

should view consumer harms of this magnitude as being beneath notice.”⁶⁵

Other commenters are in full accord with ACA's analysis of the public interest harms of coordinated negotiations. Time Warner Cable notes the “anticompetitive nature” of coordinated retransmission consent negotiations, and asks the Commission to “ensure that consumers do not suffer the obvious harms of price-fixing among competing stations.”⁶⁶ CenturyLink notes that an MVPD negotiating on the other side of a coordinated arrangement “is now in the even more difficult position of potentially losing key programming in multiple markets on multiple stations in the same local market if an agreement is not reached.”⁶⁷ It is evident that loss of multiple channels of key programming in a single market will multiply the consumer disruption experienced when negotiations break down.

CenturyLink identifies several additional interrelated public interests stemming from the competitive impacts harms of coordinated negotiations.

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

⁶⁵ ACA Comments at 14-15; Rogerson II at 23-24 (As Professor Rogerson explained: “[I]t is well recognized that retransmission consent fees are still rising very rapidly and many reputable analysts predict that even the very largest cable operators will likely be paying retransmission consent fees in the neighborhood of \$.50-.75 per subscriber per month over the next few years. Taking these points together, a more reasonable estimate of the likely level of impact of joint negotiations between two local broadcasters on retransmission consent fees would be 21.6% of \$1.50-\$2.00 per subscriber per month or \$.32 to \$.43 per subscriber per month.”).

⁶⁶ Time Warner Comments at 36.

⁶⁷ CenturyLink Comments at 6.

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.⁶⁸

Similarly, the American Public Power Association observes that: "allowing unaffiliated broadcasters to band together enables them to abuse their market dominance and exacerbate the negative impact on consumers."⁶⁹ The Rural MVPD Group concurs that separately owned broadcast stations must individually negotiate retransmission consent with MVPDs.

A station should not be permitted to grant an unaffiliated station or station group the right to negotiate or the power to approve its retransmission consent agreement. The formation of these groups substantially increases the risk that all broadcasters in a market, or in neighboring markets, will collude to set the retransmission consent price.⁷⁰

E. The Prevalence of Coordinated Negotiations Warrants Commission Intervention

The harmful practice of coordinated retransmission consent negotiations is

⁶⁸ *Id.*

⁶⁹ APPA Group Comments at 22.

⁷⁰ Rural MVPD Group Comments at 11; *see also* Cablevision Comments at 3-4 ("[T]he Commission should prohibit stations that are not commonly owned from jointly negotiating retransmission consent, to place MVPDs and broadcasters on a more level negotiating field.").

prevalent in the marketplace. Evidence previously gathered by ACA disclosed 56 instances in which Big 4 affiliates were operating under some form of sharing agreement, generally known as local marketing agreements (“LMAs”) or shared services agreements (“SSAs”), thus permitting these separately owned stations in the same market to coordinate negotiations of retransmission consent agreements with MVPDs. In addition, evidence from other MVPDs indicated that coordinated negotiation of retransmission consent agreements by separately owned Big 4 affiliates in a single market results in prices significantly higher (from 21.6% to 161%) than each station could achieve through separate negotiations.⁷¹

In response to earlier broadcaster criticisms of the lack of probative value of ACA's list of instances in which coordinated negotiations were likely to have occurred involving separately owned stations operating under sharing agreements,⁷² ACA conducted a member survey specifically asking whether negotiations had occurred for two stations using a single bargaining representative in the 56 previously-identified cases. The survey confirmed that out of the 56 cases of Big 4 affiliated stations operating under some form of sharing agreements previously identified by ACA, 36 pairs of stations in 33 different markets, actually engaged in coordinated negotiations through use of a single bargaining representative.⁷³ As ACA noted in its Comments, its

⁷¹ ACA Comments at 10.

⁷² NAB Comments at 26-27.

⁷³ ACA Comments at 18.

survey was conservatively drawn and therefore likely to have underreported the actual number of cases of coordinated negotiations occurring across the country.⁷⁴

ACA submits that 36 of instances of harmful coordinated negotiations in 33 different markets should more than suffice to support an administrative response, given the public interest harms described in the preceding section.

F. Broadcaster Claims that Coordinated Negotiations Result in Significant Cost Savings Are Incorrect; Prohibiting Such Coordination Will Not Disturb the Other Operational Efficiencies Achievable Under Sharing Agreements

NAB and other broadcasters argue that coordinated negotiations increase efficiencies for broadcasters by helping lower transaction costs of negotiating retransmission consent agreements.⁷⁵ Specifically, NAB contends that (i) coordinated negotiations help reduce operating and corporate expenses by lowering transaction costs, thereby reducing the diversion of scarce resources away from programming and services for the public; and (ii) allow expedited completion of agreements by reducing the total number of agreements that must be negotiated, thus lowering administrative burden on broadcasters and MVPDs.⁷⁶

As ACA stated in its Comments, adoption of a rule prohibiting coordinated

⁷⁴ ACA Comments at 18-19 (ACA's evidence, based on an extremely conservative survey of its own member companies alone, demonstrates that coordinated negotiations have occurred in 36 separate instances in 33 different markets, a number sufficiently high as to merit a strong and timely administrative response).

