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 21ST CENTURY FOX, INC. AND FOX TELEVISION STATIONS, LLC

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INTRODUCTION AND SUMMARY

21st Century Fox, Inc., and Fox Television Stations, LLC (together, "Fox"), urge the Commission to recognize that the retransmission consent system, and the attendant good faith bargaining rules, continue to work incredibly well to deliver to consumers vibrant, diverse and high-quality broadcast television service in markets across the country. Indeed, in a television programming era defined by fierce and growing competition, the retransmission consent rules remain a critical linchpin of broadcasters' ability to invest in the creation of content that American viewers spend so much time enjoying.

Fox also seeks to ensure that the record is clear on the appropriate, limited scope of this proceeding. As directed by Congress, the Commission was to initiate a review of the "totality of the circumstances" test for determining whether broadcasters and multichannel video programming distributors ("MVPDs") are fulfilling their obligation under Section 325(b)(3)(C)(ii) and (iii) to negotiate in good faith for retransmission consent.[1] The *Good Faith*

[1] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014 — Totality of the Circumstances Test*, NPRM, MB Docket No. 15-216, FCC 15-109, at ¶ 1 (Sept. 2, 2015) ("*Good Faith NPRM*"); *see also* 47 U.S.C. § 325(b)(3)(C)(ii) and (iii).

NPRM, unfortunately, ventures far beyond any reasonable reading of the Congressional directive. Rather than faithfully review the "totality of the circumstances" test, or even the good faith bargaining rules in general, the Commission has barreled headlong into a wide-ranging review of the entire retransmission consent system — and beyond. Not only is no basis for this approach to be found anywhere in the STELAR statute that authorized this proceeding, but there also is no policy rationale warranting so sweeping a review of a system that by all objective accounts continues to function just as Congress intended.

Moreover, even where the *Good Faith NPRM* does explore the negotiation process, it appears to approach the matter on the basis of significant misinformation about the state of competition. It is critical, however, that this review be based on an accurate assessment of the dynamics of the modern video marketplace. Many of the concepts raised in the *Good Faith NPRM* appear to stem from the false premise that increased competition among MVPDs has left them in such a diminished state that they require the Commission's protection from ordinary, market-based negotiations with broadcasters. That is far from the case. To the contrary, by far the biggest change in MVPD market dynamics since 1992 has been an increase in *concentration* among MVPDs, not *competition* between them. Meanwhile broadcasters have been subjected to a relentless barrage of new competition — for both consumer attention and for marquee programming — which if anything has only increased broadcast stations' incentives to reach retransmission consent deals with every willing MVPD. Otherwise, broadcast stations would be left to fall even further behind in the face of ever-increasing competition from new entrants and entrenched competitors alike for high-quality content, viewers and advertisers.

In any case, the Commission lacks authority as a matter of law to adopt most of the proposals teed up in the *Good Faith NPRM*. As Congress always has made clear, the retransmission consent rules govern the negotiation *process* between broadcasters and MVPDs; Congress has given the Commission no discretion to dictate the *outcome* of these negotiations. Yet many of the proposals in the *Good Faith NPRM* effectively would establish just the sort of substantive limitations on retransmission consent business terms that Congress has placed beyond the Commission's jurisdiction.

In short, the Commission should emerge from this review with one clear conclusion: to reject proposals designed to tip the balance in retransmission consent negotiations in favor of MVPDs. Instead, the Commission should leave in place a system that has helped make possible, and continues to contribute to, the current golden age of television enjoyed by consumers.

I. THE EXISTING RETRANSMISSION CONSENT SYSTEM, INCLUDING THE FLEXIBLE TOTALITY OF THE CIRCUMSTANCES TEST, CONTINUES TO SERVE THE PUBLIC INTEREST BY FACILITATING FAIR, MARKET-BASED NEGOTIATIONS, AS CONGRESS INTENDED.

A. There is No Justification for Tilting Negotiations Toward Increasingly Concentrated MVPDs and Against Broadcasters Facing Unprecedented Competition.

