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Barbara S. Esbin
Admitted in the District of Columbia

February 16, 2011

Via ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: American Cable Association ("ACA") Notice of Ex Parte Presentation; *In the Matter of Rulemaking to Amend The Commission's Rules Governing Retransmission Consent;* MB Docket No. 10-71.

Dear Ms. Dortch:

On February 15, 2011, Matt Polka and Ross Lieberman, American Cable Association; William Rogerson, Northwestern University; Thomas Cohen, Kelley Drye & Warren, LLP; and the undersigned met with Michelle Carey, Eloise Gore, Mary Beth Murphy, Steve Broeckaert, and Diana Sokolow, Media Bureau, and Jonathan Levy, Office of Strategic Policy.

During the meeting, ACA discussed the issues raised in its comments filed in support of the Petition for Rulemaking, including the matters of (i) retransmission consent price increases resulting from joint negotiations involving multiple "Big 4" (*i.e.*, ABC, NBC, CBS, and FOX) broadcast affiliates in a single market, and (ii) retransmission consent price discrimination against smaller multichannel video programming distributors ("MVPDs").[1] As part of the discussion, Professor Rogerson presented his economic analysis of these

[1] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of the American Cable Association (filed May 18, 2010) ("ACA Comments").

problems contained in Attachment A to this letter.[2] ACA also discussed how the Commission could provide effective relief with changes to the FCC's definition of "good faith" negotiations to prevent joint retransmission consent negotiations and prevent undue price discrimination against smaller MVPDs and their subscribers.

ACA stressed that it is incumbent upon the Commission, as it undertakes its first major evaluation of the retransmission consent framework, to include language in its Notice of Proposed Rulemaking that:

- expressly solicits comments on carriage fee increases resulting from joint negotiations involving multiple Big 4 broadcast affiliates in a single market and price discrimination against smaller MVPDs; and

- seeks data from MVPDs and broadcasters to analyze these issues.

Raising retransmission consent prices through joint negotiations. ACA described the significant problem with the current retransmission consent regime – broadcasters' use of sharing agreements or duopolies to jointly negotiation retransmission consent for multiple Big 4 affiliates in the same market. Professor Rogerson described how available evidence strongly suggests that joint control or ownership of multiple Big 4 affiliates in a single designated market area ("DMA") results in significantly higher retransmission consent fees.[3] And, as the Commission itself has found, consumers ultimately foot the bill in the form of higher cable rates.[4]

[2] William P. Rogerson, Professor of Economics, Northwestern University, "Two Problems with the Current Retransmission Consent Regime*,"* Presentation to the FCC, American Cable Association, February 15, 2011 ("Rogerson Presentation").

[3] ACA has also asked the Commission to investigate this issue in its comprehensive assessment of the efficacy of its media ownership rules. *See In the Matter of 2010 Quadrennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996,* MB Docket No. 09-182, Comments of the American Cable Association (filed July 12, 2010). In connection with its Retransmission Consent Comments, ACA commissioned Professor William P. Rogerson to prepare a paper addressing rising retransmission consent costs due to sharing agreements and duopolies ("2010 Rogerson Joint Control or Ownership Report"). Professor Rogerson is a Professor of Economics at Northwestern University, and served as the Commission's Chief Economist from 1998-99. Professor Rogerson's 2010 Joint Control or Ownership Report is attached as Appendix B to ACA's Comments.

[4] *See, e.g., In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of* Licensees, Memorandum Opinion and Order, MB Docket No. 10-56, ¶ 29 (rel. Jan. 20, 2011) ("Comcast-NBCU Order") ("Comcast could obtain or (to the extent it may already possess it) maintain market power in video distribution, and charge higher prices to its video distribution subscribers than those consumers would have paid absent the transaction.") (footnotes omitted); Comcast-NBCU Order, Appendix B, ¶ 37 ("As a result, the integrated firm improves its bargaining position, allowing it to extract higher prices from rival MVPDs than pre-transaction NBCU was able to when negotiating with Comcast's distribution rivals. These higher programming prices to rivals would ultimately result in higher consumer prices for MVPD service unless efficiencies resulting from the transaction that lower the cost of the joint venture providing programming lead to offsetting reductions in consumer prices.") (footnotes omitted); *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,

Although Commission rules generally prohibit common ownership of Big 4 stations in a single DMA,[5] broadcasters circumvent this general prohibition through the Commission's waiver process, or by means of contractual agreements that offer one Big 4 station control of another in the same market. As described in ACA's Comments and Professor Rogerson's presentation, ACA has examined publicly available documents and records to compile as thorough a list as possible of all instances in which multiple Big 4 broadcast affiliates from the same DMA are under joint control or ownership.[6] ACA has identified at least 93 instances of these sharing agreements or duopolies in 78 television markets – affecting more than 37% of the 210 DMAs – with the heaviest concentration in smaller markets.[7] Further, ACA has identified 36 instances of two Big 4 affiliates in the same DMA operating under common ownership;[8] and 57 instances where multiple Big 4 affiliates in the same DMA operate under some sort of sharing agreement – which typically means the stations operate under joint control for purposes of negotiating retransmission consent agreements.[9] Based on reports from ACA members and other MVPDs, ACA can confirm that in many of the 57 instances where multiple Big 4 affiliates in the same DMA operate under some sort of sharing agreement, there was a single negotiator for both stations, and reaching carriage terms for one station was contingent upon reaching terms for the other.

