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

In the Matter of	**)**	
	)	
Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent	**)** **)** **)**	**MB Docket No. 10-71**

OPENING COMMENTS OF
THE AMERICAN PUBLIC POWER ASSOCIATION; THE IOWA MUNICIPAL ELECTRIC ASSOCIATION; BRAINTREE ELECTRIC LIGHT DEPARTMENT (MA); CHELAN COUNTY PUBLIC UTILITY DISTRICT (WA); GREENVILLE ELECTRIC UTILITY SYSTEM (TX); CITY OF GLASGOW, KY; LAFAYETTE UTILITIES SYSTEM (LA); MUSCATINE POWER AND WATER (IA); SCOTTSBORO ELECTRIC POWER BOARD (AL); SOUTH GEORGIA GOVERNMENTAL SERVICES AUTHORITY; AND SPENCER MUNICIPAL UTILITIES (IA).

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May 27, 2011

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The American Public Power Association, the Iowa Association of Municipal Utilities ("IAMU") and the public multichannel video programming distributors listed above (collectively "the APPA Group") submit these comments in the above captioned proceeding. The current *Notice of Proposed Rulemaking* ("NPRM") grew out of a Petition for Rulemaking filed by a broad coalition of cable and satellite providers, non-profit entities, and public interest organizations requesting that the Federal Communication Commission initiate a proceeding to amend the rules governing the retransmission consent process under which multichannel video program distributors ("MVPDs") obtain the right to carry broadcast television stations.

The APPA Group supported many of the proposals in the Petition and commends the Commission for issuing the *NPRM* as a necessary first step in reforming the retransmission consent process. That process has grown increasingly acrimonious, dysfunctional, and detrimental to the interests of the public. As members of the APPA Group have experienced first-hand, the retransmission consent process as currently constituted provides little, if any, incentive for broadcasters to do anything but hold MVPDs and their consumers hostage to ever increasing prices and unwanted services. This is particularly true for small, competitive facilities-based MVPDs, such as the public entities in the APPA Group, which often have little choice but to comply with the ever-increasing demands of the broadcasters. The APPA Group is therefore pleased that several of the Commission's proposals in the *NPRM* go beyond the remedies proposed in the Petition for Rulemaking and seek to address some of the fundamental barriers that prevent the retransmission consent process from being truly competitive. At the same time, however, the APPA Group believes that some of the Commission's proposals do not go far enough to be effective and must be supplemented by additional measures that the Commission has ample authority to promulgate and enforce.

I. INTRODUCTION AND BACKGROUND

A. The Commenters

APPA is a national service organization that represents the interests of more than 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities developed in communities that were literally left in the dark as electric companies in the private sector pursued more lucrative opportunities in larger population centers. Residents of these neglected or underserved communities banded together to create their own power systems, in recognition that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities – including Austin, Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, approximately 70 percent of APPA's members serve communities with less than 10,000 residents. At present, more than 100 public power systems provide video programming services.

IAMU is a state service organization whose members include 545 Iowa communities, including 28 that operate municipal broadband systems. Eighteen of these broadband systems provide competitive local access telephone service. All 28 provide cable television, high speed

Internet, and data communications services over all fiber or fiber/coax distribution networks. The average population of the Iowa cities with municipal broadband systems is 5,348. The systems were established because of the failure of private service providers to provide advanced telecommunication services at anything close to a competitive rate.

The other entities joining in these comments are publicly-owned providers of electric power and other utilities. Each of these entities also provides, or supports the provision of, video programming, high-speed Internet access, voice, and other communication or information services. Several of these providers operate fiber-to-the-home systems that represent some of the most sophisticated broadband networks in the country.

B. Background

As the APPA Group pointed out in prior submissions supporting the underlying Petition, the Commission's regulations governing retransmission consent – which are now nearly twenty years old – are severely outdated, are causing harm to consumers, and are counterproductive to the development of competition in the delivery of video programming. The market conditions and circumstances that gave rise to the retransmission consent rules and policies in 1992 no longer exist. The rules and regulations should therefore be updated to reflect the current realities of the video market.

In 1992, after three years of hearings on a broad range of issues surrounding competition in the video programming market, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 521 *et seq*. ("1992 Act"). These hearings had convinced Congress that the cable industry was highly concentrated, that the competition that Congress had envisioned when it deregulated the cable industry in 1984 had not emerged, and that the monopolistic practices of the cable industry had resulted in skyrocketing cable rates, deteriorating service, and widespread dissatisfaction among consumers.[1]

One problem that particularly disturbed Congress in 1992 was the increasing likelihood that monopoly cable companies would destroy competition from local over-the-air broadcasters:

> Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, [were] endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress noticed that cable was threatening the existence of broadcast stations to such a degree that it stepped in and mandated carriage of local broadcast signals on the cable system.

Turner Broadcasting System, Inc. v. Federal Communications Comm'n, 512 U.S. 622, 633 (1994).

