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

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In the Matter of	)	
	)	
Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace	)	MB Docket No. 05-28
	)	

To: Secretary, Federal Communications Commission

REPLY COMMENTS

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EXECUTIVE SUMMARY

Congress enacted retransmission consent in 1992 in recognition of the fact that broadcasters have the right to require consent and compensation before another entity distributes their product. Nothing has changed in the marketplace since 1992 to justify any modifications to the statute or its implementing regulations.

Disney's reasonable retransmission consent practices comply with the statute and Commission decisions on retransmission consent. Disney negotiates retransmission consent only for the ten ABC Owned Stations. Disney does not require multichannel video programming distributors ("MVPDs") to carry any Disney-owned cable network to obtain retransmission consent but instead offers a reasonable stand-alone cash retransmission consent proposal as an alternative.

The retransmission consent practices challenged by MVPDs were conceived as an accommodation to cable operators who refused to pay cash for retransmission consent after the statute was enacted. Moreover, in enacting retransmission consent, Congress specifically anticipated agreements by cable operators to distribute new cable programming services as an alternative to cash payments and the Commission has affirmed the use of these types of transactions on several occasions.

Contrary to the assertions of the Joint Cable Commenters and Professor Rogerson, retransmission consent is not responsible for increased cable costs. Rather, non-programming costs, such as costs associated with offering new broadband services or the transition to digital television, drive cable rates. Additionally, as explained in a report attached as Exhibit B to these reply comments, when adjusted to account for improvements in service quality, cable rates are not increasing rapidly as Professor Rogerson claims.

To remedy perceived problems with retransmission consent, several commenters propose that the conditions imposed in the News Corp./Direct TV transaction be extended to all broadcasters. However, the rationale for imposing these conditions—the potential harm to competition in the vertical broadcast-distribution MVPD market—does not apply to retransmission consent generally because most broadcasters are not affiliated with an MVPD. Suggestions that all retransmission consent disputes be submitted to mandatory arbitration are equally unwarranted. In fact, commenters are unable to cite a single case where the Commission sanctioned a broadcaster for violating its obligation to negotiate in good faith.

Similarly, arguments that the broadcast exclusivity rules should be revised cannot be justified. Modifications to the broadcast exclusivity rules suggested by the MVPDs would upset the carefully legislated balance of negotiating power between broadcasters and MVPDs and would ultimately render a broadcaster's retransmission consent rights meaningless. Additionally, changes to the broadcast exclusivity rules would harm localism. The broadcast exclusivity rules promote the Commission's long-standing goal of localism by: (i) providing MVPD subscribers with access to local content produced by broadcasters and (ii) giving broadcasters the audience levels they need to justify producing expensive local content. Further, the broadcast exclusivity rules, which enable networks and broadcasters to negotiate programming exclusivity without interference from the government, are essential to the continued viability of the network-affiliate system.

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REPLY COMMENTS

Pursuant to Section 1.415 of the rules of the Federal Communications Commission ("FCC" or "Commission"), The Walt Disney Company ("Disney")[1], through its attorneys, hereby submits reply comments ("Reply Comments") in the above-captioned proceeding in which the FCC seeks comment on the impact of the retransmission consent, network nonduplication, syndicated exclusivity, and sports blackout rules on competition in the multichannel video programming ("MVPD") market. As further set forth below, there is no need for the government to revise the current statutes or regulations governing retransmission consent,[2] network nonduplication,[3] or syndicated exclusivity.[4]

[1] The specific entities are: (i) ESPN, Inc. (80% owned by Disney) ("ESPN"), (ii) ABC Cable Networks Group (including The Disney Channel, ABC Family, Toon Disney and SoapNet), and (iii) the ABC Television Network ("ABC") and the ABC owned television stations ("ABC Owned Stations"). ABC and the ABC Owned Stations are ultimately owned by Disney.

[2] 47 U.S.C. § 325(b); 47 C.F.R. § 76.64-70.

[3] 47 C.F.R. § 76.120-122 and 76.92-95.

[4] 47 C.F.R. § 76.101-110, § 76.120, and § 76.123-125.

I. There is No Need to Revise the Current Statutes or Regulations Governing Retransmission Consent

A. Congress's Rationale For Enacting Retransmission Consent in 1992—that Broadcasters Have the Right to Require Consent Before Another Entity Distributes Their Product—Remains Equally Valid In Today's Marketplace

The Cable Television Consumer Protection Act of 1992 ("1992 Cable Act") requires cable systems to obtain the consent of, and to compensate the owner of, a broadcast channel before distributing that channel to consumers.[5] Prior to 1992, cable operators were able to obtain broadcast stations off air, distribute them to consumers, and keep the proceeds. In passing the 1992 Cable Act, Congress concluded that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals" and public policy should not support a system "under which broadcasters in effect subsidize the establishment of their chief competitors."[6] Congress further explained that "[c]able operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently."[7] In sum, Congress concluded that broadcasters, like all other programmers, have the right to require consent and compensation before another entity distributes their product.

Although the 1992 Cable Act merely equalized the competitive balance between broadcasters and cable operators, several commenters in this proceeding have made various allegations of broadcaster "abuses" of retransmission consent.[8] The essence of these allegations is the desire of a few distributors to return to a pre-1992 regime under which they enjoyed a

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[5] Cable Television Consumer Protection and Competition Act of 1992, Pub. Law No. 102-385, 106 Stat. 1460 (1992).

