August 18, 2015

William T. Lake
Chief, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: STELA Reauthorization of Act of 2014, § 103(c) – Good Faith Retransmission Consent Negotiations

Dear Mr. Lake

As mandated by Section 103(c) of the STELA Reauthorization Act of 2014, the Commission will soon be initiating a review of the "totality of the circumstances" standard for assessing whether a party to a retransmission consent negotiation has bargained in "good faith."[1] In recent weeks, the Commission has been presented with a number of proposals for changes to its good faith negotiation rules. The undersigned (who are small and medium-sized multichannel video programming distributors (MVPDs), associations representing small and medium-sized MVPDs, and a non-profit public interest group) support many of these proposals, particularly those aimed at limiting bundling and at creating a competitive marketplace for retransmission consent.[2] However, our principal purpose in writing is to urge the Commission to address head-on the lack of transparency in retransmission consent negotiations.

The Commission is well aware that the number one issue that divides the parties in retransmission consent negotiations is price. For the past decade, retransmission consent fees have been skyrocketing (increasing by nearly 8,600 percent between 2005 and 2012 according to Chairman Wheeler and more than doubling again in the past three years).[3] These runaway increases are attributable in large part to the fact that the good faith negotiating requirement, as currently

[1] STELA Reauthorization Act of 2014 ("STELARA"), Pub. L. No. 113-200, § 103(c), 128 Stat. 2059, 2062. While the Commission is mandated to review the "totality of the circumstances" standard for assessing whether a party to retransmission consent negotiations has bargained in "good faith," the Commission should also consider enumerating specific actions undertaken by a negotiating party that are per se "bad faith." The "totality of the circumstances test" should be reserved for the Commission's review of cases that do not fall within one of the enumerated per se violations.

[2] For example, Cablevision Systems Corp. recently suggested that the Commission adopt limits on bundling practices and penetration minimums. Letter to Marlene H. Dortch, Secretary, FCC, from Samuel L. Feder, Counsel to Cablevision, MB Docket No. 10-71 (July 31, 2015). Those recommendations echo proposals found in the Petition for Rulemaking, RM-11728, filed last year by Mediacom Communications Corporation. The Commission can and should incorporate the proposals found in Mediacom's petition into its upcoming retransmission consent review.

[3] Tom Wheeler, FCC Blog, Tech Transitions, Video and the Future, Official FCC BLOG (Oct. 28, 2014), available at https://www.fcc.gov/blog/tech-transitions-video-and-future. *See also* Letter to Tom Wheeler, Chairman, FCC, from Rocco B. Commisso, Chairman and CEO, Mediacom Communications Corp., MB Docket No. 10-71 (July 7, 2015).

implemented, imposes no obligation on a broadcaster to explain, justify, or substantiate that its price demands reflect competitive marketplace considerations.

The Commission concluded in 2000 that relying on established labor law precedent governing collective bargaining as a tool for interpreting and applying the good faith retransmission consent negotiation requirement was consistent with Congressional intent.[4] Indeed, the concept of a "totality of the circumstances" standard for assessing whether a party has negotiated in good faith comes directly from labor law.[5] Moreover, as the Supreme Court has stated, "[g]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims."[6]

In order to give meaning to the labor law requirement that good faith negotiating requires that the parties' claims be "honest," the courts have held that "[i]f an 'argument is important enough to present in the give and take of bargaining… it is important enough to require some sort of proof of its accuracy.'"[7] Thus, it is a well-settled principle of labor law that negotiating parties have an obligation to provide, upon request, relevant information substantiating claims made in the course of the negotiation.[8] For example, where an employer asserts that it cannot afford the union's wage demands or that agreeing to such demands would put the employer at a specific "competitive disadvantage," the union has the right to request and receive information, including financial information, needed to determine the veracity of those claims.[9] The rationale underlying this "duty to disclose" is that the exchange of relevant information during negotiations will mitigate differences in

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[4] *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 (2000) ("*2000 Good Faith Order*") at ¶ 22.

