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

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

COMMENTS OF CBS CORPORATION

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

DISCUSSION

I. The Retransmission Consent System Is Not "Broken." 3

A. Contrary to the impression that Petitioners seek to create, service interruptions due to impasses in retransmission negotiations are exceedingly rare. 2

B. Retransmission fees have a minimal impact on consumer rates. 10

C. The unfettered opportunity to negotiate fair compensation for signal carriage by MVPDs is vital to the future of free over-the-air broadcasting. 12

II. Marketplace Negotiations Concerning Retransmission Consent Are What Congress Intended 14

III. The Commission Is Without Authority to Adopt the "Reforms" Petitioners Propose. 17

A. Binding Arbitration 17

B. The Commission is Without Authority to Allow "Interim Carriage" of a Broadcast Station During a Retransmission Dispute. 18

CONCLUSION 20

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CBS Corporation ("CBS") respectfully submits its response to the Commission's request for comment on a petition[1] ("Petition") filed by a group of large multichannel providers (the "MVPDs") and their supporters seeking major changes in the FCC's rules governing retransmission consent.

INTRODUCTION AND SUMMARY

Less than five years ago, in response to a statutory mandate, the FCC submitted a report to Congress regarding the impact of the current retransmission consent rules on competition in the multichannel video programming distribution market.[2] After careful review, the Commission found that no changes in those rules were warranted, because the retransmission consent legislation was achieving its intended purposes. Thus the Commission's report concluded that "overall, the regulatory policies established by Congress when it enacted retransmission consent

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1 *See In re Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, DA 10-474 (rel. Mar. 19, 2010).

2 *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC Lexis 4976 at ¶ 1 (released September 8, 2005) ("*FCC Report to Congress*").

have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals."[3]

As is apparent from their Petition, the MVPDs have a less sanguine view of the current state of the retransmission consent marketplace; from their standpoint, it seems, the Congressional intent has been realized only too well. After years of stubborn and unified resistance,[4] cable MSOs find themselves pressed by the forces of competition fairly to compensate broadcasters in cash for the signals they resell to their subscribers. It is understandable that they do not like this evolution of the marketplace; it is disingenuous to contend it is unfair.

In these comments, we will show that Petitioners' depiction of the supposedly adverse effects on consumers of retransmission consent is badly distorted; that marketplace retransmission negotiations as they are currently occurring are completely consistent with

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3 *Id.* at ¶ 44.

4 *See*, Ted Sherman, "Consumers Loom as Losers in Battle Between Cable, Broadcast Firms," *The Newark Star-Ledger*, Sept. 13, 1993 (noting that after 1992 Act established retransmission consent requirements, "almost every broadcaster initially demanded the cash [and] at the same time, nearly all cable operators said no, threatening to dump the on-air broadcast stations come Oct. 6, when the [retransmission consent] provision takes hold"); Mark Robichaux, "Tele-Communications Says It Will Fail to Meet Deadline on TV Stations' Fees," *The Wall Street Journal,* Aug. 18, 1993, at B8 ("Nearly all of the nation's largest cable operators have vowed to forgo paying cash to local TV stations"); Michael Burgi, "TV Ratings Companies Brace For Retransmission Fallout," *Mediaweek,* Jun. 28, 1993 ("'. . . we can foresee no circumstances where we would pay cash,' said Richard Aurelio, president of Time Warner Cable in New York, referring to the FCC retransmission consent decree . . ."); Mark Robichaux, *Cable Cowboy: John Malone and the Rise of the Modern Cable Business* (John Wiley & Sons, Inc. 2002) ("TCI, for one, refused to pay cash to any of the big networks but it indicated it might be willing make room on its systems for a new cable channel a broadcaster might like to start.") By the time of its 2005 *Report to Congress*, from which the above references are quoted, the Commission still had occasion to observe that "[t]welve years later, cash still has not emerged as a principal form of consideration for retransmission consent. . . . [V]irtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster." *FCC Report to Congress*, *supra*, at ¶ 10, notes 26 and 27.

Congressional intent; that the "reforms" Petitioners propose would eviscerate the opportunity Congress meant to provide for broadcasters to negotiate marketplace consideration for the use of their signals; and that the FCC in any event lacks authority to adopt them.

We turn first to Petitioners' misleading portrayal of the current workings of retransmission consent.

