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FILED ELECTRONICALLY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Amendment to the Commission's Rules Related to Retransmission Consent*,
MB Docket No. 10-71

Dear Ms. Dortch:

Cablevision Systems Corporation ("Cablevision") submits this letter to urge the Commission to issue a robust notice of proposed rulemaking on retransmission consent to implement Congress's mandate in the STELA Reauthorization Act of 2014 ("STELAR") to improve and strengthen the good faith requirements.¹ As explained below, the Commission should take steps to address changes in the programmer-distributor market that, when combined with rules adopted following the 1992 Cable Act, now result in consumers being forced to purchase large bundles of programming they do not want, and restrict cable operators' ability to provide the programming choices their customers desire. The Commission has authority under Sections 325 and 309 of the Communications Act and Section 103(c) of STELAR to take action to reform the retransmission consent rules to ensure that they serve consumers' interests.

I. Background: The Competitive Dynamic Has Changed Markedly Since 1992

As Cablevision has previously explained, the bargaining relationship between broadcasters and multichannel video programming distributors ("MVPDs") has changed dramatically since 1992, when Congress enacted the retransmission-consent regime.² At that time, policymakers were concerned that the cable operators maintained a bottleneck over distribution and that local broadcast stations were dependent on cable operators to reach viewers.³ Congress sought to correct that imbalance by giving broadcasters special tools to increase their relative leverage. Today, distribution is widely available to broadcasters in many forms and on many platforms: broadcasters can self-distribute (CBS All Access),

¹ STELA Reauthorization Act of 2014 ("STELAR"), Pub. L. No. 113-200, § 103(c), 128 Stat. 2059, 2062.

² See Comments of Cablevision Systems Corporation and Charter Communications, Inc., MB Docket No. 10-71 (filed June 26, 2014).

³ See *id.* at 1, 6-7.

distribute through aggregators (Hulu), deploy over streaming services (Sony, Sling TV), publish content on various Internet video services (Vimeo, YouTube), distribute over cable, DBS, and telcos, and, of course, they continue to broadcast over the air. Now that so many distribution options are available, the tools that Congress gave broadcasters to enhance their leverage in carriage negotiations with distributors is disserving consumers, resulting in higher fees to operators, driving more broadcast-affiliated cable programming into distributors' video packages, and requiring consumers to pay more for content that they do not want or forego content they do want.⁴ Congress's mandate in STELAR to revisit the good faith requirements for retransmission consent gives the Commission an important opportunity to correct these imbalances for the benefit of consumers.

II. The Retransmission Consent Regime Results in Bundling Practices that Diminish Consumer Choice

As rational economic actors, broadcasters take advantage of the statutory and regulatory tools they are given to engage in a number of practices that serve their interests but ultimately disserve consumers. To address these directly, Cablevision previously proposed a three-prong approach to retransmission consent reform: require that broadcasters (1) be transparent about retransmission consent fees and terms, (2) offer non-discriminatory rates to MVPDs in the same local market, and (3) offer reasonable standalone rates for retransmission consent that are not tied to additional programming services or other non-cash compensation.⁵

But as Chairman Wheeler has recognized, a central problem today is that consumers are forced "to buy channels they never watch."⁶ He pointed to the importance of FCC action "to give consumers more alternatives from which to choose so they can buy the programs they want."⁷ Cablevision shares Chairman Wheeler's concerns, and indeed has long advocated for effective Commission action to address wholesale tying and bundling practices that hurt consumers.⁸ And while Cablevision has led the industry in facilitating customer access to over-the-top (OTT) content—creating "cord cutter" packages and offering broadband access with digital, over-the-air antennas—the trends toward bundling and lack of

⁴ See *id.* at 1-2, 7-8.

⁵ See Comments of Cablevision Systems Corporation, MB Docket No. 10-71 (filed May 26, 2011).

⁶ Tom Wheeler, FCC Blog, *Tech Transitions, Video, and the Future*, Official FCC BLOG (Oct. 28, 2014 2:48 PM), available at <https://www.fcc.gov/blog/tech-transitions-video-and-future>.

