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

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

COMMENTS of THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES; THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION; THE INDEPENDENT TELEPHONE AND TELECOMMUNICATIONS ALLIANCE; THE WESTERN TELECOMMUNICATIONS ALLIANCE; and the RURAL INDEPENDENT COMPETITIVE ALLIANCE

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SUMMARY

The Commission has direct authority under section 325 of the Cable Act and ancillary authority under section 706 of the 1996 Act to reform the retransmission consent process. The record clearly shows that the current regime is outdated and results in multiple consumer harms. In reforming the retransmission consent process, the Commission should strengthen the good faith negotiating standards and clarify what constitutes a *per se* violation. Specifically, the Commission should declare that it is a *per se* violation when any of the following occur: 1) a broadcaster grants agreement approval rights to an affiliated network; 2) stations that are not commonly owned negotiate or approve agreements on behalf of other stations; 3) either party to a retransmission negotiation refuses to offer *bona fide* proposals on important issues; 4) either party to a retransmission negotiation refuses to agree to non-binding mediation in the event of an impasse; 5) either party engages in behaviors designed to manipulate the expiration of retransmission consent agreements to coincide with "must have" broadcasts; 6) parties attempt to deny customers access to significantly viewed out-of-market signals; and/or 7) practices that unfairly advantage the broadcaster to the detriment of the end-user, such as forced tying, multicast tying, broadband tying, and the inclusion of mandatory non-disclosure provisions. The Commission can give further meaning and import to these proposed remedies by considering whether a broadcaster has committed any violations during a broadcaster's license renewal process.

In addition, the "totality of circumstances" standard should be expanded to include price discrimination that is not based on objective competitive marketplace conditions. The Associations do not support an enhanced requirement for providing notice to consumers about potential signal loss, as it is unnecessary and potentially disruptive. The prohibition against

deleting or repositioning channels during the ratings "sweeps" period should apply to all broadcasters and video providers equitably, not just certain video providers as it is today. Non-duplication and syndicated exclusivity rules should be eliminated, as they insulate broadcasters from market forces and lead to higher consumer rates, less competition and diminished broadband investment. Finally, the Commission should implement a standstill provision and a "most favored nation" pricing rule for rural video providers. These steps are necessary to protect rural consumers and inject market forces into the negotiation process.

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I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO),[1] the National Telecommunications Cooperative Association (NTCA),[2] the Independent Telephone and Telecommunications Alliance (ITTA),[3] the Western Telecommunications Alliance (WTA),[4] and the Rural Independent Competitive Alliance (RICA)[5] (collectively, the Associations) hereby submit these comments in the above-captioned

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[1] OPASTCO is a national trade association representing approximately 460 small incumbent local exchange carriers ("ILECs") serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

[2] NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

[3] ITTA represents mid-size LECs that provide a broad range of high quality wireline and wireless voice, data, Internet, and video telecommunications services to more than 19.5 million customers in 44 states.

[4] WTA is a trade association that represents more than 250 rural telephone companies operating west of the Mississippi River. Most members serve fewer than 3,000 access lines overall, and fewer than 500 access lines per exchange.

[5] RICA is a national association of nearly 80 competitive local exchange carriers ("CLECs") that are affiliated with rural ILECs and provide facilities based service in rural areas.

proceeding.[6] Video is an important component of the service suite provided by rural local exchange carriers ("RLECs") in the small markets they serve, particularly as such services appear to help promote broadband adoption. The Associations urge the Commission to reform and update the outmoded retransmission consent rules, which prevent the operation of market forces, impair consumer choice in the video market, and impede broadband investment and adoption.

The Commission has direct authority under section 325 of the Cable Act of 1992 and ancillary authority under section 706 of the Telecommunications Act of 1996 ("1996 Act") to implement and revise as necessary its retransmission consent rules. The Commission's "good faith" negotiating standards are routinely ignored or even violated. Therefore, the Commission should strengthen the standards and clarify what constitutes a *per se* violation. Similarly, the Commission should expand the "totality of circumstances" standard, and address unjustified price discrimination experienced by small multichannel video programming distributors ("MVPDs").

The current rules regarding notice to consumers in the event of a possible loss of a broadcast signal are sufficient; enhancing this requirement would only be disruptive to consumers. Moreover, all parties, including broadcasters, should be subject to the prohibition against removing or moving broadcast signals during the critical "sweeps" period. In addition, the non-duplication and syndicated exclusivity rules should be eliminated, as they insulate broadcasters from market forces, harm consumers, and impede further broadband investment. Finally, a standstill provision is needed to protect consumers from signal loss due to an impasse

[6] *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, FCC 11-13 (rel. Mar. 3, 2011) ("NPRM").

in negotiations, and rural MVPDs should be able to obtain "most favored nation" pricing for programming.

II. THE COMMISSION HAS BOTH THE AUTHORITY AND THE RESPONSIBILITY TO UNDERTAKE COMPREHENSIVE REFORM OF THE OUTDATED RETRANSMISSION CONSENT REGIME

The NPRM seeks comment on potential revisions to its retransmission consent rules. However, the Commission has assessed that there are a number of limits on its statutory authority to revise these rules, based largely upon its reading of section 325 of the Cable Act of 1992.[7] This assessment should be revisited. The record demonstrates that the Commission has ample authority under section 325.[8]

In the plain text of section 325(b)(3)(A), Congress instructed the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[9] This language imparts direct authority to the Commission to set, and, if necessary, revise, ground rules for a retransmission consent regime that will enable broadcasters and programmers to receive fair payment for their material, in a manner consistent with other legislative goals, including increased consumer access to video programming. The authority to "govern" is of little meaning if such actions are not within the Commission's authority.

