

**Economic Analysis of Broadcasters' Brinkmanship and
Bargaining Advantages in
Retransmission Consent Negotiations**

**Steven C. Salop, Tasneem Chipty, Martino DeStefano,
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I. Introduction and Executive Summary

1. The Communications Act of 1934, as amended by the 1992 Cable Act, gives each local broadcast station the right either to require the cable multichannel video program distributors (“MVPD”) to carry its signal, with no payment in either direction, or to opt out of this “must carry” regime and instead negotiate some form of compensation with the cable operator in exchange for the station’s consent to voluntary carriage (“retransmission consent” or “RTC”). As a matter of fact, broadcasters are increasingly choosing compensation for carriage because they have bargaining advantages over MVPDs. This paper presents an economic analysis of the broadcasters’ bargaining advantages and the “brinkmanship” tactics – including threats of temporary blackouts – that broadcasters use to receive higher programming fees in their RTC negotiations with MVPDs, and the implications of this analysis for policy.
2. The broadcasters’ brinkmanship tactics include various threats and conduct that harm the MVPD more than they harm the broadcaster. We analyze both temporary blackouts and threats of temporary blackouts of broadcast programming caused by the broadcaster’s withdrawal of RTC in the event that a final RTC agreement has not been reached at the time the current contract expires. We also analyze advance public announcements of blackouts, threats of making such announcements and related broadcaster tactics. Our analysis evaluates the likely effects of this brinkmanship conduct on RTC fees, viewers, and advertisers. We also analyze the impact of a voluntary interim carriage agreements that would prevent temporary blackouts.

¹ This study was prepared at the request of Time Warner Cable. The authors are (respectively) Professor of Economics and Law, Georgetown University Law Center and CRA Senior Consultant (Salop); CRA Vice President (Chipty); CRA Associate Principal (DeStefano); CRA Vice President and Director of Competition Modeling (Moresi); CRA Vice President (Woodbury).

Finally, we also identify a number of policy changes that the Federal Communications Commission might consider to mitigate the consumer harm associated with these brinkmanship tactics.

3. A broadcaster's purpose in engaging in brinkmanship is not necessarily to cause a blackout – because blackouts inflict costs on the broadcaster (as well as the MVPD, viewers, and advertisers). Instead, the purpose (and effect) of this conduct is to pressure the MVPD to agree to higher RTC fees and other concessions. The larger relative harm suffered by the MVPDs from these brinkmanship tactics provides the broadcasters with a stronger bargaining position that ultimately leads to higher negotiated RTC fees. In this sense, brinkmanship conduct is an investment in achieving leverage and bargaining advantage.
4. Brinkmanship harms consumers. Actual blackouts cause subscribers of the targeted MVPD to lose access to favored programming. Actual and threatened blackouts also generate uncertainty among consumers and may lead them to shift unnecessarily among MVPDs. The higher fees that result from broadcaster brinkmanship tactics also harm consumers, who end up paying higher cable subscription prices. Blackouts also harm advertisers by reducing the value of advertising during blackout periods and making it more difficult to plan advertising campaigns with a required “reach.”
5. We are aware of 48 significant episodes of actual or threatened blackouts over the 2000-2009 period and three additional carriage disputes in 2010. Of these, 31 episodes stem from broadcast retransmission consent disputes that collectively span hundreds of television stations and millions of viewers. These disputes often involve “must-have” programming and, as such, generate substantial viewer uncertainty, anxiety and anger. The threatened blackouts by the broadcasters in these disputes often are purposefully timed to coincide with popular viewing events, in order to inflict maximum cost on MVPDs by causing greater disruption for viewers. For example, WABC in New York City withdrew its signal from Cablevision on March 7, 2010, the day of WABC's broadcast of the annual Academy Awards ceremony, which drew over 40 million viewers nationwide, and the LA Lakers and the Orlando Magic basketball game, which was a rematch of the previous year's NBA final. The

blackout lasted less than 24 hours, until the parties reached a last-minute deal, but the nearly 3 million affected Cablevision subscribers missed the first fifteen minutes of the Academy Awards and the entirety of the basketball game.

6. Temporary blackouts such as these are *not* an inevitable consequence of occasional delays in contract renewal negotiations. Blackouts are a choice. For example, blackouts could be avoided by the parties negotiating interim carriage agreements that would ensure that the programming remains available during continued negotiations past the contract expiration date, pending the parties reaching a final agreement or breaking off negotiations. (Such interim carriage arrangements could have been made part of the previous carriage agreement.) Once the final agreement is reached, the agreed-upon RTC fee could be applied retroactively to the interim period. Alternatively, if negotiations are terminated without a final agreement, the interim carriage agreement could specify a retroactive fee to apply.
7. In a recent submission to the Commission, Drs. Jeffrey Eisenach and Kevin Caves suggest that the number of temporary blackouts surrounding RTC negotiations has been very small and, as such, these blackouts would have little effect on the overall video programming market.² This view is incorrect. Brinkmanship tactics can have substantial market-wide effects on all RTC negotiations, whether or not a blackout actually occurs. The tactics lead to higher RTC fees and then create market fee benchmarks that can affect the level of negotiated fees market-wide in the future.
8. The evidence shows significant increases in program services fees – including RTC fees – in the last few years and projections of even higher fees in the future. This reflects, in part, the fact that broadcasters have increasingly sought cash for carriage as well as carriage of other cable networks. It also reflects the fact that more broadcasters have shifted from must-carry status to the RTC negotiation regime. According to Kagan, annual cable RTC fees have nearly doubled year-over-year, for each year from 2006 to 2010.³ Kagan also projects that aggregate RTC fees charged

² Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, May 6, 2010 (hereinafter, *Eisenach Reply to Compass Lexecon*) at 4 and 17.

³ SNL Kagan, *Broadcast Retransmission Consent Fee Projections 2006-2016*, March 22, 2010.

to cable operators will continue to rise, from a projected \$572 million in 2010 to over a projected \$1.5 billion by the year 2016. These fees would amount to about \$26 per-subscriber, per-year in 2016.⁴

9. In this paper, we describe some of the underlying economic factors that lead to the asymmetric harm suffered by MVPDs from actual or threatened blackouts – asymmetries that give rise to broadcasters’ dominant bargaining position over MVPDs in RTC negotiations.⁵ These include the following economic factors: (i) the “must-have” nature of network broadcast programming; (ii) growing competition among MVPDs; (iii) tying by the broadcast networks; and (iv) emerging broadcast network involvement in the RTC negotiations of their independently-owned local affiliates; (v) broadcaster’s local market agreements. These factors lead to the MVPDs losing more current and potential subscribers in the event of a blackout or public blackout threat. Thus, these factors cause the MVPDs to suffer more financial pain, relative to the broadcasters. As a result, the MVPDs find it more difficult to hold out for more favorable settlements and so are more willing to agree to a higher RTC fee.
10. In fact, whether or not a blackout actually occurs, a public threat of an impending blackout – perhaps made well in advance of the expiration of the contract – can severely harm the MVPD, while having little or no adverse consequences for the broadcaster. This is because the anticipation of a blackout will lead some current subscribers to switch MVPDs and some potential new subscribers to choose a different MVPD. Broadcasters can exacerbate the effects of such public announcements by making the announcement further in advance and with greater publicity, and by coupling the announcement with an advertising campaign that urges viewers to switch MVPDs or by partnering with another MVPD to offer special deals to subscribers that switch. These tactics would lead to more and faster subscriber movement. As a result, the fear of such public threats also will have the effect of leading MVPDs to agree to pay higher RTC fees in order to avoid the public

⁴ *Id.*

⁵ When the broadcaster expects the harms it would suffer are greater than those of the MVPD, so that the negotiated RTC fee might be negative, the broadcaster can opt for *must-carry* status to protect itself.

announcements. Thus, even if temporary blackouts are rare, the potential and threat of such public announcements of potential blackouts can have market-wide effects.

11. Commission rules also limit the range of counterstrategies that a MVPD might use to counter the bargaining power of the broadcast station. These rules include restrictions on the ability of MVPDs generally to move a broadcast station to an optional tier or to offer the station on an a la carte basis. The Commission rules also prohibit MVPDs from the counterstrategy of replacing a local network affiliate with a distant affiliate or blacking out a broadcast station during the “Sweeps.” These regulatory limitations translate in turn into higher per-subscriber fees for video programming, fees that harm subscribers when they are passed through as higher subscription prices.
12. Against this background and the Petition for Rulemaking filed by leading MVPDs and public interest organizations,⁶ we have identified a number of possible complementary policy changes that the Commission might consider as part of the rulemaking process to remedy these brinkmanship problems. First, the Commission could mandate continued, interim carriage during the pendency of carriage disputes, so as to avoid the harms suffered by consumers and advertisers from temporary blackouts. Second, the Commission could resolve continued fee disputes by setting RTC fees directly, or by having an expert tribunal set RTC fees, in conjunction with input by the Commission. These fees would not be based on the currently negotiated fees because those fees reflect the broadcasters’ bargaining advantages arising from the differential harms from brinkmanship. Instead, the Commission could mandate a fee structure that would reflect more equal bargaining positions, while achieving any desired regulatory benefits in a transparent manner. Third, in order to facilitate voluntary agreements between broadcasters and MVPDs, while avoiding the distortions caused by asymmetric regulatory treatment, the Commission might place more stringent “good faith bargaining” constraints on the broadcasters’ tactical freedom or eliminate some regulatory constraints on MVPD counterstrategies.

⁶ *In the Matter of Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent, Petition for Rulemaking*, MB Docket No. 10-71, March 9, 2010.

Fourth, the Commission might mandate industry-wide collective negotiations between MVPDs and broadcasters. Such collective bilateral negotiations may provide a better negotiated solution to the extent that the bargaining leverage of the broadcasters and the MVPDs becomes more equalized.

13. The remainder of this report sets out our analysis in detail. Section II describes the harmful impacts of blackouts and broadcasters' brinkmanship behavior on consumers and advertisers. Section III provides an economic analysis of broadcaster brinkmanship in RTC negotiations. Section IV describes in more detail the economic factors that give the broadcasters the advantaged bargaining position, including the relatively greater harms suffered by MVPDs stemming from the "must-have" nature of broadcaster controlled cable and broadcast programming, increased MVPD competition, and the other factors mentioned above. Section V concludes with a brief discussion of potential policy changes.

II. Impact of Blackouts and Brinkmanship Tactics on Consumers

14. Retransmission consent fees are negotiated between individual broadcasters and individual MVPDs. The negotiation conduct sometimes goes beyond standard bargaining back-and-forth. The negotiations may go down to the wire, and they sometimes include threats of blackouts and other brinkmanship tactics. Threats of blackouts sometimes become actual blackouts. Such tactics harm viewers and advertisers. Public announcements of blackout threats (even if not ultimately carried out) also may lead to consumer uncertainty, anxiety, and anger, as well as to some consumers switching to less preferred MVPDs. Advertisers also lose reach from blackouts and may be forced to rearrange their campaigns.
15. Both blackout threats and the relatively small number of temporary blackouts that actually occur can have broad market-wide effects. As discussed in more detail in this paper, they place bargaining pressure on the MVPDs. This bargaining pressure likely leads MVPDs across-the-board to agree to pay higher RTC fees, even in situations where there is no blackout, and even where there are no explicit blackout

threats.⁷ These higher RTC fees then will be passed through to consumers in the form of higher MVPD subscription prices.

A. Episodes of Brinkmanship and Temporary Blackouts

16. We have identified 48 significant episodes of actual or threatened blackouts that achieved publicity over the 2000-2009 period and 3 additional carriage disputes in 2010 to date.⁸ Inasmuch as our search failed to identify carriage disputes that were not highly publicized or those that settled early, our list inevitably understates the actual disputes that have occurred.
17. Of the 48 episodes, 31 episodes involve retransmission consent disputes spanning many television stations and many millions of viewers. Appendix 1 presents a list of the broadcast carriage disputes, and Appendix 2 presents a list of the non-broadcast carriage disputes. In addition, Appendix 3 presents estimates of impact for each of the broadcast disputes since 2006, including the number of affected television markets, television stations, and subscribers. Some recent episodes include the following:
 - a. **WABC/Cablevision (March 2010):**⁹ The week before the 2010 Academy Awards, Disney began to warn Cablevision's New York subscribers that the local ABC station, Disney-owned WABC, might go dark by the weekend because of a fee dispute with Cablevision. The station went dark at 12:01 AM on Sunday, March 7, and the dispute ended later that day, about 15 minutes into ABC's Sunday night broadcast of the Academy Awards. By that time, Cablevision's nearly 3 million subscribers had missed over 20 hours of WABC's programming,

⁷ In a recent *ex parte* submission to the Commission, Drs. Eisenach and Caves state that blackouts are very rare, more rare than the number of electricity outages experienced by cable operators. *Eisenach Reply to Compass Lexecon* at 1-2, 18-19. Such an analogy is inapposite. Electricity outages are accidents, whereas the blackouts are deliberate and planned as part of the programmers' bargaining strategies to earn higher affiliate fees. By affecting MVPD expectations, blackouts and blackout threats put pressure on the MVPDs to agree to higher fees. Back in the 1970s, MCI's long distance service probably was occasionally disrupted by natural or accidental events; but that fact would not have excused AT&T's strategy of pulling the plug on MCI's interconnections to AT&T's wireline network.

⁸ We relied on the public sources listed in Appendix 4 to identify the carriage disputes.

⁹ Appendices 3 and 4.

including the afternoon coverage of the LA Lakers-Orlando Magic basketball game.

- b. **FOX/TWC (December 2009):**¹⁰ In late 2009, News Corp. began to warn TWC subscribers that they would lose access to FOX broadcasting stations as well as several FOX cable networks should the parties not reach an agreement by December 31, 2009. In their advertisements, FOX suggested that viewers consider switching to other MVPDs, like Verizon FiOS or the direct broadcast satellite providers (“DBS”) in the event an agreement was not reached. The dispute affected the nationwide subscribers of TWC-affiliated cable systems, spanning over one hundred television markets, 7 of which overlapped with FOX O&O stations. As such, a blackout of the FOX cable networks would have affected all of the approximately 15.3 million TWC-affiliated cable system subscribers nationwide, of which 5.9 million would also have been affected by the blackout of the FOX O&O stations. The parties reached an agreement on January 1, 2010, without an actual blackout, in time for FOX’s coverage of the Sugar Bowl on New Year’s Day.
- c. **Sinclair/Mediacom (January 2007 and December 2009):**¹¹ On January 6, 2007, after ignoring government pleas to enter binding arbitration to settle its carriage dispute with cable operator Mediacom, Sinclair Broadcast Group blacked out 24 of its stations, of which 13 were affiliates of one of the big four television networks and the remaining 11 were affiliates of either CBS’s CW or FOX’s MyNetworkTV. These stations had an estimated reach of approximately 9 million television households, across 12 states and 16 television markets. We estimate that the blackout interrupted network access for nearly 570,000 subscribers in the affected Mediacom footprint. The parties reached a retransmission agreement on February 2, 2007, nearly one month later. Sinclair subsequently threatened Mediacom with another blackout if the parties did not reach an agreement by December 31, 2009, threatening viewers’ access to the

¹⁰ *Id.*

¹¹ Appendices 3 and 4.

New Year's Day coverage of the Sugar Bowl. The retransmission agreement was signed in time to avoid an actual blackout.

18. These episodes appear to have become more common in recent years. Figure 1 presents a summary of the frequency and nature of carriage disputes, by year for the past ten years. The peak years for broadcaster carriage disputes appear to be 2006, 2008, and 2009.¹² Moreover, about 80% of all broadcaster-involved disputes since 2000 have occurred over the last five years. Note also that actual and threatened blackouts are less common for cable program services. Over the past ten years, the majority of the carriage disputes involved broadcast stations.

¹² Dr. Eisenach understates the frequency of blackouts and ignores disputes in which blackouts were averted. See Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, March 31, 2009 (hereinafter, *Eisenach Retransmission Consent*), Table 2 at 36; and *Eisenach Reply to Compass Lexecon*, Table 2 at 20.

Figure 1: Frequency of Carriage Disputes, 2000-YTD 2010

Year	Total Carriage Disputes	Parties Involved				
		Content			MVPD	
		Broadcasters (and possibly their cable networks)	Non-RSN Cable Networks Only	RSN Cable Network Only	Incumbent Cable Operator	DBS or Telco
YTD 2010	3	2	1	0	2	1
2009	7	5	2	0	5	2
2008	13	11	2	0	8	5
2007	2	1	1	0	1	1
2006	8	6	2	0	7	1
2005	4	2	2	0	3	1
2004	2	1	0	1	1	1
2003	7	1	4	2	3	4
2002	2	0	1	1	1	1
2001	1	0	0	1	1	0
2000	2	2	0	0	2	0
Total	51	31	15	5	34	17
2000-2009	48	29	14	5	32	16

Notes:

1. The distribution “Total Carriage Disputes” shown separately by content involved and by MVPD involved.
2. “Broadcasters (and possibly their cable networks)” carriage disputes include all disputes involving a broadcast station; these disputes can also involve the broadcasters’ cable networks.
3. “Non-RSN Cable Networks Only” carriage disputes include all disputes involving only cable networks that are not Regional Sports Networks (“RSNs”).
4. “RSN Cable Networks Only” carriage disputes include all disputes involving only an RSN.

Source: Appendix 1.

19. Figure 2 provides some measures of the direct impact of the 25 RTC disputes that occurred in the latter part of the period, between 2006 and year-to-date 2010.¹³ For the purposes of this analysis, we focus on the impact on television households and subscribers of actual or potential loss of local television stations involved in the

¹³ For each dispute, we used the sources listed in Appendix 4 to identify the parties, the television markets, and the broadcast television stations involved. For each dispute, we then estimated the number of affected television households and the number of affected subscribers as the sum of the television households and the sum of the MVPD’s subscribers, respectively, across each of television markets involved in the dispute, using Q3-2009 data from SNL Kagan. These estimates are presented by dispute in Appendix 3 and summarized in Figure 2. We also estimated the number of affected television households and subscribers using an alternative method that allows for the possibility that a TV station may not reach the entire television market in which it is located. This method conservatively adjusts the affected numbers within an affected television market downward if the involved stations do not reach the entire television market, based on the coverage area of each individual station involved in the dispute. These adjusted estimates of impact, which are qualitatively the same as the unadjusted ones, are also presented for each dispute listed in Appendix 3. See SNL Kagan, *Q3’09 Multichannel Subscribers by DMA.xls*; SNL Kagan, *TV Stations Database.xls*, 2010; *Top Cable Systems Operators, Third Quarter 2009.xls*; Nielsen Claritas, *SPFUSC08.xls*; and Nielsen, *Designated Market Areas Map 2007-2008*.

disputes.¹⁴ For example, we estimate that the 5 RTC disputes in 2009 spanned 27 television markets and involved 42 local television stations reaching over 33 million television households and nearly 7 million MVPD subscribers. Between 2006 and year-to-date 2010, actual or threatened blackouts of local stations associated with these episodes affected about 20 million MVPD subscribers. For the episodes that involved broadcaster-owned cable networks as well, many more MVPD subscribers were affected.

Figure 2: Estimated Television Households and Subscribers Affected by Broadcast Network Actual or Threatened Blackouts, Between 2006 and YTD 2010

Year	TV Markets	TV Stations	TV Households (in mil.)	MVPD Subscribers (in mil.)
2010	4	4	8.5	3.2
2009	27	42	33.4	6.6
2008	57	67	39.2	5.4
2007	15	23	9.0	0.6
2006	27	41	16.8	4.3
Total			106.9	20.0

Source: Appendix 3.

B. Consumer Harm from Brinkmanship Behavior

20. Brinkmanship behavior harms consumers through service interruptions and higher cable subscription prices. We discuss each, in turn.

1. Service Interruptions and MVPD Switching

21. Carriage blackouts interfere with subscribers' access to desirable programming, particularly when broadcasters time the blackouts to coincide with popular viewing events. Some subscribers remain with the MVPD through the blackout and experience a harmful service interruption of major viewing events like a Bowl Game and the Academy Awards. Longer term interruptions, like the blackout of the FOX affiliate KAYU from TWC systems, obviously create greater harms to viewers who

¹⁴ The relevant MVPD footprint for episodes that involve O&Os is just the area that overlaps that of the O&O's coverage area, not the entire nationwide footprint of the MVPD.

are loyal to certain network programs and sports, or a station's local news, weather and sports programming.

22. In addition, blackout threats can harm subscribers by leading to uncertainty and anger that programming will be unavailable. Indeed, as early as 2000, the Commission noted its “concern regarding the service disruptions and consumer outrage that will inevitably result should MVPDs that are entitled to retransmit local signals subsequently lose such authorization.”¹⁵ The Commission's concerns are reflected in a recent L.A. Times report about the episode where ABC's O&O WABC went dark on Cablevision's systems on the night of the Academy Awards: “[f]rustrated Cablevision customers in the New York area scrambled Sunday to find alternative ways to watch the Oscars, with many vowing to boycott both the cable company [Cablevision] and ABC for leaving viewers in the lurch.”¹⁶ The Commission staff apparently also was frustrated. An earlier article on the dispute quotes William Lake, the FCC's Media Bureau chief, who said, “Consumers should not suffer due to the inability of these two companies to successfully negotiate a deal.”¹⁷
23. Subscribers can also be harmed by being forced to switch to less preferred MVPDs, either after the blackout begins or even preemptively in anticipation of a blackout. This is a more visible consumer response to brinkmanship. Indeed, a recent trade press report noted that “[a] blackout covering several months can cost a local cable system as much as 10% of its subscribers, who bolt to a satellite TV platform to get a highly viewed local TV station that is off cable.”¹⁸ The possibility of such substantial

¹⁵ *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶61 (2000).

