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March 9, 2010

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BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Re: Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent

Dear Ms. Dortch:

On behalf of Time Warner Cable Inc. and its co-petitioners, I hereby submit this Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent. We include an original and nine copies for filing and distribution to the Chairman and Commissioners.

If you have any questions, please call me at 202-637-1095.

Sincerely,

Matthew A. Brill
Counsel for Time Warner Cable Inc.

Enclosures

0+9
MB-Policy 10-105

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking to Amend	)	MB Docket No.
the Commission's Rules Governing	)	
Retransmission Consent	)	

FILED/ACCEPTED

MAR - 9 2010

Federal Communications Commission
Office of the Secretary

PETITION FOR RULEMAKING

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March 9, 2010

MB-Policy 10-105

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PETITION FOR RULEMAKING

I. INTRODUCTION AND SUMMARY

The Commission's regulations governing retransmission consent[1]—which were created nearly 20 years ago—are outdated and causing consumer harm. As broadcasters now demand significant cash for carriage of their signals, consumers are held hostage as MVPDs must choose between a rock and a hard place: pay spiraling carriage fees and raise consumer rates, or be forced by broadcasters to drop local signals. The recurring threats of blackouts, high-stakes public "showdown" negotiations, and recent economic analyses have all confirmed what programming distributors have known for years: the retransmission consent regime is broken. In light of this consumer harm, and given substantial changes in the media landscape since the retransmission consent regime was first created, it is time to take a new look at the rules that have given rise to this problem. ABC's recent withdrawal of its programming from three million Cablevision subscribers in New York—which briefly interfered with the broadcast of the Academy Awards and caused significant frustration and confusion for consumers—is only the

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1 47 C.F.R. §§ 76.64-65. The underlying statutory provisions were added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Act").

latest illustration of the urgent need for reform.[2] As Senator Kerry recently wrote to Chairman Genachowski, "the retransmission consent regime has become outdated in the 18 years since it was crafted," and this regime is now causing "consumer uncertainty, higher prices, and broadcasters using special events as leverage in negotiations."[3] Accordingly, pursuant to 47 C.F.R. § 1.401, the petitioning parties respectfully petition the Commission to amend and supplement its rules governing retransmission consent as set forth herein.[4]

The 1992 Act, which established the current retransmission consent regime, permits broadcast stations to seek compensation from multichannel video programming distributors ("MVPDs") in exchange for their "consent" to retransmit their signals to the MVPD's subscribers.[5] Congress acted based on its concern that cable operators were functioning as monopolies and in turn threatened to undercut the public interest benefits associated with over-

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2 *See* 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/ ("'It is now painfully clear to millions of New York area households that Disney C.E.O. Bob Iger will hold his own ABC viewers hostage in order to extract $40 million in new fees from Cablevision.'") (quoting Charles Schueler, Cablevision's executive vice president of communications).

3 Letter from Sen. John Kerry to Julius Genachowski, Chairman, Federal Communications Commission, at 1-2 (Mar. 3, 2010) ("March 3, 2010 Letter from Sen. Kerry"), attached hereto as Exhibit A.

4 Petitioners represent a broad cross-section of video distributors and stakeholders who share a consensus view that retransmission consent reform is urgently needed. The petitioning parties may differ on the details of implementing this reform, and we anticipate offering the Commission a variety of perspectives in response to a public notice and/or notice of proposed rulemaking. Nonetheless, all petitioners stand in agreement that the current retransmission consent regime has significant problems that the Commission must address expeditiously.

5 *See* 47 U.S.C. § 325(b).

the-air broadcasting.[6] The legislative history of the 1992 Act links the potential "demise of local television" to "the growth of the cable industry, and the fact that no effective competition to local cable systems ha[d] developed in the interim."[7] In particular, Congress was concerned that broadcasters, as stewards of the public airwaves, might lose the ability to discharge their public interest obligation to provide a "local voice" for their communities.

The must carry/retransmission consent regime thus sought to correct for the relatively minimal competition faced by cable operators in 1992 by granting powerful protections and new rights to broadcast stations. In addition to establishing compulsory carriage rights (*i.e.* "must carry"), Congress went one step further with its new retransmission consent construct, allowing broadcast stations to bargain for carriage while removing cable operators' historical ability to carry broadcast signals without affirmative consent. Importantly, this regime is a wholly artificial construct that has little in common with an actual marketplace. While Congress stacked the deck in broadcasters' favor in order to counterbalance the perceived threat posed by the cable industry, it did so to achieve the public interest goals of localism and a diversity of viewpoints—not to generate windfall profits for broadcast licensees.[8] And it empowered the Commission to

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6 *See* S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 ("Senate Report") (stating that retransmission consent was initially designed to "advance[] the public interest" served by broadcasters by correcting for "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

7 *Id.* at 1187. *See also id.* at 1141 ("A cable system serving a local community, with rare exceptions, enjoys a monopoly.").

