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March 15, 2016

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of *Ex Parte* Communication in MB Docket Nos. 15-216 and 10-71

Dear Ms. Dortch:

In response to a request made at our March 7, 2016 meeting,[1] this letter collects in one place the views of the American Television Alliance and its members on the Commission's legal authority to address broadcasters' bad-faith negotiating tactics. It discusses the following:

- The Commission's unquestionable legal authority—both under STELAR and under its preexisting authority—to adopt each of ATVA's proposals to amend the good faith negotiation rules.

- The Commission's authority under Section 325, read in conjunction with other provisions of the Communications Act, to adopt additional remedies, including interim carriage (with or without mandatory arbitration).

- The Commission's authority to prohibit online blocking to increase leverage in retransmission consent negotiations, notwithstanding broadcasters' claims that the First Amendment and the Copyright Act prohibit such action.

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[1] Letter from Michael Nilsson to Marlene Dortch (filed March 8, 2016). Unless otherwise indicated, each document cited in this letter was filed in MB Docket No. 15-216. Because this letter also discusses the Commission's authority to order interim carriage—a remedy discussed most clearly in *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718, ¶ 18 (2011) ("*2011 Retransmission Consent NPRM*")—we are also filing a copy of this letter in that docket, MB Docket No. 10-71. The issue of interim carriage, of course, explicitly remains open, as the Commission acknowledged in this proceeding. *Implementation of Section 103 of the STELA Reauthorization Act of 2014; Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd. 10327, ¶ 5 n.30 (2015) ("*Notice*") ("We note that we previously initiated a rulemaking proceeding on retransmission consent issues in 2011 *and certain issues in that proceeding remain pending*.") (emphasis added).

I. The Commission Possesses Authority to Adopt Each of ATVA's Proposals.

ATVA's members have argued for years that the Commission possesses broad authority under the Communications Act to address a wide variety of bad-faith behavior by broadcasters and to impose a variety of remedies to protect consumers—including interim carriage.[2] We continue to believe, and will explain further below, that the Commission should exercise this authority. The Commission can adopt each of ATVA's proposals, however, even under its prior, unnecessarily limited view of its authority, especially given the direction provided by Congress in STELAR.[3]

We begin with what should be an uncontroversial proposition—that the Commission can make new rules here if it finds that the record so warrants. Section 325 requires the Commission both to "establish regulations"[4] governing retransmission consent and to "revise" such regulations to require good faith negotiation.[5] For nearly sixteen years, the Commission has identified, pursuant to this authority, specific practices that either always or presumptively violate its good faith rules. The Commission devised the original *per se* and presumptive lists

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[2] *E.g.*, Comments of Time Warner Cable Inc., MB Docket No. 10-71 at 39-44 (filed May 27, 2011) ("Time Warner Cable 2011 Comments").

[3] We discuss specific concerns raised by broadcasters regarding online blocking in Part III, below. ATVA has also asked the Commission to limit out-of-market joint negotiation among non-commonly owned stations. In this regard, we note that broadcaster collusion in the sale of retransmission consent is easily distinguishable from occasional efforts by some cable operators to engage in joint purchasing. *See* Reply Comments of Time Warner Cable Inc., MB Docket No. 15-216, at 6-7 (filed Jan. 14, 2016). To take just one example, unlike broadcasters' presumptively anticompetitive joint *selling* arrangements, joint *purchasing* activities have long been viewed as procompetitive and, in this context, involve coordination among non-competing cable companies serving distinct, non-overlapping service areas. *Id*. *See also* Letter from R. Hewitt Pate to Robert E. Marsh (Oct. 7, 2003), *available at* https://www.justice.gov/atr/response-national-cable-television-cooperative-incs-request-business-review-letter (providing Department of Justice clearance for the National Cable Television Cooperative to negotiate on behalf of its members for programming). Broadcasters' attempts to analogize to the joint purchasing activities of Time Warner Cable and Bright House Networks are particularly inapt, given Time Warner Cable's ownership interest in Bright House Networks.

[4] 47 U.S.C. § 325(b)(3)(A).

[5] *Id.* § 325(b)(3)(C) ("The Commission shall commence a rulemaking proceeding to revise the regulations governing the exercise by television broadcast stations of the right to grant retransmission consent under this subsection, and such other regulations as are necessary to administer the limitations contained in paragraph (2). Such regulations shall . . . (ii) until January 1, 2020, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations . . . .").

itself pursuant to this authority.[6] And when the Commission added to its *per se* list in 2014, it held that it had authority to do so under Section 325.[7] It noted that "[w]here, as here, Congress has granted the Commission broad discretion to adopt rules implementing Section 325, including rules defining the scope of the good faith obligation, we find it reasonable to conclude that Congress . . . relied on the Commission to make such determinations."[8] This authority unquestionably permits the Commission to identify additional such practices here.

Were there any doubt on this score, Congress in STELAR required the Commission to "*commence a rulemaking* to review its totality of the circumstances test for good faith negotiations."[9] Since Congress directed the Commission to "commence a rulemaking," it necessarily intended to empower the Commission to actually make rules if supported by the record. As the Supreme Court has held, "[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure."[10] Broadcaster claims that Congress intended the Commission merely to "review" the test ignore the critical word "rulemaking."[11]

Congress also made clear that it intended for the Commission in this "rulemaking" to "include a robust examination" of retransmission consent negotiation practices,[12] to consider "whether certain *substantive* terms offered by a party may increase the likelihood of negotiations breaking down,"[13] and to examine "the *practices* engaged in by both parties if negotiations have broken down and a retransmission consent agreement has expired."[14] Likewise, Congress indicated that the Commission should "conduct a rulemaking to review *and update* its totality of

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6 *See generally Implementation of Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd. 5445, ¶¶ 11-24 (2000) ("*Good Faith Order*") (describing procedural history of the *per se* list).

7 *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, ¶¶ 29-33 (2014) (holding that the Commission had authority to address joint negotiation pursuant to Congress's directives to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent," and adopt rules to "prohibit a television broadcast station that provides retransmission consent from . . . failing to negotiate in good faith").

8 *Id.* ¶ 31.

9 STELA Reauthorization Act of 2014, Pub. L. No. 113-200, § 103(c), 128 Stat. 2059 (2014) (emphasis added).

10 *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

11 *See, e.g.*, Comments of the National Association of Broadcasters at 7 (arguing that "Congress directed the Commission *only* to 'commence' a review of one aspect of retransmission consent") ("NAB Comments") (emphasis added).

12 S. Rep. No. 113-322, at 13 (2014).

13 *Id.* (emphasis added).

14 *Id.* (emphasis added).

the circumstances test,"[15] and noted that "the rulemaking . . . should be used to update" the test, by taking "a broad look at *all facets* of how both television broadcast station owners and MVPDs approach retransmission consent negotiations to make sure that the tactics engaged in by both parties meet the good faith standard set forth in the Communications Act."[16] Congress explicitly stated that it expected the Commission to address "consumer harm from programming blackouts."[17] Congress even specified that "negotiations for retransmission consent have become significantly more complex in recent years, and in some cases one or both parties to a negotiation may be engaging in tactics that push those negotiations toward a breakdown and result in consumer harm from programming blackouts."[18] This statutory language and legislative history leaves no question that Congress intended for the Commission to reform its retransmission consent regime to address these problems.

ATVA, for its part, carefully drafted its proposals to identify seven sets of specific "practices engaged in"[19] by broadcasters that constitute bad faith. It did so, moreover, to ensure that these proposals would fit comfortably within the Commission's prior, unnecessarily limited understanding of its remedial authority.[20] Each ATVA proposal would allow the Commission to conclude after the fact—ideally, in an expedited proceeding—that a broadcaster has acted in bad faith. The Commission could then order the broadcaster to act in good faith and (depending on the severity of the circumstances) institute forfeiture proceedings for a willful violation of its rules.[21]

Broadcasters argue that even this goes too far, because they may choose not to consent to the retransmission of their signals under Section 325(b)(1)(A).[22] The Commission, the argument goes, "cannot adopt a rule that violates a federal statute."[23] Yet nothing ATVA proposes would violate any statute. To the contrary, the good faith rules reflect explicit statutory limitations on a

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15 *Id.* (emphasis added).

16 *Id.* (emphasis added).

17 *Id.*

18 *Notice* ¶ 3 (quoting S. Rep. No. 111-322 at 13 (internal modifications omitted)).

19 S. Rep. No. 113-322 at 13 (2014).

20 The Commission has, mistakenly in ATVA's view, tentatively "interpret[ed] Section 325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement." *2011 Retransmission Consent NPRM* ¶ 18.

21 *See Good Faith Order* ¶ 82 (noting that, "as with all violations of the Communications Act or the Commission's rules, the Commission has the authority to impose forfeitures for violations of Section 325(b)(3)(C)").

22 Reply Comments of the National Association of Broadcasters at 44 (citing 47 U.S.C. § 325(b)(1)(A)).

23 *Id.*

broadcaster's right to withhold consent. If the Commission could not declare that at least some withholding violates good faith obligations, the good faith provisions of Section 325 would be a nullity—and the Commission's *per se* and presumptive lists of bad-faith behavior could not exist.[24]

If good faith rules are to exist at all, they must apply when broadcasters withhold their signals. Otherwise, they would be meaningless. Suppose, for example, that a broadcaster threatened to withhold its signal from any MVPD that failed to make contributions to the broadcaster's favored presidential candidate. This would constitute paradigmatic bad faith. If the broadcaster actually followed through on its threat and withheld its signal, the Commission's authority to address the situation would not disappear—notwithstanding the MVPD's requirement to obtain "consent." Likewise, if a broadcaster engages in other behaviors that the Commission determines at least presumptively constitute bad faith, it cannot claim a "get out of jail free" card by actually withholding its signals on the basis of such behavior.

II. The Commission Possesses Authority to Go Beyond ATVA's Specific Proposals and Provide for Interim Carriage and Other Remedies.

While ATVA formulated its specific proposals in light of the Commission's prior view of its remedial authority, ATVA and its members have repeatedly demonstrated that the Commission possesses much more authority to address bad-faith negotiations. This authority extends to interim carriage (with or without mandatory arbitration[25]), notwithstanding the Commission's prior tentative conclusion to the contrary.[26]

For years now, ATVA's members have argued that Section 325(b)(1)(A)'s "consent" provision speaks solely to the relationship between a broadcaster and an MVPD. It is silent with respect to the *Commission's* authority under other provisions of the Communications Act to remedy bad faith negotiation tactics.[27] And for years, ATVA members have shown that those

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[24] *Good Faith Order* ¶¶ 40-46 (*per se* bad faith); *id.* ¶ 58 (presumptive bad faith).

[25] To clarify, mandatory arbitration upon expiration of an agreement in the absence of interim carriage would not be a helpful remedy, given the time required to conduct and conclude an arbitration. In any event, as Time Warner Cable has pointed out, an arbitration regime that includes *de novo* review by the Commission also would be entirely consistent with the Administrative Dispute Resolution Act ("ADR Act"). *See, e.g.*, Time Warner Cable 2011 Comments at 43-44 (explaining that, while the ADR Act provides for "binding arbitration" only "whenever all parties consent," the statute uses the term "binding arbitration" only to mean arbitration in which the award is directly enforceable in court without *de novo* review by the agency).

[26] *See* notes 20-21, above.

[27] *See, e.g.*, Reply Comments of Time Warner Cable, Inc., MB Docket No. 10-71 at 20-21, (filed June 3, 2010); Reply Comments of Mediacom Communications Corp., MB Docket No. 10-71, at 6-14 (filed June 27, 2011) ("Mediacom 2011 Reply Comments"); Comments of Time Warner Cable, Inc., MB Docket No. 10-71 at 21 n.68 (filed June 26, 2014).

other provisions—and the overall structure of broadcast regulation more generally—grant the Commission ample authority to impose a wide variety of remedies.[28]

ATVA and its members reaffirmed these arguments in this proceeding.[29] So too did Professor James Speta, the Class of 1940 Research Professor of Law and Senior Associate Dean for Academic Affairs and International Initiatives at Northwestern University.[30] We will attempt to summarize his views (and those of ATVA's members) briefly here.

First, the Communications Act provides the Commission with broad authority over both the broadcast and cable industries.[31] This authority, among other qualities, also includes strong remedial powers.[32] Specific regulatory provisions governing the relationship between these two industries (such as the consent provision in Section 325(b)(1)(A)) are presumed to exist *within* this broad grant of authority.[33] Where Congress has granted the Commission broad authority over a particular subject, restrictions on that authority are both rare and specific.[34] Congress has enacted no such specific restriction here with respect to retransmission consent.

Second, the legislative structure confirms the relationship between the "consent" provision and other aspects of broadcast regulation. Section 325 does not exist on its own—rather, it is part of a broader regulatory regime. It is, to use Professor Speta's term, "nested"

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28 For the Commission's convenience, ATVA has attached a selection of those submissions to this letter, including: (A) Mediacom 2011 Reply Comments; (B) Time Warner Cable 2011 Comments; (C) Comments of the American Cable Association, MB Docket No. 10-71 at 39-44 (filed May 27, 2011) ("ACA 2011 Comments").

29 *See* Comments of the American Television Alliance at 53 *et seq.*; Comments of Time Warner Cable Inc. at 27 ("Time Warner Cable Comments"); Comments of the American Cable Association, MB Docket No. 15-216, at 5-9 (filed Dec. 1, 2015); Reply Comments of the American Cable Association, MB Docket No. 15-216, at 21-35 (filed Jan. 14, 2016).

30 Reply Comments of Professor James B. Speta (filed Jan. 14, 2016) ("Speta Reply").

31 *Id.* at 6 (citing 47 U.S.C. § 303(r) (authority over spectrum services); 47 U.S.C. § 309 (public interest authority over broadcast services); *NBC v. United States*, 319 U.S. 190, 216 (describing such authority); *United States v. Sw. Cable Co.*, 392 U.S. 157, 168 (describing authority over the cable industry)).

32 *Id.* at 9 (citing 47 U.S.C. § 312(a)(4) (license revocation); 47 U.S.C § 312(b) (cease and desist orders)).

33 *Id.* at 8 (citing *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999)).

34 *Id.* at 11 (citing 47 U.S.C. § 152(a) (removing Commission jurisdiction for certain intrastate aspects of communications service)); 47 U.S.C. § 543(a)(1) (removing Commission jurisdiction for regulation of cable rates except as otherwise provided in the Act).

within several related provisions of the Copyright and Communications Acts.[35] No one provision of this statute (such as "no carriage without consent") should be read in isolation.[36] The structure of broadcast regulation, in his view, defeats any analogy to "common law rights" that broadcasters might use to justify the withholding of signals.[37]

Third, the text of Section 325 itself recognizes the Commission's authority to create substantive and procedural rules governing retransmission consent.

- Section 325(b)(3)(A) provides that the Commission "shall . . . establish regulations to govern the exercise by television broadcast stations of the right of retransmission consent . . . and of the right to signal carriage."[38]

- It also provides that the Commission "shall consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier."[39]

- Section 325(b)(3)(C)(ii) states that it shall not be bad faith to enter into distribution agreements "based on competitive marketplace considerations"—which indicates that the Commission could prohibit agreements *not* based on marketplace considerations.[40]

Fourth, Section 325's legislative history confirms Congress's expectation that the Commission would take an active role in regulating the retransmission consent marketplace.

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[35] *Id.* at 14-15 (citing 17 U.S.C. §§ 101(2), 111 (copyright provisions)); 47 U.S.C. §§ 534, 535 (must carry provisions); *Amendment of the Commission's Rules Related to Retransmission Consent*, 29 FCC Rcd. 3351 (2014) (syndicated exclusivity and network nonduplication rules).

[36] *Id.* at 25(citing 47 U.S.C. § 303(r) (cease-and-desist)).

[37] *Id.* at 18.

[38] *Id.* at 16 (citing 47 U.S.C. § 325(b)(3)(A)).

[39] *Id.*

[40] *Id.* at 17 (citing 47 U.S.C. § 325(b)(3)(C)(ii)).

- The Senate Report, for example, notes its expectation that the retransmission consent regime will result in "minim[al] disruption to broadcasters and cable operators" and that the rights will be exercised "harmoniously."[41]

- A variety of the Cable Act's authors spoke contemporaneously about the Commission's "supervisory" authority in this area, albeit with the understanding that good faith negotiations could (very rarely) lead to impasse.[42]

Fifth, a reviewing court would affirm the Commission's decision to exercise additional remedial authority over bad faith negotiations.[43] Congress has delegated to the Commission authority to make rules concerning broadcasting and cable television generally, and retransmission consent specifically.[44] Nothing in the Act "directly"[45] precludes the Commission from exercising such authority by requiring interim carriage, arbitration, or other such remedies.[46] And the exercise of such authority would be a "permissible" reading of the statute.[47] Nor would the Commission's prior findings with respect to its remedial authority change this

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[41] *Id.* at 21 (citing 1992 U.S.C.C.A.N. at 1169, 1171).

[42] *Id.* at 22 (citing 138 Cong. Rec. S667 (Sen. Inouye) ("The FCC does have authority to require arbitration" if the parties cannot agree)); *id.* at S643 ("[T]he FCC has the authority under the Communications Act to address what would be the rare instances in which such carriage agreements are not reached."); *id.* 138 Cong. Rec. S14604 ("[E]xisting law provides the FCC with both the direction and authority to ensure that the retransmission consent provision will not result in a loss of local TV service"). Other ATVA members have cited other such statements, as well as later ones made by the provision's authors. *See, e.g.*, 138 Cong. Rec. S14615-16 (Sen. Lautenberg) ("[I]f a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC."); Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007) ("At a minimum, Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution].").

[43] Speta Reply at 23 (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[44] *Id.* at 23-24

[45] *Chevron*, 476 U.S. at 843.

[46] Speta Reply at 24-25.

[47] *Id.* at 27 (citing *Iowa Utils. Bd.*, 525 U.S. at 391-92 (finding that the Commission had failed to give "some substance" to the relevant statutory provision)).

analysis. Agencies can change their interpretation of statutes so long as they recognize that they are doing so and the new interpretation is reasonable.[48]

III. The FCC Possesses Authority to Adopt an Online Blocking Restriction, Notwithstanding Broadcasters' First Amendment and Copyright Act Arguments.

Broadcasters have argued that the First Amendment and the Copyright Act give them an absolute right to engage in discriminatory online blocking—even when they have voluntarily elected to post content on the Internet and to make it freely available to the public.[49] Not so.

To begin with, broadcasters have inaccurately described the proposal under consideration. The Broadcast Affiliates Associations, for example, describe a rule under which "broadcast stations *must* make their content available online."[50] Nobody has proposed such a rule. Instead, ATVA has proposed that, where a broadcaster willingly makes video programming available online (on a non-subscription basis) to the public in the ordinary course, it may not then selectively restrict access to that online video programming as a means of enhancing its leverage or retaliating in connection with a retransmission consent dispute. This narrow restriction, and not the imaginary rule cited by the broadcasters, is what the Commission sought comment on.[51]

To eliminate any doubt: ATVA does *not* propose to force broadcasters to make their content available online. Nor does it propose to force broadcasters to take any content out from behind a paywall. Rather, it seeks only to prohibit broadcasters from blocking the transmission to certain viewers of content that they otherwise already make generally available online for free. Thus, for example, if a broadcaster wanted to remove its online content completely nationwide—even during a retransmission consent dispute—it could do so. Likewise, if it wanted to place its content behind a paywall nationwide—even during a retransmission consent dispute—it could.

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48 *Id.* at 28 (citing *Nat'l Cable Television Ass'n v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 981 (2005)).

49 Comments of the ABC Television Affiliate Associations *et al.* at 55-56 (filed Dec. 14, 2015).

50 *Id.* at 55 (emphasis in original).

51 *Notice* ¶ 13 ("[P]arties have urged the Commission to address the practice by broadcasters of preventing consumers' online access to the broadcaster's programming as an apparent tactic to gain leverage *in a retransmission consent dispute* . . . . Such online access restrictions prevent all of an MVPD's broadband subscribers, *i.e.*, regardless of whether those subscribers are located in markets where the MVPD and broadcaster have reached an impasse in negotiations, from accessing the online video programming that the broadcaster otherwise makes generally available when the broadcaster and the MVPD are engaged *in a retransmission consent dispute*. In addition, this practice affects the MVPD's broadband subscribers even if those subscribers do not also subscribe to the MVPD's video service. We seek comment on whether such a practice *during retransmission consent disputes* should be considered evidence of bad faith under the totality of the circumstances test.") (emphasis added).

It just could not do so *selectively* to broadband subscribers of the MVPD to increase retransmission consent leverage.

Another general principle perhaps bears mentioning: broadcasters' First Amendment and Copyright Act rights are not absolute. The very act of licensing broadcasters demonstrates otherwise, as it forces them to both "speak" and to "publicly perform."[52] A station that chose to remain silent, for whatever reason, would surely lose its license.[53]

With this in mind, we turn to the particulars of the broadcasters' arguments.

A. The First Amendment Does Not Prohibit the Commission From Restricting Online Blocking.

Broadcasters argue that an online blocking restriction would impermissibly compel speech.[54] Yet such a restriction would not force broadcasters to say anything. Rather, it would stop broadcasters from blocking particular individuals from using a particular mechanism to *access* speech in which broadcasters *already freely engage*. If a broadcaster sent a truck to MVPD subscribers' houses to jam reception by antennas during retransmission consent disputes,

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[52] 47 U.S.C. § 309(a) (requiring the Commission to grant broadcast licenses only upon a finding that "the public interest, convenience, and necessity would be served by the granting thereof").

[53] *See, e.g.*, 47 C.F.R. § 73.1750 (requiring broadcast licensee to forward its station license to the Commission for cancellation immediately upon discontinuation of operation); *NBC v. United States*, 319 U.S. 190, 216 (1943) ("The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest.").

[54] Comments of the Walt Disney Company at 23 (filed Dec. 14, 2015).

no one could characterize the broadcaster's behavior as choosing what "not to say."[55] The characterization is no more valid here.[56]

An online blocking restriction, moreover, certainly does not tell broadcasters "the ideas and beliefs deserving of expression, consideration, and adherence," or, put differently, "what they may or may not say."[57] Again, under ATVA's proposal, broadcasters can *say* whatever they want to. They can also choose not to speak at all, or to make their speech accessible only to those who wish to pay for it. They simply cannot punitively block some recipients from hearing speech that they otherwise choose to make freely available to the world at large. [58]

The First Amendment poses no obstacle to adopting a rule banning such anticompetitive and anti-consumer conduct. The government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[59] The

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55 *Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

56 This is one reason why *Motion Picture Ass'n of Am., Inc. v. F.C.C.*, 309 F.3d 796 (D.C. Cir. 2002) is inapposite. There, the D.C. Circuit found that Section 1 of the Communications Act, which grants the Commission authority over "all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication" did not authorize the Commission to require video description—in part because there was "no doubt" that video description rules "regulate[d] programing content." 309 F.3d at 803. Because of First Amendment concerns, the court reasoned, "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content." *Id.* at 805. Here, of course, Congress has been much more "clear" than it had been in *MPAA.* As discussed above, among many sources of authority, Section 325 specifically requires the Commission to "govern the exercise by television broadcast stations of the right of retransmission consent." 47 U.S.C. 325(b)(3)(A). The STELAR drafters, moreover, *explicitly* asked the Commission to address online blocking in this rulemaking. S. Rep. No. 113-322 at 13 (2014) ("The Committee . . . expects as part of this rulemaking that the FCC would examine the role digital rights and online video programming have begun to play in retransmission consent negotiations. The Committee is concerned by reports that parties in retransmission consent negotiations have begun to block access to online programming during those negotiations or after a retransmission consent agreement has expired and a blackout has occurred, including for consumers of a MVPD who subscribe only to the broadband service offered by such MVPD."). ATVA's proposal, moreover, does not "regulate programming content" at all. It simply prevents broadcasters from selectively blocking content that they already make available.

57 *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) ("*Turner I*"); *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006).

58 *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) ("[W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.").

59 *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 297 (2007) (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978)); *see also Rumsfeld*, 547 U.S. at 62 ("[I]t has never

Supreme Court has identified "numerous examples . . . of communications that are regulated without offending the First Amendment," including "the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees."[60] As with each of these examples, the proposed ban on punitive and selective online blocking by broadcasters is focused on addressing specific harmful *conduct*. Whether a station is engaged in unlawful blocking can be determined wholly without reference to the "speech" contained in a particular programming stream. Broadcasters' anticompetitive and anti-consumer commercial conduct also exhibits nothing that might be deemed uniquely expressive or otherwise worthy of First Amendment protection.

Even if an online blocking rule could be construed as affecting a broadcaster's First Amendment rights, moreover, such a rule would be content neutral and thus subject to intermediate scrutiny. It would survive "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[61] ATVA's proposal easily satisfies these criteria. It fulfills the substantial government interest, enshrined in the Communications Act, of ensuring retransmission negotiations are conducted in good faith and thus that consumers have access to broadcast television, consistent with the public-interest duty that broadcasters themselves repeatedly tout. That government interest is wholly unrelated to suppression of expression. The harms that the proposed regulation seeks to address also are undoubtedly "real" and "not merely conjectural,"[62] given the documented evidence of online blocking by broadcasters.[63] And the proposed regulation is narrowly tailored because it applies only to content that broadcasters have chosen to make publicly available for free.

Indeed, ATVA's proposal raises far fewer First Amendment issues than other restrictions upheld by reviewing courts. In *Time Warner Entertainment Co. v. FCC*, for example, the D.C. Circuit upheld the program access and exclusive contract prohibitions in the 1992 Cable Act

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been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed") (quoting *Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949)).

60 *Tenn. Secondary Sch. Athletic Ass'n*, 551 U.S. at 297 (quoting *Ohralik*, 436 U.S. at 456); *see also Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.").

61 *Time Warner Entm't Co. v. F.C.C.*, 93 F.3d 957, 978 (D.C. Cir. 1996) (internal quotation marks omitted).

62 *Turner I*, 512 U.S. at 664.

63 *See, e.g.*, Time Warner Cable Comments at 23 (describing CBS's online blocking conduct).

against a First Amendment challenge under the intermediate scrutiny standard.[64] The D.C. Circuit later rejected a similar First Amendment challenge to the FCC's expansion of its program access regime to include terrestrially delivered programming in *Cablevision Sys. Corp. v. FCC*.[65] Those laws effectively required certain programmers to make *all* of their content available to some MVPDs, even when those programmers had never before made such content available to those MVPDs. In *Time Warner Cable Inc. v. FCC*, the Second Circuit upheld FCC rules implementing the program carriage provisions of the 1992 Cable Act—concluding that those rules, which compel speech by forcing cable operators to carry certain unaffiliated programming—were constitutional to the extent they "directly target[]" alleged "anticompetitive conduct." Likewise, in *Turner II*, the Supreme Court upheld must-carry provisions against a First Amendment challenge under the intermediate scrutiny standard.[66] Those provisions, of course, similarly required cable operators to "speak" by carrying broadcast stations they did not want to carry.[67] Each of those regulatory regimes is much more intrusive on the speech interests at issue than anything under consideration here.[68]

B. The Copyright Act Does Not Prohibit the Commission From Restricting Online Blocking.

Broadcasters also argue that the Copyright Act precludes restrictions of online blocking. NAB, for example, describes the "exclusive rights" granted under the Copyright Act—and the ability of a rights-holder to "hoard all of his works" and "arbitrarily to refuse to license [them]."[69] The Commission, they claim, may not "violate" these exclusive rights.[70] Nor may it issue retransmission consent rules that "impinge upon private programming licensing agreements."[71]

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64 *See* 93 F.3d at 977-79.

65 649 F.3d 695, 710-15 (D.C. Cir. 2011).

66 *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) ("*Turner II*")

67 *Turner I*, 512 U.S. at 636 ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

68 The marketplace changes that have occurred since the *Turner* cases on must-carry were decided—and that have continued to develop since the more recent judicial rulings on the program access and program carriage regimes—could compel a different outcome today in any renewed challenge to these requirements. But even were such broad carriage mandates struck down, very narrow restrictions on blocking access to content that broadcasters choose to make freely available online would remain readily distinguishable and defensible.

69 NAB Comments at 37 (citing *Stewart v. Abent*, 495 U.S. 207, 228-29 (1990)).

70 *Id.*

71 *Id.* at 36.

Such objections are misplaced. To begin with, and at the risk repetition, nothing about the proposed rule would compel broadcasters to *license* their programming to anybody.[72] The rule would apply—by its own terms—to programming that they have already licensed or otherwise arranged to be distributed universally over the Internet. Because broadcasters have already made this programming available for free, moreover, their copyright interests are at a minimum, as the harm caused to the market for those copyrighted works by any such restriction is negligible.[73]

More broadly, a broadcaster's right to "arbitrarily" refuse to license its content is no more absolute than its "right" to arbitrarily refuse to grant retransmission consent. As Professor Speta (among others) has shown, the Copyright Act and the Communications Act work together as a "broad[], highly reticulated regulatory scheme."[74] This scheme "attempts to address the myriad issues arising from Congress's desire to resolve significant copyright issues, maintain free-over-the-air broadcasting, ensure that subscribers to cable and satellite television can receive broadcast signals, and to balance the need for reasonable prices with the use of quasi-market negotiations."[75] Broadcast regulation, including the good-faith negotiation requirement, *already* "impinges" on the copyright prerogatives of broadcasters in all sorts of ways—and it always has.

To take perhaps the most basic example, suppose a broadcaster for whatever reason decides that it could maximize revenues by providing only over-the-air service. It then elects retransmission consent with every eligible MVPD and simply refuses to meet with them. The good-faith rules flatly prohibit such conduct,[76] even though this prohibition "impinges" on the broadcaster's right to distribute its copyrighted content as it sees fit.

To the extent broadcasters have cognizable copyright rights in this context, moreover, they may not enforce such rights where they have "misused" them—that is, where they have "used the right asserted contrary to the public interest."[77] Courts have recognized that "[m]isuse

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72 Reply Comments of AT&T at 15.

73 *Sony v. Universal City Studios*, 464 U.S. 417, 447-56 (1984) (consumers do not infringe broadcasters' copyright by engaging in home recording where, among other things, they were "invited to witness [the programming] in its entirety free of charge" because such recordings "cause . . . [minimal] harm to the potential market for, or the value of, the[] copyrighted works.").

74 Speta Reply at 2; *see also* ACA 2011 Comments at 26-40 (describing "the interlocking sets of rules and regulations that govern broadcast signal carriage" under the Communications and Copyright Acts and seeking relief from third-party interference with the exercise of retransmission consent by an out-of-market station under the good faith rules).

75 *Id.*

76 47 C.F.R. § 76.65(b)(1) (identifying "[r]efusal by a Negotiating Entity to negotiate retransmission consent" as a *per se* violation of the good faith rules).

77 *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 204 (3d Cir. 2003), *as amended* (Sept. 19, 2003), *citing Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942).

often exists where the patent or copyright holder has engaged in some form of anti-competitive behavior."[78] Particularly in light of the public interest obligations broadcasters have willingly undertaken,[79] online blocking, like other bad-faith negotiating conduct, constitutes a "misuse" of whatever copyright interests broadcasters may have.

* * *

Pursuant to the Commission's rules, I am filing one copy of this letter in MB Docket No. 15-216 and another in MB Docket No. 10-71. Should you have any questions, please contact me.

Respectfully submitted,

/s/
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[78] *Id.* (citing cases).

[79] Reply Comments of the American Television Alliance at 3-5.

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

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June 27, 2011

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SUMMARY

In the Notice of Proposed Rulemaking ("*NPRM*") in this proceeding[1] the Commission notes that "[w]e do not believe that the Commission has authority to adopt either interim carriage mechanisms requirements or mandatory binding dispute resolution procedures applicable to retransmission consent"[2] but states that "[p]arties may comment on that conclusion."[3] The purpose of these comments is to accept that invitation and seek reconsideration of the Commission's conclusion by rebutting the arguments in its support made in the *NPRM* and submissions by some other filers in this proceeding.

The legislative history of the Senate bill (S.12) that was the source of the retransmission consent provisions contains the following statement by Senator Daniel K. Inouye, the bill's manager and co-sponsor and the author of those provisions:

> The retransmission consent provisions of S.12 were designed so as to avoid creating a complex set of governmental rules to promote the carriage of local broadcast signals. Instead, S.12 permits the two interested parties – the station and the cable system – to negotiate concerning their mutual interests. It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare. We should resist the urge to require formal, pre-established mechanisms that might distort the incentives of the marketplace. At the same time, there may be times when the Government may be of assistance in helping the parties reach an agreement. I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking

[1] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (rel. Mar. 3, 2011).

[2] *Id.*, at ¶18.

[3] *Id.*, at ¶19.

> implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.[4]

There is nothing in the relevant statutory language itself or in the rest of the legislative history that expresses or mandates a different view of the Commission's authority. The Commission's position is, therefore, puzzling, particularly because the Commission does not explain why it disregards this clear statement by the law's author directly addressing the Commission's authority and, instead, relies upon two general statements from the legislative history that are not directly on point.

In a case decided less than a decade after enactment of the Communications Act, the Supreme Court, finding that Congress intended the Commission to have "not niggardly but expansive powers," rejected the notion that it "regards the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other."[5] Since then, the Commission has interpreted the Communications Act consistently with that view, including during the tenure of the current Chairman.

It is surprising, therefore, that the Commission takes the position that, even though it has jurisdiction over the broadcast and cable television industries, is charged with the duty of safeguarding the public interest and is armed with broad and sweeping powers, in the realm of

[4] 138 Cong. Rec. S643 (Jan. 30, 1992)

[5] National Broadcasting Co. v. U.S., 319 U.S. 190 (1943)(holding Commission had power to issue regulations pertaining to relationship between broadcasting networks and affiliated stations, then referred to as "chain networks").

retransmission consent it has no more power than an ordinary citizen and cannot even write the equivalent of speeding tickets.[6]

The brevity of its explanation of its reasons for reaching its opinion and its apparent resignation to its powerlessness, are even more surprising in light of its past herculean and exhaustive efforts in other contexts to find a legal basis for regulatory initiatives that have a statutory foundation that in some cases most charitably can be called debatable—for example, its rulemaking regarding net neutrality, terrestrial programming services, data roaming, cell phone tower siting and timing of application decisions by local franchise authorities. To outsiders, it appears that, in other contexts where its authority is questionable, when the Commission thinks that the public interest requires it to act, it has jumped through analytical hoops to craft a legal basis for the rules it thinks are needed and has been willing to take its chances on prevailing in the inevitable judicial challenge. With rare exceptions, the courts have sustained its efforts. The fact that, in a few cases, courts have found that the Commission strained a bit too mightily has not deterred the Commission from trying again the next time it felt the need to act—often, it tries again in the same case, as in its recent efforts to find a different basis for net neutrality rules after its first try was rejected by the D.C. Circuit Court of Appeals.

Given the Commission's articulated "concern regarding the service disruptions and consumer outrage that will inevitably result should MVPDs that are entitled to retransmit local

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[6] The *NPRM* notes that "[i]n previous retransmission consent disputes, the Commission has encouraged parties to engage in voluntary dispute resolution mechanisms as a means to reach agreement." *NPRM* at ¶ 61. Unfortunately, broadcasters have simply ignored the Commission's admonitions with impunity, even though numerous MVPDs have offered to submit disputes to arbitration or other dispute resolution procedures. A negotiator for broadcast stations once said to us that broadcasters have concluded that if an MVPD files a "good faith" complaint or otherwise seeks intervention by the Commission to prevent a service interruption, "those guys are not going to do anything to us."

signals subsequently lose such authorization,"[7] we can only assume that the Commission has made the same efforts to construct a legal basis for finding that it has the authority to act on that concern and the same willingness to adopt the needed rules and take the risk that they would be overturned by a court. We presume, therefore, that the fact that it has, instead, publicly expressed the opinion that it lacks the requisite authority means that it believes that, unlike in the other situations, the statutory language and legislative history relevant to retransmission consent prevents construction of a case for the opposite conclusion that is even plausible.

We respectfully disagree. We think that a very plausible case for the opposite conclusion can be made—indeed, we think the case for concluding that the Commission does have the authority to take effective action to prevent harm to consumers in the form of service disruptions and price increases is far better than the case that it does not.

Under the standards established by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[8] if the Commission adopted a rule that mandated or allowed retransmission without the express consent of the station under specified circumstances, the court considering a challenge to the rule as being beyond the Commission's authority would engage in a potentially two-step analysis of the statutory language relating to retransmission consent. The first step would be to determine if the language clearly and unambiguously expresses the intent of Congress on the precise subject. If it does, then that intent would have to be given effect and there is no second step. In that sense, the Commission is correct in saying that efforts to establish that the Commission's ancillary authority is broad enough to encompass

[7] *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, 5458 (2000), at ¶ 61.

[8] 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

an interim carriage requirement put the cart before the horse.[9] That analysis is never reached if the more specific statutory provisions relating to retransmission consent make clear that Congress did not intend for the Commission to be able to allow carriage absent the consent of the broadcaster.

On the other hand, if the statutory language is ambiguous, then the second step would be to decide whether the rule is based on a permissible construction of that language. The court would be required to "defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'"[10]

So, all that stands between the Commission and the adoption of an effective rule to prevent service disruptions and other undesirable fallout from retransmission consent negotiations is willingness on the part of the Commission and a demonstration that the meaning and intent of Section 325(b) of the Communications Act of 1934 is ambiguous.

We believe that the analysis presented in these comments convincingly demonstrates that the Commission has the authority to adopt interim carriage and other rules to protect consumers, at the very least we respectfully submit that we can establish that Section 325(b) is sufficiently ambiguous to move the issue to *Chevron's* second-step, so that the Commission would have interpretative choice.

In choosing between the alternative interpretations, the Commission should pick the one that is most consistent with congressional intent, the goals underlying the creation of retransmission consent and the public purposes that the Communications Act is supposed to serve.

[IS] *See NPRM*, *supra* note, at ¶18 ("Contrary to the suggestion of some commenters, Section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act").

[10] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (quoting *Chevron*, 467 U.S. at 845).

In enacting the 1992 Act, one of Congress' goals was to ensure the "universal availability of local broadcast signals."[11] Correcting the marketplace "distortion" thought to flow from cable carriage of broadcast signals without consent or compensation was supposed to serve that goal. As the "findings" in the 1992 Act make clear, Congress did not want this solution to exacerbate the problem by disrupting or increasing the cost of watching broadcast television through a cable service. Congress expressly recognized the continued viability of the long-standing policy goal of ensuring that cable households could continue to receive local broadcast programming through cable carriage.

Read as a whole, as they must be, the findings set forth in Section 2 of the 1992 Act unequivocally establish that Congress, motivated by the desire to preserve local broadcast television out of concern for the public interest, rather than broadcasters' private interests, wanted to enhance the competitive status of local stations without, however, adversely impacting the millions of consumers who relied on cable service for reliable access to broadcast television programming. Those two goals may conflict in some cases, but they are not necessarily mutually exclusive. Congress thought that the market would provide sufficient incentives and disincentives to the negotiating parties to ensure that in the vast majority of cases the process would produce the right results. Recognizing that there might still be cases where the process did not work as intended, it expected the Commission to use its ancillary powers and its rulemaking authority conferred by Section 325(b)(3)(A) to intervene when a conflict did arise and to prevent retransmission consent from producing results contrary to those intended and expected.

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[11] 138 Cong. Rec. S667 (Jan. 30, 1992).

An interpretation by the Commission that gives it authority to adopt those rules mandating or requiring interim carriage in specified circumstances would be a reasonable policy choice and, therefore, entitled to judicial deference under *Chevron*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

REPLY COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION

INTRODUCTION

The Notice of Proposed Rulemaking ("*NPRM*") in this proceeding[1] expresses the view that the Commission lacks the authority, under any set of circumstance, to require or permit a cable system[2] to retransmit the signal of a local broadcast station without its express consent.[3] We respectfully disagree with that conclusion.

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[1] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (rel. Mar. 3, 2011).

[2] Although Section 325(b) applies to multichannel video programming distributions ("MVPDs") generally, these comments address only cable operators.

[3] The Commission is also of the opinion that it may not require binding arbitration in the event of a negotiating stalemate. That view is not addressed in these comments, but the analysis and conclusions regarding interim carriage should be equally valid insofar as the issue concerns authority under the Communications Act, instead of the Administrative Dispute Resolution Act (ADRA). We believe, however, that the Commission, at a minimum, should consider whether, as part of its procedures for addressing retransmission consent complaints filed by a party to negotiations, it should borrow the concept of "settlement judge" from the Federal Energy Regulatory Commission (FERC), which does not seem to raise any ADRA issues. See description under "Settlement Judge Process" on FERC's Website, at http://www.ferc.gov/legal/adr/continuum/com-dra.asp; and 18 C.F.R. §385.603, available at http://www.gpo.gov/fdsys/pkg/CFR-2010-title18-vol1/xml/CFR-2010-title18-vol1-sec385-603.xml.

The best way to begin is to assume that the Commission came to the opposite conclusion and adopted a rule imposing interim carriage requirements when a "good faith" complaint is pending, during some "cooling off" period after a negotiating stalemate is reached or in some other specified circumstances, despite the absence of the broadcaster's consent (an "Interim Carriage Rule"). We need not worry, at this point, about the precise content of the rule—the critical assumption is that it allows a cable company to carry a station in defined circumstances without the broadcaster's consent and for the ostensible purpose of preventing or delaying interruption in the ability of subscribers to view the station's programs through their cable connection. Our goal is to demonstrate that Section 325(b) of the Communications Act of 1934, as amended[4] (the "Communications Act" or the "Act"), is not an absolute bar to the Commission's requiring or allowing interim carriage in any of these circumstances, and if we can do that then there would be ample opportunity for interested parties to quibble over the exact content of the rule.

If a broadcaster challenged the Interim Carriage Rule in court as *ultra vires*, the standards established by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[5] ("*Chevron*") would govern.[6] *Chevron* requires a reviewing court to engage in a potentially two-step analysis of the statutory language in question. The first step is to consider whether the language clearly and unambiguously expresses the intent of Congress. If it does, then that intent must be given effect and there is no second step. On the other hand, if the

[4] Communications Act of 1934, Pub. L. 416, June 19, 1934, 48 Stat. 1064, 73rd Congress. Section 325(b) was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (1992), which is referred to in these comments as the "1992 Act" or "1992 Cable Act."

[5] *supra.*

[6] See, *e.g., City of Dallas, Texas v. F.C.C.,* 165 F.3d 341 (5th Cir. 1999).

statutory language is ambiguous, then the court moves to the second step, which is deciding whether the agency's rule or action being challenged is based on a permissible construction of that language. The court must "defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'"[7]

If the second step is reached, that necessarily means that there is more than one possible interpretation of the statutory language, and "the judicial task is limited to deciding whether the agency's specification of meaning is within the *range* of choice that [the language] . . . implies."[8] In determining whether the interpretation is within that range, the standard is generally one of reasonableness.[9] Obviously, it is easier to find that an interpretation is reasonable if it can be shown to be consistent with articulated congressional policies. It has been suggested that "step two would seem to set no particular limits on the means an agency uses to resolve statutory ambiguities, so long as the agency does not ignore congressionally prescribed criteria."[10]

Under *Chevron*, then, the first task in evaluating an Interim Carriage Rule would be to ascertain "whether Congress has directly spoken to the <u>precise</u> question at issue."[11] There is

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[7] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (quoting *Chevron*, 467 U.S. at 845).

[8] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Columbia. L. Rev. 612, 623 (1996); *see also* Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Columbia L. Rev.. 1093, 1121 (1987) (agency interpretation must fall within permissible "range of indeterminacy").

[9] *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 Va. L. Rev. 611, 621 (2009) (asserting there is "an emerging consensus that the 'arbitrary, capricious, and abuse of discretion' standard set forth in [the Administrative Procedure Act's (APA)] Section 706(2)(A) supplies the metric for judicial oversight at Chevron's second step."); Cass R. Sunstein, Chevron *Step Zero*, 92 Va.. L. Rev. 187, 191 (2006) (second step considers whether agency interpretation is "reasonable in light of the underlying law").

[10] Note, *How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Reclassification,* 124 Harv. L. Rev. 1017, 1025 (2011). *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . .").

[11] 467 U.S. at 842 (emphasis added).

nothing in the Communications Act that directly and expressly speaks to the precise question of whether the Commission has the power to enact a rule allowing interim carriage in any circumstances.

The next inquiry, therefore, is whether the statutory language, although not providing a direct answer, constitutes "the unambiguously expressed intent of Congress" with respect to the question, for if it does, the Commission "must give effect" to that intent.[12] In that sense, the Commission is correct in suggesting that efforts to establish that the Commission's ancillary authority is broad enough to encompass an interim carriage requirement put the cart before the horse.[13] That analysis is never reached if the more specific statutory provisions relating to retransmission consent make clear that Congress did not intend for the Commission to be able to allow carriage absent the consent of the broadcaster.

In the *NPRM*, as well as some prior pronouncements on the subject, the Commission has expressed the view that the statutory language does reveal Congress's intent to deny the Commission the power to order carriage against the will of the broadcast station's owner. Thus, in the *NPRM*, the Commission said the following:

> [E]xamination of the Act and its legislative history has convinced us that the Commission lacks authority to order carriage in the absence of a broadcaster's consent due to a retransmission consent dispute. Rather, Section 325(b) of the Act expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent. Furthermore, consistent with the statutory language, the legislative history of Section 325(b) states that the retransmission consent provisions were not intended "to dictate the outcome of the ensuing marketplace negotiations" and that broadcasters would retain the "right to control retransmission and to be compensated for others' use of their signals." We thus interpret Section

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[12] *Id.* 467 U.S.at 842-43.

[13] *See NPRM*, *supra* note 1, at ¶18 ("Contrary to the suggestion of some commenters, Section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act").

> 325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement.[14]

Under *Chevron*, the relevant question is, in a very real sense, not so much whether this conclusion is right as whether it is unambiguously dictated by the statute, for "if the statute is silent or ambiguous with respect to the specific issue, the question . . .is whether the agency's answer is based on a permissible construction of the statute."[15] In other words, if the Communications Act is ambiguous on the question of the power to require interim carriage, then the Commission, if convinced that requiring consent despite the lack of the station's consent in some instances was the best policy, could construe the statute as authorizing it to adopt an appropriate rule. In that event, assuming that the Commission could reasonably ground its rule in Section 325(b)(3)(A) of the Communications Act or its ancillary authority, then the court "[could] not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[16] Instead, it would have to defer to the agency's interpretation unless "manifestly contrary to the statute."[17] Those challenging the order or rule would "bear the 'difficult burden' of proving that the FCC's interpretation of an ambiguous statutory provision conflicts with the statutory scheme."[18]

It is respectfully submitted that a rigorous analysis of all of the relevant facts and arguments demonstrates that the Commission does have the necessary authority. In any event, we believe that the relevant statutory provisions are sufficiently ambiguous regarding this issue

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[14] *NPRM, supra* note 1, at ¶18 (internal footnotes omitted).

[15] *Chevron,* 467 U.S. at 843.

[16] *Chevron*, 467 U.S. at 844.

[17] *Id.*

[18] City of Dallas, Texas v. F.C.C., 165 F.3d 341, 347 (5th Cir. 1999).

to require construction by the Commission and that an interpretation that allows the Commission to order interim carriage in some circumstances would be reasonable and consistent with the statutory scheme and congressional intent.

We begin by demonstrating that there is, at the very least, considerable ambiguity and uncertainty in the relevant statutory language. In doing so, we proceed as courts generally do in applying *Chevron* step-one: analyzing the applicable statutory language, applying logic and consulting the legislative history.[19]

THE RELEVANT STATUTORY LANGUAGE DOES NOT FORECLOSE INTERPRETATIVE CHOICE

Section 325(b)(1)(A) Does Not Limit the Commission's Authority

Section 325(b)(1)(A) says that, with specific exceptions not relevant here:

> No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station. . . .

There is nothing in this language that directly addresses the issue of the power of the Commission to allow interim carriage without consent. Statutory silence does not divest the Commission of its authority under the Communications Act;[20] therefore, if one concludes that the statute restricts the Commission's authority to order or permit interim carriage, then that limitation must be found through a process of inference. If inference is required, for purposes of a *Chevron* analysis, the initial question is whether the relevant statutory language forecloses the possibility of more than one reasonable inference. The Commission, focusing solely on

[19] For example, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court, in applying *Chevron* step one, found ambiguity in the statute by analyzing the statutory language in issue and considering the legislative history. 545 U.S. at 989-92.

[20] *Alliance for Community Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008).

325(b)(1)(A) and seemingly ignoring other relevant statutory provisions, seems to think that there is only one possible syllogism, which goes something like this:

> 1. Section 325(b)(1)(A) prohibits retransmission by a cable system of a station's signal without its consent
> 2. If the Commission ordered or allowed interim carriage against the station's will, the cable system would be retransmitting the signal without the station's consent.
> 3. Therefore, the Commission may not permit or require carriage without the consent of the station.

In our view, this is the wrong syllogism for several reasons. We begin by noting that although retransmission consent is typically referred to as a "right" of broadcasters, Section 325(b)(1)(A) is written as a restriction upon the behavior of certain specified actors, not as the creation of a right or benefit for broadcasters. The only actors whose behavior is affected by the statutory language are cable systems and other MVPDs, and there is no express restriction upon the behavior of or the grant of any enforceable right to any other actor.

This is an important point. Section 325(b)(1) does not give the station any directly enforceable right.[21] Moreover, the prohibition on carriage without consent applies only to cable systems and MVPDs and not to any other person in the world. Even if the provision were read as conferring a right upon broadcasters enforceable on their behalf by the Commission, that right is far less than "the right to control retransmission and to be compensated for others' use of their signals" referred to in the passage from the legislative history cited by the Commission in support of its position.

[21] When Congress revised Section 325(b) to include DBS providers, it also added a new subsection 325(e), which established a complaint procedure through which broadcasters may seek redress for retransmission of local broadcast signals by satellite carriers allegedly in violation of the statute. No similar provision creating a complaint right or process for broadcasters objecting to carriage by a cable system was included in the 1992 Act or has been subsequently added.

When it comes to the Commission itself, Section 325(b)(1) does not expressly state that the Commission can or cannot order carriage against the station owner's will; indeed, it does not even mention the Commission.

Does statutory language that speaks explicitly only to the rights and obligations of the MVPD and, for the sake of argument, implicitly to those of the broadcaster mean that there is no role for the Commission? The answer is, of course, "no."

Frequently in the case of far-reaching federal statutes administered by an agency with extensive authority over regulated parties, some provisions contain language specifically regulating one or more private parties, without conferring authority as to the specific subject matter upon the agency. Other, more general statutory provisions give the agency powers and responsibilities, including rulemaking authority, and these general grants of authority are often read by the agency and courts as including the power to make rules that affect procedural and substantive aspects of the more specific provisions that refer only to regulated parties.[22] In other words, "[f]ederal administrative agencies generally enforce statutory mandates which are drawn in broad and ill-defined terms. Consequently, one of the central tasks of such agencies is to formulate policies which serve to elaborate and clarify the substantive law governing the conduct of regulated parties."[23] Thus, the fact that Section 325(b)(1)(A) refers to the regulated parties,

[22] See, *e.g., Public Serv. Comm'n v. Federal Power Comm'n*, 327 F.2d 893, 897 (D.C. Cir. 1964) ("All authority of the Commission need not be found in explicit language. . . . .While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail"; Mourning v. *Family Publications Serv., Inc.*, 411 U.S. 356, 368-74 (1973) (upholding Federal Reserve Board's authority to issue rules under the Truth-in-Lending Act); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) ("We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.")

[23] Note, *FTC Substantive Rulemaking Authority*, 1974 Duke L.J. 297 (1974)

and not to the Commission, is neither unusual nor necessarily dispositive of the issue of the Commission's authority or lack thereof.

In several instances, the Communications Act, as written and as interpreted by the Commission and courts, draws a clear distinction between the rights and obligations of regulated entities, local franchise authorities or other parties, on the one hand, and the jurisdiction and powers of the Commission, on the other. If a particular provision of the statute gives a regulated entity, whether a broadcast station, a telephone company or a cable company, a right or obligation *vis-à-vis* other non-governmental persons and entities, that does not mean that the Commission is totally precluded from affecting those rights or obligations by exercising its ancillary or other authority under other statutory provisions. If it were, then there would probably be many of the Commission's regulations, orders and rulings across the entire range of its jurisdiction that would be invalid. Notably, in situations other than retransmission consent where its authority to adopt rules affecting the rights or obligations of regulated parties under a specific statutory provision has been challenged because it does not expressly grant rulemaking authority, the Commission has recognized that silence does not negate or limit its authority derived from other provisions of the Communications Act.[24]

The Communications Act is extensive in its reach. There are few federal statutes that provide for such comprehensive regulation of entire industries and markets, or give the administering agency such vast responsibilities and power.[25] The communications and media businesses have always been characterized by rapid changes in technology, consumer tastes and

[24] See. *e.g., AT&T Corp.. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999) (sustaining FCC's issuance of regulations permitting local competition by long-distance carriers); *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, 22 FCC Rcd 18013 (2007).

[25] The federal securities laws and the authority of the Securities and Exchange Commission to administer those laws are comparable, as one example.

preferences and competitive conditions. As the Supreme Court noted in a statement about broadcasting that has equal applicability to other fields regulated by the Communications Act, "[u]nderlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[26] The Commission plays the central role in achieving that flexibility. The Communications Act was "implemented for the purpose of consolidating federal authority over communications in a single agency to assure `an adequate communication system for this country'"[27] The Commission is given broad authority "to avoid the need for repeated congressional review and revision of the Commission's authority to meet the needs of a dynamic, rapidly changing industry [because] [r]egulatory practices and policies that will serve the 'public interest' today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future."[28]

Federal courts have consistently taken an expansive view of the Commission's power to regulate all forms of wireline and wireless communications. The Commission's authority has not been confined to the matters specifically addressed in the Communications Act, such as preventing interference among radio and television broadcast stations. The leading example of just how expansively the Commission's jurisdiction and powers have been viewed by the Courts came in 1968, when the Supreme Court held, in *U.S. v. Southwestern Cable*, 392 U.S. 157. 178 (1968), that even though "CATV" systems were nowhere mentioned in the Communications Act, the Commission had the authority to regulate the cable industry to the extent "reasonably

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[26] *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

[27] *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 804 (D.C.Cir. 2002) (quoting S. Rep. No. 73-781, at 3 (1934)).

