

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

In the Matter of)	
)	
Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent)	MB Docket No. 10-71
)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

I. INTRODUCTION AND SUMMARY

The United States Telecom Association (USTelecom)¹ is pleased to comment on the Petition for Rulemaking (Petition)² regarding adoption of rules relating to the retransmission consent regime. The Petitioners include a broad range of competitors in the multichannel video program distribution (MVPD) market, including cable companies, direct broadcast satellite providers, new wireline entrants, small cable and wireline providers, as well as public interest groups.³

Time and again, the Commission has concluded that reasonable access to video programming is essential to ensuring increased competition and deployment of both broadband and video services.⁴ Both Congress and the Commission have acknowledged the importance of

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² See Petition for Rulemaking, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, March 9, 2010 (*Petition*). See also, Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, DA 10-474, MB Docket No. 10-71 (released March 19, 2010); Order, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, DA 10-594 (released April 2, 2010).

³ The signatories to the Petition include Public Knowledge, Time Warner Cable, Inc., DIRECTV, Inc., Verizon, DISH Network, LLC, Cablevision Systems Corp., Charter Communications, Inc., Mediacom Communications Corp., Charter Communications, Inc., American Cable Association, Bright House Networks, LLC, New America Foundation, Insight Communications Company, Inc., OPASTCO and Suddenlink Communications (*Petitioners*).

⁴ See e.g., Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and*

local broadcast content to consumers. As noted in the Petition, however, bargaining imbalances between broadcasters and MVPDs in the decades-old retransmission consent process are creating tangible consumer harms that have resulted in “widespread and increasingly urgent” calls to reform this “broken system.”⁵

The imbalance in the current retransmission consent regime is harming consumers by driving up rates for all MVPDs and their respective subscribers, as well as denying consumers’ access to these signals at critical times.⁶ Although consumers are not a party to retransmission negotiations, they are clearly impacted by the outcomes of those negotiations. The Commission has ample authority to reform its regulations governing the retransmission consent regime. The reforms identified in the Petition are reasonable, necessary and pro-consumer.

II. THERE IS A BARGAINING IMBALANCE IN TODAY’S RETRANSMISSION CONSENT REGIME.

The Petition highlights the bargaining imbalance between broadcasters and MVPDs resident in today’s retransmission consent regime which allows broadcasters to inhibit the reasonable acquisition of content by MVPDs.⁷ In other instances where the Commission has identified similar obstacles to accessing programming it has implemented measured and reasonable mechanisms to remove such obstacles.

Competition Act of 1992, 22 FCC Rcd. 5101, ¶51 (2006) (concluding that “broadband deployment and video entry are ‘inextricably linked’”) (*Franchise Reform Order*); *Franchise Reform Order*, ¶62 (stating that, “[t]he record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”); Report and Order, Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶20 (2007) (*MDU Order*) (stating that “broadband deployment and entry into the MVPD business are ‘inextricably linked.’”); First Report and Order, *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶36 (2010) (concluding that “a wireline firm’s decision to deploy broadband is linked to its ability to offer video.”) (*Program Access Order*).

⁵ *Petition*, p. 27.

⁶ See e.g., *Petition*, pp. 20 – 30. The Petition discusses in detail the impact the imbalance in the current retransmission regime has with respect to increasing rates. It also cites various instances where consumers have lost access to highly popular sporting and entertainment events.

⁷ *Id.*, pp. 15 - 20.

The intrinsically linked public-policy goals of increased MVPD competition and greater broadband deployment are increasingly imperiled by the imbalance in the current retransmission consent process. While the MVPD marketplace has changed dramatically over the last ten years, particularly with the increase in wireline video competitors to cable incumbents, the Commission’s retransmission consent rules have remain largely unchanged in the 18 years since they were adopted.⁸

A regulatory framework developed nearly two decades ago for a monopolistic MVPD market cannot effectively promote consumer welfare and efficiency in today’s competitive and dynamic MVPD market. When broadcasters withdraw retransmission rights and a station goes “dark” on a given MVPD network, consumers are often confused by the sudden and unanticipated loss of their local broadcast signal. Absent adoption of the recommended reforms, the outdated retransmission consent process will continue to result in increased consumer uncertainty and confusion and generate higher prices.

