Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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January 14, 2016

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I. INTRODUCTION AND SUMMARY

The comments submitted by the pay TV industry in this proceeding make one thing perfectly clear. The goal of pay TV providers is not to promote consumer welfare – which, given their past track record, is hardly surprising. Rather, for multichannel video programming distributors (MVPDs) this proceeding is solely about encouraging government intervention in the marketplace – in this one limited instance – to prevent broadcasters from negotiating for the fair market value for their signals. Nothing more, nothing less.

The question for the Commission here is whether it will be unwittingly complicit in the pay TV industry's revenue enhancement aims. Adopting all, some or even any of the proposals championed by MVPDs will only put more money in the pockets of the likes of AT&T/DirecTV, DISH and Time Warner Cable/Charter/Bright House. The Commission should not be under any illusion that changes to its good faith negotiating standard will lower consumer prices, lead to more reasonable equipment charges or reduce sky-high early termination fees. If anything, the pay TV industry's ability to dictate the terms of service with their customers will be strengthened by FCC intervention increasing MVPDs' marketplace leverage. MVPDs also cannot show how their proposals (the legal ones, at least) will promote the FCC's stated goal of benefitting consumers by reducing the already small number of service disruptions caused by negotiating impasses.

Fortunately for the Commission, despite MVPD bluster, the record makes plain that the FCC's current totality of the circumstances test is sufficiently flexible to effectively encourage fair bargaining over the retransmission of broadcast television signals. Good faith negotiation complaints are exceedingly rare. In fact, the record and recent FCC experience in this area should drive the Commission to close this proceeding as soon as practicable, so as to remove the greatest impediment to the successful and timely conclusion of retransmission consent agreements: MVPDs' ongoing wish for government intervention.

There is hardly a "crisis" in retransmission consent. One need not take NAB's word for it. The Commission need simply note the paucity of consumer complaints and the remarkably small percentage of significant service disruptions due to retransmission consent disputes. Indeed, while thousands of deals are completed, the handful of disputes that arise are gleefully trumpeted by pay TV advocates like the American Television Alliance (ATVA), which takes great pleasure in the political ammunition created each and every time one of its members allows an agreement to expire. However, even with ATVA's fetish for creating a buzz around each minor retransmission consent dispute, there still is no widespread support for government intervention in private-market negotiations between entities experienced in negotiating a variety of programming and other commercial contracts.

Although MVPD commenters in this proceeding studiously conveniently ignore the realities of today's video marketplace, the explosive growth in content options and significant and continuing MVPD consolidation have given most pay TV providers superior bargaining positions in retransmission consent negotiations. Long gone are the days when three networks controlled the nation's video content. The record contains a surfeit of data demonstrating the competitiveness of the content marketplace. And even without examining this clear data, one need only look around to see the vast array of high-quality video options consumers now enjoy. The video marketplace has never been this competitive and consumers' choices only continue to expand.

This fact is critical because it shows that broadcasters cannot possess the requisite market power to tilt retransmission consent negotiations in their favor. No matter how loosely MVPDs toss around terms like "market power" or "monopoly," no serious advocate or regulator could claim that broadcasters possess anything of the sort in today's programming marketplace. Television broadcasters must fiercely compete for eyeballs and advertising dollars, and thus have every incentive to reach agreement with MVPDs and to have their programming shown on every possible platform. Increasingly consolidated MVPDs cannot seriously argue that broadcast stations possess market power – let alone undue or excessive market power – at the retransmission consent negotiating table.

Beyond the revenue-enhancing motivations behind them, MVPDs' proposals themselves are unwise, imbalanced or simply unlawful. As the Commission has found on multiple occasions, it cannot lawfully force broadcasters to supply their signals to MVPDs. This means that interim carriage or any flavor of it – including required carriage during so-called "marquee" events – is unlawful. It is also unlawful for the Commission to require broadcasters to make their content available online. Federal copyright law gives broadcasters the right to control whether, how and when their content is distributed. Nothing supports the view that the FCC can supersede copyright law to require broadcasters to publicly perform their copyrighted material online.

MVPD arguments attempting to outlaw the bundling of programming by broadcasters – and only broadcasters – are also unavailing. There is simply no reason why the Commission should layer on top of decades of antitrust precedent new rules governing bundling that apply solely to over-the-air broadcasters. As both the Department of Justice and the courts have recognized, bundling is often pro-competitive. In many instances in the video programming market, bundling has led to greater efficiencies, increased diversity and innovations in content. Blanket rules prohibiting the practice for broadcasters beyond antitrust requirements will skew the market not only to favor MVPDs, but also cable programmers, who will still be free to bundle content as they see fit. Government policies undermining the competitiveness of consumers' free video option in favor of increasingly expensive pay options will not serve the public interest.

As shown in more detail below, MVPDs' wish list of proposals do nothing for consumers. To ensure that viewers receive their content via MVPDs uninterrupted, the FCC should quickly close this proceeding with no further changes to the current retransmission consent system. Only this action will convince MVPDs that there is no longer any value in creating service disruptions. Each day the FCC leaves an avenue open to MVPDs to seek government intervention to benefit their bottom lines is a day they weigh the political value of not reaching a retransmission consent deal. It's time for MVPDs – especially those multi-billion dollar corporations responsible for the lion's share of disputes – to focus on bargaining with broadcasters and not the Commission.

II. PROPOSALS CHAMPIONED BY MVPD COMMENTERS WOULD UNFAIRLY HANDCUFF BROADCASTERS BY LIMITING THEIR ABILITY TO NEGOTIATE, A BURDEN NOT PLACED ON ANY OTHER PROGRAMMERS

According to the pay TV industry, broadcasters have "abused their privileged status,"[1] have "exploited their significant market power,"[2] and have generally been allowed to "run wild" under the existing good faith negotiation rules, showing "absolutely no regard for the harms their demands and negotiating tactics cause MVPD customers."[3] MVPDs paint a picture divorced from reality, hoping that the Commission will ignore the most obvious and salient facts – fierce competition in the content marketplace, significantly increased MVPD consolidation (and resulting bargaining power) and the pay TV industry's own long-standing reputation for not caring about consumers – and create rules to handcuff their competitors in order to obtain greater profits for themselves.

As NAB explained in its initial comments,[4] the top 10 pay TV providers – including companies like AT&T/DirecTV and Comcast – control a massive 94 percent of the MVPD

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[1] *See* Comments of the American Television Association, MB Docket No. 15-216, at 6 (Dec. 1, 2015) (ATVA Comments).

[2] *See* Comments of AT&T, MB Docket No. 15-216, at 6 (Dec. 1, 2015) (AT&T Comments).

[3] *See* Comments of Mediacom Communications Corporation, MB Docket No. 15-216, at 10 (Dec. 1, 2015) (Mediacom Comments).

[4] NAB is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the FCC and other federal agencies, and the courts.

market.[5] That point cannot be overstated. A witheringly small portion of the American population is served by small and medium-sized MVPDs. The vast majority of pay TV customers receive their bills – those ever-higher bills – from nationally-recognized companies with market capitalizations in the billions. And now, remarkably, these same companies are seeking the FCC's assistance in the name of consumers for the sole purpose of increasing their bottom lines. As NAB discusses in detail below, the Commission should reject MVPDs' requests to restrict broadcasters' ability to negotiate for the retransmission of their signals or to otherwise artificially reduce broadcasters' retransmission consent compensation.

Both broadcasters and pay TV operators are sophisticated business entities that routinely engage in negotiations for the sale and purchase of products and services. They each have the ability to – and do – hire experienced counsel to assist them. Pay TV companies have been negotiating for, and paying for, carriage of various cable and broadcast channels for decades. This is their core business. Even the smallest cable operators often combine negotiations for carriage rights with other operators to ensure the best deal.[6]

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[5] *See* Comments of NAB, MB Docket No. 15-216, at 17-18 (Dec. 1, 2015) (NAB Comments) (following approval of the Charter/Time Warner Cable/Bright House merger).

[6] *See, e.g.,* American Cable Association Press Release, *Smaller Cable Companies, Larger Programmers Have Long Benefited From Buying Groups Like NCTC* (Mar. 24, 2014), available at: http://www.americancable.org/node/4718 ("NCTC has 890 member companies and has been successfully negotiating programming agreements on behalf of its members for 30 years."); *see also* National Cable Television Cooperative Press Release, *The Walt Disney Company & NCTC Announce First Ever Retransmission Consent Agreement for ABC-Owned Broadcast Stations* (Dec. 22, 2014), available at: https://www.nctconline.org/index.php/news/press-releases/item/191-the-walt-disney-company-and-the-national-cable-television-cooperative-announce-first-ever-retransmission-consent-agreement-for-abc-owned-broadcast-stations ("The retransmission consent agreement comes on the heels of a comprehensive long-term distribution agreement completed in August between The Walt Disney Company and NCTC to deliver Disney's robust lineup of top quality sports, news and entertainment content to participating NCTC members' customers across TVs, computers, smartphones, tablets, gaming consoles and connected devices.").

The illusion created by MVPD commenters that broadcasters are taking advantage of helpless pay TV providers during negotiations is nothing more than a self-serving and well-worn talking point. They argue, for example, that negotiating impasses have grown substantially during the previous five years,[7] but fail to acknowledge that those numbers are dwarfed by the many thousands of agreements that are seamlessly completed.[8] They rely heavily on the recent percentage increases in retransmission consent revenue,[9] but ignore how little (if anything) they paid for their most popular content for many years; how, even now, broadcasters remain underpaid on a per viewer basis; and how, compared to their total revenue, pay TV operators' input costs would be the envy of most other distribution businesses.[10] They also trot anecdotes to cast broadcasters in the darkest light, eager for the Commission to deem even routine negotiating practices as "bad faith."[11]

In reality, capitulating to MVPD demands in this proceeding would unfairly disfavor broadcasters compared to other program providers. If these proposals are adopted, broadcasters would be unable to negotiate on a level playing field for MVPDs' distribution and resale of their signals. Broadcasters would be forced to extend carriage of their signals in contravention of Section 325, required to undergo expensive and unnecessary government-led mediation or arbitration, strictly limited in what terms they may even propose and

[7] ATVA Comments at ii.

[8] *See, e.g.,* Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216, at 4-7 (Dec. 1, 2015) (Nexstar Comments).

[9] ATVA Comments at ii.

[10] *See* Comments of CBS Corp., MB Docket No. 15-216, at 7 (Dec. 1, 2015) (CBS Comments).

[11] *See* Mediacom Comments at 5.

generally be treated as supplicants to pay TV providers. Giving such decisive leverage to MVPDs would artificially reduce retransmission consent fees to the sole benefit of the pay TV industry and would do nothing to benefit the viewing public.

A. MVPD Commenters Fail To Meet Their Burden To Show A "Market Failure" Justifying Extraordinary Intrusions Into Everyday Business Negotiations

There is simply no need for the Commission to "fix" a system that by any measure is not broken, particularly in ways that will give substantially increased bargaining power to one industry over another. MVPDs try their best to label the current marketplace as a failure and suggest that broadcasters have undue bargaining power in retransmission consent negotiations. But they fail to demonstrate this essential point. It is not enough to say that retransmission consent fees have risen from nothing to something in the last decade. Nor is it enough to argue that regulation is necessary because negotiations may be "contentious."[12] As News-Press & Gazette notes, the fact that "these negotiations are ably and aggressively negotiated by both broadcasters and MVPDs—and are sometimes contentious and frequently 'go down to the wire'—does not mean there is a market failure. Competitive markets are, indeed, 'competitive.'"[13] The Commission is an expert agency that should give precise meaning to terms like "market failure," and MVPDs cannot viably claim that the current video programming marketplace is anything of the sort.

MVPDs' assertion that a gross disparity exists in the bargaining power between themselves and broadcasters defies logic. First, and most obviously, the vast majority of

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[12] Comments of Time Warner Cable, Inc., MB Docket No. 15-216, at 1 (Dec. 1, 2015) (TWC Comments).

[13] Comments of News-Press & Gazette Co., MB Docket No. 15-216, at 6 (Dec. 1, 2015) (News-Press & Gazette Comments).

negotiations, however contentious, successfully result in a contract to retransmit a broadcast signal without an impasse. Numerous broadcasters reported that they have never experienced a service disruption, and others reported only two or three negotiating impasses over the course of more than two decades.[14] This strongly suggests relatively equal bargaining power and co-dependence,[15] and also makes intuitive sense. Pay TV distribution is essential to a broadcaster's success; pay TV operators, likewise, rely on programming to redistribute. Interestingly, ATVA makes almost the same argument, and even concedes that "in a properly functioning market," disruptions should be "rare."[16] They are, in fact, rare, as we have pointed out *ad nauseam*[17] – less than one percent of negotiations result in an impasse.[18] Second, as NAB showed in its initial comments and as other broadcast

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[14] *See, e.g.,* Comments of The E.W. Scripps Co., MB Docket No. 15-216, at 2 (Dec. 1, 2015) (Scripps Comments); Comments of Graham Media Group, MB Docket No. 15-216, at 2 (Dec. 1, 2015) (Graham Media Comments); Comments of Saga Broadcasting, LLC, MB Docket No. 15-216, at 1-3 (Dec. 1, 2015) (Saga Broadcasting Comments); Comments of Raycom Media, Inc., MB Docket No. 15-216, at 6 (Dec. 1, 2015) (Raycom Media Comments); Comments of Gray Television Group, Inc., MB Docket No. 15-216, at 2-3 (Dec. 1, 2015) (Gray TV Comments).

