

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

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

**REPLY COMMENTS OF**

**THE AMERICAN PUBLIC POWER ASSOCIATION; BRAINTREE ELECTRIC  
LIGHT DEPARTMENT (MA); BRISTOL TENNESSEE ESSENTIAL  
SERVICES (TN); BRISTOL VIRGINIA UTILITIES (VA); CHELAN COUNTY  
PUBLIC UTILITY DISTRICT (WA); GREENVILLE ELECTRIC UTILITY  
SYSTEM (TX); CITY OF GLASGOW, KY; LAFAYETTE UTILITIES  
SYSTEM (LA); MURRAY ELECTRIC SYSTEM (KY); MUSCATINE POWER AND  
WATER (IA); NORWOOD LIGHT BROADBAND (MA); SCOTTSBORO  
ELECTRIC POWER BOARD (AL); SHREWSBURY ELECTRIC LIGHT  
AND CABLE OPERATIONS (MA); SOUTH GEORGIA GOVERNMENTAL  
SERVICES AUTHORITY; AND SPENCER MUNICIPAL UTILITIES (IA)**

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The American Public Power Association and the public multichannel video programming distributors listed in the title to this submission (collectively "the APPA Group") submit these reply comments in support of the Petition for Rulemaking ("Petition") in the above captioned proceeding. The Petition, filed by a broad coalition of cable and satellite providers and non-profit, public interest entities, requests that the Federal Communication Commission ("FCC") initiate a proceeding to amend the rules governing the retransmission consent process under which multichannel video program distributors ("MVPDs") obtain the right to carry broadcast television stations. As discussed below, a broad array of commenters, ranging from cable operators, public interest consumer groups and small rural telephone companies, all agreed with the APPA Group that the proposed Petition is a necessary first step in reforming a retransmission consent process that is broken. Indeed, the only commenters who opposed a reexamination and

reform of the existing retransmission consent process were broadcasters who increasingly benefit from the skewed manner in which the process has devolved.

Moreover, the broadcasters never addressed or even acknowledged the fact that the unfair practices occurring under the current retransmission consent structure are disproportionately harmful to small, new competitive facilities-based MVPD providers, such as the public entities in the APPA Group, and that such practices threaten the development and availability of advanced broadband in many areas of the country.

As the APPA Group reiterates below, the Commission should not merely adopt the remedies proposed in the Petition for Rulemaking, but it should also remove the regulatory and other barriers that prevent the retransmission consent process from being truly competitive. For example, if the Commission determines that the combination of the retransmission consent rules and the network non-duplication rules have the practical effect of impeding competition for video programming, the Commission should modify its rules appropriately and preempt the contracts in question.

Furthermore, if the Commission is serious about preserving and protecting competition by small, independent MVPDs, it should recognize and accommodate the dramatically different realities that such small MVPDs face in negotiating for retransmission consent. At a minimum, the APPA Group renews its recommendation that the Commission modify those of its “good faith” negotiating rules that disproportionately harm small, independent MVPDs.

#### **I. THE COMMENTS DEMONSTRATE BROAD SUPPORT FOR REFORM OF RETRANSMISSION CONSENT PROCESS**

A diverse group of commenters, including the American Cable Association (“ACA”), the Organization for the Promotion and Advancement of Small Telephone Companies (“OPASTCO”), Time Warner, AT&T, Verizon, the Media Access Project, and Free Press/Consumer’s Union, all echoed the APPA Group’s belief that the Commission’s regulations

governing retransmission consent – which are now nearly twenty years old – are severely outdated, are causing harm to consumers, and are counterproductive to the development of competition in the delivery of video programming. These commenters, as well as many others, noted that the market conditions and circumstances that gave rise to the retransmission consent rules and policies in 1992 no longer exist. Simply put, the record in this proceeding reflects strong support for the Commission undertaking a proceeding to update the retransmission consent rules and regulations to reflect the current realities of the video market.

