

**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 INCOMPAS

Angie Kronenberg
Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5745

December 1, 2015

TABLE OF COMMENTS

I. INTRODUCTION & SUMMARY..... 1

II. INCREASING VIDEO PROGRAMMING COSTS IMPEDE RESIDENTIAL WIRELINE BROADBAND COMPETITION..... 3

III. THE COMMISSION MUST PROVIDE SPECIFIC GUIDANCE ON ANTICOMPETITIVE PRACTICES THAT VIOLATE THE DUTY TO NEGOTIATE IN GOOD FAITH..... 9

 a. INCOMPAS Members Providing Video Service Have Faced Practices That Should Be Considered *Per Se* Violations of the Duty to Negotiate in Good Faith..... 10

 i. The Commission Should Prohibit Broadcasters From Presenting Renewal Proposals Less Than Six Months Before the Expiration of a Current Retransmission Consent Agreement..... 11

 ii. The Commission Should Bar Broadcasters’ Unreasonable Tying and Tiering Demands..... 12

 iii. MVPDs Should Not Be Forced Through Retransmission Consent Agreements to Comply With FCC Regulations That Have Been Eliminated..... 14

 iv. The Commission Should Prevent Negotiating Tactics That Threaten the Use of Blackouts During Marquee Events and Special Programming..... 15

 b. In the Alternative, These Practices Are Inconsistent with the Good Faith Negotiation Requirement and Frustrate the Competitive Market 16

IV. THE COMMISSION SHOULD PROMOTE TRANSPARENCY OF RATES TO PREVENT PRICE DISCRIMINATION BETWEEN SMALL AND LARGE MVPDs 16

V. CONCLUSION..... 18

**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 INCOMPAS

INCOMPAS, by its undersigned counsel, submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Notice of Proposed Rulemaking* (“NPRM”) reviewing the framework for evaluating good faith negotiations in retransmission consent negotiations.¹

I. INTRODUCTION & SUMMARY

As the preeminent national industry association for competitive communications networks and service providers, INCOMPAS represents companies that provide broadband, linear multichannel video programming distribution (“MVPD”), and voice services in urban, suburban, and rural areas. Most INCOMPAS members distributing video programming to residential subscribers are broadband providers that have recently entered the video marketplace to compete with other providers and to achieve higher broadband adoption rates. Obtaining programming rights is critical to offering linear video service; however, since entering the

¹ *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 20 (2015) (“NPRM”).

market, INCOMPAS members have encountered significant challenges in negotiating retransmission consent agreements at non-discriminatory and reasonable rates. This makes it difficult for the INCOMPAS members to offer a viable alternative to incumbent multichannel video service providers. To stay competitive in the broadband marketplace, therefore, small MVPDs and new entrants are providing linear video service, often at a loss, simply to meet consumer demand for bundled offerings. This situation has contributed directly to these providers' inability to expand or upgrade their broadband networks.

While video services remain vital to broadband network deployment and adoption, video programming prices and retransmission consent negotiation practices and pricing, make it particularly difficult for INCOMPAS members to offer content in competitive retail packages that reflect what consumers want and can afford. INCOMPAS accordingly supported the Congressional action that gave rise to this proceeding. The Commission should act now to “provide additional specific guidance as to actions that, taken as a whole, evidence bad faith based on the totality of the circumstances.”²

The NPRM identifies a number of anticompetitive negotiation practices. The FCC should find several of these practices to be *per se* violations of the broadcasters' duty to negotiate retransmission consent agreements in good faith. Failure by a broadcaster to deliver a renewal proposal within six months of contract expiration, forced tying or tiering of programming, forcing MVPDs contractually to continue to comply with FCC rules or policies that have been eliminated (such as program exclusivity rules once the Commission's pending Order is adopted), and using blackouts during marquee or special programming or otherwise withholding

² Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) (“Senate Report”).

programming to gain negotiating leverage should be *per se* violations of the good faith negotiation framework. In the alternative, these practices should be considered presumptively inconsistent with competitive marketplace considerations under the totality of the circumstances test. The Commission also should adopt measures to promote transparency of rates in retransmission consent negotiations so that new entrants and small MVPD competitors—that consistently have to pay more for programming than large incumbent MVPDs—are not disadvantaged in the marketplace.

