Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

COMMENTS OF CENTURYLINK

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EXECUTIVE SUMMARY

Originally, the retransmission consent statutory framework and the Commission's implementing regulations were intended to protect broadcast stations from the marketplace advantage cable operators had in their monopolies over distribution of local video programming. Twenty years later, however, that marketplace has changed significantly. In fact, partially as a result of competition in the marketplace for video programming distribution, the tables have turned. Now the broadcast stations with the benefit of the protective retransmission consent legal framework, are exercising market power against MVPDs, and especially new entrant MVPDs, to the disadvantage of MVPDs and consumers of multichannel video programming.

CenturyLink is a new entrant MVPD and is experiencing the pain of tilted retransmission consent negotiations first hand. CenturyLink believes that it has been subject to unfairly discriminatory, higher per-subscriber rates than those paid by competitors, increased tying of less-desired content with highly-desired content, tying of national agreement terms to single market agreements, and unfair leveraging of programming exclusivity while broadcast stations provide the programming for free over the air and on the public Internet. It is time for the Commission to address these issues and create a more balanced regulatory regime that does not favor broadcast stations and incumbent video providers over new entrants in the video distribution market. Wireline entrants continue to be a significant downward pressure on incumbent cable provider rates as well as a less expensive alternative for comparable video programming in their markets. But new entrants cannot have this effect if they must pay exorbitant fees and comply with onerous conditions -- especially those more exorbitant and more onerous than established video providers -- to obtain key, consumer-desired broadcast programming.

The Commission must address the more harmful conduct of broadcasters in retransmission consent negotiations, including: (1) withdrawing carriage of a station if retransmission agreements are not completed before an existing arrangement expires; and (2) demanding arbitrary and excessive rates and onerous terms for program access. It should also address the growing practice of broadcast stations entering into arrangements to coordinate control of retransmission consent negotiations of multiple stations.

To best address these concerns given the existing statutory framework for retransmission consent negotiations the Commission should modify its rules to enable more balanced retransmission consent negotiations. Those modifications should include (1) amending its good faith standards to prohibit broadcasters' coordinated control of multiple station or proxy retransmission consent negotiations; (2) defining what constitutes "competitive marketplace considerations" as used in section 325 of the Act and (3) amending its non-duplication and non-syndication rules to permit, and prohibit restrictions on, MVPDs' temporary access to duplicate programming during unresolved or unsuccessful retransmission consent negotiations. But, the Commission should not modify its notice requirements as proposed because requiring broadcast stations and MVPDs to notify subscribers of a potential signal deletion will not be beneficial to consumers, MVPDs, or broadcast stations. Implementing these reforms should loosen the regulatory restraints on MVPDs and help re-balance retransmission consent negotiations between broadcast stations and MVPDs to the ultimate benefit of multichannel video programming customers.

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CenturyLink submits these comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding.[1]

I. INTRODUCTION

As others have recognized, federal legislation and regulations regarding retransmission consent were originally designed to protect broadcast stations from potential market power abuses of incumbent cable companies' monopolies over video distribution.[2] But the video services market has changed dramatically over the last twenty years. Now, as there are new entrants in the video distribution market, those same shielding requirements are a weapon to be wielded against multichannel video programming distributors (MVPDs), and especially new entrant MVPDs, to demand substantially higher prices and greater concessions for carriage of broadcast station signals. Ultimately, this translates into higher costs for consumers of video services.

CenturyLink began as a telecommunications company over 80 years ago. More recently, with its acquisition of Qwest Communications International Inc., it is now the third largest

[1] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) (*NPRM*).

