Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of	)	MB Docket No. 16-57
	)	
Nexstar Broadcasting Group, Inc.	)	
and	)	
Media General, Inc.	)	
	)	
For Consent To Transfer Control of Licenses	)	

<u>REPLY TO OPPOSITION OF DISH NETWORK L.L.C., THE AMERICAN CABLE ASSOCIATION, AND ITTA</u>

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DISH Network L.L.C. ("DISH"), ITTA, and the American Cable Association ("ACA") (together, the "Petitioners") respectfully reply ("Reply") to the Opposition[1] filed by Media General, Inc. ("MEG") and Nexstar Broadcasting Group, Inc. ("Nexstar") (together, the "Applicants") in the above-captioned proceeding. The Applicants have failed to rebut the arguments made in the record thus far, which demonstrate the serious threats to the public interest that would result from Commission approval of the merger applications ("Applications").[2]

If approved, this transaction would create a new broadcast ownership conglomerate of unprecedented size and scope, one which will control the highest number of the Big-4 local

[1] *See* Consolidated Opposition to Petitions to Deny filed by Nexstar Broadcasting Group, Inc. and Media General, Inc., MB Docket No. 16-57 (Apr. 14, 2016) ("*Opposition*").

[2] *See* Applications of Nexstar Broadcasting Group, Inc. and Media General, Inc. for Consent to Transfer Control of Licenses, FCC Form 315, Comprehensive Exhibit, MB Docket No. 16-57, (filed Feb. 10, 2016).

broadcast stations in the country and have the power to threaten service blackouts to millions of consumers if any pay-TV distributor tries to hold the line on retransmission consent fees, which have risen more than 22,000 percent since 2005.[3] Moreover, approval of this merger will allow Nexstar to immediately profit from so-called "after-acquired station" clauses, as described below, which will result in dramatically higher fees for MVPDs and their customers without any offsetting benefit.

As the Petitioners have explained,[4] the Commission cannot approve the Applications as submitted and therefore must designate them for a hearing. If the Commission decides to approve the merger, however, it must impose conditions sufficient to cure the harms this transaction poses to the public. In particular, the Commission should, at a minimum, require the post-merger Nexstar to submit to baseball-style arbitration with interim carriage for any pay-TV operator that requests it when negotiating for retransmission consent. The Commission should also require that Nexstar refrain from exercising its right to have retransmission consent rates under existing MEG agreements reset to Nexstar rate levels as a result of its after-acquired station clauses with an MVPD until those agreements expire by their own terms.

I. PETITIONERS HAVE STANDING TO CHALLENGE THE APPLICATIONS

In their *Joint Petition to Deny or Condition*, each Petitioner established standing as parties in interest to object to this transaction. In order to establish standing to petition to deny, a party must show that: (1) "grant of the challenged application would cause the petitioner to

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[3] *See* Comments of the American Television Alliance, MB Docket No. 15-216, p. ii (Dec. 1, 2015).

[4] *See* Petition to Deny or Impose Conditions of DISH Network L.L.C., the American Cable Association, and ITTA, MB Docket No. 16-57 (Mar. 18, 2016) ("*Joint Petition to Deny or Condition*").

suffer a direct injury," (2) "the injury can be traced to the challenged action," and (3) it is "likely, as opposed to merely speculative, that the injury would be prevented or redressed by the relief requested."[5] The Petitioners fully satisfied these standing requirements.[6]

DISH demonstrated standing because DISH today retransmits certain local broadcast stations owned by the Applicants, and expects to negotiate with both Applicants in the future for continued retransmission of their stations.[7] Furthermore, DISH estimated that, if Nexstar and MEG are allowed to merge, approximately ***half*** of DISH's subscriber base could be impacted if the merged entity were to black out all of its local broadcast stations at once.[8] This is a direct injury traced to the challenged Applications, and this injury can be mitigated by the relief requested herein.

ACA demonstrated standing because its member companies negotiate retransmission consent for local broadcast television stations owned by Nexstar and MEG in numerous designated market areas ("DMAs"), and expect to negotiate in the future for continued retransmission of these stations. ACA's members believe they face threats of substantial harm if the proposed assignments are approved.[9] As ACA explained, approving a transaction that will trigger after-acquired station clauses with respect to the MEG stations that Nexstar seeks to

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[5] *Opposition* at 2, *citing Alaska Native Wireless LLC*, Order, 18 FCC Rcd 11640, 11644, ¶ 10 (2003); *Rockne Educational TV, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 14402, 14405, ¶ 7 (2011).

