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

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EXECUTIVE SUMMARY

The American Cable Associations ("ACA") submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") seeking comment on the functioning of its totality of the circumstances test and other rules for evaluating whether broadcast stations and multichannel video programming distributors ("MVPDs") are negotiating for retransmission consent in good faith.

As the NPRM recognizes, since Congress' enactment of the retransmission consent regime under Section 325, significant changes in the retransmission consent market, including the rise in competition among MVPDs, have increased broadcaster leverage, altering the negotiation dynamics between broadcasters and MVPDs. Combined with the current vague and overly permissive standard for evaluating complaints under the totality of the circumstance test adopted by the Commission in 2000, broadcasters have abused their market power by engaging in unreasonable negotiating tactics and by demanding unreasonable terms and conditions, leading to considerable harm to the public interest. The problems associated with the conduct and proposals of station owners are well known: increasingly acrimonious negotiations, growing incidences of blackouts, including online blackouts, and spiraling price increases.

In directing the Commission to institute this proceeding, Congress signaled its intention that the Commission act to improve the negotiating environment for retransmission consent through reform of its good faith rules. Given that the Commission's approach to the good faith negotiation obligation has been virtually unchanged since it was adopted fifteen years ago, it is time for it to take muscular action by improving the clarity and functionality of the good faith rules by reforming its totality of the circumstances test and adding to the list of per se violations of the obligation to negotiate in good faith.

The Commission has unquestionable authority to reform its good faith rules to improve the negotiating process and better protect the public. The Commission's direct authority to "govern the exercise" of retransmission consent rights by broadcasters is not further qualified and plainly includes the power to adopt whatever remedial measures may be necessary to protect the public from harm. Furthermore, the sole explicit constraint on the Commission with respect to its good faith rules goes to protection of the right of broadcast stations to negotiate different rates, terms and conditions with different MVPDs provided such differences are based on "competitive marketplace conditions." This presents no barrier with respect to adoption of ACA's proposed reforms.

As a general matter, the Commission should, for the first time, deem behavior that causes harm to consumers or the public interest to be evidence of bad faith under the totality of the circumstances test. A determination of bad faith should extend not merely to behavior that causes consumer harm as a means of enhancing leverage, but to any conduct undertaken or demands made during negotiations that cause harm to the public interest. Avoidance of harm to consumers and the public interest should be a guiding precept in rules governing retransmission consent negotiations. Moreover, in light of changes in the market and regulatory circumstances, the Commission should update its list of the proposals that are deemed presumptively consistent with competitive marketplace considerations under its totality of circumstances test by no longer presuming that proposals that bundle broadcast stations and other "must have" programming in retransmission consent agreements are consistent with competitive marketplace considerations.

Reform of the Good Faith Rules to Address Particularly Egregious Negotiation Practices and Proposals

ACA recommends the Commission adopt the following targeted reforms aimed at curbing the worst negotiating abuses today. These reforms, if adopted, would be an important first step toward improving the environment for retransmission consent negotiations and achieving the goals of both Congress and Commission that "retransmission consent negotiations be conducted in an atmosphere of honesty, purpose and clarity of process."

Specific Practices and Proposals to be Deemed *Per Se* Good Faith Violations

<u>A broadcaster's insistence on bundling broadcast signals with RSNs (or other "must have" programming) in retransmission consent negotiations</u>. The Commission must prohibit broadcasters from bundling retransmission consent with carriage of a same market regional sports network ("RSN") or other "must have" programming for the purpose of raising prices. Although the Commission originally determined in the 2000 Good Faith Order that retransmission consent proposals conditioned on carriage of any other programming are consistent with competitive marketplace considerations and thus do not violate the broadcaster's duty to negotiate in good faith, the market for retransmission consent of top broadcast stations has changed significantly since then. In recent years, the Commission has recognized that bundling "must have" broadcast stations with same-market RSNs or other "must have" programming, or with non-commonly owned, same market "must have broadcast stations," gives broadcasters the ability to raise rates substantially above what they could demand if such programming was negotiated individually. This occurs when the contracts for the "must have" programming assets that are bundled together expire on the same or around the same time. Economic analysis confirms that markets for "must have" programming are monopolistic, and the higher rates resulting from common ownership of a "must have" broadcast stations and a same market RSN (or other "must have" programming") network are not based on competitive marketplace considerations. Not only should the Commission eliminate its presumption that bundled negotiation of retransmission consent and other "must have" programming such as RSNs is consistent with competitive marketplace conditions and hence, good faith negotiation, it should explicitly deem such bundling a *per se* violation of the good faith obligation.

To counteract the augmented monopoly power of bundled negotiations for a commonly owned "must have" local television station and an RSN (or other "must have programming) that serves the same market, the Commission need not, as suggested in the NPRM, go so far as to require that common owners to make standalone retransmission consent offers that are subject to review by the Commission to determine whether they are reasonable. The Commission can address the problem more simply by deeming a common owner's unwillingness to sequentially negotiate the carriage contracts, for a broadcast station and RSN (or other "must have" programming) that serve the same market and have expiration dates around the same time, by granting a temporary extension of an existing retransmission consent to be a *per se* violation of the Commission's good faith rules. At the very least, it should be considered evidence of bad faith under the totality of the circumstances test.

<u>Refusal of a negotiating party to substantiate its bargaining positions</u>. The Commission recognized in its 2000 Good Faith Order both that a "[b]lanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation" and that disclosure of the reasons for a broadcaster's rejection of an MVPD's proposal is necessary so that the MVPD "understand[s] why certain terms are unacceptable to the broadcaster," yet it

declined to require information sharing under its good faith rules, noting that the good faith obligations (at the time) only applied to broadcasters and reasoning that it would negate the concept of marketplace negotiations to impose a one-sided information disclosure requirement on broadcasters. Circumstances have changed substantially with Congress' decision to extend the good faith requirement to MVPDs in 2004, making it bilateral, and the increase in broadcaster negotiating leverage. The Commission's good faith rules must change as well.

It is common for parties in retransmission consent negotiations to refuse to substantiate claims made during negotiations in support of bargaining positions, and many ACA members have reported their frustration with this practice as it limits their ability to engage in meaningful negotiations. Under the current rules, a negotiating party can make false claims and refuse to provide the other party with sufficient information to evaluate the fairness of its offer and formulate an appropriate counteroffer. Requiring a party to substantiate claims made in support of offers or bargaining positions can be beneficial by keeping the parties honest and helping to facilitate constructive bargaining that will lead to a mutually satisfying agreement for both parties. Meaningful and good faith negotiations require, at least in part, access by both sides to the relevant information necessary to evaluate specific claims made during the course of negotiations.

The duty to substantiate claims made during negotiations upon request has been recognized in the labor law context for over 50 years because it facilitates the abilities of parties to arrive at a mutual agreement on the fair market value of an MVPD's right to retransmit a broadcast signal. The exchange of relevant information during negotiations will help to mitigate differences in the parties' bargaining power and increase the chance of completing the negotiations successfully, thus avoiding breakdowns and consumer disruptions. Commission precedent in the carrier interconnection context also supports a duty to substantiate claims upon request. The Commission can improve the negotiating environment for retransmission consent and protect consumers from breakdowns by following labor law and its own precedents and recognizing that a refusal to substantiate claims made during negotiations is a *per se* violation of the obligation to negotiate in good faith or, at the very least, evidence of bad faith under the totality of the circumstances test.

<u>Blackouts involving online programming in connection with retransmission consent negotiations as a means to gain leverage in its negotiations</u>. The Commission must deem it to be a *per se* violation of a broadcaster's good faith negotiation obligation for the broadcaster to block an MVPD's broadband Internet access subscribers from accessing the broadcaster's and its affiliated network's publicly available online video programming as a means to gain leverage in negotiations. This practice by broadcasters, commonly known as "online blocking," indiscriminately harms consumers, as the broadcaster blocks all subscribers of the MVPD's broadband Internet access service whether the subscriber subscribes to the MVPD's video service or not. If the Commission declines to deem online blocking to be a *per se* violation, it must, at the very least, deem it evidence of bad faith under the totality of the circumstances test.

Online blocking is not reasonable in any context, let alone during retransmission consent negotiations for the purpose of increasing negotiating leverage. This punitive practice harms innocent consumers and is wholly inconsistent with a broadcaster's obligation to operate in the public interest and with the Commission's Open Internet policies. The Commission has expressly recognized blocking as a harmful practice when utilized by a broadband Internet access service provider because such blocking lessens the utility of the Internet and disrupts the "virtuous cycle" of innovation running through both the edge and core of the Internet.

Under the Commission's Open Internet rules, MVPDs that are also broadband Internet access service providers are prohibited from blocking any online content that is made freely available to Internet users. To allow broadcasters to engage in online blocking gives broadcasters an unfair advantage since they can unilaterally engage or threaten to engage in a tactic that is foreclosed for MVPDs who are broadband Internet access service providers.

There are no legal barriers to deeming online blocking a violation of the good faith rules. The Commission has statutory authority to address online blocking through both its good faith rules and pursuant to its Section 706 authority. Contrary to arguments that broadcasters have raised, the First Amendment poses no bar to Commission action. Such a rule is content neutral, furthers important government interests and is narrowly tailored.

<u>Blackouts involving linear programming before marquee events in connection with retransmission consent negotiations as a means to gain leverage in its negotiations</u>. The Commission should prohibit broadcasters from blacking out or threating to blackout a station signal, in the time period just prior to the airing of a "marquee" sports or entertainment event. It is well publicized that broadcasters use blackouts and the threat of a blackouts before marquee events to push MVPDs toward concluding a retransmission consent agreement, inherently on terms and conditions more favorable to the broadcaster. Because these marquee events are "must have" programming, the affected MVPD often has no choice but to accede to the broadcaster's demands lest it lose access to the valuable programming and significant number of customers to rivals. This practice ultimately harms consumers of the MVPD's service by depriving or threatening to deprive them of valuable programming and by ultimately extracting higher prices and more favorable terms for the retransmission of the signal by the MVPD, costs that are ultimately passed on to consumers.

<u>Third-party interference in retransmission consent agreements for historically carried out-of-market stations</u>. Broadcast networks and stations are increasingly making it impossible for cable operators to continue to enter into retransmission consent agreements with historically carried out-of-market stations that are desired by the operator's subscribers because they carry relevant news, weather and programming. In many parts of the country, out-of-market stations serve an important public interest, offering news, weather, sports, and other local programming that viewers do not receive from their in-market station. The Commission's rules have historically protected distant-signal carriage in these situations by limiting the extent to which a broadcast station can assert it exclusive rights to network and syndicated programming. Unfortunately, networks and in-market stations have found the means to circumvent the Commission's intention to protect viewers' access to vital out-of-market signals.

The Commission should affirm that entering into any agreement with a third party – legally-binding or otherwise – that, through an outright prohibition, a grant of a veto/pre-approval power before the execution of an agreement, or any other means or disincentives, that limits an out-of-market station's ability to grant retransmission consent to cable operator that has historically carried the station's entire programming stream, including its network and syndicated programming, is a *per se* violation of the obligation to negotiate in good faith. At the very least, the Commission should at deem such interference to be evidence of a good faith violation under the totality of the circumstances test. If the Commission opts not to prohibit this type of third-party interference as a *per se* violation of the duty to negotiate in good faith, it must instead clarify that Section 76.65(b)(i) of its rules, which prohibits as a violation of the good faith obligation the refusal by a Negotiating Entity to negotiate retransmission consent, includes any circumstances in which a broadcaster has permitted a third party to influence its exercise of retransmission consent to an MVPD to serve an out-of-market community where the station's entire programming stream, including its network and syndicated programming, has been made historically available by a cable operator.

Bundling of prospective programming in retransmission consent negotiations. Conditioning the grant of retransmission consent with set prices, terms, and conditions for carriage of unlaunched and untested, or in some cases, unidentified programming networks and after-acquired broadcast stations ("prospective programming") should be considered *per se* inconsistent with good faith bargaining. Many ACA members report demands by broadcasters for carriage of unlaunched programming networks at set prices, terms and conditions. The demands often are not only confined to the local market of the station they are negotiating with, but extend to any system the operator owns. Broadcasters make these demands without providing any commitment or indication of the content of the programming to run on the prospective channel. Members forced to agree to include "after-acquired" station provisions in their retransmission consent agreements for carriage of a local broadcast signal find their own negotiations for acceptable price, terms, and conditions of carriage with the after-acquired stations up-ended when the station changes hands or management and the rates are re-set at the higher level of the acquiring/managing station, without any corresponding change in the value of the programming. The results in either case are profoundly unfair and de-stabilizing to operator finances.

The Commission should deem the practice of a broadcaster conditioning the grant of retransmission consent for a local station on setting the prices, terms, and conditions for programming networks or multicast signals it may launch in the future, or for broadcast stations it may later acquire, to be a per se violation of the duty to negotiate in good faith, or, at the very least, as evidence of a failure to negotiate in good faith under the totality of the circumstances test. The reason is simple: an MVPD cannot possibly assess the wisdom and value of carrying an untested and in many cases unknown genre channel or one whose carriage is conditioned on future events that may or may not come to pass. No reasonable businessperson should be expected to agree to pay any amount of money, including the launch costs, for what is at the time an "empty box" that may or may not later be filled with programming that subscribers value as a condition of accessing the signals that it desires to carry and is willing to bargain for on a stand-alone basis. Such a venture is more akin to gambling than assembling an attractive package of programming for resale. Nor is it fair to set the prices, terms, or conditions for carriage of after-acquired television stations as a condition of granting retransmission consent for an already-owned local station. It is profoundly contrary to the spirit of the retransmission consent good faith obligations for a broadcaster to require a deal struck through bilateral negotiations as to the value of the signal to MVPD subscribers in the local market to be upended simply because the broadcaster subsequently acquires, or manages or controls another broadcaster.

Discrimination by an MVPD-affiliated broadcast station based on vertical competitive effects. In a number of markets, larger MVPDs that are vertically integrated with a broadcast station that operates in the same market compete directly against other MVPDs, including many ACA members. Economic analysis and the Commission's own precedent strongly support a determination that discrimination by such a broadcaster in offering prices, terms, and conditions for retransmission consent that are based on competitive vertical effects should constitute a *per se* violation of the duty to negotiate in good faith.

The Commission determined in the 2000 Good Faith Order that "[p]roposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (e.g.

other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition" are presumptively inconsistent with competitive marketplace considerations." A "must have" broadcaster that is affiliated with a dominant MVPD that operates in the same market has an incentive and ability to charge significantly higher prices to rivals of its MVPD. This is an exercise of market power by both the broadcaster and the dominant MVPD. These higher fees are likely to be passed through to consumers, which impairs competition and reduces consumer welfare. To protect against these harms, the Commission should deem discrimination by MVPD-affiliated a broadcast station based on vertical competitive effectives to be a per se violation of the duty to negotiate in good faith, or at the very least, evidence of bad faith under the totality of the circumstances test.

The Commission Should Consider Negotiation Terms Based on MFN Provisions or Demanding MFNs Evidence of Bad Faith Under the Totality of the Circumstances Test

ACA members are often asked for unilateral most favored nation ("MFN") protection by a broadcaster and are met by claims that the broadcaster is unable to accept an offer because doing so would trigger its MFN with another MVPD. The Commission should recognize that bargaining based on MFN clauses prevents parties from negotiating in an atmosphere of honesty, purpose, and clarity of process that designed to produce an agreement acceptable to both parties, and permits a third party MVPD to effectively raise its rival's costs in an unrelated transaction.

While MFNs were once considered presumptively pro-competitive by the antitrust authorities and the courts, they are now judged under a "rule of reason" analysis where the alleged pro-competitive effects are weighed against the anti-competitive effects on rivals, including the exclusionary effect of raising rivals costs, particularly where the party has market power. Use of MFNs by a top four rated broadcaster to justify rejection of alternative offers by a small or medium-sized MVPD has the effect of keeping prices above levels the negotiating parties may have arrived at if not constrained by the MFN. Only the largest MVPDs with considerable market power of their own are able to secure MFNs. The net effect of the largest MVPDs obtaining a guarantee that the broadcaster will not lower its price or give more favorable terms and conditions to another MVPD is to deprive other, smaller MVPDs of the potential to negotiate more favorable rates, terms and conditions that the broadcaster might otherwise be willing to offer those smaller MVPD in their retransmission consent negotiations *but for* the fact that doing so would trigger an MFN negotiated by the broadcaster the larger MVPD.

Demands by a top four rated broadcaster, who already possesses significant market power, that the MVPD offer the broadcaster unilateral MFN protections can have a similar anti-consumer effect by ensuring that a higher price or better terms and conditions achieved in retransmission consent negotiations with that MVPD by another broadcaster will automatically be spread by virtue of the MFN provision. Proposals based on MFNs are both unfair and destabilizing for the MVPD, and undermine the spirit of the bilateral good faith negotiation obligation. The Commission should follow the "rule of reason" approach by expressly recognizing that negotiating retransmission consent based on MFNs, including demands for MFN protections, can be evidence of bad faith under the totality of the circumstances test.

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COMMENTS

I. INTRODUCTION

The American Cable Association ("ACA") submits these Comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Commission in the above captioned proceeding.[1] ACA commends the Commission for initiating a wide ranging inquiry into the operations of the retransmission consent marketplace today and for identifying and seeking comment on specific practices common in the market that potentially evidence a failure to negotiate in good faith generally and specifically under the totality of the circumstances test, as Congress directed in Section 103(c) of the STELA Reauthorization Act of 2014 ("STELAR").[2]

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[1] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216 (rel. Sept. 2, 2015) ("NPRM" or "Totality NPRM").

[2] *See* Satellite Television Extension and Localism Act Reauthorization of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) ("STELAR"); Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) ("Senate

When creating the retransmission consent regime, Congress intended to establish a "marketplace" for broadcasters and MVPDs to negotiate the rates, terms and conditions of retransmission consent.[3] Unfortunately, the marketplace that has since developed under the Commission's rules is broken and in need of more guidance through clearer rules and more active enforcement. As the NPRM recognizes, since Congress' enactment of the retransmission consent regime under Section 325, significant changes in the retransmission consent marketplace have increased broadcaster leverage, altering the negotiation dynamics between broadcasters and their MVPD negotiating partners to the detriment of MVPDs and contributing to increases in negotiating breakdowns harming MVPD subscribers.[4]

Broadcasters' unreasonable retransmission consent negotiating practices and demands harm consumers by driving video subscription rates higher.[5] Moreover, because they pressure the margins of cable operators' video distribution businesses and tie up valuable bandwidth, these demands adversely impact the ability of those operators to invest in high-performance broadband infrastructure and offer high-performance broadband service.[6] Put simply, the Commission's good faith rules have been inadequate to create conditions for retransmission consent "negotiations to be conducted in an atmosphere of honesty, purpose and clarity of

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Committee Report") (stating Congress' concern with "whether certain substantive terms offered by a party may increase the likelihood of negotiations breaking down").

[3] *See* 102nd Cong., S. Rep. No. 102-92 at 36 (1991) ("Senate Report").

[4] NPRM, ¶ 3.

[5] In the following sections, ACA discusses specific negotiating practices and proposals the Commission should either deem per se violation of the obligation to negotiate in good faith or consider as evidence of bad faith under the totality of the circumstances test.

[6] Evidence ACA submitted to the Commission earlier this year detailing the effects of rising programming costs on cable operators' ability to invest in broadband infrastructure is directly relevant to the need for robust reform of the Commission's good faith negotiation rules. ACA's white paper shows that as programming costs continue to escalate, the margins for traditional pay television services will continue to shrink, inhibiting broadband investment, particularly among small- and medium-sized cable operators, many of whom serve rural areas. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act,* GN Docket No. 14-126, Reply Comments of the American Cable Association, Appendix (filed Apr. 6, 2015).

process" designed to produce "an agreement acceptable to both parties."[7] Instead, prices for retransmission consent are soaring with no breaks on growth on the horizon, negotiating practices have led to bloated bundles of programming, and negotiating impasses and consumer blackouts are proliferating. In short, the good faith negotiation rules have failed to protect the public interest from harm.

It is no wonder that Congress, in enacting Section 103 of STELAR, directed the Commission to commence a robust and searching rulemaking to review its totality of the circumstances test for good faith negotiations, including "whether certain substantive terms offered by a party may increase the likelihood of negotiations breaking down."[8] The Commission, broadcasters and MVPDs now have fifteen years of experience with retransmission consent negotiations under the good faith rules. This experience should permit the Commission to refine its rules in a targeted manner to provide better protections for the parties and the public against the types of negotiating breakdowns and loss of access to valued signals that have increasingly marked recent negotiating cycles. The NPRM alone lists some 20 different bargaining behaviors and proposals that have been identified by parties as problematic for the smooth functioning of retransmission consent negotiations that warrant consideration by the Commission under its good faith rules. ACA is confident that the record will confirm its long-held view that marketplace changes since the enactment of Section 325 have radically altered the balance of power in negotiations against MVPDs and their subscribers, and that consequently, significant reform of the Commission's good faith rules and changes in its approach to the totality of the circumstances test are both warranted and authorized by Congress.

[7] *Implementation of the Satellite Home Viewer Improvement Act of 1999 Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶¶ 24, 39 (2000) ("2000 Good Faith Order").

[8] Senate Report at 36.

In these comments, ACA begins by demonstrating that Congress gave the Commission adequate authority to reform its good faith negotiation rules to better protect the public from harm, and recommending that the Commission clarify its standard for evaluating complaints alleging a violation based on the totality of the circumstances and (i) deem behavior causing harm to consumers or the public interest to be evidence of bad faith and (ii) reexamine its presumptions regarding behavior that is or is not presumptively consistent with competitive marketplace conditions under the totality of the circumstances test.

The remainder of the comments focuses on the following highly problematic negotiating practices and proposals identified in the NPRM and asks that the Commission recognize that each of these practices or proposals constitute *per se* violations of the obligation to negotiate in good faith, or at the very least, as evidence of bad faith under the totality of the circumstances test: (i) bundling of broadcast signals with regional sports networks ("RSNs") (or other "must have" programming); (ii) refusal of a negotiating party to substantiate its bargaining positions; (iii) a broadcaster's blocking of access to online broadcast content they have made freely available online (online blackouts) to gain leverage in its negotiations; (iv) a broadcaster's blocking of access to a broadcast signal before or during "marquee events" to gain leverage in its negotiations; (v) third-party interference in retransmission consent negotiations for historically-carried out-of-market stations; (vi) demands for carriage of after-acquired broadcast stations or un-launched cable programming networks; and (vii) discriminatory offers by MVPD-affiliated broadcasters based on vertical effects. In addition, ACA recommends that the Commission consider as evidence of bad faith under the totality of the circumstances test a party negotiating terms based on "Most Favored Nation" ("MFN") provisions or demanding MFNs.

These targeted reforms aimed at curbing the worst negotiating abuses today, if implemented, would be an important step toward improving the environment for retransmission consent negotiations and achieving the goals of both Congress and the Commission.

II. CONGRESS HAS GRANTED THE COMMISSION THE AUTHORITY TO ADOPT GOOD FAITH RULES THAT PREVENT NEGOTIATION BEHAVIOR THAT CAUSES HARM TO THE PUBLIC INTEREST

In enacting Section 103(c) of STELAR, Congress directed the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations under clauses (ii) and (iii) of section 325(b)(3)(C) of the Communications Act of 1934 (47 U.S.C. 325(b)(3)(C))."[9] The legislative history of this provision indicates Congressional intent that the Commission commence a rulemaking for the purpose of reforming its rules:

> The Committee intends the rulemaking directed by section 103(c) . . . should be used to update the FCC's totality of the circumstances test so that the test will take a broad look at all facts of how both television broadcast station owners and MVPDs approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard set forth in the Communications Act.[10]

The Commission's charge under Section 103(c) of STELAR is clear: update the totality of the circumstances test to reflect current marketplace realities in the negotiation of retransmission consent. The Commission should endeavor to carry out this charge with dispatch, as the current framework under which retransmission consent is negotiated is broken, leaving MVPDs and consumers unprotected and with little meaningful recourse.[11]

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[9] STELAR, § 103(c).

[10] NPRM at ¶ 6, n.33, *citing* Senate Committee Report at 13. While broadcasters will likely argue that Congress did not direct the Commission to make specific changes to its good faith rules and that the Commission's jurisdiction under Section 325(b)(3)(C) remains limited, it seems clear that Congress desired the Commission to make changes to its current rules through the rulemaking process. The charge to the Commission to reform its rules concerning the totality of the circumstances test in Section 103(c) stands in sharp contrast to that of Section 106(d) of STELAR, which directed the Commission Chairman, following repeal of the set-top box integration ban, to establish an advisory committee to report on downloadable security, and nothing more. *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002) (where Congress has authorized the Commission only to prepare a report on video description and nothing further, once the Commission's task of preparing the report is complete, its delegated authority on the subject ends).

[11] Although consumers are often the innocent victims of broadcaster negotiating tactics that purposefully sacrifice consumer interests to increase leverage, the Communications Act provides consumers no private rights of action to enforce the requirement that parties negotiate retransmission consent in good faith.

The totality of the circumstances test has traditionally permitted a party to present facts to the Commission which, even though they do not allege a violation of the objective standards, reflect the absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitutes a failure to negotiate in good faith.[12] In contrast to the *per se* violations (objective standards) the Commission has established, which are concerned with bargaining behaviors rather than the content of proposals, the totality of the circumstances test permits an inquiry into the substance of the proposed terms and conditions of actual retransmission consent agreements. The Commission has previously identified two standards for evaluating claims under the totality of the circumstances test – whether the proposal or conduct in question is "sufficiently outrageous," and whether it is "not based on competitive marketplace considerations."[13]

In the fifteen years since the 2000 Good Faith Order was adopted, it has become increasingly obvious that the retransmission consent framework is not working, as evidenced by increasingly bitter disputes involving loss of signals, and that additional consumer protection measures are required. When Congress directed the Commission to adopt regulations governing the conduct of broadcast stations in retransmission consent negotiations in 1999, it placed very few restrictions on the Commission's authority to determine the parameters of good faith. Congress required the Commission to revise its regulations so that they:

> . . . prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.[14]

[12] NPRM, ¶ 2.

[13] *See id.*

[14] 47 U.S.C. § 325(b)(3)(C)(ii).

The Joint Explanatory Statement of the Committee of Conference ("Conference Report") did not explain or clarify the statutory language, instead merely stating that the regulations would:

> . . . prohibit a television broadcast station from . . . refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The [Commission] may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations.[15]

Thus, the sole explicit constraint on the Commission with respect to its good faith rules goes to protection of the right of broadcast stations to negotiate different rates, terms and conditions with different MVPDs provided such differences are based on "competitive marketplace conditions." The Commission previously has taken a narrow view of its charge to prohibit broadcasters and MVPDs from failing to negotiate in good faith, finding "that the statute does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission," but rather that it "develop and enforce a process that ensures that broadcasters and MVPDs meet to negotiate retransmission consent and that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process."[16] That may have been a reasonable posture fifteen years ago, but today, as Congress has recognized, the Commission's good faith rules are failing to protect MVPDs and consumers from unreasonable, if not unconscionable, negotiating tactics that are driving up prices, forcing carriage of unwanted or unknown programming assets, or denying access to valued signals that harm innocent members of the public. It is time for the Commission to take more muscular action by improving the clarity and functionality of its good faith rules both by reforming its totality of the circumstances test and adding to its list of per se violations of the obligation to negotiate in good faith.

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[15] *See* 2000 Good Faith Order, ¶ 11.

[16] *Id.*, ¶¶ 6, 24.

As ACA has previously noted, Section 325(b)(3)(A) broadly authorizes the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[17] In particular, Congress directed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier," and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable."[18] Together with the charge to reform its good faith rules in STELAR, this existing, expansive and far-reaching grant of authority – either standing alone or in conjunction with the Commission's ancillary authority under Sections 303(r) and 4(i) of the Act – encompasses the power to adopt whatever measures are necessary to protect consumers affected by retransmission consent disputes.[19] Indeed, the Commission's direct authority to "govern the exercise" of retransmission consent rights by broadcasters is not further qualified and plainly includes the power to adopt whatever remedial measures may be necessary to protect the public from harm, including dispute resolution procedures and interim carriage requirements.[20]

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[17] *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association at 79-80 (filed May 27, 2011) ("ACA 2011 Retransmission Consent Comments"); 47 U.S.C. § 325(b)(3)(A).

[18] 47 U.S.C. § 325(b)(3)(A).

[19] Together with the direct authority conferred on the Commission in Section 325, Section 303(r) authorizes it to adopt such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of Title III of the Act. 47 U.S.C. § 303(r). Moreover, Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The clear mandate in Section 325(b)(3)(A) to adopt rules governing retransmission consent provides just the sort of concrete statutory responsibility that justifies the exercise of ancillary jurisdiction in appropriate cases.

