February 16, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71

Dear Ms. Dortch:

Pay TV providers continue to urge the FCC to create "super-antitrust" rules applicable only to broadcasters to prohibit them from offering during retransmission consent negotiations program bundles that economists and antitrust authorities regard as procompetitive.[1] NAB previously demonstrated the efficiency and diversity benefits of program bundling; broadcasters' inability to foreclose competition in the supply of programming to MVPDs in today's video marketplace; and the infeasibility and arbitrariness of MVPDs' proposed bundling restrictions, especially those requiring the FCC to determine the "reasonableness" of the prices of bundled and standalone broadcast and nonbroadcast channels.[2] NAB also described the false premises and fundamental flaws in the American Cable Association's (ACA) proposal to prevent the bundling of top-four broadcast stations with same market regional sports networks (RSNs) or other unspecified "must have" programming.[3]

In the attached report, Dr. Kevin W. Caves of Economists Incorporated and Professor Bruce M. Owen of Stanford University examine the Riordan Study underpinning ACA's proposal.[4] As set forth in the EI Report and summarized below, the Riordan Study "fundamentally mischaracterizes competition in the market for programming, is entirely lacking in empirical support, has no basis in economics or antitrust principles, and would likely harm economic welfare."[5] The EI Report also reconfirms the benefits from program bundling, including lower

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[1] *See, e.g.,* Reply Comments of The American Television Alliance, MB Docket No. 15-216, at 26-28 (Jan. 14, 2016); Reply Comments of the American Cable Association, MB Docket No. 15-216, at 40-52 (Jan. 14, 2016); Reply Comments of AT&T, MB Docket No. 15-216, at 16-18 (Jan. 14, 2016).
[2] *See* Reply Comments of NAB, MB Docket No. 15-216, at 28-37 (Jan. 14, 2016) (NAB Replies).
[3] *See id.* at 37-40, discussing Comments of ACA, MB Docket No. 15-216, at 26-33 (Dec. 1, 2015) (ACA Comments), and Michael H. Riordan, *Higher Prices from Bundling of "Must Have" Programming Are Not Based on Competitive Marketplace Considerations* (Dec. 1, 2015), attached thereto (Riordan Study or Study).
[4] Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, February 2016, attached hereto (EI Report).
[5] *Id*. at 3.

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prices, increased quantity and improved quality.[6] The FCC accordingly should reject ACA's call to proscribe broadcasters from making a wide range of bundled offers as part of retransmission consent negotiations. Instead, as the EI Report concludes, the Commission should continue to presume that bundling offers are consistent with good faith bargaining and to place the burden on pay TV providers to overcome that presumption with evidence that a specific programming bundle violates the FCC's good faith standards.[7]

<u>ACA's Proposal and the Riordan Study</u>

In its comments, ACA contends that bundling a "top rated broadcast station with other 'must have' programming assets is not consistent with competitive marketplace considerations."[8] Based on this claim, ACA proposes that the FCC should deem a top-four rated broadcaster's refusal to grant an extension of a retransmission consent agreement that expires on or around the same date as a bundled contract for carriage of a same market RSN or other 'must have' programming a *per se* violation of the duty to negotiate in good faith or, at the very least, evidence of bad faith under the totality of the circumstances test. This forced extension of the broadcaster's retransmission consent agreement would last until the negotiations for the affiliated RSN or other "must have" programming reached an accord or "final impasse," however that might be determined.[9] As NAB stated in its reply comments, the Commission should reject ACA's proposal on its face because it violates the clear terms of Section 325 of the Communications Act by forcing carriage of the broadcast signal while the separate, sequential negotiations for the affiliated programming occurs.[10]

To attempt to buttress the economic (but not the legal) basis for its proposal, ACA commissioned the Riordan Study. That Study argues that the FCC should treat proposals bundling a local station with a same market RSN or other "must have" programming as "presumptively inconsistent with competitive marketplace considerations," and a broadcaster's refusal to extend its existing retransmission consent agreement to avoid simultaneous negotiations as evidence of bad faith bargaining.[11] Interestingly, ACA's own economist appears unwilling to endorse his client's position that bundling other programming during retransmission consent negotiations should constitute a *per se* violation of the FCC's rules. Both ACA and its expert, however, agree on the potential expansiveness of their proposals. While focusing on the bundling of top-four broadcast stations with RSNs, the Riordan Study states that its "same conclusions can be reached for any programming bundled with retransmission consent that would be considered must have," including "national cable programming networks."[12]

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[6] *Id.* at 26-34.
[7] *Id.* at 7, 39.
[8] ACA Comments at 26.
[9] *Id*. at 32-33.
[10] NAB Replies at 40. In this proceeding and many others, NAB has explained that, under the clear terms of 47 U.S.C. § 325(b)(1)(A), only broadcasters – not the FCC nor any other party -- can provide MVPDs with authority to retransmit stations' signals. *Id*. at 49-56.
[11] Riordan Study at 5, ¶7; 6, ¶9; 20-21, ¶3.
[12] *Id*. at 4 n.10.

The Riordan Study's Fundamental Mischaracterization of Marketplace Competition

The Riordan Study so grossly mischaracterizes competition in the market for programming that the FCC should reject its conclusions on that basis alone.[13] Remarkably, it ignores the "increasingly fragmented" nature of upstream content markets, the competition broadcasters face from cable networks and OTT Internet-based services and the "ongoing proliferation of viewing options," which demonstrates that "entry – another key indicator of competition – is relatively common."[14] While ignoring competition in the content markets, the Riordan Study erroneously characterizes downstream distribution markets as competitive, when in fact, as the EI Report shows, they are "highly concentrated with little scope for competitive entry."[15]

With no evidence supporting its contentions,[16] the Riordan Study nonetheless baldly asserts that broadcasters wield monopolistic power in negotiations with MVPDs and that failure to secure "must have" programming from broadcasters would put a significant fraction of an MVPD's subscriber base at risk. But as the EI Report points out, even if one accepts the premise of "must have" programming – a "dubious" one in today's competitive content market – the Riordan Study "ignores the obvious corollary" that a broadcaster failing to secure wide MVPD distribution of its programming risks sacrificing both advertising revenue and carriage fees.[17] "Given the highly concentrated nature of the typical MVPD market," a broadcaster's "failure to secure carriage with even a single MVPD could mean the difference between profit and loss"; thus, an MVPD distribution agreement is "a 'must have' input from the broadcaster's point of view."[18] The Riordan Study's claim that MVPDs are powerless "atomistic price-takers facing monopolistic program suppliers" therefore has no basis in reality.[19] In fact, as the EI Report explains, "broadcasters and MVPDs engage in bilateral negotiations to arrive at the terms and conditions" of carriage.[20] Given the complete lack of evidence supporting the Riordan Study's fundamental premises – and the wealth of marketplace data showing those premises to be erroneous – the Commission need not even examine the specifics of ACA's bundling proposal to reject it.

[13] *See* EI Report at 6.
[14] *Id*. at 13-19 (detailing cable networks' high and growing share of TV viewing; the unconcentrated nature of the upstream market, as measured by the Herfindahl-Hirschman Index (HHI); and the unprecedented growth in the number of scripted original series over the past decade, especially on cable networks and OTT).
[15] *Id*. at 20-21 (demonstrating that MVPD markets are highly concentrated, as measured by HHI, and have had "no substantial entry and expansion" for "approximately ten years"). The EI Report also relies on a detailed survey of the evidence about competition in the MVPD marketplace by former FCC Chief Economist Gregory Crawford, who concluded that, despite satellite competition, "cable systems still exert considerable market power" and that "more large-scale entry appears unlikely," because entry "means paying substantial fixed costs and facing entrenched competitors." *Id*. at 21.
[16] EI Report at 12.
[17] *Id*. at 19.
[18] *Id.*
[19] *Id*. at 6.
[20] *Id*. *See also id*. at 22 (when MVPDs negotiate with broadcasters or other content providers, neither party "sets a price"; instead, they bargain to determine a mutually agreeable price).

The Myriad Empirical and Theoretical Flaws of the Riordan Study

According to the EI Report, the Riordan Study's "empirical claims are purely speculative, and unsupported by the evidence."[21] As an initial matter, the Study does not even attempt to quantify the frequency of common ownership of RSNs and broadcast stations in the same market. Because the available evidence in fact indicates that instances of local joint ownership are rare,[22] the opportunities for a broadcaster to consider making a bundled offer of the type that the Riordan Study primarily focuses on are, by definition, very limited. This suggests that ACA may be more interested in restricting the bundling of local broadcast stations and whatever other programming ACA labels as "must have."

The Riordan Study, moreover, musters no evidence to support its speculative claim that the alleged bundling of top-four stations and RSNs actually leads to price increases.[23] Notably, the EI Report observes that the Riordan Study not only fails to offer empirical evidence to support its speculation, it does not "even acknowledge that such evidence should be necessary as a prerequisite to imposing a presumption of bad faith."[24]

The EI Report also faults the Riordan Study's bundling proposal as lacking any basis in economic or antitrust principles. The Study ignores the fact that economists and antitrust practitioners recognize that "bundling is extremely common in competitive markets, and generally has procompetitive effects,"[25] and proposes a blanket anti-bundling presumption that "utterly fails to distinguish (or even attempt to distinguish) between procompetitive and anticompetitive bundling."[26] Such a blanket presumption against bundling is "virtually guarantee[d]" to proscribe "welfare-enhancing bundled offers."[27] Indeed, in light of the pervasiveness of bundling, the EI Report observes that the Riordan Study's logic would "imply that virtually any product or service in the economy could constitute an anticompetitive bundle, as long as one of its components could be construed as 'must-have.'"[28]

Finally, far from being the "light-handed regulatory remedy" that the Riordan Study claims, the proposed anti-bundling presumption would harm competition by artificially constraining broadcasters from making bundling proposals.[29] Particularly if the restriction extends beyond RSNs to the bundling of any "must have" programming, the EI Report observes that a steady stream of disputes could result, requiring FCC "adjudication and intervention" into private commercial negotiations.[30] The proposal would clearly require the Commission to determine whether a "legitimate" impasse had been reached in negotiations for the RSN or other affiliated programming, which would thrust the FCC into judging the reasonableness of the

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[21] *Id*. at 22.
[22] *Id*. at 23-24 (citing, *inter alia*, the FCC's own video competition reports).
[23] *Id.* at 24-25.
[24] *Id.* at 24.
[25] *Id*. at 26.
[26] *Id*. at 28.
[27] *Id.* at 35. ACA's proposed *per se* rule would without doubt proscribe "welfare-enhancing" program bundles.
[28] *Id*. at 28.
[29] *Id.* at 7, 37.
[30] *Id*. at 7, 38.

prices and terms at issue in those negotiations.[31] To avoid proscribing procompetitive conduct and becoming enmeshed in private commercial negotiations, the EI Report concludes that the FCC should continue to presume that bundling offers are consistent with good faith bargaining, placing the burden on MVPDs to overturn that presumption by presenting evidence that a given programming bundle is not consistent with competitive marketplace considerations and, thus, not consistent with good faith standards.[32]

The Competitive Benefits of Bundled Programming Offers

As also discussed in the EI Report, bundling can promote competition by lowering prices. In fact, bundled offers are often referred to as "bundled discounts" because they allow sellers to pass through efficiencies (such as those derived from economies of scale and scope) that can be realized only when products are sold together. The EI Report explains that these "efficiencies are potentially critical" for programing providers because they "are obliged to recover large investments in 'first copy,'" which are typically both "fixed" and "sunk" (non-recoverable).[33]

More specifically, bundling during retransmission consent negotiations allows broadcasters to realize such efficiencies by reducing transaction and contracting costs.[34] Rather than negotiate the terms and conditions for carriage separately for each individual programming asset, broadcasters could negotiate with MVPDs contracts spanning multiple stations, markets, multicast channels and non-broadcast channels at one time, thereby avoiding replication of contracting costs and reducing risk and uncertainty by locking in terms and conditions for multiple programming assets over multiple years.[35]

The EI Report further details that bundling can enhance both buyer welfare and total welfare, even when it does not result in lower prices for the bundled products, "by allowing the seller to offer content that can be profitably supplied *only* if bundling is used."[36] Particularly given the substantial up-front investments required for video programming production, bundled contracts can provide larger and more stable revenue streams to finance higher quality content, which, in turn, attracts more viewers and advertising revenues, thereby further increasing the funds available for programming investments. Bundling can also be utilized to

