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

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

COMMENTS OF RCN TELECOM SERVICES, INC.

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COMMENTS OF RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, and in accordance with the Commission's Public Notice in the above-captioned proceeding,[1] hereby submits its comments in response to the Petition for Rulemaking submitted herein by Public Knowledge, Time Warner Cable Inc., DIRECTV, Inc., Verizon, Dish Network LLC, Cablevision Systems Corp., Charter Communications, Inc., Mediacom Communications Corp., American Cable Association, Bright House Networks, LLC, New America Foundation, Insight Communications Company, Inc., OPASTCO and Suddenlink Communications (collectively, "Petitioners").

I. INTRODUCTION

RCN agrees with Petitioners that the time is ripe – indeed is past due – for the Commission to address serious and harmful dysfunctions in its current regulatory regime governing the retransmission by cable operators of broadcast signals. A regime developed nearly twenty years ago to redress what the Commission then saw as imbalanced market conditions favoring cable operators has had the effect of allowing broadcasters to gain their own market power and to develop and launch additional cable channels that, based upon the widespread distribution afforded by cable operators, have themselves resulted in additional market power. Broadcasters abuse this market power and the outdated retransmission regulatory regime in a manner that hurts cable operators and viewers alike. Thus, a regime that may have had value when adopted has long since lost that value and now does actual – and grievous – harm. The Commission should immediately institute a rulemaking to replace the existing structure with a new one that will prevent these harms.

II. BACKGROUND

Petitioners have laid out in detail the evolution in the marketplace that has brought us to this pass. As they discuss, in 1992 Congress passed the Cable Television Consumer Protection and

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[1] Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, DA 10-474 (MB, Mar. 19, 2010).

Competition Act ("1992 Act"), granting broadcasters the right to require their consent before allowing cable providers to retransmit their signals (and to seek compensation for such retransmission). The express purpose of the 1992 Act was to preserve and protect the broadcasters' obligation to serve the public interest – and in particular the public interest in local programming – against the then-perceived market power of cable providers. In combination with must-carry requirements, as well as network non-duplication and syndicated exclusivity rules, the intent was to re-level the playing field to correct for then-existing significant inequality in bargaining power which was perceived to favor the cable providers at the broadcasters' expense, but the effect was to stack the deck in broadcasters' favor. This imbalance had arisen from the fact that in many areas of the country traditional cable providers had a near-monopoly in the multi-channel video program distribution space.[2]

But Congress was also at pains to provide for regulatory oversight by the Commission to assure that over time the retransmission consent right would not result in harm to the public. Thus, Congress did not merely grant broadcasters the right to engage in untrammeled "let-the-chips-fall-where-they may" negotiations in deciding the terms upon which they would grant their consent. Rather, Congress directed the Commission to adopt regulations "to govern the exercise by television broadcast stations of the right to grant retransmission consent." Importantly, Congress required the Commission to take into account "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier," with the express requirement that the Commission "ensure that the rates for the basic service tier are reasonable."[3] This mandate is patently a continuing one, and the Commission has the obligation to revisit its regulations from time to time to ensure that they continue to further these fundamental goals as market conditions evolve.

[2] Petition at 9-15.
[3] 47 U.S.C § 325(b)(3)(A).

The rules originally adopted by the Commission to carry out Congress' 1992 mandate reflect the realities of the market as it existed at that time. As Petitioners note:

> At the time, the Commission found that the vast majority of DMAs were served by only one cable provider, and that 96 percent of MVPD subscribers received service from a cable company. The Commission also noted that no LECs had entered the video programming distribution market, and that DBS had attracted less than 1% of MVPD subscribers. The Commission therefore designed its rules on retransmission consent with this early 1990s market dynamic in mind – one in which broadcasters faced extremely limited distribution options and negotiated almost exclusively with cable operators for carriage.[4]

Accordingly, the Commission adopted rules designed solely to protect broadcasters (and viewers) from the power of cable operators.

Now the tables have turned. It is broadcasters, not cable operators, who have the power in negotiations. Broadcasters continue to control "must have" programming, such as highly popular sports events and other one-time events such as the Academy Awards telecast, as well as a host of other programming that viewers demand and value. Indeed, because of network non-duplication and syndicated exclusivity rules, each local broadcast affiliate possesses a true monopoly in all the network and syndicated programming that it controls. Moreover, since local broadcast affiliates generally produce their own local news and other local programming, they also possess a monopoly over this programming as well. [5]

Cable operators, by contrast, are no longer the only game in town for delivering this programming to viewers. They face competition not only from over-the-air broadcast but also from satellite providers, other facilities-based cable operators, including local exchange company fiber offerings such as FIOS, and Internet offerings such as Hulu, YouTube, and network and affiliate-based streaming.[6] Thus, if cable operators once had the power to dictate terms to broadcasters for the retransmission of their signals, they have now completely lost this power. In particular, any

[4] Petition at 11-12 (footnotes omitted).