[15] *See* Robert S. Alder and Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 Harv. Negotiation L. Rev. 1, at 16-19 (2000) ("Repeated studies confirm that power symmetry, rather than disproportionate power, is the most favorable condition for reaching agreement."); *see also* Edward J. Lawler, *Power Processes in Bargaining*, 33 Soc. Q. 17, 24 (1992) (concluding that power disparities tend to produce fewer agreements).

[16] ATVA Comments at 8-9.

[17] *See, e.g.,* NAB Comments at 7, 51-52; Opposition of NAB, RM-11752, at 8 (Aug. 14, 2015); Comments of NAB, MB Docket No. 10-71, at 7-8 (May 27, 2011).

[18] ATVA has greatly overstated the number of actual disputes by a large margin by counting a dispute between a single broadcaster that owns multiple stations and a single MVPD operating in multiple markets as multiple impasses, rather than a single dispute between the same two parties. As Nexstar reported, correctly counting impasses dramatically reduces their number, finding, for instance, that the 107 service disruptions claimed by ATVA in 2014 were, in actuality, only 11 disputes – and eight of them involved DISH or DirecTV. *See* Nexstar Comments at 5-6 & n.6. Several broadcasters pointed out that the considerable majority of negotiating impasses in recent years involved only a very few MVPDs. *See, e.g.*, Graham Media Comments at 6-7 (about 64% of all impasses since 2012 involved either DISH or DirecTV); Comments of Media General, Inc., MB Docket No. 15-216, at 10 (Dec. 1,

commenters confirmed, competition in the video programming space has increased exponentially in the past two decades.[19] This fact is indisputable. As a result, pay TV operators and their subscribers have much greater choice in programming. Third, the market is overloaded with quality content. No one can reasonably complain that the market has failed to supply quality video programming. Indeed, in this "Golden Age of Television," complaints about "too much television" are more likely.[20]

MVPDs play fast and loose with the term "market power," suggesting that broadcasters somehow possess it. But what their definition really boils down to – as put best by AT&T – is that retransmission negotiations previously resulted in MVPDs carrying broadcast signals "for free," but now they have to pay.[21] The Commission, however, knows that is not the definition of "market power," let alone a market inequity that needs fixed.

B. Given That They Have Not Demonstrated Any Market Failure, MVPDs Futilely Grasp At Other Legal Straws To Justify Their Laundry List of Proposals

MVPDs appear to recognize that they cannot seriously claim that broadcasters exert unlawful market power over pay TV providers – whether because of MVPD consolidation or the myriad content choices in the marketplace. Instead, MVPDs focus their attention on the

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2015) (Media General Comments) (between 2010 and January 2015, 70% of impasses identified by ATVA involved DISH, DirecTV or Time Warner Cable).

[19] *See* NAB Comments at 8-15; *see also* Comments of The Walt Disney Co., MB Docket No. 15-216, at 3-9 (Dec. 1, 2015) (Disney Comments) (noting that "[b]etween 1990 and 2015, the number of basic cable channels has increased six-fold, and today, over 900 non-broadcast channels are available for distribution to subscribers").

[20] NAB Comments at 8-9.

[21] In its comments, AT&T – the largest MVPD in the country and once the very symbol of monopoly in telecommunications – laments the loss of the glory days for pay TV operators when retransmission negotiations "typically resulted in cable providers carrying the local broadcaster – and perhaps additional affiliated channels – *for free*." AT&T Comments at 3-4 (emphasis added).

more amorphous "public interest" – at least as far as broadcasters are concerned.[22] The public interest is not served, however, by the FCC putting a thumb on the scale for pay TV operators to artificially lower the price they pay for broadcasters' signals, which, as the FCC has recognized, would do nothing to reduce MVPDs' consumer prices.[23] MVPDs provide zero evidence that their proposals – the ones that are not blatantly unlawful, at least – would actually fulfill the FCC's only stated goal of benefitting consumers by reducing impasses.[24]

Certain MVPD commenters, particularly ATVA and ACA, make strained analogies to labor law in a vain attempt to distract the Commission from their failure to establish that their proposals would benefit consumers and/or are needed to prevent competitive harm due to broadcasters' undue market power.[25] They have selectively cribbed precedent from labor law they contend supports government intrusion into the retransmission consent marketplace.

ACA makes a futile argument that the FCC should rely on labor law precedent to impose a substantiation requirement in retransmission consent negotiations.[26] But its argument misses several important points. First, ACA completely ignores the fact that, unlike an employer and employee relationship, broadcasters and MVPDs are business rivals competing for viewers and advertising revenue, and a substantiation requirement would inherently involve sharing of sensitive information. Indeed, that is why the Commission has

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[22] *See, e.g.,* Comments of the American Cable Association, MB Docket No. 15-216, at 10 (Dec. 1, 2015) (ACA Comments); ATVA Comments at 56-57.

[23] Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109, at n.21 (Sept. 2, 2015) (NPRM).

[24] *Id*. at ¶ 6.

[25] *See* ATVA Comments at 39-42; ACA Comments at 39-48.

[26] *See* ACA Comments at 39-48.

explicitly refused to impose an "information sharing or discovery mechanism."[27] Second, unlike a union, both broadcasters and MVPDs engage in numerous negotiations for the sale and purchase of products and services with many different entities. Pay TV operators routinely negotiate not only with broadcasters, but also with potentially dozens if not hundreds of other programmers. As a result, they are hardly operating in a "vacuum" during retransmission consent negotiations.[28]

ATVA likewise fruitlessly attempts to fit the square peg of labor law into the round hole of broadcaster-MVPD negotiations. It confusingly argues that broadcasters, like employers, should not be permitted to engage in "surface bargaining" until they can unilaterally impose changes in the terms and conditions of employment (i.e., carriage), even though a "genuine" impasse has not been reached.[29] This argument defies both marketplace realities and common sense. ATVA provided no evidence that broadcasters routinely engage in "surface

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[27] *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5464 & n.100 (2000) (2000 Good Faith Order). As NAB pointed out in its initial comments, a disclosure requirement raises additional questions about the parties to whom disclosures would be made, what those parties (including potentially the FCC) would do with that information, how the information would be protected from further disclosure to others, and whether any disclosure requirements would be consistent with the Trade Secrets Act. *See* NAB Comments at 45-46. We also observed that the good faith rules already require negotiating parties to give their reasons for rejecting any aspect of retransmission consent offers. *Id*., citing 2000 Good Faith Order.

[28] Comments of NTCA – The Rural Broadband Association, MB Docket No. 15-216, at 13 (Dec. 1, 2015) (NTCA Comments). NAB recognizes, of course, that during some retransmission consent negotiations, smaller MVPDs must negotiate with larger broadcasters. But many smaller broadcasters must routinely negotiate with increasingly consolidated MVPDs that dwarf them in size, scope and negotiating resources. *See, e.g.,* Comments of Morgan Murphy Media, MB Docket No. 15-216, at 5-8 (Dec. 1, 2015) (Morgan Murphy Comments); News-Press & Gazette Comments at 1-2; Saga Broadcasting Comments at 9; Comments of Joint Broadcasters, MB Docket No. 15-216, at 8-11 (Dec. 1, 2015).

[29] ATVA Comments at 39-42.

bargaining" – however that may be defined – with no intention of reaching a deal before a contract expires.[30] Further, no party can make "unilateral" changes to the terms and conditions of retransmission consent; the contract remains in force until it expires, and if a new agreement is not reached, then a broadcast station has no right to be carried on the MVPD and the MVPD has no right to carry the broadcaster's signal without consent. ATVA's entire argument presumes that broadcasters are just biding their time until they can gleefully pull their signals. That notion is absurd. Broadcasters have every incentive to be viewed by the largest audiences possible.

Moreover, ATVA has made an entirely inapposite comparison that demonstrates its fundamental misunderstanding of labor law. ATVA insists that broadcasters are equivalent to employers, but in its own analogy broadcasters are far more aptly compared to employees, whose fundamental right to withhold their labor (i.e., to strike) serves as the foundation of labor law. Similarly, federal law expressly provides broadcasters the right to withhold consent to carriage of their signals – that is the foundation of the retransmission consent system. ATVA's proposals are akin to denying workers the right to strike, as they would effectively prevent broadcasters from withholding their consent so long as MVPDs claimed they were willing to negotiate.[31] NAB understands the appeal of this proposal to ATVA, as it would cripple the negotiating leverage of local stations by virtually nullifying their statutory right to prevent MVPDs from using their signals without consent. The Commission, however, has no

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[30] If a broadcaster or MVPD does engage in surface bargaining, then a complaint may be brought against that party under the existing good faith rules. *See* 2000 Good Faith Order, 15 FCC Rcd at 5458; NAB Comments at 45.

[31] *See* ATVA Comments at 40-42.

evidentiary or legal basis for vastly increasing MVPDs' negotiating power and undermining broadcasters' rights under Section 325.

For all these reasons, the Commission must reject ACA's and ATVA's unconvincing attempts to graft their version of labor law onto retransmission consent negotiations. The FCC's existing rules encompass the fundamental meaning of good faith negotiation under labor law and other federal statutes.[32] The FCC's adoption of the concept of good faith negotiation in its previous orders does not support MVPDs' current misuse of labor law to call for requirements the FCC has already rejected, or to substantially impair the negotiating position of only one party to commercial negotiations between two business entities.

C. The Commission Cannot Reasonably Adopt MVPD Proposals That Would Dictate Or Otherwise Limit Which Terms Broadcasters May Negotiate Over

Congress did not intend that broadcasters should be strictly limited to negotiating only for bare carriage of their signals.[33] The Communications Act explicitly provides that broadcasters are not violating their good faith requirement if they enter into retransmission consent agreements "containing different terms and conditions, *including* price terms, with different multichannel video programming distributors."[34] Congress clearly contemplated that broadcasters would be negotiating for terms and conditions beyond price, and retransmission consent negotiations have long included myriad terms, ranging from electronic program guide placement to video on demand. MVPDs want the FCC to defy Congressional intent and

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[32] *See* NAB Comments at 25-27.

[33] *See, e.g.*, S. Rep. No. 92, 102nd Cong., 1st Sess. at 35-36 (1991) (Senate Retransmission Consent Report) (stating that broadcasters may negotiate "*other issues* with cable systems, *such as* joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system") (emphasis added).

[34] 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added).

prevent broadcasters from negotiating in the same manner as other enterprises, including competing video programming providers. The Commission should not grant their wishes.

For example, MVPD proposals preventing broadcasters from negotiating about channel position/tier placement and which devices may be used to access their content should be rejected.[35] The Commission previously found proposals for carriage "conditioned on a broadcaster obtaining channel positioning or tier placement rights" presumptively consistent with good faith.[36] Broadcasters should be able to negotiate to try to prevent their signals and programming services from being placed on a tier with inappropriate or unrelated types of programming,[37] or on a tier where those programming services will likely be financially unviable. Univision in particular stressed the importance of tier placement for its programming services that appeal to both bilingual viewers and to Spanish-only speaking viewers.[38] Given that non-broadcast programmers can freely negotiate for tier/channel placement,[39] the Commission has no valid basis for discriminating against broadcast programmers in this regard.

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[35] *See, e.g.,* Comments of Cablevision Systems Corp., MB Docket No. 15-216, at 7 (Dec. 1, 2015) (Cablevision Comments); Comments of The U.S. Telecom Ass'n, MB Docket No. 15-216, at 20-21 (Dec. 1, 2015) (USTA Comments).

[36] 2000 Good Faith Order, 15 FCC Rcd at 5469.

[37] A children's programming channel, for instance, should not be grouped with more adult-oriented networks. Disney Comments at 21. *See also* News-Press & Gazette Comments at 10 (describing channel placement and tier positioning as "critical" because most viewers know their local stations by channel number and "expect to see NPG stations located near other network-affiliated programming in channel lineups").

[38] Univision Comments at 13-14.

[39] *See* Affiliate Ass'ns Comments at 20-21.

The Commission similarly should not restrict the ability of stations to negotiate over the use of various devices and functionalities by an MVPD or furnished by the MVPD to its subscribers.[40] Broadcasters and their programming partners have strong interests in ensuring that their content is distributed to the intended audiences, available to the most viewers, and seen in full, including with commercials vital for financing the creation of that content.[41] Broadcasters therefore should be able to negotiate with MVPDs about their use of devices and functionalities (the "ad hopper" is one example) that directly affect how broadcast signals are distributed and viewed.

Commenters also pointed out that proposals for restricting negotiations over devices and functionalities reflect MVPD attempts "to extract rights that broadcasters may not have the legal right to grant."[42] The content contained in any broadcast signal is created and owned by multiple parties, including the local station, its affiliated network, other local broadcast stations, sports leagues, syndicators, news services and others. Upstream content producers grant distinct rights to distributors (including broadcasters) separately, and at times decline to grant broadcasters the right to distribute certain content via particular technologies or user devices.[43] Broadcasters are contractually required to abide by these limitations when granting rights to MVPDs. If a broadcaster asks a MVPD to place limits on the

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[40] *See, e.g.,* TWC Comments at 17-18; Comments of Cox Enterprises, Inc., MB Docket No. 15-216, at 11-12 (Dec. 1, 2015) (Cox Comments); ATVA Comments at 30-31.

