



August 27, 2015

EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Notice in MB Docket No. 10-71, Amendment of the Commission's Rules
Related to Retransmission Consent

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the American Television Alliance ("ATVA") submits this letter summarizing the following meetings:

- A meeting on August 25, 2015 with Commissioner Ajit Pai and Alison Nemeth, Interim Legal Advisor, Media for Commissioner Pai. Present on behalf of the ATVA were: Jeff Blum, DISH Network; Micah Caldwell, ITTA; Jill Canfield, NTCA; Mike Chappell, Fierce Government Relations; Stacy Fuller, DIRECTV; Hadass Kogan, DISH Network; Ross Lieberman, American Cable Association; Emmett O'Keefe, Cablevision; Melissa Newman, CenturyLink; Cristina Pauzé, Time Warner Cable; Kevin Rupy, USTelecom; and David Tamasi, Rasky Baerlein, representing Mediacom.
- A meeting on August 26, 2015 with Commissioner Mignon Clyburn and Chanelle Hardy, Chief of Staff and Media Legal Advisor for Commissioner Clyburn. Present on behalf of the ATVA were: Micah Caldwell, ITTA; Stacy Fuller, DIRECTV; Hadass Kogan, DISH Network; Ross Lieberman, American Cable Association; Mary Lovejoy, American Cable Association; Alexi Maltas, Cablevision; and Cristina Pauzé, Time Warner Cable.

During the meetings, we explained that reforming the Commission's retransmission consent rules is more urgent now than ever. Local broadcast station blackouts continue to rise across the country, and retransmission consent rates continue to skyrocket, all to the detriment of consumers. During the last five years, Americans have experienced over 530 blackouts rendering them unable to watch their favorite shows. Even more troubling, this number has grown rapidly over the last several years: in 2010 there were 12 reported blackouts, while in 2014 the number rose to 107. And, already in 2015 customers have experienced 145 blackouts.¹

¹ See *Sinclair Orchestrates Largest TV Blackout in History*, American Television Alliance (Aug. 26, 2015), available at <http://www.americantelevisionalliance.org/sinclair-orchestrates-largest-tv-blackout-in-history/>. "Since 2010, millions of Americans have seen dark screens and paid higher bills instead of watching their favorite channels due to at least 533 broadcaster blackouts. The blackouts and bigger TV bills have soared in the past five years and the Sinclair blackout sets the record for the most in one year at 145. The menace of TV blackouts continues to grow:

- 145 blackouts to date in 2015

SNL Kagan estimates that TV broadcasters' retransmission consent fees will reach \$10.3 billion by 2021, versus the projected level of \$6.3 billion in 2015.² Retransmission consent fees grew **8,600%** between 2005 and 2012.³ Multichannel video programming distributors ("MVPDs") attempting to negotiate for carriage of local broadcast stations face increasingly brazen conduct on the part of broadcasters, necessitating further action by the Commission to protect consumers.

Despite the claims of the National Association of Broadcasters ("NAB"), which continues to staunchly defend the status quo with respect to the distorted playing field for retransmission consent negotiations, MVPDs are not "manufacturing" these disputes.⁴ While the NAB accuses certain MVPDs of being bad actors in retransmission consent disputes, the facts show that broadcasters are responsible for the blackouts, as broadcasters are the ones that remove their signal and deprive customers access to their local broadcast stations.

Accordingly, the STELA Reauthorization Act of 2014 ("STELAR") authorizes the Commission to take concrete steps to address the broken retransmission consent regime. STELAR Section 103 directs the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations."⁵ An overhaul of the good faith rules is critical, because the rules on the books today⁶ are outdated and not nearly strong enough to combat the variety of ways that a broadcaster can exercise its leverage to extract higher fees and force blackouts. Among other things, broadcasters have required MVPDs to carry unrelated programming as a condition of receiving retransmission consent without giving meaningful economic alternatives, blocked online access to broadcast content, blacked out stations during highly popular TV events, ceded negotiating authority to third parties, attempted to restrict consumers' ability to use lawful devices and functionality, and demanded fees for additional subscribers apart from those that receive the retransmitted station. None of these tactics is specifically called out in current FCC regulations as evidence of bad faith.

Updates to these rules are especially necessary, given the changes in the marketplace that have occurred since Congress passed the 1992 Cable Act. At that time, Congress noted that "most cable television subscribers have no opportunity to select between competing cable systems" and that "the cable industry has become highly concentrated."⁷ Indeed, in 1992 cable

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- 107 blackouts in 2014
 - 127 blackouts in 2013
 - 91 blackouts in 2012
 - 51 blackouts in 2011
 - 12 blackouts in 2010"

² Broadcast Investor Deals & Finance: Retrans projections update: \$10.3B by 2021, SNL KAGAN, June 30, 2015.

³ *Id.*

⁴ See Letter from Rick Kaplan, National Association of Broadcasters, to Marlene H. Dortch, FCC, MB Docket No. 10-71 (Aug. 24, 2015).