Congress did not stop there. The same section further instructed the Commission to account for "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier…" while ensuring that the retransmission consent regime does not conflict with the need "to ensure that the rates for the basic service tier are

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[7] *See*, *e.g.*, NPRM ¶¶ 11, 17, 19.
[8] Time Warner Cable Inc. *et al. Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, pp. 30-39 (fil. Mar. 9, 2010) (the "Petition for Rulemaking"). *See also*, *e.g.*, *Ex Parte Notice* of Time Warner, MB Docket No. 10-71 (fil. Feb. 23, 2011).
[9] 47 U.S.C. § 325(b)(3)(A).

reasonable."[10] In short, the text of section 325 "expressly gives the Commission broad authority to adopt rules that protect the public interest as it relates to broadcasters' grant of retransmission consent rights to MVPDs."[11]

The Commission's ability to address retransmission consent is further buttressed by ancillary authority conveyed through section 706 of the Telecommunications Act of 1996. This section mandates that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" using a variety of means, including the utilization of "methods that remove barriers to infrastructure investment."[12] One of the most effective methods available to the Commission to encourage the deployment of advanced services is to improve broadband providers' access to video content. The Commission has previously established that there is an intrinsic link between a provider's ability to offer video service, and to deploy broadband networks.[13] This conclusion has been confirmed by state regulators,[14] and is further reinforced by the experience of rural carriers that are able to bundle video with broadband services.[15]

Furthermore, the Commission has previously drawn from its ancillary authority under section 706 of the 1996 Act to bolster its direct authority under the Cable Act to further the

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[10] *Id.*

[11] ACA comments, MB Docket No 10-71, p. 18 (fil. May 18, 2010) (ACA comments).

[12] 47 U.S.C. § 1302(a).

[13] *See*, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007) ("MDU Order").

[14] *See*, *Resolution on Fair and Non-Discriminatory Access to Content*, National Association of Regulatory Utility Commissioners, (adopted Feb. 16, 2011), available at http://www.naruc.org/Resolutions/Resolution%20on%20Fair%20and%20Non%20Discriminatory%20Access%20to%20Content.pdf .

[15] In a 2009 study, the National Exchange Carrier Association (NECA) found that members of its Traffic Sensitive Pool offering broadband using Digital Subscriber Line (DSL) technology along with a video component had DSL adoption rates nearly 24 percent higher than those companies offering DSL without access to subscription video services. *See*, NECA comments, GN Docket Nos. 09-47, 09-51, 09-137, p. 6 (fil. Dec. 7, 2009).

public interest with respect to consumers' access to video services.[16] Notably, this precedent was set when the Commission had determined under section 706 that broadband deployment was being deployed to all Americans in a reasonable and timely fashion. Subsequently, the Commission has reversed that finding and concluded that deployment is not occurring in a reasonable and timely fashion, mostly in rural communities located throughout the country.[17] In this case, section 706 directs the Commission to "take *immediate action* to accelerate deployment"[18] of advanced services by removing barriers to infrastructure investment. Given the proven linkage between access to video content and broadband deployment, the antiquated retransmission consent regime is clearly a barrier that section 706 requires the Commission to remove without delay. By following the recommendations provided below, the Commission will spur competition in the video market, as required by the Cable Act of 1992, and will remove barriers to broadband investment and deployment as directed by section 706 of the 1996 Act.

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[16] In the MDU Order, the Commission acted to promote consumers' access to video programming and to enhance competition in the video marketplace. Correctly concluding that this action would concurrently lower barriers to broadband deployment and investment, the Commission also recognized that its decision advanced the purposes of, and was therefore authorized by, both the 1992 Cable Act and section 706 of the 1996 Act. *See* MDU Order, ¶ 52; *see also*, *Id.*, ¶ 47. In the extant proceeding, the Commission once again has a similar opportunity to exercise the authority conveyed by, and advance the goals of, these two legislative provisions.

[17] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, and *Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Amended by the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51, Report, 25 FCC Rcd 9556, 9574, ¶ 28 (2010). *See also*, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, and *Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Report and Order on Reconsideration, FCC 11-78, ¶ 52 (rel. May 20, 2011).

[18] 47 U.S.C. § 1302(b) (2010) (emphasis added).

III. THE COMMISSION SHOULD STRENGTHEN ITS GOOD FAITH NEGOTIATING STANDARDS AND CLARIFY WHAT CONSTITUTES A *PER SE* VIOLATION

The NPRM notes that service disruptions resulting from retransmission consent disputes present a growing problem for consumers.[19] Consequently, the NPRM concludes that these circumstances merit a reevaluation of the good faith rules.[20] The NPRM explores the basis of the good faith rules, and poses a number of questions about potential changes and clarifications that are under consideration.

A. The Commission Should Dismiss Arguments Contending That The Number Of Existing Retransmission Consent Agreements And The Lack Of Formal Complaints Justify The Current Flawed Process

The NPRM notes that in the Order implementing the good faith rules,[21] the Commission refrained from addressing imbalances in the retransmission consent regime in a more comprehensive manner. It chose this path in large part based upon the purported fact that thousands of retransmission consent agreements have been concluded "successfully,"[22] and that since that time, very few complaints have been filed.[23] However, in the decade since the Good Faith Order was released, the multiple consumer harms caused by the current retransmission consent regime have been demonstrated.

