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REDACTED—FOR PUBLIC INSPECTION

July 15, 2019

By ECFS

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

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

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,[1] DISH Network Corporation ("DISH") submits the enclosed public, redacted version of the Reply Declaration of William Zarakas and Dr. Jeremy Verlinda, which responds to and rebuts the declaration made on behalf of Nexstar Media Group, Inc. by Jeffrey A. Eisenach.[2] DISH has denoted with **{{BEGIN HCI END HCI}}** information that is deemed to be Highly Confidential Information pursuant to the *Protective Order*. DISH has also denoted with **{{BEGIN CI END CI}}** information that is deemed by the Applicants to be Confidential Information pursuant to the *Protective Order*. A Highly Confidential version of this filing and a Confidential version of this filing are being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

The Reply Declaration demonstrates that the criticisms leveled by Dr. Eisenach cannot rebut DISH's showing that this merger will lead to increased per-subscriber retransmission fees to DISH and thus higher prices to consumers. Among the highlights of the flaws in Dr. Eisenach's study:

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

[2] Declaration of Jeffrey A. Eisenach, MB Docket No. 19-30 (May 29, 2019).

- Dr. Eisenach disputes that retransmission fees will be passed through to consumers, yet he has previously assumed a 50% pass-through rate himself. Brattle concludes that the merger is likely to cause a 35.5% increase in retransmission fees to DISH. Using Dr. Eisenach's own previous pass-through assumption, subscribers would see a price increase.

- Using outdated studies, Dr. Eisenach claims that mergers produce increases in the quality of programming. Using recent DISH subscriber viewing data, Brattle demonstrates that viewership of large broadcasting groups is not noticeably higher than that of small broadcasting groups.

- Dr. Eisenach does not credibly dispute the strong positive relationship between broadcast group size and retransmission fee level because his calculations contain a crucial error. Correcting his calculations for that error shows that, contrary to his assertion, retransmission fees would likely increase for both Nexstar and Tribune due to the merger.

- In disputing Brattle's showing that broadcast group mergers result in above-trend retransmission fee increases, Dr. Eisenach erroneously assumes that Brattle data cover the period 2016-2019, and does not properly isolate rate increases due to merger activity from increases due to other reasons.

- Dr. Eisenach misunderstands DISH's showing that DISH is compelled to pay higher-than-market prices to one broadcast group when under the threat of a blackout by another one, regardless of geographic overlap. Contrary to his assertion, this analysis is *not* "only relevant under the premise . . . that '[large] broadcast groups are more prone to cause blackouts compared to smaller ones and they obtain higher retransmission fees.'"[3] Regardless of any such premise, the analysis simply shows that, due to cross-market effects, New Nexstar would have more leverage than the sum of the bargaining power of the standalone companies. This would be the case whether that leverage results in a blackout and then a higher fee, or directly to a higher fee without a blackout.

In sum, the Reply Declaration validates the original Brattle declaration, which showed that the proposed merger will ultimately harm consumers through higher prices, while the Applicants have still not demonstrated, let alone quantified, any offsetting benefits.

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[3] *See* Eisenach Declaration at 46 ¶ 77 (quoting Declaration of William Zarakas and Dr. Eliana Garcés at 24, attached as Exhibit B to Petition to Deny of DISH Network Corporation, MB Docket No. 19-30 (Mar. 18, 2019)).

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Please contact me with any questions.

Respectfully submitted,

/s/

Pantelis Michalopoulos
Georgios Leris
Counsel for DISH Network Corporation

Enclosure

Reply Declaration of William Zarakas
and Dr. Jeremy Verlinda

July 15, 2019

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I. Introduction

On May 28, 2019, Dr. Jeffrey A. Eisenach submitted a declaration on behalf of Nexstar Media Group, Inc. (Nexstar),[1] in which he criticizes some of the findings and conclusions made in the Declaration of William Zarakas and Dr. Eliana Garces ("the Brattle Report").[2]

The Brattle Report concluded that the relevant market to assess the effects of the Nexstar-Tribune merger is national because broadcast groups and some MVPDs, such as DISH, are national in scope. It then demonstrated that larger broadcast groups (in terms of group revenues and/or MVPD subscribers) charge higher per-subscriber retransmission fees than do smaller broadcast groups. It also showed that the per-subscriber retransmission fees paid by DISH to broadcast groups increased after those broadcast groups were merged into or acquired by larger broadcast groups. Furthermore, it demonstrated that MVPDs, such as DISH, are likely to pay higher per-subscriber retransmission fees when renewing contracts with broadcast groups if they are concurrently experiencing, or under threat of, a programming blackout with another broadcast group. These analyses indicated that approval of the proposed Nexstar-Tribune merger would likely result in the combined entity ("New Nexstar") charging higher per-subscriber retransmission fees to MVPDs like DISH than would otherwise be the case, and would therefore, in turn, lead to higher prices being charged to consumers for the same broadcast programming.

Dr. Eisenach disagrees with each of these conclusions and takes issue with the supporting analyses. Dr. Jeremy Verlinda has collaborated with Mr. William Zarakas in developing the subject reply declaration.[3] For clarity, the pronouns in this reply declaration (e.g., "we", "our") refer to Mr. Zarakas and Dr. Verlinda.

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1 *See* Declaration of Jeffrey A. Eisenach, Ph.D., dated May 28, 2019 ("Eisenach Declaration").

2 *See* Declaration of William Zarakas and Dr. Eliana Garcés, Exhibit B to Petition to Deny of DISH Network Corporation, MB Docket No. 19-30 (Mar. 18, 2019).

3 Subsequent to the filing of the Brattle Report, Dr. Eliana Garces accepted a position as Director of Economic Policy at Facebook, and is therefore not available to participate in the development of this reply declaration. Dr. Jeremy Verlinda is a Principal with The Brattle Group. He specializes in competition issues in both antitrust and regulatory contexts. He has provided and supported testimony in competition matters before U.S. district courts, federal regulatory agencies, and various state public utilities commissions, as well as before competition and regulatory agencies in Canada and Australia.

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We find that Dr. Eisenach's claims lack merit and do not change the conclusions expressed in the Brattle Report that the proposed Nexstar-Tribune merger, if approved, would result in New Nexstar charging increased per-subscriber retransmission fees to DISH, leading to higher prices to consumers. Additionally, Dr. Eisenach's criticism that the Brattle Report fails to demonstrate how the proposed merger harms competition is refuted by his own work in this area in which he accepts the real and material connection between increased per-subscriber retransmission fees and consumer prices. Specifically, he has previously assumed that a sizable portion of retransmission fees increases – which the Brattle Report demonstrated are likely and large as a result of the proposed merger – are ultimately borne by consumers in the form of higher subscription prices.

We address each of Dr. Eisenach's claims in the sections that follow.

II. The increases in retransmission fees associated with broadcaster consolidation harm competition

The Brattle Report showed that a merger of Nexstar and Tribune is likely to result in the merged group charging higher per-subscriber retransmission fees to MVPDs, including DISH. It also reasoned that these MVPD cost increases would harm consumers, as at least some of the fee increases would be shared by MVPD subscribers.[4] Dr. Eisenach criticized the absence of a formal pass-through analysis, which would quantify the harm to MVPD subscribers.[5] We respond to Dr. Eisenach's concerns by examining the consumer harm arising from the merger, adopting the pass-through rate assumption from Dr. Eisenach's prior analysis before the FCC and in his related research.[6]

He has particular expertise in network industries, including telecommunications, media markets, energy markets, transportation, financial markets, health care, and advertising. Before this Commission, Dr. Verlinda has submitted testimony in the Business Data Services docket (WC Docket Nos. 16-143, 05-25, 15-247, RM-10593), the Sinclair/Tribune merger (MB Docket No. 17-179), and the Sprint/T-Mobile merger (WT Docket No. 18-197).

4 *See* Brattle Report, p. 3.

5 *See* Eisenach Declaration, ¶ 92.

