Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	MB Docket No. 17-214

COMMENTS OF DISH NETWORK L.L.C.

DISH Network L.L.C. ("DISH") hereby submits these comments in response to the Media Bureau's request for comment on the status of competition in the market for the delivery of video programming.[1]

I. INTRODUCTION AND SUMMARY

Of the more than a dozen entities originally awarded Direct Broadcast Satellite ("DBS") permits from the Commission in the 1980s, only DISH and DIRECTV exist today. In the mid-1990s, these two companies changed the pay-TV marketplace, introducing lower prices and competition to cable. DISH distinguished itself as the low-price pay-TV maverick from the start, introducing a 40-channel package for only $19.99.[2] The dividends for consumers have been immense. But that pay-TV revolution would not have been possible without help from Congress and the Commission. The launch of DIRECTV's service in 1994 and DISH's service in 1996 followed quickly on the heels of the Commission's program access rules (1993),[3] which the

[1] Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 17-214, Public Notice, DA 17-797 (Aug. 24, 2017).

[2] Monica Hogan, *EchoStar Toasts a Decade of Dish Network*, Multichannel News (Mar. 17, 2006), http://www.multichannel.com/news/satellite/echostar-toasts-decade-dish-network/301998.

[3] Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report and Order*, 8 FCC Rcd. 3359 (1993).

Commission had been empowered to promulgate by the 1992 Cable Act. These rules unlocked the marquee programming that was controlled by cable operators, and that would otherwise not have been made available to satellite carriers except at prohibitively high prices.

Today, the industry is in the early stages of another revolution: online video distributors ("OVDs") and "skinny bundles" have emerged to provide competition against traditional linear pay-TV providers. DISH has again been in the vanguard. Ever the disruptor and the low-price competitor, DISH has negotiated tirelessly with programmers and has earned the right to offer one of the first and best skinny bundles – Flex Pack, with a core package of about 50 channels and the choice of one of eight themed add-on channel packs. Just as important, in 2015, DISH launched the first live linear, over-the-top ("OTT") subscription service, Sling TV.[4] Its 29-channel Sling Orange service remains the industry's most affordable, at $20 a month, and Sling was the first to offer live sports with ESPN and ESPN 2.

Consumers have already started reaping benefits from the OTT/skinny bundle revolution. A television is only one of many devices on which consumers can view video content today. Subscribers to traditional multichannel video program distributors ("MVPDs") are disconnecting their services ("cord cutting"), or downgrading to smaller, less expensive programming packages

[4] Stephen Silver, *Product review: Sling TV*, Technology Tell (Jan. 26, 2015), http://www.technologytell.com/entertainment/57117/product-review-sling-tv/ ("At International CES in Las Vegas earlier this month, amid all of the 4K TVs, robots, drones, and promises about the coming primacy of the Internet of the Things, perhaps the biggest splash of all was none of the above: The Dish Network-operated Sling TV, announced at a morning press conference at the show's Press Day, was the talk of the show that day, and ended up winning three official Best of CES Awards- for Best Home Theater product, Best Software/App and the overall Best of the Best award.").

and electing to purchase through online content providers a certain portion of the services that they would have historically purchased from MVPDs ("cord shaving").[5]

In this environment of increasing competition, however, MVPDs continue to face tremendous challenges in accessing the marquee programming that consumers demand. Specifically, local broadcast TV stations are being withheld today except at prohibitive prices, and the large broadcast companies are the guardians at the gate. Even as MVPDs try to keep up with the proliferation of viewing options that consumers enjoy, they face the spiral of escalating retransmission fees and an increasing number and frequency of blackouts.

Broadcasters struck a deal with the nation: free spectrum – billions of dollars of it – in exchange for free, ad-supported television.[6] They have not kept their part of that bargain: broadcast TV is free in name only, as the soaring retransmission fee increases are necessarily passed through to consumers. The Commission should act to protect consumers and the pay-TV market, ensure that retransmission negotiations are undertaken in good faith, and in the process also enforce the mandate of free broadcast television to make sure it does not become an empty promise.

