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	)	

COMMENTS OF CBS CORPORATION

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December 1, 2015

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SUMMARY

Protecting the interests of consumers, and not those of a querulous industry, should guide every Commission decision. Often, the Commission's *not* acting will best serve the consumer. This is one of those times.

This proceeding was instituted at the direction of Congress, which specifically instructed the Commission merely "to *review* its totality of the circumstances test for good faith negotiations." In doing so, the Commission should recognize that the "marketplace for the disposition of rights to retransmit broadcast signals" that Congress intended when it adopted the retransmission consent framework has developed and is functioning. Both broadcasters and MVPDs now face substantial competition within their respective industries that incentivizes them to negotiate for retransmission in good faith. The overwhelming rate at which these negotiations are successfully conducted without disruption demonstrates that the totality test works and that no change to any of the good faith negotiations rules is warranted.

It is imperative that the Commission not disrupt the current marketplace by adoption of the artificial and allegedly "pro-consumer" protections that MVPDs increasingly seek. There is no justification to protect MVPDs who have enjoyed decades of near-monopoly status just because additional distributors of broadcast content have entered their markets.

The MVPDs' self-serving requests include: (i) restrictions on the ability of broadcast stations to control distribution of their own free online content (allowing MVPDs to hold out for below-market rates in negotiations for broadcaster content), (ii) obligations on broadcasters to grant MVPDs online distribution rights (essentially requiring broadcasters to subsidize new MVPD business ventures), and (iii) limitations on the ability of broadcast stations to negotiate for distribution of other valuable content (notwithstanding that this practice developed as a result of MVPDs' historic refusal to pay for retransmission of broadcast programming).

These requests, and others sought by MVPDs for their own benefit, must be rejected. For the benefit of consumers, the FCC should terminate this proceeding.

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CBS Corporation ("CBS") – on behalf of its 29 owned-and-operated local television stations – hereby submits comments in the above-captioned proceeding in which the Commission is to review its retransmission consent-related "totality of the circumstances test." The Commission employs this test to determine whether broadcast television stations and multichannel video programming distributors ("MVPDs") have fulfilled their obligation to negotiate for retransmission consent in good faith based on a fact-specific, case-by-case review of the totality of the circumstances of a particular retransmission negotiation.

As further discussed herein, the Commission's totality of the circumstances test, and the larger retransmission consent negotiation mechanism, are both functioning properly and as a result, MVPDs deliver local broadcast stations to their subscribers on an uninterrupted basis as a routine matter. Since the retransmission consent framework was adopted in 1992, a competitive marketplace for the negotiation of retransmission consent has only recently developed between broadcast stations and MVPDs - exactly as intended by Congress.[1] Any Commission

[1] *See Cable Television Consumer Protection Act of 1991*, 102 S. Rpt. 92 (June 28, 1991) ("Senate Report 102-92") (stating the intent "to establish a marketplace for the disposition of the rights to retransmit broadcast signals [and not] to dictate the outcome of the ensuing marketplace negotiations").

intervention, including any changes to the totality test, would be unwarranted, inappropriate, and harmful to consumers.

Congress Directed The Commission Only To Review, Not Modify, The Totality Test.

The instant proceeding was instituted at the direction of Congress, which directed the Commission only "to *review* its totality of the circumstances test for good faith negotiations."[2] In conducting this review, the FCC must respect the fact that Congress clearly and specifically limited the Commission's authority to act. Congress could have, and would have, directed the Commission to take other action beyond a "review" had that been the statutory goal.[3]

When Congress provides narrow, but specific direction to the Commission, the Commission must honor the scope of its authority, such as when Congress directed the Commission to review the impact of the broadcast exclusivity rules in the MVPD market and to "submit a report on the results of the inquiry" to Congress.[4] Indeed, the Commission is well aware of the potential consequences of overstepping Congressional direction. For example, when Congress directed the FCC to "commence an inquiry" on the use of video descriptions in video programming,[5] the Commission instead adopted video description obligations, which were struck down on judicial review as "Congress authorized and ordered the Commission to produce a report – nothing more, nothing less."[6]

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2 Pub. L. No. 113-200, § 103(c) (2014) (emphasis added).

3 See, e.g., *United States v. Wilson*, 290 F.3d 347, 256 (D.C. Cir. 2002) ("Congress is presumed to preserve, not abrogate, the background understandings against which it legislates.").

