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

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

COMMENTS OF AT&T

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Introduction and Summary.

AT&T strongly believes the Commission should open a rulemaking proceeding to consider whether and how it should modify its retransmission consent rules in response to the above-referenced petition.[1] While AT&T does not necessarily agree with all of the reforms proposed by petitioners, AT&T agrees that the conditions on which Congress and the Commission relied to justify adoption of those rules have markedly changed now that incumbent cable operators confront increasing competition for multichannel video services. Those rules, which were adopted to off-set a perceived imbalance in favor of cable operators at a time when they held a virtual monopoly in such services, now provide broadcasters the incentive and ability to whipsaw MVPDs to obtain large and ever-increasing cash payments (in addition to in-kind compensation) in return for retransmission consent, contrary to Congress's and the Commission's expectations. Those payments threaten to drive up MVPDs rates to the detriment of consumers, many of whom may be forced to forego subscription to multichannel video services simply because they are priced out of the market. Given the strong linkage between investment in video facilities and services and broadband, as the Commission repeatedly has

[1] Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71 (filed Mar. 9, 2010),

recognized, these developments threaten to undermine the nation's broadband deployment and adoption objectives set forth in the Commission's National Broadband Plan. Consequently, a proceeding to consider whether the retransmission consent rules should be modified in light of marketplace developments is particularly appropriate at this time.

Under Market Conditions Prevailing in 1992, the Retransmission Consent Rules Struck an Appropriate Balance Between Broadcasters and Incumbent Cable Operators.

In the 1992 Cable Act,[2] Congress fundamentally altered the relationship that had existed between cable television systems (and other multichannel video programming distributors, or MVPDs) and broadcast television stations by permitting those stations, for the first time, to require such systems to compensate the stations in return for consent to retransmit those stations' signals to subscribers.[3] Congress granted broadcasters this right in order to redress what it then saw as a "distortion in the video marketplace," resulting from the "growth of the cable industry, and the fact that no effective competition to local cable systems ha[d] developed."[4] Congress found this growth, in combination with cable operators' historical ability to retransmit broadcast stations' signals for free, while providing programming and advertising in competition with broadcasters, had led to an imbalance of power favoring cable operators that "threaten[ed] the future of over-the-air broadcasting."[5] Congress sought to correct this perceived imbalance by allowing broadcasters to demand compensation for retransmission consent, and thus to ensure

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992) (Cable Act).

[3] 47 U.S.C. § 325(b).

[4] S. Rep. No. 92, 102d Cong., 1st Sess. 1, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 ("Senate Report"); *id.* at 1187, and 1141 ("A cable system serving a local community, with rare exceptions, enjoys a monopoly.").

[5] *Id.* at 1168.

that local broadcasters would continue to fulfill their public interest obligations.[6] But Congress recognized that granting broadcasters this new found right was a double-edged sword, carrying with it the risk that broadcasters might demand high retransmission consent fees and thus jeopardize the public interest and harm consumers by driving up the cost of providing multi-channel video programming services. While it expected such demands, if any, were likely to be modest because broadcasters "benefit[ted] from being carried on cable systems" and thus many were likely to determine that such benefits were "sufficient compensation," it warned the Commission, in adopting rules to implement the retransmission consent provisions of the Act, to consider "the impact that the grant of retransmission consent" could have on cable rates and "ensure that [such] regulations . . . do not conflict with the Commission's obligation" to ensure that cable rates are reasonable.[7] It is now time for the Commission to heed this warning.

For many years, and so long as incumbent cable operators continued to face minimal competition in the provision of multichannel video programming distribution services, Congress's expectation that retransmission consent payments, if any, were likely to be modest was borne out. Broadcasters and cable operators both recognized that theirs was a symbiotic relationship, and that failure to reach mutually acceptable and beneficial retransmission consent arrangements would result in mutually assured destruction for both. If a broadcaster demanded excessive retransmission consent payments or other onerous terms, it risked losing access to the cable operator's subscribers (thereby decreasing its ad revenues). Likewise, if a cable operator was unreasonable, the broadcaster could deprive it of popular network and syndicated programming by refusing retransmission consent and blocking the cable operator from importing

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[6] *See id.* at 1168-69.