MVPDs' disingenuous assertions that the retransmission consent system is "broken" ignore that the overwhelming majority of retransmission consent negotiations — well over 99 percent — are concluded in the ordinary course without fanfare. And despite overblown complaints about increases in retransmission consent fees, the fact that broadcasters are succeeding in negotiating fair value for their content — thus enabling the virtuous circle of investment in new and better content — is a key feature of the system Congress established, not the glitch in the system MVPDs would have the Commission believe. Accordingly, the Commission should reject two major erroneous determinations that appear to animate many of the proposals discussed in the *Good Faith NPRM*.

First, the *Good Faith NPRM* suggests that an "increase in competition among MVPDs has improved broadcasters' leverage in retransmission consent negotiations with MVPDs."[2] In fact, however, by far the biggest change in MVPD market dynamics since 1992 has been an increase in *concentration* among MVPDs, not *competition* between them. Although more households may have more than one option for subscription television service, the major MVPDs nonetheless have remained dominant on the national, regional, and local levels, and their market power has if anything increased relative to broadcasters'. As NAB has noted, "in 2002, the four largest MVPDs controlled 50.5 percent of the MVPD market nationally (measured in terms of subscribers)," but "[t]oday, with the recent merger of AT&T Inc. (AT&T) and DIRECTV, the top four MVPDs alone serve 71 million subscribers, or 73 percent of the nationwide MVPD market."[3] The combined AT&T/DIRECTV, now the largest MVPD, has 26.3 million subscribers — nearly double the size of the largest MVPD in 1995, shortly after Congress established the retransmission consent system.[4] Today, "a single MVPD enjoys a market share of 40 percent or higher" in 96 DMAs, "including 49 DMAs in which a single MVPD enjoys a share of 50 percent or more."[5] In addition, "[b]y the end of 2008, 50.7 million out of a total of 65.3 million cable subscribers were served by cable systems in regional clusters."[6] As one commentator explained, geographic clustering of MVPDs makes the pay-TV marketplace even

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[2] *Good Faith NPRM* at ¶ 3.

[3] Comments of the National Association of Broadcasters, MB Docket No. 15-158, at 16 (filed Aug. 21, 2015) ("NAB Video Competition Comments").

[4] *Id*. at 17.

[5] *Id*. at 19-20.

[6] Sung Wook Ji, The Effects of Cable Clustering on the Flow of Cable Programming Networks 6 (Aug. 15, 2012) (unpublished manuscript), *available at* http://ssrn.com/abstract=2031731.

less competitive.[7] In light of these trends, proposals to rig the good faith negotiation rules to *increase* MVPDs' leverage over broadcasters should be rejected.

Second, there is no basis for the argument advanced by MVPDs that broadcasters' alleged exercise of leverage to negotiate higher retransmission consent fees is a principal source of "upward pressure on consumer prices for MVPD video programming services,"[8] and thus causes consumer harm. The fees paid for retransmission consent are a small fraction of the overall cost base of MVPDs large and small, with broadcast retransmission fees accounting for only a small percentage of every dollar of distributors' video revenue.[9] Moreover, the Commission should not forget that, when a station elects retransmission consent, it assumes the risk that an MVPD may choose not to carry that station at all. If a particular MVPD were to conclude that a particular broadcast station is not worth the price sought by the station, the distributor is free to decline to carry it. That this happens so incredibly rarely demonstrates the resiliency of the system Congress designed 25 years ago. As does the fact that, even in an era of abundant consumer choice, nearly 90% of American television households elect to subscribe to a cable, satellite or telco video service.[10]

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[7] Note, *Enabling Television Competition in a Converged Market*, 126 Harv. L. Rev. 2083, 2090-91 (2013).

[8] *See Good Faith NPRM* at ¶ 3.

[9] *See* Jeffrey A. Eisenach, "Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content," NERA Economic Consulting, at ii (July 2014), *available at* http://www.freetv.com.au/media/NERA_RESEARCH_Delivering_for_Television_Viewers_Retransmission_Consent_and_the_US_Market.pdf ("As important as retransmission consent is to broadcasters, it accounts for less than three percent of cable operators' revenues and has little or no impact on pay TV prices.").

