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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 07-269
Competition in the Market for the	)	
Delivery of Video Programming	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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EXECUTIVE SUMMARY

The National Association of Broadcasters ("NAB") submits this reply to certain comments on the Commission's *Notices of Inquiry* requesting data and information on the status of competition in the market for the delivery of video programming as of June 30, 2007 and June 30, 2008.

The majority of comments filed in this proceeding demonstrate the continued value and importance of free over-the-air television broadcast programming to American television households. Broadcast television continues to be a competitive force in the video marketplace by offering a diverse array of free programming options. With the transition to all-digital broadcasting now complete, broadcasters are well-positioned to provide an expanded array of news, entertainment, and foreign language programming of interest to the local communities they serve using multicasting and high-definition capabilities. In addition to traditional over-the-air television, the record reflects the innovative programming delivery methods broadcast stations are beginning to employ, including their own websites, websites offering aggregated video content, and enabling mobile devices to receive digital broadcast television signals.

A few commenters, however, have used this proceeding to mischaracterize the current state of video competition and make repetitive, inaccurate, and legally unsupportable claims about the well-functioning retransmission consent marketplace. In responding to these commenters, NAB demonstrates that while broadcast station programming is very popular and provides important service for local communities, broadcast stations do not have undue bargaining power in retransmission consent negotiations. In fact, the video programming market in which broadcast stations must

compete for viewers, distribution, and advertising, is hundreds of times more competitive than the multichannel video programming distribution market, and competition is on the rise. As evidenced by the many thousands of retransmission consent agreements reached between broadcasters and multichannel video programming distributors ("MVPDs"), broadcasters continue to bargain in good faith, consistent with FCC rules.

In establishing retransmission consent, Congress intended to create a market-based system for determining the terms under which MVPDs may obtain the rights to retransmit broadcast signals to their subscribers. This vision has been realized. Empirical studies, including a new study released in March 2009, demonstrate that: (1) broadcasters are more vulnerable to economic losses from retransmission consent disputes than multichannel video programming distributors; (2) programming costs account for a small and declining proportion of cable operators' revenues; (3) retransmission consent payments are trivial in comparison to cable revenues, and are not responsible for rising consumer rates; and (4) negotiating impasses that cause interruptions in access to broadcast signals are extremely rare.

Retransmission consent is an economically efficient regime that benefits consumers by enriching the quantity, diversity, and quality of available programming. The Commission should therefore reject the repetitive and baseless claims by a few commenters that the existing retransmission consent rules need to be modified to provide multichannel video programming distributors an advantage in free-market retransmission negotiations.

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The National Association of Broadcasters ("NAB")[1] submits this reply to certain comments on the Commission's *Notices of Inquiry* requesting data and information on the status of competition in the market for the delivery of video programming as of June 30, 2007[2] and June 30, 2008.[3] A number of comments submitted in this proceeding demonstrate the continued value and importance of free over-the-air television broadcast programming to American television households. A handful of commenters, however, have used this proceeding to mischaracterize the current state of video competition and to seek relief that is beyond the scope of this proceeding and contrary

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[1] The National Association of Broadcasters is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Notice of Inquiry, MB Docket No. 07-269, FCC 07-207 (rel. Jan. 16, 2009) ("*Notice*").

[3] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Supplemental Notice of Inquiry, MB Docket No. 07-269, FCC 07-207 (rel. Apr. 9, 2009) ("*Supplemental Notice*").

to relevant statutory provisions. In this reply, NAB again refutes these commenters' repetitive, inaccurate, and legally unsupportable claims about the well-functioning retransmission consent marketplace.

I. Many Commenters Agree that Broadcast Programming Contributes to Competition and Diversity in the Video Marketplace

Several commenters address the Commission's request for information on the role of broadcast television in the video marketplace.[4] The record demonstrates that millions of consumers continue to rely on free over-the-air broadcast television.[5] One commenter cites recent reports that as many as 17.62 million television households rely exclusively on over-the-air television, and agrees that many more households have secondary televisions that rely on over-the-air broadcasting.[6] As NAB explains in its initial comments[7] and other commenters point out, broadcast television continues to be a competitive force in the video marketplace by offering a diverse array of free programming options.

The transition to all-digital broadcasting in particular was recognized as contributing to competitive programming options.[8] As Comcast observes,"[m]ulticasting allows broadcasters to provide an expanded array of news, entertainment, and foreign

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[4] *Notice* at ¶¶ 56-71; *Supplemental Notice* at ¶¶ 34-36.

[5] NCTA Comments at 16; Comcast Comments at 37.

[6] *Compare* NAB Comments at 3 *with* Comcast Comments at 38 (citing Robin Flynn, SNL Kagan, *Logic of FCC's 30% Cap Fading Along With Cable's Video Share in a Multiplatform World*, Cable TV Investor: Deals & Finance, Apr. 30, 2009, at 1).

[7] *See* NAB Comments at 5-8.

[8] *S*ee Comcast Comments at 38-39; NCTA Comments at 15-16; Verizon Comments at 14, 16.

language programming of interest to the local communities they serve."[9] Commenters also note the increase in the number of broadcasters multicasting or planning to multicast[10] and the availability of HD programming[11] as adding value to over-the-air programming. In addition to traditional over-the-air television, the record reflects the innovative programming delivery methods broadcast stations are beginning to employ, including their own websites, websites offering aggregated video content,[12] and enabling mobile devices to receive digital broadcast television signals.[13]

By offering a range of free quality programming options to millions of television households, broadcast television remains an important factor in the video marketplace. One commenter summarizes it best: "[B]roadcast television's position in the media marketplace [is] 'one of the strongest local media franchises,' one that will dynamically respond to marketplaces changes by developing new revenue streams for, among other things, 'digital multicasting and the Internet, as well as mobile TV revenues that will arise in the near future.'"[14]

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[9] Comcast Comments at 39; *see also* Verizon Comments at 16; NCTA Comments at 15-16.

[10] ACA Comments at 8. For example, "This TV" will feature MGM films and TV shows on multicast channels. Comcast Comments at 39. LATV will multicast its bilingual music and entertainment programming. *Id.* MHz Networks will multicast ten international networks. *Id.* *See also* NCTA Comments at 15-16 (noting that "already a new 'network' has been formed that will offer programming to broadcasters to fill these multicast channels").

[11] Comcast Comments at 39 (reporting an increase of HD offerings by 57 percent over the last year); *see also* NCTA Comments at 16.

[12] Comcast Comments at 40-42.

[13] Comcast Comments at 43.

[14] Comcast Comments at 37-38 (quoting SNL Kagan, *Market-by-Market Revenue Projections*, 2009 Radio/TV Station Annual Outlook 33).

II. Unsubstantiated Allegations About Retransmission Consent Do Not Reflect the Current Video Marketplace and Do Not Form the Basis for Government Intervention

Unsubstantiated allegations about broadcasters' supposed "market power" in retransmission consent negotiations[15] do not accurately reflect the marketplace and do not form any basis for government intervention into the marketplace.[16] When one compares the market for video programming (in which broadcasters compete) with the multichannel video programming distribution ("MVPD") market, there is no contest: broadcasters compete in a marketplace that is literally *hundreds of times* more competitive than the MVPD market. Every single television broadcast station must compete for both viewers and distribution with every other television broadcast station in its local market, any regional news and sports networks carried by MVPDs in the market, and the hundreds of channels of programming available on a nationwide basis.[17] A station must also compete with many of these sources for a share of local advertising revenue. Competition to television broadcast stations continues to increase, with the Commission counting 565 satellite-delivered national programming networks in

[15] *See* ACA Comments at 5 ("[t]here exists an enormous disparity in market power between broadcasters and smaller cable operators"); DIRECTV Comments at 18 ("network-affiliated broadcasters have become more aggressive in asserting their market power").

[16] *See* DIRECTV Comments at 19-20 ("the Commission should consider measures to ensure that broadcast programming: (1) is available at a reasonable price and without interruption, and (2) includes sufficient local content to justify carriage"); ACA Comments at 16 ("[t]he Commission should consider closely the impact of retransmission consent regulations on consumers and independent cable operators' ability to compete in a competitive marketplace, and should act where necessary").

[17] *See* Empiris, LLC, *The Economics Of Retransmission Consent,* Jeffrey A. Eisenach, Ph.D. (March 2009) at 12-18 ("Empiris") (attached hereto as Appendix A).

2006, a number that more than doubled between 2000 and 2006.[18] In recent years, the number of television broadcast stations also increased significantly, from 1663 stations in 2000[19] to 1758 by June 2008.[20] In contrast, the MVPD market contains few competitors—only a single cable operator and two DBS providers are available in most local markets (and perhaps one or two more competitors if there is an overbuilder or telecommunications provider offering video in the market).[21] Moreover, the MVPD market is experiencing increasing concentration at the national and regional levels.[22]

The Commission itself has recognized the relative dominance of cable over television broadcasters, explaining that, because the cable industry "by far remains the dominant player in the MVPD market,"[23] cable operators still have market power that provides them the incentive and ability to "silence the voice of competing speakers with a mere flick of the switch"[24] and an ever-increasing incentive to "*drop local broadcasters*

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[18] Empiris at 14.

[19] *See FCC,* Broadcast Station Totals as of September 30, 2000, *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-207845A1.doc (visited Jun. 5, 2009).

[20] *See FCC,* Broadcast Station Totals as of June 30, 2008, *available at* http://www.fcc.gov/mb/audio/totals/bt080630.html (visited Jun. 5, 2009).

[21] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, ¶ 9 (2009) ("*13th Annual Video Competition Report*") ("relatively few consumers have a second wireline alternative"); Empiris at n. 36 ("The consolidation among cable operators that is leading to higher concentration shows some signs of being offset by the entry of telephone companies, but concentration will remain high relative to the market for programming, as barriers to entry are substantial.").

[22] Empiris at 18-21 (discussing increasing levels of national concentration and regional clustering in the MVPD industry).

[23] *Carriage of Digital Television Broadcast Signals,* Third Report and Order, 22 FCC Rcd 21064 ¶ 49 (2007) ("Viewability Order").

[24] *Viewability Order* at ¶ 50 (citing *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 197 (1997) (internal quotes and citations omitted)).

in favor of other programmers less likely to compete with them for audience and advertisers."[25] The Commission also found that "[a]s cable capacity and the number of cable programming networks have grown, the fragmentation of the market for video programming has accelerated, further weakening broadcast stations."[26]

Moreover, contrary to the contentions of DIRECTV,[27] the Commission has *never* held that any broadcaster, on its own, wields market power over *any* individual MVPD or class of MVPDs sufficient to justify any remedial FCC action. Only the vertical combination of broadcast programming content with a subscription multichannel distribution platform has ever been found to result in any entity having sufficient incentive and ability to withhold broadcast programming for the Commission to determine that intervention was needed.[28] And, the case-specific findings analyzed only

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[25] *Viewability Order* at ¶ 51 (emphasis added).

[26] *Id.* at ¶ 49.

[27] DIRECTV Comments at 18.

[28] *See General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd. 473 (2004) ("*News-Hughes Order*")(imposing conditions on News Corporation's acquisition of an interest in DIRECTV to prevent withholding of News Corporation-controlled programming, including broadcast programming, from MVPDs competing with DIRECTV); *News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control,* Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008) (imposing conditions on the transfer of an interest in DIRECTV from News Corporation to Liberty Media Corporation to prevent withholding of programming, including broadcast programming, from competing MVPDs). The Commission very recently relieved News Corporation of the obligation to comply with the retransmission consent arbitration conditions, stating that they were no longer needed because News Corporation divested its interest in DIRECTV: "The divestiture of DIRECTV restores News Corp.'s pre-transaction bargaining position. There is thus no further need for the conditions. Moreover, as News Corp. points out, withholding its programming from MVPDs would cause News Corp. to lose programming revenues that could not be offset by any increase in DIRECTV's subscription revenues." *General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited,*

the market position of the particular broadcaster in question. It did not address the position of all broadcasters, nor even a class of broadcasters. Rather, vertical integration was essential to the Commission's analysis in the *News-Hughes Order* and thus its findings and conclusions there are irrelevant to a general statement about the relative positions of broadcasters and MVPDs in retransmission consent negotiations.

Broadcast television stations compete for distribution, viewers and advertisers with hundreds of stations and networks. In contrast, MVPDs, as multichannel providers, only compete with a handful of other multichannel distributors. No other market within the communications industry is more competitive than the market in which broadcasters compete.[29] MVPDs' desire to carry television broadcast signals stems from broadcast stations' ability to remain vibrant sources of unique programming content, in spite of—or perhaps because of—the intense and growing competition that stations face. But "[s]urviv[ing] in a sea of competition"[30] does not translate into market power generally, and certainly not vis-à-vis highly concentrated MVPDs. In short, the idea that broadcasters have undue negotiating power stemming from their local presence and

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Transferee, Authority to Transfer Control, Memorandum Opinion and Order, MB Docket No. 03-124, FCC 09-50 (rel. June 15, 2009).

[29] Not only must broadcasters compete with hundreds of other programming networks, but they must do so while subject to ownership limitations that do not exist for other programmers. A single entity may own an unlimited number of non-broadcast programming networks. Additionally, DBS and other non-cable MVPDs can establish vertical relationships with an unlimited number of programming networks. Even cable operators are limited only by channel occupancy limits, not outright caps, on vertical integration. 47 C.F.R. §76.504 (no more than 40% of a system's channels can be occupied by a cable operator's own programming networks). Ownership of television broadcast stations, by contrast, is capped at both the local and national levels, and no more than one major television broadcast network can be owned by the same entity. *See* 47 C.F.R. § 73.3555(b), (e); 47 C.F.R. § 73.358(g).

[30] Jonathan Levy, Marcelino Ford-Livene and Anne Levine, OPP Working Paper No. 37, *Broadcast Television: Survivor in a Sea of Competition* (Sept. 2002) at 3.

appeal to their communities is not grounded in any market realities or economic theory, and is contrary to the Commission's own conclusions about the functioning of the retransmission consent marketplace.[31]

III. The Retransmission Consent Process Functions as Congress Intended and Yields Public Interest Benefits

As demonstrated herein, in past pleadings, and in prior Commission decisions, the retransmission consent regime is not broken or in need of reform.[32] In 1992, Congress specifically granted broadcast stations the right to control others' retransmission of their signals, and to negotiate the terms of such retransmission through private agreements.[33] The legislative history of Section 325 demonstrates that Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals" and did not intend the government to "dictate the outcome of ensuing marketplace negotiations."[34] Given Section 325's clear language and legislative history, the Commission has consistently and correctly concluded that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[35]

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[31] *Retransmission Consent And Exclusivity Rules: Report To Congress Pursuant To Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 220670 ¶ 44 (Sept. 8, 2005) ("*SHVERA Report*") (MVPDs and broadcasters "negotiate in the context of a level playing field.").

