

April 14, 2016

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Implementation of Section 103 of the STELA Reauthorization Act of 2014 – Totality of
the Circumstances Test, MB Docket Nos. 15-216, 10-71
Ex Parte Communication

Dear Ms. Dortch:

The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the “Affiliates Associations”), hereby submit the following presentation in opposition to the efforts of multichannel video programming distributors (“MVPDs”) to convince the FCC to use the current review of the good faith negotiation rules to distort and disrupt, in their favor, today’s properly functioning retransmission consent marketplace.

The Affiliates Associations represent hundreds of local television stations that have negotiated tens of thousands of retransmission consent agreements. These negotiations have only very rarely resulted in service disruptions of any kind. In the few instances where service disruptions have occurred, they were nearly always settled in a very short time and without FCC involvement.

The Affiliates Associations already have provided through timely filed comments and reply comments substantial evidence in this proceeding to demonstrate that pro-MVPD changes to the good faith bargaining rules are unwarranted because: (1) only an infinitesimally small number of retransmission consent negotiations result in any disruption to viewers; (2) MVPDs are big businesses perfectly capable of conducting their own negotiations without government assistance; and (3) MVPDs’ allegedly “pro-consumer” proposals are just thinly veiled efforts to boost profit margins and drain from broadcasters the essential capital needed to support the high-quality local news, sports and entertainment programming that is only provided by local television stations.¹ The MVPDs participating in this proceeding have provided no meaningful rebuttal to these points. Instead, they continue to ask the FCC to insert itself into negotiations that Congress intended to be private through a myriad of new regulations that would impede

¹ See Reply Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, MB Docket No. 15-216, filed Jan. 14, 2016 (“Affiliates Association Reply Comments”); Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, MB Docket No. 15-216, filed Dec. 1, 2015 (“Affiliates Associations Comments”).

rather than smooth negotiations and place the government's thumb decidedly on the MVPD side of the scale.

This letter addresses three of the MVPDs' most persistent, dangerous, and overreaching proposals for new FCC regulations: (1) forced carriage; (2) prohibition on bundling; and (3) elimination of service disruptions during "marquee" programming events. For the reasons described below and previously stated by the Affiliates Associations, the National Association of Broadcasters ("NAB"), and others, FCC regulation in any of these areas would be unlawful, unwise, and contrary to the public interest.

I. FORCED CARRIAGE VIOLATES THE COMMUNICATIONS ACT.

As they have for years, MVPDs and their allies continue to push the FCC to adopt rules that would force broadcasters to allow continued carriage of their signals during contract disputes and under other assorted circumstances. Most recently, the American Television Alliance ("ATVA") filed an *ex parte* letter reasserting that the FCC has ancillary authority to order forced carriage under several provisions of the Communications Act, particularly as a remedy for demonstrated bad faith negotiations.² ATVA is wrong, and the FCC's adoption of the forced carriage rules ATVA requests would not withstand court scrutiny.

As NAB has argued extensively and the FCC has recognized repeatedly, Section 325(b)(1)(A) of the Act permits MVPD retransmission of local television broadcast stations that elect retransmission consent only upon the consent of each station.³ This section unambiguously creates the right to retransmission consent and prohibits MVPD signal carriage absent that consent. That ought to be the end of the debate when it comes to any form of forced carriage by the government.

MVPDs nonetheless argue that other, unrelated provisions of the Communications Act give the FCC sufficient authority to adopt forced carriage when it determines that a broadcaster has negotiated retransmission consent in bad faith.⁴ ATVA specifically argues that Congress's

² See American Television Alliance, Ex Parte Communication, MB Docket Nos. 15-216 and 10-71, filed March 25, 2016, at 7-10 (the "ATVA Letter").

³ See 47 U.S.C. § 325(b)(1)(A); see also, e.g., Amendment of the Commission's Rules Related to Retransmission Consent, *Notice of Proposed Rulemaking*, 26 FCC Rcd 2718, 2728 (2011) (2011 NPRM) (Section 325(b)(1)(A) "expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent"); see also, e.g., Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, and 10-71, filed Mar. 17, 2016, at 4-20; Affiliates Associations Comments at 53-58; Affiliates Associations Reply Comments at 37-38.

