

**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 WTA – Advocates for Rural Broadband**

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December 1, 2015

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## EXECUTIVE SUMMARY

Blackouts are not the only harm to consumers that results from a failure to negotiate retransmission consent in good faith. Rising retransmission consent fees—currently increasing at an annual rate of nearly 40 percent—also harm consumers by increasing basic service rates and decrease competition among MVPDs particularly in rural areas. Because price is the critical term around which all retransmission consent agreements in today’s video distribution marketplace rise and fall, the Commission must take actions consistent with its broad authority under the Communications Act to investigate the source of per-subscriber retransmission consent price increases charged to MVPDs—in particular prices charged to small rural MVPDs—and the impact that disparity in price has on competition in the MVPD marketplace. Because strict non-disclosure provisions prevent MVPDs and the Commission from having an accurate understanding of the retransmission consent marketplace, the Commission should inject much needed transparency into the market by requiring broadcasters to reveal to the public and to the Commission the rates charged to every MVPD in its local market.

The Commission must also take steps to provide further guidance for industry and address delay and other negotiation tactics that place additional artificial pressure on the need to quickly reach an agreement and which allow for unsubstantiated price increases. The Commission should add to its rules additional *per se* violations of the good faith requirement as described in these comments and make other reforms to the rules governing the exercise of retransmission consent such as by shifting the burden of proof to the respondent upon filing of a complaint alleging a *per se* violation of the rules, such as a complaint of take-it-or-leave-it negotiation tactics. The Commission should also provide much-needed guidance on substantive terms and conditions (such as tying, tiering, and demanding monetary compensation for retransmission to consumers that cannot obtain broadcast signals over-the-air) and make clear

that demands resulting in unreasonable increases to basic video service rates are not made in good faith.

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**Comments of WTA – Advocates for Rural Broadband**

WTA-Advocates for Rural Broadband (“WTA”)<sup>1</sup> hereby submits these comments in response to the Notice of Proposed Rulemaking (“NPRM”)<sup>2</sup> seeking comment on a review of the “totality of the circumstances” standard for assessing whether a party to a retransmission consent negotiation has bargained in “good faith” as directed by the STELA Reauthorization Act of 2014 (“STELAR Act”).<sup>3</sup> WTA welcomes the opportunity to comment on the proposals and issues raised in the NPRM, many of which substantially affect the ability for small rural multichannel video programming distributors (“MVPDs”) to provide attractive and affordable basic video services to their customers.

The aspect of retransmission consent negotiations most impacting WTA’s members and other small MVPDs at present is the need for additional oversight of prices charged to various MVPDs by broadcasters for retransmission consent. Price is the critical term that most often

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<sup>1</sup> WTA – Advocates for Rural Broadband is a national trade association representing more than 280 rural telecommunications providers offering voice, broadband and video services in rural America. WTA members serve some of the most rural and hard-to-serve communities in the country and are providers of last resort to those communities.

<sup>2</sup> *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, FCC 15-109, MB Docket No. 15-216 (rel. Sept. 2, 2015) (“*Totality of the Circumstances NPRM*”).

<sup>3</sup> Pub. L. No. 113-200, § 103(c), 128 Stat. 2059, 2062.

prevents the parties from reaching an agreement and often results in blackouts during which an MVPD is prohibited from retransmitting a broadcast signal to its cable subscribers.<sup>4</sup> Blackouts, however, are not the only harm to consumers that the Commission’s retransmission consent rules should address; unreasonable, inequitable and unsubstantiated rates charged for retransmission consent are just as harmful to consumers and competition in the marketplace for distribution of video programming, particularly in rural markets. WTA does not advocate that the Commission regulate rates charged by broadcasters for retransmission consent in the sense that the Commission set or cap permissible rates. All stakeholders, however, would benefit from increased transparency in price in addition to updates to the Commission’s list of *per se* violations and a more thoroughly illustrated “totality of the circumstances” test as proposed in the NPRM.

**I. The Current Retransmission Consent Regime Fails to Protect Consumers and MVPDs in Today’s Dramatically Different Video Distribution Marketplace.**

As noted in the NPRM, “[s]ince Congress’s enactment of Section 325, we have seen significant changes in the retransmission consent marketplace that have altered the negotiation dynamics between broadcasters and MPVDs.”<sup>5</sup> Similarly to how negotiations previously occurred between WTA’s members and the broadcast stations in their local markets, “broadcasters in the past typically negotiated with MVPDs for in-kind compensation”<sup>6</sup> such as carriage of additional networks of programming on cable systems. Across the board in today’s

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<sup>4</sup> See Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) (“Senate Commerce Committee Report”) (noting that “in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts.”).

<sup>5</sup> *Totality of the Circumstance NPRM* at ¶ 3.

<sup>6</sup> *Id.* at ¶ 3.

marketplace, however, broadcasters require monetary compensation on a per-subscriber basis in addition to the in-kind compensation demands of the 1990s and early 2000s.

