

its signal—briefly disrupting this year’s Academy Awards broadcast and causing confusion for consumers—“unless Cablevision and its customers pay \$40 million in new fees for programming that it offers today for free, both over-the-air and online.”⁷⁷ These cases, and the ones that are sure to follow, illustrate that broadcasters’ substantially escalating demands for cash compensation have created an untenable situation in which consumers face increased cable rates or the loss of popular programming.

The networks’ interference in these retransmission consent negotiations has only exacerbated the harms to consumers—both by siphoning off revenues intended to support *local* broadcasting and by establishing an effective price floor below which an independent affiliate may not grant consent to an MVPD.⁷⁸ And now that the networks are increasingly tying the sale of their local affiliates’ retransmission consent rights with other programming, the Commission’s retransmission consent regime has become just another weapon in the networks’ arsenal to

⁷⁷ Richard Huff and David Hinckley, *Dispute Between ABC, Cablevision Could Leave TV Viewers in Dark on Oscar Night*, N.Y. DAILY NEWS, Mar. 1, 2010, available at http://www.nydailynews.com/entertainment/tv/2010/03/01/2010-03-01_cablevision_may_ditch_wabc.html. See also Brian Stelter and Brooks Barnes, *Disney Pulls ABC From Cablevision After Deal Fails*, N.Y. TIMES, Mar. 7, 2010, available at <http://mediadecoder.blogs.nytimes.com/2010/03/07/disney-pulls-abc-from-cablevision-after-deal-fails/>.

⁷⁸ See TWC Comments at 10 (“It appears that FOX is compelling affiliates to divulge the substance of retransmission consent negotiations . . . , thus collecting information that it then can leverage in its direct negotiations. And, by insisting on inflated prices for retransmission of independent stations’ signals, FOX creates a higher floor for negotiations on behalf of its owned-and-operated stations.”). See also Joe Flint, *Broadcasters’ Tough Talk with Cable Is Not Without Risks*, L.A. TIMES, Dec. 18, 2009, available at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2009/12/broadcasters-tough-talk-with-cable-is-not-without-risks-.html>. (“In his Dec. 18 report on the heated retransmission consent negotiations between Time Warner Cable and News Corp.’s Fox, Pali Research’s Rich Greenfield warns that all the tough talk from broadcasters could draw some government scrutiny. ‘We are actually quite surprised at how openly (and aggressively) the senior executives are talking about retrans — as we would fear that the government would begin to look at them as a cartel,’ Greenfield wrote.”).

demand higher fees, much like the exclusive sports programming that network executives call their “battering ram.”⁷⁹ Indeed, when the loss of a broadcaster’s local signal means the loss of network sports programming as well—as was the case in the TWC-FOX dispute, where FOX’s early-January broadcasts of the Sugar Bowl, the Cotton Bowl, and the NFL playoffs were at stake—a broadcaster’s power over MVPDs is at its maximum, and the network’s purported “claim” over a slice of that retransmission consent revenue at its zenith.⁸⁰ The networks have boasted about their market power; in the words of one network executive, “When you are sitting across from the table from an MSO and you sa[y], by the way, your local team will not be on the air for your viewers this Sunday, it’s a lot of power for us.”⁸¹ Network interference thus distorts negotiations for retransmission consent, worsens the competitive imbalance between broadcasters and MVPDs, and exacerbates the harms to consumers of higher rates and losses of programming.

A compelling new economic study has shown that the Commission’s current regulatory framework will only invite further disputes between broadcasters and MVPDs, leading to higher basic cable prices and recurring losses of programming for consumers. The study, co-authored by Michael Katz, the Commission’s former Chief Economist, Jonathan Orszag, and Theresa

⁷⁹ See David D. Kirkpatrick, *Murdoch’s First Step: Make the Sports Fan Pay*, N.Y. TIMES, Apr. 14, 2003, at C1 (“Mr. Murdoch has long described sports programming as his ‘battering ram’ to attack pay television industries around the world, using a portfolio of exclusive broadcasts to demand high programming fees . . .”).

⁸⁰ Michael Malone, *Moonves: Give Us Our Retrans Cut*, BROADCASTING & CABLE, Mar. 1, 2010, available at http://www.broadcastingcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php (“CBS Corp. President/CEO Leslie Moonves made an emphatic case for broadcast’s emerging dual-revenue model . . . , saying event programming such as the Super Bowl and March Madness basketball—paired with the network’s winning primetime lineup—merits CBS a significant cut of retransmission consent revenue.”).

