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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
HolstonConnect, LLC,)	
)	
Complainant,)	
)	
v.)	File No. _____
)	
Nexstar Media Group, Inc.)	
)	
Defendant.)	
)	
)	

**COMPLAINT FOR FAILURE TO NEGOTIATE
RETRANSMISSION CONSENT RIGHTS IN GOOD FAITH**

Pursuant to Sections 76.7 and 76.65 of the Commission’s rules, HolstonConnect, LLC, a wholly owned subsidiary of Holston Electric Cooperative, Inc., submits this complaint against Nexstar Media Group, Inc. (“Nexstar”) for violating the Commission’s rules requiring broadcasters to exercise “good faith” in negotiating retransmission consent agreements.

I. BACKGROUND AND OVERVIEW

1. Chairman Pai stated in 2018 that rural electric cooperatives are “heroic figures” in the push to bring broadband to rural areas, and the Commission under his leadership has laudably encouraged electric cooperatives to play a key role in closing the digital divide. Complainant HolstonConnect – a recipient of CAF II funding through Auction 903 – is attempting to do exactly that, by bringing gigabit Internet infrastructure and services to rural East Tennessee. Unfortunately, the objectives of HolstonConnect – and the Commission – are being thwarted by HolstonConnect’s inability to engage in retransmission consent negotiations to obtain essential

video programming at reasonable rates. Without prompt and forceful remedial action by the Commission, as described below, HolstonConnect's ability to deploy gigabit infrastructure and services in rural East Tennessee will be hamstrung.

2. HolstonConnect is a wholly owned, not-for-profit subsidiary of Holston Electric Cooperative, Inc., ("HEC") a rural electric cooperative providing electric service to more than 30,000 residential, commercial, and industrial customers in a 525 square mile service area in rural East Tennessee. Formed in 1940, HEC is a member-owned distributor of Tennessee Valley Authority power, with headquarters at 1200 West Main Street, Rogersville, Tennessee, 37857.

3. Research conducted by HEC in the early 2017 indicated that nearly 40 percent of its members did not have access to residential high-speed Internet. During meetings held by HEC in 2017, members of the cooperative made clear that lack of broadband Internet access was a major problem for the predominantly rural area. With an existing fiber optic backbone deployed in support of its electric power mission, HEC realized that it could play a significant role in bridging the digital divide in rural East Tennessee.

4. In mid-2017, the Tennessee General Assembly passed legislation allowing electric cooperatives to provide retail broadband Internet, telephone, and video service within the cooperative's native service area. HolstonConnect was established in late 2017 to provide advanced communications services to Holston Electric Cooperative members.

5. HolstonConnect will serve portions of Hawkins and Hamblen Counties in the rural area between Knoxville, TN, and Kingsport, TN. The largest city in the service area is Church Hill, TN, with a population of just under 6,700. The populations of the remaining towns are all under 5,000. This has historically been an area largely ignored by Tier One service providers. Several communities do not even have Internet service via DSL or cable modem service available

to them. HolstonConnect intends to make gigabit Internet service available to every customer in its service territory, with the prospect of bringing gigabit Internet to over 10,000 people who have *no* wireline broadband access at all.

6. In January 2018, HolstonConnect received approval from the cooperative's Board of Directors to begin the initial phase of construction. Internet DIA circuits and telephone service were activated in the summer of 2018, with customer installs commencing in October 2018.

7. For the HolstonConnect fiber project to succeed financially, it must be able to offer the "triple play" of competitive voice, broadband, and cable services. While cable service in general tends to have very low, if any, margin for competitive communications companies, consumers tend to view themselves as hostages to the pricing practices of incumbent providers for bundled services. Customers are finding that, if they cancel Internet service from an incumbent provider, their cable service bill skyrockets.¹ The reluctance of subscribers to obtain Internet access service from one provider, and cable television service from another, creates significant challenges for a new provider. In short, to provide widespread gigabit broadband Internet access service in rural East Tennessee on an economically sound basis, HolstonConnect must be able to obtain essential cable television programming – particularly from the four major television networks – at reasonable and non-discriminatory rates, terms, and conditions.

8. HolstonConnect intends to ultimately offer cable service within the service area of Holston Electric Cooperative, in Hawkins and Hamblin Counties in northeastern Tennessee. The service area includes areas within both the Knoxville DMA and the Tri-Cities DMA.

¹ One customer reported that she was paying \$129 per month for the triple play package from Charter. When she cancelled Internet service from Charter in order to receive it from HolstonConnect, Charter increased her monthly price – for cable TV and voice only – to \$193. Lawson Decl. at para. 3-4.

HolstonConnect has been unable to establish that any Knoxville DMA stations are significantly viewed throughout the Tri-Cities DMA, nor that any stations in the Tri-Cities DMA are significantly viewed in the Knoxville DMA. To provide a cohesive and competitive cable service within the HEC service area, HolstonConnect must obtain Big 4 programming content from stations licensed to serve both the Knoxville and Tri-Cities DMAs.

