Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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Executive Summary

In recent years, competition in the MVPD marketplace has started to take hold, delivering significant benefits to consumers, including a wide variety of pricing and service options. This evolution started in the mid-1990s, when direct broadcast satellite (DBS) companies started gaining a competitive foothold on cable competitors and continued through the first decade of 2000, when phone companies entered the market. A regulatory framework developed nearly two decades ago for a monopolistic MVPD market cannot effectively promote consumer welfare and efficiency in today's MVPD market. The Commission's original framework was adopted specifically to shift power from the cable operator to broadcasters, giving the latter greater leverage.

Today, however, with multiple MVPDS serving a given market, broadcasters have many outlets for delivering their programming and there is no longer a need to retain rules that give broadcasters advantages in the carriage negotiation process. In fact, the tables have been turned and it is now the MVPDs that are limited to a single source of programming under the rules. In today's multi-MVPD environment, the FCC should eliminate broadcaster preferences and adopt policies that move the retransmission consent process to true free market negotiations between broadcasters and MVPDs.

Time and again, the Commission has concluded that reasonable access to video programming is essential to ensuring greater video competition and increased broadband deployment and adoption. The increasing abuse of the retransmission consent process by broadcasters constitutes a significant barrier to the deployment of competitive bundled offerings, since such abuse makes entry into the video market more costly and diminishes the incentive of wireline competitors to deploy advanced services to consumers. The absence of a truly competitive retransmission consent marketplace can be an obstacle to deployment of bundled networks supporting both video and broadband services. The presence of rapidly increasing retransmission consent fees – which are expected to break $1 billion by 2011 and are particularly high for new wireline entrants – should not be a factor in determining whether such advanced networks are deployed.

The record in this proceeding highlights the bargaining imbalance between broadcasters and MVPDs resident in today's retransmission consent marketplace which allows broadcasters to inhibit the reasonable acquisition of content by MVPDs. In other instances where the Commission has identified similar obstacles to accessing programming it has implemented measured and reasonable policies to remove such obstacles. Due in part to the exclusivity provisions of the Commission's rules, local broadcasters are the exclusive provider of "must have" programming in their local areas. The Commission has previously concluded that local broadcast content is "must have" video programming.

The increased competition within the MVPD marketplace has, perversely, increased broadcasters' ability to abuse their bargaining power, since broadcasters use the Commission's regulatory "protections" to demand exorbitant retransmission consent fees by playing multiple local MVPD systems within local markets off of one another. In stark contrast to the MVPD market of twenty years ago – where a single cable incumbent served an entire market – the threat to a broadcast licensee of its losing access to viewers in the MVPD market is relatively minimal. In each local market throughout the country, broadcasters can – and do – play multiple MVPDs off one other with little threat of losing significant numbers of viewers. Such an outcome flies in the face of the very reason Congress adopted the retransmission statute which was to ensure that broadcasters can deliver their local programming content to consumers.

The broken retransmission consent system is having an increasingly negative impact on consumers, including higher costs stemming from increasing retransmission consent fees and lower consumer welfare. As many as 2.3 million households forgo subscribing to MVPD services as a result of the passing through in consumer rates of cash payments for retransmission consent. Absent reform to the current system, it is anticipated that as many as 1.9 million additional households will forgo subscribing to MVPD services by 2015. Of course, each increase in retransmission consent fees resulting from completed negotiations becomes the benchmark for subsequent rounds of negotiations, and these ever increasing costs are ultimately passed onto consumers.

Moreover, consumers suffer from the increasing instances where they lose access to their local broadcast signals during retransmission disputes. In 2011 alone, consumers have experienced five retransmission blackouts which are the most in a decade. Yet even outside of these instances involving the loss of a broadcast signal, countless consumers in numerous markets face increasing uncertainty that results from even the threat of blackouts. As extensively detailed in the record in this proceeding, millions of consumers in several markets have been faced with the prospect of losing their broadcast signal due to the increasing demands by broadcasters. Moreover, broadcasters often time the expiration of their carriage agreements before major television events, in order to use the threat of blackouts to obtain maximum leverage during negotiations

The Commission has the necessary statutory authority to implement reasonable pro-consumer mechanisms to the current "broken" retransmission consent marketplace. Specifically, Section 325 of the Communications Act provides the Commission with an unambiguous mandate to ensure that broadcasters' exercise of retransmission consent does not interfere with 'reasonable' rates for basic cable service. Through various actions, the Commission can utilize this statutory authority to create a competitive retransmission consent marketplace.

First, the Commission has the necessary statutory authority to adopt a standstill mechanism during retransmission consent negotiations. In light of the dramatic increase in consumer harms resulting from the Commission's outdated regulations relating to retransmission consent, adoption of a standstill provision is both consistent with the Commission's existing statutory authority and essential to any meaningful approach to the issue. Such an approach is consistent with existing Commission precedent and would result in important benefits to consumers.

Second, the Commission should adopt its proposal to eliminate its network non-duplication and syndicated exclusivity rules. Elimination of these outdated rules from a bygone era will minimize unnecessary regulatory intrusion in the market, thereby fostering free market negotiations within the retransmission consent marketplace. Elimination of the exclusivity rules will also enable video providers and their subscribers to gain access to must-have programming content.

Third, the Commission should eliminate its rules regarding removal of a broadcast signal during sweeps or, in the alternative apply the rules in a reciprocal manner. With respect to the former, the presence of this rule is yet another example of Commission regulation that does little to promote competition in the marketplace and instead simply places increased obligations on MVPDs. In the alternative, the Commission should apply the rule in a reciprocal manner, particularly given broadcasters' substantial bargaining leverage that already exists in the retransmission consent marketplace.

Fourth, the Commission should strengthen its good faith rules by making it a *per se* violation in instances where a broadcast station agrees to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision. Similarly, the Commission should prohibit the abuse by broadcasters of the retransmission consent process through local marketing agreements or other similar agreements. The record in this proceeding contains substantial evidence regarding the negative impact such arrangements have on retransmission consent negotiations.

Finally, the Commission should not impose mandatory notice obligations, since such a requirement will simply exacerbate an already skewed marketplace in which broadcasters wield tremendous and undue influence through their ability to sow confusion and fear amongst consumers through the possible loss of local broadcast signals. Rather than inform consumers about potential broadcast signal loss or encourage successful completion of retransmission consent negotiations, such an approach would have the opposite effect. Consumers in the MVPD marketplace would be exposed to a continuous stream of uncertainty regarding threatened broadcast blackouts.

