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

AMERICAN CABLE ASSOCIATION

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government Affairs
Mary Lovejoy
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Barbara S. Esbin
Scott C. Friedman
Madeleine Goldfarb
Cinnamon Mueller
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 872-6811

Attorneys for American Cable Association

January 14, 2016

EXECUTIVE SUMMARY

The American Cable Association ("ACA") submits these reply comments in response to comments submitted in the record of this proceeding and to further substantiate its case for adoption of targeted reforms to the Commission's retransmission consent good faith negotiation rules that respond to significant marketplace changes and offer broadcasters and multichannel video programming distributors ("MVPDs") meaningful guidance during negotiations.

In its comments, ACA focused on the need for both a clarification that the Commission will consider "harm to the public" when evaluating claims under the totality of the circumstances test, and additional guidance regarding specific behaviors that might violate the duty to negotiate in good faith either on a *per se* basis, or as part of a fact-specific, contextual analysis. ACA identified the following particularly egregious practices and proposals that the Commission should view to be either a *per se* violation of the good faith rules, or at the very least, evidence of bad faith to be considered under the totality of the circumstances test:

- A broadcaster's insistence on bundling a top four-rated broadcast signals with regional sports networks ("RSNs") or other "must have" programming" in retransmission consent negotiations.
- Refusal of a negotiating party to substantiate claims made during negotiations.
- Blackouts involving online programming in connection with retransmission consent negotiations as a means to gain leverage in negotiations.
- Blackouts involving linear programming before "marquee" events in connection with retransmission consent negotiations as a means to gain leverage in negotiations.
- Third-party interference in retransmission consent negotiations for historically carried out-of-market stations.
- Conditioning retransmission consent on set prices, terms, and conditions for after-acquired broadcast stations or unlaunched programming networks.
- Discrimination by an MVPD-affiliated broadcast station based on vertical competitive effects.

In addition, ACA recommended that the Commission consider both a demand for, and an insistence on negotiating terms based on, most favored nation ("MFN") provisions to be evidence of bad faith under the totality of the circumstances test.

ACA's proposals received substantial support in the record from other industry associations, individual MVPDs, and public interest commenters, providing the Commission a solid foundation upon which to base reform of its good faith negotiation rules.

Broadcast television stations, networks, and affiliate groups strain mightily to convince the Commission that the market for retransmission consent is working as Congress and the Commission intended and that, in any event, the Commission cannot and should not adopt any of reforms that ACA has identified because they are either unwarranted, unlawful or would cause unintended consequences.

The time has come for broadcasters to recognize that actors within their industry are taking advantage of their market power and ineffective good faith rules, and engaging in conduct and offering proposals that are not consistent with good faith bargaining. Reforms are necessary, and ACA's proposals are narrowly tailored to address these problems in the market.

Broadcasters would be wise to embrace a fairer and more balanced negotiating environment for broadcast stations and MVPDs alike, which at least some broadcasters seem to realize, based on parts of their comments.

Neither the Market Nor the Commission's Rules Are Protecting Consumers

The record is full of broadcaster assertions that the market for retransmission consent is now finally working, as evidenced by the fact that deals get done, complaints are few, and that broadcasters and MVPDs need each other in equal measure. It is also replete with claims that adopting reforms will lead to unintended consequences, and therefore the Commission should refrain from adopting any reforms to its good faith rules that will upset the present "equipoise" achieved in the market. None of these arguments provides a basis for maintain the status quo.

<u>The market for retransmission consent is not working</u>. The fact that a deal gets done is not evidence that the market is working. Considering that the two parties supposedly have a mutual interest in reaching a deal, there are an incredibly large number of blackouts, and the number is only increasing. The fact that deals get done is also irrelevant to the question of whether the negotiating tactics and proposals identified by ACA and others are consistent with good faith negotiations. Given the unflinching willingness of broadcasters to pull their signals, most MVPDs are left with little choice but to tolerate broadcasters' negotiating tactics and cede to their demands.

<u>The Commission's good faith rules are not working</u>. Nor do unsupported assertions that few good faith complaints have been filed in the past show that the existing rules are sufficient to protect the public interest. Among the reasons that complaints are not filed more often are historical signals from the Commission that it wished to refrain from getting involved in disputes, uncertainty whether the Commission would deem many types of proposals and tactics to be in bad faith, the time and costs involved with filing a complaint, the lack of adequate relief, and a lack of clarity whether interim carriage will be granted. More significant than statistics about the historical number of good faith complaints filed is the fact that broadcaster market power has grown significantly in recent years due to increased competition among MVPDs, and broadcasters are more apt to abuse their market power by engaging in bad faith tactics now than before. In other words, past is not prologue.

<u>The Commission should not take seriously broadcaster arguments that they lack market power</u>. Broadcaster claims that bargaining leverage is balanced and that they lack market power in retransmission consent negotiations because broadcast programming is no longer "must have" as a result of competition from national and regional cable programming, VOD programming and online programming are unfounded and directly contradicted by the record in this proceeding. Only those that are benefitting from the huge windfalls created by such sharp increases in retransmission consent prices would argue that the current market is working or headed toward equilibrium. Broadcasters have significant market power over MVPDs in negotiations for retransmission consent, as the Commission itself has recognized. Top-rated broadcast programming (usually affiliated with ABC, CBS, Fox and NBC) is unique and highly valued, as reflected in the broadcasters' own statements, and considered "must have" by MVPDs and the Commission.

Arguments to the contrary rest on an erroneous view of the relevant product and geographic markets used for purposes of competitive analysis of retransmission consent. In the context of this proceeding, the product market is carriage rights for local television broadcast signals. Accordingly, the availability of national and regional programming networks and online video is not relevant to the market for retransmission consent. Competition in the sale of broadcast programming to MVPDs is not robust, given that top four-rated broadcast stations are merely partial substitutes, and MVPDs are compelled to carry them all to stay competitive. Nor are dynamics in the markets for content acquisition and advertising sales relevant to the analysis of a broadcaster's market power in retransmission consent negotiations within its DMA.

Also irrelevant to this analysis is MVPD consolidation in the national market. The appropriate geographic markets for evaluating the balance of market power in retransmission consent negotiations are the local market areas where MVPDs compete for customers in which the local broadcast station is made available, a market generally no larger than the DMA of a local station. In these markets, the level of competition among MVPDs is robust and a station can negotiate carriage with at least three different MVPDs, whereas MVPDs can negotiate carriage with only one broadcast station to obtain access to a particular network's programming, a factor that significantly determines the negotiating dynamic for retransmission consent. The fact that an MVPD may own systems in other markets is not germane to a determination of whether a broadcast station has market power in its own DMA over MVPDs.

Claims that broadcast stations need MVPDs at least as much as MVPDs need broadcast stations utterly fail to acknowledge current marketplace conditions. The Commission has repeatedly recognized that an MVPD that does not carry the local broadcaster faces significant subscriber losses, as the MVPD has no other means of providing the broadcaster's popular programming to their customers. On the other hand, viewers have multiple alternatives available to receive a broadcast signal that is not carried by a particular MVPD, including from other MVPDs or over-the-air. Any single top-four rated broadcast station depends far less on a single MVPD for competitive viability than the MVPD does on that station.

Broadcaster assertions that adopting reforms to the good faith rules will lead to unintended consequences are misguided. There is no evidence that changes to the good faith rules will have any impact on programming owners' decision to put content on their broadcast networks versus their cable networks, as broadcasters claim. Also unsupported are claims that broadcasters would not be able to compete against cable networks if they are subject to stronger good faith negotiating standards, and claims that modifying the rules would impair parties' ability to successfully conclude retransmission consent negotiations. Any unintended consequences would be far outweighed by the benefits conferred by adopting these reforms.

The Commission Has Ample Statutory Authority to Reform its Good Faith Rules

Broadcasters expend considerable energy arguing that the Commission cannot and should not change its good faith rules in any respect, including by adoption of a "harm to consumers" standard for evaluating good faith complaints. These arguments are unfounded and should be rejected.

The Commission's statutory authority to make changes to its good faith rules is not limited as broadcasters assert. Contrary to broadcasters' claims, the Commission has ample statutory authority to protect the public interest by adding to its current list of *per se* violations and reforming its approach to the totality of the circumstances test. Congress granted the Commission authority under Section 325 of the Communications Act to govern a broadcast television station's exercise of retransmission consent and to adopt good faith negotiating rules, constrained in a single respect with regard to a broadcast station's right to negotiate different rates, terms and conditions with different MVPDs, provided they reflect "competitive marketplace considerations." In all other respects, Congress granted the Commission significant flexibility in how to implement the good faith requirement. This authority, combined with the Commission's general rulemaking authority under Title I, provides more than adequate authority to adopt the rule changes sought by ACA.

Congress did not alter the Commission's existing authority to update its rules in enacting Section 103 of the STELA Reauthorization Act of 2014 ("STELAR"), as broadcasters maintain. Nothing in Section 103 limits the Commission's original grant of authority over its good faith rules under Section 325 or confines this proceeding to no more than a review of the Commission's totality of the circumstances test. Broadcasters' arguments to the contrary rest on a misreading of the legislation. In short, there is no statutory bar to the Commission updating its good faith rules both by adopting additional *per se* violations and by providing more clarity as to how it will apply the totality of the circumstances test to a complaint alleging a good faith violation.

Nor is the Commission constrained by precedent in updating its good faith rules so long as it remains within the bounds of its delegated authority. The fact that the Commission may previously have disavowed consideration of substantive proposals in its review of the good faith rules does not bar it from obeying Congress' directive to examine them now. The Commission has always had authority to address substantive prices, terms, and conditions of proposals to the extent they could be found to demonstrate bad faith. Congress reaffirmed that authority in STELAR; the legislative history of Section 103 clearly reflects Congress' intent that the Commission examine substantive proposals in its review and updating of the good faith rules.

By limiting the scope of its rules to bargaining procedures in the past, the Commission hobbled the effectiveness of its good faith rules, as both Congress and the Commission appear to have recognized and seek now to remedy. To the extent that adopting any of the proposals supported by ACA requires a change in the Commission's approach to its policies concerning the good faith requirement under Section 325(b)(3)(C), such a change in policy would easily withstand judicial review. Simply put, there is no barrier to the Commission examining substantive proposals and updating its rules to curb those that are found not to be consistent with good faith.

None of the proposed updates to the totality of the circumstances test would make the test less flexible, as broadcasters fear, and even if they do, Commission precedent does not preclude such a change, as broadcasters believe. In their attempts to support their pleas that the status quo not be altered, broadcasters cling, like capsized passengers to life preservers, to incantations of previous Commission statements about how the totality of the circumstances test was intended to work. Yet the test has never been as flexible as they claim; it has long contained presumptions that certain bargaining proposals and conduct were either presumptively consistent or inconsistent with good faith negotiation. This basic approach is not substantially different from what ACA and other MVPDs advocate in this proceeding – that certain practices and proposals now be considered either as evidence of bad faith under the totality of the circumstances test, or as presumptively inconsistent with good faith negotiation.

Broadcasters' arguments boil down to one thing – that the totality of the circumstances test cannot and should not change – and must be rejected. In contrast to the *per se* rules, which appear to have constrained bad faith practices, the totality of the circumstances test has proven of little use in curbing negotiating practices that do not reflect a sincere intent of trying to reach an agreement acceptable to both parties, and is in need of a serious update.

The Record Supports Adoption of a Harm to Consumers Standard for Evaluating Good Faith Complaints

ACA and others recommended that the Commission take harm to the public into account in assessing a good faith complaint under the totality of the circumstances test. A number of broadcasters implicitly agree, arguing that the Commission's focus should be first and foremost on the consumer.

The Commission should recognize that negotiating in bad faith not only harms one's negotiating partner, but also harms others that rely on the parties reaching a mutually acceptable agreement, particularly consumers. When bad faith negotiating leads to an impasse and an affiliated online stream is no longer made accessible on to an MVPD's broadband service, it is consumers who subscribe only to the MVPD's broadband service that are made to suffer for absolutely no reason. So too, when a broadcaster makes a proposal that is not consistent with competitive marketplace considerations, the compensation sought, if agreed to by the MVPD, is passed through to the customers. Given that the public can be harmed by bad faith negotiations for retransmission consent, it is perfectly appropriate for the Commission to consider the impact that bad faith demands or tactics may have, not only in inhibiting the parties from reaching a deal, but on consumers as well. For this reason, ACA and several other commenters have proposed that the Commission make avoidance of harm to consumers and the public interest a guiding precept or primary factor in rules governing retransmission consent negotiations.

Broadcaster objections that the standard is not needed because "[t]he free market for retransmission consent protects consumers who choose to enter a contractual relationship with MVPDs for video subscription service," and that "the vague standard of 'consumer harm' would overwhelm the FCC with oversight duty over every retransmission consent negotiation" are wrong on both counts. First, the bargaining relationship between MVPDs and broadcasters has developed not through the exercise of free market principles, but through an act of Congress, which created a heavily regulated market for retransmission consent in 1992. Nor are consumers now benefiting from this allegedly "free" market. Today's problems in the market for retransmission consent result because top four-rated broadcasters command significant market power, and current rules fail to adequately constrain their exercise of this market power against MVPD purchasers of what is in effect a monopoly product.

The establishment of a "consumer harm" standard is no more likely to overwhelm the Commission than its existing totality of the circumstances test for judging complaints. This test already provides a means for parties to bring complaints over *any* proposal that is not consistent with competitive marketplace considerations or any negotiating tactic. Moreover, the costs of litigating retransmission consent disputes act as a deterrent on frivolous filings. By incorporating a "harm to consumers" standard the Commission can make clear to negotiating parties that they are not to use consumers like pawns in their negotiations.

The Record Supports a Determination that Certain Practices and Proposals Violate the Duty to Negotiate in Good Faith

In its comments, ACA focused on seven particularly problematic negotiating practices and proposals that can be addressed by the Commission, either by adding them to its list of *per se* violations of the good faith obligation, or by treating them as evidence of bad faith under the totality of the circumstances test. None of the objections to these proposals raised by the broadcasters have merit, and the record clearly supports a determination that each of these practices and proposals violate the duty to negotiate in good faith. The Commission's good faith rules should be revised accordingly.

A broadcaster's insistence on bundling broadcast signals with RSNs (or other "must have" programming) in retransmission consent negotiations. The record supports adoption of ACA's proposal to prohibit broadcasters from bundling retransmission consent with carriage of a same market regional sports network ("RSN") or other "must have" programming for the purpose of raising prices. Although many broadcasters argue that, as a general rule, bundling should be permitted in retransmission consent negotiations, none specifically addressed the issue of bundling "must have" programming, and none of the arguments broadcasters use to defend the general practice of bundling apply to bundles involving "must have" non-broadcast programming. Bundling "must have" programming causes consumer harm by raising prices, and offers none of the supposed benefits of other types of bundling, such as discounts for less desirable programming or an increase in programming diversity. Contrary to broadcasters' claims, the Commission has the authority to adopt ACA's proposal and is in no way constrained by a previous determination that proposals involving carriage of non-broadcast programming are consistent with competitive marketplace considerations. Broadcasters are also incorrect to suggest that antitrust law is better suited than Commission regulations to protect against the anticompetitive harms cause by bundling "must have" programming, and there is no reason to take seriously concerns that a ban on this type of bundling will place broadcasters at a competitive disadvantage vis-à-vis non-broadcast programmers.

Refusal to substantiate claims made during negotiations. In its comments ACA requested that the Commission deem the refusal of a party to substantiate its claims during negotiations to be a violation of the good faith rules, and explained that imposing this duty will foster honesty in discussions, facilitate constructive bargaining through exchange of relevant information, and lead to a mutually satisfying agreement for both parties, thus avoiding breakdowns and consumer disruptions. The record supports this view. Other smaller MVPDs and public interest commenters agree that the Commission's previous approach to substantiation is outdated and not working, and that recognizing a duty to substantiate would improve the current negotiating environment for retransmission consent. Broadcaster positions that the status quo must be maintained in this and all other aspects of the Commission's good faith rules rest on the flawed assumption that the marketplace and rules are working, when they are not. Broadcasters now have significant market power in negotiations, and are abusing that market power by not substantiating their positions in negotiations. This problem can be addressed fairly by requiring both broadcasters and MVPDs to deal honestly with each other by substantiating their claims made at the bargaining table. By improving transparency, it would serve to keep both sides honest and speed resolution of differences.

Broadcaster claims about mandatory information exchanges are overblown and misdirected. There would be nothing inefficient and costly in requiring a negotiating party advancing a claim in support of its offer to provide substantiating evidence to its negotiating party upon request. In the labor law context, the NLRB and courts have recognized that labor negotiations are more likely to lead to successful outcomes where party may request and receive information to verify claims made during negotiations. Nor would the relief ACA seeks constitute an unbounded information sharing or discovery mechanism, as broadcasters assert. ACA's proposal is narrowly tailored to require substantiation only of specific claims made by either broadcasters or MVPDs during the course of retransmission consent negotiations. Rather than impede or slow, negotiations, substantiation of claims should make reaching an agreement easier and quicker by keeping the parties honest and removing doubt about whether a negotiating party is being presented with a fair deal.

Withholding otherwise freely available programming online during retransmission consent negotiations. The record overwhelmingly supports adoption of a *per se* rule prohibiting a broadcaster from blocking an MVPD's broadband Internet access subscribers from accessing the broadcaster's and its affiliated network's publicly available online video programming as a means to gain leverage during retransmission consent negotiations, or, at the least, as evidence of bad faith under the totality of the circumstances test. MVPDs and public interest groups describe, in detail, the harms that this practice inflicts upon consumers and agree that a broadcaster has no legitimate justification for blocking otherwise freely available online content to broadband Internet access subscribers of an MVPD with whom the broadcaster is negotiating retransmission consent.

Against this swelling tide of support for a rule prohibiting "online blocking," as this practice is commonly known, broadcasters claim that the Commission does not have the authority to prohibit online blocking and that such a rule would raise constitutional and copyright issues. These objections are unavailing. The Commission has the authority to address online blocking under Sections 325 and 706 of the Communications Act, and neither the First Amendment nor copyright law poses a bar to Commission action.

Blackouts during or near marquee events. The record supports the adoption of a *per* se rule prohibiting a broadcaster from blacking out or threating to blackout a station signal, in the time period just prior to the airing of a "marquee" sports or entertainment event or, at the least, as evidence of bad faith under the totality of the circumstances test. Commenters from both sides of the bargaining table note the importance of marquee events, and the ability of broadcasters to use them as leverage during negotiations. This harms consumers and distorts the marketplace in which retransmission consent negotiations occur.

Third-party interference in retransmission consent agreements for historically carried out-of-market stations. Based on the record in this proceeding, the Commission should adopt ACA's proposal to deem third party interference with long-standing retransmission consent arrangements between cable systems and willing out-of-market broadcast stations a *per se* good faith violation. Although broadcasters claim that the Commission does not have the authority to regulate agreements between broadcast stations and their network affiliates, ACA's narrow proposal would simply prohibit out-of-market stations from entering into agreements that restrict their ability to negotiate in good faith with MVPDs that have historically retransmitted their signal. Similarly, contrary to broadcasters' claims, copyright law in no way constrains the Commission's authority over geographic restrictions on a broadcaster's ability to offer retransmission consent. The Commission also has ample authority to prohibit in-market stations from demanding retransmission consent terms that would restrict an MVPD's ability to negotiate in good faith with out-of-market stations that have historically been carried on systems that lie outside the geographic zone of exclusivity defined in the Commission's rules. These prohibitions are necessary because the existing good faith rules have proven inadequate to protect consumers against the loss of historically carried out-of-market signals.

Conditioning retransmission consent on an MVPD's acceptance of prices, terms, and conditions for after-acquired stations or unlaunched programming networks. The record supports adoption of either a *per se* rule prohibiting conditioning the grant of retransmission consent on agreement to set prices, terms, and conditions for carriage of unlaunched, untested, and in some cases unidentified programming networks and after-acquired broadcast stations ("prospective programming") or, at the very least, evidence of bad faith under the totality of the circumstances test. The results of these practices are profoundly unfair and de-stabilizing to operator finances, and the Commission should no longer tolerate them. Notably, not a single broadcaster attempted to defend the practice of setting prices, terms, or conditions for prospective programming in its comments.

Broadcasters defend the practice of setting prices, terms, or conditions for after-acquired stations by claiming that that such clauses are widely found in retransmission consent agreements, but the Commission has already demonstrated its view that common industry practice is no justification for harmful behavior in retransmission consent negotiations. And contrary to broadcasters' claims, prohibiting such behavior would not prevent willing broadcasters and MVPDs from agreeing to enter into comprehensive retransmission consent agreements that govern systems or stations that are later acquired where the parties each find such clauses to be an efficient means of negotiation. It would instead merely prohibit a negotiating party from insisting that acceptance of such a prospective programming provision is a condition of gaining retransmission consent for a particular station or stations.

Discrimination by an MVPD-affiliated broadcast station based on vertical competitive effects. No commenters disagree with ACA's position that the Commission should deem discrimination by MVPD-affiliated top four-rated broadcast stations based on vertical competitive effects to be a violation of the duty to negotiate in good faith. To the contrary, the record shows that discrimination by a vertically integrated entity can harm both MVPDs and broadcast stations that compete with that entity. That broadcasters and MVPDs can agree on this issue when they see eye to eye on so little else in this proceeding should motivate the Commission to take action against such discrimination.

Recognition of Negotiating Terms Based on MFN Provisions or Demanding MFNs as Evidence of Bad Faith Under the Totality of the Circumstances Test

ACA asked the Commission to consider both negotiation terms based on MFN provisions and demands for MFNs to be evidence of bad faith under the totality of the circumstances test in recognition of the fact that MFNs can be either pro- or anticompetitive, depending on circumstances. While ACA agrees with broadcasters that MFNs are widely used and that they are not inherently inappropriate or anticompetitive, the fact that MFNs, like after-acquired station or system provisions, are widely found does not necessarily mean that they are either desirable or cause no harm. In general, only the larger MVPDs are able to secure MFNs from broadcasters, and, as the record shows, they can act as a pricing floor below which broadcasters will not sell to smaller MVPDs, even when such a sale would be mutually beneficial to the negotiating parties. Evaluation on a case-by-case basis, as ACA recommends, would permit the Commission to evaluate whether, under the totality of the circumstances, negotiating positions based on MFNs reflect the presence or absence of good faith in a particular case.

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REPLY COMMENTS

AMERICAN CABLE
ASSOCIATION

I. INTRODUCTION

The American Cable Association ("ACA") submits these reply comments urging the Commission to move ahead expeditiously with its reform of its totality of the circumstances test and other rules for evaluating whether broadcast stations and multichannel video programming distributors ("MVPDs") are negotiating for retransmission consent in good faith. The record is clear: the marketplace for retransmission consent has changed, broadcasters now have significant market power in negotiations, they are proffering proposals and engaging in conduct in bad faith that are harmful to MVPDs and their customers, and the existing rules need to be updated to ensure good faith negotiations occur as Congress intended. Action must be taken to restore balance in the negotiating dynamics between broadcast stations and MVPDs, and the Commission is fully authorized to do so to protect the public interest under the Communications Act ("Act").

In its comments, ACA focused on the need for the Commission to both reform its overall approach to the totality of the circumstances test by adding a "harm to the public" standard by which to judge complaints, and to either add to its list of *per se* violations of the duty to negotiate in good faith or, at the very least, identify as evidence of bad faith to be considered under the totality of the circumstances test, the following particularly egregious practices and proposals:

- A broadcaster's insistence on bundling a top four-rated broadcast signal with regional sports network ("RSN") or other "must have" programming" in retransmission consent negotiations.
- Refusal of a negotiating party to substantiate claims made during negotiations.
- Blackouts involving online programming in connection with retransmission consent negotiations as a means to gain leverage in negotiations.
- Blackouts involving linear programming before "marquee" events in connection with retransmission consent negotiations as a means to gain leverage in its negotiations.
- Third-party interference in retransmission consent negotiations for historically carried out-of-market stations.
- Conditioning retransmission consent on set prices, terms and conditions for after-acquired broadcast stations or unlaunched programming networks.
- Discrimination by an MVPD-affiliated broadcast station based on vertical competitive effects.