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[31] *Id*. at 7, 38-39. The Riordan Study (at 19, ¶7) does not define which impasses should be considered "legitimate."
[32] EI Report at 7, 39.
[33] *Id*. at 28-29. Economic studies previously submitted to the FCC similarly recognized the importance of television broadcasters achieving economic efficiencies, given the need for large capital investments arising in large part from sunk costs associated with the "first copy" property of video programming (i.e., the fact that the "first copy" of a news or entertainment program is expensive to produce, but distribution to additional users is essentially costless). Jeffrey A. Eisenach and Kevin W. Caves, Navigant Economics, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting*, at 1-2 (June 2011), attached to NAB Reply Comments, MB Docket No. 10-71 (June 27, 2011). *See also* Decl. of Mark Israel and Allan Shampine, Compass Lexecon, at 5-6; 9-15, Appendix B to Comments of NAB, MB Docket No. 10-71 (June 26, 2014).
[34] EI Report at 29.
[35] *Id.* To show how bundling can lower prices, the EI Report presents a hypothetical retransmission consent example, based on an analysis of bundled discounts published by two Department of Justice economists and a professor at the University of Texas. *Id*. at 29-31.
[36] *Id*. at 32 (citations omitted).

secure distribution of programming to a wider set of viewers.[37] The EI Report accordingly concludes that, in addition to lower prices, bundling can "enhance economic welfare by allowing broadcasters to offer more and/or higher quality content than would be possible otherwise."[38]

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As NAB previously explained, given the acknowledged – and now reconfirmed – benefits of program bundling, the Commission cannot rationally prohibit or significantly restrict bundling proposals during retransmission consent negotiations.[39] There is certainly no legal or economic basis for adopting ACA's call to prevent the bundling of a top-four broadcast station with a same market RSN or other so-called "must have" programming.

Respectfully submitted,

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs

cc: Jessica Almond, Holly Saurer, Marc Paul, Matthew Berry, Robin Colwell, Bill Lake, Mary Beth Murphy, Nancy Murphy, Martha Heller

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[37] *Id*. at 33-34. In this proceeding, for example, Univision stressed the importance of bundling to gaining distribution for new service offerings, especially those targeting diverse and often underserved populations. Comments of Univision Communications Inc., MB Docket No. 15-216, at 9-10 (Dec. 1, 2015).
[38] EI Report at 34.
[39] *See* NAB Replies at 28-32.

**Before the**
**Federal Communications Commission**

# Bundling in Retransmission Consent Negotiations: A Reply to Riordan

**Kevin W. Caves and Bruce M. Owen**

February 2016

## INTRODUCTION

1. We have been asked by the National Association of Broadcasters ("NAB") to comment on a paper prepared by Professor Michael Riordan (the "Riordan Study")[1] on behalf of the American Cable Association ("ACA"). For the reasons given below, the Riordan Study fundamentally mischaracterizes competition in the market for programming, is entirely lacking in empirical support, has no basis in economics or antitrust principles, and would likely harm economic welfare. Accordingly, the prescriptions of the Riordan Study should be rejected.

2. Multichannel video programming distributors ("MVPDs") periodically negotiate retransmission consent agreements with broadcasters, including the right to distribute the signals of local television stations that may be owned and operated ("O&O") by so-called "Big Four" networks (ABC, CBS, Fox, and NBC). In some local markets, there may be common ownership between an O&O station and a Regional Sports Network ("RSN"). The Riordan Study claims that "network O&O television stations insist in some cases on conditioning the terms of a retransmission consent agreement on a carriage agreement for the affiliated RSN,"[2] but provides no evidence to substantiate the existence or frequency of such bundled offers (the "Alleged Bundling.")

3. To address the claimed (but unproven) economic harm caused by the Alleged Bundling, the Riordan Study calls for FCC intervention in upstream programming markets directly analogous to the type of mandated *à la carte* regulation that the MVPD industry has steadfastly opposed in downstream distribution markets. Specifically, the Riordan Study

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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), Michael H. Riordan, "Higher Prices from Bundling of 'Must Have' Programming Are Not Based on Competitive Marketplace Considerations," (December 1, 2015) [hereafter "Riordan Study"].
2. *Id*. at 3-4, ¶4.

advocates a standard (the "Proposed Regulation") that would proscribe broadcasters from even proposing a wide range of bundled offers during retransmission consent negotiations.[3] Under the Proposed Regulation, bundled offers by broadcasters would be deemed presumptively inconsistent with competitive marketplace considerations, placing the burden on the broadcaster to prove otherwise.[4] Any attempt by a broadcaster to bundle a retransmission consent agreement for a Big Four broadcast station (or any other broadcast station) with a carriage agreement for an affiliated RSN (or any other purported "must have"[5] programming), would presumptively be in violation of the FCC's good faith bargaining rules.[6] The Riordan Study claims that the FCC could implement this standard by:

> [D]eeming a common owner's unwillingness to negotiate the carriage contracts for a broadcast station and an RSN, that serve the same market and have expiration dates around the same time, sequentially rather than simultaneously, by granting a temporary extension of an existing retransmission consent agreement, or by taking other steps to avoid simultaneous negotiations, to be a violation of the Commission's good faith rules.[7]

4. The Riordan Study repeatedly states that the Proposed Regulation would impose a (rebuttable) presumption on broadcasters making bundled offers, as opposed to a *per se* violation of the FCC's good faith rules.[8] In contrast, the ACA goes well beyond the

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3. A previous study by Professor Owen found that regulation of wholesale packaging of video programming services would be "unwarranted and imprudent," given the absence of "clear evidence of market failure or abuse of market power." *See In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements* (MB Docket No. 07-198), Bruce M. Owen, "Wholesale Packaging of Video Programming," (January 4, 2008) [hereafter "Owen Study"] at 1.

4. Riordan Study at 5, ¶7.

5. As explained in an earlier FCC proceeding, the concept of "must have" programming is generally unhelpful in understanding the economics of upstream programming markets. *See* Owen Study, Part IV.

6. Riordan Study at 5-6, ¶¶7-9. Although the Riordan Study focuses primarily on bundled offers involving a Big Four O&O station and an RSN, the study also makes clear that its prescriptions would apply to any retransmission consent negotiations involving the bundling of purported "must-have" content, such as national cable networks. *Id.* at 4, ¶4, n. 10 ("the same conclusions can be reached for any programming bundled with retransmission consent that would be considered must have, including a suite of national cable programming networks.")

7. *Id.* at 6, ¶8.

8. *Id. See also* 5, ¶7 ("[T]he FCC can treat proposals that raise prices by bundling must have retransmission consent with RSN carriage as presumptively inconsistent with competitive marketplace considerations under the

recommendations of its own expert and unambiguously endorses a *per se* prohibition on the Alleged Bundling.[9] As a practical matter, the costs and uncertainties inherent to challenging a presumption of bad faith may strongly discourage broadcasters from even attempting to make bundled offers to MVPDs. Accordingly, there may be little difference for broadcasters between a (theoretically) rebuttable presumption of bad faith and an outright prohibition on the Alleged Bundling.[10] Nevertheless, it is noteworthy that the ACA's own economist appears unwilling to fully endorse his client's position.

5. Beyond this internal tension between expert and client, the Riordan Study suffers from numerous additional flaws. As explained in Part I, the Proposed Regulation lacks any legitimate public interest justification. Its prescriptions fall squarely outside the proper scope for FCC intervention, and it would create waste and redundancy by obligating the FCC to police

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above standard."). *See also* 6, ¶9 ("[M]y analysis suggests that the Commission can interpret a common owner's refusal to extend an existing retransmission consent agreement until an otherwise concurrent same market RSN negotiation is successful or at an impasse, or to take other steps to avoid simultaneous negotiations, as evidence of bad faith bargaining.") *See also* 20-21, ¶3.

9. *See 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), Comments of the American Cable Association (December 1, 2015), [hereafter "ACA Comments"] at iii ("Not only should the Commission eliminate its presumption that bundled negotiation of retransmission consent and other 'must have' programming such as RSNs is consistent with competitive marketplace conditions and hence, good faith negotiation, it should explicitly deem such bundling a *per se* violation of the good faith obligation.") *See also* 16, 33 (reiterating the call for a *per se* prohibition.) *See also* 32 ("the Commission should deem a top four rated broadcaster's refusal to grant a temporary extension of a retransmission consent agreement that expires on or around the same date as a same market RSN (or other "must have" programming asset) to be a violation of the duty to negotiation [sic] in good faith. Professor Riordan suggests that this approach would effectively address the harms of bundled negotiations without requiring common owners of these assets to make standalone offers that would be subject to review by the Commission to determine whether they are reasonable.")

10. A broadcaster may face substantial uncertainty with respect to the costs of rebutting the presumption, the delays in reaching an FCC decision, and the likely outcome once a decision is reached, rendering the presumption tantamount to a *per se* prohibition on the Alleged Bundling. A similar set of circumstances unfolded in the wake of the FCC's 2010 *Open Internet Order*, in which the Commission determined that any paid priority arrangement would be presumptively in violation of its non-discrimination rule, placing the burden on Internet service providers to prove otherwise. The D.C. Circuit ruled that such a presumption was tantamount to common carriage—that is, it would impose such a large cost on Internet service providers that it would have effectively barred the practice. *See Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), at 649-650, 656-58 (finding that the FCC's imposition of anti-discrimination and anti-blocking rules on Internet service providers would be tantamount to *per se* common carrier regulation).

bundling arrangements, a function already performed by antitrust laws. The Proposed Regulation would create an alternative venue for specious claims that would not withstand basic antitrust analysis, and would condemn bundling practices that the antitrust agencies would regard as procompetitive.

6. As explained in Part II, the Riordan Study grossly mischaracterizes competition in the video marketplace (which alone would be sufficient to reject its conclusions). The Riordan Study erroneously claims that broadcasters wield unchecked "monopolistic" power in the upstream content market, despite the fact that the downstream distribution market is presently much more concentrated than the upstream market. MVPDs clearly are not atomistic "price-takers" facing monopolistic program suppliers, as the Riordan Study asserts. Instead, broadcasters and MVPDs engage in bilateral negotiations to arrive at the terms and conditions of program carriage.

7. As explained in detail in Part III, the Riordan Study's competitive analysis is deeply flawed on both empirical and theoretical grounds. The study's empirical claims are speculative, unsupported, and misleading, providing no evidence that the Alleged Bundling even occurs, let alone that it drives up prices. The Proposed Regulation lacks any basis in economics or in antitrust principles, both of which recognize that bundling often has procompetitive effects—as does Professor Riordan's own published work.[11] Bundled offers often lower prices, and may benefit consumers and competition even when they do not, by expanding the quantity and/or quality of output beyond what would be possible without

11. Michael H. Riordan and Yongmin Chen, *Profitability of Product Bundling*, 54(1) INTERNATIONAL ECONOMIC REVIEW, 35-57 (2013), at 51-53 (explaining that, even when practiced by a monopolist, bundling may increase both consumer welfare and total welfare, and noting that it is "unclear" how robust is the theoretical possibility that bundling may harm consumers).

bundling. Accordingly, antitrust plaintiffs must meet exacting standards to prove that a given bundled offer is anticompetitive—standards that would likely be difficult or impossible for any MVPD complaining about the Alleged Bundling to satisfy. As a consequence, FCC intervention in this context is likely welfare reducing.

8. Finally, as explained in Part IV, far from being the "light-handed regulatory remedy"[12] that Professor Riordan claims, the Proposed Regulation would harm competition by artificially constraining the negotiation space, and would require regular adjudication and intervention by the FCC into market negotiations. Contrary to the Riordan Study's assertions, the Proposed Regulation would thrust the Commission directly into the role of judging the "reasonableness" of the prices, terms, and conditions of retransmission consent offers involving bundled programming, in addition to determining whether the parties have reached a "legitimate" negotiating impasse. The FCC should continue to presume that bundled offers during retransmission consent negotiations are consistent with good faith bargaining, placing the burden on MVPDs to overturn that presumption with evidence that a given programming bundle violates the Commission's good faith standards.

