Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 AT&T

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INTRODUCTION AND EXECUTIVE SUMMARY

The comments in this proposed rulemaking confirm that the retransmission consent regime is broken and is harming the public. With the exception of parties that benefit financially from the current dysfunction, commenters, including public-interest advocates, uniformly support reforming the retransmission consent negotiation rules. Many commenters, moreover, support the same public-interest-oriented, measured steps – such as preventing online blocking, forced bundling, and blackouts timed to deprive consumers of marquee programs – that AT&T advocated in its comments. The Commission should expeditiously adopt those proposals, and the others that AT&T urged in its comments and discusses further below, to restore some balance to the retransmission consent process and to limit the ability of broadcasters to harm consumers in order to gain leverage in negotiations.

Broadcasters' self-interested claims do not counsel for a different result. For instance, broadcasters repeatedly assert that the retransmission market is functioning properly, but the facts belie that claim. To the detriment of consumers, retransmission rates are indisputably skyrocketing – increasing at many times the rate of inflation[1] – at the same time that broadcast channel ratings have *declined* dramatically.

Nor can broadcasters credibly claim that retransmission fees are too insignificant to warrant the Commission's attention. In fact, those fees are sufficiently important for Congress to direct the Commission to conduct this rulemaking.

Similarly, broadcasters miss the mark in suggesting that MVPDs with large market capitalizations or national footprints have leverage in retransmission negotiations. The continued growth in retransmission rates again refutes that claim, which ignores the basic fact that this

[1] AT&T Comments at 6-8.

matter involves *local* geographic markets where broadcasters have a monopoly on marquee network programming and multiple MVPDs are competing to show it.

Nor are broadcasters' attacks on AT&T's specific proposals persuasive. *First*, with respect to online blocking, broadcasters' claim that they have a First Amendment and copyright law right not to make content available ignores the indisputable fact that broadcasters have *already* decided to make the same content freely available. The only question is whether, consistent with their public interest duties and their obligation to negotiate retransmission consent in good faith, they can arbitrarily block some consumers' access to that same content to gain business leverage, which raises no substantial issue of free speech or copyright law.

Second, broadcasters claim that forced bundling is adequately addressed by existing antitrust laws. They cannot and do not claim, however, that antitrust cases can be resolved in the short time period required by retransmission negotiations; in fact, in other contexts, NAB has highlighted the fact that antitrust litigation can drag on for many years. Accordingly, the theoretical possibility of antitrust litigation should not dissuade the Commission from providing a meaningful remedy here.

Third, broadcasters' objections to rules prohibiting blackouts of marquee programming are likewise not substantial. They claim that such a rule could not be practically implemented, but AT&T and others have proposed concrete, readily administrable standards to determine which programming would qualify.

Finally, as discussed in more detail below, AT&T's proposed regulations prohibiting broadcasters from ceding the right to negotiate retransmission consent to third parties and from charging for subscribers who do not receive the broadcast station from their MVPD likewise have not been substantively refuted, and, in some key respects, have received affirmative support even from broadcasters. The Commission should therefore expeditiously adopt those proposed reforms as well.

I. The Commission Must Act To Fix the Broken Retransmission Marketplace

As AT&T explained in its comments (at 2-10), the retransmission consent marketplace has changed drastically since the Commission issued the *Good Faith Order*[2] over fifteen years ago, when the Commission believed the retransmission market to "function[ ] adequately."[3] Retransmission negotiations no longer involve a single MVPD and a single broadcaster with roughly equivalent bargaining power. Rather, as the Commission has rightly noted, the increase in competition among MVPDs (and OVDs) has shifted significant leverage to broadcasters.[4] In that context, broadcasters can wield their monopoly on programming to demand increases in retransmission fees that far exceed the increases in other programming costs, knowing that, if an MVPD loses "must-have" network programming, the MVPD risks losing subscribers to its competitors. As AT&T noted in its comments (at 1, 6-7), this dynamic has resulted in retransmission consent fees growing by more than *twenty-thousand percent* over the past ten years, and has increasingly led to blackouts when MVPDs resist broadcasters' unjustifiable fee increases.

No party seriously disputes that retransmission consent fees are rising rapidly and that blackouts are likewise increasing.[5] In fact, those fees have grown far faster than other

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

[3] *Id.* ¶ 61.

[4] Notice of Proposed Rulemaking, *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, 30 FCC Rcd 10327, ¶ 3 (2015) ("*Notice*").

[5] Several broadcasters speculate that certain MVPDs (like DIRECTV) are strategically causing blackouts in order to prompt the Commission to act. *See, e.g.,* Nextstar Comments at 6

programming costs (for example, four times the rate of programming costs for RSNs), and by orders of magnitude more than the general rate of inflation.[6] Similarly, blackouts have increased dramatically, so that, as ATVA reports in its comments (at 7), nearly one out of eight pay-TV subscribers experienced a blackout of a local broadcast signal in just the first ten months of 2015. By itself, that fact undermines broadcasters' claims[7] that they have sufficient economic incentives to avoid blackouts that regulation is unnecessary to protect the public interest.

Broadcasters' remaining arguments about the state of the market likewise cannot be squared with these facts.

First, broadcasters claim they have historically been *under*paid for retransmission consent and that the market is just now "catching up." For instance, Joint Broadcasters assert that "[i]t is a fact that broadcasters have historically been undercompensated by MVPDs" and that "broadcasters [are] now at least moving closer to payments that represent the true market

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(accusing DISH Network, DIRECTV, and Time Warner Cable of "manufactur[ing] a 'retransmission crisis' to provoke government intervention"); Broadcaster Affiliates Associations Comments at 37-38; NAB Comments at 14. Broadcasters provide no factual support for this speculation, nor would such actions make economic sense for an MVPD given the number of subscribers that an MVPD risks losing during a blackout. *See, e.g.*, Julianne Pepitone, *Time Warner Cable Lost 300,000 Subscribers Amid CBS Blackout*, CNN Money (Oct. 31, 2013), *available at* http://money.cnn.com/2013/10/31/technology/time-warner-cable-cbs/ (reporting that Time Warner Cable lost 306,000 subscribers in one quarter in which it suffered a blackout of several CBS stations, with Time Warner Cable acknowledging that "the dispute 'negatively impacted' subscriber numbers").

