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

In the Matter of **AMENDMENT OF THE COMMISSION'S RULES RELATED TO RETRANSMISSION CONSENT**	MB Docket No. 10-71

COMMENTS OF DIRECTV, INC.

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SUMMARY

DIRECTV, Inc. ("DIRECTV") applauds the Commission's effort to reform a retransmission consent regime that has become increasingly dysfunctional, resulting in higher prices and service disruptions for consumers. DIRECTV retransmits thousands of local broadcast signals in markets that will cover 99 percent of the nation's television households by the end of this year. It has negotiated with individual stations as well as station groups of all sizes and in all parts of the country. Thus, it has seen the full range of negotiating behavior, including demands to cease carriage of a broadcaster's signal specifically timed to deprive its viewers of marquee programming. No one has more incentive than DIRECTV to ensure that the retransmission consent regime promotes orderly negotiations that result in carriage agreements at fair prices, rather than disruptive impasses and accompanying consumer frustration. Yet no one is more aware than DIRECTV that decades-old government policies encouraging broadcast territorial exclusivity, and the business arrangements that have ossified around these policies, have created a "non-market" that encourages brinksmanship and disruption.

Accordingly, DIRECTV endorses the elimination of government support for the anachronistic system of broadcast exclusivity. In the nearly twenty years since Congress created retransmission consent, MVPD competition has flourished while the broadcast industry has maintained its one-to-a-market structure. Eliminating the Commission's network nonduplication and syndicated exclusivity rules would remove governmental imprimatur and enforcement from a regime that gives network-affiliated stations a virtual monopoly in their allocated markets, even though their over-the-air signals typically reach only a small fraction of the viewers in that area.

However, because these exclusivity rules generally apply only to cable operators, the Commission must take an additional step to extend comparable relief to satellite MVPDs.

Specifically, the Commission should establish that it is a *per se* violation of the good faith negotiation requirement for a broadcaster to withhold retransmission consent from a satellite carrier without granting that carrier a temporary waiver permitting the importation of same-network distant signals throughout the market until a carriage agreement has been reached. By taking these steps, the Commission can promote a more market-oriented negotiation process while ensuring that its actions are competitively neutral among all MVPDs. It will also promote its goal of localism by increasing broadcasters' incentives to serve local communities in order to differentiate themselves from potential competition by out-of-market stations.

DIRECTV also supports several proposals raised by the Commission that would give greater substance to the requirement that parties negotiate retransmission consent in good faith. In particular, DIRECTV submits that the Commission should define the following broadcaster actions as unreasonable *per se* and therefore inconsistent with the good faith obligation:

- Giving a network the right to negotiate or approve a station's retransmission consent agreements or any major term in such agreements;
- Granting another non-commonly owned station or station group the right to negotiate or approve a station's retransmission consent agreements;
- Requiring that an MVPD not carry legally available out-of-market stations as a condition of retransmission consent, or substantially burdening such carriage;
- Deauthorizing carriage during "sweeps" weeks or immediately prior to marquee events; or
- Refusing to give a stand-alone offer for retransmission consent when requested by an MVPD.

Each of these actions further enhances the market power that broadcasters enjoy and unfairly skews the retransmission consent process even more heavily in their favor. By clarifying that these strategies will no longer be tolerated, the Commission will reduce strategic negotiating behavior and increase the likelihood of successful transactions.

The Commission also requests comment on early termination fees ("ETFs") and notice requirements in anticipation of an impasse. Offers that include possible ETFs allow satellite MVPDs to extend competitive options for advanced equipment and professional installation free or at reduced cost in exchange for a commitment from the consumer to remain a customer for a specified period or pay an ETF. DIRECTV fully discloses the terms of offers that include the option of paying an ETF, which is always pro-rated so that the amount of the ETF decreases over the term of the programming commitment. Consumers have clearly endorsed this approach by overwhelmingly accepting offers with possible ETFs rather than paying full price for equipment and installation. There is no reason for Commission concern or action in this area. As for requiring MVPDs and broadcasters to give notice in anticipation of a negotiating impasse, on balance DIRECTV believes that any benefits would likely be outweighed by consumer confusion and negotiating brinksmanship, and that repeated use would ultimately lead consumers to heavily discount such notices or ignore them altogether.

It is high time to update the antiquated retransmission consent regime to promote market-oriented results and carriage agreements rather than negotiating impasses. Adoption of a few targeted reforms would go a long way toward achieving those ends. DIRECTV supports the Commission's efforts to identify appropriate reforms, and urges that they be implemented as expeditiously as possible.

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In this proceeding, the Commission seeks comment on a range of proposals that would streamline and clarify its rules relating to retransmission consent in an effort to ensure that they are working effectively to minimize video service disruptions to consumers.[1] DIRECTV, Inc. ("DIRECTV") applauds the Commission for undertaking this search for pro-consumer modifications that can be made to what has become an increasingly dysfunctional system for negotiating rights that allow multichannel video programming distributors ("MVPDs") to retransmit free, over-the-air broadcast programming. The current regime, shaped by significant regulatory intrusion, skews negotiations with built-in advantages for broadcasters. Something must be done to break the cycle of gamesmanship through which broadcasters impose substantial price increases and the threat of service disruptions upon the very consumers they are supposed to be serving.

As a national MVPD, DIRECTV has more experience than most with the mechanics of retransmission consent negotiations. It will be retransmitting local broadcast signals in 190

[1] *Amendment of the Commission's Rules Related to Retransmission Consent,* Notice of Proposed Rulemaking, 26 FCC Rcd. 2618 (2011) ("*Notice*").

markets covering 99 percent of all television homes nationwide by the end of the year,[2] and must periodically negotiate carriage arrangements with stations in each of those markets. DIRECTV has experienced first-hand the increasing contentiousness in negotiations and the resulting brinksmanship by which broadcasters have threatened to deprive their viewers of "must have" programming. The problem is only getting worse, as broadcasters' demands become more onerous and their threats more brazen.

The Commission has tentatively concluded that it does not have the statutory authority to take some types of corrective action to address this situation, such as ordering broadcasters to allow continued carriage of their signals or to engage in binding arbitration.[3] Setting this conclusion aside,[4] the *Notice* discusses several modifications to existing rules that the Commission clearly has the power to implement. By taking a fairly small number of such remedial actions, the Commission can reshape the retransmission consent process to better reflect free-market dynamics while precluding specific practices that have had an anticompetitive effect on negotiations. Through these changes, the Commission will make service disruptions less likely and promote lower prices for consumers. DIRECTV urges the Commission to take these steps and thereby begin the much needed reform of the retransmission consent regime.

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[2] *See* Press Release, "DIRECTV to Offer Local Channels in 190 Markets Including 16 Additional Markets in HD," Apr. 11, 2011 (*available at* http://investor.directv.com/releasedetail.cfm?ReleaseID=567980).

[3] *See Notice*, ¶ 18.

[4] DIRECTV does not agree with this tentative conclusion, and continues to believe that the Commission has adequate authority to impose standstill and arbitration requirements. *See* Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, at 30-40 (filed Mar. 9, 2010) ("Petition"). For purposes of these comments, however, DIRECTV will reserve those arguments and focus on the alternative reforms the Commission has proposed.