As both the Associations[24] and the NPRM have noted,[25] the March 9, 2010 Petition for Rulemaking filed by Time Warner and 13 other entities describes a number of specific cases in

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[19] NPRM, ¶ 20.
[20] *Id.*
[21] *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, 5448, ¶ 6 (2000) ("Good Faith Order").
[22] NPRM, ¶ 11.
[23] *Id.*, ¶ 12.
[24] Associations comments, MB Docket No 10-71, pp. 3-4 (fil. May 18, 2010) (Associations comments).
[25] NPRM, ¶ 13.

which broadcasters have manipulated the outdated retransmission consent regime to the detriment of consumers.[26] After the Petition for Rulemaking was submitted, a small MVPD filed a supporting statement, explaining that its customers had gone without broadcast signals for 15 months.[27] While the situations outlined in the Petition for Rulemaking focused on larger MVPDs, this small provider highlighted the sustained harms inflicted upon rural consumers when a small MVPD is denied access to broadcast signals under reasonable terms and conditions.[28] When large television station owners and large cable or satellite companies reach an impasse in negotiating retransmission consent, there is substantial news coverage, often nationwide, that "shines light" on the resulting situation.[29] This is not so in the case of small rural MVPDs operated by RLECs. When RLECs are faced with "take it or leave it" offers that result in consumers' loss of signal, the relatively small number of viewers impacted by these individual instances are often deemed insufficiently newsworthy to generate national attention, and any blackout occurrence goes unnoticed.[30]

Furthermore, the American Cable Association (ACA) has previously provided copious amounts of data showing that prices, terms, and conditions for access to broadcast programming have increased substantially; that small MVPDs face substantial discrimination in prices for access to broadcast programming; that increasing retransmission consent demands of broadcasters result in subscribers of small and medium-sized operators losing access to broadcast signals; and that the rising costs of retransmission consent place upward pressure on the retail

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[26] Petition for Rulemaking, pp. 20-30. *See also, Ex Parte Notice*, letter from John Kuykendall, JSI Inc. on behalf of Ringgold Telephone Company, to Secretary Dortch, MB Docket Nos. 07-29; 07-198 (fil. Oct. 5, 2007).

[27] *See*, Comments of BEVCOMM, Inc. and Cannon Valley Cablevision Inc., MB Docket No. 10-71, p. 2 (rec. Apr. 7, 2010).

[28] *Id.*

[29] Petition for Rulemaking, pp. 23–28.

[30] *Ex Parte Notice* of Keith Galitz, Canby Telecom and NTCA, MB Docket No 10-71 (fil. June 15, 2010).

prices of multi-channel video subscriptions, harm competition, and hinder the deployment of advanced services.[31] Multiple parties representing a variety of MVPDs have, in separate filings, provided similar demonstrations that the current rules are outdated, harmful to consumers, and impede broadband investment and adoption.[32] This is due in large part to the protections afforded to programmers and the lack of effective recourse available to MVPDs. To be clear, the Associations do not ask for the Commission to "sit in judgment of the terms of every executed retransmission consent agreement."[33] But the record clearly demonstrates that the Good Faith Order has fallen short of its goal to establish an environment that results in fair and balanced free-market negotiations for retransmission consent.

The NPRM further attempts to justify the Good Faith Order's ineffective approach by stating that few complaints have been filed alleging violations of the resulting rules.[34] However, as many parties have detailed previously,[35] the complaint process has proven too prolonged and costly for even large MVPDs. Small MVPDs, even if they could somehow afford the significant expense to engage in the complaint process, could not hope to keep customers during the extended amount of time it would take – even in the event of a favorable conclusion. Furthermore, mandatory nondisclosure clauses demanded by content providers, coupled with

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[31] *See*, ACA comments, MB Docket No. 07-269, pp. 4-16 (fil. May 20, 2009) (ACA 2009 comments).

[32] *See*, *e.g.*, ACA 2009 comments, pp. 5-7; NTCA comments, MB Docket No. 07-269, pp. 7-10 (fil. May 19, 2009). *See also*, ACA comments, MB 07-198, pp. 5-20 (fil. Jan. 3, 2008); NTCA comments, MB Docket No. 07-198, pp. 16-32 (fil. Jan. 4, 2008); OPASTCO, ITTA, RICA, WTA comments, MB Docket No. 07-198, pp. 8-12 (fil. Jan. 4, 2008); Small Cable System Operators for Change comments, MB Docket No. 07-198, pp. 2-5 (fil. Jan. 4, 2008); Broadband Service Providers Association comments, MB Docket No. 07-198, pp. 18-20 (fil. Jan. 4, 2008).

[33] NPRM, ¶ 11.

[34] *Id.*, ¶ 12.

[35] *See*, *e.g.*, Petition for Rulemaking, pp. 30-39; ACA Comments, MB Docket No. 10-56, pp. 40-41 (fil. June 21, 2010); AT&T, MB Docket No 10-71, p. 11 (fil. May 18, 2010); *see also* fn. 31, *supra*.

concerns about retaliation by those that have a stranglehold on necessary content, make complaints impractical to pursue.

Compounding the problem, retransmission consent agreements increasingly reflect the influence and involvement of the network with whom the local affiliate broadcaster is associated. Networks are demanding larger percentages of retransmission fee revenues, thereby driving up the retransmission consent fee that is proposed by the broadcaster. As a result, small MVPDs are faced with a declining profit margin – or worse, a loss – created by the higher cost of video content.

The marketplace realities faced by small and mid-sized MVPDs refute any notion that either the execution of a large number of retransmission consent agreements, or the lack of pending formal complaints, constitutes evidence that there is no need to reform the Commission's rules. To conform to its statutory mandates to enhance consumer choice in the video market and to remove barriers to investment in broadband infrastructure, the Commission must take the steps outlined below.

