Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	**MB Docket No. 15-216**
	)	
Totality of the Circumstances Test	)	

JOINT REPLY COMMENTS OF THE NETWORKS FOR COMPETITION AND CHOICE COALITION – INCOMPAS, ITTA, NTCA, AND PUBLIC KNOWLEDGE – AND THE OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA

January 14, 2016

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I. INTRODUCTION AND SUMMARY

The Networks for Competition and Choice Coalition ("Coalition")[1] submits these reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("*NPRM*") reviewing the totality of the circumstances test and the obligation of broadcasters and multichannel video programming distributors ("MVPDs") to negotiate retransmission consent agreements in good faith.[2]

The Coalition advocates for video programming reform on behalf of broadband companies that provide video, Internet, and voice services as well as the customers that they serve. Similarly, the Open Technology Institute at New America promotes policy and market

[1] The members of the Coalition are INCOMPAS, ITTA – the Voice of Mid-Size Communications Companies, NTCA – the Rural Broadband Association, and Public Knowledge. The Coalition's MVPD members represent more than one thousand networks that provide a variety of communications services, including video services, in today's communications marketplace.

[2] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 20 (2015) ("*NPRM*").

solutions that support broadband adoption, competition, and affordability. In this proceeding, the Coalition seeks to raise awareness about the impact video has on the availability of broadband competition and competitive network choice for consumers. Furthermore, the Coalition seeks to rebut broadcaster arguments that the retransmission consent marketplace is "working the way that Congress intended"[3] and that the current negotiation standard, including the totality of the circumstances test, is functioning in a manner that is "wholly consistent" with "the fundamental meaning of good faith."[4]

The Commission has long recognized that video services and broadband competition are intrinsically linked. The broadband community actively participates in the video services market to better meet the needs of customers who prefer to purchase both broadband and video services together in a bundled product. Obtaining the rights to retransmit broadcast network content is critical to offering video service. However, programming costs continue to rise dramatically and Coalition member companies are forced to agree to these costs due to the nature of the content, the lack of bargaining power of smaller and new entrant MVPDs, and the competition they face from other providers in the video distribution marketplace.

Broadcasters' ever-increasing pricing demands for "must-have" content and coercive negotiating practices leave MVPDs, particularly small and new entrant providers, with little ability to obtain access to reasonably-priced programming – a situation which often makes the provision of video service a loss leader for these providers. Given the overwhelming economic benefits broadcasters receive from the current regulatory regime, it is not surprising that they enthusiastically defend the status quo. However, the current regulatory framework constitutes an

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[3] Nexstar Broadcasting, Inc. Comments, MB Docket No. 15-216 (filed Dec. 1. 2015) ("Nexstar Comments"), at 4.

[4] National Association of Broadcasters Comments, MB Docket No. 15-216 (filed Dec. 1, 2015) ("NAB Comments"), at 25.

unsustainable reality for small providers and new entrants. For the Commission to realize its goal to promote the deployment, expansion, and upgrade of broadband networks, it must act to ensure that video competition can flourish. By adopting rules that revise the retransmission consent framework and clarify the standard for negotiating these agreements in good faith, the Commission will significantly promote video and broadband competition, and consumers will benefit.

The Commission has ample legal authority to clarify the good faith standard. The STELA Reauthorization Act ("STELAR")[5] affirmed the broad authority the Commission has to implement changes under Section 325 of the Communications Act.[6] While antitrust and copyright law have a complementary role in the current proceeding, the agency is well within its right to enact retransmission consent reforms given its public interest mandate and oversight authority over the broadcast and MVPD industries.

The current retransmission marketplace is not functioning as Congress intended. The agency should reject broadcasters' arguments and should clarify the good faith standard to prevent negotiation breakdowns that cause consumers harm through increased prices, blackouts, and a lack of competitive options in their local market. Furthermore, it should identify additional specific types of broadcaster conduct that constitute *per se* violations of the obligation to negotiate in good faith, or alternatively, are "sufficiently outrageous" and inconsistent with competitive marketplace conditions as to violate the duty to bargain in good faith under the totality of the circumstances test. Finally, it is essential for the FCC to promote greater transparency in the negotiation process. The Commission should, among other things, require broadcasters to disclose pricing and other relevant information relating to retransmission consent

[5] Public Law No. 113-200, 128 Stat. 2059 (2014).

[6] 47 U.S.C. § 325.

negotiations and to substantiate and explain their bargaining positions, including year-to-year changes in contract proposals, to promote transparency and facilitate marketplace negotiations for retransmission consent.

II. THE FCC HAS AMPLE LEGAL AUTHORITY TO CLARIFY THE GOOD FAITH STANDARD AND ADOPT OTHER RETRANSMISSION CONSENT REFORMS

A. STELAR Provides the Requisite Legal Authority for the FCC to Adopt Changes Proposed by MVPDs and the Public Interest Community.

Section 325 grants broad authority to the FCC to implement a framework for promoting good faith dealing in retransmission consent negotiations,[7] including proscribing substantive proposals inconsistent with competitive marketplace considerations.[8] STELAR does not limit this authority, and the only STELAR-related Committee report that addresses the FCC's authority to implement Section 325 calls for the agency to address "whether certain substantive terms offered by a party may increase the likelihood of the negotiations breaking down" and "provide additional specific guidance as to actions that, taken as a whole, evidence bad faith based on the totality of the circumstances."[9]

In 2000, the FCC implemented the good faith negotiation statutory provisions by adopting a two-part framework: (1) a list of seven (subsequently nine) negotiation tactics, the

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[7] *Amendment of the Commission's Rules Related to Retransmission* Consent, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No 10-71, ¶ 31 (rel. Mar. 31, 2014) ("*2014 Joint Negotiation Order*"); Comments of the American Cable Association, MB Docket No. 15-216 (filed Dec. 1, 2015) ("ACA Comments"), at 6-8.