BACKGROUND

As recounted at length in the Petition that led to this proceeding,[5] the retransmission consent regime was created nearly twenty years ago in order to counterbalance the market power of what was then the monopoly provider of MVPD services in virtually every market: the local cable operator. Congress feared that, if broadcasters were denied carriage by cable monopolists (many of whom controlled programming that competed with broadcasters), they might not be able to carry out their public interest function or serve the interests of local viewers. Accordingly, Congress mandated and the Commission implemented new rights for broadcasters that entitled weak stations to demand carriage[6] (and thereby displace more popular programming) and gave strong stations the right to demand compensation for retransmission of their signals, all while preventing MVPDs from importing duplicating programming from willing sellers in adjacent markets.

MVPDs carry broadcast signals unaltered, including all commercials.[7] By extending the broadcaster's signal to additional viewers who would not otherwise see it, MVPDs enable broadcasters to demand higher fees from advertisers. In light of this and other advantages, when Congress created the retransmission consent right, it apparently expected that broadcasters' demands for compensation would be modest at most, and that "many broadcasters may

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5 Petition, at 2-13. The Petition was filed by: American Cable Association; Bright House Networks, LLC; Cablevision Systems Corp.; Charter Communications, Inc.; DIRECTV, Inc.; DISH Network LLC; Insight Communications Company, Inc.; Mediacom Communications Corp.; New America Foundation; OPASTCO; Public Knowledge; Suddenlink Communications; Time Warner Cable Inc.; and Verizon.

6 47 U.S.C. §§ 534-35.

7 Because the broadcasters' signals were not altered, the United States Supreme Court twice found that their retransmission by an MVPD was not a performance that required either consent from or compensation to the holder of copyrights in broadcast programming. *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968) (local signals); *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 410-13 (1974) (distant signals). The 1976 Copyright Act, later supplemented by the retransmission consent regime, superseded those rulings.

determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system."[8] For many years, this assumption appeared to be borne out, as cable operators typically did not pay cash compensation to broadcasters in exchange for authority to retransmit their signals.

As satellite carriers arose as an MVPD alternative, Congress extended the retransmission consent/must carry regime in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), which created parallel carriage rights for "local-into-local" satellite signals.[9] Satellite carriers reach areas served by neither broadcasters nor terrestrial MVPDs, which should make satellite carriage an especially valuable tool for broadcasters to use in monetizing additional viewers. But as new entrants with little market share and no market power facing an entrenched incumbent, Direct Broadcast Satellite ("DBS") operators were at a significant bargaining disadvantage vis-à-vis broadcasters. Not surprisingly, broadcasters were immediately able to extract cash compensation from DBS operators, in addition to other in-kind compensation. As DBS and other competitors have grown more robust, broadcasters have been able to extract ever greater cash fees from all MVPDs, including cable.[10] These increases have been accelerating, to the point where SNL Kagan estimates that total retransmission consent fees will approach $1.5 billion dollars this year and, despite an expected decline in MVPD subscribers, will soar to over

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8 S. Rep. No. 102-92 (1991), at *35, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168.

9 47 U.S.C. § 338(a)(1); SHVIA was enacted as title I of the Intellectual Property and Communications Omnibus reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, Appendix I (1999).

10 *See* Michael L. Katz, Jonathan Orszag, & Theresa Sullivan, "An Economic Analysis of Consumer Harm From the Current Retransmission Consent Regime," ¶¶ 45-51 (Nov. 12, 2009) (attached to Letter from Neal M. Goldberg to Blair Levin, GN Docket Nos. 09-47, 09-51, and 09-137, and MB Docket No. 07-269 (Dec. 16, 2009)).

$3.6 billion by 2017.[11] CBS projects that its share of retransmission consent fees alone will reach $1 billion within the next three to five years.[12]

It is also worth noting that retransmitting broadcast signals imposes significant costs on a DBS system that are not incurred with carriage of other types of programming. For example, in each market where it provides local-into-local service, DIRECTV must construct a local receive facility to collect broadcast signals. It must then acquire fiber or satellite backhaul capacity to transport these signals from the local market to a DIRECTV uplink center in Colorado. There, each channel must be processed by dedicated equipment and then combined with other channels for uplinking to a DIRECTV satellite. In order to create capacity for the nearly 1400 local stations it retransmits, DIRECTV has had to invest billions of dollars to construct, launch, and operate sophisticated spot beam satellites specifically designed to localize delivery of those signals so that valuable satellite spectrum can be reused several times across the country. The costs of collecting and retransmitting highly localized signals far exceed the costs DIRECTV incurs for cable networks, which are delivered to DIRECTV by the programmer and retransmitted by standard satellites to the entire country. Adding insult to injury, the network programming that most matters to DIRECTV's customers could easily be delivered on a nationwide basis, without hundreds of duplicating signals and without incurring any of these costs.

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11 *See* Georg Szalai, *Broadcasters to Boost Retrans Fees to $3.6 Billion by 2017*, THE HOLLYWOOD REPORTER (May 25, 2011) (discussing SNL Kagan report) (*available at* http://www.hollywoodreporter.com/news/broadcasters-boost-retrans-fees-36-192349).

12 *See* Mike Farrell, *CBS Raises the Retrans Bar*, BROADCASTING & CABLE (May 24, 2011) (discussing total retransmission revenue collected directly by CBS O&Os and through reverse compensation from its affiliates) (*available at* www.broadcastingandcable.com/article/468737-CBS_Raises_the_Retrans_Bar.php).

As broadcaster compensation demands have grown more onerous, threats of signal withholding have become more prevalent. Such broadcaster brinksmanship has also led to more actual negotiating impasses, disrupting service for millions of viewers over the past several years.[13] It is this growing dysfunction that led many of the nation's MVPDs to file the Petition and prompted the Commission to initiate this proceeding.

DISCUSSION

I. REGULATORY INTERVENTION CURRENTLY SKEWS THE RETRANSMISSION CONSENT REGIME IN FAVOR OF BROADCASTERS AND ENABLES THEM TO HOLD VIEWERS FOR RANSOM.

As discussed above, retransmission consent arose from a desire to offset the market power of local cable systems. While the rules put in place nearly two decades ago have remained essentially unchanged, the MVPD market has changed substantially. The DBS service, which had not launched in 1992 and was barely off the ground when SHVIA was enacted in 1999, has grown to provide robust competition to cable incumbents throughout the country. Large telephone companies, such as AT&T and Verizon, have deployed fiber-based systems that pass nearly 40 million households (and counting) across the country,[14] joining other broadband service providers (such as RCN, Knology and WideOpenWest) in the pursuit of video subscribers once served only by cable. Most recently, broadcast content has become available from "over the top" services such as Hulu, which are available to anyone with a wired or

[13] In just the past few months, disputes have included Northwest Broadcasting withholding signals from DIRECTV earlier this year, threatening access to the Super Bowl (http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20110201/BIZ/102010316); FOX withholding signals from Time Warner, threatening access to College bowl games (http://www.huffingtonpost.com/2010/01/01/fox-time-warner-settle-di_n_409187.html); and FOX withholding signals from Cablevision, causing viewers to miss the first two games of the World Series (http://insidetv.ew.com/2010/10/30/fox-and-cablevision-resolve-carriage-dispute-in-new-york-area/).

