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

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

COMMENTS OF TIME WARNER CABLE INC. IN SUPPORT OF THE PETITION FOR RULEMAKING

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May 18, 2010

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Time Warner Cable Inc. ("TWC"), as a signatory to the petition for rulemaking ("Petition"), obviously supports its call to launch a proceeding to reform the retransmission consent process. TWC submits these brief comments to underscore the importance of prompt Commission action. As a result of fundamental changes in the media landscape, every retransmission consent negotiation now carries a significant threat of disrupting service to consumers. Even where agreements are reached in spite of broadcasters' brinksmanship tactics, the process exacts a significant toll on MVPDs and their subscribers. Consumers would be better served by new rules that end the cycles of showdown negotiations and recurring threats to cut off access to popular programming. The petitioners, who represent multichannel video programming distributors ("MVPDs") of all platform types and sizes and leading public interest organizations, came together to express their common conviction that the retransmission process is broken. Chairman Genachowski has likewise expressed "concern[] about sudden program interruptions, and about the potential for rising cable rates,"[1] while describing recent breakdowns in retransmission consent negotiations as "real warning signs" that the existing rules "may not be

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[1] Remarks of Chairman Julius Genachowski at 8, NAB Show 2010, Apr. 13, 2010, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297469A1.pdf.

serving consumers well."[2] The Commission therefore should move forward with a Notice of Proposed Rulemaking that explores appropriate means of resolving retransmission consent disputes—and preventing them from occurring in the first place—to ameliorate ongoing harm to consumers.

DISCUSSION

I. THE PETITION DEMONSTRATES THAT BROADCASTERS ARE EXPLOITING THE CURRENT RULES IN A MANNER THAT HARMS CONSUMERS

As explained in the Petition, the Commission adopted the existing retransmission consent rules nearly two decades ago under a vastly different set of marketplace conditions than exist today. The rules are now badly outdated, and broadcasters are exploiting the lopsided nature of the current framework by issuing demands for ever-increasing retransmission consent fees, backed by threats to withdraw their programming from MVPDs' subscribers. For many years, retransmission consent negotiations went relatively smoothly as broadcast stations and MVPDs typically negotiated for in-kind compensation that reflected a mutual exchange of value.[3] Indeed, many broadcasters—consistent with Congress's expectation—determined that "the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system."[4] Yet, as broadcasters are now demanding significant cash payments for retransmission

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2 John Eggerton, *Genachowski: FCC Will Protect Consumers*, BROADCASTING & CABLE, May 10, 2010, *available at* http://www.broadcastingcable.com/article/452441-Genachowski_FCC_Will_Protect_Consumers.php (quoting Chairman Genachowski).

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

4 S. REP. NO. 102-02 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1168 ("Senate Report").

consent, negotiations result in high-stakes showdowns that leave MVPDs' subscribers at the mercy of a process they do not understand or control. Even apart from the prospect of significant rate hikes, the constant threats of blackouts (whether or not they occur) create an unstable and uncertain environment that frustrates consumers and drains parties' resources from more productive uses.

In enacting the 1992 Cable Act, Congress was seeking to address concerns raised by cable's perceived "monopoly" power in the video programming distribution marketplace and, in particular, concerns that cable posed a threat to the public interest benefits associated with widespread distribution of over-the-air broadcasting.[5] Consequently, Congress not only created the new artificial "right" for broadcasters to demand retransmission consent, but also adopted or left in place a series of additional regulatory measures designed to further *shield* broadcast stations from market forces (based on the view that a framework that relied solely on bilateral negotiations would harm broadcasters and, in turn, the public interest). These regulatory advantages include optional mandatory carriage rights, the right to favorable tier placement and channel positioning, "must buy" obligations with respect to all subscribers, and generally exclusive distribution rights for broadcasters within their local markets.[6]

As indicated above, Congress expected that, in the context of the marketplace conditions of the early 1990s, this pro-broadcaster regulatory regime would produce retransmission consent

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[5] *See id.* at 1141 ("A cable system serving a local community, with rare exceptions, enjoys a monopoly."); *id.* at 1149-51 (finding that satellite and wireline distributors were unlikely to grow into viable competitors with cable in the short run); *id.* at 1172 (noting that "the FCC viewed the development of cable television as potentially harmful to local broadcast television service and the ability of these stations to serve the public interest"). *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, Appendix G, Table 1 (1995) (finding that 96 percent of MVPD subscribers received service from a cable company).

agreements based on a mutual exchange of value and thus posed little or no threat of harm to consumers. Reflecting this expectation, the Commission's initial rules implementing the retransmission consent provision generally took a hands-off approach, refraining from adopting specific measures relating to retransmission consent-related rate increases or service interruption threats.[7] However, Congress also expected that the video marketplace would evolve and become more competitive and that the Commission's oversight of the retransmission consent process would evolve as well.

