BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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 THE UNITED STATES TELECOM ASSOCIATION

Kevin Rupy
Jonathan Banks

United States Telecom Association
607 14th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 326-7271

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SUMMARY

It is well past the time for the Commission to reform its retransmission consent rules by reforming its totality of the circumstances test. The evidence clearly demonstrates that the current retransmission consent framework is in dire need of reform: broadcaster initiated blackouts are at an all-time high, and retransmission consent fees are escalating at an unsustainable rate. There is broad recognition that the current statutory scheme leaves broadcasters in a position to abuse their bargaining position with the constant threat of station blackouts. In this proceeding, the Commission has an ideal opportunity to adopt critical reforms that will remove artificial regulatory advantages granted to broadcasters and bring greater balance to the retransmission consent negotiation process.

In each local market, broadcasters can – and do – use their statutory protections dating back to a bygone era to demand exorbitant retransmission consent fees through the threat of broadcast blackouts to a single multichannel video programming distributor (MVPD). At the same time, they know full well that their programming will continue to be carried by remaining MVPDs in the market and are thus able to play multiple MVPDs off of one another with little threat of losing a significant number of viewers. Retransmission consent fees are expected to reach $10.3 billion by 2021, versus the projected level of $6.3 billion in 2015. In fact, retransmission consent fees have increased in ten years from $28 million in 2005 to $6.3 billion projected for 2015.

The broadcasters' increasingly choose to use blackouts as their weapon of choice during these negotiations, leveraging their government-sanctioned local monopolies against the direct interests of consumers. Against this backdrop, incidents of blackouts by local broadcast stations throughout the country continue their relentless climb. Since 2010, Americans have experienced over 560 blackouts, more than half of which occurred in 2014 and 2015. The 8 reported blackouts in 2010 stand in stark contrast to the 107 blackouts in 2014 and the nearly 200 record-setting blackouts in 2015.

Given the realities under the current framework, it is undeniable that reforms of the Commission's retransmission consent regime are needed. The Commission has ample authority to implement reasonable, necessary and pro-consumer mechanisms to fix the current broken retransmission consent regime. In addition to the direct authority under the Communications Act, with the passage of the Satellite Television Extension and Localism Act Reauthorization (STELAR) Act of 2014, the Commission was directed to "update its totality of the circumstances test." Given the existing statutory authority and Congress' recent authorization and directive, the Commission should move swiftly to implement much needed reforms to its retransmission consent framework.

In light of the significant problems with the existing retransmission consent framework, USTelecom supports many of the proposals contained in the Commission's Notice, which are reasonable, necessary and pro-consumer. Implementation of these proposals will help address the significant flaws under the current retransmission consent framework, while also addressing the substantial consumer harms resulting from the current process.

Blocking Online Content. A consumer's choice of MVPD provider should not be tied to his or her ability to access Internet content that is freely available to other Internet users. Given the egregious nature of the harm to consumers, the Commission should make it a *per se* violation of its good faith rules when broadcasters engage in such conduct.

Relinquishing Retransmission Consent Right to Third Parties. The Commission should make it a *per se* violation of the good faith negotiation requirement for a station to relinquish its retransmission consent rights to a third party. Such arrangements represent a flagrant disregard for the Commission's current rules, which require a broadcast station licensee to have control over the station's signal.

Bundling Broadcast Signals. The Commission should also consider it a *per se* violation of the good faith rules when broadcasters insist on the mandatory bundling of a broadcast station signal with other, affiliated broadcast or cable programming content that on their own would not be eligible for the retransmission consent rules. Because of the significant imbalance in the current retransmission consent framework, MVPDs must often assent to these demands, no matter how unreasonable. The Commission should reform the framework so that it no longer allows broadcasters to wield such unilateral power in retransmission negotiations.

Threat of Blackouts Just Prior to Marquee Events. Broadcasters often seek to increase their already oversized negotiating leverage when they require contract expiration dates, or threaten to black out a station, in the time period just prior to the airing of a popular sporting or entertainment event. The Commission should establish a *per se* violation of the good faith standard where broadcasters unreasonably cut off consumers from such highly rated marquee events.

Preventing Temporary Importation of an Out-Of-Market Signal. Elimination of the Commission's outdated Network Non-Duplication and Syndicated Exclusivity rules from a bygone era will foster more market-based negotiations for broadcast signal carriage, thereby enabling MVPDs to deliver must-have programming content to their subscribers. Absent their elimination, the Commission should make it a *per se* violation of the good faith rule in instances where a broadcaster prevents an MVPD from temporarily importing an out-of-market signal in cases where the broadcaster has blacked out its signal.

Limits on MVPD Subscribers' Use of Lawful Devices and Functionalities. One aspect of the increasing competition in the video distribution marketplace today involves the growth of alternative programming options and equipment available to consumers. An important aspect of this competition involves the MVPD deployment of next generation set top boxes that include advanced features such as multi-room viewing, multi-screen viewing, and subscriber-initiated ad-skipping. Given these benefits – and the absence of any policy reason for limiting such technologies – the Commission should adopt its proposal to consider such broadcaster demands a *per se* violation of the good faith rules.

