in

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<sup>56</sup> 47 U.S.C. § 310(d) (emphases added); *Nexstar/Media General*, 32 FCC Rcd. at 198, ¶ 38 (“With respect to the prospect of sale to smaller new entrants, Section 310(d) of the Act prohibits us from determining whether the public interest would be better served by transfer of the licenses to a person other than the proposed transferee.”).

<sup>57</sup> U.S. Const. Amend 1; 47 U.S.C. § 326; *see, e.g., Greater Boston Radio, Inc.*, 19 FCC Rcd. 13064, 13065 (2004) (“The First Amendment and section 326 of the Act prohibit the Commission from censoring program material and from interfering with broadcasters’ freedom of expression.”); *NPR Phoenix, LLC*, 13 FCC Rcd. 14070, 14072, ¶ 11 (1998) (the prohibition on censorship applies at its highest level to “news and comment programming” because such programming lies “at the core of speech which the First Amendment is intended to protect”); *see also Fox Television Stations, Inc.*, 33 FCC Rcd. 7221, 7226, ¶ 11 (2018) (“Because of th[e] statutory prohibition [in Section 326] and related First Amendment principles, and because editorial discretion in the presentation of news and public information is the core concept underlying the regulation of broadcasting pursuant to the Communications Act, the Commission does not interfere with a licensee’s selection and presentation of news and editorial programming.”).

<sup>58</sup> *See* SIG Petition at 7, 9.

<sup>59</sup> *See* Comprehensive Exhibit at 1 (explaining that “[i]n Two Overlap markets, the Transaction would create a permissible duopoly of a Top-Four and non-Top-Four Station”); *id.* at 28-31 (demonstrating that Tribune’s existing duopolies in thirteen markets comply with the local television ownership rule, and that the combination of a Nexstar station and a Tribune station in two additional markets—Salt Lake City, Utah and Washington, D.C.—will also comply with that rule); *see also supra* Section III.

market concentration,” rendering the SIGs’ supposed concerns about competition irrelevant.<sup>60</sup> And the SIGs present no specific competition arguments related to the two markets where the Transaction will create new duopolies.<sup>61</sup> The SIGs have thus provided nothing to establish that the Transaction is likely to cause competitive harm.<sup>62</sup>

At bottom, the Petitioners’ assertion that Applicants have failed to satisfy a general “public interest” test<sup>63</sup> that they claim the Commission has applied in some transactions is an effort to distract from their own inability to present specific allegations of fact sufficient to make a *prima facie* case against the Applications. Moreover, and as demonstrated below, their remaining arguments boil down to a desire for more stringent regulation that is more appropriately addressed by rulemaking than in this adjudicatory proceeding.<sup>64</sup>

## **V. THE OPPOSING PARTIES IMPROPERLY SEEK TO HAVE THIS TRANSACTION EVALUATED UNDER RULES THAT DO NOT EXIST.**

### **A. Industry-Wide Issues Are Appropriately Addressed Through Rulemaking, Not Transaction Reviews.**

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<sup>60</sup> *Gray/Raycom*, ¶ 15 n.55.

<sup>61</sup> The flaws in the SIGs’ competition arguments related to Indianapolis—which is the only market that the SIGs mention specifically in their competition analysis, *see* SIG Petition at 9; *see also* NCTA Comments at 16—are discussed in Section VII below.

<sup>62</sup> *See Gray/Raycom*, ¶ 33 (finding absence of competitive harm as a result of allowing Gray to acquire Raycom’s existing duopoly in Honolulu, Hawaii because “there is no reason to believe that the transaction would lead to an increase in bargaining power as the two stations combined will have the same market share post-transaction as they did pre-transaction” and “there would be no increased incentive for the Honolulu Stations to engage in anticompetitive behavior post-transaction”).

<sup>63</sup> *See* DISH Petition at 3-6; NCTA Petition at 21; SIG Petition at 1-2.

<sup>64</sup> *See infra* Sections V-VI.

As the Supreme Court has observed, “rulemaking is generally a ‘better, fairer, and more effective’ method of implementing new industry-wide policy than is the uneven application of conditions in isolated” licensing decisions.<sup>65</sup> The D.C. Circuit has similarly recognized the impropriety of seeking to apply new requirements within licensing proceedings, highlighting the “arbitrariness of retroactive application and the inherent constraints of the adjudicatory process.”<sup>66</sup> Consistent with this precedent, the Commission has a “long . . . practice [of] mak[ing] decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rulemaking proceedings,” rather than in the course of acting on individual applications.<sup>67</sup> Indeed,

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<sup>65</sup> *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498, 511 (1983).

<sup>66</sup> *Cal. Ass’n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 96-97 (D.C. Cir. 1988).

<sup>67</sup> *Application of Sunburst Media L.P. (Assignor), and Clear Channel Broad. Licenses, Inc. (Assignee) for Assignment of Licenses of Station KSLI(AM), Abilene, Texas et al.*, Memorandum Opinion and Order, 17 FCC Rcd. 1366, 1368, ¶ 6 (2002); *see, e.g., Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees*, Memorandum Opinion and Order, 21 FCC Rcd. 7358, 7364-65, ¶ 15 (2006) (stating that “concerns” raised by petitioner “are more properly addressed in the Commission’s pending . . . rulemaking proceeding,” in which the petitioner “ha[d] raised its concerns and public interest arguments in support of changes to the Commission’s rules and policies”); *Echo Star Commc’ns Corp.*, Memorandum Opinion and Order, 17 FCC Rcd. 20559, 20583, ¶ 48 (2002) (in transfer of license proceeding, declining to consider conditions requested by a commenter “that have application on an industry-wide basis”); *Comcast Corp.*, Memorandum Opinion and Order, 17 FCC Rcd. 23246, 23257, ¶ 31 (2002) (“The Commission’s pending rulemaking on cable horizontal ownership is the more appropriate forum for consideration of the potential effects of industry-wide clustering on the distribution of programming by MVPDs to consumers.”); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecomms., Inc. to AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 3160, 3183, ¶ 43 (1999) (“We find that digital broadcast signal carriage requirements should be addressed in the Commission’s pending rulemaking proceeding and not here. . . . [T]his is like other cases where the Commission has declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings before the Commission[.]”); *Spanish Radio Network*, 10 FCC Rcd. 9954, 9956, ¶ 9 (1995) (citing *Patteson Brothers, Inc.*, 8 FCC Rcd. 7595, 7596, ¶ 6 (1993)) (“Insofar as Miami Petitioners would have the rule recast so as to prohibit broadcast concentration in a market defined by language comprehension, the appropriate course of action is to request[] that the Commission institute a generic rule making proceeding to change its multiple ownership rules and policies.”); *Morton Jerome Victorson, Bankr. Trustee*, 10 FCC Rcd. 9499, 9500, ¶ 6 (1995) (“Insofar as Mills is requesting that the Commission consider alternative definitions for determining the relevant

in transactions presenting issues that are virtually indistinguishable from those presented here, the FCC has held repeatedly that rulemaking proceedings—not transfer and assignment proceedings—are the proper forum to address industry-wide issues.<sup>68</sup> The Opposing Parties are, of course, free to propose new or modified rules through a proper administrative rulemaking process, and to participate in a variety of rulemaking proceedings that are currently open. But their efforts to use this adjudicatory licensing proceeding to rewrite rules or obtain the imposition of “conditions” that are not even remotely relevant to the Transaction should be rejected as inappropriate attempts to avoid the rulemaking process.

**B. Opposing Parties’ Contentions Regarding The National Television Ownership Rule Are Inappropriate In This Adjudicatory Proceeding.**

In an attempt to circumvent the Commission’s pending proceeding regarding the national television ownership rule, certain Opposing Parties cite Nexstar’s estimated post-Transaction national reach percentage without use of the so-called UHF discount.<sup>69</sup> This is meaningless, for

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market for audience share purposes, the appropriate course of action would be a request for rulemaking.”); *WANV(AM), Waynesboro, VA and WANV-FM, Staunton, VA*, 8 FCC Rcd. 8474, 8477 (1993) (“Petitioners’ arguments as to the validity of this procedure amount[] to a request to reconsider the radio ownership rulemaking proceeding and is not appropriate in the context of this case.”).

<sup>68</sup> See, e.g., *Tribune/Local TV*, 28 FCC Rcd. at 16856, ¶ 13 n.51 (“The proper forum in which to seek changes in the way the Commission treats SSAs in general is a rulemaking.”); *Gannett/Belo*, 28 FCC Rcd. at 16880, ¶ 31 (denying petitions where “MVPD Petitioners fail to demonstrate that the proposed assignments and related cooperative agreements violate our rules or our policies as embodied in precedent”); *Affiliated Media, Inc. FCC Trust, et al.*, Memorandum Opinion and Order, 28 FCC Rcd. 14873, 14877, ¶ 11 (2013) (finding “that the Applications do not propose a transaction that would violate any Commission[] rule or policy, and that the objections advanced by its proponents are more appropriate for industry-wide proceedings, are unsupported, or are otherwise speculative with regard to future harms.”). To the extent that Opposing Parties seek changes to the rules governing retransmission consent, those attempts suffer from this same defect and many others, as discussed in Section VI below.