⁸¹ *Id.*

Sullivan, confirms that “retransmission fees are large and growing, and a significant percentage of these costs are passed on to consumers.”⁸² The Katz/Orszag/Sullivan Study specifically found that MVPDs paid \$738 million in retransmission fees in 2009, estimating that those fees would climb to \$1.28 billion by 2012 and to over \$1.6 billion by 2015.⁸³ The Katz/Orszag/Sullivan Study also found that the share of MVPD subscribers subject to cash retransmission fees has increased dramatically in the past few years,⁸⁴ and that “because retransmission fees are typically negotiated on a per-subscriber basis, they are a marginal cost and therefore would be at least in part passed through to consumers.”⁸⁵ The Katz/Orszag/Sullivan Study concluded that “over a million households likely forgo the benefits of MVPD services because of the higher subscription fees they face as the result of retransmission consent fees.”⁸⁶

According to the Katz/Orszag/Sullivan Study, “[a]nother way in which the current retransmission consent regime harms consumers is by leading them to lose access to broadcast

⁸² Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, “An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime,” Nov. 12, 2009, at 30. The Katz/Orszag/Sullivan Study was provided to the Commission as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009).

⁸³ *Id.* at 32.

⁸⁴ In 2006, only 18% of MVPD subscribers were subject to cash fees; by 2009, that percentage had jumped to 75%, and by 2011, it was projected to be 95%. *Id.* at 34.

⁸⁵ *Id.* at 36 (citing William Rogerson, “The Social Cost of Retransmission Consent Regulations,” Feb. 28, 2005, at 50-51, Appendix to Comments of Joint Cable Commenters, MB Docket 05-28 (filed Feb. 25, 2005). *See also id.* at 36 n.69 (noting that the Commission found in 2003 that “approximately 60 to 66 percent of increased subscription fees between July 2000 and July 2002 were due to programming cost increases”) (citing *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, MM Docket No. 92-266 (rel. July 8, 2003), at 13).

⁸⁶ *Id.* at 37. *See also id.* at 38 (finding that even “retransmission consent fees at current average levels . . . are estimated to have reduced the number of households enjoying the benefits of MVPD services by between 630,000 and 2.3 million”).

television signals when retransmission consent negotiations break down.”⁸⁷ The Katz/Orszag/Sullivan Study endorsed the analysis in the Commission’s *News Corp. Order*, which explained that even a temporary loss of programming harms consumers.⁸⁸ And, not surprisingly, the mere threat of going dark causes consumer confusion and also substantially increases the chances that the distributor will accede to a broadcaster’s unreasonable price demands.⁸⁹

The current retransmission consent regime offers little recourse for MVPDs that fall into this trap, since the rules do not expressly provide for interim carriage—even if the MVPD continues to negotiate in good faith towards a renewal agreement—and effectively prevent MVPDs from importing distant signals. The Katz/Orszag/Sullivan Study therefore concludes by calling for reform. Because “[c]hanges in the MVPD market in recent years have shifted the balance of power in negotiations towards broadcasters”—resulting in “higher prices” and “the intermittent loss of service”—Katz, Orszag, and Sullivan urged that “[t]he retransmission consent system should be reviewed to determine the consumer benefits of restoring the balance between the parties in retransmission consent negotiations.”⁹⁰

Calls to reform this broken system are widespread and increasingly urgent, and a growing number of independent observers have confirmed that the current retransmission consent regime leaves consumers vulnerable to rising prices and the potential loss of programming. Notably,

⁸⁷ *Id.* at 40.

⁸⁸ *Id.*, quoting *News Corp. Order* ¶ 210 (“[L]oss of access to local broadcast stations signals harm consumers who cannot access desired Fox programming, local news and public affairs programming, and other programming available on the affected stations, even if the loss is temporary.”).

⁸⁹ *Id.* at 40-41 (“Broadcasters can threaten to withhold their signals at selective times in order to maximize their negotiating leverage, which can result in more serious harm to consumers.”).

leading members of Congress have expressed deep frustration with broadcasters' conduct under the current system. In a December 30, 2009 letter addressing the year-end disputes, Senator John Kerry, Chairman of the Senate's Subcommittee on Telecommunications and the Internet, wrote, "Viewers subscribed to cable service expecting to receive FOX programming, and stripping them of access to that programming should not be a negotiation tactic."⁹¹ Senator Kerry expressed particular concern with the fact that broadcasters were holding college bowl games and NFL playoff games hostage by threatening to withhold their signals,⁹² and later stressed that "[w]hen pulling a signal becomes the nuclear option in negotiation, it inflicts collateral damage on consumers who pay their bills and have done nothing wrong."⁹³ Congressman Charles Gonzalez of Texas agreed with Sen. Kerry in a December 31, 2009 letter, writing that when stations go dark as a result of these negotiation tactics, it is "a sign that the retransmission consent process is broken" and a "call for swift action by Congress and the FCC to prevent further harm to consumers."⁹⁴ And in a letter that same day, Congressman Steve Israel

⁹⁰ *Id.* at 41.

