Matthew A. Brill
(202) 637-1095
Matthew.Brill@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Abu Dhabi	Moscow
Barcelona	Munich
Beijing	New Jersey
Brussels	New York
Chicago	Orange County
Doha	Paris
Dubai	Riyadh
Frankfurt	Rome
Hamburg	San Diego
Hong Kong	San Francisco
Houston	Shanghai
London	Silicon Valley
Los Angeles	Singapore
Madrid	Tokyo
Milan	Washington, D.C.

July 30, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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

Dear Ms. Dortch:

On behalf of Time Warner Cable Inc. ("TWC"), I am writing in response to a June 23, 2010 filing by The Walt Disney Company in the above-captioned docket, which included a reply by Drs. Jeffrey Eisenach and Kevin Caves to two economic papers prepared on TWC's behalf by Professor Steven C. Salop and several of his economic colleagues affiliated with Charles River Associates ("CRA"), Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury.[1] That reply, *Video Programming Costs and Cable TV Prices: A Reply to CRA* ("*Reply*"), attempts to brush aside the important public policy issues raised in the Petition for Rulemaking ("Petition") and by a diverse array of other stakeholders, all of whom agree that the current retransmission consent rules are not fulfilling Congress's and the Commission's objectives. In particular, the *Reply* argues that broadcasters' recurring threats to withdraw consent to retransmit their signals and their increasing willingness to carry out such threats cannot be characterized as harmful because such tactics supposedly reflect the healthy functioning of a free market.

But the core premise underlying the *Reply* is plainly false: As TWC and other parties have explained, there is no "free market" for the negotiation of retransmission consent rights. To

---

[1] *See* Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* (June 3, 2010) attached to the Reply Comments of Time Warner Cable Inc., MB Docket 10-71, (filed June 3, 2010) ("*Brinkmanship Report*"); Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Video Programming Costs and Cable TV Prices: A Comment on the Analysis of Dr. Jeffrey Eisenach* (June 1, 2010), filed by Time Warner Cable Inc., MB Docket No. 10-71 (filed June 1, 2010) ("*Response to Eisenach*").

the contrary, the retransmission consent regime is a wholly artificial regulatory construct, and the Commission's rules were intentionally skewed to favor broadcasters in light of the fundamentally different conditions that prevailed in 1992. Thus, broadcasters' practice of holding viewers hostage as they demand ever-increasing compensation cannot be justified as a market-based development. By the same token, broadcasters' attempts to paint reform of the retransmission consent rules as inappropriate "government intervention" are disingenuous. Congress intervened years ago when it created a regulatory system to safeguard public access to broadcast content. When that system is being manipulated to *restrict* such access and *drive up* the prices consumers pay, no amount of economic spin or rhetoric can explain away such real-world harms to consumers or mask the need for reform. In any event, the economic analysis proffered by Drs. Eisenach and Caves is as flawed as their policy defense of broadcaster brinkmanship; the relevant data leave no doubt that programming costs are rising rapidly and outstripping revenue growth. In short, the *Reply* does nothing to diminish the case for reform, and the Commission accordingly should issue a Notice of Proposed Rulemaking to explore how best to address the harms enabled by the existing retransmission consent rules.

A. The *Reply* Trivializes the Substantial Consumer Harms Caused by Broadcaster Brinkmanship in Retransmission Consent Negotiations and Misconceives the Relevant Policy Issues

In an effort to rebut the economic analyses submitted by Dr. Salop and his colleagues in support of the Petition, the *Reply* first takes aim at the showing that broadcasters' brinkmanship tactics in retransmission consent negotiations are harming consumers.[2] For example, in response to Dr. Salop's analysis of threatened and actual service disruptions, the *Reply* claims that Dr. Salop failed to provide "any economic models for how to value such disruptions to consumers' emotional states."[3] In fact, Dr. Salop and his team demonstrated the disruptive effects of threatened and actual blackouts in detail, confirming what many parties in this proceeding have observed,[4] and Drs. Eisenach and Caves simply ignore the bulk of their analysis.

