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 MEDIA GENERAL, INC.[1]

The free market for retransmission consent sanctioned by Congress and codified by the Commission works efficiently and benefits consumers. Broadcast television networks aired 47 of the 50 top-rated shows last season, demonstrating that their supply of high-quality video programming is robust. Consumers watch more video than ever on an increasing number of competing platforms, demonstrating that the demand for high-quality video programming is equally strong. The terms and conditions of the thousands of seamlessly and successfully negotiated retransmission consent agreements reflect this economic reality.

The hyperbolic cries of crisis and unsupported claims of consumer protection from the MVPD industry are nothing but pretext for government intervention, artificially-reduced retransmission consent fees, and a boost to their bottom line. The FCC should ignore these self-serving pleas and instead ground its limited review of the totality of the circumstances test in Congress's light-touch directive and the public interest. Changes to the agency's good faith regime would be unnecessary, inconsistent with the STELA Reauthorization Act of 2014

[1] Media General, Inc. ("Media General") hereby submits reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding. *See Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109 (rel. Sept. 2, 2015) ("NPRM"). Unless otherwise noted, all comments cited were filed in MB Docket No. 15-216 on Dec. 1, 2015.

("STELAR"), and an obstacle to broadcasters' continued provision of high-quality programming to their local viewers.[2]

I. STELAR DID NOT EXPAND THE COMMISSION'S AUTHORITY TO REGULATE RETRANSMISSION CONSENT NEGOTIATIONS.

Despite the claims of American Television Alliance and others,[3] STELAR provides no authority for the FCC to enlarge its limited role in retransmission consent negotiations. When it adopted the good faith negotiating rules, the Commission found that Congress did not intend for the agency to "impose a complex and intrusive regulatory [retransmission consent] regime."[4] Congress does not "hide elephants in mouseholes,"[5] and STELAR's simple command to "review its totality of the circumstances test for good faith negotiations" in no way altered the agency's authority or mandated changes or other final action.[6] The FCC's role remains limited to process, not substance.

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[2] Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) ("STELAR").

[3] Comments of American Television Alliance, at 51-52; Comments of Mediacom Communications Corp., at 19.

[4] *Implementation of the Satellite Home Viewer Improvement Act of 1999,* 15 FCC Rcd ¶ 23 (2000) ("*Good Faith Order*").

[5] *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001).

[6] Indeed, the legislative history of STELAR states that the instant proceeding is to be used "to provide additional specific guidance as to actions that, taken as a whole, evidence bad faith based on the totality of the circumstances." S. REP. NO. 113-322, at 13 (2014) (emphasis supplied). In addition to merely suggesting "guidance," this same report reflects a late change in the legislative language that supports the view that rule changes are not mandated – rather, simply a "review" intended. The report indicates that the then-still pending bill "would direct the FCC to conduct a rulemaking to review and update its totality of the circumstances test . . ." and also states that "the rulemaking . . . should be used to update . . . ." *Id.* (emphasis supplied). The legislative language included in the report similarly states, "[t]he Commission shall commence a rulemaking to review and update its totality of the circumstances test . . . ." *Id.* at 18 (emphasis supplied). The final law, as adopted, however, omitted the reference to the need for an "update," stating simply that the FCC "shall commence a rulemaking to review its totality of the circumstances test . . ." – "review" only. Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (emphasis supplied).

II. CLAIMS OF "CRISIS" IN THE RETRANSMISSION CONSENT MARKETPLACE ARE ILL-FOUNDED.

The retransmission consent marketplace is efficient and vibrant, and claims of a crisis of continual service disruptions are overblown. In establishing the retransmission consent regime, Congress envisioned a free-market system that permits broadcasters and MVPDs to negotiate for the carriage of broadcast television signals. The Commission's good faith rules create a flexible framework within which broadcasters and MVPDs can negotiate. Neither Congress nor the FCC has ever mandated that MVPDs and broadcasters conclude an agreement or agree to any specific provisions for carriage of broadcast signals. Instead, the statutory mandate only requires that parties "meet to negotiate retransmission consent" and to negotiate in "an atmosphere of honesty, purpose and clarity of process."[7]

Some MVPDs have sensationalized infrequent impasses in negotiations, claiming that service interruptions are occurring at a rate that exceeds what a free market would produce. The public, however, never hears about the vast majority of retransmission consent negotiations that proceed smoothly and end efficiently without interrupting service to MVPD customers. As the record attests, the truth is that the majority of service interruptions involve just a few well-known MVPDs.[8] More typically, parties enter into short extensions of expiring retransmission consent agreements while they continue to negotiate for long-term carriage.[9] No matter how loudly or frequently MVPDs trumpet the issue, the Commission should not extrapolate infrequent

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[7] *Good Faith Order*, 15 FCC Rcd at 5455 ¶ 24.

