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

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

COMMENTS OF CBS CORPORATION

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SUMMARY

Less than six years ago, in response to a statutory mandate, the FCC submitted a report to Congress regarding the impact of the current retransmission consent rules on competition in the multichannel video programming distribution market. After careful review, the Commission found that no changes in those rules were warranted, because the retransmission consent legislation was achieving its intended purposes: "broadcasters . . . being compensated for the retransmission of their stations . . . and MVPDs obtaining the right to carry broadcast signals."

That statement continues to hold true. Hundreds of retransmission agreements are concluded between broadcasters and MVPDs without incident every year. A handful of recent headline-generating disputes – only one of which resulted in more than a minimal loss of service to subscribers – are anomalous exceptions to what are typically uneventful business negotiations, ending in mutually beneficial accords.

In seeking to create an aura of crisis around the retransmission consent process, MVPD interests have painted a picture of consumers being "held hostage" as their multichannel providers seek to protect them from rate increases made inevitable by "spiraling carriage fees." The MVPDs claim to be left with no option apart from "rais[ing] consumer rates" or "drop[ping] local signals." These melodramatic assertions are utterly without foundation, and reflect nothing but economic self-interest.

Retransmission fees make up only a small percentage of programming costs. The license fees that MVPDs are estimated to pay to cable programmers generally outstrip what broadcasters are reported to receive, although no cable network can match the ratings of any of the major broadcast networks on a head-to-head basis. In any case, MVPD claims that they are faced with a choice between raising consumer rates and dropping local signals are fanciful. A recent study by Ernst & Young found that from 2006 to 2010, cable operators had the highest average profitability – 38 percent – of any segment of the media and entertainment industries. Thus the

choice facing MVPDs is not between raising subscriber rates and dropping local television stations, but between accepting somewhat lower profit margins and charging consumers more.

MVPDs also greatly exaggerate the threat that consumers will experience a service interruption due to an impasse in retransmission negotiations. Since the retransmission statute was enacted in 1992, thousands of agreements have been concluded uneventfully between broadcasters and MVPDs. In only a handful of instances has service to the public been disrupted, typically for just a few days.

Service disruptions and down-to-the-wire negotiations, however atypical, have been an understandable cause of public concern. But it is essential to recall that, in the rare instance when a television signal is dropped by a particular multichannel provider within a market, consumers are hardly left without alternatives. Utilizing an over-the-air antenna will allow many customers of an affected provider to continue watching the station in question during the duration of a retransmission dispute. Viewers particularly concerned about missing a unique event such as a football game frequently find another way to see it, whether by going to a bar or restaurant with access to a competing service, or visiting a friend who subscribes to a different multichannel provider. And subscribers unwilling to incur the inconvenience that these alternatives may entail can always consider switching to another MVPD.

CBS recognizes that none of these alternatives is likely to be ideal from a consumer's standpoint. Weighing on the other side of the scales, however, is the very strong public interest in maintaining consumers' access to the programming offered by broadcasters – programming that is first-class, still available at no cost to those who exercise that option, and responsive to local needs and concerns.

In adopting the retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "192 Cable Act"), Congress sought to promote the continued viability of over-the-air television by affording broadcasters the same right as cable networks to bargain with MVPDs for compensation for their programming. Unless the exercise of that right remains unfettered, broadcasters will be unable to compete with cable networks that have long enjoyed a dual revenue stream, and the migration to pay television of original drama, marquee sporting events, and other high-quality programming will continue.

That is the backdrop against which the FCC should evaluate calls by MVPDs and others to "reform" the retransmission consent process. In rejecting the two major proposals made by a group of large multichannel providers in the rulemaking petition that initiated this proceeding, the Commission examined the legislative history and concluded that it had "[no] authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations." The Commission should now be no less scrupulous in recognizing that Congress expressly rejected proposals to modify the FCC's network non-duplication and syndicated exclusivity rules in adopting the retransmission consent law, stating that "[a]mendments or deletions of these rules in a manner which would allow distant stations to be sub[stituted] on cable systems for carriage o[f] local stations carrying the same programming would . . . be inconsistent with the regulatory structure created in [the statute]." Since, as the Commission has previously recognized, Congress viewed these regulatory protections of privately-negotiated exclusivity rights as a critical component of marketplace retransmission negotiations, the Commission should reject the efforts of cable interests to have the playing field tilted in their favor through alteration of these rules.

One possible step the Commission might take to alleviate the consumer impact of retransmission disputes would be requiring that MVPDs provide notice to subscribers of the possibility of a service interruption. The interruption of an MVPD's carriage of a television station due to a retransmission impasse need not translate into the loss of that station's programming by subscribers; consumers have several options for ensuring that they will be able to continue watching the affected station, whether by obtaining an over-the-air antenna, planning to watch a unique event at a location served by a different MVPD, or switching multichannel providers. All of these possibilities, however, require some planning. Thus, if the FCC desires to make any changes to a retransmission consent regime that is already working well, it might consider bolstering the existing notice requirement to provide that MVPDs notify their subscribers of a potential interruption of service at some point in advance of an existing agreement's expiration if renewal terms have not been agreed on.

Having again recognized that "mandatory binding dispute resolution procedures would be inconsistent with . . . [the 1992 Cable Act]," the *Notice* nonetheless asks whether the parties should be required, under the good faith negotiation rule, to submit to third-party mediation. Mandatory mediation, even though non-binding, would create exactly the same counter-productive dynamic as the proposals for binding arbitration that the Commission has rejected. A mandatory mediation process would only cause multichannel operators to delay making their "best and final" offer in the expectation that a third party's bridging proposal would treat them more favorably. The prospect of gaining a public relations advantage by accepting the mediator's proposal, while the broadcaster held out for compensation more akin to what a cable network with significant (though lesser) audience appeal would command, would only add to an operator's incentive to delay in getting to its bottom line.

The *Notice* also seeks comment on a proposal that "[s]mall and mid-size MVPDs" be permitted "to pool their resources, appoint an agent, and negotiate as a group." As the *Notice* observes, that suggestion is in some tension with the Commission's proposal that stations be prohibited from granting to a non-commonly owned station or station group the right to negotiate or approve its retransmission agreements. Moreover, experience has shown that such arrangements are subject to abuse, with large operators joining a cooperative for the purpose of taking advantage of a group agreement when direct negotiations with a program supplier have not produced the desired result. Still, CBS would not object to permitting group negotiations so long as they are voluntary on both sides, and the right of either party to insist on individual negotiations is preserved.

Despite clear Commission precedent showing the issue to be decided, the *Notice* again asks whether broadcasters may condition retransmission consent on an operator's agreement to carry other programming services, such as the programming of affiliated non-broadcast networks. In adopting rules to implement the good-faith negotiation requirement, the Commission found that proposals seeking carriage of other broadcast stations or non-broadcast networks were "presumptively" consistent with "competitive marketplace considerations." This finding was in manifest accord with the legislative intent; in enacting the retransmission consent provision in the 1992 Cable Act, the Senate Commerce Committee expressly mentioned "the right to program an additional channel on a cable system" as being among the types of consideration broadcasters might legitimately seek. The Commission should not now revisit this issue.

