Before the
Federal Communications Commission
Washington, DC 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	)	

COMMENTS OF NEWS-PRESS & GAZETTE COMPANY

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SUMMARY

News-Press & Gazette Company respectfully submits these comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") released September 2, 2015 in this docket. The Commission in the *NPRM* seeks to review the second aspect of its two-part framework requiring that broadcasters and MVPDs negotiate retransmission consent in good faith—the "totality of the circumstances" test. The *NPRM* asks whether the Commission should consider any of a litany of specific practices as evidence of bad faith in evaluating the totality of the circumstances, or whether the test is best left as-is, a general test requiring a fact-specific inquiry on a case-by-case basis.

The Commission has asked and answered this question numerous times in the fifteen-year history of the good faith negotiation rules. Each time, the Commission has rightly concluded that the totality of the circumstances test is best left as a general, flexible standard to be used in that rare instance where the unique behavior of a broadcaster or MVPD, on the facts of a given negotiation, rises to a level that indicates such party lacked a sincere desire to reach an agreement acceptable to both parties. The Commission should again respond in the same manner, leave the totality of the circumstances test alone, and reaffirm its consistent position that the Commission should not and will not sit in judgment of the substantive terms of retransmission consent agreements negotiated between broadcasters and MVPDs.

Competitive marketplace conditions have operated and continued to operate successfully, as evidenced by the fact that nearly all retransmission consent negotiations are resolved without dispute—and that impasses that lead to an actual service disruption to MVPD subscribers are even rarer. The Commission should conclude its limited review of the totality of the circumstances test by finding that the test is working as intended and is not in need of revision or amendment.

COMMENTS

News-Press & Gazette Company ("NPG") submits these comments in response to the *Notice of Proposed Rulemaking* ("*NPRM*") in the above-referenced docket. The Commission released the *NPRM* at Congress's direction,[1] and in it, the Commission seeks to "*review* the totality of the circumstances test for evaluating whether broadcast stations and multichannel video programming distributors (MVPDs) are negotiating for retransmission consent in good faith."[2] The *NPRM* seeks comment on dozens of questions, asking whether any number of a wide range of negotiating practices—disproportionately, it must be noted, focusing on broadcasters' practices—should be considered evidence of bad faith under the totality of the circumstances test.

The *NPRM* poses a number of solutions in search of a problem. As evidenced by the thousands of private, market-driven retransmission consent negotiations that broadcasters and MVPDs successfully bring to mutually agreeable resolutions without issue, the totality of the circumstances test is not broken—and it does not need fixing. The Commission should conclude this limited review by finding that the totality of the circumstances test is working as intended and is not in need of amendment or revision.

NPG's position stems from years of its own experience in negotiating retransmission consent agreements with MVPDs both large and small, ranging from the largest cable and satellite behemoths to local cable operators with just a few hundred subscribers in a given DMA. NPG is a family-owned company headquartered in St. Joseph, Missouri, with business units in the

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

[2] *See In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109, ¶ 1 (Sept. 2, 2015) ("*NPRM*") (emphasis added).

broadcast, newspaper, commercial printing, and data services industries. The company at one time owned and operated multiple cable television system, but it has since disposed of them. NPG's broadcast division owns or operates network television affiliates in ten different, small markets in the Midwest and Western United States, and NPG takes pride in its commitment to localism and the fact that its local news broadcasts are ranked number one in many of these local markets.

With its stations spread across the country carrying local and network programming, NPG is constantly negotiating one retransmission consent agreement after another. Each transaction is uniquely complex, and each is different—replete with countless terms, conditions, and provisions that reflect arm's-length bargaining undertaken by sophisticated entities which, in the vast majority of cases, are much larger, with larger staff, and better financed than NPG's local stations. And while each deal is negotiated and completed by parties that are fully aware of the Commission's two-part, good faith retransmission consent regime,[3] the lack of regulatory intrusion into negotiations is a principal reason the negotiations are successful.

The *NPRM* asks whether there are certain practices the Commission should consider as evidence of bad faith in evaluating the totality of the circumstances, or whether that test is best left as a general, fact-specific measure applied on a case-by-case basis.[4] The question has essentially been asked and answered by the Commission several times. The consistent Commission response

[3] Section 325 of the Communications Act requires that both broadcasters and MVPDs negotiate retransmission consent in good faith. 47 U.S.C. § 325(b). The Commission has implemented the good faith statutory negotiation provisions through a two-part framework. The first part includes a list of nine objective standards, the violation of which amounts to a *per se* breach of the good faith negotiation obligation. *NPRM*, ¶ 2. The second part of the framework allows a complainant to establish a violation of the good faith negotiation requirement by showing that, based on the totality of the circumstances, a party did not negotiate in good faith. *Id.* Only the second part of the framework—the totality of the circumstances test—is under review.