⁴ See, e.g. Reply Comments of Prof. James B. Speta, MB Docket No. 15-216 (Jan. 14, 2016).

grant of authority to the FCC to adopt rules regarding good faith negotiations effectively gives the FCC authority to revoke broadcasters' right to withhold retransmission consent.⁵ This argument has no merit because it is well-established that the FCC cannot simply eliminate an unequivocal statutory directive by exercising its discretion to regulate parties' compliance with that directive. In *MCI Telecommunications Corp.*, the FCC read its authority to "modify" the mandatory tariffing regime in Section 203 of the Act to permit the agency to eliminate the statutory tariffing requirement and make the filing of tariffs permissive for some carriers.⁶ The Supreme Court reversed the FCC, holding that the FCC's authority to modify the requirements for mandatory filing of tariffs did not give it authority to eliminate entirely the filing requirement.⁷ Likewise, here the FCC's authority to adopt rules governing the good faith negotiation of retransmission consent does not give the FCC the right to effectively repeal Section 325(b)(1)(A) by ordering forced carriage. While ATVA and its MVPD allies are inviting the FCC to go down that road, if it does, the result will be reversal as in *MCI Telecommunications Corp.* The Communications Act simply prohibits retransmission without broadcasters' consent, and the FCC's authority over good faith negotiations cannot change that.⁸

⁵ See ATVA Letter at 7-8 (citing 47 U.S.C. § 325(b)(3)).

⁶ *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 512 U.S. 218, 233-34 (1994).

⁷ See *id.*

⁸ Some MVPDs have suggested that analogies from labor law might give the FCC authority to intervene in retransmission consent negotiations that are not settled through good faith negotiations. See, e.g., Letter from Seth A. Davidson, Counsel for Mediacom Communications Corporation, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 15-216, filed Mar. 3, 2016 (advocating forced carriage during "cooling-off period"). The reality is that Congress has not provided the FCC, any other agency, or the courts with the necessary authority to intervene in these negotiations to order forced carriage. Indeed, even in the labor law context, Congress has closely circumscribed the courts' ability to intervene even in the most contentious good-faith labor negotiations. Congress expressly empowered the courts to intervene in labor disputes to require a "cooling off" period only under certain circumstances that threaten national security.⁸ See 29 U.S.C. §§176-180. Since retransmission consent disputes are unlikely to ever threaten national security, Congress did not see fit to add such an exception to Section 325, which clearly and unequivocally requires broadcaster consent to any retransmission. Thus, the power that some MVPDs would invest in the FCC to intervene in retransmission consent disputes would be much greater than that Congress has granted the courts or the Department of Labor to help settle labor disputes. No authority exists for the proposition that the good faith bargaining rules were intended to confer on the FCC the unchecked power to effectively strip broadcasters of their retransmission consent rights to settle a contentious negotiation.

Finally, ATVA's citation to *Time Warner Cable* as authority for abrogating broadcasters' rights under Section 325(b)(1)(A) also is unavailing.⁹ ATVA claims the FCC's grant of an injunction against Time Warner Cable for unlawfully discontinuing carriage of ABC network stations during a sweeps period in 1990 somehow undermines Section 325's prohibition on MVPD retransmission of stations without consent today. But the FCC's decision in *Time Warner Cable* does not remotely support MVPDs' requests for forced carriage as a result of failed retransmission consent negotiations. In that case the FCC merely enforced a specific and unique statutory limitation on Section 325(b)(1)(A) that prohibited MVPDs from dropping broadcast signals during a sweeps period.¹⁰ The agency made clear that once the sweeps period ended, continued carriage would be unlawful under Section 325(b)(1)(A).¹¹ In any event, the sweeps restriction in Section 614 of the Act was repealed by STELAR, so the Communications Act now includes no such specific limitations on MVPDs' obligation to obtain consent to carry local TV stations that would justify forced carriage.¹²

ATVA's reliance on *Alliance for Community Media* is even further afield and less relevant to the question of whether the FCC may order forced carriage.¹³ In that case, the Sixth Circuit Court of Appeals upheld the FCC's adoption of: (1) a deadline for local franchising authorities ("LFAs") to act on proposals for competitive local cable franchises; and (2) the remedy of requiring an LFA to deem a franchise granted if an LFA failed to act within that deadline. These rules were adopted to implement an explicit Congressional directive that prohibited LFAs from unreasonably denying competitive cable franchises.¹⁴ The FCC's position with respect to broadcasters and retransmission consent couldn't be more different than its position with respect to LFAs and local franchising. Congress has given broadcasters the right to grant or withhold retransmission consent; in the local franchising context, Congress removed most of the LFAs' discretion to grant or deny competitive franchises. So while FCC imposition of a franchise was held to be a reasonable remedy for an LFAs' failure to timely grant a competitive franchise, the remedy of forced carriage makes no sense as a remedy for failure to negotiate to grant a right that is entirely within a broadcasters' discretion to grant or withhold.