⁹¹ Letter from Sen. John Kerry to Rocco Commisso, President and CEO of Mediacom, and David D. Smith, President and CEO of Sinclair (Dec. 30, 2009), attached hereto as Exhibit B.

⁹² Letter from Sen. John Kerry to Chase Carey, President and COO of News Corp., and Glenn Britt, Chairman and CEO of Time Warner Cable (Dec. 22, 2009), attached hereto as Exhibit C. (noting that if "FOX content [is] removed from cable systems Time Warner Cable owns[,] . . . millions of Time Warner Cable customers around the country could lose access to the Sugar Bowl, Cotton Bowl, Fiesta Bowl and Orange Bowl, as well as NFL playoff games").

⁹³ Cecilia Kang, *ABC Goes Dark for New York Cablevision Subscribers*, WASHINGTON POST, Mar. 7, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/07/AR2010030701058.html> (quoting statement of Sen. Kerry).

⁹⁴ Letter from Rep. Charles Gonzalez to Chase Carey, President and COO of News Corp. (Dec. 31, 2009), attached hereto as Exhibit D.

encouraged the implementation of a “30 day cooling off period . . . not only to prevent disruption for consumers, but to allow the parties to reach a mutually acceptable agreement.”⁹⁵

The calls for reform from Congress have been echoed by public interest groups. In a letter to the principals at TWC and FOX on December 31, 2009, Brent Wilkes, Executive Director of the League of United Latin American Citizens, wrote that brinksmanship in retransmission consent negotiations would “force advocacy organizations like the League of United Latin American Citizens to call for more regulation of television companies in order to ensure that consumers are not similarly harmed in the future.”⁹⁶ Michael Calabrese, Director of the Wireless Future Program at the New America Foundation, released a statement urging that “[b]roadcasts should continue during urgent negotiations and arbitration, if necessary,” and that “FOX in particular needs to put the public interest first, since unlike a cable company it receives its most expensive input to production – access to the public airwaves – free of charge.”⁹⁷ Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, and Sally Greenberg, Executive Director of the National Consumers League, both voiced their support for the use of interim carriage to ensure that consumers “continue to receive the programming that they’ve come to rely on.”⁹⁸ And Gigi Sohn, President of Public Knowledge, wrote that “[t]hese

⁹⁵ Letter from Rep. Steve Israel to Chase Carey, President and COO of News Corp., and Glenn Britt, Chairman and CEO of Time Warner Cable (Dec. 31, 2009), attached hereto at Exhibit E.

⁹⁶ Letter from Brent Wilkes to Chase Carey and Glenn Britt, (Dec. 31, 2009), attached hereto as Exhibit F.

⁹⁷ Statement of Michael Calabrese, Director of the Wireless Future Program, New America Foundation (Dec. 31, 2009), attached hereto as Exhibit G.

⁹⁸ Statement of Wade Henderson, President of the Leadership Conference on Civil Rights (Dec. 31, 2009), *available at* <http://www.civilrights.org/press/2009/millions-without-access-news.html>; Statement of Sally Greenberg, Executive Director, National Consumers League (Dec. 31, 2009), *available at* http://www.nclnet.org/news/2009/twc_fox_12312009.htm.

[recent] battles validate what I told the House Subcommittee on Communications, Technology and Internet this past February – Congress and/or the FCC should examine the current retransmission consent process and consider whether the system needs adjustments to ensure that viewers are not disenfranchised.”⁹⁹ Ms. Sohn targeted several aspects in the Commission’s rules for improvement: “Most importantly, policymakers should consider requiring interim carriage of over-the-air stations should a retransmission consent agreement expire while the parties are still negotiating. . . . In addition, policymakers should examine other proposed reforms, including . . . elimination of the prohibition against cable and satellite operators importing ‘distant’ broadcast signals.”¹⁰⁰ In light of its “obligation to consider, on an ongoing basis, whether its rules should be modified in response to changed circumstances,”¹⁰¹ the Commission can no longer afford to ignore these pleas for reform while the public endures ongoing harms linked to flaws in the current system.

III. PROPOSED REFORMS

In response to the mounting consumer harms caused by the breakdown in the retransmission consent process, the Commission should adopt targeted reforms to the regulatory regime governing retransmission consent negotiations. Section 325 of the Act requires “that the rates for the basic service tier [be] reasonable,” and Congress expressly recognized “the impact that the grant of retransmission consent by television stations may have on [such] rates.”¹⁰² Moreover, the Commission has a direct mandate under Section 309(a) to ensure that broadcast

⁹⁹ Statement of Gigi Sohn, President, Public Knowledge (Dec. 31, 2009), *available at* <http://www.publicknowledge.org/node/2830>.