9. Defendant Nexstar Media Group, Inc. (“Nexstar”) owns and operates (1) WATE, the ABC affiliate in the Knoxville DMA, and (2) WJHL, a dual CBS/ABC-affiliated station serving the Tri-Cities DMA in northeastern Tennessee.² HolstonConnect requires carriage rights for each of these three Big 4 stations.

10. Knowing that HolstonConnect has an urgent need to finalize its cable lineup, Defendant has sought to use its exclusive control over “must-have” ABC and CBS programming to obtain grossly excessive retransmission consent rates from HolstonConnect, not just for Big 4 programming itself, but also for multiple channels that HolstonConnect does not want.

11. In addition, Defendant has consistently failed to communicate in an effective and timely manner with HolstonConnect, which has caused HolstonConnect to waste extraordinary amounts of time and effort in seeking to elicit responses and conduct meaningful negotiations. Defendant’s conduct plainly indicates that Defendant has no interest in reaching agreement with HolstonConnect, except upon Defendant’s unilateral, take-it-or-leave-it terms, and at Defendant’s convenience.

12. As shown in greater detail below, the Defendant’s negotiating tactics violate both the Commission’s procedural and substantive “good faith” negotiation standards. HolstonConnect therefore urges the Commission to review this matter on an expedited basis; find

² WJHL broadcasts CBS on its primary stream and ABC on a multicast stream.

that the Defendant is not negotiating in “good faith;” order the Defendant to provide WATE and WJHL programming by no later than March 31, 2019; establish reasonable rates for that programming, commensurate with market conditions in the Knoxville and Tri-Cities DMAs; impose sanctions and/or forfeitures on the Defendant; award HolstonConnect its reasonable costs, including attorneys fees; and provide HolstonConnect such additional relief as the Commission deems appropriate.

II. JURISDICTION

13. The Commission possesses jurisdiction over this matter pursuant to Section 325(b)(3)(C) of the Communications Act, 47 U.S.C. § 325(b)(3)(C).

III. THE COMPLAINANT

14. HolstonConnect, LLC, is a wholly owned subsidiary of Holston Electric Cooperative, Inc., with headquarters at 1200 West Main Street, Rogersville, Tennessee, 37857.

IV. THE DEFENDANT

15. Nexstar Media Group, Inc. (“Nexstar”), a Delaware Corporation, owns and operates WATE-TV, the ABC affiliate licensed to the Knoxville, TN DMA, and WJHL-TV, a dual CBS/ABC affiliated station serving the Tri-Cities area of northeastern Tennessee. Nexstar’s Q3 2018 SEC Form 10-Q states that its principal office is located at 545 E. John Carpenter Freeway, Suite 700, Irving, TX 75062.

V. STATEMENT OF FACTS

16. In August 2018, HolstonConnect began notifying programmers in the Knoxville and Tri-Cities DMAs (including Defendant) of its planned cable service launch. HolstonConnect engaged Ms. Katie King, of the Chattanooga law firm Katie King Law, to handle its programming negotiations.

17. On August 2, 2018, Ms. King sent a letter via email to Keith Hopkins, Senior Vice President of Distribution at Nexstar, stating that HolstonConnect’s anticipated commercial launch date was October 1, 2018. Mr. Hopkins responded via email stating that he would provide an election letter, to be followed by negotiations. King Decl., at para. 3

18. On August 20, Marisa Elizondo of Nexstar emailed Ms. King and requested certain general information about HolstonConnect in order to begin drafting the agreement. Ms. King responded with the requested information the same day. On August 21, 2018, Ms. Elizondo replied that she would have an agreement prepared and sent back by the end of the week or early the following week. King Decl., at para. 4.

19. More than two weeks later, on September 7, 2018, Ms. Elizondo emailed Ms. King a draft carriage agreement, with rates. Nexstar’s rates were as follows:³ [RATES REDACTED FOR PUBLIC INSPECTION]

	<u>2019</u>	<u>2020</u>	<u>2021</u>
WATE-TV (Knoxville):			
ABC (primary stream):	\$---	\$---	\$---
Multicast (forced carriage):			
6.2 – GetTV	\$---	\$---	\$---
6.3 – Laff	\$---	\$---	\$---
6.4 – Cozi TV	\$---	\$---	\$---
WJHL (Tri-Cities):			
CBS (primary stream)	\$---	\$---	\$---
ABC (multicast)	\$---	\$---	\$---

20. In addition to the above rates for Nexstar’s existing programming, Nexstar would force HolstonConnect to blindly agree to carry and pay Nexstar exorbitant amounts for stations and programming that do not yet exist in the Knoxville or Tri-Cities DMAs, even if such stations

³ King Decl, at para. 5.

and programming are of little or no interest to HolstonConnect's viewers. Nexstar's specified rates for "after acquired stations" included \$---- for "Local News Stations," scaling to \$---- in 2021. Nexstar's rates for the CW, Telemundo, and MyNetworkTV would be \$---- for each channel, scaling to \$---- in 2021. King Decl. at para. 6

21. Nexstar's proposed rates were significantly higher than any other broadcaster had offered HolstonConnect, and were significantly higher than Nexstar's proposed rates from deals Ms. King had closed earlier in the year in the Knoxville DMA. King Aff., at para. 7. Complainant has requested below that the Commission allow discovery of Nexstar's other retransmission consent agreements in the area, subject to applicable confidentiality requirements, so that the Commission may complete the record.