[7] 47 U.S.C. § 325(b)(3)(A).

such programming from a distant station through application of the Commission's network non-duplication and syndicated exclusivity rules.[8] As a consequence, broadcasters typically eschewed payment for retransmission consent, agreeing instead to in-kind compensation from cable operators that reflected a mutual exchange of value between more-or-less equal bargaining partners.[9]

This in-kind compensation required cable operators to launch dozens of new programming networks, providing new assets and long-term value for broadcast conglomerates.[10] These networks (and their broadcast conglomerate parents) include: NewsCorp – FX (1994), Fox Movie Channel (1994), Fox News (1996), Fox Sports en Espanol (1996), Fox Soccer Channel (1996), ABC (fka Fox) Family (1997), National Geographic Channel (2001), Fox College Sports (2001), Fuel TV (2003), Fox Reality (2005), Big Ten Network (2007), Fox Business Network (2007); ABC/Disney – ESPN 2 (1993), ESPN Classic (1995), ESPNews (1996), Toon Disney (1998), SoapNet (2000), ESPN Deportes (2004), ESPNU (2005); NBC Universal – SyFy (1992), MSNBC (1996), CNBC World (2000), mun2 (2001), Sleuth (2006); CBS/Viacom – TV Land (1996), MTV 2 (1996), Nick Too (1998), MTV Tr3s (1998), MTV Hits (1998), MTV Jams (1998), Nick GAS (1998), VH1 Classic (1998), VH1 Country (1998), VH1 Soul (1998), Noggin (1999), Nick Toons (2002), CBS College Sports

[8] 47 C.F.R. §§ 76.92(a), 76.93.

[9] *General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket No. 03-123, *Memorandum Opinion and Order*, 19 FCC Rcd 473, ¶ 56 (2004) (noting that, "historically, most broadcasters have opted for . . . in-kind compensation from cable operators in exchange for retransmission consent").

[10] As the American Cable Association previously has observed, "[i]n retransmission consent [negotiations], the rights to distribute the four major broadcast networks are tied or bundled with at least 35 other channels." ACA Comments, MB Docket No. 07-269, at 9 (filed May 20, 2009).

(2003), Logo (2005). In each round of retransmission consent negotiations, the broadcasters demanded that cable systems (and other MVPDs) carry new programming networks in addition to those the MVPDs previously had agreed to carry in prior rounds, as well as to increase the per-subscriber license fees for those networks. Thus, once an MVPD launched a new programming network, it almost never was able to remove that network from its line-up regardless of how popular (or unpopular) that network was. . Without the broadcasters' leverage to withhold popular network and syndicated programming absent such in-kind compensation, many of these networks would have found it more difficult, if not impossible, to obtain carriage on cable systems across the country. The retransmission consent regime thus is largely responsible for the tremendous proliferation of programming networks on cable and other MVPD systems.

These affiliated programming networks have proved to be enormous cash cows, adding tremendous value to broadcast conglomerates. At the same time, however, the proliferation of programming networks caused audience fragmentation, diminishing the viewership of these conglomerates' broadcast stations and their affiliates. Thus, as the broadcast networks themselves reaped significantly higher revenues across their programming portfolios, their owned and operated stations and affiliates experienced a decline in revenues as their audiences fragmented. To address this development, broadcasters increasingly sought retransmission consent payments to off-set their declining advertising revenues. And, with increasing competition in downstream program distribution (as discussed below), broadcasters had the opening and bargaining power they needed to extract such payments from MVPDs – first from new entrants (including satellite providers and later wireline MVPDs) and then from cable incumbents once the precedent had been set.

Emerging Competition in the Distribution of Multi-Channel Video Programming has Tipped the Balance in Broadcasters' Favor, and Thus Threatens to Harm Consumers and the Public Interest.

While the retransmission consent rules at one time may have provided an appropriate counterweight to incumbent cable operators' negotiating power, and thus functioned as expected, when cable operators were virtually the only game in town, those rules (when combined with the network non-duplication and syndicated exclusivity rules, which eliminate any meaningful constraint on broadcasters' bargaining power) have tipped the balance too far in broadcasters' favor now that meaningful competition has begun to emerge in the multichannel video programming distribution space. In particular, the growth in competition in downstream multichannel video programming distribution, together with the consolidation in ownership of broadcast and cable programming networks, has drastically altered the retransmission consent landscape. As a recent economic analysis of the retransmission consent regime prepared by former FCC Chief Economist Michael Katz, Jonathan Orszag, and Theresa Sullivan, cogently explains, the growth in MVPD competition shifted the balance of negotiating power to broadcasters by placing at a significant competitive disadvantage any MVPD that fails to obtain retransmission consent for popular network or syndicated programming, and thus suffers a loss in consumer demand as subscribers turn to other MVPDs carrying that programming.[11] As video competition has grown over the past decade, broadcasters have been able to leverage their exclusive control over popular network and syndicated programming (assured by the Commission's network non-duplication and syndicated exclusivity rules) to demand cash (in addition to in-kind) compensation from new entrants, which confronted competition from