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COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom)[1] is pleased to comment on the Notice of Proposed Rulemaking issued by the Federal Communications Commission (Commission)[2] that seeks comment on reforms to its outdated retransmission consent rules. Access to local broadcast programming is critically important to USTelecom's member companies, many of whom have recently entered the multichannel video program distribution (MVPD) market, providing competition and enhanced consumer choice.

These companies ranging in size from our largest members, to small and rural providers, share the view that the Commission's current retransmission consent rules has created a negotiating imbalance favoring broadcasters over MVPDs that is resulting in numerous – and growing – negative implications for consumers in today's MVPD market.

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[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

[2] *See* Notice of Proposed Rulemaking, Amendment of the Commission's Rules Related to Retransmission Consent, 26 FCC Rcd. 2718, FCC 11-31 (March 2011) (*Notice*).

I. INTRODUCTION

In recent years, competition in the MVPD marketplace has started to take hold, delivering significant benefits to consumers, including a wide variety of pricing and service options. This evolution started in the mid-1990s, when direct broadcast satellite (DBS) companies started gaining a competitive foothold on cable competitors. Then in the first decade of 2000, phone companies entered the market and created the first significant head-to-head wireline competition with cable incumbents. Indeed, the Commission's recent Further Notice of Inquiry regarding its 14th Video Competition Report acknowledges this competitive change by altering its analytical framework to address these realities.[3]

A regulatory framework developed nearly two decades ago for a monopolistic MVPD market cannot effectively promote consumer welfare and efficiency in today's MVPD market. That framework was intended to help broadcasters secure carriage by the cable operator that served their market. With only a single cable operator typically serving a market, that operator became the gatekeeper for all programming, and broadcasters lacked the necessary leverage to guarantee their carriage on a cable system.

Concerned about the continued viability of broadcast television in a monopolistic MVPD market and at a time in which pay television subscriptions were expected to increase, Congress and the FCC developed a regulatory structure intended to protect broadcasters and ensure that they would be carried by cable operators. Specifically,

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[3] Further Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 76 FR 25345, FCC 11-65 (May 4, 2011).

Congress enacted the "must carry" provisions, which local broadcaster can elect in order to obtain guaranteed carriage on an MVPD's basic tier. There is no negotiation of terms between the broadcaster and the MVPD regarding such carriage. In recent years, however, broadcasters have increasingly been electing retransmission consent, whereby the local broadcaster can demand some form of compensation from the video provider for retransmission of the broadcast signal.

In addition, the FCC adopted the syndicated exclusivity and network non-duplication rules. The network non-duplication rules permit a station with exclusive rights to network programming, as granted by the network, to assert those rights by using notification procedures in the Commission's rules.[4] The rules, in turn, prohibit the cable system from carrying the network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply.[5] Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.[6]

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[4] *See* 47 C.F.R. §§ 76.92-76.94.

[5] *See* 47 C.F.R. § 76.92. The size of the geographic zone depends upon the size of the market in which the station is located. *See* 47 C.F.R. § 76.92(b).

[6] *See* 47 C.F.R. § 76.101 *et seq.* In the year 2000, the Commission adopted rules implementing provisions of SHVIA that applied the network non-duplication and syndicated exclusivity rules to satellite retransmission of six "nationally distributed superstations." *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688 (2000) ("*SHVIA Exclusivity Rules Order*").

All of these regulations were adopted specifically to shift power from the cable operator to broadcasters, giving the latter greater leverage. Today, however, with multiple MVPDS serving a given market, broadcasters have many outlets for delivering their programming and there is no longer a need to retain rules that give broadcasters advantages in the carriage negotiation process. In fact, the tables have been turned and it is now the MVPDs that are limited to a single source of programming under the rules. In today's multi-MVPD environment, the FCC should eliminate broadcaster preferences and adopt policies that move the retransmission consent process to true free market negotiations between broadcasters and MVPDs.

When broadcasters withdraw retransmission rights and a station goes "dark" on a given MVPD network, consumers are often confused by the sudden and unanticipated loss of their local broadcast signal. Absent adoption of the recommended reforms, the outdated retransmission consent process will continue to result in increased consumer uncertainty and confusion and increased cost to consumers.

While the Commission has removed barriers to competition among video providers, such as through its 2005 order promoting deregulation of the broadband marketplace,[7] its 2007 order opening multiple dwelling units to competition,[8] and its most

[7] Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, FCC 05-150 (2005).

recent order establishing rate parity in the pole attachment arena[9] – its decades-old regulations governing retransmission consent have remain largely untouched. The bargaining imbalance between local broadcasters and MVPDs resulting from these rules is increasingly harming consumers.

II. REFORM OF THE RETRANSMISSION CONSENT RULES WILL ENHANCE BROADBAND DEPLOYMENT AND ADOPTION

Time and again, the Commission has concluded that reasonable access to video programming is essential to ensuring increased competition and its accompanying benefits, such as deployment of both broadband and video services. [10] As noted in the underlying Petition in this proceeding, however, bargaining imbalances between broadcasters and MVPDs in the decades-old retransmission consent process are inhibiting

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[8] Report and Order, and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd. 20235, FCC 07-189 (2007) (*MDU Order*).

[9] Report and Order, and Order on Reconsideration, *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, 76 FR 26620, FCC 11-50 (2011).

[10] *See e.g.*, Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, ¶51 (2006) (concluding that "broadband deployment and video entry are 'inextricably linked'") (*Franchise Reform Order*); *Franchise Reform Order*, ¶62 (stating that, "[t]he record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."); Report and Order, Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, ¶20 (2007) *(MDU Order*) (stating that "broadband deployment and entry into the MVPD business are 'inextricably linked.'"); First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746, ¶36 (2010) (concluding that "a wireline firm's decision to deploy broadband is linked to its ability to offer video.") (*Program Access Order*).

that reasonable access, resulting in "widespread and increasingly urgent" calls to reform this "broken system."[11] These problems are particularly acute for competitive video providers, with their smaller embedded base of customers and need for popular programming in order to attract new customers. The Commission has consistently emphasized how access to critical programming will result in substantial consumer benefits including increased competition in the MVPD market, lower prices for consumers and increased broadband penetration.[12]

The Commission has noted on numerous occasions that broadband deployment and MVPD competition are "inextricably linked."[13] The increasing abuse of the

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[11] *See* Petition for Rulemaking, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, p. 27, March 9, 2010 (*Petition*). *See also*, Public Notice, *Media Bureau Seeks Comment on a Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, DA 10-474, MB Docket No. 10-71 (released March 19, 2010); Order, *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, DA 10-594 (released April 2, 2010).