[6] *See* AT&T Comments at 6-7.

[7] *See* NAB Comments at 12-13 (stating that "competition for advertising dollars is more intense than ever" and arguing that "broadcast TV stations 'must have' pay TV distribution at least as much as MVPDs 'must have' broadcasters"); Walt Disney Comments at 4.

value for their stations" even though "today broadcasters continue to be substantially underpaid."[8]

As evidence of this alleged prior under-compensation, broadcasters point to the fact that some cable programmers still receive larger licensing fees than broadcasters despite having lower ratings.[9] That assertion mixes apples and oranges. As broadcaster Gray Television correctly explains, cable and broadcast programmers have very different business models: "cable networks earn less advertising revenue, and they are more dependent on affiliate fees charged to MVPDs."[10] Accordingly, cable networks may maximize revenue by charging higher licensing fees at the expense of lower distribution and less advertising revenue. In contrast, "broadcasters will use advertising revenue to subsidize more of their programming costs leading to lower fees to MVPDs."[11] Indeed, "[i]n exchange for obtaining a valuable license to operate a broadcast station using the public airwaves, each radio and television licensee is required by law

[8] Joint Broadcasters Comments at 9-10; *see also* Broadcaster Affiliates Associations Comments at 4; Graham Media Group Comments at 3-6; Gray Television Comments at 16-17; Hearst Television Comments at 2-3; Writers Guild Comments at 5.

[9] *See* Broadcaster Affiliates Associations Comments at 4; Joint Broadcasters Comments at 10 n.28; Graham Media Group Comments at 3-6; Writers Guild Comments at 5.

[10] Gray Television Comments at 14. For example, as Gray shows, in 2012, approximately 75% of ESPN's revenue came from retransmission fees, and between 80% and 90% of RSNs' revenue comes from retransmission fees. *See id.* Retransmission fees continue to dominate ESPN's revenue in 2015. ESPN reported 92 million subscribers in 2015, and SNL Kagan estimated ESPN received retransmission fees of $6.55 per subscriber per month, resulting in $7.2 billion of retransmission fee revenue. For comparison, SNL Kagan estimates that ESPN received $2.1 billion in advertising revenue. *See* The Walt Disney Co. 10-K, at 2 (2015); Frank Bi, *ESPN Leads All Cable Networks in Affiliate Fees*, Forbes (Jan. 8, 2015), *available at* http://www.forbes.com/sites/frankbi/2015/01/08/espn-leads-all-cable-networks-in-affiliate-fees/.

[11] Gray Television Comments at 15; Broadcaster Affiliates Associations Comments at 20 ("[A]dvertising revenues remain the lifeblood of *free*, over-the-air broadcasting.").

to operate its station in the 'public interest, convenience and necessity.'"[12] As broadcasters recognize, this public interest obligation requires broadcasters to provide programming to consumers for free.[13] Accordingly, as the Commission has noted, "[t]elevision broadcast stations earn about 80 percent of their revenue through the sale of advertising time during their programs."[14] Thus, the business model for broadcast programming does not, and was never intended to, rely as much on retransmission consent fees as cable programming relies on licensing fees.[15]

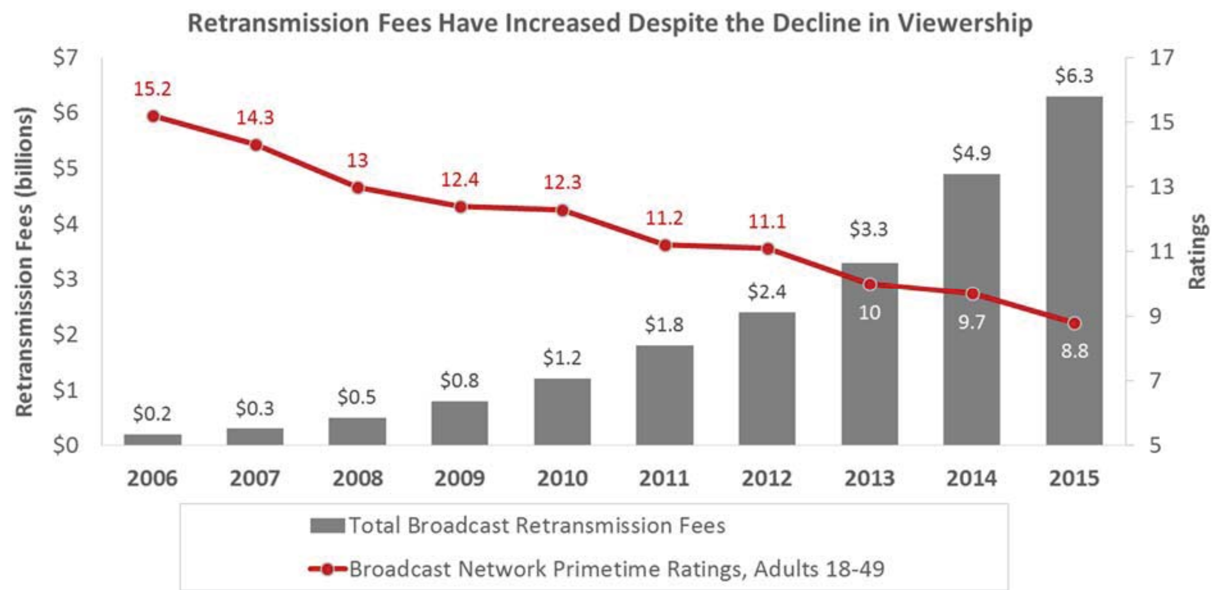
Nor can broadcasters' claim that retransmission fees are just now "catching up" to the supposed market value of their programming be squared with the fact that, while they still carry some "must-have" content, overall ratings for broadcast programming have been declining precipitously at the same time as retransmission fees have skyrocketed. That fact is demonstrated by the chart below:

[12] FCC, *The Public and Broadcasting* (July 2008 ed.); *Broadcast Localism*, 19 FCC Rcd 12425, ¶ 1 (2004) ("Broadcasters, who are temporary trustees of the public's airwaves, must use the medium to serve the public interest.") (footnote omitted).