[14] *See* AT&T Inc., Form 10-K for period ending Dec. 31, 2010, at 2 (U-verse passes more than 27.3 million living units); Verizon Communications, Inc., Form 10-K for period ending Dec. 31, 2010, at 10 (FiOS TV is available to approximately 12.4 million homes).

wireless broadband Internet connection. Thus, where once consumers had only one choice for multichannel video offerings, they now can choose from among several options. And any provider that wants to attract consumers in this highly competitive environment must offer a robust slate of attractive programming, including "must have" broadcast programming.

By contrast, the broadcast side of the equation has remained largely the same as it was in 1992. The broadcast networks, relying on the historical market structure built around decades of government regulation, typically permit affiliation with no more than one station in each Designated Market Area ("DMA"), perpetuating a virtual monopoly on the supply side. Some stations enhance their leverage by using local marketing and similar agreements to exercise such power with respect to two or more of the so-called "Big Four" network affiliates in a particular market. By regulatory fiat, moreover, broadcasters enjoy territorial exclusivity that prevents an MVPD from providing viewers in one market the signals of a station in an adjacent market, regardless of whether the adjacent-market station wishes to be delivered in this manner and, in some cases, regardless of whether the program rights-holders wish to permit such delivery.[15] This exclusivity applies by government rule throughout an entire DMA even though broadcasters typically provide their over-the-air signals to viewers in only a small fraction of that area and, for satellite carriers, applies even where broadcasters have not obtained exclusive contractual rights. Broadcasters can even invoke regulation to prevent certain MVPDs from terminating carriage during so-called "sweeps" weeks when their audiences are measured.[16] And those broadcasters that subscribers are not interested in receiving may nonetheless consume valuable bandwidth and crowd out other programmers by asserting their must-carry rights. Not surprisingly, as the

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[15] *See* 47 C.F.R. § 76.92 *et seq.* (cable network non-duplication and syndicated exclusivity); 17 U.S.C. § 119(a)(2)(B) (permitting satellite provision of distant signals only to "unserved households" regardless of whether a local broadcaster has obtained copyright exclusivity).

[16] 47 U.S.C. § 534(b)(9); 47 C.F.R. § 76.1601, Note 1.

Commission has recognized, network-affiliated stations continue to possess "significant market power" in the markets in which they have the ability to negotiate retransmission consent agreements.[17]

As a result, when a broadcaster and an MVPD negotiate over the terms for carriage of the broadcaster's signal, they do so against a backdrop that is anything but a free market. The disparity in bargaining position created by outdated regulation – with the broadcaster having an effective monopoly while each MVPD faces intense competition – allows broadcasters to hold viewers throughout an entire DMA for ransom, threatening to deny signal carriage unless their price is met. The impact of resulting service disruptions falls disproportionately upon rural viewers who the broadcasters also fail to serve over-the-air. Moreover, the structural advantages enjoyed by broadcasters ensure that the revenue windfall resulting from broadcasters' exercise of market power will continue to grow. As one network executive candidly observed: "[C]ash payments for retrans are real and will grow. And there's no incremental cost to get them, meaning that you don't have to make any investment to increase that revenue."[18] Substantial reform of this dysfunctional and antiquated regime is long overdue.

II. THE COMMISSION SHOULD ELIMINATE ITS SUPPORT FOR BROADCASTER EXCLUSIVITY AS NECESSARY TO BETTER APPROXIMATE A FREE MARKET BACKDROP FOR RETRANSMISSION CONSENT NEGOTIATIONS.

Given the regulatory distortions that skew the current retransmission consent regime in broadcasters' favor and the Commission's view of its own limitations, the most effective actions

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17 *See General Motors Corp., Hughes Electronics Corp., and The News Corp. Ltd.*, 19 FCC Rcd. 473, ¶ 201 (2004) ("*News-Hughes Order*") ("We find that News Corp. currently possesses 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 *See* Comments of Bob Iger, President and Chief Executive Officer, The Walt Disney Co., at the Goldman Sachs Communacopia XIX Conference, at 9 (Sep. 21, 2010) (*transcript available at* http://corporate.disney.go.com/investors/presentations/GoldmanSachsCommunacopia-RAI-092110-FINAL.pdf).

the Commission could take to improve the negotiation process would be to reshape its rules to more nearly approximate a functioning market, with competition among both buyers *and* sellers. Such competition now exists on the buyer side, among MVPDs. However, broadcasters still enjoy protection from a system of regulations, not to mention a variety of business arrangements built upon such regulations, that maintain their ability to exclude potential competitors and allow them to leverage exclusivity to demand higher fees.[19]

As the Commission has recognized,[20] one key to achieving this objective is the elimination of territorial exclusivity currently enjoyed by broadcast stations. Opening up the market to competition from other broadcasters would impose discipline on the process which is sorely lacking at present. In this regard, the Commission has raised the question of whether eliminating its network non-duplication and syndicated exclusivity rules (the "exclusivity rules") would have a beneficial impact on retransmission consent negotiations.[21] Those rules permit a station with exclusive rights to broadcast network programming or syndicated programming within its local service area to enforce such exclusivity through Commission processes. DIRECTV believes that eliminating these rules would be a positive step toward a better-functioning market, as it would remove two of the regulatory barriers that allow one broadcast station to prevent other stations from competing for MVPD carriage in a given market.

However, such a change would not alone be sufficient, and in fact could be counterproductive. The Commission would need to take an additional step to achieve its remedial goal in a competitively neutral manner. As the Commission noted in the *Notice*, the

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19 *See, e.g.,* David D. Kirkpatrick, *Murdoch's First Step: Make the Sports Fan Pay*, N.Y. TIMES, Apr. 14, 2003, at C1 ("Mr. Murdoch has long described sports programming as his 'battering ram' to attack pay television industries around the world, using a portfolio of exclusive broadcasts to demand high programming fees . . . .").

20 *See Notice*, ¶¶ 42-44 (discussing network non-duplication and syndicated exclusivity rules).

21 *Id.*, ¶ 44.

exclusivity rules apply largely to cable operators. By contrast, they apply to satellite carriers only in extremely limited circumstances (essentially applicable to six nationally distributed superstations and to formerly significantly viewed stations).[22]

In the satellite context, territorial exclusivity is enforced through a different mechanism. By statute, broadcast signals from a network station outside the local market may only be provided to viewers who reside in so-called "unserved households" where an over-the-air signal of sufficient intensity is not predicted to be available from a local station of the same network.[23] Thus, for example, if there is an ABC-affiliated station in Market X, then a satellite carrier is not allowed to import the signal of an ABC-affiliated station in adjacent Market Y to viewers in Market X who are predicted to be served by the local affiliate. Unlike network non-duplication and syndicated exclusivity, the "unserved household" restriction prohibits importation of distant signals even where the local affiliate has not obtained or cannot assert exclusive contractual rights to particular programming.

Eliminating the exclusivity rules for cable operators would not affect this prohibition, and so would not afford satellite carriers any meaningful relief from the exclusivity advantages currently enjoyed by broadcasters. If those rules were eliminated, dominant cable operators would alone be allowed to import competing broadcast signals from adjacent markets, and would therefore alone possess more equal bargaining leverage when negotiating with broadcasters. Satellite operators with relatively small local market shares, by contrast, would still labor under existing exclusivity restrictions and so alone would remain vulnerable to broadcasters' exercise of market power. Accordingly, simply eliminating the exclusivity rules would place satellite MVPDs at a severe competitive disadvantage to cable systems.

