New York State Broadcasters Association, Inc.
Memo in Opposition to S.933C

The New York State Broadcasters Association strongly opposes S.933C, the Antitrust Act for the 21st Century. Last year we filed a *Memo in Opposition* to this legislation. Unfortunately, the revisions made to the proposed legislation have not addressed our major concerns.

While promoted as an attempt to reign in "Big Tech," S.933C will apply to a substantial number of businesses throughout New York. Local radio and television stations are no exception. This will be true even though broadcasters remain in full compliance with FCC rules as well as existing Federal and NY State anti-trust laws. The legislation may place New York anti-trust law in direct conflict with Federal laws governing broadcasting.

S.933C upends the regulatory balance achieved by the FCC. Application of novel anti-trust concepts contained in the legislation will harm a local broadcast station's ability to compete in a hypercompetitive media marketplace and provide local news and information to its community. The following summarizes our major concerns.

Legislation may unravel nearly all existing entertainment and sports programming contracts

New York consumers are able to watch their favorite entertainment, sports and news programs because local stations are able to obtain exclusivity over the programming content that is being broadcast. Absent exclusivity, stations will lose audiences and advertising revenues. Economic support for quality programming will decline.

Exclusivity arrangements are a cornerstone of the relationship between the television broadcast networks (ABC, NBC, CBS & Fox) and their local affiliates. Exclusivity arrangements are essential for sports programming. For example, the NFL, MLB, NBA, NHL, and college football all have some form of exclusive arrangement with broadcast stations and networks. Exclusivity is essential for the provision of op quality news content. The same it true for all entertainment programming.

Exclusivity is equally important for local radio stations. For example, radio entertainment, sports and news programs that are syndicated nationally. In each instance, the entity selling the program and the stations purchasing the program seek to obtain exclusivity in their local markets.

Recognizing the economics of broadcasting, the Federal Communications Commission (FCC) developed a complex set of regulations allowing local stations to obtain exclusive rights to programs in their markets. Stations can obtain program exclusivity under the FCC rules. (See 47 CFR § 73.232 radio territorial exclusivity) and 47 CFR § 73.658 (a)(b) (exclusivity for TV network content). Stations are also allowed to obtain the exclusive rights to non-network syndicated programs in their markets. (See 47

CFR § 73.658(m)). These rules not only apply between local stations, but they also prevent other mediums, such as cable and satellite systems, from importing duplicated programs from distant markets. (See, e.g., 47 CFR §76.92 et seq.) These fundamental rules guide the relationship between content providers and local stations.

In addition, Federal Copyright law expressly recognizes the importance of exclusive licensing. This position has long been recognized by the courts. In summary, these Federal laws and regulations recognize that facilitating exclusive content arrangements promotes the public interest.

The provisions of S. 933C cast doubt on nearly all existing programming arrangements. As drafted, exclusivity arrangements would be considered an abuse of a dominant position. To address this concern, the legislation tries to create an exemption stating that the new law would not apply *"to the creation, production, and dissemination of a single expressive work that is copyrighted, including but not limited to, a streaming series, television programs and or motion pictures."* The need for the exemption demonstrates that S.933C does apply to exclusive programming arrangements.

This exemption does not work. It applies only to a single expressive work and ignores how radio and television programs are acquired by local stations. Current television network affiliation agreements encompass a variety of news, sports and entertainment content that will be provided by the network. This "network/affiliate" contract is not for a single expressive work. The contract is not even for a specific television program or series. An affiliate contract encompasses multiple entertainment series, news and sports programs to fill various time periods throughout a broadcast week. These agreements may now be subject to litigation.

Radio contracts are also problematic. Like their television counterparts, radio stations have network contracts that cover multiple types of programs. In addition, music played by radio stations is based on "blanket licensing." Radio stations contract with one or more professional rights organizations such as BMI, ASCAP, GMR, SESAC and several others. These companies are clearing houses for music rights. The contracts between these organizations and a radio station are not for a single expressive work or even a series. A station contracts with these organizations to obtain the rights to broadcast all the artists that have signed with the professional rights organizations. Accordingly, the legislation would not exempt these contracts.

Simply stated the legislation calls into question nearly all programming contracts that currently exist between local stations and their program suppliers. The legislation states that direct evidence of a dominant position may be established by demonstrating the unilateral power to set prices, and non-contractual terms and conditions without compensation or constraining competition. Depending on how the Attorney General defines its rules, this could void nearly every programming contract in broadcasting. The legislation could undermine the entire economic structure of program distribution in New York and across the country.

Conflicts with Federal broadcast ownership policies harm diversity and competition

The FCC has a complex set of rules that govern the ownership of broadcast stations. (See 47 CFR § 73.3555.) The fundamental purpose of the rules is to facilitate the diversity of broadcast voices and to promote competition. These rules are based on years of analyzing national and local advertising markets as well as the program production and distribution markets. The FCC has long recognized that

levels of common ownership at both the national and local level are necessary to stimulate the production of news and program content that serves the public interest.

