"RED HERRING" ARGUMENTS – THE UNSUPPORTED, ILL-CONSIDERED AND IRRELEVANT ARGUMENTS FOR RETENTION OF THE NATIONAL TV OWNERSHIP CAP AFTER *FOX TELEVISION STATIONS, INC.*

- The D.C. Circuit Court of Appeals decision in *Fox Television Stations, Inc.*,[1] which reversed the FCC's decision to retain the national television ownership cap (the "Cap"), presents the opponents of elimination of the Cap with an insurmountable hurdle: to provide a justification for a rule which the FCC nearly 20 years ago declared no longer serves the public interest. In an unsuccessful attempt to meet this burden, the opponents of deregulation have presented three "red herring" arguments, which simply cannot withstand scrutiny under the reasoning set forth in *Fox*.

    - Red Herring # 1: NAB/NASA allege that network affiliated stations – through discussions between their representative organizations and network executives – have a special ability to make the network sensitive to the tastes, needs and interests of consumers in local communities.

      The reality: Networks must and do listen to viewers, advertisers and the management of both affiliate and owned and operated stations (O&Os). *In fact, as between affiliates and O&Os, networks prudently give greater credence to O&O management since affiliates have an inherent economic conflict with the network over the distribution of profits. If anything, the issue raised by NAB/NASA provides support for repeal of the Cap since O&Os, whose allegiance is unambiguous, can be counted upon to provide the networks with more accurate and unbiased information on local viewer opinion than affiliates.*

    - Red Herring # 2: NAB/NASA further claim that network affiliates preempt substantially more programming than O&Os, and thus deserve special accolades for being "more committed" to localism.

      The reality: *The data clearly shows that both affiliates and O&Os preempt only a tiny fraction of network prime time programming, and that any difference in preemption rates is due to affiliate preemptions for paid programming.*

    - Red Herring # 3: Other deregulation foes, including the American Cable Association and Cox Enterprises, contend that networks gain some kind of unfair bargaining advantage through the use of their retransmission consent rights.

[1] *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C Cir. 2002) ("*Fox*").

The reality: *Multiple station ownership has no impact on station bargaining power. Whether the cable operator is an MSO or the broadcaster is a group owner, there is no change in relative bargaining power compared to multiple separate negotiations. The outcome of retransmission consent negotiations is determined by each party's market-by-market evaluation of the benefits of entering an agreement.* The retransmission practices of the networks are no different than those of Cox, which is also a broadcaster, and other group owners, all of which must adhere to the Commission's retransmission consent rules.

- In 1984, the FCC found that O&Os are no less committed to localism than affiliates and rejected claims that programming diversity would suffer without the Cap.[2] Just last year, the D.C. Circuit reversed and remanded the Cap in large part because the Commission utterly failed to explain its departure from the *1984 Report*. Indeed, the Court determined that "[s]o long as the reasoning of the *1984 Report* stands unrebutted, the Commission has not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision."[3]

- In particular, as the Court pointed out, the Commission specifically concluded that elimination of the Cap "would not adversely affect either the diversity of viewpoints available on the airwaves or competition among broadcasters."[4] The Commission further determined that "diversity should be a concern only at the local level, as to which the [Cap] was irrelevant."[5]

- The "red herring" arguments neither rebut the conclusions of the *1984 Report* nor the deregulatory presumption of Section 202(h) of the Telecommunications Act of 1996. On the contrary, they simply collapse under even the slightest scrutiny and certainly would not withstand the scrutiny of the D.C. Circuit.

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[2] *See In Re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984) ("*1984 Report*").

[3] *See Fox*, 280 F.3d at 1045.

[4] *Id*., at 1034.

[5] *Id*.

RED HERRING #1 – AFFILIATES HAVE SPECIAL INFLUENCE OVER NETWORK PROGRAMMING DECISIONS

- NAB/NASA allege that affiliates have some sort of unique influence on network program decision-making.[6] This argument is fundamentally flawed: (1) Networks heed the opinions of viewers, advertisers and the management of O&Os, and if anything, discount the views of affiliates; and (2) Equally important, the FCC should be extremely wary of maintaining a structural ownership rule based on a determination that one group of owners – networks – are for some reason deemed to exercise "inferior" editorial judgment.

Network Program Decision-Making

- NAB/NASA claim that affiliates association board meetings consistently discuss network programming, and that those discussions bring to bear influence that prompts networks to make or alter certain programming decisions.[7]

- First and foremost, networks listen to advertisers and viewers.