B. The Commission Should Declare That It Is A *Per Se* Violation For A Broadcaster To Grant Approval Rights To A Network With Which It Is Affiliated

The Commission questions whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.[36] There is no question that a network's exercise of an approval right hinders the negotiation process and should be considered

[36] NPRM, ¶ 22.

a *per se* violation of the requirement to negotiate in good faith. Each station should be required to do its own negotiating.

The major networks that provide content to the affiliate station broadcasters are on record as coveting the retransmission consent fees the broadcasters now collect. For example, the Chief Executive Officer of CBS, Les Moonves, has been quoted as saying:

> So no longer can it be "network is doomed" because they only have a single revenue stream, while cable is a much better business because they have two revenue streams. Now we are achieving that dual revenue stream as well and that's going to be significant as we move toward the future. I think it's now a given that retrans is part of the game.[37]

The Associations agree that networks like CBS should receive any retransmission fee generated by agreements involving the stations owned and operated by the network. However, when networks demand increasing percentages of retransmission consent fees and the right to approve agreements between independent affiliate stations and MVPDs, this limits the ability of local affiliates to negotiate, further inflating the costs of content and adversely affecting the customers of small rural providers.

It was reported recently that Comcast has developed a plan, presented to its affiliates, that places Comcast in the position of "blanket arbiter" for all NBC-Universal affiliate stations negotiating retransmission consent by allowing the stations to "proxy" their rights to Comcast.[38] As reported, Comcast/NBC-Universal proposed at a recent meeting with affiliate stations that to "streamline" the process, the network and the affiliates should allow Comcast to negotiate with

[37] RBR.COM TRVBR.COM, Voice of the Broadcasting Industry, "*Les Moonves says CBS is getting a cut of some affiliates retrans*" (March 1, 2010), http://www.rbr.com/tv-cable/21802.html.
[38] Malone, Michael, "*NBC Affiliates Iron Out Blanket Retrans Deal,*" (May 16, 2011), http://www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php.

MVPDs on their behalf. Comcast noted that the NBC-owned stations would be allowed to negotiate with Comcast in the same manner as affiliate stations do, but that for the majority of affiliates it would be beneficial for Comcast to negotiate with other MVPDs. This proposal raises the potential for price fixing and collusion among NBC affiliate stations, NBC-owned stations, the network, and Comcast. This is a concrete example of the undue influence a network can wield over its affiliates, and should therefore constitute a *per se* violation of the good faith rule.

C. Stations That Are Not Commonly Owned Should Not Be Permitted To Negotiate or Approve Retransmission Consent Agreements On Behalf Of Each Other

The NPRM also asks whether it should be a *per se* violation for a station to grant another station, or station group, the right to negotiate, or the power to approve, its retransmission consent agreement when the stations are not commonly owned, as might be reflected in local marketing agreements ("LMAs"), Joint Sales Agreements ("JSAs"), or shared services agreements.[39] A station should not be permitted to grant an unaffiliated station or station group the right to negotiate or the power to approve its retransmission consent agreement. The formation of these groups substantially increases the risk that all broadcasters in a market, or in neighboring markets, will collude to set the retransmission consent price. Arrangements between and among the component stations of these sorts of groups may delay and unnecessarily complicate the negotiation process.

The argument that these negotiating arrangements largely occur in small markets does nothing to mitigate the clear harms to consumers in these markets. Broadcasters have more than

[39] NPRM, ¶ 23

ample leverage in the negotiating process. The creation of a collective body that increases this leverage to the detriment of small MVPDs and their consumers should constitute a *per se* violation of the good faith rule.

D. The Commission Should Clarify That It Is A *Per Se* Violation For A Negotiating Entity To Refuse To Put Forth *Bona Fide* Proposals On Important Issues

The NPRM asks if it should be a considered a *per se* violation if a negotiating party refuses to offer *bona fide* proposals on important issues.[40] Negotiations are unnecessarily stymied when parties fail to make genuine offers. This practice in the retransmission consent negotiation context is nothing more than a stalling tactic designed to unfairly bolster one party's negotiating position. In fact, the NPRM correctly references comments demonstrating that the Commission's current *per se* negotiation standards are "easily evaded" by "*de facto* 'take it or leave it' bargaining tactics."[41] Therefore, the refusal to offer *bona fide* proposals on important issues should constitute a *per se* violation.

Several factors could help determine whether or not proposals should be considered *bona fide*. These factors should include, but not be limited to, whether there is some reasonable relationship to a previous agreement, whether prices or conditions offered to smaller MVPDs are discriminatory and fall beyond the scope of reasonable differences in the marketplace,[42] and whether an offer raises prices far beyond the rate of inflation without ample justification. Furthermore, as discussed more fully *infra* in this section, clauses that limit a party's ability to

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[40] *Id.*, ¶ 24.
[41] *Id.*, fn. 77 (citations omitted).
[42] NPRM, ¶ 33, fn. 98. *See also*, ACA Comments, MB Docket No. 10-56, pp. 38-39 (fil. June 21, 2010); *see also*, Section IV, *infra*.

negotiate with others or to do business within their market should also be deemed a violation of the *bona fide* standard and thus constitute a *per se* violation of the good faith rule.