## QUALIFICATIONS

9. Bruce M. Owen is the Morris M. Doyle Centennial Professor in Public Policy (Emeritus), in the School of Humanities and Sciences, and former Director of the Public Policy Program, at Stanford University. He is also the Gordon Cain Senior Fellow (Emeritus) in Stanford's Institute for Economic Policy Research. From 1981 to 2003, he was CEO of Economists Incorporated. Prior to co-founding Economists Incorporated, Dr. Owen was the Chief Economist of the Antitrust Division of the U.S. Department of Justice and, earlier, of the

12. Riordan Study at 21.

White House Office of Telecommunications Policy. He was also a faculty member in the Schools of Business and Law at Duke University, and before that at Stanford University. Dr. Owen is the author or co-author of numerous articles and eight books, including; Television Economics (1974), Economics and Freedom of Expression (1975), The Regulation Game (1978), The Political Economy of Deregulation (1983), Video Economics (1992), Electric Utility Mergers: Principles of Antitrust Analysis (1994), and The Internet Challenge to Television (1999). Dr. Owen has been an expert witness in a number of antitrust and regulatory proceedings, including *United States v. AT&T*, *United States Football League v. National Football League*, and the Federal Energy Regulatory Commission review of Southern California Edison's proposed acquisition of San Diego Gas and Electric Co. In 1992, Dr. Owen headed a World Bank task force that advised the government of Argentina in drafting a new antitrust law. More recently, he has advised government agencies in Mexico and the U.S. on telecommunications policy and Peru on antitrust policy. He is a consultant to the World Bank in connection with the economic evaluation of legal and judicial reform projects. Dr. Owen for more than ten years taught a seminar on law and economics at Stanford University's Washington campus. He has continued to teach this course since returning to Stanford's main campus in 2003. His research interests include regulation and antitrust, economic analysis of law, and political economy. A copy of Professor Owen's curriculum vita is attached at Appendix A.

10. Kevin W. Caves a Senior Economist at Economists Incorporated. Dr. Caves worked for the Federal Reserve Bank of New York before receiving his doctorate from the University of California at Los Angeles in 2005, specializing in applied econometrics and industrial organization. Prior to joining Economists Incorporated, he held positions at Deloitte

& Touche, Criterion Economics, Empiris LLC, and Navigant Economics. He has prepared expert analyses and testimony in a variety of industries, including cable, broadcasting, Internet, telecommunications, freight rail, healthcare, mobile wireless, and pharmaceuticals.

11. Dr. Caves is a regular contributor to peer-reviewed academic journals. His work has appeared in various popular and academic outlets, including *Antitrust, The Antitrust Source, The Atlantic, The Capitol Forum, Communications & Strategies, Competition Policy International, Econometrica, The Economist, The Economists' Voice, Forbes, Information Economics & Policy, Journal of Competition Law & Economics, Labor Law Journal, Regulation, Research in Law & Economics, Review of Network Economics,* and *Telecommunications Policy*. His academic and consulting work spans a variety of topics, including antitrust, applied econometrics, damages analysis, class certification, labor economics, merger analysis, net neutrality, public policy analysis, and vertical integration. A copy of his curriculum vita is attached at Appendix B.

## I. The Proposed Regulation Lacks Any Legitimate Public Interest Justification

12. Although FCC intervention can advance the public interest in important ways, it can also harm competition and consumers by creating a forum for policy shopping and rent-seeking by private interests. The Proposed Regulation falls squarely into the latter category. Instead of filling a gap in antitrust enforcement, the Proposed Regulation would have the FCC perform an entirely redundant function of the antitrust laws in policing bundling arrangements. This would undermine legitimate antitrust enforcement and competition policy by proscribing bundling practices that economists and antitrust agencies would categorize as procompetitive.

### A. The Proper Scope for FCC Intervention

13. FCC intervention in markets should play a complementary role to the antitrust laws where there is a legitimate public interest justification, and should avoid duplicating

functions already performed by the antitrust enforcement agencies.[13] For example, it is well understood that, so long as there is no short-term price or output effect, the antitrust laws permit discrimination by a vertically integrated firm (such as a cable company that favors its own programming over that supplied by upstream rivals), even if such discrimination reduces diversity and innovation over the long run.[14] The FCC can therefore promote the public interest by policing compliance with nondiscrimination rules. To cite another well-known example, the FCC can preempt a single firm from monopolizing spectrum in an auction through *ex ante* regulation (for example, via spectrum limits), ensuring that wireless markets remain competitive.[15] In cases such as these, the Commission can legitimately advance the public interest in ways that the antitrust laws cannot on their own. In contrast, the public interest is not served when the Commission imposes a layer of duplicative economic regulation in an area already policed by other antitrust agencies, such as the Department of Justice ("DOJ"). This form of regulatory intervention is very difficult to justify as sound public policy.[16]

### B. The Proposed Regulation Would Have the FCC Perform an Entirely Redundant Function of the Antitrust Laws in Policing Bundling Arrangements, and Would Undermine Legitimate Antitrust Enforcement

14. As explained in Part III, because virtually all products are bundles, and because bundling usually has procompetitive effects, the antitrust laws proscribe bundling only under

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13. Robert E. Litan and Hal J. Singer, *The Need for Speed: A New Framework for Telecommunications Policy for the 21st Century* (Brookings Institution Press 2013) [hereafter "Need for Speed"], at 9-10; *see also* Chapter 4.

14. Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (Alfred A. Knopf 2010), at 312.

15. *See, e.g.,* Peter Cramton, Evan Kwerel, Gregory Rosston, and Andrzej Skrzypacz, *Using Spectrum Auctions to Enhance Competition in Wireless Services*, 54 JOURNAL OF LAW & ECONOMICS 167-188 (2011).

16. *See, e.g.,* Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC* 61(1) FEDERAL COMMUNICATIONS LAW JOURNAL (2008), For a more general discussion of the adverse welfare effects of regulatory policies founded on service to transient interests, *see* Bruce M. Owen, *To Promote the General Welfare: Addressing Political Corruption in America*, Forthcoming, 6(1) BRITISH JOURNAL OF AMERICAN LEGAL STUDIES (2016), draft available at http://dx.doi.org/10.2139/ssrn.2626309). *See also* Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AMERICAN ECONOMIC REVIEW 291-303 (1974).

limited circumstances, and antitrust plaintiffs must satisfy exacting standards of proof to demonstrate that a given bundled offer is anticompetitive. There are no blanket presumptions or *per se* prohibitions against bundling; the burden is always on the plaintiff, typically an excluded rival in the tied market. For example, to satisfy the Ninth Circuit's *Cascade* test, the ACA (or one of its members) would have to establish (1) that a local Big Four station is a monopoly unto itself; and (2) that the imputed price of some "tied" programming in the bundle is below some relevant measure of incremental cost for a hypothetical equally efficient rival.[17]

15. The first prong of the test would likely be difficult or impossible to satisfy: The plaintiff would have to confront the fact that the downstream distribution market is significantly *more* concentrated than the upstream content market,[18] as well as the fact that MVPDs are not simple "price-takers," but actively negotiate with broadcasters to arrive at the terms and conditions of program carriage.[19] To satisfy the second prong of the test, the plaintiff would face the daunting task of proving that a real-world bundle has somehow been constructed by a broadcaster such that an equally efficient competitor could not compete in the upstream market. Specifically, the plaintiff would have to show that a hypothetical competitor that owned *only* the rights to the RSN (but not the rights to the Big Four station) could not profitably induce the MVPD to "break the bundle" by purchasing the RSN on a standalone basis (while purchasing the Big Four signal at a higher, out-of-bundle price).

17. Even these two conditions are only necessary, and not sufficient, for a plaintiff to prevail under the *Cascade* standard. *See* Part III.B, *infra*.

18. *See* Part II, *infra*.

19. As explained in Part III.B, *infra*, the bilateral bargaining framework that characterizes negotiations between broadcasters and MVPDs does not allow for a "bright line" test to distinguish procompetitive from anticompetitive bundling.

16. That the ACA's case would likely fail in an antitrust court is significant: This indicates that FCC intervention in this context is likely welfare reducing under efficiency criteria upheld by antitrust law. Moreover, the Proposed Regulation does not address any other pressing social policy (such as diversity or innovation) that can be advanced by the FCC. Intervention here would be pure redistribution. Accordingly, the ACA's effort to bring a bundling complaint to the FCC would not play a complementary role to the antitrust laws, which already treat certain bundling practices as cognizable offenses. Instead, it would undermine the antitrust laws by encouraging specious claims that would not survive antitrust scrutiny, while simultaneously condemning procompetitive program bundling.

## II. BROADCASTERS DO NOT WIELD "MONOPOLISTIC" MARKET POWER OVER MVPDS

17. Although the Riordan Study makes sweeping claims regarding broadcaster's allegedly "monopolistic"[20] power in negotiations with MVPDs, it provides no evidence to support this claim. Instead, the Riordan Study simply asserts that "an MVPD who fails to include the top local television stations or the local RSN in its channel lineup risks losing a significant share of its subscribers to rival MVPDs who do carry this must have programming."[21] This ignores the obvious corollary—that any broadcaster failing to secure broad distribution of its programming in a given market puts both advertising dollars and carriage fees at risk. Despite its claimed adherence to the Structure-Conduct-Performance ("SCP") paradigm—which, as the name suggests, infers a relationship between market

20. Riordan Study at 4, ¶5.
21. *Id.*

concentration and firms' competitive conduct[22]—the Riordan Study ignores the fact that upstream markets are much less concentrated than downstream distribution markets.[23]

**A. Upstream Content Markets Are Not Concentrated**

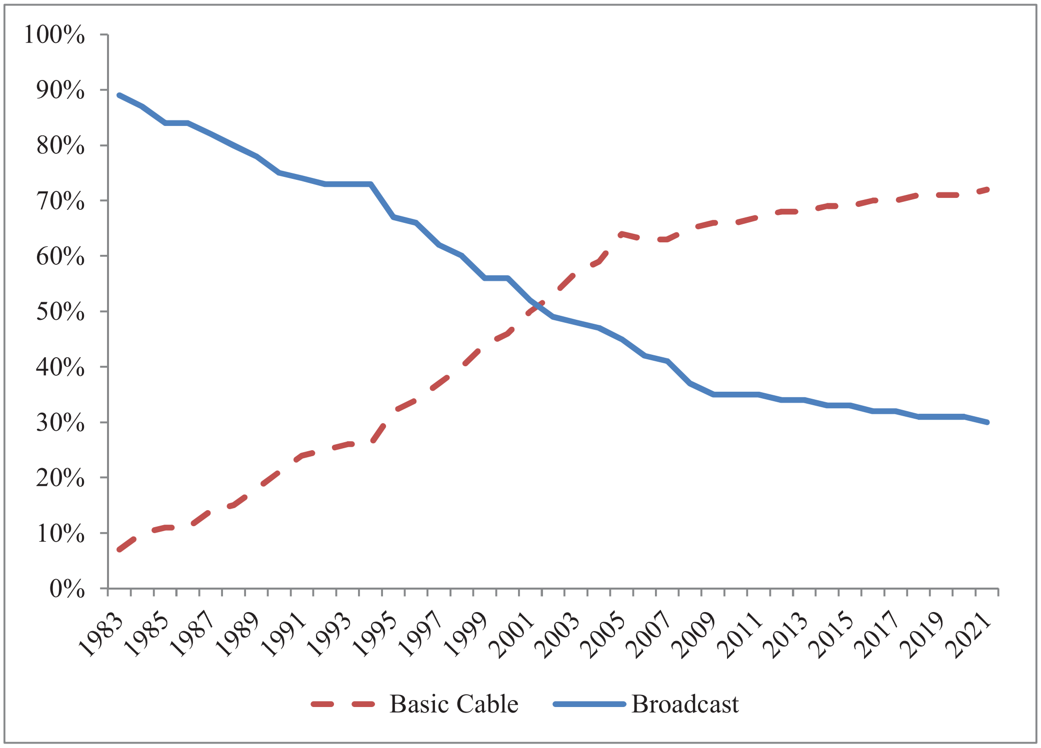
18. It is generally recognized that upstream content markets are increasingly fragmented across a large and rapidly growing space of viewing options. The four-network era is long gone, and viewers today typically have access to a dozen or more over-the-air stations, with hundreds more channels through cable, DBS, and OTT Internet-based services, including original content produced by new entrants such as Amazon, Hulu, and Netflix. Ownership of this diverse array of content is spread across a variety of content owners.