    - Networks by necessity must take into account the views of advertisers which for over-the-air broadcasters are the sole source of revenues. Ultimately, the success of any broadcast program depends upon the ability of networks to sell advertising. Not surprisingly, networks listen very carefully to any issues advertisers may raise concerning network programming.

    - Viewers most assuredly make their opinions known through phone calls, letters, emails and their channel change button. NAB/NASA's self-serving suggestion that affiliates speak for the public ignores the reality that affiliates, given the inherent economic tension with networks over division of profits, are an inferior conduit for expression of viewer opinions. While affiliates may purport to express local sentiment, the networks are well aware that these communications pass through the filter of affiliate self-interest.

- O&Os, in contrast, have no conflict of interest and, from the networks' perspective, are a far more credible source of information as to consumer tastes, needs and interests. O&O general managers and program directors are every bit as integrated into their local communities as their counterparts at affiliates. In a

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6 *See Ex Parte* Letter of Jennifer A. Johnson on behalf of the National Association of Broadcasters and the Network Affiliated Stations Alliance, dated March 25, 2003, at 1.

7 *See id.*, at 4.

world of nearly 300 national cable channels, the economic success of an O&O, in which the network has made a substantial economic investment, depends on its service to the local community. Given that their allegiance to the networks is unclouded by competing economic incentives, O&O management is a far better source of information than affiliates and the influence of the O&Os is steadily growing as they contribute more and more to their parent companies' bottom line.

- During the program development process for each of ABC, CBS, FOX and NBC, O&O management is typically present and actively participates. In contrast, there is no affiliate representation at these meetings; and affiliates have no say in the development of new programs. In fact, affiliates learn of the Fall schedule and new programs at the same time as do advertisers and other members of the public.

- Indeed, a network that airs programming despite the concerns of its O&O management risks a double financial hit – it endangers the ultimate success of its network schedule as well as diminishing the return on the substantial investment in its O&O.[8]

- It is readily apparent that the views of affiliates, as should be the case, are very much subordinate to the opinions of viewers, advertisers, and O&O management. If anything, NAB/NASA's claim illuminates a defect in the network distribution system – that affiliates are a far less credible source of local information than O&Os – and repeal of the Cap will remove an impediment to amelioration of this defect.[9]

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[8] *See Affiliate Clearances, Retransmission Agreements, Bargaining Power and the Media Ownership Rules*, Bruce M. Owen, Michael G. Baumann and Kent W Mikkelsen, Economists Incorporated, April 2003 ("*EI Bargaining Power Analysis*"), at 11-12. The *EI Bargaining Power Analysis* is attached hereto.

[9] Affiliates, to be sure, have a very direct means of communicating their views – preemption of network programs. Preservation of the Cap, however, would not ensure that networks are better able to serve the needs of local viewers. First, as noted, affiliates may be the least reliable source of information on local preferences since affiliates have an inherent incentive to preempt for economic reasons, even while proclaiming that they do so for public interest reasons. Second, even if the Cap somehow were an effective and appropriate means to ensure communication of local viewpoints to networks, which it is not, the Commission would need to preserve independent ownership of stations with at most a *de minimis* national audience reach since the inability of a network to deliver 100% of the audience is very detrimental to its profitability. Since networks compete in part on the basis of their national reach, even a small loss of geographic coverage can put a network at a significant competitive disadvantage. For many years, ABC had great difficulty in competing with CBS and NBC because it was only a few percentage points lower in its national audience reach. Given that it is exceedingly unlikely that any network would abandon the affiliate

The First Amendment

- Perhaps most significantly, the FCC should be extremely wary of maintaining a structural ownership rule based on a determination that one group of owners – networks – are for some reason deemed to exercise "inferior" editorial judgment.

- A regulatory scheme that values or favors one type of content over another is offensive to the First Amendment. NAB/NASA's contention – that regulation is justified because networks are poor "speakers" and affiliates are better "speakers" – therefore conflicts with First Amendment principles.

- The FCC has consistently tried to steer clear of promulgating and enforcing rules that regulate speech based on judgments about the value of the speech. As the Commission explained in the *Notice*: "In attempting to foster viewpoint diversity through structural regulation, our content-neutral method does not seek to evaluate the substance of any station's editorial decision. Indeed, a major benefit of content-neutral structural regulation is that we avoid making inescapably subjective judgments about editorial decisions, viewpoints, and content."[10] Quite clearly, NAB/NASA is asking the Commission to retain a regulation specifically on the basis of a subjective determination that one group of speakers – networks – makes inferior editorial decisions.