⁷⁵ NAB Comments at 27-29; CBS Affiliates Comments at 19-20; Sinclair Comments at 23; Nexstar Comments at 20-21; Joint Broadcasters Comments at 20-21; Belo Comments at 23.

⁷⁶ NAB Comments at 27-29.

retransmission consent negotiations by separately owned broadcasters in a single market will not disturb the other sharing arrangements that allow stations to achieve operating efficiencies; it will simply address the pervasive collusion now occurring between competing sellers in a market.⁷⁷ Moreover, the expected efficiencies from coordinated negotiations are quite modest compared to the cost savings achieved through sharing of other activities such as advertising or studio facilities; they are likely limited to the cost of hiring a negotiator and related administrative expenses. Thus, prohibiting coordinated negotiations, will not impact the willingness of broadcasters to continue entering into these pacts, nor materially impact any of the alleged benefits of these arrangements. Further, these relatively modest savings are entirely outweighed by the significant public interest harms of inordinately high retransmission consent prices obtainable by virtue of coordinated activity. Collusion is always going to be more efficient than non-collusion, but in this case, the savings are not likely to be substantial.

G. Bargaining Imbalances in Some Markets Do Not Justify Permitting Collusive Agreements in All Markets

NAB argues further that sharing agreements help level the playing field between broadcasters and MVPDs in instances where a small broadcaster is up against a clustered multiple system operator.⁷⁸ Yet, NAB's assertion that, even in those situations in which a "nominally 'small' MVPD is involved, broadcasters still find themselves at a

⁷⁷ ACA Comments at 30-31.

⁷⁸ NAB Comments at 29-30.

disadvantage due to the large local market share that the MVPD holds,"⁷⁹ misses the mark. As ACA noted in its Comments, the suggestion of broadcasters that it would be socially desirable to allow stations in all markets to increase their bargaining power with respect to all MVPDs through coordinated retransmission consent negotiations because some MVPDs serve relatively large shares of some DMAs giving those MVPDs a relatively large amount of bargaining power, is flawed.⁸⁰

Professor Rogerson offers two reasons why such reasoning should be rejected: (i) even if one were to accept the idea that collusion between sellers should be permitted when they negotiate prices with a large buyer, it would be a 'huge leap to conclude that the fact that there are some local markets that have a single buyer implies that sellers in ALL markets should be allowed to collude in negotiations with ALL buyers;' and (ii) the idea that it would be good public policy to let separately owned sellers collude in negotiations with a large buyer is itself "highly problematic to say the least," and not widely accepted among competition policy scholars.⁸¹

* * *

Accordingly, the record conclusively demonstrates that the Commission should

⁷⁹ *Id.*

⁸⁰ ACA Comments at 21 n. 44; see Craig Moffett, Bernstein Research, "U.S. Cable & Satellite Broadcasting & U.S. Media: Sizing Up the 'Retrans' Battle Royal," at 3 (Apr. 14, 2010) ("In end, retrans disputes come down to a simple and brutal calculus. Who can cause who the most pain? For the local broadcaster, pain from a blackout is felt immediately, in the form of lost advertising reach (typically, a broadcaster does not offer guarantees, but in practice, a broadcaster will likely have to offer 'make goods' to advertisers to make up for lost distribution.) For the distributor, pain is felt slowly or immediately, depending on the underlying strength of the 'disrupted' content. For a broadcaster, distribution snaps back as soon as the dispute is over. For a distributor, customers lost are likely lost for good. On paper, then, neither party necessarily holds the upper hand. *In practice, everything depends on relative exposure. Size matters.*")(emphasis supplied).

⁸¹ ACA Comments at 21 n. 44; Rogerson II at 17.

prohibit the practice of coordinated retransmission consent negotiation by stations not under common ownership in a single market as a *per se* violation of the duty to negotiate in good faith. Broadcaster arguments that no public policy basis exists to prohibit coordinated negotiations are flatly wrong, and should not deter the Commission from adopting this much-needed safeguard to protect MVPDs and their subscribers from this collusive price-setting practice.