¹⁶ Matea Gold, *Cablevision customers fume about missing Oscar telecast*, L.A. Times Company Town Blog, March 7, 2010, accessed at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/03/cablevision-customers-fume-about-missing-oscar-telecast.html>.

¹⁷ Joe Flint, *Disney's WABC still off in Cablevision homes as feud continues*, L.A. Times Company Town Blog, March 7, 2010, accessed at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/03/disneys-wabc-still-off-in-cablevision-homes-as-feud-continues.html>.

¹⁸ Robert Marich, *Broadcast's \$1 Billion Pot of Gold*, *Broadcasting & Cable*, July 6, 2008, accessed at http://www.broadcastingcable.com/article/114424-Broadcast_s_1_Billion_Pot_of_Gold.php.

subscriber movements was also a concern addressed by the Commission in its News Corporation/DIRECTV Order.¹⁹

24. We have documented several estimates of subscriber switches associated with RTC disputes in recent years. For example, TWC lost a significant number of its subscribers as a result of its prolonged RTC dispute with FOX affiliate KAYU – a station owned and operated by Mountain Broadcasting, a division of Northwest Broadcasting – in Spokane, Washington. On December 15, 2006, KAYU removed its signal from TWC systems over a retransmission consent dispute, affecting about 25,000 TWC customers in Pullman, Washington; Libby, Montana; and Coeur d’Alene and Moscow, Idaho.²⁰ The contractual standoff lasted for about 14 months until February 1, 2008, when an agreement was reached between the two parties that allowed TWC to retransmit the station’s feed until February 1, 2013. During the standoff, FOX programming, most notably the NFL (including the Super Bowl), the MLB World Series, and American Idol were unavailable to local cable subscribers.²¹ KAYU returned to the TWC systems two days before Super Bowl XLII.²² During the blackout period, TWC provided its subscribers with free antennas and switches (which allowed users to toggle between cable and antenna signals) so that they could access KAYU over-the-air. Notwithstanding this effort, it appears that a significant number of TWC subscribers switched to DBS services.²³ According to one news

¹⁹ *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, FCC MB Docket 03-124, Released January 14, 2004 (hereinafter *Hughes News Order*) at ¶ 4.

²⁰ Anne Becker, *Northwest Station Pulls Signal in Retransmission Battle*, *Broadcasting & Cable*, December 31, 2006. SNL Kagan also reports about 25,000 TWC subscribers, as of Q3-2009, in the television markets served by KAYU. However, another article reported that 45,000 TWC customers in Spokane, Washington were affected by this dispute. Associated Press Newswires, *Cable dispute keeps northern Idaho viewers from watching Fiesta Bowl upset*, January 5, 2007.

²¹ Mike Reynolds, *Touchdown! KAYU-TV, Time Warner Cable Reach Retrans Deal*, *Multichannel News*, February 3, 2008.

²² Robert Marich, *Broadcast’s \$1 Billion Pot of Gold*, *Broadcasting & Cable*, July 6, 2008, accessed at http://www.broadcastingcable.com/article/114424-Broadcast_s_1_Billion_Pot_of_Gold.php.

²³ See, for example, Bill Blankenship, *WIBM-TV’s threat to Cox has precedent*, *The Topeka Capital Journal*, Feb 23, 2008, reporting that local satellite television services had to hire additional staff members to meet backlog of dish installation orders and that “a lot more satellite television dishes” were sold during the standoff. See also Amy Cannata, *Fox TV fans switch to dish: Dispute keeps channel off Time-Warner Cable*, *The Spokesman Review*, January 4, 2007, reporting the comment of a satellite technician that satellite system installations jumped 50% to 100% daily when TWC stopped carrying KAYU.

story six months after the blackout began, KAYU's general manager explains that "he has heard 3,900 [subscribers] dropped the service in the five counties affected, and 3,500 new satellite customers have been signed up."²⁴ In another news story, also about 6 months later, Northwest Broadcasting President Brian Brady calculates that "6,000-7,000 local Time Warner Cable subscribers have scrapped their service, which he estimates is a \$3 million-plus hit for the operator."²⁵ These different estimates suggest that TWC lost between 16% to 28% of its subscriber base in the affected geographic areas in the first six months of the blackout. Each of those subscribers was harmed because each switched from their cable provider of choice to a second-choice provider.

25. Another example is the Sinclair/Mediacom dispute mentioned earlier. A trade press report noted that during the dispute, Mediacom "lost 7,000 subscribers in the fourth quarter alone, even before Sinclair pulled its stations, and it expects to report even more switchouts for January."²⁶ A later report indicated that "Mediacom... lost 18,000 subscribers in the first quarter, when Sinclair Broadcast Group pulled stations."²⁷ The article goes on to explain that many of these subscribers switched to DBS. A loss of these 25,000 subscribers amounts to about 4.5% of the estimated 570,000 affected Mediacom subscribers in the areas served by the Sinclair stations.
26. Broadcasters can expand subscriber switching (and thus increase the bargaining pressure on the MVPD) by making public announcements and advertising the possibility of a blackout well in advance of the expiration of the contract. Such public threats lead subscribers to switch MVPDs in advance of the contract expiration date. Such switching inflicts losses on consumers who are led to switch MVPD

²⁴ Rick Thomas, *Time Warner Cable on Fox hunt*, CDA Press, July 31, 2007.

²⁵ Michael Malone, *Carriage Spat Rages in Spokane With Local Fox Affiliate dark on cable operator's system, new satellite subs soar*, *Broadcasting & Cable*, May 27, 2007, accessed at http://www.broadcastingandcable.com/article/109048-Carriage_Spat_Rages_in-Spokane.php.

²⁶ Linda Moss and Mike Farrell, *Dueling for Dollars, Cash – Lots of It – Is at Stake When Broadcast and Cable Squares Off on Retransmitting Signals, Here's How Each Side Tries To Grab or Keep It*, *Multichannel News*, March 4, 2007, accessed at http://www.multichannel.com/article/128109-Dueling_for_Dollars.php.

²⁷ *Mediacom Loses Customers During Dispute, Revenue Up During First Quarter*, May 4, 2007, accessed at <http://www.kcci.com/money/13260018/detail.html>.

providers needlessly or choose the next-best MVPD, and on the MVPD who loses the subscribers at virtually no cost to the broadcaster. For example, during the most recent FOX/TWC RTC dispute in 2009, FOX made such a public announcement. As a result, rival MVPDs began running ads for their services even while negotiations continued. One report noted that “DISH began running television ads on Monday (Dec. 28) targeting customers in affected markets looking [for alternatives].”²⁸ DISH also supplemented their television ads with door hangings and print ads. The article goes on to explain that “[p]art of DISH’s plan... [was] to provide next-day installation for subscribers wishing to switch.”²⁹

27. In its dispute with Charter Communications in 2008, LIN TV went beyond a simple public announcement. It advertised alternative MVPDs in the weeks before the parties reached an agreement in July 2008. According to a trade press report, “LIN TV issued a press release announcing that talks had broken down and threatened to yank its channels’ carriage on June 30. LIN pursued one of the most aggressive tactics by agreeing to steer viewers of any multichannel platform that dropped its signal to DISH Network. On-air ads gave LIN viewers a toll-free number to call in advance of being pulled off cable, and DISH offered a credit card with \$50 as an incentive.”³⁰ The report further notes that this steering behavior by broadcast stations is not uncommon.³¹ For example, in the Disney/TWC dispute in Houston, Disney offered cable subscribers a \$99 rebate on a satellite dish.³²
28. In addition to subscriber harm, service interruptions also harm advertisers, who purchase advertising spots based on anticipated exposure to viewers. Thus, blackouts

²⁸ Andrea Reiher, *Dish Network, DIRECTV ready should Time Warner-FOX dispute drag on*, Zap 2 News & Buzz from Inside the BOX, December 30, 2009, accessed at <http://blog.zap2it.com/frominsidethebox/2009/12/dish-network-directv-ready-should-time-warner-fox-dispute-drag-on.html>.

²⁹ *Id.*

³⁰ Robert Marich, *Broadcast’s \$1 Billion Pot of Gold*, Broadcasting & Cable, July 6, 2008, accessed at http://www.broadcastingcable.com/article/114424-Broadcast_s_1_Billion_Pot_of_Gold.php.

³¹ *Id.*

³² Bill Carter, *Blackout of ABC on Cable Affects Millions of Homes*, The New York Times, May 2, 2000, accessed at <http://www.nytimes.com/2000/05/02/business/blackout-of-abc-on-cable-affects-millions-of-homes.html?pagewanted=1?pagewanted=1>.

lead to reduced advertising effectiveness by the loss of viewer “reach.” They also lead to uncertainty and the necessity of inefficient changes in advertising plans among advertisers.

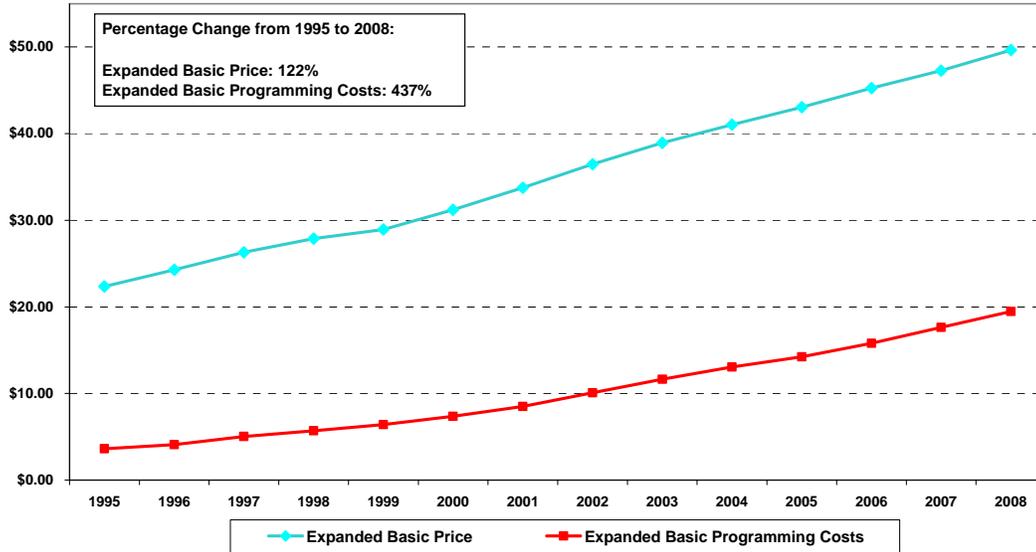
2. *Rising Cable Subscription Prices*

29. Blackout threats result in higher programming fees which lead inevitably to higher cable subscription prices.³³ Those higher prices, in turn, harm consumers. There does not seem to be any controversy over the fact that video programming costs paid by MVPDs have been rising dramatically.³⁴ Figure 3 presents some publicly available data on MVPD programming costs for basic and expanded basic programming, on a per-subscriber, per-month basis. Figure 3 also presents data on monthly cable subscription prices for expanded basic service (including the basic package). From 1995 to 2008, basic and expanded basic programming costs increased by 437%, while the retail price for expanded basic service grew by 122%.

³³ Dr. Eisenach suggests that programming fee increases must be efficient because “in the absence of some sort of market failure (for example, if programmers had monopoly power that allowed them to charge higher-than-competitive prices), market prices in general are neither ‘too high’ nor ‘too low,’ but instead ‘just right.’” Jeffrey A. Eisenach, *Video Programming Costs and Cable TV Prices*, April 2010 (hereinafter, *Eisenach Video Costs*) at ¶6. In Dr. Eisenach’s view, any concerns about consumer welfare harm thus are misplaced. *Eisenach Reply to Compass Lexecon* at 1-2. Dr. Eisenach’s description of the economic environment is unrealistic because program services and MVPD services are not sold in atomistically competitive free markets, devoid of possible market failures. This is a negotiation market, not one with posted prices. Program services are differentiated and prices likely exceed marginal costs. Similarly, MVPDs are differentiated and likely charge a price in excess of marginal costs. Further, this is anything but a “free market,” given the scope of FCC regulation. Thus, Dr. Eisenach’s attempt to sweep away any concerns with the extreme Chicago-school mantra that the market prices are “just right” is just naïve.

³⁴ For example, as a recent Morgan Stanley report stated it: “We continue to believe programming cost growth remains a structural problem for the industry, and the addition of retransmission consent payments will accelerate cost growth in the near-term.” “We expect retransmission payments to drive 30-40% of total programming cost growth in 2010E-2014E.” Morgan Stanley, *Cable/Satellite Pricing, Programming, and Payout Keys to 2010*, January 26, 2010 (hereinafter, *Morgan Stanley Keys*) at 4, 11. See also *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Released January 16, 2009 (hereinafter, *Commission’s 2009 Annual Price Report*) at ¶11 and *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, MB Docket No. 06-189, Released January 16, 2009 (hereinafter, *Commission’s 13th Annual MVPD Report*) at ¶4.

Figure 3: Expanded Basic Subscriber Price vs. Expanded Basic Programming Costs Per-Subscriber, Per-Month



Notes:

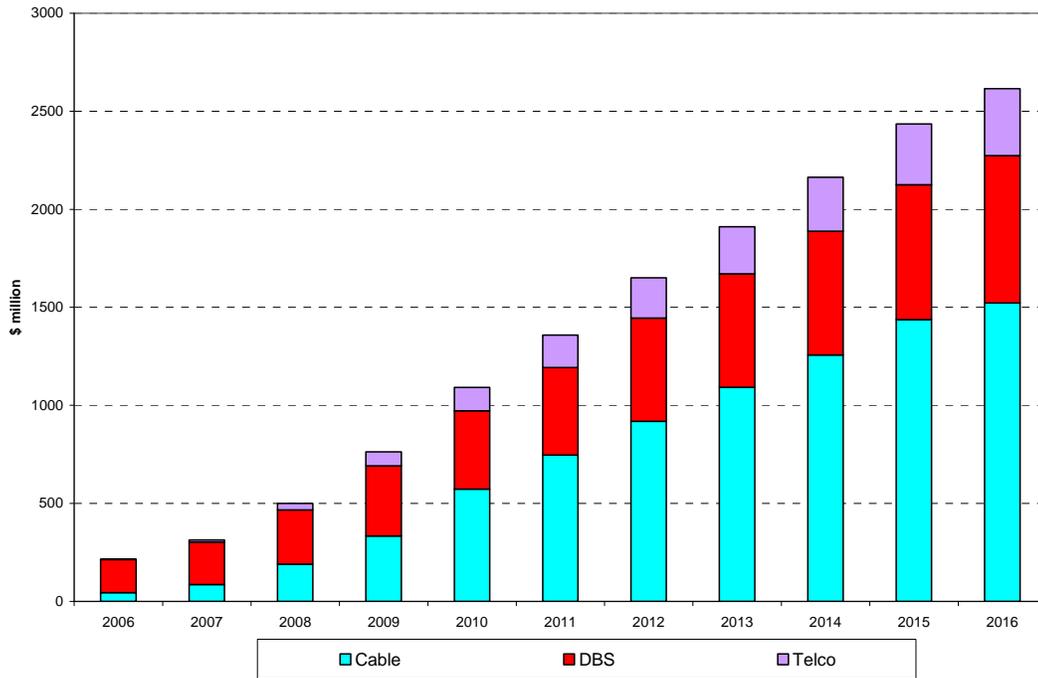
1. The expanded basic price is expressed as a per-subscriber, per-month and includes the buy through for the introductory basic package.
2. Expanded basic programming costs are expressed as per-subscriber, per-month and include retransmission consent fees for broadcast networks and affiliate fees for all major basic cable networks and some regional cable networks tracked by Kagan.

Sources: Commission's 2009 Annual Price Report; SNL Kagan, *TV Network Summary - Basic Cable* (downloaded on 05/14/2010); and SNL Kagan, *Media Trends, 2009*.

30. Figure 4 presents SNL Kagan projections of total RTC fees from 2006 to 2016. Over a period of five years, from 2006 to 2010, RTC fees paid by cable systems have increased from \$44.3 million in 2006 to \$572 million in 2010. Across all MVPDs, total RTC fees have increased from \$214.6 million in 2006 to \$1.1 billion in 2010. RTC fees are projected to grow to \$2.6 billion by 2016.³⁵

³⁵ These actual and projected fees do not take into account the value of cable services bundled with the broadcast station, or any higher fees on those services.

Figure 4: Projected Increase in Retransmission Consent Fees



Source: SNL Kagan, *Broadcast Retransmission Consent Fee Projection 2006-2016*.

31. According to Kagan, cable RTC cost increases are expected to come in part from an increase in the number of stations moving away from must-carry status to a retransmission consent regime, and in part from an increase in the per-subscriber, per-month payments from cable. (See Figure 5.) In 2006, only about 18% of cable subscribers were subject to RTC fees. This number was projected to rise to over 90% in 2010. By 2016, virtually all stations will invoke RTC, and virtually all (98%) of cable operator subscribers will be subject to RTC payments. In addition, in 2006, cable operators paid an average of \$0.32 per-subscriber, per-month on subscribers subject to retransmission consent. This number is projected to increase to \$0.84 per-subscriber, per-month in 2010, and it is expected to increase to \$2.17 per-subscriber, per-month, by 2016.

Figure 5: Cable Retransmission Consent Rollout and RTC Costs Per-Subscriber, Per Month for Cable Operators

Year	% Of Subscribers Subject to RTC	Monthly Per-Subscriber RTC Fee (\$)	Impact on Annual Expanded Basic Subscription Price, for Different Assumptions on Pass-Through (\$)		
			50%	75%	100%
2006	18	0.32	1.89	2.84	3.78
2007	25	0.44	2.64	3.96	5.28
2008	50	0.49	2.94	4.41	5.88
2009	80	0.55	3.31	4.97	6.62
2010	92	0.84	5.04	7.56	10.08
2011	95	1.07	6.44	9.65	12.87
2012	95	1.33	7.98	11.97	15.96
2013	96	1.58	9.45	14.18	18.90
2014	97	1.80	10.80	16.20	21.60
2015	98	2.04	12.24	18.36	24.48
2016	98	2.17	13.01	19.51	26.01

Source: SNL Kagan, *Broadcast Retransmission Fee Projections 2006-2016*.

32. Economic analysis clearly predicts that higher industry-wide marginal costs lead to higher prices, *ceteris paribus*. This positive relationship between industry-wide marginal costs and prices applies to most market and demand structures. It applies to “perfectly competitive” markets where price equals marginal costs. It also applies to “imperfectly competitive” markets where individual firms face somewhat inelastic demands and charge prices in excess of marginal costs. These “imperfectly competitive” markets include markets in which firms sell differentiated products, such as video program services.
33. The rate at which marginal cost increases are passed through to consumers in the form of higher prices depends on several factors, including the structure and elasticity of demand and supply in the downstream retail market. For example, if a firm faces a constant elasticity demand curve and a constant marginal cost (*i.e.*, if the demand elasticity and the marginal cost are invariant to the output level), then the pass-through rate of firm-specific marginal cost increases exceeds 100%. The exact pass-through rate will depend on the level of the demand elasticity.³⁶ If the firm instead

³⁶ For example, a 2001 Commission study estimated the cable TV demand elasticity to be about -2.0. *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, MM Docket No. 92-266, Released February 14, 2001 at ¶48. If that demand elasticity were the own-price elasticity faced by each MVPD in the current market, and if that

has a linear demand curve, then the pass-through rate varies between 50% and 100%, depending on the intensity of competition faced and whether the increase in marginal cost affects only that firm or the entire industry. In short, for firms like MVPDs selling differentiated products, the pass-through rate could be below 100%, equal to 100% or in excess of 100%, depending on the exact demand and cost structure, and whether or not the cost increases apply to all competitors.

34. Because video programming affiliate fees generally are set on a per-subscriber basis, a rise in video programming fees will entail an increase in the MVPDs' marginal costs. As a result, they would be expected to lead to an increase in subscription prices.³⁷ Figure 5 presents estimates of retail price increases associated with RTC fees paid by cable operators to the broadcasters. Assuming a pass-through rate of 100%, the RTC fees in 2006 would have been responsible for \$3.78 of a subscriber's annual cable bill. By 2010, RTC fees would be responsible for \$10.08 of a subscriber's annual bill, and by 2016, RTC fees would be responsible for \$26.01.

III. Economic Analysis of Brinkmanship and Its Asymmetric Harms

35. RTC fees are not determined in a posted price market. Instead, they generally are negotiated bilaterally between individual broadcasters (or broadcast groups) and individual MVPDs. This means that the economic analysis of RTC fee negotiations must also take into account the respective bargaining positions of the broadcaster and the MVPD and the use of brinkmanship tactics.

elasticity and the MVPDs' marginal costs were constant, then that would imply a pass-through rate of about 200%. Of course, the elasticity may have changed since that time in response to the dramatically growing importance of broadband and telephony offered by some MVPDs, as well as other factors. In another paper, Dr. Eisenach suggests that the market demand elasticity is less than unity. *Eisenach Reply to Compass Lexecon* at 16; and Austan Goolsbee and Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV*, 72 *Econometrica* 351 (2004).

³⁷ In a recent submission to the Commission, Dr. Jeffrey Eisenach concludes that though programming costs are rising, they are not responsible for cable price increases because programming costs are not rising relative to cable operators' revenues, profits, or other costs. *Eisenach Video Costs*. As we discuss in a separate paper, Dr. Eisenach's analysis fails to satisfy the economic principle of *ceteris paribus*. It also provides no relevant information on the impact of programming cost increases on retail prices because his methodology of comparing costs and revenues over time has only the loosest connection to this issue of causation. Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Video Program Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach*, June 1, 2010.