[2] *See, e.g.,* In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, Petition for Rulemaking, MB Docket No. 10-71, filed by Time Warner Cable Inc., *et al.*, at 2-3 (Mar. 9, 2010).

telecommunications company in the United States. The company has a few existing wireline video service offerings including its Prism™ TV service in certain markets around the country and is planning to expand its Prism™ TV service, which has been launched in Fort Myers, Florida and Las Vegas, Nevada to other locations in 2011 and beyond. CenturyLink is and will be a new MVPD entrant in these markets. Prism™ TV delivers high-quality video content, a broad range of on-demand content and advanced technology and interactive features over CenturyLink's managed two-way IP network, and it provides a competitive video experience to incumbent cable and satellite companies' video offerings. But, if CenturyLink is forced to pay exorbitant fees and comply with onerous conditions in order to acquire key consumer-desired programming, it will be extremely difficult for CenturyLink to establish itself as a viable alternative video provider. Unfortunately, the tilted legislative and regulatory retransmission consent negotiation framework is enabling just such a scenario.

As a new MVPD entrant in the video market, CenturyLink has experienced retransmission consent skirmishes first hand.[3] CenturyLink believes that it has been subject to unfairly discriminatory, higher per-subscriber rates than those paid by competitors, increased tying of less-desired content with highly-desired content, tying of national agreement terms to single market agreements, and unfair leveraging of programming syndicated exclusivity, while broadcast stations contemporaneously provide such programming free over the air and, in many cases, over the public Internet. These unreasonable outcomes result from broadcast stations' exercise of market power resulting from legislation and regulations that now unintentionally tilt the balance of power decidedly in the broadcasters' favor. Furthermore, broadcasters' exercise

[3] *Ex parte* letter from Jeffrey S. Lanning, CenturyLink to Marlene H. Dortch, FCC, filed herein, Jan. 24, 2011 and its attachment; *Ex parte* letter from Vickey Callen, CenturyTel to Marlene H. Dortch, FCC, filed in MM Docket Nos. 07-198 and 07-29, Sept. 30, 2008.

of market power against new entrants like CenturyLink is two-fold. Not only is the new entrant subject to the leverage broadcast stations have over all MVPDs to withhold key local programming and other must-have programming, but it is also subject to the additional leverage broadcast stations have over new entrants to demand even higher prices and more onerous conditions than those demanded from the incumbent. In retransmission consent negotiations between a broadcast station and a new entrant MVPD, the new entrant MVPD, given the massive capital investment required, is least likely to be able to survive if it is unable to obtain must-have programming from the local broadcast station. Meanwhile, the broadcast station has the least risk if the new entrant does not carry its signal, given its ability to continue to make its programming available to other video programming distributors as well as for free over the air and on the public Internet.

It is time for the Commission to address these issues to the full extent that it is able to do so. The Commission should encourage, not discourage, competition in the video services distribution market. To do so the Commission must take steps to create a more balanced regulatory regime that does not favor broadcast stations and incumbent video providers over new entrants in the video distribution market. Studies continue to show that wireline entrants' video services continue to be a significant downward pressure on incumbent cable provider rates as well as a less expensive alternative for comparable video services in their markets.[4] But new

[4] *See, e.g.*, *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, MM Docket No. 92-266, 26 FCC Rcd 1769, 1771-72 ¶¶ 3-5, 1785 ¶ 34 (2011) (noting that compared to the overall average price for expanded basis service in effective competition communities, the average price for those services was lowest (9.6 % lower) for rival operators in communities with at least two wireline operators and the incumbent operator's average price for service was lower (1.1 % lower) in those communities as well. But, the average price for those services was

entrants cannot have this effect if they are unable to successfully invest in and enter a market due to the excessive demands of broadcast programmers.

The Commission must address some of the more harmful conduct of broadcasters in retransmission consent negotiations including: (1) withdrawing carriage of a station if retransmission agreements are not completed before an existing arrangement expires, and (2) demanding excessive, discriminatory rates and onerous terms for program access. If the Commission does not take steps to address these issues and level the playing field, new wireline entrants in the video distribution market will not arrive, nor thrive. In turn, competition in that market will not flourish and lower or temper prices, but instead will wither leaving incumbent prices unchecked. Additionally, consumer choices and significant private investments in communities will be diminished and diversity of programming will likely suffer.

