Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MB Docket No. 10-71
Amendment of the Commission's Rules	)	
Related to Retransmission Consent	)	

COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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Cablevision Systems Corporation ("Cablevision") hereby submits these comments in the above-captioned proceeding in response to the Commission's Notice of Proposed Rulemaking.[1/] The Commission should update the good faith standard for retransmission consent negotiations by requiring broadcasters to charge ***non-discriminatory*** and ***transparent*** rates ***without tying*** consent to the carriage of other programming services or entry into ancillary deals.

Cablevision's market-oriented proposal would advance the Commission's goals of improving good faith negotiations while requiring only modest changes to the current rules in a manner wholly within the Commission's authority. Importantly, under Cablevision's proposal, broadcasters would retain complete discretion to set the rate for retransmission consent in any local market. However, by re-establishing the fair bargaining in good faith negotiations that Congress intended, Cablevision's proposal would significantly ameliorate the negative impact that today's outdated retransmission consent scheme has on consumers.

[1/] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, 26 FCC Rcd 2718 (2011) ("*NPRM*").

INTRODUCTION AND SUMMARY

The Commission recognizes that today's retransmission consent scheme is not working to protect consumers, to promote the goals of the 1992 Cable Act, or to satisfy the Commission's obligation to protect cable subscribers against unreasonable increases in their rates for basic cable service.[2/] This proceeding offers the Commission the opportunity to consider and identify reasonable, lawful changes that will address these flaws in today's rules.

The retransmission consent rules were designed to preserve balance in broadcaster-MVPD negotiations. Created during a time when it was believed that broadcasters needed protection to ensure that their signals were carried by MVPDs, the rules provide broadcasters a variety of regulatory advantages. With the increase of competition among MVPDs, the economic conditions on which the retransmission consent rules were premised have changed. Indeed, it is now the subscribers of MVPDs who need protection to ensure that local broadcasters continue to offer their programming to MVPDs under reasonable rates and conditions.

In light of the changing marketplace, and pursuant to its statutory directive under section 325 to ensure reasonable cable rates, the Commission should update its retransmission consent rules to ensure fair and reasonable retransmission consent fees to protect consumers, promote continued diversity in programming, and promote competition among MVPDs.

Cablevision respectfully submits that adoption of its three-prong approach to retransmission consent reform – requiring broadcasters to charge ***non-discriminatory*** and

[2/] Chairman Genachowski has recognized the need to reform the good faith negotiation rules to protect MVPD subscribers. *See* Julius Genachowski, Chairman, FCC, Remarks at the National Association of Broadcasters Conference, Las Vegas, Nevada (Apr. 13, 2010), *at* http://fcc.gov/ (expressing "concern[] about sudden program interruptions, and about the potential for rising cable rates"); Cynthia Littleton, *Too Much Static – TV Carriage Fights Spur Retrans Review*, VARIETY, Mar. 18, 2010 (interviewing Chairman Genachowski, whereby he reiterated the need for companies to be able to "negotiate fair agreements," saying, "[w]hat I'm focused on is what's the effect on consumers who don't have a seat at the negotiating table, but are affected when deals can't be struck.").

transparent rates for retransmission consent ***without tying*** that consent to carriage of other programming services or entry into ancillary deals – would best achieve the Commission's goals without unduly interfering with the operation of the free market:

- It would improve the rules in a pro-consumer fashion to ensure that retransmission consent negotiations "are working effectively" and "provide greater certainty to the negotiating parties" in order to ensure more reasonable retransmission consent rates;[3/]
- It would minimize consumer disruptions in receiving broadcast programming; and
- Its adoption is squarely within the scope of the Commission's authority.

Negotiations not conducted in accordance with this three-pronged standard would be deemed inconsistent with good faith negotiations.

By updating the rules to reflect current market conditions and to re-establish the balance in retransmission consent negotiations that Congress intended, Cablevision's proposal would result in speedier, reasonable retransmission consent agreements that appropriately reflect the value of a broadcaster in a local market and ensure that consumers have an opportunity to share the benefits of the more favorable retransmission consent deals that will flow from the proposed regulatory changes. Cablevision's market-oriented reform proposal represents a modest approach that is plainly within the Commission's statutory authority.[4/]

In addition to implementing Cablevision's proposed reforms, the Commission should adopt several other regulatory changes to promote a more market-oriented, balanced retransmission consent system. *First*, the Commission should prohibit stations that are not commonly owned from jointly negotiating retransmission consent, to place MVPDs and

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3/ *NPRM* ¶¶ 1, 3.

4/ *See NPRM* ¶¶ 18, 19.

broadcasters on a more level negotiating field. *Second*, the Commission should eliminate its non-duplication and syndicated exclusivity rules to protect MVPD consumers by allowing MVPDs the option of importing an out-of-market broadcaster if negotiations with the preferred local broadcaster fail. *Last*, the Commission should reject the proposed subscriber notice requirements, which would encourage broadcaster brinkmanship, confuse consumers, cause MVPDs to be more vulnerable to unreasonable retransmission consent demands, and so result in higher rates for MVPD subscribers.

I. TODAY'S RETRANSMISSION CONSENT REGULATORY SCHEME IS CAUSING CONSUMER HARM

Today's retransmission consent scheme is not functioning in the best interests of the public and is in need of reform. As the record reflects, the regulations designed to protect consumers in 1992 – a very heavily regulatory scheme designed to balance leverage between broadcasters and MVPDs[5/] – are outdated in today's competitive market and, because of such changed market conditions, have resulted in increasing retransmission consent fees, negotiation stalemates, and broadcast programming blackouts.[6/]

5/ *See, e.g.*, 138 Cong. Rec. S642 (Jan. 30, 1992) (the legislation is designed "to ensure that local stations remain viable well into the future to continue to provide local service to cable subscribers and nonsubscribers alike") (Sen. Inouye); S. REP. NO. 102-92 (1991) (retransmission consent was initially designed to "advance[] the public interest" served by broadcasters by correcting for "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

6/ *See, e.g.*, Reply Comments of Public Knowledge, MB Docket No. 10-71, at 3 (June 3, 2010) ("Public Knowledge Reply Comments") (noting that "[r]ecent incidents demonstrate that broadcasters no longer need to be insulated from market forces, as evidenced by their ability to hold viewers hostage during retransmission consent negotiations;" and that "[r]ecent changes in the video programming marketplace have given broadcasters even more leverage. Broadcasters now have a number of distribution options from which to choose, including direct broadcast satellite providers, incumbent local exchange carriers, and online video distribution. Consequently, broadcasters may threaten MVPDs and their subscribers with programming blackouts without risk that their programs will not be seen elsewhere in the market."); Comments of OPASTCO, et al., MB Docket No. 10-71, at 2 (May 18, 2010) ("OPASTCO Comments") (The current "skewed playing field [] favors broadcasters and prevents free-market retransmission consent negotiations from taking place. Network non-duplication, exclusivity, and mandatory carriage rights enjoyed by broadcasters leave . . . [MVPDs] . . . with the Hobson's choice of either accepting the prices and terms dictated by a broadcaster, or forgoing access to the broadcaster's