4 Pub. L. No. 108-447, Sec. 208 (2004). The Commission duly delivered a report regarding the comments it received and discussed "potential areas" for Congressional action. However, the FCC did not recommend specific Congressional action, let alone adopt any regulatory changes to the exclusivity rules. *Retransmission Consent and Exclusivity Rules: Report to Congress*, Sept. 8, 2005, ¶2.

5 Pub. L. No. 104-104, § 713(f) (1996).

6 *Motion Picture Assoc. of Amer. v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002).

In addition to the statute's plain language, its legislative history demonstrates that the Commission should not adopt changes to the totality of the circumstances test. In requesting the immediate review, Congress stated that, at most, it "may be appropriate" for the FCC to provide additional "guidance" about actions that taken in their entirety may indicate bad faith based on the totality of the circumstances in the particular matter at hand.[7] Thus, neither the statute's language, nor its legislative history, authorizes the Commission to make any changes to the totality of the circumstances test.[8] By simply issuing the NPRM in this proceeding, the FCC has satisfied its congressional mandate to "commence a rulemaking to review" its totality of the circumstances test.[9]

<u>Retransmission Negotiations Occur In A Functioning, Vibrant And Competitive Marketplace</u>

The current retransmission consent negotiation framework, which recognizes that the Communications Act "establish[es] the right of broadcast stations to control the use of their signals by cable systems and other multichannel video programming distributors,"[10] was adopted with the intent to create "a marketplace for the disposition of rights to retransmit broadcast signals."[11] The Commission's review of the totality test must recognize that just such a vibrant and effective marketplace, in which both broadcasters and MVPDs face substantial competition,

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7 *Satellite Television Access and Viewer Rights Act Report of the Committee on Commerce, Science, and Transportation on S. 2799*, 113 S. Rpt. 322 (Dec. 12, 2014).

8 No changes to the totality test are needed precisely because it is designed to provide (and in fact already provides) the Commission broad latitude to conduct a fact-specific review of any negotiation dispute by allowing either party to "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." *Implementation of Section 103 of the STELA Reauthorization Act of 2014*, NPRM (MB Docket No. 15-216, ¶3 ("NPRM").

9 Pub. L. No. 113-200, § 103(c).

10 Senate Report 102-92.

11 *Id*.

finally has developed. This competitive marketplace naturally incentivizes each of the parties to successfully negotiate for the continued and uninterrupted distribution of programming to consumers, as the failure to do so could result in loss of viewership for both broadcasters and MVPDs and create the opportunity for their competitors to serve those viewers alternative video programming.

After more than 20 years, the video marketplace has finally reached a state of equipoise. The fact that MVPDs have been more vocal on this issue does not mean that their claims are justified or that they have less leverage than broadcasters. Rather, it suggests that MVPDs simply want the government to intervene in a way that gives MVPDs additional advantages in their private marketplace negotiations. To reward MVPDs' self-serving requests when consumers now have more options than ever before, both in program offerings and among multiple MVPDs and other distributors in a single community, would amount to regulatory coddling of those MVPDs at the expense of the public interest.

Unfortunately, it appears that the FCC is heading down just such a path of regulatory favoritism, and not in a direction that benefits consumers. The NPRM incorrectly concludes, without a shred of empirical evidence, and by relying only on unsupported statements made by MPVDs, that, because competition within the MVPD marketplace has grown, broadcasters have unfair leverage. Yet, the NPRM conspicuously ignores the greater explosion of competition in the programmer marketplace. In 1993, just after Congress adopted the retransmission consent mechanism, only 81 basic/premium cable networks were available to viewers[12] while MVPDs

[12] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 94-48, Appendix C Table 4 (Rel. Sept. 28, 1994).

now routinely offer “hundreds of television channels as well as thousands of video programs.”[13] In 1993 there were 1,047 full power commercial broadcast TV stations; today there are 1,389.[14] Historically, there were three commercial television broadcast networks and PBS; today there are a total of some 100 broadcast networks, whose launch and survival have been made possible in large part by broadcasters’ use of multicast channels. And while MVPDs lament the competition from Netflix, Amazon, *et al.*, they conveniently ignore that such services compete with broadcasters as well. During this television season alone, there are 1,785 prime-time series offered on broadcast television, MVPD systems and over-the-top platforms. The NPRM in this proceeding improperly ignores the competition regularly faced by broadcasters and instead contemplates changes to the totality test based on the illusory competitive disadvantages claimed by MVPDs.