In addition, ACA recommended that the Commission consider both demanding a most favored nation ("MFN") provision be included in a retransmission consent agreement, and negotiating terms based on MFN provisions in existing third-party retransmission consent agreements to be evidence of bad faith under the totality of the circumstances test.

ACA's proposals received substantial support in the record.[1] ATVA and others have similarly demonstrated that broadcasters are engaging in an array of troubling negotiating practices, including: restrictions on lawful technology; charging for non-subscribers; dual

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[1] *See*, *e.g.*, *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of ITTA – The Voice of Mid-Size Communications Companies at 18 (filed Dec. 1, 2015) ("ITTA Comments") (supporting prohibition on bundling); Comments of NTCA – The Rural Broadband Association at 14-15 (filed Dec. 1, 2015) ("NTCA Comments") (supporting requirement to substantiate claims); Comments of Public Knowledge and Open Technology Institute at New America at 9-10 (filed Dec. 1, 2015) ("Public Knowledge Comments") (supporting online blocking rule); Comments of CenturyLink at 7-8 (filed Dec. 1, 2015) ("CenturyLink Comments") (supporting ban on blackouts around "marquee events); Comments of AT&T at 15 (filed Dec. 1, 2015) ("AT&T Comments") (discussing carriage of prospective programming).

affiliation and unreasonable penetration demands that prevent MVPDs from providing more choices to consumers; and preventing MVPDs from disclosing information on rates, terms, and conditions of a contract proposal or agreement to the Commission or a court of competent jurisdiction during a dispute concerning retransmission consent.[2] Based on the problems highlighted by MVPDs in this record, broadcasters are coming up with new and creative ways to exercise their market power, but are not generally engaging in acts that the Commission have already deemed *per se* violations, which suggests that there is value in the Commission clarifying its rules, even without adopting procedural reforms, such as interim carriage, that ACA and others have advocated in the past.

As discussed below, despite their filing hundreds of pages attesting to how well the marketplace is working, and trotting out a parade of horribles that will ensue if any of the proposals identified in the NPRM are adopted, broadcasters have failed to make a convincing case that maintaining the status quo benefits the public, that adoption of any of the proposals in the NPRM would make consumers worse off, or that the Commission lacks statutory authority to make the changes ACA has identified to its good faith rules.

II. FAILURES IN THE MARKETPLACE FOR RETRANSMISSION CONSENT DEMONSTRATE THAT NEITHER THE MARKET NOR THE GOOD FAITH RULES ARE WORKING TO PROTECT CONSUMERS

Nearly every broadcaster claims that the market for retransmission consent is now finally working as Congress intended, and therefore the Commission should refrain from adopting any reforms to its good faith rules that would upset the present "equipoise" achieved in the market.[3]

[2] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Television Alliance at 31-34 (filed Dec. 1, 2015) ("ATVA Comments"); Comments of Time Warner Cable, Inc. at 9-10 (filed Dec. 1, 2015) ("Time Warner Comments"); Comments of the United States Telecom Association at 21 (filed Dec. 1, 2015) ("US Telecom Comments").

[3] NAB Comments at 4 ("Put simply, the retransmission consent market has finally begun to work."); CBS Comments at 4 ("After more than 20 years, the video marketplace has finally reached a state of equipoise."); Hearst Comments at 6 ("The retransmission consent marketplace continues to function effectively"); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the*

In support of these arguments, broadcasters advance several factual claims, none of which are relevant to their assertion that there is nothing wrong with the status quo (despite overwhelming evidence to the contrary). First, they claim that broadcasters operate in an upstream video programming market that is competitive and becoming more so over time, and that, although MVPD competition has increased since 1992, it is now decreasing due to MVPD consolidation. Second, they suggest that broadcasters do not have excessive bargaining leverage over MVPDs because "huge consolidated companies such as AT&T/DirecTV and other MVPDs wield significant market power over most broadcasters, particularly in smaller markets."[4] Third, they assert that increasing retransmission consent rates are not a source of upward pressure on MVPD subscriber fees.[5] What broadcasters fail to do, however, is show why any of these facts are relevant to the actual health of the retransmission consent marketplace, or why they justify the continuation of the Commission's ineffective approach to the good faith obligation generally,

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Circumstances Test, MB Docket No. 15-216, Comments of Saga Broadcasting, LLC at 3 (filed Dec. 1, 2015) ("Saga Broadcasting Comments") ("the retransmission consent system in place does not need to be upset, as it involves bargaining between equal capitalistic forces").

[4] Broadcast Affiliates Comments at 52 n.119, *citing Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of the National Association of Broadcasters at 28-29 & n.73 (filed May 27, 2011) (itself citing attached Eisenach Declaration at 5-7 for the proposition that "the upstream market for MVPD video programming…is far less concentrated than the downstream market for video distribution, which 'remains highly concentrated' among a small number of MVPDs").

[5] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of 21st Century Fox, Inc. and Fox Television Stations, LLC at 5 n.9 (filed Dec. 1, 2015) ("Fox Comments") ("The fees paid for retransmission consent are a small fraction of the overall cost base of MVPDs large and small, with broadcast retransmission fees accounting for only a small percentage of every dollar of distributors' video revenue."), *citing* Jeffrey A. Eisenach, *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA ECONOMIC CONSULTING, at ii (July 2014) ("As important as retransmission consent is to broadcasters, it accounts for less than three percent of cable operators' revenues and has little or no impact on pay TV prices."). In actuality, although increases in retransmission consent fees may represent a small fraction of an MVPD bill, they apparently constitute a significant percentage of the increase in MVPD rates to subscribers. *See* Gerry Smith, *Cable Bills Are Rising Again (Those of You Who Still Have Cable)*, BLOOMBERG BUSINESS, (Dec. 23, 2015) ("Cable Bills Are Rising Again") *available at* http://www.bloomberg.com/news/articles/2015-12-23/cable-bills-are-rising-again-those-of-you-who-still-have-cable- ("Overall, Comcast customers' bills will increase on average by 3.9 percent in 2016, spokeswoman Jenni Moyer said. At Cablevision Systems Corp., it's 2.9 percent on average. Cable and satellite companies say the higher prices cover some but not all of the higher programming costs. The amount that Time Warner Cable pays local broadcast channels has risen 85 percent in the past two years, while its costs for carrying sports networks have increased 116 percent since 2008, according to spokesman Bobby Amirshahi.").

and its overly permissive standard for evaluating complaints under the totality of the circumstances test specifically.

As discussed in more detail below, the NPRM, together with record evidence submitted by ACA and others, identifies numerous problems in the retransmission consent marketplace that broadcasters blithely claim is working.[6] Almost every MVPD that filed initial comments tells a starkly different story, which is supported by evidence of sharply and endlessly increasing prices;[7] increasing numbers of blackouts, both linear and online; bundling of other "must have" programming with retransmission consent; insistence on conditioning retransmission consent on set prices, terms, and conditions for prospective programming, and other problems. The record shows that the status quo has undeniably allowed broadcasters to abuse their market power by engaging in unreasonable negotiating tactics and by demanding unreasonable terms and conditions, leading to considerable public interest harm, and that the current good faith rules have been ineffective in preventing abuses.

A. Broadcaster Arguments to the Effect That "Deals Get Done Therefore the Marketplace is Working" Ring Hollow.

To demonstrate how the marketplace is supposedly working, broadcasters claim that most deals are resolved without problem, so that there are actually few blackouts and even fewer good faith complaints. NAB asserts that, "[b]ased on an objective analysis of the record, the Commission should recognize that the current standards for good faith bargaining, along with existing marketplace incentives, ensure that broadcasters bargain with the purpose of

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[6] NPRM, ¶ 3 (reciting changes in the marketplace since 1992 that have increased broadcaster leverage against MVPDs, including increased competition among MVPDs, bundling of retransmission consent with other programming networks, that have led to increased negotiating breakdowns and blackouts); ACA Comments at 15-71; AT&T Comments at 3-10; ATVA Comments at 6-37.

[7] Significantly, Chairman Wheeler has recognized that retransmission consent prices have "skyrocketed." *See* Tom Wheeler, *Protecting Television Consumers By Protecting Competition*, FCC BLOG (Mar. 6, 2014), *available at* https://www.fcc.gov/news-events/blog/2014/03/06/protecting-television-consumers-protecting-competition ("The cost of these 'retransmission consent agreements' has skyrocketed from $28 million in 2005 to $2.4 billion in 2012, a nearly 8,600 percent increase in seven years."). "Skyrocketing" prices are not normally associated with a well-functioning marketplace.

reaching an agreement. The vast majority of retransmission consent negotiations are resolved without an impasse."[8] NAB argues that blackouts are so rare that "MVPD subscribers were much more likely to lose access to television programming because of power outages or MVPD system failures,"[9] and claims that "[i]f broadcasters actually had been failing to negotiate in good faith, then MVPDs likely would have inundated the Commission with complaints."[10] This view is echoed by CBS and Broadcast Affiliates, who maintain that the vast majority of retransmission consent negotiations are resolved without disruption, and that the good faith negotiation framework, and the totality of the circumstances test in particular, have facilitated the successful negotiation of tens of thousands of retransmission consent agreements in the private marketplace without government interference."[11] None of these arguments provides a basis for maintaining the status quo.

1. The fact that a deal gets done is not evidence that the market is working.

First, NAB's claims that blackouts are few and far between are false. Considering that the two negotiating parties supposedly have a mutual interest in reaching a deal, there is an incredibly large number of blackouts, and the number is only increasing. ATVA reports that, "[b]roadcasters pulled the plug on American consumers 191 times in 2015, a new single

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[8] NAB Comments at 7.

[9] *Id.* at 51, *citing* Decl. of Jeffrey A. Eisenach and Kevin W. Caves, at 25, 30, Attachment A to NAB Comments, MB Docket 10-71 (May 27, 2011) ("2011 Eisenach Declaration").

[10] *Id.* at 24. *See also* Nexstar Comments at 2 ("As evidenced by the Commission's review of complaints filed under the totality of the circumstances test, the test has been adequate to ensure the relevant parties negotiate in good faith").

[11] CBS Comments at 8 ("The Commission must [] acknowledge that . . . the vast majority of retransmission consent negotiations are successfully resolved concluded without service disruptions to viewers."); Broadcast Affiliates Comments at 12 ("The vast majority – more than 99 percent – of retransmission consent agreements conclude in an agreement without a dispute of any kind"). Gray, striking the same note, claims that "[a] viewer . . . is far more likely to lose service as a result of a lightning strike or other technical difficulties with an MVPD's plant than a retransmission consent dispute." *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Gray Television Group, Inc. at 2 (filed Dec. 1, 2015) ("Gray Comments").

calendar year record. Network takedowns have spiked over the past five years; in 2010 there were only eight blackouts nationwide. The blackouts in 2015 affected 12 million American homes – one of every eight pay TV subscribers."[12] These numbers are significant and they demonstrate a trend that will only continue to grow without Commission intervention.[13]

Second, the fact that deals get done is irrelevant to the question of whether the negotiating tactics and proposals identified by ACA and others are consistent with good faith negotiations. Retransmission consent deals get done with owners of "must have" broadcast signals because MVPDs would suffer significant subscriber defections due to the loss of these assets in their channel line-ups if they do not. Broadcast station owners are unflinching in their willingness to pull signals to force MVPDs into accepting deals at their preferred prices, terms, and conditions.[14] MVPDs are in most cases left with little choice but to tolerate broadcasters' negotiating tactics and to cede to their increasingly outrageous demands. This is particularly the case for MVPDs who operate only in a single market, and who tend to be smaller providers. When the impact of not reaching a retransmission consent agreement with a broadcaster means that 100 percent of an MVPD's subscribers will lose access to a top four-rated station, the only choice for the MVPD is to agree to the broadcasters' supra-competitive demands. The

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[12] *See* ATVA, *Broadcasters Ring in the New Year With More Consumer TV Blackouts*, AMERICAN TELEVISION ALLIANCE (Jan. 4, 2016), *available at* http://www.americantelevisionalliance.org/broadcasters-ring-in-the-new-year-with-more-consumer-tv-blackouts/; ATVA Comments at 6-10 (documenting the increasing number of retransmission consent blackouts, and noting that blackouts affected more than one in eight MVPD subscribers in 2015 alone).

[13] *See also* John D. McKinnon, *TV Viewers Endured Record Number of Blackouts in 2015*, THE WALL STREET JOURNAL (Jan. 13, 2016), *available at* http://www.wsj.com/articles/tv-viewers-endured-record-number-of-blackouts-in-2015-1452727503; Daniel Frankel, *Retrans-related blackouts more than doubled to record 193 in 2015, report says*, FIERCE CABLE (Jan. 14, 2016), *available at* http://www.fiercecable.com/story/retrans-related-blackouts-more-doubled-record-193-2015-report-says/2016-01-14.

[14] The Commission correctly recognized this fact in the NPRM. *See* NPRM, ¶ 3 ("The increase in competition among MVPDs has improved broadcasters' leverage in retransmission consent negotiations. MVPDs that face competition have stronger incentives to negotiate retransmission consent agreements with broadcast stations because much broadcast network television programming continues to be 'must have' programming for MVPDs and an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs – including subscribers to its associated voice and broadband services.").

alternative of losing access to the signal and, in turn, losing subscribers to video and one or more other services they provide, such as voice and broadband Internet, is not workable. The impact in such markets is often greater than in cases in which an MVPD that operates in multiple markets fails to reach a deal that may affect some but not all subscribers.

2. The number of good faith complaints filed in the past does not show that the existing rules are sufficient to protect the public interest.

The existing good faith rules are insufficient to protect MVPDs from unreasonable bargaining demands. Despite the broadcasters' claims to the contrary, many good faith complaints have been filed over the years; too many, in fact, for a marketplace that the broadcasters claim is working. The fact that more complaints are not filed reflects a combination of several factors, none of which supports a conclusion that the retransmission consent market is functioning properly.

One of the reasons more complaints have not been filed is the fact that the Commission historically has signaled to the MVPD industry its unwillingness to get deeply involved in the operation of the market for retransmission consent,[15] a policy stance well understood by broadcasters.[16] Calls for reform of the good faith rules by ACA and others from 2005 through 2010 were unanswered by Commission action until 2011, when it issued its first comprehensive retransmission consent reform rulemaking that incorporated issues raised six years earlier by

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[15] The Commission's 2000 Good Faith Order makes plain that Commission policy would primarily address bargaining procedures rather than the substance of negotiations and construe the requirement that broadcasters negotiate in good faith "narrowly," a policy unchanged when Congress later made the good faith obligation bilateral to MVPDs. *See* 2000 Good Faith Order, ¶¶ 20-24; *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, ¶ 3 (2005) ("2005 Good Faith Order").

[16] *See, e.g.*, *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the E.W. Scripps Company at 5-6 (filed Dec. 1, 2015) ("Scripps Comments") (characterizing the Commission's regulatory approach to retransmission consent negotiations as hands-off).

ACA.[17] Thus, the climate for MVPDs to file good faith complaints was not inviting, and this deterred good faith complaints that might have otherwise been filed in a different environment.

Moreover, there is great deal of uncertainty about whether the Commission would deem many types of proposals and tactics to be in bad faith under the totality of the circumstances test. This uncertainty, combined with the cost of the process (in staff time, attorney fees, and opportunity) and fears of subsequent retaliation in future negotiations, acts as a chilling factor in an MVPD's decision to file a good faith complaint, particularly for smaller MVPDs. Moreover, even if an MVPD prevails in a good faith complaint, the relief the Commission has been willing to grant in the past has gone no further than requiring the parties to go back to the bargaining table. These facts have all contributed to the relatively low number of filings. Thus while the Commission may be capable of analyzing complaints using the totality test as currently defined,[18] because the test lacks adequate specificity, few MVPDs are willing to absorb the costs and uncertainty of using the complaint process when faced with acts of bad faith.

Finally, the Commission has not made clear whether MVPDs may obtain interim carriage during the pendency of a complaint, thus reducing the utility of the complaint process and suppressing the number of complaints that otherwise would be filed.[19] MVPDs, especially smaller MVPDs, have been unwilling to bring complaints on matters of first impression, especially when resolution of the complaint by the Commission may take months, if not years,

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[17] *See ACA 2005 Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103 Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity* (filed Mar. 2, 2005); *2010 TWC Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed Mar. 9, 2010); *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, ¶¶ 13, 18 (2011) (*citing* ACA 2005 Petition, but disclaiming authority to require interim carriage and focusing on reforms to negotiating process to protect consumers).

[18] Nexstar Comments at 2.

[19] *See* AT&T Comments at 10-11 (existing regulations are too general and thus ineffective; "the Commission has adjudicated only five good faith complaints in over fifteen years, despite hundreds of blackouts and threatened blackouts.").

because an MVPD cannot leave its subscribers without access to such "must have" programming for such a significant period of time.

More significant than statistics about the historical number of good faith complaints filed is the fact that broadcaster market power has grown significantly in recent years due to increased competition among MVPDs, and broadcasters are more apt to abuse their market power by engaging in bad faith tactics now than they may have been in years past. In other words, past is not prologue.[20]

B. The Commission Should Not Take Seriously the Argument that Broadcasters Do Not Have Significant Market Power.

A number of broadcasters claim that the rapid increase in retransmission consent pricing merely reflects a marketplace that is coming into equilibrium, rather than one that is broken.[21] ACA and others have demonstrated that in reality top four-rated broadcasters have significant market power in their local DMAs when it comes to negotiating retransmission consent with MVPDs.[22] Even if the broadcasters' claim was true, an equilibrium that enshrines excessive

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[20] Moreover, as discussed below in Section IV.A., the bargaining imbalance is likely to worsen in the future due to negotiations for retransmission consent bundled with other "must have" programming such as RSNs with coterminus expiration dates.

[21] *See*, *e.g.*, Hearst Comments at 3 ("Prices paid for retransmission of local station signals have yet to even approach equilibrium based on viewership ratings . . . any increases in payments to broadcasters reflect a healthy marketplace that is permitting and fostering arms-length negotiations that yield appropriate marketplace valuations."); Graham Media Comments at 3 ("Nielsen data shows that while Graham's stations are typically top-rated in their markets, they are paid significantly less than cable channels with far lower ratings."); Joint Broadcasters Comments at 9 ("broadcasters have historically been undercompensated by MVPDs").

[22] ACA Comments at 22-32. MVPDs large and small all agree that broadcasters' have significant market power. *See*, *e.g.*, *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Block Communications, Inc. at 3, 5-7 (filed Dec. 1, 2015) ("Block Comments") (mismatched bargaining power has led to today's unfair negotiating tactics that have nothing to do with service to local viewers; "Consolidation by broadcast station groups and MVPDs has distorted the balance of the retransmission consent marketplace . . . TV broadcaster 'supergroups' have used their scope and scale to extract massive fee increases from small and mid-sized cable operators for poorly performing stations."); Cablevision Comments at 4 ("Today, broadcasters have available numerous outlets of distribution . . . however – as the Commission recognizes in the NPRM – 'broadcast network television programming continues to be must-have programming for MVPDs.'") (citing NPRM, ¶ 3); Comments of WTA – Advocates for Rural Broadband at 11 (filed Dec. 1, 2015) ("WTA Comments") ("Negotiations between broadcasters and small MVPDs often take the shape of 'take-it-or-leave-it' demands"); AT&T Comments at 3-5 ("[W]hen the *Good Faith Order* was adopted . . .

market power is not in the public interest.[23] Unfortunately, the Commission's good faith rules have thus far done little to temper broadcasters' exercise of their market power.[24] Only those that are benefitting from the huge windfalls created by such sharp increases in retransmission consent prices would argue that the current market is working or headed toward equilibrium.[25]

1. Broadcasters have significant market power over MVPDs in negotiations for retransmission consent.

The NPRM correctly reaffirms the Commission's long-standing view that "much broadcast network television programming continues to be 'must have' programming for MVPDs."[26] In its comments, ACA demonstrated that top-rated network affiliated stations are "must have" and this gives them significant market power in negotiations because "'markets for

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retransmission consent negotiations took place on a roughly level playing field . . . . The retransmission consent marketplace has changed dramatically since [the 2000 Good Faith Order] . . . . These changes have given broadcasters significant market power, which they routinely exploit.").

[23] Again, as agreements for retransmission consent and RSNs increasingly become co-terminus, broadcasters' enhanced market power will result in even higher prices than stations could command if they negotiated for each type of programming with MVPDs separately. *See* ACA Comments at 16-22.

[24] *See, e.g.*, ATVA Comments at 22-30 (broadcasters engage in negotiating tactics inconsistent with a functioning market unconstrained by the good faith rules); AT&T Comments at 11 ("The best way to fix retransmission consent negotiations would be removal of the regulatory provisions that place a heavy thumb on the scale in favor of broadcasters, including exclusivity rules. Absent such deregulation, however, the Commission can and should provide additional guidance as to what constitutes bad faith in order to restore some semblance of balance to retransmission negotiations."); Mediacom Comments at 11-12 ("[T]he Commission's [good faith] rules <u>are</u> broken . . . because [of the Commission's] aversion to intervention . . . As a representative of a major station owner threatening a blackout once told Mediacom, 'Those guys [at the FCC] are not going to do anything.'"); Time Warner Comments at 5-6 (regulatory preferences give broadcasters the leverage to demand sharply escalating retransmission consent fees; "in some instances, the Commission has exacerbated these distortions – *e.g.*, by adopting presumptions in its *2000 Good Faith Order* that various harmful broadcaster activities were somehow consistent with the good faith standard, or by allowing broadcasters to aggregate market power in local areas through multicasting and dual affiliations.").

[25] *See, e.g.*, Hearst Comments at 3 ("Prices paid for retransmission of local station signals have yet to even approach equilibrium based on viewership ratings.").

[26] NPRM, ¶ 3; *General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 202 (2004) ("News-Hughes Order").

must have programming rights are monopolistic rather than competitive.'"[27] A product that is highly valued and has no close substitutes fits the textbook definition of a monopoly.[28]

First, top-rated broadcast programming (usually affiliated with ABC, CBS, Fox and NBC), is highly valued. The broadcasters' own statements demonstrate that their programming meets this definition. They point out that their broadcast programming garners significantly higher ratings than cable programming.[29] Gray, for example, recognizes that ratings for broadcast stations dominate their cable network competitors and proudly notes that "when it comes to amassing large audiences and earning advertising revenue, the power of local broadcast stations is unmatched."[30] Although NAB cites a decline in prime time broadcast viewership in support of arguments that local stations lack market power,[31] broadcasters still achieve the highest ratings and are more likely to air very high value marquee programming, as the Writers Guild of America confirms.[32] Thus, despite somewhat lower ratings, broadcast stations remain highly valued with viewers.[33]

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[27] ACA Comments at 26; Michael H. Riordan, HIGHER PRICES FROM BUNDLING OF "MUST HAVE" PROGRAMMING ARE NOT BASED ON COMPETITIVE MARKETPLACE CONSIDERATIONS at 4, ¶ 5 ("Riordan") (attached to ACA Comments as Attachment A).