[12] *See e.g.*, *MDU Order*, ¶17 (concluding that access to programming results in a "significant increase" in MVPD competition, which "usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources."); *Franchise Reform Order*, ¶50 (concluding that increased MVPD competition, "is necessary and appropriate to achieve increased video competition and broadband deployment.").

[13] *See e.g.*, Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, ¶51 (2006) (concluding that "broadband deployment and video entry are 'inextricably linked'") (*Franchise Reform Order*) (concluding that "broadband deployment and video entry are 'inextricably linked'"); *Id.*, ¶62 (stating that, "[t]he record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."); *MDU Order*, ¶20 (stating that "broadband deployment and entry into the MVPD business are 'inextricably linked.'"); First Report and Order, *Review of the Commission's Program Access Rules*

retransmission consent process by broadcasters constitutes a significant barrier to the deployment of competitive bundled offerings that include video and broadband services. Because abuse of the retransmission consent rules makes entry into the video market more costly, it can diminish the incentive of wireline competitors to deploy advanced services capable of transmitting video to consumers.

In the absence of rules supporting a balanced retransmission consent negotiating process, the resulting higher costs for MVPDs are increasingly acting as a significant obstacle to deployment of networks supporting video and broadband services. In this regard, at least one commenter in this proceeding has noted that rural phone companies bundling video with broadband services have "experienced broadband adoption rates that are nearly 24 percent higher than those carriers that offer broadband alone."[14] Similarly, the National Exchange Carrier Association concluded in its most recent "Trends Report" that while rural companies are showing "continued progress" in deploying advanced networks, one of the three persistent challenges facing these same companies is the "[l]ack of access to affordable video content."[15] The presence of rapidly increasing retransmission consent fees – which are expected to break $1 billion by 2011[16] and are

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and Examination of Programming Tying Arrangements, 25 FCC Rcd. 746, ¶36 (2010) (concluding that "a wireline firm's decision to deploy broadband is linked to its ability to offer video.") (*Program Access Order*).

[14] *Organization for the Promotion and Advancement of Small Telecommunications Companies Comments*, March 23, 2010, p. 3.

[15] National Exchange Carrier Association Report, *Trends 2009, A Report on Rural Telecom Technology*, p. 7 (*NECA 2009 Trends Report*).

[16] *An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime*, Michael L. Katz, Jonathan Orszag, Theresa Sullivan, p. 32 (November 12, 2009) (*Retransmission Study*).

particularly high for new wireline entrants[17] – should not be a factor in determining whether such advanced networks are deployed.

These rapidly increasing fees have the potential to eviscerate the substantial benefits that accrue to consumers with the introduction of new wireline entrants in the MVPD market; specifically, greater competition, lower rates for consumers and increased broadband penetration. These increasing fees are further exacerbated by the fact that broadcasters secure guaranteed placement on the basic tier in rate-regulated systems.[18] Because broadcast stations must be carried on the basic tier in areas subject to rate regulation, and subscribers must purchase the basic tier as a condition of purchasing any other programming services,[19] all cable subscribers bear the costs of retransmitting broadcast programming.

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[17] *Retransmission Study*, pp. 35-36.

[18] Under the Commission's existing retransmission rules, broadcasters enjoy government-granted preferences that prevent balanced market-based negotiations. As noted in the Petition, in addition to guaranteeing broadcasters with cable-carriage rights, the Commission's rules give broadcasters "a host of powerful distributions controls," including: i) network non-duplication, which permits a broadcaster to block a cable operator from importing another affiliate of the same network, even when that other station has consented to carriage; ii) syndicated exclusivity, which allows a broadcaster providing syndicated programming to prevent a cable operator from carrying that programming as broadcast by an out-of-market station; and iii) guaranteed placement on a provider's basic service tier. As a result of these regulatory preferences, normal market dynamics cannot function as they would absent the regulations. *Petition*, pp. 7, 12-13 (citing 47 C.F.R. § 76.92(a); 47 C.F.R. § 76.93; 47 C.F.R. § 76.101; 47 C.F.R. § 76.103(a)).

[19] 47 U.S.C. § 543(b)(7)(A).

III. THE FCC'S REGULATORY FRAMEWORK HAS NOT KEPT PACE WITH TODAY'S RETRANSMISSION CONSENT MARKETPLACE

This proceeding already contains a voluminous and detailed record which highlights the bargaining imbalance between broadcasters and MVPDs in today's market. The retransmission consent rules prohibit MVPDs from obtaining programming from broadcasters outside of their market, thereby giving broadcasters that are the subject of negotiations the power to demand increased payments from MVPDs or threaten to remove their signal if their demands are not met. This reality places MVPDs in the position of paying more for programming, which translates into higher cable bills for consumers, or risking the loss of a broadcast signal.[20] In other instances where the Commission has identified similar obstacles to accessing programming it has implemented measured and reasonable policies to remove such obstacles.[21]

A. Local Content is Must-Have Programming

Due in part to the exclusivity provisions of the Commission's rules, local broadcasters are the exclusive provider of "must have" programming in their local areas. In previous proceedings, the Commission has concluded that because "the signals of local television broadcast stations are without close substitutes," they should be characterized as "'must have' video programming products."[22] The must have nature of network programming confers significant bargaining leverage on independent affiliates as well,

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[20] *Petition.*, pp. 15 - 20.

[21] *See e.g., Program Access Order*.

[22] Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation, Limited¸ Transferee,* 19 FCC Rcd 473, 565 ¶ 202 (2004).

especially those that invoke the Commission's program exclusivity rules to bar MVPDs from obtaining that "must have" programming elsewhere.

The extension of broadcast licensees' license terms from five to eight years, further compounds the competitive imbalance in the marketplace by minimizing their exposure to Commission license renewal proceedings. As these trends have developed, the balance in bargaining strength that Congress foresaw in 1992[23] when it enacted the current retransmission consent rules has been upended.