Not only did broadcasters previously not demand monetary compensation, but the existing rules governing retransmission consent were created during a time when a local cable system was the only outlet beyond over-the-air broadcast signals for broadcasters to reach viewers. Since enactment of Section 325, however, direct broadcast satellite (“DBS”) providers have reached nationwide coverage and the Commission has modified its effective competition rules to reflect the fact that two DBS providers can each theoretically serve the vast majority of the customer locations throughout the continental United States.<sup>7</sup> As a result, the Commission has found that 99.7% of Americans have access to at least three MVPDs (including the two DBS providers) and 35% have access to at least four MVPDs (again including the two DBS providers). The third and fourth MVPDs generally consist of traditional wired cable television (“CATV”) companies, large and small telephone companies (including many of WTA’s members) and terrestrial wireless cable providers.<sup>8</sup>

In rural areas, consumers typically have access to the two national DBS providers,<sup>9</sup> plus a terrestrial CATV/IPTV system operated by a rural local exchange carrier (“RLEC”) or small rural cable company. In addition to providing robust broadband services not offered by DBS providers, RLEC CATV and IPTV services are usually locally owned and/or managed, which provides a more direct and receptive customer service experience and often increased local

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<sup>7</sup> See *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, MB 15-53, FCC 15-62, (2015).

<sup>8</sup> See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, ¶ 31 (2015) (“16<sup>th</sup> Video Competition Report”).

<sup>9</sup> The Commission has previously found that DIRECTV provides local broadcast service in 197 markets representing over 99 percent of U.S. homes, and that Dish Network provides local broadcast service in all 210 markets. *Id.* at ¶¶ 112-13.

programming.<sup>10</sup> However, the current trajectory of retransmission consent (and other programming) costs threaten the viability of small rural cable/IPTV operations and consumer access to more responsive and localized customer service and local programming, in addition to the cost savings of obtaining triple-play bundles of voice, video and broadband services from one provider. The Commission has likewise previously recognized the importance of preserving the ability for MVPDs to offer video and broadband services and the role of triple-play in broadband deployment and adoption.<sup>11</sup>

In addition, distribution of video programming directly to consumers over the Internet has grown in popularity among distributors and consumers alike.<sup>12</sup> Broadcast networks increasingly rely on the Internet and their own applications to distribute national network programming directly to consumers. This over-the-top trend has been encouraged by the Commission<sup>13</sup> and is likely to continue and increase in the future. The growth of over-the-top as a distribution method for broadcasters could also exacerbate the exponential rise in rates charged

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<sup>10</sup> For example, some of WTA’s members have relationships with schools in their local service areas and through these partnerships broadcast local high school and college sporting and other events over their cable/IPTV systems—a service appreciated by their customers.

<sup>11</sup> See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection Act of 1992*, Second Report and Order, FCC 07-190, ¶ 62 (Nov. 6, 2007) (“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.”).

<sup>12</sup> See *16<sup>th</sup> Video Competition Report* at ¶¶ 9-11 (noting the development and increasing prevalence of online video distribution services and the fact that in 2013 Netflix accounted for approximately one-third of Internet traffic during peak hours).

<sup>13</sup> See *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC 14-210, 29 FCC Rcd 15995 (rel. Dec. 19, 2014) (“*Over-the-Top NPRM*”). See also Tom Wheeler, *Tech Transitions, Video, and the Future*, FCC Blog, Oct. 28, 2014 (announcing efforts to modernize the interpretation of “multichannel video programming distributor” to encourage competition in the market for delivery of linear programming), available at <https://www.fcc.gov/blog/tech-transitions-video-and-future>. The Open Internet Rules were also justified in part by the need to preserve competition in the delivery of video programming. See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28, ¶¶ 9, 282 (rel. Mar. 9, 2015) (noting that video is the dominant form of traffic on the Internet and that video services such as Netflix “directly confront” the video businesses of MVPDs that also provide broadband services and that the Open Internet rules will foster competitive provision of video services).

to MVPDs in addition to providing incentive for broadcasters to refuse to reach retransmission consent agreements with MVPDs in order to preserve the ability to sell programming directly to the public.<sup>14</sup> Given this new outlet for broadcasters, the fears that led to passage of the Cable Consumer Protection Act of 1992 that broadcasters would be unable to obtain carriage on cable systems<sup>15</sup> are simply no longer relevant in today's complex video distribution marketplace in which many MVPDs now compete amongst each other for the rights to deliver "must have" broadcast programming.

These trends have resulted in substantial increases in the amounts broadcast stations charge small rural MVPDs for retransmission consent. Whereas urban cable systems operated by large multiple system operators ("MSOs") and DBS providers that appear to get much lower retransmission consent rates,<sup>16</sup> small rural MVPDs are increasingly being priced out of the market—including by urban network affiliates whose signal rural MVPDs carry beyond the off-air coverage area but whose audience is too small for affiliates to care about. Over the last five years, WTA members have seen an increase of approximately 40% per year in retransmission consent fees charged as compared to an annual increase of 10% or less for the most expensive cable networks over the same period. Shortly after WTA completed an internal survey of its

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<sup>14</sup> Broadcaster interest in pursuing direct-to-consumer streaming distribution should be contrasted with industry-wide broadcaster opposition to the Local Choice Act introduced during STELA Reauthorization that would have allowed consumers to select on an *a la carte*-basis which broadcast networks to subscribe to in their cable packages at rates set by broadcasters. As described further in these comments, MVPDs in today's marketplace are generally prohibited as a condition of obtaining retransmission consent from separating local broadcast stations from the basic service tier.

<sup>15</sup> See Cable Television Consumer Protection and Competition Act of 1992, Conf. Rpt. 102-862, 102nd Cong., 2d Sess. at 57 (1992) ("Cable Act Conference Report") (noting concerns that cable systems had an economic incentive to not carry local broadcast signals and the attendant threat to "the economic viability of free local broadcast television and its ability to originate quality local programming").

