

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**REPLY COMMENTS OF CONSUMERS UNION, FREE PRESS,  
MEDIA ACCESS PROJECT, AND PARENTS TELEVISION COUNCIL**

Media Access Project (“MAP”), on behalf of Consumers Union, Free Press, and Parents Television Council (together, the “Public Interest Commenters”) respectfully submits this reply to initial comments filed in response to the Media Bureau’s *Public Notice*<sup>1</sup> in the above-captioned docket. That *Public Notice* sought comment on a Petition for Rulemaking<sup>2</sup> to amend the Commission’s rules governing retransmission consent negotiations. These brief reply comments highlight the support in the record for the types of consumer-focused remedies supported and proposed by the Public Interest Commenters, both in their own initial submissions in this retransmission consent docket and in predecessor Commission proceedings regarding other programming negotiation rules.<sup>3</sup>

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<sup>1</sup> “Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent,” MB Docket No. 10-71, *Public Notice*, DA 10-474 (rel. Mar. 19, 2010) (the “*Public Notice*”).

<sup>2</sup> Time Warner Cable *et al.*, Petition for Rulemaking, MB Docket No. 10-71 (filed Mar. 9, 2010) (“Petition for Rulemaking” or “Petition”). Joining TWC on the Petition were American Cable Association, Bright House Networks, Cablevision, Charter, DIRECTV, Dish, Insight, Mediacom, New America Foundation, OPASTCO, Public Knowledge, Suddenlink, and Verizon.

<sup>3</sup> See, e.g., *Ex Parte* Notice of Consumers Union, Free Press, Media Access Project, and Public Knowledge, MB Docket No. 07-198, at 1, 4-5 (filed July 25, 2008); *Ex Parte* Notice of Consumers Union, MB Docket No. 07-198, at 1 (filed Aug. 12, 2008); Reply Comments of Free Press, MB Docket No. 07-269, at 1, 9-10 (filed Aug. 28, 2009).

These reply comments also illustrate flaws in self-serving comments filed in the initial round by multichannel video programming distributors (“MVPDs”) and broadcasters alike. The interested parties tend either to blame the other side in negotiations for any breakdowns in the process, or else proclaim the market free, fair, and well-functioning, rather than recognizing that both distributors and content providers alike may cause consumer harms. Either party in a programming negotiation may be at fault: sometimes broadcasters, in the manner described in the Petition; and sometimes MVPDs, who can use their own affiliated programming to limit consumer options, raise prices, stifle competition, and decrease programming diversity. In either case, consumers lose because of outdated rules for retransmission consent and other negotiations.

The consumer harms that flow from such outdated rules demonstrate the need for swift Commission action to adopt remedies similar to those proposed by the Petition. Moreover, while the Public Interest Commenters call for some additional remedies and comprehensive Commission analysis of program negotiation regimes, the Commission should not delay action in the instant proceeding in order to undertake such additional inquiries. The Petition demonstrates that the retransmission consent regime has caused harm to consumers and likely will continue to do so. Public Interest Commenters respectfully submit that the Commission should move expediently to adopt substantial reforms that put consumer interests first.

## INTRODUCTION

In their initial comments, the Public Interest Commenters generally supported with some limited modifications the type of remedies proposed in the Petition for Rulemaking,<sup>4</sup> but they

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<sup>4</sup> See Comments of Media Access Project, MB Docket No. 10-71, at 3-4 (filed May 18, 2010) (“MAP Comments”); see also Comments of Free Press, Parents Television Council, and Consumers Union, MB Docket No. 10-71, at 5 (filed May 18, 2010) (“FP-PTC-CU Comments”) (“[M]inimal intervention in disputes..., the framework proposed by Petitioners, can go far to achieve the[ ] goals” of facilitating consumer choice, affordable service, and fewer disruptions).