In today's environment, broadcasters and MVPDs could easily negotiate the terms of carriage without any regulatory protection, just as MVPDs negotiate for other types of programming they offer subscribers. In the absence of this fundamental reform[7/] – which would require repeal not only of the broadcaster carriage laws and regulations, but also the many accompanying special regulatory protections created for broadcasters carried on MVPD systems[8/] – the Commission should update its retransmission consent rules to fulfill Congress's directive to protect consumers against adverse impact on consumer rates.[9/]

Among programmers, broadcasters occupy a unique status, largely because of government-granted advantages. In exchange for government-granted free broadcast licenses, broadcasters are charged with protecting the public interest and must, by law, operate in a manner that serves the "public interest, convenience, and necessity."[10/] The FCC and the courts

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signal."); Comments of Retirement Living TV, MB Docket No. 10-71, at 3 (May 17, 2010) ("RLTV Comments") ("[T]he free use of the public airwaves and decades of government-mandated cable carriage give broadcasters the leverage to use their retransmission consent rights both to demand carriage for new, untested channels and to obtain supra-competitive rates and terms for carriage of their products. Ultimately, consumers pay the price for the market distortions caused by the retransmission consent rules in terms of price and diversity of programming.").

[7/] This pleading does not address the merits of such a fundamental reform proposal.

[8/] *See* Comments of Verizon, MB Docket No. 10-71, at 3 (May 18, 2010) ("Verizon Comments") ("Under existing rules, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations."); Reply Comments of DIRECTV, Inc. and DISH Network LLC, MB Docket No. 10-71, at 2 (June 3, 2010) ("DIRECTV/DISH Reply Comments") (The retransmission of broadcast signals is not a ''free market." It is a highly regulated environment in which the government has heavily favored broadcasters); Comments of the American Cable Association, MB Docket No. 10-71, at 4 (May 18, 2010) ("ACA Comments") ("The government has granted commercial broadcasters with valuable spectrum and provides a range of legal and regulatory protections to help ensure the availability of broadcast television to the public.").

[9/] 47 U.S.C. § 325(3)(A).

[10/] 47 U.S.C. §§ 307, 309. *See Office of Communication of the United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413, 1427 (D.C. Cir. 1983) ("In return for 'the free and exclusive use of a limited and valuable part of the public domain,' broadcasters were to be 'burdened by enforceable public obligations.'") (*quoting Office of Communication of United Church of Christ v. FCC,* 359 F.2d 994, 1003 (D.C. Cir. 1966)); *Black Citizens for a Fair Media, et al. v. FCC,* 719 F.2d 407, 419 (D.C. Cir. 1983) (Wright, J., dissenting) ("It is a fundamental premise of the Act that the public, and not the broadcaster, owns the airwaves. Under the regulatory scheme, a broadcaster receives free and have long recognized that a station is not serving the public interest if it is not meeting the needs and interests of its viewers.[11/] Retransmission consent – required by a statute that was designed to preserve local broadcasting for the public – should not be allowed to become a tool in a strategy to withhold broadcast programming to leverage a substantial increase in the fees for receiving the programming.

Allowing broadcasters to impose fees on MVPDs beyond the standalone (unbundled) price of their local programming translates into increased costs for consumers. Two factors are contributing to broadcasters' ability to extract excessive fees in retransmission consent deals.

First, today's rules do not reflect and account for the significant change in the parties' relative position in the event no agreement is reached that has developed since 1992. When cable operators were broadcasters' only major non-over-the-air outlet for their programming, both parties were equally harmed in the absence of an agreement. Now, without an agreement, virtually all of the customers to whom a broadcaster would lose access can switch to another MVPD, enabling the broadcaster to regain access to them – and the longer an impasse goes on, the more customers will switch.

Adding to the broadcasters' negotiating advantage, the laws continue to give broadcasters unique benefits. Because broadcasters are the only sources of programming with the guaranteed ability to reach all viewers in a market, they routinely gain the rights to "must-have" programming, such as popular network television shows and national sporting and entertainment

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exclusive use of a slice of this public resource, the remunerative potential of which has proven to be vast. In return, the broadcaster must use this public resource so as to serve the 'public interest, convenience, and necessity.' This public interest standard mandates programming that meets the needs of a broadcaster's viewing or listening community.") (internal citations omitted).

11/ *Office of Communication of the United Church Of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

events, which MVPD subscribers enjoy and expect to receive.[12/] This unique status means that MVPDs cannot realistically resist broadcaster demands in retransmission consent negotiations,[13/] even when those demands are exorbitant.[14/] This is reflected in the parties' behavior; broadcasters involved in retransmission consent negotiations are increasingly willing to threaten or actually pull their broadcast signal,[15/] especially just before major "must see" programming

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[12/] Congressional Research Service, *A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations*, at Summary (July 9, 2007) ("CRS Report") ("The recent increase in negotiating impasses appears to be the result of structural market changes that have given programmers with "must-have" programming much greater leverage . . . . Competitive entry in distribution – almost all cable –companies now face competition from two satellite companies, and are beginning to face competition from telephone companies – has emboldened programmers with popular programming to demand cash payment from distributors for the right to carry that programming. In particular, local broadcasters increasingly are using the statutory retransmission consent requirement to demand cash payment from small cable companies who could lose subscribers to the satellite providers and new telephone entrants if they reach an impasse with the broadcaster and can no longer carry the local broadcast signals.").

[13/] Congress's concern that cable operators would have an economic incentive not to carry broadcasters, 47 U.S.C. § 521 nt (a)(15), has proven baseless. To the contrary, the Commission has repeatedly found broadcast programming to be "must have" components of MVPD service. *See, e.g.*, *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, Consolidated Application For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 4 (2004) ("*General Motors/Hughes Transfer Order*") (identifying "broadcast television station signals" as "must have" video programming).

[14/] Steven C. Salop, et al., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, ¶ 71 (June 3, 2010) ("Salop Study") (attached to the Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71 (June 3, 2010) ("Time Warner Reply Comments"). The record evidence demonstrates that broadcasters' retransmission consent demands have sharply escalated in recent years and are expected to further increase, with some broadcasters predicting that retransmission consent fees will garner hundreds of millions, if not billions of dollars. SNL Kagan predicted that that broadcasters could get as much as $1.16 billion in retransmission fees by 2011 and as much as $1.63 billion by 2015, up from a base of slightly more than $500 million in 2008. *Id. See also* Sarah Barry James, *The Retrans Effect*, SNL Kagan (Jan. 8, 2010) (quoting a Morgan Stanley analyst's predictions from November 2009) (predicting that "retransmission consent fees paid to broadcast networks and their affiliates would rise to $3 billion by 2012."); Mike Farrell, *CBS Raises the Retrans Bar, Says Retrans/Reverse Comp Fees Will Top $1B in Five Years*, MULTICHANNEL NEWS (May 24, 2011) (reporting that CBS estimates that its retransmission consent revenue will double over the next five years to $1 billion).