In addition to recognizing the highly competitive state of the video programming marketplace, the Commission should recognize one of the most significant changes in the retransmission consent landscape – namely the dramatic growth in size of many MVPDs that has occurred since adoption of the retransmission consent negotiation structure. In 1994 the Commission reported that Tele-Communications, Inc. (TCI) was the biggest cable operator with 8.5 million basic subscribers.[15] By 2013, Comcast was the largest, with 21 million subscribers.[16]

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[13] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, ¶ 21 (Rel. Apr. 2, 2015).

[14] *Broadcast Station Totals*; online at https://transition.fcc.gov/mb/audio/newsite/datafiles/BroadcastStationTotals.xls (last visited Nov. 24, 2015).

[15] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 94-48, Appendix C Table 8 (Rel. Sept. 28, 1994), *reporting number of subscribers as of 1990*.

[16] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Table 7 (Rel. Apr. 2, 2015).

During that same period the two DBS MVPDs gained significant market power by virtue of operating on a nationwide basis, growing to more than 34 million combined subscribers in 2013.[17] The continuing consolidation within the video distribution business further suggests that the largest MVPDs will continue to grow and gain market power, with AT&T's acquisition of DirecTV and the proposed Charter/Time Warner Cable/Bright House mergers serving as just two examples.[18] The Commission cannot ignore that these large-scale MVPDs, many with national or near-national reach, increasingly have significant leverage over local broadcast stations in their retransmission consent negotiations. Thus, to the extent the Commission is concerned that MVPDs are charging consumers higher subscription fees, there are factors other than increased competition among MVPDs that are driving these rates. Such factors include, but are not limited to, rising infrastructure and operational costs, the costs to license cable networks and other non-broadcast content, and MVPDs' natural desire for increased profits. None of these cost drivers would be affected by changing the totality of the circumstances test.

The upshot of the increased competition now experienced by both MVPDs and broadcasters is that the video distribution marketplace today has reached a state that policymakers have long strived to achieve – a robust marketplace with broadcasters and MVPDs on comparable footing. That MVPDs are more frequently alleging unfairness is understandable: in the early days, the local cable operator was the sole MVPD in almost every market in the nation. As those MVPDs have lost their near-monopoly/gatekeeper status and the countless attendant lucrative benefits (including the high margins and other negotiating advantages that

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[17] *Id*.

[18] It should be noted that the recent failure of the proposed merger between Comcast and Time Warner Cable was reportedly due to concerns regarding the effect on the combined company's broadband services, not traditional MVPD systems. *Remarks of Jon Sallet, Federal Communications Commission General Counsel*, Sept. 25, 2015, *available online at*: https://apps.fcc.gov/edocs_public/attachmatch/DOC-335494A1.pdf.

they have enjoyed for decades), they may find adjusting to a level playing field can be difficult.[19] Indeed, it is only recently that MVPDs began to experience healthy competition within the video distribution sector, a marketplace in which broadcasters have operated and zealously competed for decades.

Any claims of hardship and requests for additional regulatory favor by MVPDs, therefore, must be examined with skepticism.[20] According to a recent study by Ernst and Young, cable operators have the highest profitability rate (40%) of eleven measured media and entertainment industry sectors.[21] In contrast, broadcast television stations ranked eighth.[22] While MVPDs may now be starting to approach paying broadcasters the true market value of their content, it is well documented that "cable companies continue to generate healthy profits."[23]

MVPDs cannot have it both ways. On the one hand, they routinely advocate for additional government intervention on their behalf based on the claim that local broadcast programming is so critical that they would suffer competitive harm without it. On the other

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19 Ever since MVPDs have begun to experience the intra-market competition in which broadcasters have operated for decades, MVPDs have routinely sought government intervention and anti-market protections similar to those they continue to seek with regard to retransmission consent negotiations. *E.g., see* Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, DA 10-474 (MB, Mar. 19, 2010).

20 The Commission itself recognizes that a "strategy used by some MVPDs [to generate revenue] involves lobbying for modification of the retransmission consent and program access rules governing negotiations between MVPDs and content owners," along with mergers among MVPDs to enhance their bargaining position and acquiring regional sports networks, which has the effect of moving popular sports programming from free, over-the-air viewing. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, ¶ 21 (Rel. Apr. 2, 2015).