[32] *SHVERA Report* ¶ 34 ("we do not recommend specific statutory revisions or propose to revise related Commission regulations" pertaining to retransmission consent).

[33] 47 U.S.C. § 325(b). Section 325 of the Communications Act of 1934, as amended (the "Act") unequivocally states that no MVPD "shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A).

[34] S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) at 36.

[35] *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity,* 15 FCC Rcd 5445, 5450 (2000) ("*Good Faith Order")*. *Accord Implementation of the Cable*

Instead, as the Commission has recognized, Congress chose to allow the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. Although this system has worked effectively for over 15 years, two commenters (ACA and DIRECTV) claim that the system needs radical change. But they offer no evidence of any broadcaster failure to negotiate in good faith or any other flaw in the market-based system created by Congress.

A. Neither ACA Nor DIRECTV Provide Any Evidence of Broadcaster Failure to Negotiate in Good Faith

Although the Commission posed questions on numerous issues associated with video competition, ACA focused its comments exclusively on a single topic: retransmission consent.[36] A significant portion of ACA's comments concerns the terms of retransmission consent agreements. Although ACA's description of the agreement terms is lengthy, none of the agreement terms ACA complains about demonstrate any problems with retransmission consent. By reporting that cable operators are paying some combination of fees[37] and in-kind compensation in the form of carriage of affiliated programming,[38] carriage of multicast programming streams,[39] advertising time,[40] or joint

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Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2965, 3006 (1993).

[36] *See generally* ACA Comments. ACA has requested to incorporate into the record in this proceeding 12 pleadings filed as far back as July 2003. All of these pleadings already have been reviewed in connection with the proceedings in which they were filed, and many of them were filed in proceedings which are no longer pending. ACA does not explain how material filed throughout the past six years could be "pertinent" to this proceeding, which focuses on July 1, 2006 – June 30, 2008.

[37] ACA Comments at 5-7.

[38] ACA Comments at 9. ACA inaccurately and misleadingly calls this "tying" rather than carriage of affiliated programming. NAB reiterates its objection to claims that broadcasters engage in "tying." As explained in many previous filings, broadcasters do

marketing,[41] ACA has merely provided a laundry list of the very types of compensation that the Commission considers to be presumptively consistent with the obligation to negotiate in good faith.[42] This discussion provides no basis for any change to the retransmission consent system envisioned by Congress.

ACA's comments repeatedly cite the results of a commissioned "survey" which contains flaws ranging, from unexplained gaps to subjective and leading questions that do not appear designed to elicit objective responses.[43] For example, the survey reports that it has 246 ACA member "respondents," but does not explain whether each

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not coerce MVPDs to take "bundles" of affiliated programming and broadcast stations on a "take-it-or-leave-it" basis. *See, e.g.,* Reply Comments of the National Association of Broadcasters in MB Docket No. 07-198 at 5-10 (filed Feb. 12, 2008) ("NAB Reply Comments"). Some broadcasters offer to negotiate for carriage of additional programming as part of retransmission consent but they do not engage in unreasonable or illegal "tying." It is standard industry practice for broadcasters with affiliated programming channels to offer to negotiate retransmission consent for the broadcast station separately.

[39] ACA Comments at 8.

[40] ACA Comments at 9.

[41] ACA Comments at 10.

[42] *Good Faith Order*, 15 FCC Rcd at 5469-70. In implementing the good faith negotiation requirement, the Commission identified the following as examples of bargaining proposals that are presumptively consistent with good faith negotiation requirement: (1) proposals for compensation above that agreed to with other MVPDs in the same market; (2) proposals of compensation that is different from what is offered by other broadcasters in the same market; (3) proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market; (4) proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights; (5) proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and (6) proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event. Congress has also noted that, in marketplace negotiations with cable operators, stations could appropriately seek a variety of types of compensation, including monetary compensation and the right to program an additional channel. S. Rep. No. 92, 102d Cong., 1st Sess. at 36 (1991).

[43] See ACA Comments at 5-10, Appendix 2.

"respondent" represents a single cable system, a cable operator with multiple systems in various markets, and/or various individuals who may work for the same system or operator, so it is unclear what is meant by "respondent." In addition, the survey questions presuppose, before asking for any facts, that retransmission consent costs have risen for all of the surveyed ACA members. For example, the second question asks: "How have *rising* retransmission consent costs affected your business?"[44] The survey also asks how much each respondent's company paid in total retransmission fees to *all broadcasters* in 2008 as compare to what they anticipate paying in 2009.[45] But since this survey question does not seek any information on how many stations were carried in 2008 versus 2009, there is no way to know whether reported increases result from the carriage of additional stations or more money per station carried.

The leading tone of the survey persists in questions and multiple choice answers about the terms that ACA members have agreed to in their retransmission consent deals (e.g., "What *do you have* to provide this year?" rather than a more objective "What did you agree to provide this year?"; "My company *must* carry…" rather than "My agreement provides for carriage of …"). ACA may have phrased its survey questions and answers in terms of mandates, but this does not prove that the agreements reported in the survey resulted from anything other than fair, arms-length, market-based negotiations.[46]

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[44] ACA Comments at Appendix 2, Question 2.

[45] ACA Comments at Appendix 2, Question 3.

[46] In spite of the biased Q&A, the survey shows that several of ACA's chief complaints about retransmission consent do not even affect a majority of its members. In view of ACA's repeated allegations about "tying," for example, one would expect most ACA member deals to involve in-kind compensation for retransmission consent in the form of carriage of affiliated programming. Yet only 27% of ACA members are currently parties

Nor does DIRECTV present any evidence of broadcaster failure to negotiate in good faith.[47] Indeed, as far as NAB can determine, despite DIRECTV's claims that broadcasters are "demand[ing] patently unreasonable terms and conditions" for retransmission consent,[48] it has never filed a single good faith negotiation complaint with the FCC. The fact remains that thousands of individual agreements have been negotiated since broadcasters were granted retransmission consent rights by statute, and no broadcaster has ever been found by the Commission to have breached its obligation to negotiate in good faith with MVPDs. DIRECTV has presented nothing to substantiate its request that the Commission consider new regulation of the retransmission consent process.

B. Empirical Data Shows that Retransmission Consent Benefits Consumers

NAB urges the Commission to consider hard empirical data as it considers retransmission consent issues within the context of this proceeding, instead of subjective and unsubstantiated generalizations. Jeffery Eisenach, Ph.D. of Empiris, LLC, has recently conducted a study on the economics of retransmission consent.[49]

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to retransmission consent agreements that involve carriage of affiliated non-broadcast networks, and the figures are even lower for the smaller systems that ACA usually contends are the most overburdened (i.e., 22% for systems with 1000 or fewer subscribers, and 18% for systems with less than 500 subscribers). ACA Comments at Appendix 2, Question 4.

[47] DIRECTV Comments at 18. Although its comments contain vague, unsubstantiated references to "higher retransmission consent fees," "frequent threats to withhold stations," "more withheld signals," DIRECTV offers no evidence of any such conduct by broadcasters—not even a single anecdote. *Id.*

[48] DIRECTV Comments at 18.

[49] *See* Empiris, LLC, *The Economics Of Retransmission Consent,* Jeffrey A. Eisenach, Ph.D. (March 2009) at 12-18 ("Empiris") (attached hereto as Appendix A).

Key findings of the Empiris study include: (1) broadcasters are more vulnerable to economic losses from retransmission consent disputes than MVPDs; (2) programming costs account for a relatively small proportion of cable operators' revenues, and this proportion is falling; (3) retransmission consent fees are trivial when compared with cable operators' revenues and costs, and are not responsible for rising cable rates; and (4) negotiating impasses that cause interruptions in access to broadcast signals are extremely rare. The result is an economically efficient regime that "ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming."[50]

1. Service Interruptions Due to Retransmission Consent Disputes are Extremely Rare

The Empiris study analyzed news coverage of retransmission consent disputes during the timeframe from January 2006 through December 2008.[51] During that time, *Broadcasting and Cable* reported a total of eight retransmission consent disputes that led to carriage interruptions, four of which involved cable operators, while the other four involved Dish Network.[52] The study captured the timeframes associated with the interruptions and measured them against several benchmarks. The Empiris study found that the service interruptions affected only **0.0089 percent**—that is, less than one one-hundredth of one percent—of annual television viewing hours in the United States.[53] Put another way, the interruptions meant that, during this period, the average American

[50] Empiris at 41. This conclusion is in accordance with the Commission's own conclusion that "consumers benefit" when MVPD carriage of broadcast programming is arranged through retransmission consent. *SHVERA Report* at ¶ 44.

[51] Empiris at 34-40.

[52] Empiris at 34.

[53] Empiris at 40.

was unable to watch his/her first choice television channel for a total of 16 minutes per year.[54] The impact of the disputes is so small that television viewers are many times more likely to experience a total cable outage or electrical outage than to lose access to their favorite broadcast channels.[55]

Broadcasters also have a strong incentive to avoid these disputes. For MVPDs, the potential loss associated with carriage interruptions is a loss of subscribers—which is an eventual loss, not an immediate one. For a broadcaster, on the other hand, failure to successfully reach agreement means both lost retransmission consent compensation *and* lost advertising revenue—and the losses are immediate.[56] Broadcasters thus have a strong incentive to remain at the table during retransmission negotiations and not to withhold their programming even temporarily.

2. Television Broadcasters Are Not Responsible for MVPD Rate Hikes

The idea that MVPDs are being forced to raise their rates to pay retransmission consent fees[57] also is not borne out by actual facts. The total cost of all video programming relative to MVPDs' total expenses and total revenues is relatively small—and is declining.[58] An Empriris analysis of SNL Kagan data shows that in 2006, the

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[54] Empiris at 40.

[55] Empiris at 40 (households are 24 times more likely to be without electricity and ten times more likely to lack cable service than to lose a favorite broadcast channel due to a retransmission consent dispute).

[56] Empiris at 21-23.

[57] ACA Comments at 15-16 and Appendix 1, Question 6 (88% of cable operators surveyed claim they already have or are planning to raise consumer prices this year because of retransmission consent payments); DIRECTV Comments at 19 (higher retransmission fees get passed on to subscribers).

[58] Empiris at 24-30.

costs of all video programming represented only 36.3% of the expenses and 23.7% of the revenue of major cable operators (down from 38.3% of expenses and 26% of revenue in 2001).[59] Programming costs represent an even smaller proportion of expenses when the cable operators' infrastructure investments and upgrades are taken into account.[60] At an estimated 2% of cable revenues today, monetary retransmission consent compensation represents only a tiny fraction of cable companies' growing revenue base.[61] Comments before the Commission in other proceedings already have analyzed the cost per ratings point per subscriber of several major networks, and have shown that MVPDs pay much more for non-broadcast programming than for broadcast programming on a per-ratings-point basis.[62] Accordingly, retransmission consent fees

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[59] Empiris at 26.

[60] Empiris at 28-29.

[61] Empiris at 31-33. Numerous previous studies, including studies by the Government Accountability Office (GAO) have similarly concluded that retransmission compensation does not result in higher cable rates. *See, e.g.,* Jeffrey A. Eisenach, *Economic Implications of Bundling in the Market for Network Programming* at 42 ("Criterion Economics Study"), attached as Ex. A to Walt Disney Co. Comments in MB Docket No. 07-198 (filed Jan. 4, 2008); David C. Leach, *The Effect of Retransmission Consent Negotiations on the Price and Quality of Cable Television Service* (July 10, 2007) at 3-4 and Attachment, submitted as *Ex Parte* in MB Docket No. 06-189 by CBS Corporation, News Corporation, NBC Universal and The Walt Disney Company (July 17, 2007); GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003). Experts generally link rising cable rates to a lack of competition in the MVPD marketplace. *See, e.g.,* GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 9-11 (Oct. 2003) (competition to an incumbent cable operator from a wireline provider resulted in cable rates that were 15% lower than in markets without this competition); GAO, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004) (communities with overbuild competition experienced an average of 23% lower rates for basic cable and higher quality service).

[62] One broadcaster recently analyzed license fees and ratings for ten widely distributed non-broadcast programming networks from September 2006 – September 2007 and compared them to the ratings for ten of its local television broadcast stations during the same time period. *See* Reply Comments of Hearst-Argyle Television, Inc. ("Hearst-

paid for the television signals that subscribers value most are not responsible for rising consumer rates.

IV. The Commission Should Reject DIRECTV's Misplaced Arguments Regarding Significantly Viewed Signals, Content Regulation and Program Exclusivity

DIRECTV complains that the Commission's implementation of the carriage of significantly viewed stations by satellite carriers deters DBS carriage of significantly viewed stations.[63] The Commission has heard these complaints before, has rejected them for sound and valid reasons, and should continue to do so. As DIRECTV points out, its arguments about equivalent bandwidth and the Commission's comparative bit rate approach already are before the Commission in a petition for reconsideration of the agency's satellite significantly viewed decision,[64] which means that they should be addressed in the context of that proceeding. NAB and others have previously observed

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Argyle"), MB Docket No. 07-198 at 7-10 (February 12, 2008). The average monthly license fee for the ten non-broadcast networks was about 91 cents, and they garnered an average full-day rating of 0.696. *Id.* at 8, Table 1. The ten television broadcast stations enjoyed an average full-day rating of 15.525. *Id.* at 9, Table 2. The broadcaster concluded that if the stations were compensated at the same rate as the other programmers, then retransmission consent would cost $20 per subscriber per month. *Id.* Hearst-Argyle explicitly stated at the time that it "has, of course, never proposed to any ACA member or any other MVPD a retransmission fee of $20.00 per subscriber per month," but it correctly notes that such a fee could not be deemed inappropriate or unlawful given the fees being negotiated in the marketplace for lower-rated, less popular programming. *Id.* at 9-10. DIRECTV seeks to mischaracterize Hearst-Argyle's Reply Comments by presenting them as a threat to start charging MVPDs $20.00 per subscriber per month. DIRECTV Comments at 19. As demonstrated above, this characterization is in no way supported by the cited Hearst-Argyle filing.

[63] DIRECTV Comments at 21.

[64] *Id.* (citing Petition for Reconsideration of DirectTV, Inc. and EchoStar LLC, MB Docket No. 05-49 (filed Jan. 26, 2006)). DIRECTV also raised this issue in connection with the *13th Annual Video Competition Report*. *See Comments of* DirecTV, Inc., MB Docket No. 06-189 (filed Nov. 24, 2006) at 17-19.

that DIRECTV provides no factual support for its complaint that it is technically too difficult to comply with the Commission's implementation of the statute.[65] The Commission previously considered and rejected this argument, recognizing that to read the equivalent bandwidth requirement out of SHVERA would result in the very type of material discrimination that Congress sought to proscribe. Moreover, equipment and technology already exist to permit satellite carriers to comply with the Commission's comparative bit rate approach.