---

2 *Brinkmanship Report* ¶¶ 20-34.

3 Jeffrey A. Eisenach and Kevin W. Caves, *Video Programming Costs and Cable TV Prices: A Reply to CRA*, ¶ 6 n.10 (June 2010) ("*Reply*").

4 *See, e.g.*, Comments of Bright House Networks, LLC, MB Docket No. 10-71, at 1-2 (filed May 18, 2010) (describing Bright House's most recent retransmission consent dispute with FOX in which Florida residents faced a potential service disruption on New Year's Day, the day the University of Florida football team was to play in the Sugar Bowl, prompting two residents to file a Complaint and Motion for Temporary Injunction in Florida state court); Comments of the United States Telecom Association, MB Docket 10-71, at 3 (filed May 18, 2010) ("When broadcasters withdraw retransmission rights and a station goes 'dark' on a given MVPD network, consumers are often confused by the sudden and unanticipated loss of their local broadcast signal."); Joint Reply Comments of Mediacom Communications Corp. and Cequel Communications LLC d/b/a Suddenlink

LATHAM & WATKINS LLP

As an initial matter, Drs. Eisenach and Caves do not dispute that the costs imposed by blackouts and threats of blackouts are disproportionately imposed on MVPDs and their subscribers, not broadcasters. MVPDs—which face permanent loss of subscribers in the event that programming is pulled (or even when blackouts are threatened)[5]—thus have little choice but to agree to pay far higher prices in response to broadcasters' ever-increasing cash demands for retransmission consent, even when no explicit threat to pull programming is made.[6] As a result, broadcasters have significant bargaining advantages under the current rules (which in turn make their threats to pull programming highly credible),[7] as well as clear incentives to engage in brinkmanship tactics, both of which enable broadcasters to extract higher payments from MVPDs during retransmission consent negotiations.[8] Recent experience confirms that broadcasters will not hesitate to exploit this leverage as part of retransmission consent negotiations; indeed, Disney recently took out two full-page advertisements in the *New York Times* and launched a website to encourage TWC customers to switch MVPDs well before the

---

Communications, MB Docket No. 10-71, at 11-12 & n.13 (filed June 3, 2010) (collecting comments from "MVPDs, consumer and public interest groups and government officials [that] all confirm that the scare tactics being employed by broadcasters are driving up prices and are sowing confusion and frustration among consumers"); Reply Comments of Insight Communications Co., Inc., MB Docket No. 10-71, at 4-5 (filed June 3, 2010) (explaining that "broadcasters who use consumers as pawns by threatening to 'go dark,'" harm consumers even when the threat to disrupt service is not carried out); Reply Comments of Public Knowledge, MB Docket No. 10-71, at 3-4 (filed June 3, 2010) (explaining that broadcasters now have sufficient leverage in retransmission consent negotiations to impose a "constant threat of blackouts" and, "[a]s a result, consumers are left with the choice of leaving their MVPD and incurring switching costs or not receiving the programming they value").

5 *Brinkmanship Report* ¶¶ 59, 67 n.64 (explaining the long-lasting effects that programming blackouts and public blackout threats may have on MVPDs).

6 *Id.* ¶ 15 (explaining that the potential for a temporary blackout or public blackout threat places "bargaining pressure" on MVPDs, which leads them "to agree to pay higher [retransmission consent] fees, even in situations where there is no blackout, or even where there are no explicit blackout threats"); *id.* ¶ 87.

7 *Id.* ¶¶ 45-47 (explaining that broadcasters "are in a stronger bargaining position" as a result of competition among MVPDs and how "[t]he [retransmission consent] fee represents a mechanism for transferring bargaining surplus from the MVPD to the broadcaster").

