

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

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

**COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.

INTRODUCTION

In the Cable Consumer Protection and Competition Act of 1992, Congress gave broadcasters the right to require cable operators and other multichannel video programming distributors (MVPDs) to negotiate for “retransmission consent” in order to carry broadcasters’ signals. For broadcasters that exercise that right, Congress subsequently imposed an obligation on all parties to negotiate retransmission consent in good faith. The Commission adopted a two-pronged approach to implement this obligation. First, it identified certain specific conduct that would be deemed *per se* violations of the good faith requirement. Second, it allowed parties to retransmission consent negotiations to show, based on the “totality of the circumstances,” that other conduct breached the requirement.

As the Commission has noted, the marketplace for retransmission consent negotiations has dramatically changed since the Commission adopted its good faith rules, and those changed circumstances need to be taken into account in assessing whether particular conduct should be deemed to violate good faith under the totality of the circumstances. In particular, “in contrast to

the video programming landscape that existed in 1992, when consumers typically had a single cable operator as their only video service option, consumers seeking to purchase video programming service today generally are able to choose among multiple MVPDs.”¹ Moreover, “consumers today are increasingly accessing video programming from online video distributors that deliver content via the Internet.”²

These new competitive alternatives to cable operators have, according to the Commission, “improved broadcasters’ leverage in retransmission consent negotiations with MVPDs.”³ In today’s environment, “an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs – including subscribers to its associated voice and broadband services.”⁴

In directing the Commission to conduct a rulemaking proceeding to re-examine its totality of the circumstances test, Congress recognized that these changed circumstances are likely to affect and alter not only the outcomes of retransmission consent negotiations, but also the tactics employed in those negotiations. The Report of the Senate Commerce Committee indicates that the Commission, in this proceeding, should examine tactics and practices engaged in by parties not only during negotiations but also when “negotiations have broken down and a retransmission consent agreement has expired.”⁵ In particular, the Committee expected

that the FCC would examine the role digital rights and online video programming have begun to play in retransmission consent negotiations. *The Committee is concerned by reports that parties in retransmission consent negotiations have begun to block access to online programming during those negotiations or after a*

¹ Notice, ¶ 3.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014).

*retransmission consent agreement has expired and a blackout has occurred, including for consumers of a MVPD who subscribe only to the broadband service offered by such MVPD.*⁶

This tactic of blocking broadband customers' access to online programming in order to extract a higher price for the carriage of broadcast signals to cable customers is unfair, and in these brief comments we explain why the Commission should rule that, in the current "totality of the circumstances," it should be barred as a violation of good faith bargaining.

BLOCKING BROADBAND CUSTOMERS' ACCESS TO ONLINE PROGRAMMING, WHEN USED AS A TACTIC IN RETRANSMISSION CONSENT NEGOTIATIONS, SHOULD BE DEEMED TO VIOLATE THE DUTY TO NEGOTIATE IN GOOD FAITH.

Some broadcast stations are owned by entities that also offer websites and online content that are generally available on the Internet to anyone with a broadband connection. That content may include some of the same programming that appears on their broadcast stations, which may be offered simultaneously with its transmission over the air by broadcast stations or on an on-demand basis. But the availability of such online programming to ISP customers typically has nothing to do with the contractual relationship between cable operators and broadcasters and is completely extraneous to retransmission consent negotiations.

This is because, unlike programming provided to cable subscribers, online programming is not selected and "provided" by the ISP to ISP customers. In these circumstances, the targeted blocking of a broadcaster's online services to any of a cable operator's broadband customers as a negotiating tactic in order to pressure the operator to accept the broadcaster's terms and conditions for retransmission consent should be deemed to violate the duty to negotiate in good faith.

As the Commission has noted, such online blocking unfairly harms consumers who have

⁶ *Id.* (emphasis added).

no relationship to the dispute between the broadcast station and the cable operator:

Such online access restrictions prevent all of an MVPD's broadband subscribers, *i.e.*, regardless of whether those subscribers are located in markets where the MVPD and broadcaster have reached an impasse in negotiations, from accessing the online video programming that the broadcaster otherwise makes generally available when the broadcaster and the MVPD are engaged in a retransmission consent dispute. In addition, this practice affects the MVPD's broadband subscribers even if those subscribers do not also subscribe to the MVPD's video service.⁷

These broadband customers would be similarly harmed if it were the cable operator, rather than the broadcast station, that blocked access to the broadcaster's online programming as a tactic in retransmission consent negotiations.

But whether or not the unfair effect on consumers should, in itself, render blocking of online content by either side a violation of the good faith requirement, what makes such blocking by broadcasters particularly unfair is that it is a one-sided tactic that cable operators and other ISPs are already barred from using. The Commission's "Open Internet" rules flatly prohibit cable operators and other broadband Internet service providers from blocking access to lawful content on the Internet.⁸ In these circumstances, allowing broadcasters alone to block such content to obtain bargaining leverage would distort rather than ensure good faith negotiations.

The availability of the broadcast "signal for free over the air"⁹ does not mitigate this unfairness. While some broadcasters' online websites may enable viewing of the same live programming simultaneously being transmitted over the air, what they predominantly offer is on-demand access to a library of programs and clips previously shown on the stations by the broadcasters and by their network owners. The availability of live over-the-air programming on

⁷ Notice, ¶ 13.

⁸ See 47 C.F.R. § 8.5, as amended by Report and Order on Remand, Declaratory Ruling and Order, GN Docket No. 14-28, 30 FCC Rcd 5601, 5884 (2015).

⁹ Notice, ¶ 13.

their television sets is not a substitute for the broadband access, on their mobile devices, to these generally available websites, particularly since millions of viewers are still hampered from receiving over-the-air signals due to geographical constraints.

The Commission also points out that “some news organizations that distribute content via newspapers and the Internet limit access to their online content to paid subscribers,” and asks “what distinguishes such restrictions from those that are imposed in cases of preventing online access in this context, *i.e.*, where a broadcaster distributes its programming content via an MVPD and online.”¹⁰ Nobody disputes that online content providers have a general right to limit access to their content to paid customers or to otherwise generally restrict online access to particular regions or categories of viewers. But that is not what is at issue here. What distinguishes the broadcaster’s restrictions in this context is that they are not generally applicable restrictions but instead are sporadically imposed solely as a negotiating tactic and only upon all of the Internet customers of an ISP that happens to be affiliated with a cable operator with which it is engaged in retransmission consent negotiations, not based on the status or category of the viewer, but upon the status of negotiations with the cable operator serving such viewer.

¹⁰ *Id.*

CONCLUSION

For these reasons, the Commission should rule that, in the totality of these particular circumstances, blocking of online content as a negotiating tactic is inconsistent with the obligation of broadcasters and MVPDs to negotiate retransmission consent agreements in good faith.

Respectfully submitted,

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