19. Broadcast television has long been losing viewership to competition from cable networks. As seen in Figure 1 below, according to SNL Kagan, basic cable has captured a larger viewing share than broadcast television for well over a decade. Although broadcast's viewing share was close to 90 percent in the early 1980s, as of 2012, basic cable's viewing share had risen to 67 percent, approximately double that of broadcast. SNL Kagan also projects that broadcast's viewing share will continue to decline, capturing less than one third of the viewing audience in the years ahead. Any analysis of upstream competition should account for this source of competition to broadcast content.

22. *See, e.g.,* Stephen Martin, *Advanced Industrial Economics* (Blackwell 2001), at 7 ("The central hypothesis [of the SCP framework] is that observable structural characteristics of a market determine the behavior of firms within that market, and that the behavior of firms within a market, give structural characteristics, determines measurable market performance.")

23. Riordan Study at 9, ¶7.

FIGURE 1: BROADCAST VS. BASIC CABLE VIEWING SHARES




*Source*: SNL Kagan, Cable/Broadcast TV Advertising Billings Database (2012). Post-2012 data are projections.

20. To estimate horizontal concentration in the upstream market, we rely on data compiled from the recently published *Handbook of Media Economics*.[24] These data account for competition between broadcast and cable networks, as well as instances of common ownership of cable networks and broadcast stations (such as Comcast's ownership of both NBC and USA). However, because they do not account for original content produced by OTT entrants such as Netflix and Amazon, they tend to overstate upstream concentration. The data will tend to further overstate concentration wherever the local broadcast TV stations are not owned by diversified

24. Gregory S. Crawford, "The Economics of Television and Online Video Markets," Chapter 7 *in* Simon Anderson, Joel Waldfogel, and David Stromberg, *Handbook of Media Economics*, Vol. 1A (Elsevier Press 2016) [hereafter, "Handbook."]

media companies such as 21st Century Fox or Disney—that is, in the majority of local markets.[25]

21. As seen in Table 1, the Herfindahl-Hirschman Index ("HHI") of market concentration among these station groups is approximately 1,480 before adjusting for partial ownership, and approximately 1,200 after performing this adjustment.[26] Both values fall below the threshold for a market to be considered unconcentrated in the antitrust agencies' *Horizontal Merger Guidelines*.[27] According to the *Guidelines*, mergers resulting in an HHI of less than 1,500 are "unlikely to have adverse competitive effects and ordinarily require no further analysis."[28] (It bears emphasis that the figures in Table 1 overstate concentration in the upstream programming market because (1) they ignore competition from independent OTT entrants; and (2) they ignore the lack of common ownership between diversified media companies and local broadcast affiliates in the majority of local markets).

25. Big Four O&O stations are located primarily in the largest TV markets, while in most markets, local broadcast stations are owned by other entities. *See, e.g., Television & Cable Factbook 2015*, Stations Vol. 2 (Warren Communications News). In these markets, the market share of the largest diversified media companies will tend to be smaller, implying a less concentrated market. For example, if the local NBC affiliate is not owned by Comcast, there is no common ownership of the USA network and the local NBC station.

26. Similar patterns of concentration have existed since at least 1998. See Handbook, §7.4.3.1 at 309, n. 57.

27. United States Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines (August 19, 2010) [hereafter "Merger Guidelines"], §5.3.

28. *Id.*

TABLE 1: OWNERSHIP AND CONCENTRATION IN THE UPSTREAM MARKET (2013)

| Content Owner/Network | Total Rev. ($M) | Ownership Interest | Adj. Rev. | Market Share | Adj. Market Share |
|---|---|---|---|---|---|
| **The Walt Disney Co.** | | | | | |
| ABC | $3,161 | 100% | $3,161 | | |
| ESPN | $8,343 | 80% | $6,674 | | |
| Disney Channel | $1,459 | 100% | $1,459 | | |
| ESPN2 | $1,098 | 80% | $878 | | |
| ABC Family Channel | $761 | 100% | $761 | | |
| History | $890 | 50% | $445 | | |
| Lifetime Television | $884 | 50% | $442 | | |
| A&E | $879 | 50% | $440 | | |
| Others | $1,864 | 77% | $1,437 | | |
| **Walt Disney Co. Total** | **$19,339** | **81%** | **$15,697** | **22.3%** | **18.1%** |
| **Viacom Inc./CBS*** | | | | | |
| CBS | $4,241 | 100% | $4,241 | | |
| The CW | $429 | 50% | $215 | | |
| Nickelodeon | $2,117 | 100% | $2,117 | | |
| MTV | $1,366 | 100% | $1,366 | | |
| Comedy Central | $780 | 100% | $780 | | |
| Spike TV | $651 | 100% | $651 | | |
| BET | $580 | 100% | $580 | | |
| VH1 | $569 | 100% | $569 | | |
| Showtime/TMC/Flix | $1,621 | 100% | $1,621 | | |
| EPIX/EPIX Drive-In | $454 | 33% | $150 | | |
| Other | $2,141 | 97% | $2,081 | | |
| **Viacom/CBS Total** | **$14,949** | **96%** | **$14,370** | **17.2%** | **16.6%** |
| **Time Warner Inc.** | | | | | |
| The CW | $429 | 50% | $215 | | |
| TNT | $2,784 | 100% | $2,784 | | |
| TBS | $1,817 | 100% | $1,817 | | |
| CNN | $1,094 | 100% | $1,094 | | |
| Cartoon Network | $832 | 100% | $832 | | |
| HBO/Cinemax | $4,603 | 100% | $4,603 | | |
| Other | $1,937 | 74% | $1,443 | | |
| **Time Warner Inc. Total** | **$13,496** | **95%** | **$12,787** | **15.6%** | **14.7%** |
| **Comcast Corp.** | | | | | |
| NBC | $3,095 | 100% | $3,095 | | |
| Telemundo | $396 | 100% | $396 | | |
| USA | $2,066 | 100% | $2,066 | | |
| Syfy | $788 | 100% | $788 | | |
| CNBC | $656 | 100% | $656 | | |
| Bravo | $650 | 100% | $650 | | |
| E! | $531 | 100% | $531 | | |
| Comcast RSNs | $1,427 | 41% | $585 | | |
| Other | $2,889 | 86% | $2,488 | | |
| **Comcast Total** | **$12,498** | **90%** | **$11,255** | **14.4%** | **13.0%** |
| **21st Century Fox** | | | | | |
| Fox | $2,660 | 100% | $2,660 | | |
| Fox News | $1,917 | 100% | $1,917 | | |

| Content Owner/Network | Total Rev. ($M) | Ownership Interest | Adj. Rev. | Market Share | Adj. Market Share |
|---|---|---|---|---|---|
| FX Network | $1,137 | 100% | $1,137 | | |
| Fox Sports RSNs | $3,616 | 87% | $3,163 | | |
| Other | $2,428 | 79% | $1,924 | | |
| **21st Century Fox Total** | **$11,758** | **92%** | **$10,801** | **13.6%** | **12.4%** |
| **Liberty Global Inc.** | | | | | |
| Starz/Encore | $1,385 | 100% | $1,385 | | |
| Discovery Channel | $1,070 | 100% | $1,070 | | |
| TLC | $593 | 66% | $391 | | |
| Other | $1,824 | 70% | $1,270 | | |
| **Liberty Global Total** | **$4,872** | **84%** | **$4,116** | **5.6%** | **4.7%** |
| **Cablevision** | | | | | |
| AMC | $877 | 100% | $877 | | |
| Cablevision RSNs | $634 | 100% | $634 | | |
| Other | $682 | 100% | $682 | | |
| **Cablevision Total** | **$2,193** | **100%** | **$2,193** | **2.5%** | **2.5%** |
| **Independent** | | | | | |
| ***Scripps*** | | | | | |
| HGTV | $876 | 100% | $876 | | |
| Food Network | $867 | 69% | $598 | | |
| ***Total Scripps*** | **$1,743** | **85%** | **$1,474** | **2.0%** | **1.7%** |
| ***National Football League*** | | | | | |
| ***Total NFL Network*** | **$1,165** | **100%** | **$1,165** | **1.3%** | **1.3%** |
| ***Univision*** | | | | | |
| Univision | $692 | 100% | $692 | | |
| UniMás | $175 | 95% | $166 | | |
| ***Total Univision*** | **$867** | **99%** | **$858** | **1.0%** | **1.0%** |
| **Total All Other Networks** | **$3,879** | | **$12,044** | **4.5%** | **13.9%** |
| **Total All Networks** | **$86,760** | | **$86,760** | **100%** | **100%** |
| **HHI** | | | | **1,476** | **1,190** |

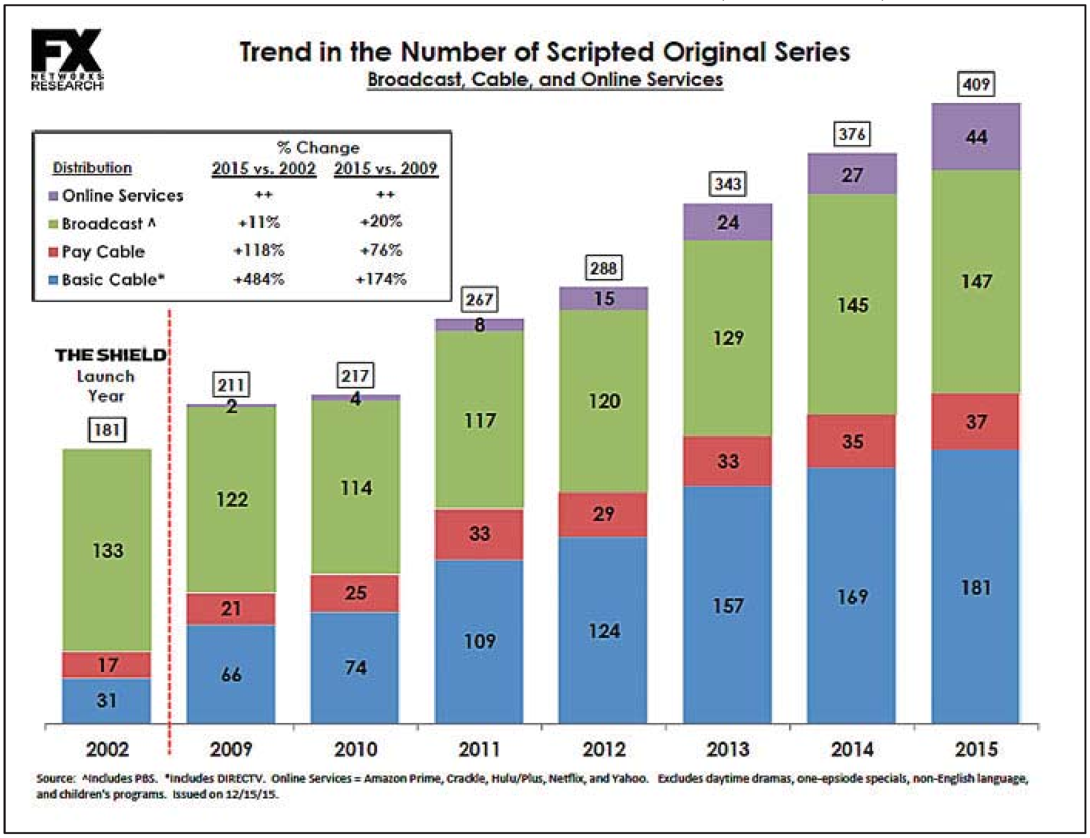
*Source*: Handbook, Table 7.5. Market shares calculated from reported revenue and ownership shares of the largest US broadcast, cable, Regional Sports, and premium programming networks among major multichannel owners as of 2013. When calculating the HHI, the residual market share of "All Others" is assumed to be distributed across owners with market shares no larger than one percent. *Note that, although CBS and Viacom are separate, publicly traded companies, they have the same controlling shareholder and are treated as commonly owned here. *See* https://www.cbscorporation.com/people/sumner-m-redstone/.

22. The ongoing proliferation of viewing options demonstrates that entry—another key indicator of competition[29]—is relatively common in the upstream market. For example, according to a study by FX Networks, the number of original scripted series available to

29. *Id.* §9.

viewers "has grown across each distribution platform—broadcast, basic and pay cable, streaming—led by significant gains in basic cable and digital services."[30]

FIGURE 2: GROWTH IN SCRIPTED SERIES (2002 – 2015)




*Source*: FX Networks Research, available at http://chronicledaily.com/2015/12/17/fx-says-scripted-shows-hit-record-409-in-us-this-year/.