[11] Michael L. Katz, Jonathan Orszag, Theresa Sullivan, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime," November 12, 2009, attached to Ex Parte Letter of Neal Goldberg, NCTA, to Blair Levin, Executive Director, Omnibus Broadband Initiative, FCC, GN Docket Nos. 09-47, 09-51, 09-137, MB Docket No. 07-269 (Dec. 16, 2009) (Katz Study).

entrenched cable incumbents, as well as each other, and could not go to market without equally attractive video programming as the incumbent. And, having used their power over vulnerable new entrants (first, satellite video providers and, later, wireline MVPDs) to set a precedent for cash payments for retransmission consent, broadcasters applied that precedent to the entire industry, extracting cash payments from cable incumbents as well. Now, as petitioners point out, every time a retransmission consent agreement comes up for renewal, broadcast networks and their affiliates present MVPDs (and their subscribers) with a Hobson's choice: paying higher retransmission consent fees (which, like all incremental costs, are passed on to consumers) or losing access to popular programming,[12] harming consumers and depriving them of the benefits of what is supposed to be "free" over-the-air broadcast programming.[13] In short, broadcasters have been able to use increasing video competition to force MVPDs into paying ever increasing retransmission consent payments through the same sort of whipsawing tactics that the Commission elsewhere has condemned as anti-consumer and contrary to the public interest.[14]

In a recent *ex parte*, the National Association of Broadcasters (NAB) counters that the advent of competition for multichannel video services has had no effect on broadcasters incentive and ability to withhold retransmission consent in order to extract ever higher fees from

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[12] Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71 (filed Mar. 9, 2010), Petition at 5.

[13] Undoubtedly, broadcasters would counter that viewers may still view their programming over-the-air by installing rabbit ears or other antennae. But, many viewers do not want to incur the time, expense, and hassle of installing antennae, in addition to whatever equipment they might need to access programming provided by their MVPD.

[14] *See Regulation of International Accounting Rates*, CC Docket No. 90-337, *Notice of Proposed Rulemaking*, 5 FCC Rcd 4948 (1990) (noting that the Commission's regulation of international accounting and settlements arrangements was designed to prevent "whipsawing" of competing U.S. carriers – that is, playing them off against each other to extract the most favorable settlements rates and terms).

MVPDs, or otherwise "'unbalance' retransmission consent negotiations.'"[15] NAB contends that, if anything, changes in the market place (including cable system clustering, audience fragmentation, and a reduction in the share of viewers watching over-the-air television) have "*reduced* broadcasters' bargaining power relative to MVPDs."[16] That is so, the story goes, because "if an impasse occurs" in retransmission consent negotiations, an MVPD loses the ability to distribute only one of many channels to its subscriber base, while a broadcaster "risks losing distribution of its one and only signal to whatever portion of its service territory is served by the MVPD with which the impasse occurs."[17]

But, if broadcasters' negotiating leverage were decreasing as NAB claims, one would expect their compensation for retransmission consent to be falling commensurately. In fact, precisely the opposite has occurred. Broadcasters not only have continued to demand in-kind compensation in the form of carriage of affiliated programming networks, but also ever higher cash payments for retransmission consent, as petitioners document.[18] In 2006, MVPDs collectively paid approximately $200 million in retransmission consent fees, with the lion's share paid by new entrants.[19] Three years later, that number had more than tripled, rising to almost $740 million.[20] Only now, as a result of whipsawing, broadcasters were able to extract

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[15] Letter of Erin L. Dozier, NAB, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-198, 07-269, 09-182, 10-71, at 2 (filed May 6, 2010).

[16] *Id.*, Attachment A, Jeffrey A. Eisenach, Kevin W. Caves, "Retransmission Consent and Economic Welfare: A Reply to Compass Lexicon," at 2 (April 2010) (emphasis in original).