DIRECTV's suggestion that the Commission take steps to ensure that broadcast stations carried pursuant to retransmission consent "include sufficient local content to justify carriage"[66] should be rejected because it is contrary to law. The retransmission consent statute does not authorize the Commission to make content-based determinations about which stations qualify for carriage pursuant to retransmission consent. Such an approach would raise a variety of First Amendment and possibly other constitutional issues. Under the statute, *no* commercial television broadcast station's signal can be retransmitted without its consent.

The Commission also should reject DIRECTV's attack on program exclusivity rules.[67] Arms-length business negotiations between broadcasters and programming providers (including networks and syndicators) are the source of broadcasters'

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[65] *See* Joint Opposition of the National Association of Broadcasters and of the ABC, CBS, FBC, and NBC Television Affiliate Associations to Petition for Reconsideration in MB Docket No. 05-49 (filed March 2, 2006). *See also* Reply Comments of the National Association of Broadcasters in MB Docket No. 06-189 (filed Dec. 29, 2006) at 7-9.

[66] DIRECTV Comments at 19-20 ("the Commission should consider measures to ensure that broadcast programming: (1) is available at a reasonable price and without interruption, and (2) includes sufficient local content to justify carriage.")

[67] DIRECTV Comments at 18.

exclusive rights to carry certain programming. Statutory provisions and Commission rules cited by DIRECTV merely allow broadcasters to enforce the exclusive rights that they already have bargained for and paid for in the marketplace. Broadcasters' ability to enforce these rights connects directly to their ability to offer programming that meets the needs and interests of their communities. These exclusive rights allow stations to attract viewers and generate advertising revenue that is used to pay all of the expenses of running a station, including the news and public affairs programming produced by local stations.[68] Importation of duplicative programming from other markets would undercut stations' audience ratings shares, which in turn reduce advertising revenues and ultimately reduce the only source of revenue available to free over-the-air broadcast stations. The Commission very recently affirmed the legitimacy and public interest value of these program exclusivity provisions, stating that: "…we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our public interest goals."[69]

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[68] Studies show that broadcasters are airing more local news programming than ever before. *See, e.g.,* RTNDA, Television News Jobs and Salaries Decline As Amount of News Increases, RTNDA/Hofstra University Survey Shows, Press Release (Apr. 19, 2009) (although local news jobs and salaries declined in 2008, stations set a record for the amount of news on the air; the typical television station added a half-hour of local news per weekday in 2008, setting a new record for the amount of news at 4.6 hours per weekday).

[69] *SHVERA Report* at ¶ 50.

V. Conclusion

As NAB and other commenters have observed, free over-the-air broadcast television continues to play a vital role in the delivery of video programming to millions of consumers. Broadcasters' continued vibrance and significance does not equate, however, to market power or undue bargaining power in retransmission consent negotiations. To the contrary, retransmission consent is functioning as Congress intended and is contributing to the quantity and quality of programming options available to American television viewers. The Commission should therefore reject the repetitive and baseless claims by a few commenters that the existing retransmission consent rules need to be modified to provide MVPDs an advantage in free-market retransmission negotiations.

Respectfully submitted,

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Appendix A

EMPIRIS LLC

THE ECONOMICS OF RETRANSMISSION CONSENT

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March 2009

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THE ECONOMICS OF RETRANSMISSION CONSENT

EXECUTIVE SUMMARY

Congress created retransmission consent in 1992 to ensure that broadcasters would be able to negotiate in a free marketplace for fair compensation for their programming.

Examining retransmission consent from an economic perspective, this study demonstrates that retransmission consent achieves Congress' intended purpose of establishing a market based mechanism to ensure that broadcasters receive an economically efficient level of compensation for the value of their signals. This compensation ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming, including local broadcast signals.

In particular, the evidence demonstrates that:

- The market for television programming is highly competitive. The sellers' side of the video programming market (broadcasters) is relatively unconcentrated and is becoming less concentrated while the buyers' side (the multichannel video program distributors market) is experiencing consolidation at both the national and local levels. In 2006, the four MVPDs with the largest shares served 63 percent of all MVPD subscribers, up from 50 percent in 2002. National networks depend on just four purchasers to reach nearly 70 percent of all MVPD subscribers nationwide. Thus, broadcasters do not have monopoly power, and are not in a position to extract excessive retransmission consent fees from cable operators or other program distributors.

- Broadcasters are more vulnerable to economic losses, by losing viewers and advertising revenues, from retransmission consent disputes than are cable operators and other program distributors. An MVPD's refusal to carry a national network, or even the threat of a refusal, can significantly jeopardize that network's ability to operate efficiently, and in the worst case, could cause that network to fail.

- Overall, programming costs account for a small proportion of cable operators' revenues, and this proportion is falling. Cable operators' gross profits increased from $48.96 per subscriber per month in 2003 to $62.99 per subscriber per month in 2006, an increase of $14.04 or 29 percent. During that same period, programming expenses per subscriber per month increased from $15.63 to $18.47, an increase of $2.84 per subscriber per month or just 18 percent. Thus, cable operators' profits per subscriber rose by about five times as much as their programming expenses, or nearly twice as much in percentage terms.

- Retransmission consent fees simply cannot be responsible for any significant portion of cable operator's increasing monthly fees. For many years, cable operators refused to pay monetary compensation for retransmission consent. Some recent retransmission consent agreements, however, include monetary compensation. While such compensation is an important source of revenue for broadcasters, it is trivial when compared with cable operators' revenues and costs. Monetary retransmission consent fees are projected to increase by just $1.08 per subscriber per month in the next decade; during the same period, cable revenues per

subscriber will go up approximately 45 times as much, by $48.38. Retransmission consent fees account for only two tenths of one percent of cable revenues today, and industry analysts predict they will never rise above one percent.

- Concerns about negotiating impasses in retransmission consent negotiations are misplaced. Analysis demonstrates that an American household is about 10 times as likely to experience a complete cable system outage, and about 24 times as likely to experience an electricity outage, as it is to be deprived of its first-choice television channel because of a retransmission consent dispute.

Overall, retransmission consent represents an economically efficient regime that results in reasonable compensation for the value of broadcaster programming, and adoption of proposals to repeal or weaken the system would harm consumer welfare.

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I. INTRODUCTION

Prior to 1992, cable operators were not required to compensate broadcast television stations for retransmitting local broadcast signals on their cable systems. In the Cable Television Consumer Protection Act of 1992 (Cable Act), Congress gave broadcasters the right to negotiate with cable systems for reasonable compensation ("retransmission consent"), or alternatively, to require cable systems to carry their signals on an uncompensated basis ("must carry"). Initially, cable operators refused to pay cash for broadcasters' signals, and broadcasters were forced either to opt for "must carry" or to accept in-kind compensation. More recently, broadcasters and cable systems have begun reaching retransmission consent agreements which include at least some cash compensation.

Cable operators, understandably, would prefer to return to the pre-1992 era, when broadcasters had no right to even negotiate for compensation. They raise various objections to the retransmission consent regime, arguing in essence that broadcasters have market power, that this market power allows broadcasters to extract unreasonably high compensation, and that this unreasonable compensation translates into higher retail prices for cable television service. These claims are most often heard during negotiations over the terms of retransmission consent, as cable operators seek to bring public pressure to bear on broadcasters to accept lower compensation.

This paper examines the performance of the retransmission consent regime from the perspective of economic efficiency and consumer welfare. The evidence shows that broadcasters do not have a negotiating advantage over program distributors (multichannel video programming distributors, referred to as MVPDs), and that retransmission consent has not led to excessive payments from cable operators to broadcasters in the past and will not lead to excessive

payments in the future. Rather, retransmission consent simply provides broadcasters with a means of obtaining an economically efficient level of compensation for their broadcast signals which, while important from the perspective of broadcasters, is inconsequential from the perspective of cable operators and their customers. Furthermore, both broadcasters and cable system operators have strong economic incentives to agree on terms of carriage. Hence, negotiating impasses are extremely rare and typically brief. The proportion of consumers affected by such impasses is infinitesimally small. In short, the current retransmission consent regime is an economically efficient, market-based approach to compensating broadcasters for the value of their signals.

The remainder of this paper is organized as follows. Section II provides a brief history of retransmission consent, including the 1992 Cable Act and the evolution of retransmission consent negotiations from "in kind" compensation towards monetary compensation for broadcast carriage. Section III explains the economics of retransmission consent negotiations, including specifically the relative bargaining power of broadcasters and cable operators as they seek to negotiate agreements. Section IV analyzes cable operators' claims about the connections between retransmission consent and subscription prices for consumers, and finds that compensation for retransmission consent has not in the past and will not in the future have a discernible impact on retail cable prices. Section V addresses concerns about the effect of carriage interruptions resulting from impasses in retransmission consent negotiations, and demonstrates that the impact on consumers of such impasses is negligible. Section VI presents a brief conclusion.

II. THE HISTORY AND EVOLUTION OF RETRANSMISSION CONSENT

Congress created retransmission consent in 1992 to ensure that broadcasters would be able to negotiate in a free and competitive marketplace for fair compensation for retransmission and, in turn, resale of their broadcast signals. This section explains Congress' purpose in establishing retransmission consent, and summarizes the results of the retransmission consent regime since it was put in place 17 years ago.

A. Before Retransmission Consent: The Pre-Cable Act Era

For nearly five decades, until passage of the Cable Act, cable systems were able to charge customers for viewing local broadcast signals without compensating the broadcasters – or even obtaining broadcasters' permission – for the right to retransmit the station's signal. At the same time, however, broadcast stations were prohibited from rebroadcasting or retransmitting another broadcast station's signal without consent.

Cable television in the U.S. dates to the late 1940s, when "community antennas" were erected on mountains and hills in rural communities in order to capture television broadcast signals and distribute them to local residents who could not receive clear signals using standard antennas. By 1962, there were nearly 800 cable systems serving approximately 850,000 subscribers.[1]

As cable grew from a purely "antenna" service to a full-fledged video competitor, the issue of compensation for retransmission of broadcast signals by cable operators became increasingly important. In 1959, based on its interpretation of Section 325 of the Communications Act (which the FCC determined banned *wireless* but not *wired* retransmission of broadcast signals), the FCC ruled that the Act did not require cable systems to obtain

1. *See* NCTA, *History of Cable* (available at www.ncta.com/About/About/HistoryofCableTelevision.aspx)

broadcasters' consent to retransmit their signals.[2] The FCC's decision stood until passage of the Cable Act in 1992.

On the other hand, the Commission grew increasingly concerned about the impact of the importation of out-of-market broadcast signals by cable operators on in-market broadcast stations. Thus, in 1963, the Commission conditioned the grant of a microwave license to a cable operator on the cable operator's agreement to carry the signal of the local broadcast station,[3] and it extended this "must carry" requirement to all cable operators in 1966.[4] In 1985, however, the courts invalidated the FCC's must-carry rules.[5] Thus, until must-carry was reinstated by the Cable Act (and, in 1997, upheld by the Supreme Court),[6] cable operators were not obligated to carry local broadcast stations on their systems (and many did not).[7]

On the copyright front, the Supreme Court ruled in 1968 (covering carriage of local broadcast signals) and 1974 (covering carriage of distant signals – i.e., carriage of broadcast signals originating outside the local market), that existing copyright laws did not require cable operators to compensate broadcasters for retransmitting their signals.[8] Thus, by the mid-1970s, cable operators were required to carry local stations, but neither the FCC nor copyright laws

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2. *See* Senate Report 109-92 (Cable Television Consumer Protection Act of 1992) citing 26 F.C.C. 403, 429-30 (1959).

3. *See Carter Mountain Transmission Corp v. FCC*, 321 F.2d 359 (1963).

4. *See* 2 F.C.C. 2d 725. See also See Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (hereafter "*SHVERA Report*") (Sep. 8, 2005) at ¶7.

5. *See SHVERA Report* at 4; see also *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985).

6. *See Turner Broadcasting System, Inc., et al. v. Federal Communications Commission, et al*. 520 U.S. 180 (1997).

7. *See Cable Television Consumer Protection and Competition Act of 1992* (S. Rep. No. 102-92, 102d Cong., 1st Sess., 1991; 1992 U.S.C.C.A.N. 1133) (hereafter *Senate Report*) at 1175-77.

8. *See*, e.g., Register of Copyrights, *Satellite Home Viewer Extension and Reauthorization Act, Section 109 Report* (June 30, 2008) (hereafter *Section 109 Report*) at 2 (citing *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974)).

required them to compensate broadcasters or to compensate copyright holders of broadcast programming content.

The issue of copyright compensation for broadcast programming content was addressed by Congress in its 1976 rewrite of the Copyright Act. Congress determined in Section 111 of the 1976 Copyright Act that retransmission of the programming in broadcast signals – though limited by FCC regulations – would be subject to payment of copyright royalties under a statutory compulsory copyright license, but that retransmission of local broadcast signals did not require cable operators to pay a broadcast station for retransmitting the station's signals.[9]

Direct broadcast satellite (DBS) services emerged in the 1970s and 1980s. In 1988, in the Satellite Home Viewer Act, Congress permitted (and established a compulsory copyright license for) DBS operators to retransmit programming from distant, out-of-market broadcast network stations, but limited that right to serving otherwise *unserved* households, i.e., those without the ability to receive local broadcast signals.[10]

The situation in the late 1980s, then, was that cable operators were permitted to retransmit local broadcast programming, and broadcasters had no rights to even negotiate for compensation. Furthermore, after the repeal of the FCC's must-carry rules in 1985, neither cable nor DBS systems were required to carry broadcast programming on their systems. Thus, MVPDs could pick and choose the local broadcast stations of their choice, and restransmit and sell those signals to their subscribers without securing the consent of the stations.

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9. *See Section 109 Report* at 3-4. In 1972, the FCC imposed restrictions on distant signal carriage which effectively limited the ability of cable operators to import distant signals. Those rules were repealed by the FCC in 1980, and then reinstated in 1988. See *Section 109 Report* at 3-5 (citing Federal Communications Commission, *Cable Television Report and Order*, Docket No. 18397 (February 2, 1972) at ¶ 75; *Final Report and Order*, Dockets 20988 and 21284 (July 22, 1980); and, *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299 (1988).

10. *See*, e.g., Section 109 Report at 83.