[5] Because the issue of whether an employer "bargains in good faith" is inherently one of fact that can only be resolved by reviewing the specific circumstances and conduct involved, courts and the National Labor Relations Board will view the totality of a party's conduct. *See E. Maine Med. Ctr. v. NLRB*, 658 F.2d 1 (1st Cir. 1981) (court stated that "distinguishing hard bargaining from surface bargaining requires sifting a complex array of facts"); *NLRB v. Cable Vision, Inc.*, 660 F.2d 1 (1st Cir. 1981) (court stated that the question of a violation is whether, from totality of employer's conduct, employer appeared to "go through the motions" of negotiations as a pretense, with no sincere desire to reach agreement). *See also Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, Notice of Proposed Rulemaking, CS Docket No. 99-363, FCC 99-406, at ¶ 16 (rel. Dec. 22, 1999), *citing General Electric Co.*, 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736 (2d Cir 1969), *cert. denied*, 397 U.S. 965 (1970); *Virginia Holding Corp.*, 293 N.L.R.B. 12 (1989); *American Commercial Lines, Inc.*, 291 N.L.R.B. 1066 (1988).

[6] *NLRB v. Truitt Manufacturing Co.*, 351 U. S. 149, 152 (1956).

[7] *KLB Industries, Inc. v. NLRB*, 700 F. 3d 551, 555 (D.C. Cir. 2012), *quoting Truitt, supra*, 351 U.S. at 152-53.

[8] *Truitt, supra*, 351 U.S. at 153 ("refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to negotiate in good faith"); *see also E.I. DuPont de Nemours & Co.*, 346 NLRB 553 (2006), *enforced* 489 F.3d 1310 (D.C. Cir. 2007) (finding that unlawful refusal to provide requested information necessary for other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude lawful impasse).

[9] *KLB Industries, supra*, 700 F. 3d at 556-57; *Nat'l Extrusion & Manufacturing Co.*, 357 NLRB No. 8 (2011), *enforced sub nom. KLB Industries, supra*. The duty to furnish information is not imposed on employers alone; a similar duty is owed by unions. *Printing & Graphic Communications Local 13 (Detroit) (Oakland Press Co.)*, 233 NLRB 994 (1977), *aff'd* 598 F.2d 267 (D.C. Cir. 1979).

the parties' bargaining power and thus increase the chances of a successful completion of a collective bargaining agreement.[10]

In the context of retransmission consent negotiations, as in the case of collective bargaining, market transparency and price discovery are critical components of a competitive market and will help bridge the differences in the parties' negotiating positions. In its *2000 Good Faith Order*, the Commission recognized that a "[b]lanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation" and that disclosure of the reasons for a broadcaster's rejection of an MVPD's proposal is necessary to ensure that the MVPD is "not negotiating in a vacuum and understand[s] why certain terms are unacceptable to the broadcaster."[11] Nonetheless, the Commission expressly declined to mandate information sharing, expressly stating that "[b]roadcasters are not required to justify their explanations by document or evidence."[12]

The approach adopted by the Commission is not working. First, the rationale that the Commission offered in 2000 for not imposing an information exchange requirement comparable to the one found in labor law is no longer sustainable. Specifically, the Commission defended its decision on the grounds that "there is no mutuality of obligations under Section 325(b)(3)(C)" and thus marketplace negotiations "would be negated by a one-sided information disclosure requirement."[13] However, in 2004, Congress amended Section 325(b)(3)(C) to impose on MVPDs a "reciprocal" good faith bargaining obligation. Consequently, there is no longer a valid reason for not requiring that the negotiating parties not only give reasons for their bargaining positions, but also that they substantiate those reasons.[14]

Second, by definition, given this mutuality of obligations, the required "good faith" negotiations cannot take place when one of the negotiating parties holds all the cards. Yet, that is the situation that exists today, particularly with respect to retransmission consent negotiations between big four network affiliates and small and medium-sized MVPDs. The bilateral monopoly[15] that defined the marketplace in 1992, and that was expected to keep retransmission consent price demands in check, has been replaced by a one-sided monopoly in which broadcasters and consumers have an array of essentially substitutable distributors to choose between while distributors have no good substitutes for their local network affiliates.[16] As a result, instead of being conducted in an

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[10] Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958).

[11] *2000 Good Faith Order*, at ¶ 44.

[12] *Id*.

[13] *Id.*, at ¶ 44, n.100.

[14] The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207 (amending 47 U.S.C. § 325(b)(3)(C)).

[15] In a bilateral monopoly, "an upstream monopolist sells its output to a single downstream buyer who may also be a monopolist in its output market." Roger D. Blair, David L. Kaserman & Richard E. Romano, A Pedagogical Treatment of Bilateral Monopoly, 55 S. Econ. J. 831 (1989).

