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REDACTED – FOR PUBLIC INSPECTION

VIA ECFS

May 28, 2019

Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Declaration of Jeffrey A. Eisenach
Tribune Media Company and Nexstar Media Group, Inc.
MB Docket No. 19-30

Dear Ms. Dortch:

On behalf of Nexstar Media Group, Inc. ("Nexstar"), enclosed is a copy of a Declaration prepared by Jeffrey A. Eisenach, PhD, Managing Director at NERA Economic Consulting.

DISH Network Corporation ("DISH"), in support of its Petition to Deny the applications that are the subject of the instant proceeding, previously submitted a declaration of William Zarakas and Dr. Eliana Garcés of The Brattle Group (the "Brattle Report").[1] The Brattle Report contends that the proposed transaction will increase Nexstar's bargaining power in retransmission consent negotiations relative to the bargaining power of the two firms operating separately, resulting in "higher retransmission prices for DISH, leading to higher prices for consumers."[2]

Dr. Eisenach's Declaration shows that the record does not support the claims in the Brattle Report. Specifically, Dr. Eisenach concludes that the Brattle Report (1) does not demonstrate that the transaction would result in higher retransmission fees paid by DISH or any other MVPD, (2) does not demonstrate that the transaction would have any effect on the downstream prices paid by consumers, and (3) does not demonstrate any other form of consumer harm. Dr. Eisenach further explains that, if anything, the Brattle Report strengthens the case that the transaction will generate efficiencies and yield public interest benefits.

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[1] *Petition to Deny of DISH Network Corporation, Exhibit B: Declaration of William Zarakas and Dr. Eliana Garcés*, *In the Matter of Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee) Consolidated Applications for Consent to Transfer Control*, MB Docket No. 19-30 (March 18, 2019).
[2] *Id.*at 3.

Pursuant to the Protective Order[3] in this proceeding, Nexstar has redacted certain information for public inspection that constitutes Confidential Information and/or that DISH previously designated as Highly Confidential Information. Nexstar will file an unredacted copy of Dr. Eisenach's declaration pursuant to the Protective Order and Section 0.459 of the Commission's Rules.

Please do not hesitate to contact us with any questions.

Respectfully submitted,

/s/ Ari Meltzer
Richard J. Bodorff
Eve Klindera Reed
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Enclosure

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[3] *Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee), Consolidated Applications for Consent to Transfer of Control*, MB Docket No. 19-30, Protective Order (rel. Mar. 15, 2019).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

DECLARATION OF JEFFREY A. EISENACH, PH.D.

May 28, 2019

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I. Introduction and Summary of Opinions

1. My name is Jeffrey A. Eisenach. I am a Managing Director at NERA Economic Consulting and Co-Chair of NERA's Communications, Media, and Internet Practice. I am also an Adjunct Professor at the Antonin Scalia Law School at George Mason University, where I teach Regulated Industries, and a Visiting Scholar at the American Enterprise Institute, where I focus on policies affecting the information technology sector. Previously, I served in senior policy positions at the U.S. Federal Trade Commission and the White House Office of Management and Budget and taught at Harvard University's Kennedy School of Government and Virginia Polytechnic Institute and State University.

2. My practice focuses on the economic analysis of competition, intellectual property, regulatory and consumer protection issues. I have submitted expert reports and testified in litigation matters, as well as in regulatory proceedings before the U.S. Federal Communications Commission (FCC or Commission), the U.S. Federal Trade Commission (FTC), the U.S. Copyright Royalty Board, several state public utility commissions and courts and regulatory bodies in Australia, Canada, the Caribbean, the European Union and South America. I have also testified before the U.S. Congress on multiple occasions. The focus of much of my work has been on assessing competition in markets for video content and distribution, including retransmission consent. I have written several reports and expert declarations on the economics of retransmission consent, including before the FCC.

3. I am the author or co-author of several books and monographs, including *Broadband Competition in the Internet Ecosystem, The Digital Economy Fact Book* and *The Telecom Revolution: An American Opportunity*, and I have edited or co-edited five books, including *Communications Deregulation and FCC Reform: What Comes Next?* and *Competition,*

Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace. My articles have appeared in peer-reviewed journals such as *Communications and Strategies*, *Review of Network Economics* and *Telecommunications Policy*, as well as in such popular outlets as *Forbes*, *Investor's Business Daily* and *The Wall Street Journal*.

4. Before joining NERA, I was a Managing Director and Principal at Navigant Economics. Before that, I served as Chairman of Empiris LLC, Criterion Economics LLC and CapAnalysis, LLC. Among my other previous affiliations, I served as President and Senior Fellow at The Progress & Freedom Foundation and a scholar at the Heritage Foundation and the Hudson Institute. I received my Ph.D. in economics from the University of Virginia and my Bachelor of Arts in economics from Claremont McKenna College. Appendix A of this report contains my curriculum vitae, including prior publications and testimony relating to retransmission consent.

5. I prepared this report at the request of Nexstar Media Group, Inc. (Nexstar) in connection with Nexstar's proposed acquisition (the Transaction) of Tribune Media Company (Tribune). Nexstar is compensating me and the NERA staff who assisted me in preparing this declaration at NERA's standard hourly rates. NERA's compensation is not dependent on our findings or on the outcome of this matter.

6. Specifically, Nexstar asked me to review and comment on the Petition to Deny (the Petition) filed by DISH Network Corporation (DISH), with a focus on portions of the Petition relating to the potential effect of the Transaction on retransmission consent fees, including the expert declaration (Brattle Report) submitted by William Zarakas and Dr. Eliana Garcés of The

Brattle Group (Brattle).[1] The Brattle Report asserts that retransmission consent fees are determined in a national bargaining market in which MVPDs like DISH negotiate with broadcast groups like Nexstar and Tribune over prices and terms, and contends that the Transaction, by increasing the bargaining power of the combined firm (New Nexstar) relative to the bargaining power of the two firms operating separately,[2] "will result in higher retransmission prices for DISH, leading to higher prices for consumers."[3]

7. In support of this contention, Brattle puts forward a highly selective and inaccurate view of the television broadcasting and content marketplace which ignores important economic realities (e.g., the presence of economies of scale and scope) and portrays a market in which the only (or nearly the only) factor affecting retransmission consent fees is the level of consolidation among television broadcast groups. It also proffers several fundamentally flawed empirical analyses which it says demonstrate a positive relationship between broadcast group size and retransmission consent fees. These include: a *"blackout"* analysis of the propensity of large and small station groups to be involved in retransmission-related carriage interruptions; a *"big and small"* analysis of average rates paid by DISH to broadcast groups above and below specified thresholds; a *"regression analysis"* of retransmission rates paid by DISH based on broadcast group size; a *"before and after"* analysis of retransmission rates paid prior to and subsequent to broadcast group mergers; and, a *"goalpost"* analysis of

[1] *In the Matter of Tribune Media Company (Transferor) and Nexstar Media Group, Inc. (Transferee) Consolidated Applications for Consent to Transfer Control*, *Petition to Deny of DISH Network Corporation, Exhibit B: Declaration of William Zarakas and Dr. Eliana Garcés*, MB Docket No. 19-30 (March 18, 2019) (hereafter "Brattle Report").

[2] Brattle Report at 29.

[3] *Ibid.* at 3.

DISH's negotiating strategies when it faces the prospect of overlapping blackouts with multiple broadcasters.

8. In my opinion, the Brattle Report's findings are both unsupported and incorrect. The report fails to demonstrate that the Transaction would give New Nexstar increased bargaining power or lead to higher retransmission consent fees; fails to demonstrate that any increase in fees that might result from the Transaction (e.g., as a result of acquired station clauses or the increased value of New Nexstar to consumers) would be uneconomic or inefficient; and fails to present any evidence that any increase in retransmission fees would affect consumer prices or that consumers would be harmed. Further, each of the individual analyses upon which it bases its findings is fundamentally flawed. Specifically:

- The Brattle Report's argument that increases in retransmission consent fees over the past several years can be attributed to consolidation among broadcasters is a classic case of mistaking correlation for causality. Markets for video content and video distribution have undergone many transformative changes that might be expected to affect retransmission consent fees, including consolidation on the distribution side (e.g., AT&T-DIRECTV, Charter-TWC), the dramatic growth of OTT programming services (e.g., Netflix, Hulu) and continuing shifts in market shares. The Brattle Report ignores all of these factors.

- While conceding that broadcast mergers can increase economic efficiency, the Brattle Report misconstrues and misrepresents both the existing empirical evidence on broadcast merger efficiencies and the evidence in this specific Transaction. Rather than showing that "[c]onsumers do not appear to have reaped benefits" from broadcast mergers, the existing evidence shows mergers result in more local news and higher quality programs, and hence higher value for consumers.

- The Brattle Report's analysis of retransmission-related blackouts erroneously concludes that larger station groups are more likely to be involved in blackouts than smaller station groups. When Brattle's methodological errors are corrected, the data shows there is no meaningful correlation between group size and either blackout frequency or the effects of blackouts.

- The Brattle Report's analyses of the relationship between DISH's retransmission consent fees and broadcast group size are fundamentally flawed on multiple levels, including: a faulty use of arbitrary and irrelevant benchmarks and metrics for group size; failing to consider rates paid for non-Big 4 stations and network owned and operated (O&O) stations;

and, excluding without explanation data from nine of the 54 station groups with which Brattle reports DISH has retransmission agreements in place.

- The Brattle Report's regression analysis is fundamentally flawed and inherently unreliable, but taken at face value it implies that over the relevant range (i.e., the range involved in the Transaction), DISH's retransmission fees decline with broadcast group size. Indeed, the regression model with the highest explanatory power implies that the Transaction would significantly *reduce* retransmission consent fees.

- The Brattle Report's finding that prior broadcast mergers have resulted in higher DISH retransmission consent fees is an artifact of Brattle's arbitrary choice of one of four industry trend adjustments that emerge from its regression analysis. Applying any of the other three estimated values would imply much smaller or even negative effects. Indeed, applying the trend adjustment from the regression specification with the highest explanatory power would imply that mergers *reduce* the retransmission fees paid by DISH to both target firms and acquirers.

- The Brattle Report's "goalpost" analysis of negotiation outcomes suffers from fundamental flaws, and its results do not support the contention that DISH accepts higher rates in retransmission negotiations when it is already involved in an impasse with another station group. Similarly, the report offers no evidentiary or analytical support for its assertions that the "reputational" effect of impasses is meaningfully related to group size or that the Transaction would hinder DISH's ability to procure a "critical mass" of programming.

- The Brattle Report presents no analysis whatsoever of the relationship between retransmission consent fees and consumer prices for MVPD services. Because retransmission consent fees account for only about **{{BEGIN CI** [redacted] **END CI}}** percent of MVPDs' programming costs, and an even smaller percentage of total costs, it is highly unlikely that an increase in retransmission consent fees would have any significant effect on consumer prices.

9. Thus, to summarize, the Brattle Report does not demonstrate that the Transaction would result in higher retransmission fees paid by DISH or any other MVPD, does not demonstrate any effect on the downstream prices paid by consumers and does not demonstrate any other form of consumer harm. If the evidence presented in the Brattle Report has any relevance at all for the Commission's review, it is to strengthen the case that the Transaction would generate efficiencies and yield public interest benefits.

10. The remainder of this declaration is organized as follows. In Section II I briefly describe the Transaction. In Section III I discuss aspects of the institutional and economic context which are relevant to assessing the economic effects of the Transaction and explain why I believe the Brattle Report mischaracterizes or ignores these factors. In Section IV I explain in detail why the Brattle Report's empirical analyses of the effects of the Transaction are both unsupported and incorrect, leading it to reach incorrect conclusions. Section V briefly addresses other issues with the Brattle Report's findings. Section VI presents a brief summary.

II. The Transaction

11. Nexstar is a publicly traded television broadcasting and digital media company headquartered in Irving, Texas which is in the business of acquiring, developing and operating television stations as well as interactive community websites and digital media services.[4] It currently owns 138 full power broadcast television stations, serving 100 television markets and reaching 42.7 million, or 38.8 percent, of all U.S. television households (without adjustments to employ the FCC's national television ownership rule methodology).[5] Nexstar's broadcasting revenues were $2.6 billion in 2018.[6] Nexstar is the **{{BEGIN CI** [redacted] **END CI}}** broadcast television station owner in the U.S. in terms of total station revenues and the **{{BEGIN CI** [redacted] **END CI}}** in terms of both total television stations owned and television markets served.[7]

[4] Nexstar Media Group, Inc., *Form 10-K for the Fiscal Year Ended December 31, 2018* (February 27, 2019) at 1,5 (hereafter *Nexstar Form 10-K*).
[5] *Ibid.* at 5, 8-12.
[6] *Ibid.* at F-51.
[7] S&P Global Market Intelligence, *Top TV Station Owners*.