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distribution system in its entirety and seek to acquire stations with 100% audience reach, the Commission should, in view of the mandate of *Fox*, eliminate the Cap as no longer necessary in the public interest. In the unfathomable event that a network should seek to acquire stations giving it a 100% reach, the Commission could examine in connection with the transfer application whether the proposed transaction raises public interest questions. In no event does the dubious connection between preemption and responsiveness of network programming to local needs warrant a structural ownership rule.

[10] *See In Re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 02-249 (released September 23, 2002) ("*Notice*"), at ¶ 36. *See also In Re Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, 12915-16 (1999) ("Of course, in attempting to foster our diversity goals, we endorse a content-neutral method that does not evaluate the substance of any station's editorial decisions.") (*citing Nat'l Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775, 801 (1978) (noting that the newspaper/broadcast cross-ownership rule is a content-neutral regulation)).

RED HERRING #2 – AFFILIATES PREEMPT SUBSTANTIALLY MORE PROGRAMMING THAN O&OS

- While affiliates do have the ability to preempt network programming on the grounds that the content is "offensive," they do so extremely rarely. This is itself a testament to the lengths networks go to ensure that their programming is responsive to viewers' preferences. NAB/NASA nonetheless claim that affiliates are more willing than O&Os to preempt network programming, and that affiliates are therefore more attuned to local preferences.[11]

- In fact, however, based on the record developed in the 2002 biennial review, there is little difference between the behavior of O&Os and the behavior of affiliates when it comes to preempting the network programming feed. The average affiliate preempted only 9.5 hours of prime-time network programming in 2001, and the average O&O preempted 6.8 hours. In both cases, these figures represent *less than 1 percent* of prime-time programming. Moreover, even this slight difference is largely attributable to higher rates of economic preemptions by affiliates (*i.e.*, for paid programming and telethons).[12]

- NAB/NASA also allege that prior FCC filings by the Joint Commenters, when compared to the EI 2003 Study, show that affiliate preemption levels have dropped dramatically over the past eight years. In particular, they assert that affiliate preemptions have declined by 64 percent between 1994 and 2001. This decline, NAB/NASA argue, stems from increased pressure that the networks have

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[11] *See* NAB/NASA Reply Comments, at 30-40.

[12] *See Preemption By O&Os Compared to Affiliates*, EI Economic Study G (the "EI 2003 Study") (submitted with the opening comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Communications Group, Inc., and Viacom (the "Joint Commenters")), at 1-2. To put this differential into context, NAB/NASA claim that affiliates are more attentive to local concerns because over the period of an *entire year*, affiliates preempted roughly 2.7 more hours of prime-time network programming than the average O&O (with the difference due mostly to preemptions for paid programming). A far better measure of a station's commitment to a local community is the amount of local news programming that it presents. As EI has demonstrated, the average O&O presents 8.5 more hours of local news programming *on a weekly basis* than the average affiliate. *See News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations*, EI Economic Study H (submitted with the opening comments the Joint Commenters), at 10. These numbers alone conclusively demonstrate that O&Os evince a far greater concern for the needs of their local markets than affiliates.

applied to prevent affiliates from preempting network programming since the Cap was increased to 35% in 1996.[13]

- The facts, however, belie NAB/NASA's assertions. As EI demonstrates in the attached analysis, "the apples-to-oranges comparison that NAB/NASA makes is at best misleading."[14] NAB/NASA inappropriately attempts to compare the EI 2003 Study with the EI 1995 Study, but the two studies are not equivalent measures.[15]

- The EI 2003 Study included primetime preemption data for the entire calendar year 2001. In contrast, the EI 1995 Study included only four sample weeks during the year 1994. "Since preemption rates vary from week to week throughout the year due to political events, sports league schedules and [paid] programming, comparing a 4-week average to a 52-week average can lead to erroneous conclusions, and in this situation it does."[16]

- Furthermore, one of the weeks studied in 1995 (chosen for conformity with an earlier FCC study)[17] contained an extremely heightened preemption rate that was not representative of the rest of the year.[18] This

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13 *See* NAB/NASA Reply Comments, at 35-36. NAB/NASA's claim is based on a comparison of the EI 2003 Study with a study EI conducted in 1995 (using preemption data for 1994). *See An Economic Analysis of the Prime Time Access Rule*, MM Docket No. 94-123, Appendix D (March 7, 1995) ("EI 1995 Study").