<sup>69</sup> See DISH Petition at 2; SIG Petition at 12; NCTA Comments at 6.

as much as the Opposing Parties may wish it otherwise, the discount is part of the national television ownership rule today.<sup>70</sup> As calculated pursuant to the rule as now in effect, Nexstar's post-Transaction ownership reach will be below the 39% limit.<sup>71</sup> To the extent that the SIGs attempt to launch a headlong challenge to the reinstatement of the UHF discount in their petition,<sup>72</sup> and other Opposing Parties lament the discount's existence, there is an open rulemaking proceeding in which they can make their views known.<sup>73</sup> Indeed, DISH, most of the SIGs, and numerous other MVPD interests have been active participants in that proceeding.<sup>74</sup> This is not that proceeding.

**C. Calls for Conditions On Approval Of The Transaction Amount To Attempted End-Runs Around The Rulemaking Process.**

The calls by Opposing Parties for the Commission to impose various conditions on approval of the Transaction fall into the same category as their self-interested attempts to rewrite

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<sup>70</sup> 47 C.F.R. § 73.3555(e)(2)(i); *see Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd. 3390 (2017); *see also Gray/Raycom*, ¶ 6 (calculating compliance with national television ownership rule including the UHF discount).

<sup>71</sup> *See* Comprehensive Exhibit at 33-34. Nexstar intends to provide calculations demonstrating its compliance with the national ownership rule in an amendment to be filed as soon as possible after the submission of all the divestiture applications.

<sup>72</sup> *See* SIG Petition at 12-14.

<sup>73</sup> *Amendment of Section 73.3555(e) of the Comm'n's Rules, Nat'l Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd. 10785 (2017).

<sup>74</sup> *See e.g.*, Reply Comments of DISH Network L.L.C., MB Docket No. 17-318 (Apr. 18, 2018) ("DISH National Cap Reply"); Reply Comments of Office of Communication, Inc. of the United Church of Christ, Common Cause, National Hispanic Media Coalition, and Public Knowledge, MB Docket No. 17-318 (Apr. 18, 2018) ("SIG National Cap Reply"); Comments of Office of Communication, Inc. of the United Church of Christ, Common Cause, National Hispanic Media Coalition, and Public Knowledge, MB Docket No. 17-318 (Mar. 19, 2018) ("SIG National Cap Comments"); Comments of DISH Network L.L.C., MB Docket No. 17-318 (Mar. 19, 2018) ("DISH National Cap Comments").

the national ownership rule. These requests are unrelated to the Transaction under review and ignore the comprehensive regime of codified regulations which govern the broadcast industry.

First, NCTA invites the Commission to impose a condition not only preventing post-Transaction Nexstar from airing a second Top Four network on a low power television (“LPTV”) station or a digital multicast channel in the future, but requiring Nexstar to unwind arrangements of this type that are currently in effect.<sup>75</sup> There is no basis for such a condition anywhere in existing FCC regulations or, for that matter, anywhere else. Neither LPTV stations nor multicast streams are subject to the Commission’s ownership rules. Nor is any such arrangement before the Commission in any Application related to the Transaction.<sup>76</sup>

Second, DISH and NCTA request conditions regarding sharing agreements between Nexstar and independently-owned, same-market television stations. DISH asks the Commission, before approving the Transaction, to conduct a fishing expedition into Nexstar’s existing sharing relationships (which are also not before the Commission in any Application related to the Transaction), but provides not a scintilla of evidence that Nexstar or a sharing partner has violated the joint negotiation or any other FCC rule.<sup>77</sup> DISH also asks the Commission to ensure that no divestitures from the Transaction are accompanied by so-called “sidecar agreements,”<sup>78</sup> and NCTA proposes that post-Transaction Nexstar be prohibited from having sharing agreements in

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<sup>75</sup> NCTA Comments at 23-25.

<sup>76</sup> NCTA cites Nexstar multicasts in Albuquerque, NM and Tri Cities, VA-TN. *Id.* at 23-24. Nexstar is not acquiring stations from Tribune in either of these markets.

<sup>77</sup> *See* DISH Petition at 43-44.

<sup>78</sup> *Id.* at 45.

markets where it owns a duopoly.<sup>79</sup> DISH does not stop there, and further proposes that Nexstar be required to terminate all of its joint sales agreements (“JSAs”) as a condition of the Transaction’s approval.<sup>80</sup>

These requests by the MVPD Parties are nothing more than gratuitous attempts to further their own interests regarding retransmission consent which, as demonstrated below, are misplaced and meritless.<sup>81</sup> But even putting aside the complete absence of any substantive basis for retransmission consent-based conditions on so-called “sidecar” arrangements, there are multiple problems with DISH’s and NCTA’s requests. In the first place, as noted above, Nexstar will not be providing ongoing services under sharing agreements (JSAs, local marketing agreements (“LMAs”) or shared services agreements (“SSAs”)) to any of the stations that it is divesting. DISH’s concern in that respect is thus moot. Second, no JSA, LMA or SSA is being assumed by Nexstar in the Transaction.<sup>82</sup> Therefore, the conditions that DISH and NCTA propose stray far outside the scope of the Applications and the Transaction under consideration. Third, there are Commission attribution rules in place that regulate a television broadcaster’s entry into same-market sharing agreements.<sup>83</sup> Nexstar complies with those rules now and will continue to do so after the Transaction’s completion.

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<sup>79</sup> NCTA Comments at 25-26.

<sup>80</sup> DISH Petition at 46.

<sup>81</sup> *See infra* Section VI.

<sup>82</sup> The only sharing agreements to which Tribune is a party relate to stations in two markets owned by Dreamcatcher Broadcasting, LLC (“Dreamcatcher”), which are being divested. *See* Comprehensive Exhibit at 2 n.9; Nexstar Divestiture Press Release. Tribune currently provides services to the Dreamcatcher stations under an SSA, but the SSA will be terminated upon closing of the divestiture sale.

<sup>83</sup> Note 2(j)(2) to 47 C.F.R. § 73.3555 (television LMAs attributable); *2014 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules*



It is telling that NCTA, in proposing its host of conditions, primarily cites the Commission’s general authority to “prescribe such restrictions and conditions, not inconsistent with law” arising under Section 303(r) of the Act, along with a decision in a non-broadcast merger case.<sup>84</sup> And DISH cites no enabling authority at all supporting its request for a broad joint negotiation inquiry and peremptory unwinding of Nexstar’s JSAs. The plain fact is that proposed conditions of the nature that NCTA and DISH propose are, by any other name, attempts to subject Nexstar to rules that have not been adopted. The Commission should recognize these attempts for what they are and reject them, just as it has rejected similar requests before.<sup>85</sup>

**VI. THE RETRANSMISSION CONSENT-RELATED ARGUMENTS ARE INAPPROPRIATELY ADVANCED HERE, AND ARE OTHERWISE TIRED AND SPECULATIVE.**

The Opposing Parties similarly attempt to cajole the Commission into adopting unnecessary and restrictive regulations related to retransmission consent that would apply only to Nexstar. Even if the Commission were inclined to entertain their arguments, none of the Opposing Parties have identified any harms specific to *this* Transaction. Instead, they present arguments that are more properly the subject of rulemaking or are speculative, exaggerated, and/or grounded in falsehoods.

**A. The Petitions and Comments Merely Repeat Arguments From Pending Rulemaking Proceedings Which Are Not Proper For Consideration In An**

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*Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802, 9846-54, ¶¶ 96-113 (2017) (“*2014 Quadrennial Recon Order*”) (eliminating television JSA attribution rule); *id.* at 9854-57, ¶¶ 114-120 (television SSAs non-attributable but disclosable).

<sup>84</sup> See NCTA Comments at 24 and n.82.

<sup>85</sup> See, e.g., *Gray/Raycom*, ¶ 17; *Nexstar/Media General*, 23 FCC Rcd. at 197, ¶ 37.