To best address these concerns given the existing statutory framework for retransmission consent negotiations the Commission should modify its rules to enable more balanced retransmission consent negotiations. Those modifications should include (1) amending its good faith standards to prohibit broadcasters' coordinated control of multiple station or proxy retransmission consent negotiations; (2) defining what constitutes "competitive marketplace considerations" as used in section 325 of the Act; and (3) amending its non-duplication and non-syndication rules to permit, and prohibit restrictions on, MVPDs' temporary access to duplicate programming during unresolved or unsuccessful retransmission consent negotiations. But, the Commission should not modify its notice requirements as proposed because requiring broadcast stations and MVPDs to notify subscribers of a potential signal deletion will not be beneficial to consumers, MVPDs or broadcast stations.

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actually higher (1.2% higher) in effective competition communities where the finding of effective competition was based on DBS market share exceeding 15%).

II. THE COMMISSION SHOULD MODIFY ITS RETRANSMISSION CONSENT RULES TO ENABLE MORE BALANCED RETRANSMISSION CONSENT NEGOTIATIONS.

A. The Commission Should Modify Its Good Faith Standards To Prohibit Broadcasters' Coordinated Control Of Multiple Station Retransmission Consent Negotiations.

Currently the Commission's rules set out seven actions or practices which constitute a *per se* breach of a broadcast station's or an MVPD's obligation to negotiate retransmission consent agreement in good faith.[5] The Commission is now proposing to amend one of the existing standards and add three new standards.[6]

The Commission should adopt two of the standards it is proposing. Specifically, the Commission should make it a *per se* violation of the broadcast station's duty to negotiate retransmission agreements in good faith when the station either (1) agrees to provide a network with which it is affiliated the right to approve, or negotiate by proxy, the station's retransmission consent agreement with an MVPD; or (2) agrees to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned.[7]

Increasingly, broadcast stations, broadcast station owners, and networks, are entering into arrangements such that there is coordinated control over the retransmission consent negotiations of multiple stations.[8] An MVPD negotiating with a single broadcast station for retransmission consent already has to be concerned about losing key programming in the local market if the

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[5] 47 C.F.R. § 76.65(b)(1).

[6] *NPRM*, 26 FCC Rcd at 2729-38 ¶¶ 20-33.

[7] *Id.* at 2730-32 ¶¶ 22-23 & 2749 Appendix B.

[8] *See* Steven C. Salop, *et al.,* Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations, June 3, 2010 at pp. 53-55 (can be accessed at the website of American Television Alliance via the following link: http://97.74.209.146/downloads/broadcaster_brinkmanship.pdf).

negotiation fails. An MVPD negotiating on the other side of a coordinated control arrangement is now in the even more difficult position of potentially losing key programming in multiple markets or on multiple stations in the same local market if an agreement is not reached. A new entrant MVPD facing this onerous situation may simply be unable to enter or sustain its recent entry in one or more local markets.

The likely result of these tactics is only harm to the consumer of multi-channel video services. On the one hand, the tactics will prevent entry or drive competitive new entrant MVPDs out of the market, which will in turn reduce choices for consumers. It will also likely result in increased prices for consumers from remaining MVPDs due to both (1) higher retransmission consent costs for remaining MVPDs also subject to broadcast stations' excessive demands and (2) less competitive pressure to keep prices down. On the other hand, the new entrant may be able to stay in the market, but consumers will likely still be subject to higher prices as all MVPDs seeks to recapture their higher costs for retransmission consent. Either way, the result is at least higher prices for the consumer, and may also include reduced choice of MVPD and the inconvenience of having to switch MVPDs or opt for no MVPD at all. The Commission's proposed provisions should help to curtail the detrimental effects on consumers from this growing anti-competitive practice of broadcast stations in a market that is already skewed in their favor.

