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Barbara S. Esbin
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August 3, 2011

Via ECFS

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Ex Parte Letter of the American Cable Association ("ACA"), Amendment of the Commission's Rules Related to Retransmission Consent MB Docket No. 10-71

Dear Ms. Dortch:

The American Cable Association ("ACA") files this letter responding to statements that mischaracterize and misconstrue ACA's position on coordinated retransmission consent negotiations among separately owned broadcast stations in the same television market contained in a July 27, 2011, letter filed in the above-reference docket by Nexstar Broadcasting Group, Inc. ("Nexstar").[1] In its letter, Nexstar reacts to a press statement released by ACA on July 26, 2011, concerning Nexstar's recently filed antitrust action against Granite Broadcasting Corporation ("Granite") and Malara Broadcasting ("Malara").

This response elucidates the position that ACA presented in its press statement that Nexstar's antitrust suit against Granite rests on the same basic economic argument as ACA's filings in this docket urging the Commission to adopt a *per se* prohibition on coordinated retransmission consent negotiations by separately owned stations in the same market. Further, ACA rebuts Nexstar's false claim that ACA seeks an outright prohibition on the use of shared services agreements ("SSAs"), when in fact, ACA has only urged a prohibition on coordinated retransmission consent negotiations by separately owned broadcast stations in a single market, whether the coordination is done by means of a legally binding agreement or a non-legally binding informal arrangement among the parties. Accordingly, the Commission should disregard Nexstar's claims that ACA has mischaracterized its lawsuit against Granite.[2]

The Commission should focus on the main fact that ACA identified in its press release: a broadcaster has recognized the competitive harms in a market where a single broadcast station gains control of sales for multiple Big 4 affiliates and affiliates of other highly rated national networks

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[1] Letter to Marlene Dortch, Secretary, FCC from Elizabeth Ryder, Vice President & General Counsel, Nexstar Broadcasting Group, Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, July 27, 2011 ("July 27th Letter").

[2] *Id.* Nexstar takes issue with ACA's description of its lawsuit in the press release by asserting, "ACA wrongly suggests that this lawsuit supports its argument that licensees should be entirely prohibited from entering into shared services agreements or from engaging in joint retransmission consent negotiations as part of such agreements. . . . ACA's claim is without any merit."

in the same DMA, thereby vastly enhancing its market power and enabling that broadcaster to extract monopoly rents from its customers, to the ultimate detriment of consumers.

Both ACA and Nexstar Complain of the Competitive Harms of a Single Broadcaster Controlling the Sales Activities of Other Separately Owned Stations in the Same DMA

On July 26, 2011, ACA published a press release stating that it welcomed the antitrust lawsuit filed by Nexstar against Granite alleging that Granite was, among other things, unreasonably restraining trade, lessening competition in, and attempting to monopolize, local television advertising sales in the Fort Wayne, Indiana, Designated Market Area ("DMA") through its control of three of the 'Big Four' television broadcast network affiliations – NBC, ABC, and FOX.[3] ACA averred that:

> *Not only will this new triopoly cause the harms cited by Nexstar*, but it also means that pay-TV providers in the market now will be subject to the unconstrained market power of the Fort Wayne Triopoly or face a massive blackout of three dominant local TV stations as soon as New Year's Day of 2012. Either way, Fort Wayne residents will suffer. (emphasis supplied)

The press release clearly noted that ACA's position that the Fort Wayne triopoly would cause harm in the retransmission consent market was *in addition to* the harms identified by Nexstar in its Complaint. ACA further expressed its view that ACA's concern with the anticompetitive effects of coordinated retransmission consent negotiations rests on the same foundational argument as Nexstar's antitrust action: a single broadcaster should be prevented from increasing its market power and therefore its ability to extract supra-competitive prices by consolidating its control over the key sales operations of other separately owned stations in the same local market. This basic concern underscores the need for the Commission to prevent consumer harms that result when separately owned broadcast stations in the same market act in concert and coordinate their retransmission negotiations with multichannel video programming distributors ("MVPDs") to drive prices up beyond the competitive levels that the stations could obtain if they negotiated with the MVPDs on a separate basis.