also emphasized two additional points. First, they asserted that the public, rather than a particular side in negotiations pitting MVPDs against broadcasters, should be the ultimate beneficiary of such remedies.<sup>5</sup> Second, they noted that while the broadcast retransmission consent regime is in need of reform, so too are the Commission’s program access and program carriage rules that govern negotiations for non-broadcast programming between and among MVPDs and content providers.<sup>6</sup> The Commission’s current regulations and enforcement procedures can result in more limited programming choices, higher prices for consumers, and MVPD service disruptions, but these harms are not limited to the broadcast context.<sup>7</sup>

Some commenters explicitly or impliedly agreed with key components of the Public Interest Commenters’ various proposals to empower consumers through program negotiation rule reforms. Unfortunately, several commenters spilled a tremendous amount of ink on unnecessarily and unjustifiably blaming one particular industry segment or the other for any problems with the programming negotiation processes that the Commission oversees, or else

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<sup>5</sup> See FP-PTC-CU Comments at 3 (“The Commission’s primary prerogative should not be to pick winners and losers in industry disputes, but rather to protect consumers.”). Free Press, Parents Television Council, and Consumers Union encouraged the Commission to “empower consumers by instituting an arbitration process and making a required outcome of the process the mandatory disclosure of per-channel costs sold by the programmer and offered by the MVPD – with a consumer option to opt out, and neither receive nor pay for each channel at issue in the dispute.” *Id.*; see also MAP Comments at 10.

<sup>6</sup> See MAP Comments at 4-7 (“The Commission should adopt comprehensive and consistent reform of its various programming rules because the use of leverage and bargaining power in any of these contexts can result in the public interest harms that the Petition rightfully decries.”); see also FP-PTC-CU Comments at 3 (encouraging the Commission “to consider extending this model to the resolution of disputes over cable carriage more broadly, to ensure a uniform framework that empowers consumers rather than concentrated and conglomerated media”).

<sup>7</sup> See MAP Comments at 4-5 (describing longstanding cable operator denials of vertically integrated regional sports programming to rival MVPDs, as well as recent examples of MVPD decisions to terminate delivery of cable programming services such as Food Network and HGTV); see also FP-PTC-CU Comments at 10-11 (citing cable program carriage disputes as another programming negotiation arena in which “the market power dynamics are comparable, and the processes pose identical harms for consumers: limited choice of content offerings, higher prices for content, and hefty risk of service disruptions”).

ignored altogether the problems of rising prices imposed on MVPD subscribers partially as a result of increased programming acquisition costs and decreased program diversity.

Rather than heeding irrelevant arguments from sparring incumbents, the Commission should recognize and address the consumer harms associated with bottleneck control, market failures, and market power wherever these obstacles arise in the video programming context. The Public Interest Commenters urge the Commission to focus on adopting comprehensive and public interest-oriented reform of its various program negotiation rules, but largely to ignore the back-and-forth between broadcasters and MVPDs – each of which may be guilty at certain times of seeking to exploit unfair advantages and acting to maximize profit to the detriment of consumer choice, program diversity, and MVPD competition.

**I. VARIOUS COMMENTERS SUPPORT DISCLOSURE AS WELL AS OTHER REFORMS THAT EMPOWER CONSUMERS, AND ALSO RECOGNIZE THAT TYING DECREASES PROGRAMMING DIVERSITY.**

In their initial comments, the Public Interest Commenters called on the Commission to adopt program negotiation rule reforms – in the retransmission consent, program access, and program carriage contexts – that would empower consumers rather than merely strengthening the hand of either industry party at the bargaining table.<sup>8</sup> Although many commenters focused entirely on excoriating alleged misbehavior or defending supposed virtues of broadcasters in the retransmission consent negotiation process, several submissions in this docket supported the Public Interest Commenters’ call for comprehensive and consumer-oriented reforms.

For example, Cablevision echoed a proposal put forward by Free Press, Parents Television Council, and Consumers Union by calling upon the Commission to mandate broadcasters’ public disclosure “on a per-subscriber basis” of “the rates paid for retransmission

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<sup>8</sup> See FP-PTC-CU Comments at 3.

consent by all distributors.”<sup>9</sup> However, while rightfully lauding the benefits of transparency, Cablevision’s comments do not suggest similar disclosure requirements for MVPDs, nor propose mechanisms by which consumers could benefit directly from such openness. Cablevision correctly cites the value that public availability of this data would add to the Commission’s oversight process, as such availability would enable the Commission to understand better “precisely what costs are associated with cable carriage of broadcasters.”<sup>10</sup> Yet, there is more that the Commission could do on this front.

