



July 18, 2023

BY ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, N.E.
Washington, DC 20554

Re: MB Docket No. 14-261 (MVPD Definition)

Dear Ms. Dortch:

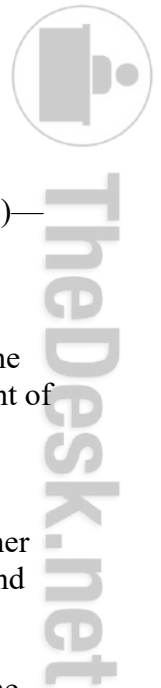
I write to you regarding the recent activities of Nexstar Broadcast Group (“Nexstar”)—and how that behavior illustrates why the Commission should *not* reopen a proceeding that would apply outdated retransmission consent rules to online providers.

Nexstar has become the largest broadcast station group by exploiting loopholes in the FCC’s broadcast ownership rules. By its own account, it serves markets reaching 68 percent of television households—that is, the vast majority of DIRECTV’s customers and potential customers.¹ Nexstar recently incited the largest programming blackout in history against DIRECTV. Last week, it expanded this blackout to include CW network programming on *Sinclair* owned and managed local stations on DIRECTV’s streaming service. It has, in other words, dragged into its dispute new viewers of a competing broadcaster against their will and regardless of DIRECTV’s agreements to serve these viewers.

This behavior reveals what is truly motivating affiliates’ calls for regulation of online providers. It is not local news; it is their economic position. Broadcast affiliates, including Nexstar, have complained that networks control negotiations with online providers to the detriment of local stations, especially local news. Now that it owns a network, however, Nexstar has done just that—required *another* broadcaster to black out programming on its local stations notwithstanding agreements that other broadcasters had negotiated. Nexstar’s conduct shows that affiliates’ attempt to regulate online providers has never really been about “preserving local broadcasting” or anything else of the sort. Affiliates simply want the government to give them leverage against the networks.

The very last thing anybody should want to do is extend today’s dysfunctional retransmission consent market—one whose dysfunction is caused largely by Nexstar—into the

¹ We refer to “potential customers” here because the harm caused when a broadcaster withholds programming includes not only disruption to existing subscribers but also limits the choices available to potential *new* subscribers.



online marketplace. Congress and the FCC should instead focus on reforming the existing retransmission consent regime.

* * *

Nexstar has grown enormously in recent years by exploiting or evading the FCC's ownership rules. First, despite the national ownership cap limiting Nexstar's reach to 39 percent of U.S. television households, Nexstar claims it and its "partner stations" reach 68 percent of U.S. television households,² or 84 million of the 123.8 million television households in the United States. It has obtained this nationwide reach both by exploiting the so-called "UHF Discount" for UHF stations³ and through unlawful control of its "sidecar" stations putatively owned by Mission and White Knight.

Nexstar has also consolidated *locally* during this time. The FCC's local ownership rules generally limit entities to owning only one of the top-four rated stations in a market.⁴ Yet Nexstar has exploited loopholes in these rules⁵ to own two or more "Big 4 Network" feeds (that is, programming from two or more of the CBS, NBC, ABC, and FOX networks) in 13 markets. Nexstar's unlawful control of its Mission and White Knight sidecars gives it control of multiple Big 4 Network feeds in an additional 24 markets. In up to 37 markets, then, representing 12.7 million US television households (all of which are DIRECTV customers or potential customers), Nexstar can withhold two or more of the CBS, NBC, ABC, and FOX networks from subscribers of DIRECTV and other pay tv providers.

This enables Nexstar to withhold programming from the vast majority of a satellite television provider's customers and potential customers in order to gain leverage in retransmission consent negotiations. And it has done just that with DIRECTV. Since July 2, DIRECTV has been unable to offer Big 4 Network programming on Nexstar-owned or Nexstar-controlled stations to subscribers in 116 local markets. (This figure includes Mission and White Knight stations, which Nexstar has withheld from DIRECTV since last October.)

² Nexstar Media Group, Inc., <https://www.nexstar.tv/> ("Nexstar Media Group, Inc. is America's largest local television and media company with 200 broadcast stations (including partner stations) in 116 markets addressing more than 68% of U.S. television households and a growing digital media operation.")).

³ 47 C.F.R. § 73.3555(e)(2)(i).

⁴ *Id.* § 73.3555(b)(1)(ii).

⁵ The top-four prohibition generally forbids a single entity from owning, operating, or controlling two top-four television stations in the same market. It does not, however, address control of two top-four network affiliates on multicasts of a single station. *Id.* Nor do the rules count same-market low-power or Class A stations for purposes of this prohibition. *Id.* § 74.732(b). Thus, broadcasters can obtain top-four duopolies, triopolies, or quadropolies by placing an additional top-four network on multicast feeds, or by moving top-four network programming to a commonly owned low-power station. And they can do so without public-interest review by the Commission.

