Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

Genevieve Morelli
Micah M. Caldwell
ITTA
1101 Vermont Ave., NW
Suite 501
Washington, D.C. 20005

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ITTA – The Voice of Mid-Size Communications Companies ("ITTA") hereby submits its comments in response to the September 2, 2015 Notice of Proposed Rulemaking ("*NPRM*") issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The *NPRM* initiates the Commission's review pursuant to the STELA Reauthorization Act of 2014 ("STELAR") regarding 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.[2] STELAR contemplates that the Commission will conduct a "robust examination" of practices used by parties in retransmission consent

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[1] *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, Notice of Proposed Rulemaking, FCC 15-109 (rel. Sept. 2, 2015) ("*NPRM*").

[2] 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).

negotiations.[3] Accordingly, the Commission seeks comment in the *NPRM* on modifying its rules to ensure that broadcasters and MVPDs are meeting their good faith obligations.[4]

As the Commission acknowledges, there have been "significant changes in the retransmission consent marketplace that have altered the negotiation dynamics between broadcasters and MVPDs" since Congress enacted the retransmission consent regime in 1992.[5] Whereas broadcasters in the past typically negotiated for in-kind compensation in exchange for MVPD carriage of their television signals, it has now become the norm for broadcasters to demand exorbitant and ever-increasing amounts of financial compensation for retransmission consent.

Moreover, while the monopoly cable provider was typically the only video service option for consumers in 1992, today consumers generally are able to choose among multiple MVPDs in purchasing video programming services. This increase in retail competition has greatly enhanced broadcasters' leverage in retransmission consent negotiations with MVPDs. As noted in the *NPRM*, "MVPDs that face competition have stronger 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 retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs – including subscribers to its associated voice and

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[3] *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.").

[4] *See* 47 U.S.C. §§ 325(b)(3)(C)(ii)-(iii); 47 C.F.R. § 76.65.

[5] *NPRM* at ¶ 3.

broadband services."[6] In addition, broadcasters that are affiliated with other programing networks have additional leverage because they can tie carriage of their broadcast signal with carriage of the other networks, meaning that an MVPD could potentially lose access to both the broadcast station and other network programming if negotiations fail.

As a consequence of these marketplace changes, retransmission consent fees have steadily grown and are projected to increase even further, leading to higher costs for consumers. Retransmission fees have skyrocketed from $28 million in 2005 to $6.3 billion in 2015, a *22,400%* increase in ten years.[7] In July, SNL Kagan reported that "retransmission consent fees are expected to climb to $10.3 billion in 2021, up from $6.3 billion in 2015."[8]

Retransmission consent negotiations also have become more and more complex in recent years, allowing broadcasters to engage in tactics that lead to a breakdown in negotiations, which increasingly results in consumer harm from programming blackouts. During the past five years, Americans have experienced more than 570 blackouts rendering them unable to watch "must have" broadcast programming.[9] In each of these five years, there have been a record number of blackouts in comparison the year before.[10]

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[6] *Id*.

[7] *See* "Tegna Broadcasting Blocks Out Millions: TV Takedown Affects 38 Markets for DISH Network Customers," American Television Alliance (Oct. 10, 2015), *available at*: http://www.americantelevisionalliance.org/tegna-broadcasting-blacks-out-millions/.

[8] Mike Farrell, "Kagan: Retrans Fees to Rise to $10.3B by 2021: Average Retrans Rate to Climb to $1.53 Per Subscriber/Month," Multichannel News (July 7, 2015), *available at*: http://www.multichannel.com/news/policy/kagan-retrans-fees-rise-103b-2021/391971.

