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 PUBLIC KNOWLEDGE AND OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA

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Table of Contents

I. Introduction

The retransmission consent regime has strayed far from its original purpose. Implemented at a time when cable providers had monopolistic control over access to video customers, the regime was intended to promote the public interest and localism by creating new rights for local broadcasters. But the regime in its current form no longer serves the public interest. Thanks to regulatory leverage granted to broadcasters, increased market power of large broadcasters and MVPDs as a result of substantial consolidation, and the pervasive use of blackouts and other measures that injure consumers as a bargaining chip in retransmission negotiations, the current regime not only fails to protect the public interest, but can harm it. PK and OTI believe that the FCC is on the right track with its proposed revisions to the good-faith negotiating standard, particularly in key areas pertaining to consumer protection.

These problems are not new, and PK and OTI appreciate the efforts of Congress to ensure that these important issues are addressed in a timely fashion by the FCC. As past petitions (such as those from Mediacom) have made clear, no simple narrative can completely explain the high costs that consumers face, nor the blackouts that plague MVPD customers. Neither "greedy cable companies" nor "greedy broadcasters" narratives fully encompasses these issues. As Public Knowledge wrote in 2014, "structural problems in the creation and the distribution of content have worked together to harm consumers."[1]

PK and OTI are strong advocates for video choice and competition. We advocates for increased choice for consumers, and believes that customers are best served when cable, satellite, telco, and online providers are each able to respond to customer demand and offer compelling products. Neither competition nor the public interest are served when rising programming costs

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[1] Comments of Public Knowledge, *Petition for Rulemaking to Amend the Commission Rules Governing Practices of Video Programming Vendors*, RM-11728, at 4 (Sept. 29, 2014) ("2014 Public Knowledge Comments")

force smaller MVPDs to exit the market or be acquired, or when limited consumer choice in the MVPD marketplace gives those companies greater control over program carriage.

II. The Retransmission Consent Marketplace is Not Functioning Well, and Needs Reform

As a foundational matter, the Commission asks how the retransmission consent market is currently functioning.[2] The short answer is that it is not working well. The retransmission consent regime was established "to establish a marketplace for the disposition of the rights to retransmit broadcast signals."[3] It created a new signal-based right for local broadcasters, separate from copyright and layered on top of the existing rights regime. It was intended to protect the rights of local broadcasters, who often lacked leverage against monopolistic cable companies and who were seen as promoting localism and related public interests in broadcasting that would otherwise be threatened. Retransmission consent is also inextricably linked to the grant of must-carry rights for local broadcast channels on multichannel video networks (MVNOs).

The market has changed since then.[4] While cable remains dominant (thanks in no small part to its control over broadband), consolidation among programmers and broadcasters and increasing video competition has turned carriage negotiations from routine business arrangements to high-stakes negotiations.[5] Customers have more ways to access video, which means that broadcasters are less hesitant to engage in blackouts.[6] Carriage fees, rather than advertising, are now arguably broadcasters' most important revenue stream, while the Internet has opened up new avenues for consumers to access local content from sources other than just local broadcasters and newspapers. At the same time, a video regulation regime is still in place

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[2] *Implementation of Section 103 of the STELA Reauthorization Act of 2014,* Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109, ¶ 7 (rel. Sept. 2, 2015) ("*2015 NPRM*").
[3] Id. at ¶ 2.
[4] Id. at ¶ 3.
[5] Id.
[6] Id.

that reflects the market conditions of 1992 rather than of 2015, which can strengthen the bargaining position of the parties who need it least.[7]

When the regime was established, however, consumers often had only one MVPD option; they now have multiple choices.[8] Furthermore, broadcasters have increasingly viewed the retransmission consent regime not only as a means of extracting in-kind compensation (i.e. carriage for additional channels, favorable tiering, and other commercial terms) from MVPDs, but now as a means of extracting substantial monetary compensation, as well.[9] Competition among MVPDs has greatly enhanced broadcaster leverage, allowing them to demand skyrocketing monetary payments.[10] And while reasonable compensation to broadcast licensees can help to support the continuation of localism in programming, it is also important to keep in mind that the public's access to "free" (ad-supported) local programming is the central *quid pro quo* required of the broadcast industry in exchange for an annual multi-billion dollar subsidy of virtually free use of some of the most economically valuable bands of public spectrum.