The Commission should consider steps beyond mandating unilateral disclosure by broadcasters in order to facilitate consumer choice among different offerings on MVPD programming platforms, so that subscribers can benefit more directly from increased information and transparency. One such mechanism could involve allowing MVPD subscribers to opt-out of receiving and paying for channels that they either consider too costly, based on this newfound per-subscriber cost information, or that they do not want to receive for other reasons, such as a desire to keep their televisions free from content they deem inappropriate for their households.<sup>11</sup> Of course, maximizing consumer benefit would dictate that the Commission consider and adopt

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<sup>9</sup> Comments of Cablevision Systems Corp., MB Docket No. 10-71, at 13-14 (filed May 18, 2010).

<sup>10</sup> *Id.* at 14. ABC, CBS, Fox, NBC, and Univision (together, the “Networks”) in a joint filing likewise call for greater transparency in the MVPD marketplace, but their comments are even more vague in terms of concrete steps the Commission could take to facilitate direct savings to consumers. The Networks simply suggest that the Commission “explore ways to ensure that consumers have timely information about their right and ability to obtain desired programming from alternative sources” in the event that retransmission consent negotiations reach an impasse. *See* Comments in Response to Petition for Rulemaking of CBS Corporation, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo Licensee Co., The Walt Disney Company, and Univision Communications Inc., MB Docket No. 10-71, at 5 (filed May 18, 2010) (“Networks Comments”).

<sup>11</sup> *See* FP-PTC-CU Comments at 9-10; *see also* Comments of Free Market Operators, MB Docket No. 10-71, at 9-10 (filed May 18, 2010) (suggesting Commission reconsideration of basic tier carriage requirements for broadcast stations that choose retransmission consent rather than must-carry on MVPD systems subject to “effective competition”).

such disclosure requirements and opt-out mechanisms both for broadcast programming subject to retransmission consent and for non-broadcast programming as well.<sup>12</sup>

Several commenters, including non-broadcast programming providers such as Discovery, Starz, and Retirement Living TV, filed initial comments confirming that tying arrangements can decrease programming diversity.<sup>13</sup> Specifically, these commenters noted that the practice of tying consent for carriage of broadcast channels to the carriage of non-broadcast programming affiliated with such broadcast channels decreases the amount of bandwidth that an MVPD has available for programming from other sources. Perhaps unsurprisingly, in light of the fact that the aforementioned commenters are themselves affiliated with MVPDs, their comments failed to note that MVPDs likewise engage in tying and bundling of program offerings and other potentially harmful behavior,<sup>14</sup> limiting their available channel capacity for independent content.

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<sup>12</sup> See FP-PTC-CU Comments at 9.

<sup>13</sup> See Comments of Discovery Communications LLC, MB Docket No. 10-71, at 14 (filed May 18, 2010) (“Discovery Comments”); Comments of Starz Entertainment, LLC in Support of Petition for Rulemaking, MB Docket No. 10-71, at 7-9 (filed May 18, 2010); Comments of Retirement Living TV in Support of Petition for Rulemaking, MB Docket No. 10-71, at 2 (filed May 17, 2010).