12. Tribune is a publicly traded diversified media and entertainment company headquartered in Chicago, Illinois[8] whose assets include 41 full power broadcast television stations, a cable network, a radio station, real estate and investments in a variety of media, websites and other related assets.[9] Tribune's broadcast television stations serve 33 television markets and reach 49 million, or 44 percent, of all U.S. households (without adjustments to employ the FCC's national television ownership rule methodology).[10] Tribune's broadcasting revenues were **{{BEGIN CI** [redacted] **END CI}}** in 2018.[11] Tribune is the **{{BEGIN CI** [redacted] **END CI}}** broadcast television station owner in the U.S. in terms of total station revenues, **{{BEGIN CI** [redacted] **END CI}}** in terms of total television stations owned and **{{BEGIN CI** [redacted] **END CI}}** in terms of television markets served.[12]

13. The Transaction is a cash merger transaction in which Nexstar will acquire all outstanding Tribune equity interests, resulting in Tribune becoming a wholly-owned subsidiary of Nexstar. Nexstar will obtain ownership of the 41 stations currently owned by Tribune.[13] To comply with the Commission's Local Television Multiple Ownership Rule ("Duopoly Rule") and National Television Ownership Limit, the merged company will divest 21 stations in 16 markets.[14] Of these 21 stations, eight are current Nexstar stations and 13 are

[8] Tribune Media Company, *Form 10-K for the Fiscal Year Ended December 31, 2018* (March 1, 2019) at 1 (hereafter *Tribune Form 10-K*).

[9] *Ibid.* at 5, 50.

[10] *Ibid.* at 7, 10-11.

[11] S&P Global Market Intelligence, *Top TV Station Owners*.

[12] *Ibid.*

[13] Nexstar Media Group, Inc. and Tribune Media Company, *FCC Form 315, Exhibit 15: Comprehensive Exhibit* (Amended April 2019) at 2, n. 9 and 16-17 (hereafter *Amended Exhibit 15*).

[14] *Amended Exhibit 15* at 1-2, n. 9; Nexstar, "Nexstar Media Group Enters into Definitive Agreement to Divest Two Indianapolis Stations for $42.5 Million" (April 8, 2019) (hereafter *Nexstar Divests Two Stations*) (available at https://www.nexstar.tv/indianapolis_station_divestitures/); Nexstar, "Nexstar Media Group Enters into Definitive Agreements to Divest Nineteen Stations in Fifteen Markets for $1.32 Billion" (March 20, 2019) (hereafter *Nexstar Divests Nineteen Stations*) (available at https://www.nexstar.tv/nexstar_tribune_divestiture_agreements/).

current Tribune stations.[15] As shown in Table 1, once these divestitures are complete, New Nexstar will own 161 full power stations,[16] will have approximately $4.6 billion in net broadcast revenues and will reach 38.3 percent of U.S. television households (adjusted to employ the FCC's national television ownership rule methodology).[17]

TABLE 1:
TOP 10 BROADCAST TV STATION OWNERS POST-TRANSACTION
BY COVERAGE OF U.S. TV HOUSEHOLDS ADJUSTED FOR UHF DISCOUNT {{BEGIN CI

[redacted]

END CI}}

III. Economic and Institutional Context

14. In this section I discuss relevant economic and institutional characteristics of the market for retransmission consent which provide context for my analysis of the Brattle Report. In the

[15] *Nexstar Divests Nineteen Stations*; *Nexstar Divests Two Stations*. Three of the current Tribune stations being divested are not owned by Tribune, but are operated by Tribune through a shared services agreement (SSA).

[16] Nexstar currently owns 138 full power stations. After the acquisition of 41 Tribune-owned full power stations and divestiture of 18 Nexstar and Tribune-owned full power stations, New Nexstar will own 161 full power stations (138 + 41 – 18 = 161). See *Nexstar Form 10-K* at 8-12; *Tribune Form 10-K* at 6, 12; *Nexstar Divests Nineteen Stations*; *Nexstar Divests Two Stations.*

[17] Amended Exhibit 15 at 34; Nexstar Media Group, Inc., *Acquisition of Tribune Media Company: Enhancing Nexstar's Position as North America's Leading Local Media Company* (December 3, 2018) at 6, 11-12 (hereafter *Nexstar Investor Presentation*) (available at https://www.nexstar.tv/wp-content/uploads/2018/12/Nexstar-Tribune-Investor-Presentation-FINAL-12-3-18.pdf).

first subsection, I note that television broadcasting is subject to economies of scale and scope, and also that it is a multi-sided market, and I explain that these characteristics have important implications for understanding the Transaction which are ignored by the Brattle Report. In the second subsection I provide contextual background on the retransmission consent market, including assessing changes in the level of retransmission consent and in the structure of the retransmission consent marketplace.

A. The Economics of Broadcast Television

15. The Brattle Report argues that the historical trend towards higher retransmission consent compensation can be attributed to "undue bargaining power"[18] resulting from consolidation in the television broadcasting business,[19] and further that the Transaction is motivated primarily by Nexstar's desire to achieve greater bargaining leverage.[20] While Brattle is correct that the retransmission consent market is a bargaining market in which prices and terms are affected by the relative bargaining power of the two parties (broadcasters and MVPDs),[21] its conclusions regarding the historical path of retransmission fees and the motivation for the Transaction are erroneous. In this section I describe two fundamental characteristics of the broadcast television business that provide alternative explanations.

[18] Brattle Report at 8.

[19] *Ibid.* at 3 ("Large broadcaster groups demand and obtain higher rates because of the leverage they enjoy through ownership of a large bundle of stations."). Elsewhere the report is more circumspect. See e.g., *ibid.* at 7 ("The simultaneous increase in the retransmission fee revenues and in the consolidation of the TV broadcast industry *raises the question* of what effect consolidation has on broadcast groups' bargaining power and their disproportionate ability to raise fees. In the next section, we describe the mechanisms that generate this increase in bargaining power and empirically demonstrate their *relevance*.") (emphasis added).

[20] *Ibid.* at 5.

[21] *Ibid.* at 7 ("Neither the MVPD nor the broadcast groups are price takers in the broadcast retransmission industry. The retransmission fee is a result of a bilateral negotiation that is determined to a large extent by the relative bargaining position of the two sides."). Compare to Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris LLC (2009) (hereafter Eisenach (2009)) at 12 ("The outcomes of negotiations between broadcasters and MVPDs are a function of the bargaining power of each side.").

First, I explain that the Transaction is likely motivated by strong economies of scale and scope in the television broadcasting business, which will allow New Nexstar to produce higher quality output at lower costs. Second, I explain how the fact that television broadcasting is a multi-sided market affects the level of retransmission compensation and how changes on the advertising side of the market have also likely contributed to increasing retransmission compensation. Neither of these market characteristics has anything to do with increased bargaining leverage or broadcaster consolidation.

1. Economies of Scale and Scope

16. The television broadcasting business is subject to strong economies of scale and scope. Video content production is subject to the so-called "first-copy" property associated with most intellectual property: The first copy is expensive to produce, but the marginal cost of distributing additional copies is close to zero.[22] Television broadcasting also requires significant fixed-cost investments in equipment such as studios and terrestrial antennas. There are also economies of scale and scope associated with marketing (i.e., advertising sales) and administration.

17. The Brattle Report gives short shrift to the significance of economies of scale and scope in broadcast consolidation in general, and specifically to their role in this Transaction. For example, it states without support that "[c]onsumers do not appear to have reaped benefits from past consolidation among TV broadcast groups,"[23] and while it acknowledges briefly

[22] See e.g., Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge: Harvard University Press, 1992) (hereafter Owen and Wildman (1992)).

[23] Brattle Report at 5.

the possibility of increased "advertisement efficiency,"[24] it dismisses the possibility of such efficiencies in this Transaction by offering misleading references to Nexstar's investor presentation describing the Transaction, suggesting that the primary synergies claimed by Nexstar are the result of its ability to gain increased retransmission consent fees.[25]

18. Contrary to Brattle's contentions, there is a substantial body of empirical research confirming the existence of significant economies of scale and scope in television broadcasting,[26] including evidence specifically relating to economies of scale at the station group level. For example, a 2016 study by Stahl found that consolidation leads to increased viewership, suggesting that stations owned by larger broadcast groups can offer more high-quality content to consumers.[27] An earlier study by Rainey found similar results: Holding other factors constant, stations owned by broadcast groups were found to have higher ratings than singly owned stations.[28]

19. Importantly, the effects of economies of scale and scope in broadcast television include increases in the quality and quantity of television programming.[29] For example, Stahl concluded that "[i]ncreases in viewership likely reflect the ability of larger broadcast groups to purchase better syndicated programming and to provide news programming to stations

[24] *Ibid.* at 6 (citing Tasneem Chipty and Christopher Snyder, "The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Industry," *The Review of Economics and Statistics* 81;2 (1999) 326-340 (hereafter Chipty and Snyder (1999))).

[25] Brattle Report at 5.

[26] See Owen and Wildman (1992) at 151. See also Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, Navigant Economics (June 2011) at 14 (hereafter Eisenach and Caves (2011)) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1894941) (finding that output rises 22 percent faster than costs over the relevant range).

[27] Jessica Calfee Stahl, "Effects of Deregulation and Consolidation of the Broadcast Television Industry," *American Economic Review* 106;8 (2016) 2185-2218 at 2217 (hereafter Stahl (2016)).

[28] Mark Christopher Rainey, *The Effects of Mergers in Broadcast Television*, Massachusetts Institute of Technology Doctoral Dissertation (2001) at 81-83 (hereafter Rainey (2001)).

[29] See Eisenach and Caves (2011) at 46-47 for a summary of the relevant literature.

that could not afford to produce their own."[30] An FCC-commissioned media ownership study by Shiman found that both corporate parent revenues and duopoly status have statistically significant positive effects on news output.[31] Another FCC-commissioned study by Crawford also found a positive statistically significant effect on news output from increased corporate parent revenues in some regression specifications.[32]

20. In recent years, the Commission has reformed broadcast ownership rules to allow broadcast station groups to more easily achieve economies of scale and scope that benefit local programming. In 2017, for example, the Commission modified the Duopoly Rule to eliminate the so-called Eight-Voices Test.[33] In support of its decision, the Commission cited

[30] Stahl (2016) at 2217.

[31] Daniel Shiman, *The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming*, Federal Communications Commission Media Ownership Study 4, Section I (July 24, 2007) at I-21, Table I.6. Note that Shiman also found that the number of stations owned by a corporate parent has a statistically significant negative effect on news output. However, when Shiman's coefficients estimates on station count and revenues are applied to the Transaction, the positive revenue effect outweighs the negative effect of station count. Indeed, Shiman's estimates suggest the Transaction will add an additional 32 minutes of news per day to each current Nexstar station and an additional 22 minutes per day to each current Tribune station. Shiman also estimated a positive and significant impact of duopolies on news output. Applying his coefficient for duopoly status to the net increase of three duopolies resulting from the Transaction (KASW/KNXV, KOIN/KRCW and WDVM/WDCW) will add an additional 24 minutes of news per day to the six stations involved in those duopolies. See *ibid.* at I-27. Note that KASW/KNXV will be a duopoly owned by E.W. Scripps Company after the planned divestiture of KASW. KASW is the only full power station in the Phoenix DMA owned by either Nexstar or Tribune, and KNXV is the only full power station in the Phoenix DMA owned by E.W. Scripps Company. Therefore, after New Nexstar's planned divestiture of KASW, E.W. Scripps Company will own a duopoly in the Phoenix DMA that did not previously exist. See *Nexstar Divests Nineteen Stations*; BIA/Kelsey, *TV Analyzer Database* (December 5, 2018) (Nexstar Media Group, Inc. and Tribune Media Company, *FCC Form 315, Exhibit 20: Top-Four Showing, Attachment D.5* (January 2019) ("CI-BIA-TV_Analyzer_Database.xls") (hereafter *TV Analyzer Database*)).

[32] Gregory S. Crawford, *Television Station Ownership Structure and the Quantity and Quality of TV Programming*, Federal Communications Commission Media Ownership Study 3 (July 23, 2007) at 23, 26.