Broadband Per-Subscriber Fees Imposed on MVPDs. To obtain retransmission consent rights to a local broadcast signal, some broadcasters require MVPDs to pay an additional fee based on the number of broadband subscribers they serve, regardless of whether or not those

customers also subscribe to subscription video services. The Commission should therefore consider demands to include all an MVPD's subscribers – even non-video-service subscribers – in the cost of broadcast signal carriage a *per se* violation of the good faith negotiation standards.

Tier Placement Demands; Imposition of Minimum Penetration Requirements. Broadcaster-mandated tier placement requirements and imposition of minimum penetration requirements are another area where broadcasters skew the retransmission consent negotiation process in their favor. In addition to mandatorily bundling affiliated content with their broadcast channels, broadcasters often demand that MVPDs place their affiliated networks in the most popular programming tiers. The ability of MVPDs to offer a variety of tailored programming packages is hindered by these broadcaster tier limitations, and the Commission should find that such tier placement demands constitute a *per se* violation of the good faith rules.

Preventing Disclosure of Contract Terms to the Commission, or Courts. It should be a *per se* violation of the Commission's good faith rules in instances where broadcasters prevent an MVPD from disclosing information on rates, terms and conditions of a contract proposal or agreement to the Commission or court of competent jurisdiction during a dispute concerning retransmission consent. Such non-disclosure provisions can prevent MVPDs from pursuing legal or regulatory remedies due to their inability to disclose to regulators the prices, terms, and conditions offered, even under appropriate confidentiality conditions.

It is well past the time for the Commission to reform its retransmission consent rules by reforming its totality of the circumstances test. In this proceeding, the Commission has an ideal opportunity to adopt critical reforms that will bring greater balance to the retransmission consent negotiation process.

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COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)[1] submits these comments in response to the Notice of Proposed Rulemaking (Notice) released by the Federal Communications Commission (Commission) in the above-referenced proceeding.[2] In its Notice, the Commission seeks to adopt much-needed reforms to its retransmission consent framework. USTelecom supports adoption of these much needed reforms, which will bring necessary changes to the outdated retransmission consent framework.[3]

I. Introduction

It is well past the time for the Commission to reform its retransmission consent rules by reforming its totality of the circumstances test, thereby promoting more balanced and market-

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[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

[2] Notice of Proposed Rulemaking, *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd. 10327, 80 FR 59706, FCC 15-109 (released September 2, 2015) (*Notice*).

[3] USTelecom is also a member of the American Television Alliance (ATVA). The ATVA brings together an unprecedented coalition of consumer groups, cable, satellite, telephone companies and independent programmers, all of whom are advocating for reforms to the current retransmission consent regime. USTelecom incorporates by reference the comments of the ATVA in this proceeding.

based negotiations. By almost any measure, the evidence is clear that the current retransmission consent framework is in dire need of reform: broadcaster initiated blackouts are at an all-time high, and retransmission consent fees are escalating at an unsustainable rate. Consumers are ultimately caught in the middle with higher costs for their video services and an increased likelihood of losing access to their local broadcast signal.

A legal framework developed nearly two decades ago cannot effectively promote consumer welfare and efficiency in today's much more complex video market. In contrast to the multichannel video programming distributor (MVPD) market of twenty-plus years ago – where a single cable incumbent served an entire market – the threat of a broadcast licensee losing access to viewers is substantially lessened by the fragmentation caused by having multiple MVPDs in the market. The increase in competition amongst MVPDs has, perversely, increased broadcasters' ability to abuse their bargaining power during the retransmission consent negotiation process.

Progress was made on retransmission consent at the end of the 113th Congress with the passage of the Satellite Television Extension and Localism Act Reauthorization (STELAR), which directed the Commission to undertake its current inquiry.[4] With the passage of STELAR, the Commission was directed to conduct a "robust examination" of its retransmission consent framework.[5] Such an examination is long overdue. Congress also directed the Commission to "provide additional specific guidance as to actions that, taken as a whole, evidence bad faith based on the totality of the circumstances."[6] USTelecom agrees that such guidance "would help

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[4] *See* Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (*STELAR*).

[5] S. Rep. No. 113-322, p. 13 (2014) (*Senate STELAR Report*).

[6] *Senate STELAR Report*, p. 13.

provide more certainty to the parties to a negotiation and ultimately give consumers greater faith in the retransmission consent process."[7]

There is broad recognition that the current statutory scheme leaves broadcasters in a position to abuse their bargaining position with the constant threat of station blackouts, particularly at inopportune times for the viewing audience. In its current proceeding, the Commission has an ideal opportunity to adopt critical reforms that will remove artificial regulatory advantages granted to broadcasters and bring greater balance to the retransmission consent negotiation process.