The record supports the Commission's concern that coordinated negotiation leads to negotiation delays or other negotiating complications, but also reveals that such complications are just one of the harms of these collusive arrangements.⁸² In ACA's view, the core demonstrable and significant harm occasioned by coordinated negotiation of retransmission consent agreements is the extraction of higher prices by each broadcaster acting in a coordinated fashion than either could expect to receive by negotiating separately.⁸³

These harmful practices are prevalent and the prevalence of the practice supports the Commission's determination to address it in this rulemaking. No public policy rationale supports the imposition of higher retransmission consent fees on MVPDs and their subscribers simply because the MVPD provides, and the subscribers

⁸² NPRM, ¶ 23; *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Unites States Telecom Association Comments at 27 (filed May 27, 2011) ("US Telecom Comments"); APPA Group Comments at 22.

⁸³ ACA Comments at 9-14; *see also In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, DirecTV, Inc. Comments at 19-20 (filed May 27, 2011) ("DirecTV Comments") (enhanced market power of control over the retransmission consent rights of two or more top network-affiliated stations in a single market gives that party enhanced market power); CenturyLink Comments at 6 (coordinated negotiating tactics will drive competitive MVPDs out of the market and increase consumer prices).

receive, service in markets where broadcasters have decided to join forces to drive prices upward through collusive activities.

In summary, the Commission has both the delegated authority and ample record evidence supporting a *per se* prohibition on coordinated retransmission consent negotiations whether by legally-binding or non-legally binding agreement by separately owned stations in a single DMA.

H. The Commission's Proposed Prohibition Does Not Go Far Enough to Address the Range of Coordinated Negotiations that Harm MVPDs and Consumers

In its Comments, ACA recommended that the Commission go beyond the NPRM's proposal to prohibit a station from granting 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 to target four harmful coordinated negotiation tactics.⁸⁴ Joint Cable Commenters similarly request that the Commission go beyond the NPRM proposal to target collusion even where stations are negotiating separately.⁸⁵

ACA again urges the Commission to broaden the scope of the *per se* prohibition to encompass both legally binding and non-legally binding agreements to fix prices by competing sellers in a single market. As ACA explained, the major problem with this proposed rule is that it is too restrictive and does not clearly apply to all forms of

⁸⁴ ACA Comments at 22-25; Rogerson II at 3-5; NPRM, ¶ 22; NPRM Appendix B ("Agreement by a broadcast television station Negotiating Entity 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...").

⁸⁵ Joint Cable Comments at 19-20.

coordinated behavior. In particular, while the wording in the NRPM's proposed rule clearly applies to the case where one broadcaster provides another broadcaster with legally binding authority to negotiate retransmission consent agreements on its behalf, it is less clear if it would apply to more informal methods of coordination where broadcasters directly communicate with one another and agree to follow a collective course of action that maximizes their joint profits, but the arrangement is not enforced by a legally binding agreement.⁸⁸ To address this problem, ACA recommended that the Commission adopt a list of practices that constitute violations of the duty to negotiate in good faith that include the following:

- (a) delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately-owned broadcaster in the same DMA;
- (b) delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately-owned broadcasters in the same DMA to a common third-party;
- (c) any informal or formal agreement between separately-owned broadcasters in the same DMA or their representatives that agreement by one of the broadcasters to enter into a retransmission consent agreement with an MVPD would be contingent upon whether the other broadcaster was able to negotiate a satisfactory retransmission consent agreement with the MVPD;
- (d) any discussions or exchanges of information between separately-owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

⁸⁸ ACA Comments at 33.

ACA submits that the record fully supports incorporation of these prohibited practices under the good faith negotiation standard, and reiterates its call for the Commission to conclude this rulemaking prior to the initiation of the next retransmission consent cycle this fall.

I. There is No Need for the Commission to Adopt a Rule Permitting Separately Owned Smaller MVPDs in the Same Market to Coordinate Retransmission Consent

In response to the NPRM's request for comment on a proposal to permit small and mid-sized MVPDs to "negotiate as a group," NAB and several broadcasters argue that it would be arbitrary and unfair to prohibit broadcast stations from engaging in coordinated negotiations while adopting a rule that permits small non-commonly owned MVPDs to bargain as a group.⁸⁷ NAB also argues that adoption of a rule permitting group negotiations by small MVPDs is unnecessary because currently there is no rule prohibiting such negotiations.⁸⁸

ACA agrees that there is no need for the Commission to adopt a rule permitting smaller MVPDs to jointly negotiate retransmission consent. First, it is noteworthy that

⁸⁷ NAB Comments at 33 ("Further, given the current state of the retransmission consent bargaining table, described above, it would be arbitrary and capricious and contrary to public policy to prohibit non-commonly owned broadcasters from Joint Negotiations but to adopt a rule to permit small non-commonly owned MVPDs to bargain as a group."); Belo Comments at 23 ("In any event, there would be absolutely no basis for restricting the right of broadcasters to negotiate jointly if the Commission were to provide a parallel right for some MVPDs."); Hubbard Comments at 2 ("[I]f the Commission were to place restrictions on having a third party negotiate a retransmission consent arrangement for a broadcaster, e.g., a network for an affiliate, the Commission should similarly place restrictions on an MVPD conducting its negotiations through a large parent company or trade association. What is good for the goose, really is good for the gander.").

