CINNAMON MUELLER

BARBARA S. ESBIN
Admitted in the District of Columbia
besbin@CinnamonMueller.com

WASHINGTON, DC
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006

direct: 202-872-6811
fax: 202-683-6791

ST. LOUIS
1714 Deer Tracks Trail
Suite 215
St. Louis, MO 63131

CHICAGO
307 N. Michigan Ave
Suite 1020
Chicago, IL 60601

phone: 312-372-3930

April 28, 2016

Via ECFS

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

Re: American Cable Association Notice of Ex Parte Communication; Implementation of Section 103 of the STELA Reauthorization Act, MB Docket No. 15-216; Amendment to the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71

Dear Ms. Dortch:

On February 16, 2016, the National Association of Broadcasters ("NAB") filed an ex parte communication, together with an economic report prepared on behalf of NAB by Dr. Kevin W. Caves of Economists Incorporated and Professor Bruce M. Owen of Stanford University ("Caves-Owen Paper"),[1] taking issue with the American Cable Association's ("ACA") request that the Commission deem the bundling of top-four rated broadcast stations with regional sports networks ("RSNs") (or other "must have" programming assets) in retransmission consent negotiations to be a violation of the good faith obligation, and with the analysis and conclusions of ACA's economic expert, Professor Michael Riordan, of Columbia University.[2]

As established below and in the attached rebuttal to the Caves-Owen Paper prepared on behalf of ACA by Professor Riordan ("Riordan Response"),[3] neither the arguments of NAB nor its economic experts undermine ACA's case. Accordingly, the Commission should implement ACA's proposed prohibition by adopting a rule deeming it a *per se* violation of the duty to negotiate retransmission consent in good faith for a common owner of a top-four rated broadcast station and a RSN (or other "must have" programming asset) to refuse an MVPD's request to sequentially negotiate their carriage contracts by granting an MVPD a temporary extension of the retransmission consent agreement. The extension would begin at the termination date of the existing retransmission consent agreement and last until 45 days after either an agreement is reached for the other "must have" programming or the "must have"

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[1] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter to Marlene H. Dortch, Esq., from Rick Kaplan, NAB (filed Feb. 16, 2016) ("NAB Feb. 16 Ex Parte), *attaching* Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, February 2016 ("Caves-Owen Paper").

[2] *See Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Cable Association (filed Dec. 1, 2015) ("ACA Totality Comments"); Michael H. Riordan, *Higher Prices from Bundling of "Must Have" Programming are not Based on Competitive Marketplace Considerations* (attached to ACA Comments as Attachment A) ("Riordan Paper").

[3] *See* Attachment A, Michael H. Riordan, *Bundling in Retransmission Consent Negotiations: Response to Caves and Owen* ("Riordan Response").

programming is withheld from the MVPD. This change would be an important step toward improving the overall environment for retransmission consent negotiations and protecting consumer interest.

In its filings in this docket, ACA explained that the Commission must no longer presume that proposals for carriage conditioned on carriage of any other programming meet the standard for good faith negotiation because such proposals are not always consistent with competitive marketplace considerations.[4] Specifically, ACA argued that the bundling of two or more "must have" programming assets, such as a top-four rated broadcast station and an RSN,[5] cannot be said to be "based on competitive marketplace considerations" as the Commission found true for other forms of bundling in its 2000 Good Faith Order.[6]

In making its argument, ACA relied upon the in-depth economic analysis of Professor Riordan in his paper. That paper advanced three main points. First, higher prices resulting from bundled negotiations for a "must have" local broadcast station and a "must have" RSN are not based on competitive marketplace considerations. Second, a broadcaster that can bundle negotiations for a "must have" local broadcast station and a "must have" RSN can increase its market power and bargaining leverage with the effect of raising prices (fees plus other consideration). Third, separate negotiations for "must have" local broadcast stations and "must have" RSNs remedy the problem of higher prices when these programming assets are under common ownership, and sequential negotiations would accomplish that.[7]

In their filing, NAB and Caves and Owen advance the following overlapping sets of arguments in opposition to ACA's request and Professor Riordan's analysis: (i) the Commission cannot, because it lacks authority, and should not, because it would undermine antitrust laws,

[4] Bundling retransmission consent with carriage of other programming assets is also inconsistent with "good faith" bargaining as defined under labor law. In the labor law context, parties are prohibited from insisting on bargaining for "non-mandatory subjects." *See Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Michael Nilsson, Counsel to the American Television Alliance at 3-7 (filed Mar. 25, 2016) ("ATVA Mar. 25th Ex Parte"). Although it is not unlawful at the outset to propose non-mandatory terms, "a party many not 'lawfully insist upon them as a condition to any agreement'" because, according to the Supreme Court's decision in Borg-Warner, that is tantamount to "a refusal to bargain about the subjects that are within the scope of mandatory bargaining.'" *Id.* at 3-4, *quoting* NLRB v. Borg-Warner Corp., Wooster Div., 356 U.S. 342, 349 (1958) ("*Borg-Warner*"). ACA agrees with ATVA that:

> This doctrine [Borg-Warner] applies squarely to retransmission consent. As the Affiliate Associations have conceded, retransmission consent is a right specific to broadcasters—a right that relates only to the "signal" of a "broadcasting station." Carriage of the station's primary programming stream, in other words, is the "mandatory subject" of a retransmission consent negotiation. Carriage of anything else is a non-mandatory subject of such a negotiation. As Borg-Warner teaches, such bargaining practices frustrate the objective of reaching agreement on the mandated subject. As such, absent agreement from both parties, such conduct violates the good faith requirement. *See id.* at 4.

[5] ACA Totality Comments at 26-32.
[6] See *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Reply Comments of the American Cable Association at 45-46 (filed Jan. 14, 2016) ("ACA Totality Reply Comments") (responding to broadcaster claims that the Commission has already sanctioned all forms of bundling).
[7] Riordan Paper at 9-10, 11-14, 16-18.

deem it a *per se* violation of the obligation to negotiate in good faith, as ACA has requested, for a top-four rated broadcaster to refuse to grant an extension of a retransmission consent agreement that expires on or around the same time as a contract for carriage of a same-market RSN; and (ii) the Riordan Paper cannot be relied upon by the Commission because it (a) mischaracterizes competition in the market for programming; (b) is entirely lacking in empirical support and has no basis in economics or antitrust principles; and (c) proposals based upon its conclusions would likely harm economic welfare.[8]

As demonstrated below and in the Riordan Response, these arguments lack merit and should be dismissed. The scope of FCC authority over a broadcast station's exercise of the right to grant retransmission consent is nowhere near as limited as NAB and its experts suggest. It is broad enough to permit the Commission to address broadcast behavior under the good faith rules even if that behavior would not violate the antitrust laws. Moreover, a prohibition on bundling two or more "must have" programming assets in retransmission consent negotiations will protect the public interest against the exercise of bargaining power resulting in MVPDs paying higher prices for those assets than could be obtained through separate, sequential negotiations and passing those supra-competitive prices through to consumers in the form of higher rates. Finally, the Riordan Response explains why the three principal economic arguments raised by Caves and Owen are misleading and provide no basis for retaining the current presumption that bundling is consistent with competitive marketplace conditions or otherwise deterring the Commission from acting on ACA's modest proposal. For these reasons, the Commission can safely disregard NAB's arguments and it should simply reject the analysis and conclusions of the Caves-Owen Paper without further consideration.[9]

I. THE COMMISSION CAN AND SHOULD PROHIBIT BUNDLED NEGOTIATIONS FOR MUST HAVE PROGRAMMING

A. The Commission's Authority is Not Limited to Filling Gaps Left by Antitrust Laws.

In their paper, Caves and Owen claim that ACA's proposal lacks any legitimate public interest justification because bundling in general is both addressed and sanctioned by economists and the antitrust authorities, suggesting that there is no proper "gap filling" role for the Commission to play in this area.[10] They recommend, as did NAB in its comments, that to the extent the Commission has complementary jurisdiction over complaints of anticompetitive bundling, it should not exercise that authority to adopt rules prohibiting practices that are otherwise allowed under those laws.[11] These arguments are unavailing.

First, the fact that bundling in general can have pro-competitive effects is not relevant to the relief requested by ACA. ACA's proposal for sequential negotiation of carriage rights for top four-rated station retransmission consent and same market RSNs (or other "must have" programming assets) is intended to remedy the adverse effect of higher prices otherwise resulting from bundled negotiations when the contracts for both assets are set to expire around the same time. This is a far narrower case than that discussed by Caves and Owen. The Riordan Response demonstrates that bundling of two "must have" goods with monopolistic properties is likely to raise prices based on two different bargaining models because in both cases, negotiating jointly for these goods increases the

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[8] NAB Feb. 16 Ex Parte at 1-6; Caves-Owen Paper, ¶¶ 12-39.
[9] NAB Feb. 16 Ex Parte at 3.
[10] Caves-Owen Paper, ¶¶ 12-13.
[11] *Id.*, ¶ 16. *See also Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Reply Comments of the National Association of Broadcasters at 28-32 (filed Jan. 14, 2016) (the Commission should reject MVPDs' pleas to selectively ban broadcasters' bundling of programming that fully complies with antitrust law).

seller's market power and bargaining leverage, allowing it to obtain more for the two goods than it could command if the goods were negotiated separately.[12] ACA's proposal for a prohibition on bundled negotiations for monopolistic goods such as top four-rated local broadcast stations and same market RSNs (or other "must have" programming assets) is narrowly targeted to address a limited but harmful bundling practice that is demonstrably *not* based on competitive marketplace considerations.

Second, Caves and Owen's argument that the Commission has no role to play with respect to this form of bundling is another variant of the broadcasters' claims in this and the related retransmission consent reform docket that the Commission lacks authority to act in this area because bundling is permitted under the antitrust laws. However, the existence of antitrust safeguards under Title 15 of the U.S. Code does not support a conclusion that reform of the Commission's retransmission consent good faith rules would be unnecessary or bad public policy.[13] ACA and others have previously addressed and refuted broadcaster arguments that the antitrust laws are better suited than the Commission's good faith rules at addressing whether bundling should be permitted or prohibited.[14] Together they have shown that the Commission's public interest authority over broadcasters is expansive and not limited to antitrust precepts.

Indeed, in adopting its chain broadcasting rules decades ago, the Commission acknowledged that the prohibitions of the Sherman Act, for example, apply to broadcasting, and recognized that although "it should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve," its "jurisdiction does not depend on a showing that [practices raising serious questions under the antitrust laws] do in fact constitute a violation of the antitrust laws."[15] The Commission stated further that, "[w]e do not

[12] Riordan Response at 8-10. It is for this reason that the Commission's current presumption that all bundling is necessarily consistent with competitive marketplace considerations at the very least must be eliminated. ACA, however, believes the case has been made on the record that bundling involving two "must have" programming assets should not be permitted under any circumstances, and should constitute a *per se* violation of the duty to negotiate in good faith. To the extent the Commission does not wish to go that far, it should specify that this form of bundling is evidence of bad faith under the totality of the circumstances test

[13] *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Reply Comments of the American Cable Association at 17-19 (filed Jun. 27, 2011) ("ACA 2011 Reply Comments"); 15 U.S.C. § 1 *et seq*.

[14] ACA Totality Reply Comments at 48-50 (FCC regulations are better suited than antitrust law to determine whether bundling violates the duty to negotiate in good faith;); ACA 2011 Reply Comments at 17-20 (the existence of potential antitrust remedies does not suggest the lack of need of retransmission consent regulatory reform where (i) it is possible to easily describe in objective terms a set of practices that clearly constitutes an anticompetitive harm concerning a subject matter covered by the Communications Act and Commission regulations, as in this case; (ii) the antitrust authorities have limited resources and cannot be expected necessarily to identify, investigate and vigorously prosecute occurrences of antitrust infractions in every business transaction; and (iii) Congress has given the FCC plenary authority over broadcast licensees under Title III and specific authority to govern the exercise of retransmission consent under Section 325(b)). *See also Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Television Alliance Comments at 26 (filed Dec. 1, 2015) ("ATVA Comments") (antitrust principles provide "too narrow a standard, given the public interests at stake"); Comments of Mediacom Communications Corporation at 14 (filed Dec. 1, 2015) (the Commission's good faith authority is not limited to preventing conduct that is already unlawful but rather was "intended to provide the Commission with the means to protect consumers from retransmission consent demands and tactics even if those demands would not violate generally applicable laws designed to prevent or punish anticompetitive or fraudulent behavior").