22. Throughout October and November, Ms. King attempted to contact Ms. Elizondo several times. On December 3, Ms. King emailed Ms. Elizondo again and requested a time that they could discuss the proposed rates. On December 4, Ms. King and Ms. Elizondo spoke by phone. Ms. Elizondo stated that Nexstar was closing deals at the proposed rates and that "she could perhaps come down about a nickel." She said that Nexstar "was not afraid to walk away" if HolstonConnect's counteroffer was too low. King Decl., at para. 8.

23. On December 5, Ms. King emailed Ms. Elizondo and offered, for 2019, \$---- for ABC and CBS, \$---- for CW/MyNetwork/Telemundo, and \$---- for other streams. Ms. Elizondo replied immediately and countered with \$---- for Big 4 (a reduction of \$0.05), no change on CW/MyNetwork/Telemundo, and \$---- for other streams. Ms. King immediately countered with \$---- for Big 4 and \$---- for other program streams. King Decl., at para. 9.

24. Over a week later, on December 14, Ms. Elizondo responded to say that she would not adjust the rate any further, and that her previous offer was still open. King Decl., at para. 10.

25. To summarize, in the five-month period from August 2 to December 14, knowing that Big 4 programming is essential for a successful deployment of HolstonConnect’s gigabit network, Nexstar proposed an initial Big 4 rate that was wildly out of line with rates being charged by other Big 4 broadcasters in the Knoxville and Tri-Cities DMAs, and far in excess of what Nexstar itself has proposed in other comparable scenarios. From that excessive starting point, Nexstar only deigned to “negotiate” to the extent of five insignificant cents and left HolstonConnect with a wooden take-it-or-leave-it decision at that point.

26. Furthermore, Nexstar would force HolstonConnect to carry a significant number of other streams – at grossly excessive rates – that HolstonConnect has absolutely no interest in carrying. (In one case, HolstonConnect already has an arrangement to carry the stream in the Tri-Cities area, for free, on a must-carry basis. Yet, it would have no choice but to pay Nexstar a fee to carry the station in the Knoxville DMA.) This sort of tying arrangement is a significant problem for new market entrants such as HolstonConnect. As further explained below, the Commission can and should prohibit it.

27. With no agreement in sight because of the Defendant’s intransigence and failure to negotiate in good faith, HolstonConnect has come to the Commission for assistance. The Defendant’s demands leave HolstonConnect in the untenable position of either accepting an economic deal that amounts to extortion, or foregoing the carriage of programming that is essential to its success. The Commission must take prompt remedial action.

28. The Complainant has gone to lengths to resolve the dispute prior to filing this Complaint. After four months of “negotiation” and two months of silence from Nexstar, on February 14, 2019 Ms. King contacted Ms. Elizondo, stating that HolstonConnect hoped the parties could come to agreement, but that, barring a meaningful counteroffer from Nexstar,

HolstonConnect intended to seek redress with the Commission. A draft copy of this Complaint was provided to Ms. Elizondo. King Decl. at para. 11.

29. On February 19, Ms. Elizondo responded to Ms. King that Nexstar would reduce its demanded rate from \$---- to \$----. In addition, however, Nexstar added an additional year to the length of the agreement, leading to the exorbitant rate of \$---- for 2022. King Decl. at para. 12.

30. As shown in greater detail below, the Defendant's negotiating tactics violate both the Commission's procedural and substantive "good faith" negotiation standards. HolstonConnect therefore urges the Commission to review this matter on an expedited basis; find that the Defendant is not negotiating in "good faith;" order the Defendant to provide WATE and WJHL Big 4 programming by not later than March1, 2019; establish reasonable rates for that programming, commensurate with market conditions in the Knoxville and Tri-Cities DMA; enjoin the Defendant from demanding that HolstonConnect carry other unwanted streams as a condition to receiving Big 4 programming; impose sanctions and/or forfeitures on the Defendant; award HolstonConnect its reasonable costs, including attorneys fees; and provide HolstonConnect such additional relief as the Commission deems appropriate.

VI. LEGAL ARGUMENTS

31. The Defendant's conduct violates its duty to negotiate retransmission consent agreements in good faith, as required by 47 U.S.C. § 325 and the Commission's implementing rules, 47 C.F.R. § 76.65. Following the enactment of the Satellite Home Viewer Improvement

Act of 1999 (SHVIA),⁴ the Commission issued an order – commonly referred to as the “*Good Faith Order*” – establishing two tests of “good faith” in retransmission consent negotiations.⁵ The first test consists primarily of procedural requirements intended to ensure a fair negotiating process, a violation of which amounts to a *per se* breach of the duty to negotiate in good faith. The second test allows an operator to present facts that, given “the totality of the circumstances,” demonstrate to the Commission that a defendant or defendants are not negotiating in good faith. In this case, the Defendant has run afoul of the both of these tests.