II. INCREASING VIDEO PROGRAMMING COSTS IMPEDE RESIDENTIAL WIRELINE BROADBAND COMPETITION

The Commission has long recognized that consumers prefer to purchase broadband and linear video services together in a bundled product.³ As such, new entrants and small MVPDs must provide competitive linear video services—not just broadband services—to compete head-to-head with other residential wireline providers and to achieve higher broadband adoption rates.⁴

As the Commission is aware, obtaining video programming rights is critical to offering

³ See, e.g., FCC, *Connecting America: The National Broadband Plan*, 38 (2010), available at <http://transition.fcc.gov/national-broadband-plan.pdf>. Indeed, when smaller carriers offer video and broadband services together, broadband adoption increases by 24%. COMPTTEL, ITTA, NTCA Letter to Senator John Thune, Chairman, Senate Committee on Commerce, Science, and Transportation, June 22, 2015, available at <http://www.ntca.org/images/stories/Documents/videohearingletter.pdf>.

⁴ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶¶ 51, 62 (2006) (“The record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”).

linear video service; however, content costs continue to rise significantly.⁵ Recently, the American Cable Association (“ACA”) submitted data to the Commission demonstrating that over the “last eight years, total programming fees for the U.S. multichannel video industry have more than doubled.”⁶ Moreover, per subscriber programming fees “increased an average of 9.4% a year between 2010 and 2015.” For smaller MVPDs, the increase in fees has been even greater—10.6%—even excluding regional sports networks and retransmission consent fees.⁷ Likewise, the American Television Alliance (“ATVA”) et al. reported that retransmission consent fees grew 8,600% between 2005 and 2012.⁸ Furthermore, SNL Kagan data showed that in 2014 “the average amount paid per pay-TV subscriber for broadcast retransmission has increased 40 percent”⁹ and broadcast stations are “looking to sustain these quickening fee increases.”¹⁰

The ACA Research Paper predicts that while programming fees will continue to grow

⁵ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd. 3253, ¶ 39 (2015).

⁶ Comments of the American Cable Association in MB Docket No. 15-158, *High and Increasing Video Programming Fees Threaten Broadband Deployment Research Paper*, at 5 (Aug. 21, 2015) (“ACA Research Paper”).

⁷ *Id.*

⁸ ATVA *et. al* Ex Parte Notice, MB Docket No. 10-71 (July 17, 2015) (*citing* SNL Kagan, *Broadcast Investor Deals & Finance: Retrans Projections Update: \$10.3B by 2021*, June 30, 2015 (“SNL Kagan June 30, 2015”)).

⁹ Daniel Frankel, *Nexstar Makes \$4.1B Hostile Bid for Media General as Broadcast Consolidation Binge Kicks into Overdrive*, FIERCETELECOM (Sep. 28, 2015), *available at* www.fiercecable.com/story/nexstar-makes-41b-hostile-bid-media-general-broadcast-consolidation-binge-k/2015-09-28.

¹⁰ *Id.*

rapidly in the future,¹¹ retail prices for video subscribers likely will be more constrained due to direct MVPD competition and availability of OVDs.¹² Due to this squeeze on providers as programming fees increase faster than retail charges, the business case for new broadband deployment in the near future will be even “less tenable” for rural expansion, new fiber deployments, and incumbent telco deployments. INCOMPAS’ members already are offering linear video service at a loss, forfeiting providing a video service entirely, or outsourcing this service, all of which impedes broadband network expansion and upgrades.

INCOMPAS members are not alone: other broadband providers also face this predicament. WTA has indicated that its members’ network upgrades have not affected favorably their ability to compete given their inability to secure reasonable rates for video programming.¹³ NTCA has stated that “video services remain vital to the deployment and adoption of broadband services”¹⁴ and that video programming rates and terms make it “particularly difficult . . . for small rural carriers to offer content in competitive retail packages that reflect what their subscribers want and can afford.”¹⁵ ITTA has observed that small and new entrant MVPDs’ inability to secure access to programming content at reasonable rates “deters them from entering new video markets altogether.”¹⁶

¹¹ ACA Research Paper at 5. Similarly, SNL Kagan estimates that TV broadcasters’ retransmission consent fees will reach \$10.3 billion by 2021 compared to the projected level of \$6.3 billion in 2015. SNL Kagan June 30, 2015.

