Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF TIME WARNER CABLE INC.

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SUMMARY

Time Warner Cable Inc. ("TWC") applauds the Commission for "recognizing the consumer harm caused by retransmission consent negotiation impasses and near impasses," and for opening a proceeding to determine how "to modify the rules governing retransmission consent" to address these harms.[1] TWC agrees with the Commission and many parties that the optimal way to determine the terms and conditions under which multichannel video programming distributors ("MVPDs") carry broadcast signals would be to rely on marketplace solutions unfettered by regulations that favor one side or the other. Unfortunately, the retransmission consent process is decidedly *not* such a market-based regime. Rather, retransmission consent is an artificial regulatory construct, and it is heavily tilted in broadcasters' favor. In addition, many aspects of the regulatory regime and changes in the MVPD marketplace now operate to further *prevent* market-based outcomes. Any review of the retransmission consent rules must be guided by this reality.

In TWC's view, the preferred solution would be for Congress to enact legislation that deregulates the relationship between MVPDs and broadcast stations—by eliminating not only the artificial retransmission consent construct but also must-carry obligations, tier-placement and buy-through requirements, and network non-duplication and syndicated exclusivity provisions, among various other anachronistic and counterproductive regulatory measures. Accordingly, TWC will support comprehensive legislative initiatives that would replace the retransmission consent regime with a genuinely market-based process.

Unless and until such legislation is enacted, however, the Commission should use all available tools to mitigate the harm to consumers caused by existing regulatory distortions and

broadcasters' exploitation of them. The Commission should eliminate rules that now do more harm than good, ban anticompetitive practices that facilitate broadcasters' demands for unreasonable retransmission consent fees and their ability to employ blackout threats, and adopt new safeguards to advance the public interest goals Congress set out to achieve.

In particular, TWC supports repeal of the outdated and anticompetitive territorial exclusivity rules, clarification and modification of tier-placement and buy-through obligations, and elimination of other regulations originally designed to provide support to broadcast stations in a starkly different era. To halt the rising tide of anticompetitive conduct by broadcasters, the Commission should amend its good faith rules to bar network-owned stations from bundling retransmission consent with the carriage of affiliated cable networks and to prevent networks from hijacking stations' consent rights. The Commission also should prohibit competing local stations from engaging in collusive negotiations with an MVPD, multicasting multiple network affiliate stations over a common signal, and otherwise violating the letter and spirit of the Commission's broadcast ownership rules. Moreover, notwithstanding the NPRM's misplaced skepticism regarding the Commission's authority to establish the terms under which MVPDs would carry broadcast stations, the Commission should explore a range of additional remedies including rate setting, dispute resolution, and interim carriage. Finally, the Commission should ensure that any notice obligations it imposes are flexible and take account of the unique circumstances of retransmission consent negotiations in today's landscape.

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[1] *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 16 (2011) ("NPRM").

TABLE OF CONTENTS

Page

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In the Matter of	)	
	)	
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Related to Retransmission Consent	)	

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Time Warner Cable Inc. ("TWC") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") proposing changes to its retransmission consent rules.

INTRODUCTION

The NPRM appropriately recognizes that the existing retransmission consent regime is broken. Under the current rules, broadcasters have sought ever-escalating increases in retransmission consent fees, and "actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes present a growing inconvenience and source of confusion to consumers."[2] The inability of the current rules to protect consumers should come as no surprise; as the NPRM points out, the Commission adopted those rules—many of which deliberately skew negotiations in broadcasters' favor—when "circumstances were different from the conditions industry and consumers face today" and when "programming disruptions due to retransmission consent disputes were rare."[3] As reflected in TWC's lead role

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2 NPRM ¶ 20.

3 *Id.*

in spearheading the Petition for Rulemaking that gave rise to this proceeding,[4] TWC fully supports the goals of the Commission's reform effort, including in particular "minimiz[ing] video programming service disruptions to consumers."[5]

Although the NPRM correctly identifies the key problems afflicting today's retransmission consent regime, it fails to diagnose the root cause. Namely, retransmission consent is an artificial regulatory construct,[6] not a market-based mechanism, and that construct requires adjustment to fit today's conditions. In the initial years following enactment of the 1992 Cable Act, retransmission consent negotiations went relatively smoothly, and impasses were very rare, because broadcasters and multichannel video programming distributors ("MVPDs") found ways to devise carriage arrangements, including through cable operators' support for launching broadcast networks' affiliated cable channels. Today, the MVPD marketplace is robustly competitive, however, and the ability to create ever-increasing numbers of linear cable channels is constrained by a number of market factors beyond the control of broadcasters or MVPDs. As a result, broadcasters are wielding the special protections they enjoy as a weapon in retransmission consent negotiations, secure in the knowledge that their multiple distribution options enable them to make credible threats to withhold network programming if their escalating demands for cash payments are not met. Several other factors, including the bundling of retransmission consent with cable network carriage, the Big Four networks' attempts to create

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4 *Amendment of the Commission's Rules Related to Retransmission Consent*, Petition for Rulemaking of Time Warner Cable *et al.*, MB Docket No. 10-71 (filed Mar. 9, 2010) ("Petition").

5 NPRM ¶ 1.

6 As explained in the Petition, before the enactment of the 1992 Cable Act, Supreme Court precedent held that cable operators were not required to obtain a station's affirmative consent before retransmitting its signal to subscribers. *See* Petition at 8 (citing *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-01 (1968)).

a shadow copyright regime by extracting an increasingly large "cut" of affiliated stations' retransmission consent fees, collusion among stations that are ostensibly independent competitors, and other anticompetitive practices, have exacerbated the breakdowns in the retransmission consent process.

TWC believes that a deregulatory approach to the carriage of broadcast signals on MVPD systems represents the preferred course, just as TWC favors market-based solutions more generally. The Commission can take an important first step towards eliminating regulatory barriers to efficient negotiations by diminishing the distorting effects of its own rules. As explained in more detail below, the Commission should eliminate its network non-duplication and syndicated exclusivity rules, clarify and modify the tier-placement requirements applicable to stations electing retransmission consent, and amend its good faith rules to prevent anticompetitive conduct by networks and stations alike. But legislation will be required to establish a genuine deregulatory solution to the relations between broadcasters and MVPDs, because the existing regime is entirely a product of government-created rules that, in the context of a now robustly competitive MVPD marketplace, lead to distortions and inefficiencies.

Most fundamentally, in establishing retransmission consent, Congress created an artificial new property right in local broadcast signals that is distinct from copyright and simply would not exist in a market-based regime. Similarly, Congress conferred must-carry rights and tier-placement privileges on broadcast stations that further prevent market-based outcomes, while the Commission's territorial exclusivity rules further enhance the power of Big Four affiliates to engage in brinkmanship in their dealings with MVPDs. This complex web of regulatory mandates makes it impossible for MVPDs—and particularly cable operators—to negotiate "market-based" retransmission consent agreements with broadcasters.

Accordingly, although TWC believes that the best solution is for Congress to undo a regulatory regime that no longer serves Congress's purposes in creating it, in the near term the Commission should adjust its regulatory framework to align it to the greatest extent possible with the animating purposes underlying the 1992 Cable Act. In particular, Congress sought to ensure continuous access to broadcast signals and to allow local broadcast stations to obtain reasonable compensation for their signals (as distinct from the network programming they transmit, as that programming is already covered by a compulsory copyright license). Conversely, Congress sought to ensure that consumers would not be denied access to broadcast programming on cable systems and that basic cable rates would not be adversely affected by retransmission consent fees. Yet those are precisely the effects of the Commission's rules, now that broadcasters can play one MVPD against another and employ blackout threats as a negotiating tactic.

While Congress anticipated—based on the very different industry dynamics that prevailed in 1992—that negotiations between broadcast stations and MVPDs would yield reasonable results, it also created a regulatory failsafe by conferring broad regulatory oversight on the Commission in Section 325 of the Act. In particular, Section 325(b)(3)(A) directs the Commission to "govern the exercise by television broadcast stations of the right to grant retransmission consent," and it establishes the prevention of basic rate increases as a guiding principle for such governance.[7] Now that the negotiating process has turned into an opportunity for broadcasters to abuse their market power and exploit their special regulatory protections, the Commission should step in to protect consumers by exploring new ways to establish reasonable retransmission consent fees and resolve disputes. The NPRM expresses unwarranted skepticism

[7] 47 U.S.C. § 325(b)(3)(A).

regarding the Commission's authority to adopt such reforms.[8] In fact, Section 325 and complementary authority broadly empower the Commission to take action as necessary to ensure a fair retransmission consent process that serves the interests of consumers.

DISCUSSION

I. RETRANSMISSION CONSENT IS AN ARTIFICIAL REGULATORY REGIME THAT IS HARMING CONSUMERS AND REQUIRES A FUNDAMENTAL REEXAMINATION OF THE COMMISSION'S RULES

A. The Existing Retransmission Consent Regime Is an Artificial Regulatory Construct, Not a Market.

As the Petition for Rulemaking and TWC's subsequent comments explain,[9] retransmission consent has *never* involved "free market" negotiations for carriage. Since its creation in 1992, retransmission consent has existed as part of a complicated system of government-created rights designed to promote policy goals regarding the perceived special importance of preserving free over-the-air television.[10] As noted above, it is not only the artificial retransmission consent construct, but also related requirements pertaining to must-carry, territorial exclusivity protections for broadcasters, mandatory placement of broadcasters on the basic tier, and various other regulations that preclude actual market-based negotiations between broadcasters and MVPDs.

In light of these outdated regulatory constructs, the Commission should, as an initial matter, reject broadcasters' defense of the status quo and their resultant appeals for inaction.

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8 NPRM ¶ 18.

9 *See* Petition at 6-7; Comments of Time Warner Cable Inc. at 4, MB Docket No. 10-71 (filed May 18, 2010); Reply Comments of Time Warner Cable Inc. at 7-9, MB Docket No. 10-71 (filed June 3, 2010).

10 *See* S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1168 ("Senate Report") (stating that retransmission consent was initially designed to "advance[] the

These broadcasters not only ignore the web of regulation that envelops retransmission consent negotiations, but also incongruously claim that today's retransmission consent agreements are the product of marketplace negotiations and should be *shielded* from government intervention. They overlook the critical point that the government intervened long ago when it created retransmission consent and the related broadcaster protections that create a distinctly uneven playing field. Thus, retransmission consent is the *product* of government intervention, not something to be shielded from such intervention. And most significantly, broadcasters and networks ignore the significant harm that their increasing demands for ever-higher retransmission consent fees and brinkmanship tactics are causing consumers in the form of higher subscription rates and threatened and actual loss of network programming.