A. The Defendant Has Violated the Commission’s Procedural “Good Faith” Standards

32. A broadcaster is not negotiating in “good faith” if it has violated one or more of the Commission’s seven *per se* procedural prohibitions set forth in 47 CFR 76.65(b).⁶ The following prohibitions apply in this case:

(b) Good faith negotiation—(1) Standards.

The following actions or practices violate a broadcast television station’s ... (the “Negotiating Entity”) duty to negotiate retransmission consent agreements in good faith:

- (i) Refusal by a television broadcast station to negotiate retransmission consent with any multichannel video programming distributor;
- ...

⁴ In the SHVIA, Congress amended Section 325 to require the Commission to promulgate regulations that would “prohibit a television broadcast station that provides retransmission consent from ... failing to negotiate in good faith.” 47 U.S.C. § 325(b)(3)(C)(ii).

⁵ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, First Report and Order (SHVIA Order)*, 15 FCC Rcd 5445. 5450-51, 2000 FCC LEXIS 1336.

⁶ 47 C.F.R. § 76.65(b)(1). *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, First Report and Order, 15 FCC Rcd 5445 (2000) (“*Good Faith Order*”), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

(iii) Refusal by a television broadcast station to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations;

(iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;

(v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal;

47 C.F.R. § 76.65(b)(1).

1. The Defendant has violated the Commission's prohibition on single, unilateral proposals.

33. Read in isolation, the Commission's terse ban on single, unilateral proposals could easily be gamed by sophisticated broadcasters such as the Defendant here. All that a broadcaster would have to do, as Defendant has sought to do here, is to take an extreme opening position, offer trivial concessions, and pretend to be open to counteroffers. Recognizing this, the Commission has provided instructive clarifications that leave no room for doubt that the Defendant here has violated the single, unilateral proposal prohibition:

The Commission has held that "[r]efusal by a negotiating entity to put forth more than a single, unilateral proposal" is a *per se* violation of a broadcast licensee's good faith obligation. The Commission has also indicated that such requirement is not limited to monetary considerations, but also applies to situations where a broadcaster is unyielding in its insistence upon carriage of a secondary programming service undesired by the cable operator as a condition of granting its retransmission consent.

"Take it, or leave it" bargaining is not consistent with an affirmative obligation to negotiate in good faith.⁷

⁷ *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking*, MB Docket No. 07-198, 22 FCC Rcd. 17791, 2007 WL 2846428 (F.C.C.) ("*Program Access Report and Order*"), ¶ 123 (emphasis added) (footnotes omitted).

34. Here, the Defendant started from an exorbitant rate of \$---- for Big 4 stations, dropped the rate five cents in response to HolstonConnect's counteroffer, and then indicated that no additional movement would be forthcoming. Functionally, this is nothing more than "a single, unilateral proposal" and "take it or leave it" bargaining. Calling it otherwise would allow large broadcasters – already in a dominant bargaining position with respect to smaller new MVPD competitors – to avoid a good faith negotiation complaint by simply nibbling around the edges of rates that are extreme to begin with.

35. In addition, as the passage above reflects, broadcasters cannot simply insist that a cable operator take unwanted programming, nor can they reject out of hand any form of consideration other than cash. Here, Defendant has given HolstonConnect no choice but to take unwanted programming – at grossly inflated rates. These "take it or leave it" demands plainly violate the Commission's single, unilateral proposal rule.

2. The Defendant has violated the Commission's requirement that broadcasters provide reasoned explanations for rejecting retransmission consent proposals.

36. A broadcaster violates its duty to negotiate in good faith if it fails "to respond to a retransmission consent proposal of a multichannel video programming distributor, including the reasons for the rejection of any such proposal." 47 C.F.R. § 76.65(b)(v). Here, the Defendant has rejected HolstonConnect's counterproposals outright, with little or no explanation of the reasons for the rejection other than to assert that it has closed deals for the proposed amount somewhere else (which is, as noted above, contrary to Ms. King's experience with Nexstar). Similarly, the Defendant has also repeatedly failed to provide any explanation for why HolstonConnect should pay far higher rates for Big 4 programming than the going rates in the Knoxville and Tri-Cities markets for comparable programming. The reason for the Defendant's conspicuous silence on

these matters is obvious – any attempt at explanation would reveal the absurdity of the Defendant’s positions.

3. The Defendant has violated the Commission’s requirements to negotiate an agreement, to meet and negotiate at reasonable times and locations, and to not unreasonably delay negotiations.

