

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Implementation of Section 103 of the STELA
Reauthorization Act of 2014

Totality of the Circumstances Test

MB Docket No. 15-216

REPLY COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

Mike Chappell
THE AMERICAN
TELEVISION ALLIANCE
1155 F Street, N.W.
Suite 950
Washington, DC 20004
(202) 333-8667

Michael Nilsson
William M. Wiltshire
John R. Grimm
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
The Eighth Floor
Washington, DC 20036
(202) 730-1300
*Counsel for the
American Television Alliance*

January 14, 2016

SUMMARY

The public interest. When broadcasters seek to protect their favored regulatory status, they seem to talk about nothing else. They even recently launched an entire website devoted to chronicling the ways in which broadcasters fulfill their public service mission. It says things like this: “Broadcasters’ dedication to helping their communities is what sets them apart from other mediums Stations take seriously their responsibility to serve the public and are licensed by the federal government to use the airwaves for the greater good.”

In this proceeding, however, broadcasters sing a very different tune. They cast themselves as everyday marketplace actors who are entitled to be free from government interference. They say things like this: “Broadcasters have no legal or regulatory duty to make their programming available to MVPD subscribers” They even claim a right under copyright law “*arbitrarily* to refuse” to deal with MVPDs. If MVPDs fail to meet their demands and viewers lose local programming, say the broadcasters, that is just too bad.

Broadcasters, however, are not everyday market actors. Rather, they have willingly—indeed, eagerly—undertaken public interest obligations in exchange for special regulatory privileges. Among those obligations is a special, particular duty to negotiate in good faith that requires them to act more responsibly than ordinary market participants. That is why Congress created the good faith rules in the first place. And that is why the Commission can and should act now to address escalating abuse.

Broadcasters cannot credibly deny their abuse—the facts exist for all to see. Instead, they make various attempts at misdirection, arguing that the Commission cannot or should not act. None has merit.

First, broadcasters argue that the Commission lacks authority to issue new rules. Some even argue that Congress merely permitted the Commission to “commence a review” of its good faith rules. Congress’s actual words, however, instructed the Commission to “commence *a rulemaking* to review its totality of the circumstances test.” By definition, then, if the Commission finds that the record supports changes to that test, it possesses authority to make such changes.

Second, broadcasters argue that they lack market power—and, indeed, that *MVPDs* possess market power in their dealings with broadcasters. We cannot square such claims with the 40 percent *annual* price increases imposed by broadcasters. Nor can we square them with the increasing number of broadcaster blackouts. In the 45 days since ATVA filed its initial comments, broadcasters have blacked out their signal *18 times*, including one of Michigan viewers while the University of Michigan football team played its bowl game on New Year’s Day. Broadcasters may suggest that blackouts do not harm viewers, but viewers know better. *They* say things like this: “I am afraid as right now I have no local news. What if there is a real security issue for the nation or my local area? I will not know. This leaves me very vulnerable.”

Third, broadcasters argue that ATVA’s specific proposals are unwise, unlawful, or affirmatively harmful. We disagree. Broadcasters’ claims that the First Amendment and the Copyright Act preclude the Commission from addressing online blocking ring especially hollow. To the extent that an online blocking restriction implicates “speech” at all, it easily satisfies intermediate scrutiny. As for the Copyright Act, *all* of the good faith rules “impinge” (to use the broadcasters’ term) upon copyright privileges broadcasters would otherwise have. That is what the good faith requirement is—a restriction on the rights of broadcasters and MVPDs to deal

“arbitrarily” with each other. Applying this everyday principle to online blocking would be nothing new.

The Commission has both the authority to adopt meaningful reforms and more than ample reason to do so. ATVA urges the Commission to seize this opportunity to restore the public interest to its rightful place at the heart of the retransmission consent regime.

TABLE OF CONTENTS

I. The Broadcasters Ignore Their Public Interest Obligations.	2
II. The Public Interest Obligations That Broadcasters Have Undertaken Animate The Authority Congress Gave The Commission To Implement The Good Faith Rules.....	5
III. Broadcasters’ Claims That The “Market Is Working” Ignore Both The Facts And The Bargain Broadcasters Have Made With The Public.	10
A. MVPDs Lack Sufficient Leverage To Prevent Unsustainable Price Increases.	13
B. MVPDs Lack Sufficient Leverage To Prevent Harmful Blackouts.....	15
IV. ATVA’s Proposals Will Benefit The Public.	19
A. Congress Authorized The Commission To Restrict Online Blocking.....	21
B. Antitrust Law Cannot Prevent Harm From Forced Bundling Of Broadcast Programming.....	26
C. The Commission Can Easily Enforce A Prohibition On Blackouts Prior To Marquee Events.....	28
D. Broadcasters Concede That Limitations On Ceding Negotiation Rights Can Help The Public.	30
E. Broadcasters Present No Valid Basis Upon Which To Restrict Lawful Technology....	31
F. Temporary Importation Of Distant Signals Will Help Reduce The Harm From And Frequency Of Blackouts.	32
G. Preventing Broadcasters From Charging For Non-Subscribers Will Serve The Public.	34

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Implementation of Section 103 of the STELA
Reauthorization Act of 2014

Totality of the Circumstances Test

MB Docket No. 15-216

REPLY COMMENTS OF THE AMERICAN TELEVISION ALLIANCE

The American Television Alliance (“ATVA”) hereby responds to the comments of broadcasters and their trade associations seeking to prevent modernization of the Commission’s good faith negotiation rules.¹ In these reply comments, ATVA will show that:

1. Broadcasters’ comments ignore the public interest obligations that they have freely undertaken.
2. Broadcasters’ obligations to the public animate the authority that Congress gave the Commission to implement good faith rules.
3. Broadcasters’ claims that the “market is working” ignore both the facts and the public-interest obligations they have undertaken.
4. ATVA’s proposed changes will help ensure that broadcasters fulfill their obligations to viewers.

¹ *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd. 10327 (2015) (“Notice”).

I. THE BROADCASTERS IGNORE THEIR PUBLIC INTEREST OBLIGATIONS.

In its initial comments, ATVA described how broadcasters, often so quick to claim credit for public service, increasingly fail the majority of their viewers who watch them over cable, satellite, or IPTV.² It documented the increasing number of retransmission consent blackouts— affecting more than one in eight MVPD subscribers in the first ten months of last year alone.³ It pointed to unsustainable price increases.⁴ It described a litany of unacceptable negotiating behaviors by broadcasters.⁵ ATVA thus proposed general and specific solutions to enable the Commission’s good faith rules to protect the public more effectively.⁶

Broadcasters, for their part, want no changes whatsoever to the rules governing their behavior.⁷ Retransmission consent, they say, is “working.”⁸ Indeed, retransmission consent constitutes, in their words, “one of the great public policy accomplishments of the last twenty-five years.”⁹ These arguments come as no surprise. After all, why should broadcasters want to change rules that, by all accounts, have worked greatly to their benefit?¹⁰

² Comments of the American Television Alliance at 6 (“ATVA Comments”). Unless otherwise indicated, all comments referred to herein were filed in MB Docket No. 15-216 on December 1, 2015.

³ *Id.* at 7.

⁴ *Id.* at 14.

⁵ *Id.* at 22.

⁶ *Id.* at 37 *et seq.*

⁷ *E.g.*, Comments of the National Association of Broadcasters at 7 (“NAB Comments”); Comments of the ABC Television Affiliates Associations *et al.* at iii (“Affiliates Associations Comments”).

⁸ *E.g.*, Comments of Nexstar Broadcasting, Inc. at 4 (“Nexstar Comments”).

⁹ *Id.*

¹⁰ *E.g.*, Comments of Raycom Media, Inc. at 5 (“Raycom Comments”) (“The system Congress established has succeeded *in supporting local broadcasting* by allowing broadcasters and MVPDs to freely negotiate over the value the retransmission of broadcast signals provides to MVPDs.”) (emphasis added).

Out of the tens of thousands of words filed by the broadcasters urging the Commission not to act, however, one thing was conspicuously missing: any acknowledgement of their public interest responsibilities.¹¹ Everywhere else broadcasters go—when, for example, they seek to preserve the favorable regulatory treatment they have enjoyed for decades¹²—they place the public interest front and center. Indeed, broadcasters recently issued a “policy agenda” emphasizing their public interest obligations.¹³ After filing their comments, NAB ran ads in the trade press directing readers to a website devoted almost entirely to claiming credit for public service.¹⁴ In this regard, the comparison between their filings in this proceeding and their statements elsewhere could hardly be more striking.

¹¹ By our count, only Raycom, Graham, and Saga devote more than a sentence or two to claims of public service. *See* Raycom Comments at 1, Attachment A; Comments of Graham Media Group at 7 (“Graham Comments”) (same); Comments of Saga Broadcasting, LLC at 2 (“Saga Comments”).

