

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

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

**OPENING COMMENTS**

**BY**

**THEAMERICAN PUBLIC POWER ASSOCIATION; BRAINTREE ELECTRIC LIGHT DEPARTMENT (MA); BRISTOL TENNESSEE ESSENTIAL SERVICES (TN); BRISTOL VIRGINIA UTILITIES (VA); CHELAN COUNTY PUBLIC UTILITY DISTRICT (WA); GREENVILLE ELECTRIC UTILITY SERVICE (TX); CITY OF GLASGOW ELECTRIC PLANT BOARD (KY); LAFAYETTE UTILITIES SYSTEM (LA); MURRAY ELECTRIC SYSTEM (KY); MUSCATINE POWER AND WATER (IA); NORWOOD LIGHT BROADBAND (MA); SCOTTSBORO ELECTRIC POWER BOARD (AL); SHREWSBURY ELECTRIC LIGHT AND CABLE OPERATIONS (MA); SOUTH GEORGIA GOVERNMENTAL SERVICES AUTHORITY; AND SPENCER MUNICIPAL UTILITIES (IA).**

**Jim Baller  
Sean Stokes  
Casey Lide  
THE BALLER HERBST LAW GROUP, P.C.  
2014 P St. NW Suite 200  
Washington, D.C. 20036  
office: 202/833-5300  
fax: 202/833-1180**

*Counsel for the APPA Group*

**May 18, 2010**

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The American Public Power Association and the public multichannel video programming distributors listed above (collectively "the APPA Group") submit these comments in support of the Petition for Rulemaking ("Petition") in the above captioned proceeding. The Petition, filed by a broad coalition of cable and satellite providers and non-profit, public interest entities, requests that the Federal Communication Commission initiate a proceeding to amend the rules governing the retransmission consent process under which multichannel video program distributors ("MVPDs") obtain the right to carry broadcast television stations. As discussed below, the APPA Group strongly support the proposed Petition as a necessary first step in reforming a retransmission consent process that has grown increasingly acrimonious, dysfunctional, and detrimental to the interests of the public. The free-for-all retransmission consent process brings out the worst in broadcasters: in cases in which carriage of a particular broadcast station is crucial to the competitive success of a cable operator, the broadcaster has

every motivation to present the MVPD a Hobson's Choice of service black-outs or ever-increasing prices and unwanted services for consumers. Were the broadcaster and cable operator approaching the negotiation from roughly equal positions of market power and capitalization, a laissez-faire approach may be acceptable. Unfortunately, while most attention in the trade press is paid to retransmission consent disputes between large national incumbent cable operators and broadcast networks, these unfair practices are disproportionately harmful to smaller, new competitive facilities-based MVPD providers, such as the public entities in the APPA Group, and threaten the development and availability of advanced broadband in many areas of the country.

As the APPA Group shows below, the Commission should not merely adopt the remedies proposed in the Petition for Rulemaking, but it should also remove the regulatory and other barriers that prevent the retransmission consent process from being truly competitive. For example, the Petition notes that FCC's network non-duplication and syndicated exclusivity rules contribute significantly to the problems that small cable operators face in negotiating for retransmission consent, but the Petition does not propose a solution to this problem. The APPA Group urges the Commission to take the next logical step – if it determines that its rules and the underlying contracts between national networks and their local affiliates do indeed impede competition for video programming, the Commission should modify its rules appropriately and preempt the contracts in question.

Furthermore, as important as establishing more fair and equitable processes may be, it is not enough for small, independent MVPDs. Such MVPDs are at a significant negotiating disadvantage to local broadcast stations backed by national broadcast networks. At the same time, they are at a significant competitive disadvantage to regional and national MVPDs, which have sufficient size to negotiate substantial discounts. If the Commission is serious about preserving and protecting competition by small, independent MVPDs, it should recognize and

accommodate these realities. At a minimum, it should modify those of its “good faith” negotiating rules that disproportionately harm small, independent MVPDs.

## **I. INTRODUCTION AND BACKGROUND**

### **A. The Commenters**

APPA is a national service organization that represents the interests of more than 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities developed in communities that were literally left in the dark as electric companies in the private sector pursued more lucrative opportunities in larger population centers. Residents of these neglected or underserved communities banded together to create their own power systems, in recognition that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities – including Austin, Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, approximately 70 percent of APPA’s members serve communities with less than 10,000 residents. At present, more than 100 public power systems provide cable television services.