Moreover, it should be abundantly clear from today's "increasingly contentious retransmission consent disputes" that leaving the rules unchanged would not foster pro-consumer and market-based outcomes in retransmission consent negotiations.[11] Broadcast stations and networks in effect have transformed the right to grant retransmission consent of signals—a right that would not exist but for congressional and Commission intervention—into the equivalent of a shadow copyright payment system, explicitly seeking compensation for the copyrighted material contained in broadcast signals, despite the fact that MVPDs separately pay for a compulsory copyright license that Congress determined would provide fair compensation to copyright holders.[12] As a result, the American Consumer Institute recently concluded: "[I]t is clear that

public interest" served by broadcasters by correcting for "a distortion in the video marketplace which threatens the future of over-the-air broadcasting").

11 NPRM ¶ 20.

12 Notably, in the open proceeding before the Copyright Office on the possible repeal of the compulsory copyright license for broadcast content, many parties are seeking to obtain uncapped copyright payments, while completely omitting any mention of the networks' efforts to transform retransmission consent into a shadow copyright regime. *See, e.g.*,

distributors are at a disadvantage when it comes to negotiating with broadcasters," which "means that consumers are the big losers of retransmission consent—both by potential blackouts and paying higher prices for years to come."[13] Failing to adjust the existing regulations to account for significant industry changes and to prevent ongoing harm to consumers would not constitute deference to market forces; to the contrary, such inaction would be tantamount to an abdication of responsibility.

B. Several Features of the Regulatory Regime Conspire To Prevent, Rather Than Facilitate, Market-Based Outcomes.

Although the fundamental impediment to re-establishing a deregulatory approach to the relations between MVPDs and broadcasters is the retransmission consent regime itself, other special privileges bestowed upon broadcasters give them significant bargaining advantages and further prevent competitive marketplace considerations from playing a meaningful role in the carriage of broadcast signals. Chief among these market-distorting privileges are the preferential placement of broadcast stations on the basic tier and the requirement that cable subscribers pay for that tier as a condition of purchasing any other cable programming service. Moreover, as the NPRM acknowledges, the Commission's current network non-duplication and syndicated exclusivity rules significantly limit cable operators' ability to bargain freely with multiple

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Program Suppliers' Comments at 8-9, *Section 302 Report to Congress*, Copyright Office Docket No. RM 2010-10 (filed Apr. 25, 2011) (arguing, without reference to the retransmission consent regime, that the Copyright Office should ask Congress to repeal statutory caps on royalty fees because "[a]ny statutorily prescribed licensing scheme necessarily limits copyright owners' freedom to exercise their exclusive rights under the Copyright Act"). These demands are inherently misleading, given their omission of the substantial compensation programming suppliers are extracting (improperly) through the retransmission consent process.

13 Steve Pociask, American Consumer Institute, Center for Citizen Research, *Retransmission Consent: The Evidence of Market Power*, May 2010, at 5, *available at* http://www.theamericanconsumer.org/wp-content/uploads/2011/05/retransmission.pdf.

suppliers.[14] These broadcaster protections are premised on assumptions about "the demise of local television" in light of a predicted absence of "effective competition to local cable systems[15]—assumptions that, as the NPRM notes, have been turned upside down in today's video marketplace.[16] Indeed, a recent essay by former FCC Chief Economist Thomas W. Hazlett characterizes these "special rules" not only as outdated and unnecessary, but as an impediment to far more efficient spectrum uses.[17]

Because of these and other regulatory protections,[18] broadcast stations now have the means to exploit the existing regime for their own pecuniary benefit, and to the detriment of MVPDs and their subscribers. In addition, the NPRM correctly identifies interference by the Big

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14 NPRM ¶ 42 ("The [network non-duplication] rules . . . prohibit the cable system from carrying the network programming as broadcast by any other station within the 'geographic zone' to which the contractual rights and rules apply. . . . 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.").

15 Senate Report at 1187 (linking the potential "demise of local television" to "the growth of the cable industry, and the fact that no effective competition to local cable systems ha[d] developed in the interim"); *see also id.* at 1141 (stating that in 1992, "[a] cable system serving a local community, with rare exceptions, enjoys a monopoly").

16 *See* NPRM ¶ 2 ("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."). *See also* Thomas W. Hazlett, *If a TV Station Broadcasts in the Forest …: An Essay on 21st Century Video Distribution*, at 14-15 (2011) ("*Hazlett Essay*") (explaining that the assumptions underlying the existing retransmission consent regulatory framework have "dissolved," noting that "[n]o longer is the TV broadcaster the default TV distributor" but that broadcast stations are simply "broker[s] for retransmission via the modes of transport that now serve as the platforms of choice").

17 *Hazlett Essay* at 16-19.

18 Broadcasters also benefit from various other legal entitlements, including free access to immensely valuable beachfront spectrum, 47 U.S.C. §§ 307, 309, must-carry rights on cable systems, *id.* § 534(a), and channel placement preferences, *id.* § 534(b)(6); 47 C.F.R. § 76.57, among others. *See also*, *e.g.*, 47 C.F.R. § 76.62 (providing signal quality protection for broadcast stations).

Four networks with the retransmission consent negotiations of independent affiliates as one of several roadblocks preventing efficient negotiations.[19] Collusion among competing stations also is growing alarmingly widespread in the industry, and it further impedes efficient outcomes. Due to the increased competition in the MVPD marketplace, these developments have become key attributes of the regulatory regime, which, working together, make market-based outcomes in retransmission consent negotiations an impossibility.

1. Mandatory tier-placement privileges for fee-seeking stations

As broadcast networks have gained leverage over their increasingly fragmented MVPD counterparts, they have made no secret of their desire to seek retransmission fees at levels that match what the most popular pay TV programmers receive for carriage.[20] The networks also obtain placement on the basic cable tier, meaning that skyrocketing retransmission fee increases must be built into the mandatory basic cable rates that subscribers cannot avoid paying.[21]

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[19] NPRM ¶ 22.

[20] *See, e.g.*, David B. Wilkerson, *NBC's Zucker Says Network Needs To Improve*, WALL STREET JOURNAL (Dec. 7, 2009), *available at* http://online.wsj.com/article/BT-CO-20091207-713848.html (quoting Chase Carey, the President and COO of News Corp., as saying, "We think Fox is another channel, and making the distinction between a broadcast and a cable channel is a looking-backward definition and not a looking-forward definition," and reporting that Carey "pointed out that ESPN commands $4 per subscriber"); Letter of Michael Hopkins, Fox Affiliate Sales President, to William Lake, Chief, Media Bureau, Oct. 25, 2010, at 4, *available at* http://www.fcc.gov/fox-letter-2010-25-10.pdf ("[B]ased on established rates for cable programming services that do not approach the performance of the Fox stations, such as the reported $3.40 Cablevision charged other MVPDs for MSG and MSG Plus in 2009, it would be reasonable for us to seek a rate between $5 and $6 per subscriber."); Joe Flint, *Moonves Takes Shot at USA Network, Tells Government to Stay Out of Distribution Fights*, LOS ANGELES TIMES (Apr. 12, 2011), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/04/cbs-les-moonves-usa-network-.html ("[T]he USA Network should not be paid more per-subscriber than the CBS network."). *See also* 16-17 *infra* (quoting Sinclair CEO David Smith in a recent trade-press report).

[21] *Cf.* 47 U.S.C. § 543(b)(8) (requiring payment for the basic tier by prohibiting "buy-through of other tiers").

Indeed, broadcasters have long invoked Section 623's mandatory tier-placement requirements to demand automatic, favorable placement on the basic cable tier,[22] despite the fact that, in a more competitive marketplace, broadcasters would be required to compete on price and quality to gain access to desired tiers. Broadcasters' inflated demands for retransmission consent fees thus inflict maximum damage on consumers. And as long as consumers are forced to subscribe to (and pay for) broadcast programming—creating an effective tax on access to cable programming—there is no market-based mechanism to discipline retransmission consent fees, which are now predicted to rise 28 percent in 2011 from $1.14 billion to $1.46 billion, and up to a staggering $3.6 billion by 2017.[23] Because consumers cannot "vote with their pocketbooks," stations' excessive fee demands go unpunished, leading stations to demand even *more* from cable operators and subscribers the next time around.

The ability of retransmission consent stations to demand placement on the mandatory basic tier also stifles competition from competing cable programmers. Fundamentally, broadcast stations are insulated from competition from cable networks because they enjoy an artificial advantage—placement on the basic tier—that cable networks do not have. But perhaps more insidiously, network affiliates that demand excessive fees and receive basic tier placement are able to drive up the price of the basic tier for consumers, thus imposing a toll on consumers who want additional cable programming but must purchase the basic tier in order to gain access to that programming. As the price of the basic tier goes up, consumers become less willing (and in

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22 *See id.* § 543(b)(7); 47 C.F.R. §§ 76.920-21 (providing for mandatory buy-through of the basic cable tier in areas where the cable operator does not face effective competition).

23 Joe Flint, *Retransmission Consent Fees To Hit $3.6 Billion in 2017*, LOS ANGELES TIMES (May 25, 2011), *available at* http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/05/retransmission-consent-fees-to-hit-36-billion-in-2017.html (citing Robyn Flynn, SNL Kagan, *Updated Retrans Projections: Despite Fewer Projected Multichannel Subs, Higher Fees Boost Totals*, at 2 (May 17, 2011)).

many cases, less able) to purchase additional cable tiers, thus reducing the number of subscribers who watch cable networks and harming competition from cable networks as a result. Indeed, cable programmers that are not affiliated with a broadcast network have expressed deep concerns that the increased fee demands from broadcasters are undermining their ability to compete.[24] Both competition and diversity suffer as a result.

More broadly, it is not simply broadcast tier-placement that distorts retransmission consent negotiations, but the very concept of regulated tiers and carriage mandates. There is no longer any reason for regulatory mandates to determine what programming is carried or how, now that the MVPD marketplace is competitive. In fact, we now have the worst of all worlds, where cable operators are heavily regulated but other MVPD platforms are not. Such disparate treatment does not arise from any principled assessment of today's competitive dynamics, but instead reflects an antiquated view of the video marketplace that is completely unwarranted today.

2. Bundling of retransmission consent and carriage of cable networks

The networks also are increasingly tying the sale of their local affiliates' retransmission consent rights with other programming. Each of the Big Four networks owns or is affiliated with a slew of cable channels,[25] and they typically require MVPDs to purchase those channels in a package that includes retransmission consent for the network's stations. Mandatory tying practices enable programming providers to obtain carriage for affiliated cable networks on more

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24 *See, e.g.*, Comments of Discovery Communications at 3, MB Docket No. 10-71 (filed May 18, 2010) (pointing out the "equally strong harm to consumers that arises from the impact broadcasters' rising leverage has had on the ability of independent programmers (those with no affiliation to 'must have' broadcasters) to contribute diverse, informative programming to Americans' channel line-ups").