¹² *See* ATVA Comments at 4-5 (describing regulation).

¹³ National Association of Broadcasters, *114th Congress Broadcasters’ Policy Agenda* (Jan. 26, 2015), <https://www.nab.org/documents/advocacy/NAB2015BroadcastersPolicyAgenda.pdf> (“2015 Policy Agenda”).

¹⁴ *We Are Broadcasters*, National Association of Broadcasters, <http://www.wearebroadcasters.com/helpingCommunities.asp> (last visited Jan. 11, 2016) (“We Are Broadcasters”).

<p style="text-align: center;">What Broadcasters Say About Their Public Interest Responsibilities Elsewhere</p>	<p style="text-align: center;">What Broadcasters Say About Their Public Interest Responsibilities In This Proceeding</p>
<p>“Radio and television broadcasters serve their local communities in remarkable ways each and every day. Broadcasters are the men and women uniquely tied to the people they serve—they are committed not only to innovation, but also to serving the public interest. They are the radio and TV stations that support our nation’s democratic ideals <i>There is no substitute for broadcasters’ service to their local communities.</i>” (2015 Policy Agenda) (emphasis added).</p> <p>“Informing communities. Helping neighbors in need. Providing a lifeline during emergencies. Reporting the facts and uncovering the truth. This is what broadcasters do best <i>Stations take seriously their responsibility to serve the public and are licensed by the federal government to use the airwaves for the greater good.</i>” (We Are Broadcasters) (emphasis added).</p> <p>“Broadcasters’ dedication to helping their communities <i>is what sets them apart from other mediums</i> [Broadcasters] strive every day to help their communities—one problem at a time, one child at a time, one emergency at a time.” (We Are Broadcasters) (emphasis added).</p>	<p>“Broadcasters have no legal or regulatory duty to make their programming available to MVPD subscribers—or to distribute their programming online at all.” (Scripps at 15).</p> <p>“If an MVPD refuses to [pay ‘fair value’], it is the MVPD—not the station making its content available free over the air—that is responsible for denying its subscribers access to the station’s programs.” (Raycom at 6).</p> <p>“[T]he Commission’s limited authority to oversee the retransmission consent negotiation process cannot override the copyright-protected right of programmers to establish the terms under which their intellectual property may be distributed.” (Affiliates Associations at viii-ix).</p>

In this proceeding, then, broadcasters would like to cast themselves as nothing more than everyday marketplace actors with no particular duty to anyone other than themselves. Indeed,

they claim the right “*arbitrarily to refuse*” to deal with MVPDs if they so desire.¹⁵ Their actions, they intimate here (if nowhere else), have no more impact on the public than those of furniture stores or florists. Regulators, the argument goes, ought to treat them more or less like storefront retailers, leaving retransmission consent matters exclusively to “private negotiation.”¹⁶

If in fact broadcasters had no more duty to the public than did florists—if, that is, they had not willingly accepted special privileges in return for public interest obligations¹⁷—their arguments in this proceeding might be valid. Yet broadcasters are not florists. They remain subject to a special, particular duty to negotiate in good faith that requires them to act more responsibly than ordinary market participants. As discussed below, the Commission has both the authority and the imperative to ensure that they do so.

II. THE PUBLIC INTEREST OBLIGATIONS THAT BROADCASTERS HAVE UNDERTAKEN ANIMATE THE AUTHORITY CONGRESS GAVE THE COMMISSION TO IMPLEMENT THE GOOD FAITH RULES.

When broadcasters talk about their public service in other venues, they sometimes seem to suggest that they perform these services out of the goodness of their hearts.¹⁸ Not so. Rather, broadcasters have willingly *undertaken* to serve the public interest in exchange for special treatment—special treatment that, in turn, has permitted them to amass considerable market power. Public Knowledge and New America put it this way: “By virtue of their access to spectrum and a number of regulatory protections such as exclusivity rules, broadcasters enjoy

¹⁵ NAB Comments at 37 (quoting *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990)).

¹⁶ *See, e.g.*, NAB Comments at 6 (describing retransmission consent negotiations as “private marketplace negotiations”).

¹⁷ *See* Sec. II, *infra*.

¹⁸ *See* 2015 Policy Agenda (describing broadcasters as the “the men and women *uniquely* tied to the people they serve”) (emphasis added).

immense benefits derived from the public. In exchange, broadcasters are expected to be stewards of the public airwaves, and to invest in ensuring that the public has access to the content they distribute.”¹⁹ As the Supreme Court has repeatedly recognized, “[a] licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.”²⁰

As broadcasters themselves acknowledge in other fora,²¹ this “social compact”²² does not distinguish between those who receive broadcast signals off-air and the vast majority who do so through an MVPD.²³ (Given the comparatively small number of people who receive broadcast signals off-air,²⁴ it would be meaningless otherwise). This is why the Commission once went so

¹⁹ Comments of Public Knowledge and Open Technology Institute At New America at 16 (“Public Knowledge/New America Comments”).

²⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 506 (2009) (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981)). See also Steven Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities*, Federal Communications Commission, 293-94 (July 2011), www.fcc.gov/infoneedsreport (“[T]he spectrum belongs to the public, and the public lent it to broadcasters. In that sense, taxpayers (through their governmental representatives) have every right to demand certain behavior—the *quo* that was supposed to be part of the original *quid pro quo*.”); New America Foundation, *The Decline of Broadcasters’ Public Interest Obligations*, Spectrum Policy Program, 1 (March 29, 2004), research.policyarchive.org/6403.pdf (“The trade of public airwaves for public interest obligations was the ‘social contract’ between broadcasters and the public.”).

²¹ Comments of the National Association of Broadcasters, MB Docket No. 10-71 at 15-16 (filed June 26, 2014) (“2014 NAB Comments”) (“‘[T]he Commission expects and indeed requires broadcasters to serve the needs and interests of their local communities.’ For decades this policy has served the American people very well. Across the country, Americans can turn on their televisions and access information pertinent to their communities: news, weather emergency alerts and more. Plus, they can access the most popular entertainment programming available—*either free over-the-air or via MVPDs.*”) (emphasis added).

²² Comments of Mediacom Communications Corporation at 2 (“Mediacom Comments”).

²³ 138 Cong. Rec. H6491 (July 23, 1992) (remarks of Rep. Callahan) (describing retransmission consent as necessary to keep broadcasting “viable well into the future to continue to provide local service to *cable subscribers and non-subscribers alike*”) (emphasis added).

²⁴ ATVA Comments at 10-11.

far as to say that an MVPD's "failure to carry the signal of a local station is inherently contrary to the public interest."²⁵

As ATVA (among others) explained in its initial comments, the obligations that broadcasters have undertaken to serve the public pervade every aspect of broadcast regulation. They formed the basis of the exclusivity protections broadcasters enjoy.²⁶ They formed the basis of the retransmission consent right Congress gave them.²⁷ They underlay Congress's decision to require good faith negotiation²⁸—a duty which, as numerous commenters point out, applies almost nowhere other than in retransmission consent and labor law.²⁹ As discussed below, moreover, they animated Congress's recent instruction for the Commission to revisit rules that, in Congress's considered view, no longer protect the public.

²⁵ *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, 30 Fed. Reg. 6038, ¶ 57 (1965) ("1965 Network Exclusivity Order").

²⁶ *Amendment of Parts 73 & 76 of the Commission's Rules Relating to Program Exclusivity in the Cable & Broad. Indus.*, 3 FCC Rcd. 5299, ¶ 74 (1988) ("[T]he public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations.") (emphasis added).

²⁷ See ATVA Comments at 53-56 (citing 47 U.S.C. § 325(b)(3)(A)).

²⁸ Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113—App. I, § 1009, 113 Stat. 1501A, 538 ("SHVIA") (codified as amended at 47 U.S.C. § 325(b)); *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd. 5445, ¶ 24 (2000) ("*Good Faith Order*") ("In other words, Congress intended that the parties to retransmission consent have negotiation obligations greater than those under common law. Absent fraudulent intent, common law imposes no obligation on parties to negotiate in good faith prior to the formation of a contract. We believe that, by imposing the good faith obligation, Congress intended that the Commission 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.").

²⁹ See, e.g., Mediacom Comments at 2; Comments of AT&T at 15 ("AT&T Comments").

The Commission possesses at least two sources of specific authority to amend its good faith rules. One is STELAR’s instruction to commence a rulemaking. The other is preexisting law’s longstanding authority to regulate the exercise of retransmission consent.