B. The 1992 Cable Act

As cable grew rapidly in the late 1980s and early 1990s, Congress became concerned that it had tilted the competitive playing field too far in favor of cable and against broadcasters – indeed, that it had created a "distortion in the video marketplace that threaten[ed] the future of over-the-air broadcasting [by supporting] a system under which broadcasters in effect subsidize the establishment of their chief competitors."[11] It responded by passing the 1992 Cable Act,[12] which created the retransmission consent regime for carriage of local broadcast programming by cable operators and re-imposed must-carry obligations. Under the Cable Act, broadcasters must, every three years, choose between must carry and retransmission consent. If they choose must carry, they are guaranteed carriage on cable systems operating within their broadcast footprints, but receive no compensation; if they choose retransmission consent, they are not guaranteed carriage, but have the right to "negotiate in good faith" for compensation.[13]

In passing the Cable Act, Congress specifically recognized that the market for broadcast programming had changed dramatically. The Senate report accompanying the bill noted, for example, that when the FCC originally interpreted Section 325 of the Communications Act to allow free retransmission by cable (in 1959), "cable systems had few channels and were limited to an antenna function of improving reception of nearby broadcast signals," so that the FCC's

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11. *See Senate Report* at 1168.

12. Cable Television Consumer Protection Act of 1992, Pub. L. No. 102-385 (1992); the FCC's implementing regulations are at 47 C.F.R § 76.55-62 (cable must carry) and 47 C.F.R. § 76.64 (cable retransmission consent).

13. In passing the Cable Act, Congress recognized that satellite operators were treated differently from cable operators in the 1976 Copyright Act, and thus did not impose retransmission consent on DBS. It extended retransmission consent to DBS operators in 1999 in the Satellite Home Viewer Improvement Act (SHVIA), while at the same time permitting DBS operators to carry local broadcast signals even to households that were not "unserved." DBS operators are not subject to the must carry requirement. However, if they choose to carry any local broadcast stations, they are required to carry all stations that have elected must carry (the "carry one, carry all" rule). See *SHVERA Report* at ¶¶13-14. SHVIA was extended in 2004 by the Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447 (2004) (SHVERA); implementing regulations are at 47 C.F.R.

"interpretation had little practical consequences (*sic*) and did not unreasonably disrupt the rights that broadcasters possess in their signals."[14] However, the report continued,

> That situation… has changed dramatically. Cable systems now include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems compete with broadcasters for national and local advertising revenues. Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, 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. Due to the FCC's interpretation of section 325, however, cable systems use these signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator.[15]

The effect of retransmission consent, the report concluded, would be to "establish a marketplace for the disposition of the rights to retransmit broadcast signals" without "dictat[ing] the outcome of the ensuing marketplace negotiations" – negotiations which, Congress recognized, might result in monetary compensation, in-kind compensation, or no compensation at all.[16]

In addition to creating retransmission consent, the Cable Act also reinstated the must-carry obligation. As with retransmission consent, its decision to do so was motivated by a sense that the competitive field had become tilted in favor of cable operators. Referring to the concerns that led Congress to embrace must-carry in the Cable Act of 1984, the Senate Report found that

> The subsequent demise of local television [after must-carry was overturned in 1985], the growth of the cable industry, and the fact that no

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§76.66. SHVERA also made several changes in the compulsory license regime affecting distant signal carriage by DBS operators. See *SHVERA Report* at ¶¶15-16).

14. *See Senate Report* at 1168.
15. *See Senate Report* at 1168.
16. *See Senate Report* at 1168-1169.

> effective competition to local cable systems has developed in the interim, have created just the competitive imbalance that the Committee feared in 1984.[17]

Thus, the Cable Act established a market-based mechanism for the determination of compensation for carriage of broadcast signals by MVPDs, based on voluntary agreements between broadcasters and operators, while at the same time (by re-imposing must carry) ensuring that cable operators and consumers would continue to have access to all broadcast channels.

C. Retransmission Consent in Practice

Not surprisingly, cable operators opposed the retransmission consent and must carry provisions of the Cable Act. Once it passed, they generally refused to pay cash compensation for broadcast signals. Instead, they have negotiated some agreements with some broadcasters that provided no consideration and other agreements in which the broadcaster granted the MVPD permission to carry its signal in exchange for "in-kind" compensation (such as "free" advertising) or for an agreement that the cable operator would carry affiliated content (such as local news and weather channels, or affiliated cable networks). As the FCC explained in 2005,

> During the first round of retransmission consent negotiations, broadcasters initially sought cash compensation in return for retransmission consent. However, most cable operators – particularly the largest multiple system operators (MSOs) – were not willing to enter into agreements for cash, and instead sought to compensate broadcasters through the purchase of advertising time, cross-promotions, and carriage of affiliated channels. Many broadcasters were able to reach agreements that involved in kind compensation by affiliating with an existing non-broadcast network or by securing carriage of their own newly-formed non-broadcast networks. Broadcast stations that insisted on cash compensation were forced to either lose cable carriage or grant extensions allowing cable operators to carry their signals at no charge until negotiations were complete.[18]

Despite their success in fending off broadcasters' efforts to win monetary compensation, cable operators, sometimes joined by DBS operators, continued to argue that broadcasters had an

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17. *See Senate Report* at 1187.

unfair advantage in negotiations and that retransmission consent should be weakened or repealed.[19] Perhaps not coincidentally, these arguments have tended to surface at times when policymakers were showing increasing concern about rising cable television rates.[20] To counter the resulting criticism, some cable operators argued (incorrectly, as shown below) that rising programming costs were to blame for rising cable prices, and retransmission consent was largely responsible for rising programming costs.[21]

In early 2000s, broadcasters began to negotiate retransmission consent agreements that included monetary compensation with DBS operators, telephone companies entering the video market, and ultimately cable operators.[22] One result was that cable and DBS operators redoubled their criticism of retransmission consent, warning that paying monetary compensation would force them to raise their prices even faster.[23]

Over the years, cable and DBS operators have put forward several proposals to weaken retransmission consent, including: (1) replacing the current obligation of broadcasters to "negotiate in good faith"[24] with binding arbitration; (2) allowing cable systems to import more duplicating broadcast signals from other (more distant) markets; (3) limiting broadcasters' ability

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18. *SHVERA Report* at ¶10.

19. See, e.g., *In the Matter of Inquiry on Rules Affecting Competition in the Television Marketplace* (Comments of Joint Cable Commenters) MB Docket No. 05-28 (March 1, 2005) at 6.

20. While one can reasonably debate the appropriate metric for measuring the price of cable television, it is indisputable that the monthly subscription rate for cable TV service increased faster than the rate of inflation throughout the 1990s.

21. *See*, e.g., Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189 (Comments of the Coalition For Retransmission Consent Reform) (Nov. 29, 2006), at 4-5 (hereafter Coalition Comments).

22. While retransmission consent agreements are confidential, it appears that the first significant one in which a cable operator agreed to pay monetary compensation to a broadcaster in exchange for the right to carry that broadcaster's signal was reached in 2005. *See* Craig Moffett et al, *U.S. Media: Cash for Retrans a Net Positive for TV Stations, But Full Financial Benefit Will Likely Require Patience*, Bernstein Research (Mar. 21, 2006), at 3. *See also* John Higgins, Cable, Broadcast Battles End, *Broadcasting & Cable* (Feb. 6, 2006); and *SHVERA Report* at ¶10.

23. See Coalition Comments at 6.

to negotiate cable carriage of affiliated cable networks and affiliated broadcast stations; and, (4) barring broadcasters from requesting cash-for-carriage.[25] The FCC has had multiple proceedings to examine such proposals, but at the end of the day has rejected them all.

Cable and DBS operators have also attempted to influence retransmission consent negotiations by filing complaints with the FCC claiming that broadcasters were failing to "negotiate in good faith." For example:

- In August 2001, the FCC ruled on a complaint filed by Echostar against Young Broadcasting alleging that Young failed to negotiate in good faith. The Commission denied the Echostar complaint, noting that the "back and forth" that had taken place between the parties was evidence of "precisely the judgment that Congress generally intended the parties to resolve through their own interactions and through the efforts of each to advance its own economic self-interest." Moreover, the Commission found that Echostar had abused the complaint process by systematically demanding confidentiality for various documents while selectively making portions of those documents available to the media.[26]

- In January 2005, Cox filed a complaint alleging that Nexstar Broadcasting Group and Mission Broadcasting were failing to negotiate in good faith in their efforts to win monetary compensation for their broadcast signals, but the dispute was settled before the FCC could rule on the complaint.[27]

- On January 4, 2007, the Commission issued an Order denying an October 2006 complaint by Mediacom against Sinclair Broadcasting for failing to negotiate in good faith over carriage of 13 Sinclair stations. The Order concluded that "This dispute, at bottom, arises from a fundamental disagreement between the parties over the appropriate valuation of Sinclair's signals. Such disagreements, without more, however, are not indicative of a lack of good faith. Even with good faith, impasse is possible."[28]

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24. The "good faith negotiation" obligation was codified by the FCC in 2000. *See* Federal Communications Commission, *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15 FCC Rcd 5445 (2000).

25. *See* e.g., Charles B. Goldfarb, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress* (Congressional Research Service, July 9, 2007) (hereafter, *CRS Report*); *SHVERA Report* at ¶¶39, 46.

26. *See* Federal Communications Commission, *In the Matter of EchoStar Satellite Corporation v. Young Broadcasting, Inc. et al, Memorandum Opinion and Order*, CSR-5655-C (August 6, 2001) at ¶¶14, 35.

27. *See CRS Report* at 31-32.

28. *See* Federal Communications Commission, *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.: Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith, Memorandum Opinion and Order*, CSR-7058-C (January 4, 2007) at ¶24.

Thus, despite the complaints of cable and DBS operators, the FCC has consistently refused to break with Congress' intention to allow compensation for broadcast carriage to be determined by good faith negotiations between the parties. No broadcaster has ever been found by the FCC to have breached its obligation to negotiate retransmission consent in good faith. In its 2005 report to Congress, the Commission concluded that the retransmission consent and must-carry provisions were achieving their intended goals.

> Together, must-carry and retransmission consent provide that all local stations are assured of carriage even if their audience is small, while also allowing more popular stations to seek compensation (cash or in-kind) for the audience their programming will attract for the cable or satellite operator. Must-carry alone would fail to provide stations with the opportunity to be compensated for their popular programming. Retransmission consent alone would not preserve local stations that have a smaller audience yet still offer free over-the-air programming and serve the public in their local areas.[29]

Despite the FCC's continued support for retransmission consent, it seems clear that cable and DBS operators will continue to seek its dilution or repeal. The sections below analyze the various arguments that have been advanced against retransmission consent and demonstrate from the consumer's perspective that these arguments are without merit.

III. THE ECONOMICS OF RETRANSMISSION CONSENT NEGOTIATIONS

Proposals to weaken retransmission consent are premised at least in part on the assumption that broadcasters possess the power to impose uneconomic terms or supracompetitive prices on MVPDs. As this section explains, the evidence demonstrates otherwise. First, the evidence shows that the market for MVPD video programming (of which broadcast programming is a part) is far less concentrated and has lower barriers to entry than the market for video distribution (i.e., the market for cable television), which is more concentrated and for which barriers to entry are relatively high. Thus, cable operators possess greater market

power, overall, than broadcasters. Second, the evidence demonstrates that both broadcasters and cable operators have strong incentives to reach agreements, but that broadcasters likely suffer higher losses as a result of negotiating impasses than do cable operators. Thus, broadcasters have, if anything, less bargaining power in retransmission consent negotiations than do cable operators.

A. Concentration and Market Power in the Video Programming and Video Distribution Markets

The outcomes of negotiations between broadcasters and MVPDs are a function of the bargaining power of each side. One way to think about bargaining power is in terms of the degree of monopoly power held by the upstream seller (the broadcaster) and monopsony power held by the downstream buyer (the MVPD). In a market with many sellers of perfectly interchangeable products, and a single buyer, all bargaining power rests with the buyer: The buyer will pay the competitive price for the product, and sellers will earn zero economic rents. Conversely, in a market with a single seller and many undifferentiated buyers, the seller will be able to charge the monopoly price, and (assuming entry is constrained) will earn positive economic rents.

The market for broadcast programming is neither a pure monopoly nor a pure monopsony. Rather, both broadcasters and MVPDs have a degree of market power, but for significantly different reasons: Broadcasters produce differentiated products, which by nature are associated with a degree of market (but not monopoly) power. MVPDs, on the other hand, possess monopsony power as a result of high concentration and barriers to entry.

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29. *SHVERA Report* at ¶33.

The evidence presented below shows that the market for programming is unconcentrated and barriers to entry are low, while the market for video distribution is concentrated and subject to substantial entry barriers. Moreover, trends in these two markets are towards increasing concentration in the market for distribution, and decreasing concentration in the market for programming. At the national level, the number of programming options is increasing while the distribution market is becoming more concentrated as a result of consolidation among cable operators. In local cable markets, mergers and "system swaps" have resulted in an increase in clustering – that is, markets in which a single cable operator serves all or most of the households in a broadcast viewing area. The increase in clustering has placed cable operators in a stronger bargaining position vis-à-vis broadcasters, who produce an inherently local product.[30]

1. The Market for Video Programming is Highly Competitive

Broadcast content is part of the larger market for television programming. Thus, broadcast networks compete directly with cable networks for viewing time and advertising dollars in local television advertising markets.[31] The evidence demonstrates that the market for television programming is highly competitive, with low levels of concentration and rapid entry.

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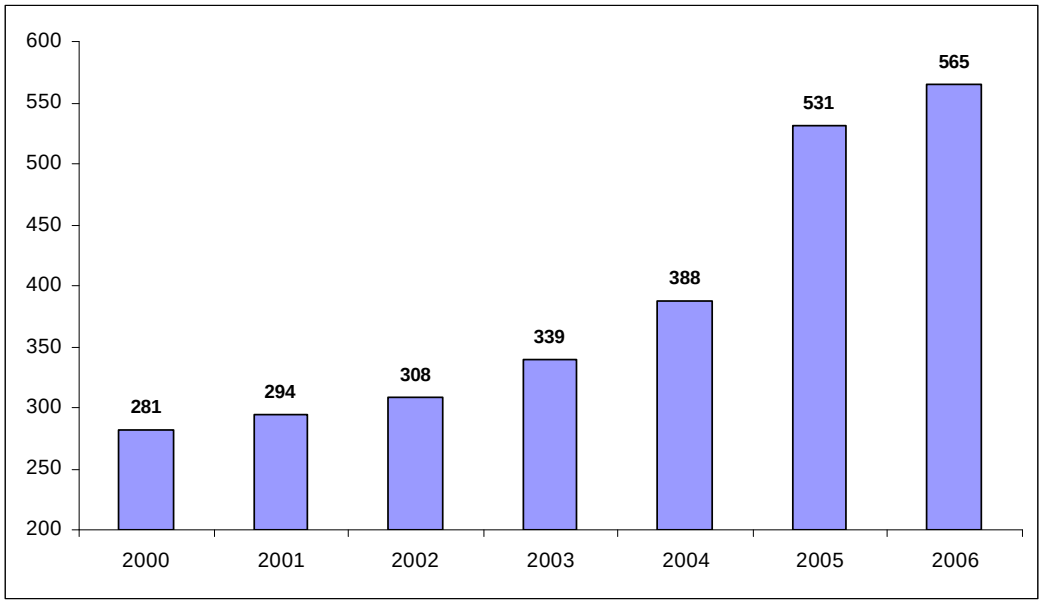
30. While broadcast programming is inherently local, retransmission negotiations often involve broadcasters who own stations in multiple markets (e.g., Fisher Communications) negotiating with MVPD operators who distribute programming in many of those same markets (e.g. Dish Network).