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[5] *See* Comments of DISH Network L.L.C., GN Docket No. 16-142, at 7-8 (May 9, 2017); *see also* Dish Network Corporation, Petition to Deny, MB Docket No. 14-57, at 24-25 (Aug. 25, 2014); Todd Spangler, *Cord-Cutting Explodes*, Variety (Sept. 13, 2017), http://variety.com/2017/biz/news/cord-cutting-2017-estimates-cancel-cable-satellite-tv-1202556594/.

[6] *See* T. Randolph Beard, George Ford, Lawrence Spiwak and Michael Stern, *An Economic Framework for Retransmission Consent*, Phoenix Center Policy Paper, at 18-19 (Dec. 2013) ("At its core, the social contract involves broadcasters providing society with 'public interest' programming in return for regulatory and legislative preferences. As the Supreme Court has repeatedly recognized, '[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'").

II. THE RETRANSMISSION CONSENT SYSTEM IS BROKEN, DENYING ACCESS TO PROGRAMMING AND RAISING CONSUMER COSTS

While competition between MVPDs has been increasing, the broadcast industry has been consolidating. The enlarged broadcast groups have continued to deploy the threat of programming shutdowns to extract progressively more exorbitant retransmission consent fees from distributors, increasing consumer prices.

A. Retransmission Consent Price Increases Are Outpacing Any Reasonable Measure

To judge by retransmission consent revenue growth alone, broadcasting would be the telecom industry's premier growth industry over the past 10 years, despite lower ratings among key demographics. In 2014, the Commission cited projections that retransmission fees for 2016 would be $2.6 billion, more than 12 times those for 2006 – $214.6 million.[7] In percentage terms, this is 1,200%. The Commission also cited projections of $7.6 billion for 2019 and $9.1 billion for 2020.[8] Those sums are 3,500% and 4,200% of the 2006 number. And while the 2014 projections may have seemed high, the reality proved even more extreme: broadcast retransmission fees reached $6.4 billion in 2015 and $7.9 billion in 2016.[9] In 2016, therefore, they turned out to be 3,591% of the 2006 number. Recent projections estimate that, by 2023,

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[7] *See* Amendment of the Commission's Rules Related to Retransmission Consent, *Report and Order*, 29 FCC Rcd. 3354, 3363 ¶ 16 n.68 (2014) ("*2014 Retransmission Consent Order*") (citing record evidence that retransmission consent fees for MVPDs increased from $214.6 million in 2006 to $1.1 billion in 2010).

[8] *Id.*

[9] SNL Kagan, *Broadcast Retransmission and Virtual Service Provider Carriage Fee Projections Through 2023* (July 2017); *see also* Letter from Mike Chappell, American Television Alliance, to Marlene Dortch, FCC, MB Docket Nos. 15-216 and 10-71, at 3 (Jan. 6, 2017). ("[R]etransmission consent prices rose 27 percent last year alone after three years of 40-percent increases.").

retransmission fees will increase to $12.82 billion, and *5,880%* of 2006 revenues.[10] These increases are not the signs of a functioning marketplace.

These fee increases are unsupported by any rational explanation, such as investment in new creative content and commensurate ratings increases. Indeed, the ratings of the broadcast networks have slipped both as a percentage of total video consumption and relative to the ratings of cable networks.[11] Rather, the main reason is the power wielded by each network affiliate. While less popular than they once were, the four networks are still must-have staples for pay-TV customers.[12]

To these facts, the broadcast industry often counters that its skyrocketing price increases are an attempt to catch up with what it views as the true value of network programming or with the price of some cable networks. As Sinclair and Tribune protested in defending their proposed

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[10] Justin Nielson, *Retrans Projections Update: $12.8B by 2023*, SNL Kagan (June 14, 2017) (estimating $9.39 billion in retransmission fees in 2017).