<sup>14</sup> See MAP Comments at 2, 6-8; Comments of American Cable Association, MB Docket No. 07-198, at 12-14, 16-17 (filed Jan. 3, 2008); see also *id.* at vi-vii (“Adjustments to **program access** and retransmission consent regulations will help mitigate the public interest harms of current wholesale practices.... Programmers and broadcasters [sh]ould be obligated to offer channels on a standalone basis on reasonable rates, terms and conditions.”) (emphasis added). Discovery’s comments in this docket cite approvingly to congressional testimony from a mid-sized cable operator who described the harms from tying popular programming to less popular fare. See Discovery Comments at 14 (citing *Examination of the Proposed Combination of Comcast and NBC Universal, Hearing before House Subcommittee on Communications, Technology and the Internet*, 111th Cong., at 4 (Feb. 4, 2010) (testimony of Colleen Abdoulah), at [http://energycommerce.house.gov/Press\\_111/20100204/abdoulah\\_testimony.pdf](http://energycommerce.house.gov/Press_111/20100204/abdoulah_testimony.pdf)). Discovery quoted only that portion of the testimony that deals with such demands from broadcasters exercising their retransmission consent rights, but the testimony is in fact replete with examples of leverage exercised by large MVPDs in content negotiations for MVPD-affiliated sports and entertainment programming. See, e.g., Abdoulah Testimony at 4-6 (describing tactics used by broadcasters and by MVPD-affiliated content providers to leverage their control of either “must have” network programming or similarly essential non-broadcast regional sports networks).

As the comments filed by the U.S. Small Business Administration’s Office of Advocacy make clear, tactics such as “take-it-or-leave-it” offers and mandatory tying of programming by content providers consistently harm smaller MVPDs and their customers.<sup>15</sup> Yet, this type of unfair use of leverage to force bundles on distributors is, once again, not unique to broadcast retransmission consent negotiations, and affects program access dynamics as well as MVPDs’ program carriage negotiations with independent providers. As the Public Interest Commenters suggested in their initial comments, the Commission need not find that bundling arrangements are *per se* unreasonable; but it should analyze the impact that tying has on all program negotiations – not just retransmission consent – and then take steps to create an escape for consumers from such forced bundles.

## **II. RHETORIC PORTRAYING EITHER BROADCASTERS OR MVPDS AS WHOLLY TO BLAME FOR CONSUMER HARMS IGNORES THE FACT THAT BOTH SEGMENTS FAIL AT TIMES TO SERVE THE PUBLIC INTEREST.**

The Petition for Rulemaking, and many though not all of the comments filed in support of it, went to great lengths to portray broadcasters and laws that provide special protections for them as the source of all problems with retransmission negotiations.<sup>16</sup> As the Public Interest Commenters explained in their own initial comments, the Commission should focus on

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<sup>15</sup> Comments of the Office of Advocacy, U.S. Small Business Administration, MB Docket No. 10-71, at 3-4 (filed May 18, 2010).

<sup>16</sup> *See, e.g.*, Petition for Rulemaking at 5 (“The Commission’s rules governing retransmission consent...are ill-suited to curb the negotiating tactics by broadcasters that place consumers in a no-win position.”); Comments of Time Warner Cable Inc. in Support of the Petition for Rulemaking, MB Docket No. 10-71, at 3 (filed May 18, 2010) (“[B]roadcasters are exploiting the lopsided nature of the current framework by issuing demands for ever-increasing retransmission consent fees, backed by threats to withdraw their programming from MVPDs’ subscribers.”); Comments of Verizon, MB Docket No. 10-71, at 3 (filed May 18, 2010) (“Under existing rules, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations.”).

consumers, not on “picking winners and losers in an industry debate”<sup>17</sup> over which side gets to capture consumer surplus. Thus, the Commission should recognize that impasses, unreasonable discrimination, and inflexible negotiating stances are problematic no matter which party to the negotiation may cause the problem.

The Public Interest Commenters suggested in initial comments that the remedies proposed in the Petition may be “overly one-sided in favor of MVPDs”<sup>18</sup> due to a variety of factors. These include the fact that MVPDs themselves often benefit from the same tactics they rightfully fault when broadcasters engage in them,<sup>19</sup> and that MVPDs generally continue to enjoy supracompetitive profits even as they complain about their rising costs for the acquisition of broadcast programming.<sup>20</sup> Several broadcast entities filing in opposition to the Petition glossed over the actual and potential harms to consumers that the Commission’s current programming negotiation regulations may permit, but they rightly noted that MVPDs continue to increase the prices they charge subscribers at a rate far outstripping any increase in MVPD costs.