[10] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3314 (2015) (noting Nielsen estimate that "about 86 percent of the 120.2 million U.S. households, or 89 percent of 115.8 U.S. television households, subscribe to an MVPD as of December 2013") ("*16th Video Competition Report*").

Let there be no mistake, though: broadcast stations face competition from far more sources than Congress possibly could have imagined in 1992. Stations compete not only with other stations in their market (including stations that were not on the air in 1992) but also with hundreds of pay-TV networks and with the increasing amount and variety of programming (both original and licensed) available through online powerhouses like Netflix and Amazon.[11] All of these options have put tremendous pressure on traditional ratings, even as the burgeoning choices have led the average consumer to spend *more* time watching video content than ever before.

For instance, one recent report projected "that subscriber numbers for services like Netflix and Amazon Prime Instant Video will grow from 92.1 million in 2014 to 333.2 million global subscriptions by 2019."[12] One analyst estimated that Netflix streamed an average of 1.8 *billion* viewing hours in the U.S. in the first quarter of 2014, achieving viewership "within striking distance of the broadcast networks."[13] As of June 2015, Consumer Reports found that Amazon offered "more than 17,000 standard- and high-definition movies and TV series," with Netflix offering 10,000.[14] And that is to say nothing of the thousands of titles of movies and television programs available through MVPDs' own on-demand libraries.

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[11] *See, e.g.*, *16th Video Competition Report*, 30 FCC Rcd at 3257 (noting that online providers "continue to expand the amount of video content available to consumers through original programming and new licensing agreements with traditional content creators").

[12] Sarah Perez, "Over-The-Top Streaming Video Services To Surge To 330 Million+ Subscribers By 2019," http://techcrunch.com/2015/05/18/over-the-top-streaming-video-services-to-surge-to-330-million-subscribers-by-2019/ (May 18, 2015).

[13] David Lieberman, "Is Netflix Closing In On Broadcast Networks In Total Viewing?," Deadline, http://deadline.com/2014/05/is-netflix-closing-in-on-broadcast-networks-in-total-viewing-733450/ (March 20, 2014).

[14] "Video streaming face-off: Amazon Prime Instant Video vs. Netflix," Consumer Reports, http://www.consumerreports.org/cro/news/2015/06/netflix-vs-amazon-prime-video-streaming/index.htm (June 12, 2015).

Thus, it is literally the case today that the programming aired by broadcast stations competes not only with the vast array of new content being created each year, but also with virtually every program ever produced. This competition — and the investment it has driven in content development — has been a resounding benefit to consumers. Investment in better content brings larger audiences, better ratings, and thus more revenue for programmers to reinvest in their content — a true virtuous circle.

Just as the competition for eyeballs has increased dramatically, so too has the cost of creating and acquiring high-quality content. Broadcasters today face an increasingly difficult challenge when it comes to attracting the best on-screen and behind-the-scenes inputs to create compelling programming. A "skyrocketing number of scripted series" — including "a more than 1,000% spike since 1999 in the number of scripted series produced for just pay and basic cable" — has been accompanied by "[a] significant spike in the cost of securing top talent and sought-after source material" and "[r]ising prices for crews, equipment, stages and locations, among other necessary ingredients for production."[15] If over-the-air television is to remain the home of compelling programming, be it expensive scripted content such as *Empire* or high-profile sports events such as the Super Bowl and the World Series, broadcasters must be permitted to rely upon a dual (advertising and subscription) revenue stream to remain competitive. Otherwise, an increasing amount of popular content will migrate to pay-TV channels, which long have benefited from the dual revenue model.

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[15] Cynthia Littleton, "How Many Scripted Series Can the TV Biz — and Viewers — Handle?" Variety, http://variety.com/2014/tv/news/new-television-fall-season-glut-of-content-1201306075/ (Sept. 16, 2014).