25 *See* Ownership Chart: Television, Free Press, *available at* http://www.freepress.net/ownership/chart/tv (listing cable networks affiliated with ABC, CBS, NBC, and FOX).

favorable terms than they would otherwise enjoy. Moreover, by forcing MVPDs to purchase their entire programming bundle, the major networks soak up even more funds from MVPDs' programming budgets and damage the chances of non-affiliated program networks to obtain carriage. And when independent programmers do secure carriage, they can do so only "by accepting reduced compensation, less favorable tier placements, and other less favorable terms."[26] For many independent programmers, unfavorable tier placement prevents them from achieving wide enough distribution to remain viable.[27]

Tying also permits networks to manipulate the retransmission consent and "must buy" protections to guarantee maximum profits for themselves at the expense of consumers. Specifically, the networks that sell programming in bundles can load up the fees for retransmission consent, knowing that all cable subscribers must buy those stations as part of the basic tier, and then use those higher fees to cross-subsidize any less popular affiliated cable networks in higher tiers. In short, as long as these mandatory tying practices are allowed to continue, the Commission's retransmission consent regime will be just another weapon in the networks' arsenal to demand higher fees for their entire programming portfolio, much like the exclusive sports programming that network executives call their "battering ram."[28]

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26 *See* Comments of the Africa Channel at 3, MB Docket No. 10-71 (filed May 18, 2010).

27 *Id. See also Report on the Packaging and Sale of Video Programming Services to the Public*, at 80, Nov. 18, 2004, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf (noting "concern that non-affiliated program networks may not be able to gain widespread carriage due to the industry practice of tying carriage of popular program networks or broadcast stations with carriage of less-popular program networks").

28 *See* 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 … .").

3. Network non-duplication and syndicated exclusivity protections

Broadcasters' network non-duplication and syndicated exclusivity rights place the government's seal of approval on anticompetitive agreements between stations and networks—agreements that guarantee to stations that they will not face competition from other stations providing the same network and syndicated programming.[29] By invoking these rules to prevent MVPDs from choosing among potential competitors for the supply of network and syndicated programming, stations increase their power to extract ever-higher fees in exchange for retransmission consent. The territorial exclusivity rules thus significantly distort negotiations between stations and MVPDs.

The network non-duplication and syndicated exclusivity rules also harm consumers by denying them access to broadcast programming in various circumstances.[30] These arcane and anachronistic rules establish geographic "zones of protection" within which broadcast stations can insist that a cable system black out its retransmissions of other broadcast stations when those

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[29] *See* 47 C.F.R. § 76.92(a) ("Upon receiving notification pursuant to § 76.94, a cable community unit located in whole or in part within the geographic zone for a network program, the network non-duplication rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . ."); *id.* § 76.93 ("Television broadcast station licensees shall be entitled to exercise non-duplication rights pursuant to § 76.92 in accordance with the contractual provisions of the network-affiliate agreement."). *See also id.* § 76.101 ("Upon receiving notification pursuant to § 76.105, a cable community unit located in whole or in part within the geographic zone for a syndicated program, the syndicated exclusivity rights to which are held by a commercial television station licensed by the Commission, shall not carry that program as broadcast by any other television signal . . ."); *id.* § 76.103(a) ("Television broadcast station licensees shall be entitled to exercise exclusivity rights pursuant to § 76.101 in accordance with the contractual provisions of their syndicated program license agreements . . ."). DBS providers are subject to different and more narrow exclusivity rules. *See id.* § 76.120 *et seq.*

[30] Moreover, the complex rules impose considerable compliance burdens on MVPDs (particularly as the volume of network non-duplication and syndicated exclusivity notices has increased recently), creating additional costs that are ultimately passed through to consumers.

stations air certain network and syndicated programs. These geographic zones of protection ignore the measures typically employed in broadcast regulation, such as the station's DMA or signal strength contour and instead are based on fixed distances (*i.e.*, 35 miles or 55 miles) calculated from a reference point assigned to the "protected" station's community of license.

In practice, the network non-duplication and syndicated exclusivity rules produce increasingly anomalous results that harm consumers. Among other things, the rules allow a station to demand blackout protection from a cable operator *even if that operator is not carrying the station requesting protection* (such as would be the case if the station was withholding retransmission consent). In some cases, the rules also force a cable system to black out a station that its subscribers could receive over the air. And because modern cable systems often are integrated facilities serving multiple communities over a broad geographic area, the rules can and frequently do force cable operators to black out programming not only to subscribers within the protected zone, but also to subscribers who reside outside that zone.[31]

The net effect of the territorial exclusivity rules is to allow stations to insulate themselves from competition in retransmission consent negotiations, even where there is no reasonable policy justification for giving a station such protection.

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[31] Under the rules, blackout protection extends throughout any community that is "located in whole or in part" with the station's protected zone. 47 C.F.R. §§ 76.92, 101. Because the protected zones are based on arbitrary distances and do not follow community boundaries, it is quite common for a community to be only partially within a station's protected zone. In such circumstances, the rules require the cable operator to expand the protected zone to cover subscribers who would otherwise be entitled to receive the programming. Moreover, even where a community is located entirely outside a station's protected zone, and thus blackouts are not required by law, where the community is part of an integrated multi-community system, it may be technically or economically impracticable for a system that is subject to blackout obligations in other communities to provide the programming in one community while having to black it out in others.

4. Network interference in retransmission consent negotiations

The NPRM appropriately points out that network interference with the retransmission consent negotiations of independent affiliates, including "a network's exercise of its contractual approval right" to bless or veto retransmission consent agreements, also "hinder[s] the progress of negotiations."[32] As TWC has explained in past proceedings, a network's demand for a "cut" of an independent affiliates' retransmission consent revenues can be just as coercive—and just as distortive to retransmission rates—as a network's direct participation in the station's retransmission consent negotiations.[33] Indeed, the two often go hand-in-hand: during TWC's 2009 negotiations with Sinclair Broadcast Group, Sinclair "informed TWC not only that FOX must approve any grant of retransmission consent rights, but that FOX would withhold such approval unless Sinclair radically increased the compensation it obtains from TWC and paid a substantial share to the network."[34] Since then, FOX has taken action to disaffiliate any local station that does not accede to similar demands,[35] and both CBS[36] and ABC[37] have publicly

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32 NPRM ¶ 22.

33 *See* Ex Parte Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR Nos. 8233-C and 8234M (filed Dec. 8, 2009).

34 *Id.* at 3-4.

35 *See* Michael Malone, *Fox Inks New Affiliation Agreements, Scraps Others*, BROADCASTING & CABLE (May 11, 2011), *available at* http://www.broadcastingcable.com/article/468137-Fox_Inks_New_Affiliation_Agreements_Scraps_Others.php (reporting that FOX had disaffiliated Nexstar's WTVW in Evansville, IN, after Nexstar had "balked at Fox's affiliation terms," which included "aggressive" demands by Fox to pay "substantial retrans earnings" to the network); *see also* Harry A. Jessell, *Fox, Affils Exchange Fire Over Retrans*, TVNEWSCHECK (Feb. 9, 2011), *available at* http://www.tvnewscheck.com/article/2011/02/09/48992/fox-affils-exchange-fire-over-retrans ("[Michael] Hopkins, who took on ultimate responsibility for affiliate relations following the resignation of Tony Vinciquerra as CEO of the Fox Networks Group last month, says that Fox realizes that some affiliates may not meet its demands for a cut of their retrans dollars. 'If that should be the case, Fox will have to

followed suit in requiring coercive, upstream payments of independent affiliates' retransmission consent revenues.

The affiliates, for their part, see no end in sight to these demands. Sinclair CEO David Smith recently predicted that the extraction of retransmission consent revenues by the networks is "just going to be an ongoing and continuing part of the business[, f]orever," and will not be "something that just stops tomorrow because they deem it that they've got all the money they think they can get."[38] Smith went on to confirm that the networks' demands for a cut of the fees will cause stations to drive up prices considerably: "We just have to keep upping that number. We need to keep growing our side, and as we grow our side, they grow theirs."[39] Smith's comments thus make clear that the increasing pressure being placed on broadcast stations to deliver retransmission consent fees to the networks inevitably will result in higher fees for consumers without any concomitant enhancement in quality of the local programming they receive. Relatedly, Smith's comments undermine any suggestion that recent spikes in

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pursue different distribution channels to receive fair value for our programming and continue to serve our viewers.' 'We don't want that to sound like a threat, but it is a fact,' he says.").

36 *See* 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 ("CBS Corp. President/CEO Leslie Moonves made an emphatic case for broadcast's emerging dual-revenue model," saying that the CBS network "merits . . . a significant cut of retransmission consent revenue."); *see also* Claire Atkinson, *Moonves: CBS Would Yank Affil Signal If Necessary*, BROADCASTING & CABLE (Mar. 9, 2010), *available at* http://www.broadcastingcable.com/article/449891-Moonves_CBS_Would_Yank_ Affil_Signal_If_Necessary.php (reporting that CBS said it "ended the affiliate agreement" of a station in Jacksonville, FL, when it refused to give up its retransmission consent revenues to the network).

37 *See Sinclair Gives Retrans Cut to ABC*, TELEVISION BROADCAST (Mar. 26, 2010), *available at* http://www.televisionbroadcast.com/article/97360 (reporting that Sinclair's new affiliation agreements with ABC "includes a licensing fee that represents a cut of retransmission revenue").

38 COMMUNICATIONS DAILY, May 5, 2011, at 15.

retransmission consent fees merely reflect a resetting of an equilibrium in such fees. To the contrary, as TWC has explained previously, recent increases in fee demands are a harbinger of continual efforts to drive up the cost of retransmitting broadcast programming using a valuable spectrum resource that is intended to be available to the public for free—a trend that is causing significant harm to consumers.[40] These demands plainly "hinder[] the progress of the negotiations" just as much as the threat of a network veto,[41] as they effectively preclude a station from granting retransmission consent except at a significantly inflated (and non-market-based) price.

Not only are networks harming consumers by interfering in retransmission consent negotiations, but by exerting their leverage to extract higher fees, they also are seeking to monetize a right they do not possess. Section 325 of the Act makes clear that the right to grant retransmission consent belongs to local broadcast stations, not the national networks.[42] Furthermore, the networks do not possess any right to assert copyrights they may have in the network programming, given MVPDs' statutory compulsory copyright licenses to retransmit

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39 *Id.*

40 *See* Petition at 16 (explaining that "increased fees become the benchmark in each subsequent round of negotiations, and the increased costs are passed directly on to consumers"); *see also* Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, "An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime," Nov. 12, 2009, at 30 (confirming that "retransmission fees are large and growing, and a significant percentage of these costs are passed on to consumers"). The Katz/Orszag/Sullivan Study was provided to the Commission as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009).

41 NPRM ¶ 22.

42 47 U.S.C. § 325(b)(1) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station."); *see also Mediacom Commc'ns Corp. v. Sinclair Broadcast Group, Inc.*, 460 F. Supp. 2d 1012, 1015 (S.D. Iowa 2006)

broadcast programming.[43] Yet there is no doubt that the networks' demands for compensation reflect their view that MVPDs should pay more than the statutory copyright licensing regime requires.[44] The retransmission consent regime was never intended to become a shadow copyright regime for the benefit of copyright owners, including the networks.[45] Indeed, courts

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("'Retransmission consent' is a federally created statutory right in a television station's broadcast signal. .. that broadcasters may attempt to sell in that station's local market.").