Finally, the Commission asks whether the rights holders of certain programming, including broadcast networks, impose geographic restrictions on the granting of retransmission consent by their licensees in a way that would prevent a station from authorizing carriage in an area in which it is significantly viewed. CBS does not do so, but strongly supports the right of program owners to control the retransmission of their works. The right to control distribution of one's intellectual property is a principal element of copyright ownership. As is the case with the network non-duplication and syndicated exclusivity rules, territorial restrictions on the right of broadcast stations to grant retransmission consent with respect to licensed programs moves the compulsory license regime closer to the contractual arrangements that would exist in a free market.

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COMMENTS OF CBS CORPORATION

CBS Corporation ("CBS") respectfully submits its comments in connection with the Commission's Notice of Proposed Rulemaking ("*Notice*") in the above docket.

INTRODUCTION

Less than six years ago, in response to a statutory mandate, the FCC submitted a report to Congress regarding the impact of the current retransmission consent rules on competition in the multichannel video programming distribution market.[1] After careful review, the Commission found that no changes in those rules were warranted, because the retransmission consent legislation was achieving its intended purposes. Thus the Commission's report concluded that "overall, the regulatory policies established by Congress when it enacted retransmission consent have resulted in broadcasters in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs obtaining the right to carry broadcast signals."[2]

That statement continues to hold true. Hundreds of retransmission agreements are concluded between broadcasters and MVPDs without incident every year. A handful of recent

1 *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC Lexis 4976 at ¶ 1 (released September 8, 2005) ("*FCC Report to Congress*").

2 *Id*. at ¶ 44.

headline-generating disputes – only one of which resulted in more than a minimal loss of service to subscribers – are anomalous exceptions to what are typically uneventful business negotiations, ending in mutually beneficial accords. However regrettable the attendant public inconvenience may be in those few instances in which timely agreements are not reached between broadcasters and MVPDs, there is no warrant for fundamental regulatory change.

To be sure, as the *Notice* observes, there have been changes in the marketplace affecting retransmission negotiations. The emergence of meaningful competition to cable operators from satellite providers and telco entrants has pressed once-dominant MSOs to compensate broadcasters fairly, including with cash, for the signals they resell to their subscribers. Given the historical and unified resistance of MSOs to paying cash for their most-viewed programming,[3] it is hardly surprising that these competitively-driven changes have resulted in some (albeit remarkably little) marketplace turmoil. But there is nothing in these developments that alters the original congressional purpose in enacting retransmission consent, namely "to establish a

3 *See*, Ted Sherman, "Consumers Loom as Losers in Battle Between Cable, Broadcast Firms," *The Newark Star-Ledger*, Sept. 13, 1993 (noting that after 1992 Act established retransmission consent requirements, "almost every broadcaster initially demanded the cash [and] at the same time, nearly all cable operators said no, threatening to dump the on-air broadcast stations come Oct. 6, when the [retransmission consent] provision takes hold"); Mark Robichaux, "Tele-Communications Says It Will Fail to Meet Deadline on TV Stations' Fees," *The Wall Street Journal,* Aug. 18, 1993, at B8 ("Nearly all of the nation' largest cable operators have vowed to forgo paying cash to local TV stations"); Michael Burgi, "TV Ratings Companies Brace For Retransmission Fallout," *Mediaweek,* Jun. 28, 1993 ("'. . . we can foresee no circumstances where we would pay cash,' said Richard Aurelio, president of Time Warner Cable in New York, referring to the FCC retransmission consent decree . . ."); Mark Robichaux, *Cable Cowboy: John Malone and the Rise of the Modern Cable Business* (John Wiley & Sons, Inc. 2002) ("TCI, for one, refused to pay cash to any of the big networks but it indicated it might be willing make room on its systems for a new cable channel a broadcaster might like to start.") By the time of its 2005 *Report to Congress*, from which the above references are quoted, the Commission still had occasion to observe that "[t]welve years later, cash still has not emerged as a principal form of consideration for retransmission consent. . . . [V]irtually all retransmission consent agreements involve a cable operator providing in-kind consideration to the broadcaster." *FCC Report to Congress*, *supra*, at ¶ 10, notes 26 and 27.

marketplace for the disposition of the rights to retransmit broadcast signals" without "dictat[ing] the outcome of the ensuing marketplace negotiations."[4]

In rejecting the two major proposals made by a group of large multichannel providers in the rulemaking petition that initiated this proceeding, the Commission was careful to respect this congressional intent, concluding that it had "[no] authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."[5] The Commission should now be no less scrupulous in recognizing that Congress expressly rejected proposals to modify the FCC's network non-duplication and syndicated exclusivity rules in adopting the retransmission consent law, stating that "[a]mendments or deletions of these rules in a manner which would allow distant stations to be sub[stituted] on cable systems for carriage o[f] local stations carrying the same programming would . . . be inconsistent with the regulatory structure created in [the statute]."[6] Since, as the Commission has previously recognized,[7] Congress viewed these regulatory protections of privately-negotiated exclusivity rights as a critical part of the backdrop against which marketplace retransmission negotiations would take place, the Commission should reject the efforts of cable interests to have the playing field tilted in their favor through alteration of these rules.

Because retransmission consent is negotiated between private businesses in a free market economy, it is beyond this Commission's power completely to insulate consumers from the consequences of those parties' failure to reach timely agreement. However, there are limited steps the Commission might take to help alleviate the impact on consumers when retransmission

4 Senate Report 102-92 at 35-36.

5 *Notice* at ¶ 18.

6 Senate Report 102-92 at 38, and n. 71.

7 *See* discussion at pages 16-17 and note 42, *infra*.

negotiations deadlock. The Commission might, for example, revise its rules to require notification of subscribers when the parties have failed to agree on renewal terms at some point prior to the expiration of a retransmission agreement, so that viewers will have sufficient time to consider alternate means of receiving particularly valued programming.

But the ultimate protection for consumers will continue to reside not with this agency, but in the strong market incentives that drive both broadcasters and MVPDs to reach agreement on retransmission terms without any disruption of service. As the Commission has observed, both parties "negotiate in the context of a level playing field in which the failure to resolve local broadcast carriage disputes . . . is detrimental to each side."[8] There is no reason to believe that the same business imperatives that have prevented service interruptions in all but a few scattered instances since the inception of retransmission consent in 1993 will not continue to do so in the future – especially once the predictable turbulence associated with broadcasters' relatively novel demands for cash compensation has passed.[9]

In sum – and contrary to the claims of MVPD interests – there is no crisis surrounding the retransmission consent process. Before addressing the specific proposals set out in the *Notice*, we briefly refute some of the myths about retransmission consent propagated by various MVPDs. We also review the reasons why preserving broadcasters' unfettered opportunity to negotiate fair compensation for carriage of their signals is vital to the future of free over-the-air broadcasting.

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[8] *FCC Report to Congress*, *supra*, at ¶ 44.