[28] *See* ACA Comments at 27; Riordan at 4, ¶ 5; 9, ¶ 18. Professor Riordan explained that programming from top broadcast networks is "must have" because it is uniquely valuable and has no close substitutes. "An MVPD who fails to include the top local television stations or the local RSN in its channel lineup risks losing a significant share of its subscribers to rival MVPDs who do carry this must have programming. This allows the seller of must have programming to charge a high price, well above its incremental cost of providing the programming, with little or no concern for the pricing of the programming by other sellers. This is essentially the textbook economic definition of monopoly. Most MVPDs have little real choice but to agree to the monopoly price of must have programming." *Id.* at 4, ¶ 5.

[29] *See, e.g.*, Graham Media Comments at 3 ("Nielsen data shows that while Graham's stations are typically top-rated in their markets, they are paid significantly less than cable channels with far lower ratings . . . Despite contributing far fewer channels, broadcasters deliver far more viewers proportionally to cable and satellite systems than do cable channels.").

[30] Gray Comments at 11.

[31] NAB Comments at 11-12.

[32] *See, e.g.*, *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the Writers Guild of America, West. Inc. at 8 (filed Dec. 1, 2015) (noting that "broadcasters still provide must-have and marquee programming").

[33] *See, e.g.*, Gray Comments at 16 (explaining that "MVPDs should have no complaints about the fees charged by [top four-rated] affiliates", and comparing high top four-rated viewership numbers to lower

Second, a top-rated broadcast station has no close substitutes in the market. Broadcasters have themselves made the point that local stations do not compete against one another. For example, NAB, in arguing against a prohibition on joint negotiations, expressly stated that "[t]he fact that some television stations may negotiate together and others do not raises no competitive issues because stations do not compete against each other for retransmission consent fees."[34] The fact that each network affiliated broadcast programming provides unique content that is highly desirable, such as live sports and other general interest marquee events, and each offers unique locally popular content that is not made available on the other broadcast stations, national cable programming networks, or online video services, may explain this market reality.[35]

2. Broadcaster claims rest on an erroneous view of the relevant markets for purposes of a competitive analysis of retransmission consent.

Broadcaster claims concerning the balance of bargaining leverage in retransmission consent negotiations rest on an erroneous view of the relevant product and geographic markets

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viewership of cable network competitors); Saga Broadcasting Comments at 4 ("And the most popular content is held by national television networks, which distribute programming to local television networks"); Hearst Comments at 3 ("Prices paid for retransmission of local station signals have yet to even approach equilibrium based on viewership. In the current market, the price paid for retransmission of local television stations affiliated with ABC, CBS, NBC, or Fox *should* be rising.").

[34] *Amendment of the Commission's Rules Relating to Retransmission Consent*, MB Docket No. 10-71, Supplemental Comments of the National Association of Broadcasters at 15 (filed May 29, 2013).

[35] *See, e.g.*, *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Letter to Chairman Tom Wheeler from Paul H. McTear, Jr., President & CEO of Raycom Media, Inc. at 1-2 (filed Dec. 9, 2015) (discussing the number of hours of local news programming produced and aired by Raycom stations as examples of its "demonstrated commitment to local service" and the value of "the local broadcast model"); *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of the National Broadcasting Association at 15-16 & n.51 (filed Jun. 24, 2014) (discussing how the Commission's longstanding national broadcast policy of localism favoring the provision of local broadcast service to communities "'expects and indeed *requires* broadcasters to serve the needs and interests of their local communities'"; the role of broadcast stations in providing "access to the most popular entertainment programming available – either for free over-the-air or via MVPDs"; and the fact that "[l]ocal broadcasters remain the go-to source for local news and investigative reporting; coverage of local sports, weather, and traffic; and important local political and public affairs programming, including candidate debates and interviews that viewers across the nation trust, value and rely on.").

for purposes of competitive analysis. In support of their claims that they lack market power in retransmission consent negotiations, broadcasters argue that broadcast programming is no longer "must have" as a result of competition from national and regional cable programming, VOD programming, and online programming.[36] Walt Disney specifically points to competition in the upstream market for acquiring video programming in an attempt to deflect attention from the significant market power of a top-four broadcaster negotiating retransmission consent within its local DMA.[37] Additionally, NAB argues that increased MVPD consolidation in the national market lessens broadcasters' market power in the retransmission consent market within its DMA.[38] As discussed below, the broadcasters are incorrect on all counts.

To start, to determine whether a particular type of transaction may raise concerns about market power, one must define the appropriate market in which those types of transactions take place.[39] The Commission's good faith bargaining rules apply to negotiations between

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[36] NAB Comments at 11-12 ("[N]o broadcast station can effectively compete against well-financed cable network programmers and OTT services without the ability to negotiate for the fair market value of its signal in the same manner as those other programmers."); Nexstar Comments at 9 ("While the Commission expounds on the changed MVPD marketplace, it simply ignores that, today, broadcast stations compete with hundreds of television channels, VOD services, and Internet content.").

[37] Walt Disney, for example, advances several reasons why the NPRM allegedly rests on false premises concerning the balance of power in retransmission consent negotiations. It asserts: (i) "the distribution market . . . has become more concentrated in recent years . . . competition among broadcasters, and competition among content providers more generally has increased dramatically [since 1992]" for "top talent and marquee content, as well as for viewers;" (ii) that "broadcasters remain dependent on MVPDs to deliver their content to subscribers so that they can recoup their substantial investments in programming;" and (iii) that there are "competitive pressures on the supply side that create incentives for broadcasters to negotiate in good faith with MVPDs." Disney Comments at 4-7. For these reasons, Walt Disney argues "[t]he NPRM's core premise, that MVPDs have limited ability to negotiate retransmission consent agreements with television stations is inherently flawed . . . Moreover, that premise is based on the Commission's misguided notion that it can assess which types of content, or even individual programs, are 'must-have' and which are not, and that those findings can serve as the basis for lawful regulation." *Id.* at 7.

[38] *See* NAB Comments at 18 ("Many locally, regionally, and nationally consolidated pay TV providers dwarf television broadcasters in scale and scope.").

[39] *See Horizontal Merger Guidelines*, U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION at 7-8 (rel. Aug. 19, 2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf ("When the Agencies identify a potential competitive concern with a horizontal merger, market definition plays two roles. First, market definition helps specify the line of commerce and section of the country in which the competitive concern arises. In any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen

broadcasters and MVPDs for rights to carry broadcast television signals, and are intended to curb bad faith proposals and conduct in these negotiations. Therefore, it is appropriate in the context of this proceeding to define the product market to be no broader than the retransmission consent market, *i.e.*, carriage rights for local broadcast television signals. We analyze the broadcasters' claims through this filter.

a. The availability of national and regional programming networks and online video is not relevant to the market for retransmission consent.

Arguments advanced by broadcasters that they compete for "eyeballs" with video programming distributed by multiple players, including over-the-top distributors, are not relevant to analyzing the market for retransmission consent.[40] This conclusion is consistent with the Commission's views in the past. With respect to competition for MVPD carriage, for analytical purposes, the Commission has recognized that the local broadcast television programming market constitutes a relevant product market that is separate from (i) national and non-sports regional cable programming networks and (ii) regional sports cable networks.[41] Moreover, just

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competition. Second, market definition allows the Agencies to identify market participants and measure market shares and market concentration. The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects. The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis. Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.") (citations omitted).

[40] *See, e.g.*, Disney Comments at 6-7 ("As a result of the proliferation of alternative video programming outlets and the corresponding race among programmers to create innovative, engaging, high-quality programming, consumers are enjoying a new 'Golden Age of Television' . . . the video programming market is thriving – far from experiencing the sort of 'severe market failure' that might justify regulatory intervention."); Nexstar Comments at 9 ("While the Commission expounds on the changed MVPD marketplace, it simply ignores that, today, broadcast stations compete with hundreds of television channels, VOD services, and Internet content."). Notwithstanding broadcasters' insistence in comparing themselves to non-broadcast programming, network-affiliated broadcast ratings compared to these other programmers are significant.

[41] 2014 Joint Negotiation Order, ¶¶ 13-17 (analyzing competitive harm of joint negotiation of retransmission consent by same-market non-commonly owned stations and finding that such joint negotiation "is not consistent with 'competitive marketplace considerations'" and therefore violates the good faith requirement "because it eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent

last year the Commission indicated that it finds "unpersuasive" broadcaster arguments that the Commission should expand its definition of the market for assessing broadcast station ownership rules.

> While we are keenly aware of the growing popularity of video programming delivered via MVPDs and the Internet, we tentatively find that competition from such video programming providers is currently of limited relevance for the purposes of our analysis. These programming alternatives compete largely in national markets – cable programming is generally uniform across all markets, as is video programming content available via the Internet – and, unlike local broadcast stations, such programming providers are unlikely to respond to conditions in local markets. Though certain broadcast commenters disputed this notion, we tentatively find their arguments to be unsupported by evidence of non-broadcast video programmers modifying their programming decisions based on competitive conditions in a particular local market.[42]

ACA agrees, and notes that competition in the sale of broadcast station programming to MVPDs in individual markets is not robust, given that top four-rated broadcast television station signals are merely partial substitutes. MVPDs are compelled to carry all of these signals in order to remain competitive for viewers, and thus each station has significant market power.

b. Dynamics in the markets for content acquisition and advertising sales are not relevant to analyzing the market for retransmission consent.

Competition for upstream content (*e.g.*, individual programs to be aired by the network, station, or online service) and for advertising dollars or viewers among programming providers

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revenues."); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶¶ 28-59 (2011) ("Comcast-NBCU Order") (analyzing potential competitive harms with respect to program access arising from vertical elements of the transaction separately with respect to three blocks of "must have" Comcast-NBCU programming, owned and operated television broadcast stations, regional sports networks and the suite of high-value Comcast-NBCU national cable programming networks); News-Hughes Order ¶¶ 86-87, 201-202 (although the Commission did not find evidence in the record that "significant numbers of customers will shift MVPDs if [national and non-sports regional cable] programming is temporarily withdrawn from their current MVPD," it found "substantial evidence in the record that a temporary withdrawal of regional sports programming networks and local broadcast television station signals would cause a significant number of customers to shift from their current MVPD," and that "News Corp. possesses market power in the broadcast station segment of the video programming market" based in part, on the fact that the signals of local television broadcast stations are without close substitutes and because of the extremely limited availability of new television broadcast licenses, entry into this segment of the video programming market is highly restricted).

[42] *2014 Quadrennial Regulatory Review, et al.*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, ¶ 23 (2014).

may be vigorous, as broadcasters claim, but it simply is not a relevant factor in analyzing the market for retransmission consent.[43] The sale of local broadcast signals to MVPDs serving subscribers in the station's local DMA is a unique market, distinct from other markets that an owner of a broadcast may be a participant.

c. Increased MVPD consolidation in the national market is not relevant to a broadcast station's exercise of market power over retransmission consent within its DMA.

Increased MVPD consolidation in the national market is not relevant to determining a broadcaster's market power in the retransmission consent market within its DMA, as NAB maintains.[44] The appropriate geographic markets for evaluating the balance of market power in retransmission consent negotiations are the local market areas where MVPDs compete for customers in which the local broadcast station is made available. This is because rivalry in the downstream MVPD markets determines the value an MVPD places on retransmission consent. Depending on the size of the footprint of the MVPD negotiation for retransmission consent with a local broadcast station, the relevant geographic market for assessing a broadcaster's market power would be no larger than the DMA of the local station.[45] In practice, the Commission has used entire DMAs as the relevant market for retransmission consent negotiations. For example, with respect to the competitive harm of joint retransmission consent negotiations by separately

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[43] It is undeniable that broadcast stations also participate in markets for television advertising, where they compete for "eyeballs" with video programming distributed by multiple players. The advertising market is relevant because the advertising prices determine the value a broadcaster places on gaining carriage by an MVPD. However, possible market power over advertising prices is not the concern of the retransmission consent proceeding, and, therefore, not an appropriate market definition for analytical purposes.

[44] *See* NAB Comments at 18 ("Many locally, regionally, and nationally consolidated pay TV providers dwarf television broadcasters in scale and scope.").

[45] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report and Order, 30 FCC Rcd 3253, ¶¶ 141, 144 (2015) ("16th Video Competition Report") ("Individual commercial stations compete primarily with other commercial broadcast stations within their local markets (DMAs) for audiences and advertising revenue;" "The Commission licenses broadcast television stations to both individual and group owners *to serve local communities within DMAs*.") (emphasis added). *See also* News-Hughes Order, ¶ 201 (recognizing that News Corp. had significant market power in DMAs in which it negotiated retransmission consent on behalf of its local broadcast stations).

owned broadcast stations, the Commission concluded the relevant market for analytical purposes is the local DMA of the broadcast stations that were coordinating their negotiations.[46] The level of competition among MVPDs in individual broadcast DMAs is robust. Notwithstanding the size of some cable operators, the Commission has deemed cable operators nationwide presumptively subject to "effective competition" from other MVPDs, particularly satellite distributors, in each local franchise.[47] In nearly all such markets, broadcast stations negotiate for carriage of their signals with at least three different MVPDs, and in some markets, the number can be five MVPDs or more, as recognized by CBS.[48] MVPDs, in contrast, can negotiate carriage with only one broadcast station in a market to obtain access to a particular broadcast network's programming, a factor that significantly determines the negotiating dynamic for retransmission consent.[49] For these reasons, the Commission should reject the NAB's

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[46] 2014 Joint Negotiation Order, ¶ 13 ("We conclude that joint negotiation by same market, separately owned Top Four stations is not consistent with 'competitive marketplace considerations' within the meaning of Section 325(b)(3)(C) because it eliminates price rivalry between and among stations that otherwise would compete directly for carriage on MVPD systems and the associated retransmission consent revenues . . . . Because same market, Top Four stations are considered by an MVPD seeking carriage rights to be at least partial substitutes for one another, their joint negotiation prevents an MVPD from taking advantage of the competition or substitution between or among the stations to hold retransmission consent payments down."). It is noteworthy that here, as in its merger reviews, the Commission did not include other video programming providers in its competitive analysis of the competitive harms of joint negotiation by same non-commonly owned market stations.

[47] *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, MB Docket No. 15-53, ¶¶ 1, 6-16 (2015) (adopting a rebuttable presumption that cable operators nationwide are subject to "Effective Competition").

[48] CBS Comments at 12 (in the event of a blackout, "[t]he station's programming would also likely be available to many viewers via several other platforms, including over-builder cable systems and two national DBS providers.").

[49] *See* Richard Greenfield, *The Disequilibrium of Power: How Retransmission Consent Went So Wrong & How to Fix It*, BTIG Research (Aug. 12, 2013), *available at* http://www.btigresearch.com/2013/08/12/the-Adisequilibrium-of-power-how-retransmission-consent-went-so-wrong-how-to-fix-it/ ("[T]he media landscape has been dramatically transformed, yet retransmission consent is still governed by 1992 legislation. The original balance of power between cable and local television station has all but vanished. Cable operators' video monopolies are now a distant memory, with many television markets now served by four or more multichannel video distributors. On the other hand, local broadcast television station owners continue to have exclusive access to a network's programming.").

assertion that in analyzing the health of the market for retransmission consent, the Commission must take account of "the presence of horizontal market power at the MSO level."[50]

Nor does the fact that MVPDs have consolidated on the national level lessen the market power of broadcasters within their DMA. Since the relevant geographic market for retransmission consent lies within the local broadcast station's DMA, the fact that cable operators may own other cable systems in other markets (*i.e.*, the overall size of the MVPD regionally or nationally) is also not relevant to determining whether a broadcast station has market power over MVPDs in its own DMA. With respect to recent MVPD mergers, even after the transaction there has remained at least three competing MVPDs purchasing retransmission consent from broadcasters who are the sole source for programming from their national broadcast affiliates in each of their DMAs. Even in the one instance where two overlapping competitors, AT&T and DirecTV, have merged, at most the merger reduced the number of competitors in the market from four to three because both parties to the transaction also competed against an incumbent cable operator and DISH Network.

3. Claims that broadcast stations need MVPDs at least as much as MVPDs need broadcast stations utterly fail to acknowledge current marketplace conditions.

NAB and Walt Disney assert that broadcast stations need pay TV distribution at least as much as MVPDs need broadcasters, but fail to provide support for this position.[51] As the Commission has repeatedly recognized, an MVPD that does not carry the local broadcaster

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[50] NAB Comments at 21 (the size of the pay TV marketplace has grown from 60% in 1992 to 85.6% in 2015, thus pay TV providers are more powerful "bottlenecks" today; pay TV providers are "essential gatekeepers" to what customers watch and how they watch it," leaving the fundamental policy concern from an economic perspective at this level).

[51] NAB Comments at 13, 18 (broadcast stations "must have" pay TV distribution at least as much as MVPDs "must have" broadcasters; this is especially true due to many locally, regionally, and nationally consolidated pay TV providers that "dwarf broadcast television broadcasters in scale and scope."). *See also* Disney Comments at 4 (heightened competition among broadcasters, and competition among content providers more generally, has increased dramatically; "[t]o remain relevant and accessible to viewers in a highly competitive television programming market, broadcasters remain dependent on MVPDs to deliver their content to subscribers so that they can recoup their substantial investments in programming.").

faces significant losses of subscribers.[52] The MVPD has no other means of providing the broadcaster's popular programming to their customers. On the other hand, viewers of a broadcast station that is not carried by an MVPD have multiple alternatives available to receive the broadcast signal, including from other MVPDs or over-the-air. Any single top four-rated broadcast station depends far less on a single MVPD for competitive viability than the MVPD does on that station. Broadcasters provide no evidence of significant harm to stations (*i.e.*, advertising losses or viewership declines) as a result of blackouts.[53]

C. Broadcaster Assertions that Adopting Reforms to the Good Faith Rules will Lead to Unintended Consequences are Misguided.

Broadcasters attempt to fend off change to the good faith rules by arguing that any changes would cause unintended and adverse consequences.[54] These assertions are neither substantiated nor quantified. There is no evidence that changes to the good faith negotiating rules will have any impact on programming owners' decisions to put content on their broadcast

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[52] News-Hughes Order, ¶¶ 202, 204-209; Comcast-NBCU Order, Technical Appendix, ¶ 46.

[53] Consistent with the NPRM's observation that an MVPD unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to three separate services, industry analysts also find that MVPDs suffer greater economic harm from retransmission consent blackouts. *See, e.g.*, Richard Greenfield, *Lesson #1 Revisited: Why Do Distributors Keep Entering Wars They Cannot Win? DirecTV Must Cave*, BTIG RESEARCH (Oct. 26, 2011), *available at* http://www.btigresearch.com/2011/10/26/lesson-1-revisited-why-do-distributors-keep-entering-wars-they-cannot-win-directv-must-cave/. ("Over the past two years, FOX (News Corp.) has experienced high profile carriage/retrans battles with DISH, Cablevision and Time Warner Cable. TWC settled just as FOX programming was about to get dropped at the start of 2010, while DISH and Cablevision went several weeks in late 2010 without programming from the FOX family of networks. In the end, both DISH and Cablevision restored FOX programming having lost a meaningful number of subscribers; they inflicted far more damage to their business than on FOX (FOX advertising revenues suffered short-term, but came back immediately when programming was restored and even faster if subscribers switched to another provider, while distributors struggled to re-capture lost subs).").

[54] Gray at Comments 10 ("[A]ny change to the Good Faith Negotiating Rule that handcuffs local broadcasters would cause top quality programming to migrate from free, over-the-air broadcast television to unregulated, expensive pay cable networks."); NAB Comments 13 ("[N]o broadcast station can effectively compete against well-financed cable network programmers and OTT services without the ability to negotiate for the fair market value of its signal in the same manner as those other programmers."); Graham Media Comments at 2 ("the current good faith negotiation rules are largely even-handed, both parties have been able to negotiate toward a mutually acceptable agreement without the government thumb on the scales. Modifying the good faith negotiation rules as proposed in the NPRM will impair – rather than enhance – the ability of parties to successfully conclude retransmission consent negotiations.").

networks versus their cable networks. Nor is there support for broadcasters' claims that they would not be able to compete against cable networks if they are subject to stronger good faith negotiating standards. Additionally, broadcasters fail to demonstrate that modifying the rules would impair parties' ability to successfully conclude retransmission consent negotiations. The Commission should simply reject these unsubstantiated assertions. Any unintended consequences would be far outweighed by the benefits conferred by adopting these reforms.

III. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO PROTECT THE PUBLIC INTEREST BY ADDING TO ITS CURRENT LIST OF PER SE VIOLATIONS AND REFORMING ITS APPROACH TO THE TOTALITY OF THE CIRCUMSTANCES TEST

In their comments, broadcasters expend considerable energy arguing that the Commission cannot and should not change its good faith rules in any respect, including by adoption of a "harm to consumers" standard in evaluating good faith complaints.[55] The Commission should reject these unfounded arguments.

A. The Commission's Statutory Authority to Make Changes to its Good Faith Rules Is Not Limited as Broadcasters Assert.

Broadcasters argue that the Commission lacks authority and is barred by precedent to adopt any of the substantive changes to its good faith rules contemplated in the NPRM. First, broadcasters claim that Section 325 "does not provide a legal basis for the FCC to regulate the

[55] *See*, *e.g.*, *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the National Association of Broadcasters at 26 (filed Dec. 1, 2015) ("NAB Comments") (Congress did not direct the Commission to change its good faith rules in any way); Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates at 17 (filed Dec. 1, 2015) ("Broadcast Affiliates Comments") ("From the outset, the Commission recognized that Congress does not envision the Commission's role in the retransmission consent negotiation process to extend beyond the assurance of a fair, open, and efficient process for private retrans negotiations."); Comments of Graham Media Group at 2 (filed Dec. 1, 2015") ("Graham Media Comments") ("Modifying the rules as proposed in the NPRM would impair the ability of parties to successfully conclude retransmission consent negotiations."); Comments of Media General, Inc. at 13 (filed Dec. 1, 2015) ("Media General Comments") ("the vague "consumer harm" standard would overwhelm the FCC with complaints.").

substance of retransmission consent negotiations,"[56] ignoring the Commission's broad statutory authority to govern a broadcast station's exercise of retransmission consent. Second, they argue that STELAR Section 103(c) affirmatively restricts the Commission's authority to amend its good faith rules, and in the alternative argue STELAR only permits the Commission to reexamine its totality of the circumstances test,[57] although they offer no support from either the text of the statute or its legislative history. Third, relying on the Commission's earlier decision to refrain from examining substantive proposals, broadcasters contend that the Commission is now forever barred from examining substantive terms when considering modifications to its good faith rules, notwithstanding report language that directs the Commission to do so. Finally, broadcasters argue that the Commission's previously stated preference for a flexible totality of the circumstance test somehow prevents the Commission from adopting additional guidance that could inform negotiating parties' behavior. In this section, ACA explains that the Commission has had, and continues to have, broad and undisturbed authority to make changes to any part of its good faith rules, including by adopting new *per se* violations. Further, the Commission's previous statements about its good faith rules neither bars its consideration of the substantive proposals of negotiating parties in adopting new rules, nor limits its ability to provide additional guidance. In light of the problems in the marketplace for retransmission consent that are presented in this record, the Commission is not bound by its earlier policy decisions.

[56] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the Walt Disney Company at 10-14 (filed Dec. 1, 2015) ("Disney Comments").

[57] *See*, *e.g.*, NAB Comments at 26 (FCC required only to commence a review of its totality of the circumstances test); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Joint Broadcasters at 4 (filed Dec. 1, 2015) ("Joint Broadcasters Comments") ("The NPRM's scope is expressly limited by statute as a directive to 'review its totality of the circumstances test.").

1. The Commission has ample statutory authority to add to its list of *per se* good faith violations and reform its totality of the circumstances test.

a. Congress granted the Commission authority to update its rules as necessary.

