

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 103 of the STELA)	MB Docket No. 15-216
Reauthorization Act of 2014)	
)	
Totality of the Circumstances Test)	

COMMENTS OF THE WRITERS GUILD OF AMERICA, WEST, INC.

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I. INTRODUCTION AND SUMMARY

Writers Guild of America, West, Inc. (“WGAW”) respectfully submits the following comments on the Federal Communication Commission (“FCC”) Notice of Proposed Rulemaking (“NPRM”) in the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, MB Docket No. 15-216.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television, news, documentaries and digital media. WGAW advocates for a competitive media marketplace that allows a wide variety of writing services to reach, entertain, and inform the public. Our members and the members of our affiliate, Writers Guild of America, East (jointly, “WGA”) create much of the primetime and late night programming that makes the broadcast networks and stations attractive to consumers. In addition, WGAW represents local news writers at the KCBS and KCAL broadcast stations in Los Angeles.

Although multichannel video programming distributors (“MVPDs”) claim that the retransmission consent rules are broken because of the rise in cash payments and hard bargaining, the market appears to be functioning as Congress intended. Broadcasters continue to air much of the most-watched programming on TV and now provide MVPDs with valuable new rights to on-demand and online content. Retransmission fees are fair for the value provided and are not a significant part of the cost of multichannel video service. While MVPDs may wish to lower their programming costs, the current retransmission consent rules remain a fair method for pricing the value that broadcasters provide to MVPD subscribers. It is unfortunate when parties are unable to reach agreement and consumers lose access to broadcast programming through their MVPD, but the programming remains available over the air and through other MVPDs in a

local area. With continued reliance on advertising for a majority of revenue and the increased choice in news and entertainment offered by cable networks, pay TV channels and online video, broadcasters continue to have sufficient incentives to reach agreement in retransmission negotiations. MVPDs have framed their proposals to weaken retransmission consent rules as pro-consumer, but consumers ultimately benefit from a process that fairly values content and leads broadcast stations and networks to continue to invest in programming. As such, any changes to the totality of circumstances test must not distort the retransmission consent market by unfairly advantaging MVPDs in negotiations.

II. THE RETRANSMISSION CONSENT MARKET IS WORKING AS CONGRESS INTENDED

The NPRM asks whether there is a failure in the retransmission consent market that warrants expansion of the totality of the circumstances test. WGAW is skeptical of calls for further regulatory intervention in the retransmission negotiation process. The retransmission consent market appears to be functioning as Congress intended and the potential expansion would serve only to enhance the bargaining power of MVPDs while limiting the ability of broadcasters to secure fair compensation.

A. The retransmission consent market and negotiation rules function well

Congress designed the retransmission consent framework to allow broadcasters to secure market value for their programming and to grant MVPDs access to the broadcast programming subscribers demand. The retransmission consent framework “establish[ed] a marketplace for the disposition of the rights to retransmit broadcast signals” but intentionally avoided “dictat[ing] the

outcome of the ensuing marketplace negotiations.”¹ Prices, terms, and conditions of consent were to be freely negotiated between broadcasters and MVPDs subject only to “competitive marketplace considerations.”²

The retransmission consent market successfully disposes of retransmission rights almost without exception. Last year, 26 station groups and 49 MVPDs successfully concluded 78 retransmission consent negotiations affecting 26.4 million subscribers.³ This year, 19 station groups and 10 MVPDs successfully concluded 30 negotiations affecting 35.4 million subscribers.⁴ Protracted negotiation impasses are extraordinarily rare. To the best of our knowledge, only one such protracted impasse is ongoing in the country at this time.⁵

Some commentators point to negotiations in which hard bargaining leads to temporary broadcast service interruptions as evidence of market failure. The extent and duration of such broadcast service interruptions, however, are overstated. In 2014, an estimated 11.2 million subscribers out of 101.6 million MVPD subscribers nationwide (~11%) experienced a broadcast service interruption due to negotiation impasse and, of those subscribers, 95% had their

¹ In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates; Request by TV 14, Inc. to Amend Section 76.51 of the Commission’s Rules to Include Rome, Georgia in the Atlanta, Georgia Television Market, MM Docket Nos. 92-259, 90-4 and 92-295, *Report and Order*, 8 FCC Rcd. at 2965, 3006, ¶ 178, (1993), quoting 1992 Cable Act Senate Report at 36.