36. “Brinkmanship” is a term used to describe “the strategy of taking your opponent to the brink of disaster, and compelling him to pull back.”³⁸ As explained by Thomas Schelling in his classic analysis of strategy,

Brinkmanship is thus the deliberate creation of a recognizable risk of war, a risk that one does not completely control. It is the tactic of deliberately letting the situation get somewhat out hand, just because its being out of hand may be intolerable to the other party and force his accommodation.³⁹

37. The broadcasters’ brinkmanship behavior when bargaining with a MVPD about RTC fees involves various negotiating tactics, including blackouts and threatened blackouts. We also analyze the impact of associated behavior such as public announcements of impending blackouts, including aggressive publicity of blackout threats and broadcasters’ exhortations to consumers to switch MVPDs, perhaps even when the broadcaster has no expectation that a blackout will occur. As succinctly stated in a recent report by Bernstein Research on RTC negotiations, “[i]n the end, these disputes come down to a simple and brutal calculus. Who can cause whom the most pain?”⁴⁰ The broadcaster has bargaining advantages in the negotiation because the pain suffered by the MVPD from brinkmanship generally exceeds the pain suffered by the broadcaster.⁴¹ Because this brinkmanship behavior works to the

³⁸ Avinash Dixit and Barry Nalebuff, *Thinking Strategically, The Competitive Edge In Business, Politics, and Everyday Life*, 1991 (hereinafter, *Dixit and Nalebuff*) at 205.

³⁹ Thomas C. Schelling, *The Strategy of Conflict*, 1980 edition (hereinafter, *Schelling*) at 200.

⁴⁰ Bernstein Research, *U.S. Cable & Satellite Broadcasting & U.S. Media: Sizing Up the “Retrans” Battle Royal*, April 14, 2010 (hereinafter, *Bernstein Retrans Battle*) at 1. In their rough-and-ready empirical analysis, Bernstein Research focuses only on the respective share of “coverages” of the broadcaster and the MVPD at the national level, that is, the percentage of MVPD subscribers who receive the local stations owned by the broadcaster (*i.e.*, network or station group) versus a proxy for the percentage of the broadcaster’s viewers accounted for by the MSO MVPD’s various systems. This coverage measure does not take into account the relative pain that each side can cause in particular local areas, which also depends crucially on the intensity of MVPD competition in the local area and the extent to which the broadcaster’s content is “must-have.” Nor does the Bernstein Research measure take into account the possibility that broadcasters in the same television market may jointly negotiate RTC deals as a result of various kinds of sharing agreements. In addition, the report fails to account for the possibility that the broadcast network will engage in tying of its O&O stations and its cable networks, though Bernstein does recognize the potential for tying. *Id.* at 4.

⁴¹ MVPDs can also engage in brinkmanship or resist the broadcaster’s tactics, which is another reason why temporary blackouts occur. But in the brinkmanship battle over RTC fee negotiations, the broadcasters have the upper hand. When MVPDs have the upper hand, broadcasters can protect themselves by opting for must-carry status. Moreover, even if they do not, the interim carriage remedy that has been proposed would protect vulnerable broadcasters from MVPD blackout threats as well as vice versa.

disadvantage of MVPDs, it leads to the broadcaster being able to negotiate higher RTC fees.

38. The overarching reason for the differential pain is the expectation that a temporary blackout of a broadcast station from a MVPD (and the announcement well in advance of an impending temporary blackout) can cause a substantial number of subscribers to migrate away from the targeted MVPD to competing MVPDs. New potential subscribers similarly may choose another MVPD. These subscriber shifts reduce the MVPD's profits but increase the broadcaster's because the broadcaster earns revenue from subscribers who switch to other MVPDs.⁴² This means that the subscriber shifts reduce the value of the MVPD's next-best alternative while they increase the broadcaster's. The broadcaster's revenue falls when the blackout begins, then it increases gradually as subscribers switch to other MVPDs, and eventually it returns to about its initial level when the blackout is ended.
39. As discussed in detail in Section IV below, the subscriber shifts can be substantial because of the must-have nature of broadcast programming, increasing MVPD competition, broadcast network tying, and certain coordinated negotiation agreements among the broadcasters. Subscribers are more willing to shift to retain access to must-have programming. If the broadcast network ties MVPD access to its cable networks with either RTC for its O&Os or RTC for its affiliates' local stations, so that a blackout entails the loss of more content, that tying also will lead to more subscriber shifts, higher RTC fees, and higher retail subscription prices. The same analysis would apply to local market agreements ("LMAs") that bundle the RTC rights for multiple local stations. The existence of MVPD competition enhances MVPD subscriber losses because the dissatisfied subscribers obviously then have compelling alternatives in the event of a blackout or a blackout threat.
40. Before discussing those economic factors in detail in Section IV, we set out the bargaining analysis in which these factors are embedded.

⁴² The broadcaster could earn a lower or higher RTC fee from the other MVPDs, but either way – unlike the MVPD – it recovers substantial advertising and RTC fee revenue when subscribers switch to new MVPDs.

A. Basic Economic Framework

41. In any negotiation, there is a concern that negotiations will be broken off and the parties will fail to reach an agreement. If this occurs, the parties collectively will lose out on the mutual benefits that an agreement would entail. Economic models of bargaining sometimes refer to the “bargaining surplus” as the mutual gains from an agreement, that is, the difference between the values obtained from agreement and the values obtained from each party’s next-best alternative. Fisher and Ury have referred to this next-best alternative as the “best alternative to the negotiated agreement” (“BATNA”).⁴³
42. It is generally in the interests of the parties to reach an agreement quickly. There are various sources of this time pressure. First, a faster agreement may allow the parties to begin to achieve mutual benefits as quickly as possible. Second, negotiations are costly. They use up the time and attention of the parties. Third, bargaining delays may reduce the bargaining surplus, particularly if viewers or advertisers substitute away from the MVPD or the station. Fourth, bargaining delays may increase the likelihood that the negotiations will break down and the parties will fail to ever reach an agreement. This might be the result of changing circumstances that evolve as negotiations ensue or even may be caused by the negotiation delays. This process was illustrated by Dixit and Nalebuff in the context of a wage negotiation between a labor union and firm:

Before an old contract expires, the union and the firm begin the negotiations for a new labor contract. But there is no sense of urgency during this period. Work goes on, no output is sacrificed, and there is no apparent advantage to achieving an agreement sooner rather than later. It would seem that each party should wait until the last moment and state its demand just as the old contract is about to expire and a strike looms. That does happen sometimes, but often an agreement is reached much sooner. In fact, delaying agreement can be costly even during the tranquil phase when the old contract still operates. The process of negotiation has its own risk. There can be misperception of the other side’s impatience or outside opportunities, tension, personality clashes, and suspicion that the other side is not

⁴³ Roger Fisher and William Ury, *Getting To Yes: Negotiating Agreement Without Giving In*, 1981, at 100.

bargaining in good faith. The process may break down despite the fact that both parties want it to succeed.⁴⁴

43. The fact that bargaining delay is costly and can ultimately lead to the failure to ever reach an efficient, mutually beneficial agreement is a reason for the parties to reach an agreement quickly. But, it does not explain how the fruits of the agreement would be divided up. Economic models of bargaining suggest that the party with less to lose from failure to reach an agreement will do better, in the sense of achieving a higher share of the joint returns. For example, suppose that an agreement would lead to party-A obtaining a value of 100 and party-B also obtaining a value of 100, for a joint value of 200. One might expect that these identical benefits would lead the parties to reach agreement with no need for any payments from one side to the other. However, that expectation ignores the impact on the parties of a failure to reach an agreement.
44. The returns that accrue to each side in the event that no final agreement is reached (*i.e.*, their BATNAs) are an important determinant of the outcome of the negotiations. For example, suppose that if the parties fail to reach an agreement, their respective BATNAs would be 50 for party-A and 10 for party-B, a collective value of 60. That is, suppose that party-A can earn 50 in the absence of the agreement (*e.g.*, on its own or through an agreement with another party) versus 100 from the agreement, while party-B can earn only 10 in the absence of the agreement. In this case, the bargaining surplus is 140 (*i.e.*, 200-60), *i.e.*, the *additional value* the parties jointly would obtain over and above their BATNAs. If the parties' respective costs of delaying the achievement of the agreement are symmetric, economic models would predict that they would split the bargaining surplus equally, or 70 each in this example.⁴⁵ But, that equal division of the surplus would mean that party-A would end up with a value

⁴⁴ Dixit and Nalebuff at 292.

⁴⁵ John F. Nash, *The Bargaining Problem*, 18 *Econometrica* 155 (1950); John F. Nash, *Two-Person Cooperative Games*, 21 *Econometrica* 128 (1953); Binmore, K., A. Rubinstein and A. Wolinsky, *The Nash Bargaining Solution in Economic Modelling*, 17 *Rand Journal of Economics* 176 (1986). Typical costs of delay include negotiation costs, the preference for obtaining the value from the agreement more quickly, and the risk that a delay may lead to a breakdown of the negotiations. Blackouts create additional delay costs and are more complex because those additional delay costs to MVPDs also contribute incremental benefits to broadcasters. Blackouts also reduce the benefits from reaching an agreement when a blackout occurs. Public announcements of blackout threats raise additional complexities, as discussed in more detail below.

of 120 (*i.e.*, 50+70) and party-B would end up with a value of 80 (*i.e.*, 10+70). This division thus would entail party-B making a payment of 20 to party-A. Thus, party-A would end up with 120 (*i.e.*, 100+20) and party-B would end up with 80 (*i.e.*, 100-20). In this example, Party-A has greater bargaining leverage.⁴⁶ This is because it has better alternatives outside the relationship than does party-B.⁴⁷ This difference in the gains from an agreement makes party-B more anxious to reach an agreement than party-A. At the same time, both parties implicitly have symmetric time pressure to reach an agreement quickly.⁴⁸

45. This analysis can be applied to the RTC negotiations between a MVPD and a broadcaster. If the parties reach a carriage agreement, they will achieve mutual benefits over and above what they each would achieve if they fail to reach an agreement. The MVPD will retain more subscribers because the failure to carry a broadcast station will cause a certain fraction of its subscribers to choose a different MVPD instead, or possibly even revert to over-the-air TV. The MVPD also will attract more new subscribers who would not choose a MVPD that carries only some of the broadcast stations. The broadcaster benefits from the agreement by obtaining advertising revenue from those subscribers who would not leave the MVPD even if it did not carry the station's signal. The RTC fee then represents a mechanism for

⁴⁶ As conceptualized by James Freund, leverage involves the following four general factors: the parties' relative *necessity* and *desire* for the agreement, *competition* from other buyers and sellers, and the *time pressure* that each party faces. James C. Freund, *Smart Negotiating*, 1992 at 42-45. In this paper, we use the terms bargaining "advantage," superior bargaining "position," and bargaining "leverage" in a similar way. There is also the term bargaining "power." Some bargaining theorists and practitioners (economists and others) draw distinctions among these terms. However, there is no general consensus on terminology.

⁴⁷ More generally, the party with the greater bargaining leverage is the party with less to lose from failure to reach an agreement. In the example, it is the party with the higher BATNA because the example assumes that each party obtains equal value (*i.e.*, 100) from the agreement .

⁴⁸ Professors Dixit and Nalebuff illustrate the sharing of the bargaining surplus with an example of the negotiations between the owners of a hotel and its workers. *Dixit and Nalebuff* at 287-290. To change their setting slightly, consider the salary negotiations between the owners of the baseball teams and the baseball players. Each game delivers profits of 1000 that will be lost if there is a strike and the game is not played. In that situation, the bargaining equilibrium involves an equal sharing of the 1000 bargaining surplus. Thus, the players and the owners each would obtain 500 per game. However, the bargaining outcome changes when the players have an opportunity to earn some income during the strike. For example, suppose that the players can earn 300 per game-day signing autographs, if there is no game. In that scenario, the bargaining surplus is only 700 (*i.e.*, 1000 – 300). When this bargaining surplus is split equally, the players get 350, which leads to them to increase their value to 650 (*i.e.*, 350 + 300) per game, while the owners' share falls to 350 per game.

transferring bargaining surplus from the MVPD to the broadcaster. Thus, a higher RTC fee will transfer more of the surplus to the broadcaster.

46. In RTC negotiations, the transfer of bargaining surplus can go in only one direction. If the broadcaster anticipates that it would have to transfer part of its value to a cable MVPD (say, because the broadcaster has a low BATNA and stands to lose more than the MVPD from failure to reach an agreement), then the broadcaster can opt for *must-carry* status rather than enter into any negotiations. In that situation, the cable MVPD has no choice but to carry the broadcast station on the basic tier even absent any payment. The fact that a higher percentage of broadcasters have opted out of must-carry in favor of the RTC regime is compelling evidence that almost all broadcasters are in a stronger bargaining position than the MVPD, and this position has been improving over time.
47. In light of the increasing MVPD competition, the bargaining advantage of the broadcasters is no surprise. If a larger number of actual or potential subscribers would choose other MVPDs in the event that a carriage agreement is not reached, the broadcaster will gain further leverage over the MVPD; the MVPD has more to lose (and the broadcaster has less to lose) from failure to reach a carriage agreement. As a result, the analysis suggests that the bargaining process will lead to a higher RTC fee. It also would not be a surprise to find higher programming fees for *must-have* programming. A MVPD would be willing to pay a higher fee to avoid the loss of programming that would induce more subscribers to choose other MVPDs instead.
48. One difference between the numerical bargaining illustration in ¶44 and actual RTC negotiations is that the RTC fee is not a lump sum payment, as in the example. Instead, it is typically structured as a per-subscriber fee.⁴⁹ This per-subscriber

⁴⁹ Negotiations involving lump sum payments are somewhat simpler to analyze than per-unit payments because per-unit payments are passed through to downstream consumers. Thus, it is common for discussions of bargaining to focus on the simpler case, while noting that the pass-through occurs for per-unit payments.

structure of the RTC fee means that it likely will be passed through to the subscribers of the MVPD in the form of a higher subscription price.⁵⁰

49. Another key difference between the numerical example and actual RTC negotiations involves the potential for temporary blackouts and other brinkmanship conduct.⁵¹ The potential for brinkmanship and its associated harms to the broadcaster and the MVPD can have a significant effect on the division of the surplus. This is because the losses suffered by the MVPD from this behavior tend to exceed the losses suffered by the broadcaster, so that the MVPD faces greater time pressure to reach a quick settlement.
50. Temporary blackouts are not an inevitable feature of negotiations. Suppose that a broadcaster and a MVPD fail to reach mutually satisfactory terms for a renewal agreement by the date of the contract expiration. At that point (or earlier, perhaps as part of the previous agreement), they could strike a voluntary interim carriage agreement, by which the broadcaster's station would continue to be carried by the MVPD, pending the parties reaching a final agreement or breaking off negotiations. Once the final agreement is reached, the agreed-upon RTC fee could be applied retroactively to the interim period. The interim carriage agreement also could specify a retroactive fee if the negotiations are terminated without an agreement. Such an interim carriage agreement thus would avoid the asymmetric time pressure, as well as the consumer harm, caused by blackouts and blackout threats.

B. Asymmetric Harms from Blackouts

51. We now turn to the issue of blackouts and brinkmanship threats. Because of mutual harms from a temporary blackout, one might expect the parties always would agree to interim carriage pending a final renewal agreement, or always reach agreement before the contract expires. However, even though blackouts are harmful to the broadcaster

⁵⁰ We discussed this pass-through in more detail above. The pass-through rate may be less or greater than 100%. Note also that the anticipation of pass-through of the RTC fee can affect the size of the bargaining surplus, the division of the surplus, and hence the level of the RTC fee.

⁵¹ As mentioned above, the only implicit costs of delay in the example typically would be the failure to achieve the benefits sooner, the time and cost of negotiation, and the possibility that the delay would lead to a breakdown in negotiations.

as well as the MVPD, blackouts nonetheless do occur sometimes. In addition, broadcasters might make blackout threats in public announcements well in advance of the contract expiration date, as well as advertising to consumers to switch MVPDs, perhaps even where a blackout is highly unlikely.

52. There are several reasons why a broadcaster might make blackout threats and even institute blackouts. First, the willingness to allow a blackout to occur is an essential component of brinkmanship. Without this willingness to pull the trigger, the threats would lose their credibility with MVPDs.⁵² The film, *The Maltese Falcon*, contains a classic dialogue about this view of brinkmanship.⁵³

Spade: If you kill me, how are you gonna get the bird? And if I know you can't afford to kill me, how are you gonna scare me into giving it to you?

Gutman: Well, sir, there are other means of persuasion besides killing and threatening to kill.

Spade: Yes, that's, that's true. But – they're none of 'em any good unless the threat of death is behind them – do you see what I mean? If you start something, I'll make it a matter of your having to kill me or call it off.

Gutman: (chuckling) That's an attitude, sir, that calls for the most delicate judgment on both sides. 'Cause as you know, sir, in the heat of action, men are likely to forget where their best interests lie and that their emotions carry them away.

Spade: Then the trick from my angle is to make my play strong enough to tie you up, but not make you mad enough to bump me off against your better judgment.

Gutman: By gad, sir, you *are* a character.

53. Second, blackouts and related brinkmanship tactics increase the pressure on the MVPD to accept a less favorable offer in this negotiation.⁵⁴ This conduct would lead

⁵² The analysis of credibility here is more complicated because it also involves the beliefs of the subscribers. Even if the MVPDs were to understand that the threats would not be carried out, the threats could still cause subscribers to switch MVPDs, if the subscribers erroneously continue to fear the blackouts. If so, then even such non-credible threats would place pressure on the MVPDs to settle, even at a higher RTC fee.

⁵³ *The Maltese Falcon* (1941). The script is available at <http://www.filmsite.org/malt3.html>.

⁵⁴ The baseball negotiation example we presented above can be rephrased in terms of time pressure. In their example, a strike is threatened to begin when there are four games left in the season. The players'

to more and faster subscriber shifts. In addition, these public announcements also likely harm the MVPD at little cost to the broadcaster. Thus, the fear of such a public announcement would cause the MVPD to settle faster, even at a higher RTC fee.

54. Third, carrying out blackout threats can have reputational benefits. They signal the broadcaster's willingness to play hard ball. Earning a reputation for aggressive behavior can pay off in terms of higher RTC fees obtained from other MVPDs.⁵⁵
55. Fourth, blackouts might be caused by miscalculation about the other side's costs and benefits. But, regardless of the exact cause, a temporary blackout itself serves a strategic purpose. It involves a further threat – a threat that no final carriage agreement may ever be achieved, to the detriment of both parties.⁵⁶ That threat also can lead the MVPD to settle for a higher RTC fee.
56. Drs. Eisenach and Caves claim that only a small fraction of total viewer minutes have been affected by service disruptions and so, in effect, the question of blackouts in this view is nothing more than a tempest in a teapot.⁵⁷ But as the discussion above makes clear, the frequency of the actual blackouts is not essential to the effects on the

ability to earn 300 per game-day signing autographs means that they face less time pressure to settle the strike than do the owners. As a result of the greater time pressure on the owners, the owners are willing to settle on terms that are more favorable to the players – 650 for the players and 350 for the owners per game.

This same analysis applies when the time pressure involves an increased cost of delay rather than a reduced cost. For example, suppose that the players do not have the ability to sign autographs, but the owners have to pay their lawyers 200 per game to negotiate with the players, whereas the players' lawyers charge nothing. In this scenario, there is more pressure on the owners to settle quickly because they have to bear the legal fees. The bargaining surplus from reaching a settlement now increases to 1200 (*i.e.*, 1000 +200). If that surplus is split 600 each, the players end up with 600 per game and the owners end up with 400. This example also isolates the issue of "time pressure" as separate from the "underlying value" of making a deal. The "underlying value" is the 1000 from avoiding the strike. The time pressure is the 200 in legal fees.

⁵⁵ A MVPD can gain reputational benefits too. However, the cost is higher to the MVPD because of the effect of blackouts on the behavior of potential subscribers and current subscribers who may leave in anticipation. As discussed below, a broadcaster also may have greater "staying power" to maintain a blackout longer.

⁵⁶ A temporary blackout is analogous to a limited war, whereas a failure to reach a final carriage agreement is analogous to an all-out war. As Schelling explains, "[t]he danger of all-out war is almost certainly increased by the occurrence of a limited war. ... [T]he threat to engage in a limited war has two parts. One is the threat to inflict costs directly on the other side. ... The second is the threat to expose the other party, together with one's self, to a heightened risk of general war." *Schelling* at 190-91.

⁵⁷ *Eisenach Reply to Compass Lexecon* at 18-20.

bargaining outcome.⁵⁸ The blackout threats and the associated brinkmanship tactics can result in MVPDs and their subscribers paying higher prices as a result of the broadcasters' use of these brinkmanship tactics – even if few blackouts ever occur.