23. As seen in Figure 2, FX estimates that there were 409 scripted original series as of 2015—up from 211 in 2009, and just 181 in 2002. Cable networks have accounted for the bulk of the increase—they now produce more scripted series than broadcasters—although OTT-produced series have seen the greatest proportional growth.[31] Broadcasters (including PBS)

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30. Lisa de Moraes, "FX Study: Record 409 Scripted Series On TV In 2015," *Deadline* (December 16, 2015), available at http://deadline.com/2015/12/tv-study-record-number-scripted-series-fx-1201668200/.

31. These totals do not consider a variety of other types of programming available to viewers, including reality TV programming, made-for-TV movies, specials, news, sports, daytime, and children's programming. *Id.*

accounted for nearly three-quarters of scripted programming in 2002, but just 36 percent in 2015.[32]

24. The Riordan Study ignores all of these indicia of upstream competition, and simply asserts that "must have programming is uniquely valuable," such that failure to secure the necessary programming rights would put a significant fraction of an MVPD's subscriber base at risk.[33] Yet even if one accepts the dubious premise of "must have" programming, the Riordan Study ignores the obvious corollary: A broadcaster failing to secure broad distribution of its content risks sacrificing both carriage fees and advertising revenue. This is particularly true of RSNs, which cannot easily sell programming tailored for one market (e.g., a full season of Dallas Mavericks games) into another market (e.g., Washington D.C., or any other non-Dallas market). Given the highly concentrated nature of the typical MVPD market (discussed below), failure to secure carriage with even a single MVPD could mean the difference between profit and loss, particularly given the large fixed costs faced by RSNs (programming rights) and by broadcasters generally.[34] This would make an MVPD distribution agreement a "must have" input from the broadcaster's point of view.

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32. Equal to 147/409.
33. Riordan Study at 4, ¶5.
34. Handbook §7.4.3.1, at 309. *See also* Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* (June 2011), Attachment A to Reply Declaration of Jeffrey A. Eisenach and Kevin W. Caves (June 27, 2011) in NAB Reply Comments in MB Docket No. 10-71, at Appendix A (June 27, 2011).

### B. Downstream Distribution Markets Presently Are Highly Concentrated, With Little Scope for Competitive Entry

25. In contrast to its claims of "monopolistic"[35] conduct on the part of broadcasters, the Riordan Study characterizes downstream interaction among MVPDs as competitive.[36] To support this claim, the Riordan Study points to data published in the FCC's most recent *MVPD Report* showing that most households have access to three or fewer MVPDs.[37] These statistics actually confirm the well-established fact that downstream distribution markets are highly concentrated among a small number of MVPDs. For example, as the *MVPD Report* itself observes, in market with three or fewer MVPDs (representing 65 percent of households), the HHI will exceed 3,333.[38] This is well above 2,500—the threshold above which markets are considered "highly concentrated," according to the *Merger Guidelines*.[39] More specifically, the FCC's data indicate that cable MVPDs account for about 54 percent of MVPD subscribers on average, with DirecTV/AT&T and DISH accounting for approximately 26 percent and 14 percent respectively.[40] This implies that the HHI for a typical local market approaches 3,800.[41]

26. Therefore, despite entry by DBS providers in the 1990s, and by AT&T and Verizon in the mid-2000s, the MVPD market remains highly concentrated. There has been no substantial entry and expansion in the industry for approximately ten years, since AT&T and Verizon entered. (Google Fiber, which entered the MVPD market in 2011, has yet to achieve

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35. Riordan Study at 4, ¶5.
36. *Id.* at 9, ¶7.
37. *Id.* at 7, ¶2.
38. Federal Communications Commission, *In The Matter of Annual Assessment of Competition in the Market for Video Programming, Sixteenth Report and Order,* (March 2015) [hereafter "16th MVPD Report"], ¶32.
39. Merger Guidelines §5.3.
40. According to the FCC, there were 100.9M MVPD households as of 2013. The combined share for DirecTV and AT&T is calculated as (20.3M + 5.5M )/100.9M. The share for Dish is calculated as 14.1M/100.9M. *See* 16th MVPD Report ¶2; ¶¶25-27.
41. $(0.54^2 + 0.26^2 + 0.14^2)*10{,}000 = 3{,}788$.

more than a *de minimis* nationwide penetration).[42] Finally, wireless broadband services currently lack the capability to provide significant competition to MVPDs.[43]

27. Thus, although the Riordan Study claims to rely explicitly on the SCP paradigm as "a standard economic framework for describing market conditions,"[44] the Riordan Study refuses to confront even the most basic aspects of market structure in its competitive analysis. As noted above, even a cursory review of the data shows that the downstream distribution market is highly concentrated. A more detailed survey of the evidence by former FCC Chief Economist Gregory Crawford reached conclusions that are difficult to square with the Riordan Study:

> Are (most) cable markets competitive? The evidence for wireline competition is encouraging, but its narrow scope (pre-telco entry) has limited measured benefits to a small fraction of cable households and lack of data (post-telco entry) renders conclusions impossible. While there is some evidence of a positive impact of satellite competition on cable prices, the estimated cable price elasticities suggest cable systems still exert considerable market power. Despite this, more large-scale entry appears unlikely. Further wireline entry means paying substantial fixed costs and facing entrenched competitors.[45]

28. Perhaps recognizing that its initial characterization of competition in the MVPD market is untenable, the Riordan Study offers an alternative characterization based on bilateral bargaining models.[46] This alternative formulation is much more consistent with the way in which both academics and policymakers view the industry: As Professor Crawford notes in the

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42. As of 2015, Google Fiber had an estimated 100,000 to 120,000 paying subscribers. Although Google may have the potential to become a significant rival to larger MVPDs, the market reaction thus far has been characterized as "dismissive." *See* Jeff Baumgartner, "Study: Market 'Too Dismissive' of Google Fiber," *Multichannel News* (October 7, 2015), available at http://www.multichannel.com/news/distribution/study-market-too-dismissive-google-fiber-s-potential/394356

43. In principle, competition from wireless operators could provide competitive discipline in broadband service in much the same way that mobile wireless providers have for voice telephony. *See, e.g.,* Hal Singer, "Promoting Broadband Competition: Will Consumers Opt for Mobile-Only Broadband?" *Forbes* (February 25, 2015); *see also* Kevin W. Caves, *Quantifying Price-Driven Wireless Substitution in Telephony,* 35 TELECOMMUNICATIONS POLICY 984-998 (December 2011).

44. Riordan Study at 6-7, ¶¶1-3.

45. Gregory S. Crawford, "Cable Regulation in the Internet Era," Chapter 3 in Nancy L. Rose,, ed., *Economic Regulation and Its Reform: What Have We Learned?* (University of Chicago Press 2014), at 174-175.

46. Riordan Study at 14, ¶¶8-12.

*Handbook of Media Economics*, when MVPDs negotiate with broadcasters (or other content providers), "it's unreasonable to think that either [party] 'sets a price'; rather they bargain to determine a mutually agreeable price."[47] Unfortunately for the Riordan Study, this more realistic bargaining framework undermines the simplistic policy implications that flowed from its misuse of introductory textbook models of monopolistic suppliers and atomistic customers. In fact, there is no basis in economics or antitrust for the Proposed Regulation, as explained in more detail below.[48]

## III. THE RIORDAN STUDY'S COMPETITIVE ANALYSIS IS FLAWED AND MISLEADING

29. The empirical claims underlying the Riordan Study's competitive analysis are speculative and unsupported, providing no evidence that the Alleged Bundling even occurs, let alone that it drives up prices. The Riordan Study makes no pretense of adhering to even the most rudimentary antitrust principles, which recognize that bundling often has procompetitive effects, and place the burden squarely on plaintiffs to prove anticompetitive effects. As a consequence, the Proposed Regulation is highly susceptible to "Type II Errors," in which the null hypothesis (anticompetitive bundling) is accepted even when it is false. Stated differently, the Proposed Regulation is virtually guaranteed to condemn procompetitive bundled offers.

### A. The Riordan Study's Empirical Claims Are Purely Speculative, and Unsupported by the Evidence

30. Despite repeated assertions that bundled offers allow broadcasters to extract higher prices from MVPDs than they could otherwise, the Riordan Study provides no evidence that such bundled offers actually occur with any frequency (or at all), let alone that bundled

47. Handbook §7.4.2, at 306 ("In television markets, it is reasonable to think that both content providers (channels) and distributors have market power. In such cases, it's unreasonable to think that either "sets a price"; rather they bargain to determine a mutually agreeable price. In such settings, noncooperative bargaining theory has proven to be a useful tool to help understand market outcomes.")

48. *See* Part III.B, *infra*.

offers raise prices if and when they ever occur. In fact, the only piece of empirical pricing evidence even mentioned in the Riordan Study—the FCC's analysis of News Corp's joint ownership of RSNs and O&O broadcast stations in the *Comcast-NBCU Order*—actually undermines the Riordan Study's conclusions. The Riordan Study also commits the fundamental conceptual error of assuming away all alternative explanations for price differences across markets, attributing any and all differences to the exercise of market power.

#### 1. The Riordan Study Provides No Evidence on the Existence or Frequency of the Alleged Bundling, Which Is Likely Empirically Rare

31. Although the Riordan Study makes no attempt to quantify common ownership of RSNs and broadcast stations, the available evidence indicates that instances of such joint ownership are limited, which would obviously limit the opportunities for broadcasters to even consider these types of bundled offers. According to the FCC's most recent *MVPD Report*, only two broadcast station owners (Scripps and News Corporation) own any RSNs at all.[49] News Corp owns local Fox stations in 17 local markets,[50] and owns RSNs serving more than 20 local markets.[51] However, there are only 11 local markets in which News Corp owns both a local Fox station and a local RSN.[52] Comcast, despite its portfolio of RSNs and its 2011 acquisition of NBC, has dual ownership of an RSN and a broadcast station in just four local markets.[53]

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49. 16th MVPD Report, Table C-2 (Regional Networks Affiliated with a National Broadcast Television Network, Broadcast Television Licensee, or Other Media Company).

50. These are Atlanta, GA; Austin, TX; Charlotte, NC; Chicago, IL; Dallas-Ft. Worth, TX; Detroit, MI; Gainesville, FL; Houston, TX; Los Angeles, CA; Minneapolis-St. Paul, MN; New York, NY; Orlando-Daytona Beach-Melbourne, FL; Philadelphia, PA; Phoenix, AZ; San Francisco-Oakland-San Jose, CA; Tampa-St. Petersburg (Sarasota), FL; and Washington, DC (Hagerstown, MD). *See* http://www.tvb.org/markets_stations#!id=1374&type=broadcast_group (Showing Fox O&O stations).

51. 16th MVPD Report, Appendix D (Regional Sports Networks).

52. These are Atlanta, GA; Austin, TX; Charlotte, NC; Dallas-Ft. Worth, TX; Detroit, MI; Gainesville, FL; Minneapolis-St. Paul, MN; New York, NY; Orlando-Daytona Beach-Melbourne, FL; Phoenix, AZ; and Tampa-St. Petersburg (Sarasota), FL.

53. The four local markets in which Comcast owns both an RSN and a local broadcast station are Washington, Chicago, Philadelphia, and San Francisco. See 16th MVPD Report, Appendix C, Table C-1 (listing Comcast's

32. The limited frequency of common ownership between an RSN and a Big Four O&O broadcast station in the same market would obviously limit the opportunities for a broadcaster even to consider making a bundled offer. Yet the scope of bundled offers contemplated by the Proposed Regulation are still more limited, because the carriage contracts for the broadcast station and the affiliated RSN must also "have expiration dates around the same time."[54] As before, the Riordan Study provides no evidence suggesting that this necessary condition for the alleged bundling occurs with any frequency. The Riordan Study itself concedes that the Alleged Bundling occurs only in "some cases."[55]

**2. The Riordan Study Musters Zero Evidence That the Alleged Bundling Leads to Price Increases, and Mischaracterizes the FCC's Findings In *Comcast-NBCU***

33. The notion that broadcasters somehow extract supracompetitive prices from MVPDs in the upstream market through the Alleged Bundling exists only as a speculative claim in the Riordan Study. The Riordan Study offers no evidence to support its speculation, nor does it even acknowledge that such evidence should be necessary as a prerequisite to imposing a presumption of bad faith. The Riordan Study also ignores the fact that, given their substantial pricing power, MVPDs would likely absorb a significant share of any increase (or decrease) in programming costs before passing it through to consumers.[56]

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regional sports networks); *see also* http://www.tvb.org/markets_stations#!id=1473&type=broadcast_group (showing NBC O&O stations).

