Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 15-216
Implementation of Section 103 of the STELA	)	
Reauthorization Act of 2014	)	
	)	
Totality of the Circumstances Test	)	

COMMENTS OF
NTCA–THE RURAL BROADBAND ASSOCIATION

Dated: December 1, 2015

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SUMMARY

One of the essential components for a functioning market is the free and complete flow of information among all involved parties. But mandatory nondisclosure agreements (NDAs) limit the flow of information and work against smaller providers in particular.

As a result, small video providers are paying drastically increasing sums for content, at rates that far outpace the overall movement of prices in the macroeconomy. While competition and technological innovation should lead to reduced prices, the trend in prices for video content – where detectable at all in the aggregate, even behind the screen of NDAs – provides compelling evidence of catastrophic market failure. Moreover, other obstacles exist beyond prices for access to content. Many smaller video providers have had a broadcaster tie non-broadcast content with broadcast programming, and there is increasing coordination (or worse) among non-affiliated sellers of content that undermines competition. Other woes of the market include threats of withheld content or blackouts (often at inopportune times of peak demand), restrictions with respect to online streaming or other digital transmission rights, and contract clauses that would aim to trump any changes in law enacted by the Federal Communications Commission (the "Commission").

For these reasons, the Commission should reform the "totality of the circumstances" test. NTCA fully supports the recommendations of the American Television Alliance to confirm a number of *per se* violations of good faith negotiating obligations. NTCA also urges the Commission to find that restrictions on sharing of content pricing information with courts, regulators, third party advocates, or the public violate public policy, and that a failure to share relevant information substantiating a bargaining position is likewise an act of bad faith. Other "take it or leave it" positions – such as compelled acceptance of a single provision before a content

agreement may be negotiated as a whole or delayed initiation of negotiations – are issues the Commission should address as well. Finally, the Commission should consider it a *per se* violation of good faith, or a presumptive violation of the totality of the circumstances test, where a broadcaster uses contracts with affiliated networks to interfere with carriage of out-of-market signals.

Finally, the Commission has ample legal authority to undertake the recommendations set forth in this filing. Section 325 of the Communications Act grants broad authority to the Commission to adopt rules that will ensure good faith actions in retransmission consent negotiations. Moreover, STELAR contains a specific directive from Congress to review the totality of the circumstances test, but is not a new grant of authority and does not limit the FCC to considering any one portion of the good faith regulatory regime. Section 706 of the Telecommunications Act and the agency's ancillary jurisdiction further bolster the authority granted in Section 325, and previous Commission rulings make clear that moving toward a fairer retransmission consent negotiation would not dictate the price that broadcasters may charge for retransmitting signals, and thereby would not constitute impermissible common carrier rate regulation.

Each of the steps cited above would not interfere with the operations of the market. To the contrary, they are essential to ensure that the market can function and govern fair dealing among all participants. For these reasons, NTCA respectfully requests that the Commission reform the "totality of the circumstances" test as recommended herein.

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I. INTRODUCTION

NTCA–The Rural Broadband Association ("NTCA," "the Association") hereby submits its comments on proposal of the Federal Communications Commission ("Commission") to reexamine the "totality of the circumstances" test in its retransmission consent good faith negotiation rules.[1] NTCA represents almost 900 rural telecommunications companies, all of whom provide broadband services to their rural communities. These companies operate in areas long ago left behind by larger providers because the markets were too high-cost – too sparsely populated, too far from larger towns and cities, and/or too challenging to serve in terms of topography or terrain. As anchors in the communities in which they live and serve, these small businesses create jobs, drive the economy, and connect rural Americans to the rest of the world. These rural network operators have been at the forefront of the broadband and Internet Protocol

[1] *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality-of-the-circumstances test*, Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109 (rel. Sept. 2, 2015). ("NPRM").

evolution for years, deploying advanced wireline and wireless networks that respond to consumer and business demand for cutting-edge services while extracting greater efficiencies from network operations in the face of operating in difficult-to-serve areas. NTCA members have also been leaders in delivering video services to their communities through their multichannel video programming distributor ("MVPD") affiliates. According to a recent NTCA/INCOMPAS survey,[2] more than 80% of NTCA's members offer video services to their rural service territory.

Video is an increasingly important component of the suite of services NTCA's members offer their subscribers. For all of NTCA's members, the ability to offer quality video services is viewed as an essential component of the business case for broadband deployment (including upgrading of existing broadband plant) and a key driver of broadband adoption in rural areas.[3] A video strategy is therefore an important component to promoting the long-term viability of most rural telecommunications providers.

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[2] *See, NTCA–The Rural Broadband Association and INCOMPAS 2015 Video Competition Survey* ("Survey"), attached to these comments as an Appendix. The survey was conducted under the guidance of NTCA's economist, Richard J. Schadelbauer. Mr. Schadelbauer belongs to the National Association for Business Economics and holds an A.B. degree from Duke University and a M.A. from George Mason University, both in economics.

[3] Fifty-two percent of survey respondents indicated that they have experienced an uptick in broadband adoption in the markets in which they provide video service. (Survey, p. 3.) Further, a National Exchange Carrier Association survey found that rural carriers offering broadband along with a video component had broadband adoption rates nearly 24 percent higher than those companies offering broadband without access to subscription-based video services. (*See,* National Exchange Carrier Association comments *In the Matter of The Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan*, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 [filed Dec. 7, 2009].)

Not only is the provision of video service important to rural providers as a driver of broadband adoption and deployment, it is an essential service provided to rural consumers. A great many rural consumers must rely on the rural provider for subscription service to receive any local broadcast programming. Nearly one-fourth of NTCA's members report that 90% or more of their service area cannot receive an over the air broadcast signal and must pay to receive local news, weather or sports.[4] Further, less than half of NTCA's members face competition with an incumbent cable company or non-DBS provider, and for those that do face competition, 90% face competition in only a portion of their service territory.[5] Larger providers focus their efforts on the more profitable areas, leaving NTCA's community-based providers as the only source of broadcast content.

Any video provider's ability to successfully deploy video services requires access to desirable content under reasonable terms and conditions. A variety of behaviors and strategies employed by programmers and broadcasters make it particularly difficult, however, for small rural carriers to offer content in competitive retail packages that reflect what their subscribers want and can afford. Access to reasonably-priced programming and the inability to compete with other providers, where such competition exists, is causing small providers pause. More than 10% of survey respondents have ceased offering video service in a market whether they previously offered service, and 72% indicated that they have considered eliminating certain

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[4] Survey, p. 2.
[5] *Id.*, p. 1

broadcast and/or non-broadcast programming or refrained from entering a market altogether as a result of rising programming costs.[6]

Governing federal statutory provisions enacted decades ago – and the rules interpreting and implementing these provisions adopted by the Commission– do not reflect today's video services market, and in many cases enable broadcasters to exercise their control over video content to the detriment of consumers and competition. Rising broadcast programming costs are necessarily passed on to consumers and the market is reaching its breaking point.