[6] S. REP. NO. 102-92, at 35 (1991).

[7] *Id*.

[8] *See, e.g.*, Comments of Joint Cable Commenters, at 6-18; Comments of EchoStar Satellite L.L.C., at 3-8; Comments of the American Cable Association, at 7.

significant advantage over broadcasters, who had virtually no way to protect their content from being redistributed by MVPDs. Absent from these commenters' arguments is any valid explanation of what has changed since 1992 that would justify returning to the pre-1992 system.

One supposed justification proffered by commenters is the alleged inappropriate exchange of broadcast station retransmission consent for the carriage of cable channels under common ownership with the broadcaster. However, what these commenters fail to address sufficiently is that both Congress and the Commission consistently have approved of this practice. Notably, Congress specifically anticipated that the compensation paid by the cable operator to the broadcast station could take the form of "the right to program an additional channel on a cable system."[9] Recognizing the resulting public interest benefits, the Commission has affirmed the acceptability of such arrangements on several occasions. For example, in March 2000, the Commission ruled that—in the SHVIA context—proposals for carriage of a broadcast signal contingent on "carriage of any other programming, such as … an affiliated cable programming service" are "consistent with competitive marketplace considerations."[10] In 2001, the Commission again stated that "offering retransmission consent in exchange for the carriage of other programming such as a cable channel" is "consistent with competitive marketplace considerations" and that "[g]ood faith negotiation requires only that the broadcaster at least consider some other form of consideration if the MVPD cannot accommodate such carriage."[11]

[9] S. REP. NO. 102-92, at 36.

[10] *Implementation of the Satellite Home Viewer Improvement Act of 1999 – Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, 5469 (2000) ("*Good Faith Negotiation Order*").

[11] *EchoStar Satellite Corporation v. Young Broadcasting*, 16 FCC Rcd 15070, 15079 (Aug. 6, 2001).

Most recently, the Commission confirmed that antitrust laws, rather than FCC-imposed regulations, should govern any dispute over allegedly unlawful tying practices.[12]

Any departure from this established precedent would have to be supported by a well-founded reason for the change. However, nothing has happened since enactment of retransmission consent in 1992 to justify any changes to the statute or its implementing regulations. Instead, the fundamental notion behind retransmission consent remains as relevant today as it was in 1992: broadcasters—like any business—should be compensated for their product if distributed and sold by another entity. Broadcasters continue to invest billions of dollars annually to create the most valuable and most desired television programming in the industry and should have the right to be compensated for that product.

B. <u>Disney's Retransmission Consent Practices Are Reasonable, Not Abusive</u>

Several commenters assert that network broadcasters, including Disney/ABC, engage in allegedly "abusive" retransmission consent practices such as tying retransmission consent to carriage of cable networks or affiliate television stations.[13] As noted above, retransmission consent arrangements involving agreements to carry program services are in accordance with the 1992 Cable Act and Commission decisions. Moreover, as detailed below, Disney's retransmission consent practices are reasonable.[14]

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[12] *See Report on the Packaging and Sale of Video Programming Services to the Public*, at 80 (2004) ("*A La Carte Report*"). ("Nonetheless, the current retransmission consent process is a function of the statutory framework adopted by Congress and we cannot conclude that it is not working as intended. To the extent tying arrangements for carriage of particular programming is being used for anti-competitive ends, the antitrust laws provide an adequate remedy.").

[13] *See, e.g.*, Comments of Joint Cable Commenters, at 6-18; Comments of EchoStar Satellite L.L.C., at 3-8.

[14] These reasonable practices enabled Disney to conclude approximately 60 retransmission consent deals in the last cycle.

1. Disney Offers ABC on a Standalone Basis

As an initial matter, Disney negotiates retransmission consent only for its ten ABC Owned Stations (which have a 24% national reach) and does not negotiate on behalf of independently owned affiliate stations. Importantly, Disney does not require MVPDs to carry any ABC/Disney/ESPN cable network in order to obtain consent to retransmit any of its ten ABC Owned Stations. Instead, Disney offers MVPDs a stand-alone cash retransmission consent proposal for each of its ABC Owned Stations. This offer (in the range of \$0.70 - 0.80 per subscriber per month) was made to each MVPD that was part of the last round of ABC's retransmission consent negotiations. If an MVPD agreed to a cash ABC retransmission deal, that MVPD was under no obligation to carry any other ABC/Disney/ESPN channel.[15]

In its initial comments in this proceeding ("Initial Comments"), Disney established that ABC's stand-alone retransmission consent price is completely reasonable and, in fact, understates the actual value of the ABC programming. As explained in the Initial Comments, Disney submitted an economic study, as part of the FCC's a la carte proceeding, that determined the fair market value of three of the ABC Owned Stations ("Retransmission Consent Economic

[15] To again confirm Disney's practices with respect to retransmission consent agreements for carrying the ABC Owned Stations, Disney is attaching the declaration executed by Ben Pyne, Executive Vice President, Disney and ESPN Networks Affiliate Sales and Marketing, on February 3, 2003. Mr. Pyne is the individual who is responsible for working with the ABC Owned Stations to negotiate retransmission agreements. In his declaration, Mr. Pyne certifies that, "in negotiating for retransmission consent, ABC offers MVPDs a cash stand-alone price for retransmission consent for the ABC Owned Stations. If the cable operator accepts that offer, that decision results in no additional obligation to carry any Disney/ABC programming. To the extent that any given MVPD decides not to accept ABC's stand-alone cash offer, and instead elects the alternative to negotiate to carry programming, that decision is made by the individual MVPD. We attempt to work with the MVPD to customize a reasonable offer to address their particular needs." *See* Declaration attached as Exhibit A.