[17] *Id.* at 5, n.10.

[18] Petition at 24-26.

[19] Katz Study at 32.

[20] *Id.*

retransmission consent payments from all MVPDs – not just new entrants.[21] And that's just the tip of the iceberg. According to industry analysts, retransmission consent payments will continue to spiral upwards, reaching $1 billion in 2011 and over $1.6 billion by 2015.[22] If the Big 4 networks were to succeed in demanding $1 per subscriber for each of their affiliates, as is their reported goal, those payments would rise to $4.8 billion per year.[23]

To make matters worse, broadcasters frequently have sought "most favored nation" provisions under which an MVPD must agree to pay the broadcaster for retransmission consent if it pays any other broadcaster for such consent. Under such provisions, the effect of retransmission consent payments quickly could escalate, driving up MVPD costs, and, concomitantly, subscribers' rates.

Compounding the problem, broadcasters have strategically timed the expiration of their retransmission consent agreements to obtain maximum leverage in negotiations with MVPDs. Earlier this year, ABC used the Academy Awards broadcast to strengthen its hand in negotiations with Cablevision. Likewise, Fox used the threat of cutting off Time Warner's ability to carry College Bowl games to try and force Time Warner to agree to significantly higher retransmission consent payments.

AT&T too has been subjected to similar demands and tactics in recent retransmission consent negotiations. And if these developments continue unabated, AT&T easily could foresee retransmission consent payments rising dramatically in some markets, which, when added to the compensation AT&T must pay for the plethora of programming networks AT&T must carry as

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[21] *Id.*

[22] *Id.*; Melissa Grego, "Retrans . . . The Bloody Battle to Save Broadcast Television," BROADCASTING & CABLE (Dec. 12, 2009), available at http://www.broadcastingcable.com/article/print/439916-Cover_Story_Retrans_The_Bloody_Battle_to_Save_Broadcast_Television.

[23] *Id.*

in-kind compensation for such consent today, would radically increase its costs. Inevitably, such costs would have to be passed on to consumers in higher subscription fees.

The harm to consumers is not limited only to increased fees for video services. Given the strong nexus between video and broadband deployment, the rise in retransmission consent payments also threatens to undermine the Commission's broadband deployment and adoption goals. As Katz, Orszag and Sullivan explain, the higher subscription fees resulting from the run up in retransmission consent payments inevitably will force millions of consumers to forego subscription to MVPD services, depressing demand for broadband services offered over the same networks and facilities.[24]

Even if the Commission were to retain any doubt that the existing retransmission consent regime tips too far in broadcasters' favor and harms consumers, the Commission cannot ignore the clear evidence that retransmission consent payments are spiraling out of control and must make adjustments to its rules that recognize the changes in the marketplace. In light of that evidence, the Commission simply must, at a minimum, grant the petition and open a rulemaking to gather and weigh all the evidence regarding marketplace developments and the impact of increasing retransmission consent payments on the rates consumers must pay for video services, in addition to the impact of such payments on subscription to video services, as well as on broadband deployment and adoption.

Proposed Reforms.

While AT&T does not necessarily subscribe to all of the reforms proposed by petitioners, AT&T agrees that the Commission is bound by the Act to consider whether its retransmission consent rules should be modified in light of marketplace developments. As petitioners point out,

[24] Katz Study at 3.

section 325 of the Act requires the Commission to consider the impact of retransmission consent payments on rates for video services, and section 309(a) requires the Commission to ensure that broadcast licensees operate in a manner consistent with "the public interest, convenience, and necessity."[25] AT&T thus agrees with petitioners that the Commission should seek comment on reforms that would remove the artificial advantage and enhanced leverage afforded to broadcasters in retransmission consent negotiations by the existing rules. In addition to the proposals offered by petitioners, AT&T urges the Commission to consider, and seek comment upon, the following additional proposals to redress the imbalance caused by the existing rules and establish appropriate rules of engagement in retransmission consent negotiations under existing market conditions:

- The Commission should consider adopting a presumption that refusing to permit an MVPD to continue carrying a broadcasters' signal pending negotiation of a retransmission consent agreement and dispute resolution is inconsistent with a broadcaster's public interest obligations and duty to negotiate in good faith. While the Commission previously found that it could not require interim carriage while a retransmission consent complaint is pending,[26] it did so on the ground that the Act prohibits an MVPD from retransmitting the signal of a broadcast station except with the express authority of the station.[27] Even if the Commission cannot require a station to permit carriage of its signal without express consent, that does not prevent the Commission from finding that refusal to do so is inconsistent with the station's public interest obligations and obligation to negotiate in good faith. Nor does it prevent the Commission from finding that a refusal by a station to include in any retransmission consent agreement a provision permitting carriage pending renewal or renegotiation of that agreement constitutes a failure to negotiate in good faith and/or a violation of the station's public interest obligations.