II. THE EXISTING RULES ARE FAILING CUSTOMERS SERVED BY SMALLER VIDEO SERVICE PROVIDERS, AS THEY RESULT IN HIGHER COSTS AND FEWER OPTIONS FOR VIDEO CONTENT.

By rewarding broadcasters with an overwhelming advantage in negotiating leverage based upon antiquated notions of market conditions, the current rules make it extremely difficult for smaller video providers to obtain access to content at prices and terms comparable to those made available to larger providers. Those ultimately paying the price are the customers of these smaller providers, who end up with fewer options at higher prices than customers served by the larger providers.

A. Non-Disclosure Agreements Frustrate any Potential Operation of an Efficient Market.

One of the essential components for a functioning market is the free and complete flow of information among all involved parties. Asymmetric information—the condition whereby one party to a transaction has significantly greater access to information than the other—is a primary

[6] *Id.*, pp 2-3.

cause of market failure. In fact, economists George A. Akerlof, A. Michael Spence, and Joseph E. Stiglitz were awarded the 2001 Nobel Prize in Economics for their pioneering work studying the harmful impacts of asymmetric information.[7]

The use of non-disclosure agreements (NDAs) all but guarantees that the ultimate result of any negotiations will be skewed in favor of the party possessing greater information—in this case, the broadcaster—and frustrate, rather than facilitate, the workings of an efficient market. Lacking knowledge of the details of any preceding negotiations, smaller providers have no concept of whether or not the pricing, terms and conditions they are being offered (often on a take it or leave it basis) represent a good deal for them, let alone the best possible deal. It takes away any possibility for negotiation, as it eliminates any ability to develop a negotiating strategy.

NTCA/INCOMPAS' survey results bear this out. Nearly half of survey respondents—48%--reported that they have faced contract provisions that prevent disclosure of rates, terms and/or conditions or a contract proposal or agreement to a government entity and/or court of competent jurisdiction.[8] On a related topic, 92% of respondents have been unable to obtain a Most Favored Nation (MFN) provision in contracts with broadcasters and/or other programmers.[9] Large providers with negotiating leverage often have such clauses in their agreements, the effect of which is to virtually guarantee that the smallest providers in any market pay the most for content and/or have the most restrictive contracts. Faced with an NDA and lacking an MFN provision, small providers are kept in the dark, to the benefit of the content provider/programmer. In a time

[7] http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2001/press.html
[8] Survey, p. 5.
[9] *Ibid.*

when "transparency" is such a hot buzzword and the preference is for the market to trump regulation, it is hard to conceive of any reason that broadcasters would wish to cling to their use of NDAs other than to skew the market and perpetuate their unfair advantage over those who have no choice but to attempt to do business with them.

B. Small Video Service Providers Have Faced Excessive Price Increases that Extend Far Beyond the Reach of what can and Should be Considered Reasonable.

Not surprisingly, the end result of small video service providers negotiating from a position of extreme weakness is crippling increases in the price of video content. Forty percent of survey respondents reported increases in broadcast retransmission consent fees during the current contract cycle of greater than 100%. Eleven percent of respondents reported an increase of 200% or more.[10] For small providers with limited resources, price increases of these magnitudes can be crippling, if not fatal.

The results of these drastic price increases are predictable: nearly three-quarters of respondents – 72% – indicated they have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering a market altogether as a result of rising programming costs.[11] At a certain point, it is no longer possible to make a valid business case for continuing to offer video service.

These recent price increases are all the more astonishing when juxtaposed against the movement of prices in the overall macroeconomy. The Consumer Price Index (CPI), a widely

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[10] *Id.*, p. 3.
[11] *Id.*, p. 2.

recognized measure of overall inflation in the economy, grew by a mere 0.2% between August 2014 and August 2015.[12] (Even removing volatile food and energy prices results in CPI growth of only 1.6% over the same period.[13]) Clearly, broadcast programming costs are rising at a rate far beyond that of inflation, with the result that small providers must absorb these costs due to the video competition they face in the marketplace. Such dramatic increases cannot not be easily explained by anything other than a fundamental flaw in the way the current system is structured.

In the Notice, the Commission poses the question "Is there market failure, and if so, what is its source?"[14] Typically, increased competition in a well-functioning market leads to lower prices, *ceteris parabus*. With the influx of new competitors and new technologies into the video marketplace, and with increased distribution avenues, it would be expected that prices would decline. Instead, the severe and extreme price increases faced by small video service providers, directly resulting from the lack of competition in the provision of broadcast programming, offer compelling evidence of catastrophic market failure.

C. In Addition to Lack of Information and Unreasonable Price Increases, Small Video Service Providers Face a Wide Range of Obstacles When Trying to Negotiate Deals with Larger Content Providers.

The survey offers important insight into the myriad challenges small video service providers face on an ongoing basis. Sixty-nine percent of respondents have had a broadcaster require them to obtain non-broadcast programming and/or services (e.g., less-popular networks,

[12] U.S. Bureau of Labor Statistics, "CPI Detailed Report, Data for August 2015," http://www.bls.gov/cpi/cpid1508.pdf, visited October 13, 2015.
[13] *Ibid.*
[14] NPRM, ¶7.

multicast streams, duplicative stations, significantly-viewed stations, after-acquired or unlaunched programming services, etc.)[15] This requirement compels small video service providers to spend more than they would otherwise wish to. Sixty-five percent of respondents have been subject to tier placement and/or subscriber penetration requirements that limit the manner in which broadcasting is offered to their subscribers.[16] Seventeen percent have faced demands for installation of a set-top box in each subscriber's home on each television.[17] Taken together, the net impact of these demands is to give the content provider substantial and excessive influence over the way the customer of the video service provider receives service. Seeing how the content provider has little or no direct interaction with the viewer, the ability to exert this influence is additional evidence of market failure.

Survey respondents provided telling insights into the negotiation process itself. In addition to the significant asymmetric information problem created by the forced imposition of NDAs discussed previously, small video service providers reported facing a number of other odious requirements imposed upon them in the negotiation process. First and foremost is the fact that many times the process is anything but a negotiation in the traditional sense—22% of respondents have had broadcasters demand fees for programming that is not subject to negotiation.[18] In other words, these companies, approaching the negotiating table in good faith, are being told to "take it or leave it." It is hard to describe that as a negotiation under even the loosest definition of that word. In the Notice, the Commission seeks input on "specific

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[15] Survey, p. 4.
[16] *Ibid.*
[17] *Id.*, p. 5.
[18] *Ibid.*

practices…evidencing bad faith negotiation under the totality of the circumstances test."[19] One would be hard pressed to find a more clear-cut example of bad faith negotiation than the outright refusal to negotiate at all.

