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 VERIZON[1]

The record in this proceeding confirms that broadcasters are hampering efforts by Multichannel Video Programming Distributors (MVPDs) to meet consumer demand for video programming at reasonable prices and without disruptive blackouts.[2] Contrary to consumer interests, broadcasters are using the retransmission consent process to garner ever-increasing fees for programming and force MVPDs to purchase bundles of channels that consumers do not want, unnecessarily raising the costs of pay TV service.[3] As many MVPDs point out, when broadcasters demand higher prices for programming, MVPDs must choose to accept higher prices or risk a blackout of programming. While MVPDs seek to prevent unreasonable price hikes, broadcasters have countered by increasingly pulling their signals from consumers, often at times that coincide with marquee events.[4] These repeated blackouts cause subscribers to miss out on popular shows and anger and frustrate consumers who are denied access to programming

[1] The Verizon companies participating in this filing (Verizon) are the regulated, wholly-owned subsidiaries of Verizon Communications Inc.
[2] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, 30 FCC Rcd 10327 (2015) ("*NPRM*").
[3] *See, e.g.*, Comments of the American Television Alliance (ATVA) at 24-27; Comments of Cablevision Systems at 5-6; Comments of American Cable Association (ACA) at 15-16.
[4] *See, e.g.*, Comments of ATVA at 6-9, 15-16; Comments of ITTA at 3; Comments of the United States Telecom Association (USTelecom) at 3-4.

they have paid for. And even when deals are reached, consumers end up paying higher prices for programming they enjoy as well as for channels they may not watch. As a result of these practices, consumers see escalating prices on their bills for MVPD services and experience broadcast signal blackouts at a rate never contemplated by Congress in enacting, and the Commission in implementing, the retransmission consent regime.

As long as broadcasters retain their current, artificially high bargaining leverage in retransmission consent negotiations, they will stymie MVPD efforts to keep pay TV prices steady and to tailor program packages to subscriber interests. Consumers, however, have taken notice by cutting the pay TV cord altogether or flocking to alternative offerings such as Verizon's "Custom TV" packages, which allow subscribers to choose channel packages based on their own interests. To protect consumers from rising prices, bloated bundles, and programming blackouts, the Commission must reform the retransmission consent process now to reduce the bargaining leverage broadcasters currently have over MVPDs in negotiations and to eliminate rules that give broadcasters unfair regulatory advantages.

In reforming the retransmission consent rules, the Commission's goal should be to ensure that consumers have access to the programming they desire at reasonable prices without blackouts.[5] To serve these subscriber interests and to fix the broken retransmission consent process, the Commission should find that the following practices violate the duty to negotiate in good faith:

- Bundling broadcast station programming with other programming without an economically reasonable stand-alone offer for the broadcast station signal;

[5] *See NPRM*, ¶ 6 ("our goal in this proceeding is to provide further guidance to negotiating parties . . . to benefit consumers of video programming service by facilitating successful negotiations and avoiding disruptions in service to consumers").

- Extending programming blackouts beyond an MVPD's video subscribers to include customers of an MVPD's affiliated Internet access services;

- Running one-sided scare advertisements to an MVPD's subscribers about potential retransmission consent disputes.

In addition, the FCC should eliminate the unnecessary and outdated syndicated exclusivity and network non-duplication rules and adopt a standstill requirement, which would allow MVPDs to carry the broadcast signal after the contract expires but while the parties continue to negotiate in good faith.

As a whole, broadcasters oppose all of the proposed regulatory solutions in the *NPRM* and any meaningful change to the current rules, claiming that the market is working and that the Commission's role in retransmission consent negotiations should be limited to the procedural guidelines currently in place.[6] As demonstrated by the American Television Alliance (ATVA), USTelecom, and multiple MVPDs, the broadcasters are simply wrong.[7] And, notably, two commenters with interests in both broadcast stations and MVPD services recommended reforms to the Commission's *per se* standards and the totality of the circumstances test for good faith negotiations.[8] The record also confirms that Section 325(b) of the Communications Act and the STELAR Act of 2014 provide authority for and direction to the Commission to take a hard look at the current market for carriage of broadcast station signals and to adopt the recommended reforms to restore balance between MVPDs and broadcast stations in retransmission consent negotiations.

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[6] *See, e.g.*, Comments of the National Association of Broadcasters at 7-8; Comments of Broadcast Affiliate Associations at 10-18; Comments of CBS Corp. at 1-2; Comments of Graham Media Group at 1; Comments of Gray Television Group at 2-5; Comments of News-Press & Gazette Co. at 4-8; Comments of Nexstar Broadcasting at 4-7.

[7] See Reply Comments of The American Television Alliance (filed Jan. 14, 2016) for a detailed rebuttal to the broadcasters' arguments.

[8] *See* Comments of Block Communications; Comments of Cox Enterprises.