E. It Should Be A *Per Se* Violation For A Negotiating Entity To Refuse To Agree To Non-Binding Mediation In The Event Of An Impasse

As suggested by the NPRM, it should be a *per se* violation for a negotiating entity to refuse to agree to non-binding mediation when the parties reach an impasse within a set time frame of the expiration of their retransmission consent agreement.[43] While not as effective as mandatory arbitration, non-binding mediation is preferable to the current situation, where small MVPDs are typically presented with "take it or leave it" offers without any dispute resolution mechanism. Any method that may help level the playing field would constitute an improvement. As alluded to in the NPRM,[44] the Commission may wish to factor into its decision on the renewal of a broadcaster's license, whether that broadcaster had engaged in, or abided by the outcome of, a retransmission consent dispute resolution process, including non-binding mediation.

The NPRM also seeks comment on whether 30 days from the expiration of the retransmission consent agreement is the appropriate time frame within which to require non-binding mediation. While 30 days may be reasonable for larger MVPDs, the Associations note that their members have far fewer staff and resources available than nationwide MVPDs. Therefore, small MVPDs serving predominately rural areas should be able to invoke mediation,

[43] NPRM, ¶ 25. The Associations do not concur with the Commission's assessment (NPRM, ¶ 18) that it lacks the authority to mandate binding arbitration.
[44] *Id.*, ¶ 30.

or any other dispute resolution process, at least 45 days prior to the expiration of any existing agreement.[45]

In the event mediation is required, the NPRM asks how a mediator should be selected, how the parties should determine who is responsible for the costs, and how the mediation's ground rules for the mediation would be determined.[46] There is significant precedent in recent merger proceedings that can serve as a foundation to address these questions.[47] The Commission should look to these precedents to establish the basis for retransmission consent mediation.

F. The Commission Should Determine That Behaviors Designed To Manipulate The Expiration Of Retransmission Consent Agreements To Coincide With "Must Have" Broadcasts Constitutes An "Unreasonable Delay"

The record in this proceeding highlights many concerns about delays in negotiations, and requests comment on what constitutes an "unreasonable delay."[48] Due to the stranglehold that programmers and broadcasters have over content under the current rules, MVPDs are at their mercy when a lack of progress in negotiations raises the possibility that consumers might lose access to "must have" programming. When the expiration of an agreement, by chance or design, is scheduled to occur just before a marquee program (such as a major sporting or cultural event), the overwhelming leverage held by the programmer is exacerbated. The NPRM alludes to

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[45] The Commission should also examine what dispute resolution procedures would be appropriate when there is no pre-existing contract, specifically in the case of new entrants to the video market. New entrants tend to have the least amount of market power and negotiating leverage, yet they are critical to providing consumer choice in the market for video services.

[46] NPRM, ¶ 25.

[47] *See, Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses,* Memorandum Opinion and Order, FCC 11-4, MB Docket No. 10-56, ¶¶ 49-59 (rel. Jan. 20, 2011). *See also, In the Matter of Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors and Transferors to Comcast Corporation (subsidiaries), Assignees and Transferees*; Memorandum Opinion and Order, MB Docket No. 05-192, Appendix B (July 13, 2006).

[48] NPRM, ¶ 26.

circumstances in which negotiations appear to be timed in this manner through delays or even the grant of strategic extensions on the part of the programmer or broadcaster.[49] The MVPD is then faced with the Hobson's choice of either agreeing to whatever demands are presented, or having their customers' access to the broadcast signal cut off just prior to a major "must-have" televised event. Delays that result in negotiations being postponed or drawn out until a major marquee event is imminent should be deemed a *per se* violation of the good faith rule.

G. Any Attempt To Deny Customers Access To "Significantly Viewed" Out-Of-Market Signals Should Be Deemed A *Per Se* Violation

The NPRM seeks comment on whether a broadcaster's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market station that is "significantly viewed" (SV) constitutes a violation of the Commission's rules.[50] Many consumers in rural communities depend on out-of-market SV stations for a variety of content, including news and weather reports that may be more relevant to their area than those coming from within their DMA. This is especially true of those areas that may be within a DMA centered on a city in another state. In addition, many rural consumers are accustomed to being able to view content from out-of-market SV stations that they have long had access to. These consumers should not be denied access to this content as a result of retransmission consent negotiations, and Commission rules should not permit this outcome. Attempts to deprive consumers of access to out-of-market SV signals should therefore be declared a *per se* violation of the good faith rules.

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[49] *Id.*, ¶ 28.
[50] *Id.*, ¶ 27.

H. Practices Such As Forced Tying, Multicast Tying, Broadband Tying, And Inclusion of Mandatory Non-Disclosure Provisions, Should Also Be *Per Se* Violations

The NPRM inquires whether other practices should constitute presumptive breaches of good faith negotiations.[51] In addition to the items discussed above, the following behaviors also significantly impair access to video content, limit consumer choice, and adversely affect further broadband investment and adoption. The Commission should therefore take the following additional steps:

- Prohibit the practice of forced tying, also known as forced carriage, where RLECs are required to purchase unwanted programming in order to offer "must have" content, often imposed during the retransmission consent process.[52]

- Prohibit the emerging practice of multicast tying, where broadcasters are attempting to tie "multi-cast" channels to their primary DTV channel as a way to increase income from retransmission consent. In this scheme, broadcasters present a lower price for the primary channel only when the additional new multi-cast channels are tied to it. This practice should be deemed a *per se* violation because the current rules correctly do not require the MVPD to take, or allow the broadcaster to force, the inclusion of the additional channels.

