

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

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

**REPLY COMMENTS OF  
CABLEVISION SYSTEMS CORPORATION**

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Cablevision Systems Corporation (“Cablevision”) hereby submits these reply comments in the above-captioned proceeding in response to the comments submitted on the issues raised by the joint petition for rulemaking filed on March 9, 2010 (“Joint Petition”).<sup>1/</sup>

**INTRODUCTION**

There is overwhelming recognition among diverse interests – operators, programmers and groups representing consumer interests – that the retransmission consent process is broken and in need of reform. Similarly, a broad cross section of commenters points out that the Commission has the legal authority to restore the balance in retransmission consent negotiations and urges the Commission to initiate a rulemaking informed by the proposals of the Joint Petitioners and Cablevision.

**I. THE JOINT PETITIONERS’ AND CABLEVISION’S PROPOSALS SHOULD BE INCLUDED IN A PROPOSED RULEMAKING**

There is broad support for a fresh look at the retransmission consent regime, and in particular the good faith provisions that have led to broadcaster abuses in negotiations with distributors.<sup>2/</sup> The Joint Petitioners have submitted a comprehensive proposal, including a role

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<sup>1/</sup> *Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed Mar. 9, 2010) (“Joint Petition”).

<sup>2/</sup> *See, e.g.*, ACA Comments at 14-16; Verizon Comments at 3-4; RCN Telecom Comments at 4; AT&T Comments at 9; American Public Power Assoc. Comments at 10.

for the Commission in resolving carriage disputes, to address the serious negotiating imbalance of the retransmission consent regime. Similarly, the objective standards for good faith negotiations that Cablevision suggests – increasing transparency and eliminating discriminatory practices – has broad support among a variety of stakeholders.

*First*, the Joint Petitioners as well as a diverse group of public interest and private sector commenters agree with Cablevision that the Commission should adopt measures that provide greater transparency and the availability of pricing information in the retransmission consent negotiation process.<sup>3/</sup> Free Press calls for mandatory disclosure of channel pricing, stating that “[t]ransparency as to channel pricing will accelerate future negotiations, and help avoid unnecessary Commission arbitration resources by limiting the ability of broadcasters to demand unfair prices.”<sup>4/</sup> OPASTCO explains that the mandatory non-disclosure provisions typically associated with retransmission consent agreements “have the effect of preventing MVPDs from gauging the market value of the content they are negotiating to obtain. MVPDs are required to agree to these provisions as a condition of gaining access to programming. Hence, small and mid-size MVPDs have no way of knowing whether the price they are paying for programming is ‘fair’ or in line with what their larger counterparts are paying.”<sup>5/</sup> Even broadcasters recognize that transparency is important and argue that “[g]ood faith bargaining disputes over price should be resolved based on objective comparisons.”<sup>6/</sup>

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<sup>3/</sup> See, e.g., RCN Telecom Comments at 9 (The FCC “should include in its new framework a mechanism for compiling and making available to both disputants and the experts assigned to decide the disputes a comprehensive body of information as to market conditions, costs and prices that will provide a solid, rational foundation for the fair resolution of these disputes.”).

<sup>4/</sup> Free Press, et al. Comments at 9.

<sup>5/</sup> OPASTCO, et. al. Comments at 4-5.

<sup>6/</sup> LIN Television Comments at 16 (emphasis removed).

Cablevision's transparency proposal (and, as discussed below, its associated proposal that all compensation take the form of cash) would make such comparisons possible, allowing all parties and the Commission to clearly understand the costs associated with retransmission consent carriage, and would satisfy the Commission's and the Chairman's objective to ensure that processes are "open and transparent" and "fact-based and data-driven."<sup>7/</sup>

*Second*, Cablevision's proposal to eliminate non-cash compensation, including banning tying arrangements, has broad support.<sup>8/</sup> Banning tying would not only allow for an increased understanding of the true costs of retransmission consent, but would result in a more diverse channel line-up responsive to the needs and interests of consumers rather than dictated by broadcast networks' self-interest. Starz Entertainment LLC suggests that program tying be prohibited "so that carriage decisions are made on the basis of value and demand -- for the benefit of consumers, rather than for the benefit of broadcast station owners."<sup>9/</sup>

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<sup>7/</sup> See, e.g., Chairman Julius Genachowski, Remarks to the Staff of the Federal Communications Commission, at 4 (June 30, 2009), at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-291834A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291834A1.pdf); see also *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, ¶ 119 (2009) (with respect to broadband, disclosure "benefit[s] policymakers and the [consumers] who rely on them by providing an empirical foundation for evaluating the effectiveness and necessity of ongoing policies").