¹² ACA Research Paper at 6.

¹³ WTA Comments in MB Docket No. 15-158, at 2 (Aug. 21, 2015).

¹⁴ NTCA Comments in MB Docket No. 15-158, at 1 (Aug. 21, 2015).

¹⁵ *Id.* at 3.

¹⁶ ITTA Ex Parte Notice in MB Docket No. 10-71 (Aug. 26, 2015).

Indeed, even for large telephone companies like AT&T, provision of video services can be a loss leader, a circumstance that significantly influenced AT&T's acquisition of DirecTV.¹⁷

Time Warner Cable and Charter also have recognized that high programming costs have a negative impact on broadband deployment:

Even as robust competition and consumer demand have driven each Applicant to invest many billions of dollars to expand and upgrade their broadband networks, the profitability of each Applicant's video business has declined significantly in recent years – a trend that is expected to continue, in light of video programming costs that have increased at a rate that far exceeds the growth in MVPDs' revenues.¹⁸

Recently, INCOMPAS and NTCA conducted a survey (“2015 Video Competition Survey”) to capture quantitative data regarding their members' provision of video service and experiences negotiating for broadcaster content.¹⁹ Ninety-five percent of survey respondents

¹⁷ See Statement of Randall Stephenson, Chairman, CEO, and President, AT&T, Inc., *The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond: Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers: Hearing Before the S. Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights*, 113th Cong. at 3 (June 24, 2014), available at <http://www.judiciary.senate.gov/download/06-24-14-stephenson-testimony>; see also *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd. 9131, at ¶ 3 (2015) (“With fewer than 6 million subscribers, AT&T's video product is hampered by higher costs of procuring programming—limiting its ability to both offer lower consumer prices and expand its high-speed broadband footprint.”).

¹⁸ See *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, Public Interest Statement, MB Docket No. 15-149 (June 25, 2015).

¹⁹ See NTCA and INCOMPAS' 2015 Video Competition Survey at 3 (Oct. 30, 2015), www.incompas.org/files/The%20RuralBroadbandAssociationandINCOMPAS2015VideoCompetitionSurvey.pdf (“2015 Video Competition Survey”). A total of 226 companies participated in the survey. Survey results can be estimated to be accurate within +/-6% at the 95% confidence level.

indicated that lack of access to reasonably priced programming is the single biggest barrier to providing video service.²⁰ Seventy-two percent of respondents have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering the MVPD market altogether due to rising programming costs.²¹ Forty percent of respondents reported that they faced an increase in retransmission consent fees of more than 100% (with 11% reporting increases of more than 200%) during the current contract cycle in comparison to the previous contract cycle.²² Similarly, 79% of respondents reported an increase of 20% or less for non-broadcast programming fees from the previous contract cycle to the current contract cycle.²³ These cost increases are extreme compared to the growth in the Consumer Price Index (which grew 0.2% over the last year) and are well in excess of inflation over the course of the previous contract cycle. While INCOMPAS's and NTCA's members historically have absorbed these costs to remain competitive in the marketplace and keep consumers' costs low, such dramatic increases in video programming costs pose a long-term threat to the viability of these providers' video operations, and thus their broadband operations as well. Moreover, their ability to upgrade their networks and deploy additional competitive broadband is compromised.

To promote broadband deployment and consumer choice, the Commission must ensure that video competition is viable. The Commission's own data concerning availability of wireline broadband network options for residential broadband Internet access service suggests that only 12 percent of households have three or more choices; 27 percent of households have just two

²⁰ *Id.* at 3.

²¹ *Id.* at 2.

²² *Id.* at 3.

²³ *Id.*

provider choices (typically the incumbent cable provider and incumbent telco); and 45 percent of households have only one single provider—in other words, no competitive choice.²⁴ To effectively promote residential wireline broadband competition, the Commission must address availability of video programming at reasonable rates and terms.