B. The Existing, Reciprocal Good Faith Standard Facilitates the Market-Based Negotiations Congress Mandated.

Although the *Good Faith NPRM* recognizes that the good faith obligations apply equally to broadcasters and MVPDs,[16] it focuses disproportionately — indeed, almost exclusively — on MVPDs' allegations of bad faith practices by broadcasters. Leaving aside the Commission's unexplained and unsustainable expansion of the narrow scope of Congress's directive in STELAR, it is equally inexplicable why the Commission would unquestioningly accept and rely on erroneous MVPD assertions and fallacious arguments as the basis for so much of the *Good Faith NPRM*. As described above, it simply is not the case that broadcasters have become dominant players in retransmission consent negotiations. The reality is the opposite: The existing retransmission consent system has enabled broadcasters to continue negotiating fair compensation for their signals despite facing dominant MVPDs. It is precisely because the existing rules are facilitating the market-based negotiations Congress intended to foster that MVPDs are so eager for the Commission to label as "bad faith" virtually the entire range of effective negotiating practices broadcasters may employ.

Once the basic fallacies promoted by MVPDs are dispelled, the truth is apparent: The existing retransmission consent system works well, allows for exactly the sort of market-based outcomes Congress intended, and generates substantial consumer benefits. The main animating goal of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") was "to promote competition in the multichannel video marketplace" by "curbing the cable operators' and programmers' market power."[17] The creation of the retransmission consent

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[16] *See Good Faith NPRM* at ¶ 18.

[17] S. Rept. No. 102-92 (1991), at 1.

system — which corrected the competitive imbalance between broadcasters and cable companies by ending a regime under which "broadcasters in effect subsidize the establishment of their chief competitors"[18] — was one aspect of these reforms, and one of the most successful elements of the act. Just as Congress intended, the Cable Act has established a true "marketplace for the disposition of the rights to retransmit broadcast signals," in which broadcasters and MVPDs freely negotiate over the fair-market value of a broadcast station's programming, subject only to the requirement that the parties negotiate in good faith.

Not surprisingly, MVPDs would prefer to return to the days when, because they did not need broadcast stations' consent, they were able to pay little or nothing for the most popular programming on their systems. But MVPDs have provided no evidence that the system no longer serves *Congress'* goals or the public interest. Nor does the evidence show that the current system harms the ability of MVPDs to compete. Almost nine out of ten households continue to subscribe to a pay-TV distributor,[19] and in the last year alone sophisticated buyers have invested tens of billions of dollars to acquire MVPDs — hardly the sign of a "broken" industry.[20] It

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[18] *See* S. Rept. No. 102-92, at 35.

[19] *See 16th Video Competition Report*, 30 FCC Rcd at 3314 (noting Nielsen estimate that "about 86 percent of the 120.2 million U.S. households, or 89 percent of 115.8 U.S. television households, subscribe to an MVPD as of December 2013").

[20] *See, e.g.*, "Time Warner Cable to Merge with Comcast Corporation to Create a World-Class Technology and Media Company," http://corporate.comcast.com/news-information/news-feed/time-warner-cable-to-merge-with-comcast-corporation (Feb. 13, 2014) (announcing Comcast's offer to purchase Time Warner for $45.2 billion); "Charter Communications to Merge with Time Warner Cable and Acquire Bright House Networks," http://ir.timewarnercable.com/investor-relations/investor-news/financial-release-details/2015/Charter-Communications-to-Merge-with-Time-Warner-Cable-and-Acquire-Bright-House-Networks/default.aspx (May 26, 2015) (announcing merger valuing Time Warner at $78.7 billion and Charter's acquisition of Bright House Networks for $10.4 billion); "Altice enters the US market with acquisition of Suddenlink," http://altice.net/wp-content/uploads/2015/05/689389.pdf (May 20, 2015) (announcing merger valuing Suddenlink at $9.1 billion); "Altice acquires Cablevision and creates the #4 cable operator in the US market," (continued…)

would be perverse for the Commission to respond to the *success* of the Cable Act by heeding MVPDs' calls to effectively *undo* the act's accomplishments through restoration of a system under which large MVPDs enjoy a competitive imbalance over local broadcasters and, accordingly, can enjoy the benefits of carrying broadcast stations without the need to negotiate fair compensation.