II. The Current Retransmission Consent Framework is Seriously Flawed, and the Commission Should Institute Much-Needed Reforms

In each local market, broadcasters can – and do – use their statutory protections dating back to a bygone era to demand exorbitant retransmission consent fees through the threat of broadcast blackouts to a single MVPD. At the same time, they know full well that their programming will continue to be carried by remaining MVPDs in the market and are thus able to play multiple MVPDs off of one another with little threat of losing a significant number of viewers. Furthermore, reasonable access to video programming is essential to ensuring increased competition and deployment of both broadband and video services.

Against this backdrop, broadcasters' accompanying retransmission consent fees continue their dramatic rise. By one estimate from SNL Kagan, these fees will reach $10.3 billion by 2021, versus the projected level of $6.3 billion in 2015. In fact, retransmission consent fees have increased in ten years, from $28 million in 2005 to $6.3 billion projected for 2015.[8] NTCA and INCOMPAS recently submitted a survey in this proceeding showing that of the 226 companies

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[7] *Id*.

[8] SNL Kagan, *Economics of Broadcast TV Revenue 2015 Edition*, p. 4 (July 2015).

surveyed, 40% reported percentage increases in retransmission consent fees during the current contract cycle in comparison to the previous contract cycle of more than 100%, and 11% reported increases of more than 200%.

MVPDs attempting to negotiate for carriage of local broadcast stations face increasingly brazen conduct on the part of broadcasters, necessitating further action by the Commission to protect consumers. The broadcasters' increasingly choose to use blackouts as their weapon of choice during these negotiations, leveraging their government-sanctioned local monopolies against the direct interests of consumers. As recently noted by the American Television Alliance (ATVA), incidents of blackouts by local broadcast stations throughout the country continue their relentless climb.[9] Since 2010, Americans have experienced over 560 blackouts, more than half of which occurred in 2014 and 2015. The 8 reported blackouts in 2010 stand in stark contrast to the 107 blackouts in 2014 and the nearly 200 record-setting blackouts in 2015.[10]

The impact of these blackouts on consumers is significant. Although consumers are not a party to retransmission negotiations, the broadcasters choose to put them in the crosshairs of the dynamics of the retransmission process in the broader MVPD marketplace. After a retransmission consent negotiation with one MVPD concludes, the broadcaster can move on to the next provider using the same tactics. As a result, even when a consumer drops his or her chosen video provider due to a broadcaster blackout, there is no guarantee that the replacement service will not eventually suffer the same fate.

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[9] *See*, Ex Parte Notice, American Television Alliance, MB Docket No. 10-71, Amendment of the Commission's Rules Related to Retransmission Consent, p. 1 (September 2, 2015) (*ATVA Ex Parte*).

[10] *See*, Id., *see also*, American Television Alliance website, Blackout List 2010-2015 (available at http://www.americantelevisionalliance.org/media-center/) (visited December 1, 2015).

When such blackouts do occur, consumers lose access to their local broadcast channel, and may often go through the process of switching MVPD providers. Even when broadcaster blackouts do not occur, consumers are subjected to a barrage of inflammatory and one-sided propaganda (often provided by the broadcasters themselves) via program crawls and local broadcast news stories discussing the possibility of a blackout. Such propaganda does nothing to resolve the underlying negotiation and only creates increased consumer confusion and frustration.

Such an outcome is contrary to the reason Congress adopted the retransmission consent requirement – to ensure that MVPD consumers can receive their local programming content from broadcasters. In today's multi-MVPD environment, the Commission should seek to eliminate artificial and unnecessary broadcaster preferences to ensure a more level playing field in commercial negotiations. A statutory framework developed nearly two decades ago for a monopolistic MVPD market cannot effectively promote consumer welfare and efficiency in today's competitive and much more complex video distribution market.

In recent months, the Commission has repeatedly acknowledged the need to update its so-called "totality of the circumstances test" for good faith negotiations over retransmission of broadcast TV signals. In announcing the rulemaking, Chairman Wheeler pointed to the need to "fulfill [the] mandate" under the Satellite Television Extension and Localism Act Reauthorization (STELAR) Act of 2014, in order to "better reflect today's media marketplace and further protect the public interest."[11]

[11] Wheeler Blog, Upgrading Media Rules to Better Serve Consumers in Today's Video Marketplace (available at: https://www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace) (visited December 1, 2015).

Both Congress and the Commission have acknowledged the importance of local broadcast content to consumers. As noted by a broad range of stakeholders, however, artificial bargaining imbalances between broadcasters and MVPDs embedded in the decades-old retransmission consent process are creating tangible consumer harms that have resulted in widespread and increasingly urgent calls to reform this broken system. Given the urgent need for reforms to the retransmission consent framework, the Commission should swiftly adopt several of its proposed reforms that are pro-consumer, reasonable and necessary to making it closer to a true commercial negotiation.

III. The Commission has the Necessary Authority to Institute Much Needed Reforms to its Good Faith Framework

Given the realities under the current framework, it is undeniable that reforms of the Commission's retransmission consent regime are needed. The Commission has ample authority to implement reasonable, necessary and pro-consumer mechanisms to fix the current broken retransmission consent regime. Section 325 of the Act requires "that the rates for the basic service tier [be] reasonable," and Congress specifically recognized "the impact that the grant of retransmission consent by television stations may have on [such] rates."[12] Of particular note, Section 325(b)(3)(A) of the Act states that the Commission "shall consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations . . . do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable."[13]

[12] 47 U.S.C. § 325(b)(3)(A).