² Communications Act, 47 U.S.C. § 325(b)(3)(C)(ii).

³ Atif Zubair, *Retrans database update: DIRECTV/Media General, Dish/TEGNA, U-verse/DIRECTV/Tribune*, SNL Kagan (Oct. 28, 2015), <https://www.snل.com/Interactivex/article.aspx?ID=34271310&KPLT=2>.

⁴ *Id.*

⁵ SNL Kagan, *Retrans Database Update: October 2015* (Oct. 28, 2015), <https://www.snل.com/InteractiveX/doc.aspx?ID=34324928>.

broadcast service restored within a week.⁶ During impasses, consumers make clear to both parties that they demand broadcast service and expect the impasse to be resolved immediately, which usually forces a compromise. In addition, incentives for broadcasters to reach agreement remain strong. Advertising continues to account for a majority of local station and broadcast network revenue and the increased choice in original programming offered by basic cable, pay TV and online video distributors means that a blackout could cause a local station to lose viewers to these alternatives. Changing the channel rather than one's MVPD is a much more likely outcome in the event of a broadcast service interruption. Hard bargaining simply underscores the value of retransmission rights, not market failure, and incentives ultimately keep hard bargaining within bounds.

Further evidence of the success of the retransmission consent market comes from formal complaints of bad faith. Since the *Good Faith Negotiation and Exclusivity Order* of 2000 ("*Good Faith Order*"), the Commission has ruled on a total of four formal complaints of bad faith and only once has it found a breach.⁷ This is striking given that the totality of circumstances test casts a wide net, stating that contract proposals that involve "compensation or carriage terms that result from an exercise of market power by a broadcast station...the effect of which is to hinder significantly or foreclose MVPD competition"⁸ are considered presumptively inconsistent with a competitive marketplace. Further, the Commission invited review of "sufficiently outrageous"⁹

⁶ SNL Kagan, *Retrans Roundup 2014* (Jan. 28, 2015), <https://www.snk.com/InteractiveX/doc.aspx?ID=30852150>.

⁷ In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test, *Notice of Proposed Rulemaking*, MB Docket No. 15-2016, ¶ 5, note 31 (2015) ("NPRM").

⁸ In the Matter of the Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, *First Report and Order*, CS Docket No. 99-363, 15 FCC Rcd. at 5445, 5470 ¶ 58 (2000) ("*Good Faith Order*").

⁹ *Id.* at 5458, ¶ 32.

proposals. The lack of bad faith rulings suggests that market forces and existing retransmission consent negotiation rules lead parties to believe they will receive a better deal through private negotiation rather than through administrative review. Changes to the totality of circumstances test will likely invert this situation, leading parties to believe that they will receive more favorable terms through FCC intervention than through private negotiation.

Ultimately, the retransmission consent market fairly prices the value of broadcast programming. MVPDs readily admit that broadcasters provide marquee and must-have programming,¹⁰ which increases the value of their offering to subscribers. Historically, when local cable operators monopolized multichannel video distribution, they used their leverage to deny cash payment to broadcast stations. The entrance of new MVPD competitors has balanced retransmission negotiations. Broadcasters can now recoup more of the value for their programming, but MVPDs still likely underpay for the value received. The license fees MVPDs pay to non-broadcast programmers far outstrip broadcaster compensation, yet these networks can't match the ratings of the major broadcast networks.

B. The statute specifically contemplates negotiations that may lead to signal loss and does not consider this a market or regulatory failure

The statutory framework for retransmission consent negotiations distinguishes between the process and the substance of negotiation, and limits regulatory authority to the former. As the Commission has stated, "Congress did not empower the Commission to sit in judgment of the

¹⁰ In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, Ex Parte Communication of the American Cable Association to William Lake, Chief, Media Bureau, FCC, MB Docket No. 10-71 (July 24, 2015).

substantive terms and conditions of retransmission consent agreements.”¹¹ Hence, parties enjoy wide latitude to settle on prices, terms, and conditions of retransmission through private negotiations free from regulatory interference. Freedom of contract in retransmission consent negotiations extends to contract termination. The Supreme Court and NLRB precedent clearly affirm in the context of labor law, from which the *Good Faith Order* derives, that the obligation to negotiate in good faith does not compel agreement. Parties retain the freedom to walk away from contracts that go against their best interest.