37. The Defendant has flatly refused to work with HolstonConnect to craft a mutually acceptable agreement. Following the discussions on December 5, in which Nexstar dropped its demanded rate by five cents, from \$---- to \$----, Ms. Elizondo refused to engage in further negotiations and did not respond to Ms. King’s repeated attempts to do so. Such refusals to negotiate violate 47 C.F.R. § 76.65(b)(i).

B. The Defendant Has Violated the Commission’s Substantive “Good Faith” Standard

38. In addition to violating the Commission’s procedural “good faith” standards, the Defendant has also violated the Commission’s substantive “good faith” standard. As the FCC observed in its *Good Faith Order*, a broadcaster violates the latter standard where “the totality of the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute a failure to negotiate in good faith.”⁸ That is the case here.

39. Furthermore, the Commission has also observed that,

[W]e will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among [cable operator] agreements are not based on competitive marketplace considerations.

Good Faith Order, ¶ 32.

⁸ *Good Faith Order*, ¶ 32.

40. As described thus far, and in further detail in the following sections, the Defendant's manifestly unreasonable proposal – by which it is attempting to hold essential programming for ransom, at the expense of a new competitor – is sufficiently outrageous as to amount to a breach of its duty to negotiate in good faith.

1. The rates that the Defendant is demanding are outrageous.

41. The Commission's statements in the Good Faith Order indicate that a proposal by a television broadcaster can be so unreasonable as to violate the Commission's good faith negotiation requirements. That is, if a broadcaster proposes a rate structure that is manifestly out of proportion to the commercial value of the station, that is flatly inconsistent with rates charged in other markets, or that makes other outrageous demands on the cable operator, the Commission may reasonably assume that the broadcaster has no good faith intention of ever reaching a deal with the cable operator in question.

42. That is the plainly the situation here. Not only are the rates that Defendant is demanding substantially higher than the rates for Big 4 and other stations owned by Nexstar in other markets, they are substantially higher than the rates that HolstonConnect has agreed to pay for other Big 4 content in the Knoxville and Tri-Cities DMAs. King Decl., at 9.

43. The Commission has stated that proposals may be “presumptively legitimate” even if they (1) seek compensation above that agreed to with other MVPDs in the same market, (2) are different from compensation offered by other broadcasters in the same market, or (3) are conditioned on carriage of other programming (e.g., tying agreements).⁹ The Commission has also stated that a disagreement over rates alone does not itself violate the good faith negotiation

⁹ See *Good Faith Order*, ¶ 56.

requirements.¹⁰ The facts in this case overcome these presumptions. In this case, the rates that the Defendant demands are not merely somewhat higher than market rates in Knoxville and the Tri-Cities, but they are vastly higher. Furthermore, the Defendant is not simply tying the unwanted streams together as a means of *lowering* the cash rates that HolstonConnect would have to pay for the Big 4 streams alone. Rather, the Defendant is tying the three multicast stations to obtain grossly inflated rates for *all* of them.

2. The Defendant's demand that HolstonConnect carry multiple unwanted channels, at exorbitant rates not reflective of their commercial value, amounts to an abusive tying arrangement.

44. To date, the Commission has been unwilling to issue a blanket prohibition of tying arrangements. The Commission has recognized, however, that such arrangements can be harmful to cable operators and the public, and it has said that it will take appropriate action in cases in which such harm is shown. Specifically, the Commission has stated:

[W]e will not adopt rules specifically prohibiting tying arrangements at this time. *In coming to this conclusion, we recognize that substantial evidence must be presented to support a claim that a tying arrangement exists and that the operator suffers harm as a result. Without proof to support the case, it is difficult for the Commission to formulate an appropriate remedy. . . .* While such arrangements are now permitted, we will continue to monitor the situation with respect to potential anticompetitive conduct by broadcasters in this context. *If, in the future, cable operators can demonstrate harm to themselves or their subscribers due to tying arrangements, we will be in a better position to consider appropriate courses of action.*¹¹

45. Furthermore, the Commission stated in the *Program Access Rulemaking*:

¹⁰ *In the Matter of HITV License Subsidiary, Inc. v. DirecTV, LLC Good Faith Negotiation Complaint*, FCC Rcd. 1137 (rel. February 5, 2018); *In the Matter of Coastal Television Broadcasting Company, LLC v. MTA Communications, LLC Good Faith Negotiation Complaint*, 2018 WL 5816554 (rel. November 2, 2018).

¹¹ *First DTV Carriage Order*, ¶¶ 35-36.

When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, *and often economically vital*, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. . . . Moreover, *we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.*¹²

46. The facts in this case bear out the Commission’s concerns. If left unchecked, Defendant’s conduct in this case will have a strong anticompetitive effect that dampens the development of competitive cable television service in rural East Tennessee.

47. As the Commission has also recognized, in today’s communications market, cable television services are often “inextricably intertwined” with voice and broadband services.¹³ That is certainly true of HolstonConnect’s fiber system. As a result, Defendant’s market power abuses not only threaten the development of HolstonConnect’s cable service, but *also impair HolstonConnect’s ability to deliver broadband Internet access service* for residents and businesses in rural East Tennessee.