[5] In markets in which a single entity owns, operates and/or manages more than one broadcast station, this entity often further leverages its monopoly by using its consent for the more desirable station to require the carriage of the less desirable station at a much higher fee than the broadcaster would be able to negotiate for that station standing alone.

[6] Petition at 15-20.

threat that cable operators may have once posed to viewers' continuing ability to receive local programming – which drove the initial passage of the 1992 Act and the framing of the Commission's enabling regulations – has long since disappeared.

Instead it is the broadcasters – and, looking over their shoulders, the broadcast networks – that now pose the threat to viewers. Because of broadcasters' control over highly valued programming, they are able to conduct negotiations in a manner that allows them to demand exorbitant compensation from cable operators,[7] and to threaten that unless cable operators agree to this compensation, the broadcaster will simply cut off access to this valued programming. This threat is typically made at the eleventh hour, upon the expiration of previous program retransmission agreements and on the eve of prized, time-sensitive events such as football bowl games and the Academy Awards. Cable operators have no recourse but to yield to these demands or else their viewers will lose access to this programming.[8]

Of course, the viewers will also lose access to *local* programming from the same broadcasters. This is a particularly perverse consequence of the existing regulatory framework, because it was concern for viewers' access to local programming that drove not only the passage of the 1992 Act but other measures such as the network non-duplication and syndicated exclusivity rules. But local programming is also a bedrock element of the broadcasters' obligation to serve the

[7] The broadcasters have crowed publicly about their ability to extract these prices, e.g.: "We are undercharging for all of our local sports networks, which are absolutely essential carriage to any cable company." (Rupert Murdoch to a Goldman Sachs industry conference). M. Farrell, "Murdoch Sees Ad Recession Bottom," Multichannel News, Sept,. 15, 2009.

[8] Petitioners describe in detail this pattern of brinksmanship engaged in by broadcasters. See Petition at 20-25. As Petitioners also show, the Commission's "good faith" negotiating standards set forth in 47 C.F.R § 76.65 have been ineffective at preventing this type of behavior. Petition at 15.

public interest[9] – and yet it is now the actions of the broadcasters themselves that pose a dire threat to local programming.

This strategy has proven very lucrative for the broadcasters:

- In 2007, Sinclair predicted that compensation from retransmission consent would *increase 89% that year* to approximately $48 million.[10]

- CBS predicted that its retransmission fees would *double* between 2009 and 2010.[11]

- SNL Karen found that during the first 9 months of 2008, revenue from retransmission fees increased 32% to $124 million for six broadcast groups. They predict that retransmission fees could top $1.3 billon a year by 2012 – a *tenfold* increase in a mere four years.[12]

It is clear that cable operators cannot and will not shoulder the burden of these cost increases but that they will have to be passed through to viewers in the form of increased rates for cable service, including the basic tier services on which these broadcast transmissions ride.

These ballooning broadcaster revenues do not represent a tenfold increase in the value of network programming to viewers. Instead they represent a simple – and enormous – wealth transfer from viewers to broadcasters, made possible by broadcasters' ability to leverage the outdated regulatory regime to extract windfall profits for themselves.[13] Thus, what was intended as a measure to protect broadcasters (and viewers) from the harm that cable operators were thought to pose has now enabled the broadcasters themselves to insist upon new and unheard-of payments – which

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[9] *See, e.g.,* the Commission's THE PUBLIC AND BROADCASTING: How to Get the Most Service from Your Local Station, revised July 2008 (Introduction, second paragraph):

> In exchange for obtaining a valuable license to operate a broadcast station using the public airwaves, each radio and television licensee is required by law to operate its station in the "public interest, convenience and necessity." This means that it must air programming that is responsive to the needs and problems of its local community of license.
>
> To do so, each station licensee must affirmatively identify those needs and problems and then specifically treat those local matters that it deems to be significant in the news, public affairs, political and other programming that it airs.

[10] "Sinclair Broadcasting Sees Increase in Retransmission Revenue," Broadcast Engineering, Apr. 17, 2007.

[11] C. Atkinson, "CBS Retrans Fees Expected to Double in 2010," Broadcasting and Cable, Nov. 5, 2009.

[12] M. Farrell, "Retransmission-Consent Fees Boost Broadcaster Revenue: Kagan Study," Multichannel News, Jan. 3, 2009.