[11] TV Network Summary, SNL Kagan (2017) (showing the decline of broadcast TV station ratings from 2006-2015 is greater than the overall decline in cable network ratings over the same period); *see also* Gerry Smith and Lucas Shaw, *Fed-Up Advertisers Stop Paying More for Smaller TV Audiences*, Bloomberg Technology (May 5, 2017), https://www.bloomberg.com/news/articles/2017-05-05/fed-up-advertisers-stop-paying-more-for-declining-tv-audiences ("In the [2017] TV season, the four major broadcasters have lost 8 percent of their audience. . . . TV ratings have dropped 33 percent in the last four years"); Anthony Crupi, *Where TV Ratings Go From Here*, Advertising Age (Apr. 18, 2016), http://adage.com/article/media/ratings/303574/ (charting the steady drop in big four broadcast ratings and noting that strong performing shows from the previous season experienced some of the greatest rating drops); Jim Edwards, *BRUTAL: 50% Decline In TV Viewership Shows Why Your Cable Bill Is So High*, Business Insider (Jan. 31, 2013), http://www.businessinsider.com/brutal-50-decline-in-tv-viewership-shows-why-your-cable-bill-is-so-high-2013-1 ("[T]here has been a 50 percent collapse in broadcast TV ratings in the last decade."); Tim Arango and Bill Carter, *An Unsteady Future for Broadcast*, New York Times (Nov. 20, 2009), http://www.nytimes.com/2009/11/21/business/media/21network.html (describing the ratings decline of the big four broadcast networks compared to cable networks).

[12] *See* 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Second Report and Order*, 31 FCC Rcd. 9864, 9958 ¶ 229 (2016).

merger, distributors were initially able to retransmit signals "without paying them any compensation,"[13] and that "began to change only after the advent of MVPD competition, which eroded cable monopolies when two major direct broadcast satellite distributors developed the technology and gained the right to retransmit local-into-local signals in the 2000s."[14]

These views, however, do not explain the escalation of retransmission consent fees. It is, of course, true that DISH and DIRECTV eroded the dominance of cable operators. But this does not explain why the price of retransmission consent remained at zero or near zero into the 2000s, when Congress had already created a retransmission consent right, and DISH and DIRECTV were competing with cable operators. Moreover, zero is not the exploitative price that the broadcasters imply. It has long been recognized that the retransmission of broadcast signals by distributors is a synergistic, win-win relationship, as it confers benefits on both sides. It was precisely for that reason that the Copyright Office had set the copyright royalty for the local retransmission of superstations at zero. In the words of the Copyright Arbitration Royalty Panel, "[l]ocal retransmission of broadcast stations benefits the broadcast station and the copyright owners of the programming."[15] The Copyright Librarian adopted that recommendation, and extended it to network stations, too.[16] The reason is obvious: the broadcaster gets more eyeballs to sell to advertisers as well as a higher-quality signal and broader reach than afforded by over-the-air reception; the MVPD gets more programming to sell to subscribers. Of course, it does

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[13] Tribune Media Company and Sinclair Broadcast Group, Inc, Consolidated Opposition to Petitions to Deny, MB Docket No. 17-179, at 36 (Aug. 22, 2017).

[14] *Id.* at 36-37.

[15] Rate Adjustment for the Satellite Carrier Compulsory License, Report of the Panel Before the Library of Congress Copyright Office, Docket No. 96-3 CARP-SRA, 51 (Aug. 28, 1997).