Chairman Wheeler has made competition, particularly broadband competition, a top Commission priority,²⁵ and the agency has recognized the importance of “removing barriers to investment and lowering the costs of broadband build-out.”²⁶ INCOMPAS could not agree more; protecting and promoting broadband competition is necessary to ensure investment, innovation, and consumer benefits. Residential wireline broadband competition is intertwined with the availability of video programming, and the Commission must address the long-standing issues with the lack of availability of video programming at reasonable and non-discriminatory rates, terms, and conditions to promote broadband competition. Action in this docket to address the broken retransmission consent process is a good, first step. Given that, as explained below, broadcasters have all the leverage against new or small MVPDs, robust rules of the road for fair negotiations are critical to achieving more reasonable retransmission consent rates, terms, and conditions.

²⁴ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, ¶ 83 (2015).

²⁵ See e.g., Prepared Remarks of FCC Chairman Tom Wheeler, The Brookings Institution, at 4 (June 26, 2015).

²⁶ Hearing on Oversight of the Federal Communications Commission: Before the Subcomm. on Commc’ns and Tech. Comm. on Energy and Commerce, 114 Cong. 4 (2014) (statement of FCC Chairman Tom Wheeler).

III. THE COMMISSION MUST PROVIDE SPECIFIC GUIDANCE ON ANTICOMPETITIVE PRACTICES THAT VIOLATE THE DUTY TO NEGOTIATE IN GOOD FAITH

In their joint 2015 Video Competition Survey, INCOMPAS and NTCA asked their members to provide feedback on their experiences negotiating retransmission consent agreements. The survey questionnaire was based entirely on the specific practices that the Commission included in the instant NPRM.²⁷ The survey reinforced that broadcasters maintain an overwhelming advantage in contract negotiations, and as a result, offer small companies unrealistic contract terms typically in a “take it or leave it” approach.²⁸

Survey results indicate that respondent video providers are not able to exert any type of leverage in their negotiations with broadcasters. Given that broadcasters have numerous MVPDs in most designated market areas (“DMAs”) to which to sell their programming, their “take it or leave it” approach is not surprising. Small MVPDs, in particular, report having broadcasters dictate the terms of affiliation agreements to them. These MVPDs have no opportunity to procure more favorable contractual language or a “Most Favored Nation” provision to guarantee lower rates, even though these terms are standard in broadcaster agreements with larger MVPDs.²⁹ On the other hand, MVPDs cannot provide a competitive video product without carrying local broadcast stations. Small MVPDs and new entrants find themselves between the proverbial “rock and a hard place.” Costly retransmission consent rates, on the one hand, and the threat of service blackouts on the other, both would cause irreparable harm to the MVPDs and

²⁷ NPRM at ¶¶ 12-19.

²⁸ See 2015 Video Competition Survey at 4-5.

²⁹ *Id.* at 5 (“92% [of survey respondents] have been unable to obtain a Most Favored Nation (“MFN”) provision in contracts with broadcasters and/or other programmers.”)

their customers. Updating the retransmission consent and good faith negotiation framework to address these challenges is essential.

Section 325(b)(3)(A) provides the Commission with direct authority “to govern the exercise by television broadcast stations of the right to grant retransmission consent.”³⁰ The Commission should use its authority to add several of the practices that it has identified to its list of *per se* violations of the good faith negotiation obligation or, in the alternative, to find these practices to be evidence of bad faith negotiation under the totality of the circumstances test.

a. INCOMPAS Members Providing Video Service Have Faced Practices That Should Be Considered *Per Se* Violations of the Duty to Negotiate in Good Faith

Per se standards are appropriate where the requirement is “concise, clear and constitute[s] a violation of the good faith standard in all possible instances,”³¹ and describes “situations in which a [party] did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties.”³² In retransmission consent negotiations, a number of anticompetitive practices experienced by INCOMPAS members should be considered *per se* violations of good faith negotiations.

³⁰ 47 U.S.C. § 325(b)(3)(A).

³¹ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiations and Exclusivity*, First Report and Order, 15 FCC Rcd 5457, ¶ 31 (2000) (“*Good Faith Order*”).