Professor Rogerson explained how broadcasters' joint negotiation of retransmission consent involving multiple Big 4 affiliates in the same market can result in higher retransmission consent fees.[10] Professor Rogerson, applying a standard modeling approach, explained that when a programmer and MVPD negotiate the fee that the MVPD will pay the programmer, they are essentially deciding how to split the joint economic gains created from having the MVPD carry the programming. This sort of bilateral bargaining situation has been extensively modeled in the economics literature. Application of the standard modeling approach used in the economics literature immediately demonstrates that a programmer selling two different programs will be able to charge more by bundling the

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19 FCC Rcd 473, 568, ¶ 209 (2004) ("News Corp. Order") ("If News Corp. can secure carriage of more cable networks and charge higher fees for such carriage, these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates.").

[5] 47 C.F.R. § 73.3555(b).

[6] ACA Comments at 9-10.

[7] *See* ACA Comments, Appendix A, *36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market* ("*Table 1*") and *57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market* ("*Table 2*").

[8] ACA Comments, Appendix A, *Table 1.* With respect to negotiating retransmission consent, ACA makes no distinction between a broadcaster that owns two stations – whether full- or low-power – in the same market that is affiliated with different Big 4 networks (*i.e.*, a duopoly), and a station owner that broadcasts one Big 4 network on its primary video stream and another Big 4 network on its multicast stream (*i.e.*, a multicast duopoly).

[9] ACA Comments, Appendix A, *Table 2*. While broadcasters appear to generally make known when sharing agreements exist between stations, they rarely publicly disclose the terms of these arrangements. Thus, it is difficult to determine from publicly available documents whether or not a sharing agreement includes the assignment of retransmission consent negotiation rights.

[10] *See* Attachment A, Rogerson Presentation at 4-9.

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.[11] Professor Rogerson observed that the Commission endorsed this analysis of the competitive effects of joint negotiations for a Big 4 affiliate and a regional sports network in its recent Comcast-NBCU license transfer order,[12] and noted that it is even more likely that the partial substitute's condition will be satisfied by two Big 4 broadcast stations.

In addition, Professor Rogerson discussed the significance of empirical evidence proffered in 2009 by Suddenlink Communications, demonstrating that joint negotiating significantly increases retransmission consent fees.[13] Suddenlink had reported the results of an internal analysis it conducted showing the effect ownership status of broadcast stations has on the magnitude of retransmission consent fees. The analysis revealed that where a single entity controls retransmission consent negotiations for more than one Big 4 station in a single market, the average retransmission consent fees Suddenlink pays for such an entity's Big 4 stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6% higher than the average retransmission consent fees Suddenlink pays for other Big 4 stations in those same markets.[14] In Suddenlink's view, this is compelling evidence that an entity combining the retransmission consent efforts of two Big 4 stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations. Professor Rogerson also highlighted that other ACA members submitted similar analyses into the record demonstrating even higher rate increases.[15] Professor Rogerson explained that the analyses of Suddenlink and others are completely consistent with the predictions of standard economic theory under plausible circumstances, and that this should raise the Commission's concern.

Raising retransmission consent costs through price discrimination. In its comments, ACA documented the gross disparities in retransmission fees paid by smaller

[11] *See* 2010 Rogerson Joint Control or Ownership Report at 7-8. (citations omitted). Professor Rogerson also provides a simple example of this theory in his report. *Id.* at 8-9.

[12] *See* Attachment A, Rogerson Presentation at 6-7. The Commission accepted ACA's evidence that programming fees were at least 20 percent higher where a single entity controls the retransmission consent rights of multiple Big 4 stations in a designated market area as "consistent with a concern about the potential horizontal harms resulting from the [Comcast-NBCU] transaction." Comcast-NBCU Order, ¶ 137; Appendix B, Section 1.C. Conditions were therefore imposed on the license transfers to prevent Comcast-NBCU from using any increased bargaining power it might obtain to raise rates above market levels for its programming. *Id.*, ¶ 138; Appendix A.

[13] ACA Comments at 14; *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc*., Retransmission Consent Complaint, CSR-8233-C, CSR-8234-M, *Ex Parte* Comments of Suddenlink Communications at 5 (filed Dec. 14, 2009).

[14] *In the Matter of Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc*., Retransmission Consent Complaint, CSR-8233-C, CSR-8234-M, *Ex Parte* Comments of Suddenlink Communications at 5 (filed Dec. 14, 2009).

[15] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, Comments of Cable America Missouri LLC (filed May 28, 2010), Comments of USA Companies (filed May 28, 2010), and Comments of Pioneer Telephone Cooperative (filed June 4, 2010).

MVPDs. Publicly available information, together with the experience of ACA members, indicates that smaller MVPDs pay nearly *twice* as much as larger MVPDs simply because they serve fewer subscribers. Professor Rogerson explained that the level of these pricing disparities greatly dwarfs any conceivable cost basis, as individual MVPDs generally make their own arrangements at their own cost to receive and download the signal of broadcast networks at their headends, and broadcasters essentially incur no additional (marginal) costs for providing their consent to MVPDs to retransmit the signals.[16] Thus, there is no cost difference in serving smaller vs. larger MVPDs. Nor could the transaction costs of negotiating with smaller providers possibly account for these vastly higher rate levels. Rather, the rate discrimination arises solely because smaller providers lack the bargaining leverage necessary to counterbalance the market power of powerful "Big 4" broadcast network affiliates and station affiliate groups. The upshot is that different groups of viewers are being charged different prices to view the same programming, and broadcasters are able to extract substantially higher fees from smaller distributors simply because they lack the ability to withstand such increases.[17]

Typically the vast majority of a local broadcaster's customer base is located in a more urban area served by one or two very large cable systems, with the remaining small fraction of its base located in less developed areas typically served by a much larger number of small cable systems.. Direct broadcast satellite (DBS) providers also generally serve throughout the viewing area. Professor Rogerson observed that under these circumstances, for the broadcaster the cost of failure to strike a deal with the smaller MVPDs is relatively insignificant, thus increasing the broadcaster's bargaining power, allowing it to extract higher per subscriber fees from the smaller providers. For the smaller provider, as the FCC has repeatedly recognized, failure to strike a deal means loss of "must have" programming and consequent subscriber losses.[18]

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[16] *See* William P. Rogerson, Professor of Economics, Northwestern University, "The Economic Effects of Price Discrimination in Retransmission Consent Agreements," prepared for the American Cable Association, attached to ACA's Comments as Appendix A, at 13.