[16] Rate Adjustment for the Satellite Carrier Compulsory License, 62 Fed. Reg. 55742 (Oct. 28, 1997) (codified at 37 C.F.R. § 258.3(b)(3), (4) (1998)).

not follow that the benefits conferred on one side exactly equal those received by the other, but that is an entirely plausible, and indeed likely, possibility that the Commission has recognized in other economic contexts.[17]

Nor is broadcast programming comparable to cable network programming, which relies exclusively or primarily on a subscription model. If they want, broadcasters are free to give back their spectrum, change their business model, and seek carriage as cable networks. Short of that, they must keep their side of the free-spectrum-for-free-TV deal with the nation. Under Commission rules, broadcasters may not charge for their primary broadcast signal; they may only do so for ancillary and supplementary services.[18] But retransmission fees that are akin to the prices for the most expensive cable networks have the effect of hollowing out that limitation. Most Americans do not receive free TV any more, as the retransmission fees are so high that they have to be passed through to consumers by distributors. The real reason for the retransmission fee increases is not the need to reach the broadcasters' perception of fair value. It is the bargaining power of the broadcasters. Each network affiliate can play three, four, or more distributors against one another. And, as discussed below, the size of the large broadcast groups, which have grown much larger thanks to the unprecedented broadcast industry consolidation of the last decade, has brought much higher retransmission prices in its wake.

[17] *See* FCC, Connect America Fund & Intercarrier Compensation Reform Order and FNPRM Executive Summary at 7 ¶ 18 (2011), 2011 WL 5114855, *6 (recognizing the value of telephone traffic as roughly equal between two carriers, the FCC adopted "a uniform national bill-and keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC . . . [W]e reject the notion that only the calling party benefits from a call and therefore should bear the entire cost of originating, transporting, and terminating a call.").

[18] 47 C.F.R. § 73.624(b), (c).

B. The Threat of Blackouts Favors the Broadcast Station and Harms Consumers

The key weapon that broadcasters have in their retransmission consent arsenal is the threat of programming blackouts. The "pain" experienced by a network station and a distributor during and as a result of a blackout is asymmetric: while the distributor is bleeding subscribers and associated revenues, its subscribers flee to competitive distributors and, as a result, the network does not lose the same number of "eyeballs" as the distributor. The broadcaster will still get its viewers (and retransmission fees from other distributors that pick up churned customers), but the distributor never recovers the lost revenues from customers who churn away, either temporarily or (even worse) permanently.

It is, then, unsurprising that the number and frequency of blackouts have increased. In 2010, there were only eight blackouts.[19] The number increased to 42 in 2011 and 90 in 2012.[20] Blackouts topped 100 for the first time in 2013 with 119 and set another record in 2015 with 193.[21] 2017 is on pace for another record year with 152 blackouts so far.[22]

The broadcast industry attempts to deflect attention from these numbers by downplaying them as a phenomenon that hurts both sides, or (worse) by pointing the finger at distributors, and especially at DISH. But these blame-shifting attempts do not take account of the bargaining power that comes with asymmetrical negotiations, where each network affiliate may choose

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[19] *Blackout List 2010-2017*, American Television Alliance, http://www.americantelevisionalliance.org/wp-content/uploads/2017/09/Retrans-Blackouts-09.12.17.xlsx (last visited Oct. 4, 2017).

[20] *Id*.

[21] *Id*.

[22] *Id*.

among four or more conduits for its signal. Nor do these explanations take account of the relationship between fees and broadcast group size.

Blackouts have afflicted DISH and its competitors with increasing frequency. So far this year, broadcasters have blacked out their signals on DIRECTV, Verizon, AT&T, Altice, Frontier, Cable One, and TDS Telecom systems.[23] In fact, two of the MVPDs who seem to be exceptions to the rule may well prove the point; not mentioned in the list of blacked out systems are Comcast and Cox – cable operators who also own broadcast stations. Cox, for its part, blacked out ten stations from AT&T's systems.[24]

The leverage wielded by means of a blackout is often compounded by a number of anti-consumer tactics broadcasters have employed during retransmission consent negotiations. For example, in addition to their linear channels, they black out their websites during retransmission consent disputes.[25] Broadcasters require MVPDs to purchase unwanted programming – sometimes even "programming to be named later" – as a condition of retransmission consent.[26] They engineer blackouts immediately prior to "marquee events" such as the NFL playoffs.[27]

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[23] *Id*.

