Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF THE WALT DISNEY COMPANY

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The Walt Disney Company ("Disney")[1] submits these comments in response to the Public Notice issued on March 29, 2010, which seeks comment on a petition for rulemaking ("Pet.") filed by various cable companies and other multichannel video programming distributors ("MVPDs"). As the Commission itself has found, most recently in 2005, the retransmission consent market is functioning exactly as Congress intended, and petitioners' proposed intervention would both violate the Communications Act and harm consumers.

INTRODUCTION AND SUMMARY

Section 325(b) provides that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station . . . except . . . with the express authority of the originating station." 47 U.S.C. § 325(b)(1)(A). Congress gave broadcasters this new right so that they, like any other content owner, can bargain about the value of their content in the free market. Just as MVPDs can carry programming from the Discovery Channel or HBO only if they negotiate rights to it, they can carry popular broadcast station programming only

[1] Disney files these comments on behalf of itself, as well as the following Disney-owned entities: ESPN (80% owned by Disney), Disney ABC Cable Networks Group (including Disney Channel, ABC Family, Disney XD, and SOAPnet), the ABC Television Network, and the ABC Owned Television Station Group.

after conducting similar negotiations. As a result, MVPDs compensate broadcasters based on the value of their content to viewers, and broadcasters use that compensation to keep investing in high quality content and sustain the jobs that support those efforts.

Wrapping themselves up in ill-fitting "free market" rhetoric, petitioners now ask the Commission to subvert the statutory retransmission consent rights of broadcasters and replace them with arbitration mandates and standstill obligations guaranteed to give cable companies a government bailout they most certainly do not need. Instead of a negotiated rate, petitioners seek a government-imposed rate—whatever an arbitrator decides is "fair." And they want the Commission to compel broadcasters to allow the retransmission of their signals against their will after their contractual consent has expired. It is bad enough that these companies would seek such regulatory hand-outs, particularly when Congress has so clearly directed the Commission to preserve the integrity of free market negotiations. It is particularly galling that petitioners would characterize their rent-seeking as "market"-oriented. But no matter how it is characterized, the regulatory intervention petitioners seek would be both unlawful and unwise.

Section 325(b) means what it says: broadcasters who choose retransmission consent may, but need not, give "express authority" for the retransmission of their signals, with precisely enumerated exceptions set forth in Sections 325(b)(1)(B) and (b)(2). Every broadcaster who elects retransmission consent most certainly wants to conclude a fair deal, but no one can *force* broadcasters to give their *consent*. The statutory text likewise refutes petitioners' claim that Section 325(b)(1) is anachronistically designed "to correct for the relatively minimal competition faced by cable operators in 1992" (Pet. 3). Section 325(b) applies broadly to any "cable system or *other multichannel video programming distributor*." 47 U.S.C. § 325(b)(1)(A) (emphasis added). Congress would not have added this extra clause and applied it to new MVPD entrants if it had designed this right merely as a check on the monopoly power of cable incumbents.

In passages that seem directed more at Congress than this Commission, petitioners also repeatedly characterize broadcasters' content as "must have." But that cannot be a basis for ignoring Section 325(b)'s flat prohibition on forcing broadcasters to allow retransmission of their programming on terms to which they do not consent. To begin with, broadcast programming is certainly no more "must have" today than it was when Congress enacted Section 325(b) in 1992, given that hundreds of new cable channels have appeared during the intervening eighteen years and broadcasters' market share has steadily fallen. In any event, when petitioners describe broadcast programming as "must have," all they mean is that the programming is very popular with their subscribers and they want to pay as little as possible for it. But Congress did not enact Section 325(b) to help them achieve that objective. Ironically, although the smallest cable operators are particularly vocal in seeking a repeal of Section 325(b)(1), they often receive the most attractive deals. For example, Disney provides retransmission consent *at no charge* to more than 90 small cable operators in the ten markets where Disney owns local broadcast stations.

Petitioners also claim that this market must be "broken" because (1) prices have fluctuated with programming demand and MVPD competition, and (2) retransmission consent agreements sometimes expire before new ones are signed. But these characteristics—market-sensitive pricing and normal commercial negotiations (what petitioners call "brinksmanship")—are integral to any well-functioning market, and thus further confirm that *this* market is meeting congressional expectations. And it is absurd to argue, as the cable companies do, that retransmission consent fees are somehow to blame for the size of their own retail rates. Such fees represent only a small fraction of cable company revenues and costs, and they are rising much less quickly than cable company profits.[2]

Although Congress prohibited regulatory interference with the substance of retransmission consent negotiations, broadcasters are committed to taking steps to give viewers advance notice about the impending expiration of any retransmission consent agreement so that viewers can evaluate their options. Such notice could include, where appropriate, a notification in a crawl (or by some other method) that the station is within a 30-day contractual window, that its contract with a particular MVPD will expire at the end of that window, and that, if a new agreement is not reached with that MVPD, the station could no longer be available on that MVPD. Broadcasters will likely develop other creative and effective ways of informing their viewers of potential impasses. These best practices should be sufficient to allow viewers time to consider their options for viewing any broadcast programming that may be affected by an impasse, including steps they may take to view the signals directly over the air or to switch to alternative MVPDs. We anticipate that MVPDs would follow our lead in ensuring that viewers have relevant information about their alternative viewing options, and, of course, existing FCC rules govern the already-required viewer notices by cable operators.[3]

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[2] *See, e.g.*, Nat Worden, *Time Warner Cable's Net Jumps on Ad, Subscriber Growth*, Wall St. J. (Apr. 29, 2010) ("Time Warner Cable Inc. reported a 30% increase in first-quarter earnings as the nation's second-biggest cable provider benefited from strong overall subscriber growth and an increase in advertising revenue. The results, which topped analysts['] expectations, mirrored the performance of the company's larger cable counterpart, Comcast Corp., signaling that the industry largely weathered the economic downturn and may now be poised to benefit from a rebound."); Nat Worden and David Benoit, *Cablevision Profit More Than Triples*, Wall St. J. (May 6, 2010) ("Cablevision Systems Corp.'s first-quarter profit more than tripled as subscriber numbers rose, fueled by high-speed-Internet and digital-phone customers. Competitor DirecTV Group Inc., meanwhile, benefited from a focus on higher-value customers as its earnings more than doubled.").

[3] *See, e.g.*, 47 C.F.R. § 76.1603; *see generally* 47 U.S.C. § 552(b).