[28] *Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1157 (9th Cir.) (footnote and citation omitted), cert. denied, 423 U.S. 836, 96 S.Ct. 62 (1975).

ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." The power of the Commission to exercise its ancillary jurisdiction to regulate the relationship between broadcasters and the cable industry had been repeatedly confirmed prior to 1992. For example, the Commission adopted rules imposing network program non-duplication, syndicated program exclusivity and sports blackout requirements on cable systems, even though none of these subject matters is mentioned in the Communications Act. The Commission continues to rely on its ancillary powers to justify rules or orders that lack an express statutory basis or to bolster its case where there is a pertinent statutory provision that does not unambiguously confer the authority to take the action in question.

Our purpose in mentioning the Commission's ancillary authority is not to argue that it is an independent source for an Interim Carriage Rule. As noted, we agree with the Commission that its Title I general authority does not support adoption of a rule that is clearly inconsistent with a provision of the Communications Act that directly addresses the specific subject matter of the rule. Instead, our point is that whenever Congress adds a provision to the Communications Act affecting the behavior of regulated parties, but does not mention the Commission, there is a choice as to how the silence is to be interpreted. One interpretation is that silence forecloses any role for the Commission beyond the merely ministerial. An alternative is to say that silence is not sufficient to read the Commission out of the script or relegate it to a bit part; for that to occur, there must be an unambiguous affirmative statement to that effect in the statute itself or its legislative history.[29] The latter is the better policy choice, given the centrality of the Commission

[29] This has consistently been the Commission's position in instances involving matters other than retransmission consent. For example, in the Commission's 2007 *Cable Franchising Order* proceeding, it interpreted a statutory provision Section 621(A)(1) of the Communications Act, which barred cable operators from providing cable service without a "franchise" – *i.e.*, an express written authorization for the cable operator to build and operate a cable

to the regulatory scheme and the decades-long history of court decisions recognizing the extensive and expansive nature of its authority.

In short, Congress enacted Section 325(b) in an historical context in which it was well-established that the Commission had broad ancillary authority that derived from pre-existing statutory provisions, as expansively interpreted by the Supreme Court. It is reasonable to believe that, given this context, Congress thought that the Commission already possessed the power to regulate the newly created retransmission consent process in order to insure that it served the public policy goals that the process, as well as the Communications Act in general, was intended to serve. There was no need to add anything to the statute expressly granting that power to the Commission—it already had it. Given the context, if Congress intended for the Commission's ancillary authority to not extend to retransmission consent, then it would have made an affirmative statement to that effect in either the statute or the legislative history, rather than trusting that the Commission and courts would arrive at the right result through inference from the language of Section 325(b)(1) and construing general statements in the legislative history that do not directly speak to the Commission's authority. In effect, the absence of a statement in Section 325(b) about the Commission's authority to allow interim carriage in some circumstances does not imply that the authority does not exist, but, rather, that it does.

system. Relying on language in Section 621(a)(1) prohibiting unreasonable denials of franchise applications – a provision that contains no reference to the Commission whatsoever – and on its ancillary authority under Sections 201(b), 303(r), and 4(i), the Commission concluded that it had the requisite legal authority not only to establish a time limit within which a franchise had to either grant or deny a franchise application, but also to adopt a rule under which a franchising authority's failure to act within the specified term period would be deemed by operation of law to constitute a grant of the required franchise on an "interim" basis on terms and conditions set by the Commission. *Cable Franchising Order*, 22 FCC Rcd at 5134. In reaching this conclusion, the Commission noted that "[t]here is nothing in the statute or the legislative history to suggest that Congress intended to displace the Commission's explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1)." *Id.* at 5131-32. The Commission's *Cable Franchising Order* was upheld by the United States Court of Appeals for the Sixth Circuit, which found that the absence of any express provision giving the Commission a role in the franchising process did not preclude the Commission from "filling the gap" in the statue through the exercise of its regulatory authority. *Alliance for Community Media v. FCC*, 529 F.3d 763.

In that regard, undoubtedly because of Congress's general intent to give the Commission broad and adaptable authority, there are few, if any, instances where the Communications Act establishes a hard and fast rule governing regulated entities and leaves no or only an insignificant role for the Commission. The fact that there are some instances is significant. When Congress wants to restrict the Commission's authority it says so, probably because there have been so many court decisions holding that silence about the Commission's authority in a statutory provision does not deprive the Commission of its full ancillary authority with respect to the subject matter of that provision. As noted in the Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC D/B/A Suddenlink Communications, and Insight Communications Company, Inc. filed in this docket:

> When Congress intends to restrict or otherwise limit the scope of the Commission's authority to regulate, it knows how to express that intent. For example, in Section 623(a)(1) of the Communications Act (as amended by the 1992 Cable Act), Congress expressly declared that "No Federal agency . . . may regulate the rates for the provision of cable service except to the extent provided under this section and section 612." Similarly, Section 623(e)(1) states that "no Federal agency . . . may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts." And in Section 624A(b)(2), Congress used the following words to restrict the Commission from adopting certain rules relating to the use of scrambling or encryption technology: "the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders."
>
> There is a world of difference between the provisions cited above and Section 325(b)(1)(A). The former are unambiguous restrictions on the Commission's regulatory authority. The latter most decidedly is not.[30]

[30] Joint Comments of Mediacom Communications Corporation , Cequel Communications LLC D/B/A Suddenlink Communications, and Insight Communications Company, Inc. (June 3, 2010), at 33-4 (internal footnotes omitted).

In sum, given the centrality of the Commission to national communications policy and law, the Commission should never be read out of the script unless that is unambiguously the congressional intent. The conclusion that the Commission is precluded from acting because of a provision that expressly speaks solely to the behavior of one or more market participants should be reached only if there is compelling evidence that Congress intended to preempt the Commission's authority.[31] That evidence does not exist. In fact, as discussed further below, the existing evidence leads to exactly the opposite conclusion: As discussed at greater length below, the only statements in the legislative history that directly and specifically relate to the Commission's authority to adopt an Interim Carriage Rule unanimously confirm that it not only has that authority, but also has a duty to exercise it to prevent harm to consumers.

Section 325(b)(3) Makes the Retransmission Consent Right Conditional, Not Absolute

It is not necessary to rely on the Commission's pre-existing ancillary powers as the basis for concluding that it can act to prevent consumers from suffering from service disruptions because of breakdowns in retransmission consent negotiations. The 1992 Act included not just subsection 325(b)(1), but also the language now found in subsection 325(b)(3)(A), which authorizes and directs the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent."[32] The two subsections have to be read together. If they are read as a whole, as they must be, what Congress really said,

[31] *In re Permian Basin Area Rate Cases*, *supra*. ("We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes.").

[32] Congress's directive that the Commission adopt rules implementing Section 325 within 180 days of its enactment does not limit the Commission's discretion to update its rules in response to changing conditions. In a related context, the Commission recently found that there was "no merit" to the contention that such an initial implementation deadline somehow stripped the Commission of its power to amend its rules implementing Section 628 of the Act. *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 ¶ 11 n.23 (2010) ("*2010 Program Access Order*").

in effect, was that MVPDs may not retransmit a station's signal without the authority of the originating station given in accordance with the Commission's regulations governing the exercise of the retransmission consent requirement.

Note that there is a conceptual shift in moving from Section 325(b)(1)(A) to Section 325(b)(3)(A). As we have seen, Section 325(b)(1)(A) is phrased as a prohibition upon the behavior of MVPDs, not as a right of a broadcast owner. In Section 325(b)(3)(A), retransmission consent is presented as a right of broadcasters that is subject to regulation by the Commission. While this might seem at first glance a trivial distinction, it is actually critically important. The Commission's position that it lacks authority to order interim carriage depends upon the proposition that the law establishes an absolute, unqualified right of broadcasters to prevent carriage without consent. That proposition has no support in the statutory language. Section 325(b)(1)(A) creates a restriction upon certain behavior by cable companies, not a right of broadcasters, while Section 325(b)(3)(A) does refer to retransmission consent as a right of broadcasters, but only a conditional right subject to Commission rules, rather than an absolute right.

As a result, to accurately reflect the statutory language, the syllogism presented above as expressing the Commission's position has to be modified to read as follows:

- Section 325(b)(1) says that an MVPD may not retransmit a broadcast signal without the station's consent, Section 325(b)(3)(A) says that the Commission can and must adopt regulations governing the station's exercise of its right to grant or withhold consent and the Commission has pre-existing direct and ancillary authority to regulate broadcast stations and their relationship with cable systems that was not expressly negated by the 1992 Act.
- If the Commission orders interim carriage in the face of a denial of consent for retransmission by the station, the result is carriage by an MVPD without the station's consent.

- Therefore, a violation of the law occurs unless the order is pursuant to regulations within the scope of the rule-making authority granted to the Commission.

As this syllogism makes clear, the answer to the question of whether or not the Commission may order interim carriage is not found in Section 325(b)(1)(A) alone, but, rather, in Section 325(b)(1)(A) read in light of Section 325(b)(3)(A) and the rest of the Communications Act, as interpreted by the Commission and the courts.[33]

The issue, then, becomes whether the Commission's rulemaking authority is broad enough to encompass an interim carriage order of some kind under some circumstances. Initially, determining the scope of that authority depends upon figuring out what Congress meant by referring to rules that "govern the exercise of the [retransmission consent] right."

The concept of exercising a right is frequently used in everyday discourse. Sometimes the speaker refers to the procedure by which the election to pursue a right is made. For example, if we talk about the exercise of a right of first refusal for a parcel of real estate, we usually are

[33] In support of its position that its ancillary authority does not extend to ordering interim carriage, the Commission states that "Section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act," and, in footnote 57, quotes *Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1213 (10th Cir. 2005) for the principle that "[i]t is a fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." According to the Commission, Section 325(b)(1)(A) is the specific provision and Section 4(i) is the general one. The cited principle applies, however, only when the two provisions cover the same subject, and Section 325(b)(1) and Section 4(i) are an apple and an orange. Section 325(b)(1)(A) does nothing more than prohibit certain conduct by MVPDs. It does not mention the Commission or its authority. Section 4(i), on the other hand, directly concerns the Commission's authority. When it comes to the Commission's authority, Section 4(i) is the specific statutory provision and Section 325(b)(1)(A) is actually not even the general one—it simply does not address the topic under consideration. The Commission is able to invoke the *Shawnee Tribe* principle only by reading into Section 325(b)(1) (A) words that are not there. Accordingly, the principle is not dispositive or even relevant to the fundamental inquiry as to whether the Commission has authority to order interim carriage. Actually, the principle is most relevant to the interplay of subsections 325(b)(3)(A), which is quite specific regarding the issue of the Commission's rule making authority, and 325(b)(1)(A), which does not even mention the Commission. The Commission's reading of Section 325(b)(1)(A) as foreclosing adoption of a rule allowing, under any circumstances, interim carriage absent the station's consent creates "an apparent conflict" with Section 325(b)(3)(A), which authorizes Commission rulemaking impacting retransmission consent and does not contain any limit on the scope of that authority. On the issue of the Commission's rulemaking authority, Section 325(b)(3)(A) is the more specific provision and, under the *Shawnee Tribe* principle, should govern.

referring to the mechanics by which the right is triggered. Often, however, we use the word "exercise" to refer to the enjoyment of the right, what we might call the "substance" of the right in question, as compared to its procedural aspects. For example, the First Amendment of the U.S. Constitution prohibits Congress from prohibiting the free "exercise" of religion and the reference is clearly to more than just mechanics.

This distinction between the procedural and substantive aspects of a right is real, but often blurry at the margins. Some aspects of the retransmission consent right are clearly mechanical and, therefore, procedural—for example, the timing of a broadcaster's election of retransmission consent rather than must carry and the manner in which that election is communicated to affected MVPDs. In other cases, matters are not so clear cut. Moreover, rules that address matters that are undoubtedly procedural may affect the substance of the right.

Considering only the statutory language, it would appear that there can be little uncertainty about what Section 325(b)(3)(A) means: A broadcaster's retransmission consent right is simply the right to say either "yes" or "no" to carriage of its signal by an MVPD, and so Section 325(b)(3)(A) means that the Commission may adopt regulations that govern the right of broadcasters to say "yes" or "no" to requests for carriage of their signals by MVPDs. There is nothing in the language that restricts the scope of the rulemaking to the merely procedural and, therefore, the Commission may regulate in ways that affect the substantive right granted, even though it may not negate that substantive right.

The conclusion that the rulemaking authority extends to substance as well as procedure is supported by the last sentence of Section 325(b)(3)(A), which directs the Commission, in adopting initial regulations governing the exercise of the retransmission consent right, to "consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under [Section 623 of the Communications Act] to ensure that the rates for the basic service tier are reasonable." For the sake of convenience, we can refer to this provision as the "Reasonable Rates Mandate."

As amended by the 1992 Act, Section 623 of the Communications Act directed the Commission to "by regulation, ensure that the rates for the basic service tier are reasonable" with the "goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[34]

In rate regulated systems, all broadcast television station signals carried by a cable operator must be placed on the basic service tier. If, therefore, cable operators secured retransmission consent by paying cash or providing other consideration and passed the cost through to subscribers, basic service tier rates would increase. The Commission's regulations "governing the exercise of the retransmission consent right" would be inconsistent with the obligation to ensure reasonable subscriber rates only if they allowed a pass through of costs to a degree that resulted in basic tier rates becoming unreasonable. That result could be avoided in either or some combination of two methods:

- by prohibiting cable operators from passing through retransmission consent costs by an amount that would tip rates over the line of reasonableness; or
- by allowing cable companies to pass through retransmission consent costs while limiting the amount that broadcasters could charge for retransmission consent so that basic tier rates remained at the "reasonable" level.

[34] Section 623(b)(1).

Reliance on the first method would mean that the Commission could accomplish the goal expressed in the Reasonable Rates Mandate by acting solely under the rate regulation rules promulgated under Section 623 of the Communications Act, and no separate rulemaking or other actions under Section 325(b)(3)(A) would be needed.[35] The fact that the Reasonable Rates Mandate directs the Commission to consider the impact on basic tier rates in the context of its retransmission consent rules means that Congress thought that protecting consumers from rate increases due to retransmission consent fees should not be handled entirely through regulation of subscriber fees for the basic tier. That conclusion is buttressed by the fact that Section 623 ordered the Commission, in formulating its rate regulation rules, to take into account "the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier . . . and changes in such costs."[36] The Commission's rules allowed cable companies to pass through the full amount of its increases in retransmission consent fees, assuming that the system's "external costs" as a whole have risen by at least that amount.[37]

If Congress had meant for the rate regulation process to be the exclusive method for protecting against basic tier cost increases caused by retransmission consent fees, then it would have proceeded differently. In that case, the logical place to address the issue would be in the rate regulation provisions of the 1992 Act—perhaps by including language in Section 623 to the effect that although the Commission was charged to take into account increases in programming

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[35] In adopting its initial rules under Section 325(b), the Commission declined to adopt rules specifically addressing retransmission consent rates, but it did not claim that it lacked the authority to do so. Instead, it concluded that it had the ability to address the potential impact of retransmission consent fees on basic rates under Section 623(b)(2), if and when required, and that there was, at that time," no specific regulatory action that the Commission need take pursuant to Section 325(b) concerning the impact of retransmission consent compensation on basic rates." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 69 (1993) ("*Broadcast Signal Carriage Issues Order*").

[36] Section 623(b)(2)(C)(ii).

[37] *See* 76 C.F.R. § 76.922.

costs, it was directed to insure that programming cost increases in the form of retransmission consent fees were not responsible for basic tier rate increases. If, despite logic, Congress chose to address the subject in Section 325(b), then the clearest way to express the concept that the Commission was to use its rate regulation power to prevent basic tier price increases due to retransmission consent would be to say something like "In carrying out its responsibility under Section 623, the Commission shall insure that cable operators do not increase rates because of their costs for retransmission consent to a degree that conflicts with the Commission's obligation to ensure that the rates for the basic service tier are reasonable." Instead, it identifies the dangers to be guarded against as excessive rates resulting from the Commission's regulations under Section 325, rather than from pass through of costs by cable operators.

For these reasons, it is most reasonable to interpret the Reasonable Rates Mandate not as granting the Commission authority it already had under Section 623—the power to limit the right of cable companies to raise rates to cover retransmission consent fees—but, rather, the supplemental authority to ensure that its rules did not allow broadcasters' demands to drive up cable operators' costs to the point that basic subscribers' monthly bills began to rise.

In the Report and Order promulgating its initial rules under Section 325(b), the Commission clearly thought that the Reasonable Rates Mandate gave it authority to deal with the impact of retransmission consent on basic rates that was different from its power under Section 623. The Commission concluded that it had the ability to address the potential impact of retransmission consent fees on basic rates under Section 623(b)(2), if and when that impact occurred, and that there was, at that time, "no specific regulatory action that the Commission need take pursuant to Section 325(b) concerning the impact of retransmission consent compensation on basic rates."[38] Although concluding that no action under Section 325(b) was then required, the Commission recognized that Section 325(b)(3)(A) was an independent grant of authority to make rules to deal with the impact of retransmission consent deals on subscriber costs, separate and apart from its rate regulation power under Section 623.

The legislative history supports this interpretation. For example, Senator Inouye, the manager of the Senate bill (S.92) that was the foundation for the 1992 Act and the author of its retransmission consent language that eventually became Section 325(b),[39] remarked that

> S. 12 will not cause consumer rates to increase because the bill explicitly requires the FCC to consider the impact of retransmission consent on rates in implementing this provision, and the FCC must ensure that this provision complies with the requirement that subscribers' rates be reasonable.[40]

If Congress had intended that the Commission address the impact of retransmission consent on rates solely through its rate regulation power under Section 623, Senator Inouye's statement would read much differently. It would say something along the lines of "In implementing its authority under Section 623, the Commission shall consider the impact of retransmission consent and ensure that is does not cause subscriber rates to become unreasonable." Instead, the language focuses on the rules to be adopted under Section 325(b)(3)(A), not Section 623.

The use of the conjunction "and" in the Reasonable Rates Mandate and Senator Inouye's statement clearly supports the notion that Congress intended to give the Commission dual

[38] *Broadcast Signal Carriage Issues Order, supra* note 35, at ¶ 69.

[39] See Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 Hastings Comm. & Ent. L.J. 305, 334n.121 (1993).

[40] 138 Cong. Rec. S14222 (Sept. 21, 1992)(remarks of Sen. Inouye).

weapons for preventing consumers from suffering unreasonable rate increases. It armed the Commission with the power to regulate cable companies' rates under Section 623 and with the authority to regulate the demands of broadcasters under Section 325(b)(3)(A).[41] That reading is confirmed by the following statement by Senator Inouye:

> [T]he FCC must ensure that local stations' retransmission rights will be implemented with due concern for any impact on cable subscribers' rates.
>
> [T]o eliminate any doubt on this issue, we will soon be offering a managers' amendment to the bill to make certain that retransmission consent does not result in rate increases. <u>In addition</u>, the FCC is <u>also</u> required to regulate the rates for the basic tier—this is the tier that contains the broadcast signals—to make certain that those rates remain reasonable. Thus, the FCC has a clear mandate to ensure that retransmission does not result in harmful rate increases that we have seen flourishing throughout this Nation.[42]

The amendment referred to was introduced by Senator Inouye on the same day, and it added the Reasonable Rate Mandate to Section 325(b)(3). This statement unambiguously says that the addition to Section 325(b)(3)(A) created a source of authority to control rates "<u>in addition</u>" to the rate regulation power of the Commission under Section 623. There was no need to give a second source of authority if all that it did was the same thing as Section 623—allow the Commission to regulate cable company rates. The only reason to add it would be to give the Commission an additional power, which is to adopt rules limiting the ability of broadcasters to collect fees at such levels as to affect raise basic tier prices.

Of course, the price that can be collected for retransmission consent is a matter of substance, not mere procedure. If, as both Congress and the Commission apparently thought, the

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[41] For that reason, repeal of federal rate regulation in 1996 did not eliminate the Commission's authority or responsibility to ensure that basic rates are not increased inordinately because of retransmission consent fees. *See* FPC v. Texaco, 417 U.S. 380 (1974) (when Congress explicitly directs an agency to set the price of a commodity, the agency cannot ignore its charge and leave the price to market forces).

[42] 138 Cong. Rec. S564 (Jan. 29, 1992).

Reasonable Rate Mandate allowed the Commission to include provisions affecting pricing discretion in its rules governing retransmission consent, then Section 325(b)(3)(A) conferred substantive, as well as procedural rule-making authority. In any event, the Reasonable Rates Mandate definitely does direct the Commission to consider the impact on rates in its rulemaking under Section 325(b)(3)(A) and to insure that its rules adopted under that Section do not conflict with its then-extant obligation to assure that basic rates remain reasonable. If the rulemaking authority granted by Section 325(b)(3)(A) encompassed only tinkering with procedures, and not adopting rules that affect substance, there would be absolutely no need for the Reasonable Rates Mandate because it is impossible to imagine how merely procedural rules could have any impact that would affect basic rates, let alone kick them into the realm of the unreasonable.

At worst from the perspective of those who think the Commission has authority to allow interim carriage, the interplay of the grant of rulemaking power in Section 325(b)(3)(A) with the dictate of Section 325(b)(1)(A) creates sufficient ambiguity to shift the analysis into the *Chevron* second step. That means that if the Commission resolved the ambiguity in favor of an interpretation that validated an Interim Carriage Rule, its construction would be entitled to judicial deference, if reasonable and within the range of permissible choices.

Before leaving analysis of the statutory language, it is worthwhile to briefly consider another provision of the Act that the Commission has previously said supports its view that it lacks authority to order interim carriage, although it did not repeat that assertion in the *Notice*. In 2000, the Commission adopted rules implementing provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") that required broadcasters to negotiate in good faith with satellite carriers and other MVPDs with respect to their retransmission of the broadcasters' signals.[43] In doing so, the Commission rejected the urgings of MVPDs that it prohibit a broadcast station from forcing an MVPD to cease carriage, as long as the MVPD was prepared to continue negotiations or at least during the pendency of a good faith complaint filed with the Commission.[44]

The Commission cited the language of Section 325(b)(1) and Section 325(e) as supporting its conclusion that it lacked authority to order interim relief.[45] Section 325(e) was added to the Communications Act by SHVIA and establishes a streamlined complaint procedure through which broadcasters may seek redress for allegedly illegal retransmission of local broadcast signals by satellite carriers. The Commission noted that the provision allowed four, and only four, defenses by the satellite carrier, none of which include a grant of authority by the Commission.

A different position would be entirely consistent with the statutory language and the legislative history. Section 325(e)(1)(A) authorizes the filing of a complaint by a broadcaster, only if it "believes that a satellite carrier has retransmitted its signal to any person in the local market of such station in violation of subsection (b)(1) of this section." Section 325(b)(2) creates certain statutory exceptions to the need for retransmission consent under Section 325(b)(1)—for example, consent is not required for retransmission of the signals of non-broadcast stations or,

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[43]SHVIA added Section 325(b)(3)(A)(C) to the Communications Act. It directs the Commission to adopt rules prohibiting a broadcasting station that elects retransmission consent from "failing to negotiate in good faith." In 2004, Congress amended Section 325(b)(3)(A)(C) to direct the Commission to adopt rules extending the good faith negotiation obligation to MVPDs. Satellite Home Viewer Extension and Reauthorization Act of 2004, § 207, passed as part of Pub.L. 108-447, 118 Stat. 2809 (2004). On its face, this provision does not in any way constrain or otherwise limit the Commission's exercise of the more general rulemaking authority previously granted it in Section 325(b)(3)(A).

[44] *First Report and Order, In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999 and Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, released March 16, 2000 (the "*Good Faith Order*").

[45] *Id.* at ¶61

subject to specified conditions, of certain "superstations." The analysis presented in the *Good Faith Order*, taken to its logical conclusion, means that a satellite carrier who retransmitted the signal of a qualifying superstation station without consent would be subject to sanctions under Section 325(e) because Section 325(e)(1)(A) authorizes a complaint based on a violation of "subsection (b)(1)" without reference to subsection (b)(2) and the "four defenses" also do not refer to the exceptions in Section 325(b)(2).

Clearly, taking that approach would be a mistake. The correct reading is that a "violation of subsection (b)(1)" cannot occur if the retransmission, even if not consented to by the station, is authorized by another provision of law. This same analysis should apply to rules adopted by the Commission under Section 325(b)(3)(A). A rule mandating or permitting interim carriage in certain events and upon certain terms would, in our view (which is supported by unambiguous legislative history), clearly be within the scope of the Commission's authority under Section 325(b)(3)(A), particularly since shut-offs on the eve of popular television programs and events are used as a tactic by broadcasters to extract higher fees, which are passed through to subscribers. If the Commission exercised that authority, then a "violation of subsection (b)(1)" would not occur for purposes of Section 325(e) during the period of interim carriage in accordance with the rules adopted under Section 325(b)(3)(A), just as no such violation would occur if carriage were authorized by Section 325(b)(2) or otherwise by law.[46]

[46] Of course, Section 325(e) only applies to "satellite carriers" and not to cable systems. Notably, there is no provision comparable to that Section that does cover cable companies. The extension to cable companies of whatever conclusions one may draw from the language of Section 325(e) is not mandated by logic or the conventions of statutory interpretation. Even if, contrary to the argument in the text, the "four defenses" really were meant to be absolutely the only ones available to satellite carriers, that does not mean that they are also the only ones available to cable companies. The fact that Congress expressly limited satellite carriers to the "four defenses" but chose not to impose a similar restriction on cable systems actually argues against the conclusion about interim relief drawn by the Commission in the *Good Faith Order* insofar as it applies to cable company negotiations with broadcasters.

The Commission's Position Is Inconsistent with Its Past Actions

It has been observed that "[t]he regulations promulgated by an agency implementing legislation often give insight into legislative purposes"[47] because the agency was involved in, or at least acutely attentive to, that process and has fresh and sometimes first-hand knowledge of the thinking underlying the new law. As directed by Section 325(b)(3)(A), the Commission released its initial retransmission consent rules on March 29. 1993. In doing so, the Commission took a number of positions that clearly indicated that it thought that its authority under Section 325(b)(3)(A) extended to substance, as well as procedure, and that neither the seemingly simple command of Section 325(b)(1)(A) nor the legislative history prevented the Commission from imposing substantive restrictions on the retransmission consent right. The Commission found that it had the authority to take each of the following steps, even though, in virtually every case, there is nothing in the sparse language of Section 325(b)(1)(A) that remotely can be read as authorizing any of them and all of them are inconsistent with the Commission's interpretation of the legislative history cited by the Commission to support its view that cannot authorize interim carriage:

- Ruled that areas where failure to reach agreement would leave a market without a channel affiliated with a national broadcast, network affiliated stations could not unreasonably withhold retransmission consent, even though owners of intangible property usually have complete discretion to allow others to use that property for any reason or no reason.[48]

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[47] Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 Fed. Comm. L.J. 99 (1996).

[48] *Broadcast Signal Carriage Issues*, *supra* note 35, at ¶147.The obligation to negotiate in good faith does not limit the right of the broadcaster, after having conducted good faith negotiations, to decide not to grant consent without cause.

- Adopted a specific rule barring local broadcasters and MVPDs from entering into exclusive retransmission consent agreements, even though participants in a "free" marketplace typically can negotiate over exclusivity.[49]
- Found that it had the authority to require that retransmission consent agreements cover an "entire program" day.[50] For example, a station could not offer one MVPD consent to carry its entire signal, but limit another MVPD to retransmission only of its non-network programs or offer different terms for carriage rights in different individual programs.
- Extended various requirements found in the must carry provision (Section 614 of the Act) to retransmission consent stations[51] despite the fact that Section 325(b)(4) expressly says that "the provisions of section 614 shall not apply to the carriage of the signal" of a station electing retransmission consent.

The first two items have the effect of requiring a broadcaster to allow carriage without its consent, something that the Commission now claims it lacks authority to do, and all of the items are directly counter to the notion that Congress intended to create a free market for retransmission consent, did not want the Commission to dictate the outcome and intended for broadcasters to control retransmission of their signals. For example, the position that the subsection 325(b)(1) creates a market for retransmission consent and precludes the Commission from altering the substantive outcome of marketplace negotiations is totally at odds with the belief that the Commission has the power to prohibit exclusive contracts. The prohibition of exclusive contracts before SHVIA also is completely counter to the view that Section 325(b)(1) precludes the Commission from ordering a broadcaster to allow a cable system to carry its signal even if the broadcaster does not wish to grant consent. Clearly, denying a broadcaster the right to grant a single MVPD the exclusive right to carry the station's signal is tantamount to saying that the broadcaster must allow carriage by certain MVPDs whether it wants to consent to that

[49] *Broadcast Signal Carriage Issues Order, supra* note 35, at ¶179. Congress subsequently codified the bar on exclusive retransmission consent agreements in Section 325(b)(3)(A)(C). However, that action was taken principally to place a "sunset" on the prohibition, not to address some perceived limitation in the Commission's authority to have adopted it.

[50] *Id.* at ¶176.

[51] *Broadcast Signal Carriage Issues Order*, *supra* note 35, 8 FCC Rcd at 3004.

carriage or not. Broadcasters did not challenge this interpretation of rulemaking authority–nor did Congress.

In adopting the first rules related to retransmission consent in 1993, the Commission noted with favor its pre-existing position that in exercising its considerable power over broadcast licensees, it would take into account their behavior with regard to granting or withholding consent to retransmission of their signals. Specifically, the Commission quoted the following statement it made in a 1967 ruling in a matter under Section 325(a):

> has declined to read Section 325(a) of the Communications Act (which requires the originating station's consent before another station may rebroadcast its programming) as sanctioning arbitrary refusals to grant such consent on the part of network affiliates and has stated that a refusal based upon no reason at all or upon unreasonable grounds would be a relevant consideration in determining whether the station was being operated in the public interest.[52]

The implication of this statement is that the Commission could take action against the station on the grounds that it was not operating in the public interest if it refused to grant retransmission consent authority.

In addition, the Commission's rules prohibit MVPDs from dropping carriage of a broadcast station during a ratings "sweeps" period, even with the consent of the broadcaster, and, in its 2005 report to Congress on the subject of retransmission consent, the Commission pointed out that the rule also prohibits broadcasters from withholding their signals from an MVPD during

[52] *Broadcast Signal Carriage Issues Order*, *supra* note 35, at ¶147 (citing *KAKE-TV and Radio*, 10 R.R. 2d 799, 801 (1967)).

a "sweeps" period.[53] One looking to find the power to impose either limitation on the discretion of broadcasters will search the specific words of Section 325(b)(1) in vain.

The decision to impose Section 614 requirements in the retransmission consent context suggests that the Commission seems to believe that it has broad enough authority to create rights and obligations completely contrary to the clear, unambiguous language of Section 325(b)(4), yet lacks the authority to regulate substantively under the far looser language of subsection 325(b)(1)(A) read in conjunction with subsection 325(b)(3)(A). Frankly, this distinction is hard to justify in a principled manner and it may seem to the cynical to simply reflect a bias against cable operators or in favor of broadcasters when it comes to cable carriage of broadcast signals. Certainly, there is nothing in the statutory language that supports the distinction. Indeed, the position that broadcast stations are guaranteed their channel positions even if they elect retransmission consent is directly contrary to statements in the legislative history of the 1992 Act.

The Commission's position regarding its authority to order interim carriage in the face of broadcasters' threats to withdraw signals to the detriment of consumers seems to conflict with previous practices. The Supreme Court has long held that Sections 4(i) and 303(r) authorize the Commission to issue an order maintaining the *status quo* in cable carriage and other disputes whenever "the public interest demands interim relief."[54] In contexts other than retransmission

[53] *See* Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) ("*2005 FCC Retransmission Consent Report*"), at 21n. 130 (citing 47 C.F.R. § 76.1601, Note 1).

[54] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

consent, the Commission has made it clear that agrees with the Supreme Court that it has the authority to grant interim relief in form of "standstill order," even if the specific statutory provision in issue does not expressly provide for, and, in a constrained reading, could be interpreted as precluding, that form of relief.

In deciding whether to grant an interim stay, the Commission usually simply cites Southwestern Cable and then applies the "Virginia Petroleum Jobbers" standards. For example, in 1998, the Commission ordered interim relief in a complaint proceeding initiated by AT&T Corp. (AT&T) and MCI Telecommunications Corporation (MCI) (together the "Petitioners") against Ameritech Corporation (Ameritech) alleging that through its "teaming" agreement with Qwest Communications Corporation (Qwest), Ameritech was providing interLATA services in violation of section 271 of the Communications Act and its equal access and non-discrimination obligations under section 251(g) of the Act.[55] The Petitioners sought an order prohibiting Qwest from further marketing under the agreement, pending a final determination by the Commission of the agreement's lawfulness. The Commission granted the requested standstill order after analyzing "the four criteria set forth in Virginia Petroleum Jobbers to evaluate requests for preliminary injunctive relief: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) that the issuance of the order will further the public interest." The Commission noted that "[a]lthough not mandated by the Communications Act, the Virginia Petroleum Jobbers standard is consistent with the standard previously used by the Commission in the standstill order affirmed by the Supreme Court in Southwestern Cable, where the Commission assessed the

[55] *In the Matter of AT&T Corp., et al. v. Ameritech Corporation and Qwest Communications Corporation*, File No. E-98-41 (rel. June 30, 1998).

seriousness of the legal questions and the interests of the public and the private parties involved."[56]

In the *2010 Program Access Order*, the Commission cited its authority under Sections 4(i) and 303(r) of the Act to establish an interim carriage regime for program access complaints, in the form of "a temporary standstill of the price, terms, and other conditions of an existing programming contract."[57] The Commission concluded that the "several benefits" of interim carriage—including "minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations); [and] encouraging settlement"—trumped the programmers' asserted right under copyright law to withhold their programming. *Id.* In its April 2010 *Sky Angel* order, the Commission acknowledged that its standstill rules for program access disputes were not yet in force, but still found that it had "statutory authority to act on a standstill petition in program access cases pursuant to the authority granted to the Commission under Section 4(i) of the Act."

The Commission has also issued an interim stay in a dispute between a broadcaster and a cable operator that temporarily prevented the broadcaster from enjoying a statutory right that was clear, unambiguous and, on its face, did not give the Commission the authority to deny or delay the exercise of that right. In 2000, the Cable Services Bureau issued an order granting a must-carry complaint by Brunson Communications, Inc. against RCN Telecom Services, Inc.

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[56] *Id.*

[57] *2010 Program Access Order*, *supra* note 32, ¶ 71.

seeking on-channel carriage of WGTW-TV in Burlington, New Jersey on RCN cable systems. The Bureau granted RCN's motion for a stay of the Bureau's order pending its appeal to the full Commission, relieving RCN, during the pendency of the proceeding, from complying with what the Bureau saw as its clear statutory obligation to carry the station on its assigned over-the-air channel.[58] In granting RCN's motion, the Bureau treated the motion as a routine filing for interim relief, noting the following:

> The Commission evaluates petitions for stays under well settled principles. To support a stay, a petitioner must demonstrate: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay. The likelihood of success on the merits is an important element in a petitioner's showing. However, the degree to which a probability of success on the merits will be found varies according to the Commission's assessment of the other factors. When confronted with a case in which other elements strongly favor interim relief, the Commission may exercise its discretion in determining whether to grant a stay.

The stay was granted notwithstanding the broadcaster's assertion that the law and Commission precedent were clear that on-channel carriage was required, a conclusion with which the Bureau agreed by ruling in the station's its favor on the complaint. In other words, the Bureau read the law as mandating on-channel carriage and there was nothing in the text of Section 614 of the Act that would expressly permit the Bureau to order carriage, either permanent or temporary, of a station duly exercising its must-carry right other than on the assigned analog channel. Nonetheless, the Bureau thought it had the power to allow carriage in a manner other than that mandated by the express language of the statute pending a final decision on the merits of the proceeding by the full Commission. The stay continued for nearly a year

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[58] *See . Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 (CSB 2000), available at http://www.fcc.gov/Bureaus/Cable/Orders/2000/da001629.txt

and a half, when the Commission finally denied RCN's petition for review. Even after denying review, the Commission granted RCN an additional 180 days to comply with the channel positioning requirement.

The statutory language of the channel positioning requirement for must-carry stations is as simple and unambiguous as the grant of the retransmission consent right and similarly devoid of any express language that would allow the Commission or any of its Staff to deny a station the positioning to which it is entitled for any length of time. If the Commission interprets Section 325(b)(1) as preventing it from temporarily staying loss of carriage of a broadcast station by an MVPD, then it should interpret Section 614 as similarly precluding it from permitting even temporary carriage of a station anywhere except on its over-the-air channel. Yet, in RCN, neither the Bureau nor the Commission expressed the slightest bit of doubt about their ability to issue an interim stay preserving the status quo, even though that meant that the broadcaster was not able to effectively enjoy a right clearly granted by simple, direct statutory language that did not provide for any exception on its face. The Commission and the Bureau thought, rightly in our view, that the Commission's ancillary authority and general remedial powers allowed it to issue an interim stay.

THE LEGISLATIVE HISTORY CLEARLY SHOWS THAT CONGRESS INTENDED THE COMMISSION TO HAVE THE AUTHORITY TO PREVENT SHUTOFFS

The conclusions we have reached based solely on analysis of the statutory language are confirmed by the legislative history, which establishes—irrefutably, it seems—that Congress did intend the Commission to have, and to exercise in the appropriate circumstances, the power to protect consumers from loss of carriage by their preferred MVPD and from price increases caused by retransmission consent fees. At a minimum, the legislative history supports the conclusion that there is sufficient ambiguity on the point to create a choice of interpretations.

Of course, the Commission thinks that the legislative history supports a different conclusion. As already mentioned, in the *Notice,* the Commission says that "the legislative history of Section 325(b) states that the retransmission consent provisions were not intended 'to dictate the outcome of the ensuing marketplace negotiations' and that broadcasters would retain the 'right to control retransmission and to be compensated for others' use of their signals'" and indicates that those statements influenced its conclusion that it lacks authority to allow interim carriage. The quoted passages are from the *Senate Report*[59] on Senate Bill 102-92 ("S.92"), which was the source for the retransmission consent provision included in the 1992 Act.[60]

Neither of the passages directly addresses the issue under consideration: the power of the Commission to allow interim carriage without consent. Instead, they are slogan-like generalizations that speak to the retransmission consent process from the perspective of the two private parties conducting the negotiations, without reference to the Commission. Given the fact that they do not speak specifically to the Commission's authority, the relevant question is

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[59] *Senate Report* No. 102–92 (June 28, 1991) (the "*Senate Report*").

[60] Although it has a much more ancient lineage, the 1992 Act traces most immediately to S.92, which was first introduced by Senator John C. Danforth on January 14, 1991. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d102:SN12: That bill, after several amendments, was adopted by the Senate by a vote on January 31, 1992. A conference committee was convened to reconcile differences between the bill and its House counterpart. The Cable Television Consumer and Protection Act of 1992 on October 5, 1992, after the House and Senate voted to override a veto by President George H.W. Bush. The House bill had no provision relating to retransmission consent, and the conference committee agreed to include in the final legislation the Senate's language from S.92. See, Conference Report on S.12, Cable Television Consumer Protection and Competition Act of 1992, 138 Cong. Rec. H8327 (Jan. 30, 1992), available at http://thomas.loc.gov/cgi-bin/query/D?r102:12:./temp/~r102PYCG61:e209954: For an exhaustive history of the 1992 Act, including its retransmission consent provisions, see Joel Rosenbloom, *Cable Television Amendments: The Cable Television Consumer Protection and Competition Act of 1992*, in *The Communications Act: A Legislative History of the Major Amendments, 1934-1996*, at 259 (Max D. Paglin et al. eds., 1999).

whether the language of the two passages dictates the Commission's conclusion about their meaning or is reasonably susceptible to an alternative interpretation that supports a finding that the Commission does have the authority to adopt an Interim Carriage Rule.

The answer is that not only is that alternative interpretation reasonable, it is more consistent with congressional intent than the Commission's interpretation, as we will hopefully demonstrate. For the sake of convenience, we can call the first quotation the "Outcome Statement" and the second the "Right to Control Statement."

Two quite different interpretations of the Outcome Statement are possible, depending upon how one views the retransmission consent negotiation process. Analytically, that process has four distinct phases or stages: the preliminaries to negotiations, the negotiations themselves, the results of the negotiations (*i.e.,* the deal terms agreed to by the cable company and the broadcaster) and the aftermath for the parties and the public. Logically, it is possible for a legislative regime for retransmission consent to treat some or all of the phases alike, or to approach some or all of them differently.

Congress clearly saw the first two phases as requiring discrete rules. It established some rules governing those phases in the statute itself. For example, the statute contains specific provisions regarding the preliminaries, such as those defining which broadcast stations are entitled to elect retransmission consent, creating exceptions to the requirement of consent and establishing a few basic rules like a three-year cycle for elections between must-carry and retransmission consent, basic rules. With respect to the negotiations phase, the statute imposes a requirement that negotiations be conducted in "good faith," although that was added after 1992.

It also is not disputed that Section 325b(3), whether or not it does more, grants the Commission the power to adopt rules governing procedures before negotiations begin and to adopt rules defining the "good faith" negotiation requirement.

The rub is with the third and fourth stages. If the Outcome Statement applies to anything, it clearly would apply to the third element—the results of the negotiations, meaning the terms of the retransmission consent deal struck by the two negotiating parties. A corollary of the Commission's view of its lack of authority to order interim carriage if there is a deadlock is that it also lacks the power to adopt rules that restrict or regulate the possible results of the negotiations.[61]

That corollary, however, does not unavoidably and unambiguously flow from the language of the Outcome Statement. With regard to that language, it is important to note that the Outcome Statement is a partial quote, and the Commission omitted an important part of the sentence in which it appears. What the Commission said in paragraph 19 of the *Notice* is this:

> The legislative history of Section 325(b) states that the retransmission consent provisions were not intended "to dictate the outcome of the ensuing marketplace negotiations"

The implication of this statement, as used by the Commission, is that the "retransmission consent provisions" were not intended to result in dictation of outcomes either by interpretation of the language of those provisions or through their operation—in other words, because the Commission's rulemaking authority is a part of the "retransmission consent provisions," its adoption of rules that limit or control the results of negotiations would mean that the outcome has indirectly been dictated by those provisions, contrary to the Commission's view of the

[61] As discussed at greater length below, this position is inconsistent with the way in which the Commission has actually acted. For example, in its initial rules adopted in 1993, the Commission prohibited broadcasters from granting exclusive retransmission consent rights, despite the silence of the statute on this subject. That prohibition clearly was a limit on the possible outcomes of negotiations, not to mention a requirement that a broadcaster who otherwise was unwilling to give consent to one MVPD because it sold exclusivity to another allow carriage by the first MVPD essentially without its consent.

congressional intent. This would be an extremely strained reading, even if the Commission's quote was a full one.

What the *Senate Report* actually says is this:

> It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.[62]

The actual language does not say that "the retransmission consent provisions" were not intended to dictate outcomes, as the Commission states, but only that the Committee did not intend to dictate outcomes "in this bill." The passage, in other words, does not speak to the Commission's authority to adopt outcome-affecting rules under Section 325(b)(3)(A) or in reliance on its ancillary authority or state Congress's intention that it not have that authority. The passage can fairly be read as nothing more than a description of the retransmission consent provisions in S.92 and a statement of a limitation imposed by Congress upon itself—that is, all it does is inform the reader that the statute itself does not contain any provision that defines or limits the possible outcomes of negotiations for retransmission consent and that Congress itself did not want to dictate those terms in the statute. Under this reading, the statement does not speak at all to Congress's intentions with respect to the authority of the Commission to adopt rules affecting the results of the negotiations.

This interpretation is supported by the fact that congressional reports on enacted legislation frequently are more descriptive than explanatory—they often merely summarize the legislation without elucidating Congress's intent or offering any interpretative gloss the statutory

[62] *Senate Report, supra* note 59, at 29 (emphasis added).

language.[63] More significantly, the Outcome Statement does not mention the Commission and neither it nor the surrounding text address the Commission's authority to affect outcomes. If Congress had intended to restrict the Commission's authority, then it could have easily expressed that concept by simply adding a few words at the end of the Outcome Statement, so that it read" it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations or to authorize the Commission to do so." To repeat a point made earlier, given the critical role of the Commission in federal communications law policy and precedent establishing its extensive ancillary authority, if Congress intended to foreclose the Commission from adopting rules that affected outcomes, it would have said that more directly and clearly, particularly in light of the fact that the actual statutory language conferring rulemaking authority is not self-limiting.

Besides omitting part of the sentence in which the Outcome Statement appears, the Commission omitted other sentences in the same paragraph that give contextual meaning to the statement. The relevant language is the following:

> It is true that broadcasters also benefit from being carried on cable systems, and many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing

[63] As a prime example, the Conference Report covered the topic of the potential impact of retransmission consent on consumer prices by noting that "[in] the proceeding implementing retransmission consent, the conferees direct the Commission to consider the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations adopted under this section do not conflict with the Commission's obligations to ensure that rates for basic cable service are reasonable." This is simply a rehash of the actual language of the last sentence of Section 325(b)(3)(A) and adds absolutely nothing in terms of understanding the intended meaning and scope of that sentence.

marketplace negotiations.[64]

The Outcome Statement is prefaced by a recitation of some of the different forms of compensation that a broadcaster might seek in return for retransmission consent, and it is clear that Congress wanted to allow the negotiating parties the freedom to reach whatever compensation arrangement made the most sense to them in the particular situation. Read in this context, it is apparent that all that the Outcome Statement means is that the Committee did not intend "in this bill" to limit that freedom of the negotiating parties in setting the terms of their deal. The paragraph talks only about the flexibility of the negotiating parties in arriving at compensation terms, and does not expressly refer to, and cannot fairly be read as addressing, the authority of the Commission in the event no deal is reached or if the contracting freedom allowed the two private parties produces a deal that harms consumers or the public interests that the Communications Act is supposed to serve. Indeed, the Commission is not even mentioned in the paragraph. Given the context, it is not reasonable to attempt to stretch the Outcome Statement into evidence for the proposition that Congress did not intend the Commission to have the power to order interim carriage or for any other proposition relating to the Commission's authority.

This conclusion is supported by the following statement made by Senator Inouye, the manager of S.92, on the floor of the Senate:

> [T]he bill is completely silent on what the negotiations between cable operators and broadcasters may entail. Mr. President, they may negotiate for money or for nonmonetary consideration, such as channel position. . . . . .
>
> It could also involve joint advertising, promotional opportunities, and other forms of [compensation].[65]

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[64] *Senate Report, supra* note 59, at 36.

[65] 138 Cong. Rec. S564 (Jan. 29, 1992)

This statement, which tracks the substance of the paragraph of the *Senate Report* in which the Outcome Statement appears, strongly indicates that the word "outcome" in the Outcome Statement refers to nothing more than deal terms and that the Outcome Statement says only that Congress did not include limits or restrictions on the freedom the negotiators to chose whatever deal terms were mutually acceptable, if, in fact, they reached a deal.

Although all of this seems compelling, let us assume for the sake of argument that the Outcome Statement does indicate intent to preclude the Commission from adopting rules that "dictate the outcome of the ensuring marketplace negotiations." The meaning of that assumed restriction is by no means clear because the word "outcome" may refer any one or more of the following: the deal terms agreed to by the negotiating parties, whether the negotiations produced a deal or a loss of retransmission rights by an MVPD or the consequences to consumers of the results of the negotiations. Even if we assume that the Outcome Statement restricts the ability of the Commission to specify or control deal terms or impose a deal if the parties are deadlocked, does it necessarily follow that the passage also establishes that Congress meant it to preclude Commission intervention of any kind if the outcome of the deadlock or agreement reached was significant harm to consumers?

Of course, it does not. Logically, in reality and legally under most of federal communications law regulating the behavior of service providers, there is a meaningful difference between the outcome of negotiations to the private parties conducting them, on the one hand, and the impact of that outcome on consumers, on the other. There is no reason that Congress could not assign the Commission different roles in the two different situations. In fact, that happens often in federal regulation. Indeed, it is the case in most contract negotiations by parties regulated by the Commission under various provisions of the Communications Act.

In other words, it is one thing to say that Congress did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD or watch over every negotiation of those terms, and quite another thing to say that, therefore, it also did not want the Commission to intervene if a breakdown in negotiations harmed or threatened to harm consumers or to adopt appropriate rules if the overall effect of the myriad deals struck was to increase basic cable rates.

In the Commission's view, however, that distinction is erased, and it reads the Outcome Statement to say, in effect, that Congress not only meant to deny the Commission any voice as to the deal terms agreed to by the parties or even the power to dictate deal terms if the parties do not reach an agreement, but also intended to strip it of any authority to protect consumers if the deals reached collectively caused monthly rates to increase dramatically or the failure to reach a deal resulted in consumers not being able to watch broadcast television through their preferred MVPD. That reading requires two brief statements in the legislative history cited by the Commission that do not even mention the Commission to bear a lot of weight, and it is not by any means the only reasonable interpretation. It is not even the most reasonable one.

Markets can fall anywhere on the scale from unregulated to completely regulated. In general, the degree of regulation is a function of the importance of the product or service in the estimation of legislators and the degree of risk that market freedom will produce results thought to be contrary to the public interest. Regulation of a market can be heavy handed, with the government intimately involved at all stages, or demonstrate a lighter touch, with no, limited or graduated governmental oversight.

A regulatory scheme that is common in our political and economic system is for the government to allow market participants almost unfettered discretion in structuring their relationships, as long as the process does not produce undesirable results. This approach is based on the expectation that, in the vast majority of cases, the market itself will provide incentives or disincentives that lead participants to take the right path to the preferred destination, but reserves the possibility of government intervention in the rare cases when the parties go astray. As one observer has remarked, "[a] central planner [*i.e.*, the federal government] in a free society would rather design a mechanism that implements a certain outcome than impose the outcome directly. A proper mechanism provides the agents with the right incentive to choose actions (individually and voluntarily) that would dictate the desirable outcome."[66] The mechanism may be the market itself or a combination of market forces and government created incentives and disincentives.

Frequently, a legislative scheme that establishes a "mechanism" that relies primarily on market forces to generate the desired outcome designates a governmental agency as the mechanic, with the authority to periodically tune up and adjust the mechanism so that it continues to work as designed. Sometimes the designers, although confident in their design, recognize that there is a risk that the mechanism will not function as intended, and so give the responsible agency the authority to intervene to assure that it does not run amuck.

There is every reason to believe that this regulatory scheme, so common in our society, is what Congress intended in the case of retransmission consent.—in other words, in saying that there was no intent "in this bill" to dictate the outcome of "marketplace negotiations", the *Senate Report* was referring only to the results of the negotiations for the negotiating parties and

[66] Chun-Hsiung Liao & Yair Tauman, *Implementation of the Socially Optimal Outcome,* 72 The Manchester School 618 (2004).

saying that the bill did not specify permissible and impermissible deal terms or even dictate to the private parties involved in the negotiation that a deal had to be reached. The language does not necessarily mean, however, that Congress intended to neuter the Commission if the deal struck, or the inability to strike a deal, had consequences that adversely impacted not just those private parties, but also consumers.

This analysis and conclusion are strongly supported by this statement made on the Senate floor by Senator Inouye, the author of the retransmission consent provisions of S.92:

> The retransmission consent provisions of S.12 were designed so as to avoid creating a complex set of governmental rules to promote the carriage of local broadcast signals. Instead, S.12 permits the two interested parties – the station and the cable system – to negotiate concerning their mutual interests. It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare. We should resist the urge to require formal, preestablished mechanisms that might distort the incentives of the marketplace. At the same time, there may be times when the Government may be of assistance in helping the parties reach an agreement. I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.[67]

For reasons that are not articulated in the *Notice*, this and other statements by Senator Inouye and other Senators and Representatives that are directly relevant to the issue of the Commission's authority are ignored by the Commission while general statements that are not

[67] 138 Cong. Rec. S643 (Jan. 30, 1992).

specifically on point are elevated to a level of significance they do not merit.

In any event, whether or not the Commission agrees with our conclusions or the analysis leading to them, there should be no doubt that, at a minimum, there is a high degree of uncertainty about the meaning and intent of the Outcome Statement.

If we consider the Right to Control Statement, we reach similar conclusions. The Commission's opinion as to its lack of authority is shared by broadcast interests, and the bases for that opinion are the same as those relied upon by broadcasters. The Right to Control Statement is near and dear to the hearts of broadcasters, although not trotted out by them quite as frequently as the Outcome Statement.

Broadcasters love the Right to Control Statement because they think it validates their position that Congress intended Section 325(b) to confer (some would say "at long last, confirm") a legally protected property right that broadcasters could exploit as they saw fit in a largely unregulated marketplace for retransmission consent. For example, in a prepared statement delivered to the House Telecommunications Subcommittee in 2004, Ben Pyne, an executive of The Walt Disney Company ("Disney"), which owns the ABC television network and several broadcast stations, claimed that "retransmission consent is not regulatory intervention into the free market, but a Congressional recognition of free market principles, namely that broadcasters—like any other business—should be compensated for their product if sold by another entity."[68] Consistently with this perspective, broadcasters also argue, like the Commission itself, that Congress severely limited the Commission's authority in the realm of retransmission consent.

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[68] *Competition and Consumer Choice in the MVPD Marketplace—Including an Examination of Proposals to Expand Consumer Choice, Such as A La Carte and Themed Tiered Offerings: Hearings Before the Subcomm. On Telecommunications and the Internet of the House Comm. On Energy and Commerce*, 108th Cong., 2d Sess. (2004) (statement of Ben Pyne, Executive Vice President, Disney and ESPN Affiliate Sales and Marketing), available at http:// archives.energycommerce.house.gov/reparchives/108/Hearings/7142004hearing1336/Pyne2140.htm.