The Commission has ample statutory authority to add to its current list of *per se* good faith violations, and to reform its approach to the totality of the circumstances test, as many MVPDs, including ACA, and public interest groups have demonstrated in the record. First, Congress granted the Commission broad authority under Section 325(b)(3)(A) to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection."[58] Second, Congress directed the Commission under Section 325(b)(3)(C)(ii) to adopt rules prohibiting a broadcast television station from failing to negotiate in good faith constrained only by the directive that the good faith rules adopted protect the right of broadcast stations to negotiate different rates, terms and conditions with different MVPDs provided such differences are based on "competitive marketplace considerations."[59] Third, Section 325(b) directs the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and "to ensure that the rates for the basic service tier are reasonable." As Cablevision points out, that authority is complemented by Section 309(a), which empowers the Commission to ensure that broadcast station licensees act in accordance with "the public interest, convenience, and necessity."[60]

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[58] 47 U.S.C. § 325(b)(3)(A). See also *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Verizon at 10 (filed Dec. 1, 2015) ("Verizon Comments") (the plain language of Section 325(b)(3)(A) provides the Commission with legal authority to adopt the protections for consumers and participants in retransmission consent negotiations described in the NPRM).

[59] 47 U.S.C. § 325(b)(3)(C)(ii); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Cable Association at 5-9 (filed Dec. 1, 2015) ("ACA Comments").

[60] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Cablevision Systems Corporation at 9-10 (filed Dec. 1, 2015) ("Cablevision Comments").

In addition to the specific provisions in Sections 325(b)(3)(A) and (C) regarding the Commission's authority to "govern" the exercise by a broadcast station of the right to grant retransmission consent and to adopt rules for good faith negotiation, the Commission has general authority under Title I of the Act to "perform any and all acts, make such rules and regulations, and issue such orders … as may be necessary in the execution of its functions." It also has authority under Section 4(i), as well as broad rulemaking authority under Section 303(r) to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . ."[61]

When implementing the statutory command concerning the obligation to negotiation in good faith for the first time, the Commission had considerable discretion because Congress gave the Commission little direction in how to fulfill this task. However, as ITTA observes, by imposing an obligation on parties to negotiate for retransmission consent in good faith, Congress signaled its intention that the Commission establish bargaining requirements that are "greater than those" that apply in other commercial contexts.[62] The Commission exercised its administrative agency discretion to adopt an approach combining a list of *per se* violations and a catch-all totality of the circumstances test for conduct that falls short of a *per se* violation but may nonetheless evidence bad faith, taking all circumstances into account. In 1999, Congress expressly limited the Commission's authority to find it a failure to negotiate in good faith in only one respect – permitting a broadcast station to enter "into retransmission consent agreements containing different terms and conditions, including price terms, with different [MVPDs] if such different terms and conditions are based on competitive marketplace considerations"[63] without

[61] 47 U.S.C. §§ 154(i), 303(r).

[62] ITTA Comments at 18.

[63] 47 U.S.C. § 325(b)(3)(C)(ii).

violating the good faith requirement. Congress did not otherwise limit the Commission's authority to adopt rules or later to change them.[64]

Significantly, the Commission used its existing statutory authority to amend its list of *per se* violations in 2014 to include joint negotiations by non-commonly owned top four broadcasters in the same DMA after concluding, based on record evidence, "that the harms from joint negotiation outstrip any efficiency benefits identified and that such negotiation on balance hurts consumers."[65] Although the Commission determined that it could have addressed this conduct through its totality of the circumstances test, since it had previously found that "agreements not to compete or fix prices are 'inconsistent with competitive marketplace considerations and the good faith negotiation requirement,'" it decided instead to add the practice to its list of *per se* violations.[66] The Commission noted that its *per se* standards "constitute a violation of the good faith duty in all possible instances" and reasoned that "adopting a rule specifically directed at such negotiation is more effective in preventing the competitive harms derived therefrom than case-by-case adjudication, and is more administratively efficient – particularly because parties

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[64] In 2004, Congress expanded the good faith rules to apply to proposals and conduct of MVPDs as well as broadcast stations.

[65] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 10 (2014) ("2014 Retrans FNPRM" or "Joint Negotiation Order"). The Commission noted that although "economic theory supports a conclusion that joint negotiation among any two or more separately owned broadcast stations serving the same DMA will invariably tend to yield retransmission consent fees that are higher than those that would have resulted if the stations competed against each other in seeking fees, the record amassed in this proceeding is centered largely around evidence regarding the impact of joint negotiation by Top Four broadcast stations." Id. Congress subsequently credited this analysis by enacting STELAR Section 103 (a), which directed the Commission to adopt a rule prohibiting joint retransmission consent negotiations by any broadcast stations in the same DMA that are not under "common de jure" control. As the NPRM notes, the Commission then found that "the statutory prohibition on joint negotiation was broader than, and thus supersedes, the Commission's previous prohibition," and amended its *per se* rules accordingly. See *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216, ¶ 4 (rel. Sept. 2, 2015) ("NPRM"); *Implementation of Sections 101, 103, and 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd 2380, ¶ 4 (2015).

[66] The Commission specifically noted that its decision was not premised on a finding that such joint negotiations could lead to negotiating delays and other complications, "but rather on our conclusion that such negotiation diminishes competition and thus leads to supra-competitive increases in retransmission consent fees." Joint Negotiation Order, ¶ 13 n. 49.

entering into a negotiation will be advantaged by advance notice of the appropriate process for such negotiation."[67] Thus, where the Commission is able to conclude on the record before it that particular negotiating practices or proposals constitute a violation of the good faith duty in all possible instances and that parties would benefit from advance guidance, it may add to its list of *per se* violations rather than proceed case-by-case under the totality of the circumstances test.

b. Congress did not alter the Commission's existing authority to update its rules by enacting STELAR.

Broadcasters argue that the statutory directive to the Commission to commence a rulemaking to review its totality of the circumstances test in STELAR's Section 103(c) affirmatively limits the Commission's pre-existing authority to make any changes to its rules.[68] Their assertion is based on a misreading of STELAR.

Broadcasters point to nothing in STELAR Section 103(c) that limits the Commission's existing statutory authority under Section 325(b)(3)(C) to reform its good faith rules through additions to its list of *per se* violations and by updating its totality of the circumstances test. None of the sources of the Commission's statutory authority with respect to retransmission consent was altered in any way by STELAR and Congress has in no way otherwise limited the

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[67] *Id.*, ¶¶ 9 n.41, 13.

[68] *See* NAB Comments at 26 (Congress directed the FCC to review its rules, not change them); Joint Broadcasters Comments at 4, 7 (Congress expressly limited the scope of the NPRM to a review; the FCC cannot expand its authority over retransmission consent negotiations through regulations); Disney Comments at 10 (nothing in the text of Section 103 either commands or justifies the broad intrusion into private contractual negotiations that the NPRM contemplates; the Commission cannot, under the guise of reviewing the totality of the circumstances test, expand the meaning of *per se* bad faith); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Nexstar Broadcasting, Inc. at 2 (filed Dec. 1, 2015) ("Nexstar Comments") (Congress neither prejudged the outcome of this review nor alter the underlying statute); Comments of CBS Corporation at 2 (filed Dec. 1, 2015) ("CBS Comments") (in conducting this review, the FCC must respect the fact that Congress clearly and specifically limited its authority to act; had Congress wanted any action beyond a review, it would have said so); Comments of Hearst Television Inc. at 4 (filed Dec. 1, 2015) ("Hearst Comments") (Congress asked the FCC to review its rules without adding to its statutory authority over retransmission consent).

Commission's established authority to make changes in its rules that will improve their functionality without unduly constraining the negotiating parties.

First, STELAR Section 103(c) cannot possibly be read to limit any of the Commission's existing authority, as broadcasters wrongly suggest, to update any of its good faith rules. Knowing that the Commission has existing authority to update its existing rules at any time, had Congress not wanted the Commission to update its rules or otherwise wanted to limit its authority to do so, Congress would have expressly said so. It did not. Rather, Congress pointedly called for "the FCC to conduct a rulemaking to review and update its totality of the circumstances test for good faith negotiations under section 325(b) of the Communications Act."[69] There is nothing in this language that limits the Commission's existing authority to update its rules, and nothing in the record that should prevent it from either adding to its list of *per se* violations or reforming how it applies its totality of the circumstances test.

Second, although Congress singled out the totality of the circumstances test for review and updating, indicating its intent that this aspect of the Commission's good faith rules in particular was in need of reform, it did not otherwise limit the Commission's existing authority under Section 325(b) to make other changes to the good faith rules consistent with its original grant of authority. Again, had Congress intended to limit the Commission's existing authority to update other aspects of its rules, it would have included language to that effect in STELAR.

In summary, there is no statutory bar to the Commission updating its good faith rules both by adopting additional *per se* violations, and by providing more clarity as to how it will apply the totality of the circumstances test to a complaint alleging a good faith violation.

[69] *See* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) ("Senate Report").

2. The Commission is not constrained by precedent in updating its good faith rules so long as it remains within the bounds of its delegated authority.

Beyond claims that the Commission lacks statutory authority to make any changes to its good faith rules, broadcasters maintain that the changes contemplated in the NPRM should not be adopted because they would conflict with views of the Commission in the past. As discussed below, the Commission should reject the strange notion that its approach to the good faith rules, once established, cannot and should not be changed.

a. That the Commission may have disavowed considering substantive proposals in its review of the good faith rules in the past does not bar it from obeying Congress' directive to examine them now.

The legislative history of STELAR Section 103 clearly reflects Congress' intent that the Commission examine substantive proposals in its review of the good faith rules. "Specifically, the FCC shall make sure that its test encourages both parties to a retransmission consent negotiation to present bona fide proposals on material terms of a retransmission consent agreement during negotiations and engage in timely negotiations to reach an agreement."[70] Congress also explicitly directed the Commission, in its rulemaking, to "include a robust examination of negotiating practices, including whether certain substantive terms offered by a party may increase the likelihood of negotiations breaking down."[71]

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[70] *Id.*

[71] *Id.* ACA recognizes that in the 2000 Good Faith Order, the Commission construed both the original retransmission consent provision and the good faith negotiation requirement of Section 325(b)(3)(C) narrowly, consistent with, respectively, Congress's intent in 1992 to "'establish a marketplace for the disposition of the rights to retransmit broadcast signals" rather than "'dictate the outcome of the ensuing marketplace negotiations'" and the rule of statutory construction that "congressional language in derogation of the common law should be interpreted to implement the express directives of Congress and go no further." *Implementation of the Satellite Home Viewer Improvement Act of 1999 Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶¶ 13-22 (2000) ("2000 Good Faith Order"). The Commission found this approach appropriate, given the fact that the obligation to negotiate in good faith was "in derogation of the long-standing common law right to contract and therefore, the duty, though statutorily imposed, must be narrowly construed" especially in light of the "dearth of guidance in the statute and legislative history" as to precisely what Congress intended by adopting the good faith requirement in SHVIA." *Id.*, ¶¶ 19, 22. As ACA has noted, the Commission's unduly narrow view of the good faith requirement has hobbled its effectiveness in

Nonetheless, broadcasters argue that, for the Commission now to consider substantive terms of individual retransmission consent agreements as a way of updating the totality circumstances test, would be inconsistent with Commission precedent that requires the agency to ignore them.[72] These arguments lack merit. First, the Commission was granted authority to address substantive prices, terms, and conditions of proposals to the extent they could be found to demonstrate bad faith. In enacting STELAR, Congress reaffirmed that authority. Second, to the extent the Commission previously chose to limit the scope of its good faith rules to the procedural aspects of negotiations only, it did not thereby relinquish its authority to examine substantive commercial terms later. While Congress initially indicated that the Commission should rely to the greatest extent possible on market forces, it also expected the Commission to adopt rules that ensure that parties will negotiate in good faith to achieve agreements that are mutually acceptable to both parties. By limiting the scope of its rules to bargaining procedures in the past, the Commission hobbled the effectiveness of its good faith rules, as both Congress and the Commission appear to have recognized and now seek to remedy.

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tempering negotiating practices that evidence bad faith. ACA agrees with ITTA that the fact that Congress imposed a good faith requirement at all signaled an intention to impose a heightened duty on the negotiating parties by directing the Commission to establish bargaining requirements greater than those applicable in other contexts. ITTA Comments at 18. Second, Congress has more recently explicitly directed the Commission to examine the substance of retransmission consent bargaining proposals. Senate Report at 13. Finally, identifying additional new per se violations such as online and marquee programming blackouts, bundling of “must have” content with retransmission consent, or conditioning retransmission consent on set prices, terms and conditions for prospective programming, or by providing more explicit guidance as to behaviors that will be found to evidence bad faith under the totality of the circumstances test such as bargaining positions based on MFN provisions, will not, as broadcasters fear, result in the Commission inevitably dictating the prices, terms and conditions of retransmission consent agreements. It will merely remove from the arsenal of a negotiating party certain practices and proposals that are inconsistent with any reasonable concept of “good faith” negotiation and evidence a lack of “sincere intent of trying to reach an agreement acceptable to both parties.” 2000 Good Faith Order, ¶ 31.

[72] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of News-Press & Gazette Company at 14 (filed Dec. 1, 2015) (“News-Press Comments”) (“[A]llowing the Commission to dictate the substantive terms of retransmission consent agreements, including their expiration dates, is inconsistent with congressional mandates and Commission precedent requiring that the agency stay out of the substantive terms of such deals.”); Broadcast Affiliates Comments at 16-18 (“For the Commission now to dictate the substantive terms of individual retrans agreements – supposedly by way of refinement to the totality of the circumstances test – would fly in the face of the very foundation of Section 325 and more than a decade of Commission precedent.).

In general, administrative agencies must continually assess the wisdom of their policies and are permitted to "reverse course" on their own regulations, provided they stay within their delegated authority and provide a valid, "reasoned explanation" for doing so. The Supreme Court has recognized that, in order to engage in informed rulemaking, an administrative agency "must consider varying interpretations and the wisdom of its policy on a continuing basis."[73] The Supreme Court has also recognized that the Commission is free to change its policies if it acknowledges the change and provides a reasoned explanation for its action, which includes that the agency display its awareness that it is changing position.[74] To the extent that adopting any of the proposals supported by ACA requires a change in the Commission's approach to its policies concerning the good faith requirement under Section 325(b)(3)(C), such a change in policy would easily withstand judicial review. Simply put, there is no barrier to the Commission examining substantive proposals and updating its rules to curb those that are found not to be consistent with good faith rules as part of its review.

b. Proposed updates to the totality of the circumstances test would not make the test less flexible, and even if they do, Commission precedent does not preclude such change.

Broadcasters maintain that the changes contemplated in the NPRM, including the adopting of additional guidance as to how the Commission will apply the totality of the

[73] *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 863-864 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis. Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.").

[74] *FCC v. Fox Television Stations*, 556 U.S. 502, 516 (2009) (an agency may reverse its course if it offers a "reasoned explanation," showing good grounds for the new policy; more detailed justifications are only required when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interest that must be taken into account"). Change in the Commission's approach to the good faith requirement in this case would rest on extensive record evidence demonstrating that changes in marketplace conditions have significantly enhanced broadcasters' market power in retransmission consent negotiations and that weaknesses in the Commission's existing rules is exacerbating that imbalance, leaving MVPDs, and particularly smaller MVPDs, with few options other than capitulation in the face of unreasonable bargaining proposals or untoward bargaining tactics.

circumstances test will unacceptably undermine the flexibility the Commission sought by adopting the fact and context specific "totality of the circumstances" test in 2002. Nexstar claims that by identifying specific practices as "evidence of bad faith" under the totality of the circumstances test, the Commission would essentially be converting it into the *per se* test.[75] Joint Broadcasters assert that the totality of the circumstances test "is and always has been, meant to look at all of the circumstances surrounding an alleged violation rather than a few specific aspects of a situation, with no single factor treated as a deciding one."[76] CBS argues that it would be improper for the Commission to adopt "broadbrush prohibitions" that instead should be left to fact-specific, case-by-case analysis that the totality of the circumstances test was specifically designed to achieve.[77] Broadcast Affiliates similarly assert that the test was intended to allow the Commission to "measure the good faith of the parties to retransmission consent negotiations on the facts of each individual negotiation,"[78] and go even further to claim that "the totality of the circumstances test functions as the Commission's 2000 Good Faith Order intended and should not be modified, expanded or made more specific."[79] In support of their pleas that the status quo not be altered, broadcasters cling, like capsized passengers to life preservers, to incantations of previous Commission statements about how the totality of the circumstances test was intended to work.[80]

[75] Nexstar Comments at 16.

[76] Joint Broadcasters Comments at 6.

[77] CBS Comments at 11.

[78] Broadcast Affiliates Comments at 14.

[79] *Id.* at 10.

[80] *See* CBS Comments at 11 (the totality of the circumstances test was specifically designed to achieve fact specific, case-by-case analysis); Joint Broadcasters Comments at 6 (the totality of the circumstances test is, and always has been, meant to look at all of the circumstances surrounding an alleged violation rather than a few specific aspects of a situation, with no single factor treated as a deciding one); Broadcast Affiliates Comments at 14 ("The totality of the circumstances test, by design, is intended to allow the Commission to measure the good faith of parties to retransmission consent negotiations on the facts of each individual negotiation. The Commission should continue to resolve good faith complaints case-by-case, on their unique facts and in light of the particular circumstances of each negotiation.");

The totality of the circumstances test has never been as flexible as broadcasters claim; its flexibility was significantly circumscribed from the outset by the Commission's adoption of a list of presumptions that certain bargaining proposals and conduct were either presumptively consistent or inconsistent with good faith negotiation.[81] It is noteworthy that this basic approach is not substantially different from what ACA and other MVPDs advocate in this proceeding: that certain practices and proposals now be considered either as evidence of bad faith under the totality of the circumstances test, or as presumptively inconsistent with good faith negotiation.[82] Providing such guidance is not even inconsistent with some broadcaster requests that the Commission address several of the specific behaviors identified in the NPRM, such as whether an agreement terminates around the time of a "marquee event" and refusals to substantiate claims,[83] on case-by-case basis, rather than by adopting "broadbrush prohibitions," or treating any "single factor as a deciding one."[84] ACA's proposals ask the Commission in several cases either to adopt new *per se* violations or to specify that practices and proposals are evidence of bad faith under the totality of the circumstances test. This approach, if adopted, will comport with broadcaster requests in cases where the Commission is unable to conclude that practices or proposals violate the good faith obligation in all possible instances – that is, as a *per se* matter.

Hearst Comments at 5 ("the flexible, context-specific "totality of the circumstances" test enables the Commission to identify the rare situation in which market participants fail to negotiate in good faith").

[81] *See* NPRM, ¶¶ 9-10.

[82] *See* ACA Comments at 14-80; *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Mediacom Communications Corporation at 20-38 (filed Dec. 1, 2015) ("Mediacom Comments") (the Commission should adopt proposals as rules or presumptive guidelines that will, inter alia, reduce blackout risk and minimize forced bundling of multiple video services to ensure that retransmission consent negotiations reflect a good faith effort to reach an agreement that is consistent with the interests of consumers impacted by negotiations); ATVA Comments at 42-50 (the Commission should identify specific activities that either constitute per se violations of good faith or presumptively violate the totality of the circumstances test).

[83] CBS Comments at 11.

[84] Joint Broadcasters Comments at 6.

It is instructive that in the labor law context, absent a clear *per se* violation of the obligation to negotiate in good faith, the NLRB and courts will cast a wide net, looking to the totality of a party's conduct, both at and away from the bargaining table.[85] While the test is flexible and allows the NLRB to consider the entire scope of conduct of negotiating parties, the NLRB has recognized a number of specific factors as evidence of bad faith under the totality of the circumstances test.[86] For example, the NLRB frequently looks at whether a party has engaged in surface bargaining, by evaluating seven main factors.[87] These factors are not prioritized, as the totality controls.[88] The NLRB has also carefully scrutinized under the totality test a party's lack of willingness to consider the other party's proposals[89] and the imposition of conditions on bargaining.[90] The NLRB's approach demonstrates that there is nothing

[85] Overall, the test is objective, and allows the NLRB to consider the relevant facts "at or away from the bargaining table" that indicate whether a party intended to frustrate or avoid mutual agreement. *See City of Akron v. State Empl. Rels. Bd.*, 2013 Ohio App. LEXIS 1119 *7 (Ohio Ct. App. 2013); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989).

[86] *See Briggs Plumbingware, Inc. v. NLRB*, 877 F.2d 1282, 1287 (6th Cir. 1989) ("Briggs Plumbingware") (while not dispositive, the NLRB considers a number of factors as evidence of bad faith).

[87] *Barry-Wehmiller Co.*, 271 NLRB 471, 479 (1984) ("A determination of whether there was 'hard bargaining' but in 'good faith' on one hand or 'bad faith' or 'surface bargaining' on the other, is made on a case-by base basis from an examination of the totality of the circumstances."). *See also Chevron Chemical Co.*, 261 NLRB No. 4, 110 NRRM 1005, 1008 (1982). The Board looks at seven principal factors when determining whether a party has engaged in unlawful bad faith, or "surface bargaining." Behavior such as delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory bargaining subjects, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of agreed upon provisions, or arbitrary scheduling of meetings would normally all qualify as surface bargaining. *See What does "Good Faith" Mean?*, NATIONAL LABOR RELATIONS BOARD at 8 (Sept. 27, 2005) *available at* http://nlrb.lettercarriernetwork.info/Good%20Faith.pdf.

[88] *See* Briggs Plumbingware at 1287 (factors considered are not prioritized, as the totality controls).

[89] *See Casino San Pablo*, 2013 NLRB LEXIS 143 (2013) (considering several factors, the NLRB found the employer did violate the good faith requirement when it put a final wage and benefit offer on the table that it believed the union would not accept, and then declared impasse on that issue without truly negotiating it).

[90] Any attempts to place conditions on bargaining or executing an agreement are considered carefully by the NLRB, and may indicate bad faith. *See National Labor Relations Board, Office of the General Counsel Case Nos. 8-CA-36737, 8-CA-369572007*, NLRB GCM LEXIS 17 (2007) (finding that the employer unilaterally conditioned joint bargaining on progress in "single-unit negotiations," but also finding no evidence that the unions used a strike to condition further bargaining about mandatory subjects on the employer's return to a prior agreement on a non-mandatory subject).

inconsistent about maintaining a totality test while at the same time recognizing that a set of identified practices and proposals, if proven, demonstrate bad faith under this test.

Identifying specific practices or proposals to be inconsistent with good faith negotiation under the totality of the circumstances test is similar to that taken by the Commission with respect to data roaming service. In its 2011 Data Roaming Order, the Commission adopted a totality of the circumstances test for evaluating complaints alleging that a mobile carrier's data roaming agreement violates the standard of "commercial reasonableness" adopted by the Commission.[91] To guide the parties as to how it would evaluate a data roaming complaint under the totality of the circumstances test, the Commission identified sixteen specific factors it would consider, and also included a seventeenth broad catch-all factor of "other special or extenuating circumstances."[92] Clearly, nothing about use of a good faith totality of the circumstances test

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[91] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 (2011) ("*Order*").

[92] *Id.*, ¶ 16. In evaluating these disputes, the Commission will consider the following factors, among others, under its totality of the circumstances test: (1) whether the host provider has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the length of time since the initial request; (2) whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement; (3) Whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements; (4) Whether the providers involved have had previous data roaming arrangements with similar terms; (5) The level of competitive harm in a given market and the benefits to consumers; (6) The extent and nature of providers' build-out; (7) Significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any "head-start" advantages; (8) Whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service; (9) The impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality; (10) Whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available; (11) Events or circumstances beyond either provider's control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage; (12) The propagation characteristics of the spectrum licensed to the providers; (13) Whether a host provider's decision not to offer a data roaming arrangement is reasonably based on the fact that the providers are not technologically compatible; (14) Whether a host provider's decision not to enter into a roaming arrangement is reasonably based on the fact that roaming is not technically feasible for the service for which it is requested; (15) Whether a host provider's decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable; (16) Whether a host provider's decision not to make a roaming arrangement effective was reasonably based on the fact that the requesting provider's provision of mobile data service to its own subscribers has not been done with a generation of wireless technology

inherently precludes the Commission from identifying specific practices or proposals that will be deemed to constitute a violation if proven, or should be deemed as making the test less flexible.