[13] *See* CBS Comments at 11.

[14] *See* Sixteenth Annual Competition Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd 3253, ¶ 173, Table 2 (2015) ("Sixteenth Annual Competition Report").

[15] Also, unlike with broadcast channels, cable channels provide MVPDs with the opportunity to obtain revenue through local advertising on those channels ("local ad avails").



Sources: Broadcast Transmission Fees. SNL Kagan, *Broadcast Retransmission Fees vs. Basic Cable and RSN Programming Fees* (Apr. 2014), *available at* http://www.tvfreedom.org/wp-content/uploads/2015/04/Cable-vs-RSN-vs-broadcast-fees1.pdf (SNL Kagan estimates of total broadcast retransmission fees, 2006-2013); SNL Kagan Press Release, *SNL Kagan Releases Updated Industry Retransmission Fee Projections to $9.3 Billion by 2020* (Oct. 27, 2014), *available at* http://www.prweb.com/releases/2014/10/prweb12279018.htm (SNL Kagan projection for 2014); SNL Kagan Press Release, *U.S. TV Station Owners' Retransmission Fees Expected to Reach $10.3 Billion by 2021, Versus the Projected Level of $6.3 Billion This Year* (July 7, 2015), *available at* http://www.prweb.com/releases/2015/07/prweb12829757.htm (SNL Kagan projection for 2015). Broadcast Ratings. Aggregate ratings for ABC, CBS, Fox, and NBC for the 2005-2006 through 2014-2015 seasons. B. Grossman, *Fast Track*, Broadcasting & Cable (May 26, 2006), http://www.broadcastingcable.com/news/news-articles/fast-track/80212; P. Gough, *Patterns, Measurements Define 2006-07 Season* (May 25, 2007), http://www.hollywoodreporter.com/news/patterns-measurements-define-2006-07-137327; TVWeek, *Fox Takes Total-Viewer Crown in Strike-Blasted Season* (May 25, 2008), http://www.tvweek.com/in-depth/2008/05/fox-takes-total-viewer-crown-i/; TVWeek, *Fox Wins 5th Straight Season in Key 18-49 Demo* (May 25, 2009), http://www.tvweek.com/in-depth/2009/05/fox-wins-5th-straight-season-i/; N. Andreeva, *Final 2009-10 Season Network Rankings* (May 27, 2010), http://deadline.com/2010/05/final-2009-10-season-network-rankings-44161/; N. Andreeva, *Final Network Rankings for 2010-11 Season: English-Language Nets Down, Univision Up* (May 26, 2011), http://deadline.com/2011/05/final-network-rankings-for-2010-11-season-135778/; N. Andreeva, *2011-12 Season Network Rankings: Fox Still on Top But Down, NBC in Third, CW Falls* (May 24, 2012), http://deadline.com/2012/05/2011-12-season-network-rankings-fox-still-on-top-but-down-nbc-in-third-cw-falls-277599/; D. Patten, *2012-2013 Season Network Rankings: CBS Sweeps in Final Numbers*(May 23, 2013), http://deadline.com/2013/05/network-tv-final-rankings-2012-2013-season-full-list-507410/; L. de Moraes, *NBC Poised to Win 2013-14 Demo for First Time in 10 Years* (May 20, 2014), http://deadline.com/2014/05/nbc-tv-ratings-demo-2013-2014-win-season-733631/; D. Patten, *NBC Set to Eke Out 2014-15 TV Season Demo Win Over CBS Thanks to Super Bowl* (May 19, 2015), http://deadline.com/2015/05/nbc-ratings-cbs-2014-2015-tv-season-demo-win-1201429722/.

Broadcasters themselves highlight the fact that they face increased competition from non-broadcast programmers. NAB, for example, claims that increased competition has reduced broadcast viewing shares from approximately 40% in 2006 to approximately 30% in 2014.[16]

If the retransmission market were working properly, that increased competition would have led to lower or at least stable rates. However, because broadcasters still have a monopoly on some must-have content, retransmission fees have *increased* astronomically over that same period as broadcasters have opportunistically exercised the leverage they have under the current regulatory regime, given the more competitive MVPD marketplace today.

[16] NAB Comments at 8-15; *see also* Fox Comments at 6-7; Walt Disney Comments at 4-7.

Second, broadcasters suggest that there is no imbalance in bargaining power between broadcasters and MVPDs that requires regulatory intervention because they need access to MVPD distribution just like MVPDs need access to programming.[17] Broadcasters claim, for instance, that this is especially the case as a result of consolidation between MVPDs. They thus argue that, because of the national subscriber numbers of companies such as Comcast and AT&T, as well as their large market capitalization, MVPDs now have significant leverage in retransmission negotiations.[18] As an initial matter, consolidation has not been limited to MVPDs; there have been significant mergers and acquisitions on the broadcast side as well.[19]

More to the point, however, broadcasters' argument ignores the relevant issue. Retransmission consent negotiations – unlike, for instance, negotiations for MVPDs to carry national cable channels – occur on a *local* level in individual DMAs. The size of any MVPD nationally does not change the fact that, in each local market, it needs access to the Super Bowl, the Oscars, and other "must-have" content to compete for customers.