[33] Federal Communications Commission, *In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al*, *Order on Reconsideration and Notice of Proposed Rulemaking*, MB Docket No. 14-50 *et al* (November 20, 2017) (hereafter *FCC Order (2017)*) at ¶2. At the same time, the Commission eliminated the Newspaper/Broadcast and Radio/Television Cross-Ownership Rules, citing evidence that cross-ownership benefits the quantity and quality of local news and information by "creating efficiencies through the sharing of expertise, resources, and capital." See *ibid.* at ¶30. Commission studies on media ownership have demonstrated that cross-owned television stations produce as much as 50 percent more local news and 25 percent more coverage of local and state politics than non-cross-owned stations. See Jack Erb, *Local Information Programming and the Structure of Television Markets*, Federal Communications Commission Media Ownership Study 4 (May 20, 2011) at

evidence that common ownership of television stations in a market allows stations to invest more in local news and public interest programming.[34] Further, the Commission points to evidence in the record suggesting that the efficiencies of common ownership can be relatively more beneficial and can lead to more high-quality local programming in the small and mid-size markets where the Eight-Voices Rule was most likely to restrict common ownership.[35]

21. In addition to ignoring evidence of economies of scale and scope in television broadcasting generally, the Brattle Report also mischaracterizes Nexstar's stated rationale for the Transaction, suggesting that Nexstar's investor presentation ignores efficiencies and instead credits the synergies from the sale mainly to increased retransmission consent fees.[36] To the contrary, both the Nexstar investor presentation and Nexstar's 10-K make clear that efficiencies generated by economies of scale and scope are the key drivers of the Transaction. For example, the investor presentation specifically indicates that "[i]ncreased scale positions Nexstar to more effectively compete with other media and innovate."[37] Nexstar's most recent 10-K affirms the importance of economies of scale and scope: "By leveraging our size and corporate management expertise, we are able to achieve economies of scale by providing programming, financial, sales and marketing support to our stations and the stations we provide services to."[38] Further, the synergies from retransmission consent fees identified in the investor presentation are attributed to "applying Nexstar rates to Tribune subscriber

27-28; Jeffrey Milyo, *The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News*, Federal Communications Commission Media Ownership Study 6 (September 2007) at 1.

[34] *FCC Order (2017)* at ¶77.

[35] *Ibid*.

[36] Brattle Report at 5.

[37] *Nexstar Investor Presentation* at 9.

[38] *Nexstar Form 10-K* at 7.

counts," presumably through "step up" or "after acquired" clauses in Nexstar's *current* contracts with MVPDs to which the MVPDs, of course, agreed. Thus, contrary to Brattle's suggestion, these synergies plainly are not the result of increased bargaining power resulting from the Transaction.[39]

22. By ignoring the importance of economies of scale and scope in television broadcasting, the Brattle Report leaves the impression that the primary motivation for broadcast station mergers is to increase the bargaining power of broadcasters relative to MVPDs. Instead, the evidence strongly suggests that economic efficiency gains are the primary motivator for broadcast station mergers in general and for this Transaction in particular.

2. Multi-Sidedness

23. A second aspect of broadcast television is that it is a classic multi-sided market which creates value, in part, by bringing different types of customers – i.e., advertisers, content creators and viewers – together in a marketplace or "platform."[40] Economic efficiency in platform markets is determined by the market operator's ability to achieve the optimal blend of platform participants and to spread the fixed costs of operating the platform across customer groups in the most efficient way, typically by setting prices based in part on the elasticity of demand of different customer groups (i.e., Ramsey pricing).[41] As a result, changes in the elasticity of demand among one class of customers will generally cause changes in prices for

[39] The Investor Presentation also suggests further synergies could result from retransmission consent agreements to be negotiated later this year, but does not attribute these to bargaining power. It is at least equally plausible to attribute these synergies to the increased value generated by improvements in program quality resulting from the Transaction.

[40] See generally Jean-Charles Rochet and Jean Tirole, "Platform Competition in Two-Sided Markets," *Journal of the European Economic Association* 1;4 (June 2003) 990-1029.

[41] See e.g., William J. Baumol, *Regulation Misled by Misread Theory* (AEI-Brookings Joint Center for Regulatory Studies, 2006) at 3.

other groups. As I have explained elsewhere, in the case of retransmission consent it seems likely that increasing competition on the advertising side of the broadcast television business model (e.g., from cable and online media) has made the demand for broadcast television advertising more elastic, while increasing demand for content has reduced the elasticity of demand for broadcast content.[42] Given these shifts, it is unsurprising that broadcasters have adjusted pricing to shift some of the fixed costs of television broadcasting from the advertising side to the content side of the platform by seeking to negotiate higher retransmission compensation. As with economies of scale and scope, the Brattle Report's exclusive focus on consolidation and station group bargaining power causes it to ignore other obvious explanations for changes in retransmission consent fees.

B. The Market for Retransmission Consent

24. In addition to ignoring basic economic characteristics of the broadcasting business, the Brattle Report also mischaracterizes the history of retransmission compensation and the structural changes that have occurred on both sides of the retransmission consent marketplace. I begin this section by briefly recounting the origins of the retransmission consent regime. Next, I present data on the level of retransmission compensation over time which indicates that broadcasters are not receiving disproportionate compensation. Third, I note that the Brattle Report's attribution of rising retransmission compensation to broadcast consolidation ignores the fact that consolidation has also occurred on the distribution side of the market, thus (other things equal) increasing MVPDs' relative bargaining leverage.

[42] See e.g., Jeffrey A. Eisenach, *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA Economic Consulting (July 2014) (hereafter Eisenach (2014)) at 8.

1. Origins of Retransmission Consent

25. Prior to 1992, cable operators were not required to compensate broadcasters for carrying their signals.[43] As cable and DBS grew rapidly in the late 1980s and early 1990s, reaching more than **{{BEGIN CI** [redacted] **END CI}}** subscribers in 1990,[44] Congress became concerned that the inability of broadcasters to be compensated for their signals was distorting the marketplace.[45] In 1992, it passed the Cable Act,[46] which created the retransmission consent regime and re-imposed must-carry obligations which had been eliminated by a 1985 court decision.[47]

26. Under the Cable Act, commercial broadcasters must, every three years, elect to be eligible for must carry or, alternatively, choose to negotiate retransmission consent. If they choose must carry, they are guaranteed carriage on cable systems operating within their geographic broadcast footprints, but receive no compensation; if they choose retransmission consent, they are not guaranteed carriage, but have the right to "negotiate in good faith" for compensation.[48] The intended effect of retransmission consent, according to the Senate, was

[43] For a more extensive discussion, see Eisenach (2009) at 3-10 and Eisenach (2014) at 3-7.

[44] See SNL Kagan, *Broadband Cable Financial Databook* (December 2013) at 8.

[45] See *Cable Television Consumer Protection and Competition Act of 1992* (S. Rep. No. 102-92, 102d Cong., 1st Sess., 1991; 1992 U.S.C.C.A.N. 1133) (hereafter *Senate Report*) at 1168 (finding that the lack of compensation was creating "a distortion in the video marketplace which threatens the future of over-the-air broadcasting…. [by supporting] a system under which broadcasters in effect subsidize the establishment of their chief competitors.").

[46] See *Cable Television Consumer Protection Act of 1992*, Pub. L. No. 102-385 (1992); the FCC's implementing regulations are at 47 C.F.R § 76.55-62 (cable must carry) and 47 C.F.R. § 76.64 (cable retransmission consent).

[47] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985).

[48] In passing the Cable Act, Congress recognized that satellite operators were treated differently from cable operators in the 1976 Copyright Act, and thus did not impose retransmission consent on DBS. It extended retransmission consent to DBS operators in 1999 in the Satellite Home Viewer Improvement Act (SHVIA), while at the same time permitting DBS operators to carry local broadcast signals even to households that were not "unserved." DBS operators are not subject to the must carry requirement. However, if they choose to carry any local broadcast stations, they are required to carry all stations that have elected must carry (the "carry one, carry all" rule). See Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sep. 8, 2005) (hereafter *SHVERA Report*) at ¶¶13-14. SHVIA was extended in 2004 by the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447 (2004) (SHVERA); implementing regulations are at 47 C.F.R.

to "establish a marketplace for the disposition of the rights to retransmit broadcast signals" without "dictat[ing] the outcome of the ensuing marketplace negotiations."[49]

27. In the initial retransmission compensation negotiations, distributors rejected broadcasters' proposals for cash compensation and instead offered various forms of in-kind compensation, a situation which persisted for more than a decade.[50] It was not until 2005 that broadcasters first began receiving cash compensation.[51]

2. Changes in Retransmission Compensation

28. The Brattle Report correctly reports that retransmission consent fees have risen since 2006 both in absolute terms and in terms of the amount paid per subscriber.[52] However, its suggestion that increases in retransmission consent fees are economically unjustified or contrary to the public interest is incorrect. Its effort to attribute rising retransmission compensation to broadcast group consolidation is also erroneous.[53]

29. First, the Brattle Report mischaracterizes both the level and the rate of increase of retransmission consent fees. In fact, recent increases in retransmission consent fees have been much lower than Brattle implies, and there is no evidence that current rates are above an efficient, market-based level. As shown in Figure 1, the growth of retransmission consent fees has moderated substantially in recent years. As the figure shows, Kagan estimates total

§76.66. SHVERA also made several changes in the compulsory license regime affecting distant signal carriage by DBS operators. See *SHVERA Report* at ¶¶15-16.

[49] See *Senate Report* at 1168-1169.

[50] See *SHVERA Report* at ¶10.

[51] See e.g., Eisenach (2014) at 17.

[52] Brattle Report at 7.

[53] The Brattle Report insinuates that rising retransmission consent fees are the result of broadcast consolidation but never quite says so explicitly. Rather it says the evidence "raises the question" and that consolidation is "relevant." *Ibid.* ("The simultaneous increase in the retransmission fee revenues and in the consolidation of the TV broadcast industry *raises the question* of what effect consolidation has on broadcast groups' bargaining power and their disproportionate ability to raise fees. In the next section, we describe the mechanisms that generate this increase in bargaining power and empirically demonstrate their *relevance*.") (emphasis added).

retransmission consent fees rose by just **{{BEGIN CI** [redacted] **END CI}}** percent in 2018 and projects growth to average **{{BEGIN CI** [redacted] **END CI}}** percent over the next five years.[54]

FIGURE 1:
RETRANSMISSION CONSENT FEES

[redacted] ***END CI}}***

30. It is also important to look at retransmission compensation in the context of other marketplace developments. For example, a growing proportion of retransmission consent fees are now passed on to the television networks in the form of "reverse compensation." Indeed, as shown in Figure 2, in 2018 networks received **{{BEGIN CI** [redacted] **END CI}}** percent of the total retransmission fees paid to non-owned and operated stations, up from just **{{BEGIN CI** [redacted] **END CI}}** percent in 2012.

[54] Kagan, *TV Station Retransmission and Reverse Retransmission Projections 2006 - 2023* (June 2018).

FIGURE 2:
REVERSE RETRANSMISSION FEES AS A PERCENTAGE OF NON-OWNED AND OPERATED RETRANSMISSION REVENUE (2012 – 2023) {{BEGIN CI

[redacted] ***END CI}}***

31. Increasing reverse compensation has cut significantly into the revenues received by station groups, with growth slowing to just **{{BEGIN CI** [redacted] **END CI}}** percent in 2017, and is expected to cut further in the future. Indeed, Kagan expects *net* retransmission compensation received by station groups (after accounting for reverse compensation) to decline beginning in **{{BEGIN CI** [redacted] **END CI}}**. In bargaining theory terms, the effect of increasing demands by the networks for reverse compensation is to reduce the size of the pool being bargained over by broadcasters and MVPDs, causing broadcasters to demand more from MVPDs for reasons that have nothing to do with consolidation or a change in the relative bargaining leverage of broadcasters and MVPDs.

FIGURE 3:
NET RETRANSMISSION CONSENT FEES OF NON-OWNED AND OPERATED STATIONS
(2012 – 2023) ($MM) {{BEGIN CI

[redacted]

[redacted] ***END CI}}***

32. It is also significant that the growth of retransmission compensation has coincided with rising compensation for all forms of video content, thanks to the emergence of online video distributors (like Amazon and Netflix) which has increased competition in the market for viewers.[55] As shown in Figure 4 below, the proportion of total programming costs represented by retransmission fees has also leveled out and is now projected to decline. Further, as Nexstar points out in its most recent 10-K filing, "[b]roadcasters currently deliver more than 30% of all television viewing audiences in a pay television household but are paid approximately 12-14% of the total cable programming fees."[56]

[55] See e.g., David Blackburn, Jeffrey A. Eisenach and Bruno Soria, *The Impact of Online Video Distribution on the Global Market for Digital Content*, NERA Economic Consulting (March 2019).

[56] *Nexstar Form 10-K* at 44.