¹² *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements, Report and Order and Notice of Proposed Rulemaking*, MB Docket No. 07-198, 22 FCC Rcd. 17791, 2007 WL 2846428 (F.C.C.) (“*Program Access Report and Order*”), ¶ 123 (emphasis added).

¹³ *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MD Docket No. 07-51, *Report and Order and Further Notice of Proposed Rulemaking*, ¶ 20, 22 FCC Rcd. 20235, 2007 WL 3353544 (F.C.C.) (*MDU Order*) (citations omitted).

3. **The Defendant’s demand for exorbitant rates in exchange for carriage of its Big 4 channels, together with its requirement that HolstonConnect also carry numerous unwanted channels – also at exorbitant rates – amounts to an abuse of market power, the effect of which is to impair the development of competitive cable service and broadband services in rural East Tennessee.**

48. The Commission has stated that a proposal reflecting an abuse of market power, including terms so onerous and unrealistic as to effectively foreclose options for competitive cable providers, is “presumptively inconsistent” with broadcasters’ obligation to negotiate carriage agreements in good faith. According to the Commission, the following would be improper and worthy of Commission action:

Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (*e.g.*, other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition.¹⁴

49. While carriage is essential for HolstonConnect’s viability as a cable operator, Nexstar has no compelling interest in ensuring that its stations are available on HolstonConnect’s cable service. Unlike a large MSO such as Comcast or Verizon, HolstonConnect does not have nationwide clout and does not have subscriber numbers that are economically meaningful to a giant broadcasting conglomerate such as Nexstar. The Defendant is using its position of market power to impose outrageous carriage agreements upon HolstonConnect.

50. The effect of the Defendant’s improper actions will be to hinder significantly or foreclose competition that would otherwise emerge from the launch of HolstonConnect’s new cable system. In short, the Defendant is attempting to gouge a new competitive entrant and obtain

¹⁴ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, First Report and Order (SHVIA Order)*, 15 FCC Rcd 5445, 5450-51, 2000 FCC LEXIS 1336, ¶ 58.

a ransom for programming that may threaten HolstonConnect’s survival – and Nexstar quite likely is exercising market power with full knowledge of that fact.

51. By preventing the Defendant from impairing HolstonConnect’s ability to deploy its state-of-the-art broadband system, the Commission would thus not only serve the purposes of 47 U.S.C. § 325. Rather, it would also serve the purposes of Section 706 of the Telecommunications Act of 1996, which requires the Commission to ensure that advanced telecommunications services and capabilities are deployed to all Americans as rapidly as possible.

52. Indeed, as noted above, Chairman Pai stated in 2018 that rural electric cooperatives such as HEC are “heroic figures” in the push to bring broadband to rural areas. In January 2018 remarks to the National Rural Electric Cooperative Association, Chairman Pai said: “What you’re able to do—given your infrastructure, your footprint, your dedication to your communities—is make sure the next generation of Americans has access to the 21st-century version of electricity, which is broadband.”¹⁵ Jay Schwartz, Wireline Advisor to Chairman Pai, said at the same event: “Today I want to discuss Chairman Pai’s belief that we are on the cusp of a new era of partnership between the FCC and rural electric cooperatives. ... That’s what I want to talk about today: our hope that electric coops will become a bigger part of closing the digital divide and delivering online opportunity to rural Americans who have been bypassed by the broadband revolution. And how the FCC can work with you all to bring about this change.” Mr. Schwartz proceeded to encourage rural electric cooperatives to participate in the CAF 2 auction. HolstonConnect in fact did so, and was a winning bidder in Auction 903.

¹⁵ “FCC Chairman: Co-ops Key to Rural Broadband,” National Rural Electric Cooperative Association, January 16, 2018, online at <https://www.cooperative.com/news/Pages/ceo-close-up-fcc-broadband.aspx>.

53. Clearly, the Commission desires to encourage and facilitate the deployment of broadband infrastructure in rural areas, and particularly by electric cooperatives. Unfortunately, the Chairman's stated sentiments and objectives with respect to rural broadband deployment are being thwarted in this case by a media conglomerate that has no real interest coming to reasonable carriage terms with HolstonConnect.

54. The Commission can and should act against the Defendant's improper conduct. The Defendant has violated the Commission's good faith negotiation requirements based on the totality of the circumstances, as set forth in section 76.65(b)(2), causing competitive harm to HolstonConnect. As the Commission has stated, such conduct is presumptively inconsistent with "competitive marketplace considerations," and this is in fact what is occurring here.

VII. COUNT 1 – PER SE VIOLATION OF DUTY TO NEGOTIATE IN GOOD FAITH

55. HolstonConnect incorporates by reference the foregoing paragraphs as though fully stated herein.

56. The Defendant has failed to negotiate in good faith an agreement for retransmission of WATE-TV (ABC) and WJHL-TV (ABC and CBS), by offering only a unilateral, "take it or leave it" proposal, a *per se* violation of the Commission's good faith negotiation rules, 47 C.F.R. § 76.65(b)(1)(iv).