[15/] *NPRM* ¶¶ 15-16 (discussing the consumer impact in the past year of "high profile retransmission consent disputes [that] result in carriage impasses" and observing that "[m]ost recently, we are aware of losses of programming resulting from retransmission consent carriage impasses involving DISH Network and Chambers Communications Corp., Time Warner Cable and Smith Media LLC, DISH Network and events,[16/] even though broadcasters are able to secure rights to this programming specifically *because of* their unique position as broadcasters.[17/] Yet despite the fact that the broadcasters' bargaining position has improved as MVPD competition has developed while that of the MVPDs has weakened, the retransmission consent scheme has remained static. These practices have translated into higher rates for consumers.

Second, today's retransmission consent rules fail to protect consumers against broadcasters' ability to isolate MVPDs by charging disparate fees for their retransmission consent within the same market. Non-uniform retransmission consent fees can skew service

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Frontier Radio Management, DirecTV and Northwest Broadcasting, Mediacom and KOMU-TV, and Full Channel TV and Entravision.").

16/ *See* Salop Study ¶ 5 ("The threatened blackouts by the broadcasters in these disputes often are purposefully timed to coincide with popular viewing events, in order to inflict maximum cost on MVPDs by causing greater disruption for viewers."); Letter from Seth A. Davidson, Counsel for Mediacom Communications Corporation, to FCC Chairman and Commissioners, MB Docket No. 10-71, at 2 (Aug. 12, 2010) ("broadcasters often manipulate the deadline when consent will be withdrawn through temporary extensions of the expiring contract so that consent will end on the eve of a major television event that it will broadcast, such as an NFL playoff game, the Super Bowl, a college bowl game of special local interest, a special event like the *Oscars* or an important episode in a network series (*e.g*., the finals of *American Idol*). All the while, the broadcast station continues to be carried by the cable company during the period leading up to signal termination, so there is no comparable impact upon the broadcaster's revenues."); Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 4 (July 30, 2010) ("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. […] [S]uch 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."); Comments of Bright House Networks, LLC, MB Docket No. 10-71, at 2 (May 18, 2010) ("A broadcaster s ability to exploit the timing of popular must see programming particularly major sporting events like the Sugar Bowl leaves an MVPD that is committed to satisfying customer expectations with little choice but to capitulate to broadcaster demands, no matter how inflationary those demands might be."); *see also* CRS Report at 26 ("There often is a timing element to must-have programming that programmers can use strategically in their negotiations with distributors. Television households are far more likely to switch MVPD providers if they fear the loss of particular time sensitive programming, such as the Super Bowl, the Olympic Games, the National Football League season, or the finale of American Idol or some other extremely popular series. Some programmers have effectively timed their negotiations with distributors to take advantage of such program schedules.").

17/ ACA Comments at 4 (noting that the government has provided broadcasters valuable spectrum, legal and regulatory protections and stating that "[t]he use of some of those legal and regulatory protections to extract substantially higher fees from smaller distributors and their customers raises equity and fairness questions that the Commission should carefully consider.").

prices and in some cases, can burden an otherwise efficient distributor with an artificially high cost structure for broadcast content. Nondiscriminatory pricing is a vehicle for ensuring that the benefits of fair pricing are passed through to consumers, regardless of whether the distributor is large or small, increasing consumer welfare and leveling the playing field between competing distributors.

It is time to amend and update the retransmission consent regulations to protect consumers against this unnecessary rate inflation. Cablevision's proposal preserves broadcasters' discretion to establish the rate for retransmission consent in any particular local market. By restoring rough balance in the balance of power between parties in a retransmission consent negotiation and eliminating broadcasters' ability to impose different retransmission consent costs across providers in the same geographic market, Cablevision's proposal will benefit customers.

II. CABLEVISION'S PROPOSED AMENDMENTS TO THE GOOD FAITH RULES WOULD AMELIORATE THE CONSUMER HARM THAT RESULTS FROM TODAY'S OUTDATED REGULATORY SCHEME

Cablevision's proposal would best address the faults in today's system by reducing the impact of retransmission consent fees on the rates consumers pay, in a manner wholly within the FCC's authority. Cablevision's proposal is based on three interrelated principles: non-discriminatory pricing, transparency in pricing, and no tying. Implemented together, Cablevision's solution will reduce the disruption in broadcast programming consumers experience today, curb the higher prices that are flowing through to consumers as the cost of retransmission consent rises, and restore balance to the retransmission consent marketplace.

Non-Discriminatory Pricing. Cablevision's reform proposal would require broadcasters to cease price discrimination among MVPDs in the same market. A broadcaster could set its own price for retransmission consent for carriage of its broadcast signal by negotiating an agreement with a MVPD,[18/] but once the price within the market was set, the broadcaster could not charge discriminatory rates among MVPDs within the market. Any MVPD in that market could receive the same price to which the broadcaster had already agreed; an MVPD that had agreed to pay a higher price could opt into the new standard lower price. A broadcaster could justify a difference in the rate offered different MVPDs in the same market only by demonstrating a cost-based distinction between the MVPDs, such as instances when a broadcaster can identify differences in transport costs for delivering the signal to different distributors.[19/]

Rate Transparency. Cablevision's reform proposal would require the rates paid by each MVPD in a market to be transparent. Each broadcast station would be required to disclose the

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18/ Contrary to suggestions by NAB (*see* Reply Comments of the Broadcaster Associations, MB Docket No. 10-71, at 38-40 (June 3, 2010)), Cablevision's proposal does not contemplate that MVPDs would be able to dictate unilaterally all other contract terms other than price. Broadcast stations carried pursuant to retransmission consent could easily be given the same tiering, channel positioning (updated to reflect new relevant dates), and signal quality rights as must-carry stations. Issues unrelated to carriage of the broadcaster's primary video stream – such as rights to VOD content or carriage of multicast streams – would be negotiated separately without regulatory restrictions except that such agreements could not be used to circumvent the new retransmission consent rules**.**

19/ Initially, the right to take the standard rate would begin with the first retransmission consent agreement negotiated under the new rules. The opportunity would be available only after expiration of an MVPD's retransmission consent agreement under the old rules (unless the agreement itself provides for early termination), and it would last only as long as the term of the original agreement. An MVPD opting into a newly established lower price would not be entitled to a true-up for the period it had paid a different negotiated price. Eventually, most contract termination dates will harmonize under this system, but this approach allows for a slower transition period, during which neither party is deprived of the benefits of any deal it struck. An example of how the system would work is as follows:

> MVPD A negotiates a retransmission consent agreement with Broadcaster with a term of three years. In Year 2 of that agreement, MVPD B's retransmission consent agreement under the old rules with Broadcaster ends. MVPD B can opt into MVPD A's agreement with Broadcaster and pay MVPD A's negotiated rate, but only until the end of Year 3. MVPD B does not get a new three-year term of its own and the new rate applies only going forward. Alternatively, MVPD B can negotiate its own lower rate with Broadcaster, which then becomes the new market rate. Other MVPDs in the market can opt into MVPD B's rate on a going-forward basis for the remaining term of their agreement with Broadcaster.

retransmission consent carriage rates between itself and each MVPD in a given market on a per-subscriber basis. Combined with the other elements of the proposal, the transparent rate would reflect the standalone rate for retransmission consent from the station that another MVPD in that market could opt to take.[20/]

No Tying. Broadcasters and their affiliated entities would be banned from tying retransmission consent to carriage of affiliated programming services or an MVPD's agreement to enter into other ancillary deals, such as sponsorship or advertising deals, carriage of multicast channels or carriage of VOD content. The ban would apply whether the compensation was directly part of the retransmission consent agreement, in a side agreement, or reflected in the terms of some other ancillary agreement between the broadcast station/broadcast network and the MVPD.