The other entities joining in these comments are publicly-owned providers of electric power and other utilities. Each of these entities also provides, or supports the provision, of video programming, high-speed Internet access, voice, and other communication or information services. Five provide such services over fiber-to-the-home systems. The rest do so through a combination of fiber and coaxial cable facilities.

### **B. Background**

The Commission’s regulations governing retransmission consent – which are now nearly twenty years old – are severely outdated, are causing harm to consumers, and are counterproductive to the development of competition in the delivery of video programming. The

market conditions and circumstances that gave rise to the retransmission consent rules and policies in 1992 no longer exist. The rules and regulations should therefore be updated to reflect the current realities of the video market.

In 1992, after three years of hearings on a broad range of issues surrounding competition in the video programming market, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 521 *et seq.* (“1992 Act”). These hearings had convinced Congress that the cable industry was highly concentrated, that the competition that Congress had envisioned when it deregulated the cable industry in 1984 had not emerged, and that the monopolistic practices of the cable industry had resulted in skyrocketing cable rates, deteriorating service, and widespread dissatisfaction among consumers.<sup>1</sup>

One problem that particularly disturbed Congress in 1992 was the increasing likelihood that monopoly cable companies would destroy competition from local over-the-air broadcasters:

Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, [were] endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress noticed that cable was threatening the existence of broadcast stations to such a degree that it stepped in and mandated carriage of local broadcast signals on the cable system.

*Turner Broadcasting System, Inc. v. Federal Communications Comm’n*, 512 U.S. 622, 633 (1994).

In the Cable Act amendments of 1992, Congress sought to curb this threat to consumers and to promote localism by creating the so-called “must carry/retransmission consent” regulatory regime. With unusual specificity, Congress set forth its finding and rationale for this scheme on the face of the 1992 Act:

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<sup>1</sup> S. Rep. No. 102-92, 1992 U.S.C.C.A.N. 1133, 1134-35.

- Over 60 percent of households with television sets subscribed to cable (in 1991), replacing over-the-air broadcasting as the primary provider of video programming. *See* § 2(a)(17).
- Monopoly conditions, together with extraordinary expense and risk of overbuilding, means that other cable competitors are not likely to take hold in a widespread manner. *See* § 2(a)(2).
- Cable operators possess the power and incentive to harm broadcast competitors, derived from the cable operator's ability, as owner of the transmission facility, "to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position." *See* § 2(a)(15).
- Increased vertical integration in the cable industry creates a program-access problem for broadcasters, because cable operators have a financial incentive to favor affiliated programmers. *See* § 2(a)(5).
- Unless cable operators are compelled to carry local broadcast stations, the "marked shift" in market share will erode broadcasters' advertising base, jeopardizing "the economic viability of free local broadcast television and its ability to originate quality local programming." *See* § 2(a)(16).

As the Petitioners note, and as demonstrated in the legislative language cited above, it was the local broadcast stations that Congress sought to protect in adopting must carry/retransmission consent, not the national broadcast networks. This is because the purpose of must carry/retransmission consent was to ensure that consumers would continue to have access to local broadcast content, especially local news and information content. At the time, Congress was concerned that local broadcasters, as stewards of the public airwaves, might lose their ability to discharge their public interest obligation to provide a "local voice" for their communities.

Accordingly, the must carry/retransmission consent regulations attempted to redress the perceived competitive imbalance between monopoly cable providers and local broadcasters by granting the broadcasters broad new rights to negotiate for carriage.

It is also significant that, at the time of enactment, Congress anticipated that compensation, if any, requested for carriage under a retransmission consent agreement would be modest, because "broadcasters also benefit from being carried on cable systems" and "many broadcasters may determine that the benefits of carriage themselves are sufficient compensation

for the use of their signal by a cable system.”<sup>2</sup> In adopting retransmission consent rules, the FCC echoed the belief that the parties had a co-dependant incentive to enter into mutually-beneficial agreements for carriage:

Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements.<sup>3</sup>

Indeed, until relatively recently, broadcasters and MVPDs had generally negotiated for in-kind compensation that reflected a mutual exchange of value. For example, in an order approving News Corporation’s acquisition of DirecTV,<sup>4</sup> the FCC indicated that given the mutual benefits of carriage and the relative parity in the bargaining positions of the parties, in-kind payment was the traditional form of compensation:

[T]he stations bargain with [cable operators] for compensation in exchange for the right to retransmit their broadcast signal. Although the bargaining may encompass many issues, it is ultimately about the “price” [a cable operator] is willing to pay for carriage of the local broadcast station, and although that price may be in the form of monetary compensation, *it is more likely to be structured in the form of an “in kind” payment whereby the [cable operator] provides channel capacity for a broadcast network’s affiliated cable programming network and/or other carriage-related concessions.* As we have previously recognized, the process was intended to provide “incentives for both parties to come to mutually beneficial arrangements.” We have additionally recognized that “retransmission consent negotiations . . . are the market through which the relative benefits and costs to the broadcaster and the [cable operator] are established.” Both programmer and [cable operator] benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by [cable operators] than otherwise, and the [cable

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<sup>2</sup> Senate Report at 1168.

<sup>3</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Memorandum Report and Order*, 9 FCC Rcd 6723 at ¶ 115 (1994)(“*Must Carry Order*”).

<sup>4</sup> *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum and Order*, 19 FCC Rcd 473, 2004 FCC LEXIS 153.

operators] benefit because the station's programming adds to the attraction of the [cable operator] subscription to consumers.<sup>5</sup>

As the Petitioners note, when the FCC developed regulations implementing the retransmission consent provisions of the 1992 Act, the incumbent cable operator was the sole multichannel distributor of broadcast programming in almost all designated market areas. At that same time, the Commission found that no incumbent local exchange carriers had entered into the video distribution market and that direct broadcast satellite ("DBS") providers had attracted less than one percent of all MVPD subscribers.<sup>6</sup> Accordingly, the rules that the FCC developed at that time reflected an environment in which broadcasters had little, if any, distribution options outside of negotiating for carriage with a single cable operator in each market.

The Commission's retransmission consent rules reflected the agency's intent to redress the perceived imbalance of power in the cable industry. The rules accorded broadcasters a number of advantages in negotiating carriage, the chief among them being the absolute right to deny carriage.

The power of a broadcaster to deny carriage of its local broadcast signal must be viewed in conjunction with its ability to block the importation of a distant signal carrying the same programming under the FCC network non-duplication and syndication rules.<sup>7</sup> For example, if a local NBC affiliate denies an MVPD the right to carry its programming, the local NBC affiliate would still have the right to assert its non-duplication rights against the MVPD and prevent the MVPD from carrying any distant station's NBC programming that would duplicate that of the

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<sup>5</sup> *Id.* at ¶ 144 (footnotes omitted).

<sup>6</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, 11FCC Rcd 2060, ¶ 101 and Appendix G Table 1 (1995).

<sup>7</sup> 47 C.F.R. § 76.92.

local affiliate. As a result, the importation of distant signals is not available as a “safety valve” against unreasonable retransmission consent demands of local broadcasters.

At the time that it adopted its rules the FCC did not anticipate that the broad carriage rights and control over the distribution of distant signals could lead to either higher prices or a disruption in service for consumers.

Moreover, the allegations that local stations electing retransmission consent would not be carried due to their inability to successfully negotiate agreements with cable operators and then assert their exclusivity rights and deprive subscribers of programming was speculative at the time the reconsideration petitions were filed. *Now that the retransmission consent provisions are in effect, there is no evidence that subscribers are being deprived of network programming.*<sup>8</sup>

## **II. NEED FOR CHANGES IN RETRANSMISSION RULES**

### **A. Multiple Sources of Broadcast Distribution in Virtually Every Market**

Over the past twenty years, there have been significant changes in the video distribution marketplace that have flipped the underlying presumptions of the 1992 Act on their head. Today, in addition to the incumbent cable operator, virtually every designated market area is served by two direct broadcast satellite providers. In addition, by 2006 the FCC had recognized that incumbent local exchange carriers, such as Verizon and AT&T, and new competitive broadband service providers, were an increasingly available MVPD option for consumers.<sup>9</sup> In soliciting information on the state of video service competition in 2009, the FCC acknowledged the widespread availability of multiple consumer choices for video delivery in many areas of the county:

In previous reports, we have found that many consumers have a choice between over-the-air broadcast television, a cable service, and at least two DBS providers.