[41] *See* Affiliate Ass'ns Comments at 19-20; NAB Comments at 48-49; Disney Comments at 27-28.

[42] Disney Comments at 28. *Accord* Nexstar Comments at 18-19 & n.47. Nexstar additionally noted the hypocrisy of such proposals, as it reported experiencing MVPD "blocking of legal broadcast functionalities (e.g., interactivity)."

[43] Disney Comments at 28. *Accord* Nexstar Comments at 19 & n.47.

use of certain functionalities because it lacks the necessary upstream rights, these requested limitations are wholly appropriate and should not implicate the good faith standard. The Commission has no basis under the Communications Act or the Copyright Act to declare that a broadcaster seeking to comply with its own legal obligations somehow acts in bad faith.[44]

How a broadcaster and MVPD ultimately agree to count subscribers likewise should not concern the Commission.[45] If a broadcaster asks to have payment calculated based on all of a MVPD's subscribers, including non-video subscribers, the MVPD is free to reject that offer, or propose an alternative.[46] The methodology for calculating payment should not be a topic banned from retransmission negotiations under the good faith standard. Indeed, the question of defining and counting subscribers is a valid subject for negotiation, as pay TV providers may have incentives to avoid paying for online video subscribers that view broadcast signals and would otherwise be considered video subscribers.[47]

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[44] Disney Comments at 28-29; Nexstar Comments at 19 & n.47. Nexstar further observed that the FCC has no authority at all over the upstream providers whose content is contained within broadcast signals and who have clear rights under the Copyright Act to protect and control the distribution of their content, including through the imposition of limits and conditions on broadcasters distributing their content.

[45] *See, e.g.,* Comments of CenturyLink, MB Docket No. 15-216, at 3 (Dec. 1, 2015) (CenturyLink Comments); Cox Comments at 12-13.

[46] The MVPD, for example, might agree to the broadcaster's proposal for counting subscribers, but then propose a lower rate per subscriber, so that total payment varies little.

[47] *See, e.g.,* Affiliate Ass'ns Comments at 24. NAB notes that cable programmers, like AMC, negotiate with MVPDs about how to measure "subscribers" for purposes of calculating payment for carriage. *See* Shalini Ramachandran, *AMC Takes Aim at Skinny Bundles in Cable Carriage Fight*, Wall Street Journal (Dec. 15, 2015). If the FCC were to restrict the ability of broadcasters to negotiate with MVPDs over the measurement of subscribers, it should consider similar restrictions on cable programmers.

In any event, the Commission should not consider particular negotiating proposals in isolation. Broadcasters and MVPDs negotiate for any number of terms for any number of reasons, and those reasons are often affected by other components of a particular negotiation. Every negotiation is unique – and that is why the current totality of the circumstances test is much more appropriate than an inflexible list of "suspect" negotiating terms and practices.

The wish list of MVPD proposals, moreover, ultimately only serves one goal: Reducing broadcasters' bargaining chips so that MVPDs will gain even greater leverage in private retransmission consent negotiations. In essence, that is the industry's "solution" to difficult negotiations and any potential impasses – persuade the government to weaken broadcasters' bargaining position such that MVPDs can unilaterally impose an "agreement." This "solution," however, is contrary to the Communications Act and would warp competition in the video marketplace.

NAB also stresses that MVPD goals in this proceeding have nothing to do with serving consumers. For example, Mediacom and CenturyLink argue that it should be evidence of bad faith, or even prohibited, for broadcasters to warn consumers of a possible impasse using crawls, website messages or other alerts.[48] Mediacom goes so far as to assert that only pay TV operators should be allowed to communicate with viewers about retransmission consent-related service disruptions.[49] Not only would such a rule prohibiting broadcaster speech

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[48] CenturyLink Comments at 5-6; Mediacom Comments 28-31.

[49] Mediacom Comments at 30 ("As a starting point, the Commission should rely on the existing rules that dictate the circumstances under which MVPDs are required to give subscribers notice of service changes and the method and timing of such notifications. These required notifications *should be the*

violate the First Amendment,[50] it also would be distinctly anti-consumer. These MVPDs would prefer to keep their customers in the dark, and they even want the FCC to prevent broadcast stations from informing *their own viewers* about any potential service interruption. This shows, yet again, that MVPD proposals in this proceeding are not intended to promote consumer access to local broadcast stations or otherwise serve viewer interests.

III. WITH A FLOURISHING VIDEO MARKETPLACE, THERE IS NO REASON TO ADOPT PRO-MVPD PROPOSALS DESIGNED TO ARTIFICIALLY REDUCE RETRANSMISSION CONSENT RATES

The pay TV industry has turned the percentages game into an art form, and their comments in this proceeding are a prime example. Multiple pay TV commenters, including ATVA, predictably trot out their favorite talking point – that broadcast retransmission consent revenue has increased 22,400% in the last decade.[51] This number is specious, and created only as an attempt to spur the Commission into action on their behalf.

Understandably, not one MVPD commenter notes that percentage changes can often be high when the starting point is zero or near-zero, as is the case with retransmission consent compensation. Consider this data point: According to SNL Kagan, total

only permissible communications regarding retransmission consent related service interruptions.") (emphasis added).

[50] MVPD objections to viewer warnings about impending service disruptions include the "content of those notices." Mediacom Comments at 29. Content-based speech restrictions are "presumptively invalid" as a violation of the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

[51] ATVA Comments at 14; TWC Comments at 7-8. ATVA even goes so far as to claim that retransmission consent revenue could increase at a rate of 40% every year, and that by 2021, broadcasters could reap $50 billion. ATVA Comments at 15-16. No respected analysis supports this ridiculous claim.

retransmission consent fees paid by MVPDs in 2006 was $214 million.[52] Broadcasters were then, as they are now, the most popular programming for pay TV subscribers. And yet, compared to MVPDs' total video revenue in 2006 (roughly $70 *billion*),[53] retransmission consent fees looked like a veritable steal. Indeed, the input cost of their most popular product was a paltry 0.3 percent of their total video-only revenue.

As NAB explained in its initial comments, Congressional action to spur some measure of competition in the MVPD marketplace finally allowed the retransmission consent system to work as originally intended. MVPD commenters predictably complain about "exorbitant" fees[54] that have "skyrockete[d]"[55] and, portending doom, call them "unsustainable,"[56] but even a cursory analysis of the marketplace shows little to support such hyperbole. Indeed, even today, these "unsustainable" retransmission consent fees still account for an exceedingly low 5.4 percent of MVPDs' total video-only revenue.[57] MVPDs decry the fact that they pay broadcasters more today than they did in 2006, but during that same period, their total video revenues increased from $70 billion to an estimated $116 billion. Put another

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[52] SNL Kagan, *Multichannel Programming Fees as a Percent of Multichannel Video Revenues: SNL Kagan Projection* (Apr. 28, 2014).

[53] *Id.* This does not include MVPD revenue from the sale of other services, including high-speed Internet access.

[54] Comments of Verizon, MB Docket No. 15-158, at 9 (Aug. 21, 2015).

[55] AT&T Comments at 7.

[56] TWC Comments at 7; ATVA Comments at 17.

[57] This calculation is based on the estimated $6.3 billion in retransmission consent revenue cited by multiple MVPD commenters, including ATVA (see comments at 14), and recent SNL Kagan data showing that MVPDs' total video revenue for 2015 is an estimated $116 billion. *See* SNL Kagan, *Multichannel Programming Fees as a % of Multichannel Video Revenues: SNL Kagan Projection* (Apr. 2015) (SNL Kagan 2015 MVPD Revenue Report).

way, just the *increase* in MVPD video revenue since 2006 ($46 billion) is *more than seven times* the *total* amount paid to broadcasters last year. Given those hard facts, how can major pay TV providers with market capitalizations as high as $200 billion reasonably cry poverty? As broadcast commenters pointed out, MVPDs are complaining about retransmission consent rate increases of pennies – or at the most nickels – on the dollar.[58]

Several MVPD commenters lean on the specifically-refuted 2009 analysis by Michael Katz to support their erroneous argument that broadcasters have the ability to extract supra-competitive retransmission consent prices, and that such price increases are harming consumers.[59] A subsequent study by Drs. Jeffrey Eisenach and Kevin Caves, however, showed how that analysis was "profoundly flawed and fundamentally incorrect."[60]

ATVA, for example, relies on the Katz Analysis to support its argument that broadcasters enjoy substantially increased leverage since passage of the 1992 Cable Act, due to the emergence of other MVPDs in addition to cable.[61] As Drs. Eisenach and Caves explained, though, the Katz Analysis ignored other "changes in the marketplace, such as the

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[58] Nexstar, for example, states that when it first sought cash payment from MVPDs in 2005, it requested *a penny a day* per subscriber and settled for much less. Today, broadcasters (including major network affiliates) are lucky to receive *five cents per day* per subscriber, as MVPDs fight to avoid paying market value for broadcast signals that they claim they must have. Nexstar Comments at 11.

[59] *See, e.g.,* ATVA Comments at 13, 20, 35-36 (citing Michael L. Katz *et al.*, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (Nov. 12, 2009) (Katz Analysis), available at http://97.74.209.146/downloads/analysis_consumer_harm.pdf); AT&T Comments at 3, 9 (same).

[60] Jeffrey A. Eisenach, Ph.D., and Kevin W. Caves, Ph.D., *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* at 1, Appendix A to Opposition of Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) (Eisenach/Caves Reply to Katz Analysis). We hereby incorporate NAB's Opposition and the attached Eisenach/Caves Reply by reference in this proceeding.

[61] ATVA Comments at 35-36.

advent of cable system clustering, a reduction in the share of viewers watching television over the air, and the increase in availability and audience shares of non-broadcast programming, all of which have *reduced* broadcasters' bargaining power."[62] These trends have only accelerated since 2010. Today's significantly increased competition in the programming market and ever-greater consolidation across the MVPD market mean that broadcasters' market power, if anything, has further diminished.[63]

Most critically for the FCC's analysis here, Drs. Eisenach and Caves showed how the Katz Analysis "fails to demonstrate that current (or anticipated future) levels of retransmission consent compensation are in any economically meaningful sense 'too high,'" and that "absent such a finding," any claim of "consumer harm is economically meaningless."[64] In essence, the Katz Analysis' allegation of consumer harm only amounted to a claim that

> pay television providers would charge consumers less for video service if they could get access to one of their key inputs (broadcast signals) for free. . . . Of course, precisely the same thing could be said about electricity and bucket trucks. The obvious fallacy is that forcing electricity providers and truck manufacturers to give pay television operators their products for free would reduce the quantity (and quality) of electricity and bucket trucks supplied, and both pay television operators and, ultimately, consumers would suffer as a result. The same is true for broadcasting.[65]

A study in 2011, moreover, reconfirmed all these findings.[66]

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[62] Eisenach/Caves Reply to Katz Analysis at 2; *see also id*. at 4-7.

[63] *See* NAB Comments at 8-22.

[64] Eisenach/Caves Reply to Katz Analysis at 3. Drs. Eisenach and Caves also observed that the Katz Analysis "*never even argues* that broadcasters have, in any meaningful economic sense, 'too much' bargaining power." *Id*. at 8 (emphasis added).

[65] *Id.* at 1-2.

[66] *See* Decl. of Jeffrey A. Eisenach and Kevin W. Caves, Attachment A to NAB Comments, MB Docket No. 10-71 (May 27, 2011) (May 2011 Economic Decl.). This updated analysis of the video

Unsurprisingly in light of this evidence and analyses, no MVPD commenter has proven – or even made a serious attempt to prove – that retransmission consent fees are "too high" in a real economic sense as a result of broadcaster market power. Given that MVPDs have not and cannot demonstrate that broadcasters possess so much market power that they may "impose uneconomic terms on MVPDs,"[67] nothing in the record supports MVPD proposals for new regulations to greatly increase their bargaining power. Pay TV providers similarly made no attempt to show that broadcasters have used whatever leverage they possess in an anti-competitive manner by, for example, withholding their signals to gain a competitive advantage vis-à-vis MVPDs in the video distribution market.[68] Continual MVPD complaints that "retransmission consent fees" are no longer "capped at zero" do not constitute a rational basis for FCC intervention.[69]

marketplace and the retransmission consent regime again concluded that MVPD complaints about retransmission fees being "too high" were unfounded "from the perspective of economic efficiency," and thus rejected MVPDs' repetitive claims about supposed consumer harm. *Id*. at 1. This analysis again explained that increasing competition in the programming marketplace and rising concentration in the MVPD market nationally and locally had kept broadcasters' bargaining power from increasing over time and, if anything, meant that their "relative bargaining power had *decreased*," which was "in no way inconsistent with the fact that retransmission consent fees have increased from an initial level of zero." *Id*. at 1-2. We hereby incorporate NAB's May 2011 comments and the accompanying analysis by Drs. Eisenach and Caves in this proceeding.

[67] Eisenach/Caves Reply to Katz Analysis at 7.