<sup>8/</sup> See, e.g., Cox Communications Comments at 6-7 (stating that tying must be reexamined for the following reasons: "First, tying can impair cable operators' discretion to construct channel lineups that best suit local needs. Second, tying can put upward pressure on cable rates by requiring cable operators to pay handsome licensing fees for networks that they otherwise would not carry (or, at least, would not carry at the 'tied' rates). Third, tying can lessen customer access to diverse cable programming because of the channel and financial capacity required to satisfy the demands of the networks, reducing available channels for programming offered by other programmers."); RCN Telecom Comments at 7 n.17 ("viewer choice and the public interest suffer" because of tying arrangements); The Africa Channel Comments at 2-3 (viability of independent channels is threatened by programming tying practices); American Public Power Assoc. Comments at 18 ("Mandatory tying provisions have little, if anything, to do with the public policy goals underlying the enactment of the must carry/retransmission consent rules. The Commission should amend its rules to prevent broadcasters from requiring carriage of additional content as part of the compensation for the underlying carriage of a broadcast station.").

<sup>9/</sup> Starz Comments at 8; see also *id.* at 1 (supporting the "Petitioners' request that the Commission institute a rulemaking proceeding to amend and supplement the Commission's retransmission consent rules by prohibiting the tying of retransmission consent to the coverage of non-broadcast programming networks.").

*Third*, Cablevision’s nondiscrimination proposal would remedy the problem identified by the Joint Petition and supported by many commenters that broadcasters take advantage of the current scheme to exercise unfair leverage against MVPDs, whether because of their size, or because they are particularly vulnerable due to an upcoming major television event like the Superbowl.<sup>10/</sup> By requiring broadcasters to charge nondiscriminatory rates for the same channels to MVPDs in the same communities (and by allowing MVPDs access to rate information through the transparency requirement), the rules could ensure that broadcasters receive adequate fair compensation for their programming – that is, whatever price they set for the relevant broadcast market – but would limit their ability to demand extra super-competitive premiums from vulnerable MVPDs. Moreover, because prices set by the broadcasters would be known and available before negotiations start in earnest, the kind of negotiation brinksmanship that results in threats to withhold signals and surprise “take downs” would be eliminated.

## **II. THE COMMISSION HAS THE AUTHORITY TO ADOPT CABLEVISION’S PROPOSAL**

In the *Good Faith Order*,<sup>11/</sup> the Commission found that Congress did not intend to create an “intrusive role” for the Commission in retransmission consent negotiations or for the Commission to “dictate the outcome” of the negotiations. Rather, Congress intended the

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<sup>10/</sup> See, e.g., AT&T Comments at 6-7 (“[T]he growth in MVPD competition shifted the balance of negotiating power to broadcasters by placing at a significant competitive disadvantage any MVPD that fails to obtain retransmission consent for popular network or syndicated programming.”); USTA Comments at 2 (bargaining imbalances between broadcasters and MVPDs in the decades-old retransmission consent process are creating tangible consumer harms that have resulted in “widespread and increasingly urgent” calls to reform this “broken system.”) (internal quotations omitted); ACA Comments at 3 (“Small and medium sized MVPDs generally have significantly less bargaining power than their larger competitors, because the share of the audience they provide to a typical broadcast station is small enough that the loss of this audience will not generally have any significant impact on the station’s advertising revenue.”); American Public Power Assoc. Comments at 3-4 (smaller “MVPDs are at a significant negotiating disadvantage to local broadcast stations backed by national broadcast networks.”).