### **Individual Transaction Review.**

The Opposing Parties’ purported concerns about retransmission consent at the “national” level are nothing more than dressed-up attempts to have the Commission apply a lower national television ownership cap to Nexstar than is provided for under existing rules.<sup>86</sup> Their arguments in this regard not only run headlong into the longstanding precedent under which the FCC generally will not address industry-wide concerns in the context of a particular transaction that is discussed above,<sup>87</sup> but also conflict with decades of decisions specifically rejecting attempts to interject retransmission consent-related issues into transactional reviews. For example, in the early days of the retransmission consent regime, the Small Business and Cable Association petitioned to deny applications concerning The Walt Disney Company’s acquisition of Capital Cities/ABC, Inc. and its affiliates, contending that “post-merger Disney will wield considerable market power that will enable it to impose even greater burdens on small operators during the next round of retransmission consent negotiations.”<sup>88</sup> In response, the Commission declared that “[t]he Commission’s transfer and assignment process is not the appropriate forum to consider changes in its rules.”<sup>89</sup>

In numerous transactions since, the Commission has rebuffed efforts by DISH, NCTA, several of the SIGs, and other similarly positioned parties to shift the balance in retransmission consent negotiations under the guise of a public interest determination where, as here, the proposed

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<sup>86</sup> See DISH Petition at 6-43; SIG Petition at 10-12; NCTA Comments at 3-4.

<sup>87</sup> See *supra* Section V.A.

<sup>88</sup> See *Applications of Capital Cities/ABC, Inc. (Transferor) & The Walt Disney Co. (Transferee)*, Memorandum Opinion and Order, 11 FCC Rcd. 5841, 5856, ¶ 16 (1996).

<sup>89</sup> *Id.* at 5861, ¶ 27.

transactions did not violate any rules and the claimed harms were speculative.<sup>90</sup> Most recently, in the context of Gray Television, Inc.’s applications to acquire control of certain subsidiaries of Raycom Media, Inc., DISH and NCTA raised several of the same arguments about retransmission consent rates that they raise here, with DISH even relying on an earlier version of the same economic study it submitted with its Petition (and which it also discussed in the pending national cap proceeding).<sup>91</sup> The Commission soundly rejected those arguments, observing that:

The commenters do not proffer any particularized evidence that this transaction, based on the stations and markets involved in this case, is likely to result in

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<sup>90</sup> See e.g., *Nexstar/Media General*, 32 FCC Rcd. at 196-97, ¶ 35 (declining to consider arguments about effect of transaction on retransmission consent rates, noting that alleged “harms must be demonstrably transaction-specific and not industry-wide in nature to be addressed in the context of a transfer of control proceeding”); *Gannett/Belo*, 28 FCC Rcd. at 16880, ¶ 31 (rejecting calls to address retransmission consent issues raised in an application proceeding, stating that “[w]e decline to address in this licensing order an issue posed in th[e] retransmission consent] rulemaking proceeding, at the behest of parties that petitioned to commence it”); *J. Stewart Bryan III and Media General Commc’ns Holdings, LLC (Transferor), S’holders of New Young Broad. Holding Co., Inc., and its Subsidiaries (Transferor), and Post-Merger S’holders of Media General, Inc. (Transferee)*, Memorandum Opinion and Order, 28 FCC Rcd. 15509, 15518, ¶¶ 20-21 (2013) (“*MEG/Young*”) (calling claim that transaction will increase retransmission consent fees “speculative and . . . improper in the context of this adjudicatory proceeding” and stating that it “will not take action in the context of this limited proceeding that will pre-judge the outcome of another proceeding pending before us”); *High Maint. Broad., Inc.*, Letter, at 2, FCC File No. BALCDT-20120315ADD (Aug. 28, 2012) (“*High Maint. Letter Order*”) (addressing retransmission consent arguments and finding that “rulemaking proceedings are the proper forum for consideration of the issues raised”); *Acme Television, Inc.*, Letter, 26 FCC Rcd. 5189, 5191 (2011) (“*Acme Television Letter Order*”) (refusing to impose conditions where “TWC has not argued that any supposedly increased bargaining position that it contends would be gained by the combined stations violates our rules”); *Acme Television Licenses of Ohio, LLC*, Letter, 26 FCC Rcd. 5198, 5200 (2011) (“*Acme Licenses Letter Order*”) (denying petition where “TWC makes no effort, beyond its generalized arguments, to demonstrate that the proposed assignment and related cooperative agreements violate our rules and precedent”); *Free State Commc’ns, LLC*, Letter, 26 FCC Rcd. 10310, 10312 (2011) (“*Free State Letter Order*”) (“We will not address here the substance of the Retransmission Consent Proceeding, and we decline to reach a decision that would effectively pre-judge the outcome of a pending rulemaking in favor of one of the parties that petitioned to commence it.”).

<sup>91</sup> *Gray/Raycom*, ¶ 7; Comments of DISH Network L.L.C., MB Docket No. 17-317 at 7-8 (Mar. 19, 2018) (describing economic study).

increased retransmission consent fees or that any theoretical increase that might result from this transaction would be anticompetitive.<sup>92</sup>

The Commission went on to note that “no commenter alleges that the transaction violates any rule or the Communications Act” and that “[t]he arguments raised by commenters are so generalized as to apply to any transaction that would increase the size of a station group.”<sup>93</sup> So, too, here.

Although ATVA acknowledges the strong Commission precedent against imposing rulemaking conditions in the context of a transaction, it nevertheless attempts to define its arguments regarding increased retransmission consent revenues as transaction-specific because they address the terms of Nexstar’s contracts.<sup>94</sup> The mere application of an unadopted and self-serving general rule to the circumstances of a specific applicant, however, do not render those concerns transaction-specific. The Commission rejected this very argument in *Nexstar/Media General*, explaining that “there is no apparent reason for the Commission to step in and deny one party the benefit of the negotiated bargain absent evidence of anticompetitive practices or other wrongdoing not apparent here.”<sup>95</sup> As in prior cases, “it is apparent that [the Opposing Parties’] real concern is [their] desire for reformation of the must-carry and retransmission consent process.”<sup>96</sup> Under these circumstances, “rulemaking proceedings are the proper forum for consideration of the issues raised.”<sup>97</sup>

## **B. The Opposing Parties’ Concerns About Retransmission Fees And Impasses**

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<sup>92</sup> *Id.* ¶ 15.

<sup>93</sup> *Id.* ¶ 16.

<sup>94</sup> *See* ATVA Comments at 3.

<sup>95</sup> *Nexstar/Media General*, 31 FCC Rcd. at 197, ¶ 36.

<sup>96</sup> *Acme Licenses Letter Order*, 26 FCC Rcd. at 5200.

<sup>97</sup> *High Maint. Letter Order* at 2.

### **Are Speculative And Exaggerated.**

Not only do the Opposing Parties fail to identify any extant rule that the proposed Transaction supposedly violates, but they also offer no evidence that a grant of the Applications will result in increased fees for consumers or cause any other actual “harms.” The gist of the Objecting Parties’ arguments is that by owning additional stations, Nexstar may be able to obtain higher retransmission consent fees.<sup>98</sup> Compensating broadcasters for the value that they deliver to viewers, however, is not against the public interest. Rather, it is a market driver for those broadcasters to increase the value they bring to viewers, benefitting both MVPD subscribers and over-the-air viewers alike.<sup>99</sup> Furthermore, the Opposing Parties’ arguments are speculative and misleading (or just plain factually incorrect), and, under established precedent, the hypothetical notion that a specific transaction will alter retransmission consent negotiations in a manner that causes consumer harm is not properly considered in an adjudicatory proceeding such as this one.<sup>100</sup>

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<sup>98</sup> See SIG Petition at 9-11; Frontier Petition at 3-5; DISH Petition at 6-44; NCTA Comments at 7-10; ATVA Comments at 3-5.

<sup>99</sup> See 138 Cong. Rec. H8649-05 (daily ed. Sept. 17, 1992) (statement of Rep. Markey) (“If they have to . . . pay some of these other channels a little less in order to get revenues over to Channel 4, 5, 7, and 9 so that the local children’s programming, the local news and public affairs programming that the rest of us watch on free television is there, fine.”).

