

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of)	
)	
Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent)	MB Docket No. 10-71
)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements)	MB Docket No. 07-198
)	

To: The Commission

**OPPOSITION OF
THE LOCAL TELEVISION BROADCASTERS**

**BARRINGTON BROADCASTING GROUP, LLC
BONTEN MEDIA GROUP, LLC
DISPATCH BROADCAST GROUP
GANNETT CO., INC.
NEWPORT TELEVISION LLC
POST-NEWSWEEK STATIONS, INC.
RAYCOM MEDIA, INC.
WEIGEL BROADCASTING COMPANY**

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May 18, 2010

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SUMMARY

The Local Television Broadcasters, eight broadcast television station groups that collectively operate 126 full-power television stations, oppose the above-captioned Petition for Rulemaking. The retransmission consent regime is working fairly and as Congress intended.

The retransmission consent regime benefits consumers because it supports local broadcasters' investments in local news and enterprise journalism and other vital services, such as providing emergency information. Broadcast programming is important and unique. It also is the most highly-rated programming on television. Retransmission consent enables local television broadcasters to bargain for fair compensation for the retransmission of popular and valuable broadcast programming by cable and satellite systems to paying subscribers.

The Petition is founded upon a series of myths about the retransmission consent process. The five myths addressed in this Opposition are: (1) that local broadcast stations have undue leverage in retransmission consent negotiations; (2) that these negotiations create "windfalls" for broadcasters; (3) that abuse of the negotiation process by broadcasters occurs and is widespread; (4) that the Commission has statutory authority to implement the changes requested; and (5) that consumers will benefit from the disruptions to the retransmission consent process sought by the Petition. As shown in this Opposition, none of these propositions is true.

Because the Petition seeks changes to the retransmission consent regime that are contrary to the statute and contrary to the public interest, the Commission should deny it.

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Retransmission Consent)

**OPPOSITION OF
THE LOCAL TELEVISION BROADCASTERS**

The undersigned (collectively referred to as the “Local Television Broadcasters”) respectfully submit this Opposition to the Petition for Rulemaking recently filed by fourteen entities seeking changes to the Commission’s retransmission consent rules.¹ The Local Television Broadcasters are eight broadcast television station groups that collectively operate 126 full-power television stations in 91 markets across the country.

The Local Television Broadcasters support the filing of the Broadcaster Associations in this proceeding.² The Local Television Broadcasters submit this Opposition in order to rebut the myths that the Petition puts forth regarding retransmission consent negotiations and to explain the importance of retransmission consent to broadcasters’ vitality and public service.

¹ See Petition for Rulemaking, MB Docket No. 10-71, filed March 9, 2010 by Public Knowledge; DIRECTV, Inc.; DISH Network LLC; Charter Communications, Inc.; American Cable Association; New America Foundation; OPASTCO; Time Warner Cable Inc.; Verizon; Cablevision Systems Corp.; Mediacom Communications Corp.; Bright House Networks, LLC; Insight Communications; Company, Inc.; and Suddenlink Communications.

² See Opposition of the Broadcaster Associations, comprised of the National Association of Broadcasters (“NAB”), ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (May 18, 2010).

I. INTRODUCTION

Congress established the retransmission consent regime in order to ensure that local television broadcast stations could negotiate for fair compensation for their programming. It found that broadcast programming is “the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates.”³ Congress expressed concern that while cable systems obtained “great benefits from local broadcast signals,” the absence of a retransmission consent regime had “resulted in an effective subsidy of the development of cable systems by local broadcasters” and created a “competitive imbalance between the 2 industries.”⁴

The retransmission consent regime works, and it benefits consumers. It creates a competitive balance between broadcasters and multichannel video programming providers (“MVPDs”). By enabling broadcasters to negotiate in exchange for granting consent to MVPDs’ carriage of their signals, Congress helped to ensure the viability of local broadcasting as a competitor to MVPDs, and one that provides a unique and “important source of local news and public affairs programming... critical to an informed electorate.”⁵ The Petition is founded upon a series of myths about the retransmission consent process, and it seeks changes to this regime that are contrary to the statute and contrary to the public interest. Accordingly, it should be denied.

³ Cable Television Consumer Protection Act of 1992 (“1992 Cable Act”), Pub. L. No. 102-385 (1992), at Section 2(a)(19).

⁴ *Id.*

⁵ *See id.* at Section 2(a)(11).

II. THE PETITION IS BASED ON MYTHS ABOUT THE RETRANSMISSION CONSENT PROCESS.

The Petition is replete with myths about the retransmission consent process. The Local Television Broadcasters file this Opposition in order to address the five most pernicious myths in the Petition and to illustrate the ways in which the current regime is a fair process that provides value to both parties and the public, while supporting the critical services that broadcasters provide to the public. The five myths addressed in this Opposition are: (1) that local broadcast stations have undue leverage in retransmission consent negotiations; (2) that these negotiations create “windfalls” for broadcasters; (3) that abuse of the negotiation process by broadcasters occurs and is widespread; (4) that the Commission has statutory authority to implement the changes requested; and (5) that consumers will benefit from the disruptions to the retransmission consent process sought by the Petition.