As is evident from the Nexstar Complaint, the gravamen of Nexstar's lawsuit against Granite is that Granite is "causing anticompetitive impact in the Fort Wayne DMA through its wielding of market power."[4] The Complaint describes how Granite in the Fort Wayne DMA (i) "already owns and controls WISE-TV, the exclusive NBC network affiliate and MyNetworkTV affiliate," (ii) controls the advertising sales and revenues of WPTA-TV, the exclusive ABC network affiliate and the CW affiliate . . . via an advertising representation agreement with Granite's partner, Malara;" and (iii) "[a]s of August 2, 2011, Granite will also be the exclusive FOX affiliate."[5] As Nexstar explains, "[a]s a result of locking up the exclusive rights to three of the "Big Four" television broadcast network affiliations, the CW network affiliate and the MyNetwork TV affiliate, Granite has obtained and will have the ability

[3] Press Release, American Cable Association, ACA President & CEO Matthew M. Polka Says Nexstar Lawsuit Underscores Need for the FCC to Curb Formation of Price-Gouging TV Station Duopolies and Triopolies (July 26, 2011), *available at* http://www.americancable.org/node/3013 (last visited July 29, 2011) and as attachment to this letter ("ACA Press Release").

[4] July 27th Letter at 1.

[5] ACA Press Release; July 27th Letter; Nexstar Complaint at 2, ¶ 4.

to exercise substantial market power" over the "vital market for local television advertising" in the Fort Wayne DMA.[6]

Continuing, the Complaint alleges that this will cause "advertising rates to be increased above competitive levels" and that this in turn has and will cause the prices of goods and services sold by advertiser to consumers in Indiana to be increased as well.[7] Count I of the Complaint avers, "Granite, along with Malara, has entered into continuing illegal contracts, combinations, or conspiracies in restraint of trade, the purpose and effect of which are to eliminate competition in the market for providing broadcast television advertising in the Fort Wayne DMA."[8] Counts II-V allege on the same set of facts, respectively, that Granite's actions violate federal and state antitrust statutes in three primary respects: (i) "Granite, along with Malara, has attempted to monopolize the relevant market;" (ii) "Granite and Malara have willfully, knowingly, and with specific intent to do so, combined or conspired to monopolize the relevant market;" and (iii) Granite's acquisition of the exclusive license to broadcast FOX network programming in addition to its ownership or control of exclusive licenses from the NBC, ABC, CW and MyNetworkTV networks "will substantially lessen competition in the relevant market, and tend to create a monopoly."[9] Nexstar seeks a decree that Granite violated federal and state antitrust laws, and an injunction restraining Granite and Malara from directly or indirectly "controlling television stations affiliate with three of the 'Big Four' networks in the Fort Wayne DMA, namely ABC, CBS, FOX and NBC."[10]

Thus, Nexstar is alleging that a single owner, Granite, through a combination of ownership, affiliation and a sharing agreement with Malara, has and will coordinate the broadcast advertising sales in the same market of stations carrying three of the "Big Four" networks – a broadcast triopoly – together with two other popular national networks, and therefore be able to extract higher local advertising prices by coordinating their sales to advertisers. The relief Nexstar seeks is a dismantling of the Fort Wayne triopoly. In fact, ACA agrees with Nexstar's assertions that the coordinated sales of television advertising by separately owned stations in the same market would be harmful to competition and consumers and should be prohibited. This matter is ripe for review by the Commission as part of its ongoing review of the media ownership rules.[11]

Nexstar's Complaint avers in essence that when a single station controls three of the top four network affiliates in the same market and two of the independent network affiliates for a total of five out of the six national networks, harm to local advertising purchasers and the consumers buying the advertised products results. This is *precisely the same underlying competitive harm* identified by

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[6] Nexstar Complaint at 2, ¶ 5.