57. The potential for blackouts advantages the broadcaster, relative to the situation where there is an interim carriage agreement. The combination of blackouts, public blackout threats and associated brinkmanship tactics cause more harm to the MVPD than the broadcaster. As a result, the MVPD faces more risk from holding out for a more favorable RTC fee than does the broadcaster.
58. These differential harms have increased along with the expansion of MVPD competition in recent years. The MVPD is harmed by an actual or threatened temporary blackout because of (current and potential) subscribers' ability and willingness to switch MVPDs in order to maintain access to the broadcaster's content. Subscriber switching also may entail the loss of broadband and/or telephony revenue for those departing subscribers who opted for broadband and/or voice in addition to video. Therefore, the harm to the MVPD from a blackout can be very large, even if the number of subscribers who would switch MVPDs in response to a temporary blackout is relatively small. The more subscribers that switch to a competing MVPD, the lower are the losses suffered by the broadcasters and the greater the losses suffered by the MVPD. For the same reason, the loss of must-have programming would lead to greater subscriber losses, as would the loss of multiple program services (as in the case of tying or LMAs). In contrast, the broadcasters gain back advertising and affiliate revenue when more subscribers shift MVPDs.
59. Although both parties suffer interim losses from a temporary blackout, the MVPD's losses are more long-lived whereas the broadcaster's losses are more temporary. The broadcaster's advertising and fee revenue returns when the blackout ends, whereas the MVPD's lost subscribers do not, except perhaps over a long period of time. Subscribers who switch to DBS or one of the Telcos often are required to sign

⁵⁸ No one would claim that the threat of nuclear warfare has been irrelevant because nuclear weapons have never been used in the past 60 years since World War II. It is the fear of their use that makes them relevant, and also which makes them unnecessary to use.

contracts committing them to purchase the services of the MVPD for some set period of time (or incur substantial cancellation penalties).

60. A blackout in principle also could lead to a permanent loss of some of the broadcaster's viewers, if viewing habits and viewer loyalty change permanently. However, there is no evidence that this is a significant factor; viewers generally return to their favorite network programs and local news shows when the blackout ends. As observed in a recent Bernstein Research report, "For a broadcaster, distribution snaps back as soon as the dispute is over. For a distributor, customers lost are likely lost for good."⁵⁹
61. If subscribers were confident that a blackout would be very short-lived, more subscribers likely would decide to wait it out. However, a strategically timed blackout might increase the amount of switching. Thus, it is no surprise that blackouts are threatened around the time of important media events such as the New Year's Day Bowl games or the Academy Awards.
62. Moreover, the mere anticipation of a potential blackout can cause some potential subscribers to choose another MVPD instead and current subscribers to switch preemptively to a different MVPD. These harms from a threatened blackout are borne entirely by the MVPD. The broadcaster bears little or no harm unless there is an actual blackout. This asymmetry increases the broadcaster's bargaining advantage.⁶⁰
63. Threatened or actual blackouts also may lead subscribers to be concerned that blackouts will be recurring events in the future. If these fears lead subscribers to switch to other MVPDs that carry the broadcaster's content, this effect also will be a harm suffered by the MVPD that does not cause a correspondingly large harm to the

⁵⁹ *Bernstein Retrans Battle* at 3.

⁶⁰ Dr. Eisenach suggests that program suppliers generally are harmed relatively more from such blackouts. He quotes a 2006 report from Bernstein Research that the programmer's advertising revenues are reduced immediately while the MVPD's subscribers leave slowly. *Eisenach Video Costs* at notes 41-42. This analysis ignores the fact that some subscribers may preemptively switch MVPDs in anticipation of a blackout instituted by a broadcaster and other potential subscribers may choose a different MVPD. It also misses the point that the broadcaster's advertising revenue returns quickly when the blackout ends, but most of the subscribers that switch MVPDs never return, or only return after a long lag, as recognized in the more recent Bernstein Research report quoted above.

broadcaster. In fact, even if the consumer does not switch in response to a blackout (or threat of a blackout), the MVPD may be harmed by a weakening of its relationship with its subscribers.

64. A larger adverse impact of a blackout on the profits of the MVPD improves the broadcaster's bargaining position, as compared to the situation where there is an interim carriage agreement. If there is interim carriage, the relative negotiation costs from delaying agreement for the broadcaster and the MVPD are likely to be fairly similar.⁶¹ In contrast, when blackouts accompany the negotiations, the MVPD loses subscribers to other MVPDs, an effect that is very long term, whereas the broadcaster's loss in advertising and RTC fees are just temporary. This asymmetry in harms from a blackout makes it more costly for the MVPD to hold out for better contract terms. Every additional day of negotiations leads to additional subscriber losses, and thus the MVPD is more willing to make more concessions to avoid a temporary blackout, relative to the situation where there is an interim carriage agreement.
65. The structure of the relative revenue losses over time from blackouts also increases the broadcaster's bargaining position. A broadcaster suffers its greatest harm from a blackout immediately when it is instituted. At the very start of a blackout, it is possible that the broadcaster's initial losses are larger than the MVPD's, since it loses all of the advertising revenue and affiliate fees generated by the MVPD subscribers that did not switch MVPDs in advance.⁶² However, the MVPD's losses then grow over time as more subscribers leave (and fewer new subscribers sign up), whereas the broadcaster's losses decline over time as subscribers move to other MVPDs that carry the broadcaster's station. This enhances the broadcaster's ability to hold out longer, once a blackout is instituted. This greater staying power can provide a further bargaining advantage to the broadcaster.

⁶¹ When the parties incur positive costs from delaying agreement, they have an incentive to reach agreement quickly.

⁶² Of course, if there has been a previous public announcement of a possible blackout, subscribers will have already begun to migrate, which inflicts a cost on the MVPD but not the broadcaster.

C. Asymmetric Harms from Public Blackout Threats

66. Public announcements of potential blackouts (particularly if well in advance) may enable the broadcaster to negotiate an even higher fee.⁶³ For example, suppose that a broadcaster threatens the MVPD that it will issue and publicize a press release warning of a possible blackout well in advance of the contract expiration date unless the broadcaster immediately accepts the RTC terms demanded. If carried out, that type of threat would lead to more and faster subscriber switching to other MVPDs, and hence would inflict a greater cost on the MVPD.
67. The threat of such a public announcement is clearly credible because a public announcement would cost the broadcaster virtually nothing. However, the public announcement would harm the MVPD even if the blackout is averted.⁶⁴ Because of these highly asymmetric harms of the public announcement, the broadcaster's credible threat to do so increases the broadcaster's bargaining advantage.⁶⁵ As a result, the MVPD would be willing to pay a higher RTC fee in order to avoid having the broadcaster make such an advance public announcement, in addition to the extra amount the MVPD would be willing to pay to avoid the blackout itself.

⁶³ We understand that the FCC requires that subscribers are given some advance notice in some circumstances. We also appreciate that subscribers gain a benefit from advance notice that a blackout will occur. The focus of our analysis involves the implications of these announcements on broadcasters' bargaining leverage and the resulting impact on RTC fees. In this regard, a required announcement would have the same effect as would a strategic announcement by the broadcaster. Both would increase the broadcaster's bargaining advantage. Of course, the broadcaster can magnify this effect by making the announcement further in advance, by giving the announcement greater publicity, or by combining the announcement with advertising or other tactics to induce more and more rapid subscriber shifting. The broadcaster also could carry out these tactics even if it felt that there was no likelihood that a blackout would actually occur.

⁶⁴ Of course, the broadcaster must be willing to carry out the threat (that is, to institute a blackout if its demands are not met) or it will lose credibility in the future. But, even if that blackout threat itself is not credible to the MVPD, it may still create (erroneous) anxiety among subscribers, resulting in subscriber shifts to other MVPDs, which would harm the MVPD. Thus, the threat of a public announcement would remain credible.

⁶⁵ A blackout would harm the broadcaster in the short-run but the threat of a blackout nonetheless may be credible because a blackout also would have longer-term reputational benefits for the broadcaster. Even if the strict requirements for credibility are not satisfied, the broadcaster can overcome the MVPD's doubts by actually instituting the blackout. In the case of broadcaster/MVPD negotiations, a broadcaster's investment in credibility likely would have a substantial payoff because the MVPD suffers much higher costs from a blackout.

68. Of course, a broadcaster can increase the magnitude of the subscriber switches by advertising that urges viewers to switch MVPDs or by giving advance notice to a competing MVPD to exploit the situation by making a special offer to new subscribers that switch. A broadcaster also can (and sometimes does) enhance the magnitude of its bargaining advantage by threatening to institute the blackout at a key time such as on New Year's Day or the Super Bowl. That timing likely would lead to more subscriber losses by the MVPD.
69. Because of Commission rules, the MVPDs do not appear to have similarly powerful threats to use as negotiation counterstrategies. For example, one possible counterstrategy would be for the MVPD to threaten the broadcaster that it would blackout the station during one of the Nielsen Sweeps months. This could be a powerful tactic because it would significantly increase the harms suffered by the broadcaster. However, Commission rulings now prohibit such a threat.⁶⁶ Another possible counterstrategy is for the MVPD to move the broadcast station to an optional tier or sell the station to subscribers on an a la carte basis to make the RTC fee increase transparent to consumers. But Commission rules generally restrict the ability of cable operators to offer broadcast stations on an optional tier or on an a la carte basis.⁶⁷ In addition, importing a distant broadcast station as a substitute for the local station is not an available strategy for the MVPD. Such importation is effectively prohibited by the Commission's network non-duplication rules and its syndicated exclusivity rules.⁶⁸

IV. Factors that Contribute to Broadcasters' Advantaged Bargaining Position

70. It is not inevitable as a theoretical matter that the harms suffered by the MVPDs from brinkmanship conduct must exceed the harms suffered by the broadcasters. That

⁶⁶ See 47 C.F.R. § 76.1601 ("No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations. For this purpose, such periods are the four national four-week ratings periods – generally including February, May, July and November – commonly known as audience sweeps.").

⁶⁷ See generally 47 U.S.C. §543(b)(7)(A).

⁶⁸ 47 C.F.R. §§ 76.92-95 and §§ 101-110.

result depends significantly on the fraction of subscribers that would switch in response to the brinkmanship. The fraction of at-risk subscribers and the asymmetry of the harms from brinkmanship are affected by a number of economic factors that may provide bargaining advantages to the broadcasters. These factors include the following: (a) product differentiation and the “must-have” nature of broadcast network programming; (b) increasing MVPD competition; (c) broadcast network tying; and (d) broadcasters’ coordinated negotiation agreements. We next discuss these four factors.⁶⁹

A. Product Differentiation and “Must-Have” Broadcast Network Programming

71. A key bargaining advantage of the broadcasters stems from their ownership of broadcast and cable program services that are highly differentiated and considered “must-have” by many MVPDs and their subscribers. As several Commission economists have stated, “not all networks are created equal – they are highly differentiated, and some lack close substitutes in the eyes of consumers and consequently in the eyes of cable and satellite providers.”⁷⁰ In its order approving the merger of News Corp. and DIRECTV, the Commission similarly concluded that News Corp. had “market power” stemming from its FOX content – noting that “the signals of local television broadcast stations are without close substitutes.”⁷¹
72. Because program services are highly differentiated products, they likely have prices in excess of marginal cost.⁷² For example, the per-subscriber monthly affiliate fees for the program services span a broad range, suggesting a distinct lack of

⁶⁹ Other relevant factors are the RTC fees paid by competing MVPDs, the MVPD’s price/cost margin, the broadcaster’s advertising revenue per subscriber and marginal cost, and the geographic “reach premium” for advertising.

⁷⁰ Evan Kwerel, Jonathan Levy, Chuck Needy, Martin Perry, Mark Uretsky, Tracy Waldon and John Williams, *Economic Analysis at the Federal Communications Commission*, Review of Industrial Organization (2004) at 405-6.

⁷¹ *Hughes News Order* at ¶202.

⁷² Most program services have gross margins approaching 100% because their marginal cost of expanding distribution to additional subscribers is zero, unless the content providers obtain a per subscriber payment. Indeed, some services may have *negative* marginal costs in the case of programming that contains advertising. Of course, we do not suggest that marginal cost pricing would be a sustainable market equilibrium in a market with high fixed costs.

homogeneity. For example, according to SNL Kagan, the per-subscriber monthly fee paid by the MVPD for ESPN/ESPN HD is \$4.08, whereas the fee for Fox News is \$0.58, the fee for Nickelodeon/Nick At Nite is \$0.44, and the fee for the History Channel is \$0.22.⁷³ Product differentiation means that some of these services likely have the power to raise price substantially above marginal costs without fear that the MVPD would stop carrying them.

73. Product differentiation also may be sufficient to imply narrow antitrust markets. As stated in the newly proposed Merger Guidelines,

Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes. As a result, properly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers.⁷⁴

74. For example, a small but significant, non-transitory increase in the price of all sports programming likely would not be defeated as a result of MVPDs making a major switch to children's program services and other alternatives. It also is questionable whether a small but significant, non-transitory increase in the RTC fees of all the broadcasters in a television DMA would be defeated by MVPDs' price sensitivity. Given this substantial product differentiation, a focus solely on market shares and concentration in a broad all-programming market to gauge the degree of competition would be both superficial and inappropriate.
75. The fact that the program services are differentiated also calls into question the way in which Dr. Eisenach measured market shares to reach his conclusion that the "concentration of network ownership is low by traditional antitrust standards."⁷⁵ First, when products are differentiated, the relevant markets may be narrowed, and each of the large program suppliers (*e.g.*, ABC and FOX) may have a larger share of one or more narrower markets. Second, Dr. Eisenach's share calculations and

⁷³ SNL Kagan, *Basic & HD Cable Network Economics*, 2009..

⁷⁴ *Proposed Merger Guidelines* at §4.

⁷⁵ *Eisenach Video Costs* at ¶42.

associated HHI calculations are based on prime-time viewer ratings.⁷⁶ However, market shares for differentiated products normally are based on a measure of revenues, not volume.⁷⁷ Partial ownership interests, which are common among program services, also complicate the calculation of market shares and concentration, and likely would lead to higher effective market shares and modified concentration indices.⁷⁸

76. Some of the differentiated program services are so highly valued that the Commission and others have characterized them as being “must-have,” regardless of the total number of programming networks available or their ratings.⁷⁹ In its order approving the News Corp.’s acquisition of a financial interest in DIRECTV, for example, the Commission noted that “Congress had recognized the importance of local television broadcast signals not only as providers of a valuable public service, but as ‘must-have programming’ critical to a DBS offering.”⁸⁰
77. The importance of broadcast programming also has been recognized by industry analysts and other researchers. For example, a recent trade press report noted that “[a]nalysts say the Big Four network affiliates are in the best position to negotiate sizeable fees, given that they have highly watched network programs and also tend to have strong local news. Broadcasters with popular local sports also have leverage, as do those with basic cable networks as corporate siblings.”⁸¹ This “must-have” characterization apparently is embraced by the programmers as well. In November

⁷⁶ *Eisenach Video Costs* Table 2 at 25.

⁷⁷ Horizontal Merger Guidelines, For Public Comment, April 20, 2010 (hereinafter, *Proposed Merger Guidelines*) at §5.2 (“revenues in the relevant market tend to be the best measure of attractiveness to customers”) This is not a new idea. According to the 1992 Horizontal Merger Guidelines, “[m]arket shares will be calculated using the best indicator of firms’ future competitive significance. Dollar sales or shipments generally will be used if firms are distinguished primarily by differentiation of their products.” See 1992 Horizontal Merger Guidelines at §1.41.

⁷⁸ For example, see 47 C.F.R. §76.503 (“ownership attribution rules”). See also Daniel O’Brien and Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 *Antitrust L.J.* 559 (2000).

⁷⁹ *Review of the Commission’s Program Access Rules and Examination of Program Tying Arrangements, First Report and Order* (2010), 25 FCC Rcd 746 at ¶34.

⁸⁰ *Hughes News Order* at ¶48.

⁸¹ Robert Marich, *Broadcast’s \$1 Billion Pot of Gold*, *Broadcasting & Cable*, July 6, 2008, accessed at http://www.broadcastingcable.com/article/114424-Broadcast_s_1_Billion_Pot_of_Gold.php.

2009, Time Warner Inc. Chairman and CEO Jeff Bewkes stated the importance of MVPD competition for “must-have” networks as follows: “We think the big *must-have*, big reach networks will gain bargaining leverage in the coming years,” as distributors “are essentially competing with ever more distribution choices -- telcos, cable, satellite and broadband.”⁸²

78. A recent J.P. Morgan survey asked subscribers about their likelihood of switching MVPDs, if their current MVPD stopped carrying certain services.⁸³ The results of this survey, reported in Figure 6 below, also are consistent with the Commission’s characterization. More than half of all surveyed subscribers indicated that they would switch MVPDs if any one of the “Big 4” broadcast networks (ABC, CBS, FOX or NBC) were unavailable to them. Ten other cable program services had the property that more than 30% of the respondents reported that the absence of any one would cause them to switch MVPDs. It would be a reasonable inference that these providers would have the dominant bargaining advantage when negotiating carriage fees.⁸⁴

⁸² Mike Farrell, *Bewkes: Retrans Could Hurt Smaller Channels*, Multichannel News, November 4, 2009 (emphasis added).

⁸³ J.P. Morgan, *J.P. Morgan Consumer Survey: Identifying “Must Carry” Networks And Consumer Appetite For Channels A La Carte*, April 20, 2010 (hereinafter, *J.P. Morgan Must-Carry Survey*). As a survey of consumer attitudes rather than a natural experiment, these percentages may overstate the fraction of subscribers that actually would switch in response to a temporary blackout. In addition, the survey question did not distinguish between a short and long-term blackout. Even so, the survey results indicate differences in the relative importance to consumers of various services. They also seem indicative of a strong consumer preference that could translate into substantial subscriber movements.

⁸⁴ In his recent *ex parte* submission, Dr. Eisenach suggests that the bargaining power of broadcasters has fallen in response to their declining share of ratings. *Eisenach Reply to Compass Lexecon* at 5. Whether or not that assertion is correct (and whether or not the use of his value metric is appropriate), the J. P. Morgan survey evidence clearly suggests that these program services still have the dominant bargaining advantage over the MVPDs.

Figure 6: Percentage of Consumers Who Would Switch Provider if Their Current MVPD Provider Stopped Offering Certain Channels

Network	% of Consumers who Would Switch
NBC	52
CBS	52
ABC	51
FOX	51
Discovery Channel	40
The History Channel	36
TNT	35
TBS	34
ESPN	33
CNN	32
TLC	31
A&E	31
Food Network	30
Fox News Channel	30

Source: J.P. Morgan Must-Carry Survey, Table 1 at 2.

B. Increasing MVPD Competition

79. Unlike the situation in 1992 when the RTC rules were promulgated, there is substantial MVPD competition today. In 1992, cable operators faced head-to-head competition from over-the-air broadcasting and wireline overbuilders in some scattered areas around the country, but DBS was just starting to become established. The Commission described DBS as “merely a vision in 1990.”⁸⁵ As shown in Figure 7, DBS’ share of MVPD subscribers was measured at 0.1% in 1993 and at 11.0% in 1998. Following the 1999 Satellite Home Viewer Improvement Act that allowed DBS to provide local broadcast signals, DBS penetration took off, and DBS currently has a subscriber share in excess of 30%. The importance of local-into-local for the competitiveness of DBS providers was recently noted in a study by Michael Katz and

⁸⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report*, CS Docket No. 94-48, Released September 28, 1994 (hereinafter, *Commission’s 1st Annual MVPD Report*) at ¶15. See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report*, CS Docket No. 95-61, Released December 11, 1995 (hereinafter, *Commission’s 2nd Annual MVPD Report*), Appendix G at Table 1.

Mark Israel. In that study, the authors concluded that carriage of local stations was a “game changer” for satellite providers.⁸⁶

80. That competition has increased further with the entry of the Telcos. For example, by December 31, 2009, FiOS passed about 15.4 million homes and served around 3 million subscribers.⁸⁷ According to Kagan’s longer-term forecast, the number of homes passed that are capable of receiving a Telco-based video service is expected to increase to over 65 million and the total number of Telco subscribers is expected to increase to 14 million by 2015, leading to Telcos achieving a share of about 21% in areas where they compete.⁸⁸
81. Increasing MVPD competition is clearly evident in data from SNL Kagan. As shown in Figure 7, the non-cable share of MVPD subscribers grew from 3.5% in 1991, the year before the RTC rules were promulgated, to 18.6% in 1999, just before the implementation of local-into-local by the DBS carriers, to 38.4% projected for 2010, and it is projected to grow further.⁸⁹

⁸⁶ Mark Israel and Michael L. Katz, *Application of the Commission Staff Model of Vertical Foreclosure to the Proposed Comcast-NBCU Transaction*, February 26, 2010 at ¶106.

⁸⁷ Todd Spangler, *FiOS Buildout to Take Breather in 2010*, Multichannel News, April 26, 2010, accessed at http://www.multichannel.com/blog/BIT_RATE/31053-FiOS_Buildout_to_Take_Breather_in_2010.php.

⁸⁸ SNL Kagan, *Media Trends*, 2009 edition, at 194.

⁸⁹ The cable percentages shown in Figure 7 may include traditional overbuilders. According to the Commission’s 13th Annual MVPD Report, the share of basic subscribers accounted for by overbuilders was about 1.5% as of June 2006, in which case the incumbent cable share might be reduced by as much as 1.5 percentage point below that reported in Figure 7. *Commission’s 13th Annual MVPD Report* at ¶13.