[15] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 29 FCC Rcd 3351, ¶ 23, n.89 (2014) ("2014 Joint Negotiation Order"), *citing* Report on

predicate our jurisdiction to issue the regulations on the ground that the practices violate the antitrust laws. We are issuing these regulations because we have found that the . . . practices prevent . . . the utilization of radio facilities in the public interest."[16] Just as the Commission's public interest authority over its broadcast licensees is not limited to issuing regulations on the ground that the practices violate the antitrust law, it is not limited from issuing regulations prohibiting practices that might pass muster under the antitrust laws if it finds they nonetheless constitute violations of the duty to negotiate retransmission consent in good faith, a standard that properly encompasses consideration of harm to the public.[17]

Although the antitrust authorities have some overlapping jurisdiction with the Commission, as ACA demonstrated in its Reply Comments, there are practical benefits (and no legal barriers) to the Commission reviewing the bundling of "must have" programming under the good faith rules.[18]

> First, as the expert agency on all subject matter covered by the Communications Act, the Commission is best-positioned to determine whether a particular proposal or behavior by a negotiating entity constitutes a violation of the obligation to negotiation good faith would serve the goals Section 325. Second, as ACA has previously explained, the clear articulation by the Commission that a specific practice, such as bundling "must have" programming, that demonstrably undermines the good faith rules and causes harm to consumers will significantly reduce the administrative costs, and the costs to the parties, of adjudicating individual antitrust complaints before antitrust agencies and courts that

Chain Broadcasting, Docket No. 5060, pp. 46, 83 n.3 (1941), aff'd *NBC v. United States*, 319 U.S. 190, 223-24 (1943). *See also Revision of Radio Rules and Policies*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183, ¶ 8 (1994), citing *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)) ("The public interest standard includes examination of competitive issues – indeed, the Commission is empowered to 'make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.'"); *Representation of Stations by Representatives Owned by Competing Stations in the Same Area*, Report and Order, 87 FCC 2d 668, 669, ¶ 3, n.4 (1981) ("Although the Commission does not enforce the antitrust or other laws relating to unfair trade practices, it takes cognizance of the policies expressed in these statutes in its interpretation of the public interest standard found in the Communications Act of 1934. . . . The core of the antitrust law is found in the Sherman Act, 15 USC §§ 1 and 2 (1958) . . . Forbidden under these sections are contracts, combinations, conspiracies which restrain trade. . . ."); *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Inquiry, 9 FCC Rcd 1649, ¶ 9 (1994) ("It is not our intention to adjudicate whether specific contracts violate the antitrust laws. Consistent with our statutory mandate, however, we will address . . . whether and to what extent . . . contracts are prohibited by existing statutes, including the antitrust laws. . . . [A]nalytical tools drawn from antitrust law are an appropriate and useful component of our broader public interest examination of . . . contracts.").

[16] *See* 2014 Joint Negotiation Order, ¶ 23, n.89, *citing* Report on Chain Broadcasting, Docket No. 5060, pp. 46, 83 n. 3 (1941), aff'd NBC v. United States, 319 U.S. 190, 223-24 (1943). The Commission has consistently maintained this position that its public interest authority is not limited to practices that would violate the antitrust laws, but comprehends broader goals, such as diversity and localism. *Id.* at n. 89 (citing numerous Commission's statements to this effect).

[17] *See* ACA Totality Comments at 10-13; ACA Totality Reply Comments at 36-39; ATVA Comments at 38-39, 56-57 (the Commission should explicitly consider the public interest); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Public Knowledge and Open Technology Institute at New America at 9 (filed Dec. 1, 2015) (the Commission should consider harm to consumers as the primary factor in reviewing negotiating practices).

[18] ACA Totality Reply Comments at 48.

> may lack the relevant communications expertise.[19] Moreover, such an approach can be best for individual parties that are most at risk of case-by-case antitrust enforcement because it can provide clear rules of the road on practices that are either permitted or permitted, as the NAB has argued in the past.[20]

In this case, the question with respect to bundling as a form of single firm behavior is not whether a direct competitor is excluded, but whether consumers would be harmed by bundled negotiations for two or more "must have" programming assets, and this is a proper question for the Commission under its public interest standard. Higher wholesale prices resulting from enhanced market power due to bundled negotiations for "must have" carriage rights harms competition in downstream MVPD by raising costs. Consumers are harmed to the extent that higher costs are passed through in higher retail prices, and to the extent higher costs damage competition by discouraging entry into (or inducing exit from) downstream MVPD markets. The public clearly has an interest in ensuring that bilateral retransmission consent negotiations are undertaken in good faith and that agreements are reached that are mutually acceptable to the parties, rather than resulting from the exercise of monopoly power, regardless of whether the antitrust authorities would find a violation of the antitrust rules.[21] Furthermore, the promotion of consumer welfare via a lower cost and more competitive MVPD marketplace is undeniably in the public interest.

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[19] *2010 Quadrennial 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, Reply Comments of the American Cable Association at 34-35 (filed Apr. 17, 2012) (the case-by-case adjudication required to identify and prosecute antitrust violations is not an efficient method of protecting against anticompetitive conduct in cases where anticompetitive practices can be clearly identified as such on a prospective basis).

[20] *See Reexamination of the Commission's Cross-Interest Policy*, Policy Statement, 4 FCC Rcd 2208, ¶ 43 (1989) ("NAB responds to the question posed in the Second Notice as to whether the Commission should continue to forbid activity not prohibited by the antitrust laws, asserting that the Commission has the responsibility to take into account the policies underlying the antitrust laws and to apply them [not] administering the antitrust laws but rather exercising its own powers under the Act, and that the Commission policies thus need not fully parallel the antitrust laws. NAB further believes that permitting combination advertising rates might lead licensees to inadvertently engage in price fixing or 'tying' violations. NAB also disputes the adequacy of private remedies for those injured by such activities, arguing that they take too long and are too expensive.").

[21] For this reason, Caves and Owen's analysis of whether bundling of two or more "must have" programming assets in a retransmission consent negotiation would be found to violate the antitrust laws under a "rule of reason" test for monopolization or attempted monopolization established by the Ninth Circuit in *Cascade* is inapposite to whether ACA's proposal for sequential negotiations should be adopted by the Commission. *See* Caves-Owen Paper, ¶¶ 14-15, 36-38; *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896-97 (9th Cir. 2008) ("Cascade"). Even if Caves and Owen are correct that there exists no general blanket presumption against bundling in the antitrust context, their argument misses the mark with respect to bundling of monopolistic goods. As ACA has previously explained, the Commission has found top four-rated broadcast stations are "must have" giving their owners significant market power in retransmission consent negotiations and that RSNs are another form of "must have" programming that are highly valued by subscribers and lack adequate substitutes. *See* supra n. 44; *see also Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶ 3 (2015) ("NPRM" or "Totality NPRM") ("MVPDs that face competition have stronger incentives to negotiate retransmission consent agreements with broadcast stations because much broadcast network television programming continues to be 'must have' programming for MVPDs and an MVPD that is unable to reach a retransmission consent agreement with a broadcast station may permanently lose subscribers to rival MVPDs – including subscribers to its associated voice and broadband services."). The issue at hand is not monopolization or attempted monopolization, which requires evidence of specific intent to exclude competitors, as was the antitrust issue in *Cascade,* but rather whether coercive bundled offers for two

Thus, both under the umbrella public interest standard of the Communications Act, and the directives of Section 325(b), the Commission's analysis of whether negotiations for retransmission consent are conducted in good faith is informed by, but is certainly not limited to, traditional antitrust principles, and there is no indication that Congress intended the Commission to play only the gap filling role with respect to anticompetitive actions undertaken by broadcast licensees as Caves & Owen suggest.

Notably, there is no statutory carve out from the obligation to negotiate in good faith for the broadcaster "bundling" practices under Section 325(b)(3)(C). The section broadly directs the Commission to adopt good faith rules and the Commission understood this charge to include adopting rules that would prospectively guide negotiations and provide parameters for what constitute competitive marketplace considerations.[22] Congress specifically incorporated competitive considerations into the good faith rules by stipulating, in the one express limitation on the Commission's good faith authority, that it shall not be a failure to negotiate in good faith if the television broadcast stations enters into retransmission consent agreements containing different terms and conditions, including price terms, with different MVPDs provided they are based on competitive marketplace conditions in Section 325(b)(3)(C)(ii).[23] Congress did not otherwise limit the Commission's authority or discretion to adopt rules implementing the requirement that retransmission consent be negotiated in good faith.

In its 2014 Joint Negotiation Order, the Commission explicitly confirmed the breadth of its discretion to adopt rules implementing Section 325 over the objections of broadcasters that it lacked authority to prohibit joint retransmission consent negotiations under the good faith rules.[24] Also instructive is the Commission's reason for rejecting broadcaster arguments that its good faith authority under Section 325 is limited "merely to establish a marketplace for the rights to retransmit broadcast signals:"

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monopoly goods raises prices and reduces consumer welfare. This issue is closer to *de facto* tying than predatory pricing, for which a different liability standard is appropriate. Moreover, it appears that this area of vertical restraints in antitrust jurisprudence is unsettled, and the Supreme Court has yet to definitively determine the precise conditions under which the appropriate antitrust treatment of bundling should be analogous to the treatment of predatory pricing, as the Caves-Owen Paper suggests, or the treatment of de facto tying. *See*, *e.g.*, U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION, Chapter 5, *Antitrust Issues in the Tying and Bundling of Intellectual Property Rights* (2007), *available at* https://www.justice.gov/atr/chapter-5-antitrust-issues-tying-and-bundling-intellectual-property-rights. Particularly because this an unsettled area of antitrust law, the Commission should avoid relying solely on tests developed in the antitrust context in establishing its good faith negotiation rules.

[22] See *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, ¶¶ 39-56 (2000).

[23] In implementing the good faith rules sixteen years ago, the Commission addressed bundling only as a general matter, and found, based on marketplace conditions at the time, that it should be considered presumptively consistent with competitive marketplace conditions. *See id.*, ¶ 56 (proposals presumptively consistent with competitive marketplace conditions include proposals for carriage conditioned on carriage of any other programming, such a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market).

[24] 2014 Joint Negotiation Order, ¶ 31 ("Where, 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 did not identify in the statute every practice or arrangement that might violate that obligation, and instead relied on the Commission to make such determinations."). *See* S. Rep. No. 102-92 at 36 (1991) ("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 . . . to dictate the outcome of the ensuing marketplace negotiations.").

> Rather, we believe that Congress's goal of a competitive marketplace is directly furthered by this rule, which is precisely designed to prevent a Top Four television broadcast station from obtaining undue leverage in its retransmission consent negotiations by virtue of an arrangement with a competing Top Four station. Thus, rather than "dictating the outcome" of the negotiation, our rule simply addresses the process of retransmission consent negotiations in a manner that protects the competitive working of the marketplace in which retransmission consent is negotiated. The rule neither compels negotiating parties to reach agreement nor prescribes the terms and conditions under which MVPDs may retransmit broadcast signals.[25]

This same reasoning is equally applicable to a *per se* prohibition on bundled negotiations for "must have" top-four stations and RSNs (or other "must have" programming assets). The rule would address the process – that is, requiring only the sequential timing – of such negotiations without compelling the parties to reach agreement or prescribing the terms and conditions under which MVPDs may retransmit broadcast signals under their retransmission consent agreements.