[13] *Id*.

With the passage of STELAR the Commission was further directed to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations."[14] The legislative history of STELAR demonstrates Congress' clear intention that the Commission's review consist of a "robust examination" of retransmission consent negotiation practices.[15] Congress acknowledged the negative impact of "tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts."[16] Importantly, Congress directed to the Commission to "*update* its totality of the circumstances test."[17] Given the existing statutory authority and Congress' recent authorization and directive, the Commission should move swiftly to implement much needed reforms to its retransmission consent framework.

IV. The Commission can Help Level the Playing Field in Commercial Negotiations Between MVPDs and Broadcasters by Amending its Good Faith Rules

In light of the significant problems with the existing retransmission consent framework, USTelecom supports many of the proposals contained in the Notice, which are reasonable, necessary and pro-consumer. Implementation of these proposals will help address the significant flaws under the current retransmission consent framework, while also addressing the substantial consumer harms resulting from the current process.

A. Blocking Online Content

USTelecom has long supported the right of all consumers to access the legal content of their choice on the Internet. A consumer's choice of MVPD provider should not be tied to his or her ability to access Internet content that is freely available to other Internet users. The

[14] *STELAR*, § 103(c).

[15] *Senate STELAR Report*, p. 13.

[16] *Id.*

[17] *Id.* (emphasis added).

Commission should therefore adopt its proposal to make the blocking of freely available online content by a broadcaster during a retransmission consent dispute a *per se* violation of the good faith rules.

As the Commission correctly notes, such blocking of online content prevents all of an MVPD's broadband subscribers from accessing the online video programming (content the broadcaster otherwise makes generally available) when the broadcaster and the MVPD are engaged in a retransmission consent dispute – regardless of whether those subscribers are located in markets where the MVPD and broadcaster have reached an impasse in negotiations.[18] In addition, the MVPD's broadband subscribers who do not subscribe to the video service are equally impacted.

For example, during a retransmission consent dispute involving CBS and Time Warner Cable, CBS decided to block access to Time Warner Cable subscribers for full-episode viewing through its website.[19] Of course, one of the more problematic aspects of CBS's decision is that not every Time Warner Cable broadband subscriber was paying for Time Warner Cable's subscription video service.

Moreover, the Commission's comparison of such conduct to that of paid subscriptions to newspapers is flawed.[20] Although some newspapers do indeed provide unlimited access to online content only to paying subscribers, the individual consumer decides whether to subscribe and access that content. Such a relationship is a standard commercial agreement between the

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[18] *Notice*, ¶ 13.

[19] *See*, Sean Hollister, *In vengeful move, CBS blocks web episodes for Time Warner Cable internet subscribers*, The Verge, August 2, 2013 (available at: http://www.theverge.com/2013/8/2/4584176/cbs-blackout-on-time-warner-cable-now-its-a-net-neutrality-issue) (visited December 1, 2015).

[20] *Notice*, ¶ 13.

consumer and the newspaper. In stark contrast, when broadcasters block access to online content *only* for the affected MVPD's broadband subscribers – content that is otherwise freely available to customers of other broadband providers the broadcaster does not give the consumer a choice. Rather, it is nothing more than a broadcaster tactic that uses the consumer as leverage during the retransmission consent negotiation process, regardless of whether that consumer is a video subscriber.

USTelecom believes that during any retransmission consent dispute, consumers should not be caught in the middle. Given the egregious nature of the harm to consumers, the Commission should make it a *per se* violation of its good faith rules when broadcasters engage in such conduct.

B. Relinquishing of Retransmission Consent Right to Third Parties

The *Notice* also seeks comment on whether it should be a *per se* violation of the good faith negotiation requirement for a station to relinquish its retransmission consent rights to a third party.[21] Given the adverse impact such arrangements have on the retransmission consent framework and the broader MVPD marketplace, USTelecom supports this proposal. Such arrangements represent a flagrant disregard for the Commission's current rules, which require a broadcast station *licensee* to have control over the station's signal.

Specifically, the Commission's current good faith rules consider it to be a *per se* violation if there is a "[r]efusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent."[22] In instances where a station must first seek approval from a third party in order to ratify its agreement to the terms for retransmission consent, its "designated representative" clearly lacks the necessary authority to

[21] *Notice*, ¶ 14.

[22] *See*, 47 C.F.R. § 76.65(b)(ii).

make any "binding representations." By their very nature, such arrangements shift the decision making ability from the broadcast licensee to an outside third-party, and constitute a violation of the Commission's rules for good faith negotiations. The Commission should therefore clarify that entering into or enforcing right-of-approval clauses that assign a licensee's authority to a third party constitutes a *per se* violation of good faith negotiation.[23] Under the same principle, similar proxy arrangements are equally problematic, and also contradict the Commission's established rule.