54. Riordan Study at 6, ¶8.

55. *Id.* at 3, ¶4.

56. The FCC itself has acknowledged this point, most recently in the current proceeding. *See Notice of Proposed Rulemaking*, MB Docket No. 15-216, FCC 15-109 (Sept. 2, 2015), ¶ 3, n. 21 ("We acknowledge that MVPDs are not required to pass through any savings derived from lower retransmission consent fees and that any reduction in those fees thus might not translate to lower consumer prices for video programming service.") *See also, Amendment of the Commission's Rules Related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 3351, 3363 (2014) ("Cable operators are not required to pass through any savings derived from lower retransmission consent fees.")

34. The only empirical pricing evidence even mentioned in the Riordan Study is the FCC's analysis of News Corp's joint ownership of RSNs and O&O broadcast stations in the *Comcast-NBCU Order*.[57] The News Corp analysis is not directly relevant because it did not test the Riordan Study's hypothesis: The FCC's analysis was designed to test for a relationship between RSN affiliate fees and common ownership of the RSN and an O&O broadcast station, without any regard to how the RSN was sold. Thus, the News Corp analysis did not address bundled offers, nor did it consider the effect (if any) of common expiration dates. Setting this aside, the Riordan Study mischaracterizes the FCC's pricing evidence, which actually undermines its conclusions. Specifically, the FCC found that horizontal common ownership had no statistically significant effect on News Corp's RSN affiliate fees:

> We find that five years after the horizontal integration of an RSN and O&O broadcast station, and after controlling for programming investment, News Corp. was able to charge affiliate fees for the RSN that were [REDACTED] higher than would be expected under separate ownership, *although this estimate is not statistically significant*.[58]

Because the FCC found no statistically significant difference between the affiliate fees of RSNs owned jointly with local O&O broadcast stations versus the affiliate fees of RSNs in local markets without joint ownership, the News Corp analysis clearly provides no empirical support whatsoever for the Riordan Study.

### 3. The Riordan Study Assumes Away All Alternative Explanations for Price Differences Across Markets

35. The Riordan Study and the Proposed Regulation rely on the indefensible assumption that any differences in prices for RSNs or broadcast stations across markets not

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57. Federal Communications Commission, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order*, Docket No. 10-56, (January 20, 2011), Appendix B.

58. *Id.* ¶55 (Emphasis added).

explained by "downstream competitive considerations" are necessarily attributable to monopoly power.[59] This is false. Common sense and empirical evidence show that there are demand- and cost-based factors that explain the variation in license fees from one market to another, including programming costs, advertising revenue, and other market-specific factors.[60] Yet the Proposed Regulation would impose a presumption of bad faith negotiation while ignoring such factors. Indeed, according to this logic, the merger of any MVPDs that operate in the same market should trigger a presumption of bad faith for simultaneous negotiations of commonly owned programming assets. Neither the Riordan Study nor the ACA appear willing to endorse such a policy.

### B. There Is No Basis in Economics or Antitrust Principles for the Proposed Regulation

36. Although the economics of bundling defies easy generalization, economists and antitrust practitioners recognize that bundling is extremely common in competitive markets, and generally has procompetitive effects.[61] Bundling may involve true discounts offered to buyers, reflecting efficiencies that are often realized when two or more products are sold together, making both buyers and sellers better off. Even if no apparent discount is offered, bundling may still enhance buyer welfare by allowing the seller to expand the range or quality of content

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59. Riordan Study at 9, ¶8.

60. Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks,* 12 REVIEW OF NETWORK ECONOMICS (2013).

61. *See, e.g.,* David S. Evans and Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22(1) YALE JOURNAL ON REGULATION 37-89 (2005) [hereafter "Evans & Salinger"], at 37 ("the sale of products [together] that could be sold separately is common in competitive markets--from left and right shoes, to the sports and living sections of daily newspapers, to cars and radios."), and at 39 (noting that "[t]ying in competitive markets presumptively occurs because it is efficient--it reduces costs or improves quality.") *See also Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 895 (9th Cir. 2008) (recognizing that consumers benefit from bundling because "bundled discounts . . . allow the buyer to get more for less.") *See also* Barry Nalebuff, *Bundling and Tying*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2nd ed. 2008) (noting that "[b]undling may be used to reduce cost and improve quality," and that "price discounts [from bundling] are typically pro-competitive.") *See also* Owen Study at 3.

available to customers. For reasons such as these, bundling is proscribed by the antitrust laws only in limited circumstances, and plaintiffs must meet exacting standards to prove that a given bundled offer is anticompetitive.

37. Under the standard of proof known as the "discount-attribution" or *Cascade* test, there exist necessary (but not sufficient) conditions for a plaintiff to succeed in a bundling complaint, which require that (1) the defendant wield monopoly power in the "tying" market; and (2) the imputed price of a competitive (or "tied") product be below some relevant measure of an equally efficient rival's incremental cost.[62] Regardless of which framework is adopted, there exists no blanket presumption against bundling (as advocated by the Riordan Study), let alone a *per se* prohibition (as the ACA advocates). The burden is always on the plaintiff (the buyer or the excluded rival in the tied market).

38. Any proof of anticompetitive bundling hinges on the ability of a monopolistic (price-setting) seller to exercise market power over a population of atomistic (price-taking) buyers. In contrast, when prices are set by bilateral bargaining and each side has some degree of market power (as is the case here), economics and antitrust scholarship provide no clear set of standards for distinguishing procompetitive bundled offers from anticompetitive bundling, or even for defining what it means for a given bundle to be anticompetitive.

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62. *See* Kevin Caves & Hal Singer, *On the Utility of Surrogates for Rule of Reason Cases*, CPI ANTITRUST CHRONICLE (May 2015), at 3 ("In *Cascade*, the Ninth Circuit ruled that exclusionary bundled discounting claims, in addition to the usual requirements for proving liability under §2 of the Sherman Act, also require plaintiffs to prove that the imputed price of the tied product (*A*) is less than the defendant's incremental cost of producing the tied product (*B*)."), citing *Cascade Health Solutions* v. *PeaceHealth*, No. 05-35627, (9th Cir. Sept. 4, 2007), 11221, n. 13 ("[E]ven if the exclusionary conduct element is satisfied by bundled discounts at price levels that yield a conclusion of below-cost sales, under the appropriate measure, there cannot be Sherman Act § 2 liability for attempted monopolization unless the other elements of a specific intent to monopolize and dangerous probability of success are satisfied.").

39. None of this apparently matters to the Riordan Study, which ignores the literature and imposes a blanket presumption that utterly fails to distinguish (or even attempt to distinguish) between procompetitive and anticompetitive bundling. The Riordan Study proceeds in a vacuum, making no pretense of relying on any of the relevant scholarship, and referencing only a single peer-reviewed article—a six-page note published more than 50 years in the past.[63] Even that article provides no support for the Riordan Study's blanket condemnation of bundling: To the contrary, the author recognized that the effect of the Supreme Court's decision to ban the bundling (or "block-booking") of Hollywood films could not be justified on efficiency grounds, as it would simply redistribute revenue from one set of monopolists to another.[64] Given the pervasiveness of bundling, the logic of the Riordan Study would imply that virtually any product or service in the economy could constitute an anticompetitive bundle, as long as one of its components could be construed as "must-have."

**1. Bundled Offers Can Lower Prices, and May Be Welfare-Enhancing Even When They Do Not Result in Lower Prices**

40. The most straightforward way in which bundling can promote competition is by lowering prices. Bundled offers are often referred to as "bundled discounts," because they often serve as a vehicle for sellers to pass through efficiencies that can be realized only when products are sold together. These efficiencies may exploit economies of scale, which allow sellers to recover high fixed costs by increasing sales volumes, as well as economies of scope, which allow for cost savings by using shared inputs to produce multiple outputs. Such efficiencies are potentially critical in the upstream programming market, in which content providers are obliged

63. Riordan Study at 11, ¶1, n. 15.

64. George Stigler, *United States v. Loew's Inc.: A Note on Block-Booking* SUPREME COURT REVIEW (1963) 152-157, at 154.

to recover large investments in "first copy," which are typically both fixed (invariant to scale) and sunk (non-recoverable).[65]

41. These efficiencies can be realized when bundling allows suppliers to reduce transaction and contracting costs that might otherwise be duplicated if products were sold separately.[66] For example, rather than negotiate the terms and conditions for carriage separately for each individual programming asset, broadcasters and MVPDs routinely negotiate all-encompassing contracts spanning multiple stations, markets, and time periods.[67] This avoids needless replication of contracting costs, which may entail substantial expense and risk.[68] By simultaneously locking in terms, conditions, and pricing for multiple programming assets over multiple years, both the broadcaster and the MVPD may eliminate substantial risk and uncertainty in current and future revenue streams.

42. To show how bundling can lower prices, consider the following hypothetical retransmission consent example, based on an antitrust analysis of bundled discounts published by two economists from the Department of Justice and a professor at the University of Texas:[69]

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65. Handbook §7.4.3.1, at 309 ("The average annual programming expenditure for even a minor broadcast network is upward of $100 million, with $200 million required for a low-end top-25 cable network. Launching a channel requires a multi-year programming commitment, as well as administrative, technical, and marketing infrastructures that can easily push the fixed costs over $1 billion. Furthermore, most of these costs are sunk: programming investments that prove unpopular cannot be recovered, as cannot many administrative and marketing costs. Furthermore, arranging carriage agreements with leading distributors, a necessary condition for the success of a television channel, are also expensive and uncertain.")

66. Evans & Salinger, *supra*, at 52 – 56.

67. *See, e.g.,* Jon Lafayette, "CBS Signs New Carriage Deal With Cablevision," *Broadcasting & Cable* (August 25, 2015); *see also* Mike Farrell, "AT&T U-Verse, CBS Sign Carriage Pact," *Multichannel News* (August 1, 2015).

68. Handbook §7.4.3.1, at 309 "[A]rranging carriage agreements with leading distributors, a necessary condition for the success of a television channel, are also expensive and uncertain."

69. Patrick Greenlee, David Reitman, and David Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts* 26 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION (2006) at 1132 – 1152.

Suppose the independent profit-maximizing price or "standalone price"[70] of a network affiliated station's signal is $7 per subscriber per month, and that standalone price of the affiliated RSN is $5 per subscriber per month. Now consider the following two types of hypothetical bundled offers that the broadcaster might make to the MVPD:

> ***Offer A***: Carry the RSN for $5 as part of a bundle with my broadcast signal at $6; otherwise, the price of the broadcast signal reverts to $7.
>
> ***Offer B***: Carry the RSN for $6 as part of a bundle with my broadcast signal at $7; otherwise the price of the broadcast signal increases to $8.

43. Offer A is clearly procompetitive, because the MVPD would pay just $5 + $6 = $11 per subscriber for both the local station's signal and the RSN when purchased as a bundle, compared with $5 + $7 = $12 when sold separately at standalone prices. In contrast, Offer B yields no discount off the standalone price of either the local station or the RSN. Yet the Proposed Regulation has no mechanism for distinguishing one type of bundled offer from another, and would therefore condemn both. Moreover, when bundled offers are "tailored to individual customers,"[71] as is indisputably the case here (given that broadcasters engage in individualized negotiations with each MVPD), there is no reliable filter to distinguish procompetitive offers from anticompetitive offers, as the DOJ economists make clear.[72] Stated differently, the bilateral bargaining framework that characterizes negotiations between

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70. Here, the standalone price is simply the amount that the broadcaster would rationally charge for a station sold in isolation from all other programming assets. *Id.* at 1135 ("The loyalty program has three components: a standalone price for $A$, $P_A$, a discounted price for $A$, $P_A - \varepsilon_A$, and a price for $B$, $P_B$.")

71. *Id.* at 1139.