[20] For this reason, the Commission should explicitly repudiate its earlier conclusion that it lacks authority to adopt relief that includes interim carriage pending the resolution of retransmission consent complaints. *See* Amendment of the Commission's Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶ 18 (2011) ("2011 Retransmission Consent NPRM"); ACA 2011 Retransmission Consent Comments at 71-76; Reply Comments of the American Cable Association at 91, n.208 (filed Jun. 27, 2011) ("ACA 2011 Retransmission Consent Reply Comments").

Given the disturbing trend of retransmission consent negotiation impasses leading to blackouts and agreements that result in skyrocketing retransmission consent fees,[21] with no limit in sight, the Commission's consideration of a broad variety of reforms to its good faith rules governing the negotiation of retransmission consent is appropriate. These reforms should include a re-examination of both the Commission's list of *per se* violations and its totality of the circumstances test in this proceeding, as well as concluding its evaluation and adoption of other needed reforms discussed in the still-pending retransmission consent reform rulemaking launched in 2011.[22]

III. THE COMMISSION MUST CLARIFY ITS STANDARD FOR EVALUATING COMPLAINTS ALLEGING A VIOLATION BASED ON THE TOTALITY OF THE CIRCUMSTANCES TEST

In its broad ranging NPRM, in addition to seeking comment on a wide range of bargaining behaviors or proposals that could be deemed inconsistent with the obligation to negotiate in good faith under the totality of the circumstances test, the Commission asks more

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[21] *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Letter from Mary C. Lovejoy, Vice President of Regulatory Affairs, American Cable Association, to Marlene H. Dortch, Secretary at 1, n.2 (filed Jul. 31, 2015) ("ACA July 31st Letter); Letter from Mike Chappell, American Television Alliance, to Marlene H. Dortch, Secretary (filed Jul. 22, 2015), *citing Broadcast Investor Deals & Finance: Retrans projections update: $10.3B by 2021*, SNL KAGAN, June 30, 2015 (retransmission consent fees rose 8,600% between 2005 and 2012 and analysts project that fees will continue to grow to roughly $10.3 billion by 2021, up from the projected $6.3 billion in 2015).

[22] *See* 2011 Retransmission Consent NPRM (identifying a number of practices that might be added to the list of seven original *per se* violations of the duty to negotiate in good faith and seeking comment on reform of the Commission's totality of the circumstances test). To date, the Commission has acted on one proposal teed up in the earlier proceeding – prohibiting non-commonly owned Top Four-rated stations in the same market from engaging in coordinated negotiations as *per se* violations of the obligation to negotiate in good faith, and has sought additional comment on a second issue addressed in the 2011 NPRM, repeal or amendment of its broadcast exclusivity rules. *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) ("2014 Retrans FNPRM" or "Joint Negotiation Order"). Congress subsequently ratified and broadened the reach of the Commission's joint negotiation prohibition to include all joint negotiations by unless such stations in the same local market are directly or indirectly under common de jure control permitted by the Commission in Section 103(a) of STELAR, and also added to the list of prohibited behaviors a television broadcast station "limiting the ability of a[n MVPD] to carry into the local market . . . of such station a television signal that has been deemed significantly viewed . . . unless such stations are directly or indirectly under common de jure control permitted by the Commission" in Section 103(b) of STELAR.

generally about “how [it] can most effectively address complaints that do not allege *per se* violations but that involve behavior that is asserted to be inconsistent with good faith.”[23]

As the NPRM notes, there has only been one case that went to decision resulting in a finding of bad faith under the totality of the circumstances test, and only four cases that have gone to decision under the good faith rules at all in the past 15 years.[24] As a result, there is a dearth of guidance beyond the rules themselves. By providing more guidance to negotiating parties about specific bargaining proposals and conduct that violate the good faith negotiation requirement, the Commission will be helping create an environment in which parties can reach mutually agreeable deals, thus avoiding negotiating impasses and programming blackouts that harm consumers. To make the totality of the circumstances test more effective, the Commission must clarify the standards under which it will evaluate good faith complaints.

A. The Commission Should Deem Behavior Causing Harms to Consumers or the Public Interest Evidence of Bad Faith Under the Totality of the Circumstances Test.

The vague and overly permissive standard adopted by the Commission in the 2000 Good Faith Order has empowered broadcast stations to engage in unreasonable negotiating tactics and to demand unreasonable terms and conditions, leading to considerable harm to the public interest. In the NPRM, the Commission asks generally whether “causing consumers harm to enhance negotiating leverage generally [should] be a factor that we should consider as evidence of bad faith under the totality of the circumstances test.”[25] The answer is emphatically, yes. Although the Commission made this inquiry in connection to one specific form of bad behavior – online blocking to gain leverage against an MVPD in in retransmission consent negotiations – the question is more properly considered in the broader context of the totality of

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[23] NPRM, ¶ 7.

[24] *Id.*, ¶ 5, n. 31. The NPRM suggests that this may be because complaints are often filed in the midst of disputes, only to be dropped when an agreement is reached, but it is also likely due in large part to problems with the way the tests were formulated.

[25] *Id.*, ¶ 13. ACA discusses the specific practice of online blocking below in Section IV.D.

the circumstances test. Further, the question must go beyond the limited examination of whether the broadcaster causes consumer harm as a means of enhancing leverage to the question of whether a negotiating party's *conduct or demands* cause harm to the public interest. Avoidance of harm to consumers and the public interest should be a guiding precept in rules governing retransmission consent negotiations. Under the current standard, which was designed to prevent the totality of the circumstances test to "serve as a 'backdoor' inquiry into the substantive terms negotiated between the parties," the Commission's totality of the circumstances test considers solely the interests of the negotiating parties, and is violated only where the Commission finds "the absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute[s] a failure to negotiate in good faith," or that "specific retransmission consent proposals are sufficiently outrageous, or evidence of differences among MVPD agreements are not based on competitive marketplace considerations, as to breach [the] good faith obligation."[26]

These amorphous standards have left MVPDs with very little recourse against broadcasters who are able to exercise their considerable market power to demand unreasonable rates, terms, and conditions. Foreclosed from reliance on the specific behaviors that have been prohibited by the *per se* violations included in the good faith rules, broadcasters have developed a variety of new tactics that force MVPDs to accept proposals that are bad for consumers and that harm the public interest.

The legislative history of the 1992 Act confirms that Congress understood the Commission to have the requisite authority to intervene in retransmission consent negotiations in order to protect consumer welfare.[27] Taking harm to consumers into account in determining

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[26] 2000 Good Faith Order, ¶ 32.

[27] *See, e.g.*, 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye) ("I am confident, as I believe the other cosponsors 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 such 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."); *see also* 138 Cong.

whether conduct is in bad faith is a good public policy and is not restricted by Congress. While the good faith rules are reciprocal and apply to both parties in a negotiation, broadcasters are issued licenses to use the public airwaves in exchange for their obligation to operate their stations in the public interest, convenience and necessity.[28] Negotiating practices by broadcasters that result in harm to the public cannot be squared with this statutory responsibility. The community for retransmission consent is the viewing public that accesses broadcast signals by means of MVPD services. Accordingly, the Commission should make clear that causing undue harm to television views in the course of or in connection with retransmission consent negotiations is a factor that the Commission will consider as evidence of bad faith under the totality of the circumstances test.[29]

Rec. S14615-16 (Sep. 22, 1992) (statement of Sen. Lautenberg) ("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;" instead "cable operators will have an opportunity to seek relief at the FCC").

[28] 47 U.S.C. § 307(a).

[29] Such conduct could include rejections of interim proposals by a negotiating party aimed at protecting the status quo for viewers while negotiations over prices, terms and conditions continue between the broadcast station and the MVPD.

B. The Commission Should Reexamine Its Presumptions Regarding Behavior that Is or Is Not Consistent With Marketplace Conditions.

The Commission has identified a number of proposals and behaviors that presumptively are[30] or are not[31] consistent with competitive marketplace conditions and the good faith negotiation requirement. The NPRM asks whether these proposals should be retained, revised or expanded to account for any of the practices or proposals parties have previously identified as problematic, discussed in detailed later in the NPRM, as well as whether there are particular negotiating practices that tend to result in a breakdown in negotiations and if so, how the totality of the circumstances test should be changed to account for those practices and whether any of the factors considered under the totality of the circumstances test should be codified in the

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[30] NPRM, ¶ 9. To provide "the parties with as much initial guidance as possible," the Commission determined in its implementation of the good faith requirement, in the 2000 Good Faith Order, that the following proposals are considered presumptively consistent with competitive marketplace considerations and the good faith negotiation requirement:

1. Proposals for compensation above that agreed to with other MVPDs in the same market;
2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market;
4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights;
5. Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and
6. Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event, such as implementation of SHVIA's satellite must carry requirements.

2000 Good Faith Order, ¶ 56.

[31] In the 2000 Good Faith Order, the Commission determined the following proposals to be presumptively inconsistent with competitive marketplace considerations:

1. Proposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming;
2. Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (e.g., other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition;
3. Proposals that result from agreements not to compete or to fix prices; and
4. Proposals for contract terms that would foreclose the filing of complaints with the Commission.

Id., ¶ 58.

Commission's rules.[32] In Section IV.A., below, ACA encourages the Commission to no longer deem proposals that bundle broadcast stations and other "must have" programming in retransmission consent agreements to be consistent with competitive marketplace considerations, and further, to deem such bundled proposals to be per se violations of the duty to negotiate in good faith.

IV. THE COMMISSION SHOULD RECOGNIZE ADDITIONAL NEGOTIATING PRACTICES AND PROPOSALS CONSTITUTE *PER SE* VIOLATIONS OF THE OBLIGATION TO NEGOTIATE IN GOOD FAITH

The NPRM asks whether, in addition to considering any of the 20 specific practices discussed, the Commission should instead consider them to be considered additional *per se* violations of the duty to negotiate retransmission consent in good faith. For the reasons discussed below, ACA urges the Commission to recognize, among the factors cited in the NPRM, the following seven additional *per se* violations of the good faith obligation:

- A broadcaster's insistence on bundling broadcast signals with RSNs (or other "must have" programming) in retransmission consent negotiations.
- Refusal of a negotiating party to substantiate its bargaining positions.
- Blackouts involving online programming in connection with retransmission consent negotiations as a means to gain leverage in its negotiations.
- Blackouts involving linear programming before marquee events in connection with retransmission consent negotiations as a means to gain leverage in its negotiations.
- Third-party interference in retransmission consent agreements for historically carried out-of-market stations.
- Bundling of prospective programming in retransmission consent negotiations.
- Discrimination by an MVPD-affiliated broadcast station based on vertical competitive effects.

Should the Commission decline to deem any of these practices or proposals per se violations, it should at the very least recognize them as evidence of bad faith under the totality of the circumstances test.

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[32] NPRM, ¶ 11.

A. A Broadcaster's Insistence on Bundling Broadcast Signals with Other "Must Have" Programming.

In its initial implementation of the totality of the circumstances test, the Commission determined that "[p]roposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same market or a different market" are *presumptively consistent* with competitive marketplace considerations.[33] However, the NPRM recognizes that times have changed, and wisely invites comment on whether it should no longer consider the bundling of broadcast and non-broadcast programming presumptively consistent with good faith bargaining.[34] More specifically, the Commission asks whether bundles that involve specific types of programming such as regional sports networks or other "must have" programming should factor into the assessment of good faith.[35]

In the attached economic analysis, discussed in more detail below, Professor Michael Riordan, the Laurans A. and Arlene Mendelson Professor of Economics at Columbia University, determines that a presumption that bundling a top four rated broadcast station and other "must have" programming in a retransmission consent negotiation is consistent with competitive marketplace considerations is insupportable from an economic perspective.[36] Professor Riordan further demonstrates that insistence by a broadcaster on bundling a "must have" local broadcast station with a same market regional sports network ("RSN") or other type of "must have" programming when both programming assets have a common contract termination date

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[33] 2000 Good Faith Order, ¶ 56.

[34] NPRM, ¶ 15 ("Have circumstances changed such that bundling of broadcast and non-broadcast programming should not be presumptively consistent with good faith bargaining under any circumstances?").

[35] *Id*.

[36] Michael H. Riordan, HIGHER PRICES FROM BUNDLING OF "MUST HAVE" PROGRAMMING ARE NOT BASED ON COMPETITIVE MARKETPLACE CONSIDERATIONS at 4, ¶ 5 (2015) (attached as Attachment A) ("Riordan").

results in higher fees (or other compensation) charged to MVPDs and their customers, and impairs competition in the MVPD marketplace.

Against this backdrop, bundling should no longer be generally presumed to be consistent with competitive marketplace considerations, particularly an insistence on bundling in the form of simultaneous negotiation of retransmission consent for a top four rated broadcast station and other same-market RSN (or other "must have" programming) with expiration dates around the same time. Moreover, the Commission should recognized as a *per se* violation the unwillingness of a top four rated broadcast station to offer an extension of its existing retransmission consent agreement until the negotiation of an affiliated same-market RSN (or other "must have" programming) with a contract expiration date around the same time as the expiration date of the broadcast station has reached an accord or final impasse. Failing that, the Commission should at the very least recognize that it is evidence of bad faith under the totality of the circumstances test.

1. The retransmission consent marketplace has changed since the Commission deemed bundling to be consistent with competitive marketplace considerations, and broadcasters now force MVPDs to accept bundled deals that include other "must have" programming.

Under the current formulation of the totality of the circumstances test, bundling retransmission consent for a local broadcast signal with negotiations for additional programming is presumed to be consistent with competitive marketplace considerations and thus consistent with good faith bargaining.[37] In establishing that presumption, the Commission reasoned that such "proposals reflect presumptively legitimate terms and conditions or forms of consideration that broadcasters may find impart value in exchange for the grant of retransmission consent to an MVPD" and are "not violative of national policies favoring competition."[38] However,

[37] 2000 Good Faith Order, ¶ 56.

[38] *Id.*

marketplace circumstances surrounding retransmission consent negotiations have changed markedly since 2000, warranting the Commission's reconsideration of its original presumption.

Since adopting this presumption in 2000, entities that own broadcaster stations have acquired or launched regional sports networks,[39] and entities that own regional sports networks have acquired broadcast stations.[40] As illustrated in the two tables below,[41] today there are at least 23 markets in which 21st Century Fox and Comcast-NBCU, which are affiliated with broadcast networks Fox and NBC respectively, own and operate both a broadcast station (an "O&O" station) and an RSN serving the same market.

Table 1. MVPDs Carrying Fox O&Os and Fox RSNs Serving the Same Market

DMA	Fox O&O	Fox RSN(s)	Number of MVPDs	Name of MVPDs
Atlanta, GA	WAGA (Fox 5)	Fox Sports Southeast and/or Fox Sports South	12	AT&T [DirecTV], Bulldog Cable, Charter, Comcast, DISH Network, ETC Communications, Flint Cable TV, Monroe Utilities Network, NuLink Enterprises, Plantation Cablevision, Truvista Communications, Windstream

[39] Prior to 2000, News Corporation, the legal predecessor to 21st Century Fox, was a significant owner of broadcast stations affiliated with the Fox Network. Since that time, Fox acquired or launched many RSNs. News Corporation acquired ownership of Midwest Sports Channel, subsequently renamed Fox Sports North, in September 2000. In February 2005, News Corporation acquired an ownership stake in Fox Sports Florida. News Corporation acquired ownership of Turner South, subsequently renamed Fox Sports Southeast, in February 2006. In October 2008, Fox Cable Networks, a unit of the Fox Entertainment Group division of 21st Century Fox, launched Fox Sports Carolinas. 21st Century Fox became the majority owner of YES Network on January 2014.

[40] In 2011, Comcast Corporation, a significant owner of RSNs across the country, acquired an ownership stake in NBC Universal and its 10 top rated broadcast stations that are affiliated with the NBC Network.

[41] These tables were put together using data obtained from SNL Kagan in November 2015. The two tables include only MVPDs operating in the listed DMA that carry the listed Fox O&O and Fox-affiliated RSN(s), or the listed NBC O&O and Comcast-affiliated RSN(s). Table 1 does not include MVPDs operating in the listed DMAs that carry the listed Fox O&O and a local version of the Big Ten Network. In some cases, one or more of a listed MVPD's systems also carry a second out-of-market Fox or NBC O&O and/or and additional Fox or Comcast-affiliated RSN. For example, a Service Electric Cable TV cable system in the New York, NY DMA carries WNBC (NBC 4), WCAU (NBC 10), SportsNet NY and Comcast SportsNet Philadelphia. Moreover, there are many unlisted MVPDs operating in other DMAs that carry an imported NBC O&O and one or more Comcast-affiliated RSNs. A Blue Ridge cable system in the Harrisburg-Lancaster-Lebanon-York, PA DMA, for example, carries WCAU (NBC 10) and Comcast SportsNet Philadelphia. Neither table list other broadcast stations owned by 21st Century Fox or Comcast that serve the market that are not affiliated with the Fox or NBC Networks (e.g. MyNetwork-affiliated stations, Telemundo affiliated-stations).

Austin, TX	KTBC (Fox 7)	Fox Sports Southwest	8	AT&T [DirecTV], DISH Network, Guadalupe Valley Tele Coop, NewWave Communications, Northland Cable Television, Rio Holdings, Suddenlink, Time Warner Cable
Charlotte, NC	WJZY (Fox 46)	Fox Sports Carolinas and/or Fox Sports Southeast	10	AT&T [DirecTV], Charter, City of Morganton, City of Salisbury, Comporium Communications, DISH Network, Morris Broadband, PTC Communications, Skyline Telephone Member Corp, Time Warner Cable
Dallas-Fort Worth, TX	KDFW (Fox 4)	Fox Sports Southwest	18	Alenco Communications, Alliance Communications, AT&T [DirecTV], Cable One, Charter, DISH Network, East Texas Cable, Greenville Electric Utility, LynnStar Communications, Millennium Telcom, Nortex Communications, Northland Cable Television, Rio Holdings, Suddenlink, Time Warner Cable, Verizon, Vyve Broadband, Zito Media
Detroit, MI	WJBK (Fox 2)	Fox Sports Detroit	10	AT&T [DirecTV], Bright House Networks, Buckeye CableSystem, Charter, Comcast, D & P Communications, DISH Network, Michigan Cable Partners, WOW!, Wyandotte Cable TV
Gainesville, FL	WOGX (Fox 51)	Fox Sports Sun and/or Fox Sports Florida	5	AT&T [DirecTV], Altitude Communications, Comcast, Cox, DISH Network
Los Angeles, CA	KTTV (Fox 11)	Fox Sports West and/or Prime Ticket	12	AT&T [DirecTV], Catalina Broadband Solutions, Champion Broadband, Charter, Cox, DISH Network, Golden Rain Fndtn. of Laguna, Lone Pine TV, Mediacom, Suddenlink, Time Warner Cable, Verizon
Minneapolis-St. Paul, MN	KMSP (Fox 9)	Fox Sports North	38	Albany Mutual Telephone, Arvig Communication, AT&T [DirecTV], Baldwin Telecom, Benton Coop Telephone, BEVCOMM Inc., Celect Communications, Charter, Clear Lake Telephone, Comcast, Consolidated Communications, Consolidated Telephone, Crosslake Cablevision, DISH Network, Emily Coop. Tel., Farmers Independent Telephone, Federated Telephone Coop, Fibernet Monticello, Fort Randall Cable System, Gardonville Coop Tele, Hiawatha Broadband, Integra Telecom, Lakeland Telecom, Lonsdale Video Ventures, Mediacom, Midcontinent, Mosaic Telecom, New Ulm Telecom, Northwest Community Comms, Paul Bunyan Rural Tele Coop, Runestone Telephone, Savage Communications, Telephone and Data Systems, Vast Broadband, West Central Telephone, Westbrook Cable TV, Windom Cable System, Windstream

New York, NY	WNYW (Fox 5)	Yes Network	11	AT&T [DirecTV], Blue Ridge Communications, Cablevision, Charter Communications, Comcast, DISH Network, Frontier, RCN, Service Electric Cable TV, Time Warner Cable, Verizon Communications
Orlando-Daytona Beach, FL	WOFL (Fox 35)	Fox Sports Florida and/or Fox Sports Sun	7	AT&T [DirecTV], Bright House Networks, Cablevision of Marion County, CenturyLink Prism, Comcast, Cox, DISH Network
Phoenix, AZ	KSAZ (Fox 10)	Fox Sports Arizona	10	AT&T [DirecTV], Cable One, CableAmerica, CenturyLink Prism, Cox, DISH Network, Mediacom, Schurz Communications, Suddenlink, Valley Tele Cooperative
Tampa-St. Petersburg, FL	WTVT (Fox 13)	Fox Sports Florida and/or Fox Sports Sun	6	AT&T [DirecTV], Bright House Networks, Comcast, DISH Network, Verizon, WOW!

Table 2. MVPDs Carrying NBC O&Os and Comcast RSNs Serving the Same Market

DMA	NBC O&O	Comcast RSNs	Number of MVPDs	Name of MVPDs
Chicago, IL	WMAQ (NBC 5)	Comcast SportsNet Chicago	9	AT&T [DirecTV], Charter, Comcast, DISH Network, Kraus, Mediacom, RCN, TV Cable of Rensselaer, WOW!
Hartford and New Haven, CT	WVIT (NBC 30)	SportsNet New York	8	AT&T [DirecTV], Cablevision, Charter, Comcast, Cox, DISH Network, Frontier, Thames Valley Communications
New York, NY	WNBC (NBC 4)	SportsNet New York	11	AT&T [DirecTV], Blue Ridge, Cablevision, Charter, Comcast, DISH Network, Frontier, RCN, Service Electric Cable TV, Time Warner Cable, Verizon
Philadelphia, PA	WCAU (NBC 10)	Comcast SportsNet Philadelphia	7	Armstrong, Blue Ridge, Cablevision, Comcast, RCN, Service Electric Cable TV, Verizon
San Francisco-Oakland-San Jose, CA	KNTV (NBC 11)	Comcast SportsNet Bay Area and/or Comcast SportsNet California	8	AT&T [DirecTV], Charter, Comcast, DISH Network, Horizon Cable TV, Mediacom, San Bruno Cable TV, Wave Broadband
Washington, DC (Hagerstown, MD)	WRC (NBC 4)	Comcast SportsNet Mid-Atlantic	9	AT&T [DirecTV], Comcast, Cox, DISH Network, Hardy Telecommunications, Metrocast, RCN, Schurz, Shentel, Verizon

In these tables, ACA has identified at least 79 different MVPDs that are at risk of facing bundled negotiations for a top four rated broadcast and an RSN that serve the same market.

Most are smaller MVPDs that are members of ACA. ACA members operating a cable system that carries both a Fox O&O and one or more Fox RSNs report to ACA that they negotiate with a single division at Fox that is responsible for carriage agreements for its broadcast stations, regional sports networks, and its national cable networks. For some of these members, in their most recent retransmission consent negotiations, the expiration date of their previous Fox O&O agreement expired on or within a few weeks of the expiration date of their previous carriage agreement with a Fox RSN that serves the same market as the Fox O&O. These operators believed that reaching an agreement for the O&O was contingent upon the renewal of their carriage agreement for the Fox RSN, and that Fox could withdraw permission to continue carrying both the Fox O&O and the Fox RSN if a renewal agreement for both was not reached by the time of the existing deal's termination date.[42]

To create conditions that support a demand for simultaneous negotiations with MVPDs who previously had staggered agreements for a Fox O&O and Fox RSN, Fox is increasingly demanding that these MVPDs renew their agreements to ensure that they are co-terminus in the future. ACA members operating a cable system that carries both a Fox O&O and one or more Fox RSNs whose contract expiration dates for these programming assets were not the same when negotiating their most recent retransmission consent agreement for the Fox O&O, report that, in their retransmission consent negotiations, Fox negotiated and to some extent insisted on "wrap around" agreements that conditioned retransmission consent on a co-terminus renewal of the carriage agreement for the local Fox RSNs. The synchronization of expiration dates insures that, in the next round, negotiations for retransmission consent and RSN carriage rights will be conducted simultaneously rather than sequentially, enabling Fox to threaten to withdraw both kinds of programming at once. The predictable effect is to strengthen Fox's

[42] In some cases, reaching agreement with the Fox O&O and Fox RSN was also contingent upon renewing carriage for other Fox programming networks that were also expiring at the same time as the Fox O&O and Fox RSN.

market power and bargaining leverage in future negotiations. Fox's wrap-around offer usually is sufficiently attractive compared to the prohibitively higher fees that Fox demands for a standalone retransmission consent agreement to effectively force these MVPDs to accept the bargain.[43]

In contrast to Fox, Comcast-NBCU has not required ACA members to bundle retransmission consent for negotiations for its O&O stations with its same market RSNs in its most recent round of retransmission consent negotiations. Instead, Comcast has entered into an agreement with the National Cable Television Cooperative ("NCTC"), a purchasing group through which most ACA members buy a substantial amount of their programming, that bundles retransmission consent for all of its O&O stations with its national cable networks, but does not include carriage rights for any RSNs.[44] Most ACA members operating in NBC O&O markets have opted into NCTC's retransmission consent deal with Comcast-NBCU and separately negotiated with Comcast directly for RSN carriage rights.

A possible explanation for the different business practices of Fox and Comcast is that the Commission identified Comcast's ability to bundle its broadcast stations with its regional sports networks serving the same market as a merger specific harm of its acquisition of NBCU in 2011, and specifically adopted a baseball style arbitration condition that gives an MVPD the right to arbitrate the price for Comcast's O&O stations, its RSNs, and its suite of national cable programming on a standalone basis. MVPDs also have the right to interim carriage of any of these programming assets when a dispute is brought to arbitration.[45] These conditions remain

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[43] In some cases, these "wrap around" agreements also included co-terminus renewal for its Fox national cable networks.

[44] ACA members entering into the NCTC's retransmission consent deal with Comcast-NBCU were required to also opt into Comcast-NBCU's deal with NCTC for its national cable programming, and these programming agreements do have the same termination date.

[45] *Applications of Comcast Corporation, General Electric Company, NBC Universal, Inc. for Consent to Transfer Control of Licenses,* Memorandum Opinion and Order, 26 FCC Rcd 4238, Appendix A, Section VII, A.5 (2011) ("Comcast-NBCU Order").

in place today, but will expire in January of 2018.[46] In contrast, Fox, which was previously subject to similar conditions on the sale of its O&O stations and its RSNs stemming from the merger of DirecTV and News Corp., has not been under any such restrictions since 2009.[47] For some ACA members, the expiration of these conditions coincides with period in which Fox started shifting toward bundled agreements with co-terminous agreements

The marketplace has changed significantly since 2000. Today, in many markets a single entity owns both a network-affiliated broadcast station and an RSN that serves the same market. Many MVPDs who operate in these markets have reported instances of bundled negotiations involving these programming assets, and there is a noticeable trend toward co-terminous agreements for these programming assets that will lead to more bundled negotiations in the future. Based on all of these market changes, it is appropriate now for the Commission to reexamine whether its presumption that bundling is consistent with competitive marketplace considerations is appropriate, particularly bundling involving two or more "must have" programming assets. In ACA's view, the presumption can no longer be supported.

2. Regulatory circumstances have changed since the Commission deemed bundling to be consistent with competitive marketplace considerations, and the Commission has found certain types of bundling to be problematic in other contexts.

Not only has the marketplace changed since 2000, the Commission has, in other contexts since then, designated certain types of broadcast stations and other programming networks as "must have" programming assets that deserve of special treatment.[48] Moreover,

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[46] *Id.*, Appendix A, Section XX.

[47] *See General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, Appendix F, Conditions, Section III (2004) ("News-Hughes Order"). Fox was also subject to additional non-discriminatory access conditions that were rendered moot by News Corp.'s divestiture of DirecTV in 2008, but the arbitration and interim carriage conditions remained in effect under the Commission granted News Corp.'s Petition for Modification in 2009. *General Motors Corporation, Hughes Elec. Corp., Transferors and The News Corporation, Limited Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 8674, ¶¶ 5-7, 18 (2009).

[48] The term "must have" was not coined by the Commission until the 2002 Program Access Report and Order retaining the ban on exclusive programming contracts found in its program access rules for five

the Commission has recognized that bundling retransmission consent with RSNs (or other "must have" programming assets) gives broadcasters the ability to raise rates substantially above levels it could command if these assets were negotiated for separately.

In the News-Hughes Order, the Commission found that local broadcast stations and RSNs are two forms of "must have" (*i.e*., a source of market power) programming that are each competitively necessary for MVPDs to have in their channel line-ups because their programming is uniquely valuable and lacking close substitutes.[49] Indeed, the current NPRM recognizes that "much network programming continues to be 'must-have' for MVPDs and an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs."[50]

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more years. In that Order, the Commission found that an MVPD's ability to compete significantly harmed if it is denied access to "must have" for which there is no good substitutes. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶ 4 (2002).