57. The Defendant has refused, and continues to refuse, to negotiate in good faith toward an agreement for retransmission of WATE-TV and WJHL-TV by HolstonConnect, in violation of 47 CFR §§ 76.65(b)(i) and (iii) of the Commission's rules.

58. The Defendant has failed to provide a meaningful response to a retransmission consent proposal for carriage of WATE-TV and WJHL-TV by HolstonConnect, in violation of 47 CFR §76.65(b)(v) of the Commission's rules.

VIII. COUNT 2 – VIOLATION OF DUTY TO NEGOTIATE IN GOOD FAITH UNDER “TOTALITY OF THE CIRCUMSTANCES”

59. HolstonConnect incorporates by reference the foregoing paragraphs as though fully stated herein.

60. The Defendant has demanded that HolstonConnect pay rates for carriage of WATE-TV and WJHL-TV that are outrageous and cannot be justified by competitive market considerations.

61. The Defendant has sought to subject HolstonConnect to an “abusive tying arrangement” by demanding that HolstonConnect carry additional stations not desired by HolstonConnect or its customers, multiplying the cost to HolstonConnect of acquiring carriage rights for WATE-TV (ABC) and WJHL-TV (ABC and CBS).

62. HolstonConnect is a small cable operator, and a new competitive entrant serving the East Tennessee market.

63. The Big 4 programming sought by HolstonConnect in the Knoxville and Tri-Cities market areas is economically vital to HolstonConnect.

64. The Defendant’s outrageous demands are the product of an improper exercise of market power by broadcast stations, the effect of which is to hinder significantly or foreclose cable operator competition.

65. Under the totality of the circumstances, the Defendant’s demands violate the Commission’s good faith negotiation rules, 47 C.F.R. § 76.65(b)(2).

IX. REQUEST FOR RELIEF

A. Expedited Treatment

66. In light of HolstonConnect’s intention to launch its competitive cable service in early 2019, it is imperative that this matter be resolved promptly. Any delay in granting

HolstonConnect reasonable access to vital programming will cause significant harm to consumers and to HolstonConnect, and will undermine Congress's objective of promoting competition and diversity in the delivery of video programming services. Accordingly, HolstonConnect requests that this matter be resolved on an expedited basis.

B. Declaration that the Defendant is Not Negotiating in Good Faith

67. HolstonConnect requests that the Commission declare that the Defendant is not negotiating in good faith, as required by Section 325 of the Communications Act, 47 U.S.C. 325, and Section 76.65 of the Commission's rules.

C. Carriage Order

68. HolstonConnect requests the Commission order the Defendant to make [WATE-TV (ABC) and WJHL-TV (CBS and ABC)] available to HolstonConnect not later than March 1, 2019, at fair and reasonable rates commensurate with market conditions in the Knoxville and Tri-Cities markets.

D. Injunction Against Tying Arrangements

69. HolstonConnect requests the Commission enjoin the Defendant from demanding that HolstonConnect carry any additional programming as a condition of carriage for Big 4 signals of WATE-TV and WJHL-TV.

E. Other Relief

70. HolstonConnect requests that the Commission impose sanctions and/or forfeitures upon the Defendant pursuant to 47 U.S.C. § 503(b) and 47 C.F.R. § 1.80(b); award HolstonConnect its reasonable costs, including attorneys fees; and grant HolstonConnect any other relief that the Commission deems appropriate.

X. REQUEST FOR DISCOVERY

71. HolstonConnect requests that the Commission allow limited discovery pursuant to 47 C.F.R. § 76.7(f). Specifically, HoltonConnect seeks discovery with respect to Defendant's retransmission consent agreements with other MVPDs located in the Knoxville and Tri-Cities DMAs executed within the past 12 months. Such discovery should include rates, subject to all applicable confidentiality requirements.

Respectfully Submitted,

/s/

Jim Baller
Casey Lide
BALLER STOKES & LIDE, P.C.
2014 P St. NW Suite 200
Washington, D.C. 20036
office: 202/833-5300
fax: 202/833-1180

Katie King
KATIE KING LAW, PLLC
P.O. Box 6007
Chattanooga, TN 37401

Counsel for Complainant

March 4, 2019

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
HolstonConnect, LLC,)	
)	
Complainant,)	
)	
v.)	File No. _____
)	
Nexstar Media Group, Inc.)	
)	
Defendant.)	
)	
)	

COMPLAINANT’S VERIFICATION

I have read HolstonConnect’s Complaint for Failure to Negotiate Retransmission Consent Rights in Good Faith (“Complaint”) in this matter and, pursuant to 47 C.F.R. § 76.6(a)(4), state that, to the best of my knowledge, information, and belief, formed after reasonable inquiry, the Complaint is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law. The Complaint is not intended for any improper purpose.

