**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
| | ) | MB Docket No. 15-216 |
| Implementation of Section 103 of the STELA Reauthorization Act of 2014 | ) | |
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| Totality of the Circumstances Test | ) | |
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# COMMENTS OF CHARTER COMMUNICATIONS, INC.


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## COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") to implement Congress' mandate in the STELA Reauthorization Act of 2014 ("STELAR") to "review [the Commission's] totality of the circumstances test for good faith negotiations" for retransmission consent.[1]

## INTRODUCTION AND EXECUTIVE SUMMARY

As the Commission recognizes, STELAR calls for a "robust examination" of practices used by parties in retransmission consent negotiations, including whether "certain substantive terms offered by a party may increase the likelihood of negotiations breaking down."[2] As part of this "robust examination," Charter urges the Commission to reform the retransmission-consent regime to account for the dramatic changes in the marketplace that have occurred since the regime was adopted—in particular, to prohibit broadcasters from using their significant leverage to restrict multichannel video providers ("MVPDs") from offering customers the targeted programming that they want. As explained further below (and as Charter has previously advanced before the Commission), a simple three-pronged approach would harness the market to

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[1] *In re Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327 ¶ 1 n.1 (2015) ("*NPRM*").

[2] *Id.* at ¶ 1 (quoting S. Rep. No. 113-322 at 13 (2014)).

ensure consumer choice and control rising retransmission-consent fees. Specifically, the Commission should clarify that the duty to negotiate in good faith requires that broadcasters: (1) offer a reasonable standalone rate, not tied to carriage of any other programming service or other non-cash compensation, (2) offer non-discriminatory rates to MVPDs in the same local market, no matter their size or where their consumers live, and (3) be transparent about their retransmission-consent fees.[3] These steps, which fall squarely within the Commission's authority, would reintroduce some measure of equality in a bargaining process that has long been distorted, and alleviate the harm to consumers from the current retransmission-consent regime.

## I. THE COMPETITIVE DYNAMIC HAS CHANGED SINCE THE RETRANSMISSION-CONSENT REGIME WAS ADOPTED.

The bargaining relationship between broadcasters and MVPDs has changed dramatically since 1992, when Congress enacted the retransmission-consent regime. As the NPRM recognizes, at that time, "consumers typically had a single cable operator as their only video service option."[4] Policymakers were thus concerned that "local stations [were] totally at the mercy of local cable operators" with "absolutely no assurances that any local stations [would] be carried on a cable system."[5] It was in response to this perceived imbalance in leverage that Congress enacted the Cable Act to give broadcasters an array of regulatory advantages, including must-carry, must-buy, and retransmission-consent.

The landscape today is considerably different. At present, cable operators compete not only with direct-broadcast satellite providers, including DirecTV and DISH (which were nascent in 1992), but also against wireline video providers, such as AT&T U-verse, Verizon, and

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[3] *See* Comments of Cablevision Systems Corporation and Charter Communications, MB Dkt. No. 10-71, at 5 (June 26, 2014) ("Charter 2014 Comments).

[4] *NPRM*, 30 FCC Rcd at 10329 ¶ 3.

[5] *See* 138 Cong. Rec. 966, 982 (1992) (statement of Sen. Inouye).

CenturyLink. Cable operators also compete with the broadcasters themselves, who have their own on-line services, like CBS All Access as well as their over-the-air signals. Meanwhile, as the NPRM acknowledges, broadcasters continue to offer "must-have" programming, such that no cable operator can risk failure to reach an agreement as to retransmission consent without the permanent loss of subscribers to rival MVPDs.[6]

Broadcasters have thrived in this dynamic. As rational economic actors, given the gross imbalance in bargaining power, broadcasters' demands have not only increased retransmission-consent fees, but have required MVPDs to carry broadcasters' affiliated second-tier cable networks or multicast channels, for additional per-subscriber fees, on the most popular programming tiers—regardless of the lack of consumer demand.

Charter urges the Commission to use this proceeding to heed Congress' call for a "robust examination" of the retransmission-consent regime and address these problems, which cause significant consumer harm.[7] As explained below, the Commission should reform the regulatory regime to recognize the changed market dynamics and to enable MVPDs to provide the targeted programming that customers want.

## II. THE COMMISSION SHOULD REQUIRE BROADCASTERS TO NEGOTIATE IN GOOD FAITH, THROUGH STANDALONE, NON-DISCRIMINATORY, AND TRANSPARENT RETRANSMISSION FEES.

In light of the changed market dynamics, Charter reiterates its previously-stated position that the Commission should require broadcasters to: (1) offer a reasonable standalone rate for a broadcast signal, not tied to or discounted for, carriage of any other programming service or

[6] *NPRM*, 30 FCC Rcd at 10330 ¶ 3.

[7] S. Rep. No. 113-322 at 13 ("The Committee 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 negotiations breaking down. The Committee also expects that the test should examine the practices engaged in by both parties if negotiations have broken down and a retransmission consent agreement has expired.").

other non-cash compensation, (2) offer non-discriminatory rates to MVPDs in the same local market, no matter their size or where their consumers live, and (3) be transparent about their retransmission fees. These inter-related reforms, which are well within the Commission's authority, would mitigate much of the consumer harm caused by today's system, including dramatically limiting blackouts and freeing customers from paying inflated rates for bloated packages of content that they do not want.

**1. Standalone Retransmission Fees.** Knowing that MVPDs are statutorily required to obtain retransmission consent, yet cannot risk the failure of reaching an agreement with a channel that includes "must have" programming, broadcasters routinely insist on the carriage of content affiliated with the broadcaster and other non-cash consideration, such as marketing support and advertising time, as a condition to obtaining consent. Broadcasters usually insist that such content be placed on the most popular programming tiers. The effect of these conditions is to require MVPDs and their customers to pay for channels that they do not want. Banning tying would prevent this restraint on consumer choice.