DISCUSSION

I. The Retransmission Consent System Is Not "Broken."

A. Contrary to the impression that Petitioners seek to create, service interruptions due to impasses in retransmission negotiations are exceedingly rare.

In seeking to tilt decisively in their favor what the Commission has found to be a "level playing field"[5] in carriage negotiations, Petitioners attempt to create an aura of crisis around the retransmission consent process. They warn of consumers being "held hostage" as MVPDs seek to protect them from rate increases made inevitable by "spiraling carriage fees." They suggest that despite the best efforts of cable and other providers to keep charges down, broadcaster dominance leaves MVPDs with no option apart from "rais[ing] consumer rates" or "drop[ping] local signals."[6] They fault Congress for "stack[ing] the deck in favor of broadcasters" by creating a "wholly artificial construct [having] little in common with an actual marketplace"[7] –

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5 *FCC Report to Congress, supra,* at ¶ 44.

6 Petition at 1.

7 *Id.* at 3. Petitioners' contention in this regard appears to be based on what they see as the market-distorting effects of the Commission's network non-duplication and syndicated exclusivity rules. This contention is clearly without merit. As the Commission has expressly found, "[t]he legislative history of the 1992 Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives." *FCC Report to Congress, supra*, at ¶ 50, citing Senate Report 102-92 at 38, and n. 71: "The Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to

the "artificial construct" apparently being the notion that distributors should actually have to pay for content they resell to their customers.

These melodramatic assertions are utterly without foundation. The only crisis facing cable MSOs is the end of the uniquely advantageous subsidy they had long enjoyed -- being able to retransmit the broadcast programming that is the backbone of their business without compensating broadcasters. Their entreaties for government intervention to spare them from marketplace negotiations with broadcasters – duly echoed by satellite carriers, telco providers and smaller cable operators who would all quite naturally prefer to increase their profits by paying their suppliers less – have little to do with consumer welfare. They reflect only economic self-interest.

The MVPDs paint a picture of consumers regularly faced with "threats of blackouts" who must hang on "showdown negotiations" to learn if their favorite television shows will still be available.[8] The reality is otherwise. Since the retransmission statute was enacted in 1992, thousands of agreements have been concluded uneventfully between broadcasters and MVPDs. In only a handful of instances has service to the public been disrupted, typically for just a few days at most.

The experience of CBS is far more typical than the handful of highly publicized disputes – none of them leading to prolonged service interruptions [9] – cited by the Petitioners. Since

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be submitted on cable systems for carriage or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12."

[8] Petition at 1.

[9] Petitioners cite the negotiations between Mediacom and Sinclair, Time Warner and Fox, and Cablevision and Disney as examples of the supposedly "broken" retransmission consent system. But only in the latter instance did consumers experience a service interruption, which lasted less than a day and caused subscribers to miss only 15 minutes

becoming an independent company on December 31, 2005, CBS has agreed on retransmission consent with more than 100 distributors accounting for over 14 million subscribers. CBS has done so without *ever* withdrawing the signal of one of its owned stations from an MVPD.[10] Contrary to Petitioners' claims, "brinksmanship" and "blackouts" are not a necessary incident to the successful negotiation of fair retransmission agreements.

This less dramatic picture of the consumer impact of retransmission consent is borne out by a rigorous analysis of all retransmission negotiation impasses from 2006 through April 2010. A study by Navigant Economics, submitted by the National Association of Broadcasters in this proceeding, shows that service interruptions resulting from retransmission consent disputes represent approximately *one one-hundredth of one percent* of annual U.S. television viewing hours.[11] To put this in further perspective, the study demonstrates that consumers are far more likely to be deprived of television viewing by cable and electricity outages than by a bargaining impasse between broadcasters and MVPDs. Importantly, there is no dispute concerning the facts on which this analysis is based; a study commissioned by MVPD interests,[12] also submitted in

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of the Academy Awards. *See*, John Eggerton, "WABC Back on Cablevision," *Broadcasting & Cable* (March 8, 2010).

