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

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
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Totality of the Circumstances Test	)	
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COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

All it takes is going online, or turning on one's cable box or mobile phone, to understand that the video marketplace has changed dramatically. Consumer video choices have exploded. Competition to produce the best programming that will attract increasingly fragmented audiences has reached an all-time high. Gone are the days when broadcast television station call letters dominated the video landscape; now broadcast channels blend into the crowd alongside the 800-plus other networks carried by pay TV distributors, not to mention high-quality broadband-delivered offerings from Amazon, Netflix, Hulu, Vudu and others.

As the video programming market has become remarkably competitive, the multichannel video programming distribution (MVPD) market has responded by consolidating. While broadcasters remain hobbled by analog-era ownership rules, MVPDs grow and combine, creating mega-players that dominate both the pay TV and broadband marketplaces. Following the Charter/Time Warner Cable/Bright House merger, the top ten MVPDs will control a whopping 94 percent of the nationwide MVPD market (measured in terms of subscribers), with the top four MVPDs controlling 79 percent of the market and the top three alone controlling two-thirds of the video delivery universe.

These twin developments have substantially impacted the retransmission consent marketplace. Pay TV providers now have an unprecedented number of options for programming content beyond broadcast channels to offer their subscribers. These MVPDs – which have market capitalizations as much as *200 times* larger than the market caps of even some of the biggest local broadcast TV companies – possess significant leverage over most broadcasters in retransmission consent negotiations. This competitive disparity fundamentally shapes the negotiations between providers that control the vast majority of the market, such as AT&T/DirecTV, Charter/Time Warner/Bright House, Verizon and DISH, and local broadcast groups, such as Graham Media, Morgan Murphy Media, Northwest Broadcasting and many, many more. These pay TV companies can easily afford to spread their costs among markets, and if playing hardball in a negotiation causes them to drop a broadcast signal during a dispute, then so be it.

The intense competition among programmers for eyeballs and the growing consolidation in the MVPD market provide the essential context for this proceeding. Remarkably, the Notice of Proposed Rulemaking[1] proposes a number of changes to the retransmission consent regime to favor pay TV operators while virtually ignoring this new video world order. In today's competitive marketplace, broadcasters have every incentive to come to the bargaining table and negotiate in good faith for carriage. Indeed, securing carriage on MVPDs that reach most viewers in the country is essential to stations' survival.

[1] *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, *Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216 (Sept. 2, 2015) (Notice).

Any leverage broadcasters may have in these negotiations does not result from market power, but rather from their continuing investments in high-quality content that consumers want to watch and that MVPDs want to use for their own commercial purposes. The FCC must encourage such investment in programming, rather than depress it by adopting rules that prevent content creators – especially just one subset of them – from recouping the full value of their investments.

The Notice curiously highlights only one contextual change – that pay TV operators are no longer monopolists – since the 1992 Cable Act first gave broadcasters the right to negotiate for pay TV companies' use of stations' signals. However, while some competition among pay TV distributors has emerged, this development scarcely bears on questions of good faith negotiation. The fact that a modicum of competition ultimately developed among MVPDs has only allowed retransmission consent to become relevant. For many years after passage of the Cable Act, monopolistic cable operators simply refused to pay any monetary compensation to broadcasters in return for reselling their signals to customers, even though, at the time, broadcast channels were by far the most popular. Those cable operators knew that broadcasters had absolutely no other choice but to provide their signals; there was no other game in town.[2] Eventually, Congress succeeded in incenting a degree of competition into the formerly monopolistic MVPD marketplace, and broadcasters have since begun to

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[2] The Commission previously explained that, after Congress established retransmission consent, cable operators – "particularly the largest multiple system operators" – were unwilling "to enter into agreements for cash" and instead offered broadcasters only in-kind compensation, such as "the purchase of advertising time, cross-promotions, and carriage of affiliated channels." Broadcasters "that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete." Even by 2005, "cash still ha[d] not emerged as a principal form of consideration for retransmission consent," and "virtually all" retransmission agreements still involved the provision of "in-kind consideration to the broadcaster." FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004,* at ¶ 10 (Sept. 8, 2005).

recoup some measure of value for the news, sports and entertainment content in which they invest so heavily. Put simply, the retransmission consent market has finally begun to work. It is therefore no surprise that pay TV companies have embarked upon a coordinated campaign before Congress and at the FCC to dismantle broadcasters' retransmission consent rights.

NAB understands why MVPDs yearn for the bygone days of old. Any business would prefer to be a monopolist and exercise control over its suppliers and customers. The irony here is that MVPDs, of all companies, are the ones rushing to the government for help. Let that sink in for a moment. Multi-billion-dollar corporations that consistently plead with government to stay out of industry's way, and that even oppose governmental efforts to promote competition,[3] now urge the Commission to regulate their own competition into submission.[4]

The pay TV industry's goal here is not to level the retransmission consent playing field, but rather to tilt it more in MVPDs' favor and, ultimately, to enhance their bottom lines. Most of the pro-pay TV proposals offered in the Notice have little or nothing to do with good faith

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[3] *See, e.g.*, Comments of the National Cable and Telecommunications Association, MB Docket No. 14-28, at 24 (July 15, 2014) ("Subjecting broadband Internet service providers to Title II regulation would bring with it . . . stagnation and underinvestment, and would rob the Internet marketplace of its current dynamism."); Comments of Verizon and Verizon Wireless, GN Docket No. 09-191, WC Docket No. 07-52, at 1-5; 12-84 (Jan. 14, 2010) (arguing that FCC had no rationale for Internet regulation and that imposing any open Internet rules would have harmful effects); Comments of Time Warner Cable Inc., GN Docket No. 09-191, WC Docket No. 07-52, at i; 24-40 (Jan. 14, 2010) (arguing that there were no genuine problems meriting regulatory intervention and that FCC's proposed open Internet rules would in fact be harmful). *See also* Jon Brodkin, "Who wants competition? Big cable tries outlawing municipal broadband in Kansas," arstechnica.com (Jan. 31, 2014) ("Legislation introduced in the Kansas state legislature by a lobby for cable companies would make it almost impossible for cities and towns to offer broadband services to residents and would perhaps even outlaw public-private partnerships like the one that brought Google Fiber to Kansas City.").

[4] For another example, see Mediacom's much-ridiculed Petition for Rulemaking filed this summer in which it made the tortured attempt to link broadcasters' over-the-air coverage with retransmission consent negotiations. Petition for Rulemaking of Mediacom Comm. Corp. (July 7, 2015), RM-11752; Public Notice, Consumer & Governmental Affairs Bureau, Reference Information Center, Petition for Rulemaking Filed, Report No. 3024 (July 15, 2015).

negotiating. Instead, they are designed to tie broadcasters' bargaining hands. For example, pay TV companies want the government to go well beyond antitrust law requirements and forbid practices in which they themselves engage in other contexts, to prevent broadcasters from negotiating retransmission agreements that include the carriage of programming beyond just a single over-the-air channel. Apart from the fact that MVPDs are loathe in every other context for the Commission to conduct reviews beyond the strictures of antitrust law,[5] this proposal says nothing about whether broadcasters make bona fide offers and engage in timely negotiations – in other words, it has nothing to do with the essence of good faith.

Similarly, pay TV companies want the Commission to violate the legal rights of broadcasters and the other copyright owners who own the copyrights to the underlying material in stations' signals by forcing them to publicly perform that content online during retransmission consent impasses. Any such requirement would clearly violate Section 106 of the Copyright Act of 1976, and imposing mandates over content *online*, rather than broadcast over-the-air, exceeds the FCC's jurisdiction. Usurping broadcasters' rights by mandating the public performance of copyrighted material also could impact the ability of broadcasters to secure the necessary programming rights from content creators to stream broadcast signals over the Internet, as rights holders may be reluctant to license content to broadcasters in an environment in which the Commission compels online distribution of broadcast signals. In any event, this pay TV proposal is not about ensuring an agreement for retransmission of a

[5] *See, e.g.,* Attachment to Ex Parte Letter from Brian Rice, Executive Director of Federal Regulatory Affairs, Verizon, WC Docket No. 07-52, at 4 (Jan. 28, 2010) ("Existing antitrust and consumer protection rules at both the federal and state levels already provide protection against the potential abuses about which the Commission professes concern."); *see also* Ex Parte Letter from Ryan Wallach, Counsel for Comcast Corp., MB Docket No. 07-29, Attachment at 2 (Aug. 16, 2007) (in advocating for elimination of the prohibition on MVPD exclusive contracts with programmers, noting that "the antitrust laws are also well-suited for addressing any anticompetitive conduct.").

station's over-the-air signal; rather, it is about the largest broadband providers (which also happen to be the largest pay TV providers) looking for loopholes in retransmission consent law so they can avoid compensating broadcasters for the full value of all the programming contained in the signals they resell to subscribers. As detailed below, the pay TV wish list goes on and on, one proposal after another, each less concerned with negotiating in good faith than with using government regulation to tie broadcasters' hands in private marketplace negotiations and to skew the playing field to benefit MVPDs.

Finally, and perhaps most importantly, there is no evidence that the pay TV proposals reflected in the Notice would, if adopted, actually promote the only stated goal of both Congress and the Commission -- to reduce the already limited number of service disruptions that result from failed negotiations. This is unsurprising – after all, the pay TV operators' goal in this proceeding is to increase their leverage in retransmission consent negotiations and pay broadcasters less, not to benefit consumers. Indeed, the proposals may lead to additional impasses by limiting arbitrarily the range and type of options that broadcasters may raise during negotiations. In the FCC's own words, reducing the "number of avenues to agreement" will "make it more difficult for broadcasters and MVPDs" to "craft solutions to the problem of reaching retransmission consent."[6] Thus, prohibiting broadcasters from proposing various options, including those routinely available to parties in all types of commercial negotiations, could well result in more, not fewer, negotiating stalemates and service disruptions.

[6] *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, 5469 (2000).

NAB's comments below address each of these elements.[7] We strongly urge the Commission to seriously and objectively grapple with all the issues, rather than prejudge the outcome without even reviewing the record.[8] Congress directed the Commission only to "commence" a review of one aspect of retransmission consent – the totality of circumstances test for good faith negotiation – and notably did not require the Commission to reach any conclusions or prescribe any rules, let alone fundamentally alter the retransmission consent system.[9] In essence, the pay TV industry's purpose here is to persuade the Commission to write laws changing the retransmission consent process that Congress declined to approve in STELAR, despite the industry's fierce lobbying.

Based on an objective analysis of the record, the Commission should recognize that the current standards for good faith bargaining, along with existing marketplace incentives, ensure that broadcasters bargain with the purpose of reaching an agreement. That fact explains why the vast majority of retransmission consent negotiations are resolved without an impasse. Moreover, since the FCC adopted the current good faith rules in 2000, parties have filed few complaints, and the Commission has never found that any broadcaster failed to negotiate in good faith. No rational, unbiased observer would consider such a marketplace broken and/or in need of government intervention.

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

[8] *See, e.g.,* Kaylee Hultgren, "FCC Chairman Wheeler's Top 7 Priorities," CableFax (Nov. 12, 2015) (quoting a senior advisor to the Chairman who said, when asked about retransmission consent, "[The Chairman] is going to look at those marketplace changes and see if those rules warrant changes… Broadcasters can't just rest on their laurels: they're going to have to change with the times.").

[9] Section 103(c), STELA Reauthorization Act of 2014 (STELAR), Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

While pay TV companies offer innumerable claims to persuade the Commission to intervene in the marketplace in their favor,[10] they cannot produce the necessary facts and data to support their laundry list of requests. Pay TV providers will be unable or unwilling to offer any valid reason why broadcasters should be singled out for unfavorable treatment in their commercial negotiations; any information about their own financials and why their consumer prices consistently increased well over the rate of inflation years before they provided cash compensation to broadcasters; or any comparison between the prices they pay for cable networks, especially on a per-viewer basis, and the prices paid to broadcasters. If the FCC approves the MVPD proposals here, it would be arbitrarily picking the pay TV industry as the winner in the retransmission consent and the wider video marketplaces, and designating broadcasters and the viewing public as the losers.

II. THE STRONGEST EVIDENCE AGAINST MARKET FAILURE: IN THIS NEW GOLDEN AGE OF TELEVISION, THE DIVERSITY OF VIDEO CONTENT AVAILABLE TO VIEWERS HAS REACHED UNPRECEDENTED LEVELS AND IS STILL INCREASING RAPIDLY

This past summer, John Landgraf, the CEO of the cable network FX, told an audience of TV critics that there is "simply too much television" today.[11] Lamenting the hyper-competitive state of television for programmers, Mr. Landgraf noted that the number of prime-time scripted shows (comedy and drama) had increased from roughly 250 shows five years ago, to more than 370 shows in 2014. He predicted that the number in 2015 "will easily blow through the 400 series mark."[12] According to the Hollywood Reporter, which says we have moved past the "Golden Age" to the "Platinum Age" of TV, there are more than 1,700 total

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[10] *See, e.g.*, Letter from Rick Kaplan, National Association of Broadcasters, MB Docket No. 15-216 (Nov. 5, 2015).

[11] *See* Yvonne Villarreal, "FX Networks CEO John Landgraf: 'There is simply too much television,'" The Los Angeles Times (Aug. 7, 2015).

[12] *Id.*

shows on television in primetime (8 to 11 p.m.), which does not include sports, news or late night shows.[13]

Too much video choice – it is an extraordinary concept. Yet even the most casual observer of the television landscape would have to agree that the smorgasbord of high-quality content now available can easily overwhelm even the most gluttonous of TV viewers. Americans today are bombarded by information and entertainment options. We spend the majority of our waking hours staring at screens, pouring through information on the Internet, viewing hours of video programming, and engaging with others on social media.

The battle for supremacy of the television screen now extends beyond competition between broadcast stations and cable networks to the rapidly growing options of over-the-top (OTT) services, including Netflix and Amazon Prime, many of which are investing heavily in original programming.[14] And it's not just the sheer number of options that draw eyeballs away from broadcast stations, but the quality of those offerings as well. Using the Emmy Awards as a barometer, the upheaval in the video programming market is obvious. There were more nominees for Best Drama and Best Comedy in 2015 from OTT services (four) than there were from traditional broadcast networks (three).[15] The remaining seven nominees, including the two winners, aired on basic or premium cable networks. In 1993, by comparison, only one of the 10 shows nominated for best drama or comedy did not air on a broadcast network.[16] Even as recently as a decade ago, eight of the 10 nominees for best drama and comedy came

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[13] *See* Tim Goodan, "TCA Journal No. 6: Welcome To the Platinum Age Of Television — And Good Luck With That," The Hollywood Reporter (Aug. 9, 2015).

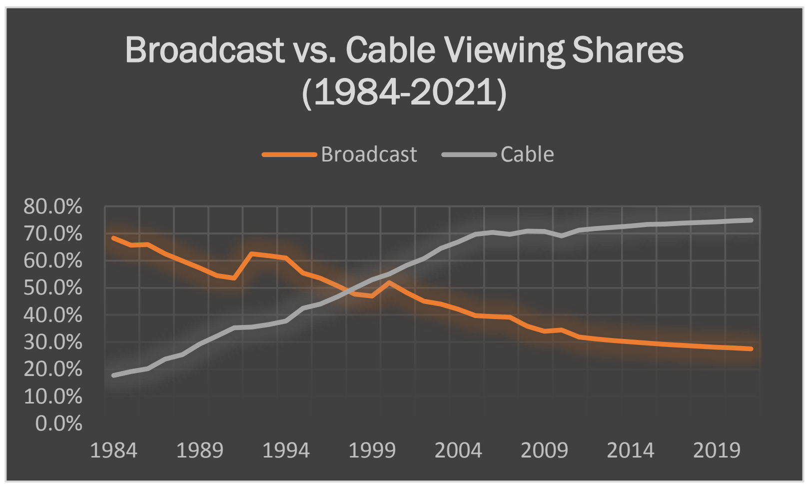
[14] *See* Jon Lafayette, "Netflix Main Cause Of TV Ratings Drop," Broadcasting and Cable (April 23, 2015).

[15] *See* "Emmy Awards: Complete List of 2015 winners," The Los Angeles Times (Sept. 20, 2015).

[16] *See* "45th Emmy Awards Nominees and Winners," Emmys.com, *available at:* http://www.emmys.com/awards/nominees-winners/1993.

from the broadcast networks.[17] This is not to suggest that the quality of broadcast television has dropped – most would say the opposite – but that the ferocity of competition for high-quality television programming, and the ratings to support it, has risen sharply. According to one TV critic: "So many great shows don't get seen at all — series that would have been festooned with accolades and Emmys in the [previous] Golden Age."[18] Consumers of great video programming have never had it better.

Television viewership has slowly but steadily fragmented as the diversity of quality programming has increased and spread throughout the pay TV lineup and beyond. In the mid-1990s, for example, *Seinfeld*, one of the top rated shows on TV, enjoyed a 20-plus rating for several seasons. Other top shows garnered ratings nearly as high. In sharp contrast, the top rated TV show today, *Sunday Night Football* on NBC, typically receives a 12-13 rating. Put another way, today's top rated TV shows would have barely cracked the top 30 two decades ago.