[17] A graphic illustration of the price inequities faced by smaller MVPDs are the 35 to 40 percent price increases demanded by programmers once Frontier Communications, a relatively small MVPD, purchased systems previously owned by Verizon, the 7th largest MVPD, in Indiana, Oregon, and Washington. The increases are for the identical programming and service previously provided by Verizon to the same households in the same markets, with the sole difference the total number of subscribers served by Frontier relative to Verizon. It is incumbent upon the FCC, as the draft resolution recognizes, to examine what public interest benefits, if any, such pricing discrimination could possibly deliver.

[18] *See, e.g.,* Comcast-NBCU Order, ¶ 36 ("The record shows that the loss of Comcast-NBCU programming, including the programming contributed by NBCU, would harm rival video distributors, reducing their ability or incentive to compete with Comcast for subscribers. This is particularly true for marquee programming, which includes a broad portfolio of national cable programming in addition to RSN and local broadcast programming; such programming is important to Comcast's competitors and without good substitutes from other sources."); News Corp. Order, ¶ 209 ("If News Corp. can . . . charge higher fees . . . these fees are unlikely to be absorbed solely by the MVPDs, but would be passed on to consumers in the form of higher rates.") ("News Corp.'s use of market power to extract artificially high levels of compensation from MVPD rivals . . . could make rival MVPDs less viable options for consumers, thus limiting consumer choice.").

Conclusion and recommendations. ACA stressed that now is the time for the FCC to carefully examine the damage that joint negotiations involving multiple Big 4 broadcast affiliates in a single market and discriminatory retransmission consent pricing practices inflict on small and rural cable operators and telephone carriers providing MVPD services and to take action to rebalance the competitive playing field to assure the ability of residents in small and rural markets to obtain access to programming at fair prices. Without reasonable and economic access to that video programming content, small providers will lack the ability both to enter small and rural markets and/or compete effectively against the larger providers, and to extend their reach to unserved areas on an economic basis.[19]

When broadcasters engage in these practices, the higher fees extracted are likely passed along to consumers in the form of rate increases. However, to the extent the MVPD cannot pass the costs through to consumers in the form of higher subscription fees either because of result of competition or local economic circumstances, the higher costs are borne by the MVPD, depriving it of revenues for capital expenditures that could be used to fund system upgrades, other programming acquisitions or broadband network expansion. In the markets served by smaller MVPDs, the current retransmission consent regime not only harms MVPDs and their subscribers, but also threatens a top domestic policy priority – bringing broadband deployment to unserved areas and underserved populations.[20]

To narrowly address the problem of joint negotiations of retransmission consent by multiple broadcasters affiliated with Big 4 networks, ACA suggested redefining the "good faith" negotiation standard to prohibit separately owned Big 4 broadcast stations in the same DMA from jointly negotiating retransmission consent fees. ACA also discussed as a possible solution to price discrimination that the Commission prohibit entirely, or place limits upon, the amount of price discrimination against smaller MVPDs.

Professor Rogerson acknowledged that under Section 325(b)(3)(C)(ii) and FCC regulations, it is not a violation of the good faith negotiation requirement for broadcast stations to charge different MVPDs different prices for retransmission consent in circumstances where such price differences are based on "competitive marketplace considerations."[21] Because Congress has introduced the examination of "competitive

[19] *See Implementation of Section 621(a) of the Cable Communications Policy Act 0f 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶ 62 (2007) ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked inextricably, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.").

[20] *See generally* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 123 Stat. 115; Omnibus Broadband Initiative (OBI), Federal Communications Commission, Connecting America: The National Broadband Plan, GN Docket No. 09-51 (2010); Acting Chairman Michael J. Copps, Federal Communications Commission, Bringing Broadband To Rural America: Report On A Rural Broadband Strategy (2009), attached to Rural Broadband Report Published in the FCC Record, GN Docket No. 09-29, Public Notice, 24 FCC Rcd 12791 (2009).

[21] 47 U.S.C. § 325(b)(C)(3)(ii); *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and

marketplace considerations" into the good faith standard, he suggested the Commission is empowered to examine whether permitting separately owned programming vendors effectively to enter into price fixing agreements through "shared services" or "joint marketing" arrangements frustrates the operation of competitive markets. ACA is confident that should the Commission undertake that inquiry, it would determine that allowing broadcast stations to jointly negotiate prices frustrates, rather than permits normal competitive markets to function, and that the practice should be prohibited as a violation of the obligation to negotiate in good faith. ACA argued that such a prohibition would leave intact the other efficiencies gained when local broadcast stations pool their resources to enhance their service to the public; it would simply eliminate their ability to act in an anticompetitive fashion by jointly negotiating retransmission consent prices with MVPDs.

With respect to the problems of joint negotiations and price discrimination, ACA urged the Commission, as part of this proceeding, to gather data that would allow it to determine the extent and magnitude that both matters affect retransmission consent fees, should it determine that such information is necessary to inform its decision. ACA stated that its members would be willing to file their retransmission consent agreements with the Commission for this purpose, if they could obtain waivers from the broadcast stations of the confidentiality provisions of their contracts. ACA suggested that the Commission encourage broadcasters to grant such waivers, subject to the Commission, establishing in the NPRM confidentiality safeguards for highly sensitive data comparable to those used in its license transfer reviews and other recent matters.[22]

ACA maintains that without exploration of these well-documented problems with the Commission's retransmission consent rules, small and rural providers will continue

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Order, 15 FCC Rcd 5445, 5469, ¶ 56 (2000); *In the Matter of Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, 10344-45, ¶¶ 13-14 (2005).