<sup>16</sup> Although WTA has no direct evidence to cite as a result of strict non-disclosure agreements contained in retransmission consent (and other programming) agreements, WTA is confident that an investigation by the Commission into the rates charged for retransmission consent will confirm that large MVPDs receive substantial discounts as compared to small operators. Accordingly, WTA urges the Commission to require disclosure, either to the public or to the Commission, by broadcasters of retransmission consent fees charged to all MVPDs in their local markets.

members, SNL Kagan released a report detailing an annual increase of approximately 40% in retransmission consent fees per subscriber.<sup>17</sup> Increases in retransmission consent (and other programming) costs are requiring small MVPDs to either raise their rates to unsustainable levels, drop other high-demand programming in order to maintain reasonable rates for their customers and remain competitive with the national DBS providers (often the only competitors to small cable or telephone company MVPDs in rural markets), or close their video businesses altogether as several WTA members have chosen in 2015.<sup>18</sup>

Rather than lose critical “must have” content or shut down operations altogether, small MVPDs reluctantly acquiesce to broadcasters’ demands for increased retransmission consent fees.<sup>19</sup> Many of WTA’s members have resisted increasing rates for cable/IPTV services to the extent that they can absorb the costs, however, they can no longer afford to do so. For example, in 2015 one WTA member saw a total increase in per-subscriber programming costs of \$5 over 2014 costs, nearly 75% of which was attributable solely to increases in retransmission consent fees paid to local broadcast stations. In order to offset the increase rather than raise rates charged to customers, this company ultimately dropped a package of independent cable programmer networks, a decision that resulted in subscriber loss to DBS providers.

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<sup>17</sup> Daniel Frankel, *Meredith Set to Renegotiate 80% of its Retrans Contracts Through 2017*, *FierceCable*, Oct. 30, 2015 (noting a rise in retransmission consent fees of 40% per pay-TV subscriber), available at <http://www.fiercecable.com/story/meredith-set-renegotiate-80-its-retrans-contracts-through-2017/2015-10-30>. NTCA-The Rural Broadband Association and Incompas (formerly Comptel) also recently released results from a survey of their respective memberships finding that 75% of their member companies experienced retransmission consent price increases of over 50% during the last round of negotiations. See NTCA and Incompas *Ex Parte* in MB Docket No. 15-216 (filed Oct. 29, 2015). The NTCA/Incompas survey likewise found lower increases in cable programming costs across the board with nearly 80% of companies experiencing cable programming rate increases of 20% or less.

<sup>18</sup> One WTA member decided to cease providing MVPD services to its customers as a result of losing approximately \$20,000 per month, losses driven primarily by the cost of programming.

<sup>19</sup> WTA’s members take appropriate steps to attempt to negotiate more reasonable rates for broadcast programming but such efforts are more often than not rebuffed by broadcasters.

Recognizing these changes and the modern dynamics in the marketplace for retransmission consent, Congress directed the Commission to review its “totality of the circumstances” test for good faith in retransmission consent negotiations. Congress has made clear that the Commission has ample authority to intervene in retransmission consent negotiations to protect consumers, “including whether certain *substantive terms* offered by a party may increase the likelihood of negotiations breaking down.”<sup>20</sup> In addition to the broad grant of authority for the Commission to “govern the exercise by television broadcast stations of the right to grant retransmission consent,”<sup>21</sup> the Communications Act also contains express direction from Congress that in developing rules governing retransmission consent that the Commission “*shall consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations . . . do not conflict with the Commission’s obligation . . . to ensure that rates for the basic service tier are reasonable.*”<sup>22</sup> Furthermore, Congress has directed the Commission to “make sure that its [totality of the circumstances] test encourages both parties to a retransmission consent negotiation to present bona fide proposals on the material terms of a retransmission consent agreement during negotiations.”<sup>23</sup>

Although the Commission to date has largely refrained from interfering in substantive aspects of retransmission consent negotiations (including regulating rates charged by broadcasters for grant of retransmission consent) it is clear from Section 325 and legislative history that Congress appreciates the potential harm to consumers that price and other

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<sup>20</sup> Senate Commerce Committee Report at 13 (emphasis added).

<sup>21</sup> 47 U.S.C. 325(b)(3)(A).

<sup>22</sup> *Id.* (emphasis added).

<sup>23</sup> Senate Commerce Committee Report at 13.

substantive demands by broadcasters could have on consumers and that Commission intervention could be warranted. Intervention by the Commission—as anticipated by Congress—is necessary at this time to prevent small MVPDs from being further priced out of the video distribution marketplace and to prevent consumer harm resulting from decreased competition among MVPDs in rural markets and the attendant negative impact on rural broadband deployment and adoption.

**II. The Commission Should Provide Additional Guidance Regarding Evidence of Bad Faith Under the Totality of the Circumstances in Retransmission Consent Negotiations.**

In this proceeding, the Commission seeks “to review, and if necessary, update the totality of the circumstances test”<sup>24</sup> that is used in circumstances which do not allege a violation of objective *per se* standards already defined in the Commission’s Good Faith rules<sup>25</sup> but still “reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties[.]”<sup>26</sup> The Commission seeks comment on whether there are “certain practices that the Commission should consider to be evidence of bad faith in evaluating the totality of the circumstance, or is that test best left as a general provision” to capture unforeseen actions and behaviors that might impede retransmission consent negotiations in the future.<sup>27</sup>

WTA recognizes the value in keeping the totality of the circumstances test broad enough to extend to unforeseeable circumstances but also knows that in order for the rules governing retransmission consent to be effective, the Commission must identify particular circumstances and practices known to harm retransmission consent negotiations in today’s marketplace and

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<sup>24</sup> *Totality of the Circumstances NPRM* at ¶ 5.