Source: SNL Kagan, data as of 2012. *Note: Total viewing shares may not add to 100 due to viewing in multi-set TVHH.*

Meanwhile, viewership for cable network programming has surged, as have the total number of cable networks.[19] While broadcast TV remains home

[17] *See* "57th Emmy Awards Nominees and Winners," Emmys.com, *available at:* http://www.emmys.com/awards/nominees-winners/2005/outstanding-comedy-series.

[18] *See* Tim Goodman, "TCA Journal No. 6: Welcome To the Platinum Age Of Television — And Good Luck With That," The Hollywood Reporter (Aug. 9, 2015).

[19] The FCC has even stopped counting the total number of cable networks. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourteenth Annual

to many of the most popular programs, several cable network shows have scored ratings that would place them in the top 10 of all shows on TV, a concept unheard of less than a decade ago. *The Walking Dead*, for example, which appears on the cable network AMC, is routinely the most viewed scripted show on television – cable or broadcast.[20] In the advertiser-coveted 18-49 demographic, five of the top 14 shows on TV last season were cable programs, including *Sons of Anarchy, Game of Thrones,* and *American Horror Story*.[21] Does this make AMC, FX and HBO "must-have" channels as well?

Clearly, the days of broadcast TV's dominance of prime time viewership have passed. On an average night, far more total viewers are watching cable programs than broadcast programs.[22] This trend shows no signs of abatement. Additionally, with more and more eyeballs distracted by OTT services like Netflix, the pressure on broadcast stations to produce high-quality content increases every year.[23] Broadcasters, however, are not responding to competition by attempting to stifle their competitors, as MVPDs are in the retransmission

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Report, 27 FCC Rcd 8610 at n. 96 (2012) ("Because of the difficulty we find in identifying all networks, we are not providing this information in our 14th Report. However, we believe the number of networks is approximately 800.").

[20] *See* Rick Kissell, "Weekly Ratings: AMC's 'The Walking Dead' Tops Football, Finishes No. 1 in 3-Day Viewing," Variety (Oct. 23, 2015).

[21] *See* Michael Schneider, "These Are the 50 Most-Watched TV Shows of the 2014-15 Season," TVInsider.com (June 3, 2015), available at: http://www.tvinsider.com/article/1989/top-50-tv-shows-2014-2015-highest-rated-winners-and-losers/.

[22] *See* "Viewing Trends," The Nielsen Company, at 8 (May 2015). In 2014, broadcast TV stations, including network affiliates, independents and public TV stations, accounted for a 37 percent share of primetime audiences. Cable TV networks – both premium and ad-supported – accounted for a nearly 60 percent share of the same audience. As recently as 2006, those shares were about even, demonstrating a significant trend toward greater fragmentation of the viewing audience.

[23] *See* Peter Kafta, "Netflix Eats Into TV Ratings, With Help From the TV Industry," Re/Code (April 23, 2015) ("Netflix, which streamed 10 billion hours of video last quarter, now represents close to 6 percent of total TV viewing in the U.S., says analyst Michael Nathanson. More to the point: Nathanson figures that Netflix accounts for 43 percent of the ratings decline the networks experienced last quarter.").

consent market; rather, broadcasters continue to innovate in the kinds of programming they offer and the platforms over which they offer it.[24]

And, because most video entertainment and information is supported by advertising, competition for advertising dollars is more intense than ever – even as the overall advertising market struggles to recover from the 2007-2009 recession.[25] Projections for the shares of advertising dollars show local broadcast stations and their network partners holding steady for the next decade, while nearly every form of paper advertising (including newspapers, magazines, and the Yellow Pages) are projected to fall.[26] The sharpest rise in advertising market share is predicted for cable TV networks, which is expected to nearly double in the next decade, and mobile advertising, which, by next year, is expected to surpass the total advertising revenue of local broadcast stations and by the end of the decade will grow into a nearly $30 billion per year industry.[27]

For all of these reasons, we find it curious that the Notice relies on assertions that MVPDs alone have experienced an increase in competition since 1992, and thereby further assumes that broadcasters have increased leverage in retransmission consent negotiations.[28] This supposition – offered with virtually no substantiation – requires a near willful ignorance of the current video marketplace described above. Such a view also entirely overlooks the increased stranglehold pay TV operators have on American consumers, both as

[24] *See* Comments of NAB, MB Docket No. 15-158, at 6-15 (Aug. 21, 2015).

[25] *See* SNL Kagan, "Advertising Forecasts: 2014 Edition," at 2 (Jan. 2015) ("Between 2007 and 2009, more than $50 billion was pulled out of the advertising market, and we still have a long way to go before matching the peak of $255.15 billion posted in 2007.").

[26] *Id.* at 6.

[27] *Id.*

[28] *See* Notice at ¶3.

gatekeepers to video content and as gatekeepers to high-speed broadband.[29] For example, in 1992, roughly 40 percent of American TV households, representing nearly 100 million viewers, did not pay for television and relied exclusively on over-the-air (OTA) television for their video information and entertainment.[30] Today, in contrast, the number that rely on OTA exclusively has been reduced to roughly 15 percent of American households. As a result, broadcasters have every incentive to be seen on each and every MVPD. And certainly no broadcast station can effectively compete against well-financed cable network programmers and OTT services without the ability to negotiate for the fair market value of its signal in the same manner as those other programmers.

The truth is that in 2015 broadcast TV stations "must have" pay TV distribution at least as much as MVPDs "must have" broadcasters. The Notice suggests otherwise by citing to news articles highlighting MVPD subscriber losses that have allegedly followed negotiating impasses.[31] For any number of reasons, this citation falls woefully short of demonstrating that broadcasters generally possess greater inherent leverage than their pay TV rivals. First, there are other factors that are far more likely to contribute to subscriber losses. Pay TV customers, frustrated by high prices and shoddy service, are increasingly cutting the cord to rely exclusively on over-the-air TV and broadband services.[32] This trend has nothing to do with

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[29] *See* Section III.B, *infra*.

[30] According to the findings of the 1992 Cable Act, 56 million households subscribed to pay TV services when the Act was passed. That left roughly 37 million households – according to estimates by TVB (the Television Bureau of Advertising) – that relied exclusively on OTA television for their video entertainment and information. Using census data, 37 million households equals approximately 100 million Americans that relied on OTA television, a number that has substantially fallen in the intervening 23 years.

[31] *See* Notice at n. 17.

[32] *See, e.g.,* Gerry Smith, "Cord-Cutting Accelerates as Pay TV Sees Record Subscriber Losses," Bloomberg Business (Aug. 13, 2015) (reporting that pay TV services "recorded their biggest-ever quarterly drop in subscribers, losing 625,000 TV customers" in the 2nd quarter of 2015).

retransmission consent disputes, and it continues at a steady pace. Second, one of the articles quotes Time Warner Cable's then-Chairman, Glenn Britt, as stating that his company's retransmission dispute with CBS resulted in lower fees for subscribers.[33] Britt suggested that the pay TV operator's ability to drive an impasse allowed him to use his company's leverage. Third, as Time Warner Cable well knows, pay TV operators have benefitted greatly on a much broader level from the relatively few retransmission consent impasses that have occurred. The very existence of this proceeding, for example, is itself evidence that real or manufactured retransmission consent impasses can be used to spur government action. Finally, and perhaps most importantly, the Notice in no way addresses the harms that befall broadcast stations engaged in retransmission consent disputes, including drops in ratings and losses of advertising revenue.[34]

It would be irresponsible, as well as arbitrary and capricious, for the Commission to ignore facts that contradict the highly asymmetric view of the video marketplace presented in the Notice, and to then, in turn, adopt pro-pay TV proposals based on erroneous assumptions drawn from that biased view.[35] The Commission cannot reasonably alter its good faith negotiation standards as proposed without actual, substantial evidence supporting the (unfounded) assertion that broadcast stations have undue leverage in retransmission consent

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[33] *See* Joe Flint, "Time Warner Cable Loses 306,000 Subscribers, Cites Fight With CBS," LA Times (Oct. 31, 2013) (quoting Britt as claiming, "We do think we are better off with CBS than we would have been if we had not had this fight.").

[34] *See* Greg Szalai, "CBS Corp. Could Lose $400,000 Per Day in Time Warner Cable Dispute, Analyst Says," The Hollywood Reporter (Aug. 5, 2013).

[35] *See, e.g., Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 763-64 (6th Cir. 1995) (finding an FCC decision arbitrary because it lacked "factual support for its conclusions"); *MCI Telecommunications Corp. v. FCC*, 842 F.2d 1296, 1305 (D.C. Cir. 1988) (finding an FCC action arbitrary and capricious because the FCC "lacked sufficient evidence on which to ground its claim[s]").

negotiations with AT&T/DirecTV, Verizon, DISH, Charter/Time Warner/Bright House and other large providers in today's highly competitive video programming marketplace.

III. INCREASINGLY CONSOLIDATED PAY TV PROVIDERS DO NOT NEED GOVERNMENT ASSISTANCE IN NEGOTIATING THEIR PRIVATE CONTRACTS, INCLUDING RETRANSMISSION CONSENT AGREEMENTS

To support its appeals for skewing the retransmission consent negotiation process in its favor, the pay TV industry argues that the marketplace has changed since Congress determined that broadcasters should have the right to negotiate with pay TV providers that resell stations' signals for profit. The only change, however, that pay TV providers cite is the emergence since 1992 of other MVPDs, in addition to cable.[36] That Congress and the Commission labored hard to bring about this one long-desired change in the video marketplace simply does not justify the pay TV industry's calls for government assistance in negotiating retransmission consent agreements.

NAB agrees that the video marketplace has changed since 1992. As discussed above, competition by programmers for viewers has exploded, giving MVPDs vastly more options for programming content beyond broadcast channels to offer to their subscribers. In addition, as described below, pay TV providers have become increasingly concentrated, and the national, regional and local consolidation in the industry is only expected to increase. It borders on the absurd to argue that broadcasters, saddled with the most restrictive ownership regulations of any industry overseen by the FCC, have any market power or undue negotiating leverage such

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[36] *See, e.g.*, Ex Parte Submission of Time Warner Cable, MB Docket No. 10-71, at 6-7 (Oct. 17, 2013); Comments of Bright House Networks, LLC, MB Docket No. 10-71, at 8-9 (May 27, 2011); Comments of Charter Communications, Inc., MB Docket No. 10-71, at 4 (May 27, 2011); Comments of Cablevision Systems Corp., MB Docket No. 10-71, at 6, 8 (May 26, 2011); Comments of AT&T, MB Docket No. 10-71, at 6-7 (May 27, 2011); Letter from Rocco B. Commisso, Mediacom Communications Corp., MB Docket No. 09-182, at 1 (Apr. 18, 2013). *See also Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2719 (2011) (noting that "important change" in video marketplace since 1992 was "the rise" of other MVPDs); Notice at ¶ 3 (same).

that government assistance on behalf of multi-billion dollar pay TV companies is needed. At bottom, pay TV providers – disliking the fact that the MVPD market is no longer a monopoly – are seeking protection from that change through government intervention in the retransmission consent marketplace.

A. The Pay TV Industry Is Highly And Increasingly Consolidated At The Local, Regional And National Levels

By any standards, MVPD concentration at the local and regional levels is high and increasing. If the FCC approves the pending merger of Charter Communications, Time Warner Cable (TWC) and Bright House Networks (BHN), a single MVPD would control 40 percent or more of the *total* MVPD market in 112 Designated Market Areas (DMAs), or 53 percent of all DMAs in the country.[37] TWC alone – even before any merger – controls over 40 percent of the entire MVPD market in 30 DMAs, ranging from the top-25 markets to among the smallest. In eight DMAs, TWC's share of the total MVPD market exceeds 60 percent.[38] MVPDs, moreover, do not need to be the size of AT&T/DirecTV or the combined Charter/TWC/BHN to possess a dominant share of the total MVPD market in individual DMAs.[39] Cable operators in particular also have long pursued a strategy of local and regional "clustering and consolidation," which "bolsters the market power of cable operators because a single geographic area can be highly susceptible to near-monopoly control by a cable company."[40]

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[37] SNL Kagan, Media Census estimates, Q2 2015. In 49 DMAs, a single MVPD would control over 50 percent of the total MVPD market. *Id.*

[38] *Id.* These eight DMAs range from Honolulu, HI, where TWC possesses a commanding 77.9% share of the MVPD market, to Laredo, TX, where it possesses a mere 60.3%.

[39] For example, Cable One controls 51% of the entire MVPD market in Biloxi-Gulfport, MS, and Suddenlink controls 60.1% of the MVPD market in Parkersburg, WV, 59.9% in Victoria, TX, and between 40-50% in a number of other DMAs. *Id*.

[40] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 712 (D.C. Cir. 2011) (internal quotation marks omitted). *See also Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1314 (D.C. Cir. 2010) (observing that "market penetration of competitive MVPDs" is lower in areas where "a single cable company controls a clustered region"); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 162 (2d Cir. 2013) (rejecting

Last August, an analysis from Multichannel News concluded that "consolidation creates a top-heavy list of [the] 25 largest MVPDs" nationally as well, and that "there is no doubt that further consolidation is coming"[41] – a prediction proved correct a month later when Altice, the owner of Suddenlink Communications, announced its acquisition of Cablevision, resulting in the combination of two more of the top-10 MVPDs.[42] Even before this most recently announced merger and expected additional ones in the future,[43] Multichannel News' analysis revealed extraordinary consolidation over the past 30 years. For example, in 1985, the four largest MVPDs had only 9.9 million subscribers, which rose to 30 million in 1995, 43.54 million in 2000 and 79.7 million today, if the FCC approves the Charter/TWC/BHN merger.[44] Tellingly, the subscribership of the largest MVPD, the combined AT&T/DirecTV, now exceeds by more than two million the subscribership of the top 25 MVPDs *combined* in 1985.[45]

SNL Kagan confirms that, if the pending Charter merger is approved, the top ten MVPDs will control a whopping 94 percent of the nationwide MVPD market (measured in terms of subscribers), the top four MVPDs will control 79 percent of the market,[46] and the top

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arguments that cable operators do not possess market power, and pointing out that "cable operators maintain significant shares in various local markets").

[41] Mike Farrell, *Eat or Be Eaten*, Multichannel News (Aug. 17, 2015) (Attachment hereto).

[42] *See* M.J. de la Merced and A.R. Sorkin, *Altice in Deal to Take Over Cablevision*, The New York Tiimes (Sept. 17, 2015).

[43] Media analysts predict that the Cablevision deal will likely "trigger a fresh round of consolidation that could roll up the last independent standouts among midsize to large U.S. cable companies." Kyle Daly, *Analysts: Cablevision Deal Signals Next Phase in Consolidation*, SNL Kagan (Sept. 17, 2015).

[44] *See* Farrell, *Eat or Be Eaten*, at 8-10.

[45] *Id*. at 8-9. AT&T/DIRECTV has 26.3 million subscribers, while the 25 largest MVPDs in 1985 had only 24.05 million subscribers.

[46] SNL Kagan, Media Census estimates, Q2 2015.

three alone "will control two-thirds of the video delivery universe."[47] In contrast, the FCC found that in 2002 the ten largest MVPDs controlled 84.4 percent of the MVPD market nationally and the top four providers controlled under 50.5 percent of the market.[48]

Many of these locally, regionally and nationally consolidated pay TV providers, moreover, dwarf broadcast television broadcasters in scale and scope. As shown in the chart below, the market capitalization of AT&T/DirecTV and Verizon, for example, is *201 times* and *182 times* larger, respectively, than the market cap of some of the largest local broadcast television companies, including Media General, Scripps and Nexstar. Even the self-described "modest"-sized combination of Charter, TWC and BHN[49] would have a market capitalization *72 times* larger than these TV station groups. And the average TV station group is tiny by comparison to the biggest broadcast groups, let alone major telco and cable/satellite companies. Last spring, BIA/Kelsey estimated that there were 630 separate owners of the 1,785 full power and 405 Class A television stations in the country – an average of only 3.5 stations per owner.[50]

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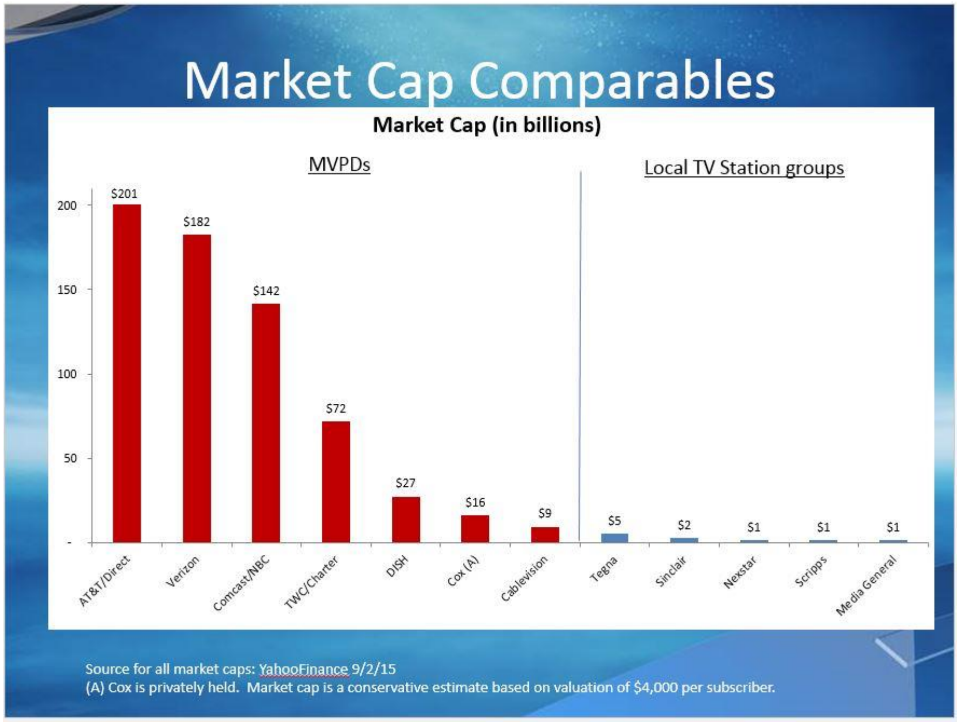
[47] Tony Lenoir, *AT&T, Comcast pro forma Charter control 66% of US video market based on MediaCensus Q2 '15 data*, SNL Kagan (Sept. 1, 2015).