The Commission seeks input on "negotiating practices that…are inconsistent with the statutory duty to negotiate in good faith."[20] The survey results provide myriad examples: 44% of respondents have been forced to participate in coordinated broadcast contract negotiations (including networks negotiating on behalf of affiliates or a third party negotiating on behalf of multiple non-commonly owned stations across markets.)[21] Forty-six percent have faced a requirement that negotiations for broadcast programming take place at the same time as negotiations for other affiliated "must-have" programming (e.g., regional sports networks, highly-rated multicast or lower power stations, popular national programming networks, etc.)[22] Forty-nine percent have faced a threat to withhold or black out a broadcast station or network in a time period approaching the airing of popular sports, entertainment, or other marquee programming content.[23] Forty-five percent have been threatened with invocation of the FCC's program exclusivity protections during negotiations.[24] Twenty-five percent have had a broadcaster restrict access to online streaming and/or other digital transmission rights to broadcast programming,[25] and 25% have had a broadcaster propose contractual language that

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[19] NPRM, ¶12.
[20] *Id.*, ¶16.
[21] Survey, p. 4.
[22] *Ibid.*
[23] *Ibid.*
[24] *Id.*, p. 5.
[25] *Ibid.*

would require them to comply with regulations even if/when the FCC has modified or eliminated their applicability.[26]

Taken *in toto*, the results of the survey paint a vivid picture of a dysfunctional marketplace where terms are dictated by one party, who holds virtually all of the leverage, to the other, who holds none. The ultimate losers in this unfortunate process are the customers of the small video service providers, who end up with fewer choices, at higher prices, under conditions not of their own choosing.

III. THE COMMISSION SHOULD REFORM THE TOTALITY OF THE CIRCUMSTANCES TEST

The Commission seeks comment on "whether there are specific practices that we should identify as evidencing bad-faith negotiation under the totality-of-the-circumstances test."[27]

A. NTCA Supports the ATVA Proposals.

NTCA is an active member of the American Television Alliance ("ATVA") and supports its proposals, namely that the Commission should identify the negotiation tactics and activities that either constitute *per se* violations of good faith or presumptively violate the totality-of-the-circumstances test. Specifically, it should be found that a broadcaster violates its duty to negotiate in good faith if during the course of negotiations it threatens or engages in any of the following behaviors:[28]

- ***On-line blocking - directly or indirectly restricting access to a broadcast station's or affiliated network's publicly available online video programming or***

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[26] *Ibid.*
[27] NPRM, ¶ 12
[28] *Ex parte of the American Television Alliance*, "Amendment of the Commission's Rules Related to Retransmission Consent," MB Docket No. 10-71 (fil. September 2, 2015), pp. 3-6.

related contact to a subscriber of an Internet service provider that is affiliated with the video service provider or any other subscriber of the video provider or its affiliates.

- ***Forced bundling – requiring a video service provider to carry cable network, non-broadcast programming, multicast programming, duplicative stations or a significantly viewed station as a condition to granting retransmission consent for carriage of the television station's primary signal.***
- ***Blacking out signals around marquee events – withholding retransmission consent during the airing of, during the one-week run up prior to, or for one day after a top-rated marquee event.***
- ***Ceding the right to negotiate – relinquishing to an affiliated television network or an out-of-market, non-commonly owned television broadcast station its right to negotiate or approve a retransmission consent agreement or any material term thereof.***
- ***Restricting equipment – conditioning retransmission consent rights on a video provider's acceptance of restrictions on providing or assisting consumer's use of, lawful devices or functionality.***
- ***Charging for subscribers that do not receive service – demanding payment for every subscriber , includes those that receive the broadcast signal off-air, do not subscribe to the station as part of its pay TV subscription package or that does not take video service as part of their subscription to broadband and/or voice service.***[29]

NTCA is fully supportive of the ATVA proposals, but the small, rural providers represented by the Association face additional, unique challenges in their quest for reasonably priced broadcast programming. Because of the nature of the markets they serve, rural carriers lack the scope and scale to obtain the discounted prices and favorable contract terms enjoyed by the larger vide providers.[30] Rural subscribers are the most reliant on pay TV service, many not having access to an over-the-air signal, and yet pay the most for it.

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[29] This provision should also address forced tiering whereby the MVPD must commit to provide the programming on a specific tier of service or to a certain percentage of all video or other subscribers.

[30] See, e.g., *Opposition to Petitions to Deny and Response to Comments of Charter, Time Warner, and Bright House Networks*, MB Docket No. 15-149 (fil. Nov. 2, 2015), p. 59. In describing the benefits of the Charter-Time Warner Cable merger, "lower programming fees will benefit New Charter's customers and make New Charter a better competitor."

There is no technological or other reason that smaller providers should pay more for programming than larger competitors. The pricing structure is shrouded in secrecy, leaving smaller providers at the absolute mercy of broadcasters who can extract almost any fee or contract term. NTCA offers additional measures to specifically address the pricing discrimination that harms rural consumers and the providers that serve them.

B. The Commission Should Consider Overly Restrictive Non-Disclosure Agreements to be a Violation of Good Faith Negotiation, or at a Minimum a Presumptive Violation the Totality of the Circumstances Test.

The Commission should consider it a *per se* violation of the duty to negotiate in good faith, or at a minimum establish a presumption that a broadcaster violates the totality-of-the circumstances test if it:

> ***Directly or indirectly restricts a MVPD from sharing information about the price it pays or other material terms of a contract with: (i) a court of competent jurisdiction; (b) any regulatory or legislative body, including the FCC, Federal Trade Commission, Congress and/or any state regulatory or legislative body; (iii) any advocacy organization or association, of which the company is a member and pays dues; and/or (iv) the public at large.***

In the context or retransmission consent negotiations, market transparency and price discovery are critical components of a competitive market and will help bridge the differences in the parties' negotiating positions. The number one issue that divides the parties in retransmission consent negotiations is price. The escalating increases are attributable in large part to the fact that the good faith negotiating requirement, as currently implemented, imposes no obligation on a broadcaster to explain, justify or substantiate that its price demands reflect competitive marketplace consideration.

As it currently stands, it is widely understood that the largest cable providers obtain substantial discounts for content. Their superior bargaining position, relative to small providers, ensures that broadcasters work with them as the eyes of their subscribers are necessary to drive prices paid by those wishing to advertise on the network or local broadcast station. Small providers lack that bargaining leverage and the secrecy that surrounds the contracts ensures that they must negotiate in a vacuum, essentially ensuring that small providers pay the more for the same content, delivered in the same manner, as larger providers.

Restricting the use of non-disclosure agreements so that information may be shared with the courts, regulatory and legislative bodies would ensure that decision makers have access to all relevant information in the decision making process. Certainly, the prices and terms offered to small companies, especially if out of line with the rest of the industry, can be evidence of bad faith and decision makers must have access to it.