Figure 7: Percentage of Basic Subscribers, by MVPDs

Year	Cable MVPD (%)	Non-Cable MVPD (%)			
		Non-Cable MVPD Total	DBS	Telco	Other
1991	96.5	3.5	0.0	0.0	3.5
1992	95.9	4.1	0.0	0.0	4.1
1993	94.9	5.1	0.1	0.0	5.0
1994	93.4	6.6	0.9	0.0	5.7
1995	90.7	9.3	3.2	0.0	6.1
1996	87.7	12.3	5.9	0.0	6.3
1997	87.1	12.9	6.9	0.0	6.0
1998	83.6	16.4	11.0	0.0	5.4
1999	81.4	18.6	13.8	0.0	4.8
2000	78.8	21.2	17.1	0.0	4.1
2001	76.9	23.1	19.7	0.0	3.4
2002	75.5	24.5	22.1	0.0	2.3
2003	73.8	26.2	24.2	0.0	2.0
2004	71.3	28.7	27.1	0.0	1.6
2005	69.7	30.3	29.0	0.0	1.3
2006	68.3	31.7	30.3	0.3	1.1
2007	66.4	33.6	31.3	1.3	1.0
2008	64.6	35.4	31.4	3.1	0.8
2009	63.0	37.0	31.1	5.2	0.8
2010	61.6	38.4	30.6	7.1	0.7
2011	60.7	39.3	30.2	8.5	0.6
2012	60.0	40.0	29.9	9.6	0.6
2013	59.4	40.6	29.6	10.4	0.5
2014	59.0	41.0	29.3	11.1	0.5
2015	58.6	41.4	29.1	11.8	0.4
2016	58.2	41.8	29.0	12.4	0.4
2017	57.8	42.2	28.8	13.0	0.4
2018	57.5	42.5	28.7	13.5	0.4

Note: Penetration rates for 2009 onward are SNL Kagan projections.

Sources: Commission's 2nd and 6th Annual Price Reports; SNL Kagan, *Basic & HD Cable Network Economics*, 2009.

82. Increasing MVPD competition also can be seen in the share of TV households served by cable operators, as opposed to other MVPDs and over-the-air television. As shown in Figure 8, about 56% of TV households obtained service from a cable company in 2009. In contrast, the percentage was 65% in 2000. The percentage today is lower than the cable share in the early 1990s, when cable competed almost solely with over-the-air television (“OTA”) and the cable share was about 60%. As indicated in the Figure, the cable share is projected to decline further in the future.

Figure 8: Share of TV Households, by Type of MVPD

Year	Cable (%)	Non-Cable MVPD (%)	OTA and Other (%)
1991	58.0	2.1	39.9
1992	59.3	2.5	38.2
1993	60.7	3.3	36.0
1994	62.6	4.4	33.0
1995	64.8	6.7	28.6
1996	65.5	9.1	25.4
1997	66.1	9.8	24.1
1998	65.5	12.9	21.6
1999	65.4	14.9	19.7
2000	65.2	17.5	17.3
2001	63.4	19.0	17.6
2002	61.9	20.1	18.0
2003	60.9	21.6	17.5
2004	59.7	24.0	16.3
2005	59.2	25.8	15.0
2006	58.7	27.3	14.0
2007	57.5	29.1	13.4
2008	56.4	30.9	12.8
2009	56.3	33.1	10.6
2010	55.4	34.5	10.2
2011	54.5	35.3	10.2
2012	53.6	35.8	10.6
2013	52.8	36.1	11.1
2014	52.1	36.2	11.7
2015	51.5	36.3	12.2
2016	50.8	36.5	12.7
2017	50.2	36.6	13.3
2018	49.5	36.6	13.8

Note: Penetration rates for 2009 onward are SNL Kagan projections. The projected increase in “OTA and Other” category, according to Kagan, stems from an expected growth of Internet video.

Sources: Commission’s 2nd and 6th Annual Price Reports; and SNL Kagan, *Basic & HD Cable Network Economics, 2009*.

83. Depending on location, most subscribers today have a choice among the traditional cable provider, DIRECTV, DISH Network, and increasingly, Verizon’s FiOS or AT&T’s U-verse. Subscribers in some areas also can turn to traditional overbuilders

like RCN. As a result, an increasing number of cable franchise areas nationwide have met the Commission's test for "effective competition."⁹⁰

84. The MVPD marketplace is expected to become even more competitive over time, partly from the expansion of DBS and the Telcos, and partly from the growth of online video. For example, according to the Commission's annual report released in 2009, "[t]he amount of web-based video provided over the Internet continues to increase significantly each year. The overall number of homes with access to the Internet continues to grow, as does the number of Americans who access the Internet via a high-speed broadband connection. Nearly 70 percent of all U.S. households subscribe to an Internet service, and high-speed connections now constitute 60 percent of online subscriptions."⁹¹ The Commission also notes that Internet video distribution has become "a means by which some new programming networks ...distribute video absent an agreement...with one of the major MVPDs."⁹²
85. Non-cable MVPDs also provide a substantially greater bargaining constraint on cable MVPDs than did over-the-air television back in 1992. A non-cable MVPD provides many more channels and better quality reception than does over-the-air reception of local broadcast stations, so more subscribers would be willing to switch to a competing MVPD than would be willing to go back to over-the-air. In addition, if a program service provider blacks out its program from the cable operator, and some subscribers switch to a competing MVPD, the program service will obtain an affiliate fee as well as advertising revenue, whereas only the advertising revenue would be retained from substitution to over-the-air reception through an antenna. Thus, increased MVPD competition enhances the bargaining advantage of the broadcasters, relative to competition solely from over-the-air distribution.
86. A recent report in the trade press highlighted the significance of the increased MVPD competition for RTC fees. The report described station group owner Nexstar

⁹⁰ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, MM Docket No. 92-266, Released January 16, 2009 at notes 10,12.

⁹¹ *Commission's 13th Annual MVPD Report* at ¶17,154 (notes omitted).

⁹² *Id.* at ¶160 (notes omitted).

Broadcasting as having “famously kicked the door open on escalating retrans fees by brinkmanship in 2005, when it yanked several channels during an impasse in negotiations. Nexstar CEO Perry Sook says the catalyst for broadcasters digging in their heels at mid-decade was a realization that cable systems, challenged by satellite providers and the nascent threat of Verizon and AT&T entering the TV distribution business, couldn’t withstand channel blackouts indefinitely anymore.”⁹³

87. The increase in MVPD and Internet competition increases the broadcasters’ bargaining advantage because the competition increases the magnitude of the MVPD’s potential loss of subscribers in the event of a failure to reach a long term carriage agreement or a temporary blackout. The MVPD’s fear of this substantial subscriber loss in turn places a severe constraint on the MVPD’s bargaining position. That same report noted that for TV stations, “common strategies are to arrange end dates of carriage deals on a staggered basis, so a blackout brawl with one subscription TV platform leaves its channel carried on all others.”⁹⁴ As a result of this increased MVPD competition, a MVPD is more likely to accept a broadcaster’s demand for higher RTC prices.⁹⁵
88. The Commission’s rules provide broadcast stations with another bargaining advantage. These rules generally require cable MVPDs to place broadcast stations on the basic tier, and thus to offer them to subscribers on a bundled basis.⁹⁶ Those stations may not be placed on an optional tier. Nor may they be sold on an a la carte

⁹³ Robert Marich, *Broadcast’s \$1 Billion Pot of Gold*, Broadcasting & Cable, July 6, 2008, accessed at http://www.broadcastingcable.com/article/114424-Broadcast_s_1_Billion_Pot_of_Gold.php.

⁹⁴ *Id.*

⁹⁵ In fact, in a recent submission to the Commission in the context of retransmission consent fees, Professor Michael Katz and his coauthors show that this kind of MVPD competition could permit the program service provider to extract a profit that exceeds the total gains to the industry from the program service. See Jonathan Orszag, Michael L. Katz, Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, November 12, 2009 at ¶27. The authors’ model focused on the harms from failure to achieve a long-term carriage agreement, not a temporary blackout. For simplicity of exposition, the authors’ model assumed bargaining over a lump sum payment. However, in the real world, negotiations involve a per-subscriber fee that would be passed on to subscribers. There is every reason to think that the authors’ results would apply to negotiation involving a per-subscriber fee. This contrasts with Dr. Eisenach’s simplistic interpretation of the analysis of Katz et al. *Eisenach Reply to Compass Lexecon* at 9-10.

⁹⁶ 47 U.S.C. §543(b)(7).

basis. Moreover, if the cable operator raises the bundled price of basic or expanded service to try to pass-through the increase in the RTC fee, the reduction in revenue is shared by all the other programmers on the basic and expanded basic tiers. This is the classic *Cournot Complements* externality identified by economists.⁹⁷ These rules generally constrain the bargaining position of the cable operator.

89. The basic tier placement/buy-through requirements also can facilitate tacit coordination and parallel accommodating pricing behavior among the broadcast stations. Local broadcast stations are substitutes for one another, albeit substitution limited by product differentiation and their must-have characteristics. This means that when one affiliate charges a higher price, it also may give other affiliates an incentive to charge higher prices. In this way, unilateral behavior that leads to parallel accommodative conduct by other competitor can create further, magnified market-wide (“multilateral”) effects. It also might lead to tacit pricing coordination.
90. In a recent *ex parte* submission to the Commission, Dr. Eisenach asserts that “the downstream (buyers) market for video programming is characterized by high levels of concentration among a few major MVPDs.”⁹⁸ This statement obscures the key point that there has been a dramatic increase in MVPD competition, which in turn substantially improves the bargaining positions of the program service providers.⁹⁹ According to a recent Morgan Stanley report, “[r]ising competitive intensity, driven primarily by the expansion of RBOCs into the video business, further limits the ability of Pay-TV operators to fuel growth through price increases. Furthermore, the new entrants into the video space have generally weakened the bargaining power of distributors vs. content providers, helping to accelerate rapidly rising programming cost growth and pressure video margins.”¹⁰⁰

⁹⁷ Augustin Cournot, *Researches into the Mathematical Principles of the Theory of Wealth* (1838), translated by Nathaniel Bacon, New York: Macmillan, 1927; Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard-Setting*, in Adam Jaffe et al, *Innovation Policy and the Economy* (Volume I) 119 (2000).

⁹⁸ *Eisenach Video Costs* at ¶46.

⁹⁹ Dr. Eisenach does acknowledge this increased MVPD competition, but minimizes its implications.

¹⁰⁰ *Morgan Stanley Keys* at 3.

91. In arguing that MVPDs have the bargaining advantage, Dr. Eisenach incorrectly focuses on the collective subscriber share of the top-4 MVPDs on a national basis.¹⁰¹ The top-4 MVPDs do not jointly negotiate with any of the broadcasters. Instead, each competing MVPD bargains independently.¹⁰² Moreover, although negotiations may take place at the national level, the bargaining takes place in the shadow of the degree of MVPD competition that exists in each local franchise area, and in the shadow of the implications of that local competition on the relative losses from a blackout.
92. To the extent that national market shares (as opposed to simply local shares) are relevant to the issue of risk aversion, it also would imply that the bargaining power of the broadcaster networks and station groups would have increased since 1992 for an additional reason. In 1992, when Congress passed the Cable Act, the broadcast ownership cap was at 25% of national audience reach. In 1996 Congress directed the Commission to raise the cap to 35%, and the Commission affirmed the 35% cap in 1998. Then, in 2003, the Commission attempted to increase the cap to 45%, only to have Congress intervene later that year and set the current 39% cap.¹⁰³ A 2008 study on media ownership shows that network ownership of local stations has increased over the years as the cap has gone up.¹⁰⁴ Over the same period, station groups like Sinclair and Belo also have gained control over more local stations.
93. Dr. Eisenach argues that geographic clustering by cable MVPDs increases their bargaining advantage over local broadcast stations.¹⁰⁵ Clustering does increase the stakes for a broadcaster by increasing the number of viewers at risk from a blackout. But, this fact does not automatically cause an asymmetric effect. Clustering also increases the stakes proportionally for the cable MVPD, which also stands to lose

¹⁰¹ *Eisenach Video Costs*, Table 3 at 27.

¹⁰² In contrast, as discussed in more detail below, local broadcasters sometimes do negotiate jointly, either because a station group owns multiple stations in a local market or because of LMAs, or because of the broadcast network becoming involved in the RTC negotiations of its local affiliates. See also William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and its Effect on Retransmission Consent Fees* (hereinafter, *Rogerson Joint Control*), May 18, 2010, at 5.

¹⁰³ See Pub. L. No. 108-199, § 629 (2004), codified at 47 U.S.C. § 303 note; see also 47 C.F.R. § 73.3555.

¹⁰⁴ <http://www.stateofthedia.org/2008/chartland.php?id=631&ct=col&dir=&sort=&c1=1&c2=1&c3=1&c4=1>.

¹⁰⁵ *Eisenach Reply to Compass Lexecon* at 5.

more subscribers to other MVPDs if the local station is not carried. In most bargaining models, the total *number* of subscribers at risk has no effect on the equilibrium programming fee per subscriber.¹⁰⁶

94. It is possible that an increase in the total number of subscribers at risk might lead to a reduction in the programming fee if the local station is more risk averse than the MVPD (or conversely to an increase in the programming fee if the MVPD is more risk averse than the local station).¹⁰⁷ This would suggest that any negative effect of clustering on programming fees alluded to by Dr. Eisenach might be relevant mainly for stand-alone local stations. Such stations may be more risk averse than stations that are part of a station group or owned by a broadcast network.¹⁰⁸ However, this factor likely would carry much less force for the larger players. It also is likely to carry less force when there is more MVPD competition in a local market from DBS, Telcos and traditional overbuilders.¹⁰⁹
95. There also has been an increase in competition from Telcos and cable overbuilders into the clustered areas.¹¹⁰ MSO clustering tends to occur in large metropolitan areas, such as New York and Chicago.¹¹¹ These are precisely the areas where entry by the Telcos (Verizon and AT&T in particular) and traditional overbuilders (like RCN) has occurred. For example, as a recent MediaBiz Bridge report describes this increased competition, “[f]rom a starting point of zero in the middle of this decade, these services have now grown to encompass most major markets across the nation . . . and

¹⁰⁶ In fact, this is the approach taken by the seminal Binmore *et al.* article cited by Dr. Eisenach. *Eisenach Reply to Compass Lexecon* at note 10.

¹⁰⁷ See William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements*, May 18, 2010 at 8.

¹⁰⁸ Similarly, a small stand-alone local MVPD also might be more risk averse than a larger MVPD.

¹⁰⁹ There also likely is less impact on the reach premium if there is more MVPD competition.

¹¹⁰ We are not claiming that the clustering has caused the increased MVPD competition. However, the same efficiencies that lead to clustering may also lead to increased entry.

¹¹¹ According to SNL Kagan, the top 10 cable clusters, measured by the number of geographically proximate cable subscribers served by a single MSO, are located in and around the greater New York area, Philadelphia, San Francisco, Chicago, Washington, Boston, Los Angeles, Seattle, and Tampa Bay. SNL Kagan, *Cable MSO Ownership: a Geographic Analysis*, 2009 (hereinafter *Kagan Geographic Analysis*) at 5. These areas are in fact among the top 15 television markets in the country, ranked by Nielsen. *Kagan Geographic Analysis* at 4.

they have made significant inroads in territories held by top 10 cable companies.” The report goes on to explain that “by the close of 2009, every one of the top 10 cable MSOs shared at least part of their service footprint with either FiOS or U-verse, according to data from MediaCensus which tracks video subscribers and provider footprints for every provider by ZIP code. The MSO with the most shared territory was, of course, Cablevision which now shows a near complete overlap with the big telco services. While Bright House takes second place in footprint overlaps (with nearly 90%), both Comcast and Time Warner also have significant cross-overs.”¹¹² Similarly, as of 2007, RCN had overbuilt Comcast, Cablevision, and TWC, and had overbuilt them in portions of their largest cable clusters.¹¹³ Thus, in areas where there are large clusters, there are also likely to be multiple MVPD alternatives for the broadcast station – a factor that increases the bargaining advantage of the local broadcast stations (small and large) over the MVPDs, *ceteris paribus*.

96. There also are bargaining models where the *share* of subscribers at risk (as opposed to the absolute number of subscribers at risk) might be relevant in the presence of large fixed costs or high bankruptcy risks. In such models, clustering could make the clustered cable MVPD become “pivotal” or “essential” to the survival of a particular local station.¹¹⁴ However, in this situation, the net effect often would be an *increase* in the programming fee for the clustered MVPD, not a decrease.¹¹⁵ The MVPD would have to ensure that the station earns sufficient revenue to survive.
97. Clustering has another potential benefit to the broadcast stations that also must be included in the analysis of its impact on the bargaining outcome. Clustering may

¹¹² The Bridge, 2009: *A Year of Mixed Messages*, MediaBiz, April 2010 at 9, accessed at <http://www.mediabiz.com/thebridge/>.

¹¹³ SNL Kagan, *Geographic Analysis* at 5 and RCN’s website at <http://www.rcn.com/about-rcn>.

¹¹⁴ Bernstein Research focuses on the relative national “coverages” of the MVPD and the broadcaster. *Bernstein Retrans Battle*. However, as mentioned earlier, this measure does not take into account MVPD competition in each local area or whether or not the negotiation involves “must-have” content. Nor does it take into account the “pivotal” nature of the MVPD to the local station.

¹¹⁵ Alexander Raskovich, *Pivotal Buyers and Bargaining Position*, 51 *Journal of Industrial Economics* 405 (2003). Being “pivotal” is a two-edged sword. On the one hand, a pivotal buyer has the advantage because the supplier has no alternative but to reach some deal. While valid, this point is only half the story. On the other hand, a pivotal buyer is on the hook to cover the supplier’s costs to ensure the supplier’s survival, or else forfeit the benefits of the supplier’s product. This affords the supplier some leverage that is absent when it is dealing with smaller, non-pivotal buyers.

reduce the marginal distribution costs of the MVPDs or improve the product quality of the cable operator. If so, a portion of those costs savings or quality improvements likely would be captured by the broadcast stations in the bargaining equilibrium.¹¹⁶

98. Finally, while this discussion has focused on MVPD competition, it also is noteworthy that Commission regulations explicitly *limit* the competition among the local affiliates of a particular broadcast network. In response to a broadcaster's threat of a blackout, the MVPD cannot engage in the counterstrategy of negotiating a voluntary RTC with a distantly located affiliate of the same network. This counterstrategy is prohibited by the Network Non-Duplication/Syndex Rules.¹¹⁷

C. Broadcast Network Tying

99. The bargaining positions of the broadcast networks are further enhanced if they engage in tying of their broadcast O&O stations with their cable services. Broadcast networks that own popular cable program services can threaten also to blackout these cable networks too, if the MVPD does not agree to its RTC terms for its O&Os. In this way, the broadcaster can negotiate higher RTC fees, higher cable network fees, or other concessions (*e.g.*, requiring the MVPD to carry other cable networks owned by the program supplier, possibly at a high price).¹¹⁸
100. In fact, each of the broadcast networks owns cable networks, as shown in Figure 9. ABC has an ownership interest in 21 basic cable networks. FOX has an ownership interest in 15 basic cable program services, and it owns broadcast network MyNetworkTV. NBC has an ownership interest in 19 basic cable program services, and NBC also owns the Spanish language broadcast network Telemundo. CBS owns

¹¹⁶ Tasneem Chipty and Christopher Snyder, 81 *The Role Of Firm Size In Bilateral Bargaining: A Study Of The Cable Television Industry*, *The Review Of Economics And Statistics*, (1999) 326.

¹¹⁷ In contrast to the prohibition on the MVPDs, the Commission has no regulatory prohibition on the broadcaster placing additional programming on the Internet during a blackout, either on its own website or through an aggregator like Hulu or YouTube.

¹¹⁸ As discussed below, it also appears that broadcast networks are becoming involved in their affiliates' retransmission consent fee negotiations with MVPDs, including possibly tying together licenses for their program services with the their independent local affiliates' RTCs, setting price floors for their affiliates' RTCs, or sharing in their RTC revenues.

2 two basic cable program services, three premium cable services (Showtime, Flix, and The Movie Channel), and the CW broadcast network.

Figure 9: Summary of Big Four Cable Network Ownership

No.	ABC/Disney	FOX	NBC	CBS
1	ESPN/ESPN HD (80%)	FOX Sports Net (100%)	USA (100%)	CBS College Sports Network (100%)
2	Disney Channel (100%)	Fox News (100%)	CNBC (100%)	Smithsonian Channel (90%)
3	ESPN2 (80%)	FX Network (100%)	Universal HD (100%)	Showtime (100%)
4	Lifetime Television (50%)	Big Ten Network (49%)	A&E (25%)	Flix (100%)
5	A&E (38%)	FOX College Sports (100%)	History Channel (25%)	The Movie Channel (100%)
6	ABC Family Channel (100%)	National Geographic Channel (67%)	Syfy (100%)	
7	History Channel (38%)	SPEED (100%)	Bravo (100%)	
8	ESPN Classic (80%)	FOX Sports en Espanol (37%)	History en Espanol (25%)	
9	ESPNews (80%)	FOX Movie Channel (100%)	MSNBC (82%)	
10	ESPNU (80%)	FOX Soccer Channel (100%)	Biography Channel (25%)	
11	History en Espanol (38%)	FUEL TV (100%)	The Weather Channel (33%)	
12	ESPN Deportes (80%)	FOX Business Network (100%)	Oxygen Network (100%)	
13	SOAPnet (100%)	Nat Geo WILD (67%)	Chiller (100%)	
14	Disney XD (100%)	Fox Reality Channel (100%)	Sleuth (100%)	
15	Biography Channel (38%)	Fox Pan American Sports (100%)	Crime & Investigation Network (25%)	
16	Lifetime Movie Network (50%)		History International (25%)	
17	Crime & Investigation Network (38%)		Military History Channel (25%)	
18	History International (38%)		mun2 (100%)	
19	Military History Channel (38%)		CNBC World (100%)	
20	Lifetime Real Women (50%)			
21	Toon Disney (100%)			

Note: Ownership share shown in parenthesis below cable network name.

