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
	)	
	)	
Totality of the Circumstances Test	)	
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: September 2, 2015 **Released: September 2, 2015**

Comment Date: (60 days after date of publication in the Federal Register)
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By the Commission:

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I. INTRODUCTION

1. By this Notice of Proposed Rulemaking ("NPRM"), as directed by Section 103(c) of the STELA Reauthorization Act of 2014 ("STELAR"),[1] we review the totality of the circumstances test for evaluating whether broadcast stations and multichannel video programming distributors ("MVPDs") are negotiating for retransmission consent in good faith. The Communications Act of 1934, as amended (the "Act"), prohibits cable systems and other MVPDs from retransmitting a broadcast station's signal without

[1] Congress directed the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations" by September 4, 2015. *See* Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

the station's express consent.[2] This consent is known as "retransmission consent." The Act and the Commission's implementing rules require broadcasters and MVPDs to negotiate for retransmission consent in good faith.[3] The Commission has adopted a two-part framework for evaluating good faith in this context. First, the Commission has established a list of objective good faith negotiation standards, the violation of which is considered a *per se* breach of the good faith negotiation obligation.[4] Second, even if the specific *per se* standards are met, the Commission may consider whether, based on the totality of the circumstances, a party has failed to negotiate retransmission consent in good faith.[5] In accordance with Section 103(c) of STELAR, which contemplates that the Commission will conduct a "robust examination" of practices used by parties in retransmission consent negotiations,[6] we adopt this NPRM and seek comment on potential updates to the totality of the circumstances test.

II. BACKGROUND

2. Congress created the 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."[7] Later, Congress adopted good faith negotiation requirements in Section 325 of the Act, prohibiting broadcast television stations and MVPDs from "failing to negotiate [retransmission consent] in good faith."[8] Section 325 also provides that entering "into retransmission consent agreements containing different terms and conditions, including price terms," is not a violation of the duty to negotiate in good faith "if such different terms and conditions are based on competitive marketplace considerations."[9] The Commission has implemented the good faith negotiation statutory provisions through a two-part framework for determining whether retransmission consent negotiations are conducted in good faith.[10] First, the Commission initially established a list of seven (subsequently nine) good faith negotiation standards, the violation of which is considered a *per se* breach of the good faith negotiation obligation.[11] Second, even if the specific *per se* standards are met, a complainant may attempt

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[2] 47 U.S.C. § 325(b)(1)(A).

[3] *Id.* § 325(b)(3)(C)(ii)-(iii); 47 C.F.R. § 76.65.

[4] *See* 47 C.F.R. § 76.65(b)(1).

[5] *See id.* § 76.65(b)(2).

[6] *See* Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. Rep. No. 113-322 at 13 (2014) ("Senate Commerce Committee Report") ("The Committee expects the FCC's totality of the circumstances test to include a robust examination of negotiating practices, including whether certain substantive terms offered by a party may increase the likelihood of negotiations breaking down. The Committee also expects that the test should examine the practices engaged in by both parties if negotiations have broken down and a retransmission consent agreement has expired.").

[7] S. Rep. No. 92, 102nd Cong., 1st Sess. (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169.

[8] 47 U.S.C. § 325(b)(3)(C).

[9] *Id.* In 1999, Congress enacted the Satellite Home Viewer Improvement Act ("SHVIA"), which required television stations to negotiate retransmission consent with MVPDs in good faith and included the "competitive marketplace considerations" provision. Pub. L. No. 106-113, 113 Stat. 1501 (1999). Although SHVIA imposed the good faith negotiation obligation only on broadcasters, in 2004 Congress made the good faith negotiation obligation reciprocal between broadcasters and MVPDs. Pub. L. No. 108-447, 118 Stat. 2809 (2004) (referred to as the Satellite Home Viewer Extension and Reauthorization Act, or "SHVERA").

[10] *See 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 (2000) ("*Good Faith Order*").

[11] 47 C.F.R. § 76.65(b)(1). The seven original *per se* standards were: "(i) Refusal by a Negotiating Entity to negotiate retransmission consent; (ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent; (iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; (iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral

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to demonstrate that, based on the totality of the circumstances, a party has failed to negotiate retransmission consent in good faith.[12] In its *Good Faith Order*, the Commission described the totality of the circumstances test as follows:

> The second part of the test is a totality of the circumstances standard. Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the objective standards, given the totality of the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute a failure to negotiate in good faith. We do not intend the totality of the circumstances test to serve as a 'back door' inquiry into the substantive terms negotiated between the parties. While the Commission will not ordinarily address the substance of proposed terms and conditions or the terms of actual retransmission consent agreements, we will entertain complaints under the totality of the circumstances test alleging that specific retransmission consent proposals are sufficiently outrageous, or evidence that differences among MVPD agreements are not based on competitive marketplace considerations, as to breach a broadcaster's good faith negotiation obligation. However, complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed by the Commission.[13]

3. Since Congress's enactment of Section 325, we have seen significant changes in the retransmission consent marketplace that have altered the negotiation dynamics between broadcasters and MVPDs. For example, whereas broadcasters in the past typically negotiated with MVPDs for in-kind compensation, broadcasters have increasingly sought and received monetary compensation in exchange for retransmission consent.[14] Moreover, in contrast to the video programming landscape that existed in 1992, when consumers typically had a single cable operator as their only video service option, consumers seeking to purchase video programming service today generally are able to choose among multiple MVPDs.[15] The increase in competition among MVPDs has improved broadcasters' leverage in retransmission consent negotiations with MVPDs.[16] MVPDs that face competition have stronger

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proposal; (v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal; (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programing distributor; (vii) Refusal by a Negotiating Entity to execute a written agreement that sets forth the full understanding of the television broadcast station and the [MVPD]." *Id.* For a discussion of the more recent adoption of the eighth and ninth *per se* standards, *see infra* ¶¶ 4-5.

[12] *See* 47 C.F.R. § 76.65(b)(2) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a).").

[13] *Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32 (footnote omitted).

[14] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3353, ¶ 2 (2014) ("*2014 Joint Negotiation Order*"); Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, at 15 (filed Mar. 9, 2010). Prior to the exchange of monetary compensation, cable operators typically compensated broadcasters for consent to retransmit the broadcasters' signals through in-kind compensation, such as carriage of additional channels of the broadcaster's programming on the cable system or advertising time. *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2719, ¶ 2 (2011) ("*2011 NPRM*").

[15] *See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, FCC 15-62, at ¶¶ 3-4 (2015).

[16] *See 2011 NPRM*, 26 FCC Rcd at 2719, ¶ 2 & 2725-26, ¶ 14.

incentives to negotiate retransmission consent agreements with broadcast stations because much broadcast network television programming continues to be "must-have" programming for MVPDs and an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs – including subscribers to its associated voice and broadband services.[17] In addition, broadcast licensees that are affiliated with other programming networks may have additional leverage because they can integrate their retransmission consent negotiations with carriage of the other networks,[18] and any negotiation impasses could result in the MVPD's loss of those other networks as well as the broadcast stations. Further, consumers today are increasingly accessing video programming from online video distributors that deliver content via the Internet.[19] As a consequence of these marketplace changes, retransmission consent fees have steadily grown and are projected to increase further,[20] thereby applying upward pressure on consumer prices for MVPD video programming services.[21] Moreover, "negotiations [for] retransmission consent have become significantly more complex in recent years, and . . . in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts."[22]

4. In March 2014, the Commission, in a separate proceeding regarding retransmission consent, adopted an order strengthening its retransmission consent rules to provide that joint negotiation by stations that are ranked among the top four stations in a market as measured by audience share and are

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[17] *See, e.g.,* Joe Flint, *Time Warner Cable Loses 306,000 Subscribers, Cites Fight With CBS*, *LA Times*, Oct. 31, 2013 (reporting that Time Warner Cable lost 306,000 of its 11.7 million video subscribers, as well as 24,000 high speed data subscribers and 128,000 voice subscribers, in the third quarter of 2013, due in large part to a month-long blackout of CBS stations in several markets during a retransmission consent dispute with CBS), *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-cbs-earns-20131031-story.html; Duane Dudeck, *Time Warner Cable Lost Subscribers During WTMJ Blackout*, *Journal Sentinel*, Dec. 3, 2013 (reporting that Time Warner Cable lost 10,350 subscribers in the Milwaukee market in the third quarter of 2013 due to a two-month long blackout of WTMJ, Milwaukee, Wisconsin, during a retransmission consent dispute with Journal Broadcasting), *available at* http://www.jsonline.com/blogs/entertainment/234274331.html; Yinka Adegoke, *Cablevision Blames Fox Blackout for Subscriber Losses*, *Reuters*, Feb. 16, 2011 (reporting that Cablevision lost more than 35,000 subscribers in the fourth quarter of 2010 primarily due to a 15-day blackout of Fox stations during a retransmission consent dispute with Fox owner, News Corp.), *available at* http://www.reuters.com/article/2011/02/16/us-cablevision-idUSTRE71F3U020110216. We note, however, that early termination fees imposed by some MVPDs may make it difficult for consumers faced with a potential retransmission consent negotiating impasse to switch to another MVPD in order to maintain access to a particular broadcast station. *See 2011 NPRM*, 26 FCC Rcd at 2727, n.50.

[18] *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3346, ¶ 203 (2015) ("*Sixteenth Competition Report*") ("Station groups that are vertically integrated with broadcast networks or affiliated with cable networks may have more leverage than other station owners, since they can integrate retransmission consent negotiations with carriage of their networks.").

[19] *See Sixteenth Competition Report,* 30 FCC Rcd at 3257, ¶¶ 9-11.

[20] Morgan Stanley Retransmission Revenue Primer, Morgan Stanley & Co. LLC, Dec. 12, 2013 at 7 (projecting retransmission consent fees to reach $9.1 billion by 2020); http://www.snl.com/InteractiveX/articleabstract.aspx?ID=25877327&KPLT=2 (projecting retransmission consent fees to reach $7.6 billion by 2019).

[21] *See Sixteenth Competition Report*, 30 FCC Rcd at 3330, ¶ 172, n.639 (noting that most consumers pay for broadcast stations indirectly as part of their MVPD service fees, which are calculated, in part, to recover retransmission consent fees that the MVPD pays to local broadcast stations). We acknowledge that 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. *See 2014 Joint Negotiation Order*, 29 FCC Rcd 3351, 3363, ¶ 17.