<sup>11/</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, ¶ 13 (2000) (“*Good Faith Order*”).

Commission to focus on establishing objective standards to ensure fairness in the negotiation process.<sup>12/</sup> The Commission further concluded that it should look to the commonly understood meaning of what constitutes “good faith” negotiation for guidance on establishing such standards.<sup>13/</sup> And it held that the commonly understood meaning requires that negotiations be “conducted in an atmosphere of honesty, purpose, and clarity of process.”<sup>14/</sup>

Cablevision’s proposed reforms fit the bill. They are not “intrusive”; they would let broadcasters set their own price for retransmission consent, rather than “dictating the outcome” of negotiation; and the proposed rules’ emphasis on transparency is consistent with commonly understood notions of good faith negotiations. By allowing the broadcasters to set prices and distributors to make distribution elections based on that market clearing price, Cablevision’s proposal gives broadcasters more control over their pricing decisions.

Requiring broadcasters and MVPDs to disclose the consideration MVPDs pay for retransmission consent (and to limit consideration to cash to avoid the potential for hidden consideration) would directly promote the Commission’s goal of ensuring honesty and clarity in the retransmission consent negotiation process. Today, both parties to those negotiations worry about whether they are receiving fair deals vis-à-vis their competitors and spend a great deal of effort negotiating MFNs to protect against this result.<sup>15/</sup> Publicizing retransmission consent fees

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<sup>12/</sup> *Good Faith Order* ¶ 30.

<sup>13/</sup> *Id.* ¶ 22.

<sup>14/</sup> *Id.* ¶ 24.

<sup>15/</sup> *See, e.g.,* AT&T Comments at 9 (Noting that “broadcasters frequently have sought ‘most favored nation’ provisions under which an MVPD must agree to pay the broadcaster for retransmission consent if it pays any other broadcaster for such consent. Under such provisions, the effect of retransmission consent payments quickly could escalate, driving up MVPD costs, and, concomitantly, subscribers’ rates.”); *see also* OPASTCO, et al. Comments at 3-4.

would ensure that negotiations are far simpler and less contentious than they have been in recent years, reducing transaction costs.<sup>16/</sup>

Increased transparency also has been recognized as a hallmark of “good faith” negotiation under the Taft-Hartley Act upon which the Commission’s rules are based.<sup>17/</sup> In that context, good faith negotiation has been found to require transparency to prevent disruptive, bad faith negotiating tactics.<sup>18/</sup> Increasing transparency in retransmission consent negotiations would be wholly in line with the authority the Commission has already found it has,<sup>19/</sup> and – just as importantly – avoid the kind of disruptive, bad faith tactics that increasingly characterize retransmission consent negotiations.

Cablevision’s proposed nondiscrimination requirement would further enhance the honesty and clarity of retransmission consent negotiations. Broadcasters would remain free to set their own prices for their programming but, as contemplated by section 325,<sup>20/</sup> would be subject to an obligation to explain any differences in the amounts charged MVPDs in the same market. While the Commission previously rejected the idea that it had authority to impose certain proposed nondiscrimination requirements, those proposals would have required substantial FCC oversight of negotiations and would have barred broadcasters from preventing MVPDs from obtaining retransmission consent.<sup>21/</sup> In contrast, Cablevision’s proposals leave

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<sup>16/</sup> As Cablevision noted in its Comments (at 14-15), the Commission frequently has recognized that increased transparency leads to a more honest discussion.

<sup>17/</sup> *Good Faith Order* ¶ 22.

<sup>18/</sup> See, e.g., *Boghossian Raisin Packing Company, Inc., et al.*, 342 NLRB 383, at 11 (June 30, 2004); *Lakeland Bus Lines, Inc., et al.*, 1999 WL 33452916 (N.L.R.B. Div. of Judges Feb. 22, 1999).

<sup>19/</sup> *Good Faith Order* ¶ 22.

<sup>20/</sup> 47 U.S.C. § 325.