Myth 1: Broadcasters Have All The Leverage.

The Petition suggests that broadcasters have unfair leverage in their free market negotiations with MVPDs. Although Congress established the retransmission consent regime in order to create a level playing field (as noted above), the Petitioners argue that “Congress stacked the deck in broadcasters’ favor.”⁶ The Petition asserts that the “new MVPD landscape has greatly increased broadcasters’ incentive and ability to hold up MVPDs for ever-higher retransmission consent fees.”⁷

This myth is flawed on several fronts. First, at bottom, these statements present a one-sided perspective on changes in the marketplace. It is true that consumers have more choice

⁶ Petition at 3.

⁷ Petition at 5.

in the video marketplace than they did in 1992, with the advent of two national DBS providers, telco providers offering multichannel video service, and even the Internet. Nevertheless, many MVPDs continue to have much more market power than broadcasters.⁸ Factors including “cable system clustering, rising concentration in the national MVPD market, falling concentration in the video programming market, increasing competition between broadcasters and other content providers, and the declining audience share of over-the-air broadcasting,” operate to reduce local broadcasters’ bargaining power with MVPDs in retransmission consent negotiations.⁹ Indeed, the fact that MVPDs still have considerable leverage is demonstrated by the artificially low rates that they pay to broadcasters as compared to the other providers whose programming they carry. (See below at pages 8-9 for more on the rate imbalance between popular broadcast programming and less viewed cable networks.)

Second, the fact that there are more alternatives in the MVPD market means that there is less chance that consumers will be harmed if an MVPD and a broadcaster cannot reach a mutually acceptable deal. Consumers may choose to receive broadcast programming over-the-air, or they may decide to subscribe to an alternative MVPD service. In essence, the Petition has

⁸ See Empiris, LLC, Jeffery A. Eisenach, Ph.D., “The Economics of Retransmission Consent”, at 11-12 (March 2009) (“*Eisenach I*”) (attached as Appendix A to Reply Comments of NAB, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269 (June 22, 2009)). See *id.* at 11-12 (noting that MVPDs “possess monopsony power as a result of high concentration and barriers to entry”). Whereas a monopoly involves one seller and many buyers, a monopsony involves one buyer and many sellers, and results in similarly distorted pricing. Compare *id.* at 16 (observing that television programming sellers are in a highly competitive market and not in a position to command above-market prices).

⁹ See Navigant Economics, Jeffery A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D., “Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon,” at 5 (April 2010) (“*Eisenach II*”) (attached to NAB’s Notice of Ex Parte Communication, MB Docket Nos. 07-198 *et al.*, GN Docket Nos. 09-47 *et al.* (May 6, 2010)). See also *id.* at 7 (finding no evidence “for the proposition that broadcasters’ relative bargaining power has increased since retransmission consent was authorized by Congress in 1992”).

twisted the existence of a more robust video competition market into something that is somehow anti-competitive and anti-consumer, when it is plain that the increase in MVPD competition since 1992 has benefited consumers.

Third, it is in broadcasters' best interests to maximize the number of subscribers that are able to receive their signals, as well as to avoid disruptions in the manner in which viewers receive their signals. Income from advertising sales – about 90 percent of station revenues¹⁰ – is heavily dependent on the number of viewers that see a station's programming. Thus, broadcasters seek to maximize distribution and seek to avoid any disruptions in carriage, giving MVPDs significant leverage in retransmission consent negotiations. Indeed, in cases where an impasse results in a local broadcast signal being dropped from an MVPD's channel lineup, the broadcaster stands to lose more than the MVPD.¹¹

Fourth, and relatedly, the established relationships that MVPDs have with their subscribers give them substantial negotiating power. Most subscribers will not drop their subscription television service if a broadcast signal is removed for a few hours or days during a breakdown in negotiations, giving the MVPD just as much of an incentive and ability to engage in brinkmanship as the Petition alleges that broadcasters have. While it is true that viewers could receive the signal from alternative pay-TV providers or even by using the free, over-the-air signal, implementing these alternatives usually entails some change from the *status quo*. Consumers typically seek to minimize such changes.

¹⁰ See Pew Research Center, Project for Excellence in Journalism, *2010 State of the News Media*, Local TV – Economics; available online at www.stateofthemediamedia.org/2010/local_tv_economics.php.

¹¹ *Eisenach I* at 22-23.

As the Commission has recognized, “[l]ocal broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements.”¹²

Myth 2: The Current Regime Creates A Windfall For Broadcasters.