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[22] *See id.*, ¶ 45 (discussing 47 U.S.C. § 339(b)(1)).

[23] *See* 17 U.S.C. § 119(a)(2).

Because the "unserved households" requirement is imposed by statute, it is not amenable to modification by the Commission. However, there are other steps that the Commission could take to ameliorate the effect of that requirement in the event of an impasse in retransmission consent negotiations. Specifically, the Commission should establish that it is a *per se* violation of the good faith negotiation requirement for a broadcaster to withhold retransmission consent from a satellite carrier without granting that carrier a temporary waiver permitting the importation of same-network distant signals throughout the DMA until a carriage agreement has been reached.[24] Such a policy would effectively achieve for satellite carriers the same relief that elimination of the exclusivity rules would achieve for cable operators, putting all MVPDs on an equal footing and allowing them to provide uninterrupted network service to their subscribers.

This new alternative should not be expected to replace retransmission of local signals. If, as broadcasters claim, the local content they provide is valuable to viewers within their respective DMAs, MVPDs will have a strong incentive to reach a carriage agreement with the local station. However, if the local station is not providing programming of interest to its community (as appears to be the case quite frequently),[25] or if it is demanding an above-market price for the right to retransmit its signal, a government-imposed and antiquated system of territorial rights would no longer deprive viewers of network programming. Elimination of the exclusivity rules would thus strengthen incentives for broadcasters to focus on localism, since that would be the distinguishing factor that would give a local station an advantage over a distant

[24] Under STELA, households covered by such a waiver would be deemed to be "unserved," and therefore eligible to receive distant signals. *See* 17 U.S.C. § 119(d)(10)(B).

[25] *See, e.g.*, Danilo Yanich, Local TV & Shared Services Agreements: Examining News Content in Honolulu (Feb. 10, 2011) (examining changes to provision of local news after implementation of shared services agreements in Honolulu) (*available at* http://mediacouncil.org/wp/resources/SharedServicesStudy.pdf).

one.[26] A move toward a free market without legacy government support for broadcasters could also lead to the repurposing of broadcasters' own spectrum for more valuable uses that would improve total consumer welfare. Accordingly, these pro-competitive reforms promote several Commission goals, even beyond a more efficacious retransmission consent process.

III. THE COMMISSION SHOULD ENHANCE ITS REQUIREMENTS FOR "GOOD FAITH" NEGOTIATION TO PRECLUDE ANTICOMPETITIVE PRACTICES USED BY BROADCASTERS THAT FURTHER SKEW NEGOTIATIONS.

Section 325 of the Communications Act requires both broadcasters and MVPDs to negotiate retransmission consent agreements in good faith.[27] As directed by Congress, the Commission has adopted rules to flesh out the contours of this good faith obligation.[28] But as the Commission has noted, "[i]n 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."[29] In this proceeding, the Commission has requested comment on a number of ways in which its good faith negotiation standards could be strengthened to better serve their intended purpose in light of the current environment for retransmission consent negotiations.[30]

DIRECTV supports this approach, and in particular submits that certain anticompetitive practices currently used by broadcasters should be defined as unreasonable *per se* and therefore a violation of the obligation to negotiate in good faith. By enhancing its good faith rules in this way, the Commission will clear away significant impediments to smooth functioning of the

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26 *See Notice*, ¶ 44 (asking whether the elimination of the exclusivity rules would have an effect on localism).

27 47 U.S.C. § 325(b)(3)(C).

28 47 C.F.R. § 76.65.

29 *Notice*, ¶ 20.

30 *See id.*, ¶¶ 20-30.

retransmission consent regime and thereby improve the likelihood of orderly negotiation and agreement without disruption to consumers.

A. Giving a Network the Right to Negotiate or Approve Retransmission Consent Agreements Should Be Deemed a *Per Se* Violation.

The *Notice* seeks comment on whether it should be a *per se* violation of the good faith negotiation requirement 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 a provision.[31] Recent evidence suggests that at least one national broadcast network includes in its affiliation contracts a unilateral right to approve or reject a station's retransmission consent agreement with an MVPD.[32] However, the issue extends beyond mere approval rights. NBC Universal, for example, has apparently reached an agreement under which it would negotiate blanket retransmission consent agreements on behalf of its affiliates.[33] Granting such rights to a national network goes to the very heart of the retransmission consent regime and the Commission's good faith rules, both of which require licensee control over the station's signal.

DIRECTV submits that network approval provisions[34] *already* violate the Commission's *per se* rules. Under the Commission's existing good faith negotiation requirement, apart from refusal to negotiate at all, the very first objective standard constituting a *per se* violation is the "[r]efusal by a Negotiating Entity to designate a representative with authority to make binding

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[31] *Id.*, ¶ 22.

[32] *See Ex Parte* Comments of FOX Broadcasting Company in Response to Time Warner Cable's Comments, CSR Nos. 8233-C and 8234-M at 18 (filed Dec. 17, 2009) ("FOX Mediacom Response") (claiming that "the approval provision has been a part of the standard Fox network-affiliation agreement for at least 14 years").

[33] *See* Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, BROADCASTING & CABLE, May 16, 2011 (*available at* http://www.broadcastingcable.com/article/468357-NBC_Affiliates_Iron_Out_Blanket_Retrans_Deal.php).

[34] For this purpose, we include contractual provisions that entitle the network to approve or reject a retransmission consent agreement in its entirety or any major term in such agreement.

representations on retransmission consent."[35] By definition, where a station must seek approval from a third party in order to ratify its agreement to the terms for retransmission consent, no representative of the station has authority to make such binding representations. By negating the licensee's ability to designate a representative of the station with the authority to make binding representations in retransmission consent negotiations, a network-affiliate agreement with a right-of-approval clause therefore violates the Commission's rules for good faith negotiations. To the extent this is unclear, the Commission should clarify that entering into or enforcing right-of-approval clauses constitutes a *per se* violation of good faith negotiation.

Granting a proxy to the network presents a scenario equally divorced from the retransmission consent construct Congress envisioned. As we understand the arrangement, an affiliated station would voluntarily divest its control over retransmission consent rights by vesting them in the network. Having amassed the individual exclusionary rights of its affiliates in each market, the network operator could then extend the significant market power that its owned and operated stations ("O&Os") enjoy in major media markets to smaller markets across the country, imposing greater price increases on a broader basis. To effectuate this scheme, the network would devise a "blanket" agreement covering multiple stations. To the extent such agreement makes an essentially uniform offer to all MVPDs in disparate markets covered by nearly 200 affiliated television stations, it is not a negotiation; it is an ultimatum. As such, it would constitute a *per se* violation of the Commission's good faith negotiation requirements.[36]

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[35] 47 C.F.R. § 76.65(b)(1)(ii).

