Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

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SUMMARY

Local broadcasters, often so quick to claim credit for public service, increasingly fail the majority of their viewers who happen to watch them over cable, satellite, or IPTV. They have blacked out their signals almost 200 times so far this year, up from only eight times five years ago. They have raised rates unsustainably. And they have otherwise behaved in a manner inconsistent both with a functioning market and with the public interest mantle they claim for themselves. As more online distributors enter the market, this will only get worse. Fortunately, this proceeding—in which Congress directed the Commission to "commence a rulemaking" and to examine the "substantive proposals" occurring in retransmission consent negotiations—gives the Commission the opportunity to act. Below, the American Television Alliance proposes general and specific changes to the relevant test and describes the Commission's ample authority to make such changes.

I. THE EXISTING GOOD FAITH RULES NO LONGER PROTECT THE PUBLIC FROM HARM.

Broadcasters claim a special, privileged place in the nation's communications landscape. They do so because they believe—and would like the public to believe—that they provide a critical, local service that cannot be duplicated by other means. This is how they describe themselves: "We turn to local TV . . . stations to follow the inspiring events that have shaped our nation . . . and to mourn together when tragedy befalls our communities, governments and leaders . . . That is the public good we provide . . . that is our mission . . . and at the heart of what we do every day."

Broadcast regulation largely reflects this worldview. It provides broadcasters extraordinary privileges—from free spectrum to special exclusivity protections to mandatory carriage—all in the name of furthering the broadcasters' public interest mission. And yet in

return, broadcasters conduct retransmission consent negotiations in a way that increasingly furthers their own interest at the expense of the public interest.

Blackouts. In 2010, just five years ago, there were only eight blackouts. In the first ten months of this year alone, broadcasters have blacked out their programming nearly *200 times*. By our count, blackouts affected more than 13 percent of MVPD subscribers this year—or one out of every eight subscribers. This represents almost 200 times in which viewers lost programming they want and expect. It represents almost 200 times in which broadcasters pressured viewers to switch from the MVPD of their choice. And it represents almost 200 times that broadcasters failed in their public interest obligations to the large majority of viewers who happen to receive their signals through MVPDs. This figure, of course, does not count the many more instances of *threatened* blackouts. Economics tells us that breakdowns in television negotiations should be exceedingly rare. Common sense should tell us that nearly 200 such breakdowns means something has gone very wrong.

Price increases. Broadcasters have increased total retransmission consent fees more than *22,000* percent since 2005, according to publicly available data. They have increased fees 40 percent per year over the last three years, compared to 5 percent annual increases for cable and satellite video services. And practically everybody expects rates to continue to increase. SNL Kagan, for example, predicts that retransmission consent fees will total more than $10 billion in 2020—an estimate that assumes, perhaps incorrectly, that growth rates will decline significantly during that time.

Broadcaster conduct. Broadcasters employ a variety of negotiating tactics inconsistent with a functioning marketplace. They black out their websites during retransmission consent disputes. They require MVPDs to purchase unwanted programming—sometimes even "programming to be named later"—as a condition of retransmission consent. They engineer blackouts immediately prior to "marquee events" such as the NFL playoffs. They cede negotiating rights to others, artificially increasing their already formidable market power. They seek to limit the equipment and technology deployed by MVPDs to provide subscribers services they are legally entitled to enjoy. They refuse to allow MVPDs to provide subscribers a modicum of relief from blackouts with out-of-market signals. They seek to charge for subscribers who receive their signals over the air. And they engage in a variety of other harmful conduct.

All of this ought to lead the Commission to act, for at least two reasons. First, circumstances have deteriorated markedly since the last time the Commission examined the issue. Things will only get worse as online distributors enter the retransmission consent market, as such entry will give the broadcasters even more leverage in negotiations.

Second, and more fundamentally, broadcasters cannot have it both ways. They can claim—and many do—that they are merely distributors of content "like any other." They can even claim the right to withhold their content as they please regardless of the consequences. They cannot, however, then simultaneously claim special privileges as servants of the public good. If the Commission is to honor the broadcasters' assertion that they perform a public interest mission, then the rules governing broadcasters' distribution above all ought to ensure that signals remain available to all Americans without the fear of disruption.

Broadcasters can, of course, always choose to free themselves of these responsibilities. They could, for example, stop broadcasting and offer their programming as cable networks. The upcoming incentive auction gives them the perfect opportunity to do so. For so long as they wish to remain broadcasters, however, they cannot complain when policy-makers seek to protect the public from their worst excesses.

II. THE COMMISSION SHOULD MODIFY ITS GOOD FAITH RULES.

In directing the Commission to institute this proceeding, Congress recognized that the time has come to act. ATVA, in turn, appreciates the Commission's efforts to move forward on issues that matter to the American viewer. The Commission should improve the rules governing retransmission consent as follows:

General Changes. The Commission should make two general changes to its totality of the circumstances test.

1. The Commission should explicitly consider the public interest—not just the interests of the parties—in making good faith determinations.
2. The Commission should more actively consider labor law precedent, which has grappled with the challenge of requiring negotiation in good faith for decades (and from which the Commission "derived" the good faith rules in the first place). For example, labor law prohibits an employer from changing terms and conditions of employment after a collective bargaining agreement has expired if the employer has not bargained to "impasse"—defined as circumstances in which *both parties* are no longer open to compromise. If, instead of engaging in good faith bargaining, an employer "runs out the clock" in order to pursue unilateral action when the contract expires, this violates the good faith bargaining requirement of the labor laws. These doctrines illuminate the all-too-common circumstance in which a broadcaster imposes a blackout despite an MVPD offer to continue negotiating and true-up fees upon reaching agreement. In ATVA's

view, a blackout in such circumstances constitutes powerful evidence that the broadcaster has been attempting to "run out the clock" all along.

Specific Conduct. The Commission should also find that seven specific sets of conduct constitute *per se* violations of the Commission's rules—or, at the very least, presumptively violate the totality of the circumstances test.

1. The Commission should prohibit online blocking.
2. The Commission should prohibit forced bundling. Here again, labor law is instructive. It prohibits one party from insisting on bargaining about "non-mandatory subjects" (that is, subjects other than the "terms and conditions of employment" for which good faith bargaining is statutorily required). Under this doctrine, a broadcaster could negotiate about bundling with an MVPD's consent, but could not insist on such bargaining.
3. The Commission should restrict blackouts prior to marquee events.
4. The Commission should restrict broadcasters from ceding negotiation rights to others
5. The Commission should prohibit broadcasters from insisting on equipment or technology restrictions.
6. The Commission should prohibit broadcasters from restricting out-of-market signals during retransmission consent disputes.
7. The Commission should prohibit broadcasters from charging for subscribers that receive signals other than from the MVPD.

III. THE COMMISSION HAS LEGAL AUTHORITY TO MODIFY ITS GOOD FAITH RULES.

The Commission has ample legal authority to adopt ATVA's suggestions. First, STELAR itself gives the Commission new, specific authority to delineate practices that presumptively fail the totality of the circumstances test. One can assume—and courts have recognized—that if Congress asked the Commission to "commence a rulemaking," it intended to empower the Commission to actually make rules. Moreover, Congress specifically worried that "negotiations for retransmission consent have become significantly more complex in recent years, and in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts." It thus expected the Commission to consider "whether certain *substantive* terms offered by a party may increase the likelihood of negotiations breaking down." To the extent that the Commission believed that it lacked authority to examine such "substantive terms" before, Congress has just specifically given it this authority.

STELAR's specific mandates come against a backdrop of the Commission's longstanding authority and duty to regulate retransmission consent negotiations. Section 325 of the Communications Act requires the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent," and to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier." This, properly understood, has always given the Commission the duty—not simply the authority—to address retransmission consent abuse.

Beyond the two sets of specific authority described above lies a broader, structural source of authority—one that reflects the view that broadcasting plays a special role in serving the public interest. This structure both presupposes and specifically provides for meaningful oversight in order to ensure that the public actually receives these benefits.

* * *

The retransmission consent regime has become dysfunctional. ATVA has proposed solutions to help fix it by making the totality of the circumstances test more efficient and effective. And the Commission has authority to adopt those solutions. Accordingly, the Commission should act expeditiously to implement ATVA's proposals—before blackouts deprive millions more Americans of access to programming they expect and deserve to watch.

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COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

The American Television Alliance ("ATVA")[1] comments on the Commission's proposal to reexamine the "totality of the circumstances" test in its retransmission consent good faith negotiation rules.[2] In these comments, ATVA will show that:

1. While broadcasters claim to be stewards of the public interest, their recent conduct demonstrates that today's good faith rules no longer suffice to protect the public from harm.
2. The Commission should reconsider how it implements its totality of the circumstances test generally. It should also add to its list of specific practices that at least presumptively fail the good faith standard.

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1 ATVA seeks to be a voice for the television viewer. Its members include large and small multichannel video programming distributors, cable programmers, and trade associations. ATVA members bring varied perspectives to a number of issues facing the Commission. They all agree, however, that abuse of the retransmission consent system harms consumers. A list of ATVA members can be found in Appendix A, attached.

2 *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking ("*Notice*"), 30 FCC Rcd 10,327 (rel. 2015).

3. Making such changes falls squarely within the Commission's legal authority.

I. THE EXISTING GOOD FAITH RULES NO LONGER PROTECT THE PUBLIC FROM HARM.

Broadcasters claim that they provide a unique, local service worthy of special consideration and protection. Broadcast regulation largely reflects this claim. Yet broadcasters increasingly act in a manner at odds with their claimed public interest status. No fair observer looking at the current retransmission consent landscape could say that the rules as they exist today protect the public.

A. Broadcast Regulation Reflects The View Broadcasters As Agents Charged With Serving The Public Interest.

Broadcasters claim a special, privileged place in the nation's communications landscape. They do so because they believe—and would like the public to believe—that they provide a critical, local service that cannot be duplicated by other means. The President and CEO of the National Association of Broadcasters ("NAB"), Gordon Smith, recently put it this way:

> We turn to local TV and radio stations to follow the inspiring events that have shaped our nation . . . and to mourn together when tragedy befalls our communities, governments and leaders. We are here to be the public's eyes and ears . . . to lead them out of darkness during times of crisis . . . to share profound moments . . . and to connect to our family, friends and neighbors. We are here to be the voices against oppression . . . and we are here to be the megaphones for freedom and democracy. We are always here for our communities . . . anywhere they are, and always available for free. That is the public good we provide . . . that is our mission . . . and at the heart of what we do every day.[3]

In their own eyes, what broadcasters "do every day" is serve the "public good."

[3] Gordon Smith, Keynote Speech at the NAB Show (Apr. 7 2014), *available at* http://www.nab.org/documents/newsroom/pressRelease.asp?id=3384.

Broadcasters make such claims most emphatically when taking credit for providing service during emergencies.[4] NAB's Mr. Smith, for example, told the Senate that local broadcast stations "kept residents safe"[5] in emergencies. "[W]hen there was no cable, no satellite, no broadband, no cell or phone service," he continued, "broadcasters were there to provide a lifeline to their communities."[6] He concluded: "So I ask you, isn't this a public good? Isn't this a role that should be supported? Because if broadcasters are not there to serve this role, who will?"[7]

Of course, many services—cable, satellite, broadband, and wireless services among them—play their own roles in public safety. Yet the view of local broadcasting as special and worthy of protection persists. This view, moreover, forms the underpinning of the entire "system of free, universally available, local broadcasting" that Congress has described as "central to the scheme created by the 1934 Act."[8]

To take the most obvious example, broadcasters received billions of dollars' worth of free spectrum in exchange for their public service. Broadcasters will tell you this themselves—as they did, for example, when they attempted to defend their spectrum from the prospects of an incentive auction: "Those who would assign arbitrary financial value to a reallocation . . . are asking policymakers to ignore the significant public interest value that free, over-the-air

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4 *See, e.g.*, Comments of Joint Broadcasters, MB Docket No. 10-71 at 4 (filed June 26, 2014) ("In case after case, local television journalists provide life-saving information about weather emergencies and other crises, including season-after-season coverage of hurricanes, tornadoes, flooding, snow storms, and wildfires.").

5 Press Release, "Testimony of NAB President and CEO Gordon Smith on 'State of Video'" (May 14, 2013), *available at* https://www.nab.org/documents/newsroom/pressRelease.asp?id=2956.

6 *Id.*

7 *Id.*

8 S. Rep. 102-92 (1991), at 55-56, *reprinted in* 1992 U.S.C.C.A.N. at 1188-89; *see also* H.R. Conf. Rep. 102-862, at 57, 1992 U.S.C.C.A.N. at 1239.

broadcast service provides."[9] Because of the "unique" public interest benefits provided by broadcasters, they argued, "[i]n the broadcasting context, the 'total value' is not a strict financial measure, but rather is one that encompasses the broader public policy objectives such as universal service, local journalism and public safety."[10]

Broadcasters also benefit from a number of regulatory advantages that can only be explained by a view that broadcasting inherently serves the public interest. These include the following:

- Retransmission consent itself, which is a unique, inalienable quasi-copyright in the broadcast signal.[11]

- Must-carry/carry-one, carry-all, which requires cable and satellite carriers to carry even unwanted broadcast programming, regardless of whether they believe their subscribers would value it.[12]

- Special copyright protections specific to broadcasters, including the ability to step into the shoes of upstream copyright holders and enhanced damages for violations.[13]

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9 Testimony of Gordon Smith, President and CEO of NAB, before the House Subcommittee on Communications, Technology, and the Internet at 4 (Dec. 15, 2009), *available at* https://wayback.archive-it.org/4949/20141224015309/http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Smith-CTI-HR-3125-Radio-Spectrum-HR-3019-Spectrum-Relocation-2009-12-15.pdf

10 *Id.*

11 47 U.S.C. § 325(b). The legal rights given by retransmission consent (with respect to the broadcast signal) are distinct from those given by copyright law (with respect to the works contained within that signal). *See* 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of Title 17 or as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers."). See also S. Rep. 102-92 (1991), 1992 U.S.C.C.A.N. 1133, 1169 ("The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal.").