[4] *NPRM*, ¶ 8.

through fifteen years of "good faith" orders and decisions[5] is that the totality of the circumstances test is best left as a general, flexible standard to be used in that rare instance where the unique behavior of a broadcaster or MVPD, on the facts of a particular negotiation, rises to the level that indicates that a party lacked a "*sincere desire* to reach an agreement that is acceptable to both parties."[6] Applying that flexible standard, the Commission has repeatedly taken the position that its proper role in ensuring a fair, open, and efficient process for retransmission consent negotiations is a narrow one because "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent,"[7] nor did Congress "intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[8]

History has proven that the Commission's repeated affirmation of this position[9] is the appropriate one. Nearly all retransmission consent negotiations are resolved without dispute, and

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[5] *See, e.g.*, *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 (2000) ("*Good Faith Order*"); *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10339 ¶ 1 (2005) ("*Reciprocal Bargaining Order*"); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC LEXIS 4976, at *11-12, 52, ¶¶ 10, 35 (Sept. 8, 2005) ("*2005 Report to Congress*"); *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking (rel. Mar. 3, 2011) ("Retrans Notice"); *In re EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070, 15082, ¶¶ 28-29 (2001).

[6] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32 (emphasis added).

[7] *Id.* at 5450, ¶ 14; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3006, ¶ 178 (Mar. 11, 1993) ("*Signal Carriage Order*") (explaining Congress's intent that the Commission refrain from direct regulation of retransmission consent rates).

[8] *Good Faith Order*, 15 FCC Rcd at 5454, ¶ 23.

[9] *Id.* at 5480, ¶ 81.

impasses that lead to an actual disruption in service to MVPD subscribers are rarer still. The Commission has only adjudicated six complaints since implementing the good faith negotiation rules,[10] and it has *never* found that a broadcaster violated them.[11] As the Commission has rightly observed: "We believe that, overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals."[12]

By and large, that has been NPG's experience. Retransmission consent negotiations are not always easy for either party, but they get done. Certainly, the terms of agreements have changed over time; generally, that has meant increased compensation for broadcasters (more in line with the popularity of their programming with viewers), along with negotiations over different means of distribution, including online distribution, and countless other evolving terms and conditions. But what has not changed is the purpose and effectiveness of the "totality of the circumstances" test. The test need not be modified, and the Commission should conclude its review of the test by leaving it as-is.

I. The "totality of the circumstances" test works—and need not be changed.

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[10] The Commission has found *one* party, the *MVPD* Choice Cable T.V., to have violated the retransmission consent obligation to negotiate in good faith. *See Letter to Jorge L. Bauermeister*, 22 FCC Rcd 4933, 4935 (2007). The Commission has rejected good faith complaints filed by other MVPDs. *See Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35 (rel. Jan. 4, 2007); *ATC Broadband, LLC v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645 (Feb. 18, 2009); *In re EchoStar Satellite Corp.*, 16 FCC Rcd 15070, and by broadcasters, *ACC Licensee, Inc. v. Shentel Telecommunications Co.*, Memorandum Opinion and Order, 27 FCC Rcd 7584 (2012); *Northwest Broadcasting, L.P. v. DIRECTV, LLC*, Memorandum Opinion and Order, MB Docket No. 15-151 (rel. Nov. 6, 2015).

[11] *See* Retrans Notice, ¶ 12.

[12] *2005 Report to Congress*, 2005 FCC LEXIS 4976, at *68, ¶ 44.

The *NPRM* is concerned only with the second aspect of the Commission's two-part framework requiring that broadcasters and MVPDs negotiate retransmission consent in good faith.[13] It does not address the first aspect of the good faith framework, under which nine specific negotiating behaviors are considered "*per se*" violations of the good faith requirement.[14] The "totality of the circumstances" test allows the Commission to consider whether, looking at the unique circumstances surrounding a retransmission consent negotiation, the parties have dealt with each other in good faith.[15] The test serves as a backstop—a catch-all—and it works because it is *not* inflexible or constrained to focus on certain behaviors. Indeed, that is the core purpose of the first aspect of the good faith framework.

