

**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)	

REPLY 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 reply 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.

In this reply, the WGAW reiterates that changing the Totality of the Circumstances Test (“TOCT”) at this time is an unwarranted response to marketplace dynamics. Commentators introduce scant evidence beyond the rise in cash payments and hard bargaining to justify overhauling the FCC’s *Good Faith Negotiations and Exclusivity Order* of 2000 (“*Good Faith Order*”).¹ Claims of widespread bad faith are based largely on a handful of anecdotes or exceptional cases. Despite the lack of systematic evidence, commentators propose remedies that far exceed the scope of Congress’s directive to “commence a rulemaking to review its totality of the circumstances test for good faith negotiations.”² They seek to redefine the meaning of good faith or tack on a laundry list of prohibitions to the per se standard. The proposals that do focus on the TOCT as Congress instructed threaten to create confusion and entangle the Commission in endless retransmission consent negotiations.

The underlying dynamic of the retransmission market is neither a function of bad faith nor of regulatory failure; it is a function of the fact that the introduction of competition on the distribution side has allowed broadcasters to finally capture fair value for the content and rights they license to multichannel video programming distributors (“MVPDs”). Try as they might,

¹ 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. (2000) (“Good Faith Order”).

² Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014).

MVPDs should not be allowed to use their size and clout to change regulations in order to hold programming prices below market rates.

II. THERE IS INSUFFICIENT EVIDENCE OF WIDESPREAD BAD FAITH CONDUCT

Commentators rely heavily on an increase in cash payments and hard bargaining to justify overhauling the Commission's *Good Faith Order* of 2000. Yet the docket contains little systematic evidence to support claims of widespread problems with negotiating practices and tactics. Many commentators assume that because some high profile negotiations have grown contentious, bad faith must be to blame. But it is entirely possible for prices to rise and parties to bargain hard while sincerely seeking a mutually acceptable agreement. Commentators also rely on anecdotal evidence of bad faith, which may be hearsay and does not show such conduct to be commonplace and harmful to negotiations. As WGAW noted in our initial comments, the overwhelming majority of retransmission negotiations result in an agreement without any signal interruption and the increase in original programming and additional on-demand rights offered by broadcasters more than justifies the retransmissions fees.³

NTCA and INCOMPAS submitted an in-house, non-scientific survey of their own members, but the results suggest bad faith may not be all that common.⁴ The survey finds that broadcasters most frequently asked for bundling and tiering, which are explicitly permitted under existing retransmission consent rules. Less than half of respondents (<113 companies) report ever in the history of retransmission negotiations participating in coordinated negotiations with a

³ Writers Guild of America, West, Inc., In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014. *Comments* in MB Docket No. 15-216 (Dec. 1, 2015) at 3, 8.

⁴ NTCA: The Rural Broadband Association, In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, *Notice of Ex Parte Submission* in MB Docket No. 15-216 (Oct. 29, 2015).

network or 3rd party, ever negotiating jointly for other must-have programming, or ever facing a threat of blackout ahead of a popular programming event. Twenty-two percent of respondents (~50 companies) report ever in the history of retransmission negotiations facing equipment or technology restrictions. Twenty percent of respondents (~45 companies) report ever in the history of retransmission negotiations facing a demand for fees for voice and/or Internet subscribers who do not take MVPD service. Only 5% of respondents (~11 companies) report ever in the history of retransmission negotiations having a broadcaster threaten or block online access to MVPD subscribers. And only 2% of respondents (~5 companies) report ever in the history of retransmission negotiations having a broadcaster threaten or block online content access to ISP subscribers. These findings suggest that problematic conduct is not commonplace and says nothing about whether such conduct actually causes negotiations to break down.

The absence of evidence of widespread bad faith parallels the absence of claims of bad faith under the TOCT in its current form. The TOCT already 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”⁵ are considered presumptively inconsistent with a competitive marketplace. If parties routinely negotiate in bad faith, why has the Commission ruled on only four formal complaints under the TOCT and only once found a breach?⁶

⁵ 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*”).