In addition, prohibiting the practice of tying content affiliated with broadcasters would produce substantial benefits for programming diversity. Increased retransmission compensation demands decrease programming diversity because MVPDs have less cash, less channel capacity, and diminished packaging flexibility for carriage of independent programmers.[8] When programming is unbundled, MVPDs can determine independently which of a broadcaster's affiliated content should be carried based on consumer demand and price. This would create

[8] *See* Comments of Discovery Communications LLC, MB Dkt. No. 10-71, at 7-8 (May 27, 2011) ("Faced with higher and higher retransmission fees, MVPDs are forced to make difficult decisions about offsetting costs . . . . The independent programmer has been singled out as the path of least resistance in recouping some of those rising retransmission fees charged by the network affiliates." (internal quotation marks omitted)).

opportunities for programming networks to compete on merit and value, rather than on ownership.[9]

Finally, banning tying in retransmission-consent agreements would ensure that there are no hidden fees and that the value of a retransmission-consent agreement is easily identifiable. Such simplification and clarity is particularly relevant given the NPRM's recognition that retransmission negotiations and agreements have become increasingly complex in recent years.[10]

**2. Non-Discriminatory Retransmission Fees.** In order for the retransmission consent regime—which was premised on a 1992 marketplace, in which a given market had one MVPD—to function properly in today's marketplace, which sees substantial competition among MVPDs, broadcasters must be prohibited from charging discriminatory rates to MVPDs that are in the same market. The charging of such discriminatory rates increases the transaction costs of broadcaster-MVPD negotiations (thus increasing rates for consumers) and makes consumers more susceptible to programming blackouts. Discriminatory rates also have a disproportionate impact on small and regional MVPDs, which may have to pay substantially more for the same broadcast signal as their in-market competitors.[11]

Requiring non-discriminatory rates in the same market, however, would restore some measure of equality in response to the increase in competition among MVPDs that was not

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[9] *See, e.g.*, Comments of Starz Entertainment, LLC in Response to Notice of Proposed Rulemaking, MB Dkt. No. 10-71, at 5 (May 27, 2011) ("Such tying of negotiations distorts the otherwise very competitive cable network marketplace and unfairly and unjustifiably favors those cable networks co-owned with local television broadcast stations over those . . . that have no meaningful broadcast ownership relationship."); Comments of The Africa Channel in Support of Petition for Rulemaking, MB Dkt. No. 10-71, at 3 (May 18, 2010) ("By forcing an MVPD to carry and pay for the full line of the network's affiliated cable services, each network takes a large share of the MVPD's channel capacity and programming budget for itself. As a result, when independent programmers do secure carriage, they find they can usually do so only by accepting reduced compensation, less favorable tier placements and other less favorable terms.").

[10] *NPRM*, 30 FCC Rcd at 10330 ¶ 3.

[11] *See* Comments of American Cable Ass'n, MB Dkt. No. 10-71, at 76–86 (May 27, 2011) (describing evidence and market effects of discriminatory retransmission rates).

contemplated in 1992, allowing rates to truly reflect "competitive marketplace considerations."[12] Such a rule would also eliminate the threat of withholding programming because broadcasters would not have an incentive to hold out for a premium. Thus, both parties would benefit through the more efficient conclusion of agreements, and consumers would benefit from reduced blackouts.[13]

Leveling the playing field through non-discriminatory pricing would provide an additional benefit to customers by incentivizing MVPDs to extend any costs savings that they realize to consumers. If MVPDs competing within a single market are paying a similar rate, in order to compete effectively, they will be incentivized to push any cost savings in retransmission fees to customers in the form of lower rates.

**3. Transparency.** Under the current regime, broadcasters are able to take advantage of the lack of transparency—which allows them to make unreasonable demands to individual MVPDs; mask the charging of discriminatory rates, as described above; and continue the upward pressure that increases rates independent of fair-market prices. These demands lead to higher rates for consumers.

The Commission can address this by requiring each broadcaster to disclose publicly the rates that it charges for retransmission consent for each network. Such transparency would help curb unreasonable broadcaster demands and help ensure that retransmission consent is obtained at fair market-based and non-discriminatory prices. This would also benefit consumers, both by

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[12] 47 U.S.C. § 325(b)(3)(C)(ii).

[13] *See* Charter 2014 Comments at 3-4 (detailing instances where consumers suffered from blackouts due to broadcasters' negotiating tactics).

reducing upward pressure on the rates that they pay for MVPD service,[14] and by helping consumers to understand how their service rates are affected by retransmission-consent negotiations.

In addition, achieving transparency would enable the Commission to more closely monitor changes in retransmission rates, facilitating the Commission's statutory duty to evaluate the effect of retransmission fees on cable rates,[15] and to encourage broadcasters' compliance with the non-discrimination provisions of Section 325(b)(3)(C)(ii).[16]

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[14] *See id.* (noting that the enormous growth in retransmission-consent compensation has put massive pressure on MVPD rates and has inflated in the most popular programming tiers with content that consumers do not want to buy).

[15] 47 U.S.C. § 325(b)(3)(A).

[16] *See* Reply Comments of Cablevision Systems Corp., MB Dkt. No. 10-71, at 5-6 (June 3, 2010).

## CONCLUSION

For the reasons stated above, the Commission should clarify that the duty to negotiate in good faith requires that broadcasters: (1) offer a reasonable standalone rate, not tied to carriage of any other programming service or other non-cash compensation, (2) offer non-discriminatory rates to MVPDs in the same local market, no matter their size or where their consumers live, and (3) be transparent about their retransmission-consent fees.

Respectfully submitted,

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