Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment to the FCC's Good-Faith Bargaining Rules	)	MB RM-11720
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To: The Commission

OPPOSITION OF THE
NATIONAL ASSOCIATION OF BROADCASTERS
TO PETITION FOR RULEMAKING

The National Association of Broadcasters ("NAB")[1] opposes the request of Block Communications, Inc. ("Block")[2] that the Commission initiate a rulemaking proceeding to modify existing rules governing good faith negotiations for retransmission consent. Although the Block Petition is carefully styled, it would result in exactly the sort of governmental intrusion into the retransmission consent negotiation process that the Commission previously has determined is contrary to Congressional intent and beyond the scope of its statutory authority. For these very reasons, and because of the public interest harms that would result, NAB has opposed such proposals in the past. NAB again urges the Commission to refrain from involving itself in retransmission consent negotiations in the manner proposed by Block.

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] Petition for Rulemaking of Block Communications, Inc. (May 6, 2014), RM No. 11720.

I. Background

In a Petition for Rulemaking filed on May 6, 2014, Block urges the Commission to "adopt appropriate procedural rules to facilitate good faith complaints alleging that a party is refusing to conduct market-based negotiations, but instead is seeking to impose its scale-based leverage to achieve retransmission consent rates that do not reflect the market."[3] The petition proposes that these procedural rules would apply in markets below the top 30, to negotiations involving either: (1) a multichannel video programming distributor ("MVPD") that serves fewer than 400,000 customers and a television station group that owns or operates at least 25 stations that elect retransmission consent; or (2) an MVPD that has more than 1,500,000 subscribers and a broadcast group that owns or operates five or fewer stations.[4] Block makes no attempt to explain how it arrived at these various market, broadcast station group or MVPD cut-offs.

If a good faith negotiation complaint is filed that meets Block's criteria, it would have the FCC review evidence of whether the parties' negotiating positions are "reasonable" in light of what Block describes as "prevailing market conditions," including: (1) the contents of their most recent offers; (2) evidence regarding their other in-market retransmission consent agreements; and (3) evidence regarding the ratings for each television station in the market.[5] Based on its analysis of this data, the FCC would determine whether either party was failing to negotiate in good faith.[6] If the FCC finds

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[3] Block Petition at ii.

[4] Block Petition at 12-13.

[5] Block Petition at 14. Before the FCC implements this system, it would set forth a series of "illustrative guideposts" of the kinds of retransmission consent offers that would be presumptively unreasonable. *Id*. at 15.

[6] In various parts of its Petition, Block refers to "bad faith," which NAB assumes is an intended reference to the statutory standard of failing to negotiate in good faith. *See, e.g.,* Block Petition at

failure to negotiate in good faith by either party, negotiations would continue, but that party would be required to give periodic updates to the FCC to demonstrate its efforts to negotiate in good faith.[7] Parties that repeatedly are found to violate good faith standards would face penalties (such as forfeitures).[8]

While cast in terms of "good faith," the Block proposal is merely a restyled version of a proposal that the FCC has found fatally flawed for years: mandatory arbitration. As with those proposals for governmental intrusion in the marketplace for retransmission consent (whether styled as arbitration, mediation or something else), the FCC is without authority to adopt Block's proposal and should summarily deny its petition. Block is wrong to try to stretch the FCC's authority to adopt good faith negotiation standards to justify adoption of rules directly involving the Commission in the substance of the negotiation of retransmission consent agreements, including the terms and conditions of carriage.

II. The FCC Lacks The Authority To Adopt The Block Proposal

Section 325(b) of the Communications Act unequivocally prohibits a cable system or other MVPD from retransmitting a television broadcast station's signal without the station's express consent.[9] The legislative history of Section 325(b) makes clear that Congress intended to provide broadcast stations with the exclusive right to control others'

9, 11, 15. NAB has analyzed the Block proposal pursuant to the FCC's authority to adopt good faith negotiation standards.

[7] Block Petition at 16.

[8] Block Petition at 17.

[9] The Act plainly states that no MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A). *See also 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, 5471 ¶ 60 (2000) ("*Good Faith Order")* (holding that Section 325(b) of the Act prevents a MVPD "from retransmitting a broadcaster's signal if it has not obtained express retransmission consent").

retransmission of their signals and to negotiate the terms and conditions of such retransmission through private agreements.[10] In light of the clarity and preciseness with which Congress expressed its intent, the Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[11]

Block's petition does not begin to address the fundamental question of the FCC's authority. The petition entirely ignores Section 325 and previous Commission determinations about the limits this section places on its authority.[12] Block somehow assumes, without analysis or discussion, that the Commission has authority to approve its proposal under the good faith bargaining provisions of the Communications Act.[13] Contrary to Block's assumption, the Commission's good faith authority is narrow[14] and cannot be expanded at will to encompass FCC intrusion into the substantive terms and conditions of retransmission consent agreements.