A. Banning Price Discrimination Among MVPDs Would Benefit Consumers And Promote MVPD Competition.

Prohibiting discriminatory pricing within a DMA would reduce friction in broadcaster-MVPD negotiations, making consumers less susceptible to programming blackouts and less likely to pay higher service rates caused by inflated retransmission consent fees.

MVPDs today devote substantial time, money and energy to retransmission consent negotiations. When those negotiations break down (and often well before that time), they devote additional resources to managing the impact of that dispute on their subscribers and the marketplace.

If prices are non-discriminatory, these unnecessary efforts can be minimized or

[20/] To ensure compliance, a broadcaster's station manager would have to attest, pursuant to 18 U.S.C. § 1001, that the rate represents the true standalone price for the broadcast station on a market-specific basis, and is not dependent on or reflective of any other agreements, terms or conditions negotiated with the MVPD, either with the broadcast station or with the broadcast network with whom the station is affiliated, or any of the station or network's affiliates.

eliminated for MVPDs, large and small. Uniform pricing will eliminate the time and other resources spent on minimizing blackouts, controlling customer losses (and attempting to win customers back). MVPDs can negotiate for the true value of the broadcast signal without fear that their distributor competitors in the market will negotiate a better rate. Such negotiations will reduce total transaction costs for all MVPDs because each buyer can trade off the costs of extending negotiations versus taking service under an already negotiated deal. With the value of broadcaster brinksmanship and the threat of withholding programming eliminated, both parties benefit by concluding agreements quickly and easily, reducing disputes over the terms of retransmission consent and attendant consumer harm.

A non-discrimination requirement would allow the Commission to ensure adherence to the statutory directive that any differences in rates charged to different MVPDs be based on "competitive marketplace considerations"[21/] rather than differences in market power and leverage between the two parties afforded to broadcasters by today's rules. Indeed, a prohibition on unjust and unreasonable discrimination is inherent in the good faith bargaining requirement.[22/] In the *Good Faith Order*,[23/] the Commission found that the commonly understood meaning of "good faith" requires that negotiations be "conducted in an atmosphere of honesty, purpose, and clarity of process."[24/] Non-discrimination – combined with the increased transparency in retransmission consent negotiations advocated by Cablevision – would be wholly in line with this standard.

21/ 47 U.S.C. § 325(b)(3)(C)(ii).

22/ *See, e.g.*, *General Motors/Hughes Transfer Order* ¶ 107 (in response to concerns about possible lack of good faith negotiations, merger parties agree not to discriminate in the terms and conditions of carriage of unaffiliated programming services).

23/ *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, ¶ 13 (2000) ("*Good Faith Order*").

24/ *Id.* ¶ 24.

Requiring non-discriminatory pricing would also benefit consumers by giving distributors an incentive to pass through any costs savings they realize to consumers. If MVPDs within a market are paying the same rate, they will have to compete effectively on pricing with all MVPDs in the market, making it more likely that consumers will benefit from any cost savings in retransmission consent fees.

Cablevision's proposed nondiscrimination requirement would obviate the need for several of the Commission's proposed revisions to the rules. Making "unreasonable delay" a good faith violation[25/] would be unnecessary, because the conclusion of agreements would be largely automatic. Smaller MVPDs would not need special protections[26/] because they would have assurances that they are not being offered unfair terms.

Finally, a non-discrimination requirement would promote MVPD competition, a longstanding goal of the Commission. An MVPD is harmed in its ability to compete effectively if it does not have access to "must-have" broadcast programming or it has to pay an unreasonably high price for the "must-have" programming as compared to its competitors. Leveling the playing field between larger and smaller distributors would promote the Commission's policy favoring a diversity of distributors.

B. Requiring Transparency In The Rates And Terms Of Retransmission Consent Agreements Would Result In Faster Agreements With Lower Transaction Costs.

The Commission recognizes the importance of public disclosure and transparency to the effective operation of a competitive market, noting with approval that disclosure "benefit[s] policymakers and the [consumers] who rely on them by providing an empirical foundation for

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25/ *NPRM* ¶ 26 (asking whether "unreasonable delay" by either party should be deemed a good faith violation).

26/ *NPRM* ¶ 29 (proposing the group bargaining option and asking about whether "small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair.").

evaluating the effectiveness and necessity of ongoing policies," and that "[t]he Commission should have access to the information it needs to enforce any rules adopted . . . and to make informed policy decisions going forward."[27/] Transparency in the fees paid for retransmission consent would have these same beneficial effects.[28/]

A transparency requirement also benefits consumers, both by reducing upward pressure on the rates they pay for MVPD service, and by helping them to understand how their service rates are affected by retransmission consent negotiations. Currently, broadcasters can engage in brinksmanship because they can isolate individual MVPDs. When cable, DBS and telcos (among other distributors) are competing for customers, the costs to the broadcaster of not reaching an agreement with an MVPD and withdrawing programming (or the threat of this withdrawal) decline over time, as the broadcaster regains viewers that switch to other MVPDs. Conversely, the costs to the MVPD of losing the programming grow worse, especially because broadcasters have made it a practice to set expiration dates prior to "marquee" events.[29/] This tactic forces the MVPD to agree to unreasonable terms and higher prices, because consumers have strong incentives to switch providers if they face the prospect of not being able to watch such events.

In contrast, in a system with transparent, uniform and unbundled prices, an MVPD cannot be singled out by a broadcaster. MVPDs can feel confident agreeing to a price because they know they are not at a disadvantage vis-a-vis their competitor. Disclosure therefore is an

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27/ *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, ¶ 119 (2009) ("*Broadband Practices Order*").

28/ Such disclosure would satisfy the Chairman's objective that the retransmission consent negotiation process be "open and transparent." *See, e.g.*, Chairman Julius Genachowski, Remarks to the Staff of the Federal Communications Commission, p. 4 (June 30, 2009) *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291834A1.pdf.

29/ *See* n.16, *supra*.

important aspect of streamlining the retransmission negotiation process and reducing transaction costs associated with the negotiations, making negotiations easier and faster.

C. The Good Faith Negotiation Rules Should Ban Tying In Retransmission Consent Agreements.

Banning tying in retransmission consent agreements would ensure that there are no hidden fees for retransmission consent and that the value of a retransmission consent agreement is easily understood and identifiable. When broadcasters receive compensation for retransmission consent through carriage of additional programming services or other deals for marketing support, advertising time, or other forms of consideration, the true costs of retransmission consent on the public cannot be readily identified.

In addition, requiring broadcasters to negotiate retransmission consent without tying will help ensure that broadcasters' demands are reasonable. Broadcasters will have to offer a price for their retransmission consent that truly reflects its value, rather than stating a deliberately unrealistically high price for consent because they intend to negotiate a price that includes both cash and many other forms of non-cash compensation. As such, banning tying would further the Commission's interest in ensuring that negotiating entities offer "bona fide" proposals on "important issues."[30/]

Cablevision's proposed ban on tying would also produce substantial benefits for programming diversity.[31/] As the record indicates, the increased demands in retransmission

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30/ *NPRM* ¶ 24.