[49] *See* News-Hughes Order, ¶ 147 ("News Corp. currently possesses significant market power with respect to its RSNs within each of their specific geographic regions"); ¶ 201 ("News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent on behalf of local broadcast television stations."). The Commission based this on its finding that "carriage of local television broadcast station signals is critical to MVPD offerings" as demonstrated by significant subscriber defections resulting from even temporary blackouts. *Id*., ¶¶ 202, 206-209. Similarly, the Commission has recognized the significant competitive importance of access to RSNs for MVPDs. "The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: [RSNs] typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game." *Id*., ¶ 133. *See also News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, ¶ 87 (2008) (Liberty-News-DirecTV Order") ("Hence, an MVPD's ability to gain access to RSNs, and the price and other terms of conditions of access, can be important factors in its ability to compete with rivals."); *Adelphia Commc'n Corp., (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Commc'n Corp., (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corp. (subsidiaries), Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 124 (2006) (an MVPD that drops local sports programming risks subscriber defections, and MVPDs "will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights."). The Commission has also found in some cases national cable programming networks can also exhibit the "must have" characteristics of "must have" programming. Comcast-NBCU Order, ¶ 46, Technical Appendix.

[50] NPRM, ¶ 3. In larger markets, the top four rated local television stations are usually owned and operated by the major broadcast networks, ABC, CBS, Fox and NBC.

Despite adopting the presumption that bundling is consistent with competitive marketplace considerations, the Commission has prohibited certain types of bundling involving retransmission consent in certain circumstances. In the Comcast-NBCU Order, the Commission found that Comcast's ability, post-transaction, to coordinate the negotiation of carriage rights for two blocks of "must have" programming – in that case, an NBC O&O and a Comcast RSN – would increase its bargaining leverage and lead to higher prices for an MVPD buyer, who would be at risk of losing two highly valued signals if negotiations failed to yield an agreement.[51] The Commission expressly noted that "joint ownership of an RSN and broadcast station in the same region may lead to substantially higher prices for the jointly owned programming relative to what would be observed if the networks were under separate ownership."[52] The Commission found such bundled negotiations allow the broadcaster to greatly increase its already considerable bargaining power by leveraging the threat of withholding not just one, but two blocks of "must have" programming at the same time.[53] While a blackout of one type of "must have" programming may lead to significant subscriber churn, the loss of two "must have" assets could be devastating, particularly for a smaller MVPD that operates in only a single market.

More recently, the Commission recognized that coordinated negotiations of retransmission consent agreements by separately-owned top four-rated local television stations

[51] Comcast-NBCU Order, ¶ 135-136.

[52] *Id.*, ¶ 137.

[53] *Id.*, ¶ 138 ("We conclude that commenters have raised a legitimate concern about the effect of the combination of Comcast's RSNs and the NBC O&O stations will have on carriage of prices for both of those networks. Nevertheless, we find that the potential harm will be mitigated in the context of this transaction because the program access-related conditions we impose will prevent Comcast-NBCU from using any increased bargaining power it might obtain to raise rates above market levels for each of the Comcast RSNs and the NBC O&Os individually."). The conditions imposed by the Commission permitted an MVPD using the commercial arbitration remedy "to demand a standalone offer for (i) broadcast programming; (ii) RSN programming; and (iii) the bundle of all cable programming, and/or (iv) any bundle of Video Programming (including any standalone bundle of Films) that a C-NBCU programmer has made available to a similar MVPD." *Id.,* ¶ 57; Appendix A, Conditions, Section VII. A. 2. These conditions were imposed for a period of 7 years. *Id*., Section XX.

(measured by audience share) in the same market is a *per se* violation of the good faith obligation.[54] Both well-established economic principles and empirical data supported the Commission's findings: economic analysis demonstrates that "when providers of inputs that are at least partial substitutes for one another bargain jointly with a downstream user of the inputs, the returns to the input providers are higher than if the input providers negotiated separately with the downstream user," and empirical data in the record "lends support to the theory that joint negotiation by Top Four stations leads to increases in retransmission consent fees."[55]

* * *

Given the changes in the marketplace, the Commission's evolved thinking with respect to "must have" programming, and the harms of certain types of bundled negotiations, the Commission should reexamine whether a broad presumption that bundling is consistent with competitive marketplace considerations remains appropriate. In the next section, ACA argues that an insistence on bundling retransmission consent with a same market RSN (or other "must have" programming) for the purpose of raising prices is not consistent with competitive marketplace considerations. In light of the mounting evidence that bundling may be harmful to competition and consumers, and not always consistent with competitive market considerations, the Commission should eliminate the presumption that bundling of a top four rated broadcast station with other "must have" programming, is consistent with competitive marketplace considerations.

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[54] Joint Negotiation Order, ¶¶ 13-16, 21, 22 (rejecting NAB's arguments that the FCC previously has found that joint negotiation is consistent with competitive marketplace considerations in its 2000 Good Faith Order and finding that that presumption pertains to bundling retransmission consent with negotiation for other programming owned by the broadcaster itself, not other programming entities; concluding that "prohibiting joint negotiation is harmonious with antitrust law, which generally prohibits contracts in restraint of trade."). Congress subsequently expanded the Commission's joint negotiation prohibition by prohibiting the coordination of negotiations between all non-commonly owned, same market broadcasters, irrespective of the station's ratings. STELAR, § 103(a).

[55] Joint Negotiation Order, ¶¶ 13, 16. Stations affiliated with a broadcast network such as ABC, CBS, NBC and Fox are most likely to be among the top-four rated stations in a designated market area; such stations seek compensation for carriage via retransmission consent rather than invoke must carry.

3. Bundling retransmission consent negotiations for a top rated broadcast station with other "must have" programming assets is not consistent with competitive marketplace considerations.

Broadcasters that control two or more "must have" programming assets, such as a top four broadcast station and an RSN, in the same market have an incentive and ability to raise prices by forcing concurrent negotiations for carriage of both types of programming and these price increases are not consistent with competitive marketplace considerations. This is most likely to occur in markets where a broadcast network owns and operates both an affiliated broadcast station and an RSN. This type of harmful bundling is made possible when contracts for retransmission consent and RSN carriage expire around the same time, and renewals are negotiated simultaneously.

As Professor Riordan explains in the attached analysis, "markets for must have programming rights are monopolistic rather than competitive,"[56] and higher prices based solely on increased market power derived from owning two monopolies in a market (*i.e.,* both a "must have" broadcast station and an RSN or other "must have" programming) rather than one are not consistent with competitive marketplace considerations. Moreover, Professor Riordan's analysis explains that bundling "must have" assets leads to higher prices for two related reasons. First, requiring bundled negotiations increases the broadcaster's market power by making the demand for each type of programming less sensitive to price.[57] Second, bundled negotiations increase bargaining leverage by imposing a greater penalty on an MVPD for failing to reach an agreement.[58] Both effects reinforce and augment the existing significant market power enjoyed by network-affiliated broadcast stations and RSNs.[59]

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[56] Riordan at 4, ¶ 5.

[57] *Id.* at 4-5, ¶ 6.

[58] *Id.*

[59] *Id.*

This practice harms consumers and competition. Professor Riordan argues that "a broadcaster's insistence on bundling retransmission consent for must have television station signals with RSN carriage rights in order to raise prices is an exercise of market power that harms consumers,"[60] because higher programming costs are passed through to consumers. The resulting adverse effects of higher prices on consumer welfare are an impairment or hindrance of competition in MVPD markets.[61] The impairment or hindrance of competition in the MVPD market caused by the insistence on bundling negotiations for two or more "must have" programming assets warrants a presumption that such conduct is *inconsistent* with competitive marketplace considerations.[62]

Professor Riordan's analysis of marketplace considerations in the video distribution market uses the Structure-Conduct-Performance (SCP) paradigm, a standard economic framework for describing market conditions that bears a "noticeable resemblance" to the analytical framework that the Commission uses in its annual video competition report. According to Professor Riordan's analysis, sellers of "must have" programming, such as top four broadcast stations and RSNs, fit the "textbook description of a monopolist," because the programming is highly valued and there is no close substitute.[63] Because both types of programming are "must have" in their respective markets, the pricing of every top four station in

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[60] *Id.* at 5, ¶ 7.

[61] *Id*.

[62] In implementing the good faith obligation in 2000, the Commission also determined that "[p]roposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (*e.g*. other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition" are presumptively inconsistent with competitive marketplace considerations." 2000 Good Faith Order, ¶ 58. As Professor Riordan explains, bundling retransmission consent rights harms consumers. Riordan at 5, ¶ 7. Thus, such bundling should be considered a violation of the duty to negotiate in good faith pursuant to the Commission's existing presumption regarding the exercise of market power that significantly hinders or forecloses competition.

[63] Riordan at 4, ¶ 5; 9, ¶ 8.

both markets and of each RSN reflects “a substantial amount of market power, or monopoly power.”[64]

Markets for “must have” programming rights therefore cannot be described as competitive, because “a competitive marketplace is one in which sellers of substitutes goods compete to satisfy buyers’ demands by offering lower prices and better quality service.”[65] “Competitive marketplace considerations” therefore excludes “market conditions that do not refer to competition between sellers.”[66] Under such conditions, a broadcaster’s insistence on bundling retransmission consent negotiations for a “must have” station with carriage negotiations for a “must have” RSN for the purpose of raising the price for both is based on monopolistic rather than competitive marketplace considerations.

4. Bundling two or more same market “must have” programming assets will result in higher fees (or other compensation) charged to MVPDs and their customers.

A broadcast station owner’s insistence on bundling its retransmission consent rights for a top rated broadcast station with carriage rights for an RSN that serves the same market will lead to higher fees (or other greater compensation) extracted from MVPDs, and these higher prices will be passed through to consumers and hinder competition in the MVPD industry.

Professor Riordan demonstrates the mechanism by which a top four broadcaster that also controls an RSN in the same market can charge a higher price by describing two hypothetical markets.[67] Subscribers in both markets share similar tastes for programming, including the top four broadcast stations and their local RSN. In one market the RSN is not affiliated with any top four broadcast station, but in the other the RSN is under common

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[64] *Id.* at 10, ¶ 9.

[65] *Id*. at 9, ¶ 7.

[66] *Id*.

[67] Professor Riordan explains that, for a variety of reasons, there are distinct geographic MVPD markets so we may expect that the different competitive conditions that impact both the price paid by MVPDs to upstream programming sellers and the rates paid by subscribers. *Id*. at 7-8, ¶¶ 4-6.

ownership with one top four station. This is the only significant difference between the two markets.

This two-product monopoly gives the seller an ability to set a higher rate for the programming bundle than it would if it sold each programming asset separately. Professor Riordan illustrates this result as follows: In one case, the two-product monopolist is offering two "must have" programming assets – a top four broadcast station and an RSN – to two types of buyers. The seller has a general notion of the price that the market can sustain, but nevertheless remains uncertain about the exact price each buyer is willing to pay for carriage rights. Buyer type A is willing to pay up to $8.00 per subscriber per month for the RSN, and as much as $2.50 for retransmission consent. Buyer type B would pay not more than $7.00 for the RSN, but is willing to pay up to $3.00 for the broadcast station. Not knowing which price the buyer is willing to pay for retransmission consent or the RSN, by offering the RSN and the broadcast stations separately, the seller would charge only $7.00 for the RSN and $2.50 for the broadcast station (for a total of $9.50), because selling either individual product at a higher price risks losing a customer for that product. However, by selling the assets as a bundle, the seller can raise its price for both assets to $10.00, since both types of buyer are willing pay that amount to obtain both programming assets irrespective of how much they are willing to pay for each asset on its own.[68]

The next example, based on an alternative bargaining model – the Nash bargaining model[69] – demonstrates that a programmer can assert greater bargaining leverage by

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[68] *Id*. at 11-12, ¶¶ 2-4. Professor Riordan notes further that while separate negotiations always succeed under the market power example, bundled negotiations may not. "Under bundled negotiations, the seller anticipates that a buyer with the lowest values for both products will refuse the seller's price offer for the bundle. In other words, bundling increases the probability that negotiations fail because, despite the must have nature of both types of programming, MVPDs sometimes simply may not be willing to pay the monopoly price for the package, and thus will withdraw from negotiations." *Id*. at 13, ¶ 6.

[69] This model "assumes that the buyer and seller have a common knowledge of the buyer's values for retransmission consent rights and RSN rights, and, with equal bargaining power, [will] split the incremental joint value of a negotiated transaction." *Id*. at 14, ¶ 8.

combining negotiations for carriage rights for two separate programming assets that are partial substitutes than it would have in selling each asset separately.[70] To illustrate, this example assumes that (i) both parties know that the buyer is willing to pay a total of $10 to carry both the broadcast station and the RSN, but is only willing to pay $7 to carry the RSN without carrying the broadcast station, and only $3.50 to carry the broadcast station without carrying the RSN; (ii) the sellers incremental cost (and thus the minimum price he is willing to accept) is zero; and (iii) that there is equal bargaining power between the buyer and the seller, meaning that the buyer and seller would negotiate a price that divides the incremental value (e.g. $10 - $7 = $3 for the broadcast station) equally between them. Under separate negotiations the buyer and seller would settle on a price of $1.50 (half of $3.00) for the broadcast station and $3.25 (half of $6.50) for the RSN, for a total of $4.75. Under a bundled negotiation, however, the seller has greater bargaining leverage – the ability to blackout not just one but two "must have" assets. As a result, the starting point for negotiations is set at the $10 that the buyer is willing to pay, so the eventual agreed upon price is $5 (half of $10) which is 5% higher than $4.75 the buyer would have paid under separate negotiations. The greater penalty for a failure to reach agreement on the bundled package increases bargaining leverage and enables the seller to negotiate a better deal than it could achieve by negotiating for each "must have" programming asset separately.[71]

[70] *Id*. at 15, ¶ 10. ("The theory of increased bargaining leverage based on the Nash bargaining model requires that retransmission rights and RSN rights are partial substitutes, in the sense that the value of retransmission consent is greater if the MVPD does not carry the RSN. This might be the case, for example, if the withdrawal of the RSN causes viewers to substitute towards sports programming carried by the television station. Such partial substitutability does not necessarily conflict with the proposition that withdrawal of the RSN might still cause a large number of subscribers to switch to other MVPDs who do carry the RSN.").

[71] Professor Riordan explains that although based on different bargaining models, the market power and leverage examples reach the similar conclusion that a bundled negotiation for two "must have" goods raises prices compared to separate negotiations. In the bargaining model, the buyer and seller agree on a price that divides the known value of the transaction, and a balance of bargaining power is captured by the assumption of equal division. "Both bargaining models are standard tools in applied economic analysis, because each captures a balance of bargaining power in a simple and tractable manner. One difference is that the theory of increased market power, based on a bargaining model in which the seller makes an offer that the buyer accepts or rejects, does not require an assumption of partial substitutability." *Id.* at 15-16, ¶ 11.

These examples demonstrate that the price differentials that result from bundling two types of "must have" programming are based on monopolistic rather than competitive marketplace considerations. As such, Congress' determination that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations" does not apply.[72] The Commission therefore has the authority to determine bundling negotiations for a top four broadcast station with one or more other "must have" programming assets is a violation of the duty to negotiate in good faith.

The NPRM recognizes that "retransmission consent fees have steadily grown and are projected to increase further, thereby applying upward pressure on consumer prices for MVPD programming services."[73] A predictable effect of higher consumer prices for MVPD services is to discourage the consumption of MVPD services. Further, to the extent that smaller MVPDs with less bargaining power are more susceptible to the exercise of market power from bundling "must have" retransmission consent with other "must have" programming, or that they pass on more of the resulting increase in costs to final consumers,[74] consumer choice is distorted by a change in the relative prices of alternative MVPD services. Thus higher prices reduce consumer welfare as more consumers forgo MVPD services altogether, and as some consumers switch to otherwise less preferred MVPD services.

Although Professor Riordan acknowledges that bundling by a multiproduct monopolist can, in some cases, lower prices if the seller believes it can expand its market by attracting new

[72] 47 U.S.C. § 325(b)(3)(C)(ii).

[73] NPRM, ¶ 3.

[74] Satellite MVPDs have national pricing, and therefore can be expected to pass on less of the price increase in any given geographic market.

customers with discounts, this is not the case in the market for "must have" programming.[75] This market is already fully covered with no room for expansion, so the seller has no incentive to offer discounts.[76] Bundling in this type of inelastic market increases the seller's market power and its leverage, allowing it profitably to raise prices, which are then passed on to consumers in higher subscription fees. This creates the potential for impairment and distortion of the MVPD market, as more consumers either forego MVPD service altogether or switch to an otherwise less preferred MVPD competitor.

5. The Commission should deem a refusal to negotiate sequentially for "must have" programming to be a violation of the duty to negotiate in good faith.

To fully remedy the harms of bundling top four broadcast stations with other same market "must have" programming assets, the Commission should deem a top four rated broadcaster's refusal to grant a temporary extension of a retransmission consent agreement that expires on or around the same date as a same market RSN (or other "must have" programming asset) to be a violation of the duty to negotiation in good faith. Professor Riordan suggests that this approach would effectively address the harms of bundled negotiations without requiring common owners of these assets to make standalone offers that would be subject to review by the Commission to determine whether they are reasonable.[77]

The challenge with a rule that requires a common owner to offer a retransmission consent proposal separate from an RSN proposal when the two contracts expire around the same time is that there is no easy way to guarantee that separate but simultaneous negotiations are not tacitly linked. A separate offer may be priced at a level intended to push the MVPD into accepting a bundled deal. To address this matter, the Commission would also need to deem the failure of a common owner to negotiate retransmission consent agreements at reasonable

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[75] Riordan at 16, ¶ 12.

[76] *Id*.

[77] *Id*. at 17, ¶ 3.

prices, terms, and conditions to be a violation of the good faith rules, which would result in the Commission serving as judge over whether separate standalone offers are reasonable, a position the Commission has avoided in the past.

A more practical way to address the problem of bundling retransmission consent with other same market "must have" programming is to deem a refusal to engage in sequential rather than simultaneous negotiations to be a violation of the good faith rules. Professor Riordan's economic analysis demonstrates that when negotiations for retransmission consent of a top four broadcast station and another jointly owned "must have" programming asset take place sequentially rather than simultaneously, the outcome is the same as if negotiations for each asset were conducted separately by independent owners.[78]

A simple method to ensure that agreements for "must have" program assets in the same market that expire on or around the same date are negotiated sequentially is for a broadcast station can offer an automatic extension of its existing retransmission consent agreement until the negotiation of the affiliated same market RSN (or other "must have" programming) has reached an accord or final impasse. . A broadcaster's refusal to do so should be considered a *per se* violation of good faith bargaining, or at the very least, evidence of bad faith under the totality of the circumstances test..

B. Refusal of a Negotiating Party to Substantiate Claims Made During Negotiations.

In response to commenters' suggestions, the NPRM seeks comment on whether an MVPD's or broadcaster's refusal to provide "information substantiating reasons for positions taken when requested in the course of bargaining" should be deemed inconsistent with the duty to bargain in good faith under the totality of the circumstances test.[79] Although the Commission

[78] *Id.* at 17-18, ¶¶ 4-5.

[79] NPRM, ¶ 16. This practice was identified by ACA in its July 24th Ex Parte Letter and by the Joint Parties (CenturyLink, Consolidated Communications, Inc., FairPoint Communications, Inc., ITTA, Mediacom Communications Corp, NTCA, Public Knowledge and TDS Telecommunications) in their Aug. 18th Ex Parte Letter. *See Amendment of the Commission's Rules Related to Retransmission Consent*,

recognized in its 2000 Good Faith Order both that a "[b]lanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation" and that disclosure of the reasons for a broadcaster's rejection of an MVPD's proposal is necessary so that the MVPD "understand[s] why certain terms are unacceptable to the broadcaster," it did not require information sharing under its good faith rules.[80] The Commission justified this by citing the lack of mutuality in the good faith obligation and reasoning that it would negate the concept of marketplace negotiations to impose a one-sided information disclosure requirement on broadcasters.[81] Despite Congress later extending the good faith requirement to MVPDs, making it bilateral, the Commission's initial approach to information disclosure was never revisited through rulemaking and has remained in place.[82]

ACA is pleased that the Commission has recognized that it is time to re-evaluate its approach and is seeking comment on whether to recognize a refusal to substantiate claims made during the course of retransmission consent negotiations as evidence of a failure to negotiate in good faith. In ACA's view, the fact that the good faith obligation is now mutual is a

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MB Docket No. 10-71, Letter from Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association, to William Lake, Chief, Media Bureau at 1 (filed Jul. 24, 2015) ("ACA July 24 Ex Parte Letter"); Letter from CenturyLink, Consolidated Communications, Inc., FairPoint Communications, Inc., ITTA – The Voice of Mid-Size Communications Companies, Mediacom Communications Corporation, NTCA – The Rural Broadband Association, Public Knowledge, and TDS Telecommunications Corp. to William Lake, Chief, Media Bureau at 4 (filed Aug. 18, 2015) ("Joint Parties Letter") (asserting that "the Commission should require, as part of the totality of the circumstances standard, that . . . parties negotiating retransmission consent . . . disclose relevant information substantiating and verifying their bargaining claims" and that the standard of relevancy be liberally construed). *See also* NPRM, ¶ 16 n.82.

[80] *Implementation of the Satellite Home Viewer Improvement Act of 1999 Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 44 (2000) ("2000 Good Faith Order").

[81] *Id.*

[82] *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339 (2005); *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.; Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith*, Order, 22 FCC Rcd 35 (2007) (rejecting Mediacom's claim that failure to provide substantiating information was a violation of the good faith rules under the totality of the circumstances).

substantial changed circumstance warranting a corresponding change in the Commission's good faith rules. Under the current rules, a negotiating party can make false claims and refuse to provide the other party with sufficient information to evaluate the fairness of its offer and formulate an appropriate counteroffer. Requiring a party to substantiate claims made in support of offers or bargaining positions can be beneficial by keeping the parties honest and helping to facilitate constructive bargaining that will lead to a mutually satisfying agreement for both parties. As demonstrated below, the Commission can improve the negotiating environment for retransmission consent and protect consumers from breakdowns by following labor law and its own precedents and recognizing that a refusal to substantiate claims made during negotiations is a *per se* violation of the obligation to negotiate in good faith or, at the very least, evidence of bad faith under the totality of the circumstances test.

1. Changed circumstances justify revisiting the Commission's decision not to require negotiating parties to substantiate negotiating positions.

The need for this reform is great. As the Commission and Congress have found, there have been significant changes in the marketplace since 1992. Apart from the fact that the good faith obligation is now bilateral, structural changes include the presence of two or more MVPDs that compete with incumbent cable operators in each market, the ability of consumers to access video programming from online distributors, and the ownership of non-broadcast programming by broadcast licensees who bundle carriage negotiations for this programming with those for their broadcast stations.[83] These changes have generally given broadcasters increased leverage in their retransmission consent negotiations, altering the negotiation dynamics with MVPDs that existed more than two decades ago. As a result, retransmission consent fees along with retail MVPD prices have steadily risen, the complexity of negotiations for retransmission consent have increased, and parties engage in tactics that "push those

[83] NPRM, ¶ 3, *citing* Senate Commerce Committee Report at 13.

negotiations toward a breakdown and in consumer harm from programming blackouts."[84] The American Television Alliance has documented that, "[d]uring the last five years, Americans have experienced over 550 blackouts rendering them unable to watch their favorite shows. Even more troubling, the number has grown rapidly over the last several years: in 2010 there were 25 reported blackouts, while in 2014, the number rose to 107. And, already in 2015 customers have experienced 189 blackouts."[85]

Given the fact that the good faith obligation is now bilateral, the bargaining leverage between broadcasters and MVPDs is far more disparate than in 1992, that refusals to substantiate claims are a tactic often employed by entities with significantly more bargaining power than those on the other side of the negotiating table, and that it increases the chances of negotiating impasses that harms consumers, ACA strongly supports the Commission deeming an MVPD's or broadcaster's refusal to provide information substantiating reasons for positions taken when requested in the course of bargaining to be deemed a *per se* violation of the duty to negotiate in good faith, or, at the very least, evidence of bad faith under the totality of the circumstances test.

2. Cable operators and broadcasters have experienced their negotiating partners refusing to substantiate claims during negotiations.

It is common for parties in retransmission consent negotiations to refuse to substantiate claims made during negotiations, particularly a party with significantly greater bargaining power over the other. ACA members, who do not have more bargaining power than broadcasters, report that broadcasters will make claims to substantiate their offers, particularly with regard to their offered prices, but will rarely provide any evidence to back up those claims when requested. For example, broadcasters will claim that their offered rates are at market or similar

[84] *Id.*

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

or better than those provided to other similarly situated operators, but refuse to provide any evidence in support.[86] These MVPDs are thus left in the dark, without the means to evaluate the veracity of claims advanced in support of a broadcaster's bargaining position[87] and without a factual basis necessary to formulate counterproposals that will lead to a mutually acceptable agreement on price, terms and conditions. ACA members report their frustration with broadcasters who refuse to substantiate their claims, thus thwarting the negotiating process and leading to more contentious negotiations in the present and future.

Broadcasters also have had problems with MVPDs not substantiating their claims. A recent dispute between a group of seven commonly-controlled broadcast companies, ("Northwest") and DirecTV illustrates that MVPDs may not substantiate their claims to broadcasters and the type of negotiating breakdown that can result when a party refuses to substantiate its bargaining claims. In that case, during retransmission consent negotiations, DirecTV, which carries over 1,700 broadcast stations throughout the country, claimed that the prices offered by Northwest were far above marketplace rates it paid other broadcasters.[88] To substantiate its claim that its prices were not above market, Northwest provided DirecTV with anonymized pricing information from its recent retransmission consent agreements with other

[86] In contrast, others are more forthcoming, pointing to reverse compensation sought by their affiliated networks as justification for the price offered the MVPD. In many cases, broadcast stations hint that their negotiating position is necessitated due to MFNs with other distributors, but refuse to substantiate this claim upon request. ACA addresses the separate issue of negotiating terms based on MFN provisions or the demand for MFN prices below in Section V.

[87] Most small and medium-sized MVPDs face a significant information disparity in most retransmission consent negotiations. The widespread use of non-disclosure provisions keeps MVPDs in the dark about market rates, terms and conditions generally. Larger station groups, which primarily own network-affiliated stations that elect retransmission consent, know not only what other MVPDs in the local market are paying, but also what dozens of other MVPDs are paying for their network-affiliated stations in other markets across the nation. Smaller MVPDs, in contrast, know only what they pay for other network-affiliated stations in their market and have no idea what their direct competitors, such as the satellite MVPDs, are paying. This lack of market-rate information leaves MVPDs left to speculate whether claims made during negotiations in support of the prices, terms and conditions offered by the broadcaster are true and unable, therefore, to formulate an acceptable counteroffer.

[88] *Northwest Broadcasting Emergency Complaint For Failure to Negotiate Retransmission Consent in Good Faith and Request For Relief*, MB Docket No. 15-151, at 4 (filed Jun. 11, 2015) ("Northwest Broadcasting Complaint"); Answer of DirecTV at 7 (filed Jul. 1, 2015).

MVPD and requested that DirecTV provide similar information regarding the rates it pays other broadcasters so that the parties could establish a fair market value for Northwest stations' signals. DirecTV refused, leading to a breakdown in negotiations that lead to Northwest filing a good faith complaint against DirecTV. It was Northwest's view that DirecTV's refusal to disclose facts relevant to its negotiating position on price was made "with the apparent purpose of evading a true negotiation over a true market price as determined by competitive marketplace considerations . . . [and that] DirecTV has muddied and stymied the negotiating process by repeatedly refusing to engage on the competitive market facts."[89]

Northwest argued that following labor law precedents, negotiating parties should be required, upon request, to substantiate claims in support of the bargaining positions in the interests of giving "the parties a fair opportunity to arrive at a mutual agreement on the competitive (or fair) market value of an MVPD's right to retransmit a broadcast signal, typically expressed as a monthly per subscriber fee paid to the broadcaster by the MVPD."[90] ACA agrees that the Commission would be wise to follow the lead of labor law and consider a party's refusal to substantiate claims made during the course of retransmission consent negotiations when requested to do so by the other party as evidence of a failure to negotiate in good faith. As discussed below, refusals to substantiate negotiating positions upon request have been recognized as evidence of a lack of good faith for over fifty years in established labor law precedent.

[89] Northwest Broadcasting Complaint at 11.

