

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

In the Matter of)	
)	
HolstonConnect, LLC,)	
)	
Complainant,)	
)	
v.)	MB Docket 19-60
)	CSR 8974-C
Nexstar Media Group, Inc.)	
)	
Defendant.)	
)	
)	

REPLY OF HOSSTONCONNECT, LLC

Respectfully Submitted,

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Certificate of Service

DISCUSSION

I. NEXSTAR’S OPPOSITION MISSTATES AND MISCHARACTERIZES KEY FACTS.

In its Opposition, Nexstar attempts to portray its conduct with respect to the HolstonConnect negotiation as that of a reasonable participant in a substantive negotiation, responding in a timely fashion with *meaningful* counteroffers. Nexstar even goes so far as to suggest that *HolstonConnect* failed to adequately pursue negotiations to obtain essential programming for HoltsonConnect’s pending cable service launch. Nexstar apparently expects that the Commission will overlook certain crucial facts demonstrating the contrary, as explained below.

A. HolstonConnect, Not Nexstar, Made the Final Counteroffer Prior to the Complaint.

Nexstar’s responsive pleading relies heavily on its supposition that Nexstar made a counteroffer on December 14, followed by silence from HolstonConnect until February 19 when HolstonConnect shared with Nexstar its intention of filing a good faith complaint with the Commission.¹ From this faulty factual premise, Nexstar builds a case that it was fully responsive and that the intervening period reflected delay and intransigency on HolstonConnect’s part.

Contrary to Nexstar’s assertions, however, HolstonConnect – not Nexstar – made the last offer, on December 5. Nexstar itself admitted that its communication on December 14 was not a

¹ See, Opp., at iii, 5-6, 8, n.16, 10.

counteroffer at all, but a “restatement” of its earlier offer (to which HolstonConnect had provided a counteroffer on December 5).² Opp., at 5.

The reality is that Nexstar had effectively stopped negotiating after December 5, having only “negotiated” to the extent of dropping its Big Four rate demand by a nickel. This is entirely in keeping with Ms. Elizondo’s earlier statement to Ms. King that “we could perhaps come down about a nickel” and that Nexstar was “not afraid to walk away.”³

In short, Nexstar was not being ignored by HolstonConnect after December 14, following a counteroffer by Nexstar. Rather, Nexstar had shut down the negotiations and had given HolstonConnect no indication that any meaningful negotiation would possible.

That, in turn, led HolstonConnect to prepare the Complaint.

Only when HolstonConnect informed Nexstar that it intended to file the Complaint did Nexstar actually deign provide a “counteroffer” to Holston’s December 5 offer. On February 19, 2019, Nexstar responded to the knowledge of the pending good faith complaint by lowering its exorbitant rate for Big Four content by only another \$0.05 -- *and by adding another year to the agreement*. Nexstar also still insisted on carriage of all of the extraneous unwanted program

² Nexstar implies that HolstonConnect’s December 5 offer should not count for some reason, because HolstonConnect’s written counteroffer – following a long conversation between Ms. Elizondo and Ms. King – involved only the Big 4 rate. (“Based on the lack of explanation from Ms. King and the significant missing information (the remaining years and rates), on December 14, 2018 Ms. Elizondo restated the counteroffer made on December 5, 2018 with a three-year term and rates for three years.”) Opp., at 5. It is true that HolstonConnect had no desire to carry the additional multicast channels, and that HolstonConnect sought a carriage arrangement that did not include them. But even taking Nexstar’s characterization of HolstonConnect’s December 5 counteroffer at face value, not once did Nexstar raise the supposed lack of information as an issue or justification for its failure to provide any counteroffer after December 5. It certainly is not the case that Nexstar had insufficient information to continue negotiations.

