

**Before the
Federal Communications Commission
Washington, DC 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)	

REPLY COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. (“TWC”) hereby submits these reply comments in response to the opening comments filed in the above-captioned proceeding. The record reflects broad consensus among multichannel video programming distributors (“MVPDs”), public interest groups, and independent programmers for updating the Commission’s good faith negotiation rules to protect competition and consumers from broadcaster abuses of the broken retransmission consent regime. Indeed, numerous commenters support the specific reforms proposed in TWC’s opening comments. Broadcasters, on the other hand, continue to bury their heads in the sand, maintaining that the retransmission consent regime is working perfectly and that the good faith rules do not need to be changed, despite overwhelming record evidence to the contrary and a congressional mandate to review and update these rules. Commission action is urgently needed to curb broadcasters’ brinkmanship tactics that result in blackouts and unreasonably drive up retransmission fees for MVPDs and their customers. The Commission therefore should move swiftly to adopt the reforms set forth in TWC’s opening comments and supported by a wide array of parties in this proceeding.

DISCUSSION

I. THE RECORD STRONGLY SUPPORTS REFORMING THE GOOD FAITH RULES TO PROTECT COMPETITION AND CONSUMERS

The need for comprehensive reform to the retransmission consent regime—and to the good faith rules in particular—enjoys overwhelming, broad-based support among commenters in this proceeding. Video distributors of all sizes and platforms—including traditional cable operators large¹ and small,² telecommunications providers,³ and satellite providers⁴—have urged the FCC to seize on Congress’s directive to review the good faith rules and to adopt reforms addressing the various harmful and anticompetitive practices currently employed by broadcasters when negotiating retransmission consent. Public interest groups likewise have reiterated their strong support not only for updating the good faith rules but also for adopting “broader reforms” to “protect consumers and return balance to the retransmission consent marketplace.”⁵

¹ See, e.g., Comments of Cox Enterprises, Inc., MB Docket No. 15-216, at 1-2 (filed Dec. 1, 2015) (“Cox Comments”); Comments of Charter Communications, Inc., MB Docket No. 15-216, at 3-4 (filed Dec. 1, 2015); Comments of Cablevision Systems Corp., MB Docket No. 15-216, at 3-7 (filed Dec. 1, 2015) (“Cablevision Comments”); Comments of the National Cable & Telecommunications Association, MB Docket No. 15-216, at 1-3 (filed Dec. 1, 2015).

² See, e.g., Comments of BEK Communications Cooperative, MB Docket No. 15-216, at 1 (filed Dec. 1, 2015) (“BEK Comments”); Comments of the American Cable Association, MB Docket No. 15-216, at 1-8 (filed Dec. 1, 2015) (“ACA Comments”); Comments of NTCA–The Rural Broadband Association, MB Docket No. 15-216, at 4-10 (filed Dec. 1, 2015) (“NTCA Comments”).

³ See, e.g., Comments of AT&T Services, Inc., MB Docket No. 15-216, at 2-10 (filed Dec. 1, 2015) (“AT&T Comments”); Comments of Verizon, MB Docket No. 15-216, at 1-4 (filed Dec. 1, 2015) (“Verizon Comments”); Comments of CenturyLink, MB Docket No. 15-216, at 2 (filed Dec. 1, 2015); Comments of United States Telecom Association, MB Docket No. 15-216, at 3-6 (filed Dec. 1, 2015) (“USTA Comments”).

⁴ See, e.g., AT&T Comments at 2 n.2 (noting that AT&T’s filing was “submitted on behalf of AT&T and its subsidiaries, including DIRECTV, LLC”).

⁵ See Comments of Public Knowledge and Open Technology Institute at New America, MB Docket No. 15-216, at 7, 16 (filed Dec. 1, 2015) (“PK/OTI Comments”).