[8] 47 U.S.C. § 325(b)(3)(C) (directs a rulemaking to produce regulations that will prohibit a broadcaster or MVPD from failing to negotiate in good faith, and agreements with different MVPDs containing different terms and conditions do not evidence bad faith if based on competitive marketplace considerations).

[9] *See* S. Rep. No. 113-322 at 13 (2014) ("Senate Commerce Committee Report").

violation of any of which is considered a *per se* breach of the good faith negotiation obligation; and (2) a totality of the circumstances standard whereby an MVPD may attempt to prove the absence of a sincere desire to reach an agreement that is acceptable to both parties, including allegations that specific proposals are not based on competitive marketplace considerations.[10] In 2014, the FCC used its Section 325 authority to add to the list of *per se* violations of the good faith negotiation obligation.[11]

When passing STELAR, Congress was fully aware of the FCC's efforts to implement Section 325's good faith requirements. Not only did Congress refrain from rejecting the agency's prior efforts, it legislatively affirmed the 2014 FCC order that produced a revised *per se* standard.[12] The only Committee report associated with STELAR that commented on the good faith standard encouraged further guidance from the FCC – including examination of substantive terms,[13] something the FCC had undertaken cautiously in the past.[14]

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[10] *See Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiations and Exclusivity*, First Report and Order, 15 FCC Rcd 5457, ¶ 44 (2000) ("*Good Faith Order*").

[11] *2014 Joint Negotiation Order* at ¶ 9 ("[P]ursuant to our authority in Section 325 of the Act, we revise Section 76.65(b) of our rules to provide that it is a violation of the Section 325(b)(3)(C)(ii) duty to negotiate in good faith for a Top Four television broadcast station (as measured by audience share) to negotiate retransmission consent jointly with another such station if the stations serve the same geographic market and are not commonly owned.").

[12] *See* STELAR § 103(a) (expanding and codifying the agency's new *per se* good faith standard from the *2014 Joint Negotiation Order*, which prohibited joint negotiation by broadcast stations that are ranked among the top four stations in a market as measured by audience share).

[13] *See* Senate Commerce Committee Report at 13 ("[T]he FCC shall make sure that its test encourages both parties to a retransmission consent negotiation to present bona fide proposals on the material terms of a retransmission consent agreement during negotiations and engage in timely negotiations to reach an agreement.").

[14] *Good Faith Order* at ¶ 14.

This plain and obvious affirmation of the FCC's implementation of Section 325 reveals that STELAR Section 103(c) does not – as suggested by many broadcasters[15] – limit the FCC's power to further refine the good faith framework to ensure that Congress's desire for fair dealing in retransmission consent negotiations is met. In fact, two cases cited by CBS Corporation in its comments confirm this conclusion.[16]

In the first decision, as stated by the D.C. Circuit, "Congress is presumed to preserve, not abrogate, the background understandings against which it legislates."[17] The FCC's interpretation of Section 325 through its implementation "colors the background against which Congress was legislating" when it passed STELAR, providing a "presumptive default."[18] The passage of STELAR produced no evidence that Congress intended to constrain the FCC's future application of the good faith requirement – which Congress put into motion.[19] "Congress is unlikely to intend any radical departures from past practice without making a point of saying so."[20] Looking at STELAR in the context of prior FCC action leads to the conclusion that STELAR did not place new limits on the FCC's authority to implement the good faith requirement, but instead directed the FCC to further update the framework to reflect the current marketplace.

Second, in *Motion Picture Assoc. of Amer. v FCC*, the agency adopted rules mandating television programming with video descriptions after Congress adopted Section 713 of the

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[15] *See* Comments of 21st Century Fox, Inc. and Fox Television Stations, LLC, MB Docket No. 15-216 (filed Dec. 1, 2015) ("Fox Comments"), at 1-2; Comments of CBS Corporation, MB Docket No. 15-216 (filed Dec. 1, 2016) ("CBS Comments"), at 2-3.

[16] *See* CBS Comments at 2.

[17] *United States v. Wilson*, 290 F.3d 347, ¶ 20 (D.C. Cir. 2002).

[18] *Wilson* at ¶ 21 (citing *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920) when stating "Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the government.").

[19] *Wilson* at ¶¶ 25, 28.

[20] *Wilson* at ¶ 31, quoting *Jones v. United States*, 526 U.S. 227, 234 (1999).

Communications Act, which defined "video description" and required the FCC to prepare a report to Congress.[21] The D.C. Circuit vacated the FCC's video description regulations, holding that "the Act does not provide the FCC with the authority to enact video description rules."[22] The distinction between the FCC's Section 713 and Section 325 authority is clear. Whereas Section 713 called for a report and provided no authority to promulgate new rules, STELAR called for a good faith framework update where Congress had already provided ample authority for the FCC to act in Section 325.[23]

Further, Section 325 does not – as suggested by many broadcasters[24] – bar the FCC from examining substantive terms offered in a retransmission consent negotiation, but instead requires that "different terms and conditions" reached with different parties be based on "competitive marketplace considerations."[25] When initially implementing the good faith requirement, the FCC produced a list of practices presumptively consistent with competitive marketplace considerations,[26] a separate list of practices presumptively inconsistent with competitive marketplace considerations,[27] and stated that neither list is comprehensive.[28]

[21] 47 U.S.C. § 713.