<sup>25</sup> See 47 C.F.R. 76.67(b)(1).

<sup>26</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, First Report and Order, 15 FCC Rcd 5445, ¶32 (2000) (“*Good Faith Order*”), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

<sup>27</sup> *Totality of the Circumstances NPRM* at ¶ 8.

implement effective enforcement mechanisms. Accordingly, WTA urges the Commission to add additional *per se* violations of the requirement to negotiate in good faith as well as further describe and refine those practices and substantive terms and conditions that evidence bad faith in retransmission consent negotiations under the totality of circumstances to be evaluated on a case-by-case basis.

**a. The Commission Should Adopt Specific Examples of Conduct in Retransmission Consent Negotiations as *Per Se* Violations of the Duty to Negotiate in Good Faith.**

Upon reviewing the Commission's existing list of *per se* violations of the requirement to negotiate retransmission consent in good faith, one notes that the Commission's current list involves behavior or circumstances that go to procedural aspects of retransmission consent negotiations, such as whether the negotiating party designates a representative with authority to bind the entity to a final agreement.<sup>28</sup> Alleged violations relating to timing and behavior during negotiations are more easily identifiable than the substantive terms and conditions typically offered during negotiations that warrant a case-by-case inquiry into local market conditions and the relative power between the negotiating entities. WTA therefore recommends that the Commission act to enhance its current approach to retransmission consent by including the following as additional *per se* violations of the requirement to negotiate in good faith:

- Failure to make an initial contract proposal at least 75 days prior to the expiration of an existing contract;
- Refusal to provide information substantiating bargaining positions;<sup>29</sup> and

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<sup>28</sup> See 47 C.F.R. § 76.65(b)(1). See also *Good Faith Order* at ¶39 (stating that “[c]onsistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not . . . prohibit proposals of certain substantive terms[.]”).

<sup>29</sup> Because retransmission consent was intended to preserve local programming, not subsidize national network and syndicated programming, it should not be permissible for a broadcaster to justify its demand for increased retransmission consent fees by alleging demands by national networks for increased reverse compensation paid to national networks.

- Engaging in “surface bargaining” (i.e., conduct designed to delay negotiations or going through the motions of bargaining, but that does not necessarily constitute an outright refusal to bargain).

Each of these behaviors by broadcasters during negotiations has impacted WTA’s members and contributes to the imbalance in the market for retransmission consent that leads to blackouts and unreasonable retransmission consent rate increases. For example, some broadcasters timely notify MVPDs of their retransmission consent election but wait to present an initial contract proposal until close to the expiration date of an existing retransmission consent agreement (often immediately prior to “marquee” broadcast television events), unreasonably increasing the pressure for the MVPD to accept the rate and terms offered in the broadcaster’s initial proposal. In order to remedy harm from this delay tactic, the Commission should require broadcasters to submit an initial contract proposal at least 75 days prior to the expiration of an existing contract or along with the notice of election required by Section 76.64(f) of the Commission’s rules. This would ensure sufficient time exists for full negotiations on the material terms without the artificial pressure applied by the potential for a blackout were negotiators unable to agree prior to expiration of the current agreement.

The Commission should also require that broadcasters provide information substantiating the rates and other material terms demanded by broadcasters, including requiring the disclosure of rates charged to all other MVPDs in the local market.<sup>30</sup> WTA’s members have no opposition to disclosing the rates they pay to other broadcasters but are prohibited from doing so by strict non-disclosure provisions in existing retransmission consent agreements. Having a sense of

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<sup>30</sup> The Media Bureau recently denied a complaint by broadcasters against DIRECTV noting that under existing precedent parties are not required “to disclose confidential information to support their position.” In re Northwest Broadcasting, L.P., et al. v. DIRECTV, LLC, Memorandum Opinion and Order, MB Docket No. 15-151, CSR-8910-C, DS 15-1271 (rel. Nov. 6, 2015) (“*Northwest Broadcasting Order*”). The Commission is not bound by this determination and may proceed to further refine the requirement that parties to a retransmission consent negotiation provide an explanation for rejecting an offer. *Id.* at ¶ 11, n. 45.

broadcaster price demands among MVPDs in a market—particularly for small MVPDs with fewer than 3,000 subscribers serving rural markets that often provide the only competition to national DBS providers with subscriber totals in the millions—would go along way towards ensuring that retransmission consent negotiations are occurring in good faith, that rates for the basic service tier remain reasonable, and that competition is not harmed by pricing small MVPDs out of the MVPD marketplace.