8 *Id.* at 1183. *Cf.* Mike Farrell, *Carey: Retrans Windfall Coming*, MULTICHANNEL NEWS, Feb. 8, 2010, *available at* http://www.multichannel.com/article/ 448037-Carey_Retrans_Windfall_Coming.php ("One month after a high-profile retransmission-consent battle with Time Warner Cable, News Corp. chief operating officer Chase Carey said the media giant is on the cusp of a windfall in retransmission-consent revenue.").

take action to ensure that this new retransmission consent process would not drive up basic rates for cable subscribers.[9]

Congress also expected that broadcasters' demands for compensation, if any, would be modest, because "broadcasters also benefit from being carried on cable systems" and therefore "many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system."[10] In recognition of these reciprocal benefits of carriage, broadcasters and MVPDs have, until recently, negotiated for in-kind compensation that reflected a mutual exchange of value.[11]

Nevertheless, emerging changes to the video programming landscape in recent years, exacerbated by Commission rules that limit the ability of MVPDs to carry network and syndicated programming from other sources, have invited abuses of this artificially created right. In 1992, the introduction of retransmission consent had no effect on C-band direct-to-home satellite systems because they had neither the capacity nor the technology necessary to retransmit local broadcast stations.[12] Today, by contrast, broadcasters enjoy distribution options beyond the cable incumbent in nearly every designated market area ("DMA"). Two national direct broadcast satellite ("DBS") providers, DIRECTV and DISH Network, are the second and third

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9 47 U.S.C. § 325(b)(3)(A).

10 Senate Report at 1168.

11 *See General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 56 (2004) ("*News Corp. Order*") ("[H]istorically, most broadcasters have opted for . . . in-kind compensation from cable operators in exchange for retransmission consent.").

12 The 1992 Act gave local broadcast stations the right to negotiate retransmission consent with all MVPDs. The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (1999), gave them the further right to elect mandatory carriage in any market in which a satellite carrier elected to retransmit local broadcast signals.

largest distributors of video programming nationwide. Local exchange carriers ("LECs") such as Verizon (FiOS) and AT&T (U-verse) are new entrants in the video marketplace and are adding hundreds of thousands of video customers each quarter. And the Internet is developing into yet another viable platform for broadcasters to distribute their content to consumers. As recent studies indicate, and as a number of recent high-profile disputes confirm, this new MVPD landscape has greatly increased broadcasters' incentive and ability to hold up MVPDs for ever-higher retransmission consent fees. Now, every time a retransmission consent agreement comes up for renewal, the broadcast networks and their affiliated stations present MVPDs and their subscribers with two options: either submit to significantly higher rates or lose access to popular network programming. Under either scenario, consumers lose. And each round of negotiations establishes a higher compensation benchmark for the next round.

The Commission's rules governing retransmission consent, which have remained largely unchanged since the Commission first promulgated them pursuant to Section 325 in the wake of the 1992 Act, are ill-suited to curb the negotiating tactics employed by broadcasters that place consumers in a no-win position. In light of the recent sea change in negotiation dynamics between broadcasters and MVPDs, petitioners propose that the Commission address skyrocketing consumer costs by establishing a new framework for resolving retransmission consent disputes—such as compulsory arbitration, an expert tribunal, or a similar mechanism—and by providing for interim carriage as long as an MVPD continues to negotiate in good faith towards a retransmission consent agreement or while such dispute resolution proceedings are underway. These reforms would help ensure that programming costs to consumers remain reasonable, while eliminating a broadcaster's incentive and ability to deprive consumers of network programming as a negotiation tactic.

The Commission has unambiguously confirmed its "obligation to consider, on an ongoing basis, whether its rules should be modified in response to changed circumstances."[13] The Commission clearly should do so in this case, and the petitioners urge the Commission to adopt these measures swiftly so that the threats and rate hikes that marred the most recent retransmission consent cycle do not repeat themselves in future years.

