

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
Mediacom Petition for Rulemaking)	
To Amend the Commission’s Rules to)	
Promote Expanded Free Access to Local)	RM-11752
Broadcast Television Stations Via)	
Over-the-Air Reception, Internet Streaming,)	
Or Other Means)	
)	
Petition for Rulemaking To Amend)	MB Docket No. 10-71
the Commission’s Rules Governing)	
Retransmission Consent)	
)	
Amendments to the FCC’s Good-Faith)	RM-11720
Bargaining Rules)	

COMMENTS OF BLOCK COMMUNICATIONS, INC.

Block Communications, Inc. (“Block”) hereby submits these comments in response to the Petition for Rulemaking filed by Mediacom Communication Corporation (“Mediacom”) seeking various reforms to the broken retransmission consent system that is saddling average Americans with higher cable bills every day.¹ Block filed a petition seeking new rules to govern retransmission consent negotiations last year,² and Mediacom’s follow-on petition is just the latest in a long series of marketplace signals to the FCC that the retransmission consent system is broken and badly in need of reform. While Block does not support every proposal Mediacom advances, plainly the time has come for the FCC to tackle this important issue. Congress’s 2014

¹ See Petition for Rulemaking, Mediacom Communications Corp., filed July 7, 2015 (the “Mediacom Petition”); FCC Public Notice, *Consumer & Government Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Report No. 3024 (rel. July 15, 2015).

² See Petition for Rulemaking, Block Communications, Inc., filed May 6, 2014 (the “Block Petition”); FCC Public Notice, *Consumer & Government Affairs Bureau Reference Information Center Petition for Rulemaking Filed*, Report No. 3003 (rel. May 20, 2014).

satellite reauthorization legislation directs the FCC to commence this year a comprehensive proceeding considering retransmission consent reform.³ Block urges the FCC to seek public comment on all of the retransmission consent reform proposals the agency has received and to adopt, at a minimum, those proposals offered by Block last year.

I. INTRODUCTION

Block is both a broadcaster and cable operator, and as such, owns a nearly unique perspective on retransmission issues, a perspective formed by hard experience on both sides of the retransmission consent negotiating table. On the cable side, Block owns Buckeye Cablevision, Erie County Cablevision, and MetroCast Mississippi, serving about 175,000 subscribers in Ohio, Michigan, and Mississippi (collectively, “Buckeye”). Block’s cable systems negotiate retransmission consent with many stations and station groups, including station groups with near-national footprints. As a broadcaster, Block owns five full-power and several Class A and low-power television stations in small and mid-sized markets across the country. Each of Block’s full-power stations has experience negotiating retransmission consent agreements with multichannel video programming distributors (“MVPDs”) of all sizes.

Both Block’s television stations and cable systems have been involved in tough retransmission consent negotiations, and Block’s TV viewers and cable subscribers have been subject to rare but significant blackouts when negotiations have broken down. These blackouts are bad for business and they’re bad for everyday television viewers at home. The frequency of blackouts continues to accelerate and retransmission consent rates are spiraling out of control. The FCC must take all necessary steps to adopt solutions to the retransmission consent crisis.

³ STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059, 2062 (“STELAR”).

FCC intervention is necessary due to developments Congress could not have foreseen when it adopted the retransmission consent regime in 1992. Since that time, massive broadcast television groups and MVPDs have emerged. Consider that in 1992, Congress confronted a marketplace that was reasonably evenly balanced between broadcasters and cable operators. Broadcasters were limited to owning no more than 14 stations covering 30% of U.S. TV households.⁴ Today, broadcasters can own as many stations as they can buy, and if those stations operate on UHF channels, they can serve up to 78% of national TV households with superior-quality digital signals.⁵ MVPD consolidation has been equally pervasive. In 1992, cable operators were the only major MVPDs, and Congress sought to impose significant horizontal and vertical ownership limitations.⁶ The top 4 MVPDs had fewer than 25 million subscribers among them.⁷ Today, cable ownership limitations are unenforceable, satellite providers are some of the largest MVPDs, and following the merger of Charter and Time Warner Cable, the Top 4 MVPDs will control more than 70 million subscriber households nationwide.⁸

These broadcasters and MVPDs are able to use their immense scale to force smaller local negotiating partners to accept rates that are far out-of-sync with fair market rates. Small and mid-sized cable operators like Block are being forced to pay unfair rates for programming and lack leverage to withstand broadcasters' unfair pricing behavior. Average viewers pay in the

⁴ See 47 C.F.R. §73.3555(d)(2)(i) (1992).

