

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

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

To: Commission's Secretary, Office of the Secretary
Attn: Chief, Media Bureau

**JOINT COMMENTS ON BEHALF OF
THE NAMED STATE BROADCASTERS ASSOCIATIONS**

**THE NAMED STATE BROADCASTERS
ASSOCIATIONS**

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Dated: May 18, 2010

SUMMARY

The Named State Broadcasters Associations vigorously oppose the rulemaking effort by a number of cable and satellite television operators and others to persuade the FCC to radically change through governmental fiat the negotiating dynamics of the Congressionally-mandated, market-driven negotiating process by which television stations exercise their must carry/retransmission consent rights. Not surprisingly, the MVPDs want the FCC to change those dynamics in ways that will benefit them, and severely prejudice the television broadcast industry, in all future retransmission consent (“RTC”) negotiations.

The Petitioners urge the FCC to grant every MVPD mandatory interim carriage—the equivalent of a “compulsory signal carriage license”—in circumstances where an MVPD and a television station are unable, for any reason, to reach agreement on the terms and conditions of a renewed or extended retransmission consent agreement before expiration/termination of the then current RTC agreement. Under such “license,” the MVPD would have the right to continue carrying the station’s signal (and thus all of its programming), on the *frozen* terms and conditions of the former RTC agreement for as long as it took the FCC, and presumably the courts, to finally decide if one of the parties had acted in bad faith. During that period, the television station could not charge the MVPD additional consideration for the right to retransmit the station’s signal even if the station, as is likely, was incurring higher and higher programming acquisition costs. Such “licenses” would be automatically available to any MVPD that took the position that it was negotiating in good faith and would last as long as it took the FCC and the courts to decide if that was true.

Neither the Communications Act nor the Copyright Act grants the FCC the statutory authority to impose either mandatory interim signal carriage or arbitration in connection

with must carry or retransmission consent. The Commission has repeatedly acknowledged that fact. For good reason, a change in the law is not warranted. Adoption of the Petitioners' proposals would lead to (i) substantially fewer mutually successful, timely RTC negotiations; (ii) substantially more FCC-based litigation; (iii) the loss of RTC-related compensation that television stations need to continue to produce and otherwise acquire increasingly expensive and responsive local, syndicated, and network informational and entertainment programming, including sports and other types of compelling programming; (iv) a weakening in the ability of television stations to compete and survive against the combined subscription/advertising-based model of cable and satellite MVPDs; and (v) as a result of the diminished capacity of the television broadcast industry to compete vigorously in the marketplace for programming, an acceleration in the already strong trend of sports and other types of compelling programming migrating from free local over-the-air television to pay TV.

Informed subscribers, not governmental intervention, is the only lawful and otherwise appropriate way to address potential MVPD service disruptions of the type complained of by the Petitioners. Their wails of distress on behalf of MVPD subscribers are no more than cries of self-interest from MVPDs more worried about losing subscribers to over-the-air viewing or to competing MVPD providers than about arming their subscribers with timely information about RTC negotiations and informing those subscribers of their options for ensuring they will be unaffected by the MVPD's loss of a particular station's programming. MVPDs are in the best position to eliminate subscriber uncertainty by beginning RTC negotiations well in advance of the RTC expiration date and by providing their subscribers with timely and truly helpful information the subscribers can use to prepare to implement an over-the-air antenna option and/or switch to an alternate MVPD provider if they wish. In short, if subscribers face

programming disruption, it is caused by deliberate decisions on the part of MVPDs to keep their subscribers in the dark during negotiations, and not by television stations exercising their statutory rights in those negotiations.

As the Petitioners have failed to demonstrate any need to “fix” the current retransmission consent process, much less addressed the harm that their proposals would create, the rulemaking sought by the Petitioners should not proceed, and their petition should be dismissed or denied in its entirety.

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Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of

Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters (collectively, the “State Associations”), by their attorneys in this matter, hereby jointly comment in strong opposition to the Petition for Rulemaking (“Petition”) filed in this proceeding by a number of cable and satellite system operators and others (collectively, “Petitioners”).