A succinct summary of the broadcasters' position can be found in the comments filed by NAB in the proceeding initiated the 2009 complaint by Mediacom alleging a violation of the good faith rules by Sinclair Broadcast Group, Inc. ("Sinclair"). In arguing that the Commission lacks the authority to mandate interim carriage while the complaint was pending, NAB said this:

> Allowing carriage of signals without consent would violate Section 325 of the Communications Act and would be inconsistent with the statute's legislative history. Congress granted broadcast stations the right to control others' retransmission of their signals, and to negotiate the terms of such retransmission through private agreements. As the Commission has consistently and correctly concluded, Congress did not intend for it to intrude in retransmission consent negotiations, but for the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. There is nothing in the statute or its legislative history to suggest that Congress intended the Commission to suspend broadcasters' statutory retransmission consent rights for any length of time. Any proposal that would place the Commission in the position of enforcing a "status quo" that has not been negotiated by the affected parties would directly contravene the statute, its legislative history, and prior Commission decisions.[69]

In short, broadcasters would like us all to believe that Congress wanted to establish an unregulated market for retransmission consent in which broadcasters have total control over the right to retransmit their signals and, to that end, intentionally refrained from adding to the 1992 Cable Act any grant to the Commission of substantive regulatory power and foreclosed the Commission from intervening using its pre-existing and almost limitless authority over broadcast television licensees or its broad ancillary authority as the federal overseer of communications in this country. According to this interpretation, the intent of Congress in 1992 was for the Commission's role to be limited to setting timetables for making elections and performing a few other minor and ministerial responsibilities. While Congress later imposed a requirement to negotiate in good faith, broadcasters see that obligation as purely formalistic in nature, with the

[69]Reply Comments of National Association of Broadcasters, *In re Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, CSR Nos. 8233-C, 8234-M (Jan. 7, 2010), at 5-6 (internal footnotes omitted).

Commission relegated to the ministerial task of setting procedural guidelines for conducting negotiations.

The broadcasters' arrive at their interpretation by focusing on Section 325(b)(1)(A) and ignoring other relevant statutory language, and by selectively quoting a couple of passages from the legislative history that are not really relevant to the issue at hand and ignoring or summarily dismissing legislative history directly on point.

The Right to Control Statement, like the Outcome Statement, fits nicely into the work of fiction that some broadcast interests have created. In the world according to Gordon Smith, assuming a few formalities are observed, the Commission has no power to intervene even if negotiations occasionally, or even often, have a result that is inconsistent with the historic goals of federal communications policy and the legislative history of the 1992 Act. The logic of the broadcasters' position is that if it could be conclusively established that consumers were experiencing rapidly escalating cost increases while the quantity and quality of locally produced broadcast television programs declined and were also enduring disruptions in their ability to view broadcast programming because of shut-offs used by stations as a negotiating tactic, there nonetheless would be absolutely nothing that the Commission could or should do about the situation.

This is a vitally important point: According to NAB, it would be entirely consistent with the law and congressional intent for retransmission consent fees for the local broadcast stations in a market to reach $20 or more per subscriber per month[70] and for all of that money to flow to

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[70] The articulated goal of important broadcast interests is for retransmission consent fees for each station affiliated with one of the Big Four networks to reach levels that equal or exceed those of ESPN, which, according to some press reports, charges over $4.00 per subscriber per month. The Big Four networks have started to demand that their local affiliates add up to $1.00 or more for them, meaning that prices of $5.00 or higher per channel are on the radar screens of broadcast interest. That is consistent with the target of $4.50 per subscriber identified by Sinclair's CEO. *See* M. Farrell, *CBS, Sinclair Toss Fuel on Retrans Fire: Station Owners Say They Expect More Cash for Carriage*, Multichannel News, Mar 6, 2006, available at http://www.multichannel.com/article/CA6313013.html. The cost for

the corporate parents of the stations to fund dividends and bail out failing or underperforming non-broadcast business ventures, rather than being reinvested in local stations and local programming, even as more and more popular programming is shifted from broadcast to affiliated pay TV services and the quality and quantity of locally produced news and other programs is reduced. (Far from being a worst case nightmare, this scenario is actually being played out today.) Similarly, if by some confluence of events, 20 million MVPD subscribers simultaneously lost access to local television stations because of negotiating impasses, the broadcasters would say that the Commission would not have the authority to intervene to restore service, even temporarily.

The inescapable implication of the broadcasters' interpretation is that the retransmission consent law was enacted in order to enrich the corporate parents of broadcast stations by allowing them to extract as much money as possible from MVPD subscribers and use it for whatever purpose they desire, even as the quantity and quality of locally produced broadcast programs declines and service interruptions become a regular event.

This perspective should be suspect on its face. The 1992 Act, of course, was motivated largely by complaints about price increases and other alleged abuses by the cable industry, and Congress's remedy for the perceived problems was to enact a host of statutory restrictions on the operation of free market forces and to direct the Commission to adopt even more regulatory restrictions. Yet, the broadcasters would have us believe that when it came to retransmission consent, Congress reversed course and put into place a legislative scheme that validates whatever outcome the unregulated market produces, even if the result demonstrably causes the vast

all of the Big Four stations in a market, therefore, would be at least $20. If there are also CW, MyNetworkTV or independent stations in the market, the total cost of broadcast stations could be even higher.

majority of ordinary citizens to suffer exactly the same sorts of harms that motivated Congress to act in the first place. This is a peculiar interpretation of the statute and congressional intent.

Moreover, given that the fundamental reason Congress created retransmission consent was its belief that there is a strong public interest in ensuring that Americans—including those who relied on cable—have ready access to broadcast television, it is ludicrous to argue that it then created a system in which continued access by cable subscribers becomes solely a matter of private negotiations between two entities viewed in 1992 as monopolies (a cable company with little or no competition at the time and a broadcast station armed with network and syndicated program exclusivity), with no one representing the public during the negotiations or with the power to intervene if the negotiations broke down and resulted in a shut off.[71]

The broadcasters' position is even superficially sustainable only through an extremely selective and highly self-serving reading of the law and its legislative history. For example, subsection 325(b)(1)(A) does not stand alone—it is only one part of the language relevant to retransmission consent added to Section 325 by the 1992 Act and other parts of that language can reasonably be read as giving the Commission the authority to protect consumers. Moreover, that language was inserted into the pre-existing Communications Act and cannot be read in isolation from the decisions of the Commission and the courts interpreting the meaning and intent of the provisions of the Communications Act that regulate broadcast television and define the responsibilities, jurisdiction and powers of the Commission. Similarly, the few passages from the *Senate Report* beloved by broadcasters are partial quotes or taken out of context, and the

[71] *See* Richard A. Gershon & Bradley R. Eagan, *Retransmission Consent, Cable Franchising, and Market Failure: a Case Study Analysis of Wood-TV 8 Versus Cablevision of Michigan,* Journal of Media Economics 201, 214 (1999). (Examining the 1996 retransmission consent dispute between WOOD-TV in Kalamazoo, Michigan and Cablevision Systems Corporation, and concluding that although "the broadcast spectrum can be considered a public resource," because of the FCC's refusal to intervene even after a negotiating deadlock causes a carriage disruption, "the public was powerless to effect change while the two parties worked out a dispute that substantially involved public property.").

broadcasters prefer to ignore other, directly relevant legislative history that completely undercuts their position.

In a variation on the old saw about missing the forest for the trees, NAB and the broadcasters are trying to convince us that there can be no forest because there are only a couple of trees—Section 325(b)(1)(A) and a couple of dozen words from the legislative history. If, however, one looks at all of the relevant statutory provisions and the entire legislative history, a much different interpretation of what Congress did and what it intended emerges.

That alternative interpretation begins by noting that, from the beginning, federal communications law has been designed to further the public interest. In adopting the Communications Act in 1934, Congress stated that its objective was "to make available, so far as possible, to all people of the United states, a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges."[72] As Commissioner Michael Copps has noted often, the term "public interest" appears 112 times in the Communications Act.[73] While opinions about what the public interest specifically entails and how it can best be served vary and evolve, Congress, the Commission and the courts have consistently defined the concept in terms of the perceived interests of the masses of American citizens who enjoy radio, television, telephone and other communications services. The foremost policy goal is to assure that television, telephone and advanced services are continuously available to all citizens throughout the country.

[72] 47 U.S.C. § 151. That objective was reaffirmed in the most recent major amendment of the Communications Act, the 1996 Telecommunications Act, which calls upon the Commission to "encourage the deployment on a reasonable and timely basis advanced telecommunications capability to all Americans." 47 U.S.C. § 706(a).

[73] *Remarks of Commissioner Michael J. Copps,* Everett Parker Ethics in Communications Lecture 14 (Sept. 24, 2002), available at http://www.fcc.gov/Speeches/Copps/2002/spmjc211.pdf

Of course, there can be no radio or television audience without programming producers and distributors and no telephone service or Internet access without service providers. Not surprisingly, given the conventional wisdom that ours is a "free enterprise" economic system, lawmakers and regulators typically believe that promoting the interests of the public requires due regard for the needs and concerns of privately owned producers and distributors. Sometimes the best way to advance the public well-being has been to expand or protect the interests of private companies; however, in the realm of federal communications policy, the advancement of private interests has always been viewed as a means to an end, rather than an end in and of itself. Rights and privileges given to private enterprises are expected to be matched by direct or indirect benefits to the public welfare.

Consistently with the approach that had guided federal communications law for over fifty years, in creating the must-carry and retransmission-consent rights in 1992, Congress was motivated by the desire to advance the public interest, rather than the private interests of broadcasters. In 1992, an estimated 40% of homes still relied on over-the-air reception for their television, and Congress believed that preservation of local broadcast stations was vitally important. It perceived that cable represented a serious and growing threat to the survival of local broadcast television. It saw that threat as twofold: First, because an increasing number of Americans relied on cable as their source for television, local stations would be severely damaged if denied cable carriage, and vertically integrated cable companies were thought to be motivated to deny carriage in order to benefit affiliated cable networks that competed for viewers and advertisers.[74] Second, Congress, rightly or wrongly, thought that broadcasters were unable

[74]That belief, based on logic (some would say lobbying), rather than empirical evidence beyond anecdotal accounts of denial of carriage in a few isolated instances, turns out not to be true. Based on an empirical study, Professor Michael Yan concluded that vertical integration did not negatively impact local broadcast stations' probability of being carried by cable operators, and that the stations most likely to be dropped were those with low ratings or

to effectively compete because they were reeling from a one-two economic punch delivered by cable. The advertising dollars that were their life's blood were increasingly being diverted to competitive cable networks, meaning that broadcasters had fewer resources with which to produce new and better programming. At the same time, cable systems, it was said, were profiting from the carriage of broadcast programs without compensation, in effect gaining competitive strength against broadcast stations by riding on their backs.[75]

Our personal opinions about the validity of those beliefs or the merits of the adopted solutions are irrelevant. Congress declared the threats to be real and, acting on its belief, created the must-carry right to deal with the first threat and the retransmission consent requirement to deal with the second.

It is clear from the record of the congressional debate that both must-carry and retransmission consent were intended to help local stations to survive and continue to produce news and other locally originated programming. The articulated goal for retransmission consent was to level the competitive playing field, which Congress thought had tilted toward cable because of the "subsidy" it enjoyed by being able to carry broadcast signals without consent or compensation. It is important to realize that shifting cash from cable companies to broadcasters was seen by Congress as one possible way in which the new right might restore competitive balance in some cases, but not as the only or preferred method. Indeed, several of the strongest supporters of retransmission consent expressed the view that most stations would elect must-carry and the minority of stations electing retransmission consent would bargain for non-cash

originating in distant markets. Michael Zhaoxu Yan, *Vertical Integration and Local Station Carriage in the Cable Television Industry: Results from Logit Analysis*. Paper presented at the 31st Annual Telecommunications Policy Research Conference, September 19-21, 2003, available at http://intel.si.umich.edu/tprc/papers/2003/224/CableVerticalIntegration.pdf.

[75]This conclusion also was based on logic, rather than hard facts and cannot survive rigorous scrutiny.

consideration.[76] In any event, the ability of stations to obtain cash for carriage was not an end in itself, but, rather, the means to an end thought to be in the public interest—continued access by American households to local news and public affairs programming through the option of free over-the-air television.

There is absolutely no support in the legislative history for the assertion by broadcast interests that Congress's primary intent in establishing the retransmission consent requirement was "to ensure that broadcasters receive the economically efficient level of compensation for the value of their signals."[77] Indeed, the legislative history directly contradicts that notion. Congress thought that most broadcast stations would elect must-carry, rather than retransmission consent, which means that they would receive no compensation for the value of their signals. In the relatively few cases where cash was collected, it was believed that the amount would be insignificant and that consumer prices would not be affected either because cable companies would absorb the small sums involved or because the Commission would obey the directive in the last sentence of Section 325(b)(3)(A) and ensure that the amount of money did not rise to the level that impacted consumer rates.[78]

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[76] See note 78 below.

[77] Jeffrey A.Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC, at 41 (Mar. 2009), attached as Appx. A to Reply Comments for the National Association of Broadcasters in MB Docket No. 07-269 (June 22, 2009 ("*First Eisenach Paper*").

[78] Congress did not want retransmission consent to result in any, or at least any significant, pressure on cable subscribers' monthly bills. *See, e.g.,* 138 Cong. Rec. S14600 (Sept. 22, 1992) (statement of Sen. Fowler)("the sponsors of this legislation do not intend for any costs associated with this legislation . . . to be passed on to the consumer"); 138 Cong. Rec. S14602 (Sept. 22, 1992) (statement of Sen. Bradley) ("rate increase resulting from these [retransmission consent and buy-through] provisions would turn the purpose of this bill on its head) During floor debate on the legislation that ultimately was enacted as the 1992 Act, a number of Senators stated their concern that retransmission consent might result in increases in subscriber rates. Supporters of the legislation argued that significant rate increases would not occur, in part because of a misplaced trust in broadcasters to act reasonably and in part based on assumptions that have not proven true, such as that negotiations would be conducted by local stations, not corporate parents, and that market conditions that in roughly equivalent bargaining power or an advantage for large MSOs would continue to exist. It was predicted that most broadcasters would elect must-carry, and that many or most of the broadcasters who did elect retransmission consent would settle for in-kind consideration such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right

Moreover, it was anticipated that any cash collected would be retained by the local station to support production of news and other locally originated programs. Representative Callahan, for example, said during the debate that the retransmission consent requirement "would give local broadcasters the opportunity to negotiate their terms of carriage with local cable operators and develop a second revenue stream which can help support the cost of local news and other programming."[79] Note that he did not stop after "a second revenue stream," as he would have if the legislation was simply a measure designed to create a property right for station owners or get money in their hands without regard to how it was spent. The goal was not to produce a windfall for the broadcast networks and other large station group owners in the form of a stream of additional revenues that flowed right to their bottom lines; rather, it was to provide the potential for revenues for local stations that would replace the local ad revenues presumed to have been lost to cable networks and cable systems and that would be spent to produce local programs. Representative Halloway, for instance, noted the "tremendous" cost of producing local news and argued that an additional revenue source was needed to replace a shrinking market for advertising "because the cables are getting part of it."[80]

The legislative history simply does not support the proposition that Congress created retransmission consent so that, for example, Sinclair could collect $154 million in retransmission consent fees over the course of a few years and pay out dividends to its stockholders of $168 million during the same period, even as it cut and consolidated local news and operated dozens

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to program an additional channel on a cable system. Senator Bradley, for example, expressed his view that "most broadcasters will opt for must-carry while a significant number of other broadcasters will negotiate nonmonetary terms, such as channel position, for the use of their signal. Whatever terms are negotiated will only last for 3 years. Thus, the vast majority of cable operators will, in my opinion, not incur significant increases in cost due to the retransmission consent provision." 138 Cong. Rec. S14603 (Sept. 22, 1992)(Statement of Sen. Bradley).

[79] 138 Cong. Rec. H6487 (Jul. 23, 1992).

[80] 138 Cong. Rec. (Jul. 23, 1992) (statement of Rep. Holloway).

of stations that offer absolutely no local news. Or that the purpose of retransmission consent was to allow Disney and CBS to collect millions in retransmission consent fees ultimately paid by consumers while simultaneously paying their CEOs over $25 million a year each and distributing millions more in dividends even as their networks reduced funding for news production, laid off news staff, shift popular programming from free broadcast television to their affiliated pay TV networks and actually demand that local station affiliates transfer part of their retransmission consent money to ABC and CBS, further reducing the amount available to support locally produced programs.[81]

Instead, Congress was motivated by the desire to preserve an important resource for the American public, which it perceived to be in jeopardy. Congress created retransmission consent "to preserve local broadcast service to the community—specifically, to maintain the competitive position of local broadcast voices against vertically-integrated cable operators in local markets."[82]

In other words, Congress believed that the economic interests of broadcasters dovetailed with the public interest. Congress thought that giving broadcasters rights that potentially increased their revenues would help secure the continued viability of local broadcast television. There can be no doubt, however, that giving broadcasters a potential new revenue stream was not a goal in and of itself, but simply a method for achieving Congress's real goal, which was

[81] See Brian Stelter, *Job Cuts at ABC Leave Workers Stunned and Downcast,* The New York Times, April 30, 2010, available at http://www.nytimes.com/2010/05/01/business/media/01abc.html (reporting that "ABC News, a unit of the Walt Disney Company, largely completed one of the most drastic rounds of budget cutbacks at a television news operation in decades, affecting roughly a quarter of the staff"); Brian Stelter, *CBS Lays Off Dozens in New Round of Cuts,* The New York Times, Feb. 3, 2010, available at http://www.nytimes.com/2010/02/04/business/media/04cbs.html (reporting that "[d]ozens of employees at CBS News were laid off in recent days amid a new round of budget cuts").

[82] *Comments of Cox Enterprises Inc.,* Matter of 2002 Biennial Regulatory Review, MB Docket No. 02-277 ("*Cox 2002 Comments*").

serving the public interest. It is mistaken to say that Congress's purpose in adopting the retransmission consent provisions of the Act was to create a marketplace for retransmission consent. Rather, the purpose was "to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services"[83] and it created the marketplace for retransmission consent as a tool for achieving those goals and not as an end in and of itself.

At the same time, Congress gave the Commission explicit authority to regulate that marketplace to ensure that the tool actually served its purpose, and it unambiguously stated in the legislative history its clear intention that the Commission would exercise that authority and its existing ancillary powers to protect consumers. The Commission's role is not to allow the marketplace to function for the benefit of broadcasters, as some broadcast interests have claimed; rather, it is to serve the public interest by insuring that the marketplace functions to serve the public policies identified by Congress. Those policies are not confined to getting money to broadcasters, but clearly also recognize the public interest in insuring that cable subscribers continue to have uninterrupted access to broadcast station signals through MVPDs and that their monthly subscription charges do not increase significantly because of the rights granted to broadcasters.

Based on the foregoing, we believe that it could not be clearer that Congress did not intend retransmission consent to be an absolute right, but rather a qualified right subject to adjustment by the Commission in order to serve the articulated policy goals.

The 1992 Act itself supports these conclusions. Section 2 of the 1992 Act lists congressional "findings" that explain the policy reasons underlying its adoption (the

[83] *See*1992 Act. § 2(b)(9)

"Findings").[84] Fully 14 of the 21 Findings relate to carriage of broadcast signals by cable systems. Findings 10, 11 and 12 confirm that, in creating the retransmission consent requirement, Congress acted because of its belief that there was a strong public interest in preserving the availability of "free" television through a local, rather than a national, broadcasting system:

> (10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation. . . . .[85]
>
> (11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.[86]
>
> (12) Broadcast television programming is . . . free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.[87]

Other Findings pointed out that the growth of cable television had resulted in "a marked shift in market share from broadcast television to cable television services"[88] as well as "increasing compet[ition] for television advertising revenues,"[89] meaning that "proportionately more advertising revenues will be reallocated from broadcast to cable television systems."[90]

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[84] *Id.* § 2(b).

[85] *Id.* § 2(b)(10).

[86] *Id.* § 2(b)(11).

[87] *Id.* § 2(b)(12).

[88] *Id.* § 2(b)(13).

[89] *Id.* § 2(b)(14).

[90] *Id.*

Finding 15 referred to the prior economic relationship between broadcast and cable that the retransmission consent requirement was intended to alter:

> Cable systems . . . obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.[91]

It is important to recognize what Finding 15 says and does not say. As the Finding states, the "great benefits" deriving from carriage of broadcast stations' signals without consent or compensation had been enjoyed from the very first day of operation of the very first cable systems in the 1940s. According to the Finding, this situation had previously been entirely "appropriate." Clearly, then, Congress did not, as NAB and other broadcast-interests like to say, act to end the subsidy because it was objectionable under free market principles, out of concern for protecting some purported property right of broadcasters or based on the notion that it is always unfair for one business to profit from use of another's products or services. Logically, all of those sorts of objections would have applied even during the prior period when cable carriage without consent had been, in Congress's view, entirely "appropriate." By characterizing such past carriage as "appropriate" under prior conditions, Finding 15 represents explicit congressional recognition of the proposition that, when it comes to the rights of broadcast license holders, the public interest trumps the general tenets of a free-enterprise/private-property economic system. Retransmission consent was being created not because of moral outrage over cable's alleged trespasses but, rather, because of the perceived harm to American citizens from

[91] *Id.* § 2(b)(15).

allowing continuation of a practice that was no longer benign or neutral under changed circumstances.

Indeed, if Congress had given statutory recognition to a supposed property right in broadcast signals, that would have been a radical departure from public policy in place since the dawn of federal regulation of users of radio spectrum. Under our nation's legislation and jurisprudence, broadcasters have no "natural" or common law right to broadcast spectrum and their interest in that spectrum or the signals they broadcast is not "private property" protected by the Fifth Amendment of the Constitution. Instead, the airwaves are property of the American people and broadcasters possess only a license to broadcast granted by the federal government. As the Supreme Court said shortly after the adoption of the Communications Act, "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."[92]

The spectrum licensed to television broadcasters has been estimated to have a value of over $50 billion.[93] Yet, commercial licensees are not required to pay an initial or ongoing fee for spectrum, even though they make billions from its use. It would be wrong to think, however, that Congress meant to give the spectrum away "for free." Congress saw the potential of broadcasting to bring citizens in every corner of the country entertainment, news and public affairs programming, and it wanted to assist and encourage broadcasters in serving that function by

[92] *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869 (1940). The form of written license granted by the Commission itself states as follows: "This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. *See, e.g*, Broadcast License for WFUM-TV, granted Jan. 29, 2010, available at http://www.michigantelevision.org/aboutus/public-file/applications&related-materials/wfum-jan2010-signed-license.pdf

[93] *E.g.*, http://www.broadcastingcable.com/article/366286-CEA_Study_Reallocating_Broadcast_Spectrum_Could_Yield_1_Trillion.php.

saving them the costs they would incur if they had to pay for licenses. Accordingly, Congress struck a bargain in which it granted exclusive licenses in return for non-cash consideration in the form of the obligation of broadcasters to serve the "public interest." As one observer summarized this bargain, "[t]he trade of public airwaves for public interest obligations was the 'social contract' between broadcasters and the public."[94]

The requirement that MVPDs obtain retransmission consent is in Section 325(b)(1)(A) of the Communications Act and restricts the conduct of MVPDs, rather than conferring a right upon the holders of broadcast spectrum licenses. If, in adopting Section 325(b)(1), Congress really intended to take the radical step of repealing or materially altering the fundamental approach to the so-called property rights of broadcasters that had guided law and public policy from the beginning of federal regulation, then one would have expected the statutory language to read quite differently and for the legislative history to reflect the heated debate that such a major change would have generated. In fact, the statutory language did not change one iota any of the provisions of existing law that governed ownership or use of the airwaves or the Commission's extensive authority over broadcast television, and the legislative history contains no discussion of an intent that the few brief words of Section 325(b) be read as effecting any such change. As noted, Section 325(b)(1) is not even phrased as creating new rights on the part of broadcasters, but as a prohibition on certain conduct by MVPDs. The Section is best read as regulating the behavior of MVPDs, rather than conferring property rights upon broadcasters.

In this regard, it is significant that subsection 325(b) did not establish a universal prohibition upon retransmission without the station's consent. Instead, it proscribes retransmission only by a single category of persons, namely "multichannel video programming

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[94] New America Foundation, *The Decline of Broadcasters' Public Interest Obligations*, at . 1 (Mar. 29, 2004), available at https://www.policyarchive.org/bitstream/handle/10207/6403/Pub_File_1518_1.pdf?sequence=1

distributors." If a person retransmitting a broadcast station's signal without the station's permission is neither a multichannel video programming distributor subject to subsection 325(b) nor a broadcasting station subject to subsection 325(a), then there is nothing in the Communications Act that prohibits the retransmission. That fact is totally inconsistent with the idea that Congress thought that broadcasters had or should have a property right in their signals. Even if Section 325(b) were read as conferring a right upon broadcasters enforceable on their behalf by the Commission, that right is far less than "the right to control retransmission and to be compensated for others' use of their signals" referred to in the passage from the *Senate Report* cited by the Commission in support of its position.

In short, after enactment of the 1992 Act, broadcast spectrum continued to be property of the nation, not the members of the NAB, and the rights and obligations of licensees continued to be defined by federal law and regulations that evolve over time. The concept that licensees have conditional usage rights as long as they serve the public interest, rather than the property rights claimed by broadcasters, continued to be "the cornerstone of the law of the land."[95]

Given that the rights of broadcasters in their signals are simply what the law says they are, nothing more and nothing less, the debate over retransmission consent is really about what the government has said, or should say, they are; and, given the philosophical and policy underpinnings of federal regulation of communications, the answer should revolve around the concept of the public interest, not "free market principles" or our society's philosophy or jurisprudence regarding private property.

Before 1992, what the law said was that cable systems did not need to obtain consent or pay broadcasters in order to receive signals that stations were required to transmit freely over-

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[95] *Id.*

the-air and distribute them to paying customers. As noted, the core reasons Congress ended the decades-long prior practice had little to do with the belief that carriage without consent was morally wrong because it conflicted with the sorts of property, copyright and other legal or moral rights enjoyed by individuals and companies that are not as dependent on government licenses or as heavily regulated as broadcasters. That conflict had always existed and was well-known to the relevant congressional committees, which for decades before 1992 declined to alter the situation despite the intense lobbying efforts of the broadcast industry.[96] Instead, Congress finally acted only when it appeared that the growth of the cable industry had reached a tipping point where a practice that had previously been beneficial (or at least not harmful) to the realization of policy goals was now viewed as a threat to the achievement of those goals—in particular, the goal of assuring the continued availability to as many Americans as possible of broadcast television programming produced by local stations.

Ironically, while Congress viewed vertically integrated cable companies as a threat to achievement of that goal, it also recognized that this goal could not be realized without cable, as the following Findings indicate:

> (9) The federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.
>
> (15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. . . .

[96] For a discussion of the history of retransmission consent, see Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 Fed. Comm. L.J. 99 (1996).

> (17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services. . . .
>
> (18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the `A/B' input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.[97]

Read as a whole, as they must be, the findings set forth in Section 2 of the 1992 Act unequivocally establish that Congress, motivated by the desire to preserve local broadcast television out of concern for the public interest, rather than broadcasters' private interests, wanted to enhance the competitive status of local stations without, however, adversely impacting the millions of consumers who relied on cable service for reliable access to broadcast television

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[97] *1992 Act.* §§ 2(b)(9), 2(b)(15), 2(b)(17) & 2(b)(18). These findings were much overdue recognition, at least on the surface, of the critical contributions of cable to the favorable development of television in this country. Cable not only resulted in the launch of dozens of new cable networks vastly expanded viewing choices and improved the quality and quantity of broadcast television viewable by millions of Americans in reception-impaired locations, but also was the primary reason that a fourth national broadcast network based largely on UHF-affiliated stations was able to prosper. Nonetheless, cable was viewed with hostility by regulators. As Professor Yoo has written:

> When cable television emerged as a technology, the relative scarcity of broadcast frequencies, and the concomitant restrictions on channel capacity were generally regarded as one of the central regulatory challenges facing television. As a result, one might have imagined that policymakers would have welcomed cable with open arms. Unfortunately, nothing could have been further from the truth. Even though cable television simultaneously eliminated the handicap in signal quality suffered by UHF and drastically expanded the channel capacity available to television viewers, the FCC initially responded to cable television with considerable hostility.
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> . . . [R]ather than embrace cable as a solution to the inability of a fourth [broadcast] network to reach substantial portions of the country [because of the limits of UHF and the scarcity of spectrum allowing better quality broadcasts], the FCC instead chose to impede cable's emergence in the name of protecting incumbent . . . broadcasters.
>
> . . . In the end, true competition among television networks developed more from successful judicial challenges to the FCC's cable regulations than it did from FCC policies.

Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 Emory L.J. 1579, 1694-1695 (Fall 2003), available at http://ssrn.com/abstract_id=333702.

programming. While these two goals may conflict in some cases, they are not necessarily mutually exclusive.

In fact, it is apparent from the legislative history of the 1992 Act that members of both houses who supported retransmission consent sincerely believed it possible to, in effect, have one's cake and eat it, too, so that the new rights given to broadcasters would simply endow them with sufficient countervailing power against cable operators to engineer a readjustment of the relationship with each other, without negatively impacting consumers. For example, there are several references to the expectation that the bulk of local stations would elect must-carry, rather than retransmission consent; that many of the stations electing retransmission consent would accept non-cash consideration; that, where cash payments were required, cable operators would absorb the costs rather than pass them through to consumers; that interruptions of cable carriage would be rare because cable systems, characterized as "local monopolies," and local broadcast stations, armed with program exclusivity rights in their markets, would have roughly equal bargaining power and would be equally motivated to reach a deal.[98]

During the floor debate over the 1992 Act, opponents of retransmission consent argued cogently that there is no such thing as a free lunch and that these expectations would probably not be realized, with the result that consumers would wind up paying more for their cable service.[99] Some of their concerns were shared by Representatives and Senators who were

[98]For example, Senator Bradley expressed his view that "most broadcasters will opt for must-carry while a significant number of other broadcasters will negotiate nonmonetary terms, such as channel position, for the use of their signal. Whatever terms are negotiated will only last for 3 years. Thus, the vast majority of cable operators will, in my opinion, not incur significant increases in cost due to the retransmission consent provision." 138 Cong. Rec. S14603 (Sept. 22, 1992). *See also* 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye) ("It is of course in their mutual interest that these parties reach an agreement ... I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare.").

[99]For example, during the House debate on the Conference Report, Representative William J. Hughes of New Jersey warned that "[r]etransmission consent, my colleagues, if you vote for this, is going to come back to bite you, because it is going to cost consumers billions and billions of dollars." 138 Cong. Rec. H8671, 8679 (daily ed. Sept. 17, 1992) (remarks of Rep. Hughes). Nearly twenty years later, the biting has begun.

inclined to support the legislation, but wanted assurances that there were safeguards to protect consumers who relied on cable carriage from shut-offs and price increases. The bill manager and other sponsors of the legislation responded by pointing to the Commission new rulemaking authority specifically related to retransmission consent that had been inserted into the bill and by including in the record unambiguous and unequivocal statement that the Commission was expected—indeed, had a responsibility—to use a combination of this new authority and its pre-existing powers to ensure that if, contrary to expectations, customer rates increased or interruptions occurred, the Commission would intervene to protect consumers either in the specific case or through changes to its rules.

For example, Senator Sanford, directly addressed the possibility that retransmission consent would result in subscriber rate hikes by citing the following quote from a letter sent by Senator Hollings, the Chairman of the Senate Commerce Committee, to the *New York Times*:

> It is flatly wrong to characterize the retransmission consent provision in the cable bill as "threatening subscribers with large rate hikes or diminished offerings. The bill expressly sates that the Federal Communications Commission must consider the impact of retransmission consent on the rates for basic service and shall ensure that the regulations proscribed under this bill do not conflict with the Commission's obligations to ensure that such rates are reasonable. . . . <u>Thus, it would be a direct violation of the statute for the FCC to permit retransmission consent to result in large rate hikes</u>.[100]

The distinction between viewing the "marketplace" for retransmission consent as an end in and of itself and seeing it as a tool for achieving consumer-oriented public policy goals is hugely important in terms of interpreting the relevant statutory provisions and determining if retransmission consent is working as Congress intended. We think that, upon consideration of the language of the 1992 Act, its entire legislative history (rather than just the few brief passages

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[100] 138 Cong. Rec. S14603-14604 (Sept. 22, 1992)(remarks of Sen. Sanford)(emphasis added).

cited by broadcasters) and other relevant information, there can be no doubt which interpretation is correct. In essence, Congress wanted balance. It thought that existing law tilted the scales too much in favor of cable and it created the retransmission consent requirement to restore balance. It did not, however, intend to tip the scales in the other direction. Congress also recognized that the new right might work in practice in an unintended fashion—to produce significant increases in cable rates or to disrupt the ability of cable subscribers to view broadcast television through their cable boxes. For that reason, it gave the Commission the power to adopt rules governing the retransmission consent process and to ensure that consumers did not suffer significant cost increases.

Unfortunately, many within and outside the government speak and act as though retransmission consent is a benefit conferred upon the corporate parents of broadcast stations and have forgotten, ignored or misinterpreted the Findings and legislative history that clearly show that Congress did not intend the right to impair the ability of consumers to access broadcast television through their cable system or to increase the price they paid for that access.

In relying on the Right to Control Statement and the Outcome Statement, the Commission seems to suggest that the undeniable desire of Congress to create a marketplace for retransmission consent is itself a limitation on the Commission's authority over that market, and Congress was prepared to live with whatever outcomes the unregulated market produced. Of course, the intent to create a market is not inherently inconsistent with the belief that it should be a regulated market. There are many regulated markets in our country, and they are usually ones that affect important public interests and it is believed that unfettered market forces cannot be relied upon to adequately, or consistently enough, further that interest. Of course, highly relevant examples of markets subject to extensive regulation because of their perceived importance to the public welfare are those regulated by the Commission, including the markets for broadcast and cable television.

Notably, the statute itself does not mention the creation of a market—it merely contains a prohibition on certain behavior by MVPDs and gives the Commission the power to adopt regulations to govern the retransmission consent process. The reference to the goal of creating a marketplace is in the *Senate Report*, not in the enacted law. Those who give that reference paramount importance invariably ignore other statements that unmistakably show that Congress wanted the Commission to regulate the market to prevent two results that the Findings in the 1992 Act itself and statements by Senator Inouye and others clearly demonstrate Congress wanted to avoid—consumers seeing their rates rise because of retransmission consent and disruptions of service.

During the debate over the enactment of the retransmission consent provisions of the 1992 Act, Congressional leaders expressly discussed the issue of "what will happen if a local station is unable to reach an agreement with the local cable operator, which could result in the loss of local programming to cable customers."[101] For example, during the Senate floor debate on the 1992 Cable Act in January 1992, legislators from both sides of the aisle posed questions to the bill's manager (and author of the retransmission consent provision), Senator Inouye, regarding the possibility that negotiations between a broadcaster and cable operator might reach an impasse resulting in a loss of local programming to consumers. These questions, and Senator Inouye's clear, direct and unequivocal answers, leave no doubt as to Congress' beliefs and expectations regarding the benefits and risks of retransmission consent:

[101] 138 Cong. Rec. S643 (Jan. 30, 1992) (Sen. Burdick); *see also id.* ("If a local broadcast station and a cable operator are unable to come to terms on an agreement to carry that station's signal, some consumers may not be able to receive local programming....How can we be sure that consumers will continue to receive the signals of the local broadcast stations if the local broadcaster and the local cable operator cannot reach agreement on the terms of carriage?") (Sen. Adams).

MR. LEVIN: Mr. President, I would like to engage the manager of S.12, Senator Inouye, in a brief colloquy regarding the retransmission consent provision in the bill….The bill directs the FCC to conduct a rulemaking proceeding to establish rules concerning the exercise of stations' rights to grant retransmission authority under the new section 325(b). But, the bill does not directly address the possibility that broadcasters and cable operators in a particular market may be unable to reach an agreement, resulting in noncarriage of the broadcast signal via the cable system. I strongly suggest, and hope that the chairman of the subcommittee concurs, that the FCC should be directed to exercise its existing authority to resolve disputes between cable operators and broadcasters, including the use of binding arbitration or alternative dispute resolution methods in circumstances where negotiations break down and noncarriage occurs, depriving consumers of access to broadcast signals.

MR. INOUYE. The FCC does have the authority to require arbitration, and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation.[102]

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MR. BURDICK. Mr. President, I would like to pose a question to my colleague, the distinguished Senator from Hawaii, the manager of S. 12 on the Democratic side, for the purpose of engaging in a colloquy….Concerns have been raised about what will happen if a local station is unable to reach an agreement with the local cable operator, which could result in the loss of local programming to subscribers. I am particularly concerned about those consumers who cannot receive all the local broadcast signals without cable. How can we be assured that if retransmission consent negotiations take place, consumers will not lose access to their local programming?

MR. ADAMS. Mr. President, I too am concerned about this possibility. If a local broadcast station and a cable operator are unable to come to terms on an agreement to carry that station's signal, some consumers may not be able to receive local programming. For example, in parts of Seattle, the signals of local Seattle stations are not viewable if they are not carried on cable, because of interference problems with over-the-air viewing of these signals. How can we be sure that consumers will continue to receive the signals of their local broadcast stations if the local broadcaster and the local cable operator cannot reach agreement on the terms of carriage?

MR. INOUYE. Mr. President, I thank the Senators for raising this very important concern, inasmuch as universal availability of local broadcast signals is a major goal of this legislation. The retransmission consent provisions of S.12 were designed so as to avoid creating a complex set of governmental rules to promote the carriage of local broadcast signals. Instead, S.12 permits the two interested parties – the station and the cable system – to negotiate concerning their mutual interests. It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access

[102]138 Cong. Rec. S667 (Jan. 30, 1992) (emphasis added).

to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare. We should resist the urge to require formal, preestablished mechanisms that might distort the incentives of the marketplace. At the same time, there may be times when the Government may be of assistance in helping the parties reach an agreement. I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem. I assure my friend that my colleagues on the committee and I will make certain that the FCC uses its authority to prevent any such impasses from becoming permanent and frustrating the achievement of our goal to maximize local service to the public.[103]

Notably, not a single member of the Senate rose to offer a contrary view to Senator Inouye's statements. Moreover, during the subsequent debate on the 1992 Cable Act's Conference Report, several Senators made similar assertions, again without contradiction. During the debate over the Conference Report, Senator Wellstone cited assurances given by Senator Inouye and the Commerce Committee's legal counsel "that existing law provides the FCC with both the direction and authority to ensure that the retransmission consent provision will not result in a loss of local TV service."[104] He cited his reliance on those assurances as the basis for his decision not to offer an amendment that would have required the Commission to adopt additional rules to ensure that the exercise of retransmission consent does not result in a

[103] *Id.* at S643 (emphasis added). The assurances given by Senator Inouye regarding the scope of the Commission's authority to address situations in which the exercise of retransmission consent was adversely impacting the public interest directly led Senator Wellstone to withdraw an amendment that he had intended to offer that would have expressly required the Commission's initial implementing regulations to ensure that the exercise of retransmission consent rights does not cause the loss of service or an increase in rates. *Id.* (Statement of Sen. Wellstone).

[104] 138 Cong. Rec. S14604 (Sept. 22, 1992) (emphasis added). *See also id.* at S.14224 (Sept. 21, 1992) (Statement of Sen. Inouye); *id.* at S14248 (Sept. 21, 1992) (Statement of Sen. Gorton); *id.* at S14615 (Sept. 22, 1992) (Statement of Sen. Lautenberg).

loss of local broadcast service.[105] Senator Lautenberg similarly stated on the floor of the Senate that it was his understanding, based on discussions with the Commerce Committee, that "if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC."[106]

In a letter to then-Chairman Martin dated January 30, 2007, Senators Inouye and Stevens (the Chairman and Vice Chair of the Commerce Committee, respectively) reaffirmed that the Communications Act gives the Commission authority to prevent disruptions of service during retransmission consent disputes, including the authority to order alternative dispute resolution and interim carriage.[107] In that letter, Senators Inouye and Stevens pointed out that Congress expressly contemplated the use of such measures when it enacted Section 325(b), citing both to the debate referenced above and, specifically, the colloquy on the Senate floor between Senator Inouye and Senator Levin quoted above. Senators Inouye and Stevens concluded their letter to Chairman Martin by emphasizing that "[a]t a minimum, Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]."[108]

Senator Inouye was not only the source of the statements quoted above, but also, as bill manager for S.92, had oversight over the drafting of the *Senate Report*. It is inconceivable that

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[105] *Id.* (Sen. Wellstone). *See also* 138 Cong. Rec. S14604 (Sept. 22, 1992) (Sen. Wellstone).

[106] *Id.* at. S14615-16 (Sen. Lautenberg); *see also id.* at S.14224 (Sept. 21, 1992) (Statement of Sen. Inouye); *id.* at S14248 (Sept. 21, 1992) (Statement of Sen. Gorton).

[107] Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, CSR No. 8233-C (filed Oct. 22, 2009).

[108] *Id.*

he would allow the *Senate Report* to contain language relevant to the Commission's authority that was diametrically opposed to his unequivocal statements made on the Senate floor. That is yet one more reason for concluding that the passages relied on by the Commission were not intended to limit, or even speak to, the Commission's authority.

The Commission reaches its conclusion stated in the *Notice* by drawing inferences from general statements in the *Senate Report* that do not expressly address the Commission's authority and disregarding statements in the record that specifically address that issue and clearly and unequivocally state exactly the opposite conclusion. Its rationale for doing so is unknown, since the *Notice* does not explain why the contrary statements by Senator Inouye and others are disregarded.

If we speculate that the Commission for some reason believes that the *Senate Report* should be given dispositive weight over statements made on the Senate floor, then that belief is not required by canons of statutory interpretation and misguided.[109] The *Senate Report* was dated June 28, 1991,[110] and so was prepared before an amendment to S.92 that added the Reasonable Rates Mandate to Section 325(b)(3)(A) and, as discussed above, that addition impacts the analysis of the scope of the Commission's rulemaking authority.[111] It was also before key exchanges between Senator Inouye and other Senators on the Senate floor regarding service interruptions and the impact of retransmission consent on consumer prices. Those exchanges not only led to the referenced amendment, but also to assurances regarding the Commission's

[109] Apparently, "American courts . . . have no formal rules as to what sorts of legislative materials they may or may not consult,"[109] nor as to the weight to give each different type. As a generalization, it seems that absent special circumstances, courts will look to committee reports, then floor statements by bill sponsors or managers and finally to floor statements by other Senators or Representatives.[109]

[110] The cover page of the *Senate Report* referenced the "Cable Television Consumer Protection Act of 1991" rather than the Cable Consumer Protection and Competition Act of 1992.

[111] The amendment can be found at Cong. Rec. S.609 (Jan 29, 1992)..

authority to intervene to prevent harm to consumers that led to the withdrawal of other amendments that would otherwise have been made to expressly confirm that authority. The amendment was introduced by Senator Inouye on January 29, 1992, over seven months after the date of the *Senate Report*. The Inouye Amendment added to Section 325(b)(3)(A) the statement regarding the Commission's responsibility regarding price as it appeared in the enacted version of the 1992 Act—prior to the Inouye Amendment, S.92 did not expressly address the potential impact of retransmission consent on consumer prices.

Arguably, the only reason that the *Senate Report* does not contain statements as to the authority of the Commission that mirror those made by Senator Inouye and Committee counsel is that it was prepared before the dialogues on the floor that revealed the need by some Senators for reassurance regarding the Commission's authority. That reassurance was given without doubt, hesitancy or qualification, and it is perfectly reasonable to conclude that views expressed by Senator Inouye on the floor were also held when the *Senate Report* was prepared, but express statements on the subject like those made on the floor were not included in the *Senate Report* because no one expressed any doubt on the subject until after the release of the *Senate Report*.

In any event, the Commission relies on general statements that do not address the specific issue and ignores statements that are directly on point. Even if there were a tendency in American jurisprudence to give committee reports more weight than sponsor statements and other floor statements, that priority should be reversed if the committee reports do not expressly address the interpretative issue in question, but the sponsor statements and floor debate do contain directly relevant statements.

In sum, we think that the legislative history unmistakably demonstrates that while Congress did want broadcasters and cable companies to have considerable freedom in their negotiations and did not want to dictate deal terms, it expected the Commission to engage in oversight of the retransmission consent process and take such action as might be necessary in order to protect the public interest if the failure to reach a deal or the deal actually struck harmed consumers either by producing service interruptions or increases in basic cable rates.

We respectfully submit that our interpretation is most consistent with the legislative scheme that has characterized communications law and policy from the inception and with the legislative history of Section 325(b). Last but not least, it reconciles the Outcome Statement and the Right to Control Statement with the opinions regarding the Commission's authority expressed on the floor, rather than creating a conflict with those opinions, and for that reason alone is a preferable interpretation from the perspective of the conventions of statutory interpretation.

CONCLUSION

While we think it is virtually indisputable that Congress intended the Commission to have the power and the duty to prevent carriage disruptions for cable subscribers, the discussion to this point should, at the very least, leave no doubt but that the meaning and intent of Section 325(b) regarding the Commission's authority to adopt an Interim Carriage Rule is ambiguous. If nothing else, it seems reasonable to conclude that it is even uncertain whether the statute is ambiguous. Under *Chevron*, there are sufficient grounds for conferring interpretative choice upon the Commission.

The Commission's first choice, in other words, is to decide if it has any choice. The Commission can stick to its position expressed in the *NPRM* that there is no ambiguity and so no choice when it comes to the issue of its authority to create an Interim Carriage Rule, or it can agree that, for all the reasons addressed in these comments, there is sufficient interpretative uncertainty to allow adoption of an Interim Carriage Rule.

In choosing between those two alternatives, the Commission should pick the one that is most consistent with congressional intent, the goals underlying the creation of retransmission consent and the public purposes that the Communications Act is supposed to serve. As the Commission said in 1970, "[i]t appears to us that in reaching a decision as to how we are to exercise our discretion, we should look to the basic purpose of regulatory activity in the context of our general national policy, as well as the specific statutory guidelines given this agency."[112]

Commissioner Michael Copps has remarked that "the Commission has not merely the discretion to consider the public interest in its decisions—it has the statutory obligation to take only actions that are in the public interest. I believe Congress made it abundantly clear that this is the prism through which we must look as we make our decisions."[113] Of course, the Commission cannot act beyond the scope of its jurisdiction and authority conferred by law, but in choosing between two different plausible interpretations of that law, it should always select the one that best serves the public interest.

[112] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Docket No. 16979,* Tentative Decision (April 3, 1970).

[113] *FCC Process Reform*, Subcommittee on Communications and Technology, House Committee on Energy and Commerce, May 13, 2011 the Internet, May 13, 2011 (prepared testimony of FCC Commissioner Michael J. Copps), at 1, available at http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Copps.pdf.

In enacting the 1992 Act, one of Congress' goals was to ensure the "universal availability of local broadcast signals."[114] Correcting the marketplace "distortion" thought to flow from cable carriage of broadcast signals without consent or compensation was supposed to serve that goal. As the analysis of the Findings set forth above demonstrates, Congress did not want this solution to exacerbate the problem by disrupting or increasing the cost of the availability of broadcast television through a cable service. Congress expressly recognized the continued viability of the long-standing policy goal of ensuring that cable households could continue to receive local broadcast programming through cable carriage. That goal was motivated not just by the desire to make broadcast television viewing easy and convenient for consumers, but also by the strong interest in preserving the broadcast television system. As an ever-growing percentage of the population relied on cable, carriage by cable systems was essential to assuring that broadcast stations maintained the viewership needed to continue to attract advertisers.

Read as a whole, as they must be, the findings set forth in Section 2 of the 1992 Act unequivocally establish that Congress, motivated by the desire to preserve local broadcast television out of concern for the public interest, rather than broadcasters' private interests, wanted to enhance the competitive status of local stations without, however, adversely impacting the millions of consumers who relied on cable service for reliable access to broadcast television programming. Those two goals may conflict in some cases, but they are not necessarily mutually exclusive. Congress thought that the market would provide sufficient incentives and disincentives to the negotiating parties to ensure that in the vast majority of cases the process would produce the right results. Recognizing that there might still be cases where the process did not work as intended, it expected the Commission to use its ancillary powers and its

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[114] 138 Cong. Rec. S667 (Jan. 30, 1992).

rulemaking authority conferred by Section 325(b)(3)(A) to intervene when a conflict did arise and to prevent retransmission consent from producing results contrary to those intended and expected.

The Commission has noted that the "overriding intent of the 1992 Cable Act was to increase—not reduce—availability of broadcast signals to the public."[115] For that reason, in instances where it has conceded that it does have a choice, the Commission has selected the alternative that maximizes consumer access and convenience.[116] These comments have largely been devoted to trying to showing that the Commission does have a choice when it comes to addressing shutoffs and threatened shutoffs resulting from negotiating stalemates, so that it has the opportunity to identify and make the choice on the same basis.

The fact that the Commission has previously expressed the view that Section 325(b)(1) prevents it from adopting interim carriage or dispute resolution rules in order to protect consumers does not inhibit it from finding that its conclusion was in error. The Supreme Court has said that an agency which changes its interpretation of a statutory provision, "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better . . . ."[117] Of course, *Chevron* itself involved the Environmental Protection Agency's departure from its prior interpretation of

[115] *Broadcast Signal Carriage Issues Order, supra* note 35, at ¶147.

[116] For example, the Commission decided that failure to elect between must-carry and retransmission consent by the applicable deadline would result in a default to must-carry.

[117] *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)

the word "source"[118] and the Supreme Court held in that case that "an initial agency interpretation is not instantly carved in stone"[119] A s the Commission recently observed in its *Terrestrial Program Access Order*, it is the Commission's duty to consider varying interpretations and policy judgments on an on-going basis.[120]

Even if, for the sake of argument, we assumed that the Commission does not have authority to adopt an Interim Carriage Rule, that does not mean that it is powerless to protect consumers from the effects of service interruptions and price increases due to ever escalating retransmission consent fees. The Commission has extensive authority to regulate broadcasters in the public interest under Section 309(a) of the Communications Act, as well as pursuant to its ancillary authority under Sections 201(b), 303(r), and 4(i). It has comparable authority over cable systems. The charge to the Commission to base broadcast licensing and other decisions upon the "vague 'public interest' standard" has been "quite generously" read by the Supreme Court.[121]

The Commission can use this power to "design a mechanism that . . . provides the . . . [parties to retransmission consent negotiations] with the right [incentives and disincentives] to choose actions (individually and voluntarily) that would dictate the desirable outcome."[122] In other words, the marketplace in which Congress placed such great reliance has changed to such a

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[118] *Chevron*, 467 U.S. at 856–58.

[119] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[120] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, 795 (2010).

[121] Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law,* 41 Wm. and Mary L. Rev. 1463, 1478 (2000).

[122] Chun-Hsiung Liao & Yair Tauman, *Implementation of the Socially Optimal Outcome,* 72 The Manchester School 618 (2004).

degree that it can no longer be relied upon to make it in the mutual best interests of the parties to reach a deal without service interruptions and without requiring large cash fees ultimately borne by subscribers.[123] If the Commission really does lack the power to adopt rules requiring carriage without consent or binding arbitration (which we do not believe), the Commission can correct the marketplace's deficiencies through rules that encourage the parties to reach a reasonable and affordable deal without service disruptions—for example, adopting a rule that provided for broadcasters who refused to allow interim carriage or agree to arbitration to receive no or reduced protection under the Commission's network or syndicated exclusivity rules or to undertake whatever capital expenditures might be required to ensure that virtually everyone in its entire license territory can enjoy off-air reception.

The Commission could also take into account the behavior of broadcast stations in retransmission consent negotiations in deciding whether to renew broadcast licenses. In that regard, the Commission also has extensive power to affect the behavior of broadcast stations under various provisions of the Communications Act, including its authority over the grant, renewal and revocation of licenses. In adopting the first rules related to retransmission consent in 1993, the Commission noted with favor its pre-existing position that a station's behavior in

[123] An important change has been the breaking of the rough market symmetry that existed in 1992, when the market for retransmission consent was best characterized as a bilateral monopoly. Cable companies, which then faced little competition within their markets, faced off against stations protected by network and syndicated program exclusivity rights. That symmetry was broken by the growth of DBS. MVPDs face competition, while stations still enjoy local monopolies because of the exclusivity rules. Broadcasters gain leverage from the ability to drive subscribers of an MVPD to its competitor if there is an interruption of service. MVPDs cannot match that leverage by holding out the prospect of carrying another station with the same network affiliation. The use of network non-duplication by retransmission consent stations to deny consumers an alternative source of programming in the event of a shut down has become a reality; indeed, in order to further increase their leverage in retransmission consent negotiations, broadcasters have begun pursuing relief from the "significantly viewed" exception to the network nonduplication rules with renewed vigor. *See, e.g.*, *Providence TV Licensee Corp.*, DA 10-769 (MB 2010); *KXAN, Inc.*, 49 CR 1184, DA 10-589 (MB 2010); *WUPW Broadcasting, LLC*, 49 CR 1055, DA 10-460 (MB 2010)

ranting or withholding consent to re-broadcast of its signal is a relevant consideration in determining whether the station was being operated in the public interest.[124]

Along the same lines, the Commission, relying on Section 325(b)(3) or its ancillary authority, might adopt rules that do not mandate specific behavior, but instead create incentives and disincentives to steer broadcasters to behave more consistently with the interests of consumers. For example, the Commission might use the network non-duplication and syndicated exclusivity protections, which are purely constructs of the Commission, creatively to induce behavior on the part of broadcasters that is more aligned with congressional goals. There is nothing in the law that prevents use of that tool, for example, to give broadcasters incentives to agree, or disincentives to refusing to agree, to interim carriage or binding arbitration. Similarly, entitlement to continued non-duplication protection might be made contingent upon the degree to which stations comply with congressional intent and use retransmission consent revenues to preserve and enhance local origination of news and public affairs programming, rather than giving it to corporate parents to use for dividends, executive salaries and other non-broadcast purposes. A number of suggestions along these lines have been made by other filers in this docket that are worthy of consideration.

In any event, for the reasons outlined above and discussed at length in the comments of certain other parties in this proceeding, we think that the Commission has both the duty and ample authority to ensure that the balance between broadcasters and MVPDs is restored and consumers are protected from the twin harms that Congress feared might flow from the creation of the retransmission consent requirement and that they are, in fact, suffering today: service disruptions and rate increases.

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[124] *Broadcast Signal Carriage Issues Order*, *supra* note 35, at 147 (citing *KAKE-TV and Radio*, 10 R.R. 2d 799, 801 (1967)).

Respectfully submitted,

Mediacom Communications Corporation

/s/ Joseph E. Young

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June 27, 2011

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	MB Docket No. 10-71
Related to Retransmission Consent	)	

COMMENTS OF TIME WARNER CABLE INC.

