

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA	)	
Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
Totality of the Circumstances Test	)	

**REPLY COMMENTS OF  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits its reply comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.

**I. ONLINE BLOCKING IS A “BAD FAITH” NEGOTIATING TACTIC THAT HARMS CONSUMERS.**

Our initial comments focused on just one of the issues identified by Congress when it directed the Commission to initiate this proceeding. Specifically, does a broadcaster violate its duty to negotiate retransmission consent agreements in good faith if, as a negotiating tactic, it prevents a cable operator’s *broadband* customers from receiving its online content that would otherwise be available to them? NCTA (and numerous other commenting parties) argued that such blocking of online content is an unfair negotiating tactic and is contrary to the public interest.

When broadcasters generally offer their broadcast and other programming online, with or without a subscription fee, to anyone with a broadband connection, the availability of such online programming has nothing to do with the contractual relationship between cable operators and broadcasters and is completely extraneous to retransmission consent negotiations. To gain leverage by withholding such content from customers of a cable operator’s Internet access service – “including broadband consumers who may not even subscribe to the MVPD’s video

service”<sup>1</sup> – is beyond the bounds of fair negotiations over the price of retransmitting broadcast stations to cable subscribers. As Cox Enterprises, Inc. explains,

Retransmission consent is fundamentally about the delivery of local television stations to local TV viewers through locally-provided MVPD services. Broadband customers should not lose access to otherwise freely available online content merely because their Internet service provider happens to be an MVPD engaged in a retransmission consent dispute with a local TV station.<sup>2</sup>

Moreover, wholly apart from the harm to broadband consumers, using online blocking to gain bargaining leverage is particularly unfair because of the non-reciprocal, one-sided availability of the tactic. The Commission’s “Open Internet” rules prevent cable operators from using similar blocking of broadcast or non-broadcast Internet content. For all these reasons, its use by broadcasters in retransmission consent disputes should be deemed to violate the duty to negotiate in good faith.

## **II. THE COMMISSION HAS AMPLE AUTHORITY TO RULE THAT THE USE OF ONLINE BLOCKING AS A NEGOTIATING TACTIC VIOLATES THE STATUTORY “GOOD FAITH” REQUIREMENT.**

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Representatives of broadcasters, including the National Association of Broadcasters (“NAB”) and the network affiliates associations, argue that broadcasters should be allowed to use online blocking as a negotiating tactic in retransmission consent discussions. For the most part, they avoid the question of whether the blocking of content that is outside the scope of retransmission consent negotiations is a fair and reasonable good-faith bargaining tactic. Instead,

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<sup>1</sup> Comments of Mediacom Communications Corporation at 27. Indeed, “this tactic is so blunt that it can harm video customers of MVPDs that are not even in a retransmission consent dispute with the blocking broadcaster. For example, consumers who take *video service* from a satellite provider and *broadband service* from a cable operator will be blocked from online video . . . even if their satellite video provider has a retransmission consent agreement with the blocking broadcaster.” Comments of Cox Enterprises at 8-9 (emphasis in original).

<sup>2</sup> *Id.* at 8. *See also, e.g.*, Comments of Public Knowledge and Open Technology Institute at New America at 10 (“[P]roactively seeking to cause consumer harm in order to increase bargaining leverage should, as a general rule, be an example of bad faith. More specifically, however, interfering with the ability of users from one ISP to access content broadly available on the Internet, purely to gain leverage in resolving an unrelated retransmission dispute, should not be permissible.”) *See generally* Comments of American Cable Association at 48-58.

they argue that, whether or not the tactic is fair, the Commission has no authority to prohibit it. The various commenting parties claim that to do so would be at odds with the retransmission consent provisions of the Communications Act, the Copyright Act, and the First Amendment. None of these claims are tenable.

These parties generally misstate what is at issue here. They claim that to rule that online blocking as a negotiating tactic violates a broadcaster's obligation to negotiate in good faith would be, in the words of NAB, tantamount to "forc[ing] a broadcaster to publicly perform its copyrighted content online."<sup>3</sup> The comments of the network affiliates go so far as to contend that

[t]he rule requested by MVPDs would effectively require broadcast stations to obtain the right to distribute their programming online and to consent to distribution on *all* platforms, whenever they consent to distribution on any traditional MVPD platform. What MVPDs seek is, essentially, a government-mandated tying rule, demanding that broadcasters authorize the distribution of their programming on all platforms whenever they consent to retransmission of their signals.<sup>4</sup>

And some even suggest that the proposed rule would require that stations make their content available online "for free."