8 *Id.* ¶¶ 52-69 (describing the myriad ways in which blackouts, public announcements of forthcoming blackouts, public blackout threats, and associated brinkmanship tactics cause more harm to the MVPD than to the broadcaster and, in fact, provide advantages to the broadcaster in subsequent negotiation cycles).

existing carriage agreements are set to expire.[9] Plainly, broadcasters understand the significant bargaining advantages the retransmission consent regime affords them, even as their economists attempt to obscure that fact. Moreover, in light of the increase in the number of programming blackouts and public threats of blackouts in recent years[10]—another point that Drs. Eisenach and Caves studiously ignore—the economic stakes for MVPDs in retransmission consent negotiations are higher now than ever before.

In addition, blackouts often are targeted to coincide with major televised events for which there is no substitute, such as the Super Bowl or the Academy Awards. As the *Brinkmanship Report* explains, such tactics ensure that the threatened (or actual) blackout will maximize the impact on MVPD subscribers, and therefore amplify the harm to consumers who are confronted with a loss of access to such programming.[11] Many MVPD subscribers accordingly will choose to incur sometimes-significant switching costs when faced with the threat of a programming blackout—in some instances even before a threatened blackout occurs—to avoid what they perceive as the greater loss caused by pulled programming.[12] The cost of switching service providers may include the outlay of funds (for the installation of new service, for example) but nevertheless imposes other significant non-monetary costs, including the time spent obtaining new service and the cost of switching to a less-preferred MVPD.

The harmful psychological effects of broadcasters' brinkmanship, which Drs. Eisenach and Caves deride as "psycho-babbl[e],"[13] exist *in addition to* these other, more tangible examples of economic harm. And while the Drs. Eisenach and Caves may balk at the Commission's consideration of consumer frustration, anxiety, and uncertainty, the loss in utility of MVPD services that consumers experience as a result of such harms is nonetheless substantial and real, regardless of whether it is easily quantified by economists. Indeed, the *Reply*'s focus on "economic models" misses the point.[14] For consumers who are fed up with broadcasters' using them as human shields in retransmission consent negotiations,[15] the issue is not the precise

---

9 *See* I Have Choices, http://www.ihavechoices.com/ (last viewed July 29, 2010) (website launched by Disney to encourage TWC customers to switch to another MVPD in advance of the September 2, 2010 expiration of TWC's carriage agreements for ABC and ESPN networks); ABC7 Advertisement, *Just the Facts*, N.Y. TIMES, July 23, 2010, at A9; ESPN Advertisement, *Just the Facts*, N.Y. TIMES, July 23, 2010, at B16.

10 *Brinkmanship Report* ¶ 18 & Figure 1.

11 *See id.* ¶¶ 21-26.

12 *See id.* ¶¶ 26, 61-62.

13 *Reply* ¶ 6.

14 *Id.* ¶ 6 n.10.

15 *See, e.g.*, Comments of Sports Fans Coalition, MB Docket No. 10-71, at 3 (filed June 14, 2010) (stating that sports fans "simply want to avoid being held hostage as broadcasters battle over fees with pay-TV providers" and that "[f]ans shouldn't be forced to purchase additional equipment … just to prepare for the possibility of a blackout" or, in the event

"value" that should be attributed to such harm; rather, they do not want to suffer *any* such harm as a result of brinkmanship tactics that run afoul of congressional intent, including the core public interest mandate Congress imposed on broadcasters as a condition of their receiving licenses to use immensely valuable spectrum for free.[16] Tellingly, every consumer group and public interest organization that has participated in this proceeding has recognized as much and therefore weighed in to support reform, seeing through broadcasters' bogus claims that they are acting in furtherance of the public interest.

Drs. Eisenach and Caves likewise miss the point in arguing that "the market for video programming is functioning efficiently" and that Dr. Salop has failed to show that retransmission consent payments, in particular, are "too high."[17] As the Petition and various commenters have explained, retransmission consent negotiations do not take place in a genuine "market" that is governed by competitive dynamics.[18] Rather, retransmission consent is an artificial regulatory

---

of an actual blackout, face "missing the sporting event entirely" or "the excitement … of a live sports broadcast").