[36] *Id.*, § 76.65(b)(1)(iv) (refusal by the Negotiating Entity to put forth more than a single, unilateral proposal). If instead the network were simply to engage in individualized negotiations with each MVPD, the purported efficiency of a "blanket" approach would be lost. Moreover, such an approach would be less efficient than the current system because an MVPD would still have to negotiate carriage rights for non-NBC stations owned by a station group owner. Rather than engage in such half-measures designed to work around the anachronistic affiliate system, it would be more efficient for networks to cut out the middle man and negotiate carriage of the network signal directly with

To the extent the network negotiated a "blanket" agreement with each MVPD covering only the affiliates in markets served by the MVPD, it would avoid the "take-it-or-leave-it" problem but raise another substantial issue: unauthorized transfer of control.

The Commission should also take this opportunity to recognize the level of influence and control such arrangements cede to the network at the expense of the local station. This is not a new issue. To the contrary, the requirement of local control is the necessary corollary to the pervasive regulatory structure that gives local broadcasters special treatment and frustrates the development of a true market for network programming. For over six decades, the Commission has regulated the relationship between television networks and their affiliated stations in order to ensure that licensees retain local control over station operations.[37] Although questions have previously been raised specifically related to the implications of network control over retransmission consent rights, the Commission has never resolved the issue.[38]

Section 310(d) of the Communications Act prohibits broadcast licensees from transferring control of their licenses without authorization from the Commission.[39] In examining control of a broadcast license, the Commission typically focuses on the ability to control

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MVPDs – bypassing broadcasters altogether. Such an arrangement, however, is preempted with respect to NBC by yet more government intervention. *See Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd. 4238, App. F (2011) (requiring Comcast to maintain NBC as a broadcast network for ten years).

[37] *See, e.g., Rules Governing Television Broadcast Stations*, 11 Fed. Reg. 33 (Jan. 1, 1946).

[38] For example, the Network Affiliated Stations Alliance ("NASA") called into question a wide array of network practices, including a network's use of its affiliates' retransmission consent rights. *See* Network Affiliated Stations Alliance, Petition for Inquiry Into Network Practices, at 33 n. 95 (filed Mar. 8, 2001) ("One example of network dominance is ABC's refusing its affiliates the right to give retransmission consent to cable and satellite companies within the affiliate's local market."). However, that issue was not ultimately resolved in that proceeding. *See Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling,* 23 FCC Rcd. 13610 (2008). *See also National Broadcasting Co.*, 44 F.C.C. 2218 (1972) (questioning whether NBC's interpretation of its contracts had led it to withhold approval of rebroadcast authority in violation of Section 3.658(b) of the Commission's rules).

[39] 47 U.S.C. § 310(d).

finances, personnel and programming, which it has described as "the major concerns of station operation and decision making."[40]

Both a right-of-approval clause in an affiliation agreement and a retransmission consent proxy arrangement grant the network control as measured by all three indicia. Such provisions essentially assign to the network the unrestricted right to grant or withhold retransmission consent. This is a right that Congress granted to stations alone.[41] Thus, the ability to control retransmission consent gives the network extraordinary control over a station's finances, which the network can then parlay into control of every other aspect of the station's operations. Broadcasters themselves are quick to emphasize the extent to which station finances are increasingly dependent upon retransmission consent revenue streams. Based on an analysis of public companies, SNL Kagan estimates that retransmission consent accounted for 52% of television station cash flow on average in 2010, and as much as 76% in some cases.[42] One station owner went so far as to claim that "[t]he future of free, over-the-air broadcast programming" depends upon securing sufficient retransmission consent compensation from MVPDs.[43]

A right-of-approval clause or proxy agreement places this critical revenue stream outside the control of the station, enabling the network to use this power to control the station and further

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40 *Stereo Broadcasters*, 87 F.C.C. 2d 87, ¶ 29 (1981); *see also, e.g., News International PLLC*, 97 F.C.C. 2d 349, ¶ 20 (1984) (describing finances, personnel, and programming as "the three most important factors in determining control"); 47 C.F.R. § 73.3555 notes 2(j) and (k) (specifying that time brokerage and joint sales agreements, respectively, must leave stations with ultimate control over "facilities including, specifically, control over station finances, personnel and programming").

41 *See* 47 U.S.C. § 325(b) (prohibiting retransmission without the station's consent).

42 *See* Georg Szalai, *Broadcasters to Boost Retrans Fees to $3.6 Billion by 2017*, THE HOLLYWOOD REPORTER (May 25, 2011) (discussing SNL Kagan report) (available at http://www.hollywoodreporter.com/news/broadcasters-boost-retrans-fees-36-192349).

43 *See* Facts About Fox's Negotiations with DISH (formerly available at http://getwhatipaidfor.com/home/story/view/182).

the network's own ends at the expense of its affiliates.[44] For example, the network could, in the words of FOX, "*completely ban* a station from granting retransmission consent to an MVPD"[45] for any reason or no reason. If this assertion were correct, a network could, for example, escalate a retransmission consent dispute between its O&O stations and an MVPD by refusing to allow its affiliates to grant retransmission consent to that MVPD. In this way, considerations wholly unrelated to a particular station could nonetheless result in a denial of approval and a station's resulting loss of revenue and expanded carriage. Alternatively, the network could condition its approval on a station's agreement to changes in its personnel (*e.g.*, hiring employees preferred by the network), programming (*e.g.*, purchasing more syndicated programming from an affiliated syndicator), or policy (*e.g.*, participating or not participating in a particular Commission proceeding).

Thus, such arrangements enable a network to override a licensee's judgment on an issue that both broadcasters and networks suggest is critical to station operations. Control over this vital aspect of station operations gives the network leverage to dictate fundamental station decisions. Where a network possesses this ability, the network – and not the station owner – exercises effective control over the broadcast license. Such an unauthorized transfer of control violates core principles of Commission licensing policy.

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44 When faced with the analogous concern that networks could pressure affiliates to raise their national spot advertising rates so as to make network ads more attractive to advertisers, and thus increase the network's profits at the expense of the affiliates, the Commission prohibited networks from representing their non-owned affiliates in the sale of non-network advertising time. *See Review of the Commission's Regulations Governing Broadcast Television Advertising*, 10 FCC Rcd. 11853, ¶ 17 (1995) ("The public interest may be harmed if networks possess sufficient bargaining power over their affiliates such that exercise of this bargaining power would result in reduction of affiliate advertising revenues significant enough to inhibit the affiliates' ability to present programming that best serves its community.").

45 FOX Mediacom Response at 7 (emphasis in original).

In addition, the Commission should find that such provisions give the network an attributable interest in local stations whose retransmission consent rights they control. The Commission's rules – which classify as "cognizable" interests as remote as a five percent equity investment – "seek to identify financial interests in licensees that convey the potential and incentive to exert significant influence over core licensee functions, and thus should be counted under the multiple ownership rules."[46] Right-of-approval clauses and proxy agreements convey far more than the "potential and incentive" to exert such influence over core licensee functions. They convey the unfettered ability to exert such influence. Accordingly, such clauses should be deemed to create a cognizable interest for the network operator in its affiliated stations. To the extent any major broadcast network includes right-of-approval clauses in its affiliation agreements, the cognizable interests created thereby would easily aggregate to a level well beyond that allowed under the national ownership cap.[47]

Thus, right-of-approval clauses and proxy agreements implicate a range of important Commission policies, any one of which would justify a decision to render such provisions unenforceable. For purposes of this proceeding, it is sufficient to find that abdication of control over retransmission consent precludes a station from meeting its obligation to negotiate in good faith, and that therefore granting a network the right of approval is unreasonable *per se*.