6 *See* Declaration of Jeffrey A. Eisenach and Kevin W. Caves, Attachment A to Amendment of the Commission's Rules Related to Retransmission Consent (May 27, 2011). *See also*, Jeffrey A. Eisenach and Kevin W. Caves, Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon, April 2010 (hereinafter, Eisenach Reply to Compass Lexecon).

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In this section, we also consider Dr. Eisenach's unsubstantiated claim 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."[7] We find that this claim is not supported by DISH's viewership data. Consequently, the combination of MVPD subscription price increases, caused by higher retransmission fees, and an absence of offsetting station quality improvements indicates that the proposed Nexstar/Tribune merger will harm subscribers.

A. Subscriber prices are likely to increase due to increased programming costs

Dr. Eisenach criticizes the Brattle Report for not providing a formal analysis to demonstrate that higher retransmission prices for DISH will lead to higher prices for consumers.[8] But Dr. Eisenach himself has written and testified on this very subject, including attempts to quantify pass-through rates of retransmission fee increases to consumers through higher MVPD subscription prices. For example, in a report commissioned by the National Association of Broadcasters that responds to a Compass Lexecon study on retransmission fees, Dr. Eisenach considers a pass-through rate of 50% (i.e., 50% of increases in retransmission fees are passed on to consumers in the form MVPD price increases).[9] Based on this pass-through assumption, Dr. Eisenach has calculated MVPD subscriber losses ultimately associated with higher retransmission fees.

Dr. Eisenach's record on the subject indicates that he recognizes that consumers are harmed (by way of higher prices) by increases in per-subscriber retransmission fees, although he considered only a scenario where consumers do not bear the full brunt of retransmission fee increases. The real-world pass-through rate may in fact be higher.[10] For example, **{{BEGIN HCI**

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7 *See* Eisenach Declaration, ¶ 15.

8 *See* Eisenach Declaration, ¶ 92.

9 *See* Eisenach Reply to Compass Lexecon, p. 14.

10 In their analysis of the effects of retransmission fees, Compass Lexecon consider pass-through rates as high as 100%. *See* Michael Katz, Jonathan Orszag and Theresa Sullivan, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime" (November 12, 2009), p. 39.

11 **{{BEGIN HCI**
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Quantifying competitive harm from increased retransmission fees requires estimates of pass-through rates and demand elasticities. Together, these inputs allow for calculation of both the magnitude of MVPD subscription price increases and the number of subscribers who would drop service as a result of the price increases. There are many factors that may affect the pass-through rate, including the degree of MVPD competition and how quickly subscriber losses accumulate as prices increase. While we have not undertaken a formal consumer demand analysis to directly estimate the appropriate pass-through rate in the calculations below, our consumer harm analysis adopts the 50% pass-through rate that Dr. Eisenach has used in his own prior analysis.

Table 1 summarizes the annual effect on DISH customers from an increase in retransmission fees charged to MVPDs for Big 4 station access, as of 2021, **{{BEGIN HCI END HCI}}**. The calculation uses data on pre-merger DISH subscribers and subscription prices, retransmission fees paid by DISH to Nexstar and to Tribune, the predicted increase in retransmission fees resulting from the merger, an aggregate MVPD elasticity estimate from the relevant academic literature, and Dr. Eisenach's assumed pass-through rate of 50%.

Table 1: Consumer Harm from Big 4 Retransmission Fee Increases in 2021
Estimated from Nexstar/Tribune Merger
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Based on our updated "before-and-after" merger analysis, discussed later in this declaration, we estimate that the proposed Nexstar/Tribune merger is likely to increase the retransmission fees that DISH pays by 35.5%.[12] Under the assumed 50% pass-through rate, we calculate that DISH's monthly subscription prices would increase by **{{BEGIN HCI END HCI}}**. We have also calculated a market demand elasticity of -0.89, based on prior academic work in the industry.[13]

[12] *See* Section V and Table 12.

[13] *See* Appendix notes for Table 1.

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Combined with the estimated subscription price increase, we estimate that DISH would lose approximately **{{BEGIN HCI END HCI}}** subscribers.[14] Consumers who continue to be DISH subscribers will pay a combined **{{BEGIN HCI END HCI}}** more per year as a result of the proposed merger's increased Big 4 retransmission fees.[15] Assuming that DISH today accounts for approximately 11.6% of all MVPD subscriptions,[16] the estimated harm to all MVPD subscribers is approximately **{{BEGIN HCI END HCI}}**, annually, with approximately **{{BEGIN HCI END HCI}}** subscribers dropping MVPD service. To the extent that Dr. Eisenach's assumption of a 50% pass-through rate is an underestimate, **{{BEGIN HCI END HCI}}** would be only a lower bound of the true consumer harm from the proposed merger.

B. Higher retransmission fees associated with larger broadcasters are not offset by higher levels of station quality

Dr. Eisenach attempts to argue that the price effects of consolidation are mitigated by improvements in quality. His assertion is based on: 1) a published paper by Dr. Jessica Calfee Stahl,[17] which found evidence that, during the period 1996 through 2007, consolidation of broadcast groups led to increased viewership, and 2) an unpublished (dissertation) paper by Mark

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14 Under the assumption that New Nexstar assesses fee increases on the other MVPDs, DISH's subscriber losses would not be recaptured by other MVPDs, and instead reflect DISH's portion of MVPDs subscribers who "cut the cord" and exit MVPD service altogether.

15 Our analysis is conservative to the extent that the proposed merger may also lead to fee increases for non-Big 4 stations.

16 11.6% market share figure derived from Leichtman Research Group, "Major Pay-TV Providers Lost About 2,875,000 Subscribers in 2018," March 6, 2019, https://www.leichtmanresearch.com/wp-content/uploads/2019/03/LRG-Press-Release-03-06-2019.pdf. We divide DISH's subscriber count by the sum of "Total Top Cable," Total DBS," and "Total Top Phone." At Table 2 of his Declaration, Dr. Eisenach provides a 13% market share for DISH, which is consistent with the numbers from the Leichtman press release if "Total Top Phone" (i.e. video subscribers through Verizon FiOS, AT&T U-verse, and Frontier) is excluded from the denominator. Note that "virtual MVPDs" (Sling TV and DIRECTV NOW) are excluded from this calculation.

17 *See* Jessica Calfee Stahl, "Effects of Deregulation and Consolidation of the Broadcast Television Industry," American Economic Review, 2016, vol. 106(8) pages 2185-2218, p. 2217 (hereafter Stahl (2016)).

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Rainey that Dr. Eisenach claims shows that "stations owned by broadcast groups were found to have higher ratings than singly owned stations."[18]

The Stahl paper has limited direct relevance to the consolidation arising from the proposed Nexstar/Tribune merger because it considers consolidation that occurred from 1996 through 2007,[19] which largely predates the introduction of cash compensation for retransmission.[20] Dr. Rainey's paper also has limited relevance, as it is confined to an even earlier period (1993 to 1998). Also, while Dr. Rainey concluded that group ownership size has only a small positive effect on station ratings, Dr. Stahl noted that "it is difficult to make a causal inference because [Dr. Rainey's] estimation does not include owner fixed effects, and there is no exogenous source of variation in ownership in the mid-1990s."[21]

Dr. Eisenach also speculates 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."[22] His speculation is both unsupported and, moreover, contradicted by DISH viewership information. Data on DISH subscriber usage patterns indicate that viewership among larger broadcast group channels is not statistically different from that of smaller broadcast groups. Table 2 compares the average viewership, measured in average hours per viewer per month, of small and large broadcast groups.[23]

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18 *See* Mark Christopher Rainey, *The Effects of Mergers in Broadcast Television*, Massachusetts Institute of Technology Doctoral Dissertation, 2001 p. 81-83.

19 *See* Stahl (2016), p. 2190.

20 Dr. Eisenach explains in a 2014 report that, from 1992 to 2004, the MVPDs did not pay cash compensation to broadcasters. Instead, rebroadcasting agreements included "in-kind compensation" such as "through the purchase of advertising time, cross-promotions, and carriage of affiliated channels." *See* Jeffrey A. Eisenach, "Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content", NERA Economic Consulting, July 2014, p. 16 (hereafter Eisenach (2014)). Dr. Eisenach explains that Sinclair Broadcast Group appears to have been the first broadcaster to secure cash compensation, starting in 2005, and that other broadcaster groups started to get cash compensation in the years that followed (Eisenach 2014, p. 17).