In the Cable Act amendments of 1992, Congress sought to curb this threat to consumers and to promote localism by creating the so-called "must carry/retransmission consent" regulatory regime. With unusual specificity, Congress set forth its finding and rationale for this scheme on the face of the 1992 Act:

- Over 60 percent of households with television sets subscribed to cable (in 1991), replacing over-the-air broadcasting as the primary provider of video programming. *See* § 2(a)(17).
- Monopoly conditions, together with extraordinary expense and risk of overbuilding, means that other cable competitors are not likely to take hold in a widespread manner. *See* § 2(a)(2).
- Cable operators possess the power and incentive to harm broadcast competitors, derived from the cable operator's ability, as owner of the transmission facility, "to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position." *See* § 2(a)(15).
- Increased vertical integration in the cable industry creates a program-access problem for broadcasters, because cable operators have a financial incentive to favor affiliated programmers. *See* § 2(a)(5).
- Unless cable operators are compelled to carry local broadcast stations, the "marked shift" in market share will erode broadcasters' advertising base, jeopardizing "the economic viability of free local broadcast television and its ability to originate quality local programming." *See* § 2(a)(16).

[1] S. Rep. No. 102-92, 1992 U.S.C.C.A.N. 1133, 1134-35.

As the APPA Group noted, and as demonstrated in statutory language and legislative history cited above, it was the local broadcast stations, not the national broadcast networks, that Congress sought to protect in adopting must carry/retransmission consent. This is because the purpose of must carry/retransmission consent was to ensure that consumers would continue to have access to local broadcast content, especially local news and information content. At the time, Congress was concerned that local broadcasters, as stewards of the public airwaves, might lose their ability to discharge their public interest obligation to provide a "local voice" for their communities.

Accordingly, the must carry/retransmission consent regulations attempted to redress the perceived competitive imbalance between monopoly cable providers and local broadcasters by granting the broadcasters broad new rights to negotiate for carriage.

It is also significant that, at the time of enactment, Congress anticipated that compensation, if any, requested for carriage under a retransmission consent agreement would be modest, because "broadcasters also benefit from being carried on cable systems" and "many broadcasters may determine that the benefits of carriage themselves are sufficient compensation for the use of their signal by a cable system."[2] In adopting retransmission consent rules, the FCC echoed the belief that the parties had a co-dependant incentive to enter into mutually-beneficial agreements for carriage:

> Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements.[3]

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2 Senate Report at 1168.

3 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Memorandum Report and Order*, 9 FCC Rcd 6723 at ¶ 115 (1994)("*Must Carry Order*").

Until relatively recently, broadcasters and MVPDs had in fact generally negotiated for in-kind compensation that reflected a mutual exchange of value. For example, in an order approving News Corporation's acquisition of DirecTV,[4] the FCC indicated that given the mutual benefits of carriage and the relative parity in the bargaining positions of the parties, in-kind payment was the traditional form of compensation:

> [T]he stations bargain with [cable operators] for compensation in exchange for the right to retransmit their broadcast signal. Although the bargaining may encompass many issues, it is ultimately about the "price" [a cable operator] is willing to pay for carriage of the local broadcast station, and although that price may be in the form of monetary compensation, *it is more likely to be structured in the form of an "in kind" payment whereby the [cable operator] provides channel capacity for a broadcast network's affiliated cable programming network and/or other carriage-related concessions*. As we have previously recognized, the process was intended to provide "incentives for both parties to come to mutually beneficial arrangements." We have additionally recognized that "retransmission consent negotiations . . . are the market through which the relative benefits and costs to the broadcaster and the [cable operator] are established." Both programmer and [cable operator] benefit when carriage is arranged: the station benefits from carriage because its programming and advertising will likely reach more households when carried by [cable operators] than otherwise, and the [cable operators] benefit because the station's programming adds to the attraction of the [cable operator] subscription to consumers.[5]

As the *NPRM* notes, when the FCC developed regulations implementing the retransmission consent provisions of the 1992 Act, the incumbent cable operator was the sole multichannel distributor of broadcast programming in almost all designated market areas.[6] Significantly, at the time the Commission initially adopted the retransmission consent rules it had found that no incumbent local exchange carriers had entered into the video distribution market and that direct broadcast satellite ("DBS") providers had attracted less than one percent of all

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4 *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum and Order*, 19 FCC Rcd 473, 2004 FCC LEXIS 153.

5 *Id*. at ¶ 144 (footnotes omitted).

6 *NPRM*, ¶ 4.

MVPD subscribers.[7] Accordingly, the rules that the FCC developed at that time reflected an environment in which broadcasters had little, if any, distribution options outside of negotiating for carriage with a single cable operator in each market.

The Commission's retransmission consent rules reflected the agency's intent to redress the perceived imbalance of power in the cable industry. The rules accorded broadcasters a number of advantages in negotiating carriage, the chief among them being the absolute right to deny carriage. At the time that it initially adopted its rules, the FCC did not anticipate that the broad carriage rights and control over the distribution of distant signals could lead to either skyrocketing prices or a disruption in service for consumers.

