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March 25, 2019

VIA ECFS

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

Re: *Ex Parte* Communication in: MB Docket No. 19-30 (*Nexstar-Tribune*); MB Docket No. 18-349 (Quadrennial Review); MB Docket No. 17-318 (National Cap); MB Docket No. 15-216 (Good Faith Negotiation); MB Docket No. 10-71 (Retransmission Consent)

Dear Ms. Dortch:

On March 21, 2019, representatives of ACA Connects – America's Communications Association[1] ("ACA Connects") and executives of four member companies listed below met with Media Bureau staff and with media advisors for Chairman Pai and each of the Commissioners to discuss issues related to the above referenced proceedings.

- Chip Macdonald of Cable ONE;
- Darren Moser of Acentek;
- Jean Edhlund of Cooperative Network Services (on behalf of Acentek);
- Chris Kyle of Shentel;
- Brent Groome of HTC; and
- Kristi Ramsey of TDS

As other ACA Connects member companies reported last year,[2] retransmission consent negotiations continue to result in blackouts, a significant increase in retransmission consent fees

1 Formerly the American Cable Association, *American Cable Association Changes Name To ACA – America's Communications Association* (Mar. 20, 2019), http://www.americancable.org/american-cable-association-changes-name-to-aca-americas-communications-association/.

2 *See* Letter from Mary Lovejoy to Marlene Dortch, MB Docket No. 15-216 (Mar. 26, 2018).

across the board, and carriage of unwanted programming.[3] Moreover, as we reported last year, ACA Connects member companies pass through most, if not all, of these fee increases to consumers, such that subscribers' bills have increased precipitously. Devoting additional resources and bandwidth to broadcasting also hinders efforts to expand and improve broadband in rural areas.

ACA Connects member companies also highlighted how problems in the retransmission consent marketplace affect particular classes of subscribers. One such group is the so-called "OTT-nevers" – those who either do not use the Internet at all, or who prefer to rely on traditional video products, perhaps because they are not confident using newer technologies. This group includes older Americans[4] and lower-income households. It also includes those without access to broadband. Another group particularly harmed by retransmission consent problems are viewers who cannot receive broadcast stations over the air and thus have no access to blacked-out broadcast programming. ACA Connects members, which serve predominantly rural areas, serve a disproportionately high number of such subscribers.

ACA Connects representatives asked the Commission to consider the experiences of these member companies as it moves forward with certain ongoing proceedings and to avoid taking any steps that might lead to higher prices and consumer harm. In particular, ACA Connects and its members asked the Commission to consider that, based on both anecdotal and empirical evidence:

- Multichannel video programming distributors ("MVPDs") pay much more for each station offered as part of a top-four duopoly than they pay for stations that are not part of such duopolies. They also carry (and pay for) far more unwanted channels forced upon them by duopoly broadcasters.

- MVPDs pay much more to larger broadcasters than to smaller ones. They also carry (and pay for) far more unwanted channels offered by such broadcasters.

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3 The member company executives each noted that their agreements with broadcasters contain confidentiality provisions limiting the extent to which they could disclose information. *See, e.g.*, *CBS Corp. v. F.C.C.*, 785 F.3d 699 (D.C. Cir. 2015) (resolving concerns by broadcasters about the disclosure of their carriage agreements).

4 David Frank, *Tech Training Builds Connections and Confidence for Older Adults*, AARP (July 24, 2018), https://www.aarp.org/home-family/personal-technology/info-2018/technology-training-for-older-adults.html.

ACA Connects urged the Commission to acknowledge this harm and weigh it against the alleged benefits of such consolidation, including in its *Quadrennial Review* rulemaking,[5] the *Nexstar-Tribune* proceeding[6] and the *National Cap* rulemaking.[7]

ACA Connects members also discussed the recent behavior of Nexstar, which has earned itself a reputation as an exceptionally bad actor in an already dysfunctional retransmission consent marketplace. The Commission should take this into account as it considers whether to permit Nexstar to purchase additional television stations.

I. ACA Connects Member Company Participants.

- Chip MacDonald, SVP-Operations, **Cable ONE**. Cable ONE is the seventh-largest cable company in the United States. Serving more than 800,000 customers in 21 states with high-speed internet, cable television and telephone service, Cable ONE provides consumers with a wide range of the latest products and services, including wireless internet service, high-definition programming, and phone service with free, unlimited long-distance calling in the continental U.S.