[9] See, Nate Worden, "TV Industry Rancor Over Carriage Fees Could Fade," Dow Jones Newswires, May 12, 2010 (carriage-fee negotiations between networks and cable are expected to become less contentious because, *inter alia,* of "broad acknowledgement that broadcasters will gain a substantial share of pay-TV subscriptions").

DISCUSSION

I. The Retransmission Consent System Is Not "Broken."

A. Retransmission fees have a minimal impact on consumer rates.

In seeking to create an aura of crisis around the retransmission consent process, MVPD interests have painted a picture of consumers being "held hostage" as their multichannel providers seek to protect them from rate increases made inevitable by "spiraling carriage fees." They suggest that despite the best efforts of cable and other providers to keep charges down, broadcaster dominance leaves MVPDs with no option apart from "rais[ing] consumer rates" or "drop[ping] local signals."[10] These melodramatic assertions are utterly without foundation, and reflect nothing but economic self-interest.

Retransmission fees make up only a small percentage of programming costs.[11] That being the case, they are not the reason that cable subscription rates have reliably increased at a pace greater than inflation, a trend that was established well before broadcasters were first successful in getting paid by operators for use of their signals.[12] Indeed, even as they suggest

10 Time Warner Cable Inc. *et al.*, Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, at 1 (filed Mar. 9, 2010) (the "Petition").

11 *See,* Navigant Economics, Jeffrey A. Eisenach, Ph.D. and Kevin W. Caves, Ph.D., *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon* (April 2010) ("Navigant Study") at 21-22, attached as Appendix A to Opposition of the Broadcaster Associations, MB Docket No. 10-71 (filed May 18, 2010).

12 *See*, *Thirteenth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 544-45 (2009) ("While competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation, prices continue to outpace the general level of inflation."); Associated Press, "Consumers Union faults cable policy," *The Oakland Tribune* (Oakland, CA), July 25, 2002 (whether calculated by methodology used by Consumers Union or National Cable & Telecommunications Association, cable rate increases "dwarf[ed] rates of inflation from December 1995 through March 1999).

that broadcasters are demanding excessive compensation for retransmission consent, MVPDs are notably silent as to what they pay broadcast stations as compared to cable networks that attract much smaller audiences.

There is good reason for this reticence: The license fees that MVPDs are estimated to pay to cable programmers in many cases outstrip what broadcasters are reported to receive. Thus, according to SNL Kagan estimates, the average monthly subscriber fees currently garnered by some of the leading cable networks are as follows: ESPN, $4.76; TNT, $1.08; Disney Channel $0.94; NFL Network, $0.75; Fox News Channel $0.73; USA Network, $0.62; CNN $0.53; TBS, $0.53 and MTV, $0.37.[13] The ratings of none of these cable networks can match those of any of the major broadcast networks on a head-to-head basis.[14]

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13 SNL Kagan, Basic Cable Networks By Affiliate Revenue Per Avg Sub/ Month (2011). As CBS CEO Leslie Moonves recently observed, there is no justification for CBS Television Network programming being accorded a lesser value than that of the USA Network – which receives 62 cents per subscriber according to the latest SNL Kagan estimates – when some of USA's highest-rated shows are CBS reruns, including NCIS and CSI. *See,* Joe Flint, "CBS chief Leslie Moonves takes shot at USA Network, tells government to stay out of distribution fights," *The Los Angeles Times,* April 12, 2011, http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/04/cbs-les-moonves-usa-network-.html

14 As the below table shows, the gap between the major television networks and the most popular cable networks is dramatic. Indeed, even the fifth broadcast network – the CW – outperforms all but five cable networks.

PRIMETIME RATINGS AND SHARES - 2010-11
Source: Nielsen NPM, (9/20/10-5/22/2011)

	Rtg	Share
CBS	7.1	12
FOX	5.5	9
ABC	5.3	9
NBC	4.4	7
USA	2	3
UNIVISION	1.9	3
ESPN	1.8	3
NICKELODEON	1.8	3
DISNEY	1.6	3
TNT	1.4	2
CW	1.3	2
FOX NEWS CH.	1.3	2
HISTORY	1.2	2
NICK AT NITE	1.2	2
TBS	1.2	2
ADULT SWIM	0.9	2

Even if retransmission fees were a more significant element of their overall costs, MVPD claims that they are faced with a Hobson's choice between raising consumer rates and dropping local signals would be fanciful. MVPDs have historically been highly profitable, and are currently enjoying healthy financial results despite the lingering effects of the recession.[15] Indeed, a recent study by Ernst & Young found that from 2006 to 2010, cable operators had the highest average profitability – 38 percent – of any segment of the media and entertainment industries.[16] By comparison, broadcast television ranked seventh of the ten media sectors studied, with 18 percent profitability between 2006 and 2010, and 16 percent last year.[17]

Thus the choice facing MVPDs is not between raising subscriber rates and dropping local television stations, but between accepting somewhat lower profit margins and charging consumers more. That is a business decision for MVPDs to make, but they cannot fairly blame their price increases on broadcaster efforts to secure payment for carriage for their signals in the same manner (though at lesser rates) as other program providers.

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15 *See*, Tom Lowry, "Cable profits on the rise; Operators post highest average profit margins," *Daily Variety*, March 15, 2011; Wayne Freidman, "Time Warner Cable: Profits Rise, Fewer Subscribers," *MediaPost.com,* January 27, 2007 (Time Warner Cable profits up 22.2 percent in fourth quarter 2010, despite subscriber loss); "Comcast Adjusted Profit Rises, Beats Forecasts," CNBC.com, May 3, 2011, http://www.cnbc.com/id/42880253; "CVC Numbers: Strong Financials, Advertising Resurgence & Video Sub Losses," Cablefax, November 4, 2009; Mike Farrell, "Rutledge: Cablevision Can Manage Retransmission Consent; Basic Subs Down In Q3, As Operator's Cash Flow Rises," *Multichannel News*, November 3, 2009 (noting that "retrans costs would not likely be shifted to customers" because of "large programming expense budget" and "some downward pressure on the rate of growth [in programming costs]"); "Charter Reports First Quarter 2010 Financial and Operating Results; Strong growth from bundle, high-speed Internet, and commercial services drives improved results," PR Newswire May 6, 2010; "Time Warner Cable 1Q Profit Jumps 30% As Revenue Up," Dow Jones Newswires, April 29, 2010.

16 Ernst & Young, "New study shows profitability and growth in media & entertainment," http://www.ey.com/US/en/Newsroom/News-releases/New-study-shows-profitability-and-growth-in-media-and-entertainment.

17 *Id.*

B. **Service interruptions due to impasses in retransmission negotiations are exceedingly rare.**

MVPDs depict a forbidding landscape in which consumers are regularly faced with "threats of blackouts" and must hang on "showdown negotiations" to learn if their favorite television shows will still be available.[18] The reality is otherwise. Since the retransmission statute was enacted in 1992, thousands of agreements have been concluded uneventfully between broadcasters and MVPDs. In only a handful of instances has service to the public been disrupted, typically for just a few days.[19]

Although these highly publicized disputes have been the source of understandable public frustration and have consequently attracted the attention of politicians, the experience of CBS is far more representative of retransmission negotiations. Since becoming an independent company on December 31, 2005, CBS has reached cash retransmission agreements with more than 65 distributors accounting for more than 27 million subscribers. CBS has done so without *ever* withdrawing the signal of one of its owned stations from an MVPD.[20] Contrary to MVPD claims, "brinksmanship" and "blackouts" are not a necessary incident to the successful negotiation of fair retransmission agreements.