The myth that retransmission consent creates “artificial” value and a windfall for broadcasters permeates the Petition. For example, the Petition calls the current regime “a wholly artificial construct that has little in common with an actual marketplace.”¹³ It says that the “interest in advancing localism (and not in generating windfalls for broadcasters) animated Congress’ decision to create a retransmission consent regime.”¹⁴ The Petitioners suggest that the current retransmission consent rates are not “reasonable” and therefore create a basis for FCC action under Section 325(b)(3)(A) of the Communications Act of 1934, as amended (the “Act”).¹⁵

As an initial matter, it should be noted that there is nothing “artificial” about the value of the broadcast programming being retransmitted by MVPDs. The value exists because the programming is desirable and compelling programming. The fact that MVPDs negotiate with broadcasters for the right to carry broadcast programming is no different than MVPDs’ need to negotiate with cable networks for the right to carry their programming. ESPN’s receipt of \$4

¹² See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order, MM Docket No. 92-259, 9 FCC Rcd 6723, at para. 115 (1994) (“*Retransmission Consent Order*”).

¹³ See Petition at 3.

¹⁴ See *id.* at 11.

¹⁵ See *id.* at 32.

per subscriber is not a “windfall” for ESPN – it’s the value negotiated at arms length between the network and the MVPD so that the MVPD can retransmit the desirable programming that ESPN created to the MVPD’s subscribers.

In fact, as Congress recognized in creating the retransmission consent regime, broadcast programming is “the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates.”¹⁶ What was true in 1992 still holds true today, notwithstanding the increased competition that broadcasters face in the video programming market. In fact, the only “artificial” aspect of retransmission consent rates is the way in which the market operated in the past to unduly depress these rates, due to cable’s monopoly power and refusal to pay broadcasters for the popular programming that broadcasters provide and that cable operators and other MVPDs resell to consumers.

Broadcast programming includes highly rated network programming (for which affiliates increasingly are required to pay the networks) and syndicated programming. It also is a unique source of local news, weather, sports, and emergency information. It is the desirability of this programming, and not anything artificial, that cable operators recognize when they agree in arm’s length negotiations to compensate broadcasters for carriage of their signals.¹⁷ Broadcast programming dominates the ratings, with the vast majority of top-100 programs coming from

¹⁶ See 1992 Cable Act at Section 2(a)(19).

¹⁷ See *Eisenach II* at 12 (observing that “the very fact that MVPDs choose to pay retransmission consent fees proves that MVPDs believe the value consumers place on broadcast signals exceeds their price”).

broadcasters.¹⁸ In the February 2010 sweeps period, broadcast programming “took all but a handful” of the top ratings.¹⁹ Over the past ten years, all of the most-watched programs on television have been broadcast programs.²⁰

In light of its desirability among viewers, broadcast programming is a bargain for MVPDs. Retransmission consent rates are substantially below the rates paid for cable networks that have less consumer appeal, lower ratings, and no local content, and any increase in retransmission consent rates simply moves them toward a fair value in today’s marketplace. As the Media Bureau noted in the *Mediacom* decision, the prices that MVPDs pay for non-broadcast programming networks establish an appropriate yardstick for measuring the value of broadcast programming.²¹ NAB has observed that “many local television stations are *20 times* more popular than some of the most popular satellite-delivered cable networks, yet broadcasters only

¹⁸ See, e.g., TVB’s Ratings Track for the week ending May 9, 2010 (noting that broadcasting delivered 93 of the top 100 programs among adults 18-49) (available online at www.tvb.org/rcentral/viewertrack/weekly/2009-10/a18-49/a18-49.asp?ms=may_9-2010.asp).

¹⁹ See TVB’s Ratings Track: Sweeps Period Analysis/February 2010, available online at www.tvb.org/rcentral/viewertrack/trends/sweeps_period_analysis.asp. The report indicated that “[i]n A18-49, broadcast took 82 of the 85 programs (or 96%); three shows were subscription television programs. In A25-54, broadcast took 100 of the 103 programs (or 97%); three shows were subscription television programs. In households, broadcast took 141 of 153 programs (or 92%); twelve shows were subscription television programs.”

²⁰ See “Most Watched Television Programs of the Decade,” *The New York Post* (December 20, 2009).

²¹ See *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, CSR-7058-C, 22 FCC Rcd 47 at paras. 17-18 (2007). See *id.* at para. 18 (“It seems reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming. Therefore, seeking compensation commensurate with that paid to other programmers of equal, or lower, ratings is not *per se* inconsistent with competitive marketplace considerations.”).

ask for a fraction of the relative value of what MVPDs willingly pay in arm’s length transactions for far less popular cable programming.”²²

As the Opposition of the Broadcaster Associations shows, the retransmission consent rates for broadcast programming pales in comparison to the rates that cable operators pay for much less popular cable networks.²³ A simple chart illuminates the vast disparity between the *prices* paid by cable operators for cable networks versus broadcast programming, and the *ratings* that each of these channels garner:

Program Source	Ratings (Nov. 2009 sweeps)	Average Per-Subscriber Fee
Top 4 Cable Networks by License Fee	5.772 for all four 1.443 for one channel	\$8.32 for all four \$2.08 average for one channel
Top 4 Cable Networks by Ratings	8.743 for all four 2.186 for one channel	\$5.95 for all four \$1.49 average for one channel
Big 4 Networks (ABC, CBS, FOX, and NBC)	20.738 for all four 5.185 for one channel	\$0.56 for all four \$0.14 average for one channel

Sources: SNL Kagan, *Economics of Basic Cable Networks 2009*, and Nielsen Media Research, as cited in the Opposition of the Broadcaster Associations at Section V.