12 47 U.S.C. §§ 534-35, 338.

13 17 U.S.C. § 501(c)-(d); *id.* § 119(a)(6).

- Requirements that cable and satellite operators not "materially degrade" broadcast signals, regardless of the parties' desire to negotiate about signal-quality issues.[14]

- Requirements that cable and satellite providers give special, preferential treatment for broadcasters in channel placement.[15]

- A requirement that cable subscribers purchase all local broadcast stations as a condition of purchasing any other cable service.[16]

- A requirement that satellite providers use a single receive dish to provide all local service to a customer, even if it would be more efficient or otherwise preferable to do so using two dishes.[17]

- The ability to have the Commission enforce certain exclusivity arrangements negotiated with networks and syndicators, rather than having to seek redress in court. This is a right that, as far as ATVA is aware, no other content distributor anywhere has.[18]

- A requirement that cable operators notify their subscribers before changing the channel placement of local broadcast stations.[19]

- Statutory copyright licenses granting broadcasters the ability to distribute programming, and (in conjunction with retransmission consent) to be paid for such programming, without obtaining the right to sublicense copyrighted works contained therein.[20]

Broadcast regulation, in other words, largely reflects the broadcasters' view of themselves by providing them with tremendous benefits.[21] It does so because Congress and the Commission,

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[14] 47 U.S.C. § 534(b)(3)(4)(A); *id.* § 338(j).

[15] 47 U.S.C. § 534(b)(3)(6); *id.* § 338(j); 47 C.F.R. § 76.66(i)(1) (containing "neighboring" requirement).

[16] 47 U.S.C. § 543(b)(7).

[17] 47 U.S.C. § 338(g).

[18] 47 C.F.R. §§ 76.92-95 (cable network non-duplication rule); *id*. § 76.122 (satellite network non-duplication rule); *id*. §§ 76.101-110 (cable syndicated exclusivity); *id*. §§ 76.123-125 (satellite syndicated exclusivity).

[19] 47 U.S.C. § 534(b)(9).

[20] 17 U.S.C. §§ 111 (cable), 119 (satellite), 122 (satellite).

[21] To be fair, regulation also imposes considerable corresponding obligations to help ensure that broadcasters serve the public interest. *See generally* Jean Benz, *et al.*, *Legal Guide to Broadcast Law and Regulation* (6th Ed. 2015).

over the years, have thought broadcasting deserving of special treatment.[22] But it is worth remembering that this regime is not supposed to be a one-way street. As the Supreme Court has repeatedly recognized, "[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."[23] Yet the broadcasters seem ever more interested in capitalizing on their advantages, even at the expense of the public interest.

B. Broadcasters Routinely Abuse Their Privileged Status In Retransmission Consent Negotiations.

While broadcasters think of themselves as serving the public interest, their behavior in retransmission consent negotiations tells a very different story. Broadcasters increasingly black out their signals. They have imposed what can only be described as unsustainable price increases. And they otherwise engage in negotiating behavior at odds with their claimed status as stewards of the public trust. They have, in other words, used their special privileges and rights as tools with which to harm the public.

1. Broadcasters Increasingly Black Out Their Signals.

In considering changes to its rules, the Commission must start with one inescapable fact: blackouts have increased more than twenty-fold in the last five years. Five years ago,

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[22] *See* Sec. III.C, below, for a more detailed discussion of the special status afforded broadcasters in statute and regulation.

[23] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506 (2009) (*quoting CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)). *See also* Steven Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities*, Federal Communications Commission, at 293-94 (July 2011) (available at: www.fcc.gov/infoneedsreport) ("The trade of public airwaves for public interest obligations was the 'social contract' between broadcasters and the public . . . . [T]he spectrum belongs to the public, and the public lent it to broadcasters. In that sense, taxpayers (through their governmental representatives) have every right to demand certain behavior—the quo that was supposed to be part of the original quid pro quo.").

broadcasters claimed that blackouts were not a serious problem.[24] They cannot make the same claim today. So far this year, broadcasters have engaged in almost two hundred blackouts, affecting over twelve million viewers nationwide by our count. Indeed, over thirteen percent of MVPD subscribers nationwide—more than one out of every eight—experienced at least one blackout at some point during the first ten months of this year.

Figure 1: Number of Blackouts Per Year[25]

Year	Incidences of Blackouts	Unique Subscribers Affected[26]
2010	8	3,162,156
2011	45	2,057,656
2012	93	14,029,838
2013	125	9,454,412
2014	107	9,731,596
2015	189 (and counting)	12,084,081

If this trend continues, consumers will face roughly 350 blackouts in the year 2020 (even assuming no blackouts during the last two months of this year).

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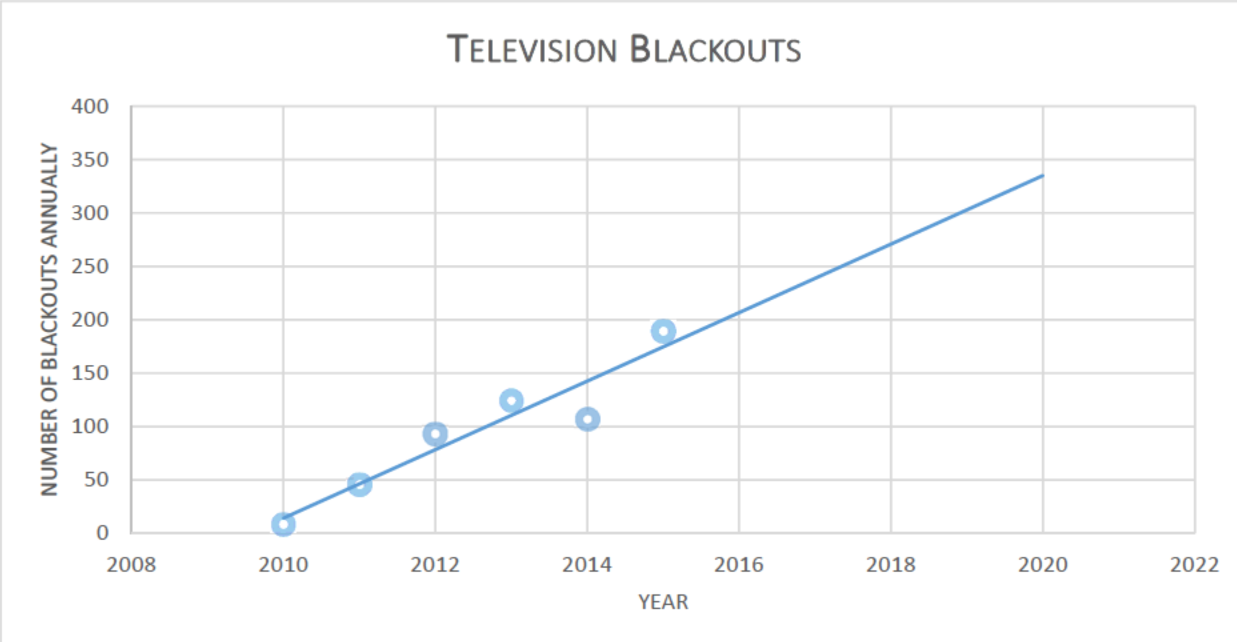
24 Opposition of the Broadcaster Associations, MB Docket No. 10-71, at vii (filed May 18, 2010) ("2010 Broadcaster Associations Opposition") ("In *tens of thousands* of retransmission consent negotiations, there have been few showdowns and even fewer shutdowns.") (emphasis in original).

25 ATVA derived these numbers using historical data gathered and maintained over time by various ATVA members and compiled on a "Blackout List" that ATVA has made available on its website for the last several years. *See* American Television Alliance, Blackout List 2010-2015, *available at* http://www.americantelevisionalliance.org/media-center/. In part to better compare disruptions caused by large and small station groups, this list treats each market in which a station blacks out its signal as a separate "blackout." Moreover, blackouts that continue from one year to another are counted for both years, as they disrupted viewers in both calendar years. The blackout totals described herein differ slightly from those reported by ATVA earlier this year. In providing prior information, it appears that ATVA had erroneously counted several compound markets (such as, for example, Medford-Klamath Falls, Oregon) as multiple markets rather than single markets. While the revisions do not change the trends reported by ATVA materially, we nonetheless apologize for the error.

26 ATVA's counsel compiled these estimates using SNL Kagan subscribership data for the providers and markets listed in the Blackout List described above. Because SNL Kagan only provides data for the top 14 cable providers, this figure significantly understates the actual number of subscribers affected by blackouts in a given year.

Figure 2: Blackout Trends[27]



Each such blackout represents an unexpected—perhaps even startling—failure of the marketplace. Generally speaking, when two parties are able to realize large gains from trade by reaching agreement, the value that they create provides a strong incentive to make a deal. These incentives are particularly powerful when transactions create a lot of value—that is, when the buyer's value of the product is high relative to the cost of supplying the buyer with the product.[28] Retransmission consent agreements create large value, both for the negotiating parties and for viewers. This is because the marginal cost of supplying the programming is virtually zero, while the value created from its exhibition is often large.[29] This provides broadcasters and MVPDs a

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27 *See* American Television Alliance, Blackout List 2010-2015, *available at* http://www.americantelevisionalliance.org/media-center/.

28 Kevin M. Murphy, *Economic Analysis of the Impact of the Proposed Comcast/NBCU Transaction on the Cost to MVPDs of Obtaining Access to NBCU Programming* ¶ 9 *et seq.* (June 21, 2010) ("Murphy Analysis"), *attached to* Comments of DIRECTV, Inc., MB Docket No. 10-56 (June 21, 2010).

29 *Id.*

strong incentive to reach agreement. It also suggests that, in a properly functioning market, blackouts should be exceedingly rare.

One reason that blackouts occur, despite the large gains from trade, is that the negotiating parties do not internalize all of the lost gains from trade—some of the loss is borne by consumers who lose access to programming. To the extent this programming is of immediate interest, such as news and sports, viewers cannot "make up" this harm. Some consumers attempt to mitigate this harm by switching MVPDs. But this in itself causes harm, as they are presumably switching from their chosen MVPD to an otherwise less preferable one. It can also lead at least some customers to invest in off-air antennas to receive broadcast signals—equipment that becomes redundant if and when retransmission consent is restored.[30]

In addition, this analysis considers only actual blackouts. They do not take into account the many more instances of threatened blackouts in which broadcasters "message" MVPD subscribers via crawls and social media, and by airing "news" stories about the possible blackout on their local newscasts. Even where blackouts do not occur, each instance of threatened blackouts causes its own harm: confusing and upsetting consumers and sometimes prompting them to abandon the MVPD of their choice.[31]

All of this harms consumers in another, perhaps more fundamental way. If indeed broadcasters serve the public interest, each blackout and threatened blackout represents a failure to fulfill broadcasters' public interest obligations to the large majority of their viewers who

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[30] As described immediately below, many subscribers cannot receive off-air signals.

[31] *See* Stephen Salop *et al.*, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, 4, *attached to* Reply Comments of Time Warner Cable, Inc., MB Docket No. 10-71 (filed June 3, 2010) ("*Salop Analysis*") ("This is because the anticipation of a blackout will lead some current subscribers to switch MVPDs and some potential new subscribers to choose a different MVPD. Broadcasters can exacerbate the effects of such public announcements by making the announcement further in advance and with greater publicity . . . .").

happen to watch them via cable, satellite, or Internet Protocol Television. If for no other reason, the Commission should act to ensure that broadcasters fulfill the obligations they have willingly and even eagerly undertaken.

Broadcasters cannot deny these numbers. They typically argue, however, either that the problem is not that serious for various reasons, or that MVPDs themselves cause the problem. As discussed below, however, these claims lack merit.

a. Broadcasters Are Not "Always On" for Many Viewers.

Broadcasters often claim that blackouts do not harm consumers because "[t]elevision station signals, of course, remain available to all consumers all the time, over the air and for *free*."[32] At one point, broadcasting advocates went so far as to say that they were "not aware of *any* consumer having lost all access to his or her favorite television programming or *any* vital emergency information as a result of a retransmission consent negotiation impasse."[33]

Yet even broadcasters must admit that their off-air signals fail to reach millions of Americans. After all, broadcasters and satellite carriers have fought since 1988 about the circumstances in which satellite carriers can offer distant signals to just such "unserved" households.[34] As organizations familiar with and partially responsible for this legislation, they cannot now claim that "all consumers" can receive off-air signals. Moreover, the tools provided by the NAB itself in connection with the digital transition showed not only that millions cannot

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32 2010 Broadcaster Associations Opposition at 8 (emphasis in original).

33 *Id.* (emphasis added); *see also, e.g.*, Comments of LIN Broadcasting, MB Docket No. 10-71 at 6 (filed June 26, 2014) ("2014 LIN Comments") (arguing that, "unlike other distributors, local broadcast stations make all of their programming available for free to any consumer who wants to receive it that way.").

34 17 U.S.C. § 119 (providing a statutory license for satellite delivery of distant signals to "unserved households").

receive off-air signals, but also that as many as 45 percent of those predicted to receive such signals by the legally prescribed test could not actually do so.[35] More recently, in response to a survey of small MVPDs, 40 percent of respondents stated that at least half of their customers could not receive off-air broadcast television signals. Many stated that 90 percent or more could not obtain such signals over-the-air.[36]

Of course, some viewers happen to live close enough to broadcast towers to receive off-air signals. Not all of those viewers, however, actually own antennas. Nor, for that matter, do they all own digital televisions or converters. (Some subscribers receive an MVPD's video service with analog televisions and video monitors, neither of which can receive off-air digital signals.) It takes time and costs money to purchase and install this equipment. With respect to the sort of automated, rotating, rooftop antennas that the Commission presumes off-air viewers would employ,[37] the expense and time involved can be considerable indeed.

b. Blackouts Are More Than The "Absence Of Agreement."