10 Prior to a corporate reorganization effected as of December 31, 2005, the CBS O&O television stations were common owned, under the umbrella of Viacom Inc., with MTV Networks Inc. ("MTV"). In March 2004, an impasse over license fees for the MTV cable networks and retransmission consent for the CBS owned television stations led DISH Network to drop both the cable channels (MTV, VH1, Comedy Central, BET and Nickelodeon) and the CBS O&Os. DISH agreed to restore the programming on terms acceptable to Viacom in less than 48 hours. *See,* Michael Learmonth and Kenneth Li, "EchoStar/Dish Network Drops CBS Stations," Reuters, March 9, 2004.

11 Navigant Economics, Jeffrey A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D., *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010) ("Navigant Study") at 17-21.

12 Michael Katz, Jonathan Orszag and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (Nov. 12, 2009)

this proceeding, fails to identify any retransmission disputes leading to service disruptions that were missed by Navigant.[13] Thus the uncontradicted record before the Commission establishes that retransmission impasses that cause viewers to lose access to stations from their multichannel providers are *exceedingly rare*.

Further, in the rare instance when a television signal is dropped by a particular multichannel provider within a market, consumers are hardly left without alternatives.[14] Utilizing an over-the-air antenna will allow many customers of an affected provider to continue watching the station in question during the duration of a retransmission dispute. Viewers particularly concerned about missing a unique event such as a football game frequently find another way to see it, whether by visiting a friend who subscribes to a different multichannel provider or going to a restaurant or bar with access to a competing service. And subscribers unwilling to incur the inconvenience that these alternatives may entail can always consider switching to another MVPD.[15]

("Lexecon Report"). The Lexecon Report was commissioned by NCTA, DIRECTV, Inc. and DISH Network. Lexecon Report at 1.

13 *See*, Lexecon Report at Table 6; Navigant Study at 17-18.

14 For some of the alternatives employed by viewers eager to see this year's Academy Awards whatever the status of negotiations between Cablevision and Disney, *see,* N.R. Kleinfield, "Oscar Night Suspense, Then Poof! Cable's Back," *The New York Times*, March 7, 2010, p. B3.

15 The fact that virtually every American now has access to several multichannel providers is a federal policy success story. Over several decades, the Congress and the FCC sought to generate the very multichannel provider competition that exists today by fostering the development and competitive parity of the DBS service. *See, e.g.,* the Satellite Home Viewer Improvement Act of 1999, PL 106-113, §1000(9), 113 Stat. 1501 (enacting the statutory copyright license allowing satellite carriers to retransmit local broadcast signals back to their own local markets). Adopting measures to protect a provider that does not offer a full range of programming options would seem to be at odds with that policy, and subvert the robustness of competition between MVPDs.

CBS fully recognizes that none of these alternatives is likely to be ideal from a consumer's standpoint. We respectfully submit, however, that the very rare loss of a television signal to the customers of a particular MVPD needs to be kept in perspective.

First, we note that retransmission consent is not the only context in which television viewers may temporarily lose access to highly valued programming. Earlier this year, more than three million Cablevision customers in New York, New Jersey and Connecticut lost access to the highly popular cable channels, HGTV and Food Network, for three weeks in a contract dispute between the MSO and programmer Scripps-Howard.[16] On the previous New Year's Eve, the celebrations of many parents were doubtless clouded by the worry that their offspring would wake the next morning to find "Dora the Explorer" and "SpongeBob Square Pants" gone from their televisions, victims of contractual wrangling between Time Warner Cable and Viacom over suitable license fees for the latter's popular cable networks.[17] And thousands of football fans who were Comcast or Time Warner subscribers were greatly frustrated by their inability to watch Thursday night NFL games because of the prolonged inability of those providers to reach carriage deals with the League's cable channel, the NFL Network.[18]

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16 *See*, Venuri Siriwardane, "Food Network, HGTV channels to be restored to 3.1M Cablevision customers in N.J., N.Y., Conn.," nj.com, January 21, 2010 (available at http://www.nj.com/news/index.ssf/2010/01/food_network_hgtv_channels_to.html); Amanda Cuda, "Connecticut residents hungry for Food Network, HGTV," *Connecticut Post Online* (Bridgeport, Connecticut), January 6, 2010.

See, "Viacom, TWC Dispute Makes SpongeBob Cry," (available at http://www.xchangemag.com/hotnews/viacom-twc-dispute-makes-spongebob-cry.html); Bill Carter, "Viacom and Time Warner Reach Deal," *The New York Times,* January 1, 2009.