[22] 309 F.3d 796, ¶ 4 (D.C. Cir. 2002).

[23] *See* ACA Comments at 5 (noting that STELAR Section 106(d) only directs the FCC to establish an advisory committee, whereas Section 103(c) calls for a rulemaking).

[24] NAB Comments at 48; Comments of the Walt Disney Company, MB Docket No. 15-216 (filed Dec. 1, 2015) ("Disney Comments"), at 9.

[25] 47 U.S.C. § 325(b)(3)(C)(ii-iii).

[26] *Good Faith Order* at ¶ 56.

[27] *Id.* at ¶ 58.

[28] *Id.* at FNs 123, 125.

The FCC insisted that the practices on the list of acceptable conduct "are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own."[29] As explained in detail below and in numerous initial comments, the tactics and proposals employed in retransmission consent negotiations between broadcasters and small and new entrant MVPDs are often not based on competitive marketplace considerations, and small and new entrant MVPDs are often not "free to accept, reject, or counter" with different proposals. The time has come to update both lists, if not eliminate the list of presumptively good faith tactics entirely.

Because of the dramatic changes in the video marketplace since the FCC's initial implementation of the good faith requirement,[30] it is unsurprising that Congress directed the FCC to revisit the good faith framework and address both the procedures and terms employed by parties to a retransmission consent negotiation. The agency thus has ample authority to reconsider both the list of *per se* violations and the totality of circumstances test, including the tactics and proposals that presumptively violate competitive marketplace considerations.[31]

B. Antitrust Law Does Not Preclude the FCC from Adopting the Changes to the Good Faith Standard Proposed by MVPDs and Others.

The Commission should see arguments that it set aside its own authority in favor of the promise that antitrust law is sufficient for what they are – arguments for the status quo of continued skyrocketing bills, blackouts, and consumer harm.[32] While antitrust law has a vital role to play in protecting consumers and promoting competition, it never has been, and should

[29] *Id.* at ¶ 56.

[30] *See* Comments of National Cable & Telecommunications Association, MB Docket No. 15-216 (filed Dec. 1, 2015), at 1-2.

[31] *See* ACA Comments at 7-9.

[32] *See, e.g.*, Disney Comments at 18.

not be, the *only* tool used to achieve these ends in this context. Instead, general-purpose antitrust oversight and narrowly-crafted, industry-specific rules can work together.

Antitrust and competition law are typically applied *ex post* to specific instances of bad behavior. While they can be applied in nuanced ways depending on the facts of specific industries and market participants, these areas of law are high-level and general purpose. In particular industries, however, it often becomes apparent that particular patterns of behavior continually recur and require *ex ante* specification of permissible and impermissible courses of conduct. In those instances, it is much more efficient and effective for regulators such as the FCC to craft specific rules that guide such behavior outright. Such rules, promulgated by an expert regulator taking into account industry and public feedback, can be more finely tailored to the facts of a specific industry than it is practical (or even desirable) to expect from a general-purpose law enforcement agency like the Department of Justice ("DOJ") applying broad laws such as the Sherman Antitrust Act.

With regard to the current proceeding, the complementary roles of antitrust and FCC rules are even more apparent. Under *Verizon v. Trinko*,[33] there can be no antitrust liability merely for failing to comply with a duty under the Communications Act. The Communications Act, and not antitrust law, creates the obligation for MVPDs and broadcasters to negotiate in "good faith." While entities regulated by the FCC might otherwise violate antitrust law in their actions, the good faith provision, if it is to be enforced at all, must be enforced by the FCC.

What's more, the FCC's public interest mandate goes well beyond antitrust. While it is true that the Commission's public interest analysis embodies a "deeply rooted preference for preserving and enhancing competition in relevant markets … and ensuring a diversity of

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[33] 540 U.S. 398 (2004).

information sources and services to the public,"[34] and that "[t]he FCC's actions should be informed by competition principles," its "'public interest' standard is not limited to purely economic outcomes."[35]

For instance, the Commission is charged with providing access to advanced telecommunications and information services across the country and encouraging deployment to all Americans;[36] ensuring quality services are available at just, reasonable, and affordable rates;[37] promoting the development of the Internet and preserving the competitive free market for its provision;[38] encouraging the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet;[39] and preventing unjust or unreasonable discrimination. The Commission is also authorized to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies."[40]

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[34] *Applications of Comcast Corporation, General Electric Company and NBC Universal for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion & Order, 26 FCC Rcd 4238, ¶ 23 (2011).

[35] Jonathan Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC Blog (Aug. 12, 2014), *available at*: https://www.fcc.gov/news-events/blog/2014/08/12/fcc-transaction-review-competition-and-public-interest.

[36] 47 U.S.C. §§ 254(b)(2), 1302(a).

[37] 47 U.S.C. §§ 254(b)(1), 201(b), 151.

[38] 47 U.S.C. §§ 230(b)(1), 230(b)(2).

[39] 47 U.S.C. § 230(b)(3).

[40] 47 U.S.C. § 548.