III. ACCESS TO VIDEO PROGRAMMING CONTENT IS CRITICAL TO INCREASING VIDEO AND BROADBAND DEPLOYMENT AND COMPETITION.

The Commission has consistently emphasized how access to critical programming will result in substantial consumer benefits including increased competition in the MVPD market, lower prices for consumers and increased broadband penetration.⁹ By its very nature, broadcast programming is ‘must-have’ programming, a conclusion the Commission has reached in other proceedings.¹⁰

⁸ *Petition*, p. 2.

⁹ See e.g., *MDU Order*, ¶17 (concluding that access to programming results in a “significant increase” in MVPD competition, which “usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources.”); *Franchise Reform Order*, ¶50 (concluding that increased MVPD competition, “is necessary and appropriate to achieve increased video competition and broadband deployment.”).

¹⁰ Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, 19 FCC Rcd 473,

As the Commission has noted on numerous occasions, broadband deployment and MVPD competition are “inextricably linked.”¹¹ The increasing abuse of the retransmission consent process by broadcasters constitutes a significant barrier to the provision of competitive video services. Because the deployment of broadband networks and the provision of video service are intrinsically linked, abuse of the retransmission consent regime makes entry into the video market more risky, thereby diminishing the incentive of wireline competitors to deploy advanced services capable of transmitting video to consumers.

As at least one commenter in this proceeding has noted, rural phone companies that bundle video with broadband services have “experienced broadband adoption rates that are nearly 24 percent higher than those carriers that offer broadband alone.”¹² Similarly, the National Exchange Carrier Association concluded in its most recent “Trends Report” that while rural companies are showing “continued progress” in deploying advanced networks, one of the three persistent challenges facing these same companies is the “[l]ack of access to affordable video content.”¹³

Rapidly growing retransmission fees are being passed onto consumers and the impact of these fees on new wireline video entrants is particularly acute.¹⁴ These rapidly increasing fees –

¶48 (discussing Congress’ recognition of local television broadcast signals as “must-have programming.”). In general, these comments focus on retransmission consent negotiations relating to the so-called ‘Big Four’ networks: ABC, CBS, NBC and FOX.

¹¹ See e.g., *Franchise Reform Order* ¶51 (concluding that “broadband deployment and video entry are ‘inextricably linked’”); *Id.*, ¶62 (stating that, “[t]he record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”); *MDU Order*, ¶20 (stating that “broadband deployment and entry into the MVPD business are ‘inextricably linked.’”); *Program Access Order*, ¶36 (concluding that “a wireline firm’s decision to deploy broadband is linked to its ability to offer video.”).

¹² *Organization for the Promotion and Advancement of Small Telecommunications Companies Comments*, March 23, 2010, p. 3.

¹³ National Exchange Carrier Association Report, *Trends 2009, A Report on Rural Telecom Technology*, p. 7 (*NECA 2009 Trends Report*).

¹⁴ *An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime*, Michael L. Katz, Jonathan Orszag, Theresa Sullivan, pp. 35-36 (November 12, 2009) (*Retransmission Study*).

which are expected to break \$1 billion by 2011¹⁵ – have the potential to eviscerate the substantial competitive benefits that accrue to consumers with the introduction of new wireline entrants in the MVPD market; specifically, greater competition, lower subscription rates and increased broadband penetration. These increasing fees are further exacerbated by the fact that broadcasters secure guaranteed placement on the basic tier in rate-regulated systems.¹⁶

A recent study concluded that “[t]elephone company video providers are estimated to pay significantly more per subscriber than cable and satellite operators in the retransmission deals that they have struck . . . [and] that telephone company providers paid 50 percent more per subscriber per month in 2009 than did cable and DBS.”¹⁷ The Retransmission Study further concludes that higher subscription fees, often times resulting from increased retransmission fees, “drives as many as 2.3 million households to forgo the benefits of MVPD services.”¹⁸

IV. THE COMMISSION HAS THE NECESSARY AUTHORITY TO REFORM ITS RETRANSMISSION CONSENT REGULATIONS.

The Commission has ample authority to implement reasonable, necessary and pro-consumer mechanisms to the current “broken” retransmission consent regime.¹⁹ Section 325 of the Act requires “that the rates for the basic service tier [be] reasonable,” and Congress specifically recognized “the impact that the grant of retransmission consent by television stations

¹⁵ *Id.*, p. 32.