The *NPRM* starts with a false premise—that the good faith negotiation framework and its "totality of the circumstances" test have not functioned, and are not functioning, to serve their purpose, which, as the Commission envisioned it, was "to develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process."[16] The *NPRM* asks whether there is a market failure, whether the totality of the circumstances test is in

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[13] *See Good Faith Order*, 15 FCC Rcd at 5448, 5457-58, ¶¶ 6, 30-32.

[14] *See id.* at 5448, 5462-64, ¶¶ 6, 40-46 (reciting seven original *per se* bad faith negotiating behaviors); *NPRM* ¶ 2, n.11 (reciting the nine current *per se* bad faith negotiating behaviors); 47 C.F.R. § 76.65(b)(1).

[15] *Good Faith Order*, 15 FCC Rcd at 5448, ¶ 7; *see also* 47 C.F.R. § 76.65(b)(2) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a).").

[16] *See also Good Faith Order*, 15 FCC Rcd at 5455, ¶ 24.

need of modification (or elimination), and, if the test should be modified, whether it should be made more specific, and if so, how that should be done.[17]

The answer to all of those questions is no. The flexibility of the totality of the circumstances test, and Congress's mandate to the Commission to take a relatively hands-off approach to retransmission consent negotiations, has led to a process in which tens of thousands of retransmission consent agreements have been negotiated successfully, without service disruptions, thereby facilitating access by MVPD subscribers to an ever-increasing diversity of local and national programming by NPG stations and other competitive broadcast stations. 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" and often contentious, all to the benefit of consumers.

As the Commission has observed, the retransmission consent process as it currently exists provides the proper incentives "for both [broadcasters and MVPDs] to come to mutually beneficial arrangements."[18] The competitive tensions between broadcast stations and MVPDs are self-policing. Broadcasters are penalized financially by any loss of viewer access to their programming (and the advertisements that go along with it), and MVPDs do not benefit from disruptions of service, either. Not only have there, historically, been very few retransmission consent negotiations that devolve to a service disruption, "[t]here have been very few complaints . . .

[17] *See, e.g.*, *NPRM*, ¶¶ 7-8.

[18] *2005 Report to Congress*, 2005 FCC LEXIS 4976, at *68-69, ¶ 44

alleging violations of the Commission's good faith rules."[19] Almost uniformly, broadcasters and MVPDs have a "sincere desire to reach an agreement that is acceptable to both parties[,]"[20] even if the road to reaching a deal is sometimes difficult, as it can be in deals of all kinds in competitive markets.

The "totality of the circumstances" test, by definition, requires the Commission to analyze whether parties have negotiated in good faith by looking to the unique facts of each negotiation. The Commission, therefore, need not provide abstract, "additional guidance on conduct that will be considered evidence of bad faith under the totality of the circumstances"[21] test.

II. The Commission has not dictated the substantive terms of retransmission consent agreements, and it should not start now.

Again, as the Commission correctly recognized fifteen years ago, "Congress clearly did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[22] The Commission has long made clear that its role, per the Communications Act, is not to engage in "detailed substantive oversight" of retransmission consent negotiations,[23] and, relatedly, that it has never "intend[ed] the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties."[24] Rather, the Commission was charged with developing and enforcing a

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[19] *See* Retrans Notice, ¶ 12; American Television Alliance, Media Center Fact Sheet, "Blackout List 2010-2015," *available at* http://www.americantelevisionalliance.org/media-center/ (last visited Nov. 30, 2015).

[20] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32.

[21] *NPRM*, ¶ 7.

[22] *Good Faith Order*, 15 FCC Rcd at 5454, ¶ 23.

[23] *Id*. at 5448, ¶ 6.

[24] *Id*. at 5458, ¶ 32. *See also id*. at 5448, ¶ 8 (finding that "it is not practicably possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on").

process whereby the marketplace for retransmission consent rights could operate in an honest and clear manner.[25] It has done that.

Embracing any of the *NPRM*'s myriad suggestions to either prohibit or identify as indicative of bad faith certain negotiating practices and behaviors would allow the totality of the circumstances test to be used as that very "back door" to substantive oversight the Commission has wisely kept closed.[26] That a broadcaster or MVPD might disagree with a particular proposed term or condition is not evidence of bad faith;[27] it is why retransmission consent is negotiated, privately, among the parties—and not dictated by the Commission.

A. The Commission should not embrace the *NPRM*'s MVPD-driven "wish list" of negotiating practices as evidencing bad faith under the totality of the circumstances test.