[90] Northwest Broadcasting Complaint at 14-15 (arguing that if a sale is to occur, the parties must come to a meeting of the minds over the value of the respective rights or property, that the most accurate barometer of market value in deals for intangible or tangible assets is found in the terms of comparable contracts and that if a negotiating party is deprived of access to the basic facts there is no way for that party to fairly and in good faith reach a mutual agreement on price). Although the Commission's Media Bureau denied the broadcasters' complaint that DirecTV violated its duty to negotiate retransmission consent in good faith by refusing to substantiate claims made during negotiations under the current TOTC test requiring only that a party provide an explanation for rejecting the other party's offer but not documentation in support of its rejection, the Bureau stated that its decision did not "prejudge any of the issues raised in the pending [STELAR] proceeding." *Northwest Broadcasting, et al. v. DirecTV*, Memorandum Opinion and Order, MB Docket No. 15-151, ¶ 11, n.45 (rel. Nov. 6, 2015).

3. Labor law and Commission interconnection precedent support recognition of a duty to substantiate claims made during the course of negotiations as part of the obligation to negotiate in good faith.

From the outset, the Commission has relied on a combination of established labor law precedent governing collective bargaining and its own good faith negotiation rules concerning the duty of an incumbent local exchange carrier to negotiate interconnection agreements in good faith under Section 251 to guide its implementation of the requirement that broadcasters, and later MVPDs, engage in good faith negotiation of retransmission consent.[91] Precedents in both areas strongly support recognition that a refusal to substantiate or provide information necessary to reach agreement, if proven, violates the duty to negotiate in good faith. At the very least, they support consideration of a failure to substantiate as evidence of bad faith under the totality of the circumstances test.

a. Labor law precedents recognize that a refusal to substantiate a claim made in support of a bargaining position violates the obligation to negotiate in good faith.

As CenturyLink, Consolidated Communications, Inc., FairPoint Communications, Inc., ITTA, Mediacom Communications Corp, NTCA, Public Knowledge and TDS Telecommunications (collectively, the "Joint Parties") have pointed out, "the concept of a 'totality of the circumstances' standard for assessing whether a party has negotiated in good faith

[91] 2011 Retransmission Consent NPRM, ¶ 9 ("Given the dearth of guidance in Section 325 and its legislative history, the Commission drew guidance from analogous statutory standards, such as the good faith bargaining requirement of Section 8(d) of the Taft-Hartly Act."); 2000 Good Faith Order, ¶¶ 6, 22, n.42 ("We also look to the Commission's rules implementing the good faith negotiation requirement of Section 251 of the Communications Act, which also relies substantially on labor law precedent."). The 2011 Retransmission Consent NPRM explains that initially, Section 325 of the Act did not include any standards governing retransmission consent negotiations between broadcasters and MVPDs. That changed when SHVIA was enacted, requiring broadcast television stations engaging in retransmission consent negotiations with any MVPD to negotiate in good faith. *See* 2011 Retransmission Consent NPRM, ¶ 8. SHVIA, the Satellite Home Viewer Improvement Act of 1999, was enacted as Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 (relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.), Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999). SHVIA also prohibited broadcasters from entering into exclusive retransmission consent agreements. *See* 47 U.S.C. § 325(b)(3)(C). Congress later made the good faith negotiation obligation reciprocal to MVPDs as well as broadcasters by the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Pub. L. No. 108-447, 118 Stat. 2809 (2004).

comes directly from labor law," and the Commission has relied on labor law precedents in shaping its good faith rules.[92] The Commission should once again take its cue from labor law, which has long supported a duty to substantiate factual claims made during negotiations in support of bargaining positions as an integral part of good faith negotiations.

It is a well-settled principle of labor law that negotiating parties have an obligation to provide, upon request, relevant information substantiating claims made in the course of the negotiation.[93] Labor case law going back more than fifty years supports the provision of relevant information upon request to substantiate claims made during the course of collective bargaining. In a seminal case interpreting Section 8(d) of the National Labor Relations Act ("NLRA"), the Supreme Court explained that "[g]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims."[94] There, the Court upheld a finding of the National Labor Relations Board ("NLRB") that an employer had not bargained in good faith where the employer claimed it could not afford to pay higher wages, but refused requests to produce information substantiating its claim.[95] As the Court explained:

> If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. And it would certainly not be farfetched for a trier of fact to reach the conclusion that bargaining lacks good faith when an employer mechanically repeats a claim of inability to pay without making the slightest effort to substantiate the claim.[96]

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[92] Joint Parties Letter at 2.

[93] Joint Parties Letter at 2; *NLRB v. Truitt Manufacturing Co.*, 351 U. S. 149, 153 (1956) ("Truitt") ("a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to negotiate in good faith"). The Court made clear, however, that it was not ruling that in every case in which economic inability is raised as an argument against increased wages it automatically follows that employees are entitled to substantiating evidence; the inquiry, rather, is "whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met" and "[e]ach case must turn upon its particular facts." Truitt at 153-154.

[94] Truitt at 152. *See also KLB Industries, Inc. v. NLRB*, 700 F. 3d 551, 558 (D.C. Cir. 2012) ("KLB Industries").

[95] Truitt at 152-153.

[96] *Id.*

For example, the D.C. Circuit has held that where an employer raises a competitiveness claim as its central justification for not agreeing to union demands, a union is entitled to receive, upon request, information verifying that claim, including financial information needed to determine the veracity of those claims.[97] "Indeed, a 'claim of pending competitive ruin generally requires some external verification before a union can reasonably rely upon it in deciding how to structure its negotiating strategy.'"[98] The court went on to note that consistent with *Truitt*, "the specific information necessary to verify a competitiveness claim will vary depending on the circumstances of the case."[99] The rationale underlying this "duty to disclose," as the Joint Parties have noted, "is that the exchange of relevant information during negotiations will mitigate differences in the parties' bargaining power and thus increase the chances of a successful completion of a collective bargaining agreement."[100]

Similarly, in a later case, the D.C. Circuit affirmed an NLRB determination that in the course of a subcontracting dispute, a company's refusal to provide the union with certain requested information about available workers prevented the union from determining the veracity of the opposing party's claim and creating an effective counterproposal.[101] In this case,

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[97] KLB Industries at 551.

[98] KLB Industries at 557. In reaching its decision, the D.C. Circuit noted that there are two lines of NLRB decisions relevant to the duty to substantiate. The first, the "*Nielsen*" line of cases, beginning with *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), "stand for the proposition that a company pleading poverty must open its books for a full financial audit—a disclosure obligation that extends to a plethora of financial information. But as *Nielsen* also makes clear, a competitive disadvantage claim is insufficient, by itself, to obligate a company to open its books." KLB Industries at 556. Second, the "discovery" line of cases, based on *Truitt*, "endorse[] a relevancy-based, pro-disclosure standard that allows a union to request specific information to verify a company's stated position, including competitiveness claims." *Id*. at 556-57. The D.C. Circuit noted that the NLRB in KLB Industries had relied primarily on the "discovery" line of cases, and found that the company's claim of competitive pressures as its reason for denying wage increases made that claim relevant to the negotiations.

[99] KLB Industries at 558.

[100] Joint Parties Letter at 2-3, *citing* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1433 (1958) ("The duty to bargain – to meet and treat – was imposed in the hope that negotiations would lead to the kind of rational exchange of facts and arguments which increases mutual understanding and then results in an agreement.").

[101] *E.I. DuPont de Nemours & Co.*, 489 F.3d 1310 (D.C. Cir. 2007) ("E.I. DuPont"). In this case, the union made seven specific requests supporting the company's claim regarding a specific cost-saving figure, and the NLRB determined each one to be relevant and essential to either the union's ability to assess the

the union made seven specific requests supporting the company's claim regarding a specific cost-saving figure, and the NLRB determined each one to be relevant and essential to either the union's ability to assess the company's claims about its allocation of costs, or in general to make an informed counterproposal.[102] In other words, there was a link between the requested information and the company's claims. The Court noted that the information asked for in the union's seven requests, which the NLRB deemed relevant to the core issues on the table, would have allowed the union to form a counterproposal[103] In order to meaningfully participate in the negotiation process, it was deemed necessary for the union to "examine the data that formed the basis for the [company's] conclusions.'"[104] The court further found that the company created an impasse in the negotiation itself by wrongfully withholding information "relevant to the issues on the bargaining table."[105] The Court noted that the NLRB's relevance standard for substantiation of particular claims is that the "the requested information need only be relevant to the union in its negotiations.[106]

Overall, these cases stand for the principle that meaningful and good faith negotiations require, at least in part, access by both sides to the relevant information necessary to evaluate

company's claims about its allocation of costs, or in general to make an informed counterproposal. *Id.* at 1315. In other words, there was a link between the requested information and the company's claims. The Court noted that the specific information requested, which the NLRB deemed relevant to the core issues on the table under its discovery-type standard, would have allowed the union to form a counterproposal. In order to meaningfully participate in the negotiation process, it was necessary for the union to "examine the data that formed the basis for the [company's] conclusions.'" *Id.* (citations omitted). The court further found that the company created the impasse itself by wrongfully withholding information "relevant to the issues on the bargaining table." *Id.* at 1315-16.

[102] E.I. DuPont at 1315.

[103] *Id.* at 1316.

[104] E.I. DuPont at 1316 (citations omitted).

[105] *Id.* at 1315-16.

[106] *Id.* at 1316 (citations omitted). In general, the NLRB and courts have set the bar for relevancy low, and when it is met, a negotiating party must provide requested information in order to negotiate in good faith. *See also Country Ford Trucks v. NLRB*, 229 F. 3d 1184, 1192 (D.C. Circ. 2000) (the rationale under the "presumptive relevance" rule "is to avoid endless bickering . . . over the specific relevance of information, the very nature of which ought to render its relevance obvious.").

specific claims made during the course of negotiations. As the Supreme Court explained in *Truitt*, if a party advances a factual claim or assertion in support of its offer during the negotiation, intelligent and informed negotiations cannot continue unless the opposing party is given an opportunity to request and obtain the underlying factual data to independently verify its veracity.[107] The duty to substantiate was developed, in part, because the NLRB recognized, and the courts have sustained, that without access to relevant information supporting claims made during negotiations, parties cannot meaningfully deal with the issues over which they are bargaining.[108]

The right of access to information granted is not unlimited, but grounded in relevancy to claims advanced in a negotiation.[109] For example, in the labor law context, if a company claims that it cannot raise wages due to its poor financial condition, the union will likely not, on its own, be able to determine whether that claim is true. Further negotiation on that point cannot progress in an intelligent fashion because the union, lacking access to the relevant company information, is left to guess as to whether the claim is in fact honest and based on the actual financial condition of the company, or is simply an attempt to bargain down wages to boost profits. Lacking this information, the union may be unwilling to accept or unable to formulate a counterproposal likely to be acceptable to the company, leading to negotiation impasses. For this reason, the NLRB and the courts have ruled that a party is entitled to request and receive information substantiating claims supporting offers or positions that are advanced during collective bargaining negotiations.

For the same reasons, a MVPD or broadcaster should be required to substantiate claims it advances in support of an offer or bargaining position during retransmission consent negotiations. Unless a party can accept another party's offer because it is based on actual

[107] Truitt at 152.

[108] See KLB Industries at 556-57.

[109] E.I. DuPont at 1317.

facts, or create an informed and intelligent counterproposal, negotiations are likely to break down and consumers of an MVPD's service lose access to valued programming. Granting parties an opportunity to verify claims made during negotiations can help realign the "negotiation dynamics" that the Commission recognized have shifted since the enactment of Section 325.[110] As the Commission noted, the current retransmission consent regime has led to negotiating impasses, blackouts, and escalating prices that ultimately harm consumers.[111] Avoiding breakdowns in the negotiation process will benefit not only the broadcasters and MVPDs by creating opportunity and an environment of honest negotiation, but will positively impact consumers as well, by lessening the likelihood of blackouts and unjustified price increases. Deeming a refusal to substantiate a claim made during retransmission consent negotiations upon request to be a *per se* violation of the duty to negotiate in good faith, or in the alternative, evidence of a failure to negotiate in good faith under the totality of the circumstances test will align the Commission's rules with its goal of facilitating successful negotiations.[112]

b. Additional support for recognizing a duty to substantiate claims made during negotiations can be found in the Commission's good faith rules governing the duty to negotiation interconnection under Section 251.

Additional support for recognizing a duty to substantiate claims upon request can be found in the Commission's good faith negotiation rules under Section 251. Section 251, enacted as part of the Telecommunications Act of 1996[113] imposes on incumbent local exchange carriers ("LECs") the duty to negotiate in good faith with competitors over the rates, terms and conditions of the interconnection arrangements necessary for competitors to enter the market.[114] To implement this market-opening provision, the Commission, looking to labor

[110] NPRM, ¶ 3

[111] *Id.*

[112] *Id.*, ¶ 6.

[113] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[114] 47 U.S.C. § 251(c)(1).

law precedents, recognized certain factors or practices that, if proven, would constitute *per se* violations of the duty to negotiate in good faith, while also permitting parties to bring complaints based on the totality of the circumstances,[115] similar to what it later did with respect to retransmission consent negotiations.

In the interconnection context, the Commission recognized, as part of its good faith negotiation rules, a broader right to discovery of relevant information. The Commission determined that "parties should be required to provide information necessary to reach agreement" and qualified that by requiring that only information "reasonable and necessary to resolving the issues at stake" must be produced upon request.[116] The Commission based this decision on *Truitt's* reasoning that "a trier of fact can reasonably conclude that a party lacks good faith if it raises assertions about inability to pay without making the slightest effort to substantiate the claim."[117] Although it relied upon the *Truitt* holding that a party is obligated to substantiate claims made during the course of negotiations, the Commission went further, stating:

> We conclude that an incumbent LEC may not deny a requesting carrier's reasonable request for cost data during the negotiation process, because we conclude that such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent LEC are reasonable. We find that this is consistent with Congress' intention for parties to use the voluntary negotiation process, if possible, to reach agreements.[118]

Accordingly, the Commission's rules require an incumbent LEC to negotiate in good faith the terms and condition of agreements to fulfill the duties established by Sections 251(b) and (c) of the Act, and further specify that, "[i]f proven to the Commission, an appropriate state

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[115] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, ¶¶ 150-155 (1996) ("Local Competition Order").

[116] Local Competition Order, ¶ 155.

[117] *Id.* ¶ 155, n.292.

[118] *Id.*, ¶ 155.

commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith: (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to: (i) Refusal by an incumbent LEC to furnish information about its network that a requesting telecommunications carrier reasonably requires to identify the network elements that it needs in order to serve a particular customer; and (ii) Refusal by an incumbent LEC to furnish cost data that would be relevant to setting rates if the parties were in arbitration."[119] While the analogies to the bilateral duty to negotiate retransmission consent in good faith are not perfect,[120] and ACA is not arguing in these comments that the Commission go so far, it is instructive that the Commission has previously recognized that failing to provide substantiating information relevant to the issues under negotiation, if proven, would violate an incumbent LEC's duty to negotiate in good faith.

c. The Commission can improve the negotiating environment for retransmission consent and protect consumers from breakdowns by following labor law and its own precedents and recognizing that a refusal to substantiate is a *per se* violation of the obligation to negotiate in good faith or, at the very least, evidence of bad faith under the totality of the circumstances test.

The following principles can be derived from the labor law cases and the Commission's good faith negotiation rules under Section 251 in support of a conclusion that a party has failed to negotiate in good faith by refusing to substantiate claims it has made when requested during the course of negotiations:

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[119] 47 C.F.R. § 51.301(c).

[120] In the case of interconnection, the incumbent LECs held all the cards in terms of information concerning the unbundling or leasing of incumbent networks and the cost data needed by competitive LECs to evaluate offered rates, terms and conditions of interconnection with incumbent networks, and for that reason, the Commission declined to impose a bilateral duty to substantiate offers with cost information, reasoning that the negotiations concern unbundling and leasing the incumbents' networks and "do not concern unbundling or leasing the new entrants' networks." *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,18 FCC Rcd 16978, ¶ 712 (2003) (amending the duty-to-negotiate rule 51.301(c)(8)(ii) to reflect the text of the Local Competition Order on the unilateral nature of the obligation).

- Relevant information should be provided upon request to support claims supporting bargaining positions made by a party during the course of negotiations.[121]
- Sharing substantiating information creates the opportunity for meaningful negotiation, which is in the spirit of the good faith requirement under both the NLRA and the Communications Act.[122]
- Information should be deemed relevant so long as it relates to what is said at the bargaining table; if a party claims that it is unable to compromise or move on a point, then it is reasonable for the other party to question the veracity of that claim.[123]
- The sharing of information increases honesty and transparency in the negotiation process, which are important to the good faith requirement.[124]
- Particularly where there is an imbalance of power between parties, access to information relevant to claims about relevant market conditions can lead to a more effective negotiation.[125]
- Parties should have information on which they can make a reasonable and informed counterproposal;[126] if a party does not know what is in the realm of reasonableness and has only the opposition's word to go on, there is no way of knowing if the final agreement reflects market considerations that are fair to not just the negotiating entities, but also to the consumer (or the individual employees, in the case of labor law).[127]

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[121] *See*, *generally*, Truitt at 149-154; Cox at 1402.

[122] E.I. DuPont at 1315-16 (explaining that information is necessary for a party to formulate a counterproposal and to engage in meaningful bargaining); *Local 13, Detroit Newspaper Printing & Graphic Communications Local 13 (Detroit) (Oakland Press Co.)*, 233 NLRB 994 (1977), aff'd 598 F.2d 267, 271 (D.C. Cir. 1979) ("Local 13") (discussing how a broad disclosure rule allows parties to "deal meaningfully with bargainable issues"). *See also Southern Sadderly Company and Local 109, United Leather Workers International Union, A. F. L.*, 90 N.L.R.B. 1205, 1207 (1950) ("The Respondent … by refusing to make any reasonable efforts to support or justify its position, erected an insurmountable barrier to successful conclusion of the bargaining.").

[123] Truitt at 152 (noting that if an argument is worth using to defend a position, it is sufficiently important that the other side should be able to independently determine its veracity). The bar for relevancy is low. *See* E.I. DuPont at 1315; KLB Industries at 557-558 (both finding particular requests for information related to a company's claim to be relevant). See also *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967) (describing the relevancy standard in labor law as a "discovery-type" standard).

[124] Truitt at 152; Cox at 1434-35.

[125] Cox at 1413. Cox discusses how one side can and will use tools at its disposal (even "extra-negotiation" type practices) to exploit an advantage in the bargaining position. "As long as there are unions weak enough to be talked to death, there will be employers who are tempted to engage in the forms of collective bargaining without the substance." *Id.*

[126] Truitt at 152.

[127] E.I. DuPont at 1315 (explaining how the union lacked enough information to even proceed with a counterproposal); Local 13 at 271 (calling requested information "vital to intelligent evaluation" and explaining that *only* with that information could the company determine how to proceed in the negotiation).

It is noteworthy that these authorities did not find a failure to substantiate a claim made concerning an issue relevant to the negotiation to be simply a factor in an evaluation of whether under the totality of the circumstances a party has failed to negotiate in good faith. Rather, in each case the determination was that the conduct, if proven, would result in a finding of a violation of the duty to bargain collectively, in good faith.

For the foregoing reasons, it is evident that the Commission can improve the negotiating environment for retransmission consent and lessen the likelihood that negotiations will end in impasse by recognizing as a failure to negotiate in good faith a refusal by a party to substantiate claims made during the course of negotiations when requested to do so by the other party. That is, recognize a refusal to substantiate claims upon request as a *per se* violation of the good faith obligation. In the alternative, at the very least, the Commission should recognize this practice or behavior as a factor demonstrating a lack of good faith under the totality of the circumstances test.

C. Withholding Programming Online During Retransmission Consent Negotiations.

Over the past few years, several broadcasters have blocked or threatened to block access to content they have otherwise made freely available online to those Internet users served by the select MVPD with which the broadcaster was simultaneously engaged in a carriage dispute. This practice by broadcasters, commonly known as "online blocking," indiscriminately harms consumers, as the broadcaster blocks all subscribers of the MVPD's broadband Internet access service whether the subscriber subscribes to the MVPD's video service or not. It even affects the MVPD's broadband Internet access subscribers that may receive video service from another MVPD, such as DBS MVPDs. Accordingly, the NPRM seeks comment on whether the "practice by broadcasters of preventing consumers' online access to the broadcaster's programming as an apparent tactic to gain leverage in a retransmission consent dispute" should be considered evidence of bad faith under the totality of the circumstances test.[128] ACA strongly recommends the Commission deem online blocking to be a *per se* violation of its good faith negotiation rules, or, at the very least, evidence of bad faith under the totality of the circumstances test.

1. Online blocking harms innocent consumers.

As highlighted by the Commission, the legislative history regarding Section 103(c) of STELAR indicates that Congress was particularly concerned about online blocking and directed the Commission to examine in this proceeding "'the role digital rights and online video programming have begun to play in retransmission consent negotiations.'"[129] The NPRM correctly notes that online access blackouts prevent all of an MVPD's broadband subscribers from accessing the online video programming that is otherwise made freely available and affects the MVPD's broadband subscribers even if those subscribers do not subscribe to the MVPD's video service.[130] Nonetheless, the Commission questions how using online blocking as a tactic to gain negotiating leverage is more egregious or harmful to consumers than other practices used to gain leverage in retransmission consent discussions and how online blocking during retransmission consent disputes differs from the situation of a content distributor limiting access to its online content to paid subscribers of its traditional content service, such as news organizations.[131]

Simply put, online blocking of otherwise freely available content to users of a specific Internet service provider is not reasonable in <u>any</u> context, let alone during retransmission consent negotiations. Consumers should never be denied access to valuable content otherwise

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[128] NPRM, ¶ 13.

[129] *Id., ¶ 13*, *citing* Senate Commerce Committee Report at 13.

[130] *Id*.

[131] *Id.* The NPRM also asks whether "causing consumers harm to enhance negotiating leverage generally" should be a factor it "consider[s] as evidence of bad faith under the totality of the circumstances test." *Id.* As discussed in Section III.A., supra, any behavior intentionally causing consumer harm should be considered a violation of the obligation to negotiate in good faith.

made publicly available for free online solely because the local broadcaster and the MVPD are unable to agree over the prices, terms and conditions for retransmission of the broadcaster's signal for the MVPD's linear video service. Nonetheless, broadcasters have selectively blocked or threatened to block access to content otherwise made freely available to Internet users to those Internet users served by an MVPD with which the broadcaster was simultaneously engaged in a retransmission consent dispute. In 2010, News Corp. threatened to block Cablevision's broadband Internet access subscribers from accessing Fox websites, including Hulu, which News Corp. partially owned, as part of a retransmission consent negotiation dispute with Cablevision.[132] Then, in 2013, CBS blocked Time Warner Cable and Bright House Network broadband Internet access subscribers in New York as part of their dispute over retransmission consent rights.[133] There is no justification for broadcasters to selectively block content they have otherwise chosen to put online for free to all Internet users from that subset of Internet users served by an MVPD with whom they are negotiating retransmission consent for the purpose of raising prices or imposing less advantageous terms and conditions on MVPDs. Consumers victimized by this practice lose doubly: blocked online access followed by higher prices for MVPD service once retransmission consent fee increases are passed through in retail rates.

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[132] *See* Sara Jerome, *TV Blackout raises net-neutrality concerns*, THE HILL, Oct. 17, 2010, *available at* http://thehill.com/policy/technology/124567-tv-blackout-dispute-raises-net-neutrality-concerns ("The dispute made a foray into net-neutrality questions on Saturday amid reports that News Corporation had blocked Cablevision Internet users from accessing Fox websites, including Hulu.com, which News Corporation partially owns. The development prompted concern from net-neutrality advocates, who believe any Internet user should be able to access any free Internet site regardless of who provides them Internet service. Usually net-neutrality advocates are concerned about Internet service providers blocking content, rather than content providers doing so, but advocates still saw the circumstances as violating net-neutrality policies.").

[133] *See* Adi Robertson, *Is CBS's web blocking of Time Warner Cable customers illegal? Senator wants FCC to investigate*, THE VERGE, Aug. 7, 2013 ("Roberson"), *available at* http://www.theverge.com/2013/8/7/4598328/senator-ed-markey-wants-fcc-to-investigate-cbs-blocking-time-warner-cable.

Online blocking is more egregious or harmful to consumers than other practices used to gain leverage in retransmission consent discussions because the broadcaster indiscriminately blocks all subscribers to an MVPD's broadband Internet access service, whether the subscriber receives the MVPD's video service or not, or whether the broadband Internet access subscriber receives its video service from another MVPD. The NPRM suggests that broadcasters engaging in online blocking block all of an MVPD's broadband subscribers because they may be unable to identify which broadband subscribers are also video subscribers.[134] ACA members that have faced online blocking by non-broadcast programming networks report this to be true.[135] Emphasizing the seriousness of this practice, Representative (and now Senator) Edward Markey raised concerns in each case highlighted above.[136] Further, a growing number of Congressional representatives have recognized that online blackouts unfairly hold an MVPD's broadband Internet access and video subscribers "hostage by a dispute they have no

[134] NPRM, ¶ 13, n.61.

[135] Viacom, Inc. blocked access to its freely available online content to dozens of small cable operators who did not renew their carriage agreement with the media conglomerate in 2014. *See* Shalini Ramachandran, *Viacom, 60 Cable Firms Part Ways in Rural U.S.*, THE WALL STREET JOURNAL, Jun. 17, 2014, *available at* http://www.wsj.com/articles/viacom-60-cable-firms-part-ways-in-rural-u-s-1403048557.

[136] *See*, *e.g.*, Robertson (quoting Markey, "This is an anti-consumer result that I urge the Commission to investigate, and I encourage the Commission to actively defend internet freedom and consumer rights"); Brian Stelter, *Internet Is a Weapon in Cable Fight*, THE NEW YORK TIMES, Oct. 19, 2010, *available at* http://www.nytimes.com/2010/10/20/business/media/20hulu.html?_r=0.

control over."[137] Chairman Wheeler has correctly called out online blocking during retransmission consent disputes as an anti-consumer and problematic behavior.[138]

Most recently, in the Open Internet Order, the Commission expressly recognized blocking as a harmful practice when utilized by a broadband Internet access service provider because such blocking lessens the utility of the Internet and disrupts the "virtuous cycle" of innovation running through both the edge and core of the Internet.[139] Online blocking is not only inconsistent with a broadcaster's obligation to operate in the public interest,[140] it is wholly

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[137] *See Bill to Eliminate TV Blackouts and Reform the Video Marketplace Introduced*, CONGRESSWOMAN ANNA G. ESHOO, Dec. 12, 2013, *available at* http://eshoo.house.gov/news-stories/press-releases/bill-to-eliminate-tv-blackouts-and-reform-the-video-marketplace-introduced/ (discussing the introduction of Congresswoman Eshoo's Video CHOICE Act to eliminate broadcast television blackouts and protect consumers from suffering the fallout from broadcaster disputes). *See also* Brooks Boliek, *Congress returns to retransmission*, POLITICO, Sep. 17, 2013, *available at* http://www.politico.com/story/2013/09/cbs-time-warner-retransmission-consent-law-096874 ("After an acrimonious dispute that featured a weeks-long CBS blackout on Time Warner Cable systems in New York, Los Angeles and Dallas, the broadcaster and the cable TV operator came to terms earlier this month. While most observers think CBS came out on top in the negotiations, the end result is that it may have awakened a sleeping giant. Eshoo found the decision by CBS to withhold content from Time Warner Cable's Internet customers particularly galling. She compared retransmission consent to a cancer. "It's metastasizing," she said. "This isn't just one area it's affecting." Scalise agreed. "This is new ground," he said. "I hope this doesn't become the new normal."); John Eggerton, *Eshoo Urges CBS, TWC To Resolve Retrans Dispute*, BROADCASTING & CABLE, Aug. 6, 2013, *available at* http://www.broadcastingcable.com/news/washington/eshoo-urges-cbs-twc-resolve-retrans-dispute/61717 (Congresswoman Eshoo urging CBS and Time Warner to resolve their retransmission consent dispute and announcing her intent to look into whether any changes in law are needed); Ryan Faughnder, *Sen. Edward Markey calls for FCC to intervene in CBS, TWC dispute*, LOS ANGELES TIMES, Aug. 6, 2013, *available at* http://articles.latimes.com/2013/aug/06/entertainment/la-et-ct-markey-fcc-cbs-twc-20130806 (Senator Markey expressing his "dismay" at CBS's web blockage of Time Warner Internet subscribers).