[48] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26901, 26958 (2002).

[49] Application of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, Public Interest Statement, at 56 (June 25, 2015).

[50] *See* Letter to Marlene H. Dortch, Secretary, FCC from Kathleen A. Kirby and Jack N. Goodman of the FCBA Mass Media Practice Committee, MB Docket No. 12-268, at 2 (May 14, 2015); FCC News Release, *Broadcast Station Totals as of March 31, 2015* (Apr. 9, 2015).

This vast gulf between TV broadcasters and pay TV providers will only expand so long as the FCC allows unprecedented consolidation in the MVPD industry, while still



preventing broadcasters from, *inter alia*, owning more than one TV station in most DMAs[51] or even agreeing to jointly sell a modest amount of advertising time.[52] Indeed, the Commission has failed even to conclude its last two statutorily mandated quadrennial reviews of all its broadcast ownership rules. Pay TV providers, in stark contrast, are not subject to any remotely comparable national or local ownership restrictions. As NAB has previously documented, this regulatory disparity has produced an increasingly severe competitive disparity between TV broadcasters and pay TV providers in today's video marketplace.[53]

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[51] The FCC also restricts the cross-ownership of TV stations with radio stations, bans the cross-ownership of TV stations with newspapers and imposes an audience reach restriction on the ownership of TV stations nationwide. *See* 47 C.F.R. § 73.3555.

[52] *See 2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527 (2014) (attributing – and thus effectively prohibiting in most markets – the joint sale of more than 15% of one TV station's advertising time by another station).

[53] *See, e.g.*, Petition to Hold in Abeyance of NAB, MB Docket No. 15-149 (Oct. 12, 2015); NAB Comments, MB Docket No. 14-50 (Aug. 6, 2014).

B. Local TV Stations Do Not Possess Market Power Or Undue Or Unfair Negotiating Leverage Against Consolidated MVPDs

While NAB readily acknowledges that cable is no longer the only type of multichannel video provider,[54] that fact alone does not automatically translate into undue power for broadcasters in retransmission consent negotiations, particularly in light of growing MVPD clustering and concentration and the increasing disparities of scale and scope between broadcasters and the large MVPDs that control access to 94 percent of pay TV subscribers. As NAB has previously explained,[55] in years past, multiple cable systems typically operated within DMAs, each serving some fraction of the market. Today, due to continuing consolidation, there are often only one or two dominant MVPDs, each serving a high proportion of TV households in many local markets, as shown above. Broadcast TV stations, unable to form local ownership combinations or to negotiate retransmission consent jointly,[56] now often must negotiate retransmission consent with MVPDs possessing significant negotiating leverage because they control access to very substantial percentages of viewers locally, regionally and nationally. It defies logic to claim that TWC does not possess significant negotiating leverage with local TV stations in, for example, the Utica, NY, Syracuse, NY, Dayton, OH and Cleveland-Akron, OH DMAs where, standing alone, it possesses nearly 75 percent, over 65 percent, nearly 55 percent and over 45 percent, respectively, of the entire MVPD market.[57] Broadcasters simply cannot afford not to be on a pay TV provider to which such large percentages of viewers subscribe, regardless of whether that pay TV provider competes with another MVPD.

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[54] *See* Notice at ¶ 3.

[55] *See, e.g.*, NAB Reply Comments, MB Docket No. 15-158, at 5 (Sept. 21, 2015).

[56] *See* Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351 (2014).

[57] SNL Kagan, Media Census estimates, Q2 2015.

Indeed, most MVPDs today enjoy a dual gatekeeper role, as both a multichannel video and broadband provider. According to SNL Kagan, 85.6 percent of all TV households subscribed to a multichannel video programming service in 2014, compared to only about 60 percent in 1992.[58] Thus, pay TV providers are even more powerful "bottleneck[s]"[59] today than they were when Congress first required MVPDs to obtain the consent of broadcasters before reselling their signals. As William Baer, the head of the Antitrust Division of the Department of Justice recently explained, both established programming networks and newer OTT programming providers (e.g., Netflix) depend on MVPDs "to deliver their content – and to enable them to sell ads or obtain subscribers."[60] These companies thus "are essential gatekeepers to what customers watch and how they watch it."[61] Similarly, the FCC's Chief Economist, David Waterman, has previously concluded that the "long history of the cable industry and the short history of the broadband Internet industry" demonstrate that the "fundamental policy concerns from an economic perspective" stem from "the presence of horizontal market power at the MSO or ISP level," and that "[*b]oth local and national market shares* of ISPs . . . influence this market power."[62]

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[58] Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(3), 47 U.S.C. 521 nt.

[59] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994).

[60] Assistant Attorney General William Baer, Keynote Address at the Future of Video Competition and Regulation Conference, Duke Law School (Oct. 9, 2015).

[61] *Id*.

[62] David Waterman and Sujin Choi, *Non-Discrimination Rules for ISPs and Vertical Integration: Lessons from Cable Television*, 35 Telecomm. Pol'y 970 (2011) (emphasis added). The FCC appears to suggest the fact that "consumers today are increasingly accessing video programming from online video distributors that deliver content via the Internet" has decreased MVPDs' leverage in retransmission consent negotiations. Notice at ¶ 3. That suggestion is inaccurate, given that most MVPDs are "essential gatekeepers" in their newer role as broadband providers, as well as their traditional role as providers of multichannel video services.

For all these reasons, simply asserting the truism that there are different types of MVPDs competing today in no way justifies government intervention to increase the retransmission consent negotiating leverage of MVPDs. In fact, it would be arbitrary and capricious for the Commission to alter its good faith rules based on this change in the video marketplace touted by the pay TV industry, while ignoring other highly relevant changes, such as those discussed above.[63] Given the evidence in this and other proceedings about increased competition among programming providers, the lack of scale and scope in the broadcast industry and high and growing concentration in the pay TV industry,[64] it also would be arbitrary and capricious for the Commission to conclude that local broadcasters have undue market power over the likes of AT&T/DirecTV or the combined Charter/TWC/BHN.[65] There is simply no reason – other than to provide corporate welfare to a particular industry – for the Commission to alter its rules to deliberately increase the negotiating leverage of MVPDs with market capitalizations as high as $200 billion.

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[63] "Fundamental principles of administrative law require that agency action be 'based on a consideration of the relevant factors.'" *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)). An "agency rule would be arbitrary and capricious if the agency . . . failed to consider an important aspect of the problem. . . ." *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

[64] See NAB Petition to Hold in Abeyance, MB Docket No. 15-149 (Oct. 12, 2015); NAB Reply Comments, MB Docket No. 15-158 (Sept. 21, 2015); NAB Comments, MB Docket No. 15-158 (Aug. 21, 2015); NAB Comments, MB Docket No. 14-16 (Mar. 21, 2014). We hereby incorporate these filings into the record in this proceeding.

[65] *State Farm*, 463 U.S. at 43 (an "agency must examine the relevant data," and any "rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before" it).

IV. THE PAY TV INDUSTRY'S GOAL – TO REDISTRIBUTE REVENUE TO MVPDS – HAS NOTHING TO DO WITH GOOD FAITH NEGOTIATIONS AND IS NOT A PROPER BASIS FOR FCC ACTION

The Notice in this proceeding is notable for both what it contains and what it lacks. While it contains a lengthy laundry list of numerous MVPD ideas for enriching themselves at broadcasters' expense, it conspicuously lacks a serious analysis of why, under current video marketplace conditions as discussed in Sections II and III, the various broadcaster negotiation practices and proposals that MVPDs want to ban should be found to violate good faith standards. The Notice ignores both MVPD consolidation and broadcasters' competitive challenges in the programming market, and it does not offer any meaningful arguments to demonstrate the alleged inadequacy of the FCC's current good faith rules. The Notice also neglects to explain how the FCC's narrow authority to require parties to negotiate retransmission consent in good faith can possibly extend to implement the various MVPD proposals, or even what many of these proposals have to do with the good faith negotiation at all.

Instead, the proposals in the Notice appear designed to impair the rights held by broadcasters, including those rights possessed by essentially all other parties negotiating commercial agreements. For example, MVPDs urge the Commission to go well beyond antitrust law and prohibit broadcasters from negotiating for the carriage of additional channels as part of retransmission consent negotiations, even though "bundling" of products is a routine commercial practice in many industries; both Congress and the FCC have previously expressly approved broadcasters negotiating for the carriage of additional channels as part of retransmission consent; and non-broadcast programmers bundle channels when they negotiate for distribution of their programming.

MVPDs additionally want the FCC to improperly stretch its narrow good faith authority in a way that violates federal copyright law. Section 106 of the Copyright Act explicitly permits a copyright owner, such as a broadcaster that owns the copyright to content in its signal, to control the public performance of its copyrighted works in all ways, including via the Internet. The Supreme Court has made clear this includes the right *not* to publicly perform (or authorize the public performance of) copyrighted content via any particular platform or to any particular audience, if it so chooses. The FCC's good faith authority also does not properly apply to questions of network-affiliate relations, and it is frivolous for MVPDs to argue that a broadcaster's exercise of its bargained-for exclusivity rights under legal programming contracts violates the requirement to negotiate retransmission consent in good faith. None of these pay TV requests has anything to do with whether any broadcaster has made "bona fide proposals" and "engage[d] in timely negotiations" with the intent "to reach an agreement."[66] In other words, none of these proposals has anything to do with the essence of good faith.

Finally, NAB observes that, if broadcasters actually had been failing to negotiate in good faith over a period of time, then MVPDs likely would have inundated the Commission with complaints. Certainly the pay TV industry has the resources to file and pursue good faith complaints. Significantly, however, in over two decades, the Commission has issued decisions in only six good faith cases, and it has never found that a broadcaster failed to negotiate retransmission consent in good faith. Not once.

Rather than pursuing good faith complaints that they know have little merit, MVPDs therefore are attempting to increase their negotiating leverage by urging the FCC to make

[66] S. Rep. No. 322, 113th Cong., 2d Sess. at 13 (Dec. 12, 2014) (Senate Report).

routine negotiating proposals and practices evidence of bad faith. But the fact that MVPDs would like to prevent broadcasters from making a wide range of proposals during retransmission consent negotiations does not mean those proposals are somehow made in bad faith or that the FCC's existing good faith rules are insufficient. Banning broadcaster negotiation proposals and practices so as to favor MVPDs at the negotiating table, and thereby artificially reducing the amount of compensation that they pay for their use of broadcast signals, is not a proper basis for FCC action here. It merely would be an unjustified governmental transfer of revenue from broadcasters to the pay TV industry.

A. The FCC'S Existing Standards Are Wholly Consistent With Federal Law And The Fundamental Meaning Of Good Faith

Despite MVPDs' carping about the FCC's current good faith standards, those standards in fact reflect consistent federal law as to what good faith negotiation means. Because Congress did not define "good faith" when initially adopting that standard for retransmission consent negotiations, the Commission looked to "analogous statutory standards," finding that the good faith bargaining requirement under Section 8(d) of the Taft-Hartley Act was the "most appropriate source of guidance."[67] Consistent with Section 8(d) precedent, the Commission concluded that Congress intended it "to develop and enforce a process" ensuring that broadcasters and MVPDs conduct retransmission consent negotiations "in an atmosphere of honesty, purpose and clarity of process," but did not intend the Commission to "require agreement or impose terms or conditions" on the parties.[68] The

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[67] *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, 5453-54 (2000) (Good Faith Order).

[68] *Id*. at 5454-55. *See, e.g., United Steelworkers of Am., AFL-CIO-CLC, Local Union 14534 v. NLRB*, 983 F.2d 240, 245 (D.C. Cir. 1993) (under Section 8(d), "parties must enter into discussions with an open mind and a sincere intention to reach an agreement," but the "obligation to bargain in good faith does not compel either party to agree to a proposal," make "a concession" or "yield any position fairly maintained," as "firmness of a bargaining position does not constitute bad faith") (internal citations

courts have interpreted other federal statutes with good faith negotiation requirements in a similar manner.[69]

Significantly, when Congress extended the good faith negotiation requirement to MVPDs in 2004, it did not indicate that the Commission should alter its good faith standards. And unlike other STELAR provisions directing the FCC to act, which all required the adoption of rules or the issuance of a report, Section 103(c) of STELAR only required the Commission to "commence" a review of its totality of the circumstances test.[70] That section did not direct the Commission to change its good faith rules in any way, and did not indicate congressional disapproval of the FCC's well-established understanding of the fundamental meaning of good faith. Neither did STELAR's legislative history. The Senate Commerce Committee report provided: "Specifically, the FCC shall make sure that its test encourages both parties to a retransmission consent negotiation to *present bona fide proposals* on the material terms . . .

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omitted); *J.P. Stevens & Co., Inc. v. NLRB*, 623 F.2d 322, 326 (4th Cir. 1980) ("'Good faith' means more than merely going through the motions of negotiating; it is inconsistent with the predetermined resolve not to budge from an initial position.") (*quoting NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 154 (1956) (Frankfurter, J., concurring in part and dissenting in part)); *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883, 889 (D.C. Cir. 1970) (good faith "contemplates a willingness to enter the discussions with an open mind and purpose to reach an agreement consistent with the respective rights of the parties") (internal quotation marks and citation omitted).

[69] For example, provisions of the Bankruptcy Code (e.g., 11 U.S.C. § 1113(b)(2)) require parties to "confer in good faith." Courts have interpreted this language to require "an honest purpose to arrive at an agreement as the result of the bargaining process." *In re Walway Co*., 69 B.R. 967, 973 (Bankr. E.D. Mich. 1987) (citing *Cap Santa Vue, Inc*., 424 F.2d 883); *accord In re AMR Corp*. 477 B.R. 384, 409 (Bankr. S.D.N.Y. 2012). Likewise, the Indian Gaming Regulatory Act requires "the State" to "negotiate with the Indian tribe in good faith." 25 U.S.C. § 2710(d)(3)(A). Courts have held that "[g]ood faith [under the IGRA] 'presupposes a desire to reach ultimate agreement' and not simply 'an attitude of take it or leave it.'" *Flandreau Santee Sioux Tribe v. S. Dakota*, No. 07-4040, 2011 WL 2551379, at *3 (D.S.D. June 27, 2011) (quoting *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960)).

[70] It is highly unusual for Congress merely to direct the FCC to initiate a review without any requirement for a final action. Neither the Satellite Television Extension and Localism Act of 2010 nor the Satellite Home Viewer Extension and Reauthorization Act of 2004 – both of which required various FCC rulemakings and reports – included such an open-ended provision.

and engage in timely negotiations to reach an agreement."[71] In other words, Congress directed the FCC to ensure its totality of the circumstances test encourages the parties to negotiate in good faith. "Bona fide" means "[I]n or with good faith."[72]

When initially adopting its totality of circumstances test in 2000, the Commission appropriately determined to adopt a flexible test that could take account of the "dynamics of specific retransmission consent negotiations [that] will span a considerable spectrum."[73] Retransmission consent negotiations today still "span a considerable spectrum," making it virtually impossible for the Commission to develop rules delineating every type or combination of negotiating behaviors that may breach the reciprocal obligation to negotiate in good faith. A useful test must be sufficiently flexible to address a wide array of factual circumstances and to determine whether "the totality of th[ose] circumstances reflect an absence of a sincere desire to reach an agreement," thereby violating the duty "to negotiate in good faith."[74] The pay TV industry's ideas for wealth redistribution have little or nothing to do with this fundamental conception of good faith.