III. MVPDS ARE ATTEMPTING TO USE THIS PROCESS TO INCREASE BARGAINING LEVERAGE OVER BROADCASTERS

MVPDs have claimed that retransmission consent rules are broken, citing the increase in retransmission fees as their main evidence. They assert that consumers are harmed by the rising fees and that the FCC must intervene in the retransmission market. However, closer examination reveals that retransmission fees are a small portion of the average cable bill and are fair for the value broadcast stations provide to an MVPD service, suggesting that MVPDs are attempting to use FCC oversight to unfairly increase their leverage.

A. Retransmission fees account for a minor share of a subscriber’s monthly cable bill

Retransmission consent fees account for a relatively small portion of a subscriber’s monthly bill. In 2014, revenue per video subscriber per month averaged \$92.53.¹² Total programming costs per video subscriber came out to \$42.99 per month while retransmission fees

¹¹ Good Faith Order at 5480, ¶ 81.

¹² SNL Kagan, *Multichannel Programming Fees as a % of Multichannel Video Revenues* (Apr. 20, 2015), <https://www.snl.com/InteractiveX/doc.aspx?ID=32259219>.

per video subscriber averaged \$0.86 per broadcast station per month.¹³ Each broadcast station accounted for 0.9% of average revenue per video subscriber per month per channel and 2% of programming costs per subscriber per month.¹⁴ Retransmission consent fees in total amounted to less than the cost of regional sports networks, premium services or basic cable networks, despite the fact that broadcast television provides the most highly rated programming on television.

As a point of comparison, subscribers spend an average of \$19.25 a month on set-top box rental fees, according to a recent Congressional study.¹⁵ In other words, the “must-have” and marquee programming broadcasters provide costs subscribers a fifth of what MVPDs charge to rent set-top boxes. MVPDs could more directly and quickly lower subscribers’ bills by reducing set-top box rental fees, as opposed to seeking changes to retransmission consent rules that would give them additional leverage in negotiations with broadcasters.

B. Retransmission fees are fair for the value of the programming provided

While MVPDs complain of rising fees, they offer no evidence to support their claim that these fees are too high. Rather, we believe there is strong evidence to support current retransmission fees as well as future increases. Despite the erosion of broadcast ratings due to the proliferation of cable and online video programming, broadcasters still provide must-have and marquee TV. The big four networks routinely attract audiences two to three times larger than every basic cable network other than ESPN. And even though the ratings of some ESPN

¹³ SNL Kagan, *Broadcast Retransmission Fee Projections, 2006-2021* (June 17, 2015), <https://www.snl.com/Interactivex/Doc.aspx?ID=33008135>.

¹⁴ *Id.*

¹⁵ Press Release, Office of Senator Ed Markey, *Markey, Blumenthal Decry Lack of Choice, Competition in Pay TV Video Box Market* (July 30, 2015), <http://www.markey.senate.gov/news/press-releases/markey-blumenthal-decry-lack-of-choice-competition-in-pay-tv-video-box-marketplace>.

programming are on par with the major broadcast networks, ESPN by itself costs \$6.61 per subscriber per month while broadcast stations cost an average of \$0.86 per subscriber per station per month.¹⁶

Despite increased choice in original programming from basic cable, pay tv and online video distributors, the broadcast networks have increased the amount of original programming offered over the past few years. According to WGAW research, the number of original comedies and dramas airing on ABC, CBS, CW, FOX and NBC has grown from 77 series in the 2010-2011 season to 96 in the 2014-2015 season. Over the same period, the number of original hours of comedy and drama programming on these networks grew from 1,294 to 1,571. By increasing the original programming offered, broadcasters are increasing the value of what they provide to an MVPD and the growing fees appropriately reflect that added value.