USTelecom maintains that such arrangements also violate the Communications Act since they constitute an unauthorized transfer of control. Section 310(d) of the Communications Act prohibits broadcast licensees from transferring control of their licenses without authorization from the Commission.[24] In examining control of a broadcast license, the Commission typically focuses on the ability to control finances, personnel and programming, which it has described as "the major concerns of station operation and decision making."[25]

Both a right-of-approval clause and a proxy arrangement that improperly reassign to the network the unrestricted right to grant or withhold retransmission consent meet all three criteria. Such provisions convey to a third party a right that Congress granted to stations alone.[26] Given the significant monetary value of retransmission consent fees to networks, their ability to control a station's retransmission consent rights gives the network extraordinary control over a station's finances.

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[23] Under such a proxy arrangement, an affiliated station voluntarily divests its control over retransmission consent rights by vesting them in the network.

[24] 47 U.S.C. § 310(d).

[25] *Stereo Broadcasters*, 87 F.C.C. 2d 87, ¶ 29 (1981); *see also, e.g., News International PLLC*, 97 F.C.C. 2d 349, ¶ 20 (1984) (describing finances, personnel, and programming as "the three most important factors in determining control"); 47 C.F.R. § 73.3555 notes 2(j) and (k) (specifying that time brokerage and joint sales agreements, respectively, must leave stations with ultimate control over "facilities including, specifically, control over station finances, personnel and programming").

[26] *See* 47 U.S.C. § 325(b) (prohibiting retransmission without the station's consent).

A right-of-approval clause or proxy agreement places this significant revenue stream outside the control of the station, enabling the network to use this power to control the station and further the network's own ends at the expense of its affiliates.[27] For example, the network could, in the words of FOX, "*completely ban* a station from granting retransmission consent to an MVPD"[28] for any reason or no reason. Such leverage and control could enable an owned and operated (O&O) network to refuse to allow its affiliates to grant retransmission consent to any MVPD. Networks could also condition retransmission consent approval on multiple facets of a station's operations, to include personnel, programming, or policy. Where a network possesses this ability, the network – and not the station owner – exercises effective control over the broadcast license. Such abdication of control over retransmission consent precludes a station from meeting its obligation to negotiate in good faith, and the Commission should find that such grants to third parties constitute a *per se* violation of its good faith rules.

C. Mandatorily Bundling Broadcast Signals with Other Broadcast Stations or Cable Networks into the Retransmission Consent Agreement

The Commission should also consider it a *per se* violation of the good faith rules when broadcasters insist on the mandatory bundling of a broadcast station signal with other, affiliated broadcast or cable programming content that on their own would not be eligible for the retransmission consent rules. While MVPDs bundle programming to offer consumers more

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[27] When faced with the analogous concern that networks could pressure affiliates to raise their national spot advertising rates so as to make network ads more attractive to advertisers, and thus increase the network's profits at the expense of the affiliates, the Commission prohibited networks from representing their non-owned affiliates in the sale of non-network advertising time. *See Review of the Commission's Regulations Governing Broadcast Television Advertising,* 10 FCC Rcd. 11853, ¶ 17 (1995) ("The public interest may be harmed if networks possess sufficient bargaining power over their affiliates such that exercise of this bargaining power would result in reduction of affiliate advertising revenues significant enough to inhibit the affiliates' ability to present programming that best serves its community.").

[28] FOX Mediacom Response at 7 (emphasis in original).

choice and often reduce costs, this form of forced bundling by broadcasters is simply an abuse of the retransmission consent rule because broadcasters are simply using their monopoly over certain "must have" programming to require MVPDs to also take unwanted programming that often is cable programming that otherwise would not be subject to the retransmission consent regime. As a result, the FCC should determine that a broadcaster is not negotiating in good faith if it does not provide a stand-alone offer for retransmission of the broadcast station signal to MVPDs that request it, and this offer should reflect marketplace terms.

Broadcasters increasingly demand that an MVPD agree to carry other broadcast stations or cable networks as a condition of obtaining retransmission consent for the broadcaster's primary signal, without giving a real economic alternative to carrying just the primary signal(s). These bundling practices are widespread. According to the NTCA INCOMPAS survey, 69% of their respondents reported instances where a broadcaster required MVPDs to obtain non-broadcast programming and/or services.[29] Indeed, reports have also surfaced of broadcasters using retransmission consent negotiations to require MVPDs to distribute a cable channel the broadcaster did not yet own.[30]

As recently noted by Mediacom, these practices "can and do effectively force MVPDs and their video customers to purchase unwanted networks."[31] In the example referenced by

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[29] *See*, Ex Parte Notice, NTCA, INCOMPAS, MB Docket No. 15-216, Implementation of Section 103 of the STELA Reauthorization Act of 2014, p. 4 (October 29, 2015) (*NTCA, INCOMPAS Ex Parte*).

[30] Joe Flint, Wall Street Journal, *Sinclair Broadcast Pulls TV Signals From Dish Network*, August 25, 2015 (available at: http://www.wsj.com/articles/sinclair-broadcast-pulls-tv-signals-from-dish-network-1440544047) (visited December 1, 2015).