B. Antitrust Law Properly Governs Any Potential Anti-Competitive Effects Of Bundling Or Tying, And The FCC Has No Basis To Declare That Routine Bundling Proposals Constitute Bad Faith

NAB strongly disagrees with the suggestion in the Notice that a broadcaster's offer, during the course of a retransmission consent negotiation, to include its primary broadcast channel as part of a broader package that may include carriage of other affiliated programming channels – such as multicast channels or cable networks – is indicative of bad

[71] Senate Report at 13 (emphasis added).

[72] Black's Online Law Dictionary, 2d ed., http://thelawdictionary.org.

[73] Good Faith Order, 15 FCC Rcd at 5470.

[74] Good Faith Order, 15 FCC Rcd at 5458.

faith.[75] First, as the Notice makes clear, antitrust laws already govern such practices, and the Commission has no valid policy reason to craft rules that would go above and beyond those laws. There is also no reason to believe that broadcasting, unique among all businesses, let alone all video programming providers, deserves to be subject to "super-antitrust" rules that address only retransmission consent negotiations. Finally, the record contains no evidence that broadcasters in fact have the requisite power in one market to effectively coerce action by pay TV providers in another market, or otherwise foreclose competitors from participation in that other market, in a manner that would violate antitrust law.

1. There Are No Valid Policy Reasons for the Commission to Supersede Antitrust Law with Unique Restrictions on Broadcasters that Would Not Apply to Other Programmers

The antitrust laws already provide a remedy for instances where bundling or tying by a broadcaster (or any other business entity) might restrain competition. The Commission has no valid basis for superseding antitrust law by broadly prohibiting practices that are otherwise allowed under those laws.

Section 313(a) of the Communications Act of 1934 makes "[a]ll laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts or agreements in restraint of trade . . . applicable to . . . interstate or foreign radio communications."[76] As the FCC has recognized, where a particular area is "regulated by the antitrust laws, other agencies such as the Department of Justice or the Federal Trade Commission have primary enforcement responsibility."[77] Congress, moreover, "created the

[75] Notice at ¶ 15.

[76] 47 U.S.C. § 313(a).

[77] *Elimination of Unnecessary Broadcast Regulation*, Policy Statement and Order, 57 Rad. Reg. 2d (P & F) 913, at ¶ 28 (rel. Feb. 5, 1985) (the FCC undertook the 1985 rulemaking in part to *eliminate* policies that "proscribe . . . business practices permitted by federal antitrust laws").

retransmission consent regime in 1992 'to establish a marketplace for the disposition of the rights to retransmit broadcast signals,' but not 'to dictate the outcome of the ensuing marketplace negotiations.'"[78] Any rule that would restrict a broadcaster's lawful ability to offer bundled programming packages necessarily affects the outcome of those negotiations and therefore contradicts congressional intent.

There also are strong policy reasons why bundling and tying are prohibited only in certain situations, *i.e.*, where there is a risk that a firm with substantial market power in one market can foreclose competition in another market. For all of the reasons discussed in Sections II and III above, broadcasters do not possess such market power in today's highly competitive video programming marketplace. Outside of those limited circumstances involving foreclosure of competition, bundling and tying can be efficient, procompetitive and pro-consumer. In the context of the video programming market specifically, bundling and tying, among other benefits, may reduce transaction costs, facilitate the introduction or expansion of new programming channels, increase the diversity of programming and enable program providers to take advantage of economies of scale.[79] Given these benefits alone, it would be arbitrary and capricious for the Commission to alter its good faith standard to prohibit broadcasters from engaging in these lawful negotiation practices.

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[78] Notice at ¶ 2 (quoting S. Rep. No. 92, 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169).

[79] NAB and other broadcasters previously demonstrated the public benefits derived from negotiating for the carriage of affiliated programming as part of retransmission consent. *See, e.g.*, Comments of NAB, MB Docket Nos. 07-29, 07-198, at 27-29 (Jan. 4, 2008) (demonstrating how retransmission consent negotiations resulted in the development of local/regional cable news networks; the MVPD carriage of stations with programming directed to Hispanic viewers; MVPD carriage of broadcasters' diverse multicast programming streams; and the increased availability of local weather information); Reply Comments of NAB, MB Docket Nos. 07-29, 07-198, at 29-30 (Feb. 12, 2008) (same). We hereby incorporate these filings by reference into the present proceeding.

Prohibiting or severely limiting broadcasters from offering bundled packages of programming to pay TV operators additionally would unfairly disadvantage broadcast stations compared to other video programming providers. Indeed, it would create an untenable perversion of the marketplace. For example, it would prevent a company that owns a broadcast station and one or more cable programming networks from bundling its broadcast channel with those other networks when negotiating with pay TV distributors. But it would not prevent that same company from offering a bundle of cable networks that did not include the broadcast channel. This glaring disparity cannot in any way be reconciled with current marketplace conditions; nor can it be justified by thinly-sourced anecdotes that broadcasters are "forcing" pay TV providers to accept bundled packages that they would not otherwise accept.

Currently, all video programmers (and all MVPDs) must comply with the antitrust laws when negotiating carriage rights. This broadly applied and consistently enforced regime ensures that all marketplace participants are treated (and protected) equally. Given the increasingly competitive nature of the video programming marketplace, the Commission has no justification to arbitrarily decide that broadcasters, alone among all programmers distributed by pay TV companies, should be subject to a different, more restrictive standard.[80]

2. Negotiating for Carriage of Multiple Programming Channels or Stations Does Not Violate Antitrust Principles of Bundling or Tying

When Congress established the retransmission consent regime, it specifically foresaw and approved of broadcasters negotiating for the carriage of affiliated programming as

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[80] *See, e.g., Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 182-83 (D.C. Cir. 1999) (finding FCC decision arbitrary and capricious where it failed to satisfactorily explain the disparate treatment of incumbent and new licensees, particularly why new licensees "should have a permanent advantage over incumbent" licensees); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172-73 (D.C. Cir. 1994) (finding FCC decision arbitrary and capricious where it failed to "provide adequate explanation before it treat[ed] similarly situated parties differently").

compensation.[81] The FCC also determined in both its 2000 and 2005 orders that negotiating for such carriage is presumptively consistent with good faith bargaining.[82] Indeed, the Commission noted with apparent approval in this proceeding that broadcasters in the past "negotiated with MVPDs for in-kind compensation," including "carriage of additional channels of the broadcaster's programming."[83] The Commission has no basis for reversing course now, particularly given that its long-standing position is consistent with the treatment of bundling and tying of programming under antitrust law.[84]

Bundling is a type of loyalty discount generally viewed as being procompetitive and pro-consumer.[85] Typically, bundling involves offering discounts conditioned on a buyer's agreement to purchase two or more products from a seller. For bundling to violate antitrust law, it must enable a firm with monopoly power in one market to exclude competitors from a second market through discounts so extreme that they become coercive.[86] Determining if

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[81] *See* S. Rep. No. 92, 102nd Cong., 1st Sess. at 36 (1991) (recognizing that broadcasters may negotiate for a variety of types of retransmission consent compensation, including "the right to program an additional channel on a cable system").

[82] Good Faith Order, 15 FCC Rcd at 5469; *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, 10346 (2005) (Reciprocal Good Faith Order).

[83] Notice at ¶ 3 & n. 14.

[84] The courts have previously faulted the FCC for failing to reasonably justify reversals of policy. *See, e.g., Mountain States Telephone and Telegraph Company v. FCC*, 939 F.2d 1021, 1034 (D.C. Cir. 1991); *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987).

[85] *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896 (9th Cir. 2008) ("Not surprisingly, the Supreme Court has instructed that, because of the benefits that flow to consumers from discounted prices, price cutting is a practice the antitrust laws aim to promote. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) ('[C]utting prices in order to increase business often is the very essence of competition.'). Consistent with that principle, we should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a rule that discourages legitimate price competition.").

[86] *See, e.g., Cascade Health Solutions,* 515 F.3d at 896 (noting that whether a firm possesses monopoly power is a key element in establishing a bundling claim); *see also* ABA Section of Antitrust Law, Antitrust Developments at 256 (7th ed. 2012).

bundling is coercive largely depends on whether the bundle is priced below a reasonable measure of costs so that equally efficient competitors are foreclosed from the second market.[87] As the Ninth Circuit stated in *Cascade Health*, "antitrust laws protect the process of competition, and not the pursuits of any particular competitor."[88]

Broadcaster retransmission proposals that include bundling are fully consistent with antitrust principles, as broadcasters do not have the requisite market power to foreclose competition in the supply of video programming to MVPDs. Indeed, it strains credulity to even suggest that bundling has foreclosed competing video program providers, in light of the explosion in the number of programming providers and the number and variety of program channels now available to MVPDs and consumers. By any standard, competition to supply video programming is thriving. The bundling of channels, moreover, generates efficiencies through reduced negotiating costs, potential for lower retransmission fees than could be achieved by licensing each channel individually, and increased diversity of program offerings for consumers. This behavior therefore is consistent with the Supreme Court's instruction to encourage competition and to allow for the discounting of products so that consumers may pay less for services.

In addition, NAB observes that the practice of bundling by sellers is commonplace in all sectors of the economy. Pay TV companies themselves routinely advertise their services as bundled packages, enticing consumers to sign up for double-, triple- and quadruple-play service packages in exchange for discounts. How many of us have home phone lines we rarely use (or never even connected) because it was cheaper to pay for the phone than to pay

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[87] *See Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *see also Cascade Health Solutions*, 515 F.3d at 901 (stating that "in the normal case, above-cost pricing will not be considered exclusionary conduct for antitrust purposes").

[88] *Cascade Health Solutions*, 515 F.3d at 901.

for cable and/or internet without the phone line? Indeed, AT&T and DirecTV argued they needed to merge to compete effectively, because, standing alone, neither company could offer the bundled products consumers demand.[89] It is wholly inconsistent for pay TV operators to argue that bundling in the context of selling cable packages is pro-competitive while bundling in the context of selling broadcast signals is anti-competitive.

Tying refers to the practice of conditioning the sale of one product on the buyer's agreement to purchase an additional product from the seller, or at least an agreement not to buy the second product from any other seller.[90] Tying arrangements are frequently viewed as being procompetitive,[91] and a plaintiff claiming a tying violation must establish four elements: (1) the existence of two separate products or services; (2) the sale of the first product was conditioned on the sale of the second product; (3) proof that "the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product"; and (4) the amount of interstate commerce in the tied product's market was not insubstantial.[92]

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[89] *See Bundles and bulk: A big merger brings telecoms and television closer together*, The Economist (May 24, 2014), *available at* http://www.economist.com/news/business/21602756-big-merger-brings-telecoms-and-television-closer-together-bundles-and-bulk.

[90] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11-12 (1984).

[91] *See Ill. Tool Works v. Indep. Ink, Inc*. 547 U.S. 28, 45 (2006) ("[m]any tying arrangements . . . are fully consistent with a free, competitive market."); *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1200 (9th Cir. 2012) ("Like other vertical restraints, tying arrangements may promote rather than injure competition."); U.S. Dep't of Justice*, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at 103 (Apr. 2007), *available at* http://www.justice.gov/atr/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition ("In view of their potential efficiencies, many economists believe that, in general, tying and bundling are more likely to be procompetitive than anticompetitive.").

[92] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS at 177 (7th ed. 2012); *see also Fortner Enters. v. U.S. Steel Corp*., 394 U.S. 495, 501 (1969); *Jefferson Parish Hosp. Dist. No. 2,* 466 U.S. at 16 ("we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby"); *Cascade Health Solutions*, 515 F.3d at 912 ("Tying arrangements are forbidden on the theory that, if the seller has market power over the tying product, the seller can leverage this market power through tying arrangements to exclude other sellers of the tied product.").

Per the Supreme Court's direction, several circuit courts of appeals have required proof that the seller exploited its control over the tying product in order to coerce the buyer into purchasing the second product.[93] Proof that the seller has copyrighted the material that it attempts to sell does not demonstrate the requisite market power.[94]

Broadcaster proposals that condition the sale of one channel on the sale of a second channel do not constitute unlawful tying arrangements. Most significantly, the pay TV industry has not put forward any proof that broadcasters are coercing MVPDs into accepting multiple channels. In the context of retransmission negotiations, courts have held that the offer to discount a channel if the MVPD also purchases a second channel does not constitute coercion, and thus the offer is not illegal tying.[95] Broadcasters can negotiate for the carriage of several channels by MVPDs, and pay TV providers can refuse to carry the extra channels. Nothing in that negotiation involves coercion or market foreclosure.[96]

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[93] *Jefferson Parish Hosp. Dist. No. 2,* 466 U.S. at 12; *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1159 (9th Cir. 2003); *Aquatherm Indus. v. Fla. Power & Light Co.*, 145 F.3d 1258, 1263 (11th Cir. 1998).

[94] *Digital Equip. Corp v. Uniq Digital Techs.*, 73 F.3d 756, 762 (7th Cir. 1996) (citing *Will v. Comprehensive Accounting Corp*., 776 F.2d 665, 673 n.4 (7th Cir. 1985)).

[95] *See Mediacom Commc'ns Corp. v. Sinclair Broad. Grp.,* 460 F. Supp. 2d 1012, 1022-24 (S.D. Iowa 2006) ("It is true that Sinclair may have been offering both the Tying and Tied Stations together for a lower net price, but that itself does not constitute an illegal tying arrangement. This is especially true given that Mediacom has not provided any evidence that the prices Sinclair sought for the Tying or the Tied Stations were above fair market value.").

[96] The courts, in any event, have rejected claims based on allegations that individual purchasers were "forced" to buy tied products. Antitrust law is concerned with harm to marketplace competition; thus, a substantial amount of commerce, rather than just individual buyers, must be implicated for any alleged tying to violate the law. *See, e.g., Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 16 (when a purchaser is "forced" to buy a tied product, "there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed"); *Station Enter., Inc. v. Ganz*, Case No. 07-CV-14294, 2009 U.S. Dist. LEXIS 82292 at *15-16 (E.D. Mich. Sept. 10, 2009) (rejecting plaintiff's claim that it was injured "from having to purchase the tied products" where there was no allegation of reduced competition in the tied product market).

Additionally, the courts have declined to hold that different programming constitutes different product markets,[97] and without the presence of two product markets, *there can be no illegal tying or bundling*. To even begin to consider whether a broadcaster has unlawfully tied their channels would require an exceptionally narrow definition of the relevant product market: each channel would have to constitute a separate market, a contention absurd on its face. Moreover, tying is unlawful only when undertaken by a firm with significant market power, which, as discussed above, broadcasters do not possess in today's highly competitive video programming market.[98]

It is within the bounds of federal antitrust law to review broadcasters' negotiations with MVPDs for the carriage of their signals, and when courts have had the chance to review these negotiations, they have determined that broadcasters did not commit bundling or tying violations. The Commission should follow suit and decline to impose new regulations that would impede broadcasters' ability to offer bundled programming packages just as every other programmer may do. Pay TV providers' proposals here to prohibit broadcaster negotiation practices that they themselves engage in are hypocritical in the extreme – especially in light of the pay TV industry's past preference for compensating broadcasters

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[97] *See, e.g.*, *Outlet Commc'ns, Inc. v. King World Prods.*, 685 F. Supp. 1570, 1575-76 (M.D. Fla. 1988) (conditioning the licensing of Wheel of Fortune on the licensing of two additional game show programs was not tying because the programming was in one market, not two markets); *Metromedia Broad. Corp. v. MGM/UA Entm't Co.*, 611 F. Supp. 415, 422-24 (C.D. Cal. 1985) (syndicated first runs of a program and the reruns of that program constituted one market).

[98] *Ill. Tool Works*, 547 U.S.at 46 (stating that in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 794, 797 (1st Cir. 1988) (tying claim requires proof of "significant market power").

through carriage of affiliated programming[99] -- and merely represent another attempt to skew the retransmission consent marketplace decisively in their favor.

C. Forcing A Broadcaster To Publicly Perform Its Copyrighted Content Online Would Directly Contradict Federal Copyright Law And Improperly Stretch The FCC's Good Faith Authority

The Notice raises a proposal that would require a broadcaster to provide online access to its broadcast programming to the subscribers of an MVPD during a retransmission consent dispute between the broadcaster and that MVPD. In particular, the Notice inquires whether this proposal raises "issues of statutory authority."[100] The answer is clearly yes. The Commission has no authority under the good faith negotiations provision in Section 325(b)(3)(C), or under the Communications Act more generally, to force a broadcaster to publicly perform its copyrighted content online.

Specifically, any rule by the Commission that would effectively force a broadcaster to publicly perform its content online would violate the copyright owner's exclusive rights under the Copyright Act. Such a rule also would be contrary to Congress' explicit admonition that retransmission consent not in any way impinge upon private program licensing agreements.