II. BACKGROUND

The carriage of broadcast television signals by MVPDs has always been a creature of federal law and regulation. Congress has consistently regulated such carriage with a goal of addressing broader policy issues regarding a perceived special role of broadcast television in public life, and has sought to use regulation of such carriage to further those broader policy goals and objectives.[14] Most significantly, as discussed below, the must carry/retransmission consent regime of the 1992 Act and the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") and the regulation that followed strongly tipped the scales in favor of broadcasters in dealing with MVPDs, chiefly by granting broadcasters new rights to seek compensation, to prevent MVPDs from carrying their signals to consumers, and to limit the ability of MVPDs to obtain from other sources network and other programming when unable to reach a carriage agreement

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13 *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 11 n.23 (2010) ("*2010 Program Access Order*").

14 *See, e.g.*, 1992 Act, § 2(b) (codified at 47 U.S.C. § 521 note) (declaring the "policy" of 1992 Act to "promote the availability to the public of a diversity of views and information" and to "ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers").

with the local broadcaster.[15] As a result, negotiations for carriage between broadcasters and MVPDs have never taken place in a "free market."[16]

In creating the retransmission consent regime, Congress believed it was creating a "marketplace for the disposition of the rights to retransmit broadcast signals."[17] But, in reality, this artificial construct bears little resemblance to a genuine "marketplace" governed by ordinary competitive forces. Rather, by creating this new construct and then conferring a host of advantages on broadcasters—including the 1992 Act's new rights to bargain for compensation, withhold broadcast signals, and secure guaranteed placement on the basic cable tier in rate-regulated systems, together with established protections including network non-duplication and syndicated exclusivity—Congress *insulated* broadcasters from market forces. While Congress set out to enable broadcasters to overcome the perceived disadvantages they faced in 1992, the substantial changes in video distribution since that time are now allowing broadcasters to exploit their bargaining leverage to the detriment of consumers. As described in the following sections, whatever merit there may have been in 1992 to giving broadcasters a leg up in obtaining carriage on cable systems, today's increasingly competitive conditions, along with broadcasters'

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15 *See* 47 C.F.R. § 76.92(a) ("Upon receiving notification pursuant to §76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . ."); *id.* § 76.101 ("Upon receiving notification pursuant to § 76.105, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . .").

16 *See* 138 Cong. Rec. S14250 (Sept. 21, 1992) (statement of Sen. Symms) (criticizing the retransmission consent regime and arguing instead that "free market competition is the way to go").

17 Senate Report at 1169.

manipulation of the current regime, render the existing rules harmful to the public interest and at odds with the Commission's statutory obligations.

A. Early History of Broadcast Carriage Agreements

The Supreme Court first considered the issue of payment for cable carriage of broadcast stations in *Fortnightly Corp. v. United Artists Television, Inc.*,[18] in which a programmer sued the operator of two community antenna television ("CATV") systems for transmitting motion pictures to subscribers without a copyright license. Finding that "CATV systems simply carry, without editing, whatever programs they receive," the Court concluded that, for copyright purposes, "CATV operators, like viewers and unlike broadcasters, do not *perform* the programs that they receive and carry."[19] Accordingly, the Court held that a CATV operator had no obligation to obtain consent from the local broadcaster to carry its signal, or to pay the copyright holder for a license to retransmit the programming.[20] The Supreme Court later extended the holding of *Fortnightly* to cable retransmissions of "distant signals."[21]

The principle of effectively free carriage of local broadcast stations endured after the enactment of the 1976 Copyright Act, which established a compulsory licensing regime for cable operators retransmitting broadcast signals. Under the compulsory copyright provisions of 17 U.S.C. § 111, cable operators are "expressly permitted to retransmit programs without any need to obtain the consent of, or negotiate license fees directly with, copyright owners."[22] In exchange, cable operators pay a royalty, set by statute and based primarily "on the number of

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18 392 U.S. 390 (1968).

19 *Id.* at 400-01 (emphasis added).

20 *Id.* at 400.

21 *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394, 410-13 (1974).

distant signals the system carries and its gross revenues."[23] By declining to include *local* signals in the royalty calculation,[24] Congress recognized the mutual benefits of carriage agreements for MVPDs and broadcasters. Since its inception, the retransmission consent regime has operated in tension with the 1976 Copyright Act's more balanced compulsory copyright licensing regime, by allowing a broadcast station to withhold its "consent" and seek compensation for carriage despite the absence of any basis in copyright law for doing so.