[7] *Id.* at 2, 11 ¶¶ 5, 46.

[8] *Id.* at 13, ¶ 52.

[9] *Id.* at 13-17, ¶¶ 52, 59, 67, 77.

[10] *Id.* at 17, ¶ A, B.

[11] *In the Matter of 2010 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, 25 FCC Rcd 6086, (2010); *See In the Matter of 2010 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Comments of the American Cable Association, MB Docket No. 09-182 (filed July 12, 2010) (requesting that the Commission take account of the harms of coordinated retransmission consent negotiations in evaluating reforms to its media ownership restrictions).

ACA in its retransmission consent reform Comments and Reply Comments: competing sellers in a single market that coordinate their retransmission consent negotiations have the ability to exercise substantial market power over prices, and that this exercise of market power has and will cause retransmission consent prices to rise above competitive levels, to the detriment of MVPDs and their subscribers in the affected local market.[12]

ACA wrote in its Comments:

> [A] significant problem with the current retransmission consent regime is that in some local markets, some broadcast stations affiliated with a Big 4 network (i.e., NBC, ABC, CBS, and FOX) engage in coordinated retransmission consent negotiations even though the stations are separately owned. Available evidence analyzed by ACA's economics expert Professor William P. Rogerson strongly suggests that common control or ownership of multiple Big 4 affiliates in a single Designated Market Area ("DMA") results in significantly higher retransmission consent fees. In his recent report, Professor Rogerson describes how local broadcast stations can achieve these levels of inflated retransmission consent fees by coordinated behavior that does not arise from express contractual agreements, such as those which might be included in shared services agreements. Consumers, particularly in smaller markets, ultimately foot the bill in the form of higher cable rates.[13]

Similarly, ACA's Reply Comments state:

> ACA has provided ample evidence demonstrating that a significant problem with the current retransmission consent regime is that in at least 33 local markets, at least one pair of broadcast stations affiliated with "Big 4" broadcast networks . . . engages in coordinated negotiations even though the stations are separately owned. This practice harms MVPDs and consumers by increasing the disruption caused by negotiating breakdowns and by driving prices significantly higher than otherwise achievable. The prevalence of this practice supports remedial relief through a *per se* prohibition on coordinated negotiations by separately owned stations in a single market, whether such coordination occurs through a legally binding or non-legally binding agreement.[14]

ACA also explained that although it had focused its research and analysis on coordinated negotiations involving Big 4 broadcast network affiliates, it was aware of coordinated negotiations

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[12] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Comments of the American Cable Association, MB Docket No. 10-71, at 6-7 (filed May 27, 2011) ("ACA Comments"); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Reply Comments of the American Cable Association, MB Docket No. 10-71, at 2-3 (filed June 27, 2011) ("ACA Reply Comments").

[13] ACA Comments at 6-7.

[14] ACA Reply Comments at 2-3.

occurring with Big 4 affiliates and independent network-affiliated stations negotiating together.[15] Accordingly, ACA believes that Nexstar's lawsuit is a textbook illustration of how coordinated sales among Big 4 and independent affiliates will drive local television advertising prices upward, which in turn will drive up the prices consumers pay when they purchase the advertised products.[16] The fact that different broadcast "products" are involved in the respective allegations of ACA and Nexstar is of no significance. The underlying competitive harm is identical: coordinated sales of a broadcast product (for ACA, retransmission consent and for Nexstar, local television advertising) among competitors in a single market driving up prices (respectively, retransmission consent fees and local TV advertising rates). The consequences described by both are also identical: harms to the purchaser of the product (for ACA, MVPDs and for Nexstar, advertisers) and consumers (pay-TV subscribers and advertised product purchasers).