[22] *See* Senate Commerce Committee Report at 13.

not commonly owned constitutes a *per se* violation of the good faith negotiation requirement.[23] The Commission intended its action to facilitate the fair and effective completion of retransmission consent negotiations.[24] Through Section 103 of STELAR, which was enacted on December 4, 2014, Congress subsequently revised Section 325 of the Act to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent under this section to a[n MVPD], unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission."[25] The Commission adopted an order implementing this provision, replacing the previous rule regarding joint negotiation with language consistent with the new statute.[26]

5. In addition to the joint negotiation provision, Section 103 requires the Commission to take certain further actions related to retransmission consent. First, Section 103 revised Section 325 of the Act to "prohibit a television broadcast station from limiting the ability of a[n MVPD] to carry into the local market . . . of such station a television signal that has been deemed significantly viewed . . . unless such stations are directly or indirectly under common de jure control permitted by the Commission."[27] The Commission implemented this provision by adding a new *per se* good faith negotiation standard to its rules.[28] Second, Section 103 directed the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations under clauses (ii) and (iii) of section 325(b)(3)(C) of the Communications Act of 1934 (47 U.S.C. 325(b)(3)(C))."[29] This NPRM commences the rulemaking to review and, if necessary, update the totality of the circumstances test.[30] In the single instance in which the Media Bureau has found a violation of the good faith negotiation requirement, it determined that the cable operator breached its duty to negotiate in good faith based on the totality of the circumstances test.[31] The

[23] *See 2014 Joint Negotiation Order*.

[24] *Id.,* 29 FCC Rcd at 3352, ¶ 1. The Commission also sought comment on whether to modify or eliminate its network non-duplication and syndicated exclusivity rules in light of changes in the video marketplace since those rules were first adopted more than 40 years ago. *Id.* The exclusivity rules permit broadcast television stations to assert before the Commission their contractual rights to exclusivity within a specific geographic zone. *See* 47 C.F.R. § 76.92 *et seq.*; *id.* § 76.101 *et seq.*

[25] Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C).

[26] The Commission found that the statutory prohibition on joint negotiation is broader than, and thus supersedes, the Commission's previous prohibition. *Implementation of Sections 101, 103 and 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd 2380, 2381, ¶ 4 (2015) ("*STELAR Sections 101, 103 and 105 Order*").

[27] Pub. L. No. 113-200, § 103(b); 47 U.S.C. § 325(b)(3)(C).

[28] *STELAR Sections 101, 103, and 105 Order*, 30 FCC Rcd at 2382, ¶ 5.

[29] Pub. L. No. 113-200, § 103(c).

[30] We note that we previously initiated a rulemaking proceeding on retransmission consent issues in 2011 and certain issues in that proceeding remain pending. *See* 2011 NPRM. To the extent certain pleadings filed in the 2011 rulemaking are relevant to this proceeding, we refer to them herein.

[31] *See* Letter to Jorge L. Bauermeister, 22 FCC Rcd 4933, 4934 (MB 2007) (finding that Choice Cable T.V. violated its duty to negotiate in good faith under the totality of the circumstances test by carrying a broadcast signal without providing evidence of a valid retransmission consent agreement authorizing such carriage). There is little precedent elaborating on the totality of the circumstances test because good faith complaints are generally filed during signal blackouts or the impending threat thereof. Accordingly, most complaints are settled and dismissed before Commission resolution. Other than the single Media Bureau finding of a good faith violation, only three other good faith complaints were not resolved prior to Commission action, and the Bureau denied all three of those complaints alleging violations of the duty to negotiate retransmission consent in good faith. *See ACC Licensee, Inc. v. Shentel Telecommunications Company*, Memorandum Opinion and Order, 27 FCC Rcd 7584 (MB 2012) (rejecting Allbritton's bad faith claim on the basis that the dispute at issue involved a disagreement between the parties over the appropriate valuation of Allbritton's signal to Shentel); *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47 (MB 2007) (finding, among other things,

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cable operator claimed during negotiations that its retransmission consent agreement with one station permitted it to carry the other broadcast stations at issue, but the Media Bureau found that its failure to provide evidence of a valid retransmission consent agreement permitting such carriage was a breach of its duty to negotiate in good faith.[32]

III. DISCUSSION

6. In accordance with Congress's directive in Section 103(c) of STELAR, we seek comment below on any potential updates we should make to the totality of the circumstances test to ensure that the conduct of broadcasters and MVPDs during negotiations for retransmission consent and after such negotiations have broken down meet the good faith standard in Section 325 of the Act.[33] In Section III.A, we seek comment generally on the totality of the circumstances test, including whether and how we should update that test. In Section III.B, we seek comment on whether there are specific practices that we should identify as evidencing bad faith under the totality of the circumstances test.[34] Consistent with Congress's intent in Section 103(c) of STELAR, our goal in this proceeding is to provide further guidance to negotiating parties about the totality of the circumstances test, if necessary, to benefit consumers of video programming service by facilitating successful negotiations and avoiding disruptions in service to consumers.[35]

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that the dispute at issue arose from a fundamental disagreement between the parties over the appropriate valuation of Sinclair's signal and that Sinclair thus did not breach its obligation to negotiate retransmission consent in good faith); *EchoStar Satellite Corporation v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070 (CSB 2001) (rejecting Echostar's allegations that Young breached its duty to negotiate in good faith by refusing to negotiate, by unreasonably delaying negotiations, by engaging in "take-it-or-leave-it" bargaining, and by tying retransmission consent for its network-affiliated stations to carriage of two independent stations).

[32] Bauermeister, 22 FCC Rcd 4933.

[33] *See* Senate Commerce Committee Report at 13 ("The Committee intends that the rulemaking directed by section 103(c) . . . should be used to update the FCC's totality of the circumstances test so that the test will take a broad look at all facets of how both television broadcast station owners and MVPDs approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard set forth in the Communications Act.").

[34] Pursuant to the totality of the circumstances test, the Commission may consider all of the facts that are brought before it regarding a retransmission consent negotiation to determine whether there is a breach of the duty to negotiate in good faith. *See, e.g., Good Faith Order*, 15 FCC Rcd at 5458, ¶ 32 ("Under this standard, an MVPD may present facts to the Commission which, even though they do not allege a violation of the objective standards, given the totality of the circumstances reflect an absence of a sincere desire to reach an agreement that is acceptable to both parties and thus constitute a failure to negotiate in good faith."). Although in this NPRM we seek comment on whether there are certain practices and/or conduct that should be considered evidence of bad faith under the totality of the circumstances test, until this rulemaking is complete we will continue to apply the presumptions established in the 2000 *Good Faith Order*. *See infra* ¶¶ 9-10; *see also Good Faith Order*, 15 FCC Rcd at 5469-70, ¶¶ 56-58. Thus, the fact that we are seeking comment on potential updates to the totality of the circumstances test does not preclude us from concluding, in a particular case, that certain practices or conduct is a breach of the good faith duty today.

[35] *See* Senate Commerce Committee Report at 13 ("The Committee believes that it may be appropriate for the FCC to provide additional specific guidance as to actions that, taken as a whole, evidence bad faith based on the totality of the circumstances. Such guidance would help provide more certainty to the parties to a negotiation and ultimately give consumers greater faith in the retransmission consent process.").

A. Totality of the Circumstances Test in General

7. First, we ask whether there is a need to update the totality of the circumstances test. How is the retransmission consent market currently functioning? Is there a market failure, and if so, what is its source? Are there issues with the current totality of the circumstances test that warrant change? We seek comment on this. We invite comment on any elaboration of the totality of the circumstances test we can provide that will help to guide negotiations to a successful conclusion. Section 76.65(b)(2) of our rules permits a party to a retransmission consent negotiation to "demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that [the other party] breached its duty to negotiate in good faith."[36] How can the Commission most effectively address complaints that do not allege *per se* violations but that involve behavior that is asserted to be inconsistent with good faith? Does the "current process for filing bad faith allegations" based on the totality of the circumstances test, including the legal standards and evidentiary burdens, help to promote *bona fide* negotiations and protect consumers?[37] If not, how can we change our good faith rules in a way that will ensure that both parties to a negotiation offer *bona fide* terms and conditions for carriage? If the Commission provides additional guidance on conduct that will be considered evidence of bad faith under the totality of the circumstances test, would this help facilitate productive retransmission consent negotiations? Alternatively, should the totality of the circumstances test be eliminated or replaced? Commenters that advocate replacement of the totality of the circumstances test should specify the test that we should consider in its place.

8. How effective has our totality of the circumstances test been? Although it was originally designed to give the Commission flexibility to take account of any unique facts underlying a particular retransmission consent dispute, should we modify the test to make it more specific? Is it possible to maintain the flexibility of the totality of the circumstances test, while at the same time giving additional guidance to the parties to retransmission consent negotiations about certain conduct that we consider evidence of bad faith negotiation? When we last sought comment on this issue in 2011,[38] some commenters stated that providing more specificity for the totality of the circumstances test would promote a more competitive marketplace,[39] and others stated that more specificity is unnecessary.[40] Are there certain practices that the Commission should consider to be evidence of bad faith in evaluating the totality of the circumstances, or is that test best left as a general provision to capture those actions and behaviors that we do not now foresee but that may in particular future cases impede retransmission consent negotiations? To the extent that we are able to provide more guidance to MVPDs and broadcasters, what specific negotiation practices do parties engage in that should be considered evidence of bad faith under the totality of the circumstances test?[41] In adopting the *Good Faith Order*, the Commission concluded

[36] 47 C.F.R. § 76.65(b)(2).

[37] *See* Senate Commerce Committee Report at 13 ("[T]he FCC shall make sure that its [totality of the circumstances] test encourages both parties to a retransmission consent negotiation to present bona fide proposals on the material terms of a retransmission consent agreement during negotiations. . . ."); *id.* at 13-14 ("[T]he Committee intends, as part of this rulemaking, for the FCC to examine whether its current process for filing bad faith allegations based on the totality of the circumstances test is effective and actually helps to promote bona fide negotiations and protects consumers"). We construe Congress's use of the term "process" broadly to mean not only the existing administrative procedures for filing complaints with the Commission, but also on the legal standards and evidentiary burdens that are applied in resolving such complaints.