In its *Good Faith Order*, the Commission carefully examined the language and legislative history of Section 325(b)(3)(C), the good faith provision.[15] It correctly found

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[10] *See* S. Rep. No. 102-92 at 34-35, 37 (1991) ("*Senate Report*") ("Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means"; and "[c]arriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system").

[11] *Good Faith Order* at ¶ 14; *accord Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* Report and Order, 8 FCC Rcd 2965, 3006 ¶ 178 (1993).

[12] *See Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2727-28 ¶¶ 17-18 (2011) ("*Retransmission Consent NPRM*").

[13] Block Petition at 11.

[14] *Good Faith Order* at ¶ 20.

[15] The Satellite Home Viewer Improvement Act of 1999 added Section 325(b)(3)(C) to the Communications Act, requiring the Commission to revise its regulations so that they shall "prohibit a television broadcast station that provides retransmission consent from . . . failing to

that this provision did not "contemplate an intrusive role for the Commission with regard to retransmission consent,"[16] and expressly concluded that Congress did not intend for the "good faith requirement" to result in the Commission "assum[ing] a substantive role in the negotiation of the terms and conditions of retransmission consent."[17] Block's proposal would clearly require the Commission to assume such a "substantive role," evaluating the terms and conditions of parties' retransmission consent proposals to determine if they are "reasonable." Indeed, Block is specifically asking the FCC to adopt "objective measures of the market value of TV signals,"[18] even though the Commission previously concluded "that it is not practically possible to discern objective competitive marketplace factors that broadcasters must discover and base any negotiations and offers on."[19] As the Commission explained, "it is the retransmission consent negotiations that take place that are the market through which the relative benefits and costs to the broadcaster and MVPD are established."[20] Block has shown no basis for the FCC to ignore the clear intent of Congress and its previous decisions by considering proposals that would require the Commission to do what "is not practically possible" – determine the "relative benefits and costs" of parties' offers and, ultimately, the value of broadcasters' signals to MVPDs.

In particular, Block cannot stretch the FCC's "good faith" authority to justify adoption of an approach that proposes Commission arbitration under another name.

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negotiate in good faith." 47 U.S.C. § 325(b)(3)(C)(ii). This Section of the Act was later amended to require good faith negotiations by MVPDs as well. 47 U.S.C. § 325(b)(3)(C)(iii).

[16] *Good Faith Order* at ¶ 13.

[17] *Id*. at ¶ 14. *Accord* at ¶ 6 (finding that the good faith statute "does not intend to subject retransmission consent negotiation to detailed substantive oversight by the Commission").

[18] Block Petition at 14, Heading C.

[19] *Good Faith Order* at ¶ 8.

[20] *Id*.

When it commenced its rulemaking proceeding concerning retransmission consent and good faith negotiations, the FCC expressly concluded, in light of Section 325(b), that it lacks "authority to adopt . . . mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."[21] Specifically, it held that "mandatory binding dispute resolution procedures would be inconsistent with […] Section 325 of the Act, in which Congress opted for retransmission consent negotiations to be handled by private parties subject to certain requirements."[22] This determination is fully consistent with the plain language of the retransmission consent statute and other federal law,[23] congressional intent, and the FCC's past decisions interpreting and applying the retransmission consent statute.

The same rationales that apply to the Commission's analysis of dispute resolution procedures apply to the petition here. If the FCC were to adopt Block's proposal and require broadcasters and MVPDs to submit for review the details of their offers and other market and ratings data, the FCC would be in the driver's seat, deciding what retransmission consent "negotiating positions," including rates, are "reasonable."[24] That would be the antithesis of the marketplace process established by Congress for negotiating retransmission consent.

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[21] *Retransmission Consent NPRM* at ¶ 18.

[22] *Retransmission Consent NPRM* at ¶ 18. *See also Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc*., Memorandum Opinion and Order, 22 FCC Rcd 35, 45 ¶ 25 (Med. Bur. 2007) (stating that the "Commission does not have the authority to require the parties to submit to binding arbitration").

[23] The Commission has previously explained that mandatory arbitration in the retransmission consent context also would be contrary to the Administrative Dispute Resolution Act, which expressly prohibits an administrative agency from requiring arbitration. *Retransmission Consent NPRM* at ¶ 18, *citing* 5 U.S.C. § 575(a)(1).

[24] Block Petition at 14-15.

Block might contend that its proposal differs from past proposals for arbitration because the FCC would only send parties back to the negotiating table after deciding that a party's proposal was not "reasonable."[25] But, it requires little imagination to understand the practical effect of a government arbiter, which controls the renewal of a broadcaster's license to operate, telling a station its offer is unreasonable and its proposed retransmission rate too high.[26] Block's proposal would allow the FCC to virtually set – or at the least very heavily influence -- retransmission consent prices in direct contravention of the law.