¹⁰⁰ *Id.*

¹⁰¹ *2010 Program Access Order* ¶ 11 n.23.

¹⁰² 47 U.S.C. § 325(b)(3)(A).

licensees operate in a manner consistent with “the public interest, convenience, and necessity.”¹⁰³ The Commission thus has the authority and the obligation to adopt a framework that addresses the mounting consumer harms caused by excessive retransmission consent fees and pervasive brinksmanship. The proposed reforms set forth below aim to tackle the core problems of escalating retransmission consent rates and brinksmanship head-on by establishing a new dispute resolution mechanism and providing for interim carriage so long as an MVPD continues to negotiate in good faith towards renewal or while such dispute resolution proceedings are underway. The Commission has already found success adopting similar measures on a smaller scale in its *News Corp. Order*,¹⁰⁴ and the time has come to roll out those reforms in the wider marketplace to curb broadcaster misconduct under the current system.

A. Protecting Consumers Requires a New Dispute Resolution Framework to Carry Out the Mandate of Section 325.

Section 325(b)(3)(A) expressly requires the Commission to adopt rules “to govern the exercise by television broadcast stations of the right to grant retransmission consent,” and also expressly provides that the Commission must ensure that those rules do not undermine its obligation to “ensure that rates for the basic service tier are reasonable.”¹⁰⁵ When the Commission first implemented the 1992 Act, it declined to adopt specific rules addressing retransmission consent rates under Section 325(b)(3)(A), finding instead that its implementation of rate regulation under Section 623 was sufficient.¹⁰⁶ However, the Commission acknowledged

¹⁰³ *Id.* § 309(a).

¹⁰⁴ *See News Corp. Order* ¶ 222 (providing for compulsory arbitration and interim carriage while arbitration is ongoing).

¹⁰⁵ 47 U.S.C. § 325(b)(3)(A).

¹⁰⁶ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶¶ 176-78 (1993); *Implementation of the Cable Television Consumer Protection and Competition*

its ongoing duty to “closely monitor” the impact of retransmission consent on rates and to “reexamine” its treatment of retransmission consent fees “if it appears that additional measures are needed” to protect against an “unwarranted impact on basic tier rates.”¹⁰⁷ As demonstrated herein, the evidence that “additional measures” are needed to protect consumers is undeniable. Most distressingly, the Commission’s rules in their current form do not provide a mechanism for preventing rising retransmission consent prices from adversely affecting the basic rates paid by consumers. Accordingly, when an MVPD is faced with the prospect of either having to acquiesce to broadcasters’ ever-increasing compensation demands or risking service disruptions to subscribers, it has no reliable means of obtaining the relief that Congress intended. As a result, the existing uncertainty regarding the available tools for resolving disputes has made MVPDs far more likely to capitulate in their negotiations for retransmission consent, driving up rates for consumers in the process.

Therefore, the Commission should amend its rules to spell out how Section 325’s requirement to ensure that broadcasters’ exercise of retransmission consent does not interfere with “reasonable” rates for the basic tier will be implemented with respect to retransmission consent. Among other options, the Commission should consider amending its rules to create one or more dispute resolution mechanisms to protect consumers from unreasonable rates, such as compulsory arbitration, an expert tribunal, or similar mechanisms. To trigger such a dispute resolution proceeding, the MVPD would need only show that negotiations had broken down and that the parties could not agree on price or other terms and conditions of carriage; an affirmative

Act of 1992; Rate Regulation, 8 FCC Rcd 5631 ¶¶ 245-48 (1993) (“*Rate Regulation Order*”).

¹⁰⁷ *Rate Regulation Order* ¶ 247.

showing of “bad faith” on the part of the broadcaster should not be necessary.¹⁰⁸ The Commission should also promulgate streamlined procedures for smaller MVPDs that lack the resources to support an arbitration or similar proceeding.

