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Nexstar-Media General Merger May Signal New DOJ Approach to Broadcast Television Mergers

Retransmission Fees, in Addition to Advertising, Examined

By David C. Kully

In the past three years, the Antitrust Division of the United States Department of Justice (DOJ) has filed six antitrust lawsuits seeking to block the merger of broadcast television station groups. Each case was settled with a consent decree, filed simultaneously with the complaint, requiring the divestiture of stations in local markets in which both companies operated stations.

In five of the six cases, the DOJ's theory of how the mergers would harm competition was the same. In its complaint in each of those five cases, DOJ alleged that, in local markets in which both station owners operated stations, the merger would eliminate competition between the merging companies in the sale of spot advertising and result in an increase in the prices that advertisers would have to pay to advertise on their local television stations.

In the sixth case, however, a September 2, 2016 challenge to the acquisition by Nexstar Broadcasting Group of Media General, DOJ alleged for the first time new grounds for concern about the merger's likely anticompetitive effects: that Nexstar, through its acquisition, would acquire greater bargaining leverage in retransmission consent negotiations with multichannel video programming distributors (MVPDs). That, under the government's theory, would force those providers to pay higher retransmission fees.

Retransmission consent refers to the process of MVPDs – cable or satellite television providers – obtaining permission from local broadcast television stations to include the local stations in the packages of channels they offer to subscribers. MVPDs typically agree to pay fees to local stations – particularly stations affiliated with the ABC, CBS, NBC, or FOX networks – for rights to "retransmit" their broadcast signals. In the relatively rare instances in which MVPDs and local broadcast stations have been unable to agree on retransmission fees, the MVPDs have lost rights to carry the local stations, resulting in "blackouts" of the stations for the MVPDs' subscribers.

The DOJ's new retransmission consent concerns will have no immediate practical impact on the ability of a broadcast television station to acquire local rival stations, because the FCC's

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Local Ownership Rules continue to prohibit the ownership of two top-four stations in any market, and the government will also likely continue to challenge these mergers as harmful to advertisers. But this new approach – no longer looking exclusively at advertising as the competitive market, but now adding retransmission consent to the mix – may reflect a permanent shift in how DOJ views these mergers. If advertisers increasingly turn to cable and satellite networks or other outlets as alternatives to spot advertising on broadcast television stations, and if the FCC relaxes or, in particular instances, waives its Local Ownership Rules, DOJ's new concern about the effect of a merger on retransmission consent negotiation would still remain as a potential impediment to the completion of a transaction.

More significantly, the absence of any immediate practical impact in the merger context might reflect the DOJ's desire to send a broader message to broadcasters. The concerns about the heightened retransmission consent bargaining leverage that Nexstar would obtain through its acquisition of Media General would apply equally to joint negotiations by rival stations unrelated to any merger. Broadcasters coordinating retransmission consent negotiations with competitors might in the future find themselves facing an investigation into a potential violation of Section 1 of the Sherman Act.

The DOJ's Traditional, Advertiser-Focused Analysis

The DOJ brought five cases between 2013 and 2015 challenging the merger of owners of broadcast television stations.

- *United States v. Gray Television, Inc., et al.*, No. 15-cv-2232 (D.D.C.) (complaint filed Dec. 22, 2015; consent decree entered March 3, 2016).

- *United States v. Media General, Inc., et al.*, No. 14-cv-1823 (D.D.C.) (complaint filed Oct. 30, 2014; consent decree entered Jan. 13, 2015).

- *United States v. Nexstar Broadcasting Group, Inc., et al.*, No. 14-cv-2007 (D.D.C.) (complaint filed Nov. 26, 2014; consent decree entered Feb. 27, 2015).

- *United States, et al., v. Sinclair Broadcast Group, Inc., et al.*, No. 14-cv-1186 (D.D.C.) (complaint filed July 15, 2014; consent decree entered Nov. 25, 2014).

- *United States v. Gannett Co., Inc., et al.*, No. 13-cv-1984 (D.D.C.) (complaint filed Dec. 16, 2013; consent decree entered Nov. 18, 2014).