[9] *See* n. 7, *supra*. "Since 2010, millions of Americans have seen dark screens and paid higher bills instead of watching their favorite channels due to at least 570 broadcaster blackouts. The blackouts and TV bills have soared in the past five years and the Tegna blackout sets a new record for the most blackouts in one year at 183. The menace of TV blackouts continues to grow:

- 183 blackouts to date in 2015

In sum, MVPDs attempting to negotiate for carriage of local broadcast stations face continuingly escalating fees and increasingly brazen conduct on the part of broadcasters, necessitating further action by the Commission to protect consumers. ITTA urges the Commission to restore some balance to the retransmission consent negotiation process by concluding that certain broadcaster behavior identified below constitutes a *per se* violation of the duty to negotiate in good faith, or alternatively, is "sufficiently outrageous" and inconsistent with competitive marketplace conditions as to violate the duty to bargain in good faith under the totality of the circumstances test. ITTA also urges the Commission to address the fundamental of lack of transparency in programming negotiations by adopting a reciprocal duty to disclose during retransmission consent negotiations. These changes to the good faith rules are necessary to effectuate the intent of the rules in light of today's marketplace conditions.

II. BACKGROUND

ITTA's members are mid-size, incumbent local exchange carriers that provide a variety of communications services to subscribers in predominantly rural areas in 45 states. All ITTA members provide video service to subscribers utilizing a variety of distribution platforms, including IPTV networks, coaxial cable systems, and fiber infrastructure.[11] Collectively, ITTA

- 107 blackouts in 2014
- 127 blackouts in 2013
- 91 blackouts in 2012
- 51 blackouts in 2011
- 12 blackouts in 2010"

[10] *See id.*

[11] Some ITTA members also resell DBS service in a number of markets throughout their footprints. However, the data and information provided in this filing relates strictly to ITTA members' terrestrial-based video offerings.

members pass well over 4.5 million homes with video service and serve more than 850,000 video subscribers in nearly 70 television markets across the United States.

In the vast majority of these markets, ITTA members are new entrant MVPDs that compete head-to-head against both DBS providers, at least one (and in some cases multiple) incumbent cable operators, and online video providers, such as Netflix, Hulu, Amazon Video, Apple TV, and others. Entering the market as the third, fourth, or fifth competitor is not easy, but ITTA members and other new entrant MVPDs have in recent years become a growing presence in the video distribution market because consumers have increasingly come to demand the ability to subscribe to a suite of services that includes video programming bundled with data, voice, and other services. Offering a video product with numerous and diverse broadcast and non-broadcast programming options that consumers desire allows ITTA members to compete in today's communications marketplace.

Offering a video product also has the important benefit of fostering broadband investment and deployment. ITTA members have invested hundreds of millions of dollars to upgrade their networks to give subscribers access to a competitive video offering that includes hundreds of standard and high definition linear programming networks, popular premium channels, thousands of options for video-on-demand programming that customers may view at the time of their choosing, the capability to stream programming to other devices on-the-go with TV Everywhere and similar applications, as well as other advanced services and functionalities demanded by consumers.

In addition, ITTA members' provision of video service drives broadband adoption when video is offered as part of a bundle with other communications services. In a recent ITTA survey comparing broadband subscribership in video versus non-video markets, nearly all survey respondents indicated that they have experienced an increase in broadband adoption in the markets where they provide video service. Indeed, the broadband adoption rate in some video markets outpaces non-video markets by a ratio of nearly 2:1.

However, like other MVPDs, ITTA members continue to experience dramatically increasing fees for video content despite increased retail competition in the video distribution marketplace. The issue of rising content costs is particularly problematic for small and new entrant providers like ITTA member companies because they lack bargaining leverage to negotiate the same rates, terms, and conditions available to larger rivals. Indeed, ITTA's members have reported escalating content fees, particularly for broadcast stations, as the single most significant cost issue that they face in the delivery of video programming. With respect to retransmission consent fees for broadcast programming, more than half of survey respondents reported that they experienced an increase in those fees of more than 90% in comparison to the previous contract cycle. By contrast, 100% of respondents reported an average increase of 20% or less for non-broadcast programming fees.