The Commission plainly has authority to establish procedural mechanisms to address the consumer harms of retransmission consent disputes. As mentioned above, Congress empowered the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions” of Section 325, including establishing dispute resolution procedures.¹⁰⁹ The Commission’s statutory power to provide for a dispute resolution mechanism, including arbitration, was confirmed in a letter to the Commission from the Chair and Vice Chair of the Senate Commerce Committee, which originally reported the 1992 Cable Act to the full Senate. The letter cited colloquy from the Senate floor debate indicating that the Commission could establish procedures “to resolve disputes between cable operators and broadcasters, including the use of binding arbitration . . .”¹¹⁰ And, of course, the Commission has required such arbitration in the past. In order to address concerns about the potential abuse of market power by News Corp. following its acquisition of DIRECTV, for example, the Commission required that retransmission consent disputes involving FOX stations be submitted to binding arbitration to determine an appropriate

¹⁰⁸ As recent disputes have shown, it has been unworkable for the Commission to insist on a showing of “bad faith” to trigger any relief. For instance, Mediacom’s recent retransmission consent complaint contained a litany of allegations detailing Sinclair’s bad faith negotiating tactics, *see* Mediacom Complaint ¶¶ 33-61, but the Commission did not act at all, either to set rates or to grant interim carriage, in all likelihood because of the amorphous nature of the existing standards.

¹⁰⁹ 47 U.S.C. § 303(r).

¹¹⁰ Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007) (citing 138 Cong. Rec. S667 (Jan. 30, 1992)), attached as Exhibit A to Mediacom Complaint, *supra* note 65.

price for the programming carriage rights at issue.¹¹¹ The Commission should now establish a dispute resolution mechanism or mechanisms that are available in the event of any retransmission consent dispute. Such dispute resolution processes should be governed by a standard that reflects the public interest obligations imposed on broadcasters because of the government preferences they receive and the public's reliance on broadcast television, as well as the obligations under Section 325.

The effectiveness of any such reform inevitably will turn on whether broadcasters can insist on the mandatory tying of retransmission consent with the sale of other programming services, including web-based content. Each of the "big four" networks owns or is affiliated with a cadre of cable channels,¹¹² and they typically require MVPDs to purchase those channels in a package that includes retransmission consent not only for the network's owned-and-operated broadcast stations, but increasingly for independent affiliates whose negotiations the network has commandeered.¹¹³ Mandatory tying practices, if allowed to continue, could enable programming providers to circumvent these reform measures and offset any decrease in the price of broadcast programming by increasing the prices of non-broadcast (including web-based) programming services that must be purchased jointly. Therefore, as a component of any dispute resolution mechanism, the Commission should adopt rules to prevent broadcasters from insisting on the

¹¹¹ *News Corp. Order* ¶ 222 (providing for interim carriage as well).

¹¹² *See* CBS Corp., Form 10-K (filed Feb. 25, 2009), at 2-5 (detailing ownership of CBS assets and various cable channels); News Corp., Form 10-K (filed Aug. 12, 2009), at 8, 10-13 (detailing ownership of FOX assets and various cable channels); Walt Disney Co., Form 10-K (filed Dec. 2, 2009), at 1-3 (detailing ownership of ABC assets and various cable channels); General Electric Co., Form 10-K (filed Feb. 18, 2009), at 7-8 (detailing ownership of NBC assets and various cable channels).

¹¹³ *See* TWC Comments at 2 (explaining that FOX recently "hijack[ed] the retransmission consent process by threatening to exercise veto power over any station's negotiation of a retransmission deal that does not extract a satisfactory kickback for the network").

tying of a broadcast station with other content. Specifically, the Commission should amend Section 76.65 of the rules to clarify that it is a *per se* violation of a broadcaster's "good faith" negotiating duties to insist on tying retransmission consent to negotiations for carriage of other programming services.¹¹⁴ The Commission should make clear that any mechanism for resolving retransmission consent disputes will involve only stand-alone agreements for the broadcast signal.¹¹⁵ Broadcasters must no longer be permitted to exploit their many government-granted preferences that preclude normal, market-based negotiations to force MVPDs to carry non-local cable programming.

B. The Commission Should Provide for Mandatory Interim Carriage While an MVPD Negotiates in Good Faith or While a Retransmission Consent Dispute is Pending.

Fixing this broken system will also require the adoption of certain procedural reforms designed to minimize the risk that consumers lose access to programming as the result of a retransmission consent dispute. Most importantly, the Commission should establish a formal process to ensure interim carriage.