To clarify, NCTA is not suggesting that broadcasters must distribute any of their content online, much less that they distribute it for free. In particular, if a broadcaster has not acquired the rights to distribute its programming online, it should not be required to do so whenever it grants retransmission consent. But where a broadcaster is *already* making its content available online to the general public – with or without charge – including to the Internet customers of a cable operator (in which case the broadcaster obviously has already obtained the rights to do so), it is a violation of good faith for the broadcaster to block those customers' access to such content

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<sup>3</sup> Comments of the National Association of Broadcasters ("NAB") at 36.

<sup>4</sup> Comments of ABC Television Affiliates Association, *et al.* ("Affiliates") at 54 (emphasis in original).

as a tactic during the course of retransmission consent negotiations. And nothing in the Communications Act, the Copyright Act, or the Constitution prohibits such a narrowly focused ruling.

Some broadcasters argue that the statutory requirement to negotiate in good faith is intended only to ensure that parties make a bona fide effort to reach agreement and does not apply to unfair conduct that coerces a party to accede to the other's demands.<sup>5</sup> But Congress itself has made clear that this is not the case. As noted in our initial comments and in the Notice of Proposed Rulemaking, the Senate Report accompanying STELAR specifically expected that the Commission, in this proceeding, would examine the "good faith" implications of online blocking.<sup>6</sup> In any case, the obligation to bargain in good faith in labor negotiations – from which the Commission has taken cues in fashioning its own rules – extends not only to conduct that "mak[es] it more difficult to achieve a contract," but also to unilateral conduct that "inject[s] extraneous issues into the negotiations" and "force[s] unions to bargain from a position of disadvantage."<sup>7</sup> Nothing in the Communications Act requires a more limited interpretation.

Others argue that, because Section 106 of the Copyright Act gives content owners the exclusive right to publicly perform their works, the statutory "good faith" requirement cannot be construed by the Commission to prohibit the blocking of content to a cable operator's Internet customers during the course of retransmission consent negotiations.<sup>8</sup> NAB argues that the Copyright Act "reserves to the copyright owner the exclusive right 'to authorize' others" to

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<sup>5</sup> See, e.g., Comments of Media General at 5; Comments of NAB at 25-26.

<sup>6</sup> See NCTA Comments at 2, *citing* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113<sup>th</sup> Cong., S. Rep. No. 113-322 at 13 (2014).

<sup>7</sup> Memorandum from Ronald Meisburg, NLRB General Counsel, Memorandum GC 07-08 (May 29, 2007), [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/annualconference/185.aucthcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/185.aucthcheckdam.pdf).

<sup>8</sup> See, e.g., Comments of Affiliates at 54; Comments of Hearst Television, Inc. at 11; Comments of NAB at 38-39; Comments of News-Press and Gazette Company at 21; Comments of Nextstar Broadcasting at 19.

engage in the activities protected by Section 106, and that “[i]n *Stewart v. Abend*, the Supreme Court made it absolutely clear that this exclusive right to authorize includes the right to *refuse* to authorize.”<sup>9</sup> All true. But the problem with this argument is that nothing in the proposed rule requires broadcasters to license or otherwise authorize cable operators or anyone else to distribute the content that they are already offering to the public online.

Cable operators (and other Internet service providers) are not licensed or authorized by the sellers or distributors of online content that reaches consumers over the operators’ broadband facilities. They simply provide the service by which content that online services choose to distribute or sell over the Internet can be accessed by individual broadband customers that want to receive it. Moreover, even if the proposed anti-blocking rule were somehow viewed as interfering with copyright owners’ rights to authorize distribution of their content online, their copyright protection would not extend to *misusing* such rights in a manner that would otherwise be deemed to violate their statutory duty to negotiate in good faith.<sup>10</sup>

A rule regarding a broadcaster’s distribution of content online could, of course, implicate speech protected by the First Amendment. But any incidental impact on the broadcaster’s protected speech would be minimized because the rule simply compels the broadcaster, temporarily, to continue allowing a cable operator’s Internet customers to receive online the very same content that the broadcaster makes available to all other consumers with Internet access. If the much more burdensome and intrusive compelled speech requirements of the program access, program carriage and must-carry rules have managed to survive First Amendment scrutiny, it is hard to imagine that a rule limited to short-term unfair negotiating tactics would pose any serious problems.

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<sup>9</sup> Comments of NAB at 37, *citing Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (emphasis added).

<sup>10</sup> *See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 203-06 (3d Cir. 2003).

## **CONCLUSION**

For the foregoing reasons, and for the reasons set forth in our initial comments, the Commission should rule that the use of online blocking as a tactic in retransmission consent negotiations violates the statutory duty to bargain in good faith.

Respectfully submitted,

**/s/ Rick Chessen**

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