Under federal law, broadcasters possess the right to control how their copyrighted programming is used. Copyright protection subsists in, among other works of authorship, motion pictures and other audiovisual works, which include television programming.[101] The Copyright Act affords certain exclusive rights to the owners of copyrighted works, including the rights to make copies, to prepare derivative works, to control the sale and distribution of the

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[99] As discussed in the Introduction and Summary, for years MVPDs refused to compensate broadcasters with cash and would offer only in-kind compensation, including the carriage of affiliated programming. It is ironic, to say the least, that MVPDs now urge the FCC to ban the specific type of broadcaster compensation that they long preferred to provide.

[100] Notice at ¶ 13.

[101] 17 U.S.C. § 102(a)(6).

works, to control the sale and distribution of any copies or derivative works, and – most importantly here -- to control the public performance or display of the works.[102] The Act also reserves to the copyright owner the exclusive right "to authorize" others to do any of the specified activities.[103]

In *Stewart v. Abend*, the Supreme Court made it absolutely clear that this exclusive right to authorize includes the right *to refuse* to authorize.[104] According to the Court, "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright. In fact, [we] ha[ve] held that a copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work."[105] The limited monopoly granted to the copyright owner is intended to provide the necessary bargaining capital to garner a fair price for the value of the works before passing into public use.[106]

A Commission mandate forcing a broadcaster to publicly perform its copyrighted content online would clearly violate its exclusive right *not* to do so.[107] Moreover, imposing such a mandate in the context of retransmission consent negotiations would effectively deprive the broadcast copyright owner of the very "necessary bargaining capital to garner a fair price for the value of the works" to which the Supreme Court held it is entitled.[108]

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[102] 17 U.S.C. § 106.

[103] H. R. Rep. No. 1476, 94th Cong., 2d Sess. at 5674 (1976) (the "exclusive rights accorded to a copyright owner under section 106 are 'to do and to authorize' any of the activities specified").

[104] *Stewart v. Abend,* 495 U.S. 207, 228-29 (1990).

[105] *Id.*; *see Fox Film Corp. v. Doyal,* 286 U.S. 123, 127 (1932).

[106] *See Harper & Row v. Nation Enterprises,* 471 U.S. 539, 546 (1985).

[107] *See* Paul Goldstein, *Goldstein on Copyright* §7 (3rd Ed., Supp. 2013) ("Copyright law's exclusive rights, including the authorization right, entitle a copyright owner to refuse to license use of its work for any reason or for no reason at all.").

[108] There are situations where Congress, under its copyright powers, has determined that copyright owners' exclusive rights, including the right to refuse to authorize a user's public performance of their works, should be diminished by means of a statutory or "compulsory" license. Were the Commission to require that broadcast copyright owners, against their will, provide their programming to MVPDs to

In passing the 1992 Cable Act, moreover, Congress was "careful to distinguish between the authority granted to broadcasters under the new Section 325(b)(1)" to "consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained in the signal."[109] Congress emphasized that nothing in this legislation was "intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements."[110] Any Commission mandate forcing a broadcaster to stream its content online, such that it would abrogate or limit its existing or future licensing agreements in connection with that content, would violate congressional intent expressed in the 1992 Cable Act, as well as the clear terms of federal copyright law.

Beyond lacking statutory authority to do so, adopting the MVPD proposals about online content also would likely have unintended, even anti-consumer, effects. Today, most major broadcast networks and local TV stations offer video online, including live news, recent episodes of top shows and archived product. While much of this online programming is currently viewable for free, other content is subscription only.[111] If, however, the Commission, at the behest of pay TV providers, used retransmission consent regulation as an excuse to interfere with broadcasters' ability to control the content they currently distribute online for free viewing, such interference would incent broadcasters to place more of their online

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stream, it would be creating a *de facto* compulsory license—an action clearly far beyond any authority possessed by the FCC.

[109] S. Rep. No. 92, 102nd Cong., 1st Sess. at 36 (1991).

[110] *Id.*

[111] On CBS.com, for example, recent episodes are available to view for free. CBS also offers a premium paid online service, CBS All Access, which includes unlimited access to more than 7,500 full episodes of current and past CBS shows.

content behind a paywall. Such a result would clearly undermine the rationale for the rule itself.

For all these reasons, the Commission must reject proposals that would force broadcasters to publicly perform their copyrighted programming online. The Commission cannot stretch its limited authority over one aspect of retransmission consent – or, indeed, any authority it has under the Communications Act – to override fundamental tenets of federal copyright law and derogate from the statutory rights of a broadcast copyright owner to control the public performance of its copyrighted works. And the FCC's authority to usurp broadcasters' rights here is doubly lacking, as the Commission has no basis for asserting jurisdiction over content online, rather than broadcast over the air.

The Supreme Court has "often admonish[ed]" the Commission that "only Congress can rewrite" the Communications Act[112] – or the Copyright Act. The Commission accordingly cannot rewrite federal copyright law in this proceeding to prevent broadcasters from limiting online access to their copyrighted programming, including to the subscribers of any MVPD or to anyone else.

D. The FCC's Good Faith Authority Does Not Properly Apply To Questions of Network-Affiliate Relations

The Notice specifically inquires about "network involvement" in affiliates' retransmission consent negotiations, including certain terms in network affiliation agreements pertaining to retransmission consent, and whether such involvement "suggest[s] bad faith."[113] The FCC's limited good faith authority concerning negotiations between TV

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[112] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 376 (1986).

[113] Notice at ¶ 14 (noting "concern" about third parties negotiating retransmission consent on behalf of stations).

stations and MVPDs cannot appropriately be stretched to control the separate contracts between networks and affiliated stations or network/affiliate relations generally.

Good faith properly concerns the negotiating process between MVPDs and broadcasters and whether they have a "sincere desire" to reach an agreement,[114] not the identity of either party's negotiating representative so long as that representative has "authority to bargain on retransmission consent issues."[115] The fact that a MVPD may prefer to negotiate with a different party than the one designated by a local station does not imply that the station's choice constitutes bad faith. And again, the Notice contains no substantive analysis as to how involvement by "third parties"[116] in retransmission consent negotiations actually causes "disruptions in service to consumers."[117] Thus, as it did in 2005, the Commission should "decline to take action on [network-affiliate] issues" in the context of a good faith proceeding.[118]

E. The FCC Must Summarily Reject MVPDs' Frivolous Argument That Broadcasters' Exercise Of Their Bargained-For Exclusivity Rights Under Legal Programming Contracts Violates The Good Faith Standard

One of the most egregious of all proposed "improvements" to the good faith negotiating standard would prohibit a broadcaster from enforcing – apparently in court as well as before the Commission – its bargained-for program exclusivity rights during a retransmission consent dispute.[119] This proposal is ill-advised, contrary to congressional intent and far outside the Commission's good faith authority.

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[114] Good Faith Order, 15 FCC Rcd at 5458; 5462.

[115] Good Faith Order, 15 FCC Rcd at 5463.

[116] Notice at ¶ 14.

[117] Notice at ¶ 6.

[118] Reciprocal Good Faith Order, 20 FCC Rcd at 10354.

[119] Notice at ¶ 16.

First, stating the obvious, this proposal directly contradicts existing FCC program exclusivity regulations – specifically the network non-duplication and syndicated exclusivity rules – which provide a mechanism to enforce a broadcaster's exclusivity rights at the Commission. Under the current rule, a broadcaster may enforce its exclusivity rights at the FCC if a MVPD imports a distant signal carrying duplicative programming during a retransmission consent impasse or at any other time.[120] Notwithstanding the Commission's wisely stalled proceeding proposing to modify or eliminate the FCC's exclusivity enforcement rules[121] – a proposal that broadcasters[122] and many members of Congress[123] have opposed – the anti-exclusivity proposal in this Notice would substantially undermine broadcasters' ability to negotiate for the fair market value of their signals.[124]

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[120] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 3006, ¶ 180 (1993) ("Congress intended that local stations electing retransmission consent should be able to invoke network non-duplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system.").

[121] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 10-71, at ¶¶40-73 (rel. Mar. 31, 2014).

[122] *See, e.g.,* Comments of NAB, MB Docket No. 10-71 (June 26, 2014) (NAB Exclusivity Comments); Reply Comments of NAB, MB Docket No. 10-71 (July 24, 2014) (NAB Exclusivity Reply Comments); *Ex Parte* Letter from Rick Kaplan, NAB, MB Docket No. 10-71 (Sept. 15, 2015); *Ex Parte* Letter from Richard R. Zaragoza on Behalf of Various State Broadcast Associations, MB Docket No. 10-71 (Oct. 13, 2015). We hereby incorporate these filings into this proceeding, MB Docket No. 15-216.

[123] *See* Letter from Sen. Chuck Schumer to FCC Chairman Tom Wheeler (Oct. 1, 2015); Letter from Sens. Charles Grassley, John Thune, Patrick Leahy and Bill Nelson to FCC Chairman Tom Wheeler (Oct. 9, 2015); Letter from Sen. Dianne Feinstein to FCC Chairman Tom Wheeler (Oct. 8, 2015); Letter from Reps. G. K. Butterfield, Bobby Rush, Gregory Meeks, Hakeem Jeffries, Yvette Clarke, and Karen Bass to FCC Chairman Tom Wheeler (Sept. 30, 2015), all letters available at https://www.fcc.gov/encyclopedia/chairman-wheelers-letters-congress.

[124] NAB has empirically documented both the declines in stations' audience ratings and revenues that result from a lack of program exclusivity in local markets and the gains in ratings resulting from stations obtaining exclusivity. *See* NAB Exclusivity Comments at 40-50 (examining a number of cases where stations did not have local program exclusivity); NAB Exclusivity Reply Comments at Appendix A, Supplemental Decl. of Mark Israel and Allan Shampine (concluding that "when a local broadcast station gains exclusivity, its ratings increase by a statistically and economically significant amount"). *See also* NAB Comments at Appendix B, Decl. of Mark Israel and Allan Shampine, at 6 (examining the economic case for program exclusivity in the television industry, and concluding that "[i]f exclusivity were eliminated or weakened, the incentives for local broadcast stations to invest in local content, and for broadcast networks and syndicators to invest in content, would be diminished"). NAB hereby

Second, preventing a broadcast station from exercising its program exclusivity rights is a perversion of the local broadcast system – a system that Congress has expressly supported time and again.[125] In fact, in its report on STELAR, the House Committee on Energy and Commerce again noted Congress's goal of maintaining "the localism regime by which television networks and stations serve individual communities with news, weather, and information," and expressly stated that "*localism is based on the exclusive territorial rights granted to local affiliate stations by programming networks*, which are reinforced by regulatory requirements established by the FCC."[126] Nothing in Section 103(c) of STELAR, or in the legislative history of that specific provision, indicates a congressional desire for the Commission to reexamine the exclusivity issue, let alone to adopt rules undermining broadcasters' program exclusivity rights, particularly in a narrow proceeding focused on the totality of the circumstances test.

Third, the FCC's good faith authority that applies to limited aspects of retransmission consent negotiations between broadcasters and MVPDs cannot conceivably stretch to abrogate contractual exclusivity rights that broadcasters separately negotiate with their network and syndicated program suppliers. Enforcing one's rights under a privately negotiated legal contract with a third party cannot possibly be termed bad faith. One can only imagine the reaction of pay TV providers if broadcasters proposed that MVPD contracts for carriage of non-broadcast programming could be abrogated, or even regulated in any way, under the guise of the FCC's narrow good faith authority.

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specifically incorporates the two Declarations of Mark Israel and Allan Shampine from MB Docket No. 10-71 into this proceeding.

[125] *See, e.g.,* Senate Report at 2, 4 (noting consistent congressional support for preservation of local, rather than distant, broadcast service).

[126] H. Rep. No. 518, 113th Cong., 2d Sess. at 5 (July 11, 2014) (emphasis added).

Fourth, this proposal would put broadcasters at a severe competitive disadvantage vis-à-vis other program networks distributed by pay TV operators. No cable programmer faces the same type of threat during negotiations for distribution of its programming. For example, if Charter Communications cannot come to terms for carriage of ESPN or HBO, it cannot simply import an ESPN or HBO signal from another cable operator carrying that channel in another market. Neither could it repurpose the content that ESPN or HBO makes available online. It must come to terms with those programmers or face the possibility of not carrying their channels. There is no legal or logical reason why broadcasters should be treated differently – that is, other than to further enrich MVPDs by artificially lowering the fees they pay to broadcasters for the right to resell stations' signals for profit.

F. The Existing Totality of Circumstances Test May Be Flexibly Applied To A Variety Of Circumstances Without Undue FCC Involvement In Negotiations Or The Substance Of Private Contracts

In stark contrast to the FCC's current good faith standard and the totality of the circumstances test, a number of the remaining items in the pay TV wish list would inappropriately and unproductively result in the Commission micromanaging the retransmission consent negotiation process, improperly judging the price and other substantive terms of private commercial contracts or dictating the proposals that parties could even offer. The Commission previously and correctly rejected that course, stressing that the "totality of the circumstances test" should not "serve as a 'back door' inquiry into the substantive terms negotiated between the parties."[127] The Commission also is not suited and

[127] Good Faith Order, 15 FCC Rcd at 5458.

lacks the resources to assume that role.[128] While NAB will not address in detail every unmeritorious MVPD idea identified in the Notice, we briefly discuss a number of the more unnecessary or counterproductive ones below. We particularly note that the Notice failed to explain how adoption of these pro-MVPD ideas would benefit consumers in any way, including by reducing negotiating impasses.

1. Evaluating Local Market Conditions and Specific Economic Benefits of Pricing Proposals

The Commission should summarily reject MVPD arguments to make it bad faith (a) for parties to fail to negotiate retransmission consent terms and conditions "based on actual local market conditions," or (b) for broadcasters to discriminate in price among MVPDs in a market "absent a showing of direct and legitimate economic benefits associated" with those price differences.[129] The Commission cannot possibly investigate the "actual" conditions in every local market in the country, particularly in a timely manner. Nor does it have the ability to evaluate myriad proposals or agreements to determine whether the broadcaster established that any price differentials among MVPDs in the same market had "direct and legitimate economic benefits."[130]

Indeed, the Commission previously found that "objective competitive marketplace factors that broadcasters must ascertain and base any negotiations and offers on" do not

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[128] *Id*. at 5454 (saying that the Commission did not have the resources to "sit in judgment of the terms of every retransmission consent agreement" and that it could "divine" no congressional intent for it to do so).

[129] Notice at ¶ 16.

[130] It is entirely unclear what types of economic benefits would be considered "legitimate." NAB also observes that this proposal is not reciprocal, but by its terms applies only to broadcasters. In the unlikely event that the FCC considers this proposal further, it must be reciprocally applied so that MVPDs are required to show "direct and legitimate economic benefits" if they pay different TV stations in the same DMA different prices for retransmitting their signals.

"exist,"[131] or, at the least, are "not practically possible to discern."[132] Because "retransmission consent negotiations *are the market* through which the relative benefits and costs" to broadcasters and MVPDs "are established,"[133] the Commission must reject calls for it to somehow independently ascertain – apart from the negotiation process – whether prices and other substantive retransmission consent proposals and terms are not "legitimate."[134] The Commission has already made clear, to the extent that any negotiating party tries "to frustrate the functioning of a competitive market," such efforts are inconsistent with the good faith requirement.[135] Further FCC action – especially any action involving the Commission in judging prices and related terms – is neither necessary nor appropriate.

2. Unnecessarily and Arbitrarily Micromanaging Negotiations

The Commission should quickly dismiss MVPD proposals that are wholly unnecessary or that would likely result in arbitrary micromanagement of the retransmission consent process. For example, the MVPD proposal to treat "surface bargaining" (i.e., going through the motions of negotiating but with no intention of reaching an agreement)[136] as inconsistent with good faith is completely redundant. The very definition of good faith under the FCC's existing totality of circumstances test is a "sincere desire to reach an agreement that is acceptable to both parties."[137] The Commission also should reject a broad and vague proposed requirement

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[131] Good Faith Order, 15 FCC Rcd at 5467.

[132] *Id*. at 5448.

[133] *Id*. at 5467 (emphasis added).

[134] *See id*. (explaining that Congress "intended the parties to resolve" questions of the amounts or form of compensation "through their own interactions and through the efforts of each to advance its own economic self interest").

[135] *Id.* at 5470 ("any effort to stifle competition through the negotiation process would not meet" the good faith standard).

[136] Notice at ¶ 16 & n. 83.

[137] Good Faith Order, 15 FCC Rcd at 5458.

for parties to "provide information substantiating reasons for positions taken" in retransmission consent negotiations.[138] As the Commission previously explained, such "an information sharing or discovery mechanism" would be problematic because broadcasters and MVPDs "are competitors and the information involved would, in most instances, be competitively sensitive."[139] The good faith rules already require the parties to provide reasons for rejecting any aspects of a retransmission consent offer,[140] and the Notice provided no rationale as to why appropriate enforcement of this requirement is insufficient.