⁸⁸ NAB Comments at 33.

not one of the groups representing smaller MVPDs or an individual smaller MVPD has filed comments responding to the NPRM in support of adopting such a rule. Second, ACA notes that the National Cable Television Cooperative does not negotiate retransmission consent for its small and mid-size members, and ACA is unaware of any small or mid-sized MVPD today that delegates the responsibility of negotiating retransmission consent to another separately owned MVPD in the same market. Smaller MVPDs do not perceive there to be any material benefit to coordinating their retransmission consent negotiations with other smaller MVPDs in the same market. Thus, such practices are not seen in the marketplace today. The fact that coordinated retransmission consent negotiations are not occurring despite the lack of a prohibition on coordinated negotiations strongly suggests the lack of need for a rule expressly permitting the practice. Accordingly, the Commission should conclude that there currently is no competitive problem engendered by smaller MVPDs in a single DMA negotiating retransmission consent together, no evidence that such practices would ever become a problem, and no need for a rule expressly permitting the practice.

III. THE COMMISSION MUST PROHIBIT ALL FORMS OF THIRD-PARTY INTERFERENCE WITH THE EXERCISE OF RETRANSMISSION CONSENT FOR OUT-OF-MARKET CARRIAGE.

The record fully supports the analysis in ACA's Comments that immediate Commission action to prohibit a broadcast station from (i) allowing a network, with which it is affiliated, a say over its right to grant out-of-market retransmission consent to an MVPD, and (ii) conditioning retransmission consent on an MVPD's agreement not to

carry distant stations. Each form of "third-party" interference disrupts the ability of MVPDs to serve consumers and should be prohibited under the good faith rules.

Congress and the Commission have long supported out-of-market carriage of broadcast signals by cable operators throughout the development of the relevant broadcast signal carriage and copyright rules, including broadcast programming exclusivity rules, the copyright compulsory license, and later, retransmission consent and the good faith negotiating obligation.⁸⁹ At a time when cable operators were carrying both in-market and distant stations, broadcast stations were specifically granted rights to obtain compensation for redistribution of their signals through retransmission consent. Cable operators were thus permitted to negotiate carriage of both in-market and distant signals. Through this interlocking set of requirements, Congress ensured the continued availability of broadcast service to residents of a community who choose to receive broadcast service via subscription television, while assuring adequate compensation to broadcast signal owners.⁹⁰ But "[n]owhere in this history can evidence be found that retransmission consent was intended to be used as a weapon to permit networks or broadcast stations to curtail distant signal carriage."⁹¹

As ACA has explained, there is already in place a complicated and carefully balanced legal structure that limits the ability of an MVPD to carry out-of-market signals

⁸⁹ ACA Comments at 28-44.

⁹⁰ NPRM, ¶ 4.

⁹¹ ACA Comments at 62.

and protects broadcast exclusivity.⁹² Congress and the Commission have already struck the correct balance between a local broadcaster's need for program exclusivity and the public's right to program diversity. NAB recognizes the zone of programming exclusivity protected through Commission rules was specifically limited to an area no greater than 35/55 miles from the local station's point of reference.⁹³ This critical limitation on the zone of exclusivity thereby ensures the ability of MVPDs in areas outside the protected zones to carry an out-of-market broadcast station without deleting network and syndicated programming, in combination with an MVPD's right to negotiate retransmission consent agreements with stations for in-market and out-of-market carriage in neighboring markets, regardless of the location of DMA lines.

Network-imposed limitations on an affiliated station's ability or disincentives to its willingness to grant retransmission consent to an out-of-market MVPD end-run this balance by effectively extending the zone of network programming exclusivity beyond that permitted under Commission rules by private means. For the same reasons, broadcast station interference with the ability of an MVPD to negotiate retransmission consent rights with an eligible out-of-market station is equally unacceptable.

Each form of third-party interference compromises this legal structure, disservices the public interest, unfairly penalizes MVPDs, and should be prohibited outright under the good faith negotiating requirement. These behaviors harm MVPDs, harm their subscribers, and are flatly contrary to the goals of Congress and the Commission in

⁹² *Id.* at 28-44.

⁹³ NAB Comments at 59.

ensuring the availability of broadcast television service delivered by MVPDs, and particularly the right of MVPDs to good faith negotiations for the right to retransmit distant signals to consumers.

As discussed below, the Commission can either address third-party interference by broadening its interpretation of the current good faith standards, adopting the rules proposed in the NPRM, with the modifications suggested herein, or by doing both.

