Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF AT&T

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini

AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-3058 – phone
(202) 457-3074 – facsimile
Attorneys for AT&T Inc.

May 27, 2011

TABLE OF CONTENTS

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 AT&T

I. INTRODUCTION AND SUMMARY.

In its Notice of Proposed Rulemaking ("NPRM"), the Commission asks "whether and how [its] rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and, to the extent possible, minimize video programming service disruptions to consumers."[1] Cable operators, direct broadcast satellite ("DBS") providers, wireline video service providers (such as Verizon and AT&T), and most importantly a broad cross-section of consumer groups – in short, everyone except for broadcasters – agree the answer to that question is no; they are not working effectively and they do nothing to minimize video programming service disruptions to consumers. Indeed, rather than protecting consumers and preventing service disruptions – as Congress plainly intended[2] – those rules, which were adopted in a different era to address vastly different market

[1] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, FCC 11-31 (rel. Mar. 3, 2011).

[2] The stated purpose of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") is "to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service." S. Rep. No. 92, 102d Cong., 1st Sess.1, *reprinted in* 1992 U.S.C.C.A.N. 1133 (1992) (Senate Report). The statute further specifically requires the Commission to adopt rules to "govern the exercise by television broadcast stations of the right to grant retransmission consent," and, in so doing, to "consider . . . the impact that the grant of retransmission consent by television stations may have on the rates for the basic

conditions, have led to the very consumer and market harms (including service disruptions and rapidly increasing consumer prices to cover the spiraling costs of content acquisition) they were intended to prevent. Specifically, the retransmission consent rules, in combination with the regulatory protections granted by the Commission's channel placement, syndicated exclusivity and network non-duplication rules, as well as the copyright distant signal rules, have enabled broadcasters to divide up the market and operate as a cartel, with each broadcaster assured that the multichannel video programming distributors ("MVPDs") in its broadcast area effectively have no alternative but to negotiate with that broadcaster to obtain access to the must-have programming carried by that station – no matter how unreasonable its demands.[3]

The retransmission consent rules may have made some sense when they were adopted by providing a counter weight to the monopsony power of cable operators, which then held a virtual monopoly in the distribution of multichannel video programming. But, in today's increasingly competitive video programming distribution market, they enable broadcasters to whipsaw competing MVPDs by threatening to withhold must-have broadcast programming (in addition to cable networks controlled by broadcasters) made available to their competitors, and thus to extract large and ever increasing cash payments in return for retransmission consent. Those payments, which were virtually non-existent in the 1990s, rose rapidly in the 2000s, quadrupling from $215 million in 2006 to $1.1 billion in 2010, and are projected to grow to $2.6 billion by

---

service tier . . . and shall ensure that . . . the rates for the basic service tier are reasonable." 47 U.S.C. § 325(b)(3)(A).

[3] For the most part, the programming carried by the stations demanding retransmission consent (which typically are network affiliates) is not produced by those stations, but rather by the networks of which they are an affiliate. The retransmission consent rules thus do not reward those stations for their own creative endeavors, but rather for distributing the creative work of others. Thus, reducing or eliminating retransmission consent payments would have little, if any deleterious impact, on the incentives of program producers to produce innovative programming.

2016,[4] and a whopping $3.61 billion the following year (according to an SNL Kagan report released just a couple of days ago).[5] These payments, like all incremental costs, inevitably flow through to the bottom line of the consumer's bill.[6] And these costs come on top of content acquisition costs associated with carriage of the dozens of cable networks that were launched as in-kind compensation in return for retransmission consent.

The broadcasters' brinksmanship tactics impose significant harms on consumers. Not only do they threaten to drive up significantly the rates consumers pay for video programming,[7] contrary to section 325(b)(3)(A), but also to undermine video competition, as well as deployment and adoption of broadband. Little more than a fortnight ago, Frontier announced that it was dumping the cable TV piece of the FiOS properties it purchased less than a year ago for $8.6 billion because its "video operation was being eaten alive by the cost of content."[8] While the cost of non-broadcast content may have played a role in Frontier's decision, it seems likely that the rise in retransmission consent payments, which (in AT&T's experience) generally are

---

[4] Steven Salop, *et al.*, "Economic Analysis of Broadcasters' Brinksmanship and Bargaining Advantages in Retransmission Consent Negotiations," at 17 (June 3, 2010) ("Salop"), citing SNL Kagan, Broadcast Retransmission Fee Projections, 2009-2016 (March 22, 2010). *See also* Thomas Hazlett, "If a TV Station Broadcasts in the Forest . . . An Essay on 21st Century Video Distribution," at 9 (May 19, 2011) ("Hazlett"), available at: http://www.americantelevisionalliance.org/wp-content/uploads/2011/05/TV-Future-TWH-5-19-111.pdf.