B. Increased MVPD Competition has Diminished the Negotiating Balance Between Local Broadcasters and MVPDs

The Department of Justice stated that "[t]he most significant development in regard to [multichannel video programming distribution] in the past three years is entry by the principal local telephone companies," further noting that, "[w]here incumbent local exchange carriers ('ILECs') have entered, they have often achieved considerable success."[24]

Perversely, increased competition within the MVPD marketplace has increased broadcasters' ability to abuse their bargaining power – particularly with respect to competitive providers – due entirely to the absence of a truly competitive retransmission consent marketplace. A 2007 study from the Congressional Research Service concluded that the current competitive MVPD marketplace has created an environment where "the tables are somewhat turned, and broadcasters with must-have programming often can

[23] 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[24] U.S. Department of Justice Report, *Voice, Video And Broadband: The Changing Competitive Landscape And Its Impact On Consumers*, November 2008, at 6, (available at: http://www.usdoj.gov/atr/public/reports/239284.pdf) (visited May 27, 2011).

negotiate from a position of strength, especially with cable systems whose subscribers do not represent a significant portion of a broadcaster's audience."[25]

Broadcasters are using the Commission's regulatory "protections" to demand exorbitant retransmission consent fees by playing multiple local MVPD systems within particular designated market areas (DMA) against one another. In stark contrast to the MVPD market of twenty years ago – where a single cable incumbent served an entire market – the threat to a broadcast licensee of its losing access to viewers in the MVPD market is relatively minimal, particularly when negotiating with new entrants in the video marketplace. In each DMA throughout the country, broadcasters can – and do – play multiple MVPDs off one other with little threat of losing significant numbers of viewers.

As noted in the underlying Petition in this proceeding, the competitive realities of the marketplace when the retransmission rules were implemented twenty years ago were "built on assumptions of market power in the hands of distributors, rather than programming providers,"[26] and "assumed a strong incentive for a broadcaster to reach a deal with the lone MVPD in its market, without contemplating the inevitable shift in those incentives once multiple MVPDs arrived on the scene."[27] Of course, as the Commission is well aware, multiple MVPDs have arrived in the current marketplace. The Commission's most recent video competition report noted that by 2006, DBS

[25] Congressional Research Service, Report to Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, July 9, 2007, p. 56 (*CRS Retransmission Study*).

[26] *Petition*, p. 16.

[27] *Id*.

providers DIRECTV and DISH Network were two of the top three MVPDs.[28] Around the same timeframe, both Verizon FiOS and AT&T U-verse launched their respective services,[29] which have since grown to 3.7 million subscribers and 3.2 million subscribers respectively.[30] Moreover, a similar story is unfolding in rural areas, where smaller ILECs continue to roll out competitive video services.[31] Broadcasters are increasingly using this intense MVPD competition to their benefit, by demanding exorbitant retransmission consent fees with no threat of going dark within their respective DMA.

This flies in the face of the very reason Congress adopted the retransmission statute, which was to ensure that broadcasters can deliver their local programming content to consumers to satisfy their public interest obligation to do so. Instead, broadcasters use the Commission's outdated regulations to demand increased retransmission consent fees from multiple MVPDs, resulting in increased programming costs for consumers and – in growing circumstances – loss of consumer access to their local broadcast signal. Rather than ensuring delivery of local broadcast signals to consumers by the single cable incumbent as originally envisioned, the Commission's

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[28] Thirteenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, FCC 07-206, ¶ 76 (2007) (*Thirteenth Video Competition Report*).

[29] *Thirteenth Video Competition Report*, ¶ 14.

[30] *See, AT&T 1st Quarter 2011, Investor Briefing*, April 20, 2011, p. 2 (available at: http://www.att.com/Investor/Financial/Earning_Info/docs/1Q_11_IB_FINAL.pdf) (visited May 26, 2011); *see also, Verizon 1Q, Investor Quarterly, First Quarter 2011*, April 21, 2011, p. 3 (available at: http://www22.verizon.com/investor/investor-consump/groups/financial/documents/investorrelation/2011_q1_qb.pdf) (visited May 26, 2011).

[31] National Exchange Carrier Association Report, *Trends 2009, A Report on Rural Telecom Technology* (*NECA 2009 Trends Report*).

rules now enable broadcasters to abuse the negotiation process amongst multiple MVPDs to the detriment of consumers.

The absence of a competitive retransmission consent marketplace deprives MVPDs of any negotiating leverage to effectively counter a broadcaster's unreasonable price demands, especially for the smaller, new entrant MVPDs. As the 2007 study from the Congressional Research Service concluded "[t]he negotiations between programmers and distributors, although private, are strongly affected by statutory and regulatory requirements and cannot be properly characterized as free-market."[32]

IV. CONSUMERS ARE INCREASINGLY IMPACTED BY TODAY'S BROKEN RETRANSMISSION CONSENT SYSTEM

The Commission's Notice appropriately acknowledges the impact on consumers of today's broken retransmission consent system.[33] While its Notice focuses primarily on the blackout aspect of retransmission consent negotiations, other consumer harms include the passing through of increased programming costs to consumers and pricing some potential MVPD subscribers out of the market.

More than fifteen years ago, a law review article jointly published by the Indiana University Board of Trustees and the Federal Communications Bar Association expressed "serious concerns" about the impact of retransmission consent on consumers.[34] The article went on to note that concerns for consumers paying the increased costs stemming

[32] *CRS Retransmission Study*, p. 56.

[33] *Notice*, ¶¶ 15 – 16.

[34] Charles Lubinsky, Federal Communications Law Journal, Commentary, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. S 325(B)) of the 1992 Cable Act*, p. 142 (November, 1996) (*Lubinsky Article*).

from retransmission consent negotiations were a possibility deemed "quite ominous."[35] Unfortunately, it appears that the authors' gloomy predictions have come to fruition.

A recent analysis of the current retransmission consent rules identified numerous consumer harms resulting from the Commission's outdated regulatory structure.[36] Among other things, the analysis concluded that the increase in MVPD costs due to retransmission consent results in higher subscription charges and lower consumer welfare.[37] The analysis found that higher retail prices triggered by retransmission fees "directly harm" consumers and are also "flatly inconsistent" with the Congress's intent that retransmission consent fees not significantly increase consumers subscription fees for MVPD services.[38]

The analysis also concluded that as many as 2.3 million households forgo subscribing to MVPD services as a result of the passing through in consumer rates of cash payments for retransmission consent.[39] Absent reform to the current system, the analysis anticipated that as many as 1.9 million additional households will forgo subscribing to MVPD services by 2015.[40] Moreover, each increase in retransmission consent fees resulting from completed negotiations becomes the benchmark for

[35] *Lubinsky Article*, p. 142.