[22] *See, e.g., In the Matter of Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Second Protective Order, (rel. Dec. 27, 2010) ("Second Protective Order"); *Data Requested in Special Access NPRM*, Public Notice, WC Docket No. 05-25, RM-10593, DA 10-2073 (rel. Oct. 28, 2010). To ensure, as part of its pending Special Access rulemaking proceeding, that it could analyze the extent of competition in markets for the provision of special access telecommunication services, the Commission recently established a process that encouraged the filing of relevant confidential and proprietary ("competitively sensitive") information. First, the Commission issued a request to the public to submit voluntarily extensive and detailed information about special access facilities deployment and use, both current and planned. Second, because the Commission found that submission of such information, even if competitively sensitive, was "necessary to develop a more complete record on which to base the Commission's decision in this proceeding and therefore require production," it adopted a Second Protective Order "to ensure that certain highly confidential and competitively sensitive documents and information that may be submitted are afforded adequate protection." Second Protective Order, ¶¶ 1, 3. As part of this order, the Commission enabled parties submitting materials of a competitively sensitive nature to designate those materials as Highly Confidential, and it limited access to that material to "Outside Counsel of Record, their employees, and Outside Consultants whom they retain to assist them in this proceeding." *Id.*, ¶ 3.

to be disadvantaged by changes in market structure that have fundamentally altered the balance of bargaining power between local broadcasters and MVPDs in favor of local broadcasters.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Barbara Esbin

Barbara S. Esbin

Enclosure

cc (*via email*): Michelle Carey
Eloise Gore
Mary Beth Murphy
Steve Broeckaert
Diana Sokolow
Jonathan Levy

ATTACHMENT A

TWO PROBLEMS WITH THE CURRENT RETRANSMISSION CONSENT REGIME

Presentation to the FCC

American Cable Association

February 15, 2011

INTRODUCTION

1. Conclusions of Petition for Rulemaking

   - changes in market structure that have occurred since the introduction of the current retransmission consent framework have fundamentally altered the balance of bargaining power between local broadcasters and MVPDs in favor of local broadcasters

   - increased competition in the MVPD market has reduced the bargaining power of MVPDs

   - Result #1: Retransmission consent fees are rising to much higher levels than were ever originally contemplated when the current rules were introduced. These fee increases are largely passed through to subscribers in the form of higher subscription fees.
   - Result #2: Increasing occurrence of temporary withdrawals of broadcast signals during negotiations in which broadcasters attempt to exercise their increase bargaining power.

2. Petition suggests that introducing some form of binding arbitration with mandatory interim carriage would be an appropriate solution to these problems.

INTRODUCTION (CONT'D)

3. ACA agrees with the conclusions of the petition for rulemaking and supports the proposed solution of introducing some form of binding arbitration with mandatory interim carriage.

4. Purpose of today's presentation:

   - describe two additional problems with the current retransmission consent regime that the Commission should also consider addressing in its over-all review of retransmission consent policy
     - joint control or ownership of multiple Big 4 broadcast stations in the same market
     - price discrimination

   - suggest approaches the Commission could take to addressing these problems

   - although these problems with the current system have existed since its inception, they have grown more serious in magnitude as retransmission consent fees have risen and will continue to grow more serious in magnitude as retransmission consent fees continue to rise further.

JOINT CONTROL OR OWNERSHIP OF MULTIPLE BIG 4 BROADCASTERS IN THE SAME MARKET

1. Background

2. Evidence on the Extent of Joint Control or Ownership

3. The Problem With Joint Control or Ownership: Theory

4. The Problem with Joint Control or Ownership: Evidence

5. Possible Solutions

BACKGROUND

1. Joint Ownership

   - Commission rules generally prohibit common ownership of multiple Big 4 broadcast stations in the same DMA
   - however, there are a number of instances where common ownership has been permitted through waivers or exceptions

2. Joint Control
   - separately owned Big 4 broadcast stations in the same DMA sometimes agree to jointly negotiate retransmission consent agreements.
   - such arrangements are often negotiated as part of more comprehensive agreements that transfer control of all or part of the operations of one station to the management of another stations
   - terms used to describe such agreements include:
     - Shared Services Agreements (SSAs)
     - Local Marketing Agreements (LMAs)
     - Joint Marketing Agreements (JMAs)

EVIDENCE ON THE EXTENT OF JOINT CONTROL OR OWNERSHIP

1. Using publicly available documents, ACA has complied a listing of instances of common ownership or control of multiple Big 4 broadcast stations in the same DMA.

2. See Tables 1 and 2 attached to these slides.

3. Summary of findings
   - instances of joint control or ownership
     - 36 instances of common ownership
     - 57 instances of joint control
     - 93 instances in total
   - how these instances are spread across the 210 DMAs
     - 16 DMAs with two instances of joint control or ownership
     - 62 DMAs with one instances of joint control or ownership
     - 78 DMAs with at least one instance of joint control or ownership

THE PROBLEM WITH JOINT CONTROL OR OWNERSHIP: THEORY

1. Retransmission consent fees are determined by bilateral bargaining.

2. Standard economic theory of bilateral bargaining shows that the negotiated prices for two networks will be higher if the networks are sold together instead of separately so long as the networks are "partial substitutes" in the sense that the marginal value of either of the networks to the MVPD is lower conditional on already carrying the other network.