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[46] *2006 Quadrennial Regulatory Review*, 24 FCC Rcd. 5896, ¶ 17 (2009). It would be anomalous for the Commission to deem a five percent indirect equity interest to constitute a "cognizable interest" but *not* to deem veto control over retransmission consent agreements to constitute such an interest.

[47] *See* 47 C.F.R. § 73.3555(e)(1) (prohibiting aggregation of cognizable interests in television stations with an aggregate national audience reach exceeding 39%).

B. Granting Another Non-Commonly-Owned Station or Station Group the Right to Negotiate or Approve Retransmission Consent Agreements Should Be Deemed a *Per Se* Violation.

The *Notice* also seeks comment on a proposal that would effectively prohibit joint retransmission consent negotiations by stations that are not commonly owned.[48] DIRECTV supports this proposal as well. If (as the Commission has found) a party exercising control over retransmission consent of a single network-affiliated station has significant market power,[49] it should come as no surprise that allowing a single party to control valuable retransmission consent rights of two or more stations in a single market would give that party enhanced market power. This conclusion is not only consistent with economic theory,[50] but also borne out by empirical data. Specifically, as demonstrated by data submitted by Suddenlink, when retransmission consent rights for more than one "Big Four" affiliated station in a market are negotiated jointly, the stations are able to demand far higher fees.[51]

Some defend arrangements under which stations in a market share resources (whether those arrangements take the form of a management agreement, local marketing agreement, or some other agreement) on the grounds that they can capture economies of scale and other efficiencies that enable the stations to better fulfill their public interest function.[52] To the extent

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48 *Notice*, ¶ 23.

49 *News-Hughes Order*, ¶ 201.

50 *See* Comments of American Cable Association, MB Docket No. 10-71, at 12-14 and Appendix B (filed May 18, 2010) (discussing economic theory suggesting that joint negotiations result in higher retransmission consent fees).

51 *See Ex Parte* Comments of Suddenlink Communications, CSR-8233-C and CSR-8234-M, at 5 (filed Dec. 14, 2009) (internal analysis showing 21.6% higher retransmission consent fees in jointly negotiated markets).

52 *See, e.g.*, *2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, ¶ 164 (2003) (reviewing evidence that "suggests that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities and that in many cases, that is what they do").

these arrangements improve internal operations of the stations involved, DIRECTV does not find them objectionable. However, when two or more stations combine forces with respect to external matters (such as retransmission consent negotiations with MVPDs), any arguable increase in efficiency is more than offset by the enhancement of market power. Prohibiting the delegation of this outward-facing function would prevent the augmentation of market power without precluding stations from capturing internal efficiencies that might be available.

Moreover, as demonstrated above with respect to a network exercising "proxy" rights on behalf of its affiliates, a station that grants another party control over its retransmission consent rights has transferred a critical aspect of station ownership.[53] The Commission should find that such an agreement constitutes a transfer of control and/or results in an attributable interest in the station that cedes its negotiation rights.[54] More germane to the current proceeding, however, the Commission could also declare that such arrangements are not consistent with principles of good faith negotiation, and are therefore unenforceable.

Accordingly, DIRECTV supports the Commission's proposal to make it a *per se* violation for a station to grant another station or station group (including a network operator) the right to negotiate or the power to approve its retransmission consent agreements when the stations are not commonly owned.

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[53] Conversely, if the station retained the right to approve any agreement negotiated on its behalf, the arrangement would fail for the same reason that the network approval right fails – because the negotiating entity does not have sufficient authority to reach a binding deal.

[54] Many of the agreements already in place would create attributable interests under current rules, but have been grandfathered. *See, e.g., Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, 19 FCC Rcd. 15238, ¶ 21 (2004) (explaining status of grandfathered LMAs entered into before November 5, 1996).

C. Burdening or Denying an MVPD's Right to Carry Out-of-Market Stations as a Condition of Retransmission Consent Should Be Deemed a *Per Se* Violation.

The *Notice* seeks comment on whether a broadcaster's request or requirement, as a condition of retransmission consent, that an MVPD not carry out-of-market "significantly viewed" stations violates the duty to negotiate in good faith.[55] A significantly viewed station is a television broadcast station that the Commission has determined to have sufficient over-the-air (*i.e.*, non-MVPD) viewing outside of its assigned market to be considered local in a portion of an adjacent market for certain purposes.[56] Congress and the Commission have recognized that a significantly viewed station is "local" to the community in which it is significantly viewed, as the criteria for significantly viewed qualification relate to the ability to provide locally-oriented programming.[57] Essentially, a demand that an MVPD not carry such stations is tantamount to cutting out a potential competitor that is legally entitled to be viewed in the local market and would otherwise augment local fare available to its viewers. DIRECTV supports a finding that such conduct is not consistent with good faith negotiation.

However, DIRECTV submits that the *Notice* frames the issue a bit too narrowly. DIRECTV has encountered stations that have attempted (1) to require DIRECTV not to provide distant network signals to qualifying (*i.e.*, "unserved") households in the station's market as a condition on retransmission consent, or (2) to require DIRECTV to grant the local station some other tit-for-tat right should it provide significantly viewed service.[58] DIRECTV has also

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[55] *Notice*, ¶ 27.

[56] *See* 17 U.S.C. § 122(a)(2) (satellite statutory copyright license for local signals); 47 C.F.R. §§ 76.5(i) (defining significantly viewed station characteristics), 76.122(j)-(k) (exemption of SV stations from satellite network non-duplication and syndicated exclusivity rules).

[57] *See Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, 25 FCC Rcd. 16383, ¶ 14 (2010) (citing Senate Report).

[58] For example, Station X might insist that if an MVPD retransmits significantly viewed signals from any other station, it must also retransmit Station X in any area where it is significantly viewed.

recently become aware that the latest version of the FOX network affiliation agreement includes a provision that prohibits the affiliated station from granting retransmission consent for out-of-market carriage, effectively preventing carriage by an MVPD in areas where the station is significantly viewed. Any attempt to prevent a viewer from receiving out-of-market signals to which she is legally entitled or to impose onerous conditions upon such service is anti-consumer as well as anticompetitive. Accordingly, the Commission should clarify that any attempt to condition retransmission consent on "blocking" or burdening legal out-of-market signals or to prevent such out-of-market carriage outright is a *per se* violation of its rules.

D. Broadcaster Deauthorization of Carriage During "Sweeps" or Prior to Marquee Events Should Be Deemed a *Per Se* Violation.

Section 614(b)(9) of the Communications Act prohibits a cable operator from deleting or repositioning a local station during a period in which major television ratings services measure the size of audiences of local television stations.[59] In implementing this rule, the Commission has specified that the relevant periods during which this prohibition applies "are the four national four-week ratings periods – generally including February, May, July and November – commonly known as audience sweeps."[60] In the *Notice*, the Commission seeks comment on its tentative conclusion that this prohibition applies only in one direction – *i.e.*, that cable operators may not choose to discontinue carriage of a broadcast station during sweeps, but that a broadcast station may require a cable operator to discontinue carriage during sweeps if it believes that would be to its advantage.[61]

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[59] 47 U.S.C. § 534(b)(9).