[36] *Retransmission Study*.

[37] *Id.*, p. 3.

[38] *Id.*

[39] *Id.*

[40] *Id.*

subsequent rounds of negotiations, and these ever increasing costs are ultimately passed onto consumers.

Finally, the study emphasized the most obvious failure of the current retransmission consent system in the form of consumers losing access to their local broadcast signal when negotiations reach an impasse. While the analysis acknowledged that such interruptions are "sporadic, hard to anticipate," and it was therefore "impossible to draw firm conclusions about a trend in such events," recent data demonstrates their dramatic increase.[41]

The Commission's Notice addresses the occurrence of high profile retransmission consent disputes that have resulted in the loss of access to broadcast signals by consumers. Most notably, the Commission recounts the retransmission consent dispute between Cablevision Systems Corp. (Cablevision) and News Corporation in October 2010 that resulted in the extended loss of broadcast signals to more than three million households in New York, New Jersey, Connecticut and Philadelphia.[42] The carriage impasse resulted in affected Cablevision subscribers being unable to view on cable the baseball National League Championship Series, the first two games of the World Series, a number of NFL regular season games, and other regularly scheduled programs.[43]

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[41] *Retransmission Study*, p. 4.

[42] *Notice*, ¶ 15.

[43] *See e.g.*, Bill Carter, Brian Stelter, New York Times, *Fox-Cablevision Blackout Reaches a 2nd Day*, October 17, 2010 (available at: http://www.nytimes.com/2010/10/18/business/media/18cable.html) (visited May 26, 2011) (noting News Corporation's demand for an increase in retransmission fees to $150 million a year from $70 million).

Similarly, on March 7, 2010, the Walt Disney Company (Disney) and Cablevision were unable to reach agreement on carriage of Disney's ABC signal for nearly 21 hours after their existing agreement expired. Once again, approximately 3.1 million Cablevision households were deprived of the first 14 minutes of the Academy Awards.[44] But like a bad weather front moving slowly across the nation, numerous other consumers in cities across the United States have suffered the loss of their broadcast signal due to retransmission consent disputes. As reflected in the Exhibit 1, these blackouts have been numerous, geographically diverse and increasingly common.

A recent press release of the American Television Alliance (the Alliance) discussed the conclusion on May 18, 2011 of the three-month long blackout of WUNI-TV, a Worcester, Massachusetts Univision affiliate. The Alliance pointed out that this was the "fifth and longest retrans[mission] blackout of 2011," which was "the most in a decade."[45] The blackout impacted approximately 7,000 households around Rhode Island's East Bay, and stemmed from the broadcaster's reported demands to seek a 33 percent retransmission fee increase.[46]

[44] *Notice*, ¶ 15. *See also*, Brian Stelter, Brooks Barnes, New York Times, *At the Last Minute, a Disney-Cablevision Truce*, March 7, 2010 (available at: http://www.nytimes.com/2010/03/08/business/media/08cable.html) (visited May 27, 2011).

[45] American Television Alliance Press Release, *Broadcasters Continue to Give Viewers the Blackout Blues*, May 18, 2011 (available at: http://www.americantelevisionalliance.org/press-releases/broadcasters-continue-to-give-viewers-the-blackout-blues/) (visited May 26, 2011).

[46] Deborah D. McAdams, Television Broadcast, *Full Channel Cuts Deal with Univision to Replace WUNI-TV*, May 16, 2011 (available at: http://www.televisionbroadcast.com/article/120480) (visited May 18, 2011).

Yet even outside of these instances involving the loss of a broadcast signal, countless consumers in numerous markets face increasing uncertainty that results from contentious retransmission consent negotiations. As extensively detailed in the record in this proceeding and elsewhere, millions of consumers in several markets have been faced with the prospect of losing their broadcast signal due to the increasing demands by broadcasters. Moreover, broadcasters often time the expiration of their carriage agreements before major television events, in order to use the threat of blackouts to obtain maximum leverage during negotiations.[47]

The 2007 Congressional Research Service study reached the same conclusion.[48] The study noted that consumers 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."[49] The study went on to note that some broadcasters "have effectively timed their negotiations with distributors to take advantage

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[47] *See*, *Petition*, p. 25 (stating that "when the loss of a broadcaster's signal means the loss of network sports programming as well – as was the case in the [Time Warner Cable]-FOX dispute, where FOX's early-January broadcasts of the Suger Bowl, the Cotton Bowl, and the NFL playoffs were at stake – a broadcaster's power over MVPDs is at its maximum, and the network's purported 'claim' over a slice of the retransmission consent revenue at its zenith.").

[48] *CRS Retransmission Study*, p. 26 (noting the presence of a "timing element" that broadcasters "use strategically in their negotiations with distributors." The report notes that some broadcasters "have effectively timed their negotiations with distributors to take advantage of" major events during their program schedules (usually sports related), and then agree to "month-to-month extensions of lapsed agreements with MVPDs until a time when a key sports event was imminent and then used the threat of lost access to that sports event as leverage to complete a more favorable distribution agreement with the MVPDs.").

[49] *CRS Retransmission Study*, p. 26.

of such program schedules," and in some cases "agreed to month-to-month extensions of lapsed agreements with MVPDs until a time when a key sports event was imminent and then used the threat of lost access to that sports event as leverage to complete a more favorable distribution agreement with the MVPDs." Because multiple broadcaster negotiations take place within each of the 210 DMAs, consumers face these threats on a continuous and rolling basis, even if they take time off of work to arrange installation from a different pay TV provider.

Broadcasters disregard the inconvenience and costs they could cause for consumers when access is threatened, suggesting subscribers turn back the hands of time by buying "rabbit ear" antennas to pull in local stations. Of course, in some instances, consumers who lose access to the local broadcast signal provided by their choice of MVPD provider may not be able to receive a signal over the air due to limitations on the range of a given broadcaster's signal, or the inability to install an antenna in their current video configuration.