The Commission is well aware of the public interest benefits of competition from smaller, new entrant MVPDs, and has "repeatedly found… that entry by LECs and other providers of wire-based video service into various segments of the multichannel video marketplace will produce major benefits for consumers," including "lower prices, more channels, and a greater diversity of information and entertainment from more sources."[12] Thus, in conducting this proceeding, the Commission must carefully evaluate not only the negative impact that bad faith negotiation tactics have on consumers and content costs, but also the threat

[12] *Exclusive Service Contracts for Providing of Video Service in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 17 (2007).

the current retransmission consent regime poses to the market for facilities-based video distribution, the continued entry and expansion by new providers like ITTA member companies, and the ability of new entrant MVPDs to advance the Commission's broadband deployment and adoption goals.

III. THE COMMISSION SHOULD CONCLUDE THAT CERTAIN BROADCASTER BEHAVIOR CONSTITUTES A *PER SE* VIOLATION OF THE DUTY TO NEGOTIATE IN GOOD FAITH

The *NPRM* seeks comment on updating the totality of the circumstances test to ensure that the conduct of broadcasters and MVPDs during retransmission consent negotiations meets the retransmission consent good faith standard. As part of this examination, the Commission asks whether it should categorize specific practices identified in the *NPRM* (discussed in more detail below) as evidencing bad faith under the totality of the circumstances test,[13] or alternatively, whether such practices should instead be considered additional *per se* violations of the duty to negotiate retransmission consent in good faith.[14]

Given that the Commission's stated objective in this proceeding is "to provide the industry with further guidance… as to what constitutes good faith in retransmission consent negotiations," ITTA urges the Commission to conclude that the various broadcaster tactics discussed below constitute a *per se* violation of the duty to negotiate in good faith.[15] Taking this course would send a clear signal that such behavior will not be tolerated and would serve as a powerful deterrent to keep broadcasters from engaging in such bad faith behavior during retransmission consent negotiations.

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[13] *See NPRM* at ¶¶ 12-16.

[14] *See id*. at ¶ 20.

[15] *Id.* at ¶ 11.

Furthermore, such action would be consistent with Congressional intent "for the FCC to provide additional specific guidance as to actions that… evidence bad faith" to "help provide more certainty to the parties to a negotiation and ultimately give consumers greater faith in the retransmission consent process."[16] The fact that the Commission is seeking comment on potential updates to the totality of the circumstances test does not preclude it from concluding that certain practices or conduct constitute a *per se* breach of the duty to negotiate in good faith.[17] Indeed, the Commission has ample authority to adopt the changes suggested herein pursuant to Sections 309 and 325 of the Communications Act, in addition to STELAR.[18]

In its prior advocacy, ITTA identified certain bad faith tactics engaged in by broadcasters that target or are particularly problematic for smaller and new entrant MVPDs.[19] These tactics include:

- Manipulating the timing of the initial contract offer to present a last-minute, "take-it-or-leave-it" proposal;
- Insisting on non-disclosure provisions that prevent smaller and new entrant MVPDs from disclosing in legal or regulatory proceedings before regulators the prices, terms, and conditions offered; and
- Engaging in discriminatory pricing against smaller and new entrant MVPDs that is not based on objective marketplace conditions.

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[16] Senate Commerce Committee Report at 13.

[17] *See NPRM* at n. 34.

[18] *See, e.g.*, Letter from Samuel L. Feder, on behalf of Cablevision Systems Corporation, to Marlene H. Dortch, FCC, MB Docket No. 10-71, at 5-7 (filed July 31, 2015) ("Cablevision *Ex Parte*") (providing an overview of the Commission's legal authority to adopt proposed reforms to the retransmission consent regime). Should the Commission for some reason decline to conclude that such broadcaster conduct constitutes a *per se* violation of the duty to negotiate in good faith, the Commission should alternatively identify this behavior as "sufficiently outrageous" or inconsistent with competitive marketplace considerations so as to violate the duty go bargain in good faith under the totality of the circumstances test.