Analysis").[16] The Retransmission Consent Economic Analysis concluded – based on three different approaches to assess the value of the ABC Owned Stations – that the average value of these stations ranged between $2.00 and $2.09 per subscriber per month, well in excess of the $0.70-0.80 per subscriber per month that ABC offers MVPDs.

2. *Disney Offers Cable Operators Additional Flexibility*

When negotiating with MVPDs—including the smaller rural carriers that may not be able to upgrade their plant in face of competition from advanced digital satellite services, Disney offers flexibility in striking a retransmission consent deal. For example, some small cable operators wish to retransmit an ABC Owned Station (but do not want to pay cash for the carriage), and yet they lack sufficient capacity on the same cable system to carry commonly-owned cable channels. In these instances, ABC has agreed to allow carriage of its station in market A in return for cable carriage of a commonly owned channel in market B where the cable operator <u>does</u> have sufficient channel capacity.[17] And, ABC will continue to work in good faith to accommodate the needs of smaller cable system operators. These practices are accommodations—not abuses—and in no way argue in favor of changes in retransmission consent.

Disney also permits MVPDs to obtain a license for its most popular individual cable channels without being obligated to obtain a license for any other Disney owned service. For example, an MVPD may elect to obtain a license for the Disney Channel but not Toon Disney, or

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[16] *See* Michael G. Baumann and Kent W. Mikkelsen, THE FAIR MARKET VALUE OF LOCAL CABLE RETRANSMISSION RIGHTS FOR SELECTED ABC OWNED STATIONS (July 15, 2004).

[17] Ironically, this good faith accommodation by Disney has been twisted by a few operators into an allegation of bad faith. In fact, the flexibility to allow the retransmission consent compensation to occur in a different market is an accommodation to capacity constraints of the cable system owner.

may enter into standalone license agreements for SOAPnet or ABC Family. Further, a distribution license for ESPN does not obligate the cable or satellite operator to carry ESPN2, ESPN Classic or ESPNEWS.[18]

In addition to providing flexibility, Disney's contracting practices are in accordance with the Commission's intention to allow private negotiations to govern tier placement requirements. All tier placements of the Disney-owned cable channels are the result of private contractual negotiations between Disney and the MVPDs. As the Commission has acknowledged in its recent report on the packaging and sale of video programming services ("*A La Carte Report*"), "[t]ier placement requirements . . . are best left to commercial negotiations between MVPDs and program networks."[19] Antitrust law, rather than modifications to retransmission consent, provides a remedy for parties harmed by anti-competitive conduct.[20]

C. MVPDs Established the Retransmission Consent Practices That They Now Challenge as Abusive

As noted in Section I.A above, prior to 1992, cable operators distributed local broadcast signals without the consent of station owners. After the 1992 change in the law, many leading cable operators announced that they never would pay cash to a broadcaster for retransmission

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[18] While ESPN offers the original "ESPN" channel on a standalone basis, it distributes the complementary ESPN-branded services (ESPN2, ESPNEWS and ESPN Classic) only to those distributors who have licensed the original basic "ESPN," and those distributors may then choose to license—or not to license—any one or more of the complementary ESPN-branded channels. Similarly, when Toon Disney was first launched, it was made available as a complementary service only to those distributors who licensed Disney Channel. Since that time, Disney's policy has changed, and as a more mature service, Toon Disney is now offered to new licensees of the service on a standalone basis. Certain Toon Disney agreements that were executed under the original distribution policy are still in effect, but as they are renewed, the new policy is applied.

[19] *A La Carte Report*, at 80.

[20] *Id*.

consent.[21] As the statutory deadline approached for completion of retransmission consent deals, a standoff ensued between the broadcasters and the cable operators.[22] This standoff threatened the continued cable carriage of many local broadcast stations.[23] This standoff was resolved when three of the then four major broadcast networks agreed to cable operators' proposals to grant retransmission consent for network-owned stations in return for cable carriage of, and payment for, new network-owned cable channels.[24] In return for granting broadcast retransmission consent, Fox created the cable network FX, ABC produced and distributed ESPN2 and NBC launched "America's Talking" (which later became MSNBC).[25]

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[21] *See* Mark Robichaux, *Tele-Communications Says It Will Fail to Meet Deadline on TV Stations' Fees*, THE WALL STREET JOURNAL, Aug. 18, 1993, at B8 ("Nearly all of the nation's largest cable operators have vowed to forgo paying cash to local TV stations."). The cable operators' prospective refusal to pay for retransmission rights was so uniform that Senator Daniel Inouye of Hawaii asked the Justice Department and the Federal Trade Commission to investigate whether the cable companies violated antitrust laws by improperly colluding with each other. *Id.*; *see also* Rachel W. Thompson, *Inouye to Cable: Why No Cash?*, MULTICHANNEL NEWS, Aug. 16, 1993.