[38] *2011 NPRM*, 26 FCC Rcd at 2735-37, ¶¶ 31-33.

[39] *See, e.g.,* Comments of CenturyLink on the 2011 NPRM at 7 (filed May 27, 2011) ("CenturyLink NPRM Comments").

[40] *See, e.g.,* Comments of Barrington Broadcasting Group, LLC, *et al.* on the 2011 NPRM at 20 (filed May 27, 2011) ("Joint Broadcasters NPRM Comments") ("any additional, more specific, rule is both unnecessary and unwise").

[41] *See infra* Section III.B (seeking comment on specific practices that potentially evidence a failure to negotiate in good faith under the totality of the circumstances test).

that Congress intended it to "follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement," and the Commission discussed labor law precedents in that order.[42] We invite comment on whether more recent labor law precedents, or precedents from other areas of law, may be useful in revising the totality of the circumstances test.[43]

9. Section 325 of the Act provides, among other things, that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different [MVPDs] if such different terms and conditions are based on competitive marketplace considerations."[44] In implementing this provision in 2000, the Commission provided the following examples of bargaining proposals that are presumptively consistent with competitive marketplace considerations:

1. Proposals for compensation above that agreed to with other MVPDs in the same market;
2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market;[45]
4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights;
5. Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and
6. Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event, such as implementation of SHVIA's satellite must carry requirements.[46]

We seek comment on whether, in light of changes that have occurred in the video programming marketplace since 2000, these bargaining proposals should remain presumptively consistent with competitive marketplace considerations under the totality of the circumstances test.[47] Should the Commission amend, delete from, or add to this list?[48] At the time the Commission adopted the totality of

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[42] *Good Faith Order*, 15 FCC Rcd at 5448, ¶ 6.

[43] *See Ex Parte* Letter of CenturyLink, Consolidated Communications, Inc., FairPoint Communications, Inc., ITTA, Mediacom Communications Corp., NTCA, Public Knowledge and TDS Telecommunications Corp. in MB Docket No. 10-71 at 4-5 (filed Aug. 18, 2015) ("Joint Parties *Ex Parte* Letter") (asserting that the Commission should require that parties negotiating retransmission consent disclose relevant information substantiating and verifying their bargaining claims and that the standard for relevancy should be liberally construed as in labor law, and that the Commission should also require parties to publish and make available in their public files "rate cards" or other information about the prices they charge in a market even though such a requirement goes beyond the "disclosure upon request" approach followed in labor law).

[44] 47 U.S.C. § 325(b)(3)(C).

[45] *See infra* Section III.B (asking whether a broadcaster's requirement that broadcast stations and cable networks be bundled as part of the same agreement should violate the good faith negotiation requirement).

[46] *Good Faith Order*, 15 FCC Rcd at 5469-70, ¶ 56.

[47] *See* ACA *Ex Parte* Letter in MB Docket No. 10-71 at 2 (filed July 31, 2015) (urging the Commission to reexamine its existing presumptions that certain types of conduct are consistent with competitive marketplace considerations) ("ACA July 31, 2015 *Ex Parte* Letter").

[48] *See, e.g.,* Comments of the American Public Power Association *et al.* on the 2011 NPRM at 26 (filed May 27, 2011) ("APPA Group NPRM Comments") (asking the Commission to reconsider its statements that items 1-4 above

(continued….)

the circumstances test, the good faith negotiation requirement applied only to broadcasters, but in 2004 Congress applied it to MVPDs as well.[49] Should any practices or bargaining proposals be added to this list to account for application of the good faith requirement to the conduct of MVPDs?

10. The Commission also previously stated that "[c]onsiderations that are designed to frustrate the functioning of a competitive market are not 'competitive marketplace considerations.'"[50] Although the Commission found it "more difficult to develop a . . . list of proposals that indicate an automatic absence of competitive marketplace considerations,"[51] it concluded that the following proposals are presumptively inconsistent with competitive marketplace considerations:

1. Proposals that specifically foreclose carriage of other programming services by the MVPD that do not substantially duplicate the proposing broadcaster's programming;

2. Proposals involving compensation or carriage terms that result from an exercise of market power by a broadcast station or that result from an exercise of market power by other participants in the market (*e.g.*, other MVPDs) the effect of which is to hinder significantly or foreclose MVPD competition;

3. Proposals that result from agreements not to compete or to fix prices; and

4. Proposals for contract terms that would foreclose the filing of complaints with the Commission.[52]

11. The Commission explained that these examples are illustrative and are not intended to be exclusive of other bargaining proposals that may be inconsistent with competitive marketplace considerations.[53] We ask commenters whether we should consider any revisions to the list of bargaining proposals that are presumptively inconsistent with competitive marketplace considerations under the totality of the circumstances test.[54] Should any practices or bargaining proposals be added to this list to account for the 2004 extension of the good faith negotiation requirement to the conduct of MVPDs? Should this list be revised or expanded to account for any of the practices or proposals discussed in

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are presumptively legitimate); Comments of Sinclair Broadcast Group, Inc. on the 2011 NPRM at 19 (filed May 27, 2011) (asking the Commission to clarify that broadcasters may consider a variety of factors consistent with competitive marketplace considerations); Comments of the National Association of Broadcasters on the 2011 NPRM at 51 (filed May 27, 2011) (asserting that volume discounts "should not be considered under the good faith negotiation standard"); Comments of Nexstar Broadcasting, Inc. on the 2011 NPRM at 18 (filed May 27, 2011) ("[T]he Commission should affirm that competitive market considerations includes bargaining power, which includes the geographic footprint of the MVPD, the size of the MVPD and subscriber numbers involved in the negotiation, and the 'services' offered (i.e., anything offered beyond cash).").

[49] *See supra* n.9.

[50] *Good Faith Order*, 15 FCC Rcd at 5470, ¶ 58.

[51] *Id.* at ¶ 57 ("Because the size and relative bargaining power of broadcasters and MVPDs range from satellite master antenna television . . . operators and low power television broadcast stations to national cable entities and major-market, network affiliate broadcast television stations, the dynamics of specific retransmission consent negotiations will span a considerable spectrum. In these instances, we will generally rely on the totality of the circumstances test to determine compliance with Section 325(b)(3)(C).").

[52] *Id.* at ¶ 58.

[53] *Id.* at 5469-70, nn.123, 125.

[54] *See, e.g.,* Comments of Cox Enterprises, Inc. on the 2011 NPRM at 9 (filed May 27, 2011) (asking the Commission to "evaluate the reasonableness of volume discounts offered during negotiations"); Comments of DISH Network L.L.C. on the 2011 NPRM at 25-26 (filed May 27, 2011) ("DISH Network NPRM Comments") ("[T]he 'totality of the circumstances' test needs further clarification to include any action taken by a broadcaster knowingly and willfully to undermine competition in the MVPD market.") (footnote omitted).

Section III.B. *infra*? Are there practices or proposals that standing alone would not violate the good faith negotiation requirement but that in combination with other factors could violate the totality of the circumstances test? Are there particular negotiating practices that tend to result in a breakdown in negotiations, and if so, how, if at all, should the totality of the circumstances test be changed to account for those practices? How can we best ensure that any revisions to the totality of the circumstances test will not hinder a party's ability to tailor its proposals to the competitive environment?[55] Should any of the factors considered under the totality of the circumstances test be codified in our rules? In keeping with Congress's directive, we seek to provide the industry with further guidance that would provide more certainty as to what constitutes good faith in retransmission consent negotiations, and thereby help facilitate productive negotiations.

B. Specific Practices that Potentially Evidence a Failure to Negotiate in Good Faith under the Totality of the Circumstances Test

12. We seek comment on whether there are specific practices that we should identify as evidencing bad faith negotiation under the totality of the circumstances test. Do broadcasters or MVPDs engage in particular conduct or demand types of contract terms that we should consider as evidence of bad faith under the totality of the circumstances test? Commenters that advocate the inclusion of additional conduct and/or practices under the totality of the circumstances test should explain the legal and policy bases for a Commission finding that such conduct and/or practices are evidence of bad faith or should be deemed presumptively inconsistent with competitive marketplace considerations. Interested parties have identified a number of practices that broadcasters or MVPDs have engaged in during retransmission consent negotiations (or after a breakdown in negotiations) that, they assert, evidence bad faith under the totality of the circumstances test. We discuss those practices below.

13. First, parties have urged the Commission to address the practice by broadcasters of preventing consumers' online access to the broadcaster's programming as an apparent tactic to gain leverage in a retransmission consent dispute.[56] In certain recent retransmission consent impasses,

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[55] *See* Reply Comments of CBS Corporation on the 2011 NPRM at 21 (filed June 27, 2011).