[138] *See* John Eggerton, *Wheeler Concerned About Online Retrans Blackouts; Says program provider blocking all IP addresses should be worry for everyone,* BROADCASTING & CABLE, May 20, 2014, *available at* http://broadcastingcable.com/news/washington/wheeler-concerned-about-online-retrans-blackouts/131292 ("During questioning by Rep. Peter Welch (D-Vt.) in a House Communications Subcommittee FCC oversight hearing Tuesday, FCC chairman Tom Wheeler said he was concerned, and everyone else should be too, about instances where subscriber access to online content was blocked as part of a programming dispute. Welch noted that the blackouts seemed to be migrating to online and asked if it was the beginning of the 'cable-ization' of the Internet. Wheeler responded that it was the right question to ask. He said the FCC's authority was based in enforcement of good faith negotiations and said that he had 'reason to be concerned because I have subscribed to a certain ISP who is in a dispute with a program provider, that the program provider blocks all access from all IP addresses coming from that ISP. I think that is something that is of concern and that we all should worry about.'").

[139] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶¶ 2, 75 (2015).

[140] Broadcasters are entrusted with licenses to use the public's airwaves to provide their product in exchange for agreeing to operate in the public interest. *See*, *e.g.*, 47 U.S.C. § 307(a) ("The Commission,

inconsistent with the Commission's Open Internet policies. As noted above, MVPDs that are also broadband Internet access service providers are prohibited from blocking any online content that is made freely available to Internet users. Allowing broadcasters to engage in online blocking not only runs counter to this principal, it gives broadcasters an unfair advantage since they can unilaterally engage or threaten to engage in a tactic that is foreclosed for MVPDs who are broadband Internet access service providers.

Finally, online blocking during retransmission consent disputes differs from the situation of a content distributor limiting access to its online content to paid subscribers of its traditional content service, such as news organizations. In that case, the content at issue is not made freely available online by the content distributor; online access is limited in all cases to its paid subscribers. In the case of online blackouts by broadcasters, the content at issue is freely available to all Internet users with the exception of Internet users whose broadband Internet access service provider is involved in a retransmission consent dispute with a local station in its capacity as an MVPD. This is a clear distinction, and one that the Commission should consider when evaluating the special harms to consumers that this practice creates.

2. The Commission has the statutory authority to address online blocking.

The NPRM asks whether there are issues of statutory authority or constitutional issues that should be considered in this context.[141] Despite broadcasters' previous arguments to the contrary, there are no statutory authority or constitutional issues that would foreclose the Commission from adopting a rule prohibiting broadcasters' from engaging in online blocking.

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if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.").

[141] NPRM, ¶ 13.

First, broadcasters have previously asserted that the Commission has no statutory authority to regulate programmers or other providers on Internet content.[142] On this point, broadcasters have been joined by numerous other content providers, who have claimed that the Commission does not have authority to forbid programmers from restricting certain broadband providers' networks from accessing online content.[143] These arguments fail upon scrutiny and should be rejected.

As covered in detail above in Section II, the Commission has the broad authority to govern the exercise of retransmission consent under Section 325. In particular, Section 325(b) directs the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent" and to adopt rules that 'prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith.'"[144] When a broadcaster blocks an MVPD's broadband Internet access subscribers from accessing its otherwise freely available online content, it is solely for the purpose of pressuring the MVPD to accede to the broadcaster's retransmission consent demands.[145] Such a practice is clearly related to the grant of retransmission consent, and appropriate to be considered inconsistent with the notion of "good faith" bargaining. Accordingly, Commission action to

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[142] *Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, Comments of LIN Television Corporation d/b/a LIN Media at 3 (filed Sept. 29, 2014) ("LIN Comments to Mediacom Petition"); *Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, Opposition of the National Association of Broadcasters at 4-5 (filed Sep. 29, 2014) ("NAB Opposition to Mediacom Petition").

[143] *Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, Joint Opposition of CBS Corporation, The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., and Viacom, Inc. at 4 (filed Sep. 29, 2014); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Reply Comments of The Walt Disney Company, 21st Century Fox, Inc., Time Warner Inc., CBS Corporation, Scripps Networks Interactive, Inc., and Viacom Inc. at 3-5 (filed Sep. 15, 2014) ("Content Interests Open Internet Reply").

[144] 2014 Retrans FNPRM, ¶ 30 (citations omitted).

[145] This is especially true when the MVPD's broadband Internet access subscribers affected by the broadcaster's actions may not subscribe to the MVPD's video service or may not even live in the broadcaster's local market.

prohibit broadcasters from engaging in online blocking is well within its obligation to prohibit a broadcast station from "failing to negotiate in good faith."[146]

Moreover, as ACA has previously demonstrated, the Commission has the authority under Section 706 to prohibit broadcasters from engaging in online blocking to ensure that the virtuous "circle" of innovation on the Internet is not broken by the anticompetitive or discriminatory actions of "must have" Internet edge providers, a category that includes broadcasters.[147] Specifically, Section 706 provides the Commission with authority to protect Internet openness from practices of edge providers, including broadcasters, which threaten to block consumer access to content otherwise made freely available on the Internet and with authority for the Commission to prevent edge providers, including broadcasters, from engaging in commercially unreasonable practices in their relations with broadband Internet service providers.[148]

Second, contrary to arguments that broadcasters have raised, the First Amendment poses no bar to Commission action. In response to a petition for rulemaking filed by Mediacom seeking relief from this practice, NAB claimed that a good faith negotiation rule prohibiting broadcasters from blocking an MVPD's subscribers' access to the broadcaster's content online raises constitutional questions.[149] Similarly, LIN asserted, without elaboration, that such a rule would have "obvious First Amendment problems."[150] Several content providers also claimed

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[146] 2014 Retrans FNPRM, ¶ 30 (citations omitted).

[147] In the Open Internet rulemaking, ACA asked the Commission to extend Open Internet rules, including the no blocking rule, to edge providers, particularly those affiliated with the broadcast and cable programming networks, to prevent these providers from blocking access to their freely available online content in instances where they cannot reach an agreement with an MVPD. *Protecting and Promoting the Open Internet*, Comments of the American Cable Association at 15-22 (filed Jul. 17, 2014) ("ACA Open Internet Comments"); Reply Comments of the American Cable Association at 30-32, 40-41 (filed Sep. 15, 2014) ("ACA Open Internet Reply Comments").

[148] ACA Open Internet Comments at 5; ACA Open Internet Reply Comments at 38.

[149] NAB Opposition to Mediacom Petition at 4-5.

[150] LIN Comments to Mediacom Petition at 3.

that any regulations forcing edge providers to make content available to all broadband providers and their subscribers would amount to compelled speech.[151] These arguments are fatally flawed for several reasons, and should be rejected by the Commission.

A Commission rule establishing that a broadcaster engaged in online blocking during a retransmission consent dispute is *per se* not negotiating in good faith is a content neutral rule that would be subject to "intermediate scrutiny" by the courts. Under intermediate scrutiny, a regulation will pass constitutional muster if: (i) it furthers an important or substantial governmental interest that is unrelated to the suppression of free expression; and (ii) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[152] The proposed rule here easily passes under this standard, as it advances many important government interests, for example, protecting consumers from losing access to programming, protecting a free and open Internet, and ensuring that one negotiating party cannot obtain undue leverage over the other. Moreover, as Mediacom has pointed out, a good faith negotiating rule against online blocking "would not bar any programs from being offered and programmers will have the same rights to develop programming that they have today."[153] Put another way, a rule ensuring that consumers can obtain content that is solely content that the broadcaster has chosen to otherwise make freely available online compels no speech from the broadcaster.

Second, a rule establishing online blocking as a *per se* violation of the obligation to negotiate in good faith is narrowly tailored and does not regulate more speech than necessary. A broadcaster would not be permitted to engage in online blocking in a singular instance – when engaged in retransmission consent negotiations with an MVPD – and the rule covers only

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[151] Content Interests Open Internet Reply at 5.

[152] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 710 (2011).

[153] *Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, Reply Comments of Mediacom Communications Corporation at 39 (filed Oct. 14, 2014).

content that the broadcaster otherwise makes freely available for public consumption. Any "incidental restriction" on speech is also minimal, at best, considering that the broadcaster has already made its content publicly available online.

3. The Commission should adopt a rule prohibiting a broadcaster from blocking its or its affiliated network's content otherwise made freely available online.

To provide a remedy against the harms created by broadcasters engaging in online blocking, the Commission should deem it to be a *per se* violation of a broadcaster's good faith negotiation obligation for the broadcaster to block an MVPD's broadband Internet access subscribers from accessing the broadcaster's and its affiliated network's publicly available online video programming while negotiating retransmission consent with the MVPD. This rule must encompass not only network O&O stations, such as those involved in the online blackouts of Time Warner Cable and Cablevision broadband Internet subscribers, but also stations that are independently (or affiliate group) owned, but affiliated with a major broadcast network. Importantly, any blocking of otherwise freely available online content available through the broadcaster – whether the broadcaster's own programming or its affiliated network programming, must be deemed attributable to the broadcaster.

To accomplish this end, ATVA has recently proposed an online blocking *per se* violation of the Commission's good faith negotiation rules, under which it would be a *per se* violation for a broadcaster to:

> Directly or indirectly restrict access to the station's or affiliated network's publicly available online video programming or related content to: (i) any subscriber of an Internet service provider that is affiliated with the MVPD; or (ii) any other subscriber of the MVPD or of an affiliate of that MVPD.[154]

[154] *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Ex Parte Notice of the American Television Alliance at 3-4 (filed Aug. 27, 2015") ("ATVA Aug. 27 Ex Parte").

Adopting this approach will comprehensively mitigate the harms online blocking imposes on consumers.[155] This proposed rule would prevent a broadcaster from directly blocking access its own programming and from indirectly blocking access to any affiliated programming that the broadcaster carries during retransmission consent disputes.

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The Commission can improve the negotiating environment for retransmission consent and lessen the risk that consumers will be indiscriminately harmed by recognizing that blocking an MVPD's broadband Internet access subscribers during negotiations from the broadcaster's content online is a failure to negotiate in good faith. The Commission should adopt a rule prohibiting broadcasters from engaging in online blocking as a *per se* violation of its good faith rules or, in the alternative, as a practice that demonstrates a lack of good faith under the totality of the circumstances test.

D. Blackouts During or Near Marquee Events.

The NPRM seeks comment on whether a "broadcaster's insistence on contract expiration dates, or threats to black out a station signal, in the time period just prior to the airing of a 'marquee' sports or entertainment event" should be considered evidence of a failure to negotiation in good faith under the totality of the circumstances test.[156] Unquestionably, the answer is yes. This well-worn tactic used by broadcasters should be considered a violation of a party's obligation to negotiate retransmission consent in good faith.

As ATVA has noted, broadcasters "often seek to increase their already oversized negotiating leverage when they require contract expiration dates, or threaten to black out a

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[155] ACA Open Internet Comments at 15-22; ACA Open Internet Reply Comments at 24-28; *Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, Comments of the American Cable Association at 7-8 (filed Sep. 29, 2014).

[156] NPRM, ¶ 16.

station, in the time period just prior to, the airing of a popular sporting or entertainment event."[157] ACA members also report that broadcasters use upcoming marquee events to push the MVPD toward concluding a retransmission consent agreement. Conveniently for broadcasters, most retransmission consent agreements expire at the end of a calendar year just as the NFL playoffs – which undoubtedly qualify as marquee programming – begin.[158] And even when a retransmission consent agreement expires at a different time of the year, broadcasters have been able to leverage other marquee sports and entertainment events during retransmission consent negotiations with the MVPD.[159] Accordingly, ACA supports deeming it a *per se* violation of a broadcaster's duty to negotiate retransmission consent in good faith for a broadcaster to deliberately blackout an MVPD's consumers before marquee events.[160] ATVA has put forth the following proposal for addressing this concern:

> Withhold retransmission consent during the airing of, during the one-week run up prior to, or for one day after a Top-Rated Marquee Event. For purposes of this rule, a "Top Rated Marquee Event" is a television program for which the most recent telecast of that event or comparable programming received a nationwide Live + Same Day U.S Rating of 7.00 or greater on the Persons 2 + demographic by Nielsen, and "comparable programming" means a prior program most reasonably comparable to the programming in question, as determined by the FCC. If a sporting event has multiple telecasts, and one or more such telecasts meet the rating specified above, all such telecasts of that event or comparable

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[157] ATVA Aug. 27 Ex Parte at 4.

[158] *Id.* at 4, n.13, *citing Sports Blackout Rules*, Report and Order, 29 FCC Rcd 12053, ¶ 24 (2014) (noting that NFL games are consistently the highest rated programming on TV). ATVA also points out that the vast majority of NFL games are played at stadiums that were publicly funded. *Id.*

[159] *See*, *e.g.*, *Subscribers Lose NFL Game in Retrans Dispute*, TVWEEK, Aug. 17, 2015, *available at* http://www.tvweek.com/tvbizwire/2015/08/subscribers-lose-nfl-game-in-retrans-dispute/ (San Diego station goes dark on DirecTV two hours before NFL game); Mike Farrell, *Media General Stations Go Dark on Mediacom*, MULTICHANNEL NEWS, Jul. 15, 2015, *available at* http://www.multichannel.com/news/cable-operators/media-general-stations-go-dark-mediacom-customers/392205 (Three Fox stations – WVBT in Norfolk, Va.; WTHI in Terre Haute, Ind.; and KTMJ in Topeka, Kans. – in Mediacom territory went dark just as the Major League Baseball All-Star Game was beginning); Christopher Zara, *DirecTV Blackout Angers NFL Fans, As Blame Game Underscores Bitter Retransmission Fee Debate*, INTERNATIONAL BUSINESS TIMES, Sep. 26, 2015, *available at* http://www.ibtimes.com/directv-blackout-angers-nfl-fans-blame-game-underscores-bitter-retransmission-fee-2098572 (Blackout of DirecTV Salt Lake NBC ends after viewers miss first NFL game of season); *Blackout Ends as Dish Settles Nasty Dispute With Huge Station Group*, TVWEEK, Oct. 12, 2015, *available at* http://www.tvweek.com/tvbizwire/2015/10/blackout-ends-as-dish-settles-nasty-dispute-with-huge-station-group/ (Blackout of 46 TV stations in 38 Dish Network markets by Tegna on a Friday during NFL season).

[160] ATVA Aug. 27 Ex Parte at 4.

> programming shall be considered to be a Top-Rated Marquee Event. If the broadcast station has pulled its signal pursuant to a retransmission consent dispute prior to a Top-Rated Marquee Event, the station must reinstate the signal during the airing of a Top-Rated Marquee Event.[161]

This practice is coercive, harms consumers, and shows a lack of good faith. When broadcasters black out or threaten to black out marquee programming to extract leverage in a retransmission consent negotiation, they harm consumers of the MVPD's service by depriving or threatening to deprive valuable programming from consumers and by ultimately extracting higher prices for the retransmission of the signal by the MVPD, a cost that is ultimately passed on to the consumer. The Commission should prohibit broadcasters from blacking out or threating to blackout a station signal, in the time period just prior to the airing of a "marquee" sports or entertainment event as a *per se* violation of its good faith rules or, in the alternative, as a practice that demonstrates a lack of good faith under the totality of the circumstances test.

E. Third Party Interference in Retransmission Consent Agreements for Historically Carried Out-of-Market Stations.

The NPRM asks whether "certain network involvement in retransmission consent negotiations [should] be a factor suggesting bad faith under the totality of the circumstances test?"[162] As ACA demonstrates below, because the type of third party involvement that disrupts long-standing retransmission consent arrangements between cable systems and willing out-of-market broadcast stations interferes with long-standing Commission policy and harms the public interest, for optimal effect, it should be not simply a factor in evaluating a claim under the totality of the circumstances test, but should be considered a *per se* violation.

To prevent the loss of out-of-market stations that have historically provided important public services to certain communities, the Commission should affirm that entering into any agreement with a third party – legally-binding or otherwise – that, through an outright prohibition,

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[161] *Id.*

[162] NPRM, ¶ 14.

a grant of a veto/pre-approval power before the execution of an agreement, or any other means or disincentives, limits an out-of-market station's ability to grant retransmission consent to an out-of-market that has historically carried the station's entire programming stream, including its network and syndicated programming, is a *per se* violation of the obligation to negotiate in good faith. Alternatively, the Commission could clarify that Section 76.65(b)(i) of its rules, which prohibits as a violation of the good faith obligation the refusal by a Negotiating Entity to negotiate retransmission consent, includes any circumstances in which a broadcaster has permitted a third party to influence its exercise of retransmission consent to an MVPD to serve an out-of-market community where the station's entire programming stream, including its network and syndicated programming, has been made historically available by a cable operator.[163] If the Commission elects to do neither, it should at the very least deem such interference to be evidence of a good faith violation under the totality of the circumstances test.

To be clear, ACA's proposal is not intended to hinder in-market stations from entering into programming exclusivity agreements with broadcast networks or syndicators or from exercising their rights under the Commission's existing exclusivity rules. As long the network non-duplication and syndicated exclusivity rules remain in place, local stations will continue to enjoy the protections afforded by those rules. ACA is asking only that the Commission take the limited and reasonable step of amending its good faith rules to ensure that program exclusivity is not expanded beyond the limits that the Commission's existing policies are designed to impose to ensure that consumers may receive distance signals. Otherwise viewers, particularly those in rural areas, will be harmed by the loss of access to truly local news, weather, and other programming.

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[163] ACA 2011 Retransmission Consent Comments at 46; ACA 2011 Retransmission Consent Reply Comments at 42-76; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association at 4-15 (filed Jun. 26, 2014) ("ACA 2014 Retrans FNPRM Comments").

1. Continued carriage of adjacent out-of-market stations serves an important public interest.

For decades, to satisfy subscriber demand for news, weather, and other programming that is not offered by the broadcast station deemed "local" to the designated market area ("DMA") of a cable system under the Commission's rules,[164] many cable systems have carried out-of-market signals from adjacent DMAs. In most cases, these out-of-market stations are expressly exempt from the Commission's network non-duplication and syndicated exclusivity rules, either because they are significantly viewed,[165] because they are offered outside the limited zone of exclusivity afforded to a local station by rules,[166] or because the cable system involved has fewer than 1,000 subscribers.[167] Unfortunately, in recent years, it has become increasingly prevalent for out-of-market stations to reluctantly end their decades-long relationship with cable systems in adjacent markets, not because the parties could not come to mutually acceptable prices, terms, and conditions during the course of retransmission consent negotiations, but because of interference from a third party that effectively prevents the broadcaster from exporting their signal out of market. In some cases a station's network affiliation agreement or syndicated exclusivity agreement may expressly prohibit the exportation of the relevant programming out-of-market or may create significant disincentives to such exportation, such as a substantial increase in reverse retransmission consent payments to the network. Such agreements might also grant the network, syndicator, or an in-market station the ability to veto the out-of-market-station's retransmission consent agreements.[168] In other cases,

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[164] *See*, *e.g.*, 47 C.F.R § 76.55(e)(2) ("Effective January 1, 2000, a commercial broadcast television station's market, unless amended pursuant to §76.59, shall be defined as its Designated Market Area (DMA) as determined by Nielsen Media Research and published in its Nielsen Station Index Directory and Nielsen Station Index US Television Household Estimates or any successor publications.").

[165] 47 C.F.R. § 76.92(f).

[166] 47 C.F.R. §§ 76.106(a); 76.101 note, *citing* 47 C.F.R. § 73.658(m).

[167] 47 C.F.R. §§ 76.95(a), 76.106(b).

[168] The granting of veto power over out-of-market retransmission consent could be given to third parties through different mechanism. For instance, broadcasters may be prohibited from granting out-of-market retransmission consent, but have the right to seek a waiver from their affiliated network. Alternatively,

an in-market broadcast station may condition its retransmission consent agreement with a cable operator on the operator's agreement to not import any duplicative programming from out-of-market stations that are not significantly viewed.

There are many reasons why an out-of-market station might be in high demand in a cable community. Geographic considerations are generally the primary drivers of whether a viewer considers a broadcast station to be "local." Unfortunately, the geographical boundaries that are used to define a viewer's "local" region in broadcast affiliation agreements and in the Commission's rules are determined not by the viewers themselves, but by the Nielsen Corporation.[169] As a result, DMAs do not, in all cases, accurately reflect a viewer's physical proximity to a local station and/or the relevant political boundaries. In larger DMAs, which can extend 55-250 miles beyond a central metropolitan area, consumers in the outer regions of the DMA can live closer to and identify their interests with the central metropolitan area of the neighboring DMA. In other cases, a subscriber may live in an "orphan county" that is served by an in-market station operating from a neighboring state. Numerous members of Congress have expressed particular concern about the ability of viewers in orphan counties to access in-state programming that caters to the state in which they reside.[170] Cable systems that operate in

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broadcasters may have permission to grant retransmission consent to an out-of-market cable operator, but must receive sign off from the network before executing such an agreement.

[169] *See supra*, note 164.

[170] *See, e.g.*, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Letter from Congressmen Mike D. Rogers and Robert Aderholt to The Honorable Thomas Wheeler, Chairman, Federal Communications Commission (filed May 12, 2015) ("It is paramount for public safety and fairness reasons that [orphan] counties have access to in-state broadcast television stations."); Letter from Senators Michael F. Bennet and Cory Gardner, and Congressman Scott Tipton to The Honorable Thomas Wheeler, Chairman, Federal Communications Commission (filed Apr. 15, 2015) ("Coloradans in two orphan counties, La Plata and Montezuma, have long been trying to access their in-state news, weather, and sports over their satellite pay TV services."); *Barrington Myrtle Beach License LLC, WPDE-TV, Florence, South Carolina (17012), Petition for Recognition of Significantly Viewed Status*, MB Docket No. 13-65, Letter from Congressman Tom Rice to The Honorable Julius Genachowski, Chairman (filed May 16, 2013) ("[C]itizens of Georgetown County, South Carolina . . . are forced to view local programming from network affiliates far away from their hometowns, and these affiliates may not correctly serve their needs for community information, news, and weather."); *OLA Correspondence*, Congressional Docket No. 12-2, Letter from Senator Rand Paul to The Honorable Julius Genachowski,

these regions can better serve the needs of their subscribers by importing an out-of-market broadcast station that offers news, weather, sports, and other local programming that is more relevant than that offered by the in-market station.

This is most readily apparent with respect to local weather, as major weather patterns in the U.S. generally move from west to east and can be affected by local topography, such as bodies of water and changes in elevation. To be useful to viewers, weather reports must be timely, particularly in emergency situations. One ACA member's experience vividly demonstrates how the public interest is served by carriage of out-of-market stations in some cases. ValuNet, LLC serves a small rural city near the edge of its DMA. The city's in-market broadcast stations, which are located to the northeast, have repeatedly failed to broadcast timely information about incoming storms. The town has been hit by tornadoes on multiple occasions, suffering millions of dollars in damage, yet its in-market stations seldom warns ValuNet's subscribers of the imminent danger until it is almost too late to take cover. The out-of-market station that has historically been carried, however, is southwest of the city and thus is more likely to provide the timely weather news needed to prepare for such weather emergencies.

There are other, less common but no less important, reasons that carriage of out-of-market stations may be highly valued in the adjacent market. In some cases it is extremely difficult to receive a good quality signal from the in-market station, which is necessary for retransmission to viewers, because the station's over-the-air signal does not reach a cable system's headend, and alternative methods of receiving the signal's feed are highly expensive to implement, especially for a smaller operator with limited financial resources and fewer subscribers to share the costs. In other cases, importing an out-of-market station has

Chairman (filed Jan. 5, 2012) (explaining that many of his constituents in Leslie County, Kentucky, could not receive local news, weather, and educational programming from in-state affiliates).

historically been the only way to access a broadcast network's programming because there was no in-market affiliate in operation. Even when a new affiliate begins operating in-market, viewers prefer the out-of-market signal that they have watched for decades.

Preserving access to these stations is by no means an attempt to "limit payments to the content owners that drive consumers to its pay service,"[171] to increase leverage during retransmission consent, or to otherwise harm in-market stations, but is rather intended to ensure that ACA's members can continue to meet their subscribers' needs.[172] In every case, the out-of-market station serves an important role that cannot be filled by the community's in-market station. As long as it is technically feasible, the cable operator importing the out-of-market signal almost always also retransmits the in-market station. And to the extent that an in-market station has exclusive rights to network or syndicated programming, those rights are still protected by the Commission's rules. But in order to protect the continued carriage of out-of-market stations that serve an important role in certain communities, the Commission must prevent out-of-market stations from entering into affiliation or syndication agreements that prevent or dis-incentivize the exportation of their signal to adjacent markets, and prevent in-market stations from blocking cable operators from carrying out-of-market signals as a condition to receive retransmission consent.

2. Prohibiting third-party interference in long-standing retransmission consent relationships is necessary to achieve the Commission's policy goals.

In adopting the broadcast exclusivity rules, the Commission placed three important limitations on a local broadcaster's ability to enforce its exclusive programming. First, the

[171] *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene Dortch, Secretary at 2 (filed Sep. 30, 2015).

[172] In fact, ACA members report paying as much in retransmission consent fees for out-of-market stations as fees paid for in-market stations. In fact, carriage of out-of-market stations will cost some cable operators more after accounting for copyright fees that are higher for carriage of out-of-market signals. For ACA members in certain areas of the country, carrying these signals is worthwhile because it satisfies consumer demand.

Commission placed strict geographic limitations on the enforcement of exclusivity. No cable operator is required to delete duplicative network programming on systems that are located more than 55 miles from any named community within the DMA.[173] In larger DMAs, network non-duplication is further limited to systems located within 35 miles of the DMA reference point.[174] No cable operator is required to enforce syndicated exclusivity more than 35 miles from the DMA reference point.[175] Second, cable operators are not required to delete duplicate network or syndicated programming on systems located in counties where the duplicate signal is significantly viewed.[176] Third, cable operators with fewer than 1,000 subscribers are not subject to the exclusivity rules.[177] These limitations demonstrate the Commission's recognition that out-of-market signals serve an important role, particularly those stations that are popular in rural areas located at the edge of their DMAs.

Congress has recently affirmed the importance of the availability certain out-of-market signals. With the Satellite Home Viewer Reauthorization Act of 2004, Congress made clear that out-of-market significantly viewed signals must be made available to satellite subscribers.[178] More recently, Congress enacted the Satellite Television Extension and Localism Act Reauthorization ("STELAR") Act of 2014, prohibiting broadcast stations from preventing the entry of significantly viewed signals from other DMAs into their local markets, and mandating the establishment of options for DBS subscribers in orphan counties to receive more localized programming.[179]

[173] 47 C.F.R. § 76.92 note, *citing* 47. C.F.R. § 73.658(m).

[174] *Id.*

[175] 47 C.F.R. § 76.101 note, *citing* 47. C.F.R. § 73.658(m).

[176] 47 C.F.R. §§ 76.92(f), 76.106(a).

[177] 47 C.F.R. §§ 76.95(a), 76.106(b).

[178] *The Satellite Home Viewer Extension and Reauthorization Act of 2004*, Pub. L. No. 108-447, § 202, 118 Stat 2809, 3409 (2004), *codified at* 47 U.S.C. § 340.

[179] STELAR, § 103(b), *codified at* 47 U.S.C. § 325(b)(3)(C)(vi).

Unfortunately, networks and in-market broadcasters have found the means to circumvent Congress and the Commission's clear intention to protect viewers' access to out-of-market signals. For instance, networks effectively expand an in-market affiliate's zone of protection beyond the geographic limits intended by Congress and the Commission by preventing its affiliated station in an adjacent market from willingly exporting its signal *anywhere* outside its local market as a condition of their affiliation or syndicated exclusivity agreements. Additionally local broadcasters prohibit – as a condition of retransmission consent – cable operators from importing out-of-market signals affiliated with the same network that are not significantly viewed. As a result, viewers that have relied on receiving from their cable operator local news, weather, political advertising, and sports that is not otherwise blacked-out on a distant signal from their cable operator are being denied access to the broadcast stations that they consider to be local and value for the content of their programming.

Agreements that restrict broadcast stations from exporting their signals out of market not only circumvent the intent of Congress and the Commission to limit the zone of protected programming exclusivity, they also contravene the concept of localism, which "has been a cornerstone of broadcast regulation for decades."[180] Broadcasters frequently tout the importance of localism. In fact, localism has served as one of the primary justifications for opposing every effort to reform the broken retransmission consent regime.[181] Yet it is apparent

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[180] *See*, *e.g.*, *Broadcast Localism,* Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, ¶ 5 (2008). *See also Localism: Tied to the Tracks?* Remarks of Ervin S. Duggan, Commissioner, Federal Communications Commission, Before the Mississippi Association of Broadcasters (Jun. 27, 1992) ("Localism has been one of the historic, animating principles underlying broadcast regulation, and our nation has been well served by it."); Written Statement of Michael K. Powell, Chairman, Federal Communications Commission on Broadcast Ownership Biennial Review, Before the Committee on Commerce, Science, and Transportation United States Senate (Jun. 4, 2003) ("The balanced set of national and local broadcast ownership rules we adopted preserve and protect our core policy goals of diversity, competition and localism.").