Independent programmers agree, pointing out, as TWC and others have, that broadcasters' harmful practices are the "product of market distorting regulations that are outdated and no longer serve the public interest."⁶

The specific proposals advanced by TWC in its opening comments likewise find significant support among other commenters. Several parties representing a wide array of stakeholders and constituencies agree that the Commission should amend the good faith rules to address (i) broadcasters' attempts to skirt the ban on joint negotiations⁷; (ii) broadcasters' demands for payment for non-video subscribers (and related requirements)⁸; (iii) broadcasters' efforts to prohibit importation of out-of-market signals during blackouts⁹; (iv) broadcasters' insistence on terms that limit consumers' use of lawful devices and functionalities¹⁰; (v) broadcasters' forced bundling of retransmission consent rights with other programming¹¹; and

⁶ Comments of TheBlaze TV, MB Docket No. 15-216, at 2 (filed Dec. 2, 2015) ("TheBlaze Comments"); *see also* Comments of the American Television Alliance, MB Docket No. 15-216, at 1 n.1 (filed Dec. 1, 2015) (noting that ATVA's members, on whose behalf ATVA submitted its comments, include independent programmers).

⁷ *See, e.g.*, Comments of the American Television Alliance, MB Docket No. 15-216, at 28-29 (filed Dec. 1, 2015) ("ATVA Comments") (noting several examples of ongoing broadcaster "collaboration" in the wake of the Commission's order addressing joint negotiations, and urging Commission to address such conduct through reforms to its good faith rules).

⁸ *See, e.g.*, PK/OTI Comments at 13-14; AT&T Comments at 25-26; USTA Comments at 19-21; ATVA Comments at 50-51; Cox Comments at 12-13; TheBlaze Comments at 4.

⁹ *See, e.g.*, AT&T Comments at 20-21; ATVA Comments at 49-50; NTCA Comments at 17-18; USTA Comments at 15-18.

¹⁰ *See, e.g.*, ATVA Comments at 48-49; Cox Comments at 11-12; USTA Comments at 18-19.

¹¹ *See, e.g.*, PK/OTI Comments at 11-12; ACA Comments at 14-33; AT&T Comments at 14-18; USTA Comments at 11-13; BEK Comments at 2-3; ATVA Comments at 44-47; Cox Comments at 9-11; Cablevision Comments at 10; TheBlaze Comments at 2-3.

(vi) other abusive practices by broadcasters that harm competition and consumers.¹² Various commenters also agree that the Commission must ensure that its enforcement mechanisms effectively address and deter unlawful conduct in the retransmission consent arena—including through the adoption of an interim carriage remedy that could be imposed in a good faith complaint proceeding if an MVPD demonstrates a likelihood of success on the merits.¹³

Broadcasters, meanwhile, perpetuate the fiction that the current retransmission consent regime “works,” that “no change to any of the good faith negotiations rules is warranted,” and that the Commission “should terminate this proceeding” on that basis.¹⁴ Such assertions, while disappointing, are not altogether surprising, as the current system clearly benefits broadcasters—to the tune of \$6.3 billion in retransmission consent fees in 2015, representing a staggering increase of nearly 22,400 percent over the past ten years.¹⁵ But broadcasters cannot seriously maintain that these skyrocketing fees and the ever-growing number of threatened and actual blackouts reflect a well-functioning marketplace that adequately protects consumers. As noted

¹² See, e.g., ACA Comments at 48-58 (supporting, like TWC, a ban on broadcasters’ blocking of online content during retransmission consent negotiations); NCTA Comments at 3-5 (likewise supporting new rules prohibiting online blocking by broadcasters); PK/OTI Comments at 9-10 (same); see also, e.g., *id.* at 10-11 (agreeing that the FCC should prohibit broadcasters from ceding their “right to negotiate or . . . power to approve a retransmission consent agreement to an affiliated television network”).

¹³ See, e.g., PK/OTI Comments at 16, 20-21 (“Interim carriage may be an appropriate tool for the Commission to apply in some circumstances, and as PK and OTI have argued before, the Commission has ample authority to require such carriage.”); Verizon Comments at 5 (“While incorporating [the substantive] proposals into the Commission’s good faith standards will help, a critical part of any retransmission consent reform is a standstill requirement that would provide for automatic interim carriage pending completion of renewal negotiations.”).