³ See Compl., at 7.

streams, adding significantly to the overall payment HolstonConnect would need to make to acquire the must-have local broadcast programming.⁴

B. Nexstar's Attempts to Portray HolstonConnect as Failing to Negotiate are Unsupported by the Facts.

In an attempt to convince the Commission that *HolstonConnect* did not adequately pursue negotiations to acquire the right to carry must-have programming on its new cable service, Nexstar repeatedly refers to the initial “87 day” period between HolsonConnect’s initial letter to Nexstar seeking information about Nexstar’s rates, and the actual commencement of active negotiations with Nexstar in December 2018. *Opp.*, at 4, 7

As stated in its Complaint, HolstonConnect spent the latter part of 2018 developing a video product for launch. During the time period cited by Nexstar, HolstonConnect was obtaining rate information from other local broadcast television stations and other video programming providers, and generally preparing its financial models in preparation for negotiating and executing the myriad carriage agreements required for the launch of a cable service. Without first obtaining *all* of that information, HolstonConnect would have an incomplete financial picture, and would be unable to negotiate effectively at all.

While HolstonConnect may have had Nexstar’s initial proposal in hand earlier, the fact is that negotiation did not commence as a practical matter until December 2018. Moreover, Nexstar does not even allege that the supposed delay affected Nexstar in the slightest: it is not as if Nexstar was seeking to obtain carriage rights on HolstonConnect’s system, and that HolstonConnect held up Nexstar’s plans. The Commission should disregard Nexstar’s red herring concerning the initial 87-day period.

⁴ Nexstar’s communications with HolstonConnect after HolstonConnect filed its complaint were substantially as described in Nexstar’s responsive pleading.

II. NEXSTAR’S MARKET POWER HIGHLIGHTS THE IMPROPRIETY OF ITS ABUSIVE AND UNILATERAL “FORCED CARRIAGE” TERMS.

HolstonConnect has clearly and repeatedly communicated to Nexstar that HolstonConnect has no desire whatsoever to agree to carry multiple programming streams that it does not want (unless it is on must-carry terms), and that HolstonConnect should not be required to agree to carriage terms for stations that do not yet exist and whose content is unknown.⁵ But Nexstar has refused to consider any alternative. Indeed, its Opposition makes clear that Nexstar is taking full advantage of its vast market power to extract the maximum revenue it can from HolstonConnect, and that HolstonConnect has no realistic option but to pay whatever Nexstar may wish to charge.⁶

As Nexstar accurately notes, the Commission’s role “is to ensure that the marketplace negotiations are competitive and that, under the totality of the circumstances, the parties engaged in good faith negotiations.”⁷ While Nexstar’s tying arrangements may be good for Nexstar’s shareholders, this imbalanced scenario hardly reflects a competitive marketplace for negotiations.

As acknowledged in the Complaint, and as Nexstar discusses in its Opposition, the Commission more than 18 years ago stated that tying arrangements of the type Nexstar demands

⁵ Thus, Nexstar is flatly incorrect in its assertion that “[i]n the six months of intermittent communication, HC has not sought to negotiate any terms other than rates....” Opp., n.13.

⁶ Nexstar blithely explains that it is Nexstar’s “preference” to negotiate (more accurately, to require carriage of) all of Nexstar’s stations and programming streams, including those that may be named later, “rather than renegotiate with a MVPD each time.” Opp., n.9.

⁷ Opp., at 9.

of HolstonConnect are “presumptively consistent with competitive marketplace considerations.”⁸ But any presumption of legitimacy for such tying arrangements has been overcome in this instance.⁹

With respect to the 18-year old precedent of the *Good Faith Order*, HolstonConnect would only add the following: The competitive environment with respect to retransmission consent negotiations has fundamentally changed over the past 18 years. While MVPDs and broadcast television station owners may have been on roughly equal footing two decades ago, that is certainly no longer the case. Indeed, it is difficult to conceive of a more *imbalanced*, *non-competitive* “marketplace” for carriage negotiation than that which exists between Nexstar, Inc., and HolstonConnect, LLC.

The Commission should use this proceeding as an opportunity to make clear that large broadcast television station conglomerates such as Nexstar must not abuse their dominant market position in retransmission consent negotiations, particularly with small cable operators. As explained further in the Complaint (¶¶ 44-47), the Commission can, and should, find that Nexstar’s proposal is “sufficiently outrageous” under the totality of the circumstances as to constitute a violation of its good faith negotiation obligation, and the Commission should fashion a remedy accordingly.¹⁰

⁸ *Good Faith Order*, ¶ 56.

⁹ *See Compl.*, ¶¶ 43-47.

¹⁰ *Good Faith Order*, ¶ 32.