14 *See EI Bargaining Power Analysis*, at 18.

15 *See id*, at 20. NAB/NASA also point to what they consider to be two problems with the information contained in the EI 2003 Study. In particular, NAB/NASA notes that Table G1 in the EI 2003 Study reports 0.0 for both political preemptions and content-related preemptions, even though stations did in fact preempt for both political events and concerns about content. The EI 2003 Study's data does contain both political and content-related preemptions. Both categories, however, accounted for less than 0.05 hours per year per station, and the study therefore rounded each category to 0.0. *See id*.

16 *See id*.

17 *See New Television Networks: Entry, Jurisdiction, Ownership and Regulation*, FCC Network Inquiry Special Staff (1980).

18 The week in question included preemptions for the Billy Graham Crusade, college basketball payoffs and a number of local high school sports. In addition, one of the stations studied in 1995 was off the air for the entire week (and thus was counted as having preempted 22 hours of prime time programming). Therefore,

abnormal week certainly skewed the results of the EI 1995 Study, which reveals yet another reason why a comparison of data for a full year with data for only four weeks yields at best an incomplete picture.[19]

- Even accepting NAB/NASA's tenuous comparative premise, the data demonstrate that both in 1994 and in 2001, affiliates and O&Os very rarely preempted network programming. As EI points out, the small difference between the two sets of data – even if accurate – does not necessarily indicate that there has been any significant decline in affiliate preemption rates.

- Even if there has been a decrease in preemption rates over the past eight years – which NAB/NASA has not demonstrated – there is absolutely no evidence of any correlation between the increase in the Cap to 35 percent and preemption rates. Indeed, EI concludes that NAB/NASA "has no basis for attributing the small observed change to increased network ownership of stations," which are alleged to be less vigilant in promoting local interests. Any decrease in preemptions could just as easily be attributed to improved network programming, or to the fact that there were significantly more viable outlets for programming in 2001 than existed in 1994.

  - In particular, there are now a number of stronger broadcast stations affiliated with the FOX, UPN and WB networks (two of which didn't even exist in 1994). There are also hundreds of cable channels – significantly more than existed in 1994. These additional outlets now carry much of the programming that in 1994 could be aired only by stations preempting the ABC, CBS and NBC network programming feeds.

  - If in fact there was a correlation between an increase in the Cap and preemption rates, the number of hours preempted would be expected to correlate inversely with the size of the audience reach of a network's group of O&Os. If this were the case, one would expect affiliate preemptions to rank in descending order from the network with the lowest audience reach to the network with the highest audience reach. As EI demonstrates, the evidence fails to support any such link.[20] In 2001, ABC's O&Os (24% audience reach) had the lowest audience reach and FOX's O&Os (41% audience reach) had the largest audience reach, with NBC's O&Os (27% audience reach) having about the same reach as ABC and CBS' O&Os

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EI concluded that the week in question was not representative of the rest of the year. *See id.*, at 21.

[19] *See id.*

[20] *See id.*, at 18-19.

(40% audience reach) having about the same reach as FOX. Yet, in 2001, CBS affiliates and FOX affiliates preempted as much or more prime time programming (as a percentage of their prime time programming) than either ABC or NBC affiliates. The average network affiliate preempted roughly 0.9% of its network's prime time programming. But CBS' affiliates preempted 1.2 % of prime time hours, and FOX affiliates preempted 0.9%.[21] In short, notwithstanding the fact that FOX's and CBS' O&Os have the largest audience reach of all the networks, their affiliates preempt as much or more prime time programming than the affiliates of the other two networks. Accordingly, the evidence fails to support the proposition that broadcast networks with larger O&O audience reaches tend to somehow undermine the ability of affiliates to exercise their right to preempt programming.

RED HERRING #3: THE CAP IS NECESSARY TO PRESERVE THE BARGAINING POWER OF CABLE OPERATORS DURING RETRANSMISSION CONSENT NEGOTIATIONS

- The American Cable Association (ACA), Cox Enterprises, Inc. (Cox) and Mediacom Communications Corporation (Mediacom, together with ACA and Cox, the "Deregulation Opponents") all claim that broadcast networks improperly exercise their retransmission consent rights. They complain that broadcast networks negotiate for all of their O&Os collectively and that they seek payment in part in the form of carriage of various cable networks associated with the broadcast networks. According to the Deregulation Opponents, the FCC should retain the Cap to prevent further erosion of the bargaining position of cable operators vis-à-vis broadcasters in retransmission consent negotiations.