21 http://www.ey.com/GL/en/Newsroom/News-releases/news-ey-me-industry-poised-to-generate-one-of-the-best-profit-margins-in-2015 (last visited Nov. 13, 2015).

22 *Id.*

23 *How Much Cable Subscribers Pay Per Channel*, *Wall Street Journal*, Aug 5, 2014; available online at: http://blogs.wsj.com/numbers/how-much-cable-subscribers-pay-per-channel-1626/ (last visited November 13, 2015).

hand, as noted above, these MVPD requests are motivated by their desire for higher profits and reluctance to pay fair market consideration for that valuable content.

In the end, the Commission must maintain laser-like focus on the party that matters most and to whom it owes regulatory respect – the consumer. Modifying the good faith negotiation standard in any manner will breach that duty – most likely by leading to more disruptions of service to the extent such government intervention complicates retransmission negotiations, which are now routinely conducted without any gap in service to viewers. And while disruptions may grow, consumers' wallets surely will not. The NPRM itself admits in a cursory footnote that no action the Commission takes in this proceeding will aid the consumer. Rather, the NPRM confesses: "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."[24] One can only conclude, therefore, that the most likely outcome of any further artificial protection to benefit MVPDs will be to enrich them at the expense of the interest of currently well-served consumers.

Retransmission Negotiations Are Routinely Concluded Successfully And Without Incident

Instead of basing its review of the totality test on the increased competition faced by only one of the two players in the retransmission consent framework, the Commission must instead acknowledge that, notwithstanding the increase in such competition faced by both broadcasters and MVPDs, the vast majority of retransmission consent negotiations are successfully concluded without service disruptions to viewers. The overwhelming rate at which these negotiations are successfully resolved without disruption further demonstrates that the totality of the

[24] NPRM, at fn. 21.

circumstances test and, in fact, the entire good faith negotiations framework, work effectively to discourage parties from negotiating in bad faith.

A conservative estimate based on the 660 cable operators recognized by NCTA would mean that there are at least 3,300 separate retransmission consent agreements with just the affiliates of the five broadcast national networks operating without incident. Indeed, CBS is party to more than 150 agreements, for its 29 broadcast stations alone – and there have only been a few instances in which an MVPD temporarily ceased carrying CBS's programming after it was unable to reach agreement in the decades during which the network has engaged in retransmission negotiations.

The nearly perfectly functioning retransmission marketplace is a true Commission success story and one that Congress envisioned when it adopted retransmission consent. The Commission should applaud the current system and not fall prey to self-serving calls for change in the illusory hope that it could eliminate all disruptions. That will never happen, no matter the regime. And Congress knew that. When it first applied retransmission consent to MVPDs in 1992, Congress stated that it was the "intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention to dictate the outcome of the ensuing marketplace negotiations."[25] The Commission cannot ignore this Congressional intent and instead adopt regulations, such as those suggested in the NPRM, that would specifically dictate the outcome of terms that otherwise would be left to marketplace negotiations, e.g., requiring broadcast stations to grant MVPDs certain online distribution rights, limiting the ability to freely negotiate carriage of various programming streams or for tier or channel placement, etc.

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[25] Senate Report 102-92, at ¶ 36.

The effectiveness of the totality test is also reflected by the fact that the Commission has had to resolve only four claims of a breach based on the totality of the circumstances. In three of those decisions, the FCC found no violation of the good faith negotiation standard, with the only party found to have failed under the totality test being an MVPD.[26] The rarity in which the FCC has had to resolve claims involving the totality test demonstrates that both broadcasters and MVPDs routinely fulfill their obligations to negotiate for retransmission consent in good faith.

The Litany Of Proposals Set Forth In The NPRM Are Unwarranted

Rather than focusing solely on a review of the totality test as Congress directed, the NPRM catalogs a variety of possible ways in which the Commission might further unnecessarily and improperly favor MVPDs in retransmission consent negotiations. All of the potential changes that are designed to benefit MVPDs in their retransmission consent negotiations should be rejected – for the sake of the consumer.

Several of the proposals, including whether the parties may negotiate for non-monetary consideration in return for retransmission rights or agree on channel placement and carriage tier requirements, have been previously examined and confirmed by Congress as legitimate subjects for retransmission consent negotiations.[27] The Congressional recognition that these issues and others may be properly addressed in retransmission consent negotiations should preclude their review in this proceeding.