⁵ See 47 C.F.R. §73.3555(e) (2015).

⁶ See 47 U.S.C. §533

⁷ See Implementation of section 19 of the Cable Television Consumer Protection and Competition Act of 1992, *First Report*, 9 FCC Rcd 7442, 7571 (1994) (Appendix C-8).

⁸ See *Comcast Corp. v. FCC*, 579 F.3d 1 (D.C. Cir. 2009) (vacating horizontal ownership limits as arbitrary and capricious); see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Sixteenth Report*, 30 FCC Rcd 3253, 3312 (Table 7).

form of impaired service and higher prices. Retransmission consent rates are increasing exponentially. The retransmission consent fees paid by Block's cable systems have increased 693% since 2010. On a national level, SNL Kagan estimates that retransmission consent fees will reach a total of \$10.3 billion by 2021, almost twice those expected in 2014.⁹ And if the largest TV station groups have their way, those fees will go even higher.¹⁰

The largest MVPDs may be equipped to weather these staggering increases in costs without unduly burdening their customers, but smaller companies like Buckeye have no such ability. When a broadcaster extracts unfair rates that are unrelated to the value or quality of their local station, smaller companies like Buckeye are faced with the choice of capitulating or subjecting their subscribers to reduced service. Of course, giving in to unreasonable broadcaster demands leads to higher customer rates and reduced investment in local service improvements. As a result, broadcasters and MVPDs are increasingly unable to come to an agreement without first subjecting MVPD subscribers to blackouts.¹¹ Blackouts now occur far too frequently, which is a calamitous consequence for all stakeholders including the broadcaster, MVPD, and most importantly, everyday Americans who just want to watch their favorite TV programs. The

⁹ See Mike Farrell Kagan: *Retrans Fees to Rise to \$10.3B by 2021*, MULTICHANNEL NEWS, July 7, 2015, available at <http://www.multichannel.com/news/policy/kagan-retrans-fees-rise-103b-2021/391971> (citing Robin Flynn, *Retrans Projections Update: \$10.3 by 2021*, SNL KAGAN BROADCAST INVESTOR, posted June 17, 2015).

¹⁰ One major TV station group, Sinclair Broadcasting, has told investors that broadcasters nationwide should be receiving nearly triple the retransmission consent fees they currently receive – a total of \$16 billion. See Sinclair Broadcasting Group, *Deutsche Bank Media Conference*, March 9, 2015, at 9, available at <http://sbgi.net/wp-content/uploads/2015/03/Deutsche-Conference-03-09-15.pdf>

¹¹ The American Television Alliance identifies more than 90 blackouts since in the last four years. See American Television Alliance, *Blackout List 2010-2015*, available at <http://www.americantelevisionalliance.org/wp-content/uploads/2015/06/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-20152.docx>.

FCC must act now to fix the retransmission consent system and make the law serve television viewers, as Congress intended.

II. TO SOLVE THE RETRANSMISSION CONSENT PROBLEM, THE FCC MUST RECOGNIZE THAT THE SCALE OF TV STATION SUPERGROUPS AND THE LARGEST MVPDS DISTORTS THE MARKET FOR SMALLER COMPANIES LIKE BLOCK.

The FCC should seize upon the opportunities presented by the Mediacom Petition, the pending Block Petition, and Congress's STELAR requirements to comprehensively reform the retransmission consent system. Such reform is absolutely necessary to counteract the pernicious and growing influence of the TV supergroups and largest MVPDs.