[16] *See, e.g.*, 138 Cong. Rec. S643 (Jan. 30, 1992) ("It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare.") (Statement of Sen. Inouye); 183 Cong. Rec.

"atmosphere of honesty, purpose and clarity of process" as Congress intended,[17] retransmission consent negotiations have become increasingly acrimonious, with the number of actual and threatened disruptions of service growing year after year. Unrestrained by market forces or any requirement that they justify their price demands, broadcasters are free to pursue a "sky's the limit" approach to retransmission consent that is antithetical to the concept of good faith negotiations.[18]

The legislative history of the 1992 Act confirms that Congress understood the Commission to have the requisite authority to intervene in retransmission consent negotiations in order to protect consumer welfare.[19] However, the undersigned are not unmindful of the Commission's past reluctance to involve itself too deeply in retransmission consent disputes for fear that doing so would only encourage more such disputes. Thus, while the proposed duty to disclose is not a solution to all of the concerns that led Congress to mandate a review of the existing totality of the circumstances test, it will create conditions in which retransmission consent negotiations are more likely to succeed and will do so without requiring the Commission to set prices or otherwise address the substance of the parties' negotiating positions.[20]

Taking a page from labor law precedent, the Commission should require, as part of the totality of the circumstances standard, that the parties negotiating the terms of a retransmission consent agreement disclose relevant information substantiating and verifying their bargaining claims. Consistent with the goal of reducing, rather than increasing, the need for ongoing Commission involvement in retransmission consent negotiations, the standard of relevance, as in labor law, should be liberally construed.[21] At minimum, a broadcaster that seeks to justify its price demands by reference to "market prices" or the prices paid by other MVPDs should be required to provide documentation substantiating those assertions. And while a requirement that the broadcasters and MVPDs publish and make available in their public files "rate cards" or other information about the

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S14603 (Sept. 22, 1992) ("I believe that most broadcasters will opt for must carry while a significant number other broadcasters will negotiate nonmonetary terms, such as channel position, for the use of their signal…the vast majority of cable operators will, in my opinion, not incur significant increase in cost due to the retransmission consent provision.") (Statement of Sen. Bradley). See also *Implementation of the Cable Television Consumer Protection and Competition Act of1992: Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723 (1994), at ¶ 115 (expressing Commission's belief that "there are incentives for both parties to come to mutually beneficial arrangements").

[17] *2000 Good Faith Order*, at ¶ 24.

[18] CableFAX Daily, June 3, 2011, at 2.

[19] *See e.g.*, 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye) ("I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers.").

[20] While imposing a duty to disclose will create conditions in which retransmission negotiations are more likely to succeed, there may still be instances when the parties involved in the negotiations seek remedies from the appropriate governmental bodies.

[21] *See, e.g., NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967) (describing the relevancy standard in labor law as a "discovery-type" standard); *Country Ford Trucks v. NLRB*, 229 F. 3d 1184, 1191 (D.C. Circ. 2000) (stating that "the threshold for relevance is low").

prices they charge in a market (including copies of retransmission consent agreements) goes beyond the "disclosure upon request" approach followed in labor law, it should also be considered by the Commission. To the extent the Commission deems it necessary to protect sensitive information, the proposed duty to disclose could be satisfied by the submission of the relevant substantiating data regarding market rates to a neutral third party for its review and analysis.

By imposing a good faith negotiation obligation on the parties to retransmission consent negotiations, "Congress has signaled its intention to impose some heightened duty" on retransmission consent negotiations by directing the Commission to establish bargaining requirements that are "greater than those" that apply in other contexts.[22] Thus, nothing in the Communications Act prevents the Commission from subjecting negotiations for the carriage of broadcast signals to a disclosure requirement not otherwise applicable to most commercial transactions.

In conclusion, the undersigned urge the Commission, pursuant to the broad discretion given it in Section 325(b)(3)(A) to regulate the exercise of retransmission consent, as well as its public interest authority under Section 309 and its authority to regulate program carriage agreements in Section 616, to propose and adopt enhanced transparency requirements, including a duty to disclose relevant market information, for retransmission consent negotiations.

Respectfully submitted,

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[22] *Good Faith Order*, at ¶ 24.

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