<sup>100</sup> See *Nexstar/Media General Order*, 32 FCC Rcd. at 196, ¶ 35 (“With regard to the claims that the Applicants will increase their bargaining leverage by the common ownership of multiple stations in a region broader than the local market, the Commission has not previously found that, with regard to retransmission consent negotiations, where the ownership of multiple stations does not violate the national audience reach cap, increasing the number of stations owned at the regional or national level leads to public interest harms, and we decline to do so here based on the evidence before us. Moreover, we find Petitioners’ claims fail to raise substantial and material questions of fact as to why the public interest would not be served by grant of the applications, because Petitioners do not provide any basis for the assertion that the merged entity will have ‘market power’ vis-à-vis MVPDs with national or at least broad coverage of their own.”); *MEG/Young*, 28 FCC Rcd. at 15517, ¶ 20 (finding that claim by DISH that grant of the merger may result in higher retransmission fees is “speculative” and “improper in the context of this adjudicatory proceeding”); *High Maint. Letter Order* at 2 (finding similar claims to be factually unsupported);

1. The Opposing Parties Present a Distorted and One-Sided View of the Retransmission Consent Marketplace.

The Opposing Parties argue that allowing Nexstar to increase the number of stations it owns on a nationwide basis will cause retransmission consent fees and consumer prices to increase. The Opposing Parties, which include the trade association for the country's largest MVPDs and the nation's fourth largest MVPD (DISH),<sup>101</sup> do not identify any specific basis for their contention that the Transaction will shift bargaining power in a way that will lead to retransmission consent fees that reflect anything other than the market value of the programming aired on Nexstar's stations. Indeed, the Petitions and Comments are premised upon many of the same exaggerated claims about retransmission consent negotiations that MVPD interests have unsuccessfully repeated in numerous rulemaking and adjudicatory proceedings. These claims were untrue and misleading then, and they remain untrue and misleading today. For example, DISH cites to the oft-repeated MVPD claim that retransmission consent fees have increased by "3,591%" since 2006.<sup>102</sup> In 2006, however, it was a novel concept for broadcasters to receive *any* cash compensation for their valuable programming, and few broadcasters received monetary payments in exchange for retransmission consent. Because retransmission consent figures started from such an artificially low baseline (\$0 for Nexstar), the percentage increase, while intentionally presented

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*Acme Television Letter Order*, 26 FCC Rcd. at 5200 (rejecting as "speculative" concerns that broadcaster will "gain bargaining leverage" and "garner higher carriage fees as a result").

<sup>101</sup> See Top 10 Video Subscription Services, NCTA, <https://www.ncta.com/chart/top-10-video-subscription-services> (last visited Mar. 25, 2019).

<sup>102</sup> DISH Petition at 15; DISH National Cap Comments at 4 (arguing that the average total retransmission fee per subscriber increased from \$0.19 in 2006 to \$6.79 in 2026. This is substantially lower than the "22,000 percent increase" in fees that DISH cited in response to the Nexstar/Media General transaction. See Petition to Deny or Impose Conditions of DISH Network, L.L.C., the American Cable Association, and ITTA, MB Docket No. 16-57 at 6 (Mar. 18, 2016).

as attention-grabbing, is inherently misleading.<sup>103</sup> In real dollars, retransmission fees for broadcasters remain grossly below the value that broadcasters deliver.

Congress has made it abundantly clear that the retransmission consent regime adopted as part of the 1992 Cable Act is designed to allow the marketplace—not the government—to determine the appropriate amount of fees to be paid for retransmission of a broadcast signal.<sup>104</sup> That marketplace is working. As even the Opposing Parties acknowledge, broadcast television stations provide “must-have sports, entertainment, and news programming.”<sup>105</sup> Broadcast television stations accounted for nine of the ten most watched programs of 2018 and all of the top ten regularly scheduled series.<sup>106</sup> The fact that broadcasters over the past decade gradually have begun to recognize the fair value of their service in retransmission consent negotiations is the sign of a functioning market, not a distorted one.

Indeed, when viewed in the context of the video programming market as a whole, it is clear that broadcast television stations remain a tremendous value for MVPDs and their subscribers alike. As NAB has explained, retransmission consent fees account for only 5.4 percent of MVPDs’

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<sup>103</sup> See Reply Comments of the National Association of Broadcasters, MB Docket No. 15-216, at 19 (Jan. 14, 2016) (“NAB Good Faith Reply”).

<sup>104</sup> See S.Rep. No. 102-92, at 35-36 (1991), accompanying S.12, 102nd Cong. (1991) (“It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace negotiations”).

<sup>105</sup> SIG Petition at 11; see also DISH Petition at 19 (“the four Big 4 networks are must-have staples for pay-TV customers”).

<sup>106</sup> See Gary Levin, *2018 in Review: The Year’s Most Popular TV Shows According to Nielsen*, USA Today (Dec. 17, 2018), <https://www.usatoday.com/story/life/tv/2018/12/17/2018-review-nielsen-ranks-years-most-popular-tv-shows/2339279002/>.

total video-only revenue.<sup>107</sup> For instance, although DISH claims that it can offer a package of all local broadcast channels for \$12 a month, MVPDs reportedly pay approximately \$8 a month for ESPN alone.<sup>108</sup> Despite the tremendous value that broadcasters offer, the FCC’s most recent report on the status of competition in the market for the delivery of video programming found that, in recent years, the growth of retransmission consent fees has slowed.<sup>109</sup>

The very notion that allowing a broadcaster to consummate a rule-compliant transaction would distort the retransmission consent negotiations ignores the realities of the MVPD marketplace. Even after acquiring several large-market Tribune stations in this Transaction, Nexstar will continue predominantly to serve medium-sized and small markets. In addition, as a matter of overall revenue, post-Transaction Nexstar will fall well short of the revenues earned by “colossus” MVPDs. For 2018, Nexstar and Tribune together had revenues of approximately \$4.78 billion, while DISH had annual revenues of \$13.62 billion in 2018—more than 2 ½ times that of Nexstar and Tribune combined.<sup>110</sup> To be sure, as a business matter, the MVPD Parties may prefer

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<sup>107</sup> See NAB Good Faith Reply at 20-21.

<sup>108</sup> Compare DISH Petition at 18 (indicating that DISH sells a broadcast package for \$12 a month) with Gerry Smith, *Who Killed the Great American Cable-TV Bundle?*, Bloomberg (Aug. 8, 2018), <https://www.bloomberg.com/news/features/2018-08-08/who-killed-the-great-american-cable-tv-bundle> (“ESPN charges TV operators about \$8 per month per subscriber, making it the most expensive channel . . .”).

<sup>109</sup> *Comm’n’s Marketplace Report*, FCC 18-181, Appendix B-1, ¶ 36, 2018 WL 6839365, at \*162 (rel. Dec. 26, 2018) (“The index shows that the growth of retransmission consent fees has slowed. Over the 2013-2014 period, retransmission consent fees per subscriber increased by 50 percent, while the 2014-2015 period showed an increase of 34.1 percent, and the 2015- 2016 period showed an increase of 30.0 percent.”); see also *id.* at ¶ 75 n.191, 2018 WL 6839365, at \*27 n.191 (indicating that the growth in retransmission consent fees slowed to 17.7 percent from 2016-2017).

<sup>110</sup> See Nexstar Media Grp., Inc., SEC Form 10-K (2018), at 42 [https://www.sec.gov/ix?doc=/Archives/edgar/data/1142417/000156459019004527/nxst-10k\\_20181231.htm](https://www.sec.gov/ix?doc=/Archives/edgar/data/1142417/000156459019004527/nxst-10k_20181231.htm) (\$2.77 billion in total revenue); Tribune Media Co., SEC Form 10-K (2018), at 59 [https://www.sec.gov/Archives/edgar/data/726513/000072651319000006/form10k\\_2018.htm](https://www.sec.gov/Archives/edgar/data/726513/000072651319000006/form10k_2018.htm)



not to deal with a strong counter-party in their retransmission consent negotiations, but the facts belie any notion that post-Transaction Nexstar will have undue negotiating power.

2. The Opposing Parties Exaggerate The Risk Of Additional Carriage Disruptions As A Result of the Transaction.

The suggestion by some of the Opposing Parties that the Transaction is more likely to result in carriage disruptions is both speculative and ignores Nexstar's and Tribune's strong history of successful retransmission consent negotiations without the need for viewer disruption. Although NCTA asserts that the Transaction "*could* also lead to more widespread blackouts when negotiations break down,"<sup>111</sup> this is exactly the type of speculative harm that the Commission repeatedly has disregarded in the context of a station-specific proceeding.<sup>112</sup> Meanwhile, DISH's argument that broadcasters have more incentive to allow a carriage disruption than MVPDs incorrectly assumes that broadcasters are unscathed by an impasse.<sup>113</sup> To the contrary, when an MVPD stops carrying a Nexstar station due to a retransmission consent dispute, not only does

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(\$2.01 billion in operating revenues). Press Release, DISH Network Reports Fourth Quarter, Year-End 2018 Financial Results (Feb. 13, 2019), <https://ir.dish.com/news-releases/news-release-details/dish-network-reports-fourth-quarter-year-end-2018-financial>. The revenues for other large national MVPDs range from \$9.57 billion in revenue for Altice USA to \$170.76 billion in the case of AT&T. See Altice USA, Inc. Form 10-K (2018) at 2, <https://www.sec.gov/Archives/edgar/data/1702780/000162828019002370/a2018123110-kalticeusa.htm>; AT&T Inc. 2018 Annual Report, at 18, <https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/annual-reports/2018/complete-2018-annual-report.pdf>. Even Petitioner Frontier's revenues, at \$8.61 billion, would dwarf those of Post-Transaction Nexstar. See Frontier Commc'ns Corp. Form 10-K (2018) at 26, [https://www.sec.gov/Archives/edgar/data/20520/000002052019000005/ft-20181231x10k.htm#Financial\\_Statements\\_And\\_Supp\\_Data](https://www.sec.gov/Archives/edgar/data/20520/000002052019000005/ft-20181231x10k.htm#Financial_Statements_And_Supp_Data).