⁶ Federal Communications Commission, 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”).

III. PROPOSED REMEDIES EITHER EXCEED THE SCOPE OF THIS PROCEEDING OR CONFUSE THE TOTALITY OF THE CIRCUMSTANCES TEST

Despite the weakness of the evidence, commentators propose remedies that would substantially change the framework of retransmission negotiations. Some proposals stretch the meaning of good faith far beyond a sincere desire to reach a mutually acceptable agreement.⁷ Other proposals tack on a laundry list of items to the per se standards, which muddy their clarity and undermine their objectivity.⁸ Overhauling the *Good Faith Order* of 2000 was not what Congress intended when it directed the Commission to review the TOCT.

The proposals that focus on the TOCT threaten to create confusion in the marketplace and entangle the Commission in endless administrative review. As the *Good Faith Order* notes, per se standards must be “concise, clear and constitute a violation of the good faith standard in all possible instances.”⁹ Conduct that falls short of that may still be judged as bad faith under the TOCT, which allows the Commission to weigh circumstantial and contextual factors on a case-by-case basis. Commentators propose a category of practices and tactics that are “evidence of bad faith” in that they enjoy a presumption of bad faith without necessarily triggering a finding

⁷ American Cable Association, In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, *Comments* in MB 15-216 (Dec. 1, 2015), 11; Public Knowledge and Open Technology Institute, In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, *Comments* in MB 15-216 (Dec. 1, 2015), 16.

⁸ American Cable Association, In the Matter of Implementation of Section 103 of the STELA; American Television Alliance, In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, *Comments* in MB 15-216 (Dec. 1, 2015), 38.

Reauthorization Act of 2014, *Comments* in MB 15-216 (Dec. 1, 2015), 4. Public Knowledge and Open Technology Institute, In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, *Comments* in MB 15-216 (Dec. 1, 2015), 9-13, 15; American Television Alliance, In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, *Comments* in MB 15-216 (Dec. 1, 2015), 42; National Cable and Telecommunications Association, In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, *Comments* in MB 15-216 (Dec. 1, 2015), 3.

⁹ Good Faith Order, 15 FCC Rcd. at 5457, ¶ 31.

of bad faith. Such a category blurs the distinction between per se standards and the TOCT and thus fails to provide clear guidance to market participants. Further, it invites TOTC review every time such conduct occurs, which unnecessarily burdens the Commission and prolongs negotiations since the Commission cannot prescribe a remedy for bad faith other than instructing the parties to renegotiate the agreement in accordance with the Commission's rules.¹⁰

IV. CONCLUSION

Commentators have failed to provide sufficient evidence for widespread bad faith conduct under the existing retransmission consent rules. In addition, the proposed remedies seem designed only to limit the ability of broadcasters to negotiate for fair compensation, instead of addressing a lack of a sincere desire to reach agreement. Retransmission consent rules in their current form do in fact promote bona fide negotiations and the retransmission consent market effectively disposes of rights. Retransmission consent negotiations conclude successfully almost without exception, and when disruptions occur they are limited in duration and circumscribed in reach.

The comments submitted in this proceeding make clear that the underlying issue is neither bad faith conduct nor regulatory failure. The issue is fair valuation for the networks that offer the most original programming and remain the most-watched, despite the explosion of original content available on basic cable, premium networks and online. According to the New York Times, the number of scripted original series on the broadcast networks is up 20 percent

¹⁰ *Id.* at 5480, ¶ 81.

since 2009.¹¹ We are living in a new Golden Era of Television and the value of quality content is increasing. The existing retransmission consent rules allow broadcasters to capture their fair share of that increased value.

¹¹ John Koblin, *How Many Scripted TV Shows in 2015? A Precise Number, and a Record*. New York Times (Dec. 16, 2015), http://www.nytimes.com/2015/12/17/business/media/how-many-scripted-tv-shows-in-2015-a-precise-number-and-a-record.html?ref=media&_r=2.