⁷ *Id.*

⁸ See Reply Comments of Cablevision Systems Corporation, MB Docket No. 04-207 (filed Aug. 13, 2004); *Media Ownership: Hearing Before the S. Comm. on Commerce, Science, and Transport.*, 108th Cong. 30-32 (2003) (testimony of Charles F. Dolan, Chairman, Cablevision Systems Corporation); News Release, Cablevision Systems Corporation, *Statement of Cablevision Chairman Charles F. Dolan Regarding A La Carte Programming* (Dec. 1, 2005), available at <http://www.prnewswire.com/news-releases/statement-of-cablevision-chairman-charles-f-dolan-regarding-a-la-carte-programming-55161697.html>; Letter from Cablevision Systems Corporation to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket Nos. 07-29 and 07-198 (filed Dec. 9, 2008).

choice in MVPD packages persist. To that end, Cablevision urges the Commission to directly address practices that most effectively restrict consumer choice.

A. Continuing Imposition of a “Must Buy” Tier in Competitive Communities Forces Consumers to Purchase Content Whether They Want It or Not

Even though the requirement to sell all subscribers a basic tier that includes local broadcast stations does not apply to cable systems subject to “effective competition,”⁹ broadcast carriage agreements typically impose the same “must buy” requirement on operators as a condition of granting retransmission consent.¹⁰ As a result, every cable television customer must buy the broadcast basic package of programming that includes the retransmission-consent channels before they can buy what they want. This practice significantly limits the extent to which a cable provider can tailor its programming to meet customer demand. For example, Cablevision must sell a customer that wishes to purchase only Spanish-language programming the full set of English-language broadcast channels. Requiring a “must buy” tier thus forces consumers to purchase broadcast programming whether or not they want it, and reverses the Congressional presumption that such mandates would expire when distribution was no longer a limitation on customers’ access to desired broadcast content.

B. Tying of Affiliated Content to Broadcast Stations Limits Consumer Choice and Reduces MVPDs’ Ability to Respond to Consumer Demand

Broadcasters seek to improve the audience reach of their affiliated programming networks by conditioning carriage of the broadcast feed on the purchase of affiliated cable networks, thus forcing cable providers to buy and distribute additional channels for which there may be little customer demand. A prohibition on tying would address this problem, but short of a complete ban on tying the Commission should consider eliminating practices that broadcasters employ in conjunction with tying that greatly exacerbate its harm:

- **Tier Placement**: In addition to tying affiliated content to their broadcast channels, broadcasters compel cable providers to place their affiliated networks in the most popular packages. This practice forces popular programming packages to become ever larger, significantly increases the cost of such packages, and means that in order for customers to purchase popular channels that they want, they must also receive and pay for channels that they do not want.
- **Penetration Minimums**: As a complement to tier-placement demands, some broadcasters impose penetration minimums, which require cable providers to guarantee that broadcaster-

⁹ See *Time Warner Entm’t Co., L.P. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995); *In re Carriage of Digital Television Broadcast Signals*, First Report & Order & Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2643 ¶ 102 (2001).

¹⁰ See *In re Amendment to the Commission’s Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574, 6583-84 ¶ 12 (2015).

affiliated cable networks will reach a certain percentage of customers. In effect, this practice limits cable operators' ability to offer alternatives to the large tiers of programming that are the subject of tier-placement demands. For example, if a programming contract requires that a channel be delivered to 90% of customers, then once 10% of consumers choose an alternative to the bundle, cable operators are effectively prohibited from selling any more of the alternatives to their customers, even as those customers continue to demand it.

- **Impact on Broadcast Basic Tier:** Penetration minimums also cause particular harm to the availability of the standalone, lower-cost, broadcast basic tier. That standalone tier of programming is a kind of "lifeline" for television, and is also increasingly attractive to broadband customers who enjoy most of their video content "over the top," but want access to broadcast basic as a supplement to OTT offerings. When penetration minimums are measured against all subscribers, including subscribers who purchase the standalone broadcast basic tier, cable operators can be forced to stop selling that tier or else include expensive cable networks in the basic tier—lest the penetration minimums be violated. Either way, the tier designed to be an affordable "lifeline" option for consumers cannot serve its intended purposes if it is made unavailable because of contractual penetration minimums that include broadcast basic in the denominator.

The end result of all of these practices is harm to consumers by leveraging a regulatory scheme that Congress never intended to operate in this manner.