> Moreover, the allegations that local stations electing retransmission consent would not be carried due to their inability to successfully negotiate agreements with cable operators and then assert their exclusivity rights and deprive subscribers of programming was speculative at the time the reconsideration petitions were filed. *Now that the retransmission consent provisions are in effect, there is no evidence that subscribers are being deprived of network programming.*[8]

As discussed below, in the intervening two decades, the MVPD marketplace has become more competitive and the Commission has found that there is ample evidence that subscribers are now being deprived of network programming and that this trend is accelerating.

> Today, in contrast, many consumers have additional options for receiving programming, including two national direct broadcast satellite ("DBS") providers, telephone providers that offer video programming in some areas, and, to a degree, the Internet. One result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public, and we recently have seen a rise in negotiation impasses that have affected millions of consumers.[9]

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7 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report*, 11FCC Rcd 2060, ¶ 101 and Appendix G Table 1 (1995).

8 *Must Carry Order*, at ¶ 115 (*emphasis* added).

9 *NPRM*, ¶ 2y.

As the APPA Group has previously observed, the power of a broadcaster to deny carriage of its local broadcast signal must be viewed in conjunction with its ability to block the importation of a distant signal carrying the same programming under the FCC network non-duplication and syndication rules.[10] For example, if a local NBC affiliate denies an MVPD the right to carry its programming, the local NBC affiliate would still have the right to assert its non-duplication rights against the MVPD and prevent the MVPD from carrying any distant station's NBC programming that would duplicate that of the local affiliate. As a result, the importation of distant signals is not available as a "safety valve" against unreasonable retransmission consent demands of local broadcasters.

II. NEED FOR CHANGES IN THE RETRANSMISSION CONSENT RULES

A. Multiple Sources of Broadcast Distribution Currently Exist in Virtually Every Market

Over the past twenty years, there have been significant changes in the video distribution marketplace that have flipped the underlying presumptions of the 1992 Act on their head. Today, in addition to the incumbent cable operator, virtually every designated market area is served by two direct broadcast satellite providers. In addition, by 2006 the FCC had recognized that incumbent local exchange carriers, such as Verizon and AT&T, and new competitive broadband service providers, were an increasingly available MVPD option for consumers.[11] In soliciting information on the state of video service competition in 2009, the FCC acknowledged the widespread availability of multiple consumer choices for video delivery in many areas of the country:

> In previous reports, we have found that many consumers have a choice between over-the-air broadcast television, a cable service, and at least two DBS providers.

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[10] 47 C.F.R. § 76.92.

[11] *Annual Assessment of the Status of Competition in the Market for The Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542 ¶ 76 (2009).

> In some areas, consumers also may have access to video programming service from a second cable system operated by a company traditionally considered a LEC or BSP. Furthermore, emerging technologies, such as digital broadcast spectrum and video over the Internet, provide some consumers with additional options for multichannel video programming service.[12]

Among the various competing MVPDs that have emerged over the past twenty years are public providers. As indicated above, there are currently 110 municipal broadband systems offering cable services in communities of various sizes around the country. Most of these municipal systems are new entrants and provide real competitive choice in the communities in which they operate.

B. The Retransmission Consent Rules Are Being Utilized in A Way That Subverts Their Original Public Interest Intent

1. Broadcasters now hold the negotiating power

As a result of the expanding variety of choices now available to consumers, the underlying concern leading to the retransmission consent rules – that a single MVPD wielding monopoly power over broadcast distribution in each market threatened the existence of local broadcasters – can no longer be justified. At the same time, the bargaining power of broadcasters has substantially increased. Today, it is the broadcasters that are in a position of dominance, as evidenced by the fact that many routinely demand excessive retransmission consent fees and other concessions, while threatening to go dark if their demands are not met.

Over the past few years broadcasters have cavalierly publicized practices that result in ever-increasing retransmission consent fees. For example, in 2010 a trade article reported that notes:

> [S]tation groups continued to report double-digit retrans increases, including Nexstar Broadcasting, which reported retrans revenue of $24.3 million, a 68.5% over the previous year. Belo Corp., which owns 20 stations in 16 markets,

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12 *Annual Assessment of the Status of Competition in the Market for The Delivery of Video Programming, Notice of Inquiry*, MB Docket No. 07-269, at ¶ 5, released January 16, 2009.

> increased its retans take by 29% to $42.6 million in 2009 and LIN TV, owner of 27 stations in 17 markets, reported a 48% increase in retrans revenue to $43 million for the year.[13]

Similarly, CBS has trumpeted its plans to obtain increased retransmission consent revenue. CBS President and CEO Les Moonves gleefully announced, "In 2010 we are going to take in over $100 million in retrans fees. That number will grow in 2012 to at least $250 million."[14]

Broadcasters are able to indulge in such schemes because they know that under the current regulatory and competitive landscape, they hold all the cards, and can threaten to withhold programming from consumers if MVPDs do not concede to the broadcasters demands. Such threats are antithetical to the reason that Congress created the must carry/retransmission consent rules in the first place: to ensure that local communities retain access to the "diversity of voices" and local programming that broadcasters have a public interest obligation to provide.