That said, advance viewer notification will be unnecessary in the overwhelming majority of cases, because retransmission consent negotiations very rarely end up affecting consumer viewing options. Since 1992, broadcasters and MVPDs have concluded thousands of negotiations without incident, and impasses have led MVPDs to drop broadcast channels only in a handful of cases. A typical viewer is *far* more likely to confront an electrical outage or complete cable-system outage than to lose access to his or her first-choice television channel because of a retransmission consent dispute. Again, the market is working, and the Commission may not and should not accept petitioners' invitation to "fix" it by forcing a wealth transfer from America's broadcasters to cable companies.[4]

DISCUSSION

I. Section 325(b)(1) Grants Broadcasters an Absolute Right Not to Authorize Carriage Except on Terms They Accept, and the Commission May Not Supersede That Right Through Regulation

A. The Language and History of Section 325(b)(1), as Well as Commission Precedent, Foreclose the Requested Market Intervention

Section 325(b)(1)(A) is straightforward. With a few exceptions inapplicable here, it provides: "No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station" except "with the express authority of the originating station."[5] This language unambiguously precludes the regulatory intervention petitioners seek, which would explicitly enable MVPDs to "retransmit the signal of a broadcasting station" *without* "the express authority or the originating station." In particular, this

[4] Because petitioners cannot agree even among themselves about what relief they are seeking (*see* Pet. 2 n.4), the Commission should consider terminating this proceeding, without prejudice to petitioners' right to reopen it by refiling a new petition with a more definite statement of their proposed regulatory action.

[5] 47 U.S.C. § 325(b)(1)(A); *cf., e.g.*, 47 U.S.C. § 325(b)(1)(B) (exception for stations electing must-carry provision); 47 U.S.C. § 325(b)(2)(A) (exception for noncommercial television stations).

language forecloses both (1) petitioner's proposed standstill ("interim carriage") obligations, which would force a broadcaster to allow retransmission of its signals over its objection after its contractual consent has expired (*e.g.*, Pet. 35-40), and (2) petitioners' proposed scheme of "compulsory arbitration," which would substitute an arbitrator's dictates for free-market negotiation and force a broadcaster to permit retransmission of its signals on the basis of an arbitral decision with which the broadcaster disagrees (*e.g.*, Pet. 32-34). By definition, consent is the exclusive prerogative of the consenting party, and it cannot be compelled by governmental fiat.

Like the statutory text, the legislative history confirms that Congress intended to preclude regulatory interference with the substance of retransmission consent agreements. In the words of the Senate Commerce Committee, Congress intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals," not "to dictate the outcome of the ensuing marketplace negotiations."[6] Petitioners ask the Commission to do precisely what Congress refused to do—"dictate the outcome[s]" of retransmission consent negotiations through compulsory arbitration and standstill obligations. But Congress entitled broadcasters to determine the terms and conditions under which their signals could be carried because it understood that the prospect of regulatory intervention would tilt the playing field in favor of MVPDs. In particular, such intervention would give MVPDs every incentive to refuse to come to an agreement while maintaining a veneer of good faith bargaining, knowing that they can continue to carry the broadcast signal until any dispute is resolved, almost certainly on terms the operators believe will be more favorable for them than they could achieve in the free market.

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[6] S. Rep. No. 92, 102d Cong., 1st Sess. at 36 (1991) ("*Senate Report*").

After examining the text and legislative history, the Commission itself has concluded that Congress intended to bar FCC intervention in the substance of retransmission consent disputes. For example, when the Commission adopted its good-faith bargaining rules in 2000, it found that the statute "clearly" and "unambiguous[ly]" precluded the Commission from requiring carriage during any impasse in negotiations.[7] The Commission explained:

> Several MVPD commenters argue that where a MVPD shows a willingness to negotiate for continued carriage of a local broadcast station, the station should have an affirmative duty to negotiate terms for such carriage and should not be permitted to withhold retransmission consent while such negotiations are pending . . . . Section 325(b)(1) of the Communications Act provides that "No cable system or other multichannel video programming distributor shall retransmit the signal of the broadcasting station, or any part thereof, *except . . . with the express authority of the originating station. . . .*" This language clearly prohibits an MVPD . . . from retransmitting a broadcaster['s] signal if it has not obtained express retransmission consent. . . . *[W]e see no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation . . . where the broadcaster has not consented to such retransmission.*[8]

Quite apart from Section 325(b)(1), the Commission also found an independent basis for this conclusion in Section 325(e)(4), which specifies a satellite MVPD's "exclusive defenses" to claims of unauthorized retransmission. 47 U.S.C. § 325(e)(4)(A). The relevant one of these applies only where "the television broadcast station . . . expressly authorized the retransmission of the station . . . *for the entire time period* during which it is alleged that a violation of subsection (b)(1) has occurred." 47 U.S.C. § 325(e)(4)(B)(ii) (emphasis added). As the Commission explained, this provision necessarily prohibits "interim carriage" of broadcast programming after the expiration of a contractual consent period. *See Good Faith Order*, ¶ 60.

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[7] *See* First Report & Order, *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 15 FCC Rcd 5445, ¶ 59 (2000) ("*Good Faith Order*").

[8] *Id.* ¶¶ 59-60 (second emphasis added; internal footnotes omitted).

More generally, the Commission found in the *Good Faith Order* that Congress did not "contemplate an intrusive role for the Commission with regard to retransmission consent," such as oversight of the terms broadcasters seek in negotiations.[9] Similarly, when recommending against any revision to the existing statutory regime in 2005, the Commission endorsed Congress's decision "not to 'dictate the outcome of . . . marketplace negotiations.'"[10] And it noted that the legislative history anticipated and endorsed the very marketplace arrangements that petitioners most criticize here, including the payment of "monetary compensation" and the "right to program an additional channel on a cable system." *2005 Report to Congress* at ¶ 9.