[24] *Id*.

[25] *See* Jeff Baumgartner, *CBS Blocks TWC Broadband Subs from Accessing Full Episodes Online*, Multichannel News (Aug. 4, 2013), http://www.multichannel.com/news/content/cbs-blocks-twc-broadband-subs-accessing-full-episodes-online/357892; Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test, *Notice of Proposed Rulemaking*, 30 FCC Rcd 10327, 10336-37 ¶ 13 & n.57 (2015).

[26] DISH Network L.L.C., Complaint, MB Docket No. 12-1, at 9 (Aug. 15, 2015); Comments of the American Television Alliance, MB Docket No. 15-216, at 25 (Dec. 1, 2015) ("ATVA Comments").

[27] *See As Football Season Kicks Off, TV Blackout Season Kicks into High Gear*, American Television Alliance (Sept. 7, 2017), http://www.americantelevisionalliance.org/as-football-season-kicks-off-tv-blackout-season-kicks-into-high-gear/ ("In 2016, broadcasters pulled the plug on post season professional football games and college football bowl games in more than 20 cities, leavings millions of fans without access to their favorite teams.").

They cede negotiating rights to others, artificially increasing their already formidable market power.[28] They seek to limit the equipment and technology deployed by MVPDs, preventing MVPDs from providing subscribers with services they are legally entitled to enjoy.[29] They refuse to allow MVPDs to provide subscribers a modicum of relief from blackouts with out-of-market signals.[30] They seek to charge for subscribers who receive their signals over the air.[31] Perhaps most troubling, humanitarian crises such as the one following Hurricane Maria can leave these practices unaffected. One broadcaster blacked out its stations in Puerto Rico and the U.S. Virgin Islands from the screens of DISH subscribers during this crisis, rebuffing DISH's plea to extend the retransmission consent agreement subject to a retroactive true-up based on the rates to be ultimately agreed between the two companies.[32] None of these practices serves the public interest or benefits consumers.

C. Consolidation in the Broadcast Industry Has Been an Important Factor in Rising Retransmission Consent Prices

DISH has documented the effect of size on prices: size alone leads to higher retransmission consent prices. Specifically, DISH's study of the retransmission consent prices it pays broadcasters shows clearly that network affiliates associated with larger broadcast groups

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[28] Sinclair Broadcast Group, Inc., *Consent Decree*, 31 FCC Rcd. 8577, 8579 ¶ 4 (2016); ATVA Comments at 28-30.

[29] ATVA Comments at 30-31.

[30] *Id*. at 31-32.

[31] *Id*. at 32-33.

[32] *See* Press Release, DISH Network Corp., Lilly Broadcasting Blocks Channels to DISH Customers in Puerto Rico, U.S. Virgin Islands, and Markets in Pennsylvania, New York and Hawaii (Sept. 30, 2017); American Television Alliance, Lilly Broadcasting Blacks Out CBS and ABC Stations in Storm Ravaged Puerto Rico and USVI Hampering Recovery Efforts (Oct. 2, 2017), http://www.americantelevisionalliance.org/lilly-broadcasting-blacks-out-cbs-and-abc-stations-in-storm-ravaged-puerto-rico-and-usvi-hampering-recovery-efforts/.

consistently command a premium over their network station counterparts in the same market but affiliated with smaller broadcast groups.[33] DISH has also found that, nationally, a broadcast group's size has a statistically significant effect on retransmission consent rates.[34]

And so do broadcast mergers. Over the last decade, the Commission has approved 14 major transactions involving the 10 largest broadcast groups. This has resulted in the largest broadcast groups controlling far more stations than they did in 2008. As shown in the following charts, each of the four largest groups in 2017 has more stations than the largest group did in 2008:

Top 10 Broadcast Groups 2008[35]

Broadcast Group	Number of Full Power Stations
ION	55
Sinclair	48
Univision	37
Raycom	36
Gray	31
Hearst	29
Nexstar	29
Trinity	24
LIN	24
Newport	24
Tribune	23

[33] *See* Declaration of Janusz A. Ordover, attached as Exhibit D to Dish Network L.L.C., Petition to Deny, MB Docket No. 17-179 (Aug. 7, 2017).