3. Example:
   - MVPD can carry two networks
   - profit from carrying one network = $1.00 per sub
   - profit from carrying both networks = $1.50 per sub
   - note that the networks are partial substitutes
     - marginal value of first network = $1.00
     - marginal value of second network = $.50
   - assume MVPD and programmer have equal bargaining strength (i.e., they split the joint surplus from any agreement.)

THE PROBLEM WITH JOINT CONTROL OR OWNERSHIP: THEORY (CONT'D)

4. Case #1: A different programmer owns each network

   - total surplus from adding a network = $.50
   - negotiated fee for a network = $.25
   - total cost of purchasing both networks = $.50

5. Case #2: One programmer owns both networks

   - total surplus from adding a bundle of both networks = $1.50
   - negotiated fee for bundle of both networks = $.75
   - total cost of purchasing both networks = $.75

6. In its analysis of the Comcast-NBCU transaction, the Commission accepted this analysis as being theoretically correct

THE PROBLEM WITH JOINT CONTROL OR OWNERSHIP: EVIDENCE

1. Suddenlink Ex Parte Filing:
   - joint control or ownership of Big 4 stations in the same DMA results in retransmission consent fees that are 21.6% higher than when there is no joint control or ownership

2. Commission Analysis in the Comcast-NBC transaction
   - issue in the Comcast-NBUC was whether joint control of an RSN and Big 4 local broadcast station in the same DMA would result in higher fees
   - Commission analysis showed there was evidence for such an effect
   - it is even more likely that the partial substitutes condition will be satisfied by two Big 4 broadcast networks

3. DOJ Has Determined That Joint Control of Retransmission Consent Fees Is Anticompetitive
   - In 1996, DOJ filed a complaint against three Big 4 broadcast stations in Corpus Christi DMA alleging that they had illegally colluded to raise retransmission consent fees by entering into an agreement to jointly negotiate these fees.
   - the three broadcast stations signed a consent decree agreeing to halt this practice

THE PROBLEM WITH JOINT CONTROL OR OWNERSHIP: EVIDENCE

4. ACA strongly urges the Commission, as part of this proceeding, to gather data that would allow it to develop its own independent empirical measure of the extent to which joint control or ownership of multiple Big 4 broadcast stations in the same DMA results in higher retransmission consent fees.

POSSIBLE SOLUTIONS

1. Binding arbitration with mandatory interim carriage
    - could help control increases in retransmission consent fees due to both common ownership of multiple Big 4 broadcasters in the same DMA and joint negotiation of retransmission consent prices by separately owned Big 4 broadcast stations in the same DMA.

2. Redefine the "good faith" requirement for negotiating retransmission consent deals to prohibit separately owned Big 4 broadcast stations in the same DMA from jointly negotiating retransmission consent fees
    - prohibition should apply even if broadcasters enter into agreements that allow some cooperative activities
    - there is a danger that broadcasters participating in a cooperative agreement would be able to informally coordinate their retrans negotiations even if they are required to conduct separate negotiations.
        - help prevent this by prohibiting broadcasters participating in a cooperative agreement from discussing or sharing information of any sort about retrans negotiations or prices
    - this would control fee increases due to joint negotiations but would not control fee increases due to common ownership.

TWO REMARKS ON REDEFINING THE GOOD FAITH REQUIREMENT TO PREVENT SEPARATELY OWNED BROADCAST STATIONS FROM JOINTLY NEGOTIATING RETRANS AGREEMENTS

1. One possible argument that the Commission does not have authority to enact such a regulation is incorrect.
   - possible argument:
     - both current regulations and the underlying act specifically state that price discrimination is allowed so long as it is based on "competitive marketplace considerations."
     - one might try to argue that allowing broadcasters to jointly negotiate prices is simply allowing normal competitive markets to function.
   - this is NOT correct
   - allowing separately owned sellers to enter into price-fixing agreements frustrates the operation of competitive markets

2. This solution would still allow potential efficiencies from other types of cooperative joint activities to occur.
   - the new rule would prohibit firms in a cooperative agreement from jointly negotiating retransmission consent prices
   - it would not prohibit them from other potential forms of cooperation that might be efficient

PRICE DISCRIMINATION

1. Background

2. Evidence on the Extent of Price Discrimination

3. Price Discrimination in Retransmission Consent Fees Does Not “Expand the Market”

4. The Problem with Price Discrimination

5. Possible Solutions

BACKGROUND

1. Small and medium size MVPDs generally have significantly less bargaining power than their larger competitors because the share of the audience they provide to a typical broadcast station is small enough that the loss of this audience will not generally have any significant impact on the station's advertising revenue.

2. The result is that small and medium sized MVPDs are often required to pay retransmission consent fees that are significantly higher that the fees that larger MVPDs are required to pay for permission to retransmit exactly the same broadcast signal.

3. Differences in retransmission consent fees cannot be explained by differences in costs of providing retransmission consent to MVPDs of different sizes

   - local broadcasters experience no direct cost of providing retransmission consent to any MVPD
     - MVPD is responsible for downloading the signal itself
   - differential negotiation costs likely to be very small

EVIDENCE ON THE EXTENT OF PRICE DISCRIMINATION

1. Universal use of non-disclosure clauses severely limits amount of publicly available information on retransmission consent fees.

2. Kagan Estimates of Average Per Subscriber Retransmission Consent Fees for 2010

Type of MVPD	Retrans. Fee ($ per sub per mo.)
Large Cable	.14
DBS	.25
Telco	.30

3. Based on anecdotal evidence from its membership ACA believes that average retransmission consent fees paid by its members are at least as high as $.30 per subscriber per month.