B. The State of Video Programming and Distribution in 1992

Congress and the Commission created the current retransmission consent regime under substantially different conditions than exist today. In 1992, the local cable provider was often the only multichannel distribution option available to local broadcast stations wishing to reach MVPD customers in a given DMA. Indeed, a principal factor motivating the passage of the 1992 Act was Congress's belief at the time that "[a] cable system serving a local community, with rare exceptions, enjoys a monopoly."[25] Cable's dominance was most pronounced "[i]n areas that do not receive clear television signals" over the air, since "the ability to provide clear television signals would, by itself, give the local cable system some degree of market power."[26] Moreover, Congress found that, "[e]ven where consumers get good over-the-air television reception," cable remained the dominant means of delivering programming, since "the ability to provide a

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22 *Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1146 (2d Cir. 1981) (emphasis added) (explaining the effect of the compulsory licensing provisions at 17 U.S.C. § 111).

23 *Id.* (emphasis added).

24 H. R. REP. NO. 94-1476, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5711 (explaining that the statutory royalty "is not a payment for the retransmission of purely 'local' signals, as is evident from the provision that it applies to and is deductible from the fee payable for any 'distant signal equivalents'").

25 Senate Report at 1141.

26 *Id.* at 1143.

relatively large number of non-local signals is likely to give the only provider of such services some degree of market power."[27]

Congress also believed in 1992 that satellite operators, telephone companies, and other nascent MVPD platforms were unlikely to grow in the short run into viable competitors with cable for the distribution of network programming. Regarding DBS, Congress explained that "it is far from clear that satellite service can provide the necessary competition to cable,"[28] and that it therefore could not "rely on satellite broadcasts . . . to protect consumers and others from cable's market power."[29] Regarding LECs, Congress found that they too presented no near-term threat to cable's dominance: "Currently, the telephone company networks are incapable of carrying video signals to the home . . . [and] it will be some time before it is economic to replace existing copper wire with fiber."[30] In sum, Congress believed that cable was the only real distribution option in 1992 and that there were no serious competitors on the horizon.

This perceived market power imbalance concerned Congress because it viewed "cable television as potentially harmful to local broadcast television service and the ability of these stations to serve the public interest."[31] Broadcasters had long been the beneficiaries of government largesse in the form of exclusive access to beachfront spectrum at no charge, with the understanding that they would use those public airwaves to contribute to localism and

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27 *Id. See also id.* at 1143-44 ("[Cable's] market power may be derived from the local cable system's ability to provide the type of programming currently offered on the basic service tier as well as its ability to provide pay cable services, for there does not appear to be a close substitute for either type of cable services.").

28 *Id.* at 1149.

29 *Id.* at 1150.

30 *Id.* at 1150-51.

31 *Id.* at 1171.

diversity in their communities.[32] Congress saw the rise of cable as a threat to these core values, reasoning that where a cable system with market power "did not carry a local station, . . . [that] station would face decreased revenues and profits, which would reduce its ability to serve the public interest."[33] This interest in advancing localism (and not in generating windfalls for broadcasters) animated Congress' decision to create a retransmission consent regime that would ultimately confer enormous negotiating leverage on broadcast networks and affiliates.

Specifically, the 1992 Act amended Section 325 of the Communications Act to enable each local commercial television broadcast station to make an election every three years for either (a) must carry, guaranteeing mandatory carriage on local cable systems, or (b) retransmission consent, under which cable systems must obtain the station's consent in order to carry it.[34] Congress authorized the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent," and, significantly, it instructed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and "to ensure that the rates for the basic service tier are reasonable."[35]

When the Commission promulgated its current rules governing retransmission consent in 1993 and 1994, little, if anything, had changed since 1992, and cable operators remained the sole multichannel distributors of network programming in nearly every DMA. At the time, the Commission found that the vast majority of DMAs were served by only one cable provider, and

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32 *Id.* at 1183-84.

33 *Id.* at 1172.

34 47 U.S.C. § 325(b)(3)(B).

35 *Id.* § 325(b)(3)(A).

that 96 percent of MVPD subscribers received service from a cable company.[36] The Commission also noted that no LECs had entered the video programming distribution market,[37] and that DBS had attracted less than 1% of MVPD subscribers.[38] The Commission therefore designed its rules on retransmission consent with this early 1990s market dynamic in mind—one in which broadcasters faced extremely limited distribution options and negotiated almost exclusively with cable operators for carriage.