A. The Current Retransmission Consent Regime Leaves Consumers Stuck Between Opposing Parties, and Frequently Sees Them Used as Bargaining Chips

On those occasions when negotiations come to a standstill, some broadcasters have been willing to use the "nuclear option" of blackouts. The real losers during blackouts are not MVPDs, but consumers. The FCC's rules do not currently prevent broadcasters from timing the expiration of contracts to coincide with marquee events, such as the Super Bowl, or other events of significant public interest. This timing only enhances broadcaster leverage, turning users against the MVPDs and harming their subscriber numbers. Blackouts remain a persistent threat,

[7] "The increase in competition among MVPDs has improved broadcasters' leverage in retransmission consent negotiations with MVPDs." Id.
[8] Id.
[9] Id.
[10] Id.

harming consumers by blacking out desirable content in numerous markets.[11] Subscriber impact is not small, either. A DirecTV dispute recently resolved in Utah, for example, affected 200,000 subscribers.[12] A dispute between Mediacom and Media General earlier this year blacked out 16 stations in 14 markets; notably, the timing of this blackout prevented Mediacom customers in three markets from viewing the 2015 Major League Baseball All-Star Game. In 2014, meanwhile, a blackout of more than 50 stations by Raycom Media's at the beginning of September was timed to threaten customers' ability to view the start of both the college and professional football seasons.[13] Service was restored after six days, just in time for NFL season openers in major markets like New Orleans.[14]

When broadcasters and MVPDs butt heads, consumers lose. They lose access to their favorite programming, while companies play on their demands for that very programming as a bargaining chip. When consumer interests are little more than bargaining chips, the public interest is not being served.

B. Rapidly Rising Retransmission Fees Harm Consumers and Competition

As a result of the imbalance in leverage in retransmission consent negotiations, the monetary fees demanded by broadcasters continue to escalate. SNL Kagan reported earlier this year that retrans fees are up nearly 40% each year between 2012 and 2014.[15] This 40% year-over-year increase comes on the heels of years of retrans fee increases, including a nearly 8600%

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[11] Daniel Frankel, *After 1-Day blackout, Dish and Tegna strike long-term retransmission agreement*, FierceCable (Oct. 12, 2015), http://www.fiercecable.com/story/after-1-day-blackout-dish-and-tegna-strike-long-term-retransmission-agreeme/2015-10-12.

[12] Daniel Frankel, *DirecTV ends retrans blackout on Utah's KSL-TV, but talks break down with Pac-12 Network*, FierceCable (Sept. 14, 2015), http://www.fiercecable.com/story/directv-ends-retrans-blackout-utahs-ksl-tv-talks-break-down-pac-12-network/2015-09-14.

[13] Daniel Frankel, *Raycom, Dispatch Video pull broadcast channels off DirecTV*, FierceCable (Sept. 1, 2014), http://www.fiercecable.com/story/raycom-dispatch-video-pull-broadcast-channels-directv/2014-09-01.

[14] Daniel Frankel, *DirecTV and Raycom settle retrans fight, exchange nasty words*, FierceCable (Sept. 7, 2014), http://www.fiercecable.com/story/directv-and-raycom-settle-retrans-fight-exchange-nasty-words/2014-09-08.

[15] Daniel Frankel, *SNL Kagan: Retrans fees up 40% per sub, as NCTA looks to kick broadcasters out of basic tier*, FierceCable (Sept. 23, 2015), http://www.fiercecable.com/story/snl-kagan-retrans-fees-40-sub-ncta-looks-kick-broadcasters-out-basic-tier/2015-09-23.

increase from 2005 to 2012,[16] and the broadcasting industry continues to look for more. In remarks in New York in June, the CEO of one broadcast media ownership group said that current retrans fees (around $1 per subscriber per month) could shoot up to as much as $6 monthly per subscriber in the near future.[17] In explaining why, he explained that “the negotiations with the MVPDs are basically very simple.”[18] He continued, saying “How many customers are they going to lose if they don’t have us? It’s no more complicated than that.”[19] His frankness exposes the true strength of, and imbalance in favor of, large broadcasters during these negotiations. Broadcasters are able, through demand for their programming and the certainty of harm to MVPDs, to extract both in-kind and monetary compensation at rapidly accelerating rates.