It is particularly ironic that the NPRM raises MVPD-favored issues regarding the appropriateness of broadcasters simultaneously negotiating for carriage of non-broadcast program networks. This very conduct was directly encouraged by John Malone and others in the cable industry that flatly "refused to pay cash to any of the big networks," suggesting instead that

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[26] NPRM, at fn 31.

[27] S. Rpt. 102-92, 102 Cong. at 35.

there could be "room on its systems for a new cable channel a broadcaster might like to start."[28] Moreover, even the NPRM recognizes that MVPDs already have significant protection under existing antitrust laws with regard to tying of non-broadcast programming in retransmission consent agreements.[29]

In other instances, the NPRM suggests the Commission might improperly adopt broad-brush prohibitions that instead should be left to the fact-specific, case-by-case analysis that the totality of the circumstances test was specifically designed to achieve, including the review of such factors as whether an agreement terminates around the time of a "marquee" event, allegations that a party has refused to substantiate its negotiating positions, provisions related to out-of-market station carriage, and even standard confidentiality provisions.

Regulations That Discourage Free Online Content Harm The Public Interest

Other items raised in the NPRM exceed the scope of the intended review and go well beyond the negotiation of retransmission of broadcast signals. The Commission should not use this proceeding to improperly expand its jurisdiction over other video programming distribution platforms.

Notably, the NPRM asks about the propriety of a broadcaster limiting an MVPD subscriber's access to the station's free online content during those periods in which the MVPD is not authorized to retransmit the station's signal.

Local broadcast stations have a duty to transmit programming for free, over-the-air. They have no obligation to make any of that programming or any other content available online.

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[28] For a fuller history of how broadcasters began negotiating for carriage of additional channels due to the refusal of cable operators to pay retransmission consent fees, see *Comments of the National Association of Broadcasters*, MB Docket No. 07-29/MB Docket No. 07-198, Jan. 4, 2008 (*citing* Mark Robichaux, *Cable Cowboy: John Malone and the Rise of the Modern Cable Business* at 130 (2002)).

[29] NPRM, at ¶ 15.

The fact that many stations choose to do so for free as a routine business practice is in stark contrast to other content providers, including online newspapers and other media providers such as Netflix and Amazon that place their content behind paywalls.[30] Any attempt to require a broadcast station to make its content available online for free, including to customers of distributors with which it is then in a negotiation impasse, would impose an affirmative and constitutionally infirm obligation on broadcasters that is not imposed on other content owners and/or industries.

The Commission should also recognize that such a requirement would have unintended and harmful consequences to the consumer. Prohibiting a broadcaster from limiting access to customers of an MVPD with which it is having a dispute in order to protect its negotiating position would be a strong disincentive for stations to make their content available online as a general practice. Thus, the net effect of such a regulation would be that the significant benefit of having local programming routinely available online at no cost would be sacrificed. Commission action on this issue might (unnecessarily) aid MVPDs, but it will surely harm consumers in the long run.

The Commission should also recognize the unique nature of local broadcasters as the only program providers that make all of their content available to viewers for free as a regular business practice. Even subscribers to an MVPD that is in a retransmission dispute with a broadcast station can still receive the broadcaster's programming content at no cost over the air. The station's programming would also likely be available to many viewers via several other platforms, including over-builder cable systems and two national DBS providers.[31]

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[30] NPRM, at ¶13.

[31] Congress long ago recognized the basic fact that during a retransmission consent dispute "broadcast signals will remain available over the air for anyone to receive without having to obtain consent."

On balance, allowing a broadcaster to suspend some access to online content may be necessary to protect the station's negotiating position and prevent that MVPD from using its separate broadband business to avoid having to pay fair market value for a broadcast station's content. The inconvenience that such MVPD's customers experience by not having free access to that content online for a brief period of time is mitigated by their continuing ability to receive the content at no cost over the air or via another in-market distributor. Of course, that may no longer be true if the Commission's regulations disfavor broadcasters over MVPDs and, as a result, high-quality content and other expensive programming such as sports events migrate from free, over-the-air stations to cable networks – where all consumers must purchase access to such content. When MVPDs cease to carry a cable network during a retransmission dispute, the content is completely lost to viewers – an outcome the Commission should not favor.[32]

Ultimately, the Commission must avoid any action that, while purporting to benefit consumers, would instead reduce their access to free online video programming. The Commission should recognize the fundamental principle that all video programmers must have the ability to control the distribution of their content.[33] Even while a broadcaster must negotiate for retransmission consent in good faith, an obligation not imposed on non-broadcast program networks, the Communications Act recognizes the broadcaster's ultimate right to control distribution by providing that an MVPD may not retransmit a station without its permission.[34]

Senate Report 102-92. Subsequent developments have made broadcast signals available by other distribution platforms as well.