⁹ See ATVA Letter at n.24 (citing *Time Warner Cable*, 15 FCC Rcd 7882 (Cab. Serv. Bur. 2000)).

¹⁰ It is worth noting that in this case, ABC had offered Time Warner Cable an extension to continue carrying the stations during the sweeps period but that Time Warner Cable rejected the extension in an effort to gain leverage against ABC at its subscribers' expense. *Time Warner Cable*, 15 FCC Rcd at 7884.

¹¹ See *id.*, 15 FCC Rcd at 7884-86.

¹² STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059, § 105 (2014).

¹³ See ATVA Letter at n.24 (citing *Alliance for Community Media v. F.C.C.*, 529 F.3d 763 (6th Cir. 2008)).

¹⁴ 47 U.S.C. § 541(a)(1).

As ATVA points out, MVPDs have dumped hundreds of pages of comments into the record demanding forced carriage,¹⁵ but the reality is that not a single one of those pages establishes the FCC's legal authority to order that remedy. No such authority exists. Congress prohibited carriage of broadcast signals without a broadcasters' consent. Any abrogation of that principle by the FCC will violate the Communications Act.

II. BUNDLING IS A STANDARD, PRO-COMPETITIVE FEATURE OF VIDEO CONTENT AGREEMENTS AND THE COMMISSION LACKS AUTHORITY TO SINGLE OUT AND PUNISH BROADCASTERS FOR USING IT IN RETRANSMISSION CONSENT NEGOTIATIONS.

The FCC also should reject MVPDs' call for restrictions on broadcasters' right to bundle multiple programming services into retransmission consent agreements. In the first place, MVPDs more or less built today's video services marketplace and perfected the practice of bundling multiple video services into a single deal. That was in the 1980s and 1990s when broadcast stations cost nothing to carry and the MVPD industry was so vertically integrated that Congress felt it had to step in and adopt the program access and program carriage provisions of the 1992 Cable Act. To hear MVPDs ask the FCC to prohibit broadcasters from using the same practices that the MVPDs used for years in their own programming endeavors is the height of hypocrisy.¹⁶

In reality, there is no such thing as the "forced bundling" that MVPDs describe, for the simple reason that broadcasters don't have the ability to "force" MVPDs to do anything. When a

¹⁵ ATVA Letter at 7.

¹⁶ Moreover, while MVPDs complain about bundling, they constantly demand that broadcasters grant them distribution rights for distribution platforms that go beyond the traditional MVPD platforms that retransmission consent was designed to cover. Members of the Affiliates Associations report that many cable operators and both satellite carriers demand the rights to offer their subscribers in-home and out-of-home video streaming rights and the right to distribute broadcasters' signal over the Internet bundled with more traditional distribution rights. In many cases these demands are for rights that broadcasters haven't even been granted by their programming partners. When informed of this, MVPDs then demand that broadcasters promise to grant them such rights as soon as they are granted by the broadcasters' programming partners. These demands put broadcasters in the impossible position of choosing between (1) granting MVPDs rights that would put the broadcaster in breach of its programming agreements; or (2) promising the MVPDs that they will grant such rights in the future – before the broadcaster even sees the terms on which those rights may be granted by programming partners. To the extent that the current retransmission consent marketplace includes any "forced bundling," it is this insistence by MVPDs that broadcasters grant them rights that would allow MVPDs to bundle their future service offerings. As with other retransmission consent issues, broadcasters have chosen to negotiate these issues with MVPDs in good faith rather than seek government intervention to stop MVPDs' abusive practices.

television station elects retransmission consent, it takes the risk that it will not be carried on one or more MVPD systems.¹⁷ MVPDs always have the option of deciding not to make a deal with a broadcaster that is seeking to bundle its station with other video programming. Broadcasters have no recourse if the MVPD makes that decision. But the freedom to say “no” is not enough for the MVPDs; they want the FCC to tell broadcasters that local television stations can’t even ask for a deal that bundles multiple video services unless their bundled offers comply with a complex set of standards proposed by the MVPDs.