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SUMMARY

Time Warner Cable Inc. ("TWC") applauds the Commission for "recognizing the consumer harm caused by retransmission consent negotiation impasses and near impasses," and for opening a proceeding to determine how "to modify the rules governing retransmission consent" to address these harms.[1] TWC agrees with the Commission and many parties that the optimal way to determine the terms and conditions under which multichannel video programming distributors ("MVPDs") carry broadcast signals would be to rely on marketplace solutions unfettered by regulations that favor one side or the other. Unfortunately, the retransmission consent process is decidedly *not* such a market-based regime. Rather, retransmission consent is an artificial regulatory construct, and it is heavily tilted in broadcasters' favor. In addition, many aspects of the regulatory regime and changes in the MVPD marketplace now operate to further *prevent* market-based outcomes. Any review of the retransmission consent rules must be guided by this reality.

In TWC's view, the preferred solution would be for Congress to enact legislation that deregulates the relationship between MVPDs and broadcast stations—by eliminating not only the artificial retransmission consent construct but also must-carry obligations, tier-placement and buy-through requirements, and network non-duplication and syndicated exclusivity provisions, among various other anachronistic and counterproductive regulatory measures. Accordingly, TWC will support comprehensive legislative initiatives that would replace the retransmission consent regime with a genuinely market-based process.

Unless and until such legislation is enacted, however, the Commission should use all available tools to mitigate the harm to consumers caused by existing regulatory distortions and

broadcasters' exploitation of them. The Commission should eliminate rules that now do more harm than good, ban anticompetitive practices that facilitate broadcasters' demands for unreasonable retransmission consent fees and their ability to employ blackout threats, and adopt new safeguards to advance the public interest goals Congress set out to achieve.

In particular, TWC supports repeal of the outdated and anticompetitive territorial exclusivity rules, clarification and modification of tier-placement and buy-through obligations, and elimination of other regulations originally designed to provide support to broadcast stations in a starkly different era. To halt the rising tide of anticompetitive conduct by broadcasters, the Commission should amend its good faith rules to bar network-owned stations from bundling retransmission consent with the carriage of affiliated cable networks and to prevent networks from hijacking stations' consent rights. The Commission also should prohibit competing local stations from engaging in collusive negotiations with an MVPD, multicasting multiple network affiliate stations over a common signal, and otherwise violating the letter and spirit of the Commission's broadcast ownership rules. Moreover, notwithstanding the NPRM's misplaced skepticism regarding the Commission's authority to establish the terms under which MVPDs would carry broadcast stations, the Commission should explore a range of additional remedies including rate setting, dispute resolution, and interim carriage. Finally, the Commission should ensure that any notice obligations it imposes are flexible and take account of the unique circumstances of retransmission consent negotiations in today's landscape.

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[1] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 16 (2011) ("NPRM").

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COMMENTS OF TIME WARNER CABLE INC.

Time Warner Cable Inc. ("TWC") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") proposing changes to its retransmission consent rules.

INTRODUCTION

The NPRM appropriately recognizes that the existing retransmission consent regime is broken. Under the current rules, broadcasters have sought ever-escalating increases in retransmission consent fees, and "actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes present a growing inconvenience and source of confusion to consumers."[2] The inability of the current rules to protect consumers should come as no surprise; as the NPRM points out, the Commission adopted those rules—many of which deliberately skew negotiations in broadcasters' favor—when "circumstances were different from the conditions industry and consumers face today" and when "programming disruptions due to retransmission consent disputes were rare."[3] As reflected in TWC's lead role

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[2] NPRM ¶ 20.

[3] *Id.*

in spearheading the Petition for Rulemaking that gave rise to this proceeding,[4] TWC fully supports the goals of the Commission's reform effort, including in particular "minimiz[ing] video programming service disruptions to consumers."[5]

Although the NPRM correctly identifies the key problems afflicting today's retransmission consent regime, it fails to diagnose the root cause. Namely, retransmission consent is an artificial regulatory construct,[6] not a market-based mechanism, and that construct requires adjustment to fit today's conditions. In the initial years following enactment of the 1992 Cable Act, retransmission consent negotiations went relatively smoothly, and impasses were very rare, because broadcasters and multichannel video programming distributors ("MVPDs") found ways to devise carriage arrangements, including through cable operators' support for launching broadcast networks' affiliated cable channels. Today, the MVPD marketplace is robustly competitive, however, and the ability to create ever-increasing numbers of linear cable channels is constrained by a number of market factors beyond the control of broadcasters or MVPDs. As a result, broadcasters are wielding the special protections they enjoy as a weapon in retransmission consent negotiations, secure in the knowledge that their multiple distribution options enable them to make credible threats to withhold network programming if their escalating demands for cash payments are not met. Several other factors, including the bundling of retransmission consent with cable network carriage, the Big Four networks' attempts to create

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4 *Amendment of the Commission's Rules Related to Retransmission Consent*, Petition for Rulemaking of Time Warner Cable *et al.*, MB Docket No. 10-71 (filed Mar. 9, 2010) ("Petition").

5 NPRM ¶ 1.

6 As explained in the Petition, before the enactment of the 1992 Cable Act, Supreme Court precedent held that cable operators were not required to obtain a station's affirmative consent before retransmitting its signal to subscribers. *See* Petition at 8 (citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968)).

a shadow copyright regime by extracting an increasingly large "cut" of affiliated stations' retransmission consent fees, collusion among stations that are ostensibly independent competitors, and other anticompetitive practices, have exacerbated the breakdowns in the retransmission consent process.

TWC believes that a deregulatory approach to the carriage of broadcast signals on MVPD systems represents the preferred course, just as TWC favors market-based solutions more generally. The Commission can take an important first step towards eliminating regulatory barriers to efficient negotiations by diminishing the distorting effects of its own rules. As explained in more detail below, the Commission should eliminate its network non-duplication and syndicated exclusivity rules, clarify and modify the tier-placement requirements applicable to stations electing retransmission consent, and amend its good faith rules to prevent anticompetitive conduct by networks and stations alike. But legislation will be required to establish a genuine deregulatory solution to the relations between broadcasters and MVPDs, because the existing regime is entirely a product of government-created rules that, in the context of a now robustly competitive MVPD marketplace, lead to distortions and inefficiencies.

Most fundamentally, in establishing retransmission consent, Congress created an artificial new property right in local broadcast signals that is distinct from copyright and simply would not exist in a market-based regime. Similarly, Congress conferred must-carry rights and tier-placement privileges on broadcast stations that further prevent market-based outcomes, while the Commission's territorial exclusivity rules further enhance the power of Big Four affiliates to engage in brinkmanship in their dealings with MVPDs. This complex web of regulatory mandates makes it impossible for MVPDs—and particularly cable operators—to negotiate "market-based" retransmission consent agreements with broadcasters.

Accordingly, although TWC believes that the best solution is for Congress to undo a regulatory regime that no longer serves Congress's purposes in creating it, in the near term the Commission should adjust its regulatory framework to align it to the greatest extent possible with the animating purposes underlying the 1992 Cable Act. In particular, Congress sought to ensure continuous access to broadcast signals and to allow local broadcast stations to obtain reasonable compensation for their signals (as distinct from the network programming they transmit, as that programming is already covered by a compulsory copyright license). Conversely, Congress sought to ensure that consumers would not be denied access to broadcast programming on cable systems and that basic cable rates would not be adversely affected by retransmission consent fees. Yet those are precisely the effects of the Commission's rules, now that broadcasters can play one MVPD against another and employ blackout threats as a negotiating tactic.

While Congress anticipated—based on the very different industry dynamics that prevailed in 1992—that negotiations between broadcast stations and MVPDs would yield reasonable results, it also created a regulatory failsafe by conferring broad regulatory oversight on the Commission in Section 325 of the Act. In particular, Section 325(b)(3)(A) directs the Commission to "govern the exercise by television broadcast stations of the right to grant retransmission consent," and it establishes the prevention of basic rate increases as a guiding principle for such governance.[7] Now that the negotiating process has turned into an opportunity for broadcasters to abuse their market power and exploit their special regulatory protections, the Commission should step in to protect consumers by exploring new ways to establish reasonable retransmission consent fees and resolve disputes. The NPRM expresses unwarranted skepticism

[7] 47 U.S.C. § 325(b)(3)(A).

regarding the Commission's authority to adopt such reforms.[8] In fact, Section 325 and complementary authority broadly empower the Commission to take action as necessary to ensure a fair retransmission consent process that serves the interests of consumers.

DISCUSSION

I. RETRANSMISSION CONSENT IS AN ARTIFICIAL REGULATORY REGIME THAT IS HARMING CONSUMERS AND REQUIRES A FUNDAMENTAL REEXAMINATION OF THE COMMISSION'S RULES

A. The Existing Retransmission Consent Regime Is an Artificial Regulatory Construct, Not a Market.

As the Petition for Rulemaking and TWC's subsequent comments explain,[9] retransmission consent has *never* involved "free market" negotiations for carriage. Since its creation in 1992, retransmission consent has existed as part of a complicated system of government-created rights designed to promote policy goals regarding the perceived special importance of preserving free over-the-air television.[10] As noted above, it is not only the artificial retransmission consent construct, but also related requirements pertaining to must-carry, territorial exclusivity protections for broadcasters, mandatory placement of broadcasters on the basic tier, and various other regulations that preclude actual market-based negotiations between broadcasters and MVPDs.

In light of these outdated regulatory constructs, the Commission should, as an initial matter, reject broadcasters' defense of the status quo and their resultant appeals for inaction.

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8 NPRM ¶ 18.

9 *See* Petition at 6-7; Comments of Time Warner Cable Inc. at 4, MB Docket No. 10-71 (filed May 18, 2010); Reply Comments of Time Warner Cable Inc. at 7-9, MB Docket No. 10-71 (filed June 3, 2010).

10 *See* S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 ("Senate Report") (stating that retransmission consent was initially designed to "advance[] the

These broadcasters not only ignore the web of regulation that envelops retransmission consent negotiations, but also incongruously claim that today's retransmission consent agreements are the product of marketplace negotiations and should be *shielded* from government intervention. They overlook the critical point that the government intervened long ago when it created retransmission consent and the related broadcaster protections that create a distinctly uneven playing field. Thus, retransmission consent is the *product* of government intervention, not something to be shielded from such intervention. And most significantly, broadcasters and networks ignore the significant harm that their increasing demands for ever-higher retransmission consent fees and brinkmanship tactics are causing consumers in the form of higher subscription rates and threatened and actual loss of network programming.

Moreover, it should be abundantly clear from today's "increasingly contentious retransmission consent disputes" that leaving the rules unchanged would not foster pro-consumer and market-based outcomes in retransmission consent negotiations.[11] Broadcast stations and networks in effect have transformed the right to grant retransmission consent of signals—a right that would not exist but for congressional and Commission intervention—into the equivalent of a shadow copyright payment system, explicitly seeking compensation for the copyrighted material contained in broadcast signals, despite the fact that MVPDs separately pay for a compulsory copyright license that Congress determined would provide fair compensation to copyright holders.[12] As a result, the American Consumer Institute recently concluded: "[I]t is clear that

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public interest" served by broadcasters by correcting for "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

11 NPRM ¶ 20.

12 Notably, in the open proceeding before the Copyright Office on the possible repeal of the compulsory copyright license for broadcast content, many parties are seeking to obtain uncapped copyright payments, while completely omitting any mention of the networks' efforts to transform retransmission consent into a shadow copyright regime. *See, e.g.*,

distributors are at a disadvantage when it comes to negotiating with broadcasters," which "means that consumers are the big losers of retransmission consent—both by potential blackouts and paying higher prices for years to come."[13] Failing to adjust the existing regulations to account for significant industry changes and to prevent ongoing harm to consumers would not constitute deference to market forces; to the contrary, such inaction would be tantamount to an abdication of responsibility.

B. Several Features of the Regulatory Regime Conspire To Prevent, Rather Than Facilitate, Market-Based Outcomes.

Although the fundamental impediment to re-establishing a deregulatory approach to the relations between MVPDs and broadcasters is the retransmission consent regime itself, other special privileges bestowed upon broadcasters give them significant bargaining advantages and further prevent competitive marketplace considerations from playing a meaningful role in the carriage of broadcast signals. Chief among these market-distorting privileges are the preferential placement of broadcast stations on the basic tier and the requirement that cable subscribers pay for that tier as a condition of purchasing any other cable programming service. Moreover, as the NPRM acknowledges, the Commission's current network non-duplication and syndicated exclusivity rules significantly limit cable operators' ability to bargain freely with multiple

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Program Suppliers' Comments at 8-9, *Section 302 Report to Congress*, Copyright Office Docket No. RM 2010-10 (filed Apr. 25, 2011) (arguing, without reference to the retransmission consent regime, that the Copyright Office should ask Congress to repeal statutory caps on royalty fees because "[a]ny statutorily prescribed licensing scheme necessarily limits copyright owners' freedom to exercise their exclusive rights under the Copyright Act"). These demands are inherently misleading, given their omission of the substantial compensation programming suppliers are extracting (improperly) through the retransmission consent process.

13 Steve Pociask, American Consumer Institute, Center for Citizen Research, *Retransmission Consent: The Evidence of Market Power*, May 2010, at 5, *available at* http://www.theamericanconsumer.org/wp-content/uploads/2011/05/retransmission.pdf.

suppliers.[14] These broadcaster protections are premised on assumptions about "the demise of local television" in light of a predicted absence of "effective competition to local cable systems[15]—assumptions that, as the NPRM notes, have been turned upside down in today's video marketplace.[16] Indeed, a recent essay by former FCC Chief Economist Thomas W. Hazlett characterizes these "special rules" not only as outdated and unnecessary, but as an impediment to far more efficient spectrum uses.[17]

Because of these and other regulatory protections,[18] broadcast stations now have the means to exploit the existing regime for their own pecuniary benefit, and to the detriment of MVPDs and their subscribers. In addition, the NPRM correctly identifies interference by the Big

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14 NPRM ¶ 42 ("The [network non-duplication] rules . . . prohibit the cable system from carrying the network programming as broadcast by any other station within the 'geographic zone' to which the contractual rights and rules apply. . . . Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.").

15 Senate Report at 1187 (linking the potential "demise of local television" to "the growth of the cable industry, and the fact that no effective competition to local cable systems ha[d] developed in the interim"); *see also id.* at 1141 (stating that in 1992, "[a] cable system serving a local community, with rare exceptions, enjoys a monopoly").

16 *See* NPRM ¶ 2 ("Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite ('DBS') providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet."). *See also* Thomas W. Hazlett, *If a TV Station Broadcasts in the Forest …: An Essay on 21st Century Video Distribution*, at 14-15 (2011) ("*Hazlett Essay*") (explaining that the assumptions underlying the existing retransmission consent regulatory framework have "dissolved," noting that "[n]o longer is the TV broadcaster the default TV distributor" but that broadcast stations are simply "broker[s] for retransmission via the modes of transport that now serve as the platforms of choice").

17 *Hazlett Essay* at 16-19.

18 Broadcasters also benefit from various other legal entitlements, including free access to immensely valuable beachfront spectrum, 47 U.S.C. §§ 307, 309, must-carry rights on cable systems, *id.* § 534(a), and channel placement preferences, *id.* § 534(b)(6); 47 C.F.R. § 76.57, among others. *See also*, *e.g.*, 47 C.F.R. § 76.62 (providing signal quality protection for broadcast stations).

Four networks with the retransmission consent negotiations of independent affiliates as one of several roadblocks preventing efficient negotiations.[19] Collusion among competing stations also is growing alarmingly widespread in the industry, and it further impedes efficient outcomes. Due to the increased competition in the MVPD marketplace, these developments have become key attributes of the regulatory regime, which, working together, make market-based outcomes in retransmission consent negotiations an impossibility.

1. Mandatory tier-placement privileges for fee-seeking stations

As broadcast networks have gained leverage over their increasingly fragmented MVPD counterparts, they have made no secret of their desire to seek retransmission fees at levels that match what the most popular pay TV programmers receive for carriage.[20] The networks also obtain placement on the basic cable tier, meaning that skyrocketing retransmission fee increases must be built into the mandatory basic cable rates that subscribers cannot avoid paying.[21]

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19 NPRM ¶ 22.

20 *See*, *e.g.*, David B. Wilkerson, *NBC's Zucker Says Network Needs To Improve*, WALL STREET JOURNAL (Dec. 7, 2009), *available at* http://online.wsj.com/article/BT-CO-20091207-713848.html (quoting Chase Carey, the President and COO of News Corp., as saying, "We think Fox is another channel, and making the distinction between a broadcast and a cable channel is a looking-backward definition and not a looking-forward definition," and reporting that Carey "pointed out that ESPN commands $4 per subscriber"); Letter of Michael Hopkins, Fox Affiliate Sales President, to William Lake, Chief, Media Bureau, Oct. 25, 2010, at 4, *available at* http://www.fcc.gov/fox-letter-2010-25-10.pdf ("[B]ased on established rates for cable programming services that do not approach the performance of the Fox stations, such as the reported $3.40 Cablevision charged other MVPDs for MSG and MSG Plus in 2009, it would be reasonable for us to seek a rate between $5 and $6 per subscriber."); Joe Flint, *Moonves Takes Shot at USA Network, Tells Government to Stay Out of Distribution Fights*, LOS ANGELES TIMES (Apr. 12, 2011), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/04/cbs-les-moonves-usa-network-.html ("[T]he USA Network should not be paid more per-subscriber than the CBS network."). *See also* 16-17 *infra* (quoting Sinclair CEO David Smith in a recent trade-press report).

21 *Cf.* 47 U.S.C. § 543(b)(8) (requiring payment for the basic tier by prohibiting "buy-through of other tiers").

Indeed, broadcasters have long invoked Section 623's mandatory tier-placement requirements to demand automatic, favorable placement on the basic cable tier,[22] despite the fact that, in a more competitive marketplace, broadcasters would be required to compete on price and quality to gain access to desired tiers. Broadcasters' inflated demands for retransmission consent fees thus inflict maximum damage on consumers. And as long as consumers are forced to subscribe to (and pay for) broadcast programming—creating an effective tax on access to cable programming—there is no market-based mechanism to discipline retransmission consent fees, which are now predicted to rise 28 percent in 2011 from $1.14 billion to $1.46 billion, and up to a staggering $3.6 billion by 2017.[23] Because consumers cannot "vote with their pocketbooks," stations' excessive fee demands go unpunished, leading stations to demand even *more* from cable operators and subscribers the next time around.

The ability of retransmission consent stations to demand placement on the mandatory basic tier also stifles competition from competing cable programmers. Fundamentally, broadcast stations are insulated from competition from cable networks because they enjoy an artificial advantage—placement on the basic tier—that cable networks do not have. But perhaps more insidiously, network affiliates that demand excessive fees and receive basic tier placement are able to drive up the price of the basic tier for consumers, thus imposing a toll on consumers who want additional cable programming but must purchase the basic tier in order to gain access to that programming. As the price of the basic tier goes up, consumers become less willing (and in

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[22] *See id.* § 543(b)(7); 47 C.F.R. §§ 76.920-21 (providing for mandatory buy-through of the basic cable tier in areas where the cable operator does not face effective competition).

[23] Joe Flint, *Retransmission Consent Fees To Hit $3.6 Billion in 2017*, LOS ANGELES TIMES (May 25, 2011), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/05/retransmission-consent-fees-to-hit-36-billion-in-2017.html (citing Robyn Flynn, SNL Kagan, *Updated Retrans Projections: Despite Fewer Projected Multichannel Subs, Higher Fees Boost Totals*, at 2 (May 17, 2011)).

many cases, less able) to purchase additional cable tiers, thus reducing the number of subscribers who watch cable networks and harming competition from cable networks as a result. Indeed, cable programmers that are not affiliated with a broadcast network have expressed deep concerns that the increased fee demands from broadcasters are undermining their ability to compete.[24] Both competition and diversity suffer as a result.

More broadly, it is not simply broadcast tier-placement that distorts retransmission consent negotiations, but the very concept of regulated tiers and carriage mandates. There is no longer any reason for regulatory mandates to determine what programming is carried or how, now that the MVPD marketplace is competitive. In fact, we now have the worst of all worlds, where cable operators are heavily regulated but other MVPD platforms are not. Such disparate treatment does not arise from any principled assessment of today's competitive dynamics, but instead reflects an antiquated view of the video marketplace that is completely unwarranted today.

2. Bundling of retransmission consent and carriage of cable networks

The networks also are increasingly tying the sale of their local affiliates' retransmission consent rights with other programming. Each of the Big Four networks owns or is affiliated with a slew of cable channels,[25] and they typically require MVPDs to purchase those channels in a package that includes retransmission consent for the network's stations. Mandatory tying practices enable programming providers to obtain carriage for affiliated cable networks on more

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24 *See, e.g.*, Comments of Discovery Communications at 3, MB Docket No. 10-71 (filed May 18, 2010) (pointing out the "equally strong harm to consumers that arises from the impact broadcasters' rising leverage has had on the ability of independent programmers (those with no affiliation to 'must have' broadcasters) to contribute diverse, informative programming to Americans' channel line-ups").

25 *See* Ownership Chart: Television, Free Press, *available at* http://www.freepress.net/ownership/chart/tv (listing cable networks affiliated with ABC, CBS, NBC, and FOX).

favorable terms than they would otherwise enjoy. Moreover, by forcing MVPDs to purchase their entire programming bundle, the major networks soak up even more funds from MVPDs' programming budgets and damage the chances of non-affiliated program networks to obtain carriage. And when independent programmers do secure carriage, they can do so only "by accepting reduced compensation, less favorable tier placements, and other less favorable terms."[26] For many independent programmers, unfavorable tier placement prevents them from achieving wide enough distribution to remain viable.[27]

Tying also permits networks to manipulate the retransmission consent and "must buy" protections to guarantee maximum profits for themselves at the expense of consumers. Specifically, the networks that sell programming in bundles can load up the fees for retransmission consent, knowing that all cable subscribers must buy those stations as part of the basic tier, and then use those higher fees to cross-subsidize any less popular affiliated cable networks in higher tiers. In short, as long as these mandatory tying practices are allowed to continue, the Commission's retransmission consent regime will be just another weapon in the networks' arsenal to demand higher fees for their entire programming portfolio, much like the exclusive sports programming that network executives call their "battering ram."[28]

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26 *See* Comments of the Africa Channel at 3, MB Docket No. 10-71 (filed May 18, 2010).

27 *Id. See also Report on the Packaging and Sale of Video Programming Services to the Public*, at 80, Nov. 18, 2004, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf (noting "concern that non-affiliated program networks may not be able to gain widespread carriage due to the industry practice of tying carriage of popular program networks or broadcast stations with carriage of less-popular program networks").

28 *See* David D. Kirkpatrick, *Murdoch's First Step: Make the Sports Fan Pay*, N.Y. TIMES (Apr. 14, 2003), at C1 ("Mr. Murdoch has long described sports programming as his 'battering ram' to attack pay television industries around the world, using a portfolio of exclusive broadcasts to demand high programming fees … .").

3. Network non-duplication and syndicated exclusivity protections

Broadcasters' network non-duplication and syndicated exclusivity rights place the government's seal of approval on anticompetitive agreements between stations and networks—agreements that guarantee to stations that they will not face competition from other stations providing the same network and syndicated programming.[29] By invoking these rules to prevent MVPDs from choosing among potential competitors for the supply of network and syndicated programming, stations increase their power to extract ever-higher fees in exchange for retransmission consent. The territorial exclusivity rules thus significantly distort negotiations between stations and MVPDs.

The network non-duplication and syndicated exclusivity rules also harm consumers by denying them access to broadcast programming in various circumstances.[30] These arcane and anachronistic rules establish geographic "zones of protection" within which broadcast stations can insist that a cable system black out its retransmissions of other broadcast stations when those

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29 *See* 47 C.F.R. § 76.92(a) ("Upon receiving notification pursuant to § 76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . ."); *id.* § 76.93 ("Television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to § 76.92 in accordance with the contractual provisions of the network-affiliate agreement."). *See also id.* § 76.101 ("Upon receiving notification pursuant to § 76.105, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . ."); *id.* § 76.103(a) ("Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to § 76.101 in accordance with the contractual provisions of their syndicated program license agreements . . ."). DBS providers are subject to different and more narrow exclusivity rules. *See id.* § 76.120 *et seq.*

30 Moreover, the complex rules impose considerable compliance burdens on MVPDs (particularly as the volume of network non-duplication and syndicated exclusivity notices has increased recently), creating additional costs that are ultimately passed through to consumers.

stations air certain network and syndicated programs. These geographic zones of protection ignore the measures typically employed in broadcast regulation, such as the station's DMA or signal strength contour and instead are based on fixed distances (*i.e.*, 35 miles or 55 miles) calculated from a reference point assigned to the "protected" station's community of license.

In practice, the network non-duplication and syndicated exclusivity rules produce increasingly anomalous results that harm consumers. Among other things, the rules allow a station to demand blackout protection from a cable operator *even if that operator is not carrying the station requesting protection* (such as would be the case if the station was withholding retransmission consent). In some cases, the rules also force a cable system to black out a station that its subscribers could receive over the air. And because modern cable systems often are integrated facilities serving multiple communities over a broad geographic area, the rules can and frequently do force cable operators to black out programming not only to subscribers within the protected zone, but also to subscribers who reside outside that zone.[31]

The net effect of the territorial exclusivity rules is to allow stations to insulate themselves from competition in retransmission consent negotiations, even where there is no reasonable policy justification for giving a station such protection.

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[31] Under the rules, blackout protection extends throughout any community that is "located in whole or in part" with the station's protected zone. 47 C.F.R. §§ 76.92, 101. Because the protected zones are based on arbitrary distances and do not follow community boundaries, it is quite common for a community to be only partially within a station's protected zone. In such circumstances, the rules require the cable operator to expand the protected zone to cover subscribers who would otherwise be entitled to receive the programming. Moreover, even where a community is located entirely outside a station's protected zone, and thus blackouts are not required by law, where the community is part of an integrated multi-community system, it may be technically or economically impracticable for a system that is subject to blackout obligations in other communities to provide the programming in one community while having to black it out in others.

4. Network interference in retransmission consent negotiations

The NPRM appropriately points out that network interference with the retransmission consent negotiations of independent affiliates, including “a network’s exercise of its contractual approval right” to bless or veto retransmission consent agreements, also “hinder[s] the progress of negotiations.”[32] As TWC has explained in past proceedings, a network’s demand for a “cut” of an independent affiliates’ retransmission consent revenues can be just as coercive—and just as distortive to retransmission rates—as a network’s direct participation in the station’s retransmission consent negotiations.[33] Indeed, the two often go hand-in-hand: during TWC’s 2009 negotiations with Sinclair Broadcast Group, Sinclair “informed TWC not only that FOX must approve any grant of retransmission consent rights, but that FOX would withhold such approval unless Sinclair radically increased the compensation it obtains from TWC and paid a substantial share to the network.”[34] Since then, FOX has taken action to disaffiliate any local station that does not accede to similar demands,[35] and both CBS[36] and ABC[37] have publicly

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32 NPRM ¶ 22.

33 *See* Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation’s Retransmission Consent Complaint, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR Nos. 8233-C and 8234M (filed Dec. 8, 2009).

34 *Id.* at 3-4.

35 *See* Michael Malone, *Fox Inks New Affiliation Agreements*, *Scraps Others*, BROADCASTING & CABLE (May 11, 2011), *available at* http://www.broadcastingcable.com/article/468137-Fox_Inks_New_Affiliation_Agreements_Scraps_Others.php (reporting that FOX had disaffiliated Nexstar’s WTVW in Evansville, IN, after Nexstar had “balked at Fox’s affiliation terms,” which included “aggressive” demands by Fox to pay “substantial retrans earnings” to the network); *see also* Harry A. Jessell, *Fox*, *Affils Exchange Fire Over Retrans*, TVNEWSCHECK (Feb. 9, 2011), *available at* http://www.tvnewscheck.com/article/2011/02/09/48992/fox-affils-exchange-fire-over-retrans (“[Michael] Hopkins, who took on ultimate responsibility for affiliate relations following the resignation of Tony Vinciquerra as CEO of the Fox Networks Group last month, says that Fox realizes that some affiliates may not meet its demands for a cut of their retrans dollars. ‘If that should be the case, Fox will have to

followed suit in requiring coercive, upstream payments of independent affiliates' retransmission consent revenues.

The affiliates, for their part, see no end in sight to these demands. Sinclair CEO David Smith recently predicted that the extraction of retransmission consent revenues by the networks is "just going to be an ongoing and continuing part of the business[, f]orever," and will not be "something that just stops tomorrow because they deem it that they've got all the money they think they can get."[38] Smith went on to confirm that the networks' demands for a cut of the fees will cause stations to drive up prices considerably: "We just have to keep upping that number. We need to keep growing our side, and as we grow our side, they grow theirs."[39] Smith's comments thus make clear that the increasing pressure being placed on broadcast stations to deliver retransmission consent fees to the networks inevitably will result in higher fees for consumers without any concomitant enhancement in quality of the local programming they receive. Relatedly, Smith's comments undermine any suggestion that recent spikes in

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pursue different distribution channels to receive fair value for our programming and continue to serve our viewers.' 'We don't want that to sound like a threat, but it is a fact,' he says.").

36 *See* Michael Malone, *Moonves: Give Us Our Retrans Cut*, BROADCASTING & CABLE (Mar. 1, 2010), *available at* http://www.broadcastingcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php ("CBS Corp. President/CEO Leslie Moonves made an emphatic case for broadcast's emerging dual-revenue model," saying that the CBS network "merits . . . a significant cut of retransmission consent revenue."); *see also* Claire Atkinson, *Moonves: CBS Would Yank Affil Signal If Necessary*, BROADCASTING & CABLE (Mar. 9, 2010), *available at* http://www.broadcastingcable.com/article/449891-Moonves_CBS_Would_Yank_ Affil_Signal_If_Necessary.php (reporting that CBS said it "ended the affiliate agreement" of a station in Jacksonville, FL, when it refused to give up its retransmission consent revenues to the network).

37 *See Sinclair Gives Retrans Cut to ABC*, TELEVISION BROADCAST (Mar. 26, 2010), *available at* http://www.televisionbroadcast.com/article/97360 (reporting that Sinclair's new affiliation agreements with ABC "includes a licensing fee that represents a cut of retransmission revenue").

38 COMMUNICATIONS DAILY, May 5, 2011, at 15.

retransmission consent fees merely reflect a resetting of an equilibrium in such fees. To the contrary, as TWC has explained previously, recent increases in fee demands are a harbinger of continual efforts to drive up the cost of retransmitting broadcast programming using a valuable spectrum resource that is intended to be available to the public for free—a trend that is causing significant harm to consumers.[40] These demands plainly "hinder[] the progress of the negotiations" just as much as the threat of a network veto,[41] as they effectively preclude a station from granting retransmission consent except at a significantly inflated (and non-market-based) price.

Not only are networks harming consumers by interfering in retransmission consent negotiations, but by exerting their leverage to extract higher fees, they also are seeking to monetize a right they do not possess. Section 325 of the Act makes clear that the right to grant retransmission consent belongs to local broadcast stations, not the national networks.[42] Furthermore, the networks do not possess any right to assert copyrights they may have in the network programming, given MVPDs' statutory compulsory copyright licenses to retransmit

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39 *Id.*

40 *See* Petition at 16 (explaining that "increased fees become the benchmark in each subsequent round of negotiations, and the increased costs are passed directly on to consumers"); *see also* Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime," Nov. 12, 2009, at 30 (confirming that "retransmission fees are large and growing, and a significant percentage of these costs are passed on to consumers"). The Katz/Orszag/Sullivan Study was provided to the Commission as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009).

41 NPRM ¶ 22.

42 47 U.S.C. § 325(b)(1) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station."); *see also Mediacom Commc'ns Corp. v. Sinclair Broadcast Group, Inc.*, 460 F. Supp. 2d 1012, 1015 (S.D. Iowa 2006)

broadcast programming.[43] Yet there is no doubt that the networks' demands for compensation reflect their view that MVPDs should pay more than the statutory copyright licensing regime requires.[44] The retransmission consent regime was never intended to become a shadow copyright regime for the benefit of copyright owners, including the networks.[45] Indeed, courts

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("'Retransmission consent' is a federally created statutory right in a television station's broadcast signal. .. that broadcasters may attempt to sell in that station's local market.").

43 *See* 17 U.S.C. § 111. The Commission should take note that, on the same day it issued its NPRM in this proceeding, the Copyright Office issued a Notice of Inquiry seeking comment on recommendations to Congress regarding the elimination of the compulsory copyright provisions of the Copyright Act. *See* Library of Congress, Copyright Office, *Section 302 Report*, Docket No. RM 2010-10, Notice of Inquiry, 76 Fed. Reg. 11,816 (Mar. 3, 2011). Of course, if Congress decides to repeal Section 111 of the Copyright Act, Congress also should take immediate steps to eliminate retransmission consent. Without a compulsory copyright regime, the resulting private copyright payments would fully compensate all rights holders; any additional payment for retransmission consent would be, in effect, an unjustifiable second payment for the same distribution rights.

44 *See, e.g.*, *Les Moonves Says CBS Is Getting a Cut of Some Affiliates' Retrans*, RADIO BUSINESS REPORT (Mar. 1, 2010), *available at* http://www.rbr.com/tv-cable/21802.html (quoting CBS Corp. CEO Les Moonves as stating that "if you want to get our top programming—which we believe network programming is at the top—and if we're spending hundreds of millions of dollars to bring you NFL Football, or 'CSI,' then we should get paid as much as a cable network showing repeats"); Ben Grossman, *Rupert's Main Man: Q&A with News Corp.'s Chase Carey*, BROADCASTING & CABLE, Oct. 26, 2009, *available at* http://www.broadcastingcable.com/article/366208-Rupert_s_Main_Man_Q_A_With_News_Corp_s_Chase_Carey.php (quoting News Corp. COO Chase Carey as follows: "It's not rocket science. It starts with making it a dual revenue business. It doesn't make sense that broadcast is only ad supported. It competes against other channels that are dual revenue businesses that are getting 1, 2, 4 dollars [per subscriber], while a network like Fox, it sits there with truly the best programming in sports and entertainment, so we need to move that business to a place where we are getting fair value.").

45 *See* 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code."); 138 CONG. REC. H6493 (daily ed. July 23, 1992) (statement of Rep. Chandler) (explaining during floor debate about the 1992 Cable Act that retransmission consent should not serve "as a subsidy for major networks"); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶ 173 (1993) ("The legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal, completely separate from the programming contained in the signal.

have held that a copyright holder's conduct may violate antitrust laws when it "impos[es] restrictions on the use of copyrighted [works] that extend beyond the permissible bounds of the exclusive rights granted by the copyright laws."[46] So, too, might such a violation occur in the programming context when a network injects itself in retransmission consent negotiations to extract payments for a right it cannot claim to have under copyright or communications law. Accordingly, this conduct not only fundamentally distorts retransmission consent negotiations, but also may represent an unlawful attempt to force MVPDs to pay twice for the "value" of broadcast network content.

5. Collusion among competing broadcast stations

Finally, broadcast stations increasingly are engaging in a number of collusive activities to coordinate carriage negotiations in a single DMA as a means of raising the price of retransmission consent. A recent study by the American Cable Association identified 57 joint negotiation arrangements through which the owner of one of the Big Four stations in a DMA exerts some measure of "control" over the negotiations of retransmission consent of a competing Big Four station.[47] In discussions with its members, ACA found that in many of these instances,

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Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights. . . . [R]etransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest. Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.").

[46] *Electronic Data Systems Corp. v. Computer Associates Int'l, Inc.*, 802 F. Supp. 1463, 1465 (N.D. Tex. 1992); *see also United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-58 (1948).

[47] Comments of American Cable Association, MB Docket No. 10-71, at 10 (filed May 18, 2010); *see also id.*, App. C, Table 2 (listing each of the 57 instances).

"there was a single negotiator for both stations, and reaching carriage terms for one station was contingent upon reaching terms for the other."[48]

TWC's experience has been the same: stations in TWC's footprint rely on a variety of dubious "sharing" mechanisms (such as local marketing agreements, shared services agreements, and joint sales agreements) that enable ostensibly independent competitors to collude in negotiating retransmission consent.[49] For example, when a Big Four station in a DMA seeks to negotiate carriage on behalf of itself *and* a non-Big Four competitor (such as the local CW or MyNetwork affiliate) pursuant to an LMA or equivalent arrangement, the cost of carriage increases for MVPDs and, in turn, their subscribers. Indeed, in TWC's experience, the Big Four station often will demand a retransmission consent payment for the non-Big Four station that the latter could not secure on its own but for the increased leverage flowing from joint negotiations.

Other station activities present additional opportunities for collusion. For instance, FOX's recent decision to begin migrating some of its existing affiliations to multicasts that include the programming stream of another Big Four station poses serious competitive

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48 *Id.* at 10.

49 *See, e.g.*, *ACME Television Licenses of Ohio, LLC, Assignor, and WBDT Television, LLC, Assignee, For Consent to Assignment of Broadcast Station License of WBDT, Springfield, OH*, Petition to Deny, File No. BALCDT-20100917AAT, at 6 (filed Oct. 22, 2010) (explaining that a joint sales agreement between two owners of competing stations in the Dayton, OH DMA had "consolidate[d] negotiating authority into the hands of a single entity" and "effectively eliminated competition between [the stations] in the retransmission consent context"); *ACME Television Licenses of Wisconsin, LLC, Assignor, and LIN of Wisconsin, LLC, Assignee, For Consent to Assignment of Broadcast Station License of WCWF, Suring, WI*, Petition to Deny, File No. BALCDT-20100917AAF, at 11 (filed Oct. 22, 2010) (noting that a shared services agreement between two stations in the Green Bay, WI DMA enabled LIN, the owner of one of the stations, to serve as the other station's "agent with respect to the negotiation of . . . retransmission consent agreements" *before* the closing of the transaction that would have brought the two stations under common ownership).

concerns.[50] The potential for one of the Big Four stations to own or control two of the four highest-rated broadcast programming streams in a given DMA certainly violates the spirit, if not the letter, of the Commission's media ownership rules, and it facilitates collusive negotiations that exacerbate the already severe problems plaguing the retransmission consent process.

Moreover, many station groups participate on "affiliate boards" for each of the Big Four networks, and these gatherings present a golden opportunity to share competitive information. A station group with, say, an ABC station in one DMA and an FOX station in another DMA often will attend the ABC affiliate board meeting and discuss pricing with the competitor to its FOX station. Membership on affiliate boards ensures the free flow of information about pricing demands by ostensible competitors, and, in turn, raises the risk of collusive pricing by stations affiliated with different networks.

II. THE COMMISSION SHOULD USE ALL AVAILABLE TOOLS TO MINIMIZE HARMFUL REGULATORY DISTORTIONS AND PROTECT CONSUMERS

Prior to, or in the absence of, congressional action to deregulate broadcast carriage negotiations altogether, there are a number of steps the Commission can and should take to address the inefficiencies and distortions in the current system. As an initial matter, the Commission should eliminate the anachronistic and artificial bargaining advantages that arise under its own rules. These advantages—including broadcasters' territorial exclusivity protections and tier-placement and "must buy" preferences, and the Commission's tolerance for bundling the carriage of a broadcast station with cable channels, network interference, and station collusion—make up part of the uneven playing field that is causing harm to consumers.

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[50] *See* Michael Malone, *Fox Inks New Affiliation Agreements, Scraps Others*, BROADCASTING & CABLE (May 11, 2011), *available at* http://www.broadcastingcable.com/article/468137-Fox_Inks_New_Affiliation_Agreements_Scraps_Others.php.

Thus, by eliminating these distortions, the Commission would allow for more effective and efficient negotiations between stations and MVPDs.

Standing alone, these modest reforms will be insufficient to protect consumers and keep broadcasters' disproportionate bargaining power in check. Indeed, broadcasters will continue to demand unreasonable payments for the right to retransmit programming that is broadcast over the air for free, backed by coercive threats to cut off access to such programming where their demands are not met. Accordingly, unless and until deregulatory legislation is enacted, the Commission also should fulfill its responsibility to advance the public interest by creating a new method of establishing compensation levels and ensuring uninterrupted carriage of broadcast stations, so as to better serve the goals embodied in the Act.

A. The Commission Should Eliminate Protections for—and Affirmatively Ban—Anticompetitive Agreements Providing for Network Non-Duplication or Syndicated Exclusivity.

As discussed above, territorial exclusivity protections, such as the rules authorizing network non-duplication and syndicated exclusivity arrangements, have a significant distorting effect on negotiations. These rules enable broadcasters to prevent cable operators from mitigating the effects of a blackout by replacing a local signal with a distant signal containing the same network and syndicated programming,[51] and thus allow a broadcaster to insist that it serve as an MVPD's sole supplier of network and syndicated programming in a particular geographic area. The effect of the Commission's exclusivity rules is to create hundreds of local, government-sanctioned monopolies for network and syndicated programming across the country.

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51 *See* NPRM ¶ 42 ("The [network non-duplication] rules . . . prohibit the cable system from carrying the network programming as broadcast by any other station within the 'geographic zone' to which the contractual rights and rules apply. . . . Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity

Reflecting concern about the anticompetitive impact of these rules, the NPRM laudably seeks comment on "eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity."[52] The Commission plainly should do so, given the distorting effects of such exclusivity measures.[53] As the NPRM recognizes, "a cable system negotiating retransmission consent with a local network affiliate may face greater pressure to reach agreement by virtue of the cable system's inability to carry another affiliate of the same network if the retransmission consent negotiations fail."[54]

But while this proposal is an important first step, it does not go far enough. The Commission properly recognizes that its "exclusivity rules" exacerbate the problems surrounding existing retransmission consent negotiations by authorizing stations to block cable systems from taking critical remedial measures—importing distant signals of a station's network and syndicated programming—that would make hold-out threats less powerful.[55] However, the NPRM also recognizes that the exclusivity rules "do not create these rights but rather provide a means for the parties to the exclusive contracts to enforce them through the Commission rather

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within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.").

52 *Id.*

53 For similar reasons, the Commission also should get out of the business of facilitating anticompetitive exclusive agreements in today's marketplace by modifying the broadcast territorial exclusivity rules, which define the allowable scope of a station's network and non-network programming exclusivity vis-à-vis another broadcast station. *See* 47 C.F.R. § 73.658(b), (m). These rules have remained unchanged for many years. *See, e.g.*, 28 Fed. Reg. 13673 (Dec. 14, 1963) (promulgating the broadcast network territorial exclusivity rule in its current form).

54 NPRM ¶ 42; *see also id.* ¶ 43 (noting concern among commenters that "the exclusivity rules provide broadcasters with artificially inflated bargaining leverage in retransmission consent negotiations").

55 *See id.* ¶¶ 42-43.

than through the courts."[56] The NPRM thus acknowledges that "eliminating the Commission's exclusivity rules may have little effect on retransmission consent negotiations, because private exclusive contracts between broadcasters and programming suppliers would remain in place."[57]

Accordingly, the Commission should not only rescind its rules authorizing exclusivity agreements, but affirmatively ban such agreements. In today's competitive environment, networks and broadcast stations should no longer be permitted to coordinate their efforts to prevent MVPDs that have lost a local signal from accessing network programming by carrying another affiliate's signal. Indeed, courts have recognized the anticompetitive effects of vertical agreements establishing exclusive territories,[58] and have found similar restraints to be *per se* unlawful when insisted upon by downstream distributors (in this case, broadcast stations).[59] Here, local stations invoke contractual exclusivity rights to shield themselves from competition from out-of-market stations, thus allowing them to drive up prices by credibly threatening to

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56 *Id.* ¶ 42. To the extent the Commission presupposes that, absent the exclusivity rules, networks *could* enforce these rights though the courts, it is mistaken. Section 325 makes clear that retransmission consent is right owned by the stations, not the networks. Therefore, only the stations, and not the networks, would have standing to enforce these exclusivity limits in court.

57 *Id.* ¶ 43.

58 *See, e.g.*, *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1077-81 (2d Cir. 1980) (holding that agreements establishing exclusive territories violated Section 1 of the Sherman Act where they lacked a valid business purpose and there was no enhancement of interbrand competition to offset loss of intrabrand competition); *Graphic Products Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1575-78 (11th Cir. 1983) (striking down territorial restraints that harmed both intrabrand and interbrand competition, where intrabrand competition would provide a critical source of competitive pressure on price and consumer welfare).

59 *See, e.g.*, *Shulton, Inc. v. Optel Corp.*, 1987-1 Trade Cas. (CCH) P67,436, 1986 U.S. Dist. LEXIS 19775, at *77 (D. N.J. 1986) ("[A] manufacturer/supplier acting at the behest of any of its distributors to police a division of territories may be imposing a *per se* illegal horizontal restraint whether or not the manufacturer is in fact in competition with its distributors . . . .); *Aunyx Corp. v. Canon USA, Inc.*, 1990-2 Trade Cas. (CCH) P69,201, 1990 U.S. Dist. LEXIS 12682, at *5 (D. Mass. 1990) (denying summary

block an MVPD's access to network programming. As long as territorial exclusivity provisions continue to exist, broadcast stations will have a free hand to charge monopoly rents.[60]

In analogous circumstances in which the Commission amended its rules to prevent anticompetitive conduct, the Commission also has invoked its authority to prohibit enforcement of *existing* agreements to protect the public interest. For instance, when the Commission extended new program access requirements to terrestrially delivered programming, it barred enforcement of existing contracts that did not comply,[61] and it likewise prohibited enforcement of multi-dwelling unit exclusivity agreements after finding such arrangements to be anticompetitive.[62] In this context, the same considerations that warrant elimination of the territorial exclusivity rules call for banning continued enforcement of the underlying anticompetitive agreements.

It is disingenuous for broadcasters to claim that the Commission's exclusivity rules are necessary to protect localism. As an initial matter, the Commission has consistently recognized that greater competition among broadcasters promotes localism by providing "added incentives

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judgment where there was evidence that territorial restrictions were developed with assistance of dealers' advisory council).

60 In contrast, if the Commission eliminates its territorial exclusivity rules, it will not diminish MVPDs' incentives to enter into reasonable retransmission consent agreements. Given the higher copyright fees associated with distant signal importation, MVPDs would continue to have an incentive to reach a retransmission consent agreement with the local station.

61 *See Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 64 (2010).

62 *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 ¶ 55 (2007) ("[T]he law affords us wide authority to prohibit the enforcement of such clauses where, as here, the public interest so requires."), *aff'd sub nom Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

to respond to conditions in local markets."[63] The Commission's rules protecting broadcasters' contractual network non-duplication and syndicated exclusivity rights thus are *in tension* with the Commission's interest in fostering localism, because the exclusivity rules suppress the quality-enhancing competition that a broadcaster would otherwise face from out-of-market stations.

Moreover, although broadcast stations today enjoy the benefits of territorial exclusivity, many stations increasingly are curtailing local news operations and original reporting and consolidating operations with competing stations.[64] Indeed, as Professor Hazlett explains in his recent report, cable and the Internet are growing as sources of local content, while broadcast stations "have performed poorly" in fulfilling their public interest obligations, including promoting localism, and have "produc[ed] little if any content not offered in an unregulated market."[65] As TWC explained in the Commission's ongoing media ownership proceeding, it is *MVPDs* such as TWC that are making significant new investments to deliver diverse local content to their subscribers, while broadcasters increasingly are failing to meet the local needs of

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63 *2006 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*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 ¶ 97 (2008); *see also id.* ¶ 101 ("[C]ompetition, and not concentration of market players, leads to better programming.").

64 *See, e.g.*, Kim McAvoy, *News Sharing: One For All, All for One?*, TVNEWSCHECK (May 20, 2009), *available at* http://www.tvnewscheck.com/article/2009/05/20/32369/news-sharing-one-for-all-all-for-one (reporting that "TV stations in a growing number of markets are suppressing their competitive instincts and forming news co-ops to capture and share video of public meetings, press conferences and other routine events"); Chris Churchill, *Former Rivals Now Partners*, ALBANY TIMES UNION (Mar. 11, 2009) (reporting that formerly "fiercely competitive" news stations WRGB and WNYT in the New York Capital Region "are negotiating a plan to share content," including news and sports footage).

65 *Hazlett Essay* at 8.

consumers.[66] In any event, even assuming *arguendo* that broadcasters' unsubstantiated claims were true, localism concerns would not provide a sufficient basis for retaining the Commission's exclusivity rules, particularly given the competitive and public interest harms they are causing by thwarting efficient retransmission consent agreements.

B. The Commission Should Prohibit Broadcasters from Demanding Mandatory Placement on the Basic Tier to the Fullest Extent of Its Authority.

TWC also urges the Commission to amend Section 76.65(b) of its rules and specify that it is a *per se* violation of the duty to negotiate in good faith for a fee-seeking station to insist, on a take-it-or-leave-it basis, on placement on a mandatory basic tier in areas where a cable operator faces effective competition. Alternatively, the Commission should expressly clarify that cable operators are permitted to make subscription to the basic tier optional in areas of effective competition, or to carry broadcast stations that elect retransmission consent in such areas on a separate tier or an á la carte basis. Each of these options would aim to eliminate the significant distortions associated with broadcasters' demands for automatic placement on a mandatory basic cable tier. As discussed above, these demands have forced cable operators to build spiraling retransmission consent fee increases into the mandatory basic cable rates that subscribers cannot avoid paying. By contrast, if cable operators could offer such stations on an optional basis, a station's excessive demands would be tempered by the possibility that consumers would refuse such programming at the station's inflated asking price.

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66 Comments of Time Warner Cable, MB Docket No. 09-182, at 4-6 (filed July 12, 2010) ("TWC 2010 Media Ownership Comments") (describing the local and regional programming services that TWC provides to its subscribers, including 24/7 local news channels, Video On Demand and Web and Mobile channels featuring local content, and local interest channels that focus on public affairs, politics, sports, cultural affairs, entertainment, and other content of interest to the community at issue).

The Commission has clear authority to prevent broadcast stations from insisting on mandatory placement on the basic tier (or, for that matter, on any other tier) or "must buy" treatment in areas subject to effective competition. As the Commission recognizes in the NPRM, Section 325 authorizes it to prohibit conduct that is inconsistent with "competitive marketplace considerations,"[67] and *no* provision in the Act affirmatively requires placement of stations on the basic tier in areas subject to effective competition. The Commission should also render unenforceable any current contractual provisions that require mandatory basic tier placement for stations electing retransmission consent in areas of effective competition.[68]

Some broadcasters assert—incorrectly—that Section 623 of the Communications Act, which provides that the "minimum contents" of the basic tier shall include "[a]ny signal of any television broadcast station that is provided by the cable operator to any subscriber,"[69] imposes a mandatory tier-placement obligation on *all* cable systems. But, as both the D.C. Circuit and the Commission have recognized, the statute imposes tier-placement obligations *only* in areas subject to rate regulation, and not in areas subject to effective competition.

In *Time Warner Entertainment, Inc. v. FCC*, the D.C. Circuit struck down an earlier Commission interpretation of Section 623 that "the tier buy-through provision applies not only to regulated systems, but also to systems subject to 'effective competition' and thus not subject to rate regulation."[70] The court explained that, as a rate regulation statute, Section 623(b)(7) is "triggered by the absence of effective competition and ceases [to apply] when effective

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67 NPRM ¶ 8 (quoting 47 U.S.C. § 325(b)(3)(C)(ii)).

68 *See* nn.61-62 *supra* and the accompanying text.

69 47 U.S.C. § 543(b)(7)(A).

70 *Time Warner Entertainment, Inc. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995).

competition emerges."[71] Accordingly, the requirement that all broadcast networks be carried on a mandatory basic tier no longer applies when the cable operator faces effective competition.[72] The Commission confirmed this conclusion in 2001, stating: "[I]f a cable system faces effective competition under one of the four statutory tests, and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier."[73] Therefore, the Commission should amend the good faith rules to prevent broadcasters from thwarting consumer choice and its disciplining effect on rates by insisting on basic tier placement.

Notably, tier placement obligations generally apply *only* to cable operators, and as discussed above, the Commission should take this opportunity address the disparate treatment of cable operators and other MVPDs. TWC recognizes that some instances of differential treatment, including some of cable operators' obligations vis-à-vis must-carry stations, appear in the Act itself,[74] and in such instances the Commission should urge Congress to repeal these distorting provisions in their entirety. But there are a number of steps the Commission can take under its existing authority (beyond the clarifications identified above) to minimize the differential treatment endemic in its own rules. For instance, the Commission should promptly

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71 *Id.* at 185.

72 *Id.* at 192 ("Because this provision applies to any basic tier established pursuant to § 543(b)(7) and clearly states an intention directly to regulate rates, it cannot apply to systems that face effective competition. . . . Given the close relationship between § 543(b)(7) and the tier buy-through provision, the Commission's interpretation that the latter applies to systems not facing effective competition fails.").

73 *Carriage of Digital Television Broadcast Signals*, Report and Order, 16 FCC Rcd 2598 ¶ 102 (2001). *See also id.* ("This finding is based upon the belief that Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area. We believe that the decision in *Time Warner v. FCC* supports this interpretation.").

74 *See, e.g.*, 47 U.S.C. § 534.

initiate a proceeding to revisit the rules and determinations made regarding cable operators in the *Viewability Order*, which the Commission scheduled for review "between February 2011 and February 2012."[75] In doing so, the Commission should explore means of allowing cable operators to carry stations, including those that elect must-carry status, on a separate, non-mandatory tier. In particular, the Commission should clarify that cable operators have the option of providing must-carry stations on an optional tier or à la carte, as long as the stations remain available to subscribers who wish to receive those stations.[76] The elimination of these and other regulatory distortions that stack the deck against cable operators is essential in any effort to updating the current rules to reflect today's competitive realities.[77]

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[75] *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 ¶16 (2007) ("*Viewability Order*").

[76] In the *Viewability Order*, the Commission interpreted Sections 614(b)(7) and 615(h) as requiring that must-carry stations be "actually viewable" to all cable subscribers. *Id.* ¶ 15. If taken to its logical conclusion, this rule might require cable operators to place must-carry stations on the basic tier of service. But the plain text of the statute affords more flexibility to cable operators and would not necessarily compel the delivery of must-carry stations on the basic tier. Section 614(b)(7) of the Act states that must-carry stations "shall be provided to every subscriber of a cable system" and "shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system." 47 U.S.C. § 534(b)(7). Importantly, the statute does *not* expressly require cable operators to *deliver* must-carry stations to all of its subscribers; it merely requires cable operators to make such stations *available* to all subscribers, by "provid[ing]" and making them "viewable" to subscribers. Thus, the statute leaves open the option of making must-carry stations optional to cable subscribers, as long as the stations remain available to subscribers and capable of being viewed by subscribers who wish to receive them.