43 *See* 17 U.S.C. § 111. The Commission should take note that, on the same day it issued its NPRM in this proceeding, the Copyright Office issued a Notice of Inquiry seeking comment on recommendations to Congress regarding the elimination of the compulsory copyright provisions of the Copyright Act. *See* Library of Congress, Copyright Office, *Section 302 Report*, Docket No. RM 2010-10, Notice of Inquiry, 76 Fed. Reg. 11,816 (Mar. 3, 2011). Of course, if Congress decides to repeal Section 111 of the Copyright Act, Congress also should take immediate steps to eliminate retransmission consent. Without a compulsory copyright regime, the resulting private copyright payments would fully compensate all rights holders; any additional payment for retransmission consent would be, in effect, an unjustifiable second payment for the same distribution rights.

44 *See, e.g.*, *Les Moonves Says CBS Is Getting a Cut of Some Affiliates' Retrans*, RADIO BUSINESS REPORT (Mar. 1, 2010), *available at* http://www.rbr.com/tv-cable/21802.html (quoting CBS Corp. CEO Les Moonves as stating that "if you want to get our top programming—which we believe network programming is at the top—and if we're spending hundreds of millions of dollars to bring you NFL Football, or 'CSI,' then we should get paid as much as a cable network showing repeats"); Ben Grossman, *Rupert's Main Man: Q&A with News Corp.'s Chase Carey*, BROADCASTING & CABLE, Oct. 26, 2009, *available at* http://www.broadcastingcable.com/article/366208-Rupert_s_Main_Man_Q_A_With_News_Corp_s_Chase_Carey.php (quoting News Corp. COO Chase Carey as follows: "It's not rocket science. It starts with making it a dual revenue business. It doesn't make sense that broadcast is only ad supported. It competes against other channels that are dual revenue businesses that are getting 1, 2, 4 dollars [per subscriber], while a network like Fox, it sits there with truly the best programming in sports and entertainment, so we need to move that business to a place where we are getting fair value.").

45 *See* 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code."); 138 CONG. REC. H6493 (daily ed. July 23, 1992) (statement of Rep. Chandler) (explaining during floor debate about the 1992 Cable Act that retransmission consent should not serve "as a subsidy for major networks"); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶ 173 (1993) ("The legislative history of the 1992 Act suggests that Congress created a new communications right in the broadcaster's signal, completely separate from the programming contained in the signal.

have held that a copyright holder's conduct may violate antitrust laws when it "impos[es] restrictions on the use of copyrighted [works] that extend beyond the permissible bounds of the exclusive rights granted by the copyright laws."[46] So, too, might such a violation occur in the programming context when a network injects itself in retransmission consent negotiations to extract payments for a right it cannot claim to have under copyright or communications law. Accordingly, this conduct not only fundamentally distorts retransmission consent negotiations, but also may represent an unlawful attempt to force MVPDs to pay twice for the "value" of broadcast network content.

5. Collusion among competing broadcast stations

Finally, broadcast stations increasingly are engaging in a number of collusive activities to coordinate carriage negotiations in a single DMA as a means of raising the price of retransmission consent. A recent study by the American Cable Association identified 57 joint negotiation arrangements through which the owner of one of the Big Four stations in a DMA exerts some measure of "control" over the negotiations of retransmission consent of a competing Big Four station.[47] In discussions with its members, ACA found that in many of these instances,

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Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights. . . . [R]etransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest. Just as Congress made a clear distinction between television stations' rights in their signals and copyright holders' rights in programming carried on that signal, we intend to maintain that distinction as we implement the retransmission consent rules.").

46 *Electronic Data Systems Corp. v. Computer Associates Int'l, Inc.*, 802 F. Supp. 1463, 1465 (N.D. Tex. 1992); *see also United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 156-58 (1948).

47 Comments of American Cable Association, MB Docket No. 10-71, at 10 (filed May 18, 2010); *see also id.*, App. C, Table 2 (listing each of the 57 instances).

"there was a single negotiator for both stations, and reaching carriage terms for one station was contingent upon reaching terms for the other."[48]

TWC's experience has been the same: stations in TWC's footprint rely on a variety of dubious "sharing" mechanisms (such as local marketing agreements, shared services agreements, and joint sales agreements) that enable ostensibly independent competitors to collude in negotiating retransmission consent.[49] For example, when a Big Four station in a DMA seeks to negotiate carriage on behalf of itself *and* a non-Big Four competitor (such as the local CW or MyNetwork affiliate) pursuant to an LMA or equivalent arrangement, the cost of carriage increases for MVPDs and, in turn, their subscribers. Indeed, in TWC's experience, the Big Four station often will demand a retransmission consent payment for the non-Big Four station that the latter could not secure on its own but for the increased leverage flowing from joint negotiations.

Other station activities present additional opportunities for collusion. For instance, FOX's recent decision to begin migrating some of its existing affiliations to multicasts that include the programming stream of another Big Four station poses serious competitive

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48 *Id.* at 10.

49 *See, e.g.*, *ACME Television Licenses of Ohio, LLC, Assignor, and WBDT Television, LLC, Assignee, For Consent to Assignment of Broadcast Station License of WBDT, Springfield, OH*, Petition to Deny, File No. BALCDT-20100917AAT, at 6 (filed Oct. 22, 2010) (explaining that a joint sales agreement between two owners of competing stations in the Dayton, OH DMA had "consolidate[d] negotiating authority into the hands of a single entity" and "effectively eliminated competition between [the stations] in the retransmission consent context"); *ACME Television Licenses of Wisconsin, LLC, Assignor, and LIN of Wisconsin, LLC, Assignee, For Consent to Assignment of Broadcast Station License of WCWF, Suring, WI*, Petition to Deny, File No. BALCDT-20100917AAF, at 11 (filed Oct. 22, 2010) (noting that a shared services agreement between two stations in the Green Bay, WI DMA enabled LIN, the owner of one of the stations, to serve as the other station's "agent with respect to the negotiation of . . . retransmission consent agreements" *before* the closing of the transaction that would have brought the two stations under common ownership).

concerns.[50] The potential for one of the Big Four stations to own or control two of the four highest-rated broadcast programming streams in a given DMA certainly violates the spirit, if not the letter, of the Commission's media ownership rules, and it facilitates collusive negotiations that exacerbate the already severe problems plaguing the retransmission consent process.

Moreover, many station groups participate on "affiliate boards" for each of the Big Four networks, and these gatherings present a golden opportunity to share competitive information. A station group with, say, an ABC station in one DMA and an FOX station in another DMA often will attend the ABC affiliate board meeting and discuss pricing with the competitor to its FOX station. Membership on affiliate boards ensures the free flow of information about pricing demands by ostensible competitors, and, in turn, raises the risk of collusive pricing by stations affiliated with different networks.

II. THE COMMISSION SHOULD USE ALL AVAILABLE TOOLS TO MINIMIZE HARMFUL REGULATORY DISTORTIONS AND PROTECT CONSUMERS

Prior to, or in the absence of, congressional action to deregulate broadcast carriage negotiations altogether, there are a number of steps the Commission can and should take to address the inefficiencies and distortions in the current system. As an initial matter, the Commission should eliminate the anachronistic and artificial bargaining advantages that arise under its own rules. These advantages—including broadcasters' territorial exclusivity protections and tier-placement and "must buy" preferences, and the Commission's tolerance for bundling the carriage of a broadcast station with cable channels, network interference, and station collusion—make up part of the uneven playing field that is causing harm to consumers.

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50 *See* Michael Malone, *Fox Inks New Affiliation Agreements, Scraps Others*, BROADCASTING & CABLE (May 11, 2011), *available at* http://www.broadcastingcable.com/article/468137-Fox_Inks_New_Affiliation_Agreements_Scraps_Others.php.

Thus, by eliminating these distortions, the Commission would allow for more effective and efficient negotiations between stations and MVPDs.

Standing alone, these modest reforms will be insufficient to protect consumers and keep broadcasters' disproportionate bargaining power in check. Indeed, broadcasters will continue to demand unreasonable payments for the right to retransmit programming that is broadcast over the air for free, backed by coercive threats to cut off access to such programming where their demands are not met. Accordingly, unless and until deregulatory legislation is enacted, the Commission also should fulfill its responsibility to advance the public interest by creating a new method of establishing compensation levels and ensuring uninterrupted carriage of broadcast stations, so as to better serve the goals embodied in the Act.

A. The Commission Should Eliminate Protections for—and Affirmatively Ban—Anticompetitive Agreements Providing for Network Non-Duplication or Syndicated Exclusivity.

As discussed above, territorial exclusivity protections, such as the rules authorizing network non-duplication and syndicated exclusivity arrangements, have a significant distorting effect on negotiations. These rules enable broadcasters to prevent cable operators from mitigating the effects of a blackout by replacing a local signal with a distant signal containing the same network and syndicated programming,[51] and thus allow a broadcaster to insist that it serve as an MVPD's sole supplier of network and syndicated programming in a particular geographic area. The effect of the Commission's exclusivity rules is to create hundreds of local, government-sanctioned monopolies for network and syndicated programming across the country.

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[51] *See* NPRM ¶ 42 ("The [network non-duplication] rules . . . prohibit the cable system from carrying the network programming as broadcast by any other station within the 'geographic zone' to which the contractual rights and rules apply. . . . Similarly, under the syndicated exclusivity rules, a station may assert its contractual rights to exclusivity

Reflecting concern about the anticompetitive impact of these rules, the NPRM laudably seeks comment on "eliminating the Commission's rules concerning network non-duplication and syndicated programming exclusivity."[52] The Commission plainly should do so, given the distorting effects of such exclusivity measures.[53] As the NPRM recognizes, "a cable system negotiating retransmission consent with a local network affiliate may face greater pressure to reach agreement by virtue of the cable system's inability to carry another affiliate of the same network if the retransmission consent negotiations fail."[54]

But while this proposal is an important first step, it does not go far enough. The Commission properly recognizes that its "exclusivity rules" exacerbate the problems surrounding existing retransmission consent negotiations by authorizing stations to block cable systems from taking critical remedial measures—importing distant signals of a station's network and syndicated programming—that would make hold-out threats less powerful.[55] However, the NPRM also recognizes that the exclusivity rules "do not create these rights but rather provide a means for the parties to the exclusive contracts to enforce them through the Commission rather

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within a specified geographic zone to prevent a cable system from carrying the same syndicated programming aired by another station.").

