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	)	
	)	

JOINT COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION, CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS, AND INSIGHT COMMUNICATIONS COMPANY, INC.

Arthur H. Harding
Seth A. Davidson
Micah M. Caldwell

Edwards Angell Palmer & Dodge LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900

Their Attorneys

May 27, 2011

TABLE OF CONTENTS

Page

SUMMARY

Mediacom Communications Corporation ("Mediacom"), Cequel Communications LLC d/b/a Suddenlink Communications ("Suddenlink"), and Insight Communications Company, Inc. ("Insight") (collectively "Joint Cable Commenters") are pleased that the Commission has issued a Notice of Proposed Rulemaking ("NPRM") with the goal of revising its outdated retransmission consent rules to better protect consumers from what has become a dysfunctional process. As the Commission has recognized, today's retransmission consent marketplace is much different than the one that existed when Congress enacted, and the Commission implemented, the retransmission consent regime. The changes in the marketplace, together with the current rules, have created a situation in which retransmission consent negotiations now take place in an environment that unfairly favors broadcasters and puts the interests of consumers second. While the specific proposals in the NPRM are a good start to correct this imbalance, the Commission must do more to curb the broadcasters' abusive and anticompetitive practices – practices that are driving up the cost of retransmission consent and contributing to the use of brinksmanship tactics in retransmission consent negotiations. The Joint Cable Commenters urge the Commission to:

- Adopt rules to prevent interference by broadcast networks in their affiliates' exercise of retransmission consent. Retransmission consent is a right that vests in a broadcast station's signal and was intended by Congress to be exercised by and for the benefit of broadcast stations, not the national networks. Yet, despite unequivocal statements from both legislators and broadcasters that retransmission consent was not meant to serve as a subsidy for the networks and that the networks "will not play a role in" and have "no right…to demand any part of the benefits" of retransmission consent negotiations, the Big 4 networks have improperly transformed retransmission consent into a "shadow copyright" regime that they are exploiting for their own financial benefit at the expense of consumers, MVPDs, and their own affiliates. The Commission can and should address network practices such as demanding a substantial cut of affiliates' retransmission consent fees, requiring affiliates to obtain network approval for retransmission consent agreements, imposing restrictions on network programming that can be carried by the

cable operator, and prohibiting affiliates from offering out-of-market carriage of their signals.

- Limit the application of its network non-duplication and syndicated exclusivity blackout protections (the "exclusivity rules") and prohibit stations from seeking contractual exclusivity provisions that allow them to avoid competition in the retransmission consent marketplace. The exclusivity rules allow broadcast stations to be the sole over-the-air source of network programming within their market. However, broadcasters now have a means of off-setting any monetary loss resulting from importation of distant signals through the retransmission consent negotiation process rather than through programming blackouts. The Commission should limit the applicability of the exclusivity rules to stations that elect mandatory carriage, or in the alternative, should only allow stations that elect retransmission consent to invoke the protections if their over-the-air signal reaches at least 85% of local homes passed by the cable operator and if it lifts other restrictions on importation of significantly viewed signals and carriage of stations that place a Noise Limited Service Contour over a portion of the community. The Commission should also ban stations from insisting on contractual provisions that limit cable operators' ability to negotiate with competitive sources of programming, such as restrictions on out-of market carriage or the importation of an out-of-market station affiliated with the same network unless the local station also is being carried.

- Address the anticompetitive impact of a single licensee engaging in retransmission consent negotiations jointly on behalf of multiple stations in a market. The exercise of collusive "duopoly" control over retransmission consent rights in a single market, and the increasing number of virtual "multicast" duopolies in particular, is enhancing the broadcasters' market power and allowing them to coerce even higher retransmission consent payments from MVPDs.

- Clarify the circumstances under which discriminatory retransmission consent terms violate the good faith rules. For instance, a competitive marketplace justifying different terms and conditions among providers should be defined as one in which more than one station (either local or distant) affiliated with a particular network has the right to grant retransmission consent in the relevant geographic area and whose programming would not be subject to network non-duplication blackout. The Commission should also specifically find that it is a violation of its rules for a station to refuse to offer comparable short-term contract extensions to all MVPDs in a market.