[6] *See Joint Petition to Deny or Condition* at 1-2, n.1-3. *See also* Declaration of Jeffrey H. Blum, Senior Vice President & Deputy General Counsel, DISH Network L.L.C.; Declaration of Ross Lieberman, Senior Vice President of Government Affairs, The American Cable Association; Declaration of Genevieve Morelli, President, ITTA.

[7] *See id.* at 1 n.1.

[8] *Id.* at 9.

[9] *Id.* at 1-2 n.3.

acquire, thereby increasing the price of retransmission consent paid by ACA members pursuant to their Nexstar retransmission agreements, is a direct injury traceable to the proposed merger and would be redressed by the requested relief. Indeed, numerous ACA members have reported that, as a result of the merger, the retransmission consent fees they will be paying for former MEG stations will increase anywhere between 11 percent to 125 percent as the rates are reset at Nexstar agreement levels over the remaining life of their agreements.[10]

ITTA demonstrated standing because its members today retransmit certain local broadcast stations owned by the Applicants, and expect to negotiate with both Applicants in the future for continued retransmission of their stations.[11] Thus, this transaction could cause a direct injury to members negotiating retransmission consent that would be alleviated by the relief requested.

II. PETITIONERS HAVE MADE MERGER-SPECIFIC FACTUAL ALLEGATIONS SHOWING THE MERGER IS NOT IN THE PUBLIC INTEREST

The Applicants claim that parties that filed against the transaction do not have standing because, among other things, they have only alleged "remote, speculative, conjectural, or hypothetical" harms that the Applicants "*might* engage in anticompetitive conduct."[12] The Applicants assertions in this regard are entirely without merit. Indeed, Petitioners claims are not speculative; they are based on ongoing contractual relationships with the Applicants and upon the Applicants' established previous conduct.

[10] *Id.* at 10.

[11] *Id.* at 1 n.2.

[12] *Opposition* at 4.

Petitioners have made specific factual allegations demonstrating that the merger is not in the public interest. Specifically, that consumers, including subscribers to services offered by Petitioners or their member companies, are more likely to experience local broadcast station blackouts if the merger is approved without appropriate conditions.[13] The scope and scale of such blackouts would be especially severe for Petitioners (as pay-TV operators), given that Commission approval of this transaction create a broadcast behemoth that would own at least 115 local broadcast stations affiliated with ABC, CBS, FOX, or NBC (the "Big-4" networks) spanning 101 DMAs across the nation.[14] Post-merger, Nexstar would thus enjoy a dramatic increase in negotiating leverage based solely on its aggregation of market power in the impacted local markets.

In addition, Petitioners cited specific prior instances where each of the Applicants held consumers hostage by blacking out stations during a contract dispute, proving that fears of such future action are neither speculative nor hypothetical.[15] Nexstar and MEG individually have a history of blacking out their stations in order to increase their leverage in retransmission consent negotiations. There is little doubt that such behavior will continue post-merger, given the combined company's even greater bargaining leverage. The Applicants' prior conduct in retransmission consent negotiations provides ample evidence to predict post-merger Nexstar's behavior.

Further, Petitioners' claim that the Applicants' aggregation of market power would harm the public interest through increased retransmission consent fees is a factual, merger-specific

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[13] *See Joint Petition to Deny or Condition* at 9-10.

[14] *Id.* at 9.