As Block has pointed out to the FCC over the past few years, large TV "supergroups" consistently use their scale and scope to extract above-market fee increases from small and mid-sized cable operators, often for some of the worst performing television stations in smaller markets. The game plan from these supergroups is simple: buy underperforming network affiliates in small and midsized markets and then demand top-of-the-market retransmission fees. Should the cable operator resist, the broadcaster withholds retransmission consent (even if a cable operator continues to negotiate in good faith), directs the cable operator to remove the television station's signal, and waits for customer complaints to mount, thereby forcing the operator to surrender to the broadcaster's unreasonable demands. Since each of these supergroups owns dozens of stations in markets across the country, it can spread the costs of a blackout over its entire operation. But in the affected market, every cable customer suffers. They suffer the signal outage while it lasts; then they are hit with rate increases when the cable operator accepts the best deal it can negotiate.

When the largest nationwide MVPDs engage with small broadcast companies in small and mid-sized markets, a similar dynamic emerges. The nationwide MVPDs use their substantial leverage to pay below-market retransmission consent fees. Customers suffer when the operator discontinues carriage, but the largest MVPDs can sustain the losses from defecting customers by spreading those losses over their nationwide subscriber bases. Indeed, several of the largest MVPDs are responsible for 90% of retransmission consent-related blackouts,¹² and blackouts disproportionately occur in small and mid-sized markets.¹³

Cable consumers need the Commission's protection from these vicious cycles brought about by TV supergroups and the largest MVPDs. These giant companies' conduct has fueled service disruptions and unconscionable increases in retransmission consent fees – and ultimately consumer cable rates.

The Commission's previous efforts to update its retransmission consent rules have not been aggressive enough to produce any meaningful improvements for consumers. Block recognizes and appreciates the Commission's and Congress's work to address joint retransmission consent negotiations by non-commonly-owned broadcasters. While Block does not support the FCC's initiative to eliminate its non-duplication and syndicated exclusivity

¹² See Wayne Friedman, *NAB Blames 3 TV Cos. For Retrans Blackouts*, MEDIA DAILY NEWS, Sept. 11, 2013 (citing NAB claims that Time Warner Cable, Dish, and DirecTV are responsible for 90% of programming blackouts), available at <http://www.mediapost.com/publications/article/208902/nab-blames-3-tv-cos-for-retrans-blackouts.html>.

¹³ See, e.g., *NBC Affiliate KRIS-TV vs. Time Warner Cable – Worst Programming Disputes of All Time*, FIERCE CABLE, Apr. 25, 2013 (describing 5-month standoff between Time Warner Cable and KRIS-TV in Corpus Christi, Texas), available at <http://www.fiercecable.com/special-reports/nbc-affiliate-kris-tv-vs-time-warner-cable-worst-programming-disputes-all-t>. See also American Television Alliance, *Blackout List 2010-2015*, available at <http://www.american-televisionalliance.org/wp-content/uploads/2015/06/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-20152.docx>. About 85% of all blackouts involved markets outside the top 30 DMAs.

rules,¹⁴ it does advocate crucial changes to those rules that would greatly benefit television viewers and protect them from blackouts.¹⁵ While the Commission has made progress on retransmission consent reform, it can and must do more.

III. THE FCC SHOULD SEEK COMMENT ON BLOCK'S PROPOSALS TO REMEDY THE DISTORTIONS CREATED BY TV SUPERGROUPS AND THE LARGEST MVPDS.

Whether separately or as part of its STELAR retransmission consent proposal, the FCC should seek public comment on the specific proposals to remedy the retransmission consent imbalances Block and others have identified. The main point of the Mediacom Petition is that the FCC should take a close look at the retransmission consent marketplace and adopt concrete proposals to protect consumers from the impacts of the current dysfunctional retransmission consent marketplace. While Block does not necessarily support Mediacom's specific proposals, Block agrees that the FCC should seek comment on all available alternatives to the current regime. Among those alternatives is Block's pending petition for rulemaking regarding retransmission consent reform.