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<sup>8</sup> *Must Carry Order*, at ¶ 115 (*emphasis added*).

<sup>9</sup> *Annual Assessment of the Status of Competition in the Market for The Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542 ¶ 76 (2009).

In some areas, consumers also may have access to video programming service from a second cable system operated by a company traditionally considered a LEC or BSP. Furthermore, emerging technologies, such as digital broadcast spectrum and video over the Internet, provide some consumers with additional options for multichannel video programming service.<sup>10</sup>

Among the various competing MVPDs that have emerged over the past twenty years are public providers. As indicated above, there are currently more than 110 public broadband systems offering cable services in communities of all sizes around the country. These municipal systems provide real competitive choice in the communities in which they operate.

**B. The Retransmission Consent Rules Are Being Utilized In A Way That Subverts Their Original Public Interest Intent**

**1. Broadcasters now hold the negotiating power**

As a result of the expanding variety of choices now available to consumers, the underlying concern leading to the retransmission consent rules – that a single MVPD wielding monopoly power over broadcast distribution in each market threatened the existence of local broadcasters – can no longer be justified. At the same time, the bargaining power of broadcasters has substantially increased. Today it is the broadcasters that are in a position of dominance, as evidenced by the fact that many routinely demand excessive retransmission consent fees and other concessions, while threatening to go dark if their demands are not met. As the Petitioners note, such threats are antithetical to the reason that Congress created the must carry/retransmission consent rules in the first place: to ensure that local communities retain access to the “diversity of voices” and local programming that broadcasters have a public interest obligation to provide.

Moreover, broadcasters are no longer the bastion of local-interest programming that underpinned much of the original concern. Changes in broadcast licensing, such as the extension

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<sup>10</sup> *Annual Assessment of the Status of Competition in the Market for The Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 07-269, at ¶ 5, released January 16, 2009.

of license terms from five years to eight years and a reduction in regulatory oversight, has dramatically reduced the prior motivational threat that a broadcaster might lose its license for a failure to adequately meet the needs and interests of its community.

In addition, local broadcasters no longer fit the image of small local companies locked in combat with rapacious cable monopolists. Rather, local broadcasters are increasingly supported by major national networks. Indeed, as spelled out in greater detail in the Petition for Rulemaking, the national networks have increasingly injected themselves into the retransmission consent negotiation process, usurped their local affiliates' control over retransmission consent decisions, dictated the terms under which such consent can be granted, and claimed a percentage of the retransmission consent compensation. The Commission has acknowledged the power of large broadcast networks in negotiating retransmission agreements. In addressing the transfer of control of DirectTV to News Corp., the Commission noted that News Corp. possessed "significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations."<sup>11</sup> As the Commission also noted, this market power extends to network-owned and network-operated stations, as well as to any local broadcast station affiliate on whose behalf a large network negotiates retransmission consent agreements.<sup>12</sup> None of this fosters the goals of localism that the retransmission rules were created for.

The FCC itself has acknowledged the growing problems with the retransmission consent process. In its *Thirteenth Annual Report on the Status of Video Competition*, the Commission acknowledged the widespread "concern about the ability of broadcasters to leverage the existing

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<sup>11</sup> *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum and Order*, 19 FCC Rcd 473, at ¶ 201 (2004).

<sup>12</sup> *Id.*, at fn. 577.

retransmission consent, network nonduplication, and syndicated exclusivity rules to demand exorbitant compensation for their programming.”<sup>13</sup> Commenters reported that, by threatening to withhold local broadcast programming, the big four broadcast networks and other broadcast conglomerates have used retransmission consent to gain leverage over smaller cable operators to launch new affiliated networks, to obtain higher license fees and broader distribution for those new networks, and to obtain higher license fees for their existing affiliated networks.

The Petition highlights the fact that, during the past year, the situation has continued to worsen, with recurring threats of blackouts and high-stakes public “showdown” negotiations, such as ABC’s recent withdrawal of its signal for carriage of the Academy Awards to three million Cablevision subscribers in New York. As the Commission has itself observed, even if there is no blackout, the mere ability to credibly threaten such action harms consumers.