Finally, despite the fact that the Commission’s rules already delineate “take-it-or-leave-it” demands as a *per se* violation of the good faith negotiation requirement,<sup>31</sup> negotiations between broadcasters and small MVPDs often do take the shape of “take-it-or-leave it” demands for increased compensation by broadcasters followed by reluctant acquiescence by MVPDs after failed attempts to obtain any concession on price or any other material terms. Broadcaster attitudes toward retransmission consent negotiations were recently illustrated by one broadcast CEO describing his approach to negotiations with one simple question: "How many customers are they going to lose if they don't have us? It's no more complicated than that."<sup>32</sup> Additionally, some broadcasters have begun demanding that an MVPD agree to per-subscriber compensation prior to discussing any other material terms or conditions of the agreement (such as tier placement and customer penetration requirements that substantially impact the financial composition of the totality of the deal). Although not necessarily constituting an outright refusal to bargain, such behavior violates the requirement to negotiate in good faith because it demands that an MVPD agree to one material term without the ability to negotiate (or even consider) other

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<sup>31</sup> See 47 C.F.R. § 76.65(b)(1)(iv) (prohibiting the refusal to put forth more than a single, unilateral proposal).

<sup>32</sup> Daniel Frankel, *Retrans Fees Could Reach \$6 Per Sub, Broadcasters Say*, *FierceCable*, June 29, 2015 (discussing broadcasters’ intent to increase per-subscriber retransmission consent fees and quoting broadcast executives to that effect), available at [http://www.fiercecable.com/story/retrans-fees-could-reach-6-sub-broadcasters-say/2015-06-29?utm\\_medium=nl&utm\\_source=internal](http://www.fiercecable.com/story/retrans-fees-could-reach-6-sub-broadcasters-say/2015-06-29?utm_medium=nl&utm_source=internal).

terms that could have a material impact on the deal as a whole. Such conduct should be expressly prohibited in the Commission's rules.

Furthermore, many small rural MVPDs are stonewalled when it comes to attempting to negotiate price<sup>33</sup> and carriage terms offered in a broadcaster's initial proposal. The Commission should make clear that refusing any concession on at least one material term of a retransmission consent agreement (such as price, tier placement, and/or penetration requirements) violates the requirement to negotiate in good faith as a failure "to put forth more than a single, unilateral proposal."<sup>34</sup>

**b. The Commission Should Provide Additional Guidance Regarding Certain Substantive Terms and Conditions That Evidence Bad Faith in Retransmission Consent Negotiations Under the Totality of the Circumstances.**

In addition to identifying additional *per se* violations of the requirement to negotiate retransmission consent in good faith as described above, the Commission must consider the impact that certain substantive terms have on the trajectory and outcome of retransmission consent negotiations.<sup>35</sup> The Commission asks how it can "best ensure that any revisions to the totality of the circumstances test will not hinder a party's ability to tailor its proposals to the competitive environment?"<sup>36</sup> Because the Commission's rules already provide that "[p]roposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station . . . the effect of which is to hinder significantly or foreclose MVPD

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<sup>33</sup> The Commission should note that at this point any increases retransmission consent fees are only a windfall to broadcasters at the expense of cable customers. See CBS Leslie Moonves on Q2 Results – Earnings Call Transcript, Seeking Alpha, Aug. 5, 2015 (stating that "we had previously said we'd get to \$1 billion by 2017. We will now surpass that target next year in 2016. *These are dollars that fall right to the bottom line.*") (emphasis added), available at <http://seekingalpha.com/article/3405525-cbs-cbs-leslie-moonves-on-q2-2015-results-earnings-call-transcript?page=2>.

<sup>34</sup> 47 C.F.R. § 76.65(b)(1)(iv).

<sup>35</sup> Senate Commerce Committee Report at 13.

<sup>36</sup> *Totality of the Circumstances NPRM* at ¶ 11.

competition” are presumptively inconsistent with the competitive marketplace considerations under the totality of the circumstances test,<sup>37</sup> the Commission can achieve its goal of protecting free market aspects of retransmission consent negotiations by focusing its inquiry on the extent to which certain terms or conditions proposed in retransmission consent negotiations negatively impact competition in the market for MVPD services, particularly the impact on the ability for small MVPDs to continue providing MVPD services.<sup>38</sup> The Commission’s focus should be on “impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier” as required by the Communications Act.<sup>39</sup> Preserving competition and ensuring reasonable basic service rates are key goals of the Communications Act and can be achieved by providing meaningful illustrative guidance to industry regarding the boundaries of good faith in retransmission consent negotiations, including the reasonableness of annual rate increases charged to MVPDs for retransmission consent.

As an initial matter, a proper evaluation of the totality of the circumstances must include a comparison of the negotiating power and relative sizes of the negotiation entities. For example, one WTA member providing MVPD services to 135 customers in rural Nebraska is assigned to the Denver, CO Designated Market Area (“DMA”), which includes over 1.5 million TV homes.<sup>40</sup> Whereas broadcasters in the Denver DMA would be substantially harmed by failure to reach agreements with large MSOs serving major urban or suburban areas of the Denver DMA or with the DBS providers serving the entire DMA, they are unlikely to have any

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<sup>37</sup> *Good Faith Order* at ¶58.

<sup>38</sup> *Id.* at ¶ 57 (noting the range in the size and relative bargaining power of broadcaster and MVPDs and the differing dynamics of specific retransmission consent negotiations).

<sup>39</sup> 47 U.S.C. §325(b)(3)(A).