Broadcasters also claim that they never black out signals. Rather, they argue, retransmission consent agreements "simply, by their own terms, *expire*"—as if broadcasters have nothing to do with it.[38]

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[35] *See* Written Testimony of Robert Gabrielli, Senior Vice President, Program Operations, DIRECTV, Inc., Before the Senate Committee on Commerce, Science, and Transportation (Oct. 7, 2009), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=6c1bf04a-bbb5-4ced-8e80-737da650eba7 (describing discrepancies between NAB's "AntennaWeb" software and the Commission's Individual-Location Longley Rice predictive model).

[36] NTCA—The Rural Broadband Association and INCOMPAS, *2015 Video Competition Survey*, 2 (Sept., 2015) ("*2015 NTCA Video Competition Survey*"), *attached to* Letter from Jill Canfield to Marlene Dortch, MB Docket No. 15-216 (filed Oct. 29, 2015).

[37] *See* 47 C.F.R. § 73.686(e)(2)(iii)-(iv) (requiring rooftop antennas oriented to a particular digital signal being tested).

[38] 2010 Broadcaster Associations Opposition at 29 (emphasis in original).

This is wrong on two counts. First, the Communications Act prohibits MVPDs from retransmitting broadcast signals without the "consent" of the broadcaster.[39] Therefore, by definition, a blackout occurs when a broadcaster refuses to grant such consent.[40] This is what "retransmission consent" is. As a matter of law, *only* a broadcaster can cause a blackout.[41]

In practically every contested negotiation, moreover, the MVPD seeks to extend negotiations while continuing to operate under the expiring agreement, and almost invariably offers to "true up" any new, higher rates back to the original expiration date.[42] In practice, then, blackouts occur only when broadcasters affirmatively decide to cut off such negotiations over the objection of the MVPD. In those circumstances, broadcasters intentionally create harm to the public (effectively holding consumers hostage) in order to enhance their leverage, even though they are guaranteed to receive the higher rate for the period in question after the negotiation is complete. This fact says a great deal about the balance of power in retransmission consent

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[39] 47 U.S.C. § 325(b).

[40] MVPDs, of course, have no similar right to withhold *their* consent, as broadcasters can demand mandatory carriage on their systems.

[41] Unfortunately, this does not mean that broadcasters bear the blame from viewers for blackouts. To the contrary, because MVPDs have an ongoing financial relationship with their subscribers, subscribers tend to blame them for failing to deliver the programming subscribers expect. Most subscribers would not think to call a television station for blacking out a signal, and a television station would have no particular reason for listening if the subscriber did call.

[42] For example, in the recent blackout involving Tegna and DISH, DISH offered to extend negotiations and true up its rates. Tegna refused. *See* Todd Spangler, *Dish's Latest Blackout: Satcaster Loses TV Stations in 38 Markets in Fight With Tegna*, Variety, Oct. 10, 2015, *available at* http://variety.com/2015/tv/news/dish-tv-station-blackout-tegna-1201615294/ ("'With Dish willing to grant an extension and a retroactive true-up on rates, Tegna had nothing to lose and consumers had everything to gain by leaving the channels up,' Warren Schlichting, Dish senior VP of programming, said in a statement. 'Instead, Tegna chose to turn its back on its public interest obligations and use innocent consumers as bargaining chips.'"). *See also DISH Network, L.L.C. v. Sinclair Broadcast Group, Inc.*, Amended and Restated Verified Retransmission Complaint and Request for Injunctive Relief, MB Docket No. 12-1 at ii-iii, 8-9 (filed Aug. 24, 2015) ("DISH-Sinclair Amended Complaint") (alleging that Sinclair had blacked out its stations after refusing DISH's offer of a retroactive true-up).

negotiations and whether this market is functioning properly today. It also belies broadcaster claims that blackouts are merely things that happen without their involvement.

c. "Big" MVPDs Do Not "Manufacture" Blackouts.

Broadcasters also claim that most blackouts involve (and are caused by) a handful of larger MVPDs—DIRECTV, DISH, and Time Warner Cable among them.[43] More recently, broadcasters went even further, warning that these three companies and others would *deliberately* manufacture blackouts in order to influence this proceeding.[44]

These suggestions are as wrong in substance as they are regrettable in tone. To begin with, an examination of the record reveals that broadcasters have victimized the customers of MVPDs large and small alike.[45] Broadcasters have chosen some targets more often than others. This, however, should surprise no one. Those companies happen to represent a very lucrative

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43 Statement by Dennis Wharton, NAB (July 18, 2012) *available at* http://www.nab.org/documents/newsroom/pressRelease.asp?id=2778 (suggesting that most blackouts involved Time Warner Cable, DISH Network, and DIRECTV); 2014 LIN Comments at 12 ("For example, the Commission should ask why three MVPDs blacked out small their subscribers' [*sic*] access to local television programming so frequently in 2013. And the Commission should ask why those three large MVPDs so frequently blacked out the signals of very small broadcasters.").

44 *See* Letter from Erin Dozier to Marlene Dortch, MB Docket No. 10-71 (filed July 13, 2015) (arguing that "some in the pay TV industry appear to have developed a strategy of manufacturing retransmission consent disputes to spur the government to regulate more heavily in this arena," warning that "[t]he Commission should thus not be surprised by an uptick in pay TV-manufactured disputes as it launches its Section 103 proceeding" and arguing that "[t]he Commission should keep a close eye on this trend, as bad actors should not be rewarded with government assistance, especially when those actions come, yet again, at consumers' expense.").

45 *See, e.g.*, Comments of NTCA, MB Docket No. 10-71 at 6-7 (filed June 26, 2014) (discussing broadcaster harm to small MVPDs); Michael L. Katz *et al.*, *An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime*, 42-44 (Nov. 12, 2009) ("*Katz Analysis*"), *available at* http://97.74.209.146/downloads/analysis_consumer_harm.pdf, (listing service interruptions arising from impasse with various MVPDs); *2015 NTCA Video Competition Survey* at 1 ("New survey finds 95% of small MVPDs and new entrants into the video market struggle to obtain reasonably-priced programming, and 40% report retransmission consent fee price increases of more than 100% during the current contract cycle.").

source of potential retransmission consent revenue.[46] As for the notion that MVPDs might engineer blackouts in order to influence this proceeding, common sense suggests otherwise. Again, only *broadcasters* can withhold retransmission consent. Given the disproportionate harm caused to MVPDs and their subscribers by blackouts,[47] moreover, the notion that a rational MVPD would even consider the deliberate takedown of broadcast television in hopes of influencing this proceeding beggars belief. Broadcasters have presented no evidence of such unlikely behavior, and ATVA is aware of none.

2. Broadcasters Have Increased Retransmission Consent Rates Unsustainably.

Blackouts nearly all have one thing in common—they occur because a broadcaster wants considerably more money in a new retransmission consent agreement than it receives under an expiring agreement. In other words, in substantially every case, the dispute boils down to a broadcaster's demand for exorbitant rates versus an MVPD's efforts to prevent its subscribers from having to pay such rates.

While actual retransmission consent rates paid by MVPDs remain confidential,[48] others have reported on retransmission consent pricing.[49] According to this data, retransmission consent fees grew *22,400 percent* in ten years, increasing from the $28 million in 2005 cited by Chairman Wheeler in 2014 to $6.3 billion projected for 2015.[50] Even looking only at recent

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[46] Comcast, of course, also represents a lucrative potential source of revenue for broadcasters. It also, however, owns NBC along with numerous owned-and-operated NBC affiliates.

[47] *See Salop Analysis* at 27-33 (describing asymmetrical harm to MVPDs from blackouts).

[48] *See, e.g.*, *CBS Corp. v. F.C.C.*, 785 F.3d 699 (D.C. Cir. 2015) (resolving concerns by broadcasters about the disclosure of their programming carriage agreements).

[49] SNL Kagan, *Economics of Broadcast TV Revenue 2015 Edition*, 4 (July 2015) ("*2015 SNL Kagan Report*") (on file with authors).

[50] *Compare* Tom Wheeler, "Protecting Television Consumers By Protecting Competition," (Mar. 6, 2014) (noting that the cost of retransmission consent agreements has "skyrocketed from $28 million

years, the growth in retransmission consent fees is unsustainable. SNL Kagan reports nearly 40 percent growth each year between 2012 and 2014.[51] Reports from the field confirm SNL Kagan's estimates. According to a survey of small MVPDs, 40 percent of respondents reported retransmission consent fee price increases of more than 100 percent during the current contract cycle.[52] Eleven percent reported increases of more than *200 percent*.[53] ATVA members report figures generally consistent with—and sometimes larger than—these figures.[54]

Nearly everybody expects this out-of-control growth to continue. SNL Kagan believes that retransmission consent revenues will exceed $10.3 billion in 2021.[55] This, however, is a conservative estimate that assumes a substantial decline in growth rates—and SNL Kagan has consistently underestimated future growth rates over the years.[56] Were current, 40-percent-per-year growth rates to continue, MVPD subscribers would pay $50 billion in retransmission

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in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years"), *available at* https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition, *with 2015 SNL Kagan Report* at 4.

51 *2015 SNL Kagan Report* at 6 (showing growth rates of 35 percent in 2012, 50 percent in 2013, and 35 percent in 2014).

52 *2015 NTCA Video Competition Survey* at 3.

53 *Id.*

54 In various instances, these Comments refer to facts and figures "as reported by" one or more ATVA members. Because retransmission consent agreements universally require confidentiality, we have presented these facts and figures generally and anonymously. ATVA members would, however, be pleased to provide documentation supporting their claims, if so requested by the Commission and under an appropriate protective order.

55 *2015 SNL Kagan Report* at 6.

56 *See, e.g.*, Press Releases available at http://www.snl.com/InTheMedia.aspx: "SNL Kagan updates retransmission fee projections to $6B by 2018" (Nov. 5, 2012) (increasing forecast of 2017 retransmission consent fees from $4.86B to $5.5B); "SNL Kagan Releases Updated Industry Retransmission Fee Projections" (Nov. 22, 2013) (increasing forecast for 2018 fees from $6.05B to $7.15B); "SNL Kagan Releases Updated Industry Retransmission Fee Projections" (Oct. 27, 2014) (increasing forecast for 2019 fees from $7.64B to $8.78B); "U.S. TV station owners' retransmission fees expected to reach $10.3 billion by 2021, versus the projected level of $6.3 billion this year" (July 7, 2015) (increasing forecast for 2020 fees from $9.3B to $9.8B).

consent fees by 2021.[57] Broadcasters certainly seem to be planning on large increases. NBC's Steve Burke, for example, has stated that his network "had some catching up to do," adding that "I know you'll see that $500 million [in current retransmission consent revenues] go up over time."[58] CBS's Les Moonves went even further, recently noting that "retransmission consent and reverse compensation . . . were up 50 percent in the third quarter and are well on their way to exceeding $1 billion next year."[59] A recent article described the CEO of a smaller broadcast group as suggesting that, "in the not-too-distant future," MVPDs would "pay $4, $5, $6 per subscriber, per month, for the privilege of carrying a broadcaster's signal."[60] He added: "How many customers are they going to lose if they don't have us? It's no more complicated than that."[61]

Broadcasters argue that the problem is not as severe as the numbers might suggest. Here again, however, these claims lack merit.

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57 Applying a 40 percent annual growth rate to SNL Kagan's estimated $4.9 billion in retransmission consent revenues for 2014 results in a figure of $51.7 billion in 2021.

58 Mike Farrell, *Burke: NBC Should Reap $500M in 2015 Retrans*, MultiChannel News, Sept. 9, 2015, *available at* http://www.multichannel.com/news/content/burke-nbc-should-reap-500m-2015-retrans/393607.

59 Paul Bond, *CBS Quarterly Earnings a Mixed Bag*, Hollywood Reporter, Nov. 3, 2015, *available at* http://www.hollywoodreporter.com/news/cbs-quarterly-earnings-a-mixed-836599.

60 Diana Marszalek, *Nowhere to Go But Up for Retrans Fees*, TVNewsCheck, June 26, 2015, *available at* http://www.tvnewscheck.com/article/86466/nowhere-to-go-but-up-for-retrans-fees (internal quotation marks omitted).

61 *Id.*

a. The "Slower" Rate Of Growth In Retransmission Consent Fees Is Still Unsustainable.

Broadcasters have recently suggested that, even if retransmission consent rates are growing, the rate of growth has slowed.[62] Even if that is true, it is only because of the ever-larger amount of retransmission consent fees that broadcasters have been able to collect from MVPDs in recent years. Yet it is not as if recent growth is low. That retransmission consent fees grew *only* 40 percent over each of the last three years provides cold comfort to MVPD subscribers—especially given that the Consumer Price Index for cable and satellite service increased a total of less than 5 percent over that same period.[63]

b. Retransmission Consent Fees Are Not Determined By Ratings.

Broadcasters often argue that no demand for fee increases—no matter how exorbitant—can ever be considered in bad faith so long as MVPDs pay more for lower-rated cable programming. One broadcaster even argued that it should be paid as much as $20 per subscriber per month based on the ratings its programming received.[64] The Media Bureau at least once seems to have adopted similar reasoning (erroneously, in ATVA's view).[65] Yet ratings, to the extent they are relevant at all, tell only part of the story.

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62 NAB, *The [G]rowth of [R]etransmission [C]onsent [F]ees is [S]lowing*, *available at* http://www.nab.org/documents/newsRoom/pdfs/Growth_Retrans_Fees.pdf.

63 *See CPI Detailed Report: Data for December 2014*, Table 25, *available at* http://www.bls.gov/cpi/cpid1412.pdf.

64 Reply Comments of Hearst-Argyle Television, Inc., MB Docket No. 07-198 at 10 (filed Feb. 12, 2008) (arguing that broadcasters could lawfully insist on retransmission consent fees of $20 per month per subscriber, as such fees represent the "indisputable marketplace value" of its signals).

65 *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, 22 FCC Rcd 35, ¶ 17 (MB 2007) (rejecting a good faith complaint, in part, because "[t]he record also indicates that [broadcaster defendant] seeks compensation at or below levels that [cable complainant] already pays other less highly rated programmers").