16 *See* Press Release, The Honorable John F. Kerry, *Kerry on Time Warner Cable-Fox Dispute: Denying 4 Million Consumers Programming Is No Negotiation Tactic* (Dec. 31, 2009), *available at* http://kerry.senate.gov/press/release/?id=3a3daef1-6d50-40c8-8600-fa72c627e6bf; Letter from Charles A. Gonzalez, Member of Congress, 20th District of Texas, to Chase Carey, News Corporation (Dec. 31, 2009) (stating that FOX's refusal to find an "interim solution" to retransmission consent disputes would "hold my constituents hostage" and "cause significant and completely unnecessary damage"); Letter from Michael E. McMahon, Member of Congress, 13th District of New York, to Chairman Julius Genachowski, Federal Communications Commission (Dec. 23, 2009) (urging Chairman Genachowski "to take whatever steps are necessary to protect the viewing audience" and to investigate allegations of wrongdoing by broadcasters during retransmission consent negotiations).

17 *Reply* at Summ., ¶¶ 5-6.

18 *See, e.g.*, Petition at 6-7; Reply Comments of Time Warner Cable Inc., MB Docket 10-71, at 7 (filed June 3, 2010) ("TWC Reply Comments"); Comments of Institute for Policy Innovation, MB Docket 10-71, at 2 (filed May 18, 2010) ("The heart of the problem in [the] retransmission [consent regime] is that government has inserted a bias that upsets the balance of negotiations and introduces economic distortion by providing greater leverage to the broadcasters. Simply put, the retransmission [consent] scheme is a wholly artificial construct built during a time of monopoly technology that bears no resemblance to today's vibrant, competitive video service marketplace."); Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, the National Telecommunications Cooperative Association, the Independent Telephone & Telecommunications Alliance, the Western Telecommunications Alliance, and the Rural Independent Competitive Alliance, MB Docket No. 10-71, at 2 (filed May 18, 2010) (stating that the "static" rules for retransmission consent have created "a skewed playing field that favors broadcasters and prevents free-market retransmission

construct designed in large part to address the harms associated with cable operators' perceived monopoly power in 1992—an era before multichannel video services were available from other sources, including DBS, wireline telecommunications providers and cable overbuilders, online service providers, and other platforms. As a result of a host of regulatory measures—such as guaranteed placement on the basic tier, the "must buy" requirement for the basic tier, network non-duplication, syndicated exclusivity, and channel placement rights—broadcasters have long been insulated from market forces, not subject to them.[19]

Accordingly, it is meaningless to invoke concepts of economic efficiency in describing broadcasters' demands for retransmission consent payments, as they are inherently a function of the regulatory regime, not market forces. The real question is whether the artificial construct of retransmission consent still serves Congress's purposes in creating it. Drs. Eisenach and Caves also overlook this reality in asserting that "CRA fails to establish a basis for government intervention."[20] The critical point here is that government created this non-market based system to achieve certain regulatory objectives; its intervention into the marketplace occurred long ago, when Congress established retransmission consent rights in 1992 and the Commission promulgated the rules at issue. Asking the government to modify rules that no longer serve the purposes for which they were created is not asking the government to intervene in the marketplace. Rather, it is simply a request that the Commission critically examine whether its *existing* rules are adequately preventing consumer harm in the form of disruption and price hikes.

As the petitioners and supporting commenters have shown, the retransmission consent rules are not, in fact, serving the public interest. To the contrary, broadcasters' unbridled ability to raise retransmission consent rates based on threats of blackouts and their demonstrated willingness to carry out such threats plainly subvert the animating public interest objectives. Drs. Eisenach and Caves do not—and could not—rebut that showing, because they entirely misapprehend the nature of the policy calculus in resorting to claims about economic efficiency. What the *Reply* completely misses, but the remainder of the record makes clear, is that the Commission's focus must be the manner in which it should fulfill its mandate to "govern" the retransmission consent process for the benefit of consumers.[21]

---

consent negotiations from taking place"); Comments of Verizon, MB Docket No. 10-71, at 2-5 (filed May 18, 2010) ("Under the existing rules, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations."); Reply Comments of DIRECTV, Inc. and DISH Network L.L.C., MB Docket No. 10-71, at 2-5 (filed June 3, 2010) (explaining the differences between a free market and the current retransmission consent regime and stating that "no one should be under the illusion that the retransmission consent regime is [a free market]").