FIGURE 4:
RETRANSMISSION COMPENSATION PERCENTAGE OF MVPD PROGRAMMING COSTS (2010 – 2022) {{BEGIN CI

[redacted] ***END CI}}***

3. Consolidation Among MVPDs

33. The Brattle Report is correct that the retransmission consent market is a bargaining market in which prices and terms are affected by the relative bargaining power of the two parties (broadcasters and MVPDs),[57] and also that there has been consolidation among broadcast stations.[58] Among the many market developments it ignores, however, is the fact that consolidation has also occurred among MVPDs. Most notably, the 2015 acquisitions of DIRECTV by AT&T and of Time Warner Cable by Charter increased concentration in the

[57] Brattle Report at 7 ("Neither the MVPD nor the broadcast groups are price takers in the broadcast retransmission industry. The retransmission fee is a result of a bilateral negotiation that is determined to a large extent by the relative bargaining position of the two sides."). Compare to Eisenach (2009) at 12 ("The outcomes of negotiations between broadcasters and MVPDs are a function of the bargaining power of each side.").

[58] Brattle Report at 4.

MVPD business significantly. Both industry analysts and the FCC recognized at the time that the effect would be to increase MVPD bargaining power relative to broadcasters.[59] In the context of the Charter-Time Warner merger, the FCC found that New Charter "would be likely to achieve costs savings from a reduction in its programming costs" that Charter could not achieve without the transaction.[60] Similarly, the FCC, in AT&T's acquisition of DIRECTV, found that "AT&T's programming payments may be reduced as a result of the proposed transaction."[61] Thus, to the extent relative bargaining power is affected by industry structure, the Brattle Report ignores half of the equation.

IV. Brattle's Empirical Analyses

34. The Brattle Report concludes that the Transaction "will result in higher retransmission prices for DISH, leading to higher prices for consumers."[62] It attributes these effects to what it argues would be the increased bargaining power New Nexstar would have as compared with Nexstar and Tribune separately,[63] and it presents several analyses which it asserts support this conclusion. Specifically, it proffers: (a) a *"blackout"* analysis of the propensity of large and small station groups to be involved in retransmission-related carriage interruptions; (b)

[59] SNL Kagan, *Economics of Broadcast TV Retransmission Revenue* (August 2016) at 28 (available at https://www.snl.com/web/client?auth=inherit#news/docviewer?KeyProductLinkType=2&mid=35194921) (noting that AT&T's acquisition of DIRECTV and Charter's acquisition of Time Warner Cable would "likely affect the distributor's leverage while negotiating carriage contracts with TV station owners.").

[60] Federal Communications Commission, *In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order,* MB. Docket No. 15-149 (May 10, 2016) at ¶¶343, 346.

[61] Federal Communications Commission, *In the Matter of Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order,* MB Docket No. 14-90 (July 28, 2015) at ¶287. See also SNL Kagan, *Media Trends* (December 2014) at 76 (available at https://www.snl.com/web/client?auth=inherit#news/docviewer?id=30290744) (noting that "consolidation and scale have long been touted by industry insiders as a means to control rapidly growing programming expenses.").

[62] Brattle Report at 3.

[63] *Ibid.* at 29 ("The proposed merger of Nexstar and Tribune gives the combined company the power to use the threat of simultaneous blackouts of all Nexstar and Tribune stations to extract higher retransmission rates than either company could obtain individually.").

a *"big and small"* analysis of average rates paid by DISH to broadcast groups above and below specified thresholds; (c) a *"regression analysis"* of retransmission rates paid by DISH based on broadcast group size; (d) a *"before and after"* analysis of retransmission rates paid prior to and subsequent to broadcast group mergers; and, (e) a *"goalpost"* analysis of DISH's negotiating strategies when it faces the prospect of overlapping blackouts with multiple broadcasters.

35. In the five subsections below, I explain why each of these analyses is fundamentally flawed and does not support Brattle's conclusions with respect to the effects of the Transaction. In fact, as I explain, some of the evidence in the Brattle Report supports the opposite conclusion, i.e., that other things being equal, large station groups charge lower retransmission consent fees, not higher ones.

A. Blackout Analysis

36. The Brattle Report asserts that "large broadcast groups have not been shy in leveraging their undue bargaining power," and presents data which purports to show that large groups "tend to impose blackouts more frequently than smaller broadcast groups."[64] But the evidence Brattle presents does not demonstrate that large groups are in any meaningful way more likely to be involved in blackouts than small ones, nor does it provide any economic basis for believing that such differences, if they did exist, would be caused by large groups' purported "undue bargaining power."

37. The Brattle Report presents two sets of data comparing the frequency of blackouts between large and small broadcast groups. First, in Figure 3, it presents data on the number of

[64] *Ibid.* at 8.

blackouts per broadcast group in 2018 involving large groups as compared with small groups, where large groups are defined as the top 10 groups by number of stations. [65] The figure shows that large broadcast groups are involved in an average of 0.22 blackouts per year while small station groups are involved in an average of 0.13 blackouts per year, a ratio of 1.7 to one.[66] From this data, Brattle concludes that "the top ten broadcast groups, measured in terms of total number of stations nationally, tend to impose blackouts more frequently compared to smaller broadcast groups."[67]

38. A more careful assessment shows that Figure 3 does not support Brattle's conclusion because it fails to account for the fact that large station groups overlap with more MVPDs than smaller groups, and thus are required to negotiate more retransmission consent agreements. Hence, it is not surprising that a simple count would show more impasses for large station groups than small ones, even if the likelihood of an impasse were the same.

39. To assess the magnitude of this error, I use data from BIA/Kelsey and Kagan to calculate the number of MVPDs overlapped by the 10 largest broadcast station groups and by 79 smaller station groups with retransmission consent revenues.[68] I find large groups overlap with an

[65] Figure 3 does not specify which station groups are being considered, but in Figure 4 Brattle identifies the 10 largest groups as Gray Television Inc, Sinclair Broadcast Group Incorporated, Hearst Television Inc, Nexstar Media Group Inc, TEGNA Inc, Tribune Media Company, Quincy Media Inc, EW Scripps Co, News-Press & Gazette Company and Fox Television Stations Incorporated. See Brattle Group at Figure 4. Brattle defines all other broadcasters as the "Smallest 104," which I was unable to identify based on either BIA/Kelsey or Kagan data. I identified 183 unique parent companies in U.S. DMAs (excluding American Samoa, Guam, San Juan, PR, and Virgin Islands) in the BIA/Kelsey data, of which 89 report retransmission consent revenue. I was also unable to replicate the Brattle Report's list of top 10 station groups based on station count. Based on BIA/Kelsey data, I identify three groups as top 10 groups which are included in the Brattle list (ION Media, Univision and Entravision), replacing Fox Television Studios Incorporated, Quincy Media Inc and News-Press & Gazette Company, which are included by Brattle. See *TV Analyzer Database*. BIA/Kelsey station ownership data were adjusted for Nexstar and Tribune stations based on Nexstar's 2018 Form 10-K and the parties' Comprehensive Exhibit to FCC Form 315. See *Nexstar Form 10-K* at 8-12; *Amended Exhibit 15* at 16-17.

[66] 1.7 = 0.22 / 0.13.

[67] Brattle Report at 8.

[68] As explained above, I am unable to replicate precisely Brattle's station count data. For this calculation I accept Brattle's identification of the top 10 station groups.

average of **{{BEGIN CI** [redacted] **END CI}}** MVPDs compared with an average of **{{BEGIN CI** [redacted] **END CI}}** MVPDs for smaller groups.[69] Thus, if large station groups and small station groups were equally likely to be involved in an impasse for any given retransmission consent negotiation, large station groups would have 1.8 times as many impasses simply because they were involved in 1.8 times as many negotiations. As noted above, the Brattle Report estimates the top 10 broadcast groups were involved in 1.7 times as many impasses as smaller groups. Thus, Brattle's data demonstrates the opposite of what it claims. That is, for any given retransmission consent negotiation, the likelihood of an impasse is *slightly lower* for large station groups than for small ones.

40. In Figure 4, the Brattle Report presents a tally of DMAs affected by blackouts associated with large versus small station groups. Unlike Figure 3, which appears to count blackouts occurring in 2018, Figure 4 appears to count all blackouts from 2010 through 2018.[70] On this

[69] *TV Analyzer Database*; *Nexstar Form 10-K* at 8-12; *Amended Exhibit 15* at 2, n. 9 and 16-17; Kagan, *MediaCensus All Video by DMA Q4 2018* (March 28, 2019) (hereafter *All Video by DMA*). Overlaps are defined here as the presence of both a broadcast TV station with retransmission consent revenues and an MVPD in the same DMA. However, results are similar when including stations with no retransmission consent revenue, with top 10 broadcast groups overlapping with an average of **{{BEGIN CI** [redacted] **END CI}}** and other broadcast groups overlapping with an average of **{{BEGIN CI** [redacted] **END CI}}**. Data on DMA presence are available for 14 specific MVPDs (Atlantic Broadband Group LLC, Cable One Inc., Cablevision Systems Corp., Charter Communications Inc., Comcast, Cox Communications Inc., Mediacom Communications Corp., RCN Corp., WideOpenWest Inc., Suddenlink Communications, DIRECTV Group Holdings LLC, DISH Network Corp., AT&T Inc. and Verizon Communications Inc.) and two "all other" categories ("All Other Basic Cable" and "All Other Telco Video"). For simplicity, the presence of subscribers for each "all other" category counts as one MVPD presence. Station data are from December 2018 and sourced from BIA/Kelsey; however, BIA/Kelsey station ownership data were adjusted for Nexstar and Tribune stations based on Nexstar's 2018 Form 10-K and the parties' Comprehensive Exhibit to FCC Form 315. Retransmission consent revenues are for 2017 and sourced from BIA/Kelsey. MVPD data are from Q4 2018 and sourced from Kagan.

[70] The Brattle Report does not describe the calculations underlying Figure 3, and I was unable to replicate them precisely. My attempt to replicate their results came closest to their actual results, when using the American Television Alliance (ATA) data cited in the report, I assumed: (a) the data in the table is for 2018 blackouts; (b) the number of stations blacked out in a given DMA is equal to the number of networks reported in the ATA data set; (c) Raycom blackouts are attributed to Gray Television (as discussed in ¶41); (d) "top 10" station groups are the groups identified in Figure 4 of the Brattle Report; and (e) the numerator of the statistic reported in Figure 3 is the number of blackouts reported by ATA for each set of station groups (large vs. other) and the denominator is the number of stations owned by each set of station groups. Based on these assumptions, I calculate 128 station blackouts for top 10 groups and 84 for all other broadcasters. I divide these figures by the number of full-power stations owned by each group in 2018

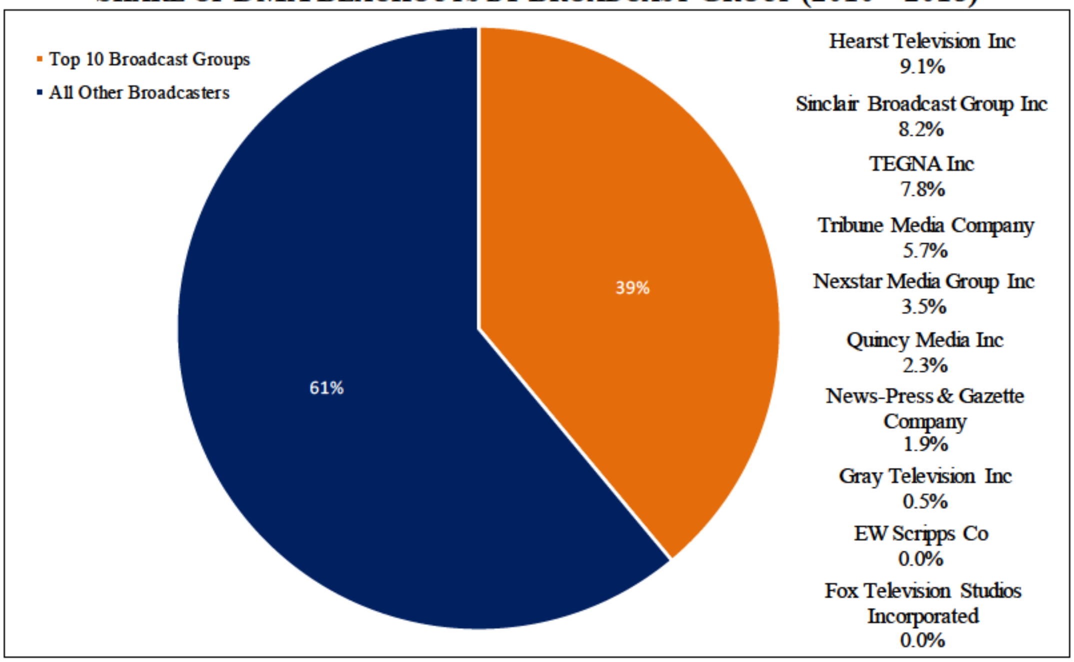
basis, Brattle purports to show that large station groups accounted for 58 percent of DMAs affected by blackouts compared with 42 percent for smaller station groups.