52 *Id.*

53 For similar reasons, the Commission also should get out of the business of facilitating anticompetitive exclusive agreements in today's marketplace by modifying the broadcast territorial exclusivity rules, which define the allowable scope of a station's network and non-network programming exclusivity vis-à-vis another broadcast station. *See* 47 C.F.R. § 73.658(b), (m). These rules have remained unchanged for many years. *See, e.g.*, 28 Fed. Reg. 13673 (Dec. 14, 1963) (promulgating the broadcast network territorial exclusivity rule in its current form).

54 NPRM ¶ 42; *see also id.* ¶ 43 (noting concern among commenters that "the exclusivity rules provide broadcasters with artificially inflated bargaining leverage in retransmission consent negotiations").

55 *See id.* ¶¶ 42-43.

than through the courts."[56] The NPRM thus acknowledges that "eliminating the Commission's exclusivity rules may have little effect on retransmission consent negotiations, because private exclusive contracts between broadcasters and programming suppliers would remain in place."[57]

Accordingly, the Commission should not only rescind its rules authorizing exclusivity agreements, but affirmatively ban such agreements. In today's competitive environment, networks and broadcast stations should no longer be permitted to coordinate their efforts to prevent MVPDs that have lost a local signal from accessing network programming by carrying another affiliate's signal. Indeed, courts have recognized the anticompetitive effects of vertical agreements establishing exclusive territories,[58] and have found similar restraints to be *per se* unlawful when insisted upon by downstream distributors (in this case, broadcast stations).[59] Here, local stations invoke contractual exclusivity rights to shield themselves from competition from out-of-market stations, thus allowing them to drive up prices by credibly threatening to

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56 *Id.* ¶ 42. To the extent the Commission presupposes that, absent the exclusivity rules, networks *could* enforce these rights though the courts, it is mistaken. Section 325 makes clear that retransmission consent is right owned by the stations, not the networks. Therefore, only the stations, and not the networks, would have standing to enforce these exclusivity limits in court.

57 *Id.* ¶ 43.

58 *See, e.g.*, *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1077-81 (2d Cir. 1980) (holding that agreements establishing exclusive territories violated Section 1 of the Sherman Act where they lacked a valid business purpose and there was no enhancement of interbrand competition to offset loss of intrabrand competition); *Graphic Products Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1575-78 (11th Cir. 1983) (striking down territorial restraints that harmed both intrabrand and interbrand competition, where intrabrand competition would provide a critical source of competitive pressure on price and consumer welfare).

59 *See, e.g.*, *Shulton, Inc. v. Optel Corp.*, 1987-1 Trade Cas. (CCH) P67,436, 1986 U.S. Dist. LEXIS 19775, at *77 (D. N.J. 1986) ("[A] manufacturer/supplier acting at the behest of any of its distributors to police a division of territories may be imposing a *per se* illegal horizontal restraint whether or not the manufacturer is in fact in competition with its distributors . . . .); *Aunyx Corp. v. Canon USA, Inc.*, 1990-2 Trade Cas. (CCH) P69,201, 1990 U.S. Dist. LEXIS 12682, at *5 (D. Mass. 1990) (denying summary

block an MVPD's access to network programming. As long as territorial exclusivity provisions continue to exist, broadcast stations will have a free hand to charge monopoly rents.[60]

In analogous circumstances in which the Commission amended its rules to prevent anticompetitive conduct, the Commission also has invoked its authority to prohibit enforcement of *existing* agreements to protect the public interest. For instance, when the Commission extended new program access requirements to terrestrially delivered programming, it barred enforcement of existing contracts that did not comply,[61] and it likewise prohibited enforcement of multi-dwelling unit exclusivity agreements after finding such arrangements to be anticompetitive.[62] In this context, the same considerations that warrant elimination of the territorial exclusivity rules call for banning continued enforcement of the underlying anticompetitive agreements.

It is disingenuous for broadcasters to claim that the Commission's exclusivity rules are necessary to protect localism. As an initial matter, the Commission has consistently recognized that greater competition among broadcasters promotes localism by providing "added incentives

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judgment where there was evidence that territorial restrictions were developed with assistance of dealers' advisory council).

60 In contrast, if the Commission eliminates its territorial exclusivity rules, it will not diminish MVPDs' incentives to enter into reasonable retransmission consent agreements. Given the higher copyright fees associated with distant signal importation, MVPDs would continue to have an incentive to reach a retransmission consent agreement with the local station.

61 *See Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 64 (2010).

62 *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 ¶ 55 (2007) ("[T]he law affords us wide authority to prohibit the enforcement of such clauses where, as here, the public interest so requires."), *aff'd sub nom Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

to respond to conditions in local markets."[63] The Commission's rules protecting broadcasters' contractual network non-duplication and syndicated exclusivity rights thus are *in tension* with the Commission's interest in fostering localism, because the exclusivity rules suppress the quality-enhancing competition that a broadcaster would otherwise face from out-of-market stations.

Moreover, although broadcast stations today enjoy the benefits of territorial exclusivity, many stations increasingly are curtailing local news operations and original reporting and consolidating operations with competing stations.[64] Indeed, as Professor Hazlett explains in his recent report, cable and the Internet are growing as sources of local content, while broadcast stations "have performed poorly" in fulfilling their public interest obligations, including promoting localism, and have "produc[ed] little if any content not offered in an unregulated market."[65] As TWC explained in the Commission's ongoing media ownership proceeding, it is *MVPDs* such as TWC that are making significant new investments to deliver diverse local content to their subscribers, while broadcasters increasingly are failing to meet the local needs of

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63 *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 ¶ 97 (2008); *see also id.* ¶ 101 ("[C]ompetition, and not concentration of market players, leads to better programming.").

64 *See, e.g.*, Kim McAvoy, *News Sharing: One For All, All for One?*, TVNEWSCHECK (May 20, 2009), *available at* http://www.tvnewscheck.com/article/2009/05/20/32369/news-sharing-one-for-all-all-for-one (reporting that "TV stations in a growing number of markets are suppressing their competitive instincts and forming news co-ops to capture and share video of public meetings, press conferences and other routine events"); Chris Churchill, *Former Rivals Now Partners*, ALBANY TIMES UNION (Mar. 11, 2009) (reporting that formerly "fiercely competitive" news stations WRGB and WNYT in the New York Capital Region "are negotiating a plan to share content," including news and sports footage).

65 *Hazlett Essay* at 8.

consumers.[66] In any event, even assuming *arguendo* that broadcasters' unsubstantiated claims were true, localism concerns would not provide a sufficient basis for retaining the Commission's exclusivity rules, particularly given the competitive and public interest harms they are causing by thwarting efficient retransmission consent agreements.

B. The Commission Should Prohibit Broadcasters from Demanding Mandatory Placement on the Basic Tier to the Fullest Extent of Its Authority.

TWC also urges the Commission to amend Section 76.65(b) of its rules and specify that it is a *per se* violation of the duty to negotiate in good faith for a fee-seeking station to insist, on a take-it-or-leave-it basis, on placement on a mandatory basic tier in areas where a cable operator faces effective competition. Alternatively, the Commission should expressly clarify that cable operators are permitted to make subscription to the basic tier optional in areas of effective competition, or to carry broadcast stations that elect retransmission consent in such areas on a separate tier or an á la carte basis. Each of these options would aim to eliminate the significant distortions associated with broadcasters' demands for automatic placement on a mandatory basic cable tier. As discussed above, these demands have forced cable operators to build spiraling retransmission consent fee increases into the mandatory basic cable rates that subscribers cannot avoid paying. By contrast, if cable operators could offer such stations on an optional basis, a station's excessive demands would be tempered by the possibility that consumers would refuse such programming at the station's inflated asking price.

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66 Comments of Time Warner Cable, MB Docket No. 09-182, at 4-6 (filed July 12, 2010) ("TWC 2010 Media Ownership Comments") (describing the local and regional programming services that TWC provides to its subscribers, including 24/7 local news channels, Video On Demand and Web and Mobile channels featuring local content, and local interest channels that focus on public affairs, politics, sports, cultural affairs, entertainment, and other content of interest to the community at issue).

The Commission has clear authority to prevent broadcast stations from insisting on mandatory placement on the basic tier (or, for that matter, on any other tier) or "must buy" treatment in areas subject to effective competition. As the Commission recognizes in the NPRM, Section 325 authorizes it to prohibit conduct that is inconsistent with "competitive marketplace considerations,"[67] and *no* provision in the Act affirmatively requires placement of stations on the basic tier in areas subject to effective competition. The Commission should also render unenforceable any current contractual provisions that require mandatory basic tier placement for stations electing retransmission consent in areas of effective competition.[68]

Some broadcasters assert—incorrectly—that Section 623 of the Communications Act, which provides that the "minimum contents" of the basic tier shall include "[a]ny signal of any television broadcast station that is provided by the cable operator to any subscriber,"[69] imposes a mandatory tier-placement obligation on *all* cable systems. But, as both the D.C. Circuit and the Commission have recognized, the statute imposes tier-placement obligations *only* in areas subject to rate regulation, and not in areas subject to effective competition.

In *Time Warner Entertainment, Inc. v. FCC*, the D.C. Circuit struck down an earlier Commission interpretation of Section 623 that "the tier buy-through provision applies not only to regulated systems, but also to systems subject to 'effective competition' and thus not subject to rate regulation."[70] The court explained that, as a rate regulation statute, Section 623(b)(7) is "triggered by the absence of effective competition and ceases [to apply] when effective

67 NPRM ¶ 8 (quoting 47 U.S.C. § 325(b)(3)(C)(ii)).

68 *See* nn.61-62 *supra* and the accompanying text.

69 47 U.S.C. § 543(b)(7)(A).

70 *Time Warner Entertainment, Inc. v. FCC*, 56 F.3d 151, 192 (D.C. Cir. 1995).

competition emerges."[71] Accordingly, the requirement that all broadcast networks be carried on a mandatory basic tier no longer applies when the cable operator faces effective competition.[72] The Commission confirmed this conclusion in 2001, stating: "[I]f a cable system faces effective competition under one of the four statutory tests, and is deregulated pursuant to a Commission order, the cable operator is free to place a broadcaster's digital signal on upper tiers of service or on a separate digital service tier."[73] Therefore, the Commission should amend the good faith rules to prevent broadcasters from thwarting consumer choice and its disciplining effect on rates by insisting on basic tier placement.

Notably, tier placement obligations generally apply *only* to cable operators, and as discussed above, the Commission should take this opportunity address the disparate treatment of cable operators and other MVPDs. TWC recognizes that some instances of differential treatment, including some of cable operators' obligations vis-à-vis must-carry stations, appear in the Act itself,[74] and in such instances the Commission should urge Congress to repeal these distorting provisions in their entirety. But there are a number of steps the Commission can take under its existing authority (beyond the clarifications identified above) to minimize the differential treatment endemic in its own rules. For instance, the Commission should promptly

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71 *Id.* at 185.

72 *Id.* at 192 ("Because this provision applies to any basic tier established pursuant to § 543(b)(7) and clearly states an intention directly to regulate rates, it cannot apply to systems that face effective competition. . . . Given the close relationship between § 543(b)(7) and the tier buy-through provision, the Commission's interpretation that the latter applies to systems not facing effective competition fails.").