[77] President Obama has instructed agencies to reevaluate any "rules that may be outmoded, ineffective, insufficient, or excessively burdensome" and to modify or repeal those rules when appropriate. *See* Exec. Order No. 13,563, § 6(a), 76 Fed. Reg. 3,821 (Jan. 21, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

C. The Commission Should Make Further Changes to Its Good Faith Rules To Address Anticompetitive Practices That Are Distorting Retransmission Consent Negotiations.

In addition to addressing the structural distortions in its rules, the Commission should no longer tolerate the anticompetitive practices employed by broadcast networks and stations that skew negotiations in their favor, and should therefore amend its good faith rules to target such conduct more effectively. Indeed, the Commission has recognized that its good faith rules are designed to prevent anticompetitive conduct,[78] and to ensure that "negotiations are conducted in an atmosphere of honesty, purpose and clarity of process."[79] And as noted in the NPRM, establishing new *per se* violations of the good faith requirement will "promot[e] the successful completion of retransmission consent negotiations," and help "protect[] consumers from impasses or near impasses."[80]

Unfortunately, the current good faith requirements do little to protect consumers from the threatened and actual blackouts that have grown increasingly common in disputes between broadcasters and MVPDs.[81] While the rules allow parties to file complaints for alleged violations of the good faith requirements, their lack of specificity, their failure to anticipate today's bargaining tactics, and the absence of any meaningful enforcement history all undermine the rules' deterrent effect. Indeed, as noted in the NPRM, "[t]here have been very few

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78 *See* 47 U.S.C. § 325(b)(3)(C)(ii) (providing that the good faith negotiation standards promote "terms and conditions [that] are based on competitive marketplace considerations").

79 *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶ 24 (2000) ("*Good Faith Order*").

80 *See* NPRM ¶ 21.

81 *See id.* ¶ 20 ("In recent times, the actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes present a growing

complaints filed alleging violations of the Commission's good faith rules," and "there has only been one finding that a party to a retransmission consent agreement negotiated in bad faith."[82] Given the numerous examples of actual or threatened blackouts cited by the Commission—and based on TWC's experience with broadcasters that have employed such threats to drive unreasonable fee increases[83]—it is difficult to believe that, in the years since the initial adoption of the good faith rules, just one negotiating party has engaged in actionable bad faith.

Accordingly, TWC supports the Commission's proposals for "[p]roviding more guidance under the good faith negotiation requirements" by "[s]pecifying additional examples of *per se* violations" based on today's realities.[84]

1. The Commission should bar networks from bundling retransmission consent with carriage rights to affiliated cable networks.

TWC continues to support the Petition's original recommendation to make it a *per se* violation of a broadcaster's good faith negotiating duties to "insist on tying retransmission consent to negotiations for carriage of other programming services."[85] As discussed above, the Big Four networks increasingly bundle the retransmission consent of their local stations with the

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inconvenience and source of confusion for consumers."); *id.* ¶ 15 (listing several recent "high profile retransmission consent disputes [that] result[ed] in carriage impasses").

82 *Id.* ¶ 12.

83 *See, e.g.*, Mike Farrell, *Fox Gets Tough with TWC*, MULTICHANNEL NEWS (Dec. 21, 2009), *available at* http://www.multichannel.com/article/441200-Fox_Gets_Tough_With_TWC.php (describing Fox's threats to pull its programming, which included highly anticipated airings of the NFL playoffs and college bowl games, if TWC did not accede to Fox's pricing demands); Mark K. Miller, *Sinclair to Pull Stations from TWC Systems*, TVNEWSCHECK, Dec. 28, 2010, *available at* http://www.tvnewscheck.com/article/2010/12/28/48014/sinclair-to-pull-stations-from-twc-systems (describing similar demands by Sinclair).

84 NPRM ¶ 3. Moreover, as discussed above, the Commission should render unenforceable any current contractual provisions that violate these new examples of *per se* good faith violations. *See* nn.61-62 *supra* and the accompanying text.

85 Petition at 34.

carriage rights to their cable services, thus driving up MVPDs' programming costs and soaking up funds that were once available for independent programming. These tying practices also prompt networks to demand even higher fees for retransmission consent as a means of subsidizing the tied cable networks. These higher retransmission consent fees translate into higher rates for the basic cable tier—and therefore a higher "tax" for consumers, as they must purchase the basic tier in order to get access to the higher tiers containing the programming they may prefer.

In adopting a rule prohibiting tying, the Commission should revisit its determination more than a decade ago that such bundling practices are consistent with a broadcaster's good faith obligations.[86] The Commission concluded at the time that such practices reflected "competitive marketplace considerations" presumably because they did not involve "the exercise of market power by a broadcast station"—conduct deemed presumptively *inconsistent* with the good faith negotiation standard.[87] But in today's environment, where the Big Four networks enjoy significant bargaining advantages over their increasingly fragmented MVPD counterparts, these tying practices *do* result from the exercise of market power—power that is reinforced by the anachronistic regulatory distortions discussed herein.

2. The Commission should prohibit networks from interfering in the retransmission consent negotiations of stations.

The Commission should further amend the good faith rules to prevent network interference in the retransmission consent process. The Commission proposes to make it a *per se* violation of the good faith rules "for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply

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[86] *Good Faith Order* ¶ 56.

[87] *Id.* ¶ 58.

with such an approval provision."[88] TWC agrees with the Commission that networks should be prohibited from forcibly usurping a station's right to control its retransmission consent negotiations, and such conduct may well run afoul of the existing good faith standards.[89] As discussed above, when a network intervenes in retransmission consent negotiations without the invitation of the negotiating parties, such conduct tends to "hinder[] the progress of the negotiations,"[90] drive up prices for retransmission consent, and increase the threat of a blackout.

While networks should be prohibited from overriding their affiliates by injecting themselves into retransmission consent negotiations, nothing should prevent MVPDs from consenting to a group deal for multiple stations as negotiated by a network when such an arrangement is beneficial for, and agreed upon by, all parties. Indeed, a network's use of a "clearinghouse" model for the disposition of its affiliates' retransmission consent rights may, in some cases, bring efficiencies by reducing transaction costs for stations and MVPDs alike. And to the extent a station's abdication of negotiations creates "transfer of control" issues under Section 310(d),[91] the network may, as a formal matter, send any deal negotiated with an MVPD to the stations for ratification. Nonetheless, the touchstone for determining whether a network's negotiation on behalf of its affiliates is permissible should be the consent of the MVPD. If the MVPD is unable to discern any efficiencies from a network's proposal to negotiate on behalf of its affiliates—and believes the network's commandeering of negotiations will lead to substantially higher fees for consumers and a greater risk of a blackout—the MVPD should

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88 NPRM ¶ 22.

89 *See id.* ("If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has arguably impaired its own ability to designate a representative who can bind the station in negotiations, contrary to our rules.").

90 *Id.* ¶ 22.

91 47 U.S.C. § 310(d).

remain free to negotiate with individual stations in order to reach the most efficient deal for consumers.

3. The Commission should update its good faith rules to prevent stations from jointly negotiating retransmission consent.

TWC also supports the Commission's proposal to make it a *per se* violation of the good faith standard to "grant another station or station group the right to negotiate or the power approve its retransmission consent agreement when the stations are not commonly owned."[92] The Commission correctly notes in its NPRM that such joint conduct, at a bare minimum, "delays . . . the negotiation process" and makes negotiations "unnecessarily complicated."[93] Of even greater concern, however, are the anticompetitive effects noted earlier—the ability of two or more competing stations in the same DMA to collude in the sale of retransmission consent, jointly withhold retransmission consent as a bargaining tactic, and drive up prices in the process. The Commission's overly permissive approach regarding dubious sharing arrangements has facilitated collusive negotiations, and if the Commission is going to continue allowing such arrangements at all (deeming the managing station's influence insufficient to constitute an unauthorized transfer of control), it at least should take corrective action to prevent anticompetitive effects.

Such conduct not only is plainly inconsistent with "competitive marketplace conditions" (and thus at odds with the good-faith requirement), but also runs afoul of the antitrust laws. As TWC and many others have pointed out, the Department of Justice filed suit to enjoin joint retransmission consent negotiations as a form of illegal price-fixing, explaining as follows: "Although the 1992 Cable Act gave broadcasters the right to seek compensation for

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[92] NPRM ¶ 23.

[93] *Id.*

retransmission of their television signals, the antitrust laws require that such rights be exercised *individually* and *independently* by broadcasters."[94] Nor should stations be allowed to evade condemnation by dressing up a price-fixing conspiracy as a mere "sales agency" relationship. As the Supreme Court has explained, "[t]he fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action."[95]

The Commission has recognized in the past that "it is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the [retransmission consent] negotiation process would not meet the good faith negotiation requirement," and that bargaining proposals "that result from agreements not to compete or to fix prices" are "presumptively" inconsistent with a broadcaster's obligation to negotiate retransmission consent in good faith.[96] The record confirms that such anticompetitive arrangements are causing tangible harm to consumers in the form of spiraling fees and an increased risk of blackouts. Accordingly, in adopting a rule against joint retransmission consent negotiations, the Commission should again recognize the anticompetitive nature of such conduct and ensure that consumers do not suffer the obvious harms of price-fixing among competing stations.[97]

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94 *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement at 8 (S.D. Tex. Feb. 2, 1996) (emphasis added), *available at* http://www.justice.gov/atr/cases/texast0.htm.

95 *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942). *See also United States v. American Smelting and Refining Co.*, 182 F. Supp. 834, 855-56 (S.D.N.Y. 1960) (condemning as price-fixing an arrangement by two lead mining companies under which one acted as the "seller of a portion of the production of the other in a designated area of the country").

96 *Good Faith Order* ¶ 58.

97 The Commission asks how to reconcile its proposed rule permitting joint purchasing by MVPDs with a prohibition on joint selling by stations. NPRM ¶ 29. As an initial matter, incumbent cable operators generally do not compete by virtue of their distinct franchise

Moreover, even apart from the harms to the retransmission consent process identified above, TWC has pointed out in the parallel media ownership proceeding that joint negotiations among stations may violate the Commission's ownership rules as well.[98] The Commission should not permit stations to circumvent the prohibitions on owning multiple Big Four stations in the same DMA by allowing *de facto* acquisitions of stations through local marketing agreements, shared services agreements, joint sales agreements, or similar arrangements. Other collusive practices, such as multicasting multiple network affiliate stations over a common signal and negotiating fees for both, may also violate the letter and spirit of the Commission's media ownership rules, and the Commission should closely examine these abuses of the retransmission consent regime in both proceedings and promptly put a stop to them.

4. *The Commission should adopt additional remedies to better deter and punish such violations of the good faith standard.*

In addition to reforming the substantive good faith requirements, the Commission should craft more appropriate remedies to deter bad faith tactics in the first place. The Commission suggests punishing a station's "failure to negotiate in good faith" by "considering such failure in

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areas, whereas stations in a given DMA do compete directly with one another for the sale of retransmission consent and advertising. Moreover, the antitrust agencies have explained that joint *purchasing* arrangements, unlike joint *sales* activity, usually "do not raise antitrust concerns and indeed may be pro-competitive," because they "enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies." FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000).

98 *See* TWC 2010 Media Ownership Comments at 10 ("The Commission's rules already prohibit actual duopolies by providing that an entity may not 'directly or indirectly own, operate, or control' two of the top-4 rated stations in a given DMA. Station groups therefore violate the Commission's rules when they own one of the top four stations in a DMA and then, through an LMA or similar arrangement, control the retransmission consent negotiations (among other key functions) of a second top four station.") (internal citation omitted).

the context of license renewals."[99] TWC strongly supports this proposal. Not only would such a rule create a far stronger compliance incentive than a forfeiture remedy, it would also reinforce the public interest obligations of broadcasters as licensees under Section 309. Indeed, Section 309(k) already instructs the Commission in license renewal proceedings to take into account whether the station has failed to "serve[] the public interest," committed "serious violations . . . of this Act or the rules and regulations of the Commission," or engaged in a "pattern of abuse."[100] TWC submits that, for purposes of license renewals under Section 309(k), the Commission should deem a station's "good faith" violations to be presumptively contrary to the public interest and sufficiently "serious" to warrant denial of a station's renewal application.

D. The Commission Also Should Affirmatively Address the Core Problems of Inflated Rates and Blackouts.

While eliminating distortions arising from the Commission's rules and targeting anticompetitive conduct are important steps in producing more efficient outcomes for consumers, the reforms discussed above will not prevent broadcasters from manipulating other aspects of the antiquated regulatory regime to serve their own pecuniary interests. TWC will support deregulatory legislation to replace the current regime with a truly market-based system, but until such legislation is enacted, the Commission should adopt new rules that would establish rate-setting and dispute-resolution mechanisms and require interim carriage. Such action would prevent broadcast programming blackouts and threats of blackouts by removing broadcasters' ability to extract higher payments using such threats. And in so doing, the Commission would eradicate the consumer harm associated with the actual or potential loss of popular network programming.

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99 NPRM ¶ 30.

100 47 U.S.C. § 309(k)(1)(A)-(C).

1. Title III of the Act gives the Commission ample legal authority to protect the interests of consumers threatened by retransmission consent disputes.

Notwithstanding the cautious approach taken in the NPRM, the Commission has broad authority under Title III of the Act to regulate retransmission consent rates and mandate binding arbitration and interim carriage. Section 325(b)(3)(A) provides the Commission with uncommonly broad authority "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[101] In addition to that general mandate, Congress directed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable."[102] This authority dovetails with the Commission's power to ensure that broadcast stations, as Commission licensees, act in accordance with "the public interest, convenience, and necessity" under Section 309(a),[103] as well as the good-faith requirement in Section 325(b)(3)(C),[104] which as the NPRM notes, is designed to address instances when a party's demands "include[] terms

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101 *Id.* § 325(b)(3)(A).

102 *Id.*

103 *Id.* § 309(a). The Supreme Court has stated that the Commission's Section 309 mandate "to assure that broadcasters operate in the public interest is a broad one," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-80 (1969), and, in fact, the Commission has cited its Section 309 authority to impose requirements on broadcasters—requirements that were *unrelated* to any license application or renewal proceeding—that it found necessary to serve the public interest, convenience, and necessity. Indeed, the Commission stated in connection with the DTV transition that "[o]ne can scarcely conceive a situation more illustrative of the 'necessity' prong of this duty than the instant case, where certain viewers will cease having access to full-power broadcast services transmitted over the public airwaves on a date certain." *See DTV Consumer Education Initiative*, Report and Order, 23 FCC Rcd 4134 ¶ 20 (2008).

104 47 U.S.C. § 325(b)(3)(C).

and conditions not based on competitive marketplace considerations."[105] Read together with the Commission's ancillary authority,[106] these far-reaching grants of authority empower the Commission to adopt specific measures necessary to ensure that the retransmission consent regime conforms to the public interest.

The Commission recently relied on its broad Title III authority in an analogous context to impose a data roaming mandate on wireless carriers, notwithstanding the absence of any specific provisions in the statute addressing that issue. In particular, the Commission roundly rejected assertions—similar to those made by broadcasters in the retransmission consent context—that other provisions of Title III limited its ability to require data roaming arrangements to be offered on "commercially reasonable terms and conditions."[107] Indeed, the Commission determined that it had "broad authority" and "enormous discretion" to impose obligations to promote competitive marketplace conditions,[108] including a "baseball" style dispute-resolution mechanism.[109] The Commission's reluctance (to date) to consider rules adopting a dispute-resolution mechanism and requiring interim carriage thus is even more puzzling in the retransmission consent context.

Although the regulatory regime envisioned by Congress may reflect a preference for deciding the price of carriage through private negotiations, Congress also included a failsafe that

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105 NPRM ¶ 33.

106 47 U.S.C. §§ 303(r), 154(i).

107 *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265, FCC 11-52, ¶ 68 (rel. Apr. 7, 2011).

108 *Id.* ¶ 58; *id.* ¶ 62 n.172 (quoting *Shurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992)).

109 *Id.* ¶ 79 (explaining that Commission staff may consider "claims regarding the commercial reasonableness of the proffered terms and conditions, including prices," by "requir[ing] both parties to provide to the Commission their best and final offers" so that the "Commission staff, if it so chose, [could] resolve a particular roaming dispute").

contemplates Commission intervention to ensure reasonable rates. In fact, the Commission is not only empowered, but obligated, to protect consumers pursuant to Title III of the Act when changes in the marketplace have made it impossible for the regulatory regime to work as intended. Moreover, protecting the public interest in uninterrupted access to broadcast programming is at the heart of Congress's intent in the 1992 Cable Act.[110] It is this core purpose that should animate the Commission's reforms in this proceeding, even if they require suspending negotiations pending comprehensive legislation to develop a market-based regime.

2. The Commission should establish effective rate-setting and dispute-resolution mechanisms and provide for interim carriage.

TWC believes that the Commission has the responsibility to use all of these tools to combat broadcasters' exploitation of the retransmission consent regime. In particular, the Commission should consider adopting a rate-setting mechanism that would establish reasonable rates for retransmission consent to put an end to the cycle of constant disputes and blackout threats. In establishing rate levels, the Commission would be guided by the principles in Section 325, which, as noted above, instructs the Commission to consider "the impact of the grant of

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110 *See* 138 CONG. REC. S14615-16 (Sept. 22, 1992) (statement of Sen. Lautenberg) (remarking that "if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights;" but that "[i]nstead, cable operators will have an opportunity to seek relief at the FCC"). More recently, in a 2007 letter to the Commission, the Chairman and Ranking Member of the Senate Commerce Committee wrote that Section 325's directives meant, "[a]t a minimum," that "Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]." Letter from Sens. Inouye and Stevens to Chairman Kevin Martin, Federal Communications Commission (Jan. 30, 2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR No. 8233-C (filed Oct. 22, 2009). *See also* 138 CONG. REC. S643 (Jan. 30, 1992) (statement of Sen. Inouye) (stating, as author of Section 325, that the "universal availability of local broadcast signals" was a major goal of the legislation, and that "the FCC has authority under the Communications Act" to "ensure that local signals are available to all the cable customers").

retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable."[111] The Commission could examine the impact of recent spikes in retransmission consent fees on basic cable rates and assess the reasonableness of such impacts, for example by comparing the rate of increase over time to the level of inflation.

The creation of a rate-setting mechanism, which would determine the *price* for retransmission consent deals, would not preclude the use of—or eliminate the need for—dispute resolution and interim carriage, as those measures could play a critical role in ending impasses centering on *non-price* terms. Dispute resolution is consistent with core aspects of existing rules and Commission precedent. The Commission's "good faith" rules, for instance, are not merely "hortatory," but in fact require broadcasters to adhere to "some heightened dut[ies] of negotiation . . . greater than those at common law."[112] Those rules reflect the Commission's active role in encouraging carriage agreements and, when necessary, proscribing conduct that stands in the way of agreement. Moreover, the Commission has established a mechanism for resolving retransmission consent disputes as a condition of *three* mergers since 2004, including in its *Comcast-NBCU Order*, and that process could serve as a template for a generally applicable dispute-resolution process.[113]

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111 47 U.S.C. § 352(b)(3)(A).

112 *Good Faith Order* ¶ 24 (internal citations and quotation marks omitted).

113 *See General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp., Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 209, App. F, § IV (2004) (explaining the potential consumer harms that could result from post-transaction retransmission consent disputes, including "higher rates," "withholding or threats of withholding [programming]," and "limiting consumer choice"); *Applications for Authority to Transfer Control, News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶ 107 n.331, App. B, § IV.A (2008); *Applications of Comcast corp.,*

Broadcasters have argued that the Act forecloses Commission involvement in resolving retransmission consent disputes, because in their view such involvement would run afoul of broadcasters' statutory right to refrain from entering into a carriage agreement.[114] But establishing the price and other terms that will apply *in the event* the parties agree to carriage is not tantamount to compelling carriage. The parties are and would remain free to negotiate retransmission consent without Commission involvement. To be sure, preserving the ability to opt out of carriage would mean that some disputes could go unresolved. But in TWC's experience, if a reasonable price is established, carriage inevitably will follow, as it is rare for either party to prefer non-carriage.

Broadcasters' arguments under the Administrative Dispute Resolution ("ADR") Act also are unavailing. An arbitration regime that includes *de novo* review by the Commission would be entirely consistent with the ADR Act.[115] Although the ADR Act provides for "binding arbitration" only "whenever all parties consent,"[116] the statute uses the term "binding arbitration"

General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer of Control Licenses, Memorandum Opinion and Order, 26 FCC Rcd 4238 ¶ 52, App. A, § VII.A (2011) (noting that the Commission's "public interest mandate requires that [it] extend the arbitration and standstill remedy to all [Comcast-NBCU affiliated] programming").

114 *See* 47 U.S.C. § 325(b)(1)(A). Yet the Commission has overcome this statutory "consent" requirement to order temporary "standstills" in the program access disputes using its ancillary authority. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* First Report and Order, 25 FCC Rcd 746 ¶¶ 71-72 (2010) (relying on the Commission's ancillary authority to establish standstill rules for program access disputes); *see also Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 ¶ 6 n.31 (MB 2010) (noting that Section 4(i) permitted the Commission to impose a standstill *before* the new rules took effect). The Commission should take a similar approach here, as the Supreme Court has long held that Sections 303(r) and 4(i) authorize the Commission to maintain the status quo when "the public interest demands interim relief." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

115 Administrative Dispute Resolution Act, 5 U.S.C. §§571-84 ("ADR Act").

116 *Id.* §§ 575(a)(1), 575(a)(3).

only to mean arbitration in which the award is directly enforceable in court without *de novo* review by the agency.[117] The consent requirement does not apply to other forms of arbitration, including those in which the agency retains *de novo* review over the arbitral decision.[118] Consistent with these statutory guidelines, the Commission dismissed the assertion that Commission-imposed mandatory arbitration violates the Administrative Procedures Act and the ADR Act and instead concluded that, because *de novo* review of the arbitrator's decision is available, "the process is consistent" with those statutes.[119]

III. THE COMMISSION SHOULD ENSURE THAT ANY NOTICE REQUIREMENTS DO NOT CAUSE CONSUMER CONFUSION OR DISTORT NEGOTIATIONS

Finally, to the extent that the prospect of impasses remains under any revised rules (*e.g.*, if the Commission opts against requiring interim carriage in the event of a dispute), the Commission is likely to consider the extent to which consumer notice should be required. TWC submits that mandatory notices are just as likely to confuse consumers as to assist them. The Commission accordingly should proceed with caution, and any rules it does adopt should apply equally to all MVPDs.

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117 *Id.* §§ 576, 580(c), 581(a).

118 *See Comcast Corp.; Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938 ¶ 4 n.13 (2007) ("We do not find the prohibition in section 575(a)(3) of the ADRA to apply because the arbitration here is non-binding (*i.e.*, either party may seek *de novo* review of the arbitration decision).") ("*Comcast RSN Order*"). Moreover, by its terms, the ADR Act expressly leaves open other avenues for arbitration; the Act explains that its procedures are "voluntary" and were intended to "supplement rather than limit other available agency dispute resolution techniques." 5 U.S.C. § 572(c).

119 *See Comcast RSN Order*, 22 FCC Rcd 17938 ¶ 4 n.13; *see also TCR Sports Broadcasting Holding, LLP v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783 ¶ 52 (MB 2008) (stating that "[t]he ADRA's prohibition [on mandatory arbitration] thus does not apply where, as here, … either party may seek *de novo* review of the arbitration decision" from the Commission).

A. The Commission Should Amend Any Applicable Notice Requirements To Better Protect Consumers and Prevent Confusion.

The NPRM contemplates revising the Commission's existing notice rules to provide better information to consumers. TWC agrees with the Commission that effective subscriber notice of a potential service disruption requires a balance between the need for consumers to make alternative viewing arrangements and the desire to avoid the confusion, frustration, anxiety, and most significantly, wasted time and money associated with false alarms.[120]

As the NPRM acknowledges, programming blackouts caused by broadcaster brinkmanship, or threats of such blackouts, often induce consumers to switch from their preferred MVPD to avoid losing network programming.[121] The costs associated with switching MVPDs—or attempting to obtain over-the-air reception—often are substantial and can require consumers to expend significant personal time and effort.[122] When the threatened blackout never occurs but, in fact, was used merely as a negotiating ploy to pressure an MVPD to accept unreasonable carriage terms, the time and money spent to switch providers is wasted, which only heightens consumer frustration and anger (and rightfully so).[123] More fundamentally, consumer welfare is diminished when subscribers to one MVPD service switch to a less-preferred provider, not to obtain better service or lower prices, but simply to maintain access to broadcast programming that stations have a public interest obligation to make available to the public. In

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120 NPRM ¶ 34.

121 *See id.*; *see also* Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* at 38, MB Docket No. 10-71 (filed June 3, 2010) ("*Salop Brinkmanship Report*") (citing a 2010 survey by J.P. Morgan, which found that more than 50 percent of subscribers would consider switching to a competitor if their current MVPD lost one of the four major broadcast networks).

122 *Salop Brinkmanship Report* at 11-16.

fact, the existence of a consumer-notice requirement enhances broadcasters' ability to use blackout threats as a ploy to drive up retransmission consent fees, as they know that their threats will put MVPDs at risk of losing customers simply because free over-the-air programming may be pulled. And even those consumers who switch MVPDs are never free from the threat of pulled programming. All MVPDs must regularly renegotiate their carriage agreements with broadcasters, and because broadcasters are increasingly threatening to go dark unless their cash demands for retransmission consent are met, consumers may be forced to engage in an endless cycle of switching among MVPDs simply to avoid the potential for a blackout.

Accordingly, to strike the appropriate balance for providing subscriber notice, and thus avoid the unnecessary harm caused by unnecessary MVPD switching, TWC urges the Commission to ensure that any notice requirements fit the realities of retransmission consent negotiations and disputes. In particular, the Commission should provide maximum discretion to MVPDs to determine the form and content of any required notices. A one-size-fits-all approach is not necessary and may be counterproductive to the Commission's goal of providing "[a]dequate advance notice" to enable consumers "to prepare for disruptions in their video service."[124] MVPDs have an ongoing relationship with their subscribers. As a result, MVPDs have established effective means of communicating with their customers and, in fact, regularly do so. MVPDs thus are better suited to identify the best ways to provide notice of a programming disruption to their subscribers. Moreover, if the Commission determines that notice invariably should be issued at some fixed interval in advance of an expiring agreement (*e.g.*, 30 days), it should ensure that MVPDs can accurately apprise customers of the status of

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[123] *Id.* at 14-15 (explaining that additional consumer harm is inflicted when consumers "are led to switch MVPD providers needlessly or choose the next-best MVPD").

[124] NPRM ¶ 34.

negotiations rather than needlessly sowing confusion and apprehension where an agreement appears likely to be reached.

TWC also believes that any notice requirements must apply equally to all MVPDs. There can be no rational basis for requiring cable operators, but not their competitors, to provide notice of potential service outages caused by a broadcaster's withdrawal of retransmission consent. All MVPDs participate in retransmission consent negotiations, and all MVPD subscribers are affected in the same way by broadcaster brinkmanship, making differential notice requirements irrational. Indeed, the rule's application only to traditional "cable operator[s]" and not to competing MVPDs, such as DBS providers,[125] may well violate the Fifth Amendment's guarantee of equal protection. Differential notice rules improperly "single[] out one or a few for uniquely disfavored treatment," and in such cases, "[n]owhere are the protections of the Equal Protection Clause more critical."[126] The Commission has authority to extend any notice rules to non-cable MVPDs, including under Sections 335(a), 154(i), 303(r), and 303(v).[127]

B. The Commission Should Apply Its "Sweeps" Rules to All MVPDs.

As with other notice requirements, there is no principled basis for the Commission to impose its "sweeps" rules on cable operators and not on other MVPDs. Indeed, regulatory parity among different types of MVPDs is required, not just as a policy matter, but as a matter of straightforward Constitutional interpretation. Accordingly, for the same reasons discussed above

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125 47 C.F.R. § 76.1601.

126 *News America Pub., Inc. v. FCC*, 844 F.2d 800, 813, 814 (D.C. Cir. 1988) (applying heightened scrutiny to strike down a statutory provision that prevented the Commission from extending any existing temporary waivers from the cross-ownership rules but permitted the Commission to grant new waivers, where News America was the only company with a preexisting waiver and thus received less favorable treatment under the Commission's rules than its competitors seeking new waivers).

127 47 U.S.C. §§ 335(a), 154(i), 303(r), 303(v).

with regard to the Commission's notice requirements—and using the same bases of legal authority—the Commission should extend its "sweeps" rules to other non-cable MVPDs.

CONCLUSION

The Commission already has "recogniz[ed] the consumer harm caused by retransmission consent negotiation impasses and near impasses."[128] It should therefore move swiftly to protect consumers by adopting much-needed reforms to the current retransmission consent regime. While legislation ultimately will be necessary to deregulate the relationship between broadcasters and MVPDs and to enable market-based broadcast carriage negotiations, the Commission can take a number of steps to provide interim relief. In particular, the Commission should address problems caused by its own rules (such as network non-duplication and syndicated exclusivity) and put a stop to anticompetitive conduct that is becoming increasingly prevalent (such as network interference and collusion among competing local stations). In addition, the Commission should fulfill its responsibility to protect consumers from harm by adopting effective rate-setting procedures, dispute-resolution mechanisms, and interim carriage requirements. Unless and until Congress eliminates the artificial regulatory construct of retransmission consent, must carry, and various other broadcaster preferences, such action is needed to ensure that the Commission's regulations protect the interests of *consumers*, rather than *broadcasters*.

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[128] NPRM ¶ 16.

Respectfully submitted,

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May 27, 2011

EXHIBIT C

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules Related to Retransmission Consent	)	MB Docket No. 10-71
	)	

COMMENTS

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May 27, 2011

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EXECUTIVE SUMMARY

The American Cable Association ("ACA") files these Comments in response to the Commission's Notice of Proposed Rulemaking seeking comment on a series of proposals to improve the functioning of its rules concerning or affecting retransmission consent. As the NPRM recognizes, significant changes in the broadcast television and multichannel video distributor ("MVPD") markets since the retransmission consent framework was implemented in 1992 have caused retransmission consent disputes to become more frequent and contentious, and the rise in negotiation impasses under the current regulatory framework have adversely affected millions of consumers. The markets are not working, the regulatory framework within which they function are outdated and now is the time for Commission action to protect the interests of the only parties not at the negotiation tables: consumers of pay television services.

It is long past time to stop arguing over whether reform of the Commission's retransmission consent framework is required: this system is not working, particularly for smaller MVPDs and their subscribers, and it must be changed before they are again put at risk by harmful broadcaster and network practices. <u>It is of critical importance, therefore, that the Commission complete this rulemaking expeditiously in order that any new rules adopted could govern the thousands of retransmission consent negotiations that will occur this fall</u>. Consumers should not have to suffer again through another contentious retransmission consent cycle, facing temporary and permanent foreclosure of valued programming.

It is appropriate for the Commission to step in and address the problems in these markets. The broadcast industry holds a special place in the market for video programming. An over-the-air broadcaster is not just any business, like Sam's Club or Costco. Broadcasters are entrusted with licenses to use the public's airwaves to provide their product in exchange for agreeing to operate in the public interest, and therefore stand in a special relationship to the government: federal law provides special support and protections to broadcasters in the public interest, and the government views itself as having a special interest in how its products are distributed and priced.

ACA submits that the Commission must take the following actions to improve the functioning of its retransmission consent and related rules, improve the negotiating process, and protect consumers from supra-competitive prices and service disruptions. ACA submits that the Commission must (i) prohibit coordinated retransmission consent negotiations between separately-owned broadcast stations in a single market by means of both legally binding and non-legally binding agreements; (ii) prohibit third party interference with the exercise of retransmission consent and the ability of MVPDs to carry distant signals, and immediately abrogate existing agreements in violation of this prohibition; (iii) provide interim carriage during the pendency of retransmission consent complaint cases; (iv) make adjustments to its broadcast exclusivity rules to harmonize exceptions for network and non-network programming; and (v) investigate the rampant price discrimination against smaller MVPDs and take remedial action to address the problem.

Prohibit Coordinated Negotiation by Separately-owned Broadcast Stations. The Commission must prohibit coordinated negotiation of retransmission consent by separately-owned stations in a single market. Economic theory suggests, and ample evidence demonstrates, that coordinated negotiations allow broadcasters to extract significantly higher retransmission consent fees from MVPDs, and these costs are passed along to consumers, whether the coordination arises from common control or ownership of multiple Big 4 affiliates in a single DMA. Consumers ultimately foot the bill in the form of higher cable rates. The Commission itself has recognized the likelihood of this consumer harm in several proceedings.

By surveying its members, ACA has confirmed 36 pairs of broadcasters engaging in such coordinated negotiations. Because use of coordinated negotiations is prevalent in the industry, the Commission is correct to attempt to address the problem by adopting a *per se* prohibition of this practice. However, the amendment to its rules proposed by the Commission to address coordinated negotiations is far too limited, and would fail to address all types of coordinated negotiations that would lead to harm. ACA proposes a broader prohibition, citing four specific coordination behaviors that would explicitly and appropriately encompass all forms of legally binding and non-legally binding coordinated negotiation agreements. Prohibiting coordinated retransmission consent negotiations by separately-owned broadcasters in a market will not disturb other sharing arrangements that allow stations to achieve operating efficiencies; it will simply address the pervasive collusion now occurring between competing sellers in a market.

Prohibit Third Party Interference with Retransmission Consent. The Commission must adopt *per se* prohibitions against third-party interference with the negotiation of retransmission consent agreements for distant broadcast signals in areas where the rules permit such signals to be carried. The Commission has a history of permitting distant signal carriage in certain circumstances, and for decades cable operators in rural areas have been providing these valued stations to their customers. Today, networks and broadcasters are interfering with the ability of MVPDs to provide distant signals to consumers, and the Commission should immediately address this problem. Specifically, the Commission must prohibit, as *per se* violation of the duty to negotiate in good faith:

- a broadcast station's agreement to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.

- a broadcast station's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market station that is either significantly viewed or can be received off-air in the community.

The Commission's broadcast exclusivity and retransmission consent regulations were intended to protect broadcasters from unfair cable competition in the local advertising market, but only to a limited extent, and to foster a fair marketplace for carriage negotiations, both within and outside local broadcast markets. They were not designed to block cable subscribers from receiving distant broadcast signals long viewed and/or valued in an MVPD's service area. The Commission should not countenance <u>any</u> third-party practices that harm consumers, particularly where both Congress and the Commission intended for MVPDs, and particularly smaller and rural cable operators, to be able to negotiate retransmission consent for distant signals, and should abrogate existing network-affiliate agreement provisions that interfere with such rights. Put simply, third party interference conflicts with the intent of the broadcast exclusivity and retransmission consent regulations, the scope of the cable compulsory license, and the intent and express language of the good faith negotiation rules and regulations.

Provide Interim Carriage Pending Resolution of Complaints. The Commission has ample direct and ancillary statutory authority to require temporary interim carriage of broadcast signals pending resolution of retransmission consent disputes brought before it by MVPDs. Interim carriage protects consumers from loss of valued broadcast programming while providers attempt to resolve negotiating impasses or rule violations using Commission processes. The Commission should extend such protections to retransmission consent complaints as part of its reform of its regulations.

Harmonize Protections from Exclusivity for Network and Non-Network Programming. The Commission should amend its exclusivity rules to permit carriage of a distant signal's network programming on cable systems located in whole, or in part, within such station's Grade B or noise limited service contour. The Commission's rules currently provide this protection to syndicated programming. The Commission itself initiated a rulemaking to extend this protection to network programming, recognizing that this would reproduce in cable households the same ability to view network programming that non-cable subscribers in the same locality have. Harmonizing its network and non-network programming exclusivity rules would protect consumers from harm or loss of valued programming in the case of a negotiating impasse or threatened impasse.

Investigate and Eliminate Price Discrimination Against Smaller MVPDs. Retransmission consent reform will fail to adequately protect consumers unless it addresses the widespread price discrimination against smaller MVPDs. ACA has extensively documented rampant price discrimination against smaller MVPDs. ACA urges the Commission to fully investigate and take steps to eliminate the unfair price discrimination experienced by smaller MVPDs across the nation.

The difference in prices paid by large and small operators has no basis in broadcasters' cost of delivering the signal; the marginal cost to broadcasters of providing retransmission consent for all MVPDs is essentially zero. The principal reason for the difference relates to the bargaining power imbalance between a “must have” Big 4 broadcast station and a small MVPD. The Commission itself has determined in several proceedings that individual Big 4 local broadcast stations have significant levels of market power.

Today, smaller cable operators are paying, on average, retransmission consent fees that are at least double the amount of larger operators. Consumers and providers alike are harmed by retransmission consent price discrimination.

First, retransmission consent price discrimination raises provider costs of service and these increases, in turn, are partially passed along to consumers in the form of higher subscription television prices. Second, the escalating demands of broadcasters for retransmission consent price increases, experienced most acutely by smaller MVPDs, require diverting funds from other service improvements, network expansions and upgrades, including broadband deployment. Price discrimination is a significant problem for small and rural providers and their subscribers and the Commission has ample authority both to investigate the matter by obtaining necessary marketplace data and information and to address it.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	MB Docket No. 10-71
Rules Related to Retransmission	)	
Consent	)	
	)	

COMMENTS

American Cable Association

I. INTRODUCTION.

The American Cable Association ("ACA") files these Comments in response to the Commission's Notice of Proposed Rulemaking seeking comment on a series of proposals to improve the functioning of its rules concerning or affecting retransmission consent.[1] As the NPRM recognizes, significant changes in the broadcast television and multichannel video distributor ("MVPD") markets since the retransmission consent framework was implemented in 1992 have caused retransmission consent disputes to become more frequent and contentious, and the rise in negotiation impasses under the current regulatory framework have adversely affected millions of consumers.[2] The markets are not working, the regulatory framework within which they function are outdated and now is the time for Commission action to protect the interests of the only parties not at the negotiation tables: consumers of pay television services.

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[1] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (rel. Mar. 3, 2011) ("NPRM").

[2] NPRM at ¶ 2.

It is long past time to stop arguing over whether reform of the Commission's retransmission consent framework is required: this system is not working for smaller MVPDs and their subscribers, and it must be changed before they are again put at risk by harmful broadcaster and network practices. <u>It is of critical importance, therefore, that the Commission complete this rulemaking expeditiously in order that any new rules adopted could govern the thousands of retransmission consent negotiations that will occur this fall</u>. Consumers should not have to suffer again through another contentious retransmission consent cycle, facing potentially protracted loss of access to valued programming.

In examining its retransmission consent framework, the Commission must bear in mind that retransmission consent negotiations do not take place in a "free market" unconstrained by a high degree of sector-specific regulation, as evidenced by the fact that although it is generally legal in most markets for a firm to charge any price it wishes for its product, the government would not permit broadcasters to scramble their signals and charge viewers a fee to purchase a descrambler in order to view the signals over the air. The broadcast industry is an industry with a special relationship to the government: federal law provides special support and protections to broadcasters in the public interest, and the government views itself as having a special interest in how its products are priced and where they may be sold. The operation of the Commission's retransmission consent regulations is inextricably intertwined with the operation of its broadcast signal exclusivity rules and the compulsory copyright rules. Longstanding federal policies protecting distant signal carriage lie behind each of these sets of requirements, and they must be taken in account as the Commission reforms the operation of its retransmission consent regulations. ACA emphatically supports the

Commission's proposed modifications of its rules to include additional objective good faith negotiation standards that will improve the functioning of the retransmission consent negotiating process.

First, the Commission must prohibit coordinated negotiation of retransmission consent by separately-owned stations in a single market. Ample evidence demonstrates that coordinated negotiations allow broadcasters to extract higher retransmission consent fees from MVPDs, and these costs are passed along to consumers. By surveying its members, ACA has confirmed 36[3] instances of pairs of broadcasters engaging in such coordinated negotiation. Because use of coordinated negotiations is prevalent in the industry, the Commission is correct to attempt to address the problem by adopting a *per se* prohibition of this practice. However, the amendment to its rules proposed by the Commission to address coordinated negotiations is far too limited, and would fail to address all types of coordinated negotiations that would lead to harm. ACA proposes a broader prohibition, citing four specific coordination behaviors that would explicitly and appropriately encompass both legally binding and non-legally binding coordinated negotiation agreements.

Second, the Commission must adopt *per se* prohibitions against third-party interference with the negotiation of retransmission consent agreements for distant broadcast signals in areas where such signals are permitted to be carried. The Commission has a history of permitting distant signal carriage in certain circumstances, and for decades cable operators in rural areas have been providing these valued stations to their customers. Today, networks and broadcasters are interfering with the

[3] *See infra*, Appendix B.

ability of MVPDs to provide distant signals to consumers, and the Commission should immediately address this problem. Specifically, the Commission must prohibit, as *per se* violation of the duty to negotiate in good faith:

- a broadcast station's agreement to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.

- a broadcast station's request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market station that is either significantly viewed or can be received off-air in the community.

In addition to these amendments to the Commission's good faith regulations, ACA requests that the Commission:

- add a requirement for interim carriage of broadcast signals pending resolution of complaints brought before it alleging violations of its rules.

- adopt amendments to its exclusivity rules applying the equivalent of its analog "Grade B" contour safeguard to all broadcast programming.

- address the widespread price discrimination against smaller MVPDs.

It is important to emphasize that each of ACA's recommended rule changes are squarely aimed at achieving the goals the Commission has articulated for this rulemaking: allowing the market-based retransmission consent negotiations contemplated by Congress to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. The changes recommended to the Commission's good faith negotiation rules focus on improvements to the negotiating process, rather than with specific outcomes. With the adoption of these clean, clear "rules of the retransmission road," ACA is confident that each of Commission's ends may be achieved.

Finally, ACA's suggested rule changes all fall well within the Commission's statutory authority to govern the exercise by television broadcast stations of the right to grant retransmission consent and, if adopted, will go a long way to achieving the Commission's goals in initiating this rulemaking proceeding to protect the public interest by minimizing, to the extent possible, video programming service disruptions to consumers. ACA again urges the Commission to amend its retransmission consent and related rules as expeditiously as possible, but in any event, in time for consumers to benefit from the rule changes before the commencement of the next negotiating cycle.

American Cable Association. ACA represents nearly 900 small and medium-sized cable operators, companies providing video, broadband Internet, and phone service in smaller markets across the United States. ACA's membership includes a variety of businesses – family owned companies serving small towns and villages, multiple system operators serving predominantly rural markets in several states, and hundreds of companies in between. These companies deliver affordable basic and advanced services, such as high-definition television, next-generation Internet access, and digital phone, to about 7.6 million households and businesses.

The current retransmission consent market, with spiraling costs and highly disruptive service withdrawals, harms consumers and the ACA members who serve them. ACA commends the Commission on initiating this reform of its retransmission consent and associated rules, and urges the Commission to complete this rulemaking before the start of the upcoming retransmission consent cycle in the fall of this year.

II. THE COMMISSION SHOULD PROHIBIT AS A *PER SE* VIOLATION OF THE GOOD FAITH NEGOTIATING OBLIGATION THE COORDINATED NEGOTIATION OF RESTRANSMISSION CONSENT AGREEMENTS BY STATIONS NOT UNDER COMMON OWNERSHIP.

The Retransmission Consent NPRM asks whether the Commission should prohibit coordinated retransmission consent negotiations by stations not commonly owned. From the perspective of smaller MVPDs, the answer is emphatically: yes. Now is the time for the Commission to protect consumers by putting an end to broadcasters' use of coordinated negotiations to drive up retransmission consent fees.

As ACA has previously noted in this docket, a significant problem with the current retransmission consent regime is that in some local television markets, some broadcast stations affiliated with a Big 4 network (i.e., NBC, ABC, CBS, and FOX) engage in coordinated retransmission consent negotiations even though the stations are separately-owned.[4] Available evidence analyzed by ACA's economics expert Professor William P. Rogerson strongly suggests that common control or ownership of multiple Big 4 affiliates in a single Designated Market Area ("DMA") results in significantly higher retransmission consent fees. In his recent report, Professor Rogerson describes how local broadcast stations can achieve these levels of inflated retransmission consent fees by coordinated behavior that does not arise from express contractual arrangements, such as those which might be included in shared services agreements.[5] Consumers,

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[4] *See In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association (filed May 18, 2010) ("ACA Petition Comments") at 9-14; *Notice of Ex Parte Presentation*, American Cable Association, at 5 and presentation notes page 14 (filed Feb. 16, 2011) ("ACA Feb. 16th Ex Parte Letter"). In connection with its May 18th Retransmission Consent Comments, ACA commissioned Professor William P. Rogerson to prepare a paper addressing rising retransmission consent costs due to sharing agreements and duopolies, "*2010 Rogerson Joint Control or Ownership Report*" ("Rogerson I"). Professor Rogerson is a Professor of Economics at Northwestern University, and served as the Commission's Chief Economist from 1998-99. Professor Rogerson's Joint Control or Ownership Report is attached to the May 18th ACA Comments as Appendix B. ACA has also asked the Commission to investigate this issue in its comprehensive assessment of the efficacy of its media ownership rules. *In the Matter of 2010 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. 09-182, Comments of the American Cable Association, (filed July 12, 2010) ("ACA Quadrennial Review Comments").

[5] William P. Rogerson, Professor of Economics, Northwestern University, "Coordinated Negotiation of

particularly in smaller markets, ultimately foot the bill in the form of higher cable rates.

The Commission currently permits broadcasters to enter into sharing agreements with one another under which one broadcaster transfers control of a significant part of its operations to another broadcaster in the same DMA. These arrangements come in many varieties and have various names, such as shared services agreements (SSAs) and local marketing agreements (LMAs). Most instances that the ACA is aware of where separately-owned broadcasters in the same DMA engage in coordinated negotiation of retransmission fees occur between broadcasters that have entered into sharing agreements with one another.

In 2010, ACA examined publicly available documents and records and identified 56 instances where multiple Big 4 affiliates in the same DMA operate under some sort of sharing agreement.[6] Based on reports from ACA members and other MVPDs, ACA can confirm that in 36[7] of these 56 instances of pairs of broadcasters coordinating their retransmission consent negotiations, there was a single negotiator for both broadcasters.

There are likely additional instances of sharing agreements and other coordinated arrangements achieving the same ends involving multiple Big 4 affiliates in the same market that the ACA has not yet identified. ACA will update the record as more of these instances are discovered. Furthermore, as discussed in Section II.C.,

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Retransmission Consent Agreements by Separately-owned Broadcasters in the Same Market," at 3 ("Rogerson II*")*.

[6] *See infra*, Appendix B; s*ee also* ACA Petition Comments, Appendix C. Note that the table in Appendix C lists 57 such instances. However, one of listed instances (Ft. Smith-Fayetteville-Springdale-Rogers, AR) was erroneously placed in this table and is actually a case of common ownership. Removal of this market leaves 56 instances of sharing agreements.

[7] *Id.*

infra, there may be instances in which broadcasters agree to coordinate retransmission consent negotiations but otherwise operate separately. If such stations do not consider themselves as operating under a sharing agreement, then they did not appear in ACA's 2010 assessment, nor ACA's new list of instances of coordinated retransmission consent negotiations, even though they do in fact negotiate retransmission consent prices together.

ACA has no objection to cooperative activities by local broadcast stations that enable otherwise marginal businesses to take advantage of efficiencies in operations, news gathering, marketing and other similar areas.[8] As Professor Rogerson observes, prohibiting coordinated negotiation of retransmission consent by separately-owned stations would not prevent broadcasters from entering into agreements where one broadcaster transfers control over other aspects of station operations to the management of another station in the DMA, thus preserving the main efficiencies of joint marketing and programming functions.[9] The sole difference under the relief sought by ACA would be the requirement for each station to negotiate its own retransmission consent agreement. The cost savings from combined retransmission consent negotiations is likely to be insignificant compared to the cost savings from combined marketing or programming functions.[10]

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[8] *See In the Matter of Petition for Rulemaking to Amend The Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Reply Comments of the Broadcaster Associations, at 22-23 (filed June 3, 2010) ("Broadcaster Associations Reply Comments"),

[9] Rogerson II at 13.

[10] Rogerson II at 18.

A. Common ownership or control of multiple Big 4 broadcasters in the same DMA results in increases in retransmission consent fees.

ACA previously submitted an economic analysis in this docket, Rogerson I, that applied basic economic theory to show why common ownership or control of multiple Big 4 broadcasters in the same DMA will result in higher retransmission consent fees.[11] In that report, Professor Rogerson, applying a standard modeling approach used in economics literature, explained:

> When a programmer and MVPD negotiate the fee that the MVPD will pay the programmer, they are essentially deciding how to split the joint economic gains created from having the MVPD carry the programming. This sort of bilateral bargaining situation has been extensively modeled in the economics literature. Application of the standard modeling approach used in the economics literature immediately demonstrates that a programmer selling two different programs will be able to charge more by bundling the programs together so long as the programs are substitutes in the sense that the marginal value of either of the programs to the MVPD is lower conditional on already carrying the other program.[12]

A 2007 Congressional Research Service report on retransmission consent made the following similar observation while discussing programmer-distributor conflicts:

> [I]t was striking how often the broadcaster involved in a dispute owned or controlled more than one broadcast station in a small or medium sized market. It appears that where a broadcaster owns or controls two stations that are affiliated with major networks, that potentially gives that broadcaster control over two sets of must-have programming and places a distributor, especially a relatively small cable operator, in a very weak negotiating position since it would be extremely risky to lose carriage of both signals.[13]

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[11] *See* Rogerson I & Rogerson II.

[12] Rogerson I at 7-8. (citations omitted). Professor Rogerson also provides a simple example of this theory in his report. *Id.* at 8-9.

[13] Charles B. Goldfarb, CRS Report for Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, at CRS-70 (July 9, 2007), *available at* http://www.policyarchive.org/handle/10207/bitstreams/19204.pdf (last visited May 27, 2011).

The empirical evidence available also suggests that common control or ownership of multiple Big 4 affiliates in a single market results in significantly higher retransmission consent fees.

In a 2009 filing with the Commission, Suddenlink Communications ("Suddenlink") reported the results of an internal analysis it conducted showing the effect that common control or ownership of broadcast stations has on the magnitude of retransmission consent fees. Suddenlink reported:

> Suddenlink has examined its own retransmission consent agreements and has concluded that, where a single entity controls retransmission consent negotiations for more than one "Big 4" station in a single market, the average retransmission consent fees Suddenlink pays for such entity's "Big 4" stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6% higher than the average retransmission consent fees Suddenlink pays for other "Big 4" stations in those same markets. This is compelling evidence that an entity combining the retransmission consent efforts of two "Big 4" stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations.[14]

Similarly, in response to the Petition in this docket, three cable operators – Cable America, USA Companies, and Pioneer Telephone Cooperative – reported the variance in prices between negotiations involving one Big 4 station and those involving coordinated negotiations of two Big 4 stations. The operators reported that retransmission consent fees are 161%, 133% and 30% higher, respectively, in the same DMA that are subject to common control or ownership, than for separately-owned or controlled broadcast affiliates.[15] To gauge the relevance of such increases, ACA notes

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[14] *Mediacom Communications Corp. v. Sinclair Broadcast Group, Ex Parte* Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, CSR No 8233-C, 8234-M, at 5 (filed Dec. 14, 2009).

[15] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission*

that the federal antitrust agencies generally consider that a proposed merger results in significant competitive harm when there is a more than 5% increase in price.[16]

This same economic theory described in Rogerson I formed the basis of ACA's calls for appropriate conditions to combat the horizontal harms posed by the Comcast-NBCU transaction, and the Commission's subsequent imposition of remedies in its approval of the associated license transfers.[17] In Rogerson II, Professor Rogerson observes that since he wrote his initial study, the Commission released its order approving the license transfers associated with the Comcast-NBCU transaction, and "the logic and findings in this order support the conclusion that joint ownership or control of multiple Big 4 broadcasters in the same market will result in higher retransmission consent fees and harm consumers."[18] In Comcast-NBCU, the Commission explicitly acknowledged that the horizontal theory of harm proffered by ACA "is a well-established concern in antitrust enforcement."[19] Further, the Commission accepted the proposition

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Consent, MB Docket No. 10-71, Comments of Cable America Missouri LLC (filed May 28, 2010), Comments of USA Companies (filed May 28, 2010); *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*¸ MB Docket No. 10-71, Comments of the Pioneer Telephone Cooperative, at 2 (filed June 4, 2010).

[16] *See Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, Rev. Apr. 8, 1997, at 7, *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html (last visited May 27, 2011) ("Horizontal Merger Guidelines").

[17] The Commission accepted ACA's evidence that programming fees were at least 20 percent higher where a single entity controls the retransmission consent rights of multiple Big 4 stations in a designated market area as "consistent with a concern about the potential horizontal harms resulting from the [Comcast-NBCU] transaction." *See, e.g.*, *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, MB Docket No. 10-56, ¶ 137 (rel. Jan. 20, 2011) ("Comcast-NBCU Order"); Appendix B, Section 1.C. Conditions were therefore imposed on the license transfers to prevent Comcast-NBCU from using any increased bargaining power it might obtain to raise rates above market levels for its programming. *Id.* ¶ 138; Appendix A.

[18] Rogerson II at 10; *see* Comcast-NBCU Order.

[19] Comcast-NBCU Order at ¶ 57 & n. 333, citing *Horizontal Merger Guidelines* Section 6.2; Gregory J.

that coordinated negotiations of carriage rights for two blocks of “must have” programming – in that case, an NBC Owned and Operated (“O&O”) station and a Comcast Regional Sports Network (“RSN”) – would result in increased bargaining leverage for the programming entity and higher prices for the MVPD purchaser, now at risk of loss of two highly desirable signals if negotiations fail to result in a carriage agreement.[20] In its analysis of this transaction, the Commission performed an economic analysis on data derived from News Corp.’s integration of a Fox O&O and Fox RSN in the same market and determined that common “ownership of these two types of programming assets in the same region allowed the joint venture to charge a higher price for the RSN relative to what would be observed if the RSN and local broadcast affiliate were separately-owned. . . . This evidence is consistent with ACA’s claim of potential for horizontal harms resulting from the [Comcast-NBCU] transaction.”[21]

As Professor Rogerson observes:

> Since two broadcast networks should be at least as close substitutes for one another as a broadcast network and RSN, the Commission findings imply *a fortiori* that combined ownership or control of two broadcast stations in the same market should increase programming fees.[22]

Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, Handbook of Antitrust Economics 62-64 (Paolo Buccirossi ed., 2008); Horizontal Merger Guidelines at 34-36 (providing a summary of relevant case law).