B. Commission Intervention Would Not Improperly Undermine Antitrust Enforcement.

Caves and Owen also argue that adoption of a prohibition on bundled negotiations by the Commission would not only be redundant, but would undermine legitimate antitrust enforcement by invariably prohibiting welfare-enhancing bundling under efficiency criteria upheld by antitrust law.[26] They argue specifically that "FCC intervention in this context is likely welfare reducing under efficiency criteria upheld by antitrust law" and because it does not address "any other pressing social policy (such as diversity or innovation) that can be advanced by the FCC, intervention here would be pure redistribution."[27] These arguments are wholly unsupported and should be disregarded by the Commission. Higher prices from bundling are not purely redistributive if performance of the downstream MVPD market is impaired, including by raising consumer prices and reducing MVPD subscriptions and/or by distorting MVPD choice. The fact that bundling in general enables some forms of programming that would otherwise not be possible because revenues would not cover large fixed costs is an observation that most certainly does not apply to either top-four broadcast stations or RSNs (or other "must have" programming assets), each of which are quite profitable. As ACA has demonstrated, generalized arguments that bundling should be permitted in retransmission consent negotiations do not undermine the case for a prohibition on bundling retransmission consent with RSNs, or other "must have" programming. Bundling of "must have" programming causes consumer harm by raising prices, and very likely offers none of the supposed benefits of other types of bundling, such as discounts for less desirable programming or an increase in programming diversity.[28] The higher fees from this type of bundling are due to a consolidation of

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[25] 2014 Joint Negotiation Order, ¶ 32. In the STELA Reauthorization Act of 2014, Congress ratified this reasoning by directing the Commission to amend its good faith rules specifically to prohibit the joint negotiation of retransmission consent by any non-commonly owned same market broadcasters following the Commission's own more limited conclusion that such behavior on the part of top-four stations constituted a *per se* violation of the obligation to negotiate retransmission consent in good faith. *See* Pub. L. No. 113-200, 128 Stat. 2059 (2014) ("STELAR"); *Implementation of Sections 101, 103 & 105 of the STELA Reauthorization Act of 2014*, Order, 30 FCC Rcd 2380 (2015).
[26] Caves-Owen Paper, ¶¶ 14-16.
[27] *Id.*, ¶ 16.
[28] *See* Riordan Response at 16 (evaluation of claimed efficiencies such as enabling higher quality programming that is otherwise not viable is either "appropriate for a totality of the circumstances evaluation" or, if the Commission were to determine the possibility of efficiencies was sufficiently remote, treating "bundled negotiations as a per se violation of good faith bargaining").

monopoly power, rather than a sensible economic interpretation of competitive marketplace considerations.[29]

Moreover, there is no reason to take seriously the claim that ensuring that carriage negotiations for retransmission consent and RSNs be negotiated separately rather than concurrently would be welfare reducing. Caves and Owen's argument that the regulation would undermine antitrust laws by "encouraging specious claims that would not survive antitrust scrutiny, while simultaneously condemning procompetitive bundling," is itself specious. As discussed in more detail below, the Riordan Paper demonstrates that the market for top-four stations and RSNs (or other "must have" programming assets) is monopolistic rather than competitive, based on the Commission's prior findings about their "must have" qualities for MVPDs, qualities that allow simultaneous negotiations to produce prices higher for each asset than would independent negotiations.[30] These excess higher costs are passed through to MVPD subscribers in the form of higher rates, as evidenced by the retail cable service bills ACA members have sent their subscribers after receiving retransmission consent price increases attached to this letter.[31] Preventing this result is by definition welfare enhancing.

Competitive marketplace considerations today, as Professor Riordan has demonstrated, warrant a different conclusion with regard to bundles involving two sets of "must have" programming assets, such as top-four stations and RSNs serving the same market, which are essentially monopolistic products from the conclusion reached by the Commission 16 years ago with regard to bundling in general. The Riordan Paper makes clear that higher fees derived from this form of bundling "is due to the consolidation of monopoly power, rather than a sensible meaning of competitive marketplace considerations.'"[32] Sound public policy in this case warrants this form of regulatory intervention to protect pay television consumers, contrary to the claims of Caves and Owen.

C. The Commission Has Ample Statutory Authority to Adopt the Proposed Prohibition.

NAB argues that ACA's proposal should be rejected "because it violates the clear terms of Section 325 of the Communications Act by forcing carriage of the broadcast signal while the separate, sequential negotiations for the affiliated programming occurs."[33] NAB, however, misunderstands ACA's proposal. It does not force carriage of the broadcast signal. ACA's proposal goes no further than to ask the Commission to deem it a *per se* violation of the good faith obligation for the common owner of a top four-rated broadcast station and another "must have" programming asset whose carriage agreement with the MVPD expires at the same time as the station's retransmission consent agreement, to refuse to grant the request of an MVPD for a temporary extension of its existing retransmission consent agreement. The temporary

[29] ACA Totality Comments at 28-32; ACA Totality Reply Comments at 40-48.
[30] Recent industry research again confirms the wisdom of the Commission's classification. See Jeff Baumgartner, *TiVo: Big Four Broadcasters Top 'Must Keep' List*, MULTICHANNEL NEWS, Apr. 27, 2016, *available at* http://www.multichannel.com/news/content/tivo-big-four-broadcasters-top-must-keep-list/404488?utm_medium=twitter&utm_source=twitterfeed.
[31] See *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 15-216, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Michael Nilsson, Counsel to the American Television Alliance at 3-7 (filed Feb. 18, 2016) (describing economic evidence of the relationship between higher retransmission consent fees and higher consumer bills for basic tier subscriptions, including evidence that MVPDs, including smaller providers, explicitly pass through at least some retransmission consent fess using line items).
[32] ACA Totality Reply Comments at 41; Riordan Paper at 10.
[33] NAB Feb. 16 Ex Parte at 2.

extension would begin at the termination date of the existing retransmission consent agreement and last until 45 days after either an agreement is reached for the other "must have" programming or the "must have" programming is withheld from the MVPD.[34]

Notwithstanding the broadcasters' incorrect claims that the Commission lacks authority to grant interim carriage, the Commission has the authority to adopt ACA's proposal for sequential bargaining because it unquestionably "has the authority to identify instances of bad faith and to impose other remedies in response to them."[35] ACA's proposal goes no further than to request that the Commission identify a bad faith practice – refusal to grant a temporary extension of retransmission consent to permit sequential negotiations to occur that *are* based on competitive marketplace considerations in lieu of bundled negotiations that *are not.* This is a procedural remedy and is not tantamount to the Commission "ordering forced carriage as the remedy for a broadcaster's violation of the good faith rules," which NAB has maintained would exceed the Commission's statutory authority,[36] even assuming that were true. It would simply require that broadcasters grant temporary extensions upon request of the MVPD to permit good faith negotiations for retransmission consent to occur.[37]

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[34] The terms and conditions of carriage during the temporary extension period shall be the same as the expired agreement, but those of the new agreement shall become retroactive to the expiration date of the previous carriage agreement, subject to true-up by the negotiating entities. This is similar to the terms of the arbitration condition placed on Comcast-NBCU regarding the terms and conditions of carriage during the arbitration period. *See Applications of Comcast Corporation, General Electric Company, NBC Universal, Inc. for Consent to Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 46, Appendix A, Section VII. B.12 (2011) ("Comcast-NBCU Order").

[35] ATVA Mar. 25th Ex Parte at 9 (noting NAB's apparent agreement with the proposition that the Commission may impose remedies other than interim carriage upon a finding of bad faith negotiating conduct on the part of a broadcaster).

[36] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter to Marlene H. Dortch, Esq., from Rick Kaplan, NAB at 9 (filed Mar. 17, 2016).

[37] ACA continues to maintain that the Commission should reject its earlier stance that language in Section 325(b) constraining the ability of MVPDs to retransmit broadcast signals without the broadcaster's express consent limits the Commission's authority over the broadcast signal carriage negotiating practices of licensees of the public's airwaves. ACA and others have repeatedly demonstrated that Section 325(b) provides the Commission with ample authority to require interim carriage pending resolution of retransmission consent disputes, and these arguments are fully applicable to carriage of the station for a temporary period after either an agreement is reached for the other "must have" programming or the MVPD has lost the right to carry the other "must have" programming. *See*, *e.g.*, ACA Totality Comments at 5-9; ACA Totality Reply Comments at 21-26; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association at 71-76 (filed May 27, 2011); ACA 2011 Reply Comments at 91, n.108; ATVA Comments at 53-56; *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of Time Warner Cable at 27 (filed Dec. 1, 2015); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Reply Comments of Professor James Speta at 1-2, 4-29 (filed Jan. 14, 2016) (concluding, based on an analysis of the Communications Act as a whole, Section 325(b) and its legislative history that "the Commission has ample authority to order interim carriage as a remedy for a broadcaster's violation of its statutory duty to negotiate in good faith" and to "to enact rules that require retransmission consent agreements to include specific procedures that pertain to negotiation of renewal agreements, including such terms as cooling off an extension periods"); *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Reply Comments of Mediacom Communications Corporation at 6-26 (filed Jun. 27, 2011); *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*; *Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket Nos. 15-216, 10-71, Letter to Marlene H. Dortch from Michael Nilsson, American Television Alliance (filed Mar. 15, 2016) (summarizing statutory support for

II. THE COMMISSION SHOULD DISREGARD THE ARGUMENTS OF NAB AND ITS EXPERTS CONCERNING ALLEGED DEFICIENCIES OF THE RIORDAN PAPER

The Riordan Paper analyzed three key economic issues: (i) whether markets for "must have" television station signals and "must have" RSNs are monopolistic; (ii) whether monopoly bundling of two must-have goods is likely to raise prices; and (iii) whether separate good faith negotiations for must-have television stations and must-have RSNs would improve consumer welfare.[38] In each case, the Riordan Paper demonstrated that the answer was yes.

NAB claims, as do Caves and Owen, that the Riordan Paper mischaracterizes marketplace competition, has empirical and theoretical flaws, overlooks the competitive benefits of bundled programming offers, and should therefore be disregarded.[39] "All of these counterarguments are misleading," as the Riordan Response demonstrates,[40] and should therefore be dismissed in their entirety.

A. The Riordan Paper's Characterization that Markets for "Must Have" Programming Are Monopolistic is Correct.

NAB, based on the conclusions of Caves and Owen, asserts that the Commission should disregard the Riordan Paper because it mischaracterizes competition in the market for video programming, "ignores the 'increasingly fragmented' nature of upstream content markets" and competition broadcasters face from other programming vendors, and ignores the high degree of concentration in MVPD markets.[41] NAB and its experts argue instead that the market power of broadcasters should be evaluated in the context of a broad upstream market for video programming that includes additional actors, and that doing so shows that the Riordan Paper's conclusion that markets for "must have" programming – to the extent such a concept is valid – is flawed.[42] Based on this assessment, NAB urges the Commission to reject ACA's proposal.

Accurate definition of the relevant markets lies at the heart of competition analysis. The Riordan Paper based its argument that markets for "must have" programming are monopolistic on the well-accepted "Structure-Conduct-Performance paradigm for describing market conditions" and on the Commission's own findings "that these are must-have programming assets for which there are no close substitutes."[43] The Caves-Owen Paper attempts to misdirect the Commission's attention from the dynamics of negotiations for local broadcast signal and RSN carriage by asking it to focus its attention instead on the relative lack of concentration in a broadly defined upstream content market under market concentration tests established for merger analyses. As the Riordan Response demonstrates, however, this is a misleading indicator of market power because "neither a dispersed overall ownership of video content, nor an oligopolistic MVPD market structure, are relevant for an analysis of whether markets for retransmission consent and RSNs are monopolistic," based on the

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adoption of interim carriage remedies and other pending proposals to reform the Commission's good faith rules); ATVA Mar. 25th Ex Parte at 7-10 (refuting broadcaster arguments that the prohibition on an MVPD's carriage of a broadcaster's signal without its consent also prohibits the Commission from requiring interim carriage or adopting any of ATVA's reform proposals). Thus, even assuming for the sake of argument that ACA's proposal for sequential negotiations of retransmission consent and one or more other "must have" programming assets such as RSNs were tantamount to limited term "interim carriage," which ACA does not concede, to avoid the effects of monopolistic bundling, as discussed below, it would be well within the Commission's authority to adopt such a requirement.

[38] Riordan Response at 3.

[39] NAB Feb. 16 Ex Parte at 4-6; Caves-Owen Paper, ¶¶ 33-34.

[40] Riordan Response at 4.

[41] NAB Feb. 16 Ex Parte at 3; Caves-Owen Paper, ¶ 39.

[42] NAB Feb. 16 Ex Parte at 4; Caves-Owen Paper, ¶¶ 33-34.

[43] Riordan Response at 3.

definition of a monopoly as "a market with a sole seller of a good for which there are no close substitutes," a description the Commission has repeatedly found applies to top-four broadcast stations and RSNs.[44] Because competition involves the presence of rivalrous substitutes, and the Commission has found this lacking in the case of top-four broadcast station and RSN programming, it is entirely appropriate to characterize this market as monopolistic.