To begin with, simply comparing *broadcast* ratings and *cable* ratings fails to take into account the differences between the two products and the very different regulatory structures under which they are each offered. At least some MVPD subscribers have access to broadcast programming off-air—indeed, as discussed above, broadcasters assert that all do—while cable programming is only available through a subscription. From this, one would expect broadcasters should not be able to command as high a price as cable programmers do, all else being equal.

Broadcasters, moreover, monetize their product very differently than do cable programmers. To this day, broadcasters' primary revenue comes from advertising, not retransmission consent fees.[66] In order to maximize advertising revenues, a broadcaster needs to maximize distribution—which in turn places downward pressure on retransmission consent fees. Many cable programmers, by contrast, sell comparatively less advertising, and thus seek higher subscription fees. Indeed, some (such as HBO) forego advertising revenue entirely in order to command a higher per-subscriber fee. The particular "mix" between an advertising-based revenue model and a subscription/retransmission consent fee model has no direct relationship with ratings. Nobody would suggest, for example, that if HBO commands $12 per subscriber per month, its ratings must be twelve times higher than a general interest, advertiser-supported cable channel commanding $1 per month. Likewise, while MVPDs may pay higher nominal rates for cable channels, they often receive countervailing consideration in exchange, such as advertising availabilities, marketing funds, and the like.

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66 *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd 3253, ¶ 197 (2015) ("*2015 Video Competition Report*") ("On-air advertising is by far the most significant source of revenue for television stations[.]"); NAB 2014 IRS Form 990, *available at* https://projects.propublica.org/nonprofits/organizations/530114600; Comments of National Association of Broadcasters, MB Docket No. 10-71 at 5 (filed May 27, 2011) ("2011 NAB Comments")) (noting that retransmission consent revenues are the "next most important category of station revenues" "*after* on-air advertising") (emphasis added).

Most fundamentally, license fees for video programming do not depend entirely or even primarily on ratings. Rather, the value of programming to an MVPD depends the importance of a particular program in attracting subscribers to the MVPD and discouraging them from choosing other options. Some, but not all, cable networks have fewer substitutes than broadcasters in subscriber's eyes—even if broadcasters have higher ratings. Thus, for example, ESPN has traditionally commanded higher license fees than broadcasters.[67]

Broadcasters thus have their own unique economics and participate in their own unique "market." Nor, for that matter, do broadcasters really offer television for "free," as they like to claim.[68] From an economic perspective, broadcasters "charge" viewers through advertisements, receive subscription fees for eighty percent of their viewership, and (in the case of the networks themselves) command digital revenues for distribution of their prime time programming by online providers. Broadcasters have constructed a novel and highly lucrative distribution system, and the Commission should not unthinkingly compare them to content providers with other distribution models.

c. Retransmission Consent Fees Make Up A Large And Increasing Part Of Subscriber Bills.

Broadcasters also claim that retransmission consent fees make up a negligible portion of MVPD programming expenditures,[69] and do not (or should not) show up on subscriber bills.[70]

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[67] *See, e.g.*, Crawford, Lee, Whinston and Yurukoglu, "The Welfare Effects of Vertical Integration in Multichannel Television Markets," (September 2014 (draft)) (on file with authors).

[68] *See* 2010 Broadcaster Associations Opposition at 10 (describing broadcasters as being available "for free").

[69] 2011 NAB Comments at 1 ("Retransmission consent fees represent a tiny fraction of MVPD costs and the amount passed through to consumers is an even tinier fraction of consumer bills.").

[70] *Id.*

While that may have been true in 2006, it is no longer the case today. SNL Kagan estimates that by 2018, retransmission consent fees will exceed 15 percent of MVPD expenditures on basic cable and regional sports networks.[71]

Of course, from an MVPD customer's perspective, what matters is the *amount* paid by the MVPD for broadcast stations and passed along to the subscriber, not what percentage of his or her total bill (which often covers broadband and voice services along with video) accounts for them.[72] For a typical MVPD, retransmission consent fees represent the expenditures for only four or five channels out of hundreds offered.[73] Thus, for a two hundred-channel MVPD, retransmission consent represents 15 percent of the bill for only 2.5 percent of the channels. If growth rates continue as they have (or even at the slower rates envisioned by SNL Kagan), moreover, such fees will only continue to absorb an increasingly larger share of MVPDs' programming expenditures. MVPDs and their subscribers soon may pay more for a handful of local broadcasters than they pay for all other programming combined. If the Commission is to fulfill its obligation to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier,"[74] it surely must take these price increases into account.

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[71] SNL Kagan, *Retrans Projections Update: $10.3B by 2021* at 2 (June 17, 2015) (on file with authors).

[72] *Katz Analysis* at 31 ("The issue, however, is not whether retransmission consent fees are a significant *share* of the revenues collected by firms that provide cable services (particularly given that those revenues increasingly include amounts derived from telephone and high-speed Internet services), but whether the *dollar amount of retransmission consent fees* has a significant effect on consumer demand and consumer welfare. Similarly, size comparisons between projected increases in retransmission consent fees and cable operator revenues are largely irrelevant to the analysis of consumer welfare.") (emphasis in original).

[73] *See generally* Time Warner Cable Chanel Lineup Finder, http://www.timewarnercable.com/en/tv/channels-lineup.html.

[74] 47 U.S.C. § 325(b)(3)(A). The Commission must also ensure that its regulations do not conflict with its obligation to ensure that rates for the basic service tier are reasonable. *Id.*

As for the notion that these increases do not make their way to subscribers, this is pure fantasy.[75] Any firm's quality-adjusted retail pricing reflects its input costs in one way or another. MVPDs are no different in this regard than bakeries, shoe stores, and electronics retailers. Different MVPDs may, of course, make different choices about how to *allocate* the impact of higher retransmission consent fees, depending on their own circumstances. But the Commission cannot simply assume, as broadcasters suggest, that MVPDs will "eat" such increases out of their margins.[76]

One other point about rates: broadcasters routinely seek to obfuscate the prices they charge. ATVA members report that broadcasters routinely seek to prohibit them from placing a separate "retransmission consent" pass-through (the fees charged by all broadcasters in the market, without markup) on subscriber bills. Such prohibitions, of course, are intended to saddle MVPDs with the blame for broadcaster price increases. They suggest that even broadcasters sense the disconnect between the prices they demand and the public-interest status they claim.

d. Ever-Higher Retransmission Consent Fees Do Not Serve Localism.

While some broadcasters claim that retransmission rates "aren't really high," others are more forthright—admitting that rates have increased, but arguing that they *need* to be high in order to support local programming.[77] Here again, the facts suggest otherwise. Even

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75 *See, e.g.*, 2014 LIN Comments at 15 (arguing that "there is no evidence that MVPDs pass through higher retransmission input cost to consumers or give consumers the benefit of lower input costs").

76 *See, e.g.*, Letter from Chairman Thomas Wheeler to Senator Dianne Feinstein at 2 (Nov. 10, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1124/DOC-336580A1.pdf ("Wheeler Letter") (noting broadcasters' expectation for continuing double-digit increases in retransmission consent fees, and concluding that "[t]hese fees, of course, are ultimately paid by consumers").

77 *E.g.* 2011 NAB Comments at 5 ("In particular, retransmission consent fees represent an opportunity for broadcasters to help defray the high costs associated with the production of local news."); *2015 Video Competition Report* ¶ 49 (2015) ("NAB contends that retransmission consent compensation

broadcasters sometimes admit that fees are necessary not to pay for local news but to pay for programming of national interest.[78] As retransmission consent rates increase, investments in local programming lags.[79] Worse yet, the amount of truly local content on "local news" has dwindled as well.[80] Moreover, the largest component of growth in retransmission consent rates involves so-called "reverse retrans" payments from affiliates to networks.[81] In other words, when broadcasters hike retransmission consent rates, the additional money does not pay for local content in local newscasts. Instead, money out of viewers' pockets increasingly goes to pay networks in New York and Los Angeles for nationally distributed programming.

3. Broadcasters Engage In Negotiating Tactics Inconsistent With A Functioning Market.

Hundreds of blackouts per year and unsustainable price increases ought to be enough to demonstrate pervasive problems with retransmission consent. If more evidence were needed, however, one might consider broadcasters' negotiating behavior. In practically every respect, broadcasters engage in tactics that cannot be reconciled with a functional marketplace.

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defrays the high costs associated with producing local news and other programming options and allows broadcasters to provide free locally oriented programming and services.").

78 Brooks Boliek, *Cable Fight Invites Football Fans' Wrath*, Politico, Aug. 28, 2013 (updated Aug. 29, 2013), *available at* http://www.politico.com/story/2013/08/cbs-time-warner-cable-fight-football-095996.

79 Philip Napoli, *Retransmission Consent and Broadcaster Commitment to Localism* (Nov. 2011), *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/07/Retransmission_Consent_and_Localism_Paper_by_Napoli_FINAL.pdf

80 *2015 Video Competition Report* ¶ 181 ("In 2013, the average television station aired just under 5.5 hours of local news per weekday, a 6 minute decline from 2012.").

81 *2015 SNL Kagan Report* at 6.

a. Internet Blocking.

The *Notice* asks about "the practice by broadcasters of preventing consumers' online access to the broadcaster's programming as an apparent tactic to gain leverage in a retransmission consent dispute."[82] On at least two occasions, a broadcaster has blocked an MVPD's *broadband* subscribers from obtaining the broadcaster's otherwise freely available online content—whether or not those subscribers received the MVPD's video programming, and whether or not they lived in the same local market as the stations involved.[83]

Such conduct significantly expands the damage from a broadcaster's decision to withhold its signal from an MVPD's video subscribers in a particular market, creating collateral damage to unsuspecting broadband subscribers for the sole purpose of gaining leverage to increase prices. ATVA is unaware of any public-interest justification for a broadcaster to deny an MVPD's broadband subscribers access to programming that it makes available to all others free of cost. Nor does the ability to receive similar programming off-air ameliorate the harm caused by online blocking.[84] The programming on broadcasters' websites does not always match programming offered over the air. Many subscribers cannot actually receive off-air programming. And they certainly cannot do so on the same devices with which they can view online programming. In any event, there can be no possible justification for broadcasters to penalize MVPD broadband subscribers who do not receive the station in question from the MVPD.

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82 *Notice* ¶ 13.

83 *Id.* ¶ 13 n.57 (describing Internet blocking by CBS and FOX).

84 *Id.* ¶ 13.

b. Forced Bundling.

The *Notice* also asks about "a broadcaster's insistence on bundling broadcast signals with other broadcast stations or cable networks into the retransmission consent agreement."[85] ATVA members identify at least three forms of forced bundling.

First, broadcasters sometimes bundle two sets of desirable programming. For example, a broadcaster may bundle 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. If broadcasters insist on such bundling over the MVPD's objection, as some ATVA members report, this can be abusive. In other cases, however, such bundling can provide efficiencies that at least somewhat offset the greater leverage such bundling offers the broadcaster.

Second, broadcasters sometimes "tie" undesired programming to retransmission consent. Indeed, practically every ATVA member reports that one or more broadcasters insisted on bundling unwanted programming—either a cable channel or a multicast channel—as a precondition of granting retransmission consent, in all cases over the objections of the MVPD. One member, for example, reported that the broadcaster demanded carriage of cable programming across the distributor's entire subscriber base, even though the broadcaster itself was available only to a limited portion of that base. Another pointed out that broadcasters that control more than one Big Four affiliate in a particular market[86] much more aggressively seek to tie multicast carriage to primary signal carriage.

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[85] *Id.* ¶ 15.

[86] In 2013, DIRECTV reported numerous instances of local markets in which a single entity negotiates retransmission consent on behalf of more than one Big Four affiliate. *See* Letter from Stacy Fuller to Marlene Dortch, MB Docket No. 10-71 (Dec. 6, 2013) (attaching data).

Most perniciously, some broadcasters even seek to tie what might be called "speculative programming" to retransmission consent. DISH Network, for example, recently filed a good faith complaint alleging that Sinclair attempted to force DISH to carry a network that *Sinclair didn't even yet own but merely hoped to purchase* as a condition of granting retransmission consent.[87] Other ATVA members report receiving similar demands from broadcasters. One even described demands to carry a "network to be named later." In other words, the broadcaster didn't even know what channel it wanted the MVPD to carry, yet insisted that the MVPD carry (and pay for) it anyway, without knowing anything about its content or whether it would be attractive to subscribers. Another ATVA member reported similar demands regarding a yet-to-be launched news channel. Yet another reports that essentially all broadcasters require guaranteed carriage of (and payment for) their future multicast channels—whatever they may be, and no matter how unpopular they may be.

While the extent of forced bundling is new, the practice itself is not. For example, the Commission recognized the dynamics of forced bundling—and the resulting "substantial" risk of consumer harm—in considering News Corporation's acquisition of DIRECTV in 2003.

> When News Corp. secures carriage of other cable programming networks from MVPDs in exchange for its broadcast signal, MVPDs pay for those networks. If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates. If News Corp. uses withholding or threats of withholding in retransmission consent negotiations to obtain carriage of its affiliated cable networks that the MVPD, absent the threat of foreclosure, would not agree to carry, consumers are harmed because MVPDs are forced to make programming decisions based on News Corp.'s demands rather than selecting the programming of their choice.[88]

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87 DISH-Sinclair Amended Complaint at ii, 9.

88 *General Motors Corp., Hughes Elec. Corp., and The News Corp. Ltd.* ("*General Motors*"), 19 FCC Rcd 473, ¶ 209 (2003).

As further noted by Professor William Rogerson, "if MVPDs would purchase certain programs from non-broadcasters in the absence of bundling and bundling changes these decisions, then consumers will be worse off because they will be receiving programming that does not meet their needs as well."[89] Yet the use of such tactics continues despite the obligation to negotiate in good faith.