[31] *See*, Mediacom Petition for Expedited Rulemaking, RM 11728, p. ii (submitted July 21, 2014).

Mediacom, half of the channels provided in its "family" or "expanded basic" tier were owned or controlled by broadcasters.[32]

Because of the significant imbalance in the current retransmission consent framework, MVPDs must often assent to these demands, no matter how unreasonable. The Commission should reform the framework so that it no longer allows broadcasters to wield such unilateral power in retransmission negotiations. Rather, the Commission should require broadcasters to provide a stand-alone offer for carriage of the station signal on reasonable terms, even when they also offer the signal bundled with other programming.

D. Threat of Blackouts Just Prior to Marquee Events

Broadcasters often seek to increase their already oversized negotiating leverage when they require contract expiration dates, or threaten to black out a station, in the time period just prior to the airing of a popular sporting or entertainment event. Broadcasters often resort to such tactics, as when News Corp. blacked out the Major League Baseball National League Championship Series in 2010 during a retransmission consent dispute with Cablevision.[33] A similar dispute between Disney and Cablevision led to a blackout of a portion of the 2010 Academy Awards.[34]

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[32] *Id*., p. 15 (in its filing, Mediacom noted that its Expanded Basic tier consists of 52 channels. Of these 52 channels, 11 were owned or controlled by NBC or NBC/Universal; 9 were owned or controlled by Disney or Hearst/Disney; and 6 were owned or controlled by Fox.

[33] *See*, Samantha Gross, *Fox Blackout Prevents MLB Playoff Broadcasts For 3 Million Cablevision Customers*, The Huffington Post, October 16, 2010 (available at: http://www.huffingtonpost.com/2010/10/16/fox-blackout-may-prevent-_n_765270.html) (visited December 1, 2015).

[34] *See*, Brian Stelter, Brooks Barnes, *At the Last Minute, a Disney-Cablevision Truce*, New York Times, March 7, 2010 (available at: http://www.nytimes.com/2010/03/08/business/media/08cable.html?_r=0) (visited December 1, 2015).

But even absent a blackout, broadcasters have repeatedly used impending marquee events – particularly sports related programming – as increased leverage during retransmission consent disputes. One network executive characterized the increased bargaining leverage inherent in marquee sports programming as follows: "When you are sitting across from the table from an MSO and you sa[y], by the way, your local team will not be on the air for your viewers this Sunday, it's a lot of power for us."[35]

The abuse of timing blackouts to marquee events is often exacerbated in instances where the broadcaster seeks to "run out the clock" during retransmission consent negotiations. Instead of engaging in good faith negotiations in the period leading up to the expiration of a retransmission consent agreement, broadcasters will often wait until the last minute to engage in any substantive discussions, when the leverage accompanying an impending marquee event is at its zenith.[36]

As the Commission recognized in eliminating the Sports Blackout Rule, the vast majority of the highest rated television events are NFL games,[37] and the majority of those games are played at publicly funded stadiums. Because marquee events often include non-sports programming (*e.g.*, the Academy Awards), the proposal set forth by the ATVA uses relevant

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[35] Michael Malone, *Moonves: Give Us Our Retrans Cut*, Broadcasting & Cable, Mar. 1, *2010*, (available at: http://www.broadcastingcable.com/news/local-tv/moonves-give-us-our-retrans-cut/42178) (visited December 1, 2015) ("CBS Corp. President/CEO Leslie Moonves made an emphatic case for broadcast's emerging dual-revenue model ... , saying event programming such as the Super Bowl and March Madness basketball-paired with the network's winning primetime lineup-merits CBS a significant cut of retransmission consent revenue.").

[36] In instances where these offers occur less than 30 days before an existing contract expiration, this interferes with cable's requirement to notify subscribers 30 days prior to a station being taken off the air. In these situations, cable operators must either preemptively notify customers that channels may be dropped (causing significant customer confusion and uncertainly), or agree to unfavorable contract terms in order to avoid customer notifications.

[37] *See* Report and Order, *Sports Blackout Rules*, 29 FCC Rcd. 12053 ¶ 25 (2014) (noting that "NFL games are consistently the highest rated programs on broadcast television").

Nielsen data to make a reasonable determination surrounding what constitutes a marquee event.[38] Using this Nielsen standard, the Commission should establish a *per se* violation of the good faith standard, where broadcasters unreasonably cut off consumers from such highly rated marquee events.

E. Preventing an MVPD from Temporarily Importing an Out-Of-Market Signal in Cases Where the Broadcaster has Blacked Out its Local Signal

USTelecom has previously expressed support for the elimination of the Commission's Network Non-Duplication and Syndicated Exclusivity rules (collectively referred to as the "Exclusivity Rules").[39] Elimination of these outdated rules from a bygone era will foster more market-based negotiations for broadcast signal carriage, thereby enabling MVPDs to deliver must-have programming content to their subscribers.[40] Absent their elimination, the Commission should make it a *per se* violation of the good faith rule in instances where a broadcaster prevents an MVPD from temporarily importing an out-of-market signal in cases where the broadcaster has blacked out its signal.