Even if adopting the changes considered in the NPRM would make the totality of the circumstances test less flexible, as discussed above, the Commission is not bound forever by an approach to the totality test it developed in 2000. The Commission should reject the broadcasters' misguided assertion that the totality of the circumstances test cannot and should not be changed from its initial form. There is no reason to suggest that the Commission cannot or should change or make improvements to the test to provide both adequate guidance to negotiating parties and an effective means of redress for an aggrieved party.

* * *

It was the Commission's choice to implement the good faith obligation through a combination of *per se* rules that "'identify . . . situations in which a broadcaster did not enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties," and that the standards constitute a violation of the good faith duty in all possible instances,"[93] and a fact-specific totality of the circumstances test. This overall approach has proven useful, as broadcasters appear to generally avoid engaging in any of the practices identified as *per se* violations. The totality of the circumstances test, in contrast, has proven to be of little use in curbing negotiating practices that do not reflect a sincere intent of trying to reach an agreement acceptable to both parties. Congress and the Commission both have recognized that reform is needed, and nothing contained in STELAR and the Commission's previous Orders prevent the Commission from exercising its ample authority to adopt the changes ACA proposed in its comments.

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comparable to the technology on which the requesting provider seeks to roam; and (17) Other special or extenuating circumstances.

[93] *See* Joint Negotiation Order, ¶ 9 n.41 (describing the intent of the Commission in identifying "per se" violations of the good faith requirement in the 2000 Good Faith Order).

B. The Record Supports Adoption of a Harm to Consumers Standard for Evaluating Complaints Alleging a Good Faith Violation Based on the Totality of the Circumstances Test.

Several commenters, including ACA, recommended that the Commission take harm to the public into account when assessing a good faith complaint under the totality of the circumstances test.[94] ATVA, for example, calls for the Commission "to find it a violation of the totality of the circumstances test where a negotiating party unduly harms television viewers in retransmission consent negotiations."[95] A number of broadcasters implicitly agree, arguing that the Commission's focus should be first and foremost on the consumer. CBS, for example, asserts that the Commission "must maintain laser-like focus on the party that matters most and to whom it owes regulatory respect – the consumer."[96] Hearst likewise explains that the purpose of any Commission regulation in this area must be to protect the consumer.[97]

ACA wholeheartedly agrees. Negotiating in bad faith not only harms one's negotiating partner, but also harms others that rely on the parties reaching a mutually acceptable agreement, particularly consumers. For example, when bad faith negotiating leads to an impasse and an affiliated online stream is no longer made accessible on to an MVPD's broadband service, it is consumers who subscribe only to the MVPD's broadband service that are made to suffer for absolutely no reason. Moreover, when a broadcaster's proposal is not consistent with competitive marketplace considerations, the compensation sought, if agreed to

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[94] ACA Comments at 10-13; ATVA Comments at 2-6, 38-39 (citing broadcaster claims to special privileged status in the communications sphere as justifying special regulatory privileges as servants of the public good; calling for the Commission "to explicitly consider the public interest"); Public Knowledge Comments at 9 (complaining of behavior by both broadcasters and MVPDs using consumer harm as leverage in retransmission consent negotiations). Public Knowledge also argues that "the public interest and consumer welfare would be greatly served by incorporating the existing public interest obligations of broadcasters into the good conduct standard." Public Knowledge Comments at 16.

[95] ATVA Comments at 39. ATVA explains that while such harm can take many forms, "[t]he point, however, is that a negotiating party cannot be said to act in good faith if it deliberately harms viewers or even casually disregards the viewer's interest. In making such determinations, the Commission could look to whether a less harmful alternative was available." *Id.*

[96] CBS Comments at 8.

[97] Hearst Comments at 3.

by the MVPD, is passed through to consumers. Given that the public can be harmed by bad faith negotiations for retransmission consent, it is perfectly appropriate for the Commission to consider the impact that bad faith demands or tactics may have not only in inhibiting the parties from reaching a deal, but on consumers as well. For this reason, ACA and several other commenters have proposed that the Commission make avoidance of harm to consumers and the public interest a guiding precept or primary factor in rules governing retransmission consent negotiations.[98]

Media General makes two arguments against adopting a "consumer harm" standard. The first is that the standard is not needed because "[t]he free market for retransmission consent protects consumers who choose to enter a contractual relationship with MVPDs for video subscription service."[99] The second is that "the vague standard of 'consumer harm' would overwhelm the FCC with oversight duty over every retransmission consent negotiation.[100] Media General is wrong on both counts.

Rather than disputing the benefit of a consumer harm standard in instances of possible bad faith negotiation, Media General simply observes the truism that consumers benefit when the forces of supply and demand set prices, terms, and conditions. However, Media General's claim that a consumer harm standard is not needed because consumers are protected today by the "free market" for retransmission consent is demonstrably false and at odds with the views of policymakers in Congress and the NPRM initiating this rulemaking. First, the bargaining relationship between MVPDs and broadcasters can hardly be cited as a model of a "free market." Created by Congress in 1992, this is a heavily regulated market with its own rules.

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[98] ACA Comments at 10-13; ATVA Comments at 38, 56-57 (the Commission should explicitly consider the public interest under the totality of the circumstances test and may do so under its Title III authority to assure broadcast licensees operate in the public interest); Public Knowledge Comments at 9 (the Commission should consider harm to consumers as the primary factor in reviewing negotiating practices).

[99] Media General Comments at 13.

[100] *Id.*

Moreover, the retransmission consent rules are intertwined with copyright compulsory licenses and numerous broadcast and cable regulations, creating a market in which both broadcasters and MVPDs are subject to regulatory constraints on what they may bargain for and how they may bargain. Second, consumers are not benefiting from Media General's allegedly "free market." Today's problems in the market for retransmission consent result because top four-rated broadcasters command significant market power and current rules fail to adequately constrain their exercise of this market power against MVPD purchasers of what is in effect a monopoly product. This is not just the view of MVPDs. Policymakers have recognized that the Commission's rules have not prevented parties from engaging in negotiating tactics that harm consumers by pushing negotiations to or past the point of breakdown.[101]

Nor is Media General's claim that a "consumer harm" standard would overwhelm the Commission with complaints well founded.[102] The establishment of a "consumer harm" standard is no more likely to overwhelm the Commission than its existing totality of the circumstances test for judging complaints. This test already provides a means for parties to bring complaints over *any* proposal that is not consistent with competitive marketplace considerations or any negotiating tactic. In fact, the Commission has few limits on evaluating whether such proposals and tactics are in bad faith under the totality of the circumstances test today, apart from the presumptions it has adopted concerning practices that are or are not consistent with competitive marketplace considerations. Moreover, there is no reason to expect that adopting a "harm to consumers" standard will result in an onslaught of complaint filings.

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[101] See NPRM, ¶¶ 3, 12-15; Senate Report at 13 ("The Committee intends that the rulemaking directed by section 201(c) of the bill should be used to update the FCC's totality of the circumstances test so that the test will 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 set forth in the Communications Act. Evidence collected by the Committee suggests that the negotiations surrounding retransmission consent have become significantly more complex in recent years, and that in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts.").

[102] Media General Comments at 13.

Bringing a good faith complaint to the Commission remains an expensive undertaking, particularly for smaller operators. Unless the behavior complained of is particularly egregious and can be clearly shown to harm the public, an MVPD is unlikely to file a complaint. Thus, it is highly unlikely that making clear that the Commission may consider harm to the public in evaluating a bad faith complaint will increase the Commission's oversight duty over every retransmission consent negotiation.

Finally, it is worth noting that there is no statutory restriction barring the Commission from considering harm to the public interest in considering whether a broadcaster or MVPD has negotiated retransmission consent in bad faith. The legislative history of STELAR Section 103(c) evidences Congress' intent that the Commission consider the impact of retransmission consent negotiating tactics on consumers.[103]

The public today has an interest in how broadcast licensees conduct their businesses and negotiate retransmission consent that is not protected by either the marketplace or the Commission's rules, which focus solely on the relationship of content suppliers and distributors. The Commission should therefore make clear that causing undue harm to television viewers in the course of or in connection with retransmission consent negotiations is a factor that will be considered as evidence of bad faith under the totality of the circumstances test. By incorporating a "harm to consumers" standard the Commission can make clear to negotiating parties that they are not to use consumers like pawns in their negotiations.

IV. THE RECORD CLEARLY SUPPORTS A DETERMINATION THAT CERTAIN NEGOTIATING PRACTICES AND PROPOSALS VIOLATE THE DUTY TO NEGOTIATE IN GOOD FAITH

In its comments, ACA focused on seven particularly problematic negotiating practices and proposals that can be addressed by the Commission, either by adding them to its list of *per*

[103] Senate Report at 13 (citing evidence collected by the Committee suggesting negotiating tactics were causing harm to consumers and directing the Commission to look broadly at such matters in its rulemaking).

se violations of the good faith obligation or by treating them as evidence of bad faith under the totality of the circumstances test. ACA demonstrated that adopting these reforms would be an important first step toward improving the overall environment for retransmission consent negotiations and achieving the goals of both Congress and Commission that broadcasters enter into negotiations with the sincere intent of trying to reach an agreement acceptable to both parties" and that "retransmission consent negotiations be "conducted in an atmosphere of honesty, purpose and clarity of process."[104] As demonstrated below, none of the objections raised by the broadcasters has merit, and the records clearly supports a determination that each of these practices and proposals violate the duty to negotiate in good faith and the Commission's good faith rules should be revised accordingly.

A. Bundling Retransmission Consent with Other "Must Have" Programming

ACA explained in its initial comments that the Commission should no longer presume that "[p]roposals for carriage conditioned on carriage of any other programming" meet the standard for good faith negotiation because such proposals are not always consistent with competitive marketplace considerations.[105] ACA focused in particular on proposals that involve bundling two or more "must have" programming assets, such as a top four broadcast station and a regional sports network ("RSN"), demonstrating through an in-depth economic analysis that broadcasters that control two or more "must have" programming assets in the same market can raise prices by negotiating both types of programming simultaneously. This type of harmful bundling is made possible when contracts for retransmission consent and RSN carriage expire on or around the same time such that renewals must be negotiated simultaneously. As Time Warner Cable notes, broadcast stations that own more than one popular programming assets

[104] 2000 Good Faith Order, ¶¶ 39, 24.

[105] ACA Comments at 26-32.

"often seek to enhance their negotiating leverage … by aligning the expiration dates of their retransmission consent agreements with MVPDs."[106]

In conjunction with its initial comments, ACA submitted an economic analysis by Professor Michael Riordan, the Laurans A. and Arlene Mendelson Professor of Economics at Columbia University, which illustrated that "markets for must have programming rights are monopolistic rather than competitive," and that a top four rated broadcast station can extract higher fees by bundling its retransmission consent negotiations with carriage for other "must have" programming assets.[107] Professor Riordan concluded that higher fees derived from this sort of bundling is "due to a consolidation of monopoly power, rather than a sensible economic meaning of competitive marketplace considerations."[108]

To combat the harm that such bundling can cause to consumers and competition, ACA recommended that the Commission deem it a *per se* violation of the duty to negotiate in good faith for the common owner of a top four broadcast station and another in-market "must have" program asset whose carriage agreement with an MVPD expires at the same time as the station's retransmission consent agreement to refuse to grant an extension of its existing retransmission consent agreement until carriage negotiations for the other programming asset are complete.[109]

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[106] TWC Comments at 11.

[107] Professor Riordan's analysis explains that bundling same-market "must have" programming assets that have coterminous expiration dates allows the seller to charge higher prices for two related reasons. First, requiring bundling negotiations increases the broadcaster's market power by making the demand for each type of programming less sensitive to price. Second, bundled negotiations increase bargaining leverage by imposing a greater penalty on an MVPD for failing to reach an agreement. Riordan at 4-5, ¶ 6.

[108] *Id*. at 10, ¶ 10.

[109] ACA Comments at 15-33.

1. Nothing in the Record Contradicts ACA's Observation that Bundling "Must Have" Programming for the Purpose of Raising Prices Causes Consumer Harm.

Rather than address the specific harms of bundling retransmission consent negotiations with negotiations for carriage of other "must have" programming, broadcasters generally discussed bundling as a broad concept, or focused specifically on the practice of "tying" undesired programming to retransmission consent. In the absence of any legal or policy justification for doing otherwise, the Commission should adopt ACA's proposal to reform its good faith rules regarding the bundling of "must have" programming assets.

Only Cox draws a distinction between bundling that involves national programming and local or regional programming, arguing on the one hand that it should not be bad faith if a TV station seeks to bundle retransmission consent of a local TV station and a commonly-owned local cable channel that is primarily dedicated (*i.e.*, over 50% of programming time between 9 AM and midnight) to distributing local news, sports, or other local or regional content,"[110] but on the other hand that "[i]t should be considered evidence of bad faith if a TV station seeks to force bundling of its local signal with a non-local cable network."[111] Without regard to whether the non-national programming network would be deemed "must have" or not, Cox justifies its position by claiming that "[p]ermitting bundling of such channels with local broadcast signals is fully consistent with Congress's intention that retransmission consent should support and enhance localism."[112] Yet, Cox presents no explanation how the bundling of retransmission consent with a "must have" local or regional network supports or enhances localism. As ACA has argued, RSNs do not need the support of retransmission consent in order to gain carriage because they are already widely distributed, nor do they need additional revenue to produce local interest programming because they already command the highest rates in the market.

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[110] Cox Comments at 11.

[111] *Id.* at 10.

[112] *Id.*

Among broadcasters that discuss bundling as a general practice, many assert that bundling should be permitted because it causes harm "only under very restrictive circumstances" and because it provides numerous benefits to MVPDs and consumers.[113] Even if these assertions were true in general, bundling "must have" programming prices does cause harm to consumers[114] while offering little or no benefits in return. As such the Commission should consider such a demand to be a violation of the duty to negotiate in good faith.

Few of the supposed benefits that broadcasters attribute to bundling can reasonably be said to apply to the type of bundling that ACA describes, and to the extent that any do, these benefits are far outweighed by its harms. For example, NAB argues that bundling can lead to lower prices because it typically involves "offering discounts conditioned on a buyer's agreement to purchase two or more products from a seller."[115] This assertion does not apply to bundling involving "must have" programming assets. When sellers offer discounts for bundled products, it is for the purpose of attracting buyers that otherwise might not purchase one or both products on an individual basis. This is not the case with "must have" programming.[116] Because MVPDs want to carry "must have" programming assets and are willing to do so at market rates, owners of two or more "must have" programming assets have no need to offer discounted bundles to secure carriage of each asset. ACA's proposal reflects the fact that owners do not offer discounted bundles of "must have" programming assets in order to attract customers, but rather to extract higher fees.

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[113] Disney Comments 19; NAB Comments at 29 ("NAB for example argues that "[o]utside of those limited circumstances involving foreclosure of competition, bundling and tying can be efficient, procompetitive and pro-consumer."). *See also* Broadcast Affiliates Comments at 40 ("Because bundling is not inherently competitive, broadcasters should remain free to negotiate for carriage of other programming in any circumstances that is not unlawful under the antitrust laws."); News-Press Comments at 17 ("Bundling is not *per se* anticompetitive; to the contrary it has long been one of the many considerations in retransmission consent negotiations."); Joint Broadcasters Comments at 14 ("[T]here is no evidence that bundling is causing harm to MVPDs.").

[114] *See* ACA Comments at 28-32.

[115] NAB Comments at 31.

[116] ACA Comments at 31-32, *citing* Riordan at 16, ¶ 12.

Broadcasters also assert that bundled negotiations promote efficiency by lowering transaction costs, which in turn lowers programming costs.[117] As the Commission has previously determined, however, any efficiencies that can be achieved through the simultaneous negotiations of "must have" programming "are likely to be modest" because they are related to isolated transactions that occur once every three years or even longer.[118] Further, those limited efficiencies are outweighed by the harms of "supra-competitive" fees that the practice can command.[119]

Finally, broadcasters claim that bundling can increase programming diversity by facilitating the introduction or expansion of new programming channels.[120] Yet again, this rationale does not apply to bundling of "must have" programming, as each programming asset will likely be carried on its own merits, regardless of whether the negotiations occur simultaneously or sequentially.

Because bundling "must have" programming can cause demonstrable harms, and because none of the supposed benefits associated with other types of bundling apply, the Commission should find a refusal to negotiate retransmission consent and carriage of other "must have" programming sequentially to be a violation of the duty to negotiate in good faith.

2. The Commission has the authority to adopt a presumption that refusing to extend a retransmission consent agreement until the conclusion of negotiations for carriage of other "must have" programming violates the duty to negotiate in good faith.

Several broadcasters argue that the Commission lacks authority to find that bundling retransmission consent with other programming, including other "must have" programming can

[117] *See* NAB Comments at 29, 31-32. *See also* Fox Comments at 11; Disney Comments at 19; Broadcast Affiliates Comments at 40 ("The economic efficiencies that bundling can afford are well established.").

[118] Joint Negotiations Order, ¶ 18.

[119] *Id.*

[120] NAB Comments at 29; Scripps Comments at 18 ("[C]onsumers benefit from bundling, as they frequently exposed to programming … that they might not otherwise receive.").

violate the duty to negotiate in good faith.[121] Contrary to these assertions, the Commission has the authority to determine that an insistence on bundling retransmission consent with carriage of other "must have" programming violates the duty to negotiate in good faith. In particular, Disney's assertion that the 1992 Cable Act provides "no statutory grounds upon which the Commission may prohibit bundling" ignores the fact that Congress granted the Commission broad authority to adopt substantive reforms to address specific behaviors and substantive terms related to retransmission consent negotiations, as discussed above in Section III. This includes the authority to reverse the existing presumption that bundling is always consistent with competitive marketplace considerations.[122] The only express constraint Congress placed on this broad authority is the directive that parties be permitted to negotiate for different rates, terms, and conditions as long as those differences are based on competitive marketplace considerations,[123] as ACA has shown, is not a constraint with respect to the bundling of top four rated broadcast stations and "must have" non-broadcast programming networks because the

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[121] Broadcast Affiliates Comments at 39 ("A Commission decision to tie broadcasters' hands by dictating the non-cash compensation for which they may negotiate in exchange for their consent for retransmission of their signals would contravene not only Section 325, but also the Commission's own long and substantial body of regulatory decisions and policy."); Disney Comments at 18 ("The Commission has no jurisdiction under 325 to prohibit bundling and the 1992 Cable Act provides no other statutory ground upon which the Commission may prohibit bundling. Commission precedent confirms this reading. In order to reverse course, the Commission would have to "explain its reasons" for the change."); NAB Comments at 29 ("Any rule that would restrict a broadcaster's lawful ability to offer bundled programming packages necessarily affects the outcome of those negotiations and therefore contradicts congressional intent."); Scripps Comments at 13-14 ("Legislative history, Commission precedent, and longstanding industry practice all point to the conclusion that broadcast stations' request to bundle a broadcast signal with other programming services or the station's own multicast channels should not be viewed as a failure to negotiate in good faith. The Commission should reject any proposal that it now reverse course and begin to dictate the kinds of non-cash compensation for which broadcasters can negotiate at the retransmission consent bargaining table.").

[122] *See* ACA Comments at 5-9; ITTA Comments at 18; Block Comments at 2-3; Cablevision Comments at 9-10; Mediacom Comments at 4, 6, 14; Verizon Comments at 6; WTA Comments at 7-8; AT&T Comments at 26-29; NTCA Comments at 19, 21-22; USTA Comments at 6-7.

[123] 47 U.S.C. § 325(b)(3)(C)(ii).

price differences that result from such bundling are due to a consolidation of monopoly power, rather than a reasonable economic meaning of competitive marketplace considerations.[124]

Broadcasters' assertions that the Commission is forever bound by its past determination that bundling of retransmission consent and other video programming is consistent with competitive marketplace considerations are also incorrect, as are suggestions that it could not reasonably explain a change in policy on this matter.[125] To the extent that a Commission finding that bundling of retransmission consent with other "must have" programming constitutes a *per se* violation today would represent a change in its good faith policy, it would be a permissible change based on changed circumstances and record evidence demonstrating that such bundling is not consistent with competitive marketplace considerations today.

While broadcasters are correct that the Commission has adopted a presumption that "[p]roposals for carriage conditioned on carriage of any other programming" are consistent with competitive marketplace considerations, at the same time it also stated that "it is implicit in Section 325(b)(3)(C) that any effort to further anti-competitive ends through the negotiation process would not meet the good faith negotiation requirement," because "[c]onduct that is violative of national policies favoring competition … is not within the competitive marketplace considerations standard included in the statute."[126] More so than other types of bundling, bundling of "must have" programming is used to further anti-competitive ends, and the Commission has never considered whether this particular form of bundling is consistent with competitive marketplace considerations. Accordingly, adoption of ACA's proposal regarding the bundling of "must have" programming assets may be considered consistent with rather than a change in, existing policy.

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[124] ACA Comments at 26-32.

[125] Disney Comments at 18-19, *citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 56 (1983).

[126] 2000 Good Faith Order, ¶¶ 56, 8.

Even if the existing presumption does apply to bundling "must have" programming, broadcasters are incorrect to suggest that the Commission is forever beholden to its prior determination.[127] While Disney is correct that the Commission must "explain its reasons" for the change of policy, the record in this and other proceedings provide ample support to justify this change.[128] Numerous commenters have pointed out,[129] and the Commission has acknowledged,[130] the marketplace for retransmission consent has changed so dramatically since the good faith rules were first adopted that the reevaluation and reform of those rules is more than warranted. ITTA, for example explains, "[t]he bilateral monopoly that defined the marketplace in 1992 … has been replaced by a one-sided monopoly in which broadcasters and consumers have an array of essentially substitutable distributors to choose between while distributors have no substitutes for their local network affiliates."[131] With respect to the bundling of "must have" content in particular, ACA has pointed out that in contrast to 2000, when very few broadcast stations were affiliated with RSNs, today there are at least 23 markets in which 21st

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[127] *See*, *e.g.*, Broadcast Affiliates Comments at 39; Scripps Comments at 13-14.

[128] Disney Comments at 18-19, *citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 56 (1983).

[129] *See*, *e.g.*, AT&T Comments at 3-4 ("Given the significant changes in the video distribution marketplace since the Commission adopted the retransmission consent rules."); Block Comments at 7 ("The broadcast and MVPD marketplace today looks nothing like the one Congress addressed in 1992, when it granted retransmission consent right to broadcasters, or in 1999 when Congress instructed broadcasters to negotiate retransmission consent in good faith, or even in 2004, when Congress mad good faith negotiating duties reciprocal for both broadcasters and MVPDs."); Cablevision Comments at 3 ("[S]ignificant changes have taken place in the video distribution market since Congress enacted the retransmission consent regime in the 1992 Cable Act, and these changes have substantially altered the negotiation dynamics between broadcasters and MVPDs."); Mediacom Comments at 19 ("Section 103(c) represents an acknowledgment by Congress that retransmission consent negotiations have changed in recent changes."); CenturyLink Comments at 2 ("Over the last several years the Commission has accumulated a record replete with evidence that the retransmission consent negotiation process is no longer working in the manner and under the circumstances it was originally established and that it has been artificially lopsided against MVPDs, particularly smaller MVPDs, for quite some time.").

[130] NPRM, ¶ 3 ("Since Congress's enactment of Section 325, we have seen significant changes in the retransmission consent marketplace that have altered the dynamics between broadcasters and MVPDs.").