In the November 2009 sweeps, the four most popular cable networks averaged ratings of 2.186 per channel, while the Big 4 broadcast networks averaged ratings of 5.185 per channel. Cable operators paid an average of \$1.49 per channel for the most popular cable networks, and an average of \$0.14 for the Big 4 broadcast channels. In other words: cable operators paid more than 10 times the per-subscriber fee for cable networks that were less than half as popular as the broadcast network channels.

²² See Reply Comments of NAB, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 07-29 (Feb. 12, 2008). See also Melissa Grago, “Retrans... The Bloody Battle to Save Broadcast Television,” *Broadcasting & Cable* (Dec. 14, 2009) (“Broadcasters call the current value landscape for broadcast and cable networks distorted; they contrast a network like ESPN that gets \$4 carriage fees with many network affils that get 25 cents, while broadcasters out-rate their cable counterparts by multiples.”).

²³ See Opposition of the Broadcaster Associations at Section V.

Rates for retransmission consent have been depressed below fair market value in the past, and are only beginning to move towards fair. There are a number of factors that have operated to artificially depress rates in prior years, chief among them fact that the local MVPD market has been (and in many markets remains) relatively concentrated.²⁴ In the meantime, other factors are at work that tend to increase rates, reasonably and in good faith. For example, broadcasters are now offering desirable high-definition (“HD”) broadcast programming. Consumers find HD programming very attractive.²⁵ Broadcasters are increasingly providing additional streams of programming, including network affiliated content not otherwise available in the market. Further, MVPDs are making new uses of broadcast content (and reaping value from it), such as by offering broadcast content to subscribers on a video-on-demand basis. Thus, increases in retransmission consent rates reasonably take account of the increasing value of broadcast programming, together with developments in the MVPD marketplace that have started to reduce cable’s monopsony power.²⁶

Broadcast stations properly seek competitive retransmission consent rates because they rely on such compensation in order to help finance their investments in quality programming. Television stations have to invest heavily in order to create or have the rights to

²⁴ See *Eisenach I* at 13 (“the market for video distribution is concentrated and subject to substantial entry barriers”). This study notes that increasing “concentration at the local level increases the bargaining power of cable systems relative to local programmers.” See *id.* at 20. See also *Eisenach II* at 5-7 (describing flaws with the argument that broadcasters’ bargaining power has increased since 1992).

²⁵ Consumers have invested over \$109.8 billion in HD television sets since 2003. See Consumer Electronics Association (“CEA”), *FastFacts Historical Data* (2009). The CEA’s figure represents 118.5 million receivers. CEA also projects the investment of another \$21.6 billion, for 31.2 million receivers, in 2010.

²⁶ See *Eisenach I* at 11-12 (noting that MVPDs “possess monopsony power as a result of high concentration and barriers to entry”).

this programming. For example, a recent study by NAB indicated that local television stations spend approximately \$3.1 billion annually in operating expenses and \$545 million in capital funds, and dedicate roughly 83 million employee-hours per year, to produce and broadcast local news alone.²⁷ In 2009, despite a very challenging economy, local broadcasters increased the amount of local news to a record average of five hours each weekday per station.²⁸ Broadcasters incur substantial additional expenses to acquire all of the other programming included in their signals, including syndicated programming, sports programming, and network programming. Retransmission consent supports broadcasters' ability to make these investments in creating and acquiring programming, and broadcasters cannot afford to simply give this programming to MVPDs for free or at depressed rates. Local broadcasters provide unique and vital local reporting, investigative journalism, and emergency information, and consumers benefit from the existence of a healthy broadcast industry in its own right (as well as from having a viable, free, and competitive alternative to expensive pay-TV services). This is exactly what Congress intended when it created the retransmission consent process.

Ironically, it is the Petition itself that seeks to establish artificial rates for retransmission consent. Negotiations in which one side has no incentive to reach a deal would result in artificial rates. That is exactly what the Petition seeks: an elimination of the incentive of an MVPD to engage in fair negotiations concerning *mutually acceptable* terms for

²⁷ See "The Economic Realities of Local Television News – 2010: A Report from the National Association of Broadcasters," at 3 and 13-14 (April 2010); attached as Attachment B to NAB's Comments in GN Docket No. 10-25 (May 7, 2010). Survey respondents indicated that retransmission consent fees typically constitute 6.3% of station revenues. See *id.* at 9.