<sup>40</sup> In addition to being located in an out-of-state DMA, consumers in this company’s service territory are unable to receive broadcast signals from Denver or any Nebraska broadcasters free over-the-air, leaving the rural MVPD or national DBS providers as their only true options for broadcast content.

significant interest in negotiating with an out-of-state MVPD that serves only nine thousands of one percent (0.009 percent) of the households in the DMA. Due to its small size, the WTA member is unable to negotiate pricing arrangements including for retransmission consent that would enable it to compete with a \$19.99 promotional package offered by DBS providers serving the same area.<sup>41</sup>

The Commission's rules must make clear that such dramatically different negotiating postures are taken into account in assessing good faith in retransmission consent negotiations, particularly if the impacts of such a dynamic significantly hinder the ability for the small MVPD to compete with large, national MVPDs. The Commission should also make clear that price discrimination among MVPDs in a market without showing of a direct and legitimate economic benefit evidences bad faith in retransmission consent negotiations. For example, there is no evidence that the cost to a broadcaster is any less to transmit its signal to a national DBS provider than to a small MVPD. Once a local broadcast station has obtained the rights to its programming (network, syndicated and local) and broadcast such programming, there is no additional cost whether such programming is received and re-broadcast by large, small, or medium-sized MVPDs. Once a retransmission agreement is in place, a broadcast station has only to keep track of which MVPDs make their required payments, and in fact may have less of a problem reviewing and occasionally auditing the payments of small MVPDs rather than large MVPDs.

In addition to considering the size and negotiating power, the Commission should identify the failure to negotiate terms and conditions for retransmission consent based on actual market conditions (including the availability of broadcast signals directly to consumers for free

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<sup>41</sup> <http://www.directv.com>

over-the-air) as evidence of bad faith in retransmission consent negotiations.<sup>42</sup> Currently, small rural MVPDs often cannot receive re-transmissible broadcast signals at head-ends in their service areas and must engage a third party to transport broadcast signals from the city of license to the MVPD's franchise area due to the limited reach of digital broadcast signals. For example, one WTA member is unable to obtain any signal from its assigned DMA according to Commission data. Nearly two-thirds of the towns in another member's service area are unable to obtain off-air signals. Due to their small size and low negotiating power, these small MVPDs are unable to reach agreements that reflect this lack of access in an appropriate manner. In effect, these MVPDs are extending the viewership of broadcast stations to the benefit of the broadcasters at the expense of rural consumers that should be able to obtain these signals for free over-the-air but cannot—a situation foreseen by drafters of the retransmission consent statute.<sup>43</sup> Charging per-subscriber fees for customers that cannot otherwise obtain broadcast signals free over-the-air directly leads to increased basic service rates<sup>44</sup> and is inconsistent with the obligation for broadcasters to serve the public interest. At a minimum, the Commission should make clear that it is evidence of bad faith under the totality of the circumstances (and contrary to the public interest) for broadcasters to demand monetary compensation on a per-subscriber basis when the subscriber could not otherwise obtain the broadcast signal without an intermediary.

The Commission's freely available Broadcast Coverage Tool (the "Tool")<sup>45</sup> can easily be used to determine whether broadcast signals are reasonably available to consumers over-the-air.

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<sup>42</sup> *Totality of the Circumstances NPRM* at ¶ 16.

<sup>43</sup> See Cable Act Conference Report at 57 (stating that "[a] cable television system carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues").

<sup>44</sup> For one WTA member, the need to engage a third-party transport provider results in an effective per-subscriber rate that is double the rate charged by broadcasters for retransmission consent.

<sup>45</sup> FCC, DTV Reception Maps, available at <http://transition.fcc.gov/mb/engineering/dtvmaps/>.

WTA proposes that the Commission provide guidance to negotiating entities that charging per-subscriber compensation for retransmission consent is inconsistent with the requirement to negotiate in good faith unless the Tool lists broadcast signal strength as “strong” or “moderate” in the negotiating MVPD’s service territory. If the signal availability is listed as “weak” or “no signal” for the MVPDs service area, the Commission should limit retransmission consent compensation to in-kind compensation (such as tier placement demands). Furthermore, the Commission should consider requiring that broadcasters offer to assist in obtaining transport from a third-party and/or invest in facilities necessary to ensure broadcast signal availability to all consumers in their local market. This would ensure that all consumers are able to access the broadcast programming Congress intended to be free for all Americans, rather than requiring rural consumers to pay while urban and suburban consumers have access to broadcast content for free over-the-air.

The Commission should also examine the broadcasters’ tiering and tying demands that are growing the size and price of the basic service tier. Broadcaster insistence on bundling broadcast signals with other broadcast stations and/or cable networks (including regional sports networks, multicast channels, and prospective/untested programming channels that a station has not launched or acquired ownership) in combination with demanding carriage on the most penetrative tier has caused substantial increases both to the size and cost of basic MVPD service. In the majority of cases, broadcasters that demand MVPDs take multiple networks in a bundled package fail to offer a meaningful financial alternative, leaving MVPDs with no choice but to require their customers to subscribe to ever-increasing basic service tiers.

For example, in recent negotiations one WTA member requested a standalone price for a national network’s local affiliate rather than a bundled package. The broadcaster’s response was

to offer a standalone price that far exceeded rates for other broadcast stations, with the standalone rate nearly 40% higher than the rate offered on a bundled basis. Additionally, penetration requirements accompanied carriage of both the standalone and bundled packages and required nearly all of the MVPD's customers to subscribe to both networks. Such demands are not unusual and are particularly harmful for small MVPDs and their customers because small MVPDs are more likely to operate on capacity constrained cable systems and are less likely to be able to react to increases in the size and price of basic MVPD service tier. The Communications Act imposes on the Commission an obligation to ensure that the grant of retransmission consent does not interfere with the goal of ensuring rates for basic MVPD service remain reasonable, and such an obligation is particularly relevant in negotiations involving small MVPDs that lack any real negotiation power. The Commission should make clear that broadcasters act in bad faith when demanding tying and tiering requirements without providing a meaningful financial alternative if the impact of such demands is to unreasonably increase the size and cost to consumers of the basic service tier.