III. The Commission Should Propose Specific Reforms to Address These Problems

In the forthcoming NPRM, the Commission should seek comment broadly on what it can do to address these practices in order to prevent further consumer harm. In particular, Cablevision urges the Commission to tentatively conclude that contractually imposed "must buy" and tying requirements are *per se* violations of the duty to negotiate in good faith. If the Commission does not prohibit tying, it should prohibit the related practices that are most harmful to consumers, such as tier-placement requirements and penetration minimums.

- **Prohibit Broadcasters From Requiring Cable Operators and Customers to Buy the Basic Tier in Areas Subject to Effective Competition.** "Must buy" requirements for areas that are subject to effective competition directly contravene Congress' intent that MVPDs have flexibility to offer a range of different packages in competitive areas. Where a community is subject to effective competition, contractual provisions that perpetuate the "must buy" tier serve no purpose other than forcing consumers to pay for channels they do not watch. The Commission should ask how it could plausibly serve the public interest to require Spanish-language households to purchase English-language broadcast channels as a condition of purchasing Spanish-language programming, or to require a customer who enjoys most video over a broadband service and wishes to purchase only a few *a la carte* programming services from a cable operator to purchase a basic tier. The Commission should tentatively conclude that contractually imposed "must buy"

requirements are inconsistent with the public interest and a *per se* violation of the duty to negotiate in good faith.

- **Prohibit Tying.** Likewise, the practice of tying retransmission consent to the purchase of affiliated cable programming plainly exceeds the scope of broadcast retransmission negotiations and serves only to force MVPDs to acquire programming that their consumers do not want. Tying practices are a function of broadcasters exercising market power by virtue of their control over “must have” programming and harm cable operators and consumers. The Commission should tentatively conclude that the changed market dynamics since the 1992 Cable Act justify a *per se* rule against tying broadcast stations to other cable programming.
- **Prohibit Tier-Placement Requirements.** Tying is particularly harmful to consumers in conjunction with tier-placement requirements, which the Commission should also propose to prohibit. Tier-placement provisions not only require a cable operator to purchase programming that it may not want to purchase, but they require cable operators to sell that programming to customers who may not want to view it. Tier-placement requirements effectively require consumers to purchase programming they do not want, and the Commission should propose to prohibit tier-placement requirements by broadcasters.
- **Prohibit Penetration Minimums.** The Commission should propose prohibiting penetration minimums, which effectively prohibit cable operators from marketing alternatives to any programming bundles that are subject to tying and tier-placement requirements.
- **Protect the Availability of Standalone Broadcast Basic as a Lifeline Service or Supplement to OTT offerings.** At the very least, the Commission should tentatively conclude that the good faith standard mandates omitting basic-tier customers from the denominator used to assess whether penetration-minimum requirements have been met in contracts for broadcast-affiliated programming that are negotiated in combination with, or tied, to retransmission consent.

Cablevision recognizes that not all cable programming is affiliated with broadcasters, and thus that these reforms will not fully address the consumer harms associated with bundling. Nevertheless, broadcast-affiliated programming dominates the cable lineup, and Commission action in this area will go a long way towards improving the choices available to consumers.

IV. The Commission Has Ample Legal Authority to Reform Retransmission Consent Agreements to Serve Consumers

The Commission has ample authority to prohibit these practices. Section 325(b)(3)(A) directs the Commission “to govern the exercise by television stations of the right to grant retransmission consent.”¹¹ That provision requires the Commission to consider “the impact that the grant of retransmission consent

¹¹ 47 U.S.C. § 325(b)(3)(A).

by television stations may have on the rates for the basic service tier” and “to ensure that the rates for the basic service tier are reasonable.”¹² Section 309(a) also empowers the Commission to ensure that broadcast station licensees act in accordance with “the public interest, convenience, and necessity.”¹³ These provisions provide solid statutory authority for the adoption of substantive restrictions on the good faith negotiations process.