Bad faith behavior in the retransmission consent context could frustrate any or all of those aims. As the record shows, particular negotiation tactics can lead to higher MVPD and broadband bills for consumers, reduced demand for those services, and slowed deployment, particularly in rural areas.[41] These tactics can lead to bloated cable bundles which reduce consumers' ability to control the information they allow into their homes, and can restrict the availability of content online. They can lead to smaller, independent, and diverse programmers being squeezed out of the programming marketplace. Under the Communications Act, the FCC is charged with preventing these outcomes by using its tailored authority to promote the public interest.

For these reasons, arguments that proposed FCC actions are "plainly inconsistent with recent trends in antitrust law"[42] are inapposite. Whether or not something is appropriate under antitrust law is not relevant to whether it is appropriate under the Communications Act, since those bodies of law serve different purposes. For these reasons, the Commission should reject calls to set aside its own authority.

C. Copyright Law Does Not Preclude the FCC from Adopting Necessary Reforms.

Several commenters reference copyright law as if it were a trump card preventing the Commission from carrying out its statutory obligation to ensure that retransmission consent negotiations are carried out in good faith, but this gambit fails.[43]

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[41] *See, e.g.*, ACA Comments at 2; Comments of ITTA – the Voice of Mid-Size Communications Companies, MB Docket No. 15-216 (filed Dec. 1, 2015) ("ITTA Comments"), at 5-7.

[42] Disney Comments at 2, 15-17.

[43] *See, e.g.*, Comments of E.W. Scripps Company, MB Docket No. 15-216 (filed Dec. 1, 2015) ("Scripps Comments"), at 15; Comments of News-Press & Gazette Company, MB Docket No. 15-216 (filed Dec. 1, 2015) ("News-Press Comments"), at 21; Comments of Raycom Media, MB Docket No. 15-216 (filed Dec. 1, 2015) ("Raycom Comments"), at 8-9.

First, these commenters mischaracterize the nature of the proposed Commission action. For example, NAB claims that if the Commission were to act in this area it would amount to "forcing a broadcaster to publicly perform its copyrighted content online."[44] This inaccurate depiction of this issue is repeated by a number of other commenters.[45] However, no one has suggested that any programmer be required to make content available online—only that, in the event content already is online, that a broadcaster not leverage that content in unfair ways designed to influence the retransmission consent negotiation process. The practice of blocking users of a single MPVD's Internet service from accessing content which the programmer has already made available online is nothing more than an attempt to harm customers and create the false appearance that content that is freely offered online to all Internet users is somehow connected with retransmission consent negotiations. This is only made worse by the fact that Internet users who are not even customers of the MVPD in question are usually also affected by such actions.

To describe tactics like this as a "mandatory public performance" is tendentious in the extreme. Copyright holders cannot cite to their intellectual property rights as a means to avoid their other legal obligations. A copyright holder required to act in good faith under a provision of law is not excused from that obligation when it comes to its intellectual property rights, any more than it is with any of its other property rights. In fact, FCC rules frequently touch on the property rights of regulated entities in one way or the other. As one example, MVPDs are subject to "must-carry" obligations even though this requires that they use their physical property in ways they might prefer not to. If copyright law could be used to prevent FCC actions that

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[44] NAB Comments at 35.

[45] *See, e.g.,* Scripps Comments at 15; News-Press Comments at 21; Raycom Comments at 8-9.

affect programming, FCC authority to promote the public interest in a number of respects might be imperiled. For instance, FCC rules which require that programmers provide closed captions or overlay emergency information could be characterized as the mandatory creation of a derivative work.

Arguments such as those cited here border on the frivolous. For example, one entity, in an antitrust context, once argued that license restrictions being challenged were legally justified because, in imposing them, it was simply "exercising its rights as the holder of valid copyrights."[46] The D.C. Circuit rejected this argument, noting that it "borders upon the frivolous. The company claims an absolute and unfettered right to use its intellectual property as it wishes ... That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability."[47] Similarly, here, programmers' valid copyright interests do not give them leave to engage in bad faith negotiating tactics, and the FCC has the authority to prohibit these practices.

III. THE RETRANSMISSION CONSENT MARKETPLACE IS NOT WORKING

Broadcasters suggest that we are in a "golden age of television,"[48] that broadcast TV is no longer as dominant as it once was,[49] and that it cannot be considered "must-have" programming.[50] Broadcasters further contend that MVPDs are in a position to drop broadcast

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[46] *United States v. Microsoft*, 253 F.3d 34, 62-63 (D.C. Cir. 2001).

[47] *Id.* at 63.

[48] *See, e.g.*, NAB Comments at 8; Disney Comments at 6-7.

[49] *See, e.g.*, NAB Comments at 10-11.

[50] *See, e.g.*, Disney Comments at 7.

programming at any time.[51] However, these statements do not accurately depict the current marketplace. Contrary to broadcaster arguments, broadcast programming is "must-have" programming that MVPDs, particularly smaller and new entrant MVPDs, must offer to provide a competitive video product.[52]

As the Commission acknowledges, increased retail competition is one of the "significant changes in the retransmission consent marketplace that have altered the negotiation dynamics between broadcasters and MVPDs" since Congress enacted the retransmission consent regime in 1992.[53] While the monopoly cable provider was typically the only video service option for consumers in 1992, today consumers generally are able to choose among multiple MVPDs in purchasing video programming services. In recent years, smaller and new entrant MVPDs have become a growing presence in the video distribution market in response to consumer demand for subscription to a suite of communications offerings that includes video programming bundled with data, voice, and other services.