Sources: SNL Kagan, *TV Network Summary, Economics of Basic Cable Networks*; CBS Corporation, Form 10-K, Annual Report, for the fiscal year ended December 31, 2009; The Walt Disney Company, Form 10-K, Annual Report, for the fiscal year ended October 3, 2009; General Electric Company, Form 10-K, Annual Report, for the period ended December 31, 2009; and NEWS CORP, Form 10-K, Annual Report, for the period ended June 30, 2009.

101. There have been several episodes where the broadcast network has threatened to blackout cable networks if the MVPD refused to accept its RTC price offered. For example, in March 2004, Viacom tied the carriage for all of its cable networks and

the company's then 15 CBS O&O stations.¹¹⁹ In its submission to the Commission in this proceeding, the American Cable Association (ACA) provided other examples of recent take-it-or-leave-it bundled offers by key broadcast station groups. For example, Disney required the purchase of numerous Disney-affiliated cable program services (ABC News Now, various ESPN services, and Toon, among others) if the cable operator wished to retransmit the ABC O&Os to its subscribers.¹²⁰ As another example, NBC Universal apparently conditioned cable operator access to its NBC O&Os on the cable operator also purchasing Bravo, MSNBC, and SyFy, among other NBC-affiliated cable services.¹²¹

102. There are several ways in which tying can lead to consumer harm. First, tying can lead directly to higher fees. If the MVPD must take the O&Os and the cable networks on an all-or-nothing basis, *and the two types of programming are substitutes to some degree*, then the MVPD would be willing to pay a higher total price for the package than for each type of programming separately. As a result, tying can lead to an increase in the RTC fees for O&Os or an increase in the fees charged for cable networks. (In this way, tying also may permit the broadcaster to disguise the magnitude of the increase in the RTC payment by incorporating the payment into higher prices for some of its cable networks.) Second, tying potentially also can lead to foreclosure of competing cable networks by forcing the MVPD to agree to carry undesired cable networks. Third, tying may lead to the dampening of competition between the broadcaster's cable program services and their competitors, particularly if the tying leads to an increase in the prices of the tied products.¹²²

103. The all-or-nothing pricing effect can be explained with an illustrative numerical example. Suppose that the loss to the MVPD's subscribers of solely the O&O local

¹¹⁹ Steve Donohue, *EchoStar Loses Viacom Channels*, Multichannel News, Mar. 9, 2004, accessed at http://www.multichannel.com/article/67945-EchoStar_Loses_Viacom_Channels.php.

¹²⁰ *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, ACA Comments, MB Docket No. 07-198, filed January 3, 2008 at 7.

¹²¹ *Id.*

¹²² For analysis of this dampening competition effect explained in the context of RPM, see Andrew I. Gavil et al, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* (2nd Edition 2008) at 397.

station (assuming that the MVPD still carries the network's cable services) would lower the value of the channel lineup by \$1. Similarly, suppose that the loss solely of the network's cable services would lower the value of the channel lineup by \$4.

104. However, because the local station and the cable services products are substitutes to some extent, the economic theory of consumer demand would predict that the loss of both network's cable services and the local station would reduce the value of the channel lineup by *more* than \$5 (*i.e.*, \$1 + \$4). Intuitively, the reduction in value from the loss of the network's cable services is greater than \$4 if the MVPD does not carry the local station, because subscribers no longer can use the local station as a substitute for the network's cable services. Similarly, the reduction in value from the loss of the local station is greater than \$1 if the MVPD does not carry the network's cable services, because subscribers have fewer options to substitute for the local station.
105. To illustrate the point in a concrete way, suppose that the loss in the value to the MVPD's subscribers is assumed to be \$7 if it loses access to *both* the broadcaster's O&O local station and the network's cable network services. Therefore, by tying the local station together with its cable services – and offering the bundle on an “all or nothing” basis – the network might be able to increase the programming fees it charges the MVPD for the package to something closer to the maximum of \$7, rather than the maximum of \$5 (*i.e.*, \$1 + \$4) that it could obtain if it were to offer individual programming on an unbundled basis.¹²³
106. While the broadcasters can engage in such tying to force the carriage of multiple services, a vertically integrated cable MVPD is not equally positioned to remove the broadcaster's cable services from its lineup. This is because the vertically integrated

¹²³ See, for example, Aaron S. Edlin and Daniel L. Rubinfeld, *The Bundling of Academic Journals*, 95 *American Economic Review* 441 (2005). This paper argues that by selling its products as a bundle, a firm “can effectively stop [them] from competing with each other, which substitutes will otherwise do even when sold by the same firm,” and charge a higher price. See also *Rogerson Joint Control* at 7-9, which similarly concludes that “a programmer selling two different programs will be able to charge more by bundling the programs together so long as the programs are substitutes in the sense that the marginal value of either of the programs to the MVPD is lower conditional on already carrying the other program.”

MVPD's ability to delete channels from its lineup is constrained by the Commission's program access rules.¹²⁴

D. Broadcasters' Coordinated Negotiation Agreements

107. A broadcast network owns numerous non-competing local stations in various local markets, as do station groups such as Sinclair. However, in two ways, broadcasters may combine to negotiate RTC fees with MVPDs. One combination involves LMAs between competing local broadcasters. The other involves the emerging network involvement in the RTC negotiations of their independent local broadcast affiliates.

1. Broadcaster LMAs

108. In some areas, competing broadcast stations are involved in LMAs or other sharing agreements. As one recent example, we understand that Sinclair has entered into LMAs that give Sinclair the exclusive right to negotiate on behalf of two of the top four stations in several DMAs across the country.¹²⁵ Under these agreements, one broadcaster may engage in RTC negotiations for multiple broadcasters. This joint negotiation eliminates competition between the stations. The MVPD is unable to gain a bargaining advantage by playing one broadcaster off against another. As a result, the LMAs and the sharing agreements strengthen the broadcasters' bargaining position.¹²⁶

109. In his submission to the Commission, Professor William Rogerson identified 57 instances "where two Big 4 stations in the same DMA operate under some sort of

¹²⁴ Of course, blacking out "must-have" cable program services would harm the MVPD even more.

¹²⁵ Sinclair negotiates on behalf of two of the Big 4 network affiliates in at least three DMAs where TWC provides cable services: Columbus, OH (WSYX and WTTE); Charleston/Huntington, WV (WCHS and WVAH); and Dayton, OH (WKEF and WRGT). *Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission Consent Complaint*, Dec 9, 2009 (hereinafter *TWC Comments*) at note 54.

¹²⁶ These LMAs may violate the antitrust laws. For example, the Justice Department brought an enforcement action in 1996, alleging that broadcasters in a Corpus Christi LMA had colluded in retransmission consent negotiations to "extract... more favorable terms from the cable companies than they would have otherwise obtained..." Competitive Impact Statement at 6, *United States v. Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc.*, Civ. No. C-96-64 (S.D. Tex. February 2, 1996) at 6. LMAs such as these can be viewed as a way to evade the FCC regulations that generally prohibit an entity from acquiring ownership in two of the top-4 rated stations in a given DMA. See 47 C.F.R. § 73.3555(b).

sharing agreement and thus are very likely to operate under joint control for purposes of negotiating retransmission consent agreements.”¹²⁷ Professor Rogerson further notes that when one considers the common ownership of two Big 4 affiliates in the same DMA, “of the 210 DMAs, fully 78, or more than one third of them have one or two pairs of jointly owned or controlled Big 4 stations.”¹²⁸

110. Of course, competing MVPDs are not permitted to negotiate jointly with broadcasters or other program suppliers. If broadcasters and MVPDs are treated asymmetrically, it will place the MVPDs at a bargaining disadvantage, *ceteris paribus*.

2. Growing Broadcast Network Involvement in RTC Negotiations

111. In 2009, some of the broadcast networks became involved in the RTC negotiations of their independently owned local stations (*i.e.*, non-O&O affiliates). FOX has pressured its affiliates for a share of their retransmission revenues.¹²⁹ For example, in TWC’s negotiations with Sinclair, Sinclair informed TWC that FOX would have “veto power” on any grant of retransmission consent rights by its affiliates, and that “FOX would withhold such approval unless Sinclair radically increased the compensation it obtains from TWC and paid a substantial share to the network.”¹³⁰ In a different negotiation, a station group apparently told TWC that FOX was “using their leverage to get into this retrans game with their affiliates” and “going after our retransmission fees in a big way, perhaps as much as 50%.”¹³¹ Similarly, CBS has

¹²⁷ William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements*, May 18, 2010, (hereinafter *Rogerson*) at 6 (note omitted).

¹²⁸ *Id.* at 7.

¹²⁹ “In negotiations [with TWC], the News Corporation is pushing for about \$1 a month for each subscriber. . . . The News Corporation is demanding the money on behalf of its 27 owned stations, but it is also pressuring about 150 affiliates for a share of their retransmission payments.” Brian Stelter, *Broadcasters Battling for Cable Fees*, New York Times, December 29, 2009, accessed at <http://www.nytimes.com/2009/12/29/business/media/29cable.html>

¹³⁰ *TWC Comments* at 3-4. FOX apparently based this veto right on a contractual provision in its affiliation contracts.

¹³¹ *Id.* at 5.

stated publicly that it would seek “a significant cut of retransmission consent revenue” from its affiliates.¹³²

112. If this network involvement in RTC negotiations were to become the norm, it could advantage the broadcasters’ bargaining position in a number of ways and create potential antitrust concerns.

a) Tying

113. Jointly negotiating and tying together the sale of RTC rights to independently owned broadcast network affiliates with the licensing of the broadcast network’s cable networks has the same economic effects as tying together the network’s O&Os and its cable networks. The only difference is that the local affiliates are independently owned. If the cable and broadcast services are substitutable to some extent, this joint negotiation for the network’s cable services and RTCs for its local affiliates raises prices by eliminating the potential for the MVPD to take one service without the other, and thereby eliminating any competition between the network’s cable services and its affiliates’ broadcast stations. By tying the independent local affiliates together with its cable services – and offering the bundle on an “all or nothing” basis – the network is able to negotiate a higher total fee.

114. Thus, the joint negotiation eliminates the inherent competition between the broadcaster-owned cable program services and its independently owned local broadcast affiliates. This (*horizontal*) elimination of competition goes beyond the purely vertical relationship between the network and its affiliates because it involves the network’s solely owned and distributed cable networks, not its broadcast network. Thus, the usual dual distribution free riding rationales for joint negotiation would not apply directly.

b) Network Taxes and Price Floors

115. As discussed above, it was suggested that FOX might institute a “network tax” on the local affiliate’s RTC revenue by requesting a certain payment from the affiliate’s

¹³² Michael Malone, *Moonves: Give Us Our Retrans Cut, CBS chief says NBC may do better than expected with Olympics*, Broadcasting & Cable, March 1, 2010, accessed at http://www.broadcastingcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php.

RTC fee (*e.g.*, 50 cents). Such a tax could correspond to an additional cost incurred by the local station and could lead to a higher RTC fee and higher subscription prices for consumers. And if successful, other networks could follow as the tax becomes a market benchmark.

116. Such a “network tax” could lead to higher RTC fees. The tax would reduce the RTC revenue that accrues to the local station. Therefore, it could make the local station less willing to accept a MVPD’s offer. In the presence of a network tax, or any other mechanism that would allow the network to obtain some of its affiliates’ RTC revenues, the network also would have an incentive to impose a price floor for the RTC fee. By imposing a price floor, the network would be able to raise the RTC fee and share the incremental RTC revenues with its affiliates.

V. Conclusions and Policy Implications

117. The economic analysis in this paper supports the view of the recent Rulemaking Petition that the evolution of the market in recent years has created a situation today where the broadcasters can engage in harmful brinkmanship conduct to achieve a substantial bargaining advantage in negotiating RTCs. As a result of the increased competition among MVPDs, the must-have nature of broadcast programming, the various types of possible broadcaster tying arrangements and coordination, and the regulations that constrain a MVPD’s counterstrategies, the broadcasters have achieved increased bargaining leverage in the RTC negotiations with the MVPDs. These bargaining advantages mean that the use of brinkmanship tactics by broadcasters can lead to higher RTC fees. Consumers are clearly harmed when blackouts actually occur, but even the public threat of a blackout can be sufficient for the MVPD to accede to the broadcaster’s demands for a higher RTC fee and may cause some consumers to switch to an otherwise less-preferred MVPD. Moreover, the potential for blackouts increases the broadcaster’s ability to negotiate higher RTC fees, even when there are no explicit public blackout threats made. Ultimately, these higher fees will be passed through to consumers in the form of higher MVPD subscription rates.

118. The Petition asks the Commission to consider a number of policy changes. A detailed discussion of these and other possible policy changes goes beyond the scope of our analysis here. However, for completeness, we identify several possible policy changes that may act separately or in tandem to reduce consumer harm from blackouts and equalize the parties' bargaining positions.
119. First, the Commission could eliminate the harms to consumers and advertisers from temporary blackouts and eliminate the bargaining leverage that comes from broadcasters' threats of temporary blackouts by mandating interim carriage when the parties are unable to agree to an RTC fee before the expiration of their contract. This interim carriage would continue, pending the parties reaching a final fee agreement or terminating negotiations altogether. When a final fee agreement is reached, that fee would be applied retroactively back to the contract expiration date.
120. Second, in tandem with mandating interim carriage, the Commission could resolve continued fee disputes by setting RTC fees directly or by having an expert tribunal act as a backstop to determine the RTC fee when the parties are unable to reach agreement on the fee in a reasonable period of time but want to renew their carriage agreement rather than terminate negotiations. These fees would not be based on the currently negotiated fees in today's market because those fees reflect the broadcasters' dominant bargaining position arising from the differential harms from brinkmanship. Instead, the Commission would mandate a framework for the fee structure that would reflect more equal bargaining positions.¹³³
121. Third, in order to facilitate voluntary agreements between broadcasters and MVPDs, while avoiding the distortions caused by asymmetric regulation, the Commission could take action to equalize the regulatory constraints on broadcaster brinkmanship tactics facing each side. This could involve placing greater "good faith bargaining" strictures on broadcasters' bargaining tactics and eliminating certain constraints on MVPD counterstrategies.

¹³³ The Commission also could instruct the tribunal to take into account certain regulatory goals. In this way, the impact of these regulatory goals on the market outcome would be made more transparent.

122. Fourth, the Commission could mandate industry-wide collective negotiations between MVPDs and broadcasters over RTC fees. This process would eliminate the ability of a broadcaster to exploit the competition among MVPDs, or vice versa. The Commission also could consider whether to constrain the negotiations in various ways, for example, whether or not to require the same RTC fee for all MVPDs and/or all broadcasters in a local market. In addition, the Commission also could require the negotiations to satisfy other policy considerations in a transparent way.

Appendix 1: Threatened and Actual Blackouts, for Broadcast Television Stations and Broadcaster-Owned Cable Networks

Dispute No.	Dates	Station Owner	MVPD	Local Broadcast Stations		Broadcaster-Owned Cable Networks	Blackout
				TV Stations	TV Markets		
1	3/24/2010 - 4/1/2010	Citadel Communications	DirecTV	WHBF-TV (CBS) WOI-TV (ABC) KLKN-TV (ABC)	Davenport, IA-Rock Island-Moline, IL Des Moines-Ames, IA Lincoln-Hastings-Kearney, NE	N.A.	
2	3/7/2010 - 3/7/2010	The Walt Disney Co.	Cablevision	WABC-TV (ABC)	New York, NY	N.A.	Blackout Occurred
3	12/18/2009 - 1/1/2010	News Corp.	Time Warner Cable, Bright House Networks	KTBC-TV (FOX) KDFL-TV (MNT) KDFW-TV (FOX) WJBK-TV (FOX) KCOP-TV (MNT) KTTV-TV (FOX) WNYW-TV (FOX) WWOR-TV (MNT) WOFL-TV (FOX) WRBW-TV (MNT) WTVT-TV (FOX)	Austin, TX Dallas-Ft. Worth, TX Dallas-Ft. Worth, TX Detroit, MI Los Angeles, CA Los Angeles, CA New York, NY New York, NY Orlando-Daytona Beach-Melbourne, FL Orlando-Daytona Beach-Melbourne, FL Tampa-St. Petersburg-Sarasota, FL	FX, Speed, Fuel TV, Fox Movie Channel, Fox Reality Channel, Fox Soccer Channel, Fox Sports en Espanol, Fox Sports Networks (Arizona, Florida, Houston, Midwest, Southwest, West, Prime Ticket, SportsSouth, Sun Sports) - Affecting all Time Warner Cable and Bright House Networks TV Markets	
4	12/17/2009 - 1/7/2010	Sinclair Broadcast Group	Mediacom	WABM-TV (MNT) WTTO-TV (CW) KGAN-TV (CBS) WICD-TV (ABC) WICS-TV (ABC) KDSM-TV (FOX) WLOS-TV (ABC) WMYA-TV (MNT) WDKY-TV (FOX) WMSN-TV (FOX) WCGV-TV (MNT) WVTV-TV (CW) WUCW-TV (CW) WEAR-TV (ABC) WFGX-TV (MNT) WZTV-TV (FOX) WNAB-TV (CW) WUXP-TV (MNT) WTVZ-TV (MNT) KBSI-TV (FOX) WDKA-TV (MNT) WYZZ-TV (FOX) KDNL-TV (ABC) WTWC-TV (NBC)	Birmingham, AL Birmingham, AL Cedar Rapids-Waterloo-Dubuque, IA Champaign-Springfield-Decatur, IL Champaign-Springfield-Decatur, IL Des Moines-Ames, IA Greenville-Spartanburg, SC-Asheville, NC Greenville-Spartanburg, SC-Asheville, NC Lexington, KY Madison, WI Milwaukee, WI Milwaukee, WI Minneapolis-St. Paul, MN Mobile, AL-Pensacola, FL Mobile, AL-Pensacola, FL Nashville, TN Nashville, TN Nashville, TN Norfolk-Portsmouth-Newport News, VA Paducah, KY-Cape Girardeau, MO-Harrisburg-Mt Vernon, IL Paducah, KY-Cape Girardeau, MO-Harrisburg-Mt Vernon, IL Peoria-Bloomington, IL St. Louis, MO Tallahassee, FL-Thomasville, GA	N.A.	
5	2/5/2009 - 2/14/2009	Newport Television	Cable One	WLMT-TV (CW) WPTY-TV (ABC) WPML-TV (NBC) KMYT-TV (MNT) KOKI-TV (FOX)	Memphis, TN Memphis, TN Mobile, AL-Pensacola, FL Tulsa, OK Tulsa, OK	N.A.	Blackout Occurred
6	1/1/2009 - 1/30/2009	Hearst-Argyle	Sunflower Broadband	KCWE-TV (CW) KMBC-TV (ABC)	Kansas City, MO-KS Kansas City, MO-KS	N.A.	Blackout Occurred
7	1/1/2009 - 1/7/2009	Free State Communications	DISH Network	KTKA-TV (ABC)	Topeka, KS	N.A.	Blackout Occurred
8	12/19/2008 - 12/29/2008	Belo Corp.	Charter Communications	KTVB-TV (NBC) WCNC-TV (NBC) WFAA-TV (ABC) KHOU-TV (CBS) WHAS-TV (ABC)	Boise, ID Charlotte, NC Dallas-Ft. Worth, TX Houston, TX Louisville, KY	Northwest Cable News, Texas Cable News - Affecting all Charter Communications TV Markets	

Dispute No.	Dates	Station Owner	MVPD	Local Broadcast Stations		Broadcaster-Owned Cable Networks	Blackout
				TV Stations	TV Markets		
				WUPL-TV (MNT)	New Orleans, LA		
				WWL-TV (CBS)	New Orleans, LA		
				WVEC-TV (ABC)	Norfolk-Portsmouth-Newport News, VA		
				KGW-TV (NBC)	Portland, OR		
				KING-TV (NBC)	Seattle-Tacoma, WA		
				KONG-TV (IND)	Seattle-Tacoma, WA		
				KREM-TV (CBS)	Spokane, WA		
				KSKN-TV (CW)	Spokane, WA		
				KMOV-TV (CBS)	St. Louis, MO		
9	12/18/2008 - 6/11/2009	Fisher Communications	DISH Network	KBAK-TV (CBS)	Bakersfield, CA	N.A.	Blackout Occurred
				KBFX-TV (FOX)	Bakersfield, CA		
				KBCI-TV (CBS)	Boise, ID		
				KVAL-TV (CBS & This TV)	Eugene, OR		
				KIDK-TV (CBS)	Idaho Falls-Pocatello, ID		
				KATU-TV (ABC & This TV)	Portland, OR		
				KUNP-TV (Univision)	Portland, OR		
				KOMO-TV (ABC & This TV)	Seattle-Tacoma, WA		
				KUNS-TV (Univision)	Seattle-Tacoma, WA		
				KIMA-TV (CBS & CW)	Yakima-Pasco-Richland-Kennewick, WA		
				KUNW-TV (Univision)	Yakima-Pasco-Richland-Kennewick, WA		
10	12/11/2008 - 12/14/2008	Young Broadcasting	DISH Network	WTEN-TV (ABC)	Albany-Schenectady-Troy, NY	N.A.	Blackout Occurred
				KWQC-TV (NBC)	Davenport, IA-Rock Island-Moline, IL		
				WBAY-TV (ABC)	Green Bay-Appleton, WI		
				WATE-TV (ABC)	Knoxville, TN		
				KLFY-TV (CBS)	Lafayette, LA		
				WLNS-TV (CBS)	Lansing, MI		
				WKRN-TV (ABC)	Nashville, TN		
				KCLO-TV (CBS)	Rapid City, SD		
				WRIC-TV (ABC)	Richmond-Petersburg, VA		
				KRON-TV (MNT)	San Francisco-Oakland-San Jose, CA		
				KELO-TV (CBS)	Sioux Falls-Mitchell, SD		
11	12/2008 - 12/31/2008	McKinnon Broadcasting	Time Warner Cable	KIII-TV (ABC)	Corpus Christi, TX	N.A.	
12	12/2008 - 12/30/2008	Meredith Broadcasting Group	Cable One	KPHO-TV (CBS)	Phoenix, AZ	N.A.	
13	10/3/2008 - 10/29/2008	LIN TV	Time Warner Cable, Bright House Networks	KBVO-TV (MNT)	Austin, TX	N.A.	Blackout Occurred
				KNVA-TV (CW)	Austin, TX		
				KXAN-TV (NBC)	Austin, TX		
				WIVB-TV (CBS)	Buffalo, NY		
				WNLO-TV (CW)	Buffalo, NY		
				WWHO-TV (CW)	Columbus, OH		
				WDTN-TV (NBC)	Dayton, OH		
				WANE-TV (CBS)	Ft. Wayne, IN		
				WLUK-TV (FOX)	Green Bay-Appleton, WI		
				WIII-TV (Univision)	Indianapolis, IN		
				WISH-TV (CBS)	Indianapolis, IN		
				WNDY-TV (CBS)	Indianapolis, IN		
				WALA-TV (FOX)	Mobile, AL-Pensacola, FL		
				WBPG-TV (WB)	Mobile, AL-Pensacola, FL		
				WWLP-TV (NBC)	Springfield-Holyoke, MA		
				WTHI-TV (CBS)	Terre Haute, IN		
				WUPW-TV (FOX)	Toledo, OH		
14	9/9/2008 - 10/13/2008	Post-Newsweek Stations	Time Warner Cable	KSAT-TV (ABC)	San Antonio, TX	N.A.	
15	8/1/2008 - 9/6/2008	Citadel Communications	DISH Network	WHBF-TV (CBS)	Davenport, IA-Rock Island-Moline, IL	N.A.	Blackout Occurred
				WOI-TV (ABC)	Des Moines-Ames, IA		