III. Reforming the Good-Faith Rule

While the good faith rule lays out a solid framework for protecting consumers and ensuring that neither side is able to exercise disproportionate negotiating power, substantial reforms are needed to address problems that have cropped up in the market. It is important to continue requiring broadcasters and MVPDs equally to continue negotiating in good faith, in order that MVPDs may serve their customers and broadcasters may meet the public interest obligations which accompany their broadcast licenses.

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[16] Chairman Tom Wheeler, *Protecting Television Consumers by Protecting Competition*, FCC Blog (Mar. 6, 2014), https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition, (“The cost of these “retransmission consent agreements” has skyrocketed from $28 million in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years.”).

[17] Daniel Frankel, *Retrans fees could reach $6 per sub, broadcasters say*, FierceCable (June 29, 2015), http://www.fiercecable.com/story/retrans-fees-could-reach-6-sub-broadcasters-say/2015-06-29.

[18] Id.

[19] Id.

A. The Commission Should Do Away with Presumptively Reasonable Practices, and Rely on Case-by-case Analysis

Section 325 of the Act seeks to ensure that both broadcasters and distributors negotiate for retransmission consent in good faith, and grants the Commission authority to address instances of bad faith action on a case-by-case basis. Broad presumptions of good faith undermine the strength of this statutory authority, opening the door to exercises of market power and providing a shelter for bad faith. Eliminating the list of presumptively good faith tactics would close this significant loophole. The list of *per se* bad faith actions, however, should be maintained and expanded, as it contributes to the efficient resolution of retransmission disputes by identifying those behaviors which are not permissible, while also serving as a resource for factors an arbitrator could consider in resolving deadlocked negotiations. For those disputes that do not involve *per se* instances of bad faith, as it does in other arenas, the Commission should instead examine negotiating practices on a case-by-case basis, as practices that may in one case not be an example of bad faith, may be bad faith or an abuse of market power when carried out by other actors. The blanket presumption in favor of bundling, for example, opens the door for large programmers to drive up fees and consumer cable bills by insisting on carriage of numerous channels alongside their most desirable products. Similarly, insistence on receiving a bundle by a large MVPD may be an unfair exercise of market power. Were such bundling proposed by a smaller programmer, however, or demanded by a smaller MPVD attempting to expand its programming, these actions may be more pro-competitive. In general, presumptions that ignore the bargaining power of particular actors and treat all MVPDs or all broadcasters alike are counterproductive. At the same time, certain egregious actions, such as those that harm consumers directly or that are contrary to the statutory and regulatory schema, may be examples of bad faith *per se*.

B. Practices That Warrant Additional Scrutiny

1. The Commission Should Consider 'Harm to Consumers' as the Primary Factor in its Review of Negotiating Practices

Consumer harm has become a great source of leverage for both broadcasters and MVPDs. Broadcasters have engaged in a rapidly rising number of blackouts, with reported incidents increasing from 8 in 2010 (impacting 3.2 million unique subscribers) to 189 during the first 10 months of 2015 (impacting more than 12 million subscribers).[20] MVPDs, meanwhile, threaten to keep consumers from viewing cable content that is affiliated with broadcast stations during retrans debates, blocking consumer access to channels that *aren't* available over-the-air. Furthermore, as discussed in detail below, broadcasters are subject to broad public interest duties; pulling a signal from customers, particularly those who cannot access that signal over-the-air, for the sake of gaining negotiating leverage, cannot be consistent either with good-faith negotiating or with those broadcasters' public interest obligations.

2. Restricting Online Video and Consumer Device Usage Should be Considered *Per Se* Bad Faith Conduct

In some recent disputes, large broadcasters have taken steps beyond pulling their content from MPVD channel lineups. In a widely publicized dispute with Time Warner Cable, for example, CBS took the extraordinary step of blocking Time Warner Cable internet subscribers from viewing CBS programming made available free, online, to users of any other ISP.[21] This blocking applied even to Time Warner Cable broadband customers who were customers of other MVPDs, such as DISH, who did have carriage agreements with CBS at the time. When asked about the blocking, CBS simply stated: "As soon as CBS is restored on Time Warner Cable

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[20] *See* American Television Alliance, "Blackout List 2010-2015," *available at* http://www.americantelevisionalliance.org/media-center/.