4. ACA strongly urges the Commission, as part of this proceeding, to gather data that would allow it to determine the extent and magnitude of price discrimination in retransmission consent fees if it determines that such information is necessary to inform its decision.

PRICE DISCRIMINATION IN RETRANSMISSION CONSENT FEES DOES NOT "EXPAND THE MARKET"

1. Traditionally cited benefit of price discrimination is that it may allow the firm to "expand the market"
   - firm is willing to sell to certain buyers with a low willingness to pay because it is still able to charge high prices to buyers with a high willingness to pay.

2. This possible benefit does NOT apply to price discrimination in retransmission consent fees.

3. Since the vast bulk of MVPD subscribers are provided by larger MVPDs, local broadcasters would obviously be willing to continue to supply retransmission consent to larger MVPDs even if they were required to offer similarly low fees to smaller MVPDs.

THE PROBLEM WITH PRICE DISCRIMINATION

1. Increases in retransmission consent fees are substantially passed through to subscribers in the form of higher subscription prices.

2. Allowing price discrimination in retransmission consent agreements therefore essentially means that subscribers of smaller MVPDs pay more for the right to view local broadcast signals than do subscribers of larger MVPDs.

3. While there may be a good policy rationale for requiring MVPD subscribers to make payments to help support the programming efforts of local broadcasters, the rationale for requiring customers of small and medium size MVPDs to make larger payments than the customers of large MVPDs is much less apparent.

4. The distinction between retransmission consent fees and fees for other programming:
   - government has provided local broadcasters with many more advantages and protections than it has provided to other programmers
   - generally recognized that government in return has the right to make greater demands on local broadcasters to serve the public interest

POSSIBLE SOLUTIONS

1. Prohibit entirely or place limits on the amount of price discrimination that local broadcasters are allowed to engage in.

CONCLUSION

1. Besides the problems with retransmission consent identified in the petition for rulemaking, the ACA has identified two additional problems with retransmission consent that the Commission should consider addressing in this proceeding.

2. Problem #1: Joint control or ownership of Multiple Big 4 Broadcasters in the same DMA

   - results in higher retransmission consent fees which are substantially passed through to subscribers in the form of higher subscription fees.

   - possible solutions
     - binding arbitration proposal of the petition for rulemaking would address this problem
     - "good faith" requirement for negotiations could be modified to prohibit separately owned Big 4 broadcast stations in the same DMA from jointly negotiating retransmission consent fees.

CONCLUSION (CONT'D)

3. Problem #2: Price Discrimination
   - because they have less bargaining power, smaller MVPDs are charged higher retransmission consent fees than are larger MVPDs
   - retransmission consent fees are passed substantially through to subscribers in the form of higher subscription fees
   - result: customers of small MVPDs are required to make higher payments to support the programming efforts of local broadcasters than are customers of large MVPDs
   - possible solutions:
     - prohibit entirely or place limits on the amount of price discrimination that local broadcasters are allowed to engage in

36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market

			Station or Signal #1		Station or Signal #2	
DMA	DMA Rank	Station(s) Owner	Call Letters	Affil.	Call Letters	Affil.
Raleigh-Durham (Fayetteville), NC[#]	26	Capital Broadcasting	WRAL	CBS	WRAZ	FOX
Grand Rapids-Kalamazoo-Battle Creek, MI[#]	41	LIN Media	WOOD	NBC	WOTV	ABC
Norfolk-Portsmouth-Newport News, VA[#]	43	LIN Media	WAVY	NBC	WVBT	FOX
Albuquerque-Santa Fe, NM[#]	44	LIN Media	KASA	FOX	KRQE	CBS
Jacksonville, FL[#]	47	Gannett Co.	WJXX	ABC	WTLV	NBC
Youngstown, OH[*@]	110	New Vision Television	WKBN 27.1	CBS	WKBN 27.2 (WYFX-LP)	FOX
Santa Barbara-Santa Maria-San Luis Obispo, CA[#]	120	Cowles Media	KKFX	Fox	KCOY	CBS
Topeka, KS[*+]	136	New Vision Television	KSNT 27.1	NBC	KSNT 27.2 (KTMJ-CA)	FOX
Beaumont-Port Arthur, TX[*]	141	London Broadcasting Co.	KBMT 12.1	ABC	KBMT 12.2	NBC
Palm Springs, CA[*+]	142	News-Press & Gazette Co.	KESQ 42.1	ABC	KESQ 33.2 (KDFX-CA)	FOX
Salisbury, MD[*]	144	Draper Holdings Business Trust	WBOC 16.1	CBS	WBOC 21.2	FOX
Bluefield-Beckley-Oak Hill, WV[*]	156	West Virginia Media Holdings	WVNS 59.1	CBS	WVNS 59.2	FOX
Binghamton, NY[#]	157	Newport Television LLC	WIVT	ABC	WBGH-CA	NBC
Wheeling, WV-Steubenville, OH[*]	159	West Virginia Media Holdings	WTRF 7.1	CBS	WTRF 7.2 & 7.3	FOX & ABC
Sherman, TX-Ada, OK[*]	161	Gray Television	KXII 12.1	CBS	KXII 12.3	FOX
Sherman, TX-Ada, OK[*]	161	Lockwood Broadcasting Group	KTEN 10.1	NBC	KETN 10.3	ABC
Yuma, AZ-El Centro, CA[*]	164	News-Press & Gazette Co.	KECY 9.1	FOX	KECY 9.2	ABC
Clarksburg-Weston, WV[#]	168	Withers Broadcasting Co.	WDTV	CBS	WVFX	FOX
Clarksburg-Weston, WV[*]	168	West Virginia Media Holdings	WBOY 12.1	NBC	WBOY 12.2	ABC
Quincy, IL-Hannibal, MO-Keokuk, IA[*]	171	Barrington Broadcasting Group	KHQA 7.1	CBS	KHQA 7.2	ABC
Quincy, IL-Hannibal, MO-Keokuk, IA[*]	171	Quincy Newspapers	WGEM 10.1	NBC	WGEM 10.3	FOX
Harrisonburg, VA[*]	178	Gray Television	WHSV 3.1	ABC	WHSV 3.2	FOX
Alexandria, LA[*]	179	Hoak Media Corp.	KALB 5.1	NBC	KALB 5.2	CBS
Marquette, MI[*]	180	Barrington Broadcasting	KLUC 6.1	NBC	KLUC 6.2	FOX
Bowling Green, KY[*]	182	Gray Television	WBKO 13.1	ABC	WBKO 13.2	FOX
Bowling Green, KY[*]	182	Max Media	WNKY-DT 40.1	NBC	WNKY-DT 40.2	CBS
Charlottesville, VA[*@]	183	Gray Television	WCAV 19.1	CBS	WCAV 19.3 (WAHU-LP)	FOX
Charlottesville, VA[*@]	183	Gray Television	WVAW-LD 16.1	ABC	WVAW-LD 16.2 (WCAV 19.1)	CBS