Additionally, if there were any doubt as to the Commission’s authority, Congress’s enactment of STELAR invites the Commission to consider substantive limitations on retransmission consent negotiations. The Act directs the Commission to “commence a rulemaking to review its totality of the circumstances test for good faith negotiations,”¹⁴ and its legislative history clearly indicates that Congress intended this review to be comprehensive, “so that the test will take a *broad* look at *all facets* of how both television broadcast station owners and MVPDs approach retransmission consent negotiations.”¹⁵ Indeed, the Senate Committee on Commerce, Science, and Transportation, where the provision was initiated, stated that it “expects the FCC’s totality of the circumstances test to include a robust examination of negotiating practices, including whether certain substantive terms offered by a party may increase the likelihood of the negotiations breaking down.”¹⁶

Broadcasters have previously argued that the legislative history to the 1992 Cable Act suggests that Congress thought bundling practices would be acceptable. Legislative history of course does not trump statutory text, and nothing in the statute limits the Commission’s authority to prohibit bundling practices when they harm consumers. Moreover, the stronger implication from the legislative history is that Congress envisioned retransmission consent rules as a way for *local* broadcast channels to get carriage, not for national networks to bundle other national programming;¹⁷ today’s bundling practices

¹² *Id.*

¹³ *Id.* § 309(a).

¹⁴ STELAR, § 103(c), 128 Stat. at 2062.

¹⁵ S. Rep. No. 113-322, at 13 (2014) (emphasis added); see 160 Cong. Rec. H8081, H8084 (daily ed. Nov. 19, 2014) (statement of Rep. Green) (describing the bipartisan effort to “address[] the abuses in the retransmission consent process” and “pro-consumer reforms” contained within the Act, including “an FCC rulemaking to address the standard to for determining whether parties are negotiating in good faith for retransmission consent”); *id.* at H8086 (statement of Rep. Eshoo) (“Reflecting my belief that our video laws are outdated and in some cases are even being abused, [the Act] requires the FCC to re-examine its ‘good faith’ rules to ensure retransmission consent negotiations are conducted fairly and in a timely manner.”).

¹⁶ S. Rep. No. 113-322, at 13.

¹⁷ For example, a leading sponsor of retransmission consent, Senator Daniel Inouye, foresaw that retransmission consent would “permit local stations, not national networks, as I have indicated, to control the use of their signals.” 138 Cong. Rec. 828 (1992) (statement of Sen. Inouye). Senator Inouye explained that retransmission consent rights would be exercised by “[b]roadcasters—and I am speaking of local broadcasters, not NBC in New York or CBS in New York or ABC in New York; I am talking about

would have been foreign to the Congress that enacted the 1992 Cable Act. In addition, nothing in the statute prohibits the Commission from accounting for the significantly changed market conditions since 1992. Broadcaster bundling practices might have been thought reasonable when cable operators controlled the bottleneck to distribution, but in today's significantly different marketplace, tying affiliated content to broadcast signals creates concrete harm to consumers.¹⁸

Finally, there is no bar to the Commission's imposition of substantive limitations on existing contracts. The Commission has repeatedly done so in order to promote the public interest, and its actions have been upheld by the courts. For example, when the Commission extended certain program access requirements to terrestrially-delivered programming, it barred enforcement of existing contracts that did not comply with the new rules.¹⁹ Similarly, the Commission prohibited parties from enforcing multi-dwelling unit exclusivity agreements after it deemed such contracts anticompetitive.²⁰

Accordingly, the Commission should issue a robust NPRM and tentatively conclude that contractually imposed "must buy," tying, tier-placement requirements, and penetration minimums are *per se* violations of the duty to negotiate in good faith.

Sincerely,

/s/ Samuel L. Feder

Samuel L. Feder

channel 9 here, channel 4, or channel 7." *Id.* 827-828. Indeed, NAB itself told Congress that retransmission consent would mean "that stations and cable operators at the local level will negotiate a contract to provide our signals on cable systems" and that "any consideration" exchanged would "flow from such a local marketplace negotiation." *Cable Television Regulation: Hearing Before the Subcomm. on Telecomms. and Finance of the H. Comm. on Energy and Commerce*, 102d Cong. 753 (1991) (statement of Eddie Fritts, President, National Association of Broadcasters).

¹⁸ See *In re Carriage of Digital Television Broadcast Signals*, First Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 2598, 2613 ¶ 35 (2001) ("[W]e will not adopt rules specifically prohibiting tying arrangements at this time," but "will continue to monitor the situation with respect to potential anticompetitive conduct . . . in this context" and "to consider appropriate courses of action.").

¹⁹ See *In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 789 ¶ 64 (2010), *vacated in part by Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

²⁰ See *In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20,235, 20,261-62 ¶ 55 (2007) ("[T]he law affords us wide authority to prohibit the enforcement of such clauses where, as here, the public interest so requires."), *aff'd sub nom Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).