[15] *Id.* at 12-13.

assertion. Nexstar itself has extolled the benefits of its increased bargaining power post-transaction to extract higher retransmission consent fees, noting in an investor presentation that "[a]cceleration in retransmission revenue post-contract renewal cycle highlights ability [of Nexstar] to negotiate favorable rates which also leads to competitive advantages in deriving value from station acquisitions."[16] And industry observers have recognized that Nexstar "sees the merger as a way to improve retransmission consent negotiations."[17]

Petitioners also raised a merger-specific harm related to so-called "after-acquired station" clauses.[18] These are clauses that Nexstar has forced many MVPDs to accept in retransmission consent negotiations, and which could now cause those MVPDs and their customers to pay significantly higher retransmission consent fees. ACA stated that several of its members have reported that, as a result of the merger, the retransmission consent fees they will be paying for former MEG stations will increase anywhere between 11 percent to 125 percent as the rates are reset at Nexstar agreement levels over the remaining life of their agreements.[19]

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[16] *Id.* at 12, *citing* Presentation of Tom Carter, EVP & CFO, Nexstar Broadcasting Group, Inc., JP Morgan Global High Yield & Leveraged Finance Conference, p. 6 (Mar. 1, 2016), *available at* http://cdn.idstatic.com/cms/live/13/JPM-NXST-Short-Deck-3-1-16-FINAL.pdf?1456845024.

[17] *See Joint Petition to Deny or Condition* at 12, *citing* Jonathan Kuperberg, *Nexstar, Media General Mesh with Complementary Stations, Little Market Overlap*, Broadcasting & Cable (Jan 27, 2016), *available at* http://www.broadcastingcable.com/news/local-tv/nexstar-media-general-mesh-complementary-stations-little-market-overlap/147313.

[18] *See Joint Petition to Deny or Condition* at 10.

[19] *Id.*

III. THE RECORD REFLECTS SERIOUS CONCERNS ABOUT WHETHER THE TRANSACTION SERVES THE PUBLIC INTEREST

A. The Commission's Review of this Transaction is Not Limited to Whether the Merger Exceeds the Relevant Ownership Cap.

The FCC's decision about whether to approve this merger need not be dictated solely by whether the merged entity will exceed the national broadcast ownership cap.[20] Even if the Commission determines that post-merger Nexstar will not exceed the cap, the Petitioners have submitted evidence demonstrating that post-merger Nexstar will be large enough to cause widespread harm to consumers through blackouts or the threat of blackouts, and that such harms are likely given the past behavior of each Applicant. As a result, Petitioners have demonstrated that the transaction is not in the public interest and have proposed conditions to remedy the harms described.

The Applicants attempt to downplay the scale of post-merger Nexstar by arguing that the transaction will not produce the largest (or even second or third largest) television company in terms of national audience reach (citing ION Media Networks, Tribune and Univision as television companies with a greater reach).[21] The metric offered by the Petitioners is equally valid, if not more, because it focuses on how many stations post-merger Nexstar would own that are affiliated with one of the top-4 broadcast networks.[22] This is key, because Big-4 stations are the richest source of retransmission fees. In addition, they are the stations that are most

[20] *See Opposition* at 5-9.

[21] *Id.* at 6 n.19.

[22] *See Joint Petition to Deny or Condition* at 9 ("If the Commission allows MEG and Nexstar to merge (with Nexstar as the surviving entity), the combined broadcast conglomerate will own at least 115 Big-4 affiliated stations spanning 101 DMAs. The combined entity would eclipse Sinclair as the owner of the most Big-4 affiliated local broadcast stations in the country.").

susceptible to broadcaster-initiated blackouts when MVPDs push back on outrageous fee increases.

B. Nexstar's Enhanced Ability to Harm Consumers Through the Retransmission Consent Process is Properly Considered in This Proceeding.

The Applicants suggest that objections to their merger should be dismissed because they involve issues that ought to be considered in the Commission's rulemaking proceeding to update the "good faith" standard for negotiating retransmission consent.[23] The Applicants contention, however, is flawed.

As an initial matter, Petitioners here have requested no condition that would override an existing Commission rule. Indeed, in this merger proceeding, the Petitioners have not asked for any changes to the standard for good faith negotiations in the retransmission consent context. The Petitioners proposed (1) arbitration and interim carriage for Nexstar's stations to address the merged entity's dramatically enlarged bargaining leverage, and (2) a condition barring enforcement of Nexstar's after-acquired station clauses in order to blunt the significant adverse cost impact to smaller companies like ACA's members resulting from the merger. Thus, the cases cited by the Applicants supporting the proposition that general industry rule changes are not appropriate in the merger context are not relevant here, where Petitioners have requested narrowly tailored conditions consistent with prior Commission precedent that will help remedy transaction-specific harms.[24]

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[23] *See Opposition* at 9-11, 33-35.