The Commission should take a new and harder look at how it analyzes forced bundling. Today, the Commission will examine bundling only involving "[c]onduct that is violative of national policies favoring competition—that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market—is not within the competitive marketplace considerations standard . . . ."[90] This is too narrow a standard, given the public interests at stake. Even assuming forced bundling is not intended to gain or sustain a "monopoly" as that term is understood in antitrust law, broadcasters certainly possess monopoly rights to key network content—arrangements erected on the basis of numerous statutes and rules favoring broadcasters over other forms of distribution. Forced bundling enables them to further leverage such monopolies by forcing MVPDs and their subscribers to purchase and pay for content they would not otherwise want. Likewise, even if forced bundling is not intended to "foreclose" MVPDs from participation in another market, it

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[89] William P. Rogerson, *The Social Cost of Retransmission Consent Regulations*, at 51 (Feb. 28, 2005) (attached to Comments of Joint Cable Commenters, MB Docket No. 05-28 (Mar. 1, 2005)).

[90] *Notice* ¶ 15 (citing *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, CS Docket No. 99-363, 15 FCC Rcd at 5448, ¶ 58 (2000) ("*Good Faith Order*")). The Commission has also "clarif[ied] that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws." *Id.* (citing *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, ¶ 15 (2005) ("*Reciprocal Bargaining Order*")).

routinely if not universally emanates from the broadcasters' market power[91]—this, after all, is what "forced" bundling means. In any event, if broadcasters wish to insist that their programming possesses special public-interest qualities, the Commission should view skeptically attempts to require carriage of other programming as a condition of carrying the programming deemed to be uniquely imbued with the public interest.[92]

c. Blackouts Before Marquee Events.

The Commission seeks comment on a broadcaster's insistence on contract expiration dates, or threats to black out a station's signal, in the time period just prior to the airing of a "marquee" sports or entertainment event.[93] This, too, happens regularly. One ATVA member, for example, reports that between one-third and one-half of its agreements expire on December 31 immediately prior to the beginning of the NFL playoffs and in the midst of college football's bowl season and BCS Final. Another reports that essentially all of its agreements expire at that time. Indeed, one ATVA member attempted to avoid this dilemma by changing its form agreement to expire in the middle of the summer—but no broadcaster agreed to this change. Another ATVA member reports that it attempted to move expiration dates by as little as one or two months, but broadcasters rejected these attempts outright.

When broadcasters black out the Super Bowl, the NFL Playoffs, the World Series, the Academy Awards, the Olympics, College Bowls, and other key content, they harm viewers who reasonably want and expect to watch such programming. They also further distort the

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91 *See, e.g.*, *General Motors Corp.* ¶ 201 (2004) ("We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.").

92 This category would include both cable programming and multicast programming lacking substantial local content.

93 *Notice* ¶ 16.

"marketplace" in which retransmission consent negotiations occur. Retransmission consent negotiations should help the parties determine the *long-term* value of the programming over the life of the contract. By engineering negotiations to occur prior to marquee events, however, broadcasters can command rates based on an MVPD's *short-term* considerations—rates that are invariably much higher than the actual value of the programming over the life of the contract. Just as consumer protection law prohibits, for example, gasoline price-gouging after a hurricane,[94] so too should it prohibit broadcaster price-gouging in anticipation of marquee events.

d. Ceding The Right To Negotiate.

The Commission seeks comment "about broadcasters' relinquishing to third parties their right to grant retransmission consent and similar practices."[95] The Commission's rules now prohibit *in-market* joint negotiation,[96] although DISH's recent complaint against Sinclair suggests that broadcasters honor these new rules in the breach, if at all.[97] Meanwhile, *out-of-market* collaboration remains a concern to many ATVA members. For example, ATVA members report that such coordination occurs between networks and their affiliated stations. Networks either demand "approval" rights over retransmission consent agreements, insist on a seat at the negotiating table, or, in at least one case, seek to negotiate such agreements outright.

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94 *E.g.*, D.C. Code §§ 28-4101, 28-4102 (prohibiting businesses from charging "more than the normal average retail price" for any merchandise or service during a natural disaster or declared state of emergency).

95 *Notice* ¶ 14.

96 Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C) (requiring the Commission to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission").

97 DISH-Sinclair Amended Complaint at ii-iii, 8-9 (alleging that Sinclair violated the joint negotiation rules).

But this is not the only context in which this problem arises. Several ATVA members report that affiliate groups asked other affiliate groups with stations in different markets to negotiate on their behalf. This conduct further increased the market power already possessed by the group on its own and gave the combination significant market power overall. Moreover, there were no offsetting efficiencies benefitting viewers.

This conduct lies in tension with the idea that retransmission consent is a right that belongs to individual broadcasters that cannot be exercised by others.[98] A group of state affiliate associations recently suggested as much, stating that network approval rights are "presumably a *per se* violation of the FCC's Good Faith rule since a station is required to 'designate a representative with authority to make binding representations on retransmission consent' and can't do so if the agreement has to be reviewed and approved by a third party before any binding commitment can be made."[99]

This conduct can also harm viewers. Any time a broadcaster gives a third party control over retransmission consent rights, it by definition allows the third party to act in its own interest even if it is contrary to the interest of the broadcaster that ceded its statutory authority. DIRECTV, for instance, filed a complaint alleging that a station group agreed to a retransmission consent contract (presumably concluding that the agreement served its interest), only to have a third party veto agreement on the grounds that the agreement didn't sufficiently meet *its* interests.[100]

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[98] 47 U.S.C. § 325(b).

[99] Letter from Richard Zaragoza to Marlene Dortch, MB Docket No. 10-71 at 8 (filed Oct. 13, 2015) (filed on behalf of State Broadcasters Associations) (citations omitted).

[100] *DIRECTV, LLC v. Tribune Company, Debtor-In-Possession*, Complaint For Failure to Negotiate in Good Faith, CSR-8612-C (filed Apr. 2, 2012).

Indeed, ATVA members have suggested that such conduct not only violates the Commission's good faith rules but also demonstrates that the broadcaster no longer exercises control over its license.[101] Section 310(d) of the Communications Act prohibits broadcast licensees from transferring control of their licenses without authorization from the Commission.[102] In examining control of a broadcast license, the Commission typically focuses on the ability to control finances, personnel, and programming, which it has described as "the major concerns of station operation and decision making."[103] Granting third parties the right to conduct retransmission consent negotiations or approve resulting agreements gives third parties influence over all three indicia of control.[104]

e. Equipment Restrictions.

The Commission asks about "a broadcaster's demand that an MVPD place limits on its subscribers' use of lawful devices and functionalities."[105] Such demands have become more common lately. Numerous ATVA members report that broadcasters have sought to restrict lawful copying, for example. Several observe that such demands ultimately came from networks, which sought to make non-owned-and-operated affiliates "bearers of bad news." One member reports that broadcasters have sought to prohibit or restrict a wide range of legal

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[101] *See, e.g.*, Comments of DIRECTV, MB Docket No. 10-71 at 12-26 (filed May 27, 2011).

[102] 47 U.S.C. § 310(d).

[103] *Stereo Broadcasters Inc.*, 87 F.C.C.2d 87, ¶ 29 (1981); *see also, e.g.*, *News International PLLC*, 97 F.C.C. 2d 349, ¶ 20 (1984) (describing finances, personnel, and programming as "the three most important factors in determining control"); 47 C.F.R. § 73.3555 notes 2(j) and (k) (specifying that time brokerage and joint sales agreements, respectively, must leave stations with ultimate control over "facilities including, specifically, control over station finances, personnel and programming").

[104] The Commission could also find that such conduct gives the third party an attributable interest in stations whose retransmission consent rights they control. *Ex Parte* Submission of the United States Department of Justice, MB Docket Nos. 09-182, 07-294, and 04-256 (filed Feb. 20, 2014).

[105] *Notice* ¶ 16.

technologies, including mosaic and picture-in-picture technology, subscriber-initiated ad-skipping, and in-home distribution through a secured network.

No broadcaster should be permitted to deprive consumers of technology, services, or features they can lawfully use—even if the technology, services, or features compete with programming offered by broadcasters or are otherwise not to the broadcasters' liking. In any other context, this conduct would be transparently outrageous. For instance, the Commission would never for an instant permit a broadcaster to demand that an MVPD drop cable channels so as to encourage its subscribers to watch broadcast television. Indeed, such conduct presumptively violates the totality of the circumstances test.[106] Broadcaster demands to restrict technology, services, and features in order to "encourage" subscribers to watch their programming in a manner they prefer raise similar concerns.

f. Out-of-Market Signals.

ATVA members report that essentially every broadcaster seeks to prohibit the distribution of out-of-market signals, particularly during blackouts. Most if not all broadcaster standard agreements prohibit MVPDs from importing distant signals in many circumstances, whether such importation would be lawful or not.[107] In particular, broadcasters seek to prevent

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[106] *Good Faith Order* ¶ 58 (finding as presumptively violating the totality of the circumstances test "[p]roposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming").

[107] Historically, many broadcasters engaged in a double-standard—seeking to prohibit the *importation* of significantly viewed signals into their markets, while demanding carriage of (and payment for) their own signals in distant markets where they are significantly viewed. Thanks to Congressional action, they no longer do so directly. *Implementation of Sections 101, 103 & 105 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd 2380, ¶ 4 (2015) ("*STELAR Implementation Order*") (citing STELAR Section 103(b), which requires the Commission to "prohibit a television broadcast station from limiting the ability of a [MVPD] to carry into the local market (as defined in section 122(j) of title 17, United States Code) of such station a television signal that has been deemed significantly viewed, within the meaning of section 76.54 of title 47, Code of Federal Regulations, or any successor regulation, or any television broadcast signal such distributor is authorized to carry

the importation of distant signals during blackouts at all costs. Never, to ATVA's knowledge, has a broadcaster granted blanket waivers of the cable exclusivity rules or the satellite "unserved household" rules that would permit such importation. Broadcasters have also extended this "no distant signal" policy into online streaming. One ATVA member reports that, although a national broadcast network offers nationwide "TV Everywhere" rights, affiliates of that network have demanded that the MVPD restrict subscriber access to the nationally distributed programming, requiring subscribers to obtain the programming only through the affiliate (if the affiliate obtains rights to offer it and chooses to do so).

This conduct seeks to use the rights the broadcasters have been given to serve the public interest as a sword to harm subscribers. In a different context, ATVA members have proposed what they called "blackout relief" for subscribers.[108] The idea is that, regardless of the equities in a broadcaster-MVPD dispute, the subscriber who has done nothing wrong should not lose network programming during that fight. Assuring that MVPDs retain some ability to deliver distant network stations during disputes—or at least preventing broadcasters from prohibiting such carriage—would provide subscribers with some protection in such circumstances.

g. Charging For Subscribers That Do Not Receive Service.

Several ATVA members report that broadcasters seek to charge for subscribers that do not receive broadcast programming from the MVPD. One reports, for example, that a large

under section 338, 339, 340, or 614 of [the] Act, unless such stations are directly or indirectly under common de jure control permitted by the Commission").

108 DIRECTV, LLC and DISH Network L.L.C., Joint Response to Questions From Senate Commerce Committee at 10 (Mar. 17, 2014), *attached to* Testimony of R. Stanton Dodge, Executive Vice President and General Counsel, DISH Network L.L.C. on "Compulsory Video Licenses of Title 17" before the United States House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property and the Internet (May 8, 2014), *available at* http://judiciary.house.gov/_cache/files/a383729c-39bb-4a36-b696-e9ecca2ffe33/video-license-testimony-dish.pdf.

station group demands payment for all "basic tier" subscribers, regardless of whether such subscribers receive the broadcaster's signals through the member. Others report that broadcasters have demanded payments even for subscribers who receive broadcast signals off-air, rather than through the MVPD.

Such conduct conflicts with the very concept of retransmission consent and thus cannot be considered to be in good faith. An MVPD must obtain a broadcaster's permission before it "retransmit[s] the signal" of a television station.[109] The requirement simply does not apply where the MVPD does not retransmit television signals. If an MVPD's subscriber receives a broadcast television signal other than from the MVPD, neither she nor the MVPD needs the broadcaster's permission as a matter of law. Broadcaster demands for payment in such circumstances belie broadcasters' claims that their signals are always available "for free." Such conduct also directly harms those subscribers who choose to receive broadcast signals for free over the air rather than through their MVPD. It also discourages MVPDs from providing alternative solutions (such as free antennas) to meet consumer needs.

h. Other Conduct.

The Commission seeks comment on other forms of conduct relevant to the "good faith" standard.[110] One reported by numerous ATVA members is the so-called "hourly extension." Retransmission consent agreements typically (but not always) expire at midnight. Retransmission consent negotiations sometimes (but not always) come down to the last minute, and sometimes the parties cannot tie up all loose ends before the deadline hits. One would think that the "good faith" standard in such circumstances would dictate an extension until the next

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[109] 47 U.S.C. § 325(b).

[110] *Notice* ¶ 16.

day, so long as the parties are making progress. Many broadcasters, however, refuse to grant such extensions. Rather, they grant extensions of one hour (or less), in hopes of extracting additional last-minute concessions from the MVPD. Such concessions typically if not always come out of the wallets of MVPD subscribers. As several ATVA members report, broadcasters like to combine such hourly extensions with "take-it-or-leave-it" offers—often with more onerous terms that hadn't appeared in earlier drafts.

Others report contractual provisions that extend *status quo* application of rules or regulations that may be amended or repealed during the term of an agreement, even if the amendment or repeal does not include any "grandfathering." Thus, for example, broadcasters routinely ask MVPDs to agree to abide by the network non-duplication and syndicated exclusivity rules, even if the Commission repeals them.[111] DISH's complaint against Sinclair alleges yet worse conduct—a requirement that DISH agree not to file a complaint over Sinclair's behavior as a condition of granting retransmission consent.[112] Of course, such a demand presumptively violates the Commission's rules.[113]

C. The Dysfunction In The Retransmission Consent Market Demands The Commission's Attention.

When faced with facts such as those described above, broadcasters like to wrap themselves in the mantle of the marketplace. As one network once intoned: "In this country, the terms on which private companies will do business with each other are not prescribed by the

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[111] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 55 (2014) ("*2014 Joint Negotiation Order*") (seeking comment on eliminating the exclusivity rules).

[112] DISH-Sinclair Amended Complaint at ii, 8-9.