[34] *Id*.

[35] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 2, 2009).

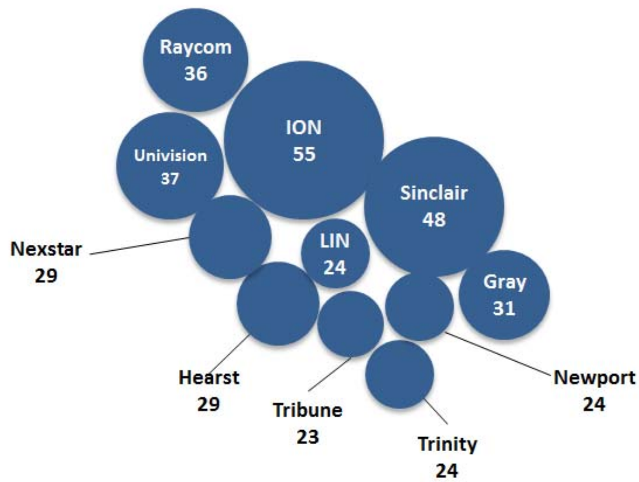
Top 10 Broadcast Groups 2017 (showing in parentheses groups acquired)[36]

Broadcast Group	Number of Full Power Stations
Nexstar (Media General, LIN Media, Young)	130
Sinclair (Allbritton, Fisher, Bonten, Barrington)	118
Gray (Shurz, Hoak Media, Parker)	75
ION	60
Raycom (Drewry)	47
TEGNA/Gannett (Belo)	45
Tribune (Local TV)	41
Univision	38
Hearst	32
Scripps (Journal)	27

Below is a graphic demonstration:

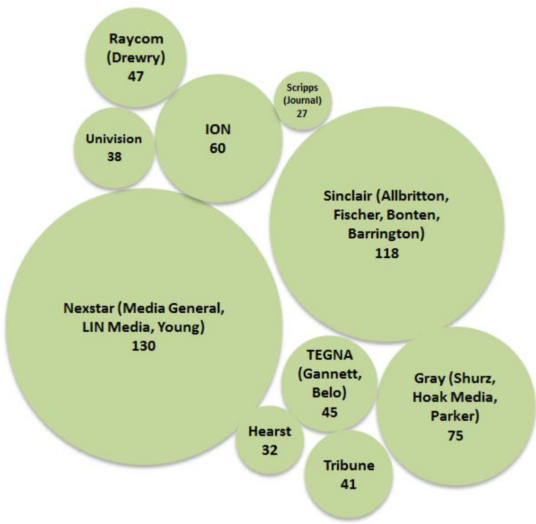
The Big Bang of Broadcast Industry Consolidation

2008

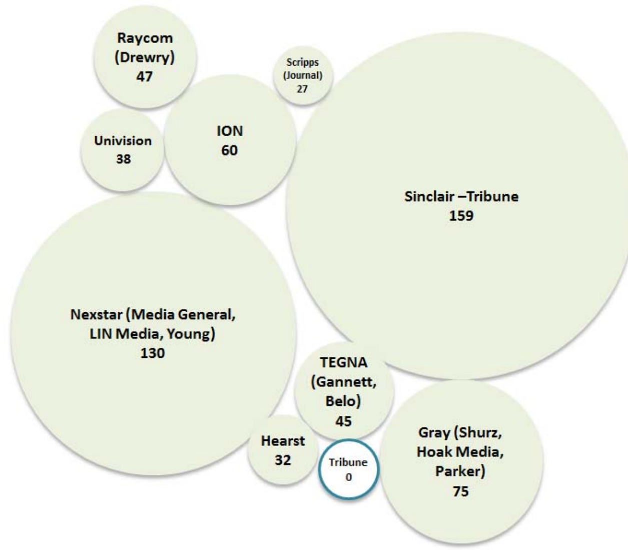


[36] Derived from SNL Kagan, *Top Commercial TV Station Groups* (Jan. 26, 2017).