The Commission also proposes two other modifications to its retransmission consent negotiation good faith standards: that it would be a violation of those standards for a negotiating entity to (1) refuse to provide a bona fide proposal on an important issue, or (2) refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement.[9] At this time, CenturyLink does not see any benefit to adopting these proposals. What would constitute a "bona fide" proposal or an "important" issue seem likely to be highly subjective determinations that would make it difficult to apply the proposed standard in a useful, objective manner. Mandating non-binding mediation for the parties in drawn out retransmission consent negotiations, seems to require more procedural hoops without any certainty that an agreement will be reached. Mandating what may be a fruitless endeavor seems impractical and not useful for accomplishing any Commission objective.

B. The Commission Should Consider Defining "Competitive Marketplace Considerations" For Purposes Of Implementing Section 325 Of The Act.

To further address the inequities of today's retransmission consent negotiations caused by the slanted legislative framework for those negotiations, the Commission should further define "competitive marketplace considerations" as used in section 325 of the Act. As Time Warner Cable, Inc. has noted, "[b]ecause retransmission consent is a legislative construct and because many Commission rules . . . give preferences to broadcasters, retransmission consent negotiations do not occur in a genuine marketplace . . . ."[10] In turn, the Commission should interpret and define what are and are not appropriate "competitive marketplace considerations" in order to re-establish a more level, competitive marketplace.

In this vein, the Commission should define that competitive marketplace conditions do not extend to abuse of market power. The Commission has previously stated that one example of bargaining proposals that would be presumptively not consistent with competitive

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[9] *NPRM*, 26 FCC Rcd at 2732 ¶¶ 24-25 & 2749 Appendix B.

[10] *Ex parte* letter from Matthew A. Brill, Counsel for Time Warner Cable to Marlene H. Dortch, FCC, filed herein Feb. 24, 2011 at note 1.

marketplace considerations and the good faith negotiation requirement is one that "involv[ed] 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[.]"[11] The Commission should adopt this as a good faith standard.

Additionally, the Commission should identify criteria that are appropriate competitive marketplace considerations such as market size, station size, and how content is available over other platforms. Currently, MVPDs are required to negotiate retransmission consent agreements with no standard or transparency applied to how a publicly-licensed broadcast station determines its pricing, terms and conditions for fair access to its programming. In turn, MVPDs have no real ability to predict their costs for acquiring and maintaining access to local broadcast programming. This problem is further exacerbated by the retransmission consent regime which requires renegotiation of those costs every three years. Such a short time frame makes it impossible for an MVPD to accurately forecast its retransmission costs in each market for a period of time that is useful for business case planning and investment purposes. But, to the extent that the Commission identifies criteria that are appropriate competitive market place considerations, and requires broadcast stations to demonstrate use of those criteria as a good faith negotiation standard, this would enable more rational and predictable retransmission consent costs. In turn, consumers should benefit from greater stability of MVPD video service offerings and pricing.

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[11] *In the Matter of: 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 ¶ 58 (2000).

C. The Commission Should Modify Its Non-Duplication And Non-Syndication Rules To Permit MVPDs Temporary Access To Duplicate Programming During Unresolved Or Unsuccessful Retransmission Consent Negotiations.

The Commission should modify its existing non-duplication and non-syndication rules to permit MVPDs to privately negotiate carriage of affiliate programming when retransmission consent negotiations with a broadcast station in a local market are not progressing well. Currently, due to the Commission's existing non-duplication and non-syndication rules, a broadcaster can prevent a cable operator from carrying the duplicative programming of another station in the same local market or from importing duplicative programming of another station outside of the local market. This ability of broadcasters is particularly onerous on cable operators when retransmission consent negotiations are underway and not progressing well. To alleviate this regulatorily-created leverage and to create a more level negotiation table, the Commission should permit all MVPDs to negotiate to carry duplicative programming of another station in the event of stalled or unsuccessful retransmission consent negotiations with a local broadcast station. MVPDs should be permitted to negotiate such carriage at any time to be implemented in the event of loss of carriage of a local broadcast station due to stalled or unsuccessful retransmission consent negotiations with the station. And, the Commission should act to ensure that broadcast licensees, neither singularly nor in concert, create restrictions on such private arrangements.