18 *See,* Alan Pergament, "Battle line set in fight for fans on local TV; Time Warner and the NFL Network are playing an expensive game of chicken with their often frustrated football audience," *Buffalo News,* December 2, 2006, p. A-1; James Walker and Shawn Mitchell, "For many, game is no-see TV; NFL-cable dispute means few will get Browns-Steelers, *Columbus Post-Dispatch*, December 7, 2006, p. 01C; Toby Smith, "Local sports bars preparing for a blitz of Cowboys, Packers fans, " *Albuquerque Journal*, November

Thus an impasse in license negotiations between a cable network and an MVPD can occasionally threaten the ready availability to subscribers of programming they want to see, no less than a retransmission dispute. Yet Petitioners are curiously silent on this threat to the viewing experience of their subscribers. And even the highly-regulatory, anti-discrimination provisions imposed by the FCC's program access rules [19] – designed to prevent anti-competitive conduct by vertically-integrated cable operators in the market for delivery of cable programming – do not force unwilling content providers to submit to binding arbitration, [20] let alone provide pre-adjudication relief such as "interim carriage."

Since no such remedies are imposed in the context of disputes concerning cable network carriage, one wonders why they are so readily bruited when broadcast programming is involved. Perhaps it is because their glaring inconsistency with free market principles is more apparent in a context where marketplace negotiations have long been the rule. But although it may be a

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29, 2007, p. B1; Michael McCarthy, "Blackout rules; A dispute between the NFL and cable firms leaves fans in the dark ," *USA Today,* November 29, 2007.

[19] *See*, 47 CFR §§ 76.1000-76.1004. The Commission has been at pains to make clear that there is nothing in the retransmission consent statute "that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions." To the contrary, it has cited the program access rules as indicative of the Commission's limited role in enforcing the requirement that broadcasters and MVPDs negotiate in good faith concerning retransmission consent, noting that "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does with specificity." *See, First Report and Order,* CS Docket No. 99-363, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 5 FCC Rcd 5445, 5454 and n.45 ("*Good Faith Order*").

[20] Section 76.1003(i) provides: "Within 20 days of the close of the pleading cycle, the parties to the program access dispute may *voluntarily* engage in alternative dispute resolution, including commercial arbitration. The Commission will suspend action on the complaint if both parties *agree* to use alternative dispute resolution." 47 CFR 76.1003(i) (emphasis added).

relatively new concept that MVPDs should pay broadcasters for use of the program packages they assemble at great effort and expense, its fundamental justice is indisputable.

We note again the need for some perspective in viewing the occasional spate of headlines about a "showdown negotiation" between an MVPD and a broadcaster that threatens the "blackout" of highly desired programming. Such situations are always regrettable, and public frustration and anger at being "caught in the middle" of a commercial dispute is entirely understandable. But it is an unavoidable incident of a free market economy that at times commercial transactions that would be socially beneficial will not occur because a buyer and seller cannot come to terms.

We submit that the proposals made in the Petition are utterly at odds with free market principles. In this country, the terms on which private companies will do business with each other are not prescribed by the state or its representatives. And absent a threat to public health and safety, neither individuals nor businesses are forced to provide economic goods for what they consider inadequate value, whether temporarily or otherwise.

As we have seen, however, based on the market's less-than-tumultuous experience with retransmission consent since its enactment in 1993, it may safely be predicted that disruptions to consumers will be rare. Indeed, it is highly likely that the number of subscribers experiencing technical problems with their multichannel service will exceed by an order of magnitude those needing to consider alternate ways to receive broadcast programming as a result of a retransmission deadlock.[21]

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[21] In this connection, a recent press report indicates that "[t]he rancor in carriage-fee negotiations between networks and cable is expected to decrease." The article cites, among other factors, "a broad acknowledgement that broadcasters will gain a substantial share of pay-TV subscriptions." *See,* Nat Worden, "TV Industry Rancor Over Carriage Fees Could Fade," Dow Jones News Services, May 12, 2010; *see also,* Mike Farrell,

B. Retransmission fees have a minimal impact on consumer rates.

To read the Petition, one would imagine that "spiraling carriage fees" fees extracted by broadcasters are the principal reason that cable subscription rates have reliably increased at a pace great than inflation.[22] This, too, has no basis in reality.

