March 28, 2016

VIA ECFS *EX PARTE NOTICE*

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Implementation of Section 103 of the STELA Reauthorization Act of 2015, et al.*****, MB Docket No. 15-216 and** ***Amendment of the Commission's Rules Related to Retransmission Consent*****, MB Docket No. 10-71**

Dear Ms. Dortch:

On March 24, 2016, representatives of the Networks for Competition and Choice Coalition ("Coalition"), including Jill Canfield of NTCA, John Bergmayer and John Gasparini of Public Knowledge, Genny Morelli of ITTA, Angie Kronenberg and the undersigned counsel from INCOMPAS, and Michael Calabrese of the Open Technology Institute at New America met with Martha Heller, Raelynn Remy, Nancy Murphy, Steve Broeckaert, Calisha Myers, and Diana Sokolow of the Media Bureau to discuss the above-captioned proceedings.

The Commission has long recognized that residential consumers prefer to purchase both broadband and linear video services together in a bundled product. As such, competitive broadband networks must provide video services, in addition to broadband, in order to compete head-to-head with other wireline providers in the residential marketplace and/or to achieve higher broadband adoption rates by consumers. Obtaining the rights to provide video content, in particular the "must have" programming found on local broadcast stations, is critical to offering linear video; however, content costs continue to rise significantly.

Members of the associations that make up the Coalition are providing linear video service as smaller and new entrant multichannel video programming distributors ("MVPDs"), often at a loss, in order to complete the bundle and support the provision of their broadband service. This has a direct impact on their ability to expand and upgrade their broadband networks. While video services remain vital to deployment and adoption of broadband services, current video programming prices and practices make it particularly difficult for these networks to offer content in competitive retail packages that reflect what their subscribers want and can afford.

In light of the increased competition in the video distribution market, smaller and new entrant MVPDs, like our members, risk the permanent loss of subscribers to any of their associated services – video, voice, or broadband – if they are unable to reach a retransmission consent agreement with broadcasters. Broadcasters regularly use this leverage to negotiate anticompetitive terms and conditions and rate increases with little to no explanation or economic

justification. Perhaps most troubling is that the rate disparity between competitive networks and large, incumbent MVPDs, who are able to secure volume discounts based on their subscriber levels and ability to withstand short-term signal disruptions, continues to grow. This issue, in particular, has become a significant problem as small and new entrant MVPDs are the video providers who can least afford to meet broadcasters' increasing rate demands.

While broadcasters and large MVPDs have dominated the recent conversation in this proceeding, the Commission must not ignore the fact that the retransmission consent marketplace is not working for smaller and new entrant MVPDs. In short, the Coalition believes Commission action on the retransmission consent negotiation process is critical to promoting broadband and video competition and to providing affordable video service to our customers.

To ensure that all parties are meeting the obligation to negotiate in good faith, the Commission must bring transparency to all aspects of the retransmission process. Currently, the good faith negotiation standard does not require broadcasters to share information, justify their explanation for rejecting offer terms, or substantiate reasons for their negotiating positions. The retransmission consent marketplace cannot function effectively in an environment where asymmetric information persists and the justification for rate hikes, volume discounts, and other terms and conditions remains unknown to one of the parties. In the instant proceeding, the Commission should require the negotiating parties to provide, upon request, all relevant information substantiating and verifying offers or claims made in the course of negotiations. A reciprocal duty to disclose would allow MVPDs access to information about retransmission consent rates, including base rates and volume discounts, and permit small and new entrant MVPDs to better assess the prices being offered during negotiations. Shining a light on the process could help ease the price discrimination between large, incumbent MVPDs, who are able to secure volume discounts and smaller providers who do not possess the leverage to negotiate favorable terms.

Similarly, we indicated that the Commission can increase the likelihood of success in the market by limiting or restricting the use of non-disclosure agreements, so that information about retransmission consent terms may be shared with courts, regulatory entities, legislative bodies, and membership-based associations or organizations that represent these companies' interests for advocacy purposes. Decision makers and advocates for these providers must have access to all relevant information, including the prices and terms offered to small companies, in order to effectively discharge their duties. Increasing transparency both during a transaction and once it is completed, will contribute to the speedy resolution of disputes and improved advocacy.

During the meeting, the Coalition also urged the Commission to clarify the good faith standard and to address tactics that have led to breakdowns in negotiations that cause harm to consumers through increased prices and signal blackouts. With regard to forced bundling, broadcasters routinely engage in program tying by conditioning retransmission consent upon carriage of other programming. This practice harms consumers by increasing the cost of video service for unwanted programming and is anticompetitive to video providers attempting to differentiate their service in the market. Absent the provision of a viable economic alternative for the primary signal, the Commission should consider the practice of bundling a *per se* violation of the obligation to negotiate in good faith. In the alternative, the Commission could

institute a rebuttable presumption that bundling represents bad faith behavior during retransmission consent negotiations, with particular attention paid to the relative market power of the negotiating parties in any given instance.

The Coalition also suggested that the Commission use the good faith proceeding to address negotiation tactics that have contributed to the practice of blacking out broadcast signals. Despite broadcasters' assurances that their content is always available over-the-air, many consumers are simply unable to receive these signals. A survey of the providers represented by the Coalition found that for 40% of these MVPDs 50% or more of their customers could not receive over-the-air broadcast signals.[1] The Coalition explained that there are two broadcaster negotiating tactics related to negotiating timing that compel small and new entrant MVPDs into accepting unreasonable retransmission consent terms and conditions rather than risk the threat of blackout and which should be *per se* violations of the obligation to negotiate in good faith – last minute negotiations and making strategic use of marquee programming to secure an agreement.

First, the Coalition noted that broadcasters often present a renewal proposal with an intractable set of terms and conditions shortly before a retransmission consent agreement expires. We explained that manipulating the timing of the initial contract offer to present a last minute "take it or leave it" proposal impedes an MVPD's ability to engage in meaningful negotiations. Given the catastrophic effect a blackout can have on its business, small and new entrant MVPDs have no choice but to take the agreement as it is presented to them. The Coalition recommended that the Commission require negotiating parties to deliver renewal proposals at least six months prior to the existing contract's expiration. Providing material terms to MVPDs six months in advance increases the likelihood that parties will reach a new agreement and gives the parties an opportunity to seek regulatory relief at the Commission for a breach of the duty to negotiate in good faith well in advance of an agreement's expiration if the negotiations falter.

Broadcasters are also able to increase their leverage in negotiations by timing the expiration of retransmission consent agreements to coincide with network exclusive, marquee events. The Coalition indicated that nearly half of its members who provide video services have faced a threat from broadcasters to withhold or blackout a station in a period leading up to a popular sports, entertainment, or other marquee programming. The Coalition argued that this behavior distorts the retransmission consent marketplace by enabling broadcasters to engage in price gouging in anticipation of "must have" programming. We encouraged the Commission to adopt a framework in which it is a *per se* violation for negotiating entities to insist on contract expiration dates in the 30 days leading up to marquee events or other special programming or to withhold retransmission consent during the airing of, during the one-week run up prior to, or for one day after a top-rated marquee event.

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[1] *See* NTCA and INCOMPAS' 2015 Video Competition Survey, Oct. 2015, *available at*: www.incompas.org/files/The%20RuralBroadbandAssociationandINCOMPAS2015VideoCompetitionSurvey.pdf, at 2. A total of 226 companies participated in the survey. Survey results can be estimated to be accurate within +/-6% at the 95% confidence level.

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced dockets. Please do not hesitate to contact me if you have any questions about this submission.

Respectfully submitted,

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