¹⁴ Comments of CBS Corp., MB Docket No. 15-216, at i-ii (filed Dec. 1, 2015) (“CBS Comments”); see also Comments of the National Association of Broadcasters, MB Docket No. 15-216, at 1-7 (filed Dec. 1, 2015) (“NAB Comments”).

¹⁵ See Comments of Time Warner Cable Inc., MB Docket No. 15-216, at 7 (filed Dec. 1, 2015) (“TWC Comments”) (citing industry data).

above and in TWC’s opening comments, the overwhelming weight of evidence is directly to the contrary and indicates that comprehensive reform is needed now more than ever.

Broadcasters also have it exactly backwards when they assert that the reforms proposed in the NPRM and in the comments of MVPDs, public interest groups, and independent programmers aim to “single[] out” broadcasters for “unfavorable treatment.”¹⁶ As TWC and other have explained, the current retransmission consent rules, coupled with statutory must-carry obligations, tier-placement and buy-through requirements, and related provisions, unquestionably “single out” broadcasters for *favorable* treatment, and broadcasters continue to exploit these artificial regulatory preferences to demand exorbitant fees and to engage in brinkmanship and blackouts—all to the detriment of competition and consumers.¹⁷ Indeed, TWC’s preferred outcome continues to be one in which Congress eliminates *any* regulatory overlay in favor of a genuinely market-based system that more adequately protects the interests of consumers and MVPDs.¹⁸ The reform proposals identified in TWC’s opening comments and supported by numerous other commenters merely provide a path to restoring competitive *balance* to retransmission consent negotiations and to protect consumers from harms caused by the existing regulatory regime.¹⁹

¹⁶ NAB Comments at 8.

¹⁷ See TWC Comments at 1-2; see also, e.g., TheBlaze Comments at 1 (explaining that the current regime “singl[es] out broadcasters” by “creat[ing] an artificial market advantage for broadcasters and bestowing upon them special legal and financial benefits”).

¹⁸ See TWC Comments at 2.

¹⁹ See *id.*; see also USTA Comments at 3 (“In its current proceeding, the Commission has an ideal opportunity to adopt critical reforms that will remove artificial regulatory advantages granted to broadcasters and bring greater balance to the retransmission consent negotiation process.”).

II. BROADCASTERS' CRASS ATTACKS ON TWC ARE UNFOUNDED AND IRRELEVANT

Perhaps recognizing the weakness of their claim that no reforms are necessary, some broadcasters resort to making various irrelevant and unsubstantiated accusations about TWC and other MVPDs in a cynical attempt to distract the Commission from the task at hand. For example, multiple broadcasters suggest that joint purchasing arrangements among cable operators serving distinct geographic areas, including the arrangement between TWC and Bright House Networks (“BHN”), are somehow improper and should be regulated to the same degree as joint *selling* arrangements among competing local stations.²⁰ But as TWC has explained previously, broadcasters cannot sanitize their collusive conduct in the *sale* of retransmission consent by drawing comparisons to the joint *purchasing* activities of some cable operators. Among other key distinctions, the antitrust laws have long recognized that joint purchasing arrangements—in stark contrast to joint sales by competitors—are procompetitive in most circumstances.²¹ Indeed, the Commission has expressly recognized the value of joint MVPD buying groups and accords them various protections under the program access rules.²² Moreover, the competition laws generally prohibit agreements on price *by competitors*, so there

²⁰ See, e.g., Comments of the Affiliates Associations, MB Docket No. 15-216, at 52 (filed Dec. 1, 2015); Comments of Nexstar Broadcasting, Inc., MB Docket No. 15-216, at 22 (filed Dec. 1, 2015) (“Nexstar Comments”).

²¹ See, e.g., FED. TRADE COMM’N AND U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000) (explaining that joint purchasing arrangements, even as between direct competitors, usually “do not raise antitrust concerns and indeed may be pro-competitive,” because they “enable participants to centralize ordering . . . or to achieve other efficiencies”); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (“Wholesale purchasing cooperatives . . . are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects.”).