21 *See* Stahl (2016), p. 2190.

22 *See* Eisenach Declaration, ¶ 15.

23 In Section III, below, we respond to Dr. Eisenach's criticisms of the "Big/Small" analysis of retransmission fees, and include a sensitivity analysis of the size thresholds for determining whether a broadcast group is big or small. *See* Table 3, below. For Table 2, examining viewership differences, we

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Table 2: Comparison of Viewership per subscriber (hours per month) per Big 4 Station by Broadcast Group Size

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Sources: BIA Kelsey Media Pro data as of April 5, 2019; DISH Subscriber Information; DISH Retransmission Agreements

Notes: 2017 monthly average hours viewed of a Big 4 station per user.

Broadcast group sample excludes network-operated stations (*i.e.* ABC/Disney, CBS, Fox, NBC).

Size thresholds are determined using DISH Subscriber and Revenue information for 2016.

As shown in the table, we consider two metrics for gauging broadcaster size: 1) broadcaster group revenue, and 2) the number of broadcaster group subscribers on the DISH network. The table shows that although the average viewership per subscriber per month is slightly higher for larger broadcast groups, these differences are not statistically significant (i.e., the T-Test p-values exceed standard critical values by a wide margin).[24] Moreover, the small, but not statistically significant, difference in average viewership appears to be driven by the low viewership of very small broadcast groups. In a scenario where broadcast groups with less than $5 million in annual revenue

adopt the thresholds presented in Table 3 for consistency purposes. Our conclusion that big broadcast groups have no greater viewership per subscriber is not sensitive to the specific value of the threshold used.

24 Table 6, in the Appendix, provides viewership comparisons for big and small broadcast groups using the size thresholds in the Brattle Report. That analysis also finds that the difference in viewership between big and small broadcast groups is not statistically significant.

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are omitted, the difference in mean viewership between small broadcasters and larger broadcast groups (i.e., those with more than $800 million revenues) is even smaller.[25]

III. Large broadcast groups charge higher per-subscriber retransmission fees than do smaller broadcast groups

The Brattle Report first examined the relationship between broadcaster size and retransmission fees for Big 4 stations with a simple comparison of the retransmission fees charged by a set of larger broadcast groups with those charged by a set of smaller broadcast groups.[26] That analysis demonstrated that DISH paid lower per-subscriber retransmission fees for the Big 4 stations of the smaller broadcast groups compared to the same types of fees paid to larger broadcast groups, where "large" and "small" were specified in terms of local broadcast group annual revenues and in terms of the number of DISH subscribers covered.[27] It also examined the per-subscriber retransmission fees that DISH pays to Nexstar and Tribune. It showed that DISH pays Nexstar, which **{{BEGIN HCI END HCI}}**, higher per-subscriber retransmission fees than it pays Tribune, even if those fees are adjusted to reflect the ages of contracts.[28]

Dr. Eisenach mistakenly asserts that this analysis is problematic and is not informative as to the effects that a merger that creates a large broadcast group could have on per-subscriber retransmission fees paid by MVPDs and, in turn, on consumer prices. Dr. Eisenach criticizes the analysis in three areas, each of which is without merit and rebutted below. First, Dr. Eisenach points out that both Nexstar and Tribune are "big" according to the threshold used in the Brattle Report, and this somehow means that findings concerning the correlation between the size of a

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[25] The results of this additional comparison are shown in the bottom panel of Table 6 in the Appendix. The average viewership (per station per subscriber per month) is **{{BEGIN HCI END HCI}}** hours for broadcast groups with revenues from $5 million to $800 million, as opposed to **{{BEGIN HCI END HCI}}** hours for large broadcast groups. If network-owned broadcast groups are not excluded from the analysis, the average viewership (per station per subscriber per month) for large groups is **{{BEGIN HCI END HCI}}** hours – *lower* than that of the broadcast groups with revenues from $5 million to $800 million.

[26] *See* Brattle Report, pp. 16-17.

[27] *See* Brattle Report, pp. 16-17.

[28] *See* Brattle Report, pp. 17-18.

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broadcast group and per-subscriber retransmission fees are irrelevant.[29] Second, Dr. Eisenach disagrees with the decision to omit both non-Big 4 stations and network owned-and-operated ("O&O") stations from this and subsequent analyses, and, again, thinks that this negates the informational value of the analysis.[30] Third, Dr. Eisenach notes that the Brattle Report identified 54 broadcast groups with which DISH currently has contracts in place to retransmit Big 4 stations (in Table 2 of the Brattle Report), but only used 45 in the "Big and Small Analysis."[31] Dr. Eisenach suggests that this resulted in inaccurate results due to selection bias. As we explain below, the inclusion of contracts in the Brattle Report's analysis was determined by data availability and consistency alone, and not by some biased screening mechanism. We address each of Dr. Eisenach's criticisms in this area in turn below.

A. The Brattle Report's analysis is robust to the choice of size thresholds

Dr. Eisenach's observation that both Nexstar and Tribune are already "big" according to the thresholds used – as shown in Table 3 of the Brattle Report ("Average Retransmission Fee by Broadcast Group Size") and associated analyses included in the Report's Appendix (Table 11: "Retransmission Fees by Broadcast Group Size Including Network Owned Broadcast Groups") – is true, but irrelevant. Table 3 demonstrates the relationship between broadcast group size and per-subscriber retransmission fees; it does not analyze the *incremental* effect that an increase in the size of a broadcast group may have upon per-subscriber retransmission fees. Incremental effects of broadcaster size are addressed in the regression analysis, with results summarized in Table 5 of the Brattle Report ("Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group").

The analysis shown in Table 3 demonstrated that larger broadcast groups do indeed charge higher per-subscriber retransmission fees than do smaller groups. However, to address Dr. Eisenach's concerns, we present the same analysis using an alternate pair of thresholds, which we show in Table 3, below. Here, we specify large broadcast groups to be those that have more than $800

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29 *See* Eisenach Declaration, ¶ 49.

30 *See* Eisenach Declaration, ¶ 50-51. Dr. Eisenach claims that the Brattle Report "provides no explanation for why omitting O&O stations is appropriate" in a sentence that cites the explanation offered for their omission. Dr. Eisenach may disagree with the explanation, but it is a distortion to claim that the Brattle Report "provides no explanation."

31 *See* Eisenach Declaration, ¶ 52.

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million in annual revenues and groups that have more than 2.5 million DISH subscribers.[32] Under both thresholds, **{{BEGIN HCI END HCI}}** As is clear from the table, the result presented in the Brattle Report continues to hold under this alternative specification for "large" and "small" broadcast groups. That is, DISH pays higher per-subscriber retransmission fees to larger broadcast than it does to smaller groups.

Table 3: Average Retransmission Fee by Broadcast Group Size

{{BEGIN HCI

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Sources: BIA Kelsey Media Pro data as of April 5, 2019; DISH Subscriber Information; DISH Retransmission Agreements

Notes: 2017 monthly average hours viewed of a Big 4 station per user.

Broadcast group sample excludes network-operated stations (*i.e.* ABC/Disney, CBS, Fox, NBC).

Size thresholds are determined using DISH Subscriber and Revenue information for 2016.

B. The Brattle Report's analysis appropriately focuses on retransmission fees charged for Big 4 stations by independent broadcast groups

Dr. Eisenach criticizes the Brattle report for omitting non-Big 4 stations and O&O stations from the analysis.[33]

32 These thresholds have been increased from the thresholds considered in the Brattle Report to reflect Dr. Eisenach's complaint that both Nexstar and Tribune were already large. At these levels, **{{BEGIN HCI END HCI}}**.

33 *See* Eisenach Declaration, ¶ 51. Dr. Eisenach repeats this criticism when discussing the regression analysis. *See also* Eisenach Declaration, ¶ 57, 65.