I. BROADCASTERS' LEVERAGE HAS SUBSTANTIALLY INCREASED SINCE 2000, AND, AS A RESULT, MVPDS ARE AT AN UNFAIR DISADVANTAGE IN NEGOTIATING RETRANSMISSION CONSENT AGREEMENTS.

As the Commission recognizes and the record here reflects, the market has changed significantly since the Commission adopted its current rules governing retransmission consent negotiations, including changes "that have altered the negotiation dynamics between broadcasters and MVPDs."[9] These negotiations no longer occur in a market characterized by a "bilateral monopoly," in which one broadcaster and one MVPD have mutually beneficial interests to ensure carriage by the MVPD of the broadcast station's signal.[10] Almost all local broadcast station markets now contain multiple MVPD services, including one incumbent cable operator, two DBS providers, and one or more competitive MVPDs, like Verizon.[11] Alternative sources of video programming, such as over-the-top distribution platforms, have also emerged.

The growth in competing distribution sources has resulted in increased leverage for broadcasters in retransmission consent negotiations. Today, broadcasters negotiate knowing that, by regulation, they are generally the sole source of must-have programming in their local markets, and failure to meet their demands puts an MVPD at risk of losing customers to its competitors if the MVPD loses access to must-have broadcast content.[12]

Using this artificially-high leverage, broadcasters' demands for financial remuneration have increased exponentially each cycle of negotiations.[13] And on top of the cash payments, MVPDs must continue to negotiate through demands for bundling of broadcast station signals

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[9] *NPRM* ¶ 3.

[10] *See* Comments of Mediacom Communications at 4; Comments of ATVA at 35-36.

[11] *See, e.g.*, Comments of Charter Communications at 3-4; Comments of Time Warner Cable at 5-6; Comments of USTelecom at 2; Comments of WTA at 3-5.

[12] *See, e.g.*, Comments of AT&T at 3-5; Comments of National Cable and Telecommunications Association (NCTA) at 1-2.

[13] *See NPRM* ¶ 3 ("retransmission consent fees have steadily grown and are projected to increase further"); Comments of Mediacom Communications at 34-35; Comments of Time Warner Cable at 7-8; Comments of USTelecom at 3; Comments of WTA at 1-2.

and other programming streams, which can also increase the rates MVPDs must pay.[14] But for a broadcaster's demand to carry these channels, which may include yet-to-be-launched cable channels, the MVPD might not carry the additional channels. And as new video distribution platforms emerge featuring smaller programming packages, it becomes critical for an MVPD to be able to offer "skinny" bundles, such as Verizon's "Custom TV," that attract those consumers who may prefer to forego the traditional larger programming packages.

Broadcasters still enjoy various outdated regulatory preferences that preclude balanced negotiations with MVPDs in the current market. For example, an MVPD cannot pursue effective alternative arrangements to carrying the broadcast programming that is the subject of the negotiations because of the Commission-provided network non-duplication and syndicated exclusivity rights.[15] These rules disadvantage an MVPD in the negotiations by limiting the MVPD to a single input for the network or syndicated programming that consumers expect to receive.

Even with the changes in the market, the Commission's rules governing retransmission consent can serve an important role in disciplining the behavior of broadcasters and MVPDs. Unfortunately, few retransmission consent complaints reach the Commission for resolution because that remedy generally comes too late – by the time an MVPD needs to file a complaint, it would have already reached an impasse in negotiations and lost access to programming.[16] Because of the risk of losing customers during a blackout, many MVPDs simply do not get to the point of filing complaints. But by adopting new rules that limit the artificial leverage broadcasters currently have during negotiations, as a result of the comprehensive set of

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[14] *See, e.g.*, Comments of Charter Communications at 4; Comments of Mediacom Communications at 38-39.
[15] *See, e.g.*, Comments of USTelecom at 15-18; Comments of Block Communications at 13-14.
[16] *See, e.g.*, Comments of Mediacom Communications at 12; Comments of WTA at 6, 18.

regulatory preferences that favor them, the Commission can help stave off impasses and thereby benefit "consumers of video programming service by facilitating successful negotiations and avoiding disruptions in service to consumers."[17]

II. THE COMMISSION SHOULD ADOPT TARGETED GUIDANCE FOR RETRANSMISSION CONSENT NEGOTIATIONS.

The record is rife with recommendations to reform the broken retransmission consent regime, including several proposals that Verizon believes are critical to support consumers.[18] First, the Commission should find that it is *per se* evidence of bad faith for a broadcaster to demand – as a condition of retransmission consent – bundling its station signal with other programming streams unless the station offers the station signal on a stand-alone basis on economically reasonable terms.[19] Demands for program "bundling" run counter to consumer preferences by limiting an MVPD's ability to tailor its packages to subscriber interests. In keeping with current consumer demands, Verizon took the lead last year among pay TV providers by launching "Custom TV" packages, which allow customers to choose channel packages based on their own interests. Many Verizon subscribers take advantage of Custom TV, demonstrating that consumers prefer not to pay for more channels than they want to watch – yet that is still what broadcasters demand in retransmission consent negotiations. The Commission should deem unreasonable bundling demands – without an economically-viable, stand-alone offer for the broadcast signal – not negotiating in good faith.