[56] *See* American Television Alliance ("ATVA") *Ex Parte* Letter in MB Docket No. 10-71 at 3 (filed July 17, 2015) ("ATVA *Ex Parte* Letter"). In 2014, Mediacom Communications Corporation ("Mediacom") filed a Petition in which it requested, among other things, that the Commission prohibit the practice of preventing subscribers' online access. *See* Mediacom Communications Corporation Petition for Rulemaking, RM-11728, at iii-iv, 13, 17 (filed July 21, 2014) ("Mediacom Petition"). Commenters were divided on whether the Commission should address this practice. Some commenters asserted that we should prohibit this practice because it uses anti-consumer behavior as leverage in retransmission consent negotiations, which they argue is inconsistent with an obligation to negotiate in good faith. *See, e.g.,* Comments of the American Cable Association in RM-11728, at 7-8 (filed Sept. 29, 2014) ("ACA Comments on Mediacom Petition"); Comments of Charter Communications. Inc. in RM-11728, at 4, n.6 (filed Sept. 29, 2014) ("Charter Comments on Mediacom Petition"); Comments of ITTA in RM-11728, at 9-10 (filed Sept. 29, 2014) ("ITTA Comments on Mediacom Petition"); *See* Comments of NTCA-The Rural Broadband Association in RM-11728, at 5-6 (filed Sept. 29, 2014) ("NTCA Comments on Mediacom Petition"); Comments of Public Knowledge in RM-11728, at 8-9 (filed Sept. 29, 2014); Comments of TDS Telecommunications Corporation in RM-11728, at 6 (filed Sept. 29, 2014) ("TDS Comments on Mediacom Petition"); Comments of Verizon in RM-11728, at 3, 12 (filed Sept. 29, 2014) ("Verizon Comments on Mediacom Petition"); Comments of WTA-Advocates for Rural Broadband in RM-11728, at 2, n.1 (filed Sept. 29, 2014); Reply Comments of Mediacom Communications Corporation in RM-11728, at 31 (filed Oct. 14, 2014) ("Mediacom Reply Comments"); Reply Comments of Verizon in RM-11728, at 3 (filed Oct. 14, 2014). Others argued that preventing online access is an appropriate tool in retransmission consent negotiations and that a broadcaster may be unable to ascertain which of an MVPD's broadband customers also subscribes to the MVPD's video service. *See, e.g.,* Comments of CBS Corporation, The Walt Disney Company, Time Warner Inc., Twenty First Century Fox, Inc., and Viacom, Inc., in RM-11728, at 3 (filed Sept. 29, 2014) ("Content Companies Comments on Mediacom Petition"); Comments of LIN Television Corporation d/b/a LIN Media in RM-11728, at 3 (filed Sept. 29, 2014) ("LIN Media Comments on Mediacom Petition"); Opposition of the National Association of Broadcasters to Petition for Rulemaking in RM-11728 at 3-5 (filed Sept. 29, 2014) ("NAB Comments on Mediacom Petition").

broadcasters have prevented subscribers from accessing their video content over the Internet during retransmission consent negotiations.[57] The legislative history regarding Section 103(c) of STELAR indicates that Congress was concerned about such practices and directed the Commission to examine in this proceeding "the role digital rights and online video programming have begun to play in retransmission consent negotiations."[58] Such online access restrictions prevent all of an MVPD's broadband subscribers, *i.e.*, regardless of whether those subscribers are located in markets where the MVPD and broadcaster have reached an impasse in negotiations, from accessing the online video programming that the broadcaster otherwise makes generally available when the broadcaster and the MVPD are engaged in a retransmission consent dispute.[59] In addition, this practice affects the MVPD's broadband subscribers even if those subscribers do not also subscribe to the MVPD's video service.[60] We seek comment on whether such a practice during retransmission consent disputes should be considered evidence of bad faith under the totality of the circumstances test.[61] We acknowledge that, even where a broadcaster has prevented access to its programming online, many consumers can obtain access to the signal for free over the air. How, if at all, is using this online practice as a tactic to gain negotiating leverage more egregious or harmful to consumers than other practices used to gain leverage in retransmission consent discussions? Should causing consumers harm to enhance negotiating leverage generally be a factor that we should consider as evidence of bad faith under the totality of the circumstances test?[62] We note that, in an analogous context, some news organizations that distribute content via newspapers and the Internet limit access to their online content to paid subscribers. To the

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[57] For example, during a retransmission consent dispute between CBS and Time Warner Cable ("TWC") in 2013, CBS prevented TWC's broadband customers from accessing CBS programming online, even if the broadband customers did not subscribe to TWC for video programming. *See* Jeff Baumgartner, "CBS Blocks TWC Broadband Subs from Accessing Full Episodes Online," *Multichannel News* (Aug. 4, 2013), *available at* http://www.multichannel.com/news/content/cbs-blocks-twc-broadband-subs-accessing-full-episodes-online/357892. Similarly, during a retransmission consent dispute between News Corporation and Cablevision in 2010, News Corporation briefly prevented Cablevision's Internet customers from accessing Fox programming online via either Fox.com or Hulu, which impacted even those Cablevision Internet customers that did not subscribe to Cablevision for video programming. *See* Brian Stelter, "Internet Is a Weapon in Cable Fight," *New York Times* (Oct. 19, 2010), *available at* http://www.nytimes.com/2010/10/20/business/media/20hulu.html.

[58] *See* Senate Commerce Committee Report at 13 ("The Committee . . . expects as part of this rulemaking that the FCC would examine the role digital rights and online video programming have begun to play in retransmission consent negotiations. The Committee is concerned by reports that parties in retransmission consent negotiations have begun to block access to online programming during those negotiations or after a retransmission consent agreement has expired and a blackout has occurred, including for consumers of a MVPD who subscribe only to the broadband service offered by such MVPD.").

[59] *See* Mediacom Reply Comments at 19 (filed Oct. 14, 2014) (asserting that broadcasters who use such tactics prevent access to online programming if a consumer's IP address has been assigned by the MVPD involved in the retransmission consent dispute).

[60] *See* NTCA Comments on Mediacom Petition at 6; Reply Comments of Cequel Communications, LLC d/b/a Suddenlink Communications in RM-11728, at 4 (filed Oct. 14, 2014); TDS Comments on Mediacom Petition at 6 ("TDS has thankfully not yet experienced programmers blocking Internet access to video programming during carriage negotiations. However, in the heat of a recent negotiation, the programmer did send customers of our ISP service targeted in-bound messaging regarding the uncertain status of ongoing negotiations when those customers attempted to navigate to the programmer's content via the Internet.").

[61] We understand that when a broadcaster prevents an MVPD's broadband subscribers from accessing the broadcaster's programming online, it may be unable to identify which broadband subscribers are also video subscribers.

[62] *See* ACA July 31, 2015 *Ex Parte* Letter at 2 (urging the Commission to seek comment on whether the totality of the circumstances test should take into account harms to the public interest). *See also* Comments of National Consumers League on the 2011 NPRM at 1 ("NCL NPRM Comments") (negotiating impasses are only resolved by higher cable service rates and/or loss of programming to consumers).

extent online access restrictions are reasonable in that context, what distinguishes such restrictions from those that are imposed in cases of preventing online access in this context, *i.e.*, where a broadcaster distributes its programming content via an MVPD and online? Are there issues of statutory authority or constitutional issues that should be considered in this context?

14. In addition to broadcasters preventing online access, parties have expressed concern about broadcasters' relinquishing to third parties their right to grant retransmission consent and similar practices. For example, should certain network involvement in retransmission consent negotiations be a factor suggesting bad faith under the totality of the circumstances test? We understand that some network affiliation agreements give the network the right to approve its affiliate's retransmission consent agreement with an MVPD, and some MVPDs and consumer groups have argued that this practice has hindered the progress of retransmission consent negotiations.[63] What are the appropriate parameters of network involvement in retransmission consent negotiations? Would it be appropriate for a network to negotiate on behalf of its affiliates, and if so, to what extent?[64] Should it be considered evidence of bad faith for a broadcaster to give any third party the right to approve its retransmission consent agreement? As noted, the statute now precludes joint negotiation by non-commonly owned stations in the same local market;[65] should it be considered evidence of bad faith under the totality of the circumstances test if a

[63] *See* 2011 NPRM, 26 FCC Rcd at 2730, ¶ 22. In response to the 2011 NPRM, many commenters supported a new *per se* violation for stations that give their affiliated networks the right to approve a retransmission consent agreement with an MVPD, or for compliance with such an approval provision. *See, e.g.,* Comments of the American Cable Association on the 2011 NPRM at vii, 4 (filed May 27, 2011); APPA Group NPRM Comments at 21-22; CenturyLink NPRM Comments at 5; DISH Network NPRM Comments at 23; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies *et al.* on the 2011 NPRM at 9-11 (filed May 27, 2011); Comments of Public Knowledge and the New America Foundation on the 2011 NPRM at 7 (filed May 27, 2011) ("Public Knowledge and New America Foundation NPRM Comments"); Comments of Time Warner Cable Inc. on the 2011 NPRM at 34 (filed May 27, 2011); Comments of the United States Telecom Association on the 2011 NPRM at 24-26 (filed May 27, 2011). Other commenters, in contrast, opposed this proposal. *See, e.g.,* Comments of CBS Corporation on the 2011 NPRM at 27-28 (filed May 27, 2011); Comments of the CBS Television Network Affiliates Association on the 2011 NPRM at 18-19 (filed May 27, 2011); Comments of the Walt Disney Company on the 2011 NPRM at ii, 12-13 (filed May 27, 2011); Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc. on the 2011 NPRM at 12-21 (filed May 27, 2011); Joint Broadcasters NPRM Comments; Comments of LIN Television Corporation on the 2011 NPRM at ii, 20-21 (filed May 27, 2011); Comments of Morgan Murphy Media on the 2011 NPRM at 6-7 (filed May 27, 2011); Comments of the NBC Television Affiliates on the 2011 NPRM at 13-15 (filed May 27, 2011); Reply Comments of Univision Communications Inc. on the 2011 NPRM at 9-11 (filed June 27, 2011); Comments of the Writers Guild of America, West, Inc. on the 2011 NPRM at 10 (filed May 27, 2011).

[64] Parties have suggested that network participation in retransmission negotiations harms consumers by raising costs, and that such participation thus should be deemed a *per se* violation of the good faith requirement. *See* Public Knowledge and New America Foundation NPRM Comments at 7.