V. THE COMMISSION HAS THE NECESSARY AUTHORITY TO ESTABLISH FAIR NEGOTIATIONS AND PREVENT HARM TO CONSUMERS

Ideally, the Commission should scrap its current retransmission consent framework and move to full market-based negotiations. In the absence of such a move, the Commission has authority to implement reasonable pro-consumer mechanisms to the "broken" retransmission consent rules.[50] Section 325 of the Act requires "that the rates for the basic service tier [be] reasonable," and Congress specifically recognized "the

[50] *Petition*, p. 1.

impact that the grant of retransmission consent by television stations may have on [such] rates."[51] Of particular note, Section 325(b)(3)(A) of the Act states that the Commission "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 regulations . . . do not conflict with the Commission's obligation . . . to ensure that the rates for the basic service tier are reasonable."[52]

This unambiguous mandate provides the Commission with ample authority "to ensure that broadcasters' exercise of retransmission consent does not interfere with 'reasonable' rates for the basic tier" being implemented with respect to retransmission consent.[53] As noted in the *Retransmission Study*, retransmission consent fees "results in higher subscription charges and lower consumer welfare," and such fees will "continue to rise dramatically if the system is not reformed."[54] As demonstrated throughout the underlying Petition in this proceeding, evidence that reform of the retransmission consent rules is needed in order to protect consumers "is undeniable."[55]

As discussed below, the Commission has sufficient statutory authority based on Section 325 to order interim carriage as negotiations continue during retransmission disputes. Additionally, the Commission can foster true market-based negotiations by eliminating its network non-duplication and syndicated exclusivity rules. Similarly,

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[51] 47 U.S.C. § 325(b)(3)(A).

[52] 47 U.S.C. § 325(b)(3)(A).

[53] *Petition*, p. 32.

[54] *Retransmission Study*, p. 3.

[55] *Petition*, p. 32.

USTelecom urges the Commission to use its direct statutory authority to remove unnecessary regulations, such as those relating to removal of a local signal during sweeps. Finally, the Commission can strengthen its good faith rules by prohibiting networks from approving retransmission consent agreements for affiliates, and preventing abuse of local marketing agreements by broadcasters.

A. The Commission Should Implement Interim Carriage

The Commission has the necessary statutory authority under Section 325(b)(3)(A) of the Act to adopt a standstill mechanism during retransmission consent negotiations. That section of the Communications Act requires the Commission to "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."[56] The Senate Report accompanying the legislation noted Congress's intention that the FCC "ensure that these costs do not result in excessive basic cable rates."[57] Indeed, the Commission's initial proceeding to establish its current rules acknowledged that "[t]he statute requires that our rules ensure reasonable rates for the basic service tier."[58]

In light of the dramatic increase in consumer harms resulting from the Commission's outdated regulations relating to retransmission consent, adoption of a standstill provision is both consistent with the Commission's existing statutory authority

[56] 47 U.S.C. §§ 325(b)(3)(A)

[57] S. Rep. No. 102-92, at 74 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1207.

[58] Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 7 FCC Rcd 8055, MM Docket No. 92-259, ¶ 31 (1992).

and essential to any meaningful approach to the issue. Such an approach is consistent with existing Commission precedent and would result in important benefits to consumers.

As noted throughout the record in this proceeding, broadcasters currently have both the incentive and ability to engage in brinksmanship during retransmission consent negotiations. This in turn, increases dramatically the existence of several consumer harms: loss of local programming for consumers, an increase in consumer MVPD subscription rates and imposition of switching costs and burdens on consumers.[59] USTelecom agrees with the broad range of commenters in this proceeding that implementation of a standstill mechanism during retransmission consent negotiations will foster substantial benefits for consumers.

Such a mechanism will achieve critical public policy goals, including the elimination of brinksmanship as a negotiating tool, as well as ensuring fulfillment of the government's interest in localism by preventing the withholding of local broadcast signals from large portions of the viewing public.[60] Moreover, such a mechanism will fulfill Section 325(b)'s mandate to ensure that rates for the basic service cable tier are reasonable, by providing MVPDs with much needed leverage during retransmission consent negotiations, thereby helping to level the playing field. A standstill requirement should apply only so long as the MVPD negotiates in good faith towards a renewal

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[59] *Petition*, p. 36.

[60] The Petition cites a string of examples where broadcasters have used the airing of popular broadcast sporting and entertainment events – such as the Academy Awards, the Sugar Bowl, the Cotton Bowl and the NFL playoffs – for maximum leverage during retransmission negotiations. *Petition*, pp. 1 – 2, 24 – 25, 28.

agreement, and during the period while a dispute resolution proceeding remains pending.[61]

The Commission recently adopted a similar mechanism under its program access rules.[62] There, in implementing a standstill provision for vertically integrated cable programming, the Commission emphasized the "many benefits" that would result from such a mechanism. Those same benefits – such as minimizing the impact on subscribers who may otherwise lose valued programming; limiting the ability of programmers to use temporary foreclosure strategies and encouraging settlement – are equally (if not more so) relevant during the retransmission consent process.[63]

B. The Commission Should Eliminate its Outdated Network Non-Duplication and Syndicated Exclusivity Rules to Foster Market-Based Negotiations

USTelecom supports the Commission's proposal to eliminate its network non-duplication and syndicated exclusivity rules.[64] Elimination of these outdated rules from a bygone era will foster more market-based negotiations for broadcast signal carriage. Further, elimination of the network non-duplication and syndicated exclusivity rules will enable video providers to deliver must-have programming content to their subscribers.

The Commission's Network Non-Duplication and Syndicated Exclusivity (collectively referred to as the "Exclusivity Rules") provide broadcast station with an exclusive right to programming in a geographic area and prohibit a cable system from

[61] *Id.*, p. 36.

[62] *Program Access Order*, ¶¶ 71 – 75.

[63] *Program Access Order*, ¶ 71.

[64] *Notice*, ¶¶ 42 – 45.

carrying another station with the same programming. The Commission's network non-duplication rules permit a station with exclusive rights to network programming, as granted by the network, to assert those rights by using notification procedures in the Commission's rules.[65] The rules, in turn, prohibit the cable system from carrying the network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply.[66] Similarly, the Commission's syndicated exclusivity rules enable broadcasters to assert exclusivity within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.[67]

The Commission's outdated Exclusivity Rules have created a lopsided marketplace whereby broadcasters benefit from a competition-free environment. This regulatory wall prevents MVPDs from carrying another affiliate of the same network if retransmission consent negotiations fail. The Commission's regulations also create a monopoly marketplace that forestalls the benefits of true competition within any given MVPD market. As a result, MVPDs are often faced with broadcast stations adopting a 'take it or leave it' bargaining strategy.