- Darren Moser, Chief Financial Officer, **Acentek**. Acentek provides services to 22 communities in southeastern Minnesota and northeast Iowa, along with 11 communities in Michigan.

- Jean Edhlund, Video Product Partner, **Cooperative Network Services**, who negotiates retransmission consent agreements on behalf of small cable and IPTV system operators, including Acentek.

- Chris Kyle, Vice President – Industry Affairs and Regulatory, **Shentel**. Shentel provides broadband, video, and voice services to subscribers in rural Virginia and southern West Virginia. Shentel's territories include some of the poorest counties in the United States.

- Brent Groome, Chief Executive of Marketing, Economic and Strategic Initiatives, **HTC**. HTC has served Horry and Georgetown Counties in South Carolina for over 65 years.

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[5] *2018 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*, Notice of Proposed Rulemaking, FCC No. 18-179, MB Docket No. 18-349 (rel. Dec. 13, 2018) ("*Quadrennial Review NPRM*").

[6] *Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Nexstar Media Group, Inc. and Permit-but-Disclose* Ex Parte *Status for the Proceeding*, Public Notice, DA No. 19-82, MB Docket No. 19-30 (rel. Feb. 14, 2019).

[7] *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, 32 FCC Rcd. 10785 (2017) ("*National Cap NPRM*").

Today, it provides broadband, digital cable, wireless, security, traditional telephone, and advanced business solutions to its customers.

- Kristi Ramsey, Director - Content Management, **TDS**. TDS provides video services both as a cable and IPTV provider. As a cable provider, TDS offers services primarily in Colorado, New Mexico, Texas, Utah and Oregon, where it does business as Bend Broadband. The IPTV operation is smaller than the cable operation and provides video service to rural and suburban communities in Georgia, Indiana, Minnesota, New Hampshire, Tennessee, and Wisconsin.[8]

II. Local Media Ownership.

ACA Connects representatives urged the Commission to account for retransmission consent-related harms in considering requests to create new "top-four" duopolies,[9] or in considering changes in the rules to make the creation of such duopolies easier than it is today. They noted that, in their experience, ACA Connects members pay substantially higher prices for each station offered as part of a top-four duopoly than they pay for stations that are not part of such duopolies.

The Commission has previously found that MVPDs invariably pay higher retransmission consent fees when they are forced to negotiate with a single entity for two "top four" rated stations in the same designated market area ("DMA").[10] It also has found that the increases may create "pressure for retail price increases."[11] Furthermore, it has found that the harms caused

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[8] Not every ACA Connects representative attended every meeting. A complete list of meeting attendees can be found in Appendix 1, attached.

[9] By "top-four duopolies," we refer to ownership of two or more top-four, full power, overlapping stations specifically prohibited by the Commission's local ownership rules. 47 C.F.R. § 73.3555. More broadly, we refer to combinations of the "Big Four" networks within a single market – whether or not they fall within the specific prohibition – as "Big Four combinations."

[10] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, ¶ 10 (2014) ("*Joint Negotiation Order*")(adopting a rule that prohibits joint negotiation between two or more non-commonly owned "top-four" stations in the same market). The Commission's prohibition on joint negotiation was later codified and expanded by Congress. STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2060, § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv) (subsequent legislation requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common *de jure* control permitted under the regulations of the Commission…").

[11] *Id.* ¶ 17.

thereby "outstrip any efficiency benefits" from joint negotiation.[12] The Department of Justice has relied on similar conclusions in requiring divestitures in the Nexstar-Media General and Gray Raycom mergers.[13]

Despite this evidence, loopholes in the Commission's rules permit broadcasters to obtain "top-four" combinations through acquisition of low power stations or through multicast arrangements. More recently, the Commission changed its local ownership rules to allow broadcasters to demonstrate that particular "top-four" duopolies in a market serve the public interest.[14] The Commission is now considering whether to further loosen, or even to eliminate, this prohibition.[15]

Several of the ACA Connects member company executives negotiate with broadcasters controlling more than one of the "Big Four" (CBS, ABC, NBC, and FOX) affiliates in a single market. Each company's experience reflects the prior findings of the Commission and of the Department of Justice. As TDS's Ms. Ramsey explained, the threat of losing two networks simultaneously is, in nearly all circumstances, too difficult for a small cable system operator to withstand.