In addition to the studies submitted by the parties, Commission staff conducted its own analysis, which is described in greater detail in Appendix D. As commenters have correctly observed, the *ability* of a television broadcast station to threaten to withhold its signal, even if it does not actually do so, changes its bargaining position with respect to MVPDs, and could allow it to extract higher prices, which ultimately are passed on to consumers.<sup>14</sup>

All of the above demonstrates that the current retransmission consent rules are broken. Moreover, there is every reason to believe that such extortionist conduct will continue, because the broadcasters view retransmission consent as a cash cow that will provide them with “windfall profits.”<sup>15</sup>

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<sup>13</sup> *Thirteenth Annual Report*, at ¶ 207.

<sup>14</sup> News Corp., ¶ 204.

<sup>15</sup> See, Multichannel News Article, *Carey: Retrans Windfall Coming News COO Calls Time Warner Cable Deal a 'Transformational Event'*, in which the News Corp. chief operating officer Chase Carey said the media giant is on the cusp of a windfall in retransmission-consent revenue that could ultimately fix the broken broadcasting model. [http://www.multichannel.com/article/448037-Carey\\_Retrans\\_Windfall\\_Coming.php](http://www.multichannel.com/article/448037-Carey_Retrans_Windfall_Coming.php)

**2. Small new competitive new entrants, such as public providers, are particularly vulnerable to abuses of the retransmission process**

Abuses of the current retransmission consent rules are particularly harmful and burdensome for small new entrants, such as public communications providers. As a practical matter, these systems cannot succeed without carrying the major networks, and they lack the ability of their large incumbent MSO competitors to negotiate volume discounts or other concessions. As a result, public providers often have little choice but to pay a substantial premium for retransmission consent and to pass that premium through to their rural and small-market subscribers. This puts them at a significant competitive disadvantage to larger MVPDs in their markets.

Members of the APPA Group have increasingly faced unreasonable retransmission consent demands, dictated by broadcasters with little, if any, interest in constructive negotiation and mutual accommodation. Where members of the Group have found broadcasters in neighboring markets that were willing to provide alternative programming, the Commission's network non-duplication and syndicated exclusivity rules and the broadcasters' contracts with national broadcast networks precluded access to such alternative programming – or even the threat of obtaining it.

**3. Abuses also potentially impact viability of broadband deployment**

While the Petition focuses on access to broadcast programming, it is important for the Commission to consider the impact of the current abuses and unfair practices that occur in the retransmission consent process in the broader context of the national goals of fostering greater broadband availability. The Commission has repeatedly recognized, most recently in the context of access to terrestrially delivered video programming, that “by impeding the ability of MVPDs to provide video service, unfair acts involving [video service] can also impede the ability of MVPDs to provide broadband services. Allowing unfair acts involving [video service] to

continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission. This secondary effect heightens the urgency for Commission action.”<sup>16</sup> Indeed, the FCC has specifically recognized the importance of local broadcasting to MVPDs: “we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings.”<sup>17</sup>

In its recent National Broadband Plan, the Commission announced a national goal of achieving 100 megabits to 100 million households by 2020 as part of its National Broadband Plan.<sup>18</sup> In describing this goal, Chairman Julius Genachowski stated that the United States should also seek to push past 100 Megabits as fast as possible.

The U.S. should lead the world in ultra-high-speed broadband testbeds as fast, or faster, than anywhere in the world. In the global race to the top, this will help ensure that America has the infrastructure to host the boldest innovations that can be imagined. Google announced a one gigabit testbed initiative just a few days ago – and we need others to drive competition to invent the future.<sup>19</sup>

Several members of the APPA Group are *already* capable of providing ultra-fast broadband connectivity at 100 Mbps – a full decade ahead of the Commission’s proposed

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<sup>16</sup> *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, ¶ 36, 2010 WL 236800 (F.C.C.) (rel. January 10, 2010) (footnotes omitted). While the Commission was addressing access to video programming under Section 628 it is no less true with respect to access to MVPD access to broadcast programming.

<sup>17</sup> *News Corp Order*, ¶ 202.

<sup>18</sup> *Connecting America: The National Broadband Plan*, Federal Communications Commission, released March 16, 2010.