[68] In fact, broadcasters unaffiliated with a MVPD have no economic incentive whatsoever to engage in such withholding. *See, e.g., General Motors Corp. and Hughes Electronics Corp., Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 565-66 (Jan. 14, 2004).

[69] May 2011 Economic Decl. at 1. In fact, "from an economic perspective, it would have been virtually inconceivable for retransmission fees to have remained at zero," unless broadcast "signals were truly devoid of any real economic value" or "broadcasters somehow possessed no bargaining power whatsoever" in their negotiations with pay TV providers. *Id*. The fact that broadcasters have some degree of bargaining leverage is no basis for government regulations that would artificially drive down retransmission fees paid for valuable broadcast signals.

Indeed, several commenters noted that broadcasters should be able to command higher rates than cable programming providers and higher rates than they do today on a per-subscriber basis.[70] ATVA feebly argues that broadcasters should not be paid retransmission rates on par with cable networks, because, among other things, "[s]ome, but not all, cable networks have *fewer substitutes than broadcasters in subscriber's eyes*—even if broadcasters have higher ratings."[71] This statement is strikingly inconsistent with almost every other assertion ATVA makes about broadcast signals in its comments. For example, ATVA argues that broadcasters "continue to enjoy their monopoly position,"[72] and that broadcasters "certainly possess monopoly rights to key network content."[73] But broadcasters cannot be "monopolists" if there are substitutes for their programming and, according to ATVA, *more* substitutes than for a number of cable networks. It is similarly inconsistent with their argument that broadcasters continue to raise rates "unsustainably."[74] If broadcasters are more substitutable than cable networks, how is it possible that retransmission consent rates will increase to theoretical "unsustainable" levels? It defies logic.

As NAB also previously explained, the FCC cannot justify directly or indirectly regulating MVPDs' wholesale costs like retransmission consent fees unless it also regulates the retail

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[70] *See, e.g.,* Gray TV Comments at 15-17; Comments of The Writers Guild of America, West, Inc., MB Docket No. 15-216, at 7-8 (Dec. 1, 2015) (Writers Guild Comments); Graham Media Comments at 3-6. For example, Graham notes that if its average station received compensation based on the same scale as TNT, because of much higher ratings it would be paid as much as $6.39 per subscriber. Likewise, compared to TBS, Graham stations would receive $4.45 per subscriber.

[71] ATVA Comments at 19 (emphasis added).

[72] *Id.* at 35.

[73] *Id.* at 26.

[74] *Id*. at 14.

costs charged to pay TV subscribers.[75] NAB has demonstrated repeatedly that broadcasters are hardly the cause of high pay TV bills;[76] *pay TV operators* are themselves the cause of high pay TV bills. According to the Writers Guild, citing SNL Kagan Data, in 2014 MVPD revenue per video subscriber per month averaged $92.53, while MVPD total programming costs per video subscriber were $42.99 per month and retransmission fees per video subscriber averaged $0.85 per broadcast station per month. The costs of each broadcast station thus equated to only "0.9% of average revenue per video subscriber per month per channel" and a mere "2% of [MVPD] programming costs per subscriber per month."[77] Given this data, the FCC must reject the pay TV industry's attempts to transfer blame for MVPDs' high consumer prices to local broadcast stations.[78]

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[75] *See, e.g.,* Reply Comments of NAB, MB Docket No. 10-71, at 45-47 (June 27, 2011); *see also* Comments of Hearst Television, Inc., MB Docket No. 15-216, at 3-4 (Dec. 1, 2015) (Hearst Comments) ("In the absence of the Commission's ability and willingness to regulate MVPD rates—which runs counter to the Commission's ongoing regulatory initiatives—any action in this docket will almost certainly harm broadcasters without any commensurate positive impact on MVPD subscribers.").

[76] *See, e.g.,* Reply Comments of the Broadcaster Associations, MB Docket No. 10-71, at 13-17 (June 30, 2010); Comments of NAB, MB Docket No. 10-71, at 41-47 (May 27, 2011); Supplemental Comments of NAB, MB Docket No. 10-71, at 2-8 (May 29, 2013).

[77] Writers Guild Comments at 6-7. In 2014, total retransmission consent fees were less than the costs to MVPDs of regional sports networks. *Id*.

[78] Past MVPD efforts cited by commenters to buttress claims of consumer harm from retransmission consent have been specifically refuted. *See* AT&T Comments at 3, 9 and ATVA Comments at 9, 14, citing Steven Salop, *et al*., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* (Salop Study), attached to Reply Comments of Time Warner Cable, MB Docket No. 10-71 (June 3, 2010). This TWC study was quickly and thoroughly refuted. *See* Jeffrey A. Eisenach and Kevin W. Caves, *Video Programming Costs and Cable TV Prices: A Reply to CRA* (June 2010), submitted in MB Docket No. 10-71 by The Walt Disney Co. (June 23, 2010). The TWC study on its face showed that the pay TV industry was more concerned with its retransmission payments to broadcasters than with consumer welfare. It explicitly identified the retransmission consent (RTC) fee as "a mechanism for transferring bargaining surplus from the MVPD to the broadcaster," and "[t]hus, a higher RTC fee will transfer more of the surplus to the broadcaster." Salop Study at 25-26. Given that the Salop Study was focused on the (alleged) "harm suffered by

Rising consumer prices for MVPD service -- which pre-date by many years the payment of any cash retransmission consent compensation to broadcasters[79] -- are at least partially explained by MVPDs' increasing tendency to saddle consumers with new and mysterious "fees" that look like taxes and wildly over-priced equipment costs. For example, the Writer's Guild observed that, according to a recent Congressional study, "subscribers spend an average of $19.25 a month on set-top box rental fees."[80] The Commission would better serve consumers by investigating these types of fees and equipment costs rather than crediting the stale complaints of TWC, Verizon and AT&T/DirecTV about stations' requests for retransmission fees commensurate with the value of broadcast signals.

Just as ATVA asserts the Commission cannot expect pay TV operators to "'eat' [retransmission consent fee] increases out of their margins,"[81] nothing suggests that pay TV operators would ever pass any artificially-gained savings in their programming costs onto consumers. Unless Congress and the Commission are willing to concurrently regulate MVPD subscriber rates, no justification exists for reducing retransmission consent rates through regulatory fiat.

Finally, NAB observes that pay TV advocates neglected to acknowledge the harms to the viewing public resulting from artificially reducing broadcasters' retransmission consent revenue. As economic studies have found and commenters stressed in this proceeding, in

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MVPDs," *id*. at 4, it "fail[ed] to provide an economic basis for establishing consumer harm from the results" of retransmission negotiations. Eisenach and Caves, *A Reply to CRA* at 4.

[79] *See* NAB Comments at 55 & n.161.

[80] Writers Guild Comments at 7.

[81] ATVA Comments at 21.

today's competitive video marketplace retransmission revenues are vital to supporting stations' costly local news and weather programming and emergency journalism and for keeping popular and expensive sports programming on free, over-the-air (OTA) television, rather than behind a paywall.[82] Adopting MVPD-proposed rules designed to lower broadcasters' revenues will disserve the public interest by reducing economic support for stations' programming services. Such proposals are therefore contrary to the interests of the millions of viewers informed and entertained by broadcast programming accessed via MVPDs, and are particularly harmful to those viewers who rely exclusively or in part on free OTA services. As has been well documented, lower income and minority viewers make up significant percentages of viewers reliant on OTA services, as do an increasing number of "cord cutters" and "cord nevers."[83] The pay TV industry's proposals in this proceeding completely ignore the interests of these viewers, as well as their own subscribers.

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[82] *See, e.g.*, Raycom Media Comments at 3-4 and Att. A (Raycom's stations produce about 1,300 hours of local news per week, at a cost of $150 million per year; maintaining "local coverage in the face of an unprecedented level of competition and audience fragmentation is an expensive proposition, and retransmission consent revenues are a crucial element"); Media General Comments at 14-15 (retransmission fees "offset" the high costs of providing "local news, sports, weather and emergency information," as well as the company's recently opened Washington DC bureau, which provides political and breaking news); Morgan Murphy Comments at 3-5 ("Viewers demand and expect high-quality, locally produced programming," but "[p]rogramming costs have increased dramatically" and "fair compensation for retransmission consent remains . . . critical"); Graham Media Comments at 7-9 ("Graham . . . has made substantial investments in local news programming at all of its stations, as well as in other public services not provided by MVPDs, including significant, substantive investments in investigative reporting . . . . If retransmission consent rates are depressed, high-quality, high-cost programming will be moved behind a pay wall."). *See also* Jeffrey A. Eisenach, *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA Economic Consulting, at 28-33 (2014) (concluding that retransmission revenues are critical for supporting broadcast programming, including local news and public affairs programming; developing multicast streams that serve niche audiences such as foreign language speakers; and retaining sports programming on free broadcast services).

[83] *See, e.g.,* Comments of NAB, MB Docket No. 15-158, at 3-5 (Aug. 21, 2015).

IV. THE COMMISSION SHOULD REJECT MVPDS' PLEAS TO SELECTIVELY BAN BROADCASTERS' BUNDLING OF PROGRAMMING THAT FULLY COMPLIES WITH ANTITRUST LAW

As NAB explained in its initial comments, and as many broadcast commenters agreed,[84] the Commission has no basis to declare that routine bundling proposals made in the context of retransmission consent negotiations constitute bad faith. Antitrust law properly addresses any potential competition questions arising from the bundling or tying of programming, whether by cable programmers or by broadcasters. The record does not demonstrate that broadcasters, unique among all video programming providers – indeed, unique among all business enterprises – should be subjected to "super-antitrust" rules applicable only when they negotiate certain contracts, often with entities far exceeding them in scale and scope.

A Given The Acknowledged Benefits Of Program Bundling, The FCC Cannot Rationally Ban Or Restrict Bundling Proposals During Retransmission Consent Negotiations

Even assuming that the Commission had the requisite authority to prohibit or significantly restrict bundling proposals during retransmission consent negotiations – which it does not[85] – the Commission cannot rationally do so. The record in this and in the FCC's earlier proceeding specifically addressing program bundling is replete with evidence and studies demonstrating the diversity benefits and economic efficiencies of bundling.

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[84] *See, e.g.*, Affiliate Ass'ns Comments at 38-44.

[85] Various commenters have explained that the FCC lacks authority to forbid broadcasters from proposing the carriage of additional programming during retransmission consent negotiations. *See, e.g.*, Disney Comments at 18-19; Affiliate Ass'ns Comments at 39. *See also* Comments of NBC Universal, Inc. and NBC Telemundo License Co., MB Docket No. 07-198, at 8-22 (Jan. 4, 2008); Comments of The Walt Disney Co., MB Docket Nos. 07-29, 07-198, at 3-9 (Jan. 4, 2008); Comments of NAB, MB Docket Nos. 07-29, 07-198, at 8-11 (Jan. 4, 2008). NAB incorporates these earlier comments into the present proceeding by reference.

A number of broadcast commenters discussed how offering a package including its primary broadcast channel and other programming channels, such as multicast channels or cable networks, promotes the diversity of video programming. For example, various broadcasters pointed out that bundling allows viewers access to minority-oriented programming, including the African-American targeted network Bounce; Spanish language programming such as Telemundo; and additional free, over-the-air sports programming, including local Major League Baseball games.[86] Univision Communications discussed how negotiating carriage of affiliated programming networks allows it to deliver "Spanish-language programming responsive to the needs of the U.S. Hispanic community."[87] In particular, Univision explained how "incentiviz[ing] carriage of new services by offering them as part of a discounted package is especially critical" for programmers seeking to bring "innovative content for diverse and often underserved populations" to market.[88] Other commenters similarly demonstrated the importance of bundling to launching "innovative channels, including niche channels targeted to underserved communities," which need time and higher audience penetration to attract both viewers and advertising revenue.[89]

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[86] *See, e.g.*, News-Press & Gazette Comments at 18-19; Raycom Media Comments at 8; Media General Comments at 8-9; Nexstar Comments at 24-25.

[87] Comments of Univision Communications Inc., MB Docket No. 15-216, at 10 (Dec. 1, 2015) (Univision Comments).

[88] *Id*.

[89] Comments of 21st Century Fox, Inc. and Fox Television Stations, LLC, MB Docket No. 15-216, at 12 (Dec. 1, 2015) (Fox Comments), citing Bruce M. Owen, *Wholesale Packaging of Video Programming* at 3 (Owen Video Bundling Study), attached to Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 07-198 (Jan. 4, 2008). NAB incorporates Dr. Owen's study and Fox's 2008 comments by reference in this proceeding.

Broadcast commenters stressed that "no MVPD is compelled" to carry broadcasters' proposed bundles of programming[90] and that they "offer options to MVPDs" to carry additional programming networks "at different price points."[91] Broadcasters also observed that while they may seek to include carriage of additional programming channels in their negotiations, MVPDs often refuse to carry the additional network(s), including diverse ones such as Bounce.[92] Morgan Murphy Media stated that the multicast channels of some of its stations "often have higher ratings than other programming channels in an MVPD's lineup," yet "MVPDs often refuse to carry these channels" as part of a retransmission agreement for its primary station.[93] In light of this record, complaints by MVPD giants with market

[90] New-Press & Gazette Comments, at 18. *Accord* Affiliate Ass'ns Comments at 42 ("No MVPD is *forced* to accept a 'bundle' of programming."); Univision Comments at 11 ("Univision has never required that all of its services be purchased in order to reach agreement on a retransmission consent deal.").