A. Network Interference with a Broadcast Station's Exercise of Retransmission Consent for Out-of-Market Carriage Must Be Prohibited.

It should be obvious: a local station cannot plausibly be considered to be engaging in good faith negotiations with an MVPD to reach a mutually agreeable price, or set of terms and conditions, when the station has previously alienated its right to grant consent to its affiliated network, or has agreed to limitations demanded by its affiliated network on its ability to grant out-of-market retransmission consent. As numerous commenters recognize, retransmission consent is a right of broadcast stations to control use of their signals, not a right of the networks.⁹⁴ The record

⁹⁴ See, e.g., Joint Cable Comments at 7 ("Both the legislative history of Section 325(b) and contemporaneous statements by broadcasters urging the enactment of that provision make clear that retransmission consent was intended to give individual broadcast licensees, not the national networks, control over use of the station's signal and that retransmission consent revenues were not meant to subsidize national programming."); Time Warner Comments at 7-8 (NAB itself expressly recognized at the time of enactment that retransmission consent was not a network issue and that networks would not have a right to participate in negotiations between local stations and MVPDs); Block Comments at 8-9 ("Congress made it clear that it intended to create a market for local station's retransmission consent rights and the Commission too has recognized one of the principal goals of retransmission consent is "to preserve local broadcast station service to the public."); US Telecom Comments at 26 ("the Communications Act is explicit in that the right of a broadcast station to grant retransmission consent rights to an MVPD resides solely with the broadcast licensee.").

conclusively supports adoption of a *per se* prohibition on broadcast network interference with an affiliated station's right to negotiate retransmission consent for out-of-market carriage, whether that interference is in the form of a network affiliation agreement giving the network "approval," "consent" or "veto" power on an affiliate's right to grant retransmission rights to an out-of-market MVPD, or some other restraint or disincentive that operates to prevent the station from negotiating out-of-market retransmission consent in the same manner it negotiates in-market retransmission consent.

The Commission's proposed rule, confined to network "approval" provisions, will not go far enough to address the extent of network interference with the retransmission consent negotiating process experienced by MVPDs. The rule must prohibit a broadcast station from agreeing to any price, term, or condition imposed, required, or suggested by its affiliated network that would cause the station to negotiate differently for in-market as opposed to out-of-market retransmission consent rights. Consistent with its analysis of the means of carrying out coordinated negotiations, ACA also submits that the Commission should prohibit both legally binding and non-legally binding agreements that interfere with the ability of a broadcast station to enter into good faith negotiations for retransmission consent of out-of-market signals.

- 1. Network Interference That Arguably Violates Existing Good Faith Standards Should Be Conclusively Prohibited As a *Per se* Violation.**

As ACA established in its Comments, at the very least, an agreement by a station to give a network with which it is affiliated the right to veto or approve a retransmission consent agreement for out-of-market carriage with an MVPD or a

station's compliance with such an approval provision should be deemed a *per se* violation of the Commission's existing good faith standards.⁹⁵ The vast majority of MVPDs and public interest groups commenting on the issue of network interference with a station's right to grant retransmission consent agree that not only should network interference be prohibited, but "that such conduct may well run afoul of the existing good faith standards."⁹⁶

⁹⁵ ACA Comments at 26-28; 47 C.F.R. § 76.65(b)(i) ("[r]efusal by a Negotiating Entity to negotiate retransmission consent" is a *per se* violation of the duty to negotiate in good faith); 47 C.F.R. § 76.65 (b)(vi) ("[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor" is a *per se* violation of the duty to negotiate in good faith).

⁹⁶ Most of these commenters seek an even broader prohibition than ACA that prevents a network from having any say in an affiliated station's retransmission consent negotiations, whereas ACA's concern is primarily focused on network interference with retransmission consent for *distant* signals. See ACA Comments at 37-62; Time Warner Comments at 34 ("[N]etworks should be prohibited from forcibly usurping a station's right to control its retransmission consent negotiations, and such conduct may well run afoul of the existing good faith standards."); DirecTV Comments at 13-14 ("DIRECTV submits that network approval provisions already violate the Commission's *per se* rules . . . By definition, where a station must seek approval from a third party in order to ratify its agreement to the terms for retransmission consent, no representative of the station has authority to make such binding representations. By negating the licensee's ability to designate a representative of the station with the authority to make binding representations in retransmission consent negotiations, a network-affiliate agreement with a right-of-approval clause therefore violates the Commission's rules for good faith negotiations."); Joint Cable Comments at 17 ("[T]he Commission should adopt rules addressing broadcast station practices that frustrate the ability of MVPDs to negotiate carriage agreements with out-of-market stations. One category of such practices involves network-imposed contractual restrictions that limit the geographic areas within which a station may grant retransmission consent."); Rural MVPD Group Comments at 9-10 ("There is no question that a network's exercise of an approval right hinders the negotiation process and should be considered a *per se* violation of the requirement to negotiate in good faith. Each station should be required to do its own negotiating."); CenturyLink Comments at 5 ("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 . . . 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."); US Telecom Comments at 28 ("The Communications Act is explicit in that the right of a broadcast station to grant retransmission consent rights to an MVPD resides solely with the broadcast licensee . . . As such, the networks should not be permitted to dictate the programming and operational decisions of local television broadcast stations."); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Public Knowledge and New America Foundation Comments at 7 (filed May 27, 2011) ("Public