Ms. Ramsey explained that TDS serves the Indianapolis DMA, where Tribune created a duopoly four years ago and now proposes to transfer that duopoly to Nexstar.[16] She noted that TDS currently pays more for Tribune's duopoly stations than it pays for the average of the other two top-four stations in the market, despite the fact that Tribune typically charges lower retransmission consent rates than other broadcasters.[17] Ms. Ramsey also noted that, nationally, TDS pays 16 percent higher for commonly owned top-four stations than it pay for other stations.

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12 *Id.* ¶ 10 ("With regard to Top Four broadcasters, we can confidently conclude that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers.").

13 *See United States v. Nexstar Broad. Grp.*, 81 FR 63206, Competitive Impact Statement at 8 (D.D.C. Sept. 2, 2016).

14 *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, et al.*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802 (2017) ("*Local Ownership Reconsideration*").

15 *Quadrennial Review NPRM.*

16 Media Bureau Consolidated Database System, File No. BTC - 20190107ADI, Comprehensive Exhibit at 15 (June 2014), available at https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.hts?context=25&appn=101796969&formid=315&fac_num=72114 (admitting that the transaction will result in "increased revenue" to Nexstar from retransmission-consent fees) ("Comprehensive Exhibit").

17 Tribune prices have been historically lower because it also receives additional, non-cash compensation in the form of carriage of WGN America. The lower Tribune fees pricing is one of the reasons why Nexstar wants to buy Tribune. Nexstar readily admits that part of its motivation for purchasing Tribune is to "reset" lower Tribune rates to higher Nexstar rates, to the tune of $75 million

Cable ONE faces perhaps an even worse situation in Greenville, Mississippi, where Northwest Broadcasting has obtained the rights to all four major networks by acquiring a full-power station, a low-power station, and carrying a multicast signal on each. Because Northwest holds a "quadropoly" in this market, it is able to extract unreasonably high rates for the four Greenville stations. Mr. MacDonald reports that Cable ONE pays more for these Northwest Broadcast stations than it pays for any other station anywhere. He also reports that Northwest has not appeared to invest its retransmission consent revenues into improving local programming because, as best as he can ascertain, Northwest Broadcasting simply repeats the same news programming on all four of its Greenville stations.

Ms. Edhlund of Cooperative Network Services noted that similar circumstances exist for other clients on behalf of whom she negotiates. In the Wausau-Rhinelander DMA, for example, Gray controls both the CBS and Fox affiliates, and thus has almost exclusive access to NFL games. It now charges rates 91% higher than the average of the ABC and the NBC in that market. Similarly, Ms. Edhlund also reports that, in the Fargo DMA, Gray owns the NBC and CBS affiliates. She states that Gray's prices in this market are 9% higher than one Big Four affiliate in Fargo and 31% higher than the other.

Ms. Edhlund noted another consequence of the Gray duopoly in Wausau-Rhinelander: Gray charges 35-55% higher for its (generally unwanted) multicast channels than the average for multicast channels of the other two stations. In other words, where a broadcaster holds a duopoly, it can extract rents both in terms of inflated Big Four station prices and *also* in terms of multicast prices. This makes it easier to hide the extent of the anticompetitive harm.

Shentel's Mr. Kyle agreed. In Harrisonburg, VA, Gray has always held the ABC affiliate but recently acquired control of the Fox and CBS affiliates. Mr. Kyle reports that the retransmission consent fees Shentel pays for these stations are among the highest rates he pays – and that the rates will increase by 250% between 2015 and 2021.

The ACA Connects representatives stressed how important it is for the Commission to account for retransmission consent-related harms, both in individual merger applications that seek to maintain or create duopolies or in rulemakings seeking to make the creation of such duopolies easier. In ACA Connects' view, the Commission cannot rationally (or lawfully) conclude that requests for local duopolies serve the public interest without both quantifying the harms it has already identified related to retransmission consent and determining that the claimed benefits of its proposed action outweigh these and other harms.[18]

in the first year. *Acquisition of Tribune Media Company*, Nexstar Media Group, Inc., 10 (Dec. 3, 2018), https://www.nexstar.tv/wp-content/uploads/2018/12/Nexstar-Tribune-Investor-Presentation-FINAL-12-3-18.pdf.