First, with respect to the exclusion of non-Big 4 stations, Dr. Eisenach does not provide any opinion as to whether or not non-Big 4 stations should be included in this analysis, nor does he provide any insight as to whether their inclusion would affect results. Instead, Dr. Eisenach cites statistics regarding differences across broadcast groups with respect to the ratio of average Big 4 fees to average non-Big 4 fees, and argues that these differences mean that there is "no reason to believe that a comparison based only on Big 4 stations is representative of overall levels."

Big 4 and non-Big 4 stations are characterized by different viewing patterns and per-subscriber retransmission fees, which provides strong reason not to include both of these station types in a single analysis. The statistics cited by Dr. Eisenach make this point with respect to retransmission fees quite clearly: on average, the ratio of average retransmission consent revenue per subscriber per month for Big 4 stations to the average for non-Big 4 stations is **{{BEGIN CI END CI}}**.[34]

Table 4, below, provides further illustration of the disparity between Big 4 and non-Big 4 stations. In the table, we compare the average retransmission fee and average monthly viewership hours by network affiliation using data from the 16 broadcast groups for which (a) we have data on DISH retransmission fees (as of March 1, 2019) and (b) the broadcaster owns at least one Big 4 affiliated station and one non-Big 4 station.

Table 4: Average Retransmission Fees by Network Affiliation, Selected Broadcast Groups

{{BEGIN HCI

[34] *See* Eisenach Declaration, FN 81.

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Source: Retransmission contracts provided by DISH.

Notes: Based on DISH retransmission fees as of March 1, 2019. Viewership based on 2017 viewing patterns of DISH subscribers.

* Analysis is limited to the 16 broadcast groups for whom we have current retransmission fee information for at least one Big 4 affiliated station and one non Big 4 affiliated station.

The data show nearly a **{{BEGIN HCI END HCI}}** difference between the per-subscriber retransmission fees for Big 4 affiliates and those of non-Big 4 affiliates. The **{{BEGIN HCI END HCI}}** difference illustrates the presence of product differentiation and a vastly different willingness to pay across network affiliate types. In contrast, across the Big 4 stations, retransmission fees are much more similar; the difference between the highest and lowest of the Big 4 stations is only **{{BEGIN HCI END HCI}}**.[35] Similar differences are observed in terms of viewership patterns for Big 4 and non-Big 4 stations. On average, DISH subscribers in 2017 watched approximately **{{BEGIN HCI END HCI}}** hours per month for each Big 4 network-affiliated station. In contrast, DISH subscribers watched approximately **{{BEGIN HCI END HCI}}** hours per month for each non-Big 4 network affiliate stations, representing a **{{BEGIN HCI END HCI}}** difference.

Thus, the decision to focus this "Big and Small Analysis" on the retransmission fees paid for Big 4 stations is consistent with the reality that the market views these as fundamentally different products. Furthermore, Big 4 stations play a dominant role in negotiations between MVPDs and broadcast groups, **{{BEGIN HCI**

END HCI}}.[36] Indeed, Big 4 stations

[35] Furthermore, most broadcast groups charge **{{BEGIN HCI END HCI}}** when they own stations affiliated with more than one Big 4 network. Of the 16 broadcast groups in the chart, 15 own stations that are affiliated with more than one Big 4 network. Of those 15, **{{BEGIN HCI END HCI}}**.

[36] **{{BEGIN HCI**

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represent more than **{{BEGIN HCI END HCI}}** of DISH's retransmission fee costs,[37] and is consistent with the fact that the Big 4 stations also account for approximately **{{BEGIN CI END CI}}** of all broadcast station revenues (including advertising revenues).[38] Thus, the focus on Big 4 retransmission fees, both in this simple comparison as well as in the regression analysis that follows, is both intentional and appropriate.

Second, it is reasonable to exclude the O&O stations in the "Big and Small Analysis" because O&O stations are extensively integrated with broadcast networks and, as a result, can potentially have different incentives for retransmission fee levels from those of the independent broadcasting groups. Also, the four network-owned broadcast groups own and operate the Big 4 affiliates in many of the largest media markets in the country, further distinguishing them from the other broadcast groups.[39] Thus, as we noted above with respect to non-Big 4 stations, including O&O stations in this analysis would muddy results because of product inconsistencies. However, to be complete in the analysis, the Brattle Report did include the O&O stations in its regression analyses.[40] In doing so, it explicitly controlled for potential O&O differences in per-subscriber retransmission fees by including an O&O identifier variable in the regression specification.

C. The Brattle Report's analysis relies upon the available information and is robust to inclusion of additional information

Finally, Dr. Eisenach expressed concern that the Brattle Report only used 45 of the 54 retransmission contracts between broadcast groups and DISH in its analysis.[41] As described below,

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37 Source: Brattle calculations based on DISH profit and loss information. *See* Workpapers for this report.

38 Source: Brattle calculations based on BIA Kelsey data. *See* Workpapers.

39 For example, all four network-owned broadcast groups (ABC/Disney, CBS TV, Comcast/NBC, and Fox Television Stations Incorporated) own and operate the corresponding Big 4 affiliates in five of the six largest media markets in the country: New York, Los Angeles, Chicago, Philadelphia, and San Francisco-Oakland-San Jose. In Dallas-Ft. Worth (the fifth largest media market), three of the Big 4 affiliate stations are owned and operated by the corresponding network. Source: BIA Kelsey data.

40 *See* Brattle Report, p. 18-21.

41 *See* Eisenach Declaration, ¶ 52.

the scope of contracts included in the analysis was determined by data availability and consistency alone, and not by some biased screening mechanism.

The 54 broadcast groups included in Table 2 ("Broadcast Group Size") met all three of the following conditions: (1) DISH provided a retransmission fee agreement for that group; (2) the broadcaster group could be mapped to a group in BIA Kelsey; and (3) that group owned one or more Big 4 affiliated stations. However, for nine of these broadcast groups, the provided retransmission agreement did not include current (as of March 1, 2019) retransmission fee data for Big 4 affiliates. Accordingly, those nine broadcast groups were excluded from the analysis.

Since the submission of the Brattle Report, we have identified three additional broadcast groups that we are able to match in the BIA Kelsey data, and for whom we have current retransmission fee data. We have reexamined the "Big and Small" and regression analyses with these three additional broadcast groups included and find that their inclusion has no material effect on the results of this descriptive analysis, nor of the regression analysis that follows. Table 7 and Table 9 in the Appendix present these results.

IV. Regression analysis indicates that there is a strong positive relationship between broadcast group size and per-subscriber retransmission fees paid by DISH

The Brattle Report showed that, across multiple specifications and using multiple measures of broadcaster size, there is a strong positive relationship between broadcaster group size and retransmission fees.[42] In his declaration, Dr. Eisenach makes several criticisms of this analysis. In particular, he claims that the results indicate that the transaction would reduce retransmission fees, and that the econometric analysis presented is flawed and unreliable.[43] His critiques are incorrect.

A. Dr. Eisenach's predictive exercise is uninformative

Dr. Eisenach begins his discussion of the regression analysis in the Brattle Report with an exercise where, using the reported results from one of the 12 provided regression specifications, he predicts

42 *See* Brattle Report, p. 18-21, 32.

43 *See* Eisenach Declaration, ¶ 57-66.

Continued on next page

retransmission fees for Tribune, Nexstar, and New Nexstar. He justifies his choice of which specification to use based on a comparison of the R-Squared statistic associated with each of the six regression specifications in Table 5.[44] He concludes that the analysis indicates that the transaction would decrease retransmission fees. However, Dr. Eisenach makes a crucial error in carrying out this exercise: in short, a specification difference in one of those regressions means that the R-Squared metrics are not uniformly comparable. Appropriate adjustments to the "goodness of fit" measure, so that all of the regressions are directly comparable, demonstrate that Dr. Eisenach's conclusions are not valid.