41. Just as with the data presented in Figure 3, the data in Figure 4 do not support the Brattle Report's conclusions for two primary reasons. First, the data in Figure 4 appear to attribute to large station groups blackouts involving stations that were owned by small station groups at the time the blackout occurred. For example, simply counting the number of blackouts for Gray Television shown in the ATA data upon which Figure 4 is based shows that, between 2010 and 2018, Gray was involved in blackouts affecting just five DMAs, or about 0.5 percent of the DMA blackouts shown in the ATA data. Yet Figure 4 shows Gray accounting for 11.5 percent of all DMA blackouts. The difference appears to be accounted for by the fact that Brattle attributes DMA blackouts to the station groups which *currently* own the stations involved in each blackout rather than to the owners *at the time of the blackout.* For example, Brattle appears to be attributing blackouts to Gray stations which, at the time the blackouts occurred, were owned by Raycom Media, United Communications, Eagle Creek, ICA Broadcasting and Prime Cities, of which only Raycom was at the time of the blackout a top-10 group. Similar errors are present in the Brattle Report's calculations for five of the ten station groups listed in Figure 4.

reported by BIA/Kelsey (625 for large groups, 656 for small groups). See American Television Alliance, *Retrans Blackouts 2010 – 2019* (hereafter *American Television Alliance*) (available at https://www.americantelevisionalliance.org/retrans-blackouts-2010-2019/); *TV Analyzer Database*. The resulting figures are 20.5 percent for stations in top-10 groups and 13 percent for other stations (as compared with the 22 percent and 13 percent figures calculated by Brattle and shown in Figure 3.) The correct interpretation of these statistics is that 20.5 percent of stations in the top 10 groups and 13 percent of other stations were subject to a blackout in 2018, which is different from the "Number of Blackouts per Broadcast Group" indicated by the title of Brattle's Figure 3 and the accompanying text.

42. To assess the magnitude of this error, I re-calculated the totals in Figure 4 to attribute to each group only DMA blackouts associated with stations owned by the top-10 groups identified in Brattle's Figure 4 at the time the blackout occurred. As shown in Figure 5, when calculated in this way, the top 10 groups accounted for just 39 percent of DMA blackouts rather than the 58 percent suggested by the Brattle Report.[71]

FIGURE 5:
SHARE OF DMA BLACKOUTS BY BROADCAST GROUP (2010 – 2018)



Sources: American Television Alliance; Brattle Report at Figure 4.

43. A second problem with the data presented in Figure 4 is that it has nothing to do with the relative likelihood of large and small groups being engaged in negotiating impasses, and hence does not support Brattle's contention that large groups engage in blackouts "more frequently" than smaller ones. Instead, it reflects the fact that large broadcast groups own

[71] I also performed an alternative calculation which attributed DMA blackouts of stations which belonged to station groups which were top 10 station groups at the time of the blackout and which were later acquired by the groups listed in Brattle's Figure 4. Counted in this way, I calculate that the large groups identified in Figure 4 accounted for 53 percent of DMA blackouts versus 47 percent for small groups.

more stations than smaller groups, such that each blackout tends to affect more DMAs. For example, from 2010 through 2018, impasses involving the top 10 groups listed in Brattle's Figure 4 affected an average of 15.2 DMAs per impasse compared with an average of 3.3 DMAs for other groups. Thus, Brattle's analysis simply confirms a mathematical truism – large groups have more stations – but says nothing whatsoever about the relative proclivity for blackouts, let alone the bargaining power of large versus small groups.

44. Before leaving the topic of blackouts, it is worth noting that the same data relied upon by Brattle for its erroneous conclusions about station group blackouts show that the market participant with the highest proclivity for blackouts, by a wide measure, is DISH itself.

TABLE 2:
DISH MARKET SHARE OF TOTAL VIDEO SUBSCRIBERS, NEGOTIATION IMPASSES AND DMA-BLACKOUTS (2010 – 2018) {{BEGIN CI

[redacted] ***END CI}}***

45. As shown in Table 2, DISH accounted for approximately **{{BEGIN CI** [redacted] **END CI}}** percent of MVPD subscribers from 2010 through 2018, but has accounted for between approximately

37 percent of all impasses and more than half of all DMA blackouts.[72] By comparison, the broadcast group involved in the most DMA blackouts, Raycom, accounted for just 2.6 percent of impasses and 10.1 percent of DMA blackouts. If, as Brattle suggests, the propensity to be involved in blackouts was a meaningful indicator of bargaining power, these data would demonstrate that the leverage advantage lies with DISH, not the broadcasters.[73]

B. Big and Small Analysis

46. The Brattle Report next undertakes a big and small analysis, which it offers in two varieties.[74] First, it presents the results of what it describes as a "simple statistical analysis" comparing retransmission consent fees paid by DISH to different broadcast groups classified by the size of the group. Second, it compares the retransmission consent fees DISH pays to Nexstar to the fees it pays to Tribune. Neither analysis supports its conclusions regarding the probable effects of the Transaction.

[72] DISH's nationwide coverage, which requires it to negotiate with all station groups, does not account for its high share of impasses and DMA blackouts. For example, over the period from 2010 to 2018, DISH was involved in 69 impasses compared to 47 for DIRECTV, which negotiates with just as many broadcast groups. See *American Television Alliance*; *All Video by DMA*. In 2018, Kagan reports that DISH was involved in three of the four retransmission consent signal disruptions affecting more than one million subscribers. On average, these disruptions lasted **{{BEGIN CI** [redacted] **END CI}}** days, affected **{{BEGIN CI** [redacted] **END CI}}** markets and **{{BEGIN CI** [redacted] **END CI}}** million subscribers. The only other large impasse, involving Verizon and Tegna, lasted just {{**BEGIN CI** [redacted] **END CI**}} days and affected just **{{BEGIN CI** [redacted] **END CI}}** markets and **{{BEGIN CI** [redacted] **END CI}}** million subscribers. See Atif Zubair, "2018 Retrans Roundup Shows Longer Signal Disruptions, But Plenty of Deals Inked," *Kagan* (January 18, 2019); Etan Vlessing, "Univision, Dish Network Settle Long-Running Carriage Dispute," *The Hollywood Reporter* (March 26, 2019) (available at https://www hollywoodreporter.com/news/univision-dish-network-settle-long-running-carriage-dispute-1197280); "Entravision's Univision and UniMás Affiliated Television Stations Return to Dish Network," Seeking Alpha (April 11, 2019) (available at https://seekingalpha.com/pr/17474715-entravisions-univision-unimas-affiliated-television-stations-return-dish-network); Jon Lafayette, "Tegna Reaches Multi-Year Carriage Deal with Verizon," BC+ (January 3, 2019) (available at https://www.broadcastingcable.com/news/tegna-reaches-multi-year-carriage-deal-with-verizon).

[73] In reality, the propensity to engage in blackouts is a function of many factors, including especially the combined losses to the parties of failing to achieve agreement, and is not a reliable indicator of market power. See Eisenach (2009).

[74] See Brattle Report at 15-18.

47. The first version of the big and small analysis divides broadcast groups into two categories based on two criteria, group broadcast revenues from Big 4 stations and the number of DISH subscribers reached by Big 4 stations for each group, both for 2016. "Small" groups are defined as those with annual revenues below $500 million or fewer than 1.5 million DISH subscribers; "large" groups are those with $500 million or more in revenues and 1.5 million or more DISH subscribers. The analysis consists of comparing the monthly, per subscriber retransmission fees paid by DISH to large and small groups, defined as described above. The results are presented in Brattle's Table 3, which indicates that DISH pays higher rates to large groups than small groups and that the differences (using a simple t-test) are statistically significant. From this, Brattle concludes that "DISH has paid lower retransmission fees (on a per subscriber per month basis) for the Big 4 stations of the smaller broadcast groups compared to those of larger ones."[75]

48. While I do not have access to the underlying data upon which this analysis is based, it is nevertheless straightforward to show that it does not provide meaningful insight into the effects of the Transaction on the retransmission fees paid by DISH or any MVPD.

49. To begin, the analysis utilizes cut-offs for distinguishing large groups from small ones which are well below the 2016 size of both Nexstar **{{BEGIN HCI** [redacted] **END HCI}}** and Tribune **{{BEGIN HCI** [redacted] **END HCI}}**.[76] Thus, by the standards of the big and small analysis, both Nexstar and Tribune are *already* "big." Even if the rest of the analysis were robust (which it is not), nothing could be inferred from it about

[75] *Ibid.* at 16.
[76] See *ibid.* at Table 2.

the effects of the Transaction on DISH retransmission fees, since the analysis itself offers no insight into how or whether retransmission fees vary within the group of "big" stations. The Brattle Report offers no explanation for how it chose these size categories.[77]

50. A second fundamental problem with the big and small analysis is that it ignores retransmission fees paid to both non-Big 4 stations and network owned-and operated (O&O) stations, which together account for approximately 47.4 percent of all stations, 44.3 percent of all broadcast revenues and 34.9 percent of all retransmission fees.[78] As the Brattle Report reveals in the Appendix,[79] the omission of O&O stations is material: When O&O stations are included the differences between retransmission fees for large and small groups are no longer statistically significant. Yet it provides no explanation for why omitting O&O stations is appropriate.[80]

51. The omission of non-Big 4 stations would not affect Brattle's results if the relationship between retransmission fees for Big 4 and non-Big 4 stations were constant across broadcast groups – for example, if fees for Big 4 stations were always five times fees for non-Big 4 stations. But there is no reason to suppose this is the case, and an examination of station-level retransmission consent fees as estimated by BIA/Kelsey indicates that the ratio varies widely.[81] Thus, there is simply no reason to believe that a comparison based only on Big 4

[77] The Brattle Report does not disclose the underlying DISH retransmission fee data that would be necessary to test alternative specifications, and I do not otherwise have access to that data.

[78] *TV Analyzer Database.* Data are for all stations, not just those with which DISH has retransmission consent agreements, because I have not been provided with DISH's retransmission consent fee data.

[79] Brattle Report at Table 11.

[80] The Report states that "[O&O stations] are all large, but differ in that they do not have to transfer fees to an affiliated network," but it offers no explanation for why this fact justifies their omission from the analysis. See *ibid.* at 17.

[81] Across the 24 broadcast groups with both Big 4 and non-Big 4 stations for which retransmission revenue data are available, the ratio of average retransmission consent revenue per subscriber per month for Big 4 stations to the average for non-Big 4 stations ranges from **{{BEGIN CI** [redacted] **END CI}}**, with a mean of **{{BEGIN CI** [redacted] **END CI}}** and a standard deviation of **{{BEGIN CI** [redacted] **END CI}}**. The data also do not indicate any consistent ratio

stations is representative of overall levels. Despite these problems, Brattle provides no economic rationale, nor any logical explanation, for its decision to omit non-Big 4 stations from the analysis.

52. Third, in addition to omitting O&O and Big 4 stations, the big and small analysis (like all of the Brattle Report's analyses of DISH retransmission fees) is based on an analysis of just 45 of the 54 station groups with which Brattle says DISH has Big 4 retransmission consent contracts in place.[82] The Report does not explain this omission,[83] does not indicate which of the 54 station groups are omitted and does not offer any visibility into resulting selection bias.[84]

53. The second version of the Brattle Report's big and small analysis is a comparison of retransmission fees paid by DISH to Nexstar and to Tribune, which purports to show that Nexstar charged higher retransmission consent fees for Big 4 stations than Tribune during overlapping contract periods.[85] While there is no disagreement that Nexstar's current fees

across groups of similar size. For example, simple regressions of the ratio against indicators of group size (number of stations, number of DMAs served, total revenues) do not show any statistically significant relationships. These estimates are based on 2017 retransmission consent revenue from BIA/Kelsey and Q4 2017 video subscribers from Kagan. See *TV Analyzer Database*; *Nexstar Form 10-K* at 8-12; *Amended Exhibit 15* at 2, n. 9 and 16-17; *All Video by DMA*. BIA/Kelsey station ownership data were adjusted for Nexstar and Tribune stations based on Nexstar's 2018 Form 10-K and the parties' Comprehensive Exhibit to FCC Form 315.

[82] Brattle Report at 14.

[83] The Report indicates that "[c]urrent (as of March 1, 2019) retransmission fees were provided in 45 of these contracts," but does not explain how it is that "Dish currently has contracts in place" with 54 these groups but that retransmission fees were "provided" in only 45. See *ibid.* at 14, n. 16.

[84] I discuss selection bias further in my analysis of the Brattle Report's regression analysis.

[85] *Ibid.* at Table 4. Note that the Nexstar fee premiums are incorrectly adjusted for inflation to account for the difference in time between execution of the Nexstar and Tribune contracts, leading the Brattle Report to incorrectly present inflation-adjusted premiums **{{BEGIN HCI** [redacted]

are higher than Tribune's,[86] the Brattle Report presents no basis for attributing the difference to size-based bargaining power. To the contrary, as noted above, Tribune is already a "large" station group according to Brattle's criteria, meaning that if rates were determined by size it should already be charging purportedly "higher rates"[87] based on alleged "undue bargaining power."[88] Rather, the Brattle Report's comparison simply highlights that retransmission consent fees are determined largely by factors other than the size of the broadcast station group.