[22] *See, e.g.*, Ted Sherman, *Consumers Loom as Losers in Battle Between Cable, Broadcast Firms*, THE NEWARK STAR-LEDGER, Sept. 13, 1993 (noting that after 1992 Cable Act established retransmission consent requirements, "[a]lmost every broadcaster initially demanded the cash [and] at the same time, nearly all cable operators said no, threatening to dump the on-air broadcast stations come Oct. 6, when the [retransmission consent] provision takes hold"); Robichaux, *supra* note 21 ("Delays in meeting the October deadline have been caused in part by the face-off between TV stations demanding new cash fees and cable systems steadfastly refusing to pay.").

[23] *See, e.g.*, Jeannine Aversa, Rachel W. Thompson & Rod Granger, *Storm Still Brews in Conn. as FCC Readies Final Must-Carry Rules*, MULTICHANNEL NEWS, Mar. 8, 1993 (noting Cablevision's threat to drop several broadcast stations, including those in Boston and Hartford/New Haven "if they don't forgo payment for carriage"). Some cable operators, including Cablevision, said they would offer subscribers switches to easily obtain broadcast programming over the air rather than pay broadcasters for their signals. *See* Sherman, *supra* note 22.

[24] *See* Sherman, note 22 ("Instead [of cash], the cable operators have been offering to swap spare channel capacity to the broadcasters for new cable programming that all networks are developing, in return for the right to retransmit regular, over-the-air programming.").

[25] *See* Sherman, *supra* note 22 (describing cable channels for which ABC, Fox, NBC and CBS negotiated carriage).

There are two critical points to make regarding these agreements which established the pattern of granting broadcast retransmission consent in return for carriage of commonly owned cable channels. First, these alternatives were conceived by cable operators[26] who—notwithstanding the 1992 Act—refused to pay cash for broadcast retransmission consent and were an accommodation to this refusal.[27] Second, as discussed above, these alternatives had been specifically anticipated and approved in the Senate Report to the 1992 Act.[28] Thus, it is MVPDs and not broadcasters who have established the terms of many current retransmission consent deals. For MVPDs now to complain about the very practice they insisted upon is outrageous.

D. Retransmission Consent Is Not Responsible for Increased Cable Costs

The Joint Cable Commenters ("JCC") submitted to the Commission a report by William P. Rogerson, Professor of Economics at Northwestern University, in which Professor Rogerson

[26] *See, e.g.*, Sherman, *supra* note 22 ("In a nearly united front…cable operators refused to negotiate with the networks, making it a possibility that cable subscribers would be forced to rely on conventional television reception to tune in to top rated shows…"); Rachel W. Thompson, *TCI Cuts 14 'Zero Pay' Carriage Agreements*, MULTICHANNEL NEWS, June 21, 1993 ("Cablevision Systems announced last Friday that it would offer broadcasters a single free cable channel in each of the markets where it operates that they can use" and "a package of free advertising time…in exchange for retransmission consent"); Jeannine Aversa, *Effros: Offer Broadcasters Leased Access*, MULTICHANNEL NEWS, May 3, 1993, at 18 ("At least one cable executive has an idea of how to deal with failed retransmission consent negotiations: Offer the broadcaster a leased access channel on the cable system's basic tier and let the station collect a fee directly from subscribers."); Mark Robichaux, CABLE COWBOY: JOHN MALONE AND THE RISE OF THE MODERN CABLE BUSINESS (John Wiley & Sons, Inc. 2002) ("TCI, for one, refused to pay cash to any of the big networks but it indicated it might be willing to make room on its systems for a new cable channel a broadcaster might like to start.")

[27] *See, e.g., Inouye Poses Antitrust Question on Retransmission Consent Decisions*, COMMUNICATIONS DAILY, Aug. 11, 1993 ("14 of top-20 cable MSOs said they wouldn't pay cash for retransmission consent"). MSOs that stated they would not pay for retransmission consent included TCI, Continental, Cablevision Industries, Coaxial, Colony, Comcast Crown, Harron, Jones, KBLCom, Newhouse, TeleCable, Time Warner and Viacom. *Id*.

[28] *See supra* at pp. 3-4.

concludes that retransmission consent is responsible for the rapidly rising cost of basic cable service.[29] As explained in a report by Jeffrey A. Eisenach and Douglas A. Trueheart, attached as Exhibit B to these Reply Comments ("Eisenach/Trueheart Report"), Professor Rogerson's analysis is flawed.[30]

The Eisenach/Trueheart Report makes clear that programming costs alone do not drive increases in basic cable rates. Rather, programming costs are one factor among many that contribute to cable rate increases. As explained in the Eisenach/Trueheart Report, between 1996 and 2002, the cable industry spent over $75 billion on infrastructure and system upgrades. In 2004, cumulative capital expenditures by cable operators totaled over $80 billion. In comparison, programming costs in 2004 totaled $10.7 billion. The Eisenach/Trueheart Report further demonstrates that Professor Rogerson's conclusion that programming costs account for 42% of the rise in cable subscription rates is erroneous because Professor Rogerson's methodology is flawed. If Professor Rogerson's methodology is applied to determine the percentage of the increase in cable subscriber rates represented by costs other than programming, the increase in cable rates calculated using such methodology would be more than double the actual rise in cable rates.