Now, moreover, Nexstar has found an additional source of leverage: viewers of CW programming on stations *not owned or controlled by Nexstar*. Nexstar purchased the CW Network last October.⁶ DIRECTV carries 21 CW-affiliated stations owned or managed by Sinclair Broadcast Group pursuant to retransmission consent agreements (in the case of its satellite service) and copyright license agreements (in the case of its streaming service) it has negotiated with Sinclair. On July 11, Sinclair told DIRECTV that these stations are no longer authorized to provide CW network content to DIRECTV’s streaming service because Nexstar had withdrawn Sinclair’s rights to do so.⁷ Sinclair thus required DIRECTV to black out this programming from its streaming service, and DIRECTV complied with this directive beginning on July 12.

This, of course, compounds the damage Nexstar had already inflicted on DIRECTV’s streaming service with its initial blackout:

- Nexstar has now forced a blackout of network programming in nine *new* markets covering 6.5 million television households that are, or could be, DIRECTV streaming customers. In other words, only 27% of US households can now subscribe to DIRECTV’s streaming service without being subject to a total or partial blackout of a broadcast channel in their DMA.
- Nexstar has now forced a blackout of a *second or third* network in thirteen local markets covering nearly 10 million television households.

Nexstar, in other words, has sought to expand its retransmission consent dispute to the online market. And it is doing so at the expense of a rival broadcaster—Sinclair—which had negotiated a valid carriage agreement with DIRECTV.

This behavior is remarkable in light of recent advocacy in the FCC’s “MVPD Definition” proceeding.⁸ Nexstar and other broadcasters have urged the Commission to apply the retransmission consent rules to online providers because, in their view, networks would otherwise have too much control over online carriage. Here are some of the things they have said:

- **Nexstar.** “We firmly believe that we should control our own destiny with regard to the virtual MVPDs instead of allowing the network to negotiate on our behalf. Currently, the

⁶ *Nexstar Media Closes Acquisition of The CW Network*, Nexstar Media Group, Inc. (Oct. 3, 2022), <https://www.nexstar.tv/nexstar-closes-acquisition-of-the-cw-network/>.

⁷ This did not affect DIRECTV’s satellite service. Nor did it affect non-network programming such as local news and syndicated programming.

⁸ *See, e.g.*, Letter from Tim Nelson to Marlene Dortch, MB Docket No. 14-261 (filed Jan. 25, 2023), *available at* <https://www.fcc.gov/ecfs/document/101262546720988/1> (“TOC-Starks Meeting”).

individual network affiliate boards lead the discussions with the networks on behalf of their respective affiliates, which include station groups like Nexstar to opt in or out of virtual MVPD agreements.”⁹

- **Television Operators Caucus.** “The current model effectively allows the national television Networks to dictate the economics of distribution agreements with vMVPDs and also effectively precludes carriage of strong independent local news stations. . . . [A]ffording local stations the right to negotiate fair compensation and non-economic terms that are reflective of the true value of their local programming is important to the long-term health of local stations and to preserving the important role they play in informing their communities.”¹⁰
- **Affiliates Associations.** “Because the Commission’s retransmission consent rules do not currently apply to vMVPDs, the Big Four networks control negotiations with virtual MVPDs. The Affiliated stations are at the mercy of agreements that they have no say in negotiating. The December 2021 impasse between YouTube TV and ABC/Disney illustrates one of the many problems with the current framework: all ABC-Affiliated stations nationwide were simultaneously removed from YouTube TV during the impasse, and local Affiliates had no insight into the YouTube TV/Disney negotiations, including if or when their signals and local content would be restored to YouTube TV subscribers. The Four Affiliates Associations representatives explained that local stations must be able to negotiate directly with virtual MVPDs (as they do with traditional MVPDs under the retransmission consent rules) in order to negotiate fair compensation and non-economic terms reflective of the true value of their local programming, which they could then reinvest in the production and distribution of local news and other local programming.”¹¹
- **NAB.** “Without the ability to negotiate for the value of their signals, local stations would struggle to keep pace in an incredibly competitive marketplace. It would also lead to less choice for viewers and fewer resources for stations to invest in local news, public affairs programming, emergency weather events and community activities.”¹²

Yet the moment Nexstar itself became a network owner, it did exactly what broadcast affiliates have complained about. It usurped *Sinclair’s* role in distributing the content on *Sinclair’s* stations to an online provider in order to advance its own economic interests—interests

⁹ Daniel Frankel, *Restoration of More than 200 Local CBS Broadcast Stations Culminates Two-Month Standoff*, NextTV (April 02, 2023), <https://www.nexttv.com/news/cbs-affiliates-finally-return-to-fubo>

¹⁰ TOC Starks Meeting at 2.

