CENTER FOR INDIVIDUAL FREEDOM

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Douglas Rathbun
Competition Policy and Advocacy Section
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Ave., NW, Room 3413
Washington, DC 20530
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Re: Roundtable on Anticompetitive Regulations

Dear Mr. Rathburn:

On behalf of the Center for Individual Freedom (hereinafter "CFIF") and over 300,000 supporters and activists across the nation, I write to draw your attention to a series of anti-competitive regulations governing "retransmission consent" negotiations for pay-TV carriage of broadcast television stations. Eliminating these regulations and instead permitting the marketplace to govern carriage terms of these broadcast stations would encourage innovation, better enable pay-TV providers meet the needs of their subscribers and very likely lower retail prices.

About the Center for Individual Freedom (CFIF)

Founded in 1998, CFIF is a constitutional and free-market advocacy organization. CFIF seeks to focus public, legislative and judicial attention on the rule of law as embodied in the federal and state constitutions, and on policies that advance free markets, private investment and greater innovation. In addition, the Center seeks to foster intellectual discourse by bringing together independent thinkers to examine broad-ranging issues of individual freedom in our global society.

Government Interference in Retransmission Consent Negotiations

The relationship between pay-TV providers and providers of video programming *except* for broadcast programming has always been governed by purely market-based transactions. Broadcast stations, however, are different. They, and only they, can choose between one of two different regulatory regimes for determining their carriage arrangements with pay TV providers.

Under the "must carry" regime, the relationship between pay-TV providers and broadcast stations is completely regulated and involves no market-based transactions of any sort. Pay-TV providers *must* carry the station in question, and the station cannot charge fees for such carriage.

Under the "retransmission consent" regime, by contrast, a pay-TV provider *cannot* carry the station without its permission. The station can, and invariably does, negotiate a fee known as a "retransmission consent payment."

Public television stations must choose must-carry, and most smaller and less-watched commercial stations do as well. Affiliates of the major networks, by contrast, almost always choose retransmission consent. They can often charge retransmission consent fees that are comparable or higher than the license fees charged by even the most popular cable networks.

While broadcasters claim that retransmission consent negotiations are purely "marketplace" negotiations, that is not correct. In reality, the carriage arrangements between local TV stations and pay-TV providers must satisfy a set of stringent conditions and regulations that have nothing to do with the "marketplace." For example:

- The government forces cable operators to include all local broadcast networks in any bundle of programming sold to subscribers. Thus, cable subscribers must purchase access to all broadcast networks as a precondition of purchasing access to any other programming. 47 U.S.C. § 543(b)(7).

- The government mandates that cable operators and satellite operators offer all broadcast programming "without material degradation" and at the "same quality of signal processing and carriage" offered any other programming. 47 C.F.R. § 76.62.

- The government requires cable operators and satellite carriers to give special preferential treatment for broadcasters in channel placement. 47 U.S.C. § 534(b)(3)(6); *id.* § 338(j).

- The government imposes "network nonduplication" and "syndicated exclusivity" rules. Those rules enable stations to enforce exclusivity arrangements negotiated with networks and syndicators against satellite and cable operators who are not parties to those agreements. 47 C.F.R. §§ 76.92-95 (cable network non-duplication rule); *id.* § 76.122 (satellite network non-duplication rule); *id.* §§ 76.101-110 (cable syndicated exclusivity); *id.* §§ 76.123-125 (satellite syndicated exclusivity).

Those regulations may make sense for *must-carry* stations. A local broadcast station elects must-carry when the pay-TV provider has no commercial interest in carrying the signal of the local TV station and is in a sense being "forced" to carry the signal. In such cases, it may be necessary for the government to specify a set of conditions and requirements that the carriage agreements must satisfy in order to guarantee that the local TV station does not receive "inferior"

carriage terms.