Furthermore, small companies lack the resources to fully advocate on their own behalf. Unlike large companies with virtual armies of lobbyists and attorneys at their disposal, small companies rely on their industry groups to represent them in front of the Commission, Congress and local decision makers. The lack of full information ties the hands of these third party advocates as they have only partial facts or figures and assumptions upon which to draw conclusions and make comparisons. Association access to the details of the retransmission consent contracts would help ensure that small providers have adequate representation in front of decision makers.

Members of the general public are the ultimate decision makers and should know the impact rising retransmission consent fees have on end user bills. It should be bad faith to restrict a MVPD from telling its customers what it is paying in retransmission consent fees or from creating a line item on a bill that specifies the portion of the bill that is attributed to each broadcaster. Only a fully informed public can make fully informed decisions about how or whether it will pay for broadcast content.

C. Broadcasters Should be Required to Substantiate their Negotiating Positions.

The Commission should consider it a *per se* violation of good faith negotiation, or at a minimum, establish a presumption that a broadcaster violates the totality of the circumstances test if it:

> ***Fails to provide, upon request, relevant information substantiating its bargaining position.***

The Commission previously concluded that relying on established labor law precedent governing collective bargaining as a tool for interpreting and applying the good faith retransmission consent negotiation requirement was consistent with Congressional intent.[31] As a group of interested parties, including NTCA, described in an *ex parte* filing,[32] it is a well-settled principle of labor law that negotiating parties have an obligation to provide, upon request, relevant information substantiating claims made in the course of the negotiation.[33] The exchange

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[31] *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). ("2000 Good Faith Order").
[32] *Ex parte of CenturyLink, et al,* STELA Reauthorization of Act of 2014, § 103(c) - Good Faith Retransmission Consent Negotiations (August 18, 2015). ("STELA *ex parte").*
[33] *NLRB v. Truitt Manufacturing Co.,* 351 U.S. 149, 153 (1956) ("refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to negotiate in good faith"), *see also, NLRB v. Cable Vision, Inc.*, 660 F. 2d 1 (1st Cir 1981) (court stated that the question of a violation is whether, from totality of employer's conduct, employer appeared to "go through the motions" of negotiations as a pretense, with no sincere desire to reach agreement).

of relevant information during negotiations mitigates differences in the parties' bargaining power and increases the chance of a successful completion of a collective bargaining agreement.

It is obvious that the Commission's rejection 15 years ago of a broadcaster duty to justify their explanations by document or evidence is outdated and is hurting small providers. The Commission, in rejecting the disclosure requirement, found that there was "no mutuality of obligations" and the disclosure would be one-sided.[34] However, in 2004, Congress amended Section 325(b)(3)(C) in 2004 to impose on MVPDs a "reciprocal" good faith bargaining obligation.[35] Given this recognized mutuality of obligations, "the required 'good faith' negotiations cannot take place when one of the negotiating parties holds all the cards."[36]

Today, broadcasters are unrestricted by any requirement that they justify their price demands or any terms of their contract. Small providers are provided "take it or leave it" offers with little to no further explanation or negotiation. Broadcasters must justify price demands or other contract terms based and any broadcaster that claims that they are based on the "market" or any other measure, should be required to provide documentation substantiating those assertions.

D. A Retransmission Consent Agreement should be Negotiated as a Whole.

The Commission should consider it a *per se* violation of the requirement to negotiate in good faith, or at a minimum, establish a presumption that a broadcaster violates the totality-of-the-circumstances test if it:

> ***Provides an incomplete offer, forcing the MVPD to agree to one or more terms of a contract before having access to the other terms being offered.***

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[34] 2000 Good Faith Order, ¶ 44.
[35] *The Satellite Home Viewer Extension and Reauthorization Act of 2004*, Pub. L. No. 108-447 § 207 (amending 47 U.S.C. § 325 (b)(3)(C)).
[36] STELA *ex parte, p. 3.*

Small video providers are being presented with “take it or leave it” contract provisions, without the ability to review all of the terms of an agreement. Specifically, broadcasters are demanding a price for content and will not provide or negotiate the rest of the terms of the agreement until such time as the small MVPD agrees to the set price.

Price is but one component of a retransmission consent agreement. An entire agreement provides a perspective that one cannot glean from a single contractual term. A partial offer that must be accepted before other terms are presented eviscerates the usual push and pull of contract negotiation. A contract negotiation is a balancing act, changing the position of one term impacts its equilibrium. Forcing MVPDs to agree to price before any other contact term will be discussed puts them on the losing side of the fulcrum with the broadcaster holding all of the weight and power. It is not a “good faith” negotiation.

E. Small MVPDs Should Not be Subjected to Last Minute Retransmission Consent Negotiations.

The Commission should consider it a *per se* violation of good faith negotiations, or at a minimum, establish a presumption that a broadcaster violates the totality-of-the-circumstances test if it:

> ***Makes an initial offer or begins negotiations less than 90 days before a contract is set to expire.***

Small video providers report that broadcasters refuse to make offers or negotiate with them until the 11th hour. This forces small MVPDs to accept unfavorable contract terms under fear of blackout. The parties should have at least 90 days to consider propels and counter-proposals to successfully negotiate an agreement.

F. It Should be Bad Faith to Enter Into Agreements that Restrict Out-of-Market Signal Carriage.

The Commission should consider it a *per se* violation of good faith, or at a minimum, establish a presumption that a broadcaster violates the totality-of-the-circumstances test if it:

> ***Enters into an agreement with its affiliated network that has the effect of limiting the ability of, or creating disincentives for, the station to grant retransmission consent to any MVPD for out-of-market carriage.***

Broadcasters and networks are interfering with the rights of MVPDs to carry distant signals and prohibiting out-of-market broadcasters from entering into retransmission consent agreement where such carriage otherwise would be permitted. These practices undermine and distort policies set by Congress and the Commission regarding permissible, and desirable, extent of protectable program exclusivity.

Networks should not be permitted to interfere with a MVPD's ability to negotiate in good faith with a broadcaster willing to negotiate for out-of-market carriage of a signal to serve its customer's needs.[37] This is particularly so for carriage outside the local broadcasters' exclusivity zone or when the distant signal is "significantly viewed."

Because local broadcasters remain the only source for the programming that consumers demand as part of their MVPD subscription, the exclusivity provisions shift bargaining power to broadcasters who use their sole supplier bargaining leverage to demand exorbitant retransmission consent fees. As a result, many MVPDs, particularly smaller and new entrant providers, sell

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[37] For a more complete discussion of the policy behind this proposal and the legal arguments in support, *See, Comments of the American Cable Association, In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* MB Docket No. 10-71 (filed May 27, 2011), Reply Comments of the American Cable Association, MB Docket No. 10-71 at 2-41 (filed June 27, 2011).

video services at a loss while maintaining the complementary voice and data service subscriptions that utilize other investments in their network. These perpetually rising costs for consumer-demanded programming ensure that smaller and new entrant MVPDs have less capital with which to deploy and/or upgrade their networks.