²⁸ Bob Papper, "2010 TV and Radio Staffing and News Profitability Survey," *RTDNA/Hofstra University*, summarized at www.rtdna.org/pages/media_items/2010-tv-and-radio-news-staffing-and-profitability-survey1943.php?id=1943.

retransmission consent. The most blatant example of this tactic is in the Petition’s “interim carriage” proposal. Carriage of a broadcaster’s signal past the term of the broadcaster’s grant of retransmission consent would represent a shift from market-based negotiations, where both sides have something to lose, to a situation where the MVPD loses absolutely nothing by stonewalling. The natural result would be to skew negotiations in favor of the MVPD and to artificially depress rates. Other aspects of the Petition also seek to tip the scales in favor of MVPDs.²⁹

Myth 3: Abuse Of The Process By Broadcasters Is Widespread.

The Petition incorrectly states that the “good faith” negotiation standards are aimed at broadcasters, asserting that “rules governing ‘good faith’ negotiation standards are intended to prevent extortionate tactics and other bad faith conduct by broadcasters.”³⁰ The reality is that Congress has expressly applied the good faith negotiation obligation to both broadcasters and MVPDs.³¹ The Petition also refers to “abuses of this artificially created right” as if there had ever been a single case in which the Commission found that a broadcaster had violated the obligation to negotiate in good faith.³² While both broadcasters and MVPDs can be

²⁹ For example, the requests that the FCC “make clear that any mechanism for resolving retransmission consent disputes will involve only stand-alone agreements for the broadcast signal” and not other programming services. Petition at 34-35. Yet it states that the Commission should permit such arrangements when “the MVPD freely consents.” *Id.* at n.114. Needless to say, once the Commission has tied one party’s hands in the negotiations, they are hardly the “normal, market-based negotiations” that the Petitioners claim to want. *Id.* at 35.

³⁰ *See Petition* at 15.

³¹ *See* Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”), Pub. L. No. 108-447, 118 Stat. 2809 (2004) (imposing reciprocal good faith negotiation obligation on MVPDs).

³² *See Petition* at 4.

aggressive in retransmission consent negotiations, broadcasters take seriously the obligation to negotiate in good faith.

The Commission has never found that a broadcaster violated the good faith negotiation requirement. The mere filing of a complaint by an MVPD is not evidence that a broadcaster has violated the good faith negotiation requirement. Rather, MVPDs appear to file complaints as a tactic to create negotiating leverage.³³

Indeed, the FCC has clarified that certain negotiating positions complained of in the Petition are perfectly acceptable. For example, the Petition asks that the Commission “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.”³⁴ The Commission has explicitly addressed this issue and found MVPDs’ complaints to be baseless.³⁵ It has identified “[p]roposals for carriage conditioned on carriage of any other programming, such as. . . an affiliated cable programming service” as an example of the kinds of bargaining positions that “presumptively are consistent with competitive marketplace considerations and the

³³ See *Mediacom Communications Corp.*, *supra* n.21, at para. 24 (dismissing complaint filed by MVPD, noting “[t]his dispute, at bottom, arises from a fundamental disagreement between the parties over the appropriate valuation of Sinclair’s signals. Such disagreements, without more, however, are not indicative of a lack of good faith. Even with good faith, impasse is possible.”) See also *EchoStar Satellite Corporation v. Young Broadcasting Inc.*, Memorandum Opinion and Order, CSR-5655-C, 16 FCC Rcd 15070 (2001) (denying MVPD complaint against broadcaster, noting that the “back-and-forth” between the parties, each acting in its own self-interest, was “precisely” what Congress intended; admonishing EchoStar for abusing the Commission’s process with respect to confidential treatment for documents).

³⁴ See Petition at 35.

³⁵ See *In the Matter of: Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, CS Docket No. 99-363, 15 FCC Rcd 5445 (2000) (“*Good Faith Order*”) at para. 39. See also *EchoStar v. Young Broadcasting* at para. 21 (confirming reasonableness of proposals pertaining to multiple stations and noting that MVPD had failed to demonstrate that it lacked the channel capacity to carry the other stations).

good faith negotiation requirement.”³⁶ Also, large cable operators routinely negotiate retransmission rights for multiple cable systems, including those that are affiliated or managed by the operator, as well as systems that are owned by the operator.

The Petition also rehashes arguments with respect to network-affiliate relationships, such as network non-duplication rights and limitations on granting retransmission consent outside of a local affiliate’s market.³⁷ The Commission has already found that Congress did not intend the retransmission consent regime to limit these traditional aspects of network-affiliate relationships. The Commission has recognized that retransmission consent rights and exclusivity rights protect different interests and that “[b]oth policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress’ view.”³⁸ Likewise, the FCC found no Congressional intent to “preclude specific terms contained in network-affiliate agreements,” such as restrictions of the ability to grant retransmission consent outside of a specified geographic area.³⁹

Myth 4: The FCC Has Authority To Implement What Is Being Asked For.