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[17] *NPRM* ¶ 6.

[18] USTelecom and the American Television Alliance both identified good faith requirements that the Commission should consider adopting. Verizon supports USTelecom's and ATVA's efforts to reform the current retransmission consent regime.

[19] *See, e.g.*, Comments of ACA at 15-32; Comments of AT&T at 14-17; Comments of Charter Communications at 5-6; Comments of Cox at 9-11; Comments of Time Warner Cable at 18-22; Comments of WTA at 16-17; Comments of ATVA at 44-45; Comments of USTelecom at 11-13.

Also, now is the time for the Commission to eliminate its network non-duplication and syndicated programming exclusivity rules.[20] These rules intrude into market-based remedies and disadvantage MVPDs by making it nearly impossible to import an out-of-market station when the local station withholds consent to broadcast its programming.[21] As USTelecom noted, "[t]he outdated Exclusivity Rules have created a lopsided marketplace whereby broadcasters benefit from a competition-free environment buttressed by regulation."[22] The Commission should adopt its proposal to eliminate these rules.[23]

The record also shows that the Commission should find that broadcasters violate the duty to negotiate in good faith when a broadcaster expands programming blackouts to include customers of an MVPD's affiliated Internet access services.[24] Such customers may not subscribe to the MVPD's video service, or may reside in a different local market. This action serves only to harm a group of customers who may pressure the MVPD to accept the broadcast station's demands.

Similarly, the Commission should find that it is *per se* evidence of bad faith when a broadcast station runs one-sided scare advertisements regarding potential disputes that encourage consumers to place pressure on MVPDs to reach an agreement just to avoid a blackout.[25] "Rather than being an honest effort to convey accurate and useful information to consumers, the broadcasters' messages tend to be alarmist in tone and blame the MVPD for the impending

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[20] *See*, *e.g.*, Comments of ATVA at 49.
[21] *See* Comments of Mediacom Communications at 24; Comments of USTelecom at 15-18.
[22] Comments of USTelecom at 16.
[23] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014).
[24] *See* Comments of ACA at 48-58; Comments of Cox at 8-9; Comments of Time Warner Cable at 23-24; Comments of Mediacom Communications at 27-28; Comments of ATVA at 44; Comments of USTelecom at 7-9; Comments of NCTA at 3-5; Comments of AT&T at 12-13.
[25] *See* Comments of Mediacom Communications at 28-30; Comments of USTelecom at 5.

disruption."[26] Airing such a message only inflames the dispute, and "does nothing to resolve the underlying negotiation."[27]

Finally, to provide a backstop when negotiations approach impasse, the Commission should adopt a standstill requirement and cooling off period that ensures consumers have continued access to the broadcast station signal.[28] As long as the parties are negotiating in good faith to reach an agreement, however difficult those negotiations may be, there is no reason to maintain a regime that offers only one result for consumers when an agreement expires – loss of the broadcast station signal and must-have programming. Rather, the Commission should institute options – indeed require at least a standstill option to demonstrate good faith – that ensure consumers continue to receive the signal that the Commission licensed the broadcast station to transmit.

III. THE COMMISSION HAS THE LEGAL AUTHORITY TO ADOPT MEANINGFUL REFORMS TO ITS RETRANSMISSION CONSENT REGIME.

As multiple commenters noted, the plain language of Section 325(b)(3)(A) provides the Commission with legal authority to adopt the protections described above for consumers and participants in retransmission consent negotiations.[29] The legislative history of the STELA Reauthorization Act confirms this authority, explaining that Congress intended the Commission to "take a broad look at *all facets* of how both television broadcast station owners and MVPDs approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard."[30] The record reflects that many negotiating tactics used by

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[26] Comments of Mediacom Communications at 29.
[27] Comments of USTelecom at 5.
[28] *See* Comments of WTA at 18-19; Comments of Mediacom Communications at 22-23.
[29] *See, e.g.*, Comments of ACA at 5-9; Comments of AT&T at 26-29; Comments of Cablevision Systems at 9-12; Comments of WTA at 7; Comments of ATVA at 53-56; Comments of USTelecom at 6-7.
[30] S. Rep. 113-322, at 13 (Dec. 12, 2014) (emphasis supplied).

broadcasters harm consumers through rising prices and increased blackouts and therefore should constitute failing "to negotiate in good faith." Reforming the retransmission consent rules to address these practices will further Congress's purposes in enacting Section 325(b)(3) and the STELA Reauthorization Act.

IV. CONCLUSION.

In the past 15 years, broadcasters have gained substantially more leverage over MVPDs in retransmission consent negotiations, resulting in harms to consumers including escalating programming costs, more frequent blackouts, larger bundles and programming packages, and, more recently, blocking of Internet content. To alleviate such harms to consumers and competition in the market for video programming, the Commission should adopt the targeted proposals outlined above.

Respectfully submitted,

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