[113] *Good Faith Order* ¶ 56.

state or its representatives."[114] Broadcasters, the argument goes, act merely as distributors of content "like any other"[115] and should be left alone to distribute or not distribute their content as they see fit, consequences be damned.

Yet there are at least two reasons to think otherwise. First, the problem has gotten worse over time—and will likely continue to do so. The numbers of blackouts and increasing retransmission consent rates suggest this. So too does economic theory. As ATVA has described previously, the market conditions that existed 23 years ago when it created the retransmission consent statute no longer hold.[116] At that time, as Congress explicitly found, "most cable television subscribers have no opportunity to select between competing cable systems" and that "the cable industry has become highly concentrated."[117] Indeed, in 1992 cable operators held 98 percent of the MVPD market share.[118] As a result, broadcasters and cable operators enjoyed essentially offsetting monopoly positions. Today, broadcasters continue to enjoy their monopoly position, while cable faces a host of MVPD competitors, from DBS operators to telephone companies to overbuilders, as well as a growing challenge from video delivered via broadband. This has significantly altered the dynamics of retransmission consent negotiations. As explained by Dr. Michael Katz,

> As competition among MVPDs has intensified, the relative bargaining strength of MVPDs in negotiations with local broadcast stations has been weakened. Now, an MVPD faces the prospect of losing more subscribers than it previously would

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[114] Comments of CBS Corp., MB Docket No. 10-71 at 9 (filed May 18, 2010).

[115] Comments of The Walt Disney Company, MB Docket No. 10-71 at 1 (filed May 18, 2010).

[116] *See* Letter from Mike Chappell, American Television Alliance, to Marlene Dortch, MB Docket No. 10-71 at 2-3 (filed Sept. 2, 2015) ("ATVA September 2 Letter").

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

[118] See Comments of the National Cable & Telecommunications Association, MB Docket No. 15- 158, at 3 (filed Aug. 21, 2015) (citing NCTA Analysis of SNL Kagan Data).

> have if it is unable to carry local stations. This is so because a subscriber who cannot get a local broadcast station from his MVPD can now go to a different MVPD to receive that signal, as well as other programming. In contrast, the bargaining position of broadcasters vis-à-vis MVPDs has been strengthened as a result of these developments. The presence of multiple viable MVPDs in a market means, for example, that if a broadcaster cannot come to an agreement with a cable provider, it can now make agreements with DBS providers and thereby still obtain distribution to a large number of viewers.[119]

Thus, as competition among MVPDs has increased over the last five years, broadcasters have acquired and exercised more leverage.

This insight also has important consequences going forward. As more entities, such as online providers, seek to distribute broadcast programming, broadcasters will have additional parties to play off one another. All things being equal, as the distribution market becomes more fragmented, each blackout will harm the broadcaster less and harm the distributor more. This, in turn, suggests that blackouts will increase and prices will continue to go up.

Second, as a policy matter, broadcasters cannot have it both ways. They cannot argue that they are merely distributors of content "like any other" while at the same time asserting that they are entitled to special consideration as servants of the public good. If the Commission is to honor the broadcasters' assertion that they perform a public interest mission, then the rules governing their distribution above all ought to ensure that they remain available to all Americans (not just those lucky enough to live next to their towers and have off-air antennas) without the fear of disruption.

Broadcasters can always choose to free themselves of these responsibilities. They could, for example, stop broadcasting and offer their programming as cable networks. Some broadcasters have suggested they might well do so if they prove unsuccessful in protecting their

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[119] *Katz Analysis* at 24-25.

revenues "through legal and political avenues."[120] And CBS recently announced that it will air the new *Star Trek* series principally on its "CBS All Access" digital subscription service.[121] In the upcoming incentive auction, moreover, broadcasters have the perfect opportunity to transition out of broadcasting,[122] and potentially to thereby reap billions from wireless carriers.[123] They cannot, however, continue to claim to be stewards of the public trust while simultaneously insisting that the Commission ignore the public-interest consequences of their conduct.

II. THE COMMISSION SHOULD REFORM THE TOTALITY OF THE CIRCUMSTANCES TEST.

There can be no doubt that the totality of the circumstances test requires reform. Congress certainly thinks it does, which is why it instructed the Commission to "commence a rulemaking"[124] and to examine the "substantive terms offered by a party" to see if they "increase the likelihood of negotiations breaking down."[125] Accordingly, ATVA urges the Commission to

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[120] David S. Cohen, *News Corp. Threatens to Make Fox Cable-Only Amid Aereo Dispute*, Variety, Apr. 8, 2013, *available at* http://variety.com/2013/digital/news/chase-carey-threatens-to-yank-fox-from-broadcast-tv-over-aereo-1200334235/ (quoting News Corp Chief Operating Officer Chase Cary as suggesting: "If we can't have our rights properly protected through legal and political avenues, we will pursue business solutions. One such business solution would be to take the network and turn it into a subscription service.").

[121] Dave Itzkoff, *A New "Star Trek" TV Series Will Debut in 2017*, New York Times (Nov. 2, 2015), *available at* http://www.nytimes.com/2015/11/03/arts/television/a-new-star-trek-tv-series-will-debut-in-2017.html?hp&action=click&pgtype=Homepage&module=first-column-region&region=top-news&WT.nav=top-news&_r=0

[122] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6403(a)(2) (codified at 47 U.S.C. § 1452), 126 Stat. 156 (2012); *Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, ¶ 366 *et seq.* (2014).

[123] *Incentive Auction Task Force and Wireless Bureau Release Opening Bid Prices for Reverse Auction*, DA-15-1191, Attachment A: *Opening Bid Prices for Reverse Auction Announced*, *available at* https://www.fcc.gov/document/opening-bid-prices-reverse-auction-announced (setting opening prices as high as $900,000,000 *per station* for those stations seeking to relinquish spectrum rights).

[124] Pub. L. 113-200 § 103(c), 128 Stat. 2062.

[125] S. Rep. No. 113-322, 13 (2014). Please see Sec. III, *infra*, for a detailed discussion of the Commission's legal authority to adopt these proposals.

do everything in its power to rectify the behavior described above.[126] Doing so will require a two-pronged effort. First, the Commission should reform the general parameters of the totality of the circumstances test to make it a more effective tool against abusive behavior. Second, it should also identify a range of specific activities that are at the very least presumptively inconsistent with good faith under that test, if not *per se* violations of the good faith rules.

A. The Commission Should Make General Changes To Its Totality Of The Circumstances Test.

The Commission "invite[s] comment on any elaboration of the totality of the circumstances test we can provide that will help to guide negotiations to a successful conclusion."[127] ATVA has two suggestions. First, the Commission should explicitly consider the public interest in making such determinations, using labor law as a guide. Second, the Commission should consider ways to make the test easier to administer.

1. The Commission Should Explicitly Consider The Public Interest.

Perhaps the most basic problem with the totality of the circumstances test as currently applied is that it considers the interests only of the negotiating parties. Under existing precedent, the Commission will conclude that the test is violated only where it finds either "the absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute[s] a failure to negotiate in good faith"[128] or that "specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach [the] good faith negotiation obligation."[129]

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[126] *See Notice* ¶ 7 (seeking comment on whether reform is necessary or appropriate).

[127] *Notice* ¶ 12.

[128] *Good Faith Order* ¶ 32.

[129] *Id.*

Neither of these standards, however, takes into account the impact of the parties' behavior on viewers—which is, after all, the entire reason the good faith rules exist in the first place.[130]

The Commission should thus find a violation of the totality of the circumstances test where a negotiating party **unduly harms television viewers in retransmission consent negotiations**. Such harm could take many forms. The point, however, is that a negotiating party cannot be said to act in good faith if it deliberately harms viewers or even casually disregards the viewer's interest. In making such determinations, the Commission could look to whether a less harmful alternative was available. Where an MVPD offers a 24-hour extension, a broadcaster could be said to harm television viewers by granting only a one-hour extension.

2. The Commission Should Incorporate Labor Law Precedent To A Greater Extent.

The Commission should also incorporate labor law precedent into its totality of the circumstances analysis to a greater extent than it now does. The Commission's good faith rules, of course, are in substantial part "derived from [National Labor Relations Board ("NLRB")] precedent"[131] which the Commission found to be "the most appropriate source of guidance."[132]

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[130] *See, e.g., Good Faith Order* ¶ 12 ("These rules will provide a framework under which broadcasters and satellite carriers can achieve retransmission consent before the expiration of the six-month period set forth in Section 325(b)(2)(E) so as to avoid the highly undesirable interruption of local broadcast signals that satellite carriers have begun to provide to their subscribers in many cities across the nation. On an ongoing basis, we intend these rules to govern the negotiation of retransmission consent between broadcasters and all MVPDs."); *see also infra* Sec. III.C (describing public-interest considerations behind much broadcast regulation).

[131] *Good Faith Order* ¶ 39.

[132] *Id.* ¶ 22. *See also id.* ¶ 30 (noting that the Commission's two-part good faith test "follows well established precedent in the field of labor law"). The Commission here explicitly invites comment on whether "more recent labor law precedents, or precedents from other areas of law, may be useful in revising the totality of the circumstances test." *Notice* ¶ 8, *citing* Letter of CenturyLink, Consolidated Communications, Inc., FairPoint Communications, Inc., ITTA, Mediacom Communications Corp., NTCA, Public Knowledge and TDS Telecommunications Corp. MB Docket No. 10-71 at 4-5 (filed Aug. 18, 2015).

This makes sense. Labor law seeks to limit the employers' and employees' otherwise existing rights to help preserve a variety of statutory goals, prominent among them "industrial peace."[133] Likewise, the good faith rules limit the negotiating parties' otherwise existing contractual rights in order to promote what might be thought of as "broadcasting peace"—that is, to limit what the Commission once referred to as the "highly undesirable interruption of local broadcast signals."[134]

Two labor law doctrines, in particular, are relevant to broadcaster conduct. We discuss one, relating to "insistence on a non-mandatory subject," below in connection with ATVA's proposal on forced bundling (and again more briefly in connection with other proposals).[135] A second doctrine, of perhaps broader applicability, relates more directly to blackouts and the process leading to blackouts.

Under the National Labor Relations Act ("NLRA"), parties must bargain until impasse is reached, and an employer may not make unilateral changes in terms and conditions of employment prior to impasse, even if the existing collective bargaining agreement expires before an impasse has been reached.[136] "Impasse" is a term of art: "a genuine impasse in negotiations is reached only when the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from

[133] *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488 (1960). ("[T]he policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace.")

[134] *Good Faith Order* ¶ 12.

[135] *See infra* Sec. II.B.2.

[136] *NLRB v. Katz*, 369 U.S. 736 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991).

its respective position."[137] "Even if [one side] has demonstrated that it was unwilling to compromise any further, there must also be evidence that the [other side] is also unwilling to compromise any further."[138] Only if "further discussions would be fruitless,"[139] does an impasse exist. Thus, by no means can an impasse be said to exist merely because the agreement between the negotiating parties has expired. An employer cannot treat the contract expiration date as the end point for bargaining, "pull[ing] the plug on further negotiations" when that date arrives, if it cannot be "establish[ed] that continued bargaining would have been futile."[140]

The NLRA allows an employer to implement unilateral changes in terms and conditions of employment once the collective bargaining agreement has expired, if, but only if, the employer has bargained in good faith and a genuine impasse has been reached.[141] Thus, an employer cannot go through the motions of bargaining without a "serious intent to . . . reach an acceptable common ground,"[142] playing a waiting game until the contract expires in order to declare an impasse and impose unilateral changes. Such conduct constitutes bad faith bargaining and renders the unilateral changes unlawful.[143]

These doctrines, if applied to retransmission consent negotiations (as Congress suggested they should), would make the good faith rules more effective by leading the Commission to

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[137] *Carey Salt Co.*, 358 NLRB No. 124, at 12 (2012), *enforced in pertinent part*, 736 F.3d 405 (5th Cir. (2013).

[138] *Id.*

[139] *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988).

[140] *NLRB v. Newcor Bay City Div.*, 219 F. App'x 390, 396, 397 (6th Cir. 2007).

[141] *See Carey Salt*, 736 F.3d at 412-16.

[142] *Ins. Agents' Int'l Union*, 361 U.S. at 485.

[143] *See Newcor*, 219 F. App'x at 396; *CBC Indus., Inc.*, 311 NLRB 123, 126-27 (1993); *Dust-Tex Serv., Inc.*, 214 NLRB 398, 405 (1974); *enforced*, 521 F.2d 1404 (8th Cir. 1975).

examine much more closely whether either party has attempted to "run out the clock" with an eye on the date when the retransmission consent agreement will expire and making no serious effort to reach common ground. Engaging in such "surface bargaining" until the point when a party believes it will have maximum leverage is the antithesis of good faith bargaining. Just as an employer cannot avoid bargaining in order to use its "weapon of choice" (unilateral changes) to maximize its leverage, a broadcaster cannot avoid bargaining in order to use its own weapon of choice (blackouts) to maximize its leverage.

Of course, such conduct can be difficult to detect. Here again, however, labor law can be helpful. As discussed above,[144] many blackouts occur even though the MVPD has offered to extend the existing retransmission consent agreement while negotiations continue and to "true up" its payments to incorporate retroactively any rate increases to which the parties may ultimately agree. In such cases, the MVPD at least is "willing to compromise . . . further"[145]—thus, impasse has not been reached. A broadcaster's insistence on resorting to a blackout at that juncture notwithstanding the economic protection provided by a true-up is powerful evidence that the broadcaster has sought to "run out the clock" all along, instead of engaging in good faith negotiations.

B. The Commission Should Identify Specific Activities That Either Constitute *Per Se* Violations Of Good Faith Or Presumptively Violate The Totality Of The Circumstances Test.

The Commission seeks comment on "whether there are specific practices that we should identify as evidencing bad faith negotiation under the totality of the circumstances test."[146]

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[144] *See supra* Sec. I.B.2.

[145] *Carey Salt Co.*, 358 NLRB No. 124, at 12.