In addition, the Commission should decline requests to engage in micromanagement of the retransmission consent process. MVPDs call for a one-sided requirement on broadcasters to make an initial contract proposal at least 90 days prior to an existing contract's expiration.[141] But even a reciprocal requirement for both MVPDs and broadcasters to make their initial offers at some arbitrary date should not be adopted. The Notice contained no showing that negotiating impasses would be less likely to occur if initial offers were made 90, rather than 120 or 60 days, in advance. As anyone familiar with negotiating commercial agreements knows, contract negotiations are often concluded close to deadlines, regardless of when negotiations are formally initiated. In any event, just because a broadcaster might make an initial offer 90 or some other set number of days in advance, it

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[138] Notice at ¶ 16.

[139] Good Faith Order, 15 FCC Rcd at 5464 & n. 100. The Notice does not make clear whether this information would be provided only to the other negotiating party, or also to the FCC, and how this information would be protected from further disclosure. Requiring the wide disclosure of "sensitive" information would raise additional questions under the Trade Secrets Act. *See* 18 U.S.C. § 1905; *CBS Corp. v. FCC*, 785 F.3d 699 (D.C. Cir. 2015)

[140] Good Faith Order, 15 FCC Rcd at 5464.

[141] Notice at ¶ 16.

does not guarantee a MVPD's timely response. There appears no reason to adopt such a wholly unnecessary rule.

Finally, the fact that a retransmission consent contract might expire, or that a negotiating impasse be reached, somewhere close in time to a so-called "marquee" event cannot be regarded as breaching a broadcaster's duty to negotiate in good faith.[142] Again, this MVPD proposal is one sided, rather than reciprocal, referring to "a broadcaster's insistence on contract expiration dates" near marquee events, as though MVPDs have no say in the duration and expiration date of retransmission consent agreements. Implementing this proposal also would result in a hopelessly arbitrary rule. For example, would an event or program be considered marquee only if it earned a certain audience rating? If so, such an event or program could well be considered marquee one year (or month or week) but not the next year (or month or week). What specific ratings level would be high enough to justify the marquee label? And would the relevant ratings for making this determination be nationwide, or could certain events and programs be regarded as marquee in some DMAs but not in others?

Depending on how defined, moreover, marquee events could proliferate uncontrolled throughout the calendar year. But even defined narrowly to include only some sporting events and certain awards shows – which itself is an arbitrary distinction – there is virtually no time throughout the year that the expiration of an agreement, and/or a potential negotiating impasse, would not be near a marquee event, particularly given the length of some retransmission consent negotiations and the frequent practice of short-term extensions of

[142] Notice at ¶ 16.

agreements during negotiations to avoid service disruptions.[143] The Commission should not attempt to institute such a rule.

3. Prohibiting Parties to Private Contracts from Offering Numerous Proposals

Despite MVPDs' evident preference not to negotiate with broadcasters about certain terms and conditions for commercial reasons, the Commission has not demonstrated any basis for it to pick and choose the proposals that the parties to private contracts should be allowed to even propose. In particular, there is no reason for contract terms, such as non-disclosure provisions common in various types of commercial agreements, to be treated as evidence of bad faith in retransmission consent negotiations.[144] The Notice similarly demonstrates no basis for preventing broadcasters from negotiating for terms such as channel placement and tier position, which are common in all types of program carriage agreements. In addition, the Commission should not blatantly favor MVPDs by prohibiting broadcasters from proposing terms important to maintaining free, over-the-air broadcasting. Some broadcasters, for instance, have negotiated for conditions on the use of "devices and functionalities,"[145] such as the "ad hopper." Pay TV operators have an obvious incentive to

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[143] For example, it seems logical for commercial contracts to expire at the end of the calendar year. However, that time is near the college football bowl games. January sees the NFL playoffs and the Superbowl in early February. In some years, the Winter Olympics occur in February. The Academy Awards and the Grammy Awards are also held that time of year. Then there is March Madness and the NCAA basketball championship game in early April. The NBA playoffs and championship series are aired in May and June. Would the NHL playoffs and Stanley Cup count as marquee events in the spring? They are likely to be in Chicago, Detroit and Boston, for example, but not in all locations. While the summer might be seen as lacking marquee events, that is not the case in years when the Summer Olympics are held. And then the fall sees the Emmy Awards, the baseball playoffs and World Series, and the return of the NFL and college football.

[144] *See* Notice at ¶ 16. The MVPD proposal that broadcasters should be regarded as negotiating in bad faith if they "prevent[]" MVPDs from disclosing rate, terms and conditions of a contract proposal or agreement is not reciprocal. *Id*. It is highly unlikely that broadcasters are the only parties to retransmission consent negotiations to propose non-disclosure provisions.

[145] Notice at ¶ 16.

utilize these devices to reduce the viewership of advertisements on broadcast stations, with whom MVPDs compete for the national and local advertising revenue vital to supporting free television services.

Given that parties negotiating all types of commercial contracts, moreover, routinely make proposals that other parties object to and consequently reject, the Commission has no valid rationale for compiling a lengthy list of proposals to ban from even mentioning during retransmission consent negotiations. The pay TV industry has not established that, as a whole, it lacks the ability to respond to retransmission consent proposals with which it disagrees. Frankly, it stretches credulity to suggest that the leading pay TV providers are incapable of addressing a range of negotiating proposals without government assistance. The Notice, moreover, does not attempt to explain precisely how banning these various proposals from the retransmission consent negotiating table would benefit consumers by reducing the already limited number of negotiating impasses.

NAB notes, however, that one issue raised in the Notice – an "MVPD's demand for online distribution rights, or a broadcaster's refusal to grant such rights"[146] – could implicate the FCC's and Congress's goal of avoiding breakdowns in retransmission consent negotiations under certain circumstances. If an MVPD knows (or is informed) that a broadcaster does not have the legal right to grant the online distribution rights to certain programming within its signal (e.g., NFL games or other sporting events), yet nonetheless continues to demand those distribution rights, such an MVPD demand should not be considered a "bona fide proposal[]."[147] Demanding in negotiations something that a party

[146] Notice at ¶ 19.

[147] Senate Report at 13.

does not have the legal right to grant may be a pretext for precipitating a negotiating impasse, and thus should be considered evidence of bad faith under the totality of the circumstances test. Apart from this case, however, the mere fact that parties either propose to, or decline to, negotiate for online distribution rights as part of retransmission consent generally should not be evidence of bad faith. As NAB discussed above, the parties to retransmission consent negotiations, like parties to other commercial negotiations, should be free to make and reject proposals without government interference.

V. NONE OF THE PROPOSALS ON THE MVPD WISH LIST, IF ADOPTED, WOULD REDUCE SERVICE INTERRUPTIONS OR OTHERWISE BENEFIT CONSUMERS

The Commission's stated goal in this proceeding is to "benefit consumers of video programming service by facilitating successful negotiations and avoiding disruptions in service to consumers."[148] That is also the only goal expressed in the legislative history to Section 103(c) of STELAR.[149] But the Notice conspicuously lacks real evidence showing that the lengthy list of pro-MVPD proposals, if adopted, would directly promote that goal, or benefit consumers in any other way.

A. Broadcasters Already Have Very Strong Incentives To Negotiate For MVPD Carriage In Good Faith

Broadcasters have strong incentives under the current legal framework and marketplace conditions to negotiate with MVPDs in good faith and to reach retransmission agreements. As the Commission previously recognized, the retransmission process "provides incentives for both parties to come to mutually beneficial arrangements," and broadcasters specifically "benefit[] from carriage because [their] programming and advertising will be

[148] Notice at ¶ 6.

[149] *See* Senate Report at 13.

carried as part of the MVPD's service."[150] Broadcasters' main revenue stream comes from advertisements, and advertising dollars are driven by viewership. Without carriage by MVPDs, broadcasters lose a large percentage of their viewing audience, and with that, a large percentage of their advertising revenue. As discussed above, broadcasters simply cannot afford to walk away from the massive audiences that MVPDs reach — a dynamic that is only becoming more pronounced as the MVPD marketplace continues to consolidate.[151]

Given these incentives, it is unsurprising that the vast majority of retransmission negotiations are successfully concluded without service disruptions to consumers and without publicity. In fact, as previously explained by NAB, carriage disputes in the period from 2006 to 2011 affected only about one one-hundredth of one percent (0.01%) of total annual U.S. television viewing hours. To put this figure in perspective, MVPD subscribers were much more likely to lose access to television programming because of power outages or MVPD system failures.[152] Although MVPDs are quick to publicize any service disruptions (and some may have incentives to provoke them), even if disruptions had increased 10-fold since 2011 (which they have not), they still would affect only about one tenth of one percent (0.1%) of total U.S. television viewing hours. In contrast, TVfreedom.org last year examined the number of outages reported by consumers via DownDetector.com and identified 3,050 outages involving

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[150] FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at ¶ 44 (2005) (internal citation omitted).

[151] *See* Section III, *supra* (describing national, regional and local MVPD consolidation and the high percentages of the total MVPD market that individual MVPDs possess in many DMAs).

[152] Decl. of Jeffrey A. Eisenach and Kevin W. Caves, at 25, 30, Attachment A to NAB Comments, MB Docket 10-71 (May 27, 2011).

just five MVPDs over a period of five months.[153] And, of course, whenever a broadcast signal is not available on a particular MVPD for any reason, that signal remains available for free, over-the-air.

In short, MVPDs' efforts to publicize the very limited number of service disruptions cannot disguise the fact that broadcasters are strongly incentivized to negotiate in good faith to conclude retransmission consent agreements. Even more importantly, nothing that MVPDs have proposed in this proceeding will increase those marketplace incentives.

B. Nothing In The Record Establishes, Or Even Suggests, That The MVPD Proposals Would Decrease The Number of Retransmission Consent Impasses And Those Proposals Might In Fact Increase The Risk Of Impasses

As discussed above, the pay TV industry has thrown together a laundry list of negotiating terms and tactics that they argue should be treated as showing a lack of good faith. All these proposals appear based on the erroneous assumption that broadcasters and their tactics cause all negotiation breakdowns, as if MVPDs are mere bystanders in retransmission consent negotiations. This one-sided view of the dynamics between the negotiating parties has no basis in reality.

More significantly, the pay TV industry has not attempted to connect the supposed dots between broadcasters' terms and tactics and actual negotiation stalemates. Nowhere have MVPDs provided evidence establishing that but for broadcasters' ability to negotiate for terms like tier placement, contract length and expiration dates, nondisclosure provisions or differing prices among different MVPDs, there would be fewer retransmission stalemates. And despite the FCC's stated goal in this proceeding to alter its rules in a manner that would

[153] *See* Letter from Robert C. Kenny, Director of Public Affairs, TVfreedom.org, to the Honorable Claire McCaskill, Chairman, Subcommittee on Consumer Protection, Product Safety and Insurance, Committee on Commerce, Science and Transportation, U.S. Senate (July 9, 2014).

reduce negotiating impasses,[154] the Notice fails to fill the gaping evidentiary hole left by the pay TV industry. Therefore, Commission action would be arbitrary and capricious because those proposals have no demonstrated connection to the FCC's stated purpose.[155]

There is, in fact, real risk that the MVPD proposals may lead to additional impasses. The proposals in the Notice would limit broadcasters' ability to negotiate both for financial compensation and for in-kind terms. Significantly, the Commission previously concluded that "arbitrarily limit[ing] the range or type of proposals that the parties may raise in the context of retransmission consent will make it *more* difficult for broadcasters and MVPDs to reach agreement."[156] Permitting the "greatest number of avenues to agreement" gives the "parties latitude to craft solutions to the problem of reaching retransmission consent."[157] Consistent with its conclusion, the Commission then expressly found that several negotiating terms that MVPDs now want to ban were *per se* consistent with the good faith requirements.[158] To adopt these MVPD proposals now, the FCC would be reversing course on both its findings as to how

[154] Notice at ¶ 6 (stating its goal as "facilitating successful negotiations and avoiding disruptions in service").

[155] *See State Farm*, 463 U.S. at 43 (stating that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (internal citations omitted). *See also ALLTEL Corp. v. FCC*, 838 F.2d 551, 559 (D.C. Cir. 1988) (finding FCC rule to be arbitrary and capricious because FCC's decision "has 'no relationship to the underlying regulatory problem'") (internal citations omitted); *Bechtel v. FCC*, 10 F.3d 875, 880-81 (D.C. Cir. 1993) (finding FCC policy to be arbitrary and capricious because FCC had no evidence that it accomplished the agency's purposes).

[156] Good Faith Order, 15 FCC Rcd at 5469 (emphasis added).

[157] *Id*. Reducing broadcasters' options at the pay TV industry's behest also may increase the likelihood of service disruptions simply because broadcasters would have little choice but to exercise their statutory right – which the FCC cannot alter – to withhold their signals from MVPDs in the event of negotiating stalemates.

[158] *Id.* (finding that proposals for carriage of additional programming, tier placement and channel positioning, and "compensation above that agreed to with other MVPDs in the same market" were consistent with good faith).

successful negotiations work and its specific conclusions about particular negotiating terms.[159]

As the Commission correctly recognized in its original good faith order, the retransmission consent framework properly allows broadcasters and MVPDs to consider a multitude of factors that each party might find more or less valuable in any given negotiation. In some markets and with some parties, monetary compensation may be the most important factor; in other negotiations a local station may be willing to accept less financial compensation if, for example, the MVPD agrees to carry the station's new multicast channel. NAB is familiar with a broadcaster in a major metropolitan area that has multiple multicast streams, each carrying programming in a different language, where MVPD carriage of those various streams is the most important factor in that station's retransmission consent negotiations. NAB knows of another broadcaster who explicitly offered retransmission consent of its primary signal at a reduced rate in exchange for carriage of one of its multicast signals, but its offer was rejected. Some other common retransmission consent deal terms that have had the effect of reducing cash compensation include guarantees of purchasing advertising time on the broadcast station; providing fiber links to satellite or translator stations or to other cable systems; and video on demand rights.

If, however, the FCC were to artificially limit stations' negotiating options, then those negotiations may more easily reach a deadlock. For instance, assuming a broadcaster cannot propose the carriage of various types of in-kind compensation as part of retransmission consent, then the local station and the MVPD may more likely reach a stalemate over total

[159] The Commission is obligated, of course, to acknowledge all departures from previous policies and to justify them, including providing a reasoned explanation for "disregarding facts and circumstances that underlay" the prior policies. *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009).

compensation. In this manner, reducing broadcasters' negotiating flexibility -- including prohibiting options routinely available to parties in other commercial negotiations – could well result in more, not fewer, negotiating stalemates and thus more service disruptions. Such a result would be contrary to the FCC's stated goal and the public interest.

C. Changes To The Good Faith Rules Will Not Lead To Lower Consumer Bills Or Enhanced Consumer Offerings

MVPDs also cannot show – or even credibly claim – that their one-sided proposals will benefit viewers by lowering consumer bills or improving services. As the Commission itself acknowledged in this proceeding, "MVPDs are not required to pass through any savings derived from lower retransmission consent fees and that any reductions in those fees thus might not translate to lower consumer prices for video programming service."[160] Given that the FCC's own reports on cable industry consumer prices have shown that from 1995-2014, expanded basic cable prices increased at a compound average annual rate of 5.9 percent, compared to a 2.4 percent compound average rate of growth in the Consumer Price Index, the Commission cannot expect MVPDs to pass on any programming cost savings to their customers.[161] Without also regulating MVPD retail rates, which the FCC just recently eschewed,[162] consumers will not see lower pay TV bills as the result of enactment of any MVPD proposals in this proceeding.

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[160] Notice at ¶ 3, n. 21.

[161] *Report on Cable Industry Prices*, DA 14-1829, at ¶ 28 (Med. Bur. Dec. 15, 2014). NAB observes, again, that MVPDs cannot attribute these consistent increases in their consumer prices to retransmission consent fees, as those price increases began years before cable companies started providing cash compensation to broadcasters.

[162] *See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, MB Docket No. 15-53 (rel. June 3, 2015).

Even as MVPDs routinely complain about "exorbitant" retransmission consent fees,[163] they continue to report substantial year-over-year revenue gains. For example, from Q4 2014 through Q2 2015, MVPDs reported five percent-plus year-over-year revenue gains.[164] Dish reported that its average revenue per pay-TV user rose to $86.33 in 2015 from $84.39 in 2014;[165] Comcast reported that its total revenue per cable communications customer relationship increased 4.3 percent in the 3rd Quarter of 2015;[166] AT&T reported $39.1 billion in consolidated revenues, up almost 19 percent from 2014.[167] Perhaps MVPDs are able to report consistent revenue increases despite having to compensate broadcasters for reselling their signals, because retransmission consent fees "account[] for less than three percent of cable operators' revenues and has little or no impact on pay TV prices."[168]

The pay TV industry and the Notice also both fail to acknowledge the pro-consumer benefits broadcasters are able to provide through their receipt of retransmission fees. In 2013, the monies that broadcasters earned in retransmission consent fees "accounted for 34 percent of their spending on programming."[169] Stated differently, "in the absence of retransmission consent compensation broadcasters would have had to reduce the amount

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[163] *See, e.g.,* Comments of Verizon, MB Docket No. 15-158, at 9 (Aug. 21, 2015). As noted above, Verizon's market capitalization is 182 times larger than that of some of the biggest broadcast TV station groups. *See* Section III, *supra*.