Introduction

The Petitioners are asking the Commission, in effect, to grant *ultra vires* any multichannel video programming distributor (“MVPD”) the extraordinary right of mandatory interim carriage notwithstanding the expiration or termination of a previously mutually agreed upon retransmission consent (“RTC”) agreement. Such extraordinary “relief” would be available to every MVPD that unilaterally and simply asserts “that the parties could not agree on price or other terms and conditions of carriage...”¹ and would not require any showing of bad faith on the part of the broadcaster. Indeed, the Petitioners’ proposal would not even require that the MVPD demonstrate it negotiated in good faith, only that there has been no ruling by the FCC finding the MVPD had acted in bad faith.

The clear motivation of the Petitioners is to reduce the amount of future RTC compensation that MVPDs may have to pay television stations for the right to include broadcast programming in the MVPDs’ channel line-ups that they resell to their subscribers for a fee. The

¹ Petition at 32.

Petitioners seek to achieve this purely economic objective, in the context of arms-length RTC negotiations, by urging the FCC to intervene to place a thumb on the scale in favor of MVPDs in their RTC negotiations with television stations. If the Petitioners' mandatory interim carriage proposal were adopted, one party to the RTC negotiations (the MVPD) could easily and unilaterally nullify the original intent of both parties in setting an expiration date for their current RTC Agreement. When that agreement was signed, both parties voluntarily agreed to the arrangement based upon a mutual understanding that if no renewed or extended RTC agreement were in force before the expiration date of the existing RTC agreement, then the MVPD would no longer carry, and indeed would no longer have the legal right to carry, the station's signal.

Under the Petitioners' proposed scheme, the MVPD would be allowed to effectively take the position that it had its fingers crossed when signing the original agreement, and to then unilaterally amend the contract to extend the term indefinitely while it pursues further negotiations or a complaint and the inevitable appeals at the FCC and in the courts. The Petitioners' proposal would therefore require television stations to provide for "resale" by MVPDs to their subscribers "this year's" extremely expensive programming at prices negotiated three to five years prior. Certainly MVPDs do not let their subscribers, unhappy with rate increases, maintain their subscriptions in good standing simply by paying the monthly subscription fee from five years ago! The Petition fails to present any basis for subjecting broadcast stations to such treatment.

Setting aside the fundamental unfairness of the Petitioners' proposal, the Commission does not, contrary to Petitioners' claims, have the statutory authority to permit MVPDs to carry the signal of a television station without that station's consent. Retransmission consent is ultimately a product of copyright law, and copyright matters are firmly outside the Commission's

jurisdiction. Retransmission consent is merely a statutory recognition of the established right of copyright holders (in this case, television stations) to control the use and distribution of their copyrighted materials, and to determine themselves under what contractual terms they will make such content available to third parties.

The extraordinary measures sought by the Petitioners are all the more amazing given that the Commission's procedural scheme for the exercise and implementation of RTC rights is neither broken nor in need of fixing, and certainly not in the illogical and one-sided manner proposed by the Petitioners. The relief proposed by the Petitioners is unfocused, broad and draconian, when by any rational measure, the "problem" it seeks to address by regulatory sledgehammer is rare, transitory, and can be mitigated if not eliminated by providing subscribers with more timely notice about RTC deadlines and negotiations. This would allow subscribers to make their own informed decision as to how to avoid or minimize any disruption to their viewing.

Even the MVPDs must concede that they have no basis for seeking governmental intrusion into private negotiations unless there is a significant public interest need. As a result, the Petitioners' proposal can only merit consideration if they first demonstrate that the public has suffered widespread "blackouts" involving significant numbers of people being unable to continue receiving broadcast programming either through the use of an antenna or through an alternate MVPD. This the Petitioners have failed to do. Indeed, their anecdotal claims of service disruptions (the term "blackouts" overstates the inconvenience to subscribers) are quite sparse given the literally thousands of RTC agreements that have been reached over many years without the slightest disruption of service. Subscribers are far more likely to lose programming from technical failures of their MVPDs.