As noted in the *NPRM*, "MVPDs that face competition have stronger incentives to negotiate retransmission consent agreements with broadcast stations because much broadcast network television programming continues to be 'must-have' programming for MVPDs" and an

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[51] *See, e.g.,* Fox Comments at 5 (suggesting that a station electing retransmission consent "assumes the risk that an MVPD may choose not to carry that station at all," and that "[i]f a particular MVPD were to conclude that a particular broadcast station is not worth the price sought by the station the distributor is free to decline to carry it.").

[52] Not only is the provision of video service necessary for small and new entrant providers to compete, it is an essential service provided to rural consumers in areas served by companies represented by INCOMPAS, ITTA, NTCA, and others. Many consumers in rural areas do not have access to over-the-air signals and must rely on MVPDs for broadcast programming. Nearly one-fourth of NTCA's members, for example, report that 90% or more of their service area cannot receive an over-the-air broadcast signal and must pay to receive local news, weather, or sports. *See* Comment of NTCA – the Rural Broadband Association, MB Docket No. 15-216 (filed Dec. 1, 2015) ("NTCA Comments"), at 3.

[53] *NPRM* at ¶ 3.

MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers – including subscribers to its associated voice and broadband services – to rival MVPDs.[54] Thus, the ability to offer a video product with numerous and diverse programming options that consumers desire, including "must-have" broadcast stations, is a necessary component of continued competition in the retail video distribution marketplace.

Furthermore, claims that broadcast programming is not "must have" and that MVPDs can drop broadcast signals at any time are impossible to reconcile with the rate of retransmission consent price increases. If these assertions were true, retransmission consent fees would not be rising at rates that substantially outpace inflation. As a consequence of marketplace changes, where broadcasters have all of the bargaining leverage relative to small and new entrant MVPDs, retransmission consent fees have steadily grown and are projected to increase even further, leading to higher costs for consumers. Retransmission fees have skyrocketed from $28 million in 2005 to $6.3 billion in 2015, a *22,400%* increase in ten years.[55] In July 2015, SNL Kagan reported that "retransmission consent fees are expected to climb to $10.3 billion in 2021, up from $6.3 billion in 2015."[56] Indeed, as one broadcaster indicates, "[p]rices paid for retransmission of local signals have yet to even approach equilibrium based on viewership ratings. In the current market, the price paid for retransmission of local television stations affiliated with [the Big Four networks] *should* be rising."[57] Under the circumstances, it is patently disingenuous for

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[54] *Id.*

[55] *See* "Tegna Broadcasting Blocks Out Millions: TV Takedown Affects 38 Markets for DISH Network Customers," American Television Alliance (Oct. 10, 2015), *available at*: http://www.americantelevisionalliance.org/tegna-broadcasting-blacks-out-millions/.

[56] Mike Farrell, "Kagan: Retrans Fees to Rise to $10.3B by 2021: Average Retrans Rate to Climb to $1.53 Per Subscriber/Month," Multichannel News (July 7, 2015), *available at*: http://www.multichannel.com/news/policy/kagan-retrans-fees-rise-103b-2021/391971.

[57] Comments of Hearst Television Inc., MB Docket No. 15-216 (filed Dec. 1, 2015), at 3.

broadcasters to argue that MVPDs could simply do without broadcast programming in today's marketplace.

IV. BROADCASTERS' COMPLAINTS REGARDING CONCENTRATION IN THE MVPD MARKET IGNORE THE PARTICIPATION AND CONCERNS OF SMALLER PROVIDERS AND NEW ENTRANTS IN RETRANSMISSION CONSENT NEGOTIATIONS

While the broadcasters themselves willingly acknowledge that the video distribution marketplace has changed, their concern over the "massive consolidation" of "mega" MVPDs with "growing financial and negotiating leverage" ignores competitive entry by smaller and new entrant MVPDs.[58] For these competitive providers, video and broadband competition is inextricably linked and the ability to upgrade and deploy new networks is being hindered by ever-increasing video programming pricing, especially broadcast retransmission consent fees.

Broadcasters' disproportionate emphasis on large, incumbent MVPDs willfully overlooks the concerns expressed by smaller and new entrant MVPDs who find themselves subject to discriminatory pricing and coercive negotiation practices.[59] While large incumbents serve a substantial percentage of viewers locally, regionally, and nationally, the Commission should not make the broadcasters' mistake of ignoring the smaller MVPDs and new entrants' frustration with the current retransmission consent regime and good faith negotiation process.

Given the focus of the broadcasters' comments on larger video providers, it is clear that small providers and competitive networks are not viewed as "must-have" distribution platforms

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[58] Comments of Broadcast Affiliates Association, MB Docket No. 15-216 (filed Dec. 1, 2015) ("Broadcast Affiliates Comments"), at 2.

[59] *See, e.g.,* Comments of Clark Mather, MB Docket No. 15-216 (filed Dec. 1, 2015) (filed on behalf of Tacoma Public Utilities' Click! Network), at 2 (stating that the network believes it was initially offered rates by the broadcaster that "were much higher than rates charged to its larger competitors in the same market").

for video retransmission.[60] While retransmission consent negotiations between network-backed broadcasters and large MVPDs might be acrimonious street fights over pricing among evenly-matched, well-heeled behemoths, small MVPDs and new entrants typically have terms dictated to them with little to no explanation or justification. Indeed, many of these "negotiations" are over before they get started, as small MVPDs and new entrants are compelled to agree to terms with broadcasters so as to avoid an impasse or signal disruption that could cripple their businesses. With the increase in retail competition at the local and national level, broadcasters take advantage of the limited size and virtually nonexistent bargaining leverage of small providers to squeeze exorbitant retransmission consent fees for "must-have" programming out of the very providers that can least afford to pay.