³² *Id.* at ¶ 39.

i. The Commission Should Prohibit Broadcasters From Presenting Renewal Proposals Less Than Six Months Before the Expiration of a Current Retransmission Consent Agreement

A broadcaster’s failure to deliver a requested renewal proposal less than six months prior to the expiration of an existing retransmission consent agreement should be a *per se* violation of the duty to negotiate in good faith. The STELA Reauthorization Act’s legislative history is clear: Congress intended the good faith negotiation framework to be updated to ensure that parties “engage in timely negotiations to reach an agreement.”³³

For many INCOMPAS members, “retransmission consent negotiations” can be a misnomer. Broadcasters typically present a renewal proposal with an intractable set of terms and conditions one to two months before the current agreement expires. Faced with the imminent expiration of the current agreement, most MVPDs have no choice but to “take or leave” the agreement presented to them. A six-month window would ensure that both sides enter into *bona fide* negotiations with sufficient time to discuss contract terms and alternative proposals. This clear start date for negotiations should provide the necessary lead-time for the parties to come to an agreement and prevent an impasse. Furthermore, a six-month window will establish greater certainty regarding the start date for new negotiations for both parties. To ensure that both parties can engage in a robust series of negotiations once the proposal has been delivered, the renewal proposal provided by the broadcasters should include the material terms of the renewal long-form agreement, including a justification for any proposed rate increases based on direct and legitimate economic factors.³⁴

³³ Senate Report at 13.

³⁴ See generally ITTA Ex Parte Notice in MB Docket No. 10-71 (Aug. 18, 2015) (proposing that it be a *per se* violation for broadcasters to “[d]iscriminate in price among MVPDs in a market

Providing material terms to MVPDs six months before an agreement expires increases the likelihood that parties will reach a new agreement and gives the parties an opportunity to seek regulatory relief at the Commission for a breach of the duty to negotiate in good faith, well in advance of the current agreement's expiration date if negotiations falter. As noted in the NPRM, "most complaints are filed during signal blackouts or the impending threat thereof" and are "settled and dismissed before Commission resolution."³⁵ Given the relative size of INCOMPAS' members providing video service, however, a blackout could harm subscribership to their video and broadband services. Just the mere threat of such harms leads many members to capitulate to broadcasters' terms and conditions before the Commission has completed its review of the dispute. As such, small providers lack the luxury of waiting until an impasse to allege a breach of the duty to negotiate in good faith. Opening a six-month negotiation window would produce more agreements and possibly resolve more disputes without implicating Commission resources.

ii. The Commission Should Bar Broadcasters' Unreasonable Tying and Tiering Demands

The Commission also should find that tying and tiering requirements are presumptively inconsistent with competitive marketplace considerations and are *per se* violations of the good faith obligation.³⁶ Although determined to be consistent with marketplace considerations in the

unless the broadcaster can demonstrate that there are direct and legitimate economic benefits associated with charging different prices to different MVPDs").

³⁵ NPRM at n. 31.

³⁶ See *Good Faith Order* at 5469, ¶ 56. Specifically, the Commission should eliminate proposal #2 on "carriage conditioned on carriage of any other programming" and proposal #3 on "channel positioning or tier placement rights" from its examples of proposals that are presumptively consistent with competitive marketplace considerations.

Good Faith Order,³⁷ the practice of forced tying, in which broadcasters require MVPDs to carry additional broadcast stations or cable networks in return for access to “must have broadcast programming,” has constrained small MVPDs’ and new entrants’ ability to provide consumers with a more affordable service package. INCOMPAS’s and NTCA’s 2015 Video Competition Survey found that 69% of respondents have been required by broadcasters to obtain non-broadcast programming and/or services such as less-popular networks, multicast streams, duplicative stations, significantly-viewed stations, and after-acquired or unlaunched programming services.³⁸ In separate research, NTCA found that it is necessary for rural MVPDs “to pay for and distribute as many as 120 to 125 programming channels” to “provide customers with access to the 10 most requested channels.”³⁹ INCOMPAS members have not been provided with a cost-effective alternative to replace these programmer-controlled packages in favor of carrying only the primary signal. MVPDs inevitably end up with unwanted programming and large, expensive service tiers. For small MVPDs to be able to offer programming that differentiates their service offerings from those of larger MVPDs, the Commission must prohibit forced tying, absent the provision of an economic alternative for the primary signal that would allow companies to offer more affordable service packages.