Given their Petition, however, it appears the Petitioners are more focused on forcing broadcasters to shoulder the costs of programming that MVPDs resell to their subscribers than on ensuring the reliability of their technical facilities (which would do more to avoid “blackouts” than their proposal would). At bottom, the Petitioners’ chief desire is to “buy low” (from broadcasters) while continuing to “sell high” to their subscribers.

Since that objective is not a proper focus of an FCC proceeding, the State Associations urge the Commission to reject the Petitioners’ purely self-interested proposal and consider instead this: if the FCC is concerned about the type of service interruptions complained about by the Petitioners, the Commission should focus its attention on modifying the conduct of MVPDs, for they are in the best position to avoid completely and at least mitigate any temporary inconvenience to their subscribers. Specifically, an MVPD is in the best position, as a party to RTC negotiations, to know whether it is likely or not to agree to enter into a new RTC agreement by the contract deadline. Accordingly, an MVPD can avoid any inconvenience by completing negotiations in a timely fashion or mitigate the impact of any programming disruption to its subscribers by providing subscribers with timely notice that a station’s programming may no longer be available over the MVPD’s system.

Armed with that information, subscribers will be better able to make their own decisions whether to purchase an antenna and remain with the MVPD, move to a different MVPD that carries the station, abandon entirely the use of MVPD services and rely solely on over-the-air reception, or do nothing at all because that subscriber is not concerned about missing that particular station’s programming. Rather than merely provide their subscribers with this basic information, the Petitioners seek to have the Commission effectively delete a key negotiated term from thousands of retransmission agreements, as well as to make such term meaningless for all

future purposes, to the benefit of cable and satellite operators and to the detriment of broadcasters and their local programming services.

Furthermore, the Petitioners' proposal would actually undercut the well-established industry practice of television stations and MVPDs timely entering into mutually acceptable RTC agreements, where failed negotiations are a rare exception and not the rule. These agreements, the terms and conditions of which (including contract expiration dates) have customarily been heavily negotiated and agreed upon with the bilateral expectation that the contractual rights and obligations of the parties will be mutually respected and enforceable. If the mandatory interim carriage proposal were adopted, mutually agreed upon contract expiration and termination dates would become nullities.

In addition, MVPDs would no longer have any incentive to finalize their RTC negotiations before expiration of their current RTC agreements. With programming costs perpetually rising for everyone, MVPDs facing negotiations for increased RTC fees will logically choose to keep the previous fees in place for as long as possible by turning every RTC agreement into an open-ended opportunity by one party (the MVPD) to force the other party (the television station) into an indeterminate rate freeze during a marathon of continued negotiations or litigation. When the MVPD can no longer maintain the façade of negotiating in good faith while deliberately making no progress, it will use (and abuse) the FCC's complaint process to further draw out its enjoyment of the old RTC fees. It can then proceed to file interminable appeals to keep its access to broadcast programming at a discount rate for literally years. In essence, MVPD's would be able to use drawn-out negotiations and the FCC's complaint process to keep RTC prices frozen in place indefinitely.

At bottom, adoption of Petitioners' proposal will lead to (i) dramatically fewer mutually successful, timely RTC negotiations, (ii) substantially more FCC-based litigation, (iii) the loss of new RTC-generated compensation that television stations need to continue to produce and otherwise acquire increasingly more expensive local, syndicated and network informational and entertainment programming, including sports and other compelling programming, (iv) a weakening in the ability of television stations nationwide to compete and survive against the subscription/advertising funded pay cable networks, and (v) as a result of diminished capacity by the television broadcast industry to compete in the marketplace for programming, an acceleration in the already strong trend of sports and other compelling programming migrating from free television to pay television. At bottom, the Petitioners are wrongly asking the government to intervene and disrupt the free marketplace for the distribution of broadcast station content, contrary to the intent of Congress when it statutorily acknowledged the broadcaster's right to control the distribution of content it pays dearly to produce and acquire.