Dr. Eisenach claims that the quadratic specification he uses provides the best fit to the data.[45] He determines this by comparing the R-Squared from the quadratic model (0.747, in column [5] of Table 5, "Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group," in the Brattle Report) with those of the other models. The next highest R-Squared value among the five remaining regressions in that table is 0.729 (from the log-log specification in column [6] of the same table). The R-Squared statistic measures the share of the variation in the dependent variable that can be explained by the independent variables included in the regression specification. For example, model [5] can explain 74.7% of the variation in per-subscriber retransmission fees across broadcast groups. The R-Squared measure provides a general indication of how well the regression model fits the data.[46] When two or more regression models have the same dependent variable and are estimated on the same dataset, the R-Squared metric can be used to directly compare the "goodness of fit" of those models.

However, in estimating a log-log specification, one first transforms the dependent variable (here, the per-subscriber retransmission fees charged by the various broadcast groups), by taking its natural logarithm. Accordingly, the R-Squared measures from models [5] and [6] from Table 5 are <u>not comparable</u>.[47] Instead, in order to compare the relative ability of these two models to fit the

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44 *See* Eisenach Declaration, ¶ 58.

45 *See* Eisenach Declaration, ¶ 55, ¶ 58: "The two non-linear models fit the data best as measured by the R-Squared statistic, with the quadratic model producing the best fit."

46 *See*, e.g., Peter Kennedy, "A Guide to Econometrics." 6th Edition, pp. 13-14; William Greene, "Econometric Analysis," 4th edition, pp. 238-240.

47 *See*, e.g., Kennedy at p. 103: "A distinct danger… is that, if the dependent variable is not the same, the R^2 is not directly comparable… Estimated values of the dependent variable must be used to construct a

Continued on next page

data, one has to account for this transformation by "exponentiating" the predicted values of the dependent variable (which are expressed in natural logs of retransmission fees).[48] We thus calculate a corollary to the R-Squared measure that takes this into account and is thus more directly comparable to the R-Squared measure from the quadratic specification. We find that while the log-log specification can only explain 72.9% of the variation in the *natural log of retransmission fees*, it explains 87.7% of the variation in retransmission fees, which is of course the variation we are ultimately interested in explaining.[49] Accordingly, the log-log model fits the data better than the quadratic model by more than ten percentage points, meaning that Dr. Eisenach's justification for his choice of model is simply incorrect.

We find qualitatively similar results whether using the 45-observation regressions as submitted in the Brattle Report, or the updated 48-observation regressions presented in the Appendix of this report. The finding that the logarithmic model fits the data better than the quadratic model holds whether subscribers or station revenues are used as the measure of broadcast group size. The results of the various permutations are presented in Table 5, below.

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comparable R^2, or some transformation must be applied to the data to assure comparability." *See also* Greene, p. 241.

48 In taking the anti-log, it is also necessary to make a technical adjustment to account for the properties of the log-normal distribution.

49 Similarly, when we measure size using revenues instead of subscribers, we reach similar conclusions. While the quadratic specification accounts for 73.2% of variation in retransmission fees, the corollary log specification accounts for 89.0% of variation in retransmission fees. *See* Brattle Report at Table 12, p. 33 and Backup Materials.

Table 5: Retransmission Fee vs Broadcaster Size Regression Model Fit Comparisons

{{BEGIN HCI

END HCI}}

Sources: Regression analyses as reported in Tables 5 and 12 of the Brattle Report and Tables 6 and 8 as presented in the Appendix of this report.

Notes: For the logarithmic regressions, the fraction of explained variation in fees is calculated by using the results of that regression to predict the retransmission fees, using standard statistical techniques. Updated subscriber regressions use 48 observations, and updated revenue regressions use 47 observations.

If we focus on the logarithmic regression in model 6, which provides the best fit for the data, we find that, contrary to Dr. Eisenach's claims, retransmission fees would be estimated to increase for both Tribune and Nexstar.[50] Specifically, the results of the logarithmic regression would imply that Tribune's retransmission fees would increase by approximately **{{BEGIN HCI** **END HCI}}**, while Nexstar retransmission fees would increase by approximately

[50] Even if the quadratic model were the most appropriate model to use in carrying out his predictive exercise, Dr. Eisenach commits a second error in doing so. It is standard, when reporting regression coefficient estimates, to round those estimates for brevity of exposition. In carrying out calculations based on those coefficient estimates, it is also standard to use the precise estimate, as opposed to the rounded estimate that gets reported in a regression table. **{{BEGIN HCI**

END HCI}}.

We note that, to our knowledge, Dr. Eisenach never requested the work papers underlying the analysis, where the more precise coefficient values are readily available.

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{{BEGIN HCI END HCI}}.[51] These estimates directly refute Dr. Eisenach's claims that the regressions imply that the proposed merger would cause retransmission fee decreases. Furthermore, the evidence presented in the before-and-after merger analysis indicates that they are likely underestimates of the retransmission fee increases that would arise from the proposed merger. We discuss these estimates in further detail in Section V, below.

While we do not generally believe that blind adherence to "best fit" is the best criterion in choosing among regression models, there is also a strong theoretical reason not to rely on the quadratic as a preferred specification, as Dr. Eisenach has done. While the coefficients from that regression model suggest an inflection point, one needs to have an economically sound explanation for why size increases might result in decreases in retransmission fees. Dr. Eisenach has provided no such rationale.

B. Responses to Dr. Eisenach's other critiques of the regression analysis

In addition to the critiques addressed above, Dr. Eisenach also claims that the regression analysis in the Brattle Report is "flawed" and "unreliable."[52] This is based on two concerns: one pertaining to the potential effects of omitted variables, and the other pertaining to the potential for selection bias due to the perceived omission of some contracts. Earlier in this response, we explained why the Brattle Report does not include all 54 contracts as presented in Table 2 of that report ("Broadcast group Size").[53] This leaves the omitted variable bias critique.

The omission of relevant variables from a regression analysis can result in biased or unreliable coefficient estimates if two conditions are met: (1) the omitted variables have explanatory power and (2) the omitted variables are correlated with the variables that are already included in the

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51 Values are calculated based on Appendix Table 7, which measures size based on the number of DISH subscribers. If we measure size based on revenues instead (Table 9), the relevant values are approximately **{{BEGIN HCI END HCI}}** for Tribune and approximately **{{BEGIN HCI END HCI}}** for Nexstar.

52 *See* Eisenach Declaration, ¶ 64-66.

53 In his footnote 108, Dr. Eisenach also questions whether the results would be robust to a different measure of size – in particular whether using the size of the group at the time of the retransmission negotiation would yield qualitatively different results. We present, in Table 8 and Table 10 of the Appendix, regressions showing that doing so has no substantive effect on the results.

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regression.[54] Dr. Eisenach asserts that omitting "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.," may make the results unreliable, "as the relationships suggested by the regression coefficients may be spurious."[55] Dr. Eisenach's claim, however, is unsupported and without merit.

The omission of one or more variables does not automatically bias the resulting coefficients, and even when it does result in bias, that bias can cut either way. In other words, the omission of relevant variables can result in an *understatement* of the coefficient of interest, an *overstatement* of that coefficient, or can result in *no meaningful effect* on the coefficient of interest. Furthermore, the possibility of omitted variable bias can never be ruled out; one can always assert that the inclusion of some additional variable would change the results.[56]

However, in claiming that omitted variables render an econometric analysis "flawed," "unreliable," or possibly "spurious," Dr. Eisenach has an obligation to (a) show that the omitted variables would have an effect on the estimates, (b) show that the bias would imply a smaller or negative effect as opposed to the positive and statistically significant effect that was estimated, and (c) provide empirical evidence to back up his claims. Instead, Dr. Eisenach has made a blanket assertion but has done nothing to demonstrate that adding another variable would have an effect of understating the size effects. He has not even put forth a conceptual argument suggesting the direction of such hypothetical bias.

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54 *See*, for example, William Greene, "Econometric Analysis," 4th edition, at pp. 334-337.

55 *See* Eisenach Declaration, ¶ 64.

56 *See*, for example, Daniel L. Rubinfeld, "Reference Guide on Multiple Regression" at pp. 309-310: "Pointing to the possibility of a spurious correlation will typically not be enough to dispose of a statistical argument. It may be appropriate to give little weight to such an argument absent a showing that the correlation is relevant." Rubinfeld in turn cites Allen v. Seidman, 881 F.2d 375 (7th Cir. 1989), which takes issue with Defendants' attack on a statistical study without "bother[ing] to conduct its own regression analysis, which for all we know would have strengthened the plaintiffs' simpler study." The court further ruled that this type of approach by Defendants "amounts to a contention that unless a plaintiff eliminates all alternative hypotheses he must lose."