[18] The Commission must take its earlier findings into account, or explain why they are no longer valid or otherwise should not apply, in order to meet its obligations under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545–49 (1978); *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins.*

The ACA Connects representatives also noted the relationship between these issues and rural broadband. Broadcasters obtain market power when they create local duopolies and exercise that power by extracting higher rates and requiring carriage of unwanted programming. This diverts bandwidth away from better broadband offerings and resources away from rural broadband expansion. Neither result comports with the Commission's stated goal of expanding rural broadband access.

III. National Media Ownership.

ACA Connects representatives also urged the Commission to account for retransmission consent-related harms in considering whether to increase or eliminate the national ownership cap. The national cap currently limits entities from owning television stations that, in the aggregate, reach more than 39 percent of the television households in the country (subject to a 50 percent UHF discount[19]), but the Commission is considering whether it can and should change these limits.[20]

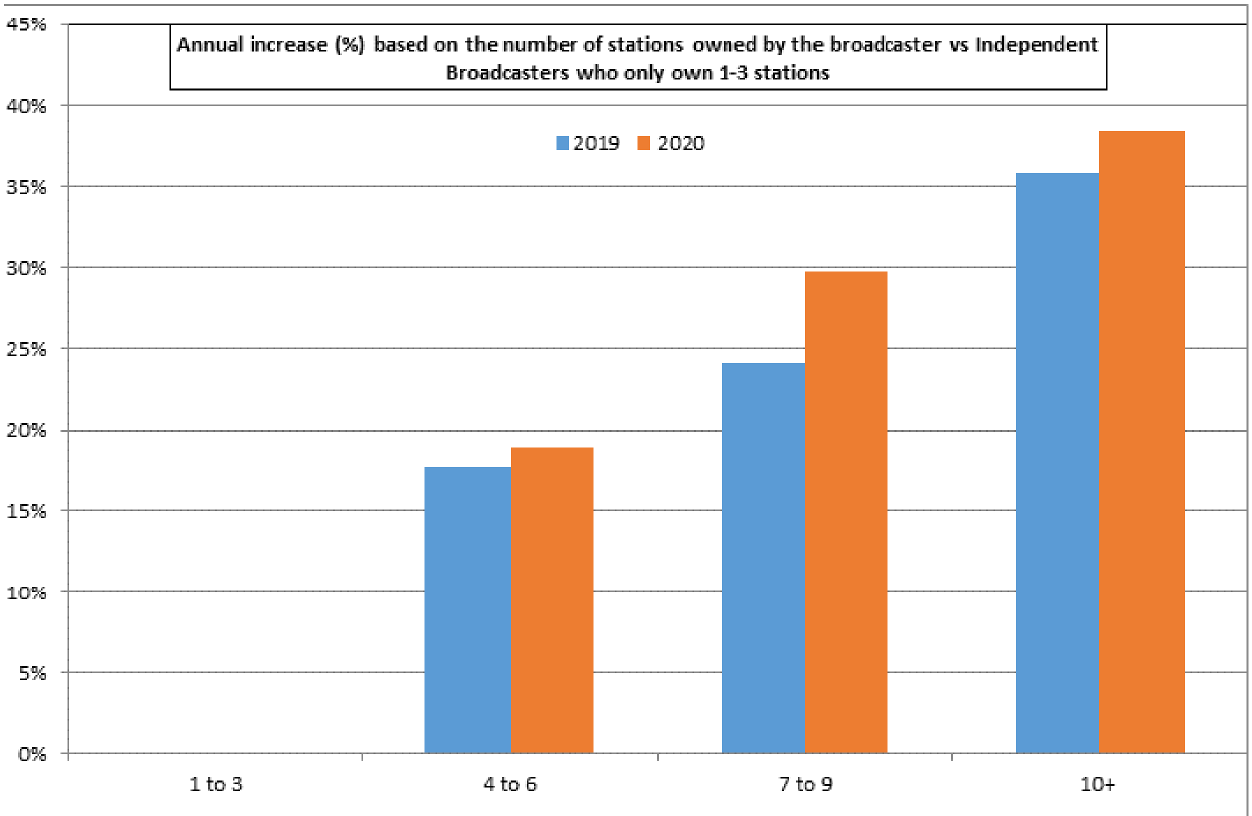
ACA Connects member company executives reported that their own experiences reflect empirical evidence previously submitted to the Commission showing that an increase in the existing national cap will invariably lead to higher prices. HTC's Mr. Groome, for example, reported that HTC saw significant rate increases when formerly independent stations were purchased by larger operators. One formerly independent station was purchased first by Barrington and then by Sinclair. During the next retransmission consent cycle, that station's rates went up by 121% despite the programming remaining the same. Another station's rates jumped nearly *450%* after it was purchased by Lin Media in 2015. The same station's rates then went up by 77% in the next cycle, after it was purchase by Nexstar– again, with no change of programming.