Discussion

In their Petition, the Petitioners have targeted the legal regime under which Congress has given every full-power television station two mutually exclusive but critically important rights: (i) the right to require non-satellite-based MVPDs to carry the station's signal for no compensation ("Must Carry"), and (ii) the alternative right to insist that there be in place a mutually acceptable agreement between the station and the MVPD *before* the MVPD may lawfully make the station's signal, and thus all of its programming, available to the MVPD's subscribers for a fee ("Retransmission Consent"). In establishing these two rights, Congress clearly contemplated that each television station would have to decide for itself whether to take the assured mandatory carriage path presented by the Must Carry option, or the more uncertain

path presented by the Retransmission Consent option where carriage and compensation are not assured.

Indeed, there would have been no need to create a Must Carry right if Congress assumed that stations would always be available on all local MVPD systems. Congress implicitly understood that not all RTC negotiations would be successful, in which case the subscribers of an MVPD that failed to reach a mutually agreeable RTC agreement with a station would not be able to view that station's signal *over that MVPD's system*.

The Petitioners claim, however, that this straightforward mechanism is broken and needs to be fixed in the ways they propose. They essentially allege that the current law did not anticipate either that television broadcasters would develop enough negotiating leverage to demand anything more than in-kind consideration or nominal payment in exchange for the grant of RTC, or that a television station and an MVPD might fail to reach a new mutually acceptable RTC Agreement before expiration of the current RTC Agreement.

In support of their position, the Petitioners are able to cite only a paltry number of instances where television stations and MVPDs were unable to reach mutually agreeable RTC Agreements by the expiration date of the current RTC Agreement. In those cases, the MVPD was required by statute to stop carrying the television station's signal, usually for a brief period of time until a new RTC Agreement was reached. The Petitioners claim that those circumstances caused "consumer uncertainty," created "blackouts," and held each MVPD's subscribers "hostage." The Petitioners also claim that the monetary consideration they pay to television stations nationwide under RTC Agreements has increased substantially over the years and has had the effect of forcing the MVPDs to increase the rates that they charge subscribers. The

Petitioners appear, perhaps unwittingly, to ask the FCC to delve into their subscriber rate increases over the years.²

To remedy these alleged problems, the Petitioners urge the FCC to amend its regulations to:

1. Automatically allow an MVPD to continue to carry the signal of a television station on the terms and conditions of the expired RTC agreement unless/until the Commission actively rules that the MVPD is negotiating in bad faith;
2. Automatically allow an MVPD to continue to carry the signal of a television station on the terms and conditions of the expired RTC agreement while an RTC-related complaint is pending before the FCC; and
3. Require television stations and MVPDs which are unable, for any reason, to reach mutual agreeable terms and conditions on a new RTC agreement to submit to binding arbitration.

As noted above, and as demonstrated below, each of those proposed remedies is legally problematic. The FCC has no authority to award mandatory interim carriage to any MVPD in the absence of a mutually acceptable RTC agreement. Furthermore, as the Commission itself has acknowledged, it has no authority to compel parties to RTC negotiations to submit to binding arbitration. Finally, even if the Commission possessed the requisite authority to adopt these proposals, the Petitioners have neither made a prima facie case to support that action nor addressed the unintended and perverse effects that will be caused by the adoption of their proposals.

² One television station has reported that a cable system in its market claimed to its subscribers that it had to raise its monthly fee by \$5.00 because the retransmission consent fees demanded by local television stations were so high. However, according to the television station, the increased RTC fees would have, at most, justified the cable system raising its rates by only \$1.00. If this is true, the cable system used the RTC process to enrich itself five-fold. Are other cable systems around the nation doing the same thing?

I. THE COMMISSION DOES NOT HAVE THE STATUTORY AUTHORITY TO GRANT A RIGHT OF MANDATORY INTERIM CARRIAGE OR TO IMPOSE ARBITRATION

Section 76.64(j) of the Commission’s Rules notes that “Retransmission consent agreements between a broadcast station and a multichannel video programming distributor shall be in writing and shall specify the extent of the consent being granted, whether for the entire signal or any portion of the signal.”³ The purpose of this requirement is obvious: to ensure that there is no question as to the scope and extent of retransmission consent provided by the broadcast station should the MVPD attempt to exceed the bounds of that consent. Where a cable system has carried a station’s programming in the absence of such a written agreement, the Commission’s Media Bureau has ruled that the cable operator has proceeded in bad faith.⁴