Section 325 of the Act prohibits the FCC from taking certain actions that the Petition requests, such as requiring “interim carriage” when the broadcaster’s consent has

³⁶ See *Good Faith Order* at para. 56 (continuing, “we point out that these are bargaining proposals which an MVPD is free to accept, reject or counter with a proposal of its own”). See also *id.* at para. 44 (noting that while broadcasters must consider other forms of consideration, the good faith requirement does not “in any way” require the broadcaster to accede to what it deems to be an unacceptable offer from the MVPD).

³⁷ See Petition at 12-14.

³⁸ See *Retransmission Consent Order*, *supra* n.12 at para. 114. See also *id.* at para. 115 (observing that “the dire consequences predicted [by MVPDs] do not exist”).

³⁹ See *In the Matter of Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, MB Docket No. 05-89, 20 FCC Rcd 10339, at para. 33 (2005).

expired.⁴⁰ The Petition misinterprets the statute – and established Commission precedent in this area – in suggesting that interim carriage is permissible under the statute and that the Commission merely “passed up an opportunity” to establish interim carriage in its 2000 *Good Faith Order*.⁴¹ In the *Good Faith Order*, the Commission clearly stated that Congress had prohibited it from establishing an interim carriage regime:

Two equally unambiguous provisions of SHVIA foreclose the approach advanced by MVPD commenters. First, Section 325(b)(1) of the Communications Act provides that “No cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, *except ... with the express authority of the originating station...*” This language clearly prohibits an MVPD... from retransmitting a broadcaster’s [sic] signal if it has not obtained express retransmission consent. Second, Section 325(e) of the Communications Act establishes a streamlined complaint procedure through which broadcasters may seek redress for allegedly illegal retransmission of local broadcast signals by satellite carriers. The procedures established by Section 325(e) provide only four defenses that a satellite carrier may raise.... Against the backdrop of the express language of these provisions, we see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.⁴²

The Petition’s references to the other statutory provisions are inapt. The Petition cites Section 325(b)(3)(A) of the Act, which directs the Commission to commence a rulemaking

⁴⁰ See Petition at 36 (suggesting that the FCC authorize MVPDs to continue carrying a broadcaster’s signal after the term of retransmission consent has expired and during dispute resolution proceedings – without even requiring that the MVPD show that the broadcaster has violated the “good faith” negotiation obligation).

⁴¹ See Petition at n.46.

⁴² *Good Faith Order* at para. 60 (emphasis in original). See also *id.* at para. 84 (“upon expiration of... an existing retransmission consent agreement, an MVPD may not continue carriage of a broadcaster’s signal while a retransmission consent complaint is pending at the Commission”).

proceeding concerning retransmission consent within 45 days of the enactment of the 1992 Cable Act and to consider “*in such proceeding* the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier.”⁴³ This provision does not create an open-ended authorization for the Commission to alter the established retransmission consent regime in the name of rate regulation, much less to ignore the clear language of Section 325(b)(1). In any event, as shown above, current retransmission consent rates are reasonable (if not skewed in MVPDs favor). They also pose little if any upward pressure on cable rates. Cable prices rise significantly even when programming costs do not.⁴⁴ From 2003 to 2006, gross profits per subscriber for four leading cable operators (Comcast, Time Warner, Cablevision, and Charter) increased at a rate *five times faster* than the increase in per subscriber programming expenses.⁴⁵ Notably, representatives of several of the Petitioners have indicated publicly that they are not concerned about the possibility of rising retransmission consent rates and their effect on subscription prices.⁴⁶

The Petition also refers to Section 4(i) of the Act, which authorizes the Commission to “perform any and all acts... not inconsistent with this Act,” and Section 303(r), which authorizes the Commission to “[m]ake such rules and regulations and prescribe such

⁴³ See Section 325(b)(3)(A) (emphasis added).

⁴⁴ See *Eisenach I* at 25.

⁴⁵ See *id.* at 30.

⁴⁶ See Mike Farrell, “Networks Seek Their Cut of Retrans: Cable Operators Say They Can Manage Rising Fees for Broadcast Stations,” *Multichannel News* (November 9, 2009) (“Cable operator executives on earnings calls last week didn’t sound too concerned about the potential for retransmission-consent fees forcing their hand in terms of raising rates or dropping channels. Cablevision Systems chief operating officer Tom Rutledge said on Cablevision’s earnings call Tuesday that retrans expenses shouldn’t lead directly to higher rates.... Time Warner Cable chairman and CEO Glenn Britt, on TWC’s earnings call Thursday, sounded optimistic about retransmission negotiations.... ‘I think we have been pretty successful in most of these negotiations, arriving at mutually satisfactory deals without a lot of fireworks.’”).

restrictions and conditions, not inconstant with law, as may be necessary to carry out the provision of this Act.” Nothing in these provisions authorizes the Commission to take actions that would be inconsistent with the specific and unambiguous language of Section 325(b)(1).