2017



2017 (with Sinclair Tribune combined)



This big bang has had a profound effect on retransmission prices. DISH has examined what happened to the retransmission rates it pays after ten large broadcast industry consolidations that took place during the last decade. In all but one of these cases, after-acquired clauses operated to cause a rate hike immediately upon consummation. But this rate hike was only the beginning. In *all* cases, the first agreement following consummation of these transactions ushered in rate increases over the target company's rates that outpaced industry wide price increases by stunning percentages.[37]

D. The Commission Should Consider Changes to its Retransmission Consent Rules to Address the Staggering Consumer Price Increases

To address this retransmission consent crisis and prevent further harm to American consumers, the Commission needs to revise its rules to ensure that retransmission consent negotiations are actually undertaken in good faith. Specifically, for blackouts, the Commission should consider requiring "standstills" that allow the continued transmission of the programming

[37] Reply of DISH Network L.L.C., MB Docket No. 17-179, at 24-25 (Aug. 29, 2017).

while negotiations continue as well as baseball rules arbitration for the event of an impasse. This will ensure consumers are not used as pawns and that they will continue to have access to broadcast programming during a dispute. The broadcasters have called that proposal one-sided. It is not. The Commission can and should ensure even-handedness by requiring both parties to accept carriage at the price chosen by the arbitrator. If the arbitrator sides with the broadcaster, then the distributor must continue retransmission at the broadcaster-proposed rate, and must moreover pay the broadcaster retroactively at that rate. Short of a standstill, the Commission should rule that the failure of a broadcaster to grant waivers permitting signal importation to served households during blackouts is a *per se* violation of the good faith requirement, or at least creates a presumption that the broadcaster has violated the totality of the circumstances test.[38]

The Commission should also find that certain conduct constitutes a *per se* violation of the Commission's good faith rules. Such conduct would include, among other things, online blocking, forced bundling, blackouts prior to marquee events, ceding negotiation rights to other parties, restricting the use of certain technology or equipment, restricting out-of-market signals during disputes, charging for subscribers who do not receive a signal from an MVPD, and forcing blackouts before, during, or after a natural disaster. These steps are necessary to

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[38] In the words of the American Television Alliance, the *per se* violation or presumption should be triggered when the broadcaster: "For satellite MVPDs, fails to grant a blanket waiver sufficient to permit households not qualifying as unserved households to receive same-network distant signals if the television broadcast station has declined to grant an extension of a retransmission consent agreement to allow continued carriage of the broadcast station's signal; for cable/telco MVPDs, exercise its network non-duplication or syndicated exclusivity rights, pursuant to sections 76.92 and 76.101 of title 47, Code of Federal Regulations, if the television broadcast station has declined to grant an extension of a retransmission consent agreement to allow continued carriage of the broadcast station's signal." *See* Comments of the American Television Alliance, MB Docket No. 15-216, at 49 (Dec. 1, 2015).

safeguard the good faith requirement, fulfill the promise of free, ad-supported broadcast TV, and enhance the health of the multichannel video markets.

III. CONCLUSION

As the pay-TV market innovates with new consumer-friendly alternatives like skinny bundles and services provided by OVDs, MVPDs continue to face challenges in accessing the marquee content that consumers demand. The Commission should act to protect consumers and the pay-TV market by ensuring that retransmission consent negotiations are undertaken in good faith, and in the process also enforce the mandate of free broadcast television to make sure it does not become an empty promise, consistent with the proposals listed herein.

Respectfully submitted,

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