C. Regression Analysis

54. The Brattle Report next presents the results of a regression analysis which it claims "indicates that there is a strong relationship between broadcast group size and the monthly per-subscriber retransmission fees paid by DISH"[89] and that "DISH pays more for retransmission fees per subscriber to larger broadcast groups than it does to smaller groups."[90]

55. As detailed below, there are multiple problems with the regression analysis, the most notable of which (as explained in the first subsection below) is that the regression specification that best fits the data shows a non-linear relationship between group size and retransmission fees in which retransmission fees increase with size up to a point, after which they decline. At Nexstar's current size, the model implies that an additional 100,000 DISH subscribers would reduce the retransmission fee paid by DISH by approximately **{{BEGIN HCI** [redacted] **END** [redacted] **END HCI}}**

[86] *Nexstar Investor Presentation* at 10.
[87] Brattle Report at 7.
[88] *Ibid.* at 8.
[89] *Ibid.* at 20.
[90] *Ibid.*

HCI}}, all else equal.[91] Thus, *Brattle's regression model suggests that the Transaction would reduce, not increase, the retransmission fees paid by DISH*.

56. In addition, as I explain in the second subsection below, the regression analysis has multiple methodological flaws, including both selection and omitted variable bias, which render its results unreliable. Thus, the most that can be reliably said about the regression analysis is that it provides no support for the Brattle Report's contention that the Transaction would lead to higher retransmission consent fees.

1. The Results Indicate the Transaction Would Reduce Retransmission Fees

57. The Brattle Report's contention that the Transaction would increase the retransmission fee paid by DISH by enhancing Nexstar's and Tribune's bargaining leverage is predicated upon a statistical regression analysis assessing the relationship between broadcast group size and the retransmission fee paid by DISH to the group. The data is drawn from a sample of 45 contracts with broadcast groups specifying the fee paid by DISH to retransmit local Big 4 (ABC, CBS, FOX, NBC) network signals as of March 1, 2019.[92] The report states that DISH currently has agreements in place to retransmit Big 4 network signals with 54 broadcast groups, but, as noted above, does not explain why retransmission fee data is unavailable for nine groups.[93] Broadcast group size is measured by the number of DISH subscribers in each group's coverage footprint in 2016;[94] the report does not explain why it uses 2016 subscriber counts rather than the subscriber count at the time each contract was negotiated.

[91] See *infra* n. 99.
[92] Brattle Report at 14, Table 5.
[93] See *infra* n. 83.
[94] In Appendix A, the Brattle Report presents an alternative analysis where broadcast group size is measured in terms of 2016 group revenues. See discussion *infra* n. 102.

58. Brattle presents the results of six regression specifications, four of which specify a linear relationship between broadcast group size and monthly per subscriber retransmission fee and two of which specify a non-linear relationship – a "quadratic" model including size and size-squared as the main variables of interest and a "log-log" model where the dependent variable is the log of the retransmission fee and the main independent variable of interest is the log of size. There is strong evidence of non-linearity in the results. Specifically:

- The two non-linear models fit the data best as measured by the R-Squared statistic, with the quadratic model producing the best fit;
- The size-squared term in the quadratic model is statistically significant at the 99 percent level;
- Brattle notes that the results of an unreported specification involving the addition of a control for multiple stations in a DMA suggested "a nonlinearity in [the] impact of size."[95]

59. The coefficient on the squared-term in the quadratic regression analysis is negative, which the report concedes indicates the "impact being larger for smaller broadcast groups and smaller for larger ones."[96] It fails to note, however, that for larger groups like Nexstar (and New Nexstar) the estimated size effect actually turns negative.[97]

60. The Brattle Report's quadratic model estimates the incremental contribution of broadcast group size to retransmission fees as:

{{BEGIN HCI

[redacted]

[95] Brattle Report at 19, n. 20.

[96] *Ibid.* at 21.

[97] I focus on the quadratic model because it best fits the data (as measured by the R-squared statistic). However, the results of the log-log model also undermine the Brattle Report's conclusions. Because of the functional form, it is not possible mathematically for the log-log model's size effect to turn negative, but it does become vanishingly small. For example, the log-log model's size coefficient implies that at Nexstar's size **{{BEGIN HCI** [redacted] **END HCI}}** DISH subscribers covered by Big 4 stations) an additional 100,000 DISH subscribers would increase the monthly fee by approximately **{{BEGIN HCI** [redacted] **END HCI}}** percent, or, using the average retransmission fee reported by Brattle of **{{BEGIN HCI** [redacted] **END HCI}}**. See *ibid.* at Table 5.

END HCI}} where F_g is the monthly per subscriber retransmission fee paid by the group and X is broadcast group size. This relationship is presented graphically in Figure 6.

FIGURE 6:
BRATTLE'S ESTIMATED RELATIONSHIP BETWEEN MONTHLY RETRANSMISSION COMPENSATION PER SUBSCRIBER AND DISH SUBSCRIBERS {{BEGIN HCI

[redacted] **END HCI}}**

61. As the figure shows, the model estimates that the effect of size on retransmission fees increases up to **{{BEGIN HCI** [redacted] **END HCI}}** DISH subscribers (the point labeled F_{Max} in the figure), at which point the size effect turns negative – that is, further increases in subscribers result in lower, not higher, monthly fees. Thus, for example, Brattle's results imply that at **{{BEGIN HCI** [redacted] **END HCI}}** Big 4 DISH subscribers, Tribune's retransmission compensation per subscriber is increased by **{{BEGIN HCI** [redacted] **END HCI}}** per month due to size; similarly, based on reaching **{{BEGIN HCI** [redacted] **END**

HCI}} Big 4 DISH subscribers,[98] Nexstar's retransmission compensation per subscriber is increased by **{{BEGIN HCI** [redacted] **END HCI}}** per month – still positive, but less than Tribune, reflecting the fact that the "size effect" is diminishing for subscribership above **{{BEGIN HCI** [redacted] **END HCI}}**.[99]

62. Applying these results to the effect of the Transaction, it is straightforward to calculate that the larger size of New Nexstar compared to Tribune and Nexstar would (based on Brattle's estimated coefficients) lead to lower retransmission compensation for the combined firm. Specifically, the Brattle Report's model implies that the incremental effect of size due to the Transaction would be to reduce Nexstar's retransmission fees by **{{BEGIN HCI** [redacted] **END HCI}}**[100] per subscriber per month and decrease Tribune's retransmission fees by **{{BEGIN HCI** [redacted] **END HCI}}**[101] per subscriber per month.[102]

[98] *All Video by DMA*. Note that subscriber coverage includes only DMAs where Nexstar and Tribune own Big 4 stations. Identification of Nexstar and Tribune stations is based on their respective Form 10-Ks, and station DMA location is based on Kagan station data. See Nexstar Form 10-K at 8-12; Tribune Form 10-K at 11; Kagan, Global Broadcast Station Database (Nexstar Media Group, Inc. and Tribune Media Company, FCC Form 315, Exhibit 20: Top-Four Showing, Attachment C.2 (January 2019) ("CI-SNL-Global_Broadcast_Station_Database.xlsx")).

[99] The change in retransmission fee per subscriber-month is given by the derivative of $F_g(X)$. Specifically, the change in retransmission fee per subscriber-month is given by **{{BEGIN HCI** [redacted] **END HCI}}.** Thus, the decrease in retransmission fees per subscriber-month at Nexstar's size is approximately **{{BEGIN HCI** [redacted] **END HCI}}.**

[100] This figure represents the value of F_g from Figure 6 for New Nexstar less the value for Nexstar or **{{BEGIN HCI** [redacted] **END HCI}}.**

[101] This figure represents the value of F_g from Figure 6 for New Nexstar less the value for Tribune or **{{BEGIN HCI** [redacted] **END HCI}}.**

[102] As noted above, the Brattle Report also includes a version of the regression analysis in Appendix A where size is measured in terms of revenue rather than the number of DISH subscribers. Because the hypothesis the Brattle Report attempts to test is that consolidation increases leverage in terms of broadcast groups' negotiations with DISH, revenue is a less precise measure of size given the underlying hypothesis. Thus, it is unsurprising that the squared term in the quadratic revenue specification is not as precisely estimated as in the quadratic DISH subscriber specification. Nevertheless, the squared term in the quadratic revenue regression approaches statistical significance and the regression implies a non-linear relationship between size and retransmission fees, where the relationship turns negative at a group size of approximately **{{BEGIN HCI** [redacted] **END HCI}}**. The estimated fee reductions due to the Transaction are actually larger for this specification, with the results implying that incremental effect of size due to the Transaction would be to reduce Nexstar's retransmission fee by **{{BEGIN HCI** [redacted] **END HCI}}** and reduce Tribune's retransmission fee by **{{BEGIN HCI** [redacted] **END HCI}}**.

63. Because of the methodological problems discussed immediately below, the Brattle Report's regression model does not, in my opinion, constitute a reliable estimate of the relationship between broadcast group size (however defined) and retransmission compensation (by DISH or anyone else). That said, if the methodological problems were ignored, the correct interpretation of Brattle's results is that the effect of the Transaction associated with station group size would be to reduce retransmission compensation, not increase it.

2. The Econometric Analysis Presented in the Brattle Report Is Methodologically Flawed and Inherently Unreliable

64. Several fundamental methodological errors render the Brattle Report's regression analysis inherently unreliable. First, while the report claims that the regression model is designed to assess the relationship between size and fees while controlling for "other possible explanatory factors,"[103] it fails to do so. There is a substantial econometric literature considering the relationship between prices and market structure in television broadcasting, in which it is standard to include a wide variety of control variables accounting for quality and demand including viewership, ratings, local news ratings, number of local news hours, demographic factors, market size, etc.[104] The Brattle Report, by contrast, includes only two control variables: network ownership status and contract age (in years). By failing to include these important control variables (or choosing not to report regression specifications which include them), the Brattle Report's results suffer from what econometricians refer to as omitted variable bias, which occurs when there are insufficient control variables in a regression analysis. This failure to adequately control for other possible explanatory factors

[103] Brattle Report at 18.

[104] See e.g., Stahl (2016); Adam Rennhoff and Kenneth Wilbur, *Local Media Ownership and Quality*, Federal Communications Commission Media Ownership Study (2011); Mark Christopher Rainey, *The Effects of Mergers in Broadcast Television*, Massachusetts Institute of Technology Doctoral Dissertation (2001).

means that the independent variables that are included in the analysis may reflect spurious correlations arising from the unobserved effects of the omitted variables.[105] The result is that the regression incorrectly attributes the effect of the omitted variable on the dependent variable to the independent variables included in the analysis. Because the Brattle Report's regression analysis fails to include important factors that affect retransmission fees, the results are unreliable as the relationships suggested by the regression coefficients may be spurious.

65. The regression analysis has numerous other fundamental flaws. For example, like the big and small analysis, the regression analysis focuses only on Big 4 network signals and excludes data for nine of the 54 contracts Brattle says are currently in place.[106] The result is to introduce what econometricians call selection bias, which occurs when there is a systematic underlying relationship between the observations included in the data sample and the observations not included which affects the relationship between the independent and dependent variables. In this situation, the observed coefficient estimates may reflect the influence of the process by which the data were selected rather than the true relationship between the variables.[107] The potential impact of selection bias is especially significant due to the limited set of controls included in the regression analysis.[108]

[105] James H. Stock and Mark W. Watson, *Introduction to Econometrics*, 1d. ed. (Boston, MA: Pearson Education, 2003) at 145 (hereafter Stock and Watson (2003)).

[106] Brattle Report at 14, n. 16.

[107] Stock and Watson (2003) at 251 ("Sample section bias arises when a selection process influences the availability of data and that process is related to the dependent variable. Sample selection induces correlation between one or more regressors and the error term, leading to bias and inconsistency of the OLS estimator.").

[108] The Brattle Report's regression analysis also employs modelling decisions that raise questions about the robustness of the results. For instance, size is defined in the analysis using 2016 data rather than the size of the group at the time of the retransmission negotiation.

66. As a result of these flaws, the regression analysis provides no meaningful information on the relationship between broadcast group size and the level of retransmission compensation paid by DISH.