This discriminatory pricing affects many of the networks and companies supported by the joint commenters. INCOMPAS, ITTA, and NTCA all advocate on behalf of companies that are providing linear video service, often at a loss, as part of a broadband service bundle. While video services remain vital to the deployment and adoption of broadband services, video programming prices and negotiation practices make it particularly difficult for small MVPDs and new entrants to offer content in competitive retail packages that reflect what their subscribers want and can afford. Other companies have been forced to outsource or forfeit their video service to more established video providers after being confronted with retransmission consent

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[60] *See, e.g.,* NAB Comments at 20, 50 (claiming with respect to Time Warner Cable's negotiating leverage that "[b]roadcasters simply cannot afford not to be on a pay TV provider to which such large percentages of viewers subscribe" and noting that "broadcasters simply cannot afford to walk away from the massive audiences that MVPDs reach — a dynamic that is only becoming more pronounced as the MVPD marketplace continues to consolidate.").

terms from broadcasters for which it was impossible to make a business case.[61] In some cases, it appears that the broadcasters are at least partly responsible for the very market concentration that they decry in their comments.[62]

Far from being the provision of "corporate welfare,"[63] retransmission consent reform is vital to ensuring the future of competition that benefits consumers in both the video and broadband markets. Obtaining programming rights is essential to offering linear video service and, contrary to broadcaster arguments, the retransmission consent marketplace is broken. Price discrimination and current negotiation practices have made it increasingly difficult for small MVPDs and new entrants to offer a viable alternative to incumbent MPVDs. Through this proceeding, the Commission should take appropriate steps to reign in anticompetitive negotiating tactics and the rising costs of programming, thus giving smaller MVPDs and new entrants the opportunity to compete more effectively in the video services market.

V. CLARIFYING THE GOOD FAITH STANDARD WOULD HELP CONSUMERS WHILE PROMOTING COMPETITION AND OTHER IMPORTANT POLICY GOALS

Broadcasters claim that the totality of the circumstances test is working as intended,[64] that there is no need to provide more specificity as to the types of bargaining behavior that constitute

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[61] *See* NTCA and INCOMPAS' 2015 Video Competition Survey, Oct. 2015, *available at*: www.incompas.org/files/The%20RuralBroadbandAssociationandINCOMPAS2015VideoCompetitionSurvey.pdf, at 2. A total of 226 companies participated in the survey. Survey results can be estimated to be accurate within +/-6% at the 95% confidence level. According to the survey, 12% of video service providers have ceased offering video service in a market where they previously offered service.

[62] NAB Comments at 18 ("Many of these locally, regionally and nationally consolidated pay TV providers, moreover, dwarf broadcast television broadcasters in scale and scope.").

[63] *Id*. at 22.

[64] *See, e.g.*, Broadcast Affiliates Comments at 10-12, 15-16; CBS Comments at 1; Nexstar Comments at 2.

bad faith,[65] and that adopting the proposals in the *NPRM* would not be helpful to consumers.[66] Contrary to broadcaster arguments, the record is replete with evidence that the current retransmission consent regime is broken. Clarifying the good faith standard as proposed by MVPDs and the public interest community would help cure many of the defects in the current rules, thereby providing a number of tangible public interest benefits.

The record clearly shows that bad faith behavior by broadcasters during retransmission consent negotiations leads to breakdowns in negotiations and causes harm to consumers through increased prices and blackouts, and decreased competition and investment. For instance, broadcasters routinely engage in program tying by conditioning retransmission consent upon carriage of other programming.[67] One common scenario occurs when a broadcaster bundles retransmission consent with a regional sports network or a popular cable network. Such bundling increases the broadcaster's leverage considerably. In the event of a blackout, the MVPD would lose two sets of "must-have" programming, not just one. Another common scenario occurs when a broadcaster ties undesirable or less popular programming to retransmission consent. Both situations lead to higher costs for consumers and require MVPDs to make programming decisions based on broadcaster demands rather than business plans or consumer preferences.

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[65] *See, e.g.*, Broadcast Affiliates Comments at 13-15; Nexstar Comments at 2-3, 16-18.

[66] *See, e.g.*, NAB Comments at 50-57; CBS Comments at 8; Comments of Media General, Inc., MB Docket No. 15-216 (filed Dec. 1, 2015), at 14-15.

[67] *See, e.g.,* Comments of the American Television Alliance, MB Docket No. 15-216 (filed Dec. 1, 2015) ("ATVA Comments"), at 24-27; Comments of INCOMPAS, MB Docket No. 15-216 (filed Dec. 1, 2015) ("INCOMPAS Comments"), at 12-14; Comments of Public Knowledge and the Open Technology Institute at New America, MB Docket No. 15-216 (filed Dec. 1, 2015) ("Public Knowledge Comments"), at 11-12; ITTA Comments at 11; NTCA Comments at 7-8. Public Knowledge argues that tying is primarily anticompetitive in the context of unbalanced negotiating positions (*e.g.,* large programmers and smaller MVPDs) and that the Commission's *per se* rules should reflect this.).

Broadcasters also regularly insist on contract expiration dates, or threaten to withhold a station's signal, in the time period just prior to the airing of a "marquee" sports or entertainment event.[68] This behavior puts consumers at risk of losing access to key programming, such as the Super Bowl, the World Series, and the Academy Awards. It also distorts the retransmission consent marketplace by enabling broadcasters to engage in price gouging in anticipation of upcoming "must-have" programming.