Dispute No.	Dates	Station Owner	MVPD	Local Broadcast Stations		Broadcaster-Owned Cable Networks	Blackout
				TV Stations	TV Markets		
16	7/3/2008 - 9/2008	Barrington Broadcasting Group	DISH Network	KLKN-TV (ABC) KCAU-TV (ABC) KRCG-TV (CBS)	Lincoln-Hastings-Kearney, NE Sioux City, IA Columbia-Jefferson City, MO	N.A.	Blackout Occurred
17	6/4/2008 - 7/1/2008	LIN TV	Charter Communications	WDTN-TV (NBC) WOOD-TV (NBC) WOTV-TV (ABC) WXSP-TV (MNT) WLUK-TV (FOX) WCTX-TV (MNT) WTNH-TV (ABC) WNAC-TV (FOX) WPRI-TV (CBS) WWLP-TV (NBC) WUPW-TV (FOX)	Dayton, OH Grand Rapids-Kalamazoo-Battle Creek, MI Grand Rapids-Kalamazoo-Battle Creek, MI Grand Rapids-Kalamazoo-Battle Creek, MI Green Bay-Appleton, WI Hartford-New Haven, CT Hartford-New Haven, CT Providence, RI-New Bedford, MA Providence, RI-New Bedford, MA Springfield-Holyoke, MA Toledo, OH	N.A.	
18	1/1/2008 - 3/25/2008	LIN TV	Suddenlink Communications	KBIM-TV (CBS) KXAN-TV (NBC)	Albuquerque-Santa Fe, NM Austin, TX	N.A.	Blackout Occurred
19	1/6/2007 - 2/2/2007	Sinclair Broadcast Group	Mediacom	WABM-TV (MNT) WTTO-TV (CW) KGAN-TV (CBS) WICD-TV (ABC) WICS-TV (ABC) KDSM-TV (FOX) WLOS-TV (ABC) WMYA-TV (MNT) WDKY-TV (FOX) WMSN-TV (FOX) WCGV-TV (MNT) WVTV-TV (CW) WUCW-TV (CW) WEAR-TV (ABC) WFGX-TV (MNT) WZTV-TV (FOX) WNAB-TV (CW) WUXP-TV (MNT) WTVZ-TV (MNT) KBSI-TV (FOX) WDKA-TV (MNT) WYZZ-TV (FOX) KDNL-TV (ABC) WTWC-TV (NBC)	Birmingham, AL Birmingham, AL Cedar Rapids-Waterloo-Dubuque, IA Champaign-Springfield-Decatur, IL Champaign-Springfield-Decatur, IL Des Moines-Ames, IA Greenville-Spartanburg, SC-Asheville, NC Greenville-Spartanburg, SC-Asheville, NC Lexington, KY Madison, WI Milwaukee, WI Milwaukee, WI Minneapolis-St. Paul, MN Mobile, AL-Pensacola, FL Mobile, AL-Pensacola, FL Nashville, TN Nashville, TN Nashville, TN Norfolk-Portsmouth-Newport News, VA Paducah, KY-Cape Girardeau, MO-Harrisburg-Mt Vernon, IL Paducah, KY-Cape Girardeau, MO-Harrisburg-Mt Vernon, IL Peoria-Bloomington, IL St. Louis, MO Tallahassee, FL-Thomasville, GA	N.A.	Blackout Occurred
20	12/15/2006 - 2/1/2008	Mountain Broadcasting Corp.	Time Warner Cable	KAYU-TV (FOX)	Spokane, WA	N.A.	Blackout Occurred
21	12/2006 - 1/19/2007	Sinclair Broadcast Group	Time Warner Cable	WABM-TV (MNT) WTTO-TV (CW) WNYO-TV (MNT) WUTV-TV (FOX) WMMP-TV (MNT) WTAT-TV (FOX) WCHS-TV (ABC) WVAH-TV (FOX) WSTR-TV (MNT) WSYX-TV (ABC) WTTE-TV (FOX)	Birmingham, AL Birmingham, AL Buffalo, NY Buffalo, NY Charleston, SC Charleston, SC Charleston-Huntington, WV Charleston-Huntington, WV Cincinnati, OH Columbus, OH Columbus, OH	N.A.	

Dispute No.	Dates	Station Owner	MVPD	Local Broadcast Stations		Broadcaster-Owned Cable Networks	Blackout
				TV Stations	TV Markets		
				WKEF-TV (ABC)	Dayton, OH		
				WRGT-TV (FOX)	Dayton, OH		
				WXLV-TV (ABC)	Greensboro-High Pt.-Winston Salem, NC		
				WMYV-TV (MNT)	Greensboro-High Pt.-Winston Salem, NC		
				WDKY-TV (FOX)	Lexington, KY		
				WCGV-TV (MNT)	Milwaukee, WI		
				WVTV-TV (CW)	Milwaukee, WI		
				WEAR-TV (ABC)	Mobile, AL-Pensacola, FL		
				WTVZ-TV (MNT)	Norfolk-Portsmouth-Newport News, VA		
				KBSI-TV (FOX)	Paducah, KY-Cape Girardeau, MO-Harrisburg-Mt Vernon, IL		
				WDKA-TV (MNT)	Paducah, KY-Cape Girardeau, MO-Harrisburg-Mt Vernon, IL		
				WPGH-TV (FOX)	Pittsburgh, PA		
				WPMY-TV (MNT)	Pittsburgh, PA		
				WGME-TV (CBS)	Portland-Auburn, ME		
				WLFL-TV (CW)	Raleigh-Durham, NC		
				WRDC-TV (MNT)	Raleigh-Durham, NC		
				WUHF-TV (FOX)	Rochester, NY		
				KABB-TV (FOX)	San Antonio, TX		
				KMYS-TV (MNT)	San Antonio, TX		
				WGGB-TV (ABC)	Springfield-Holyoke, MA		
				WNYS-TV (MNT)	Syracuse, NY		
				WSYT-TV (FOX)	Syracuse, NY		
				WTWC-TV (NBC)	Tallahassee, FL-Thomasville, GA		
				WTTA-TV (MNT)	Tampa-St. Petersburg-Sarasota, FL		
22	11/2006 - 12/8/2006	Gray Television, Inc.	Time Warner Cable	WSAZ-TV (NBC)	Charleston-Huntington, WV	N.A.	
23	7/1/2006 - 8/7/2006	Sinclair Broadcast Group	Suddenlink Communications	WCHS-TV (ABC)	Charleston-Huntington, WV	N.A.	Blackout Occurred
				WVAH-TV (FOX)	Charleston-Huntington, WV		
24	2/1/2006 - 2/3/2006	McKinnon Broadcasting	Time Warner Cable	KIII-TV (ABC)	Corpus Christi, TX	N.A.	Blackout Occurred
25*	1/23/2006 - unknown	Gray Television, Inc.	Time Warner Cable	KWTX-TV (CBS)	Waco-Temple-Bryan, TX	N.A.	Blackout Occurred
26	1/1/2005 - 12/19/2005	Nexstar Broadcasting, Mission Broadcasting	Cable One	KAMR-TV (NBC)	Amarillo, TX	N.A.	Blackout Occurred
				KODE-TV (ABC)	Joplin, MO-Pittsburg, KS		
				KSNF-TV (NBC)	Joplin, MO-Pittsburg, KS		
				KTAL-TV (NBC)	Shreveport, LA		
27*	1/1/2005 - 10/20/2005	Nexstar Broadcasting, Mission Broadcasting	Cox Communications	KRBC-TV (NBC)	Abilene-Sweetwater, TX	N.A.	Blackout Occurred
				KTAB-TV (CBS)	Abilene-Sweetwater, TX		
				KAMR-TV (NBC)	Amarillo, TX		
				KCIT-TV (FOX)	Amarillo, TX		
				KCPN-TV (MNT)	Amarillo, TX		
				KBTU-TV (FOX)	Beaumont-Port Arthur, TX		
				KFTA-TV (FOX)	Ft. Smith-Fayetteville-Springdale-Rogers, AR		
				KNWA-TV (NBC)	Ft. Smith-Fayetteville-Springdale-Rogers, AR		
				KODE-TV (ABC)	Joplin, MO-Pittsburg, KS		
				KSNF-TV (NBC)	Joplin, MO-Pittsburg, KS		
				KAMC-TV (ABC)	Lubbock, TX		
				KLBK-TV (CBS)	Lubbock, TX		
				KARD-TV (FOX)	Monroe, LA-El Dorado, AR		
				KTVE-TV (NBC)	Monroe, LA-El Dorado, AR		
				KMID-TV (ABC)	Odessa-Midland, TX		
				KLST-TV (CBS)	San Angelo, TX		
				KSAN-TV (NBC)	San Angelo, TX		
				KTAL-TV (NBC)	Shreveport, LA		
				KOLR-TV (CBS)	Springfield, MO		
				KSFX-TV (FOX)	Springfield, MO		

Dispute No.	Dates	Station Owner	MVPD	Local Broadcast Stations		Broadcaster-Owned Cable Networks	Blackout
				TV Stations	TV Markets		
28	3/9/2004 - 3/11/2004	Viacom	DISH Network	KEYE-TV (CBS) WJZ-TV (CBS) WBZ-TV (CBS) WBBM-TV (CBS) KTVT-TV (CBS) KCNC-TV (CBS) WWJ-TV (CBS) KCBS-TV (CBS) WFOR-TV (CBS) WCCO-TV (CBS) WCBS-TV (CBS) KYW-TV (CBS) KDKA-TV (CBS) KUTV-TV (CBS) KPIX-TV (CBS)	Austin, TX Baltimore, MD Boston, MA Chicago, IL Dallas-Ft. Worth, TX Denver, CO Detroit, MI Los Angeles, CA Miami-Ft. Lauderdale, FL Minneapolis-St. Paul, MN New York, NY Philadelphia, PA Pittsburgh, PA Salt Lake City, UT San Francisco-Oakland-San Jose, CA	Comedy Central, MTV, MTV2, Nickelodeon, Nick Games and Sports (GAS), Noggin, VH1, VH1 Classic, MTV Espanol, BET - Affecting all DISH Network TV Markets	Blackout Occurred
29	5/31/2003 - 6/4/2003	Allbritton Communications	DISH Network	WBMA-TV (ABC) WHTM-TV (ABC) KTUL-TV (ABC) WJLA-TV (ABC)	Birmingham, AL Harrisburg-Lancaster-Lebanon-York, PA Tulsa, OK Washington, DC	N.A.	Blackout Occurred
30*	5/1/2000 - 5/2/2000	The Walt Disney Co.	Time Warner Cable	WLS-TV (ABC) WJRT-TV (ABC) KFSN-TV (ABC) KTRK-TV (ABC) KABC-TV (ABC) WABC-TV (ABC) WPVI-TV (ABC) WTVD-TV (ABC) KGO-TV (ABC) WTVG-TV (ABC)	Chicago, IL Flint-Saginaw-Bay City, MI Fresno-Visalia, CA Houston, TX Los Angeles, CA New York, NY Philadelphia, PA Raleigh-Durham, NC San Francisco-Oakland-San Jose, CA Toledo, OH	N.A.	Blackout Occurred
31*	1/1/2000 - 1/6/2000	News Corp.	Cox Communications	KTBC-TV (FOX) KDFI-TV (MNT) KDFW-TV (FOX) KRIV-TV (FOX) KXTH-TV (MNT) WHBQ-TV (FOX)	Austin, TX Dallas-Ft. Worth, TX Dallas-Ft. Worth, TX Houston, TX Houston, TX Memphis, TN	N.A.	Blackout Occurred

- Notes:*
- Information on the identity of the television stations, cable networks, and television markets affected by the carriage dispute were compiled from news stories identified in Appendix 4 as well as data from SNL Kagan.
 - For Dispute 25, we are unable to identify the end date of the dispute. However, we know - based on TWC's channel lineup - that the blackout has ended.
 - For Dispute 27, news reports indicate that 21 networks were involved in the dispute, but our data sources only allow for the identification of 20 networks.
 - For Dispute 30, the television market of Racine, WI was identified in one news report as a potential affected market. We were unable, however, to corroborate this news report with any other report or with the list of O&O stations available in The Walt Disney Co.'s 10-K filing for that year. For this reason, Racine is excluded from the list of affected markets associated with this event.
 - For Dispute 31, the stations identified correspond to FOX O&O stations in the markets affected according to news reports, even though current sources indicate that Cox no longer has a footprint in these markets.

Sources: Appendix 4 and SNL Kagan.

Appendix 2: Threatened and Actual Blackouts, for Non-Broadcaster Owned Cable Networks

Dispute No.	Dates	Station Owner	MVPD	Cable Networks	TV Markets	Blackout
32	1/1/2010 - 1/21/2010	Scripps Networks Interactive	Cablevision	Food Network, HGTV	New York, NY	Blackout Occurred
33	9/1/2009 - 3/15/2010	Comcast	DirecTV	Versus	All DirecTV TV Markets	Blackout Occurred
34	8/2009 - 9/24/2009	Independent Investors	Cablevision	Tennis Channel	New York, NY	Blackout Occurred
35	12/30/2008 - 1/1/2009	Viacom	Time Warner Cable, Bright House Networks	CMT: Pure Country, Comedy Central, Logo, MTV 2, MTV Hits, MTV Jams, MTV Tr3s, MTV, Nick 2, Nickelodeon, Nicktoons, Noggin, Palladia, Spike, The N, TV Land, VH1 Classic, VH1 Soul, VH1	All Time Warner Cable and Bright House Networks TV Markets	
36	8/1/2008 - Present	Tenfield	DISH Network	GoTV	All DISH Network TV Markets	Blackout Occurred
37	1/1/2007 - 2/9/2007	Turner Broadcasting	DISH Network	Court TV (n/k/a Tru TV)	All DISH Network TV Markets	Blackout Occurred
38	1/1/2006 - 1/31/2006	The Walt Disney Co. and The Hearst Corporation	DISH Network	Lifetime, Lifetime Movie Network	All DISH Network TV Markets	Blackout Occurred
39	2006 - 5/19/2009	National Football League	Comcast	NFL Network	All Comcast TV Markets	
40	12/19/2005 - Present	National Football League	Charter Communications	NFL Network	All Charter Communications TV Markets	Blackout Occurred
41	1/1/2005 - 12/31/2005	NBC Universal	DirecTV	Trio	All DirecTV TV Markets	Blackout Occurred
42	8/1/2004 - 8/11/2004	Cablevision and News Corp.	Time Warner Cable	FSNY, FSN Digi-nets (Fox College Sports Pacific, Fox College Sports Central, Fox College Sports Atlantic), MSGN	New York, NY	Blackout Occurred
43	12/2/2003 - 12/30/2003	NBC Universal	DirecTV	Trio	All DirecTV TV Markets	
44	12/2003 - 4/29/2004	Turner Broadcasting	DISH Network	Boomerang, Cable News Network, Cartoon Network, CNN Headline News, CNNfn, Turner Classic Movies, Turner South	All DISH Network TV Markets	
45	10/2003 - 2/19/2004	The Walt Disney Co.	Cox Communications	ESPN	All Cox Communications TV Markets	
46*	10/2003 - 12/3/2003	News Corp.	Cox Communications	Various Fox RSNs	Baton Rouge, LA Macon, GA New Orleans, LA Oklahoma City, OK Omaha, NE Phoenix, AZ San Diego, CA Tucson, AZ	
47	3/6/2003 - 3/26/2003	The Walt Disney Co.	DirecTV	ABC Family Channel	All DirecTV TV Markets	
48	1/1/2003 - 3/13/2003	News Corp.	Time Warner Cable	Fox Sports Net North, Sunshine Network	All Time Warner Cable Markets in Florida and Minnesota	Blackout Occurred
49	3/19/2002 - 3/31/2003	New York Yankees	Cablevision	YES Network	New York, NY	
50	1/1/2002 - 4/2002	The Walt Disney Co.	DISH Network	ABC Family Channel, ESPN Classic	All DISH Network TV Markets	Blackout Occurred
51	6/27/2001 - 9/24/2001	News Corp.	Time Warner Cable	FSN West	Los Angeles, CA	Blackout Occurred

Notes:

1. Information on the identity of the cable networks and television markets affected by the carriage dispute were compiled from news stories identified in Appendix 4 as well as data from SNL Kagan.
2. For Dispute 46, it was unclear from the news report whether the dispute extended nationwide.

Sources : Appendix 4 and SNL Kagan.

Appendix 3: Estimated Television Households and Subscribers Affected by Broadcaster Network Actual or Threatened Blackouts, Between 2006 and YTD 2010, By Carriage Dispute

Dispute No.	Year	Station Owner	MVPD	Reported Impact		Impact Based on Kagan 2009Q3 Data			Adjusted Impact Based on Kagan 2009Q3 Data			
				# of TV Markets	Subscribers	# of TV Markets	# of TV Stations	Total TVHH	Total MVPD Subscribers	Percentage of Area across TV Markets Affected by the Dispute (%)	Total TVHH	Total MVPD Subscribers
1	2010	Citadel Communications	DirecTV	3		3	3	1,022,810	183,295	58	596,953	106,978
2	2010	The Walt Disney Co.	Cablevision	1	3,100,000	1	1	7,493,530	2,983,454	90	6,721,027	2,675,892
3	2009	News Corp.	Time Warner Cable; Bright House Networks	7	3,900,000	7	11	21,527,490	5,922,863	93	20,108,063	5,532,336
4	2009	Sinclair Broadcast Group	Mediacom	15	700,000	15	23	8,997,600	569,906	95	8,537,458	540,761
5	2009	Newport Television	Cable One	3		3	5	1,730,460	32,664	100	1,730,460	32,664
6	2009	Hearst-Argyle	Sunflower Broadband	1	31,000	1	2	941,360	28,000	100	941,360	28,000
7	2009	Free State Communications	DISH Network	1		1	1	180,090	26,658	65	117,935	17,458
8	2008	Belo Corp.	Charter Communications	11		11	14	12,782,260	1,074,380	55	7,020,361	590,078
9	2008	Fisher Communications	DISH Network	7		7	7	4,096,590	615,396	41	1,664,515	250,046
10	2008	Young Broadcasting	DISH Network	11		11	11	6,778,350	810,788	57	3,860,704	461,796
11	2008	McKinnon Broadcasting	Time Warner Cable	1	100,000	1	1	199,560	79,210	100	199,560	79,210
12	2008	Meredith Broadcasting Group	Cable One	1		1	1	1,873,930	52,535	13	251,033	7,038
13	2008	LIN TV	Time Warner Cable; Bright House Networks	11	1,606,000	11	15	5,901,950	1,766,323	100	5,901,950	1,766,323
14	2008	Post-Newsweek Stations	Time Warner Cable	1	350,000	1	1	830,000	424,524	43	357,621	182,914
15	2008	Citadel Communications	DISH Network	4		4	4	1,177,620	211,683	65	767,156	137,900
16	2008	Barrington Broadcasting Group	DISH Network	1	40,000	1	1	178,810	41,470	100	178,810	41,470
17	2008	LIN TV	Charter Communications	7	<1,000,000	7	10	3,982,740	287,328	100	3,982,740	287,328
18	2008	LIN TV	Suddenlink Communications	2	30,000	2	2	1,372,770	35,126	23	309,628	7,923
19	2007	Sinclair Broadcast Group	Mediacom	16	700,000	15	23	8,997,600	569,906	95	8,537,458	540,761
20	2006	Mountain Broadcasting Corp.	Time Warner Cable	1	25,000	1	1	419,350	23,527	20	81,927	4,596
21	2006	Sinclair Broadcast Group	Time Warner Cable	22	6,000,000	22	35	14,865,180	4,037,428	98	14,635,034	3,974,920
22	2006	Gray Television, Inc.	Time Warner Cable	1	43,000	1	1	501,530	55,554	95	473,953	52,499
23	2006	Sinclair Broadcast Group	Suddenlink Communications	1	240,000	1	2	501,530	88,137	100	501,530	88,137
24	2006	McKinnon Broadcasting	Time Warner Cable	1	100,000	1	1	199,560	79,210	100	199,560	79,210
25	2006	Gray Television, Inc.	Time Warner Cable	1	7,000	1	1	326,890	7,000	100	326,890	7,000
Total				131	17,972,000	130	177	106,879,560	20,006,365		88,003,688	17,493,237

- Notes:*
1. The impact of each dispute is calculated as the sum of all TV households and the MVPD's subscribers in the affected TV markets, where the affected TV markets are the MVPD's TV markets that overlap with the TV markets of the TV stations involved in the dispute.
 2. The adjusted impact calculation allows for the possibility that a TV station may not reach the entire television market in which it is located. This method adjusts the number of TV households and subscribers within an affected television market downward if the involved stations do not reach the entire television market, based on the coverage area (in square kilometers) of each individual station involved in the dispute. This adjustment factor is shown in the column labeled "Percentage of Area across TV Markets Affected by the Dispute (%)." For 16 out of the 25 disputes studied, this method adjusts downward the number of television households and subscribers calculated as the straight sum across the affected television markets.
 3. News sources report that Dispute 20 affected 4 local cities (Pullman, WA, Libby MT, Coeur d'Alene, ID, Moscow, ID) and that Dispute 22 affected 6 local cities (Huntington, WV, Charleston, WV, Ashland, KY, Ironton, OH, Portsmouth, OH, Jackson, OH). In each case, we identified the appropriate television market.
 4. Dispute 25 appears to involve only high definition programming. The news report suggests that the disruption affected the approximately 7,000 of TWC's 110,000 subscribers in central Texas receiving HD programming. We estimate that TWC had approximately 108,722 cable subscribers in the one television market involved. Because we do not have information on the penetration of high definition in this market, we rely on the news report for our measure of impact.