Virtually all commenters, including the National Association of Broadcasters (“NAB”), agree that when the Commission initially developed regulations implementing the retransmission consent provisions of the 1992 Act, the incumbent cable operator was the sole multichannel distributor of broadcast programming in almost all designated market areas. Accordingly, the rules that the FCC developed at that time reflected an environment in which broadcasters had little, if any, distribution options outside of negotiating for carriage with a single cable operator in each market. Therefore the Commission’s retransmission consent rules reflected the agency’s intent to redress the perceived imbalance of power in the cable industry.

**A. Broadcasters Arguments Against Reform Are Not Convincing.**

While the broadcasters grudgingly acknowledge that the MVPD market is more competitive than it was at the time of the enactment of the retransmission consent rules, they nevertheless argue that MVPDs have market power in the retransmission consent process:

[T]he Petition’s preoccupation with the advent of limited competition among MVPDs is a logical fallacy: while cable operators no longer enjoy a complete monopoly in the MVPD marketplace, it does not follow automatically that MVPDs are now significantly disadvantaged vis-à-vis local broadcast stations in retransmission consent negotiations. Cable operators still offer dozens, and often hundreds, of channels of video programming and, most importantly, still control access to a majority of viewers that local stations must be able to reach with their programming and advertising.<sup>1</sup>

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<sup>1</sup> NAB Comments, at 39.

Indeed, NAB contends that, if anything, changes in the market place (including cable system clustering, audience fragmentation, and a reduction in the share of viewers watching over-the-air television) have “*reduced* broadcasters’ bargaining power relative to MVPDs.”<sup>2</sup> In support of this startling statement, NAB argues that “if an impasse occurs” in retransmission consent negotiations, an MVPD loses the ability to distribute only one of many channels to its subscriber base, while a broadcaster “risks losing distribution of its one and only signal to whatever portion of its service territory is served by the MVPD with which the impasse occurs.”<sup>3</sup>

The broadcasters’ argument is belied by the facts. As AT&T correctly notes, if broadcasters’ negotiating leverage were decreasing, as NAB claims, then one would expect their compensation for retransmission consent to be falling commensurately. In fact, precisely the opposite has occurred.<sup>4</sup> Broadcasters not only have continued to demand in-kind compensation in the form of carriage of affiliated programming networks, but also ever higher cash payments for retransmission consent, as documented in the Petition, and experienced first-hand by the APPA Group.

Commenters point to multiple news reports that broadcasters are receiving, and intend to continue to push for, ever-increasing retransmission consent fees. For example, Bright House Networks notes:

News Corp/Fox is pushing for monthly fees of as much as \$1 per household in current negotiations with Time Warner Cable. In fact, dramatic increases in

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<sup>2</sup> *Id.*, Attachment A, Jeffrey A. Eisenach, Kevin W. Caves, “Retransmission Consent and Economic Welfare: A Reply to Compass Lexicon,” (“Navigant Study”) at 2 (April 2010) (*emphasis* in original).

<sup>3</sup> Navigant Study at 5, n.10.

<sup>4</sup> ATT Comments, at 9.

retransmission consent fees have been reported by several prominent broadcast groups. A trade article recently reported:

[S]tation groups continued to report double-digit retrans increases, including Nexstar Broadcasting, which reported retrans revenue of \$24.3 million, a 68.5% over the previous year. Belo Corp., which owns 20 stations in 16 markets, increased its retrans take by 29% to \$42.6 million in 2009 and LIN TV, owner of 27 stations in 17 markets, reported a 48% increase in retrans revenue to \$43 million for the year.

CBS certainly has made no secret of its desire for increased retransmission consent revenue. CBS President and CEO Les Moonves recently announced, 'In 2010 we're going to take in over \$100 million in retrans fees. That number will grow in 2012 to at least \$250 million.'