The fact is that cable programming costs are rising more slowly than cable profits, and that retransmission fees make up only a small percentage of programming costs.[23] And while suggesting that broadcasters are demanding excessive compensation for retransmission consent, the MVPDs are notably silent as to what they pay broadcast stations as compared to cable networks that attract much smaller audiences.

Their reticence may be explained by the fact that the license fees that MVPDs are estimated to pay to cable programmers in many cases outstrip what broadcasters are reported to receive. Thus, according to SNL Kagan estimates, the average monthly subscriber fees currently garnered by some of the leading cable networks are as follows: ESPN, $4.43; Fox Sports Net, $2.58; Disney Channel $0.91; NFL Network, $0.73; Fox News $0.70; USA Network, $0.57; CNN $0.50; TBS, $0.48 and MTV, $0.35.[24] The ratings of none of these cable networks can match those of any of the major broadcast networks on a head-to-head

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"Retrans Feuds Ease Up; Era of Feuding May Be Over, Analysts Say – At Least for Big MSOs," *Multichannel News,* June 22, 2010.

22 *See, Thirteenth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 544-45 (2009) ("While competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation, prices continue to outpace the general level of inflation.").

23 Navigant Study at 21-22.

24 SNL Kagan, Basic Cable Networks By Affiliate Revenue Per Avg Sub/ Month (2010).

basis.[25]

The MVPDs complain of being "between a rock and a hard place," forced by broadcasters' unreasonable demands to choose between raising consumer rates and dropping local signals. Even if retransmission fees were a more significant element of their overall costs, those alternatives would hardly be the only options open to MVPDs. Multichannel providers have historically been highly profitable, and are currently enjoying healthy financial results despite the lingering effects of the recession.[26] Perhaps, then, it would not reflect undue

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25 The gap between the major television networks and the most popular cable networks is dramatic. Indeed, even the fifth broadcast network – the CW – outperforms all but seven cable networks:

PRIMETIME RATINGS AND SHARES - 2009-10
Season-to-date
Source: Nielsen, most current data, 9/21/09-5/2/10

	Rtg	Share
CBS	7.2	12
FOX	5.8	9
ABC	5.4	9
NBC	5.1	8
USA	2	3
NICKELODEON	1.7	3
ESPN	1.6	3
DISNEY	1.6	3
FOX NEWS	1.4	2
NICK-AT-NITE	1.4	2
CW	1.3	2
TBS	1.2	2
A&E	1	2
HISTORY	0.9	2
FAMILY	0.9	1
CARTOON	0.9	1
FX	0.9	1
HGTV	0.9	1
LIFETIME	0.8	1
DISCOVERY	0.8	1
COMEDY CENTRAL	0.6	1
MTV	0.6	1
CNN	0.5	1

26 *See*, Nate Worden, "Time Warner Cable's Net Jumps On Ad, Subscriber Growth," *Wall Street Journal*, April 29, 2010; Nate Worden, Comcast Profit Doubles on Solid Subscriber Growth, *Wall Street Journal*, February 3, 2010; "CVC Numbers: Strong Financials, Advertising Resurgence & Video Sub Losses," Cablefax, November 4, 2009; Mike Farrell, "Rutledge: Cablevision Can Manage Retransmission Consent; Basic Subs Down In Q3, As Operator's Cash Flow Rises, *Multichannel News*, November 3, 2009 (noting that "retrans costs would not likely be shifted to customers" because of "large programming expense budget" and "some downward pressure on the rate of growth [in programming costs]"); "Charter Reports First Quarter 2010 Financial and Operating

skepticism to wonder whether concern about being compelled to increase their subscribers' bills is the primary reason the MVPDs are seeking government protection from the marketplace.

C. The unfettered opportunity to negotiate fair compensation for signal carriage by MVPDs is vital to the future of free over-the-air broadcasting.

Petitioners depict broadcasters' right to negotiate marketplace compensation for carriage of their signals as inimical to the interests of consumers. In fact, by helping to ensure the continued viability of free over-the-air broadcasting, it serves those interests well.

American broadcasting has been characterized by a unique partnership between national broadcast networks and their local affiliates, which has blended local news and information with universally-available national news, sports and entertainment programming. Maintaining consumers' access to the programming offered by broadcasters – programming that is first-class, still available for free to those who exercise that option, and responsive to local needs and concerns – is manifestly in the public interest.