[19] *See, e.g.*, Letter from Micah M. Caldwell, ITTA, to Marlene H. Dortch, FCC, MB Docket No. 10-71 (filed Aug. 7, 2015) ("ITTA *Ex Parte*"), at 2.

Such practices, which are routinely employed by broadcasters, are coercive, anticompetitive, and detrimental to the public interest. Manipulating the timing of the initial contract offer to present a last-minute, "take-it-or-leave-it" proposal, for instance, impedes an MVPD's ability to engage in meaningful negotiations, and often causes confusion for subscribers because of the Commission's rules requiring 30 days' notice of programming changes. Likewise, insisting on non-disclosure provisions that prevent smaller and new entrant MVPDs from disclosing relevant information to regulators when pursuing available legal or regulatory remedies is problematic because it prevents MVPDs from seeking relief from bad faith conduct for themselves and their subscribers. Such non-disclosure provisions also interfere with the ability of the FCC, which is responsible for monitoring and overseeing developments in the retransmission consent marketplace, to perform this necessary and valuable role.

Similarly, broadcaster engagement in discriminatory pricing that does not reflect objective marketplace conditions is harmful because it leads to less marketplace competition and higher prices for consumers of video services. It is well settled that programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs through volume discounts, which are based on the number of subscribers the MVPD serves. One study indicates that "small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs."[20] In the experience of ITTA member companies, fees paid for RSN programming in particular are as much as 50% higher for smaller MVPDs than for larger providers.[21] This trend of higher

[20] *See* Comments of the American Cable Association, MB Docket No. 07-269 (filed June 8, 2011), at 9.

[21] *See* Comments of ITTA, *In the Matter of Mediacom Communications Corporation Petition for Rulemaking to Amend the Commission's Rules Governing Practices of Video Programming Vendors*, RM-11728 (filed Sept. 29, 2014) ("ITTA Comments"), at 5.

programming fees that are inversely proportional to MVPD size extends to broadcast programming as well. However, program production and acquisition costs are sunk, and the transmission and administrative costs associated with delivery of programming are the same for all MVPDs, regardless of size. Thus, volume discounts or other pricing methods that favor larger providers are not reflective of the costs of programming, placing smaller retail video providers at an unreasonable competitive disadvantage vis-à-vis their larger rivals.

While Section 325 of the Act expressly 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, that is only true "if such different terms and conditions are based on competitive marketplace considerations."[22] Moreover, the Commission has made clear that "[c]onsiderations that are designed to frustrate the functioning of a competitive market are not 'competitive marketplace considerations.'"[23] Volume discounts that give larger MVPDs lower rates for video programming are not justified by cost considerations and are detrimental to the public interest. When programmers utilize unreasonably discriminatory volume-based pricing, consumers who are not served by larger MVPDs are forced to bear the cost. This burden becomes even more disproportionate when larger providers are allowed to merge because smaller MVPDs and their customers have to make up the difference so that programmers can recoup revenues they give up through volume discounting. The Commission must move expeditiously to address the harms such discriminatory volume discount practices cause for competition and consumers.

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[22] *See* 47 U.S.C. § 325(b)(3)(C).

[23] *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, ¶ 58 (2000) ("*Good Faith Order*").

Thus, based on the foregoing, ITTA proposes that the FCC conclude that it is a *per se* failure to negotiate in good faith for a television broadcast station to:

> *Not make its initial contract proposal at least 90 days prior to the existing contract's expiration, which would automatically extend the existing term for 90 days beyond the contract's expiration.*
>
> *Prevent an MVPD from disclosing the rates, terms, and conditions of a contract proposal or agreement to the Federal Communications Commission, court of competent jurisdiction, and/or other state or federal governmental entity in connection with a formal retransmission consent complaint or other legal or administrative proceeding.*
>
> *Discriminate in price among MVPDs in a market unless the broadcaster can demonstrate that there are direct and legitimate cost differences associated with providing programming to different MVPDs.*