31. Both the FCC and the Department of Justice (DOJ) have embraced the existence of local advertising markets. See, e.g., *In re Applications of Pegasus Broadcasting, LLC, Transferor, and Chancellor Media Corporation of Los Angeles, Transferee*, adopted Aug. 11, 1999, ¶ 40, available at www.fcc.gov/Bureaus/Mass_Media/Orders/1999/fcc99218.wp; *In re Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion & Order, adopted Aug. 14, 1997, at ¶ 55, available at http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1997/fcc97286.txt; *In re Applications of Shareholders of Citicasters, Inc., Transferor, and Jacor Communications, Inc., Transferee*, Memorandum Opinion & Order, adopted Sep. 17, 1996, ¶ 10, available at http://www.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96380.txt; Press Release, Department of Justice, *Abry Broadcast Partners Abandons Deal with Bastet Broadcasting*, July 16, 1999, available at http://www.usdoj.gov/atr/public/press_releases/1999/2565.pdf; Department of Justice, *Antitrust Division Merger Challenges, Meredith Corp./First Media Television, L. P.*, Sep. 16, 1998, available at http://www.usdoj.gov/atr/public/4523h.htm.

As shown in Figure 1 below, the FCC reports that there were 565 satellite-delivered national programming networks in 2006, that the number more than doubled between 2000 and 2006, and continues to increase. This evidence of rapid entry is inconsistent with the notion of market power for any incumbent programmers, broadcasters included.

FIGURE 1:
NUMBER OF NATIONAL SATELLITE-DELIVERED PROGRAMMING NETWORKS 2000-2006[32]



Competition authorities sometimes use measures of industry concentration as indicators of the potential for anticompetitive conduct. Table 1 below shows the prime-time audience share of the six leading producers of television programming, as reported by Bernstein Research. Four

32. *See* Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, MB Docket No. 06-189 (Jan. 16, 2009); Federal Communications Commission at ¶20 [hereafter Thirteenth MVPD Report], *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No. 05-255 (Mar. 3, 2006) [hereafter Twelfth MVPD Report] , at ¶157; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, MB Docket No. 04-227 (Feb. 4, 2005), at ¶145 [hereafter Eleventh MVPD Report]; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, MB Docket No. 03-172 (Jan. 28, 2004), at ¶17; Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, MB Docket No. 02-145 (Dec. 31, 2002), at ¶13; Federal Communications Commission, *In the Matter of Annual Assessment of*

of the firms – CBS, Disney, NBC, and News Corporation – own broadcast stations; two – Time Warner and Viacom – do not.

The data show that the six-firm concentration ratio in the broadcast programming industry has remained stable over time, at approximately 70 percent. Moreover, the Herfindahl-Hirschman Index (HHI), the most commonly accepted measure of industry concentration, has decreased by nearly 100 points since 2000 – from 978 to 881.[33] The Department of Justice and the Federal Trade Commission classify markets where the HHI is below 1,000 as "unconcentrated," and find that mergers in such markets are "unlikely to have anticompetitive effects."[34]

TABLE 1:
PRIME TIME AUDIENCE SHARES (PERCENT) AND HERFINDAHL-HIRSCHMAN INDICES FOR THE SIX LEADING PRODUCERS OF TV PROGRAMMING (2000-2006)

	2000	**2001**	**2002**	**2003**	**2004**	**2005**	**2006**
Time Warner	14	13	14	13	12	11	11
News Corporation	8	9	8	12	10	10	10
NBC Universal	12	11	12	12	11	12	12
Disney	18	16	15	14	14	15	16
Viacom	5	6	7	6	7	8	8
CBS	15	16	15	14	13	14	14
Combined Share	72	71	71	71	67	70	71
HHI Index	978	919	903	885	779	850	881

Source: Share data from Nielsen Media Research and Wolzien LLC as reported in Michael Nathanson, et. al., *Big Thinking on Small Caps: As Primetime Content Distribution Expands, Will Local Broadcasters Go The Way of Your Local Record Store?* Bernstein Research (January 17, 2007), at Exhibit 1.

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the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report, CS Docket No. 01-129 (Jan. 14, 2002), at ¶13.

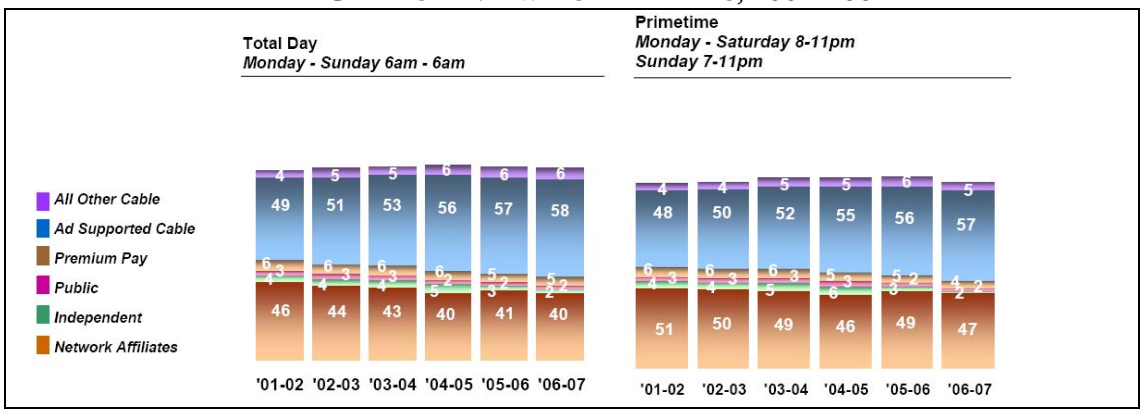
33. By ignoring the remaining firms in the market, this calculation understates the HHI, but only slightly. For example, if the remaining 29 percent of the market in 2006 were divided equally among 20 firms, the calculated HHI would increase by only 42 points, to 923, still well within the "unconcentrated" range. In fact, the remaining share is divided among many more than 20 firms.

34. See U.S. Department of Justice and U.S. Federal Trade Commission, Horizontal Merger Guidelines (1997) at 15-16.

These data demonstrate that the overall market for television programming is highly competitive, with low concentration, low or non-existent barriers to entry, and diverse ownership. In such a market, there is no basis for believing that *any* seller is in a position to command higher-than-competitive prices.

The data also demonstrate that broadcast programming is losing share to cable networks, and that the decline is expected to continue in the future. As shown in Figure 2, basic cable's share of the total day viewing audience surpassed that of the seven broadcast networks (ABC, CBS, NBC, FOX, WB, UPN and Pax) in the 2000-2001 viewing season, and its share of prime time viewing surpassed the networks two years later. The most recent data shows basic, ad supported cable programming holding a 58 percent share of total day viewing (compared with 42 percent for network and independent broadcasters combined) and a 57 percent share of primetime viewing (compared with a 49 percent share for broadcasters).[35] When premium channels and pay-per-view viewing is included, cable's share rises to 69 percent for total day, and 66 percent for prime time.

FIGURE 2:
AC NEILSEN VIEWERSHIP TRENDS, 2001-2007

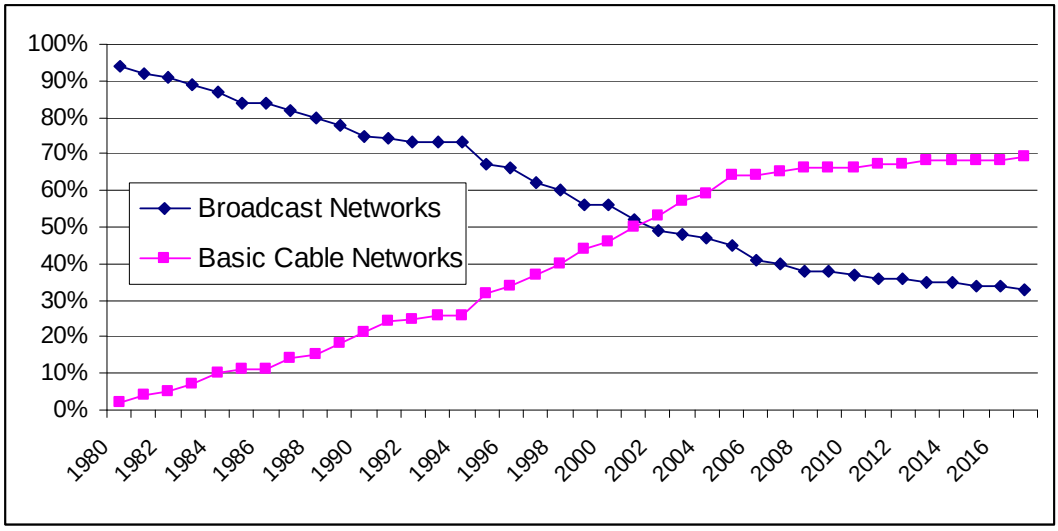


Source: AC Nielsen Television Viewing Audience, 2007

The shift in audience share from broadcast to cable is expected to continue into the future. Figure 3 shows SNL Kagan's projection for broadcast versus basic cable viewing shares through 2017.

Within the next decade, basic cable's share is projected to grow to nearly 70 percent, while broadcast networks – though they will continue to provide widely viewed content to large audiences – overall will command less than a third of the market in terms of overall viewing.

FIGURE 3:
ACTUAL AND PROJECTED BROADCAST VS. BASIC CABLE VIEWING SHARES
(1980-2017)



Source: SNL Kagan, Cable Futurecast

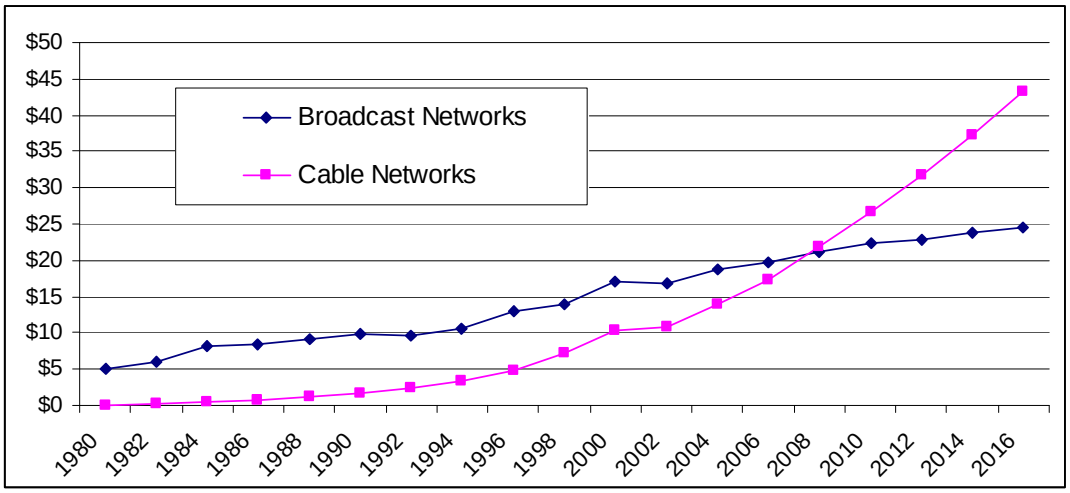
Ratings, of course, translate directly into revenues, and the revenue data also show the rise of cable programming. Figure 4 below shows the total revenues of broadcast and cable networks as reported by SNL Kagan. As the figure indicates, in 2008, for the first time, cable

35. Note: Nielsen ratings measure the proportion of households tuned to a particular channel at a particular time. Since households with multiple TVs may be tuned to multiple stations, the ratings to not necessarily sum to 100 percent.

network revenues exceeded broadcast network revenues, and the gap is expected to grow over time.

FIGURE 4:

ACTUAL AND PROJECTED TOTAL REVENUES,
BROADCAST NETWORKS VS. CABLE NETWORKS (1980-2016; $BILLIONS)



Source: SNL Kagan, Cable Futurecast

Taken together, the data above demonstrate two things: The market for television programming is highly competitive, with low concentration and rapid entry; and, the share of that market that is commanded by broadcast programming is low from the perspective of competition analysis – indeed, lower than in 1992 when Congress enacted retransmission consent due to its concern that the competitive playing field unduly favored cable. Broadcasters, simply put, do not have monopoly power.

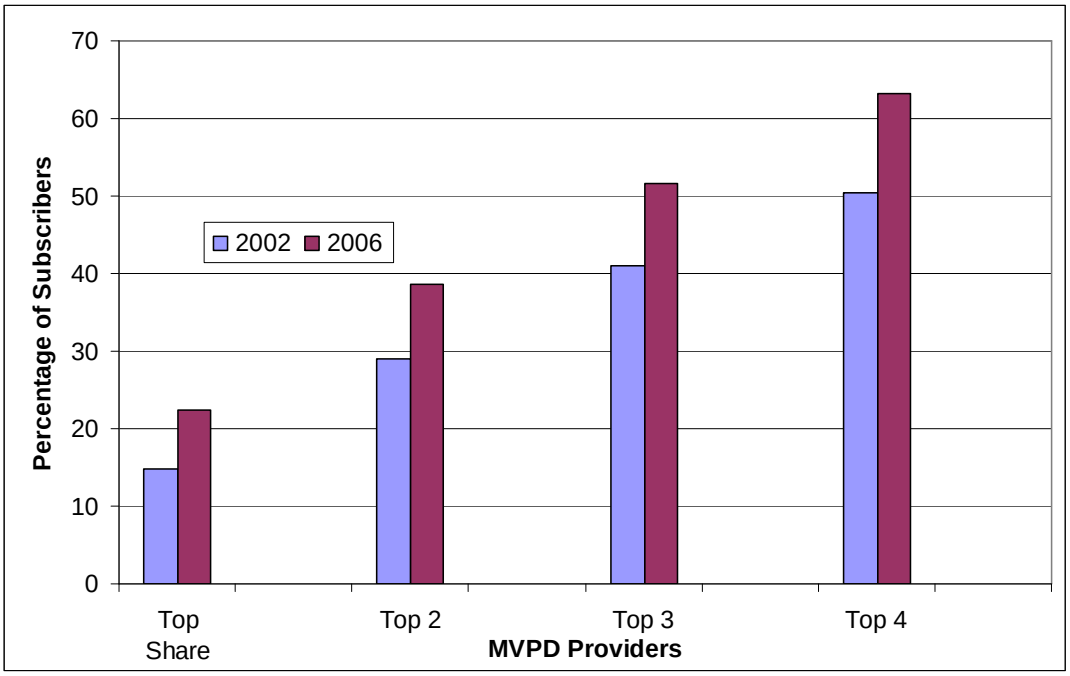
2. Concentration in the National MVPD Market Has Increased

While the sellers' side of the video programming market is unconcentrated and becoming less concentrated, the buyers' side – that is, the MVPD market – is experiencing consolidation at both the national and local levels.[36]

The national market for program distribution has seen significant consolidation in recent years as large cable acquisitions, including the acquisition of Adelphia by Comcast and Time Warner, have increased buyer concentration. As shown in Figure 5, in 2006, the four MVPDs with the largest shares served 63 percent of all MVPD subscribers, up from 50 percent in 2002.[37] When Adelphia's share is added to the shares of the top four, reflecting the acquisition of Adelphia by Comcast (#1) and Time Warner (#4), the top four MVPDs in 2006 served over 68 percent of the MVPD market – an increase of 18 percentage points from 2002. Thus, national networks depend on just four purchasers to reach nearly 70 percent of all MVPD subscribers nationwide. An MVPD's refusal to carry a national network, or even the threat of a refusal, can significantly jeopardize that network's ability to operate efficiently, and in the worst case, could cause that network to fail.