<sup>111</sup> NCTA Comments at 8 (emphasis added). NCTA makes reference to a good faith complaint by HolstonConnect, LLC. *Id.* at 9. Nexstar has addressed that complaint in that proceeding, where it properly belongs.

<sup>112</sup> See *ACME TV Licenses*, 26 FCC Rcd. at 5198; *Free State*, 26 FCC Rcd. at 10310.

<sup>113</sup> See DISH Petition at 20-21.

Nexstar lose retransmission consent revenue, but it also likely will suffer either a decline in ratings that could force Nexstar to provide refunds to its advertisers or provide free advertising time as a “make good” or a loss of advertising or both.<sup>114</sup> Thus, it is always in Nexstar’s best interests to resolve retransmission consent negotiations without a carriage disruption where possible.

As to Nexstar’s and Tribune’s alleged “aggressive tactics in negotiating retransmission consent agreement[s],”<sup>115</sup> before pointing the finger at others, the MVPD Parties should make sure their own hands are clean. According to data maintained by commenter ATVA, DISH was involved in more than 600 impasses between 2010 and 2018—far more than any other MVPD or broadcaster.<sup>116</sup> Petitioner Frontier has dropped local stations in two separate impasses just since 2017.<sup>117</sup> Nexstar, meanwhile, has successfully negotiated thousands of retransmission consent agreements with MVPDs of all sizes.<sup>118</sup> Thus, if history suggests anything, it suggests that after

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<sup>114</sup> See Ryder Decl. ¶ 9.

<sup>115</sup> See Frontier Petition at 4-5.

<sup>116</sup> See ATVA, Retransmission Consent Blackouts 2010-2018, <https://www.americatelevisionalliance.org/wp-content/uploads/2018/12/Retrans-Blackouts-2010-2018-1.pdf> (“Retrans Blackouts”). If, as DISH suggests, the transaction will make it “more likely to capitulate” to Nexstar, DISH Petition at 8, 29, 43, perhaps the risk of future carriage disputes involving DISH will actually decrease as a result of the Transaction.

<sup>117</sup> See Retrans Blackouts. From January 1, 2017 to February 9, 2017, Frontier stopped carrying Sinclair-owned stations in Seattle, WA, Myrtle Beach, NC, Raleigh Durham, NC, Portland, OR, and Charleston, SC. See *id.* On January 1, 2018, Frontier stopped carrying a Cox-owned station in Seattle, WA. See *id.*

<sup>118</sup> See Ryder Decl. ¶ 10. ACA in its *ex parte* letter similarly attempts to vilify Nexstar as a “bad actor” for demanding a fair price for the value its stations deliver. See ACA Mar. 25 Ex Parte at 10. However, as the Commission has recognized time and again (and as ACA itself appears to admit), “disagreement over the rates, terms, and conditions of retransmission consent—even fundamental disagreement—is not indicative of a lack of good faith.” *Coastal Comms. Broad. Co. LLC v. MTA Comms., LLC Good Faith Negotiation Complaint*, Memorandum Opinion and Order, MB Docket No. 18-208, CSR No. 8961-C, DA 18-1126, ¶ 7 (MB Nov. 2, 2018) (citing *HITV License Subsidiary, Inc. v. DIRECTV, LLC*, Memorandum Opinion and Order, 33 FCC Rcd. 1137, 1140, ¶ 7 (MB 2018); *Mediacom Commc’ns. Corp. v. Sinclair Broad. Grp., Inc.*, Memorandum

the Transaction, Nexstar will continue to timely negotiate new retransmission consent agreements that continue to allow MVPDs to provide their viewers with uninterrupted access to Nexstar's valuable and highly desirable local programming.

The Commission need not rely on the Opposing Parties' speculative and self-serving assertions regarding prospective negotiations when it has a process for resolving actual disputes based on tangible facts. Under the Communications Act and the FCC's Rules, both MVPDs and broadcasters are obligated to engage in good faith retransmission consent negotiations, and the FCC has specific procedures to enforce these obligations.<sup>119</sup> Following a Congressionally mandated review of the Commission's implementation of the good faith negotiation requirement, former FCC Chairman Tom Wheeler announced that based upon FCC "staff's careful review of the record," which included "extensive comments and ex parte submissions," it was "clear that more rules in this area [we]re not what [was] needed."<sup>120</sup> Instead, he explained that the "totality of the circumstances test" in Section 325 of the Communications Act provides the FCC with broad

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Opinion and Order, 22 FCC Rcd. 47, 50, ¶ 6 (MB 2007); *see also* ACA Mar. 25 Ex Parte at 10 (acknowledging that the conduct complained of by its members "may or may not be violations of the Commission's good faith rules"). Particularly fallacious is the description of Nexstar, attributed to Chris Kyle of Shentel, as "the most difficult party with whom he negotiates," ACA Mar. 25 Ex Parte at 10, because Mr. Kyle was not involved in Shentel's most recent negotiations with Nexstar. Rather, Shentel forced Nexstar to negotiate with its consultant, Lew Scharfberg, despite Nexstar's repeated requests to speak directly with Shentel. *See* Ryder Decl. ¶ 7. Mr. Kyle's characterization of the negotiations in which he did not personally participate is grossly inaccurate. *See id.* Acentek's complaint that Nexstar failed to advise Acentek that there are multiple ABC affiliates in the Battle Creek/Kalamazoo/Grand Rapids, Michigan television market similarly rings hollow given that Acentek's own channel guide identified both "WOTV-ABC (Battle Cr.)" and "WZZM-ABC (Gr. Rap.)" at least as early as June 30, 2015. *See id.* ¶ 8 & Attach. 1.

<sup>119</sup> 47 U.S.C. § 325(b); 47 C.F.R. § 76.65.

<sup>120</sup> *See* Blog Post, Tom Wheeler, FCC Chairman, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules* (July 14, 2016, 10:36 am), <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules>.

authority “to address the negotiating practices of broadcast stations or MVPDs in the marketplace today.”<sup>121</sup> Given the Commission’s existing mechanism for resolving abusive negotiating tactics, it need not resort to prophylactic measures based on speculative harms, as the Opposing Parties suggest.

3. The Transaction Does Not Create Any New Sharing Arrangements and Will Not Affect Retransmission Consent Negotiations for Existing Sharing Stations.

Finally, DISH’s contention that the Transaction will somehow affect retransmission consent rates paid to so-called “sidecar stations” (stations with whom Nexstar is a party to a same-market sharing agreement) is without merit. As discussed above, the Transaction will not result in Nexstar entering into any new sharing agreements or even assuming existing ones,<sup>122</sup> and no party has presented any evidence that Nexstar has violated the prohibition on joint negotiations among separately owned stations in a market.<sup>123</sup> To the extent that, as DISH claims,<sup>124</sup> the rates achieved by stations involved in sharing agreements may be higher than comparable stations that do not have a sharing agreement, any such rates would be the result of independent negotiations.<sup>125</sup> The Commission should reject DISH’s invitation to intrude upon Nexstar’s retransmission consent negotiation practices as baseless and well-beyond the scope of this transaction.<sup>126</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *See supra* Section III.

<sup>123</sup> *See supra* Section V.C.

<sup>124</sup> *See* DISH Petition at 43-44.

<sup>125</sup> The Applicants reserve the right to address DISH’s economic arguments in a subsequent filing.

<sup>126</sup> Even more specious is ATVA’s suggestion that the divestiture transactions might be structured so that Nexstar would “temporarily control[]” the Tribune stations and thus trigger Nexstar’s after-acquired clauses for the benefit of the divestiture buyers. ATVA Comments at 2-3 n.5. These clauses do not apply unless Nexstar “acquires” the stations at issue, and Nexstar will not “acquire”

## VII. THE COMMISSION SHOULD PERMIT NEXSTAR TO ACQUIRE TRIBUNE'S EXISTING TOP-FOUR COMBINATION IN INDIANAPOLIS.

Although the SIGs and NCTA nominally raise concerns regarding the Applicants' request for a waiver to preserve Tribune's existing Top-Four combination in the Indianapolis market,<sup>127</sup> they identify no "incremental harm that would result . . . from the assignment of the duopoly from [Tribune] to [Nexstar]."<sup>128</sup> As the Commission explained in *Gray/Raycom*, the role for the Commission in a transaction like this is not to evaluate the combination *de novo*, but rather to "determine whether the benefits of *continuing* to allow common ownership outweigh any public interest harms that have resulted or may yet result from the combination."<sup>129</sup> Neither the SIGs nor NCTA address any of the Applicants' arguments regarding why application of the Commission's Top-Four Prohibition in Indianapolis, specifically, is not in the public interest. Rather, the SIGs and NCTA raise general concerns about waivers of the Top-Four Prohibition that are inapplicable to the preservation of an existing combination in the Indianapolis market.