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V. DISH's per-subscriber retransmission fees paid to smaller broadcast groups increased after those groups were acquired by larger broadcast groups

The Brattle Report showed that, on average, retransmission fees increase significantly following past broadcast group mergers. For example, it found that, after controlling for industry trends in fee inflation, the target broadcasters saw increases of approximately **{{BEGIN HCI END HCI}}** in their next contract, while the acquiring broadcasters saw increases of approximately **{{BEGIN HCI END HCI}}**.[57] To control for inflation, it relied upon the results of the regression analysis of per-subscriber retransmission fees, which included controls for broadcaster size, contract age, and whether the broadcast group was network owned and operated. Specifically, it identified the inflation rate implied by the contract age variable in model 6, which indicated that, for each year earlier that a contract was negotiated, its retransmission fees were predicted to be **{{BEGIN HCI END HCI}}**.[58]

As we explain above, we have since updated the analyses to include additional contract information. We find that the relevant implied inflation rate is now estimated at **{{BEGIN HCI END HCI}}**.[59] When applied to the before-and-after merger analyses, we now see that target broadcasters saw merger-related retransmission fee increases of approximately **{{BEGIN HCI END HCI}}** and acquiring broadcasters saw increases of approximately **{{BEGIN HCI END HCI}}**. These results are summarized in Table 11 and Table 12 in the Appendix.[60]

Dr. Eisenach takes issue with use of this estimate of the inflation rate. Specifically, he makes two claims. First, he suggests that the analysis should have relied on the inflation estimates from the other regression models in the Brattle Report.[61] Had it done so, he purports to show, the merger

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57 *See* Brattle Report Tables 6-7, p. 23-24.

58 *See* Brattle Report Table 5, p. 20.

59 *See* Table 7. **{{BEGIN HCI END HCI}}**.

60 In addition to updating the inflation rate to account for our revisions to the regression analysis, we have identified additional adjustments to Brattle Report Tables 6 and 7, none of which alter the qualitative results of those tables.

61 *See* Eisenach Declaration, ¶¶ 68-70.

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effects on per-subscriber retransmission fees would have been reversed. Second, he claims that the inflation rate is too low relative to the "S-shaped trajectory" of retransmission fees over the period.[62] In particular, he claims that, whereas the average inflation rate from 2016 to 2019 was just **{{BEGIN CI END CI}}**, the inflation rate during 2013 to 2016, which he argues is the more relevant period for the contracts listed in the analysis, was **{{BEGIN CI END CI}}**.[63] Dr. Eisenach is wrong on both counts.

Dr. Eisenach's first claim is predicated on the same error that he made in reference to assessing the model fit of the regression models, where he incorrectly identifies model 5 as the one with the best model fit. As we have explained above, R-squared values are not directly comparable when the dependent variable changes, and when an apples-to-apples assessment of model fit is performed, we see that model 6, which was used for calculating the inflation rate, has the smallest prediction error. Moreover, Dr. Eisenach contradicts himself by looking to models 3-5, which provide linear estimates of the change in retransmission fees over time, for an estimate of the inflation rate, while simultaneously arguing that the changes in retransmission fees have been non-linear over time.

Dr. Eisenach's second claim betrays ignorance of the data informing the Brattle Report's regression analysis. Dr. Eisenach incorrectly asserts that the data must cover the period 2016 to 2019, when in fact the contract start dates in the regression analysis span the period **{{BEGIN HCI END HCI}}**. Moreover, although Dr. Eisenach claims that the relevant inflation rate is higher than was estimated during the period 2013 to 2016, he conflates the high rates of increase in retransmission fees during that period with the high level of merger activity that coincided with those years. By controlling for broadcaster size, the regression analysis partially accounts for the elevated rates of increase in retransmission fees caused by merger activity during the 2013 to 2016 period. That is, Dr. Eisenach's preference for the higher observed rate during that period would subsume the merger effect that the Brattle Report aims to estimate in the first place. In contrast, the before-and-after merger analysis partially accounts for underlying trends in retransmission fees independent of those merger effects, enabling direct estimation of the merger effects.

[62] *See* Eisenach Declaration, ¶ 74.

[63] *See* Eisenach Declaration, FN 118.

VI. The goalpost analysis in the Brattle Report demonstrates that DISH paid higher per-subscriber retransmission fees in order to avoid simultaneous blackouts

The Brattle Report demonstrated that the effects of blackouts extend beyond the contracting price of the parties involved in the dispute, because during blackouts MVPDs such as DISH, facing negotiations with a third party, will agree to higher prices in those negotiations than they otherwise would have agreed to in order to avoid multiple simultaneous broadcast group blackouts. Programming blackouts can be damaging to the affected MVPD's reputation and can lead to defection of current and prospective subscribers. Furthermore, blackouts that are perceived by consumers to be pervasive and extensive further erode an MVPD's reputation and leads to even greater defection of current and prospective subscribers.

In her declaration, Melisa Ordonez explained how DISH's negotiations with broadcast groups are affected when DISH is experiencing a blackout from another broadcast group. Specifically, Ms. Ordonez stated that "If DISH has to renegotiate a contract with a broadcaster at a time when it is subject to a blackout of another broadcast group's stations, it is more to likely to accede to some of that first broadcaster's demands to avoid a second blackout and additional churn among its national subscriber base."[64] The goalpost analysis used the prices that DISH agreed to pay as a result of such retransmission negotiations to determine the extent to which, as Ms. Ordonez explained, DISH paid higher prices when negotiation during blackouts of other broadcast groups. As the Brattle Report establishes, on average DISH does accept retransmission fees that are higher than its goalpost guidelines when it is experiencing, or threatened by, a blackout from another broadcast group than when third-party blackouts are not a factor.[65] The data summarized in Table 8 ("Results of Retransmission Negotiations under Threat of Tribune Blackout") and Table 9 ("Results of Retransmission Negotiations Before or After Tribune Blackout was a Factor") in the Brattle

[64] Declaration of Melisa Ordonez, Exhibit A to Petition to Deny of DISH Network Corporation, MB Docket No. 19-30 (Mar. 18, 2019), ¶ 5 (hereinafter, "Ordonez Declaration").

[65] As explained in the Brattle Report, DISH's goalpost documents are internal documents used to set retransmission fee targets as DISH enters retransmission fee negotiations. They take a variety of information into account, including the outcomes of DISH's recent retransmission fee negotiations with comparable broadcast groups. *See* Brattle Report, pp. 24-25.

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Report make this point quite clearly. Dr. Eisenach does not challenge this important finding, but seeks to minimize it by raising four criticisms.

First, Dr. Eisenach asserts that "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.'"[66] Dr. Eisenach is incorrect in his assertion. Notwithstanding that Dr. Eisenach does not fundamentally dispute that larger broadcast groups are, in fact, associated with more blackouts,[67] the relevance of the goalpost analysis is in no way contingent on the relationship between broadcast group size and the propensity for a blackout. As Dr. Eisenach himself recognizes, the purpose of the goalpost analysis is to assess the potential for cross-market price effects,[68] and the Brattle Report shows that DISH suffers a loss in bargaining leverage with broadcast groups when it is experiencing or is under the threat of a simultaneous blackout with another broadcast group.[69] This finding thus illustrates that broadcaster mergers that combine station ownership across multiple DMAs increase broadcaster bargaining leverage.[70]

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66 *See* Eisenach Declaration, ¶ 77, citing the Brattle Report, p. 24.