[13] Broadcasters often extract even greater windfalls by charging discriminatorily higher per-subscriber rates to smaller cable operators (and indirectly their subscribers) in the *same* market even though the value of the signal to the smaller operator's subscribers is no greater than its value to the larger operator's subscribers.

ultimately come from viewers – as a condition to delivering the very local programming that it is the broadcasters' public interest duty under the law to provide.

III. THE COMMISSION SHOULD IMMEDIATE INSTITUTE A RULEMAKING TO ADOPT NEW RULES PREVENTING BROADCASTERS FROM EXTRACTING UNREASONABLE REVENUES FOR RETRANSMISSION AND THEREBY HARMING THE PUBLIC INTEREST.

It is no wonder that there has been an outcry from many quarters for reform of the system.[14] RCN agrees that such reform is overdue. RCN believes that the Commission should immediately commence a rulemaking with the goal of expeditiously adopting a regulatory structure going forward that embraces four key elements. These elements are as follows:

1. Mandated Interim Carriage. Perhaps the most lethal weapon in broadcasters' arsenal is their ability to threaten to simply cut off programming if cable operators do not cave in to their demands, no matter how one-sided and draconian these demands may be. As the notorious examples cited by Petitioners[15] show, broadcasters do not scruple to roll out this tactic at times when cable operators – and, by proxy, viewers – are at their most vulnerable, such as on the eve of major sporting events or the Academy Awards. At that point, cable operators simply have no choice but to capitulate, or their viewers will be deprived of the ability to see this programming.[16] But this capitulation does not simply result in an excessive one-time payment for the right to carry the desired event, though that would be bad enough. Rather, broadcasters demand, and cable operators must accept, excessive payments that run for the entire length of the forthcoming new agreement. Of course, this is on top of broadcasters' continuing – and widening – demands that cable operators also agree to carry the program offerings of broadcasters' non-broadcast affiliates as a condition to

[14] Petition at 27-30.
[15] Petition at 20-25.
[16] Generally, as in the examples cited by Petitioners, this programming is effectively perishable; the Super Bowl is simply not the same watched a week after the event. Thus, cable operators cannot credibly call broadcasters' bluff here. For these programs, programming delayed is programming denied.

carrying their broadcast signals.[17]

To prevent broadcasters from using this patently unfair and harmful tactic, the Commission should require that, pending negotiations toward a new agreement and during the pendency of any dispute resolution process, broadcasters must continue to allow the carriage of their signal on the old terms until a new agreement is reached or the dispute resolution is concluded. This will at least protect viewers from the most important abuse that broadcasters have shown that they are perfectly willing to engage in to obtain their windfalls.

There can be no harm to broadcasters from this approach, since these are terms that they willingly agreed to in the last agreement. And the knowledge that they will have to continue to provide programming upon the old terms will incent them to come to the table sooner rather than later with reasonable non-windfall proposals for the forthcoming agreement.

2. Speedy, Meaningful Dispute Resolution. The Commission should also include within its new regime a clearly spelled-out binding dispute resolution process so that if direct negotiations between the broadcaster and cable operator reach an impasse or become protracted, the parties may have recourse to a disinterested third party to arrive at the terms for their forthcoming retransmission arrangement. RCN will review closely the proposals of other parties in this regard, but a few key principles should clearly be part of the mechanism adopted.

First, the procedures must be ***streamlined***. Otherwise, broadcasters can turn them into wars of attrition using delaying and obfuscating tactics to force cable operators to spend vast amounts of

[17] In the early days of the existing regulatory framework, this in-kind compensation was by and large all that was requested by broadcasters. At the time, when the market for cable programming was still in the developmental stage, this kind of arrangement – which was usually entered into in lieu of cash payments – made sense for both parties, and also enabled new cable programming to grow and find niches where cable operators had capacity for it. However, broadcasters' demands – driven by their networks –continue to burgeon in this sphere as well, and now include the overt requirement to "tie" the carriage of affiliated channels for which there is little or no subscriber demand to consent for the retransmission of the broadcast channels that subscribers do want. Moreover, these demands are now made in addition to, not in lieu of, the demand for cash payments. This kind of tying arrangement insisted upon by networks results in a significant competitive disadvantage for non-broadcast-affiliated programming providers. To the extent that these providers are driven from the market by this disadvantage – or deterred from entering it in the first place – viewer choice and the public interest suffer.

time, money and resources and thereby pressure the cable operators to make unfair concessions.

Second, the procedures must be <u>*binding*</u> to accomplish their purpose of arriving quickly at a definite set of terms for the relationship going forward.