At the national level, the FCC allows common ownership of multiple stations (See 47 CFR § 73.3555(e). It permits common ownership of multiple stations at the local level for both radio and television stations. (See 47 CFR § 73.3555(a)(b).) The rules are tailored to market size and the type of service. The FCC has developed incredibly detailed rules defining what constitutes ownership.

S.993C completely undermine the policies that underpin the FCC's carefully crafted ownership rules. For example, the legislation states that a seller may have a position of dominance if it controls 40% of the "relevant" market. A buyer may have a dominant position if it has 30% of the "relevant" market. These thresholds may be in direct conflict with the FCC's ownership policies, especially in small and medium sized markets. To make matters more uncertain, the statute provides no guidance to the NY Attorney General as to how to define a "relevant" market. What is the metric for determining the 40% or 30% standard? Simply stated, 40% of what?

How will the Attorney General define the relevant market for advertising? Are radio and television stations in separate markets? Will the local advertising market include all "Big Tech" companies, that also sell local advertising? Will the Attorney General define a relevant geographic market as the county where the station is located? Will it define a geographic market as all counties that receive a broadcast signal? Will it use current industry indices? Similar considerations apply to the program acquisition market. Will the Attorney General look at program acquisition on a local, national basis or even international basis? It is far from clear how the legislation will address these new marketplace realities without damaging local broadcast stations.

The only certainty is that the New York Attorney General is not bound by current market definitions. Especially troubling are the provisions stating that if there is direct evidence of an entity having a dominant position or abusing a dominant position, the court will not even consider evidence regarding the definition of the relevant market. In short, market power may no longer be a key element in antitrust enforcement. Anti-trust litigation will now be premised on the definitions of "dominance" and "abuse" crafted by the NY Attorney General.

The new anti-trust approach envisioned by S. 933C may dramatically affect existing ownership combinations. Penalties may be applied even though the combinations have been approved by the FCC and the Department of Justice as being in the public interest. It may negatively affect new combinations that comply with FCC policies. The new "abuse of a dominant position" concept may supersede the FCC's approach to creating an ownership structure that facilitates program diversity and competition. Moreover, injecting uncertainty regarding antitrust litigation undermines the FCC's attempts to ensure that broadcasters continue to provide quality local journalism and public interest programming.

New anti-trust law may undermine broadcast licensing in New York

The FCC has the authority to deny the renewal of a broadcast license. As part of its renewal process, the FCC examines a station's "basic character qualifications" to hold a license. The review may include whether a station has violated any antitrust laws. While the FCC is not obligated to revoke or deny a license in this context, it has legal ground to do so. The FCC's *Character Policy Statement* is clear, "[C]oncerns with anticompetitive and antitrust activity in broadcasting have occupied a unique position

in the Commission's regulatory scheme…. Because of this unique position, violations of anticompetitive and or antitrust laws in the broadcast context may have a potential bearing on an applicant's proclivity to comply with the Commission's rules and policies."[1] The FCC does not require there to be an adjudicated antitrust violation. The FCC may decide to condition the renewal of license on the outcome of collateral proceedings such as a litigation under state law involving "broadcast related" antitrust activity.[2]

This legislation contemplates an entirely novel approach to anti-trust enforcement. Anti-trust enforcement shifts from traditional concepts of "market power" to -- "abuse of a dominant position." The legislation increases the risk that a station may be not only be penalized under New York law, but subsequently by the FCC. This could apply even though the station has been in compliance with all FCC regulations and federal antitrust laws.

Eliminating the "Pro-Competitive" Defense is Problematic

This has been a time-honored defense in anti-trust litigation. It is based on the fundamental goal of the anti-trust laws which is to promote competition. The legislation is a radical departure from this goal, focusing not on competition, but "abuse of a dominant position." Congress and the FCC have made decisions that certain ownership combinations promote competition and diversity. These combinations are essential to facilitating programming, such as news, which serves the public interest. Yet this legislation would preclude the consideration of the pro-competitive impact that result from such combinations. The same concerns are raised in the context of programming contracts. These arrangements, which provide exclusive use on a national or market-by-market basis, have a pro-competitive result. Under the legislation, the pro-competitive result of these program contracts would no longer be relevant in any antitrust analysis.

Summary

The legislation would have a significant, negative impact on the ability of broadcasters to serve the public interest. The analysis presented above focuses on just a few of the business arrangements that may be placed in legal jeopardy under the legislation. The problems associated with the legislation are exacerbated given the complex nature of the broadcast advertising and programming market. We remain fundamentally concerned about the impact of this bill on broadcasters and our related businesses. The negative impact on businesses in New York could be profound.

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[1] *FCC Character Policy Statement*, Gen. Docket No. 81-500; BC Docket No. 78-108, 102 FCC 2d 1179, 1202-03 (1986).
[2] *Policy Regarding Character Qualifications in Broadcast licensing*, 5 FCC Rcd. 3252, 3253 (1990)