72. *Id.* at 1139-40 ("[A]re there tests that distinguish good bundled rebates from bad? Although the *Ortho* and *VAA/BA* tests have their uses, the discussion above suggests that they should be used with care, especially if loyalty programs are tailored to individual consumers…In Model 2 [with tailored loyalty programs], the pricing effects of bundling are complex and can raise or lower consumer and total welfare, even if the standalone price of $A$ exceeds the pre-bundling monopoly price.")

broadcasters and MVPDs[73] does not allow for a "bright line" test to distinguish procompetitive from anticompetitive bundling.

44. The Riordan Study observes correctly that bundling can, in theory, increase seller revenue by effectively decreasing the elasticity of demand through a homogenization of buyer preferences.[74] However, the Riordan Study offers no evidence that this effect is at work here, and provides only vague and inapposite hypotheticals. The Riordan Study speculates that the Alleged Bundling would lead to increased "bargaining leverage"[75] in broadcasters' negotiations with MVPDs. However, as the Riordan Study admits, this hypothetical assumes that there is a non-trivial degree of partial substitution between the RSN and the broadcast station—implying that similar sports programming is available on both the (commonly owned) local broadcast station and the RSN.[76] Yet it is far from clear that this is the case, given that the past decade has seen the rights to significant sports programming migrate from broadcast outlets to cable networks and RSNs. Other speculative hypotheticals assume unrealistically that the broadcaster can force a simple "take it or leave it" offer, leaving the MVPD no role in the price-setting process other than to accept or reject the ultimatum with which it is presented.[77] This assumption contradicts both the economic reality of retransmission consent negotiations and the FCC's existing good faith rules, which already prohibit such offers.[78] These same hypotheticals

73. *See* Part II.B, *supra*, citing Handbook §7.4.2, at 306.

74. Riordan Study at 12, ¶3; and at 13, ¶5. Professor Crawford provides a useful review of this literature. *See* Handbook §7.4.4.1-2

75. *Id.* at 14-15, ¶8.

76. *Id.* at 15, ¶10.

77. *Id.* at 12, ¶3 ("The example captures a bargaining situation in which a seller, in the course of negotiations, arrives at a firm price offer that the buyer can accept or refuse.")

78. We understand that making a "take it or leave it" proposal for bundled programming and refusing to consider alternate terms or counterproposals, including an MVPD's "request to compensate the broadcaster in some other way," is "not consistent" with good faith. *See Implementation of the Satellite Home Viewer Improvement Act*

subsume other unjustified assumptions,[79] in addition to an elementary arithmetic error.[80] (And even if one ignored all of these flaws, the implied price effects would be modest).[81]

45. Economists recognize that bundling can enhance both buyer welfare and total welfare even when it does not result in lower prices for the bundled products, by allowing the seller to offer content that "can be profitably supplied *only* if bundling is used."[82] Accordingly, even if the Riordan Study had mustered evidence that the Alleged Bundling occurs, and that the Alleged Bundling increases broadcaster revenues, the bundle could still generate procompetitive effects. As noted above, achieving profitability in the upstream market may hinge on exploiting

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*of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order (2000), 15 FCC Rcd 5445, 5463.

79. These stylized hypotheticals assume that broadcasters insist on "pure bundling," refusing to offer the bundled programming on a standalone basis at any price. Riordan Study at 12, ¶¶3-4. Yet the Riordan Study offers no evidence that this is what occurs. It is our understanding that broadcasters do not engage in pure bundling. *See* Comments of Broadcast Affiliate Associations, MB Docket No. 15-216 (Dec. 1, 2015), at 42 ("No MVPD is forced to accept a 'bundle' of programming."); *see also* Comments of Univision Communications Inc., MB Docket No. 15-216 (Dec. 1, 2015), at 11 ("Univision has never required that all of its services be purchased in order to reach agreement on a retransmission consent deal."); *see also* Comments of Media General, Inc., MB Docket No. 15-216 (Dec. 1, 2015), at 9 (stating that broadcasters "offer options to MVPDs" to carry additional programming networks "at different price points," and that Media General is "unaware of any widespread practice of conditioning retransmission consent of its primary channel only on carriage of an affiliated station or multicast stream.") Professor Owen's prior study found no evidence of pure bundling in the upstream market. *See* Own Study at 1, and Part II.

These same stylized hypotheticals also assume a particular reversal in valuations, according to which one type of MVPD ("Type A") places a relatively high value on an affiliated RSN, while another type ("Type B") places a relatively high value on a broadcast station's signal. Riordan Study at 11, ¶2. But the Riordan Study makes no effort to show that such reversals actually occur among MVPDs in their demand for RSNs and broadcast signals. It is unclear how such an assumption could be justified, given that two MVPDs serving the same local market would presumably place similar values on similar programming.

80. The Riordan Study's stylized example involving "121 equally likely types of buyers" actually involves only 66 types of buyers. To see this, note that there are 6 possible types that "value the retransmission rights for the broadcast station anywhere between $2.50 and $3.00 at 10-cent increments," and 11 possible types that "value the RSN rights at 10-cent increments between $7 and $8." This means there are 6 x 11 = 66 possible buyer types, and that the expected price is $9.60 x (65/66) = $9.45, which is *less* than the $9.50 that would be earned under separate selling. Thus, under Riordan Study's stylized hypothetical, the broadcaster would *not* choose to bundle. *Id.* at 13, ¶5.

81. In the Riordan Study's first stylized example, in which there are only two possible buyer types, bundling increases price by 5 percent. *Id.* at 11-12, ¶2. In the second and more realistic stylized example, when there are more types of possible buyers, bundling increases prices by a mere 0.21 percent (from $9.50 to $9.52). *Id.* at 13, ¶5, n. 17. As noted above, once the arithmetic error in the second example is corrected, bundling does not raise prices at all.

82. Handbook §7.4.4.1, at 317 (emphasis in original).

scale and scope economies Conversely, it may also be driven by so-called "demand-side economies of scope,"[83] which are present whenever bundling creates more buyer surplus than could be achieved if the products in question were sold separately, and can result in efficiencies even when bundling does not generate significant cost savings to suppliers.[84] Any or all of these efficiencies can make both buyers and sellers better off when products are sold together in a bundle instead of being sold separately. Because the Proposed Regulation's blanket presumption ignores these effects entirely, it would condemn this form of procompetitive bundling.

46. In fact, precisely these effects have already been documented in MVPD markets. Professor Crawford and his co-author, Stanford Professor Ali Yurukoglu, have shown theoretically and empirically that the bundling of cable channels likely enhances consumer welfare. Under a mandated *à la carte* regime, content providers in the upstream market would face narrower distribution of their channels. To (partially) offset the resulting revenue losses, content providers would negotiate higher per-channel programming fees with MVPDs, some of which would be passed on to end-customers in the form of higher per-channel prices. These higher per-channel costs would offset any consumer benefits from being able to purchase channels individually. In effect, consumers would lose under mandated *à la carte* because they would no longer retain the option of purchasing the original bundle of channels at the original price, and would be forced to choose among inferior combinations of channels and higher per-channel price points.[85]

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83. *Id.* §7.4.4.1, at 317-318.
84. *Id*.
85. Gregory Crawford and Ali Yurukoglu, *The Welfare Effects of Bundling in Multichannel Television Markets,*102(2) AMERICAN ECONOMIC REVIEW (2012) 643-685. *See also* Gregory Crawford and Joseph Cullen,

47. By similar logic, even if the Alleged Bundling were typical, and even if it did increase broadcaster revenue, it could still enhance economic welfare by allowing broadcasters to offer more and/or higher quality content than would be possible otherwise. Given that content production requires large up-front investments that are both sunk and fixed,[86] bundled contracts represent a mechanism that can provide larger and more stable revenue streams to finance higher quality content than would otherwise be possible under lower investment levels. Because higher-quality content attracts more viewers, an increase in quality, by definition, leads directly to an increase in output (measured in eyeballs), as well as increased consumer welfare. Increased viewership would also raise advertising revenue, further increasing the funds available for programming investments. Similarly, to the extent that they are used to secure distribution to a wider set of viewers, bundled contracts can expand output still further.[87] As Professor Crawford observes,

> [T]he fact that a broadcaster typically makes more profit when bundling is used implies that some content can be profitably supplied *only* if bundling is used. As a result, even if bundling often reduces consumer surplus for a given range of content, the fact that more content might be offered with bundling could lead to consumer gains from the practice.[88]

### 2. The Proposed Regulation's Blanket Prohibition Would Condemn Welfare-Enhancing Offers

48. As the literature reviewed above makes clear, bundled offers may be either procompetitive or anticompetitive, and the task of distinguishing the two is a complicated one.

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*Bundling, product choice, and efficiency: Should cable television networks be offered à la carte?* 19 INFORMATION ECONOMICS AND POLICY 379–404 (2007).

86. Handbook §7.4.3.1, at 309.

87. The Riordan Study claims misleadingly (and without evidence) that bundling cannot expand output "because the market is already fully covered, leaving no room for expansion." Riordan Study at 16, ¶12. This is incorrect. As noted above, even if the market were "fully covered," bundling can still result in an increase in quality, which raises output as measured by both viewership and consumer welfare. The Riordan Study also offers no evidence that networks subject to the Alleged Bundling are universally available to MVPD subscribers.

88. Handbook §7.4.4.1, at 317.

Given that economists and antitrust practitioners have already developed frameworks designed to make this distinction, the Proposed Regulation creates clear incentives for opportunistic MVPDs to circumvent the established frameworks by availing themselves of an alternative enforcement venue. Thus, to the extent that the Alleged Bundling actually occurs in the marketplace (currently or in the future), the Proposed Regulation's blanket presumption against bundling virtually guarantees that welfare-enhancing bundled offers would be proscribed.

49. The Riordan Study would have the Commission believe that the solution to the problem of distinguishing procompetitive bundled offers from anticompetitive offers is simple, straightforward, and easily implementable through a forced sequencing of negotiations. It goes almost without saying that, if such a magic elixir actually existed, the remedy would already be well known, well understood, and widely implemented by the antitrust authorities and courts. That the Riordan Study can point to no authority whatsoever in support of its purported "light-handed regulatory remedy"[89] confirms that this is not the case.

**3. The Proposed Regulation Would Fail Even on Its Own Terms**

50. Even if one accepts the basic premises of the Riordan Study, the Proposed Regulation fails to solve the problem for which it is intended. The Proposed Regulation would mandate that carriage over one programming asset (such as an affiliated RSN) be resolved before moving on to negotiate a new carriage agreement for another asset (such as a local broadcast station).[90] Yet even under this forced sequencing, there would be nothing to prevent the broadcaster from conditioning the terms of a retransmission consent agreement for its local station on reaching a carriage agreement for its affiliated RSN. (For purposes of this

89. Riordan Study at 21.
90. Riordan Study at 16-19, ¶¶2-7.

hypothetical, we assume counterfactually that the Riordan Study is correct in asserting that broadcasters can be said to act as monopolistic price-setters, while MVPDs are passive price-takers).[91]

51. Specifically, if the MVPD failed to accept the broadcaster's terms in the first (RSN) negotiation, the broadcaster could simply penalize the MVPD by insisting on a higher price in the second (local station) negotiation. In view of this imminent penalty, the MVPD would rationally accept the broadcaster's terms in the first round to avoid penalties in the second. Therefore, there would be nothing to prevent the broadcaster from extracting higher prices from the MVPD through something akin to Offer B above.[92] Remarkably, although the Riordan Study recognizes that this problem of "tacit linkage"[93] could arise in separate but simultaneous negotiations, it dismisses this possibility in sequential negotiations.[94]

52. The Riordan Study reaches this conclusion only by assuming that the seller cannot credibly condition its offer in the second negotiation on the outcome of the first. This, in turn, rests on the untenable assumption that broadcasters and MVPDs negotiate only once, and in a vacuum.[95] Under these unrealistic assumptions, a broadcaster has no incentive to charge anything other than the standalone price in the second round, regardless of what happens in the first. In the real world, contracts expire, and broadcasters and MVPDs interact repeatedly and regularly over time through periodic and predictable renegotiations. By committing to punish

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91. As noted above, this assumption is clearly untenable here; instead, negotiations between broadcasters and MVPDs are more accurately captured by a bilateral bargaining framework, according to which each party plays a role in determining the terms and conditions of carriage.