Further, the Riordan Response debunks the critique of NAB and Caves and Owen that the Riordan Paper's finding of harms to MVPDs from loss of "must have" programming ignored losses to broadcasters from failure to strike a deal by noting that such revenue loss "is only one half of the profit maximization equation. "According to elementary textbook analysis, a profit-maximizing

[44] Riordan Response at 2, 3-5. *See* NPRM, ¶¶ 3, 15. The Commission first referenced must-have programming "for which there are not good substitutes" in its 2010 *Program Access Order,* where it also described region sports programming as must have. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶¶ 4, 47 (2002). The Commission also referenced "must have" programming in subsequent program access orders, and in various merger reviews. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, ¶¶ 29-42 (2007), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010) (discussing claims of MVPDs regarding "must have" programming that includes RSN programming in evaluating extension of ban on exclusive contracts); *Id.*, ¶ 38 ("The record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes"); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 25 FCC Rcd 746, ¶¶ 27-28, 60 (rel. Jan. 20, 2010), *aff'd in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (defining RSNs for program access purposes and adopting a rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN would violate Section 628(b) of the Act); *Revision of the Commission's Program Access Rules, et al*., Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 27 FCC Rcd 12605, ¶¶ 74-79 (2012) (seeking comment on whether to adopt a rebuttable presumption that an exclusive contract involving satellite-delivered, cable-affiliated RSN programming has the "purpose or effect" of "significantly hindering or preventing" the complainant in a program access complain from providing satellite cable programming or satellite broadcast programming as set forth in the Section 628(b) of the Act); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 133, 147 (2004) ("News-Hughes Order") ("The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: [RSNs] typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."); *Id.*, ¶¶ 201, 202-206 (carriage of local broadcast stations is critical to MVPDs; evidenced by substantial subscriber defections even during temporary blackouts); *See also News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, ¶ 87 (2008) (Liberty-News-DirecTV Order") ("Hence, an MVPD's ability to gain access to RSNs, and the price and other terms of conditions of access, can be important factors in its ability to compete with rivals."); *Adelphia Commc'n Corp., (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Commc'n Corp., (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corp. (subsidiaries), Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 124 (2006) (an MVPD that drops local sports programming risks subscriber defections, and MVPDs "will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights."). The Commission has also found in some cases national cable programming networks can also exhibit the "must have" characteristics of "must have" programming. Comcast-NBCU Order, ¶ 46, Technical Appendix, ¶¶ 53-55.

monopolist more than compensates for the lost profit from failed deals by raising its price for the successful deals."[45] ACA maintains that its definition of the market relevant to the question before the Commission concerning bundling of two or more "must have" programming assets in retransmission consent negotiations is correct and may safely be relied upon by the Commission in determining whether to reform its good faith rules.

B. Monopoly Bundling of Two "Must Have" Programming Assets Is Likely to Raise Prices and Harm Consumers.

NAB and its experts also advance a number of challenges to the conclusions of the Riordan Paper based on alleged empirical or theoretical flaws.[46] First, they argue that it fails to quantify the frequency of common ownership of broadcast stations and RSNs in the same market and that doing so shows the instances to be quite rare and the opportunities for joint negotiation limited.[47] Next, they assert the Riordan Paper rests on no empirical evidence to support its claim that bundling of top-four stations and RSNs actually leads to price increases and that the sequential negotiations proposal lacks any basis in economic or antitrust principles, fails to distinguish between pro- and anti-competitive bundling, and would lead to heavy-handed regulatory adjudication and intervention that would wrongly proscribe welfare-enhancing bundled offers.[48] These arguments lack merit. As Professor Riordan observes in his response, "neither the overall frequency of product bundling in the economy, nor the general possibility that it is beneficial, are dispositive of the question whether, in the specific case of markets for retransmission consent of must-have broadcast stations and must-have RSNs, an insistence on bundled negotiations by a common owner is likely to raise prices by enhancing market power and increasing bargaining leverage."[49]

Opportunities for joint negotiation are significant. It should be obvious that the frequency of common ownership of RSNs and broadcast stations in the same market is not the issue. Rather, the issue for the Commission is the likely harm to consumers from the bundled negotiation of two same-market "must have" programming assets that does or could occur in the marketplace and the opportunities for such bundled negotiations are significant. As ACA has demonstrated, the number of RSNs owned by entities that also own local broadcast stations in the same market is relatively high, given the limited number of RSNs nationally. A substantial number of them are owned by either of two entities: 21st Century Fox and Comcast-NBCU. In particular, "there are at least 23 markets in which 21st Century Fox and NBC respectively, own and operate both a broadcast station (an "O&O") station and an RSN serving the same market."[50] In addition, ACA "has identified at least 79 different MVPDs that are at risk of facing bundled negotiations for a top four rated broadcast [station] and an RSN that serve the same market."[51] Moreover, there are tens of millions of television homes served by MVPDs in these markets.

ACA has also described how its members operating a cable system that carry both a Fox O&O and one or more Fox RSNs report to ACA that they negotiate with a single division at Fox responsible for carriage of all Fox programming. In their most recent negotiations, some members' retransmission consent and RSN agreements expired on or within a few weeks of each other; they believed that reaching a deal for the O&O was contingent on the renewal of the Fox RSN, and that Fox could withdraw permission to continue carrying both the Fox O&O and Fox RSN if a renewal

[45] Riordan Response at 7.
[46] NAB Feb. 16 Ex Parte at 4-5; Caves-Owen Paper, ¶¶ 5-8.
[47] NAB Feb. 16 Ex Parte at 4; Caves-Owen Paper, ¶¶ 31-32.
[48] NAB Feb. 16 Ex Parte at 4; Caves-Owen Paper, ¶¶ 33-34.
[49] Riordan Response at 4.
[50] ACA Totality Comments at 17-19.
[51] *Id.* at 19.

agreement was not reached by the time of the existing deal's termination date.[52] Further, Fox is increasingly demanding that renewals be co-terminus, and ACA members believe this will strengthen Fox's market power and negotiating leverage in future negotiations.[53]

Although the broadcasters deny it, both the identity of owners of broadcast stations and their strategies for negotiating retransmission consent have changed since 2000, and the Commission's rules must change as well. There are now many instances of common ownership of same market O&Os and RSNs due to mergers and acquisitions. Most significantly, in 2011, Comcast acquired NBCU, which combined Comcast's RSNs with broadcast stations owned and operated by NBC Universal.[54] Most recently, in the Charlotte, North Carolina market where Fox owns Fox Sports Carolina, Fox acquired WJZY in 2013 and switched its affiliation from CW to Fox, giving it ownership of both a top four rated broadcast station and regional sports network in the market.[55] MVPDs operating in these markets have reported instances of bundled negotiations and "there is a noticeable trend toward co-terminus agreements for these programming assets that will lead to more bundled negotiations in the future.[56] There is an ample basis for the Commission to conclude that bundled negotiations for two or more "must have" assets such as top-four stations and RSNs are occurring in the marketplace and are likely to increasingly occur in the future, absent Commission action.

<u>The Riordan Paper Is Based on Well-Established Economic Models and Commission Precedents Concerning the Harms of Common Ownership of "Must Have" Programming Assets</u>. NAB, based on the Caves-Owen Paper, argues that the bundling proposal lacks any basis in economic or antitrust principles, fails to distinguish between pro- and anti-competitive bundling, and would wrongly proscribe welfare-enhancing bundled offers.[57] NAB and its experts maintain that because the welfare effects of bundling in general are ambiguous, the Commission should retain its blanket presumption that bundling is pro-competitive; at the very least, they suggest that the Commission should require evidence that bundling of top-four stations and RSNs actually leads to price increases before imposing a presumption of bad faith.[58] These objections are without merit.

First, in citing economic literature that purportedly supports their arguments that bundling in general can have pro-competitive effects, Caves and Owen reference an article authored by Professor Riordan and Yongmin Chen, Professor of Economics, University of Colorado at Boulder.[59] As demonstrated in the Riordan Response, however, citing the article for this proposition is incorrect. "The analysis in that paper demonstrates that profit-maximizing product bundling lowers prices only under specific markets conditions, and in fact supports the proposition that monopoly bundling of two must-have goods is likely to raise prices and reduce consumer welfare."[60]

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[52] *Id.* at 20.
[53] *Id.* at 21-22. ACA also noted that Comcast, in contrast, has not done this, which may reflect the merger conditions permitting arbitration over any of Comcast's programming on a standalone basis that will expire in Jan. 2018. *Id*.
[54] *See*, *e.g.*, News-Hughes Order; *General Motors Corporation, Hughes Elec. Corp., Transferors and The News Corporation, Limited Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 8674 (2009); Comcast-NBCU Order.
[55] *See* Mark Washburn, *Fox and CW networks switch stations in Charlotte starting Monday*, CHARLOTTE OBSERVER, June 28, 2013, *available at* http://www.charlotteobserver.com/entertainment/article9090008.html.
[56] ACA Totality Comments at 22.
[57] NAB Feb. 16 Ex Parte at 4-5; Caves-Owen Paper, ¶¶ 33-34.
[58] NAB Feb. 16 Ex Parte at 4; Caves-Owen Paper, ¶ 34.
[59] Caves-Owen Paper, ¶ 7, n.11; Yongmin Chen and Michael H. Riordan, *Profitability of Product Bundling*, INTERNATIONAL ECONOMIC REVIEW (2013).
[60] Riordan Response at 7-8. Professor Riordan further explains that the Chen-Riordan analysis follows the economics literature on monopoly bundling, by distinguishing the independent monopoly price that

Next, NAB and its experts complain that ACA and Professor Riordan have failed to present empirical evidence in support of their proposal. The Riordan Paper's conclusion that bundled negotiations raise prices is based on two different bargaining models, the Nash bargaining model, where the threat to withhold two "must have" programming assets increases the seller's bargaining leverage and the monopoly-pricing model, where the ability of the seller to make a package offer augments the seller's market power.[61] The Riordan Response notes that although neither of these bargaining models is fully realistic, "the purpose of an economic model is not to describe reality, but to gain insights by making simplifying assumptions."[62] Significantly, "[b]oth bargaining models lead to the same hypothesis - that bundled negotiations for a must-have local broadcast station and a must-have regional sports network of must-have programming by common owner raises programming prices," a hypothesis fully consistent with the Commission's empirical findings as reported in the *Comcast-NBCU* Order.[63] Simply put, and contrary to the claims of Caves and Owen that the Commission's analysis provides no real world support for the Riordan Paper,[64] the Commission's analysis in fact demonstrated that common ownership of a top-four broadcast station and RSN in the same market allowed the common owner to extract higher RSN fees after five years of common ownership, evidence it found consistent with ACA's claim of potential horizontal harms resulting from the Comcast-NBCU transaction.[65]

More recently, the Commission has recognized that the coordination of carriage negotiations for non-commonly owned top four-rated broadcast stations serving the same market would drive retransmission consent prices higher than they would be if the stations negotiated independently. The Commission relied on the Nash bargaining model analysis in its 2014 Joint Negotiation Order in reaching the conclusion that joint negotiations for retransmission consent by two or more non-commonly owned top-four stations in a single market constituted a *per se* violation of the obligation to negotiate in good faith.[66] In that case, the bundling was of two "must have" broadcast stations, but the principle is the same – bundled negotiations for "must have" programming assets enhances market power and bargaining leverage, resulting in higher fees for the assets than they would have been able to command if negotiated independently. The Commission's explanation of the reasoning behind its conclusion there bears directly on the question of bundling negotiations in this proceeding:

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maximizes the profit of a single-product monopolist, from the standalone price that is part of a mixed bundling strategy for a two-product monopolist. The analysis in the Caves-Owen Paper finding that bundling can lower prices mistakenly fails to observe this crucial distinction between two price concepts in evaluating the effects of monopoly bundling by presenting an example that conflates the standalone mixed-bundling price and the independent monopoly price. *Id.* at 8. It is, accordingly, unreliable.

[61] *Id.* at 9.

[62] *Id.* at 9-10 ("The Nash-bargaining model yields insights about how "bargaining skill" and opportunity costs (described by outcomes in case of disagreement) determine bargaining outcomes. The monopoly-pricing model yields insights about how a buyer's private information about value is a source of bargaining advantage. The models have different strengths and weaknesses in terms of realism. The alternating-offer interpretation of the Nash-bargaining model has the strength of explicitly modeling the possibility of back-and-forth negotiations, and the weakness of ignoring private information and therefore not accommodating i*mpasse* as an equilibrium outcome. The monopoly-pricing model has the strength that it models private information explicitly, and the weakness that it does not allow back and forth offers over price. A more complicated (and realistic) model that combines back-and-forth communication and private information unfortunately does not yield sharp predictions and clear insights.")

[63] *Id.* at 15; Comcast-NBCU Order, Appendix B, ¶¶ 54-55.