73 *Carriage of Digital Television Broadcast Signals*, Report and Order, 16 FCC Rcd 2598 ¶ 102 (2001). *See also id.* ("This finding is based upon the belief that Section 623(b)(7) is one of those rate regulation requirements that sunsets once competition is present in a given franchise area. We believe that the decision in *Time Warner v. FCC* supports this interpretation.").

74 *See, e.g.*, 47 U.S.C. § 534.

initiate a proceeding to revisit the rules and determinations made regarding cable operators in the *Viewability Order*, which the Commission scheduled for review "between February 2011 and February 2012."[75] In doing so, the Commission should explore means of allowing cable operators to carry stations, including those that elect must-carry status, on a separate, non-mandatory tier. In particular, the Commission should clarify that cable operators have the option of providing must-carry stations on an optional tier or à la carte, as long as the stations remain available to subscribers who wish to receive those stations.[76] The elimination of these and other regulatory distortions that stack the deck against cable operators is essential in any effort to updating the current rules to reflect today's competitive realities.[77]

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75 *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 ¶16 (2007) ("*Viewability Order*").

76 In the *Viewability Order*, the Commission interpreted Sections 614(b)(7) and 615(h) as requiring that must-carry stations be "actually viewable" to all cable subscribers. *Id.* ¶ 15. If taken to its logical conclusion, this rule might require cable operators to place must-carry stations on the basic tier of service. But the plain text of the statute affords more flexibility to cable operators and would not necessarily compel the delivery of must-carry stations on the basic tier. Section 614(b)(7) of the Act states that must-carry stations "shall be provided to every subscriber of a cable system" and "shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system." 47 U.S.C. § 534(b)(7). Importantly, the statute does *not* expressly require cable operators to *deliver* must-carry stations to all of its subscribers; it merely requires cable operators to make such stations *available* to all subscribers, by "provid[ing]" and making them "viewable" to subscribers. Thus, the statute leaves open the option of making must-carry stations optional to cable subscribers, as long as the stations remain available to subscribers and capable of being viewed by subscribers who wish to receive them.

77 President Obama has instructed agencies to reevaluate any "rules that may be outmoded, ineffective, insufficient, or excessively burdensome" and to modify or repeal those rules when appropriate. *See* Exec. Order No. 13,563, § 6(a), 76 Fed. Reg. 3,821 (Jan. 21, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order.

C. The Commission Should Make Further Changes to Its Good Faith Rules To Address Anticompetitive Practices That Are Distorting Retransmission Consent Negotiations.

In addition to addressing the structural distortions in its rules, the Commission should no longer tolerate the anticompetitive practices employed by broadcast networks and stations that skew negotiations in their favor, and should therefore amend its good faith rules to target such conduct more effectively. Indeed, the Commission has recognized that its good faith rules are designed to prevent anticompetitive conduct,[78] and to ensure that "negotiations are conducted in an atmosphere of honesty, purpose and clarity of process."[79] And as noted in the NPRM, establishing new *per se* violations of the good faith requirement will "promot[e] the successful completion of retransmission consent negotiations," and help "protect[] consumers from impasses or near impasses."[80]

Unfortunately, the current good faith requirements do little to protect consumers from the threatened and actual blackouts that have grown increasingly common in disputes between broadcasters and MVPDs.[81] While the rules allow parties to file complaints for alleged violations of the good faith requirements, their lack of specificity, their failure to anticipate today's bargaining tactics, and the absence of any meaningful enforcement history all undermine the rules' deterrent effect. Indeed, as noted in the NPRM, "[t]here have been very few

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78 *See* 47 U.S.C. § 325(b)(3)(C)(ii) (providing that the good faith negotiation standards promote "terms and conditions [that] are based on competitive marketplace considerations").

79 *Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445 ¶ 24 (2000) ("*Good Faith Order*").

80 *See* NPRM ¶ 21.

81 *See id.* ¶ 20 ("In recent times, the actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes present a growing

complaints filed alleging violations of the Commission's good faith rules," and "there has only been one finding that a party to a retransmission consent agreement negotiated in bad faith."[82] Given the numerous examples of actual or threatened blackouts cited by the Commission—and based on TWC's experience with broadcasters that have employed such threats to drive unreasonable fee increases[83]—it is difficult to believe that, in the years since the initial adoption of the good faith rules, just one negotiating party has engaged in actionable bad faith.

Accordingly, TWC supports the Commission's proposals for "[p]roviding more guidance under the good faith negotiation requirements" by "[s]pecifying additional examples of *per se* violations" based on today's realities.[84]

1. The Commission should bar networks from bundling retransmission consent with carriage rights to affiliated cable networks.

TWC continues to support the Petition's original recommendation to make it a *per se* violation of a broadcaster's good faith negotiating duties to "insist on tying retransmission consent to negotiations for carriage of other programming services."[85] As discussed above, the Big Four networks increasingly bundle the retransmission consent of their local stations with the

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inconvenience and source of confusion for consumers."); *id.* ¶ 15 (listing several recent "high profile retransmission consent disputes [that] result[ed] in carriage impasses").

82 *Id.* ¶ 12.

83 *See, e.g.*, Mike Farrell, *Fox Gets Tough with TWC*, MULTICHANNEL NEWS (Dec. 21, 2009), *available at* http://www.multichannel.com/article/441200-Fox_Gets_Tough_With_TWC.php (describing Fox's threats to pull its programming, which included highly anticipated airings of the NFL playoffs and college bowl games, if TWC did not accede to Fox's pricing demands); Mark K. Miller, *Sinclair to Pull Stations from TWC Systems*, TVNEWSCHECK, Dec. 28, 2010, *available at* http://www.tvnewscheck.com/article/2010/12/28/48014/sinclair-to-pull-stations-from-twc-systems (describing similar demands by Sinclair).

84 NPRM ¶ 3. Moreover, as discussed above, the Commission should render unenforceable any current contractual provisions that violate these new examples of *per se* good faith violations. *See* nn.61-62 *supra* and the accompanying text.

85 Petition at 34.

carriage rights to their cable services, thus driving up MVPDs' programming costs and soaking up funds that were once available for independent programming. These tying practices also prompt networks to demand even higher fees for retransmission consent as a means of subsidizing the tied cable networks. These higher retransmission consent fees translate into higher rates for the basic cable tier—and therefore a higher "tax" for consumers, as they must purchase the basic tier in order to get access to the higher tiers containing the programming they may prefer.

In adopting a rule prohibiting tying, the Commission should revisit its determination more than a decade ago that such bundling practices are consistent with a broadcaster's good faith obligations.[86] The Commission concluded at the time that such practices reflected "competitive marketplace considerations" presumably because they did not involve "the exercise of market power by a broadcast station"—conduct deemed presumptively *inconsistent* with the good faith negotiation standard.[87] But in today's environment, where the Big Four networks enjoy significant bargaining advantages over their increasingly fragmented MVPD counterparts, these tying practices *do* result from the exercise of market power—power that is reinforced by the anachronistic regulatory distortions discussed herein.

2. The Commission should prohibit networks from interfering in the retransmission consent negotiations of stations.

The Commission should further amend the good faith rules to prevent network interference in the retransmission consent process. The Commission proposes to make it a *per se* violation of the good faith rules "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

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86 *Good Faith Order* ¶ 56.

87 *Id.* ¶ 58.

with such an approval provision."[88] TWC agrees with the Commission that networks should be prohibited from forcibly usurping a station's right to control its retransmission consent negotiations, and such conduct may well run afoul of the existing good faith standards.[89] As discussed above, when a network intervenes in retransmission consent negotiations without the invitation of the negotiating parties, such conduct tends to "hinder[] the progress of the negotiations,"[90] drive up prices for retransmission consent, and increase the threat of a blackout.

While networks should be prohibited from overriding their affiliates by injecting themselves into retransmission consent negotiations, nothing should prevent MVPDs from consenting to a group deal for multiple stations as negotiated by a network when such an arrangement is beneficial for, and agreed upon by, all parties. Indeed, a network's use of a "clearinghouse" model for the disposition of its affiliates' retransmission consent rights may, in some cases, bring efficiencies by reducing transaction costs for stations and MVPDs alike. And to the extent a station's abdication of negotiations creates "transfer of control" issues under Section 310(d),[91] the network may, as a formal matter, send any deal negotiated with an MVPD to the stations for ratification. Nonetheless, the touchstone for determining whether a network's negotiation on behalf of its affiliates is permissible should be the consent of the MVPD. If the MVPD is unable to discern any efficiencies from a network's proposal to negotiate on behalf of its affiliates—and believes the network's commandeering of negotiations will lead to substantially higher fees for consumers and a greater risk of a blackout—the MVPD should

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[88] NPRM ¶ 22.

[89] *See id.* ("If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has arguably impaired its own ability to designate a representative who can bind the station in negotiations, contrary to our rules.").

[90] *Id.* ¶ 22.

[91] 47 U.S.C. § 310(d).

remain free to negotiate with individual stations in order to reach the most efficient deal for consumers.

3. *The Commission should update its good faith rules to prevent stations from jointly negotiating retransmission consent.*

TWC also supports the Commission's proposal to make it a *per se* violation of the good faith standard to "grant another station or station group the right to negotiate or the power approve its retransmission consent agreement when the stations are not commonly owned."[92] The Commission correctly notes in its NPRM that such joint conduct, at a bare minimum, "delays . . . the negotiation process" and makes negotiations "unnecessarily complicated."[93] Of even greater concern, however, are the anticompetitive effects noted earlier—the ability of two or more competing stations in the same DMA to collude in the sale of retransmission consent, jointly withhold retransmission consent as a bargaining tactic, and drive up prices in the process. The Commission's overly permissive approach regarding dubious sharing arrangements has facilitated collusive negotiations, and if the Commission is going to continue allowing such arrangements at all (deeming the managing station's influence insufficient to constitute an unauthorized transfer of control), it at least should take corrective action to prevent anticompetitive effects.

Such conduct not only is plainly inconsistent with "competitive marketplace conditions" (and thus at odds with the good-faith requirement), but also runs afoul of the antitrust laws. As TWC and many others have pointed out, the Department of Justice filed suit to enjoin joint retransmission consent negotiations as a form of illegal price-fixing, explaining as follows: "Although the 1992 Cable Act gave broadcasters the right to seek compensation for

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92 NPRM ¶ 23.