Since the passage of the 1992 Act, there has in fact been tremendous growth in competition among MVPDs in the distribution of video programming. In today's marketplace, cable operators like TWC face vigorous competition from direct broadcast satellite ("DBS") providers, wireline competitors including Verizon and AT&T, Internet video platforms, and other emerging technologies.[8] Accordingly, the fundamental assumption underlying the Commission's initial implementation of the retransmission consent regime—cable's "monopoly" power—no longer applies. To the contrary, given that fundamental shift, broadcasters are increasingly able to wield the outmoded rules to demand excessive retransmission consent fees by credibly threatening to "go dark" on an MVPD's system. When cable was the only multichannel distribution platform, broadcasters could not afford to carry out such threats. But as recent experience has shown, they are plainly willing to do so now that vigorous competition among MVPDs and online distribution options enable broadcasters to reach viewers through a

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6 *See* Petition at 7, 12-15.

7 *See* 47 C.F.R. §§ 76.64-65 (implementing the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Act")).

8 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶¶ 76, 132-33, 150-63

variety of platforms. MVPDs thus face a lose-lose choice on behalf of their subscribers: either accede to skyrocketing carriage fees and pass through the increased costs, or be forced by broadcasters to drop local signals and cut off access to popular programming. And, as noted above, consumers suffer regardless of the outcome of a particular dispute, as recurring threats of blackouts produce uncertainty and frustration even when signals are not actually withdrawn.[9] Moreover, since all MVPDs are faced with this same Hobson's choice, consumers are adversely affected no matter which MVPD they choose, and the broken retransmission consent process thus significantly diminishes the benefits that vigorous MVPD competition otherwise would provide to consumers.

TWC and its subscribers have experienced these problems firsthand. Most recently, on the eve of the January 2010 college bowl season and NFL playoffs, FOX Broadcasting Company ("FOX") threatened to pull the signals of its owned-and-operated stations if TWC did not accede to substantial increases in retransmission consent fees. Although TWC and FOX ultimately were able to reach agreement (after frenzied negotiations and short-term extensions of the expiring agreement), that episode and many more like it show that such brinkmanship and harm to consumers may become the norm going forward unless the Commission fulfills its statutory obligation to "govern" the retransmission consent process.[10] Indeed, TWC likely will face demands for significantly increased compensation, backed by hold-out threats, as existing

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(2009) (describing the emergence of DBS, wireline, Internet, and other platforms in the MVPD marketplace).

9 Some broadcasters' recent insistence on limiting retransmission consent agreements to a year or less, *see* Petition at 23 (noting Sinclair Broadcast Group stations' refusal to enter into standard three-year agreements), further exacerbate this problem, as negotiations must begin anew shortly after a contentious round has been completed.

10 47 U.S.C. § 325(b)(3)(A).

retransmission consent agreements expire later this year and in coming years.[11] Other cable operators have encountered similar negotiation tactics by increasingly powerful broadcasters. For instance, Sinclair Broadcasting Group pulled its signals from hundreds of thousands of consumers served by Mediacom Communications Corp. for nearly a month in early 2007 and then threatened to repeat that disruptive act again at the end of last year unless Mediacom gave in to its demands for "outrageous increases" in retransmission consent fees.[12] And the ABC affiliate in New York City recently carried out a threat to disrupt the broadcast of this year's Academy Awards as part of a scheme to extract "$40 million in new fees" from Cablevision Systems Corp. and its customers.[13]

These abusive negotiating tactics—undeterred and, indeed, encouraged by the Commission's current rules[14]—have resulted in concrete harms to consumers.[15] Broadcaster

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[11] For example, although Sinclair Broadcast Group did not carry out its threat to go dark on TWC systems in December 2010, as noted above it refused to enter into any agreement exceeding one year in duration, thereby ensuring that a new agreement will need to be reached in 2010.