Accordingly, Nexstar's position that ACA is wrong to cite its allegations against Granite in support of the relief ACA requests in the retransmission consent reform rulemaking should be given little credence by the Commission.

Nexstar Incorrectly Represents that ACA Seeks a Prohibition on Broadcast Licensees Entering into Shared Services Agreements

ACA has consistently *refraine*d from calling for the prohibition of sharing agreements in recognition of certain efficiencies broadcasters can achieve through them in areas *other than* negotiations for retransmission consent; the sole behavior ACA has requested the Commission prohibit as a *per se* violation of the good faith negotiation requirement the coordination of retransmission consent negotiations by separately owned stations in a single DMA.[17]

Nexstar asserts in the July 27th Letter that ACA seeks a complete prohibition on broadcast stations entering into SSAs.[18] Additionally, Nexstar claims that ACA has suggested that Nexstar filed its Complaint against Granite "because Granite has shared services and advertising representation agreements with WPTA (owned by Malara Broadcast Group) or because Granite may negotiate retransmission consent on behalf of WPTA."[19] Finally, Nexstar alleges that "ACA seeks to use Nexstar's very fact specific Complaint to assert that sharing agreements cause harm."[20]

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[15] *Id.* at 3 n.1.

[16] As ACA noted in its press release, Nexstar has its own sharing agreements in 13 markets across the country with Mission Broadcasting involving at least two Big 4 affiliates, pursuant to which Nexstar coordinates retransmission consent agreements for the stations: Wilkes Barre-Scranton, Pa, (DMA 54); Springfield, Mo. (74); Amarillo, Tx. (131); Rockford, Il. (134); Monroe, La/El Dorado, Ark. (138); Lubbock, Tx. (143); Erie, Pa. (146); Joplin, Mo./Pittsburg, Kan. (147); Wichita Falls, Tx./Lawton, Ok. (149); Terre Haute, Ind. (152); Abilene-Sweetwater, Tx. (165); Billings, Mont. (169); and San Angelo, Tx.(198). In view of Nexstar's recognition of how coordination of sales among separately owned stations in a single market causes harm, ACA suggested, "Nexstar should cease coordinating retransmission consent with Mission in these markets immediately." ACA Press Release at 2.

[17] *See, e.g.,* ACA Comments at 5-26: ACA Reply Comments at 2-42.

[18] July 27th Letter at 1.

[19] *Id.* at 2.

[20] *Id.*

As the excerpts from ACA's filings quoted above make obvious: ACA does not seek a complete prohibition of sharing agreements. Nor did ACA claim in its press release that Nexstar filed its antitrust Complaint on the basis of competitive harms in the market for retransmission consent.

First, ACA specifically focused in its Comments and Reply Comments on the coordination of retransmission consent negotiations whether through legally binding agreements, which may be contained in SSAs, or non-legally binding agreements.[21] It is the coordination of retransmission consent negotiations by separately owned broadcasters in a single market, not the entry into sharing agreements *per se*, that concerns ACA and should concern the Commission.

ACA has explicitly sought a prohibition on coordinated negotiations whether or not they occur pursuant to some form of shared service or local marketing agreement. For that reason, it critiqued the Commission's proposed *per se* prohibition on a station granting another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned as not going far enough to address the range of coordinated negotiations that harm MVPDs and consumers.

> In particular, while the wording in the NRPM's proposed rule clearly applies to the case where one broadcaster provides another broadcaster with legally binding authority to negotiate retransmission consent agreements on its behalf, it is less clear if it would apply to more informal methods of coordination where broadcasters directly communicate with one another and agree to follow a collective course of action that maximizes their joint profits, but the arrangement is not enforced by a legally binding agreement.[22]