While MVPDs desire to enhance their customers' video offering by providing access to local programming at reasonable prices, they are at risk of losing subscribers as a result of signal blackouts when broadcasters walk away from retransmission consent negotiations. Out-of-market signals are 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. Indeed, carriage of distant signals has been in decline because such fees have become increasingly cost prohibitive. Prohibiting exclusivity would be another tool to keep broadcasters at the negotiating table and ensure that consumers are not harmed by the loss of local programming via blackouts.

G. The Commission Should, at a Minimum, Repeal the Exclusivity Rules That Put the Commission in the Position of Enforcing Contractual Exclusivity Agreements between Broadcasters and Program Suppliers.

The exclusivity rules were first enacted before cable providers were required to obtain copyright clearance for the broadcast programming they retransmitted, and before they were required to obtain consent of the broadcaster for use of its signal. Given legal and marketplace changes, the rules are redundant, since they only allow for FCC enforcement of contractual rights. The Commission's program exclusivity rules do not themselves confer exclusivity on broadcast stations. Rather, they merely serve as an additional (and unnecessary) means of enforcing contractual exclusivity agreements between broadcasters and program suppliers. In reality, the rules likely distort the marketplace. By giving regulatory special treatment to some kinds of contractual arrangements between programmers, networks, and local stations, the rules can encourage players to continue entering into these arrangements instead of exploring new ways to deliver programming to viewers.

IV. LEGAL AUTHORITY

A. Section 325 and the Satellite Television Extension and Localism Act Reauthorization Act of 2014 (STELAR)

In Section 103(c) of STELAR, Congress directed the FCC to commence a rulemaking that the agency already had authority to commence under Section 325(b)(3)(C) of the Communications Act. Section 325 grants the FCC broad discretion to adopt rules that define and implement the good faith obligation.[38]

The Commission relied on the Section 325 grant of authority when promulgating the two-part test for good faith negotiation – both the list of objective "*per se*" negotiation standards and the totality of the circumstances standard,[39] the latter being defined in part by a list of bargaining proposals that are presumptively inconsistent with competitive marketplace considerations and the good faith negotiation requirement.[40]

Though the STELAR directive is limited to the totality of circumstances standard, the Commission has authority under Section 325 to review and update rules to ensure that retransmission consent negotiations are conducted in good faith. Indeed, the agency relied on

[38] 2014 Joint Negotiation Order, ¶ 31.
[39] 2000 Good Faith Order, ¶ 30-32.
[40] *Id.*, ¶ 58.

Section 325 last year when adding to the list of *per se* violations, even concluding that the provision "provides an independent statutory basis for our rule."[41]

Many of the proposals enumerated above are substantially similar to an existing *per se* violation, and the agency therefore has authority to add them to the list.[42] Further, the practices listed by NTCA and ATVA are all inconsistent with competitive marketplace considerations as applied to small, rural carriers because they "result from an exercise of market power…the effect of which is to hinder significantly…MVPD competition."[43]

The competitive landscape faced by small carriers is clearly articulated above. Given this scenario that forces small MVPDs to pay more for content than larger carriers, it is time to further define the "competitive marketplace considerations" analysis that the FCC first put forward in its Good Faith Order. In that Order, the FCC listed presumptively legitimate bargaining proposals, and noted that "these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own."[44] Unfortunately for the small MVPD, that is not the case for the proposals listed above – the small carrier has no choice but to accept non-

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[41] 2014 Joint Negotiation Order, ¶ 11, 30 (stating that joint negotiations by Top Four stations are inconsistent with national policies favoring competition, such as agreements not to compete or fix prices).

[42] For example, forcing an MVPD to agree to certain terms before having access to other terms is akin to a refusal "to put forth more than a single, unilateral proposal", and refusing to begin negotiations until the contract is near expiration is arguably "acting in a manner that unreasonably delays retransmission consent negotiations." *See* 47 C.F.R. Sec. 76.65(b)(1)(iii)-(iv).

[43] Good Faith Order, ¶ 58 (Further, some practices are illustrative of multiple examples of bargaining proposals presumptively inconsistent with competitive marketplace considerations. Non-disclosure agreements, in addition to hindering small MVPD competition, are also "proposals for contract terms that would foreclose the filing of complaints with the Commission").

[44] *Id.*, ¶ 56.

disclosure agreements, incomplete offers that hide certain provisions, charges for non-video broadband customers, and other anticompetitive practices that do not reflect "the sincere intent of trying to reach an agreement acceptable to both parties."[45]

Just as the FCC recently defined a new *per se* violation of Section 325 by determining that certain joint broadcaster negotiations were presumptively anticompetitive, the same authority may be used to further expand the list of *per se* violations as described above. The practices listed by NTCA and ATVA, if added to the body of good faith law as per se violations of the good faith negotiation requirement, would bring the retransmission consent regime closer to the competitive marketplace that Congress intended for establishing "the relative benefits and costs to the broadcaster and MVPD."[46] To the extent this would require looking into the substantive terms of retransmission consent negotiations, the NPRM noted that Congress contemplated as much when considering STELAR.[47]

B. Section 706 and Ancillary Jurisdiction

The Commission's Section 706 authority further bolsters the case that it needs no further grant of authority from Congress before taking the actions described herein. The data has long demonstrated that the availability of affordable video service is a key driver for rural broadband

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[45] *Id.*, ¶ 39. *See also* ¶ 24 ("Congress intended that the Commission 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.").
[46] *Id.*, ¶ 8.
[47] NPRM, ¶ 1, FN 6 (quoting S. Rep. No. 113-322 at 13 (2014) ("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."))

deployment and adoption. Section 706(a) directs the Commission to take actions that "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" in part through "other regulating methods that remove barriers to infrastructure investment." Providing small MVPDs with a retransmission consent regime designed to produce fair negotiations will lower video costs for the consumer, thereby promoting broadband adoption and investment.

Though the Commission has sufficient authority to act under Section 325 alone, its ancillary jurisdiction provides further authority, in that the rules contemplated above are within the agency's subject matter jurisdiction and are more than "reasonably ancillary" to the Commission's effective performance of statutorily mandated responsibilities in Section 325.[48] As noted above, the NTCA and ATVA proposals for new per se violations dovetail nicely with the FCC's existing framework for enforcing the good faith requirement.

C. The Proposed Reforms Would Not Regulate Rates

Both Supreme Court precedent and FCC rulings make clear that delineating specific violations of the good faith requirement and other changes advocated by most video providers to ensure continuous, affordable video service for the consumer would not amount to treating broadcasters as common carriers or common carriage rate regulation.