[5] Communications Daily, May 26, 2011 at 15 ("Pay-TV providers' retransmission consent fees could swell to $3.61 billion in 2017 from $1.14 billion in 2010, and the average per-subscriber fee for cable operators could more than double in that time, SNL Kagan said.").

[6] The run up in retransmission consent payments is particularly galling insofar as it forces consumers to pay for programming that broadcasters purportedly make available "free" over-the-air in return for receiving a free license to use a significant swath of a scarce and increasingly valuable public resource – *i.e.*, broadcast spectrum. Given that only 9 percent of households relied on over-the-air TV signals by mid-2009 (Hazlett at 3), the vast majority of American consumers now are forced to pay for the privilege of watching programming that they are supposed to receive for free in return for giving broadcasters a license to use their spectrum, contrary to congressional intent. Senate Report at 1169 (noting that the intent of the retransmission consent provision was to "ensure that our system of free broadcasting remain vibrant, and not be replaced by a system which requires consumers to pay for television service").

[7] Salop at 4, 16.

[8] *Frontier Dumps FiOS Cable TV*, Communications Technology (May 12, 2011), available at: http://www.cable360.net/print/ct/46345.html.

increasing much faster than those for other content, also played a significant role. In AT&T's experience, between 2008 and 2011, the combined annual growth rate for our retransmission consent costs was over seven times those for national cable networks over the same period; and, unless the Commission acts promptly to reform its retransmission consent regime, this unacceptable trend is likely to continue. To make matters worse, AT&T has found that broadcasters typically have sought to extract higher retransmission consent payments from new entrants than from cable incumbents, making it more difficult for new entrants to offer consumers a competitive alternative to cable. And the resulting increase in MVPD rates has already forced as many as 2.3 million households to forego subscription to multichannel video services, and could reduce subscribership by up to 1.9 million more households by 2015, by pricing them out of the market.[9] Given the strong linkage between broadband and investment in video facilities and service, as the Commission has repeatedly recognized, broadcasters' strong arm tactics threaten to undermine the Commission's and Congress's ambitious broadband deployment and adoption objectives.

For these reasons, all parties (except broadcasters) agree that consumers and the public interest would be far better served by new rules to prevent broadcasters from exploiting their exclusive control over must-have programming to threaten to cut off consumers' access to popular programming and extract ever-higher programming fees for what is supposed to be free over-the-air programming in their retransmission consent negotiations with MVPDs. Accordingly, the Commission should take action to remove the artificial advantage afforded to broadcasters in retransmission consent negotiations under the existing rules.

[9] Katz *et al.*, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime," at3, November 12, 2009, attached to Ex Parte Letter of Neal Goldberg, NCTA, to Blair Levin, Executive Director, Omnibus Broadband Initiative, FCC, GN Docket Nos. 09-47, 09-51, 09-137; MB Docket no. 07-269 (Dec. 16, 2009) (Katz Study).

II. DISCUSSION

1. The Commission's Out-Dated Retransmission Consent Rules Have Enabled Broadcasters to Exploit their Control over Must-Have Programming to Extract Excessive Retransmission Consent Payments and Harm Consumers.

The Commission adopted its existing retransmission consent rules almost 20 years ago under very different market conditions. At the time, Congress and the Commission were concerned that the growth of the cable industry, and the lack of effective competition to local cable systems (which provided programming and advertising in competition with broadcasters), had created an imbalance of power favoring cable operators that "threaten[ed] the future of over-the-air broadcasting."[10] Congress sought to redress this imbalance, and thus ensure that broadcasters would continue to fulfill their public interest obligations, by allowing broadcasters, for the first time, to demand compensation for retransmission consent.[11] At the same time, it left in place a variety of regulatory measures that shielded local broadcast stations from market forces and ensured that they would have exclusive control over the popular network and syndicated programming that viewers are most interested in watching and cable systems are most interested in acquiring. These measures included the network non-duplication and syndicated exclusivity rules, which, together with the distant signal copyright rules, effectively block cable operators from contracting with an out of market station to acquire popular network or syndicated programming if a local broadcaster's demands for retransmission consent are unreasonable. They also included favorable tier placement and channel positioning rules, which prevent a cable operator from assigning a station that demands unreasonably high retransmission consent payments to a tier accessible only by those viewers actually willing to pay such high

[10] Senate Report at 1168.