¹¹ Letter from Mark J. Prak to Marlene Dortch, MB Docket No. 14-261, at 2–3 (filed Apr. 21, 2022).

¹² *The FCC Should Seek Updated Input on the Impact of Virtual MVPDs*, NAB, <https://www.nab.org/advocacy/issue.asp?id=6760&issueid=1002>.

that Sinclair does not share. The broadcast affiliates' position in this proceeding, then, isn't really about "preserving the important role [local stations] play in their communities." It is about one set of economic actors (affiliates) wanting the government to give them more power at the expense of another set of economic actors (the networks). If broadcasters really believed their localism rhetoric, Nexstar would never have acted against the interest of Sinclair's local stations.

More generally, rather than trying to expand the broken retransmission consent regime into streaming services, Congress and the Commission should focus on fixing it. We have said this many times before, but it bears repeating: The retransmission consent market is dysfunctional by any reasonable standard. According to SNL Kagan, retransmission consent fees have increased 877 percent since 2010, from \$1.25 billion to \$12.2 billion in 2020. According to the Commission, each subscriber pays more than \$200 per year for "free" broadcast stations, an *annual* increase of 30 percent per year.¹³ The American Television Alliance reports that blackouts have increased 4,175 percent since 2010, from 8 blackouts that year to 342 in 2020.

Indeed, Nexstar has, in no small part, *caused* this dysfunction. In the last year alone, Nexstar has threatened or removed stations from Verizon FIOS (Oct. 2022),¹⁴ Comcast Xfinity (Dec. 2022),¹⁵ DISH Network (Jan. 2023),¹⁶ FuboTV (Feb.–Mar. 2023),¹⁷ Altice USA-Optimum (Mar. 2023),¹⁸ DIRECTV (July 2023), and Hawaiian Telecom (July 2023).¹⁹ And Nexstar has been accused by Comcast, Charter, and DIRECTV of violating the ownership rules in order to unlawfully and anticompetitively raise retransmission consent prices.²⁰

¹³ *Communications Marketplace Report*, FCC No. 22-103, GN Docket No. 22-203, at App. E (rel. Dec. 30, 2022), available at <https://docs.fcc.gov/public/attachments/FCC-22-103A3.pdf>.

¹⁴ Adam Jacobson, *Nexstar, Verizon FiOS Fail to Reach Retrans Deal*, Radio and Television Business Report (Oct. 16, 2022), <https://rbr.com/nexstar-verizon-fios-fail-to-reach-retrans-deal/>.

¹⁵ Matthew Keys, *Nexstar Pulls WPIX from Comcast Systems in New York Area*, TheDesk.net (Dec. 6, 2022), <https://thedesk.net/2022/12/wpix-dropped-comcast-new-york-cw-11/>.

¹⁶ *Two Years Later, Dish Dumps Nexstar SSA Partners Again*, Radio and Television Business Report (Jan. 8 2023), <https://rbr.com/two-years-later-dish-dumps-nexstar-ssa-partners-again/>.

¹⁷ Jon Lafayette, *Sinclair, Nexstar, Gray, Scripps, Hearst, Cox Media CBS Affiliates Leave FuboTV (Updated)*, Broadcasting + Cable (Feb. 1, 2023), <https://www.nexttv.com/news/sinclair-nexstar-gray-scripps-hearst-cox-media-cbs-affiliates-off-fubo>.

¹⁸ Luther Turmelle, *Some Connecticut Optimum cable TV customers lose WTNH from channel lineup*, CT Insider (Mar. 27, 2023), <https://www.ctinsider.com/business/article/cable-operator-to-drop-wtnh-from-channel-lineups-17862815.php>

¹⁹ Adam Jacobson, *Nexstar Gets a Retrans Consent Complaint from Hawaii*, Radio and Television Business Report (July 6, 2023), <https://rbr.com/nexstar-gets-a-retrans-consent-complaint-from-hawaii/>.

²⁰ Petition for Declaratory Ruling, MB Docket No. 21-__ (filed July 1, 2021); Amy Maclean, *Charter Joins Comcast, Argues Nexstar Violated FCC Cap*, Cablefax (Apr. 18, 2022),



Retransmission consent, then, is not working properly today, as Nexstar's behavior amply demonstrates. Rather than talking about expanding this broken regime, we should be focused on how we can fix it.

Sincerely,

/s/ _____
Stacy Fuller
Senior Vice President



<https://www.cablefax.com/regulation/complaint-dept-charter-joins-comcast-argues-nexstar-violated-fcc-cap>.