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[48] *American Library Ass'n v. FCC*, 406 F.3d 689, 703–04 (D.C. Cir. 2005). For example, if the use of NDAs preclude the Commission from measuring whether retransmission consent agreements reflect "competitive marketplace considerations," this would frustrate the performance of duties under Section 325.

A common carrier does not "make individualized decisions, in particular cases, whether and on what terms to deal."[49] In the 2011 data roaming order,[50] the FCC stated that the roaming obligations imposed on providers of mobile data services were not common carrier rate regulation, because providers retained flexibility to negotiate commercially reasonable charges, and provision service subject to individually negotiated contractual provisions. The agency contrasted the data roaming order with *Midwest Video II,*[51] where the Supreme Court held that FCC rules for cable operators were impermissible common carrier regulation because the rules circumscribed and delimited what operators could charge for access.

In the present case, no one is asking the FCC to delimit what broadcasters may charge MVPDs for retransmitting signals. Instead, video providers are advocating for an update to the good faith negotiation framework that will produce competitive retransmission consent negotiations in a more transparent marketplace and on a more level playing field.

V. CONCLUSION

For all of the reasons detailed above, NTCA urges the Commission to reform the totality of the circumstances test. Small providers have shown that they face numerous daunting obstacles in trying to obtain access to video content at reasonable prices under reasonable conditions. Absent some type of action on the Commission's part, these providers will not be able to provide the types of service their customers wish to receive.

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[49] *National Association of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601, 608-09 (1976).
[50] 2011 Roaming Order, ¶ 68.
[51] *See Midwest Video II*, 440 U.S. at 694, 701-02 (1979).

Broadcasters possess overwhelming and undue leverage when entering into negotiations with smaller video service providers. As they have not shown any inclination to refrain from abusing this leverage, it falls to the Commission to take necessary steps toward a more level playing field. By enacting the common sense recommendations contained herein, the Commission take a significant step toward ensuring fair negotiations for programming and access to reasonably priced video content for all Americans who wish to receive it.

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APPENDIX:

NTCA–The Rural Broadband Association and INCOMPAS
2015 Video Competition Survey

New survey finds 95% of small MVPDs and new entrants into the video market struggle to obtain reasonably-priced programming, and 40% report retransmission consent fee price increases of more than 100% during the current contract cycle.

Recently, the FCC has shown increased interest in issues that promote video competition, and has issued a Notice of Proposed Rulemaking (NPRM) addressing the good faith negotiating standard in retransmission consent. Furthermore, the Commission is considering an Order to eliminate the agency's outdated program exclusivity rules.

In September of 2015, NTCA and INCOMPAS ("the associations") conducted a survey of their membership to gather data and information regarding their provision of video services and their experience negotiating with broadcasters and other entities for content.

The survey was conducted online. The URL was sent to each of the associations' member companies. A total of 226 companies participated in the survey, comprised of both NTCA and INCOMPAS member companies. The NTCA respondents are small incumbent providers offering voice, broadband, wireless and video service to rural America, while the INCOMPAS respondents are competitive wireline broadband providers offering residential video (MVPD) , broadband, and voice services.

Based on this sample size, the results of this survey can be estimated to be accurate within +/- 6% at the 95% confidence level.

SURVEY RESULTS

Overview – Video Service Provision

- **87%** of survey respondents currently provide video service. Of those who do not, **31%** plan to do so in the immediate future, **38%** do not, and **31%** are not sure.

- **77%** of those providing video service do so via IPTV, **47%** via Cable TV, and **2%** via resale DBS. **6%** do so via some other means. (Among the INCOMPAS member companies only, **100%** use IPTV, **40%** cable and **40%** resale DBS.)[1]

- **49%** compete with an incumbent cable company or non-DBS provider some portion of their service territory, **10%** in 100% of their service territory, and **40%** do not face competition. (Among INCOMPAS members only, all face competition: **29%** compete in some portion of their service territory, and **71%** in 100% of their service territory.)

[1] Totals exceed 100% as respondents may utilize more than one means of providing video service.

- **72%** of survey respondents have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering a market altogether as a result of rising programming costs.

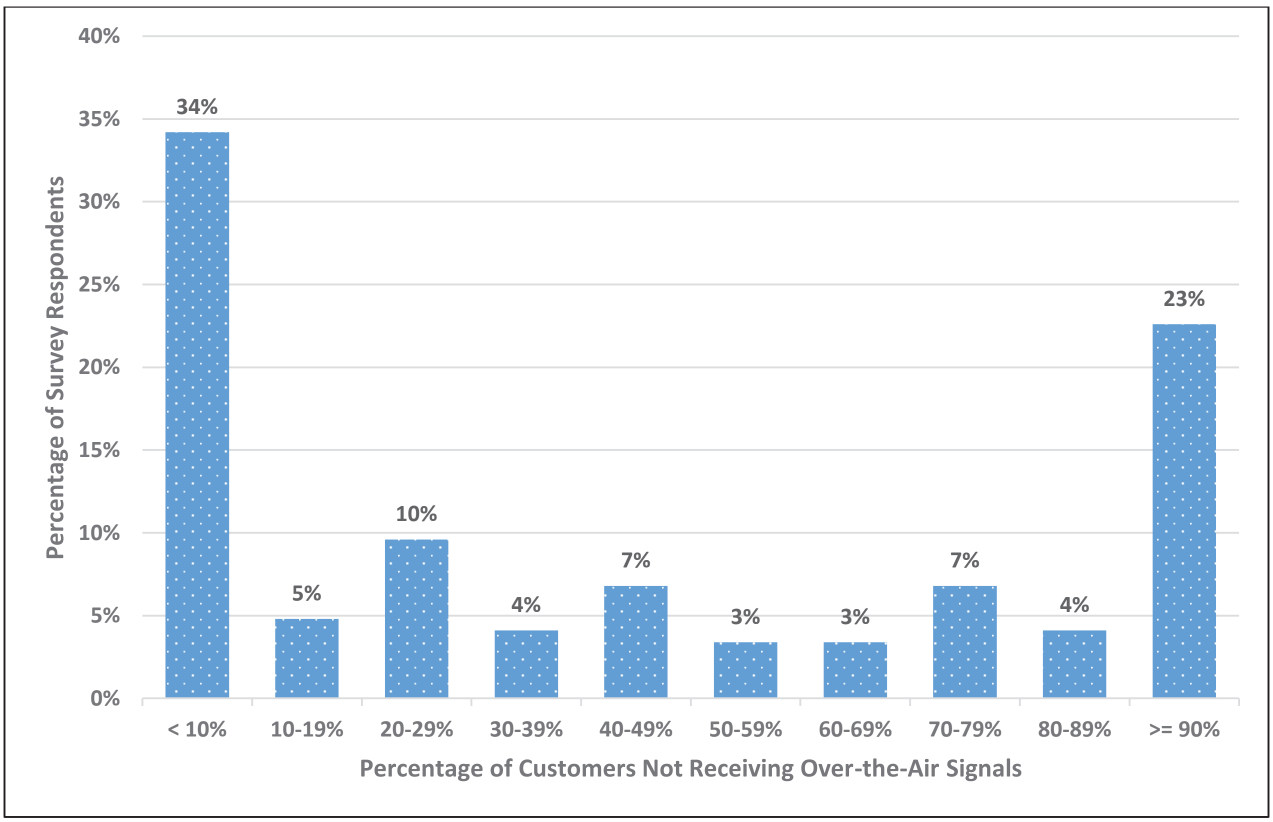
- **12%** have ceased offering video service in a market where they previously offered service.