[21] Todd Spangler, *CBS Blocks Time Warner Cable Internet Users from Full Episodes Online*, Variety (Aug. 6, 2013), http://variety.com/2013/digital/news/cbs-blocks-time-warner-cable-internet-users-from-full-episodes-online-1200573080/.

systems in affected markets, that content will be accessible again."[22] As discussed previously, proactively seeking to cause consumer harm in order to increase bargaining leverage should, as a general rule, be an example of bad faith. More specifically, however, interfering with the ability of users from one ISP to access content broadly available on the Internet, purely to gain leverage in resolving an unrelated retransmission dispute, should not be permissible.[23]

The Commission should also consider it a *per se* violation for programmers to dictate, through contract terms, the extent to which consumers may utilize their own lawful devices or services to view broadcast content, or exercise their fair use rights. Consumer rights such as these do not belong to either MVPDs or broadcasters to bargain away. Broadcasters in particular are subject to public interest obligations that go beyond those of other programmers and should not be allowed to leverage retransmission consent negotiations to control the means by which consumers access the content that they are required to make available free over the air.

3. Ceding Control Over Retransmission Consent Negotiations to Third Parties (Such as Networks) Should be Prohibited

If a licensee grants either its right to negotiate or its power to approve a retransmission consent agreement to an affiliated television network, or to an out-of-market, non-commonly-owned broadcast station, it should be a *per se* violation of the good faith rule.[24] The purpose of

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[22] Id.

[23] It must be made clear, however, that PK and OTI do not view such actions by content providers or websites to block access to users of a particular ISP to be a "net neutrality" or "Open Internet" issue. As PK wrote in 2014 when discussing this issue, "those principles apply only to last-mile ISPs, and there may be valid reasons where a content provider might not want to make content available to users in a certain area; e.g., regional licensing restrictions. *See* 2014 Public Knowledge Comments at 9. PK and OTI reiterate now, however, that that does not mean that blocking of this sort is not anti-consumer, nor that large content providers might not gain substantial leverage over small MVPDs or ISPs through anti-consumer conduct of this sort. Consumer protection is not limited to net neutrality issues. The most direct manner in which the Commission can address such blocking, when it occurs in the context of a retransmission consent negotiation, is to either prohibit such blocking outright as bad faith behavior, or to implement some mechanism for interim carriage to ensure that, while businesses work out their differences, consumers are not hurt while caught in the middle.

[24] *See generally* Comments of Public Knowledge and New America Foundation, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, at 7 (May 27, 2011) ("*PK and OTI 2011 Comments*").

the retransmission consent regime was to promote local broadcasting, not to give economic assistance to national programming networks. Network participation in retransmission consent negotiations can change the negotiating balance between broadcasters and MVPDs. Furthermore, as networks siphon off portions of retransmission consent revenue away from local affiliates, local broadcasting suffers. By ultimately raising the price of MVPD services, consumers too are harmed. Of course, networks are within their rights to manage their relationships with their affiliates; however, network participation in these regulated negotiations upsets the balance Congress sought to create. Therefore, network approval of affiliates' retransmission consent agreements, as well as network participation in negotiations for stations that are not network-owned, should amount to a *per se* violation of the good faith negotiating rule.

4. Bundling and Tiering Demands Should Not Be Presumptively Permissible, and Should Be Examined On a Case-by-case Basis

The Commission should take particular note of the harm to consumers that results from widespread demands for channel bundling and preferential tiering terms. In reforming the good faith rule, the FCC must remove "a broadcaster's insistence on bundling broadcast signals with other broadcast stations or cable networks into the retransmission consent agreement" from the list of conduct presumptively consistent with good faith bargaining.[25] As PK and OTI explained in response to the Commission's 2011 NPRM, the agency's previous determination 15 years ago in the *Good Faith Order* does not prevent it from reevaluating the public interest implications of these "tying" tactics in the light of today's substantially different market conditions, broadcaster bargaining power and the adverse impact on consumers who ultimately bear the cost.[26]

[25] *2015 NPRM* at ¶ 15. *See Implementation of the Satellite Home Viewer Improvement Act of 1999, First Report and Order, CS Docket No. 99-363, 15 FCC Rcd at 5448, ¶ 58 (2000) ("Good Faith Order")*

[26] Reply Comments of Public Knowledge and New America Foundation, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, at 6-7 (June 25, 2011) ("*PK and OTI 2011 Reply Comments*")..