31/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-356, § 2(b)(1) (announcing a Congressional policy to "promote the availability to the public of a diversity of views and information through cable television."). As the FCC has noted, "Congress identified the promotion of diversity of views and information as one of the purposes of the 1992 Cable Act. The courts have also determined that promoting diversity of media sources is a proper Commission goal and, specifically, that the Commission has the authority to apply rules promoting source diversity." *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite* consent negotiations decreases programming diversity, because MVPDs have less cash, less channel capacity, and diminished packaging flexibility for carriage of independent programmers.[32/] When programming is unbundled, MVPDs can determine independently which of a broadcaster's affiliated programming networks it wants to carry. This would create opportunities for programming networks to compete on merit and value, rather than based on ownership, and so would greatly enhance MVPDs' ability to create the most diverse service offerings possible, packaging channels in the manner that consumers value most.

Public Interest Obligations, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 19 FCC Rcd 5854, ¶ 55 (2004) (internal citations omitted).

[32/] *See, e.g.*, Public Knowledge Reply Comments at 4-5 ("[B]roadcasters use their leverage to require MVPDs to carry less valuable commonly-owned programming that has been bundled together with the broadcasters' main programming channel. This again raises rates for consumers, as MVPDs must pay for these additional mandatory programs, in addition to crowding out valuable independent programming."); Comments of Cox Communications, MB Docket No. 10-71, at 6-7 (May 18, 2010) (noting that tying "impair cable operators' discretion to construct channel lineups that best suit local needs," "put upward pressure on cable rates by requiring cable operators to pay handsome licensing fees for networks that they otherwise would not carry (or, at least, would not carry at the "tied" rates)" and "can lessen customer access to diverse cable programming because of the channel and financial capacity required to satisfy the demands of the networks, reducing available channels for programming offered by other programmers"); Comments of RCN Telecom Services, Inc., MB Docket No. 10-71, at 17 (May 18, 2010) ("viewer choice and the public interest suffer" because of tying arrangements); Comments of the Africa Channel, MB Docket No. 10-71, at 2-3 (May 18, 2010) (viability of independent channels is threatened by programming tying practices); Comments of Starz Entertainment, MB Docket No. 10-71, at 3 (May 18, 2010) (noting, that "the Fox Television broadcast station group has used its leverage from withholding retransmission consent for carriage of its local television stations to extract carriage commitments and advantageous positioning of their non-broadcast Fox Movie Network and f/x channels on MVPDs' systems. Similarly, Viacom used its local CBS station ownership leverage to extract carriage and position advantages for many non-broadcast networks, such as MTV and VH1 that previously were commonly owned."); Comments of Ovation, MB Docket No. 10-71, at 3 (May 18, 2010) ("Without the leverage of a large media company or affiliation with an MVPD, the independent programmer has been singled out as the path of least resistance in recouping some of those rising retransmission fees charged by the network affiliates. Clearly, the deterioration of the balance between distributors and broadcasters has directly affected independent programmers' ability to negotiate business terms that allow us to thrive and continue to offer consumers programming they cannot get elsewhere."); Comments of Discovery Communications, MB Docket No. 10-71, at 15 (May 18, 2010) ("This imbalance in retransmission consent negotiations is causing an increasingly greater proportion of MVPDs' limited programming budgets and channel slots to go to broadcasters, at the direct expense of high-quality programmers like Discovery Communications"); American Public Power Assoc. Comments at 18 ("Mandatory tying provisions have little, if anything, to do with the public policy goals underlying the enactment of the must carry/retransmission consent rules. The Commission should amend its rules to prevent broadcasters from requiring carriage of additional content as part of the compensation for the underlying carriage of a broadcast station.").

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Banning tying in retransmission consent agreements also better ensures that negotiations are market-specific, as Congress intended. In the absence of such a requirement, the terms of retransmission consent end up as part of a bundled deal also involving one or more national programming services. The rate paid for the broadcast station in what should be a market-specific negotiation inevitably ends up linked to the rate paid the broadcast network for those programming services, to the detriment of smaller or regional distributors who cannot bargain for the best rates for those national services. By separating negotiations for the rights to the local broadcast station programming from any negotiations over national programming services, the distributor can keep the negotiations focused on the local market, as Congress intended.

III. THE COMMISSION HAS FULL AUTHORITY TO ADOPT CABLEVISION'S SUGGESTED CHANGES TO THE GOOD FAITH NEGOTIATION RULES

The record establishes that the Commission has ample authority to adopt retransmission consent reforms in general as well as the specific reforms proposed by Cablevision.[33/] Moreover, Cablevision's proposal specifically addresses the Commission's concern that section 325(b)(1) prohibits it from requiring broadcasters to allow carriage of their signal without their consent, because none of Cablevision's proposed reforms would require this result.[34/]

The plain language of section 325(b)(3)(A) expressly authorizes the Commission "to establish regulations to govern the exercise by television broadcast stations of the right to grant

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33/ *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, at 11, 31-32 (Mar. 9, 2010) ("Joint Petition"); Comments of Cablevision Systems Corp., MB Docket No. 10-71, at 8-9 (May 18, 2010) ("Cablevision Comments"); Verizon Comments at 8, Comments of Time Warner Cable, MB Docket No. 10-71, at 11 (May 18, 2010) ("Time Warner Comments"); Time Warner Reply Comments at 19; ACA Comments at 18-19; Comments of the United States Telecom Assoc., MB Docket No. 10-71, at 5-6 (May 18, 2010); Reply Comments of Mediacom and Suddenlink, MB Docket No. 10-71, at 35 (June 3, 2010) ("Mediacom and Suddenlink Reply Comments").

34/ *NPRM* ¶¶ 7, 18.

retransmission consent."[35/] Indeed, section 325(b)(3)(A) includes specific mandates that compel the FCC to act. In regulating a broadcaster's exercise of its retransmission consent rights, Congress stated that the FCC "*shall* consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and *shall* . . . ensure that the rates for the basic service tier are reasonable."[36/] This provision creates an affirmative obligation on the FCC to modify its retransmission consent rules to protect consumers from the impact of higher retransmission consent fees on the rates they pay for service.[37/]

Cablevision's non-discrimination proposal is inherent in the requirement to negotiate in good faith pursuant to section 325(b)(3)(C)(ii).[38/] Section 325(b)(3)(C)(ii) states that it is not a failure to negotiate retransmission consent in good faith if television broadcast stations propose or enter into retransmission consent agreements with different MVPDs containing different terms and conditions, including price terms, if based on "competitive marketplace considerations."[39/] Conversely, in the absence of "competitive marketplace conditions," as is currently the case today,[40/] the Commission clearly has the authority to impose regulations to prevent the harm that results from price discrimination in such an environment.[41/]

35/ 47 U.S.C. § 325(b)(3)(A).

36/ 47 U.S.C. § 325(b)(3)(A) (emphasis added).