Not only have non-programming costs played a more significant role in driving any purported increase in cable rates than programming costs, programming costs have remained relatively flat as a percentage of total costs.[31] To the extent programming costs have increased,

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[29] *See* Comments of Joint Cable Commenters, William P. Rogerson, Professor of Economics, Northwestern University, THE SOCIAL COST OF RETRANSMISSION CONSENT REGULATIONS (Feb. 28, 2005) ("ROGERSON REPORT").

[30] *See* Jeffrey A. Eisenach and Douglas A. Trueheart, RETRANSMISSION CONSENT AND CABLE TELEVISION PRICES (Mar. 31, 2005) ("EISENACH/TRUEHEART REPORT").

[31] *See id.*, at 16, Exhibit 9.

cable operators have been able to offset a portion of these costs through the sale of local advertising, a fact that the JCC ignores. As illustrated in the Eisenach/Trueheart Report, in the past five years, cable operators have seen an 87% increase in the amount of advertising revenue generated per subscriber. Ultimately, however, the cable interests want the best of both worlds, *i.e.* they want to pay less for programming that increases their advertising revenues. Such a result would be unwarranted, unreasonable, and unrealistic.

The Eisenach/Trueheart Report further demonstrates that when adjusted to account for improvements in service quality, cable rates are not, in fact, rising rapidly as Professor Rogerson contends. Professor Rogerson relies on data in the Commission's most recent annual report on competition in the MVPD market to reach his conclusion that programming costs are responsible for rising cable rates. Examining this data alone, however, is an insufficient means of analyzing the effect of retransmission consent on cable prices because it fails to account for costs associated with increases in the quality of service. The Eisenach/Trueheart Report analyzes cable costs per channel and shows that, over the last five years, the price of basic cable service on a per channel basis has risen at a rate of only 0.4%, much slower than the rate of inflation. The Eisenach/Trueheart Report also considers cable costs per hour viewed and finds that the adjusted price of basic cable per viewing hour decreased by almost 7% between 1999 and 2003. Thus, it is clear that, when improvements to the quality of cable service provided to customers are taken into account, cable prices are not increasing rapidly as Professor Rogerson claims.

E. Proposed Modifications to the Current Retransmission Consent Procedures Are Irrelevant and Unnecessary

In their comments, the cable interests propose several specific modifications to the current retransmission consent procedures. Among these are recommendations that Congress: (i) extend the conditions imposed in the News Corporation Limited ("News Corp.")/DirecTV

Holdings LLC ("DirecTV") transaction; and (ii) modify existing retransmission consent procedures to require that all retransmission consent disputes be submitted to mandatory arbitration.[32] As further set forth below, these proposed modifications are unnecessary and should not be adopted.

1. *The Commission Should Not Extend the Conditions Imposed in the News Corp./DirecTV Transaction Because the Rationale For Imposing Such Conditions Does Not Apply to Retransmission Consent Generally*

In approving the proposed merger between News Corp. and DirecTV, the Commission concluded that the transaction could create an incentive for the combined entity to withhold retransmission consent from other MVPDs.[33] To alleviate the potential for competitive harm, the Commission conditioned its approval on compliance with two primary conditions.[34] Several commenters argue that the Commission should recommend to Congress that it impose these conditions on all broadcasters.[35] There is no basis for such action because the principal reasons for imposing the News Corp./DirectTV conditions do not apply to broadcasters, as further set forth below.

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[32] *See, e.g.,* Comments of EchoStar Satellite L.L.C, at 8-11, Comments of American Cable Association, at 11, Comments of BellSouth Corporation and BellSouth Entertainment, L.L.C., at 8.

[33] *See General Motors Corporation and Hughes Electronic Corporation, Transferors, and The News Corporation Limited, Transferee, For Authority to Transfer Control*, MB Docket No. 03-124 (rel. Jan. 14, 2004) ("*News Corp./DirecTV Order*").

[34] Specifically, the Commission (1) required News Corp. to provide cable programming networks with non-discriminatory access to News Corp.'s owned and affiliated broadcast stations and (2) permitted MVPDs to submit retransmission consent disputes to arbitration. *Id.* at ¶ ¶ 218-226.

[35] *See, e.g.,* Comments of EchoStar Satellite L.L.C., at 8-11, Comments of American Cable Association, at 3 & 11.

First, the Commission's conclusions regarding the merger of News Corp. and DirecTV are not relevant to retransmission consent policies generally because, in reaching these conclusions, the Commission was concerned with the effect of the transaction on competition in the vertical broadcast-MVPD distribution market. Specifically, the Commission considered the potential for harm to non-affiliated MVPDs arising from the combination of a broadcaster, News Corp., and an MVPD, DirecTV, and found that, due to the vertical integration of these two types of entities, News Corp would have an increased ability to temporarily foreclose on provision of programming during retransmission consent negotiations given that it could direct defecting subscribers to DirecTV.[36] Such concerns generally are not present in retransmission consent negotiations involving broadcasters since most broadcasters (including Disney) are not affiliated with an MVPD.