19 *See, e.g.*, 47 U.S.C. § 543(b)(7); 47 C.F.R. §§ 76.92-95, 76.101-110, 76.57.

20 *Reply* at 3 (Heading II).

21 47 U.S.C. § 325(b)(3)(A).

LATHAM&WATKINS LLP

B. The *Reply* in any Event Fails To Rebut the Economic Analysis Supporting Retransmission Consent Reform

Even apart from its misplaced policy musings, the *Reply* fails to grapple with or rebut the persuasive economic evidence presented by multiple parties regarding the harmful effects that broadcasters' retransmission consent demands are having on consumers.[22]

First, recognizing that their argument that programming costs are not "rising at all" cannot pass the straight-face test,[23] the *Reply*'s authors argue that the dramatic increases in retransmission consent payments are justified by "significant increases in programming quantity and quality that have taken place in recent years."[24] But as TWC explained in its reply comments in this docket, the popularity of broadcast network programming (whatever its level) cannot form the basis for escalating demands by local broadcast stations for cash compensation for signal retransmission.[25] Congress granted MVPDs a compulsory copyright license to retransmit broadcast content,[26] and both Congress and the Commission have expressly recognized that, under the 1992 Act, the copyright is entirely distinct from local stations'

---

22 *See, e.g.*, *Response to Eisenach; Brinkmanship Report* ¶¶ 29-34; William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements*, at 14-16 (May 18, 2010), attached as Appendix A to Comments of American Cable Association, MB Docket No. 10-71 (filed May 18, 2010) (stating that "a significant share of any increase in retransmission consent fees will be passed through to subscribers in the form of higher subscription prices" and concluding that "the main economic effect of allowing price discrimination in retransmission consent agreements is that different groups of viewers are being charged different prices to view the same programming" (alteration to second quotation)); William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and its Effect on Retransmission Consent Fees*, at 9-10 (May 18, 2010), attached as Appendix B to Comments of American Cable Association, MB Docket No. 10-71 (filed May 18, 2010) (explaining that, because "retransmission consent fees are levied on a per subscriber basis, they represent the marginal cost of providing service to the MVPD," a "substantial share" of which will "be passed on to consumers in the form of higher prices"); Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, at 3 (Nov. 12, 2009), filed by National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009) (explaining that the "*increase in MVPD costs due to retransmission consent results in higher subscription charges and lower consumer welfare*" that "are flatly inconsistent with Congress's intent" (emphasis in original)); *id.* ¶¶ 44-58.

23 *Reply* ¶ 37.

24 *Id.* ¶ 20.

25 TWC Reply Comments at 10-12.

26 17 U.S.C. § 111.

retransmission consent rights.[27] Accordingly, the *Reply*'s attempt to justify double payment for broadcast programming is improper as a matter of law. To the extent Disney believes that the compulsory copyright regime undervalues its broadcast programming,[28] it should address its complaints to Congress, rather than seeking to drive up payments to local broadcast stations for signal retransmission and then siphon off such revenues for the network.

In any event, the *Reply* provides no support for the assertion that increases in the quality of broadcast television justify increases in retransmission consent fees. While it points to increasing television viewership as "the best measure" of the quality of broadcast programming,[29] it fails to note that *broadcast* viewership has declined sharply in recent years.[30]

---

27 *See* 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code . . . ."); Senate Report at 1169 ("The Committee is careful to distinguish between the authority granted broadcasters under the new section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of copyright holders in the programming contained on the signal."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶ 173 (1993) ("Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights. . . . We stress . . . that retransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest. Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.").