36. The consolidation among cable operators that is leading to higher concentration shows some signs of being offset by the entry of telephone companies, but concentration will remain high relative to the market for programming, as barriers to entry are substantial.

FIGURE 5:
INCREASE IN MARKET SHARE OF LARGEST MVPD PROVIDERS: 2002-2006



Source: Thirteenth MVPD Report, at Appendix B, Table B-4; Twelfth MVPD Report, at Appendix B, Table B-4

3. MVPD Concentration in Individual Local Markets Has Increased

Cable acquisitions have not only increased national buyer concentration ratios, which increases their bargaining power relative to national programming networks, they have also led to increased concentration in markets. But acquisitions are not the only means by which cable operators have increased local market shares: In recent years, they have engaged in large numbers of cable system "swaps," in which two multi-system operators (MSOs) trade cable systems in different geographic areas to build larger "clusters." Higher cable system concentration at the local level increases the bargaining power of cable systems relative to local programmers.

37. Thirteenth MVPD Report at Tables B-3, B-4, Twelfth MVPD Report at Tables B-3, B4. The share of subscribers served by the top ten MVPDs has also increased, from approximately 84 percent in 2002 to 87 percent in 2006.

As reported by the FCC, clustering via system swaps has become increasingly common:

> Cable operators continue to pursue a regional strategy of 'clustering' their systems. Many of the largest MSOs have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. This strategy is accomplished through purchases and sales of cable systems, or by system 'swapping' among MSOs.[38]

Data from SNL Kagan show the number of clusters with 500,000 or more subscribers rose from 29 systems in 2005, covering 29.8 million subscribers, to 43 in 2007, covering 38.1 million subscribers.[39] A cable operator's refusal to carry a local station (once that station has elected retransmission consent, and thus is not eligible for must carry) in a clustered area, or even the threat of a refusal, can significantly jeopardize that local station's ability to operate.

B. Cable Operators Have Significant Advantages in Bi-Lateral Negotiations

In addition to the standard measures of market power presented above, the bargaining relationship between broadcasters and programming distributors can also be thought of in terms of each side's ability to bear the costs of a bargaining impasse. While cable operators complain that broadcasters have the upper hand, the evidence demonstrates otherwise.

As an initial matter, it is important to note that both broadcasters and MVPDs have very strong incentives to reach agreements, for two primary reasons: First, both industries are characterized by high fixed costs, meaning that any reduction in output (i.e., a reduction in the number of viewers/subscribers) is, in the short run, not matched by a decline in costs. Second, both industries' products are highly perishable, meaning that a product that is not sold at the time it is produced cannot simply be put in a warehouse to be sold later. Thus, if a negotiating impasse leads broadcasters to lose viewers (and hence advertising revenues), or cable companies

38. Eleventh MVPD Report at ¶141.

to lose subscribers, the loss of revenues translates directly into lost profits, and can never be made up. As the FCC has concluded, "the retransmission consent process provides 'incentives for *both* parties to come to mutually beneficial arrangements,'" and "the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental *to each side*."[40]

While both sides lose when a local broadcast signal is pulled from a cable operator's channel lineup, the evidence suggests that broadcasters lose more. When impasses occur, and broadcast stations are pulled from an MVPD's channel lineups, the primary cost to the MVPD is the potential loss of subscribers (who may either switch to another MVPD, such as from cable to DBS, or simply go back to over-the-air). The primary cost to a broadcaster, on the other hand, is the combination of lost compensation from the MVPD plus lost advertising revenues.

Most industry analysts believe the costs of impasses fall disproportionately on broadcasters. Bernstein Research, for example, concludes that retransmission negotiating leverage is "steeply asymmetrical" in favor of cable operators,[41] primarily because "subscribers leave distributors for competitors only slowly, while advertising revenues are lost right away."[42] Moreover, Bernstein explains, "negotiating leverage for retransmission consent is a function of local market share."[43] Thus,

> At the end of the day, if retrans[mission] negotiations reach an impasse, the TV station owners can choose to pull their signal from the cable system. However, financially this is profoundly damaging to the TV station's P[rofit] &L[oss] given

39. Data for 2007 data from SNL Kagan, Broadband Cable Financial Databook; 2005 data from SNL Kagan as reported in Thirteenth MVPD Report at Table B-2.

40. *SHVERA Report* at ¶44 (citing News-Hughes Order, 19 FCC Rcd at 556-7, ¶180) (emphasis added).

41. Bernstein Research, *Cable and Satellite: Asymmetrical "Retrans" Leverage Favors Cable over Satellite and Telcos*, Mar. 21, 2006 (hereafter *Bernstein Report*) at 1. See also Merrill Lynch, *Brief Thoughts on Media*, Mar. 16, 2006, at 2 ("We are simply not convinced that broadcasters have sufficient leverage over the MSO's to charge significant rates [for retransmission consent].").

42. *Bernstein Report* at 1.

43. *Bernstein Report* at 1.

> that its sole revenue stream is driven by viewers and given that cable MSOs account for an average of 60% of distribution and even higher in some markets (i.e., urban markets). Given the fixed cost nature of the TV station business model, the margin on this lost advertising revenue is nearly 100%.[44]

In summary, based on traditional measures of market concentration and entry, and on the specific economic characteristics of bilateral negotiations between broadcasters and MVPDs, there is simply no basis for claims that broadcasters have the ability to impose unreasonable retransmission consent terms on programming distributors. As shown in the section below, the evidence also demonstrates that the outcomes of actual negotiations have not resulted in excessive compensation and that the compensation that has been paid has little or no impact on cable company prices.

IV. RETRANSMISSION CONSENT, PROGRAMMING COSTS AND RETAIL PRICES

One of cable operators' arguments against retransmission consent is that any compensation paid to broadcasters for their signals is ultimately passed along to consumers in the form of higher retail prices. At one level, this assertion is a truism, equivalent to saying that if steel were free, car companies could charge less for automobiles. The problem, of course, is that if the price of steel were set to zero, no steel would be produced, and there would be no cars in the first place. From an economic and consumer welfare perspective, the correct question is whether prices are set so as to send the right signals to both sellers and buyers. If the price is set too low, sellers will not produce the economically optimal quantity (or quality) of output, and consumer welfare will suffer.

The discussion above demonstrates as a *prima facie* matter that conditions in the market for programming are such that retransmission consent negotiations can be expected to yield prices that closely approximate the social optimum. Nevertheless, cable operators and other

44. *Bernstein Report* at 2.

MVPDs have continued to complain that retransmission consent compensation has "unreasonably" increased their programming costs and resulted in significantly higher prices to consumers. The evidence presented below demonstrates otherwise. First, during the period when cable operators refused to pay monetary compensation, and forced broadcasters instead to accept in-kind compensation (primarily in the form of carriage of affiliated programming), the evidence does not support cable operators' claims that resulting increases in programming costs had any significant effect on their overall costs structures or on the retail prices they charged consumers. Second, during the more recent period when broadcasters have begun to receive monetary compensation, the evidence shows that such compensation is extremely modest relative to cable operators' overall revenues, and is likely to remain so.

A. In-Kind Compensation for Retransmission Consent Has Not Had an Appreciable Effect on Cable Costs or Rates

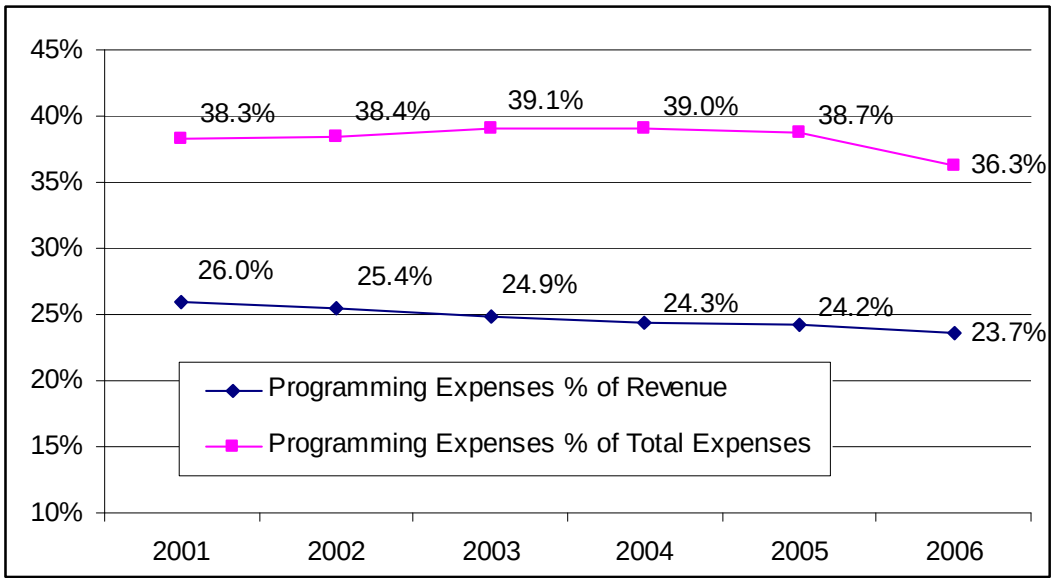
From 1992 through 2004, cable operators refused to pay monetary compensation for retransmission consent, preferring instead to compensate broadcasters, if at all, only in kind. Such compensation primarily took the form of agreeing to carry affiliated broadcast or cable programming. For example, a cable operator might agree to carry a local station's cable-only news and weather channels or to carry a small independent station owned by a broadcasting company in one market where the cable operator had a cable system in return for the right to carry a "big three" network-affiliated station in another market; or to carry a start-up cable network owned by a broadcasting company in return for the right to carry that company's broadcast stations. In either case, it is for practical purposes impossible to place a monetary value on these barter exchanges. It is possible, however, to examine the total costs cable operators paid for programming. As noted above, cable operators allege that retransmission

consent resulted in higher programming costs, and forced them, in turn, to raise prices charged to consumers.

The problem with the cable operators' argument is that programming costs have not risen in relative terms in recent years, even as cable prices have gone up significantly. Whether compared to other elements of cable company costs, to cable company revenues, or to cable company profits, programming costs are relatively small, and their share has been stable or, by some measures, declining. And, the cost of any broadcast retransmission consent compensation is a small fraction of what cable and satellite companies pay for non-broadcast programming.

Figure 6 below shows the relationship between cable operators' programming expenses, on the one hand, and their overall expenses and revenues, on the other, as reported by SNL Kagan. The data show that programming expenses have declined in recent years when compared to both revenue and expenses, falling to less than 24 percent of revenues in 2006. This period coincides with the period when cable operators have complained most aggressively about *rising* programming costs.

FIGURE 6:
PROGRAMMING EXPENSES VS. TOTAL REVENUE AND TOTAL EXPENSES
MAJOR CABLE OPERATORS (2001-2006)

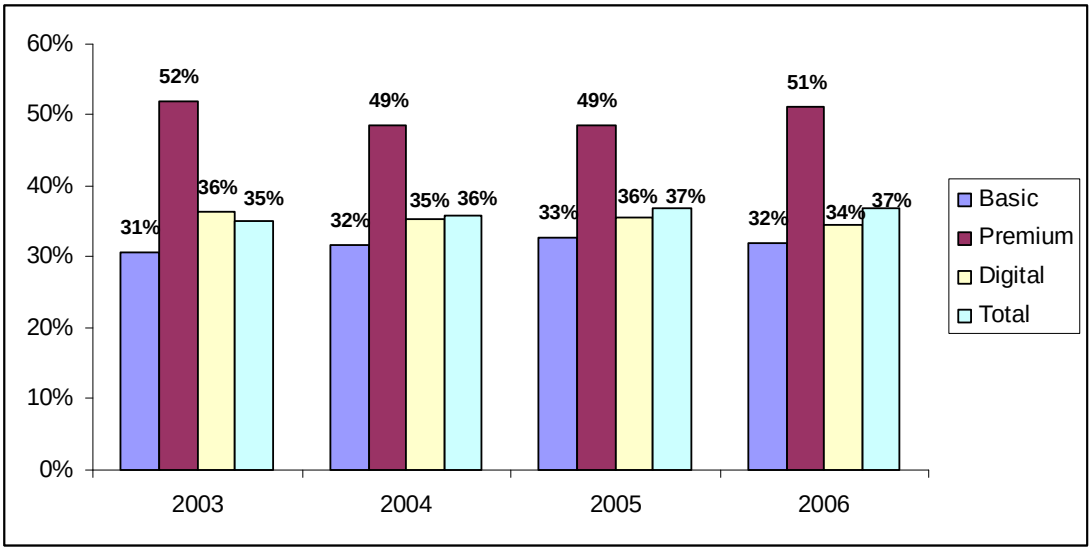


Source: SNL Kagan, Benchmarking Cable

The Kagan data is consistent with data reported by other industry analysts. Figure 7 shows the results of an analysis by Morgan Stanley[45] of programming costs in relationship to video revenues (as opposed to all revenues), by category type of programming. As the figure shows, there simply is no evidence that programming costs have increased relative to the revenues cable operators earn from distributing that programming.

45. See Morgan Stanley, *Cable/Satellite: Looking into 3Q06 and 2007; Cautious on the Top Line, Capital Expenditures, and Lofty Valuations* (Oct. 25, 2006) [hereafter *Morgan Stanley*].