Moreover, broadcasters are no longer the bastion of local-interest programming that underpinned much of the original concern. Changes in broadcast licensing, such as the extension of license terms from five years to eight years and a reduction in regulatory oversight, has dramatically reduced the threat that a broadcaster might lose its license for a failure to adequately meet the needs and interests of its community.

In addition, local broadcasters no longer fit the image of small local companies locked in combat with rapacious cable monopolists. Rather, local broadcasters are increasingly supported and sometimes directed by major national networks. Indeed, the national networks have increasingly injected themselves into the retransmission consent negotiation process, assumed control over their local affiliates' retransmission consent decisions, dictated the terms under

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13 *Stations Score Retrans Fees*, by Mike Farrell, Multichannel News, March 22, 2010.

14 *Les Moonves Says CBS is Getting A Cut of Some Affiliates Retrans*, Radio Business Report/ Television Business Report, March 2010.

which such consent can be granted, and claimed a percentage of the retransmission consent compensation. For example, in a recent well-publicized move, Fox dropped broadcast affiliates in Boise, Idaho and Evansville, Indiana, for purportedly not providing the network with large enough kickbacks from the retransmission consent negotiations. Rather than deny these actions, a Fox executive brazenly stated,

> If we can't come to an agreement with someone, we have to look at something else. ... We needed to look at where we could affiliate and that's what we did.[15]

Similarly, Robert Iger, Disney President and CEO, has stated,

> We expect to see a portion of (affiliates') retransmission fees. We've struck some deals with affiliates to gain access for fees and are in negotiation with others. Retrans payments are real and will grow and there is no incremental cost to get them.[16]

Just this week, NBC announced an agreement with its affiliates in which it would be taking the lead in the retransmission consent negotiations on behalf of the individual stations.

> NBC reached an agreement in principle that would give the network the ability to negotiate deals with pay-TV distributors on behalf of their affiliates as well as take a cut of that revenue.
>
> The network and its affiliates are positioning this as a win for them and consumers. Though the two sides have not said what the split of so-called retransmission consent fees would be, the idea is that the stations have a better chance of getting more money from distributors if they team up and have NBC fronting for them than if they go it alone.[17]

While NBC may characterize this scheme as a “win” for consumers, it is difficult to see how this is possible, since the goal of the joint negotiations is to maximize the amount of revenues obtained from the MVPD providers. These revenues will have to be passed through to consumers.

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15 *Fox Playing Hardball With Balky Afils*, TVNewsCheck, May 11, 2011.

16 *Disney Taps Affiliate Stations for More Cash*, Fierce Cable, September 22, 2010.

17 *NBC's new deal with affiliates may be topic of discussion at FCC*, Los Angeles Times, May 24, 2011.

The Commission has in the past acknowledged the power of large broadcast networks in negotiating retransmission agreements. In addressing the transfer of control of DirectTV to News Corp., the Commission noted that News Corp. possessed "significant market power in the DMAs in which it has the ability to negotiate retransmission consent agreements on behalf of local broadcast television stations."[18] As the Commission also noted, this market power extends to network-owned and network-operated stations, as well as to any local broadcast station affiliate on whose behalf a large network negotiates retransmission consent agreements.[19] All available evidence indicates that these trends are only increasing as networks more and more look to retransmission consent fees as a substantial source of expected revenues and as an offset to declining advertising revenues. Quite simply, it is now almost entirely about revenue enhancement for the broadcasters and has precious little to do with retransmission rights. None of this fosters the goals of localism that the retransmission rules were created for.

The FCC itself has acknowledged the growing problems with the retransmission consent process. In its *Thirteenth Annual Report on the Status of Video Competition*, the Commission acknowledged the widespread "concern about the ability of broadcasters to leverage the existing retransmission consent, network nonduplication, and syndicated exclusivity rules to demand exorbitant compensation for their programming."[20] Commenters reported that, by threatening to withhold local broadcast programming, the big four broadcast networks and other broadcast conglomerates have used retransmission consent to gain leverage over smaller cable operators to launch new affiliated networks, to obtain higher license fees and broader distribution for those

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18 *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, For Authority to Transfer Control, Memorandum and Order*, 19 FCC Rcd 473, at ¶ 201 (2004).

19 *Id*., at fn. 577.

20 *Thirteenth Annual Report*, at ¶ 207.

new networks, and to obtain higher license fees for their existing affiliated networks. Broadcasters also demand superior channel positions, even for less desirable content or untested content for which there is little consumer demand.

As the *NPRM* highlights, during the past year, the situation has continued to worsen, with recurring threats of blackouts and high-stakes public "showdown" negotiations.