With respect to the former, NAB claims that “Congress directed the Commission *only* to ‘commence’ a review of one aspect of retransmission consent.”³⁰ Others make similar claims.³¹ This selective quotation, however, does not accurately reflect the statutory mandate. STELAR actually instructs the Commission to “commence *a rulemaking* to review its totality of the circumstances test.”³² A “rulemaking,” of course, is more than a mere “review.” A *rulemaking* is an “agency process for *formulating, amending, or repealing a rule*[.]”³³

Congress thus authorized the Commission to do more than “only commence a review.” Congress instructed the Commission to begin a specific process that can result in the Commission formulating new rules or amending existing ones, should the Commission determine that the record supports such modifications. At the very least, Congress plainly authorized the Commission to add to the existing list of conduct that presumptively violates the totality of the circumstances test.³⁴ This command, along with unusually clear legislative

³⁰ NAB Comments at 7 (emphasis in original); *see also id.* at 26 (“[U]nlike other STELAR provisions directing the FCC to act, which all required the adoption of rules or the issuance of a report, Section 103(c) of STELAR only required the Commission to ‘commence’ a review of its totality of the circumstances test.”).

³¹ *See* Comments of Media General, Inc. at 2 (referring to “Congress’ instruction to *simply* ‘review its totality of the circumstances test’”) (emphasis added); Comments of CBS Corporation at 2 (“CBS Comments”) (arguing that Congress “directed the Commission *only* ‘to *review* its totality of the circumstances test for good faith negotiations’”) (emphasis added).

³² Pub. L. 113-200 § 103(c), 128 Stat. 2062 (emphasis added).

³³ 5 U.S.C. § 551(5) (emphasis added).

³⁴ *See* ATVA Comments at 52. As ATVA showed in its opening comments, the Supreme Court has noted that “[i]t is fair to assume generally that Congress contemplates administrative action with the

history—specifically mentioning harm to consumers from blackouts³⁵—undermines broadcasters’ claims that the totality of the circumstances test is and must forever remain focused upon matters that are “merely procedural.”³⁶

Preexisting law, moreover, gives the Commission authority to both address the totality of the circumstances test and add to its list of *per se* violations. Indeed, the Commission originally promulgated its two-part good faith test using its authority under Section 325(b)³⁷ and it added additional bad-faith categories fourteen years later using the same authority.³⁸ In other words, the Commission’s entire good faith regime—including the definition of the totality of the circumstances test and the addition of *per se* violations—was developed under authority the Commission possessed before STELAR and continues to possess today. Section 325 would

effect of law when it provides for a relatively formal administrative procedure.” *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

³⁵ See, e.g., Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) (“Senate Commerce Committee Report”) (warning of “consumer harm from programming blackouts”).

³⁶ STELAR’s rulemaking authority also extends to proposals to permit temporary distant signal importation during retransmission consent disputes. As Scripps and others point out, see Comments of E.W. Scripps Company at 12 (“Scripps Comments”), one provision of STELAR prohibits stations from restricting a small category of distant signals in all circumstances. Having “spoken directly to [this] point,” argues Scripps, Congress “plainly leaves it to the parties” with respect to other distant signal importation. *Id.* This claim, however, ignores the completely separate authority STELAR grants for the Commission to add to its list of behavior presumptively violating the totality of the circumstances test. Of course, the Commission’s authority to “make rules” here must include the authority to modify applicability of its existing rules, contrary to NAB’s claims. See NAB comments at 41 (suggesting that the Commission cannot modify the reach of its exclusivity rules). Likewise, STELAR’s prohibition of joint negotiation within local markets does not preclude the Commission from exercising its completely separate authority to address multi-market joint negotiation. Affiliates Associations Comments at 52.

³⁷ *Good Faith Order*, ¶ 11 *et seq.*

³⁸ *Amendment of the Commission’s Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351, ¶ 29 *et seq.* (2014) (“*Joint Negotiation Order*”).

allow the Commission to conduct this exact rulemaking even if STELAR had not explicitly authorized (and required) it to do so.

As ATVA pointed out in its initial comments,³⁹ the Commission’s Title III authority⁴⁰ and Congress’s general mandate that the Commission regulate broadcasters in the public interest⁴¹ provide separate authority allowing the Commission to modify its totality of the circumstances test and enumerate additional *per se* bad faith conduct. Given the strong public interest in local broadcasting and Congress’s concern over consumer harm from blackouts,⁴² the Commission would be justified in updating its totality of the circumstances test on the basis of the public good alone. STELAR is just the latest grant of authority to the Commission to protect the public from unfair tactics by broadcasters and evidences yet again Congress’s ongoing concern in this area. The Commission, in other words, has long possessed ample authority to modify its good faith standards. STELAR makes that authority (and responsibility) unmistakable.

III. BROADCASTERS’ CLAIMS THAT THE “MARKET IS WORKING” IGNORE BOTH THE FACTS AND THE BARGAIN BROADCASTERS HAVE MADE WITH THE PUBLIC.

Broadcasters’ suggestions that the Commission need not amend its good faith rules fare no better than their claims that the Commission cannot do so. They begin with the odd claim that, because we are in a “platinum age of television,” broadcast programming can no longer be

³⁹ ATVA Comments at 56-58, 56 n.198.

⁴⁰ See 47 U.S.C. § 303(r) (authorizing Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out” its obligations to govern retransmission consent and promote the public interest).

⁴¹ See 47 U.S.C. § 309(a).

⁴² Senate Commerce Committee Report at 13.

considered “must-have programming.”⁴³ Such claims, however, conflict with the ever-increasing price broadcasters charge. They also conflict with broadcasters’ simultaneous claims in this proceeding about the importance of broadcast programming—particularly sports programming such as the Super Bowl and the World Series.⁴⁴ As Gray Broadcasting points out, “when it comes to amassing large audiences and earning advertising revenue, the power of local broadcast stations is unmatched.”⁴⁵

Broadcasters also claim that they lack leverage in retransmission consent negotiations, and, indeed, that consolidated MVPDs possess such leverage instead.⁴⁶ This claim, to start with, rests on dubious accounting. NAB purports to compare the market capitalization of MVPDs with that of broadcasters.⁴⁷ This “comparison,” however, entirely omits station groups owned by the “Big Four” networks—some of NAB’s biggest members. The market caps of the Big Four networks rival those of the biggest MVPDs.⁴⁸ Worse yet, in calculating *MVPD* market caps, NAB included Comcast’s *broadcasting* properties, NBC and Telemundo. Even if a “market cap comparison” were relevant to the dynamics in this particular marketplace—which it is not—surely any fair comparison must correct for such errors. Such a comparison would reveal that for

⁴³ See, e.g., NAB Comments at 8-11.

⁴⁴ E.g., Comments of Hearst Television Inc. at 3 (“Hearst Comments”) (“Prices paid for retransmission of local station signals have yet to *even approach* equilibrium based on viewership ratings.”) (emphasis added); Comments of Writers Guild of America, West, Inc. at 7 (noting that “broadcasters still provide must-have and marquee TV”).

⁴⁵ Comments of Gray Television Group at 11 (“Gray Comments”).

⁴⁶ E.g., NAB Comments at 20.

⁴⁷ *Id.* at 18.

⁴⁸ For example, Disney’s market cap of \$186 billion lies between that of Verizon and AT&T. See NAB Comments at 19.

every small broadcaster that must negotiate with a much larger MVPD, a small MVPD must negotiate with a much larger broadcast network or station group.

We do not deny that MVPDs have consolidated. So too have broadcasters.⁴⁹ MVPD consolidation, however, has had no relevant impact on retransmission consent negotiations, as the balance of leverage in retransmission consent negotiations remains squarely in favor of broadcasters.⁵⁰ As the Commission described in its *Notice*,⁵¹ and as ATVA and numerous others pointed out in initial comments,⁵² the market conditions that existed 23 years ago when Congress created the retransmission consent right no longer hold.⁵³ While broadcasters and cable operators enjoyed essentially offsetting monopoly positions in 1992, today, broadcasters continue to enjoy their monopoly position, while distributors face tremendous competition. This has significantly altered the dynamics of retransmission consent negotiations to the detriment of MVPDs and their subscribers. The horizontal consolidation that has occurred among both MVPDs and broadcasters in recent years has not restored the bargaining dynamics that Congress envisioned in 1992.

⁴⁹ *E.g., Belo Corp. and Gannett Co., Inc.*, 28 FCC Rcd. 16867 (2013); *Media Gen., Inc.*, 29 FCC Rcd. 14798 (2014); *Gannett Co., Inc., Gannett to Acquire Journal Media Group for \$12.00 per share*, (Oct. 7, 2015), <http://www.gannett.com/news/press-releases/2015/10/7/gannett-acquire-journal-media-group-1200-share/>.

⁵⁰ *See, e.g., General Motors Corp., Hughes Elec. Corp., and The News Corp. Ltd.*, 19 FCC Rcd. 473, ¶ 201 (2003) (“*General Motors*”) (“We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations.”).

⁵¹ *Notice*, ¶ 3.