At the same time, it is no secret that in recent years vastly increased competition and dramatic technological change have brought the business model of television broadcasters under increasing strain. Audiences have fragmented, advertising revenues have dropped, and new rivals for the attention of audiences – from cable television to the DVR, from the Internet to the iPad – have emerged.

In this new environment, if broadcasters are to compete with cable networks that enjoy a dual revenue stream, they must have the same unfettered right to bargain with MVPDs for compensation for their programming. If they do not, original drama, marquee sporting events,

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Results; Strong growth from bundle, high-speed Internet, and commercial services drives improved results," PR Newswire May 6, 2010; "Time Warner Cable 1Q Profit Jumps 30% As Revenue Up," Dow Jones Newswires, April 29, 2010.

and other high-quality programming will continue its migration to pay television, and people who cannot afford, or do not wish, to subscribe to a multichannel service will be unable to view such programming.

Less than two years ago, in a $500 million deal that the *Washington Post* described as representing "the latest in a series of major sports events to migrate from free network television to subscription-based television," ESPN won from Fox the right to telecast the NCAA's Bowl Championship Series from 2011 through 2014. The *Post* article noted that the deal "would leave out about 20 million television viewers who rely on free over-the-air television"; it also reported that ESPN "charges cable and satellite operators $3.65 a month per subscriber to carry its programs."[27]

More recently, CBS agreed to share rights to the NCAA Basketball Tournament with Turner Broadcasting, which *Broadcasting & Cable* characterized as "a plus for over-the-air coverage" since "[t]he alternative could easily have been March Madness going lock, stock and slam-dunk to cable." The article noted industry comment to the effect that "one of the reasons CBS . . . got to keep a piece of the Madness was the retrans revenues CBS stations expect to collect over the 14-year life of the contract." *See*, John Eggerton, "March Madness: A Retrans Slam Dunk; Carriage cash helps pay for broadcast sports rights," *Broadcasting & Cable*, May 3, 2010.

The MVPDs effectively argue that it is in the consumer's best interest for over-the-air broadcasters to be increasingly priced out of the bidding for such premiere events. That contention is simply not true and should be afforded no weight.

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[27] Cecilia Kang; "ESPN, BCS Deal Raises Questions," *The Washington Post,* November 26. 2008, p. E05. The BCS followed the NBA All-Star Game and *Monday Night Football* in moving to pay television. See, John Eggerton, "March Madness: A Retrans Slam Dunk," *Broadcasting & Cable*, May 3, 2010.

II. Marketplace Negotiations Concerning Retransmission Consent Are What Congress Intended.

Despite the occurrence of occasional disputes as to the amount an operator should pay for carriage of a particular cable network, the MVPD industry has never questioned the basic – and seemingly obvious – proposition that it must negotiate with the programmer concerning an appropriate license fee. The industry's resistance to similar marketplace negotiations with broadcasters is a matter of history, not logic.

Thus two early decisions of the U.S. Supreme Court under the Copyright Act of 1909 effectively allowed cable operators to retransmit television broadcast signals without compensation to either the copyright owners of individual programs or to the television stations that had paid to broadcast them. *See*, *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968) (pertaining to the retransmission of local television station signals) and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) (pertaining to the retransmission of distant television station signals). The anomalous situation created by those decisions led Congress to adopt, as part of the Copyright Act of 1976, the current statutory licensing scheme applicable to cable television.[28] Under that scheme, cable operators receive a compulsory license to retransmit broadcast signals in return for the payment of specified fees to the U.S. Copyright Right Office, which in turn parcels out these funds to the copyright owners. Statutory licensing thus spares cable operators the transactional costs of negotiating direct licenses with the numerous copyright owners that are generally represented in the program schedule of even one television station.

But while the 1976 Act thus provided some compensation for the copyright owners of television programs, it did nothing for the broadcast stations that had licensed the local rights to

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[28] *See,* 17 USC § 111.

air those programs in their individual markets. With the evolution of cable television from a "community antenna" television service – delivering enhanced reception of broadcast signals to remote areas – to today's multichannel distributors of hundreds of channels of satellite-delivered programming – this situation was increasingly recognized as being unfair.