The Exclusivity Rules provide a broadcast station with an exclusive right to transmit programming in a geographic area and to prohibit a cable system from carrying another station with the same programming. The network non-duplication rules permit a station with exclusive rights to network programming, as granted by the network, to assert those rights by using

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[38] *See*, *ATVA Ex Parte*, pp. 4 – 5.

[39] *See e.g.*, Comments of the United States Telecom Association, MB Docket No. 10-71 (submitted June 26, 2014).

[40] In the satellite context, broadcasters enforce territorial exclusivity through a different mechanism. By statute, broadcast signals from a network station outside the local market may only be provided to viewers: (1) to whom the satellite carrier does not make available the local affiliate of the same network (*see*, 17 U.S.C. § 119(a)(3)(C); 47 U.S.C. § 339(a)(2)(C)); and (2) who reside in so-called "unserved households" where an over-the-air signal of sufficient intensity is not predicted to be available from a local station of the same network (*See* 17 U.S.C. § 119(a)(2)). USTelecom supports similar relief for DBS providers as proposed by ATVA.

notification procedures in the Commission's rules. The rules, in turn, prohibit the cable system from carrying the network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply. Similarly, the Commission's syndicated exclusivity rules enable broadcasters to assert exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.

The outdated Exclusivity Rules have created a lopsided marketplace whereby broadcasters benefit from a competition-free environment buttressed by regulation. This regulatory wall prevents MVPDs from carrying another affiliate of the same network if retransmission consent negotiations fail. It also creates a monopoly marketplace that forestalls the benefits of true competition within any given local broadcast station market. As a result, MVPDs are often faced with broadcast stations adopting a 'take it or leave it' bargaining strategy.

As Chairman Wheeler recently stated, consideration of these rules is an "integral part of any review of the retransmission consent regime."[41] Noting that the negotiations between broadcasters and cable operators over retransmission rights "often result in program blackouts where cable consumers are denied the ability to see a particular channel until the dispute is resolved," Chairman Wheeler stated that the Commission's exclusivity rules "serve to exacerbate this problem for consumers by prohibiting the importation of distant signals, as well as strengthen the position of broadcasters in retransmission disputes, thereby constituting a distortion of free market processes."[42]

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[41] *See e.g.*, Letter from Chairman Tom Wheeler, to the Honorable Charles E. Schumer, November 10, 2015.

[42] *Id.*

A Congressional Research Service study supported a proposal to allow the importation of distant signals when a retransmission consent impasse develops.[43] The study concluded that such an approach could strengthen the negotiating position of MVPDs by potentially allowing them to bargain among alternative providers of the same must-have network programming. It also noted that "giving all MVPDs the ability to negotiate with any network affiliate would strengthen the negotiating leverage of large as well as small MVPDs."[44] Such an approach would also mitigate the harms to consumers, who would otherwise be deprived of programming content.

Contrary to concerns raised by broadcasters, there are still strong incentives for MVPDs to prefer the local station over the importation of a distant network. For example, most MVPD subscribers will still prefer access to the local content provided by the broadcaster. In addition to local news and weather coverage, the local broadcaster likely carries live sports programming of particular interest to such subscribers. Moreover, out-of-market signals are generally only carried in the limited instances where subscriber demand justifies the cost of obtaining retransmission consent and paying much higher copyright fees associated with distant signal carriage.[45]

In addition, the ability of MVPDs to import a distant signal during a broadcaster initiated blackout will subject the local broadcaster to greater competition, thereby promoting localism and benefitting consumers. The Commission has previously found that greater competition among broadcasters promotes localism by providing "added incentives to respond to conditions

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[43] Congressional Research Service, Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, p. 60, July 9, 2007 (*CRS Study*).

[44] *Id.*, p. 61.

[45] Such a scenario only applies to non-DBS MVPDs.

in local markets."[46] Thus, the Exclusivity Rules undermine the Commission's interest in promoting localism by blocking competition from out-of-market stations that would enhance the quality of local broadcast programming.

F. Limits on MVPD Subscribers' Use of Lawful Devices and Functionalities

One aspect of the increasing competition in the video distribution marketplace today involves the explosive growth of alternative programming options and equipment available to consumers.[47] In the current marketplace, MVPD providers are competing with a growing number of providers of alternative video services (*e.g.*, Netflix, Amazon Prime, Hulu) and a vast array of connected devices for consumers (*e.g.*, Roku, AppleTV, Google Chromecast). An important aspect of this competition involves the MVPD deployment of next generation set top boxes that include advanced features such as program recording (by specific episode or series), multi-room viewing, multi-screen viewing, and subscriber-initiated ad-skipping.

Despite the significant consumer demand for such functionalities, and the resulting consumer benefits, broadcasters often seek to restrict such services during the retransmission consent negotiation process. Given these benefits – and the absence of any policy reason for limiting such technologies – the Commission should adopt its proposal to consider such broadcaster demands a *per se* violation of the good faith rules.[48] Such transformative changes in the MVPD marketplace should be encouraged by the Commission, and broadcasters should not

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[46] *See e.g.*, Report and Order on Reconsideration, *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 23 FCC Rcd 2010, ¶ 97 (2008); *see also id*. at ¶ 101 (concluding that "competition, and not concentration of market players, leads to better programming").