Remarkably, although many of the petitioners here participated in both of those proceedings, and although they raised there most of the same arguments they raise here, they do not cite the *2005 Report to Congress* at all, and they mention the *Good Faith Order* only in two perfunctory footnotes (Pet. 15 n.46, 39 n.126). In those footnotes, petitioners try to distinguish a central conclusion of the *Good Faith Order*—that the Commission should not and may not impose "standstill" obligations on negotiating parties during an impasse—on the ground that the threat of impasse is somehow greater now than it was in 2000. But today, as in 2000, most negotiations end in agreement with little or no programming interruption, and petitioners cite no evidence that impasses are more common now than then. More important, the *Good Faith Order* concluded that imposition of standstill requirements would be not only unnecessary, but also unlawful, in that it would violate the plain language of Sections 325(b) and 325(e)(4). *See Good*

[9] *Id.* at ¶ 13; *see also id.* at ¶ 23 ("Despite the arguments of the satellite industry and other MVPDs, we find nothing supporting a construction of Section 325(b)(3)(C) that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions or the interconnection requirements of Section 251[.]").

[10] *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, ¶ 35 (Sept. 8, 2005) ("*2005 Report to Congress*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.pdf (citing *Senate Report* at 36).

Faith Order at ¶ 60. That legal conclusion applies no matter how common bargaining impasses might be, and it is just as valid today as it was in 2005.[11]

B. Section 325(b)(3)(A) Does Not Somehow Trump the Retransmission Consent Right Contained in Section 325(b)(1)(A)

Petitioners note that Section 325(b)(3)(A), which governs FCC regulations concerning retransmission consent and must-carry, directs the Commission to "consider . . . the impact that the grant of retransmission consent . . . 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) [47 U.S.C. § 543(b)(1)] to ensure that the rates for the basic service tier are reasonable."[12] And they argue that this provision somehow empowers the Commission to do what Section 325(b)(1) prohibits: regulate the substance of retransmission consent agreements. That argument fails for several independent reasons.

First, as a threshold matter, "the Commission's obligation under section 623(b)(1)" to regulate basic-tier rates is limited only to areas that are not subject to "effective competition." *See* 47 U.S.C. § 543(a)(2). Of course, cable operators often suggest that a great many areas *are* subject to effective competition and are thus beyond the scope of that authority. If so, then, for this reason alone, Section 325(b)(3(A) is irrelevant to *any* retransmission consent issue in many if not most areas.

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[11] Although petitioners rely heavily on commitments made by the merging parties in the *News Corp./Hughes Order*, 19 FCC Rcd 473 (2004), that order does not help them. The Commission acted there under its public interest authority to avoid anticompetitive results of a proposed merger. Outside of the merger context, the Commission has no authority to dictate the terms on which individual broadcasters may authorize or decline to authorize MVPDs to carry their signals.

[12] *See* 47 U.S.C. § 325(b)(3)(A); Pet. 30-33; *see also* 47 U.S.C. § 543(b)(1) (codifying Section 623(b)(1)).

Second, even in markets where the Commission retains authority over basic-tier rates, nothing in Section 325(b)(3)(A) suggests that this authority somehow trumps the retransmission consent right created by Section 325(b)(1)(A). Section 623(b)(1) of the Communications Act directs the Commission to limit the rates charged to *consumers* by *cable operators* in areas without sufficient MVPD competition. *See* 47 U.S.C. § 543(b)(1). But neither provision cancels out Section 325(b)(1)(A)'s grant of an absolute right to *broadcasters* to negotiate for compensation *from cable operators* in a free, unregulated market. Instead, Section 325(b)(3)(A) serves a quite different purpose. When it enacted the retransmission consent right, Congress found that, in the words of the legislation's chief Senate sponsor, "cable companies are not paying for any of these [broadcast] signals. They just pluck them off the air. But when they retransmit them to us, we pay for it. Thus, *subscribers are paying an average of 58 cents per channel for broadcast programming that is free to cable*."[13] In Section 325(b)(3)(A), therefore, Congress directed the Commission to keep cable companies from passing through any new retransmission consent fees to consumers in the basic tier, given that, in Congress's view, cable monopolists were *already* "recovering" the equivalent of those fees from basic-tier consumers even before they faced any obligation to pay them.[14]

Third, quite apart from these legal considerations, petitioners have no plausible *empirical* basis for arguing that retransmission consent fees are somehow to blame for the cable industry's year-after-year increases in subscriber rates. As discussed in Section II.D below, the total revenues and costs of cable companies dwarf the retransmission consent fees they pay, and cable

[13] 138 Cong. Rec., S561-02 at S563 (daily ed. Jan. 29, 1992) (remarks of Sen. Inouye) (emphasis added).

[14] *See id.* ("[T]he FCC is also required to regulate the rates for the basic tier—that is the tier that contains the broadcast signals—to make certain that those rates remain reasonable. Thus, the FCC has a clear mandate to ensure that retransmission does not result in harmful rate increases.").

company profits are rising at a far faster pace than those fees as well. And as further discussed below, the Commission could not rationally invoke potential effects on the retail rates of MVPDs as a basis for regulating retransmission consent fees unless it simultaneously increased the scope and degree of regulation for those retail rates. Most of these petitioners would presumably oppose that outcome.[15]

II. Petitioners Cite No Plausible Policy Basis for Amending or Repealing Section 325(b)

Petitioners argue repeatedly that retransmission consent rights are "a wholly artificial construct" enacted in 1992 to constrain the monopoly power of cable companies; that the marketplace has changed significantly since then, with the continued growth of MVPD competition; and that the Commission should respond to these changes by entitling cable companies to retransmit broadcast content on terms to which broadcasters do *not* consent, despite Section 325(b)'s contrary mandate. *See* Pet. 3-5. These are all arguments for repealing or radically revising Section 325(b). Of course, the Commission cannot repeal an Act of Congress or impair congressionally bestowed rights, as petitioners surely know. Nonetheless, much of the petition reads like a white paper addressed to Congress that somehow got misrouted to the Commission.

In any event, even if the petition *had* been styled as a request for legislative repeal, it would still lack merit because petitioners have identified no developments since 1992 that could possibly warrant a change in policy. When, less than five years ago, the Commission last heard

[15] Any regulatory measure that forces broadcasters to "consent" to retransmission against their will would violate not only Section 325, but also the First Amendment, for the reasons discussed in the separate comments of Fox Entertainment Group et al. At the very least, any such measure would raise substantial First Amendment questions and would be barred by the doctrine of constitutional avoidance for that reason alone. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1340-41 (D.C. Cir. 2002).

these same arguments for retransmission consent "reform" from most of the same parties, it accurately observed that the market was functioning just as Congress intended and thus decided "not . . . to recommend [to Congress] any changes to the retransmission consent regime[.]" *2005 Report to Congress* at ¶ 35. The market is fundamentally the same today as it was in 2005, and petitioners' arguments are as unpersuasive now as they were then.