[20]Comcast-NBCU Order at ¶ 136 (“If failing to reach an agreement with the seller will result in a worse outcome for the buyer – if its alternatives are less attractive than they were before the transaction – then the buyer’s bargaining position is weakened and it can expect to pay more for the products. . . If not carrying either the NBC or the RSN places the MVPD in a worse competitive position than not carrying one but still being able to carry the other, the MVPD will have less bargaining power after the transaction, and is at risk of having to pay higher rates.”).

[21] *Id.* ¶ 141.

[22] Rogerson II at 22.

Professor Rogerson notes that the analyses of Suddenlink and others are completely consistent with the predictions of standard economic theory under plausible circumstances, and that fact should raise the Commission's concern.[23] For this, and other reasons, the Broadcaster Associations' argument that ACA's expert relied on only one data point and therefore his conclusions are of limited value must be rejected.[24] In Rogerson II, Professor Rogerson explains that his conclusions rely on (i) the Suddenlink data; (ii) data subsequently submitted by the other operators; (iii) the probative value of the fact that standard economic theory predicts the result of increased retransmission consent prices through coordinated negotiations; and (iv) the logic and findings of the Commission in the Comcast-NBCU Order that combined negotiations for two blocks of "must have" programming would increase programming fees.[25] Together, Professor Rogerson states, these data and analysis provide sufficient independent evidence that coordination of retransmission consent by multiple Big 4 broadcast stations in the same DMA that are not commonly owned is likely to increase retransmission consent fees.[26]

Similarly, the Broadcaster Associations' suggestion that even if the data relied upon by Professor Rogerson is correct – that is, coordinated retransmission consent negotiations among two Big 4 broadcasters in the same market leads to at least a 21.6% increase in fees – the actual increase reported computes to a dollar amount per subscriber per month that is not large enough to concern the Commission, also should

[23] Rogerson I at 12.

[24] Broadcaster Associations Reply Comments at 23-24.

[25] Rogerson II at 21-22.

[26] *Id.* at 22.

be rejected.[27] First, as Professor Rogerson notes, the Commission has never adopted a policy that it will ignore anti-competitive behavior that causes a substantial percentage increase in prices so long as the prices being charged are not "too large" to begin with.[28] Rather, by adopting a firm stance against all anti-competitive activity, the Commission may provide firms with appropriate incentives to avoid anti-competitive activity in a broad range of markets that individually may be small but collectively are large. Second, according to Professor Rogerson, the relevant dollar amount that coordinated negotiations will increase retransmission consent fees over the next few years will continue to grow larger as the overall level of retransmission consent fees grows larger.[29] Professor Rogerson concludes:

> [I]t is well recognized that retransmission consent fees are still rising very rapidly and many reputable analysts predict that even the very largest cable operators will likely be paying retransmission consent fees in the neighborhood of $.50-$.75 per subscriber per month over the next few years. Taking these points together, <u>a more reasonable estimate of the likely level of impact of joint negotiations between two local broadcasters on retransmission consent fees would be 21.6% of $1.50-$2.00 per subscriber per month or $.32 to $.43 per subscriber per month</u>. It is by no means clear to me that the Commission should view consumer harms of this

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[27] Broadcaster Associations Reply Comments at 24 ("if Suddenlink does pay 21.6% more to Big 4 Stations involved in joint negotiations, that amounts to only three cents more per subscriber per month for each station...").

[28] Rogerson II at 23.

[29] *Id.* Professor Rogerson notes that the fee upon which the Broadcaster Associations' per subscriber per month calculation was based was the fee of $.14 per subscriber per month reportedly paid by the largest cable operators in 2010, whereas most coordinated negotiations occur in smaller markets. Of the list of 36 instances of coordinated negotiations confirmed, only 12 instances were in the top 100 markets, and of these, only 2 were in the top 50. The remaining 24 instances of coordinated negotiations occurred in even smaller markets that are generally served by smaller and mid-size operators that likely paid considerably more than $.14 per subscriber per month even in 2010. Significantly, the average per subscriber retransmission consent payment in 2010 by the largest telecommunications companies who are also MVPDs was $.30, a figure much closer to that paid by ACA members. *See* ACA Petition Comments at 11.

magnitude as being beneath notice.[30]

B. Increases in retransmission consent fees directly harm MVPD subscribers.

Increased retransmission consent fees result in higher basic cable rates for consumers and impede broadband deployment, threatening important public interests the Commission must protect.[31] Moreover, when talks between MVPDs and broadcasters who are coordinating their negotiations break down, the disruption to consumers is greater because two stations are simultaneously dropped.

The Commission has previously concluded what cable rate studies show and ACA members report: Retransmission consent fee hikes are passed along to consumers in the form of higher cable rates. In the Commission's evaluation of the News Corporation acquisition of DirecTV, the Commission found that increased retransmission consent fees lead to higher costs for consumers and these higher costs can harm consumers.[32] Buttressing this conclusion, Professor Rogerson highlights an economic study on cable prices that found, in general, that about 50 percent of programming cost increases is passed along to customers in the form of higher subscription rates.[33]

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[30] Rogerson II at 23-24 (emphasis added).

[31] *See* Section VI.B.2 *infra*, (discussing the impact of price discrimination on broadband deployment).

[32] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, ¶ 209 (2004) ("News Corp.-Hughes Order") ("If News Corp. can…charge higher fees…these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates.") ("News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals…could make rival MVPDs less viable options for consumers, thus limiting consumer choice.").

[33] *See* Rogerson II at 8 (citing Ford, George S. and John D. Jackson, "Horizontal Concentration and

Moreover, when broadcasters engage in coordinated retransmission consent negotiations, to the extent the MVPD cannot pass the increase fees through to consumers in the form of higher subscription fees either because of competition or local economic circumstances,[34] the higher costs are borne by the MVPD, depriving it of revenues for capital expenditures that could be used to fund system upgrades, other programming acquisitions or broadband network expansion. In the markets served by smaller MVPDs, the current retransmission consent regime not only harms MVPDs and their subscribers, but also threatens a top domestic policy priority – bringing broadband deployment to unserved areas and underserved populations.[35]

Regulators at both the federal and state levels have recognized that broadband adoption increases significantly when it is offered along with video services, and that the federal goals of enhanced MVPD competition and rapid broadband deployment are interrelated.[36]

Vertical Integration in the Cable Television Industry," *Review of Industrial Organization*, 12, 1997, 513-14).

[34] *See* Craig Moffett, Bernstein Research, U.S. Cable & Satellite Broadcasting, "*Weekend Media Blast: The Poverty Problem*," (Oct. 22, 2010) (by year end 2008, 40% of American households were "essentially bereft of discretionary spending power;" 2009 data indicate a worsening picture: "[a]fter transportation and healthcare costs, *these households [bottom two quintiles] are under water to the tune of $1000 per year.* That is, they have nothing left for Cable TV. They have nothing left for Wireless phone service. They have nothing left for clothing or debt service or debt retirement.") (emphasis original).

[35] *See generally* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 123 Stat. 115; Omnibus Broadband Initiative (OBI), Federal Communications Commission, Connecting America: The National Broadband Plan, GN Docket No. 09-51 (2010); Acting Chairman Michael J. Copps, Federal Communications Commission, Bringing Broadband To Rural America: Report On A Rural Broadband Strategy (2009), attached to Rural Broadband Report Published in the FCC Record, GN Docket No. 09-29, Public Notice, 24 FCC Rcd 12791 (2009).

[36] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007). *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Comments of the Federal State Joint Board on Universal Service at 34-35 (filed May 18, 2010) ("video content is the

C. Coordinated retransmission consent negotiations by same-market broadcasters not under common ownership are prevalent.

In its original filing in this docket, ACA provided a list of 56 instances where multiple Big 4 affiliates in the same DMA operate under some kind of sharing agreement but are not commonly owned.[22] It stated that, based on reports from its membership, firms participating in sharing agreements generally participate in joint negotiations of retransmission consent agreements but explicitly noted that it had not determined on a case-by-case basis whether they did or not.[23] Thus, while ACA's data on the number of sharing agreements suggests that the number of instances of joint negotiation is relatively high, it does not definitively prove this. In their reply comments the Broadcaster Associations essentially restated these observations, stressing the point that the ACA did not actually present any data on the number of instances of joint negotiations.[24]

In response to the Broadcaster Associations observation, the ACA submits into the record an updated list based on responses to the following question by its members who operate in the markets of the broadcasters named in the 56 instances:

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leading, if not "killer," application in the bundling of services by competitors seeking to enter discrete mid-size, small, and rural markets . . . For a rural provider, the ability to offer the so-called "triple-play" is crucial to a successful business plan and essential to gain access to the capital required to bring video and broadband services to a currently unserved area.")(emphasis supplied);Resolutions Passed by the Board of Directors, National Association of Regulatory Utility Commissioners (Feb. 16, 2011), p. 17, *available at* http://winter.narucmeetings.org/2011WinterFinalResolutions.pdf.

[22] *See* ACA Petition Comments, at Appendix C. Note that the tables in Appendix C list 36 instances of common ownership and 57 instances of sharing agreements. However, one of the instances (Ft. Smith-Fayetteville-Springdale-Rogers, AR) was erroneously placed in the sharing agreements table instead of the common ownership table. Therefore, there were actually 37 instances of common ownership and 56 instances of sharing agreements.

[23] *See* ACA Petition Comments at n.22.

[24] *See* Broadcaster Associations Reply Comments at 22.

> Within the last 3 years, have you simultaneously negotiated retransmission consent for two separately-owned Big 4 networks, (i.e., ABC, NBC, CBS, or FOX) in the same TV market with a single representative for both broadcasters?

ACA was able to obtain responses for 48 out of the 56 cases.[26] Of these 48 cases, there were reports of retransmission consent negotiations with a single representative for two broadcasters in 36 instances.[37] This data provides further evidence that coordinated negotiation of retransmission consent agreements by separately-owned Big 4 broadcasters in the same DMA is a pervasive problem.

ACA drafted its survey question to ensure that its members could provide objective answers, knowing that its question would fail to include certain types of coordinated negotiations that would lead to higher retransmission consent fees, and should be barred, but could not be objectively determined by its members. For instance, as Professor Rogerson notes (and as discussed more extensively below) coordinated negotiations can occur when there are separate negotiations with separate representatives, but the broadcasters agree with each other privately or otherwise, not to accept a deal unless both of them are satisfied.[38] Instances of this sort of coordination would not have been tallied by ACA's survey question because it only asked about simultaneous negotiations occurring through a single representative for both broadcasters. However, even knowing that its survey results would likely

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[26] Of the eight cases where the ACA was unable to obtain information, there were no ACA members in the DMA for six of the cases (Honolulu, HI; Rochester, NY; Monterey-Salinas, CA; Utica, NY; Grand Junction-Montrose, CO; and Victoria, TX), and none of the ACA members that were contacted provided a response in the other two cases (Joplin, MO-Pittsburg, KS and El Paso, TX).

[37] *See infra*, Appendix B.

[38] Rogerson II at 4.

undercount the actual number of cases of coordinated negotiations, ACA felt it was best to conservatively report only confirmed instances of coordinated negotiations that could be objectively determined by its members.

The updated list may also underreport the actual number of cases of coordinated negotiations because of the conservative methodology used by the ACA to conduct this survey. First, ACA contacted only member companies, and in six instances, ACA did not have any members to query in identified markets. Second, ACA had members to query in two of the markets, but did not receive any response to its inquiry. These eight instances were not included on ACA's list due to the absence of any information; their absence does not conclusively suggest the broadcasters involved in these cases are not engaging in coordinated negotiations. Third, ACA staff only contacted its members in the markets identified in the original 56 instances. ACA did not query its entire membership to determine whether there are additional cases of coordinated negotiations occurring in absence of common control. As a result, the possibility remains that there might be more confirmed cases. While not definitively knowing the full extent that separately-owned broadcasters in the same market are engaging in coordinated negotiations, ACA believes that the 36 confirmed cases are surely a sufficient number to warrant remedial relief in a rulemaking setting.[39]

The Broadcaster Associations, in reply comments filed in response to the Petition

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[39] The Commission adopted proscriptive Open Internet rules on a far smaller showing of actual instances of non-neutral network management practices or other harmful behaviors. *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, ¶¶ 35-36 (2010) ("Open Internet Order") (finding that broadband providers have been determined to have acted to limit openness in a handful of instances and that allegations of such interference have been raised in approximately six other instances).

in this docket, argued that the extent of the negotiating arrangements ACA complains of is "minimal, constituting less than 8% of such possible combinations. . . ."[40] Yet, as Professor Rogerson notes, there is no public policy "de minimus" exception for harms that occur less than 8% of the theoretical maximum number of times they could occur.[41] The harm of these coordinated negotiations is demonstrable and cannot be ignored simply because it is does not occur more frequently.

D. Big 4 broadcasters in the same market can effectively band together to raise retransmission consent fees without entering into legally binding agreements.

Professor Rogerson identifies two types of harmful coordination in his recent report: "legally binding coordination" and "non-legally binding coordination."

> One kind of joint coordination and control would occur if one of the two broadcasters was to give another broadcaster legally binding authority to negotiate retransmission consent agreements on its behalf. I will refer to this practice as "legally binding coordination." Legally binding coordination is most obviously equivalent to common ownership since a single decision-maker clearly has the legal authority to decide whether or not to withhold both signals. I will refer to coordination that is not enforced by a legally binding agreement as "non-legally binding coordination." This would occur, for example, if the two broadcasters each participated in nominally separate negotiations but had agreed in advance to exchange information during the negotiations and to collectively decide whether or not to accept the retransmission consent deals that they were negotiating with any given MVPD. Another example of non-legally binding coordination would be where both broadcasters informally agree that one of them will negotiate on behalf of both of them and their goal will be to maximize their joint profits, but where legal authority is not formally transferred and each broadcaster retains the ultimate legal authority to accept the

[40] Broadcaster Associations Reply Comments at 22.

[41] Rogerson II at 21.

> reject the deal that is negotiated.[42]

As Professor Rogerson explains, a well-accepted principle from antitrust analysis is that even non-legally binding coordination will generally be sufficient to create a significant risk that firms will be able to successfully collude and raise prices.

> That is, giving firms the opportunity to explicitly discuss joint price-setting arrangements with one another and reach non-legally binding agreements to coordinate their behavior is generally thought to create a significant risk that the firms will be able to recognize their collective self interest and keep prices at high levels that maximize joint profits. Thus, antitrust law does not simply make it illegal for competing firms to enter into legally binding arrangements to engage in joint pricing. Rather, even informal non-legally binding arrangements to engage in joint pricing are illegal. This principle applies equally well to the market for programming as for any other market.[43]

From this, Professor Rogerson concludes that "there is a significant risk that separately-owned Big 4 broadcasters in the same market could increase retransmission consent fees by agreeing to collectively negotiate retransmission consent deals without the need for one of the broadcasters to provide the other broadcaster with legally binding authority to negotiate its retransmission consent agreements."[44]

[42] Rogerson II at 11-12.

[43] Rogerson II at 12-13.

[44] The Broadcaster Associations claim that some MVPDs serve relatively large shares of some DMAs and that this likely gives them a relatively large amount of bargaining power in retransmission consent negotiations, such that it would be socially desirable to allow broadcasters in all markets to increase their bargaining power with respect to all MVPDs through coordinated retransmission consent negotiations is flawed. Broadcaster Associations Reply Comments at 18-20. Professor Rogerson offers two reasons why such reasoning should be rejected: (i) even if one were to accept the idea that collusion between sellers should be permitted when they negotiate prices with a large buyer, it would be a "huge leap to conclude that the fact that there are some local markets that have a single large buyer implies that sellers in ALL markets should be allowed to collude in negotiations with ALL buyers;" and (ii) the idea that it would be good public policy to let separately-owned sellers collude in negotiations with a large buyer is itself "highly problematic to say the least," and not widely accepted among competition policy scholars.

Thus, to fully protect consumers from service disruptions and higher prices, the Commission must address both formal and informal coordinated retransmission consent negotiations.

E. The Commission should adopt a *per se* prohibition against explicitly coordinated behavior related to retransmission consent negotiations by separately-owned broadcast stations.

In view of the harms to MVPDs and their subscribers from coordinated negotiation of retransmission consent agreements, the Commission should adopt a *per se* prohibition against a broadcast station engaging in coordinated retransmission consent negotiations with another station not under common ownership. In its NRPM the Commission has proposed a solution which would go only part way to accomplishing this outcome. That is, the Commission has proposed to adopt a rule making it a *per se* violation of a broadcaster's duty to negotiate in good faith to "grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned."[45] The major problem with this proposed rule is that it is too restrictive and does not clearly apply to all forms of coordinated behavior. In particular, while the wording in the NRPM's proposed rule clearly applies to the case where one broadcaster provides another broadcaster with legally binding authority to negotiate retransmission consent agreements on its behalf, it is less clear if it would apply to more informal methods of coordination where broadcasters directly communicate with one another and agree to follow a collective course of action that maximizes their joint profits, but the arrangement

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Rogerson II at 13.

[45] NPRM at App. B.

is not enforced by a legally binding agreement.

For example, it seems much less likely that it would be interpreted as applying to a case where two broadcasters in the same market engage in nominally separate negotiations with a particular MVPD, but agree in advance to accept a deal only if both of them are satisfied and communicate with one another constantly during the negotiations. Even if the broadcasters explicitly told the MVPD that they were communicating with one another and that they would accept a deal only once both of them were satisfied, the fact that each broadcaster retained ultimate authority to make decisions and that the negotiations were nominally separate might well mean that this practice would not be interpreted to be a *per se* violation of the broadcasters' duty to negotiate in good faith given the wording currently used in the NPRM.

In order to prevent separately-owned broadcasters from engaging in coordinated negotiations for retransmission consent, the ACA recommends that the Commission adopt a list of practices that constitute violations of the duty to negotiate in good faith that include the following:

(a) delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately-owned broadcaster in the same DMA;

(b) delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately-owned broadcasters in the same DMA to a common third party;

(c) any informal or formal agreement between separately-owned broadcasters in the same DMA or their representatives that agreement by one of the broadcasters to enter into a retransmission consent agreement with an MVPD would be contingent upon whether the other broadcaster was able to negotiate a satisfactory retransmission consent agreement with the MVPD;

(d) any discussions or exchanges of information between separately-owned broadcasters in the same DMA or their representatives regarding the

> terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

One possible argument against expanding the description of prohibited behavior in this manner might be that broadcasters currently appear to coordinate their negotiations over retransmission consent agreements by delegating negotiation authority to a single representative through sharing agreements and that this practice would likely be interpreted as being covered by the wording currently used in the proposed rule appended to the NRPM.[46] However this argument is flawed for at least two reasons. First, since the terms of sharing agreements are generally not publicly available, it is not clear if the sharing agreements that firms operate under formally delegate legal authority to negotiate retransmission agreements for both broadcasters to a single broadcaster or if this is simply a more casual practice that firms informally agree to follow but where each firm retains the final legal authority to approve its own deal. In the latter case, it is less clear if this practice would be interpreted as being covered by the wording currently used in the NPRM. Second, even if the current

[46] It is important to reiterate that ACA is not opposed to broadcasters entering into mutually beneficial sharing agreements to achieve efficiencies in certain station operations, such as certain marketing and programming functions. For this reason, Broadcaster Associations claim that allowing common ownership of multiple stations in the same DMA can be beneficial is completely irrelevant. *See* Broadcaster Associations Reply Comments at 21 for comments on common ownership and at 22-23 for comments on sharing agreements (stating "such sharing agreements may well be necessary for the stations to survive economically."); Rogerson II at 18-19. As Professor Rogerson explains, the policy change under consideration is one of not allowing separately-owned broadcasters in the same DMA to coordinate negotiation of retransmission consent agreements. Adoption of this policy would not prevent broadcasters from entering into agreements where one broadcaster transfers control over other aspects of operations to the management of another station in the DMA. "The main efficiencies from these sharing agreements are generally thought to be created by combining various marketing and programming functions. This could still occur in completely unchanged fashion. The only difference if the Commission adopted its new rule would be that broadcasters entering into a sharing agreement would each still be required to negotiate their own retransmission consent agreements without engaging in any formal or informal coordination. The cost savings from combining retransmission consent negotiations (which typically only occur every three years) is likely to be insignificant compared to the cost savings from combining marketing or programming functions." *Id.*

wording of the proposed rule was interpreted as covering informal agreements to delegate responsibility for negotiation of retransmission consent agreements for both broadcasters to a single broadcaster, it seems likely that it would nonetheless be interpreted as allowing broadcasters to engage in nominally separate negotiations but agree that neither of them would accept a deal until both were satisfied. As Professor Rogerson has observed, it would be trivially easy for firms to shift to this method of coordination if they were prevented from engaging in their current practice.[47]

F. The Commission has statutory authority to address coordinated negotiations.

Prohibiting, as a *per se* violation of the statutory obligation to negotiate in good faith, two or more separately-owned broadcasters operating in the same market and coordinating their negotiation of retransmission consent agreements, is fully consistent with Section 325 (b)(3)(C)(ii), which dictates that the terms and conditions of a broadcaster's retransmission consent agreements must be "based on competitive marketplace considerations." Allowing separately-owned suppliers to enter into price-fixing arrangements frustrates, not furthers, the operation of competitive markets.[48] The Commission has already determined that "[p]roposals that result from agreements not to compete or fix prices" are presumed inconsistent with competitive marketplace conditions."[49] Taking the next step and effectively prohibiting collective negotiations by

[47] Rogerson II at 5.

[48] Rogerson II at 12-13.

[49] *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues; Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, ¶ 58 (2000) ("SHVIA Implementation Order") ("Conduct that is violative of national policies favoring competition -- that is, for example, intended to gain or sustain a monopoly, is an agreement not

declaring them to be *per se* violations of the good faith negotiating obligation would simply eliminate the ability of broadcasters to act in an anticompetitive fashion, while leaving other efficiencies obtainable through resource pooling intact.[50]

III. THE COMMISSION SHOULD PROHIBIT THIRD-PARTY INTERFERENCE WITH THE EXERCISE OF RETRANSMISSION CONSENT.

The Commission has recognized in the NPRM that several practices involving third-party interference with the exercise of retransmission consent require its immediate attention and remedial action. ACA urges the Commission to move forward expeditiously with these much needed reforms.

The NPRM specifically seeks comment on whether to prohibit two forms of third-party interference with the exercise of retransmission consent: (i) whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision; and (ii) whether a broadcasters' request or requirement, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" ("SV") station violates Section 76.65(b)(10)(vi).[51] ACA's unequivocal answer to these questions is emphatically, <u>yes</u>. However, the Commission must go further, and more generally prohibit a broadcaster from interfering in the right of a cable operator to enter into a retransmission consent deal with a distant broadcast station, where such station's carriage is otherwise permitted. As is demonstrated

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to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard included in the statute.").

[50] *See* Rogerson II at 14; ACA Feb. 16th Ex Parte Letter at 7.

[51] NPRM at ¶¶ 21, 27.

below, prohibiting these practices is fully in accord with the forty-year history of enabling and protecting the right of cable operators and other MVPDs to negotiate carriage of both local and distant signals to best serve the needs of their subscribers.

Accordingly, to the extent the Commission retains its exclusivity rules, ACA strongly advocates prohibition of both network and broadcast station behaviors that interfere with the ability of cable operators to negotiate retransmission consent with distant broadcast stations "in an atmosphere of honesty, purpose and clarity of process."[52] MVPDs should be able to freely negotiate with an out-of-market station where carriage is otherwise permissible under copyright law and does not violate the exclusivity rights of another station. Interference in such negotiations by third parties must be deemed a violation of the good faith rules.

This section will briefly review the interlocking sets of rules and regulations that govern broadcast signal carriage and propose prohibitions on network and station behaviors that violate the good faith negotiation obligation and harm small cable operators and the consumers they serve.

What this history will demonstrate is a forty-year succession of Congressional and Commission rules and policies all supporting the availability for carriage on MVPD systems of distant broadcast station signals, most particularly in rural markets. This public policy supporting carriage of distant signals can be seen throughout the development of the relevant signal carriage rules: broadcast exclusivity, copyright

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[52] SHVIA Implementation Order at ¶ 24. ACA has previously requested that the Commission amend its rules to eliminate broadcast exclusivity when a broadcaster elects retransmission consent and seeks additional consideration for carriage by a small cable company. *See In the matter of Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103 Retransmission Consent, Network* Nonduplication*, and Syndicated Exclusivity*, Petition for Rulemaking of the American Cable Association (filed Mar. 2, 2005) ("ACA 2005 Petition").

compulsory license and, later, retransmission consent and the good faith requirements. Nowhere in this history can evidence be found that retransmission consent was intended to be used as a weapon to permit networks or broadcast stations to curtail distant signal carriage. The time has come for the Commission to unequivocally affirm that third-party interference with the exercise of retransmission consent constitutes a *per se* violation of the obligation to negotiate in good faith.

A. The history of broadcast exclusivity, the compulsory copyright, and retransmission consent reveals that Congress and the Commission intended consumers in certain areas to have access to distant broadcast signals.

The following discussion will illustrate the long-standing recognition by Congress and the Commission of the value of permitting cable operators to offer their customers distant broadcast signals, particularly in areas that lay outside a limited zone of exclusivity protection or where the distant signal is significantly viewed in the operator's locality. This public policy is well embodied in law, as well as in Commission regulations.

The cable industry originated as a means of extending broadcast television service to consumers who could not receive broadcast signals over the air. As it grew, local broadcast stations raised concerns about the competitive impact of cable operators importing duplicative distant network signals on the local station's audience share and advertising revenues. As detailed below, the Commission's initial response was not to prohibit cable operators from carrying distant broadcast signals, but to adopt network nonduplication rules to protect broadcasters from unfair competition from cable systems *within a limited zone*. In the subsequent decade, the Commission put restrictions on the total number of distant signals that could be carried in a market (which were later rescinded) and extended its nonduplication rules to syndicated programming. However, at no time did the Commission adopt rules banning cable operators from carrying distant broadcast stations outside the broadcaster's limited protected zone. Rather, the Commission created exceptions in its regulations permitting carriage of distant broadcast signals within a local broadcaster's zone of exclusivity by designating certain stations as significantly viewed.

Congress built upon this framework the cable compulsory copyright license, which explicitly recognized cable's right to retransmit distant broadcast signals without violating the copyright holders' rights in the programming carried by the signal. The Section 111 compulsory license recognized the public benefit of cable systems, particularly rural cable systems, distributing distant stations to meet the needs of consumers, particularly those who resided in rural areas where the local broadcaster signals were either unavailable over-the-air, or the number of signals available were more limited.

The addition of cable retransmission consent provisions to the Communications Act in 1992 reaffirmed that distant signals have a place in the market by granting broadcast stations the right to obtain compensation from MVPDs for carriage of their signals both in-market and out-of-market.

A brief review of the history of these regulations, together with the cable compulsory license, underscores that Congress and the Commission, through decades of regulation, have intended that cable operators not be limited in carrying distant broadcast signals in local areas that are outside of a local broadcasters' limited zone of exclusivity protection or are significantly viewed.

1. Broadcast exclusivity – protecting local broadcasters from "harmful" cable competition, but only within a limited zone.

The Commission's broadcast exclusivity regulations were enacted to protect in-market local broadcasters, but the extent of protection was also intentionally limited. Outside the protected zones of exclusivity, cable operators are permitted to carry distant broadcast signals and offer them to their customers. A review of the pertinent orders demonstrates that the Commission did not intend to prevent cable operators from being able to offer distant broadcast signals in certain areas and under certain circumstances.

1965 and 1966 – The initial nonduplication regulations.

The Commission first promulgated network nonduplication regulations for microwave-fed cable systems in 1965[53] and then expanded those regulations to all cable systems in 1966.[54] These orders contain detailed discussions of the rationale for limited broadcast exclusivity. Key policy themes articulated in these orders surface repeatedly in subsequent orders and are germane to the changes proposed here.

In adopting the first network nonduplication regulations, the Commission described one overriding policy concern – protecting broadcasters from unfair competition from cable systems. The Commission observed that although cable operators distribute the programs of television broadcast service, cable "stands outside

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[53] *In the Matter of Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave States to Relay Television Signals to Community Antenna Systems;* Docket Nos. 14895 and 15233, First Report and Order, 38 FCC 683 (1965) ("1965 Cable Carriage Order").

[54] *In the Matter of Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters;* Docket Nos. 14895, 15233, and 15971, Second Report and Order, 2 FCC 2d. 725, ¶¶ 19, 46 (1966) ("1966 Cable Carriage Order").

its normal program distribution process and fails to recognize the reasonable exclusivity for which local stations have bargained in the program market when it duplicates local programming via signals of distant stations.[55] The Commission feared that cable systems would use distant signals to block or impede access to local signals as a competitive strategy, thereby hurting the growth of network broadcasting.[56] Therefore, the Commission adopted a set of network nonduplication rules that balanced the interests of cable operators in offering distant signals with that of local broadcasters' interests in not being competitively harmed by the availability of those signals. On this point, the Commission said:

> The new [network nonduplication] rules discussed below are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.[57]

As these statements show, the Commission's answer to this competitive imbalance in cable's favor was not a complete prohibition on cable operators' ability to offer distant broadcast signals, but rather "the creation of a <u>reasonable measure of exclusivity</u>" that gave program suppliers a means of protecting the value of their product and giving stations a means of protecting the value of their investment in programs."[58] The key term is protection for a <u>reasonable</u> measure of exclusivity, not unlimited exclusivity. The Commission didn't extend the exclusivity rules beyond set geographic

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[55] 1966 Cable Carriage Order at ¶ 26 (citing 1965 Cable Carriage Order, ¶¶ 52-56).

[56] *Id.* at ¶ 26 (citing 1965 Cable Carriage Order, ¶ 57).

[57] *Id.* at ¶ 47

[58] *Id.* at ¶ 27.

limits because the threat to broadcasters in these areas would be *de minimis*. Another important policy theme raised in 1966 for permitting cable operators to carrying distant broadcast stations – the disruption and inconvenience to consumers when a cable operator loses access to network programming. For that reason, in 1966, the network nonduplication rules did not apply where a local signal was not carried.

> If nonduplication were afforded where the local station is not carried, the CATV subscriber would, in some instances, be greatly inconvenienced and, much more important, in others be deprived of all opportunity to view the programs involved. This is not the purpose or effect of the rules as written, nor would it serve the public interest.[59]

1972 – Comprehensive signal carriage, network nonduplication and syndicated program exclusivity protections adopted without change in cable's right to carry distant signals.

In the years following the 1966 *Cable Carriage Order*, questions remained about the appropriate regulatory framework for cable services and the mechanism by which copyright holders of the programming that aired over the broadcast stations would be compensated by cable operators.[60] These matters were argued before the Commission, the courts,[61] and Congress for the next six years until the Commission adopted a set of comprehensive and highly complex broadcast signal carriage rules for

[59] *Id.* at ¶ 64 (citations omitted).

[60] *See* 2008 SHVERA Report at 2-6. As the report observes, once the Supreme Court made it clear that cable was exempt from liability under the Copyright Act of 1909, and Congress was unable to pass new copyright legislation, the Commission took it upon itself to exercise regulatory jurisdiction to protect broadcast localism and the local programming market. *Id.* at 5.

[61] *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (cable systems could retransmit local television stations signals without incurring any copyright liability for the copyrighted programs carried on those signals); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.,* 415 U.S. 394 (1974) (cable systems could retransmit distant television station signals without incurring any copyright liability for the copyrighted programs carried on those signals).

distant and local signals that formed the foundation of cable regulation throughout the 1970s and 80s.[62] These rules were the result of a "consensus agreement" reflecting the efforts of the principal industries to reach agreement on the major issues.[63]

In its order, the Commission reaffirmed its regulatory posture that it is in the public interest for cable operators to continue to be permitted to carry distant broadcast stations. The Commission granted cable operators the right to carry a set number of distant signals in each market segment on the basis of its estimation of the ability of broadcasters in each segment to withstand additional distant signal competition. At the same time, the rules expanded exclusivity protection to non-network "syndicated" programming. Moreover, it recognized the importance of not removing distant signals that were currently available to consumers to void viewer disruption, within certain limitations.

In addition to clarifying the rights of cable operators to carry distant broadcast signals, the Commission also established classes of distant signals that would be treated as "local" for must carry and exclusivity purposes further protecting their continued carriage: (i) the signals of stations within 35 miles of the cable systems; (ii) otherwise distant signals meeting a "significant viewing" test; (iii) market signals in hyphenated markets; and (iv) in some cases Grade B signals.[64] Cable operators could continue to carry significantly-viewed distant signals in a local station's market in recognition of the fact that such signals were effectively "local," could be received over-

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[62] *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972) ("1972 Cable Order").

[63] 1972 Cable Order at ¶ 61 & Appendix C.

[64] *Id.* at ¶ 81.

the-air in the community, and in view of the adverse impact deletion would have on local viewers.[65]

Similarly, a special provision was made for overlapping market signals to balance the legitimate needs of the cable industry and the programming investments of local stations:

> Cable development is not likely to be advanced if television choices on the cable are more limited than choice over the air, nor is it reasonable that signals significantly viewed over the air be excluded from carriage on cable systems. Thus our rule permits, and on appropriate request, requires carriage of a signal from one major market into another if that signal – without regard to distance or contour – has a significant over-the-air audience in the cable system's community.[66]

The Commission extended this protection to overlaps between major and smaller markets so that cable systems were permitted to carry the signal from a major market as a local signal in cases where the system's community was wholly or partially within 35 miles of that market or if the signal in question is significantly viewed in the cable system community; in other words, there was no restriction on carriage of Grade B signals or those significantly viewed from one smaller market into another was imposed.[67] The Commission specifically held that significantly-viewed signals should be treated as "local," adding:

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[65] *In the Matter of Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Systems*, Memorandum Opinion and Order, 67 F.C.C.2d 1303, 1305 (1978) ("Network Program Exclusivity Protection Order") ("The issue here is one of balancing. On one side is concern that a station be available in full on the cable where it is available that way off-the-air. On the other side is the traditional concern about economic impact to local broadcasting.").

[66] 1972 Cable Order at ¶ 83.

[67] *Id.* at ¶ 83.

> This approach strikes an appropriate balance – in 1965 we selected the Grade B contour, and in 1968 the 35-mile zone, neither of which was specifically geared to actual viewing, while we now select a precise standard that is much more likely to reflect such viewing.[68]

One month after its 1972 Cable Order, the Commission on reconsideration, strengthened this holding by amending its rules to provide that significantly viewed stations need not be deleted pursuant to the network nonduplication rules:

> When a station is significantly viewed, we shall give it full local status for purposes of cable carriage.[69]

It is noteworthy that, throughout the numerous proceedings seeking to adjust the delicate balance between the competing goals of preserving local broadcasters' economic viability and the ability of cable operators to provide adequate service to subscribers, the Commission steadfastly has maintained the principle that cable subscribers are entitled to receive all of the broadcast signals that can be received over the air in their local communities.[70]

Once the Commission had established a workable set of distant signal regulations that permitted cable carriage of all broadcast signals while protecting, up to the established geographic limits, exclusivity rights in both network and non-network

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[68] *Id.* at ¶ 85.

[69] Network Program Exclusivity Protection Order at 1305.

[70] *See id.* at 1304 ("Since the nonduplication rules were first devised in 1965, the Commission has exhibited some concern about deleting programs on stations which viewers could receive over the air."); *In the Matter of Teleprompter of Quincy*, Memorandum Opinion and Order, 83 F.C.C. 2d 431, 438 (1980) ("Teleprompter of Quincy") ("…these [*network* nonduplication] rules were designed to reproduce in cable households the same ability to view network programming that noncable subscribers in the same locality have, and thereby avoid imposing a on local stations a competitive disadvantage of <u>distant</u> network stations <u>not available locally</u>.")(emphasis supplied); *In the Matter of Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 17278, 17281, (2005).

programming purchased by broadcast stations, the ground was set for a compromise that led to the enactment of the cable compulsory license.[71] Together, these rules would permit cable operators to offer distant signals that are significantly viewed in the operator's community and to carry distant broadcast station signals in areas where the local station's signal generally did not reach.

2. Compulsory license created to permit cable carriage of distant and local broadcast signals while compensating copyright holders for public performance of their works.

By the mid-1970s, in accordance with the regulations prescribed by the Commission, cable operators typically carried multiple broadcast signals containing programming owned by dozens of copyright owners. Congress recognized that it was not realistic for hundreds of relatively small cable operators to negotiate individual licenses with dozens of copyright owners, thus requiring a practical mechanism for clearing rights. With the Copyright Act of 1976, Congress created the Section 111 license, which permits a cable operator to retransmit both local and distant radio and television signals to its subscribers who pay a fee for such service.

One of the purposes of Section 111 is to permit cable systems to carry distant broadcast signals while compensating copyright owners for the public performance of their works, without incurring the transaction costs associated with marketplace negotiations for the carriage of copyrighted programs. Section 111 allows cable

[71] The Commission explicitly recognized that adoption of the consensus agreement would serve the public interest in three ways: (i) it would facilitate passage of cable copyright legislation, as it was essential that "cable be brought within the television programming distribution market;" (ii) passage of copyright legislation would in turn ease an uncertainty that had been hindering cable's ability to attract the capital investment needed for substantial growth; and (iii) "the enactment of cable copyright legislation by Congress – with the Commission's program before it – would in effect reaffirm the Commission's jurisdiction to carry out that program, including such important feature as access to television facilities." 1972 Cable Order at ¶ 65.

operators to complement the carriage of local broadcast signals with distant signal programming. Congress enacted Section 111 after years of industry input and <u>in light of (i) Commission regulations that inextricably linked the cable and broadcast industries and (2) the need to preserve the nationwide system of local broadcasting</u>.[72] In accordance with the Commission's treatment of significantly-viewed signals as "local" for carriage purposes, copyright law treats significantly-viewed signals as "local" for copyright purposes.[73]

Thus, both Congress and the Commission clearly intended for cable operators to be able to deliver broadcast signals both within other broadcasters' zone of exclusivity in certain circumstances and in other regions where such carriage would not violate the exclusivity rights of any station by facilitating the clearing of copyright for these stations in a similar manner as local stations.

3. Retransmission consent – reaffirming the right to carry local ***and*** distant broadcast stations.

Congress established statutory broadcast signal carriage rules, including the requirement that cable operators obtain retransmission consent from broadcasters seeking compensation for carriage of their signals in the Cable Competition and Consumer Protection Act of 1992.[74] In enacting Section 325(b), Congress intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals. .

[72] Copyright Office 2008 SHVERA Report at i, 3 (emphasis supplied).

[73] 17 U.S.C. §111(a), (c) and (f).

[74] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

. ."[75] As this statement and the statute make clear, Congress did not intend to limit the scope of retransmission consent to in-market negotiations. The express language of Section 325(b) applies to all commercial broadcast stations – local and distant alike.[76]

Congress subsequently amended Section 325 with the Satellite Home Viewer Improvement Act of 1999 to establish an obligation for broadcasters to negotiate retransmission consent in good faith.[77] With the Satellite Home Viewer Extension and Reauthorization Act of 2004 ("SHVERA"), Congress imposed a reciprocal good faith retransmission consent bargaining obligation on MVPDs.[78] Again, the statutory language is clear: Congress made no distinction under the good faith obligation for retransmission consent negotiations involving in-market as opposed to distant signals. In other areas of the law, Congress readily distinguishes between carriage of local and distant stations.[79] It did not do so for retransmission consent on cable systems. Accordingly, the requirement that a broadcaster negotiate in good faith applies to all negotiations, both in-market and out-of-market.

For a decade or so following enactment of the retransmission consent rules, the market responded, and in accordance with the rules and subsequent regulations prescribed by the Commission, cable operators, operating in rural areas where local

[75] Senate Committee on Commerce, Science, and Transportation, S.Rep. No. 92, 102d Cong., 1st Sess. (1991) at 36.

[76] 47 U.S.C. § 325(b) (2004) *amended by* PL 108-447 § 201, 118 Stat 2809, December 8, 2004.

[77] Satellite Home Viewer Improvement Act of 1999, P.L. 106-113, Div. B, § 1000(a)(9), § 1009, 113 Stat. 1536, 1501A-521 (Nov. 29, 1999) ("SHVIA").

[78] The Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat. 2809, 3393 (2004).

[79] 17 U.S.C. § 111 (cable compulsory copyright license); 17 U.S.C. § 119 (DBS compulsory copyright license).

broadcasters could not invoke exclusivity rights were able to negotiate and enter into retransmission consent agreements with broadcasters for out-of-market carriage with relatively little friction.

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As the foregoing illustrates, nearly all of the broadcast exclusivity, signal carriage and retransmission consent rules were developed with the aim of protecting broadcasters, up to the limits established by Congress and the Commission. The history of the distant signal carriage rules reflects the Commission's recognition of the value to viewers of receipt of distant signals through their MVPD subscription service. Accordingly, the Commission's exclusivity rules do not preclude carriage of distant signals, but rather permit it where provided that the cable community unit is (i) outside the local market station's protected zone of exclusivity,[80] or (ii) is within the zone but the station is either significantly viewed[81] or the cable community unit falls within the Grade B contour of the station[82]; or where the programs carried would not duplicate the programming of a local station with exclusivity rights.[83]

Today, rules and regulations enacted in 1992 to protect broadcasters from the cable industry are distorting the marketplace – one that is vastly different from what existed two decades ago. As a result, we are seeing broadcast networks and in-market broadcasters engaging in behaviors that are intended to interfere with the rights of

[80] 47 C.F.R. § 76.92(a); 47 C.F.R. § 76.101.

[81] 47 C.F.R. § 76.92(f); 47 C.F.R. § 76.106(a).

[82] 47 C.F.R. § 76.106(a).

[83] 47 C.F.R. § 76.92(a); 47 C.F.R. § 76.101.

MVPDs to carry distant signals under existing rules, by prohibiting out-of-market broadcasters from entering into retransmission consent agreements, where such carriage would otherwise be permitted. Behavior by broadcast networks and local stations today undermines well established public policies set by the Congress and the Commission regarding the rights of cable operators to carry distant broadcast signals. Therefore, the Commission's good faith regulations should be clarified and augmented to specifically prohibit this sort of behavior.

B. The government's public policy of allowing consumers to receive distant broadcast signals from cable operators in certain areas has benefited consumers residing in these areas.

As discussed above, Congress and the Commission have recognized the value of distant signal carriage in both copyright and communications rules and regulations as a means to meet the needs of pay-television subscribers, particularly those who reside in rural areas where the local broadcasters' signals were unavailable over-the-air or the number of options were more limited. Congress also explicitly recognized the benefit of distant signals carried to cable systems, particularly smaller operators in rural areas, when it stated that distant non-network programming by cable systems is "of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues."[84] Government policies put in place to protect distant signal carriage have resulted in tangible public interest benefits to residents of smaller and rural markets.

Just as in the 1960s and 70s, consumers continue to benefit from the receipt of distant signals today. As NCTA observed in comments recently filed with the Copyright

[84] H.R. Rep. 94-1476, at 90 (1976).

Office, larger cable systems retransmit on average between two and three distant signals.[85] Similarly precise data for smaller cable operators is not available, but smaller operators typically carry a greater number of distant signals than large cable systems because small operators often serve rural areas where there is a greater need to carry distant network signals given that in-market broadcast stations are not available over-the-air.

For MVPDs, the rationale behind carrying a distant signal applies with the same force today as it did for cable operators more than four decades ago, especially with respect to rural systems located well outside of urban areas, many of which are beyond the over-the-air service areas of in-market broadcast stations. As discussed in the Rural MVPD Group's Section 302 Report Reply Comments, for copyright purposes, determining local/distant status rests in large part on where an MVPD system falls within a DMA, essentially a group of counties determined by Nielsen Media Research based on estimates of what constitutes a broadcast market.[86] Whereas under Commission rules, "local" is defined as within the 35/55 mile radius of the local broadcast station, most smaller rural MVPDs, however, would deem a signal local or distant based on other, more important criteria— whether the signal offers its customers

[85] *In the matter of Section 302 Report to Congress*, Comments of the National Cable and Telecommunications Association, Docket No. RM-2010-10, at 5 (filed Apr. 25, 2011) (The Copyright Office's Section 302 Report is in response to Congress's direction for the Copyright Office to prepare a report addressing possible mechanisms, methods, and recommendations for phasing out the statutory licensing requirements under Sections 111, 119 and 122 of the Copyright Act); *see also In the matter of Section 302 Report to Congress*, Comments of the Rural MVPD Group, Docket No. RM-2010-10, (filed Apr. 25, 2011); *In the matter of Section 302 Report to Congress*, Reply Comments of the Rural MVPD Group, Docket No. RM-2010-10, at 28 (filed May 25, 2011) (The Rural MVPD Group includes: ACA, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance) ("Rural MVPD Group Reply Comments").

[86] Rural MVPD Group Reply Comments at 10.

relevant news and weather, or whether it is cost effective for the MVPD to transport the signal to its customers. These determinations do not always comport with regulatory boundaries, but they are of vital importance to operators attempting to satisfy customer needs within the communities they serve.[87]

As the Rural MVPD Group also noted, in some cases involving rural MVPD systems the "local" stations are actually located out-of-state, requiring the MVPD system to bring in "distant" in-state stations to provide their customers in-state news, sports, and political coverage. The customers of rural MVPDs value receiving these stations, particularly during the political campaign season when "local" out-of-state broadcasts do not cover relevant in-state campaigns.[88]

Similarly, in many larger DMAs, which could extend 150 – 250 miles beyond the metropolitan area, consumers in the far reaches of the market may not receive vital weather advisories or warnings in a timely manner if carriage of "distant" signals is inhibited. For example, in larger markets where the weather typically crosses from west to east, consumers that live 55 or more miles west of a "local" metropolitan area have far less time, if any, to react to a broadcaster's report that a dangerous storm is approaching. By the time a meteorologist for the "local" broadcast station reports a severe storm has formed and is approaching the broadcast station's city of license, a consumer living far west of the city is already experiencing the weather event. Making a geographically closer metropolitan area's "distant" signal available to the customer

[87] *Id.* at 10-11.

[88] *Id.*

permits a rural MVPD to serve its community better.[89]

If rural MVPDs are unable to offer distant signals due to third-party interference, the cost of providing broadcast signals to customers in certain areas may increase, likely resulting in higher retail prices. It is common industry practice for an MVPD that elects retransmission consent to incur the cost of receiving the broadcaster's signal. The cost is relatively insignificant for urban and suburban MVPDs that receive the local broadcaster's signal off-air using an antenna. But the cost is significant for rural MVPDs that operate outside of the local broadcaster's signal contour. Rural MVPDs must incur transport costs to receive the signals via satellite, microwave, or fiber, which can range up to $0.50 per subscriber per signal per month and more in cases of minimum charge requirements. In some of the largest DMAs, lower cost options exist through carriage of "distant" signals. In these DMAs, where rural systems serve the outskirts, the sources of "distant" stations are often closer than the sources of "local" stations, providing an opportunity to lower or eliminate transport costs. A lower priced distant signal is beneficial to rural MVPDs who may be able to pass along those savings to customers.[90]

The foregoing demonstrates the benefits that have accrued to rural residents under longstanding public policies supporting distant signal carriage in certain circumstances by MVPDs, particularly small and rural companies. Third-party practices that interfere with the ability of small and rural MVPDs to provide adequate and affordable service to their communities via carriage of "distant" signals unequivocally should be deemed against public policy and prohibited by the Commission under the

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[89] *Id.* at 11.

[90] *Id.* at 11-12.

good faith rules.

C. The Commission should prohibit broadcast stations from granting any third party a say over its right to exercise retransmission consent and should prohibit broadcast stations from conditioning retransmission consent on an MVPD's agreement not to carry distant stations.

The NPRM recognizes the harm of third party interference with retransmission consent negotiations and seeks comment on two aspects of this problem. First, the NPRM asks whether it should be a *per se* good faith violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision.[91] A proposed rule change explicitly prohibiting this conduct is included in Appendix B of the NPRM.[92] ACA submits that the Commission must prohibit stations from granting any third party a say over its right to exercise retransmission consent. By clarifying that the good faith rules bar such behavior, the Commission would reaffirm its long-standing policy of permitting cable carriage of distant broadcast service in certain areas of the country, and would adequately protect rural consumers where carriage of distant signals is not prohibited by regulations, and alternatives to the local station are available.

The NPRM also seeks comment on whether a broadcast station's request or requirement, as a condition of granting retransmission consent, that an MVPD not carry

[91] NPRM at ¶ 22. The NPRM cites several examples in the comments filed in support of the Petition describing how a network's exercise of its contractual approval right has hindered the progress of the negotiations. *Id.* n.69.

[92] *Id.*, at Appendix B (adding to the list of objective *per se* violations of the good faith obligation, "Agreement by a broadcast television station Negotiating Entity to provide a network with which it is affiliated the right to approve the station's retransmission consent agreement with an MVPD.").

an out-of-market significantly viewed station violates the good faith obligation.[93] Specifically, the NPRM asks whether the Commission should interpret its current prohibition against execution of an agreement not to enter into retransmission consent agreement with any other station or MVPD in Section 76.65(b)(1)(vi) more expansively to preclude a broadcast station from executing an agreement prohibiting an MVPD from carrying an out-of-market significantly viewed station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, in the event of retransmission consent impasse.[94] Finally, the NPRM asks whether stations have threatened to delay or refuse to reach a retransmission consent agreement unless the MVPD commits to forgo carriage of out-of-market significantly viewed stations without including such commitment in the executed agreement; whether such threats circumvent the rule as written by keeping the commitment out of the executed document; and whether the Commission should revise the rule to prevent such circumvention.[95] The answer to all of these questions is emphatically: <u>yes</u>, the Commission should prohibit local stations from not only interfering in cable operators rights to carry significantly viewed stations. However, it must go further. The Commission must bar local stations from interfering in cable operators' rights to carry any distant broadcast signals in areas where such carriage would not otherwise violate any existing limitation set forth in the exclusivity rules.

Simply put, both behaviors, herein termed "third-party interference," should be

[93] *Id.* at ¶ 27.

[94] NPRM at ¶ 27.

[95] *Id.*

prohibited as *per se* violations of the obligation to negotiate retransmission consent in good faith. A broadcast station's assigning the right to strike a deal with an MVPD to either its affiliated network or requiring, as a condition of the grant of retransmission consent, that an MVPD refrain from carrying any other station is fundamentally inconsistent with the forty year history of broadcast carriage regulation, and more specifically, as discussed below, with the statutory obligation of a station to negotiate retransmission consent for <u>all</u> signals in good faith. Each form of behavior threatens to unfairly deprive MVPD customers of the ability to receive broadcast signals where carriage is not only otherwise permissible under the Commission's exclusivity rules, but expressly authorized by the copyright statutory license. Each form of behavior also increases the harm to consumers from temporary and permanent service disruptions resulting from retransmission consent negotiation impasses by foreclosing alternative sources of programming that would otherwise be available.

The following discussion will address how the Commission may achieve these goals, either through adoption of its proposed additions and others to the list of objective good faith violations, or by re-interpreting the scope of its existing prohibitions on third-party interference to cover a broader set of behaviors.

D. The Commission must protect distant signal carriage by prohibiting third-party interference with the exercise of retransmission consent under its good faith rules.

The Commission's good faith rules already address, in limited fashion, third-party interference with a station's exercise of retransmission consent.[96] The NPRM

[96] 47 CFR §§ 76.67(b)(1)(i), (vi).

recognizes the need to adjust its rules to ensure smoother negotiations and protect consumers from service disruptions.[97]

1. The Commission has previously addressed third-party interference in its good faith rules.

The issue of third-party interference is touched on already in two of the Commission's current objective good faith violation standards – the prohibition on agreements preventing a broadcaster from granting retransmission consent and the prohibition on refusing to negotiate retransmission consent.[98] These standards were introduced by the Commission when it first established the good faith negotiation regulations in the *SHVIA Implementation Order*.[99] A review of key points from the order shows how the current ways that networks and local stations interfere with the carriage of distant signals by cable operators squarely conflict with the letter and spirit of these regulations.

In implementing Section 325(b)(3)(C), the Commission established seven objective standards, and a subjective "totality of the circumstances" test.[100] In adopting the objective standards, the Commission intended to provide "<u>concise, clear</u>" standards where the proscribed conduct would "<u>constitute a violation of the good faith standard in</u>

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[97] NPRM at ¶¶ 22, 27.

[98] 47 CFR § 76.65(b)(1)(i), (vi) ("The following actions or practices violate a broadcast television station's or multichannel video programming distributor's (the "Negotiating Entity") duty to negotiate retransmission consent agreements in good faith: (i) Refusal by a Negotiating Entity to negotiate retransmission consent; . . . (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor . . . .").

[99] *See* SHVIA Implementation Order.

[100] 47 C.F.R. § 76.65(b)(1), (2).

all possible instances."[101] Put another way, the Commission did not intend the standards to govern negotiations for carriage on one side of a DMA boundary and not the other. In saying "all possible instances," it meant negotiations involving both in-market and out-of-market carriage. This interpretation is fully consistent with the inextricably intertwined "thicket" of rules undergirding broadcast signal carriage regulation.[102] That is, cable MVPDs are not restricted from entering into retransmission consent agreements to carry distant broadcast stations under certain circumstances, and therefore, the Commission must take this into account when determining what conduct should be deemed in violation of the good faith negotiating obligation.

The *SHVIA Implementation Order* discussed whether extrinsic evidence of an understanding with a third party that the negotiating party will not enter into a retransmission consent agreement should also evidence violations of the good faith negotiation requirement."[103] The *SHVIA Implementation Order* appears to address this conduct without equivocation:

> [A] broadcaster is prohibited from entering into an agreement with any party a condition of which is to deny retransmission consent to any MVPD. It is impossible for a broadcaster to engage in good faith negotiation with an MVPD regarding retransmission consent when it has a contractual obligation not to reach an agreement with that MVPD.[104]

[101] SHVIA Implementation Order, at ¶ 31 (emphasis added).

[102] *See* Satellite Home Viewer Extension and Reauthorization Act Section 109 Report, U.S. Copyright Office, at vi & 65 (June 2008).