Bundling broadcast and cable channels together raises costs to consumers, while forcing them to pay for content they may not want to watch. Furthermore, broadcast stations enjoy their preferential status in exchange for public interest obligations, and it is not appropriate for broadcasters to leverage their preferential status to gain leverage in obtaining carriage for unrelated cable products. PK and OTI note, however, that bundling in general should not necessarily become *per se* unreasonable, as there are instances where bundling (such as to promote carriage of independent programming) may be beneficial. Bundling provisions should not be presumptively permissible, but should instead be examined on a case-by-case basis, with particular attention paid to the relative market power of negotiating parties in any given instance.

5. Timing Blackouts to Maximize Consumer Harm and Gain Bargaining Leverage, Such as Prior to Marquee Events, Should Be *Per Se* Bad Faith

Broadcasters increase their leverage in negotiations by limiting the duration of retransmission consent agreements to a period of a few years or less, and timing the expiration of those agreements to coincide with major events like the Super Bowl. In this manner, they ratchet up pressure on one party, granting them unfair negotiating leverage that does not accurately reflect true market value. Once again, consumers pay the price. These marquee events are often network exclusives, and are not available for viewing online. This means that unless a consumer has set up an over-the-air antenna, and lives in an area that still receives over-the-air broadcast signal, they are unable to enjoy these events of national interest. Such actions once again hold consumers hostage for business purposes, making them into pawns in high-stakes negotiations. Consumers must be protected, or they will be used in this manner; making the manipulation of blackout timing to coincide with marquee events a *per se* bad faith action will help address this element of the retransmission consent issue.

It is important to note, too, that the power of blackout timing gives broadcasters a perverse incentive to *avoid* expanding their coverage area, or ensuring that all customers in their market receive a high quality signal. The greater the number of people who can receive their signal over the air, the less leverage broadcasters can derive from programming blackouts. It should therefore also be a sign of bad faith if it is revealed, in the course of negotiations or otherwise, that a broadcaster has failed to conduct work to improve its over-the-air capacity and reach.

6. Demands for Per-User Fees For Non-Video Subscribers Should Not Be Permissible

Among a number of negotiating tactics the Commission identifies as worth considering as a factor is the broadcaster practice of demanding per-subscriber fees for carriage that are based not only on an MVPD's number of video subscribers, but also on its non-video subscribers, such as those who only obtain voice or data service from the MVPD.[27] This practice is similar to practices similar to those Microsoft engaged in when it was accused of abusing its market power two decades ago. Relying on its market power in the operating system marketplace, Microsoft offered volume licensing to computer manufacturers, requiring that they pay for a license on the basis of total number of computers shipped, rather than the number shipped with a Microsoft, or any other, operating system. This practice was brought to an end only as the result of a consent decree Microsoft signed in 1994, and opened the door for PC manufacturers to begin offering Linux systems, or systems without an OS, in a cost-effective manner.[28] Broadcasters' demands for payment for all users, regardless of whether or not they subscribe to video services, is eerily similar and raises similar concerns. Broadcasters should not

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[27] *See* 2015 NPRM at ¶ 16.
[28] Jeremy Reimer, *Dell goes Ubuntu; "Windows tax" is $50, according to pricing*, Ars Technica (May 25, 2007), http://arstechnica.com/gadgets/2007/05/windows-tax-is-50-according-to-dell-linux-pc-pricing/.

be entitled to compensation for every customer an MVPD has, but only those who use video services just as Microsoft was not entitled to compensation for all PCs shipped, but only those that used its products. Notably, this sort of behavior only crops up in a marketplace where one party possesses, and is able to leverage, significant market power; it is unlikely that a broadcaster without leverage could insist on being paid fees for customers that do not have access to its programming.