The Commission assumed that retransmission consent posed little threat to consumers in the form of higher rates or service disruptions,[39] and its rules accordingly offered broadcasters both carriage rights and a host of powerful distribution controls, including network non-duplication and syndicated exclusivity. And the Commission's rules continue to provide that same one-sided level of protection to broadcasters today. For example, under the rules on network non-duplication protection, powerful local network affiliates can protect their monopoly position by blocking cable systems from importing another affiliate of the same network, even where that other station has consented to carriage.[40] These rules ensure that affiliates of the same

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36 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, Appendix G, Table 1 (1995) ("*2nd MVPD Competition Report*").

37 *Id.* ¶ 101.

38 *Id.*, Appendix G, Table 1.

39 *See, e.g.*, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues,* Memorandum Opinion and Order, 9 FCC Rcd 6723 ¶ 115 (1994) (concluding that there is "no evidence" that the interplay of network non-duplication rules and the exercise of retransmission consent would result in a loss of network programming to subscribers).

40 *See* 47 C.F.R. § 76.92(a) ("Upon receiving notification pursuant to §76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . ."); *id.* § 76.93 ("Television broadcast station licensees shall be

network do not compete against one another for the sale of retransmission consent. Moreover, because cable systems cannot import distant signals without imposing significant blackouts on programming as required by the rules, they cannot continue providing subscribers with network programming if the local station decides to withdraw its signal from the cable operator.[41] Likewise, under the Commission's rules guaranteeing syndicated exclusivity, a local station providing syndicated programming may prevent the local cable system from carrying that programming as broadcast by an out-of-market station.[42] Furthermore, the Commission has declined to prohibit networks from imposing other restrictions on the exercise of retransmission consent rights by their affiliates. The Copyright and Communications Acts create a parallel, but separate, regime for satellite. Satellite carriers can import distant network signals only to households that cannot receive a same-network, over-the-air local signal of sufficient intensity.[43] Moreover, satellite carriers are generally not allowed to offer a distant signal to new subscribers in any market in which they provide local broadcast signals.[44] In addition, most broadcast networks do not affiliate with more than one local station per market and the terms of affiliation between the broadcast station and broadcast network may bar the station from granting

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entitled to exercise non-duplication rights pursuant to §76.92 in accordance with the contractual provisions of the network-affiliate agreement.").

41 Notably, even without such restrictions, the royalty formula under the cable compulsory copyright license, which penalizes carriage of distant signals above certain set "quotas," would deter cable operators from indiscriminately importing distant network signals. *See* 17 U.S.C. § 111.

42 *See* 47 C.F.R. § 76.101 ("Upon receiving notification pursuant to §76.105, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . ."); *id.* § 76.103(a) ("Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to §76.101 in accordance with the contractual provisions of their syndicated program license agreements . . .").

43 17 U.S.C. § 119(d)(10).

retransmission consent for out-of-market carriage. A broadcaster can therefore enjoy almost complete exclusivity over its network and syndicated programming in a given DMA by invoking the Commission's rules to prohibit MVPDs from seeking the same programming elsewhere.

The differing experiences of cable, DBS, and telco MVPDs in retransmission consent negotiations are instructive. In the first decade of the retransmission consent regime, broadcast networks negotiating retransmission consent agreements with cable operators on behalf of their owned and operated television stations allowed retransmission of their broadcasts in exchange for carriage of one or more affiliated programming services (such as MSNBC or ESPN Classic). Cable operators were generally able to deflect cash demands by providing valuable in-kind compensation. By contrast, DBS providers and telcos entered the MVPD marketplace after cable operators were already well established, and also faced competition from each other. Because of this competitive dynamic, broadcasters were able to extract cash compensation (often in addition to in-kind carriage for affiliated programming) from these new entrants. As cable operators faced increased competition in the MVPD marketplace, broadcasters have made increasingly aggressive demands of cable operators and have been more and more successful in extracting cash compensation.

By arming broadcasters with must carry and retransmission consent, protections such as network non-duplication and syndicated exclusivity, and further structural advantages like the tier buy-through requirement, Congress gave broadcasters a significant leg-up in their dealings with cable operators (and later, other MVPDs). And because the Commission in implementing the statute was focused on the threats to localism posed by cable, the retransmission consent rules do not provide any means of curbing practices by broadcasters that are now harming

[44] *Id.* § 119(a)(4)(B)-(D); 47 U.S.C. § 339(a)(2)(B)-(D).

consumers. While the later-adopted rules governing "good faith" negotiation standards are intended to prevent extortionate tactics and other bad faith conduct by broadcasters,[45] the rules so far have proven ineffective in constraining demands for increased fees leveraged by broadcaster threats to withdraw programming from millions of customers. Nor do the rules offer procedural vehicles, like interim carriage in the absence of a finding of bad faith by an MVPD, to make this conduct a less attractive option to broadcasters.[46] As discussed below, these gaps in the rules have allowed fee-seeking broadcasters to engage in a costly game of brinksmanship, resulting in concrete and widespread harms to consumers.