[64] Caves-Owen Paper, ¶¶ 29-35.

[65] Comcast-NBCU Order, Appendix B, ¶¶ 54-55 (analysis of bargaining results for negotiations by a common owner of top four-rated O&O stations and RSNs serving the same market show that higher prices were charged for the RSN than would have been observed if the RSN and broadcast station had been separately owned, resulting in a statistically significant percentage point increase in the annual percent change of programming prices).

[66] 2014 Joint Negotiation Order, ¶¶ 11-15.

> In its review of the Comcast-NBCU transaction, the Commission stated that this theory of harm "is a well-established concern in antitrust enforcement" and concluded that *coordinated negotiations of carriage rights for two blocks of "must have" programming (in that case, an NBC owned and operated station (O&O) and a Comcast Regional Sports Network ("RSN")) would give increased bargaining leverage to the programmer and lead to higher prices for an MVPD buyer, who would be at risk of losing two highly desirable signals if negotiations failed to yield an agreement*. In particular, the Commission found 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*." Although the Commission in that context was considering the competitive effects of combining a broadcast network and an RSN, we believe that two (or more) broadcast stations that are ranked among the top four stations in a market by audience share offer at least a comparable level of substitution to an MVPD bargaining for carriage rights. Furthermore, Rogerson's bargaining model suggests that the more valuable the stations' programming is, the greater is the increase in retransmission consent fees resulting from joint negotiation. We thus find it reasonable to infer that the magnitude of fee increases derived from joint negotiation is larger for Top Four station combinations than for other stations.[67]

The Commission's theoretical conclusions about how coordinated negotiations of retransmission consent for a top four-rated station and an RSN in the same market would produce higher prices than if the assets were negotiated separately in the 2014 Joint Negotiation Order were buttressed by empirical evidence supplied by ACA that joint negotiation by Top Four stations leads to increases in retransmission consent fees by stations operating in the same market.[68]

Treatment of Potential Efficiencies of Bundling. NAB and Caves and Owen also take issue with ACA's proposal on the grounds that it would disallow "welfare-enhancing bundled offers."[69] They maintain that bundling might have efficiencies other than lower prices such as potentially enabling higher quality programming that is otherwise not viable.[70] The Commission should not be distracted by this wholly unsupported claim in analyzing the harms of bundled offers for two or more

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[67] *Id.*, ¶ 15 (emphasis added). To ameliorate this harm, the Commission established a commercial arbitration condition that permits an MVPD to request separate offers for Comcast-NBCU O&O stations, RSNs, or the suite of Comcast-NBCU cable programming networks. *See* Comcast-NBCU Order, Appendix A, Conditions, Section VII, A., ¶ 2 ("An MVPD Claimant may demand a standalone offer for (i) broadcast programming; (ii) RSN programming; (iii) the bundle of all cable programming, and/or (iv) any bundle of Video Programming (including any standalone bundle of Films) that a C[omcast]-NBCU Programmer has made available to a similar MVPD.").
[68] 2014 Joint Negotiation Order, ¶ 16 (describing examples submitted by ACA "indicating that where a single entity controls retransmission consent negotiations for more than one Top Four station in a single market, the average retransmission consent fees for such stations was more than twenty percent higher than the fees paid for other Top Four stations in those same markets," that support the "conclusion that joint negotiation between or among separately owned, same market Top Four stations leads to supra-competitive increases in retransmission consent fees"). Using the same analysis, ACA believes the Commission can comfortably conclude that bundled negotiations for "must have" top-four stations and other "must have" programming, such as RSNs will also produce supra-competitive increases in retransmission consent fees.
[69] NAB Feb. 16 Ex Parte at 4; Caves-Owen Paper, ¶ 48.
[70] Caves-Owen Paper, ¶ 36.

"must have" programming assets. In its advocacy against coordinated retransmission consent negotiations, ACA demonstrated that the efficiencies were likely very small, as retransmission consent negotiations typically occur only once every three years, and the costs savings likely arise solely from the use of one versus two negotiating agents.[71] The Commission appears to have credited this analysis in rejecting the claims of "opponents of a prohibition on joint negotiation who argue that joint negotiation promotes efficiency by reducing transaction costs, and that the cost savings, in turn, lead to lower retransmission consent rates," finding instead that the "efficiencies are likely to be modest and outweighed by the harm from an anticompetitive practice that the record indicates generates supra-competitive retransmission consent fees."[72]

The Riordan Response demonstrates that even if Caves and Owen's claim is credible that bundling might result in efficiencies other than lower prices, such as potentially enabling higher quality programming that is otherwise not viable, the Commission could, consistent with ACA's advocacy, treat such bundled negotiations as *per se* violations of good faith bargaining if it determined the possibility of efficiencies were sufficiently remote.[73] In no event, however, does the record before the Commission support the continued presumption that such bundled negotiations for monopolistic "must have" programming are based on competitive marketplace considerations.

ACA's Proposal Is a Light-Handed Remedy. NAB and Caves and Owen also dispute the Riordan Paper's claim that ACA's proposal for sequential negotiations is "light handed" and complain that ACA's proposal will result in a "steady stream of disputes" requiring Commission "'adjudication and intervention' into private commercial negotiations."[74] If the instances of bundled retransmission consent and RSN carriage negotiations are as "rare" as NAB and its experts claim, the number of disputes reaching the Commission would be commensurately rate, perhaps rising to the level of no more than a trickle.

Despite the fact that the amount of common ownership of these forms of "must have" programming is significant, the likelihood of a stream of litigated disputes is not. Prosecuting a retransmission consent complaint at the Commission is both costly and time-consuming. It is not a process undertaken lightly by any MVPD, despite the outrageousness of some broadcaster negotiating behaviors, as evidenced by the lack of great numbers of adjudicated good faith cases. Moreover, adoption of a *per se* rule that it is inconsistent with good faith bargaining for a top four-rated station to refuse to engage in sequential rather than simultaneous (bundled) negotiations where the expiration date of carriage agreements for the broadcast station and same market RSN occur on or around the same date will more likely result in fewer disputes over prices, terms and conditions will be brought to the Commission for resolution because the parties will have clear "rules of the road" to guide them. Once the ground rules are in place, and one or two cases litigated, one would not expect to see a constant stream of complaints. Further and most importantly, following the Commission's ban on coordinated of negotiations by same market broadcasters, counsel is aware of one instance of a complaint filed regarding coordinated negotiations.[75] Since the number of

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[71] *See* ACA 2011 Reply Comments at 36.
[72] *See* 2014 Joint Negotiation Order, ¶ 18, n.77 ("As ACA notes, the costs that are spared by allowing stations to engage in joint negotiation likely are limited to the cost of hiring a negotiator and related administrative expenses. *See* ACA 2011 Reply Comments at 36. In addition, these costs are borne by stations relatively infrequently because retransmission consent negotiations typically occur only every three years.
[73] Riordan Response at 16.
[74] NAB Feb. 16 Ex Parte at 4, *quoting* Caves-Owen Paper at 7, 38.
[75] *DISH Network L.L.C. v. Sinclair Broadcast Group, Inc.*, Verified Amended and Restated Retransmission Complaint and Request for Preliminary Injunctive Relief, MB Docket No. 12-1, File No. CSR-_____-C (filed Aug. 25, 2015) (good faith complaint about certain negotiating behavior that violated the good faith

possible instances of coordinated retransmission consent negotiations among separately owned, same market broadcasters prior to the Commission's ban far exceeds the number of possible instances of bundled negotiations between top four broadcast stations and RSNs, it's reasonable to conclude that if broadcast/RSN bundling was barred, the number of complaints filed with regard to this type of bundling would be equally low or non-existent. Finally, NAB's claims about the difficulties inherent in determining when an "impasse" has occurred are overblown.[76] There are no difficulties. ACA's proposal would have the temporary extension period begin at the termination date of the existing retransmission consent contract and last until 45 days after either an agreement is reached for the other "must have" programming or the "must have" programming is withheld from the MVPD.

III. SEPARATE BARGAINING IS A VALID REMEDY FOR HIGHER PRICES FROM MONOPOLY BUNDLING

Based on the analysis in the Riordan Paper that obliging common owners to negotiate carriage agreements for "must have" top-four broadcast stations and other "must have" programming assets such as RSNs separately would improve downstream MVPD performance and protect consumers by undermining the ability of a common owner to charge higher prices resulting from enhanced market power and bargaining leverage due to bundling, ACA asked the Commission to ensure that broadcasters cannot insist on bundling negotiations for "must have" programming assets over the objection of MVPDs seeking sequential negotiations.

In their paper, Caves-Owen criticize this idea by claiming it is analogous to a la carte pricing in downstream MVPD markets, and then support their opposition to sequential negotiations by pointing to a study by Gregory Crawford and Ali Yurukoglu purporting to show that mandated a la carte pricing would harm consumer welfare.[77] A la carte pricing in downstream MVPD markets is, according to the Riordan Response, "a false analogy" to separate good faith negotiations for retransmission consent for a "must have" broadcast stations and RSNs.[78] The Riordan Response provides several reasons why Caves-Owen's use of the Crawford-Yurukoglu study in support of "must have" asset bundling is wrong.

- Non-comparable markets. From an industrial organization perspective, retail MVPD markets are not comparable to wholesale markets for "must have" programming. In downstream MVPD markets, oligopolistic firms sell a programming bundle composed of a large number of channels to consumers at posted prices. In upstream markets for "must have" television broadcast signals and RSNs, monopoly programmers usually negotiate individually with MVPDs. The wholesale bundling proposals at issue here are about including two "must have" goods, a top four-rated local broadcast station and a RSN, in the larger MVPD bundle. With such different markets structures and conduct, there is no reason to assume that the properties of the downstream MVPD market described by Crawford and Yurukoglu apply to the upstream programming market.

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rules, including Sinclair's behavior earlier in negotiations by negotiating for 32 in-market stations not under Sinclair's *de jure* control).

[76] NAB Feb. 16 Ex Parte at 4 (arguing that ACA's proposal will engender litigation over the factual issue of whether negotiations for the RSN have reached an impasse, thus ending the temporary extension period for negotiating retransmission consent for the broadcast station).

[77] Caves-Owen Paper, ¶¶ 46-47; Gregory S. Crawford an Ali Yurukoglu, *The Welfare Effects of Bundling in Multichannel Television Markets*, AMERICAN ECONOMIC REVIEW (2013) ("Crawford-Yurukoglu").

[78] Riordan Response at 4, 27.

- Inapposite pricing model. The Crawford-Yurukoglu baseline model of à la carte pricing assumes MVPDs compete by offering unrestricted multipart tariffs that charge consumers a fixed monthly fee plus an incremental price for each channel the consumer choose to include in her subscription. This interpretation of à la carte pricing allows consumers to assemble their own customized bundles and avoid charges for unwanted channels.[79] The fixed monthly fee is analogous to paying a cover charge just to sit down at a table in a restaurant, before ordering a la carte items from the menu. However, the model is inapposite because in separate negotiations for retransmission consent and RSN carriage, there is no analog to the fixed monthly fee of the Crawford-Yurukoglu model. Rather, each separate negotiation establishes just a uniform wholesale per subscriber price. Furthermore, with just two goods under consideration, a multipart tariff à la Crawford-Yurukoglu is equivalent to mixed-bundle pricing, because the fixed fee plus the incremental prices of the two goods is the package price, while the fixed fee plus the incremental price of one of the goods is the standalone price of that good. Because à la carte pricing as interpreted by Crawford-Yurukoglu departs significantly from separate negotiations for retransmission consent and RSN carriage, the Crawford-Yurukoglu analysis of à la carte pricing has no bearing on the case for separate negotiations.

- Misread results. The Caves-Owen Paper incorrectly claims the Crawford-Yurukoglu analysis shows "that the bundling of cable channels likely enhances consumer welfare."[80] The theoretical analysis in Crawford-Yurukoglu illustrates that, while bundling by itself is likely to raise final prices by reducing the dispersion of consumer values, the renegotiation of programming prices can have an offsetting effect. Thus, the net effect on consumer welfare depends on which of these two effects dominates, which is an empirical question. Contrary to the claim of the Caves-Owen Paper, the baseline empirical analysis in Crawford-Yurukoglu actually shows that on balance bundling reduces consumer welfare by a small amount (0.2%).