A. There Is No Plausible Basis for Petitioners' Selective Attack on the Role of Retransmission Consent Within the Broader Mix of Intellectual Property Rules Applicable to MVPD Retransmission of Broadcast Programming

Petitioners criticize the retransmission consent right created in Section 325(b) as "a wholly artificial construct" that "stack[s] the deck in broadcasters' favor" and has "invited abuses" such as "significantly higher rates" for the rights to broadcast programming. Pet. 3-5. These claims fall flat not only because they are untrue and directed to the wrong institution (the Commission rather than Congress), but also because anyone could use the same rhetoric to attack *any* intellectual property right. And the intellectual property right that petitioners attack here—the retransmission consent right Congress enacted in Section 325(b)—is no more "artificial" than any other such right, including the compulsory copyright license on which petitioners themselves rely.

In 1976, Congress settled many years of uncertainty by confirming that ordinary copyright protections apply to the retransmission of broadcast programming.[16] But it eliminated much of the economic value of those protections by giving cable companies a compulsory license and setting the regulated license fee at zero for all local programming.[17] In 1992,

[16] Copyright Act of 1976, Pub. L. 94-553 (1976) (codified in relevant part at 17 U.S.C. § 111(c)-(d)). This statutory provision overturned the result in *Fortnightly Corp. v. United Artists Television., Inc.*, 392 U.S. 390 (1968).

[17] Cable systems transmitting broadcast signals *outside* of their local service area (generally defined as the station's television market) must pay a fee to the Register of Copyright

Congress concluded that this regime disserved the public interest because it forced broadcasters to "subsidize the establishment of their chief competitors" (*i.e.*, cable operators and non-broadcast cable channels), threatened broadcasters' incentives to invest in high quality programming, and "created a distortion in the video marketplace which threatens the future of over-the-air broadcasting." *Senate Report* at 35. Congress thus supplemented the highly qualified copyright protections with the *unqualified* retransmission consent right set forth in Section 325(b).[18]

This provision places broadcasters closer to the position of non-broadcast content providers such as Discovery, which are free to license their content to cable systems (or not) as they see fit. As the *Senate Report* explained, "[c]able operators pay for the cable programming services they offer to their customers," and "programming services which originate on a broadcast channel should not be treated differently." *Senate Report* at 35. Any other outcome would be nonsensical because, in the words of the *Senate Report*, "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals." *Id.*

As these passages confirm, Congress enacted Section 325(b)(1)(A) to protect the economic rights of broadcasters in the value of their signals. Although petitioners suggest

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based on the number of "distant" signals carried. *See* 17 U.S.C. § 111(d)(1). No fee is payable for retransmission of television signals within the station's television market. A similar statutory copyright license permits the use of broadcast television programs by direct broadcast satellite services without the copyright owners' consent. 17 U.S.C. § 119.

[18] This new provision reversed what Congress considered an incorrect decision by the Commission in 1959 not to apply the original 1927 retransmission consent provision to cable operators. *Senate Report* at 34-35 ("The Committee believes . . . that Congress's intent [in 1927] was to allow broadcasters to control the use of their signals by *anyone* engaged in retransmission *by whatever means*. . . . Nevertheless, the FCC in 1959 ruled that cable systems need not obtain consent from broadcast stations for retransmission of their signals[.]") (emphasis added); *see* Report and Order, *Inquiry into the Impact of Community Antenna Systems*, 26 F.C.C. 403, 429-30 (1959).

otherwise (Pet. 3), Congress did *not* enact this provision only—or even primarily—to serve "localism" and "diversity" objectives. Instead, Congress achieved *those* objectives by enacting the separate must-carry provisions, which guarantee carriage for less popular stations. *See* 47 U.S.C. §§ 534-535. But if those had been Congress's only objectives in the 1992 Cable Act, Congress would not have needed to enact Section 325(b), which granted new intellectual property protections for broadcasters that had no need to invoke the must-carry provision in the first place.

Again, this retransmission consent right is no more "artificial" than any other intellectual property right designed to encourage the creation of high-value content or other social goals. For example, it is no more artificial than laws barring theft of cable or satellite signals.[19] And it is *certainly* no more artificial than the extraordinary free compulsory license that Congress gave

[19] *See, e.g.*, 47 U.S.C. § 553; *see also* Mo. Rev. Stat. § 570.300; N.C. Gen. Stat. § 14-1185; 18 Pa. Cons. Stat. § 3926. Petitioners argue that the retransmission consent right is somehow more "artificial" because it appears alongside the must-carry requirement and the "network non-duplication" rule, which generally bars a cable system from importing distant broadcast network programming into a market served by a local broadcaster that is affiliated with the same network and has bargained for exclusive programming rights in that market. *See* Pet. 7. This argument is meritless. The must-carry rule is irrelevant, because it does not even apply to stations that have invoked retransmission consent rights. 47 U.S.C. § 325(b)(1)(B) & (C). And the network-nonduplication rule is also largely beside the point. As the Commission has explained: "[C]able operators' ability to retransmit duplicative distant broadcast signals is governed in the first instance by the contract rights negotiated between broadcasters and their programming suppliers. If networks and syndicators have entered into contracts with broadcasters that limit broadcasters' exclusivity such that a duplicative distant signal could be imported by an MVPD without blacking out the duplicative programming, the Commission's rules would not prevent that result. Conversely, where exclusivity contracts exist, repeal of the Commission's rules would not necessarily be sufficient to enable the retransmission of duplicative programming." *2005 Report to Congress* at ¶ 49. And the Commission has rightly rejected petitioners' prior requests "to modify the network non-duplication and syndicated exclusivity rules such that they would supersede contract arrangements," explaining that voiding such contracts would violate congressional intent, undermine the Commission's own policies supporting local broadcasting, and "risk[] . . . major disruption and possible unintended consequences." *Id.* at ¶¶ 50-51; *see also Senate Report* at 38 ("the Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules").

cable companies to carry all local broadcast content (but no other televised content). Petitioners implicitly, but illogically, believe that the inextricably intertwined intellectual property rights in today's regime can somehow be pulled apart and modified in isolation. But they cannot be. As the Commission explained in 2005, "when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination." *2005 Report* at ¶ 45. For example, Congress could not reasonably curtail broadcasters' retransmission consent rights without also giving serious consideration to elimination of the compulsory copyright license, which petitioners inexplicably appear to take for granted.