[131] ITTA Comments at 17. *See also* AT&T Comments at 3-5; Charter Comments at 3.

Century Fox and Comcast-NBCU own and operate both a broadcast station and an RSN.[132] Thus, the Commission faces no legal barriers to eliminating its prior presumption that bundling is consistent with marketplace considerations, and is free to adopt ACA's proposal to deem bundling negotiations for two or more "must have" programming assets to be a violation of the duty to negotiate in good faith.

3. FCC regulations are better suited than antitrust law to determine whether bundling violates the duty to negotiate in good faith.

Broadcasters also insist that antitrust law, rather than the good faith rules, should govern complaints about bundling,[133] but this argument, too, is unpersuasive. Although the antitrust authorities have overlapping jurisdiction with respect to some competitive issues, there are practical benefits (and no legal barriers) to the Commission reviewing the bundling of "must have" programming under the good faith rules. First, as the expert agency on all subject matter covered by the Communications Act, the Commission is best-positioned to determine whether a particular proposal or behavior by a negotiating entity constitutes a violation of the obligation to negotiation good faith would serve the goals Section 325. Second, as ACA has previously explained, the clear articulation by the Commission that a specific practice, such as bundling "must have" programming, that demonstrably undermines the good faith rules and causes harm to consumers will significantly reduce the administrative costs, and the costs to the parties, of

[132] ACA Comments at 17.

[133] Scripps Comments at 14 ("[N]o reversal of the Commission's longstanding hands-off approach to 'bundling' is necessary because the antitrust laws are designed to regulate potentially anticompetitive behavior[.]"); Broadcast Affiliates Comments at 30 ("[T]he antitrust laws provide a separate legal framework that is intended to identify and address potentially anticompetitive practices."); Hearst Comments at 10 ("Antitrust law is the proper vehicle for enforcing anticompetitive business practices, not Commission regulation under the 'totality of the circumstances' test."); News-Press Comments at 18 ("[T]he antitrust laws provide a proper mechanism through which to guard against any potentially anticompetitive bundling or tying."); Disney Comments at 21 ("Because the antitrust laws are available to deter and punish anticompetitive tying or bundling, and are better equipped than the FCC's proposals to analyze competitive effects in individual cases, the Commission should not reverse its existing presumption on bundling."); NAB Comments at 28 ("The antitrust laws already provide a remedy for instances where bundling or tying by a broadcaster (or any other business entity) might restrain competition.").

adjudicating individual antitrust complaints before antitrust agencies and courts that may lack the relevant communications expertise.[134] Moreover, such an approach can be best for individual parties that are most at risk of case-by-case antitrust enforcement because it can provide clear rules of the road on practices that are either permitted or permitted, as the NAB has argued in the past.[135]

The Commission has adopted its own rules in lieu of relying on existing antitrust laws in numerous instances. Notably, the Commission adopted prospective "rules of the road" for broadband Internet service providers in both its 2010 and 2015 Open Internet Orders, where the existence of a mere handful of verifiable instances of "net neutrality" violations was twice deemed sufficient to support an administrative rulemaking response.[136]

Relatedly broadcasters argue that, to the extent the Commission does have jurisdiction over complaints of anticompetitive bundling, it should not adopt rules that prohibit practices that

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[134] *2010 Quadrennial Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09-182, Reply Comments of the American Cable Association at 34-35 (filed April 17, 2012) (the case-by-case adjudication required to identify and prosecute antitrust violations is not an efficient method of protecting against anticompetitive conduct in cases where anticompetitive practices can be clearly identified as such on a prospective basis).

[135] *See Reexamination of the Commission's Cross-Interest Policy*, Policy Statement, 4 FCC Rcd 2208, ¶ 43 (1989) ("NAB responds to the question posed in the Second Notice as to whether the Commission should continue to forbid activity not prohibited by the antitrust laws, asserting that the Commission has the responsibility to take into account the policies underlying the antitrust laws and to apply them [not] administering the antitrust laws but rather exercising its own powers under the Act, and that the Commission policies thus need not fully parallel the antitrust laws. NAB further believes that permitting combination advertising rates might lead licensees to inadvertently engage in price fixing or 'tying' violations. NAB also disputes the adequacy of private remedies for those injured by such activities, arguing that they take too long and are too expensive.").

[136] See *Preserving the Open Internet; Broadband Industry Practices, Report and Order,* 25 FCC Rcd 17905, ¶¶ 20-37 (2010) ("Open Internet Order") (citing a handful of purported instances of non-neutral behavior on the part of broadband Internet access service providers)*; Protecting and Promoting the Open Internet,* 30 FCC Rcd 5601, ¶ 78 (2015) ("2015 Open Internet Order") (citing the same examples from the 2010 order). Indeed, the rationale for the adoption of the rule and the Commission's authority to do so is grounded very much on the potential for broadband ISPs to act anti-competitively against online providers of voice and video services and applications who offer services that compete with the core voice and video services of the ISP. *See* 2015 Open Internet Order, ¶¶ 79-101 (describing economic incentives and ability and the technical ability of fixed and mobile broadband Internet access service providers to impair Internet openness).

are otherwise allowed under those laws.[137] This argument, too, is unavailing. As ATVA explains, antitrust principles provide "too narrow a standard, given the public interests at stake."[138] Mediacom correctly notes that the Commission's authority under Section 325(b) is not intended "to ensure that retransmission consent negotiations are conducted in good faith merely to prevent behavior that [is] already unlawful," but rather "the good faith standard was intended to provide the Commission with the means to protect consumers from retransmission consent demands and tactics even if those demands would not violate generally applicable laws designed to prevent or punish anticompetitive or fraudulent behavior."[139]

4. Broadcasters' other arguments in favor of retaining the presumption that bundling is consistent with good faith are not persuasive.

Broadcasters make several other specious arguments in their attempt to forestall Commission remedying the harms of bundling, but these too are unpersuasive. For example, NAB argues that eliminating the presumption in favor of bundling will place broadcasters at a competitive disadvantage vis-à-vis cable networks that will still be permitted to bundle.[140] First, Congress did not intend for broadcasters to be treated the same as non-broadcast programmers, as evidenced by the fact that Congress has declined to impose any good faith negotiation obligations on non-broadcast programmers and continues to prohibit local broadcast

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[137] NAB Comments at 28 ("The Commission has no valid basis for superseding antitrust law by broadly prohibiting practices that are allowed under those laws."); *Id.* at 31 ("For bundling to violate antitrust law, it must enable a firm with monopoly power in one market to exclude competitors from a second market through discounts so extreme that they become coercive."); Nexstar Comments at 23 ("Nexstar . . . does not understand how bundling of broadcast and non-broadcast programming violate antitrust law. To the extent MVPDs complain about bundling . . . simply stating that [it] is not good faith is not sufficient. MVPDs must be required to explain how these actions sustain a monopoly, fix prices, foreclose competition or otherwise are not bona fide, good faith proposals."); Fox Comments at 11 ("Short of conduct that violates antitrust law, there is no reason why, in a functioning marketplace, broadcasters and MVPDs should not be permitted to continue freely negotiating different combinations of monetary compensation and noncash considerations, including carriage of a broadcaster's affiliated programming.").

[138] ATVA Comments at 26.

[139] Mediacom Comments at 14.

[140] NAB Comments at 30.

stations from engaging in exclusive contracts for carriage.[141] The Commission has a duty to carry out Congress's directive that broadcasters comply with good faith obligations, and its authority in that respect is not constrained by considerations of any alleged competitive disadvantages that its rules might create. As ATVA explained in its comments, broadcasters receive significant regulatory benefits – including the right to control billions of dollars of free spectrum – that are not enjoyed by their non-broadcast competitors, and in return they have certain duties to the public interest, which include the requirement to negotiate in good faith.[142] Placing limited restrictions on broadcasters' ability to engage in harmful retransmission consent bundling practices is undeniably in the public interest.

Second, it is unlikely that deeming the bundling of two or more "must have" programming assets to be a violation of the duty to negotiate in good faith would implicate any non-broadcast programmers, even if such programmers were subject to the same duty to negotiate in good faith. Although the Commission has determined that under some circumstances a suite of cable networks may constitute marquee programming,[143] non-broadcast programmers are significantly less likely to own or control two or more programming networks that qualify as "must have" on a standalone basis. In other words, ACA's proposal will not place broadcasters at a competitive disadvantage relative to non-broadcast programmers, because non-broadcast programmers are not likely to be in a position where they can engage in the practice of bundling multiple "must have" programming assets for the purpose of raising prices

[141] *Compare* 47 U.S.C. § 325(b)(3)(C)(ii) (Commission to adopt rules that "prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage") with 47 U.S.C. § 548(c)(2)(B)(iv) (exclusivity prohibition with respect to cable programming networks that was permitted to sunset).

[142] ATVA Comments at 2-6. *See also* Mediacom Comments at 2 ("Broadcasters operate pursuant to a 'social compact' under which they commit to serve the needs and interests of their local communities [in] return for the free commercial use of public airwaves worth billions of dollars.").

[143] Comcast-NBCU Order, ¶ 52.

Finally, broadcasters' assertion that bundling is a common practice both in the video programming industry and in other industries is irrelevant to the issue of whether bundling "must have" programming for the purpose of raising prices constitutes good faith in the context of retransmission consent negotiations.[144] Indeed, the Commission previously restricted certain types of bundling involving retransmission consent when it has determined that such bundling can cause harm to consumers. As ACA has explained, the Commission has specifically found that an entity's ability to coordinate carriage rights for two blocks of "must have" programming increases bargaining leverage and can lead to higher prices.[145] The reasoning led to the Commission's decision to ban coordinated retransmission consent negotiations by separately-owned top four-rated television stations in the same market.[146]

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None of the parties that filed initial comments directly addressed the issue of bundling retransmission consent with other types of "must have" programming, and the arguments presented against the adoption of any restrictions on bundling provide no compelling rationale for failing to adopt ACA's proposal. The harms that can occur when a top four broadcaster bundles negotiations for retransmission consent with negotiations for carriage of an RSN or other "must have" programming assets are well-documented, and the benefits of such practice or minimal at best. There is no statutory or precedential bar to the Commission adopting ACA's proposal, and there is no reason to believe that antitrust law is a better vehicle for addressing the anticompetitive harms of bundling. Nor is there any reason to take seriously broadcasters' arguments that eliminating the presumption in favor of bundling will place them at a competitive disadvantage, or that bundling must be considered good faith simply because it is a common

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[144] Hearst Comments at 10 ("[B]undling is common in commercial activity[.]"); NAB Comments at 32 ("[T]he practice of bundling by sellers is commonplace in all sectors of the economy.").

[145] ACA Comments at 14, *citing* Comcast-NBCU Order, ¶¶ 135-136.

[146] Joint Negotiation Order, ¶¶ 13-16.

practice. For these reasons, the Commission should adopt ACA's proposal to view a broadcaster's refusal to grant a temporary extension of a retransmission consent agreement that expires on or around the same date as a same market RSN (or other "must have" programming asset) to be a violation of good faith. This would ensure that negotiations for the two types of "must have" programming are conducted sequentially rather than simultaneously, thus protecting against the threat of losing two "must have" assets at the same time.

B. Refusal of a Negotiating Party to Substantiate Claims Made During Negotiations.

1. The record supports change in the Commission's approach to substantiation of claims made during negotiations.

Under the current good faith rules, the Commission does not require a negotiating party to substantiate any claims made to justify its offers or positions. This allows a negotiating party to make false claims and to refuse to provide the other party with the information necessary to evaluate the fairness of an offer or to formulate an appropriate counteroffer. Meaningful and good faith negotiations require, at least in part, honest dealings between the parties. Moreover they require access by both sides to the relevant information necessary to evaluate specific claims and to produce responding offers. In its comments, ACA requested that the Commission deem the refusal of a party to substantiate its claims during negotiations as a violation of the good faith rules. In support, ACA explained that imposing this duty will foster honesty in discussions, facilitate constructive bargaining through exchange of relevant information, and lead to a mutually satisfying agreement for both parties,[147] thus avoiding breakdowns and consumer disruptions.[148] Other smaller MVPDs and public interest commenters agree that the

[147] ACA Comments at 39-48.

[148] ACA Comments at 47. *See also* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1434-35 (1958). ACA's comments summarized six principles derived from labor law cases and the Commission's Section 251 good faith rules applicable to the obligation to negotiation retransmission consent in good faith: (i) relevant information should be provide upon request to support claims supporting bargaining positions made by a party during the course of negotiations; (ii) sharing substantiating information creates the opportunity for meaningful negotiation, which is in the spirit of the

Commission's previous approach to substantiation is outdated and not working, and that recognizing a duty to substantiate would improve the current negotiating environment for retransmission consent.[149] As ACA explained, a duty to substantiate claims made during negotiations upon request is not a novel concept. It has been recognized in the labor law context for over 50 years as facilitating the ability of parties to arrive at a mutual agreement.[150] The time has come for the Commission to deem refusals to substantiate claims made during negotiations as a *per se* violation or by treating it as evidence of bad faith under the totality of the circumstances test.

2. Broadcaster Claims that the Status Quo on Information Disclosure Must be Maintained Should be Rejected.

Several broadcast groups, based on little more than recitations of past statements by the Commission that it would not impose a unilateral information sharing obligation on broadcasters, argue that there is no reason for the Commission to deviate from its current posture that while parties must provide reasons for rejecting a proposal, the good faith rules are not intended to

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good faith requirement under both the NLRA and the Communications Act; (iii) Information should be deemed relevant so long as it relates to what is said at the bargaining table; if a party claims that it is unable to compromise or move on a point, then it is reasonable for the other party to question the veracity of that claim; (iv) the sharing of information increases honesty and transparency in the negotiation process, which are important to the good faith requirement; (v) particularly where there is an imbalance of power between parties, access to information relevant to claims about relevant market conditions can lead to a more effective negotiation; (vi) parties should have information on which they can make a reasonable and informed counterproposal; if a party does not know what is in the realm of reasonableness and has only the opposition's word to go on, there is no way of knowing if the final agreement reflects market considerations that are fair to not just the negotiating entities, but also to the consumer (or the individual employees, in the case of labor law). ACA Comments at 47 (citations omitted).

[149] *See* ACA Comments at 33-47; ITTA Comments at 15-17 (the Commission's previous approach is not working, its original rationale for not requiring substantiation is no longer sustainable, and the negotiating environment would be improved by requiring substantiation by keeping the parties honest); Mediacom Comments at 37 (the Commission's rationale that there was no mutuality of obligations under the good faith rules no longer holds water); NTCA Comments at 14-15 (the current rule is outdated and hurting small providers and the Commission should look to labor law precedents in revising its approach to substantiation); Public Knowledge at 14 (lack of transparency and accountability in making demands slows down and impedes the retransmission consent negotiating process).

[150] ACA Comments at 39-46.

serve as an information sharing or discovery mechanism.[151] Scripps, for example, reminds the Commission that it has already rejected a substantiation requirement, and, overlooking not only the material change in the law making the good faith obligation bilateral but also the substantial evidence of market failure recited by the Commission, argues that the Notice points to no reason to deviate from this long-held position.[152]

Broadcasters' positions that the status quo must be maintained in this and all other aspects of the Commission's good faith rules rest on the flawed assumption that the marketplace and rules are working. For the reasons explained above in Section II, they are not. Broadcasters now have significant market power in negotiations, and are abusing that market power by not substantiating their positions in negotiations. ACA proposes to address this problem fairly by requiring both broadcasters and MVPDs to deal honestly with each other by substantiating their claims made at the bargaining table. Because the rule would apply to both parties, it would not tilt negotiations towards MVPDs.[153] Rather, by improving transparency, it would serve to keep both sides honest and speed resolution of differences.

Moreover, the sole reason advanced by the Commission for its decision not to require broadcasters to substantiate positions taken during negotiations – the unilateral nature of the

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[151] See Broadcast Affiliates Comments at 35 (the Commission resolved this issue in the 2000 Good Faith Order when it concluded that broadcasters must provide reasons for rejecting any aspects of an MVPD's offer, but that the rules are not intended as an information or discovery mechanism and broadcasters are not required to justify their explanations with evidence or documentation); News Press Comments at 14-15 (there is no reason to deviate from the Commission's long-held position that broadcasters are not required to justify their explanations by evidence or documentation); Scripps Comments at 16-17 (the Commission has already rejected use of the good faith rules as an information sharing or discovery mechanism). Notably, the Joint Broadcasters, while opposing nearly every other proposed reform, suggest that the Commission use existing procedures, such as controlled discovery to help resolve negotiating impasses arising from failure to substantiate claims made during negotiations. See Joint Broadcasters Comments at 12. They argue the Commission recently missed such an opportunity and therefore would need to explain that if it now decides to recognize such an obligation. *Id.*, *citing Northwest Broadcasting, L.P., et al v. DIRECTV, LLC*, Memorandum Opinion and Order, DA 15-1271 (rel. Nov. 6, 2015).

[152] Scripps Comments at 16-17.

[153] Fox Comments at 3 (there is no justification for tilting negotiations toward MVPDs and against broadcasters).

good faith obligation – no longer holds. This is a highly significant alteration in the legal framework governing good faith negotiations that broadcasters completely fail to acknowledge in their comments. Despite the protestations of broadcasters, the record shows that the Commission can and should improve the negotiating environment for retransmission consent and protect consumers from breakdowns by following labor law and its own precedents, and recognizing that a refusal to substantiate claims made during negotiations is a *per se* violation of the obligation to negotiate in good faith or, at the very least, evidence of bad faith under the totality of the circumstances test.

3. Broadcaster Concerns About Mandatory Exchanges of Information Are Overblown and Misdirected.

Broadcast Affiliates make the unsupported assertion that requiring parties to substantiate positions necessarily would be inefficient and costly because the mandatory exchange of information would slow negotiations down and create additional opportunities for litigation.[154] To the contrary, as ACA and other MVPDs show, an obligation to substantiate claims upon request will likely improve the negotiating environment for retransmission consent and lead the parties to reach mutually satisfactory bargaining outcomes, as it has for over 50 years in the context of labor law.[155] The NLRB and courts have recognized that labor negotiations are more likely to lead to successful outcomes where a party may request and receive information to verify claims made during negotiations.[156] As ACA demonstrated in its comments, labor law precedents establish that verification allows a party to better consider the merits of the offer, participate meaningfully in the negotiation and make an informed

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[154] Broadcast Affiliates Comments at 36.

[155] ACA Comments at 39-48; ITTA Comments at 15 (labor law recognizes the value of a duty to substantiate claims in keeping parties honest about important bargaining topics); NTCA Comments at 14 (it is a well-settled principle of labor law that negotiating parties have an obligation to provide, upon request, relevant information substantiating claims made in the course of negotiation).

[156] ACA Comments at 41; *NLRB v. Truitt Manufacturing Co.*, 351 U. S. 149, 153 (1956); *KLB Industries, Inc. v. NLRB*, 700 F. 3d 551, 551 (D.C. Cir. 2012).

counterproposal.[157] They also show that verification can help parties avoid negotiating impasses brought on by a party's inability to verify claims supporting bargaining proposals.[158]

The relief ACA seeks would not, as broadcasters assume, constitute an unbounded information sharing or discovery mechanism. It would simply require broadcasters and MVPDs alike to substantiate, upon request, claims made during retransmission consent negotiations. This modest reform should increase the chances of a successful completion of an agreement. For this reason, broadcaster concerns about mandatory exchanges of information are overblown. ACA's proposal is narrowly tailored to require substantiation only of specific claims made during the course of retransmission consent negotiations.[159] For example, if a broadcaster claimed that its offer was comparable to that offered to similarly situated MVPDs in the local market, the broadcaster would not be required to produce evidence showing offers extended to larger MVPDs in other markets. The scope of the disclosure would depend on the scope of the claim asserted. It would not, in answer to Nexstar's query, result in a broad obligation on each party substantiating the terms of every agreement entered into by such a party.[160]

Nor would ACA's proposal require the production of competitively sensitive information, as NAB fears.[161] Substantiation of claims made during negotiations can be accomplished in any number of ways that do not involve disclosure of data and information that is competitively sensitive information to negotiating parties or subject to non-disclosure agreements. For example, a broadcaster claiming the price offered is "market rate" and consistent with the prices paid by other MVPDs can provide the MVPD with anonymized pricing information from its recent

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[157] ACA Comments at 41-42, *citing E.I. DuPont de Nemours & Co.*, 489 F.3d 1310, 1315 (D.C. Cir. 2007) ("E.I. DuPont").

[158] *Id*, *citing* E.I. DuPont at 1315-1316.

[159] ACA Comments at 43-44.

[160] Nexstar Comments at 32.

[161] NAB Comments at 46.

retransmission consent agreements with other MVPDs, a method utilized by Northwest Broadcasting in its recent negotiation with DirecTV.[162] It could also provide data that is aggregated.

Finally, ACA fully agrees with Nexstar that such an obligation must be reciprocal, applying both to broadcasters and MVPDs.[163] As either side to a retransmission consent negotiation is able and likely to make claims supporting its position during negotiations, both parties must be under the same obligation to provide substantiating information upon request.

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In summary, broadcasters' arguments that requiring parties to substantiate claims would be inefficient and costly are baseless and should be rejected. The record shows that rather than impede or slow negotiations, substantiation of claims should make reaching an agreement easier and quicker by keeping the parties honest and removing doubt about whether a negotiating party is being presented with a fair deal.

C. Withholding Otherwise Freely Available Broadcast Programming Online During Retransmission Consent Negotiations.

In its comments, ACA recommended that the Commission deem online blocking to be a *per se* violation of its good faith negotiation rules, or, at the very least, evidence of bad faith under the totality of the circumstances test.[164] ACA explained that there is no justification for a broadcaster to selectively block content it has otherwise chosen to put online for free to all Internet users from only that subset of Internet users served by an MVPD with whom the broadcaster is negotiating retransmission consent.[165] ACA also explained that the Commission has ample statutory authority to address online blocking and there is no merit to the

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[162] ACA Comments at 37-38; *Northwest Broadcasting Emergency Complaint for Failure to Negotiate Retransmission Consent in Good Faith and Request for Relief*, MB Docket No. 15-151, at 14-15 (filed Jun. 11, 2015).

[163] Nexstar Comments at 32.

[164] ACA Comments at 48-57.

[165] *Id.* at 48-53.

constitutional objections that broadcasters have previously raised.[166] Nothing in the record contradicts this view.

1. The record demonstrates the need for Commission action against online blocking.

The record overwhelmingly demonstrates that online blocking is contrary to the public interest, the purpose of the retransmission consent regime, and the goals of the Communications Act.[167] MVPDs and public interest groups agree that a broadcaster has no legitimate justification for blocking otherwise freely available online content to broadband Internet access subscribers of an MVPD with whom the broadcaster is negotiating retransmission consent. Cox explains that if a broadcaster distributes its content over the Internet "outside the retransmission consent process," then that broadcaster "has no justification for punishing the customers of an MVPD/ISP merely because the parties are involved in a local dispute."[168] ATVA agrees, describing how online blocking "significantly expands the damage from a broadcaster's decision to withhold its signal from an MVPD's video subscribers in a particular market, creating collateral damage to unsuspecting broadband subscribers for the sole purpose of gaining leverage to increase prices."[169] Similarly, Mediacom emphasizes that "innocent consumers, including broadband consumers who may not even subscribe to the MVPD's video service, [] are victimized."[170]

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[166] *Id.* at 52-57.

[167] Time Warner Comments at 23 (describing how online blocking "represents the antithesis of acting in the public interest, flies in the face of Congress's goal of preserving *access* to broadcast programming in enacting the retransmission consent regime, and directly implicates the online blocking concerns that the Commission has consistently articulated in the net neutrality context.") (citations omitted).