Indeed, network interference with the ability of an affiliated station to grant retransmission consent arguably implicates three separate good faith standards:

Standards. The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the "Negotiating Entity") duty to negotiate retransmission consent agreements in good faith:

- (i) Refusal by a Negotiating Entity to negotiate;
- (ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent; . . .
- (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor;⁹⁷

Restrictions in network affiliation agreements that prevent an affiliate from granting retransmission consent to an out-of-market MVPD are one prevalent form of network interference.⁹⁸ As ACA has shown, the retransmission consent and good faith rules give broadcasters the right to seek compensation, and the obligation to negotiate in good faith, for carriage of broadcast signals both within and outside the DMA line.⁹⁹ Network interference with the ability of a broadcast station to exercise *its* right to grant

Knowledge Comments") ("[T]he networks' participation in retransmission consent negotiations worsens the competitive imbalance between broadcasters and MVPDs."); APPA Group Comments at 21-22 ("If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has impermissibly impaired its own ability to designate a representative who can bind the station in negotiations, contrary to FCC rules.").

⁹⁷ 47 C.F.R. § 76.65(b).

⁹⁸ ACA Comments at 44-62; Joint Cable Comments at 7-15; see also *In the Matter of Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103; Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity*, Petition for Rulemaking of ACA (filed March 2, 2005) ("ACA 2005 Petition").

⁹⁹ ACA Comments at 37-40.

retransmission consent to carriage of *its* signal by a neighboring market MVPD frustrates the intent of Congress and the Commission in crafting the broadcast signal carriage and compulsory copyright license to preserve the ability of MVPDs to carry “distant” signals.¹⁰⁰ The record is clear: network interference leads to MVPDs dropping carriage of signals, including significantly viewed neighboring market signals, to the detriment of consumers.¹⁰¹

Commendably, and alone among the broadcasters and networks filing comments, Nexstar recognizes the deleterious impact of network interference on an affiliated station’s ability to negotiate retransmission consent in good faith and its inconsistency with the current good faith standard requiring a broadcaster to appoint a negotiating entity with authority to make binding representations and to enter into a binding agreement.¹⁰²

It is a violation of the *per se* good faith rules for the negotiating entity to fail to designate a representative who can make binding representations and agreements for retransmission consent. Therefore, Nexstar believes that it is in the best interest of the retransmission consent marketplace for the Commission to make it a *per se* violation

¹⁰⁰ ACA Comments at 26-62.

¹⁰¹ Joint Cable Comments at 10 (“In Suddenlink’s case, network interference was the reason that one of its systems had to drop a network affiliate from a significantly viewed neighboring market that the system was carrying in order to provide consumers with continued access to network programming after the local affiliate refused to extend its retransmission consent agreement with Suddenlink. Although the neighboring market station had given its consent to carriage in areas where it was significantly viewed, it subsequently informed Suddenlink that the network with which it was affiliated was pressuring it to withdraw its consent on the grounds that the station’s network affiliation agreement did not allow it to permit out-of-market carriage.”).

¹⁰² Nexstar Comments at 19-20.

for affiliates to be required to provide a network with veto power over its ability to grant retransmission consent for its station's signal within its DMA.¹⁰³

Joint Cable Commenters argue that while the Commission's proposal to bar stations from agreeing to give a network the right to veto a particular retransmission consent agreement "is a well-intentioned first step, meaningful relief requires that the Commission" more broadly "prohibit any agreement between a network and its affiliates that has the effect of interfering with or otherwise dictating the terms of an affiliate's grant of retransmission consent for carriage of its signal either inside or outside its local market."¹⁰⁴

ACA agrees with Nexstar to the extent it argues that network interference with the exercise of retransmission consent by an affiliated station already violates the Commission's good faith standards. Network restrictions on the ability of an affiliated station to grant consent to out-of-market carriage are also utterly inconsistent with the Commission's recognition that retransmission consent and the good faith obligation applies to negotiations for carriage of both in-market and out-of-market signals.¹⁰⁵ ACA believes the Commission should go further, however, and prohibit a station from voluntarily agreeing to provide a network with veto power over its ability to grant retransmission consent for the station's signal within its DMA. ACA also agrees with

¹⁰³ Nexstar Comments at 20.