28 *See, e.g.*, *Reply* ¶ 11 (citing Morgan Stanley study for the proposition that "broadcasters are currently underpaid for their audience delivery among ad Supported TV networks"). In addition to ignoring the critical significance of the compulsory copyright, Drs. Eisenach and Caves overlook the fact that broadcast networks—unlike pay television networks—choose to transmit their programming over the air (and, increasingly, over the Internet) *for free*. In light of these and other obvious differences between broadcast networks and pay television networks, benchmarking the former's retransmission consent fees against the latter's copyright license fees compares apples and oranges. *See* TWC Reply Comments at 10-12 (explaining how differences between broadcast networks and pay television networks prevent any meaningful comparison of their respective compensation).

29 *Reply* ¶ 17.

30 *See* Omnibus Broadband Initiative, *Spectrum Analysis: Options for Broadcast Spectrum*, OBI Technical Paper No. 3, at 7-8 (June 2010) (finding that, while "overall television viewership continues to increase," there has been a "25-30% decline in the average prime time ratings of all broadcast TV networks over the past decade"). Data from SNL Kagan show that prime time ratings for the "big 4" broadcast networks (NBC, ABC, CBS, and

Indeed, the *Reply*'s generic statements regarding the quality of television programming *overall* (or *cable* programming specifically[31]) say nothing about the current state of *broadcast* programming. To the contrary, substantial evidence undercuts the claim that the value of broadcast programming has increased. As TWC and other parties recently demonstrated in the Commission's media ownership proceeding, broadcast stations are increasingly relying on consolidation and dubious sharing arrangements to *diminish* their investment in local news, notwithstanding their obligation to promote localism and diversity.[32] Similarly, the broadcast networks have cut back on the scripted programming that was once their hallmark in favor of low-budget reality shows, re-runs, and similar fare. These trends are reflected in the notable shift in award nominations for prime time television dramas and movies from broadcast networks to cable networks.[33] In short, while there is no doubt that broadcast content remains widely popular

---

FOX) declined from 29.60 in 2000 to 18.10 in 2009 and that 24-hour ratings declined from 16.40 in 2000 to 12.24 in 2009. *See* SNL Kagan, *TV Network Summary – Basic Cable* (downloaded May 14, 2010); SNL Kagan, *TV Network Summary – Broadcast Networks* (downloaded May 14, 2010).

31 The *Reply* offers—apparently as the most compelling proof of the value of broadcast programming—the comments of the National Cable & Telecommunications Association ("NCTA") regarding the significant investments of *cable networks* to produce "a wide variety of diverse, high quality programming." *Reply* ¶ 16 (quoting Comments of the Nat'l Cable & Telecomms Ass'n, MB Docket No. 07-269, at 21-22 (filed May 20, 2009)). But, the investments made by cable networks to develop high-quality programming that will attract consumers in no way justify the excessive retransmission consent demands of broadcasters—whose audience is captive due to the placement of broadcast networks on the basic tier.

32 *See* Comments of Time Warner Cable Inc., MB Docket No. 09-182, at 14 (filed July 12, 2010); Comments of Free Press, MB Docket No. 09-182, at 6 (filed July 12, 2010) (noting that broadcasters have "little economic incentive to produce" local news and instead "are more likely to take cost savings as dividends"); Comments of Communications Workers of America, MB Docket No. 09-182, at 11 (filed July 12, 2010) (citing studies demonstrating that local broadcast stations account for a diminishing portion of local news stories); Comments of the American Federation of Television and Radio Artists, MB Docket No. 09-182, at 14 (filed July 12, 2010) (explaining that the major networks' extraction of "heavy fees from their affiliates in exchange for rights to air network-owned or produced content" prevents investment in diverse local content).