67 Specifically, Dr. Eisenach does not refute the finding in the Brattle Report that large broadcast groups are associated with 1.7 times as many blackouts as small broadcast groups. (Eisenach Declaration ¶ 37) Instead, he merely tries to muddy the waters by claiming that the causes of these phenomena may not all have to do with the leveraging of bargaining power. See Eisenach Declaration, ¶¶ 36, 39. And while Dr. Eisenach notes that, among MVPDs, DISH accounts for a large fraction of blackouts, he fails to acknowledge that such a result would be consistent with DISH's relative bargaining position vis-à-vis broadcasters compared to MVPDs with larger subscriber shares in any given DMA, or that as a satellite provider is present in many more DMAs than most other MVPDs.

68 *See* Eisenach Declaration, ¶ 78.

69 *See* Brattle Report, pp. 26-27.

70 Bargaining theory posits that a merger will lead to a loss in bargaining leverage for the counterparty whose "surplus function" from a successful agreement is "concave" (i.e., the incremental gain from securing an agreement with broadcaster B is higher if it does not already have an agreement with broadcaster A than if it does already have an agreement with broadcaster A). See, for example, Chipty, Tasneem, and Christopher M. Snyder. "The role of firm size in bilateral bargaining: A study of the cable television industry." *Review of Economics and Statistics* 81, no. 2 (1999): 326-340. The goalpost analysis directly demonstrates the concavity of DISH's "surplus function" across broadcasters in different geographic markets.

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Second, Dr. Eisenach observes that the sample size of blackouts in which DISH was involved – a requirement for the goalpost analysis – is small, which, in his view, makes it impossible to determine whether or not the presence of a blackout elsewhere in DISH's network has a meaningful effect upon the retransmission fee negotiations. However, notwithstanding the number of such negotiations available for review, the available data set is complete, consistent, and informative to the issue at hand. Review of Tables 8 and 9 in the Brattle Report indicates that the goalpost analysis supports Ms. Ordonez's assertion: DISH agreed to pay per-subscriber retransmission fees that exceeded the goalpost rates by a weighted average of 10% when those negotiations were conducted while DISH was under a blackout or the threat of a blackout from Tribune during the summer of 2016. Dr. Eisenach unsuccessfully attempts to diminish the value of contemporaneous DISH data with an alternative interpretation: that "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."[71] He is incorrect. It is not reasonable, especially when criticizing an analysis for being based on "limited information," to cherry pick a single data point in an attempt to make an alternative argument.

Third, Dr. Eisenach takes aim at two blackout observations included in the goalpost analysis, which he unsuccessfully attempts to use to discredit the Brattle Report's findings. Dr. Eisenach drew data from Table 8 (which shows the results of retransmission negotiations when DISH was experiencing or under threat from a blackout by Tribune) and Table 9 (which shows the results of retransmission negotiations before or after such a blackout threat) in the Brattle Report. He then observed that the ratio of the negotiated per-subscriber retransmission fees (in the columns labeled "Big 4 retransmission rates, average over life of contract, Final Agreement") to the goalpost rate for two large broadcasters **{{BEGIN HCI**

END HCI}} and concluded that this fact doesn't support the argument.

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71 *See* Eisenach Declaration, ¶ 79.

Dr. Eisenach's critique is, again, based on cherry picking a single data point, repeating the key flaw of his earlier critique. However, he has further compounded his error here by ignoring a lengthy explanation in the Brattle Report indicating that the retransmission fee he chose to focus on from Table 9 is superficially high, and thus does not provide a valid comparison.

In the paragraph preceding Table 9 in the Brattle Report, Brattle cautioned that the final number (in terms of per-subscriber retransmission fees) from the October agreement from that table is over-stated because of special arrangements between DISH and the subject broadcast group. In her declaration, Ms. Ordonez explained that the **{{BEGIN HCI END HCI}}** per-subscriber retransmission fee in question (shown in Table 9 in the Brattle Report in the "Final Agreement" column) **{{BEGIN HCI**

END HCI}}.[72] **{{BEGIN HCI**

END HCI}}. In short, Table 8 and 9 demonstrate that the per-subscriber retransmission fees agreed to by DISH were higher when those agreements were negotiated while DISH was under the threat of a blackout from another broadcast group.

Figure 1 synthesizes the information in Tables 8 and 9 of the Brattle Report, and presents the ratio of the agreed retransmission fees to the goalpost rate for each of the 12 contract negotiations in question. The figure clearly illustrates the flaws in Dr. Eisenach's attempted critiques. Despite one anomalously low ratio pertaining to one negotiation that took place during the Tribune blackout, a clear pattern emerges.[73] The vast majority of the ratios from negotiations conducted during or under the threat of the blackout are significantly higher than those from the comparison set.

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72 *See* Ordonez Declaration, ¶ 18.

73 **{{BEGIN HCI**

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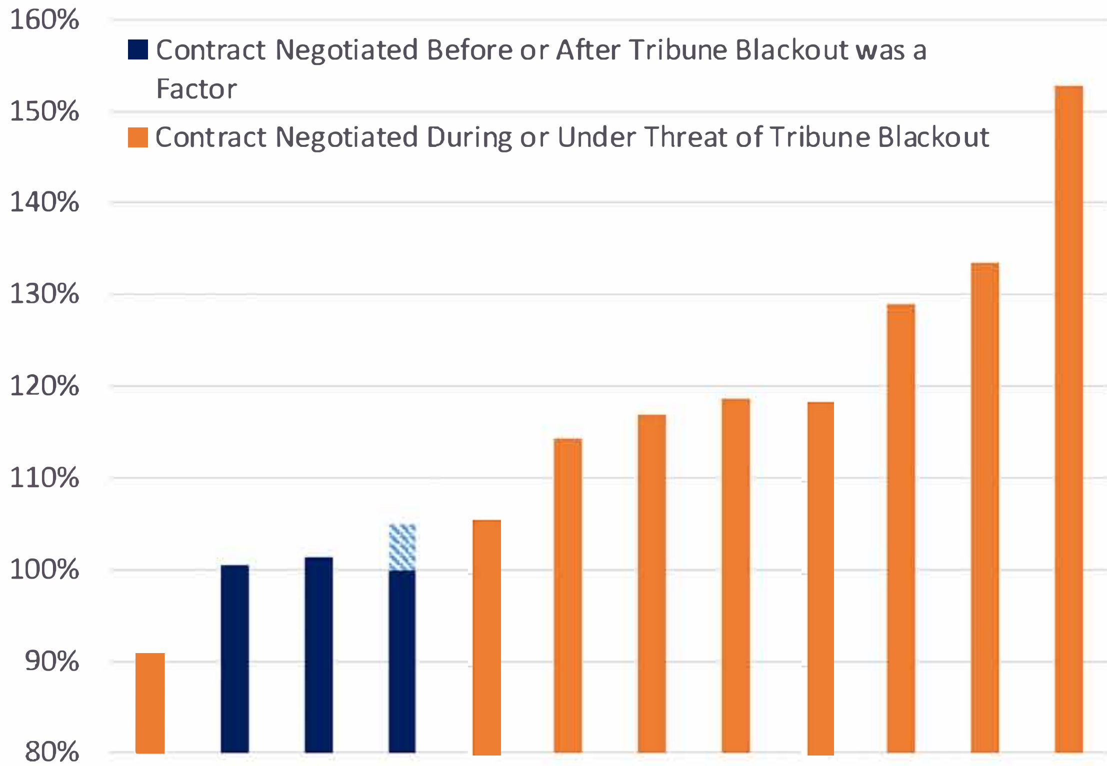
Figure 1: Ratio of DISH Negotiated Retransmission Fees to DISH Goalposts



Source: Tables 8 and 9 of the Brattle Report.

Note: The blue hash-marked area of the highest of the three blue bars represents the minimum impact of the special circumstances surrounding that negotiation (pertaining to the third row from Table 9 of the Brattle Report), according to the Ordonez Declaration.