<sup>21/</sup> *Good Faith Order* ¶ 14. In addition, the Commission’s belief that it did not have authority to impose the proposed nondiscrimination requirements was based on the fact that Congress had considered such a proposal and failed to enact it. The Commission appears to have change course on this position,

broadcasters free to set their own prices and grant or deny consent to retransmission of their signal, but ensure, in combination with the transparency proposals and all-cash requirement, that retransmission consent negotiations are concluded in a manner fair to all parties and at a price that reflects the market value of the broadcaster programming rather than the strength, size or vulnerability of the MVPD.

### **III. THE BROADCASTERS' NOTICE PROPOSALS SHOULD BE REJECTED**

In furtherance of their argument that carriage interruptions are not a sign of abuse of leverage, but rather “demonstrate[] a flaw in some MVPDs’ own negotiation strategy,” the broadcasters propose that MVPDs simply “plan ahead” by giving their subscribers notice of the impending loss of programming.<sup>22/</sup> The State Broadcasters Associations assert that MVPDs should provide “subscribers earlier notice of the pendency and prospects of retransmission consent negotiations.”<sup>23/</sup> Likewise, the joint filing by CBS, et al. calls on the Commission “to explore ways to ensure that consumers have timely information about their right and ability to obtain desired programming from alternative sources.”<sup>24/</sup> LIN Television calls on MVPDs to

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however, and recently rejected an argument that an unenacted bill carried any significance, arguing that “Failed legislative proposals . . . are ‘a particularly dangerous ground on which to rest an interpretation of a prior statute.’ [and that] ‘Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.’”). *Comcast Corp. v. FCC*, Case No. 08-1291 (D.C. Cir. Sept. 21, 2009), Brief of Respondents at 40 n.3 (citations omitted).

<sup>22/</sup> NAB Comments at 60-62; *see* LIN Television Comments at 14; Sinclair Broadcast Group Comments at 10; Local Broadcasters Coalition Comments at 12; State Broadcasters Associations Comments at 20.

<sup>23/</sup> State Broadcasters Associations Comments at 20.

<sup>24/</sup> CBS, et al. Comments at 5.

provide “clear, actual notice to subscribers at least 30 days before the end of a retransmission agreement term if a new agreement has not been reached.”<sup>25/</sup>

These proposals would serve to increase the frequency and abuse of broadcasters’ *in terrorem* negotiating strategies. More “notice” to consumers will exacerbate consumer confusion and harm and enhance broadcasters’ ability to pressure MVPDs to pay unreasonable fees. As demonstrated extensively in the comments, a major flaw in today’s retransmission consent scheme is that broadcasters use potential harm to consumers as a tool in their negotiating strategy.<sup>26/</sup> Broadcasters attempt to intimidate MVPDs by asserting that if the MVPDs don’t meet the broadcasters’ price demands, they will withdraw the signal, causing consumers to leave for another MVPD. Indeed, broadcasters engaged in a retransmission consent dispute frequently engage in joint marketing efforts with one or more alternate providers in that market, urging consumers to switch to those alternate providers if they wish to continue viewing the

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<sup>25/</sup> LIN Television Comments at 13-14 (noting that newspaper disclosure, in its opinion, was not satisfactory yet also noting that the “FCC should not prescribe the specific methods the MVPD should use in each case, because circumstances vary.”).

<sup>26/</sup> *See, e.g.*, Cox Comments at 4 (“Television viewers are ill-served by public business negotiations that leave them confused, used as pawns in disputes between communications companies, then deprived of the signals of local broadcasters that the Commission has licensed to serve them.”); RCN Telecom Comments at 4 (“Because of broadcasters’ control over highly valued programming, they are able to conduct negotiations in a manner that allows them to demand exorbitant compensation from cable operators, and to threaten that unless cable operators agree to this compensation, the broadcaster will simply cut off access to this valued programming. This threat is typically made at the eleventh hour, upon the expiration of previous program retransmission agreements and on the eve of prized, time-sensitive events . . . .”); AT&T Comments at 9 (“[B]roadcasters have strategically timed the expiration of their retransmission consent agreements to obtain maximum leverage in negotiations with MVPDs. Earlier this year, ABC used the Academy Awards broadcast to strengthen its hand in negotiations with Cablevision. Likewise, Fox used the threat of cutting off Time Warner’s ability to carry College Bowl games to try and force Time Warner to agree to significantly higher retransmission consent payments.”); American Public Power Assoc. Comments at 10 (“Today it is the broadcasters that are in a position of dominance, as evidenced by the fact that many routinely demand excessive retransmission consent fees and other concessions, while threatening to go dark if their demands are not met.”); Verizon Comments at 4 (“Because the current regime restricts the ability of an MVPD to obtain broadcast signals from alternative sources, consumers are caught in the middle of retransmission consent negotiations and are being used as pawns when agreements expire during sensitive periods.”).