[164] *SNL Kagan Industry Update: Q2 2015* 1, 4 (2015).

[165] *DISH Network Reports Third Quarter 2015 Financial Results* (Nov. 9, 2015), http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=941433.

[166] *Comcast Reports 3rd Quarter 2015 Results* (Oct. 27, 2015), http://cmcsk.com/releasedetail.cfm?ReleaseID=938550.

[167] *AT&T Reports Double-Digit Growth In: Revenue, Adjusted Operating Margin, Adjusted EPS and Free Cash Flow in Third-Quarter Results* (Oct. 22, 2015), http://about.att.com/story/att_third_quarter_earnings_2015.html.

[168] Jeffrey A. Eisenach, *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA ECONOMIC CONSULTING, at ii (July 2014).

[169] *Id*. at 28.

they spend producing content by more than a third."[170] The revenues broadcasters earn through retransmission fees significantly supplements their revenue from advertising and supports a number of pro-consumer initiatives, including increased "local television news and public affairs programming," investments in "digital multicasting" (including foreign language programming streams) and new technologies, and the retention of "rights to programming, especially sports programming, that would not otherwise have been available on free over-the-air television."[171] The MVPD proposals, designed to cut their costs of doing business and increase their bottom lines, would reduce the revenue that directly enhances the quality and diversity of the public's only universally available, free-to-all video service.[172] While substantially hobbling a competitor in the video marketplace would serve the interests of MVPDs, it would not promote the public interest.

VI. CONCLUSION

The pay TV industry's argument in this proceeding boils down to this: the video marketplace is not the same as it was in 2005, or 2000, or 1992, so the FCC needs to adopt a laundry list of changes to its good faith negotiation rules – all of which will skew retransmission consent negotiations decisively in MVPDs' favor. The FCC has not, however, seriously examined all the changes in the video marketplace and has not explained how or why those changes, including continuing consolidation among MVPDs and unprecedented competition among video programming providers, justify the numerous, one-sided alterations

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[170] *Id*.

[171] *Id*. at 29-33.

[172] Such proposals could even ultimately threaten the viability of the free, over-the-air broadcast television service. The "elimination of retransmission consent revenues would reduce the average profit margins of broadcast television stations by nearly 80 percent . . . resulting in long-run economic losses that ultimately would force many broadcasters to exit the industry." *Id*. at 27.

to its good faith negotiation rules advocated by pay TV providers. Certainly the Notice does not establish – and the FCC will be unable to establish – that broadcasters have undue market power such that government intervention to enhance the negotiating leverage of the pay TV industry is necessary.

Instituting the "wish list" delineated in the Notice would favor the handful of MVPDs that are "essential gatekeepers," both as video and broadband providers, for the vast majority of pay TV subscribers. Given the history of the pay TV industry and its consumer pricing and customer service practices, the Commission cannot rationally conclude that consumers will benefit from government policies designed to increase substantially the marketplace power of pay TV and broadband gatekeepers. Certainly no showing has been made that MVPDs' proposals will substantially reduce the limited number of negotiating impasses – in fact, they may well increase those impasses. In sum, there appears to be no public purpose for the Commission to adopt pay TV providers' ideas for enhancing their own market power and their own pocketbooks.

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December 1, 2015

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

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 15-158
	)	
	)	
	)	
	)	

To: The Commission

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB)[1] submits these reply comments briefly responding to the comments of a number of multichannel video programming distributors (MVPDs) in this proceeding assessing the status of competition in the market for the delivery of video programming.[2] For many of the same reasons that NAB set forth in its initial comments and in other proceedings, we dispute the MVPDs' characterization of the pay television industry as highly competitive and their claims that the retransmission consent regime needs to be "fixed" in their favor. Given the recent and continuing massive consolidation in the MVPD industry, the Commission should take a hard look at competitive conditions in the video marketplace, including ensuring that consumers' interests are not compromised.

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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] *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming,* Public Notice, MB Docket No. 15-158, DA No. 15-748 (rel. Jul. 2, 2015) (*Notice*).

I. Rather Than Highly Competitive, the MVPD Marketplace Is Highly And Increasingly Consolidated

Several MVPD industry commenters agree that competition is the "hallmark of the MVPD marketplace."[3] NAB wonders if these commenters are observing the same marketplace as everyone else. As NAB empirically demonstrated in its initial comments, the MVPD industry is highly consolidated at the local, regional and national levels and only continues to become more concentrated through mergers, such as the recent AT&T/DIRECTV merger and the proposed Charter/Time Warner Cable (TWC)/Bright House merger.[4]

According to the most recent SNL Kagan data, TWC alone – even before any merger – controls over 40 percent of the *total* MVPD market in 30 different DMAs, ranging from the top-25 (*e.g.*, Cleveland, OH) to among the smallest (*e.g.*, Presque Isle, ME).[5] In eight DMAs, TWC's share of the entire MVPD market exceeds 60 percent.[6] Standing alone, Charter controls over 40 percent of the MVPD market in ten more DMAs, ranging from the mid-sized (*e.g.*, Madison, WI) to the very small (*e.g.*, Helena, MT), and in several additional DMAs, the merger of TWC and Charter will give the combined entity control of more than 40 percent of the MVPD market.[7]

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[3] Comments of the National Cable & Telecommunications Association (NCTA), MB Docket No. 15-158, at 2 (Aug. 21, 2015); *accord* Comments of Verizon, MB Docket No. 15-158, at 11, 16 (Aug. 21, 2015) (characterizing video marketplace as "competitive" and "increasingly competitive"); Comments of AT&T Services, Inc., MB Docket No. 15-158, at 1, 15 (asserting that "competition for the delivery of video programming has never been stronger" and that the combined AT&T/DIRECTV "will stimulate even greater competition" going forward).

[4] *See* Comments of NAB, MB Docket No. 15-158, at 16-21 (Aug. 21, 2015) (citing data on MVPD dominance in individual DMAs and nationwide).

[5] SNL Kagan, Media Census estimates, Q2 2015.

[6] *Id*. These DMAs are Honolulu, HI (77.9%); Utica, NY (74.7%); Rochester, NY (69.2%); Albany, NY (67.4%); Watertown, NY (65.7%); Syracuse, NY (65.4%); Portland, ME (60.4%); and Laredo, TX (60.3%).

[7] In Charlotte, NC, Green Bay, WI and Lincoln, NE, the combined TWC/Charter will surpass the 40% market share threshold, and in other markets (e.g., Wilmington, NC and Milwaukee, WI) the combination with Charter will increase TWC's already 40%-plus market share to over 50%. The merger

By any standards, the combined Charter/TWC/Bright House will have market power in a significant number of DMAs (as do other MVPDs in other markets),[8] and will be increasingly consolidated on a regional basis.[9] The Commission should not continue to ignore MVPD concentration at the regional and local levels.[10] As NAB previously explained, economic studies have found that large, clustered cable companies charge consumers higher prices than smaller, unclustered cable operators, as clustering discourages the entry of overbuilders into local markets.[11] Unsurprisingly, the FCC's Chief Economist, David Waterman, on multiple occasions has identified "horizontal market power at the MSO level" as the "fundamental source" of potential "anticompetitive behavior" in the marketplace.[12]

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also gives the combined entity a dominant presence in large Florida markets, as Bright House standing alone controls over 50% of the MVPD market in both the Orlando and Tampa DMAs.

[8] Even without accounting for any recently-approved or pending mergers, NAB reported 96 DMAs in which a single MVPD possessed a market share of 40% or higher (including 49 DMAs in which a single MVPD enjoyed a 50% or higher share of the entire MVPD market). NAB Comments at 19-20.

[9] FCC, Public Notice, *Commission Accepts for Filing Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, DA 15-856, at 6 (July 27, 2015) (noting that proposed merger would give the combined company "denser geographic coverage" and "increasing density within multiple regions").

[10] *See* NAB Comments at 17-19.

[11] *See* NAB Comments at 17-18 & nn. 89-90, citing Philip Reny and Michael Williams, *The Deterrent Effect of Cable System Clustering on Overbuilders*, 35 Economics Bulletin 519 (Mar. 2015); Hal J. Singer, *Does Clustering by Incumbent Cable MSOs Deter Entry by Overbuilders?* (2003), available at http://ssrn.com/abstract=403720

[12] David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Fed. Comm. L.J. 511, 531 (1995) (also explaining that an "individual local cable system may have bargaining leverage over local or regional program suppliers, whether that system is affiliated with a large MSO or not"). *See also* David Waterman and Sujin Choi, *Non-Discrimination Rules for ISPs and Vertical Integration: Lessons from Cable Television*, 35 Telecommunications Policy 970 (2011) (concluding that the "long history of the cable industry and the short history of the broadband Internet industry" demonstrate that the "fundamental policy concerns from an economic perspective" stem from "the presence of horizontal market power at the MSO or ISP level," and that "[b]oth local and national market shares of ISPs . . . influence this market power"); David Waterman and Andrew Weiss, Vertical Integration in Cable Television, The MIT Press and The AEI Press, at 141 (1997) ("horizontal market power, especially at the cable system operator level, is the basic ingredient for successful foreclosure of other MVPDs").

In addition, an analysis last month from Multichannel News concluded that "consolidation creates a top-heavy list of [the] 25 largest MVPDs" nationally, and that "there is no doubt that that further consolidation is coming."[13] Indeed, further consolidation has already come, as just last week Altice, the owner of Suddenlink Communications, announced its acquisition of Cablevision, resulting in the combination of the seventh and eighth largest MVPDs.[14] According to media analysists, the "Cablevision deal is likely to trigger a fresh round of consolidation that could roll up the last independent standouts among midsize to large U.S. cable companies."[15]

Even before this most recent announced merger and expected additional ones in the future, Multichannel News identified the top 25 MVPDs in 1985, 1995, 2000 and 2015, revealing extraordinary consolidation during the past 30 years. For example, in 1985, the four largest MVPDs had only 9.9 million subscribers, which rose to 30 million in 1995, 43.54 million in 2000, and 79.7 million today, assuming the Charter/TWC/Bright House merger is approved.[16] Tellingly, the subscribership of the largest MVPD, the combined AT&T/DIRECTV, now exceeds by more than two million the subscribership of the top 25 MVPDs *combined* in 1985.[17] SNL Kagan confirms that, if the Charter/TWC/Bright House merger is approved, then the top four MVPDs will control 79 percent of the nationwide MVPD market (measured in terms of subscribers),[18] and the top *three* alone "will control two-thirds of the video delivery

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[13] Mike Farrell, *Eat or Be Eaten*, Multichannel News (Aug. 17, 2015) (attached hereto).

[14] *See* M.J. de la Merced and A.R. Sorkin, *Altice in Deal to Take Over Cablevision*, The New York Times (Sept. 17, 2015).

[15] Kyle Daly, *Analysts: Cablevision Deal Signals Next Phase in Consolidation*, SNL Kagan (Sept. 17, 2015).

[16] *See Eat or Be Eaten*, at 8-10.

[17] *See* NAB Comments at 17, citing *Eat or Be Eaten*, at 8-9.

[18] SNL Kagan, Media Census estimates, Q2 2015.

universe."[19] In contrast, the FCC found that in 2002 the four largest MVPDs controlled 50.5 percent of the MVPD market nationally.[20]

While NAB readily acknowledges that cable is no longer the only type of multichannel video provider,[21] that fact does not automatically translate into robust competition in the video marketplace. As NAB previously explained, in years past, multiple cable systems typically operated within DMAs, each serving some fraction of the market. Now, as the result of local and regional consolidation, there are often only one or two dominant cable systems, each serving a high proportion of television households in many local markets.[22] One therefore must analyze the concentration of MVPDs nationally and in specific local and regional markets to make determinations about competition, rather than rely on the truism that there are different types of MVPDs today. And it is undisputable that the MVPD marketplace is much more concentrated now than in the past, given that "horizontal integration in the cable industry" – and now the MVPD industry as a whole – has "never shown any serious inclination to reverse or even stabilize."[23]

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[19] Tony Lenoir, *AT&T, Comcast pro forma Charter control 66% of US video market based on MediaCensus Q2'15 data*, SNL Kagan (Sept. 1, 2015).

[20] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Report, 17 FCC Rcd 26901, 26958 (2002).

[21] *See* NCTA Comments at 2; AT&T at 6.

[22] *See* NAB Reply Comments, MB Docket No. 10-71, at 12-15 (June 27, 2011); NAB Supplemental Comments, MB Docket No. 10-71, at 11 (May 29, 2013); *see also supra*, p. 2; NAB Comments at 19-20 (setting forth the high MVPD market shares of individual cable operators in many DMAs).

[23] Patrick Parsons, *Horizontal Integration in the Cable Television Industry: History and Context*, 16 J. Med. Econ. 23, 38 (2003). Small rural MVPDs in this proceeding made clear the difficulties they have in competing against other video providers with greater "scale and scope." Comments of NTCA-The Rural Broadband Association, MB Docket No. 15-158, at 2 (Aug. 21, 2015) (reporting that 67% of its members "identified the difficulty of competing with other video providers as a major impediment" to their provision of video services); *accord* Comments of WTA-Advocates for Rural Broadband, MB Docket No. 15-158, at 2 (Aug. 21, 2015) (remarking that its members "compete" with DISH and the conbined AT&T/DIRECTV) (quote marks in original).

II. Particularly In Light of MVPD Consolidation, The Commission Should Reject MPVDs' Call For Tilting The Retransmission Consent Marketplace In Their Favor

Several MVPD commenters in this proceeding made their usual complaints about the supposedly "broken" retransmission consent system and how the Commission should intervene in the retransmission consent marketplace established by Congress to "fix" it, no doubt in a way that gives them increased leverage in retransmission negotiations.[24] NAB has refuted these, and similar complaints and proposals for altering the retransmission consent system, in numerous prior submissions.[25] NAB will not repeat these arguments here, but we note that unmeritorious, if not flatly unlawful, proposals for changing retransmission consent do not improve with age or repetition.[26]

Given the rapid and continuing consolidation in the MVPD industry, NAB also observes the irony of the largest MVPDs in the land complaining about retransmission consent and the

[24] *See, e.g.*, Comments of Verizon, at 6-9 (noting the FCC's "obligation to prohibit a *broadcast* station from failing to negotiate in good faith" but ignoring the reciprocal obligation on MVPDs, and calling for myriad changes to retransmission consent process, including "a mandatory standstill" and forced "interim carriage") (emphasis added); AT&T Comments at 14-15 (calling on FCC to "thoroughly revamp the retransmission consent regime," and referring to its proposals made in previous proceedings); WTA Comments at 2, 10 (asserting that its members are "required" to pay "often discriminatory prices" for broadcast and cable programming, and calling on FCC to become involved in program pricing to prevent all programmers from "demand[ing] unreasonable increases" in fees); NTCA Comments at 6, 15 (supporting FCC involvement in program pricing to ensure that small MVPDs are given "affordable" or "favorable" prices and other terms and conditions).

[25] *See, e.g.*, NAB Comments, MB Docket No. 10-71 (May 27, 2011); NAB Reply Comments, MB Docket No. 10-71 (June 27, 2011); NAB *Ex Parte* Communication, MB Docket No. 10-71 (Nov. 15, 2013); NAB *Ex Parte* Communication, MB Docket No. 10-17 (Dec. 5, 2013).

[26] For example, the Commission still lacks authority under the Communications Act to allow MVPDs to carry broadcast signals, on an "interim" or long-term basis, without the broadcasters' consent. *See* 47 U.S.C. § 325(b)(1) (no cable system or other MVPD "shall retransmit the signal of a broadcasting station," "except with the express authority" of the station). Similarly, the Act expressly provides that it is not a failure of a broadcaster's duty to negotiate retransmission consent in good faith if a "station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different" MVPDs. 47 U.S.C. § 325(b)(3)(C).

fees they pay to broadcasters.[27] Retransmission consent is not "broken" merely because broadcasters are now receiving greater retransmission consent fees than in the past, particularly given the ratings earned by broadcast programming. As NAB and independent analysts have long pointed out, many cable networks for years have received fees well beyond those paid to broadcasters on a per-viewer basis.[28] Complaints about "skyrocketing" retransmission consent fees[29] continue to ring hollow, given SNL Kagan's estimate that in 2014 total broadcast retransmission consent fees were *less* than the programming fees paid to regional sports networks and reached only 10.8 percent of the programming fees paid to basic cable and regional sports networks combined.[30] Interestingly, the large MVPDs complaining about the fees paid to broadcasters make no reference to the high costs of any *non*-broadcast programming. In every other context, moreover, these large MVPDs argue for the Commission to take a hands-off approach, and eschew regulatory solutions in favor of the marketplace.