[11] *Id.* at 1168-69.

fees. The retransmission consent provision in the 1992 Cable Act, and the Commission's implementing regulations (which retained these protectionist provisions), thus established a highly lopsided regime that placed all the cards in the hands of broadcasters.

Even in 1992, when cable operators held a virtual monopoly in the provision of multichannel video programming,[12] Congress recognized that granting broadcasters this new retransmission consent right could enable broadcasters to demand high retransmission consent fees and thus jeopardize the public interest and harm consumers by driving up the cost of providing MVPD services. But it expected such demands, if any, to be modest because broadcasters "benefit[ted] from being carried on cable systems," and were unlikely to demand exorbitant retransmission consent fees lest monopoly cable operators would refuse to pay, and thus stop retransmitting their signals, cutting the broadcasters off from a sizable portion of their audience.[13] Indeed, it expected that many broadcasters likely would determine that the benefits of being carried on their local cable systems would be "sufficient compensation," while others might seek non-monetary compensation.[14] But to guard against the risk that the new retransmission consent regime could harm consumers, it required the Commission to adopt rules to "govern the exercise by television broadcast stations of the right to grant retransmission consent," and, in so doing, 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."[15]

---

[12] Katz Study at 2 (noting that, in 1992, 96 percent of MVPDs' subscribers received service from a cable company and there typically was only a single cable provider in each local area).

[13] *Id.* at 1168-69.

[14] *Id.*

[15] 47 U.S.C. § 325(b)(3)(A).

Following Congress's lead, the Commission's initial rules implementing the retransmission consent provision of the Act adopted a *laissez faire* approach that did nothing to address the risk of retransmission consent rate increases or service interruptions. But, as Congress and the Commission expected, as long as incumbent cable operators continued to face minimal competition in the provision of MVPD services, the threat of mutually assured destruction to both broadcasters and cable operators if retransmission consent negotiations failed ensured that both sides were reasonable.[16] As a consequence, until the early 2000s, when real competition to cable began to emerge, broadcasters typically opted for in-kind compensation from cable operators in exchanging for retransmission consent, which reflected a mutual exchange of value between more or less equal bargaining partners.[17]

But the monopoly cable market in and for which the current retransmission consent regime was designed is vastly different from the increasingly competitive MVPD marketplace in which retransmission consent negotiations now take place. Cable operators no longer hold a legally sanctioned monopoly in the provision of MVPD services. As a consequence, they now face increasingly stiff competition from two nationwide direct broadcast satellite networks and wireline competitors (such as AT&T and Verizon), which only began to emerge as serious competitors to cable in the second half of the past decade, not to mention nascent, yet growing, competition from over-the-top video providers, such as Netflix, Apple TV and Google TV. This growth in competition in downstream video distribution markets, together with consolidation in

---

[16] If a broadcaster demanded excessive retransmission consent payments, it risked losing access to the cable operator's subscribers, and losing ad revenues in the process. And, if a cable operator was unreasonable, the broadcaster could deny it access to must-have network and syndicated programming by refusing retransmission consent and enforcing the syndicated exclusivity and network non-duplication rules.

[17] *General Motors Corp. and Hughes Electric Corp., Transferors and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, MB Docket No. 03-123, *Memorandum Opinion and Order*, 19 FCC Rcd 473, ¶ 56 (2004) (*Hughes Electric Corp.*).

the ownership of broadcast and cable programming networks, has dramatically shifted the balance of negotiating power towards broadcasters. Instead of facing a risk that they will lose access to MVPD subscribers if their retransmission consent payment demands are unreasonable, broadcasters can and do play multiple MVPDs off one another, and credibly threaten to go dark on a particular MVPD's system if it does not agree to pay new or increasingly large retransmission consent fees without the fear of losing access to all MVPD subscribers in a particular DMA.

Broadcasters first exercised their regulatorily protected exclusive control over must-have broadcast programming[18] to demand cash (in addition to in-kind) compensation from vulnerable new entrants, which could not go to market without video programming that was equally attractive as that of the cable incumbent. And, having done so, broadcasters proceeded to leverage that precedent to extract cash payments from cable incumbents as well. Now, in each new round of retransmission consent negotiations, broadcasters demand ever higher payments (with no let up in demand for in-kind compensation in the form of carriage of affiliated cable network programming) in return for retransmission consent, confronting MVPDs with a no-win situation – either agree to exploding retransmission consent payments or be forced to drop popular network and syndicated broadcast programming, and in many cases popular cable networks that are linked to the retransmission consent deal.