[146] *Notice* ¶ 12.

ATVA has identified seven practices as constituting *per se* violations of the good faith rules.[147] The Commission should identify them as such here. Identifying these practices as *per se* violations would help address some of the difficult logistical problems MVPDs have historically faced in bringing complaints for bad faith negotiating tactics. In many cases, broadcaster acts of bad faith occur with only days or sometimes even hours left to reach agreement, and sometimes this is because of the kind of "running out the clock" strategy described above. MVPDs aggrieved by such conduct usually have little time to draft a complaint or seek an injunction prior to a blackout—leaving the Commission even less time to consider and resolve such a complaint. Because totality of the circumstances complaints are by definition more complex and fact dependent than those alleging *per se* violations, complainants almost never have the opportunity to resolve their concerns prior to a blackout.[148] This, more than anything else, is why the Commission has only resolved four totality of the circumstances complaints in the 15 years the good faith rules have been in place.[149] Classifying particular broadcaster conduct as *per se* violations of the good faith rules would enable MVPDs to seek more timely relief from such conduct in a more efficient manner.

Alternatively, each of the practices identified by ATVA should, at a minimum, be considered to presumptively violate the totality of the circumstances test. The Commission may also identify other such practices, as suggested by individual ATVA members.

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[147] ATVA September 2 Letter at 2.

[148] Indeed, the most recent complaint resolved by the Commission—in which a broadcaster accused DIRECTV of bad faith for failing to disclose the terms of its agreements with broadcasters—took the Commission five months to resolve. This case, moreover, was one on which the parties essentially agreed on the facts. *Northwest Broad., L.P. v. DIRECTV, LLC*, DA 15-1271, MB Docket. No. 15-151, CSR-8910-C, ¶ 5 n.24 (MB, rel. Nov. 6, 2015).

[149] *Notice* ¶ 5 n.31 (the three companies referenced in the *Notice* plus *Northwest Broadcasting*, described immediately above).

1. Online Blocking.

The Commission should consider it a *per se* violation of good faith or, at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> **Directly or indirectly restricts access to the station's or affiliated network's publicly available online video programming or related content to: (i) any subscriber of an Internet service provider that is affiliated with the MVPD; or (ii) any other subscriber of the MVPD or of an affiliate of that MVPD.**[150]

This recommendation strikes ATVA as the easiest for the Commission to implement. Online blocking should never be acceptable, period. Indeed, as ATVA member Time Warner Cable has suggested, the Commission should go further. It should consider such conduct in reviewing applications for broadcast license renewals.[151]

2. Forced Bundling.

The Commission should consider it a *per se* violation of good faith or, at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> **Requires 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).**[152]

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[150] *Id.* ¶ 12.

[151] *See* Letter from Marc Lawrence-Apfelbaum to Marlene Dortch, MB Docket No. 10-71 at 8 (filed Oct. 17, 2013) (citing Letter from U.S. Senator Edward J. Markey to FCC Acting Chairwoman Mignon Clyburn (Aug. 6, 2013)) (describing CBS's blocking as "anticonsumer" and urging the Commission to investigate and "to actively defend Internet freedom and consumer rights"); Public Knowledge Statement on CBS Internet Blackout (Aug 5,2013), *available at* http://publicknowledge.org/public-knowledge-statement-cbs-intemet-black-ou-0 (characterizing CBS's "outright abuse of consumers" as "unacceptable").

[152] *Notice* ¶ 15.

While the proposed rule speaks for itself, ATVA's proposal can also serve as the basis for more comprehensive action in this area.

The Commission should begin by removing bundling from the list of conduct presumptively consistent with good faith.[153] However bundling may have been used in the very different competitive circumstances that existed in 2000, broadcasters today use it as a weapon to exploit their leverage. It is no longer appropriate for the Commission to presume that such conduct serves the public interest.

Here again, moreover, the Commission can take its cues from labor law precedent. For more than fifty years, the NLRB and the courts have recognized that the statutory goal of promoting agreement by labor and management on terms and conditions of employment can be frustrated not only by a refusal to negotiate on the statutorily-required subjects, but equally by conditioning agreement on the resolution of *other* subjects. As the Supreme Court has put it:

> [G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining . . . . [S]uch conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.[154]

Under what has become known as the *Borg-Warner* doctrine, proposing terms relating to a non-mandatory subject is not unlawful from the outset, but a party may not "lawfully insist upon them as a condition to any agreement."[155]

One clear example of unlawful insistence on a non-mandatory subject is where a party presses for an agreement that will affect other bargaining units besides the one that is the proper

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[153] *Good Faith Order* ¶ 56; *Notice* ¶ 15 ("Have circumstances changed such that bundling of broadcast and non-broadcast programming should not be presumptively consistent with good faith bargaining under any circumstances?").

[154] *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 349 (1958).

[155] *Id.*

subject of the bargaining. Absent consent of the union, an employer cannot insist on bargaining jointly with other employers.[156] Nor, without consent of the employer, may a union seek "to force the contract terms negotiated for one unit upon . . . other units."[157] Similarly, a union may not bargain to impasse over benefits for employees who are already retired, because retired employees are not in the bargaining unit and their benefits do not vitally affect the terms and conditions of employment of active employees.[158]

As discussed above, retransmission consent is a right specific to broadcasters—a right that relates *only* to the "signal" of a "broadcasting station."[159] Where a broadcaster insists over the objection of the MVPD on bundling retransmission consent with carriage of other programing, the process of attempting to reach agreement on retransmission consent applicable to one station is in effect held hostage to a demand for agreement on other matters involving the interests of other programming. This, under labor law, would be considered bargaining on a non-mandatory subject. As *Borg-Warner* teaches, such bargaining practices, by conditioning agreement on matters outside the statutorily mandated subject of negotiation, frustrate the objective of reaching agreement on the mandated subject. As such, absent agreement from both parties, such conduct violates the good faith requirement.

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156 *See, e.g., Don Lee Distrib., Inc. v. NLRB*, 145 F.3d 834, 842-44 (6th Cir. 1998).

157 *Utility Workers, Locals 111* (*Ohio Power Co.*), 203 NLRB 230, 239 (1973), *enforced*, 490 F.2d 1383 (6th Cir. 1974). *See also Associated Gen. Contractors of N.D.*, 245 NLRB 328 (1979), *enforced*, 637 F.2d 556 (8th Cir. 1980) (employer violated good faith bargaining requirement by insisting to impasse on clause prohibiting union from entering into conflicting agreements with other employers); *Supervalu, Inc.*, 351 NLRB 948 (2007) (proposed clause requiring supermarket to recognize union at additional stores presented a non-mandatory subject of bargaining).

158 *Allied Chem. Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 179-80 (1971).

159 47 C.F.R. § 325(b).

Labor law precedents also show why bundling should be considered to be "forced," and hence to be impermissible, even if a broadcaster resorts to the common strategy of accompanying a bundled offer with an unbundled offer that contains such onerous terms as to be obviously unacceptable. As the NLRB has reasoned, "[t]he law relating to mandatory subjects of bargaining would be meaningless if a [party] were permitted to force the [other party] to choose between acceptance of a demand on a nonmandatory subject and an alternative that the [party making the offer] knows the [other party] cannot live with."[160] This, it seems to ATVA, is a more elegant way of pointing out stand-alone offers that do not present "a real economic alternative" to the bundle, which is ATVA's proposed standard.[161]

3. Blackouts Around Marquee Events.

The Commission should consider it a *per se* violation of good faith or, at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> **Withholds 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 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.**

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[160] *Lathers Local 42*, 223 NLRB 37, 42 (1976). *See also Southern California Pipe Trades District Council No. 16*, 167 NLRB 1004, 1009 (1967) (where "the counterproposals advanced by [the party that had been insisting on a nonmandatory subject] were so extreme as to preclude a reasonable expectation of acceptance [such] that the ostensible choice they offered was illusory," the party was in effect continuing to insist on the nonmandatory subject even though it had been removed from the counterproposal, and the party thus failed to bargain in good faith).

[161] The Commission could alternatively determine that it is a *per se* violation to insist on a bundle that requires the channels in that bundle to be available to a particular percentage of customers.

As set forth above, in the case of a blackout that begins well in advance of a marquee event but extends into it, the broadcaster should be required to reinstate consent during that event so that viewers are not deprived of such exceptional programming.

4. Ceding Right To Negotiate.

The Commission should consider it a *per se* violation of good faith or, at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> **Relinquishes 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.**[162]

This request fills in the gaps left by existing rules, which prohibit joint negotiation only in a single market, and then only by so-called "Big Four" affiliates.[163] A more expansive rule is needed to address this harmful and increasingly pervasive practice.

5. Equipment Restrictions.

The Commission should consider it a *per se* violation of good faith or, at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> **Conditions 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.**[164]

There is no reason to allow broadcasters to deprive viewers of legally available options for technology and services, to impose the additional expense and energy usage of unnecessary set-top boxes in the viewer's home, or more generally to stifle technological advances.

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[162] *Notice* ¶ 14.

[163] 47 C.F.R. § 76.65(b)(1)(viii).

[164] *Notice* ¶ 16.

Here again, this request touches on the "non-mandatory subjects" doctrine of labor law.[165] Just as employers and unions cannot insist on bargaining for items outside of the scope of statutorily mandated bargaining subjects, broadcasters cannot insist—over the objection of the MVPD—on dictating the technology or equipment used by the MVPD in its ordinary course of business.

6. Out-Of-Market Signals.

The Commission should consider it a *per se* violation of good faith or, at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> **For satellite MVPDs, fails 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.**[166]

In case of a broadcaster blackout, this proposal would help prevent a disruption of service to viewers by allowing MVPDs to temporarily import the signal of a station from another market providing programming of the same network. It contains two parts because the rules that enable broadcasters to keep out distant signals differ as between satellite and cable MVPDs.

Broadcasters enforce exclusivity against cable operators in part using the network non-duplication and syndicated exclusivity rules.[167] By contrast, those rules apply to satellite carriers only with respect to the carriage of a handful of nationally distributed superstations and to

[165] *See supra* Sec. II.B.2 and cases cited therein.

[166] *Id.*

[167] 47 C.F.R. §§ 76.92-95 (Cable Network Non-duplication Rule); *id.* §§ 76.101-110 (Cable Syndicated Exclusivity).

formerly significantly viewed stations.[168] In the satellite context, broadcasters enforce territorial exclusivity through a different mechanism. By statute, broadcast signals from a network station outside the local market may only be provided to viewers: (1) to whom the satellite carrier does not make available the local affiliate of the same network[169] and (2) who reside in so-called "unserved households" where an over-the-air signal of sufficient intensity is not predicted to be available from a local station of the same network.[170]

This proposal accounts for these differences by identifying conduct tailored to the MVPD's specific situation. Thus, with respect to a satellite MVPD, a waiver lifts the effects of exclusivity. With respect to cable and telco MVPDs, declining to exercise network non-duplication and syndicated exclusivity rights achieves the same end. In either case, the proposal ameliorates the effects of rules that, as Chairman Wheeler recently recognized, "prohibit[] the market from operating in a fair and efficient manner and aggravate[] the harm to consumers during retransmission consent disputes."[171]

7. Charging For Subscribers That Do Not Receive Service.

The Commission should consider it a *per se* violation of good faith or, at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> **Demands 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 MVPD-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**

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[168] *2014 Joint Negotiation Order* ¶¶ 45, 51. They also apply to stations that are removed from the "significantly viewed" list. 47 C.F.R. § 76.122(j); *id.* § 76.123(k).

[169] 17 U.S.C. § 119(a)(3)(C); 47 U.S.C. § 339(a)(2)(C).

[170] *See* 17 U.S.C. § 119(a)(2).

[171] Wheeler Letter at 2.

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).[172]

This proposal ensures that broadcasters cannot insist on compensation where there is no "retransmission" of their signals to a viewer. In other words, it aligns a broadcaster's compensation with the terms of the statute giving it the right to such compensation. It also keeps subscribers from having to pay for services they don't receive.

This request also relates to the "non-mandatory subjects" doctrine of labor law.[173] A broadcaster's demand for payment for signals *not* retransmitted is, of course, an attempt to bargain on a subject other than retransmission consent. Labor law would not permit insistence on such demands over the objection of the MVPD, and the Commission's rules should treat such demands no differently.

III. THE COMMISSION HAS AUTHORITY TO ADDRESS BAD FAITH BEHAVIOR BY BROADCASTERS.

A. STELAR Specifically Authorizes The Commission To Delineate Presumptively Bad Faith Conduct.

Broadcasters have long questioned the Commission's authority to regulate bad faith conduct in retransmission consent negotiations.[174] Yet there can be no doubt that STELAR gives the Commission new, specific authority to delineate practices that presumptively fail the totality of the circumstances test. Congress required the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations."[175] One can assume that,

[172] *Notice* ¶ 16.

[173] *See supra* Sec. II.B.2 and cases cited therein.

[174] *E.g.*, Comments of the National Association of Broadcasters at 62 *et seq.*, MB Docket No. 10-71, (filed May 18, 2010).

[175] STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

if Congress asked the Commission to "commence a rulemaking," it intended to empower the Commission to actually make rules. As the Supreme Court has held, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure."[176]

STELAR's legislative history confirms that Congress both authorized the Commission to act and affirmatively intended that it do so. Congress expected the Commission to engage in a "robust examination" of retransmission consent negotiation practices,[177] to consider "whether certain *substantive* terms offered by a party may increase the likelihood of negotiations breaking down,"[178] and to examine "the *practices* engaged in by both parties if negotiations have broken down and a retransmission consent agreement has expired."[179] Likewise, Congress indicated that the Commission should "conduct a rulemaking to review *and update* its totality of the circumstances test,"[180] and noted that "the rulemaking . . . should be used to update" the test, "so that [it] will take a broad look at *all facets* of how both television broadcast station owners and MVPDs approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard set forth in the Communications Act."[181] Were there any doubt on this score, Congress stated that it expected the Commission to address "consumer harm from programming blackouts."[182] As the Commission recognized, Congress even specified

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[176] *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

[177] S. Rep. No. 113-322, at 13 (2014).