⁵² *See, e.g.,* Mediacom Comments at 4-5.

⁵³ *See* Letter from Mike Chappell, American Television Alliance, to Marlene Dortch, MB Docket No. 10-71 at 2-3 (filed Sept. 2, 2015) (“ATVA September 2 Letter”).

In any event, claims that MVPDs possess undue leverage cannot be squared with either continuing unsustainable price increases for retransmission consent or the increasing number of blackouts. Indeed, just two months ago, the Commission described another market—that for inmate calling services—as a “prime example of market failure,” because it “is characterized by increasing rates, with no competitive pressures to reduce rates.”⁵⁴ The Commission found that it could not “rely on competition and market forces to discipline prices” in such a market.⁵⁵ Notwithstanding broadcaster claims of MVPD leverage, that conclusion appears equally apt here. We discuss these two factors in more detail below.

A. MVPDs Lack Sufficient Leverage To Prevent Unsustainable Price Increases.

As the Commission suggests,⁵⁶ claims that MVPDs possess meaningful leverage cannot possibly be reconciled with the rate of broadcaster price increases. If MVPDs really had leverage, prices wouldn’t be going up 40 percent a year.⁵⁷ Nor would broadcasters feel comfortable essentially promising additional rate hikes to the Commission in this proceeding.⁵⁸

⁵⁴ *Rates for Interstate Inmate Calling Servs.*, FCC 15-136, ¶ 2 (rel. Nov. 5, 2015).

⁵⁵ *Id.*

⁵⁶ *Notice*, ¶ 3 (“As a consequence of these marketplace changes, retransmission consent fees have steadily grown and are projected to increase further, thereby applying upward pressure on consumer prices for MVPD video programming services.”) (internal citations omitted).

⁵⁷ ATVA Comments at 8. Broadcasters suggest that MVPDs have been less than fair in describing the rate of retransmission consent price increases. Because rates were so low ten years ago, they suggest, the ten-year price increase paints an inaccurate picture. Nexstar Comments at 12. This, however, is the methodology used by the Chairman himself. Tom Wheeler, *Protecting Television Consumers By Protecting Competition*, FCC Blog (March 6, 2014), <https://www.fcc.gov/news-events/blog/2014/03/06/protecting-television-consumers-protecting-competition>. In any event, surely even broadcasters would concede that there is nothing unfair about describing 40-percent annual price increases over the last three years.

⁵⁸ Hearst Comments at 3 (“Prices paid for retransmission of local signals have *yet to even approach equilibrium* based on viewership ratings. In the current market, the price paid for [Big Four Affiliates] *should* be rising.”) (initial emphasis added).

Perhaps knowing that they cannot defend rapid and unending rate hikes, broadcasters attempt to change the subject. First, they argue that retransmission consent rates are actually lower than they should be because MVPDs pay more for lower-rated cable programming.⁵⁹ As ATVA has explained, however, one cannot blindly compare broadcast and cable ratings in order to determine reasonable retransmission consent fees because broadcasters and cable programmers distribute and monetize their programming differently.⁶⁰ Gray Broadcasting perhaps inadvertently proves ATVA’s point by arguing that the ability of broadcasters to amass “larger audiences” results in “outsized advertising revenue.”⁶¹ As Gray explains, it is precisely because they receive outsized advertising revenue that “local broadcast stations charge lower fees” for similar programming.⁶² The Commission should give no credence to any unsupported contention that the price of so-called “free” broadcast programming “*should* be rising.”⁶³

Second, broadcasters argue that any Commission action would not help the public because MVPDs will not pass the savings from price reductions (or lower price increases) through to their subscribers.⁶⁴ Well-established economic principles, however, demonstrate that

⁵⁹ *E.g.*, Hearst Comments at 3.

⁶⁰ ATVA Comments at 18.

⁶¹ Gray Comments at 15.

⁶² *Id.* This insight also explains why broadcasters’ stated concern that enforcement of the good faith rules might cause sports programming to migrate to cable are overblown. *E.g.*, *id.* at 10. For so long as broadcasters generate “outsized advertising revenue”—in large part on the back of MVPD distribution to those who cannot receive their signals over the air—sports leagues and other programmers will continue to distribute through them. More reasonable good faith rules will do nothing to disturb this—and, indeed, will protect broadcasters’ ability to continue to generate “outsized advertising revenue.”

⁶³ Hearst Comments at 3 (emphasis in original).

⁶⁴ NAB Comments at 55 (“MVPDs also cannot show—or even credibly claim—that their one-sided proposals will benefit viewers by lowering consumer bills or improving services.”); Affiliates Associations Comments at 23 (“In fact, the ‘reforms’ suggested in the *Notice* would not benefit subscribers.”).

even monopolies (which MVPDs are not) will pass through some portion of cost savings to their subscribers in one way or another.⁶⁵ More to the point, after reviewing the economic evidence,⁶⁶ the Commission reached a similar conclusion less than six months ago in the AT&T-DIRECTV transaction.⁶⁷ Broadcasters have presented no basis upon which the Commission could reach a different conclusion here.

B. MVPDs Lack Sufficient Leverage To Prevent Harmful Blackouts.

ATVA is confident that, if MVPDs really possessed leverage in retransmission consent negotiations, the number of blackouts would not have increased as quickly as it has. Certainly, the dramatic increase in blackouts correlates strongly with the history of broadcasters' increasing leverage over MVPDs. In the 45 days since ATVA filed its initial comments, broadcasters have blacked out their signal 18 times.⁶⁸ As described below, moreover, broadcasters routinely insist on blackouts over the objection of MVPDs. ATVA is aware of practically no instances in which an MVPD threatened to drop broadcast programming over a broadcaster's objections—and the

⁶⁵ E. Glen Weyl and Michal Fabinger, *Pass-Through as an Economic Tool: Principles of Incidence Under Imperfect Competition*, 121 J. Pol. Econ. 528, 548 (2013) (explaining how, under conditions of both perfect competition and monopoly, firms will pass through cost reductions, although the amount by which they are expected to do so depends on elasticities of supply and demand). This is why the Commission need not regulate the “economic output” in order to address problems with the “input.” See Affiliates Associations Comments at 24.

⁶⁶ AT&T and DIRECTV, *Content Cost Savings Will Result in Both Improved Profitability and Pass Through to Consumers*, White Paper, 11-12 (“Content Cost White Paper”), attached to Letter from Maureen R. Jeffreys to Marlene H. Dortch, MB Docket No. 14-90 (filed Nov. 12, 2014).

⁶⁷ *AT&T Inc. and DIRECTV*, 30 FCC Rcd. 9131, ¶ 290 (2015) (“We find it likely that some of the programming payment reductions will be passed through to subscribers and, as discussed below, that some portion of such reductions may help in funding FTTP expansion.”).

⁶⁸ American Television Alliance, *Blackout List* (2016), <http://www.americantelevisionalliance.org/wp-content/uploads/2016/01/Retrans-Blackouts-2010-20161.xlsx>.

broadcast comments have presented no such evidence. In such circumstances, one cannot reasonably describe the relationship between broadcast leverage and increased blackouts as coincidental.

Broadcasters seek to play down the problem of blackouts.⁶⁹ Nexstar, for example, states that the percentage of blackouts is low when compared to the overall number of agreements.⁷⁰ NAB similarly claims that the total number of viewer hours blacked out is low when compared to other measurements.⁷¹ Yet, as ATVA showed in its comments, more than *one out of every eight* pay-TV viewers experienced a blackout in just the first 10 months of 2015. No matter how one slices and dices the numbers, surely consumer disruption on this scale is too high.

Broadcasters also suggest—without quite saying—that blackouts do not cause meaningful harm.⁷² Such claims, of course, ignore broadcasters’ claimed public interest status. If indeed “[t]here is no substitute for broadcasters’ service to their local communities,”⁷³ then

⁶⁹ The Affiliates Associations object to the term “blackout,” arguing that it is “strategically invoked by MVPDs to mischaracterize MVPD service disruptions.” Affiliates Associations Comments at 13. We assume that *Congress* did not use the term “strategically” when it described broadcaster conduct. See Senate Commerce Committee Report at 13 (noting that “negotiations [for] retransmission consent have become significantly more complex in recent years, and . . . in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts”). Nor did the Commission. *Notice*, ¶ 3 n.17; *id.* ¶ 5 n.31.

⁷⁰ Nexstar Comments at 5. Nexstar also objects to ATVA’s methodology, arguing that ATVA should not have counted “a dispute between a single broadcaster who operates multiple stations and a single MVPD as multiple impasses.” *Id.* This, however, is the only reasonable way to make such calculations. Each station that withholds its signal creates its own “blackout.” If Tegna withholds consent from DISH, 47 stations in 47 markets go dark. If Saga withholds consent from DISH, two stations in two markets go dark. It makes no sense to treat the two circumstances as “one blackout” each. In any event, ATVA also provided figures for the number of *subscribers* affected, which is perhaps the most important data of all. See ATVA Comments at 7.