TDS has had a similar experience, albeit on a larger scale. According to Ms. Ramsey, TDS pays on average 18% more to broadcasters that own 4 to 6 stations within TDS's footprint than it does for broadcasters (including Network owned and operated stations) that own 1 to 3 stations within the footprint. The disparity jumps to 24% in 2019 and 30% in 2020 for broadcasters that have 7 to 9 stations (compared to the rate paid to broadcasters that own 1 to 3 stations) and jumps to 36% and 38% premium in 2019 and 2020 to the largest broadcast groups.

Co., 463 U.S. 29, 43 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). In addition, the Commission cannot ignore evidence and arguments placed in the record in individual proceedings considering duopolies. *State Farm*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.").

[19] 47 C.F.R. § 73.3555(e).

[20] *National Cap NPRM.*



Cable ONE's Mr. MacDonald gave an even more striking example: Cable ONE pays almost as much for Nexstar (which has the most stations within Cable ONE's footprint) as it pays for Northwest Broadcasting's quadropoly in Mississippi. In other words, from Mr. MacDonald's perspective, national consolidation causes every bit as much harm as local consolidation.

Each of the ACA Connects member company executives noted another consequences of national consolidation: a diminishment in the local content on allegedly "local" news. TDS's Ms. Ramsey, for example, described Nexstar stations in New Mexico syndicating out-of-market newscasts from stations owned by smaller groups instead of producing their own. Others described the practice of large station groups offering news "pumped in" from centralized locations.

Thus, each of the ACA Connects member company executives emphasized the importance of accounting for retransmission consent-related harms (including harms to rural broadband deployment) in any consideration of the national ownership cap, or in any mergers that threaten significant national consolidation. If their individual experiences hold true industry-wide, as the executives believe they do, relaxing the cap will cause significant consumer harm – harm that would have to be outweighed by corresponding consumer benefits.

The experience of these ACA Connects member company executives corresponds with the evidence already in the record on the relationship between broadcast group size and retransmission consent pricing. Both economic theory and the best empirical evidence available to the Commission – in the form of two econometric studies submitted by DISH in the *Sinclair-Tribune* proceeding[21] and then last week in the *Nexstar-Tribune* proceeding[22] – suggest that increasing the national cap beyond its current level will lead to higher retransmission consent rates.[23]

ACA Connects has suggested that the Commission obtain retransmission consent data and engage the new Office of Economics and Analytics to conduct an econometric analysis to help the Commission balance the harms and benefits of relaxing the national cap. ACA Connects also suggested that broadcasters, as the parties seeking to make the case for the rule change, should bear the burden of providing the data necessary for such an analysis.[24] The Commission should do the same in the Nexstar-Tribune merger –require the Applicants to provide the data necessary to undertake their own econometric analysis. We continue to believe that the Commission cannot rationally or lawfully approve significant additional national consolidation without taking such steps.

IV. *Nexstar-Tribune.*

ACA Connects member company executives also discussed the *Nexstar-Tribune* merger. The American Television Alliance, of which ACA Connects is a member, filed Comments in that proceeding,[25] and other parties filed Petitions to Deny.[26] Among other things, these parties noted that Nexstar has promised to raise retransmission consent rates – and, indeed, cites this as a *benefit* of the proposed transaction.[27]

The ACA Connects member company executives focused more narrowly on Nexstar's marketplace conduct and the reputation it has earned as a bad actor in an already dysfunctional

21 *See Media Bureau Establishes Pleading Cycle for Applications to Transfer Control of Tribune Media Company to Sinclair Broadcast Group, Inc. and Permit-But-Disclose* Ex Parte *Status for the Proceeding,* DA No. 17-647, MB Docket No. 17-179 (re. July 6, 2017); Petition to Deny of DISH Network L.L.C., MB Docket No. 17-179, Exh. D, Declaration of Janusz Ordover (filed Aug. 7, 2017); Reply Comments of DISH Network, L.L.C., MB Docket No. 17-179, Exh. C, Reply Declaration of Janusz Ordover (filed Aug. 29, 2017).