  As an alternative, and consistent with the statutory cycle for broadcasters' election between the right to must-carry or retransmission consent,[28] the Commission could consider adopting

[25] Petition at 30-31.

[26] *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity,* CS Docket No. 99-363, *First Report and Order,* 15 FCC Rcd 5445, ¶ 60 (2000).

[27] *Id.*, citing 47 U.S.C. § 325(b)(1).

[28] *See* 47 U.S.C. 325(b)(3)(B).

a rule requiring broadcasters to synch up their retransmission consent contracts with all MVPDs so that all such contracts terminate at the same time and the negotiating schedule is the same for all MVPDs. It also might consider adopting an "all or none" requirement under which a broadcaster would be required to grant interim carriage to (or grandfather existing retransmission consent agreements with) all MVPDs or none. Such a requirement would reduce broadcasters' incentive and ability to whipsaw MVPDs into paying ever higher retransmission consent fees, and provide them incentives to behave reasonably in negotiations lest their signals be suspended from all MVPDs pending negotiations.

- The Commission also might consider prohibiting termination of retransmission consent agreements shortly in advance of significant and/or popular events (such as the Super Bowl, Academy Awards, College Bowl Games, or March Madness). Such a rule would prevent broadcasters from holding the public hostage in retransmission consent negotiations by denying consumers access to the most popular programming unless MVPDs agree to pay higher retransmission consent fees.

- The Commission also should seek comment on whether it should modify its network non-duplication and syndicated exclusivity rules to permit MVPDs to obtain popular network and syndicated programming from distant stations in the event a local station demands cash compensation for retransmission consent. To be sure, the Commission previously rejected proposals to modify those rules because the Senate Report on retransmission consent stated that section 325 of the Act presumed that those rules would continue to apply without amendment.[29] But, section 325 itself contains no limitation. Plainly, had Congress intended to limit the Commission's authority to modify those rules in light of marketplace developments almost 20 years later, it could – and would – have said so. Modifying the rule to permit MVPDs to negotiate with distant stations in the event a local station demands cash for retransmission consent would restore much needed balance to retransmission consent negotiations by allowing MVPDs to obtain must-have programming if a local broadcaster is unreasonable. It also would not threaten the Commission's localism objectives insofar as an MVPD would not seek to carry a distant station except in exigent circumstances, since its subscribers undoubtedly would prefer the local station and because of the higher license fees associated with carrying a distant signal. Thus, an MVPD will turn to a distant station only if the local station's demands are unreasonable. Modifying the network non-duplication and syndicated exclusivity rules thus would provide a market-based backstop that would promote the Commission's localism objectives while, at the same time, reducing broadcasters incentive and ability to demand unreasonable retransmission consent fees to the detriment of consumers. It also would reduce administrative burdens on the Commission insofar as MVPDs could obtain must-have network and syndicated programming from a distant station rather than having to go to the time and expense of litigating retransmission consent disputes.

[29] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Signal Carriage Issues, et al.*, MM Docket No. 92-259, *et al.*, *Report and Order*, 8 FCC Rcd 2965, ¶ 180 (1993), citing Senate Report at 38.

AT&T believes that these limited and targeted proposals could provide an appropriate counterweight to broadcasters' increased bargaining power in retransmission consent negotiations under existing market conditions, and should be considered in any proceeding considering reform of the Commission's retransmission consent regime. Given the potential impact of rapidly rising retransmission consent fees on MVPDs' rates, and the potential spillover effects on video subscription rates and, concomitantly, on the nations broadband deployment and adoption goals, such a proceeding is particularly appropriate at this time. Simply put, if local broadcasters themselves are going to treat their broadcast channels the same as any other cable programming channel, the Commission should consider whether the existing retransmission consent rules, with their bias in favor of broadcasters and which were adopted to address very different market conditions, continue to be consistent with the public interest, convenience and necessity.

Respectfully submitted,

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