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18 Petition at 1.

19 *See,* Brian Stelter and Bill Carter, "Fox-Cablevision Blackout Reaches a 2nd Day," *The New York Times,* October 18, 201, p.B3 ("Blackouts of local stations rarely last longer than a day, as stations risk losing ratings and advertisers and distributors risk losing customers altogether").

20 Prior to a corporate reorganization effected as of December 31, 2005, the CBS O&O television stations were commonly owned, under the umbrella of Viacom Inc., with MTV Networks Inc. ("MTV"). In March 2004, an impasse over license fees for the MTV cable networks and retransmission consent for the CBS owned television stations led DISH Network to drop both the cable channels (MTV, VH1, Comedy Central, BET and Nickelodeon) and the CBS O&Os. DISH agreed to restore the programming on terms acceptable to Viacom in less than 48 hours. *See,* Michael Learmonth and Kenneth Li, "EchoStar/Dish Network Drops CBS Stations," Reuters, March 9, 2004.

It is also essential to recall that, in the rare instance when a television signal is dropped by a particular multichannel provider within a market, consumers are hardly left without alternatives.[21] Utilizing an over-the-air antenna will allow many customers of an affected provider to continue watching the station in question during the duration of a retransmission dispute.[22] Viewers particularly concerned about missing a unique event such as a football game frequently find another way to see it, whether by going to a bar or restaurant with access to a competing service,[23] or visiting a friend who subscribes to a different multichannel provider. And subscribers unwilling to incur the inconvenience that these alternatives may entail can always consider switching to another MVPD.[24]

CBS fully recognizes that none of these alternatives is likely to be ideal from a consumer's standpoint. We respectfully submit, however, that the very rare loss of a television signal to the customers of a particular MVPD needs to be kept in perspective.

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21 *See,* Neil Best, "There are other ways to watch Series," *Newsday* (New York), October 27, 2010, p.A-59; N.R. Kleinfield, "Oscar Night Suspense, Then Poof! Cable's Back," *The New York Times*, March 7, 2010, p. B3.

22 *See, e.g.,* David Katzmaier, "Cablevision subscribers: How to watch Fox," CNET.com October 21, 2010

23 Michael M. Grynbaum, "Denied Game at Home, Football Fans Go to Bars," *The New York Times*, October 18, 2010, p. A-31; Erin Duffy, "Mercer bars tap other avenues to bypass Cablevision-Fox tiff," *The Times of Trenton* (New Jersey), October 19, 2010; Cody Derespina, "Shut out at home, Series fans take to pub," *Newsday* (New York), October 28, 2010, p. A60.

24 The fact that virtually every American now has access to several multichannel providers is a federal policy success story. Over several decades, the Congress and the FCC sought to generate the very multichannel provider competition that exists today by fostering the development and competitive parity of the DBS service. *See, e.g.,* the Satellite Home Viewer Improvement Act of 1999, PL 106-113, §1000(9), 113 Stat. 1501 (enacting the statutory copyright license allowing satellite carriers to retransmit local broadcast signals back to their own local markets). Adopting measures to protect a provider that does not offer a full range of programming options would seem to be at odds with that policy, and subvert the robustness of competition between MVPDs.

First, we note that retransmission consent is not the only context in which television viewers may temporarily lose access to highly valued programming. Last year, more than three million Cablevision customers in New York, New Jersey and Connecticut lost access to the highly popular cable channels, HGTV and Food Network – which unlike broadcast stations are not available over-the-air -- for three weeks due to a contract dispute between the MSO and programmer Scripps-Howard.[25] On the previous New Year's Eve, parents worried that their offspring would wake the next morning to find "Dora the Explorer" and "SpongeBob Square Pants" gone from their televisions, casualties of contractual wrangling between Time Warner Cable and Viacom over suitable license fees for the latter's popular cable networks.[26] And thousands of football fans who were Comcast or Time Warner subscribers were long frustrated by their inability to watch Thursday night NFL games because of the prolonged inability of those providers to reach carriage deals with the League's cable channel, the NFL Network.[27]

Nor should it be forgotten that innocent third parties "caught in the middle" of a contractual dispute may suffer worse consequences than missing a television program, without

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25 *See*, Venuri Siriwardane, "Food Network, HGTV channels to be restored to 3.1M Cablevision customers in N.J., N.Y., Conn.," nj.com, January 21, 2010 (available at http://www.nj.com/news/index.ssf/2010/01/food_network_hgtv_channels_to.html); Amanda Cuda, "Connecticut residents hungry for Food Network, HGTV," *Connecticut Post Online* (Bridgeport, Connecticut), January 6, 2010.

26 *See*, "Viacom, TWC Dispute Makes SpongeBob Cry," (available at http://www.xchangemag.com/hotnews/viacom-twc-dispute-makes-spongebob-cry.html); Bill Carter, "Viacom and Time Warner Reach Deal," *The New York Times,* January 1, 2009.

27 *See,* Alan Pergament, "Battle line set in fight for fans on local TV; Time Warner and the NFL Network are playing an expensive game of chicken with their often frustrated football audience," *Buffalo News,* December 2, 2006, p. A-1; James Walker and Shawn Mitchell, "For many, game is no-see TV; NFL-cable dispute means few will get Browns-Steelers, *Columbus Post-Dispatch*, December 7, 2006, p. 01C; Toby Smith, "Local sports bars preparing for a blitz of Cowboys, Packers fans, " *Albuquerque Journal*, November 29, 2007, p. B1; Michael McCarthy, "Blackout rules; A dispute between the NFL and cable firms leaves fans in the dark ," *USA Today,* November 29, 2007.

any thought being given to summoning government involvement. A labor strike at a manufacturing plant, for example, may cause layoffs in an industry that supplies the affected factory with component materials. But absent a threat to public health and safety,[28] government will not intervene.

Occasional disruptions of this kind are inevitable incidents of a free-market economy in which neither individuals nor businesses are forced to provide economic goods for what they consider inadequate value. The resulting public inconvenience is always unfortunate, but free-market principles have functioned to create unparalleled prosperity, including the greatest abundance of choices for television viewing that the world has ever known.

C. **The unfettered opportunity to negotiate fair compensation for signal carriage by MVPDs is vital to the future of free over-the-air broadcasting.**

American broadcasting has been characterized by a unique partnership between national broadcast networks and their local affiliates, which has blended local news and information with universally-available national news, sports and entertainment programming. Maintaining consumers' access to the programming offered by broadcasters – programming that is first-class, still available at no cost to those who exercise that option, and responsive to local needs and concerns – is manifestly in the public interest.