Broadcasters have been shameless in their efforts to whipsaw MPVDs into paying ever higher retransmission consent fees, running ads and other notices that threaten subscribers to MVPDs that do not agree to pay such fees that they will lose access to the broadcasters'

[18] The Commission previously has determined that local broadcast station signals are highly valued by consumers and lack close substitutes. *See id.* at ¶ 201.

programming if they do not switch to other providers offering MVPD services in the market.[19] Broadcast executives have been equally open and unapologetic in trumpeting their intent to continue to demand ever increasing retransmission consent payments, regardless of their impact on consumers. Earlier this month, for example, David Smith of Sinclair Broadcasting was quoted as saying: "I think it's [retransmission consent fees] just going to be an on-going and continuing part of the business. Forever. This isn't something that just stops tomorrow because [the broadcast networks] deem it that they've got all the money they think they can get. We just have [to] keep upping that number."[20] While Fox executives have characterized as reasonable an increase in fees from $0.50 to $1.00 per subscriber for consent to retransmit their broadcast content (with no relief whatsoever from the previously granted in-kind consideration), and have suggested that fees as high as $5 to $6 per subscriber would be reasonable.[21]

Of course, it is consumers that bear the brunt of these oppressive negotiating tactics. As noted above, over 90 percent of households now receive broadcast programming through an MVPD. As a consequence, virtually all consumers have suffered, and will continue to suffer, very real harms from the anticompetitive negotiating tactics embraced by broadcasters and enabled by the existing, one-sided retransmission consent regime. These harms include higher subscription fees and/or reduced MVPD efforts to attract customers by offering high-quality

---

[19] Ex Parte Letter of Matthew A. Brill, on behalf of Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, MM Docket No. 10-71 (filed July 30, 2010) (noting that, in 2010 during retransmission consent negotiations with Time Warner Cable (TWC), Disney took out two full-page advertisements in the *New York Times* and launched a website to encourage TWC subscribers to switch MVPDs well before its existing retransmission consent agreements with TWC expired) (citations omitted).

[20] Steve Pociask, "Retransmission Consent: The Evidence of Market Power," The American Consumer Institute Center for Citizen Research, ConsumerGram, at 2, available at: http://www.theamericanconsumer.org/wp-content/uploads/2011/05/retransmission.pdf (last checked May 25, 2011), citing *Communications Daily*, May 5, 2011, p. 15.

[21] *Id.* at 3, citations omitted.

services,[22] less vibrant MVPD competition,[23] and loss of access to programming when retransmission consent negotiations breakdown – as has increasingly been the case.[24] And, as the Sports Fans Coalition has explained, consumers also suffer from uncertainty and frustration when broadcasters' threaten blackouts even if their signals ultimately are not withdrawn.[25]

The harm to consumers is not limited only to increased subscriber fees, lower consumer welfare, service disruptions, and reduced competition. The rise in retransmission consent fees also threaten to derail the Commission's ambitious broadband deployment and adoption agenda. As former FCC Chief Economist Michael Katz explained last year in an analysis of the consumer harms caused by the current retransmission consent regime, the higher subscription fees that result from the dramatic rise in retransmission consent payments has already driven millions of consumers to forego subscribing to an MVPD service, and likely will reduce MVPD subscribership by millions more by 2015.[26] That loss in subscribers inevitably will depress demand for broadband services offered over the same networks and facilities, contrary to Congress's and this Commission's ambitious broadband deployment and adoption agenda.

---

[22] Katz Study at 3.

[23] As discussed above, broadcasters typically require new entrants, like AT&T, to pay higher (in some cases significantly higher) retransmission consent fees than their cable incumbent competitors, not because of any difference in cost to the broadcasters but rather because of the relative weaker bargaining position of new entrants. Inevitably, such discriminatory pricing inhibits the ability of new entrants to compete downstream in the provision of MVPD services, and may even drive nascent competitors from the market as the crushing burden of content acquisition costs recently drove Frontier to dump its FiOS cable operations.

[24] *Id.* at 4 (noting that the number of bargaining breakdowns resulting in a station going dark appeared to be significantly higher in the second half of the 2000s as compared to the second half of the 1990s).

[25] Ex Parte Letter of the Sports Fans Coalition to the FCC, MB Docket No. 10-71 at 3 (filed June 14, 2010) (noting that "[t]he recurring threat of blackouts during these [retransmission consent] disputes causes significant uncertainty, frustration, anxiety, and confusion for sports fans") ("Sports Fans Coalition Ex Parte").