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Each complaint alleged that the merger would harm competition in the sale of broadcast television spot advertising in the local markets in which both of the merging parties operated stations. The complaints laid out the many ways in which, in the view of the DOJ, broadcast television spot advertising is materially different from other television advertising and from advertising in other media. According to the DOJ, broadcast television spot advertising provides a unique vehicle for efficiently reaching a large number of viewers in a particular local area with a memorable message. Network television advertising lacks the local focus of spot advertising offered by local stations. Advertising on cable and satellite networks reaches fewer viewers. And advertising on radio, in newspapers, or through billboards cannot provide the combination of sight, sound, and motion that makes television advertising particularly memorable and effective. Because advertisers have no good substitutes for broadcast television spot advertising in the event of a price increase, and because it would be difficult for advertisers to "buy around" the popular, network-affiliated stations operated by the merging parties, the government concluded in each case that the merger, if left unchallenged, would result in higher prices to advertisers.

As the viewing habits of consumers continue to evolve, the DOJ might at some point conclude (or a court might be persuaded) that advertising on local cable or satellite networks or on online video sources are reasonable substitutes for broadcast television spot advertising to which advertisers could turn to avoid merger-related price increases. For now, however, DOJ continues to act to protect competition between broadcast television stations in the sale of spot advertising.

The DOJ's New Interest in Retransmission Consent Negotiations

On September 2, 2016, the DOJ announced its challenge to the acquisition by Nexstar Broadcasting Group of Media General Corporation, as well as the settlement of its claims based on Nexstar's agreement to divest television stations in six local markets. *See United States v. Nexstar Broadcasting Group, Inc.*, No. 16-cv-1772 (D.D.C.). As in each of its five previous challenges to broadcast television mergers in the past three years, the complaint alleged that the merger would harm competition in those six markets in the sale of broadcast television spot advertising and result in higher prices for advertisers.

But the complaint also alleged that, after the merger, MVPDs would have to pay higher retransmission fees to Nexstar to carry its stations in the six markets. The government's lawyers observed that, before the merger, Nexstar and Media General could threaten during retransmission consent negotiations to withhold only its own local station in each market. An MVPD facing that threat would assume that many of its subscribers would turn during a blackout to other stations – including from Nexstar's station to Media General's, or vice versa –

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and the threat to the MVPD of losing a significant number of subscribers during the blackout would be relatively low. After its acquisition of Media General, Nexstar's leverage in retransmission consent negotiations with MVPDs would increase substantially, as MVPDs would fear that the loss of two stations would produce an intolerable level of subscriber attrition. Nexstar's increased bargaining leverage, the DOJ alleged, would allow it to obtain higher retransmission consent fees from MVPDs, which MVPDs would pass through to consumers in the form of higher subscription fees.

Implications of DOJ's New Theory of Harm

As reflected in its approach in the five recent broadcast television merger cases that preceded its challenge to Nexstar's acquisition of Media General, the government believed its allegations of harm to competition in the sale of spot advertising provided adequate grounds on which to base its broadcast television merger challenges. The FCC's Local Ownership Rules also continue to block a broadcast television station from acquiring its local rivals. The new retransmission consent allegations would not at this point appear to materially strengthen the government's hand in these cases.

Why then did DOJ depart in the Nexstar/Media General complaint from its usual approach?

In 1996, DOJ challenged under Section 1 of the Sherman Act an agreement among the three network-affiliated broadcast television stations in Corpus Christi, Texas, to coordinate in the licensing of their retransmission rights. *See* *United States v. Texas Television, Inc., et al.* (S.D. Tex.) (complaint filed Feb. 2, 1996; consent decree entered January 10, 1997). In the 20 intervening years, the DOJ did not again assert, in either the merger context or outside of the merger context, that the coordination among local broadcasters in retransmission consent negotiations with MVPDs would be likely to harm competition.

By adding allegations concerning the effect of the merger of Nexstar and Media General on bargaining leverage in retransmission consent negotiations, DOJ appears to be sending a signal concerning its current views on joint negotiations of retransmission rights by competing broadcasters. Even under circumstances in which FCC rules permit such joint negotiations, broadcasters should be aware of the government's likely interest and understand that coordinating retransmission consent negotiations might carry consequences under Section 1 of the Sherman Act.

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