D. Before and After Analysis

67. The Brattle Report argues that "[a] review of the retransmission rates DISH has paid after large broadcast mergers shows that the post-merger rates are materially higher than those predicted by industry trends."[109] The ostensible support for this claim is a before and after analysis across ten broadcast mergers completed between August 2013 and July 2017 where the effect of each merger on retransmission fees is estimated by comparing "the retransmission fee of each of the merging parties' pre-merger contract[s] with the retransmission fee that was specified in the associated first post-merger contract."[110] The Brattle Report then "adjust[s] the fees for the differences in the age of the contracts" in order to "compare the retransmission consent fees across two contracts that were executed at different times" and thus distinguish overall industry trends from merger-specific price effects.[111] Based on this analysis, the Brattle Report asserts that the ten mergers increased retransmission fees for the "target" or acquired broadcast group by **{{BEGIN HCI** [redacted] **END HCI}}** percent[112] on average and increased retransmission fees for the acquirer by **{{BEGIN HCI** [redacted] **END HCI}}** percent on average.[113]

[109] Brattle Report at 3. (Brattle made a similar argument in the Sinclair-Tribune proceeding. See DISH Sinclair Tribune Reply at ¶40 ff.)
[110] *Ibid.* at 22.
[111] *Ibid.*
[112] *Ibid.* at Table 6.
[113] *Ibid.* at Table 7.

68. As an initial matter, the before and after analysis suffers from the same myopia that affects the rest of the Brattle Report, in this case by assuming that the only merger-related factor that could affect retransmission consent fees is a change in relative bargaining power, thereby ignoring other more plausible explanations, such as the increased value to MVPDs of improved programming resulting from merger-driven efficiencies, or simply the effect of step up clauses negotiated by the acquiring firm prior to the merger and agreed to by MVPDs (which by definition are not a result of the merger). Having failed to consider these reasons for increased retransmission consent fees post-merger, the Brattle Report cannot reasonably claim that a finding of higher post-merger retransmission compensation supports its bargaining power thesis.

69. A closer look at the before and after analysis, however, reveals an even deeper problem: The finding of higher post-merger fees is an artifact of Brattle's arbitrary choice of one of four industry trend adjustments that emerge from its regression analysis.[114] The other three estimated values imply much smaller or even negative effects; the trend adjustment from the regression specification that best fits the data implies mergers *reduce* retransmission fees for both target firms and acquirers.

70. Brattle's estimated industry trend adjustments are shown in Table 5, which presents four regressions containing the variable "Contract Age." For its before and after analysis, the Brattle Report selects the coefficient from Model 6, which indicates an industry trend adjustment factor of **{{BEGIN HCI** [redacted] **END HCI}}** percent per year, but ignores the

[114] The industry trend analysis is purportedly intended to capture a time trend of rising per subscriber monthly fees, such that an agreement negotiated in 2016 (for example) would be expected, other things equal, to have higher fees than one negotiated in 2015. For the reasons explained above, the regression analysis itself is fundamentally flawed, such that none of the industry trend estimates that emerge are reliable.

adjustment factors from Models 3, 4 and 5.[115] Replicating the before and after analysis using these alternative figures produces dramatically different results from those presented in the Brattle Report.

71. Table 3 compares the before and after analysis results presented in the Brattle Report for acquisition targets to the results applying the same methodology applying the three excluded industry trend adjustments. As the table shows, Brattle's reported **{{BEGIN HCI** [redacted] **END HCI }}** percent estimate of the impact of mergers on the retransmission compensation paid to acquired firms is entirely dependent on its choice of adjustment factor: Simply applying the alternative trend adjustments reduces the estimated average effect to between an increase of **{{BEGIN HCI** [redacted] **END HCI }}** percent and a decrease of **{{BEGIN HCI** [redacted] **END HCI}}** percent.

[115] For each of these regressions, the dependent variable is the retransmission fee in dollars. Specifically, models 3, 4, and 5 estimate industry trend adjustment factors of **{{BEGIN HCI** [redacted] **END HCI}}** per year, respectively.

TABLE 3:
COMPARISON OF BEFORE AND AFTER ANALYSIS FOR
TARGET GROUPS USING ALTERNATIVE INDUSTRY TREND ADJUSTMENTS {{BEGIN HCI

[redacted] **END HCI}}**

72. Table 4 performs the same analysis for the acquiring broadcast groups. Again, the large price effects presented in the Brattle Report are seen to be an artifact of its choice of trend adjustments: Rather than a **{{BEGIN HCI** [redacted] **END HCI}}** percent increase, the other three estimates range from an increase of **{{BEGIN HCI** [redacted] **END HCI}}** percent to a decrease of **{{BEGIN HCI** [redacted] **END HCI}}** percent.

TABLE 4:
COMPARISON OF BEFORE AND AFTER ANALYSIS FOR ACQUIRERS USING ALTERNATIVE INDUSTRY TREND ADJUSTMENTS {{BEGIN HCI

[redacted]

END HCI}}

73. As I have explained, the results from Brattle's regression analysis are generally unreliable. However, the model which best fits the data (i.e., which has the highest R-squared statistic) is Model 5. Applying the trend adjustment from that model reverses Brattle's reported result, indicating that for the mergers being analyzed, retransmission consent fees fell by **{{BEGIN HCI** [redacted] **END HCI}}** percent for acquired firms and **{{BEGIN HCI** [redacted] **END HCI}}** percent for acquirers. The Brattle Report provides no explanation or justification for its selective use of trend adjustment estimates.[116]

74. A potentially even more profound problem is the fact that the Brattle Report's regression analysis is based on a sample of active DISH retransmission agreements as of March 1, 2019,[117] which presumably were negotiated starting in 2016. Thus, the trend adjustment

[116] Also without explanation, the Brattle Report applies a different trend adjustment (the **{{BEGIN HCI** [redacted] **END HCI}}** trend adjustment from regression Model 3) in its comparison of Nexstar and Tribune rates. See *ibid.* at Table 4.

[117] *Ibid.* at 14.

estimated in the regression analysis is based on trends over the last three years. By contrast, eight of the ten mergers evaluated in the before and after analysis occurred in 2013 and 2014 and none occurred after 2017. As discussed in Section III.B, retransmission consent fees have followed an "S"-shaped trajectory – slowly rising from zero, increasing rapidly, and then plateauing in recent years.[118] While I do not have the data necessary to extend Brattle's regression analysis to the earlier, more relevant period, it is extremely likely that doing so would yield a significantly larger trend adjustment than any of those based on 2016 to 2019 data, which would in turn produce lower estimated price increases (or higher estimated price declines) if applied to Brattle's before and after analysis of mergers.

75. In sum, the before and after analysis provides no support for Brattle's assertion that broadcast consolidation raises retransmission compensation for DISH or anyone else.

E. Goalpost Analysis

76. Finally, the Brattle Report offers a goalpost analysis, which purports to show that during three blackouts resulting from DISH's failure to reach retransmission consent agreements with Tribune, Quincy Media and SagamoreHill Broadcasting, the retransmission fees negotiated with other broadcast groups resulted in higher rates relative to the "goalpost" benchmarks set by DISH for each group.[119] Based on this evidence, the Brattle Report asserts that the Transaction would increase the retransmission fees charged by broadcast groups in

[118] According to Kagan, the average monthly retransmission consent fee per subscriber rose by **{{BEGIN CI** [redacted] **END CI}}** percent annually from 2013 through 2016 compared with **{{BEGIN CI** [redacted] **END CI}}** percent for 2016 through 2019 (est.). Kagan, *TV Station Retransmission and Reverse Retransmission Projections 2006 - 2023* (June 2018).

[119] The Brattle Report asserts that "goalpost" fees – which are internal negotiating targets set by DISH management for upcoming retransmission consent negotiations – are systematically higher for larger broadcast groups than smaller ones, and that this establishes that larger groups have greater bargaining power. As noted above, there are multiple factors other than bargaining power that could cause rates to vary by group size. Brattle considers none of them.

"cross-market" DMAs, i.e., DMAs where neither Nexstar nor Tribune own broadcast stations.[120]

77. As an initial matter, the goalpost analysis is only relevant under the premise, asserted by the Brattle Report at the beginning of the analysis, that "[l]arge broadcast groups are more prone to cause blackouts compared to smaller ones and they obtain higher retransmission fees."[121] However, as I explained above, the evidence does not support Brattle's contention that bigger groups are more likely than smaller ones to engage in blackouts, and there is thus no basis for concluding that the Transaction would have any effect on the frequency of blackouts.

78. Even if its underlying premise were valid, the goalpost analysis fails to establish that when a blackout occurs, retransmission fees negotiated for markets unaffected by the blackout increase relative to the rates that would have prevailed but for the blackout. The Brattle Report's primary evidence of cross-market price effects comes from its comparison of the retransmission fees in nine agreements reached during the DISH-Tribune blackout (from June 12, 2016 to September 3, 2016) to the fees associated with three agreements consummated "shortly before or after the Tribune blackout."[122] Specifically, the Brattle Report states:

> **{{BEGIN HCI** [redacted]

[120] Brattle Report at 25.
[121] *Ibid.* at 24.
[122] *Ibid.* at 27.

[redacted] **END HCI}}**[123]

79. First, with such a small sample size, it is impossible to determine whether the comparison is meaningful, especially in light of the small difference in fee increases across the comparison groups and the substantial heterogeneity surrounding negotiations of retransmission rates. Indeed, it would be just as reasonable, given the very limited information available, to posit that because one group negotiated a rate below the goalpost benchmark during the blackout and no groups did so before or after the blackout that blackouts potentially create opportunities for MVPDs to negotiate better rates, for instance by demonstrating their willingness to bargain aggressively.

80. Furthermore, only two agreements involved in the comparison, one negotiated during the blackout and one negotiated after the blackout, involved "large" broadcast groups (as defined in Brattle's Table 3), and these yielded nearly identical outcomes (negotiated rates were **{{BEGIN HCI** [redacted] **END HCI}}** percent and **{{BEGIN HCI** [redacted] **END HCI}}** percent of the DISH goalpost levels respectively).[124] Thus, the one comparison that is presumably most relevant to Brattle's argument provides no support for it.

81. Demonstrating awareness of the unreliability of this analysis, the Brattle Report explains its attempts to supplement the Tribune goalpost analysis as follows:

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

[123] *Ibid.* at 26-27.
[124] *Ibid.* at Table 8, Table 9.

> Quincy blackout, which lasted 46 days in August to October of 2018 and affected 12 smaller DMAs; and the SagamoreHill blackout, which lasted 85 days from May through August of 2018 and affected 11 DMAs.[125]

82. However, rather than providing support for the initial analysis, this additional data further undermines the conclusions reached by the Brattle Report for two primary reasons.

83. First, the analysis indicates an average price effect across the two much smaller blackouts of **{{BEGIN HCI** [redacted] **END HCI}}** percent of the goalpost benchmark, which is the same as the weighted average price effect for the Tribune blackout.[126] Thus, ignoring all of the other problems with the Brattle analysis, it suggests that the price effects of the Quincy Media and SagamoreHill blackouts, which affected approximately **{{BEGIN CI** [redacted] **END CI}}** DISH subscribers, respectively, according to Kagan's Q4 2018 MediaCensus data, were similar to the price effects of the Tribune blackout which affected approximately {{**BEGIN CI** [redacted] **END CI}}** DISH subscribers.[127] Furthermore, the SagamoreHill blackout, which affected fewer subscribers than the Quincy Media blackout, is associated with a larger price effect (**{{BEGIN HCI** [redacted] **END HCI}}** percent for SagamoreHill and **{{BEGIN HCI** [redacted] **END HCI}}** percent for Quincy Media).[128] These results directly contradict one of the Brattle Report's central hypotheses with regard to cross-market price effects:

> Another reason why blackouts decrease an MVPD's bargaining power nationally is the desire to avoid subscriber losses. The impact of viewership changes in terms of brand and reputation may

[125] *Ibid.* at 29.

[126] *Ibid.* at Table 8, Table 10.

[127] See *All Video by DMA*; *American Television Alliance*. As discussed below, in evaluating the size and effects of the Quincy Media and SagamoreHill blackouts the Brattle Report appears to be assessing all coverage rather than just Big 4 coverage, which is the focus of the rest of the report. Thus, the 2018 DISH subscriber coverage counts indicated above are for all coverage rather than Big 4 coverage.

[128] Brattle Report at Table 10.

> disproportionately increase with size. This means that a nationwide MVPD will take pains to avoid losing many subscribers at any one time. Faced with the loss of subscribers generated by a blackout, DISH will concede higher rates to prevent additional losses.[129]

84. Here again, the Brattle Report's own analysis undermines its assertion that there is a direct relationship between size and bargaining power.