[65] As noted above, Congress in Section 103 of STELAR revised Section 325 of the Act to "prohibit a television broadcast station from coordinating negotiations or negotiating on a joint basis with another television broadcast station in the same local market . . . to grant retransmission consent . . . unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission," Pub. L. No. 113-200, § 103(a); 47 U.S.C. § 325(b)(3)(C)(iv), and the Commission codified this language in its rules nearly verbatim. *See* 47 C.F.R. § 76.65(b)(1)(viii). We note that Congress's inclusion of the term "de jure control" in Section 103 of STELAR was intended to ensure that only those stations that come within the scope of this term as defined by the Commission (*e.g.*, same market stations owned by an entity that holds over 50 percent of the stations' voting stock) would be permitted to negotiate jointly for retransmission consent. *See, e.g., Application of Fox Television Stations, Inc.,* 10 FCC Rcd 8452, 8513 (1995) (*de jure* control typically is determined by whether a shareholder owns more than 50 percent of the voting shares of a corporation); *Metromedia, Inc*., 98 FCC 2d 300, 305-306 (1984) (*de jure* control is ownership of over 50 percent of a corporation's voting stock); *Corporate Ownership Reporting and Disclosure by Broadcast Licensees,* Report and Order, 97 F.C.C.2d 997, 1018, n.47, 1020-21 (1984) (a voting ownership interest exceeding 50% reflects the line of *de jure* control). Thus, stations operating under joint sales agreements ("JSAs"), local marketing agreements ("LMAs"), or similar "sidecar" arrangements, even if attributable, cannot jointly

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broadcaster jointly negotiates with, or entrusts retransmission consent negotiations to, any non-commonly owned entity regardless of the geographic market in which that entity operates?[66]

15. We also invite comment on how a broadcaster's insistence on bundling broadcast signals with other broadcast stations or cable networks into the retransmission consent agreement should be treated under the totality of the circumstances test.[67] We note that early retransmission consent agreements typically provided for noncash payment to broadcasters in the form of carriage of additional programming. If a broadcaster requires MVPDs to purchase less popular programming in order to purchase more desired programming, the MVPDs may be forced to pay for programming that they do not want and may in turn pass those costs onto consumers.[68] And while broadcasters and other programmers sometimes offer MVPDs both a bundled price and standalone prices for particular programming, some MVPDs assert that the prices for the standalone options may be so high that the only economically sound option is to accept the bundled offer.[69] Although the Commission, in the *Good Faith Order*, concluded

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negotiate retransmission consent with a station in the same market owned by the broker because they are not "under common *de jure* control."

[66] *See* ATVA *Ex Parte* Letter at 4-5 (broadcasters have sought to increase their bargaining leverage by forcing MVPDs to negotiate with a single third party for retransmission consent for multiple, non-commonly owned stations across different markets, and networks have negotiated retransmission consent on behalf of affiliates or obtained the right to approve affiliates' retransmission consent agreements).

[67] *See, e.g.*, *id.* at 3 (broadcasters increasingly demand that an MVPD agree to carry other broadcast stations or cable networks as a condition to obtaining retransmission consent for the broadcaster's primary signal without "giving a real economic alternative to carrying just the primary signal(s)"). Although this NPRM is focused on the effect of bundling practices on retransmission consent negotiations, we note that parties have raised other public policy concerns about bundling or Commission action to address bundling. For example, some parties have argued that bundling increases programming diversity. *See, e.g.,* Comments of Leadership Conference on Civil Rights in MB Docket No. 04-207 at 3 (asserting that a departure from bundling "could diminish what little diversity is currently on cable and put minority and women programmers at risk"); http://www.calcable.org/learn/policy-positions/a-la-carte/ ("Cable's method of delivering programming packages, with channels bundled into basic and digital tiers, has proven to provide both choice and quality to consumers. This model has enabled all programming networks, including niche networks that serve underserved audiences, to find and build an audience."). *See also* NAB Comments on the 2011 NPRM at 54; NAB Comments on Mediacom Petition at 13, 17; Reply Comments of Tribune Broadcasting Company on the 2011 NPRM at 8; Reply Comments of Univision on the 2011 NPRM at 6-8. By contrast, others have asserted that bundling undermines programming diversity. *See, e.g.,* Comments of Joint Center for Political and Economic Studies on the 2011 NPRM at 2 (Tying consent to "carriage of non-broadcast programming may . . . serve as a market entry barrier for minority-owned programmers seeking access to pay television channels"); Cablevision Systems Corp. on the 2011 NPRM at 15-17 (a ban on tying would diversify programming).

[68] *See, e.g.,* ACA Comments on Mediacom Petition at Ex. A ¶ 7; Charter Comments on Mediacom Petition at 8 ("The price of MVPD service, and the number of bundled networks that consumers are forced to buy, have gone up in direct response to increased programming costs."); ITTA Comments on Mediacom Petition at 3; Mediacom Petition at 9; NTCA Comments on Mediacom Petition at 3; TDS Comments on Mediacom Petition at 5; Verizon Comments on Mediacom Petition at 6. *Cf.* Cablevision *Ex Parte* Letter in MB Docket No. 10-71 at 5 (filed July 31, 2015) ("Cablevision July 31, 2015 *Ex Parte* Letter") (arguing for a *per se* rule prohibiting tying of broadcast stations to other programming).

[69] *See, e.g.,* ATVA *Ex Parte* Letter at 3; ITTA Comments on Mediacom Petition at 3; Mediacom Petition at 8; NTCA Comments on Mediacom Petition at 4; Verizon Comments on Mediacom Petition at 9. The Mediacom Petition requested that the Commission address broadcasters' "coercive bundling" practices. Mediacom Petition at 16-17. Some commenters agreed with Mediacom that the Commission should address bundling of broadcast stations and cable networks as part of the same agreement because such bundling results in higher costs for consumers and for MVPDs. *See, e.g.,* ACA Comments on Mediacom Petition at Ex. A ¶ 7; Charter Comments on Mediacom Petition at 8; NTCA Comments on Mediacom Petition at 3; Public Knowledge Comments on Mediacom Petition at 6; TDS Comments on Mediacom Petition at 4-6; Verizon Comments on Mediacom Petition at 6. Commenters also expressed other concerns about bundling practices, including that these practices require MVPDs

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that the bundling of broadcast and non-broadcast programming in retransmission consent agreements is a practice that is presumptively consistent with good faith bargaining,[70] it also stated that "[c]onduct that is violative of national policies favoring competition – that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market – is not within the competitive marketplace considerations standard. . . ."[71] The Commission has specifically "clarif[ied] that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws."[72] Have circumstances changed such that bundling of broadcast and non-broadcast programming should not be presumptively consistent with good faith bargaining under any circumstances?[73] What type of showing must an MVPD complainant make to demonstrate that bundling in a particular case violates antitrust laws? We also seek comment on whether and to what extent a broadcaster's insistence on bundling a local broadcast signal with specific types of programming such as regional sports networks (or other "must have" programming), multicast programming, duplicative stations, and/or significantly viewed stations should factor into our assessment of whether the broadcaster has negotiated in good faith under the totality of the circumstances test.[74] In addition, we seek comment on whether a broadcaster's insistence on bundling a local broadcast signal with one or more prospective programming channels[75] should be considered evidence of bad faith under the totality of the circumstances test. With regard to the bundling of prospective channels, how can an MVPD assess the reasonableness of a broadcaster's proposed carriage fees for a bundled offering that contains a programming channel that has not yet been launched or whose carriage is conditioned on future events? Is it consistent with good faith bargaining for a broadcaster to insist on MVPD carriage of untested programming channels as a condition of carrying

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to use bandwidth that otherwise could be used for other services, they hinder MVPDs' ability to select channel lineups based on what their viewers would like to see, and they are anticompetitive. *See* ACA Comments on Mediacom Petition at Ex. A ¶ 7; Charter Comments on Mediacom Petition at 5; NTCA Comments on Mediacom Petition at 3; TDS Comments on Mediacom Petition at 4; Verizon Comments on Mediacom Petition at 9. In contrast, other commenters argued that giving weight to such practices would intrude into aspects of retransmission consent negotiations that Congress intended be resolved in the marketplace. *See* NAB Comments on Mediacom Petition at 7-16.

[70] *See Good Faith Order*, 15 FCC Rcd at 5469-70, ¶ 56.

[71] *Id.*, 15 FCC Rcd at 5470, ¶ 58.

[72] *See also 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, ¶ 15 (2005) ("*Reciprocal Bargaining Order*") ("[W]e clarify that tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.").

[73] *See* Reply Comments of Public Knowledge and New America Foundation on the 2011 NPRM at 6-7 (The Commission's previous decision to permit tying arrangements does not prevent it from now finding that such arrangements are *per se* bad faith because the record presents ample evidence of abuses under the current retransmission consent regime.).

[74] *See* ATVA *Ex Parte* Letter at 3 (a broadcaster's demand that an MVPD carry multicast programming, duplicative stations or significantly viewed stations as a condition to carriage of its primary broadcast signal raises concerns about whether it has satisfied its duty to negotiate retransmission consent in good faith); ACA *Ex Parte* Letter in MB Docket No. 10-71 at 2-3 (filed July 24, 2015) ("ACA July 24, 2015 *Ex Parte* Letter") (the following practices raise concerns about whether a broadcaster has met its good faith duty: (i) demanding that retransmission consent negotiations "take place concurrently with [the broadcaster's] or an attributable entity's carriage negotiations for other 'must have' programming that is distributed in some or all of the same market"; and (ii) withholding or threatening to withhold retransmission consent from an MVPD "at the same time that [the broadcaster] or an affiliated entity withholds or threatens to withhold carriage rights for any other 'must have' programming or bundle of programming from the same MVPD that would affect the same customers").

[75] By prospective programming channel, we refer to a programming channel that has not yet been launched or a station or network that may be acquired in the future. *See* ACA July 24, 2015 *Ex Parte* Letter at 2.

a local broadcast signal? If we decide that a broadcast station's attempt to tie carriage of its affiliated programming to carriage of a broadcast station is a factor suggesting a failure to negotiate in good faith, how would we analyze the legitimacy of a standalone offer? The American Television Alliance, for example, suggests that the stand-alone offer be "a real economic alternative to a bundle of broadcast and non-broadcast programming."[76]

16. Parties have identified a number of other negotiating practices that, they assert, are inconsistent with the statutory duty to bargain in good faith.[77] We seek comment on whether any of these practices should factor into our assessment of whether a negotiating entity has breached its duty to negotiate in good faith under the totality of the circumstances test. In particular, parties assert that the following practices raise concerns about whether a party has met its obligation to negotiate retransmission consent in good faith: (i) a broadcaster's insistence on contract expiration dates, or threats to black out a station signal, in the time period just prior to the airing of a "marquee" sports or entertainment event;[78] (ii) a broadcaster's preventing an MVPD from temporarily importing an out-of-market signal in cases where the broadcaster has blacked out its local signal after negotiations failed to produce an agreement by the contract expiration date;[79] (iii) a broadcaster's demand that an MVPD place limits on its subscribers' use of lawful devices and functionalities;[80] (iv) a broadcaster's demand that MVPDs pay per-subscriber fees not only for viewers of the broadcaster's retransmitted signal, but also for subscribers that receive the broadcaster's signal over-the-air or who receive an MVPD's Internet or voice service, but not its video service;[81] (v) an MVPD's or broadcaster's refusal to provide "information substantiating reasons for positions taken when requested to in the course of bargaining";[82] (vi) an MVPD's or broadcaster's

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[76] *See* ATVA *Ex Parte* Letter at 3.