[91] Media General Comments at 9 (further stating it is "unaware of any widespread practice of conditioning retransmission consent of its primary channel only on carriage of an affiliated station or multicast stream").

[92] Raycom Media Comments at 8 (noting that "certain major MVPDs have refused to carry" Bounce); Affiliate Ass'ns Comments at 42 ("many negotiations conclude without the MVPD agreeing to carry any additional or non-broadcast channels"); Univision Comments at 11 (noting that when Univision offers MVPDs a package of programming services at discounted rates, some MVPDs take the entire suite, while others select specific services that they believe best meet the needs of their subscribers).

[93] Morgan Murphy Comments at 4. An earlier empirical analysis found that cable operators, including small ones, very seldom carried all, or even most, of the programming services provided by broadcasters with affiliated cable networks. For example, only 4% of all cable systems carried all 11 cable networks provided by Disney, only 1% carried all six cable networks offered by Scripps, 0% carried all nine cable networks provided by Fox, 4% carried all seven cable networks provided by NBC Universal, and 0% carried the four cable networks provided by Univision. When only *small* cable operators were considered (i.e., those with less than 400,000 subscribers), only 1% of cable systems carried all 11 cable networks offered by Disney; otherwise 0% carried all of the cable networks carried by Fox, NBC Universal, Scripps and Univision. Owen Video Bundling Study, at 22-23, Figs. 11 & 12. This data lead to one obvious conclusion: broadcasters do not force MVPDs, including small ones, to take their full bundles of channels and networks.

capitalizations up to 200 times greater than many of the largest local broadcast station groups about so-called "forced bundling" are unconvincing, if not disingenuous.[94]

Beyond documented diversity benefits, economic studies have concluded that the "bundling of video programming is driven by efficiencies," and that consumers benefit from the economics of scale and scope and the reduced transactional costs generated by the bundling of video programming.[95] As NAB and other commenters observed,[96] the courts also have recognized that consumers benefit from bundling because "bundled discounts . . . allow the buyer to get more for less."[97] Even a number of MVPDs calling for regulation of broadcaster bundling acknowledge (albeit grudgingly) the efficiency and consumer benefits of bundling programming, and consequently do not urge the FCC to ban all bundling proposals by broadcasters.[98] In light of this record and the documented benefits of bundling, it would be

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[94] AT&T Comments at 14; TWC Comments at 18; ATVA Comments at 44.

[95] Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming*, at 8-19 (Eisenach Program Bundling Study), attached to Comments of The Walt Disney Co., MB Docket Nos. 07-29, 07-198 (Jan. 4, 2008). NAB hereby incorporates Dr. Eisenach's study and the 2008 Walt Disney comments in this proceeding.

[96] *See, e.g.,* NAB Comments at 31-32; Affiliate Ass'ns Comments at 40-41; Disney Comments at 19-20.

[97] *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 895 (9th Cir. 2008). *See also* Owen Video Bundling Study at 3 (explaining that program suppliers may offer price discounts on their more popular content if a MVPD agrees to also carry new or less popular content; thus, "the competitive price for a package of content may be less that the competitive price for a stand-alone unit of content – whether a popular program or a popular channel – by itself").

[98] *See, e.g.*, ATVA Comments at 24 (stating that bundling "two sets of desirable programming" can "provide efficiencies"); Mediacom Comments at 39 (recognizing "there may be instances in which a bundled arrangement is capable of producing efficiencies that benefit consumers"); AT&T Comments at 14 (recognizing that offering attractive packages of services "often reduces costs and is pro-consumer"). *See also* Comments of Public Knowledge and Open Technology Institute at New America, MB Docket No. 15-216, at 12 (Dec. 1, 2015) (PK/OTI Comments) (bundling should not be regarded as *per se* unreasonable, as there are instances, "such as to promote carriage of independent programming," where it may be "beneficial").

arbitrary and capricious for the Commission to ban or substantially restrict broadcasters from making bundling proposals during retransmission consent negotiations.[99]

B. Given Broadcasters' Lack Of Market Power In Today's Marketplace, Their Bundling Proposals Cannot Harm Competition

Given the explosion in the number and variety of video programming options now available to MVPDs and consumers, broadcasters not only lack the market power to coerce consolidated MVPDs into carrying proposed bundles of programming they do not want to carry, but more significantly, they also cannot foreclose competition in the supply of programming to MVPDs.[100] As shown in Section III above and in NAB's initial comments,[101] competition to supply video programming to MVPDs and viewers is thriving – a fact that no pay TV commenters disputed or, indeed, even seriously addressed.

Economic studies in the FCC's proceeding specifically addressing video programming bundling similarly concluded that broadcasters do not have market power in the "tying" market and that their bundling practices cannot anti-competitively foreclose rivals in the market to supply programming to MVPDs.[102] These studies found that broadcasters did not have market power because their share of the viewing audience was falling and because

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[99] *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983) (an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal citations omitted).

[100] *See* NAB Comments at 27-35.

[101] *See* NAB Comments at 8-15; *see also* Disney Comments at 3-9.

[102] Eisenach Program Bundling Study at 19-47. *Accord* Owen Video Bundling Study at 1, 25-28 (finding that programmers supplying programming to MVPDs at the wholesale level "lack market power").

concentration in the MVPD market had increased.[103] As these developments have only become more pronounced since the studies were conducted, broadcasters today possess even less market power and less ability to harm competition in the programming market.

Given this record, the Commission lacks any evidentiary or economic basis for restricting, let alone banning, broadcast bundling,[104] The FCC's only rational and legally permissible course of action is to continue relying on the existing good faith standards, which specifically address any "take it or leave it" broadcaster bundling offers,[105] and on antitrust law to prevent potential competitive harm from bundling or tying by any type of programmer. In today's hyper-competitive, fragmented programming marketplace, the adoption of MVPD proposals for "super-antitrust rules" restricting the bundling of programming by broadcasters alone would warp marketplace competition. A regulatory regime tilting the competitive playing field toward providers that offer only subscription video programming will not serve viewers.

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[103] Eisenach Program Bundling Study at 35-43. *See also* Owen Video Bundling Study at 25-28. Dr. Owen concluded that the "marketplace in which video programmers attempt to sell their programming to MVPDs is highly competitive," when there were only "301 basic national programming networks" carried by MVPDs, which pales in comparison to today's 900-plus.

[104] *See, e.g., Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (finding rules on wireless ownership and attribution rules arbitrary because FCC offered only "generalized conclusions," rather than "documentary support" and an "economic rationale").

[105] Making a "take it or leave it" proposal for bundled programming and refusing to consider alternate terms or counterproposals, including a MVPD "request to compensate the broadcaster in some other way," is "not consistent" with good faith. 2000 Good Faith Order, 15 FCC Rcd at 5463.

C. The Various MVPD Bundling Proposals Demonstrate Why The FCC Should Continue To Rely On Antitrust Law To Prevent Any Potential Competitive Harm From Bundling Or Tying

1. The Proposed Bundling Restrictions Are Wholly Impractical, Would Improperly Involve The FCC In Price Determinations, And Would Result In Arbitrary Decisions

Even assuming that the Commission had an evidentiary basis for banning or restricting broadcasters' bundling practices (which, as discussed above, it does not), an examination of specific MVPD proposals reveals them to be practically infeasible and arbitrary. For example, ATVA urges the FCC to forbid broadcasters from "forcing" MVPDs to carry additional networks or programming as a condition to granting retransmission consent, if the broadcasters refuse "to make a standalone offer" for carriage of "the television broadcast station that is a real economic alternative to a bundle of broadcast and non-broadcast or multicast programming."[106] But what precisely constitutes a "real economic alternative" and in whose eyes must the alternative be "real" or "reasonable"? For MVPDs, a "reasonable" alternative would be one artificially and drastically reducing the prices they pay to retransmit stations' signals. Adoption of any such standard would require the FCC to make determinations about the prices of numerous primary broadcast channels, multicast channels and non-broadcast networks, both on a standalone and bundled basis, across all DMAs in hundreds of individual negotiations involving a wide range of broadcasters and MVPDs. That is an impossible task for the Commission to undertake on an administrative basis alone, and one that inevitably would result in arbitrary and inconsistent determinations about the "reasonableness" or

[106] ATVA Comments at 44. Other MVPDs made similar proposals. *See, e.g.*, Cablevision Comments at 6 (FCC should require broadcasters to "offer reasonable standalone rates"); Comments of BEK Communications Cooperative, MB Docket No. 15-216, at 3 (Dec. 1, 2015) (FCC should find it bad faith for a broadcaster to make "an unreasonable, exorbitant" standalone offer).

"fairness" of programming prices. Indeed, economic analyses have concluded that "bundling prohibitions would require price *controls*."[107]

Consistent with clear Congressional intent,[108] the Commission has consistently and correctly eschewed passing judgment on, let alone setting, prices in the retransmission consent context. Congress gave no indication in adopting the reciprocal good faith negotiation standard or in passing the STELA Reauthorization Act (STELAR) that it intended the FCC to dramatically reverse course. STELAR's directive to "commence" a review, without any required action, of one aspect – the totality of circumstances test – of the good faith negotiation requirement is hardly *carte blanche* for the Commission to begin determining the prices that broadcasters may offer in retransmission consent negotiations, as some MVPDs urge.[109]

ATVA's strained analogy to labor law also fails to provide any justification for FCC involvement in determining the economic reasonableness of bundling proposals. According to ATVA, labor law precedent provides that parties cannot insist upon the inclusion of "non-mandatory" subjects (that is, subjects that are not statutorily required, such as employees not

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[107] Jeffrey A. Eisenach, *Why the FCC Should Not Increase Regulation of Wholesale TV Programming: Reply to Comments in MB Docket No. 07-198*, at 13-14 (Feb. 12, 2008) (Eisenach Reply to Comments) (emphasis added). NAB hereby incorporates Dr. Eisenach's reply in this proceeding. *Accord* Owen Video Programming Study at 3-4 (explaining that regulation of bundled packages would require "impractical" rate regulation, as MVPDs would "[p]redictably" claim that networks or channels were overpriced, and observing that "[n]either the traditional tools of utility regulation nor more modern tools such as rate caps offer a practical solution to such disputes").

[108] *See* Senate Retransmission Consent Report at 36 ("It is the Committee's intention to create a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.").

[109] Section 103(c), STELAR, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014). The legislative history of Section 103(c) does not refer to bundling or to the types or amount of compensation that broadcasters propose during retransmission negotiations. *See* S. Rep. No. 322, 113th Cong. 2nd Sess. at 13 (2014).

part of the bargaining unit) as conditions to any agreement. ATVA argues that the retransmission consent right relates only to the signal of the broadcast station and that negotiation for carriage of other programming is bargaining on a "non-mandatory subject" that broadcasters cannot "insist" upon.[110] ATVA ignores the fact that Congress specifically approved of broadcaster negotiation for carriage of other programming when adopting the retransmission consent regime.[111] It also is meaningless to assert that carriage of additional programming is unrelated to negotiation for a broadcaster's signal, as broadcasters propose the carriage of additional programming as compensation specifically for MVPD carriage of the station's signal. Certainly the carriage of multicast channels is related to negotiation for a broadcaster's signal, as multicast streams are part of a station's six megahertz channel.

The logic of ATVA's proposal, moreover, would mean that myriad other types of compensation often negotiated as part of retransmission consent (e.g., video on demand rights, providing fiber links to satellite or translator stations; guarantees of purchasing advertising time on the broadcast station) could be deemed "non-mandatory," and thus off limits in negotiations, if an MVPD simply did not want to negotiate about those subjects. ATVA's proposal is essentially a veto right by MVPDs – they would only need to object and then broadcasters would be unable to negotiate for carriage of multicast streams or cable channels (or any other supposedly "non-mandatory" subject, however that term is defined).

[110] *See* ATVA Comments at 45-47. Again, ATVA is erroneously assuming that broadcast stations have the market power to insist upon the bundling of programming, which the record in this proceeding does not support.

[111] *See* Senate Retransmission Consent Report at 35-36 (recognizing that broadcasters may seek "the right to program an additional channel on a cable system" during retransmission negotiations).

ATVA's proposal is yet another one plainly designed to reduce broadcasters' negotiating flexibility and decisively increase MVPDs' leverage and should be rejected.

2. The Proposal for Special Rules Addressing The Bundling Of Top Four Broadcast Channels And Regional Sports Networks Are Based On False Premises And Are Contrary To Statute

The American Cable Association (ACA) proposes special regulations to apply to the bundling of a top-four rated broadcast station with a same market regional sports network (RSN) or other unspecified "must have" programming. ACA argued that the Commission should deem a top-four rated broadcaster's refusal to grant an extension of a retransmission consent agreement that expires on or around the same date as a bundled contract for carriage of a same market RSN (or other "must have" programming asset) to violate the duty to negotiate in good faith.[112] Even a cursory examination of this proposal reveals numerous reasons why the Commission should not adopt it.