[24] *See id., citing Local TV Holdings, LLC, Transferor, and Tribune Broadcasting Company II, LLC, Transferee*, Memorandum Opinion and Order, 28 FCC Rcd 16850, 16856, ¶ 13 (2013)(dismissing Petitioners request to "reestablish meaningful local ownership limits."); *Application of Sunburst Media L.P. (Assignor), and Clear Channel Broadcasting Licenses, Inc. (Assignee) for Assignment of Licenses of Station KSLI(AM), Abilene, Texas et al.*, Memorandum Opinion and Order, 17 FCC Rcd 1366, 1368, ¶ 6 (2002) (declining to "change [FCC] policy with

More importantly, the Commission is not prohibited from remedying transaction-specific harms through narrowly tailored conditions just because there may be similar issues under consideration in a concurrent Commission rulemaking. The cases cited by the Applicants involve situations where, unlike here, the Commission declined to adopt arguments or impose proposed conditions because there was no showing that the transaction would lead to the harms the conditions were designed to remedy.[25] In fact, the Commission has a long history of

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respect to whether certain network affiliation agreements should be *per se* attributable."); *EchoStar Communications Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 20559, 20583, ¶ 48 (2002)(declining a request to "restructure the public interest set-aside obligations"); *Spanish Radio Network*, Memorandum Opinion and Order, 10 FCC Rcd 9954, 9956, ¶ 9 (1995)(declining to adopt a new market definition of a "Spanish radio market" because "[i]t would involve a substantial rewriting of the present rules"); *WANV(AM), Waynesboro, VA and WANV-FM, Staunton, VA*, Letter, 8 FCC Rcd 8474, 8477 (1993) (declining Petitioners objections regarding calculation of market share because such procedures are already laid out in the Commission's rules); *Acme Television, Inc.*, Letter, 26 FCC Rcd 5189, 5191-2 (2011)(noting that a discussion of whether the Commission should "never grant any waivers that would permit the combination of two stations in the same market because of a concomitant increase in market power" has been teed up in the 2*010 Quadrennial Ownership Review*). Applicants also cite cases where requesting parties sought to require the Commission to adopt conditions pursuant to a statute that did not grant the Commission the authority to adopt such conditions, and they were thus declinedt. Those cases are similarly not relevant here. *See California Ass'n of the Physically Handicapped, Inc. v. FCC*, 840 F.2d 88, 97 (D.C. Cir. 1988)(finding that the Rehabilitation Act of 1973 (under which Petitioners sought EEO and captioning conditions) applied to the FCC itself, and not to the entities licensed or certified by the FCC, and thus the agency had no "responsibility for enforcement and no duty to promulgate regulations"); *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 510 (1983) (holding that the FCC did not have the statutory authority to enforce the Rehabilitation Act of 1973 on entities regulated by the Commission, "we are unwilling to assume that Congress has instructed the Federal Communications Commission to take original jurisdiction over the processing of charges that it regulates have violated [the Rehabilitation] Act").

[25] *See Opposition* at 9-11; 33-35, *citing Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees*, Memorandum Opinion and Order, 21 FCC Rcd 7358, 7364-65, ¶ 15 (2006) (dismissing petitioners proposed conditions because they were based on the incorrect assertion that the transaction would result in a reduction in the number of iDEN nationwide roaming partners, where the Commission concluded that no such reduction in competition would occur); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Telecommunications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3183, ¶ 43

adopting merger conditions seeking to remedy a transaction-specific set of harms, despite the existence of an open rulemaking proceeding addressing a similar subject or industry-wide issue.[26] As the Commission has explained:

(1999)(declining to adopt a proposed condition because "evidence in the record does not demonstrate that the proposed merger will adversely affect the development of digital broadcast signal carriage"); *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16867, 16880, ¶ 31 (2013) (rejecting arguments raised by Petitioners regarding the need to consider the impact of joint negotiation of retransmission consent because "the evidence they marshal in support of their position consist of reports and comments filed in the *Retransmission Consent Proceeding*" rather than a presentation of transaction-specific harms.); *Free State Communications, LLC*, Letter, 26 FCC Rcd 10310, 10312 (2011) (same); *Morton Jerome Victorson, Bankruptcy Trustee*, Memorandum Opinion and Order, 10 FCC Rcd 9499, ¶ 5 (1995) (declining to consider the local Area of Dominant Influence ("ADI") index in a transaction because such index "has no relevance in assessing" the competition and diversity concerns relating to common ownership of radio stations at issue in the transaction); *Comcast Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 23246, 23257, ¶ 31 (2002) (finding the condition proposed inappropriate because the merger would not "enable AT&T Comcast to harm its MVPD rivals by entering into otherwise prohibited exclusive contracts for the distribution of such programming…. [or] alter materially each Applicant's existing incentive and ability to deny MVPD competitors access to such programming and that the merger itself therefore is not likely to harm competition in this respect."); *Applications of Capital Cities/ABC, Inc. (Transferor) & The Walt Disney Co. (Transferee)*, Memorandum Opinion and Order, 11 FCC Rcd 5841, 5860, ¶ 27 (declining to adopt proposed condition because petitioner did not demonstrate that "the public interest would not be served by reduced viewership… as a result of the alleged tying."); *Affiliated Media, Inc. FCC Trust, et al.*, Memorandum Opinion and Order, 28 FCC Rcd 14873 (2013) (declining petitioners objections because the transaction would not result in the program access, broadband discrimination, or reduction in over-the-air service alleged, finding that in some cases these issues would be improved by the transaction).

[26] *See, e.g.*, Statement of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Networks, FCC News (Apr. 25, 2016) (announcing conditions prohibiting data caps, usage-based billing, interconnection fees, or programming terms harmful to OVDs during pending proceeding proposing new rules for video distributors (29 FCC Rcd. 15995 (2014)) and challenge to open Internet Order (*US Telecom v. FCC*, No. 15-1063 (D.C. Cir. filed Apr. 13, 2015))); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4241 ¶ 5 (2011) (*Comcast/NBCU Order)* (imposing conditions "to protect the integrity of … fair and equitable retransmission consent negotiations" during pending proceeding related to retransmission consent (25 FCC Rcd. 2731 (2010)); *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. D/B/A/ CenturyLink for Consent to Transfer Control*, Memorandum

> Our public interest authority enables us, where appropriate, to impose and enforce transaction-related conditions targeted to ensure that the public interest is served by the transaction. Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with the law, which may be necessary to carry out the provisions of the Act. Indeed, unlike the role of antitrust enforcement authorities, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits. *In exercising this broad authority, the Commission generally has imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions and that are related to the Commission's responsibilities under the Act and related statutes*.[27]

As Petitioners have explained, and reiterated above in Section II, Nexstar will enjoy dramatically increased bargaining leverage to threaten blackouts and raise retransmission consent fees as a direct result of this transaction. In addition, this merger will cause harm to subscribers of MVPDs who are forced to agree to after-acquired station clauses in the Nexstar retransmission consent agreements and who also have retransmission consent agreements with MEG stations when, post-merger, rates for the MEG stations automatically reset to Nexstar rate levels. The effects of such clauses are profoundly destabilizing to operator finances and harmful to their customers. Although there may be some issues that overlap, this merger threatens consumer welfare *today* precisely because the retransmission consent regime is broken. There can be no guarantee of the outcome of the Commission's rulemaking, and allowing this merger to proceed

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Opinion and Order, 26 FCC Rcd. 4194, 4213-14 ¶ 43, 4235 & n.3 (2011) (requiring relinquishment of certain universal service funds during pending proceeding determining eligibility of providers for universal service support (26 FCC Rcd. 4554 (2011))); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd. 6547, ¶¶ 53-54 & n.163 (2001) (imposing unaffiliated ISP access condition during pending proceeding on high-speed Internet access (15 FCC Rcd. 19287 (2000))); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, 14153, 14157 ¶¶ 266, 274 & n.616 (2000) (imposing line sharing condition during pending appeal of line sharing rules (*US Telecom v. FCC*, No. 00-1012 (D.C. Cir. filed Jan 18, 2000)).