[77] We note that parties advocate that some of these practices be added to the list of *per se* good faith violations set forth in Section 76.65(b) of our rules. *See* ATVA *Ex Parte* Letter at 3; Cablevision July 31, 2015 *Ex Parte* Letter at 4-5. In addition, ACA asserts that the Commission should deem some of these practices to be either *per se* violations of a negotiating entity's good faith duty or, alternatively, conduct that is "sufficiently outrageous" or inconsistent with competitive marketplace considerations under the totality of the circumstances test. *See* ACA July 24, 2015 *Ex Parte* Letter at 1.

[78] *See* ATVA *Ex Parte* Letter at 3-4 (defining "Top-Rated Marquee Event" for the purpose of applying a *per se* rule that prohibits such conduct); ACA July 24, 2015 *Ex Parte* Letter at 2. *See also* Comments of Consumer Action on the 2011 NPRM at 1 ("Consumer Action Comments") (programmers' timing of blackout threats to coincide with key events is coercive, harms consumers, and does not show good faith).

[79] *See* ATVA *Ex Parte* Letter at 4. Although Section 103 of STELAR amended Section 325 of the Act to "prohibit a television broadcast station from limiting the ability of [an MVPD] to carry into the local market . . . of such station a television signal that has been deemed significantly viewed . . . or any other television broadcast signal such distributor is authorized to carry. . . .," this provision would not permit an MVPD to import a non-significantly viewed signal in cases where the MVPD were not "authorized to carry" the signal, with certain exceptions. *See* 47 U.S.C. § 325(b)(3)(C) (*as amended by* Section 103 of STELAR). ATVA proposes that we deem it a *per se* failure to negotiate in good faith for a broadcaster not to authorize such carriage either through waiver of the right to prevent importation of distant signals (in the case of satellite carriers) or through exercise of network non-duplication or syndicated exclusivity rights (in the case of cable and telecommunications MVPDs). *See* ATVA *Ex Parte* Letter at 4.

[80] ATVA asserts that such limits would include a broadcaster's demand that an MVPD either accept restrictions on providing, or assisting consumers' use of, lawful devices or functionality, or a broadcaster's demand that an MVPD commit to install a set-top box in each home on each television receiver. *Id.* at 5. *See also* Public Knowledge Comments on Mediacom Petition at 8 (a programmer likely violates the good faith negotiation requirement when it seeks to control what devices a subscriber can use).

[81] ATVA *Ex Parte* Letter at 5.

[82] *See* ACA July 24, 2015 *Ex Parte* Letter at 1. *See also* Joint Parties *Ex Parte* Letter at 4 (asserting that "the Commission should require, as part of the totality of the circumstances standard, that . . . parties negotiating . . .

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engaging in "surface bargaining," *i.e.,* conduct designed to delay negotiations, but that does not necessarily constitute an outright refusal to bargain;[83] (vii) an MVPD-affiliated broadcaster's "discriminat[ion] in the prices, terms and conditions [for] retransmission consent among or between MVPDs based on vertical competitive effects";[84] (viii) an MVPD's or broadcaster's demanding or negotiating retransmission consent based on "most favored nation" provisions;[85] (ix) a broadcaster's demand for tier placement commitments, which compel MVPDs to place their affiliated networks in the most popular programming packages;[86] (x) a broadcaster's imposition of minimum penetration requirements, which require MVPDs to guarantee that broadcaster-affiliated cable networks will reach a specified percentage of customers;[87] (xi) a broadcaster's failure to make an initial contract proposal at least 90 days prior to the existing contract's expiration;[88] (xii) a broadcaster's preventing an MVPD from disclosing rates, terms and conditions of a contract proposal or agreement to the Commission, a court of competent jurisdiction, and/or other state or federal governmental entities in connection with a formal retransmission consent complaint or other legal or administrative proceeding;[89] (xiii) a broadcaster's discrimination in price among MVPDs in a market absent a showing of direct and legitimate economic benefits associated with such price differences;[90] (xiv) an MVPD's or broadcaster's failure to negotiate

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retransmission consent . . . disclose relevant information substantiating and verifying their bargaining claims" and that the standard for relevancy should be liberally construed). We note that ACA does not elaborate on this proposal, but we assume it is referring to a broadcaster's refusal to provide evidence that supports a proposed term or condition of retransmission consent.

[83] *Id.* at 2. ACA asserts that, in assessing whether a negotiating entity is "merely going through the motions" with no intention of reaching an agreement in the near term, the Commission should consider certain factors such as unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Id.*

[84] *Id.* at 3. Although ACA does not elaborate on this proposal, we assume it is referring to a broadcaster's offering more favorable terms and conditions of retransmission consent to an MVPD with which it is vertically integrated. *Id.*

[85] *Id.* (a negotiating entity's seeking or receiving a most favored nation ("MFN") clause as consideration for retransmission consent rights, and refusal to accept a price, term or condition due to the existence of a MFN clause, should be deemed a failure to negotiate retransmission consent in good faith). *Id.*

[86] *See* Cablevision July 31, 2015 *Ex Parte* Letter at 3, 5; ITTA *Ex Parte* Letter in MB Docket No. 10-71 at 1-2 (filed Aug. 7, 2015) ("*ITTA August 7, 2015 Ex Parte Letter*"); Mediacom Petition at 10-12 (identifying certain other tactics used by programmers to force bundling of multiple channels on widely penetrated tiers).

[87] *See* Cablevision July 31, 2015 *Ex Parte* Letter at 3-5 (asserting that, in order to broaden the reach of their programming, broadcasters have used tying practices in conjunction with tier placement and minimum penetration requirements, and that these practices collectively harm consumers). Cablevision further asserts that the good faith standard mandates that broadcasters omit basic tier customers from the denominator used to assess whether minimum penetration requirements have been met in contracts for bundled programming. *Id.* at 5. *See also* Mediacom Petition at 11-12 (some programmers have sought to impose minimum penetration levels for popular programming channels, and such penetration requirements can severely restrict an MVPD's ability to offer customers service offerings that have fewer channels and cost less than the expanded basic tier). Mediacom also identifies certain other tactics used by programmers to control the manner in which their programming is packaged and sold in more indirect ways. *Id.* at 10-12.

[88] *See* ITTA *Ex Parte* Letter in MB Docket No. 10-71 at 2 (filed Aug. 13, 2015) ("*ITTA August 13, 2015 Ex Parte Letter*") (arguing that such failure should be deemed a *per se* violation of the requirement to negotiate in good faith and should result in automatic extension of the existing contract term for 90 days).

[89] *Id.* (asserting that this practice should be deemed a *per se* failure to negotiate retransmission consent in good faith).

[90] *Id.* (asserting that such price discrimination should be deemed a *per se* failure to negotiate retransmission consent in good faith because it is not based on competitive marketplace considerations).

terms and conditions for retransmission consent based on actual local market conditions;[91] and (xv) an MVPD's or broadcaster's attempt to manufacture a retransmission consent dispute in the hope of encouraging government intervention.[92] We also seek comment on any other practices that should be considered evidence of bad faith under the totality of the circumstances test.

17. How, if at all, should any of the above practices figure into our assessment of whether the broadcaster or MVPD has breached its duty to negotiate retransmission consent in good faith under the totality of the circumstances test? With regard to the second practice noted above (concerning importation of distant broadcast signals), we note that there could be situations where an MVPD is denied the right to carry a significantly viewed signal by a distant broadcast station that is precluded from granting out-of-market carriage of its signal due to restrictions in a network affiliation agreement.[93] Does Section 325(b)(3)(C)(v) of the Act, as added by Section 103(b) of STELAR (which, as noted above, generally prohibits a broadcast station from limiting the ability of an MVPD "to carry into the local market . . . of such station . . . a television signal that has been deemed significantly viewed. . . .") require the significantly viewed station to consent to carriage of its signal by the MVPD in retransmission consent negotiations or does it only govern retransmission consent negotiations between local stations and the MVPD?[94] If this section does not apply, we note that the Commission, in implementing the reciprocal bargaining provisions of Section 325, found that "it is incumbent on broadcasters subject to . . . contractual limitations [in a network affiliation agreement] that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal to at least inquire with its network whether the network would waive the limitation with regard to the MVPD in question."[95] Given this statement, in cases where a significantly viewed station refuses out-of-market carriage of its signal without first asking the network whether it would consider waiving its right to enforce contractual restrictions on such carriage, should the broadcaster's refusal continue to be probative evidence of whether it is negotiating in bad faith under the totality of the circumstances test?[96]

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[91] *See* Comments of Block Communications, Inc. in MB Docket No. 10-71 at 8-9 (filed Aug. 14, 2015) ("*Block Comments*") (asserting that the Commission should require negotiators "to make offers that reasonably reflect the market position of the TV station at issue, taking into account station ratings and the valuable local services each station provides," and that failure to do so should be deemed a *per se* breach of the duty to negotiate in good faith).

[92] *See* NAB *Ex Parte* Letter in MB Docket No. 10-71 at 1 (filed July 13, 2015); NAB *Ex Parte* Letter at 2 (filed July 24, 2015); NAB *Ex Parte* Letter at 1 (filed August 25, 2015).

[93] *See* Comments of ACA on the 2011 NPRM at 55-58 (filed May 27, 2011); ACA *Ex Parte* Letter in MB Docket No. 10-71 at 4 (filed Aug. 28, 2015) ("[T]o protect against the loss of historically available out-of-market broadcast signals that provide access to vital emergency weather reports, in-state news, and political advertising, such as significantly viewed signals and stations that offer in-state news to subscribers in orphan counties, repeal of the network non-duplication and syndicated exclusivity rules must be accompanied by a prohibition on interference by broadcast networks with retransmission consent agreements between MVPDs and out-of-market stations.")

[94] We note that Congress intended Section 103(b) of STELAR "to be interpreted broadly by the FCC to ensure that a television broadcast station is not able to limit MVPD carriage of signals that it is permitted to carry pursuant to the Communications Act. . . ." *See* Senate Commerce Committee Report at 13.