Similarly, in retransmission consent negotiations broadcasters have demanded and secured control over the composition of service tiers. The 2015 Video Competition Survey indicated that 65% of INCOMPAS and NTCA members that provide video service have been subject to tier placement and/or subscriber penetration requirements that limit the manner in

³⁷ *Id.*

³⁸ 2015 Video Competition Survey at 4.

³⁹ NTCA Comments in MB Docket No. 15-158 at 12 (Aug. 21, 2015).

which broadcast programming is offered to subscribers.⁴⁰ This “editorial control” over programming tiers directly impacts MVPDs’ ability to create affordable service packages that meet consumer demand. This practice also makes it difficult for competitive MVPDs to offer their consumers the channels they demand, a unique user experience, and service packages distinguishable from those of larger providers.

iii. MVPDs Should Not Be Forced Through Retransmission Consent Agreements to Comply With FCC Regulations That Have Been Eliminated

Forcing an MVPD through the terms of a retransmission consent agreement to continue to comply with FCC regulations or policies that have been eliminated also should be considered a *per se* violation of good faith negotiation rules. For INCOMPAS’ members, this consideration has arisen in the context of the Commission’s network non-duplication and syndicated exclusivity rules (“program exclusivity rules”), which prevent MVPDs from importing a signal from a distant market into a market in which a local station has exclusive distribution rights for the same programming.⁴¹ Today, these rules serve as an additional means of enforcing contractual exclusivity agreements between broadcasters and program suppliers. Recently, the FCC has signaled that it would eliminate these rules. In the wake of this announcement, several INCOMPAS members have reported that a number of major broadcasters have conditioned their grant of retransmission consent on MVPDs agreeing to continue to comply with the terms of the FCC’s rules even in the event the Commission terminates them. Furthermore, broadcasters have negotiated for expansion of the territorial limits of the program exclusivity rules (which typically

⁴⁰ 2015 Video Competition Survey at 4.

⁴¹ See FCC Chairman Tom Wheeler, *Upgrading Media Rules to Better Serve Consumers in Today’s Video Marketplace*, OFFICIAL FCC BLOG (Aug. 12, 2015, 11:54 AM), www.fcc.gov/blog/upgrading-media-rules-better-serve-consumers-today-s-video-marketplace.

only apply within narrow 35- or 55-mile geographic zones) to the entirety of the station's DMA. Broadcasters also have sought to preclude importation of distant signals even after termination of the agreement.

While it is appropriate to condition agreements on adherence to Commission rules and policies, contractual terms should not overrule federal decisions made in the public interest. In INCOMPAS' members' experience, proposals to require compliance with FCC regulations that have been eliminated are presented in a "take it or leave it" fashion in order to gain access to broadcasters' must-have programming. These proposals should be made a *per se* violation of the duty to negotiate in retransmission consent agreements in good faith.

iv. The Commission Should Prevent Negotiating Tactics That Threaten the Use of Blackouts During Marquee Events and Special Programming

Finally, it should be a *per se* violation of the good faith standard for broadcasters to require contract expiration dates or to threaten MVPDs with service blackouts in the 30 days leading up to marquee events or other special programming.⁴² Nearly half of INCOMPAS and NTCA members surveyed have faced a threat from a broadcaster to withhold or blackout a station in a period leading up to popular sports, entertainment, or other marquee programming.⁴³ This practice increases broadcasters' leverage during retransmission consent negotiations and gives small MVPDs little opportunity to bargain for reasonable terms. Competitive providers

⁴² INCOMPAS supports the language proposed by the ATVA in a recent *ex parte* notice on how the Commission can determine which programs should be considered marquee events. See ATVA Ex Parte Letter in MB Docket No. 10-71 at 3 (filed July 17, 2015).