7. Requiring Supporting Documentation to Substantiate Negotiating Claims Enhances Transparency and Contributes to the Speedy Resolution of Disputes

In August 2015, Public Knowledge and others submitted a letter addressing concerns with transparency in the good-faith negotiation process. That letter focused on the fact that the good faith rule in its current form "imposes no obligation on a broadcaster to explain, justify, or substantiate that its price demands reflect competitive marketplace considerations."[29] PK and the other participants in the letter called attention to the Commission's past reliance on labor law as a source of substantive input in defining the good faith standard, but explained that subsequent FCC action has yet to require parties to explain and substantiate their claims and demands.[30] The letter urged the FCC to revisit labor law as a source of inspiration yet again, by adopting a requirement that "the parties negotiating the terms of a retransmission consent agreement disclose relevant information substantiating and verifying their bargaining claims."[31] This lack of transparency, and lack of accountability in making demands, slows down and impedes the retransmission consent negotiation process, and PK reiterates its support for increased transparency between parties required to negotiate in good faith.

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[29] Letter from CenturyLink, Consolidated Communications, FairPoint Communications, et al., MB Docket No. 10-71 (Aug. 18, 2015).
[30] Id.
[31] Id. at 4.

8. "Most Favored Nation" Clauses That Damage Competition Should Not Be Permitted

PK and OTI believe that "most favored nation" clauses, or MFNs, should be considered an example of bad faith negotiating tactics when engaged in by parties with significant bargaining power. PK and OTI agree that "a negotiating entity's seeking or receiving a most favored nation (MFN) clause as consideration for retransmission consent rights, and refusal to accept a price, term, or condition due to the existence of a MFN clause, should be deemed a failure to negotiate retransmission consent in good faith."[32] Such clauses unfairly enhance the market power of large content providers and MPVDs, enhancing further the difficulty smaller providers and content producers face in these negotiations. The retransmission consent regime was not meant to serve as a vehicle to encourage or reward increased consolidation of media ownership or distribution; MFN clauses serve as one of many incentives that reward just such behavior.

9. The Good Faith Rule Must Continue to Apply Equally to Broadcasters and MVPDs

All good faith bargaining rules must continue to apply equally to broadcasters and MVPDs. Under the present system large broadcasters retain more power, while MVPDs, particularly smaller ones, tend to 'lose' retransmission disputes. Both parties are bound by good faith under the law, and must remain so. While certain practices are by their very nature available to only one party, or only able to be pursued by a particular sort of market participant, it is important that the rules remain neutral. A practice that harms competition or consumers in bad faith, is done in bad faith regardless of the perpetrator. Regardless of which side of a dispute has which particular bad-faith actions available to it, the underlying principles of consumer welfare

[32] *See* 2015 NPRM at ¶ 16, n. 85

must remain constant throughout, and the principle of good faith must similarly remain equally applicable to both broadcasters and MVPDs.

IV. The Commission Must Implement Broader Reforms to Fully Address the Problems with the Retransmission Consent System

While PK and OTI believe that revisions to the good faith negotiating rule will go a long way toward the kind of rebalancing that's necessary to protect consumers and return balance to the retransmission consent marketplace, we also believe additional steps are warranted. As Public Knowledge has maintained for years, we believe that the introduction of mandatory final-offer arbitration, and steps to facilitate interim carriage arrangements, are both necessary to protect consumers.

A. Broadcasters' Existing Public Interest Obligations Should be Included as Factors in Good Faith Rule Investigations

PK and OTI continue to believe that the public interest and consumer welfare would be greatly served by incorporating the existing public interest obligations of broadcasters into the good conduct standard.[33] By virtue of their access to spectrum and a number of regulatory protections such as exclusivity rules, broadcasters enjoy immense benefits derived from the public. In exchange, broadcasters are expected to be stewards of the public airwaves, and to invest in ensuring that the public has access to the content they distribute. In examining good-faith negotiating practices, PK and OTI continue to believe that the public interest would be best served if broadcasters' attention to these public interest obligations were considered. Inclusion of these obligations would, for example, address the perverse incentive against investing in their

[33] Public Knowledge and OTI have discussed this issue at greater length in previous filings. *See, e.g.*, Comments of Public Knowledge, *Petition for Rulemaking to Amend the Commission's Rules to Promote Expanded Free Access To Local Broadcast Television Stations Via Over-the-Air Reception, Internet Streaming, or Other Means*, RM-11752, pp. 4-9 (Aug. 6, 2015); *PK and OTI 2011 Comments*, *supra* note 24; Public Knowledge, OTI, and Others Ex Parte, MB Docket No. 10-71 (Dec. 11, 2013);

over-the-air infrastructure, as broadcasters enjoy more leverage over MVPDs when fewer of those MVPDs' customers can resort to an over-the-air antenna to avoid blackouts.