Finally, the Caves-Owen Paper also suggests that repeated interaction between a broadcaster and an MVPD would undo the salutary effects of sequential negotiations.[81] That is, the broadcaster would extract higher than the independent monopoly price for retransmission rights or RSN carriage by demanding even higher prices in a future negotiation if the MVPD declined to pay the supra-monopoly price. What is missing from this theory is a convincing explanation for why it is credible for the seller to follow through on a self-punishing threat like this. The Caves-Owen Paper remarks, without further elaboration or literature citation, that "the threat could be reinforced by (publicly) making an example of one MVPD, thereby putting the others on notice."[82] However, a publicized refusal to deal or a punitive price would blatantly violate good faith bargaining.

[79] A multi-part tariff specifies a fixed monthly subscription fee plus an incremental price for each individual channel a consumer includes in a subscription. Riordan Response at 17-18.
[80] Caves-Owen Paper, ¶ 46.
[81] *Id.*, ¶ 52.
[82] *Id.*

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For all these reasons, the Commission should reject the claims of NAB and its experts that sequential negotiations are not an appropriate remedy for bundling negotiations for "must have" top-four stations and other "must have" programming such as RSNs. As the Riordan Response demonstrates, "the objections of the Caves-Owen Paper to the main arguments of the Riordan Paper are based on serial misreadings of the relevant economic literature and lack merit."[83] Properly understood, the economic studies referenced in the Caves-Owen Paper support rather than undermine the case for separating retransmission consent and RSN carriage negotiations to curtail the augmentation of market power resulting from bundled negotiations.[84]

In the event, however, that the Commission disagrees with ACA's proposed sequential negotiation remedy based on temporary extension of the retransmission consent agreement at issue, it could, in the alternative, incorporate into its good faith procedures a commercial arbitration remedy for aggrieved MVPDs similar to the commercial arbitration remedy it has adopted in Comcast-NBCU to ameliorate the competitive harms of combining Comcast's distribution and programming assets, including RSNs, with NBC O&O stations serving the same markets as the Comcast RSNs. Specifically, the Commission imposed a baseball-style arbitration and standstill remedy for all "Comcast-NBCU affiliated programming," that permits aggrieved MVPDs whose negotiations have reached impasse to request arbitration to determine the terms and conditions of a new agreement, with a "fair market value" standard to be applied to the final offers submitted by the parties to the arbitrator.[85] Significantly, in crafting this remedy, the Commission gave MVPD claimants the right to "demand a standalone offer for (i) broadcast programming; (ii) RSN programming, (iii) the bundle of all cable programming, and/or (iv) any bundle of Video Programming (including any standalone bundle of Films) that a C-NBCU Programming has made available to a similar MVPD."[86]

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[83] Riordan Response at 20.
[84] *See id.* at 12-13 (discussing errors with respect to Caves and Owen's use of an antitrust analysis of bundled loyalty discounts) and 8-10 (discussing errors with respect to Caves & Owen's arguments against the sequential negotiation proposal based on a study of a la carte pricing). Professor Riordan explains how a hypothetical posed by Caves and Owen to demonstrate that bundling can lower prices and benefit consumers that is based on the bundled loyalty discount study is inapposite because, unlike bundled negotiations for retransmission consent and RSN carriage, that study was based on an analysis of the consumer welfare effects of exclusionary bundling of a monopoly good with a second good for which there is a competitive substitute. *Id.* at 10. Further, even if relevant to retransmission consent negotiations, the study's result, properly understood, "supports a policy of regulatory oversight aimed at holding the standalone price of must-have programming at or below the price that would be the outcome of separate negotiations." *Id.* Caves & Owen's own hypothetical example, "by the same token, also supports a policy of constraining the standalone price to be no higher than the independent monopoly price." *Id.* It is also worth noting that Caves and Owen criticize ACA's proposal for being unable to distinguish two hypothetical examples of bundling, one of which yields pro-competitive and one of which yields anti-competitive outcomes. Caves-Owen Paper, ¶¶ 42-43. ACA's alternative remedy of commercial arbitration of standalone offers for retransmission consent and RSNs would resolve this problem.
[85] Comcast-NBCU Order, ¶¶ 52-54; Appendix A, Section VII.
[86] *Id.* at Appendix A, Section VII.A.2. ACA explained certain shortcomings with the Commission's arbitration remedy and proposals for improvement of its commercial arbitration remedy to make it more useful for smaller MVPDs in its filings in several recent media transaction reviews, most recently in its filings concerning the Charter-Time Warner Cable-Bright House Networks. *See Commission Seeks Comment on Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149, Comments of the American Cable Association (filed Oct. 13, 2015); Reply Comments of the American Cable Association at 17 (filed Nov. 12, 2015). The changes ACA requested to the Commission's arbitration remedy to make it more effective for smaller MVPDs are

Imposing a similar arbitration remedy would achieve the same goal as ACA's proposal of sequential negotiations: an MVPD that desires to negotiate for the purchase of separate blocks of "must have" programming assets, including retransmission consent for top four-rated stations, on a standalone basis will have that option.

IV. CONCLUSION

In conclusion, neither NAB nor Caves and Owen have presented data and analysis that undermines the case for adoption of ACA's proposal that the Commission adopt a rule deeming it a *per se* violation of the duty to negotiate retransmission consent in good faith for a common owner to refuse an MVPD's request to sequentially negotiate carriage contracts for top-four broadcast stations and one or more other "must have" programming assets such as RSNs that serve the same market and have expiration dates around the same time by granting a temporary extension of the retransmission consent agreement. The temporary extension would begin at the end of the existing retransmission consent agreement and last until 45 days after either an agreement is reached for the other "must have" programming or the "must have" programming is withheld from the MVPD.

This ex parte presentation is being filed pursuant to Section 1. 1202(b) of the Commission's rules, 47 C.F.R. § 1.1202(b).

If you have any questions, or require further information, please do not hesitate to contact me directly.

Sincerely,

Barbara Esbin

Barbara Esbin
Counsel to the American Cable Association

cc: William Lake
Mary Beth Murphy
Nancy Murphy
Martha Heller
Jessica Almond
David Grossman
Marc Paul
Matthew Berry
Robin Colwell

(i) obligating the programmer, upon request, to provide data and information that permits an MVPD to determine whether the offered prices, terms and conditions are equivalent to fair market value and to formulate an informed "final offer" to initiate an arbitration and (ii) modifying the sequence of the baseball-style arbitration process to require the programmer to submit the first final offer that may then be reviewed by the MVPD before submitting its own final offer. ACA hereby incorporates those filings into the records in these retransmission consent reform proceedings.

ATTACHMENT A

Bundling in Retransmission Consent Negotiations: Response to Caves and Owen

April 2016

Michael H. Riordan

Commissioned by the American Cable Association

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I. INTRODUCTION AND OVERVIEW

My previous paper, prepared on behalf of the American Cable Association ("Riordan Paper"[1]), argued three major points. First, higher prices due to bundled negotiations for a must-have local broadcast station and a must-have regional sports network ("RSN") are not based on competitive marketplace considerations. Second, a broadcaster's insistence on bundled negotiations for a must-have local broadcast station and a must-have RSN increases market power and increases bargaining leverage with the effect of raising prices (fees plus other consideration). Third, good faith separate negotiations for must-have local broadcast stations and must-have RSNs remedy the problem of higher prices when these programming assets are under common ownership, and sequential negotiations would accomplish that.[2]

Dr. Kevin Caves and Professor Bruce Owen take issue with all three points, in a paper prepared on behalf of the National Association of Broadcasters ("Caves-Owen Paper"[3]). In the paper, they counter my analysis with several specious arguments. First, the upstream market for content is no more concentrated than the

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[1] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, MB Docket No. 15-216, Comments of the American Cable Association, (filed Dec. 1, 2015) ("ACA Comments"); Michael H. Riordan, HIGHER PRICES FROM BUNDLING OF "MUST HAVE" PROGRAMMING ARE NOT BASED ON COMPETITIVE MARKETPLACE CONSIDERATIONS at 4, ¶ 5 (2015) (attached as Attachment A) ("Riordan Paper").

[2] My understanding, based on consultation with the American Cable Association, is that network owned and operated (O&O) local broadcast stations in some cases insist on conditioning the terms of a retransmission consent agreement on a carriage agreement for an affiliated RSN. Relevant instances of common ownership of an O&O station and a RSN are listed in Table 1 of the ACA's December 1, 2015 Comments.

[3] Written Ex Parte Communication to Marlene H. Dortch from Rick Kaplan, National Association of Broadcasters, MB Docket Nos. 15-216, 10-71 (filed Feb. 16, 2016), attaching Kevin W. Caves and Bruce M. Owen, "Bundling in Retransmission Consent Negotiations: A Reply to Riordan," February 2016 ("Caves-Owen Paper").

downstream market for multichannel video programming distribution ("MVPD"). Second, in general, bundling might reduce prices, and might benefit consumers in other ways. Third, a requirement for good-faith separate negotiations for must-have broadcast television stations and RSNs is analogous to *à la carte* pricing in downstream MVPD markets.

All of these counterarguments are misleading. First, neither a dispersed overall ownership of video content, nor an oligopolistic MVPD market structure, are relevant for an analysis of whether markets for retransmission consent for top four-rated local television stations and RSNs are monopolistic. A monopoly is a market with a sole seller of a good for which there are no close substitutes. The Federal Communications Commission ("FCC") previously determined that markets for top four-rated local broadcast stations and RSNs fit that description.[4] Second, neither the overall frequency of product bundling in the economy, nor the general possibility that it is beneficial, are dispositive of the question whether, in the specific case of markets for retransmission consent of must-have broadcast stations and must-have RSNs, an insistence on bundled negotiations by a common owner is likely to raise prices by enhancing market power and increasing bargaining leverage. Third, *à la carte* pricing in downstream MVPD markets is a false analogy to separate good faith negotiations for retransmission consent of a must-have broadcast station and a must–have RSN.

The Caves-Owen paper also includes sundry other misleading comments. I organize my rebuttal on the key economic issues that are the subject of the Riordan

[4] *See* infra n. 7.

Paper, and address minor issues in footnotes.[5] The key issues are: (1) Are markets for must-have television station signals and must-have RSNs monopolistic? (2) Is monopoly bundling of two must-have goods likely to raise prices? (3) Would separate good faith negotiations for must-have television stations and must-have RSNs likely improve consumer welfare?

II. MARKETS FOR MUST-HAVE PROGRAMMING ARE MONOPOLISTIC

The Riordan Paper's argument that markets for must-have programming are monopolistic is based on the Structure-Conduct-Performance ("SCP") paradigm for describing market conditions,[6] and on FCC findings that these are must-have programming assets for which there are no close substitutes.[7] The Caves-Owen

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[5] The American Cable Association replies directly to other issues raised in the Caves-Owen Paper, such as the proper relationship between antitrust standards and the FCC's public interest standard.

[6] The Caves-Owen Paper's statement that the SCP paradigm "infers a relationship between market concentration and firms' competitive conduct" is supported by an incorrectly cited quotation from STEPHEN MARTIN, ADVANCED INDUSTRIAL ECONOMICS (Blackwell 2001). The quote does not appear at page 7, where the text discusses the SCP paradigm, but does appear at page 118, where the text criticizes a hypothesis (the SCP "framework") underlying empirical industrial organization research of the 1950s. The introductory discussion at pages 7-9 recognizes that the SCP paradigm "came to be perceived as descriptive and nonanalytic." That discussion supports my use of the SCP as a framework for describing conditions in upstream markets for must-have broadcast stations and must–have RSNs. *See* Caves-Owen Paper at 12-13.

[7] *Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, 30 FCC Rcd 10327, ¶¶ 3, 15 (2015) ("NPRM" or "Totality NPRM"). The FCC first referenced must-have programming "for which there are not good substitutes" in its 2010 Program Access Order, where it also described regional sports programming as must have. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶¶ 4, 47 (2002). The FCC also referenced "must have" programming in subsequent program access orders, and in various merger reviews. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, ¶¶ 29-42 (2007), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010) (discussing claims of MVPDs regarding "must have" programming that includes RSN programming in evaluating extension of ban on exclusive contracts), ¶ 38 ("The record reflects that numerous national programming networks, RSNs, premium programming networks, and VOD networks are cable-affiliated programming networks that are demanded by MVPD subscribers and for which there are no adequate substitutes"); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Doc. No. 07-198, First Report and Order, 25 FCC Rcd 746, ¶¶ 27-28, 60 (rel.