The argument that it is bad faith to seek to bundle multiple programming services together as part of a retransmission consent agreement has no foundation in law or logic. Congress specifically recognized when it enacted retransmission consent that broadcasters might bundle their signals with other programming services.¹⁸ And the FCC specifically recognized that the practice should not be prohibited in its original good faith negotiation order.¹⁹ Since then, and following Congress’s lead, the FCC has wisely refrained from trying to micromanage the rates, terms, and conditions of retransmission consent agreements out of proper respect for Congress’s desire to establish a free market for retransmission consent negotiations.²⁰ In that free market, the broadcasters and MVPDs should be permitted to structure their relationship according to the dictates of the marketplace, not arbitrary rules proposed by one side or the other and ratified by the government. MVPDs’ invitation to outlaw bundling in retransmission consent negotiations would violate that principle and flout Congress’s will.

ATVA’s analogies to labor law concepts of “mandatory” and “non-mandatory” subjects of bargaining in the retransmission consent context are entirely misguided.²¹ While labor negotiations and retransmission consent negotiations both require good faith among the parties, the similarities between these two regimes basically end there. Congress enacted the National Labor Relations Act (“NLRA”) to remediate a national labor market characterized by strike-

¹⁷ And that risk is real – most MVPDs seek to include provisions in their agreements that permit them to drop or cease paying a station if the station loses its network affiliation. Broadcasters don’t complain to the FCC about that; they try to bargain on that issue.

¹⁸ See S. Rep. No. 92, 102nd Cong., 1st Sess. at 35-36 (1991) (“Senate Report”) (stating that broadcasters may negotiate “other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or *the right to program an additional channel on a cable system*”) (emphasis added).

¹⁹ 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, 5470 (2000).

²⁰ See, e.g., *Northwest Broadcasting, L.P. v. DirecTV*, 30 FCC Rcd 12449, 12453 (Med. Bur. 2015); *ACC Licensee, Inc. v. Shentel Telecommunications Company*, 27 FCC Rcd 7584, 7590 (Med. Bur. 2012); *Mediacom Communications Corp. v. Sinclair Broadcasting Group, Inc.*, 22 FCC Rcd 35, 41 (Med. Bur. 2007).

²¹ ATVA Letter at 3-5.

breaking, widespread employee dislocation, and violence on a massive scale.²² Congress passed the retransmission consent and good faith bargaining rules to make sure that a free market would exist for broadcasters to sell MVPDs the right to retransmit television signals.²³ The NLRA has been subject to decades of long-running disputes and litigation leading to the development of complex doctrines like the *Borg-Warner* doctrine ATVA cites. The retransmission consent statute has led to a situation where practically every negotiation settles in a timely manner; where even negotiations that go to dispute are settled in a very short time; and where no cases have produced even a single written judicial opinion, let alone the development of complex doctrine. Before the FCC willy-nilly imports principles of labor law like “mandatory” and “non-mandatory” subjects for bargaining into the retransmission consent process, it should consider carefully which model it prefers. The retransmission consent process the FCC has thus far championed clearly better serves the public interest.

ATVA’s defense of its bundling proposal leaves no doubt that adoption of it would drag the FCC down the rabbit-hole of endless litigation and dispute. ATVA starts from the simple (though erroneous) proposition that the good faith negotiation rules should require broadcasters to negotiate solely for the primary signal of each station.²⁴ But it quickly moves to arguing that the FCC should adopt complex standards for when a broadcaster is making a “real” offer or a “sham” offer for stand-alone retransmission of the primary signal of a local broadcast station.²⁵ These standards would require the FCC to examine the rates proposed by the broadcaster in question against deals with other MVPDs and the rates charged by other stations in other markets. This analysis would place the FCC squarely in the position of deciding whether a broadcaster’s proposed rates are reasonable, a position the agency has always avoided, remaining faithful to Congress’s commands.²⁶ The good faith bargaining rules were never intended to be and have never been used for the type of back-door rate regulation that ATVA advocates. Adopting ATVA’s proposals would lead to more good faith bargaining disputes, and greater FCC intervention in the marketplace, but there is no reason to think they would lead to a smoother functioning retransmission consent market.