C. Video Programming and Distribution Today

The video programming marketplace today is substantially different from the conditions that prevailed when Congress and the Commission established the retransmission consent regime. Because MVPDs now compete with one another in nearly every community nationwide, given the presence of two DBS providers and other emerging providers of video services, broadcasters now wield the Commission's "protections" to demand excessive retransmission consent fees by credibly threatening to "go dark" on one or more local MVPD systems. Such threats are antithetical to the reason Congress established retransmission consent and must carry in the first place: to ensure that local communities retain access to the "diversity of voices" and

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45 *See generally* 47 C.F.R. § 76.65 (setting forth the Commission's "good faith" negotiating standards). These "good faith" rules are currently set to expire on March 29, 2010. *See Implementation of Section 1003(b) of the Department of Defense Appropriations Act, 2010*, Order, at ¶ 2 (Dec. 28, 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-113A1.pdf (extending sunset from January 1 to March 1); Temporary Extension Act of 2010, H.R. 4691, 111th Cong., § 10(b) (2010) (extending sunset from March 1 to March 29).

46 The Commission passed up an opportunity to establish an interim carriage regime a decade ago, back when "the market . . . functioned adequately" and the threat of blackout was "the exception, rather than the norm." *Good Faith Order* ¶ 61. Interim carriage has

local programming that broadcasters have a public interest obligation to provide. Moreover, those increased fees become the benchmark in each subsequent round of negotiations, and the increased costs are passed directly on to consumers. Even if a multichannel video subscriber is willing to forego such popular programming, that may not be an option for cable customers in light of the mandatory nature of the basic cable tier.[47] The Commission's current rules simply fail to give it the tools needed to regulate effectively the unreasonable price demands and hold-up threats that have become prevalent in recent negotiations; not only was the regime built on assumptions of market power in the hands of distributors, rather than programming providers, but it also assumed a strong incentive for a broadcaster to reach a deal with the lone MVPD in its market, without contemplating the inevitable shift in those incentives once multiple MVPDs arrived on the scene.

The Commission has fully appreciated the fact that cable systems have lost significant market share to DBS and other emerging MVPDs in recent years. In its most recent report on competition in the distribution of video programming, the Commission observed that, by 2006, DBS providers DIRECTV and DISH Network had become two of the top three MVPDs, and both distribute national and local programming to customers nationwide.[48] The Commission also found that, as early as 2006, both Verizon and AT&T were an increasingly available option for consumers.[49] The Commission subsequently observed that Verizon FiOS and AT&T U-verse

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now become a necessity in today's dysfunctional environment, given that such threats are so widespread.

47 *See* 47 U.S.C. § 543(b)(7)(A). Non-cable MVPDs are not subject to this tier buy-through provision.

48 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶ 76 (2009) ("*13th MVPD Competition Report*").

49 *Id.* ¶¶ 132-33.

had more than doubled their subscribers in 2008 and were "continu[ing] to expand their service areas."[50] Indeed, the Department of Justice stated that "[t]he most significant development in regard to [multichannel video programming distribution] in the past three years is entry by the principal local telephone companies," further noting that, "[w]here incumbent local exchange carriers ('ILECs') have entered, they have often achieved considerable success."[51]

In addition to the increasing number of MVPD options for distribution, the networks' increased use of "web-based internet video" as a distribution method continues to erode any market power that MVPDs have over broadcasters. The Commission has observed that "[t]raditional broadcast and nonbroadcast networks continue to experiment with alternate programming content options on their own websites" and that the major broadcast networks "sell episodes of their TV programs for download on Apple's iTunes service."[52] Additional services, such as Hulu and YouTube, continue to gain in popularity.[53] The availability of network programming on the Internet led the Commission to determine that "established models for the distribution of video programming are being challenged by these technological advancements and consumers' ability to receive video programming via alternative means, not just from

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50 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Supplemental Notice of Inquiry, 24 FCC Rcd 4401 ¶ 33 (2009).