As an initial matter, the SIGs' arguments concerning competition are baseless and overlook the fact that the Indianapolis combination already exists and that preserving its existence will deliver substantial public interest benefits.<sup>130</sup> The SIGs provide no support for their argument that continuation of the combination would "give Nexstar increased power to control the advertising

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any of the Tribune stations being divested. *See, e.g.*, Nexstar Divestiture Press Release. As ATVA recognizes, the Commission rejected a similar claim in *Gray/Raycom*, ¶ 8, based on a representation that the Applicants would not structure the divestiture transactions in this manner, and the same result is appropriate here.

<sup>127</sup> *See* SIG Petition at 9; NCTA Comments at 11-20.

<sup>128</sup> *See Gray/Raycom*, ¶ 33.

<sup>129</sup> *Id.* ¶ 29 (emphasis added).

<sup>130</sup> *See generally* Indianapolis Top-Four Showing; *see also supra* Section IV.

market” aside from a reference to the Herfindahl-Hirschman Index,<sup>131</sup> which the Commission has recognized is irrelevant in the case of “the sale of an existing combination with no consolidation of ownership.”<sup>132</sup> Indeed, the empirical evidence cited in the Applications demonstrates the absence of harm from the existing combination. Since WTTV changed its affiliation and Tribune’s existing duopoly became a Top-Four duopoly in 2014, the revenue share of top-ranked WTHR increased while WXIN’s revenue share declined.<sup>133</sup> Furthermore, although the SIGs’ argument assumes that the advertising market is limited to broadcast television, the Applicants have demonstrated that broadcast television occupies a relatively small role in the Indianapolis advertising market.<sup>134</sup> Indeed, the Congressional Review Service report referenced in the SIG Petition observes that “the DOJ may view the issue differently if it includes online advertising in the relevant product market.”<sup>135</sup> Accordingly, the SIGs’ generic argument regarding competition cannot overcome the extensive evidence presented by the Applicants that preserving the existing Top-Four combination will not harm competition.

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<sup>131</sup> SIG Petition at 9.

<sup>132</sup> *See Application of Eagle Broad. Co., Inc. & Eagle II Broad. Co., Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 18440, 18445, ¶ 12 (2008). Even in the merger context, the FCC has rejected the strict application of HHI to analyze competitive harms in broadcast transactions. *See Applications of Golden Triangle Radio, Inc.*, Order on Reconsideration, 20 FCC Rcd. 4396, 4398, ¶ 5 (2005) (finding no competitive harms where post-transaction HHI would increase by 985 to 3602); *Applications of Stay Tuned Broad. Corp.*, Letter Order, 20 FCC Rcd. 19069, 19072 (MB Audio Div. 2005) (finding no competitive harm despite post-transaction HHI of 3,055).

<sup>133</sup> *See Top-Four Showing* at 10-11.

<sup>134</sup> *See id.* at 11.

<sup>135</sup> *Nexstar-Tribune Merger: Potential Competition Issues*, Congressional Research Service (Feb. 22, 2019), <https://fas.org/sgp/crs/misc/IF11112.pdf>.

The NCTA's retransmission consent-related objections to preservation of the Top-Four combination, meanwhile, once again raise issues properly left to a rulemaking and, in any event, are too generic to rebut the Applicants' Top-Four Showing. Although the Commission has indicated that it will consider concerns related to retransmission consent issues in the context of a request for a waiver of the Top-Four Prohibitions, it has also required that the issues raised must be "relevant to the particular market, stations, or transaction."<sup>136</sup> NCTA's showing falls well short. In rejecting similar concerns in the Gray/Raycom transaction, the FCC determined that allowing Gray to acquire Raycom's existing combination in the Honolulu market would not provide Gray with any "additional leverage within the Honolulu market."<sup>137</sup> The Commission went on to state:

[T]he Honolulu Stations, being commonly owned today, already have the ability to negotiate jointly, consistent with existing rules and statutes, and no commenter has provided any evidence of public interest harm arising from such joint negotiations in Honolulu. As the Commission has said in the context of the larger transaction, the Commission has not previously found that increasing the number of stations owned at the regional or national level within the national ownership cap leads to public interest harms with regard to retransmission consent negotiations. Accordingly, we do not find that the record demonstrates any harm related to retransmission consent that would warrant requiring divestiture of one of the Honolulu Stations.<sup>138</sup>

The instant transaction is indistinguishable from the Gray/Raycom transaction in this regard. NCTA's general and speculative claims regarding market power in the retransmission consent marketplace cannot stand up to the Applicants' specific showing that joint ownership of WXIN and WTTV has created a strong counterweight to top-ranked WTHR without creating any

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<sup>136</sup> 2014 Quadrennial Recon Order, 32 FCC Rcd. at 9836, ¶ 82 n.239 (2017).

<sup>137</sup> Gray/Raycom, ¶ 34.

<sup>138</sup> *Id.*

competitive harms in the market.<sup>139</sup> Accordingly, NCTA has provided no valid basis for the Commission to disrupt the *status quo* by forcing the divestiture of one of the stations.<sup>140</sup>

Finally, NCTA's request that the agency fashion and apply a Nexstar-specific rule to the request for reauthorization of Indianapolis station WTTK(DT) as a satellite<sup>141</sup> is so absurd that it barely warrants mention. All satellite stations, including WTTK, are subject to Note 5 of Section 73.3555 of the Commission's Rules, which requires the Commission to determine, upon a request for continuation of a parent-satellite combination in connection with an assignment or transfer of

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<sup>139</sup> Although NCTA criticizes Nexstar for not analyzing "the impact of the proposed combination on retransmission consent negotiations," NCTA again fails itself to acknowledge that the combination at issue exists today. *See* NCTA Comments at 14-15.

<sup>140</sup> In its late-filed *ex parte* letter, ACA alleges, with no evidence and not even a sworn declaration, that "TDS currently pays more for Tribune's duopoly stations than it pays for the average of the other two top-four stations in the market, despite the fact that Tribune typically charges lower retransmission consent rates than other broadcasters." ACA Mar. 25 Ex Parte at 5. ACA's reliance on the "average of the other two top-four stations," however, is misleading. As the Applicants explained, there is a significant drop off between the ratings of top-ranked WTHR and the next three stations in the market. *See* Top-Four Showing at 3-10. Accordingly, it is not surprising that the number two and three stations in the market receive higher retransmission consent fees than an average including the number four station in the market. TDS also fails to disclose other relevant factors such as when each agreement was negotiated, whether the fees reflect specific prices for those stations or prices negotiated for a multiple station group, and whether any non-monetary consideration was included in the retransmission consent agreements. *See* Declaration of Dana Zimmer, ¶ 3. Moreover, although Tribune does not know what rates TDS pays other broadcasters in the markets where Tribune operates, it does not and never has negotiated an "Indianapolis" rate but instead negotiates for a uniform "big four" rate across the entire footprint of a given MVPD. Accordingly, as TDS knows, under TDS's agreements with Tribune, the rates for all Tribune stations in each of the four markets served by TDS are identical—including in Indianapolis, notwithstanding the presence of a Top-Four duopoly there. *See id.* ¶ 4. Similarly, Nexstar does not set retransmission consent rates on a market-by-market basis for multi-market MVPDs such as TDS; rather, Nexstar maintains the same rate for all "big four" network affiliates across all markets. Ryder Decl. ¶ 12.

<sup>141</sup> NCTA Comments at 18.



control, whether the request meets the requirements for reauthorization of satellite authority.<sup>142</sup> Nexstar has made such a showing,<sup>143</sup> and NCTA offers no reason for the FCC to depart from its established satellite criteria just because Nexstar is the applicant.<sup>144</sup>

## VIII. CONCLUSION

As demonstrated above, the Petitioners lack standing and have failed to establish a *prima facie* case against the Applications. Nor do any of the Opposing Parties present anything to demonstrate—let alone with the specificity or evidence that the Act and Commission rules and precedent require—that approval of the Transaction violates FCC rules or will not serve the public interest. For these reasons, the Petitions filed by DISH, the SIGs, and Frontier should be promptly dismissed or denied, the arguments of the Commenters should be rejected, and the Applications should be granted without imposition of the conditions requested by Opposing Parties.