B. The Alleged Evolution in the Relative Bargaining Positions of Cable Companies and Broadcasters Provides No Basis for Disregarding Section 325(b)

As part of their overall effort to depict Section 325(b) as outdated and repeal-worthy, petitioners claim that Congress enacted that provision simply "to correct for the relatively minimal competition faced by cable operators in 1992" and "to counterbalance the perceived threat posed by the cable industry" during the heyday of its monopolistic grip on the MVPD market. Pet. 3. That argument is baseless.

First, the very text of Section 325(b) refutes the claim that Congress intended retransmission consent rights as a check on cable companies' market power. Whereas Congress limited many other provisions of the 1992 Act to "cable systems" or "cable operators"[20]—which were then acknowledged monopolists—Congress extended Section 325(b) to any "cable system or other *multichannel video programming distributor*," including direct broadcast satellite

[20] *See, e.g.*, Section 613(a)-(d) (47 U.S.C. § 533(a)-(d)) (ownership restrictions); Sections 614-15 (47 U.S.C. §§ 534-535) (must carry); Section 623 (47 U.S.C. § 543) (rate regulation); Section 628 (47 U.S.C. § 548) (program access).

companies and cable overbuilders, whether they had market power or not. 47 U.S.C. § 325(b)(1)(A) (emphasis added). If Congress had intended for Section 325(b) simply to constrain the negotiating leverage of "monopolists," as petitioners contend, it would not have included this deliberate extra reference to non-cable, non-dominant MVPDs.[21] More generally, the retransmission consent right created in Section 325(b) is, like other intellectual property rights, independent of the ever-fluctuating bargaining positions of individual rights-holders. If Congress had meant for retransmission consent rights to wax and wane with market conditions, it would have said so, and it would not have created the straightforward intellectual property right that it did. In short, there is nothing outdated about this provision.

In any event, petitioners present a grossly one-sided account of market changes since 1992. Since the enactment of Section 325(b), increasing competition for viewers has affected *broadcasters* at least as much as, if not more than, increasing MVPD competition has affected *cable incumbents*. There are now four major broadcast networks, several additional broadcast networks, many independent local stations, and dozens of major cable networks, many of which have sprung up since 1992. Indeed, the Commission's own data reveal that, in the six years between 2000 and 2006, the number of programming networks more than doubled, from 281 channels to 565.[22] Broadcasters thus face *much more* competition for viewers than they did in 1992, and their audience shares have declined accordingly. As Dr. Eisenach explains: "[T]he

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[21] The status of those new MVPD entrants was also a key focus of the 1992 Act, which promoted MVPD entry by including a new ban on exclusive cable franchises, 47 U.S.C. § 541(a)(1), and the creation of new program access rules, 47 U.S.C. § 548.

[22] Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, Navigant Economics, at 22, Fig. 10 (Apr. 2010) ("*2010 Eisenach Analysis*") (citing FCC orders), attached to Letter from Susan Fox (Disney) to Marlene Dortch (FCC), MB Docket No. 10-71 (Apr. 23, 2010). These numbers reflect the number of *satellite-delivered* programming networks, and thus do not even capture the terrestrially delivered programming networks owned by cable companies.

highest-rated television show in 1950 (Texaco's 'Star Theater') captured over 60 percent of the prime-time audience; as recently as the 1980s it was typical for top-rated shows to capture [shares] in the 30s. By the turn of the century, however, the top-rated show had fallen to less than a 20 percent [share], and the decline is continuing."[23] Meanwhile, cable-only networks, many of which are owned by cable operators, have now surpassed broadcast networks in aggregate viewership and revenues, and the gap continues to widen.[24]

Additional developments since 1992 have also tended to increase MVPD bargaining leverage in negotiations with broadcasters. First, cable operators have increasingly engaged in "clustering," an arrangement in which one operator obtains control of most, if not all, cable systems in a given television market and then negotiates with local broadcasters on behalf of the unified cluster.[25] Second, because MVPD subscribership has increased steadily since 1992—from less than 60% of television households to nearly 90% today—"the importance of multichannel distribution as a means of retransmitting broadcasting signals to a broad audience is substantially greater than it was when Congress enacted retransmission consent."[26]

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[23] *Id.* at 22. The last network series to exceed a 30% share was *The Cosby Show* in 1986-87, and the last to exceed a 20% share was *Seinfeld* in 1997-98. *Id.* at 23, Fig. 11. The highest-rated series from 2005-2007 was *American Idol*, whose shares of the total audience hovered between 12% and 13%. *Id.*

[24] *Id.* at 23-24; Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC, at 17-18 (Mar. 2009) ("*2009 Eisenach Analysis*"), attached as Appx. A to Reply Comments for the National Association of Broadcasters in MB Docket No. 07-269 (June 22, 2009).

[25] *See* Twelfth Annual Report, *Annual Assessment of Competition in the Market for Delivery of Video Programming*, 21 FCC Rcd 2503, 2507, 2521, 2550-51 (2006); *see also* Comments of the National Association of Broadcasters, MB Docket No. 07-29, at 14-15, 19-21 (Jan. 4, 2008).

[26] Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, Navigant Economics, at 6 (Apr. 2010) ("*2010 Eisenach & Caves Analysis*"), attached to Letter from Erin Dozier (NAB) to Marlene Dortch (FCC), MB Docket No. 07-198 (May 6, 2010).

For all of these reasons, which petitioners essentially ignore, there is "no basis for concluding that broadcaster bargaining power has increased (relative to MVPD bargaining power)"—and petitioners "therefore cannot credibly argue that the shift from in-kind to cash compensation is the result of a shift in bargaining power in the first instance." *2010 Eisenach & Caves Analysis* at 2-3.

There is similarly no merit to petitioners' related claim that broadcasters have "market power" because they own the rights to what petitioners call "must-have" programming. Petitioners highlighted this same argument in 2005, when unsuccessfully urging the Commission to propose legislative amendments to the retransmission consent regime,[27] and the argument has no greater merit now than then. Indeed, it has *less* merit now than in 2005, and certainly less than in 1992 when Congress enacted Section 325(b)(1)(A), given the steadily increasing proliferation of hundreds of programming alternatives to the broadcast networks. In any event, when petitioners use these terms—"market power" and "must-have"—they simply mean that broadcasters still air, and pay many millions of dollars to produce, some of the highest quality and most highly valued programming available on television today. That is not "market power"; it is just programming excellence. It would be absurd to penalize broadcasters for that excellence by invoking it as a basis for regulating the rates they may charge for it (via compulsory arbitration) or compelling them to allow its retransmission when they no longer consent to it (via compulsory "interim carriage" agreements).