Forced bundling and manipulating the timing of retransmission consent agreements to coincide with marquee events are just two examples of anti-consumer and anti-competitive broadcaster negotiating tactics that are being experienced by MVPDs today. As the comments in this proceeding demonstrate, broadcasters exercise their bargaining leverage to employ a variety of other dubious strategies to extract higher fees at the expense of MVPDs and their customers.

Clarifying the good faith standard by identifying additional specific types of broadcaster conduct that are so egregious as to constitute *per se* bad faith would send a clear signal that such behavior will not be tolerated and would serve as a powerful deterrent to keep broadcasters from engaging in such behavior during retransmission consent negotiations.[69]

Furthermore, an approach that clearly delineates the types of broadcaster behavior that constitute *per se* bad faith would be consistent with Congress's direction to the FCC "to provide additional specific guidance as to actions that… evidence bad faith" to "help provide more certainty to the parties to a negotiation and ultimately give consumers greater faith in the

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[68] *See, e.g.,* ATVA Comments at 27-28; INCOMPAS Comments at 15-16; Public Knowledge Comments at 12; ITTA Comments at 11; NTCA Comments at 9.

[69] *NPRM* at ¶ 11. Should the Commission for some reason decline to conclude that the broadcaster conduct identified in the *NPRM* constitutes a *per se* violation of the duty to negotiate in good faith, the Commission should alternatively identify this behavior as "sufficiently outrageous" or inconsistent with competitive marketplace considerations so as to violate the duty to bargain in good faith under the totality of the circumstances test.

retransmission consent process."[70] The fact that the Commission is seeking comment on potential updates to the totality of the circumstances test does not preclude it from concluding that certain practices or conduct constitute a *per se* breach of the duty to negotiate in good faith.[71] As discussed above, the Commission has ample legal authority to adopt the changes suggested in the *NPRM* pursuant to STELAR and other provisions of the Communications Act.

Broadcasters would have the Commission believe that the flexibility of the totality of the circumstances test has allowed it to function effectively with little regulatory burden on the Commission, affected parties, and consumers.[72] Broadcasters further suggest that this flexibility has facilitated tens of thousands of agreements without government interference and, therefore, specifying additional bad faith negotiating practices would be affirmatively unhelpful.[73]

To the contrary, clarifying the kinds of broadcaster behavior that are considered *per se* bad faith is far more preferable than the case-by-case analysis required by the totality of the circumstances test. Indeed, an approach that clearly sets forth the types of broadcaster behavior that constitute *per se* bad faith would be more consistent with the Commission's preference for a limited role in retransmission consent negotiations, and would not entail micromanaging retransmission consent negotiations as broadcasters contend.[74] Establishing clear expectations as to the types of conduct that are not permissible during retransmission consent discussions obviates the need for the Commission to conduct a case-by-analysis based on the unique circumstances of particular negotiations.

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[70] Senate Commerce Committee Report at 13.

[71] *See NPRM* at FN 34.

[72] *See, e.g.*, Broadcast Affiliates Comments at 10-11; Nexstar Comments at 16, 33-34.

[73] *See, e.g.*, Broadcast Affiliates Comments at 12-15; NAB Comments at 50-52; CBS Comments at 8-10; Nexstar Comments at 3-4.

[74] *See, e.g.*, Broadcast Affiliates Comments at 21, 30-31; NAB Comments at 45-48.

Moreover, the reason there have been so few retransmission consent complaints filed at the Commission is not because the good faith rules have been so effective, as broadcasters claim.[75] Rather, the lack of complaints is more accurately attributable to the fact that the Commission's retransmission consent complaint process is so time consuming and costly. Because of the time and resources involved in litigating a retransmission consent complaint, many MVPDS, particularly smaller and new entrant MVPDs, do not view the complaint process as a meaningful avenue for relief.[76] In the majority of cases, any relief to which MVPDs may be entitled at the end of the complaint process would come too late to be helpful or effective. By the time the Commission could act, the damage in terms of subscriber losses, decreased market share, and other harms would already be done.

Thus, any case-by-case analysis of whether retransmission consent negotiations violate the good faith standard effectively leaves most MVPDs with no practical remedy to ensure that they have reasonable access to programming they must carry to compete. Based on the foregoing considerations, the Commission should clarify the good faith standard as advocated by MVPDs and the public interest community by expanding on the types of broadcaster conduct and negotiation practices that constitute *per se* bad faith.

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[75] *See, e.g.*, Broadcast Affiliates Comments at 11-12; CBS Comments at 8-10; Nexstar Comments at 3-4.

[76] The delay and expense associated with bringing a retransmission consent complaint are especially problematic for smaller and new entrant MVPDs. This process, which is inefficient even for large, well-financed MVPDs, is virtually unusable for smaller and new entrant MVPDs who cannot devote the substantial time and resources required to pursue such relief. For such providers, the time and financial burden involved in bringing a retransmission consent complaint to remedy the immediate harm from lack of access to programming make pursuing such relief infeasible.