Third, the procedures must provide for decisions to be made by experts, in the form of either a dedicated corps of experts from which the arbitrator for each particular dispute is to be chosen or the empanelment of a specialized expert tribunal sitting to adjudge each dispute. It is critical that in either case the decision-maker(s) have the expertise needed to assess the presentations and data submitted by each party so as to reach a decision that is fair to both sides in the context of the market for broadcast services generally and of the broadcasters' public interest obligations specifically.

Finally, the procedures must be <u>*automatic*</u> – i.e., they should be available on the basis of a showing by either party that they are unable to reach an agreement. In particular, the availability of these procedures should *not* be pre-conditioned on a showing of bad faith. This showing is time-consuming (and factually often difficult) to make and should not be a hurdle to getting "in the door" to having these disputes decided.

3. Transparency and Access to Information. As the Commission has learned in other programming contexts where arbitration is an available remedy, networks have used a variety of tactics to make it as difficult as possible for cable operators to effectively present their cases, and this in turn has inhibited the arbitrators from being able to reach decision that are based on the real-world conditions in the marketplace. To the extent networks have grudgingly shared market data in their possession (such as agreements with other cable providers), they have done so not only under standard protections for confidential information (which, to be sure, are appropriate) but have insisted on other conditions that serve only to hinder current and future disputants from developing and presenting their case. For example, in at least one programming arbitration case of which RCN is aware, RCN understands that the network insisted that the expert retained to review the information provided by the network agree not only to keep the information confidential, but also *to refrain from appearing in any other proceeding.* The availability of such tactics unnecessarily inflates the costs to disputants and decision makers alike of each new proceeding. Of course, it also appreciably delays the resolution of the disputes,[18] and virtually eliminates the potential value of the arbitration remedy for small carriers like RCN who simply cannot withstand the costs imposed.

Thus, the Commission should include in its new framework a mechanism for compiling and making available to both disputants and the experts assigned to decide the disputes a comprehensive body of information as to market conditions, costs and prices that will provide a solid, rational foundation for the fair resolution of these disputes.

4. Meaningful Enforcement of the Good Faith Standard. As noted above, the Commission has had on its books for some time regulations that attempt to require broadcasters to negotiate in "good faith." But these well-intentioned standards have failed of their essential purpose. In fact, broadcasters routinely engage in tactics that in other spheres would be considered the epitome of bad faith. Most obvious of these is, of course, the eleventh-hour brinksmanship they have often engaged in as described above – the threat to simply pull the plug unless the cable operators accede to their demands.

Another egregious example of which RCN is aware occurred within a recent retransmission negotiation window. In this case the broadcaster arrived at an agreement on terms with the cable operator but insisted on the ability to reopen the terms at any time rather than agreeing to a stable set of terms for the full term of the retransmission agreement. The broadcaster then negotiated with other cable operators to see what it could extract from them, then – within a short time after the contract with the original cable operator had been inked – used that clause to reopen the terms of the agreement to demand similar concessions from the original cable operator.

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[18] By contrast, since the networks have access to this data at all times, they do not need to re-school themselves again and again each time they are in a new dispute.

Other bad faith tactics are legion on the broadcasters' part as well. One of the most straight-forward is a stark "dictate, not negotiate" tactic: the broadcaster makes a demand, the cable operator counters with a compromise proposal, and then rather than engage in meaningful efforts to find common ground, the broadcaster merely repeats its demand over and over again or at most moves only pennies in order to claim it has met the good faith negotiation standard. Another is the outright refusal by broadcasters to make proposals as to key issues. A third is repeated foot-dragging, delaying responses and counterproposals far past the time reasonably need to prepare them.

As noted above, no showing of bad faith should be required as a precondition to invoking the dispute resolution process. But once the process has been initiated, cable operators should be free to make such a showing before the decision-maker charged with resolving the dispute. And where the cable operator does make such a showing, the decision-maker should be instructed to provide in the decision for remedies for such bad faith. For example, the decision-maker might include an offset against the compensation otherwise to be paid to the broadcaster to make the cable operator whole for the additional time, resources and expenses expended by the cable operator in responding to the broadcaster's bad faith tactics.

IV. CONCLUSION

In the nearly two decades that have passed since the adoption of the Commission's original rules governing retransmission consent, the marketplace has turned one hundred and eighty degrees. Today, it is broadcasters, not cable operators, who have the dominant position in the negotiations. Thus, the Commission's rules now have exactly the opposite effect than they had in the early 1990s, and instead of protecting the public interest, the rules harm it. The time has clearly come to reform the regulatory structure as quickly as possible to redress the market balance between broadcasters and cable operators, all in the manner described herein. The public interest demands no less.

Respectfully submitted,

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