[8] Comments of Raycom, at n. 4 (documenting that DirecTV, DISH Network, and Time Warner Cable have caused two-thirds of all retransmission consent disputes since January 1, 2013); Comments of Hearst Television Inc., at 7.

[9] *See*, *e.g.*, Daniel Frankel, *AT&T's U-verse and Tribune Extend Retrans Talks to Oct. 13*, Fierce Cable (Oct. 7, 2015), *available at* http://www.fiercecable.com/story/atts-u-verse-and-tribune-extend-retrans-talks-oct-13/2015-10-07; *Disney and Dish Reach Short-Term Deal to Continue Retrans Talks*, Deadline Hollywood (Sept. 30, 2013, 5:13 PM), *available at* http://deadline.com/2013/09/disney-dish-network-retransmission-talks-short-term-extension-600118/; Deborah D. McAdams, *Sinclair and DirecTV Reach Agreement Regarding Retrans*, TVTechnology (Feb. 28, 2013), *available at* http://www.tvtechnology.com/news/0086/sinclair-and-directv-reach-agreement-regarding-retrans/218051.

impasses during a few retransmission consent negotiations into evidence of a marketplace crisis – and certainly not a need for regulatory change. The marketplace is actually working as Congress envisioned, and the FCC need not modify its good faith framework.

III. THE COMMISSION SHOULD NOT LIMIT A BROADCASTER'S ABILITY TO OFFER BUNDLES OF MULTICAST OR AFFILIATED PROGRAMMING.

The Commission has previously determined that it should not limit or constrain a broadcaster's ability to negotiate for carriage of affiliated programming.[10] Contrary to MVPDs' claims of a problem,[11] broadcasters, by offering bundles of programming to MVPDs, are able to provide programming to MVPDs more cheaply than if separate negotiations were required for each programming stream. MVPDs are free to negotiate the particular combination of programming they will retransmit on their own systems as well as the fee for such carriage. A regulatory change is not in order.

Indeed, Media General's experience in negotiating retransmission consent agreements has shown that MVPDs generally pick and choose among several different broadcaster approaches. Several MVPDs agree to carry programming from the top 6 broadcast networks. Other MVPDs only agree to carry one multicast stream of their choosing, while some contract for the right, but not the obligation, to carry programming aired on a station's multicast stream. As initial comments from Media General and others attest, broadcasters do not force MVPDs to carry bundles of programming.[12] The Commission should not, as a regulated matter, prohibit broadcasters from offering bundles of affiliated or multicast programming.

The Commission's good faith rules are not designed to provide an advantage to either party; they simply set the stage to create an honest, purposeful, and clear negotiation process.

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[10] *See Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, 10346 (2005); *Good Faith Order*, 15 FCC Rcd at 5469.

[11] *See, e.g.*, Comments of WTA, at 16-17; Comments of CenturyLink, at 6.

[12] Comments of The E.W. Scripps Company, at 12-14; Comments of 21st Century Fox, Inc. and Fox Television Stations, LLC, at 11-12; Comments of Media General, at 8-9.

Broadcasters' offers of programming bundles expand consumer access to high-quality news, sports, and entertainment programming. Were the Commission to prohibit broadcasters from offering bundles of programming, consumers would experience reduced access to high-quality local programming. Bundling of programming also results in reduced transaction and negotiating costs, permitting lower subscriber rates.[13]

IV. THE COMMISSION SHOULD NOT MICROMANAGE RETRANSMISSION CONSENT NEGOTIATIONS.

Media General believes that the Commission should work to ensure that consumers have access to the widest possible variety of diverse and competing sources of news and information. Further government regulation is not necessary to achieve that result. To the contrary, as the record demonstrates, such diversity and competition already abound because of the operation of market forces.[14] As a result, the NPRM's proposed modifications to the good faith rules are unnecessary.