37/ *See, e.g.*, Reply Comments of Charter Communications, MB Docket No. 10-71, at 3-4 (June 3, 2010) (Section 325 clearly establishes Commission oversight regarding the exercise of retransmission consent and contemplates that such oversight will focus on the rate implications of retransmission consent fees).

38/ *See, e.g., General Motors/Hughes Transfer Order* ¶ 107.

39/ 47 U.S.C. § 325(b)(3)(C)(ii).

40/ *See* Section I, *supra*.

41/ ACA Comments at 19-20; Cablevision Comments at 16; Mediacom and Suddenlink Reply Comments at 36.

Prohibiting tying retransmission consent to carriage of other programming or agreement to enter into other business arrangements would reduce upward pressure on rates for cable service in furtherance of the Commission's duties pursuant to the Cable Act. Indeed, the Commission has held earlier that it has authority to ban tying in retransmission consent agreements, although it has declined to use it.[42/]

Finally, the Commission has long asserted authority to require transparency in transactions within its jurisdiction.[43/] Requiring transparency here would allow all parties and the Commission to clearly understand the costs associated with retransmission consent carriage, consistent with the Chairman's objective to ensure that processes are "open and transparent" and "fact-based and data-driven."[44/] Increased transparency also has been recognized as a hallmark of "good faith" negotiation under the Taft-Hartley Act upon which the Commission's rules are based.[45/]

42/ *See, e.g.*, *Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶ 127 (2007); *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999: Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, ¶ 35 (2001).

43/ *See, e.g.*, *Broadband Practices Order* ¶¶ 83-86 (proposing to require transparency for broadband services, based on the FCC's authority under sections 47 U.S.C. 151, 152, 154(i)-(j), 201(b), 230, 257, 303(r), 503, and 1302); *see also id.* ¶ 119 (with respect to broadband, disclosure "benefit[s] policymakers and the [consumers] who rely on them by providing an empirical foundation for evaluating the effectiveness and necessity of ongoing policies").

44/ *See, e.g.*, Chairman Julius Genachowski, Remarks to the Staff of the Federal Communications Commission, at 4 (June 30, 2009), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291834A1.pdf.

45/ Reply Comments of Cablevision Systems Corp., MB Docket No. 10-71, at 7 (June 3, 2010).

IV. MANY OF THE COMMISSION'S PROPOSALS ALSO WOULD IMPROVE GOOD FAITH NEGOTIATIONS

As the Commission recognizes, the good faith negotiation rules should promote fair, market-based, negotiations between broadcasters and MVPDs.[46/] Several changes to the Commission's rules governing carriage of broadcasters on MVPD systems would go far to reduce the unfair advantages that the current system grants to broadcasters, which distort the market for retransmission consent. The Commission should prohibit stations that are not commonly owned from jointly negotiating retransmission consent, and it should eliminate its non-duplication and syndicated exclusivity rules (collectively, "exclusivity rules") so that MVPDs have a meaningful option of importing an out-of-market broadcaster if negotiations with the preferred local broadcaster fail.

A. The Commission Should Ban Stations Not Commonly Owned From Jointly Negotiating Retransmission Consent.

Stations that are not commonly owned should not be permitted to enter into or negotiate joint retransmission consent arrangements. Today, MVPDs, both large and small, often face retransmission consent negotiations where local broadcasters team up with unaffiliated broadcast counterparts in order to wield more bargaining power over retransmission consent negotiations.[47/] By declaring this practice inconsistent with good faith negotiations, the

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46/ *NPRM* ¶¶ 23, 43.

47/ *See, e.g.*, ACA Comments at 9-10 (noting the "significant problem" of "broadcasters' use of sharing agreements or duopolies to jointly negotiate retransmission consent for multiple Big 4 affiliates in the same market" because "joint control or ownership of multiple Big 4 affiliates in a single DMA results in significantly higher retransmission consent fees. Consumers, particularly in smaller markets, ultimately foot the bill in the form of higher cable rates."); Comments of Pioneer Communications, *et. al.*, MB Docket No. 10-71, at 4 (May 18, 2010) ("Pioneer Comments") ("Even . . . where stations remain independently owned, local marketing arrangements between and among television stations are used to require MVPDs to negotiate retransmission consent rights for multiple local stations as a single package. . . in a number of markets, one or two broadcasters can effectively control access to the retransmission consent rights to most if not all of the major network programming available in that market. . . [This]

Commission would place the MVPD and the local broadcaster on more equal footing and so more likely to negotiate fair and reasonable terms that truly benefit the consumers in that market.

Without regulatory intervention, the practice is likely to grow. Already the American Cable Association has found that broadcasters in at least 57 markets "operate under some sort of sharing agreement – which typically means the stations operate under joint control for purposes of negotiating retransmission consent agreements."[48/] And although these arrangements may have been initially conceived of as a means to protect and benefit small stations,[49/] the practice has spread and morphed into arrangements formed by often already powerful stations purely to extract larger retransmission consent fees and burdensome carriage demands at the expense of consumers.[50/]

Such arrangements lead to MVPDs paying artificially high retransmission consent fees. When MVPDs must negotiate for two "must have" channels, the risk that they will lose customers absent an agreement is even higher. This makes the MVPD more susceptible to excessive demands, and results in higher prices.

To stem this growing trend and prevent the higher consumer prices that are its result, the Commission should declare that it is a *per se* violation of good faith negotiation standards for unaffiliated (*e.g.*, not commonly owned) stations to enter into private contractual arrangements or otherwise agree to negotiate jointly for retransmission consent. As the Commission notes,

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creates an extreme inequality of bargaining power in favor of stations/networks that are negotiating with smaller MVPDs . . . .").

48/ ACA Comments at 10. ACA also stated that it could "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." *Id*.

49/ *See NPRM* ¶ 23, n.76 (noting arguments that such sharing agreements are sometimes necessary for stations to "survive economically").

50/ *See, e.g.*, ACA Comments at 9-10; Pioneer Comments at 4; Public Knowledge Reply Comments at 3.

such arrangements can take various forms -- local marketing agreements, joint sales agreements, shared service agreements or other similar arrangements[51/] -- and all such agreements should be prohibited. Moreover, the Commission's proposal to prohibit only agreements in which one station gives the power to negotiate or grant its retransmission consent is insufficient;[52/] any joint arrangement should be prohibited, even if the two stations are both present at negotiations or must separately approve the agreement.

B. The Commission Should Clarify That Efforts By Broadcasters To Exclude Broadcast Competitors From The Market Are Banned Under Existing Law.

Despite the Commission's existing rule that it is bad faith negotiation for a broadcaster to require an MVPD as a condition of retransmission consent to refrain from negotiating retransmission consent with another broadcast station,[53/] broadcasters frequently violate the spirit if not the letter of this rule by asking MVPDs to agree not to carry a significantly viewed out of market station,[54/] or to carry the station only if the in-market station affiliated with the same network is also carried. The Commission should clarify that such practices – including any request by a broadcaster that the MVPD refrain from carrying any other programming service,

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[51/] *NPRM* ¶ 23.

[52/] *Cf.* proposed amendment to 47 C.F.R. § 76.65(b)(1)(ix).

[53/] 47 C.F.R. § 76.65(b)(1)(vi).