<sup>19</sup> *Connecting America: The National Broadband Plan*, Federal Communications Commission, released March 16, 2010. Julius Genachowski, “Broadband: Our Enduring Engine for Prosperity and Opportunity,” as prepared for delivery at NARUC Conference, February 16, 2010, <http://tinyurl.com/yc6j2l8>.

national goal – and their fiber systems will be capable of offering 1 Gbps long before 2020. These systems will increasingly provide many other benefits to their communities and the Nation, including support for economic development and competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable modern health care, quality government services, and the many other advantages that contribute to a high quality of life.

For all this to occur, however, the public providers must be able to pay for their systems. To do that, they must be able to provide, or support the provision, of all major communications services, including video services. They must therefore have fair and reasonable access to broadcast video programming.

### **III. APPA SUPPORTS THE PROPOSED RULE CHANGES**

As demonstrated above, and in the Commission’s own record, the current retransmission rules have remained essentially unchanged since the FCC first adopted them in 1992. They have simply failed to keep up with changes in the MVPD marketplace and are ill-suited to curb the negotiating abuses utilized by broadcasters that place MVPDs and consumers in a no-win position. While the FCC has in the past maintained that the retransmission consent process should rely on market forces, the current retransmission rules (in conjunction with non-duplication authority) have in fact *insulated* broadcasters from market forces.

Accordingly, the APPA Group joins the Petitioners in urging the Commission to revise its retransmission consent rules to ameliorate these abuses and better protect consumers. The Commission has authority to undertake such action under Section 309(a) of the Communications Act, which requires that the FCC take actions to ensue that broadcast licensees operate in a manner consistent with the “public interest, convenience, and necessity.” Clearly the widespread and growing abuse of the retransmission consent process is not in the public interest, convenience or necessity.

Apart from the broad grant of authority contained in Section 309, the Commission also has specific authority under Section 325(b)(3)(A) to “commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent.” In adopting such regulations, the Commission is required to “consider in such proceeding the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable.”<sup>20</sup>

When the Commission initially implemented provisions of the 1992 Cable Act, including Section 325, it declined to adopt specific regulations concerning retransmission consent fees, based on its tentative finding that its regulation of cable rates under Section 623 would be sufficient. At the same time, however, the Commission stated:

We will closely monitor initial retransmission consent agreements for their potential impact on subscriber rates. *If it appears that additional measures are needed* to assure that pass-through of retransmission consent fees does not have an unwarranted impact on basic tier rates, we will reexamine this treatment of such fees.<sup>21</sup>

Clearly, based on the record, “additional measures are needed” to protect consumers. Moreover, the Commission has clear authority 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 this Act,”<sup>22</sup> including Section 325.

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<sup>20</sup> 47 U.S.C. 325(b)(3)(A).

<sup>21</sup> *In The Matter Of Implementation Of Section Of The Cable Television Consumer Protection And Competition Act Of 1992, Rate Regulation*, 8 FCC Rcd 5631, ¶ 247 (1993).

<sup>22</sup> 47 U.S.C. 303(r).

Specifically the FCC should undertake the following procedural rule changes to reform the retransmission consent process to better protect consumers and ensure that rates for the basic tier remain reasonable.

**A. The Commission Should Establish Dispute Resolution Mechanisms**

As recommended by the Petition, the FCC should establish a dispute resolution mechanism or mechanisms, such as compulsory arbitration, an expert tribunal or similar mechanisms that are available in the event of a retransmission consent dispute. The Commission should develop streamlined procedures for such alternate dispute mechanisms in order to ensure that smaller MVPDs are fully able to participate.

To initiate such a dispute resolution process, an MVPD should only have to demonstrate that retransmission consent negotiations had reached an impasse and that the parties could not agree on price or other terms and conditions of carriage. Unlike the current process, there should not be an affirmative showing of “bad faith” on the part of the broadcaster. Recent disputes have shown that it is difficult to prove “bad faith” if the broadcaster engages in even a pro forma demonstration of a willingness to negotiate. Such rules create a sham in which broadcasters can game the system with no real intent to engage in meaningful negotiations for reasonable compensation.