- Adopt enhanced notice rules designed to reduce consumer confusion and minimize the opportunity for broadcasters to use scare tactics as part of their strategy in retransmission consent negotiations. The proposal in the NPRM to require cable operators to give notice whenever there is a "potential" shutdown places the notice burden on the wrong party and will lead to more, rather than less, consumer confusion. Broadcasters are in the best position to determine whether a service disruption will occur, thus, broadcasters should be required to provide notice to subscribers when they decide to pull a signal. Such notices should be provided in a straightforward, accurate manner (and include information on the status of negotiations, indication of when the contract expires, and the specific steps viewers should take to access the signal over-the-air) only within a limited time frame and only when a service disruption is all but certain to occur. Broadcasters should also be required to place copies of their retransmission consent agreements in the station's public file to provide transparency to consumers with respect to programming costs.

- Establish uniform retransmission consent election periods and expiration dates to prevent broadcasters from manipulating the expiration dates of their retransmission consent agreements in order to maximize their bargaining leverage.

- Adopt additional remedies that will meaningfully address situations in which a violation of the rules governing retransmission consent negotiations has occurred. Such remedies can and should include provisions for interim carriage or mandatory, binding arbitration in appropriate circumstances. Other approaches that may also be helpful in this regard include establishing a benchmark "reasonable" rate for retransmission consent to provide guidance in negotiations or establishing a "cooling off" period . Under the cooling off approach, a window would open for an MVPD to negotiate with any other station if, at the end of the contract term, the broadcaster fails to agree to an extension or to submit to arbitration.

Joint Cable Commenters believe that such reforms would help restore a measure of balance to a process that, over time, has become broken and, in so doing, create conditions that will reduce the risk of negotiation impasses.

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

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

JOINT COMMENTS OF MEDIACOM COMMUNICATIONS CORPORATION, CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS, AND INSIGHT COMMUNICATIONS COMPANY, INC.

Mediacom Communications Corporation ("Mediacom"), Cequel Communications LLC d/b/a Suddenlink Communications ("Suddenlink"), and Insight Communications Company, Inc. ("Insight") (collectively "Joint Cable Commenters") hereby submit their joint comments in response to the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] The NPRM solicits comment on how the Commission might amend its rules in order improve the retransmission consent negotiation process and help protect consumers from retransmission consent-related service disruptions.

INTRODUCTION

Joint Cable Commenters are three of the nation's leading cable operators focused on providing consumers in smaller cities with broadband video, data and voice service.[2] Because of their size and circumstances, these companies were among the first cable operators targeted by broadcasters seeking to take advantage of changes in the video programming marketplace that

---

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

[2] Mediacom operates cable systems serving approximately 1.2 million subscribers in 22 states; Suddenlink operates cable systems serving approximately 1.4 million subscribers in 16 states; and Insight operates cable systems serving approximately 720,000 subscribers in three states.

allow them to coerce multichannel video programming distributors ("MVPDs") into accepting exorbitant increases in retransmission consent consideration. They also were among the first cable operators to bring these marketplace changes to the attention of the Commission and to ask the Commission to use its authority under the Communications Act to protect consumers when a broadcaster exercises its retransmission consent rights in ways that are contrary to the public interest.

With the release of the NPRM, the Commission now has acknowledged what Joint Cable Commenters and numerous other parties have been saying for some time: the Commission's current rules governing the exercise of retransmission consent are outdated in light of the significant changes in the video programming marketplace that, under the current regulatory regime, have fostered an imbalance in negotiating power that unfairly favors broadcasters and harms consumers.[3] As the NPRM expressly recognizes, "[o]ne result of such changes in the marketplace is that disputes over retransmission consent have become more contentious and more public" leading to "a rise in negotiation impasses that have affected millions of consumers."[4]

Joint Cable Commenters are pleased that the Commission, "recognizing the consumer harm caused by retransmission consent negotiation impasses and near impasses," has commenced this proceeding and has set as its goal the adoption of rules that will improve the retransmission consent negotiation process and reduce the risk of programming disruptions.[5]

---

[3] NPRM at ¶ 20 (pointing out that when the current rules governing retransmission consent were adopted, "circumstances were different from the conditions industry and consumers face today" and "programming disruptions due to retransmission consent disputes were rare").