As an initial matter, ACA's proposal depends on the remarkable assertions that sellers of "must have" programming, such as top-four broadcast stations and RSNs, are "monopolists" and that "owning two monopolies in a market" allows broadcasters to obtain "higher prices based solely on increased market power," thereby harming "consumers and competition."[113] If it were actually the case that local broadcast stations were monopolists, and were using "double" monopoly power when bundling same market RSNs (or other unidentified "must have" programming) to extract monopoly rents to the detriment of

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[112] ACA Comments at 15-16, 32, and Michael H. Riordan, *Higher Prices from Bundling of "Must Have" Programming Are Not Based On Competitive Marketplace Considerations*, at 6, 16, attached thereto (Riordan Study). ACA urges the FCC to treat a broadcaster's refusal to extend a retransmission agreement as a *per se* violation of the good faith requirement. ACA Comments at 16, 33.

[113] ACA Comments at 26-27, citing Riordan Study at 4-5.

consumers and competition in the programming market, then antitrust law would directly address the competitive harms from such bundling.[114] A new, additional FCC rule beyond antitrust law would be entirely superfluous.

The fact that ACA is proposing a special rule, however, suggests it doubts that the antitrust laws are implicated and that its frequent use of the "M" words (monopolies, monopolist and monopolistic) are more for effect, rather than serious legal or economic analysis. Indeed, ACA's claim that sellers of "must have" programming "fit the textbook definition of a monopolist because the programming is highly valued and there is no close substitute,"[115] would mean that innumerable program providers, including HBO, with programming such as "Game of Thrones," AMC, with highly rated programs like "The Walking Dead," or Netflix, with Emmy award-winning programs including "Orange Is the New Black" and "House of Cards," are also monopolists – and should be treated as such under FCC rules.

ACA's and other MVPDs' labelling as "must have" any broadcaster-owned or affiliated programming that they want subjected to regulation, moreover, has drained that term of any valid economic meaning it might once have had. In fact, all differentiated products, including video programming, arguably possess some degree of market power in the sense that there are no perfect substitutes. But the critical question in any analysis of differentiated programming is whether the broadcaster (or non-broadcast program owner) possesses market power sufficient to profitably engage in harmful anticompetitive conduct.[116] The mere

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[114] One also would have thought that at least one MVPD would already have brought an antitrust claim.

[115] ACA Comments at 27, citing Riordan Study at 4, 9.

[116] *See* Eisenach Reply to Comments at 12.

fact that some video programming, including some broadcast programming, is more popular than other programming "does not demonstrate the existence of market power, any more than the fact more consumers buy Fords than Hyundais makes Ford a monopolist," especially in light of the unprecedented competition in today's video programming marketplace.[117]

ACA also exaggerates the bargaining power of broadcasters by ignoring their strong incentives to reach agreement with MVPDs. Without access to the large number of pay TV customers that subscribe to increasingly consolidated MVPDs, local stations would suffer losses of viewers, advertising dollars, retransmission consent revenues and, over time, reduced brand awareness and consumer loyalty. As NAB explained in its initial comments, local stations cannot afford not to be on a MVPD with access to 30, 40, 50, 60 or even 70 percent of the pay TV subscribers in a DMA.[118] The mere fact that a broadcaster negotiated for the carriage of affiliated programming as part of retransmission consent does not reduce the economic importance of reaching an agreement with the MVPD.

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[117] *Id*. Additionally, in his study of program bundling, Dr. Bruce Owen concluded that the "concept of 'must have' programming is economic nonsense." Owen Video Bundling Study at 2. Dr. Owen pointed out that the FCC appears to use the term "must have" to describe a network that makes a MVPD "more profitable than otherwise, given its remaining carriage choices and the price it would like to pay for the network," but it "does not follow that such networks are essential for the survival of an MVPD as a viable competitor." He noted that few, "if any, MVPDs are likely to go out of business for lack of a particular network; instead, they will simply adjust other programming choices, prices, and marketing strategy." *Id*.

[118] *See* NAB Comments at 16-21. Earlier economic studies conducted when the MVPD marketplace was notably less consolidated than today nonetheless still concluded that a "local station's ability to operate" can be "significantly jeopardize[d]" by a failure to negotiate carriage on a locally consolidated MVPD. Jeffrey A. Eisenach, Ph.D., *The Economics of Retransmission Consent*, at 21 (March 2009), attached to Reply Comments of NAB, MB Docket No. 07-269 (June 22, 2009). We hereby incorporate Dr. Eisenach's study by reference in this proceeding.

Finally, NAB observes that ACA's proposal is economically inefficient and contrary to the Communications Act. As discussed above, the bundling of products increases efficiencies and reduces costs, including costs to consumers. Forcing separate, sequential negotiations between the same parties for carriage of top-four broadcast stations and RSNs (or other unidentified so-called "must have" programming) would reduce the transactional efficiencies of bundling and increase the costs associated with conducting (now multiple) negotiations. More significantly, ACA's proposal involves forced carriage of the broadcast signal while the separate, sequential negotiations of the bundled programming occurs.[119] Forced "consent" to retransmission of a station's signal does not satisfy the terms of Section 325(b) for true consent.[120] The Commission should reject ACA's proposal, and may do so on this basis alone.

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Pay TV providers' various proposals to ban or impair broadcasters' ability to negotiate for carriage of additional channels or networks as part of retransmission consent are transparent attempts to disfavor their broadcast competitors in the marketplace, reduce stations' bargaining position in negotiations and, ultimately, reduce MVPDs' costs of doing business at broadcasters' expense. While pay TV providers vociferously defend their rights to bundle programming at the retail level, asserting that they "bundle programming to offer consumers more choice and often reduce costs," they claim at the same time – indeed, in the *same sentence* -- that broadcasters' "forced bundling" is an "abuse" of the retransmission

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[119] *See* ACA Comments at 32-33.

[120] *See* Section VIII, *infra*, discussing the incompatibility of forced carriage with statutory requirements.

consent process and urge the Commission to forbid it.[121] Such arguments are hypocritical in the extreme and divorced from the reality of the 21st century video marketplace, and the Commission should swiftly reject them.

V. COPYRIGHT LAW PREVENTS THE COMMISSION FROM ADOPTING ANY RULES COMPELLING THE PUBLIC PERFORMANCE OR DISTRIBUTION OF PROGRAMMING ONLINE – A FACT THAT NO PAY TV COMMENTER DISPUTED

NAB and other broadcast commenters uniformly agreed that the Commission has no authority under the good faith negotiation provision, or under the Communications Act generally, to require a broadcaster to provide online access of its programming to the subscribers of an MVPD during a retransmission consent dispute between the broadcaster and that MVPD.[122] Specifically, any rule by the Commission that would effectively force a broadcaster to publicly perform or distribute content online would violate the copyright owner's exclusive rights under Section 106 of the Copyright Act.[123] As NAB explained in its initial comments, a copyright owner's exclusive rights to make copies, prepare derivative works, control the sale and distribution of the works and, most importantly here, to control the public performance of the works across all technologies and platforms, also includes the exclusive right to "authorize" or to *refuse* to authorize others to do any of these specified

[121] USTA Comments at 11-12.

[122] *See* NAB Comments at 36-39; Affiliate Ass'ns Comments at 53-58; Raycom Media Comments at 8-9; Hearst Comments at 11; Fox Comments at 14-16; Disney Comments at 22-24; Nexstar Comments at 19; Scripps Comments at 15; News-Press & Gazette Comments at 20-21.

[123] 17 U.S.C. § 106.

activities.[124] A Commission mandate forcing a broadcaster to publicly perform its copyrighted content online would clearly violate its exclusive right *not* to do so.

Although a number of MVPDs urged the Commission to force broadcasters to provide online access of their programming to the subscribers of MVPDs during retransmission consent disputes, those commenters failed to even acknowledge federal copyright law requirements, let alone explain how their proposed rule would be consistent with copyright law.[125] While most pay TV providers supporting a requirement forcing broadcasters to publicly perform their content online notably avoided discussing the specific source of the FCC's supposed authority to adopt this rule, the few commenters addressing the issue presented no basis for FCC adoption of a rule overriding broadcasters' statutory copyright rights.

For example, repeating the truism that broadcasters are "obligat[ed] to operate in the public interest" under the Communications Act[126] cannot justify regulatory measures contrary to the clear terms of the Copyright Act and broadcasters' specific rights as copyright owners. Similarly, the fact that the Commission has authority to adopt rules pertaining to limited aspects of the retransmission consent process between MVPDs and broadcasters provides no

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[124] NAB Comments at 36-37 (citing, *inter alia*, *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990)). *See also* Affiliate Ass'ns Comments at 54-56.

[125] *See, e.g.*, ATVA Comments at 23, 44; Mediacom Comments at 27-28; AT&T Comments at 12-14; Comments of Nat'l Cable & Telecommunications Ass'n, MB Docket No. 15-216, at 3-5 (Dec. 1, 2015) (NCTA Comments); TWC Comments at 23-24; Comments of Centurylink, MB Docket No. 15-216, at 3 (Dec. 1, 2015); USTA Comments at 7-9; ACA Comments at 48-58.

[126] ACA Comments at 52. *See also* ATVA Comments at 56-59 (arguing generally that the FCC can adopt all manner of restrictions on broadcasters and their negotiation of retransmission consent, given the FCC's authority to "regulate broadcasters for the public good").

valid basis for the FCC to rewrite portions of the Copyright Act.[127] "[A]n agency literally has no power to act" – "let alone" override "validly enacted legislation" – "unless and until Congress confers power upon it."[128] And claims that the FCC's Open Internet rules and policies somehow justify restricting broadcasters' abilities to provide, or to not provide, their content online should be summarily dismissed.[129] Broadcasters are not ISPs (or cable operators) controlling consumers' online access to the content of others, and the Commission has made clear that its rules "involve[] only the transmission component of Internet access service" and not "any Internet applications or content."[130]

Beyond lacking statutory authority to do so, adopting the MVPD proposals about online content would very likely have anti-consumer consequences. As the MVPD commenters made

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[127] *See* ACA Comments at 54-55 (arguing that Section 325(b) of the Communications Act permits FCC to adopt rules compelling broadcaster provision of content online). *See also* ATVA Comments at 53-55 (arguing generally that FCC's authority under Section 325 "to regulate retransmission consent negotiations" authorizes all manner of pro-MVPD proposals in this proceeding).

[128] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Railway Labor Executives' Ass'n v. Nat'l Mediation Bd*., 29 F.3d 655, 670 (D.C. Cir. 1994) (en banc) ("categorically reject[ing]" the position that an agency "possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area"). Moreover, any statutory grant of authority to the FCC sufficient to override federal copyright law "must be a clear one." Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc*., 531 U.S. 457, 468 (2001).

[129] *See, e.g.,* ACA Comments at 52-53; NCTA Comments at 4-5.

[130] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5775 (2015). *See also* Order, RM-11757, DA 15-1266, at ¶ 1 (WCB Nov. 6, 2015) (dismissing a petition for rulemaking that "plainly does not warrant consideration" because the "Commission has been unequivocal in declaring that it has no intent to regulate edge providers"). The Commission thus has already correctly rejected ACA's argument that it should regulate under Section 706 of the 1996 Telecommunications Act the practices of edge providers, including broadcasters, which supposedly threaten Internet openness. *See* ACA Comments at 55. Even Public Knowledge made clear that it did not regard the "actions of content providers or websites to block access to users of a particular ISP to be a 'net neutrality' or 'Open Internet' issue," because "those principles apply only to last-mile ISPs." PK/OTI Comments at 10 n.23.

clear, their proposed rule "would affect only [broadcast] content that is freely available on the Internet."[131] Imposing burdens specifically and only upon broadcasters' provision of free content online would clearly incentivize broadcasters to place more of their online content behind a paywall.[132] It would be ironic indeed if the Commission were to approve the MVPDs' proposal with the purpose of aiding consumers, only to ultimately reduce the amount of video content freely available to the viewing public.

VI. MVPD EFFORTS TO DEFINE WHEN BROADCASTERS WOULD BE FORCED TO EXTEND CARRIAGE AGREEMENTS BEFORE OR DURING "MARQUEE EVENTS" REVEAL THE ABSURDITY OF THAT PROPOSAL

A. These Proposals Cannot Be Squared With The Terms Of Section 325

MVPD proposals to restrict broadcasters' statutory rights to consent to carriage around the time of so-called "marquee events" constitute forced carriage and violate Section 325 of the Communications Act.[133] As discussed in more detail in Section VIII below, Section 325(b)(1)(A) prohibits MVPDs from retransmitting broadcast signals except "with the express authority of the originating station."[134] The proposal that the FCC should treat as a *per se* violation of good faith (or, at a minimum, a presumptive violation of the totality of circumstances test), any broadcaster's exercise of its statutory right to withhold consent for the retransmission of its signal near a marquee event, is contrary to the express terms of Section 325. Because the Commission cannot adopt a rule that violates a federal statute, it need not address the marquee event proposals any further.

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[131] AT&T Comments at 14.

[132] *See, e.g.*, NAB Comments at 38-39; CBS Comments at 11-13.

[133] *See* ATVA Comments at 47-48; *see also* ACA Comments at 58-60 (endorsing ATVA's proposal).