Finally, it is important to clear up a factual misimpression that the petition appears to convey (although, even if it were true, this misimpression would not support a different answer on the legal or policy questions presented here). Citing a 2009 MVPD-financed study,

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[27] *See 2005 Report to Congress* at ¶ 37.

petitioners imply that a broadcaster affiliated with a major broadcast network might be able to cause many of an MVPD's subscribers to switch to another MVPD simply by withholding its signal.[28] In a recent submission in the Comcast-NBC Universal merger proceeding, however, the lead author of that study refutes that very suggestion. As he concludes, "past analyses have shown little effect on MVPD subscribership from the loss of a single broadcast television network."[29]

C. The Market Dynamics That Petitioners Cite As Evidence that the Retransmission Consent Regime Is "Broken" Are Classic Features of Any Well-Functioning Market

Petitioners also argue that the retransmission consent regime must be "broken" (Pet. 1) because cable companies are now more likely than before to pay monetary compensation for some broadcast signals and because, in individual negotiations, broadcasters have relied on the impending expiration of existing retransmission agreements as inducements for cable companies to sign new ones on mutually agreed terms (this is what petitioners call "brinksmanship"). These arguments are inscrutable because the cited commercial dynamics—market-sensitive pricing and vigorous negotiations—are part of any well-functioning marketplace, and thus further confirm that *this* marketplace is living up to congressional expectations.

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[28] Pet. 26-27. The cited study is Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (Nov. 12, 2009) ("*Katz/Orszag/Sullivan Paper*"), which was attached to Letter from Neal Goldberg (NCTA) to Blair Levin (FCC), GN Docket No. 09-47 (filed Dec. 16, 2009). *See also* § II.D, *infra* (noting additional conceptual flaws with this study).

[29] Mark Israel and Michael L. Katz, *The Comcast/NBCU Transaction and Online Video Distribution*, at 60 (May 4, 2010), attached to Letter from Michael H. Hammer, Comcast, and A. Richard Metzger, General Electric, to Marlene H. Dortch, MB Docket No. 10-56 (May 4, 2010); *accord id.* at 61-62 ("[E]xisting empirical evidence from the MVPD marketplace shows little effect on a traditional MVPD's subscriptions from the temporary loss of carriage of a single broadcast television network's signal by a rival MVPD.").

1. The continuing evolution in retransmission consent compensation is a sign of market health, not market failure

From the inception of the retransmission consent regime, Congress has *always* intended and expected that some broadcasters would receive cash compensation for their content; that others would receive compensation in kind, in the form of additional channel-carriage; and that still other broadcasters could receive both.[30] As the Senate Report explained: "Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently. . . . Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as . . . the right to program an additional channel on a cable system." *Senate Report* at 35-36. In contrast, petitioners appear eager to foreclose *both* forms of congressionally approved compensation—compensation in cash and in kind—revealing once more their disagreement with the very premise of this statute.[31] And they mischaracterize the facts as well as the law when they accuse broadcasters of "the mandatory tying of retransmission consent with the sale of other programming services[.]" Pet. 34. While Disney, for example, offers cable companies substantial price breaks if they are willing to carry a variety of Disney-affiliated channels, it never forces them to do so; it always gives them the option of paying cash instead for the ABC owned stations, ESPN, or Disney Channel.

[30] *See, e.g., 2005 Report to Congress* at ¶ 35 ("Congress chose not to 'dictate the outcome of the ensuing marketplace negotiations.' Many expected that cable that cable operators would compensate broadcasters with cash in return for retransmission consent. In reality, much of the compensation for retransmission consent has been in-kind, including carriage of an affiliated non-broadcast channel[.]") (footnote omitted); *see also id.* at ¶¶ 10-11.

[31] *Compare, e.g.,* Pet. 4-5 (arguing that broadcasters should be satisfied with the "in-kind compensation" rather than seeking "ever-higher retransmission consent fees") *with id.* at 35 (attacking arrangements to bundle cable channels).

More generally, the Commission has rejected previous requests by the MVPD industry to regulate the types or magnitude of retransmission consent compensation, and it should do so here as well. As it has explained: "Although some parties earnestly suggest . . . that broadcasters should be entitled to zero compensation in return for retransmission consent or that the forms of compensation for carriage should be otherwise limited, this seems to us precisely the judgment that Congress generally intended the parties to resolve their own interactions and through the efforts of each to advance its own economic self interest."[32] To the extent that some MVPDs have begun paying cash compensation for the carriage of some broadcast signals, that is evidence not that the market is "broken," but that it is evolving as Congress intended. Indeed, it is difficult to identify any other regulatory setting where large corporate actors have complained that a market has "failed" because money has changed hands and prices have fluctuated with supply, demand, quality, and competition. And petitioners' complaints here are particularly implausible. If anything, it is a sign of market *health* that providers of the very highest-quality programming, including many broadcasters, may be able to earn greater cash compensation now than they were 18 years ago.

Several factors may explain the evolving nature of retransmission consent compensation. To begin with, the quality and expense of much broadcast programming has increased substantially since 1992.[33] Of course, in well-functioning competitive markets, prices tend to rise with increases in quality and cost. Just as important, as petitioners themselves stress, cable companies faced very little MVPD competition in 1992 and face more now. They have therefore

[32] *Good Faith Order* at ¶ 53; *see also id.* at ¶ 43 (finding that the good faith standard "does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal").

[33] Indeed, the cable industry's trade association has itself recently cited "a huge increase in output in terms of the number of channels" and both "the quality and quantity of programming." NCTA Comments, MB Docket No. 07-269, at 24 (May 20, 2009).

lost some of their power to avoid paying a competitive rate for programming.[34] Thus, to the extent that some broadcasters may now be able to recover more monetary compensation than they could recover before, when most cable companies were almost pure monopsonists, this is not a sign that the market has "broken," as petitioners contend. To the contrary, it is a sign that the market is *working better*, now that cable companies are less capable of exploiting monopsony power to deprive broadcasters of any monetary compensation for their programming, as they succeeded in doing until recently.