22 Petition to Deny of DISH Network L.L.C., MB Docket No. 19-30 (filed Mar. 18, 2019) ("DISH Petition").

23 Comments of the American Cable Association, MB Docket No. 17-318 (filed Mar. 19, 2018).

24 *Id.* at 7.

25 Comments of the American Television Alliance, MB Docket No. 19-30 (filed Mar. 18, 2019).

26 *E.g.*, DISH Petition; Petition to Deny of Common Cause, *et al.*, MB Docket No. 19-30 (filed Mar. 18, 2019).

27 Comprehensive Exhibit at 13.

marketplace. Shentel's Mr. Kyle, for example, described Nexstar as the most difficult party with whom he negotiates. He described Nexstar's policy of essentially ignoring negotiation requests until weeks or even days prior to a blackout, when Nexstar believes it has the most leverage over Shentel. He also described such "negotiations" as essentially take-it-or-leave it exercises.

Ms. Ramsey described a recent 32-day blackout of Nexstar's CBS and FOX affiliates in Albuquerque during the NFL Playoffs, which resulted in TDS subscribers missing most of the NFL Playoffs. She noted that one of the sticking points was Nexstar's insistence that it be paid similar to "Big Four" rates even for stations that lost Big Four network affiliation.[28]

Acentek's Mr. Moser provided additional details about Nexstar's "quasi duopoly" in Grand Rapids. According to Mr. Moser, Nexstar negotiated an exceptionally high rate for its ABC station without informing Acentek that the station was not the "primary" ABC affiliate in the market. Acentek learned only later that it would be required to black out the ABC network programming from the Nexstar station's signal because of network nonduplication protection claimed for the first time by the other ABC affiliate in the market, and yet still continue to pay the high rate as if Acentek was receiving such ABC content.

These may or may not be violations of the Commission's good faith rules. At a minimum, however, they paint a picture of Nexstar as a bad marketplace actor. They also provide a fairly reliable predictor of what will happen if the Commission permits Nexstar to obtain additional stations. ACA Connects and its member companies urge the Commission to think very carefully before doing so.

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I have filed this letter electronically pursuant to section 1.1206 of the Commission's rules.

Sincerely,

Mary C. Lovejoy

cc: Meeting participants (see Appendix 1)

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28 Letter from Andrew Peterson to Chairman Pai (Jan. 4, 2019), *available at* https://blog.tdstelecom.com/news/tds-delivers-letter-to-fcc-about-nexstar-negotiation/.

Appendix 1:
Meeting Participants

On Behalf of ACA Connects:

Ross Lieberman (except for Commissioners Carr, Rosenworcel, and Starks)
Mary Lovejoy
Michael Nilsson, Harris, Wiltshire & Grannis LLP
Chip MacDonald, SVP-Operations, Cable ONE
Darren Moser, Chief Financial Officer, Acentek.
Jean Edhlund, Video Product Partner, Cooperative Network Services
Chris Kyle, Vice President – Industry Affairs and Regulatory, Shentel (except for Media Bureau and Commissioner Rosenworcel)
Brent Groome, Chief Executive of Marketing, Economic and Strategic Initiatives, HTC (except for Commissioner Rosenworcel)
Kristi Ramsey, Director - Content Management, TDS (except for Chairman Pai)

Media Bureau Staff:

Holly Saurer
Nancy Murphy
Varsha Mangal
Steven Broeckaert
Brendon Murray
Maria Mullarkey
Jonathan Mark
Olivia Avery

From Chairman Pai's Office:

Matthew Berry
Alexander Sanjenis

From Commissioner O'Rielly's Office:

Joel Miller

From Commissioner Rosenworcel's Office:

Kate Black

From Commissioner Carr's Office:

Evan Swarztrauber

From Commissioner Starks's Office

Michael Scurato