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

[13] Richard Huff and David Hinckley, *Dispute Between ABC, Cablevision Could Leave TV Viewers in Dark on Oscar Night*, N.Y. DAILY NEWS, Mar. 1, 2010, *available at* http://www.nydailynews.com/entertainment/tv/2010/03/01/2010-03-01_cablevision_may_ditch_wabc.html. *See also* Brian Stelter and Brooks Barnes, *Disney Pulls ABC From Cablevision After Deal Fails*, N.Y. TIMES, Mar. 7, 2010, *available at* http://mediadecoder.blogs.nytimes.com/2010/03/07/disney-pulls-abc-from-cablevision-after-deal-fails/.

[14] For instance, the Commission's rules on network non-duplication and syndicated exclusivity, which permit local broadcasters to prevent cable operators from importing network and syndicated programming from out-of-market stations, facilitate these holdups by making the loss of broadcast programming a genuine possibility for MVPDs and their subscribers. *See* 47 C.F.R. §§ 76.92-95 (network non-duplication rules); *id.* §§ 101-110 (syndicated exclusivity rules). The requirements that (1) broadcast stations be carried on the basic tier in areas subject to rate regulation, and (2) subscribers purchase the basic tier as a condition of purchasing any other programming services, 47 U.S.C. § 543(b)(7)(A), also give broadcasters significant advantages by forcing all cable

brinksmanship drives up subscription fees[16] and deprives consumers of programming when negotiations break down.[17] Equally concerning, the current rules cause many households simply to "forgo the benefits of MVPD services because of the higher subscription fees they face as the result of retransmission consent fees."[18] And as demonstrated by the disputes described above, the bargaining distortions caused by networks' interference in the negotiation process and stations' insistence on basic tier placement have only aggravated these harms to consumers.

The role of the "Big Four" networks in driving aggressive demands for dramatic increases in retransmission consent payments is particularly at odds with congressional intent and the public interest principles that animated the establishment of the retransmission consent regime nearly two decades ago. As Senator Inouye, the author of the retransmission consent provision, stated during the Senate debate on the 1992 Cable Act, "[t]he retransmission provisions of S.12 will permit *local stations, not national networks* . . . to control the use of their signals."[19]

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subscribers to bear the costs of retransmitting broadcast programming, regardless of whether they want to view such programming. More broadly, broadcasters of course benefit enormously from access to immensely valuable spectrum at no charge and from their must-carry rights. All of these advantages ensure that broadcasters are differently situated from providers of cable programming services, even apart from Congress's conferral of an artificial retransmission right on broadcasters that is separate from copyright.

15 *See* Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime," Nov. 12, 2009, attached to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009).

16 *Id.* at 30-39.

17 *Id.* at 40-41.

18 *Id.* at 37.

19 138 Cong. Rec. S563 (daily ed. Jan. 29, 1992) (emphasis added). *See also* 138 Cong. Rec. H6491 (daily ed. July 23, 1992) (statement of Rep. Callahan) ("This right of retransmission consent…is a local right. This is not, as some allege, a network bailout

Ignoring Congress' clear intent that retransmission consent not serve "as a subsidy for major networks,"[20] the networks contend that the payment of substantially increased retransmission consent fees—and the allocation of a large "cut" of those fees to the networks themselves—is justified by the popularity of network programming.[21] But this argument simply confirms that the networks are improperly seeking to capitalize on their *copyright* interest in such programming in spite of the compulsory license provided by 17 U.S.C. § 111, under which cable operators are "expressly permitted to retransmit programs without any need to obtain the consent of, or negotiate license fees directly with, copyright owners."[22] Congress's grant of retransmission consent rights to broadcast stations was wholly independent of any copyright in the underlying programming, as the Commission has recognized.[23] Thus, even apart from the

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for Dan Rather or Jay Leno. Networks are not a party to these negotiations, except in those few instances where they own local stations themselves.").

[20] 138 Cong. Rec. H6493 (daily ed. July 23, 1992) (statement of Rep. Chandler).