- Irrespective of whether a broadcaster owns one or several stations, however, the outcome of retransmission consent negotiations is determined by each party's market-by-market evaluation of the benefits of entering an agreement. Whether the cable operator is an MSO or the broadcaster is a group owner, there is no change in relative bargaining power compared to multiple separate negotiations.

- Put differently, if a cable operator faces several independently owned stations in different markets, it must determine whether the cash or other consideration demanded (*e.g.*, carriage of an affiliated local or national cable channel) in each market outweighs the harm in each market if the station is not carried. The calculus is no different if the stations are commonly owned – only the form of consideration (*e.g.*, carriage of an associated national cable network) may differ.

- In fact, the Commission in adopting regulations governing retransmission consent negotiations expressly contemplated that broadcasters would bargain for carriage

[21] *Id.*, at 19.

of other stations and associated cable networks.[22] The Deregulation Opponents have offered no reason why the Commission should use the draconian remedy of ownership restrictions instead of narrowly tailored behavioral rules. At the core, the Deregulation Opponents' allegations are an attack on the Congressionally mandated retransmission consent procedures. This effort to gain a bargaining advantage has no relevance to issues in the biennial review proceedings.

The Number of Stations a Company Owns Nationwide is Utterly Irrelevant to Relative Bargaining Power in Retransmission Consent Negotiations

- The Cap is completely irrelevant to any analysis of retransmission consent negotiations. This is equally true in simple negotiations between a single cable system and a sole broadcaster and complex negotiations between companies with multiple cable systems and those with multiple broadcast properties.

    - *Single Station – Single System: Retransmission Consent Benefits Both Parties*. As EI explains, retransmission consent rights have created a market in which both cable companies and broadcasters benefit, which can be readily seen in the case of a single cable system and single station in the same market: "[t]he station benefits from carriage because its programming and advertising are likely to reach more households when carried by cable than when not carried by cable. The cable operator benefits because the addition of the station's programming to the cable offerings makes cable subscriptions more attractive."[23]

    - *Retransmission Consent Negotiations When the Broadcaster Owns a Cable Network*. When the broadcaster also owns a cable network that is not currently carried on the cable system, there is, as EI explains, *no* change in the relative bargaining power of the two parties.[24] "The cable operator cannot be made worse off by the opening of another possible form of compensation for broadcast station carriage, since the parties can now negotiate over cash payments, carriage of a cable network, and the terms of the cable network's carriage."[25] The cable operator always retains the option to decline to carry the broadcaster's associated cable network and instead to bargain for a cash payment. Quite correctly, the

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22 *See In Re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith and Exclusivity*, 15 FCC Rcd 5445, ¶ 56 (2000) ("*SHVIA Order*").

23 *See EI Bargaining Power Analysis*, at 14.

24 *Id*., at 15.

25 *Id*.

Commission's retransmission consent rules (discussed below) permit broadcasters to bargain for carriage of an associated cable network.

- *Retransmission Consent Negotiations When the Broadcaster and Cable Operator Both Own Multiple Properties.* Again, as EI explains, there is no change in relative bargaining power when a broadcaster owns several stations within the markets in which the cable operator has systems, for the "[t]he total gains from carriage of the television stations on their local cable systems is the sum of the gains that occur in each individual market."[26] Although the total consideration paid for consent rights will increase if the cable operator desires to carry multiple stations, the calculus each party must perform to determine whether the retransmission agreement is a net gain or a net loss is still based upon a market-by-market evaluation of the benefits of the transaction. As a result, "*[t]here is no change in relative bargaining power compared with multiple separate negotiations*."[27] Again, the Commission's retransmission consent rules (discussed below) permit broadcasters to bargain for carriage of another broadcast signal in another market.

    - Cox's overblown description of its retransmission consent negotiations with Disney ABC amply demonstrate that the Cap has no bearing on the outcome of retransmission negotiations, however complex. Cox claims that Disney ABC was unreasonable to request nationwide carriage of its cable network, SoapNet, "even though Cox Communications carries ABC O&Os in systems serving only about 500,000 (or approximately 1/12) of its customers."[28] Whether Disney ABC owned a single station in only one market served by Cox or a great number of stations overlapping every market served by Cox, Cox was free to accept Disney ABC's proposal, reject it, or to offer a counterproposal with different terms. In fact, Cox accepted Disney ABC's proposal, indicating that it perceived a net benefit would be gained from entering into the agreement. Most importantly, however, the number of stations Disney ABC owned nationwide was completely irrelevant to the outcome of the negotiation.