[#]Common Ownership Thru Duopoly w/ Full Power Station

[@]Common Ownership Thru Duopoly w/ Low Power Station

[+]Common Ownership Thru Duopoly w/ Class A Station

*Common Ownership Achieved Thru a Primary Video and Multicast Stream

36 Identified Instances of Common Ownership of Multiple Big 4 Affiliates in the Same Market

			Station or Signal #1		Station or Signal #2	
DMA	DMA Rank	Station(s) Owner	Call Letters	Affil.	Call Letters	Affil.
Meridian, MS#	185	Michael Reed (WGBC-TV)	WGBC 30.1	FOX	WMDN	CBS
Meridian, MS*	185	Michael Reed (WGBC-TV)	WGBC 30.1	FOX	WGBC 30.2	NBC
Greenwood-Greenville, MS*	187	Commonwealth Communications	WAGB 6.1	ABC	WAGB 6.2	FOX
Bend, OR*@	189	News-Press & Gazette Co.	KTVZ 21.1	NBC	WTVZ 21.3 (KFXO-LP)	FOX
Parkersburg, WV*	194	Gray Television	WTAP 15.1	NBC	WTAP 15.2	FOX
Mankato, MN*	199	United Communications Corp.	KEYC 12.1	CBS	KEYC 12.2	FOX
Victoria, TX*@	204	Saga Communications	KAVU 25.1	ABC	KAVU 25.2 (KMOL-LP)	FOX
North Platte, NE+	209	Hoak Media Corp.	KNOP	NBC	K11TW	FOX

#Common Ownership Thru Duopoly w/ Full Power Station

@Common Ownership Thru Duopoly w/ Low Power Station

+Common Ownership Thru Duopoly w/ Class A Station

*Common Ownership Achieved Thru a Primary Video and Multicast Stream

57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market

		Station #1			Station #2		
DMA	DMA Rank	Owner (**also Controlling Entity**)	Call Letters	Affil.	Owner	Call Letters	Affil.
Columbus, OH	34	Sinclair Broadcast Group	WSYX	ABC	Cunningham Broadacsting Corp.	WTTE	FOX
Jacksonville, FL	47	Newport Television	WAWS	FOX	High Plains Broadcasting	WTEV	CBS
Providence, RI-New Bedford, MA	53	LIN TV Corp	WPRI	CBS	WNAC	WNAC	FOX
Wilkes Barre-Scranton, PA	54	NexStar Broadcasting Group	WBRE	NBC	Mission Broadcasting	WYOU	CBS
Charleston-Huntington, WV	63	Sinclair Broadcast Group	WCHS	ABC	Cunningham Broadacsting Corp.	WVAH	FOX
Ft. Myers-Naples, Fl	64	Waterman Broadcasting Co.	WBBH	NBC	Montclair Communications, Inc.	WZVN	ABC
Dayton, OH	65	Sinclair Broadcast Group	WKEF	ABC	Cunningham Broadacsting Corp.	WRGT	FOX
Honolulu, HI	71	Raycom Media	KHNL	NBC	MCG Capital	KGMB	CBS
Springfield, MO	74	Schurz Communications	KYTV	NBC	Perkin Media	KSPR	ABC
Springfield, MO	74	NexStar Broadcasting Group	KSFX	FOX	Mission Broadcasting	KOLR	CBS
Rochester, NY	80	NexStar Broadcasting Group	WROC	CBS	Sinclair Broadcast Group	WUHF	FOX
Syracuse, NY	83	Barrington Broadcasting	WSTM	NBC	Granite Broadcasting Crop.	WTVH	CBS
Cedar Rapids-Waterloo-Iowa City and Dubuque, IA	88	Sinclair Broadcast Group	KGAN	CBS	Second Generation Iowa	KFXA	FOX
Tri-Cities, TN-VA	93	Bonten Media Group	WCYB	NBC	Esteem Broadcasting of North Carolina	WEMT	FOX
Burlington, VT-Plattsburgh, NY	94	Smith Media	WFFF	FOX	Lambert Broadcasting of Burlington	WVNY	ABC
Baton Rouge, LA	95	Communication Corp of America	WGMB	FOX	White Knight Broadcasting	WVLA	NBC
Savannah, GA	96	New Vision Television	WJCL	ABC	Parkin Broadcasting	WTGS	FOX
El Paso, TX	98	Communication Corp of America	KTSM	NBC	Titan TV	KDBC	CBS
Ft. Smith-Fayetteville-Springdale-Rogers, AR	100	NexStar Broadcasting Group	KNWA	NBC	NexStar Broadcasting Group	KFTA	FOX
Johnstown-Altoona, PA	101	Peak Media	WWCP	FOX	Palm Television	WATM	ABC
Greenville-New Bern-Washington, NC	103	Bonten Media Group	WCTI	ABC	Esteem Broadcasting of North Carolina	WFXI	FOX
Lincoln and Hastings-Kearney, NE	105	Pappas Telecasting	KWNB	ABC	Omaha World-Herald	KFXL	Fox
Fort Wayne, IN	107	Granite Broadcasting Corp.	WISE	NBC	Malara Broadcasting Group	WPTA	ABC
Tyler-Longview(Lufkin and Nacogdoches), TX	109	Communication Corp of America	KETK	NBC	White Knight Broadcasting	KFXK	Fox
Youngstown, OH	110	New Vision Television	WKBN 27.1	CBS	Parkin Broadcasting	WYTV	ABC
Augusta, GA	114	Media General	WJBF	ABC	Schurz Communications	WAGT	NBC
Peoria-Bloomington, IL	116	Granite Broadcasting Crop.	WEEK	NBC	Barrington Broadcasting	WHOI	ABC
Peoria-Bloomington, IL	116	NexStar Broadcasting Group	WMBD	CBS	Sinclair Broadcast Group	WYZZ	FOX