[21] *See, e.g.*, Michael Malone, *Moonves: Give Us Our Retrans Cut*, BROADCASTING & CABLE, Mar. 1, 2010, *available at* http://www.broadcastingcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php ("CBS Corp. President/CEO Leslie Moonves made an emphatic case for broadcast's emerging dual-revenue model . . . , saying event programming such as the Super Bowl and March Madness basketball—paired with the network's winning primetime lineup—merits CBS a significant cut of retransmission consent revenue.").

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

[23] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶ 173 (1993) ("The legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal, completely separate from the programming contained in the signal. Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights. . . . [R]etransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest. Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.").

adverse impact on cable subscribers (which runs afoul of Section 325(b)(3)(A)), the networks' efforts to inflate and appropriate retransmission consent fees amount to copyright misuse,[24] as they are seeking a second payment for the same content already covered by the compulsory license. Making matters worse, such tactics significantly increase the likelihood of disputes that result in service disruptions, thereby undermining Congress's goal of preserving the benefits of over-the-air broadcasting.[25]

II. THESE CONSUMER HARMS WARRANT PROMPT ACTION BY THE COMMISSION

The recurring disruption, consumer frustration, cost increases, and other harms caused by broadcasters' exploitation of the outdated retransmission consent rules warrant prompt Commission action. The Commission has recognized a general "obligation to consider, on an ongoing basis, whether its rules should be modified in response to changed circumstances."[26] Moreover, in the retransmission consent context, after the Commission declined to adopt rules

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24 Notably, where an entity with market power (such as a broadcast network that provides "must have" programming) engages in copyright misuse, such conduct may violate the Sherman Act. *See, e.g.*, *Electronic Data Systems Corp. v. Computer Associates Int'l, Inc.*, 802 F. Supp. 1463, 1465-66 (N.D. Tex. 1992) (holding that a "copyright misuse claim" under "antitrust principles" was sufficient to state a claim under § 2 of the Sherman Act, where plaintiff had alleged that defendant "impos[ed] restrictions on the use of copyrighted software that extend beyond the permissible bounds of the exclusive rights granted by the copyright laws").

25 In some instances, network interference can cause consumers to lose access to network programming through an affiliate's signal altogether, even over the air. CBS has boasted in recent weeks that it "ended the affiliate agreement" of a station in Jacksonville, FL, when it refused to give up its retransmission consent revenues to the network. *See* Claire Atkinson, *Moonves: CBS Would Yank Affil Signal If Necessary*, BROADCASTING & CABLE, Mar. 9, 2010, *available at* http://www.broadcastingcable.com/article/449891-Moonves_CBS_Would_Yank_ Affil_Signal_If_Necessary.php.

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

governing retransmission consent rates under Section 325(b)(3)(A),[27] it acknowledged its ongoing duty to "closely monitor" the impact of retransmission consent on retail rates and to "reexamine" its treatment of retransmission consent fees "if it appears that additional measures are needed" to protect against an "unwarranted impact on basic tier rates."[28] The Petition makes a compelling case for adopting such "additional measures" to protect consumers, and the Commission accordingly should adopt a Notice of Proposed Rulemaking to explore such reforms in greater detail.

The Commission has broad authority under Section 325 to take whatever steps it deems necessary to protect the public against abuses of the retransmission consent process. Section 325(b)(3)(A) authorizes the Commission "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[29] More specifically, Congress directed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable."[30]

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27 *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶¶ 176-78 (1993) (declining to adopt rules governing retransmission consent on the ground that the Commission's implementation of rate regulation under Section 623 was sufficient to protect consumers); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, 8 FCC Rcd 5631 ¶¶ 245-48 (1993) ("*Rate Regulation Order*").

28 *Rate Regulation Order* ¶ 247.

29 47 U.S.C. § 325(b)(3)(A).