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<sup>142</sup> Note 5 to 47 C.F.R. § 73.3555; *see Gray/Raycom*, ¶ 43 (approving continued satellite exemption for two stations in Honolulu DMA notwithstanding assignment of existing duopoly).

<sup>143</sup> *See* Comprehensive Exhibit at 32-33.

<sup>144</sup> Moreover, the FCC recently *streamlined* its procedures for reauthorizing satellite station status when the license of a television satellite station is assigned or transferred, allowing applicants simply to certify to the absence of material change in the circumstances existing when satellite status was last authorized and submit a copy of the most recent Commission granting the satellite exception. *Streamlined Reauthorization Procedures for Assigned or Transferred Television Satellite Stations*, Report and Order, MB Docket No. 18-63, FCC 19-17 (rel. Mar. 12, 2019). Although the Applications were filed before the FCC adopted rules implementing this streamlined process, the FCC's relaxation of its satellite reauthorization requirements further undermines NCTA's request.

Dated: April 2, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Eve Klindera Reed, hereby certify that on this 2nd day of April, 2019, I caused a true and correct copy of the foregoing Consolidated Opposition to Petitions to Deny to be served upon the following individuals by electronic mail:

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/S/ Eve Klindera Reed

## **Declaration of Elizabeth Ryder**

## DECLARATION OF ELIZABETH RYDER

I, Elizabeth Ryder, under penalty of perjury, declare as follows:

1. I am the Executive Vice President & General Counsel of Nexstar Media Group, Inc. (“Nexstar”).

2. I have read the foregoing “Consolidated Opposition to Petitions to Deny and Comments,” and the facts stated therein of which the Federal Communications Commission may not take official notice are true and correct to the best of my knowledge and belief (except for the facts supported by the declaration of Dana Zimmer, for which I have no personal knowledge). In particular:

3. The suggestion by America’s Communications Association (“ACA”) that “Nexstar stations in New Mexico syndicat[e] out-of-market newscasts from stations owned by smaller groups instead of producing their own” is simply false. Nexstar-owned KRQE(TV) in Albuquerque, New Mexico broadcasts more than 50 hours of news per week on its primary and multicast streams, all of which Nexstar produces locally in the Albuquerque market.

4. All of the newscasts broadcast by Nexstar’s stations are produced by Nexstar. Consistent with industry practice, Nexstar’s stations subscribe to a variety of news services (e.g., network affiliate news services, Associated Press, CNN NewsSource, etc.) from which Nexstar’s stations may obtain individual stories that local news personnel determine are compelling for their local audiences. Nexstar’s stations also have access to Nexstar’s own Washington, D.C. bureau and many state news bureaus. Nexstar’s stations also routinely share compelling or important content with other Nexstar stations. For example, in 2018, Nexstar’s station KXAN-TV, in Austin, Texas, produced the only gubernatorial debate between incumbent Greg Abbott and former Dallas County Sheriff Lupe Valdez, with the debate shared and broadcast on

Nexstar's other stations located throughout Texas (as well as other select stations to ensure broadcast in each market across the state).

5. Nexstar provides viewers with extensive local sports programming and has no plans to cut back on this programming following its merger with Tribune. Nexstar has made significant investments to allow coverage of local sports teams on the professional, collegiate and high school levels. Indeed, Nexstar stations even preempt late-night network programming for the broadcast of Friday night high school football wrap-ups.

6. Nexstar stations have garnered literally thousands of broadcast journalism awards issued by local, regional, and national organizations. Since 2013 alone, Nexstar stations have received more than 2700 such awards, including 391 regional or state Emmy Awards, 172 Regional Murrow Awards, nearly 1000 state broadcasting association awards, 744 Associated Press awards, and 422 other awards, along with three national Emmy awards, three national Murrow awards, one duPont award, and four Walter Cronkite awards.

7. ACA, citing Chris Kyle of Shentel, grossly mischaracterizes Shentel's most recent retransmission consent negotiations with Nexstar. Nexstar actively negotiated with Shentel's designated consultant, Lew Scharfberg, for more than three months between September 2017 and December 2017. Although Nexstar repeatedly requested to speak directly with someone at Shentel, Mr. Scharfberg declined. Nevertheless, the parties executed an agreement on December 30, 2017.

8. While ACA also claims that Nexstar acted in bad faith by failing to advise Acentek that there are multiple ABC affiliates in the Battle Creek/Kalamazoo/Grand Rapids, Michigan television market, Acentek's own channel guide identified "WOTV-ABC (Battle Cr.)" and "WZZM-ABC (Gr. Rap.)" at least as early as June 30, 2015. Attached hereto as Attachment



1 is a true and accurate printout from the Internet Archive Wayback Machine of Acentek's channel lineup for the Grand-Rapids DMA as of June 30, 2015.

9. The potential loss of advertising revenues provides a substantial incentive for Nexstar to avoid any disruption of carriage due to a retransmission consent dispute. Advertising sales still account for a substantial portion of Nexstar's revenues. Further, if a multichannel video program distributor were to stop carrying a Nexstar station due to a retransmission consent dispute, it is inevitable that Nexstar's station would experience a drop in ratings. Depending on the amount of the decline in ratings and the details of Nexstar's advertising contracts, Nexstar could be forced to provide refunds to its advertisers or provide free advertising time as a "make good" for the lost ratings.

10. Nexstar has successfully negotiated thousands of retransmission consent agreements with MVPDs of all sizes.

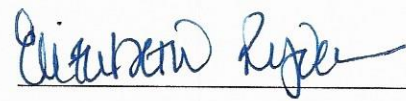
11. I believe that Nexstar's prior negotiations, including its current negotiation with HolstonConnect, LLC, have all been in compliance with the Commission's regulations requiring good faith negotiations, and Nexstar will continue to negotiate and meet its good faith obligations in the future.

12. Nexstar does not set retransmission consent rates on a market-by-market basis for multi-market MVPDs. Rather, Nexstar maintains the same rate for all big four network affiliates across all markets.

(CONTINUED ON NEXT PAGE)



April 2, 2019

A handwritten signature in blue ink, reading "Elizabeth Ryder", written over a horizontal line.

Elizabeth Ryder

## **Attachment 1**

<http://www.acentek.net/Michigan/Residential/Video/Grand-Rapids-DMA>

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Go

APR JUN SEP

◀ 30 ▶

2014 2015 2016



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[29 captures](#)

3 Nov 2014 - 24 Jun 2018



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- [Residential](#)
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  - [Internet](#)
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    - [Traverse-City-DMA](#)
    - [Grand-Rapids-DMA](#)
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## Programming Options

### BASIC

\$26.50 Per Month

- Local Networks
- Weather Channel
- 
- 

[View Channels](#)

### Basic Plus

\$55.95 Per Month

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◀ 30 ▶

2014 2015 2016



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## Expanded

\$61.95 Per Month

- Music channels
- News
- Outdoors
- 

[View Channels](#)

## Video Enhancements

DVR	9.95
Whole Home DVR	14.95
HD Set Top Box	11.95

[HD Channels](#)

## Premium Networks

HBO	16.95
Cinemax	12.95
Starz/Encore	10.95

[Premium Channels](#)

- Basic
- 2 WTLJ-TCT (Gr. Rap.)
  - 3 WWMT-CBS (Gr. Rap.)
  - 4 WOTV-ABC (Battle Cr.)
  - 5 WGVU-PBS (Gr. Rap.)
  - 6 City Weather-Local
  - 7 Bounce (WXSP)
  - 8 WOOD-NBC (Gr. Rap.)
  - 9 WGN
  - 10 ION
  - 11 WXMI-FOX (Gr. Rap.)
  - 12 CW
  - 13 WZZM-ABC (Gr. Rap.)
  - 14 HSN
  - 15 WXSP TV
  - 16 ThisTV (WXMI)
  - 17 AntennaTV (WXMI)

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APR JUN SEP

◀ 30 ▶

2014 2015 2016



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[29 captures](#)

3 Nov 2014 - 24 Jun 2018

- 2 WTLJ-TCT (Grand Rap.)
- 3 WWMT-CBS (Gr. Rap.)
- 4 WOTV-ABC (Battle Cr.)
- 5 WGVU-PBS (Gr. Rap.) City
- 6 Weather-Local
- 7 Bounce (WXSP)
- 8 WOOD-NBC (Gr. Rap.)
- 9 WGN
- 10 ION
- 11 WXMI-FOX (Gr. Rap.)
- 12 CW
- 13 WZZM-ABC
- 14 HSN
- 15 WXSP TV
- 16 ThisTV (WXMI)
- 17 AntennaTV (WXMI)
- 18 QVC
- 19 Big Ten Network
- 20 ESPNU
- 21 ESPN2
- 22 ESPN Classic
- 23 ESPNEWS
- 24 ESPN
- 25 Fox Sports Detroit
- 27 Fox Sports 1
- 30 Lifetime
- 31 USA
- 33 FX
- 34 A&E
- 37 TV Land
- 39 Nickelodeon
- 43 Hallmark Channel
- 46 Lifetime Movie Network
- 47 AMC
- 52 Comedy Central
- 55 Spike
- 61 Fox News Channel
- 62 The Weather Channel
- 63 Discovery Channel
- 64 TLC
- 65 History Channel
- 66 Travel Channel
- 67 Animal Planet
- 68 National Geo. Ch.
- 69 HGTV
- 73 MTV
- 74 VH1
- 75 CMT
- 76 Lifetime Real Women
- 78 CSPAN