[103] *Id*. (emphasis added).

[104] SHVIA Implementation Order, ¶ 45 (emphasis added). Although the example given by the Commission involves a situation in which "Broadcaster A is prohibited from agreeing with MVPD B that it will not reach retransmission consent with MVPD C," there is no statutory constraint, nor policy reason, suggesting that the prohibition on agreements condition on the denial of retransmission consent to any MVPD should be construed in such a narrow manner.

A contractual provision that prohibits affiliates from granting retransmission consent to cable operators outside a station's DMA, even if the signal can be received over-the-air, is exactly the type of third party understanding that should be found to violate the good faith standards. As a result of these illegitimate affiliate agreement provisions, broadcasters refuse to negotiate with cable operators for out-of-market carriage, violating another fundamental objective standard of good faith negotiation. On its face, nothing in the Commission's current regulation should exempt application of this standard to network-affiliate agreements that bar broadcast stations from granting carriage out of its market. Nowhere do the regulations contain an "out-of-DMA" exception to the good faith obligation that would single that network-affiliate terms that limit a broadcasters' right to grant distant carriage less objectionable.

After passage of *SHVERA*'s reciprocal good faith obligation, the Commission found it expeditious to simply extend its existing good faith bargaining rules to MVPDs, while explicitly recognizing that the reciprocal bargaining obligation applies to retransmission consent negotiations between <u>all</u> broadcasters and MVPDs <u>regardless of the DMA in which they are located</u>.[105]

In its *SHVERA Implementation Order*, the Commission confirmed that there is "no statutory or regulatory distinction between in-market carriage and out-of-market carriage pursuant to retransmission consent."[106] Nonetheless, the Commission

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[105] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, ¶ 1 (2005) ("SHVERA Implementation Order").

[106] SHVERA Implementation Order at ¶ 27.

paradoxically emphasized that "although the reciprocal bargaining obligation applies without geographic limitation, that does not mean it will apply exactly the same way in all negotiations."[107] Instead, the Commission determined that it would account for the distinction between in-market and out-of-market signals under the "totality of the circumstances test, and apply a contextual analysis to its determination of what constitutes a breach of the duty of good faith, rather than set a *per se* standard.[108]

The Commission found that although, as with all retransmission consent negotiations, the *per se* negotiating standards set forth in Section 76.65 will still apply, "a different calculus in evaluating [good faith negotiating] complaints involving cable operators and distant signals" will be employed. In this different calculus, "<u>distance will play a critical factor</u> in determining whether a party complied with its reciprocal bargaining obligation," and "the main difference in these distant reciprocal bargaining negotiations should lie in either party's ability, after evaluating the prospect of distant signal carriage and giving full consideration to the proposals of the party requesting carriage, to reject the proposal and terminate further negotiation."[109] The Commission's intent was to avoid engaging distant entities in protracted good faith negotiation "for signals that <u>have no logical or local relation</u> to the MVPD's service area."[110]

The obverse, of course, is true for adjacent out-of-market network signals that <u>do have</u> a logical or local relation to the MVPD's service area, and are either significantly

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[107] *Id.* at ¶ 29.

[108] *Id.*

[109] *Id.* at ¶ 31.

[110] *Id.*

viewed, can be received off-air, or carry programming of particular interest to adjacent-market viewers: no different calculus should apply under the good faith standard. For example, it is unlikely that the Commission would permit broadcast networks to impose a provision in its affiliation agreement that would forbid a station from making its signal available to operators in its local market whose subscribers resides *more* than 60 miles away from the station's main tower. No different treatment should be accorded to a network's imposition of a provision in its affiliation agreement that would prohibit a station from making its signal available to operators out of its market whose subscribers, ironically, could reside *less* than 60 miles away from the main tower of the station. Nothing in the statute or the Commission's rules can be read to suggest that while such restrictions would not be permissible in-market, they become permissible once the station is across the DMA line.

Although the Commission has previously declined to address this behavior through its reciprocal good faith regulations, there is no statutory or public policy justification for failing to adopt the prohibition on a broadcaster agreeing to provide a network with which it is affiliated the right to approve the station's retransmission consent agreement with an MVPD proposed in the NPRM.[111] In the *SHVERA*

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[111] The *SHVERA Implementation Order* declined to add as an additional *per se* violation of a broadcaster's reciprocal bargaining obligation a contractual provision, such as one contained in a network affiliation agreement, that restricts a broadcaster's ability to negotiate retransmission consent in good faith outside of a specified geographic area, often the broadcaster's DMA. SHVERA Implementation Order at ¶ 34. Rather than address the obvious conflict between such arrangements and a station's obligation to negotiate in good faith in the *SHVERA Implementation Order*, the Commission stated that the issue was more squarely raised in the 2005 Petition for Rulemaking filed by ACA, now incorporated into the record in this proceeding. SHVERA Implementation Order at ¶ 33, n.107. *See* ACA 2005 Petition. The NPRM incorporates this Petition and the comments filed in response thereto into this proceeding. NPRM at ¶ 43, n.130. In view of the lack of language prohibiting Commission limitation on the ability of networks to restrict the ability of local stations to grant retransmission consent where the station and an out-of-market MVPD find carriage of mutual benefit, the Commission is fully empowered to intercede to protect the

Implementation Order, the Commission's reasoned that the Section 76.65(b)(1)(vi) prohibition would remain aimed solely at collusion between a broadcaster and an MVPD requiring non-carriage by another MVPD in view of the lack of evidence that Congress intended the good faith rules to extend to a network affiliation agreement that limits redistribution of network programming.[112] It is worth noting that although the Commission did not find evidence that Congress, through the good faith and reciprocal bargaining obligations, intended to restrict the rights of networks and their affiliates to agree to limit an affiliate's right to redistribute affiliated programming, neither did it find that either *SHVIA* or *SHVERA* prohibited the agency from restricting the rights of networks and their affiliates to limit the ability of affiliated stations to grant retransmission consent.[113]

The *SHVERA Implementation Order* went no further than to recognize the tension between an interpretation of Section 76.65(b)(1)(vi) that permits contractual preclusion of a broadcaster's ability to grant out-of-market retransmission consent and the Commission's recognition of the broadcaster's reciprocal bargaining obligation with regard to all MVPDs – in-market as well as out-of-market. The Commission's answer was to create a non-enforceable halfway measure:

> We believe that it is incumbent on broadcasters subject to such contractual limitation that have been engaged by an out-of-market MVPD to negotiate retransmission consent of its signal by a distant MVPD to at least inquire with its network whether the network would waive the limitation with regard to the MVPD in question. <u>We believe that in many</u>

interests of consumers in receiving distant signals.

[112] SHVERA Implementation Order at ¶ 34.

[113] *Id.* at ¶ 33.

> situations retransmission of the broadcaster's signal by a distant MVPD would be deemed advantageous to the network as well as the broadcaster and MVPD. In such situations, we believe that a network that has otherwise restricted a broadcaster's redistribution rights might be amenable to a limited waiver of the restriction.[114]

Although the Commission may have believed that the good faith obligation would impel broadcasters to seek waiver of affiliate agreement limitations on their ability to enter into mutually beneficial retransmission consent agreements with adjacent-market cable operators, many small operators find themselves and their subscribers precluded from access to such distant signals. Five years later the problem has not gone away, and in fact, based on reports from ACA members it has gotten worse. This may be related to the fact that the leverage networks have over their affiliates has significantly increased since the FCC adopted this half-way measure.[115] As a result, broadcast affiliates today have far less bargaining power to resist the inclusion of these prohibitions on out-of-market distribution when demanded by the networks, and less influence to obtain a waiver, leaving smaller rural MVPDs unable to strike mutually

[114] *Id.* at ¶ 35.

[115] *See e.g.*, Reply Comments of the Rural MVPD Group at 9 ("Moreover, it is widely reported that the Big 4 networks (ABC, CBS, Fox, and NBC) now demand affiliate stations pay them a "cut" of retransmission consent fees as compensation for their content."); *see id.* n. 26 (citing P.J. Bednarski, *Fox Gives No Ground on Retrans Sharing*, TVNewsCheck.com (Apr. 12, 2011), *available at* www.tvnewscheck.com/article/2011/04/12/50547/fox-gives-no-ground-on-retranssharing (last visited May 27, 2011); Linda Moss, *ABC Seeks Half of Affiliates' Retrans Take*, TVNewsCheck.com (Jan. 6, 2010), *available at* www.tvnewscheck.com/article/2010/01/06/38666/abc-seeks-half-of-affiliates-retrans-take/page/1 (last visited May 27, 2011); *CBS Wants Affils to Pony Upfor Programs, Exec Session with Diana Wilkin*, TVNewsCheck.com, (Feb. 23, 2010), *available at* www.tvnewscheck.com/article/2010/02/23/40075/cbs-wants-affils-to-pony-up-for-programs (last visited May 27, 2011); Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, Broadcasting & Cable, (May 27, 2011), *available at* www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php (last visited May 27, 2011)).

advantageous agreements with out-of-market broadcasters.[116]

The time has come for the Commission to now abandon its non-enforceable halfway measure, and replace it with a series of *per se* rules that would ban third-party interference in cable operators' exercise of retransmission consent with broadcasters for the purpose of distant signal carriage where such carriage is otherwise permitted.

2. The Commission should flatly prohibit network interference with a station's exercise of retransmission.

ACA submits that the Commission can address the problem of network-affiliate agreements that have the effect of limiting the ability of broadcast stations to negotiate retransmission consent in good faith by either adopting its proposed *per se* rule prohibiting such agreements, or by revising or re-interpreting the scope of the prohibition in Section 76.65(b)(vi) on agreements preventing a broadcaster from entering into a retransmission consent agreement with an MVPD, or by doing both.

In turning broadcast signal carriage over to marketplace negotiations, Congress intended to foster marketplace negotiations for broadcast signals without qualification that such negotiations must be limited to in-market carriage. Absent express language

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[116] The Commission's faith that existing exemptions for the smallest MVPDs offers sufficient relief, reflected in its 2005 SHVERA Report, is misplaced. *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC LEXIS 4976 (2005) ("2005 SHVERA Report"). Although the Commission stated in its report that it would not limit the application of its network nonduplication rules in cases where a broadcaster elects to exercise retransmission consent, it indicated a belief that the "exclusivity rules already contained certain exceptions that should ameliorate rural cable operators' need for relief," pointing to the significantly viewed signals exemption from network nonduplication. 2005 SHVERA Report at ¶ 49. The Commission also observed that the exemption from the rules for small systems serving fewer than 1,000 subscribers should cover half of ACA member companies. *Id.* That may be true, but it leaves the other half without any protections from network affiliate behaviors intended solely to extract maximum retransmission consent fees by eliminating any possibility of an actual marketplace negotiation for the programming. Sadly, for many ACA members, this has not been the case in practice. Moreover, the fact that roughly half of ACA member companies are exempt from the exclusivity provisions does not relieve the Commission of the obligation to ensure that the other half are able to freely negotiation retransmission consent agreements without being subject to network or station manipulation of the rules.

otherwise, the rule clearly reads that Congress intended for negotiations to include out-of-market carriage, and delivery of these signals be permitted in the regions that are not restricted pursuant to other rules and regulations, such as the exclusivity rules. When networks interfere with negotiations between a broadcaster and cable operator for out-of-market carriage, thereby limiting the rights of broadcasters to enter into a deal with a cable operator to make their signal available, the networks are, in fact, impeding in the proper operation of the marketplace as intended by Congress.

Moreover, the Commission's use of a "different calculus" in the *SHVERA Implementation Order* to determine whether the good faith obligation has been violated in distant signal carriage negotiations has not proven workable for smaller and rural MVPDs. That half-way measure has proved meaningless to protect the interests of out-of-market MVPD subscribers in receipt of broadcast stations that they have either grown accustomed to receiving or would value receiving. <u>Simply put, the good faith obligation in Section 325(b) should be interpreted to unequivocally prohibit providing network-affiliated broadcast stations monopoly status in their entire market through network affiliation agreements</u>. Experience has shown that such affiliation restrictions cannot co-exist with a broadcaster's statutory duty to negotiate retransmission consent in good faith, and are inconsistent with longstanding federal policies that distant signals be available for carriage on MVPD systems under certain circumstances. In areas where such distant signal carriage would not violate the programming exclusivity rights of an in-market station in the MVPD's service area, networks should not be permitted to interfere with the exercise of retransmission consent by the out-of-market station.

ACA members have experienced numerous instances where an adjacent-market broadcast station wishes to grant retransmission consent to a cable operator, but cannot because its network affiliate agreement expressly prohibits the station from granting retransmission consent outside of its DMA, even where the station would be deemed significantly viewed in another community. In many cases, this practice, coordinated by networks, allows stations to effectively enlarge the zone of exclusivity protection beyond the geographic limits set by Congress and the Commission.

Section 325, added to the Communications Act by the 1992 Cable Act, gives broadcast stations, not networks, the right to control cable retransmission of their signals both within and outside of their DMAs. Initially, in the years following 1992, broadcast stations would negotiate and grant retransmission consent to cable operators seeking carriage of out-of-market stations that were either significantly viewed within the cable operator's franchise area, or where carriage of such stations would not violate any other station's network nonduplication or syndicated exclusivity rights. Increasingly, smaller MVPDs find that because of network prohibitions on out-of-market retransmission consent, they cannot obtain signals desired in their community. These practices, coupled with broadcast station negotiating tactics that seek to limit the ability of the MVPD to carry significantly viewed stations, or other stations whose signal fall outside the in-market station's protected zone of exclusivity, deprive MPVD subscribers of access to the broadcast signals that the Commission is charged with making available to all.[117]

Simply put, the zone of exclusivity recognized by Congress and enforceable

[117] *See e.g.*, 47 U.S.C. § 307(a) (directing the Commission to grant station licenses "if public convenience, interest, or necessity will be served thereby"); 47 U.S.C. § 309(a) (directing the Commission to determine, with respect to an application for license, "whether the public interest, convenience, and necessity will be served by the granting of such application").

through the Commission's network nonduplication and syndicated exclusivity rules is not unlimited for good reason. The Commission's rules only allow commercial television stations to protect the exclusive distribution rights they have negotiated with broadcast networks, not to exceed a specified geographic zone of 35 miles (55 miles for network programming in smaller markets).[118] The rules were intended to act as an affirmative limitation on the scope of exclusivity enforceable through Commission processes so as to balance the interests of broadcasters and MVPDs. Network practices that prevent a community in which an out-of-market station is significantly viewed from continued receipt of those signals by their MVPD frustrates the Commission's intent in limiting the enforceable zone of an in-market stations' right to programming exclusivity to 35/55 miles.

Cable subscribers are directly harmed by network interference with a station's right to grant out-of-market retransmission consent because it can cause the operator to lose the ability to provide access to broadcast stations that its subscribers have either become accustomed to receiving for years, or provides more relevant regional content. The Commission's exclusivity rules did not restrict carriage of distant broadcast signals in certain areas because the threat to broadcasters would be de minimis. There is no evidence today that permitting distant signal carriage in these areas would have a significant impact on broadcasters, such that MVPDs should be able to engage in good faith negotiations to attain retransmission consent to carry these signals free from third party interference.

These same MVPD subscribers are also put at greater risk of disruption when

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[118] *See* 47 C.F.R. §§ 76.92 and 76.120.

their cable operator and the in-market network affiliate fail to come to terms on retransmission consent because the operator has lost access to the alternative network programming feed, no other station is able to grant retransmission consent, and the consumer cannot receive the local station over-the-air. The calculus of harm due to pulled signals in rural areas where over the air signals are not available is significantly worse than in areas where there is over-the-air service. One of the rationales behind the Commission's decision not to extend network nonduplication rights to where the local station is not carried when it adopted its exclusivity rules was in recognition that consumers in these areas have less alternatives.[119] For smaller operators today, when broadcasters block access to other sources of network programming, it is precisely to threaten disruption and inconvenience to cable consumers, those that cannot even receive the local signal over the air. Therefore the Commission should treat these areas differently, and the Commission's good faith rules are exactly the right place to address these problems.

Although the plain language of the Commission's current good faith negotiation standards prohibit the "[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires such Negotiating Entity not to enter into a retransmission consent agreement with any other television station or multichannel video programming distributor," the Commission has so narrowly construed the scope of the rule as to render it meaningless. Under Commission precedent, this prohibition is aimed solely at collusion between a broadcast station and MVPD the aim of which is to preclude the broadcast station from agreeing to carriage on another MVPD.

[119] 1966 Cable Carriage Order at ¶ 64.

Whatever the wisdom of this interpretation in years past, the time has come to flatly prohibit, as *per se* violation of the duty of good faith, a broadcast station's granting a network veto power over any retransmission consent agreement with an MVPD. Accordingly, the Commission should either expressly interpret Section 76.65(b)(1)(vi) to encompass such behavior, or should add this behavior as an additional *per se* violation to list of objective good faith violations listed under subsection (b)(1) by adopting a rule that the one proposed in the NPRM.

3. The Commission should flatly prohibit a broadcast station conditioning its grant of retransmission consent on an MVPD's agreement not to carry an out-of-market station.

Consistent with the reasoning stated above, a broadcast station's request that an MVPD refrain from carrying a distant broadcast signal, whether embodied in written agreements or simply carried out via threats during negotiations, should be flatly deemed to be *per se* violations of the duty to negotiate in good faith under any circumstances and prohibited.[120] In light of the Commission's steadfast position that cable operators may carry distant broadcast signals, without deleting any of its programming, outside of a broadcasters' zone of exclusivity, and recognition that television stations that are considered "significantly viewed" in a cable community should be treated as "local" signals, it is unconscionable that a local broadcast station during their retransmission consent negotiations should be permitted to deny a cable operators' its right. In instances where this occurs, consumers are harmed by not only losing access to a valued source of relevant regional programming, but also because they are at greater risk of significant service disruption if their cable operator no longer

[120] NPRM at ¶ 27.

carries a out-of-market signal of the same network as a local signal in which their cable operator reaches a negotiation impasse. Accordingly, the Commission should affirmatively prohibit the practice as a *per se* violation of the duty to negotiate retransmission consent in good faith.

As noted above, the NPRM asks whether the Commission should interpret its current prohibition against execution of an agreement not to enter into retransmission consent agreement with any other station or MVPD in Section 76.65(b)(1)(vi) more expansively to preclude a broadcast station from executing an agreement prohibiting an MVPD from carrying an out-of-market SV station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, in the event of retransmission consent impasse.[121] ACA submits, consistent with its position on network interference, that the Commission can either interpret its current prohibition more expansively, as suggested in the NPRM, or it can add an explicit prohibition on broadcast station practices that interfere with the ability of an MPVD to carry a distant significantly viewed station in the local broadcaster's market. ACA suggests, however that the Commission go further and prohibit local broadcaster interference with the carriage of distant signals in cases where the signal may not be deemed significantly viewed, but is nonetheless of interest to residents in the MVPD's service area and carriage without blackouts is permitted in accordance with the broadcast exclusivity rules.

Additionally, the NPRM asks whether stations have threatened to delay or refuse to reach a retransmission consent agreement unless the MVPD commits to forgo

[121] *Id.*

carriage of out-of-market SV stations without including such commitment in the executed agreement; whether such threats circumvent the rule as written by keeping the commitment out of the executed document; and whether the Commission should revise the rule to prevent such circumvention.[122] ACA submits, consistent with its position on coordinated negotiations, that the Commission should prohibit all aspects of broadcaster interference with the right of an MVPD to carry any out of market station, including those that are significantly-viewed station or available off-air in the provider's community, whether embodied in an executed agreement or informally agreed to by the parties.

* * *

In summary, the Commission's broadcast exclusivity and retransmission consent regulations were intended to protect broadcasters from unfair cable competition in the local advertising market, but only to a limited extent, and to foster a fair marketplace for carriage negotiations, both within and outside local broadcast markets. They were not designed to block cable subscribers from receiving distant broadcast signals long viewed and/or valued in an MVPD's service area. The Commission should not countenance <u>any</u> third-party practices that harm consumers, particularly where both Congress and the Commission intended for MVPDs, and particularly smaller and rural cable operators, to be able to negotiate retransmission consent for distant signals, and should abrogate existing network-affiliate agreement that interfere with such rights. Put simply, third party interference conflicts with the intent of the broadcast exclusivity and retransmission consent regulations, the scope of the cable compulsory license, and the

[122] *Id.*

intent and express language of the good faith negotiation rules and regulations.

Congress and the Commission have long supported carriage of distant signals through development of the relevant signal carriage rules: broadcast exclusivity, copyright compulsory license and, later, retransmission consent and the good faith requirements. Nowhere in this history can evidence be found that retransmission consent was intended to be used as a weapon to permit networks or broadcast stations to curtail distant signal carriage, the time has come for the Commission to unequivocally affirm that third-party interference with the exercise of retransmission consent constitutes a *per se* violation of the obligation to negotiate in good faith.

To promote the public interest and protect consumers interests in receiving the broadcast signals they wish to receive in markets served by small cable companies, the Commission must declare it to be a *per se* violation of its good faith rule for any third-party to interfere with the right of either a broadcast station or MVPD to freely negotiate retransmission consent with the other.

E. The Commission has authority to abrogate existing network-affiliate agreements.

The NPRM seeks comment on the Commission's authority to abrogate, on a going-forward basis, any provisions in existing network-affiliate agreements restricting an affiliate's power to grant retransmission consent without network approval, should the Commission decide to prohibit stations from granting networks the right to approve their affiliates' retransmission consent agreements.[123] ACA strongly urges the Commission to abrogate broadcast station agreements giving any third party the ability

[123] *Id.*

to control or veto the stations' exercise of retransmission consent. Unless the Commission takes this additional step, MVPDs will continue to be harmed by these unlawful provisions for years as result of their inclusion in existing agreements.

The FCC has exercised its authority to abrogate provisions in existing agreements found to be contrary to the public interest in violation of its rules in other contexts, and should not hesitate to do so here. For example, the Commission prohibited contract clauses granting one MVPD exclusive access for the provision of video services to ("exclusivity clauses") to multiple dwelling units ("MDUs") and other real estate developments.[124] The Commission found that clauses granting such exclusivity to cable operators harm competition and broadband deployment; that any benefits to consumers are outweighed by the harms; and accordingly that such clauses are proscribed by Section 628 of the Act, which prohibits unfair methods of competition that have the purpose or effect of hindering significantly or preventing MVPDs from providing "satellite cable" and/or "satellite broadcast" programming to subscribers and consumers.[125] In light of these findings, the Commission prohibited the enforcement of existing exclusivity clauses and the execution of new ones by cable operators and others subject to the relevant statutory provisions.[126] It rejected requests to allow such clauses for a period of years or for a set time limit.

> We are reluctant to grant any communications companies an artificial period of immunity from pro-competitive regulation

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[124] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Notice of Further Proposed Rulemaking, 22 FCC Rcd 20235 (2007) ("MDU Exclusivity Order").

[125] MDU Exclusivity Order at ¶¶ 1, 27.

[126] *Id.* at ¶¶ 1, 35.

> during which the recovery of their investment is guaranteed; companies in communications markets routinely invest billions of dollars without any such guarantees.[127]

This analysis applies with equal force to provision in network-affiliate agreements that grant networks veto authority or other control over the station's exercise of its statutory right to grant retransmission consent. The Commission should prohibit such provisions as *per se* violations of the duty to negotiate retransmission consent in good faith, and such prohibit the enforcement of such provisions in existing agreements as well as their inclusion in new agreements.

The Commission recently ordered similar relief concerning exclusive contracts for terrestrially-delivered, cable-affiliated programming, which it found to harm video competition and broadband deployment and therefore to violate the prohibition in Section 628(b) concerning unfair acts.[128] In that order, the Commission found that application of the rules to existing contracts would not pose economic hardship on cable operators or their affiliated programmers or constitute a "regulatory taking" under the Fifth Amendment.[129] Regulatory abrogation of the existing exclusivity agreements would not violate the takings clause because (1) any economic impact arising from compliance with Commission rules correcting current market failures is outweighed by

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[127] *Id.* at ¶ 39.

[128] *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 (2010) ("2010 Program Access Order").

[129] *Id.* at ¶ 64 (citing Connolly v. Pension Ben. Guaranty Corp., 475 U.S. 211, 224-25 (1986)(Supreme Court reviews regulatory takings claims based on factual inquiries into the circumstances of each particular case). The Commission identified three factors which have particular significance in this determination: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations and (3) the character of the governmental action). 2010 Program Access Order at ¶ 65; MDU Exclusivity Order at ¶ 56.

the Commission's public interest objective of promoting competition in the video distribution market; (2) providers do not have legitimate investment-backed expectations in profits obtained through anticompetitive behavior; and (3) applying the new prohibitions to existing contracts substantially advances the legitimate governmental interest in protecting consumers from "unfair methods of competition and unfair acts or practices," and interest that Congress has explicitly recognized, protected by statute, and charged the Commission with vindicating by adopting appropriate regulations.[130]

Nothing in Section 628(b) expressly directed the FCC to abrogate exclusive contracts for terrestrially-delivered cable-affiliated satellite programming retroactively, yet the Commission found such relief permissible to advance the statutory objectives of protecting consumers from unfair acts and practices. Similar relief should be available under Section 325(b), which, in contrast, expressly delegates to the FCC authority to govern the exercise of retransmission consent by broadcast stations. Pursuant to this direct statutory authority, the Commission may lawfully abrogate existing agreements found to violate, as a *per se* matter, the good faith negotiation obligation of broadcasters. Such agreements have the effect of depriving out-of-market cable viewers of broadcast programming the retransmission of which is specifically protected by both the cable compulsory license and the limitations on the geographic reach of programming exclusivity protected by Commission rules. Broadcasters should have no legitimate investment-backed expectations in profits obtained through manipulation of Commission rules, and actions taken to correct such regulatory failures should not have a material adverse economic impact on broadcasters. To the contrary, local broadcast

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[130] 2010 Program Access Order at ¶¶ 66-68.

stations should benefit economically when freed of network-imposed restrictions on their ability to freely negotiate mutually acceptable terms, conditions, and prices for retransmission consent with out-of-market MVPDs.

IV. THE COMMISSION SHOULD ADOPT CHANGES TO ITS EXCLUSIVITY RULES THAT WOULD APPLY THE EQUIVALENT OF ITS ANALOG "GRADE B" CONTOUR SAFEGUARD TO BOTH NETWORK AND SYNDICATED PROGRAMMING.

The NPRM specifically seeks comment on whether to retain the Commission's network nonduplication and syndicated exclusivity rules,[131] and asks generally "whether there are other actions the Commission should take either to revise its existing rules or adopt new rules to protect consumers from harm as a result of impasses or threatened impasses in retransmission consent negotiations."[132] Should the exclusivity rules be retained, ACA strongly urges the Commission to amend them to permit carriage of a distant station's network programming on MVPD systems located, in whole or in part, within such station's Grade B or noise limited service contour.

Longstanding Commission policy supports applying a Grade B or noise limited service contour exception to the Commission's network nonduplication rules. Cable MVPDs want to carry programming that is of interest to their subscribers. Broadcast signals that can be received over-the-air in the community served by cable operators would certainly meet that criterion. A cable operator would therefore prefer to carry <u>both</u> broadcast stations – even if they are affiliated with the same network – than to have to choose only one to carry on its system. Therefore as a business matter, separate and apart from the operation of the retransmission consent rules, cable operators would

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[131] NPRM at ¶¶ 42-45.

[132] *Id.* at ¶ 46.

carry both broadcast stations in order to satisfy and meet the expectations of their subscribers.

Harmonizing the Commission's exclusivity rules would protect consumers from harm in the case of an impasse or threatened impasse in retransmission consent negotiations because consumers would already be receiving the alternate broadcast signal from their cable operator. Consumers would therefore be harmed less by any impasse or threatened impasse. In addition, harmonization of the exclusivity rules would promote the efficient working of the retransmission consent framework.

A. Broadcast stations should have no reasonable expectation of exclusivity against adjacent-market stations receivable in the community over-the-air.

The Commission articulated the policy underlying its network nonduplication rules as "reproduc[ing] in cable households the same ability to view network programming that noncable subscribers in the same locality have…."[133] Moreover, the Commission explicitly stated that the rules:

> were never intended to confer on any particular station an artificial competitive advantage over any other station in terms of access to cable television subscribers. On the contrary, these rules were designed to reproduce in cable households the same ability to view network programming that noncable subscribers in the same locality have, and thereby avoid imposing on local stations a competitive disadvantage of distant network stations not otherwise viewable locally.[134]

[133] Teleprompter of Quincy at ¶ 14.

[134] *Id.* at ¶ 14 (emphasis added) (citing *In re Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Program Exclusivity Protection by Cable Television Sys.*, Memorandum Opinion and Order, 67 F.C.C.2d 1303, 1305 (1978); *In re Application of American Television and Commc'ns Corp.*, Memorandum Opinion and Order, 47 F.C.C.2d 211 (1974); *In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Cmty. Antenna Television Sys.*, Cable Television Report and Order, 36 F.C.C.2d 143, 181 (1972); *In the Matter of Rules Re Microwave-Served CATV,* First Report and Order, 38 FCC 683, 720 (1965)).

Application of the network nonduplication rules to signals otherwise received over-the-air has precisely the opposite effect that the Commission designed the exclusivity rules to advance. The Commission intended the exclusivity rules to prevent the importation of duplicative distant signals that could not be received over-the-air.

Similarly, as the Commission reinstituted its syndicated exclusivity rules in 1988, it stated: "[W]here a cable system's viewers can receive, off the air, the signals of two or more broadcast stations...neither station will be permitted to invoke syndicated exclusivity rights against the programming of the other…."[135] The Commission concluded that "when a cable community unit falls, in whole or in part, within the grade B contour of a broadcast signal…the cable community unit cannot be required to delete the signal."[136] The Commission explicitly authorized the carriage of stations' broadcast signals whose Grade B contour fell within all or part of a cable system's community unit, despite the existence of an agreement providing for syndicated exclusivity.[137]

As explained above, the Commission's exclusivity rules evidence the Commission's intention to limit the applicability of exclusivity agreements to only those adjacent-market broadcast signals that could not be received over-the-air in a particular community. Therefore, any broadcaster's expectation of exclusivity against adjacent-market stations receivable over-the-air in a particular community is misplaced.

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[135] *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules relating to program exclusivity in the cable and broadcast industries*, Report and Order, 3 FCC Rcd 5299, ¶ 96 (1988) (emphasis added).

[136] *Id.* at ¶ 96 (emphasis added).

[137] The "Grade B contour" exception to the Commission's syndicated exclusivity can be found in Section 76.106 of the Commission's rules. 47 C.F.R. § 76.106(a).

B. The Commission proposed extending its Syndicated Exclusivity Grade B Contour safeguard to network programming in 1988.

Shortly after reinstituting its syndicated exclusivity rules, the Commission adopted and released a Further Notice of Proposed Rulemaking seeking to, among other things, "develop a consistent policy across all of [the Commission's exclusivity rules]."[138] Specifically, the Commission noted that "both [the network nonduplication and syndicated exclusivity rules] prohibit stations from exercising exclusivity rights against other signals that are significantly viewed in the relevant cable community and, additionally, the new syndicated exclusivity rules ban exclusivity against other stations placing a Grade B signal over the cable community."[139] The Commission concluded that the "program exclusivity rules should [not] differentiate between program types and distribution technologies", and "propose[d] to modify each of [the exclusivity] rules…."[140]

More than 22 years after the Commission adopted the Further Notice of Proposed Rulemaking, the proceeding remains pending at the Commission. Consequently, the Grade B contour exception remains applicable only to non-network programming subject to the cable syndicated exclusivity rules.[141] This discrepancy exists even as the Commission subsequently included a Grade B contour exception in the network nonduplication and syndicated exclusivity rules applicable to satellite

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[138] *In the Matter of Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Further Notice of Proposed Rulemaking, 3 FCC Rcd 6171, ¶ 41 (1988) ("1988 FNPRM").

[139] *Id.* at ¶ 41.

[140] *Id.*

[141] 47 C.F.R. § 76.106(a) ("Notwithstanding the requirements of §§76.101 through 76.105, a broadcast signal is not required to be deleted from a cable community unit when that cable community unit falls, in whole or in part, within that signal's grade B contour…").

MVPDs.[142]

C. Application of the Grade B Contour or equivalent measurements to network programming will protect consumers and promote the efficient working of the retransmission consent framework.

Amending the Commission's rules to apply the Grade B or noise limited service contour exception to the Commission's cable network nonduplication rules will benefit consumers. Cable operators want to carry programming that is of interest to their subscribers. Broadcast signals that can be received over-the-air in the community served by a cable operator would certainly meet that criterion. Cable operators would prefer to carry <u>both</u> broadcast stations – even if they are affiliated with the same network – than to have to choose only one to carry on their system. Irrespective of retransmission consent, cable operators would carry <u>both</u> broadcast stations in order to satisfy and meet the expectations of their subscribers.

Harmonizing the Commission's exclusivity rules would protect consumers from harm in the case of an impasse or threatened impasse in retransmission consent negotiations because consumers would already be receiving the alternate broadcast signal from their cable operator. Consumers would therefore be harmed less by any impasse or threatened impasse. In addition, harmonization of the exclusivity rules would promote the efficient working of the retransmission consent framework.

The existing network nonduplication rules <u>do not</u> "reproduce in cable households the same ability to view network programming that noncable subscribers in the same locality have…." To the contrary, broadcast stations currently have the ability to enforce

[142] 47 C.F.R. § 76.122(j)(3) (satellite network nonduplication); 47 C.F.R. § 76.123(k)(3) (satellite syndicated exclusivity).

network nonduplication rights against distant broadcast stations carried on cable systems in a community that can receive the signal over-the-air. Such actions harm consumers who, in many cases, have grown accustomed to receipt of signals from network stations in adjacent-markets that, while considered "distant" under the Commission's rules, in reality comprise a greater metropolitan area, such as the Detroit-Toledo market.[143]

V. THE COMMISSION SHOULD ADOPT DISPUTE RESOLUTION MECHANISMS TO PROTECT CONSUMERS AND MVPDS FROM SERVICE DISRUPTIONS.

The NPRM expressed the view that the Commission lacks authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations, because Section 325(b) of the Act expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent.[144] ACA submits that the Commission is not precluded by the express language of Section 325(b) from imposing stand-still relief pending resolution of retransmission consent complaint, arbitration or mediation proceedings, or by its prior contrary interpretations of this provision.[145]

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[143] *In the Matter of WTVG, Inc. Petition For Waiver of Section 76.92(f) of the Commission's Rules*, Memorandum Opinion and Order, 25 FCC Rcd 2665 (2010); *In the Matter of WUPW Broadcasting, LLC Petition For Waiver of Section 76.92(f) of the Commission's Rules,* Memorandum Opinion and Order, 25 FCC Rcd 2678 (2010). Applications for Review have been filed with the Commission. *See In the Matter of WTVG, Inc. and WUPW Broadcasting, LLC Petitions for Waiver of Section 76.92(f) of the Commission's Rules*, Order, 25 FCC Rcd 12263, ¶ 1 (2010) ("Buckeye has filed…Applications for Review in response to [the WTVG and WUPW Orders]").

[144] NPRM at ¶ 18-19. The NPRM cites previous Commission determinations that it was prohibited from adopting regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission, even upon a finding of violation of a good faith negotiation requirement. NPRM at ¶ 18, citing SHVIA Implementation Order at ¶ 60.

[145] ACA also similarly notes that there is no prohibition on the Commission requiring *non-binding* dispute resolution procedures, including mandatory commercial arbitration pursuant to the ADRA, so long as it

First, it is well established that the Commission may change regulatory policy if it acknowledges that it is changing its policy, provides the courts a reasoned basis for the change, and takes account of the reliance interests stemming from the earlier policy.[146] The Commission's earlier interpretations of Section 325(b) as precluding the imposition of temporary interim carriage requirements are policy decisions on the intent and scope of the statutory language can be re-visited as circumstances change. In fact, the Commission has recognized its "obligation to consider, on an ongoing basis, whether its rules should be modified in response to changed circumstances."[147] Today, as the Petition initiating this proceeding demonstrated, widespread MVPD competition means that broadcasters can afford to deny retransmission consent for extended periods of time; that "this dynamic gives broadcasters the incentive and ability to engage in brinkmanship by holding up the MPVD for ever-increasing retransmission consent fees;" and these tactics increase the likelihood that a dispute will result in a loss of programming for the MVPD's subscribers.[148] Ultimately, "this conduct harms consumers by driving up rates and imposing switching costs, harms advertisers by potentially decreasing the number of "eyeballs" available, and harms competition among

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provides for *de novo* review of the arbitrator's award.

[146] *FCC v. Fox Television Stations*, 129 S.Ct 1800 (2009); *See* Open Internet Order at ¶¶ 117-122 (reinterpreting the scope of its statutory charge under Section 706(a) of the Telecommunications Act of 1996 to "encourage the deployment of advanced telecommunications capability" as sufficient to support the imposition of affirmative regulatory obligations on broadband Internet access service providers, where the Commission had previously determined that the provision granted no additional regulatory authority beyond that contained in other provision of the Communications Act).

[147] 2010 Program Access Order at ¶ 11 n. 23.

[148] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* Petition for Rulemaking, at 35-36. (filed Mar. 9, 2010) ("Petition"),

MVPDs by undermining attempts to compete more effectively on price."[149]

The Commission should take note of these changed market conditions as it re-examines the scope of its authority under the Act generally and Section 325 specifically. In the eleven years since the adoption of the *2000 Good Faith Order*, it has become increasingly clear that the retransmission consent framework is not working, bitter disputes involving loss of signals are becoming more frequent, and that additional consumer protection measures are required. There is nothing in Section 325(b) that expressly prohibits regulatory action to require interim carriage pending resolution of retransmission consent disputes. Rather, the language of the statute governs the relationship between a broadcaster and an MVPD, and is silent with respect to the Commission's authority under Sections 325(b)(3)(A) and 309(a) and Sections 303(r) and 4(i).[150]

Section 325(b)(3)(A) authorizes the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent.[151] In particular, Congress directed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable."[152]

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[149] *Id.* at 36.

[150] *See In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 16-21 (filed June 3, 2010) ("Time Warner Cable Reply Comments").

[151] 47 U.S.C. § 325(b)(3)(A).

[152] *Id.*

This expansive and far-reaching grant of authority—either standing alone or in conjunction with the Commission's ancillary authority under Sections 303(r) and 4(i) of the Act—encompasses the power to adopt whatever measures are necessary to protect consumers affected by retransmission consent disputes.[153] Indeed, the Commission's authority to "govern the exercise" of retransmission consent rights by broadcasters plainly includes the power to adopt whatever remedial measures may be necessary to protect the public from harm, including dispute resolution procedures and interim carriage requirements.

The Commission has imposed stand-still requirements to permit continued carriage of programming pending resolution of disputes in several contexts and its ability to establish such requirements is well established. First, the Commission has consistently imposed interim carriage requirements where retransmission consent disputes are submitted to commercial arbitration pursuant to license transfer conditions imposed in connection with media mergers and acquisitions.[154] Second, the Commission has imposed such relief in several rulemaking proceedings, including its *2010 Program Access Order* and recent data roaming decision.[155] In the *2010*

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[153] As Time Warner Cable aptly demonstrates in its Reply Comments supporting the Petition, complementing the direct authority conferred in Section 325, Section 303(r) authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of Title III of the Act. 47 U.S.C. § 303(r). Moreover, Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The clear mandate in Section 325(b)(3)(A) to adopt rules governing retransmission consent provides just the sort of concrete statutory responsibility that justifies the exercise of ancillary jurisdiction. *See* Time Warner Cable Reply Comments at 18.

[154] *See, e.g.*, Comcast-NBCU Order at App. A; News Corp.-Hughes Order at ¶ 222.

[155] *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265, at ¶ 80 (rel Apr. 7, 2011) (establishing mechanism for a requesting provider to obtain data roaming service on an

Program Access Order, the Commission cited several benefits of interim carriage, including "minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint," limiting the ability of vertically-integrated programmers to use temporary foreclosure strategies to extract concessions from an MVPD during contract renewal negotiations; and encouraging settlement.[156] Third, the Supreme Court has long held that the Commission has authority to issue an order maintaining the status quo in cable carriage disputes when the public interest "demands interim relief."[157] Fourth, during the congressional debates surrounding enactment of Section 325, sponsors of the legislation made clear that cable operators would be able to petition the Commission to require interim carriage in the event of retransmission consent disputes.[158] Finally, the Commission has previously found no limitation on its authority to order interim carriage under other provisions of the Act, despite the "general consent requirement of Section 325(b)."[159]

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interim basis during the pendency of a dispute over the terms and conditions of a roaming agreement; Commission staff may if requested and upon proper circumstances, order the host provider to provide data roaming on its proffered terms, during the pendency of the dispute, subject to possible true-up once the roaming agreement is in place); 2010 Program Access Order at ¶ 73 (2010) (allowing an MVPD to seek a temporary standstill pending the resolution of a program access complaint).Prior to the adoption of the 2010 Program Access Order, the Media Bureau had found authority to act on a standstill petition in program access cases pursuant to the authority granted to the Commission in Section 4(i) of the Act. *See In the Matter of Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, ¶ 6 n.31 (2010).

[156] 2010 Program Access Order at ¶ 71. The interim carriage the Commission made available to program access complainants permits a temporary standstill of the price, terms and other conditions of an existing programming contract despite the right of the affected cable programming network to withhold their programming pursuant to copyright law.

[157] *United States v. Southwestern Cable Co*., 392 U.S. 157, 180 (1968).

[158] *See* Time Warner Cable Reply Comments at 20-21; 138 CONG. REC. S14615-16 (Sept. 22, 1992) (statement of Sen. Lautenberg). More recent expressions of congressional intent to permit such relief were filed by Senators Inouye and Stevens in 2007. *See id*.; Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007).

[159] *Time Warner Cable; Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order,*

It is therefore evident that the Commission has ample direct and ancillary statutory authority to require temporary interim carriage of broadcast signals pending resolution of retransmission consent disputes brought before it by MVPDs, despite the general consent language of Section 325(b). As the Commission found in the *News Corp.-Hughes Order*, interim carriage protects consumers from loss of valued broadcast programming while providers work out the details of their carriage agreements, thus preventing viewers from becoming collateral damage when agreement cannot be reached on the price of service without the assistance of Commission processes.[160] The Commission should extend such protections to parties who have filed retransmission consent complaints with it and/or parties engaging in commercial arbitration or mediation of retransmission consent disputes, should the Commission decide to adopt such measures in this proceeding.

VI. RETRANSMISSION CONSENT REFORM WILL FAIL TO ADEQUATELY PROTECT CONSUMERS UNLESS IT ADDRESSES THE WIDESPEAD PRICE DISCRIMINATION AGAINST SMALLER MVPDS.

The NPRM asks "whether small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair."[161] As ACA has extensively

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or in the Alternative for Immediate Injunctive Relief, Memorandum Opinion and Order, 15 FCC Rcd 7882, ¶ 7 (2000).

[160] News Corp.-Hughes Order, ¶¶ 210, 221 (The Commission noted that during periods of temporary foreclosure, the "loss of access to local broadcast stations [sic] signals harms consumers who cannot access desired Fox programming, local news and public affairs programming, and other programming available on the affected stations…." As a result, the Commission adopted a condition requiring continued retransmission of a broadcast station signal under the same terms and conditions of the expired contract in certain circumstances).

[161] NPRM at ¶ 29.

documented,[162] the answers are unarguably: yes, smaller MVPDs are typically forced to accept markedly higher prices than larger MVPDs; and no, this is not fair to either the MVPDs or their subscribers. ACA urges the Commission to fully investigate and take steps to eliminate the unfair price discrimination experienced by smaller MVPDs across the nation. Price discrimination is a significant problem for small and rural providers and their subscribers that the Commission has ample authority to address it.

In 2008, ACA provided the Commission with a detailed report on retransmission consent price discrimination against smaller MVPDs.[163] That filing explained how broadcasters were discriminating against smaller MVPDs by charging substantially higher per subscriber fees than those paid by larger operators.[164] At that time, Professor Rogerson conducted an economic evaluation of retransmission consent price discrimination, concluding the following:

> In some markets, price discrimination can have the desirable effect that it provides firms with the incentive and ability to serve more customers by allowing them to simultaneously serve customers with a low ability/willingness to pay for the good at low prices while still serving customers with a higher ability/willingness to pay for the good at higher prices. No such economic rational applies in the case of retransmission consent. Obviously, local broadcasters would still provide their signals to the major MVPDs if they were not allowed to charge even higher prices to

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[162] ACA Petition Comments at 4-5; ACA Feb. 16th Ex Parte Letter at 5 and presentation notes page 14; ACA Quadrennial Review Comments at 17; *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Reply Comments of the American Cable Association, MB Docket No. 07-198, at 18 – 23 (filed Feb. 12, 2008) ("ACA 2008 Program Access Reply Comments").

[163] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007); ACA 2008 Program Access Reply Comments at 6-14.

[164] ACA 2008 Program Access Reply Comments at 7-8.

> small and rural MVPDs. Therefore the main effect of price discrimination in this case, is simply to allow broadcasters to charge higher prices to MVPDs that possess less bargaining power.[165]

Last year, ACA submitted comments filed in support of the petition for rulemaking in this docket, supplemented by an updated report and analysis by Professor Rogerson showing that retransmission consent price discrimination continues unabated.[166] Other MVPDs, including Cablevision, have also called upon the Commission to address the rampant retransmission consent price discrimination faced by smaller operators.[167]

A. Smaller MVPDs are charged retransmission consent fees more than twice as much as those paid by larger MVPDs for the same stations.

Publicly available information, combined with reports from ACA members, shows that retransmission consent price discrimination against smaller MVPDs has not ceased since ACA's 2008 report to the Commission. Today, smaller cable operators are paying, on average, retransmission consent fees that are at least double the amount of larger operators.

Professor Rogerson's 2010 study evaluated contemporary reports of retransmission consent prices compiled by Kagan Research.[168] At that time, Kagan's

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[165] *Id*; 2010 Rogerson Price Discrimination Report at 9.

[166] ACA Petition Comments at 5-9; 2010 Rogerson Price Discrimination Report at 5-14.

[167] *See In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of Cablevision Systems Corporation at 17-18 (filed May 18, 2010) (the Commission should address broadcasters charging discriminatory rates to different distributors in the same market by requiring, in response to a complaint alleging unfair pricing discrimination, that broadcaster identify the cost differentials claimed to support pricing differences); Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Reply Comments of Cablevision Systems Corporation at 6 (filed June 3, 2010) (a "prohibition on unjust and unreasonable discrimination is inherent in the good faith bargaining requirement").

[168] 2010 Rogerson Price Discrimination Report at 10-14 (citing Tables 2 and 3 of Katz, Michael L.,

most recent report contains estimates and projections of retransmission consent payments broken down by MVPD type and projections for the number of MVPD subscribers by MVPD type. From this data, Professor Rogerson calculated 2010 average per subscriber retransmission consent fees by MVPD type, summarized in Tables 1 and 2 below.

Jonathan Orzag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime* at 32, 34, Nov. 12, 2009 ("Katz Economic Paper"), attached to the *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009).

TABLE 1

2010 PER SUBSCRIBER RETRANSMISION CONSENT PAYMENTS TO ALL BROADCAST STATIONS BROKEN DOWN BY TYPE OF MVPD[169]

MVPD Type	Total Retrans Payments (millions of $)	Total Subscribers (millions)	Per Subscriber Retrans Payments ($ per sub per month)
Cable	$424.0	62.1	$.57
DBS	$390.0	32.3	$1.01
Telco	$119.1	8.2	$1.21
All	$933.1	102.2	$.76

Assuming that each MVPD pays for 4 Big 4 stations per market, Professor Rogerson calculates per station fees in Table 2.

TABLE 2
2010 AVERAGE PER SUBSCRIBER RETRANSMISSION CONSENT PAYMENTS TO A SINGLE BIG 4 STATION BROKEN DOWN BY TYPE OF MVPD[170]

MVPD Type	Per Subscriber Retrans Payments ($ per sub per month)
Cable	$0.14
DBS	$0.25
Telco	$0.30
All	$0.19

From this data, Professor Rogerson evaluated the magnitude of price discrimination suffered by smaller MVPDs. He noted that to properly interpret the numbers, one must keep in mind that although there are a large number of small and medium sized cable operators, they are completely dwarfed in size by the handful of large operators with the result that only a very small fraction of cable subscribers receive service from small or

[169] 2010 Rogerson Price Discrimination Report at 11 (citing Katz Economic Paper).

[170] *Id.* at 11.

medium sized MVPDs. As a result, the average per subscriber retransmission consent payment made by cable MVPDs in Table 2 should be interpreted as being very close to the average amount paid by large cable operators:

> In particular, then, consistent with the description of bargaining strength in Section 2, above, large cable operators pay the lowest per subscriber retransmission consent fees; on average they pay $.14 per subscriber per month to an individual Big 4 station.[171]

ACA and Professor Rogerson believe that small and medium size MPVDs pay at least as much in retransmission consent fees as telecommunications providers, represented by the nation's largest carriers, listed in Table 2.   As a result, the "Telco" rate can be viewed as a very conservative estimate of what small and medium size MVPDs pay broadcasters. Professor Rogerson concludes:

> <u>Therefore, based on the above data, it appears that the average retransmission consent fee paid by small and medium sized cable operators is more than twice as high as the average retransmission consent fee paid by large cable operators</u>. Representatives of the ACA have told me that, based on anecdotal evidence from their membership, they agree that $.30 per subscriber per month is likely a conservative estimate of the retransmission consent fee that the average small or medium sized MVPD pays to a single Big 4 station. In fact they are aware of numerous instances where their members currently pay retransmission consent fees as high as $.75 per subscriber per month to individual Big 4 stations.[172]

According to ACA members, retransmission consent contracts specify that MVPDs bear the cost of obtaining the broadcasters' signal. In accordance with these provisions, ACA members pay the fees associated with receiving the broadcast signal,

[171] *Id.* at 12.

[172] *Id.* at 12-13 (emphasis supplied).

whether via off-air, satellite, microwave, or fiber,[173] Thus, the difference in prices paid by large and small operators has no basis in broadcasters' cost of delivering the signal.[174] For this reason, the argument made by the Broadcaster Associations that price discrimination simply reflects efficiencies of scale is completely misleading.[175] The marginal cost to broadcasters of providing retransmission consent for all MVPDs is essentially zero.

The principal reason for the difference relates to the bargaining power imbalance between a "must have" Big 4 broadcast station and a small MVPD.[176] The Commission itself has determined in several proceedings that individual Big 4 local broadcast stations have significant levels of market power.[177]

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[173] As ACA has previously noted in its discussion of third party interference above, ACA members, particularly its rural providers, that cannot receive a broadcaster's signal off-air may incur significant transport costs, which can range up to $0.50 per subscriber per signal per month, further adding to the dramatic difference in the overall cost for rural, smaller MVPDs to provide the same broadcast signal to its customers than urban, larger operators.

[174] *Id.* at 13-14.

[175] Broadcaster Associations Reply Comments at 16.

[176] 2010 Rogerson Price Discrimination Report at 14.

[177] News-Hughes Order ¶ 201 ("We find that News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations). For this reason alone, the Commission should reject claims of the Broadcaster Associations that there is no problem today concerning retransmission consent prices and that broadcasters do not have a monopoly in their local markets. *See* Broadcaster Associations Reply Comments at at 10-13 (Similarly, the Commission should reject their argument that the notion of a broadcaster monopoly was "put to rest by William Rogerson, an economist hired by Petitioner American Cable Association ("ACA"), who states that certain price effects for network programming can only occur if the programs within the bundle are *substitutes*. Obviously, if the programs are substitutes in an economic sense, then they cannot, by definition, be monopolies in an economic sense." *Id.* at 12-13. The Broadcaster Associations failed to comprehend that substitutability, in an economic sense, is a matter of degree. Even when a firm has monopoly power, there are likely partial substitutes for the firm's product that limit its market power. If these substitutes were eliminated then the firm would have even more market power. Therefore, it is possible for a firm to have significant market power but for there to be a partial substitute for the firm's good that still places significant limits on the firm's market power. Professor Rogerson notes that while each Big 4 broadcaster in a DMA has significant market, a single entity that owned all 4 stations in a DMA would have significantly more market power. *See* Rogerson II.

Professor Rogerson's price discrimination analysis underscores the trends reported by industry analysts and participants. Sanford Bernstein cable and satellite analyst Craig Moffett has described how small operators bear the brunt of retransmission consent "pain":

> "[T]wo trends are clear from 2007: <u>retrans consent generates cash and smaller operators . . . will bear the brunt of the pain</u>."[178]

This trend has not abated. Dr. John Malone, chairman of Liberty Media and DirecTV, described price discrimination in 2010 in even more blunt terms:

> The biggest distributors have some leverage in that negotiation because they can do damage. <u>The smaller distributors are going to be pretty powerless to protect themselves from getting creamed…</u>.[179]

The available evidence that suggests that smaller operators pay average retransmission consent fees more than twice as large as larger operators validates Dr. Malone's observation – <u>smaller MVPDs are "getting creamed</u>," and well as his further observation that, "In the end, the distributors are really the middle men . . . It's the American public that's going to end up paying."[180]

This point was aptly observed by Craig Moffett:

> Where there is a commons there is a tragedy waiting to happen
>
> The Retransmission Consent disputes that are currently rolling across the Pay TV landscape ably illustrate why, in

[178] Mike Farrell, *Retrans on the Rise*, MULTICHANNEL NEWS, Jan. 6, 2008, *available at* http://www.multichannel.com/article/131629-Retrans_On_the_Rise.php (last visited May 26, 2011) (emphasis added).

[179] ACA Petition Comments at 8-9, quoting Kelley Riddell, *Malone Sees Pay-TV Industry Consolidation as Fee Disputes Mount*, BLOOMBERG NEWS, Mar. 19, 2010, *available at* http://www.bloomberg.com/apps/news?sid=aWetzLpEbhUo&pid=20601087 (last visited May 26, 2011) (emphasis added).

[180] *Id.*

> the Pay TV industry, the consumer wallet is that commons.[181]

Retransmission consent price discrimination "creams" consumers served by smaller MVPDs, causing significant public interest harms, and the trend of price discrimination against smaller MVPDs continues unabated today.