93 *Id.*

retransmission of their television signals, the antitrust laws require that such rights be exercised *individually* and *independently* by broadcasters."[94] Nor should stations be allowed to evade condemnation by dressing up a price-fixing conspiracy as a mere "sales agency" relationship. As the Supreme Court has explained, "[t]he fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action."[95]

The Commission has recognized in the past that "it is implicit in Section 325(b)(3)(C) that any effort to stifle competition through the [retransmission consent] negotiation process would not meet the good faith negotiation requirement," and that bargaining proposals "that result from agreements not to compete or to fix prices" are "presumptively" inconsistent with a broadcaster's obligation to negotiate retransmission consent in good faith.[96] The record confirms that such anticompetitive arrangements are causing tangible harm to consumers in the form of spiraling fees and an increased risk of blackouts. Accordingly, in adopting a rule against joint retransmission consent negotiations, the Commission should again recognize the anticompetitive nature of such conduct and ensure that consumers do not suffer the obvious harms of price-fixing among competing stations.[97]

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94 *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement at 8 (S.D. Tex. Feb. 2, 1996) (emphasis added), *available at* http://www.justice.gov/atr/cases/texast0.htm.

95 *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942). *See also United States v. American Smelting and Refining Co.*, 182 F. Supp. 834, 855-56 (S.D.N.Y. 1960) (condemning as price-fixing an arrangement by two lead mining companies under which one acted as the "seller of a portion of the production of the other in a designated area of the country").

96 *Good Faith Order* ¶ 58.

97 The Commission asks how to reconcile its proposed rule permitting joint purchasing by MVPDs with a prohibition on joint selling by stations. NPRM ¶ 29. As an initial matter, incumbent cable operators generally do not compete by virtue of their distinct franchise

Moreover, even apart from the harms to the retransmission consent process identified above, TWC has pointed out in the parallel media ownership proceeding that joint negotiations among stations may violate the Commission's ownership rules as well.[98] The Commission should not permit stations to circumvent the prohibitions on owning multiple Big Four stations in the same DMA by allowing *de facto* acquisitions of stations through local marketing agreements, shared services agreements, joint sales agreements, or similar arrangements. Other collusive practices, such as multicasting multiple network affiliate stations over a common signal and negotiating fees for both, may also violate the letter and spirit of the Commission's media ownership rules, and the Commission should closely examine these abuses of the retransmission consent regime in both proceedings and promptly put a stop to them.

4. *The Commission should adopt additional remedies to better deter and punish such violations of the good faith standard.*

In addition to reforming the substantive good faith requirements, the Commission should craft more appropriate remedies to deter bad faith tactics in the first place. The Commission suggests punishing a station's "failure to negotiate in good faith" by "considering such failure in

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areas, whereas stations in a given DMA do compete directly with one another for the sale of retransmission consent and advertising. Moreover, the antitrust agencies have explained that joint *purchasing* arrangements, unlike joint *sales* activity, usually "do not raise antitrust concerns and indeed may be pro-competitive," because they "enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies." FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (2000).

98 *See* TWC 2010 Media Ownership Comments at 10 ("The Commission's rules already prohibit actual duopolies by providing that an entity may not 'directly or indirectly own, operate, or control' two of the top-4 rated stations in a given DMA. Station groups therefore violate the Commission's rules when they own one of the top four stations in a DMA and then, through an LMA or similar arrangement, control the retransmission consent negotiations (among other key functions) of a second top four station.") (internal citation omitted).

the context of license renewals."[99] TWC strongly supports this proposal. Not only would such a rule create a far stronger compliance incentive than a forfeiture remedy, it would also reinforce the public interest obligations of broadcasters as licensees under Section 309. Indeed, Section 309(k) already instructs the Commission in license renewal proceedings to take into account whether the station has failed to "serve[] the public interest," committed "serious violations . . . of this Act or the rules and regulations of the Commission," or engaged in a "pattern of abuse."[100] TWC submits that, for purposes of license renewals under Section 309(k), the Commission should deem a station's "good faith" violations to be presumptively contrary to the public interest and sufficiently "serious" to warrant denial of a station's renewal application.

D. The Commission Also Should Affirmatively Address the Core Problems of Inflated Rates and Blackouts.

While eliminating distortions arising from the Commission's rules and targeting anticompetitive conduct are important steps in producing more efficient outcomes for consumers, the reforms discussed above will not prevent broadcasters from manipulating other aspects of the antiquated regulatory regime to serve their own pecuniary interests. TWC will support deregulatory legislation to replace the current regime with a truly market-based system, but until such legislation is enacted, the Commission should adopt new rules that would establish rate-setting and dispute-resolution mechanisms and require interim carriage. Such action would prevent broadcast programming blackouts and threats of blackouts by removing broadcasters' ability to extract higher payments using such threats. And in so doing, the Commission would eradicate the consumer harm associated with the actual or potential loss of popular network programming.

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[99] NPRM ¶ 30.

[100] 47 U.S.C. § 309(k)(1)(A)-(C).

1. *Title III of the Act gives the Commission ample legal authority to protect the interests of consumers threatened by retransmission consent disputes.*

Notwithstanding the cautious approach taken in the NPRM, the Commission has broad authority under Title III of the Act to regulate retransmission consent rates and mandate binding arbitration and interim carriage. Section 325(b)(3)(A) provides the Commission with uncommonly broad authority "to govern the exercise by television broadcast stations of the right to grant retransmission consent."[101] In addition to that general mandate, Congress directed the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable."[102] This authority dovetails with the Commission's power to ensure that broadcast stations, as Commission licensees, act in accordance with "the public interest, convenience, and necessity" under Section 309(a),[103] as well as the good-faith requirement in Section 325(b)(3)(C),[104] which as the NPRM notes, is designed to address instances when a party's demands "include[] terms

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101 *Id.* § 325(b)(3)(A).

102 *Id.*

103 *Id.* § 309(a). The Supreme Court has stated that the Commission's Section 309 mandate "to assure that broadcasters operate in the public interest is a broad one," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-80 (1969), and, in fact, the Commission has cited its Section 309 authority to impose requirements on broadcasters—requirements that were *unrelated* to any license application or renewal proceeding—that it found necessary to serve the public interest, convenience, and necessity. Indeed, the Commission stated in connection with the DTV transition that "[o]ne can scarcely conceive a situation more illustrative of the 'necessity' prong of this duty than the instant case, where certain viewers will cease having access to full-power broadcast services transmitted over the public airwaves on a date certain." *See DTV Consumer Education Initiative*, Report and Order, 23 FCC Rcd 4134 ¶ 20 (2008).

104 47 U.S.C. § 325(b)(3)(C).

and conditions not based on competitive marketplace considerations."[105] Read together with the Commission's ancillary authority,[106] these far-reaching grants of authority empower the Commission to adopt specific measures necessary to ensure that the retransmission consent regime conforms to the public interest.

The Commission recently relied on its broad Title III authority in an analogous context to impose a data roaming mandate on wireless carriers, notwithstanding the absence of any specific provisions in the statute addressing that issue. In particular, the Commission roundly rejected assertions—similar to those made by broadcasters in the retransmission consent context—that other provisions of Title III limited its ability to require data roaming arrangements to be offered on "commercially reasonable terms and conditions."[107] Indeed, the Commission determined that it had "broad authority" and "enormous discretion" to impose obligations to promote competitive marketplace conditions,[108] including a "baseball" style dispute-resolution mechanism.[109] The Commission's reluctance (to date) to consider rules adopting a dispute-resolution mechanism and requiring interim carriage thus is even more puzzling in the retransmission consent context.

Although the regulatory regime envisioned by Congress may reflect a preference for deciding the price of carriage through private negotiations, Congress also included a failsafe that

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105 NPRM ¶ 33.

106 47 U.S.C. §§ 303(r), 154(i).

107 *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, WT Docket No. 05-265, FCC 11-52, ¶ 68 (rel. Apr. 7, 2011).

108 *Id.* ¶ 58; *id.* ¶ 62 n.172 (quoting *Shurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1048 (7th Cir. 1992)).

109 *Id.* ¶ 79 (explaining that Commission staff may consider "claims regarding the commercial reasonableness of the proffered terms and conditions, including prices," by "requir[ing] both parties to provide to the Commission their best and final offers" so that the "Commission staff, if it so chose, [could] resolve a particular roaming dispute").

contemplates Commission intervention to ensure reasonable rates. In fact, the Commission is not only empowered, but obligated, to protect consumers pursuant to Title III of the Act when changes in the marketplace have made it impossible for the regulatory regime to work as intended. Moreover, protecting the public interest in uninterrupted access to broadcast programming is at the heart of Congress's intent in the 1992 Cable Act.[110] It is this core purpose that should animate the Commission's reforms in this proceeding, even if they require suspending negotiations pending comprehensive legislation to develop a market-based regime.

2. The Commission should establish effective rate-setting and dispute-resolution mechanisms and provide for interim carriage.

TWC believes that the Commission has the responsibility to use all of these tools to combat broadcasters' exploitation of the retransmission consent regime. In particular, the Commission should consider adopting a rate-setting mechanism that would establish reasonable rates for retransmission consent to put an end to the cycle of constant disputes and blackout threats. In establishing rate levels, the Commission would be guided by the principles in Section 325, which, as noted above, instructs the Commission to consider "the impact of the grant of

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110 *See* 138 CONG. REC. S14615-16 (Sept. 22, 1992) (statement of Sen. Lautenberg) (remarking that "if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights;" but that "[i]nstead, cable operators will have an opportunity to seek relief at the FCC"). More recently, in a 2007 letter to the Commission, the Chairman and Ranking Member of the Senate Commerce Committee wrote that Section 325's directives meant, "[a]t a minimum," that "Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]." Letter from Sens. Inouye and Stevens to Chairman Kevin Martin, Federal Communications Commission (Jan. 30, 2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, CSR No. 8233-C (filed Oct. 22, 2009). *See also* 138 CONG. REC. S643 (Jan. 30, 1992) (statement of Sen. Inouye) (stating, as author of Section 325, that the "universal availability of local broadcast signals" was a major goal of the legislation, and that "the FCC has authority under the Communications Act" to "ensure that local signals are available to all the cable customers").

retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that its rules are consistent with its obligation "to ensure that the rates for the basic service tier are reasonable."[111] The Commission could examine the impact of recent spikes in retransmission consent fees on basic cable rates and assess the reasonableness of such impacts, for example by comparing the rate of increase over time to the level of inflation.

The creation of a rate-setting mechanism, which would determine the *price* for retransmission consent deals, would not preclude the use of—or eliminate the need for—dispute resolution and interim carriage, as those measures could play a critical role in ending impasses centering on *non-price* terms. Dispute resolution is consistent with core aspects of existing rules and Commission precedent. The Commission's "good faith" rules, for instance, are not merely "hortatory," but in fact require broadcasters to adhere to "some heightened dut[ies] of negotiation . . . greater than those at common law."[112] Those rules reflect the Commission's active role in encouraging carriage agreements and, when necessary, proscribing conduct that stands in the way of agreement. Moreover, the Commission has established a mechanism for resolving retransmission consent disputes as a condition of *three* mergers since 2004, including in its *Comcast-NBCU Order*, and that process could serve as a template for a generally applicable dispute-resolution process.[113]

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[111] 47 U.S.C. § 352(b)(3)(A).