A little more than a year ago, Block filed a Petition for Rulemaking to advance proposals to protect consumers from blackouts and higher cable rates.¹⁶ Block proposes that the Commission adopt objective, heightened good faith bargaining standards that would apply in markets and situations where substantial differentials in bargaining power exist. In these markets, customers are exposed to the greatest risk of harm from TV supergroups and larges MVPDs.

¹⁴ See Amendment to the Commission's Rules Related to Retransmission Consent, *Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351 (Mar. 31, 2014).

¹⁵ See Comments of Block Communications, Inc., MB Docket No. 10-71, filed June 26, 2014.

¹⁶ See n.2, *supra*.

Specifically, the Commission should adopt heightened good faith bargaining rules that require retransmission consent negotiators to make offers that reasonably reflect the market position of the TV station at issue, taking into account station ratings and the valuable local services each station provides. Block's proposal would permit the Media Bureau staff to determine whether the parties are negotiating fairly or whether either party is using its bargaining leverage to extract rates that are out of sync with local market conditions. Block proposes that the heightened good faith requirements would apply only in instances of demonstrably unequal bargaining power. Such imbalances exist when: (1) an MVPD serves fewer than 400,000 customers¹⁷ and the TV station group owns or operates at least 25 full-power TV stations that elect retransmission consent; or (2) an MVPD serves more than 1,500,000 subscribers and a TV station group owns or operates five or fewer full-power stations.¹⁸ Furthermore, the new rules would apply only in small and mid-sized markets, *i.e.*, those outside the top 30 DMAs.

Parties that contend their counter-parties are not negotiating in good faith could file a complaint, just as they do now, and both parties would be required to demonstrate that their negotiating positions are reasonable in light of the circumstances. The Media Bureau would be called upon to judge the complaint based on objective factors, including (1) the contents of the parties' most recent offers; (2) evidence regarding each parties' other in-market retransmission consent agreements; and (3) the ratings and local programming activities of each television station in the market as compared to those of the station at issue. The Media Bureau would have

¹⁷ See 47 C.F.R. § 76.901(e).

¹⁸ The Commission generally has determined cable companies with fewer than 1,500,000 subscribers to lack bargaining power in the programming context. See, e.g., In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, 26 FCC Rcd 4238 ¶ 58 (2011) (establishing 1.5 million subscriber threshold for arbitration conditions on Comcast/NBCU merger approval).

the authority to order parties to submit such information, and all such submissions could be provided to the Commission under seal to protect confidential and proprietary information.

To make a prima facie showing of bad faith, the complainant would have the burden of showing that the other party's offers are unreasonable in light of these objective standards. For example, if the lowest-rated station in a market demands the highest rates in the market, that likely would be unreasonable. If, on the other hand, an MVPD refuses to pay the highest rated station in the market top-level rates, that likewise would be presumptively unreasonable. The Media Bureau would make the determination of presumptive unreasonableness. And the party seeking to rebut that presumption would have the burden to show that its offers are reasonable by presenting evidence going to the objective factors noted above.

The Media Bureau would review the evidence and exercise its judgment to determine whether a party's retransmission consent demands are reasonable in the context of the specific, objective market factors. At no time would the Media Bureau be called upon to approve or disapprove of the rates in a retransmission consent agreement. Instead, the Bureau would apply objective criteria to the question of whether parties are negotiating in good faith. If the Bureau finds that a party has not negotiated based on actual local market conditions, including station ratings, that party would be guilty of *per se* bad faith negotiations, and subject to sanctions the Commission deems appropriate.

Block's proposed changes to the good faith rules will reduce the number of blackouts and lower cable rates for average Americans in small and medium sized markets around the country. This reform would correct the imbalances in retransmission consent negotiations caused by TV supergroups and large MVPDs. Consumers should be assured that the video service providers in their local markets are negotiating in good faith to provide service – not seeking unjustifiably