For example, certain comments suggest that the FCC should prohibit a programming provider from limiting access to online video programming.[15] As Media General and others established in their initial comments, the Commission does not have the statutory authority to take the extraordinary step of forcing a video programmer to provide valuable, copyrighted programming on the Internet.[16]

Nor should the agency regulate specific contractual provisions in retransmission consent agreements. In the *Good Faith Order*, the Commission made clear that the good gaith negotiating rules are based on comparable labor laws, which do not "compel either party to agree

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13 Comments of News-Press & Gazette Company, at 18-19.

14 Comments of Walt Disney Company, at 5-9; Comments of 21st Century Fox, at 6-7.

15 *See, e.g.,* Comments of USTA, at 7-9; Comments of NCTA, at 3-5.

16 Comments of Media General, at 7-8; Comments of News-Press & Gazette, at 20-21; Comments of NAB, at 36-39.

to a proposal or require the making of a concession."[17] For instance, certain parties have advocated that retransmission consent agreements should not expire prior to the airing of a "marquee" sports or entertainment event.[18] First, it would be virtually impossible to develop a definition of "marquee event" that could be applied with any consistency across the wide array of entertainment and sports programming and reflect the new formats continually evolving for such programs. Second, applying any such definition, if it could be developed, would submerge the Commission in extremely detailed analysis of alleged bad-faith negotiating. Not only is such micromanagement contrary to Congressional intent,[19] but it would also force the Commission to squander administrative resources in examination of specific contract proposals and case-by-case minutiae.

MVPD operators' additional complaints about supposed restrictions on lawful devices are meritless and equally undeserving of any regulatory change.[20] Broadcasters only have legal authority to grant operators the rights that the broadcasters themselves receive from their own programming providers. MVPDs, however, seek the right to distribute the signals of broadcast television stations using any devices – regardless of whether the legality of such distribution has been established. As *Aereo* demonstrated, the legality of new distribution models with novel technological characteristics may be unclear and take years to determine.[21] Various courts may agree and disagree on the scope of rights over the course of extended litigation. What is clear is that the FCC has no authority to force broadcasters to grant consent to retransmit their

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[17] *Good Faith Order*, 15 FCC Rcd at 5448 ¶ 6 (quoting National Labor Relations Act § 8(d), 29 U.S.C. 158(d)).

[18] *See* Comments of the American Television Alliance, at 47-48; Comments of Public Knowledge, at 9-10.

[19] Indeed, the Commission has previously stated that Congress did "not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission." *Good Faith Order*, 15 FCC Rcd at 5448 ¶ 6.

[20] *See, e.g.*, Comments of Time Warner Cable Inc., at 17-18; Comments of USTA, at 18-19.

[21] *American Broadcasting Companies, Inc. v. Aereo, Inc.*, __ U.S. __, 134 S.Ct. 2498 (2014).

programming for distribution, especially to those using legally uncertain distribution methods. Even if the Commission possessed the authority, requiring carriage on such systems could also cause the major broadcast networks to rethink their local distribution model, endangering service to local communities.

The Commission should also reject the American Cable Association's ("ACA's") invitation to impose on one party, when another party requests, a "duty to substantiate" claims made during the course of negotiations as part of the obligation to negotiate in good faith.[22] That approach represents a slippery slope that invariably would lead to *de facto* retransmission consent rate regulation – a duty well beyond the agency's limited statutory authority.

Given that the free-market system is otherwise functioning efficiently, the Commission need not dedicate its limited administrative resources to investigate whether "substantiated" claims made during the retransmission consent process are reasonable. Changing the good faith negotiating standards, as ACA suggests, would disrupt such efficiency by creating an advantage for operators during retransmission consent negotiations.

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[22] *See* Comments of American Cable Association, at 33-48.

VI. CONCLUSION

The Commission's good faith negotiating rules underpin an efficient retransmission consent marketplace that has led to thousands of successful negotiations for retransmission consent. Absolutely no documented need exists for the Commission to update these rules generally or the totality of the circumstances test specifically. Media General respectfully urges the Commission to reject calls to the contrary.

Respectfully submitted,

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