⁵ STELAR § 103(c).

⁶ 47 C.F.R. §76.65.

⁷ Cable Television Consumer Protection and Competition Act of 1992, Section 2 (a), Public Law 102-385 (Oct. 5, 1992).

operators held 98 percent of the MVPD market share.⁸ Today, however, consumers face more competition than ever in the market for MVPD services, with some markets having as many as five MVPDs to choose from.⁹ In today's marketplace, it is the broadcasters who now have undue leverage in negotiations against MVPDs because they know that customers can easily switch providers in the case of a programming blackout. Thus, despite the increase in competition among providers, retransmission consent fees continue to rise at staggering levels. Updates to the good faith rules are necessary to effectuate the intent of the rules in light of today's marketplace conditions.

Therefore, in order to protect consumers and carry out the statutory directive in STELAR, the Commission's forthcoming notice of proposed rulemaking to update the good faith rules should develop a robust record on the variety of tactics that broadcasters engage in during retransmission consent negotiations. But simply reviewing the totality of circumstances test may not be enough. In order for all parties to have clear rules of the road going forward, the Commission should consider what specific types of conduct would, *per se*, constitute bad faith. This effort should take a fresh look at the industry and the marketplace, because the Commission previously has found that certain broadcaster tactics might be acceptable in light of "competitive marketplace considerations" that prevailed at the time.¹⁰ But that precedent is now more than 15 years old. As noted above, the marketplace has changed drastically. Among other things, consumers have a choice among several MVPDs throughout the country, whereas broadcasters still enjoy a monopoly on network-affiliated content in their local markets.

In opening its review of the good faith rules, as required by STELAR, ATVA urges the Commission to, at a minimum, seek comment on whether to define the following negotiating tactics as *per se* evidence of bad faith:

1. Online Blocking: Broadcasters have blocked access to their publicly available online content following a negotiation impasse, which impacts not just the subscribers of the MVPD across the table, but all Internet access subscribers served by that MVPD regardless of their video provider.¹¹ Therefore, the Commission should propose that it shall be *per se* evidence of bad faith for a broadcaster to:

Directly or indirectly restrict access to the station's or affiliated network's publicly available online video programming or related content to: (i) any subscriber of an

⁸ See Comments of the National Cable & Telecommunications Association, MB Docket No. 15-158, p. 3 (Aug. 21, 2015) (*citing* NCTA Analysis of SNL Kagan Data).

⁹ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Sixteenth Report, MB Docket No. 14-16, ¶ 22 (Apr. 2, 2015).

¹⁰ See 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, 5469-70 (2000) (defining six examples of bargaining proposals that "presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement.").

¹¹ See, e.g., *In Vengeful Move, CBS Blocks Web Episodes for Time Warner Cable Internet Subscribers*, The Verge (Aug. 2, 2013), available at <http://www.theverge.com/2013/8/2/4584176/cbs-blackout-on-time-warner-cable-now-its-a-net-neutrality-issue> (after failing to reach a new retransmission consent agreement, CBS blocked all Time Warner Cable internet subscribers from watching episodes on its website CBS.com, including those that subscribed to a different TV provider).

Internet service provider that is affiliated with the MVPD; or (ii) any other subscriber of the MVPD or of an affiliate of that MVPD.

2. Forced Bundling: Broadcasters increasingly demand that an MVPD agree to carry other broadcast stations or cable networks as a condition of obtaining retransmission consent for the broadcaster's primary signal, without giving a real economic alternative to carrying just the primary signal(s).¹² This type of bundling requirement, among other things, raises programming costs that ultimately may be passed on to consumers. We are not asking the Commission to prohibit all bundling, but a broadcaster should be required to give a stand-alone offer to MVPDs that request it, and this offer should reflect marketplace terms. Therefore, the Commission should propose that it shall be *per se* evidence of bad faith for a broadcaster to:

Require an MVPD to carry cable network, non-broadcast programming, multicast programming, duplicative stations, or a significantly viewed station as a condition to granting retransmission consent to the MVPD for carriage of the television broadcast station's primary signal, including, but not limited to, by refusing to make a standalone offer for the MVPD's carriage of the television broadcast station that is a real economic alternative to a bundle of broadcast and non-broadcast or multicast programming (for example, justified by actual prices for other similar broadcast channels in the same market).