¹⁶ Under the Commission’s existing retransmission rules, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations. As noted in the Petition, in addition to guaranteeing broadcasters with cable-carriage rights, the Commission’s rules give broadcasters “a host of powerful distributions controls,” including: i) network non-duplication, which permits a broadcaster to block a cable operator from importing another affiliate of the same network, even when that other station has consented to carriage; ii) syndicated exclusivity, which allows a broadcaster providing syndicated programming to prevent a cable operator from carrying that programming as broadcast by an out-of-market station; and iii) guaranteed placement on a provider’s basic service tier. As a result of these regulatory preferences, normal market dynamics cannot function as they would absent the regulations. *Petition*, pp. 7, 12-13 (citing 47 C.F.R. § 76.92(a); 47 C.F.R. § 76.93; 47 C.F.R. § 76.101; 47 C.F.R. § 76.103(a)).

¹⁷ *Id.*, p. 35.

¹⁸ *Id.*, p. 1.

¹⁹ *Petition*, p. 1.

may have on [such] rates.”²⁰ Of particular note, Section 325(b)(3)(A) of the Act states that the Commission “shall consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations . . . do not conflict with the Commission’s obligation . . . to ensure that the rates for the basic service tier are reasonable.”²¹

This unambiguous mandate provides the Commission with ample authority “to ensure that broadcasters’ exercise of retransmission consent does not interfere with ‘reasonable’ rates for the basic tier” being implemented with respect to retransmission consent.²² As noted in the *Retransmission Study*, retransmission consent fees “results in higher subscription charges and lower consumer welfare,” and such fees will “continue to rise dramatically if the system is not reformed.”²³ As demonstrated throughout the Petition, evidence that reform of the retransmission consent regime is needed in order to protect consumers “is undeniable.”²⁴

V. THE PETITION FOR RULEMAKING PROPOSES REASONABLE, NECESSARY AND PRO-CONSUMER IMPROVEMENTS TO THE RETRANSMISSION CONSENT REGIME.

USTelecom believes that the proposals contained in the Petition are reasonable, necessary and pro-consumer. Implementation of the proposals contained in the Petition will address the substantial consumer harms resulting from the current retransmission process.

²⁰ 47 U.S.C. § 325(b)(3)(A).

²¹ 47 U.S.C. § 325(b)(3)(A).

²² *Petition*, p. 32.

²³ *Retransmission Study*, p. 3.

²⁴ *Petition*, p. 32.

A. Implementation of a Standstill Requirement is Consistent with Commission Precedent, Will Ensure a Fairer Negotiating Environment and is Pro-Consumer.

The Commission should adopt a standstill mechanism during retransmission consent negotiations. Such an approach is consistent with existing Commission precedent and would result in substantial benefits to consumers.

As noted by the Petitioners, broadcasters currently have both the incentive and ability to engage in brinksmanship during retransmission consent negotiations. This in turn, increases dramatically the existence of several consumer harms: loss of local programming for consumers, an increase in consumer MVPD subscription rates and imposition of switching costs and burdens on consumers. Taken together, these issues result in substantial harms to consumers and MVPD competition.²⁵ USTelecom agrees with the Petitioners that implementation of a standstill mechanism during retransmission consent negotiations will foster substantial benefits for consumers.

USTelecom also agrees that such a standstill requirement should apply only so long as the MVPD negotiates in good faith towards a renewal agreement, and during the period while a dispute resolution proceeding remains pending.²⁶ Such a mechanism will achieve critical public policy goals, to include the elimination of brinksmanship as a negotiating tool, as well as ensuring fulfillment of the government's interest in localism by preventing the withholding of local broadcast signals from large portions of the viewing public.²⁷

The Commission recently adopted a similar mechanism under its program access rules. There, in implementing a standstill provision for vertically integrated cable programming, the

²⁵ *Petition*, p. 36.

²⁶ *Id.*, p. 36.

²⁷ The *Petition* cites a string of examples where broadcasters have used the airing of popular broadcast sporting and entertainment events – such as the Academy Awards, the Sugar Bowl, the Cotton Bowl and the NFL playoffs – for maximum leverage during retransmission negotiations. *Petition*, pp. 1 – 2, 24 – 25, 28.