Indeed, if national consolidation of MVPDs reduced broadcaster leverage, as broadcasters claim, then one would expect retransmission rates to have gone down (or at least to

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[17] NAB Comments at 12-13; Walt Disney Comments at 4.

[18] *See* Joint Broadcasters Comments at 5-6, 8-9; Broadcaster Affiliates Associations Comments at 2; CBS Comments at 5-6; Fox Comments at 4-5; Hearst Television Comments at 2; Morgan Murphy Media Comments at 5-6; NAB Comments at 16-19; Walt Disney Comments at 8.

[19] *See, e.g.*, Memorandum Opinion and Order, *Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc*., 29 FCC Rcd 9156 (2014); *J. Stewart Bryan II and Media General Communications Holdings, LLC (Transferor), Shareholders of New Young Broadcasting Holding Company, Inc., and Its Subsidiaries (Transferor) and Post-Merger Shareholders of Media General, Inc. (Transferee) For Consent to Transfer Control of Licenses*, 28 FCC Rcd 15509 (2013).

stabilize) over the past decade. In fact, the opposite has occurred.[20] Thus, the relevant fact is that, over that time, MVPD competition has increased substantially *within individual DMAs*, as the Commission has repeatedly noted.[21] That increased competition has resulted in a negotiating context that, as the Commission recognized in the *Notice*,[22] is far different than the one that existed when the Commission issued the existing *Good Faith Order*. These drastically changed circumstances require reform of the existing rules.

Third, broadcasters argue that the Commission should not worry about the broken retransmission consent market, because retransmission fees allegedly are not a significant portion of an MVPD's programming costs, and, in any event, reining in those costs supposedly would not benefit consumers.[23]

In fact, retransmission consent costs *are* a substantial and rapidly growing expense for MVPDs. Indeed, broadcasters themselves have stated that they believe $6 per subscriber per month per network is a realistic goal.[24] Based on publicly available estimates, that would be a

[20] *See* AT&T Comments at 7 n.20 (noting that broadcast retransmission fees grew by an average of over 40% per year between 2006 and 2014).

[21] Sixteenth Annual Competition Report ¶ 32 ("We also note that the launch of DBS in the 1990s and the expansion of telephone MVPD networks since 2005 have significantly reduced MVPD concentration since the Commission's *First Report* on the status of competition in the market for the delivery of video programming in 1995.").

[22] *Notice* ¶ 3.

[23] Joint Broadcasters Comments at 10; Broadcaster Affiliates Associations Comments at 3-4; Nexstar Comments at 11-12; Graham Comments at 4-6; Gray Television Comments at 15-17; Writers Guild Comments at 6-7.

[24] Diana Marszalek, *Nowhere to Go But Up for Retrans Fees*, TVNewsCheck (June 26, 2015), *available at* http://www.tvnewscheck.com/article/86466/nowhere-to-go-but-up-for-retrans-fees.

600% increase from current rates and would raise MVPD costs by $20 per month just for the four primary network channels.[25]

Moreover, arresting the growth of retransmission-consent costs will benefit consumers. As we have explained, the MVPD market is increasingly competitive. But even if that were not the case, basic economics teaches that marginal cost savings would still be passed through at least in part to consumers, resulting in lower rates than would otherwise exist. As former FCC Chief Economist Michael L. Katz has explained, "[i]t is a well-established principle taught in freshman economics courses that even a monopolist . . . has incentives to pass through marginal cost decreases to consumers in whole or in part."[26]

Fourth, and finally, broadcasters attempt to diminish the harm caused by blackouts by pointing out that they continue to provide their broadcast signal for "free" over-the-air.[27] However, as both broadcasters and MVPDs recognize, many consumers either do not have an antenna with which to receive over-the-air signals or live in areas where they do not receive a high-quality signal.[28] The availability of an over-the-air signal is cold comfort for these

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[25] Daniel Frankel, *Retrans Fees Could Reach $6 Per Sub, Broadcasters Say*, FierceCable (June 29, 2015), http://www.fiercecable.com/story/retrans-fees-could-reach-6-sub-broadcasters-say/2015-06-29.

[26] *See* Joint Opposition of AT&T Inc. and DIRECTV to Petitions to Deny and Condition and Reply to Comments, *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, An Economic Assessment of AT&T's Proposed Acquisition of DIRECTV: Reply Declaration of Michael L. Katz ¶ 21 (filed Oct. 16, 2014); *see also* Memorandum Opinion and Order, *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, ¶ 290 (July 28, 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.").

[27] *See* Broadcaster Affiliates Associations Comments at 13; E.W. Scripps Comments at 12-13; Hearst Television Comments at 4; Raycom Media Comments at 7 n.13.

[28] *See* NAB Comments at 13 (noting that, "in 1992, roughly 40 percent of American TV households . . . did not pay for television and relied exclusively on over-the-air (OTA)

consumers. At best, they are forced to spend time and money purchasing and installing an antenna. At worst, they cannot receive the signal, and, during a blackout, must either forgo broadcast programming or switch MVPDs.

II. The Commission Should Adopt AT&T's Proposed Reasonable Steps To Provide Additional Guidance Regarding the Requirements for Good Faith Retransmission Consent Negotiation

AT&T explained in its comments (at 10-11) that the primary problem with the Commission's good-faith regulations is that they do not provide sufficient guidance to be useful during fast-paced retransmission negotiations. MVPDs cannot wait for the Commission to adjudicate complaints under the existing general guidance because MVPDs lose subscribers and customer goodwill every day during a blackout.[29] Accordingly, AT&T proposed (at 11-26) six reasonable *per se* rules for what constitutes bad faith. Alternatively, AT&T proposed that the Commission designate these six practices as presumptive evidence of bad-faith negotiations under the totality of the circumstances test that can be rebutted only by a showing that the practices are consistent with competitive marketplace considerations. These *per se* rules (or presumptions) would provide the parties enhanced guidance with which to conduct negotiations in good faith, which should better allow them to adhere to these requirements without Commission intervention and, where that does not occur, will allow the Commission to adjudicate complaints in a timely fashion.