The *NPRM* seeks comment on whether more than a dozen specific negotiating practices should factor into the Commission's assessment of the totality of the circumstances test. The Commission has long recognized that parties to retransmission consent negotiations should be given latitude in their bargaining positions and has consequently refused to limit the kinds of proposals that broadcasters and MVPDs can make to one another.[28] To superimpose on the fact-driven, case-by-case totality of the circumstances inquiry a rigid set of prohibited practices (the

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[25] S. Rep. No. 92, 102nd Cong., 1st Sess., at 35-36 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1169 (explaining that Congress created retransmission consent "to establish a marketplace for the disposition of the rights to retransmit broadcast signals"). *See also* 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.65; *Good Faith Order*, 15 FCC Rcd at 5455, ¶ 24.

[26] *See Good Faith Order*, 15 FCC Rcd at 5469, ¶ 56 ("[A]bsent conduct that is violative of national policies favoring competition, we believe Congress intended this same give and take to govern retransmission consent.").

[27] *In re ACC Licensee*, 27 FCC Rcd at 7587, ¶ 8 ("disagreement over the rates, terms, and conditions of retransmission consent—even fundamental disagreement—is not indicative of a lack of good faith"); *see also In re Mediacom*, 22 FCC Rcd at 38, ¶ 6 (same).

[28] *Good Faith Order*, 15 FCC Rcd at 5469, ¶ 56.

prohibition of most of which would disproportionately hurt broadcasters' bargaining power) would remove the very flexibility that has been the hallmark of the good faith rules for fifteen years.

- **Negotiating retransmission consent based on most-favored nation provisions.**

"Most favored nation" ("MFN") proposals or demands are not inconsistent with the duty to negotiate in good faith under the totality of the circumstances test.[29] MFN provisions are commonly used in various kinds of negotiations within the television and other industries. There is nothing inherently inappropriate in their use in the retransmission consent process. Parties should be left free, in a competitive market, to accept or reject MFN demands in specific negotiations provided they are consistent with competitive marketplace considerations.

- **Regulation of a station's ability to require that an MVPD place limits on the use of lawful devices and functionalities.**

The Commission should not regulate stations' ability to require that MVPDs place limits on their subscribers' use of lawful devices and functionalities.[30] Commission regulation in this realm would constitute an inappropriate intrusion into the substantive terms of retransmission consent agreements. Broadcasters should have the ability to negotiate for limitations on the use of devices and functionalities that allow MVPD subscribers to view broadcasters' signals, particularly, for example, when certain of those devices enhance the ability of the MVPD to compete unfairly against the station whose signal the MVPD retransmits—such as devices allowing the viewer to skip the station's advertisements, from which the station derives much of

[29] *NPRM*, ¶ 16.

[30] *Id*.

its revenue.[31] The parties should be free to negotiate such terms without the Commission tipping the scales in either party's favor.

- **Regulation of channel placement and tier positions.**

The Commission has repeatedly held that "carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights" is presumptively consistent with competitive marketplace conditions,[32] and no valid reason exists to warrant a change in that position.[33] Of course, broadcast stations market themselves and are commonly known within their communities by their channel position and network affiliation. Most NPG viewers know their local station by its channel number—not its call letters, and they expect to see NPG stations located near other network-affiliated programming in channel lineups. Thus, channel placement and tier positioning are critical, substantive aspects of the consideration a station might seek in return for its grant of retransmission consent to an MVPD; it is an important feature of the overall value proposition in every retrans negotiation.

- **Discrimination in price among MVPDs in a market.**

The *NPRM* asks whether broadcasters and MVPDs should be prohibited from discriminating in price absent a showing of direct and legitimate economic benefits associated with such prices differences.[34] As an initial matter, it would impose a difficult, if not impossible, burden on the Commission to ascertain the "direct and legitimate economic benefits" in thousands of retransmission consent negotiations given the variations and differing value propositions reflected

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[31] It should be noted that broadcasters may be prevented under the terms of their program or network or other agreements from permitting their signals' retransmission on certain devices.

[32] *See Good Faith Order*, 15 FCC Rcd at 5469, ¶ 56

[33] *NPRM*, ¶ 16.

[34] *Id*.

in each agreement. And Congress has already definitively answered this question: "it *shall not be a failure to negotiate in good faith* if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, *including price terms*, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[35] The statute is dispositive.