In examining competition in the video marketplace generally or the alleged need to intervene in the retransmission consent marketplace specifically, the Commission should keep in mind the sheer size and scope of the leading MVPDs. Broadcast television station groups are dwarfed by the telcos and cable/satellite operators, with the market capitalization

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27 *See* AT&T Comments at 13-14 (calling for remedies for "exploding" and "skyrocketing" retransmission consent fees); Verizon Comments at 9 (complaining about "exorbitant" and "skyrocketing" fees).

28 *See, e.g.*, NAB Reply Comments, MB Docket No. 10-71, at 15-18 (June 27, 2011); Diana Marszalek, *Ryvicker: Stations Losing $10.4B in Retrans*, TV NewsCheck (Sept. 18, 2013) (quoting Wells Fargo analyst Marci Ryvicker as saying that broadcast TV stations "capture[] 35% of the audience" but receive just "7% of programming fees").

29 AT&T Comments at 13; Verizon Comments at 9.

30 SNL Kagan, *Broadcast Retransmission Fees vs. Basic Cable and RSN Programming Fees* (June 2015).

of AT&T/DIRECTV, for example, being *200 times* larger than the market cap of even sizable broadcast television companies.[31]

Despite protestations to the contrary,[32] today's MVPD behemoths do not need the FCC's interference in retransmission consent negotiations to level the playing field for them. Local broadcasters are the ones that often must negotiate retransmission consent with a dominant MVPD possessing significant negotiating leverage, particularly in the many DMAs where a single pay TV provider controls a high percentage of the MVPD market.[33] And while the Commission has allowed unprecedented consolidation in the MVPD industry, the FCC's rules still prevent the common ownership of two broadcast TV stations in most DMAs and even prohibit most agreements between two same-market stations for the joint sale of advertising time. This regulatory disparity has produced an increasingly severe competitive disparity, as local stations are prevented from achieving the economies of scale and scope that their MVPD competitors enjoy.[34] Ultimately, consumers that rely upon broadcast TV services, especially in smaller markets, will be the ones harmed by these disparities in the video marketplace.

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[31] According to Yahoo Finance, as of September 2, 2015, AT&T/DIRECTV had a market cap of $201 billion, Verizon had a market cap of $182 billion, Comcast, $142 billion, and TWC/Charter combined, $72 billion. In contrast, TV station group owners such as Media General, Scripps and Nexstar had market caps of $1 billion.

[32] *See, e.g.*, Verizon at 1, 8 (advocating for a host of changes to retransmission consent system to "restore balance" to negotiations and enable broadcasters and MVPDs "to negotiate on a more equal footing"); AT&T Comments at 14 (contending that retransmission consent process needs "re-balancing").

[33] MVPDs do not need to be the size of AT&T/DIRECTV or Charter/TWC to possess a dominant share of the total MVPD market in individuals DMAs. For example, Suddenlink controls 60.1% of the entire MVPD market in Parkersburg, WV, 59.9% in Victoria, TX, and between 40-50% in a number of other DMAs. SNL Kagan, Media Census estimates, Q2 2015.

[34] See, e.g., NAB Comments at 23-27; NAB Comments, MB Docket No. 14-50, at 38-58 (Aug. 6, 2014).

III. The Consolidated MVPD Marketplace Contributes To Widespread Consumer Dissatisfaction

As NAB documented in a recent submission,[35] MVPD subscribers express clear dissatisfaction with their MVPD services. A recent Consumer Reports survey on telecommunications services found that "consumers continue[] to express dissatisfaction with their TV and internet providers, giving most poor reviews."[36] Indeed, Consumer Reports concluded that "lousy cable service seems to be one of life's certainties," "[a]long with death and taxes."[37]

These negative consumer attitudes are unsurprising. The FCC's own reports on cable industry prices have shown that over the 19-year period from 1995-2014, expanded basic cable prices increased at a compound average annual rate of 5.9 percent, compared to a 2.4 percent compound average rate of growth in the Consumer Price Index.[38] In a truly competitive MVPD market, price increases notably above the rate of inflation could not be sustained for nearly two decades, and complaints about customer service and support would not be so consistent and nearly universal.[39]

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[35] *See* Opposition of NAB to Petition for Rulemaking by Mediacom Comm. Corp., RM-11752, at 2, 10-12 (Aug. 14, 2015).

[36] Consumer Reports, *Cable-TV and Internet Subscribers Remain Unhappy Customers* (May 29, 2015).

[37] *Id*.

[38] *Report on Cable Industry Prices*, DA 14-1829, at ¶ 28 (Med. Bur. Dec. 15, 2014). NAB observes, again, that the MVPD industry cannot attribute these consistent increases in consumer prices to retransmission consent fees, as those price increases began years before cable operators started providing cash compensation to broadcasters. As late as 2005, the FCC found that "cash still has not emerged as a principal form of consideration for retransmission consent" and that "virtually all retransmission consent agreements" involve "in-kind compensation." FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005).

[39] See Opposition of NAB to Petition for Rulemaking by Mediacom Comm. Corp., RM-11752, at 10-12 (Aug. 14, 2015); Consumer Reports, *Cable-TV and Internet Subscribers Remain Unhappy Customers* (May 29, 2015).

IV. Conclusion

Beyond reforming outdated ownership rules so that local TV stations can compete and serve consumers effectively, NAB recently argued that the Commission should do more to help consumers disadvantaged in their dealings with large MVPDs.[40] In light of the rapid consolidation in the pay TV industry documented in this proceeding, and continuing consumer dissatisfaction with MVPD services, we repeat our call for the Commission to exercise its authority under Section 632 of the Communications Act, or under other provisions of the Act, to adopt and enforce updated customer service standards for MVPDs.[41]

Respectfully submitted,

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September 21, 2015

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[40] *See* Opposition of NAB to Petition for Rulemaking by Mediacom Comm. Corp., RM-11752, at 12-13 (Aug. 14, 2015).

[41] *Id*.

Eat or Be Eaten

CONSOLIDATION CREATES A TOP-HEAVY LIST OF 25 LARGEST MVPDs BY MIKE FARRELL

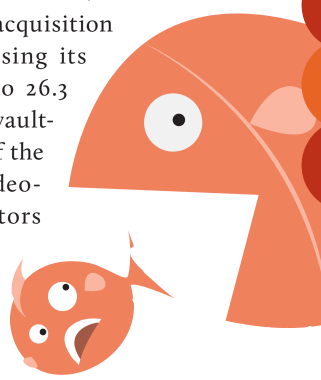
The cable universe is shrinking.

Consolidation, competition and new viewing habits are irrevocably changing the pay TV landscape, with more contraction expected as larger deals close and smaller cable systems are snapped up by their larger peers.

But unlike years past, when deals were driven by a desire to cluster operations more efficiently, the coming consolidation wave seems sparked purely by a need to get bigger — bulking up to roll out new services more effectively and cheaply across a broader base, and to help keep rising programming costs in check.

Cable operators aren't the only ones looking for scale. AT&T completed its $48.5 billion acquisition of DirecTV in July, raising its video-subscriber tally to 26.3 million customers and vaulting the telco to the top of the list of multichannel video-programming distributors (MVPDs). Comcast, which abandoned its $67 billion pursuit of Time Warner Cable in April when it determined regulators would not sign off on the deal, is still a solid No. 2 with 22.3 million subscribers.

> **TAKEAWAY**
>
> Consolidation has created a wide disparity between the top and bottom of the list of Top 20 pay TV providers.



Charter Communications, which started the whole consolidation wave in 2014 when it began a dogged pursuit of Time Warner Cable, finally won that prize with its May agreement to purchase the 10.8 million-subscriber TWC for $78.7 billion. That deal is expected to close by the end of the year, and with Charter's $10 billion purchase of Bright House Networks — also expected to close in December — the Stamford, Conn.-based operator will have 17.2 million customers with which to spread the operating acumen of CEO Tom Rutledge.

CATCHING THE WAVE

Charter is expected to at least look at other potential acquisitions, but others are not sitting idly by. European telecom giant Altice agreed to purchase a 70% interest in Suddenlink Communications for $9.1 billion, and has said it will use the midsized St. Louis-based cable company as a vehicle to expand its U.S. presence.

Already, Altice chairman Patrick Drahi has named Cox Communications and Cablevision Systems as potential targets. And though Cox has insisted it isn't for sale — and there is some doubt as to whether Altice could pay Cablevision's price — there is no doubt that further consolidation is coming.

In a recent report, MoffettNathanson principal and senior analyst Craig Moffett said possible acquisition targets could include some of the larger operators at the lower end of the top 10 — Mediacom Communications, Cable One or WideOpenWest.

"It would be foolish to dismiss the idea that any or all of them might be acquired," Moffett wrote.

And the cable industry has a long history of acquisition. For example, only three of the Top 25 MSOs of 1985 still exist today (Cox, Cablevision and Comcast); the rest have been assumed by other entities. Five of the Top 25 of 1995 are in business today — Time Warner Cable, Comcast, Cox, Cablevision and Charter — with TWC expected to be swallowed by Charter by year-end.

Cable operators stopped growing their basic-video subscriber rolls more than

Top 25 MVPDs (2015)

With the recently completed, $48.5 billion AT&T-DirecTV merger, the multichannel video-programming distributor (MVPD) industry has a new leader. With 26.4 million video customers, the post-merger AT&T has the potential to bring high-speed Internet, voice and video services to underserved markets across the United States.

NAME	SUBSCRIBERS
1. AT&T (including DirecTV)	26.3 million
2. Comcast	22.3 million
3. Charter-Time Warner Cable-Bright House *	17.2 million
4. Dish Network	13.9 million
5. Verizon Communications (FiOS)	5.8 million
6. Cox Communications	4.1 million
7. Cablevision Systems	2.7 million
8. Suddenlink Communications/Altice	1.1 million
9. Mediacom Communications	879,000
10. WideOpenWest	606,500
11. Frontier Communications/FiOS	570,000
12. Wave Broadband	415,000
13. Cable One	399,000
14. Service Electric	290,000
15. RCN	289,000
16. CenturyLink/Prism	258,000
17. Atlantic Broadband (Cogeco)**	247,000
18. Armstrong Cable	245,000
19. Midcontinent Communications	229,000
20. MetroCast/Harron Communications	200,000
21. Blue Ridge Communications	170,000
22. Rural Broadband Investments (GTCR)	150,000
23. Telephone & Data Systems	137,000
24. Vyve Broadband	120,000
25. General Communication Inc.	113,000

*Pending transaction **Pending Metrocast-Conn. purchase

SOURCES: SNL Kagan, MoffettNathanson, company reports and *MCN* estimates

Top 25 MSOs (1985)

Thirty years ago, when the cable-television industry was growing rapidly, there was no single dominant force: TCI was the top provider and Comcast stood at No. 18.

NAME	SUBSCRIBERS
1. Tele-Communications Inc.	3.7 million
2. American Television and Communications Group	2.5 million
3. Group W Cable	2.2 million
4. Storer Cable Communications	1.5 million
5. Cox Cable Communications	1.48 million
6. Warner Amex Cable Communications	1.2 million
7. Continental Cablevision	1.1 million
8. Times-Mirror Cable Television	997,000
9. United Cable TV	949,000
10. Newhouse Broadcasting	927,000
11. Viacom Cablevision	820,000
12. UA Cablesystems Corp.	711,000
13. Sammons Comunications	665,000
14. Cablevision Co.	592,000
15. Rogers Cablesystems	587,000
16. Heritage Communications	585,000
17. Jones Intercable	573,000
18. Comcast Cable	506,000
19. Telecable Corp.	445,000
20. McCaw Communications	382,000
21. Capital Cities Cable	376,000
22. Prime Cable	331,000
23. American Cable Systems	312,000
24. Wometco Cable TV	308,000
25. Centel Cable Television Co.	304,000

SOURCE: The Barco Library, The Cable Center

Top 25 MSOs (1995)

The impact of consolidation is apparent just 10 years later: TCI is still the leader, with 13.3 million customers, and Comcast Cable has leaped 15 spots from No. 18 in 1985 to No. 3 with 3.4 million customers.

NAME	SUBSCRIBERS
1. Tele-Communications Inc.	13.3 million
2. Time Warner Cable	10.1 million
3. Comcast Cable	3.4 million
4. Cox Cable	3.2 million
5. Continental Cablevision	3.1 million
6. Cablevision Systems	2.8 million
7. Adelphia Communications	1.6 million
8. Cablevision Industries	1.4 million
9. Jones Intercable	1.35 million
10. Viacom Cable	1.2 million
11. Falcon Cable TV	1.1 million
12. Sammons Communications	1.09 million
13. Century Communications	962,000
14. Colony Communications	814,000
15. Charter Communications	791,000
16. Scripps-Howard Communications	751,000
17. Lenfest Group	743,000
18. Prime Cable	648,000
19. TKR Cable	638,000
20. Marcus Cable	561,000
21. InterMedia Partners	560,000
22. Southern Multimedia Comm. (MediaOne)	512,000
23. TCA Cable TV	511,000
24. Post-Newsweek Cable	506,000
25. DirecTV	500,000

SOURCE: The Barco Library, The Cable Center a decade ago. The industry peaked at about 66.9 million total subscribers in 2001, and in 2014, it finished the year with a total of about 54 million subscribers, according to the National Cable & Telecommunications Association. Broadband, for years the profit center of the business, emerged as the subscriber leader last year — the first year that cable broadband customers exceeded video subscribers.

While that had been anticipated — and in some cases, encouraged — for years, cable operators are beginning to turn the corner on basic-video subscriber growth. The four top cable service providers have drastically reduced their customer losses over the past three years; Comcast alone has cut losses by nearly 75% since 2010.

Telcos, which had been engines of video-subscriber growth for more than a decade, began reporting losses for the first time in the second quarter. AT&T said it lost about 22,000 U-verse TV customers in the most recent quarter, while Verizon Communications saw its growth cool considerably, adding 26,000 FiOS TV customers in the period compared to 100,000 additions in the prior year.

At the same time, satellite subscriber growth has stalled — DirecTV lost 133,000 net subscribers in the second quarter, well below the 60,000 additions in the first three months of the year. No. 2 satellite company Dish Network lost 81,000 net subscribers in the second quarter, almost twice the 44,000 it lost during the previous year.

Top 25 MVPDs (2000)

Just five years later, the cable picture shifted yet again, with AT&T's purchase of TCI and satellite-TV providers DirecTV and EchoStar Communications cracking the Top 10.

NAME	SUBSCRIBERS
1. AT&T Broadband	16.4 million
2. Time Warner Inc.	12.7 million
3. DirecTV	8.3 million
4. Charter Communications	6.14 million
5. Cox Communications	6.1 million
6. Comcast Cable	5.7 million
7. Adelphia Communications	5 million
8. EchoStar Communications	3.9 million
9. Cablevision Systems	3.1 million
10. Insight Communications	1.4 million
11. Mediacom Communications	747,000
12. Cable One	741,000
13. Classic Communications	413,000
14. Service Electric	294,000
15. RCN	292,000
16. Ameritech	280,000
17. Tele-Media	267,000
18. Northland Communications	261,000
19. Midcontinent Communications	215,000
20. Armstrong Cable	205,000
21. Susquehanna Communications	189,000
22. Millennium Digital	175,000
23. Blue Ridge Communications	167,000
24. Buckeye Cable	162,000
25. U.S. Cable	140,000

SOURCES: Individual companies; *Multichannel News*, *B&C* estimates

REUTERS/MIKE SEGAR

Time Warner Cable is in line to be the next big cable brand to fall by the wayside in the wake of cable consolidation.

Dish Network lost about 79,000 net subscribers in 2014, compared to a gain of 1,000 in 2013.

DISRUPTING THE DISRUPTOR

As satellite- and telco-TV service stagnates, a new distribution model is disrupting TV's early disruptor — cable operators. Over-the-top services like Sling TV, HBO Now and Sony's PlayStation Vue have burst onto the scene with much fanfare, and pay TV operators who may have dismissed those services in the past are now scrambling to come up with their own solutions.

In the second quarter, pay TV lost its traditional growth engines — satellite TV was down 284,000 customers while telco TV providers lost 2,000 subscribers — and perennial loss leader cable cut its losses almost in half to 280,000 from 534,000 a year ago.

Indeed, pay TV subscriber growth dipped to a record low of -0.7% in the past 12 months, according to Moffett. The pay TV industry lost 566,000 subscribers in the second quarter, 76% worse than the 321,000 it lost during the same period in 2014.

With more OTT services slated to launch later this year — Verizon is expected to debut its "mobile-only" Go90 service in the late summer and other programmers are considering launching their own direct-to-consumer services — cord-cutting will likely get worse. And cable operators will likely meet the challenge by trying to add scale.

But just how many customers will migrate over remains to be seen. Years of consolidation have narrowed the number of large available properties. While there are about 660 cable operators and 5,208 cable systems in the United States, more than 80% of the nation's 116 million TV households are represented by the top eight MVPDs.

And unlike other years when an MVPD could buy the operator below it on the list and move up several spots on the list, today the fifth-largest provider (Verizon) could could buy the next three largest distributors below it and still be stuck at No. 5 with 13.7 million customers, behind Dish Network's 13.9 million subscribers.