[26] Katz Study at 3 (noting that as many as 2.3 million households already forego subscribing to MVPD services due to cash payments for retransmission consent, and as many as 1.9 million more households will forego such services by 2015 if such cash payments continue to increase).

2. The Commission Can and Should Act Promptly to Reform its Retransmission Consent Rules to Protect Consumers.

As the record in this proceeding already establishes, consumers, leading public interest groups, cable operators, DBS providers, and wireline MVPDs (everyone except broadcasters) broadly agree that cost increases, service disruptions, consumer confusion and frustration, and other consumer harms caused by broadcasters' exploitation of the out-dated retransmission consent regime require Commission action to fix the existing rules in order to better protect consumers. Section 325 of the Act specifically requires the Commission to adopt rules to govern the exercise by television broadcast stations of the right to grant retransmission consent and, in so doing, to consider the impact of retransmission consent payments on rates for video services.[27] It further requires the Commission to ensure that broadcasters' exercise of their retransmission consent rights does not conflict with the Commission's obligation to ensure that rates for the basic service tier (on which broadcast signals must be carried) are reasonable.[28] And section 309(a) requires the Commission to ensure that broadcast licensees operate in a manner consistent with "the public interest, convenience, and necessity."[29] These unambiguous mandates (standing alone or in combination with the Commission's ancillary authority under sections 4(i) and 303(r) of the Act[30]) necessarily grant the Commission ample authority to take whatever actions are necessary to protect consumers from the harms flowing from broadcasters' unfettered power under the existing retransmission consent process to increase prices for consumers of video programming.

[27] 47 U.S.C. § 325(b)(3)(A).

[28] *Id.*

[29] 47 U.S.C. § 309(a).

[30] 47 U.S.C. §§ 154(i), 303(r).

The Commission should exercise that authority to reform the retransmission consent and associated rules to prevent broadcasters from exploiting their exclusive control over must-have network and syndicated programming to impose unreasonable rates, terms and conditions as conditions for carriage of their signals, and thus encourage true market-based negotiations for retransmission consent as Congress intended. In particular, the Commission should adopt rules to provide for interim carriage pending resolution of retransmission consent negotiations and/or disputes. It also should eliminate its network non-duplication and syndicated exclusivity rules, and thus ensure that MVPDs can turn to alternative sources of must-have network and syndicated programming in the event a broadcaster seeks unreasonable rates, terms and conditions for retransmission consent. And it should amend its rules to strengthen its good faith negotiation requirements. Finally, it should not impose mandatory notice requirements.

A. The Commission Should Provide For Interim Carriage.

Perhaps the most important reform the Commission could implement to fix the existing retransmission consent regime is to establish a formal process to provide for interim carriage pending resolution of retransmission consent negotiations and/or disputes. One of the most pernicious aspects of the current regime is that it allows broadcasters to use consumers "as pawns"[31] to obtain leverage in retransmission consent negotiations and disputes by threatening to go dark if MVPDs do not accede to their retransmission consent demands. As AT&T (and others) previously has explained, broadcasters strategically game the process by, among other things, timing the expiration of their retransmission consent agreements to coincide with important and popular events, such as the Academy Awards, the Super Bowl, and College Bowl

[31] Sports Fans Coalition Ex Parte at 1 (complaining that sports fans "have become pawns in retransmission consent disputes" when broadcasters threaten to take away games "to gain leverage in retransmission consent negotiations").

games, to strengthen their hands and force MVPDs to agree to significantly higher retransmission consent payments.[32] And, as potential disputes have developed, broadcasters have aggressively advertised to consumers on their stations about the potential removal of such marquee programming if MVPDs do not agree to their demands. Providing for interim carriage (on the terms of an expiring agreement) pending resolution of retransmission consent negotiations (so long as the MVPD continues to negotiate in good faith) and/or disputes would ensure that the status quo is maintained until negotiations are completed or disputes are resolved. It also would prevent broadcasters from using viewers as pawns and brinksmanship as a negotiating tool, which, in turn, would reduce the risk of service disruptions and help ensure that payments (if any) for retransmission consent are reasonable rather than extortionate.