[60] 47 C.F.R. § 76.1601, Note 1.

[61] *See Notice*, ¶ 39.

Nothing in Section 614 itself compels the Commission's reading. Rather, the language simply states that "no deletion or repositioning of a local commercial television station shall occur" during a sweeps period, not "no cable operator shall delete or reposition a local commercial television station." The most natural reading of this language is that its limitation applies to broadcasters and cable operators alike – a view endorsed by prior Commission decisions.[62]

In any event, given the developments in the market described above, it would be counterintuitive and counterproductive to give broadcasters yet another advantage. As explained by one broadcast executive, "When you are sitting across the table from an MSO and you said, by the way, your local team will not be on the air for your viewers this Sunday, it's a lot of power for us."[63] Even if the Commission were to conclude that Section 614 does not constrain cable operators and broadcasters equally, nothing would prevent the Commission from finding that forcing deletion during sweeps – when broadcasters tend to put on their most attractive programming – constitutes a bad faith negotiating tactic. Here again, DIRECTV submits that the Commission should go farther. Specifically, the Commission should find it inconsistent with good faith for a broadcaster to withhold retransmission consent immediately prior to other marquee events that have been used as clubs by broadcasters in past negotiations, such as the World Series, the NCAA Division I football Bowl Championship Series, the NFL Playoffs, and

62 *See Northland Cable TV, Inc.*, 23 FCC Rcd. 7865, ¶ 8 (2008) (finding that a cable operator "would have been in violation for removing programming during a sweeps period, *even if* the retransmission consent agreement had lapsed *during* that period") (emphasis in original) (citing *Time Warner Cable*, 21 FCC Rcd. 9016, ¶ 21 (2006)).

63 Michael Malone, *Moonves: Give Us Our Retrans Cut*, BROADCASTING & CABLE, Mar. 1, 2010 (*available at* http://www.broadcastingcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php).

the Oscars.[64] Removing the temptation to threaten withholding of such particularly attractive programming should reduce the level of contentiousness in retransmission consent negotiations and foster a less confrontational and counterproductive atmosphere for reaching agreement.

The Commission also tentatively concludes that the sweeps rule does not apply to non-cable MVPDs, such as DBS operators, and asks whether the rule should be extended in the interest of regulatory parity.[65] The *Notice* mentions Section 335 of the Communications Act as an arguable source of authority for such action.[66] That statute, enacted in 1992, specifically directed the Commission to impose on DBS operators certain carriage obligations related to political speech and noncommercial, educational, and informational programming, while also more generally authorizing the Commission to consider imposing other public interest requirements for providing video programming.[67] Although many parties argued in the ensuing rulemaking that DBS should be made subject to the same types of carriage regulations that applied to cable, the Commission rejected that argument, finding that "DBS and cable are separate and distinct services, warranting separate and distinct obligations."[68] Moreover, the Commission has tentatively concluded that Section 335 would not appear to grant authority to

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64 *See, e.g., Cablevision, Fox Resolve Fee Dispute for World Series, NFL Games*, BLOOMBERG BUSINESSWEEK (Oct. 31, 2010) (withholding of retransmission consent for Fox O&O in New York deprived three million Cablevision subscribers access to World Series and NFL games) (*available at* http://www.businessweek.com/news/2010-10-31/cablevision-fox-resolve-fee-dispute-for-world-series-nfl-games.html).

65 *Notice*, ¶ 41.

66 *Id.*, ¶ 40. The *Notice* also mentions Sections 154(i), 303(r), and 303(v) of the Communications Act as potential sources of authority to extend the sweeps rules to non-cable MVPDs. *Id.*, ¶ 41. Such assertions of ancillary authority have not fared well in recent court challenges. *See, e.g., Comcast Corp. v. FCC,* 600 F.3d 642 (D.C. Cir. 2010).

67 *See* 47 U.S.C. § 335. The Commission implemented this mandate, as directed, over a decade ago. *See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd. 23254 (1998) ("*DBS Public Interest Order*").

68 *DBS Public Interest Order*, ¶ 59.

extend the sweeps rule to broadcasters.[69] It would be ironic indeed were the Commission to compound the problem discussed above by extending a right for broadcasters to use against another set of MVPDs without making that right reciprocal.

E. Refusing to Honor a Request for a Stand-Alone Retransmission Consent Offer Should Be Deemed a *Per Se* Violation.

One other practice (not specifically identified in the *Notice)*[70] that should be deemed to be a *per se* violation of the duty to negotiate in good faith is the forced tying of affiliated content as a condition of gaining access to a station's signal. This most often arises in negotiations with the large station groups affiliated with national networks, which use their "must have" broadcast programming as a hammer to gain carriage for new and/or unpopular cable networks affiliated with the corporate parent. However, this same strategy has been used by large station groups that threaten to withhold consent for a station in one market in order to force carriage of a local non-broadcast station in a market where DIRECTV does not have available capacity (and would therefore have to drop a broadcast station to make room, contrary to SHVIA's "carry one, carry all" requirement). Refusing to even discuss carriage of the station's signal separate from carriage of other tied programming introduces an additional element of cost and complexity to the negotiation, and thereby increases the risk that the parties will reach an impasse. Such an outcome does not serve the public interest.

To be clear, DIRECTV does not contend that the Commission should prohibit offers that bundle retransmission consent with carriage of additional content. We recognize that the Commission has previously concluded that making proposals for carriage conditioned on carriage of other programming (including affiliated cable programming or another broadcast

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[69] *Notice*, ¶ 40.

[70] The *Notice* also requests that commenters identify any additional practices that should be deemed to constitute *per se* violations of the duty to negotiate in good faith. *Id.*, ¶ 28.

station) is presumptively consistent with the good faith negotiation requirement.[71] Indeed, it is DIRECTV's experience that in many cases, an MVPD may find the terms and conditions of such a bundled offering attractive. However, if an MVPD requests an offer for retransmission consent on a stand-alone basis, there is no reason why a station should be allowed to refuse to honor that request. Accordingly, the Commission should clarify that it is unreasonable for a station to refuse to make an unbundled offer if one is requested.

IV. EARLY TERMINATION FEES SERVE AN IMPORTANT FUNCTION AND SHOULD NOT BE SUBJECT TO COMMISSION REGULATION.

The Commission has requested information on early termination fees ("ETFs"), including whether they raise any problems related to retransmission consent that the Commission should address.[72] As discussed below, DIRECTV's ETF is a fully disclosed and integral part of its consumer offers that reduces up-front costs for consumers and is critical to its ability to compete with other MVPDs. There is no reason for the Commission to regulate this pro-consumer aspect of MVPD service.

Delivering DIRECTV's all-digital satellite service to homes throughout the country requires high-tech equipment in every phase, from the uplink centers that process programming for transmission, to the satellites that receive the uplinked signal and beam it down to part or all of the country, to the receive antennas and set-top boxes deployed in the consumer's home. Today, the in-home aspect of this delivery system is more complex than ever, with options ranging from one or more standard set-top boxes to gateways that serve the entire home and include digital video recorder capabilities and Internet connections. Because of DIRECTV's one-way service architecture, this equipment has advanced storage and processing capabilities

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[71] *See Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd. 5445, ¶ 56 (2000).