[27] *Comcast/NBCU Order* at 4249 ¶ 25 (emphasis added).

in an unconditional manner in the face of that uncertainty would disserve consumers. Thus, there is no argument that this harm is not transaction specific, nor can Applicants can argue that concerns about retransmission consent fee increases and rising blackouts are "speculative" and "exaggerated"[28] in the face of the facts that Petitioners have already placed in the record of this proceeding.[29]

Finally, the Applicants' claimed public interest benefits, including efficiencies and economies of scale that will facilitate investments in programming,[30] are remote and speculative and do not come close to offsetting the public interest harms enumerated above. Petitioners proposed conditions are therefore both necessary and appropriate to consider in the context of this proceeding.

IV. THE COMMISSION HAS THE AUTHORITY TO ADOPT PETITIONERS' PROPOSED CONDITIONS

The Applicants ignore established FCC precedent when claiming that the Commission lacks the legal authority to adopt the conditions proposed in the record.[31] The Commission has

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[28] *See Opposition* at 36.

[29] *See Joint Petition to Deny or Condition* at 8-12. The record in this transaction has been supplemented with evidence of transaction specific harms. Unlike the case cited by the Applicants, where the Commission "implied" an outcome based on an informal objection submitted by a Petitioner. *See Opposition* at 4 *citing* J. *Stewart Bryan III and Media General Communications Holdings, LLC (Transferor), Shareholders or New Young Broadcasting Holding Company, Inc., and its Subsidiaries (Transferor), and Post-Merger Shareholders of Media General, Inc. (Transferee)*, Memorandum Opinion and Order, 28 FCC Rcd 15509, 15518 ¶ 20 (2013)(dismissing DISH's informal objection because it "does not clearly state the harms that would be caused as a result of the approval of this transaction" and is read to "imply" an outcome with respect to retransmission consent fees).

[30] *See* Opposition at ii, 16-19.

[31] *Id.* at 41 ("Congress never intended for the Commission to adopt requirements that dictate the outcome of retransmission negotiations or serve as a back door inquiry into the parties' negotiations.").

imposed arbitration remedies in previous mergers to counter the increased incentive and ability of the merging parties to extract supra-competitive prices for their affiliated programming post-transaction.[32] With respect to the arbitration and interim carriage remedy imposed in Comcast/NBCU, the Commission explained that "the need for arbitration has grown as the market has changed" and that "our public interest mandate requires that we extend the arbitration and standstill remedy to all [Comcast/NBCU affiliated] programming."[33] Applicants' contention that their proposed ownership of 115 Big-4 affiliated stations spanning 101 DMAs post-transaction is somehow less concerning than Comcast's acquisition of numerous cable and television channels is unpersuasive.

In addition, Applicants cite no rule that would prohibit the Commission from imposing the proposed condition to prevent Nexstar from exercising its after-acquired station clauses to automatically reset the retransmission consent rates paid under existing MEG agreements to the higher Nexstar rates. Such a condition is squarely in the public interest, because allowing Nexstar to increase retransmission consent fees prior to the date that the MEG agreements would expire by their own terms disserves consumers. Although Nexstar attempts to downplay the harmful effects of the after-acquired station clauses it imposes on MVPDs, its arguments are unavailing.

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[32] *See News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3342, Section IV: A. Commercial Arbitration Remedy (2008); *Comcast/NBCU Order* at 4260 ¶ 52.

[33] *See Comcast/NBCU Order at 4260* ¶ 52.

First, Nexstar defends the clauses by maintaining that they are quite common,[34] as if the frequency of their use somehow mitigates the harm they cause to MVPDs and consumers. The fact that after-acquired station clauses are not unique to Nexstar's agreements should not preclude the Commission from examining the practice in the context of this merger. Indeed, prior to the Commission's ban on joint retransmission consent negotiations by non-commonly owned same-market broadcast stations, that harmful practice too was quite common.[35]

Second, Nexstar claims that MVPDs do not often object to after-acquired station clauses,[36] and that such clauses will, in some cases, reduce the post-transaction rates for the MEG stations.[37] Evidence to the contrary has been submitted to the Commission, and Nexstar provides no evidence to support its claims. Even if after-acquired station clauses may be accepted "generally without objection," as Nexstar claims, this would not mean that such provisions are negotiable, as ACA members and others have reported directly contrary experiences to the Commission.[38] Although Nexstar asserts that there may be instances in which

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[34] *Opposition* at 45-47.