In the NPRM, the Commission incorrectly concludes that it lacks authority to adopt rules to provide for interim carriage pending resolution of retransmission consent negotiations and disputes.[33] While the Commission is correct that section 325(b)(1)(A) prohibits MVPDs from retransmitting the signal of a broadcasting station without the express authority of that station,[34] that provision only governs the actions of MVPDs and their relations with broadcasters. By its plain language, that provision does not limit the Commission's authority under section 325(b)(3) or any other provision of the Act (including sections 4(i), 303(r) or 309) to provide for interim carriage by requiring a broadcaster to grant MVPDs temporary retransmission consent pending resolution of retransmission consent negotiations and/or disputes. If Congress intended to limit

---

[32] AT&T Comments in MB Docket No. 10-71 at 9 (filed May 18, 2010); Sports Fans Coalition Ex Parte at 1, 3.

[33] NPRM at ¶ 18.

[34] *Id.*, citing 47 U.S.C. § 325(b)(1)(A).

the Commission's authority in that regard, it would have done so.[35] Where, as here, Congress expressly required the Commission to adopt rules governing broadcasters' exercise of the right to grant retransmission consent, and to ensure that their exercise of that right is consistent with the Commission's obligation to protect consumers and ensure subscriber rates are reasonable, section 325 should not be read to deprive the Commission of the authority to require broadcasters to grant temporary retransmission consent to prevent harm to consumers.

Nor does the legislative history support such an interpretation, as the Commission incorrectly concluded in the NPRM.[36] There, the Commission observed that "the legislative history of Section 325(b) states that the retransmission consent provisions were not intended 'to dictate the outcome of the ensuing marketplace negotiations' and that the broadcasters would retain the 'right to control retransmission and to be compensated for others' use of their signals,'" and, on that basis, interpreted section 325(b) to preclude the Commission from ordering carriage over the objection of the broadcaster "even upon a finding of a violation of the good faith negotiation requirement."[37] But the language cited by the Commission in no way dictates such an interpretation, which, in any event, flies in the face of Congress's express direction to the Commission to ensure that the exercise by broadcasters of their right to retransmission consent does not drive up end user rates. At most that language suggests that the ultimate outcome of any *final* retransmission consent agreement should be the product of market forces, not that the Commission cannot require *interim* carriage to ensure that those forces work by preventing broadcasters from strong arming MVPDs into paying exorbitant retransmission

[35] *Compare* 47 U.S.C. § 325(b)(1) *with* 47 U.S.C. § 543(a)(1) ("No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title.").

[36] NPRM at ¶ 18.

[37] NPRM at 18, citations omitted.

consent fees (such as by threatening to go dark on the eve of the Superbowl). Given the obvious market failure resulting from the Commission's lopsided retransmission consent regime, one can hardly characterize the current rates as the product of true marketplace negotiations. In any event, other portions of the legislative history make clear that Congress did not intend for the Commission to throw up its hands and abdicate its responsibility to protect consumers no matter how unreasonable are broadcasters' retransmission consent demands. As Public Knowledge, *et al.*, observed in an ex parte filed earlier this year, when explaining the Commission's section 325 authority, Senator Inouye stated:

> I am confident, as I believe the other cosponsors of the bill are, that the Commission has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers.[38]

Likewise, Senator Lautenberg made clear that, if a broadcaster sought to force a cable operator to "pay an exorbitant fee for retransmission rights," the cable operator would not be forced simply to pay the fee or lose retransmission rights, "[i]nstead, cable operators will have an opportunity to seek relief at the Commission."[39] Plainly, any such opportunity would be hollow indeed if the Commission's interpretation of section 325 were correct, which it is not.

Even if the Commission were to conclude, wrongly, that it cannot require a station to permit carriage of its signal without express consent that does not prevent the Commission from finding that refusal to do so is inconsistent with the station's public interest obligations and obligation to negotiate in good faith. Nor does it prevent the Commission from finding that a

[38] Ex Parte Letter of Public Knowledge, New America Foundation, Benton Foundation, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-71 at 6 (filed Jan. 4, 2011), citing 138 Cong. Rec. S643 (Jan. 30, 1992).

[39] *Id.* citing 138 Cong. Rec. S14615-16 (Sep. 22, 1992) (statement of Sen. Lautenberg).

refusal by a station to include in any retransmission consent agreement a provision permitting carriage pending renewal or renegotiation of that agreement constitutes a failure to negotiate in good faith and/or a violation of the station's public interest obligations.