[181] *See, e.g.*, *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of the CBS Television Network Affiliates Association at 3 (filed May 27, 2011) ("The network non-duplication rules, together with the syndicated exclusivity rules, advance the goals of localism and diversity in programming. Eliminating the rules would have a severe adverse impact on these important interests."); Comments of the NBC Television Affiliates at 6 (filed May 27, 2011) ("Exclusivity within a station's local television market – the basis of the local advertising market – allows

that, in many cases, the exercise of expanded exclusivity through the use of prohibitive affiliation or syndication agreements, or by retransmission consent agreements that restrict a cable operator from importing out-of-market signals prevents viewers from accessing their relevant local news, weather, sports and other programming. Broadcast interests claim the existing network non-duplication and syndicated exclusivity rules are necessary to protect localism, but it is clear that localism is not served when broadcasters and their affiliated networks are permitted to expand that exclusivity in a way that prevents viewers from accessing the broadcast stations that they consider to be local. The viewers themselves, rather than the Commission, the Nielsen Company, or the national broadcast networks and syndicators, should determine which programming best reflects their local interests. Cable operators should not be arbitrarily prevented from providing access to these signals in cases where an out-of-market station remains willing to enter into a retransmission consent agreement but for restrictions imposed on its or the cable operator's ability to do so by a third party.

This is not a hypothetical concern. In comments filed in response to the Commission's 2011 NPRM, ACA explained that members have experienced numerous instances where an adjacent-market broadcast station that wanted to negotiate for retransmission consent could not do so because its network affiliation agreement expressly prohibits it from granting

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the station to maximize viewership and advertising revenue, and thereby to invest further in quality local programming."); Reply Comments of the National Association of Broadcasters at 57 (filed Jun. 27, 2011) ("The importation of distant signals into local markets fundamentally threatens localism and jeopardizes the richness and diversity of television programming generally"); Comments of the National Association of Broadcasters at 15 (filed Jun. 26, 2014) ("As we have stated repeatedly, the broadcast model is built around the partnership of national and local entities, with local content being an important competitive differentiator for this business model. The Commission has a long history of support for local content."); Letter from Jane E. Mago, Jerianne Timmerman, and Erin Dozier, National Association of Broadcasters, to Marlene Dortch, Secretary at 2-3 (filed Mar. 24, 2014) ("Any claimed public interest justification for examining retransmission consent payments simply does not exist… As empirical evidence in the record shows, such regulation would 'significantly reduce investment returns in the broadcasting industry' and 'reduce local news programming.'"); Letter from Jerianne Timmerman, Senior VP and Senior Deputy General Counsel of the National Association of Broadcasters, to Marlene Dortch, Secretary at 2 (filed Feb. 6, 2014) ("In light of current competitive realities, joint arrangements such as joint sales agreements are increasingly necessary for stations' ability to maintain their financial viability, and most importantly, their ability to continue offering high-quality service, including local news.").

retransmission consent outside of its DMA.[182] For example, despite a successful more than 30-year retransmission consent relationship with out-of-market station WDRB-41, FPB Cable was advised at the beginning of negotiations for the 2011 election cycle that WDRB would require the blackout of all FOX network programming throughout the three-year term of the agreement, and that FPB would be required to insert alternative multicast programming for a minimum of three hours per day. When FPB inquired as to the extraordinary change, they were informed that WDRB's recent affiliation agreement with FOX denied the station the right to broadcast FOX programming out of market. Because the cost of effectuating the programming blackout was so great, FPB and WDRB failed to come to an agreement on carriage for the first time in 30 years, and FPB subscribers lost what was at the time the only 10 PM newscast in the Louisville market.

As was true then, ACA members are not the only cable operators that have experienced this phenomenon in the past few years. For example, ACA more recently reported that Syracuse station WSYR was forced to cease exportation of its signal to Time Warner Cable stations outside of the Syracuse DMA as a result of its affiliation agreement with the ABC broadcast network.[183] Similarly, Comcast subscribers in the Pittsburgh, PA and Buffalo, NY DMAs can no longer receive Erie-based ABC affiliate WJET due to a prohibition contained in the stations' affiliation agreement with ABC.[184]

To protect against the harm caused by this type of network interference, the Commission should preserve to the greatest extent possible the ability of willing broadcasters to negotiate

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[182] ACA 2011 Retransmission Consent Comments at 55-56. *See also* ACA 2011 Retransmission Consent Reply Comments at 59 (citing experience of non-ACA member Suddenlink being forced to drop a significantly viewed station that had previously granted retransmission consent when the station found itself pressured to withdraw consent by the network with which it was affiliated on the grounds the station's network affiliation agreement did not allow it to permit out-of-market carriage).

[183] *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Letter from Barbara Esbin, Cinnamon Mueller, to Marlene Dortch, Secretary at Exhibit A (filed Jul. 24, 2014).

[184] *Id*. at Exhibit B.

with MVPDs for the distant signals that best satisfy consumer needs by preventing network interference with long-standing arrangements between MVPDs and out-of-market stations.[185] As ACA has previously recommended, the Commission can effectuate this prohibition either by adopting a new *per se* violation or by clarifying that existing *per se* violations of the obligation to negotiate for retransmission consent in good faith already extends to such network interference.[186]

Ideally, the Commission should adopt a new *per se* rule that would recognize it to be a violation of the duty to negotiate in good faith for a station to enter into any agreement – legally-binding or otherwise – that has the effect of limiting the ability of a station to grant retransmission consent to an MVPD to serve an out-of-market community where the station's entire programming stream, including its network and syndicated programming, has been made historically available by a cable operator, whether through an outright prohibition, a grant of a veto/pre-approval power before the execution of an agreement, or any other means that has the purpose of influencing or dis-incentivizing the station's grant of retransmission consent in such areas. Alternatively, the Commission could achieve the same effect by clarifying that Section 76.65(b)(i) of its rules, which prohibits as a violation of the good faith obligation the refusal by a Negotiating Entity to negotiate retransmission consent, includes any circumstances in which a broadcaster has permitted its affiliated network to influence its exercise of retransmission consent to an MVPD to serve an out-of-market community where the station's entire programming stream, including its network and syndicated programming, has been made historically available by a cable operator. Finally, if the Commission chooses not to deem this conduct to be a *per se* good faith violation, the Commission should consider such conduct by a broadcaster to be evidence of bad faith under the totality of the circumstances test.

[185] ACA 2014 Retrans FNPRM Comments at 3.

[186] *Id.*

F. Conditioning Retransmission Consent on an MVPD's Acceptance of Prices, Terms, and Conditions for After-Acquired Stations or Unlaunched Programming Networks.

In connection with its general examination of bundling, the NPRM seeks comment on several questions specifically related to the practice of broadcasters bundling the grant of retransmission consent for a local broadcast signal with carriage of broadcast stations that may be acquired in the future or broadcast stations and programming networks that have yet to launch. The NPRM asks whether a broadcaster's bundling of a local broadcast signal with one or more "prospective programming channels" should be recognized as a negotiating practice inconsistent with good faith bargaining and factored into an assessment under the totality of the circumstances test.[187] A "prospective programming channel" is defined as "a programming channel that has not yet been launched or a station or network that may be acquired in the future."[188] The NPRM appropriately questions how an MVPD can assess the reasonableness of the proposed carriage fees for a bundled offering that contains a programming channel that has not yet been launched or whose carriage is conditioned on future events.[189] Specifically, the NPRM asks whether it is consistent with good faith bargaining for a broadcaster to insist on MVPD carriage of a programming channel that has not yet been launched or whose carriage is conditioned on future events as a condition of carrying a local broadcast signal that it presently needs.[190] Quite simply, conditioning the grant of retransmission consent with set prices, terms,

[187] NPRM, ¶15, *citing* ACA July 24 Ex Parte Letter at 2.

[188] *Id.*, ¶15, n.75.

[189] *Id.*, ¶ 15.

[190] *Id.* Comment is also sought on how the Commission should analyze the legitimacy of a standalone offer if it decides that a station's attempt to tie carriage of its affiliated programming to carriage of a broadcast station is a factor suggesting a failure to negotiate in good faith. *Id.* There is no need for the Commission to determine at this time how to analyze the legitimacy of a standalone offer upon making the determination that a station's attempt to tie carriage of its affiliated programming to carriage of a broadcast signal suggests bad faith. Requiring stand-alone negotiations should allow the marketplace itself to function and set a value for the programming through the negotiating process between the MVPD and the programmer as it does for cable programming networks in general.

and conditions for carriage of unlaunched and untested, and in some cases unidentified programming networks and after-acquired broadcast stations should be considered inconsistent with good faith bargaining. The Commission should add insistence on carriage of prospective programming channels at set prices, terms, and conditions as a condition of carrying a local broadcast signals to the list of factors it will consider as a *per se* violation of the obligation to negotiate in good faith, or, at the very least, as evidence of a failure to negotiate in good faith under the totality of the circumstances test.

Many ACA members, in response to a survey asking if they "had experienced demands that they agree in the future to carry at set prices, terms and conditions another broadcast station or programming network that the broadcaster does not currently own (but might someday acquire) or does not currently exist (but might someday launch)," responded in the affirmative as to both forms of forced bundling. Examples of these experiences are as follows.

<u>Demands for carriage of unlaunched programming networks at set prices, terms, and conditions</u>. Several members reported being required by station groups to agree to carry an unlaunched cable network with unidentified content as a condition of retransmission consent for its local broadcast station.[191] In some instances, the launch of such a prospective network was required not only within the designated market area ("DMA") where the local station was carried,

[191] The Sinclair Broadcast Group ("Sinclair") was recently identified by DISH Network ("DISH") in public filings as a broadcast group engaging in this practice. *See* In the Matter of DISH Network L.L.C., Complainant, v. Sinclair Broadcast Group, Inc., Defendant, Verified Amended and Restated Retransmission Consent Complaint and Request for Preliminary Injunctive Relief, MB Docket No. 12-1 (filed Aug. 26, 2015) ("DISH Complaint"). Though DISH has since requested the Commission to dismiss its Complaint with prejudice, in its Complaint, DISH alleged, among other things, that Sinclair breached its duty to negotiate in good faith for renewal of DISH's retransmission rights for Sinclair's stations "by insisting on tying retransmission consent to agreement on terms for future carriage rights of a cable network that Sinclair *does not yet own* (the "Non-Sinclair Owned Cable Network"). *See* DISH Complaint at ii, 6-13, ¶ 31; Letter from Jeffrey H. Blum, Senior Vice President and Deputy General Counsel, DISH Network L.L.C., to Marlene H. Dortch, Secretary (filed Nov. 25, 2015). *See also* Lorraine Mirabella, *Sinclair plans to create 'hybrid' cable TV news channel*, THE BALTIMORE SUN, Jul. 30, 2013, *available at* http://articles.baltimoresun.com/2013-07-30/business/bs-bz-sinclair-allbritton-conference-call-20130730_1_snl-kagan-cable-channel-sinclair-markets.

but in any cable system the operator owns. Many members reported similar situations with respect to the carriage of multicast programming streams that might be launched in the future by the broadcaster. Members reported that some broadcasters requested carriage of these multicast signals without providing any commitment or even indication with regard to the programming that would run on the signal. Moreover, the broadcasters' demands included that the multicasts be immediately added by the operator upon launch by the broadcaster, irrespective of disruptions that the launch may cause to in channel line-ups.

Demands for carriage of after-acquired broadcast stations at set prices, terms, and conditions. Demands for carriage of after-acquired broadcast stations by broadcast station ownership groups was reported to be not only extremely common, but nearly universal. This includes not only demands for carriage of the after-acquired station, but for carriage under the same rates, terms and conditions being set in the current negotiations for the existing local broadcast channel, regardless of the acquired station's network affiliation, or its ratings in the market. In many cases, the broadcasters' after acquired broadcast stations provisions require the operator to pay higher rates than the operator had previously negotiated with the after-acquired station.

ACA has detailed for the Commission the difficulties faced by its members forced to agree to include "after-acquired" station provisions in the agreements for carriage of a local broadcast signal.[192] After-acquired station provisions permit a broadcaster to go into any market, simply sign a management contract whereby they assume the daily operations of a station with relatively lower retransmission consent prices (without filing any formal application for transfer of ownership or control), and effectively raise the retransmission consent rates on that station to the higher rates commanded by the managing station under its own retransmission consent agreements, displacing by fiat the lower rate an MVPD had previously

[192] ACA Mar. 19, 2012 Ex Parte Letter at 3.

negotiated in good faith with the managed station.[193] A prime example was detailed by the ACA in a 2012 filing:

> Ms. Pritchard also described how Knology was forced to accept an "after-acquired" station clause that it could not negotiate out of its agreement if the operator wanted to have the station available on air for its subscribers on January 1, 2012. After-acquired station or market clauses entitle a broadcaster to roll into its agreement with an operator other stations it acquires, manages, or otherwise gets the rights to negotiate retransmission consent. Ms. Pritchard confirmed that Knology had experienced first-hand the effects of an after-acquired station clause that drove up its fees, simply because one station had agreed to put itself under management of another. Ms. Pritchard explained how this practice is both proliferating and deeply de-stabilizing because it introduces continuing budget uncertainty for operators.[194]

<u>Demands for carriage of prospective programming channels at set rates, terms, and conditions harm MVPDs and the consumers</u>. Demands for carriage of unlaunched cable networks or multicast streams at set rates (and at specific terms and conditions) generally results in MVPDs and their customers incurring added expense for unwanted content. Similarly, demands for after-acquired broadcast station provisions at pre-determined rates, terms, and conditions, encourages fee arbitrage by large broadcast station groups, resulting in MVPDs and consumers paying higher fees for broadcast stations that they already receive. These higher fees are not due to any improvement in the station's programming, but simply because the station has a new owner or management agreement. Both demands create budgetary uncertainty for MVPDs, particularly smaller ones, many of whom already lose money or make thin margins on their video service, which acts as a drag on their future investment in their networks. Moreover, being forced to set aside channel capacity in case the broadcaster choose to launch a cable network or launch a multicast signal containing unknown content, ties up scare channel capacity[195] that most cable operators are struggling to free up in order to offer

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[193] *Id.* at 3, n.2.

[194] *Id.* at 3.

[195] *See* Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120, Comments of the American Cable Association at 6 (filed Apr. 16, 2015) (discussing the need to extend the HD carriage exemption for small cable systems with 552 MHz or less

high broadband speeds to their Internet customers. Given the harms, the Commission should no longer countenance this behavior – there is no public interest justification for permitting broadcasters to demand carriage of prospective programming networks and stations.

Demands for carriage of prospective programming channels should be recognized as either per se violations or, at the least, as inconsistent with good faith negotiation under the totality of the circumstances test. The Commission should deem the practice of a broadcaster conditioning the grant of retransmission consent for a local station on setting the prices, terms, and conditions for programming networks or multicast signals it may launch in the future or for broadcast stations it may later acquire as a per se violation of the duty to negotiate in good faith, or, at the very least, as evidence of a failure to negotiate in good faith under the totality of the circumstances test. The reason is simple: it is impossible for an MVPD to assess the wisdom and value of carrying an untested and in many cases unknown genre channel or one whose carriage is conditioned on future events that may or may not come to pass. No reasonable businessperson should be expected to agree to pay any amount of money, including the launch costs, for what is at the time an "empty box" that may or may not later be filled with programming of value to subscribers as a condition of accessing the signals that it desires to carry and is willing to bargain for on a stand-alone basis. That type of venture is more akin to gambling than assembling an attractive package of programming for resale. Nor is it fair to set the prices, terms or conditions for carriage of after-acquired television stations as a condition of granting retransmission consent for an already-owned local station. It is profoundly contrary to the spirit of the retransmission consent good faith obligations for a broadcaster to require a deal struck through bilateral negotiations as to the value of the signal to MVPD subscribers in the

of capacity and unable to carry signals in HD because they are channel-locked and/or financially resource constrained).

local market to be upended simply because the broadcaster subsequently acquires, or manages or controls another broadcaster.

In sum, the results of these broadcaster practices are more difficult and protracted negotiations, increased likelihood of negotiating impasses, bloated programming tiers, higher prices for consumers, and limits on the ability of the MVPD to offer other advanced services to its customers. The Commission should act to halt to these harms by prohibiting demands for bundling of prospective programming in retransmission consent agreements that are inconsistent with the obligation to negotiate in good faith.

G. Discrimination by an MVPD-affiliated Broadcast Station Based on Vertical Competitive Effects

The NPRM seeks comment on whether an MVPD-affiliated broadcaster's discrimination in the prices, terms, and conditions for retransmission consent among or between MVPDs based on vertical competitive effects should be considered as a factor in the totality of the circumstances test.[196] Economic analysis and the Commission's own precedent strongly support a determination that such discrimination constitutes a *per se* violation of the duty to negotiate in good faith, but barring that, it should at least be considered evidence of bad faith under the totality of the circumstances test.

Throughout a number of markets, larger MVPDs that are vertically integrated with a network-affiliated broadcast station that operates in the same market compete directly against other MVPDs, such as AT&T [DirecTV], DISH Network, WOW!, RCN, Wave Broadband, and others. The chart below lists examples of such vertical integration among the ten largest MVPDs.

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[196] NPRM, ¶ 16.

Table 3. MVPDs Serving in the Same Markets as Their Affiliated Broadcast Stations.

Market Size	Market Name	Broadcast Station (Network Affiliation)	Affiliated MVPD in Market
1	New York, NY	WNBC (NBC)	Comcast
3	Chicago, IL	WMAQ (NBC)	Comcast
4	Philadelphia, PA	WCAU (NBC)	Comcast
5	Dallas-Ft. Worth, TX	KXAS-TV (NBC)	Comcast
6	San Francisco-Oakland- San Jose, CA	KNTV (NBC)	Comcast
7	Washington, DC (Hagerstown, MD)	WRC (NBC)	Comcast
16	Miami-Fort Lauderdale, FL	WTVJ (NBC)	Comcast
19	Orlando-Daytona Beach-Melbourne, FL	WFTV (ABC)	Cox
30	Hartford & New Haven, CT	WVIT (NBC)	Comcast
60	Tulsa, OK	KOKI (Fox)	Cox

Pursuant to Section 325(b)(3)(C) of the Cable Act, the duty to negotiate in good faith does not preclude television broadcast stations from charging different prices for retransmission consent to different MVPDs *if* those differences are based on competitive marketplace considerations.[197] The Commission is, however, permitted to deem any differences in prices, terms, and conditions that are *not* based on competitive marketplace considerations to be a violation of good faith.[198]

In implementing the good faith obligation in 2000, the Commission determined that "[p]roposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (e.g. other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition" are presumptively inconsistent with competitive marketplace considerations.[199] Built into this presumption is a two-part test. The first part of the test asks whether the proposal reflects an exercise of market power, which from an economic perspective

[197] 47 U.S.C. §325(b)(3)(C).

[198] *See* 2000 Good Faith Order, ¶ 23 ("While the Commission generally will not intrude into the substance of particular retransmission consent agreements, we note that Section 325(b)(3)(C) sanctions only those retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs if such different terms and conditions are based upon competitive marketplace considerations.").

[199] *Id.*, ¶ 58.

means the ability to profitably raise prices above incremental cost. The second part asks whether the proposal impairs competition, which from an economic perspective means an injury to competitors that reduces aggregate consumer welfare or economic efficiency. Discriminatory pricing (or other discriminatory terms or conditions) based on vertical competitive effects by an MVPD-affiliated broadcaster satisfies this two part test.

The first part of the Commission's test is met in the case of discriminatory proposals for retransmission for top four local television station signals based on vertical effects because markets for such must have retransmission rights are monopolistic rather than competitive. As discussed in Section IV.A., supra, a top four local broadcast station has substantial market power, or monopoly power. More specifically, because there is no close substitute for its signal, a top four local broadcast station can exercise market power by setting a price for retransmission consent that is substantially above incremental cost with little or no concern for the price of other programming. This is exacerbated in the case of a top four broadcast station that is affiliated with an MVPD operating in the same market, particularly a dominant MVPD. The combination of a "must have" broadcaster with a dominant MVPD serving the same market gives the vertically-integrated broadcaster an incentive and ability to charge significantly higher prices to rivals of its MVPD. This is an exercise of market power by both the broadcaster and the dominant MVPD.

This point can be illustrated by considering two hypothetical geographic markets that are comparable in all respects, except that in one market a dominant MVPD owns and operates a top four rated television station and charges a higher price for retransmission consent in that geographic market, whereas in the other market, the top four station is not owned by a dominant MVPD. The difference in retransmission consent terms and conditions is due only to a difference in vertical ownership structure; in one market, the television station and a dominant MVPD are under common ownership, while in the second market they are under separate ownership. Market structure is otherwise the same in the two geographic markets, so the only difference in market structures is a difference in monopolistic conditions. In one market, the "must have" broadcast station is a vertically-integrated monopoly, and the higher monopoly price in that market reflects an exercise of market power.

The second part of the Commission's test is satisfied because rival MVPDs that are forced to pay higher fees based on negotiating for retransmission consent with an MVPD-affiliated broadcaster are likely to pass through at least part of the cost increase by raising their prices to final consumers. Such cost pass-through is normal in a differentiated product market like the downstream MVPD market. Further, the integrated MVPD is likely to follow suit because, in differentiated products markets, firms normally respond to rivals' price increases by raising their own price to some extent. These price effects of vertical integration on retransmission consent agreements impair competition in the downstream market by raising the costs of rival MVPDs, and by reducing consumer welfare as these higher costs are reflected in higher final prices. Higher subscription prices discourage consumers from purchasing MVPD service and/or distort consumer choice of differentiated MVPD services.

Both Congress and the Commission have long been aware that the vertical integration of programming and distribution can harm competition and consumers. In its 1993 Notice of Proposed Rulemaking to implement Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992, the Commission explained that in enacting that legislation, Congress had concluded both that "vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors,"[200] and that "the programming provisions of the 1992 Act are necessary to prevent cable operators from abusing their market power to the detriment of . . . competitors."[201] Moreover, the Commission

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[200] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, ¶ 3 (1992).

[201] Cable Act of 1992 – Program Distribution and Carriage Agreements, 58 Fed. Reg. 328, ¶ 2 (Jan. 5, 1993).

recognized that this vertical integration “may restrict the availability and increase the cost of programming.”[202]

The Commission has repeatedly acknowledged its review of mergers involving broadcast stations and video distribution assets that common ownership gives a vertically integrated broadcast station an incentive to charger a higher price for retransmission consent to rival MVPDs. Beginning with the News-Hughes merger, and continuing through its review of the News-Liberty and Comcast-NBCU mergers, the Commission has found that the integration of broadcast programming and video distribution assets increases a broadcaster’s incentive and ability to raise rivals’ costs.[203]

To protect against these harms, the Commission should deem discrimination by MVPD-affiliated broadcast station based on vertical competitive effectives to be a *per se* violation of the duty to negotiate in good faith. Barring that, the Commission should consider such discrimination as a factor in determining a violation of the duty to negotiate in good faith under the totality of the circumstances test.

V. NEGOTIATING TERMS BASED ON MFN PROVISIONS OR DEMANDING MFNS SHOULD BE CONSIDERED EVIDENCE OF BAD FAITH UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST

The NPRM seeks comment on whether an MVPD’s or broadcaster’s demanding or negotiating retransmission consent based on “most favored nation” (“MFN”) provisions should be considered evidence of bad faith under the totality of the circumstances test.[204] ACA believes that these practices, including negotiating positions based on MFNs with other MVPDs and demands that a party insist on receiving MFN pricing should be considered evidence of bad faith under the totality of the circumstances test. Bargaining based on MFNs thwarts the Commission’s goal that retransmission consent “negotiations are conducted in an atmosphere

[202] *Id*., ¶ 7.

[203] Liberty-News-DirecTV Order, ¶ 104; Comcast-NBCU Order, ¶ 29.

[204] NPRM, ¶ 16, *citing* ACA July 24 Ex Parte Letter at 3.

of honesty, purpose and clarity of process" designed to produce "an agreement acceptable to both parties,"[205] by permitting the results of one MVPD's negotiation with the broadcaster to effectively raise the costs of MVPD rivals in an unrelated negotiation.

ACA members have reported a number of troubling practices concerning MFNs. Among the most common is asking the MVPD for an MFN provision and claiming that the broadcaster is unable to accept the rates, terms and conditions offered by the cable operator because doing so would violate their MFN with another MVPD, but refusing to substantiate that claim upon request by the MVPD with whom they are negotiating.[206]

MFN clauses, which are also known as "most favored customer," "prudent buyer"[207] or "antidiscrimination" clauses, ensure that the buyer obtaining MFN protection is not being treated any worse by the seller than any other buyer, or, to put it in the affirmative, "the seller promises to treat the buyer as well as the seller treats its best (most-favored) customer.[208] The net effect is "no lower sales price."[209] While they can offer valuable protections to the buyer with sufficient market power to obtain MFN status, they can also have the exclusionary effect of raising rivals' costs.[210]

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[205] 2000 Good Faith Order, ¶¶ 24, 39.

[206] ACA discusses how refusals to substantiate claims made during negotiations are inconsistent with the obligation to negotiate in good faith in Section IV.C. Others report that although some broadcasters will not admit to having MFNs, when pressed to substantiate their negotiation position on rates, terms and conditions, the answers make clear that the broadcaster has an MFN issue.

[207] *See* Joseph A. Martin, *Antitrust Analysis of "Most Favored Nation" Clauses in Health Care Contracts*, first published in the PRIVATE ANTITRUST LITIGATION NEWS, Fall 2000, *available at* http://www.archerlaw.com/files/articles/martin_antitrust.pdf.

[208] Jonathan B. Baker, *Competitive Harm from MFNs: Economic Theories*, DOJ/FTC Workshop on Most-Favored-Nations Clauses and Antitrust and Enforcement Policy, Sept. 10, 2010 ("Baker MFN Presentation"), *available at* http://www.justice.gov/sites/default/files/atr/legacy/2012/10/01/286766.pdf; Department of Justice, Public Workshop: Most-Favored-Nations Clauses and Antitrust and Enforcement Policy, Sept. 10, 2012, at slide 2, available at http://www.justice.gov/atr/events/public-workshop-most-favored-nation-clauses-and-antitrust-enforcement-and-policy.

[209] Baker MFN Presentation at 2.

[210] Baker describes the categories of competitive harms from MFNs in his DOJ/FTC presentation. Baker identifies three main ways that MFNs may harm competition from an economic standpoint: (i) "Collusive Theories" – MFNs facilitate coordination and dampen competition; (ii) "Exclusionary Theories" – MFNs

While MFNs earlier were generally viewed as either *per se* procompetitive,[211] or at least competitively neutral until the mid-1990s,[212] they have increasingly been challenged by the antitrust authorities under a variety of legal theories, including exclusionary theories.[213] One such case is United States v. Delta Dental of Rhode Island, which involved a challenge brought by the Department of Justice ("DOJ") to an MFN clause included in all of the health insurer's contracts with its provider dentists.[214] The "Prudent Buyer" clause required Delta's participating dentists to accept as full payment from Delta the lowest price Delta was accepting from other non-governmental dental reimbursement programs. The DOJ brought suit alleging that Delta's MFN clause violated section 1 of the Sherman Act, and Delta moved to dismiss, arguing that MFN clauses are considered pro-competitive as a matter of law. The court disagreed, first finding that the clauses are neither *per se* pro-competitive nor anti-competitive, but rather that each clause under consideration must be evaluated under a fact-intensive "rule of reason"

raise the costs of rivals or new entrants; and (iii) "Increase Seller Bargaining Power" – MFNs are a commitment not to discount; discourage waiting for a better price. Baker MFN Presentation at 4.

[211] *See*, *e.g.*, *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F. 2d 1101, 1110-11 (1999) (MFNs tend to further competition and are not exclusionary).

[212] *See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic & Sec. Health Plan*, No. 95-1965, 63 F.3d 1406, 1415 (1995) ("Perhaps, as the Department of Justice believes, these clauses are misused to anticompetitive ends in some cases; but there is no evidence of that in this case.").

[213] *See, e.g.*, *U.S. v. Apple, Inc.*, No. 1:12-cv-2826 (S.D.N.Y. filed Apr. 11, 2012) (the Department of Justice ("DOJ") alleged that Apple and several large book publishers alleging a per se violation of Section 1 of the Sherman Act for conspiring to raise the retail price of e-books through various mechanisms, including MFN provisions; the proposed final judgement with three of the publishers requires the termination of existing MFNs); *U.S. v. Blue Cross Blue Shield of Michigan*, No. 2:10-cv-15155 (E.D. Mich. filed Oct. 18, 2010) (the DOJ alleged that Blue Cross Blue Shield of Michigan's use of MFN clauses in its agreements with hospitals violated antitrust laws by excluding competitors. The Court found that "[b]ased on the allegations in the Complaint, it is plausible that the MFNs entered into by Blue Cross with various hospitals in Michigan establish anticompetitive effects as to other health insurers and the cost of health services in those areas." *United States v. Blue Cross Blue Shield*, 809 F. Supp. 2d 665, 674 (2011); *Starr v. Sony BMG Music Entm't*, 592 F. 3d 314, 327 (2010) (finding that MFNs can facilitate collusion); *Blue Cross Blue Shield of Ohio v. Bingaman*, No. 94-2297, 1996 U.S. Dict. LEXIS 17091 (N.D. Ohio 1996) (holding that Blue Cross Blue Shield's use of MFN's may have violated the Sherman Act).