[134] 47 U.S.C. § 325(b)(1)(A).

B. ATVA's Complex Proposal Does Not Reflect The Dynamics Of Local Markets Or The Ratings Standards Typically Relied Upon By The Television Industry

If the Commission were to (improperly) consider these proposals, it would find ATVA's proposed definition of "Top-Rated Marquee Event"[135] to be overly-complicated yet based on an overly-simplistic understanding of television ratings. ATVA's definition is based on a "nationwide Live + Same Day U.S. Rating of 7.00 or greater on the Persons 2 + demographic by Nielsen."[136] This standard, however, is problematic because it relies on a nationwide average that does not reflect the reality of ratings in local markets. For example, local markets actually use four different ratings methodologies,[137] and out of the 210 markets, 140 still rely on diary surveys.[138] Local markets rely on an average quarter-hour computation while the national average relies on an average minute computation. And many local markets have limited ratings, measuring only four times per year during the sweeps months. The national ratings standard proposed by ATVA does not reflect these differences, nor does it account for the fact that program ratings differ wildly from market to market. A football game, for instance, may be marquee in one region of the country but not elsewhere. ATVA's nationwide average fails to take account of the dynamics of local markets and the very different methodologies used to measure ratings in different markets.

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135 ATVA Comments at 47.

136 *Id*.

137 Methodologies include Code Reader measurement, Diary Entry measurement, Local People Meter (LPM) measurement and Set Meter measurement.

138 *See* E-mail Press Release from Nielsen Product Notifications (Dec. 29, 2015, 04:03 PM) (announcing an increase in the number of local markets using all-electronic measurements to 70).

The reliance on Persons 2 + demographic is also curious. Persons 2 + is not the standard most commonly used by the television industry, which typically relies on the 18-49 age demographic, or more frequently the 25-54 age demographic, for everything from tracking trends to selling advertisements. Persons 2 + captures all viewers – even toddlers who accidentally turn on a TV – rather than focusing on the age demographics actually important to the TV industry and advertisers.

ATVA's definition inserts several additional complicating factors, including basing the 7.0 marquee rating on "the most recent telecast of that event or comparable programming."[139] Both "most recent" and "comparable programming" are problematic phrases. "Most recent" makes multi-year retransmission agreements risky and unpredictable. It effectively requires broadcasters to forecast ratings into the future to determine whether an agreement might expire near an event for which the "most recent" airing will have received a 7.0 or higher rating.

"Comparable programming" adds more ambiguity and would likely consume extensive Commission resource to define. ATVA defines "comparable programming" as a "prior program most reasonably comparable to the programming in question as determined by the FCC."[140] This definition is a virtual tautology, and fails to provide sufficient guidance for broadcasters and MVPDs to determine what constitutes "comparable." ATVA further adds that "[i]f a sporting event has multiple telecasts" and one meets the marquee rating, the rest of the

[139] ATVA Comments at 47.

[140] *Id.*

telecasts or "comparable programming" should be considered marquee as well.[141] But if one NFL game between two top teams is marquee, should all NFL games be considered marquee? And is an NFL game comparable to a college football or an NBA game? ATVA's definition all but guarantees that parties will repeatedly turn to the Commission to determine the boundaries of what constitutes "comparable" on a case-by-case basis.[142] Even aside from the obvious legal impediments to adoption of ATVA's proposal, the Commission would find it impossible to administer as a practical matter.[143]

C. Broadcast Commenters Opposed "Marquee Event" Proposals As Impractical, Inequitable And Unnecessary

Unsurprisingly, NAB was not alone in opposing MVPDs' marquee event proposals.[144] Beyond their sheer impracticality, broadcasters specifically noted the inequity of MVPDs expecting to benefit from their carriage of events, including the Super Bowl, other sporting events and special events such as the Academy Awards, even though they have failed to

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[141] ATVA Comments at 47.

[142] At the risk of exhausting the FCC with a litany of hypothetical questions, how would it treat one-off events, like disaster relief concerts, or broadcasts that take place only once per year or once every several years, like the Macy's Thanksgiving Day Parade or coverage of presidential elections? Do any of those programs have comparable programming? And if the most recent airing of the presidential election or comparable programming is from the last presidential election, is it fair to rely on the television viewing patterns from four years ago?

[143] The Commission also must consider any potential unintended negative consequences of ATVA's request. The proposal would prohibit broadcasters from withholding a signal "during the one-week run up prior to" a marquee event. ATVA Comments at 47. It appears, however, to allow a broadcaster to withhold a signal earlier than one week prior to a marquee event, provided that it "reinstate[s] the signal during the airing of a Top-Rated Marquee Event." This would seem to incentivize broadcasters to avoid marquee events by withholding their signals earlier, and thus, to withhold them for longer periods of time, provided that they permit the single marquee event to be carried on the MVPD. The creation of perverse incentives to lengthen service disruptions is yet another reason for the FCC to decline to adopt ATVA's request.

[144] *See, e.g.,* News-Press & Gazette Comments at 14; Media General Comments at 10-11; Affiliate Ass'ns Comments at 32-35; Nexstar Comments at 25-26.

reach an agreement with broadcasters as to the fair value of the signals containing that highly desired programming.[145] Broadcasters make investments of hundreds of millions of dollars for the rights to provide certain events to all viewers, both free over-the-air and via pay TV providers. If a MVPD declines to offer a reasonable fee to the local broadcast station to make programming that the MVPD labels as "marquee" (along with all of the other valued programming in stations' signals) available to its subscribers, then the local station must be allowed to exercise its statutory right to withhold consent for MVPD carriage of its signal. In such a case, it is the MVPD's choice that makes marquee programming unavailable to subscribers, and the FCC should not strip from broadcasters the value of their investments in premiere programming by approving ATVA's proposal.

Stations also have strong incentives to reach retransmission agreements prior to premiere events. Broadcasters' significant investments in such events are only justified by the high levels of advertising revenue generated from the high viewer ratings for premiere events – ratings that cannot be achieved if pay TV customers are unable to watch the events via their MVPDs. Contrary to MVPDs' implications, broadcasters in fact have every incentive to resolve retransmission negotiations before special events are aired. For all the legal, practical and equitable reasons described above, the Commission should summarily reject MVPD proposals relating to so-called marquee events.

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[145] *See, e.g.,* Affiliate Ass'ns Comments at 32-34.

VII. ARGUMENTS IN FAVOR OF FORCED MEDIATION OR ARBITRATION CANNOT BE SQUARED WITH THE LAW

Certain commenters urge the Commission to require negotiating parties to participate in some form of mediation or arbitration. However, none of the proposals for mediation or arbitration would be consistent with Section 325 of the Communications Act and other governing law. Proposals for mandatory arbitration have been repeatedly rejected by the Commission, and forced mediation suffers the same legal infirmities.

Cox proposes that the FCC adopt a process of mandatory, non-binding mediation that could be invoked by either negotiating party.[146] If mediation did not result in an agreement, however, the parties would be required to make public their "last best offers," and even a successful mediation would result in a report to the FCC of the key terms of the agreement.[147] While the mediator's conclusions would not be binding on the parties, if one party accepted the mediator's decision and the other refused, that fact would be relevant in any FCC analysis of whether the refusing party bargained in good faith.[148] Mediacom proposes that the FCC establish a 60-day "cooling off" period if negotiating parties reach an impasse, which would trigger an obligation to participate in mediation (or be subject to a presumption of failure to negotiate in good faith).[149] Parties would provide information to a mutually-selected mediator,

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[146] Cox Comments at 2-7. The mediator apparently would be mutually agreed upon by both parties, and FCC rules would specify the types of information the mediator would consider, including "other comparable retransmission consent agreements" involving the parties. *Id.* at 4-5.

[147] *Id.* at 5-7.

[148] *Id.* at 7.

[149] During Mediacom's proposed "cooling off" period, retransmission consent agreements would be automatically extended. Mediacom Comments at 22-23. As discussed in Section VIII below, any proposal that involves MVPD carriage of a broadcaster's signal without the broadcaster's consent—for any length of time—violates Section 325.

including their most recent offers and data supporting those offers. If the parties failed to reach agreement within ten days of receiving the mediator's report, it would be made public and provided to the FCC, which would use the report as its "foundation" in determining "whether to take any further action."[150] Beyond these mandatory mediation proposals, PK/OTI proposes imposition of mandatory binding baseball-style arbitration.[151]

The Commission previously stated that it lacks "authority to adopt . . . mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."[152] NAB agrees with this determination and believes it applies with equal force to the mandatory non-binding dispute resolution proposals advanced by Cox and Mediacom.[153]

Because Section 325(b) expressly states that only broadcasters can grant authority to retransmit their signals,[154] no other party – whether the FCC or an arbiter – can authorize a MVPD to retransmit a station's signal without the broadcaster's consent. If the FCC mandated that broadcasters and MVPDs engage in arbitration to resolve retransmission consent

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[150] Mediacom Comments at 26.

[151] PK/OTI Comments at 17-20.

[152] *Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727-28 (2011) (2011 NPRM). *See also id*. at 2720 n.6 (FCC "does not have the power to . . . order binding arbitration"); *Mediacom Commc'ns Corp. v. Sinclair Broadcast Group, Inc*., Memorandum Opinion and Order, 22 FCC Rcd 35, 45 (Med. Bur. 2007) (stating that the "Commission does not have the authority to require the parties to submit to binding arbitration").

[153] NAB has previously demonstrated that the FCC lacks the authority to mandate arbitration or mediation—whether binding or non-binding. *See, e.g.*, Reply Comments of NAB, MB Docket No. 10-71, at 27-33 (June 27, 2011); Comments of NAB, MB Docket No. 10-71, at 19-22, 35-39 (May 27, 2011); Reply Comments of the Broadcaster Associations, MB Docket No. 10-71, at 31-36 (June 3, 2010); Opposition of the Broadcaster Associations, MB Docket No. 10-71, at 74-78 (May 18, 2010). *See also* Opposition of NAB to Block Communications Petition for Rulemaking, RM-11720 (June 19, 2014). We hereby incorporate these previous submissions by reference in this proceeding.

[154] 47 U.S.C. § 325(b)(1)(A); 2000 Good Faith Order, 15 FCC Rcd at 5471.

disputes, the parties would have no choice but to submit to arbitration, which, by definition, involves the arbitrator rendering a "final and binding" decision. As in court-based adjudication, arbitration outcomes are typically win-lose, with the arbitrator generally making the decision as to which side is right and which side is wrong. In the retransmission context, the arbitrator would necessarily decide whether the broadcaster or the MVPD is "right." If the broadcaster "loses," the MVPD would be granted the right to retransmit the station's signal even though the broadcaster never authorized carriage and never consented to carriage on the arbitrator's terms and, most troubling, even though the broadcaster strongly objected to such carriage. The adoption of mandatory binding arbitration therefore contravenes the plain language of Section 325(b) because it would permit the arbitrator, not the broadcaster, to decide the terms upon which to grant permission to a MVPD to carry a broadcaster's signal.

Besides being squarely at odds with statutory language, mandatory binding arbitration is contrary to the most fundamental premise of the retransmission consent marketplace established by Congress, in which local television stations have the opportunity to negotiate for compensation from MVPDs in exchange for the right to retransmit and resell broadcast signals.[155] Congress made it quite plain that this marketplace is to function without government intervention, emphatically rejecting the notion that it or the FCC should or would "dictate the outcome" of the negotiations between broadcasters and MVPDs.[156] By forcing the parties into mandatory dispute resolution, the FCC would turn congressional intent on its

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[155] *See* Senate Retransmission Consent Report at 36 (stating that the Cable Television Consumer Protection and Competition Act of 1992 created a "marketplace for the disposition of the rights to retransmit broadcast signals").

[156] *Id.*

head by removing negotiations from the marketplace where they belong and designating a third-party arbitrator (or, as discussed below, mediator) to "dictate the outcome."

The mandatory non-binding mediation scenarios proposed by Cox and Mediacom do not differ in any material respect. If the FCC were to adopt these proposals and require negotiating parties to participate in mediation and submit for a mediator's review the details of their offers (and other retransmission agreements and data), the *mediator* would be in the driver's seat, deciding what retransmission consent offers, including prices, terms and conditions, are reasonable. That is the antithesis of the marketplace process established by Congress for negotiating retransmission consent.

Cox and Mediacom might argue that their proposals differ from arbitration because they allow negotiating parties to respond to a mediator's report, rather than directly establishing agreement terms. But it requires little imagination to understand the practical effect of a government-sanctioned mediator telling a station—which requires a government license to operate—that its proposed agreement terms are unreasonable.[157] These MVPD proposals would allow a mediator to effectively set – or at least heavily influence -- retransmission consent prices, terms and conditions in direct contravention of the law. Just as is the case with mandatory arbitration, under the mediation proposals, the parties would have little or no choice but to participate. The mediator's decision would similarly involve a determination that one or both parties were making unreasonable proposals. If the

[157] As the courts have recognized, "[n]o rational firm—particularly one holding a government-issued license—welcomes" government scrutiny. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998). "A station would be flatly imprudent to ignore any . . . factor[] it knows may trigger intense review." *Id*. *Accord MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001).

broadcaster "loses," then the MVPD returns to the negotiating table with a government-strengthened bargaining hand. The proposed use of the mediator's determinations in FCC decisions regarding compliance with the good faith standard or other enforcement actions[158] would further coerce broadcasters into granting retransmission consent on the mediator's, rather than the station's, terms.