For instance, NAB and the television station affiliate associations for the largest broadcast networks opposed the Petition’s call for sensible reforms. Yet, they cited salient data on MVPDs’ robust and consistent growth in revenues and cash flow, all occurring while MVPDs increase the prices they charge their customers at several times the rate of increases in the consumer price index.<sup>21</sup> While the Public Interest Commenters still maintain that rising

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<sup>17</sup> FP-PTC-CU Comments at 7.

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *See* MAP Comments at 5-7.

<sup>20</sup> FP-PTC-CU Comments at 8.

<sup>21</sup> *See* Opposition of the Broadcaster Associations, MB Docket No. 10-71, at 3-4 (filed May 18, 2010) (“NAB *et al.* Comments”) (“The simple fact is that cable rates are high because, according to the Commission’s own economists, ‘cable operators with high market shares wield unilateral market power to charge higher prices’....”) (citation omitted); *see also* Comments of the Walt Disney Company MB Docket No. 10-71, at 26-28 (filed May 18, 2010) (“Disney Comments”).

programming acquisition costs should be expected to contribute to increases in MVPD subscription prices, broadcasters noted in initial comments that programming costs may be either declining or rising less quickly than are MVPDs' revenues, total costs, and profits.<sup>22</sup> In sum, although broadcasters may indeed wield undue influence in some negotiations due to their control over "must have" programming, MVPDs likewise enjoy and exert market power in specific geographic and product markets.<sup>23</sup>

Finally, while the Public Interest Commenters do not necessarily agree with the substance or tone of all suggestions in the Petition regarding broadcaster misconduct and misdeeds in retransmission consent negotiations, broadcaster oppositions to the Petition were likewise weighed down by overblown rhetoric. Broadcasters generally praised the working of the current system and ignored the consumer harms that arise from forced bundling, rising costs, and service disruptions associated with breakdowns in retransmission consent talks and other program negotiations.<sup>24</sup> Some broadcasters also praised the current retransmission consent model because it supposedly facilitates the production of higher quality national and local programming, but they offered no citations supporting the assertion that broadcasters provide such superior

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<sup>22</sup> See Disney Comments at 26-27. Time Warner Cable submitted, after the initial comment period but prior to the due date for replies, a study critiquing the data on which broadcasters typically rely in making these points. See Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Ms. Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 10-71 (filed June 1, 2010). In any event, the Public Interest Commenters note that MVPD subscription prices continue to rise, and that increased programming acquisition costs obtained as a result of leverage enjoyed by large broadcast *and* cable incumbents cannot help but contribute to those rising costs.

<sup>23</sup> See Opposition of the Local Television Broadcasters, MB Docket No. 10-71, at 4 (filed May 18, 2010) ("Local Broadcasters Comments") (explaining that MVPDs have more market power than broadcasters in many instances due to "cable system clustering, rising concentration in the national MVPD market, falling concentration in the video programming market, increasing competition between broadcasters and other content providers, and the declining audience share of over-the-air broadcasting").

<sup>24</sup> See, e.g., NAB *et al.* Comments at 7-9; Disney Comments at 19-24; Local Broadcasters Comments at 2 ("The retransmission consent regime works, and it benefits consumers.").

content.<sup>25</sup> The truth is that MVPD subscribers lose out and pay too much for service when *any* party to programming negotiations – either broadcasters or MVPDs – can exercise undue influence to drive up program acquisition costs and limit subscriber choice.

### CONCLUSION

For the foregoing reasons, the Commission promptly should adopt reforms similar to those proposed in the Petition for Rulemaking, but subject to the modifications and suggestions set forth in the Public Interest Commenters' initial comments in this proceeding.

Respectfully submitted,

**CONSUMERS UNION, FREE PRESS,  
MEDIA ACCESS PROJECT, AND  
PARENTS TELEVISION COUNCIL**

/s/ Matthew F. Wood

Matthew F. Wood  
Media Access Project  
1625 K Street, NW  
Suite 1000  
Washington, DC 20006  
(202) 232-4300

June 3, 2010

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<sup>25</sup> See Networks Comments at 15-16.