Thus in a 1990 report to Congress, the FCC warned that the rules then governing cable carriage of broadcast signals created a competitive imbalance that threatened to "undermine the viability of local television."[29] They did so, the Commission found, by allowing cable operators to use broadcast programming at a fraction of the cost paid by broadcasters themselves – in effect, forcing broadcasters to subsidize their direct competitors. Accordingly, the Commission urged Congress "to redress the competitive imbalance between cable systems and local broadcasters by giving broadcasters the right to control the use of their signals" through a system of retransmission consent.[30]

Congress acted on the Commission's recommendation, adopting the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),[31] which for the first time gave television stations the ability to seek compensation from cable operators for the carriage of their signals. The legislative history of the Act echoed the concerns that had been expressed by the Commission.

Describing prior FCC interpretations that allowed cable systems to retransmit the signals of broadcast stations without the stations' consent, the report of the Senate Commerce Committee observed that "[a]t a time when cable systems had few channels and were limited to

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29 *In the Matter of the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600, 5 FCC Rcd 4962 5042 (1990) (hereafter "*Cable Television Service*").

30 *Id.*

31 Public Law 102-385, 106 Stat. 1460 (1992).

an antenna function of improving reception of nearby broadcast signals, this interpretation had little practical consequences and did not unreasonably disrupt the rights that broadcasters possess in their signals."[32] The situation, the Committee noted, had "changed dramatically":

> Cable systems now include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems compete with broadcasters for national and local advertising revenues. Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, 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. . . . Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. *While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.*[33]

Finding that cable television had become an established service that "[paid] for the cable programming services they offer to their customers," the Committee opined that "that programming services which originate on a broadcast channel should not be treated differently."[34] Equivalent treatment for broadcasters can mean nothing more or less than the right to engage in free market negotiations with MVPDs concerning compensation for carriage of their signals – the same kind of negotiations that MVPDs conduct with cable programmers as a matter of course.

In short, Petitioners' suggestion that retransmission consent is not working as Congress

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32 Senate Report 102-92 at 35-36.

33 *Id.* (emphasis added).

34 *Id.*

intended cannot be reconciled with the expression of that intent by Congress itself.

III. The Commission Is Without Authority to Adopt the "Reforms" Petitioners Propose.

The "reforms" proposed by Petitioners – to impose binding arbitration on the parties to a retransmission negotiation and to mandate "interim carriage" of broadcast signals during this process – can likewise not be squared with Congressional intent or the language of the statute. Moreover, these proposals would serve to eviscerate the opportunity Congress meant broadcasters to have to bargain for compensation for their signals.

A. Binding Arbitration

The appeal to MVPD interests of the compelled submission of retransmission disputes to an arbitrator is clear. Relative to the value multichannel subscribers place on broadcast programming, MVPDs know that they underpay for it. Rather than having to give due weight to the importance of that programming to their customers as they negotiate with broadcasters, they would prefer simply to turn the matter over to a third party whom they hope will split the difference.

But fostering marketplace negotiations, rather than difference splitting, was clearly what Congress had in mind in adopting retransmission consent. Thus the report of the Senate Commerce Committee emphasized that the legislation was intended "to establish a *marketplace* for the disposition of the rights to retransmit broadcast signals" but did not intend "to dictate the outcome of the ensuing *marketplace negotiations*."[35] Based on this language, the Commission concluded in promulgating rules to implement the statute that "Congress did not intend that the Commission should intrude in the negotiation of retransmission consent."[36]

Subsequently, the Commission found that, in enacting the "good faith negotiation"

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[35] *Id.* (emphasis added).

[36] *Good Faith Order, supra,* 5 FCC Rcd at 5450.

requirement in the Satellite Home Viewer Improvement Act of 1999, "Congress clearly did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[37] Rather, the FCC concluded that federal labor law provided the most appropriate source of guidance for interpreting the requirement, noting that Section 8(d) of the Taft-Hartley Act required the parties to "confer in good faith with respect to . . . [the] terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." The FCC cited NLRB precedent holding that the labor board could not "require agreement or impose terms or conditions on collective bargaining agreements." It then quoted the Supreme Court as making this point "with force and clarity":

> It was recognized from the beginning that agreement might be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.[38]

There is little difference, we submit, between the government's "step[ping] in, becom[ing] a party to the negotiations and impos[ing] its own views of a . . . settlement," and appointing an arbitrator to do precisely the same thing. Both the legislative history and authoritative FCC precedent interpreting it make clear that the Commission has no authority to do so.