[95] *See 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, 10355, ¶ 35 (2005) ("*Reciprocal Bargaining Order*"). The Commission believed that in many situations, retransmission of the broadcaster's signal by a distant MVPD would be deemed advantageous to the network as well as the broadcaster and MVPD, and that in such situations, a network that has otherwise restricted a broadcaster's redistribution rights might be amenable to a limited waiver of the restriction. *Id.*

[96] Although Section 76.65(b)(vi) of our rules provides that the "[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or [MVPD]" violates the duty to negotiate retransmission consent in good faith, we note that Section 76.65(b)(vi) was intended to prohibit collusion between a broadcaster and an MVPD that contemplates non-carriage of the broadcaster's signal by another MVPD, and was

(continued….)

18. We note that although most of the alleged bad faith practices discussed in this NPRM are attributed by commenting parties to broadcasters, Section 325(b)(3)(C) of the Act imposes a duty to negotiate retransmission consent in good faith reciprocally on broadcasters and MVPDs, and the Commission has interpreted this statutory obligation to subject broadcasters and MVPDs equally to the totality of the circumstances test and the *per se* violations of good faith in Section 76.65 of our rules.[97] Thus, we propose that any practices that we find to be indicative of bad faith under the totality of the circumstances test or to be *per se* violations of the duty to negotiate in good faith apply to both broadcasters and MVPDs (to the extent such practices are engaged in by both broadcasters and MVPDs),[98] and we seek comment on that proposal. Parties asserting that certain practices should be deemed bad faith only when engaged in by MVPDs or by broadcasters should explain how such an interpretation is consistent with the text of Section 325(b)(3)(C) of the Act, which imposes a reciprocal duty to bargain in good faith.

19. Finally, we invite comment on how an MVPD's demand for online distribution rights, or a broadcaster's refusal to grant such rights, should be treated under the totality of the circumstances test.[99] Online distribution rights are important because consumers today are increasingly accessing video programming from online video distributors that deliver content via the Internet. We understand that online distribution rights have been a critical factor in recent retransmission consent negotiations.[100] Are there any circumstances in which an MVPD's demands with respect to online rights, or a broadcaster's unwillingness to offer such rights, should be considered evidence of bad faith under the totality of the circumstances test?[101]

20. In the alternative to considering any of the above factors, or additional factors that commenters raise, pursuant to the totality of the circumstances test, we ask commenters to consider whether any of the factors mentioned above should instead be considered additional *per se* violations of the duty to negotiate retransmission consent in good faith.[102] Commenters should explain their reasoning

(Continued from previous page)
not intended "to affect the ability of a network affiliate agreement to limit redistribution of network programming." *See id.,* 20 FCC Rcd at 10355, ¶ 34.

[97] *See 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, 10344, ¶ 13 (2005) ("Broadcasters and MVPDs must comply with the seven objective negotiation standards set forth in Section 76.65(b)(1). . . . In addition, MVPDs and broadcasters will now be equally subject to, and able to file, a complaint based on the totality of the circumstances").

[98] For example, demanding that an MVPD place limits on its subscribers' use of lawful devices and functionalities (set forth in (iii) above) appears to be a practice that can be attributed only to broadcasters.

[99] This would include any online distribution by the MVPD, such as through a TV Everywhere offering or by any other online means.

[100] *See, e.g.,* John Eggerton, "ACA: Video Could Become Losing Proposition," *Multichannel News* (Apr. 7, 2015), *available at* http://www.multichannel.com/news/distribution/aca-video-could-become-losing-proposition/389506 (indicating ACA's concern "about the impact of content providers charging a per-subscriber fee for online distribution"); Doug Halonen, "Wheeler 'Concerned' Over Online Blackouts," *TVNewsCheck* (May 20, 2014), *available at* http://www.tvnewscheck.com/article/76465/wheeler-concerned-over-online-blackouts (quoting NAB spokesman Dennis Wharton as saying that "broadcasters 'are fine' with online distribution of their programming as [long] as they are properly compensated").

[101] *See* ACA July 24, 2015 *Ex Parte* Letter at 3 (a broadcaster fails to meet its duty to negotiate in good faith when it refuses to give an MVPD online rights that are offered to another MVPD or refuses to give an MVPD online rights that are offered to another Internet-based distributor of video programming).

[102] *See, e.g.*, Cablevision July 31, 2015 *Ex Parte* Letter at 4-5 (advocating that the Commission prohibit tying arrangements, tier placement and minimum penetration requirements imposed by a broadcaster as *per se* violations of the duty to negotiate in good faith).

for considering particular conduct or practices either in the context of the totality of the circumstances test or as a candidate for a *per se* rule, and the statutory authority for a Commission finding that any such practices should be regulated under the totality of the circumstances test or as a *per se* rule.[103]

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act Analysis

21. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[104] the Commission has prepared an Initial Regulatory Flexibility Act Analysis ("IRFA") relating to this NPRM. The IRFA is set forth in Appendix A.

B. Initial Paperwork Reduction Act Analysis

22. This document does not contain proposed new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, therefore, it does not contain any new or modified "information burden for small business concerns with fewer than 25 employees" pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

C. Ex Parte Rules

23. Permit-But-Disclose. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[105] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

D. Filing Requirements

24. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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[103] *See id.* at 5-7 (asserting that the Commission has ample legal authority to adopt proposed reforms to the retransmission consent regime).

[104] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 ("CWAAA").

[105] 47 C.F.R. §§ 1.1200 *et seq.*

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

25. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

26. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

E. Additional Information

27. For additional information on this proceeding, contact Diana Sokolow, Diana.Sokolow@fcc.gov, or Raelynn Remy, Raelynn.Remy@fcc.gov, of the Policy Division, Media Bureau, (202) 418-2120.

V. ORDERING CLAUSES

28. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in Sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 325, and Section 103 of the STELA Reauthorization Act of 2014,[106] this Notice of Proposed Rulemaking **IS ADOPTED.**

[106] Pub. L. No. 113-200, § 111, 128 Stat. 2059 (2014). 47 U.S.C. § 543(o)(1).

29. **IT IS FURTHER ORDERED** that, the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") concerning the possible significant economic impact on small entities by the policies and rules proposed in the Notice of Proposed Rulemaking ("NPRM"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[2] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. In the Notice of Proposed Rulemaking ("NPRM"), as directed by Section 103 of the STELA Reauthorization Act of 2014 ("STELAR"),[4] we review the totality of the circumstances test for evaluating whether broadcast stations and multichannel video programming distributors ("MVPDs") are negotiating for retransmission consent in good faith. The Communications Act of 1934, as amended (the "Act"), prohibits cable systems and other MVPDs from retransmitting a broadcast station's signal without the station's express consent.[5] This consent is known as "retransmission consent." The Act and the Commission's implementing rules require broadcasters and MVPDs to negotiate for retransmission consent in good faith.[6] The Commission has adopted a two-part framework for evaluating good faith in this context. First, the Commission has established a list of objective good faith negotiation standards, the violation of which is considered a *per se* breach of the good faith negotiation obligation.[7] Second, even if the specific *per se* standards are met, the Commission may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith.[8] In accordance with STELAR, we adopt this NPRM and seek comment on the scope of the totality of the circumstances test.

B. Legal Basis

3. The proposed action is authorized pursuant to Sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 325, and Section 103 of the STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103, 128 Stat. 2059 (2014).

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

[2] *See* 5 U.S.C. § 603(a).

[3] *See id*.

[4] Congress directed the Commission to "commence a rulemaking to review its totality of the circumstances test for good faith negotiations" by September 4, 2014. *See* Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

[5] 47 U.S.C. § 325(b)(1)(A).

[6] *Id.* § 325(b)(3)(C)(ii)-(iii); 47 C.F.R. § 76.65.

[7] *See* 47 C.F.R. § 76.65(b)(1).

[8] *See id.* § 76.65(b)(2).

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[9] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[10] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[11] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[12] Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

5. *Wired Telecommunications Carriers*. The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[13] The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."[14] Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[15] Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.[16] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

6. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined above. The SBA has developed a small business size standard for this category, which is: All

[9] 5 U.S.C. § 603(b)(3).

[10] *Id.* § 601(6).

[11] *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

[12] 15 U.S.C. § 632.

[13] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[14] 13 C.F.R. § 121.201 (NAICS code 517110).

[15] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[16] *Id*.

such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[17] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[18] Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

7. *Cable Companies and Systems.* The Commission has developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rate regulation rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.[19] According to SNL Kagan, there are 1,258 cable operators.[20] Of this total, all but 10 incumbent cable companies are small under this size standard.[21] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[22] Current Commission records show 4,584 cable systems nationwide.[23] Of this total, 4,012 cable systems have fewer than 20,000 subscribers, and 572 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

8. *Cable System Operators* (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[24] There are approximately 56.4 million incumbent cable video subscribers in the United States today.[25] Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do

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[17] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[18] *Id*.

[19] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[20] Data provided by SNL Kagan to Commission Staff upon request on March 25, 2014. Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, ¶ 24 (2013) ("*15th Annual Video Competition Report*").

[21] SNL Kagan, U.S. Multichannel Top Cable MSOs, http://www.snl.com/interactivex/TopCableMSOs.aspx (visited June 26, 2014). We note that when this size standard (*i.e.*, 400,000 or fewer subscribers) is applied to all MVPD operators, all but 14 MVPD operators would be considered small. *15th Annual Video Competition Report*, 28 FCC Rcd at 10507-08, ¶¶ 27-28 (subscriber data for DBS and Telephone MVPDs). The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, 17245-46, ¶ 37 (2011) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

[22] 47 C.F.R. § 76.901(c).

[23] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on July 1, 2014. A cable system is a physical system integrated to a principal headend.

[24] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn.1-3.