Finally, the Petition seeks to have the Commission “clarify” that a broadcaster’s decision to condition a grant retransmission consent on the MVPD’s carriage of other programming services is a *per se* violation of good faith negotiation obligation.⁴⁷ Such a “clarification” would be contrary to the statutory retransmission consent regime.⁴⁸ As Congress recognized, broadcasters have the right to withhold consent to the carriage of their signals by MVPDs, and may condition a grant of consent on appropriate conditions, such as cash consideration or carriage of other programming services. “Congress did not empower the Commission to sit in judgment of the substantive terms and conditions of retransmission consent agreements.”⁴⁹ Moreover, arrangements concerning multiple programming services are in the public interest, because they result in more channels being provided to consumers and a stronger, competitive broadcast industry.

⁴⁷ See Petition at 34-35.

⁴⁸ See *Good Faith Order* at para. 39 (“Consistent with our determination that Congress intended that the Commission should enforce the process of good faith negotiation and that the substance of the agreements generally should be left to the market, we will not adopt the suggestions of certain commenters that we prohibit proposals of certain substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel”); see *id.* at para. 23 (“Congress clearly did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement....”).

⁴⁹ *Id.* at para. 81.

Myth 5: Consumers Will Benefit From The Disruptions To The Retransmission Consent Regime Sought By The Petition.

Consumers would lose if the Commission were to adopt the changes that the Petition seeks. The only beneficiaries of the rule changes sought in the Petition would be private businesses (MVPDs) subject to no public interest mandates.

As noted above, broadcasters use retransmission consent fees to support investments in unique and vital programming services, including local journalism, emergency information, and educational and informational programming for children. The Petitioners seek the ability to drag broadcasters into expensive, drawn-out dispute resolution proceedings without any showing that the broadcaster has failed to negotiate in good faith.⁵⁰ These proceedings and the related proposals, such as those pertaining to carriage of multiple program services and to carriage of a broadcaster's signal after the term of retransmission consent has expired, would undermine broadcasters' bargaining position, in turn harming their economic viability and programming services. This is precisely the outcome that Congress sought to avoid when it established the retransmission consent regime.⁵¹

The current retransmission consent system is working. Together, the Local Television Broadcasters are parties to hundreds of retransmission consent agreements. The reality is that negotiation impasses resulting in dropped signals are rare. Consumers are 20 times

⁵⁰ See Petition at 32-33: "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 showing of 'bad faith' on the part of the broadcaster should not be necessary."

⁵¹ The Commission has recognized the importance of providing flexibility to the parties in these negotiations. See *Good Faith Order* at para. 56 ("By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent.").

more likely to be without any television service at all, due to electrical outages, than they are to experience a missing channel due to a retransmission consent impasse.⁵² On the whole, service interruptions due to breakdowns in negotiations represent about one one hundredth of one percent of annual U.S. television viewing hours.⁵³ Meanwhile, as noted above, retransmission consent rates remain very modest compared to cable network rates, and have minimal impact on subscriber fees.⁵⁴

III. CONCLUSION

The retransmission consent regime is working as Congress intended. It permits local television stations to bargain for fair compensation from MVPDs for the most popular programming on television. MVPDs reap significant benefits from providing this programming to their subscribers, and enabling broadcasters to receive a share of those benefits provides broadcasters with revenue needed to finance investments in critical local programming. The best outcomes for the parties – and consumers – occur when the parties are free to negotiate on equal footing (subject to the reciprocal good faith negotiation obligation.)⁵⁵ The Petition seeks to stack the deck in MVPDs favor, providing them with advantages such as the ability to carry a broadcaster’s signal after retransmission consent has expired. These advantages would be contrary to the statutory framework established by Congress and would skew the parties’ negotiating incentives. And they would not help consumers.

⁵² See *Eisenach II* at 18-20.

⁵³ *Id* at 19.

⁵⁴ See pages 8-9 and 16. See also *Eisenach II* at 21-22.

⁵⁵ Beyond enforcing the good faith negotiation requirement, the Commission has recognized that Congress did not intend for the FCC to interfere in retransmission consent negotiations. See *Good Faith Order* at para. 13 (“The statute does not appear to contemplate an intrusive role for the Commission with regard to retransmission consent.”).

* * *

For the reasons set forth above, the Commission should deny the Petition.