If a station elects retransmission consent, however, the pay-TV provider is no longer being "forced" to carry the signal. Rather, Congress intended for the two parties to determine the terms and conditions of carriage. Thus, there is no more justification for regulating the carriage conditions in agreements between pay-TV providers and local TV stations that elect retransmission consent than there is to regulate the carriage conditions of agreements between pay-TV providers and other programmers. In the absence of any government interference, we would expect the parties to negotiate efficient carriage terms that maximized their joint gain and to then negotiate a license fee that splits the gains from that efficient relationship between them. No "push" from the government is necessary to achieve this result.

Effect of Government Interference in Retransmission Consent Negotiations

It is not only *unnecessary* for the government to interfere in retransmission consent negotiations, it is affirmatively *harmful* to the parties and consumers alike.

First, those rules inhibit innovation and restrict the ability of the parties to negotiate fully efficient relationships. That harms consumers, because it prevents parties from providing the products that consumers most want.

- The government now mandates that every pay-TV bundle of programming contain every broadcast station, which constitutes an obvious example of such a harmful and un-needed regulation. Yet online providers – who are *not* governed by those retransmission consent rules – increasingly offer smaller bundles of programming more narrowly tailored to subscribers' individual interests. Almost every observer views that as a positive development for consumers. Yet pay-TV operators cannot match those offerings, in part because they cannot, by law, omit broadcast stations from any of their service offerings.

- The government also requires that pay-TV providers offer broadcasters the same "signal processing and carriage" as offered to other programmers. In the near future, however, pay-TV operators will likely begin to experiment with offering some programming in ultra-HD or 4k resolution. It is likely that pay-TV providers will begin by offering only a limited number of networks at that higher resolution. Were the FCC to interpret this rule as requiring pay-TV operators to offer *all* broadcast stations at ultraHD or 4k once they begin to experiment at all with this new technology, it could slow or even halt the rollout of this new technology. Here again, the harm would flow to consumers.

- Similar issues also arise with respect to the government mandate to offer broadcasters preferential channel placement. Once again, those restrictions limit the ability of pay-TV providers to experiment with new and potentially more intuitive channel groupings that may appeal to consumers.

- Likewise, parties could negotiate their own versions of network non-duplication and

syndicated exclusivity arrangements if the protections offered by those rules are efficient. Private parties, moreover, would be able to do a better job of negotiating agreements finely tuned to match their own particular circumstances, rather than being forced to adopt a "one-size-fits-all" arrangement mandated by government.

Second, all of the government intervention described above creates an entirely different form of harm because it favors one party to the negotiation (broadcasters) over the other party (pay TV providers) to the negotiation. Broadcasters receive those terms *by law* before the negotiation has even begun. They do not need to bargain for them by, for example, lowering the license fees that they charge. Thus, mandating those broadcaster-favorable terms instead of allowing them to be part of the negotiation essentially increases the bargaining power of broadcasters, and likely allows them to negotiate higher license fees than they would otherwise be able. Of course, a substantial share of those increases in license fees are ultimately passed on to consumers in the form of higher subscription fees.

Recommendation

We believe that, absent a demonstrated and uncorrectable market failure, the marketplace remains the best mechanism for allocating goods and services and directing economic activity. By distorting negotiations between the parties, the current retransmission consent regime limits the benefits that competitive markets can produce by artificially restricting parties to agree to regulatory conditions appropriate (if at all) only in the context of must carry. That harms consumers by limiting efficient and innovative arrangements between broadcasters and pay-TV carriers and by placing upward pressure on prices. Negotiations over the distribution of the signals of local broadcast stations electing retransmission consent should take place in the same free marketplace that today works perfectly well for all other types of programming.

Some of these requirements are found in the Communications Act, and thus require Congressional intervention to remedy. Others, however, can be fixed, or at least ameliorated, by the FCC. The FCC could, for example, eliminate the network nonduplication and syndicated rules. It could also clarify that the material degradation and buy-through rules apply only to must-carry stations. The Antitrust Division should urge it to do so.

Sincerely,

Timothy Lee
Senior Vice President of Legal and Public Affairs
Center for Individual Freedom