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television" but that "[t]oday, in contrast, the number that rely on OTA exclusively has been reduced to roughly 15 percent of American households"); NTCA Comments at 3 ("Nearly one-fourth of NTCA's members report that 90% or more of their service area cannot receive an over the air broadcast signal."); BEK Comments at 2; *see also* AT&T Comments at 8.

[29] Other commenters, including broadcasters, have acknowledged the time sensitivity of retransmission consent negotiations. *See* Joint Broadcasters Comments at 12 (broadcasters advocating that the Commission decide retransmission complaints "as expeditiously as possible" and no later than within 90 days); Mediacom Comments at 11-12 (noting that few good-faith complaints are resolved because MVPDs cannot wait for that to happen).

Numerous commenters proposed similar reforms in an effort to restore some balance to retransmission consent negotiations and to limit the harm to consumers caused by broadcasters' bad-faith negotiating tactics.[30] Broadcasters' attacks on these reasonable proposals lack merit.

A. Online Blocking

As AT&T has explained, the Commission should prohibit broadcasters from blocking an MVPD's subscribers or subscribers of an affiliated Internet service provider from accessing any content that the broadcaster or an affiliated network has made publicly available online.[31] Broadcasters have used such tactics to deprive an MVPD's customers of access to online content that the broadcaster itself has made freely available to all Internet users, even if the Internet access subscriber does not receive video service from the MVPD with which the broadcaster is having the dispute. Notably, broadcasters provide no assurance here that, absent Commission action, they will not resort to these tactics again.

Instead, broadcasters argue that, despite all their paeans to their public-interest mission, they have the right to continue to harm consumers in this way to gain leverage in negotiations. In the broadcasters' view, the Commission cannot legally address the public-interest harms caused by this kind of online blocking. Those claims lack merit.

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[30] *See, e.g.,* American Cable Association Comments at 15-33, 48-76; ATVA Comments at 44-51; Public Knowledge Comments at 9-14; ITTA Comments at 11-13; NCTA Comments at 3-5; NTCA Comments at 10-12, 17-18; USTA Comments at 7-21.

[31] Contrary to concerns of certain commenters, AT&T is not advocating that the Commission regulate online content that is available only on a subscription basis, only content that is freely available to the public at large. *See* Writers Guild Comments at 9-10. Also, because AT&T's proposal is limited to content that the broadcaster has chosen to make available for free, Saga Broadcasting's concern that this proposal would affect broadcasters' ability to charge for online content is misplaced. *See* Saga Broadcasting Comments at 7-8.

First, broadcasters assert that compelling them to make content available online would violate the compelled speech doctrine of the First Amendment.[32]

AT&T's proposed rule does not implicate this doctrine. It does not tell broadcasters "the ideas and beliefs deserving of expression, consideration, and adherence," or, put differently, "what they may or may not *say*."[33] Accordingly, the rule does not compel any speech. Instead, the rule would merely prevent broadcasters from arbitrarily blocking some individuals from receiving the same speech (actually, only receiving it through certain Internet access providers) that the broadcaster has *already* made freely available (and continues to make available to others) all because of a non-speech-related business dispute with a third party.

In any event, even if an online blocking rule could be construed as affecting a broadcaster's First Amendment rights, such a rule would be content neutral and thus subject to intermediate scrutiny, as broadcasters recognize.[34] AT&T's proposed regulation would survive intermediate scrutiny "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[35] The proposed regulation easily does so. It fulfills the substantial government interest, enshrined in the Communications Act, of ensuring retransmission negotiations are conducted in good faith and thus that consumers have access to broadcast television, consistent

[32] *See* Broadcaster Affiliates Associations Comments at 54-55 n.126; CBS Comments at 15; E.W. Scripps Comments at 15; Fox Comments at 16; News-Press & Gazette Comments at 21; Walt Disney Comments at 22-23.

[33] *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

[34] *See* Fox Comments at 16; Walt Disney Comments at 22-23.

[35] *Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 978 (D.C. Cir. 1996) (internal quotation marks omitted).

with the public-interest duty that broadcasters themselves repeatedly tout.[36] That government interest is wholly unrelated to suppression of expression. And the proposed regulation is narrowly tailored because it applies only to content that broadcasters have chosen to make publicly available for free.

In fact, AT&T's proposed rule poses far fewer First Amendment issues than other restrictions upheld by the D.C. Circuit and promulgated by the Commission. In *Time Warner Entertainment Co. v. FCC*, the D.C. Circuit upheld the program access and exclusive contract prohibitions in the 1992 Act against a First Amendment challenge under the intermediate scrutiny standard. Those laws effectively required certain programmers to make *all* of their content available to some MVPDs and are thus more intrusive on speech interests than AT&T's limited rule that would require broadcasters to make available to customers of some Internet access providers only the same online content that is already otherwise publicly available.[37]

Second, broadcasters argue that compelling them to make content available online violates their intellectual property right to determine the method by which they make copyrighted works available.[38] That argument greatly overstates the copyright interests at stake. AT&T's proposed online blocking rule does not compel broadcasters to license content against their will. There is thus no licensing issue implicated here because the broadcaster itself has already made the decision to make its content freely available online. The rule would merely

[36] *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (noting the "societal benefits" of "expand[ing] public access to freely broadcast television programs").

[37] *See* 93 F.3d at 977-79.

[38] *See* Broadcaster Affiliates Associations Comments at 54-58; CBS Comments at 14 & n.36; E.W. Scripps Comments at 15; Fox Comments at 14-15; Hearst Television Comments at 11; NAB Comments at 36-37; News-Press & Gazette Comments at 21; Nexstar Comments at 19; Walt Disney Comments at 29.

forbid broadcasters' negotiating tactic of blocking an MVPD's subscribers from viewing publicly available content due to an unrelated business dispute. Indeed, broadcasters' online blocking has *nothing* to do with whether broadcasters have granted consumers license to view their online content. The same consumer who is blocked from viewing certain online content through his or her MVPD can access – albeit inconveniently – the same content on their mobile phone through a different Internet access provider (even one who has no contractual arrangement with the broadcaster).