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[65] *See* 47 C.F.R. §§ 76.92-76.94.

[66] *See* 47 C.F.R. § 76.92. The size of the geographic zone depends upon the size of the market in which the station is located. *See* 47 C.F.R. § 76.92(b).

[67] *See* 47 C.F.R. § 76.101 *et seq*. In the year 2000, the Commission adopted rules implementing provisions of SHVIA that applied the network non-duplication and syndicated exclusivity rules to satellite retransmission of six "nationally distributed superstations." *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules To Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688 (2000) (*SHVIA Exclusivity Rules Order*).

Indeed, the 2007 Congressional Research Service study supported a proposal to allow the importation of distant signals when a retransmission consent impasse develops. The study concluded that such an approach could strengthen the negotiating position of MVPDs by potentially allowing them to bargain among alternative providers of the same must-have network programming. It also noted that "giving all MVPDs the ability to negotiate with any network affiliate would strengthen the negotiating leverage of large as well as small MVPDs."[68]

C. The Commission Should Strengthen its Good Faith Rules

The Commission also proposes various measures in its Notice to reform its existing good faith rules.[69] The Commission acknowledges that circumstances at the time the original rules were adopted were "different from the conditions industry and consumers face today," in that blackouts resulting from retransmission consent disputes were rare.[70] USTelecom believes the Commission can best achieve its goal of promoting the successful completion of retransmission consent negotiations by amending its good faith rules by in ways that encourage market-based negotiations between broadcasters and MVPDs. .

1. Networks Should be Prohibited From Interfering in Retransmission Consent Negotiations

USTelecom supports the Commission's proposal to establish a *per se* violation in instances where a broadcast station agrees to give a network with which it is affiliated the

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[68] *CRS Retransmission Study*, p. 60.

[69] *Notice*, ¶¶ 20 – 30.

[70] *Notice*, ¶ 20.

right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision. The record in this proceeding contains substantial evidence regarding the negative impact such arrangements have on retransmission consent negotiations.

For example, Cox Enterprises, which owns both broadcast television stations and cable television systems across the country, emphasized in this proceeding the "evidence that the national broadcast television networks are demanding a larger role in the negotiation of their non-owned affiliates' retransmission consent agreements and a larger share of retransmission consent compensation."[71] It goes on to note that such behavior "threatens to harm consumers by putting continued upward pressure on retransmission consent rates, which ultimately results in higher basic cable rates."[72]

Similar accounts of network interference are detailed in the underlying Petition to this proceeding. In one incident, Sinclair Broadcasting Group "insisted that it be given the right 'to terminate the [retransmission consent] agreement at will" if the network decided the terms were not acceptable.[73] In another instance, Time Warner Cable stated that FOX Network "sought to hijack the retransmission consent process by threatening to

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[71] Cox Comments, p. 5.

[72] *Id.*

[73] *Petition*, p. 22 (citing Reply of Mediacom Communications Corp. at 22, *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, CSR No. 8233 (Nov. 18, 2009)).

exercise veto power over any station's negotiation of a retransmission deal that does not extract a satisfactory kickback for the network."[74]

The Communications Act is explicit in that the right of a broadcast station to grant retransmission consent rights to an MVPD resides solely with the broadcast licensee. Section 310(d) of the Communications Act requires a broadcast station licensee to maintain control over its programming and station operations, including either direct or indirect transfer of control of any station license to another entity. The Commission has previously interpreted Section 310(d) as necessary to preserve a licensee's control over its operations.[75] As such, the networks should not be permitted to dictate the programming and operational decisions of local television broadcast stations. Cox underscored this point in its comments, noting that "Congress and the Commission contemplated that the retransmission consent right would belong to the local broadcaster and could not be asserted by a third-party network or other programming provider."[76]

[74] Ex Parte Comments of Time Warner Cable in Support of Mediacom Communications' Corporation Retransmission Consent Complaint, at 2, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR Nos. 8233-C and 8234-M, Dec. 8, 2009.

[75] *See*, Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling, Declaratory Ruling, 23 FCC Rcd 13610, 13611 (2008) (stating that “"Affiliates, as the licensees of local television stations, must retain ultimate control over station programming, operations and other critical decisions with respect to their stations, and network affiliations must not undercut this basic control. Retention of this control by the Commission licensees is required by Section 310(d) of the Communications Act and the Commission's rules."). *See also*, 47 U.S.C. §325(b)(1)(A) (stating that the right to grant retransmission consent can only occur "with the express authority of the originating station.").

[76] Cox Comments, p. 5.

2. The Commission Should Prohibit the Abuse of Local Marketing Agreements by Broadcasters

Similarly, the Commission should prohibit the abuse by broadcasters of the retransmission consent process through local marketing agreements (LMAs), Joint Sales Agreements (JSAs), or other similar agreements.[77] While such agreements may have certain benefits to local broadcasters, particularly in smaller markets, significant problems occur when one station or station group negotiates retransmission consent on behalf of a station or station group that is not commonly owned.

First, in addition to the unnecessary delays and complications referenced by the Commission in its Notice,[78] such arrangements reflect the transfer of control of a station license to another entity. The same concerns regarding unauthorized transfers of control arising when a national network exercises authority over a broadcast licensee's retransmission consent negotiations arise under the abuse of LMAs or JSAs by a group of unaffiliated broadcasters in a single market. As noted previously, the Communications Act requires a broadcast station licensee to maintain control over its programming and station operations, including either direct or indirect transfer of control of any station license to another entity.

In addition, as noted by others in this proceeding, in instances where independently owned stations within a local market require MVPDs to negotiate retransmission consent rights for multiple local stations as a single package, "one or two broadcasters can effectively control access to the retransmission consent rights to most if

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[77] *Notice*, ¶23.
[78] *Id.*

not all of the major network programming available in that market."[79] Moreover, prohibiting such practices would promote the necessary competition within the retransmission consent marketplace, which is currently lacking.