[214] *United States v. Delta Dental of Rhode Island*, 943 F. Supp. 172 (1996) ("Delta Dental").

analysis.[215] Under this analysis, the burden on the complainant is to prove that "the anti-competitive effects of [the agreement] outweigh the legitimate business justifications."[216]

Next, the court found that DOJ had alleged facts sufficient to withstand dismissal. DOJ argued that the Delta Prudent Buyer Clause had the effect of excluding potential competitors from the market, preventing existing competitors from expanding, and substantially increasing the cost of dental insurance to all Rhode Island consumers, and that these anticompetitive concerns were not offset by an appreciable monetary savings to Delta.[217] The court agreed, finding that "the lack of savings associated with Delta's Prudent Buyer clause suggests that it is not procompetitive," leaving Delta unable to assert any legitimate business justifications to outweigh any findings that the clause has anti-competitive effects as required under a "rule of reason" analysis.[218] An additional consideration compelling the court's conclusion was evidence plausibly showing that Delta possessed market significant market power, and that Delta used its market power to apply its MFN clause to selectively block alternative reduced-fee plans from the market without gaining any discernible cost savings.[219] The case is important for establishing that the competitive effect of MFNs is to be judged under a "rule of reason" and that MFNs can be used by parties with market power to harm rivals and competition. In this instance, the court balanced the pro-competitive effects of the MFN for Delta against the anti-competitive effect on its rivals, and found overall that it was not pro-competitive.

Use of MFNs by a top four rated broadcaster to justify rejection of alternative offers by a small or medium-sized MVPD has the effect of keeping prices above levels the negotiating parties may have arrived at if not constrained by the MFN and/or of refusing to give terms and

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[215] *Id.* at 178.

[216] *Id.* at 173, *quoting Monahan's Marine Inc. v. Boston Whaler, Inc.*, 866 F. 2d 525, 526-27 (1989).

[217] Delta Dental at 177, 182.

[218] *Id.* at 179.

[219] *Id.* at 180.

conditions more favorable than those granted another MVPD. It is well-known that only the largest MVPDs with considerable market power of their own are able to secure MFNs from broadcasters in the first place.[220] The net effect of their obtaining a guarantee that the broadcaster will not lower its price or give more favorable terms and conditions to another MVPD is to deprive other smaller MVPDs, and in turn, their subscribers, of the more favorable rates, terms and conditions the broadcaster might otherwise be willing to offer those MVPD in their retransmission consent negotiations *but for* the fact that the broadcaster had agreed to an MFN when negotiating with the larger MVPD. Demands by a top four rated broadcaster, who already possesses significant market power, that the MVPD offer the broadcaster unilateral MFN protections can have a similar anti-consumer effect by ensuring that a higher price or better terms and conditions achieved in retransmission consent negotiations with that MVPD by another broadcaster will automatically be spread by virtue of the unilateral MFN provision. For instance, it may make sense for an MVPD to carry a multicast signal offered by one broadcast station in the market because that multicast signal offers content that is desired by the MVPD's subscribers. However, if this MVPD were required to provide an MFN to other broadcasters, the MVPD's carriage a desired multicast signal of the one broadcaster could trigger the carriage of undesired multicast signals of another broadcaster. Such a triggering of the MFN either may lead the MVPD not to carry the desired multicast signal at all, thus depriving its customers of content they desire, or to its carrying the unwanted multicast signals of other broadcasters that utilize scarce channel capacity that could be used for offering other more desired programming or higher broadband speeds. Such an outcome is inefficient and can be harmful to competition

[220] *See, e.g.*, *Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149, Applicants' Opposition to Petitions to Deny and Response To Comments, Exhibit B, Reply Declaration of Michael L. Katz, Charter-TWC-BHN Efficiencies Analysis, at 94-104 (filed Nov. 2, 2015).

and consumers. For these reasons, proposals based on MFNs are both unfair and destabilizing for the MVPD and undermine the spirit of the bilateral good faith negotiation obligation.

Accordingly, the Commission should follow the "rule of reason" approach in antitrust jurisprudence by expressly recognizing that negotiating retransmission consent based on MFNs, including demands for MFN protections, can be evidence of bad faith under the totality of the circumstances test.

VI. CONCLUSION

It has been nearly five years since the Commission started down the path to reform of its retransmission consent rules. During that period of time, two retransmission consent election cycles have come and gone, consumers have experienced 558 blackouts,[221] prices have risen about 40 percent *each year*,[222] and demands for carriage of other and often unwanted programming have increased, resulting in bloated bundles and less capacity for other more highly valued programming or other services such as higher capacity broadband. Although the Commission took an important step in 2014 by adding to the list of *per se* violations of the good faith negotiation obligation joint negotiations by non-commonly owned top four rated stations in the same market, it left many needed reforms pending. Since that time, Congress has directed the Commission to engage in a robust examination of its totality of the circumstances test for good faith negotiations for the purpose of reforming its good faith rules. The time for decisive and muscular Commission action has arrived.

Adoption of the targeted, common sense reforms ACA has proposed will improve the environment for retransmission consent negotiations, lessen the likelihood of negotiating impasses, consumer blackouts – both linear and online – and increase the likelihood of

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

[222] *See Economics of Broadcast TV Revenue 2015 Edition*, SNL KAGAN, Jul. 2015 (retransmission consent fees grew at the following rates: 2012 – 35%, 2013 – 50%, 2014 – 35%).

retransmission consent fees set at fair market value, and on reasonable terms and conditions that are acceptable to broadcasters and MVPDs alike. ACA urges the Commission to act quickly to conclude this rulemaking and the companion retransmission consent reform rulemaking launched in 2011 to better protect consumers and ensure that retransmission consent negotiations are indeed "conducted in an atmosphere of honesty, purpose and clarity of process." The public interest demands no less.

Respectfully submitted,

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December 1, 2015

Attachment A

HIGHER PRICES FROM BUNDLING OF "MUST HAVE" PROGRAMMING ARE NOT BASED ON COMPETITIVE MARKETPLACE CONSIDERATIONS

December 1, 2015

A Paper by Michael H. Riordan[1]

Commissioned by the American Cable Association

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A. Introduction and overview.

1. The Communications Act establishes that the retransmission of broadcast television station signals by multichannel video programming distributors (MVPDs) requires the consent of the broadcaster. A retransmission consent agreement allows the television station to receive compensation for the value of its signal. The Act requires television stations and MVPDs to negotiate retransmission consent agreements in good faith.

2. The Federal Communications Commission (FCC) adopted a two-part framework for evaluating good faith. First, there is a specific list of *per se* violations. Second, to address behavior that is not contemplated by the specific *per se* violations, there is a more general totality of the circumstances test for good faith negotiations that considers facts indicating an "absence of a sincere desire to reach an agreement that is acceptable to both parties."[2] The test also allows an MVPD to bring a complaint alleging a violation of good faith based on "evidence that differences among MVPD agreements are not based on competitive marketplace considerations."[3] This language invites an economic analysis of market conditions.

3. The FCC is reviewing its totality of the circumstances test for good faith negotiation of retransmission consent agreements, including the application of the test to proposals that bundle retransmission consent agreements with other carriage agreements. The FCC initially treated bundled proposals as presumptively consistent with competitive marketplace considerations, and thus consistent with good faith bargaining.[4] Recently, however, the FCC moved away from a

[2] *In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216, ¶ 2 (2015) ("NPRM") (citing *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 32 (2000) ("2000 Good Faith Order")).

[3] NPRM, ¶ 3 (citing 2000 Good Faith Order, ¶ 32).

[4] 2000 Good Faith Order, ¶ 56 (explaining the decision to not "arbitrarily limit the range or type of proposals" in the context of retransmission consent negotiations).

blanket presumption and determined that the coordinated negotiation of retransmission consent agreements by separately owned top four rated local television stations (measured by audience share) in the same market is a *per se* violation of good faith obligations.[5] Congress subsequently expanded the FCC's rule by prohibiting the coordination of negotiations between separately owned, same market broadcasters, irrespective of the station's ratings.[6] The FCC now seeks comment on how a broadcaster's insistence on bundling of retransmission consent with the carriage of regional sports networks (RSNs) or other "must have" programming should be treated under the totality of circumstances test.[7]

4. The top four local television stations usually are associated with the Big Four networks (ABC, CBS, Fox, and NBC), and broadcast network programming is considered particularly valuable. Indeed, the FCC recognizes that "much network programming continues to be 'must-have' for MVPDs and an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs."[8] The top local stations in larger markets often are owned and operated (O&O) by the networks. In many cases these O&O stations broadcast in markets that are served by an affiliated regional sports network (RSN), which the FCC has identified as another type of must have programming.[9] These network O&O television stations insist in some cases on conditioning the terms of a retransmission consent agreement on a

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[5] *See, generally, In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014) ("Joint Negotiation Order").
[6] *See* 47 U.S.C. § 325(b)(3)(C)(iv); 47 C.F.R §(b)(1). *See also In the Matter of Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd 2380, ¶ 4 (2015).
[7] NPRM, ¶ 15.
[8] NPRM, ¶ 3.
[9] In its Order on the News Corp-DirecTV application transfer of Title III licenses, for example, the FCC identifies both Fox broadcast television station signals and Fox RSNs as must have programming "for which there are no good substitutes." *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 44 (2004).

carriage agreement for the affiliated RSN.[10] The FCC is now asking how such bundling of must have programming ought to be treated under the totality of the circumstances test for good faith bargaining of retransmission consent agreements. My purpose is to evaluate this question from an economic perspective. I argue three main points.

5. My first point is that markets for must have programming rights are monopolistic rather than competitive, so it does not make sense from an economic perspective to presume that any conduct undertaken or proposals offered by must have programmers are based on competitive marketplace considerations. Must have programming is uniquely valuable. There are no close substitutes. An MVPD who fails to include the top local television stations or the local RSN in its channel lineup risks losing a significant share of its subscribers to rival MVPDs who do carry this must have programming. This allows the seller of must have programming to charge a high price, well above its incremental cost of providing the programming, with little or no concern for the pricing of other programming by other sellers. This essentially is the textbook economic definition of monopoly. Most MVPDs have little real choice but to agree to the monopoly price of must have programming.

6. My second point is that the insistence by a television station owner on bundling its grant of carriage rights for a must have broadcast station with an RSN that serves the same market as the station results in higher fees (or other compensation) charged to MVPDs.[11] This is possible if

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[10] These network O&O television stations also insist in some cases on conditioning retransmission consent on carriage of its affiliated national cable programming networks. In one instance, the Commission has found a suite of national cable programming networks can have must have characteristics. *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Order and Opinion, 26 FCC Rcd 4238, Technical Appendix, ¶ 46 (2011) ("Comcast-NBCU Order") ("the overall bundle of NBCU cable networks is critical programming that MVPDs need to offer a competitive service that is attractive to consumers even if no individual network in the bundle were considered 'marquee' programming."). In this paper, I focus on the bundling of negotiations for top four broadcast stations with regional sports networks, but the same conclusions can be reached for any programming bundled with retransmission consent that would be considered must have, including a suite of national cable programming networks.

[11] In reviewing the merger of Comcast and NBC Universal, the FCC found that common "ownership of these two types of programming assets in the same region allowed the joint venture to charge a higher price for the

carriage contracts for the same market broadcast station and RSN expire around the same time and renewals are negotiated simultaneously. I provide two related reasons for these higher prices: greater market power and increased bargaining leverage. First, bundling increases market power by making the demand for each programming asset in the bundle less sensitive to price, i.e. in economic jargon, by decreasing the price elasticity of demand. Second, bundling increases the bargaining leverage of the broadcaster by imposing a greater penalty on an MVPD for failing to reach an agreement, i.e. the additional loss of carriage of the RSN. Thus the ability of the owner of a must have broadcast station to bundle its carriage negotiations with a same market RSN reinforces and augments the monopoly power the must have broadcast station already possesses.

7. The FCC has identified certain bargaining proposals to be presumptively inconsistent with competitive marketplace considerations, including "(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 competition."[12] My argument essentially is that a broadcaster's insistence on bundling retransmission consent for must have television station signals with RSN carriage rights in order to raise prices is an exercise of market power that harms consumers and can impair the performance of MVPD markets. Higher fees and other consideration for the carriage of must have programming raise the costs of MVPD services, and the higher costs are passed through to consumer prices. By regarding such cost increases and the resulting consumer harms as an impairment or hindrance of competition in MVPD markets,[13] the FCC can treat proposals that raise prices by bundling must have retransmission consent with RSN carriage as presumptively inconsistent with competitive marketplace considerations under the above standard.

RSN relative to what would be observed if the RSN and local broadcast affiliate were separately-owned." Joint Negotiation Order, ¶ 15 (citing Comcast-NBCU Order, Technical Appendix, ¶ 55).
[12] NPRM, ¶ 10.
[13]*See* NPRM, ¶ 3 (noting continued upward growth of retransmission consent fees).

8. My third point is that there is a remedy to the problem of higher prices that result from the bundling of same market must have retransmission consent and RSN carriage that does not involve requiring common owners to make standalone retransmission consent offers that must be then be judged for reasonableness by the Commission. The FCC can address this problem by deeming a common owner's unwillingness to negotiate the carriage contracts for a broadcast station and RSN, that serve the same market and have expiration dates around the same time, sequentially rather simultaneously, by granting a temporary extension of an existing retransmission consent agreement, or by taking other steps to avoid simultaneous negotiations, to be a violation of the Commission's good faith rules.

9. My conclusion is that economic analysis does not support a policy of treating bundling of must have retransmission consent with carriage rights for a must have RSN in the same market as the broadcast station as presumptively consistent with good faith bargaining as the Commission's existing presumption concerning bundling may suggest. Because markets for must have programming are monopolistic rather than competitive, the Commission should not presume that any conduct undertaken or proposal offered by a seller of must have programming is consistent with competitive marketplace considerations, particularly involving bundling with other RSNs serving the same market. To effectively address this problem, my analysis suggests that the Commission can interpret a common owner's refusal to extend an existing retransmission consent agreement until an otherwise concurrent same market RSN negotiation is successful or at an impasse, or to take other steps to avoid simultaneous negotiations, as evidence of bad faith bargaining.

B. Markets for must have programming are monopolistic.

1. The Structure-Conduct-Performance (SCP) paradigm is a standard economic framework for describing market conditions. Market structure refers to the market conditions that set the stage for competition, e.g. the number and market shares of sellers, barriers to entry,

product differentiation, cost conditions, and consumer demand. Conduct refers to pricing, product positioning, service and advertising. Market performance refers to economic efficiency, consumer welfare, and profits. The SCP paradigm recognizes a primary chain of causality running from structure to conduct to performance, while also recognizing possible feedback from performance to structure, e.g. new entry responds to profit opportunities.

2. The analytical framework of the FCC's annual video competition report bears a noticeable resemblance to the SCP paradigm. The report describes groups of video program providers, including different types of MVPDs (direct broadcast satellite operators, cable operators, and telephone companies), summarizes their business models and competitive strategies (technologies, pricing, and product differentiation), and reports performance indicators (numbers of subscribers, revenue, etc.). The most recent report estimates that most homes in the U.S. have access to at least three MVPDs, and recognizes that MVPDs might charge different prices in different towns based on different market conditions, including "differences in the number of competitors or differences in the competitive strategies of competitors used in different locations."[14]

3. The SCP paradigm provides a framework for examining the market conditions pertinent to a retransmission consent marketplace that includes MVPDs and broadcasters. I first discuss some general aspects of the MVPD marketplace, and then turn more explicitly to the marketplace for retransmission consent agreements.

4. The MVPD marketplace is two-sided. Downstream MVPDs compete for subscribers based on price, service, quality, and variety of programming. Cable MVPDs and telephone MVPDs operate regionally or locally. Direct broadcast satellite MVPDs operate nationally, but also retransmit local broadcast stations. Consequently, there are distinct geographic MVPD markets, with possibly different prices due to different competitive conditions. Upstream cable channels

[14] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report and Order, 30 FCC Rcd 3253, ¶ 73 (2015).

compete for space in MVPD channel lineups based on the quality of programming and fees (or other compensation terms).

5. An MVPD's demand for programming depends on technological considerations, such as scarce channel capacity, or the effect of additional cable channels on the available bandwidth of broadband Internet services that the MVPD offers over the same network. Importantly, an MVPD's demand for programming is also derived from downstream market conditions. For all of these reasons, prices for programming carriage rights, including compensation for retransmission consent, might vary geographically. Moreover, the same competitive considerations that explain differences in MVPD prices to final consumers in the downstream market also help explain different prices paid by MVPDs for programming rights in the upstream market.

6. The marketplace considerations relevant for retransmission consent agreements include both downstream and upstream market conditions for MVPDs and broadcasters. Pertinent downstream market conditions include conditions of MVPD market structure and conduct that determine the value the negotiating MVPD places on the television station signal, for example, the service offerings and pricing of MVPDs competing in the same geographic market, and consumer valuations of these MVPD offerings. Downstream market conditions also impact the broadcaster's opportunity cost of providing retransmission consent. For example, the willingness of consumers to switch to a different MVPD service determines a broadcaster's cost-benefit analysis of withholding retransmissions consent should retransmission consent negotiations with a particular MVPD break down. The terms and conditions of retransmission consent proposals are part of conduct in upstream MVPD markets. Relevant upstream market conditions include the substitutability of other programming, the common ownership of (or affiliation with) other programming, the relative bargaining power of the negotiating parties, and the conduct of negotiations, such as the decision to offer specific terms and conditions in retransmission consent negotiations.

7. The totality of circumstances test for good faith negotiation of retransmission consent considers whether differences in MVPD agreements are based on *competitive* marketplace considerations. Rational economic decision-making implies that a difference in prices for retransmission consent between two geographic markets must be based on *some* differences in market conditions, rather than on whimsy or bias. But the modifier "competitive" presumably excludes from consideration those market conditions that do not refer to competition between sellers. From an economic perspective, a competitive marketplace is one in which sellers of substitute goods compete to satisfy buyers' demands by offering lower prices and better quality and service. This may be a fair description of downstream competition between MVPDs for subscribers, and a fair description for competition between many cable networks for inclusion in the channel lineups of MVPDs. But this is not a fair description of markets for must have programing rights, including the retransmission of top four rated local stations and the carriage of RSNs.

8. Must have programming is different from other programming. By definition, must have programming is highly valuable programming, for which there is no good substitute, and for which market coverage is almost complete. The seller can charge what the market will bear with little or no concern for the prices of rivals. This is the textbook description of a monopolist. Must have programming assets, like top four rated local television stations and RSNs, do not compete with other cable networks or with other top rated stations and RSNs, because an MVPD must include all of this programming in its channel lineup in order to compete effectively with rivals in the downstream market. Differences across geographic markets in prices, terms, and conditions for must have programming that cannot be explained by downstream competitive considerations must therefore be presumed to be due to monopolistic considerations in the upstream market.

9. Put another way, a difference in prices paid by MVPDs due to an insistence by a common owner on bundling a must have retransmission consent agreement with an RSN carriage

agreement is due to a consolidation of monopoly power holding competitive considerations constant. Consider two hypothetical geographic markets for retransmission rights. Suppose the markets are served by similar MVPDs, including a local cable TV company and two national direct broadcast satellite TV companies. Suppose the two subscriber populations have similar tastes for programming, including for the top rated local television stations and the local RSN. And suppose the local broadcast stations in the two markets have similar ratings. In both markets, the must have local television station signals and the RSN have no good substitutes, and pricing of these products therefore reflects a substantial amount of market power, or monopoly power. The only significant difference is that, in one of the two markets, a top local broadcast station and the RSN are under common ownership. This is a difference in monopolistic marketplace considerations. Common ownership consolidates monopoly power by replacing two single-product monopolies with one two-product monopoly.

10. In summary, a difference in prices resulting from the bundling of the retransmission rights for a must have local broadcast station with the carriage rights for a same market RSN is due to a consolidation of monopoly power, rather than a sensible economic meaning of competitive marketplace considerations. From an economic perspective, it is sensible to interpret competitive marketplace considerations in this context to refer to differences in downstream MVPD market structure and conduct, such as differences in concentration, channel lineups, and technology, but not to differences in the ownership of must have programming. In other words, common ownership of must have programming is not a competitive marketplace consideration, because it is a difference in upstream market structure that increases monopoly power by enabling the common owner to pursue a bundling strategy that raises prices.

C. Bundling of must have programming raises fees to MVPDs by increasing market power and bargaining leverage.

1. It is well understood in the economics literature that bundling can be a profitable strategy for a two-product monopolist, ever since Nobel laureate George Stigler's seminal article on the block-booking of movies.[15] The subsequent literature on the subject distinguishes between mixed bundling, under which products are offered for sale both separately and at a package discount, and pure bundling, under which only the package is offered for sale. Insistence by a broadcaster on negotiating together the agreements for two must have programming assets is an instance of pure bundling.

2. The following simple example, patterned closely on Stigler's analysis, demonstrates how a programmer ("the seller") can profitably set a higher price to an MVPD ("the buyer") for a package of programming rights, compared to separate prices for the component rights. Assume that the seller is negotiating carriage rights with one of two different types of buyers. Each type of buyer has different valuations of the seller's programming: Type A would pay $8 per subscriber for RSN rights, and $2.50 for retransmission consent rights; Type B would pay $7 for the RSN rights, and $3 for retransmission consent rights. The seller is uncertain about the type of buyer he is dealing with and so assigns equal probability to each possibility. For simplicity, assume further that the seller has no incremental cost of providing the programming to the MVPD. Pricing separately, on the one hand, a profit-maximizing seller would charge $7 for the RSN rights, and $2.50 for the retransmission consent rights, for a total of $9.50. Higher prices are unprofitable on average because one or the other type of buyer would decline the offer. Pricing the carriage rights as a package, on the other hand, the seller charges $10, because both types of buyer are willing to pay

[15] *See* George Stigler, United States v. Loew's Inc.*: A Note on Block-Booking*, 1963 SUP. CT. REV. 152 (1963) (discussing the phenomenon of "block-booking"—offering only a combined assortment of movies to an exhibitor—in the context of antitrust law).

that amount. Therefore, in this example, package selling increases compensation by 5% compared to separate selling.

3. The example captures a bargaining situation in which a seller, in the course of negotiations, arrives at a firm price offer that the buyer can accept or refuse.[16] Importantly, the seller remains uncertain about the buyer's willingness-to-pay. This uncertainty is a source of bargaining power for the buyer, because a buyer that places has a high value on the seller's goods can pretend that it has a low value. Thus, under the separate selling example above, the Type A buyer gains a $1 profit on RSN carriage (only pays $7 when willing to pay $8), and the Type B buyer gains a 50-cent profit on retransmission consent of the television signal (only pays $2.50 when willing to pay $3). What limits the market power of the seller is a fear that the buyer's value is in fact low, and the buyer will walk away from a deal if the price is too high. The example shows that the demand of the buyer is less sensitive to the price of each individual good when the rights are sold as a package, enabling the seller to raise the package price with less risk that the buyer will refuse the offer. In economics jargon, bundling reduces the price elasticity of demand. The buyer has less bargaining power, because both types are willing to pay a higher price for the bundle, and accordingly the buyer's profit from the transaction is less.

4. The example captures well the concept of must have programming. Under separate selling, the programming is so valuable (relative to incremental cost) that the programmer prices the rights just low enough to secure the agreement of both types of buyers. Under bundling, the buyer and seller successfully negotiate the same carriage rights as under separate selling, but at a higher total price.

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[16] For the purposes of interpreting this and other examples with reference to the FCC's good faith bargaining standards, "price" should be interpreted to encompass any form of consideration, including possibly different combinations of fees, advertising revenue, or carriage of affiliated programing. The FCC has determined that good faith bargaining requires a broadcaster to consider alternative forms of consideration, but "does not, in any way, require a broadcaster to reduce the amount consideration it desires for carriage of its signal by MVPDs." 2000 Good Faith Order, ¶ 43.

5. An extension of the market power example shows how increased market power due to bundling can result both in a higher price and in less carriage of programming. Suppose a market where a single firm (the "seller") owns a top four rated broadcast station and an RSN, and is negotiating carriage rights with an MVPD (the "buyer"). The seller knows certain information about the buyer and the market, but nevertheless remains uncertain about how much the buyer is willing to pay for carriage rights. In this hypothetical, from the seller's perspective, the buyer might value the retransmission rights for the broadcast station anywhere between $2.50 and $3.00 at 10-cent increments, and value the RSN rights at 10-cent increments between $7 and $8. All combinations are equally possible, i.e. there are 121 equally likely types of buyers. On the one hand, the seller still would charge $2.50 for retransmission consent and $7 for RSN rights if each were offered for sale separately, because even a 10 cent increase for either product would reduce revenue as buyer types with the lowest value for *one or the other product* walk away. On the other hand, the seller can profitably charge $9.60 for the bundle instead of $9.50, because only a single buyer type, the one with the lowest possible values for *both products*, would refuse the offer.[17] Thus the lower price elasticity of demand under package pricing increases monopoly power, resulting in both a higher price and less carriage.

6. A noteworthy feature of this example is that separate negotiations always succeed, while bundled negotiations may not. Under bundled negotiations, the seller anticipates that a buyer with the lowest values for both products will refuse the seller's price offer for the bundle. In other words, bundling increases the probability that negotiations fail because, despite the must have nature of both types of programming, MVPDs sometimes simply are not willing to pay the monopoly price for the package, and thus will withdraw from negotiations.

[17] The seller trades off the loss from not selling to a single type of buyer with the gain of charging all other types 10 cents more. Under bundled selling, expected profit at the higher total price is the probability (120/121) times $9.60, or $9.52, which exceeds the $9.50 per subscriber earned under separate selling.

7. In the above examples, a buyer's demand for retransmission rights is assumed to be independent of the buyer's demand for RSN rights. That is, the buyer's willingness to pay for the retransmission rights is the same whether or not it carries the RSN; similarly, the buyer values RSN carriage independently of retransmission consent. Similar conclusions would follow if the broadcast station and the RSN were partial substitutes, in the sense that the buyer's value for the television station decreases if the RSN is also carried.

8. The next example relies on an alternative bargaining model, Nash bargaining, to show how a programmer gains additional bargaining leverage by combining negotiations for carriage rights that are partial substitutes. The Nash bargaining model assumes that the buyer and seller have a common knowledge of the buyer's values for retransmission consent rights and RSN rights, and, with equal bargaining power, split the incremental joint value of a negotiated transaction.[18] Assume the total price that the buyer is willing to pay for the bundled broadcast station and RSN is $10 if the buyer carries both the broadcast station and the RSN, but $3.50 if it carries only the broadcast station, and $7 if it carries only the RSN. The reason that the sum of standalone values exceeds the total $10.00 value is the partial substitutability of the programming, meaning that retransmission consent is less valuable if the RSN is carried also ($10.00-$7.00 = $3.00) than if the RSN is not carried ($3.50) and the RSN is less valuable if the broadcast station is also carried ($10.00 - $3.50 = $6.50) than it would be if the broadcast station is not carried as well ($7.00).[19] Assuming that seller's incremental cost of supplying any of the programming to the

[18] This example is similar to the one presented by William Rogerson, current Professor of Economics at Northwestern University and former FCC Chief Economist, and elsewhere in various FCC proceedings. The key economic issue is similar: Does combining negotiations over two must have programming assets that are partial substitutes raise prices? *See* Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, Comments of the American Cable Association, Appendix A, William P. Rogerson, COORDINATED NEGOTIATION OF RETRANSMISSION CONSENT AGREEMENTS BY SEPARATELY OWNED BROADCASTERS IN THE SAME MARKET (filed May 27, 2011).

[19] Although carriage of the broadcast station and the RSN may each be very highly desired by the MVPD and its customers, after securing the rights to one of the programming assets, the operator's need to carry the other programming asset would be somewhat less because its customers would have at least one of the two highly desired programming assets to watch, and would adjust their viewing habits accordingly.

buyer is $0 (that is, the seller conceivably is willing to sell at $0), the buyer and seller negotiate a price that divides the incremental value equally between them. In other words, both parties settle on a price that is halfway between the seller's floor and the buyer's ceiling. Thus, under separate negotiations, the buyer and seller settle on prices of $1.50 (half of $3.00) for the retransmission agreement and $3.25 (half of $6.50) for the RSN agreement, for a total price of $4.75. Under bundled negotiations, the agreed package price is $5 (half of $10.00), or 5% higher compared to the sum of separate prices.