[35] *See, e.g.*, Letter to Marlene Dortch from Barbara Esbin, Cinnamon Mueller, MB Docket No. 10-71 at 5 (June 24, 2013) (identifying 48 pairs of Big 4 broadcasters in 43 DMAs coordinating their retransmission consent negotiations in 2011).

[36] *Opposition* at 46; Declaration of Elizabeth Ryder ¶ 8

[37] *Opposition* at 45-47

[38] *See* Letter to Marlene Dortch from Barbara Esbin, Cinnamon Mueller, MB Docket No. 15-216 at 3-4 (Mar. 7, 2016) ("ACA Mar. 7 Ex Parte") (describing the debilitating effects to ACA member finances and ill effects to their subscribers of being forced to agree to after-acquired station clauses as a condition of retransmission consent from large station groups; affirming that this type of clause "cannot be negotiated out of the agreements, and that they have become a financial arbitrage tool by New York-based media consolidators to roll-up rural television stations for the sole purpose of raising their retransmission consent rates above levels previously negotiated by the station owners and MVPDs"). *See also* Letter to Marlene Dortch from Patricia Cave, WTA, MB Docket No. 15-216 at 2 (Feb. 11, 2016) (highlighting "existence of provisions

the post-transaction rates for the MEG stations may be reduced as a result of after-acquired station clauses, it fails to provide evidence demonstrating that the net effect of all its existing after-acquired station clauses would reduce the overall fees paid by all MVPDs. If this is the case, the Applicants should submit evidence based on the relevant agreements.[39] Based on the results of a survey of ACA's members, however, the net effect of the merger will be an overall increase in retransmission consent fees.[40]

Finally, Nexstar states that "the MVPD petitioners exaggerate the costs of after-acquired station clauses as more than 55% of subscribers covered by MEG's retransmission consent agreements will adjust to the new rates over the next year due to the expiration by their terms even in the absence of an after-acquired station clause."[41] That some of MEG's existing retransmission consent agreements will expire over the next year is irrelevant. Certain MVPDs will still be forced to pay fees that are higher than expected for the remainder of contract term, while countless others will be forced to pay higher fees for even longer. If anything, the fact that

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in retransmission consent agreement that require carriage of other networks…that might be acquired or created in the future" and how such provisions are "non-negotiable in the vast majority of circumstances.").

[39] Widespread lowering of retransmission consent rates post-transaction would be inconsistent with forward-looking statements made by Nexstar to the investment community about the benefits of its MEG acquisition in terms of "Growing High Margin Non-Traditional Revenue Streams" that include "Retransmission Consent Agreements." See supra [n. 16] Presentation of Tom Carter, EVP & CFO, Nexstar Broadcasting Group, Inc., JP Morgan Global High Yield & Leveraged Finance Conference, p. 6 (Mar. 1, 2016), *available at* http://cdn.idstatic.com/cms/live/13/JPM-NXST-Short-Deck-3-1-16-FINAL.pdf?1456845024.

[40] Most ACA members pass the majority, if not 100 percent, of retransmission consent fees through to subscribers. *See* ACA Mar. 7 Ex Parte at 3 (ACA members responding to questions from staff concerning the effect of after-acquired station clauses on consumers stated that they passed 100 percent of retransmission consent fees through to subscribers).

[41] *Opposition* at 46-47.

several of MEG's agreements will expire within the next year demonstrates that the proposed condition, which will provide significant relief for MVPDs that are impacted by the merger, would create only a limited burden on Nexstar.

V. CONCLUSION

For the foregoing reasons, the Commission should deny the Applications, or, at least, impose conditions, including the ones described herein, to safeguard the public interest.

Respectfully submitted,

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May 5, 2016

CERTIFICATE OF SERVICE

I, Alison Minea, hereby certify that, on this 5th day of May 2016, caused a copy of the foregoing Reply to Opposition of DISH Network L.L.C., the American Cable Association, and ITTA to be filed electronically with the Commission using the ECFS system and caused a copy of the foregoing to be served upon the following individuals by First Class Mail or electronic mail*:

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/s/
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* Denotes service by electronic mail.