II. THE COMMISSION MUST REJECT PROPOSALS THAT EXCEED ITS AUTHORITY OR THAT WOULD HAVE IT DICTATE THE OUTCOME OF NEGOTIATIONS.

Several of the proposals in the *Good Faith NPRM* not only are unnecessary but also are beyond the Commission's statutory authority. In particular, the Commission has no authority to use the rules requiring a good faith negotiation *process* as a means to intrude in the *substance* of negotiations — in particular by (1) restricting the use of in-kind compensation in retransmission consent agreements, (2) further regulating the terms of network affiliation agreements, or (3) controlling whether and on what terms broadcast stations make their content available over the Internet.

A. The Commission Has No Authority to Prohibit Broadcasters from Negotiating for Consideration in the Form of an MVPD's Carriage Of Affiliated Programming.

The *Good Faith NPRM* asks how a broadcaster's supposed "insistence on bundling broadcast signals with other broadcast stations or cable networks into the retransmission consent agreement should be treated under the totality of the circumstances test."[21] The NPRM itself recognizes that in-kind consideration such as carriage of a broadcaster's other programming has

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http://altice.net/wp-content/uploads/2015/09/20150917-ALT-Cablevision-Acquisition.pdf (Sept. 17, 2015) (announcing merger valuing Cablevision at $17.7 billion).

[21] *Good Faith NPRM* at ¶ 15.

long been a feature of retransmission consent negotiations.[22] These arrangements have been recognized as "presumptively consistent with competitive marketplace considerations" since the Commission first implemented the good faith requirement.[23] Short of conduct that violates antitrust law, there is no reason why, in a functioning marketplace, broadcasters and MVPDs should not be permitted to continue freely negotiating different combinations of monetary compensation and noncash consideration, including carriage of a broadcaster's affiliated programming.

Indeed, these types of arrangements benefit the public and provide great value to both parties. In particular, as more than a decade of record evidence confirms, the marketplace has developed in a manner that allows both MVPDs and broadcasters to negotiate mutually beneficial carriage arrangements. These negotiations often result in MVPDs electing to purchase broadcast and cable programming services in packages of channels sold together. Far from being anticompetitive, these packages often are preferred by MVPDs because they permit distributors to purchase multiple channels at once, achieving transaction cost savings and enabling them to offer their subscribers popular packages of program channels. Broadcasters that wish to increase distribution of affiliated video networks offer MVPDs economic and other incentives to purchase multiple channels. These incentives, ranging from volume discounts to cash payments in the form of marketing support, foster competition and generate consumer benefits.

Congress envisioned just this type of bargaining in the retransmission consent context: "[Some] broadcasters may not seek monetary compensation, but instead [may] negotiate other

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[22] *See Good Faith NPRM* at ¶¶ 3 & n.14., 9, 15.

[23] *See id*. ¶¶ 9.

issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or *the right to program an additional channel on a cable system*."[24] The ability of broadcasters and other programmers to negotiate idiosyncratic distribution arrangements and compensation models with MVPDs is fundamental to a free market. It is also critical to programmers' ability to develop and offer to consumers a diverse set of innovative channels, including niche channels targeted to underserved communities, which in many cases might not be feasible to launch if the channel had to be immediately viable entirely on its own.[25] Thus, as one study in the record observes, across a wide variety of markets "[b]undling is extremely common, and by no means sinister,"[26] and regulatory intervention to restrict the ability to negotiate for bundled carriage would be "little more than a stab in the dark" that would "distort programming content" with no assurance that consumers would end up better off.[27] As Congress recognized, in the context of retransmission consent negotiations bundling is a perfectly legitimate, and pro-competitive, mechanism for reaching agreement.

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[24] S. Rept. No. 102-92, at 35-36 (emphasis added).