Moreover, as NAB and others have shown conclusively, the “problem” of bundling that the MVPDs are trying to “solve” is actually a practice that creates substantial public benefits.²⁷

²² See NLRA, 29 U.S.C. § 151 (legislative findings leading to adoption of NLRA).

²³ See Senate Retransmission Consent Report at 36 (“It is the Committee’s intention to create a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee’s intention in this bill to dictate the outcome of the ensuing marketplace negotiations.”).

²⁴ See ATVA Letter at 3-5.

²⁵ See *id.* at 5-6.

²⁶ See n.17, *supra*.

²⁷ See, e.g., Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary,

The record in this proceeding establishes that “bundling is extremely common in competitive markets, and generally has procompetitive effects,” benefitting consumers by “lowering prices.”²⁸ Moreover, economists are in agreement that bundling generally increases viewers’ programming options by “allowing the seller to offer content that can be profitably supplied only if bundling is used.”²⁹ This opens the opportunity for broadcasters to economically serve diverse and underserved audiences.³⁰ ATVA and the MVPDs have failed to provide any evidence that their proposals would provide viewers with any benefits to go along with the decreased competition, higher prices, and lower levels of diverse programming that would accompany adoption of their restrictions on bundling.³¹

The bottom line is that broadcasters’ supposed “forced bundling” proposals in retransmission consent agreements do not “force” MVPDs to do anything, and they are aimed at (and, in fact, accomplish) improved service to TV viewers. The MVPDs’ proposals to regulate bundling are unsupported by the Communications Act, would involve the FCC and negotiating parties in endless disputes, and, if successful, would reduce viewers’ programming choices and increase the prices they pay for multichannel video service. These proposals should be rejected and the FCC should affirm that the good faith rules place no restrictions on broadcasters’ efforts to negotiate retransmission consent contracts that include multiple video services.

III. MVPDS’ FOCUS ON “MARQUEE PROGRAMMING” IS A DIVERSION DESIGNED SOLELY TO INCREASE MVPDS’ LEVERAGE IN NEGOTIATIONS.

MVPDs’ proposals that the FCC should intervene in setting the expiration dates for retransmission consent agreements are every bit as misguided as their forced carriage and bundling proposals. The term of the agreement and the accompanying end-date are issues that

FCC, MB Docket Nos. 15-216, and 10-71, filed April 5, 2016, at 4 (“NAB April 5 Letter”) (collecting record evidence). *See also* Affiliates Associations Comments at 38-44; Affiliates Associations Reply Comments at 34-36.

²⁸ *See* Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at ¶¶ 36, 40 (Feb. 2016), attached to NAB Written Ex Parte Communication, MB Docket Nos. 15-216, 10-71 (Feb. 16, 2016) (the “Economists Incorporated Study”). *See also, e.g.*, Affiliates Associations Reply Comments at 34-36.

²⁹ *See* Economists Incorporated Study at ¶ 45.

³⁰ *See id.* at ¶ 47.

³¹ The MVPDs also have failed to explain why state and federal laws designed to constrain anti-competitive behavior are insufficient to address alleged bundling abuses. There is no reason for the FCC to wade into this area of law when the Communications Act says nothing about bundling while a well-developed body of state and federal law administered by other federal agencies already includes clear rules regarding the marketing of bundled goods and services. *See* Affiliates Associations Comments at 38-44; Affiliates Associations Reply Comments at 36.

are an important part of every retransmission consent negotiation. Today the parties are able to negotiate term and expiration date in the context of the give and take of a complex agreement that may have twenty or more issues that are heavily negotiated. What the MVPDs are asking for is for the FCC to permanently take those issues off the table and make all contractual expiration dates favorable to MVPDs.