    - ACA's contention that multiple ownership skews retransmission consent negotiations is particularly specious since its challenge is the converse of the Cox complaint – broadcasters may own stations

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26 *Id*.

27 *Id*. (emphasis added).

28 Cox Comments, at 43-44.

where the cable operator does *not* own a system. ACA represents the interests of rural and primarily smaller cable operators, many of which own a single system. As EI explains, whether a broadcaster owns stations in other markets not served by the cable operator is *irrelevant*.[29] The negotiations between the broadcaster and a *different* cable operator has no bearing on the negotiations with the same market cable operator.

Behavioral Rules, Not Structural Ownership Restrictions, Ensure the Fairness of Retransmission Consent Negotiations

- The Deregulation Opponents have offered no reason why, even assuming *arguendo* that any party could demonstrate that retransmission consent negotiations are a proper subject of Commission concern, the Commission should use the sweeping "solution" of ownership restrictions instead of specific behavioral rules. The FCC adopted a "good faith" negotiation requirement in its rules governing retransmission consent over three years ago.[30] Under these rules, a cable company (or other MVPD) that is aggrieved by a broadcaster displaying a lack of good faith in retransmission consent negotiations can file a complaint with the FCC against that broadcaster.[31] These rules prohibit, for example, a simple refusal to negotiate or "take it or leave it" proposals.[32] (On the other hand, cable companies (or other MVPDs) are under no such obligation to negotiate in good faith.)

- *Offering Retransmission Consent Bundled with Other Rights (e.g., carriage of associated cable network or other broadcast stations) Expressly Permitted*. Adopting reasoning identical to EI's (discussed above), the Commission expressly approved the right of broadcasters to request carriage of an affiliated cable channel or other broadcast station. The FCC noted in the *SHVIA Order* that "[w]e do not find anything to suggest that, for example, requesting an MVPD to carry an affiliated channel, another broadcast signal in the same or another market, or digital broadcast signals is impermissible or other than a competitive marketplace

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29 *EI Bargaining Power Analysis*, at 17.

30 *SHVIA Order*, at ¶ 39.

31 *See* 47 C.F.R. § 76.65.

32 47 C.F.R. § 76.65(b). Ironically, ACA complains that Cox is "demanding strictly cash for carriage, take it or leave it" in its retransmission consent negotiations in apparent violation of the FCC's "good faith" negotiation requirement. *See* ACA Reply Comments, at 2.

consideration . . . [and] we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own."[33]

- *FCC Intended Market for Retransmission Consent Rights to Develop Through Private Negotiations, Not Commission Intervention*. The Deregulation Opponents have proffered no evidence whatsoever that the Commission should reverse its well-considered determination in the *SHVIA Order* that "retransmission consent negotiations . . . are the market through which the relative benefits and costs to the broadcaster and the MVPD are established."[34] Indeed, the Commission expressly noted in the *SHVIA Order* that "complaints which merely reflect commonplace disagreements encountered by negotiating parties in the everyday business world will be promptly dismissed by the Commission."[35]

- *Cable Companies Benefit From Bundled Offerings*. As EI notes, "an increase in the number of dimensions in which bargaining can take place expands the opportunity for welfare-enhancing agreements."[36] The FCC acknowledged as much in the *SHVIA Order*: "[w]e also believe that to arbitrarily limit the range or type of proposal that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent."[37]

- In short, the Deregulation Opponents ignore the well-settled precedent concerning good faith negotiations for retransmission consent and, in so doing, attempt to transform the Commission's systematic review of the Cap into a platform to address their illegitimate retransmission consent grievances. The Commission should ignore these pleas by the Deregulation Opponents for an increase in their bargaining power through government fiat just as the Commission ignored similar pleas in 1984 when striking down the Cap: "[W]hile [non-network groups] might prefer to be insulated from network competition . . ., we are not in the business of subsidizing non-network groups, or for that matter, network groups."[38] The Deregulation Opponents' contentions are a poorly concealed attack on the

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33 *SHVIA Order*, at ¶ 56.

34 *Id*. at ¶ 8.

35 *Id*. at ¶ 32.

36 *EI Bargaining Power Analysis*, at 16.

37 *SHVIA Order*, at ¶ 56.

38 *1984 Report*, at n. 130.

Congressionally mandated retransmission consent procedures which has no place in the biennial review rulemaking.