85. Second, the analysis is characterized by a number of inconsistencies and omissions that undermine its credibility. For instance, the Brattle Report states that the SagamoreHill blackout "lasted 85 days from May through August of 2018 and affected 11 DMAs."[130] However, according to the ATA database which the Brattle Report relied on, the SagamoreHill blackout only involves 11 DMAs if Big 4 and non-Big 4 stations are included in the analysis, and Appendix B does not indicate whether the retransmission fees used in the SagamoreHill goalpost analysis are for Big 4 stations only or both. In contrast, the Tribune goalpost analysis presented in Table 9 of the report clearly indicates that the DMA counts, DISH subscriber counts and retransmission rates are only for Big 4 retransmission. Thus, it appears on the face of the Brattle Report that the Tribune analysis and the Quincy Media/SagamoreHill analysis do not represent apples-to-apples comparisons.

86. Additionally, while the Brattle Report provides information on broadcast group characteristics in terms of size and DMAs covered for the deals negotiated during the Tribune blackout, it does not provide any such information for the Quincy Media/SagamoreHill analysis. This omission makes it impossible to examine potential sources of heterogeneity in the negotiations that may provide alternative explanations for the observed pricing patterns.

[129] *Ibid.* at 25.
[130] *Ibid.* at 29.

Indeed, the entire analysis makes no attempt to control for any of the factors that may drive differential pricing across broadcast groups.

87. As a result of all of these factors, the Brattle Report's goalpost analysis – like its other empirical analyses – fails to support its contention that the Transaction would lead to higher retransmission consent fees for DISH or any other MVPD.

V. Other Issues

88. In this section, I briefly address two other fundamental flaws in the Brattle Report: Its faulty attempt to show that larger blackouts cause DISH disproportionately greater harm than smaller ones; and, its failure to analyze the effect of the Transaction on consumers.

89. First, Brattle argues ineffectively that the cost to DISH of negotiating impasses rises disproportionately with either the size of a blackout, the number of blackouts, or both.[131] This point is significant because it determines whether, in terms of bargaining theory, negotiating leverage in retransmission consent markets increases with the size of the station group.[132] If not, Brattle's conclusions are not just lacking empirical support (as I have shown) – they are without theoretical foundation.

90. Brattle's arguments on this front are unsupported and erroneous. For example, it asserts (based on Ms. Ordonez's declaration) that in order to be successful, DISH must possess a

[131] *Ibid.* at 3 ("The bargaining power that allows large broadcast groups to charge higher fees can be explained with the disproportionate damage that a large blackout can cause to an MVPD like DISH. The data indicate that DISH is willing to incur a cost in order to avoid simultaneous blackouts.").

[132] According to economic theory, the curvature of the surplus function (i.e., the total value created when a bargain is reached) determines whether bargaining power is increasing or decreasing in size. When the surplus function is concave, bargaining power increases with size, whereas when the surplus function is convex, bargaining power decreases with size. See e.g., Chipty and Snyder (1999). In this context, the curvature of the surplus function is determined by whether from DISH's perspective broadcast stations are substitutes or complements. When stations are substitutes the surplus function is concave and bargaining power increases in size. When stations are complements the surplus function is convex and bargaining power decreases in size.

"critical mass" of local station availability, but it offers no analysis of what such a critical mass would entail and no evidence that the Transaction would cross any meaningful threshold. Indeed, the primary evidence it offers on this point revolves around DISH's 2016 blackout of Tribune, which it says caused DISH to "capitulate" in negotiations with other parties. As I explained above, Brattle's "goalpost" analysis fails to provide empirical support for this contention but, even if this were true, it would demonstrate that Tribune *already* has bargaining leverage over DISH, not that the Transaction would increase such leverage.[133]

91. The Brattle Report also asserts that the harm of impasses is increasing in size as a result of reputational effects,[134] but its arguments in favor of this contention are baseless: Specifically, Brattle provides no support for believing that "a blackout that is larger in geographical scope is more likely to hit a critical TV event,"[135] no basis for the contention that "media and news outlets will report on blackouts once they are large enough,"[136] and no basis for believing that "the compounding nature of the reputational effect is even more pronounced due to social media."[137] In short, Brattle fails to present any valid support for its contention that the harm to DISH of impasses increases disproportionately with size.

92. Second, as noted above, the Brattle Report argues (in the second paragraph) that "approval of the proposed merger will result in higher retransmission prices for DISH, leading to higher

[133] Of course, the notion that Tribune has such power is inconsistent with the relatively low level of Tribune's current retransmission consent fees.

[134] Brattle Report at 12 ("[T]he simultaneous loss of a large number of stations in several geographic areas has worse reputation effects on DISH than the sum of non-simultaneous losses of the same number of stations.").

[135] *Ibid*.

[136] *Ibid*. As elsewhere, the evidence Brattle offers in support of this argument is self-defeating. For example, it offers as an example of the effect of size on media coverage referencing USA Today's coverage of Tribune's blackout with Charter – proving again that Tribune is already large enough to have such an effect, but offering no basis for believing the Transaction would affect media coverage.

[137] *Ibid.* at 13. In fact, the impact of social media is likely the opposite of what Brattle asserts, since it allows customers to express public dissatisfaction about even small blackouts.

prices for consumers."[138] I looked in vain for any evidence or analysis of this statement, and found none. Thus, Brattle not only fails to demonstrate that the Transaction would raise retransmission compensation, but does not even attempt to show that consumers would be harmed if it did.

VI. Conclusions

93. For the reasons I have explained above, the Brattle Report's analyses are fundamentally flawed and unreliable. Nothing in the report demonstrates that the Transaction would result in higher retransmission fees paid by DISH or any other MVPD, that the Transaction would have any effect on the downstream prices paid by consumers, or that it would cause any other form of economic or public interest harm.

Jeffrey A. Eisenach, Ph.D.
May 28, 2019

[138] *Ibid.* at 3.

NERA
ECONOMIC CONSULTING

May 2019

APPENDIX A:
JEFFREY A. EISENACH, PH.D.
Managing Director
Co-Chair Communications, Media and Internet Practice

Dr. Eisenach is a Managing Director and Co-Chair of NERA's Communications, Media, and Internet Practice, and also serves on the firm's Board of Directors. He is also an Adjunct Professor at George Mason University Law School, where he teaches Regulated Industries, and a Visiting Scholar at the American Enterprise Institute. Previously, Dr. Eisenach has served in senior policy positions at the US Federal Trade Commission and the White House Office of Management and Budget, and taught at Harvard University's Kennedy School of Government and Virginia Polytechnic Institute and State University.

Dr. Eisenach's consulting practice focuses on economic analysis of competition, regulatory, intellectual property and consumer protection issues. He has submitted expert reports and testified in US federal court as well before the Antitrust Division of the U.S. Department of Justice, the Federal Trade Commission, the Copyright Royalty Board, the Federal Communications Commission, the International Trade Commission, US Tax Court, several state public utility commissions, and courts and regulatory bodies in Australia, Canada, the United Kingdom, the Caribbean, and South America. He has also advised clients in some of the world's largest information technology sector mergers.

He has written or edited 19 books and monographs, including *Broadband Competition in the Internet Ecosystem* and *Competition, Innovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace*. His writings have also appeared in scholarly journals such as *The Review of Network Economics*, as well as in popular outlets like *Forbes*, *The New York Times*, and *The Wall Street Journal*.

Prior to joining NERA, Dr. Eisenach was a managing director and principal at Navigant Economics, and before that he served as Chairman of Empiris LLC, Criterion Economics, and CapAnalysis, LLC. Among his other previous affiliations, Dr. Eisenach has served as President and Senior Fellow at The Progress & Freedom Foundation; as a scholar the Heritage Foundation, and the Hudson Institute; as a member of the 1980-81 Reagan-Bush Transition Team on the Federal Trade Commission, the 2000-2001 Bush-Cheney Transition Team on the Federal Communications Commission, the Virginia Governor's Commission on E-Communities, and the Virginia Attorney General's Task Force on Identity Theft. In 2016-2017 he led the Trump-Pence Transition Team for the Federal Communications Commission.

Dr. Eisenach received his PhD in economics from the University of Virginia and his BA in economics from Claremont McKenna College.

Jeffrey A. Eisenach, Ph.D.

Education

1985	Ph.D. in Economics, University of Virginia
1979	B.A. in Economics, Claremont McKenna College

Professional Experience

Jan 2014-present	Managing Director/Senior Vice President NERA Economic Consulting
Jan 2010-Jan 2014	Managing Director and Principal, Navigant Economics
Sept 2008-Jan 2010	Chairman and Managing Partner, Empiris LLC
June 2006-Sept 2008	Chairman, Criterion Economics, LLC
July 2005-May 2006	Chairman, The CapAnalysis Group, LLC
Feb 2003-July 2005	Executive Vice Chairman, The CapAnalysis Group, LLC
June 1993-Jan 2003	President, The Progress & Freedom Foundation
July 1991-May 1993	Executive Director, GOPAC
Mar 1988-June 1991	President, Washington Policy Group, Inc.
Sept 1986-Feb 1988	Director of Research, Pete du Pont for President, Inc.
1985-1986	Executive Assistant to the Director, Office of Management and Budget
1984-1985	Special Advisor for Economic Policy and Operations, Office of the Chairman, Federal Trade Commission
1983-1984	Economist, Bureau of Economics, Federal Trade Commission
1981	Special Assistant to James C. Miller III, Office of Management and Budget/Presidential Task Force on Regulatory Relief
1979-1981	Research Associate, American Enterprise Institute
1980	Consultant, Economic Impact Analysts, Inc.
1978	Research Assistant, Potomac International Corporation

Teaching Experience

2000-present	Adjunct Professor, George Mason University School of Law, (Courses Taught: Regulated Industries; Perspectives on Government Regulation; The Law and Economics of the Digital Revolution)
1995-1999	Adjunct Lecturer, Harvard University, John F. Kennedy School of Government, (Course Taught: The Role of Government in the 21st Century)
1989	Adjunct Professor, George Mason University, (Course Taught: Principles of Economics)
1985, 1988	Adjunct Professor, Virginia Polytechnic Institute and State University, (Courses Taught: Graduate Industrial Organization, Principles of Economics)
1983-1984	Instructor, University of Virginia, (Courses Taught: Value Theory, Antitrust Policy)
1982-1983	Teaching Assistant, University of Virginia, (Courses Taught: Graduate Microeconomics, Undergraduate Macroeconomics)

Honors & Professional Activities

2018-present	Member, Board of Directors, NERA Economic Consulting
2016-2017	Leader, Trump-Pence Presidential Transition Team on the Federal Communications Commission
2012-present	Visiting Scholar, American Enterprise Institute
2011-present	Member, Board of Directors, Information Technology & Innovation Foundation
2011-2018	Member of the Board of Directors, Economic Club of Washington (Vice President for Education, 2012-2017)
2010-2011	Member, World Bank ICT Broadband Strategies Toolkit Advisory Group
2009-present	Member, Economic Club of Washington
2008-2009	Member, Board of Directors, PowerGrid Communications
2008-2012	Member, Board of Advisors, Washington Mutual Investors Fund
2002-2014	Member, Board of Advisors, Pew Project on the Internet and American Life
1993-2009	Member, Board of Directors, The Progress & Freedom Foundation
2002	Member, Attorney General's Identity Theft Task Force, Virginia
2002-2003	Member of the Board of Directors, Privacilla.com

2001-2004	Member, Executive Board of Advisors, George Mason University Tech Center
2001-2002	Contributing Editor, *American Spectator*
2001	Member, Transition Advisory Committee on the FCC
2000-2001	Member, Governor's Task Force on E-Communities, State of Virginia
1999-2001	Member, 2000-2001 Networked Economy Summit Advisory Committee
1998-2003	Member, Board of Directors, Internet Education Foundation
1998-2003	Member, Internet Caucus Advisory Committee
1996-2002	Member, American Assembly Leadership Advisory Committee
1995-2000	Member, Commission on America's National Interests
1988-1991	Adjunct Scholar, Hudson Institute
1988-1991	Visiting Fellow, Heritage Foundation
1981-1984	President's Fellowship, University of Virginia
1981-1983	Earhart Foundation Fellowship, University of Virginia
1981	Member, Presidential Transition Team on the Federal Trade Commission
1979	Henry Salvatori Award, Claremont Men's College
1978	Frank W. Taussig Award, Omicron Delta Epsilon

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In Re: Determination of Royalty Rates and Terms of Making and Distributing Phonorecords (Phonorecords III), United States Copyright Royalty Judges, Written Supplemental Report of Jeffrey A. Eisenach on behalf of National Music Publishers Association and National Songwriters Association International (March 1, 2017)

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In the Matter of the Appropriate Forms of Regulating Telephone Companies, Maryland Public Service Commission, Case No. 9133, Rebuttal Testimony on Behalf of Verizon Maryland (September 24, 2008)

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I, Ari S. Meltzer, hereby certify that on this 28th day of May, 2019, I caused a true and correct copy of the foregoing Declaration of Jeffrey A. Eisenach to be served upon the following individuals by electronic mail:

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