broadcasters' programming.<sup>27/</sup> Broadcasters further increase the potential consumer harm by frequently timing the expiration of retransmission consent agreements to occur immediately before high-profile television events like the Superbowl or Academy Awards.<sup>28/</sup>

Broadcasters' notice proposals would support this practice. A substantial number of retransmission consent negotiations are concluded within 30 days of the expiration of the current agreement. Moreover, MVPDs and broadcasters frequently enter into one or more short-term extensions of an agreement as it approaches its expiration date. If MVPDs were required to notify consumers about an "impending loss" at any time an agreement had not been reached 30 days before its expiration, the predictable result would be alarmed consumers and public officials – and resulting pressure on MVPDs to reach an agreement with the broadcaster.

More specifically, a requirement for advance notice would give broadcasters even more time to engage in advertising and other public relations efforts to persuade customers to switch MVPDs – again intended to force the MVPD to meet their pricing or carriage demands. Indeed, the broadcasters explicitly acknowledge that this is their intent, stating that broadcasters want to provide "advance notice about the impending expiration of any retransmission consent agreement so that viewers can evaluate their options."<sup>29/</sup> The opportunity to "evaluate options"

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<sup>27/</sup> See, e.g., Petition at 26-27; LIN Television Comments at Exhibit 2 ("LIN TV has formed a marketing and promotional partnership with DISH Network to encourage consumers to switch to DISH Network if a LIN TV local station signal has the potential to become unavailable or is removed from a cable system. The parties jointly market LIN TV's availability on DISH Network so viewers will have the opportunity to continue watching their favorite local news and programming.").

<sup>28/</sup> See Cablevision Comments at 3-4, 6; see also Verizon Comments at 4 ("As several recent episodes have shown, some broadcasters have used the preferences afforded under the current regime to demand increased payments from MVPDs for programming and to threaten to pull - or actually pull - their signal if their demands are not met. These threats of service disruption have coincided with popular events, such as college football bowl games or the Academy Awards."); RCN Telecom Comments at 4; AT&T Comments at 9.

<sup>29/</sup> The Walt Disney Company Comments at 4; see also CBS et al. Comments at 5 ("Consumers have the right, and should have the opportunity, to take advantage of the many alternative choices available when one MVPD's behavior threatens the potential loss of popular content.").

is the scare tactic that broadcasters will use to force MVPDs into contracts that may not be in the best interest of their subscribers. The notice proposal is not a means of protecting consumer interests but yet another attempt by broadcasters to secure a regulatory scheme that works entirely to their advantage.

Moreover, there is a real risk that requiring such notices would cause substantial customer confusion and concern. If MVPDs were forced to provide 30 days advance notice at any time an agreement had not yet been concluded, consumers could receive frequent notices suggesting the impending loss of broadcast channels, even though late stage agreements are relatively common. Near the end of a retransmission consent cycle, when many agreements expire, consumers could be misled to believe that their cable service is about to lose most or all major broadcasters. And because the distributors who would send the notice could not divine whether a broadcaster intends to act unreasonably or pull its signal, the customer questions generated by this alarming notice would be unanswerable. This proposal serves no one but the broadcasters.

## CONCLUSION

For the reasons set forth above, Cablevision respectfully requests that the Commission open a rulemaking to consider amending its rules governing the retransmission consent process as described in Cablevision's comments.

Respectfully submitted,

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