[178] *Id.* (emphasis added).

[179] *Id.* (emphasis added).

[180] *Id.* (emphasis added).

[181] *Id.* (emphasis added).

[182] *Id.*

that "negotiations for retransmission consent have become significantly more complex in recent years, and in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts."[183]

Congress's direction that the Commission examine the "substantive terms offered by a party" is critical. In the past, the Commission has thought (incorrectly, in our view) that it lacked authority to examine such "substantive terms."[184] Congress has just specifically given it this authority.

B. Section 325 Of The Act Specifically Authorizes The Commission To Regulate Retransmission Consent Negotiations.

STELAR's specific mandates come against a backdrop of the Commission's longstanding authority and duty to regulate retransmission consent negotiations. Section 325 of the Communications Act requires the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent,"[185] and to consider "the impact that the grant of retransmission consent by television stations may have on

[183] *Notice* ¶ 3 (quoting S. Rep. No. 111-322 at 13) (internal modifications omitted).

[184] *See Good Faith Order* ¶ 32 ("We do not intend the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties.").

[185] 47 U.S.C. § 325(b)(3)(A) (emphasis added). The fact that this provision directs the Commission to adopt rules within 180 days does not prevent the Commission from updating its rules in response to new conditions. In a related context, the Commission found "no merit" to the contention that an initial implementation deadline in a statute limited its ongoing ability to revisit rules. *See Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, FCC 10-17, 25 FCC Rcd 746, ¶ 11 n.23 (2010). The Commission specifically held that it "has an obligation to consider, on an on-going basis, whether its rules should be modified in response to changed circumstances." *Id.*

the rates for the basic service tier."[186] This, properly understood, has always given the Commission the duty—not simply the authority—to address retransmission consent abuse.

Here again, Congress intended to vest the Commission with broad authority to regulate retransmission consent. For instance, during the floor debate leading to the Act's enactment, Senator Lautenberg observed that "if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights;" instead, "cable operators will have an opportunity to seek relief at the FCC."[187] And in a 2007 letter to the Commission, the Chairman and Ranking Member of the Senate Commerce Committee reiterated that Section 325's directives mean, "[a]t a minimum," that "Americans should not be shut off from broadcast programming while the matter is being negotiated among parties and is awaiting Commission resolution."[188]

This preexisting authority permits—and has always permitted—the Commission to go beyond *presumptively* bad conduct by revising its *per se* standards for bad faith negotiation.[189] The Commission has previously added to the *per se* categories on its own initiative, without a congressional directive to do so.[190] Indeed, the Commission devised the original *per se* list itself

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[186] 47 U.S.C. § 325(b)(3)(A). The Commission must also ensure that its regulations do not conflict with its obligation to ensure that rates for the basic service tier are reasonable. *Id.*

[187] 138 Cong. Rec. S14615-16 (Sept. 22, 1992) (statement of Sen. Lautenberg).

[188] Letter from Sens. Inouye and Stevens to Chairman Kevin Martin, Federal Communications Commission (Jan. 30, 2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Comm'ns Corp. v. Sinclair Broad. Grp., Inc.*, CSR No. 8233-C (filed Oct. 22, 2009).

[189] *Notice* ¶ 20 ("In the alternative to considering any of the above factors, or additional factors that commenters raise, pursuant to the totality of the circumstances test, we ask commenters to consider whether any of the factors mentioned above should instead be considered additional *per se* violations of the duty to negotiate retransmission consent in good faith.").

[190] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶¶ 13-14 (2011) (noting that the Commission commenced rulemaking upon petition by MVPDs).

without any specific congressional mandate to enumerate bad faith tactics.[191] And when the Commission added two *per se* factors last year, it held that it had authority to do so under Section 325.[192] It noted that "[w]here, as here, Congress has granted the Commission broad discretion to adopt rules implementing Section 325, including rules defining the scope of the good faith obligation, we find it reasonable to conclude that Congress . . . relied on the Commission to make such determinations."[193] The Commission also held, over broadcasters' objections, that it was authorized to proscribe certain negotiation practices only when employed by broadcasters without also proscribing them for MVPDs.[194]

Of course, STELAR's new directive to examine the "substance" of negotiations gives the Commission new and additional authority to add to its *per se* list.[195] The Commission can add to its *per se* list, moreover, even if it were to determine that Congress's new directive to look at the "substance" of broadcasters' demands applies only to *presumptive* findings under the totality of

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[191] *See generally Good Faith Order* ¶¶ 11-24 (describing procedural history of *per se* test).

[192] *2014 Joint Negotiation Order* ¶¶ 29-33 (holding that the Commission had authority to address joint negotiation pursuant to Congress's directives to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent," and adopt rules to "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith.").

[193] *Id.* ¶ 31.

[194] *Id.* ¶ 33.

[195] Broadcasters also acknowledge that STELAR may represent a change in congressional policy. Although Sinclair initially challenged the Commission's decision to add joint negotiations to its *per se* list, it withdrew its appeal because "Congress passed . . . STELA[R] . . . which *directly impacts* the subject matter of [Sinclair's] Petition and the FCC's order under review in material respects[.]" Mot. for Voluntary Dismissal at 1-2, *Sinclair Broadcast Grp. v. FCC*, No. 14-1088 (D.C. Cir. Dec. 4, 2014) ECF No. 1525540 (emphasis added). Sinclair only challenged the Commission's changes to its *per se* test. *See* Br. of Pet'r at 2, *Sinclair Broadcast Grp. v. FCC*, No. 14-1088 (Sept. 16, 2014) ECF No. 1512558 (statement of issues). Thus Congress's instructions to reexamine the totality of the circumstances test also implies authority to revisit the *per se* test as well, if STELAR had a "direct," "material" impact on the legitimacy of the *per se* factors.

the circumstances test.[196] The behavior ATVA identifies pertains only to broadcasters' negotiating tactics,[197] not the substance of offers—and tactics have always been within the purview of the Commission's authority.[198]

C. The Comprehensive Regulatory Regime Governing Broadcasting Authorizes The Commission to Regulate Broadcasters For The Public Good.

Beyond the two sets of specific authority described above lies a broader, structural source of authority—one that reflects the view, described at the beginning of these Comments, that broadcasting plays a special role in serving the public interest. Broadcasters like to refer to the "carefully constructed copyright and communications statutory scheme enacted and reenacted by Congress," especially when they want to argue that modifications to the scheme would harm

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[196] *Good Faith Order* ¶ 23 (internal quotation marks and modifications omitted) (finding that, in originally enacting the good faith requirement, "Congress clearly did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD.").

[197] Congress specifically expected the Commission to "make sure that the *tactics* engaged in by both parties meet the good faith standard set forth in the Communications Act." S. Rep. No. 113-322, at 13 (2014) (emphasis added).

[198] The Commission's ancillary authority augments its statutory responsibilities under Title III, and, in conjunction with the more specific authority described above, provides further authority to regulate specific bad faith negotiation tactics. Section 303(r) authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out," 47 U.S.C. § 303(r), its dual obligations to govern retransmission consent negotiations, *id.* § 325(b)(3)(A), and to ensure that the "public interest, convenience, and necessity" is served by the grant of Title III applications. *Id.* § 309(a). Likewise, Section 4(i) of the Communications Act authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." *Id.* § 154(i). Of course, ancillary authority must be exercised "in conjunction with an express delegation of authority to the Commission." *Comcast Corp. v. FCC*, 600 F.3d 642, 652 (D.C. Cir. 2010). Here, however, the statutory authority under Section 325 justifies the exercise of ancillary authority to the extent necessary to prevent consumer harm—especially since Congress was specifically motivated by concern over harm to consumers when it reauthorized STELA. *See, e.g.*, S. Rep. No. 113-322, at 13 (2014) (warning of "consumer harm from programming blackouts"); 160 Cong. Rec. H8081-01 (daily ed. Nov. 19, 2014) (statement of Rep. Green) ("Our colleagues on the Senate Commerce Committee proposed additional pro-consumer reforms, and I am pleased that we were able to include those in H.R. 5728.").

their business.[199] This statutory scheme and its associated regulations, however, were not created for the benefit of broadcasters. They were created for the viewing public—both those who view broadcast television using rooftop antennas and those who rely upon coaxial cable, fiber, or a satellite dish. This structure, therefore, presupposes and specifically provides for meaningful oversight in order to ensure that the public actually receives these benefits.

Section 309 of the Communications Act requires the Commission to determine "whether the public interest, convenience, and necessity will be served by the granting" of broadcast license applications.[200] This conveys a "broad" and "expansive" "mandate [on] the FCC to assure that broadcasters operate in the public interest,"[201] and has upheld significant exercises of authority to satisfy that mandate.[202] So too with other provisions of the Communications Act relating to broadcasting:

> The fundamental statutory responsibilities of the Commission are clear. The Commission is charged with the duty of executing the policy of the Communications Act to "*make available, so far as possible, to all people of the United States*, a rapid, efficient, nationwide and worldwide wire and radio communication service" and "*generally to encourage the larger and more effective use of radio in the public interest*." The Commission is also required to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities *as to provide a fair radio service to each of the same*."[203]

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[199] Comments of the ABC Television Affiliates Association at ii, MB Docket No. 10-71 (filed June 26, 2014) (arguing against repeal of the network non-duplication and syndicated exclusivity rules).

[200] 47 U.S.C. § 309(a) requires the Commission to determine "whether the public interest, convenience, and necessity will be served by the granting" of broadcast license applications.

[201] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380 (1969).

[202] *See, e.g.*, *id.* (affirming "fairness doctrine" requiring broadcasters to allow each side of important public issues to be presented on broadcast stations). The *Red Lion* Court made clear that the Commission's public interest authority extends not just to the initial grant of a broadcast license, but to its oversight of broadcast stations' operations as licensees. *Id.* (affirming FCC requirements "included among the conditions of the . . . license itself . . . that the operation of the station be carried out in the public interest").

[203] *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to*

The Commission has exercised its authority repeatedly under these and other provisions over the years.

Congress intended for this authority to benefit viewers, not just broadcasters. Practically every exercise of broadcast regulation reflects this fact. Thus, for example, the Supreme Court upheld the Cable Act's must-carry provisions because they served three "interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."[204] Each of these interests relates not to the broadcasters themselves, but to the viewers who watch broadcast television. The Court also clearly signaled its conclusion that Congress did not limit itself to the parochial interests of broadcasters when it rejected the dissent's argument that "must-carry is designed solely to be (and can only be justified as) a measure to protect broadcasters from cable operators' anticompetitive behavior."[205]

Likewise, when it first implemented program exclusivity rules, the Commission found that "a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest."[206] And when the Commission reinstated syndicated exclusivity in 1988, it stressed that "the public interest requires that free, local, over-the-air broadcasting *be given full*

Community Antenna Systems, 30 Fed. Reg. 6038, 6044 (1965) ("*1965 Network Exclusivity Order*") (quoting 47 U.S.C. §§ 151, 303(g)) (internal quotation marks and citations omitted) (emphasis added).

[204] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

[205] *Id.* at 194.

[206] *1965 Network Exclusivity Order* ¶ 57.

opportunity to meet its public interest obligations."[207] The Commission has specifically used its public-interest authority to ensure fair competition between broadcasters and MVPDs, noting that "fair competition between free, over-the-air broadcasting and cable helps ensure that local communities will be presented with the most attractive and diverse programming possible."[208] Here again, these concerns relate to the viewer, not just the broadcaster.

For more than seventy years, then, Congress and the Commission have routinely intervened in the "free market" in order to prevent harm to viewers of broadcast programming. That it is the broadcasters themselves causing this harm today has no bearing on the Commission's authority to do so again here.

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The good faith negotiation rules no longer suffice to protect the public from blackouts, price hikes, and other unreasonable behavior. The Commission now has the perfect opportunity to make those rules work better for the negotiating parties and, more importantly, for the American television viewer. For the reasons set forth above, the Commission should modify and clarify its totality of the circumstances test as described herein.

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[207] *Amendment of Parts 73 & 76 of the Commission's Rules Relating to Program Exclusivity in the Cable & Broad. Indus.*, Report and Order, DA 88-180, 3 FCC Rcd 5299, ¶ 74 (1988) (emphasis added).

[208] *Id.* (emphasis added). The Commission has invoked this implicit authority in a variety of other contexts, including a proposal to establish operating requirements relating to network resiliency, and its requirement that broadcasters air public service announcements during the DTV transition. *See Effects on Broadband Communications Networks of Damage to or Failure of Network Equipment or Severe Overload*, Notice of Inquiry, FCC 110-62, 25 FCC Rcd 4333, ¶ 9 n.12 (2010) (network resiliency) ("Under Title III, the Commission has the authority to establish operational obligations for licensees that further the goals and requirements of the Act if the obligations are in the public interest and do not contradict any basic parameters of the agency's authority."); *DTV Consumer Education Initiative*, Report and Order, FCC 08-56, 23 FCC Rcd 4134, ¶ 28 (2008) ("Sections 303(r) and 4(i) of the Communications Act provide ample authority for the[se] reporting requirement(s) because providing this information will help us ensure broadcasters are acting as public trustees . . . ." (citing *Red Lion*, 395 U.S. at 383)).

Respectfully Submitted,

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APPENDIX A

ATVA Members

The Africa Channel
American Cable Association
American Public Power Association (APPA)
BendBroadband
Bright House Networks
Cablevision Systems Corp.
CenturyLink
Charter Communications
Comporium
DIRECTV
Discovery Communications
DISH Network
Eastern Rural Telecom Association
GMC
Harron Communications
Independent Telephone and Telecommunications Alliance
Massillon Cable TV
Mediacom Communications
Midcontinent Communications
New America Foundation
NTCA—The Rural Broadband Association
Outdoor Channel
Parents Television Council
Retirement Living TV
Rural Independent Competitive Alliance
NUVOtv
Starz Entertainment
Suddenlink Communications
Time Warner Cable
USTelecom
Verizon
Wave Broadband and Astound Broadband