As the Affiliates Associations and NAB have correctly pointed out, this proposal would be practically impossible to administer.³² The FCC would need to define what constitutes “marquee programming,” an inherently vague concept that could apply to any programming event – planned or unplanned – that garner higher than average ratings. Depending on how liberally the FCC construes “marquee programming,” the calendar would then be dotted with dates on which an agreement could not expire. Any station group with affiliates of all four major networks likely would find it nearly impossible to identify a date that was more than 30 days removed from such programming events. In the event that a few dates could be found when a retransmission consent agreement would actually be permitted to expire by rule, the effect would be the FCC setting by regulation the expiration date and simultaneous, massive service disruption. And presto, what today is a subject for back-and-forth negotiations tomorrow would be set by government order. That is not what Congress had in mind when it established a free market mechanism for retransmission consent.

That is just the start of the FCC market intervention that MVPDs demand. They also ask the FCC to force broadcasters to permit them to carry “marquee” events if they occur during a dispute or service interruption. For all the reasons discussed in Section I above, this kind of forced carriage would be unlawful. And it is also a terrible idea based on the market principles that are supposed to drive retransmission consent. The value of retransmitting a local television signal is based in large part on a station’s ability to deliver large audiences. Forcing broadcasters to permit carriage of its most-watched programming would artificially devalue each station’s right to grant retransmission consent. Section 325 permits broadcasters to bargain in good faith for carriage of their signals – it does not require them to give up their most valuable programming for free and bargain only for retransmission of non-“marquee” programming.

Of course, the MVPDs claim that they are trying to protect their subscribers from disruption of service during the most attractive programming. But like so many of their proposals in this proceeding, the result is likely to be precisely the opposite. Today most negotiations that are not completed by a contract’s expiration date are extended until the parties can work out a solution. That is one of the main reasons that any service disruptions are so rare. If broadcasters cannot decline retransmission consent within 30 days of a “marquee” event, such extensions will be less likely to be granted because they likely would bring the parties within the 30-day window of some “marquee” event. Parties that would have extended their agreement and come to a resolution before any service disruption would be forced to resort to such disruptions.

³² See, e.g., Affiliates Associations Comments at 32-33; Affiliates Associations Reply Comments at 25-27; NAB April 5 Letter at 5-6.

There is a “marquee” programming problem in the video services market, but it isn’t the one that the MVPDs have identified. Rather, the problem is that free over-the-air television stations are finding it harder and harder to compete with non-broadcast outlets for the most desired programming. The NCAA college football championship playoffs, the finals of three tennis Grand Slam events, both the NBA’s conference finals, the NHL All-Star Game, the NFL Pro-Bowl, and other major events now are available only to viewers with an MVPD subscription. The reason these events now appear only on MVPD channels is because obtaining the rights to air them is extremely expensive, and the rights fees are simply outside the budget of broadcast stations. But they aren’t outside the budget of national and regional programming networks. Why? Because MVPDs pay double or more for carriage of ESPN, the YES Network (New York), the New England Sports Channel, and others than they pay for significantly more popular local TV stations.³³

Nothing prohibits these MVPD channels from realizing the value of their programming through contracts with MVPDs, and nothing prohibits them from discontinuing service when a contract expires. Indeed, the cable channel that carries the Los Angeles Dodgers games in Southern California has been absent from most MVPDs systems for more than two seasons. When Congress enacted Section 325’s retransmission consent provisions, it intended to give local stations these same rights to pursue agreements that properly reflect each station’s value in its market. Congress did not intend for the FCC to use the good faith bargaining provisions as a way to keep the value of retransmission consent artificially depressed through regulations that do not apply to television stations’ competitors.

Broadcasters appreciate the fact that they have a larger public service mission than MVPD channels or local sports networks. And they accept significantly greater regulation as a consequence. But MVPDs should not be permitted to fund the competitors of broadcasters through higher licensing fees while at the same time demanding manipulation of the market to keep down the price of carrying the broadcast channels on their systems. The MVPDs’ “marquee” programming proposals are designed to do just that and should be rejected.

IV. CONCLUSION

The Affiliates Associations continue to contend that the existing good faith retransmission consent bargaining rules are functioning as Congress intended and need no

³³ See Letter from Wade H. Hargrove, Counsel for the NBC Television Affiliates, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 15-216, and 10-71, filed April 8, 2016, at 2-3.

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revision. The FCC should reject the MVPD proposals discussed above and their other proposed changes designed to tilt the retransmission consent marketplace against local broadcast stations.

Very truly yours,

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