⁷¹ NAB Comments at 51 (comparing broadcaster blackouts to power outages and MVPD system disruptions).

⁷² *E.g.*, Gray Comments at 4.

⁷³ 2015 Policy Agenda at 3.

broadcast signals should never (or almost never) come down. If, in other words, Raycom truly provides emergency reporting “when other communications channels may be unavailable,”⁷⁴ then surely a Raycom decision to pull its signal from MVPDs that provide the majority of its stations’ viewership has public interest—possibly even public safety—consequences.

Gray, for example, describes one of its blackouts as resulting from negotiations it characterizes as “the very epitome of a good faith effort.”⁷⁵ It cites these negotiations as evidence that the Commission should leave its rules unchanged.⁷⁶ Yet nowhere does Gray acknowledge the harm it caused *to viewers* when it chose to black out its signals. Contemporary media accounts, by contrast, vividly documented the public harm. The *Omaha World Herald*, for example, led its story on the dispute this way:

If you’re a Cox subscriber and want to see this Sunday’s Golden Globes show, get your antenna ready. WOWT remained unavailable Saturday night on Cox after the cable company was unable to reach a contract agreement with Gray Television, the owner of Omaha’s local NBC affiliate. The station went dark for Cox television subscribers on Wednesday.⁷⁷

It reported a subscriber’s frustration: “I was lucky enough to get a free antenna from the Cox Solution store. It’s nice to see NBC again. WOWT, it’s a shame your owners are greedy. I’m sure Cox can be greedy too, but at least they are helping at the moment.”⁷⁸ Nor did Gray acknowledge the ongoing public harm caused by its “epitome of good faith” negotiation. When Omaha viewers (as well as their friends and relatives) next see a broadcaster’s crawl threatening

⁷⁴ Raycom Comments at 3.

⁷⁵ Gray Comments at 3.

⁷⁶ *Id.*

⁷⁷ Paige Yowell, *Is WOWT Back Yet? No word of deal in Cox-Gray Television dispute*, *Omaha World Herald* (Jan. 10, 2015), http://www.omaha.com/money/is-wowt-back-no-word-yet-of-deal-in-cox/article_288ceaae-381c-5d39-82de-5320e4de9a28.html.

⁷⁸ *Id.*

another blackout, they will have every reason to fear that their service could be disrupted and to take action to avoid that eventuality—even if the parties ultimately settle. This, of course, benefits *broadcasters*. But it harms the public.

In the end, the best evidence of harm to the public comes from the public itself. Thousands of viewers have written the Commission via ATVA’s website to raise their concerns over blackouts. Appendix A hereto contains a selection of their comments, which include statements like these:

- “I am afraid as right now I have no local news. What if there is a real security issue for the nation or my local area? I will not know. This leaves me very vulnerable. I am shocked this is happening in our great USA.”⁷⁹
- “What matters most is how are consumers supposed to be informed of local emergencies. This is a dangerous practice that needs to end. I watch local news every morning. I get traffic conditions, adverse weather reports, Presidential information, etc. This is ridiculous that networks and providers are fighting over how much more money they can put in their pockets. They are all wrong, Sinclair and Dish.”⁸⁰
- “We pay for free TV stations on a monthly basis therefore why do they have the option to blackout stations that are on air for free if you don’t subscribe to a cable or satellite provider. ARE WE BEING HELD HOSTAGE FOR SUBSCRIBING TO CABLE/SATELLITE PROVIDERS. WHAT HAPPENS WHEN THE ELECTION DEBATES ARE HELD AND WE ARE NOT ALLOWED TO FOLLOW CANDIATES [sic].”⁸¹
- “Forget about losing our favorite television stations. The consumer is being blocked from local news, for which there is no excuse. Should a local emergency arise, blocking local channels could result in bodily harm and property damage which would lead to litigation and rightfully so. This simply has to stop. There IS an obligation to the consumer. It is a right and not a privilege to view my local stations, particularly when I am paying for it.”⁸²

⁷⁹ Comments of Jeanette Hudson, App. A at 616.

⁸⁰ Comments of Alberta Robinson, App. A at 625.

⁸¹ Comments of Mr. and Mrs. Kerry Douglas, App. A at 2211.

⁸² Comments of Fantasia Fairchild, App. A at 2226.

- “I work hard for my money and pay my bill to the satellite company so my retired dad can watch his favorite shows during the day, and I can come home in the evening and enjoy some favorite programs myself, including Wheel of Fortune and NCIS. Thanks to some broken down communications over which I had no control, we can no longer watch these and many other programs shown on our local channel 11 (CBS). It is not right for the consumer to be harmed due to the greed of large companies playing hardball with their contracts. Please fix these issues so we can get back to enjoying the programs we want.”⁸³

Nor can broadcasters reasonably claim—as they do once again—that MVPDs “cause” blackouts and thus must take responsibility for harm to the public.⁸⁴ As multiple MVPDs described, including under oath, most blackouts occur over the objections of the MVPD, and despite an MVPD offer to “true up” fees once a new rate has been set.⁸⁵ No reasonable observer would say that MVPDs cause blackouts in such circumstances.⁸⁶ To the contrary, labor law suggests that such facts present powerful evidence of bad faith on the part of the broadcasters who engage in it.⁸⁷

IV. ATVA’S PROPOSALS WILL BENEFIT THE PUBLIC.

As demonstrated above, there is clearly a problem to be solved and Congress gave the Commission legal authority to solve it. As a last line of defense, broadcasters claim that ATVA’s specific proposals are not the solution that would benefit the public. For example, NAB claims that the Commission has presented “no evidence” that any of the proposals listed in

⁸³ Comments of Cheryl Brooks, App. A at 977.

⁸⁴ *See, e.g.*, Raycom Comments at 6.

⁸⁵ *See* ATVA Comments at 12 n.42; Comments of AT&T Services at Ex. A (Decl. of Linda Burakoff).

⁸⁶ As ATVA demonstrated in its initial comments, broadcasters “cause” *all* blackouts as a matter of law by refusing to “consent” to the carriage of their signals. ATVA Comments at 12.

⁸⁷ *Id.* at 40-41 (citing cases).

the *Notice* would reduce blackouts—or, for that matter, would “benefit consumers in any way.”⁸⁸

This claim fares no better than the others.

Most generally, broadcasters argue that the totality of the circumstances test works because of its flexibility.⁸⁹ Thus, they contend, any revision of or addition to it would take away this flexibility, making it impossible to administer.⁹⁰ The Affiliates Associations go so far as to argue that changes to the totality of the circumstances test will require the Commission to establish a “Good Faith Negotiation Bureau.”⁹¹ Yet nobody—certainly not ATVA—has asked the Commission to abandon the totality of the circumstances test altogether. Rather, ATVA and others have asked the Commission to provide more guidance in its implementation by adding to the existing list of behaviors that presumptively violate good faith under the test.⁹² This list has existed since the Commission first promulgated the good faith rules, and nobody has ever suggested that its existence has made the totality of the circumstances test more difficult to administer.⁹³

⁸⁸ NAB Comments at 50.

⁸⁹ Affiliates Associations Comments at 10.

⁹⁰ Scripps Comments at 5.

⁹¹ Affiliates Associations Comments at 30.

⁹² Claims that antitrust law evinces a “demonstrable shift away from *per se* prohibitions” are thus doubly inapposite to proposals to change the totality of the circumstances test. Comments of Walt Disney Company at 15 (“Disney Comments”). As discussed in Sec. IV.A, broadcasters have willingly undertaken good faith obligations that extend beyond antitrust doctrines of general applicability. In any event, moreover, concerns about *per se* violations would not apply to any *presumptive* changes to the totality of the circumstances test.

⁹³ ATVA believes that the behaviors it has identified are so egregious as to also constitute *per se* violations. ATVA Comments at 43. As discussed above, the Commission possessed authority to add to *that* list long before Congress enacted STELAR. The Commission, in other words, has authority to add these behaviors to either the “presumptive list” or the “*per se* list.”

To the contrary, providing more guidance as to behavior that would presumptively violate the totality of the circumstances test will make that test more effective.⁹⁴ As numerous commenters have described, a principal drawback of the totality of the circumstances test relates to timing.⁹⁵ Much bad behavior occurs at or near the expiration of an existing agreement. By the time the Commission can review the facts presented in a totality of the circumstances complaint, the damage has already occurred.⁹⁶ This, and not broadcaster good behavior, is why MVPDs have filed few complaints and the Commission has resolved even fewer of them.⁹⁷ Congress directed the Commission to open this proceeding not simply to provide additional legal theories under which MVPDs could file complaints. It did so in the hopes of getting broadcasters not to engage in bad behavior in the first place. If broadcasters know that particular conduct constitutes bad faith unless they can demonstrate otherwise, they may be less inclined to engage in it.