> In the past year, we have seen high profile retransmission consent disputes result in carriage impasses. When Cablevision Systems Corp. ("Cablevision") and News Corp.'s agreement for two Fox-affiliated television stations and one MyNetwork TV-affiliated television station expired on October 15, 2010, and the parties did not reach an extension or renewal agreement, Cablevision was forced to discontinue carriage of the three stations until agreement was reached on October 30, 2010. 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. Previously, on March 7, 2010, Walt Disney Co. ("Disney") and Cablevision were unable to reach agreement on carriage of Disney's ABC signal for nearly 21 hours after a previous agreement expired. As a result, the approximately 3.1 million households served by Cablevision were unable to view the first 14 minutes of the Academy Awards through their cable provider. Most recently, we are aware of losses of programming resulting from retransmission consent carriage impasses involving DISH Network and Chambers Communications Corp., Time Warner Cable and Smith Media LLC, DISH Network and Frontier Radio Management, DirecTV and Northwest Broadcasting, Mediacom and KOMU-TV, and Full Channel TV and Entravision.[21]

Not only do blackouts routinely now occur, the pace of blackouts has also increased dramatically over the past two years. As the American TV Alliance recently noted, we are only in May and there have already been more blackouts this year than in any other in the past decade.[22]

All of the above demonstrates that the current retransmission consent rules are broken.

2. Small new competitive new entrants, such as public providers, are particularly vulnerable to abuses of the retransmission process

The trade press and the Commission have generally focused on "high profile" disputes in major markets, in which large national incumbent cable operators or satellite providers are pitted

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21 *Id.*, ¶ 15.

22 Communications Daily, May 19, 2011.

against national broadcast networks, with both sides approach the negotiations from roughly equal positions of market power and capitalization. In these disputes, the arguments between national broadcast networks and large MSOs have often devolved into philosophical debates about government intrusion into the marketplace versus a laissez-faire approach.

What gets much less attention is the disproportionate harm that the practices of broadcasters have on the more than 1000 smaller, facilities-based MVPD, including the public entities in the APPA Group. For these smaller providers, the impact of the broadcasters' actions is neither abstract nor theoretical, but is instead real and immediate. As a practical matter, these systems cannot succeed without carrying the major networks, and they lack the ability of their large incumbent MSO and DBS competitors to negotiate substantial volume discounts or other concessions. As a result, small MVPDs often have little choice but to pay substantial premiums for retransmission consent and to pass these premiums through to their rural and small-market subscribers. This puts them at a significant competitive disadvantage to larger MVPDs in their markets.

Members of the APPA Group have increasingly faced unreasonable retransmission consent demands, dictated by broadcasters with little, if any, interest in constructive negotiation and mutual accommodation. Where members of the Group have found broadcasters in neighboring markets that were willing to provide alternative programming, the Commission's network non-duplication and syndicated exclusivity rules and the broadcasters' contracts with national broadcast networks precluded access to such alternative programming – or even the threat of obtaining it.

If the Commission is serious about protecting and preserving competition and localism in smaller markets, then it must act aggressively to give small MVPDs a fair opportunity to obtain content in the retransmission consent process on terms and conditions similar to those available to large MVPDs.

3. Abuses also potentially impact viability of broadband

While the *NPRM* focuses on access to broadcast programming, it is important for the Commission to consider the impact of the current abuses and unfair practices that occur in the retransmission consent process in the broader context of the national goals of fostering greater broadband availability. The Commission has repeatedly recognized, most recently in the context of access to terrestrially delivered video programming, that "by impeding the ability of MVPDs to provide video service, unfair acts involving [video service] can also impede the ability of MVPDs to provide broadband services. Allowing unfair acts involving [video service] to continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission. This secondary effect heightens the urgency for Commission action."[23] Indeed, the FCC has specifically recognized the importance of local broadcasting to MVPDs: "we agree with commenters who contend that carriage of local television broadcast station signals is critical to MVPD offerings."[24]

In its recent National Broadband Plan, the Commission announced a national goal of achieving 100 megabits to 100 million households by 2020 as part of its National Broadband Plan.[25] In describing this goal, Chairman Julius Genachowski stated that the United States should also seek to push past 100 Megabits as fast as possible.

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[23] *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, ¶ 36, 2010 WL 236800 (F.C.C.) (rel. January 10, 2010) (footnotes omitted). While the Commission was addressing access to video programming under Section 628 it is no less true with respect to access to MVPD access to broadcast programming.

[24] *News Corp Order*, ¶ 202.

[25] Connecting America: The National Broadband Plan, Federal Communications Commission, released March 16, 2010.

> The U.S. should lead the world in ultra-high-speed broadband testbeds as fast, or faster, than anywhere in the world. In the global race to the top, this will help ensure that America has the infrastructure to host the boldest innovations that can be imagined. Google announced a one gigabit testbed initiative just a few days ago – and we need others to drive competition to invent the future. [26]

Several members of the APPA Group are *already* capable of providing ultra-fast broadband connectivity at 100 Mbps – a full decade ahead of the Commission's proposed national goal – and their fiber systems will be capable of offering 1 Gbps long before 2020. These systems will increasingly provide many other benefits to their communities and the Nation, including support for economic development and competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable modern health care, quality government services, and the many other advantages that contribute to a high quality of life.