In addition to the bad faith negotiation tactics discussed above, the American Television Alliance ("ATVA") (of which ITTA is a member) has identified a variety of other ways a broadcaster can exercise its leverage to extract higher fees and harm consumers to gain leverage in retransmission consent negotiations, including by:

- Insisting that MVPDs carry unrelated programming as a condition of receiving retransmission consent without giving meaningful economic alternatives;
- Demanding fees for additional subscribers apart from those that receive the retransmitted station;
- Blocking access to online content during a negotiation impasse;
- Timing the contract expiration to coincide with "must have" broadcasts;
- Preventing importation of out-of-market signals during negotiation impasses;
- Ceding the right to negotiate to networks or other third parties; and
- Placing limits on consumers' use of lawful devices.[24]

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[24] *See* Comments of the American Television Alliance, MB Docket No. 15-216 (filed Dec. 1, 2015) ("ATVA Comments"), at 42-51. ITTA notes that categorizing program tying as bad faith behavior would require the Commission to reverse its previous conclusion that conditioning carriage of a broadcast station on carriage of other programming is presumptively consistent with competitive marketplace considerations. *See NPRM* at ¶ 9. We nonetheless believe the FCC

ATVA describes in detail the anti-consumer and anticompetitive effects of such behavior in its comments in response to the *NPRM*, outlining for each category the precise behavior that should be considered bad faith.[25] ITTA does not repeat those arguments here, but continues to fully support the conclusion that such conduct should constitute a *per se* violation of the duty to negotiate in good faith.[26]

ITTA also believes the Commission should consider tier placement and penetration requirements as *per se* bad faith behavior to the extent the Commission stops short of taking steps to prohibit program tying, as advocated above.[27] As ITTA previously pointed out, many broadcasters routinely dictate how MVPDs must package programming in their retail offerings to consumers by including in affiliation agreements provisions that effectively require MVPDs to include the broadcaster's unrelated programming on the basic or expanded basic tier (the most highly-penetrated tiers).[28] Sometimes this entails a contract provision that expressly requires carriage on either the first or second most highly-penetrated tier. In other cases, broadcasters achieve the same result indirectly by incorporating a graduated license fee schedule that imposes a significantly higher charge if weaker programming is not carried on the same tier as more popular programming. By employing these and other practices that tie tier placement to

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should reverse its prior determination, given the distorting effect program tying has on retransmission consent negotiations.

[25] *See* ATVA Comments at 42-51.

[26] *See* ITTA *Ex Parte* at 1.

[27] *See also* Cablevision *Ex Parte* at 5. ITTA notes that, as with program tying, categorizing tier placement and tier penetration requirements as bad faith behavior would require the Commission to reverse its previous conclusion that such conduct is presumptively consistent with competitive marketplace considerations. *See NPRM* at ¶ 9. We nonetheless believe the FCC should reverse its prior determination, given the negative impact such practices have on consumers.

[28] *See* ITTA Comments at 3.

subscriber penetration and related metrics, broadcasters force consumers to purchase large bundles of programming they may not want and restrict MVPDs' ability to provide the programming choices their customers desire, which should constitute a *per se* violation of the duty to negotiate in good faith.

Finally, ITTA urges the Commission to develop a robust record on other negotiating tactics that lead to higher prices for or other harms to consumers, such as the potential anticompetitive impact of "most favored nation" clauses[29] and provisions that restrict online streaming or other digital transmission rights for smaller and new entrant MVPDs.[30] Without non-discriminatory access to programming content under reasonable terms and conditions, smaller and new entrant MVPDs face a competitive disadvantage that impedes their ability to compete and/or deters them from entering new video markets altogether. The Commission must address the types of broadcaster behavior identified above to ensure that smaller and new entrant MVPDs can compete effectively in the video distribution marketplace and provide an affordable competitive alternative for video programming subscribers.