The true anomaly here is that cable systems paid as little monetary compensation as they did in the past, given Congress's determination that "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals." *Senate Report* at 35. At bottom, petitioners ask the Commission to perpetuate that anomaly by shielding them from the impact of nascent MVPD competition on retransmission consent negotiations. That is an absurd request.

2. What petitioners mislabel "brinksmanship" is an integral part of any free market

Petitioners ask the Commission to keep broadcasters from "abus[ing]" (Pet. 4) or "exploiting" (Pet. 37) their statutory rights by engaging in "brinksmanship" (*id.*), by which petitioners mean that the Commission should forbid any broadcaster to withhold retransmission consent if it fails to reach mutually agreeable terms with MVPDs. This, too, is hollow rhetoric. Section 325(b) means nothing if a broadcaster cannot decide when and on what terms to grant consent to the retransmission of its programming. A broadcaster does not "exploit" or "abuse" its rights under Section 325(b) by exercising such discretion; it merely exercises them.

[34] *See generally 2005 Report to Congress* ¶¶ 10-11; Comments of the National Association of Broadcasters, MB Docket No. 07-29, at 4-5 (filed Jan. 4, 2008).

Similarly, what petitioners call "brinksmanship" is an inherent component of negotiation. In virtually *any* voluntary transaction, either side may walk away if the other side offers too little value to make the deal mutually beneficial. A homeowner might refuse to hire a painter who insists on earning too much; a painter might refuse to paint the house of a homeowner who offers to pay too little. The regime petitioners propose here would be analogous to a legal system in which neither the homeowner nor the painter would be free to withhold payment or services, and in which either could cite any "impasse" in such negotiations as a pretext for calling in the government to compel service at prescribed "fair" rates. Of course, the government has no need to intervene in that market because (among other considerations) it is competitive—and the same is true here.

Indeed, providers of *non*-broadcast content and MVPDs engage in "brinksmanship" all the time, yet no one views that as a basis for regulatory intervention. For example, for approximately three weeks in January 2010, "[a]bout 3.1 million Cablevision Systems Corp. customers saw Food Network and HGTV go dark after the cable operator couldn't reach a deal with Scripps Networks Interactive Inc., owner of the cable channels," which "had been pushing cable operators for big monthly fee increases for Food Network."[35] Petitioners do not ask the Commission to impose "binding arbitration" or "standstill agreements" on the parties negotiating about the carriage of such popular non-broadcast content, and for good reason: the parties can be expected to reach pro-consumer outcomes if left unregulated. There is no basis in law or policy to treat broadcast programming differently.

[35] Shira Ovide and Nat Worden, *Time Warner, Fox Reach Cable Deal*, Wall St. J. (Jan. 2, 2010). The signals were restored in late January. *See* Chloe Albanesius, *Cablevision Reaches Deal for HGTV, Food Network*, PCMag.com (Jan. 22, 2010), *available at* http://www.pcmag.com/article2/0,2817,2358312,00.asp.

Finally, despite a handful of well-publicized impasses since 1992, the vast majority of retransmission consent negotiations have produced mutually acceptable agreements without any service interruption to any viewer. Since 1992, broadcasters and MVPDs have concluded literally thousands of retransmission consent agreements without incident. As one analysis concludes, "an American household is about 10 times as likely to experience a complete cable system outage, and about 24 times as likely to experience an electricity outage, as it is to be deprived of its first-choice television channel because of a retransmission consent dispute."[36] This, too, confirms the accuracy of the Commission's observation in 2005: the retransmission consent "process provides 'incentives for both parties to come to mutually beneficial arrangements,'" because both sides lose when broadcast signals go dark on a cable system.[37]

D. Petitioners Identify No Plausible Basis for Blaming Their Own Increases In Retail Cable Rates on Retransmission Consent Fees

Citing a 2009 economic study, petitioners criticize the retransmission consent regime on the grounds that it has given rise to monetary compensation, that such compensation increases MVPD costs, and that some MVPDs may choose to pass a portion of those increased costs through to subscribers. *See* Pet. 25-27. There are three basic problems with this argument. *First*, as discussed, Congress anticipated that Section 325(b)(1)(A) would lead to the payment of monetary compensation, and it endorsed that outcome because, in the words of the *Senate Report*, "[c]able operators pay for the cable programming services they offer to their customers,"

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[36] *2009 Eisenach Analysis* at 2; *see also 2010 Eisenach & Caves Analysis* at 17 ("[A]n update of the March 2009 analysis shows that the basic results have not changed: retransmission consent impasses are extraordinarily rare and typically short lived, and do not substantially impact consumer welfare."); *id.* at 19 ("Aggregate service interruptions continue to represent approximately one one-hundredth of one percent of annual U.S. viewing hours[.]").

[37] *2005 Report to Congress* at ¶ 44; *see also id.* ("local television broadcaster[s] and MVPD[s] negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes through the retransmission consent process potentially is detrimental to each side").

and "programming services which originate on a broadcast channel should not be treated differently." *Senate Report* at 35. By itself, that congressional judgment is a complete answer to petitioners' opposition to the payment of retransmission consent fees.

Second, petitioners' argument makes no economic sense because, at bottom, it merely seeks to preserve the vestiges of monopsony. This point is underscored by the 2009 economic study on which petitioners rely. The study forthrightly explains that, for many years after Section 325(b)(1)(A) was enacted, cable operators "were able to deflect cash demands" in favor of in-kind compensation because they "did not face much, if any, competition in the provision of MVPD service in their local markets[.]" *Katz/Orszag/Sullivan Paper* at 33. The study criticizes the retransmission consent regime precisely because the gradual decline of that monopsony power has made MVPDs today *less* "able to deflect cash demands." That criticism, however, rests on an explicit premise that monetary compensation is *inherently* undesirable: *i.e.*, that "consumers are harmed when retransmission consent fees raise MVPDs' costs" because MVPDs may then "charge higher subscription fees to consumers." *Id.* at 29.

This categorical opposition to any commercial arrangement that "raise[s] MVPDs' costs" is untenable not only because it contradicts the congressional policy judgment underlying Section 325(b)(1)(A), but also because it violates basic economic logic. Dr. Eisenach explains:

> One of cable operators' arguments against retransmission consent is that any compensation paid to broadcasters for their signals is ultimately passed along to consumers in the form of higher retail prices. At one level, *this assertion is a truism, equivalent to saying that if steel were free, car companies could charge less for automobiles. The problem, of course, is that if the price of steel were set to zero, no steel would be produced, and there would be no cars in the first place.* From an economic and consumer welfare perspective, the correct question is whether prices are set so as to send the right signals to both sellers and buyers. If the price is set too low, sellers will not produce the economically optimal quantity (or quality) of output, and consumer welfare will suffer.