- **74%** have experienced video subscriber losses in any market in the past year.

Importance of Providing Video

- **52%** have experienced an uptick in broadband adoption in the markets in which they provide video service.

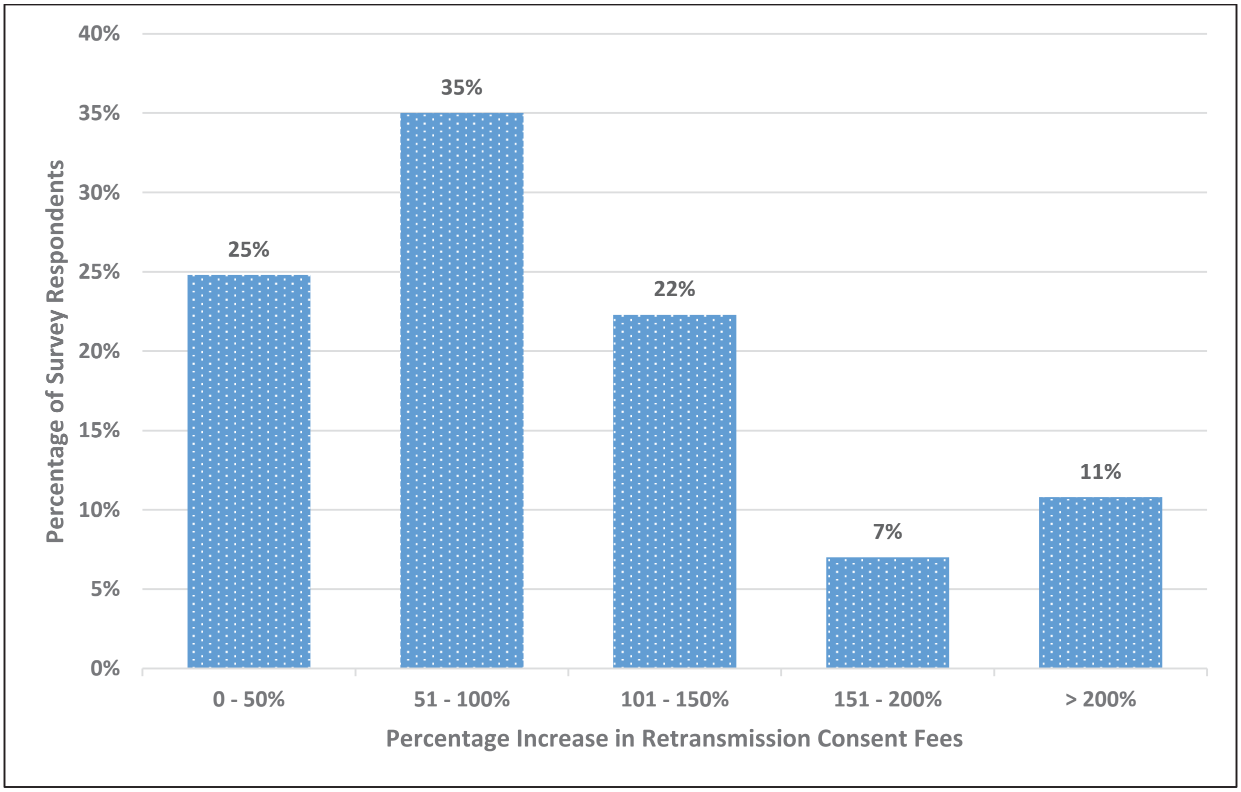
- Respondents were asked what percentage of their service area households cannot receive over-the-air broadcast signals. **34%** of respondents reported that 10% or less of their customers cannot receive over-the-air broadcast signals, while a total of **40%** responded that 50% or more of their customers could not receive over-the-air broadcast signals. In fact, **23%** reported that 90% or more of their customers cannot obtain over-the-air broadcast signals. The complete results are as follows:



Barriers and Challenges to Providing Video

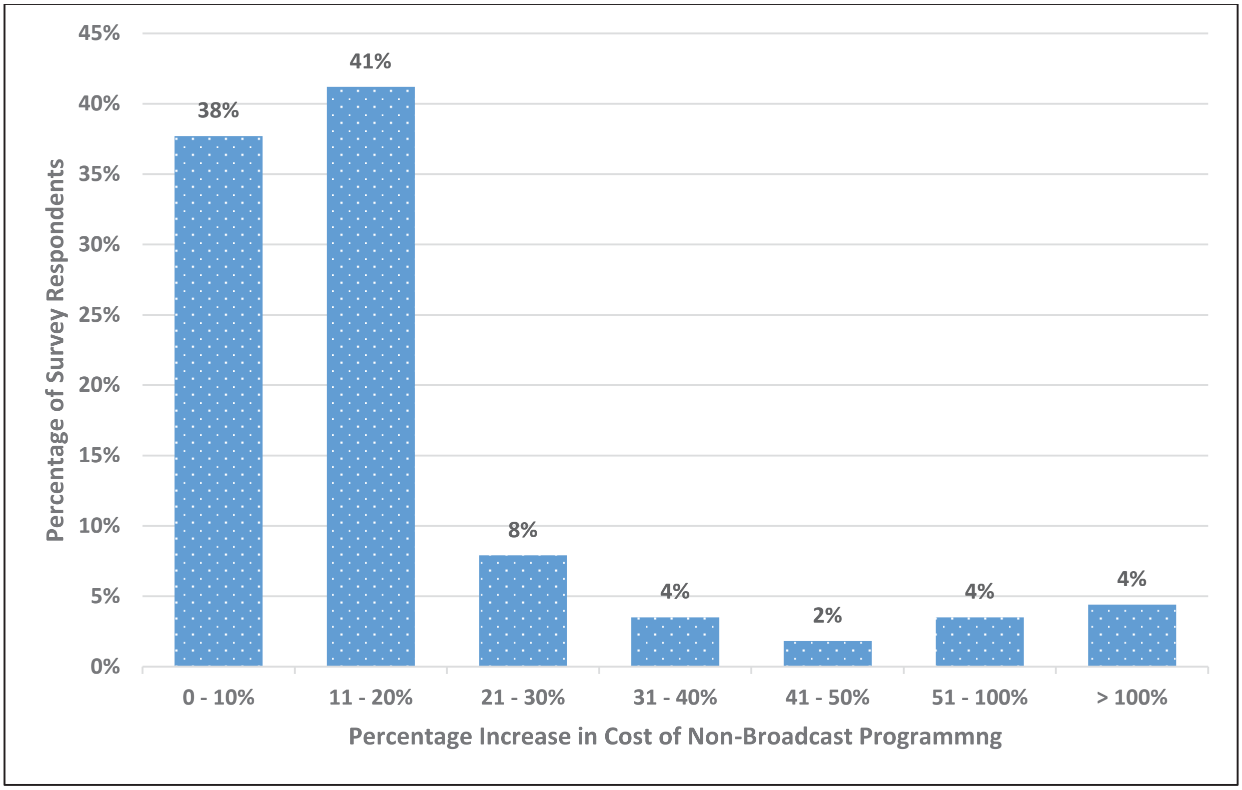
- The single biggest barrier to providing video service is obtaining access to reasonably-priced programming, cited by **95%** of respondents. Other barriers cited include competing with other providers (**53%**), making a business case for video (**53%**), the cost of necessary customer premise equipment (i.e., set top box) (**36%**), cost of necessary network equipment (**35%**), obtaining/acquiring customer premise equipment (**4%**), obtaining/acquiring network equipment (**4%**), and obtaining financing (**2%**).[2]