The compensation to be paid by an MVPD to a broadcaster in exchange for the ability to retransmit its signal is precisely the kind of substantive term that has been—and should be—determined as a result of fair, arm's-length competitive market negotiations. It is, as the Commission has recognized, an area in which the Commission should not meddle: "Congress did not intend that retransmission consent rates be directly regulated."[36] To allow the Commission to find a violation of the totality of the circumstances test in virtually any case where a broadcaster failed to obtain identical retransmission consent fees from multiple MVPDs, no matter what the differences in the value of those providers' signal retransmission to the broadcaster, would improperly put the Commission in the role of rate regulator (well beyond its jurisdiction in the Communications Act's retransmission consent regime) and would also drive retrans consent rates below what the market would naturally bear.

- **Discrimination in prices, terms, and conditions among MVPDs based on vertical competitive effects.**

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[35] 47 U.S.C. § 325(b)(3)(C)(ii) (emphasis added); *see also* 47 C.F.R. § 76.65(a)(1) (declaring that "it shall not be a failure to negotiate in good faith if . . . [t]he television broadcast station proposes or enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations").

[36] *See Signal Carriage Order*, 8 FCC Rcd at 3006, ¶ 178. *See also 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*, MB Docket No. 10-56, Memorandum Opinion and Order, ¶¶ 34-49 (2011) (concluding that differences in rates and terms are permissible so long as they result from competitive marketplace conditions).

The *NPRM* also questions whether an MVPD-affiliated broadcaster should be permitted to discriminate among other MVPDs when it comes to rates, terms, and conditions of retransmission of the station.[37] MVPDs that own or control local broadcast stations or a broadcast network are in a special category and should not be able to use their collective negotiating leverage to create an un-level playing field in retransmission consent negotiations; any such negotiations would, of course, fail to be conducted in the required "atmosphere of honesty, purpose and clarity of process."[38] In those special cases, however, all rates, terms, and conditions need not be identical in a given DMA. Such differences are appropriate, but they must be based on the functioning of a competitive marketplace, rather than unfair advantages created based on common ownership or control.[39]

- **Negotiating for per-subscriber payments from subscribers that do not receive an MVPD's video service.**

The Commission should reject the *NPRM*'s suggestion that it prohibit broadcasters from negotiating for fees based on MVPD subscribers who receive the broadcaster's signal from the MVPD's Internet service, but not the MVPD's traditional cable or satellite service.[40] The parties must be left free to negotiate who is considered a "subscriber" pursuant to a retransmission consent agreement. A Commission ruling prohibiting a broadcast station from negotiating for such subscriber fees would allow MVPDs to circumvent retransmission consent on traditional MVPD platforms by providing subscribers access to the broadcast station's signal through online distribution and other technologies.

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[37] *NPRM*, ¶ 16 & n.84.

[38] *Good Faith Order*, 15 FCC Rcd at 5455, ¶ 24.

[39] 47 U.S.C. § 325(b)(3)(C).

[40] *NPRM*, ¶ 16.

- **Preventing an MVPD from temporarily importing an out-of-market signal in certain instances.**

The *NPRM* asks whether the Commission should prohibit broadcasters from preventing an MVPD from importing an out-of-market signal that the broadcaster has withdrawn upon expiration of a retransmission consent agreement.[41] STELAR provides the one exception to the exclusivity rules, barring a broadcaster from limiting an MVPD from carrying into the local market a duplicating distant signal that is "significantly viewed."[42]

Beyond that limitation, as the program exclusivity rules make clear, broadcasters and MVPDs are free to negotiate their exclusivity rights at arm's-length: "By requiring MVPDs to black out duplicative programming carried on any [non-significantly viewed] distant signals they may import into a local market, the Commission's network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights."[43] If it prevented broadcasters from prohibiting the importing of duplicating distant signals and enforcing the program exclusivity a broadcast station obtained by contract, the Commission would exceed its statutory authority and ultimately undercut the economics of "local" broadcast service, contrary to national congressional policy. Such an intrusion into retransmission consent negotiations is not consistent with the law or Commission precedent.

- **Regulating the commencement date of retransmission consent negotiations.**

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[41] *Id*.

[42] STELAR § 103(b) (amending 47 U.S.C. § 325(b)(3)(C) to "prohibit a television broadcast station from limiting the ability of a[n MVPD] to carry into the local market . . . of such station a television signal that has been deemed significantly viewed . . . unless such stations are directly or indirectly under common de jure control permitted by the Commission."); *see* 47 C.F.R. § 76.92(f).

[43] *See 2005 Report to Congress*, 2005 FCC LEXIS 4976, at *27-28, ¶ 17.

