

Matthew A. Brill
Direct dial: (202) 637-1095
Email: matthew.brill@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

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August 3, 2011

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

Re: Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71; 2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 09-182

Dear Ms. Dortch:

In the Commission's pending proceedings regarding its retransmission consent and broadcast ownership rules, Time Warner Cable ("TWC") has called attention to a disturbing rise in broadcasters' aggregation and abuse of market power in local designated market areas ("DMAs"). In particular, TWC has pointed to broadcasters' use of local marketing agreements ("LMAs"), shared services agreements ("SSAs"), and similar arrangements that enable ostensibly independent competitors to collude in negotiating retransmission consent.¹ TWC also

¹ See, e.g., Comments of Time Warner Cable, Inc., *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, at 19-20 (filed May 27, 2011) ("TWC Retrans Comments") (describing harms flowing from collusive retransmission consent negotiations); Comments of Time Warner Cable, Inc., *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 09-182, at 7-14 (filed July 12, 2010) ("TWC Media Ownership Comments") (describing joint conduct by broadcasters that skirts the letter and spirit of the Commission's ownership rules); *ACME Television Licenses of Ohio, LLC, Assignor, and WBDT Television, LLC, Assignee, For Consent to Assignment of Broadcast Station License of WBDT, Springfield, OH*, Petition to Deny, File No. BALCDT-20100917AAT, at 6 (filed Oct. 22, 2010) (explaining that a joint sales agreement between two owners of competing stations in the Dayton, OH DMA had "consolidate[d] negotiating authority into the hands of a single entity" and "effectively eliminated competition between [the

has expressed concerns regarding broadcasters' increasingly common practice of affiliating with two or more national networks and multicasting multiple streams of network programming in a single DMA.² These tactics enable broadcasters to drive up retransmission consent fees (and, in turn, the rates consumers pay for video service) by credibly threatening to pull multiple Big Four signals from an MVPD's lineup at the same time. Such arrangements also flout the letter and spirit of the Commission's local broadcast ownership rules, which are designed to prevent a single entity from controlling two or more of the top four stations in a given DMA.

On July 25, 2011, Nexstar Broadcasting, Inc. ("Nexstar") filed a federal antitrust lawsuit against Granite Broadcasting Corp. ("Granite") that powerfully illustrates these concerns. The lawsuit arises out of Granite's recent expansion of its market power in the Fort Wayne, Indiana Designated Market Area ("DMA"). Effective August 1, 2011, FOX shifted its affiliation in the Fort Wayne DMA from Nexstar-owned WFFT to Granite-owned WISE-TV. WISE-TV already serves as the market's NBC and MyNetworkTV affiliate via multicast signals, and Granite also controls WPTA-TV, a multicasting ABC and CW affiliate, through an SSA with Malara Broadcasting. As a result, Granite now controls affiliates of three of the Big Four networks as well as affiliates of five of the six national networks in the Fort Wayne DMA.

In previous Commission filings, Nexstar has defended joint retransmission consent negotiations conducted pursuant to SSAs and similar contractual arrangements.³ But when confronted with a massive aggregation of broadcaster market power that harms its own ability to compete, Nexstar now joins a broad chorus of stakeholders in arguing that such arrangements are anticompetitive, harmful to consumers, and unlawful. Indeed, Nexstar's complaint, which is attached to its July 27, 2011 *ex parte* letter in MB Docket No. 10-71, is replete with allegations documenting these competitive concerns—charging Granite with violations of Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and several provisions of the Indiana Antitrust

stations] in the retransmission consent context"); *ACME Television Licenses of Wisconsin, LLC, Assignor, and LIN of Wisconsin, LLC, Assignee, For Consent to Assignment of Broadcast Station License of WCWF, Suring, WI*, Petition to Deny, File No. BALCDT-20100917AAF, at 11 (filed Oct. 22, 2010) (noting that a shared services agreement between two stations in the Green Bay, WI DMA enabled LIN, the owner of one of the stations, to serve as the other station's "agent with respect to the negotiation of . . . retransmission consent agreements" before the closing of the transaction that would have brought the two stations under common ownership).

² See TWC Retrans Comments at 20-21 (noting "FOX's recent decision to begin migrating some of its existing affiliations to multicasts that include the programming stream of another Big Four station"); TWC Media Ownership Comments at 15-17 (identifying "a number of broadcasters in its service areas that have affiliations with more than one major national broadcast network").

³ See, e.g., Comments of Nexstar Broadcasting, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, at 20-23 (filed May 27, 2011).

Act.⁴ According to Nexstar, Granite’s “ownership and control of the FOX network affiliation, in addition to the NBC, ABC, CW, and MyNetworkTV affiliations” gives it market power in the Fort Wayne DMA.⁵ Nexstar alleges that Granite’s market power enables it to charge “supra-competitive prices for local spot advertising.”⁶ Nexstar also alleges that Granite has “already caused competitors, including Nexstar’s WFFT-TV, to be barred from continued access to ‘must have’ television network programming.”⁷ In particular, Granite’s acquisition of an “exclusive license to broadcast programming from the FOX Network . . . will substantially lessen competition in the relevant market and tend to create a monopoly.”⁸ Moreover, Granite’s use of an SSA to control an ostensibly competing broadcast station in the same DMA, as well as its “acquisition of the exclusive FOX affiliation” to tack on to WISE-TV’s NBC and MyNetworkTV affiliations, “ha[s] no legitimate business purpose” and “achieve[s] no legitimate efficiency benefit to counterbalance the anticompetitive effects” of Granite’s conduct.⁹ These harms to competition have translated into harms to consumers, who no longer enjoy the benefits of competition among network affiliates in the Fort Wayne DMA. Specifically, Granite’s ability to charge supra-competitive rates to third parties for advertising “will cause, in turn, Indiana consumers to pay higher prices for [those] goods and services.”¹⁰