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◀ 30 ▶

2014 2015 2016



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3 Nov 2014 - 24 Jun 2018

156 RFD-TV  
171 Outdoor Channel  
172 FXX  
203 WWMT-CBS HD  
204 WOTV-ABC HD  
208 WOOD-NBC HD  
209 WGN HD  
211 WXMI-FOX HD  
213 WZZM-ABC HD  
215 WXSP TV HD  
219 Big Ten Network HD  
221 ESPN2 HD  
224 ESPN HD  
225 FS Detroit HD  
227 Fox Sports 1 HD  
230 Lifetime HD  
231 USA HD  
233 FX HD  
234 A&E HD  
243 Hallmark Ch. HD  
246 Lifetime Movie HD  
247 AMC HD  
261 Fox News Channel HD  
263 Discovery Channel HD  
264 TLC HD  
265 History Channel HD  
266 Travel Channel HD  
267 Animal Planet HD  
268 National Geo. Ch. HD  
269 HGTV HD  
304 OWN HD  
327 Fox Sports 2 HD  
371 Outdoor Channel  
372 FXX HD

Expanded

2 WTLJ-TCT (Gr. Rap.)  
3 WWMT-CBS (Gr. Rap.)  
4 WOTV-ABC (Battle Cr.)  
5 WGVU-PBS (Gr. Rap.)  
6 City Weather-Local  
7 Bounce (WXSP)  
8 WOOD-NBC (Gr. Rap.)  
9 WGN  
10 ION  
11 WXMI-FOX (Gr. Rap.)  
12 CW  
13 WZZM-ABC (Gr. Rap.)  
14 HSN  
15 WXSP TV  
16 ThisTV (WXMI)

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◀ 30 ▶

2014 2015 2016



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3 Nov 2014 - 24 Jun 2018

- 21 ESPN2
- 22 ESPN Classic
- 23 ESPNEWS
- 24 ESPN
- 25 Fox Sports Detroit
- 26 NFL Network
- 27 Fox Sports 1
- 28 NBCSN
- 29 Golf Channel
- 30 Lifetime
- 31 USA
- 32 TBS
- 33 FX
- 34 A&E
- 35 TNT
- 36 ABC Family
- 37 TV Land
- 38 Disney XD
- 39 Nickelodeon
- 40 Disney Channel
- 41 Cartoon Network
- 42 Bravo
- 43 Hallmark Channel
- 44 Oxygen
- 45 WE
- 46 Lifetime Movie Network
- 47 AMC
- 48 TCM
- 49 SyFy
- 50 truTV
- 51 BET
- 52 Comedy Central
- 53 E!
- 54 GSN
- 55 Spike
- 56 FOX Sports Detroit Plus
- 57 CNN
- 58 HLN
- 59 CNBC
- 60 MSNBC
- 61 Fox News Channel
- 62 The Weather Channel
- 63 Discovery Channel
- 64 TLC
- 65 History Channel
- 66 Travel Channel
- 67 Animal Planet
- 68 National Geo. Ch.
- 69 HGTV
- 70 Food Network



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◀ 30 ▶

2014 2015 2016



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75 CMT  
76 Lifetime Real Women  
77 Big Ten Network Alt  
78 CSPAN  
79 CSPAN II  
80 SEC Network  
86 EWTN  
87 TBN  
99 Fusion  
101 Science Channel  
102 American Heroes Channel  
103 ID  
104 OWN  
105 Destination America  
106 fyi  
107 H2  
108 CNBC World  
109 Fox Business  
120 Disney Jr  
121 Discovery Family  
122 Nick Jr  
123 TEENick  
124 Boomerang  
125 Nicktoons  
127 Fox Sports 2  
150 Chiller  
151 FX Movie  
153 Esquire  
155 DIY Network  
156 RFD-TV  
171 Outdoor Channel  
172 FXX  
173 Sportsman Channel  
191 MTV2  
193 MTV Hits  
194 VH1 Classic  
195 CMT Pure Country  
HD Channels  
203 WWMT-CBS HD  
204 WOTV-ABC HD  
208 WOOD-NBC HD  
209 WGN HD  
211 WXMI-FOX HD  
213 WZZM-ABC HD  
215 WXSP TV HD  
219 Big Ten Network HD  
221 ESPN2 HD  
224 ESPN HD  
225 FS Detroit HD  
226 NFL Network HD

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◀ 30 ▶

2014 2015 2016



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[29 captures](#)

3 Nov 2014 - 24 Jun 2018

231 USA HD  
232 TBS HD  
233 FX HD  
234 A&E HD  
235 TNT HD  
240 Disney Channel HD  
242 Bravo HD  
243 Hallmark Ch. HD  
245 WE HD  
246 Lifetime Movie HD  
247 AMC HD  
249 SyFy HD  
250 truTV HD  
253 E! HD  
254 GSN HD  
259 CNBC HD  
260 MSNBC HD  
261 Fox News Channel HD  
263 Discovery Channel HD  
264 TLC HD  
265 History Channel HD  
266 Travel Channel HD  
267 Animal Planet HD  
268 National Geo. Ch. HD  
269 HGTV HD  
270 Food Network HD  
280 SEC Network HD  
290 AXS TV  
291 HD Net Movies  
292 Velocity HD  
301 Science Ch. HD  
303 ID HD  
304 OWN HD  
305 Destination America HD  
306 fyi HD  
309 Fox Business Net. HD  
321 Discovery Family HD  
327 Fox Sports 2 HD  
371 Outdoor Channel  
372 FXX HD  
399 Fusion HD  
Premium

- 401 HBO  
402 HBO 2  
403 HBO Family  
404 HBO Signature
- 405 Cinemax  
406 MoreMAX

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Go

APR

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SEP



30



2014

2015

2016



▼ About this capture

[29 captures](#)

3 Nov 2014 - 24 Jun 2018

- 435 Starz Comedy
- 436 Starz Kids & Family
- 441 Encore
- 442 Encore Action
- 443 Encore Suspense
- 444 Encore Westerns
- 445 Encore Classic
- 446 Encore Black
- 447 Encore Family

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## **Declaration of Dana Zimmer**

## **DECLARATION OF DANA ZIMMER**

I, Dana Zimmer, under penalty of perjury, declare as follows:

1. I am President, Distribution, of Tribune Media Company (“Tribune”). In that capacity I am responsible for negotiating or supervising the negotiation of agreements for retransmission of the Tribune television stations by multichannel video programming distributors (“MVPD”), including TDS, which retransmits Tribune stations on its cable and IPTV systems serving the Denver, Salt Lake City, Milwaukee and Indianapolis Designated Market Areas (“DMA”).

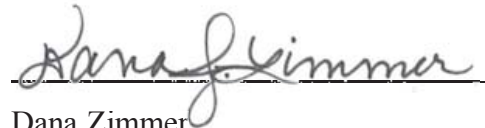
2. I have read the foregoing “Consolidated Opposition to Petitions to Deny and Comments.” The facts stated in footnote 140 therein of which the Federal Communications Commission may not take official notice are true and correct to the best of my knowledge and belief. In particular:

3. The implication by America’s Communications Association (“ACA”) that Tribune is able to command higher rates from TDS in Indianapolis as a result of Tribune’s ownership of a duopoly there (ACA Mar. 25 Ex Parte at 5), is misleading, at best. Of course, Tribune does not know what rates TDS pays other broadcasters in Indianapolis (or in Denver, Salt Lake City or Milwaukee). Indeed, Tribune also does not know how other broadcaster’s rate cards are structured for a particular MVPD in any particular market. For example, a broadcaster may have a lower Indianapolis rate because an MVPD—say, TDS—pays more for the broadcaster’s affiliated non-broadcast content or for that broadcaster’s non big-four stations in other markets.

4. Tribune does not and never has negotiated an “Indianapolis” rate but instead negotiates for a uniform “big four” rate across the entire footprint of a given MVPD. Under Tribune’s retransmission agreements with TDS, the rates TDS pays for all the Tribune stations in

each of these four markets are identical—including in Indianapolis, notwithstanding Tribune's ownership of a Top-Four duopoly there.

April 2, 2019

  
Dana Zimmer