III. CONTRARY TO NEXSTAR’S BLANKET ASSERTION, THE COMMISSION CAN AND SHOULD INTERVENE IN A RETRANSMISSION CONSENT RATE CASE WHERE A COMPETITIVE MARKETPLACE FOR NEGOTIATION DOES NOT EXIST.

Nexstar’s Opposition includes the blanket statement that the Commission simply “does not” involve itself in retransmission consent rate disputes.¹¹ But Nexstar goes on to acknowledge that the Commission’s role, at least in part, is “to ensure that the marketplace negotiations are competitive.”¹² Nexstar then cites Commission precedent, as did HolstonConnect in its Complaint, providing that, “*absent other factors*, disagreement over the rates, terms, and conditions of retransmission consent – even fundamental disagreement – is not indicative of a lack of good faith.”¹³ (emphasis added).

In this matter, a small, nascent cable system is attempting to negotiate carriage rights for essential programming with a giant broadcasting company that has little interest in whether or not its content is carried on HolstonConnect’s system. Nexstar’s tactics – starting with an exorbitant rate, tied to an obligation to carry and pay for other unwanted programming, and then “negotiating” to the tune of \$0.05 – is clear evidence that the “marketplace negotiations” are *not* competitive. Nexstar suggests that HolstonConnect “might have achieved ending rates in the neighborhood” of MVPDs that have actually closed deals with Nexstar.¹⁴ But this ignores the clear fact that Nexstar had utterly stonewalled HolstonConnect, and gave no indication that any movement would be forthcoming beyond the initial reduction of a nickel.

The Commission also should take note of Nexstar’s ownership of multiple Big 4 stations within the relevant DMAs (Knoxville and Tri-Cities). Nexstar controls the ABC affiliate in both

¹¹ Opp., at 9.

¹² *Id.*

¹³ *Id.*

¹⁴ Opp., at 10.

DMA, and controls the CBS affiliate in the Tri-Cities DMA. So, Nexstar controls three of the eight Big 4 broadcast station programming streams in the two DMAs for which HolstonConnect must obtain Big 4 carriage rights. While perhaps not improper *per se*, this concentration of ownership only serves to reduce the market competition for negotiation of Big 4 content.

These “other factors,” in addition to those outlined in the Complaint, demonstrate that Nexstar has not acted in good faith under the totality of the circumstances. Contrary to Nexstar’s blanket assertion that the Commission simply does not and cannot get involved in such matters, this case presents a scenario where the Commission clearly should, in order to “ensure that the marketplace negotiations are competitive.”

IV. NEXSTAR’S ASSERTION THAT MVPDS IMPROPERLY ENGAGE IN JOINT NEGOTIATIONS IS INACCURATE AND ILLOGICAL

In a footnote, Nexstar stated that “MVPDs are free to essentially engage in joint negotiations by choosing to work with the same consultant.”¹⁵ While this topic is admittedly not central to this proceeding, HolstonConnect is compelled to briefly respond to Nexstar’s assertion on the record.

Nexstar’s contention ignores the reality of the broadcast television / MVPD marketplace. Broadcast television station owners like Nexstar negotiate with many, many different MVPDs around the country, including multiple MVPDs in the same market. Nexstar uses the knowledge it gains in one market for the benefit of its stations in other markets (or even the same market). An MVPD’s knowledge of rates, on the other hand (particularly a small MVPD like HolstonConnect), is limited to what it negotiates with broadcast television stations in its service territory. The only

¹⁵ Opp., n.21.

way to comparably address the issue Nexstar raises would be to require that every single MVPD negotiation Nexstar engages in must be conducted by a separate Nexstar negotiator, and that those negotiators must never discuss the substance of those negotiations amongst themselves.

To be clear, HolstonConnect is not suggesting that MVPD consultants *do* discuss the substance of negotiations among various MVPDs. The point is that Nexstar (and other companies like Nexstar) benefit from economies of scale and concentration of ownership in a way that is not available to smaller MVPDs.

V. CONCLUSION

For the reasons set forth above and in the Complaint, the Complaint of HolstonConnect, LLC should be granted.

Respectfully Submitted,



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April 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, I caused a confidential copy of the foregoing Reply of HolstonConnect, LLC to be served by Federal Express, postage prepaid, upon the following:

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