Here, the Petitioners seek not simply to continue carriage of a station’s programming in the absence of an RTC agreement, but to create out of whole cloth and then institutionalize two implicit presumptions upon which to base mandatory interim carriage: first, that every television station which is the subject of an MVPD RTC complaint must be presumed to be acting in *bad faith* and, second, that every such MVPD complainant must be presumed to be acting in *good faith*. Each presumption is unsupported, unsupportable, and arbitrary and capricious on its face. In fact, the Commission itself has stated that “a disagreement over the rates, terms, and conditions of retransmission consent—even fundamental disagreement—is not indicative of a lack of good faith.”⁵

³ 47 CFR § 76.64(j). Petitioners do not object to this requirement.

⁴ *March 12, 2007 Letter to Jorge L. Bauermeister, Counsel for Choice Cable T.V.*, DA 07-1264.

⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542 (2009), at ¶ 213.

The fact that MVPDs have banded together to advance these presumptions does not alter their arbitrary and capricious nature, and the resulting invalidity of their mandatory interim carriage/arbitration proposals. The simple truth is that the Petitioners urge the Commission to authorize them to ignore both the law and the effect of carefully drawn and negotiated RTC agreements so that they can continue, beyond the mutually agreed upon terms of those agreements, to carry a signal without the originating station's statutorily required consent.

The Petitioners' mandatory interim carriage proposal also contains a strong element of self-evident hypocrisy. Their proposal would permit unauthorized carriage where (i) the station and the MVPD have not reached a new mutually agreeable RTC agreement by the end of the existing term, and (ii) the Commission has not yet ruled that the MVPD acted in bad faith. This proposal therefore appears to allow the MVPD to carry a station's signal without consent indefinitely, as long as the Commission has not issued a finding of bad faith on the part of the MVPD.

However, as the Petition itself indicates in a related context, "recent disputes have shown [that] it has been unworkable for the Commission to insist on a showing of 'bad faith' to trigger any relief."⁶ Thus, the Petitioners' demand to be released from needing to show bad faith on the part of broadcasters to obtain relief, yet proceed to demand perpetual carriage unless/until the broadcaster can show bad faith on the part of the MVPD. Apparently, an "unworkable" standard works better if it is imposed only upon broadcasters.

⁶ Petition at 33 n.108.

Setting aside the internally inconsistent nature of the Petitioners’ proposal, the Commission has repeatedly and correctly held that it lacks the statutory authority to authorize MVPD carriage of a television station’s signal absent the station’s consent. Section 325(b)(1) of the Communications Act of 1934, as amended, states clearly that “no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, *except...with the express authority of the originating station....*”⁷ This is consistent with the general treatment of programming under copyright law, where copyright holders legally control the use and distribution of their copyrighted materials, and determine themselves under what contractual terms they will make it available to third parties. The Commission acknowledged the clarity of this statutory limitation on its authority when it concluded that there is “no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission.”⁸

The Commission later reaffirmed this fact in *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*,⁹ where it noted that it lacked authority to permit continued carriage in the absence of the broadcaster’s consent. In effect, the Petitioners seek to transform market-based copyright negotiations among television stations and MVPDs into compulsory signal carriage licenses where the MVPD may

⁷ 47 U.S.C. § 325(b)(1) (emphasis added).

⁸ See *Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445 (2000), at ¶ 60. The Commission further noted that “[U]pon expiration of an MVPD’s carriage rights under...an existing retransmission consent agreement, an MVPD may not continue carriage of a broadcaster’s signal while a retransmission consent complaint is pending at the Commission....” *Id.* at ¶ 84.

⁹ 22 FCC Rcd 47 (2007), at ¶ 25.

unilaterally create for itself a compulsory license when it best suits its economic self-interest. As a result, the Petitioners' proposal for allowing mandatory interim carriage over the objection of the affected broadcast station is not only unfair, unfounded, and unwise, but it is also beyond the power of the Commission to grant.