B. In Order to Protect Consumers, The Commission Should Require Mandatory Final-Offer Arbitration When Negotiations Reach an Impasse

The retransmission consent rules should be reformed to promote blackout-free negotiation, and to keep rapid fee escalation in check in order to curb consumer cost increases. Mandatory final-offer arbitration should be imposed in order to effectively resolve consent disputes, as final-offer arbitration compels parties to either settle prior to arbitration, or to make legitimate, *bona fide* offers. Either of these two outcomes would lead to quick, blackout-free resolution of content disputes. Alternative dispute resolution also reinforces the core public interest obligation that broadcast licensees accept in return for cost-free use of the most valuable frequency bands of spectrum, which is to provide at least one primary stream of programming at no cost to all viewers within their service area. In 2015 it is both burdensome and unrealistic to expect consumers to switch back and forth between an antenna and MVPD depending on whether a local station decides that a blackout gives it a bargaining advantage.

Final-offer or "baseball" arbitration requires that the arbitrator pick between two competing offers; the arbitrator may not split the difference.[34] The arbitrators' limited discretion tends to diminish the chilling effect that plagues traditional arbitration, and leads to parties making reasonable offers due to high risk associated with extreme offers.[35] This will prevent parties from employing brinksmanship tactics, as the more extreme party is likely to lose final-offer arbitration. Finally, we note that under 47 U.S.C. § 325, and other authority, the FCC has

[34] Benjamin A. Tulis, *Final-Offer "Baseball" Arbitration: Contexts, Mechanics & Applications*, 20 Seton Hall J. Sports & Ent. L. 85, 88 (2010).
[35] Id.

the power to enact such a requirement, and requests that the Commission undertake implementation of such a scheme.[36]

1. The Commission has the Authority to Compel Mandatory Final-Offer, or 'Baseball', Arbitration

As PK and OTI have previously explained,[37] the Commission has strong authority on which to base implementation of a final-offer scheme. Section 325(b)(3)(A) expressly directs the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent" and to do so considering "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier."[38] Furthermore, this general mandate is bolstered by the Commission's obligation to adopt and enforce rules which "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith."[39] The legislative history of Section 325 demonstrates that Congress intended the Commission to grant interim carriage and any other appropriate relief to ensure that blackouts are avoided.[40] In addition, in light of a broadcast station's public interest

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[36] The purpose of implementing arbitration, as discussed, is to minimize consumer harm, not to tilt the power balance toward MVPDs. MVPDs with vertically integrated programming interests, or whose size allows them to exercise substantial market power, remain just as capable of acting in bad faith as any broadcaster. In instances where programmers are already at a disadvantage in dealing with a large MPVD with excess market power, or with a vertically integrated MPVD, it may be inappropriate to require arbitration that would diminish programmers' ability to obtain reasonable prices, terms, and conditions for carriage.

[37] *See* 2015 Mediacom petition comments at 10, note 30; *PK and OTI 2011 Reply Comments* at 6-7; *Ex Parte* Letter from John Bergmayer, Public Knowledge, *et al.*, to Marlene Dortch, FCC, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, at 6-7 (Dec. 11, 2013).

[38] 47 U.S.C. § 325(b)(3)(A).