Broadcasters also claim that ATVA’s specific proposals for reform are unnecessary, unworkable, unlawful, or all three. As demonstrated below, these claims all lack merit.

A. Congress Authorized The Commission To Restrict Online Blocking.

In other contexts, broadcasters concede that their websites are no longer “ancillary to their core business, but [instead are] an integral part of their connection with viewers.”⁹⁸ Yet

⁹⁴ Notice, ¶ 7 (“If the Commission provides additional guidance on conduct that will be considered evidence of bad faith under the totality of the circumstances test, would this help facilitate productive retransmission consent negotiations?”).

⁹⁵ See ATVA Comments at 43; AT&T Comments at 11, 11 n.33; Comments of WTA—Associates for Rural Broadband at 18 (“WTA Comments”).

⁹⁶ See WTA Comments at 18.

⁹⁷ *Contra* Affiliates Associations Comments at 16 (arguing that “tellingly, *the Commission has never found a single broadcast station to have engaged in bad faith negotiations*”) (emphasis in original).

⁹⁸ Comments of the National Association of Broadcasters, MB Docket No. 15-158 at 9-10 (filed Aug. 21, 2015) (“According to a recent report by RTDNA, every television station that provides local news also has a website that provides local news. Those websites are becoming increasingly dynamic as

they claim here that the Commission would violate the First Amendment and the Copyright Act if it sought to prevent broadcasters from blocking access to these websites during retransmission consent disputes. Neither claim has merit.

To begin with, the broadcasters inaccurately describe the online-blocking proposal on which the Commission seeks comment. The Broadcast Affiliates Associations, for example, describe a rule under which “broadcast stations *must* make their content available online.”⁹⁹ Yet the Commission proposed no such rule. Here is what it actually said:

[P]arties have urged the Commission to address 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* Such online access restrictions prevent all of an MVPD’s broadband subscribers, *i.e.*, regardless of whether those subscribers are located in markets where the MVPD and broadcaster have reached an impasse in negotiations, from accessing the online video programming that the broadcaster otherwise makes generally available when the broadcaster and the MVPD are engaged *in a retransmission consent dispute*. In addition, this practice affects the MVPD’s broadband subscribers even if those subscribers do not also subscribe to the MVPD’s video service. We seek comment on whether such a practice *during retransmission consent disputes* should be considered evidence of bad faith under the totality of the circumstances test.¹⁰⁰

local stations and their news directors see their websites not as ancillary to their core business, but as an integral part of their connection with viewers. For example, in addition to the text, photos and video clips that have been staples of local news offerings on TV stations’ websites for several years, more stations are streaming, both live and recorded, the entirety of their local newscasts. For example, in the top 100 TV markets, about 70 percent of local news stations provide live newscasts on their websites. Substantial numbers of stations include more information online than they do on-air—including blogs from local reporters, podcasts, event calendars, live camera access, and more. Viewers have responded favorably to these increased online offerings. According to the RTNDA Online Study, page views and unique visitors to TV station websites soared in the last year, almost doubling overall. In the top 25 markets, for example, TV stations reported an average of more than 2.5 million unique visitors last year. Even smaller market TV stations (markets 51-100) reported an average of about 588,000 unique visitors in the last year.”) (internal citations omitted).

⁹⁹ Affiliates Associations Comments at 55 (emphasis in original).

¹⁰⁰ Notice, ¶ 13 (emphasis added).

The Commission, in other words, does not propose to force broadcasters to make their content available online. Nor does it propose to force broadcasters to take any content out from behind a paywall. It only asks about harm to viewers where broadcasters block particular modes of transmission to certain viewers for content that they otherwise already make generally available online for free.¹⁰¹

AT&T puts this proposal in useful perspective. If, during a retransmission consent dispute, an MVPD blocked its broadband subscribers' access to broadcaster websites, broadcasters would be first in a long line to file an Open Internet complaint.¹⁰² As AT&T concludes, it would be “difficult to imagine” the Commission permitting such activity.¹⁰³ Broadcasters, however, claim an absolute right under the First Amendment and the Copyright Act to engage in identical conduct—and even to do so “arbitrarily.” This cannot be correct.

Certainly, the First Amendment gives broadcasters no such absolute right. To begin with, while broadcasters argue that this is a “forced speech” case,¹⁰⁴ the proposed rule would not force broadcasters to say anything. Rather, it would stop broadcasters from preventing some people from using a particular mechanism to *hear* speech in which broadcasters *already freely engage*. If a broadcaster sent a truck to MVPD subscribers' houses to jam reception by antennas during

¹⁰¹ Comments of the National Cable & Telecommunications Association at 5 (“NCTA Comments”). This is why the broadcasters are wrong when they suggest that restricting online blocking might “discourage” broadcasters from putting content online in the first place. CBS Comments at 11. If it makes sense for broadcasters to put their content online, they will continue to do so. The suggestion that broadcasters might forego entirely an “integral part of their connection with viewers” if they cannot use it as leverage in a retransmission consent dispute suggests *more* need for Commission intervention, not less.

¹⁰² AT&T Comments at 12-13.

¹⁰³ *Id.*

¹⁰⁴ Disney Comments at 23.

retransmission consent disputes, no one would characterize the broadcaster’s behavior as choosing what “not to say.”¹⁰⁵ The characterization is no more valid here.

Even assuming that an anti-blocking rule would be subject to the intermediate scrutiny standard governing content-neutral restrictions, it would easily survive. “A regulation will be upheld under intermediate scrutiny ‘if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.’”¹⁰⁶ In this case, “important governmental interests” abound—including the Congressional desire to reduce blackouts and the harm they cause, Congress’s particular interest in online blackouts, promoting the widespread dissemination of information from a multiplicity of sources, and promoting fair competition in the market for television programming.¹⁰⁷ And a prohibition on online blackouts (much less a mere presumption that online blackouts violate good faith) is narrowly tailored to such governmental interests.

Nor do broadcasters’ rights under the Copyright Act preclude restrictions of online blocking. NAB, for example, describes the “exclusive rights” granted under the Copyright Act—and the ability of a rights-holder to “hoard all of his works” and “arbitrarily to refuse to

¹⁰⁵ *Pac. Gas. & Elec. Co. v. Pub. Utilities Comm’n of Cal.*, 475 U.S. 1, 16 (1986).

¹⁰⁶ *BellSouth Corp. v. FCC*, 144 F.3d 58, 69-70 (D.C. Cir. 1998) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (“*Turner II*”). As applied to the Commission’s predictive judgment, the intermediate scrutiny standard considers whether the agency has “draw[n] ‘reasonable inferences based on substantial evidence.’” *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994)).

¹⁰⁷ See Senate Commerce Committee Report at 13 (2014) (“The Committee . . . expects as part of this rulemaking that the FCC would examine the role digital rights and online video programming have begun to play in retransmission consent negotiations. The Committee is concerned by reports that parties in retransmission consent negotiations have begun to block access to online programming during those negotiations or after a retransmission consent agreement has expired and a blackout has occurred, including for consumers of a MVPD who subscribe only to the broadband service offered by such MVPD.”); *Turner II*, 520 U.S. at 189 (positing latter two interests).

license [them].”¹⁰⁸ The Commission, we are told, may not “violate” these exclusive rights.¹⁰⁹ Nor may it issue retransmission consent rules that “impinge upon private programming licensing agreements.”¹¹⁰

That is clearly not the case. The Commission already impinges on private licensing agreements and has done so for years, as the retransmission consent regime itself illustrates. Suppose, for example, CBS were to decide that it wants to distribute WCBS-TV’s copyrighted programming to one MVPD and not to other MVPDs in the market. The Communications Act’s prohibition on exclusive arrangements prevents it from doing so.¹¹¹ Likewise, suppose CBS were to decide that it could maximize the “necessary bargaining capital”¹¹² of its copyrighted works by accepting larger payments for WCBS from one MVPD in exchange for agreeing not to distribute it to another MVPD. The Commission’s *per se* prohibition of such arrangements forbids it to do so.¹¹³ Indeed, *every* aspect of the good faith rules “impinges”—to a greater or lesser extent—on a broadcaster’s right to withhold its copyrighted programming from MVPDs “arbitrarily.” That, at a bare minimum, is what the obligation to negotiate in good faith means.

Nor does the fact that an online blocking prohibition rule would touch upon programming distributed other than over-the-air change this analysis. The good faith rules plainly apply even where a broadcaster delivers its signal to MVPDs through alternate means, such as fiber. Indeed, they go further—reaching conduct in retransmission consent negotiations that also involve *non-*

¹⁰⁸ NAB Comments at 37 (citing *Stewart v. Abent*, 495 U.S. 207, 228-29 (1990)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 36.