[168] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Cox Enterprises, Inc. at 9 (filed Dec. 1, 2015) ("Cox Comments").

[169] ATVA Comments at 23.

[170] Mediacom Comments at 27.

Time Warner Cable, one of the MVPDs that has been victimized by this practice, discusses its own experience with online blocking and the harms it causes.[171] In particular, Time Warner Cable describes how "[CBS] deliberately prevented TWC's broadband subscribers from accessing network content online . . . even for those broadband customers who purchased MVPD service from another provider or accessed CBS's programming over the air, and even in geographic markets where no CBS station went dark."[172] Public Knowledge criticizes CBS for its actions against Time Warner Cable, emphasizing that broadcasters should not be permitted to interfere with the ability of users of one Internet service provider to access content broadly available on the Internet purely to gain leverage in resolving an unrelated retransmission dispute.[173] Verizon explains that this is because online blocking serves "only to harm another set of customers who may pressure the MVPD to accede to the broadcast station's demands."[174] CenturyLink also agrees that online blocking reaches well beyond what should be the bounds of retransmission consent negotiations because it harms "more than just the MVPD and the video customers of the MVPD."[175] In addition, NCTA notes that broadcasters providing online programming typically has nothing to do with the contractual relationship between

[171] Time Warner Comments at 23.

[172] *Id.*

[173] Public Knowledge Comments at 9-10.

[174] Verizon Comments at 4.

[175] CenturyLink Comments at 3 ("Where a broadcaster prevents access to its programming available on-line during retransmission consent negotiations that conduct can harm more than just the MVPD and the video customers of the MVPD. It may also prevent access to the broadcaster's content by any internet customer of the MVPD, whether or not the internet customer is also a video customer. This may even have the perverse result of precluding on-line access to the broadcaster's content of the negotiating MVPD's internet customer who is actually the video customer of another provider. This negotiation tactic, especially as one that reaches well beyond what should be the bounds of retransmission consent negotiations, should be impermissible and per se evidence of not negotiating in good faith. At a minimum, it should be conduct that creates a presumption of negotiating in bad faith under the totality of the circumstances test.").

MVPDs and broadcasters and is completely extraneous to retransmission consent negotiations.[176]

Mediacom, who previously petitioned the Commission to adopt a rule prohibiting online blocking,[177] describes how broadcasters employing the tactic of online blocking seek only "to punish the MVPD for resisting its demands and thereby coerce the MVPD into giving in."[178] In this vein, Mediacom observes that online blocking of all of an MVPD's broadband Internet access subscribers is similar to a "secondary boycott," which is unlawful under labor law.[179] Mediacom describes how a "secondary boycott" involves one party, in this case, a broadcaster, using economic pressure against a neutral third party – broadband Internet access subscribers – in order to influence the other party to the negotiations, the MVPD.[180]

Broadcasters nonetheless suggest that online blocking is an appropriate negotiating tactic.[181] Remarkably, Broadcast Affiliates unabashedly claims that blocking an MVPD's broadband subscriber's access to content that broadcast stations make freely available online to any person with an Internet connections is "a perfectly appropriate tool available to broadcasters engaged in negotiating the terms and conditions on which they will consent to the retransmission of their signals."[182] Similarly, CBS discusses how suspending some access to

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[176] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the National Cable & Telecommunications Association at 3-4 (filed Dec. 1, 2015) ("NCTA Comments").

[177] *See Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728, Mediacom Petition for Rulemaking (filed Jul. 7, 2015).

[178] Mediacom Comments at 27.

[179] *Id.* at 27-28.

[180] *Id.* at 28, n.71 ("A secondary boycott is when one party to a negotiation (such as a union) uses economic pressure against a neutral third party in order to influence the other party to the negotiations (such as the employer).").

[181] News-Press Comments at 21 ("broadcasters' ability to limit online access to their programming, whether during a retransmission consent impasse or otherwise, represents just one of many practices available in the course of negotiations"); Saga Broadcasting Comments at 8 ("[A] local station absolutely should be able to prevent MVPD customers from accessing the station's online content unless that MVPD is providing compensation to the station.").

[182] Broadcast Affiliates Comments at 56.

online content may be necessary for a broadcast station to protect its negotiating position.[183] While these broadcasters are at least forthright about their motives in using online blocking to increase negotiating leverage in retransmission consent negotiations, the Commission should reject out of hand their arguments that online blocking is an appropriate negotiating tactic.

Finally, commenters also note, as did ACA, that many MVPD subscribers reside in areas where over-the-air reception is not an option.[184] Removing access to broadcast content online may deprive these subscribers of their only possible source of local news and weather during a negotiation dispute. Consistent with ACA's recommendation that the Commission adopt a "harm to consumers" standard for evaluating good faith complaints, the Commission should act decisively to put an end to this blatantly anti-consumer negotiating tactic.

2. Despite broadcasters' claims to the contrary, the Commission has the statutory authority to address online blocking.

Broadcasters claim that they are under no legal or regulatory obligation to make their programming available online to MVPD subscribers or available for Internet distribution at all, and that a rule prohibiting online blocking would require them to make their content available online.[185] Broadcasters further claim that the Commission does not have the authority to adopt a rule prohibiting online blocking during retransmission consent negotiations.[186] These objections are unavailing.

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[183] CBS Comments at 13.

[184] ATVA Comments at 23 ("Many subscribers cannot actually receive off-air programming.").

[185] Broadcast Affiliates Comments at 54 ("The 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, including online, whenever they consent to distribution on any traditional MVPD platform."); Scripps Comments at 15 ("Broadcast stations have no legal or regulatory duty to make their programming available to MVPD subscribers – or to distribute their programming online at all.").

[186] Media General Comments at 7 ("The NPRM cites no statutory authority whereby the Commission could force certain video programmers to provide content online."); Hearst Comments at 11 ("The Commission is without legal authority to adopt MVPD proposals to require broadcasters to distribute their content online."); Fox Comments at 14 ("Section 325(b) is expressly limited to the process by which a broadcast station may (but is not required to) authorize an MVPD to retransmit the station's signal."); CBS Comments at 12 ("Any attempt to require a broadcast station to make its content available online for free, including to customers of distributors with which it is then in a negotiation impasse, would impose an

First, ACA and others object to the blocking of only programming that is otherwise made "voluntarily" and freely available to all Internet users. Adoption of a rule prohibiting selective blocking of content otherwise made freely available by a broadcast station online to broadband Internet access subscribers of MVPDs with whom the station is negotiating retransmission consent as a *per se* violation of the good faith rules would not, as broadcasters suggest, *require* stations to post content online. To the contrary, the prohibition would come into play *solely* in cases where the broadcast station already makes its content freely available to all Internet users.[187] Only then would a broadcaster be prohibited from selectively blocking public access as a negotiating tactic.

Second, as ACA demonstrated in its comments, when a broadcast station places its content online for free to the public using the Internet, and then selectively blocks access to broadband Internet access subscribers of MVPDs with whom it is negotiating retransmission consent, its actions may be regulated by the Commission under both Section 325 and Section 706.[188] The actions of broadcast stations taken in the course of negotiating retransmission consent agreements under consideration in this rulemaking fall comfortably within the Commission's ample authority to govern the exercise of a broadcast station's right to grant retransmission consent under Section 325(b)(3)(A).[189] In particular, Section 325(b)(3)(A) directs the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent" and to adopt rules that 'prohibit a television

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affirmative and constitutionally infirm obligation on broadcasters that is not imposed on other content owners and/or industries."); Fox Comments at 15 (arguing that prohibiting online blocking would contradict the Commission's disclaimer of regulating "the Internet, *per se*, or any Internet applications or content" in its Open Internet Order).

[187] *See*, *e.g.*, Cox Comments at 9 (describing that any rule that the Commission adopts to prohibit broadcasters from blocking MVPD broadband Internet access subscribers from accessing the broadcaster's online programming that is otherwise generally available during a retransmission consent impasse should not apply to any special online distribution rights granted pursuant to a retransmission consent agreement).

[188] ACA Comments at 54-55.

[189] See Section III, *supra*.

broadcast station that provides retransmission consent from . . . failing to negotiate in good faith.'"[190] Blocking an MVPD's broadband Internet access subscribers from accessing broadcasters' otherwise freely available online content cannot constitute good faith. Rather, it is a blunt force negotiating tactic that intentionally inflicts harm on innocent consumers solely to enhance the bargaining position of broadcast stations at the expense of MVPDs and their broadband subscribers, regardless of whether those subscribers also purchase video service from the affected MVPD. Use of such tactics can hardly be said to reflect "a sincere intent of trying to reach an agreement acceptable to both parties" through negotiations conducted in an "atmosphere of honesty, purpose and clarity of process."[191] Broadcasters engaging in this practice do so solely to pressure the MVPD to accede to the broadcaster's retransmission consent demands, rather than to help both parties come to mutually agreeable prices, terms, and conditions. The Commission would be well within its authority under Sections 325(b)(A) and 325(b)(3)(C)(ii) to prohibit broadcasters from engaging in online blocking.[192]

In addition, the Commission has authority under Section 706 to regulate behavior that threatens the "virtuous circle" of innovation and investment in broadband.[193] ACA has previously demonstrated that Section 706 provides the Commission with authority to protect Internet openness from Internet actors. This authority extends to broadcast stations making their content online freely available to Internet users that engage in commercially unreasonable practices in their relations with broadband Internet access service providers.[194] Selective blocking of broadcast station online content to broadband subscribers of MVPDs involved in

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[190] ACA Comments at 54-55, *citing* 2014 Retrans FNPRM, ¶ 30.

[191] 2000 Good Faith Order, ¶¶ 39, 24.

[192] 47 U.S.C. §§ 325(b)(A), 325(b)(3)(C)(ii); *see also* ACA Comments at 54-55, *citing* 2014 Retrans FNPRM, ¶ 30.

[193] *See* ACA Comments at 55; *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

[194] ACA Comments at 55; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the American Cable Association at 41-52 (filed Jul. 17, 2014); Reply Comments of the American Cable Association at 39-51 (filed Sep. 15, 2014).

retransmission consent negotiations with the station for linear video rights is an unreasonable and anti-consumer practice that threatens Internet openness and harms the virtuous circle.

Finally, the fact that the Commission declined to regulate edge providers in its 2015 Open Internet Order is not tantamount to finding that it could not regulate such providers. Nor is it in any way dispositive of the Commission's authority to reach broadcast station behavior during retransmission consent negotiations directly under Section 325(b) and other provisions of Title III requiring broadcast licensees to operate in the public interest.[195]

3. Broadcasters' claims that a prohibition on online blocking would infringe upon their First Amendment rights are unavailing.

Broadcasters advance several dubious claims that a prohibition on online blocking would infringe upon their First Amendment rights.[196] As ACA demonstrated in its comments, the First Amendment poses no bar to Commission action prohibiting online blocking.

Contrary to broadcasters' arguments, a Commission rule establishing that a broadcaster engaged in online blocking during a retransmission consent dispute is *per se* negotiating in bad faith is a narrowly tailored, content neutral rule that would be subject to intermediate scrutiny by the courts.[197] ACA described how such a rule would easily pass constitutional muster under this standard, as it advances many important government interests – for example, protecting consumers from losing access to broadcast programming online, protecting a free and open Internet, and ensuring that consumers do not suffer higher retail costs due to one negotiating party obtaining undue leverage over the other.[198]

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[195] ACA Comments at 52 n.140 (noting broadcasters' obligation under Section 307 of the Act to operate in the public interest).

[196] Disney Comments at 23. More generally, multiple broadcasters claim that a rule prohibiting online blocking would raise constitutional concerns. *See* Scripps Comments at 15; News-Press Comments at 21; Fox Comments at 16.

[197] ACA Comments at 55-57.

[198] *Id.*

Also, contrary to Disney's claim that this is a "forced speech" issue,[199] the proposed prohibition on online blocking compels no speech, because it would cover only content that the broadcaster otherwise makes freely available for public consumption. That is, the rule applies only in cases where the broadcaster is already speaking on its own accord. The *per se* rule would mean only that a broadcaster would be prohibited from preventing certain members of the public – an MVPD's broadband Internet access subscribers – from hearing speech that the broadcaster has already decided to freely engage in.

4. Broadcaster arguments that a prohibition on online blocking would violate their rights under the Copyright Act are also misplaced.

Broadcasters vociferously argue that a prohibition on online blocking would violate their rights under the Copyright Act. For example, Broadcast Affiliates and Scripps both claim that a rule compelling broadcast stations to make their programming available for Internet distribution would raise serious questions about federal copyright law.[200] NAB also asserts that copyright owners have "exclusivity rights" to publicly perform (or not perform) their content, and that a rule prohibiting online blocking would "violate" these exclusive rights by effectively forcing a broadcaster to publicly perform its content online.[201] News-Press goes even further, claiming that it would be improper and "unconstitutional" for the Commission to abrogate the ability of News-Press to exercise its right under copyright law to control how its program content is distributed in the retransmission consent context.[202]

Again, broadcasters misconstrue the proposed rule. A rule prohibiting online blocking would come into play *solely* in cases where the broadcast station has already voluntarily made content freely available to all Internet users. As AT&T observes, once a broadcaster makes its

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[199] Disney Comments at 23.

[200] Broadcast Affiliates Comments at 55; Scripps Comments at 15.

[201] NAB Comments at 36-38.

[202] News-Press Comments at 21.

content publicly available, it has no legitimate reason to discriminate against certain members of the public (*i.e.*, broadband Internet access subscribers of an MVPD).[203] Moreover, contrary to News-Press's assertions, broadcasters do not have the absolute right to control the licensing of their programming to MVPDs in the retransmission consent context. In particular, the Communications Act and the Commission already prohibit broadcasters from entering into exclusive retransmission consent arrangements with an MVPD.[204] There is no reason why a rule prohibiting the blocking of otherwise freely available programming online would not be deemed a similar type of permissible restriction.

Moreover, broadcasters "voluntarily" placing their content online for all Internet users have arguably already made the decision to "publicly perform" that content. Under the Copyright Act, an entity performs when it "transmit[s] . . . a performance . . . to the public."[205] As the Supreme Court recently observed, "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."[206] Put another way, in uploading the content for viewing online – on a freely available website – the broadcaster has transmitted its performance to the public.[207] In many ways, this is similar to a

[203] AT&T Comments at 14.

[204] 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65(b)(1)(vi).

[205] 17 U.S.C. § 101; *American Broadcasting Companies, Inc., et al., Petitioners v. AEREO, INC., fka BAMBOO LABS, INC.*, 134 S. Ct. 2498, 2510 (2014) ("Aereo") (one may transmit a performance to the public "whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times."). *See also Cartoon Network LP v. CSC Holdings, Inc*., 536 F.3d 121, 136 (2d Cir. 2008) (stating that "'when Congress speaks of transmitting a performance to the public, it refers to the performance created by the act of transmission,' not simply to transmitting a recording of a performance.").

[206] Aereo at 2509.

[207] Courts have also observed that Internet streams constitute a performance because it "is an electronic transmission that renders the musical work audible as it is received by the client-computer's temporary memory. This transmission, like a television or radio broadcast, is a performance because there is a playing of the song that is perceived simultaneously with the transmission." *United States v. Am. Soc'y of Composers*, 627 F.3d 64, 74 (2d Cir. 2010). *See also Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 158 (1975).

broadcaster placing content in its broadcast signal and transmitting it over-the-air for free, for receipt by anyone with antenna.[208] Having transmitted its signal over-the-air, copyright law would not give the broadcast station the right to selectively interfere with some viewers' ability to receive that signal. Broadcasters' complaints that a Commission rule prohibiting online blocking would violate the copyright owners' rights to control when, where and how the content may be viewed therefore fall short.[209]

D. Blackouts During or Near Marquee Events Should Not Be Allowed.

In its comments, ACA supported prohibiting broadcasters from blacking out or threatening to blackout a station signal in the time period just prior to the airing of a "marquee" sports or entertainment event, as a *per se* violation of its good faith rules or, in the alternative, as a practice that demonstrates a lack of good faith under the totality of the circumstances test.[210] The record supports a determination that blacking out or threatening to blackout a station signal before a "marquee" event violates the duty to negotiate in good faith.

Commenters from both sides of the negotiating table observe that broadcasters specifically choose expiration dates prior to marquee events because of that programming's importance to viewers,[211] and it is clear that broadcasters vastly increase their negotiating leverage when retransmission consent agreements expire before marquee events.[212] As

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[208] It is worth recalling that the Supreme Court held in *Fortnightly* that the broadcaster's signal was a public performance and, therefore, cable operators were allowed to retransmit the broadcaster's signal. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 88 S. Ct. 2084 (1968). Congress later created the compulsory license to give content owners a means of compensation from cable operators because the act of broadcasting was considered a public performance.

[209] Nexstar Comments at 19.

[210] ACA Comments at 58-60.

[211] ATVA Comments at 27; Broadband Affiliates Comments at 34; Verizon Comments at 8 ("[T]hreatening to turn off programming the day before a marquee event (*e.g.*, the Super Bowl), is behavior that a broadcaster designs solely to misdirect the negotiation – just as much as refusing to meet except at midnight.").

[212] CenturyLink Comments at 6-7; AT&T Comments at 18-19; *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of INCOMPAS at 15 (filed Dec. 1, 2015).

Verizon notes, "threatening to turn off programming the day before a marquee event (*e.g.*, the Super Bowl), is behavior that a broadcaster designs solely to misdirect the negotiation – just as much as refusing to meet except at midnight."[213] CenturyLink agrees, explaining how "such conduct may be indicative of a broadcaster unreasonably creating and then leveraging the MVPD's sudden vulnerability to extract terms to which the MVPD would not otherwise agree."[214] This plainly harms consumers and distorts the marketplace in which retransmission consent negotiations occur.[215] In many ways, such a tactic is no different than refusing to negotiate retransmission consent at reasonable times and locations or unreasonably delaying retransmission consent negotiations, which is already a *per se* violation of the good faith negotiation requirement.[216]

Moreover, despite broadcasters' claims, the Commission has the authority to adopt this proposal.[217] Section 325(b) directs the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent" and to adopt rules that 'prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith.'"[218] Addressing blackouts or threatened blackouts of a station signal before a "marquee" event during retransmission consent negotiations falls well within this authority.[219] Though broadcasters also complain that MVPDs and public interest

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[213] Verizon Comments at 8.

[214] CenturyLink Comments at 6-7.

[215] ATVA Comments at 27-28. *See also* ACA Comments at 59-60.

[216] *See* 47 C.F.R. § 76.65(b)(1)(iii).

[217] Media General Comments at 10; NAB Comments at 47; News-Press Comments at 13; *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Raycom Media, Inc. at 6 (filed Dec. 1, 2015).

[218] 47 U.S.C. § 325(b)(3)(A); *see also* ACA Comments at 54-55, *citing* 2014 Retrans FNPRM, ¶ 30.

[219] The Commission also has authority to obligate interim carriage around marquee events. *See* ACA Comments at 8 n.20. The Commission is plainly authorized to protect consumers from negotiating impasses and that includes requiring interim carriage (or authorizing the grant of short-term extensions); for this reason the Commission should explicitly repudiate its earlier conclusion that it lacks such authority. *See* 2011 NPRM, ¶ 18; *Amendment of the Commission's Rules Related to Retransmission*

groups want the Commission to intervene in private contractual negotiations, in particular to change contract expiration dates, this is far from the case.[220] The remedy that ACA supports would simply prevent a broadcaster from directly blocking access to programming that meets the definition of "marquee" under the rule during retransmission consent disputes.

Finally, broadcasters argue that a rule prohibiting blackouts around marquee events is too vague or difficult for the Commission to implement.[221] ACA disagrees. For instance, ATVA's proposal marquee events rule puts forth a simple, straightforward definition of what programming would be considered "marquee."[222] Instead of offering their suggestions on how best to define marquee programming, broadcasters make vague and apocalyptic predictions that marquee events would "proliferate uncontrolled throughout the calendar year" or that the proposed rule would introduce "potential debate and controversy without meaningfully impacting the substance of the issue."[223] Considering that broadcasters admit that they choose expiration dates prior to marquee events because of the importance of the marquee event programming, broadcasters know full well which events are "marquee." The Commission should have no trouble either.

E. Third Party Interference in Retransmission Consent Negotiations for Historically Carried Out-of-Market Stations.

In its comments, ACA requested that the Commission deem third party interference with long-standing retransmission consent arrangements between cable systems and willing out-of-

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Consent, MB Docket No. 10-71, Comments of the American Cable Association at 71-76 (filed May 27, 2011); Reply Comments of the American Cable Association at 91 n.208 (filed Jun. 27, 2011). AT&T also observes that under labor law precedent, the status quo is permitted to be maintained so that parties can negotiate over long terms concerns without the pressure of a short term negotiation breakdown/strike. *See* AT&T Comments at 19.

[220] Scripps Comments at 10 (arguing that a contract's expiration date is a substantive term of an agreement that both parties agree to and should not be subject to Commission review). *See also* Media General Comments at 10; Nexstar Comments at 26.

[221] Broadcast Affiliates Comments at 34; Media General Comments at 11.

[222] *See* ACA Comments at 59-60.

[223] NAB Comments at 47; Hearst Comments at 11.

market broadcast stations a *per se* good faith violation on the grounds that such interference is contrary to long-standing Commission policy and harms the public interest.[224] Although many broadcasters responded to the Commission's inquiry as to whether "certain network involvement in retransmission consent negotiations [should] be a factor suggesting bad faith under the totality of the circumstances test," none specifically addressed the narrow concern raised by ACA.[225] Thus the myriad arguments that broadcast interests put forth to argue against a more general limitation on network interference should not influence the Commission's evaluation of ACA's more targeted proposal: to prohibit, as a violation of the duty to negotiate in good faith, either a broadcast station or an MVPD from entering into any agreement with a third party – legally-binding or otherwise – that, through an outright prohibition, a grant of a veto/pre-approval power before the execution of an agreement, or any other means or disincentives, limits an out-of-market station's ability to grant retransmission consent to a cable operator that has historically carried the station's entire programming stream.[226]

Broadcasters offer up a number of arguments to support their opposition to ACA's proposal. As discussed below, none of these misguided arguments should prevent the Commission from adopting a narrow and reasonable reform that is necessary to protect consumers that have historically relied on nearby out-of-market stations for important news and local programming.

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[224] ACA Comments at 60-70.

[225] See, e.g., Broadcast Affiliates Comments at 25-30, 44-51; NAB Comments at 39-43; Fox Comments at 13; Disney Comments at 24-26.

[226] ACA's proposal would not impact network or syndicated programming that is required to be blacked out by the Commission's network non-duplication or syndicated exclusivity rules.

1. Contrary to broadcaster claims, the Commission has the authority to prevent broadcaster stations from entering into network affiliation agreements that restrict their ability to negotiate in good faith.

Broadcasters expend significant energy arguing that the Commission does not have the authority to regulate agreements between broadcast stations and their network affiliates.[227] These arguments are misdirected and obfuscate the real issue at hand, as ACA's proposal is quite narrow, leaving the much vaunted "network-affiliate" relationship fully intact. The proposal, which in part, would deem it a violation of the duty to negotiate in good faith for an out-of-market station to enter into a third party agreement that would restrict its ability to retransmit its signal to an MVPD to whom it has historically granted retransmission consent, is not an impermissible intrusion into the network-affiliate relationship at all. Rather, it is a valid restriction on a behavior that does not comport with a broadcaster's duty to negotiate in good faith, which falls squarely within the Commission's authority to govern the exercise of the right of retransmission consent and adopt good faith negotiation rules. While NAB and 21st Century Fox are correct in stating that Section 325 governs negotiations between broadcast stations and MVPDs,[228] the Commission's authority over retransmission consent negotiations necessarily includes the authority to restrict these parties from entering into third party agreements that would require them to violate the duty to negotiate in good faith.