B. The Commission Should Eliminate the Network Non-Duplication and Syndicated Exclusivity Rules.

The Commission should adopt its proposal to eliminate its network non-duplication and syndicated exclusivity rules, or, at a minimum, revise those rules to prohibit any local broadcast station that has not granted retransmission consent from enforcing any right it might have to network non-duplication or syndicated exclusivity. As discussed above, those rules, in combination with the retransmission consent rules and the regulatory protections granted by the Commission's channel and tier placement rules, have enabled broadcasters to divide up the market and ensure that MVPDs have no alternative but to negotiate with the local broadcast station to obtain access to the must-have network or syndicated programming carried by that station – no matter how unreasonable its demands. Eliminating or revising those rules to permit MVPDs to negotiate with distant stations if a local station does not grant retransmission consent would restore much needed balance to retransmission consent negotiations by allowing MVPDs to obtain must-have programming if a local broadcaster is unreasonable. Doing so would not threaten the Commission's localism objectives insofar as an MVPD would not seek to carry a distant station unless the local station's demands for retransmission consent were unreasonable, since its subscribers undoubtedly would prefer to receive the signal of the local station. Modifying the network non-duplication and syndicated exclusivity rules thus would provide a market-based backstop that would promote the Commission's localism objectives while, at the same time, reducing broadcasters incentive and ability to demand unreasonable retransmission consent fees to the detriment of consumers, as Congress intended. It also would reduce administrative burdens on the Commission insofar as MVPDs could obtain must-have network and syndicated programming from a distant station rather than having to go to the time and expense of litigating retransmission consent disputes.

C. The Commission Should Strengthen its Good Faith Negotiation Requirements.

AT&T agrees with the Commission that marketplace conditions today are markedly different than they were in 2000 when it adopted its original good faith standards. The entry of wireline video service providers (like AT&T and Verizon), and growth in competition from other MVPDs over the past decade, has radically changed the balance of power in retransmission consent negotiations. While the Commission's retransmission consent and other rules (including the network non-duplication and syndicated exclusivity rules, as well as its channel and tier placement rules) tipped decidedly in favor of broadcasters even then, the leverage afforded by those rules was offset by the lack of a meaningful alternative to the incumbent cable operator for retransmission of a broadcaster's signal to consumers subscribing to MVPD services. The mutually assured destruction that would result from an impasse in retransmission consent negotiations helped ensure that both broadcasters and cable operators were reasonable in those negotiations. With the growth in competition in the downstream market for MVPD services, broadcasters now have the incentive and ability to whipsaw MVPDs to force them to pay ever increasing retransmission consent fees on top of the in-kind compensation they traditionally demanded in return for retransmission consent. This in-kind compensation took the form of demands for carriage of or increased license fees for affiliated cable programming networks, such as: Soapnet, Fuel, Fox Movie Channel, Fox Deportes, Fox College Sports, NatGeo, Nat Geo Wild, ESPNU, ESPN News, ESPN Classic, Disney XD, ESPN 3D, Fox Soccer, Fox Soccer Plus, MSNBC, Olympic Surcharge, CNBC World, Deportes, Fuel, Chiller, Sleuth, ABC News

Now, Mun2, and many others. Accordingly, to restore some balance, the Commission should modify its good faith negotiation rules to ensure that negotiations, and the resulting retransmission consent agreements, reflect "competitive marketplace considerations" rather than the power conferred on broadcasters through their exclusive control of must-have network and syndicated programming.

First, the Commission should amend its rules to prevent broadcasters from demanding both cash and in-kind compensation in return for retransmission consent. Historically, broadcasters gave up demands for cash payments in return for in-kind compensation in the form of carriage of affiliated network programming (or increases in the license fees for such programming). This in-kind compensation required cable operators (and later MVPDs) to launch dozens of new programming networks. And, in each succeeding round of retransmission consent negotiations, the broadcasters demanded MVPDs to carry new networks, on top of the ones already carried (no matter how popular or unpopular they were), as well as to pay increased license fees for those networks. Now, broadcasters are demanding that MVPDs continue to pay rapidly growing retransmission consent fees on top of such in-kind compensation. These tying tactics have exacerbated the consumer harms caused by a broadcaster's threat to withdraw retransmission consent for its broadcast signal if an MVPD does not agree to pay exorbitant fees because the broadcaster can threaten to cut off the MVPD's access to other popular, non-broadcast programming as well.[40] Accordingly, if a station elects to demand cash compensation for retransmission consent, it should be prohibited from tying any other programming assets (such as cable programming channels) into the negotiations for retransmission consent.

[40] *See* Sports Fans Coalition Ex Parte at 3 ("Compounding the threat to fans is the practice by media conglomerates of tying broadcast carriage rights with non-broadcast channel. This means, for example, that not only are games carried on one of the 'Big 4' broadcast networks at risk, but so are games on cable/satellite sports channels.").