Under the current regime, once a retransmission consent agreement between an MVPD and a broadcaster expires, the broadcaster can immediately pull its signal from the MVPD and "go dark." In the early 1990s, when cable was nearly the sole multichannel distribution method for a station's programming, "going dark" would have led to mutually assured destruction for MVPDs and broadcasters, given the "must have" nature of network programming and the dearth

¹¹⁴ In crafting a rule to curb abuses of tying, the Commission should take care to preserve the ability of broadcasters and MVPDs to enter into efficient arrangements that include multiple networks or services if they so choose, as long as the MVPD freely consents to the arrangement and it does not undermine the Commission's oversight of retransmission consent fees.

of alternate distribution channels. But now that broadcasters know they can achieve distribution through other means—*e.g.*, DBS providers, LECs, the Internet—they can afford to deny retransmission consent to an MVPD for extended periods of time. This dynamic gives broadcasters the incentive and ability to engage in brinksmanship by holding up the MVPD for ever-increasing retransmission consent fees. And these tactics increase the likelihood that a dispute will result in a loss of programming for the MVPD’s subscribers. This conduct harms consumers by driving up rates and imposing switching costs, harms advertisers by potentially decreasing the number of “eyeballs” available, and harms competition among MVPDs by undermining attempts to compete more effectively on price.

To combat these threats, the Commission should amend its rules to provide for automatic interim carriage in two situations.

First, as suggested recently by Senator Kerry in his letter to Chairman Genachowski concerning the Disney-Cablevision negotiations, the Commission should provide for interim carriage (on the terms of the expiring arrangement) so long as the MVPD continues to negotiate in good faith towards a renewal arrangement.¹¹⁶ This approach would protect consumers and ensure carriage on existing terms unless the Commission found that the MVPD was engaging in bad faith, at which point the right to interim carriage would cease.

Second, the Commission should provide for interim carriage during the period while a dispute resolution proceeding is pending. As with the dispute resolution mechanism, interim carriage would be available upon a showing that negotiations had broken down and that the parties could not agree on price, and would not require an affirmative showing of “bad faith” by

¹¹⁵ The Commission established just such a stand-alone requirement with respect to arbitration of retransmission consent disputes involving FOX broadcast stations owned by News Corporation. *See News Corp. Order* ¶ 222.

the broadcaster. The petitioning parties propose that interim carriage be granted for the duration of the dispute resolution proceedings described above.

Interim carriage in either of these circumstances would serve the essential function of maintaining the *status quo* during the dispute resolution proceedings proposed above. The benefits of such an approach are clear. Interim carriage eliminates brinksmanship as a negotiating tool, thereby reducing the risk of programming loss for consumers and ensuring that negotiations produce reasonable and non-coercive rates for retransmission consent. Interim carriage also prevents broadcasters from undermining the government's interest in localism by exploiting their government-granted preferences while withholding their signal from a substantial portion of the viewing public. As Senator Kerry recently observed, policymakers must reconsider broadcasters' ability to "pull programming from consumers" given the benefits they receive from "free access to our airwaves" and their carriage of must-have programming.¹¹⁷

During the interim carriage period, an MVPD would be required to continue paying the broadcaster the most recent rate for retransmission consent. Such an interim carriage system would be akin to well-established "cooling-off" periods that apply in similar contexts.¹¹⁸ To facilitate this process, the Commission could also require a broadcaster to send the MVPD a written demand at the expiration of the retransmission consent agreement, informing the MVPD of its intention to pull its signal.

The Commission has ample authority to adopt rules that provide for interim carriage while good faith negotiations are ongoing and while dispute resolution proceedings are

¹¹⁶ See March 3, 2010 Letter from Sen. Kerry.

¹¹⁷ *Id.* at 2.

underway. Section 325 of the Communications Act provides the Commission with direct statutory authority to adopt the necessary regulations “to govern the exercise by television broadcast stations of the right to grant retransmission consent under this subsection and of the right to signal carriage under section 614.”¹¹⁹ When promulgating those regulations, the Commission is required by statute to consider “the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier” and “ensure that the rates for the basic service tier are reasonable.”¹²⁰ Where, as here, the Commission is confronted with threats to pull signals, programming fee hikes, and other practices that have a significant adverse impact on basic cable rates, it is amply justified in exercising its rulemaking authority under Section 325 by providing for interim relief in order to prevent harm to consumers. Moreover, where, as here, the Commission is expressly granted authority over an issue by a substantive provision of the Act, the Commission also may rely on its authority under Section 4(i) of the Act, to “perform any and all acts . . . not inconsistent with this Act, as may be necessary in the execution of its functions,”¹²¹ and Section 303(r) to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions” of Title III of the Act.¹²² Notably, the Commission recently relied on Sections 4(i) and 303(r) in establishing procedures for MVPDs to seek a temporary “standstill” in program access complaint proceedings under Section 628(b) involving

¹¹⁸ The Taft-Hartley Act, one of the central pieces of legislation in labor law, instituted a 60-day “cooling-off” period between the end of a collective bargaining agreement and the beginning of a work stoppage. *See* 29 U.S.C. § 158(d).

¹¹⁹ 47 U.S.C. § 325(b)(3)(A).

¹²⁰ *Id.*

¹²¹ *Id.* § 154(i).