Furthermore, broadcasters now provide tremendous additional value in the form of online/Video-on-Demand content delivered via TV Everywhere. ABC, NBC and FOX all make their content available to MVPD subscribers through online authentication portals. TV Everywhere helps MVPDs reduce subscriber churn by increasing the value of MVPD offerings and strengthening the competitive position of MVPDs vis-à-vis over-the-top video providers.¹⁷

Lastly, retransmission fees support the localism principle and funds local news, weather, emergency and public affairs programming. This programming is also “must-have”

¹⁶ Scott Robson, *What would ESPN cost a la carte?* SNL Kagan (Aug. 18, 2015), <https://www.snl.com/interactivex/article.aspx?id=33568277&KPLT=6>.

¹⁷ Bernie Arnason, *Survey: Pay TV Providers Can Compete With Netflix with VOD, TV Everywhere*, telecompetitor (Jan. 28, 2014), <http://www.telecompetitor.com/survey-pay-tv-providers-can-compete-netflix-vod-tv-everywhere/>; Jim O’Neill, *Is TV Everywhere the answer to pay-TV’s Millennial problem?* Ooyala (Oct. 14, 2015), <http://www.ooyala.com/videomind/blog/tv-everywhere-answer-pay-tv-s-millennial-problem>.

programming in that it provides timely information about local events, some of which bears directly on public safety and civic life.

IV. RETRANSMISSION CONSENT NEGOTIATION RULES SHOULD NOT BE CHANGED JUST TO INCREASE MVPD POWER

Since there is little evidence of market failure or unfair agreements, proposals to change the existing retransmission consent rules should be approached with caution. For instance, proposals that seek to define hard bargaining tactics as bad faith may amount to interference in the substance of negotiations. Further, excluding broadcast networks from participation in their affiliates' retransmission consent impinges on longstanding relationships and contractual arrangements that affect the terms and conditions of the redistribution of network programming. These proposals would enhance the bargaining position of MVPDs at the expense of broadcasters without any clear legal justification or consumer benefit.

The Commission asks whether broadcasters preventing subscribers from accessing video content over the Internet during a retransmission consent dispute should be considered evidence of bad faith under the totality of circumstances test, noting that the practice has occurred in some disputes. While we are not in favor of consumers losing access to programming, we are concerned with potential rules that create an obligation to provide content and therefore undermine the value of the content. Programmers make decisions to license content and make content available to consumers in ways that maximize revenue, thereby supporting the high quality, high budget content our members create. Broadcasters are not under an obligation to provide online access to programming and, as edge providers, the content they make available online is valuable to an internet service provider ("ISP"), particularly in a retransmission dispute

where the MVPD/ISP may be interested in directing subscribers and undercutting the need to negotiate for access to the linear feed. Online rights to content have also become part of MVPD TV Everywhere offerings. For instance, the FOX network website offers additional access to network episodes for certain MVPD customers who sign-in and authenticate their subscription. Because this content availability is clearly negotiated with an MVPD, if the Commission were to deem the withholding of online content as evidence of bad faith bargaining in a review of the totality of circumstance, the Commission may adversely impact the value of this programming. If the FCC is to restrict a broadcaster's ability to withhold content online, it must do so carefully, ensuring that it is not creating an obligation to provide such content no matter the circumstance or limiting the ability of the broadcaster to negotiate fair compensation for such valuable rights.

V. CONCLUSION

In the matter of whether the FCC should revise the totality of circumstances test, WGAW urges caution in making any changes to existing rules. We contend that the market appears to be working successfully and the current rules adequately embody Congressional intent. In the free negotiations contemplated by Congress, there will be times when the parties fail to find mutually acceptable agreement right away. But such occurrence in and of itself does not warrant further regulatory intervention in the retransmission negotiation process. The thrust of the proposed changes is to enable MVPDs to pay less for valuable retransmission and online/on-demand rights while avoiding the consumer disruptions caused by hard bargaining. There is no legal or consumer welfare justification for making such changes at this time.