Additionally, as the Supreme Court recognized in *Sony v. Universal City Studios*, broadcasters' copyright interests are greatly diminished for programming that they have publicly broadcast for free. Accordingly, consumers do not infringe broadcasters' copyrights by recording for non-commercial purposes broadcast programming that consumers have been "invited to witness in its entirety free of charge" because such recordings "cause . . . [minimal] harm to the potential market for, or the value of, the[ ] copyrighted works."[39] Likewise here, because broadcasters have already chosen to make content available online to all Internet users to view for free, any Commission action that ensures this content remains available to all such users on equal terms, regardless of whether their Internet access provider is affiliated with a particular MVPD, would have *de minimis* effect on broadcasters' copyrights.

Finally, broadcasters argue that any regulation restricting their ability to block online access would cause broadcasters to cease making their content available online for free to the public at large.[40] Broadcasters, however, provide no plausible basis to believe this would occur. Broadcasters make their content available online for free because it increases their advertising revenue, builds their viewership, fosters goodwill, or furthers other business goals. They have

[39] 464 U.S. at 447-56.

[40] CBS Comments at 12; NAB Comments at 38-39.

not explained why (or provided any evidence suggesting that) their current incentives to make content available online would change because they could not block some subset of customers from receiving that same content in the discrete context of business disputes. Indeed, this argument implicitly confirms that the advantages conveyed to broadcasters through the current retransmission consent regime encourage strategic behavior that runs directly counter to the core public interest purposes of broadcasting – to make over-the-air programming available to as many people as possible. In all events, the Commission's decision should not be dictated by unsupported threats, as opposed to the abundant evidence of real and current harm from broadcaster tactics that are contrary to the public interest.

B. Forced Bundling

In its comments, AT&T described (at 14-17) how broadcasters use their monopoly on "must-have" programming to force MVPDs to carry unwanted channels, which has the effect of raising subscribers' bills and wasting MVPD capacity. Perhaps unintentionally, Fox's comments vividly demonstrate why the current situation is causing harm to MVPDs and consumers. Fox concedes that broadcasters use bundling to demand carriage of channels that have *negative* value – *i.e.*, that consumers do not want and for which they would not pay a penny if offered on a standalone basis. In Fox's words, " '[t]he stand-alone competitive price for the new or less popular content may well be negative.' "[41]

[41] Fox Comments at 12 & n.25 (quoting Comments of NBC Universal and NBC Telemundo License Co., *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Ex. B, Bruce M. Owen, *Wholesale Packaging of Video Programming*, at 3 (filed Jan. 4, 2008)).

In its comments, AT&T proposed (at 14-17) to address this issue *not*, as broadcasters wrongly contend,[42] by prohibiting broadcasters and MVPDs from ever negotiating bundling of channels where that is mutually beneficial, but rather by requiring that broadcasters at least also make a good-faith standalone offer for the broadcaster's primary signal that is a real economic alternative to their bundling proposal. AT&T, moreover, provided (at 17) specific factors that the Commission should consider to determine whether the standalone offer is a real economic alternative. At the very least, AT&T urged the Commission to prohibit forced bundling of unwanted channels coupled with minimum penetration requirements, so that MVPDs can lower costs by removing unwanted channels from the more widely available tiers.

Broadcasters oppose this proposal primarily on the ground that bundling is already governed by antitrust law.[43] But antitrust law does not provide a practical remedy in the context of retransmission consent negotiations. Antitrust litigation often takes years to conclude, while retransmission negotiations need to be resolved within a matter of days or weeks.[44] Indeed, NAB has argued in a different context that "antitrust litigation is notoriously expensive and

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[42] *See* Broadcaster Affiliates Associations Comments at 38-44; E.W. Scripps Comments at 13-14; Fox Comments at 10-12; NAB Comments at 27-36; News-Press & Gazette Comments at 17-19; Walt Disney Comments at 17-21. In these comments broadcasters point to several alleged benefits of bundling agreements, including increased programming diversity and transaction cost savings. Because AT&T's proposal would continue to allow bundling negotiations, it would not prevent the parties from realizing any such benefits where they exist.

[43] *See* Broadcaster Affiliates Associations Comments at 38-44; E.W. Scripps Comments at 14; Hearst Television Comments at 10; NAB Comments at 27-36; News-Press & Gazette Comments at 18-19; Walt Disney Comments at 20-21.

[44] *See* Broadcaster Affiliates Associations Comments at 32 ("[A]s a practical matter, retransmission consent negotiations regularly come down to the last day before an agreement is set to expire, regardless of when the negotiation process begins."); NAB Comments at 46 ("As anyone familiar with negotiating commercial agreements knows, contract negotiations are often concluded close to deadlines, regardless of when negotiations are formally initiated."); Remarks of William T. Lake, Chief, Media Bureau, FCC, to The Media Institute, at 2-3 (Dec. 8, 2010), *available at* http://transition.fcc.gov/mb/Media_Institute_Remarks.pdf (recounting the "growing number of cliffhanger [retransmission] negotiations").

protracted," and thus, "reliance on the antitrust laws to resolve disputes . . . would be disruptive to time sensitive transactions."[45] Thus, whether antitrust law provides an appropriate framework for evaluating the legitimacy of broadcasters' bundling demands is beside the point. The key issue for the Commission is whether, having already noted that broadcaster bundling practices may be anticompetitive,[46] and with a record that demonstrates broadcasters' significant market power, the Commission will provide guidance and an effective remedy for that forced bundling.

