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Broadcaster Can't Sidestep Nexstar Antitrust Suit

By **Scott Flaherty**

Law360, New York (October 10, 2012, 4:16 PM ET) -- An Indiana federal judge on Tuesday kept in place allegations lodged by Nexstar Broadcasting Group Inc. that Granite Broadcasting Corp. has violated antitrust laws by attempting to monopolize the local television advertising market in Fort Wayne, Ind., saying Nexstar had plausibly pled its case.

U.S. District Judge Robert L. Miller Jr. said Granite had not raised any novel arguments that warranted further review of a July 9 order, in which he denied the broadcaster's bid to dismiss Nexstar's antitrust allegations. The judge's opinion and order from Tuesday deny a motion for reconsideration and Granite's request to certify an interlocutory appeal.

"Granite has identified good legal questions of significant interest in this case, but those questions are 'controlling' only if one shares Granite's understanding of the court's ruling on the motion to dismiss," Judge Miller said. "Granite's understanding of that ruling isn't correct. An interlocutory appeal of those issues would simply delay the course of litigation."

The suit, first brought in 2011 by Nexstar, contends that Granite engaged in conduct that restricted competition for local spot advertising in the Fort Wayne designated market area.

Nexstar owns one of five commercial television stations and was the exclusive local Fox Broadcasting Co. affiliate from 1986 until July 2011, at which point the contract expired, according to the suit.

Granite, meanwhile, owned the local NBC affiliate and controlled advertising sales and revenues for the local ABC and CW affiliate through an agreement with another broadcasting company, according to Judge Miller. Once Nexstar's contract ran out, Granite also struck a deal to become the exclusive Fox affiliate in the Fort Wayne area, according to the suit.

Nexstar alleges that, even before the Fox deal, Granite controlled some 45 percent of the local spot advertising market and that by becoming the Fox affiliate, its dominance became further entrenched. Through its position as a local heavyweight, Granite was able to charge prices for local advertising at far above competitive rates and restrain competition in other ways, the complaint says.

Granite eventually asked Judge Miller to dismiss the allegations, arguing that the suit failed to state a claim and that it focused on Nexstar's loss of the Fox affiliate contract, not on any illegal actions taken by Granite.

But in July, Judge Miller sided with Nexstar and denied Granite's motion to dismiss. In particular, the judge found that Nexstar had plausibly alleged a theory of antitrust injury

not related just to Granite's takeover of the Fox affiliation, but one that included a broader range of purported anti-competitive conduct dating back several years.

"The conduct complained of and the injury alleged aren't as simple as Granite contends," the judge said. "The complaint alleges that Granite, either alone or with ... others, engaged in a course of conduct that had the purpose and effect of excluding competition in the television local spot advertising market in violation of the antitrust laws."

Granite asked for a reconsideration or permission to appeal, but Judge Miller on Tuesday rebuffed those requests, saying the broadcaster's argument fell into the same traps that sunk the motion to dismiss.

"Granite's argument once again incorrectly assumes that the acquisition of the Fox network affiliation was the only antitrust violation alleged and the sole cause of Nexstar's alleged injuries," the judge said. "It was not."

A representative for Granite denied the allegations Wednesday and said the company believes it will defeat the claims.

"Granite continues to believe that it has meritorious defenses to Nexstar's baseless lawsuit and that it will ultimately prevail in the litigation," the representative said.

Matthew Cantor, an attorney for Nexstar, told Law360 on Wednesday that he was happy with the judge's ruling, which reaffirmed that the company had sufficiently pled its case.

"We're gratified that the court has now found, not just on one, but on two, occasions, that the allegations were plausible," he said, adding that the company intends to pursue the case through to the merits stage.

Nexstar is represented by Matthew L. Cantor, Lloyd Constantine, Ankur Kapoor, Taline Sahakian and Alee N. Scott of Constantine Cannon LLP and Libby Y. Goodknight and Jeffrey C. McDermott of Krieg DeVault LLP.

Granite is represented by Michael D. Hays and J. Parker Erkmann of Dow Lohnes PLLC and Philip A. Whistler of Ice Miller LLP.

The case is Nexstar Broadcasting Inc. v. Granite Broadcasting Corp. et al., case number 1:11-cv-00249, in the U.S. District Court for the Northern District of Indiana.

--Editing by Lindsay Naylor.

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