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28 Upon the petition of the Attorney General, acting at the direction of the President, Section 208 of the Labor Management Relations Act authorizes a federal district court to enjoin a strike affecting interstate or foreign commerce for a period of eighty days, but only if the court finds the strike (i) affects an entire industry or a substantial part of an industry and (ii) "imperil[s] the national health or safety." 29 USC §§ 178, 179(b); *see generally, United Steelworkers of America v. United States*, 361 U.S. 39 (1959) (evidence that an industry-wide strike in the steel industry seriously impaired specific defense projects supported an injunction under the statute on the ground that the strike would imperil the national safety).

At the same time, it is no secret that in recent years vastly increased competition and dramatic technological change have brought the business model of television broadcasters under increasing strain. Audiences have fragmented, advertising revenues have dropped, and new rivals for the attention of audiences – from cable television to the DVR, from the Internet to the iPad – have emerged.

In this new environment, if broadcasters are to compete with cable networks that enjoy a dual revenue stream, they must have the same unfettered right to bargain with MVPDs for compensation for their programming. If they do not, original drama, marquee sporting events, and other high-quality programming will continue its migration to pay television, and people who cannot afford, or do not wish, to subscribe to a multichannel service will be unable to view such programming.

Less than three years ago, in a $500 million deal that the *Washington Post* described as representing "the latest in a series of major sports events to migrate from free network television to subscription-based television," ESPN won from Fox the right to telecast the NCAA's Bowl Championship Series from 2011 through 2014. The *Post* article noted that the deal "would leave out about 20 million television viewers who rely on free over-the-air television"; it also reported that ESPN "charges cable and satellite operators $3.65 a month per subscriber to carry its programs."[29]

More recently, Time Warner Cable announced a twenty-year deal, estimated to be worth three billion dollars, to carry all pre-season, regular-season, and post-season games of the Los

[29] Cecilia Kang; "ESPN, BCS Deal Raises Questions," *The Washington Post,* November 26. 2008, p. E05. The BCS followed the NBA All-Star Game and *Monday Night Football* in moving to pay television. See, John Eggerton, "March Madness: A Retrans Slam Dunk," *Broadcasting & Cable*, May 3, 2010.

Angeles Lakers (except those nationally telecast) on two new regional sports networks.[30] The agreement means that after the current NBA season the team's away games will no longer be available on local television station KCAL-TV (owned by CBS) and, as noted by *The Daily News of Los Angeles,* that "the millions of Angelenos in the 600,000-plus homes that don't have a pay-TV service stand to be pushed aside."[31]

Viewers without pay-TV subscriptions will also lose access to some games of one of the nation's premiere sports events, the NCAA Basketball Tournament. Last year, CBS agreed to share rights to the tournament with Turner Broadcasting's cable networks, in a deal that *Broadcasting & Cable* characterized as "a plus for over-the-air coverage" since "[t]he alternative could easily have been March Madness going lock, stock and slam-dunk to cable." The article noted industry comment to the effect that "one of the reasons CBS . . . got to keep a piece of the Madness was the retrans revenues CBS stations expect to collect over the 14-year life of the contract." *See*, John Eggerton, "March Madness: A Retrans Slam Dunk; Carriage cash helps pay for broadcast sports rights," *Broadcasting & Cable*, May 3, 2010.

Affording broadcasters the right to bargain for such compensation was precisely the intent of Congress in adopting retransmission consent in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[32] Describing prior FCC interpretations that allowed cable systems to retransmit the signals of broadcast stations without the stations' consent, the report of the Senate Commerce Committee observed that "[a]t a time

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30 Mark Medina, "Lakers to air games on Time Warner Cable beginning with the 2012-2013 season,"*The Los Angeles Times,* February 14, 2011; Tom Hoffarth, "Marriage will have dribble-down effect," *The Daily News of Los Angeles*, February 18, 2011, p.C4; Jim Carlisle, "Lakers' new TV deal will impact others," *Ventura County Star* (California), February 18, 2011, p.C01.

31 Tom Hoffarth, "Marriage will have dribble-down effect," *The Daily News of Los Angeles*, February 18, 2011, p.C4

32 Public Law 102-385, 106 Stat. 1460 (1992).

when cable systems had few channels and were limited to an antenna function of improving reception of nearby broadcast signals, this interpretation had little practical consequences and did not unreasonably disrupt the rights that broadcasters possess in their signals."[33] The situation, the Committee noted, had "changed dramatically":

> Cable systems now include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems compete with broadcasters for national and local advertising revenues. Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. . . . Using the revenues they obtain from carrying broadcast signals, cable systems have been able to support the creation of cable services. Cable systems and cable programming services sell advertising on these channels in competition with broadcasters. *While the Committee believes that the creation of additional program services advances the public interest, it does not believe that public policy supports a system under which broadcasters in effect subsidize the establishment of their chief competitors.*[34]

Finding that cable television had become an established service that "[paid] for the cable programming services they offer to their customers," the Committee opined that "programming services which originate on a broadcast channel should not be treated differently."[35] Equivalent treatment for broadcasters can mean nothing more or less than the right to engage in free market negotiations with MVPDs concerning compensation for carriage of their signals – the same kind of negotiations that MVPDs conduct with cable programmers as a matter of course.

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[33] Senate Report 102-92 at 35-36.

[34] *Id.* (emphasis added).

[35] *Id.*

In other words, contrary to the claims made by MVPD interests in seeking insulation from marketplace negotiations, the current retransmission consent regime is working exactly as Congress intended.

II. Alteration of the Commission's Network Non-Duplication and Syndicated Exclusivity Rules Would Contravene the Express Intent of Congress.

The rulemaking petition that initiated this proceeding contends that the Commission's network non-duplication and syndicated exclusivity rules provide a "one-sided level of protection" that gives broadcasters artificially inflated bargaining leverage in retransmission negotiations.[36] Responding to these contentions, the *Notice* inquires whether those rules should be eliminated or made inapplicable if the station invoking them is not then being carried on the cable system in question.[37]

CBS respectfully submits that such rule changes are beyond the Commission's authority, since they would clearly contravene congressional intent. Thus, the Senate Report on the bill that became the 1992 Cable Act expressly indicated its "[reliance] on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules" and that "[a]mendments or deletions of these rules in a manner which would allow distant stations to be sub[stitued] on cable systems for carriage o[f] local stations carrying the same programming would . . . be inconsistent with the regulatory structure [of the statute]."[38]

Citing this statement, the Commission found in its 2005 *Report to Congress* that "[t]he legislative history of the 1992 Act indicates that the network non-duplication and syndicated

36 Petition at 12-15.

37 *Notice* at ¶¶ 42-45.

38 Senate Report 102-92 at 38, and n. 71.

exclusivity rules were viewed as integral to achieving congressional objectives."[39] Thus, the Commission noted, it had "previously . . . refused to find that the network non-duplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system."[40]

The Commission also found in its *Report to Congress* that diluting the rules would be inconsistent with its longstanding policy of promoting broadcast localism:

> Except in cases where a contract violates the Commission's rules, we do not deem it in the public interest to interfere with contractual arrangements that broadcasters have entered into for the very purpose of securing programming content that meets the needs and interests of their communities. Such interference would contradict our own requirements of broadcast licensees and would hinder our policy goals.[41]

In so stating, the Commission echoed the views it had expressed in originally adopting rules to implement retransmission consent:

> Network non-duplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.[42]

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39 *FCC Report to Congress, supra*, at ¶ 50.