Respectfully submitted,

LOCAL TELEVISION BROADCASTERS

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May 18, 2010

Barrington Broadcasting Group, LLC

KGBT-TV, Harlingen, TX
KHQA-TV, Hannibal, MO
KRCG, Jefferson City, MO
KTVO, Kirksville, MO
KVII-TV, Amarillo, TX
KVIH-TV, Clovis, NM
KXRM-TV, Colorado Springs, CO
WACH, Columbia, SC
WBSF, Bay City, MI
WEYI-TV, Saginaw, MI
WFXL, Albany, GA
WHOI, Peoria, IL
WLUC-TV, Marquette, MI
WNWO-TV, Toledo, OH
WPBN-TV, Traverse City, MI
WPDE-TV, Florence, SC
WSTM-TV, Syracuse, NY
WTOM-TV, Cheboygan, MI

Bonten Media Group, LLC

KAEF-TV, Arcata, CA
KCFW-TV, Kalispell, MT
KECI-TV, Missoula, MT
KRCR-TV, Redding, CA
KTVM-TV, Butte, MT
KTXS-TV, Sweetwater, TX
WCYB-TV, Bristol, VA
WCTI-TV, New Bern, NC

Dispatch Broadcast Group

WBNS-TV, Columbus, OH
WTHR, Indianapolis, IN

Gannett Co., Inc.

KARE, Minneapolis, MN
KNAZ, Flagstaff, AZ
KPNX, Mesa, AZ
KSDK, St. Louis, MO
KTHV, Little Rock, AR
KTVD, Denver, CO
KUSA, Denver, CO
KXTV, Sacramento, CA
WBIR-TV, Knoxville, TN
WCSH, Portland, ME
WFMY-TV, Greensboro, NC
WGRZ, Buffalo, NY
WJXX, Orange Park, FL
WKYC, Cleveland, OH
WLBZ, Bangor, ME
WLTX, Columbia, SC
WMAZ-TV, Macon, GA
WTLV, Jacksonville, FL
WTSP, St. Petersburg, FL
WUSA, Washington, DC
WXIA, Atlanta, GA
WATL, Atlanta, GA
WZZM, Grand Rapids, MI

Newport Television License LLC

KASN, Pine Bluff, AR
KLRT-TV, Little Rock, AR
KMCB, Coos Bay, OR
KTCW, Roseburg, OR
KMTR, Eugene, OR
KMYT-TV, Tulsa, OK
KOKI-TV, Tulsa, OK
KSAS-TV, Wichita, KS
KAAS-TV, Salina, KS
KOCW, Hoisington, KS
KTVF, Fairbanks, AK
KTVX, Salt Lake City, UT
KVOS-TV, Bellingham, WA
WAWS, Jacksonville, FL
WETM-TV, Elmira, NY
WHAM-TV, Rochester, NY
WHP-TV, Harrisburg, PA
WIVT, Binghamton, NY
WJKT, Jackson, TN
WJTC, Pensacola, FL
WKRC-TV, Cincinnati, OH
WLMT, Memphis, TN
WPMI-TV, Mobile, AL
WPTY-TV, Memphis, TN
WSYR-TV, Syracuse, NY
WWTI, Watertown, NY
WXXA-TV, Albany, NY

Post-Newsweek Stations, Inc.

WKMG-TV, Orlando, FL
WJXT, Jacksonville, FL
WPLG, Miami, FL
WDIV-TV, Detroit, MI
KPRC, Houston, TX
KSAT-TV, San Antonio

Weigel Broadcasting Company

WBME-TV, Racine, WI
WCIU-TV, Chicago, IL
WDJT-TV, Milwaukee, WI

Raycom Media, Inc.

KAIT, Jonesboro, AR
KCBD, Lubbock, TX
KFVS-TV, Cape Girardeau, MO
KHNL, Honolulu, HI
KHBC-TV, Hilo, HI
KOGG, Wailuku, HI
KGMB, Honolulu, HI
KLTU, Tyler, TX
KOLD-TV, Tucson, AZ
KPLC, Lake Charles, LA
KSLA-TV, Shreveport, LA
KTRE, Lufkin, TX
WAFB, Baton Rouge, LA
WAFF, Huntsville, AL
WTNZ, Knoxville, TN
WTOL, Toledo, OH
WALB, Albany, GA
WAVE, Louisville, KY
WBRC, Birmingham, AL
WDAM-TV, Hattiesburg, MS
WECT, Wilmington, NC
WFIE, Evansville, IN
WFLX, West Palm Beach, FL
WIS, Columbia, SC
WLBT, Jackson, MS
WLOX, Biloxi, MS
WMBF-TV, Myrtle Beach, SC
WDFX-TV, Dothan, AL
WTOC-TV, Savannah, GA
WMC-TV, Memphis, TN
WOIO, Shaker Heights, OH
WPGX, Panama City, FL
WSFA, Montgomery, AL
WTVM, Columbus, GA
WUAB, Lorain, OH
WBTV, Charlotte, NC
WCSC-TV, Charleston, SC
WWBT, Richmond, VA
WXIX-TV, Newport, KY