²² See 47 C.F.R. § 76.1000(c); 47 U.S.C. § 548(c)(2)(B); *Revision of the Commission’s Program Access Rules*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 2605 ¶ 83 (2012).

is a decisive difference between coordination involving non-competing cable companies (such as TWC and Bright House), on the one hand, and collusion involving broadcast stations that are head-to-head competitors in a DMA, on the other.

A handful of station groups also accuse TWC (along with DIRECTV and DISH) of “manufactur[ing]” disputes in order to “provoke government intervention” in the retransmission consent arena.²³ Setting aside the fact that retransmission consent is the *product* of “government intervention,” these claims have no basis in evidence or common sense. The record in this proceeding powerfully demonstrates the harms that can accompany retransmission consent disputes, not only for consumers but also for MVPDs’ businesses. TWC itself reported a loss of more than 300,000 subscribers in the calendar quarter that coincided with its 2013 disputes with CBS and Journal Communications—a record decline that TWC believes was attributable in part to those disputes—and still was subject to “significant fee increases” even after those disputes were resolved.²⁴ It would be wholly irrational as a business matter for TWC to invite such disputes merely to prove a point in a regulatory filing. Accordingly, even apart from the lack of evidence supporting broadcasters’ claims in this regard, their theory entirely overlooks the very real harms to MVPDs and their customers often associated with retransmission consent disputes.

Finally, a few broadcasters point to TWC’s proposed merger with Charter and BHN in an effort to argue that the Commission should be concerned with MVPDs’ bargaining leverage

²³ Nexstar Comments at 6; *see also, e.g.*, Comments of Media General, Inc., MB Docket No. 15-216, at 10 (filed Dec. 1, 2015).

²⁴ *See* Brian Stelter, *Time Warner Left Bruised in Fee Battle with CBS*, N.Y. Times, Oct. 31, 2013, at B1, *available at* <http://www.nytimes.com/2013/11/01/business/media/time-warner-reports-record-quarterly-loss-of-tv-subscribers.html>; TWC Comments at 23.

rather than with the negotiating power of broadcasters.²⁵ These arguments are wholly misplaced. Whatever modest increase in negotiating leverage could result from the proposed merger would *benefit* consumers by restraining the runaway growth in retransmission consent fees (and other skyrocketing programming fees).²⁶ In any event, there is no realistic prospect that New Charter's increased subscriber base (at a level well below that of AT&T and Comcast) would prevent further growth in retransmission consent fees seen across the industry in recent years. Moreover, there is no reason to conclude that any reductions in retransmission consent fees would result in any cognizable harm to broadcasters; in approving the recent merger of AT&T and DIRECTV, the Commission expressly found that there was no evidence that "a decrease in programming rates would have the net effect of lowering the quality or quantity of programming."²⁷ Broadcasters' efforts to resist reform by citing TWC's pending merger with Charter and BHN thus fall flat.

²⁵ See, e.g., CBS Comments at 6; NAB Comments at 1-2; Comments of the Walt Disney Company, MB Docket No. 15-216, at 8 (filed Dec. 1, 2015).

²⁶ *Applications of AT&T Inc. and DIRECTV For Consent To Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131 ¶¶ 290-91 (2015) ("AT&T/DIRECTV Order") (recognizing reduced programming costs as a benefit based on evidence that a portion of such reductions will be passed through to consumers in the competitive video marketplace); see also NPRM ¶ 3 (noting that rising retransmission consent rates have applied "upward pressure on consumer prices for MVPD video programming services").

²⁷ *AT&T/DIRECTV Order* ¶ 235.

CONCLUSION

At bottom, broadcasters offer no plausible basis for leaving unchanged the Commission's weak good faith rules or for ignoring the broad consensus for reform among all other commenters in this proceeding. Thus, for the reasons discussed above and in TWC's opening comments, the Commission should promptly update its good faith rules to address broadcaster abuses of the current retransmission consent regime, and should use its legal authority to establish enforcement measures that are more effective at deterring harmful broadcaster conduct and protecting consumers during retransmission consent disputes.

Respectfully submitted,

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