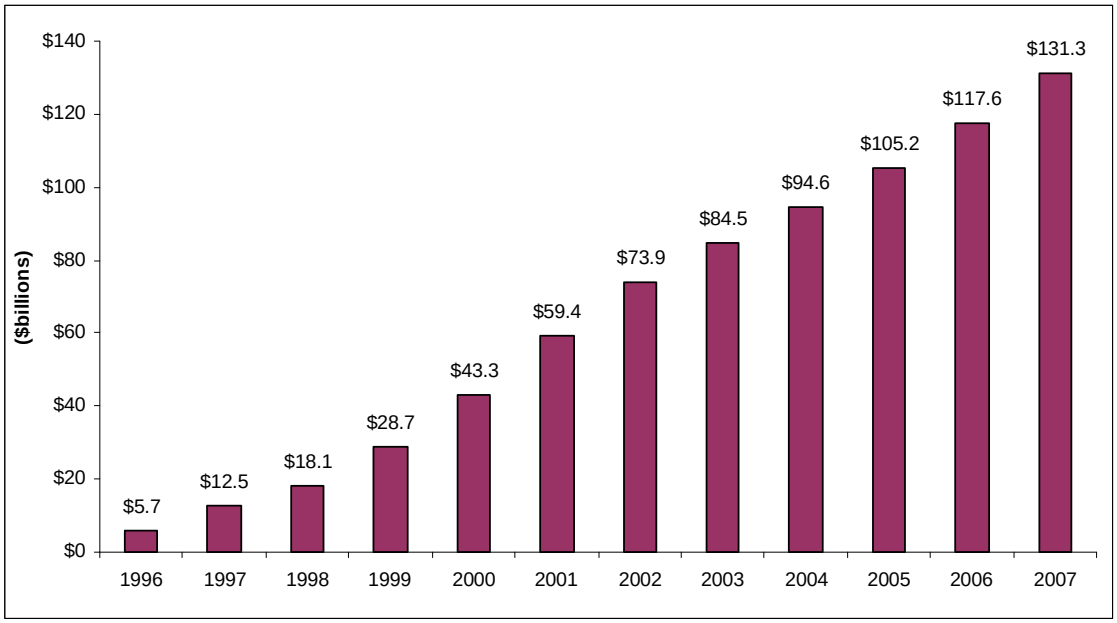
FIGURE 7:
CABLE OPERATORS' PROGRAMMING COSTS AS A PROPORTION OF VIDEO REVENUES, BY CATEGORY OF PROGRAMMING, 2003-2006



Source: Empiris LLC, Morgan Stanley

The operating expense figures discussed above do not include the large infrastructure investments made by cable operators in recent years. As shown in Figure 8, the National Cable and Telecommunications Association (NCTA) reports that cable operators have invested more than $131 billion since 1996 to replace coaxial cable with fiber optic technology and to install new digital equipment in homes and system headends, allowing them to provide digital signals, broadband services, telephony services, high-definition television (HDTV), and video-on-demand services.

FIGURE 8:
CUMULATIVE INVESTMENT IN PLANT BY CABLE OPERATORS 1996-2007 ($BILLIONS)

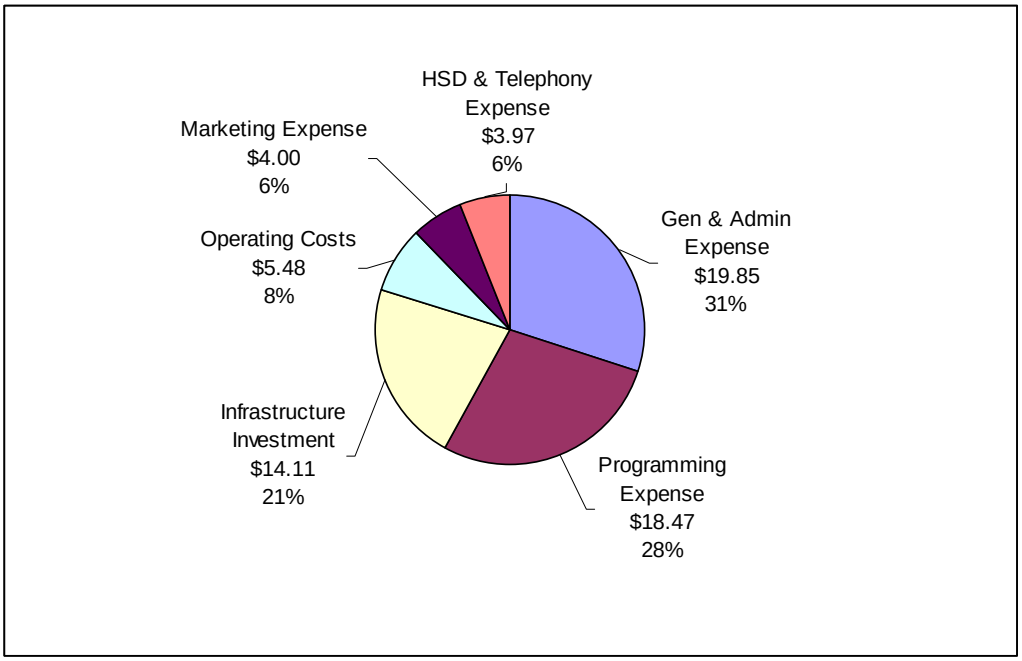


Source: National Cable and Telecommunications Association

As Figure 9 shows, when cable operators' investments in infrastructure are taken into account, the proportion of their total expenditures accounted for by programming falls to 28 percent.

FIGURE 9:

CABLE OPERATORS EXPENSES PER SUBSCRIBER PER MONTH
(INCLUDING INFRASTRUCTURE SPENDING), 2006



Source: Empiris LLC, Morgan Stanley

It is also useful to compare programming costs to cable operators' profits, which have increased substantially in recent years. If programming expenses were significantly contributing to the cable operators' costs, then one would expect, other things equal, that profits would decline as programming expenses increased.[46] The evidence suggests otherwise.

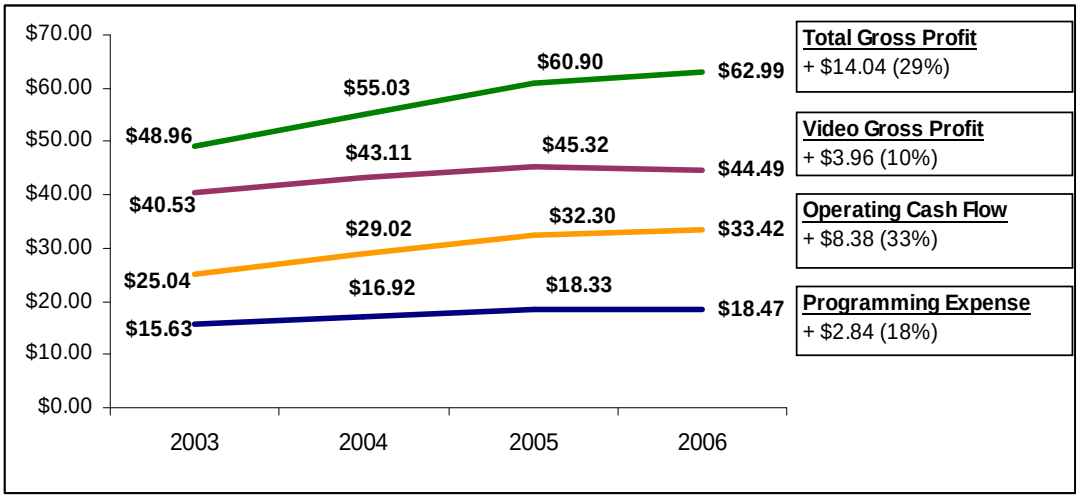
Figure 10 shows the change in programming expenditures (per subscriber, per month) compared with three measures of profitability – total gross profit, video gross profit, and operating cash flow, for 2003 through 2006 for four leading cable operators.[47] Total gross

46. In general, some portion of an increase in the cost of an input will be passed through to consumers, with the precise effect depending on several factors, including the share of the input's contribution to the production of the overall service, changes in the quality of the input (and resulting changes in quality of the output), and the competitive structure of the industry. Firms in a perfectly competitive industry pass on 100 percent of a cost increase to end users, whereas a firm with monopoly power absorbs a certain percentage of a cost increase. See, e.g., P.R.G. Layard and A.A. Walters, *Micro-Economic Theory* (1978), esp. Ch. 9-10.

47. Based on data reported by Morgan Stanley for Cablevision, Charter, Comcast and Time Warner.

profits increased from $48.96 per subscriber per month in 2003 to $62.99 per subscriber per month in 2006, an increase of $14.04, or 29 percent. During the same period, programming expenses per subscriber per month increased from $15.63 to $18.47, an increase of $2.84 per subscriber per month, or 18 percent. Thus, the increase in gross profits per subscriber for these cable operators was approximately five times as large as the increase in programming expenses per subscriber (and, in percentage terms, nearly twice as large). As the figure shows, on a percentage basis, three of the four metrics grew more rapidly than programming expenses; the fourth, video gross profits, still grew by more than programming expenses in absolute terms.

FIGURE 10:
GROWTH IN PROGRAMMING EXPENSES VS. MEASURES OF PROFITABILITY,
MAJOR CABLE OPERATORS (PER SUBSCRIBER PER MONTH, 2003-2006)



Source: Empiris LLC, Morgan Stanley.

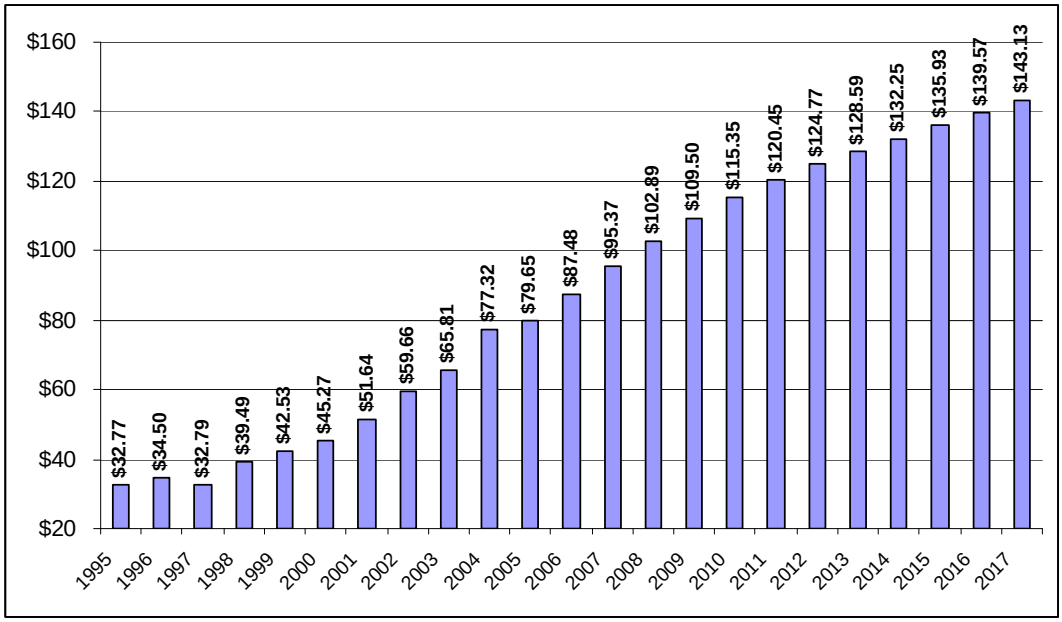
In summary, there simply is no evidence that the in-kind compensation cable operators have paid to broadcasters for retransmission consent has resulted in increased programming expenses relative to cable operators' revenues, other expenses, or profits. Accordingly, there is no basis for cable operators' claims that retransmission consent has had any appreciable effect on cable subscription rates paid by consumers.

B. Monetary Compensation for Retransmission Consent is *De Minimus* and Likely to Remain So

As noted above, cable operators have resisted paying monetary compensation for retransmission consent and argued that the recent trend in favor of monetary compensation will cause them to raise prices to consumers still further. The evidence shows, however, that monetary compensation represents a tiny fraction of cable operators' revenues, and – even if nearly all broadcasters are successful in winning monetary compensation – will remain a tiny fraction in the future.

Figure 11 shows actual and projected revenue per residential cable subscriber, as reported by SNL Kagan, for 1995 through 2017. As the figure indicates, cable operators have seen dramatic increases in their monthly subscriber revenues (average revenues per unit, or ARPU) in recent years, with ARPUs more than tripling (from $32.77 to $102.89) between 1995 and 2008. Cable operators have seen increases in revenues from basic and enhanced video services, from high-speed data services, and, most recently, from cable telephony. All of these revenues, however, are ultimately attributable in some measure to the basic cable programming that forms the core of cable operators' new triple-play offerings: Without video, their entry into these new markets would be vastly more difficult, if not impossible.

FIGURE 11:
ACTUAL AND PROJECTED AVERAGE REVENUE
PER RESIDENTIAL CABLE SUBSCRIBER (1995-2017)

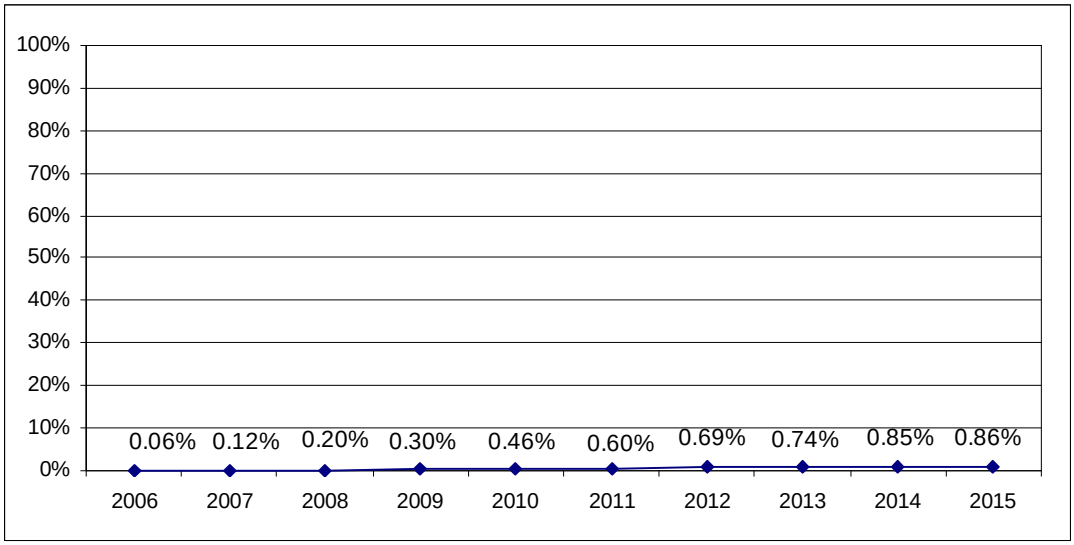


Source: SNL Kagan, Cable Futurecast

Monetary retransmission consent compensation represents, and is expected to continue to represent, only a tiny fraction of the cable companies' exploding revenue base. While retransmission consent agreements are typically confidential, broadcasters do provide reports on overall revenues, including data that can be used to estimate retransmission consent fees. Figure 12 below shows SNL Kagan's estimates for retransmission consent fees as a proportion of cable company revenues from 2006 through 2015, assuming that (a) the proportion of cable subscribers covered by monetary compensation agreements for retransmission consent increases from 18 percent in 2006 to 95 percent in 2012 and beyond, and (b) the number of broadcast stations in each market that receive monetary compensation increases from 1.5 in 2006 to 4.0 in 2014 and beyond; that is, the figures assume that virtually all major broadcast stations receive monetary compensation for retransmission by the end of the period. As the figure shows, Kagan estimates that monetary compensation accounts for only 0.2 percent (that is, two tenths of one

percent) of cable company revenues today, and that, even under very liberal assumptions about the trend towards monetary retransmission consent fees in the future, will never reach one percent of cable revenues.