/s/

James Sandlin, P.E.,
General Manager, Holston Electric Cooperative

Date

CERTIFICATE OF SERVICE

I herby certify that on _____ 2019, I caused a confidential copy of the foregoing Complaint to be served by Federal Express, postage prepaid, upon the following:

Nexstar Media Group
545 E. John Carpenter Freeway, Suite 700
Irving, TX 75062

/s/

Jim Baller

Date

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
HolstonConnect, LLC,)	
)	
Complainant,)	
)	
v.)	File No. _____
)	
Nexstar Media Group, Inc.)	
)	
Defendant.)	
)	
)	

DECLARATION OF KATHRYN KING

1. My name is Kathryn King. I am more than 21 years old, am competent to make this declaration, and have personal knowledge of the facts set forth below. My business address is 5751 Uptain Road, Suite 508, Chattanooga, TN 37411.

2. I am the owner and operator of Katie King Law, PLLC, a law firm with a focus in utility and communications practice. In that capacity, I was retained to represent HolstonConnect, LLC, with the launch of its fiber-to-the-home communications system. In particular, I am assisting HolstonConnect in developing retransmission consent agreements to obtain cable television programming for its system.

3. On August 2, 2018, I sent a letter via email to Keith Hopkins, Senior Vice President of Distribution at Nexstar, stating that HolstonConnect’s anticipated commercial launch date was October 1, 2018. Mr. Hopkins responded via email stating that he would provide an election letter, to be followed by negotiations.

4. On August 20, Marisa Elizondo of Nexstar emailed me and requested certain general information about HolstonConnect in order to begin drafting the agreement. I responded with the requested information the same day. On August 21, 2018, Ms. Elizondo replied that she would have an agreement prepared and sent back by the end of the week or early the following week.

5. More than two weeks later, on September 7, 2018, Ms. Elizondo emailed me a draft carriage agreement, with specific rates. Nexstar’s rates were as follows:

	<u>2019</u>	<u>2020</u>	<u>2021</u>
WATE-TV (Knoxville):			
ABC (primary stream):	\$---	\$---	\$---
Multicast (forced carriage):			
6.2 – GetTV	\$---	\$---	\$---
6.3 – Laff	\$---	\$---	\$---
6.4 – Cozi TV	\$---	\$---	\$---
WJHL (Tri-Cities):			
CBS (primary stream)	\$---	\$---	\$---
ABC (multicast)	\$---	\$---	\$---

6. Nexstar’s draft carriage agreement also specified rates for stations and programming that do not yet exist in the Knoxville or Tri-Cities DMAs. Nexstar’s rate for “Local News Stations” would be \$----, scaling to \$---- in 2021. Nexstar’s rates for the CW, Telemundo, and MyNetworkTV would be \$---- for each channel, scaling to \$---- in 2021.

7. Nexstar’s proposed rates were significantly higher than any other broadcaster had offered HolstonConnect, and were significantly higher than Nexstar’s proposed rates from a deal I had closed earlier in 2018 for carriage of WATE.

8. Throughout October and November, I attempted to contact Ms. Elizondo several times. On December 3, I emailed Ms. Elizondo again and requested a time that we could talk to discuss the proposed rates. On December 4, Ms. Elizondo and I spoke by phone. Ms. Elizondo

stated that Nexstar was closing deals at the proposed rates and that “[she] could perhaps come down about a nickel.” She said that Nexstar “was not afraid to walk away” if HolstonConnect’s counteroffer was too low.

9. On December 5, I emailed Ms. Elizondo and offered, for 2019, \$---- for ABC and CBS, \$---- for CW/MyNetwork/Telemundo, and \$---- for other streams. Ms. Elizondo replied immediately and countered with \$---- for Big 4 (a reduction of \$0.05), no change on CW/MyNetwork/Telemundo, and \$---- for other streams. I immediately countered with \$---- for Big 4 and \$---- for other program streams.

10. Over a week later, on December 14, Ms. Elizondo responded to say that she would not adjust the rate any further, and that her previous offer was still open.

11. On Friday, February 15, I informed Ms. Elizondo that HolstonConnect desired to come to agreement but that, if Nexstar continued to refuse to engage in meaningful negotiation, HolstonConnect intended to file a retransmission complaint with the Commission. I provided Ms. Elizondo with a draft copy of the Complaint prepared by Complainant’s’s counsel. Ms. Elizondo stated her belief that HolstonConnect, and not Nexstar, should provide a counterproposal, thus suggesting that HolstonConnect should negotiate against itself (HolstonConnect having provided the last counteroffer, on December 5).

12. After I informed Ms. Elizondo that HolstonConnect made the last offer, and that Nexstar must make a meaningful counteroffer for negotiations to continue, and with a draft of this Complaint in hand, Ms. Elizondo responded with a “counteroffer” consisting of a reduction of Nexstar’s demanded rate by another meaningless five cents, along with an extension of the agreement term by an additional year (culminating in a per-subscriber fee of \$---- in year four).

I, Kathryn King, swear under penalty of perjury that the foregoing statements above are true.

/s/

Kathryn S. King

/s/

Rebecca Lawson