[47] *See e.g.*, Sixteenth Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 30 FCC Rcd 3253, FCC 15-41, ¶¶ 214 – 322 (released April 2, 2015).

[48] *Notice*, ¶ 16.

be permitted to deprive consumers of the technologies, services, or features that they increasingly demand.

G. Broadband Per-Subscriber Fees Imposed on MVPDs

To obtain retransmission consent rights to a local broadcast signal, some broadcasters require MVPDs to pay an additional fee based on the number of broadband subscribers they serve, regardless of whether or not those customers also subscribe to subscription video services. This practice may unreasonably raise the cost of video programming because the subscriber base for the retransmission fees may include subscribers who do not consume video services.

Charging for non-users – in a growing number of cases, these may be broadband subscribers who have dropped their video subscription service – goes well beyond the realm of any reasonable condition for access to broadcast content, and is particularly harmful to the MVPDs represented by USTelecom. As many are relatively new MVPD entrants, their respective video market share is dwarfed by incumbent cable companies and other MVPDs. Because these same companies also often provide video, voice and data, in order to create a competitively attractive triple-play offering for consumers, their respective broadband subscribers may far outnumber their video subscribers when initially entering the market.

As a result, their initial entry into the video marketplace is made all the more difficult by the increased content acquisition costs – which are already substantial – when broadband subscribers are used as the basis for determining retransmission consent fees. This is even more harmful to USTelecom-member MVPDs since for many providing a video offering is not much better than a break-even proposition. The Commission should therefore consider demands to include all an MVPD's subscribers – even non-video-service subscribers – in the cost of broadcast signal carriage a *per se* violation of the good faith negotiation standards.

H. Demands for Tier Placement Commitments and Imposition of Minimum Penetration Requirements

Broadcaster-mandated tier placement requirements and imposition of minimum penetration requirements are another area where broadcasters skew the retransmission consent negotiation process in their favor. In addition to mandatorily bundling affiliated content with their broadcast channels, broadcasters often demand that MVPDs place their affiliated networks in the most popular programming tiers. While MVPDs and broadcasters may legitimately bargain for placement of programming channels, the end result of compelled tier placement is that popular programming packages offered by MVPDs are significantly expanded with the addition of programming content that consumers are not demanding.

Allowing MVPDs the flexibility to negotiate for the placement and packaging of these stations would lead to more innovative offerings for consumers. Absent this flexibility, MVPDs cannot tailor their programming to meet customer demand. The ability of MVPDs to offer a variety of tailored programming packages is hindered by these broadcaster tier limitations, and the Commission should find that such tier placement demands constitute a *per se* violation of the good faith rules.

Similarly, the Commission should also consider it a *per se* violation of its good faith rules in instances where broadcaster's impose minimum penetration requirements.[49] Related to tier-placement demands, broadcasters sometimes impose penetration minimums, which require MVPDs to guarantee that broadcaster-affiliated cable networks reach a certain percentage of customers. Such practices limit the ability of MVPDs to offer alternatives to the large tiers of programming that are the subject of tier-placement demands. For example, if a given cable

[49] *Notice*, ¶ 16.

network has an 80% penetration requirement, it must then be among the channels in the service tiers purchased by 80% of all of the MVPD's video service subscribers.

I. Preventing an MVPD From Disclosing Rates, Terms and Conditions of a Contract Proposal or Agreement to the Commission, or Court of Competent Jurisdiction

It should be a *per se* violation of the Commission's good faith rules in instances where broadcasters prevent an MVPD from disclosing information on rates, terms and conditions of a contract proposal or agreement to the Commission or court of competent jurisdiction during a dispute concerning retransmission consent. Such non-disclosure provisions can prevent MVPDs from pursuing legal or regulatory remedies due to their inability to disclose to regulators the prices, terms, and conditions offered, even under appropriate confidentiality conditions. Perhaps even more importantly, such provisions may prevent the Commission from being in a position to enforce its retransmission consent rules by effectively withholding relevant evidence. In addition to foreclosing the opportunity for such remedies by MVPDs, such provisions significantly undermine the ability of the Commission and courts to efficiently and fairly administer such proceedings.

V. Conclusion

It is well past the time for the Commission to reform its retransmission consent rules by reforming its totality of the circumstances test, thereby promoting more balanced and market-based negotiations. The evidence clearly shows that the current retransmission consent framework is in dire need of reform: broadcaster initiated blackouts are at an all-time high, and retransmission consent fees are escalating at an unsustainable rate. In its proceeding, the Commission has an ideal opportunity to adopt critical reforms that will bring greater balance to the retransmission consent negotiation process.

Respectfully submitted,
UNITED STATES TELECOM ASSOCIATION

By: _____

Kevin Rupy
Jonathan Banks

Its Attorneys
607 14th Street, NW, Suite 400
Washington, D.C. 20005
202-326-7300

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