⁴³ 2015 Video Competition Survey at 4 (finding that 49% of survey respondents have been threatened by the strategic use of blackouts in the lead up to special event programming).

should no longer be forced to decide between accepting unreasonable contract terms or experiencing potential harm to their subscribers and subscribership from blackouts.

b. In the Alternative, These Practices Are Inconsistent with the Good Faith Negotiation Requirement and Frustrate the Competitive Market

Even if the aforementioned practices are not considered *per se* violations of the duty to negotiate in good faith, they should be considered inconsistent with competitive marketplace considerations. Section 325 of the Communications Act directs the Commission to look to competitive marketplace considerations to determine whether or not an entity is negotiating in good faith.⁴⁴ In response, the Commission has established a list of proposals “designed to frustrate the functioning of a competitive market.”⁴⁵ Broadcasters’ failure to deliver renewal proposals within six months of contract expiration, forced tying and tiering of video programming, forcing MVPDs to comply with FCC policies that have been eliminated, and threatening blackouts during marquee events or special programming are practices that have frustrated the competitive market and led to breakdowns in contract negotiations. These practices reduce consumer choice, service affordability, and innovation. The Commission should expand its current list of proposals that are presumptively inconsistent with competitive marketplace considerations to include these four negotiating techniques.

IV. THE COMMISSION SHOULD PROMOTE TRANSPARENCY OF RATES TO PREVENT PRICE DISCRIMINATION BETWEEN SMALL AND LARGE MVPDs

The Commission should promote transparency of video programming rates so that new entrants and small MVPDs are not disadvantaged by having to pay multiples more for

⁴⁴ 47 U.S.C. § 325(b)(3)(C).

⁴⁵ *Good Faith Order* at ¶ 58.

programming and signal carriage than large incumbent MVPDs. In the 2015 Video Competition Survey, INCOMPAS and NTCA found that 48% of respondents have faced contract provisions that prevent disclosure of rates, terms, and/or conditions, while 92% have been unable to obtain a MFN provision in contracts with broadcasters and other programmers.⁴⁶ As recently noted by Public Knowledge, MFNs “restrict new entry” into the video programming marketplace and “merit at least a careful examination by the Commission to determine if they are being used anticompetitively.”⁴⁷ The transparency of rates charged by broadcasters to MVPDs, including base rates and volume discounts, would ensure that programmers are offering such rates to small MVPDs and competitive networks on a non-discriminatory basis.

To ensure “equitable market-based negotiations,” INCOMPAS supports NTCA’s proposal to require broadcasters, as a condition of their license, to publicly disclose the base rate they will charge prior to any volume discount.⁴⁸ In addition, INCOMPAS urges the Commission to require broadcasters to make a schedule of volume discounts publicly available to MVPDs and to present legitimate economic justifications for providing different discounts to different MVPDs. Non-discriminatory pricing of video programming is critical to promoting competition among MVPDs (as well as competitive broadband service providers, as discussed above), and the public availability of pricing information should “enable competitive forces to police behavior in the marketplace.”⁴⁹

⁴⁶ 2015 Video Competition Survey at 5.

⁴⁷ Public Knowledge Comments in MB Docket No. 15-158 at 6 (Aug. 21, 2015).

⁴⁸ NTCA Comments in MB Docket No. 15-158 at 11 (Aug. 21, 2015).

⁴⁹ *Id.* at 10.

Rate transparency also would obviate concerns about how the current negotiation process protects pricing confidentiality. Given the relatively small number of law firms specializing and representing broadcasters in retransmission consent negotiations, INCOMPAS members express concerns that confidentiality on pricing and terms are difficult to maintain. Requiring broadcasters to disclose their market rates would eliminate the risk of law firms representing multiple broadcasters from misusing pricing information from other retransmission consent negotiations, in addition to ensuring that competitive rates are available to all entities bargaining for retransmission consent. The Commission, in taking “account of any unique facts underlying a particular retransmission dispute,” should be consider whether pricing confidentiality is evidence of bad faith that requires redress.⁵⁰

V. CONCLUSION

The Commission should address the high barriers to video and broadband competition by adopting INCOMPAS’s recommendations on the good faith negotiation obligation.

Respectfully submitted,

INCOMPAS

/s/ Christopher L. Shipley

Angie Kronenberg
Christopher L. Shipley
INCOMPAS
1200 G Street NW
Suite 350
Washington, D.C. 20005
(202) 872-5745

December 1, 2015

⁵⁰ NPRM at ¶ 7.