¹¹¹ 47 U.S.C. § 325(b)(3)(C)(ii).

¹¹² Affiliates Associations Comments at 55 (citing *Stewart*, 495 U.S. at 229).

¹¹³ 47 C.F.R. § 76.65(b)(1)(vi).

broadcast programming. For example, broadcasters cannot “specifically foreclose carriage of other programming services by the MVPD”¹¹⁴—a restriction that, by its terms, applies even to non-broadcast “programming services.” Thus, once a broadcaster seeks to inject non-broadcast programming into a retransmission consent negotiation, its conduct with respect even to such programming is governed by the good-faith rules.

B. Antitrust Law Cannot Prevent Harm From Forced Bundling Of Broadcast Programming.

Broadcasters claim that the Commission need not restrict forced bundling of programming both because bundling sometimes benefits the public and because antitrust law can address cases in which bundling causes harm.¹¹⁵ The first argument misses the point. ATVA has not proposed to prohibit broadcasters from *offering* bundles.¹¹⁶ It merely proposed the standard labor-law rule that broadcasters cannot *insist* on bundling.¹¹⁷ Likewise, the Commission seeks comment on “how a broadcaster’s *insistence* on bundling broadcast signals with other broadcast stations or cable networks into the retransmission consent agreement should be treated under the totality of the circumstances test.”¹¹⁸ Where MVPDs think their subscribers desire the bundled programming, they uniformly welcome bundled offers—and the Commission

¹¹⁴ *Good Faith Order*, ¶ 58.

¹¹⁵ NAB Comments at 30.

¹¹⁶ *E.g.*, Scripps Comments at 15 (describing an imaginary “regulatory directive that broadcasters cannot even *propose* their preferred terms and conditions when they meet MVPDs at the bargaining table”) (emphasis added); NAB Comments at 49 (arguing that the Commission lacks a valid rationale “for compiling a lengthy list of proposals to ban *from even mentioning* during retransmission consent negotiations”) (emphasis added).

¹¹⁷ ATVA Comments at 44-47.

¹¹⁸ *Notice*, ¶ 15.

does not propose to restrict such offers. ATVA objects only to the insistence on bundling on terms and conditions that its members believe will harm their subscribers.

With respect to the broadcasters' second argument, antitrust law can address bundling concerns involving everyday market participants. As ATVA has explained, however, it cannot address concerns about forced bundling of broadcast programming. Indeed, NAB appears to make this point itself when it suggests that the tying and tied programming exist in the same product market.¹¹⁹ Were this correct (and ATVA believes it is not), antitrust law could not *ever* address forced bundling because traditional tying theories require products from different markets.¹²⁰ In this regard, perhaps Mediacom put it best: "Congress did not grant the Commission the authority under Section 325(b) to ensure that retransmission consent negotiations are conducted in good faith merely to prevent behavior that already was unlawful."¹²¹ Moreover, if broadcast programming possesses public interest qualities (as broadcasters claim), the Commission should not permit broadcasters to condition its receipt on payment for unwanted programming that may lack such qualities.

In any event, restricting *forced* bundling should help prevent blackouts.¹²² The record already contains evidence of at least one blackout—that involving DISH and Sinclair—caused exclusively because a broadcaster sought to condition carriage of its signal on carriage of a

¹¹⁹ NAB Comments at 35.

¹²⁰ *Id.* (citing cases).

¹²¹ Mediacom Comments at 3. This, ATVA believes, responds to NAB's question of why "broadcasting, unique among all business . . . deserves to be subject to 'super-antitrust' rules that address only retransmission consent negotiations." NAB Comments at 28.

¹²² *See, e.g.*, NAB Comments at 50.

network “to be named later.”¹²³ As for broadcasters’ suggestion that bundling can reduce blackouts by “open[ing] up other avenues” for agreement,¹²⁴ ATVA agrees. *Forced* bundling, however, closes such avenues, and the Commission should prohibit it.¹²⁵

C. The Commission Can Easily Enforce A Prohibition On Blackouts Prior To Marquee Events.

Broadcasters argue that any prohibition on blackouts prior to marquee events “would be essentially impossible to articulate or enforce.”¹²⁶ ATVA finds this claim curious. ATVA “articulated” such a rule this summer,¹²⁷ and did so again in its initial comments.¹²⁸ The proposal delineated specifically what programming would be considered “marquee,” making it very easy to enforce—easier, indeed, than the more amorphous totality of the circumstances rule itself. One could, of course, articulate broader or narrower formulations of “marquee

¹²³ See *DISH Network, L.L.C. v. Sinclair Broadcast Group, Inc.*, Amended and Restated Verified Retransmission Complaint and Request for Injunctive Relief, MB Docket No. 12-1 at ii, 9 (filed Aug. 24, 2015).

¹²⁴ Affiliates Associations Comments at 19.

¹²⁵ Gray appears to claim that a forced bundling prohibition would impede after-acquired station or system clauses. Gray Comments at 8. Yet the Commission seeks comment only on a “broadcaster’s insistence on bundling *broadcast signals with other broadcast stations or cable networks* into the retransmission consent agreement.” *Notice*, ¶ 15 (emphasis added). Likewise, ATVA’s proposal concerns a station that “[r]equires an MVPD to carry cable network, non-broadcast programming, multicast programming, duplicative stations, or a significantly viewed station as a condition to granting retransmission consent to the MVPD for carriage of the television broadcast station’s primary signal, including, but not limited to, by refusing to make a standalone offer for the MVPD’s carriage of the television broadcast station that is a real economic alternative to a bundle of broadcast and non-broadcast or multicast programming (for example, justified by actual prices for other similar broadcast channels in the same market).” ATVA Comments at 45. By their terms, neither of these proposals would restrict after-acquired station or system clauses.

¹²⁶ Affiliates Associations Comments at 34; *see also, e.g.*, Media General Comments at 11.

¹²⁷ ATVA September 2 Letter at 2-3 (filed Sept. 2, 2015).

¹²⁸ ATVA Comments at 48.

programming.”¹²⁹ But broadcasters themselves know marquee programming when they see it. For example, it defies belief to assume—as Nexstar would have us do—that agreements *happen* to expire “just in time for the major college football bowl games” because that is when the retransmission consent cycle expires.¹³⁰ Nor do agreements *happen* to expire prior to the NFL playoffs or the Oscars. As ATVA observed in its initial comments, broadcasters choose expiration dates prior to marquee events and refuse to consider expiration at any other time.¹³¹ The Affiliates Associations confirm this commonsense understanding by arguing that they need to be able to black out marquee events precisely because they are important.¹³²

A prohibition on blackouts around marquee events (however defined) would plainly serve the public interest by reducing the harm of blackouts. Since marquee programming is the most “highly-valued broadcast programming,”¹³³ blackouts of such programming by definition harm viewers more than do other blackouts. Limiting marquee-programming blackouts will help parties focus on the long-term value of the programming over the life of the contract, rather than the short-term value of holding up MVPDs and consumers.¹³⁴ Such limitations will also make blackouts a less desirable tool for broadcasters generally. This, in turn, should help reduce their overall frequency.

¹²⁹ See NAB Comments at 47-48 n.143 (arguing that the entire calendar is full of potential “marquee events,” if broadly defined).

¹³⁰ Nexstar Comments at 3.

¹³¹ E.g., ATVA Comments at 27.

¹³² Affiliates Associations Comments at 34.

¹³³ *Id.*

¹³⁴ ATVA Comments at 28.

D. Broadcasters Concede That Limitations On Ceding Negotiation Rights Can Help The Public.

Broadcasters claim that the ceding of negotiation rights causes no harm. In NAB's view, for example, "[t]he fact that an MVPD prefers to negotiate with a different party than the one designated by a local station does not imply that the station's choice constitutes bad faith."¹³⁵ The issue here, however, involves more than mere "preference." As ATVA explained in its initial comments, the ceding of negotiation rights can, at least in certain circumstances, harm the public by providing broadcasters significant market power without creating offsetting consumer benefits.¹³⁶

The Affiliates Associations appear to confirm ATVA's point. In discussing network interference with retransmission consent negotiations, they say:

Any attempt by a broadcast network to appropriate the statutory right (indeed, statutory responsibility) of an affiliate to negotiate retransmission of the affiliate's signal raises fundamental questions of network overreach in violation of the core policies underlying the Commission's separate and longstanding network affiliate rules. It also raises a basic issue of abdication of licensee responsibility.¹³⁷

This reasoning, of course, applies equally to out-of-market joint negotiations. Those, too, can raise "fundamental questions of overreach" and "basic issue[s] of abdication of licensee responsibility."¹³⁸ The harm comes from broadcasters' ceding negotiation rights in the first

¹³⁵ NAB Comments at 40.