Commission emphasized the “many benefits” that would result from such a mechanism. Those same benefits – such as minimizing the impact on subscribers who may otherwise lose valued programming; limiting the ability of programmers to use temporary foreclosure strategies and encouraging settlement – are equally (if not more so) relevant during the retransmission consent process.²⁸

B. The Commission Should Promulgate Streamlined Procedures for Smaller MVPDs That Lack Resources, Similar to its Approach in the Terrestrial Loophole Proceeding.

USTelecom supports the proposal contained in the Petition that the Commission should promulgate streamlined procedures for smaller MVPDs that lack the resources to support an arbitration or similar proceeding.²⁹ Many of USTelecom’s members are small, rural telecom providers in varying stages of video deployment. Some have been in the marketplace for several years, while others are just now entering. But regardless of how long they have been in the market, many face the identical obstacles faced by their larger counterparts (and competitors) during the retransmission consent process.

Of all the factors facing small, rural entrants, one of the most formidable is the “often costly and lengthy process of acquiring the rights to carry video programming from the local authority and content owners.”³⁰ As noted by the Petitioners, as well as several commenters in this proceeding,³¹ reasonable access to local broadcast programming content is one of the most fundamental obstacles facing these new wireline entrants. USTelecom supports the

²⁸ *Program Access Order*, ¶ 71.

²⁹ *Petition*, p. 33.

³⁰ National Exchange Carrier Association Report, *Trends 2007, Building Tomorrow’s Network*, p. 14.

³¹ See e.g., OPASTCO Comments, p. 3, March 23, 2010 (noting that because “nondiscriminatory access to video content is a vital component of broadband adoption, it is imperative for the Commission to reform the retransmission consent and program access regimes to release the ‘take it or leave it’ stranglehold that programmers have over content availability and pricing); Bevcomm Comments, March 31, 2010.

promulgation of streamlined procedures for smaller MVPDs that often lack the resources of their larger counterparts.

C. The Commission Should Consider Amending its Rules to Create More Robust Dispute Resolution Mechanisms, Such as Arbitration, for Negotiating Parties.

USTelecom supports the proposals contained in the Petition regarding much-needed reforms to the current retransmission consent process. The Commission should amend its rules to ensure that broadcasters' exercise of retransmission consent does not interfere with its mandate to ensure "reasonable" rates for the basic cable tier.

The Petitioners propose implementation of certain mechanisms that would provide much needed reform to the retransmission consent negotiation process. USTelecom fully supports unfettered free market negotiations during retransmission consent discussions. However, when such negotiations break down, the Petitioner's recommendations regarding possible arbitration, expert tribunals or other similar mechanisms are viable options. As noted previously, a standstill provision should be implemented so long as the MVPD negotiates in good faith towards a renewal agreement, and during the period while a dispute resolution proceeding remains pending. An MVPD's willingness to submit to arbitration should be deemed to be a showing of good faith.

In addition, the Commission should adopt rules that would prevent broadcasters from insisting on the mandatory tying of a broadcast station with other, affiliated cable programming content. In other words, the Commission should clearly state in its rules that any mechanism for resolving retransmission consent disputes should only involve stand-alone agreements for the broadcast signal.³² The Petitioners note that not only are the "big four" networks utilizing tying arrangements for their owned and operated stations, but such tactics are being used "increasingly

³² *Petition*, p. 35.

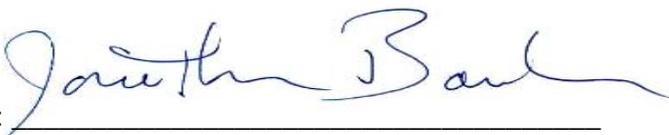
for independent affiliates whose negotiations the network has commandeered.”³³ As a result, programming costs in markets with affiliated stations – often in rural areas – are resulting in increased costs to consumers for MVPD services.

VI. CONCLUSION

Reasonable access to video programming is essential to ensuring increased MVPD competition and further deployment of broadband services. As noted by the Petitioners, the current retransmission consent regime is in dire need of carefully crafted changes that more accurately reflect today’s MVPD marketplace. Reasonable access to broadcast video programming leads to increased video competition and the inherent consumer benefits that flow from such competition, including greater broadband deployment. The Commission has ample authority to reform its retransmission consent regulations, and the proposed mechanisms for improving the retransmission consent regime are reasonable, necessary and pro-consumer. For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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³³ *Id.*, p. 34.