For all this to occur, however, the public providers must be able to pay for their systems. To do that, they must be able to provide, or support the provision, of all major communications services, including video services. They must therefore have fair and reasonable access to broadcast video programming.

III. APPA SUPPORTS THE PROPOSED RULE CHANGES AND URGES THE COMMISSION TO GO EVEN FARTHER IN SOME AREAS

As demonstrated above, and in the Commission's own record, the current retransmission rules have remained essentially unchanged since the FCC first adopted them in 1992. They have simply failed to keep up with changes in the MVPD marketplace and are ill-suited to curb the negotiating abuses utilized by broadcasters that place MVPDs and consumers in a no-win

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[26] Connecting America: The National Broadband Plan, Federal Communications Commission, released March 16, 2010. Julius Genachowski, "Broadband: Our Enduring Engine for Prosperity and Opportunity," as prepared for delivery at NARUC Conference, February 16, 2010, http://tinyurl.com/yc6j2l8.

position. While the FCC has in the past maintained that the retransmission consent process should rely on market forces, the current retransmission rules (in conjunction with non-duplication authority) have in fact *insulated* broadcasters from market forces.

Accordingly, the APPA Group urges the Commission to revise its retransmission consent rules to ameliorate these abuses and better protect consumers. The Commission has authority to undertake such action under Section 309(a) of the Communications Act, which requires that the FCC take actions to ensue that broadcast licensees operate in a manner consistent with the "public interest, convenience, and necessity." Clearly the widespread and growing abuse of the retransmission consent process is not in the public interest, convenience or necessity.

Apart from the broad grant of authority contained in Section 309, the Commission also has specific authority under Section 325(b)(3)(A) to "to establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent." In adopting such regulations, the Commission is required to "consider in such proceeding 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 prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable."[27]

When the Commission initially implemented provisions of the 1992 Cable Act, including Section 325, it declined to adopt specific regulations concerning retransmission consent fees, based on its tentative finding that its regulation of cable rates under Section 623 would be sufficient. At the same time, however, the Commission stated:

> We will closely monitor initial retransmission consent agreements for their potential impact on subscriber rates. *If it appears that additional measures are needed* to assure that pass-through of retransmission consent fees does not have

[27] 47 U.S.C. 325(b)(3)(A).

an unwarranted impact on basic tier rates, we will reexamine this treatment of such fees.[28]

Clearly, based on the record, "additional measures are needed" to protect consumers. Moreover, the Commission has clear authority to [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act,"[29] including Section 325. This broad language provides the Commission ample authority to take the steps discussed in the *NPRM* and below.

Specifically the FCC should undertake the following rule changes to reform the retransmission consent process to better protect consumers as well as the availability of competitive multichannel video services.

A. The FCC Should Curb the Anticompetitive Effects of the Network Non-Duplication and Syndicated Exclusivity Rules and the Exclusivity Clauses in National Network Agreements

The *NPRM* seeks comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity. The APPA Group strongly supports the elimination of the non-duplication and syndicated exclusivity rules. Allowing MVPDs to import distant station signals would provide a critical "safety valve" against unreasonable retransmission consent demands of local broadcasters.

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.[30] The rules, in turn, prohibit the cable system from carrying the

28 *In the Matter of Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation,* 8 FCC Rcd 5631, ¶ 247 (1993).

29 47 U.S.C. 303(r).

30 *See* 47 C.F.R. §§ 76.92-76.94

network programming as broadcast by any other station within the "geographic zone" to which the contractual rights and rules apply.[31] 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. Collectively the rules are referred to as the "exclusivity rules."

The network non-duplication and syndicated exclusivity rules compound the flaws in the retransmission consent process by depriving MVPDs of competitive choices. As currently drafted, the exclusivity rules provide broadcasters with a one-sided level of protection and artificially inflated bargaining leverage in retransmission consent negotiations. The inability of MVPD's to import a distant signal in instances where the local broadcaster and the MVPD are unable to reach a retransmission consent agreement denies the MVPD with a competitive alternative and effectively holds the MVPD hostage to the whims of the local station. This is particularly true in instances where the MVPD is a small, new entrant attempting to compete against a large incumbent MVPD that has been able to use its larger resources and scale to reach a carriage agreement with the local broadcaster. In such circumstances, with no ability to import a distant station, the competitive new entrant has no real choice but to also agree to carry that local broadcaster, even if it means acceding to the demands of the local station at prices many times higher than the incumbent MVPD.

In discussing a possible revision of the exclusivity rules the Commission observes that some broadcasters have argued that the rules foster localism. These arguments are misplaced. The only programing that the exclusivity rules protect are the importation of network programming and syndicated programming, not locally originated programming. Moreover, broadcasters in many situations actually rely on the exclusivity rules to block the importation of

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[31] *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).

in-state stations that communities actually consider to be more locally relevant than the assigned "local" out-of-state station for a particular DMA.