- Prohibit the practice of broadband tying, where RLECs are required to pay an additional fee for access to online content based on their number of broadband subscribers, regardless of whether or not these customers subscribe to multichannel video services.[53]

- Prohibit the use of mandatory non-disclosure provisions. These provisions have the effect of preventing MVPDs from gauging the market value of the content they are negotiating to obtain, yet they are required to agree to these provisions in order to gain access to programming. Hence, small and mid-size MVPDs have no way of knowing whether the price they are paying for programming is at all representative of its market value.[54]

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[51] *Id.*, ¶ 30.

[52] *See*, OPASTCO, NTCA, RICA, and WTA *ex parte* letter, MB Docket No. 07-198 (fil. Aug. 15, 2008). *See also*, Section VII, *infra*.

[53] *See*, OPASTCO comments, MB Docket No. 07-269, pp. 5-16 (fil. Jul. 29, 2009). *See also*, NTCA comments, MB Docket No. 07-269, pp. 5-6 (fil. May 19, 2009); ACA reply comments, MB Docket No. 07-269, pp. 9-11 (fil. Aug. 28, 2009).

[54] Association comments, p. 5.

By establishing that these practices constitute *per se* violations of the good faith rules, the Commission will help inject market forces into retransmission consent negotiations and even the playing field between small MVPDs and broadcasters. In turn, this will serve the public interest by easing upward pressure on the rates consumers pay, encouraging more providers to enter the video market to further competition, and spurring more bundled video-broadband offerings.

I. The Commission Should Account For Violations Of The Good Faith Rules When Considering A Broadcaster's License Renewal Request

The NPRM seeks comment on ways the Commission's remedies may be strengthened in the event of a good faith violation, and it specifically inquires about license renewals.[55] In addition to fines and similar inducements, the Commission should consider whether a broadcaster that violates the good faith rules is a worthy steward of the public airwaves when that broadcaster seeks to renew any licenses it holds. Furthermore, as noted above, although the Commission believes that it lacks authority to require binding arbitration, it does have the authority to consider a broadcaster's refusal to engage in, or to abide by, non-binding mediation during the license renewal process. Given the importance of an equitable retransmission consent process to both video competition and broadband deployment, the Commission should make a broadcaster's behavior during retransmission consent negotiations a major factor when license renewals are considered.

[55] NPRM, ¶ 30.

IV. THE COMMISSION SHOULD EXPAND THE "TOTALITY OF CIRCUMSTANCES" STANDARD, AND CLARIFY THAT IT INCLUDES PRICE DISCRIMINATION FACED BY RURAL MVPDS THAT IS NOT BASED ON COMPETITIVE MARKETPLACE CONSIDERATIONS

The NPRM asks about behaviors that are not *per se* violations, but that are calculated to threaten disruption of consumer access to video as a negotiating tactic.[56] In the event that the Commission finds that any of the behaviors listed in Section III above does not constitute a *per se* violation, such a practice should be considered under the "totality of circumstances" standard that allows the Commission to account for factors that are not necessarily considered *per se* violations. These behaviors reduce consumer choice in the video market while impeding broadband investment, thwarting the goals of both sections 325 of the Cable Act and 706 of the 1996 Act.

The NPRM also asks if this standard should be expanded, as suggested by ACA, to address price discrimination endured by rural MVPDs that is not based on competitive marketplace considerations.[57] The price discrimination referred to by ACA has significant, direct impact on rural consumers. It is also a major factor that prevents RLECs from entering the video market, and from improving upon the quality and reach of existing video and broadband services. Therefore, as demonstrated by ACA, the Commission is well within its authority to address this harm. Furthermore, as shown above, the Commission is required to act to reduce barriers to broadband deployment under section 706 of the 1996 Act. The price discrimination encountered by rural MVPDs clearly constitutes a barrier that the Commission must work to lower or remove.

[56] NPRM, ¶¶ 31 – 33.
[57] *Id.*, ¶ 33, fn. 98.

V. AN ENHANCED NOTICE REQUIREMENT IS UNNECESSARY AND WOULD BE DISRUPTIVE TO CONSUMERS

The NPRM seeks comment on how best to balance useful advance notice of possible signal loss against the potential for causing unnecessary anxiety to consumers.[58] It asks if a vague "enhanced notice" requirement will "encourage parties to conclude their negotiations more than 30 days before the expiration of the existing agreement."[59] The NPRM correctly notes that while adequate advance notice of retransmission consent disputes for consumers can enable them to prepare for disruptions in their video service, it can also be unnecessarily costly and disruptive if the notice turns out to be a "false alarm" when a resolution is reached.[60] The NPRM further observes that notices of impending impasses can have negative consequences, including "unnecessarily alarming consumers and public officials, making negotiations increasingly contentious, providing broadcasters and rival MVPDs with more time to encourage customers to switch MVPDs, and causing customers who do switch to bear the associated costs unnecessarily if the negotiations are resolved without service disruption."[61] The Commission also correctly expresses concerns about the potential for consumers to ignore notices of potential service disruptions if they begin to receive such notices almost routinely as retransmission consent disputes increase in frequency and severity.[62]

The concerns raised by the NPRM are valid and suggest that the existing requirement for customer notice is more than sufficient. The current rules require an MVPD to alert its

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[58] *Id.*, ¶ 34.
[59] *Id.*, ¶ 37.
[60] *Id.*
[61] *Id.*, ¶ 36.
[62] *Id.*, ¶ 37.

customers at least 30 days before a broadcast signal is deleted or repositioned.[63] In cases where negotiations for retransmission consent are ongoing and the outcome is uncertain, even this requirement generates a degree of potentially unnecessary consumer angst. Therefore, "enhancing" the current rules will cause more, not less, consumer inconvenience and disruption, and should not be pursued.