FIGURE 12:
ACTUAL AND PROJECTED RETRANSMISSION FEES AS A PERCENTAGE OF CABLE REVENUES
2006-2015



Source: Empiris LLC, SNL Kagan

These figures are perhaps even more stark when expressed in dollars and cents. Kagan estimates that the average total retransmission consent fee paid by cable companies in 2015 will be $1.14 (for four broadcast channels), while at the same time cable companies will be charging the average subscriber about $136 per month. Put still another way, monetary retransmission consent fees are projected to increase by $1.08 per subscriber per month in the next decade; during the same period, cable revenues per subscriber will go up approximately 45 times as much, by $48.38. Retransmission consent fees, in other words, simply cannot be responsible for any significant portion of cable operators' increasing monthly fees.

V. NEGOTIATING IMPASSES ARE RARE, AND HAVE A NEGLIGIBLE IMPACT ON CONSUMERS

As noted above, cable operators have resisted the move towards monetary retransmission consent fees. Despite the fact that both DBS operators and, more recently, telephone companies that provide video services have paid monetary fees for retransmission, cable companies have fought hard to hang on to the "in kind" compensation regime they successfully imposed in the wake of the 1992 Act. One symptom of this resistance has been the willingness of cable companies temporarily to forego carriage of broadcast stations rather than accede to monetary compensation. In addition, as DBS operators' market shares have increased during the 1990s, and as they have increasingly sought to increase their ability to transmit local broadcast stations into local markets (local-into-local carriage), they too have grown more likely temporarily to forgo carriage of some broadcast stations when retransmission consent agreements are not reached.

As noted above, negotiating impasses that result in carriage interruptions are costly for program distributors and cable companies alike. Consumers also incur a cost, as they may be inconvenienced (e.g., by having to purchase and install antennas, or learning to download some of their favorite programs over the Internet), or even decide to forego watching some programming. Concerns about the impact of negotiating impasses on consumers have raised questions in the minds of some about whether retransmission consent should be weakened or reformed.[48]

This section presents evidence demonstrating that carriage interruptions resulting from retransmission consent impasses are extremely rare, typically brief, and have a negligible impact on consumers.

Two points should be noted at the outset. First, the right to not agree is fundamental to any negotiation. As indicated above, this is the posture Congress took in passing the 1992 Cable Act (when it indicated it would not "dictate the outcome" of negotiations), and it has been faithfully upheld by the FCC on the occasions when cable and DBS operators have sought its intervention. Second, the alternative to permitting free negotiations is to force companies to engage in binding arbitration. Ultimately, however, the purpose of arbitration is to set prices and terms, i.e., to engage in price controls, even if on a case-by-case basis. Given the complexities and higher differentiated circumstances associated with retransmission consent negotiations, the probability of mandatory arbitration achieving anything approaching socially optimal prices and terms is low.

If carriage interruptions were imposing large costs on the U.S. economy, or even on a substantial proportion of consumers, some might argue that mandatory arbitration, despite its inherent inefficiencies, should be considered. The evidence, however, shows that this is not the case.

Between January 2006 and December 2008, *Broadcasting and Cable* reported a total of eight instances in which retransmission disputes led to carriage interruptions.[49] As shown in Table 2, four of these involved a DBS operator (Dish Network), while the other four involved cable companies (Mediacom, Suddenlink, and Time Warner). The number of stations involved ranged from as few as one to as many as 24, while the duration of the interruption ranged from as

48. See, e.g., *CRS Report* at 1-2.

49. *Broadcasting and Cable* is the leading trade magazine covering the broadcasting and cable industries and it is reasonable to assume that it covered every instance in which a negotiating impasse led to an interruption in carriage.

few as five days to as many as 415.[50] The simple average duration of the disputes was 91 days, but this average is heavily affected by the single-station dispute between KAYU and Time Warner: The average of duration of the other seven disputes was approximately 44 days.

TABLE 2:
RETRANSMISSION DISPUTES RESULTING IN CARRIAGE INTERRUPTIONS, 2006-2008

Parties	Dates	Duration (Days)	Number of Stations Affected	List of Stations Affected	Total Households in Affected DMAs
Fisher Communications/Dish Network	12/18/08-present	14 (through 12/31/08)	10	KBAK, KBFX, KBCI, KVAL, KIDK, KATU KOMO,KUNS, KIMA, KUNW	4,061,880
Young Broadcasting/Dish Network	Mid-December 2008	5	10	KRON , WLNS, WKRN, WTEN, WRIC, WATE, WBAY, KLFY, KELO, KWQC	6,650,980
Lin TV/Time Warner Cable	October-November 2008	31	17	KXAN, KNVA, KBVO, WIVB,WNLO, WWHO, WUPW, WDTN, WISH, WNDY, WIIH, WTHI,WANE, WLUK,WALA,WBPG,WWLP	5,914,950
Citadel/Dish Network	August-September 2008	37	4	WOI , WHBF, KLKN, KCAU	1,178,200
Barrington/Dish Network	July-September 2008	72	1	KRCG	179,010
Lin TV/Suddenlink	December 2007 – March 2008	90	2	KXAN, KBIM	1,356,790
KAYU/Time Warner Cable	December 2006 – February 2008	415	1	KAYU	416,630
Sinclair/MediaCom	December 2007 – February 2008	60	24	KDSM , KGAN,WEAR, WFGX , WYZZ , WLOS, WMYA , WDKY, WMSN, WZTV, WUXP, WNAB, WUCW, KBSI, WDKA, WICS WICD, KDNL, WTWC, WTTO, WABM, WTVZ, WCGV, WVTV	10,726,520
Averages/Totals	NA	91	9		30,484,960

It would be incorrect, however, to conclude that all of the households in these DMAs – or even a significant fraction of them – were affected by these carriage interruptions. First, these

50. One dispute, between Fisher Communications and Dish Network, is still ongoing; for purposes of the calculations below, which are based on 2006-2008 viewing data, only the 14 days in 2008 for which carriage was interrupted are counted.

interruptions affected (at most) only the households subscribing to the MVPD involved in the dispute. Thus, only Dish subscribers (not cable subscribers, and not DirecTV subscribers) were affected by the Dish disputes; and, only subscribers of the affected cable company (not DBS subscribers or subscribers of other cable companies operating in these DMAs) were affected by the disputes involving cable companies. Of course, none of the households which receive their television exclusively over the air (i.e., which do not subscribe to pay TV at all) were affected at all.

Second, among households which do subscribe to the affected cable or DBS provider, not all households would have watched the affected channels at all during the duration of the interruption. Nationally, the typical household only tunes in to about 17 television channels each month.

Third, even among households that would otherwise have tuned in to a particular channel during the period of the interruption, it is reasonable to believe that many of them were able to find another channel offering acceptable programming. For example, a viewer who might have tuned in to the local nightly news on the channel for which carriage was interrupted in order to see the weather forecast might well have found local weather news on another channel.

Taking these three factors into account, it is clear that many of the households in a DMA where a carriage interruption occurs would be *completely unaffected by that interruption*, as they did not subscribe to the MVPD involved in the interruption, would not have watched the affected channel anyway, or found the programming they were seeking on a different channel.

For some households, however, it is reasonable to believe that the interruption did have at least some effect. One way of measuring that effect is to estimate how many hours those households would have spent viewing the affected station in the absence of the interruption. It is

possible to arrive at such an estimate by combining data on the number of households affected by a particular carriage interruption (i.e., the number subscribing to the affected MVPD) with ratings data for the interrupted stations.

Table 3 presents estimates of the impact of the eight carriage interruptions during 2006-2008 on household viewing hours, both in the aggregate and as a proportion of total viewing hours. Columns (1) and (2) show the number of markets affected by each interruption, and the total number of TV households in those markets. Column (3) shows the estimated proportion of households in the affected markets which subscribe to the MVPD for which service was interrupted – i.e., the proportion of households *potentially* affected by the interruption. Column (4) shows, for potentially affected households only, the average number of daily viewing hours affected by the interruption, i.e., the hours those households would have spent watching the station that was made unavailable by the interruption, and Column (5) shows affected viewing hours for those households divided by total daily viewing hours, i.e., the proportion of daily television viewing time affected by the interruption. Column (6) shows affected viewing hours as a proportion of total annual viewing hours for potentially affected households; Column (7) shows affected viewing hours as a proportion of total viewing hours for all households in the affected markets (including those subscribing to an unaffected MVPD, or which receive television only over the air). The bottom row in the table shows national totals and averages.

TABLE 3:
ESTIMATED EFFECT OF SERVICE INTERRUPTIONS ON VIEWING HOURS

Parties	(1) Affected Markets	(2) Total TV HHs in Affected Markets	(3) % TV HHs Subscribing to Affected MVPD	(4) Daily Affected Viewing Hours (Affected HHs)	(5) % Daily Viewing Hours Affected (Affected HHs)	(6) % Annual Viewing Hours Affected (Affected HHs)	(7) % Annual Viewing Hours Affected (All TV HHs)
Fisher Communications/Dish Network	7	4,061,880	13%	0.39	4.7%	0.27%	0.03%
Young Broadcasting/Dish Network	10	6,650,980	13%	0.80	9.7%	0.10%	0.01%
Lin TV/Time Warner Cable	11	5,914,950	38%	0.55	6.7%	0.67%	0.25%
Citadel/Dish Network	4	1,178,200	15%	0.40	4.8%	0.46%	0.07%
Barrington Broadcasting/Dish Network	1	179,010	20%	0.88	10.7%	2.12%	0.43%
Lin TV/Suddenlink	2	1,356,790	22%	0.40	4.8%	0.92%	0.20%
KAYU/Time Warner Cable	1	416,630	10%	0.28	3.4%*	3.83%	0.38%
Sinclair/MediaCom	16	10,726,520	7%	0.32	3.9%	0.95%	0.07%
National Averages/Totals	**47***	**30,484,960**	**16%****	**0.47****	**5.7%****	**0.21%****	**0.0089%*****

* Rows to not add to total since some markets were affected by more than one dispute. ** Average across affected markets. *** Based on 100% of U.S. TV HHs.

The data shown in Table 3 demonstrate that the impact of retransmission consent-related carriage interruptions on television viewing in the U.S. is infinitesimally small. For example, the bottom row of columns (4) and (5) shows that households subscribing to MVPDs affected by service interruptions were unable to view their "first choice" television station for about 30 minutes during each day of the interruption, representing less than *six percent* of the average household's total daily viewing time of 8.2 hours; the highest proportion of viewing time affected, in the Barrington/DISH dispute, was less than an hour, or about 10.7 percent of daily viewing time. Of course, these figures assume none of these households had access to those channels over-the-air, and that none were able to find equally acceptable programming on other stations.

Overall, as shown in the bottom row of column (7), the eight service interruptions that occurred in 2006-2008 affected just *0.0089 percent* – that is less than one one-hundredth of one percent – of annual television viewing hours in the United States. To put this figure in perspective, on average, U.S. households experienced an average annual service interruption – that is, the inability to tune in to their first-choice television channel – of about 16 minutes during this period. To put this figure in further context, the average North American household experiences annual electricity outages of about 381 minutes – during which time, they are, of course, unable to watch *any* TV channels. Thus, the average household is about 24 times as likely to be without electricity at any given time during the year than it is to be deprived of its first-choice television channel as a result of a retransmission-related carriage interruption.

Another benchmark worth considering is this: The *aspirational* standard for cable system reliability is 99.97%, implying average annual system outages of 158 minutes per year.[51] Assuming (conservatively) that cable systems meet this aspirational target, the typical U.S. household is about ten times as likely to be without any cable service at all as a result of a cable system outage than it is to be unable to watch its favorite broadcast channel as a result of a retransmission dispute.

VI. CONCLUSION

Cable operators seek to weaken the retransmission consent regime, thereby strengthening their leverage in negotiations with broadcasters. They argue broadcasters have market power, that they have used this power in the past to impose unreasonable in-kind compensation arrangements, and that they will use it in the future to force payment of excessive monetary compensation. They wrap all of their arguments in the notion that retransmission consent

increases the cost of programming, which must then be passed through to consumers in the form of higher cable rates – thereby explaining why cable rates are rising so rapidly.

Each and every one of the cable operators' assertions is incorrect. Broadcasters do not have market power in the national market for MVPD programming, and they do not have the ability to impose uneconomic terms of any kind on MVPDs at the local level. Programming expenses do not explain a significant portion of rising cable rates. Moreover, the move towards monetary compensation for broadcast signals – which cable operators have successfully resisted for 15 years – is likely to increase economic efficiency and enhance consumer welfare, as it provides another means (in addition to barter) for broadcasters and distributors to reach efficiency-enhancing bargains. Finally, concern about the impact on consumers of carriage interruptions resulting from impasses in retransmission negotiations is misplaced, as such impasses are rare and typically brief, and do not affect a significant proportion of household television viewing.

More broadly, retransmission consent is achieving precisely what Congress intended it to achieve when it passed the 1992 Cable Act: Establishing a market based mechanism to ensure that broadcasters receive the economically efficient level of compensation for the value of their signals. Such compensation ultimately benefits consumers by enriching the quantity, diversity, and quality of available programming, including local programming. Thus, proposals to repeal or weaken the existing system are misguided, and would harm consumer welfare.

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51. See Walter Ciciora, et al, *Modern Cable Television Technology 2d* (Amsterdam: Morgan Kaufmann, 2004) p. 720. Cable operators do not publicly report their actual outage rates.