[54/] *See* Comments of Free Market Operators, MB Docket No. 10-71, at 6 (May 18, 2010) ("Broadcasters essentially have been given a monopoly for their DMAs and are exploiting that status to extract supra-competitive payments. Even when a competing network affiliate is significantly viewed in a particular community, the network affiliation agreement prohibits carriage of the out-of-DMA station, thus thwarting any competition between broadcasters. Rather, a flagship broadcast station that also controls another station in the same DMA has forced Wave to carry the weaker network and pay a higher than warranted fee for that sibling station and has forced Wave to carry the programming of an affiliated cable service."); Letter from Seth A. Davidson (on behalf of Mediacom Communications Corporation and Suddenlink Communications) to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 1 (Feb. 17, 2011) (describing practices of the "Big 4" networks that were driving up retransmission costs, including "pressuring a significantly-viewed affiliate not to allow its signal to be carried by a system where the local affiliate was denying the system retransmission consent."); *see also NPRM* ¶ 27 (noting DISH's concerns about this practice).

whether a broadcast station or some other service – violate a broadcaster's duty to negotiate in good faith.[55/]

The Commission's rules allow MVPDs to carry significantly viewed out of market stations – and protect network and syndicated programming shown on such stations against network non-duplication and syndicated exclusivity requests – out of a recognition that because such stations have an established audience, allowing such carriage benefits consumers by not disrupting their longstanding viewing preferences.[56/] Broadcasters' efforts to discourage carriage of such stations work directly against the public interest by seeking to force consumers to abandon their preferences solely to allow the broadcaster a monopoly status in a market where it would otherwise have to compete for viewer attention. Broadcasters should not be allowed to use the retransmission consent process to dictate the other programming services offered by an MVPD in an effort to enhance the likelihood that a broadcast station (or one of its affiliated programming services) will be viewed.[57/] The Commission should clarify that any such practices violate the obligation to negotiate retransmission consent in good faith.

C. The Commission Should Eliminate The Network Non-Duplication And Syndicated Exclusivity Rules.

The "exclusivity rules"[58/] provide broadcasters a "one-sided level of protection"[59/] during

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55/ *NPRM* ¶ 27.

56/ *Cable Television Report and Order*, 36 FCC 2d 143, ¶ 83 (1972).

57/ This clarification would also assist in protecting against broadcaster attempts to evade a restriction on tying. If a broadcaster does not require carriage of one of its affiliated services as a condition of its consent, then it will have satisfied the no tying requirement – but if that broadcaster requires as a condition of its consent that the MVPD refrain from carrying programming services that are arguably similar to or substitutes for its affiliated programmer, the MVPD will have no choice but to carry the broadcaster affiliate, and the broadcaster will have achieved the same result indirectly.

58/ The cable network non-duplication rules are found at 47 C.F.R. §§ 76.92-76.94; the cable syndicated exclusivity rules are found at 47 C.F.R. §§ 76.101-110.

59/ Joint Petition at 12.

retransmission consent negotiations and fail to protect consumers' interest in continued access to broadcast programming.[60/] Like the retransmission consent rules, the exclusivity rules were established "to equalize the conditions under which cable systems and broadcasters compete[], and to ameliorate the risk that cable television would have a future adverse economic impact on television broadcasting service."[61/] In today's changed market, the exclusivity rules are no longer needed. Local broadcasters' ability to charge high prices today for retransmission consent is an artifact – an inefficient extension of contractual exclusivity rights long after such contracts serve an efficiency-enhancing purpose.

Repealing the exclusivity rules – and forbidding broadcast networks and stations from imposing the same or similar exclusivity protections in their private contracts[62/] – would offer the benefit of "minimiz[ing] regulatory intrusion in the market"[63/] without threatening the benefits of localism. Even in the absence of those rules, MVPDs would prefer local broadcast stations over out-of-market stations, because the local broadcast contains locally-generated content, especially news and public affairs, that will not be included in the out of market signal. MVPDs would turn

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60/ *See, e.g.*, Letter from Matthew Brill, Counsel to Time Warner Cable to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 2 n.1 (Feb. 24, 2011) ("Because retransmission consent is a legislative construct and because many Commission rules (including network non-duplication and syndex provisions and the general obligation to carry broadcast stations on a compulsory basic tier) give preferences to broadcasters, retransmission consent negotiations do not occur in a genuine marketplace, and there is, therefore, no meaningful way for an arbitrator or regulator to determine 'market' rates for retransmission consent."); *see also* Reply Comments of Public Knowledge at 2-3 (noting that broadcaster "leverage is further strengthened by the Commission's non-duplication and syndicated exclusivity rules, which prohibit MVPDs from importing competing broadcast signals, removing a market-based incentive for broadcasters to price their retransmission consent competitively.").

61/ *Amendment of Subpart F of Part 76 of the Commission's Rules and Regulations with Respect to Network Programming Exclusivity Protection by Cable Television Systems*, First Report and Order, 52 F.C.C.2d 519, ¶ 2 (1975).

62/ Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 14-15 (June 3, 2010) (noting that the elimination of rules on network non-duplication and syndicated exclusivity would be ineffective absent "an affirmative ban on the underlying exclusivity agreements.").

63/ *NPRM* ¶ 44.

to out-of-market alternatives only when the retransmission consent price demanded by the local broadcaster exceeds the value of the *local* content the broadcaster is providing consumers. MVPDs will be willing to pay more for a local retransmission, but the amount of the incremental payment would be determined by the value of the locally-generated content, not the national network programming.

Repealing the exclusivity rules could thus have a positive effect on the amount and quality of local programming consumers receive from their local broadcasters. Broadcasters today pay a significant portion of retransmission consent fees to the national network to go towards the network's programming,[64/] but have no incentive to devote significant budgets to their own local programming efforts. Eliminating the exclusivity rules would ensure that between the network and the local station, each is getting the value from retransmission consent that they deserve – but is not able to charge an artificial higher price as a result of the outdated regulations. When local broadcasters' retransmission consent fees are based more on the worth of their local programming, they are more likely to create compelling local content to ensure they receive the highest possible value.

64/ *See* Letter from Anne Lucey, Senior Vice President for Regulatory Policy, CBS Corp., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 1 (April 19, 2011) (noting the "importance of retransmission consent to broadcasters as a means for our investing in high quality news and entertainment programming and for our competing for rights to professional sports programming."); Mike Farrell, *CBS Raises the Retrans Bar, Says Retrans/Reverse Comp Fees Will Top $1B in Five Years*, MULTICHANNEL NEWS (May 24, 2011) (reporting that CBS estimates that its retransmission consent revenue will double over the next five years to $1 billion); Sam Schechner, *TV Networks, Local Stations Do Battle Over Cable Fees*, WALL STREET JOURNAL, Dec. 14, 2009, at B4 (reporting on News Corp. President Chase Carey's recent announcement that he expected retransmission consent revenues to rise in 2012 and that News Corp.'s broadcast business will be a "billion dollar-plus business" within the next two years and stating that FOX, CBS, and ABC have all begun demanding from independent local affiliates "a cut"—as much as 50%—"of the payments the stations get from cable, satellite and telecommunications companies)); *see also* Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, BROADCASTING & CABLE (May 16, 2011) (reporting that "Fox is demanding affiliates come up with specific payment amounts per pay-TV subscriber, which escalate each year" and also noting that "NBC wants a percentage of affiliates' retrans earnings, as opposed to demanding a particular dollar amount.").