[39] 47 U.S.C. § 325(b)(3)(C)(ii)

[40] *See* 138 CONG. REC. S643 (Jan. 30, 1992) (statement of Sen. Inouye) ("I am confident, as I believe the other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which [retransmission consent] carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers ... . If [the FCC] identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.); *id.* at S14615-16 (Sept. 22, 1992) (statement of Sen. Lautenberg) (remarking that "if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights;" but that "[i]nstead, cable operators will have an opportunity to seek relief at the FCC"). *See also id.* at S667 (Jan. 30, 1992) (statement of Sen. Inouye) (explaining, in a colloquy with Senator Levin, that "[t]he

obligation to ensure that the viewing public in its local license area receives the primary signal either free over the air or on reasonable terms through an MVPD, the Supreme Court has long recognized that the Commission's public interest authority is "expansive."[41] Finally, sections 303(r) and 4(i) of Title 47 provide a supplemental source of legal authority on which the Commission may rely.[42] Therefore, there is ample legal authority on which the Commission may depend in implementing a final-offer scheme.

2. The Policy Underlying Final-Offer Arbitration Makes it the Ideal Choice for Resolving Retransmission Consent Negotiation Disputes

Final-offer arbitration is the ideal solution to consent disputes, as it produces *bona fide* offers and does not possess the same problems as traditional arbitration. Traditional arbitration is problematic because the arbitrator has discretion to split the difference and find a compromise, and this "idea of a compromise can be seen as an obstacle to good-faith bargaining."[43] Parties are "less willing to make concessions and more likely to take extreme positions so that the aribtral 'compromise' will be skewed in their favor."[44] This has a "chilling effect" on the arbitration process.[45]

Final-offer arbitration remedies this problem by removing the element of discretion from the equation, and thus eliminates the incentive to skew offers to the extremes. Taking an extreme position becomes risky because if the "final offer is too extreme, an arbitrator will [likely]

FCC does have the authority to require arbitration, and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation"). More recently, in a 2007 letter to the Commission, the Chairman and Ranking Member of the Senate Commerce Committee wrote that Section 325's directives meant, "[a]t a minimum," that "Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]." Letter from Sens. Inouye and Stevens to Chairman Kevin Martin, Federal Communications Commission (Jan. 30, 2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR No. 8233-C (filed Oct. 22, 2009).

[41] *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943).

[42] 47 U.S.C. §§ 4, 303.

[43] Tulis, supra note 34.

[44] Id.

[45] Id.

choose" the less extreme offer.[46] This tends to "promote[] good faith bargaining and pre-hearing settlement," as "winning means being more reasonable."[47] Thus, final-offer arbitration is "the key that unlocks the door to settlement" and quicker resolution of a dispute."[48]

Final-offer arbitration benefits television consumers, as it would decrease the length of content disputes and reduce the chances of a blackout. Neither party would have an incentive to take an extreme position, as doing so would increase the chances of an unfavorable arbitration result. This would drive offers towards a reasonable midpoint, and prevent either side from engaging in brinksmanship. Thus, consumers are not deprived of content for which they pay, while parties arrive at fair, but not exorbitant, compensation for their content.

C. The Commission Should Examine Options for Interim Carriage to Forestall Blackouts, in Order to Prevent Consumer Harm

Interim carriage may be an appropriate tool for the Commission to apply in some circumstances, and as PK and OTI have argued before, the Commission has ample authority to require such carriage. Interim carriage may be necessary, for instance, to prevent region-wide blackouts of multiple programming channels by broadcasters with significant market power, or in areas where over-the-air reception is limited and without interim carriage viewers might lose access to important information. But this does not mean that interim carriage is necessarily an appropriate remedy for all retransmission consent disputes--the Commission should in general use this tool on a case by case basis, taking into account the relative negotiating leverage between the disputing parties, and the effects on viewers, rather than declaring that *all* negotiation impasses result in interim carriage, regardless of any other circumstances. Such a balanced approach would be more likely to avoid unintended consequences of Commission rule

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[46] Id.
[47] Id.
[48] Id.

changes (e.g., a nationally dominant MVPD using interim carriage to avoid fair negotiations with a small programmer).

However, this balanced approach depends on the Commission having taken steps to limit the consumer harms of blackouts, for example, by finding that timing blackouts to marquee events is in bad faith. Measures such as these should limit blackouts and threats of blackouts, thus reducing viewer harm. If the Commission instead declines to more clearly delineate what constitutes bad faith, across-the-board interim carriage may be appropriate as a blunt tool to limit harms to viewers.

V. Conclusion

For the reasons outlined above, the Commission should act to reform the retransmission consent regime to curb abuses of market power, promote consumer protection, and encourage competition in the programming and video distribution marketplaces.

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