That the good faith rules may have the effect of restricting certain provisions that might otherwise be included in a network-affiliation agreement is no bar to the Commission's authority

[227] NAB Comments at 24 ("The FCC's good faith authority also does not properly apply to questions of network-affiliate relations[.]"); Fox Comments at 13 ("Commission precedent is clear that Section 325 does not – and was not intended to – interfere with [the terms on which an affiliate may authorize the distribution of network content]."); Disney Comments at 24 ("The Commission should not, in the context of evaluating the duty of good faith applicable to MVPDs and broadcasters, seek to regulate the network-affiliate relationship.").

[228] NAB at 39-40 ("The FCC's limited good faith authority concerning negotiations between TV stations and MVPDs cannot appropriately stretched to control the separate contracts between networks and affiliated stations or network/affiliate relations generally."); 21st Century Fox at 13 ("As a legal matter … Section 325 governs negotiations between broadcasters and MVPDs, not broadcasters and their networks or other program suppliers.").

to impose such rules. Indeed, it defies logic to suggest, as broadcasters do here, that the Commission may not penalize broadcasters for abiding by an obligation contained in its affiliation agreement even when the Commission deems such an obligation to interfere with the station's statutory obligation to negotiate in good faith.[229] If the Commission, in fulfilling its Congressional mandate to ensure that broadcast stations and MVPDs negotiate for retransmission consent in good faith, deems a specific practice to be a violation of that obligation, a party should not be permitted to commit such a violation without penalty simply because it has contractually committed to a third party to do so. To suggest otherwise would lead to absurd results and would permit broadcasters to circumvent the good faith rules entirely by stipulating that they are required to engage in practices that are explicitly prohibited by the Commission.

Broadcasters also point to the Commission's previous statements that it would not regulate the terms of network affiliation agreements in support of their argument that the Commission lacks authority to interfere with network-affiliate agreements.[230] There is no reason, to believe, however, that the Commission does not have the authority to act when a broadcaster agrees to specific terms that interfere with its duty to negotiate in good faith. Although the Commission did not find evidence in the 2005 Good faith Order that Congress intended the good faith rules to restrict the rights of networks to limit an affiliate's right to

[229] Disney Comments at 26 ("[W]here a television station has freely entered into an affiliation agreement obligating it to distribute network-licensed content only in certain geographic areas, it cannot be penalized for abiding by that provision in granting retransmission consent."); Nexstar Comments at 22 ("[E]ven though content owners are not directly involved in retransmission consent negotiations, a broadcaster is wholly within its rights to not breach its agreements with its content providers when negotiating retransmission consent rights, and the Commission has no authority to mandate a broadcaster breach a third party agreement simply to appease MVPD demands."). If the Commission determines that adoption of a *per se* good faith rule concerning third-party interference with retransmission consent negotiations for historically carried out-of-market stations would cause a station to be in breach of its affiliation agreement, it could grant stations a grace period following the effective date of the rule in which to negotiate reforms of existing agreements containing such restrictions with their affiliated networks. Going forward, networks and stations would be on notice that such restrictions are impermissible.

[230] Broadcast Affiliates Comments at 47-50; Fox Comments at 13.

redistribute affiliated programming, it also did not find that either SHVIA or SHVERA actually constrains its authority to prohibit a broadcast station from voluntarily restricting its right to grant retransmission consent.[231]

In arguing that the Commission does not has the authority to adopt substantive reforms to the retransmission consent rules, broadcasters acknowledge that the Commission does have the authority – and indeed the duty – to ensure that parties do not contract away their ability to negotiate in good faith. Nexstar, for example, argues that the totality of the circumstances test is intended to determine "whether the applicable party, based on all of the facts and circumstances of a negotiation, evidenced a bona fide and sincere desire to reach an agreement."[232] Disney similarly asserts that Section 325 "grants the Commission authority to ensure that MVPDs and broadcasters appear at the bargaining table, ready and willing to negotiate."[233] Broadcasters cannot reasonably argue that a broadcast station or MVPD "has evidenced a bona fide and sincere desire to reach an agreement" where the station or MVPD has entered into an agreement with a third party the effect of which is to restrict the station's or MVPD's ability to engage in retransmission consent negotiations. To the contrary, such an action demonstrates unequivocally that the party in question is neither ready nor willing to negotiate in good faith.

2. Copyright law does not constrain the Commission's authority to regulate geographic restrictions on retransmission consent.

Broadcasters also suggest that the Commission does not have the authority to prohibit broadcast stations from entering into restrictive network affiliation agreements because

[231] 2005 Good Faith Order, ¶ 34.

[232] Nexstar Comments at 15.

[233] Disney Comments at 11; *see also* Gray Comments at 6 ("The Commission's authority is limited to sanctioning a party for 'failing to negotiate in good faith.'"). *See also* Broadcast Affiliates Comments at 13 ("The Commission should continue, as it has historically, to evaluate good faith negotiation complaints by considering the unique facts of a retransmission consent negotiation in light of the "totality of the circumstances" to answer the simple question whether the party accused of bad faith engaged in negotiations with a "sincere desire to reach an agreement that is acceptable to both parties.").

"networks and program rights holders have the right under copyright law to limit the geographic areas in which they license the exhibition of their copyright-protected property and to control the terms under which they grant those licenses."[234] This claim is correct only up to a point and confuses the issue raised by ACA, which concerns the right of a broadcast station to enter into an agreement that would violate its duty to negotiate in good faith by agreeing to geographic restrictions on its ability to negotiate and grant out-of-market retransmission consent to a cable operator that has historically carried the station. The Commission and Congress have already made clear that there are limits to the demands that broadcasters may place on MVPDs, even if such demands are dictated by their network affiliation agreements. For example, the good faith rules prohibit a broadcast station from imposing limitations that would prevent an MVPD from importing a significantly viewed signal.[235] Technically speaking, while a network has the right to demand that an in-market station prohibit MVPDs from doing so, the broadcast station itself is not permitted to abide by such a restriction. The fact that the network and/or the station are "copyright owners" does not change the result.

The broadcasters' confusion about the role (or lack thereof) that copyright principles play in assessing what constitutes a violation of the duty to negotiate retransmission consent in good faith is illustrated by the comments of the Broadcast Affiliates, which inexplicably claim that "each local station has the right under copyright law to determine the terms under which MVPDs may distribute the station's own, locally-produced programming."[236] The statement is simply incorrect as a matter of law. Section 111 of the Copyright Act clearly authorizes an MVPD to retransmit a broadcast station's programming without geographic restriction, provided that such

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[234] Broadcast Affiliates Comments at 50; *see also* Hearst Comments at 10 ("[N]etworks have their own copyright interests in the programming aired by their affiliates, and they have the right to control and monetize the distribution of that programming.")

[235] 47 C.F.R. § 76.64(b)(ix).

[236] Broadcast Affiliates Comments at 46.

retransmission is consistent with the Commission's rules.[237] The Commission confirmed the bright line distinction between retransmission consent and copyright in its 1993 Order implementing the 1992 Cable Act, stating that "retransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest."[238] Put another way, the "terms under which MVPDs may distribute [a] station's own, locally produced programming" as well as the terms under which MVPDs may distribute any other programming broadcast by a station, are determined by the statutory compulsory licensing mechanism in the Copyright Act, and not by the station or any of the copyright owners from which it acquires broadcasting rights.

21st Century Fox argues that network affiliation agreements apply only to network programming and thus provisions in such agreements that purport to prevent an affiliated station from authorizing the retransmission of network programming,[239] yet this argument ignores the distinction, described above, between a station's signal and the programming embedded in that signal. A network has no right under the Copyright Act or the Communications Act to limit the retransmission of its programming except as a byproduct of the Commission's rules relating to network non-duplication protection. The broadcast station, not the network, was granted the right to exercised retransmission consent and controls the station's signal. Whether it is good faith for a network to condition its grant to a broadcast station of over-the-air distribution rights to the network's programming by demanding that the station give up control over its signal is the sole question presented by ACA's proposal.

In any event, the Commission should reject 21st Century Fox's argument on the grounds that an untenable choice is no choice at all. Retransmitting a broadcast signal that excludes

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[237] 17 U.S.C. § 111(c).

[238] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 173 (1993).

[239] Fox Comments at 13-14.

important network or syndicated programming does little to help an MVPD serve the needs and interests of a community that has traditionally received an out-of-market station's entire linear signal. Local broadcast news is not the only unique programming aired by historically carried out-of-market stations that is important to consumers in the community; local stations may broadcast important local content during network programming hours. For example, emergency alerts, weather information, and local news break-ins can occur during network programming hours or during syndicated programming, and consumers that watch such programming on their less preferred in-market station may miss out on crucial local information. Moreover, political advertising runs throughout the day, including during network and syndicated programming (in fact, political advertising may be more likely to run during prime time hours when network programming is aired). Viewers that cannot watch such programming on their preferred local station would lose access to information that is vital to a functional democracy.

3. In-market broadcast stations should not be permitted to restrict the importation of historically carried out-of-market signals that are not subject to the network non-duplication or syndicated exclusivity rules.

Just as the Commission should restrict the ability of a broadcast station to enter into agreements that restrict its ability to negotiate in good faith with an out-of-market MVPD with whom it has a historical relationship, so too must it prohibit in-market stations from demanding retransmission consent terms that would restrict an MVPD's ability to negotiate in good faith with out-of-market stations that have historically been carried on systems that lie outside the geographic zone of exclusivity defined in the Commission's rules. Broadcasters' arguments to the contrary do not withstand scrutiny and must be rejected.

The broadcasters argue that, in order to preserve the geographic exclusivity rights that they have bargained for with networks and syndicators, in-market stations must be permitted to restrict the right of MVPDs to import out-of-market stations. The Broadcast Affiliates, for example, claim that "a rule that would effectively prohibit broadcast stations from enforcing (and

MVPDs agreeing to honor) their bargained-for exclusivity rights would unsettle the interlocking scheme of statutes and regulations that govern the video programming distribution ecosystem[.]"[240] NAB similarly asserts that "[t]he FCC's good faith authority cannot conceivably stretch to abrogate contractual exclusivity rights that broadcasters separately negotiate with their network and syndicated program suppliers."[241] Yet, again, ACA's proposal is extremely limited and would apply only to contractual provisions that would restrict MVPDs from importing historically carried out-of-market signals that are not covered by the network non-duplication and syndicated exclusivity rules. There is therefore no basis for any concern that ACA's proposal would interfere with an in-market station's bargained-for exclusivity rights, so long as those rights are consistent with Commission policy to permit such rights only within a specific (but generous) geographic zone.

NAB's argument that it would be "frivolous for MVPDs to argue that a broadcaster's exercise of its bargained-for exclusivity rights under legal programming contracts violates the requirement to negotiate retransmission consent in good faith" is similarly hyperbolic.[242] ACA's proposal is designed to guarantee that parties that have the duty to negotiate in good faith are not permitted to enter into third-party contracts that prohibit them from doing so. The Commission already applies this principle by prohibiting a broadcaster from entering into retransmission consent agreements that would restrict its ability to negotiate in good faith with another MVPD.[243] Although the Commission previously declined to interpret its rules to include geographic restrictions contained in a network affiliation agreement, there is no policy justification for permitting an in-market broadcaster and MVPD to enter into an agreement that prohibits the MVPD's carriage of another broadcast station that it has historically carried.

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[240] Broadcast Affiliates Comments at 28.

[241] NAB Comments at 42.

[242] *Id.* at 24.

[243] 47 C.F.R. § 76.64(b)(1)(iv); 2005 Good Faith Order, ¶ 34.

Finally, the Commission should reject claims that because STELAR Section 103 prohibits broadcast stations only from limiting an MVPD's ability to retransmit an out-of-market significantly viewed station, stations must necessarily be permitted to restrict an MVPD's ability to retransmit other out-of-market stations.[244] As discussed in Section III.A above, the Commission has ample authority to adopt substantive reforms to the good faith rules, and nothing STELAR Section 103 limits the Commission's authority to expand the prohibition on limiting an MVPD's ability to retransmit out-of-market stations to include stations that are historically carried but not "significantly viewed." To the contrary, Congress's decision to prohibit restrictions on the exportation of significantly viewed signals evinces a broader concern that viewers retain access to important local out-of-market signals.

4. The Existing Good Faith Rules Are Inadequate to Protect Against the Loss of Historically Carried Out-of-Market Signals.

Broadcast Affiliates argue that "no blanket prohibition on local stations' exercise of valid contractual exclusivity is necessary, because the existing good faith test has long been adequate to evaluate negotiations for out-of-market carriage."[245] But this argument is belied by the fact that MVPDs are increasingly unable to enter into retransmission consent agreements allowing them to carry out-of-market signals in historically offered areas. In the 2005 Good Faith Order, the Commission determined that "it is incumbent on broadcasters subject to [contractual restrictions on their ability to negotiated for out-of-market carriage] that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal to at least inquire with its network whether the network would waive the limitation with respect to the

[244] Scripps Comments at 12 ("Apart from significantly viewed stations, STELAR plainly leaves it to the parties to negotiate restrictions on the importation of out-of-market, duplicating signals."); Broadcast Affiliates Comments at 26 ("Beyond the constraint imposed by STELAR, Section 325 plainly anticipates that the terms and conditions of – including restrictions upon – retransmission of a station's signal are to be dictated by private negotiations, not Commission regulation.").

[245] Broadcast Affiliates Comments at 27.

MVPD in question."[246] In adopting this interpretation, the Commission anticipated that such waivers would not be unreasonably withheld. This expectation has not been met, and more and more historically carried out-of-market stations are refusing to negotiate in good faith, citing restrictions in their affiliation agreements.

Because the Commission's existing interpretation of an out-of-market station's duty to negotiate in good faith is no longer serving the public interest, the Commission should reverse its determination, at least with respect to historically carried out-of-market stations, to ensure that they do not voluntarily restrict their ability to negotiate in good faith.

F. Conditioning Retransmission Consent on an MVPD's Acceptance of Prices, Terms, and Conditions for After-Acquired Stations or Unlaunched Programming Networks.

In its comments, ACA urged the Commission to deem conditioning the grant of retransmission consent on agreement to set prices, terms, and conditions for carriage of unlaunched, untested, and in some cases unidentified programming networks and after-acquired broadcast stations ("prospective programming") to be considered a *per se* violation of the obligation to negotiate in good faith, or, at the very least, evidence of bad faith under the totality of the circumstances test.[247] In the case of after-acquired market clauses, broadcasters are able to extract higher prices from MVPDs for stations that are under existing contracts not by negotiating price increases justified by an increase in the value of the station in its market, but simply by acquiring the right to operate or own the station. In the case of conditioning retransmission consent on the carriage of unlaunched, untested, and often un-identified programming networks, broadcasters force agreement to arbitrary prices, terms, and conditions on MVPDs who are unable to bargain effectively for something they can neither see nor

[246] 2005 Good Faith Order, ¶ 35.

[247] ACA Comments at 71-76. AT&T also mentioned the practice of retransmission consent conditioned on carriage of a "currently non-existent, national or regional cable channel that would not itself be subject to the retransmission consent regime" in its comments on the problems of forced bundling. *See* AT&T Comments at 15.

measure. BEK Communications Cooperative, a small triple-play provider in North Dakota, described the pain of being forced to agree to carry "future content, sight unseen, when the content becomes available" at set prices, terms, and conditions as harmful to BEK, its business model, and its customers.[248] The results are profoundly unfair and de-stabilizing to operator finances and should no longer be tolerated by the Commission.

Only one broadcaster, Gray, opposed the proposal to deem setting prices, terms, or conditions for after-acquired stations or unlaunched programming networks as a violation of the obligation to negotiate in good faith. Gray argued that "after-acquired station" or "after-acquired system" clauses are part of nearly every retransmission consent agreement and are often included as an efficient means by which the entire relationship of the two parties are governed, rather than looking to dozens of agreements covering a different station or system.[249] Notably, not a single broadcaster attempted to defend the practice of setting prices, terms, or conditions for unlaunched programming networks in its comments.

The fact that after-acquired market clauses are widely found in retransmission consent agreements should not be considered dispositive by the Commission in evaluating reform of its good faith rules to prevent the conditioning of retransmission consent on acceptance of set prices, terms, and conditions for such stations or systems. To be clear, coordinated retransmission consent negotiations by separately owned, same market broadcasters was also a practice that was widely found in the market before the Commission found it to be a *per se* violation of its good faith rules. Moreover, prohibiting the mandatory conditioning of retransmission consent on an MVPD's acceptance of set prices, terms, and conditions for prospective programming would not prevent willing broadcasters and MVPDs from agreeing to

[248] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Written Ex Parte Communications of BEK Communications Cooperative at 2-3 (Dec. 1, 2015) ("BEK Ex Parte").

[249] Gray Comments at 8-9.

enter into comprehensive retransmission consent agreements that govern systems or stations that are later acquired where the parties each find such clauses to be an efficient means of negotiation, as Gray suggests. It would merely prohibit a negotiating party from insisting that acceptance of such a prospective programming provision is a condition of gaining retransmission consent for a particular station or stations.

The record shows that smaller MVPDs in particular oppose inclusion of after-acquired station or system clauses in their retransmission consent agreements, but are unable to negotiate them out of their deals with broadcasters who possess far greater negotiating leverage.[250] Commission action to prevent conditioning retransmission consent on an unwilling MVPD's acceptance of set prices, terms, and conditions for prospective programming would improve the negotiating environment for retransmission consent without unduly constraining the ability of broadcast stations to negotiate and receive compensation based on the value of the signal desired by the MVPD.

G. Discrimination by an MVPD-affiliated Broadcast Station Based on Vertical Competitive Effects.

In its initial comments, ACA argued that the Commission should deem discrimination by MVPD-affiliated top four-rated broadcast stations based on vertical competitive effects to be a *per se* violation of the duty to negotiate in good faith, but barring that, it should at least be considered evidence of bad faith under the totality of the circumstances test.[251] ACA explained that economic analysis and the Commission's own precedent recognize that discrimination

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[250] ACA Comments at 73-75; BEK Ex Parte at 3. NAB arguments against any changes to the good faith rules on the grounds that evidence is lacking that broadcast stations have undue leverage in retransmission consent negotiations point exclusively to negotiations with "AT&T/DirecTV, Verizon, DISH, Charter/Time Warner/Bright House and other large providers," ignoring the significant negotiating imbalance between a small market MVPD and a top-four affiliated broadcast station serving 100 percent of its market. *See* NAB Comments at 14-15.

[251] ACA Comments at 76-79.

based on vertical competitive effects is inconsistent with competitive marketplace considerations,[252] and therefore it is permitted to be deemed in violation of the good faith rules.

No party argued against Commission recognition that discrimination by a vertically integrated entity should be a violation of the good faith rules. In fact, several broadcasters agree that entities that own or control both an MVPD and a broadcast station that operate in the same market "pose special concerns and warrant special regulatory oversight to assure fairness and a competitive marketplace."[253] As News-Press notes, while Section 325 makes clear that the rates, terms, and conditions negotiated by both broadcasters and MVPDs need not be identical in every retransmission consent agreement within a given DMA, any difference "must be based on the functioning of a competitive marketplace, rather than unfair advantages created based on common ownership or control."[254]

MVPDs and broadcasters see eye to eye on few matters in this proceeding. ACA encourages the Commission to recognize the exceptional nature of their agreement on the issue of discrimination based on vertical effects, and take action by deeming discrimination by MVPD-affiliated top four-rated broadcast stations based on vertical competitive effects a *per se* violation of its good faith rules, or at the very least, evidence of bad faith under the totality of the circumstances test.

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[252] The Commission has previously determined that "[p]roposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (e.g. other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition" are presumptively inconsistent with competitive marketplace considerations. 2000 Good Faith Order, ¶ 58. This standard is met when MVPD-affiliated top four-rated broadcast stations use their significant market power to harm their MVPD rivals by demanding higher prices based on vertical competitive effects.

[253] Broadcast Affiliates Comments at 25; *see also* News-Press Comments at 12 ("MVPDs that own or control local broadcast stations or a broadcast network are in a special category and should not be able to use their collective negotiating leverage to create an un-level playing field in retransmission consent negotiations[.]").

[254] News-Press Comments at 12, *citing* 47 U.S.C. § 325(b)(3)(C).

V. THE RECORD SUPPORTS RECOGNITION OF NEGOTIATING TERMS BASED ON MFN PROVISIONS OR DEMANDING MFNS AS EVIDENCE OF BAD FAITH UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST

Recognizing that MFNs can be either pro- or anticompetitive, depending on circumstances, ACA asked the Commission to consider both negotiation terms based on MFN provisions and demands for MFNs to be evidence of bad faith under the totality of the circumstances test. Such provisions can, in some circumstances, prevent the negotiating parties from achieving an agreement between themselves that is mutually acceptable, and they permit a third-party to effectively raise its rivals' costs in an unrelated transaction.[255]

Several broadcasters argue against adopting a good faith rule concerning negotiation of terms based on MFNs on the grounds that MFNs are substantive provisions that are widely used by both MVPDs and broadcast stations that are not inherently anticompetitive.[256] ACA agrees that MFNs are widely used and that they are not inherently inappropriate or anticompetitive. However, the fact that MFNs, like after-acquired station or system provisions, are widely found does not necessarily mean that they are either desirable or cause no harm. The Commission was not persuaded to permit coordinated negotiations of separately owned, same market broadcast stations just because the practice had become common among broadcasters.

In general, only the larger MVPDs are able to secure MFNs from broadcasters, and, as the record shows, they can act as a pricing floor below which broadcasters will not sell to smaller MVPDs, even when such a sale would be mutually beneficial to the negotiating

[255] ACA Comments at 80-84.

[256] Broadcast Affiliates Comments at 19 (MFN provisions are substantive terms that appear in various carriage agreements and are widely used, particularly by MVPDs); Scripps Comments at 9-10 (MFNs are core terms of retransmission consent agreements that are widely used and should not be constrained by regulation); News-Press Comments at 9 (MFNs are commonly used in various kinds of negotiations within the television and other industries; there is nothing inherently inappropriate in their use). Nexstar, which commented at length about its problems with the majority of the NPRM's proposals, noted the proposal concerning MFNs, but refrained from taking a position in its initial comments. *See* Nexstar Comments at 27.

parties.[257] ACA's proposal that negotiating positions based on MFNs be considered evidence of bad faith under the totality of the circumstances test reflects its agreement with the proposition that MFNs are not inherently anticompetitive, but rather can have anticompetitive or anti-consumer effects in particular cases, and therefore should be evaluated on a case-by-case basis. This would permit the Commission to evaluate whether, under the totality of the circumstances, negotiating positions based on MFNs reflect the presence or absence of good faith in a particular case.

VI. CONCLUSION

The Commission can ensure that its existing good faith rules serve as correctives to current marketplace problems and abuses by eliminating presumptions that enable broadcasters to engage in harmful practices, and by providing more guidance on acts and proposals by negotiating entities that would be *per se* violations or evidence of violations under the totality of the circumstances test consistent with ACA's advocacy. Despite their voluminous filings and numerous protestations, broadcasters have failed to demonstrate that the marketplace and Commission's rules are working to protect consumers and that maintenance of the status quo for retransmission consent negotiations would serve the public interest. The time for change in the Commission's good faith rules, long overdue, has arrived.

[257] ACA Comments at 80-84.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

By: Barbara Esbin

Barbara S. Esbin
Scott C. Friedman
Madeleine Goldfarb
Cinnamon Mueller
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 872-6811

Attorneys for American Cable Association

Matthew M. Polka
President and CEO
American Cable Association
875 Greentree Road
Seven Parkway Center, Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government Affairs
Mary Lovejoy
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

January 14, 2016