[4] *Id.* at ¶ 2. *See also id.* at ¶ 17 ("Subscribers are the innocent bystanders adversely affected when broadcasters and MVPDs fail to reach an agreement to extend or renew their retransmission consent contracts.").

[5] *Id.* at ¶ 16.

And while we disagree with the Commission's tentative conclusion that it lacks the statutory authority to protect consumers from market failures through the adoption of interim carriage requirements and mandatory dispute resolution procedures, we have addressed those issues previously and will not dwell on them here.[6] Rather, our comments will focus on the need for the Commission to go beyond the reforms it has proposed in the NPRM. As discussed below, in order to achieve its stated goal of "protect[ing] consumers from the disruptive impact of the loss of broadcast programming,"[7] the Commission must make meaningful changes in its rules – changes that will restore to the retransmission consent process a competitive balance that will

[6] Mediacom and Suddenlink addressed the Commission's legal authority in detail in Joint Reply comments in this docket, filed on June 3, 2010 ("Mediacom/Suddenlink Reply Comments"). *See also* Reply Comments of Insight Communications Company, Inc., MB Docket No. 10-71 at 6-7 (filed June 3, 2010) ("Insight Reply Comments"). Joint Cable Commenters note that the NPRM does not respond to most of the arguments made in those comments and thus again refer the Commission to those submissions. In addition, Joint Cable Commenters note that in the recently issued *Data Roaming Order*, the Commission specifically found that Title III provides it with "broad authority" to adopt such regulations as it deems necessary to serve the public interest including, in that particular instance, rules providing for interim data roaming arrangements and authorizing the Commission staff to establish "commercially reasonable terms and conditions" for data roaming agreements using a "baseball style" arbitration approach. *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, ¶¶ 61-68 (rel. April 7, 2011). The Commission's defense of its adoption of these rules echoed many of the arguments made by Joint Cable Commenters in this proceeding, such as the argument that "the issuance of a Commission license does not convey any ownership or property interests in the spectrum and does not provide the licensee with any rights that can override the Commission's proper exercise of its regulatory power." *Id.* at ¶ 62. In the case of retransmission consent, the scope of the Commission's "proper exercise" of regulatory power is defined by the plain language of Section 325(b)(3)(A), which directs the Commission "to establish regulations to govern the exercise of the right to grant retransmission consent" and imposes no express limitations on the Commission's authority in this regard. 47 U.S.C. § 325(b)(3)(A). Indeed, Section 325(a), which uses virtually the identical language as Section 325(b)(1), has long been construed by the Commission as allowing it to determine whether a broadcaster's refusal to give consent to the use of its signal by another broadcaster is unreasonable and to take appropriate action in such cases. *See, e.g., Channel Seven, Inc.*, 3 RR 2d 680, 683 (1964); *KAKE-TV & Radio, Inc*., 10 RR 2d 799, ¶ 4 (1967); *Roanoke Telecasting Corp.*, 20 RR 2d 613 (1970). *See also Amendment of the Rebroadcasting Rules*, Memorandum Opinion and Order, 17 FR 10309, 10310 (rel. Oct. 29, 1952).

[7] NPRM at ¶ 17.

hold excessive demands for consideration in check and ensure that broadcasters fulfill their obligations under the social compact that requires them to serve the needs and interests of their communities in exchange for free use of the public airwaves.

DISCUSSION

When the Commission first implemented Section 325(b), it expressly acknowledged that Congress had created a new right vesting in the use of a broadcast station's signal by an MVPD, separate and distinct from the rights that subsist as a matter of copyright law in an MVPD's use of the programming embodied in that signal.[8] Moreover, the Commission recognized that Congress intended for retransmission consent to be exercised by and for the benefit of the broadcast station, not the owners of broadcast programming.[9] And like Congress, the Commission expected that retransmission consent would not lead to price gouging or threaten consumers' access to broadcast stations because broadcasters and cable operators were assumed to have roughly equal bargaining power (and because broadcasters would continue to have the residual protection of the mandatory carriage option).[10]

---

[8] *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) ("*Retransmission Consent Implementation Order*") ("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."); *see also* 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.").

[9] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723, ¶ 107 (1994) ("*Retransmission Consent Implementation Reconsideration Order*") (describing retransmission consent as "a new right subject to the control of the station licensee").