[32] *Comcast Pulls Plug on YES Network*, New York Post, Nov. 17, 2015, *available online at http://nypost.com/2015/11/17/comcast-pulls-plus-on-yes-network.*

[33] To be clear, the right of a content provider, including a broadcast station, to control the availability of its own content online is intrinsically distinct from the issues underlying the Commission's Open Internet rules that prohibit an Internet Service Provider from blocking access to online content owned by third parties.

[34] 47 U.S.C. § 325(b).

<u>MVPDs Should Not Be Permitted To Leverage Traditional Retransmission Negotiations To Build New Businesses</u>

The NPRM also requests comments regarding how an MVPD's "demand"[35] for online distribution rights should be reviewed under the totality test. The Commission should recognize that online distribution rights are distinct from the retransmission of a broadcast station's signal via an MVPD system and should remain outside the scope of the Commission's jurisdiction.[36]

Any claim that an MVPD should have the right to "demand" anything of any broadcaster, be it the station's signal, online video, or anything else MVPDs might wish the FCC to oversee, must be dismissed out of hand. The retransmission consent construct is based on the fact that "Congress[ional] intent was to *allow* broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means."[37] As a result, the Communications Act clearly provides that a station's voluntary consent is needed before its broadcast signal can be retransmitted by an MVPD system.[38] The Commission should not even suggest that a lower standard would apply to a broadcast station's online distribution rights.

The Commission should not impose any obligation on broadcasters to provide online distribution rights to third parties. The fact that a particular MVPD may operate a separate broadband business or otherwise attempt to launch an online video distribution system is irrelevant to whether a broadcast station is fulfilling its obligation to negotiate in good faith with

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35 NPRM, at ¶ 19.

36 As CBS has noted previously, unlike cable and satellite retransmission, the online retransmission of broadcast video programming also raises significant copyright matters that are outside the Commission's jurisdiction. Thus, the Commission lacks the authority to adopt regulations that would require broadcasters to negotiate the right to sublicense content to online platforms. *See Comments of The Walt Disney Company, 21st Century Fox, Inc. and CBS Corporation*, MB Docket No. 14-261, 15 (Mar. 3, 2015).

37 Senate Report 102-92.

38 47 U.S.C. § 325(b).

an MVPD for carriage of its broadcast signal on that MVPD's traditional video distribution system.

Regulations that would obligate a broadcaster to provide online distribution rights when requested by MVPDs also raise First Amendment concerns.[39] The Supreme Court has clearly stated that video programmers "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[40] As a result, broadcasters have First Amendment rights to speak and distribute their content as they determine.[41] A regulation that compels any video programmers – including broadcasters – to speak by making content available when they would otherwise choose not to do so necessarily raises a constitutional issue because "[t]hat kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations, as for individuals, the choice to speak includes within it the choice of what not to say."[42]

Conclusion

As discussed herein, the totality of the circumstances test is used by the Commission to ensure that broadcasters and MVPDs negotiate in good faith with regard to retransmission of station signals as directed by Congress. Congress adopted that retransmission consent process in order to establish a marketplace for the retransmission rights of broadcast stations. In the more than two decades that have elapsed since those requirements were adopted, a healthy and robust

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[39] To be clear, these same First Amendment concerns would apply to any attempt by the Commission to obligate a broadcast station to make its programming available for free to an MVPD's broadband subscribers.

[40] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

[41] *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it.").

[42] *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986).

marketplace finally has developed in which broadcasters and MVPDs routinely and successfully negotiate such retransmission rights without any interruption to consumers. The Commission should not seek to correct what Congress, the marketplace, and consumers have determined. Rather, the Commission should recognize that the functioning marketplace intended by Congress has become a reality that benefits consumers and therefore conclude that no changes should be made to its totality of the circumstances test.

Respectfully submitted,

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December 1, 2015