VI. THE COMMISSION'S REFORM EFFORTS SHOULD INCLUDE INCREASED TRANSPARENCY REQUIREMENTS

In addition to providing more guidance on the types of behaviors that constitute a failure to negotiate in good faith, the Commission should take all possible steps to increase the level of transparency in retransmission consent negotiations. To the extent "the marketplace" is cited as playing an effective role in governance, that "marketplace" is meaningless if no one can perceive the prices and other terms and conditions at which items are offered or sold. Currently, the good faith negotiation standard does not require broadcasters to share information, justify their explanation for rejecting offer terms, or substantiate reasons for their negotiating positions.[77] Despite broadcasters' claims that to require them to do otherwise would "slow down and complicate retrans negotiations,"[78] requiring greater transparency, particularly with regard to pricing, "will help bridge the differences in the parties' negotiation positions" and would help prevent impasses and service interruptions.[79]

Under the current retransmission consent regime, the lack of transparency has made it virtually impossible for MVPDs to negotiate an agreement with a full understanding of the market or whether the terms being presented to them by broadcasters are consistent with competitive marketplace considerations. This shortcoming of the current process is reflected in the record of this proceeding. In calling for more "public visibility" into the negotiation process, Cox Communications points out that the "lack of a clear understanding of the broader signal carriage marketplace" is "one source of friction in negotiations."[80] Similarly, Mediacom Communications notes that the "lack of transparency" in retransmission consent has frustrated

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[77] *Good Faith Order* at ¶ 44.

[78] Broadcast Affiliates Comments at 36.

[79] NTCA Comments at 12.

[80] Comments of Cox Communications, MB Docket No. 15-216 (filed Dec. 1, 2015), at 6.

Congress's public policy objectives for the good faith negotiation requirement and makes it less likely that negotiations are "conducted in an atmosphere of 'honesty, purpose and clarity of process.'"[81]

The record further indicates that broadcasters are likely to employ a "take it or leave it" approach to negotiations.[82] This frustrates the retransmission consent process for smaller providers and new entrants who do not have the bargaining leverage to secure competitive terms for video programming and signal carriage. As a consequence, the market has seen an increase in price discrimination between large incumbent MVPDs, who are able to secure volume discounts, and new entrants and smaller MVPDs who end up being disadvantaged by having to pay significantly more for video programming. Affording MVPDs and regulators access to retransmission consent rates, including base rates and volume discounts, during the retransmission consent process would allow smaller providers and new entrants greater ability to assess broadcasters' price offerings and would result in a fairer, more even-handed negotiation process.

To that end, the Commission should, at a minimum, require broadcasters to disclose the base rate that a broadcaster will charge an MVPD prior to any volume discounts. Additionally, the Commission must, at a minimum, require broadcasters to make a schedule of volume discounts available to MVPDs and regulators with legitimate economic justifications for providing different discounts to different MVPDs. Substantiating these bargaining positions in advance will serve the public interest by making it more likely that parties will be able to reach

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[81] Comments of Mediacom Communications Corp., MB Docket No. 15-216 (filed Dec. 1, 2015), at 5 (quoting *Good Faith Order* at ¶ 24).

[82] *See* NTCA Comments at 5; *see also* Comments of WTA – Advocates for Rural Broadband, MB Docket No. 15-216 (filed Dec. 1, 2016), at 11.

an agreement on the issue that currently leads to the most negotiation impasses – price – and avoid actual or threatened service disruptions.

Although the Commission declined to mandate information sharing in the *Good Faith Order*, the entry of new entrant MVPDs with no bargaining leverage with the resulting disputes over "take it or leave it" pricing should persuade the Commission to reconsider its decision on transactional transparency in its good faith negotiation framework. As noted by ITTA and NTCA in separate comments, the Commission should revisit established labor law precedent governing collective bargaining in its application of the good faith negotiation requirement.[83]

In 2012, the D.C. Circuit reaffirmed an information exchange requirement applicable to both parties as to claims made in the bargaining process, making it 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 negotiation."[84] The Commission considered this requirement in the *Good Faith Order*, but dismissed it because, *at the time*, a "mutuality of obligations under Section 325(b)(3)(C)" did not exist for MVPDs.[85] However, a reciprocal obligation to negotiate in good faith was imposed by Congress on MVPDs in 2004. Because a reciprocal statutory obligation to negotiate in good faith now exists, and given the marketplace conditions that have dramatically changed in the interim, the Commission can and should use this proceeding to mandate that broadcasters substantiate retransmission consent claims and demands as part of their duty to negotiate in good faith.

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[83] ITTA Comments at 14; NTCA Comments at 14-15.

[84] ITTA Comments at 15 (citing *KLB Industries, Inc. v. NLRB*, 700 F.3d 551, 555) (D.C. Cir. 2012)).

[85] *Good Faith Order* at FN 100 ("We do not believe it would be desirable to attempt to replicate such a [information exchange] requirement here . . . Because there is no mutuality of obligations under Section 325(b)(3)(C), the marketplace negotiation contemplated in SHVIA would be negated by a one-sided information disclosure requirement.").

The Commission should also conduct a careful examination of non-disclosure provisions (particularly provisions that prevent a negotiating entity from disclosing rates, terms, and conditions of a contract proposal to the Commission or a court of competent jurisdiction in connection with a retransmission consent complaint) and "most favored nation" clauses. These provisions have a significant potential to frustrate enforcement mechanisms and restrict new entry into the video distribution marketplace. Adoption of this comprehensive approach will promote transparency, encourage agreement, and enhance the efficient functioning of the competitive video distribution marketplace.

VII. CONCLUSION

For the reasons outlined above, the Networks for Competition and Choice Coalition and the Open Technology Institute at New America encourage the Commission to reform the retransmission consent regime and clarify the good faith negotiation standard to promote consumer welfare and network choice.

Respectfully submitted,

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