VI. THE COMMISSION SHOULD APPLY THE SWEEPS PROHIBITION EQUITABLY TO BROADCASTERS AND SATELLITE PROVIDERS, AS WELL AS TO MVPDS

The NPRM asks whether the Commission's "sweeps" prohibition should be extended to non-cable MVPDs.[64] This prohibition reflects the decision of Congress to declare that "no deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations."[65] The Commission has interpreted this to mean that MVPDs cannot remove a broadcast station from their system during sweeps, but that broadcast stations are free to withhold retransmission consent during these periods.[66] The Commission admits that the statute is "broadly worded"[67] but has decided to interpret it narrowly to allow broadcasters to withhold their content during sweeps if they choose.

This is a prime example of the government intervening in the marketplace to grant broadcasters one-sided protections at the expense of MVPDs and their customers. As discussed above, MVPDs must often contend with the prospect of losing a broadcast station just prior to a

[63] 47 CFR, § 76.1601 (2010).
[64] NPRM, ¶ 38.
[65] 47 USC § 534(b)(9).
[66] NPRM, ¶¶ 39-40.
[67] NPRM, ¶ 39.

highly-viewed event, but broadcasters have statutory and regulatory protection against having their stations deleted during their most important times of the year – sweeps periods. The Commission can help to remedy this situation by creating a more level playing field between negotiating parties. The Commission should apply the statute preventing the deletion of content during sweeps periods equally to all entities – broadcasters, direct broadcast satellite companies, and MVPDs – that have a role in the provision of programming to consumers.

VII. THE COMMISSION SHOULD ELIMINATE NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES, WHICH INSULATE BROADCASTERS FROM MARKET FORCES AND LEAD TO HIGHER CONSUMER RATES, LESS COMPETITION, AND REDUCED BROADBAND ADOPTION

The NPRM seeks comment on whether the Commission's network non-duplication and syndicated exclusivity rules are necessary, or if any benefit of these rules is outweighed by a negative impact on retransmission consent negotiations.[68] As the NPRM itself notes, there is ample evidence in the record showing that these rules provide broadcasters with a "one-sided level of protection" and artificially-inflated bargaining leverage in retransmission consent negotiations, and are thus no longer justified.[69] The rules essentially require a small MVPD to pay whatever retransmission rates are demanded by the broadcast station within a given DMA. The MVPD is not permitted to purchase programming from an alternative broadcast station in a neighboring DMA even if offered at a lower rate. This prohibition against "shopping" for content in nearby DMAs prevents competition for broadcast programming. The Associations have previously suggested specific rule changes that would alleviate this situation.[70]

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[68] NPRM, ¶ 44.

[69] *Id.*, ¶ 43 (citations omitted).

[70] Association comments, pp. 2-6.

The inability of small MVPDs to obtain certain content from alternative sources can also compound the problem of forced tying, where vertically integrated programmers require MVPDs to carry undesired content in order to obtain "must-have" programming. The Commission has previously identified the adverse impacts that such forced tying has on small MVPDs and their customers:

> When programming is available for purchase only through programmer-controlled packages that include both desired and undesired programming, MVPDs face two choices. First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis. We note that the competitive harm and adverse impact on consumers would be the same regardless of whether the programmer is affiliated with a cable operator or a broadcaster or is affiliated with neither a cable operator nor a broadcaster, such as networks affiliated with a non-cable MVPD or a non-affiliated independent network. **Moreover, we note that small cable operators and MVPDs are particularly vulnerable to such tying arrangements because they do not have leverage in negotiations for programming due to their smaller subscriber bases.**[71]

In addition to being required by programmers to purchase undesired programming to obtain "must have" content, rural MVPDs are often forced to place certain channels into specific programming tiers as a condition of purchase. This includes both "must have" programming as well as less desired content. Rural MVPDs have also been forced to agree to sell certain channels to a specific, often very high, percentage of their subscribers as a condition of obtaining

[71] *See*, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17862-17863, ¶120 (2007) (Program Access NPRM) (emphasis added).

"must have" content (or having access to this content at a certain rate). This type of requirement, in effect, necessitates that rural MVPDs include these channels in their basic programming tiers in order to reach the required percentage of subscribers.

The result of these requirements is that rural MVPDs must include more channels than many consumers want in their basic tiers, but neither the MVPD nor the consumer can avoid the higher costs these requirements incur. There is strong demand in rural areas for lower-cost, entry-level programming tiers. However, various forms of forced tying leave rural MVPDs with no choice but to include much more programming in the lower tiers than consumers demand, resulting in much higher prices, and limiting consumers' choices of tiered packages.

If the retransmission consent, non-duplication, and syndicated exclusivity rules were reformed, rural MVPDs could obtain content from alternative sources, reducing the market power of programmers to engage in forced tying. This would enable rural MVPDs to craft more affordable tiers, as well as additional tiers that are more attuned to the interests of their local markets. This would comport with the 1992 Cable Act's goal of furthering consumer choice. Furthermore, by making multichannel video services more affordable and attractive to consumers, these reforms would encourage more "triple play" purchases by consumers, enhancing broadband adoption, which, in turn, encourages continued network upgrades. Reform of these rules would therefore reduce barriers to broadband investment, as required by section 706 of the 1996 Act.