Finally, Dr. Eisenach took issue with the accuracy and consistency of data used in the goalpost analysis, a claim that is easily dispelled. Dr. Eisenach observed that the Brattle Report stated that 11 DMAs were affected by the 2018 SagamoreHill blackout. He correctly reports that Brattle included non-Big 4 stations in the count of the number of affected DMAs. He is apparently concerned that this is inconsistent with the goalpost analysis related to the Tribune blackout, which was based on the per-subscriber retransmission fees for Big 4 stations only. There is no inconsistency: the narrative description of the SagamoreHill blackout simply makes reference to the total number of affected DMAs (Big 4 plus non-Big 4). But Brattle used the per-subscriber

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retransmission fees for only Big 4 stations in both goalpost analyses.[74] Thus, the goalpost analysis is consistent and clear; Dr. Eisenach's claim of "a number of inconsistencies and omissions that undermine its credibility," is clearly specious.[75] Dr. Eisenach had no basis to suggest that the goalpost analysis was compromised.

Dr. Eisenach also claims that he was unable to fully review the analysis because he was unable to view some of the data associated with the Quincy Media/SagamoreHill analysis. All of this information was and is available in the Brattle Report workpapers supporting the goalpost analysis.

The goalpost analysis thus provides strong indications that DISH is "more to likely to accede to some of that first broadcaster's demands to avoid a second blackout and additional churn among its national subscriber base."[76]

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74 Focusing only on DMAs with Big 4 stations, the SagamoreHill blackout affected 9 DMAs.

75 *See* Eisenach Declaration, ¶ 85.

76 *See* Ordonez Declaration, ¶ 5.

VII. Appendix

Notes and Sources to Table 1

[1]: 2018 DISH Subscribers are used as a proxy of 2021 Subscribers. *See* DISH Network Corporation: SEC Form 10-K (for FY Ended December 25, 2018) at p. 65. Available at: https://dish.gcs-web.com/sec-filings/sec-filing/10-k/0001558370-19-000607

[2]: Market elasticity is derived from information contained in Table III and Table A.I of S. Crawford, Gregory & S Lee, Robin & Dennis Whinston, Michael & Yurukoglu, Ali, "The Welfare Effects of Vertical Integration in Multichannel Television Markets." *Econometrica*, Vol. 86, No. 3 (May 2018) 891–954.

$$\varepsilon = [IV\ Logit\ Price\ Coefficient] * (1 - [Inside\ Share]) * [Weighed\ Avg.Price]$$

[3]: See Table 7 and footnote 59.

[4]: See Table 12. New Nexstar Retransmission Fee Increase = Average Post-Merger Acquirer Fee Increase.

[5]: 50% DISH pass-through rate is taken from Eisenach and Caves (2011). *See* Eisenach Reply to Compass Lexecon at p.14.

[6] - [9]: Number of monthly DISH Subscribers (2016) that are counted in determining retransmission fees paid by DISH to the broadcaster. DISH 2016 Subscriber Information and BIA Kelsey Media Pro Data, April 5, 2019. Station divestitures are listed both in the BIA Kelsey data and the FCC filing.

[10]: Sum([6]:[9])

[11]: Projected 2021 Retransmission Fees: **{{BEGIN HCI**

END HCI}}

New Nexstar's 2021 retransmission fee is standalone Nexstar's fee x (1 + [4]).

[12]: $\text{Cost Increase Paid to New Nexstar} = ([10]_{NewNexstar} \times [11]_{NewNexstar}) - \big(([10]_{Tribune} \times [11\,]_{Tribune}) + ([10]_{Nexstar} \times [11]_{Nexstar})\big)$

[13]: $\text{Cost Increase Paid to Owner of Divested Assets} = [11]_{Tribune} * ([10]_{Tribune} + [10]_{Nexstar} - [10]_{NewNexstar})$

We assume that retransmission fees that are owed to owners of the divested broadcast assets are equal to the lower of Tribune or Nexstar fees.

[14]: [13] + [12]

[15]: [14] / [1]

[16]: DISH ARPU is derived from Q1 2017 number subscribers by tenure and ARPU for Plan A and Plan B;

New Nexstar adjusted by [4]

[17]: (New Nexstar [16] / Nexstar [16]) - 1

[18]: [1] x (-[2]) x [17]

These are subscriber losses that are not recaptured by other MVPDs (i.e., cable or DirectTV).

[19]: [1] - [18]

[20]: 12 months x [19](New Nexstar [16] - Nexstar [16])

Table 6: Additional Comparisons of Viewership per Subscriber (Hours per Month) by Broadcast Group Size

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END HCI}}

Sources: BIA Kelsey Media Pro data as of April 5, 2019; DISH Subscriber Information; DISH Viewership Information

Notes: 2017 monthly average hours viewed of a Big 4 station per user.

Network-operated broadcast groups are ABC/Disney, CBS, Fox, and NBC.

Size thresholds are determined using DISH Subscriber and Revenue information for 2016.

Table 7: Update to Brattle Report Table 5
Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group
{{BEGIN HCI

END HCI}}

Sources: BIA Kelsey Media Pro data as of March 13, 2019; DISH Subscriber Information; DISH Retransmission Agreements.

Notes: Standard errors in parentheses.

***: Significant at 99% level; **: Significant at 95% level; *: Significant at 90% level

A broadcast group's DISH subscribers are counted only in those DMAs where the broadcast group has a Big 4 station, and are measured in hundreds of thousands of subscribers.

Table 8: Alternative to Brattle Report Table 5
Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group at Negotiation
{{BEGIN HCI

END HCI}}

Sources: BIA Kelsey Media Pro data as of March 13, 2019; DISH Subscriber Information; DISH Retransmission Agreements.

Notes: Standard errors in parentheses.

***: Significant at 99% level; **: Significant at 95% level; *: Significant at 90% level

A broadcast group's DISH subscribers are counted only in those DMAs where the broadcast group has a Big 4 station, and are measured in hundreds of thousands of subscribers.

Table 9: Update to Brattle Report Table 12
Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group, as Measured by Total Station Revenues

{{BEGIN HCI

END HCI}}

Sources: BIA Kelsey Media Pro data as of March 13, 2019; DISH Subscriber Information; DISH Retransmission Agreements.

Notes: Standard errors in parentheses.

***: Significant at 99% level; **: Significant at 95% level; *: Significant at 90% level

A broadcast group's revenues are counted only in those DMAs where the broadcast group has a Big 4 station, and are measured in hundreds of thousands of dollars. The regressions in this table have one fewer observation than those in Table 7 and Table 8 because **{{BEGIN CI**

END CI}}

Table 10: Alternative to Brattle Report Table 12
Regression of Big 4 Station Retransmission Fees on Size of Broadcast Group, as Measured by Total Station Revenues at Negotiation

{{BEGIN HCI

END HCI}}

Sources: BIA Kelsey Media Pro data as of March 13, 2019; DISH Subscriber Information; DISH Retransmission Agreements.

Notes: Standard errors in parentheses.

***: Significant at 99% level; **: Significant at 95% level; *: Significant at 90% level

A broadcast group's revenues are counted only in those DMAs where the broadcast group has a Big 4 station, and are measured in hundreds of thousands of dollars. The regressions in this table have one fewer observation than those in Table 7 and Table 8 because **{{BEGIN CI**

END CI}}

Table 11: Update to Brattle Report Table 6
Post-Merger Effects on Retransmission Fee Agreements – Target

{{BEGIN HCI

END HCI}}

Source: DISH Retransmission Agreements.

Notes: The Inflation-Adjusted Fee (Column 5) is the retransmission consent fee in the first year of the contract (Column 4), increased by an annual rate of **{{BEGIN HCI** **END HCI}}** from the date of the last contract between DISH and the acquired firm to the date of the first contract between DISH and the combined entity;

The Nexstar-Media General combined entity was not included in the analysis above due to the fact it was subject to a merger review at the time the retransmission fees were being negotiated.

Table 12: Update to Brattle Report Table 7

Post-Merger Effects on Retransmission Fee Agreements - Acquirer

{{BEGIN HCI

END HCI}}

Source: DISH Retransmission Agreements.

Notes: The Inflation-Adjusted Fee (Column 5) is the retransmission consent fee in the first year of the contract (Column 4), increased by an annual rate of **{{BEGIN HCI END HCI}}** from the date of the last contract between DISH and the acquired firm to the date of the first contract between DISH and the combined entity;

The Nexstar-Media General combined entity was not included in the analysis above due to the fact it was subject to a merger review at the time the retransmission fees were being negotiated.