40 *Id.* The Commission thus reaffirmed its conclusion, in promulgating rules to implement the retransmission consent law, that "Congress intended that local stations electing retransmission consent should be able to invoke network non-duplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system." *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC Rcd 2965, 3006 (1993).

41 *FCC Report to Congress, supra*, at ¶ 50.

42 *Id.* at note 172, *citing*, *Memorandum Opinion and Order on Reconsideration,* MM Docket No. 92-259, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 9 FCC Rcd 6723, 6747 (1994).

Contrary to the claims of MVPD interests, the network non-duplication and syndicated exclusivity rules do not afford broadcasters unfair leverage in retransmission negotiations, but merely protect contractually negotiated exclusivity rights that would otherwise be rendered meaningless by the cable compulsory copyright license.[43] The compulsory license, of course, relieves cable operators of the necessity of obtaining directly from copyright owners the right to retransmit (whether locally or in distant markets) the programs included in the broadcast signals they carry. Since the copyright negotiations made unnecessary by the compulsory license would normally provide the occasion for program owners to impose territorial restrictions necessary to protect the exclusivity rights granted to other licensees, the FCC's exclusivity rules do no more than partially correct for the interference with free market agreements inherent in the cable copyright regime.

The Commission has recognized that the exclusivity rules serve as a means of more closely approximating the free market conditions that would exist in the absence of the compulsory license. Thus, in proposing to restore syndicated exclusivity rules after an eight year hiatus following their 1980 repeal, the Commission observed:

> While the Commission's earlier action in 1980 removing these rules was intended to be deregulatory, it appears to have reduced the ability of program producers and broadcasters to enter into enforceable contracts at market determined prices. Instead, the 1980 amendments . . . moved further *away* from a market situation. We now recognize that the ability of copyright holders and broadcasters (acting as exclusive exhibitors) to control the use of creative output may have been reduced by our actions. It is possible that deleting syndicated exclusivity, given the existence of the compulsory license, moved the

43 *See,* 17 USC § 111.

> marketplace *further away* from effective freedom of contract.[44]

Following this reasoning, the Commission ultimately adopted the syndicated exclusivity rules that are in place today, while expanding the network non-duplication rule to allow networks and their affiliates greater contractual freedom in defining the temporal scope of such exclusivity.[45] Notably, the Commission's 1988 *Report and Order* expressly "affirm[ed] that broadcaster need not be carried on a cable system in order to enforce network non-duplication protection for which it has negotiated," finding it "sufficient that the broadcaster holds non-duplication rights as an element of its affiliate contractual arrangements."[46]

In sum, contrary to the impression that MVPD interests seek to create, the network non-duplication and syndicated exclusivity rules do not provide unfair leverage to broadcasters in retransmission negotiations. Rather, they are longstanding regulations adopted by the Commission for the purpose of partially restoring the ability of copyright holders and broadcasters to enforce contractually negotiated exclusivity arrangements, notwithstanding the freedom enjoyed by cable operators under the compulsory license to import distant signals into a local television market at will. As this Commission has recognized on more than one occasion, Congress expressly relied on this regulatory structure in adopting the retransmission provisions

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44 *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393 (1987) ("*Program Exclusivity NPRM*"), at ¶ 26 (emphasis in the original).

45 *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 (1988)("*1988 Program Exclusivity Order*"), at ¶¶ 90-107, 118 and Appendix B. The Commission noted that "the difference between the network non-duplication rules and the former syndicated exclusivity rules appear to be one more of degree than of kind. . . . [since] [b]oth simply permit the broadcaster to negotiate for and enforce exclusivity provisions in their program contracts." *Id.* at ¶ 110.

46 *1988 Program Exclusivity Order*, *supra,* 3 FCC Rcd 5299 at ¶ 122.

of the 1992 Cable Act. Repealing or diluting the exclusivity rules are therefore not options open to the FCC in this proceeding.

III. Consumers Could Benefit From Clearer Notice Requirements Concerning the Status of Retransmission Negotiations.

As noted above, the interruption of an MVPD's carriage of a television station due to a retransmission dispute need not translate into the loss of that station's programming by subscribers. Consumers have several options for ensuring that they will be able to continue watching the affected station, whether by obtaining an over-the-air antenna, planning to watch a unique event at a location served by a different MVPD, or by themselves switching multichannel providers.

All of these possibilities, however, will require at least some planning. As the *Notice* observes, the Commission's current rule provides only that an MVPD must provide 30 days written notice to subscribers before *deleting* a broadcast signal. This means that if service ultimately is not interrupted, the lack of notice of a potential signal loss does not violate the rule.

Thus, if the FCC desires to make *any* changes to a retransmission consent regime that is already working well, it might consider bolstering the existing notice requirement to provide that MVPDs notify their subscribers of a potential interruption of service at some point in advance of an existing agreement's expiration if renewal terms have not been agreed on.

IV. Other Issues.

A. Mandatory mediation would likely impede rather than facilitate the timely conclusion of retransmission agreements.

One of the principal "reforms" of the existing retransmission consent process sought by multichannel providers has been the imposition of binding arbitration on the parties to a retransmission negotiation.[47] The reason mandatory arbitration appeals so strongly to MVPDs is clear: They know they underpay for broadcast programming relative to the value placed on it by their customers. Rather than having to give due weight to the importance of that programming to their subscribers as they negotiate with broadcasters, MVPDs would prefer simply to turn the matter over to an arbitrator in the hope that a third party's difference-splitting will get them a better deal.[48]

Having again recognized that "mandatory binding dispute resolution procedures would be inconsistent with . . . [the 1992 Cable Act],"[49] the *Notice* nonetheless asks whether the parties should be required, under the good faith negotiation rule, to submit to third-party mediation. We think the answer is clearly no.

Mandatory mediation, even though non-binding, would create exactly the same counter-productive dynamic as the proposals for binding arbitration that the Commission has rejected. A

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47 Petition at 31-35.

48 Discussing Cablevision's proposal that its highly-publicized retransmission dispute with Fox be settled by arbitration, one commentator quoted attorneys familiar with retransmission consent issues as saying that "Fox would have been out of its mind to accept arbitration." Expanding on this view, one lawyer not involved in the dispute was quoted as follows:

> Arbitration is usually a compromise . . . . Anytime you have a seller, that party will be less willing to go into arbitration because they set the price and it's the other party that doesn't want to pay. Imagine if you went into a car dealership and you offered to go into arbitration rather than pay the price the dealer was looking for. The only thing that will come out of arbitration is a figure that's less than what they're willing to sell for.

Victor Li, "The Legal Strategy Behind the Fox-Cablevision Dispute," *The AmLaw Daily,* October 18, 2010, http://amlawdaily.typepad.com/amlawdaily/2010/10/fox-v-cablevision.html.