The exclusivity rules do not foster localism, completion or the consumer interest, and are an anathema to free-market forces that the broadcasters claim to embrace. At a minimum, the Commission should revise the network non-duplication rules so that they do not apply to a television station that has not granted retransmission consent. Thus, a television station would only be permitted to assert network non-duplication protection if it is actually carried on the cable system. If a local broadcaster and an MVPD are unable to reach an agreement the MVPD should be free to enter into an agreement with a distant station.

In order to be effective, however, the Commission's elimination of the non-duplication rules would have to be coupled with an action to prohibit the enforceability of contracts between national networks and local affiliates that act to preclude the importation of distant duplicate signals. Ironically, removing non-duplication and syndicated exclusivity rules, with their territorial limitations, would make matters worse by expanding the range or exclusivity that networks could enforce contractually. The APPA Group believes that the Commission has more than sufficient authority to take all appropriate steps to remedy this situation, including preempting the contract provisions at issue.

B. The Commission Should Amend its Good Faith Negotiation Standards

Much of the focus of the Commission's proposals in the *NPRM* is on making adjustments to the regulatory standards governing the statutory requirement that broadcasters and MVPD engage in "good faith" negotiations. The Commission noted that

> When the Commission originally adopted the good faith standards in 2000, the circumstances were different from the conditions industry and consumers face today. At that time programming disruptions due to retransmission consent disputes were rare. The Commission's approach then was to provide broad standards of what constitutes good faith negotiation but generally leave the negotiations to the parties... In recent times, the actual and threatened service

> disruptions resulting from increasingly contentious retransmission consent disputes present a growing inconvenience and source of confusion for consumers. We believe that these changes in circumstances support reevaluation of the good faith rules, particularly to ameliorate the impact of retransmission consent negotiations on innocent consumers.[32]

In implementing the good faith negotiation requirement of Section 325 of the Communications Act,[33] the Commission established seven objective good faith negotiation standards.[34] Violation of any of these standards by a broadcast station or MVPD is considered a *per se* breach of its obligation to negotiate in good faith. In the *NPRM* the Commission seeks comment on augmenting the rules to include additional objective good faith negotiation standards.

1. The Commission should prohibit stations from allowing an affiliated network to be involved in the retransmission consent negotiation approval process

The APPA Group supports the Commission's proposal that it should be a *per se* violation for a station to agree 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, indeed the Commission should prohibit affiliated networks from being involved in the retransmission consent negotiation process altogether.

The good faith rules currently require "the Negotiating Entity" to designate a representative with authority to make binding representations on retransmission consent and not unreasonably delay negotiations.[35] If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has impermissibly impaired its own ability to designate a representative who can bind the station in negotiations, contrary to the

32 *NPRM*, at ¶ 20.

33 47 U.S.C. § 325(b)(3)(C)(ii)-(iii).

34 *See supra* ¶ 10 and n. 26.

35 47 C.F.R. § 76.65(b)(1)(ii)-(iii).

FCC's rules. Provisions in network affiliation agreements giving the network approval rights over the grant of retransmission consent by its affiliate represent an unreasonable exercise by a network of its distribution rights in network programming.

At a minimum, the Commission should prohibit direct or indirect involvement of networks in the contractual approval process. Such involvement hinders the negotiations process, and as was discussed above, there is evidence that the networks are increasingly dictating terms of retransmission consent agreements and demanding larger "cuts" from the agreements, and dropping stations that do not comply. The arrangement discussed above, wherein NBC has reportedly entered into an agreement with its affiliates to act as the lead negotiator in retransmission consent negotiations is an example of the type of arrangement that should be banned because it overwhelming stacks the deck in favor of broadcasters.

2. The Commission should prohibit a station from granting another station or station group the right to negotiate or approve a retransmission consent agreement, especially when the stations are not commonly owned

Second, the APPA Group supports the Commission's proposal to make it a violation for a station to grant the right to negotiate its retransmission consent agreement to other stations or station groups, particular if those stations or station groups are not commonly owned. As the Commission notes, when a station relinquishes its responsibility to negotiate its own retransmission consent, there may be delays to the negotiation process, and negotiations may become unnecessarily complicated if an MVPD is forced to negotiate with multiple parties with divergent interests, potentially including interests that extend beyond a single local market. More important, allowing unaffiliated broadcasters to band together enables them to abuse their market dominance and exacerbates the negative impact on consumers.

3. It should be a *per se* violation for a negotiating entity to refuse to put forth *bona fide* proposals on important issues

The APPA Group supports the Commission's proposal to make it a *per se* violation of the good faith standard for a negotiating entity to refuse to put forth or consider *bona fide* proposals on important issues. Currently broadcasters are too easily able to evade the purpose, if not the letter, of the good faith negotiation requirement by essentially couching their "negotiation" terms in what essentially amount to *de facto* take it or leave it proposals.

4. It should be a *per se* violation for a negotiating entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement. In appropriate circumstances, the Commission should also order the parties to engage in mandatory arbitration

The APPA Group supports the Commission's proposal to make it a *per se* violation of the good faith rules for a negotiating entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement. In previous retransmission consent disputes, the Commission has encouraged parties to engage in voluntary dispute resolution mechanisms as a means to reach agreement because a neutral third party may be able to facilitate agreement where the parties have otherwise failed.