D. The Commission Should Eliminate its Rules Regarding Removal of a Broadcast Signal During Sweeps or, in the Alternative, Apply the Rules in a Reciprocal Manner

The Commission also seeks to clarify the current rule prohibiting the relocation or deletion of a commercial television station during a sweeps ratings period. Under the Commission's current interpretation of the rule, MVPDs are prohibited from deleting a broadcast station during the sweeps period. However, the Notice suggests that the regulation has been interpreted to prevent *only MVPDs* from dropping or repositioning a station during sweeps, and asks whether the rule should permit *broadcasters* to pull their signal during sweeps.

USTelecom maintains that the Commission's rules on this issue should be either eliminated, or applied in a reciprocal manner. With respect to the former, the presence of this rule is yet another example of Commission regulation that does little to promote competition in the marketplace and instead simply places increased obligations on MVPDs. It makes little sense to treat MVPDs – who are already at a distinct disadvantage in the retransmission consent marketplace – in a manner that affords broadcasters additional leverage.

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[79] See, Comments of Pioneer Communications, CT Communications and West Kentucky Rural Telephone Cooperative, Inc., MB Docket 10-71, p. 4 (May 18, 2010).

If the Commission decides to retain the rule, however, it should apply it in a reciprocal manner. There is no sound policy basis for applying this rule in an uneven manner, particularly given broadcasters' substantial bargaining leverage that already exists in the retransmission consent marketplace.

VI. THE COMMISSION SHOULD NOT IMPOSE MANDATORY NOTICE REQUIREMENTS

The Commission also seeks comment on whether it should clarify and expand its existing notice requirements. USTelecom opposes the Commission's proposal, primarily because adoption of such a notice requirement will simply exacerbate an already skewed marketplace in which broadcasters wield tremendous and undue influence through their ability to sow confusion and fear amongst consumers through the possible loss of local broadcast signals.

Under the Commission's current rules, cable operators must provide written notice to "any broadcast television station at least 30 days prior to either deleting from carriage or repositioning that station," as well as to "subscribers of the cable system."[80] If, however, the subscribers are not provided notice of the possible loss of a signal by their cable operator, and the retransmission consent negotiations are successful, then the cable operator has not violated the rule.[81]

The Commission's proposal to expand notice requirements, however, would achieve none of the benefits identified in its Notice. At any given time, there can be hundreds of retransmission consent negotiations taking place within the MVPD

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[80] 47 C.F.R. § 76.1601.

[81] *Notice*, ¶ 35.

marketplace. Rather than inform consumers about potential broadcast signal loss or encourage successful completion of retransmission consent negotiations, such an approach would have the opposite effect. Consumers in the MVPD marketplace would be exposed to a continuous stream of uncertainty regarding threatened broadcast blackouts. As the Commission alludes to in its Notice, frequent and excessive notice requirements would potentially result in consumers beginning to discount the notices.[82]

Finally, the Commission's assertion that such an approach would provide consumers with the opportunity to "obtain access to particular broadcast signals by alternative means,"[83] is misplaced. The primary means by which a consumer could "obtain access to" a local broadcast signal that may go dark, is through switching to a different provider in the same competitive market.

In addition to the costs associated with such a transaction – both in terms of time and transactional costs – consumers switching between MVPD providers would have no guarantee that their *new* provider would be insulated from an identical loss of the local broadcast signal. Indeed, as reflected in Exhibit 1, residents of Medford, Oregon lost access to their local ABC broadcast signal between December 16 and December 22, 2010 during a blackout dispute with DISH Network. Just a few weeks later, residents in the same DMA lost their local FOX broadcast signal between January 4 and January 15, 2011 during a blackout dispute with DIRECTV.

[82] *Id.*, ¶ 37.

[83] *Id.*, ¶ 36.

VII. CONCLUSION

Reasonable access to video programming is essential to ensuring increased MVPD competition and further deployment of broadband services. As is evident from the record in this proceeding, the current retransmission consent rules is in dire need of changes that more accurately reflect today's MVPD marketplace. Reasonable access to broadcast video programming leads to increased video competition and the inherent consumer benefits that flow from such competition, including greater broadband deployment. The Commission has authority to reform its retransmission consent regulations, and the proposed mechanisms for improving the retransmission consent rules are reasonable, necessary and pro-consumer.

Respectfully submitted,

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Exhibit 1
Incidence of Retransmission Consent Blackouts[84]

DMA Rank	Impacted City	Impacted MVPD	Stations	Blackout Dates	DMA Pops (as of 2010)
1	New York, N.Y.	Cablevision, DISH, & AT&T	FOX	Oct. 15 – 28, 2010	7,493,530
4	Philadelphia, Penn.				2,955,190
189	Bend, Oregon	DISH Network	ABC	Dec. 16 - 22, 2010	66,980
140	Klamath Falls and Medford, Oregon				172,900
119	Eugene, Oregon				241,730
137	Columbia, Mo.	Mediacom	NBC, CW	Jan. 4, 2011	178,810
126	Yakima, Wash.	DIRECTV	FOX	Jan. 4 - 15, 2011	219,510
75	Spokane, Wash.				419,350
140	Medford, Oregon				172,900
	Birmingham, N.Y.				
122	Macon, Georgia	DISH Network	FOX, ABC	Jan. 4 - 15, 2011	239,330
44	Albuquerque, N.M.	DISH Network	CBS, FOX, NBC, CW and MyNetwork affiliates	March 5 - 11, 2011	694,040
48	Austin, Texas				678,730
52	Buffalo, N.Y.				633,220

[84] Information regarding occurrences of broadcast blackouts obtained from the American Television Alliance website (available at: http://www.americantelevisionalliance.org/blog/) (visited May 24, 2011).

DMA Rank	Impacted City	Impacted MVPD	Stations	Blackout Dates	DMA Pops (as of 2010)
34	Columbus, Ohio	DISH Network	CBS, FOX, NBC, CW and MyNetwork affiliates	March 5 - 11, 2011	904,030
65	Dayton, Ohio				482,590
107	Fort Wayne, Ind.				273,860
41	Grand Rapids, Mich.				740,430
70	Green Bay, Wis.				443,420
25	Indianapolis, Ind.				1,119,760
191	Lafayette, Ind.				66,180
60	Mobile, Ala.				534,730
30	New Haven, Conn.				1,010,630
43	Norfolk, Va.				709,880
53	Providence, R.I.				619,610
111	Springfield, Mass.				262,960
152	Terre Haute, Ind.				145,550
73	Toledo, Ohio				423,100

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