2009 Eisenach Analysis at 23 (emphasis added). Here, Dr. Eisenach concludes, "conditions in the market for programming are such that retransmission consent negotiations can be expected to yield prices that closely approximate the social optimum." *Id.*

To attain this "social optimum" in the production of highly valued programming, broadcasters may well need to find revenue sources, like retransmission consent fees, that supplement commercial advertising. Indeed, petitioners' own economists acknowledge that "increased demands for cash compensation are likely due to a variety of additional factors, including broadcasters' desires to replace declining advertising revenues" during a deep recession. *Katz/Orszag/Sullivan Paper* at 31. But those economists never explain how "cash compensation" could possibly be undesirable if it is necessary to produce a good that consumers value: in this case, high-value broadcast programming. In economic terms, their analysis "ignores the dynamic or 'second order' effects of retransmission consent on consumers. That is, in the absence of retransmission consent, consumers would be harmed by the reduction in the quantity and quality of broadcast programming that would result." *2010 Eisenach & Caves Analysis* at 2 n.4.

Third, simply as an empirical matter, petitioners vastly overstate any relationship between wholesale retransmission consent compensation and retail cable rates. Every rigorous economic analysis has shown that the *total* cost of *all* cable content contributes only modestly to cable subscription rates, and "the cost of any broadcast retransmission consent compensation is a *small fraction of what cable and satellite companies pay for non-broadcast programming*." *2009 Eisenach Analysis* at 25 (emphasis added). Dr. Eisenach explains: "If programming costs are in fact driving cable price increases, we would expect to see them rising faster than cable company revenues, faster than other components of cable company costs, and faster than cable company profits. Instead, the opposite is true: programming costs are declining relative to relevant [cable company] financial metrics." *2010 Eisenach Analysis* at 5. In particular:

- Programming costs *overall* (including the costs of nonbroadcast as well as the generally far lower costs of broadcast programming) constitute a minority of cable company costs, and they "are declining as a share of cable operators' cost structures," even as cable rates increase. *Id.* at 5, 7.

- "[M]onthly [cable company] revenues per subscriber per month rose by $38.06 per month between 2003 and 2008, while [all] programming expenses rose by only $6.65. Put differently, for every dollar increase in programming expenses, [cable companies] raised total charges to consumers by $5.72." *Id.* at 10.

- Cable companies' "profitability has increased over time, both in absolute terms and relative to programming costs. This result is hardly surprising, given that programming costs have declined relative to both costs and revenues." *Id.* at 12-13.

- "[M]onetary compensation accounts for only 0.2 percent . . . of cable company revenues today," and "even under very liberal assumptions about the trend towards monetary retransmission consent fees in the future, will never reach one percent of cable revenues. *Eisenach 2009 Analysis* at 32-33.

- "[M]onetary retransmission consent fees are projected to increase by $1.08 per subscriber per month [over the course of] the next decade; during the same period, cable revenues per subscriber will go up approximately 45 times as much, by $48.38." *Id.* at 33.

Given these facts, "[r]etransmission consent fees . . . simply cannot be responsible for any significant portion of cable operators' increasing monthly fees." *Id.*

In their more candid moments, cable industry executives concede the same thing. A few months ago, for example, "Cablevision Systems' chief operating officer told analysts that *any retrans costs would not likely be shifted to customers*."[38] He explained: "when you look at the totality of the programming cost structure of the cable business, it's still growing although not as much as it was. There's actually some downward pressure on the rate of growth [of costs].

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[38] Mike Farrell, *Rutledge: Cablevision Can Manage Retransmission Consent*, Multichannel News (Nov. 3, 2009) (emphasis added), *available at* http://www.multichannel.com/article/ 367493-Rutledge_Cablevision_Can_Manage_ Retransmission_Consent.php?rssid=20292.

While we have concerns about retransmission consent, we think we can manage our overall cost structure."[39] As Drs. Eisenach and Caves observe, moreover, petitioners' own economic analysis, even if taken at face value, confirms that allowing the market to set retransmission consent fees has only a minimal effect on consumer prices. In particular, the *Katz/Orszag/Sullivan Report* alleges "that consumers pay between $0.37 and $0.74 per month to be able to watch broadcast programming on their MVPD services, or between about 0.75 percent and 1.5 percent of the average monthly price for expanded basic cable. Even if this proportion were accurate, it hardly seems excessive, especially when one considers that broadcast programming accounts for about 38 percent of television viewing." *2010 Eisenach & Caves Analysis* at 13 (footnote omitted).

In short, petitioners have not established and cannot establish the evidentiary predicate for their contrary claim that relatively modest increases in cash payments for broadcast content will significantly increase cable rates, let alone harm the public interest in a well-functioning marketplace for high-value broadcast programming. Indeed, petitioners—which bear the burden of proving a "problem" that needs "fixing"—produce *no* data to support that conclusion. The petition is rife with assertions that broadcasters are charging MVPDs "too much" and that MVPDs may in turn pass through those additional fees to consumers. But nowhere do petitioners identify *any actual facts* to support these claims. These omissions are telling because, again, all available data show that increased reliance on cash compensation would not substantially raise cable subscription fees, which do not significantly vary with such programming costs.

[39] *Id.*

Finally, it is deeply ironic that cable providers—who have fought retail rate regulation tooth and nail for decades—would invoke their own retail subscription rates as a basis for imposing the functional equivalent of regulation on retransmission consent rates. The Commission could not rationally regulate wholesale rates in order to produce putative effects on retail rates unless it simultaneously acts to ensure that such wholesale regulation actually *has* such effects. Here, the Commission could not reasonably adopt new retransmission consent regulations on the basis of concerns about cable rates without simultaneously acting to ensure that cable operators pass through all the benefits of such regulation to their subscribers in the form of lower rates—particularly when, as just noted, cable industry executives are telling analysts that retransmission consent costs are *not* passed through to consumers in the first place. In essence, the logic of this petition is an open invitation to broader and more intrusive cable rate re-regulation—which may help explain Public Knowledge's decision to join this patently self-serving petition by the MVPD industry.

CONCLUSION

The petition for rulemaking should be denied.

Respectfully submitted,

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