In its *ex parte* letter, Nexstar attempts to distinguish its antitrust claims against Granite from MVPDs’ closely related concerns about the harmful effects of coordination among local affiliates in the sale of retransmission consent. But that effort is unavailing—Nexstar’s complaint addresses the precise concerns raised by TWC and others in their comments in the above-referenced dockets. The same “market power” described in Nexstar’s complaint—derived from Granite’s control over multiple streams of “must have” network programming in the Fort Wayne DMA—enables broadcasters like Granite to seek supra-competitive fees from MVPDs and their subscribers by threatening to withhold and/or actually withholding retransmission consent for multiple Big Four affiliates. Just as monopolization in the sale of advertising slots raises the rates that local business pay for those slots, monopolizing access to “must have” network programming drives up the retransmission consent fees paid by MVPDs—particularly in light of the restrictions under the network non-duplication rules on MVPDs’ ability to import

⁴ See Complaint, *Nexstar Broadcasting, Inc. v. Granite Broadcasting Corp.*, No. 11-cv-249 (N.D. Ind. Jul. 25, 2011) (“Nexstar Complaint”), attached to *Ex Parte* Letter of Elizabeth Ryder, Vice President and General Counsel, Nexstar Broadcasting, to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (Jul. 27, 2011).

⁵ *Id.* ¶ 43.

⁶ *Id.* ¶ 44.

⁷ *Id.* ¶ 47.

⁸ *Id.* ¶ 73.

⁹ *Id.* ¶ 55.

¹⁰ *Id.* ¶ 46.

distant signals as substitutes.¹¹ And just as the higher advertising fees paid by businesses lead to higher retail prices for consumers, the higher retransmission consent fees paid by MVPDs lead to higher basic cable rates for subscribers. Granite's conduct also underscores the ineffectiveness of the Commission's local television ownership rules, which are "aimed at precluding broadcasters from obtaining and exercising market power" in carriage negotiations with MVPDs.¹² As the Granite situation makes clear, station groups are able to circumvent these rules by using dual affiliation (in the case of WISE-TV) and anticompetitive SSAs and similar agreements (in the case of WPTA-TV) to negotiate retransmission consent on behalf of multiple network affiliates in a single DMA.

While Granite's conduct in Fort Wayne presents an especially egregious example of broadcasters' aggregation of market power, the problem is becoming widespread. A study by the American Cable Association ("ACA") identified 57 LMAs, SSAs, and other "sharing" agreements through which the owner of one of the Big Four stations in a DMA "control[s]" the negotiations of retransmission consent of a competing Big Four station.¹³ ACA's study found that in many of these instances, "there was a single negotiator for both stations, and reaching carriage terms for one station was contingent upon reaching terms for the other."¹⁴ These "sharing" agreements are substantially the same across the industry; Granite's SSA with Malara Broadcasting gives Granite the same level of control over WPTA-TV's retransmission consent negotiations as do the SSAs widely used by other station groups. Similarly, stations are increasingly creating "virtual duopolies" in local DMAs by affiliating with multiple networks and multicasting their signals. One report has identified 68 instances of dual affiliation involving Big Four affiliates.¹⁵ As a result, these dual affiliation arrangements and "sharing" agreements are causing consumer harm in DMAs across the country.

¹¹ See 47 C.F.R. §§ 76.92 *et seq.* Such monopolization with respect to retransmission consent also ties up scarce channel slots, as stations with market power can insist on premium placement for their multicast signals and thereby foreclose opportunities for other programming providers.

¹² *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, 14 FCC Rcd 12903 ¶ 25 (1999) (citing *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, Second Report and Order, 4 FCC Rcd 1741, 1745 (1989)).

¹³ Comments of American Cable Association at 10, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed May 18, 2010) ("ACA PN Comments"); see also *id.*, Appendix C, Table 2 (listing each of the 57 instances).

¹⁴ ACA PN Comments at 10.

¹⁵ See Price Colman, *D2 Offers A1 Opportunity for Big Four Nets*, TVNewsCheck, Apr. 20, 2011, available at <http://www.tvnewscheck.com/article/2011/04/20/50699/d2-offers-a1-opportunity-for-big-four-nets> ("[FOX] now has 35 [affiliates with multiple affiliations], far more than any of the other Big Four networks, according to research firm BIA/Kelsey

The pervasive aggregation of market power by broadcasters—as illustrated by Granite’s conduct in Fort Wayne—highlights the need for prompt Commission action to protect consumers. Accordingly, the Commission should follow through with its proposal in the retransmission consent NPRM to make it a *per se* violation of the good faith standard to “grant 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.”¹⁶ The blatantly anticompetitive nature of such conduct also militates strongly in favor of the Commission’s proposal to consider a station’s good-faith violations in the context of license renewals.¹⁷ In addition, TWC calls on the Commission to clarify—and, to the extent necessary, amend—its local television ownership rules to prevent practices, such as dual affiliation and joint negotiation arrangements, that undercut competition, localism, and diversity. Such reforms would offer much-needed protection for consumers by preventing broadcasters from increasing their market power and skirting Commission rules through collusion and *de facto* consolidation.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
of LATHAM & WATKINS LLP
Counsel to Time Warner Cable Inc.

. . . . Second place belongs to ABC, with 20, while NBC ranks third with seven; and CBS six”).

¹⁶ *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 23 (2011).

¹⁷ *Id.* ¶ 30.