Further, antitrust authorities subsequently decided not to employ these conditions in situations not involving vertical integration concerns, a fact ignored by commenters. Specifically, in the Federal Trade Commission's ("FTC") approval of the merger of NBC and Vivendi Universal Entertainment,[37] the FTC implicitly rejected arguments that the merger of a broadcast network and a content supplier may provide the combined entity with increased bargaining power in retransmission consent negotiations.[38] Since the transaction did not pose vertical integration concerns, competition would not be harmed because MVPDs would have multiple sources from which to secure programming. Accordingly, the Commission should

[36] *News Corp./DirecTV Order*, at ¶ 206.

[37] *See* Letter from Susan A. Creighton, Director, Federal Trade Commission, to Jean-Francois Dubos, General Counsel, Vivendi Universal S.A. (Apr. 20, 2004) (determining that further review of the proposed merger was unnecessary).

[38] *See* Jayne O'Donnell, *NBC, Vivendi Merger Hits Possible Snag*, USA TODAY, (Dec. 31, 2003), *available at* http://www.usatoday.com/money/media/2003-12-31-merger_x.htm.

follow this on-point precedent and reject the proposal to impose conditions on broadcasters absent a specific demonstration of such vertical integration concerns.

Second, the assertions by some commenters that the Commission determined in the *News Corp./DirecTV Order* that all broadcasters possess substantial market power to coerce acceptance of unfair retransmission consent agreements by MVPDs[39] is incorrect. Nowhere in the *News Corp./DirecTV Order* did the Commission find that broadcasters exercise market power at a level that is sufficient to harm competition. Although the Commission concluded that News Corp. possessed some market power in certain DMAs, the Commission did not reach any conclusions regarding the broadcast industry.[40] In fact, subsequently the Commission clarified that it was not passing upon the competitive balance of negotiating power that normally exists between broadcasters/programmers and MVPDs in the *News Corp./DirecTV Order*.[41]

Lastly, statements that broadcast-owned cable channels or networks are dominant forces in the market for MVPD programming are also incorrect.[42] As described in the Eisenach/Trueheart Report, broadcast-owned cable networks are far from dominant and

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[39] *See, e.g.,* ROGERSON REPORT, at 26 ("[T]he Commission's more general conclusion that broadcasters have market power with respect to their broadcast signals most certainly is relevant [to consideration of retransmission consent]."); Comments of EchoStar Satellite, L.L.C., at 5 ("To the extent there was any doubt about the market power of each major broadcasting network, the Commission has now definitively settled that question in the *News Corp.* decision"),.

[40] Nor did the Commission find that News Corp., absent the merger, enjoyed an unfair advantage over MVPDs in retransmission consent negotiations.

[41] *A La Carte Report*, at 70. Professor Rogerson ignores this statement in his attempt to refute arguments that the FCC's conclusions in the *News Corp./DirecTV Order* do not apply to retransmission consent broadly. *See* ROGERSON REPORT, at 26-27. In fact, in recent retransmission consent disputes, it has been said that "[c]able systems in bigger markets have more leverage because broadcasters have more money at stake." John M. Higgins and Bill McConnell, *No Cash, No Carry*, BROADCASTING & CABLE, Feb. 7, 2005, *available at* http://www.broadcastingcable.com.

[42] *See, e.g.,* Comments of Joint Cable Operators, at 6-28.

represent a small percentage of all cable networks, the overall number of which continues to increase.[43] Additionally, the Commission has acknowledged the diverse ownership of the most popular cable networks, thus indicating that broadcast-owned cable networks do not control programming in the MVPD market. In fact, the Eisenach/Trueheart Report points out that even Professor Rogerson's calculations regarding market share are more consistent with the FCC's findings of diversity than with dominance.[44]

2. *Other Suggested Modifications of Retransmission Consent Procedures Cannot Be Justified*

Several commenters also urge the Commission to recommend to Congress certain procedural changes, such as binding arbitration, to the existing retransmission consent regime.[45] These changes are not justified because there is no evidence indicating that the existing regime, which requires broadcasters to negotiate retransmission consent agreements in good faith and provides specific rules governing the retransmission consent complaint process, is ineffective.

The requirement that broadcasters negotiate in good faith was enacted by Congress in 1999 as a means to facilitate retransmission consent negotiations while still enabling the market to drive these negotiations.[46] In 2000, the Commission promulgated regulations to implement this provision, including regulations governing the process for filing retransmission consent complaints.[47] At that time, the Commission decided not to require arbitration because "[t]here

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[43] *See* EISENACH/TRUEHEART REPORT, at 12.

[44] *Id.* at 13.

[45] *See, e.g.,* Comments of EchoStar Satellite L.L.C, at 8-11, Comments of American Cable Association, at 11, Comments of BellSouth Corporation and BellSouth Entertainment, L.L.C., at 8.

[46] *See Good Faith Negotiation Order*, at 5448.