[25] *See* Bruce M. Owen, *Wholesale Packaging of Video Programming*, FCC MB Docket No. 07-198, at Attachment 2 p. 3 (filed Jan. 4, 2008) ("Owen 2008") ("The stand-alone competitive price for the new or less popular content may well be negative. … The payment to carry less desirable content may take the form of a price discount on the more popular content if the MVPD agrees to take both. As a result, the competitive price for a package of content may be less than the competitive price for a stand-alone unit of content — whether a popular program or a popular channel — by itself."); *see also* Reply Comments of Fox Entertainment Group, Inc., and Fox Television Stations, Inc., MB Docket No. 10-71, at 13-15 (June 3, 2010); Jeffrey A. Eisenach, Economic Implications of Bundling in the Markets for Network Programming (2008), filed with Comments of The Walt Disney Company, MB Docket Nos. 07-29, 07-198, at Ex. A (Jan. 4, 2008); Michael G. Baumann & Kent W. Mikkelsen, Benefits of Bundling and Costs of Unbundling Cable Networks (2004), filed with Reply Comments of The Walt Disney Company, MB Docket No. 04-207, at Ex. 1 (Aug. 13, 2004); Bruce M. Owen & John M. Gale, Why a Box of Crayons Has Many Colors, And the "Cable Tax" Is Not a Tax (2004), filed with Reply Comments of Viacom, Inc. in MB Docket No. 04-207, at Attachment 1 (Aug. 13, 2004).

[26] Owen 2008, *supra* n. 25, at 32.

[27] *Id*. at 34.

B. There is Neither a Legal Basis nor a Policy Justification for the Commission to Interfere in the Distribution Terms Negotiated By Networks and Their Affiliates.

The *Good Faith NPRM* also asks whether "certain network involvement in retransmission consent negotiations [should] be a factor suggesting bad faith under the totality of the circumstances test."[28] Networks and affiliates are sophisticated parties who negotiate a wide range of terms to govern their relationship, including the terms on which an affiliate may authorize the further distribution of network content. Commission precedent is clear that Section 325 does not — and was not intended to — interfere with these terms.[29] The Commission has said that it "perceive[d] no intent on the part of Congress that the reciprocal bargaining obligation interfere with the network-affiliate relationship or . . . preclude specific terms contained in network-affiliate agreements . . . ."[30] Moreover, the Commission has emphasized that the mere "existence of an underlying agreement" between a network and an affiliate does not violate the good faith negotiation requirement since the obligation "applies to negotiations between MVPDs and broadcast stations, and not between a network and an affiliate."[31]

These conclusions are logical from both a legal and policy standpoint. As a legal matter, as the Commission noted, Section 325 governs negotiations between broadcasters and MVPDs, not broadcasters and their networks or other program suppliers. No network affiliation

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[28] *Good Faith NPRM* at ¶ 14.

[29] *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10354 (2005) ("neither the text nor the legislative history" of the Act "indicate[s] a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming") ("*Reciprocal Bargaining Order*").

[30] *Id*.

[31] *Monroe, Georgia Water Light and Gas Commission*, Mem. Op. & Order, 19 FCC Rcd 13977, 13980 (MB 2004).

agreement does or can prevent a station from granting retransmission consent to an MVPD; the affiliation agreement simply governs whether the station is permitted to authorize retransmission of broadcast network programming. As a policy matter, forbidding broadcasters from negotiating with their affiliates for limits on the redistribution of network content — and thus limiting networks' ability to negotiate for compensation in connection with such redistribution — would drive the further migration of content from over-the-air broadcast to subscription platforms not subject to intrusive regulation.

C. The Commission Has No Authority to Regulate Whether or On What Terms Broadcast Stations Make Their Content Available Over the Internet.

Section 325(b) is expressly limited to the process by which a broadcast station may (but is not required to) authorize an MVPD to retransmit the station's signal. The provisions of this Section — including the good faith requirements — regulate the *process*, not the *outcome*, of negotiations over retransmission,[32] and in any case have no application to distribution outside the MVPD context. At the same time, the Copyright Act gives content owners exclusive, broad rights to control the distribution and public performance of their motion pictures and other audiovisual works.[33] Congress enacted explicit statutory licenses to cover circumstances in which copyright owners would be required to allow certain qualified cable and satellite operators to distribute their work.[34] Nothing in Section 325(b) authorizes the Commission to in effect

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[32] *See Good Faith NPRM* at ¶ 2; S. Rept. No. 102-92, at 36 ("It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.").