The *NPRM* asks whether a broadcaster should be required to make an initial contract proposal at least 90 days prior to an existing contract's expiration.[44] Such a rule would be unnecessary and impractical. In NPG's experience, both parties generally start discussing the looming expiration of an existing retrans agreement and engage in earnest negotiations well before it expires. NPG and other broadcasters are liberal in granting extensions of agreements to accommodate the time demands of MVPDs. Imposition of a 90-day shot clock is not needed (and certainly not a unilateral one that only imposes an obligation on broadcasters). As is the case with many deadlines, retransmission consent negotiations often come "down to the wire." That is not because of bad faith on either party's part. And the timing of *concluding* negotiations is unlikely to change even if the Commission mandates an earlier opening date for negotiations.

- **Prohibiting expiration of retransmission consent agreements prior to "marquee" events.**

The *NPRM* also asks whether the Commission should prohibit a broadcaster from insisting on contract expiration dates in the time period just before a "marquee" event.[45] Again, it should not. From a practical perspective, it would be impossible for the Commission to define what is meant by a "marquee" sports or entertainment event, and, arguably, such events occur at all times of the year. Such a rule would not be administrable, plain and simple. Moreover, as set forth above, allowing the Commission to dictate the substantive terms of retransmission consent agreements, including their expiration dates, is inconsistent with congressional mandates and Commission precedent requiring that the agency stay out of the substantive terms of such deals.

- **Refusing to provide information substantiating the reasons for positions taken.**

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[44] *NPRM*, ¶ 16.

[45] *Id*.

The *NPRM*, again, treads over already plowed ground when it asks whether it should be evidence of bad faith under the totality of the circumstances test for broadcast stations or MVPDs to refuse to provide "information substantiating reasons for positions taken" in retransmission consent negotiations when requested by the other party.[46] The Commission clearly explained in the *Good Faith Order* that, although broadcasters must "provide reasons for rejecting any aspects of the MVPD's offer[,]" they "are not required to justify their explanations by documentation or evidence."[47] There is no reason to deviate from this long-held position.

- **Negotiating for confidentiality provisions regarding rates, terms, and conditions of retransmission consent proposals or agreements.**

The *NPRM* also asks whether a broadcaster's insistence on confidentiality provisions regarding the rates, terms, and conditions of a retransmission consent proposal or agreement should be considered as evidence of bad faith.[48] It should not. A rule requiring such disclosure not only would be unwarranted, but also would (again) inject the Commission into the substantive terms of retransmission consent agreements. Parties routinely bargain at arm's length for contractual confidentiality provisions; broadcasters and MVPDs do this in the context of retransmission consent agreements, as well as in the negotiation of any number of other transactions to which they are parties. The rates, terms, and conditions of retransmission consent proposals and agreements are commercially sensitive[49]—both parties have an interest in protecting against the disclosure of the competitively sensitive provisions of the agreements, and it is certainly not evidence of bad faith to attempt to negotiate to keep such information confidential. As discussed, the Commission

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[46] *Id*.

[47] *Good Faith Order*, 15 FCC Rcd at 5464, ¶ 44.

[48] *NPRM*, ¶ 16.

[49] Indeed, federal courts have held that retransmission consent agreements may be kept confidential. *See CBS Corp. v. FCC*, 785 F.3d 699, 704-08 (D.C. Cir. 2015).

has found that bargaining proposals for different terms and conditions are presumptively consistent with competitive marketplace conditions and in good faith;[50] to require disclosure of such terms would, ultimately, lead to uniform pricing that is antithetical to a competitive marketplace. While the *NPRM* unfairly questions only whether a *broadcaster's* insistence on non-disclosure provisions would be problematic,[51] neither broadcasters nor MVPDs should be prevented from negotiating to keep their commercially sensitive, competitive information confidential.

- **Negotiations that amount to "surface bargaining".**

The *NPRM* asks whether it should promulgate a rule prohibiting broadcasters and MVPDs from engaging in so-called "surface bargaining" that is designed to "delay" negotiations.[52] Such a rule is unnecessary and would be difficult, if not impossible, to administer. From a practical perspective, how would the Commission determine whether a party had intentionally "delayed" negotiations? Presumably, the Commission would have to engage in a discovery-like process to determine not only whether a party had acted in some manner that purportedly amounted to an ambiguous "delay" in negotiations, but also whether such "delay" was "by design," and not merely because the broadcaster or MVPD had other items to deal with that were more pressing relative to the future expiration of a given retransmission consent agreement.