49 *Notice* at ¶18.

mandatory mediation process would only cause multichannel operators to delay making their "best and final" offer in the expectation that a third party's bridging proposal would treat them more favorably. The prospect of gaining a public relations advantage by accepting the mediator's proposal, while the broadcaster held out for compensation more akin to what a cable network with significant (though lesser) audience appeal would command, would only add to an operator's incentive to delay getting to its bottom line.

Last fall's widely-publicized, two-week dispute between Fox and Cablevision is instructive as to how operator hopes for third-party intervention in retransmission negotiations may actually be an obstacle to the parties' reaching agreement. A chronology of the dispute suggests that an agreement was concluded only after it had become clear that FCC intervention would not be forthcoming.

Following an FCC proposal that the two companies enter into mediation (a proposal accepted by Cablevision but rejected by Fox), the Fox owned television stations in New York and Philadelphia came off Cablevision systems in the early morning hours of October 16, 2010.[50] Despite statements of concern from the FCC, including one commissioner's suggestion that the agency might have authority to intervene in the dispute,[51] no progress was made in the parties' negotiations over the following days. On October 22, 2010, in what was to be the high-water mark of FCC involvement in the matter, the Commission ordered the two sides to provide

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50 *See*, Brian Stelter and Bill Carter, "In Cable TV Fights, Consumers Wait to See Who Blinks," *The New York Times*, October 17, 2010, p.A27.

51 Celia Kang, "Pressure mounting for FCC to intervene in Fox-Cablevision battle, but analysts question ability," *The Washington Post,* October 20, 2010, http://voices.washingtonpost.com/posttech/2010/10/pressure_mounting_for_fcc_to_i.html

evidence of their compliance with the good-faith negotiation rule.[52] Extensive responses and replies were filed, but no agreement was reached.

Then, on October 26, 2010, the president and chief executive of Cablevision wrote to the FCC's chairman requesting a joint meeting with Fox's chief executive in the chairman's office the next day. Cablevision's request left little room for doubt that its aim was to have the chairman "bang heads together" and impose a resolution more favorable to Cablevision than it would otherwise be able to get.

This time, however, the Commission threw cold water on the prospects for its intervention. An unidentified "senior official" at the agency sent a statement to news outlets saying that Cablevision "should spend less time writing publicity-seeking letters to the F.C.C., and more time at the negotiating table reaching an agreement."[53]

Within days of this pointed statement, a different, but similarly contentious, negotiation involving the Fox television stations was suddenly resolved. In a statement replete with expressions of good will and mutual praise, Fox and DISH Network announced that they had successfully concluded a retransmission agreement that averted a blackout of Fox-owned stations on the satellite carrier.[54] The next day, Fox and Cablevision also reached agreement, with

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52 *See,* Bill Carter and Brian Stelter, "F.C.C. Tries To Add Pressure In Fee Dispute," *The New York Times,* October 23, 2010, http://query.nytimes.com/gst/fullpage.html?res=9E07E3DB123BF930A15753C1A9669D8B63&ref=cablevisionsystemscorporation.

53 *See,* Bill Carter and Brian Stelter, "F.C.C. Tells Cablevision: Fewer Stunts, More Talks," *The New York Times,* October 27, 2010, p.B3.

54 *See,* Brian Stelter, "Sports Broadcasts Return as Fox and Dish End Dispute," *The New York Times,* October 30, 2010, p.B2.

Cablevision issuing a statement saying it had agreed to terms it found excessive "[i]n the absence of any meaningful action from the F.C.C."[55]

The history of the Fox-Cablevision dispute appears to illustrate what commonsense suggests: the prospect of third-party intervention will only delay the direct, no-nonsense negotiations that result in retransmission agreements. Encouraging parties to await the recommendations of a third-party mediator – rather than getting down to brass tacks – is likely to result in more, rather than fewer, service interruptions.

B. Broadcasters should not be required to negotiate with MVPD consortiums.

The *Notice* seeks comment on a proposal that "[s]mall and mid-size MVPDs" be permitted "to pool their resources, appoint an agent, and negotiate as a group."[56] As the *Notice* observes, that suggestion is in some tension with the Commission's proposal that stations be prohibited from granting to a non-commonly owned station or station group the right to negotiate or approve its retransmission agreements. If appointing an agent and giving that agent authority over retransmission negotiations is deemed impermissible, that rule should apply equally to broadcasters and MVPDs.

Such arrangements are, moreover, subject to abuse. Having failed to reach a carriage agreement with the Tennis Channel prior to the 2009 U.S. Open tennis tournament – and under pressure as a result of a Tennis Channel advertising campaign – Cablevision Systems Corporation, one of the nation's largest MSOs, purported to join the National Cable Television Cooperative ("NCTC"), an organization described by *The Los Angeles Times* as "a small Kansas nonprofit cooperative that negotiates group discounts on behalf of its members, which are largely

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55 *See*, Brian Stelter and Bill Carter, "Fox and Cablevision Deal Returns Signal," *The New York Times,* October 31, 2010, p.A28.

56 *Notice* at ¶ 29.

rural, mom-and-pop operators."[57] Cablevision then claimed that it was entitled to carry the Tennis Channel under the terms of a years-old deal the network had negotiated with the NCTC, and which were less favorable to the network than the ones sought by the Tennis Channel. The network responded in kind, invoking a provision in the NCTC agreement requiring 30 days notice of a system's commencement of carriage, thus delaying Cablevision's launch of its service until after the U.S. Open was over.[58]

CBS respectfully submits that the Commission should adopt no rule that would encourage the substitution of these kinds of maneuvers for direct negotiations between the affected parties. Having said that, CBS would not object to permitting group negotiations so long as they are voluntary on both sides (assuming the Commission finds such negotiations are consistent with competitive goals and other regulations it may adopt). However, the right of either party to insist on individual negotiations should remain paramount, and no negative inference should be drawn from such a choice.[59]

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57 *See,* Meg James, "Game, TV set, rough match," *The Los Angeles Times*, August 28, 2009, p.B1. This description of NCTC as representing small operators may have been accurate at one time, but seems increasingly suspect; a look at the organization's web site reveals that three of its nine board members are executives at a top-ten cable MSO. http://www.nctconline.org/board.asp.

58 *See,* Richard Sandomir, "Cablevision Gets Channel," *The New York Times*, September 24, 2009, p.B12.

59 In a related vein, the *Notice* asks "whether small and new entrant MVPDs are typically forced to accept retransmission consent terms that are less favorable than larger or more established MVPDs, and if so, whether this is fair." *Notice* at ¶ 29. Without attempting to address what may be "fair," it is sufficient to note that the statute expressly contemplates that broadcasters may take into account factors related to size – such as the volume of distribution and absolute level of compensation a particular operator can offer – in reaching retransmission agreements. Thus the statutory language mandating that broadcasters negotiate in good faith with multichannel providers itself makes clear that the provision does not preclude broadcasters from entering retransmission agreements with different MVPDs "containing different terms and conditions, *including price terms,* . . . if such different terms . . . are based on competitive marketplace considerations." 47 USC § 325(b) (3) (C) (emphasis added).