[72] *Notice*, ¶ 30.

that act like a headend in the home, supporting interactive offerings that are standard among its competitors with two-way communication platforms. In addition, DIRECTV uses professional installers to mount the receiving antenna at the subscriber's residence, properly orient it to achieve optimal signal reception from DIRECTV's satellites operating at multiple locations, wire the home to deliver the signal from the antenna, hook up the set-top boxes or whole-home network, and integrate the consumer's broadband service.

The labor and equipment costs involved in setting up a new subscriber with these advanced services are significant – and significantly more than other MVPDs face. When DBS service first launched, new subscribers were required to pay hundreds of dollars to help cover such costs.[73] As the Commission recognized, this upfront charge made DBS a less effective competitor against cable,[74] which imposed no similar expense and made this disparity a focus of its marketing against DBS. In order to eliminate this competitive disadvantage and maximize consumers' ability to choose among MVPDs, DIRECTV decided to discount the price of equipment and installation significantly.

Accordingly, for over a decade, DIRECTV has given consumers a range of options from which to choose. Among other options, consumers can choose to pay full retail price for equipment and installation with no agreement to maintain service for any period of time, or they can opt for free or reduced-cost equipment and installation if they agree to maintain service for

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73 *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Tenth Annual Report,19 FCC Rcd. 1606, ¶ 68 (2004) (noting that in 1994, DIRECTV charged $699 for equipment and $150-$200 for professional installation).

74 *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd. 1034, ¶ 59 (1998) ("The 'upfront costs' to subscribers that DBS operators may charge are an additional disincentive for some consumers considering DBS service."); *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284, ¶ 63 (1998) ("Consumers continue to report that the biggest drawbacks of DBS services are the difficulties associated with the provision of local broadcast signal, and the upfront cost of equipment and installation.").

24 months or pay a pro-rated ETF. When presented with this choice, consumers have forcefully indicated their preference by overwhelmingly electing the lower or no upfront cost alternative. Clearly, DIRECTV's customers believe our offers represent a significant value. The elimination or sharp reduction of upfront costs has been an important factor enabling total DBS subscribership to increase from 5.1 million to 33.6 million since the Commission identified upfront costs as an impediment to consumer adoption in 1998.

Moreover, DIRECTV's ETF is designed to be consumer friendly. The amount of the ETF has always been lower than the investment DIRECTV makes upfront in a new customer. Moreover, the monthly pro-rated amount of the ETF has always been lower than the monthly amount the subscriber will pay if she continues to purchase programming for the term of the agreement.

The terms and conditions of this ETF are fully disclosed numerous times: in advertisements and marketing materials, during the sales call or online ordering process, in a sales confirmation letter or e-mail, and in the Equipment Lease Agreement. The fee is pro-rated, so that it decreases proportionately as the subscriber fulfills more of her commitment and it is entirely extinguished at the end of the commitment period. After that period, unless she has accepted an offer for upgraded or new equipment, a subscriber can continue service on a month-to-month basis and cancel at any time without paying an ETF. And, on average, most subscribers do continue DIRECTV service well after the commitment period has run.

This contractual arrangement is mutually beneficial. The subscriber receives equipment and installation without significant upfront costs and DIRECTV receives a commitment that the subscriber will continue to purchase programming for a certain period or pay an ETF. And both sides benefit to the extent DIRECTV is a more robust alternative to competing MVPD offerings.

Any effort to regulate ETFs would have a negative impact on DIRECTV's competitive pricing models, shifting more costs to consumers and harming competition. Accordingly, there is no reason for the Commission to intercede in this arrangement, even assuming it had any legal authority to do so.

Some have suggested that MVPDs should be required to waive ETFs for subscribers who wish to terminate service in the event that a negotiating impasse leads to a usually short-term loss of a broadcaster's signal.[75] There is no justification for such a regulatory intervention. DIRECTV provides hundreds of channels of programming, along with video on demand and pay-per-view content. Short-term loss of one broadcast station among all of this programming is no basis for imposing a waiver of the ETF.[76] By contrast, limiting the enforceability of the ETF would undermine the mutually beneficial contractual arrangement between DIRECTV and its subscribers, and could jeopardize DIRECTV's ability to continue making pro-competitive offers available to consumers. Moreover, imposing an ETF waiver would give broadcasters yet another point of leverage to use in retransmission consent negotiations. There is no reason for the Commission to interfere in a contractual relationship that serves an important function based simply upon a short-term loss of one channel among hundreds.

V. CONSUMER NOTICE REQUIREMENTS WOULD LIKELY BE COUNTERPRODUCTIVE.

As explained in the *Notice*, current requirements for giving notice of an impending channel loss apply to cable operators only, and are not violated by failure to provide notice

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75 *See, e.g.*, John Eggerton, *Missouri AG Says Dish Could Be In Violation of Agreement*, MULTICHANNEL NEWS (Oct. 21, 2010) (discussing call to waive early cancellation fee in light of programming dispute between DISH Network and Fox) (*available at* http://www.multichannel.com/article/458835-Missouri_AG_Says_Dish_Could_Be_In_Violation_Of_Agreement.php).

76 DIRECTV also explicitly reserves the right to modify the programming included in its packages. *See* Customer Agreement, Section 1(d) (available at http://www.directv.com/DTVAPP/content/legal/customer_agreement).

unless service is actually disrupted.[77] The Commission has requested comment on whether it should revise its rules to (1) require that notice of potential loss of a broadcaster's signal be given to consumers once a retransmission consent agreement is within thirty days of expiration, and (2) extend this requirement to all MVPDs (rather than just cable).[78]

DIRECTV recognizes that a more comprehensive notice requirement could have benefits, such as driving unwilling broadcasters to the negotiating table sooner and thereby encouraging resolution well in advance of contract expiration. We are concerned, however, that notice will cause confusion among consumers, and that the steady drumbeat of warnings will ultimately lead consumers to ignore them. Approximately 90% of DIRECTV's retransmission consent agreements with major station groups are concluded within the thirty days before expiration of the prior deal. Notice could cause confusion, as viewers would have no way to gauge the likelihood that a particular negotiation would result in impasse rather than agreement at the end of 30 days. Moreover, like the boy who cried wolf, multiple false alarms from broadcasters and MVPDs would steadily desensitize viewers, to the point where they would likely discount notices or ignore them entirely. In addition, once a dispute becomes public, it tends to escalate in a way that hardens positions and makes a rational arrangement to avoid an impasse less likely. Accordingly, we believe that any benefits from compulsory notice would likely be outweighed by the disadvantages.

CONCLUSION

Reform of the retransmission consent regime is long overdue. It is part of an anachronistic system of rules that distort market forces by bestowing special benefits on broadcasters that cannot be justified under current conditions. The regime has grown

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77 *Notice*, ¶ 35.

78 *Id.*, ¶ 37.

increasingly dysfunctional, resulting in confusion and loss of service for consumers. The Commission has ample authority to restore some balance by moderating broadcasters' government-supported exclusive territorial rights and enhancing its requirements for good faith negotiation. DIRECTV urges the Commission to implement such changes as expeditiously as possible in order to avoid further disruption to consumers.

Respectfully submitted,

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