The Petitioners' effort to persuade the FCC to impose arbitration upon broadcasters in RTC negotiations suffers from an identical statutory defect—the FCC lacks any such authority, and has acknowledged that fact. In its *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, the Commission “recognized that we do not have the authority to require the parties to submit to binding arbitration...”¹⁰ Therein, it cited to the Media Bureau's decision in *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, which also found that “the Commission does not have the authority to require the parties to submit to binding arbitration”¹¹

In this regard, it is notable that the Petitioners make no effort to distinguish or even address these fundamental statutory flaws in its proposals. Instead, this clear statutory precedent is blithely ignored, apparently in hopes that the Commission will ignore it as well. However, the law, while perhaps inconvenient to the Petitioners' proposals, cannot be discarded so cavalierly.

¹⁰ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542 (2009), at ¶ 213.

¹¹ 22 FCC Rcd 284 (MB 2007), at ¶ 3.

II. THE CONGRESSIONALLY MANDATED, MARKET-DRIVEN NEGOTIATING PROCESS BY WHICH TELEVISION STATIONS EXERCISE THEIR MUST CARRY/RETRANSMISSION CONSENT RIGHTS IS NOT BROKEN OR IN NEED OF “FIXING”

The Petitioners claim that the recognition of stations’ retransmission consent rights was an effort to address the monopoly power of cable systems, and that in the absence of cable monopolies, the retransmission consent process does not function as intended by Congress, thus requiring adoption of the Petitioners’ “fixes.”¹² While there is no doubt that cable operators’ exercise of monopoly power exacerbated the situation, the Petition is mistaken in its claim that the Cable Television Consumer Protection and Competition Act of 1992 (“Cable Act”) was merely a response to that monopoly power. This is nicely summed up in the findings of the Cable Act, particularly Section 2(a)(19), which states:

At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. Also cable programming placed on channels adjacent to popular off-the-air signals obtains a larger audience than on other channel positions. Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. *This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.*¹³

As this language makes clear, the intent of the Cable Act was not to punish cable monopolies, but to correct a legal imbalance that threatened “an important source of local news

¹² Petition at 9-15.

¹³ Cable Act, § 2(a)(19) (emphasis added).

and public affairs programming and other local broadcast services critical to an informed electorate.”¹⁴ The findings in the Cable Act further clarify this intent, noting that:

Broadcast television programming is supported by revenues generated from advertising broadcast over stations. Such programming is otherwise free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.¹⁵

None of these facts has changed since 1992, and the Petition’s fundamental claim of changed circumstances is without basis. To the extent cable’s monopoly power has lessened with the passage of time, that has actually led to the retransmission negotiation process finally working as anticipated by the Cable Act, and it therefore is not in need of “fixing.”

Since enactment of the Cable Act in 1992, full-power television stations have been free to address MVPD carriage either through the exercise of “Must Carry” rights, or through the exercise of their “Retransmission Consent” rights to seek mutually agreeable terms with MVPDs for the carriage of their signal. The RTC option requires the television station to assume the risk that if the station and the MVPD are unable for any reason to reach such an agreement, the station would receive neither compensation nor carriage over the MVPD’s system. Accordingly, for nearly two decades, television stations have successfully exercised their must carry/retransmission consent rights with regard to cable systems and satellite operators, reliably providing the millions of subscribers of those MVPDs, as well as the American public at large, with outstanding broadcast programming year after year.

¹⁴ Cable Act, § 2(a)(11).

¹⁵ Cable Act, § 2(a)(12).

Notwithstanding this record of success, and in order to try to give their Petition some “public relations” urgency and “public interest” acceptability, the MVPDs give prominence to a handful of instances where an MVPD failed to successfully negotiate a retransmission agreement, and its subscribers needed for some brief period of time to use rabbit ears or switch to an alternate MVPD that had successfully negotiated a retransmission agreement with the station at issue. However, this public relations effort before the FCC is completely undermined by two sets of facts that the Petitioners do not provide. First, in those instances where an MVPD failed to successfully renew its right to continue to carry a particular station’s signal, a new mutually agreeable RTC agreement was entered into within days after the expiration of the former agreement, restoring the broadcast programming to the MVPD’s system. Second, in all instances where a particular MVPD temporarily lost its right to carry a particular station’s signal, the MVPD’s subscribers had the ability to readily view the station’s signal over-the-air and/or by subscribing to a different MVPD.