If the Commission declines to repeal the network non-duplication rule, then at a minimum it should revise the rule to allow a broadcaster to assert such rights only if the broadcaster is actually carried on the cable system.[65/] Adopting this measure would improve good faith negotiations and could restore some balance in negotiations since cable operators could negotiate with more than one network affiliate for popular network programming, thus securing at least some benefits for consumers. If the Commission pursues this approach, it would again have to ensure that broadcast networks and stations do not evade the spirit or intent of the rule by privately agreeing to exclusive territorial arrangements and it should prohibit broadcast networks from retaliating against local affiliates that entered into agreements with out of market MVPDs.

V. CHANGES TO THE SUBSCRIBER NOTICE REQUIREMENTS ARE UNWARRANTED AND WOULD NOT IMPROVE GOOD FAITH NEGOTIATIONS

Requiring MVPDs to give notice to subscribers of potential interruptions in service would exacerbate the existing imbalance in retransmission consent negotiations, making consumers even worse off than they are today. The Commission should address its concerns about consumers unexpectedly losing access to broadcast signals by adopting Cablevision's proposed reforms, which would sharply reduce the likelihood of blackouts ever occurring, and reject this misguided solution to the problem, which would actually harm consumer welfare.

Contrary to proponents' arguments,[66/] a notice requirement would not result in negotiations being concluded before the agreement's expiration date. In many cases,

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[65/] *NPRM* ¶ 44.

[66/] *See* Comments of Lin Television Corporation, MB Docket No. 10-71, at 14 (May 18, 2010) (Advanced notice "would provide strong incentives for MVPDs and broadcasters to conclude renewal negotiations at least 30 days before an existing agreement expires."); Joint Comments on Behalf of the Named State Broadcasters Associations, MB Docket No. 10-71, at 21 (May 18, 2010) ("Such retransmission consent agreements are strategically timed and extended to expire just before a "must have" television viewing event.[67/] Broadcasters establish this timing deliberately, in order to maximize their leverage in negotiations by credibly threatening to withdraw the signal from the MVPD's subscribers, and so extract the highest possible retransmission consent fees, and so will not finalize negotiations early regardless of the notice requirement. Moreover, even in cases in which negotiations are proceeding without incident, they rarely are concluded more than thirty days before an agreement's expiration, due to other business needs. Thus, whether a notice requirement is implemented or not, broadcasters will have no incentive to conclude negotiations earlier and it is likely that MVPDs will frequently be giving notice of an "impending" loss well before the likelihood of any such loss can be ascertained.

For this reason, the proposed notice requirement will not offer more complete and timely information to subscribers as the Commission hopes. Such notices, particularly when received with regularity, will only serve to confuse subscribers, particularly because the MVPD will not be able to provide any more concrete information if a subscriber calls with questions. This type of alarming and unnecessary notice can cause significant consumer harm if customers drop their preferred MVPD because of the possibility of losing access to valued programming, when they likely do not have to do so, since agreement is typically ultimately reached.[68/]

At base, the broadcasters' notice proposal is self-serving and will harm consumers in the form of higher prices, representing an effort by broadcasters to intervene further into the relationship between MVPDs and their customers in order to gain bargaining power.

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announcements . . . [would] incentiviz[e] MVPDs to lock down those rights through the commencement of active retransmission consent negotiations as early as possible.").

67/ *See* n. 16, *supra*.

68/ *See* Salop Study ¶¶ 21, 26 (noting consumer harm when consumers "are led to switch MVPD providers needlessly" or "switch to less preferred MVPDs, either after the blackout begins or even preemptively in anticipation of a blackout.").

Broadcasters seek mandatory notice requirements only to ensure that MVPDs are besieged by customer questions to enhance the likelihood that the MVPD caves to pressure to pay higher retransmission consent fees.[69/] Mandatory notice will lead to higher prices for both retransmission and customer subscriptions. Because it would harm consumer welfare, the Commission should resist calls for additional advanced notice requirements.[70/]

CONCLUSION

Cablevision's proposal to update the standard for good faith negotiations would substantially increase the likelihood of successful negotiations without disruptions in service for consumers while requiring only modest changes to the current rules in a manner wholly within

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69/ *See* Reply Comments of Insight Communications Company, Inc., MB Docket No. 10-71, at 8 (June 3, 2010) (stating that broadcasters "are not shy about mounting extensive advertising and public relations campaigns to scare consumers as part of their strategy for coercing MVPDs into giving into their demands, no matter what the ultimate cost to the consumer. A notice provision would simply formalize and legitimize this tactic and would not provide meaningful relief."); Time Warner Reply Comments at 16 (stating that the broadcasters' notice proposal "would be ineffective and likely counterproductive" as "[a]dditional notice would only give consumers more warning about possible losses of broadcast signals, but would do nothing to prevent (and may even more greatly facilitate) the ability of broadcasters to threaten to and actually pull their signals. Indeed, broadcasters' proposals relating to MVPDs' provision of additional notice simply aim to deflect attention from the fact that they are responsible for consumers' loss of access to programming in the context of retransmission consent disputes."); Reply Comments of Verizon, MB Docket No. 10-71, at 10-11 (June 3, 2010) (providing customers notice of potential impasses "would solve none of the problems with the current regime, nor would it protect consumers from being harmed as a result of brinksmanship in retransmission consent negotiations. And having to send out notices that could prompt customers to look elsewhere – even while the video provider is negotiating in good faith towards a renewal agreement – would only increase the pressure on video providers to accept unreasonable terms that increase the fees ultimately passed on to consumers. In the end this 'solution' exacerbates the existing negotiating imbalance and continues to subject consumers and MVPDs to brinksmanship negotiating tactics.").

70/ If the FCC chooses, however, to impose a mandatory notice requirement, Cablevision agrees that the rule should require *all* MVPDs, not just cable operators, to satisfy the obligation. Cable operators already operate in a regulatory scheme highly skewed in favor of competitors. In the highly competitive MVPD market, the Commission should be looking for ways to reduce and equalize regulation, not impose more burdensome regulations on cable operators alone. Any notice requirement should also reflect the competitive nature of the marketplace and allow MVPDs maximum flexibility with respect to the delivery means and content of such notices. Further, the Commission's proposed rule suggests that broadcasters should also be required to give affected subscribers notice. Appendix B; proposed § 76.1601(b). To the extent the Commission envisions interpreting this requirement to allow a broadcaster the opportunity to contact an MVPD's subscribers directly, this would be an extreme intrusion into the MVPD-broadcaster relationship and raise substantial privacy concerns.

the Commission's authority. Cablevision's market-oriented approach preserves broadcaster discretion to establish a market by market rate for the carriage of broadcast signals. By re-establishing the fair bargaining in good faith negotiations that Congress intended, Cablevision's proposal would significantly ameliorate the negative impact that today's outdated retransmission consent scheme has on consumers. The Commission should adopt the reforms that Cablevision has proposed herein.

Respectfully submitted,

/s/

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