In addition, the idea of a "surface bargaining" rule is redundant. The crux of the good faith rules' totality of the circumstances test is to allow the Commission to analyze, on a case-by-case basis, whether certain conduct fails to evidence a "sincere desire to reach an agreement that is

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[50] *See* n. 35 *supra* and accompanying text.

[51] *NPRM*, ¶ 16.

[52] *Id*.

acceptable to both parties."[53] The totality of the circumstances test serves as a safety net to "catch" certain behaviors that evidence bad faith on the facts of a particular negotiation. *On certain facts*, it is possible that a broadcaster or MVPD's repeated refusal to respond in any substantive way to the other side's attempts to negotiate could evidence delay that rises to the level of a violation. The existing test already provides the vehicle to deal with such a situation.

B. Bundling of broadcast signals should not be prohibited by the Commission.

The *NPRM* asks a series of questions regarding how a broadcaster's proposal for the bundling of broadcast signals should be treated under the totality of the circumstances test.[54] The Commission has consistently declined, for good reason, to prohibit bundling that otherwise comports with the antitrust laws. Dating back to the *Good Faith Order*, the Commission has said: "[p]roposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market" are "bargaining proposals [that] presumptively are consistent with competitive marketplace considerations and the good faith negotiation requirement."[55]

Bundling is not, *per se*, anticompetitive; on the contrary, it has long been one of many considerations in retransmission consent negotiations. As the *NPRM* notes, before cable operators

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[53] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32.

[54] *NPRM*, ¶ 15.

[55] *Good Faith Order*, 15 FCC Rcd at 5462, ¶ 56; *id.* ¶ 39 ("Consistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal.") (footnote omitted). *See also 2005 Report to Congress*, 2005 FCC LEXIS 4976, at *11-12, 52, ¶¶ 10, 35.

made monetary payments to broadcasters for retransmission of their signals, "cable operators typically compensated broadcasters for consent to retransmit the broadcasters' signals through in-kind compensation, such as carriage of additional channels of the broadcaster's programming on the cable system . . . ."[56] From the outset, the Commission has rightly left the issue to private negotiations.[57]

As the Commission has noted, the antitrust laws provide a proper mechanism through which to guard against any potentially anticompetitive bundling or tying.[58] NPG commonly presents MVPDs with proposals that may include carrying multiple stations' primary channels and/or a station's primary and multicast channels. While NPG would, generally, prefer that an MVPD carry all such channels, no MVPD is compelled to do so. And, in NPG's experience, negotiations over rates and other terms are inextricably tied up in the negotiations regarding which programming (for example, which multicast channels) will be retransmitted. Such negotiations evidence the robust market-driven framework that Congress intended and that the Commission has overseen for fifteen years. Nothing has changed that should alter the finding that bundling is presumptively consistent with good faith bargaining.

If anything, consumers benefit from bundling, as they are frequently exposed to programming on multicast channels that they might not otherwise receive. In some of NPG's

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[56] *NPRM*, ¶ 3 n.14.

[57] *Good Faith Order*, 15 FCC Rcd at 5461-62, ¶¶ 37, 39 ("the substance of [retransmission consent] agreements generally should be left to the market").

[58] *NPRM*, ¶ 15 ("[C]onduct that is violative of national policies favoring competition—that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market . . . ." (quoting *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58)); *id.* ¶ 15 ("The Commission has specifically 'clarif[ied] that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.") (quoting *Reciprocal Bargaining Order*, 20 FCC Rcd at 10346, ¶ 15).

markets, for example, bundling allows viewers access to Spanish-language programming on the Telemundo network. Bundling of multiple stations and multiple MVPD systems also results in a reduction in transactional and negotiating costs for broadcast stations and MVPDs, permitting lower subscriber rates.

C. Networks' role in affiliates' retransmission consent negotiation involves a delicate balance of which the Commission should be mindful.

The *NPRM* asks about the appropriate parameters for networks' involvement in their affiliates' retransmission consent negotiations.[59] Broadcast networks should not be allowed to hijack their affiliate stations' retransmission consent negotiations. On the other hand, broadcast networks have the right, under copyright law, to specify the terms by which their copyrighted programming can be distributed by affiliates.[60] As the Commission has explained, Congress "made clear a distinction between television stations' rights in their signals and copyrights holders' rights in programming carried on that signal, [and the Commission] intend[ed] to maintain that distinction as [it] implement[ed] the retransmission consent rules."[61]

In short, networks should not be permitted to assume the right of their affiliates to negotiate retransmission consent, but networks should be permitted to delineate the parameters—geographic and otherwise—by which their program content may be retransmitted by third parties. The Commission has previously taken a hands-off approach to such network-affiliate negotiations, and it should not depart from that position, particularly in the guise of good faith rulemaking: "neither the text nor the legislative history of the SHVIA or the SHVERA indicate a congressional intent

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[59] *NPRM*, ¶ 14.