Paper disputes this by calculating a Herfindahl-Hirschman Index ("HHI") for an expansively defined upstream content market that comes in below the threshold for a moderately concentrated market, as defined by antitrust agencies for purposes of merger analysis.[8]

The antitrust agencies, in contrast, use a rigorous methodology for defining relevant markets for purposes of merger analysis, defining the smallest set of products for which a hypothetical monopolist could profit from a small but

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Jan. 20, 2010), *aff'd in part and vacated in part sub nom. Cablevision Sys. Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (defining RSNs for program access purposes and adopting a rebuttable presumption that an "unfair act" involving a terrestrially delivered, cable-affiliated RSN would violate Section 628(b) of the Act); *Revision of the Commission's Program Access Rules, et al*., Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, 27 FCC Rcd 12605, ¶¶ 74-79 (seeking comment on whether to adopt a rebuttable presumption that an exclusive contract involving satellite-delivered, cable-affiliated RSN programming has the "purpose or effect" of "significantly hindering or preventing" the complainant in a program access complain from providing satellite cable programming or satellite broadcast programming as set forth in the Section 628(b) of the Act); *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶¶ 133, 147 (2004) ("The basis for the lack of adequate substitutes for regional sports programming lies in the unique nature of its core component: [RSNs] typically purchase exclusive rights to show sporting events, and sports fans believe that there is no good substitute for watching their local and/or favorite team play an important game."); ¶¶ 201, 202-206 (carriage of local broadcast stations is critical to MVPDs; evidenced by substantial subscriber defections even during temporary blackouts). *See also News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, ¶ 87 (2008) ("Hence, an MVPD's ability to gain access to RSNs, and the price and other terms of conditions of access, can be important factors in its ability to compete with rivals."); *Adelphia Commc'n Corp., (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Commc'n Corp., (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corp. (subsidiaries), Assignees and Transferees; Comcast Corp., Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 124 (2006) (an MVPD that drops local sports programming risks subscriber defections, and MVPDs "will drive hard bargains to buy, acquire, defend or exploit regional sports programming rights."). The FCC has also found in some cases national cable programming networks can also exhibit the "must have" characteristics of "must have" programming. *Applications of Comcast Corporation, General Electric Company, NBC Universal, Inc. for Consent to Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 46, Technical Appendix, ¶ 46, Technical Appendix, ¶¶ 53-55 (2011) ("Comcast-NBCU Order") (discussing horizontal price increases resulting from common ownership of a local broadcast station and RSN in the same market).

[8] U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, *Horizontal Merger Guidelines*, (Aug. 19, 2010). According to the *Guidelines*, "(m)arket definition focuses solely on demand substitution factors, i.e., on customers' ability a willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service." *Id.* at 7.

significant non-transitory increase in price. The purpose of the "hypothetical monopolist test" is to identify products that are sufficiently close substitutes to constrain market power.[9] The broad upstream content market proposed by the Caves-Owen Paper is not based on the hypothetical monopolist test, and is not relevant for determining whether markets for must-have television stations and must-have RSNs are competitive or monopolistic.

Nor is the oligopolistic nature of downstream MVPD markets relevant for whether particular upstream markets are monopolistic.[10] The key issue remains whether there are close substitutes for must-have programming. The Caves-Owen argument that the programmer loses revenue ("advertising dollars and carriage fees") from failure to strike a deal is only one half of the profit maximization equation.[11] According to elementary textbook analysis, a profit-maximizing monopolist more than compensates for the lost profit from failed deals by raising its price for the successful deals.

III. MONOPOLY BUNDLING OF TWO MUST-HAVE GOODS IS LIKELY TO RAISE PRICES

The Caves-Owen Paper cites a recent economics article I coauthored with Yongmin Chen in support of the general proposition that bundling can have pro-competitive effects.[12] In fact, the analysis in that paper demonstrates that profit-maximizing product bundling lowers prices only under specific market conditions,

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[9] "The Agencies use the hypothetical monopolist test to identify a set of products that are reasonably interchangeable with a product sold by one of the merging firms." *Horizontal Merger Guidelines* at 7-8.

[10] Caves-Owen Paper at ¶¶ 25-27.

[11] *Id.* at ¶ 17.

[12] *Id.* at ¶ 7 n.11; Yongmin Chen and Michael H. Riordan, *Profitability of Product Bundling*, INTERNATIONAL ECONOMIC REVIEW (2013) ("Chen and Riordan Paper").

and in fact supports the proposition that monopoly bundling of two must-have goods is likely to raise prices and reduce consumer welfare, consistent with the conclusion in the Riordan Paper.[13]

The Chen-Riordan analysis considers a set of examples involving two symmetric goods. In these examples, consumers' values for each of the goods range uniformly between 4.00 and 9.00, and the correlation of consumers' values for the two goods varies between moderately positive and moderately negative.[14] Table 1 reports selected results for cases of marginal cost equal to 0.00 (low), 2.00 (medium), and 4.00 (high). The table distinguishes the case of a monopolist pricing a single good independently, and the case of a monopolist selling two goods under a bundling strategy. There are two types of bundling strategies represented in the table. "Pure bundling," represented in the case of low and medium marginal costs,

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[13] The Riordan Paper deals only with the case relevant to the question before the FCC of bundling two must-have goods. The Caves-Owen paper misdirects attention from the relevant case with the statement that "the logic of the Riordan Study would imply that virtually any product or service in the economy could constitute an anticompetitive bundle, as long as one of its components could be construed as 'must-have'." This is simply false. *See* Caves-Owen Paper at ¶ 39.

[14] Positive correlation means that consumers who have a higher value for one product also tend to have a higher value for the other product. Conversely, negative correlation means that consumers with a higher value for one product tend to have a lower value for the other. In statistics, the Pearson correlation coefficient measures the linear correlation between two variables, taking on values between -1 and 1. In Table 1, the negative correlation case has a correlation coefficient of -1/3, and the positive correlation case has a correlation coefficient of 1/3. These correlations are derived from a bivariate distribution function formed from the two extreme members of the Fairlie-Gumbel-Morgenstern ("FGM") family of copulas. In statistics, a copula is a function that couples two univariate distributions (in this case, the two uniform distributions of values between 4 and 9), to form a bivariate distribution. Employing copulas to form bivariate distributions is standard in the statistics literature. The FGM copula family is particularly tractable, and useful for modeling scenarios for which the correlation between two variables is relatively weak. *See* ROGER B. NELSEN, INTRODUCTION TO COPULAS (2d ed. 2006). The Caves-Owen Paper objects that the first hypothetical posited in the Riordan Paper relies on "a particular reversal of valuations," that is, on a negative correlation of values. Riordan Paper at 11, ¶2; Caves-Owen Paper at n.79. The Chen-Riordan analyses reported in Table 1 below makes clear that the point of that hypothetical is more robust. In the low marginal cost case, for which market coverage is high, as it is for must-have programming, bundling raises prices and reduces consumer welfare for moderate negative correlation, zero correlation, or moderate positive correlation.

offers a package of the two goods at a reasonable price, and prices each standalone good above what any prospective buyer would be willing to pay (> 9.00). "Mixed bundling," represented in the case of high marginal cost, offers both the package and the standalone goods at attractive prices.

The low marginal cost case corresponds most closely to the relevant case of must-have programming with high market coverage.[15] In the low marginal cost case, the single-product monopoly price is 4.50 and the resulting market coverage is 90%. The profit-maximizing strategy for a two-product monopolist, however, is pure bundling.[16] The package price is significantly above the sum of the single product monopoly prices (9.00), no matter the correlation of consumer values. With zero correlation of buyer values, for example, the profit maximizing package price of 10.21 is 13% higher than the sum of single-product monopoly prices.[17] For higher marginal cost, market coverage is lower, mixed bundling may be optimal, and the consumer welfare effects of bundling are ambiguous. In summary, bundling tends to reduce prices when market coverage is low, and tends to raise prices when market coverage is high, as it is in the case of must-have goods.

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[15] The Caves-Owen Paper objects that the Riordan Paper ignores that "any broadcaster failing to secure broad distribution of its programming in a market puts both advertising dollars and carriage fees at risk." Foregone advertising revenue is equivalent to a negative marginal cost, and therefore would be a force for high market coverage under separate negotiations – the circumstances under which bundling raises prices. *See* Caves-Owen Paper at ¶ 17.

[16] Mixed bundling with unattractive standalone prices is equivalent to pure bundling.

[17] The Caves-Owen Paper helpfully identifies an "arithmetic error" for a similar example in the Riordan Paper at 13, ¶5. The error is due to a misstatement of the hypothetical. The correct statement is: "In this hypothetical, from the seller's perspective, the buyer might value the transmission rights for the broadcast station anywhere between $2.50 and $3.50 at 10-cent increments, and value the RSN rights in 10-cent increments between $7.00 and $8.00. All combinations are equally possible, i.e. there are 121 equally likely types of buyers." The same correction applies to the sequential negotiation problem at 17-18, ¶¶4-5. With these corrections, the arithmetic is correct and supports my analysis.

Table 1 Effects of Bundling on Price, Profit, and Consumer Welfare[18]							
Buyer values for each product are uniformly distributed between 4.00 and 9.00.		Single Product Monopoly Seller		Two Product Monopoly Seller		Welfare Effects of Bundling	
Marginal cost:	Correlation of consumer values:	Price	Market coverage	Stand-alone price	Package price	Change in profit	Change in consumer welfare
Low	Negative	4.50	90%	> 9.00	10.56	1.64	-1.56
	Zero				10.21	1.11	-1.19
	Positive				9.68	0.71	-0.67
Medium	Negative	5.50	70%	> 9.00	11.10	1.27	-0.44
	Zero				10.96	0.84	-0.24
	Positive				10.68	0.45	0.66
High	Negative	6.50	50%	7.50	12.07	0.42	0.13
	Zero			7.33	12.31	0.25	0.02
	Positive			7.09	12.70	0.12	-0.03

The Chen-Riordan analysis follows the economics literature on monopoly bundling by distinguishing the independent monopoly price that maximizes the profit of a single-product monopolist, from the standalone price that is part of a mixed bundling strategy for a two-product monopolist.[19] The distinction between these two price concepts is crucial for evaluating the effects of monopoly bundling. The package price obviously must be discounted below the sum of standalone prices for any consumer to prefer the package. Therefore, if the standalone prices were equal to the independent monopoly prices, a package discount would benefit

[18] Selected results from Table A.1 in the Chen and Riordan Paper.
[19] *See, e.g.*, R. Preston McAfee, John McMillan and Michael D. Whinston, *Multiproduct Monopoly, Commodity Bundling, and Correlation of Values*, QUARTERLY JOURNAL OF ECONOMICS (1989).

consumers. The mistake of applying this line of reasoning to must-have programming is that the two-product monopolist has an incentive to raise the standalone prices in this case, as shown in all of the examples in Table 1.[20]

To demonstrate that bundling *can* lower prices and benefit consumers, the Caves-Owen Paper presents a hypothetical retransmission consent example that conflates the standalone mixed-bundling price and the independent monopoly price.[21] The hypothetical, which concerns bundling a broadcast signal with an RSN, is introduced with the statement that it is based on an antitrust analysis of bundled loyalty discounts by Patrick Greenlee, David Reitman, and David S. Sibley ("GRS").[22] The purported relationship is dubious. GRS is concerned with the consumer welfare effects of exclusionary bundling of a monopoly good with a second good for which there is a competitive substitute. Bundling of two must-have programming assets such as a top four-rated broadcast signal and an RSN is a different scenario because, by definition, must-have goods lack close substitutes.

GRS presents two results for the case in which the second good is supplied competitively. The first result is that, if the standalone price for the monopoly good is constrained artificially to equal the independent monopoly price, then the monopolist has an incentive to adopt a loyalty discount program that improves its profits without harming consumers ("Theorem 1"). The Caves-Owen example appears to be inspired by this first result, even though the market for must-have

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[20] *Id.*
[21] Caves-Owen Paper at ¶¶42-43.
[22] Patrick Greenlee, David Reitman, and David Sibley, *An Antitrust Analysis of Bundled Loyalty Discounts*, INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION (2006) ("Greenlee, Reitman, and Sibley").