To address this problem, ACA recommended that the Commission adopt a list of practices that constitute *per se* violations of the duty to negotiate in good faith, including (i) delegation of responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another not under common ownership in the same DMA; (ii) delegation of responsibility to negotiate or approve retransmission consent agreements and by two separately owned broadcasters in a DMA to a common third party; (iii) any informal or formal agreement between two separately owned broadcasters in the same DMA rendering their willingness to enter into a retransmission consent agreement with an MVPD contingent upon the other's satisfactory negotiation of a deal with the MVPD; and (iv) any discussion or exchanges of information between separately owned broadcasters in the same DMA or their representative regarding terms of existing or future retransmission consent

[21] *See, e.g.,* ACA Comments at 7 ("There are likely additional instances of sharing agreements *and other coordinated arrangements achieving the same ends* involving multiple Big 4 affiliates in the same market that the ACA has not yet identified"); *Id.* at 20-25 (there are two types of harmful coordination: "legally binding coordination" and "non-legally binding coordination;" even non-legally binding coordination will generally be sufficient to create a significant risk of harm that firms will be able to successfully collude and raise prices such that the Commission should adopt a *per se* prohibition against explicitly coordinated behavior related to retransmission consent negotiations by separately owned broadcast stations); ACA Reply Comments at 3 (the prevalence of the practice of coordinated negotiations by separately owned stations in a single market, "whether such coordination occurs through a legally binding or non-legally binding agreement" should be prohibited); *Id.* at 39 ("ACA again urges the Commission to broaden the scope of the *per se* prohibition to encompass both legally binding and non-legally binding agreements to fix prices by competing sellers in a single market").

[22] ACA Reply Comments at 40; ACA Comments at 22-25.

agreements or the status of negotiations over future agreements.[23] As ACA noted, these four specific coordination behaviors "would explicitly and appropriately encompass all forms of legally binding and non-legally binding coordinated negotiation agreements."[24]

It is therefore evident from the passages quoted and the relief requested that ACA is concerned with agreements to coordinate negotiations for retransmission consent by separately owned stations in a single market, whether or not the agreement is reduced to a formal written document, rather than with sharing agreements *per se*, as Nexstar suggests.

Moreover, ACA explicitly stated in its Comments and Reply Comments that it takes no issue with sharing agreements as a *per se* matter.

> Prohibiting coordinated retransmission consent negotiations by separately owned broadcasters in a market will not disturb other sharing arrangements that allow stations to achieve operating efficiencies; it will simply address the pervasive collusion now occurring between competing sellers in a market.[25]
>
> . . . .
>
> As ACA stated in its Comments, adoption of a rule prohibiting coordinated retransmission consent negotiations by separately owned broadcasters in a single market will not disturb the other sharing arrangements that allow stations to achieve operating efficiencies. . . . Moreover, the expected efficiencies from coordinated negotiations are quite modest compared to the cost savings achieved through sharing of other activities such as advertising or studio facilities; they are likely limited to the cost of hiring a negotiator and related administrative expenses. *Thus, prohibiting coordinated negotiations, will not impact the willingness of broadcasters to continue entering into these pacts, nor materially impact any of the alleged benefits of these arrangements*. Further, these relatively modest savings are entirely outweighed by the significant public interest harms of inordinately high retransmission consent prices obtainable by virtue of coordinated activity. Collusion is always going to be more efficient than non-collusion, but in this case, the savings are not likely to be substantial.[26]

As is evident from the foregoing, ACA has not asked the Commission to prohibit sharing agreements as part of its reform of its retransmission consent regulations.

Nor did ACA allege in its press release that Nexstar filed its antitrust suits against Granite on the basis of Granite's ability to coordinate retransmission consent negotiations for separately owned stations pursuant to its sharing agreement with Malara. Rather, ACA quickly perceived that its

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[23] ACA Comments at 23-24; ACA Reply Comments at 40.

[24] ACA Comments at vi.

[25] *Id.*

[26] ACA Reply Comments at 35-36.

advocacy in the Commissions' retransmission consent reform rulemaking and Nexstar's Complaint were each directed at a common underlying harm: the enhanced market power to extract supra-competitive prices a single broadcaster gains by controlling five out of six separately owned national broadcast network affiliates (three Big 4 and two independent network affiliates) in the same DMA.