[60] *See* 17 U.S.C. § 106(3) (vesting copyright owners with the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending").

[61] *Signal Carriage Order*, 8 FCC Rcd at 3005, ¶ 173.

to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming . . . [to] interfere with the network-affiliate relationship or to preclude specific terms in network-affiliate agreements."[62] Such terms do not indicate a lack of good faith in terms of retransmission consent negotiations, and the Commission should not regulate them.[63]

D. Broadcasters cannot be forced to provide access to their programming online.

The *NPRM* asks for comment on the role of digital rights and online video programming in retransmission consent, observing that online distribution rights have become a "critical factor" in recent negotiations.[64] Among other things, the *NPRM* questions whether broadcasters' preventing consumers online access to their programming during retrans consent disputes should amount to evidence of bad faith under the totality of the circumstances test,[65] and how an MVPD's demand for online distribution rights, or a broadcaster's refusal to grant those rights, should be treated under the test.[66]

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[62] The Commission has previously held that it will not interfere in network–affiliate contractual negotiations insofar as they pertain to a network seeking to place any such geographic limitation on an affiliate's ability to grant out-of-market retransmission consent. *See Reciprocal Bargaining Order*, 20 FCC Rcd at 10354, ¶ 33. It is a position the Commission has consistently affirmed, and there is no reason to reverse it in this proceeding. *See, e.g.*, *ATC Broadband*, 24 FCC Rcd at 1651, ¶ 15.

[63] The *NPRM* also asks whether it should be evidence of bad faith for a broadcaster to jointly negotiate with or entrust negotiation to any non-commonly owned entity in another market. *NPRM*, ¶ 14. NPG handles retransmission consent negotiations for all of its stations and does not engage in such type of joint negotiations. Such negotiations, to the extent they occur, do not amount to and should not be considered evidence of bad faith. Congress intentionally prohibited joint negotiation among stations not under common de jure control *in the same market*; if it wanted to extend the prohibition further, it would have done so. *See* STELAR § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv); 47 C.F.R. § 76.65(b)(1)(viii).

[64] *NPRM*, ¶ 19.

[65] *Id.*, ¶ 13.

[66] *Id.*, ¶ 19.

The Commission correctly recognizes that a rule requiring broadcasters to make available their programming online would place the Commission in the untenable position of forcing the exhibition of "works" protected under copyright law and would raise obvious First Amendment concerns.[67] Broadcasters have the exclusive right under copyright law to control how their program content is distributed,[68] and it would be improper—indeed, unconstitutional—for the Commission to abrogate broadcasters' ability to exercise that right in the retransmission consent context.

Practically speaking, broadcasters' ability to limit online access to their programming, whether during a retransmission consent impasse or otherwise, represents just one of many practices available in the course of negotiations that Congress, by design, "left . . . to the give and take of the competitive marketplace[.]"[69] There is nothing inherently "more egregious or harmful to consumers"[70] about a broadcaster using access to its programming online during tense negotiations as a bargaining tool than any other practice that it or an MVPD might employ. The broadcaster's programming always remains available to the viewing public free over the air.[71]

CONCLUSION

The Commission's "totality of the circumstances" test for determining whether broadcasters and MVPDs have satisfied their obligation to negotiate retransmission consent in good faith has worked and continues to work well. It does not need to be modified. For the reasons set forth above, NPG respectfully urges the Commission to refrain from adopting changes to its

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[67] *Id.*, ¶ 13 (asking about constitutional issues related to requiring online distribution).

[68] *See* 17 U.S.C. § 106(3).

[69] *See Good Faith Order*, 15 FCC Rcd at 5469, ¶ 56.

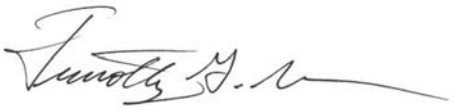
[70] *NPRM*, ¶ 13.

[71] *Id.*

"totality of the circumstances" test.

Respectfully submitted,

NEWS-PRESS & GAZETTE COMPANY



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