In a March 2010 article, ominously entitled More Retrans Disputes on the Horizon, the Associated Press focused on the broadcast industry's quest for higher retransmission consent fees and the likelihood of a concomitant increase in retransmission consent battles. The article explains:

Broadcasters hurt by declining ad revenue are demanding more fees from cable and other subscription TV providers to carry the stations. There is a lot of money at stake, said Robin Flynn, an analyst at SNL Kagan. There are a lot more fights coming up.<sup>5</sup>

Broadcasters, in turn, argue that the compensation being demanded as part of retransmission consent carriage agreements is simply a reflection of a market-based negotiation process, and is consistent with Congressional intent. The majority of non-broadcast interests, however, agree with the APPA Group that the current retransmission consent process and rules do not reflect market forces so much as regulatory preferences that are preventing normal market dynamics from functioning. As Verizon notes, the combination of retransmission consent and network non-duplication/syndicated exclusivity rights effectively limits an MVPD to a single source for programming that consumers expect to receive.

Throughout their collective comments, broadcasters attempt to argue that there is no harm to consumers from increased costs for retransmission consent. The most strenuous of such

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<sup>5</sup> Bright House Networks Comments, at 6 (citations omitted).

arguments was submitted by NAB, which offered a study by Navigant Economics<sup>6</sup> that purported to refute arguments and analysis contained in a 2009 Report by Compass Lexecon on the consumer harms stemming from the current retransmission consent process.<sup>7</sup> Among the many dubious claims and unsupported jumps in logic contained within the Navigant Study is the following argument.

At the most basic level, Lexecon's allegation of consumer harm amounts to nothing more or less than the assertion that pay television providers would charge consumers less for video service if they could get access to one of their key inputs (broadcast signals) for free, and that consumers would be better off as a result. Of course, precisely the same thing could be said about electricity and bucket trucks. The obvious fallacy is that forcing electricity producers and truck manufacturers to give pay television operators their products for free would reduce the quantity (and quality) of electricity and bucket trucks supplied, and both pay television operators and, ultimately, consumers would suffer as a result. The same is true for broadcasting.<sup>8</sup>

Navigant's strained analogy is not only misplaced, but it reflects the broadcasters' distorted view of the world. Unlike broadcasters, electric utilities do not receive any benefit from cable operators using their services beyond cash compensation. It is a simple sales relationship in which the utility provides electric service in exchange for payment. In contrast, a broadcaster obtains a clear value from a cable operator's carriage of its signal – it is available to more viewers and the broadcaster is therefore able to generate more advertising revenue.

Compounding the harm of the broadcasters' disproportionate bargaining power is the fact that broadcasters frequently seek "most favored nation" provisions under which an MVPD must agree to pay the broadcaster for retransmission consent if it pays any other broadcaster for such

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<sup>6</sup> Navigant Study, at p 2.

<sup>7</sup> Michael Katz, Jonathan Orszag and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime* (November 12, 2009).

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consent. Under such provisions, the effect of retransmission consent payments quickly could escalate, driving up MVPD costs, and, concomitantly, subscribers' rates.

Moreover, the broadcasters are also wrong in arguing that the threat of consumers losing access to popular programming should a retransmission consent negotiation reach an impasse is not an issue because “[c]onsumers can receive the programming from the local station over the air and for *free*—or from another MVPD.”<sup>9</sup> This argument displays a willfully cavalier attitude towards the interest of their viewing audience. First, NAB is well aware that, in the period since the transition to digital television last year, a majority of MVPD households no longer have access to over the air broadcasting with their existing reception devices. At a minimum, this would require many customers to buy a digital-to-analog converter box and possibly an antenna. Second, MVPD customers cannot pick and choose between MVPDs for individual channels; instead consumers would have to switch their MVPD provider. In addition to imposing a burden on consumers, this also underscores the competitive importance of reasonable access to broadcast stations for all competing MVPDs.

If a subscriber does actually defect to an alternate MVPD in response to a temporary loss of programming, it is not at all assured that the subscriber will return to the original MVPD when the programming impasse is resolved. As Bright House Networks notes, consumers are likely to quickly resume watching a popular programming service once it is restored to a channel line-up, but they are far less likely to abandon their new MVPD relationship once the terminated programming service is restored to the line-up of their original MVPD.