IV. THE COMMISSION SHOULD ADOPT A RECIPROCAL DUTY TO DISCLOSE IN GOOD FAITH NEGOTIATIONS

As indicated in the *NPRM*, Congress intended for the Commission to "follow established precedent, particularly in the field of labor law, in implementing the good faith retransmission consent negotiation requirement."[31] Accordingly, the Commission seeks input on whether labor

[29] *See NPRM* at ¶ 16.

[30] *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."). Several ITTA members have reported limitations on their ability to obtain online streaming or other digital transmission rights, particularly in comparison to larger MVPDs.

[31] *Good Faith Order* at ¶ 6.

law precedents or precedents from other areas of law may be useful in amending its rules relating to good faith negotiations.[32]

As the Commission is aware, the number one issue that divides the parties in retransmission consent negotiations is price. In fact, the skyrocketing increases in retransmission consent fees over the past decade are attributable in large part to the fact that the good faith negotiating requirement, as currently implemented, imposes no obligation on a broadcaster to explain, justify, or substantiate that its price demands reflect competitive marketplace considerations. Thus, as ITTA and others have previously advocated, the Commission should look to labor law precedent to tackle the fundamental problem of the lack of transparency in retransmission consent negotiations.[33]

The Commission has previously concluded that drawing on established labor law precedent governing collective bargaining as a tool for interpreting and applying the good faith retransmission consent negotiation requirement is consistent with Congressional intent.[34] Indeed, the concept of a "totality of the circumstances" standard for assessing whether a party has negotiated in good faith comes directly from labor law.[35] Moreover, as the Supreme Court

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[32] *See NPRM* at ¶ 8.

[33] *See Ex Parte* Letter of CenturyLink, Consolidated Communications, Inc., FairPoint Communications, Inc., ITTA, Mediacom Communications Corp., NTCA, Public Knowledge, and TDS Telecommunications Corp., MB Docket No. 10-71 (filed Aug. 18, 2015).

[34] *Good Faith Order* at ¶ 22.

[35] Because the issue of whether an employer "bargains in good faith" is inherently one of fact that can only be resolved by reviewing the specific circumstances and conduct involved, courts and the National Labor Relations Board will view the totality of a party's conduct. *See E. Maine Med. Ctr. v. NLRB*, 658 F.2d 1 (1st Cir. 1981) (court stated that "distinguishing hard bargaining from surface bargaining requires sifting a complex array of facts"); *NLRB v. Cable Vision, Inc.*, 660 F.2d 1 (1st Cir. 1981) (court stated that the question of a violation is whether, from totality of employer's conduct, employer appeared to "go through the motions" of negotiations as a pretense, with no sincere desire to reach agreement). *See also Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues,* Notice of Proposed

has stated, "[g]ood faith bargaining necessarily requires that claims made by either bargainer should be honest claims."[36]

In order to give meaning to the labor law requirement that good faith negotiating requires that the parties' claims be "honest," the courts have held that "[i]f an 'argument is important enough to present in the give and take of bargaining… it is important enough to require some sort of proof of its accuracy.'"[37] Thus, it is a well-settled principle of labor law that negotiating parties have an obligation to provide, upon request, relevant information substantiating claims made in the course of the negotiation.[38] For example, where an employer asserts that it cannot afford the union's wage demands or that agreeing to such demands would put the employer at a specific "competitive disadvantage," the union has the right to request and receive information, including financial information, needed to determine the veracity of those claims.[39] The rationale underlying this "duty to disclose" is that the exchange of relevant information during

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Rulemaking, CS Docket No. 99-363, FCC 99-406, ¶ 16 (rel. Dec. 22, 1999), *citing General Electric Co.*, 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736 (2d Cir 1969), *cert. denied*, 397 U.S. 965 (1970); *Virginia Holding Corp.*, 293 N.L.R.B. 12 (1989); *American Commercial Lines, Inc.*, 291 N.L.R.B. 1066 (1988).