If the parties are unable to reach agreement on their own and the expiration of their existing agreement is imminent, the Commission should consider it bad faith for one of the parties to refuse to participate in non-binding mediation.

Furthermore, the APPA Group disagrees with the Commission's statement in the *NPRM* that it lacks authority to require the parties to engage in mandatory arbitration. Rather, the APPA Group believes that the authorities cited about are broad enough to support such a requirement.

5. Delaying tactics to gain an advantage constitute bad faith

Currently, the rules provide that "[r]efusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations," constitutes a violation of the good faith negotiation standard.[36] The Commission seeks comment on what it means to "unreasonably" delay retransmission consent negotiations.

Broadcasters often engage in foot-dragging delay tactics, in which they are either unresponsive or unwilling to engage in substantive negotiations until the eve of the current agreement's expiration. Such delaying tactics are antithetical to the goals of reaching an agreement and are more likely to reach an impasse that disrupts service to consumers. The APPA Group submits that the Commission should find that delaying the commencement or progress of a negotiation as a tactic to gain advantage rather than out of necessity constitutes bad faith. Specifically, the Commission should adopt a rebuttable presumption that a party's failure to meet and negotiate within thirty (30) days of a request is an unreasonable delay. Further, under normal circumstances a party should respond to any outstanding negotiation proposal at least five (5) days before the expiration of an agreement.

6. A requirement that a MVPD not carry an out-of-market "significantly viewed" station violates the FCC's rules

The APPA Group supports the Commission's proposal to make it a violation of its rules for a broadcaster to request or require, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" station. Section 76.65(b)(1)(vi) provides that "[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor" is a violation of the Negotiating Entity's duty to negotiate in good faith.

As the *NPRM* notes, despite the existence of this rule, the Commission previously interpreted it narrowly, as involving collusion between a broadcaster and an MVPD. The APPA

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[36] 47 C.F.R. § 76.65(b)(1)(iii).

Group supports the Commission's proposal to interpret this rule more expansively to preclude a broadcast station from executing or seeking to enforce an agreement prohibiting an MVPD from carrying an out-of-market significantly viewed station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, in the event of a retransmission consent negotiation impasse. Such a rule change more closely comports with the clear language of the regulation, the public interest and will provide a degree of relief for some MVPDs in negotiating with their local broadcasters.

7. The FCC should ban the tying of carriage of broadcast channels to other programming, including web-based programming

Recognizing that small, independent MVPDs have no practical choice but to carry broadcast networks to survive, the major broadcast networks and their affiliates are increasingly taking advantage of the Commission's hands-off interpretations of its "good faith" negotiation rules to demand the carriage of other channels as part of a retransmission consent agreement. Local broadcast stations are now routinely demanding that cable operators carry affiliated programming or broadcast signals that neither the cable operator nor its subscribers want, as part of the consideration of obtaining a retransmission consent agreement. These demands have included carriage of low power or out of market stations. Public systems, which typically lack sufficient size to have comparative bargaining power, are particularly vulnerable to such "tying" arrangements.

Mandatory tying provisions have little, if anything, to do with the public policy goals underlying the enactment of the must carry/retransmission consent rules. The Commission should amend its rules to prevent broadcasters from requiring carriage of additional content as part of the compensation for the underlying carriage of a broadcast station. Specifically, the FCC should amend 47 C.F.R 76.65 of the Commission's rules to make it a *per se* violation of the good faith negotiating obligation to insist on tying retransmission consent to carriage of other programming services.

8. The FCC should also consider other changes to its "good faith" negotiation rules

The Commission should also consider other changes to its "Good Faith" negotiation rules to make them more useful to small, independent MVPDs. In particular, the Commission should reconsider its statements that the following proposals by broadcasters are "presumptively legitimate:"

1. Proposals for compensation above that agreed to with other MVPDs in the same market;

2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;

3. Proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market; and

4. Proposals for carriage conditioned on a broadcaster obtaining channel positioning or tier placement rights.

Even if the Commission adopts the procedural reforms discussed above, such reforms may prove to be of little value to small independent MVPDs if the Commission's statements outlined above remain on the books. While such proposals may not be unfair in negotiations between parties of roughly equal strength, they may certainly be unfair to small independent MVPDs when pitted against local broadcasters that are backed by powerful national networks. At the very least, the Commission should be neutral with respect to these considerations, letting the decision-makers view the totality of the circumstances without the outcome essentially dictated for them.

IV. CONCLUSION

The APPA Group commends and supports the Commission's issuance of the *NPRM* as a necessary first step in reforming the retransmission consent process. As discussed above, the current process is broken and detrimental to the public interest. The APPA Group therefore urges the Commission to take actions consistent with the above comments in order to address some of the fundamental barriers that prevent the retransmission consent process from functioning in a manner that provides for greater parity in the negotiation process, including small to medium MVPDs.

Respectfully Submitted,

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May 27, 2011