B. <u>The Commission is Without Authority to Allow "Interim Carriage" of a Broadcast Station During a Retransmission Dispute.</u>

Petitioners ask the Commission to relieve MVPDs of any sense of urgency about reaching agreement with broadcasters on retransmission terms by allowing them to continue to

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37 *Id.*

38 *Good Faith Order*, *supra,* 5 FCC Rcd *at* 5454, quoting *H.K. Porter v. NLRB,* 397 U.S. 99, 103-04 (1970).

carry a television signal for as long as the operators are "negotiating in good faith," or for the duration of a forced arbitration. The labor law equivalent would be to prohibit workers from striking as long as management continued to show up at bargaining sessions, however little progress was being made.

The one-sidedness and self-serving nature of Petitioners' proposal is obvious. It is also clear that the FCC has no power to adopt it, as the Commission itself has previously held.

Thus in the rulemaking proceeding to implement the good-faith negotiation requirement, a number of MVPDs urged the Commission to restrict a broadcaster's withdrawal of retransmission consent during the pendency of a complaint brought under the provision. Finding this approach "foreclose[d]" by the "unambiguous" language of the statute prohibiting retransmission "except . . . with the express authority of the originating station," the Commission held it had "no latitude . . . to adopt regulations permitting retransmission . . . where the broadcaster has not consented to such retransmission."[39] The Commission has no greater latitude to adopt such regulations now.[40]

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39 *Id.* at 5471.

40 As precedent both for requiring binding arbitration of retransmission disputes and allowing MVPDs to continue carriage of a television station's during such proceedings, Petitioners point to a condition of the FCC's order approving the acquisition of DBS provider DIRECTV by News Corporation, which owned 35 television stations through its subsidiary, Fox Television Stations, Inc ("FTS"). That condition permitted a competing MVPD to continue to carry an FTS owned television station that was the subject of a retransmission dispute pending completion of an arbitration proceeding that was also provided for by the Commission's order. The conditions placed on the FCC's approval of the DIRECTV transaction, pursuant to its authority over the transfer of radio licenses, *see* 47 USC § 310 (d), were found necessary by the Commission in light of "News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, *when combined with ownership of a nationwide DBS platform*." *Applications of General Motors Corporation et ano. and News Corporation Limited, for Authority to Transfer Control*, 19 FCC Rcd 473, 565 (2004) (emphasis added). The imposition of those conditions is accordingly without general application.

CONCLUSION

The retransmission consent process is working well. Cable resistance to paying cash for retransmission consent is eroding, and broadcasters are being compensated for the use of their signals as Congress intended. While broadcasters still do not command the payments that subscriber viewing of their schedules would warrant, neither do they "subsidize . . . their chief competitors" to the same degree as before.

This has happened as a result of quiet business negotiations, the overwhelming majority of which the public has no occasion to learn of or care about. Headline-generating disputes that threaten the potential interruption of service are rare; the actual loss of a television station to affected subscribers even rarer.

Despite the enormous attention given to a handful of recent retransmission negotiations – only one of which led to a very brief service outage – the situation is hardly one calling for corrective action by the FCC. And even if the Commission were inclined to find intolerable the mere possibility of a temporary loss of one broadcaster's programming by a particular MVPD's subscribers – unlike the situation that exists with regard to increasingly popular cable network

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Equally without merit is the Petition's suggestion that Section 325(b) (3) (A) of the Communications Act somehow provides the FCC with authority to regulate the retransmission fees agreed on by broadcasters and MVPDs. That provision of the 1992 Cable Act did no more than direct the Commission to commence a rulemaking proceeding, "[w]ithin 45 days" of the statute's enactment, to adopt rules to implement retransmission consent, and to "consider *in such proceeding* the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and . . . ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable." 47 USC § 325(b)(3)(A) (emphasis added). This direction to the Commission to consider, in a rulemaking proceeding completed 17 years ago **[check],** the impact of retransmission consent on its rules regarding regulation of the rates for basic service charged by *cable operators* to *consumers* has no relevance whatsoever in the present context.

programming – it has no authority under present law to adopt the proposals urged on it by Petitioners.

In short, no further proceedings with respect to the Petition are warranted.

Respectfully submitted,

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