[36] *NLRB v. Truitt Manufacturing Co*., 351 U. S. 149, 152 (1956).

[37] *KLB Industries, Inc. v. NLRB,* 700 F. 3d 551, 555 (D.C. Cir. 2012), *quoting Truitt, supra,* 351 U.S. at 152-53.

[38] *Truitt*, *supra*, 351 U.S. at 153 ("refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to negotiate in good faith"); *see also E.I. DuPont de Nemours & Co.*, 346 NLRB 553 (2006), *enforced*, 489 F.3d 1310 (D.C. Cir. 2007) (finding that unlawful refusal to provide requested information necessary for other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude lawful impasse).

[39] *KLB Industries, supra,* 700 F.3d at 556-57; *Nat'l Extrusion & Manufacturing Co*., 357 NLRB No. 8 (2011), *enforced sub nom., KLB Industries, supra*. The duty to furnish information is not imposed on employers alone; a similar duty is owed by unions. *Printing & Graphic Communications Local 13 (Detroit) (Oakland Press Co.),* 233 NLRB 994 (1977), *aff'd* 598 F.2d 267 (D.C. Cir. 1979).

negotiations will mitigate differences in the parties' bargaining power and thus increase the chances of a successful completion of a collective bargaining agreement.[40]

In the context of retransmission consent negotiations, as in the case of collective bargaining, market transparency and price discovery will help bridge the differences in the parties' negotiating positions. In its *Good Faith Order*, the Commission recognized that a "[b]lanket rejection of an offer without explaining the reasons for such rejection does not constitute good faith negotiation" and that disclosure of the reasons for a broadcaster's rejection of an MVPD's proposal is necessary to ensure that the MVPD is "not negotiating in a vacuum and understand[s] why certain terms are unacceptable to the broadcaster."[41] Nonetheless, the Commission expressly declined to mandate information sharing, stating that "[b]roadcasters are not required to justify their explanations by document or evidence."[42]

The approach adopted by the Commission is not working. First, the rationale that the Commission offered in the *Good Faith Order* for not imposing an information exchange requirement comparable to the one found in labor law is no longer sustainable. Specifically, the Commission defended its decision on the grounds that "there is no mutuality of obligations under Section 325(b)(3)(C)" and thus marketplace negotiations "would be negated by a one-sided information disclosure requirement."[43] However, in 2004, Congress amended Section 325(b)(3)(C) to impose on MVPDs a "reciprocal" good faith bargaining obligation.

[40] Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

[41] *Good Faith Order* at ¶ 44.

[42] *Id*.

[43] *Id*. at ¶ 44, n.100.

Consequently, there is no longer a valid reason for not requiring that the negotiating parties not only give reasons for their bargaining positions, but also that they substantiate those reasons.[44]

Second, by definition, given this mutuality of obligations, the required "good faith" negotiations cannot take place when one of the negotiating parties holds all the cards. Yet, that is the situation that exists today, particularly with respect to retransmission consent negotiations between big four network affiliates and small and medium-sized MVPDs. The bilateral monopoly[45] that defined the marketplace in 1992, and that was expected to keep retransmission consent price demands in check, has been replaced by a one-sided monopoly in which broadcasters and consumers have an array of essentially substitutable distributors to choose between while distributors have no substitutes for their local network affiliates.[46] As a result, instead of being conducted in an "atmosphere of honesty, purpose and clarity of process" as Congress intended,[47] retransmission consent negotiations have become increasingly acrimonious, with the number of actual and threatened disruptions of service growing year after year.

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[44] The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207 (amending 47 U.S.C. § 325(b)(3)(C)).

[45] In a bilateral monopoly, "an upstream monopolist sells its output to a single downstream buyer who may also be a monopolist in its output market." Roger D. Blair, David L. Kaserman & Richard E. Romano, *A Pedagogical Treatment of Bilateral Monopoly*, 55 S. Econ. J. 831 (1989).