Moreover, the Commission frequently has enacted regulation for the purpose of supplementing antitrust enforcement. For example, when it enacted its original prohibition on joint retransmission negotiation by same-market broadcast stations, the Commission rejected Sinclair's argument that "antitrust law is better suited to address any such concerns."[47] The Commission noted that "on multiple occasions" it "has drawn on antitrust principles in exercising its responsibility under the Act to regulate broadcasting in the public interest" and that its "authority under Title III of the Act to regulate broadcasting in the public interest empowers [it] to prescribe regulation that not only prevents anticompetitive practices, but also affirmatively promotes competition."[48] That logic applies here as well.

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[45] Further Notice of Proposed Rule Making, *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 6171, ¶ 13 (1988).

[46] *See Notice* ¶ 15 (" '[C]onduct that is violative of national policies favoring competition – that is, for example, . . . exercis[ing] . . . market power in one market in order to foreclose competitors from participating in another market – is not within the competitive marketplace considerations standard.' ") (quoting *Good Faith Order* ¶ 58).

[47] *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd 3351, ¶ 8 (2014) ("*Joint Negotiation Order*").

[48] *Id.* ¶ 23 & n.89 (" 'While many . . . practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws.' ") (quoting *Report on Chain Broadcasting*, Docket No. 5060, at 46, 83, 83 n.3 (May 1941), *aff'd*, *NBC v. United States*, 319 U.S. 190, 223-24 (1943)) (alterations in original).

C. Marquee Programming

AT&T proposed in its comments (at 18-19) that the Commission address one of broadcasters' most frequently used methods of threatening to harm the public in order to obtain bargaining leverage: scheduling retransmission consent agreements to expire before marquee events such as the Super Bowl. In support of that request, AT&T provided sworn testimony that broadcasters frequently time the expiration of retransmission consent agreements so that they can hold consumers hostage until MVPDs acquiesce to their exorbitant demands.[49]

Broadcasters provide little defense of their brinkmanship. They claim that they must be free to cause blackouts during marquee programming so that they have sufficient leverage to recoup their investment in that programming.[50] Those suggestions give the game away: they demonstrate that, in derogation of their public interest obligations, broadcasters intentionally threaten consumers with the loss of marquee programming to maximize their leverage. Nor is there a basis for concern that broadcasters will not be able to recoup their investment. AT&T (and other MVPDs) routinely make "true-up" offers during periods of interim carriage. These offers ensure that broadcasters will be compensated at the newly agreed-upon rates during any interim coverage period.

Broadcasters also argue that such a rule is impractical because it is difficult to define what constitutes a marquee event and that such events would likely occur year-round.[51] AT&T

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[49] AT&T Comments, Ex. A, at ¶¶ 11-12 ("Broadcasters have unabashedly admitted to our negotiating team that they want their agreements to expire around the NFL playoffs, the college football bowl season, the NBA playoffs, the Academy Awards, and other such high-profile events in order to maximize their leverage in future negotiations.").

[50] Broadcaster Affiliates Associations Comments at 32-34.

[51] Broadcaster Affiliates Associations Comments at 34-35; E.W. Scripps Comments at 10-11; News-Press & Gazette Comments at 14; NAB Comments at 47-48; Media General Comments at 11.

and others, however, have proposed (*e.g.*, AT&T Comments at 19) a clear definition of what constitutes marquee programming based on historical ratings. This definition would also leave many periods during the year during which retransmission agreements could expire without AT&T's proposal having any effect, including most of the summer months. There is thus no basis for concern that the proposal is unenforceable or impractical.

D. Importing Out-of-Market Signals

AT&T proposed in its comments (at 20-21) that the Commission deem it bad faith for broadcasters to refuse to consent to an MVPD temporarily importing out-of-market signals during a retransmission negotiation impasse. This rule would diminish the harm to consumers from blackouts by allowing them to view some broadcast programming. Broadcasters, however, contend that this proposal would give MVPDs too much bargaining power by removing their incentive to reach agreement with their local broadcaster and, as a result, would destroy local broadcast television.[52]

AT&T's limited proposal would have none of the ill effects that broadcasters claim. MVPDs would still have every incentive to negotiate with the local broadcaster because transmitting the out-of-market signal would not allow MVPD customers to view unique and attractive local content developed by the in-market station. Indeed, in this regard, the proposal would encourage broadcasters to live up to their public-interest localism obligations, as the more attractive local content a broadcaster created, the greater the incentive to retain its signal. And broadcasters could still avoid any concern here by accepting offers to "true up" rates after a negotiation instead of blacking out the local channel.

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[52] *See* Broadcaster Affiliates Associations Comments at 25-30; Nexstar Comments at 29-31; NAB Comments at 40-43; Walt Disney Comments at 24-26.

E. Ceding Rights To Negotiate

AT&T explained in its comments (at 22-25) that broadcasters often increase their already significant leverage by ceding their right to negotiate retransmission consent to a common third party, such as a network or a broadcasting conglomerate. AT&T further noted that broadcasters achieve similar increases in leverage through the sharing of confidential information by common consultants and outside counsel. AT&T urged the Commission to address these practices.

Numerous parties, including many broadcasters, agreed that networks should not control their broadcast affiliates' retransmission consent negotiations.[53] Echoing AT&T's arguments (at 22-23) that allowing networks to control negations are an unlawful transfer of control, the Broadcaster Affiliates Associations explain that "[b]roadcast networks should not be permitted to confiscate or hijack the retransmission consent negotiation rights of their affiliates, either directly or indirectly through the threat of disaffiliation or the imposition of less advantageous affiliation terms" because it is a "statutory *responsibility*" for "an affiliate to negotiate retransmission."[54]

Only a few commenters support allowing network involvement in retransmission negotiations, and of those, only two (NAB and Univision) provide any argument.[55] NAB claims that broadcasters should be free to designate whomever they desire as a negotiating representative, and Univision claims its practice of negotiating on behalf of its broadcast affiliates is efficient.