30 *Id.*

This expansive grant of authority—either standing alone or in conjunction with the Commission's ancillary authority[31]—plainly includes the power to adopt whatever remedial measures may be necessary, including dispute resolution procedures. In closely analogous contexts, the Commission also has established that it has authority under Sections 303(r) and 4(i) to order interim carriage to preserve the status quo while such dispute resolution proceedings are pending, consistent with the Supreme Court's longstanding recognition of such authority.[32]

Most notably, the Commission's new standstill rules in the program access context provide for interim carriage, despite the programming providers' right to withhold their content pursuant to copyright law.[33] There, the Commission invited complainants to seek "a temporary standstill of the price, terms, and other conditions of an existing programming contract," concluding that the "several benefits" of interim carriage—including "minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal

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[31] Complementing the direct authority conferred in Section 325, Section 303(r) authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of Title III of the Act. 47 U.S.C. § 303(r). Moreover, Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The clear mandate in Section 325(b)(3)(A) to adopt rules governing retransmission consent provides just the sort of concrete statutory responsibility—in contrast to an amorphous statement of policy—that justifies the exercise of ancillary authority.

[32] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968) (recognizing the Commission's authority under Sections 4(i) and 303(r) to issue an order maintaining the *status quo* in cable carriage disputes whenever "the public interest demands interim relief") (internal quotation marks and citations omitted). *See also* 47 C.F.R. §76.7(e) (delegating authority to Media Bureau to order temporary relief).

[33] *2010 Program Access Order* ¶ 71 (2010).

negotiations); [and] encouraging settlement"—trumped the programmers' asserted right under copyright law to withhold their programming.[34] If the Commission can protect the public interest by authorizing MVPDs to continue carriage of copyrighted programming in program access disputes, it can certainly do the same to combat the demonstrated consumer harms in retransmission consent disputes.

In fact, the Commission recently found that it had authority under Section 4(i) to order a standstill *before* the new rules took effect. In its April 2010 *Sky Angel* order, the Commission acknowledged that its standstill rules for program access disputes were not yet in force, but still found that it had "statutory authority to act on a standstill petition in program access cases pursuant to the authority granted to the Commission under Section 4(i) of the Act."[35] Thus, while the soon-to-be-effective standstill rules provided helpful procedural certainty about the availability of interim relief in program access disputes, the Commission determined that it has power to order such relief in any event under Section 4(i).

As reflected in the diverse array of parties that signed the Petition, there is widespread recognition among all stakeholders other than broadcasters that reform is urgently needed. Leading public interest organizations joined a broad cross-section of MVPDs to emphasize their shared conviction that consumers are being harmed under the current rules. Non-signatories like the Media Access Project and Consumers Union have also voiced their strong support for the Petition.[36] And the coalition's proposals are consistent with the deep concerns about the current

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34 *Id.*

35 *Sky Angel U.S., LLC*, Order, DA 10-679, ¶ 6 n.31 (rel. Apr. 21, 2010).

36 *See* Statement of Andrew Jay Schwartzman, President and CEO of Media Access Project, Mar. 9, 2010, *available at* http://www.mediaaccess.org/press-room/media-access-project-expresses-support-for-reform-of-fcc-retransmission-consent-process ("MAP strongly supports the procedural reforms suggested in today's Petition for Rulemaking.");

system expressed by several Members of Congress in public statements and open letters over the past five months.[37] The Commission should heed these calls for reform and initiate a rulemaking in short order. TWC looks forward to working with the Commission and other interested parties to develop more specific remedial proposals and to build a robust record demonstrating the need for new rules.

Consumers Shouldn't Be Penalized in Broadcast/Cable Disputes, News Release, Consumers Union, Mar. 10, 2010, *available at* http://www.consumersunion.org/pub/core_telecom_and_utilities/015910.html (lauding petition as "a major step toward finding a solution" and noting that, absent reforms, "consumers are likely to see these disputes more frequently and they will only result in rising monthly costs").

37 *See* Petition at 2, 28-29 (describing letters and statements from Sen. John Kerry, Rep. Charles Gonzalez, and Rep. Steve Israel); *see also* Statement of Sen. John Kerry, Mar. 19, 2010, *available at* http://kerry.senate.gov/cfm/record.cfm?id=323251 ("applaud[ing]" the Commission's decision to "[a]llow[] for comments on this petition for rulemaking").

CONCLUSION

For the foregoing reasons, the Commission should adopt a Notice of Proposed Rulemaking to seek comment on reforms that will ameliorate the public interest harms caused by the existing retransmission consent rules, including in particular the absence of any effective dispute resolution mechanism.

Respectfully submitted,

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May 18, 2010