Second, the Commission should rule that a broadcaster may not, consistent with its obligation to negotiate in good faith, force MVPDs to negotiate at the point of a gun by terminating retransmission consent agreements shortly in advance of significant and popular cultural or sporting events (such as the Super Bowl, Academy Awards, College Football Bowl Games, or March Madness). Such a rule would prevent broadcasters from holding the public hostage in retransmission consent negotiations by denying consumers access to the most popular programming unless MVPDs agree to pay ever higher retransmission consent fees.

Third, the Commission should require broadcasters to synch up their retransmission consent contracts with all MVPDs so that all such contracts terminate at the same time, and adopt an "all or none" requirement under which a broadcaster would be required to grant interim carriage to (or grandfather existing retransmission consent agreements with) all MVPDs or none. Such a requirement would reduce broadcasters' incentive and ability to whipsaw MVPDs into paying ever higher retransmission consent fees, and provide them incentives to behave reasonably in negotiations lest their signals be suspended from all MVPDs pending negotiations.

Fourth, the Commission should adopt a presumption that a broadcaster that demands higher retransmission consent payments from an MVPD than it obtains from other distributors in the market violates its obligation to negotiate in good faith, unless the broadcaster can show that such higher payments are justified by competitive marketplace conditions. To be sure, section 325(b)(3)(C) provides that it "shall not be a failure to negotiate in good faith" if a station enters retransmission consent agreements with different terms and conditions, including price terms, with different MVPDs, but only "if such different terms and conditions are based on competitive marketplace conditions."[41] As discussed above, broadcasters typically have required new entrants, like AT&T, to pay significantly higher retransmission consent fees than their incumbent cable competitors. They do so not because of legitimate competitive marketplace conditions but because new entrants are even more vulnerable to threats to withhold retransmission consent than their incumbent competitors. Insofar as the exorbitant rates that broadcasters are now demanding even from incumbent cable operators are the product of the artificial regulatory barriers that force MVPDs to negotiate with them for access to must-have network and syndicated programming, broadcasters can hardly claim that the even higher rates demanded from new entrants are based on "competitive marketplace conditions" as required by the statute. At a minimum, given the threat to competition in the provision of multichannel video programming distribution services (and, concomitantly, to fulfillment of the Commission's broadband deployment and adoption agenda), the Commission should place the burden on broadcasters, rather than MVPDs, to show that any differences in the retransmission consent fees demanded from different MVPDs are the result of competitive marketplace conditions.

D. The Commission Should Not Impose Mandatory Notice Requirements.

Finally, the Commission should not modify its existing requirements regarding the provision of notice to subscribers regarding the deletion or repositioning of a broadcast station's signal. Requiring MVPDs to notify customers of retransmission consent disputes would only increase broadcasters' leverage in retransmission consent negotiations, and increase consumers confusion and uncertainty, without any corresponding benefit to consumers. As the Sports Fans Coalition recently explained:

[41] 47 U.S.C. § 325(b)(3)(C).

> It does not do any good to tell fans that a game scheduled to be aired a month later *might* be unavailable [because a station's signal might be withdrawn due to a retransmission consent dispute]. That message – that a broadcaster *may* deprive fans of a big game in the future – only makes the situation more confusing.
>
> Taking steps to install a digital antenna and converter box – even assuming a fan can get them to work and the over-the-air signals are available – is a major hassle that most fans will not undertake merely because there is a possibility of a blackout down the road.
>
> The prospect of switching to another provider is equally problematic. Switching takes time and money and may force the sports fan to give up other service features that are desirable (such as other sports packages). And there is no assurance that, upon switching, the new video distributor won't be subject to the same blackout risks a short time later. Switching back and forth among providers every time there's a fee dispute with a broadcaster is obviously untenable.[42]

Accordingly, the Commission should reject its proposal to expand its existing notice requirements.

[42] Sports Fans Coalition Ex Parte at 4.

III. Conclusion

The Commission should adopt the foregoing proposals for modifying its retransmission consent regime to provide an appropriate counterweight to broadcasters' increased bargaining power in retransmission consent negotiations under existing market conditions. Given the potential impact of rapidly rising retransmission consent fees on MVPDs' rates, and the potential spillover effects on video subscription rates and, concomitantly, on the nation's broadband deployment and adoption goals, Commission action plainly is necessary to reform its retransmission consent rules to ensure that they protect consumers and prevent further service disruptions.

Respectfully submitted,

By: /s/ Christopher M. Heimann

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini

AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, D.C. 20036
(202) 457-3058 – phone
(202) 457-3074 – facsimile
Attorneys for AT&T Inc.

May 27, 2011