57 Identified Instances of Common Control of Multiple Big 4 Network Stations in the Same Market

		Station #1			Station #2		
DMA	DMA Rank	Owner (**also Controlling Entity**)	Call Letters	Affil.	Owner	Call Letters	Affil.
Traverse City-Cadillac, MI	117	Barrington Broadcasting	WPBN	NBC	Tucker Broadcasting of Traverse City	WGTU	ABC
Fargo-Valley City, ND	121	Hoak Media Corp.	KVLY	NBC	Parker Broadcasting	KXJB	CBS
Monterey-Salinas, CA	124	Cowles Publishing	KION	CBS	Seal Rock Broadcasters	KCBA	Fox
Columbus, GA	128	Raycom Media	WTVM	ABC	Southeastern Media Holdings	WXTX	FOX
Corpus Christi, TX	129	Cordillera Communications	KRIS	NBC	Eagle Creek Broadcasting	KZTV	CBS
Amarillo, TX	131	NexStar Broadcasting Group	KAMR	NBC	Mission Broadcasting	KCIT	FOX
Wilmington, NC	132	Raycom Media	WECT	NBC	Southeastern Media Holdings	WSFX	FOX
Rockford, IL	134	NexStar Broadcasting Group	KQRF	FOX	Mission Broadcasting	WTVO	ABC
Monroe, LA-El Dorado, AR	138	Hoak Media Corp.	KNOE	CBS	Parker Broadcasting	KAQY	ABC
Monroe, LA-El Dorado, AR	138	NexStar Broadcasting Group	KARD	FOX	Mission Broadcasting	KTVE	NBC
Duluth, MN-Superior, WI	139	Granite Broadcasting Crop.	KBJR & KRII	NBC	Malara Broadcast Group	KDLH	CBS
Lubbock, TX	143	NexStar Broadcasting Group	KLBK	CBS	Mission Broadcasting	KAMC	ABC
Erie, PA	146	NexStar Broadcasting Group	WJET	ABC	Mission Broadcasting	WFXP	FOX
Erie, PA	146	SJL of Pennyslvania	WICU	NBC	Lilly Broadcasting	WSEE	CBS
Joplin, MO-Pittsburg, KS	147	NexStar Broadcasting Group	KSNF	NBC	Mission Broadcasting	KODE	ABC
Joplin, MO-Pittsburg, KS	147	Saga Communications	KOAM	CBS	Surtsey Media	KFJX	FOX
Sioux City, IA	148	Titan Broadcast Group (TTBG)	KPTH	FOX	Waitt Broadcasting	KMEG	CBS
Wichita Falls, TX-Lawton, OK	149	NexStar Broadcasting Group	KFDX	NBC	Mission Broadcasting	KJTL	FOX
Wichita Falls, TX-Lawton, OK	149	Drewry Broadcast Group	KSWO	ABC	Hoak Media Corp.	KAUZ	CBS
Terre Haute, IN	152	NexStar Broadcasting Group	WTWO	NBC	Mission Broadcasting	WFXW	FOX
Rochester, MN-Mason City, IA-Austin, MN	153	Quincy Newspapers	NBC	KTTC	SagamorHill Broadcasting	KXLT	FOX
Idaho Falls-Pocatello, ID	162	Sunbelt Communications Co.	KPVI-DT	NBC	Compass Communications	KFXP	FOX
Abilene-Sweetwater, TX	165	NexStar Broadcasting Group	KTAB	CBS	Mission Broadcasting	KRBC	NBC
Billings, MT	169	NexStar Broadcasting Group	KSVI	ABC	Mission Broadcasting	KHMT	FOX
Utica, NY	170	NexStar Broadcasting Group	WFXV	FOX	Mission Broadcasting	WUTR	ABC
Grand Junction-Montrose, CO	184	Hoak Media Corp.	KREX	CBS	Parker Broadcasting	KFQX	CBS
San Angelo, TX	198	NexStar Broadcasting Group	KLST	CBS	Mission Broadcasting	KSAN	NBC
Ottumwa, IA-Kirksville, MO	200	Barrington Broadcasting	KTVO	ABC	Ottumwa Media Holdings	KYOU	FOX
Victoria, TX	204	Saga Communications	KAVU	ABC	Surtsey Media	KVCT	FOX