Implementing such modifications to the Commission's rules will also potentially increase the effectiveness of the Commission's retransmission consent negotiation good faith standard. Right now, the inability of an MVPD to be able to carry a station with must-have programming if retransmission consent negotiations fail leaves most MVPDs in an untenable position. In the time it takes to bring and prove a case of a broadcast station's breach of the good faith standards, the harm to an MVPD and its customers who have lost valuable programming in the interim is significant. And, repeated instances of lost programming would be a death knell to a new entrant. New entrants cannot afford either to lose important programming or pay arbitrarily and significantly higher rates for that programming than competitors. As a result, MVPDs, especially new entrants, are more likely to acquiesce to broadcasters' unreasonable terms rather than pursue a complaint and risk the loss of key programming. But, if the MVPD has recourse to carry another station's duplicative programming when retransmission consent negotiations are unsuccessful, then it may be more likely to pursue a complaint that a broadcast station has breached its duty to negotiate in good faith.

Further, modifying the Commission's rules to enable an MVPD to carry duplicative programming when it has lost carriage of a local broadcast station due to unsuccessful or stalled retransmission consent negotiations, would also inure to the benefit of consumers. It should preclude the unnecessary interruption of access to important programming, such as news and weather, and minimize the need for consumers to suffer the inconvenience of switching video programming providers to retain desired programming.

III. THE COMMISSION SHOULD NOT MODIFY ITS NOTICE REQUIREMENTS.

Current FCC rules require "cable operator[s]" to provide written notice to any broadcast station and the cable system subscribers at least 30 days before deleting carriage of or repositioning the broadcast station.[12] Now the FCC is proposing to add a requirement that broadcast stations and any MVPDs must notify "affected subscribers of the potential deletion of

[12] 47 C.F.R. § 76.1601.

a broadcaster's signal a minimum of 30 days in advance of a retransmission consent agreement's expiration, unless a renewal or extension agreement has been executed."[13]

CenturyLink opposes this proposed rule. This rule would provide little, if any, benefit to customers or incentive to negotiating parties to successfully negotiate a new retransmission consent agreement. Under the existing rule, cable operators already must determine whether to provide 30-day advance notice of a potential disruption of service or press for the timely successful resolution of the negotiation process. Once the proposed rule is triggered, the MVPD's focus will of necessity shift to controlling the damage of the potential loss of subscribers. And, the broadcast station will now have the additional leverage of that situation to insist on its terms for its carriage.

If anything, new entrant MVPDs are likely to be most harmed by this proposed rule, in that they depend on each new subscriber to establish and maintain a profitable business. Small new entrant MVPDs are least likely to be able to tolerate loss of subscribers and subscriber good will as the result of unsuccessful retransmission consent negotiations. Meanwhile, a broadcast station is likely to experience little harm if the small new entrant ceases to carry its signal. CenturyLink agrees with those who have argued that this proposed rule would have many negative results including unnecessarily alarming consumers and causing consumers who do switch to unnecessarily bear the costs of that switch if service is not ultimately disrupted.

IV. CONCLUSION

The Commission should act promptly to rectify the market imbalance that has been created because the retransmission consent legislative and regulatory regime now places too heavy a hand on MVPDs, and especially new entrant MVPDs, in negotiating for carriage of

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[13] *NPRM*, 26 FCC Rcd at 2749 Appendix B, proposed rule 47 C.F.R. § 76.1601(b).

must-have broadcast programming. By implementing the reforms proposed above, the Commission should be able to lighten the regulatory restraints on MVPDs to enable more level retransmission consent negotiations between broadcast stations and MVPDs to the ultimate benefit of multichannel video programming customers.

Respectfully submitted,

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