¹⁰⁴ Joint Cable Comments at 13.

¹⁰⁵ ACA Comments at 29, 37-40.

the Joint Cable Commenters that the Commission must clarify and make explicit that this prohibition on network interference applies to retransmission consent negotiations for both in-market and out-of-market carriage agreements.

To curtail this practice, using the existing good faith standard, the Commission should affirm that the good faith requirement applies equally to in-market and out-of-market carriage, and should disavow its former approach of applying a “different calculus” to the good faith determination for out-of-market carriage negotiations.¹⁰⁶ That is, the Commission must expressly make it a *per se* violation of the good faith rules for a broadcast station to refuse to negotiate in good faith with an MVPD for out-of-market carriage of its signal. It is already a violation of the good faith requirement for a broadcast station to refuse to negotiate retransmission consent.¹⁰⁷ The record amply supports the Commission taking the next step and explicitly prohibiting network-imposed requirements, limitations or practices that act as disincentives for an affiliate to negotiate out-of-market retransmission consent in good faith. It is essential that a broadcast station explicitly be required to negotiate in the same manner with MVPDs regardless of whether the negotiation is for in-market or out-of-market carriage.

Accordingly, the Commission must expressly declare that permitting a network to

¹⁰⁶ See ACA Comments at 50-55; *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, ¶ 31 (2005).

¹⁰⁷ 47 C.F.R. § 76.65(b)(i).

influence a station's exercise of granting retransmission consent for distant carriage, whether in the form of an outright prohibition, a network's prior "consent" or "approval" or "veto" right or other means that has the purpose of influencing the broadcaster's ability to grant retransmission consent for distant carriage, would be a *per se* violation of the existing good faith rules. Again, ACA submits that the Commission can either accomplish this end by adopting a new interpretation of its current *per se* prohibitions, or by adopting its proposed rule, as amended by ACA's proposal, or by doing both. ACA further submits that this prohibition must apply to both legally binding and non-legally binding agreements in order to avoid circumvention of the prohibition through non-legally binding arrangements. To the extent that existing network-affiliate agreements would conflict with this new rule, ACA again urges the Commission to abrogate the offending provisions from these agreements.¹⁰⁸

2. Broadcaster Arguments that the Status Quo Must be Maintained Should Not Prevent Adoption of Good Faith Standards Prohibiting Network Interference with a Station's Ability to Grant Retransmission Consent for Out-of-Market Carriage.

Against the demonstrable public interest harms of network interference in the granting of out-of-market carriage rights discussed in the comments, broadcast network and station arguments that, at all costs, the Commission must preserve the sanctity of the network-affiliate relationship and continue to refrain from prohibiting such practices

¹⁰⁸ See ACA Comments at 62-66.

under the good faith rules ring hollow.¹⁰⁹ ACA maintains that these arguments should be rejected for the following reasons: (i) retransmission consent is a right of a station, not a network; (ii) the good faith rules are the appropriate place to regulate network interference with an affiliate's ability to negotiate retransmission consent for out-of-market carriage in good faith; (iii) intervention in the network-affiliate relationship through the good faith rules is in the public interest and warranted on the facts; and (iv) network and broadcaster arguments that prior Commission decisions to refrain from imposing constraints on the network-affiliate relationship through the good faith bargaining obligation should limit its ability to prohibit harmful practices today should be rejected.

¹⁰⁹ See, e.g., *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, The NBC Television Affiliates Comments at 13 (filed May 27, 2011) ("NBC Affiliates Comments") (there is no need to adopt additional per se violations of the good faith rules and "it would be particularly unwarranted to establish additional per se violations that are specific to the network-affiliate relationship"); CBS Affiliates Comments at 19 (the Commission should not use retransmission consent as a vehicle for regulating the network-affiliate relationship; existing standards are sufficient); Joint Broadcasters Comments at 19 (the network-affiliate relationship should remain in large part a private contractual matter); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, Fox Entertainment Group, Inc. and Fox Television Stations, Inc. Comments at 14 (filed May 27, 2011) ("Fox Comments") (the Commission's proposed changes to the good faith rules would improperly limit a network's ability to utilize the retransmission consent process as a legitimate framework for working with affiliates in connection with fair compensation); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, CBS Corporation Comments at 28 (filed May 27, 2011) ("CBS Comments") (copyright owners [networks] must be able to control the distribution of their programming by restricting the areas in which their licensees [affiliates] may grant MVPDs to right to retransmit that programming as part of their signals); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, The Walt Disney Company Comments at 13 (filed May 27, 2011) ("Disney Comments") (Commission interference with network-affiliate agreements is unwarranted and will involve it in intrusive definitional disputes and substantive review of other provisions to resolve disputes between parties).

a. The Commission Should Prohibit Any Alienation of the Station's Ability to Grant Retransmission Consent to its Affiliated Network Under the Good Faith Standard.