9. In this example, the seller has greater bargaining leverage under bundled negotiations due a threat to withhold *both* retransmission rights and RSN rights, thus penalizing the buyer $5 should negotiations fail. Withholding only retransmission consent under separate negotiations penalizes the buyer $1.50, and withholding only RSN carriage penalizes the buyer $3.25. The greater penalty for a failure to reach agreement on the package increases bargaining leverage and enables the seller to negotiate a better deal.

10. The theory of increased bargaining leverage from bundled negotiations based on the Nash bargaining model requires that retransmission consent rights and RSN rights are partial substitutes, in the sense that the value of retransmission consent is greater if the MVPD does not carry the RSN. This might be the case, for example, if the withdrawal of the RSN causes viewers to substitute toward sports programming carried by the television station. Such partial substitutability does not necessarily conflict with the proposition that an RSN is must have programming, because the withdrawal of the RSN might still cause a large number of subscribers to switch to other MVPDs who do carry the RSN.

11. Although based on different bargaining models, the market power and bargaining leverage examples reach the similar conclusion that a bundled negotiation for two must have goods raises prices compared to separate negotiations. Both bargaining models are standard tools in applied economic analysis, because each captures a balance of bargaining power in a simple and

tractable manner. One difference is that the theory of increased market power, based on a bargaining model in which the seller makes offers that the buyer accepts or rejects, does not require an assumption of partial substitutability.

12. Bundling of must have programming can impair the performance of MVPD markets. In general, bundling by a multiproduct monopolist might improve economic welfare due to market expansion resulting from a discount of the bundle price relative to the sum of monopoly prices of the separately sold goods. This is not the case with must have goods, because the market is already fully covered, leaving no room for expansion. In the case of must have programming, bundling is likely to raise carriage fees or other consideration charged to MVPDs due to the market power and bargaining leverage effects of bundling. To the extent these higher programming fees are passed on to final consumers in higher subscription fees, the ultimate effect would be to contract the downstream MVPD market, as more consumers forgo MVPD service, or to distort consumer choice in the downstream MVPD market, as some consumers switch to otherwise less preferred MVPDs.

D. Sequential bargaining improves the performance of MVPD markets.

1. To counteract the augmented monopoly power of bundled negotiations for a commonly owned must have local television station and an RSN that serves the same market, the FCC need not require common owners to make standalone retransmission consent offers that are subject to review by the Commission to determine whether they are reasonable. The FCC can address the problem more simply. It can deem a common owner's unwillingness to sequentially negotiate the carriage contracts, for a broadcast station and RSN that serve the same market and have expiration dates around the same time, by granting a temporary extension of an existing retransmission consent agreement, or by taking other steps to avoid simultaneous negotiations, to be a violation of the Commission's good faith rules.

2. One solution to addressing concerns surrounding the bundling of a top rated broadcast station and RSN that serve the same market and have common contract expirations is to

deem the unwillingness of a common owner to negotiate a standalone retransmission consent agreement to be an act of bad faith under the retransmission consent rules. However, there is no easy way to guarantee that separate but simultaneous negotiations are not tacitly linked. An offer as part of a separate negotiation could be set at artificially high prices to push the MVPD into accepting a bundled offer. As a result, the Commission would therefore need to also deem the failure to of a common owner to negotiate standalone retransmission consent agreements at *reasonable*, prices, terms, and conditions to be a violation of the good faith rules. This would thrust the Commission into judging whether separate standalone offers are reasonable.[20]

3. A more practical and simpler antidote for the augmented monopoly power from common ownership of a must have local television station and an RSN is to presume that a common owner's refusal to negotiate the two carriage agreements sequentially rather than simultaneously is a violation of good faith. This approach does not require complainants or the Commission to conduct an econometric analysis of whether a standalone offer is reasonable or not. Moreover, sequential negotiations solve the tacit linkage problem associated with only requiring separate negotiations when existing carriage agreements for the broadcast station and RSN are co-terminus.

4. To demonstrate the salutary effects of sequential rather than simultaneous negotiations, I return to the extended market power example with 121 different possible types of buyer. Specifically, the buyer is equally likely to value retransmission rights at 10-cent increments between \$2.50 and \$3.00, and equally likely to value RSN rights at 10-cent increments between \$7 and \$8. With simultaneous bargaining, as explained above, seller would offer \$9.60 for the bundle

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[20] A sensible method for assessing the reasonableness of a standalone offer might be to examine whether the terms and conditions offered to the MVPD are comparable to those that are offered or would be offered to a similarly situated MVPD in a similarly structured market, except that retransmission consent is negotiated independently from carriage of an RSN or other must have programming. Appropriate economic evidence might include, for example, an econometric analysis of price differences controlling for differences in competitive conditions across MVPD markets. However, the widespread use of nondisclosure agreements may prevent complainants, particularly smaller MVPDs from having the data necessary to make a *prima facie* case, and limit the Commission's ability to conduct an accurate assessment of the reasonableness of a standalone offer.

of rights, and the buyer would agree to the offer 120/121 per cent of the time. Only the buyer type with the lowest possible values for *both* products would decline the bundled offer. For such an unlucky buyer, the negotiation is not in good faith, because the seller understands that this buyer type would decline, but is willing to accept a low risk of loss in order to gain greater compensation most of the time.

5. In comparison, consider a bargaining protocol in which a retransmission consent agreement is negotiated only after RSN negotiations are done. Applying the usual method of game theory, the sequential bargaining problem is solved by backward induction in several steps. First, suppose an RSN agreement has been reached already, and the buyer and seller are negotiating an agreement for retransmission consent. In this case, the seller is willing to offer the broadcast television signal additionally at a price of $2.50, the minimum willingness to pay of the buyer. Second, since by assumption the demand for retransmission consent is independent of the demand for RSN carriage, exactly the same deal for retransmission consent would be struck in the opposite case in which the buyer and seller failed earlier to reach an RSN agreement and had terminated further negotiations for RSN carriage. Thus the first two steps of the argument imply that it is rational for both the buyer and seller to expect to reach a retransmission consent agreement at a price $2.50. Third, suppose the buyer and seller are negotiating the RSN agreement, and rationally expect in the future to reach a retransmission consent agreement at a price of $2.50. Then the seller would offer and the buyer would accept a price of $7 for RSN rights, which is the minimum willingness to pay of the buyer. Thus the sequential bargaining outcome is the same as if must have retransmission consent and must have RSN carriage were negotiated separately by independent owners.

6. Sequential bargaining based on the Nash bargaining model, in which retransmission consent and RSN carriage are partial substitutes, yields the same conclusion. Consider again the bargaining leverage example, but suppose the RSN negotiation is conducted before the

retransmission consent negotiation. The value of retransmission consent is $3.00 if the RSN negotiation is successful, and $3.50 if not. That is, a successful RSN renegotiation reduces the incremental value of retransmission consent by 50 cents. The 50 cents is an opportunity cost of reaching an RSN agreement. The value of the RSN agreement is $7.00, assuming a subsequent retransmission consent agreement. Subtracting the 50 cents opportunity cost gives net incremental value of $6.50 for RSN carriage, which a price of $3.25 divides equally. The subsequent retransmission agreement then splits an incremental value of $3.00 with a price of $1.50. Again the sequential bargaining outcome is the same as if independent owners negotiated retransmission consent and RSN carriage separately.

7. Separate negotiations for carriage rights may be elusive in cases where existing contracts for each of the must have programming assets expire on or near the same date. This problem can be solved by requiring a common owner of the assets to bargain sequentially with an MVPD by granting an extension of the existing retransmission consent agreement until the parties have either completed a new carriage agreement for the RSN or other must have programming, or the negotiations have come to a legitimate impasse. Alternatively, the seller could allow the MVPD to opt-in to a previously negotiated retransmission consent agreement for an O&O television station signal.[21] A common owner's willingness to commit to either of these options could offer a defense against a good faith complaint brought on the basis of a refusal to negotiate separately.

E. Summary and conclusions.

1. I considered from an economic perspective the following question: How should bundling of a top rated broadcast station with an RSN be treated under the good faith bargaining rules of retransmission consent?

[21] For example, the National Cable Television Cooperative (NCTC) is a group purchasing organization that currently negotiates an agreement with NBC for retransmission consent of O&O stations. Members of NCTC can opt-in to this retransmission consent agreement as part of a bundle that includes carriage of NBC national cable networks.

2. In considering this question, I argued the following points:

- A difference in MVPD retransmission consent terms and conditions due to bundled negotiations for must have programming between otherwise similar MVPD markets is not based on competitive marketplace considerations. Using a standard economic framework for describing market conditions, I explain that competitive marketplace considerations for negotiations involving must have retransmission consent sensibly refers to differences in downstream MVPD market structure, such as the number and size of firms, product differentiation, technology and consumer demand, and to differences in downstream market conduct, such as pricing, service and advertising. Common ownership of must have programming is not a competitive marketplace consideration, because it is a difference in upstream market structure that increases monopoly power by enabling the common owner to pursue a bundling strategy that raises prices. Proposals for greater compensation based on the common ownership of multiple must have programming assets are based on monopolistic rather than competitive marketplace considerations.

- Bundling must have retransmission consent with a carriage agreement for an RSN results in higher carriage fees or other consideration. I demonstrated with examples based on two standard bargaining models how bundled negotiations for must have goods raise prices because of increased market power and greater bargaining leverage.

- MVPD market performance would be improved if must have local television stations were obliged to negotiate retransmission consent agreements separately from RSN carriage agreements. I built on the same examples to show how sequential versus simultaneous bargaining attenuates the augmented market power otherwise resulting from the common ownership of two must have programming assets.

3. Based on these arguments, and on FCC determinations about must have programming, I conclude that proposals that bundle retransmission consent for top four local

television station signals with RSN carriage rights ought not be deemed presumptively consistent with competitive marketplace considerations. Consumers are harmed by higher prices resulting from the enhanced market power and the greater bargaining leverage that bundling affords in this case. Abandoning the good faith presumption if a broadcaster is unwilling to negotiate separate agreements for commonly owned must have programming seems a light-handed regulatory remedy. In the case of a top four broadcast television station and an affiliated RSN, the FCC ought to treat a broadcaster's refusal to extend an existing retransmission consent agreement pending completion of otherwise concurrent affiliated RSN negotiations as evidence of bad faith in evaluating the totality of circumstances. However, the FCC should permit an owner of both a top four broadcast station and a regional sports networks to defend its refusal by demonstrating that it is allowing an MVPD to opt-in to a retransmission consent agreement previously negotiated by its purchasing group.

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"A Stackelberg Solution to the Public Goods Problem," with Jacques Cremer, CARESS Working Paper #82-12, University of Pennsylvania, November 1982.
"Price Regulation with Asymmetric Information," manuscript, University of Pennsylvania, April 1982.
"Bilateral Contracts and Asymmetric Information," CSOI Discussion Paper #124, University of Pennsylvania, January 1982.
"Credit-Labor Transactions with a Dominant Landlord: A Theoretical Note," with Pranab Bardhan, manuscript.

PRESENTATIONS AT CONFERENCES AND PROFESSIONAL MEETINGS

"Cybersecurity, Industrial Organization, and Competition Policy," keynote address, CRESSE Conference on Advances in the Analysis of Competition Policy and Regulation, Corfu, July 2014

"Outsourcing, Vertical Integration, and Cost Reduction".

- MaCCI Summer Institute in Competition Policy, Schloss Gracht, Germany, June 2014
- Workshop of Public Private Collaboration, IESE Business School (Barcelona), May 2013
- Canadian Economics Association Conference, Montreal, May 2013
- KICK Off Workshop, Dusseldorf Institute for Competition Economics, June 2013.

"Procurement, Cost Reduction and Vertical Integration," Industrial Economics Conference, Zhejiang University, June 2011.

"Economics of Bundling," Workshop on Law and Economics, Hitotsubashi University, March 2010.

"Preferences, Prices and Products: Monopoly and Duopoly in a Discrete Choice Product Differentiation Model," Industrial Organization Conference, Marbella, Chile, December 2009.

"Equilibrium Product Selection," IO Day Conference, NYU, September 18, 2009.

"Equilibrium Product Selection," Summer Workshop on Antitrust Economics and Competition Policy," Shanghai University of Finance and Economics, June 20-21, 2009.

"Quality Competition and Multiple Equilibria," 27th Australasian Economic Theory Workshop, Massey Unviersity, February 20-21, 2009.

"Equilibrium Product Selection," Fifth Summer Workshop in Industrial Organization," University of Auckland, February 27-28, 2009.

"Universal Service Reform" (keynote lecture), Fourth Conference on Regulation, Competition and Universal Service in the Postal Sector, Institut d'Economie Industrielle (IDEI),Toulouse, March 16-17, 2006.

"Product Improvement and Technological Tying in a Winner-Take-All Market," Conference on Economics in Competition Policy, Canadian Competition Bureau, Ottawa, April 27-28, 2006.

"Quality Competition in a Winner-Take-All Market," Conference in Celebration of Jim Friedman's 70th Birthday, Duke University, November 4-5, 2006.

"Competitive Effects of Vertical Integration," LEAR Conference on Advances in the Economics of Competition Law, Rome, June 23-25, 2005.

"Price and Variety in the Spokes Model," Summer Workshop on Industrial Organization and Management Strategy, Tsinghua University, Beijing, June 8-9, 2005.

"Low Income Demand for Telephone Service: The Effects of Lifeline and Linkup," International Industrial Organization Conference, Atlanta, April 9-10, 2005.

"Vertical Integration, Exclusive Dealing, and Ex Post Cartelization," International Industrial Organization Conference, Atlanta, April 9-10, 2005.

"Ain't It Suite: Bundling in the PC Office Software Market," 18th Summer Conference on Industrial Organization, University of British Columbia, Whistler, July 9-10, 2004.

"Predatory Pricing: Strategic Theory and Legal Policy," Conference on Use of Economics in Competition Law, London, March 11-12, 2004.

"Vertical Integration, Exclusive Dealing, and Ex Post Cartelization," Duke-Northwestern-Texas IO Theory Conference, Evanston, October 18-19, 2003.

"Low Income Demand for Telephone Service: The Effects of Lifeline and Linkup" Telecommunications Policy Research Conference, September 2003.

"Competitive Local Exchange Services," Conference on Regulatory Reforms in Telecommunications, Moscow, Russia, June 27-28, 2003.

"Vertical Integration, Exclusive Dealing and Cartelization," Workshop on Antitrust and Regulation, Padua, Italy, April 2003.

"Industrial Organization and Corporate Finance," keynote address, First Annual International Industrial

Organization Conference, Boston, April 2003.
"Competitive Effects of Vertical Mergers," plenary session (invited), E.A.R.I.E. Conference, Madrid, Spain, September 2002.
"Product Improvement and Technological Tying," Theoretical Industrial Organization Conference, University of Texas, May 2002.
"An Economist's Perspective on Universal Residential Telephone Service," 27th Annual Telecommunications Policy Research Conference, Alexandria, VA, September 25-27, 1999.
"Universal Residential Service: An Economist's Perspective," London Business School Conference, April 1999.
"Dynamics of Price Regulation," with Gary Biglaiser, Tel Aviv University Mini-Conference on Antitrust and Regulation, May 26, 1999.
"Estimation of a Production Process for Health Care Treatment: A Preliminary Analysis," NBER Productivity Workshop, December 1998.
"Dynamics of Price Regulation," with Gary Biglaiser, Telecommunications Policy Research Conference, Washington D.C., September 1988.
"Dynamics of Price Regulation," with Gary Biglaiser, European Summer Symposium in Economic Theory, Gerzensee, Switzerland, June 29-July 10, 1998.
"Predatory Pricing: Strategic Theory and Legal Policy," with Patrick Bolton and Joseph Brodley, European Summer Symposium in Economic Theory, Gerzensee, Switzerland, June 29-July 10, 1998.
"The Transition to Competition," with Gary Biglaiser, European Summer Symposium in Economic Theory, Gerzensee, Switzerland, June 29-July 10, 1998.
"The Transition to Competition," with Gary Biglaiser, Conference on Regulation and Competition in Network Industries, Barcelona, Spain, June 5-6, 1998.
"Anticompetitive Vertical Integration by a Dominant Firm," Summer Conference on Industrial Organization, University of British Columbia, Vancouver, July 11-12 1996.
"Anticompetitive Vertical Integration by a Dominant Firm," Economia Industrial Conference, Universidad Carlos III de Madrid, Spain, July 3-5 1996.
"Predation in a Learning Curve Model," Conference on Networks and Competition, October 20-22, 1994, Institute d'Economie Industrielle, Toulouse, France.
"Predatory Pricing in New Markets," Charles River Associates' Conference on "Antitrust in Today's Economy," Boston, April 1994.
"Learning to Compete and Vice Versa," Carleton Industrial Organization Summer Conference, July 1992.
"Competition in Banking: A Theoretical Perspective," CEPR Conference on Financial Intermediation and the Reconstruction of Europe, San Sebastian, Spain, March 1992.
"Learning to Compete and Vice-Versa," Econometric Society Meetings, January 1992.
"Preemptive Adoption of New Technologies," Telecommunication Policy Research Conference, September 28-30, 1991, Solomon's Island, MD.
"Regulation and Preemptive Technology Adoption: Cable TV versus Telephone Companies," Telecommunication Policy Research Conference, September 30-October 2, 1990, Airlie House, Warrenton, VA.
"Technology Adoption in a Regulated Duopoly," International Conference on Information, Incentive and Regulation, September 4-5 1990, Institute d'Economie Industrielle, Toulouse, France.
"Ownership Without Control: Toward a Theory of Backward Integration," ASSA Meetings, Atlanta, December 1989.
"Auditing and Investment Incentives in Procurement," ORSA/TIMS Meetings, New York, October 1989.
"Incentives for Cost Reduction in Defense Procurement," Conference on Incentives in Procurement Contracting, NBER, Cambridge, September 1989.
"Asset Specificity and Backward Integration," Summer Industrial Organization Workshop, Northwestern University, July 1989.
"Ownership Without Control: Towards a Theory of Backward Integration," Carleton Industrial Organization Summer Conference, Carleton University, Canada, July 1989.

"Asset Specificity and Vertical Integration," International Seminar on the New Institutional Economics, Universitat des Saarlandes, West Germany, May/June 1989.
"Contracting Out," Policy Forum on Public Sector Management, John Deutch Institute for the Study of Economic Policy, Queen's University, Canada, February 1989.
"Second Sourcing," with D. Sappington, Econometric Society Summer Meeting, University of Minnesota, June 1988.
"Hierarchical Control and Investment Incentives in Procurement," Econometric Society Summer Meeting, University of Minnesota, June 1988.
"What is Vertical Integration?," SCASSS Conference on The Firm as a Nexus of Treaties, Uppsala, Sweden, June 1988.
"Incentives for Cost Reduction Under Price Cap Regulation," with L. Cabral, CEPR Conference on Public Utility Regulation, Stanford University, April 1988.
"Commitment in Procurement Contracting," with D. Sappington, ORSA/TIMS Meeting, New Orleans, May 1987.
"Information, Incentives and Organizational Mode," with D. Sappington, Workshop on Incentives and Hierarchies, Birkbeck College, University of London, July 1986.
"Awarding Monopoly Franchises," with D. Sappington, Econometric Society Summer Meeting, June 1986, Duke University.
"Repeated Majority Voting," with D. Epple, Carnegie Conference on Political Economy, Carnegie-Mellon University, May 1986.
"Designing Procurement Contracts," Conference on Issues in the Economics of Defense Procurement, Rand Corporation, May 1986.
"Awarding Monopoly Franchises," with D. Sappington, Conference on Regulation and Information, Bell Communications Research, May 1986.
"Industry Structure with Sequential Technology Choice," with R. McLean, Conference on Games and the Theory of Firm Behavior, University of Western Ontario, May 20-21, 1985.
"Incomplete Information and Conjectural Variations," Econometric Society Summer Meeting, Stanford University, June 27-30, 1984.
"Information, Incentives and Vertical Contracting," with D. Sappington, CSOI/Sloan Conference on the Economics or Organization, University of Pennsylvania, June 13-14, 1984.
"Asset Specificity and Economic Organization," with O. Williamson, Eastern Economics Association Convention, New York, March 1984.
"Advertising as a Signal," with R. Kihlstrom, Econometric Society Meeting San Francisco, December 1983.
"Contracting in an Idiosyncratic Market," Econometric Society Summer Meeting, New York, June 1982.
"Advertising as a Signal," with R. Kihlstrom, NBER/KGSM Conference on Time and Uncertainty in Economics, Northwestern University, April 16-18, 1982.
"Optimal Contracts in an Idiosyncratic Market," Eastern Economics Association Convention, Washington, D.C., April 19 - May 1, 1982.

OTHER PROFESSIONAL ACTIVITIES

Editorial Advisory Board, *Review of Network Economics*, 2010-2015

Member, Scientific Advisory Board, International Journal of Industrial Organization, 2007–2012

Member, Board of Directors, New York Census Regional Data Center, 2004 –2012

- Finance Committee Member, 2008 – 2012
- Executive Committee Member, 2004-2005

Member, Census Committee, American Economic Association, 2007 – 2009

Co-chair, Universal Service Working Group, Digital Age Communication Act Project, Progress and Freedom Foundation, 2005-2006

Editor:
- Associate Editor, *Journal of the European Economic Association*, 2009 -2011
- Member, Board of Editors, *American Economic Review*, 1999-2004
- Co-Editor, *RAND Journal of Economics*, 1990-1997
- Associate Editor, *Quarterly Journal of Economics*, 1988-1997

Director, Industry Studies Program, Department of Economics, Boston University, 1990-1999

Program Committee:
- Econometric Society Meetings: Winter 2003, Winter 2000, Summer 1993, and Winter 1992
- Telecommunications Policy Research Conference: 1992 and 1993

Speeches and Panels:
- Panelist: "Addressing Cybersecurity," BRUEGEL, Brussels, June 5, 201
- Panelist: "Cyber-criminality," TIGER Forum, Toulouse, June 3, 2014.
- Seminar: "Cyber-criminality: Economic and Legal Issues,", Toulouse, June 2014
- "Competition, Innovation, and the Future of Postal Markets," invited presentation, La Poste, Paris, April 2013.
- Panel Discussion, Cornerstone Research New York Antitrust Forum, October 2008.
- Panel Discussion, "Investment and Competition in Network Industries," Toulouse School of Economics Inauguration, June 2, 2008.
- Panel Discussion, "Structural Separation in Dynamic Markets: Lessons for the Internet, Lessons for Europe," Conference on The Enduring Lessons of the Breakup of ATT&T: A Twenty-five Year Perspective, University of Pennsylvania Law School, April 18-19, 2008.
- Panel Discussion, Symposium on Telecommunications Regulation, USC, Annenberg Center for Communication, Oct. 13, 2006
- Panel Discussion, "Procurement Options," CITI Conference on Wireless Communications and Universal Service, Columbia University, December 2005.
- Panel Discussion, "DACA Working Group Proposal on Universal Service Reform," Progress and Freedom Foundation, Washington D.C., December 7, 2005.
- Panel Discussion, "Marketplace Reality Check: The Rhetoric and Reality of Universal Service," Conference on Universal Service Policy - Challenges and Opportunities for a New Telecom Act (Center for the New West), Washington, D.C., April 22, 2005.
- Panel Discussion, "Universal Service," Silicon Flatirons Conference on Universal Service and E-911 Policy in an Age of Convergence, University of Colorado School of Law, October 21, 2004.
- "Universal Broadband: Can We Get There, and How?" Presentation to Congressional staff, sponsored by Georgetown University, McDonough School of Business, October 18, 2004.
- "Competitive Local Exchange Service," FCC Chief Economists Conference, Georgetown, October 17, 2003.
- Panel Discussion, "Entering the Debate, Influencing the Agenda, Continued," Telecommunications Policy Research Conference, Alexandria, VA, September 2002
- Panel Discussion, "Why Close the Digital Divide?," CITI Conference, Columbia University, June 2001.
- "Conundrums for Telecommunications Policy," National Economists Club, Washington, D.C., May 28, 1998.
- Roundtable Discussion, IOS/PIEP Mini-Conference: Making Microeconomic Policy, George Washington University, Washington, D.C., June 9, 1999.
- "FCC Merger Policy," CRA Conference on "Economists' Perspectives on Antitrust Today," Boston, Mass., April 30, 1998.

“FCC Merger Policy: The Bell Atlantic - NYNEX Order,” 1998 Spring Meeting of the NARUC Staff Subcommittee on Accounts, San Diego, March 17, 1998.

“The Regulation of Privatized Industries,” conference organized by British Embassy in Mexico, the World Bank, and the Secretariat of Trade and Industrial Development in Mexico, Mexico City, December 1997.

“The Transition to Competition,” AICGS Conference on “Telecommunications Reform in Germany: Lessons and Priority,” Bonn, Germany, November 19-20, 1997.

“Market Power: Mergers, Acquisitions and Deregulation,” National Association of Regulatory Utility Commissioners Convention, Boston, Mass., November 11, 1997.

FCC Panel, Janney Montgomery Scott Telecommunications Regulation Conference, Boston, Mass., November 11, 1997.

“Mobile Communications: Lessons Learnt from the U.S.,” ACI Mobile Communications Conference, Sydney, Australia, September 24-25, 1997.

“The Interplay Between Antitrust and Intellectual Property Protection,“ Antitrust conference sponsored by Business Development Associates, Washington, DC, March 1995.

Session on "Information Markets and Firms," Global Communications Forum, Tokyo, Japan, October 30-31, 1991.

Invited Lectures:

“Telecommunications Regulation in the United States,” Harvard Institute for International Development, July 1998.

"The Theory of Contracts," Tel Aviv University, Israel, May-June 1994.

"The Theory of Contracts," Center for the Study of the New Institutional Economics, Universitat des Saarlandes, West Germany, August 1992.

"Economics and Law of Incomplete Contracts," Center for the Study of the New Institutional Economics, Universitat des Saarlandes, West Germany, July-August 1990.

"Incomplete Contracts, Renegotiation and Ownership," Faculdade de Economia, Universidad Nova de Lisboa, Portugal, May-June 1990.

"The Regulation of Monopolies," Conference on Regulation: U.S. Experiences, CERES, Montevideo, Uruguay, August 1989.

"Information and Coordination in the Enterprise and the Economy," People's University of China, Beijing, July 1987.

"Contracting with Asymmetric Information," Universidad Autonoma de Barcelona, March 1987.

Conference Organizer:

14th Annual Columbia-Duke-Northwestern Theoretical Industrial Organization Conference, December 2015 (with Andrea Prat).

10th Annual Columbia-Duke-Northwestern Theoretical Industrial Organization Conference, November 2011 (with Patrick Bolton, Yeon-koo Che, Marina Halac, and Navin Kartik).

"Conference on Industrial Organization of Health Care”, Boston University, 1993 (with Thomas McGuire) and 1995 (with Albert Ma and Thomas McGuire).

“Regulating Diverse Competitors,” with Michael Salinger and Ingo Vogelsang, Telecommunications Policy Forum, Boston University, May 1995.

"A Vision of Telecommunications Market Structure," with Michael Salinger and Ingo Vogelsang, Telecommunications Policy Forum, Boston University, May 1994.

"Conference on the Economics of Organization," with David Sappington and Pablo Spiller, University of Pennsylvania, June 1984.

Referee: *American Economic Review*; *Bell Journal of Economics*; *B.E. Press*; *Information, Economics and Policy*; *Economica*; *Econometrica*; *Economic Inquiry*; *Economic Journal*; *Economic Letters*; *European*

Economic Review; *Quarterly Journal of Economics*; *International Economic Review*; *International Journal of Industrial Organization*; *Journal of Economic Behavior and Organization*; *Journal of Economics and Management Strategy*; *Journal of the European Economics Association; Journal of Industrial Economics*; *Journal of the Japanese and International Economies*; *Journal of the European Economic Association*; *Journal of Law, Economics and Organization*; *Journal of Labor Economics*; *Journal of Political Economy*; *Journal of Public Economics*; *RAND Journal of Economics*; *Review of Economic Studies*; *Review of Industrial Organization*; *Scandinavian Journal of Economics*; *Journal of Economics and Management Strategy*; *Journal of Public Economics*.

Reviewer: Academic Press; M.I.T. Press; National Science Foundation; Oxford Economic Press; University of Chicago Press.

Member: American Economic Association, Econometric Society.

Consulting: American Cable Association, AOL-Time Warner, Charles River Associates, Communication Workers of America, Conmed Corporation, Department of Justice, Federal Trade Commission, New Zealand Commerce Commission, RIAA, SESAC, Vodafone.