¹²² *Id.* § 303(r).

terrestrially delivered cable programming, noting that the Supreme Court has confirmed the Commission's authority to impose interim injunctive relief.¹²³

The Commission's mandate "to ensure that local signals are available" was confirmed during the congressional debate over the enactment of the retransmission consent right and has subsequently been reconfirmed by congressional leaders.¹²⁴ It would be a small step to specify, as a matter of administrative economy, that the absence of a finding of bad faith by the MVPD and/or the initiation of dispute resolution proceedings would trigger automatic temporary relief to protect consumers, in the form of mandatory interim carriage.¹²⁵ Moreover, the fact that the Commission declined to adopt a similar rule a decade ago, when distribution options remained limited and market conditions were much different, does not preclude the Commission from carrying out its mandate now to correct this flaw in the system.¹²⁶ As Senator Kerry recently

¹²³ 2010 Program Access Order ¶ 72 & n.265 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968)). See also *id.* ¶ 75 (concluding, from a policy perspective, that "the benefits of establishing a temporary stay process outweigh [the] purported harms" of chilling incentives to resolve disputes).

¹²⁴ See, e.g., 138 Cong. Rec. S643 (Sen. Inouye) (ensuring, as author of the retransmission consent provisions, that the "universal availability of local broadcast signals" was a major goal of the legislation, and that "the FCC has authority under the Communications Act" to "ensure that local signals are available to all the cable customers"); *id.* at S14615-16 (Sept. 22, 1992) ("[I]f a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC.") (Sen. Lautenberg). See also Letter from Senators Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission, (January 30, 2007) ("At a minimum, Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution].").

¹²⁵ In fact, the Commission has already instituted a successful automatic interim carriage regime as a condition to the News Corp./DIRECTV merger. See, e.g., *News Corp. Order* ¶ 222 (providing for automatic and mandatory interim carriage during arbitration to maintain the *status quo* pending resolution of the proceeding).

¹²⁶ The Commission expressly noted in its 2000 order that interim carriage provisions were unnecessary at the time "[b]ecause the market has functioned adequately since the advent

wrote to Chairman Genachowski, the Commission must act to end the “game of chicken” that will play out over and over absent a change in the retransmission consent rules.¹²⁷

IV. CONCLUSION

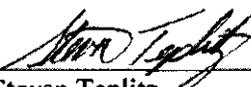
For the foregoing reasons, the petitioning parties respectfully petition the Commission to amend and supplement the rules governing retransmission consent in the manner set forth above. In their current form, the Commission’s rules fail to account for the fundamental “changed circumstances”¹²⁸ in the market for video programming distribution since the early 1990s. MVPDs now face competition in markets across the country. Broadcasters with an increased number of distribution options are engaging in brinksmanship, thus driving up programming costs for MVPDs and harming consumers with higher cable rates and the constant threat of blackouts. And broadcasters are actively engaging in a host of practices to use their many government-granted preferences as a weapon that prevents meaningful negotiation at the expense of consumers. The Commission has a statutory duty to protect consumers against these kinds of harms, and adopting the proposed reforms would be a decisive step in the right direction.

of retransmission consent in the early 1990’s, we expect such instances to be the exception, rather than the norm.” *Good Faith Order* ¶ 61. By contrast, the current market, distorted by abusive negotiation tactics by broadcasters, is certainly not functioning “adequately.”

¹²⁷ March 3, 2010 Letter from Sen. Kerry at 2.

¹²⁸ *See 2010 Program Access Order* ¶ 11 n.23 (confirming the Commission’s “obligation to consider, on an ongoing basis, whether its rules should be modified in response to changed circumstances.”).

Respectfully submitted,

By:  _____

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March 9, 2010

EXHIBIT A

United States Senate

WASHINGTON, D.C. 20510

March 3, 2010

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Genachowski:

As you know, millions of Cablevision customers in New York, New Jersey, and Connecticut could miss the Oscars this year due to a retransmission dispute with Disney. I recognize that these are private negotiations, but its resolution is something that matters to the consumers who take hard earned money out of their wallets each month to pay their cable bills and have a right to expect not to be collateral damage in wars between executives. I ask you to urge the parties to stay at the negotiating table and continue transmitting ABC programming to Cablevision consumers. I simply do not believe consumers should lose access to a signal over their cable service as long as both parties are negotiating in good faith.

I take the rules that govern these negotiations seriously because they have repercussions for what Americans can view and how much they pay for it. I fear that this dispute is the most recent evidence that the retransmission consent regime has become outdated in the 18 years since it was crafted. Regardless of how this dispute turns out, it will not be the last time that we see a public fight between cable companies and broadcasters where the consumer is likely to be the loser and we need to fix the system.