Arguments that the Commission should refrain from interfering with the network-affiliate relationship through the good faith rules should be rejected. These claims conveniently overlook the foundational issue: the right to exercise retransmission consent is vested in the licensee station, not its affiliated network. The record confirms that retransmission consent is a right of broadcast stations to control use of their signals.¹¹⁰

Nexstar and others attempt to distinguish situations in which a network compels an affiliate to provide it with veto power or the ability to impose other restrictions from situations in which an affiliated station wishes to permit the network to be the designated negotiating agent for the station.¹¹¹ ACA disagrees that the Commission should recognize a distinction between situations in which a network compels veto power over, or a station voluntarily agrees to a limitation on, a station's ability to grant retransmission consent to an MVPD. Rather, the Commission must recognize that, consistent with the obligation to negotiate in good faith, a broadcast station cannot voluntarily agree or be compelled by a network, through either a legally or non-legally binding agreement, to refuse to bargain or to bargain differently with an MVPD for out-

¹¹⁰ See, e.g., Joint Cable Comments at 7; Time Warner Comments at 7-8; Block Comments at 8-9; US Telecom Comments at 26.

¹¹¹ Nexstar Comments at 20; NBC Affiliates Comments at 13-14 (describing a comprehensive "framework" or cooperative agreement concerning an affiliate's right to delegate to its network the ability to negotiate all retransmission consent agreements on behalf of participating local affiliates).

of-market versus in-market retransmission consent.

Fox justifies its network consent provisions by arguing that they have no bearing on a broadcast station's ability to negotiate in good faith, and that as a network owner and programmer, it "has done nothing more than bargain for precisely the types of rights permitted under the Act and FCC precedent."¹¹² Fox asserts that it has been including a "consent clause" in its standard network-affiliate agreement for more than 15 years that contemplates that the affiliate will obtain Fox's approval before finalizing an agreement with an MVPD for retransmission consent that includes distribution of Fox network programming, but that this clause "does nothing to restrict an affiliated station's ability to grant retransmission consent."¹¹³ According to Fox, even if the network "were to refuse to approve a station's deal, the refusal would at most affect the network-affiliate relationship, but as confirmed by Commission precedent, would not prevent the station licensee from granting retransmission consent for its entire signal to any MVPD that the licensee chooses."¹¹⁴

Taken on its face, this argument suggests that Fox has included an utterly meaningless provision in its network-affiliate agreement that effectively conveys to it no substantive rights, and that affiliates remain free to enter into retransmission consent deals that the network expressly refuses to approve. Even if, as an abstract matter, an

¹¹² Fox Comments at 14.

¹¹³ Fox Comments at 13.

¹¹⁴ *Id.*

affiliate could ignore its network's failure to grant consent and risk a breach of contract action, reason and experience suggests that affiliates are unlikely to do so.¹¹⁵ For example, Fox's recent action penalizing an affiliate owned by Block Communications for resisting the network's retransmission consent fee demands¹¹⁶ and its severing ties with several Nexstar stations¹¹⁷ will doubtless be understood by other Fox affiliates as sending the message "that resistance is futile."

Accordingly, the notion that an affiliate remains free to grant retransmission consent in the face of network resistance would seem fanciful, at best. As ACA has shown, broadcast affiliates today have far less power to resist inclusion of these prohibitions on out-of-market distribution when demanded by networks, are far less able to obtain network waivers of these provisions, and are therefore quite unlikely to risk breach of their affiliation agreements to strike deals with out-of-market MVPDs.¹¹⁸

In summary, MVPDs and consumers are harmed by these network approval arrangements, and an affiliate that has alienated its right to grant retransmission consent, or has agreed to negotiate for in-market retransmission consent differently from out-of-market retransmission consent, either voluntarily or by compulsion, has

¹¹⁵ ACA Comments at 53 & n.115 (the leverage networks have over their affiliates has significantly increased since the Commission adopted its "different calculus" approach to out-of-market retransmission consent negotiations).

¹¹⁶ Block Comments at 9.

¹¹⁷ See Michael Malone, "Fox, Nexstar Cut Ties in Springfield, Mo. and Ft. Wayne" *Broadcasting & Cable* (June 20, 2011), available at <http://www.broadcastingcable.com/article/470015-Fox-Nexstar-Cut-Ties-in-Springfield-Mo-and-Ft-Wayne.php> (last visited June 25, 2011).

¹¹⁸ ACA Comments at 53-54.