VIII. IN ORDER TO PROTECT CONSUMERS AND INJECT MARKET FORCES INTO THE NEGOTIATION PROCESS, THE COMMISSION SHOULD (A) INSTITUTE A STANDSTILL PROVISION, AND (B) GRANT "MOST FAVORED NATION" STATUS TO RURAL MVPDS

A. The Commission Should Institute A Standstill Provision To Protect Consumers From Losing Access To Programming

The NPRM asks if there are other actions the Commission should take either to revise its existing rules, or adopt new rules in order to protect consumers from harm.[72] Under current rules, a broadcaster can pull its signal from the customers of an MVPD as soon as a retransmission consent agreement expires.[73] This imbalance leaves MVPDs with only two options, both of which harm consumers: (1) incur higher costs by acceding to the broadcaster's demands, or (2) forgo access to programming that consumers demand and expect. The Petition for Rulemaking on retransmission consent suggests instituting an interim carriage (or "standstill") rule that would preserve consumers' access to a broadcast signal while negotiations and/or dispute resolution proceedings are underway.[74] The Associations support this measure.[75]

In addition to the immediate impact the loss of a signal has on consumers, the Commission should also consider that an MVPD's resulting loss of revenue will harm its ability to make further investments in video and broadband infrastructure. When customers cannot view programming due to a contract dispute between a video provider and a broadcaster, that provider will likely lose customers, impeding its ability to improve and expand access to video and broadband services.

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[72] NPRM, ¶ 46.
[73] Petition for Rulemaking, p. 35.
[74] *Id.*, pp. 35-40.
[75] As noted above, due to the established intrinsic link between the provision of video and broadband services, Commission authority to institute a standstill provision can be found in section 706 the 1996 Act.

A standstill provision would help level the playing field and inject market forces into the negotiation process. Once an agreement expires, the current rules permit broadcasters to withhold, with impunity, signals that are available over the public airwaves. MVPDs have no practical recourse to this stranglehold. Even if an MVPD considered filing a complaint in response to a rule violation, the Commission has observed that "the threat of temporary foreclosure pending resolution of a complaint may impair settlement negotiations and may discourage parties from filing legitimate complaints."[76] A standstill provision would help to promote an environment in which good faith negotiations between parties could occur.

B. Small And Mid-Size MVPDs Should Have Access To "Most Favored Nation" Pricing For Programming, Which Allows Them To Request The Same Prices And Conditions From Any Other Existing Retransmission Agreements A Broadcaster Has Entered Into With Other MVPDs

As discussed in Section III (A) above, evidence indicates that the prices that small and mid-size MVPDs pay for broadcast programming per subscriber is much higher than that paid by large MVPDs.[77] Large MVPDs are able to negotiate a favorable rate because they provide broadcasters with a large number of potential viewers that generate additional advertising revenue. In contrast, a broadcaster can extract higher per-subscriber rates from small and mid-size MVPDs because it loses little by denying them access to programming. However, as noted in Section III (H) above, small and mid-size MVPDs are prevented from determining the true market value of the programming they attempt to acquire due to mandatory non-disclosure provisions required by broadcasters as a condition of access.

[76] Program Access NPRM, ¶ 137.
[77] *See*, ACA comments, pp. 5-7.

Though small and mid-size MVPDs often provide service to rural areas not served by large MVPDs, they often compete for subscribers in lower-cost towns and suburban markets. A small or mid-size MVPD cannot effectively compete for customers with a large MVPD if the large company is receiving lower rates for programming. This situation can be exacerbated by broadcasters that demand "most favored nation" clauses entiling broadcaster "A" to the same rate as broadcaster "B" if broadcaster "B" obtains a higher rate.[78] In some cases, these combined factors have led small MVPDs to exit the video marketplace, diminishing rural consumers' choice of video service providers.

These harms and disparities could be partially rectified by a "most favored nation" rule that would allow small and mid-size MVPDs to request the same prices and conditions from any of the other existing retransmission consent agreements that a broadcast station has entered into with other MVPDs. This would help to level the playing field among negotiating parties and reduce a barrier to video competition that is imposed by discriminatory pricing. Enabling small and mid-size MVPDs to compete more vigorously in the video marketplace would provide consumers with more choices and would enhance small and mid-size MVPDs' ability and incentive to expand their offerings of video and broadband services.

IX. CONCLUSION

The Commission should utilize its authority under the Cable Act and 1996 Act to correct multiple flaws with the outdated retransmission consent regime. The current rules provide broadcasters with undue leverage in negotiations for retransmission consent at the expense of the rural consumers of small MVPDs. These harms, in turn, impede competition in the video market, as well as further broadband investment and adoption. As outlined above, strengthening

[78] *See* NPRM, ¶ 28.

and clarifying the "good faith" negotiating rules, which the record demonstrates are currently ineffective and easily evaded, would constitute a good first step. The Commission should also expand the "totality of circumstances" standard, and clarify that the unwarranted price discrimination encountered by small MVPDs will no longer be permitted.

The Commission should not enhance its consumer notification requirements regarding potential signal loss, as doing so would only serve to be disruptive to consumers. It should also apply the prohibition against removing, or moving, broadcast signals during "sweeps" period to broadcasters and satellite providers, in addition to other video providers. Non-duplication and syndicated exclusivity rules should be eliminated, as they impede market forces, impair further broadband investment, and unjustifiably benefit broadcasters at the expense of rural consumers. Finally, rural consumers would also benefit by the institution of a standstill provision to preserve access to broadcast signals during an impasse in negotiations, as well as "most favored nation" pricing for small MVPDs that would level the playing field for these providers.

Respectfully submitted,

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May 27, 2011

CERTIFICATE OF SERVICE

I, Stephen Pastorkovich, hereby certify that a copy of the comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies, the National Telecommunications Cooperative Association, the Independent Telephone and Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance was sent via electronic mail, on this, the 27th day of May, 2011, to those listed on the attached sheet.

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