Neither of these arguments addresses the fundamental problem that network involvement in retransmission negotiations is an unlawful transfer of control. Nor do they come to grips with

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[53] *See* Broadcaster Affiliates Associations Comments at 44-47; Hearst Television Comments at 10; News-Press & Gazette Comments at 19-20; Nexstar Comments at 21-22.

[54] Broadcaster Affiliates Associations Comments at 45.

[55] *See* Joint Broadcasters Comments at 14; NAB Comments at 39-40; Univision Comments at 4-9; Writers Guild Comments at 9.

the fact that these practices substantially increase broadcasters' already significant leverage to the detriment of consumers.[56] And the Commission has already "confidently conclude[d]" in the *Joint Negotiation Order* that "the harms from joint negotiation [by same-market stations] outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers."[57] So, too, with network control over their affiliates' negotiations.[58]

Broadcasters further contend that Congress did not intend the Commission to impose restrictions on joint negotiations by non-commonly owned stations in different markets. In support, they note that, in STELAR, Congress prohibited joint negotiations by non-commonly owned stations in the same market, but did not address joint negotiations by non-commonly owned stations in different markets.[59] But where, as here, Congress has been silent on an issue within the scope of an agency's authority, the agency retains delegated authority to resolve that issue. The fact that Congress did not address the issue does not suggest that the Commission could not do so, any more than Congress's prior silence on common in-market negotiations prevented the Commission from acting there.[60] Congress intended the Commission to use its

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[56] *See* AT&T Comments at 22-23.

[57] *Joint Negotiation Order* ¶¶ 10, 18 (footnotes omitted).

[58] AT&T's proposal would not regulate the terms of any agreement between a broadcaster and its affiliated network (*e.g.*, geographic exclusivity provisions), thereby mooting networks' argument that the Commission cannot or should not regulate such agreements. *See* Fox Comments at 13-14; NAB Comments at 39-40; Walt Disney Comments at 24-26.

[59] *See* Broadcaster Affiliates Associations Comments at 51-52; E.W. Scripps Comments at 17-18; News-Press & Gazette Comments at 20 n.63.

[60] *See Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnotes omitted).

expertise to develop appropriate rules regarding joint negotiation in different markets. The Commission should do precisely that.

F. Charging for Subscribers Who Do Not Receive Service

In its comments, AT&T urged (at 25-26) the Commission to make clear that it constitutes bad faith for a broadcaster to charge retransmission fees for all of an MVPD's subscribers regardless of whether those subscribers receive the broadcaster's signal over-the-air rather than from the MVPD. First, it is patently unreasonable for broadcasters to charge MVPDs a fee for retransmission where the retransmission is not taking place. That practice forces consumers to pay for a service that is not being provided to them. Moreover, "[l]ocal broadcast stations have a duty to transmit programming for free, over-the-air."[61] Broadcasters plainly violate that duty when they charge MVPDs for subscribers who receive a broadcaster's signal solely over-the-air; this practice results in consumers paying for what should be a free over-the-air broadcast signal.

Notably, of all the broadcasters that filed comments, only News-Press & Gazette substantively defends this practice. It contends that this rule "would allow MVPDs to circumvent retransmission consent on traditional MVPD platforms by providing subscribers access to the broadcast station's signal through online distribution and other technologies."[62] Not so. AT&T's proposal would merely ensure that consumers who receive a broadcaster's signal off-air are not charged directly or indirectly for that signal. Nothing in this proposal would allow an MVPD to take the broadcaster's signal, transmit it to a subscriber "through

[61] CBS Comments at 11.

[62] *See* News-Press & Gazette Comments at 12.

online distribution and other technologies," and then claim that it will not pay retransmission fees for that subscriber.[63]

III. The Commission Has Ample Authority To Adopt These Proposals

AT&T demonstrated in its comments (at 26-29) that Congress has explicitly granted authority to the Commission to regulate bad-faith conduct in retransmission consent negotiations. Congress has repeatedly directed the Commission to enact rules "to . . . prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith."[64] Each of AT&T's proposals asks the Commission simply to do what the Communications Act expressly authorizes.

Broadcasters nonetheless contend that these proposals seek to regulate the "substance" rather than the "procedure" of retransmission consent negotiations.[65] Even if that were the case, it would not bar the Commission from acting. Indeed, the Senate Committee explicitly stated that it "expects the FCC's totality of the circumstances test to include a robust examination of negotiating practices, *including whether certain substantive terms offered by a party may increase the likelihood of the negotiations breaking down*."[66]

In any case, AT&T is not asking the Commission to mandate any substantive terms for retransmission consent agreements, such as price, duration, or tier placement. Rather, these

[63] Of course, for the independent reasons discussed above, if a broadcaster is freely making its content available online, the Commission should prevent the broadcaster from arbitrarily blocking it to some consumers because of a dispute with an Internet access provider's affiliated MVPD.

[64] 47 U.S.C. § 325(b)(3)(C)(ii); *see* SHVIA § 1009, 113 Stat. 1501A-538 (initial enactment in 1999 codified at 47 U.S.C. § 325(b)(3)(C)(ii)).

[65] Broadcaster Affiliates Associations Comments at 16-18; E.W. Scripps Comments at 9-11; Fox Comments at 15-17; Hearst Television Comments at 4-6; Meredith Comments at 3-4; NAB Comments at 43-44; News-Press & Gazette Comments at 7-8; Raycom Comments at 7-8; Walt Disney Comments at 9-14; Writers Guild Comments at 5-6.

[66] S. Rep. No. 113-322, at 13 (2014) (emphasis added).

proposals would merely provide additional guidance as to which negotiating tactics are made in good or bad faith. Those are quintessential procedural matters.

CONCLUSION

The Commission should reform its rules to provide specific guidance as to what constitutes bad-faith retransmission negotiation in order to increase certainty and confidence in those negotiations and redress ongoing harm to consumers.

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Respectfully submitted,

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