- **40%** reported percentage increases in retransmission consent fees during the current contract cycle in comparison to the previous contract cycle of more than 100%. **11%** reported increases of more than 200%. The complete results are as follows:



- **38%** reported percentage increases in the cost of non-broadcast programming during the current contract cycle in comparison to the previous contract cycle of between 0 and 10%. **41%** reported increases of 11 to 20%. The complete results are as follows:

[2] Totals exceed 100% as respondents were allowed to select more than one barrier.



<u>Retransmission Consent Negotiation Challenges</u>

- **69%** of survey respondents have had a broadcaster require them to obtain non-broadcast programming and/or services (e.g., less-popular networks, multicast streams, duplicative stations, significantly-viewed stations, after-acquired or unlaunched programming services, etc.)

- **65%** have been subject to tier placement and/or subscriber penetration requirements that limit the manner in which broadcasting is offered to their subscribers.

- **44%** have been forced to participate in coordinated broadcast contract negotiations (including networks negotiating on behalf of affiliates or a third party negotiating on behalf of multiple non-commonly owned stations across markets.)

- **46%** have faced a requirement that negotiations for broadcast programming take place at the same time as negotiations for other affiliated "must-have" programming (e.g., regional sports networks, highly-rated multicast or lower power stations, popular national programming networks, etc.)

- **49%** have faced a threat to withhold or black out a broadcast station or network in a time period approaching the airing of popular sports, entertainment, or other marquee programming content.

- **45%** have been threatened with invocation of the FCC's program exclusivity protections during negotiations.

- **5%** have had a broadcaster or other programmer block access (or threaten to block access) to its online content for video subscribers, **2%** for their Internet subscribers, and **9%** for both their video and Internet subscribers (**16%** total.)

- **20%** have faced demands for fees for their voice and/or Internet services subscribers who do not take their video service.

- **22%** have had broadcasters demand fees for programming that is not subject to negotiation.

- **6%** have had broadcasters demand fees for subscribers who do not take broadcast channels (e.g., over-the-air programming, foreign language-only programming, etc.)

- **22%** have faced demands for the placement of limitations on subscribers' use of lawful devices and/or functionalities.

- **17%** have faced demands for installation of a set-top box in each subscriber's home on each television receiver. (Among INCOMPAS members only, **40%** have faced such a demand.)

- **48%** have faced contract provisions that prevent disclosure of rates, terms, and/or conditions or a contract proposal or agreement to a governmental entity and/or court of competent jurisdiction.

- **92%** have been unable to obtain a Most Favored Nation (MFN) provision in contracts with broadcasters and/or other programmers.

- **25%** have had a broadcaster restrict access to online streaming and/or other digital transmission rights to broadcast programming.

- **25%** have had a broadcaster propose contractual language that would require them to comply with regulations even if/when the FCC has modified or eliminated their applicability.

<u>**Conclusions**</u>

- **Sky High Prices: NTCA and INCOMPAS member companies seeking to provide video service to their customers must deal with exorbitant price increases for both broadcast and non-broadcast programming.** Forty percent of survey respondents reported increases in retransmission consent fees of more than 100% during the current contract cycles; 11% reported increases in excess of 200%. And while the percentage increase in the cost of non-broadcast programming seemed tame by comparison—62% of respondents reported increases during the current contract cycle of greater than 10%, and 21% reported increases of greater than 20%--this, too is quite extreme next to the growth in the Consumer Price Index (CPI). The CPI, a widely recognized measure of overall inflation in the economy, grew by a mere 0.2% between August 2014 and August 2015.[3] (Even removing volatile food and energy prices results in CPI growth of only 1.6% over the same time period.[4]) Clearly, programming costs are rising at a rate well in excess of inflation, with the result that our members absorb theses costs due to the video competition they face in the marketplace. Such dramatic increases pose a significant threat to the ongoing viability of these small companies' operations, including their ability to upgrade their networks and deploy more broadband.

- **Competition Needs a Package Deal: In order to remain competitive in today's marketplace, NTCA and INCOMPAS member companies need to be able to offer packages of voice, broadband and video.** Today's consumers are increasingly drawn to "triple play" packages—bundled service packages that include voice, broadband and video service. If a provider is unable to provide any one of the three components of the triple play, they are placed at an insurmountable disadvantage compared to larger competitors. Additionally, more than half of survey respondents reported that offering video leads to an uptick in broadband adoption rates. Without the ability to offer video, broadband adoption rates would likely fall, contrary to the Commission's ongoing efforts to increase broadband adoption throughout the country and contrary to the Commission's goal of promoting multiple broadband offerings to consumers.

- **Big Broadcaster Control: Broadcasters hold an overwhelming advantage in contract negotiations, and as a result offer small companies unrealistic contract terms.** Survey results clearly show that NTCA and INCOMPAS member companies are not able to exert any type of leverage in their negotiations with programmers. Actually, "negotiation" may not be the proper term to use, as many companies report having terms of service dictated to them with no opportunity to procure more favorable terms. This one-sided tilt in the balance of power results in outcomes that unfairly favor the programmers, and harm the small providers and, ultimately, their current and potential customers.

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[3] U.S. Bureau of Labor Statistics, "CPI Detailed Report, Data for August 2015," http://www.bls.gov/cpi/cpid1508.pdf, visited October 13, 2015.

[4] *Ibid.*