Sources: Appendix 1; SNL Kagan, Q3'09 Multichannel Subscribers by DMA.xls; SNL Kagan, TV Stations Database.xls, 2010; Top Cable Systems Operators, Third Quarter 2009.xls; Nielsen Claritas, SPFUSC08.xls; and Nielsen, Designated Market Areas Map 2007-2008.

Appendix 4: News Stories Identifying Actual and Threatened Blackouts

Dispute No.	Station Owner	Sources
1	Citadel Communications	Register staff, <i>DirrecTV, Citadel reach agreement; stations stay on air</i> , DesMoines Register, April 1, 2010 Sarah Barry James, <i>Retrans battle gets brief reprieve</i> , SNL Financial, April 1, 2010
2	The Walt Disney Co.	Joe Flint, <i>Disney's WABC still off in Cablevision homes as feud continues</i> , L.A. Times Company Town Blog, March 7, 2010 Matea Gold, <i>Cablevision customers fume about missing Oscar telecast</i> , L.A. Times Company Town Blog, March 7, 2010 Mike Reynolds, <i>Disney Pulls WABC-TV Signal From Cablevision in Retrans Dispute</i> , Multichannel News, March 7, 2010 Mike Reynolds and John Eggerton, <i>WABC-TV Returns to Cablevision</i> , Multichannel News, March 7, 2010 Mike Reynolds and John Eggerton, <i>WABC-TV Serves Up New Offer; Cablevision Would Agree To Arbitration In Retrans Battle</i> , Multichannel News, March 7, 2010 Mike Farrell, <i>Cablevision Consents to Launch ESPNU</i> , Multichannel News, March 23, 2010
3	News Corp.	Mike Farrell, <i>Fox Looks To 'Keep On' Time Warner Cable Systems In Retrans Dispute</i> , Multichannel News, December 18, 2009 Andrea Reiher, <i>Dish Network, DIRECTV ready should Time Warner-FOX dispute drag on</i> , Zap 2 News & Buzz from Inside the BOX, December 30, 2009 Associated Press, <i>Dispute between Fox and Time Warner Cable is going down to wire</i> , silive.com, December 31, 2009. Mike Farrell, <i>Food Fight Rages On</i> , Multichannel News, January 9, 2010
4	Sinclair Broadcast Group	John Eggerton, <i>Iowa Rep. Braley Doesn't Want Orange Bowl To Be Tackled By Mediacom-Sinclair Retrans Dispute</i> , Multichannel News, December 17, 2009 John Eggerton, <i>Legislators Ask FCC To Intervene In Sinclair-Mediacom Dispute</i> , Multichannel News, December 22, 2009 Nigel Duara, <i>Mediacom Accepts Extension in Cable TV Dispute</i> , ABC News, December 31, 2009 John Eggerton, <i>FCC Media Bureau Chief: Sinclair Extension Gives Viewers Chance To Seek Alternative</i> , Multichannel News, January 4, 2010 Mediacom, <i>Sinclair Reach TV Programming Contract</i> , The Wall Street Journal, January 7, 2010
5	Newport Television	E-E Staff Reports, <i>Cable One drops Fox station KOKI</i> , Bartlesville Examiner-Enterprise.com, February 5, 2009 Michael Malone, <i>Cable One, Newport Engaged in Retransmission Battle</i> , Multichannel News, February 6, 2009 Michael Malone, <i>Newport, Cable One Square Off on Retrans</i> , Broadcasting & Cable, February 6, 2009 <i>Agreement nears between CableOne, Newport (WPTY, WLMT return to local channel lineup)</i> , Dyersburg State Gazette, February 17, 2009
6	Hearst-Argyle	Linda Moss, <i>Sunflower Retrans Dispute Keeps K.C. Viewers in the Dark</i> , Multichannel News, January 5, 2009 <i>KMBC, KCWE Return to Sunflower Broadband</i> , KMBC.com, January 30, 2009
7	Free State Communications	Justin Schmidt, <i>KTKA no longer on Dish lineup</i> , KTKA.com, January 2, 2009 Michael Hooper, <i>KTKA, DISH Network reach accord</i> , The Topeka Capital-Journal, January 8, 2009 <i>DISH Network brings back KTKA</i> , KTKA.com, January 7, 2009
8	Belo Corp.	Todd Spangler, <i>Charter In Retrans Standoff With Belo Stations</i> , Multichannel News, December 22, 2008 Matthew Deegan, <i>Retrans dispute heats up between Belo stations and Charter</i> , SNL Financial, December 23, 2008 Mike Reynolds, <i>Charter, Three Belo Stations Reach Tentative Retrans Accords</i> , Multichannel News, December 28, 2008 Mike Reynolds and Linda Moss, <i>Charter, Belo Reach Retrans Accord</i> , Multichannel News, December 29, 2008
9	Fisher Communications	Associated Press, <i>Portland's KATU no longer available through Dish Network</i> , The Daily News Online, December 18, 2008 Associated Press, <i>Dish Network, Fisher End Legal Dispute</i> , ABC News, June 11, 2009
10	Young Broadcasting	Jon Lafayette, <i>Dish Drops Young Broadcasting Content in Retrans Dispute</i> , TVWeek, December 12, 2008 Jennifer DeWitt, <i>Young Broadcasting, DISH Network reach agreement</i> , Quad-City Times, December 15, 2008 Linda Moss, <i>Young Broadcasting, Dish Network resolve three-day retransmission-consent standoff</i> , Broadcasting & Cable, December 15, 2008
11	McKinnon Broadcasting	Fanny S. Chirinos, <i>Time Warner may pull KIII Channel 3</i> , Corpus Christi Caller Times, December 31, 2008 <i>KIII & Time Warner Agreement</i> , KIII TV News, December 31, 2008
12	Meredith Broadcasting Group	John Eggerton, <i>Meredith, Cable One at Retrans Impasse in Phoenix</i> , Multichannel News, December 30, 2008 Linda Moss, <i>Cable One Reaches Tentative Retrans Deal With KPHO</i> , Multichannel News, December 30, 2008 Michael Malone, <i>Newport, Cable One Square Off on Retrans</i> , Broadcasting & Cable, February 6, 2009
13	LIN TV	<i>LIN TV Announces Retransmission Contract with Time Warner Expires October 2, 2008</i> , LIN TV Press Release, September 15, 2008 Linda Moss, <i>LIN Stations Go Dark On Time Warner Systems in Retrans Dispute</i> , Multichannel News, October 2, 2008 Linda Moss, <i>LIN TV, TWC Fight On Over Retrans Compensation</i> , Multichannel News, October 11, 2008 John Nolan, <i>WDTN-TV back on Time Warner Cable</i> , Dayton Daily News, October 29, 2008 <i>LIN TV Reaches Carriage Agreement with Time Warner Cable</i> , LIN TV News Release, October 29, 2008

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		Linda Moss, <i>Time Warner, LIN TV Reach Retrans Deal</i> , Multichannel News, October 29, 2008 <i>Call letter change on the Gulf Coast</i> , Radio Business Report at rbr.com, December 9, 2009 <i>Our Brands</i> , LIN Media Website, retrieved May 25, 2010
14	Post-Newsweek Stations	Sanford Nowlin, <i>KSAT says Time Warner may drop it</i> , San Antonio Express-News, September 10, 2008 Jeanne Jakle, <i>KSAT says it will stay on Time Warner</i> , San Antonio Express-News, October 14, 2008
15	Citadel Communications	Linda Moss, <i>Dish-Citadel Retrans Flap Results In Four Station Drops</i> , Multichannel News, August 1, 2008 Linda Moss and Mike Reynolds, <i>Dish Drop Kicks GoTV In Contract Dispute</i> , Multichannel News, August 3, 2008 Robert Marich, <i>Dish Restores Four Citadel Stations</i> , Broadcasting & Cable, September 10, 2008
16	Barrington Broadcasting Group	Catherine McComb, <i>Update: KRCG/Channel 13 drops DISH Network</i> , Columbia Missourian, July 1, 2008 Linda Moss, <i>Dish Restores Missouri Station in Retrans Deal</i> , Multichannel News, September 11, 2008
17	LIN TV	<i>LIN TV Announces Negotiations with Charter Communications Unsuccessful</i> , LIN TV Press Release, June 4, 2008 Mike Farrell, <i>Charter/LIN TV Retrans Talks Break Down, 11 Stations Could Go Dark</i> , Multichannel News, June 4, 2008 <i>LIN TV and Charter Sign Carriage Agreement</i> , LIN TV Press Release, July 1, 2008 Robert Marich, <i>Broadcast's \$1 Billion Pot of Gold</i> , Broadcasting & Cable, July 6, 2008 <i>LIN TV 2008 Annual Report, Network Coverage</i> , at 5
18	LIN TV	Michael Malone, <i>Suddenlink-LIN TV Retransmission-Consent Spat Continues</i> , Broadcasting & Cable, January 4, 2008 <i>LIN TV and Suddenlink Sign Carriage Agreement</i> , Business Wire, March 25, 2008 Michael Malone, <i>LIN TV, Suddenlink Ink Retransmission-Consent Deal</i> , Broadcasting & Cable, March 25, 2008
19	Sinclair Broadcast Group	Mike Farrell, <i>Iowa Legislators Weigh In on Mediacom-Sinclair</i> , Multichannel News, January 11, 2007 <i>Mediacom Reaches Retransmission Consent Agreement with Sinclair; Broadcast Stations Immediately Restored</i> , Business Wire, February 2, 2007 <i>Sinclair and Mediacom Enter Into Retransmission Agreement</i> , PRNewswire-FirstCall, February 2, 2007 <i>Mediacom Loses Customers During Dispute</i> , KCCI.com, May 4, 2007
20	Mountain Broadcasting Corp.	Anne Becker, <i>Northwest Station Pulls Signal in Retransmission Battle</i> , Broadcasting & Cable, December 31, 2006 Amy Cannata, <i>Fox TV fans switch to dish: Dispute keeps channel off Time-Warner Cable</i> , The Spokesman Review, January 4, 2007 Michael Malone, <i>Carriage Spat Rages in Spokane, With local Fox affiliate dark on cable operator's system, new satellite subs soar</i> , Broadcasting and Cable, May 27, 2007 Rick Thomas, <i>Time Warner Cable on Fox hunt</i> , CDA Press, July 31, 2007. Mike Reynolds, <i>Touchdown! KAYU-TV, Time Warner Cable Reach Retrans Deal</i> , Multichannel News, February 3, 2008 Bill Blankenship, <i>WIBM-TV's threat to Cox has precedent</i> , The Topeka Capital Journal, Feb 23, 2008 Robert Marich, <i>Broadcast's \$1 Billion Pot of Gold</i> , Broadcasting & Cable, July 6, 2008
21	Sinclair Broadcast Group	<i>Letter to Viewers</i> , Sinclair Broadcast Group, undated Linda Moss, <i>Sinclair, Time Warner Settle</i> , Multichannel News, January 19, 2007 Linda Moss, <i>Sinclair Broadcast Pact Covers All Time Warner Subscribers</i> , Multichannel News, January 22, 2007 Linda Moss and Mike Farrell, <i>Sinclair Settles With TWC</i> , Multichannel News, January 27, 2007 Linda Moss and Mike Farrell, <i>Dueling for Dollars, Cash – Lots of It – Is at Stake When Broadcast and Cable Squares Off on Retransmitting Signals, Here's How Each Side Tries To Grab or Keep It</i> , Multichannel News, March 4, 2007
22	Gray Television, Inc.	<i>Gray strikes retrans deal in market #65</i> , Television Business Report at rbr.com, undated <i>WSAZ AND Time Warner Reach Agreement</i> , wsaz.com, undated Kenneth Hart, <i>WSAZ, cable co. reach accord</i> , The Daily Independent, December 9, 2006
23	Sinclair Broadcast Group	Mike Farrell, <i>Suddenlink, Sinclair in Retrans Clash</i> , Multichannel News, July 5, 2006 Mike Farrell, <i>Suddenlink, Sinclair Settle Retrans Flap</i> , Multichannel News, August 10, 2006
24	McKinnon Broadcasting	Linda Moss, <i>Spats Over Retransmission Down to Wire</i> , Multichannel News, December 31, 2005 Jamie Powell and Mari Saugier, <i>Victoria station pulled off</i> , Corpus Christi Caller Times, February 2, 2006
25	Gray Television, Inc.	<i>Letter from Johnny Mankin (Time Warner Cable) to Rich Adams (KWTX Channel 10)</i> , dated January 20, 2006 Carl Hoover, <i>CBS Programming From Dallas, Austin, Texas, Replace Waco Station's</i> , Waco Tribune-Herald, January 24, 2006 <i>Channel Lineups</i> , Time Warner Cable - Waco, retrieved May 27, 2010
26	Nexstar Broadcasting; Mission Broadcasting	Linda Moss, <i>Cox, Cable One Face Retrans Fight</i> , Multichannel News, December 30, 2004 <i>Cable ONE, Nexstar Broadcasting and Missing Broadcasting Reach Retransmission Agreement</i> , Business Wire, December 19, 2005 Linda Moss, <i>Cable One, Nexstar Settle</i> , Multichannel News, December 19, 2005
27	Nexstar Broadcasting;	Linda Moss and Ted Hearn, <i>Retrans, HD Complaints Reach Feds</i> , Multichannel News, January 23, 2005

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28	Viacom	<i>Viacom Inc. Form 10-K, Annual Report</i> , for fiscal year ended December 31, 2003, at I-14-5 Michael Learmonth and Kenneth Li, <i>EchoStar/Dish Network Drops CBS Stations</i> , tvantenna.com, March 9, 2004 Andrew Wallenstein and Brooks Boliek, <i>Viacom, EchoStar resolve dispute, restore channels</i> , The Hollywood Reporter, March 11, 2004 R. Thomas Umstead, <i>Kicking Dish In The Pants</i> , Multichannel News, March 14, 2004
29	Allbritton Communications	John Maynard, <i>Dish TV Denied WJLA In Contract Dispute</i> , The Washington Post, June 2, 2003 Nicole Nascenti, <i>Satellite TV Firm Drops Tulsa, Okla.-Area ABC Affiliates</i> , Tulsa World, June 3, 2003 Emerald Christopher, <i>EchoStar's DISH Network Drops Harrisburg, Pa., ABC Affiliate</i> , York Daily Record, June 4, 2003 Emerald Christopher, <i>Agreement Allows Harrisburg, Pa., TV Station to Broadcast over DISH Network</i> , York Daily Record, June 7, 2003 John Eggerton, <i>Retrans Flap Fixed</i> , Broadcasting & Cable, June 8, 2003
30	The Walt Disney Co.	Amanda Lamb, <i>Dispute Between Disney, Time Warner Leaves Triangle Cable TV Viewers Without ABC Affiliate</i> , WRAL.com, April 30, 2000 Bill Carter, <i>Blackout of ABC on Cable Affects Millions of Homes</i> , The New York Times, May 2, 2000 Linda Moss, <i>Its [sic] a Done Deal</i> , Multichannel News, May 29, 2000
31	News Corp.	Jim Cooper, <i>Fox and Cox Settle Standoff</i> , Mediaweek, January 10, 2000 K.C. Neel, <i>Cox-Fox Battle Resolved</i> , Cable World, January 10, 2000
32	Scripps Networks Interactive	Mike Farrell, <i>Scripps Pulls HGTV, Food Network From Cablevision's Menu</i> , Multichannel News, January 1, 2010 Mike Farrell, <i>Analyst: Scripps Fight Shouldn't Hurt Cablevision</i> , Multichannel News, January 4, 2010 Mike Reynolds, <i>Cablevision, Scripps Exchange Barbs in Contract Dispute</i> , Multichannel News, January 4, 2010 Mike Farrell, <i>Food Fight Rages On</i> , Multichannel News, January 9, 2010 Mike Reynolds, <i>Scripps, Cablevision Reach Contract Accord</i> , Multichannel News, January 21, 2010 Mike Reynolds, <i>Disney Pulls WABC-TV Signal From Cablevision in Retrans Dispute</i> , Multichannel News, March 7, 2010
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34	Independent Investors	John Eggerton, <i>Appeals Court Rejects Cablevision Must-Carry Challenge of WRNN Distribution In Long Island</i> , Multichannel News, June 4, 2009 John Eggerton, <i>Cablevision Asks Supreme Court to Review Constitutionality of Must-Carry</i> , Broadcasting & Cable, January 28, 2010
35	Viacom	Cynthia Littleton, <i>TW, Viacom settle cable dispute</i> , Variety.com, undated Associated Press, <i>Time Warner Cable and Viacom reach deal</i> , msnbc.com, January 1, 2009
36	Tenfield	<i>Dish Network Satellite TV to Offer New Soccer Network -- GOL TV -- in Spanish-Language...</i> , Business Wire, February 17, 2003 Linda Moss and Mike Reynolds, <i>Dish Drop Kicks GoTV In Contract Dispute</i> , Multichannel News, August 3, 2008 Linda Moss, <i>GoTV, Citadel Stations Remain Off Dish</i> , Multichannel News, August 8, 2008 Robert Marich, <i>Dish Restores Four Citadel Stations</i> , Broadcasting & Cable, September 10, 2008 Linda Moss, <i>Gol TV, Dish Tangle in Court Over License Fees</i> , Multichannel News, December 5, 2008 <i>America's Top 250 Package</i> , Dish Network, retrieved May 27, 2010
37	Turner Broadcasting	Joyzelle Davis, <i>Dish Network yanks Court TV off the air</i> , ScrippsNews.com, January 3, 2007 David Goetzl, <i>Dish, Court TV Trade Accusations, No Carriage Deal Yet</i> , MediaPost Publications, January 17, 2007 Linda Moss, <i>Court TV Returns to Dish Network</i> , Multichannel News, February 9, 2007
38	The Walt Disney Co. and The Hearst Corporation	Linda Moss, <i>Lifetime, Dish Back to Talking</i> , Multichannel News, January 21, 2006 Linda Moss, <i>Dish to Lifetime: a la Carte?</i> , Multichannel News, January 23, 2006 Mike Reynolds, <i>Hearst Key to Lifetime-Dish</i> , Multichannel News, February 1, 2006 Linda Moss, <i>DirecTV, Lifetime Dispute Heads to Court</i> , Multichannel News, August 19, 2006
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40	National Football League	Multi Channel News Staff, <i>First MSO Touchdown for NFL Network</i> , Multichannel News, January 7, 2004 Mike Reynolds, <i>Charter Hands the Ball to NFL Network</i> , Multichannel News, January 12, 2004 Anita Snow, <i>Intentional Grounding: NFL Net Pulls Signal from Charter</i> , The America's Intelligence Wire, December 20, 2005

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43	NBC Universal	R. Thomas Umstead, <i>DirecTV Removes Crawl Threatening Trio Removal</i> , Multichannel News, December 11, 2003 Reuters, <i>DirecTV Says It May Drop Trio</i> , Los Angeles Times, December 11, 2003 Multi Channel News Staff, <i>Trio Facing DirecTV Boot</i> , Multichannel News, December 10, 2003 Linda Moss, <i>EchoStar, DirecTV Reach Deals at the Wire</i> , Multichannel News, December 30, 2003 Linda Moss, <i>Network Drops Averted -- For Now</i> , Multichannel News, January 5, 2004
44	Turner Broadcasting	Linda Moss, <i>EchoStar, DirecTV Reach Deals at the Wire</i> , Multichannel News, December 30, 2003 Linda Moss, <i>Network Drops Averted -- For Now</i> , Multichannel News, January 5, 2004 Linda Moss, <i>EchoStar, Turner Ink Carriage Deal</i> , Multichannel News, April 26, 2004
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