NAB also argues that “competitive pressure *between television stations* in a market incentivizes broadcasters to get a deal done. The only thing worse than a station losing viewers

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<sup>9</sup> NAB Comments, at 27.

generally is losing them to a competitor broadcast station.”<sup>10</sup> Again, this argument is not borne out by the facts. As the ACA observes, broadcasters jointly negotiate retransmission consent for multiple Big 4 affiliates in the same market through sharing agreements, or as a result of duopolies. ACA “identifies at least 93 sharing agreements or duopolies involving more than one Big 4 affiliate in 78 television markets – affecting more than 37% of the 210 DMAs – with the heaviest concentration in smaller markets served by ACA members.” ACA members confirm having to jointly negotiate retransmission consent in many of these instances. What’s more, ACA cites economic analyses that detail how this broadcaster tactic, akin to collusion, enables broadcasters to threaten simultaneous withdrawal of two “must have” channels, resulting in higher fees for MVPDs.<sup>11</sup> The APPA Group concurs that this is a problem that its members have experienced first-hand.

#### **B. Retransmission Consent Rules Not Suited to Competitive MVPD Environment**

The Commission has long encouraged the development of MVPD competition in anticipation of expected consumer benefits. Underpinning this encouragement for competition has been the assumption that MVPD competition would have a restraining impact on consumer prices. For example, the Communications Act removes rate regulation for MVPDs in markets that are subject to “effective competition.”<sup>12</sup> Unfortunately, this assumption regarding the pro-consumer impact of MVPD competition does not extend to retransmission consent negotiations and pricing. As Bright House Network Notes,

Programmers generally, and broadcasters particularly, have discovered newfound leverage to extract dramatically higher fees from competing MVPDs, thereby

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<sup>10</sup> *Id.*, at 53-54.

<sup>11</sup> ACA Comments, at 3.

<sup>12</sup> 47 U.S.C. 543(a)(2)(ii).

turning MVPD competition into something that is inflating, rather than deflating, consumer pricing.<sup>13</sup>

This is because competing MVPDs cannot afford to forego carriage of “must have” broadcast programming and therefore a broadcaster can essentially extract monopoly rents from each of the competing MVPDs, and these costs are necessarily passed on to customers either directly or indirectly. In short, left unchecked, broadcasters can apply retransmission consent so that they, *rather than the public*, capture all the benefits associated with MVPD competition.<sup>14</sup>

**C. Broadcasters Ignore Disproportionate Impact of Current Rules on Small MVPDs**

NAB and its broadcaster-funded expert study focus exclusively on the relative bargaining power of the largest cable multiple system operators, and they completely ignore the disproportionate harm of current broadcaster negotiation tactics on small and mid-size cable operators. ACA, OPASTCO, and the U.S. Small Business Administration all confirm the APPA Group’s contention that abuses of the current retransmission consent rules are particularly harmful and burdensome to small providers. ACA indicates that, on average, smaller MVPDs pay retransmission consent fees more than twice as high as the average retransmission consent fee paid by large operators, and that there is no meaningful cost-based justification for this disparity -- it simply reflects the vast difference in bargaining power between a smaller MVPD and the larger broadcast stations.<sup>15</sup>

ACA points to an economic evaluation of retransmission consent price discrimination that concluded:

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<sup>13</sup> Bright House Networks Comments, at 8.

<sup>14</sup> *Id.*, at 9 (*emphasis* in original).

<sup>15</sup> ACA Comments, at 2.