Today, a broadcaster can pull its signal from cable companies serving millions of people if it does not get paid what it wants for that signal. I don't believe they should be able to do that unless the cable company is negotiating in bad faith, the broadcaster has submitted a claim of bad faith negotiation to the Federal Communications Commission (FCC) and the FCC has determined that claim to be true. At that point, then yes, the broadcaster should be free to pull their signal. But as long as there are good faith negotiations, all parties should stay at the table and signals should continue to be transmitted to consumers. That is not the law today, however. Currently, the broadcaster can pull his signal at his or her discretion.

In 1992, when the law was written, satellite and telephone delivery of television service were almost nonexistent. If you lived in New York, for example, you did not have the choice of FIOS or two satellite companies. You do today. Back then, cable's near monopoly status gave it immense power over broadcasters. As a result, the negotiating parameters were rightly set up to favor broadcasters.

A lot has changed since then. But the rules are still the same. As a result, Disney can, as it has this week, threaten Cablevision with the loss of ABC right before the Oscars as a tool to

The Honorable Julius Genachowski

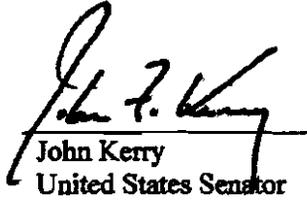
March 3, 2010

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negotiate higher cash payment for the programming. FOX did the same thing with Time Warner Cable at the beginning of the year with College Bowls programming. Disney knows that if they pull the signal, viewers will blame the cable company and switch to FIOS, RCN, DISH, or DIRECT TV after missing the Oscars. The result of these flawed incentives is consumer uncertainty, higher prices, and broadcasters using special events as leverage in negotiations.

The question for policymakers today is under what conditions the broadcaster should be able to pull programming from consumers, especially considering these important facts: first, broadcasters already benefit from free access to our airwaves; second, broadcasters carry live programming that can't be substituted like the Super Bowl, the Oscars, and the Olympics; and third, we are not living in 1992. I have suggested an answer here and I am open to alternatives. But this game of chicken being played again and again between cable companies and broadcasters with consumers in the crosshairs must come to an end.

Sincerely,



John Kerry
United States Senator

EXHIBIT B

December 30, 2009

Mr. Rocco Commisso
CEO and Chairman
Mediacom Communications Corporation
100 Crystal Run Road
Middletown, NY 10941

Mr. David D. Smith
President and CEO
Sinclair Broadcast Group, Inc.
10706 Beaver Dam Road
Cockeysville, MD 21030

Dear Sirs:

You may be aware that I recently sent a letter to the News Corporation and Time-Warner relative to their private negotiations over the terms of carriage for FOX-owned broadcast and cable channels throughout the country. It is my understanding that Mediacom and Sinclair are engaged in a similar private negotiation.

Like in the Time-Warner/FOX situation, I hope that the parties reach a mutually acceptable resolution before the existing agreement expires on December 31, 2009 - just over 24 hours from now. While I realize that both parties are engaged in negotiations at this time, I fear that the looming deadline and the potential lack of progress might be harmful to consumers. If an agreement is not reached, I suggest that Sinclair allow Mediacom the ability to continue transmitting into the New Year either under the current terms and conditions, or under terms and conditions that will retroactively be applied once an agreement is reached. Just today, Time-Warner agreed to do so, and that decision will likely have a significant impact for television consumers as we begin the New Year. Unfortunately, FOX is rejecting arbitration as possible solution. My primary concern is not process. It is consumer protection. Viewers subscribed to cable service expecting to receive FOX programming and stripping them of access to that programming should not be a negotiation tactic. If both parties can agree to retroactively apply a finally negotiated or arbitrated fee to the date of the existing contract termination, there is no good reason for terminating carriage other than to hold consumers hostage in the negotiation process.

As I understand it, at midnight on December 31, 2009, local Mediacom stations will no longer be carried by Sinclair throughout the country. That means no college bowl games, no NFL regular-season and playoff games, and a loss of educational program and favorite TV shows everywhere.

As the Chairman of the Senate Commerce Subcommittee on Communication, Technology and the Internet, I have sought to place the interests of consumers at the center of our work. If both parties conclude that the best alternative to a negotiated agreement is to have screens go dark for consumers, then they will have neglected the core interests of the millions of households that rely on Sinclair broadcast signals in affected markets. As leaders of major companies that are licensed with the FCC and obligated to serve the public interest, I hope and expect that you will resolve this matter consistent with those obligations.

Sincerely,

John F. Kerry

EXHIBIT C