[47] *See id.*

has not been a sufficient demonstration that such a measure is necessary to implement the good faith provision of Section 325(b)(3)(C)."[48] Since then, no showing has been made to the Commission to establish the inadequacy or violations of the good faith negotiation rules that would warrant implementing binding arbitration.[49] Indeed, commenters are unable to cite a single case where the Commission actually sanctioned a broadcaster for violating its obligation to negotiate in good faith. In fact, the Commission has had only one opportunity to consider the issue and, in that case, determined that the broadcaster fulfilled its statutory obligation.[50]

Further, in enacting the Satellite Home Viewer Extension and Reauthorization Act, Congress extended the sunset date of the good faith negotiation requirement by five years and expanded the obligation to apply to all participants—MVPDs and broadcasters—in retransmission consent negotiations.[51] If Congress was concerned that the good faith negotiation provisions of the Act were ineffective, it would have implemented an alternative remedy, such as mandatory arbitration. For this and other reasons set forth above, there is no basis for modifying the existing retransmission consent regime.

[48] *Id*.

[49] Contrary to statements by several commenters, the *News Corp./DirecTV Order* does not provide a basis for implementing mandatory arbitration because, as discussed above, broadcasters generally are not affiliated with MVPDs.

[50] *See EchoStar Satellite Corp.*, 16 FCC Rcd at 15079. In this case, EchoStar brought a complaint against Young for allegedly violating the good faith negotiation requirement. The Commission applied a two-part test to determine whether such violation occurred. First, the Commission determined that Young did not violate the good faith negotiation requirement under an objective standard because Young did not refuse to (1) negotiate with EchoStar; (2) meet and negotiate in a reasonable time and manner, or (3) advance more than one unilateral proposal. Second, the Commission concluded that, considering the totality of the circumstances surrounding the dispute, Young negotiated in good faith. Thus, the Commission dismissed EchoStar's complaint.

[51] 47 U.S.C. § 325(C).

II. There Is No Need For the Government to Revise the Current Statutes or Regulations Governing Exclusivity

The network non-duplication and syndicated exclusivity rules (together, the "Exclusivity Rules") were promulgated decades ago to protect programming for which broadcasters had negotiated exclusive rights and, in turn, to protect advertising revenues generated by such programming. The purpose of the Exclusivity Rules is "to allow all participants in the marketplace to determine, based on their own best business judgment, what degree of programming exclusivity will best allow them to compete in the marketplace and most effectively serve their viewers."[52]

The Commission already has concluded that the absence of such rules directly harms the ability of broadcasters to compete against cable operators.[53] This conclusion remains true today because, as audience levels of broadcast stations continue to decline in the face of competition from MVPDs,[54] the Exclusivity Rules ensure that local broadcast audiences (and, thus, advertising revenues) do not further decline as a result of duplicate programming that is retransmitted in a local market in contravention of contractual arrangements between television stations, their networks and other program suppliers. Further, there is no evidence that the

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[52] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to the Program Exclusivity in the Cable and Broadcasting Industries*, 3 FCC Rcd 5299, 5319 (1988) ("*Exclusivity Rules Order*").

[53] Specifically, in 1988, the Commission found that, in light of the growing number of cable operators, "the potential for duplicating broadcasters' programs, diverting broadcasters' audiences and advertising *as a result of an unbalanced regulatory regime* [(e.g. a regulatory scheme without exclusivity protection)] is far greater than we expected it to be when we rescinded our syndicated exclusivity rules." *See id.*, at 5305 (emphasis added).

[54] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227, FCC 05-13, ¶¶ 14, 77 (rel. Feb. 4, 2005) ("[B]roadcast television stations' audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of nonbroadcast networks continue to grow.").

Exclusivity Rules are ineffective. Indeed, the Exclusivity Rules, by enabling broadcasters to negotiate and enforce program exclusivity, contribute to the "operation of a fully competitive market" for program distribution.[55]

A. There Is No Reason To Alter the Negotiated Exclusivity Between Networks and Their Affiliates

In its 1988 order regarding the Exclusivity Rules, the Commission explicitly endorsed the network-affiliate system as an efficient means of program distribution and determined that "enforcement of reasonable exclusivity" was necessary to support distribution of network programming.[56] The Exclusivity Rules prevent MVPDs from retransmitting duplicate out-of-market network programming in a market where a network and its local affiliate have negotiated exclusivity. Such rules protect network advertising revenues, which the Commission has determined are "an essential underpinning of the network-affiliate relationship."[57] Thus, the Commission should not make any changes to its Exclusivity Rules because any changes that would allow MVPDs to import an out-of-market broadcaster's identical network programming into the local market without regards to negotiated exclusivity rights would jeopardize the continued vitality of the network system.

B. The Exclusivity Rules Enhance Localism

Commenters' proposed elimination of or modifications to the Exclusivity Rules also would harm localism and run contrary to Section 307(b) of the Act which requires the Commission to ensure that individual community interests are served.[58] The current Exclusivity

[55] *Exclusivity Rules Order*, at 5302.

[56] *Id.*, at 5318.

[57] *Id.*

[58] 47 U.S.C. § 307(b).