51 U.S. Department of Justice, *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers*, at 6 (Nov. 2008), *available at* http://www.usdoj.gov/atr/public/reports/239284.pdf. *See also Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("Cable operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992.").

52 *13th MVPD Competition Report* ¶ 158.

53 *See* Meredith A. Baker, Commissioner, Federal Communications Commission, *The Rise of Broadband Video and the Future of Digital Media*, at 2 (Oct. 12, 2009), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2009/db1021/DOC-294144A1.pdf (explaining that "usage has soared over Hulu, a website launched a year ago that offers commercial-supported streaming video of TV shows and films from a number of

traditional linear networks."[54] As the Commission recently concluded, "almost all consumers are able to obtain programming through over-the-air broadcast television, a cable service, and at least two DBS providers. In some areas, consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber-to-the-home facilities, or web-based Internet video."[55] As a result of the "seemingly infinite variety of choices in front of consumers,"[56] including new options for broadcast network programming, the idea of a single MVPD in a given market with "monopoly" power over distribution has become a thing of the past, along with any additional leverage that purported power may have provided MVPDs in negotiations with broadcasters.[57]

As MVPDs' bargaining power has diminished, broadcasters' bargaining power has substantially increased. Local broadcasters continue to be the exclusive provider of attractive network and syndicated programs in their local areas. Moreover, the extension of the term of a broadcast license from five years to eight years, coupled with a diminution of regulatory oversight, means that broadcasters no longer face any real threat of losing their license based on a failure to serve the needs and interests of their communities adequately. As these trends have

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sources," and noting that "the total number of video streams . . . on Hulu had risen 490.4 percent" between April 2008 and April 2009).

54 *13th MVPD Competition Report* ¶ 153.

55 *Id.* ¶ 4.

56 *See* Brian Stelter, *Next Up on Cable TV, Higher Bill for Consumers*, N.Y. TIMES, Jan. 3, 2010, *available at* http://www.nytimes.com/2010/01/04/business/media/04cable.html ("'Content providers are testing the limits — hoping to raise the bar as high as possible,' said Steve Ridge, the president of the media strategy group for the consulting firm Frank N. Magid Associates. . . . Cable and satellite distributors are resisting the demands, but a 'power shift,' as Mr. Ridge put it, is under way as broadband Internet becomes pervasive, putting a seemingly infinite variety of choices in front of consumers.").

57 *See also Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("Cable operators . . . no longer have the bottleneck power over programming that concerned the Congress in 1992.").

developed, the balance in bargaining strength that Congress foresaw in 1992 has been upended. Not only do broadcast stations now have more than a single distributor available to carry their signal, but they also have the assistance of the major national networks, which have injected themselves into retransmission consent negotiations in recent years. The Commission noticed this expansion of broadcaster market power and network influence as early as 2004, when assessing the News Corp./DIRECTV transaction. There, the Commission expressly found that "News Corp. currently possesses significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations,"[58] and noted that its conclusions about that market power "apply to any O&O station as well as any local broadcast station affiliate on whose behalf News Corp. negotiates retransmission consent agreements."[59] The Commission reached this conclusion because "the signals of local television broadcast stations are without close substitutes,"[60] and characterized them as "'must have' video programming products.'"[61] The "must have" nature of network programming confers significant bargaining leverage on independent affiliates as well, especially those that invoke the Commission's program exclusivity rules to bar MVPDs from obtaining that "must have" programming elsewhere.

In light of this growing bargaining imbalance, the Commission's most recent report on competition acknowledged the mounting public concern regarding rising retransmission consent

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58 *News Corp. Order* ¶ 201.

59 *Id.* ¶ 201 n.577.

60 *Id.* ¶ 202.

61 *Id.* ¶ 4. *See also id.* ¶ 48 ("By the time Congress enacted the must-carry/retransmission consent provisions of the Satellite Home Viewer Improvement Act of 1999 ('SHVIA'), Congress had recognized the importance of local television broadcast signals not only as providers of a valuable public service, but as "must-have programming" critical to a DBS offering.").