B. Retransmission consent price discrimination harms consumers of smaller MVPDs.

Consumers and providers alike are harmed by retransmission consent price discrimination. First, retransmission consent price discrimination raises provider costs of service and these increases, in turn, are partially passed along to consumers in the form of higher subscription television prices. Second, the escalating demands of broadcasters for retransmission consent price increases, experienced most acutely by smaller MVPDs require diverting funds from other service improvements, network expansions and upgrades, including broadband deployment.

1. Retransmission consent price discrimination raises costs for consumers of smaller MVPDs.

As ACA noted above, a substantial share of programming cost increases is passed along to customers in the form of higher subscription rates. In particular, one class of viewers – those served by smaller distributors – bears the burden of

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[181]Craig Moffett, Senior Analyst, Bernstein Research, U.S. Cable & Satellite Broadcasting, Weekend Media Blast: A Tragedy of the Commons (Mar. 26, 2010) (describing how in the current Pay TV industry structure, as in health care, the consumer is largely left out of the equation in Pay TV, or is at least too distant to exert pricing restraint when cable and satellite operators raise prices to pass along rising costs). Of course, Moffett assumes that operators pass along a greater percentage of their price increases to consumer than the actual cost increase, but for many ACA members serving in poor and/or rural areas, significant cable price increases are not an option and the operator is force[181] 2010 Rogerson Price Discrimination Report at 15.

[181]*In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Comments of the American Cable Association, MB Docket No. 07-198 (filed Jan. 3, 2008) ("ACA 2007 Program Access Comments").

retransmission consent price discrimination. As Professor Rogerson has shown, retransmission consent price discrimination results in an unreasonable cost disparity between viewers of the same programming:

> Since MVPDs pass higher programming costs back to their subscribers in the form of higher subscription fees, the main ultimate effect of price discrimination in retransmission consent agreements is simply that different groups of viewers are being charged different prices to view the same programming.[182]

2. Higher prices resulting from retransmission price discrimination depletes capital available for smaller MVPDs broadband deployment efforts.

Beyond increasing the cost of MVPD services, retransmission consent price discrimination and broadcasters' coordinated negotiation tactics also threaten broadband deployment in rural markets, the Commission's top policy priority, which harms consumers residing in those areas. The calculus is straightforward – for businesses with limited resources, broadcasters' escalating demands require diverting funds from other service improvements, network expansion and upgrades. Because of triple-digit percentage price discrimination, smaller MVPDs and rural markets are most vulnerable. As discussed, while a substantial share of retransmission consent cost increases are passed along to consumers, the remainder depletes capital that could be used to deploy other advanced services, including broadband.

ACA began reporting this dynamic to the Commission in 2008.[183] Other smaller

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[182] 2010 Rogerson Price Discrimination Report at 15.

[183] *See, e.g.,* ACA 2007 Program Access Comments at 20 ("The ever-escalating pressure on cost and bandwidth from programmers and broadcasters can delay and even prevent very small systems from upgrading to provide broadband.").

MVPDs and their representatives have corroborated this problem.[184] Most recently, state utility commission members of the National Association of Regulatory Utility Commissioners acknowledged the impact of programming costs on the ability of small and rural telecommunications carriers to enter and compete in the MVPD market.

> **WHEREAS**, Video content is the leading, if not "killer," application in the bundling of services by competitors seeking to enter discrete midsize, small and rural markets, and without reasonable and economic access to content, small carriers will lack the ability to enter those markets and/or compete effectively against larger LECs and MSOs; *and*
>
> **WHEREAS**, For rural providers seeking to reach unserved areas, the ability to offer the so-called "triple-play" is crucial to implementation of successful business plans and a pre-requisite to access to the significant capital investment required not only to bring video and broadband and IP-enabled services to those currently residing in unserved areas. . . .[185]

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[184] *See, e.g., In the Matter of Comment Sought on Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* MB Docket No. 10-71, Comments of Organization for the Promotion and Advancement of Small Telecommunications Companies, National Telecommunications Cooperative Association, Independent Telephone and Telecommunications Alliance, Western Telecommunications Alliance, and Rural Independent Competitive Alliance at 3-4 (filed May 18, 2010) ("[S]mall MVPDs face substantial discrimination in prices for access to broadcast programming; that increasing retransmission consent demands of broadcasters result in subscribers of small and medium-sized operators losing access to broadcast signals; and that the rising costs of retransmission consent raise the costs of multi-channel video, harm competition, and hinder the deployment of advanced services. Multiple parties representing a variety of MVPDs have, in separate filings, provided similar demonstrations that the current rules are outdated, harmful to consumers, impede broadband adoption and deployment, and are therefore in need of reform.") (citations omitted). *In the Matter of Petition for Rulemaking to Amend The Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Organization for the Promotion and Advancement of Small Telecommunications Companies Notice of Ex Parte Presentation at 3 (filed Mar. 23, 2010) ("Since nondiscriminatory access to video content is a vital component of broadband adoption, it is imperative for the Commission to reform the retransmission consent and program access regimes to release the 'take it or leave it' stranglehold that programmers have over content availability and pricing").

[185] Resolutions Passed by the Board of Directors of the National Association of Regulatory Utility Commissionser, TC-1, "Resolution on Fair and Non-Discriminatory Access to Content" (Feb. 16, 2011), *available at* http://winter.narucmeetings.org/2011WinterFinalResolutions.pdf (last visited May 26, 2011).

C. The Commission must investigate and take appropriate remedial action to address the extent and magnitude of price discrimination in the retransmission consent market.

ACA has submitted sufficient anecdotal evidence to support a full Commission inquiry into price discrimination against smaller MVPDs. ACA once again urges the Commission, as part of this rulemaking, to gather additional data that would allow it to determine the extent and magnitude of retransmission consent price discrimination, and to craft remedial action to address this problem should its findings corroborate ACA's evidence.[186] ACA is confident that such an investigation will confirm that smaller MVPDs and their subscribers are unfairly burdened with payment of grossly disproportionate retransmission consent fees, and that the Commission would be acting well within its statutory authority to "govern the exercise by television broadcast stations of the right to grant retransmission consent . . . ."[187]

To this end, ACA members would be willing to file their retransmission consent agreements with the Commission for this purpose, if they could obtain waivers from the broadcast stations of the confidentiality provisions of their contracts. The Commission could facilitate this process by encouraging broadcasters to grant such waivers, subject to the Commission establishing in the NPRM confidentiality safeguards for highly sensitive data comparable to those used in its license transfer reviews and other recent matters. ACA also notes the Commission has authority to compel production of these contracts,[188] and would encourage the Commission to exercise such authority, should

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[186] *See* ACA Feb. 16th Ex Parte Letter at 7.

[187] 47 U.S.C. § 325(b)(3)(A).

[188] 47 U.S.C. § 325(b)(3)(A) (The Commission shall "establish regulations to govern the exercise by

broadcasters refuse to grant waivers after establishing confidentiality safeguards.

It is against this backdrop of confidentiality provisions and non-disclosure agreements that the Commission must evaluate the claims of the Broadcaster Associations that there is no evidentiary basis at the Commission for claims of price discrimination.[189] In light of non-disclosure provisions contractually prohibiting ACA members from disclosing the actual prices and terms of its agreements, ACA has presented substantial anecdotal evidence based on observations of industry participants, analysts and reporters studying this industry that small MVPDs pay significantly higher fees than large MVPDs, as well as its economic expert who notes that this prediction is completely consistent with standard economic theory.[190]

Therefore, the Commission should not hesitate to determine whether or not the levels of price discrimination that ACA alleges occur in the marketplace would be against the public interest if proven to exist.[191] If the answer is yes, then the Commission has more than enough anecdotal evidence to justify requiring firms to submit the relevant data.

Broadcaster Associations arguments that, even if discrimination is present, there

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television broadcast stations of the right to grant retransmission consent….").

[189] Broadcaster Associations Reply Comments at 14-16. ACA notes it is disingenuous of the Broadcaster Associations to assert there is no evidentiary basis in the record to claim price discrimination, when it is their members who control access to the most relevant data and information contained in their self-protected retransmission consent agreements.

[190] 2010 Rogerson Price Discrimination Report at 5-14.

[191] 47 U.S.C. § 310(d) ("No…station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby").

is "nothing illegal or nefarious about" price discrimination[192] should not trump the fact that over-the-air broadcasting is not just any product, and behaviors that may be tolerated with regard to other products, like soap or detergent, should not be acceptable here. To clarify this point further, it is generally legal in most markets for a firm to charge any price it wishes for its product, yet, the government would not permit broadcasters to scramble their signals and charge over-the-air viewers a fee to purchase a descrambler in order to view the signals. The broadcast industry is an industry with a special relationship to the government: federal law provides special support and protections to broadcasters in the public interest, and the government views itself as having a special interest in how its products are priced. It is on this basis that ACA suggests the Commission investigate and limit price discrimination against smaller MVPDs.

The Commission has the authority to gather retransmission consent data, and compel production of contracts, if necessary.[193] For example, to ensure, as part of its pending Special Access rulemaking proceeding, that it could analyze the extent of competition in markets for the provision of special access telecommunication services, the Commission recently established a process that encouraged the filing of relevant confidential and proprietary ("competitively sensitive") information. First, the Commission issued a request to the public to submit voluntarily extensive and detailed information about special access facilities deployment and use, both current and

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[192] Broadcaster Association Reply Comments at 16.

[193] *See, e.g., In the Matter of Special Access for Price Cap Local Exchange Carriers*, , *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Second Protective Order, 25 FCC Rcd 17725 (2010) ("Second Protective Order"); *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd 15146 (2010).

planned. Second, because the Commission found that submission of such information, even if competitively sensitive, was "necessary to develop a more complete record on which to base the Commission's decision in this proceeding and therefore require production," it adopted a Second Protective Order "to ensure that certain highly confidential and competitively sensitive documents and information that may be submitted are afforded adequate protection."[194] As part of this order, the Commission enabled parties submitting materials of a competitively sensitive nature to designate those materials as "Highly Confidential," and limit access to that material to "Outside Counsel of Record, their employees, and Outside Consultants whom they retain to assist them in this proceeding."[195] The Commission could adopt a similar procedure for retransmission consent agreements to permit it to determine, for itself, the degree and extent of price discrimination against smaller MVPDs.

Without exploration of these well-documented problems with the Commission's retransmission consent rules, small and rural providers will continue to be disadvantaged by changes in market structure that have fundamentally altered the balance of bargaining power between local broadcasters and MVPDs in favor of local broadcasters.

It is important to note that ACA is not asking the Commission to lower average retransmission consent fees. Therefore, contrary to the claims of the Broadcaster Associations,[196] the fact that overall retransmission consent fees are "modest" or set at

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[194] Second Protective Order at ¶¶ 1, 3.

[195] *Id.* ¶ 3.

[196] Broadcaster Associations Reply Comments at 13-14.

an appropriate level is not the issue. Rather, ACA simply requests that unfair price discrimination be fully investigated by the Commission and, if found (as ACA fully expects it will be), eliminated.[197] ACA is confident that after reviewing the data, the Commission will conclude that price discrimination is a significant problem for small and rural providers and that remedial action can be crafted well within the authority delegated to it by Congress to "govern the exercise by television broadcast stations of the right to grant retransmission consent. . . ."[198]

VII. CONCLUSION

For the foregoing reasons, ACA submits that the Commission must (i) prohibit coordinated retransmission consent negotiations between separately-owned broadcast stations in a single market by means of both legally binding and non-legally binding agreements; (ii) prohibit network and broadcast station interference with the exercise of retransmission consent and the ability of MVPDs to carry distant signals, and immediately abrogate existing agreements in violation of this prohibition; (iii) provide

[197] Broadcaster Associations make two additional arguments concerning potential relief from findings of unfair price discrimination against smaller MVPDs: (1) that it would be inappropriate and extraordinary to regulate broadcaster retransmission consent input prices without regulating MVPD service output prices; and (2) if the Commission were to regulate to assure a uniform market or national retransmission consent rate, it "would be compelled, in fairness, to mandate uniform pricing for the purchase of broadcast equipment, programming, talent, and other services – a result plainly inappropriate and impossible, as a practical matter, for any agency of government to administer." Broadcaster Association Reply Comments at 17. That is, if the Commission regulates upstream, it must also regulate downstream, and if the Commission regulates downstream, it must also regulate upstream. Both of these arguments are nonsensical. As to the first argument, there is no general economic principle that whenever government regulates the price of an input it must also be desirable to regulate the output. Water and electricity are "regulated inputs" used by most firms; yet this does not imply that their output prices must also be regulated. The second argument appears to hold that if the government restricts regulated firms in an industry from discriminating against customers of different sizes, then it would be "compelled in fairness" to regulate all markets in which these firms purchase inputs and guarantee that no price discrimination occurs. There is no basis, economic or otherwise, for such a claim. Government should regulate at levels of the production chain where there are demonstrable market failures or other public policy problems that need to be addressed and regulation at one level in no way implies or suggests that regulation must also be appropriate at some other level.

[198] 47 U.S.C. § 325(b)(3)(A).

interim carriage during the pendency of retransmission consent complaint cases; (iv) make adjustments to its broadcast exclusivity rules to harmonize exceptions for network and non-network programming; and (v) investigate the rampant price discrimination against smaller MVPDs and take remedial action to address the problem.

It is important to emphasize that each of these actions are squarely aimed at achieving the goals the Commission has articulated for this rulemaking: allowing the market-based retransmission consent negotiations contemplated by Congress to proceed more smoothly, provide greater certainty to the negotiating parties, and help protect consumers. The changes to the Commission's good faith negotiation rules proposed by ACA are appropriately focused on improvements to the negotiating process, rather than with specific outcomes. With the adoption of these clean, clear "rules of the retransmission road," ACA is confident that each of Commission's ends may be achieved.

Finally, ACA's suggested rule changes fall well within the Commission's statutory authority to govern the exercise by television broadcast stations of the right to grant retransmission consent and if adopted, will go a long way to achieving the Commission's goals in initiating this rulemaking proceeding to protect the public interest by minimizing, to the extent possible, video programming service disruptions to consumers. ACA again urges the Commission to amend its retransmission consent and related rules as expeditiously as possible, but in any event, in time for consumers to benefit from the rule changes before the commencement of the next negotiating cycle.

Respectfully submitted,

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May 27, 2011

Appendix A

COORDINATED NEGOTIATION OF RETRANSMISSION CONSENT AGREEMENTS BY SEPARATELY-OWNED BROADCASTERS IN THE SAME MARKET

COORDINATED NEGOTIATION OF RETRANSMISSION CONSENT AGREEMENTS BY SEPARATELY OWNED BROADCASTERS IN THE SAME MARKET

by

William P. Rogerson**

May 27, 2011

***** **Prepared for the American Cable Association**

****** **Professor of Economics, Northwestern University. FCC Chief Economist, 1998-99.**

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1. INTRODUCTION AND SUMMARY

The retransmission consent framework put into place by the 1992 Cable Act[1] allows broadcasters to negotiate compensation from multichannel video programming distributors (MVPDs) in return for providing MVPDs with permission to carry their signals. After receiving a petition for rulemaking [2] asking it to consider changes to the rules governing the retransmission consent framework and evaluating a first round of comments, the Commission has issued a Notice of Proposed Rulemaking (NPRM) [3] which outlines a set of proposed rule changes, asks for comment on these proposed rule changes, and also asks for comment on other revisions or additions that would potentially benefit consumers. In the initial round of comments preceding the issuance of the NPRM, the American Cable Association (ACA) submitted a study which I wrote (Rogerson I)[4] that identified one particular problem with current retransmission consent

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[1]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. *See also* 47 C.F.R. 76.64. This original act applies only to cable system operators. In 1999 Congress enacted the Satellite Home Viewer Improvement Act, Pub. L. No. 106-113, 114 Stat. 1501, which allows DBS companies to offer local broadcast channels to their subscribers and allows broadcasters to negotiate compensation for providing them with retransmission consent. *See also*, Satellite Home Viewer Extension Reauthorization Act ("SHVERA"), Pub. L. No. 108-447, 118 Stat. 2809 (2004).

[2] Public Knowledge, DirecTV, Inc., DISH Network LLC, Charter Communications, Inc., American Cable Association, New America Foundation, OPASTCO, Time Warner Cable, Inc., Verizon, Cablevision Systems Corp., Mediacom Communications Corp., Bright House Networks, LLC, Insight Communications Company, Inc., and Suddenlink Communications ("Petitioners"), *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, "Retransmission Consent Petition for Rulemaking", MB Docket No. 10-71, March 9, 2010.

[3]*See "Notice of Proposed Rulemaking, In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent,* "*Retransmission Consent NPRM*" , MB Docket 10-71, March 3, 2011.

[4]*See* "Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and its Effect on Retransmission Consent Fees," May 18, 2010, submitted by the ACA attached to

practices. The problem is that in some local television markets, some broadcast stations affiliated with a Big 4 network (i.e., NBC, ABC, CBS, and FOX) engage in coordinated negotiation of their retransmission consent deals with MVPDs, even though the broadcast stations are separately owned. By negotiating together, separately owned broadcasters are able to obtain the same level of retransmission consent fees that they would be able to attain if they were allowed to merge and a single owner were to negotiate a bundled deal on behalf of all of them. I explained that both economic theory and the available evidence suggest that this practice allows local broadcasters to charge higher retransmission consent fees than they would otherwise be able to, and that higher retransmission consent fees are largely passed through to MVPD subscribers in the form of higher subscription fees. This observation about retransmission consent markets is simply an application of a much more general basic economic point: when firms producing substitute products coordinate or collude with one another, they are generally able to raise prices. When the collusion occurs in a wholesale market and causes increases in the price of an input, we would normally expect a substantial share of these wholesale price increases to be passed through to consumers of the final product. Thus, collusive price setting at the wholesale level will generally result in consumers of the final product paying higher prices.

In its NPRM, the Commission proposes to deal with this problem by adopting a rule making it a *per se* violation of a broadcaster's duty to negotiate in good faith to "grant another station or station group the right to negotiate or the power to approve its retransmission consent

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Comments on In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent, "*ACA Comments on Retransmission Consent Petition,*" MB Docket 10-71, March 3, 2011.

agreement when the stations are not commonly owned."[5] The major point I wish to make in this additional study is that, while I think the Commission's general approach of prohibiting practices that facilitate coordinated negotiation of retransmission consent agreements is an excellent one, the specific wording used to describe the prohibited practices suggested in the current NPRM is too restrictive and therefore may not be interpreted as applying to the full range of practices that broadcasters can engage in to coordinate their negotiations. In particular, although the wording in the NRPM clearly applies to the case where one broadcaster provides another broadcaster with legally binding authority to negotiate retransmission consent agreements on its behalf, it is less clear whether it would be interpreted as applying to more informal methods of coordination where broadcasters directly communicate with one another and agree to follow a collective course of action that maximizes their joint profits, yet the agreement is not enforced by a legally binding contractual arrangement. For example, suppose that two broadcasters in the same market engage in nominally separate negotiations with a particular MVPD, but agree in advance to only accept a deal once both of them are satisfied and communicate with one another constantly during the course of negotiations. Even if the broadcasters explicitly told the MVPD that they were communicating with one another and that they would only accept a deal once both of them were satisfied, the fact that each broadcaster retained ultimate legal authority to decide on its own retransmission agreement could be interpreted as meaning that this practice would not be found to be a *per se* violation of the broadcasters' duty to negotiate in good faith under the wording currently used in the NPRM.

It is of course a bedrock principle of antitrust analysis that non-legally binding

[5] *See*, *Retransmission Consent NRPM*, Appendix B, at 32.

coordination between a small number of firms can generally be quite successful in raising prices. Thus, antitrust law is generally oriented towards preventing both legally-binding and non-legally binding collusive arrangements. The important policy implication that follows from this is that any Commission rule intended to limit coordinated negotiation of retransmission consent agreements by separately owned firms in the same market must apply to both legally-binding and non-legally-binding coordination in order to be effective. Even if much of the existing coordination of retransmission consent agreements is accomplished through legally binding arrangements, it would be trivially easy for broadcasters to switch to non-legally binding arrangements if a new rule passed by the Commission were interpreted to only prohibit legally binding arrangements.

In addition to addressing this major issue, I will also briefly review arguments submitted by the Broadcaster Associations[6] in response to my initial paper and explain the flaws in these arguments.

The paper is organized as follows. Section 2 briefly reviews the main point of my previous study - that both economic theory and the available evidence suggest that separately owned Big 4 broadcasters in the same market can increase their retransmission consent fees by banding together to collectively negotiate retransmission consent agreements with individual MVPDs and that these fee increases are substantially passed through to MVPD subscribers in the form of higher subscription fees. Section 3 makes the main new economic point of this study - that Big 4 broadcasters in the same market can effectively band together to collectively insist on

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[6]*See*, *Reply Comments of the Broadcaster Associations*, National Association of Broadcasters, ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates, MB Docket No. 10-71, June 3, 2011.

higher retransmission consent fees without necessarily having to enter into legally binding commitments to jointly negotiate retransmission consent fees. Section 4 observes that the language currently suggested in the NPRM for limiting coordinated negotiations may be interpreted as falling short of prohibiting non-legally-binding collective action by separately owned broadcasters in the same market, and suggests alternate wording that would more clearly state that any collective price-setting action on the part of separately owned broadcasters in the same market is a *per se* violation of the good faith negotiation standard, regardless of whether it is implemented by legally binding contracts or not. Section 5 briefly reviews the arguments advanced by the Broadcaster Associations that collective price-setting action on the part of separately owned broadcasters in the same market is not an issue that the Commission should address and explains the flaws in these arguments. Finally, Section 6 draws a brief conclusion.

2. JOINT OWNERSHIP OR CONTROL OF MULTIPLE BIG 4 LOCAL BROADCASTERS IN THE SAME MARKET RESULTS IN HIGHER RETRANSMISSION CONSENT FEES WHICH ARE PASSED THROUGH TO MVPD SUBSCRIBERS IN THE FORM OF HIGHER SUBSCRIPTION FEES

Standard economic theory predicts that a single entity that owns or controls two networks will be able to charge higher retransmission consent fees than if the two networks were separately owned and controlled so long as the networks are partial substitutes for one another in the sense that the value of one of the networks to MVPDs is less conditional on already carrying the other network. Since broadcast networks carry the same general type of programming it is reasonable to expect that broadcast networks will be partial substitutes for one another in the required sense.

A simple example will help explain the basic idea. Suppose that an MVPD can carry two networks. Suppose that it would earn a profit of $1.00 per subscriber if it carried just one of the two networks and that is would earn a profit of $1.50 per subscriber if it carried both of the networks. Note that the marginal value of adding a network is $1.00 if the other network is not being carried, but is only equal to $.50 if the other network is already being carried. The networks are thus partial substitutes in the sense that the marginal value to the MVPD of either network is lower conditional on already carrying the other network. Note, in particular, that the fact that networks are partial substitutes does NOT mean that the MVPD only wishes to purchase one of the two networks. The MVPD will clearly make more profit if it carries BOTH networks. Nonetheless, the two networks are partial substitutes in the sense that the marginal value of carrying one of the networks is smaller conditional on the other network already being carried. To the extent that customers appreciate and are willing to pay for increases in variety at a diminishing rate as variety increases, we would expect this condition to hold.

To keep the example as simple as possible, assume that the network's cost of providing the network to the MVPD is zero so the joint gain if the MVPD carries the network is simply equal to the MVPD's profit.[7] Also, assume that the MVPD and network have equal bargaining strength in the sense that they choose a price to evenly split the joint profit.[8]

First, suppose two different entities each own one of the two networks. Then, so long as the MVPD carries both networks in equilibrium, when the MVPD negotiates with either of the two networks, the marginal profit of adding a network will be equal to $.50 per subscriber and

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[7]It is easy to see that the example described below continues to yield the same conclusion if we assume that there is a cost of delivering the network or if the network earns additional advertising revenue when the MVPD shows the programming.

[8]It is easy to see that the example described below continues to yield the same conclusion if we assume that the network receives some share α of the total surplus where α is between 0 and 1.

the negotiated fee will therefore be equal to half this amount or $.25. Therefore the total fees paid for both networks will be $.50. Now suppose that the same entity owns both networks. In this case the joint profit of adding both networks is equal to $1.50. Therefore, so long as the owner sells both networks bundled together as a single item, the negotiated fee for the bundle will be half this amount or $.75.

Thus, a single owner will be able to negotiate higher total fees than will two separate owners. The basic economic reason is simply that, when negotiations for each network occur separately, each network is only able to extract some share of the joint profit from adding the *last* program. However, when negotiations occur for a bundle of programs, the owner is able to extract a share of the joint surplus from adding the *entire bundle*. So long as networks within the bundle are partial substitutes, the joint surplus from adding a bundle of both networks will be greater than twice the surplus from adding the last network.

Standard economic principles suggest that a significant share of any increase in retransmission consent fees will be passed through to subscribers in the form of higher subscription prices. In particular, since retransmission consent fees are levied on a per subscriber basis, they represent a marginal cost of providing service to the MVPD, and we would normally expect a substantial share of any increase in marginal costs to be passed on to consumers in the form of higher prices. For example, one study of cable prices found that, in general, about 50 percent of increases in programming costs were passed though to subscribers in the form of higher subscription fees.[9] In its evaluation of the News Corp./ DirecTV merger, the Commission itself concluded that higher programming fees are "passed on to consumers in

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[9]Ford, George S. And John D. Jackson, "Horizontal Concentration and Vertical Integration in the Cable Television Industry," *Review of Industrial Organization*, 12, 1997, 513-14.

the form of higher rates."[10] The FTC reached a similar conclusion in its evaluation of the Time Warner/Turner merger.[11]

To measure the effect of joint ownership or control on retransmission consent fees, one would need data on retransmission consent fees charged by different Big 4 broadcasters in different local markets as well as information on the extent of joint ownership or control in each market. The effect of joint ownership or control then could be measured by comparing the average retransmission consent fee charged by stations that are jointly owned or controlled to the average retransmission consent fee charged by stations that are not jointly owned or controlled. As I mentioned in my initial study, the universal use of nondisclosure clauses in retransmission consent agreements means that there is no publicly available data that I am aware of that the Commission could use to directly perform this calculation itself. However, I also noted that one MVPD - Suddenlink - has performed this calculation on its own retransmission consent fee data and reported the results to the Commission in a filing. In particular, Suddenlink reported that joint ownership or control resulted on average in a 21.6% increase in the retransmission consent fees that it pays.[12] In this study, I would like to note that three additional MVPDs have also

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[10]FCC, "Memorandum Opinion and Oder," *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124, December 19, 2003 at para. 208.

[11]See *Time Warner, Inc. et. al., Proposed Consent Agreement with Analysis to Aid Public Comment*, 61 Fed. Reg. 50301, 50309 (rel. Sept.25, 1999). "The complaint alleges . . . that substantial increases in wholesale programming costs for both cable systems and alternative providers - including direct broadcast satellite service and other forms of non-cable distribution - would lead to higher service prices."

[12]Suddenlink Communications, "Ex Parte Comments of Suddenlink Communication in Support of Mediacom Communications Corporation's Retransmission Consent Complaint," *Mediacom Communications Corp., Complainant, v. Sinclair Broadcast Group, Inc. Defendant*, ("*Mediacom-Sinclair Complaint"),* CSR No 8233-C, 8234-M at 5.

performed this type of calculation on their own retransmission consent data and reported the results to the Commission. They find that retransmission consent fees are 161%, 133%, and 30% higher for Big 4 broadcast stations in the same DMA that are subject to joint control or ownership than for separately owned or controlled broadcast stations.[13]

Finally, I would also like to note that since I wrote my initial study, the Commission has released its final order in the Comcast-NBCU transaction and the logic and findings in this order support the conclusion that joint ownership or control of multiple Big 4 broadcasters in the same market will result in higher retransmission consent fees and harm consumers.[14] In its analysis of this transaction the Commission determined that combined ownership of an NBC owned and operated (O&O) station and a Comcast regional sports network (RSN) in the same market would result in increased programming fees that would be passed through to MVPD subscribers in the form of higher subscription prices.[15] Since two broadcast networks should be at least as close substitutes for one another as a broadcast network and RSN, the Commission findings imply *a*

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[13]*Ex-Parte* Communication of Cable America, *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* MB Docket No. 10-71, May 28, 2010; *Ex-Parte* Communication of USA Companies, *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* MB Docket No. 10-71, May 28, 2010; and *Ex-Parte* Communication of Pioneer Telephone Cooperative, *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, June 4, 2010.

[14]*See, Memorandum Opinion and Order, In the Matter of Application of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees "Comcast-NBCU Order"*, MB Docket No. 10-56, January 18, 2011.

[15]*See, Comcast NBCU Order* at paras. 135-139. In particular note that the Commission concluded based on its own analysis of data that "joint ownership of an RSN and broadcast station in the same region may lead to substantially higher prices for the jointly owned programming relative to what would be observed if the networks were under separate ownership." *(Comcast-NBCU Order* at para. 137.)

fortiori that combined ownership or control of two broadcast stations in the same market should increase programming fees.

3. BIG 4 BROADCASTERS IN THE SAME MARKET CAN EFFECTIVELY BAND TOGETHER TO RAISE RETRANSMISSION CONSENT FEES WITHOUT ENTERING INTO LEGALLY BINDING AGREEMENTS TO JOINTLY NEGOTIATE RETRANSMISSION CONSENT FEES

The above theory predicts that if two Big 4 broadcasters in the same market are able to collectively negotiate to maximize their joint profit, they will be able to charge higher retransmission consent fees than if they are each forced to separately negotiate retransmission consent fees. The essential idea is that if the two broadcasters can collectively threaten to withdraw their signals unless they are each satisfied, then they will be able to negotiate higher fees for everyone than if each broadcaster can only threaten to withdraw its own signal unless the broadcaster is satisfied. That is, it is the ability to threaten collective withdrawal that creates the power to raise retransmission consent fees.

This raises the question of what sorts of institutions or practices are sufficient for broadcasters to be able to recognize their collective self-interest and credibly threaten to collectively withdraw their signals unless they are collectively satisfied. One kind of joint coordination and control would occur if one of the two broadcasters was to give another broadcaster legally binding authority to negotiate retransmission consent agreements on its behalf. I will refer to this practice as "legally-binding coordination." Legally binding coordination is most obviously equivalent to common ownership since a single decision-maker clearly has the legal authority to decide whether or not to withhold both signals. I will refer to coordination that is not enforced by a legally binding agreement as "non-legally binding coordination." This would occur, for example, if the two broadcasters each participated in nominally separate negotiations but had agreed in advance to exchange information during the negotiations and to collectively decide whether or not to accept the retransmission consent deals that they were negotiating with any given MVPD. Another example of non-legally binding coordination would be where both broadcasters informally agree that one of them will negotiate on behalf of both of them and their goal will be to maximize their joint profits, but where legal authority is not formally transferred and each broadcaster retains the ultimate legal authority to accept or reject the deal that is negotiated. In the case of non-legally binding coordination, while both firms may have promised to make the same decisions that a single negotiator would make, they potentially have the opportunity to change their minds if an MVPD attempts to break the coalition apart by attempting to convince one of the broadcasters to accept some deal without regard to the welfare of other broadcaster in the coalition. In order for the coalition to hold together each of the broadcasters must decide that the long run benefit from adhering to the agreement and maintaining high prices over the long run exceeds any short-term profit that could be earned by violating the agreement.

A well accepted principle from antitrust analysis is that even non-legally binding coordination will generally be sufficient to create a significant risk that a small number of firms will be able to successfully collude and raise prices. That is, giving firms the opportunity to explicitly discuss joint price-setting arrangements with one another and reach non-legally binding agreements to coordinate their behavior is generally thought to create a significant risk that the firms will be able to recognize their collective self interest and keep prices at high levels that maximize joint profits.[16] Thus, antitrust law does not only make it illegal for competing firms to enter into legally binding arrangements to engage in joint pricing. Rather, even informal non-legally-binding agreements to engage in joint pricing are illegal. This principle applies equally well to the market for programming as to any other market.

Therefore, I conclude that there is a significant risk that separately owned Big 4 broadcasters in the same market could increase retransmission consent fees by agreeing to collectively negotiate retransmission consent deals without the need for one of the broadcasters to provide the other broadcaster with legally binding authority to negotiate its retransmission consent agreements.

As I discussed in my original study, it appears that much of the existing coordinated behavior of broadcasters occurs between firms that have entered into more comprehensive cooperative agreements. In smaller markets the Commission currently permits broadcasters to enter into sharing agreements with one another under which one broadcaster transfers control of all or part of its operations to another broadcaster in the same DMA. These arrangements, referred to by labels such as Local Marketing Agreements (LMAs) or Shared Services Agreements (SSAs), often transfer control of advertising sales and/or programming. Most instances that the ACA is aware of where a single entity represents two separately owned broadcasters in retransmission consent negotiations occur where the two broadcasters have

[16]Although firms will generally have a short-run incentive to cheat on any collusive agreement, this is counterbalanced by the long-run incentive that cheating will cause the agreement to collapse and thus lower profits in all future periods. *See,* for example W. Kip Viscusi, Joseph E.Harrington Jr. and John M. Vernon, *Economics of Regulation and Antitrust*, MIT Press, Cambridge, chapter 5, for an exposition of the basic theory. It concludes that "[i]n the case of explicit collusion, coordination is not difficult, as firms can directly communicate their intentions over the phone, through faxes and e-mails, and at face-to-face meetings." (page 123).

entered into some sort of sharing agreement. Since the terms of these sharing agreements are generally not publicly available, it is difficult for third parties to determine whether the joint negotiation of retransmission consent agreements is formally required as part of the sharing agreement or whether the agreement to jointly negotiate retransmission consent agreements is more informal. Furthermore, even if the Commission adopted a rule that required broadcasters engaged in a sharing agreement to separately negotiate retransmission consent agreements, but nonetheless allowed them to freely communicate with one another and reach informal agreements that neither of them would agree to a deal until both of them were satisfied, it seems clear that the rule would have little effect.

4. THE COMMISSION SHOULD DETERMINE THAT ANY EXPLICITLY COORDINATED BEHAVIOR BY SEPARATELY OWNED BROADCASTERS RELATED TO NEGOTIATION OF RETRANSMISSION CONSENT AGREEMENTS IS A *PER SE* VIOLATION OF THE GOOD FAITH NEGOTIATIONS REQUIREMENT

In its NPRM the Commission proposes to deal with the problem of coordinated negotiations by adopting a rule making it a *per se* violation of a broadcaster's duty to negotiate in good faith to "grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned."[17] The major point I wish to make in this additional study is that, while I think that the Commission's general approach of prohibiting practices that facilitate coordinated negotiation of retransmission consent agreements is an excellent one, the specific wording used to describe the prohibited practices suggested in the current NPRM may not be interpreted as capturing a broad enough range of practices. In particular, while the wording in the NRPM clearly applies to the

[17] *See*, *Retransmission Consent NRPM*, Appendix B, at 32.

case where one broadcaster provides another broadcaster with legally binding authority to negotiate retransmission consent agreements on its behalf, it is less clear whether it would be interpreted as applying to more informal methods of coordination where broadcasters directly communicate with one another and agree to follow a collective course of action that maximizes their joint profits, although the agreement is not enforced by a legally binding contractual arrangement. For example, suppose that two broadcasters in the same market engage in nominally separate negotiations with a particular MVPD, but agree in advance to only accept a deal once both of them are satisfied and communicate with one another constantly during the course of negotiations. Even if the broadcasters explicitly told the MVPD that they were communicating with one another and that they would only accept a deal once both of them were satisfied, the fact that each broadcaster retained ultimate legal authority to make decisions concerning its own retransmission agreement might mean that this practice would not be interpreted to be a *per se* violation of the broadcasters' duty to negotiate in good faith under the wording currently used in the NPRM.

I conclude that the Commission should broaden its description of the sorts of activities that constitute *per se* violations of a broadcaster's duty to negotiate in good faith in order to include activities that allow broadcasters to engage in non-legally binding coordination of their retransmission consent negotiations. With my advice the ACA has created a list of practices that should be included in the group of practices prohibited by the duty of broadcasters to negotiate in good faith. This list is presented by the ACA in its comments, to which this paper is attached.[18]

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[18] *See* ACA, *Comments In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent ("ACA Comments on Retransmission Consent NPRM"),* MB Docket No. 10-71, May 28, 2011.

For convenience of reference I will also provide the list below:

(a) delegation of the responsibility to negotiate or approve retransmission consent agreements by one broadcaster to another separately owned broadcaster in the same DMA;

(b) delegation of the responsibility to negotiate or approve retransmission consent agreements by two separately owned broadcasters in the same DMA to a common third party;

(c) any informal or formal agreement between separately owned broadcasters in the same DMA or their representatives that agreement by one of the broadcasters to enter into a retransmission consent agreement with an MVPD would be contingent upon whether the other broadcaster was able to negotiate a satisfactory retransmission consent agreement with the MVPD;

(d) any discussions or exchanges of information between separately owned broadcasters in the same DMA or their representatives regarding the terms of existing retransmission consent agreements, the potential terms of future retransmission consent agreements, or the status of negotiations over future retransmission consent agreements.

5. ARGUMENTS RAISED BY THE BROADCASTER ASSOCIATIONS ARE WITHOUT MERIT

The Broadcaster Associations devoted one section of their reply comments[19] to arguments purporting to show that there was no need for the Commission to adopt a new rule restricting the ability of separately owned broadcasters in the same market to jointly negotiate retransmission consent agreements. In this section I will consider the various arguments presented by the Broadcaster Associations and explain why they are all without merit.

Argument #1: Some MVPDs serve large shares of some DMAs.

[19] *See Reply Comments of Broadcaster Associations*, section II.B.3, entitled "Negotiations Involving Multiple Stations Are Lawful and Do Not Harm the Public Interest."

The Broadcaster Associations note that some MVPDs serve relatively large shares of some DMAs and that this likely gives them a relatively large amount of bargaining power in retransmission consent negotiations.[20] They then assert that this implies that it would be socially desirable to allow broadcasters in all markets to increase their bargaining power with respect to all MVPDs (by allowing them to coordinate negotiations of retransmission consent agreements in all markets with all MVPDs.) This argument is severely flawed in two fundamental respects.

First, even if we accepted the idea that sellers should be allowed to collude when they negotiate prices with a large buyer, it would still be a huge leap to conclude that because there are some local broadcast markets that have a single large buyer implies that sellers in ALL local broadcast markets should be allowed to collude in their negotiations with ALL buyers.

Second, a policy of allowing separately owned sellers to collude whenever they face a large buyer would itself be highly problematic to say the least. This would mark a radical departure from the current policies of both the Commission and the antitrust agencies. I doubt that the Broadcaster Associations would seriously advocate such a policy themselves if they genuinely considered the consequences of applying such a radical policy to the entire range of economic transactions that the Commission oversees.

Argument #2: Common ownership of multiple stations and/or sharing agreements such as LMAs and SSAs can be desirable in small DMAs.

The Broadcaster Associations note that allowing common ownership of multiple stations and/or sharing agreements such as LMAs and SSAs can be desirable in some smaller DMAs

[20] *See, Reply Comments of the Broadcaster Associations* at 18-19.

because the resulting efficiencies due to joint operations may allow more broadcast signals to be provided to the DMA than would otherwise be provided.[21] This may well be true but is irrelevant to the policy issue being considered.

First, the Commission is not considering changes in its policies on ownership of multiple stations in the same DMA in this proceeding, so the issue of whether or not ownership of multiple stations in the same DMA can be beneficial is obviously completely irrelevant. Second, with respect to the issue of benefits from sharing arrangements such as LMAs and SSAs, the policy change the Commission is considering of not allowing separately owned broadcasters in the same DMA to jointly negotiate retransmission consent agreements would not prevent broadcasters from entering into agreements where one broadcaster transfers control over other aspects of operations to the management of another station in the DMA. The main efficiencies from these sharing agreements are generally thought to be created by combining various marketing and programming functions. This could still occur in completely unchanged fashion. The only difference if the Commission adopted its new rule would be that broadcasters entering into a sharing agreement would each still be required to negotiate their own retransmission consent agreements without engaging in any formal or informal coordination. The cost savings from combining retransmission consent negotiations (which typically only occur every three years) is likely to be insignificant compared to the cost savings from combining marketing or programming functions.

[21] *See Reply Comments of the Broadcaster Associations* at 21 for comments on common ownership and at 22-23 for comments on sharing agreements (stating “such sharing agreements may well be necessary for the stations to survive economically.”)

Argument #3: How often do broadcasters participating in sharing agreements also participate in joint negotiations of retransmission consent agreements?

In its original filing, the ACA provided a list of 56 instances where multiple Big 4 affiliates in the same DMA operate under some kind of sharing agreement but were not commonly owned.[22] The ACA stated that, based on reports from its membership, firms participating in sharing agreements generally participate in joint negotiations of retransmission consent agreements but explicitly noted that it had not determined on a case-by-case basis whether they did or not.[23] Thus, while the ACA's data on the number of sharing agreements suggests that the number of instances of joint negotiation is relatively high, it does not definitively prove this. In their reply comments the Broadcaster Associations essentially restated these observations, stressing the point that the ACA did not actually present any data on the number of instances of joint negotiations.[24] The ACA, in its comments responding to the NPRM[25] (to which my current study is attached), reports on additional data it has gathered to address this issue. In the 56 cases it identified in its first study, the ACA queried its members who operate in these DMAs to ask if within the last three years, retransmission consent negotiations with the broadcasters involved in the sharing agreement were conducted

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[22]*See ACA Comments on Retransmission Consent Petition,* appendix C. Note that the tables in Appendix C list 36 instances of common ownership and 57 instances of sharing agreements. However, one of the instances (DMA 100, Ft. Smith-Fayetteville-Springdale-Rogers, AR) was erroneously placed in the sharing agreements table instead of the common ownership table. Therefore there were actually 37 instances of common ownership and 56 instances of sharing agreements.

[23]*See ACA Comments on Retransmission Consent Petition,* at footnote 22.

[24]*See Reply Comments of the Broadcaster Associations* at 22.

[25]*See ACA Comments on Retransmission Consent NPRM*.

simultaneously with a single representative for both broadcasters. It was able to obtain responses for 48 of the 56 cases.[26] Of these 48 cases, there were reports of retransmission consent negotiations with a single representative for both broadcasters in 36 of these cases. This data provides further evidence that coordinated negotiation of retransmission consent agreements by separately owned Big 4 broadcasters in the same DMA is a pervasive problem.

Argument #4: Instances of common ownership/control are "minimal" because less than 8% of all such possible combinations occur.

In its original comments, the ACA identified 93 instances of common ownership or control of two Big 4 broadcasters in the same DMA. The Broadcaster Associations report the following (correct) mathematical calculation. Since there are 210 DMAs and there are 6 different unique pairs of two Big 4 broadcasters that can be drawn from a set of 4 alternatives, if all four Big 4 broadcast networks were represented in every DMA, there are 1,260 (6 x 210) different pairs that could be formed. The 93 pairs that ACA identifies are thus 7.38% (93 ÷ 1,260 = .0738) of all possible pairs. If it was true that any harmful phenomenon that the Commission examined could be viewed as "minimal" if it could be shown that the harmful phenomenon occurred in less than 8% of possible instances where it was theoretically possible that it could occur, then the Broadcaster Associations would be correct to conclude that the 93 instances are "minimal." I, however, am unaware of any basis for the "ignore phenomena that occur less than 8% of the theoretically maximum possible number of times" rule that the

[26] Of the 8 cases where the ACA was unable to obtain information, there were no ACA members in the DMA for 6 of the cases, and none of the ACA members that were contacted provided a response in the other 2 cases.

Broadcaster Associations appear to be relying on. [27]

Argument #5: There is scant data to show that joint negotiations increases retransmission consent fees.

In my original study I pointed out that the universal use of nondisclosure clauses in retransmission consent agreements means that there is no publicly available data that the Commission could use to directly calculate the effect of joint negotiations on retransmission consent fees for itself. However, I also noted that one MVPD - Suddenlink - had calculated the magnitude of this effect based on its own retransmission consent fees and reported the results to the Commission in a filing. In particular, Suddenlink reported that joint ownership or control resulted on average in a 21.6% increase in the retransmission consent fees that it paid.[28] In their reply comments, the Broadcaster Associations noted that this was only one data point and was thus of limited value. I would like to note the following three points.

First, in this study I provide the Commission with references to three other similar filings.[29] Second, as I state in my original study, the fact that standard economic theory predicts this result under very plausible assumptions should be viewed as providing additional evidence

[27]As another illustration that this approach is flawed, suppose that there were two pairs of colluding broadcasters in every DMA. This would mean that all retransmission prices charged by all Big 4 broadcasters in all DMAs would be set collusively. Obviously there would be a very severe problem. However the total number of pairs of collusive pairs would be 420 which would still only be 33% of all possible collusive pairs.

[28]Suddenlink Communications, "Ex Parte Comments of Suddenlink Communication in Support of Mediacom Communications Corporation's Retransmission Consent Complaint," *Mediacom Communications Corp., Complainant, v. Sinclair Broadcast Group, Inc. Defendant,* ("*Mediacom-Sinclair Complaint"),* CSR No 8233-C, 8234-M at 5.

[29]*See* footnote 13 and the associated text.

that joint negotiations likely increase retransmission consent fees. Third, as I mentioned above,[30] since my original study the Commission has released its final order in the Comcast-NBCU transaction and the logic and findings in this order support the conclusion that joint ownership or control of multiple Big 4 broadcasters in the same market will result in higher retransmission consent fees. In its analysis of this transaction the Commission determined that combined ownership of an NBC O&O and a Comcast RSN in the same market would result in increased programming fees.[31] Since two broadcast networks should be at least as close substitutes for one another as a broadcast network and RSN, the Commission findings imply *a fortiori* that combined ownership or control of two broadcast stations in the same market should increase retransmission consent programming fees. Thus the Commission's own independent analysis of data in its review of the Comcast-NBCU transaction provides some additional independent evidence that common control or ownership of multiple Big 4 broadcast stations in the same DMA is likely to increase retransmission consent fees.

Argument #6: An increase of retransmission consent fees of 21.6% is not significant.

In my original study I provided Kagan data which stated that the average retransmission consent fee that the largest cable operators paid to Big 4 broadcast stations was in the neighborhood of $.14 per subscriber per month. The Broadcaster Associations report the (correct) mathematical calculation that 21.6% of $.14 per subscriber per month is approximately

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[30]*See* pages 10-11.

[31]*See*, *Comcast NBCU Order* at para. 137. Based on its own analysis of data the Commission concluded that "joint ownership of an RSN and broadcast station in the same region may lead to substantially higher prices for the jointly owned programming relative to what would be observed if the networks were under separate ownership.

$.03 per subscriber per month and offer the observation that $.03 per subscriber per month is not a large enough amount of money for the Commission to concern itself with. I have two responses to this argument.

First, and most importantly, I don't believe that the Commission has ever adopted the policy that it will ignore anti-competitive behavior that causes substantial *percentage* increases in prices so long as the prices being increased are not "too large" to begin with. Furthermore I think it would be a mistake for the Commission to articulate this point of view in its analysis of this issue. Among other reasons, by adopting a firm stance against all anti-competitive activity, the Commission may potentially provide firms with appropriate incentives to avoid anti-competitive activity in a broad range of markets that individually may be small but collectively are large.

Second, the relevant dollar amount that coordinated negotiations will increase retransmission consent fees by over the next few years is likely much larger than $.03 per subscriber per month. Since coordination must occur between two broadcasters, the appropriate base to calculate the percentage on is obviously the total payment to two broadcasters, which would be $.06. Furthermore, the fee of $.14 per subscriber per month is the fee that the very largest cable operators paid in 2010. Most joint negotiations occur in smaller markets that are generally served by smaller and medium sized MVPDs that likely paid considerably more than $.14 per subscriber per month even in 2010. Finally, it is well recognized that retransmission consent fees are still rising very rapidly and many reputable analysts predict that even the very largest cable operators will likely be paying retransmission consent fees in the neighborhood of $.50-$.75 per subscriber per month over the next few years. Taking these points together, a more reasonable estimate of the likely level of impact of joint negotiations between two local broadcasters on retransmission consent fees would be 21.6% of $1.50-$2.00 per subscriber per month or $.32 to $.43 per subscriber per month. It is by no means clear to me that the Commission should view consumer harms of this magnitude as being beneath its notice.

6. CONCLUSION

In an effort to allow broadcasters in small markets to capture some extra economies of scale, the Commission has historically allowed broadcasters in smaller market to enter into agreements that combine some of their operations related to marketing and programming. Without attracting much explicit attention, broadcasters in many cases have begun to coordinate their negotiation of retransmission consent fees as part of these arrangements. This is anti-competitive behavior that likely increases retransmission consent fees and ultimately harms MVPD subscribers by increasing their subscription fees. The arguments advanced by the Broadcaster Associations in defense of this practice are without merit. The Commission should take advantage of its current review of retransmission consent rules to clearly indicate that this is an undesirable practice that broadcasters should not engage in.

Appendix B

CHART ON CONFIRMED INSTANCES OF COORDINATED RETRANSMISSION CONSENT NEGOTIATIONS INVOLVING MULTIPLE BIG 4 NETWORK STATIONS IN THE SAME MARKET THAT ARE NOT COMMONLY OWNED

36 Confirmed Instances of Coordinated Retransmission Consent Negotiations involving Multiple Big 4 Network Stations in the Same Market that are not Commonly Owned

		Station #1			Station #2		
DMA	DMA Rank	Owner	Call Letters	Affil.	Owner	Call Letters	Affil.
Columbus, OH	34	Sinclair Broadcast Group	WSYX	ABC	Cunningham Broadacsting Corp.	WTTE	FOX
Jacksonville, FL	47	Newport Television	WAWS	FOX	High Plains Broadcasting	WTEV	CBS
Providence, RI-New Bedford, MA	53	LIN TV Corp	WPRI	CBS	WNAC	WNAC	FOX
Wilkes Barre-Scranton, PA	54	NexStar Broadcasting Group	WBRE	NBC	Mission Broadcasting	WYOU	CBS
Charleston-Huntington, WV	63	Sinclair Broadcast Group	WCHS	ABC	Cunningham Broadacsting Corp.	WVAH	FOX
Springfield, MO	74	Schurz Communications	KYTV	NBC	Perkin Media	KSPR	ABC
Springfield, MO	74	NexStar Broadcasting Group	KSFX	FOX	Mission Broadcasting	KOLR	CBS
Syracuse, NY	83	Barrington Broadcasting	WSTM	NBC	Granite Broadcasting Crop.	WTVH	CBS
Cedar Rapids-Waterloo-Iowa City and Dubuque, IA	88	Sinclair Broadcast Group	KGAN	CBS	Second Generation Iowa	KFXA	FOX
Burlington, VT-Plattsburgh, NY	94	Smith Media	WFFF	FOX	Lambert Broadcasting of Burlington	WVNY	ABC
Baton Rouge, LA	95	Communication Corp of America	WGMB	FOX	White Knight Broadcasting	WVLA	NBC
Savannah, GA	96	New Vision Television	WJCL	ABC	Parkin Broadcasting	WTGS	FOX
Johnstown-Altoona, PA	101	Peak Media	WWCP	FOX	Palm Television	WATM	ABC
Greenville-New Bern-Washington, NC	103	Bonten Media Group	WCTI	ABC	Esteem Broadcasting of North Carolina	WFXI	FOX
Fort Wayne, IN	107	Granite Broadcasting Corp.	WISE	NBC	Malara Broadcasting Group	WPTA	ABC
Tyler-Longview(Lufkin and Nacogdoches), TX	109	Communication Corp of America	KETK	NBC	White Knight Broadcasting	KFXK	Fox
Youngstown, OH	110	New Vision Television	WKBN 27.1	CBS	Parkin Broadcasting	WYTV	ABC
Traverse City-Cadillac, MI	117	Barrington Broadcasting	WPBN	NBC	Tucker Broadcasting of Traverse City	WGTU	ABC
Fargo-Valley City, ND	121	Hoak Media Corp.	KVLY	NBC	Parker Broadcasting	KXJB	CBS
Columbus, GA	128	Raycom Media	WTVM	ABC	Southeastern Media Holdings	WXTX	FOX
Corpus Christi, TX	129	Cordillera Communications	KRIS	NBC	Eagle Creek Broadcasting	KZTV	CBS
Amarillo, TX	131	NexStar Broadcasting Group	KAMR	NBC	Mission Broadcasting	KCIT	FOX
Wilmington, NC	132	Raycom Media	WECT	NBC	Southeastern Media Holdings	WSFX	FOX
Rockford, IL	134	NexStar Broadcasting Group	KQRF	FOX	Mission Broadcasting	WTVO	ABC
Monroe, LA-El Dorado, AR	138	Hoak Media Corp.	KNOE	CBS	Parker Broadcasting	KAQY	ABC
Monroe, LA-El Dorado, AR	138	NexStar Broadcasting Group	KARD	FOX	Mission Broadcasting	KTVE	NBC
Duluth, MN-Superior, WI	139	Granite Broadcasting Crop.	KBJR & KRII	NBC	Malara Broadcast Group	KDLH	CBS

36 Confirmed Instances of Coordinated Retransmission Consent Negotiations involving Multiple Big 4 Network Stations in the Same Market that are not Commonly Owned

		Station #1			Station #2		
DMA	DMA Rank	Owner	Call Letters	Affil.	Owner	Call Letters	Affil.
Lubbock, TX	143	NexStar Broadcasting Group	KLBK	CBS	Mission Broadcasting	KAMC	ABC
Erie, PA	146	NexStar Broadcasting Group	WJET	ABC	Mission Broadcasting	WFXP	FOX
Erie, PA	146	SJL of Pennyslvania	WICU	NBC	Lilly Broadcasting	WSEE	CBS
Joplin, MO-Pittsburg, KS	147	NexStar Broadcasting Group	KSNF	NBC	Mission Broadcasting	KODE	ABC
Wichita Falls, TX-Lawton, OK	149	NexStar Broadcasting Group	KFDX	NBC	Mission Broadcasting	KJTL	FOX
Terre Haute, IN	152	NexStar Broadcasting Group	WTWO	NBC	Mission Broadcasting	WFXW	FOX
Abilene-Sweetwater, TX	165	NexStar Broadcasting Group	KTAB	CBS	Mission Broadcasting	KRBC	NBC
Billings, MT	169	NexStar Broadcasting Group	KSVI	ABC	Mission Broadcasting	KHMT	FOX
San Angelo, TX	198	NexStar Broadcasting Group	KLST	CBS	Mission Broadcasting	KSAN	NBC