As a result, the Petitioners’ wails of distress on behalf of MVPD subscribers are no more than cries of self-interest from MVPDs more worried about losing subscribers to over-the-air viewing or to competing MVPD providers than about arming their subscribers with timely information about RTC negotiations and informing subscribers of their options for ensuring they will be unaffected by the MVPD’s loss of a station’s programming.

III. THE AVAILABILITY OF AUTOMATIC, MANDATORY INTERIM CARRIAGE WOULD UNDERMINE ALL FUTURE RETRANSMISSION CONSENT NEGOTIATIONS, WITH UNINTENDED AND PERVERSE CONSEQUENCES

If the extraordinary remedy of mandatory interim carriage were available to MVPDs, it would serve only to (i) slow rather than speed the completion of retransmission consent negotiations nationwide, (ii) unjustly reward MVPDs that delay retransmission consent negotiations, (iii) encourage MVPDs—as a purely procedural step to permit continued carriage at “frozen” rates—to deluge the Commission with retransmission complaints and appeals, and (iv) thereby create the perfect atmosphere for contentious and acrimonious negotiations after expiration of the prior RTC agreement, thus maximizing the likelihood of no agreement being reached at the very point in time where breaking off negotiations would cause the greatest program disruption possible.

One can argue that all four effects described above would certainly be unintended and unwanted from the Commission’s perspective, as the Commission surely has no interest in doing anything that would slow, rather than speed, retransmission consent negotiations, or that would promote the filing of superfluous complaints by parties to such negotiations. However, mandatory interim carriage would undoubtedly have all of these unintended, perverse effects.

From an MVPD’s perspective, providing interim carriage would grant them a valuable benefit they had bargained away during their last RTC negotiations. The availability of the mandatory interim carriage remedy would effectively nullify any contract termination date that the parties previously agreed to incorporate into their mutually acceptable RTC agreement. Particularly in a dynamically changing market,

those expiration dates represent a thing of no less value than the compensation provisions themselves to a television station.

This is not just broadly true, in the sense that stations need to recalibrate their fees from time to time to the current market, but also true on a month-by-month basis. The program services on all television stations vary over the course of a year and, as a result, the programming that stations carry at certain times of the year has more value to an MVPD as an “asset” to attract and retain subscribers than programming carried at other times of the year. As a case in point, the carriage of college football bowl games and NFL playoff games, as well as season premieres of shows like “American Idol” (which are not only popular but very costly for stations to acquire) makes the programming in January and February particularly valuable to both the television station and any MVPDs carrying the station’s signal. For that reason, MVPDs regularly try to persuade television stations to move the traditional contract termination date of December 31 to a date in March or April so that when RTC negotiations must be completed by those later dates, the risk of losing access to, for example, college and NFL football games will have passed.

In short, the termination date of an RTC agreement can be even more important than the amount of this year’s RTC fees because it establishes the context in which the RTC fees for the next retransmission consent cycle will be negotiated. A contract expiration date has a real value that is often heavily negotiated. Providing MVPDs with mandatory interim carriage therefore does not maintain the status quo between the parties during negotiations or litigation, but significantly alters the parties’ relative positions, in

this case, solely in favor of MVPDs and to the clear and irreparable detriment of broadcast stations.

Nothing in the 1992 Cable Act, the Copyright Act, nor in the Commission's Rules prevents an MVPD from bargaining, as a part of RTC negotiations, for a provision either (i) extending carriage to a date beyond the traditional date of December 31 of the year that ends the three-year RTC cycle, (ii) extending carriage past whatever termination date has been agreed upon for a period of time during continued negotiations, and/or (iii) providing for alternative dispute resolution, such as mandatory arbitration. When stripped of its rhetoric, the Petitioners in essence urge the Commission to grant MVPDs benefits that they either bargained away (in which case they were less important to the MVPD than the other bargained-for issues) or which they made no attempt to obtain through the negotiating process (in which case the MVPD considered them of no real importance).