fees and threats of holdouts by networks and their affiliates. The Commission reported that "[a] number of commenters express concern about the ability of broadcasters to leverage the existing retransmission consent, network nonduplication, and syndicated exclusivity rules to demand exorbitant compensation for their programming."[62] The report highlighted the concern expressed in public comments that "by threatening to withhold local broadcast programming, the big four broadcast networks and other broadcast conglomerates have used retransmission consent to gain leverage over smaller cable operators to launch new affiliated networks, to obtain higher license fees and broader distribution for those new networks, and to obtain higher license fees for their existing affiliated networks."[63] As recent retransmission consent disputes illustrate, such impacts are no longer limited to smaller MVPDs and their subscribers. Indeed, broadcasters' structural advantages in the retransmission consent process are harming consumers by driving up rates for *all* MVPDs and their subscribers. The report also noted commenters' worry that "the use of retransmission consent has substantially foreclosed the opportunities for programming networks that are not affiliated with broadcasters to gain carriage on the expanded basic tier, thereby depriving consumers of the benefits of programming quality and diversity, and the opportunity for lower prices."[64] Despite these widespread concerns and the increasing prevalence of destructive disputes, the Commission's rules have remained unchanged.

D. Manipulation of the Current Retransmission Consent Regime in Recent Negotiations

At the end of 2009, several high-profile retransmission consent disputes brought the above-described concerns into sharper focus, making clear that the current retransmission

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62 *See 13th MVPD Competition Report* ¶ 207.

63 *Id.*

64 *Id.*

consent system is in dire need of reform. Two stand-offs in particular merit special attention: the dispute between Mediacom Communications Corporation ("Mediacom") and Sinclair Broadcasting Group ("Sinclair") and the dispute between Time Warner Cable ("TWC") and Fox Broadcasting Company ("FOX"). These down-to-the-wire negotiations—with stations likely remaining on the air only because key members of Congress and Commission officials made clear their view that subscribers should not suffer service disruptions as the result of negotiating standoffs—squarely demonstrate the risk to consumers of maintaining the current outdated system.

In October 2009, Mediacom filed a complaint with the Commission deploring the recent "outrageous increases being demanded by Sinclair"[65] and alleging that Sinclair "refused to move in any meaningful way from its outrageous initial proposal to one that is more in keeping with economic and competitive marketplace realities and that would represent a fair distribution of the retransmission consent burden."[66] Sinclair's conduct allegedly was facilitated by the use of sham agreements to acquire effective control over multiple stations in a single DMA,[67] and the complaint argued that the Commission's exclusivity rules only exacerbated this distortion.[68] Moreover, Mediacom made clear that network pressure was driving these demands by local broadcasters. Mediacom noted that Sinclair had cited network "contractual issues" that

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65 Retransmission Consent Complaint ¶ 20, *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, CSR No. 8233-C (Oct. 22, 2009) ("Mediacom Complaint").

66 *Id.* ¶ 25.

67 *Id.* ¶ 28.

68 *Id.* ¶ 45 ("The Commission's own network non-duplication regulations (and the increasingly common practice of networks contractually denying their affiliates the right to grant consent to an out-of-market cable operator) exacerbates the distortion in the marketplace created by duopolies by effectively barring Mediacom from pursuing substitute sources for the programming on Sinclair's stations.")

prevented it from negotiating the terms of the deal on its own.[69] Sinclair insisted that it be given the right "to terminate the agreement at will" if the network decided the terms were not acceptable.[70] In addition to securing additional leverage to drive up programming costs, this veto right would also have made the loss of programming a perpetual possibility.

TWC's *ex parte* filing in the Mediacom/Sinclair dispute brought to light its own clash with FOX, and demonstrated that the failure of the retransmission consent system is an industry-wide phenomenon. TWC explained that FOX "sought to hijack 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."[71] TWC placed special emphasis on FOX's demand for placement on the basic tier, which would force TWC to pass on those substantially higher costs to all of its subscribers.[72] Ultimately, the network's leverage caused severe distortions in TWC's negotiations with a number of independent station groups.[73] A common theme in these negotiations was the broadcaster's assertion that FOX was "going after [the station's] retransmission fees in a big way, perhaps as much as 50%"[74]—conduct that not only drives up fees but also *weakens* local broadcasting by depriving stations of

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69 Reply of Mediacom Communications Corp., at 22, *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, CSR No. 8233-C (Nov. 18, 2009) ("Mediacom Reply").

70 *Id.*

71 Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, at 2, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR Nos. 8233-C and 8234-M, Dec. 8, 2009 ("TWC Comments").

72 *Id.* at 10 ("FOX evidently is seeking to exploit the placement of broadcast signals on the basic cable tier by obtaining substantial cash payments and forcing MVPDs to pass through the cost to all basic cable subscribers whether they want to view the broadcast programming or not.").

73 *Id.* at 4-5.