[46] *See, e.g.*, 138 Cong. Rec. S643 (Jan. 30, 1992) ("It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare.") (Statement of Sen. Inouye); 183 Cong. Rec. S14603 (Sept. 22, 1992) ("I believe that most broadcasters will opt for must carry while a significant number other broadcasters will negotiate nonmonetary terms, such as channel position, for the use of their signal…the vast majority of cable operators will, in my opinion, not incur significant increase in cost due to the retransmission consent provision.") (Statement of Sen. Bradley). *See also Implementation of the Cable Television Consumer Protection and Competition Act of1992: Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶ 115 (1994) (expressing Commission's belief that "there are incentives for both parties to come to mutually beneficial arrangements").

[47] *Good Faith Order* at ¶ 24.

Unrestrained by market forces or any requirement that they justify their price demands, broadcasters are free to pursue a "sky's the limit" approach to retransmission consent that is antithetical to the concept of good faith negotiations.[48]

While the proposed duty to disclose is not a solution to all of the concerns that led Congress to mandate a review of the existing totality of the circumstances test, it will create conditions in which retransmission consent negotiations are more likely to succeed and will do so without requiring the Commission to set prices or otherwise address the substance of the parties' negotiating positions.[49] Thus, the Commission should require as part of this proceeding that the parties negotiating the terms of a retransmission consent agreement disclose relevant information substantiating and verifying their bargaining claims. At a minimum, a broadcaster that seeks to justify its price demands by reference to "market prices" or the prices paid by other MVPDs should be required to provide documentation substantiating those assertions. Of course, achieving transparency in a manner that would truly level the playing field in retransmission consent negotiations would be unlikely unless this duty to disclose is paired with the changes relating to non-disclosure provisions ITTA proposes in Section III above.

By imposing a good faith negotiation obligation on the parties to retransmission consent negotiations, "Congress has signaled its intention to impose some heightened duty" on retransmission consent negotiations by directing the Commission to establish bargaining requirements that are "greater than those" that apply in other contexts.[50] Thus, nothing in the Communications Act prevents the Commission from subjecting negotiations for the carriage of

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[48] *See* CableFAX Daily, June 3, 2011, at 2.

[49] While imposing a duty to disclose will create conditions in which retransmission negotiations are more likely to succeed, there may still be instances when the parties involved in the negotiations seek remedies from the appropriate governmental bodies.

[50] *Good Faith Order* at ¶ 24.

broadcast signals to a disclosure requirement not otherwise applicable to most commercial transactions. ITTA urges the Commission, pursuant to its authority under STELAR and Sections 325, 309, and 616 of the Act, to adopt a duty to disclose relevant market information, along with necessary restrictions on contractual non-disclosure provisions, in order to promote transparency and create an environment more conducive to marketplace negotiations for retransmission consent.

V. CONCLUSION

In conclusion, ITTA urges the Commission to restore some balance to the retransmission consent negotiations between broadcasters and MVPDs by concluding that certain broadcaster behavior constitutes a *per se* violation of the duty to negotiate in good faith, or alternatively, is "sufficiently outrageous" and inconsistent with competitive marketplace conditions as to violate the duty to bargain in good faith under the totality of the circumstances test. ITTA also urges the Commission to address the fundamental of lack of transparency in programming negotiations by adopting a reciprocal duty to disclose, coupled with appropriate limitations on the use of non-disclosure provisions in programming agreements, in order to create an environment more conducive to marketplace negotiations for retransmission consent.

The changes ITTA proposes are necessary to effectuate the intent of the good faith rules, address the rising costs of programming for MVPDs and their customers, minimize the disruption and harm that occurs when consumers lose access to desired programming, and ensure that consumers benefit from increased broadband investment that stems from increased competition in the video marketplace.

Respectfully submitted,

By: /s/ Micah M. Caldwell

Genevieve Morelli
Micah M. Caldwell
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, D.C. 20005
(202) 898-1520
gmorelli@itta.us
mcaldwell@itta.us

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