¹³⁶ ATVA Comments at 29.

¹³⁷ Affiliates Associations Comments at 45.

¹³⁸ Nexstar appears to suggest that restricting joint negotiation would prevent station owners from negotiating on behalf of their owned stations. Nexstar Comments at 24. The Commission, however, asks merely about "broadcasters' relinquishing *to third parties* their right to grant retransmission consent and similar practices." *Notice*, ¶ 14 (emphasis added).

place, even if the damage can be further exacerbated by the identity of the party to whom such rights are ceded.

E. Broadcasters Present No Valid Basis Upon Which To Restrict Lawful Technology.

In its initial comments, ATVA described the obvious harm that comes from broadcaster attempts to deprive consumers of technology, services, or features they can lawfully use.¹³⁹ It argued that broadcasters should not be able to require MVPDs to disable these features—even if they compete with broadcast programming or are otherwise not to broadcasters’ liking.¹⁴⁰ Broadcasters, for their part, suggest that they insist on such restrictions in order to prevent MVPDs from favoring their own advertisements over broadcast advertisements.¹⁴¹ MVPDs, they claim, employ devices like DISH’s AutoHop, Time Warner Cable’s StartOver, and DIRECTV’s GenieGo DVR in order to use them against broadcasters in the advertising market.¹⁴²

Broadcasters provide no evidence supporting this unlikely theory, and ATVA is not aware of any.¹⁴³ MVPDs employ innovative technologies because their customers want them, not to favor their own advertisements over those of broadcasters. These technologies enable

¹³⁹ ATVA Comments at 31.

¹⁴⁰ *Id.*

¹⁴¹ *E.g.*, Affiliates Associations Comments at 20 (“As shown earlier, MVPDs compete directly with broadcast stations for advertising revenue and, clearly, have a competitive incentive to deploy anticompetitive devices against competitive broadcast stations.”).

¹⁴² NAB Comments at 48-49 (describing MVPDs’ “obvious incentives to utilize these devices to reduce the viewership of advertisements on broadcast stations, with whom MVPDs compete . . .”).

¹⁴³ Indeed, Scripps states what ATVA believes to be the real point of such restrictions: to “ensur[e] that advertisements . . . reach as many viewers as possible,” even if those viewers do not wish to view them. Scripps Comments at 10.

MVPDs to serve the viewing public better and thereby win subscribers from less innovative competitors. This has been a significant factor leading courts to largely uphold their legality.¹⁴⁴

ATVA would have thought the harm from restricting such innovation to be self-evident. Certainly, ATVA members report that broadcaster insistence on such restrictions has led to blackouts or near blackouts. At least one broadcaster, however, suggests that the contrary is true. Gray suggests that, had CBS and ABC been unable to coerce DISH to disable its AutoHop functionality, CBS- and ABC-owned stations might have remained dark on DISH to this day.¹⁴⁵ If Gray's suggestion is true, this provides the Commission with more reason to intervene, not less.

F. Temporary Importation Of Distant Signals Will Help Reduce The Harm From And Frequency Of Blackouts.

ATVA has urged the Commission to allow MVPDs to import distant signals temporarily when local broadcasters black out their signals. Broadcasters, perhaps unsurprisingly, suggest that providing such signals to viewers is unnecessary or will affirmatively cause harm. Here again, broadcasters mischaracterize the proposal in order to attack it. The Affiliates, for example, describe “a regulatory prohibition on broadcasters negotiating for (and MVPDs agreeing to) a restriction on the importation of out-of-market, non-significantly-viewed signals.”¹⁴⁶ Yet the *Notice* describes no such restriction. It seeks comment only on “a broadcaster's preventing an MVPD from *temporarily importing* an out-of-market signal in cases

¹⁴⁴ *E.g., Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060 (9th Cir. 2014) (denying rehearing and upholding DISH's use of Autohop and related technologies); *Fox Broad. Co. v. Dish Network LLC*, No. CV 12-4529 DMG SHX, 2015 WL 1137593, at *12 (C.D. Cal. Jan. 20, 2015) (upholding DISH's use of Sling-enabled devices).

¹⁴⁵ Gray Comments at 8.

¹⁴⁶ Affiliates Associations Comments at 26.

where the broadcaster has blacked out its local signal after negotiations failed to produce an agreement by the contract expiration date.”¹⁴⁷ This reflects ATVA’s request,¹⁴⁸ which was for temporary relief for viewers, not a “prohibition” on exclusivity altogether.

In any event, the broadcasters’ claim that broadcast exclusivity is solely the province of “private negotiation, not Commission regulation”¹⁴⁹ is both wrong and unhelpful. It is wrong because, as the Affiliates concede, the Commission has already concluded that its good faith rules cover retransmission consent negotiations as they relate to distant signal importation.¹⁵⁰ It is unhelpful because it ignores broadcasters’ obligations to the public they serve. Here again, the public interests at stake involve more than the ability of broadcasters to “maximize viewership and, thereby, advertising revenue.”¹⁵¹

The ability to import distant signals during the duration of a dispute will markedly decrease the harm to the public caused by blackouts. As with other ATVA proposals to reduce such harm, the availability of distant signals should also lead to fewer blackouts overall by making blackouts a less viable tool for gaining negotiating leverage. In this regard, we note that broadcasters appear to have abandoned earlier arguments that this approach will lead to more

¹⁴⁷ *Notice*, ¶ 16 (emphasis added).

¹⁴⁸ ATVA Comments at 49. By definition, this rule would apply when there is no contract between the station and the MVPD, demonstrating that the rule has nothing to do with terms negotiated between the parties.

¹⁴⁹ Affiliates Associations Comments at 26.

¹⁵⁰ *Id.* at 27 (citing *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Red. 10339, ¶¶ 27-29 (2005)).

¹⁵¹ *Id.* at 29.

blackouts by making MVPDs indifferent to carriage of the local signal.¹⁵² Such arguments, of course, ascribe little to no value to broadcasters' local programming. If a station carries local programming of value, an MVPD would prefer to carry it rather than an out-of-market substitute—and the more attractive that local content, the greater the preference will be.¹⁵³

G. Preventing Broadcasters From Charging For Non-Subscribers Will Serve The Public.

Broadcasters claim that they should be free to charge for subscribers who do not subscribe to video service at all or subscribers who receive broadcast signals over the air—including doing so through tiering obligations.¹⁵⁴ Such provisions, NAB argues, are “common in all types of program carriage agreements.”¹⁵⁵ The Affiliates Associations describe them as “elements of the value proposition for stations in any retransmission consent negotiation.”¹⁵⁶ Scripps describes them as “particular terms, conditions, or limitations on the retransmission of a local television station’s signal.”¹⁵⁷ Such demands are not, however, mere “limitations on the retransmission of a local television station’s signal.” They are demands for payment from

¹⁵² See, e.g., 2014 NAB Comments at 22-23 (arguing that eliminating exclusivity protections would lead to “opportunistic ‘hold-up’” by MVPDs through the importation of distant signals.)

¹⁵³ Nexstar claims that distant signal importation causes a variety of more specific harms, including confusion with respect to different versions of “Eyewitness News,” harm to Nexstar’s relationship with its advertisers, and even the unauthorized practice of law. Nexstar Comments at 31. Nexstar nowhere explains, however, how satellite carriers have offered distant network signals for nearly thirty years without causing similar problems.

¹⁵⁴ See AT&T Comments at 26 (describing how broadcasters enact such requirements through tiering obligations).

¹⁵⁵ NAB Comments at 48.

¹⁵⁶ Affiliates Associations Comments at 20.

¹⁵⁷ Scripps Comments at 10. Scripps also describes such provisions as a mere “method used to calculate” fees. *Id.* at 11. As AT&T points out, it is immaterial whether a broadcaster forces an MVPD to provide signals to a subscriber that can receive them off-air or simply charges the MVPD as if it did so. AT&T Comments at 26.

subscribers who do not receive such retransmission in the first place. As ATVA has explained, this conflicts with the very concept of retransmission consent and thus cannot be in good faith.¹⁵⁸

* * *

As set forth herein and in ATVA's initial comments, the retransmission consent market no longer functions properly. Without reform, it will only get worse. ATVA's proposals would benefit the public, which, after all, bears the brunt of broadcaster misbehavior. The Commission possesses more than ample authority to adopt these proposals. ATVA urges the Commission to do so expeditiously.

Respectfully submitted,



Mike Chappell
THE AMERICAN
TELEVISION ALLIANCE
1155 F Street, N.W.
Suite 950
Washington, DC 20004
(202) 333-8667

Michael Nilsson
William M. Wiltshire
John R. Grimm
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W.
The Eighth Floor
Washington, DC 20036
(202) 730-1300
*Counsel for the
American Television Alliance*

January 14, 2016

¹⁵⁸ ATVA Comments at 33.