Rules promote the Commission's long-standing goal of localism by: (i) providing MVPD subscribers with access to local content produced by broadcasters; and (ii) giving broadcasters the audience levels they need in order to justify producing expensive local content. Specifically, without the Exclusivity Rules, MVPDs would be able to retransmit distant out-of-market programming into the local market without any consideration as to such station's programming actually serves the interests of the community into which it is retransmitted. At the same time, viewers would be diverted from the local broadcast station, thereby reducing the local broadcaster's advertising revenues. With less advertising revenue, a local broadcaster's ability to produce high quality locally oriented news and information services would be seriously impaired. Ultimately, elimination or modification of the Exclusivity Rules would jeopardize the viability of local television stations and their ability to serve their local community.

C. Suggested Revisions to the Exclusivity Rules Are <u>A Back-Door Attempt To Repeal Retransmission Consent</u>

As discussed above, the Exclusivity Rules effectively promote the Commission's goal of localism and support the network-affiliate system. Nonetheless, several commenters assert that the Exclusivity Rules should be eliminated under certain circumstances because they place MVPDs at a distinct disadvantage during retransmission consent negotiations.[59] Specifically, the National Cable and Telecommunications Association ("NCTA") and the American Cable Association ("ACA") request that the Exclusivity Rules be modified to prohibit broadcasters who elect retransmission consent from exercising their rights under the Exclusivity Rules.[60]

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[59] *See, e.g.,* Comments of Joint Cable Commenters, at 14, Comments of the National Cable & Telecommunications Association, at 12.

[60] *See*, Comments of the National Cable & Telecommunications Association, at 12; American Cable Association, Petition for Rulemaking to Amend 47 C.F.R. § § 76.64, 76.93, and

Although these proposals are characterized as "modifications" to the existing rules, they seek to eliminate the Exclusivity Rules in their entirety for broadcasters electing retransmission consent, a result not proposed or contemplated by the Commission's public notice in this proceeding or otherwise warranted.[61]

Complaints about the Exclusivity Rules are a back-door attempt to repeal retransmission consent. The Exclusivity Rules do not unfairly enhance a broadcaster's position in retransmission consent negotiations. Rather, the Exclusivity Rules merely respect a network's contractual decision to distribute programming in a certain way. Further, the Exclusivity Rules, which were established prior to the enactment of retransmission consent, were taken into consideration in adopting the existing retransmission consent scheme,[62] which seeks to balance the relative negotiating positions of broadcasters and MVPDs.[63] The modifications suggested

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76.103: Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity (filed Mar. 2, 2005).

[61] In the public notice governing this proceeding, the Commission sought comment only on the impact of the Exclusivity Rules on competition in the MVPD market. The FCC did not seek comment on repeal of these rules. *See Media Bureau Seeks Comment For Inquiry Required by the Satellite Home Viewer Extension and Reauthorization Act on Rules Affecting Competition in the Television Marketplace*, Public Notice, MB Docket No. 05-28, DA 05-169 (rel. Jan. 25, 2005).

[62] Congress recognized the importance of the interplay between retransmission consent and the Exclusivity Rules in 1992 and concluded that modifications to the Exclusivity Rules "in a manner which would allow distant stations to be submitted on cable systems for carriage or local stations carrying the same programming would . . . be inconsistent with the regulatory structure created in [the Act]." S. REP. NO. 102-92, at 38.

[63] *See News Corp./DirecTV Order*, at ¶ 180 ("Both programmer and MVPD benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by MVPDs than otherwise, and the MVPDs benefit because the station's programming adds to the attraction of the MVPD subscription to consumers. Thus, the local television broadcaster and the MVPD negotiate in the context of a roughly even 'balance of terror' in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially damages each side greatly in their core business endeavor.")

by the cable interests, however, would upset this balance of power. If the Exclusivity Rules are modified as requested, broadcasters will have far less bargaining power in retransmission consent negotiations because, as the cable interests correctly state, an MVPD simply could contract to carry the signal of a non-local station instead of the local station. In sum, elimination of, or modifications to, the Exclusivity Rules would negate broadcasters' bargaining power while at the same time strengthening that of MVPDs and, ultimately, would render a broadcaster's retransmission consent rights meaningless.

III. CONCLUSION

As demonstrated in these Reply Comments and the attached exhibits, there is no need for the government to revise the current statutes or regulations regarding retransmission consent, network nonduplication, or syndicated exclusivity.

Respectfully Submitted,

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March 31, 2005

EXHIBIT A

EXHIBIT A

DECLARATION OF BEN PYNE

I am Senior Vice President of Affiliate Sales and Marketing for ABC Cable Networks Group. Among other responsibilities, I am responsible for working with the ABC owned television stations to negotiate retransmission agreements for the ten ABC owned television stations.

I attest that, in negotiating for retransmission consent, ABC offers MVPDs a cash stand-alone price for retransmission consent for the ABC owned stations. If the cable operator accepts that offer, that decision results in no additional obligation to carry any Disney/ABC programming. To the extent that any given MVPD decides not to accept ABC's stand-alone cash offer, and instead elects the alternative to negotiate to carry programming, that decision is made by the individual MVPD. We attempt to work with the MVPD to customize a reasonable offer to address their particular needs.

I hereby declare, under penalty of perjury, that, to the best of my knowledge, information, and belief, all of the factual information contained in this Declaration is accurate and complete.

Benjamin N. Pyne
Senior Vice President of Affiliate
Sales and Marketing
ABC Cable Networks Group

February 3, 2003