IV. INFORMED SUBSCRIBERS, NOT GOVERNMENT INTERVENTION, IS THE ONLY LAWFUL AND OTHERWISE APPROPRIATE WAY TO ADDRESS POTENTIAL MVPD SERVICE DISRUPTIONS

It is clear from the foregoing that the Petitioners want to pay television stations less, or nothing at all, for the right to resell broadcast programming to their subscribers. It is also clear that the Petitioners are using this proceeding to try to improve their negotiating position in RTC negotiations going forward. To that end, the Petitioners have striven mightily to recast their obvious effort at advancing their private interests as a collective, munificent effort to protect their subscribers.

The irony of Petitioners' position is that MVPDs are in the best position to avoid service disruptions in the first place, as well as to mitigate any inconvenience to their subscribers when they fail to renew their right to carry a station's signal. By negotiating

new or extended RTC agreements in a timely manner, MVPDs avoid the kind of service disruption that the Petitioners complain about. By providing their subscribers with earlier notice of the pendency and prospects of RTC negotiations, rather than just the minimum 30-day notice before termination of carriage currently set forth in the Commission's Rules¹⁶ (which is often less than that in practice), MVPDs can ensure their subscribers are forewarned, and therefore forearmed, to take steps to prevent their MVPD's loss of signal carriage rights from affecting their ability to continue to view a particular station's programming. However, because MVPDs do not want to risk their subscribers jumping ship to other MVPDs that have successfully negotiated RTC terms with the station at issue, they prefer to leave their subscribers in the dark about potential losses of service, thus maximizing the very disruption that they claim requires FCC regulatory intervention.

The Commission is familiar with the tendency of the MVPD community to keep subscribers in the dark as long as possible. A similar "notice" issue came before the Commission when NFL Enterprises LLC ("NFL") complained to the FCC that Time Warner Cable ("Time Warner") discontinued carriage of the NFL Network without providing Time Warner's customers the 30-day notice mandated by Section 76.1603 of the Commission's Rules. In finding that Time Warner had violated the rule, the Media Bureau stated that, had the customers in question been provided with adequate notice that renewal negotiations with the NFL did not look promising,

...if a customer wanted to ensure that he or she would be able to view the threatened programming without interruption, he or she would have had time to research options offered by other multichannel video programming distributors and make alternative arrangements to switch. At the end of the day, Time Warner is really arguing that customers were better off being *left in the dark* because it was likely that carriage agreements would be reached with most of the networks and stations at issue. However,

¹⁶ See 47 CFR § 76.1603(b, c).

Time Warner provides no reason as to why it could not have explained this to consumers at the time, and we doubt that viewers of the NFL Network who awoke on August 1 to find that the network had been removed from their cable systems share Time Warner's view that the company was acting in the best interests of its subscribers.¹⁷

The likelihood of inadequate notice to subscribers is even greater in the satellite context, where satellite MVPDs are not required to provide even the minimal 30-day notice imposed upon cable operators. In any event, if the Petitioners are truly concerned about minimizing program disruption to their subscribers, all MVPDs would, as early as possible, provide their subscribers with enough information so that each subscriber can make their own informed judgment about what steps to take in the event their MVPD is unable to carry a particular station's signal after a certain date. Such announcements would allow subscribers to better protect themselves from disruption in the manner described by the Commission in the *NFL* decision, while incentivizing MVPD's to lock down those rights through the commencement of active retransmission consent negotiations as early as possible. In sum, if the subscribers of MVPDs are to be considered "hostages," as the Petitioners claim, that is so because MVPDs tend to keep them in the dark during RTC negotiations and charge them high early termination fees when those negotiations fail.

Conclusion

Based on the foregoing, the Commission should promptly dismiss or deny the Petition in its entirety. The extraordinary regulatory relief the Petitioners seek has no valid justification, and the Commission itself has acknowledged that it lacks the legal authority to provide such relief in any event. Moreover, the welfare of subscribers that the Petitioners ostensibly seek to improve can be advanced in a far more direct and

¹⁷ *Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016 (MB 2006), at ¶ 20 (emphasis added).