Mandatory arbitration and mediation are not just contrary to Section 325(b) of the Communications Act, but also to the Administrative Dispute Resolution Act.[159] The ADRA expressly prohibits an administrative agency from requiring arbitration. In particular, Section 575(a)(3) of the U.S. Code states that: "an agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit."[160] This "prohibition is intended to help ensure that the use of arbitration is truly voluntary on all sides."[161] The ADRA's terms thus provide further support for the FCC's correct conclusion that resolution of retransmission consent disputes should be voluntary rather than mandatory.

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[158] Cox Comments at 7 ("if one party elects to accept the mediator's decision and the other party refuses, this fact should be relevant in any inquiry into whether the refusing party has bargained in good faith); Mediacom Comments at 26 (FCC should "create a presumption of bad faith if either party refuses to submit to mediation" and should use the mediator's report to "decide whether to take any further action (including extending the cooling off period and ordering the parties back to the negotiating table) . . .").

[159] 2011 NPRM, 26 FCC Rcd at 2728-29 ("mandatory binding dispute resolution procedures would be inconsistent with both Section 325 . . . and with the Administrative Dispute Resolution Act ('ADRA'), which authorizes an agency to use arbitration 'whenever all parties consent.'"), *quoting* 5 U.S.C. § 575(a)(1); *see Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Internal Policy Statement and Order, 6 FCC Rcd 5669 (1991); *see also* S. REP. NO. 101-543 at 13 (1990).

[160] 5 U.S.C. § 575(a)(3).

[161] S. Rep. No. 101-543 at 13 (1990).

For these reasons, the arbitration and mediation proposals advanced here run afoul of the most basic element of retransmission consent – the consent itself. The ultimate outcome would reflect a government-coerced determination of the value of broadcasters' signals by outside arbiters, and carriage might be mandated even if the broadcaster strongly objected to some or all of the terms of carriage. A mandatory mechanism for resolving good faith complaints is fundamentally inconsistent with Section 325(b) because coerced consent is not true consent.

VIII. MVPDS' PROPOSED ONE-SIDED PENALTIES FOR FAILING TO NEGOTIATE IN GOOD FAITH CLEARLY VIOLATE THE COMMUNICATIONS ACT

Several MVPDs request that the FCC adopt more stringent penalties for violations of the good faith standard. Unsurprisingly, the proposed penalties would apply only if a *broadcaster* failed to negotiate in good faith. Like so many MVPD proposals concerning retransmission consent, these one-sided enforcement proposals violate Section 325.

Mediacom, for example, urges the Commission to adopt a "standstill" provision under which "interim carriage can be ordered upon a prima facie showing of a violation of the good faith requirement."[162] In a similar proposal, TWC calls for a new penalty under which a broadcaster that violates the good faith standard would be forced to elect "must-carry" status for a specified period (such as the duration of the election cycle, or 12 months from the finding of a violation).[163]

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[162] Mediacom Comments at 40-41. Other parties also propose mandatory interim carriage under various circumstances. *See, e.g.,* PK/OTI Comments at 20-21; Comments of WTA – Advocates for Rural Broadband, MB Docket No. 15-216, at 18-19 (Dec. 1, 2015) (WTA Comments).

[163] TWC Comments at 27-28. *See also* Mediacom Comments at 41 n. 101 ("Another remedy that the Commission can and should consider would be to bar a broadcaster that violates its duty to negotiate in good faith from electing retransmission consent for the next cycle.").

Both of these proposals clearly violate the Communications Act. Section 325(b) expressly states that broadcasters, and only broadcasters, can provide MVPDs with authority to retransmit their signals.[164] The plain language of Section 325(b) thus makes clear that no party–including the Commission—can authorize a MVPD to retransmit a station's signal without the broadcaster's consent.[165]

Nor can the Commission dictate a station's election of must carry or retransmission consent status. This would violate not only the statutory requirement that stations consent to carriage, but also the requirement that stations make their elections,[166] *and* the requirement that stations electing retransmission consent and MVPDs negotiate the prices, terms and conditions of carriage (stations electing must carry are not permitted to seek any form of compensation). Dressing up mandatory interim carriage as an "enforcement mechanism" or "penalty" in lieu of monetary forfeiture does not somehow cure these proposals' multiple Section 325 violations.

[164] No MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A). *See also* 2000 Good Faith Order, 15 FCC Rcd at 5471 (holding that Section 325(b) of the Act prevents a MVPD "from retransmitting a broadcaster's signal if it has not obtained express retransmission consent").

[165] Allowing carriage of signals without the express consent of the originating broadcast station would not only violate the unambiguous mandate of Section 325(b), but also would be inconsistent with the statute's legislative history. The legislative history of Section 325(b) makes clear that Congress intended to provide broadcast stations with the exclusive right to control others' retransmission of their signals and to negotiate the terms and conditions of such retransmission through private agreements. *See* Senate Retransmission Consent Report at 34, 37 ("Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means," and "[c]arriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system").

[166] The statute directs the FCC to adopt rules requiring "*television stations*" to "make an election between the right to grant retransmission consent under this subsection and the right to signal carriage under section 534 of this title." 47 U.S.C. § 325(b)(3)(B) (emphasis added).

In light of the statutory language, the FCC previously interpreted Section 325(b) as preventing it from "ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement."[167] The statutory language has not changed. For the same reasons that the Commission correctly rejected proposals for mandatory interim carriage in the past, it must do so again here.

IX. MVPDS HAVE MADE MANY ADDITIONAL PROPOSALS THAT HAVE LITTLE TO DO WITH ACTUAL GOOD FAITH BARGAINING AND WOULD NOT REDUCE IMPASSES OR OTHERWISE BENEFIT CONSUMERS

MVPD proposals run the gamut from problematic to absurd, and a number of their proposals fall into the absurd column. None of the following proposals would reduce impasses – the only stated goal of the FCC in this proceeding – and MVPDs do not even attempt to demonstrate how they would do so or how they would otherwise benefit consumers. At best, these proposals are superfluous, and at worst, they are thinly-veiled attempts to further their own interests at the expense of broadcasters – and they all would require the (unnecessary) expenditure of FCC resources to enforce. The Commission therefore should summarily reject the following MVPD proposals:

- *Prohibiting third party involvement in retransmission negotiations, including joint negotiation of non-commonly owned out-of-market stations*.[168] The identity of the negotiator does not change the obligation of broadcasters and MVPDs to negotiate in good faith. If a third party negotiates on behalf of a broadcaster or a MVPD, that third party must negotiate in good faith, and if it violates that

[167] 2011 NPRM, 26 FCC Rcd at 2728. *See also id.* (an "examination of the Act and its legislative history has convinced us that the Commission lacks authority to order carriage in the absence of a broadcaster's consent due to a retransmission consent dispute"); 2000 Good Faith Order, 15 FCC Rcd at 5471 (given the express language of Section 325 and its legislative history, there is "no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission").

[168] *See, e.g.*, AT&T Comments at 22-24; ATVA Comments at 28-30, 48.

obligation, the aggrieved party can file a complaint. More specifically, in STELAR, Congress spoke directly to the issue of joint negotiation by non-commonly owned stations and determined to prohibit only such joint negotiations involving stations in the same market.[169] Given the absence of even potential competitive questions arising from joint negotiations by stations that do not compete in the same local markets, the Commission has no sound basis for second-guessing Congress' recent judgment on this issue. NAB also observes that, taken to its logical extreme, a prohibition on third-party involvement in negotiations would have absurd results, such as conceivably prohibiting outside attorneys or consultants – who are technically "third parties" – from negotiating on behalf of their clients.[170]

- *Prohibiting surface bargaining*.[171] The existing good faith rules already addresses concerns about so-called surface bargaining. Going through the motions of negotiating with no intention of reaching an agreement violates the FCC's current totality of the circumstances test.[172] Broadcasters also observed that concerns about conduct designed to delay negotiations are already encompassed in the totality of the circumstances test, and that attempting to delineate by rule all the various types of conduct that could unreasonably delay negotiations would be a hopeless task.[173] After all, any objection by either party to a proposed rate, term or condition would inevitably delay a negotiation, yet should not automatically be regarded as unreasonable delay or as evidence of surface bargaining.

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[169] *See* Scripps Comments at 17-18.

[170] In fact, AT&T complains about the same attorneys and consultants representing different broadcasters in different retransmission consent negotiations. AT&T Comments at 23. The FCC cannot reasonably interpret the reciprocal good faith standard as requiring that every single broadcaster and MVPD in the country obtain separate outside counsel and/or consultants for retransmission consent negotiations. According to Nexstar, in its 2014 negotiations, one attorney negotiated for over half of the MVPD systems in Iowa, another attorney negotiated on behalf of numerous Wisconsin systems, three lawyers at the same firm negotiated for multiple MVPDs serving numerous markets in the Midwest, and the same consultant negotiated for a dozen different systems. Nexstar reported it is currently negotiating with two separate large MVPDs both of whom are represented by the same individual attorney. Nexstar Comments at 22 (also noting that the National Cable Television Cooperative often negotiates with broadcasters on behalf of its members).

[171] *See, e.g.*, WTA Comments at 10.

[172] *See, e.g.*, NAB Comments at 45; Affiliate Ass'ns Comments at 36.

[173] *See* Scripps Comments at 17; Nexstar Comments at 32-34; Affiliate Ass'ns Comments at 36-37.

- *Regulating the length and expiration date of retransmission contracts*.[174] Broadcasters and MVPDs should be able to negotiate over the length, and expiration date, of their retransmission agreements, just like other parties to commercial contracts. In many retransmission negotiations, the parties may agree to a longer contract that provides certainty for a greater period of time. In other negotiations, the parties may want a shorter contract, perhaps anticipating rapid technological or other marketplace changes. Too many factors come into play during individual negotiations for the FCC to determine the appropriate length of time or expiration date of all contracts.

- *Investigating how broadcasters spend their retransmission monies*.[175] This proposal will in no way advance the FCC's stated goal in this proceeding because how broadcasters use their retransmission consent revenues has no relationship whatsoever to negotiating impasses. And while it might be enlightening to see how MVPDs spend the vast revenues they derive from subscribers' pockets – how much, for example, is spent on improving the technical reliability of their services – the answers to such questions will not reduce negotiating impasses or clarify whether MVPDs negotiate in good faith.

- *Requirements that broadcasters publicly disclose their retransmission contracts*.[176] This is yet another MVPD proposal lacking a clear connection to the FCC's goal of reducing impasses. Requiring broadcasters to disclose their contracts, moreover, would unjustifiably result in the disclosure of highly sensitive business materials and raise serious questions under the Trade Secrets Act. The Commission has no basis to require the parties to retransmission consent agreements to make these disclosures, and certainly cannot require broadcasters alone to do so.[177]

- *Timing of broadcasters' initial offers*.[178] As anyone who has negotiated an agreement knows, regardless of how far in advance the negotiating process begins, negotiations almost always come down to the "11th hour." Instituting a mandated start date for negotiations is unlikely to change that reality. Because either party to a retransmission negotiation can make the initial offer, any rule

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[174] *See, e.g.*, Mediacom Comments at 32-33.

[175] *See* Mediacom Comments at 33-35.

[176] *See* Comments of ITTA – The Voice of Mid-Size Communications Companies, MB Docket No. 15-216, at 13-18 (Dec. 1, 2015).

[177] *See* News-Press & Gazette Comments at 15-16; Scripps Comments at 17; Affiliate Ass'ns Comments at 53.

[178] *See, e.g.*, WTA Comments at 9-10; NTCA Comments at 16.

(unnecessarily) considered by the Commission must apply equally to broadcasters and MVPDs.[179]

X. CONCLUSION

Retransmission consent is not a broken system. The few impasses that do occur, among thousands of successful negotiations that pass without notice, often last just hours or a day or two. Retransmission consent also is not the cause of rising MVPD bills. This proceeding is little more than a cynical ploy by pay TV providers to use the government to lower their cost of doing business. None of the MVPD-proposed changes (at least the legal ones) will benefit consumers by preventing negotiating impasses or reducing consumers' bills.

As we have shown, current marketplace conditions do not warrant an overhaul of the good faith negotiation rules, as the programming marketplace is flourishing as never before. Local broadcast stations do not possess undue market power in today's hyper-competitive programming market, and even if they did, that is not a legal or economic justification for changing the rules so that they decisively favor pay TV operators. Neither is there a rational basis to ban broadcasters from offering a number of proposals during negotiations with increasingly consolidated MVPDs.

Changing the good faith rules as proposed by pay TV commenters would harm the public interest by shifting money away from broadcasters, which invest in local content and offer video services free to the public, into the pockets of billion-dollar corporations that offer only increasingly expensive subscription services. Accordingly, we urge the Commission to

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[179] *See* News-Press & Gazette Comments at 13-14; Hearst Comments at 11; Scripps Comments at 17.

maintain the existing good faith negotiation rules and continue to let the marketplace, rather than regulatory fiat, determine the value of broadcast signals as Congress intended.

Respectfully submitted,

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January 14, 2016