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

In the Matter of	)	
	)	
Amendment of the Commission's Rules Concerning Market Modification	)	MB Docket No. 15-71
	)	
Implementation of Section 102 of the STELA Reauthorization Act of 2014	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB)[1] submits these reply comments concerning the Commission's implementation[2] of Section 102 of the STELA Reauthorization Act of 2014 (STELAR).[3] NAB's reply comments focus primarily on an issue raised by DISH Network, L.L.C. regarding a station that elects retransmission consent following a market modification.[4] As explained below, DISH and other satellite carriers must abide by provisions of the Communications Act and FCC rules governing retransmission consent and must-carry within a station's market, including areas affected by a market modification request.

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Amendment of the Commission's Rules Concerning Market Modification; Implementation of Section 102 of the STELA Reauthorization Act of 2014*, Notice of Proposed Rulemaking, MB Docket No. 15-71, FCC No. 15-34 (rel. Mar. 26, 2015) (*Notice*).

[3] The STELA Reauthorization Act of 2014 (STELAR), §§ 102, 204 Pub. L. No. 113-200, 128 Stat. 2059, 2060-62 (2014), *codified at* 47 U.S.C. § 338(l); 47 U.S.C. § 534(h)(1)(C); 17 U.S.C. § 122(j)(2)(E).

[4] Comments of DISH Network, L.L.C. (DISH) in MB Docket No. 15-71 (May 13, 2015) at 2, 9-10 (DISH Comments).

Satellite carriers cannot lawfully obtain a "free pass" to carry retransmission consent stations without negotiating the prices, terms and conditions of such consent in any geographic area.

I. THE COMMISSION SHOULD "CAREFULLY EXAMINE" CLAIMS OF INFEASIBILITY BASED ON SUBSTANTIVE INFORMATION AND DATA

As discussed in our initial comments, NAB generally supports the Commission's proposed interpretation of Section 102 and believes that many of the proposals in the *Notice* will effectuate the plain language of the statute and Congressional intent. NAB also strongly agrees with the Commission's observations in the *Notice* that Congress intended that satellite carrier claims of technical and economic infeasibility "should be well substantiated and carefully examined by the [Commission] as part of the petition consideration process."[5] Several commenters support a market modification process that permits the Commission to consider data and information relevant to such claims.[6] In contrast, the mere "certification" proposed by satellite carriers[7] would not comport with the legislative intent of the technical and economic infeasibility provision.[8] It would also be inconsistent with the Commission's longstanding approach to market modification requests in the cable context, which involve a substantial evidentiary showing.[9] Given the specific legislative history of the technical and economic infeasibility provision and Congress'

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[5] *Notice* at ¶ 19, *citing* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 (2014) (*Senate Commerce Committee Report*) at 11.

[6] Comments of NAB in MB Docket No. 15-71 (May 13, 2015) at 7-10; Comments of Gray Television, Inc. in MB Docket No. 15-71 (May 13, 2015) at 6-7; Comments of Virginia Broadcasting in MB Docket No. 15-71 (May 12, 2015) at 7.

[7] DISH Comments at 7-9; Comments of DIRECTV in MB Docket No. 15-71 (May 13, 2015) at 7-11.

[8] *See supra* note 5.

[9] 47 C.F.R. § 76.59(b).

directive to establish a satellite market modification process similar to that for cable, [10] an approach that involves only an unverifiable certification would be inadequate.

II. THE COMMISSION SHOULD REJECT PROPOSALS THAT CONTRAVENE SECTION 325 OF THE COMMUNICATIONS ACT

The Commission has correctly proposed that, once a station's market is modified for purposes of satellite carriage, the station may lawfully elect retransmission consent or must carry with respect to the geographic areas affected by the modification.[11] As with any other election, the satellite carrier must then negotiate with the station pursuant to statutory provisions and Commission rules governing retransmission consent,[12] or carry the station under statutory provisions and Commission rules governing must carry.[13]

DISH purports to "bring[] to the Commission's attention" an issue upon which comment was not requested.[14] However, requesting comment on the matter raised by DISH would be entirely inappropriate because the law is well-settled, and the requested relief would be patently unlawful. DISH states that a satellite carrier "should not be required" to pay retransmission consent fees when a television broadcast station's market is modified to include additional geographic areas.[15] As DISH is well aware, no satellite carrier is or can be "required" to pay retransmission consent fees.[16] The law merely requires a satellite carrier

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[10] *Notice* at n. 15, *citing Senate Commerce Committee Report*.

[11] *See Notice* at ¶ 18, *citing* Appendix A – Proposed Rules; proposed rule 47 C.F.R. § 76.66(d)(6).

[12] 47 U.S.C. § 325; 47 C.F.R. §§ 76.64-76.65.

[13] 47 U.S.C. § 338; 47 C.F.R. § 76.66(c).

[14] DISH Comments at 2.

[15] DISH Comments at 2, 9-10.

[16] *See, e.g., EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (MB 2001). There, the FCC held that DISH (fka EchoStar) failed to meet its burden of proof that a broadcaster engaged in "take-it-or-leave-it bargaining" in violation of the good faith rules. *Id.* at 15079 ¶ 21. Rather, the record showed that the broadcaster offered alternatives and DISH simply "[did] not wish to pay" the prices proposed. *Id.* The FCC held that the broadcaster complied with all aspects of the

to negotiate with a broadcaster that elects retransmission consent about the prices, terms and conditions of carriage. Whether an agreement may involve compensation is a matter to be determined by the parties negotiating retransmission consent—it cannot be decided by the Commission.

DISH's proposal that the Commission somehow ensure that it does "not have to pay additional retransmission consent fees" is exactly the sort of governmental intrusion into the retransmission consent negotiation process that the Commission previously has determined is contrary to Congressional intent and beyond the scope of its statutory authority. Section 325(b) of the Communications Act unequivocally prohibits a cable system or other multichannel video programming distributor from retransmitting a television broadcast station's signal without the station's express consent.[17] 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.[18] The Commission's limited authority to adopt regulations to prevent parties from "failing to negotiate in good faith"[19] cannot be interpreted to permit a governmental mandate that broadcast stations consent to carriage of their signals without negotiating carriage terms and conditions with satellite

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good faith standard, but admonished DISH for abuse of Commission processes and lack of candor. *Id.* at 15075 ¶ 12.

[17] 47 U.S.C. § 325(b)(1)(A); *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, 5471 ¶ 60 (2000) ("*Good Faith Order*").

[18] S. Rep. No. 102-92 at 34-35, 37 (1991) ("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").

[19] 47 U.S.C. § 325(b)(3)(C).

carriers.[20] Because DISH's proposal is clearly beyond the scope of the Commission's authority, it does not warrant Commission consideration.

III. CONCLUSION

The Commission has properly concluded that modifying its existing rules and procedures relating to cable market modification petitions is the best means to establish a satellite market modification process. NAB urges the Commission to ensure that satellite carriers make appropriate evidentiary showings to support any claim that a new carriage obligation arising from a market modification is technically and economically infeasible. Finally, the Commission should make clear that a station electing retransmission consent with regard to a community or communities that become part of its defined market following a modification request is the same as any other station making a retransmission consent election. Accordingly, a satellite carrier wishing to carry that station must negotiate in good faith with the station as required by the Commission's retransmission consent good faith rules.

Respectfully submitted,

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[20] *See, e.g., Good Faith Order* at ¶ 14 (concluding that Congress did not intend for the "good faith requirement" to result in the FCC "assum[ing] a substantive role in the negotiation of the terms and conditions of retransmission consent.").