3. Marquee Events: Broadcasters often seek to increase their already oversized negotiating leverage when they require contract expiration dates, or threaten to black out a station, in the time period just prior to, the airing of a popular sporting or entertainment event. As the Commission recognized in eliminating the Sports Blackout Rule, the vast majority of the highest rated television events are NFL games,¹³ and the majority of those games are played at publicly funded stadiums. It should be a *per se* violation of the good faith standard to deliberately cut off consumers from such highly rated—often publicly funded—marquee events. Therefore, the Commission should propose that it shall be *per se* evidence of bad faith for a broadcaster to:

Withhold retransmission consent during the airing of, during the one-week run up prior to, or for one day after a Top-Rated Marquee Event. For purposes of this rule, a "Top-Rated Marquee Event" is a television program for which the most recent telecast of that event or comparable programming received a nationwide Live + Same Day U.S. Rating of 7.00 or greater on the Persons 2 + demographic by Nielsen, and "comparable programming" means a prior program most reasonably comparable to the programming in question, as determined by the FCC. If a sporting event has multiple telecasts, and one or more such telecasts meet the rating specified above, all

¹² For example, Sinclair Broadcast Group has previously indicated that it plans to make NewsChannel 8 a national cable network that it will package with its local broadcast stations. As Sinclair CEO David Smith explained: "The takeaway is we believe there is significant value we can unlock when we couple the cable channel with the rest of our news channels and roll it out to more than just D.C." Dan Weil, *Sinclair Plans National Cable News Channel with Allbritton Acquisition*, Newsmax (July 30, 2013), available at <http://www.newsmax.com/Newsfront/sinclair-national-cable-channel/2013/07/30/id/517831/>.

¹³ See Sports Blackout Rules, *Report and Order*, 29 FCC Rcd. 12053 ¶ 25 (2014) ("we note that NFL games are consistently the highest rated programs on broadcast television").

such telecasts of that event or comparable programming shall be considered to be a Top-Rated Marquee Event. If the broadcast station has pulled its signal pursuant to a retransmission consent dispute prior to a Top-Rated Marquee Event, the station must reinstate the signal during the airing of a Top-Rated Marquee Event.

4. Importation of Out-of-Market Signals: If a broadcaster blacks out its signal while negotiations continue past the contract expiration, then that broadcaster should not be allowed to prevent MVPDs from temporarily importing an out-of-market station. Therefore, the Commission should propose that it shall be *per se* evidence of bad faith for a broadcaster to:

For satellite MVPDs, fail to grant a blanket waiver sufficient to permit households not qualifying as unserved households to receive same-network distant signals if the television broadcast station has declined to grant an extension of a retransmission consent agreement to allow continued carriage of the broadcast station's signal; for cable/telco MVPDs, exercise its network non-duplication or syndicated exclusivity rights, pursuant to sections 76.92 and 76.101 of title 47, Code of Federal Regulations, if the television broadcast station has declined to grant an extension of a retransmission consent agreement to allow continued carriage of the broadcast station's signal.

5. Ceding Right to Negotiate: Retransmission consent rights belong to individual broadcast stations, and accordingly, agreements should be negotiated only by the owners of those stations. Broadcasters seek to increase their leverage by forcing MVPDs to negotiate with a single third party for retransmission consent for multiple, non-commonly owned stations across many different markets. Similarly, networks have negotiated retransmission consent agreements on behalf of their affiliates, or have garnered the right to approve an affiliate's retransmission consent agreement before it can be finalized. Therefore, the Commission should propose that it shall be *per se* evidence of bad faith for a broadcaster to:

Relinquish to an affiliated television network or an out-of-market, non-commonly owned television broadcast station its right to negotiate or approve a retransmission consent agreement or any material term of such agreement.

6. Equipment Restrictions: Broadcasters have demanded in exchange for retransmission consent that an MVPD place limits on its subscribers' use of lawful devices and functionalities. This hurts innovation and consumer choice and violates the fair use rights under copyright law of MVPDs and consumers. Therefore, the Commission should propose that it shall be *per se* evidence of bad faith for a broadcaster to:

Condition retransmission consent on (i) an MVPD's acceptance of restrictions on providing, or assisting consumers' use of, lawful devices or functionality; or (ii) an MVPD's commitment to install a set-top box in each home on each television receiver.

7. Charging for Subscribers That Do Not Receive Service: Broadcasters have demanded that MVPDs pay per-subscriber fees not just for viewers of the broadcaster's retransmitted signal, but also for subscribers who choose to receive the broadcaster's station over-the-air or who receive an MVPD's Internet or voice service, but not their video service. Therefore, the Commission should propose that it shall be *per se* evidence of bad faith for a broadcaster to:

Demand retransmission consent or other payment for every respective MVPD subscriber, including, but not limited to, any subscriber who receives the broadcaster's signal off-air (even if the MVPD integrates that off-air signal with MPVD-delivered content or services); or any subscriber who does not receive such station as part of its pay-TV subscription package from the MVPD or any affiliate of the MVPD (e.g., Foreign-language only packages, or any subscriber of Internet and/or voice service that does not take video service as part of their subscription).

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The ATVA looks forward to working with the Commission to update the good faith negotiating rules pursuant to STELAR to better protect consumers and advance the public interest.

Respectfully submitted,

Mike Chappell
American Television Alliance

cc: Alison Nemeth
Chanelle Hardy