In some markets, price discrimination can have the desirable effect that it provides firms with the incentive and ability to serve more customers by allowing them to simultaneously serve customers with a low ability/willingness to pay for the good at low prices while still serving customers with a higher ability/willingness to pay for the good at higher prices. No such economic rationale applies in the case of retransmission consent. Obviously, local broadcasters would still provide their signals to the major MVPDs if they were not allowed to charge even higher prices to small and rural MVPDs. Therefore the main effect of price discrimination in this case, is simply to allow broadcasters to charge higher prices to MVPDs that possess less bargaining power.<sup>16</sup>

The disproportionate bargaining power between smaller MVPDs and broadcasters is particularly acute for small, new entrants, since, as a practical matter, these systems cannot succeed without carrying the major networks that their (often much larger) competitors are already providing. As a result, small, competitive public providers – or service providers using their systems – often have little choice but to pay a substantial premium for retransmission consent and to pass that premium through to their rural and small-market subscribers. This puts them at a significant competitive disadvantage to larger MVPDs in their markets.

The members of the APPA Group have experienced such unfair practices first-hand. They have increasingly faced unreasonable retransmission consent demands, dictated by broadcasters with little, if any, interest in constructive “good faith” negotiation and mutual accommodation. Further, where members of the Group have found broadcasters in neighboring markets that were willing to provide alternative programming, the Commission’s network non-duplication and syndicated exclusivity rules and the broadcasters’ contracts with national broadcast networks precluded access to such alternative programming – or even the threat of obtaining it.

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<sup>16</sup> ACA Comments, at 5.

## **II. CHANGES IN RETRANSMISSION RULES WILL FOSTER BROADBAND DEPLOYMENT**

Several commenters echoed the APPA Group's observation that, while the Petition focuses on access to broadcast programming, it is important for the Commission to consider the impact of the current abuses and unfair practices that occur in the retransmission consent process in the broader context of the national goals of fostering greater broadband availability. As AT&T observes, "[t]he harm to consumers is not limited only to increased fees for video services. Given the strong nexus between video and broadband deployment, the rise in retransmission consent payments also threatens to undermine the Commission's broadband deployment and adoption goals." AT&T goes on to note, "[t]he higher subscription fees resulting from the run up in retransmission consent payments inevitably will force millions of consumers to forego subscription to MVPD services, depressing demand for broadband services offered over the same networks and facilities."<sup>17</sup>

Similarly, OPASTCO argues that broadband providers must be able to pay for their systems. "In addition to the immediate impact the loss of a signal has on consumers, the Commission should also consider that an MVPD's resulting loss of revenue will harm its ability to make further investments in video and broadband infrastructure."<sup>18</sup> They must therefore have fair and reasonable access to broadcast video programming.

As the APPA Group explained, many of its members have specifically constructed their networks to extend high-capacity broadband capabilities to their communities in order to foster robust economic development and competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable

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<sup>17</sup> AT&T Comments, at 10.

<sup>18</sup> OPASTCO Comments, at 9.

modern health care, quality government services, and the many other advantages that contribute to a high quality of life that the Commission recently identified in its National Broadband Plan. In order to construct, maintain, and extend such broadband networks, however, the members of the APPA Group must have access to broadcast programming at reasonable, nondiscriminatory rates.

### **III. COMMENTERS SUPPORT A BROAD REVIEW AND REFORM OF THE RETRANSMISSION CONSENT RULES**

As demonstrated by a wide array of commenters, the current retransmission rules have failed to keep up with changes in the MVPD marketplace and are ill-suited to curb the negotiating abuses utilized by broadcasters that place MVPDs and consumers in a no-win position. Accordingly, the APPA Group reiterates that the record supports the Commission undertaking a broad review and revisions in its retransmission consent rules to ameliorate these abuses and better protect consumers.

Commenters as diverse as Time Warner and Free Press/Consumers Union echo the APPA Group in maintaining that the Commission has authority to undertake such action under Section 309(a) of the Communications Act, which requires that the FCC take actions to ensure that broadcast licensees operate in a manner consistent with the “public interest, convenience, and necessity.” Clearly the widespread and growing abuse of the retransmission consent process is not in the public interest, convenience or necessity. Similarly, the record supports the Commission’s authority under Section 325(b)(3)(A) to “commence a rulemaking proceeding to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent,” and that in adopting such regulations, the Commission is required to ensure that its regulations do not conflict with the Commission's obligation under section

623(b)(1) “to ensure that the rates for the basic service tier are reasonable.”<sup>19</sup> Clearly, based on the record, additional measures are needed to protect consumers. Moreover, the Commission has clear authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act,”<sup>20</sup> including Section 325.