[33] *See* 17 U.S.C. § 106.

[34] *See* 17 U.S.C. §§ 111, 119, 122.

enact a new statutory license, or otherwise to limit a station's ability under copyright to control the distribution of its content online.

Moreover, any suggestion that the Commission may pursue regulation of content online would contradict the Commission's emphatic assertion in its order adopting the Open Internet rules that the Commission was not "regulating the Internet, *per se*, or any Internet applications or content."[35] Indeed, Chairman Wheeler testified before the House Energy and Commerce Committee that it is "not our intention" to extend Commission jurisdiction to edge providers.[36] Proposals that would penalize stations for controlling the online distribution of their content would do precisely what the Commission lacks authority to do, and what the *Open Internet Order* and Chairman Wheeler both have promised it would not do: regulate Internet edge providers. Framing such proposals as a regulation of parties' bargaining tactics, rather than a "substantive" regulation of edge services, is a distinction without a difference and without any limiting principle.

Congress has made clear that the Commission's authority to ensure good faith negotiations between broadcasters and MVPDs is limited to the negotiating process and provides the Commission with no additional authority to regulate parties' substantive conduct. Where the

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[35] *Protecting and Promoting the Open Internet*, R&O on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5622, 5775 (2015) ("*Open Internet Order*"). *See also Consumer Watchdog Petition for Rulemaking to Require Edge Providers to Honor 'Do Not Track' Requests*, Order, RM-11757, DA 15-1266, at ¶ 1 (WCB Nov. 6, 2015) (finding petition "plainly does not warrant consideration by the Commission" because Commission "has been unequivocal in declaring that it has no intent to regulate edge providers") (alterations omitted); Kieren McCarthy, "FCC now regulates ISPs — but don't take your complaints to the watchdog just yet," The Register, http://www.theregister.co.uk/2015/07/28/ftc_net_neutrality_rules/ (July 28, 2015) (reporting Chairman Wheeler's testimony before the House Committee).

[36] Testimony of Chairman Wheeler, "Continued Oversight of the Federal Communications Commission," House Energy and Commerce Committee Subcommittee on Communications and Technology, https://energycommerce.house.gov/hearing/continued-oversight-federal-communications-commission#video, at 1:52:45 (July 28, 2015).

Commission lacks authority to impose a substantive regulation — as it lacks the authority to control the terms on which edge providers offer content online — it cannot obtain such authority simply by claiming it constitutes "bad faith" not to comply with the Commission's preferred substantive rule. Any other outcome would literally leave the Commission in a position of limitless power to regulate anything and everything using the pretext of the good faith rubric.

Finally, and it should not even need to be said, penalizing stations that limit the online availability of their content would violate the First Amendment. The Supreme Court has held that even content-neutral regulations that require regulated entities to distribute content are subject to at least intermediate First Amendment scrutiny.[37] The regulation of broadcasters' online content, applications or services therefore would have to (a) further an important or substantial governmental interest; (b) be unrelated to the suppression of free expression; and (c) impose incidental First Amendment restrictions no greater than is essential to the furtherance of that interest. An interpretation of "good faith negotiation" that curtails broadcasters' rights to control online access to their content could not survive such scrutiny. No "important" or "substantial" government interest would be served by requiring that, in addition to providing their content over the air, broadcasters must permit indiscriminate access to content they choose to post online — especially considering that the myriad non-broadcast programmers would be under no comparable obligations.

III. CONCLUSION

Section 325(b) provides the Commission with limited authority to ensure that broadcasters and MVPDs engage in a fair process for negotiating whether and on what terms an

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[37] *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661-62 (1994).

MVPD may retransmit a broadcast station's signal. The Commission's existing rules and standards effectively serve this purpose, consistent with the intent of Congress. Congress' recent grant of narrow authority on this topic was not intended to be — and cannot legally be used as — a back-door means of altering broadcast stations' *substantive* rights to control the scope and other terms on which a station's programming is distributed. Fox therefore urges the Commission to reject such proposals in the *Good Faith NPRM*.

Respectfully submitted,

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