33 *See, e.g.*, *Emmy Nominations Announced: Extra Nominees, Public Voting Lead to Surprising Choices*, BROADCASTING & CABLE, July 16, 2009, *available at* http://www.broadcastingcable.com/article/315477-Emmy_Nominations_Announced.php ("As has usually been the case the last few years, cable programs dominated the list of nominees for the 61st Primetime Emmy Awards."); Marisa Guthrie, *Primetime Emmys: Nominations 'Validating' for Cable Programmers*, BROADCASTING & CABLE, July 17, 2008, *available at* http://www.broadcastingcable.com/article/114614-

and the major broadcast networks retain their "must have" character, the claim that broadcast quality has *increased* in recent years is not only unsubstantiated but undermined by the available data.

Second, the *Reply* fails to support its general assertions regarding the "economic fundamentals of the multi-product firm."[34] Drs. Eisenach and Caves argue that MVPDs' separate services—voice, video, and data—are "interrelated" in ways that affect costs and demand.[35] As a result, they claim, "the costs and revenues of video, data, and voice services must be analyzed jointly, taking into account their interdependence, rather than in isolation."[36] But the *Reply*'s subsequent analysis grossly overstates the extent to which the costs that TWC incurs to deliver its video service—including the cost of retransmission consent—are related to revenues generated by separate and distinct services. Even more tenuous is the unsupported assertion that the *broadcast* programming component of TWC's video service has been responsible for driving the growth of its voice and data services (at a time when cable penetration levels have steadily declined).

Setting aside the *Reply*'s incorrect assumptions regarding the increasing value that consumers assign to broadcast programming, which are discussed above, Dr. Salop already has demonstrated that Dr. Eisenach's cost/revenue analysis is "irrelevant" and confirmed the "fundamental economic truth that higher input costs lead to higher prices," other factors held constant.[37] As Dr. Salop and his team have shown, even assuming, *arguendo*, some interrelationship in demand patterns for video service, on the one hand, and voice and broadband, on the other, that simply does not mean that the significant increase in the cost of providing video service does not harm consumers by inflating prices.[38]

There is no need to repeat that analysis here, as the *Brinkmanship Report* documents in detail how broadcasters' escalating demands for retransmission consent payments, coupled with public threats to go dark and the increasing incidence of actual blackouts, are imposing significant costs on consumers.[39] Far from "arbitrarily allocat[ing] costs to revenues,"[40] Dr. Salop and his team demonstrated what consumers already know to be the case, and what common sense confirms—that increases in MVPDs' programming costs force them to pay more

---

Primetime_Emmys_Nominations_Validating_for_Cable_Programmers.php (stating that the number of nominations for "cable productions, especially in the drama and movie and miniseries categories, is a testament to the original work being done there").

34 *Reply* ¶ 33.

35 *Id.* ¶ 22.

36 *Id.* ¶ 23.

37 *Response to Eisenach* at 4-13.

38 *Id.* at 21-22.

39 *See generally Brinkmanship Report*.

40 *Reply* ¶ 36.

for video service. Consumers are paying more to access video programming—and, in particular, broadcast programming—than ever before, and the fact that cable operators like TWC have achieved success in selling separate voice and broadband services, and that consumers derive benefits from those services, offers no solace. Consumers should be able to reap the benefits of voice and broadband services without having to pay inflated rates for broadcast programming that is offered over the air for free. To claim that the successful roll-out of voice and broadband services is a consequence of supposed increases in the quality of broadcast programming, as Drs. Eisenach and Caves suggest, is pure fantasy, but in any event would not ameliorate the effects of escalating programming costs.

* * *

In summary, the *Reply* does nothing—from either a public policy or economic perspective—to diminish the case for reforming the retransmission consent rules. If anything, the *Reply*'s tortured analysis only highlights the need for reform. As nearly all of the economic data before the Commission confirm, the disruption and consumer confusion caused by recurring cycles of down-to-the-wire negotiations, together with the rising cost of broadcast programming, is having a significant negative impact on consumers. The governing construct is entirely a creature of the Commission's rules, and the Commission therefore should not hesitate to take corrective action.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
of LATHAM & WATKINS LLP
Counsel for Time Warner Cable Inc.