RSN programming obviously is different from the competitive market considered by GRS. The second GRS result establishes that, if there is no constraint on the standalone price of the monopoly good, then the monopolist has an incentive to adopt a loyalty program that invariably reduces consumer welfare ("Theorem 2"). The GRS discussion illuminates this point by explaining:

> One may object that Theorem 1 is of little relevance because the monopolist can increase its profits by raising the standalone price above the initial monopoly price. The implication is that one would never expect to see a standalone price no higher than the pre-bundling monopoly price. This critique, however, presumes that firms set prices in an unconstrained environment. To the extent that bundled discounts are subject to antitrust scrutiny and possible litigation, it may be optimal for a monopolist to forego what may be small gains from raising the standalone price in order to claim that its bundled discount program unambiguously enhances consumer welfare.[23]

Thus, the GRS analysis, to the extent it has any relevance for retransmission consent negotiations, supports a policy of regulatory oversight aimed at holding the standalone price of must-have programming at or below the price that would be the outcome of separate negotiations. The Caves-Owen hypothetical example, by the same token, also supports a policy of constraining the standalone price of retransmission consent to be no higher than the independent monopoly price.

My conclusion that bundled negotiations raise prices is based on two different bargaining models, the Nash-bargaining model and the monopoly-pricing model. In the Nash-bargaining model, the threat to withhold two must-have programming assets increases the seller's bargaining leverage. In the monopoly-

[23] Greenlee, Reitman, and Sibley at 1138.

pricing model, the ability of the seller to make a package offer augments the seller's market power. Neither of these bargaining models is fully realistic. Of course, the purpose of an economic model is not to describe reality, but to gain insights by making simplifying assumptions. The Nash-bargaining model yields insights about how "bargaining skill" and opportunity costs (described by outcomes in case of disagreement) determine bargaining outcomes. The monopoly-pricing model yields insights about how a buyer's private information about value is a source of bargaining advantage. The models have different strengths and weaknesses in terms of realism. The alternating-offer interpretation of the Nash-bargaining model has the strength of explicitly modeling the possibility of back-and-forth negotiations, and the weakness of ignoring private information and therefore not accommodating impasse as an equilibrium outcome. The monopoly-pricing model has the strength that it models private information explicitly, and the weakness that it does not allow back-and-forth offers over price.[24] A more complicated (and realistic) model that combines back-and-forth communication and private information unfortunately does not yield sharp predictions and clear insights.[25]

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[24] The Nash-bargaining model can be interpreted a sequential game in which sellers are able to make back-and-forth proposals, even though agreement is reached immediately, whereas the monopoly-pricing model can be interpreted as a two-stage game in which the seller makes a single offer that the buyer accepts or rejects. *See* Ken Binmore, Ariel Rubinstein, and Asher Wolinsky, *The Nash Bargaining Solution in Economic Modeling*, RAND JOURNAL OF ECONOMICS (1986). The market-power model assumes the seller cannot discriminate between multiple types of buyer, as in the examples from the Chen and Riordan Paper discussed above.

[25] Dynamic bargaining models with incomplete information typically have multiple equilibriums, and therefore do not yield sharp predictions about bargaining outcomes. Intuitively, the reason for the indeterminacy is that bargainers' beliefs about the willingness-to-pay or opportunity cost of the opposite party evolve during the course of negotiations, and the standard equilibrium concept does not restrict how these beliefs might respond to a surprising proposal or a surprising rejection.

Both bargaining models lead to the same hypothesis – that bundled negotiations for a must-have local broadcast station and a must-have RSN by common owner raise programming prices. This hypothesis is consistent with FCC findings reported in the *Comcast-NBCU Order*:

> We test ACA's claim that the combination of RSNs and local affiliates of major broadcast networks leads to higher programming charges by analyzing the change in affiliate fees following the integration of a Fox O&O broadcast station and a Fox RSN in the same local market under the joint ownership of News Corp relative to a control group of RSNs not under joint ownership with a broadcast station… The results generally support the conclusion that joint 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 the local broadcast affiliate were separately owned. We find that five years after the horizontal integration of an RSN and O&O broadcast station, and after controlling for programming investment, News Corp. was able to charge affiliate fees for the RSN that were [REDACTED] higher than would be expected under separate ownership, although this estimate is not statistically significant. We do find a statistically significant [REDACTED] percentage point increase in the annual percent change in programming prices. This evidence is consistent with the ACA's claim of potential horizontal harms resulting from the transaction [REDACTED].[26]

The Caves-Owen Paper, emphasizing the lack of statistical significance for the FCC's finding that RSN fees were higher after five years of common ownership than would be expected under separate ownership, erroneously concludes that "the News Corp analysis clearly provides no empirical support whatsoever for the Riordan Study." This extreme conclusion is clearly at odds with the FCC's own

[26] Comcast-NBCU Order, Appendix B, ¶¶ 54-55.

interpretation of the evidence.[27] Furthermore, the companion contention of the Caves-Owen Paper that, in quoting the FCC's conclusion, "the Riordan Study mischaracterizes the FCC's pricing evidence" is outlandish.[28]

The Caves-Owen Paper also suggests that bundling of must-have programming might have efficiencies other than lower prices, including possibly enabling higher quality programming that otherwise is not viable.[29] Evidence of such efficiencies is appropriate for a totality of the circumstances evaluation. Alternatively, the FCC might treat bundled negotiations as a *per se* violation of good faith bargaining if it determined the possibility of efficiencies is sufficiently remote, as ACA has maintained.

IV. SEPARATE BARGAINING IS A REMEDY FOR HIGHER PRICES FROM MONOPOLY BUNDLING

The Riordan paper argues that obliging common owners to negotiate carriage agreements for must-have local televisions stations and must-have RSNs separately would improve downstream MVPD market performance by undermining the ability of a common owner to charge higher prices resulting from enhanced market power and bargaining leverage due to bundling. The Caves-Owen Paper criticizes this idea, first by claiming it is analogous to *à la carte* pricing in downstream MVPD markets, and then by mischaracterizing a study by Gregory

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[27] The finding of a positive difference in RSN fees clearly is consistent with the hypothesis that bundled negotiations of commonly owned must-have assets raises prices. Statistical significance at a conventional level only means that there is less than 5% probability that the difference in RSN fees is an artifact of the small sample size.
[28] Caves-Owen Paper at ¶ 34.
[29] *Id.* at ¶¶ 40-41.

Crawford and Ali Yurukoglu ("Crawford-Yurukoglu"[30]) as having shown "theoretically and empirically that the bundling of cable channels likely enhances consumer welfare."[31]

First and foremost, the Caves-Owen argument is a false analogy. From an industrial organization perspective, retail MVPD markets are not comparable to wholesale markets for must-have programming. In downstream MVPD markets, oligopolistic firms sell a programming bundle composed of a large number of channels to consumers at posted prices.[32] In upstream markets for must-have broadcast television signals and RSNs, monopoly programmers usually negotiate individually with MVPDs, and the wholesale bundling proposals at issue are about including two must-have goods, a top four local television station and a RSN, in the larger MVPD bundle. With such different markets structures and conduct, there is no reason to assume that the normative properties of the downstream MVPD market apply to the relevant upstream programming markets.

Second, the Crawford-Yurukoglu baseline model of *à la carte* pricing assumes MVPDs compete with unrestricted multi-part tariffs, essentially allowing consumers to assemble their own customized bundles.[33] A multi-part tariff specifies a fixed monthly subscription fee plus an incremental price for each individual channel a

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[30] Gregory S. Crawford and Ali Yurukoglu, *The Welfare Effects of Bundling in Multichannel Television Markets*, AMERICAN ECONOMIC REVIEW (2013) ("Crawford-Yurukoglu").
[31] Caves-Owen Paper at ¶46. Crawford-Yurukoglu, however, is much more circumspect: "Our qualitative conclusion is that consumers could in principle benefit from mandatory à la carte pricing at existing input costs, but would not in practice benefit due to input cost renegotiation in an à la carte world." Crawford-Yurukoglu at 679.
[32] The Caves-Owen Paper incorrectly states that the Riordan Paper assumes MVPDs are atomistic. Caves-Owen Paper at ¶ 6.
[33] The other *à la carte* variants analyzed in Crawford-Yurukoglu are "theme tiers" and "bundle-size pricing."

consumer includes in a subscription. There is no analog to the fixed monthly fee of a multi-part tariff in the separate negotiations for retransmission rights and RSN carriage rights. Furthermore, with just two goods under consideration, a multi-part tariff is equivalent to mixed bundle pricing.[34] To see the equivalence, suppose that the fixed fee is \$5.00 and the incremental price of each channel is \$4.00. This two-part tariff is equivalent to offering a package price of \$13.00 and a standalone price of \$9.00 for either channel. Furthermore, the seller alternatively could charge of fixed fee of \$13.00 plus an incremental price of \$0.00 for each channel, thus effectively achieving a pure bundling strategy. By analogy, therefore, unrestricted *à la carte* pricing of a must-have television station and a must-have RSN is equivalent to mixed-bundle pricing, and, accordingly, the Crawford-Yurukoglu analysis of *à la carte* pricing does not undercut the case for separate negotiations.

Third, the Crawford-Yurukoglu analysis does *not* show theoretically or empirically that *à la carte* pricing is likely to reduce consumer welfare compared to bundling. The heuristic theoretical analysis in Crawford-Yurukoglu illustrates diagrammatically that, while bundling by itself is likely to increase final prices by reducing the dispersion of consumer values and thus making consumers more homogeneous,[35] the renegotiation of programming prices after *à la carte* pricing is enforced can have an offsetting effect.[36] Thus, the net effect on consumer welfare

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[34] *See* John B. Long, Jr., *Comments on 'Gaussian Demand and Commodity Bundling'*, JOURNAL OF BUSINESS (1984).

[35] "While we choose valuations that are highly negatively correlated in (Figure 1) to emphasize this point, it is quite general: à la carte regulations can unlock surplus and improve consumer welfare, for given input costs." Crawford-Yurukoglu at 647.

[36] "One can see that the equilibrium input cost for the more dispersed (à la carte) good…is higher than for the less dispersed (bundle) good... For many distributions of preferences, this drives up costs." Crawford-Yurukoglu at 648.

depends on which of these two effects dominates, which is an empirical question. Contrary to the claim of the Caves-Owen Paper, the baseline empirical analysis in Crawford-Yurukoglu in fact shows that on balance, bundling reduces consumer welfare by a small amount (0.2%) compared to *à la carte* pricing.[37]

The Caves-Owen Paper also suggests that repeated interaction between a broadcaster and an MVPD would undo the salutary effects of sequential negotiations.[38] That is, the broadcaster would extract higher than the independent monopoly price for retransmission rights or RSN carriage by demanding even more in a future negotiation if the MVPD declined to pay the supra-monopoly price. What is missing from this theory is a convincing explanation for why it is credible for the seller to follow through on a self-punishing threat like this. The Caves-Owen paper remarks, without further elaboration or literature citation, that "the threat could be reinforced by (publicly) making an example of one MVPD, thereby putting others on notice." A publicized refusal to deal or a punitive price would blatantly violate good faith bargaining.

[37] Furthermore, the Crawford-Yurukoglu baseline model of MVPD price competition, under the scenario in which programming prices are renegotiated under *à la carte* pricing, is flawed. The authors in a footnote frankly acknowledge that, "for computation reasons," the individual channel prices in the multi-part tariffs offered by MVPDs are assumed artificially to exactly equal the renegotiated programming prices. Thus, rather than competing by setting profit-maximizing multi-part tariffs, MVPDs in the Crawford-Yurukoglu model by assumption earn profits on only the fixed fee component of the multi-part tariff, and fully pass on the wholesale cost of individual channels to final consumers. *See* Crawford-Yurukoglu at n.39. A robustness check shows that both consumer welfare and profits decrease under the *à la carte* regime if the markup on programming costs is fixed at 10% instead of 0%. *See* Crawford-Yurukoglu at Web Appendix, Table 7. Thus, conclusions about the net effect of hypothetical *à la carte* pricing on consumer welfare in downstream MVPD markets are not robust, and hinge on artificial assumptions about MVPD competition.
[38] Caves-Owen Paper at ¶ 52.

V. CONCLUSION

The objections of the Caves-Owen Paper to the main arguments of the Riordan Paper are based on serial misreadings of the relevant economic literature and lack merit. First, an HHI calculation for an expansively defined upstream content market does not indicate that the marketplace for negotiation of access to must-have programming is competitive rather than monopolistic. Second, the commonplace observation that product bundling is sometimes precompetitive does not mean that consumers are likely to benefit from bundled negotiations of must-have programming. Third, *à la carte* pricing in downstream MVPD markets is not analogous to separate negotiations for must-have programming and does not undercut the case for sequential negotiations.