Just as in any other sort of mandatory arbitration, under the Block proposal, the parties would have no choice but to participate once a complaint that meets the Block standard is filed. The FCC's decision would similarly involve a determination that one or both parties were making unreasonable proposals. If the broadcaster "loses," then the MVPD returns to the negotiating table with a government-strengthened bargaining hand. The proposed "periodic status reports" on negotiations, backed by the threat of FCC penalties, would provide further opportunities for improper governmental intrusion into retransmission consent negotiations.[27]

The Block proposal would actually result in a system that runs afoul of the most fundamental premise of retransmission consent – the consent itself. Under Block's approach, the ultimate outcome of negotiations would reflect a government coerced

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[25] Block Petition at 16.

[26] As the courts have recognized, "[n]o rational firm—particularly one holding a government-issued license—welcomes" government scrutiny. *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998). "A station would be flatly imprudent to ignore any . . . factor[] it knows may trigger intense review." *Id*. *Accord MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001).

[27] Block Petition at 16.

determination of the value of broadcasters' signals, and carriage might be authorized even if the broadcaster strongly objected to some of the terms of such carriage. Section 325(b) expressly states that broadcasters, and only broadcasters, can provide MVPDs with authority to retransmit its broadcast signal.[28] The plain language of Section 325(b) makes clear that no party – neither the FCC nor an independent arbiter – can authorize a MVPD to retransmit a station's broadcast signal without the broadcaster's consent. A mandatory mechanism such as Block's for resolving good faith complaints is fundamentally inconsistent with Section 325(b), because it would authorize a third party to exercise significant control over the terms upon which a broadcaster grants permission to a MVPD to carry its signal. Coerced consent is not true consent.

III. The Block Petition Ignores The Many Non-Price Terms And Conditions Involved In Retransmission Consent Negotiations

Even if the law permitted the sort of governmental intrusion into retransmission consent that is proposed here, examining the factors proposed by Block would not permit the Commission to determine the reasonableness of a party's proposal. As with most proposals for mandatory arbitration or other sorts of heightened governmental intrusion into retransmission consent negotiations, this proposal "implicitly assumes that retransmission consent negotiations are only about money" when this does not begin to capture the range of issues addressed during these negotiations.

As broadcasters have previously shown, retransmission consent negotiations typically involve many complex and multifaceted issues such as: "video on demand, the purchase of broadcast advertising by the MVPD, the purchase of MVPD advertising by the broadcast station, broadcast station promotion by the MVPD, MVPD promotion by the

[28] 47 U.S.C. § 325(b)(1)(A); *see Good Faith Order* at ¶ 60.

broadcast station, fiber connectivity between the station's studio or transmitter and the MVPD's headend or local receive facility, channel position and tier placement, digital and multicast channel carriage, system expansion options, studio/personnel/equipment sharing, electronic program guide placement, news insertion options, carriage of non-broadcast programming, duration of the term of the agreement, technical standards, after-acquired system provisions, after-acquired station provisions, non-discrimination clauses, indemnity provisions, venue, jurisdiction, and manner of dispute resolution, to list but a few."[29]

If one compares only dollar figures, without regard to the many other non-price terms and conditions of retransmission consent agreements, a proposal that appears reasonable on its face might, given all of the other factors, be entirely unreasonable. Block's proffer of allowing "defendants" to provide evidence of "specific, market-based facts" to overcome FCC presumptions in connection with these reviews does not cure this problem. The proposed approach does not and cannot sufficiently account for the wide-ranging non-price terms and conditions negotiated in these agreements.

IV. Conclusion

Under the retransmission consent marketplace established by Congress, local television stations have the opportunity to negotiate for compensation from MVPDs in exchange for the right to retransmit and resell their broadcast signals.[30] Congress made it quite plain that this retransmission consent marketplace is to function without government intervention, and emphatically rejected the notion that it or the Commission should or

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[29] Opposition of the Broadcaster Associations, MB Docket No. 10-71 (May 18, 2010) at 76-77.

[30] *See Senate Report* at 36 (stating that the Cable Television Consumer Protection and Competition Act of 1992 created a "marketplace for the disposition of the rights to retransmit broadcast signals").

would "dictate the outcome" of the negotiations between broadcasters and MVPDs.[31] By forcing the parties into the kind of arbitration proposed by Block, the FCC would impermissibly intervene in retransmission consent negotiations, removing those negotiations from the marketplace where they belong and hammering them into an artificial forum. Block's petition fails to explain how the Commission can "subject retransmission consent negotiation to detailed substantive oversight" consistent with Section 325(b),[32] and must be rejected for that reason.

Respectfully submitted,

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[31] *Id.*

[32] *Good Faith Order* at ¶ 6.