**III. The Commission Should Reform Existing Enforcement Mechanisms to Provide Broadcasters with Meaningful Incentives to Negotiate in Good Faith and Protect Consumers from Unreasonable Price Increases.**

An effective regulatory regime governing retransmission consent is impossible without an enforcement mechanism that is effective in preventing and resolving disputes to the benefit of consumers. In evaluating what regulatory steps are necessary in this proceeding, the Commission must remember that blackouts are not the only harm to consumers when retransmission consent agreements are not the product of good faith negotiations. Exponential increases in retransmission consent fees and bloated basic service packages also lead to customer harm and dissatisfaction. The Commission asks whether the current process for filing bad faith

allegations based on the totality of the circumstances test, including legal standards and evidentiary burdens, helps to promote bona fide negotiations and protect consumers?<sup>46</sup> The current process does not.

The complaint process today is costly, lengthy, and largely ineffective for small MVPDs. Small MVPDs unsatisfied with the direction of retransmission consent negotiations must either succumb to a black out or accept the new terms (e.g., increased prices) then file a complaint and wait for the Commission to make a determination. By the time an agreement is reached or a formal complaint is filed and resolved, the small MVPD has lost customers to national DBS providers either due to raising basic service rates or losing must-have programming. As discussed above, although take-it-or-leave-it negotiation tactics are already prohibited but continue in ongoing negotiations between small MVPDs and broadcasters, more must be done to ensure that the Commission's rules and enforcement actually promote bona fide negotiations and protect consumers.

Mediacom Communications filed a proposal seeking the Commission to require interim carriage and the re-opening of negotiations for 90 days upon prima facie showing of bad faith followed by mandatory arbitration on a self-supported, loser pays basis.<sup>47</sup> WTA supports the idea of mandatory interim carriage while negotiations continue along with "true-up" if an agreement includes increased fees, but as a practical matter arbitration is no more cost-effective as a mechanism for dispute resolution for small companies than filing a complaint with the Commission and in fact could be more costly. Furthermore, parties already have an existing

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<sup>46</sup> *Totality of the Circumstances NPRM* at ¶7.

<sup>47</sup> *Mediacom Ex Parte* Letter in MB 15-216 at 4 (filed Sep. 28, 2015).

option to elect arbitration under the Commission’s existing rules.<sup>48</sup> Accordingly, the Commission should focus its reform efforts on more clearly defining permissible negotiation practices and substantive terms and conditions that evidence bad faith in order to prevent the need for ex post enforcement and increase the likelihood that an agreement will be reached after bona fide good faith negotiations. Although WTA believes that more guidance on permissible negotiation practices would be most likely to stem the rising tide of retransmission consent fees than mandatory arbitration, the Commission could also make minor adjustments to its existing enforcement mechanisms that would have a pro-consumer effect.

For example, the Commission could shift the burden of proof in retransmission consent complaints to the respondent upon a showing of a *per se* violation.<sup>49</sup> The current regulatory structure places the burden on the complainant regardless of the nature of the violation.<sup>50</sup> In circumstances of a *per se* violation, such as a take-it-or-leave-it demand by broadcasters, placing the burden of disproof on the respondent would more likely incentivize both parties to negotiate in good faith. Given the constrained resources of small MVPDs and the expense involved in pursuing a formal retransmission consent complaint at the Commission, combined with the fact that no time limit for Commission action on a retransmission complaint exists, frivolous complaints are highly unlikely to occur.<sup>51</sup>

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<sup>48</sup> 47 C.F.R. § 76.67(g)(2) (providing that parties may elect arbitration after the Commission informs the parties of its intent to designate the case for a hearing with an administrative law judge).

<sup>49</sup> See *Totality of the Circumstances NPRM* at ¶ 7, n. 37 (construing Congressional direction to include “not only the existing administrative procedures for filing complaints with the Commission, but also on the legal standards and evidentiary burdens that are applied in resolving such complaints); Senate Commerce Committee Report at 13 (stating that “the Committee intends, as part of this rulemaking, for the FCC to examine whether its current process for filing bad faith allegations based on the totality of the circumstances test is effective and actually helps to promote bona fide negotiations and protects consumers.”).

<sup>50</sup> 47 C.F.R. ¶ 76.65(d).

<sup>51</sup> It is worth noting the relatively few formal retransmission consent complaints brought to the Commission and the lack of complaints filed by small MVPDs due primarily to the fact that these MVPDs lack the resources for a formal adjudication. Small MVPDs are inclined to avoid pursuing formal adjudication simply due to the economic effect

Finally, the Commission should also consider requiring broadcast stations to make public or submit for review the rates charged to all MVPDs in each local market to better enable the Commission to conduct a neutral, third-party investigation into the market for retransmission consent. MVPDs and broadcasters alike have no way to know where they rank as compared to their competitors and both sectors of the industry have expressed a desire for more transparency in pricing.<sup>52</sup> Requiring the submission of rates charged by a broadcaster to each MVPD in a local market would enable a comparison to ensure that rates charged are based upon local market conditions rather than unjustifiable volume-based discounts or other anti-competitive measures and also ensure that rates are reasonable. The Commission could require broadcast stations to make a rate card available in their public files or file retransmission consent agreements with the Commission to ensure that the Commission has an accurate view of the market in order to fulfill its Congressional mandate to protect competition and ensure that rates for the basic service tier remain reasonable. This requirement would provide the regulator with an accurate picture of the retransmission consent landscape as it exists rather than requiring reliance on blanket assertions that “all is well” when it comes to retransmission consent.