* * *

In conclusion, the Commission should disregard Nexstar's claims that ACA has mischaracterized its lawsuit against Granite. Instead, the Commission should focus on the similarity of the allegations contained in Nexstar's antitrust suit and ACA's call for reform of the Commission's retransmission consent rules to prevent separately owned stations in a single market from entering into collusive agreements, whether legally binding or non-legally binding, to vastly enhance their market power and ability to extract monopoly retransmission consent rents from MVPDs, to the ultimate detriment of consumers.

If you have any questions or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Barbara S. Esbin
Counsel to the American Cable Association

cc: William Lake, Chief, Media Bureau (via electronic mail)

CONNECTING HOMETOWN AMERICA

For Immediate Release
Contact: Ted Hearn
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ACA President & CEO Matthew M. Polka Says Nexstar Lawsuit Underscores Need for the FCC to Curb Formation of Price-Gouging TV Station Duopolies and Triopolies

SAN FRANCISCO, July 26, 2011 — "The American Cable Association welcomes the antitrust lawsuit of Nexstar Broadcasting Group against Granite Broadcasting and Malara Broadcasting to break up a TV station triopoly in Fort Wayne, Ind.

"Not only will this new triopoly cause the harms cited by Nexstar, but it also means pay-TV providers in the market now will be subject to the unconstrained market power of the Fort Wayne Triopoly or face a massive blackout of three dominant local TV stations as soon as New Year's Day of 2012. Either way, Fort Wayne's residents will suffer.

"For years, ACA has been urging the government to prevent consumer harm that results when separately owned broadcasters in the same market act in concert and coordinate their retransmission consent negotiations with pay-TV providers.

"Cable companies have documented for the FCC that they pay from 21% to 161% more for retransmission consent when they are required to negotiate with a single entity representing two network affiliated stations in the same market. When two stations in a market are involved, it's real bad; but when it's three, it's outrageous.

"Most importantly, the FCC must stop `kicking the can down the road' -- as it did most recently in approving without any conditions the sale of KTKA- TV and the formation of the Topeka Triopoly in Kansas.

"ACA believes the FCC has an obligation to step up to protect consumers and competition by prohibiting coordinated negotiation of retransmission consent by separately owned TV stations.

"The time to make a decision is now before the Topeka and Fort Wayne triopolies and nearly three dozen duopolies around the country are allowed to inflict much more serious consumer harm. ACA members and their customers in these markets are watching and waiting.

ACA would point out that while we agree with Nexstar's lawsuit that breaks with its broadcaster brethren, Nexstar forms joint negotiating agreements itself with Mission Broadcasting in 13 markets across the country.

"ACA believes that as a sign of faith in the merits of its argument that sharing agreements cause harm, Nexstar should cease coordinating retransmission consent negotiations with Mission in these markets immediately: Wilkes Barre-Scranton, Pa. (DMA 54); Springfield, Mo. (74); Amarillo, Tx. (131); Rockford, Il. (134); Monroe, La/El Dorado, Ark. (138); Lubbock, Tx. (143); Erie, Pa. (146); Joplin, Mo./Pittsburg, Kan. (147); Wichita Falls, Tx./Lawton, Ok. (149); Terre Haute, Ind. (152); Abilene-Sweetwater, Tx. (165); Billings, Mont. (169); and San Angelo, Tx.(198)."

About the American Cable Association

Based in Pittsburgh, the American Cable Association is a trade organization representing nearly 900 smaller and medium-sized, independent cable companies who provide broadband services for more than 7.6 million cable subscribers primarily located in rural and smaller suburban markets across America. Through active participation in the regulatory and legislative process in Washington, D.C., ACA's members work together to advance the interests of their customers and ensure the future competitiveness and viability of their business. For more information, visit http://www.americancable.org/