[25] *See* NCTA, Industry Data, Cable Video Customers (2012), http://www.ncta.com/industry-data (visited Aug. 30, 2013).

not exceed $250 million in the aggregate.[26] Based on available data, we find that all but 10 incumbent cable operators are small under this size standard.[27] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[28] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

9. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[29] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[30] Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[31] Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.[32] Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled "Cable and Other Program Distribution." The 2002 definition of Cable and Other Program Distribution provided that a small entity is one with $12.5 million or less in annual receipts.[33] Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network.[34] Each currently offers subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

10. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs)*. SMATV systems or PCOs are video distribution facilities that use closed

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[26] 47 C.F.R. § 76.901(f); *see* Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[27] *See* NCTA, Industry Data, Top 25 Multichannel Video Service Customers (2012), http://www.ncta.com/industry-data (visited Aug. 30, 2013).

[28] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[29] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007). The 2007 NAICS definition of the category of "Wired Telecommunications Carriers" is in paragraph 5, above.

[30] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[31] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[32] *Id*.

[33] 13 C.F.R. § 121.201; NAICS code 517510 (2002).

[34] See *15th Annual Video Competition Report*, 28 FCC Rcd at 10507, ¶ 27. As of June 2012, DIRECTV is the largest DBS operator and the second largest MVPD in the United States, serving approximately 19.9 million subscribers. DISH Network is the second largest DBS operator and the third largest MVPD, serving approximately 14.1 million subscribers. *Id*. at 10507, 10546, ¶¶ 27, 110-11.

transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA's broad economic census category, "Wired Telecommunications Carriers,"[35] which was developed for small wireline firms. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.[36] Census data for 2007 shows that there were 31,996 establishments that operated that year.[37] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[38] Therefore, under this size standard, the majority of such businesses can be considered small.

11. *Home Satellite Dish ("HSD") Service.* HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers.[39] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[40] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[41] Therefore, under this size standard, the majority of such businesses can be considered small.

12. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[42] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[43] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67

[35] *See* 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[36] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[37] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[38] *Id*.

[39] 13 C.F.R. § 121.201, NAICS code 517110 (2007).

[40] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[41] *Id*.

[42] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995).

[43] 47 C.F.R. § 21.961(b)(1).

auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[44] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[45] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.[46] Auction 86 concluded in 2009 with the sale of 61 licenses.[47] Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

13. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based EBS. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services."[48] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year.[49] Of this total, 30,178 establishments had fewer than 100

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[44] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[45] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[46] *Id.* at 8296.

[47] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[48] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers," (partial definition), www.census.gov/naics/2007/def/ND517110.HTM#N517110. Examples of this category are: broadband Internet service providers (*e.g.*, cable, DSL); local telephone carriers (wired); cable television distribution services; long-distance telephone carriers (wired); closed circuit television ("CCTV") services; VoIP providers, using own operated wired telecommunications infrastructure; direct-to-home satellite system ("DTH") services; telecommunications carriers (wired); satellite television distribution systems; and multichannel multipoint distribution services ("MMDS").

[49] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007

(continued….)

employees, and 1,818 establishments had 100 or more employees.[50] Therefore, under this size standard, the majority of such businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that, as of September 2012, there were 2,241 active EBS licenses.[51] The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[52]

14. *Fixed Microwave Services.* Microwave services include common carrier,[53] private-operational fixed,[54] and broadcast auxiliary radio services.[55] They also include the Local Multipoint Distribution Service (LMDS),[56] the Digital Electronic Message Service (DEMS),[57] and the 24 GHz Service,[58] where licensees can choose between common carrier and non-common carrier status.[59] At present, there are approximately 31,428 common carrier fixed licensees and 79,732 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. There are approximately 120 LMDS licensees, three DEMS licensees, and three 24 GHz licensees. The Commission has not yet defined a small business with respect to microwave services. For purposes of the IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.*, an entity with no more than 1,500 persons.[60] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[61] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 show that there were 11,163 firms that operated that year.[62] Of those, 10,791 had fewer than 1000 employees, and 372 firms had 1000 employees or more. Thus under this category and the associated small business size standard, the majority of firms can be considered small. We note that the number of firms does not necessarily

(Continued from previous page)
Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[50] *Id*.

[51] http://wireless2.fcc.gov/UlsApp/UlsSearch/results.jsp.

[52] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[53] *See* 47 C.F.R. Part 101, Subparts C and I.

[54] *See* 47 C.F.R. Part 101, Subparts C and H.

[55] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[56] *See* 47 C.F.R. Part 101, Subpart L.

[57] *See* 47 C.F.R. Part 101, Subpart G.

[58] *See id.*

[59] *See* 47 C.F.R. §§ 101.533, 101.1017.

[60] 13 C.F.R. § 121.201, NAICS code 517210.

[61] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[62] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.

track the number of licensees. We estimate that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

15. *Open Video Systems.* The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[63] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[64] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[65] The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[66] Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.[67] Therefore, under this size standard, the majority of such businesses can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[68] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[69] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities.

16. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[70] The SBA has developed a small business size standard for this category, which is: all such businesses having $38.5 million dollars or less in annual revenues.[71] Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[72] Of this total, 2,940 firms had

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[63] 47 U.S.C. § 571(a)(3)-(4). *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, 24 FCC Rcd 542, 606, ¶ 135 (2000) ("*13th Annual Video Competition Report*").

[64] *See* 47 U.S.C. § 573.

[65] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[66] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[67] *Id*.

[68] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[69] *See 13th Annual Video Competition Report*, 24 FCC Rcd at 606-07, ¶ 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

[70] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[71] 13 C.F.R. § 121.210; 2012 NAICS code 515210.

[72] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

fewer than 100 employees, and 248 firms had 100 or more employees.[73] Thus, under this size standard, the majority of such businesses can be considered small entities.

17. *Small Incumbent Local Exchange Carriers*. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[74] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[75] We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

18. *Incumbent Local Exchange Carriers ("ILECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[76] Census data for 2007 shows that there were 3,188 firms that operated for the entire year.[77] Of this total, 2,940 firms had fewer than 100 employees, and 248 firms had 100 or more employees.[78] Therefore, under this size standard, the majority of such businesses can be considered small entities.

19. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[79] Census data for 2007 shows that there were 31,996 establishments that operated that year.[80] Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees.[81] Therefore, under this size standard, the majority of such businesses can be considered small entities.

[73] *Id*.

[74] 15 U.S.C. § 632.

[75] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[76] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[77] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ5; available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table.

[78] *Id*.

[79] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[80] U.S. Census Bureau, 2007 Economic Census. *See* U.S. Census Bureau, American FactFinder, "Information: Subject Series – Estab and Firm Size: Employment Size of Establishments for the United States: 2007 – 2007 Economic Census," NAICS code 517110, Table EC0751SSSZ2; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[81] *Id*.

20. *Television Broadcasting*. "This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources.[82] The SBA defines a television broadcasting station as a small business if such station has no more than $38.5 million in annual receipts. The 2007 U.S. Census reports that in 2007, 808 television broadcasting firms operated during that year. Of that number, 709 had annual receipts of less than $25 million. Twenty-nine firms operated with annual receipts from $25 million to $50 million, but the Census does not specify the number of stations in that category that had annual receipts of $38.5 million or less.[83] Based on this data, the Commission concludes that a majority of television stations is small under the applicable SBA size standard.

21. The Commission has estimated the number of licensed commercial television stations to be 1,390.[84] According to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) as of January 31, 2011, 1,006 (or about 78 percent) of an estimated 1,298 commercial television stations[85] in the United States have revenues of $14 million or less and, thus, qualify as small entities under the SBA definition. The Commission has estimated the number of licensed noncommercial educational ("NCE") television stations to be 391.[86] We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[87] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

22. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also, as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

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[82] http://www.census.gov/cgi-bin/sssd/naics/naicsrch

[83] http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ4&prodType=table

[84] *See* News Release, "Broadcast Station Totals as of December 31, 2010," 2011 WL 484756 (F.C.C.) (dated Feb. 11, 2011) ("*Broadcast Station Totals*"); also available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0211/DOC-304594A1.pdf.

[85] We recognize that this total differs slightly from that contained in *Broadcast Station Totals*, *supra*, note 56; however, we are using BIA's estimate for purposes of this revenue comparison.

[86] *See Broadcast Station Totals*, *supra*.

[87] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

23. Apart from the U.S. Census, the Commission has estimated the number of licensed commercial television stations to be 1,388.[88] In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television* Database, as of March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less.[89] We therefore estimate that the majority of commercial television broadcasters are small entities.

24. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[90] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent.

25. In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[91] These stations are non-profit, and therefore considered to be small entities.[92]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

26. The NPRM does not seek comment on specific reporting or recordkeeping requirements. Rather, in Section III.A the NPRM broadly seeks comment on any elaboration of the totality of the circumstances test it can provide that will help guide negotiations to a successful conclusion. Then in Section III.B the NPRM seeks comment on whether there are specific practices that we should identify as evidencing bad faith under the totality of the circumstances test. The resolution of these issues could affect all entities that negotiate retransmission consent, including small entities.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

27. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[93]

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[88] *See Broadcast Station Totals as of December 31, 2013*, Press Release (MB rel. Jan. 8, 2014) ("*Jan. 8, 2014 Broadcast Station Totals Press Release*"), https://www.fcc.gov/document/broadcast-station-totals-december-31-2013.

[89] We recognize that this total differs slightly from that contained in *Jan. 8, 2014 Broadcast Station Totals Press Release*; however, we are using BIA's estimate for purposes of this revenue comparison.

[90] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both." 13 C.F.R. § 121.103(a)(1).

[91] *See Jan. 8, 2014 Broadcast Station Totals Press Release*.

[92] *See generally* 5 U.S.C. §§ 601(4), (6).

[93] 5 U.S.C. § 603(c)(1)-(c)(4).

28. Enhancing the successful completion of retransmission consent negotiations would benefit both broadcasters and MVPDs, including those that are smaller entities, as well as MVPD subscribers. Given that improvements to the totality of the circumstances test would have such an effect, making such improvements would benefit both smaller and larger entities, and thus an analysis of alternatives is unnecessary. We note additionally that the NPRM broadly seeks comment on any elaboration of the totality of the circumstances test it can provide that will help guide negotiations to a successful conclusion, and it asks whether there are specific practices that we should identify as evidencing bad faith under the totality of the circumstances test. These inquiries are wide-ranging, and we encourage commenters to indicate whether we should consider any alternatives that would minimize any adverse impact on small businesses while maintaining the benefits to the retransmission consent process.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

29. None.