92. *See* Part III.B.1, *supra*. If the MVPD refused to accept the (higher) RSN price of $6 in the first negotiation, the broadcaster could threaten to retaliate by insisting on a (higher) price of $8 for the broadcast station's signal in the second negotiation.

93. Riordan Study at 17, ¶3.

94. *Id.* at 16-17, ¶¶2-3.

95. *Id.* at 17-18, ¶¶4-5.

MVPDs that fail to cooperate with its bundled offer in the first round, the broadcaster could increase its stream of current and future revenue. The credibility of the threat could be reinforced by (publicly) making an example of one MVPD, thereby putting the others on notice. The Riordan Study's hypothetical example of sequential Nash bargaining suffers from exactly the same logical flaw.[96]

## IV. THE PROPOSED REGULATION IS NOT A "LIGHT-HANDED REGULATORY REMEDY," AND WOULD LIKELY HARM ECONOMIC WELFARE

53. Under no stretch of the imagination can the Proposed Regulation be accurately characterized as a "light-handed regulatory remedy."[97] By creating either a presumption or a *per se* prohibition against bundled offers, the Proposed Regulation would upend existing antitrust standards, bumbling into an area already policed by antitrust laws, which have established precisely the opposite presumption on efficiency grounds. The Proposed Regulation would generate clear incentives for MVPDs to attempt to gain negotiating leverage by forcing broadcasters to either submit to an MVPD's preferred set of terms and conditions, or to prove their innocence. The likely result would be tantamount to a prohibition on bundling, with no mechanism to prevent MVPDs from invoking the prohibition on specious grounds simply to gain leverage in their negotiations with broadcasters.

54. At best, the ultimate effect of the Proposed Regulation might be negligible—if the Alleged Bundling seldom (or never) occurs in practice. This seems unlikely, given that neither the ACA nor any other industry group would rationally expend resources in pursuit of a regulation not expected to deliver substantive results. What seems more likely is that the Proposed Regulation is intended to target (or to lay the groundwork for targeting) a much

96. *Id.* at 18-19, ¶6.
97. *Id.* at 21.

broader set of programming assets than the RSNs and Big Four O&O stations that are the primary focus of the Riordan Study. Indeed, the Riordan Study is careful to clarify (in a footnote) that "the same conclusions can be reached for any programming bundled with retransmission consent that would be considered must have, including a suite of national cable programming networks."[98] This language appears to signal an intention to expand the scope of the Proposed Regulation to proscribe *any* bundle involving *any* broadcast station combined with *any* cable network. If so, both the Commission and the marketplace could be saddled with a steady diet of disputes, requiring regular adjudication and intervention into negotiations previously settled among private economic agents.

55. The Riordan Study suggests that a broadcaster could insulate itself from a good faith complaint (and thus avoid the threat of FCC intervention) by "granting an extension of the existing retransmission consent agreement until the parties have either completed a new carriage agreement for the RSN or other must have programming, or the negotiations have come to a legitimate impasse."[99] Alternatively, "the seller could allow the MVPD to opt-in to a previously negotiated retransmission consent agreement for an O&O television station signal."[100] But this raises at least three problems.

56. *First*, given that the market value of a programming asset can easily increase over time, there would be nothing to prevent an MVPD from exploiting this provision by holding up the RSN contract in order to maintain carriage of a broadcast station at prior (below-market) prices. *Second*, enforcement of the provision would force the FCC to identify "legitimate" negotiating impasses. This would thrust the Commission directly into the role of

98. *Id.* at 4, ¶4, n. 10.
99. *Id.* at 19, ¶7.
100. *Id.* at 19, ¶7.

judging the "reasonableness" of the prices, terms, and conditions at issue in the RSN negotiations, contrary to the claims of the Riordan Study. *Third*, if the broadcaster has multiple preexisting retransmission consent agreements with the MVPD, the FCC could be forced to decide which of the previously negotiated retransmission consent agreements should be used to satisfy the opt-in provision—a potentially arbitrary determination.

## CONCLUSION

57. The Commission should reject the Riordan Study's call for what amounts to mandatory *à la carte* regulation in upstream programming markets. Far from promoting the public interest, the Proposed Regulation can be expected to undermine legitimate antitrust enforcement and proscribe procompetitive conduct while also requiring burdensome intervention by the Commission. Rather than embarking upon a regulatory trajectory unsupported by empirical evidence or sound economic principles, the FCC should leave in place its existing presumption that broadcasters' bundled programming offers are consistent with good faith bargaining.

# APPENDIX A: CURRICULUM VITAE OF PROFESSOR OWEN

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|---|---|
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| BACKGROUND | Born 1943, Worcester, Massachusetts • Attended public schools in Millbury, Massachusetts • Married 1965 to the former Josetta Knopf • Two children: Peter 1969 and Bradford 1974. |
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| PRESENT POSITION | Stanford University: Gordon Cain Senior Fellow (Emeritus), Stanford Institute for Economic Policy Research, 2015-; Morris M. Doyle Centennial Professor in Public Policy (Emeritus). |
| PREVIOUS POSTS | Stanford University: Gordon Cain Senior Fellow, Stanford Institute for Economic Policy Research 2003-2015. Morris M. Doyle Centennial Professor in Public Policy and Director, Public Policy Program, School of Humanities and Sciences, 2005-2014. Professor of Economics (by courtesy) 2003-2014. Economists Incorporated: co-founder and CEO, 1981-2002, consultant 2003- • Stanford University: Visiting Professor of Economics, Stanford in Washington, 1989-2002, Assistant Professor of Economics 1973-1978 • Antitrust Division, United States Department of Justice: Chief Economist, 1979-1981 • Duke University: Associate Professor of Business and Law, 1978-1980, Adjunct Professor of Public Policy, 1981-88 • White House Office of Telecommunications Policy: Chief Economist, 1971-1972. |
| MEMBERSHIPS AFFILIATIONS | American Economic Association |
| FELLOWSHIPS | Merit Scholar 1961-65; Woodrow Wilson Fellow 1966; National Defense Education Act Title IV Fellow 1966-69; Brookings Institution Economic Policy Fellow 1970-1971; Hoover Institution National Fellow 1974-1975; Aspen Institute for Humanistic Studies Fellow and chairman, Task Force on the Future of the Postal Service 1978-79. |
| TEACHING | Economic Analysis of Law (at Stanford, 2003-present) |

PUBLICATIONS

BOOKS

*The Internet Challenge to Television*, Harvard University Press, 1999.

*Economics of a Disaster: The Exxon Valdez Oil Spill,* Praeger, 1995. (with others)

*Electric Utility Mergers: Principles of Antitrust Analysis,* Praeger, 1994. (with M. Frankena)

*Video Economics,* Harvard University Press, 1992. (with S. Wildman)

*The Political Economy of Deregulation,* American Enterprise Institute, 1983. (with R. Noll)

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Economists INCORPORATED

## APPENDIX B: CURRICULUM VITAE OF DR. CAVES

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### Education

Ph.D. Economics, University of California at Los Angeles, December 2005
Fields of Study: Industrial Organization, Applied Econometrics

M.A. Economics, University of California at Los Angeles, May 2002

B.A. *Magna cum laude*, Departmental Honors in Economics, Haverford College, May 1998

### Current Position

Senior Economist, Economists Incorporated

### Employment History

Director, Navigant Economics, March 2011 to December 2013

Associate Director, Navigant Economics, February 2010 to March 2011

Vice President, Empiris LLC, September 2008 to February 2010

Senior Economist, Criterion Economics LLC, October 2006 to September 2008

Senior Consultant, Deloitte & Touche LLP, September 2005 to October 2006

Teaching Fellow, Department of Economics, UCLA, January 2002 to June 2004

Assistant Economist, Federal Reserve Bank of New York, August 1998 to June 2000

**Publications and Research Papers**

*Identification Properties of Recent Production Function Estimators*, 83(6) ECONOMETRICA 2411-2451 (November 2015), co-authored with Daniel Ackerberg and Garth Frazer.

*On the Utility of Surrogates for Rule of Reason Cases*, COMPETITION POLICY INTERNATIONAL (May 2015), co-authored with Hal J. Singer.

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*Life After Comcast: The Economist's Obligation to Decompose Damages Across Theories of Harm*, 28 ANTITRUST (Spring 2014), co-authored with Hal J. Singer.

*Mobile Wireless Performance the EU and the US: Implications for Policy*, 93 COMMUNICATIONS & STRATEGIES (Q1 2014), co-authored with Erik Bohlin and Jeffrey A. Eisenach.

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*In the Matter of 2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, (MB Docket No. 14-50), Expert Report of Kevin W. Caves and Hal J. Singer: "Competition in Local Broadcast Television Advertising Markets" Federal Communications Commission (August 2014).

*In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services* (WC Docket No. 05-25 & RM-10593), Declaration of Kevin W. Caves and Jeffrey A. Eisenach, Federal Communications Commission (March 2013).

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*The Empirical Link Between Fibre-to-the-Premises Deployment and Employment: A Case Study in Canada* (prepared with support from Bell Canada, co-authored with Hal Singer and Anna Koyfman, October 2015).

*Mobile Wireless Performance in Canada: Lessons from the EU and the US* (prepared with support from TELUS, co-authored with Erik Bohlin and Jeffrey A. Eisenach, September 2013).

*Mobile Wireless Performance in the EU & the US* (prepared with support from GSMA, co-authored with Erik Bohlin and Jeffrey A. Eisenach, May 2013).

*Estimating the Economic Impact of Repealing the FLSA Companion Care Exemption (prepared with support from National Association for Home & Hospice Care*, co-authored with Jeffrey A. Eisenach, March 2012).

*The Impact of Liberalizing Price Controls on Local Telephone Service: An Empirical Analysis* (prepared with support from Verizon Communications, co-authored with Jeffrey A. Eisenach, February 2012).

*Bundles in the Pharmaceutical Industry: A Case Study of Pediatric Vaccines* (prepared with support from Novartis, co-authored with Hal J. Singer, July 2011).

*Evaluating the Cost-Effectiveness of RUS Broadband Subsidies: Three Case Studies* (prepared with support from The National Cable & Telecommunications Association, co-authored with Jeffrey A. Eisenach, April 2011).

*Video Programming Costs and Cable TV Prices: A Reply to CRA* (prepared with support from The National Association of Broadcasters, co-authored with Jeffrey A. Eisenach, June 2010).

*Modeling the Welfare Effects of Net Neutrality Regulation: A Comment on Economides and Tåg* (prepared with support from Verizon Communications, April 2010).

*Retransmission Consent and Economic Welfare: A Reply to Compass-Lexecon* (prepared with support from The National Association of Broadcasters, co-authored with Jeffrey A. Eisenach, April 2010).

*The Benefits and Costs of Implementing "Return-Free" Tax Filing in the U.S.* (prepared with support from The Computer & Communications Industry Association, co-authored with Jeffrey A. Eisenach & Robert E. Litan, March 2010).

*The Benefits and Costs of I-File* (prepared with support from The Computer & Communications Industry Association, co-authored with Jeffrey A. Eisenach & Robert E. Litan, April 2008).

*The Effects of Providing Universal Service Subsidies to Wireless Carriers* (prepared with support from Verizon Communications, co-authored with Jeffrey A. Eisenach, June 2007).

**Speaking Engagements**

*Competition and Monopsony In Labor Markets: Theory, Evidence, and Antitrust Implications*, New York State Bar Association, Antitrust Law Section, New York, NY, (April 23, 2014).

*Econometric Tests of Common Impact*, Covington & Burling LLP, Washington, DC., (May 23, 2013).

*Vertical Integration in Cable Networks: A Study of Regional Sports Networks*, Federal Communications Commission (May 21, 2013).

*Regression Methods: Theory and Applications of Fixed-Effects Models*, O'Melveny & Myers LLP, Washington, DC., (July 16, 2012).

*Regression Methods: Theory and Applications*, Antitrust Practice Group, Cohen Milstein Sellers & Toll PLLC, Washington, DC., (June 4, 2012).

*Using Regression in Antitrust Cases*, University of Pennsylvania Law School, Philadelphia, PA., (April 12, 2012).

Interview with *IT Business Edge* on Rural Utilities Service Broadband Subsidies (May 17, 2011).

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International Journal of the Economics of Business

**Honors and Awards**

Howard Fellowship for Excellency in Teaching, University of California at Los Angeles, Spring 2005.

Graduate Fellowship, University of California at Los Angeles, 2000 – 2004.

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