Although the Commission has previously refrained from imposing direct rate regulation on rates charged for retransmission consent,<sup>53</sup> that decision relied on the lack of “credible

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that loss of the ability to retransmit local broadcast programming for any period of time would have on their ability to retain subscribers.

<sup>52</sup> See *Northwest Broadcasting Order* at ¶ 12 (denying broadcasters’ complaint seeking the Commission to order discovery pursuant to Section 76.7 of the Commission’s rules to require DIRECTV to provide its retransmission consent agreement pricing information so that a market price can be established for a retransmission consent agreement). See also *Mediacom Communications Corp., v. Sinclair Broadcasting Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35, 41 ¶ 15 (MB 2007) (denying a similar request by cable company Mediacom that Sinclair broadcasting be required to justify price demands with evidence of amounts it agreed to receive in retransmission consent agreements with other cable companies).

<sup>53</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶ 178 (1993) (“*Broadcast Signal Carriage Order*”) (concluding based on the record and regulatory structure that the time that “[i]t appears that Congress did not intend that retransmission consent rates be directly regulated.”). There were concerns raised during the legislative process

analysis suggesting that the effect [of retransmission consent rates on basic service tier rates] cannot be dealt within the rate regulation proceeding [to regulate rates charged by cable companies].”<sup>54</sup> As with the marketplace for distribution of video programming more generally, that conclusion no longer holds true. Retransmission consent rates have skyrocketed in comparison to the rates charged when the Commission first implemented its retransmission consent rules,<sup>55</sup> and all indications lead WTA and its members to believe that only intervention by the Commission could stem the tide of rising retransmission consent rates.

Furthermore, Senator Daniel K. Inouye, principal sponsor of the Cable Act of 1992 and the retransmission consent provision noted that “the FCC has a clear mandate to ensure that retransmission does not result in harmful rate increases[.]”<sup>56</sup> Because the Commission’s prior determination to refrain from regulation of retransmission consent rates relied on the regulation of retail cable rates and the rates of the vast majority of cable companies—including the majority of WTA’s members—are no longer regulated by the Commission or local franchising authority pursuant to Section 623(b)(1), the Commission must act within its broad statutory authority to governing the grant of retransmission consent<sup>57</sup> in a manner that ensures that rates charged for retransmission consent are reasonable and do not result in pricing small MVPDs and their

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about the impact of retransmission consent regime on basic cable rates. See Cable TV Consumer Protection Act of 1991: Hearings on S. 12 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 102d Cong., 1st Sess., 181-82 (1991) (testimony of Ted Turner, president of Turner Broadcasting System) (noting in response to questioning by Senator Inouye that retransmission consent costs would likely be passed onto consumers).

<sup>54</sup> *Broadcast Signal Carriage Order* at ¶ 178

<sup>55</sup> Rates charged for retransmission consent have risen over 8,600%. See Tom Wheeler, Protecting Television Consumers by Protecting Competition, March 6, 2014, *available at* <https://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>. Additionally, some broadcast networks have publicly indicated their desire to have retransmission consent rates reach \$6.00 per subscriber per month.

<sup>56</sup> 138 Cong. Rec. S563 (Jan. 29, 1992).

<sup>57</sup> In addition to the mandate to ensure that rates for basic cable service remain reasonable, the Commission has authority through Section 4(i) to “perform any and all acts . . . as necessary in the execution of its functions” including by requiring submission of retransmission consent agreements for review to ensure that rates for basic cable service are reasonable.

customers out of the marketplace to the detriment of competition in the market for cable and broadband services.

#### **IV. CONCLUSION**

WTA encourages the Commission to develop a full record in this proceeding to ensure that broadcasters and MVPDs alike are negotiating for retransmission consent in good faith. In considering the comments in the record, the Commission should bear in mind that blackouts are not the only consumer harm that results from bad faith in retransmission consent negotiations. Because price is the critical term around which all retransmission consent agreements in today's video distribution marketplace rise and fall, the Commission must take actions consistent with its broad authority under the Communications Act to investigate the source of retransmission consent per-subscriber price increases charged to MVPDs—in particular prices charged to small rural MVPDs—and the impact that disparity in price has on competition in the MVPD marketplace. Accordingly, the Commission should inject much needed transparency into the market by requiring broadcasters reveal to the public and to the Commission the rates charged to every MVPD in its local market.

The Commission must also take steps to address delay and other negotiation tactics that place additional artificial pressure on the need to quickly reach an agreement and allow for unsubstantiated price increases by adding to its rules additional *per se* violations of the good faith requirement as described in these comments, including by shifting the burden of proof to the respondent upon filing of a retransmission consent complaint alleging a *per se* violation of the rules. The Commission should also elaborate further on substantive terms and conditions such as tying and tiering demands and make clear that substantive demands that result in unreasonable rates for basic video services are not made in good faith. Providing additional,

much-needed guidance for industry will go a long way toward ensuring that retransmission consent negotiations occur in good faith and that rates for basic service remain reasonable.

Respectfully Submitted,

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Dated: December 1, 2015