C. <u>There is no basis for precluding retransmission proposals requiring an operator's carriage of affiliated broadcast and non-broadcast channels.</u>

Once again, the *Notice* raises an issue that we would have thought long since decided: Whether broadcasters may condition retransmission consent on an operator's agreement to carry other programming services, such as the programming of affiliated non-broadcast networks. Both the legislative history of the 1992 Cable Act and Commission precedent clearly show that this is a form of consideration that it is perfectly legitimate for broadcasters to seek.

In adopting rules to implement the good-faith negotiation requirement, the Commission found that proposals seeking carriage of other broadcast stations or non-broadcast networks were "presumptively" consistent with "competitive marketplace considerations."[60] In so doing, the Commission acted in accordance with manifest congressional intent. Thus, in enacting the retransmission consent provision in the 1992 Cable Act, the Senate Commerce Committee observed:

> [Some] broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, *or the right to program an additional channel on a cable system.*[61]

The Committee's discussion indicated that all these forms of consideration would be legitimate for broadcasters to seek in exchange for the right to retransmit their signals.[62]

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60 *See, First Report and Order,* CS Docket No. 99-363, *Implementation of Satellite Home Viewer Improvement Act; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity,* 15 FCC Rcd. 5445, 5469 (2000) (hereafter *Good Faith Order*").

61 Senate Report 102-92 at 35-36 (emphasis added).

62 As is well known, in the years following adoption of the 1992 Cable Act – when then-dominant cable operators uniformly and publicly proclaimed that they would never pay cash for retransmission consent – the only consideration available to broadcasters for their signals was the opportunity for carriage of an affiliated cable channel. It is ironic

In *EchoStar Satellite Corp. v. Young Broadcasting Inc.*,[63] the Commission reaffirmed that bundled retransmission consent proposals are, in themselves, completely consistent with the obligation to negotiate in good-faith. There, the multichannel satellite provider EchoStar claimed that Young Broadcasting had failed to bargain in good faith because it refused meaningfully to negotiate about retransmission consent for its network-affiliated stations separately from the independent stations it also owned. In this regard, EchoStar argued that an *a la carte* offer made by Young for its network stations alone did not present a real alternative, since the price demanded for those stations was four times greater than the fee it sought for a package including the independent stations.

The Commission rejected EchoStar's argument that Young's offer was coercive, stating:

> The fact that Young priced its *a la carte* price higher than that of the three channel package reflects Young's legitimate desire to have all three channels carried, if possible. EchoStar was free to accept either of Young's proposals, to offer counter proposals to any or all of Young's proposals, or, as it did here, to cede carriage of all three channels. The fact that Young sought to occupy three channels of satellite transponder capacity, however, in no way violates our good faith retransmission consent rules.[64]

In addition to contravening the congressional intent, as reflected by the legislative history and prior Commission interpretations, foreclosing certain proposals from retransmission negotiations would simply be bad policy. As the Commission has recognized in rejecting

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that the cable industry appears to regard such second-channel carriage arrangements to be unacceptably coercive now that competition from DBS and telephone entrants into the multichannel business has afforded broadcasters meaningful bargaining leverage.

63 16 FCC Rcd 15070, at ¶¶ 21, 29 (2001).

64 *Id.* at ¶ 30.

entreaties by MVPDs that certain bargaining positions be declared off-limits in retransmission negotiations:

> [T]o arbitrarily limit the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent.[65]

It is notable, in this connection, that we have experienced situations in which a *cable operator* has insisted on negotiating retransmission consent for the CBS owned television stations simultaneously with an affiliation agreement for one of CBS's cable networks, apparently in the belief that its leverage as a distributor of the cable service could improve its bargaining position on retransmission consent. To state the obvious, if bundling is considered permissible for one side in retransmission negotiations, it must be available to all.

D. The right of copyright owners and licensees to control distribution of their intellectual property must be respected.

The Commission asks whether the rights holders of certain programming, including the broadcast networks, impose geographic restrictions on the granting of retransmission consent by their licensees in a way that would prevent a station from authorizing carriage in an area in which it is significantly viewed. CBS does not do so, but strongly supports the right of program owners to control the retransmission of their works.

Since the 1992 Cable Act was adopted, the standard CBS Television Network Affiliation Agreement has permitted stations to grant retransmission consent for network programming on an out-of-market basis where (1) the affiliate is significantly viewed in the relevant community or (2) the station has historically been carried on the cable system in question. In drafting this provision, CBS sought to protect its affiliates' network exclusivity within their markets, while at

65 *Good Faith Order*, *supra,* 15 FCC Rcd. at 5469.

the same time not interfering with cable carriage where an affiliate could be received over the air or where such carriage was traditional.

Although this was the balance struck by CBS, we emphasize that copyright owners must be able to control the distribution of their programming as they see fit by restricting the areas in which their licensees may grant MVPDs the right to retransmit that programming as part of their signals. The right to control distribution of one's intellectual property is a principal element of copyright ownership. While Congress has adopted cable and satellite compulsory copyright licenses to further the distribution of broadcast signals by relieving MVPDs of the necessity of negotiating license fees with multiple copyright owners, retransmission consent works to restore program owners' control over territorial distribution and exclusivity by restricting geographically the right of their licensees to grant retransmission consent to MVPDs.

As is the case with the network non-duplication and syndicated exclusivity rules, territorial restrictions on the right of broadcast stations to grant retransmission consent with respect to licensed programs moves the compulsory license regime closer to the contractual arrangements that would exist in a free market. The Commission should not interfere with this.

CONCLUSION

The retransmission consent process is working well. Cable resistance to paying cash for retransmission consent is eroding, and broadcasters are being compensated for the use of their signals as Congress intended. While broadcasters still do not command the payments that subscriber viewing of their schedules would warrant, neither do they "subsidize . . . their chief competitors"[66] to the same degree as before.

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66 Senate Report 102-92 at 35-36.

This has happened as a result of quiet business negotiations, the overwhelming majority of which the public has no occasion to learn of or care about. Headline-generating disputes that threaten the potential interruption of service are rare; the actual loss of a television station to affected subscribers even rarer.

Despite the enormous attention given to a handful of recent retransmission negotiations – only one of which led to a service outage lasting more than a day – the situation is hardly one calling for corrective action by the FCC. And even if the Commission were inclined to find intolerable the occasional and temporary loss of one broadcaster's programming by a particular MVPD's subscribers, the 1992 Cable Act places severe constraints on the FCC's authority to devise corrective measures. Just as the statute and its legislative history preclude the Commission's adoption of rules requiring binding arbitration or interim carriage to forestall a signal loss, the FCC may not eliminate or dilute the network non-duplication and syndicated exclusivity rules given Congress's express statement that such action would be "inconsistent with the regulatory structure [of the Act]."

In any case, tempering the rough and tumble of the retransmission consent marketplace should not be an overriding objective of this Commission. The right to bargain with MVPDs for compensation for carriage of their signals – just as cable programming networks do – is critical to broadcasters' ability to compete with multichannel providers that have long enjoyed dual revenue streams. Whether events such as the World Series will, in the future, be available on free television at all depends on their unfettered ability to exercise that right. Attempts by government to "fix" the free market in response to immediate political pressures will not, in the long run, promote consumer welfare.

Respectfully submitted,

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