**A. The Commission Should Adopt the Rule Changes Recommended in the Petition**

Specifically the record supports the FCC undertaking the procedural rule changes related to mediation, interim carriage and tying recommended by the Petition in order to reform the retransmission consent process to better protect consumers and ensure that rates for the basic tier remain reasonable.

**B. The Commission Should Modify its “Good Faith” Rules**

To be truly effective in protecting consumers and fostering competition within the MVPD marketplace, however, the APPA Group reiterates its call for the Commission to modify its “Good Faith” negotiation rules to make them more useful to small, independent MVPDs.

The current Good Faith rules, while well intended, are essentially a shield behind which broadcasters can hide myriad unfair and anticompetitive practices. NAB, for example, decries the Petition’s reference to “broadcaster misconduct,” and “abuses,” and indignantly states “no broadcaster has *ever* been found by the Commission to have violated its obligation to bargain in good faith.”<sup>21</sup> While this may be an entirely true statement, it testifies more to the lack of teeth in the Good Faith standards than to actual fairness, nondiscrimination and honest brokering on

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<sup>19</sup> 47 U.S.C. 325(b)(3)(A).

<sup>20</sup> 47 U.S.C. 303(r).

<sup>21</sup> NAB, at 30 fn 105.

the part of broadcasters. As APPA Group members know from personal experience, broadcasters and their negotiators are well aware of their negotiating power and the ease with which they can act substantively in a patently unfair manner while uttering hollow assurances that will enable them to claim to be complying with the Good Faith rules. Small providers would benefit greatly from a streamlined, cost-effective process through which to bring a good-faith negotiation dispute – with remedies/penalties that actually mean something to the broadcasters.

In order to rectify these abuses, the Commission should reconsider its statements that the following proposals by broadcasters are “presumptively legitimate:”

1. Proposals for compensation above that agreed to with other MVPDs in the same market;
2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market;
4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights;
5. Proposals for compensation in the form of commitments to purchase advertising on the broadcast station or broadcast-affiliated media; and
6. Proposals that allow termination of retransmission consent agreement based on the occurrence of a specific event, such as implementation of SHVIA's satellite must carry requirements.<sup>22</sup>

As the APPA Group noted, while such proposals may not be unfair in negotiations between parties of roughly equal strength, they may certainly be unfair to small independent MVPDs when pitted against local broadcasters that are backed by powerful national networks. At the very least, the Commission should be neutral with respect to these considerations, letting

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<sup>22</sup> *Id.*, at ¶ 56 (emphasis added).

the decision-makers view the totality of the circumstances without the outcome essentially dictated for them.

**C. The FCC Should Investigate and Take Appropriate Action to the Curb the Anticompetitive Effects of the Network Non-duplication and Syndicated Exclusivity Rules**

Where members of the APPA Group have found broadcasters in neighboring markets that were willing to provide alternative programming, the Commission's network non-duplication and syndicated exclusivity rules and the broadcasters' contracts with national broadcast networks precluded access to such alternative programming – or even the threat of obtaining it. Many other commenters have encountered the same problem and agree with the APPA Group that the Commission's network non-duplication and syndicated exclusivity rules compound the flaws in the retransmission consent process by depriving MVPDs of competitive choices.

The APPA Group reiterates its recommendation that the Commission investigate the relationship between non-duplication and syndicated exclusivity rules and any reforms to the retransmission consent process that it considers undertaking. If the Commission concludes that the rules and contracts would significantly hinder such reforms – as the APPA Group strongly believes will be true – then the Commission should take all appropriate steps to remedy this situation, including preempting the contract provisions at issue.

Respectfully Submitted,



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