[112] *Good Faith Order* ¶ 24 (internal citations and quotation marks omitted).

[113] *See General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp., Ltd., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473 ¶ 209, App. F, § IV (2004) (explaining the potential consumer harms that could result from post-transaction retransmission consent disputes, including "higher rates," "withholding or threats of withholding [programming]," and "limiting consumer choice"); *Applications for Authority to Transfer Control, News Corp. and The DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 3265 ¶ 107 n.331, App. B, § IV.A (2008); *Applications of Comcast corp.,*

Broadcasters have argued that the Act forecloses Commission involvement in resolving retransmission consent disputes, because in their view such involvement would run afoul of broadcasters' statutory right to refrain from entering into a carriage agreement.[114] But establishing the price and other terms that will apply *in the event* the parties agree to carriage is not tantamount to compelling carriage. The parties are and would remain free to negotiate retransmission consent without Commission involvement. To be sure, preserving the ability to opt out of carriage would mean that some disputes could go unresolved. But in TWC's experience, if a reasonable price is established, carriage inevitably will follow, as it is rare for either party to prefer non-carriage.

Broadcasters' arguments under the Administrative Dispute Resolution ("ADR") Act also are unavailing. An arbitration regime that includes *de novo* review by the Commission would be entirely consistent with the ADR Act.[115] Although the ADR Act provides for "binding arbitration" only "whenever all parties consent,"[116] the statute uses the term "binding arbitration"

General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer of Control Licenses, Memorandum Opinion and Order, 26 FCC Rcd 4238 ¶ 52, App. A, § VII.A (2011) (noting that the Commission's "public interest mandate requires that [it] extend the arbitration and standstill remedy to all [Comcast-NBCU affiliated] programming").

114 *See* 47 U.S.C. § 325(b)(1)(A). Yet the Commission has overcome this statutory "consent" requirement to order temporary "standstills" in the program access disputes using its ancillary authority. *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements,* First Report and Order, 25 FCC Rcd 746 ¶¶ 71-72 (2010) (relying on the Commission's ancillary authority to establish standstill rules for program access disputes); *see also Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879 ¶ 6 n.31 (MB 2010) (noting that Section 4(i) permitted the Commission to impose a standstill *before* the new rules took effect). The Commission should take a similar approach here, as the Supreme Court has long held that Sections 303(r) and 4(i) authorize the Commission to maintain the status quo when "the public interest demands interim relief." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

115 Administrative Dispute Resolution Act, 5 U.S.C. §§571-84 ("ADR Act").

116 *Id.* §§ 575(a)(1), 575(a)(3).

only to mean arbitration in which the award is directly enforceable in court without *de novo* review by the agency.[117] The consent requirement does not apply to other forms of arbitration, including those in which the agency retains *de novo* review over the arbitral decision.[118] Consistent with these statutory guidelines, the Commission dismissed the assertion that Commission-imposed mandatory arbitration violates the Administrative Procedures Act and the ADR Act and instead concluded that, because *de novo* review of the arbitrator's decision is available, "the process is consistent" with those statutes.[119]

III. THE COMMISSION SHOULD ENSURE THAT ANY NOTICE REQUIREMENTS DO NOT CAUSE CONSUMER CONFUSION OR DISTORT NEGOTIATIONS

Finally, to the extent that the prospect of impasses remains under any revised rules (*e.g.*, if the Commission opts against requiring interim carriage in the event of a dispute), the Commission is likely to consider the extent to which consumer notice should be required. TWC submits that mandatory notices are just as likely to confuse consumers as to assist them. The Commission accordingly should proceed with caution, and any rules it does adopt should apply equally to all MVPDs.

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117 *Id.* §§ 576, 580(c), 581(a).

118 *See Comcast Corp.; Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938 ¶ 4 n.13 (2007) ("We do not find the prohibition in section 575(a)(3) of the ADRA to apply because the arbitration here is non-binding (*i.e.*, either party may seek *de novo* review of the arbitration decision).") ("*Comcast RSN Order*"). Moreover, by its terms, the ADR Act expressly leaves open other avenues for arbitration; the Act explains that its procedures are "voluntary" and were intended to "supplement rather than limit other available agency dispute resolution techniques." 5 U.S.C. § 572(c).

119 *See Comcast RSN Order*, 22 FCC Rcd 17938 ¶ 4 n.13; *see also TCR Sports Broadcasting Holding, LLP v. Time Warner Cable Inc.*, Order on Review, 23 FCC Rcd 15783 ¶ 52 (MB 2008) (stating that "[t]he ADRA's prohibition [on mandatory arbitration] thus does not apply where, as here, … either party may seek *de novo* review of the arbitration decision" from the Commission).

A. The Commission Should Amend Any Applicable Notice Requirements To Better Protect Consumers and Prevent Confusion.

The NPRM contemplates revising the Commission's existing notice rules to provide better information to consumers. TWC agrees with the Commission that effective subscriber notice of a potential service disruption requires a balance between the need for consumers to make alternative viewing arrangements and the desire to avoid the confusion, frustration, anxiety, and most significantly, wasted time and money associated with false alarms.[120]

As the NPRM acknowledges, programming blackouts caused by broadcaster brinkmanship, or threats of such blackouts, often induce consumers to switch from their preferred MVPD to avoid losing network programming.[121] The costs associated with switching MVPDs—or attempting to obtain over-the-air reception—often are substantial and can require consumers to expend significant personal time and effort.[122] When the threatened blackout never occurs but, in fact, was used merely as a negotiating ploy to pressure an MVPD to accept unreasonable carriage terms, the time and money spent to switch providers is wasted, which only heightens consumer frustration and anger (and rightfully so).[123] More fundamentally, consumer welfare is diminished when subscribers to one MVPD service switch to a less-preferred provider, not to obtain better service or lower prices, but simply to maintain access to broadcast programming that stations have a public interest obligation to make available to the public. In

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120 NPRM ¶ 34.

121 *See id.*; *see also* Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations* at 38, MB Docket No. 10-71 (filed June 3, 2010) ("*Salop Brinkmanship Report*") (citing a 2010 survey by J.P. Morgan, which found that more than 50 percent of subscribers would consider switching to a competitor if their current MVPD lost one of the four major broadcast networks).

122 *Salop Brinkmanship Report* at 11-16.

fact, the existence of a consumer-notice requirement enhances broadcasters' ability to use blackout threats as a ploy to drive up retransmission consent fees, as they know that their threats will put MVPDs at risk of losing customers simply because free over-the-air programming may be pulled. And even those consumers who switch MVPDs are never free from the threat of pulled programming. All MVPDs must regularly renegotiate their carriage agreements with broadcasters, and because broadcasters are increasingly threatening to go dark unless their cash demands for retransmission consent are met, consumers may be forced to engage in an endless cycle of switching among MVPDs simply to avoid the potential for a blackout.

Accordingly, to strike the appropriate balance for providing subscriber notice, and thus avoid the unnecessary harm caused by unnecessary MVPD switching, TWC urges the Commission to ensure that any notice requirements fit the realities of retransmission consent negotiations and disputes. In particular, the Commission should provide maximum discretion to MVPDs to determine the form and content of any required notices. A one-size-fits-all approach is not necessary and may be counterproductive to the Commission's goal of providing "[a]dequate advance notice" to enable consumers "to prepare for disruptions in their video service."[124] MVPDs have an ongoing relationship with their subscribers. As a result, MVPDs have established effective means of communicating with their customers and, in fact, regularly do so. MVPDs thus are better suited to identify the best ways to provide notice of a programming disruption to their subscribers. Moreover, if the Commission determines that notice invariably should be issued at some fixed interval in advance of an expiring agreement (*e.g.*, 30 days), it should ensure that MVPDs can accurately apprise customers of the status of

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123 *Id.* at 14-15 (explaining that additional consumer harm is inflicted when consumers "are led to switch MVPD providers needlessly or choose the next-best MVPD").

124 NPRM ¶ 34.

negotiations rather than needlessly sowing confusion and apprehension where an agreement appears likely to be reached.

TWC also believes that any notice requirements must apply equally to all MVPDs. There can be no rational basis for requiring cable operators, but not their competitors, to provide notice of potential service outages caused by a broadcaster's withdrawal of retransmission consent. All MVPDs participate in retransmission consent negotiations, and all MVPD subscribers are affected in the same way by broadcaster brinkmanship, making differential notice requirements irrational. Indeed, the rule's application only to traditional "cable operator[s]" and not to competing MVPDs, such as DBS providers,[125] may well violate the Fifth Amendment's guarantee of equal protection. Differential notice rules improperly "single[] out one or a few for uniquely disfavored treatment," and in such cases, "[n]owhere are the protections of the Equal Protection Clause more critical."[126] The Commission has authority to extend any notice rules to non-cable MVPDs, including under Sections 335(a), 154(i), 303(r), and 303(v).[127]

B. The Commission Should Apply Its "Sweeps" Rules to All MVPDs.

As with other notice requirements, there is no principled basis for the Commission to impose its "sweeps" rules on cable operators and not on other MVPDs. Indeed, regulatory parity among different types of MVPDs is required, not just as a policy matter, but as a matter of straightforward Constitutional interpretation. Accordingly, for the same reasons discussed above

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125 47 C.F.R. § 76.1601.

126 *News America Pub., Inc. v. FCC*, 844 F.2d 800, 813, 814 (D.C. Cir. 1988) (applying heightened scrutiny to strike down a statutory provision that prevented the Commission from extending any existing temporary waivers from the cross-ownership rules but permitted the Commission to grant new waivers, where News America was the only company with a preexisting waiver and thus received less favorable treatment under the Commission's rules than its competitors seeking new waivers).

127 47 U.S.C. §§ 335(a), 154(i), 303(r), 303(v).

with regard to the Commission's notice requirements—and using the same bases of legal authority—the Commission should extend its "sweeps" rules to other non-cable MVPDs.

CONCLUSION

The Commission already has "recogniz[ed] the consumer harm caused by retransmission consent negotiation impasses and near impasses."[128] It should therefore move swiftly to protect consumers by adopting much-needed reforms to the current retransmission consent regime. While legislation ultimately will be necessary to deregulate the relationship between broadcasters and MVPDs and to enable market-based broadcast carriage negotiations, the Commission can take a number of steps to provide interim relief. In particular, the Commission should address problems caused by its own rules (such as network non-duplication and syndicated exclusivity) and put a stop to anticompetitive conduct that is becoming increasingly prevalent (such as network interference and collusion among competing local stations). In addition, the Commission should fulfill its responsibility to protect consumers from harm by adopting effective rate-setting procedures, dispute-resolution mechanisms, and interim carriage requirements. Unless and until Congress eliminates the artificial regulatory construct of retransmission consent, must carry, and various other broadcaster preferences, such action is needed to ensure that the Commission's regulations protect the interests of *consumers*, rather than *broadcasters*.

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128 NPRM ¶ 16.

Respectfully submitted,

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