**B. The FCC Should Ban the Tying of Carriage Of Broadcast Channels to Other Programming, Including Web-Based Programming.**

Recognizing that small, independent MVPDs have no practical choice but to carry broadcast networks to survive, the major broadcast networks and their affiliates are increasingly taking advantage of the Commission’s hands-off interpretations of its “good faith” negotiation rules to demand the carriage of other channels as part of a retransmission consent agreement. Local broadcast stations are now routinely demanding that cable operators carry affiliated programming or broadcast signals that neither the cable operator nor its subscribers want, as part

of the consideration of obtaining a retransmission consent agreement. These demands have included carriage of low power or out of market stations. Public systems, which typically lack sufficient size to have comparative bargaining power, are particularly vulnerable to such “tying” arrangements.

Mandatory tying provisions have little, if anything, to do with the public policy goals underlying the enactment of the must carry/retransmission consent rules. The Commission should amend its rules to prevent broadcasters from requiring carriage of additional content as part of the compensation for the underlying carriage of a broadcast station. Specifically, the FCC should adopt the Petitioner’s recommendation to amend 47 C.F.R 76.65 of the Commission’s rules to make it a *per se* violation of the good faith negotiating obligation to insist on tying retransmission consent to carriage of other programming services.

**C. The FCC Should Provide For Interim Carriage While an MVPD Negotiates In Good Faith or While a Retransmission Consent Dispute Resolution Is Pending**

As discussed above, the current retransmission consent process allows the broadcaster to wield the threat of going dark by withholding its broadcast signals as a means of coercing an MVPD to enter into a compensation arrangement to which it would not otherwise agree. This is not only an unfair bargaining tactic but ultimately harms the consumers for whom the rules were initially enacted as a protection.

The FCC should allow broadcast channels to remain on the air during a broadcaster-cable dispute, as long as the MVPD continues to negotiate in good faith, or while a dispute-resolution proceeding is pending. Interim carriage in either of the above circumstances would preserve the status quo and thereby protect consumers and the principal goal of the retransmission consent process – “to ensure that local signals are available.”

#### **D. The FCC Should Also Consider Other Changes to Its “Good Faith” Negotiation Rules**

The Commission should also consider other changes to its “Good Faith” negotiation rules to make them more useful to small, independent MVPDs. In particular, the Commission should reconsider its statements that the following proposals by broadcasters are “presumptively legitimate:”

1. Proposals for compensation above that agreed to with other MVPDs in the same market;
2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market;
4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights;
5. Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and
6. Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event, such as implementation of SHVIA's satellite must carry requirements.<sup>23</sup>

Even if the Commission adopts the procedural reforms discussed above, such reforms may prove to be of little value to small independent MVPDs if the Commission’s statements outlined above remain on the books. While such proposals may not be unfair in negotiations between parties of roughly equal strength, they may certainly be unfair to small independent MVPDs when pitted against local broadcasters that are backed by powerful national networks. At the very least, the Commission should be neutral with respect to these considerations, letting

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<sup>23</sup> *Id.* at ¶ 56 (emphasis added).

the decision-makers view the totality of the circumstances without the outcome essentially dictated for them.

**D. The FCC Should Investigate and Take Appropriate Action to the Curb the Anticompetitive Effects of the Network Non-duplication and Syndicated Exclusivity Rules and the Exclusivity Clauses in National Network Agreements**

As indicated in the Petition for Rulemaking, the FCC's network non-duplication and syndicated exclusivity rules compound the flaws in the retransmission consent process by depriving MVPDs of competitive choices. Even if the rules would allow such competition, contracts between national networks and local affiliates would often preclude the local affiliates from entering into such competitive arrangements. Unfortunately, the Petition stops short of recommending that the Commission take the appropriate steps to remove the anticompetitive effects of these rules and the contract provisions in question.

The APPA Group urges the Commission to investigate the relationship between these rules and contracts and any reforms to the retransmission consent process that it may consider adopting. If the Commission concludes that the rules and contracts would significantly hinder such reforms – as the APPA Group believes will be true – then the Commission should take all appropriate steps to remedy this situation, including preempting the contract provisions at issue.

Respectfully Submitted,



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Jim Baller  
Sean Stokes  
Casey Lide  
THE BALLER HERBST LAW GROUP, P.C.  
2014 P St. NW Suite 200  
Washington, D.C. 20036  
office: 202/833-5300  
fax: 202/833-1180

*Counsel for the APPA Group*

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