[10] *See, e.g.*, 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye) ("It is of course in their mutual interest that these parties reach an agreement … I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare."); *see also Retransmission Consent Implementation Reconsideration Order* at ¶ 115 (expressing the

Nearly 20 years later, changes in the regulatory, competitive, and technological landscape have created a retransmission consent marketplace that no longer comports with the understandings and expectations upon which the Commission's implementing rules were based. Retransmission consent has been transformed into a shadow copyright regime in which broadcasters' escalating demands for consideration are based not on the value of their signals, but on the supposed value of the programming embodied in those signals – programming for which MVPDs already have obtained a statutory performance right under the 1976 Copyright Act.[11] Decisions regarding the disposition of the retransmission consent right increasingly are dictated not by the stations for whose benefit that right was created, but by content owners, particularly the major broadcast networks.[12] And the balance in negotiating leverage that Congress and the Commission expected would protect consumers has been replaced by a distorted competitive environment in which broadcasters, supported by an outdated regulatory regime, enjoy the unchecked ability to threaten consumers with (and actually carry out) service disruptions as a means of coercing MVPDs into giving in to whatever terms the broadcasters demand.

The Commission, to its credit, has recognized that its existing rules do not reflect the changed marketplace in which retransmission consent negotiations now occur and that

---

Commission's belief that "there are incentives for both parties to come to mutually beneficial arrangements").

[11] For example, in an "open letter" to Congressional leadership in March 2010, Paul Karopwicz, Chairman of NAB's Television Board, cited the popularity of broadcast content and declared that "[r]etransmission consent rules simply ensure that broadcasters have the opportunity to negotiate for such highly regarded content." Staff, *Karpowicz on Retrans: It Ain't Broken*, TVNewsCheck, March 11, 2010 (available at http://staging.tvnewscheck.com/article/2010/03/11/40568/karpowicz-on-retrans-it-aint-broken).

[12] *See, e.g.*, P.J. Bednarski, *Fox Gives No Ground on Retrans Sharing*, TVNewsCheck, April 12, 2011 (available at http://www.tvnewscheck.com/article/2011/04/12/50547/fox-gives-no-ground-on-retrans-sharing).

consumers are being adversely impacted as a result.[13] The NPRM thus seeks comment on a number of proposals for reforming the current regulatory regime. While adoption of certain of these proposals would constitute a step in the right direction, they need to be expanded upon in various ways in order to protect consumers from a retransmission consent regime that no longer is working as Congress and the Commission intended and expected. As described in these comments, Joint Cable Commenters urge the Commission to pursue meaningful reform that goes beyond the rules proposed in the NPRM.

Specifically, in the first section of these comments, Joint Cable Commenters focus on steps the Commission can and should take to correct the competitive imbalance that exists in the retransmission consent marketplace by addressing (i) practices engaged in by the major national broadcast television networks that are driving up the cost of retransmission consent and contributing to the use of brinksmanship tactics in retransmission consent negotiations; (ii) the protectionist exclusivity rules and contractual exclusivity provisions that allow broadcasters to avoid competition in the retransmission consent marketplace; (iii) the growing trend of stations exercising "duopoly" control over retransmission consent rights in a single market in order to increase their market power and coerce even higher retransmission consent payments from MVPDs; and (iv) the need for clear guidance as to when discriminatory retransmission consent terms and conditions are, and are not, consistent with "competitive marketplace considerations."[14] In the second section, we discuss additional reforms and remedies that the Commission should consider and adopt in this proceeding, including reforms designed to give consumers the benefit of a more transparent and uniform retransmission consent process and a

---

[13] NPRM at ¶¶ 2, 15-17, 20.

[14] *See* 47 U.S.C. § 325(b)(3)(C)(ii); *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, ¶¶ 56-58 (2000) ("*Good Faith Order*").

more effective and rational approach to notifying consumers in those instances when a retransmission consent negotiation culminates in a service disruption.

I. REFORMS ADDRESSING ANTICOMPETITIVE PRACTICES AND PROTECTIONIST REGULATIONS THAT GIVE BROADCASTERS AN UNFAIR UPPER HAND IN RETRANSMISSION CONSENT NEGOTIATIONS.

A. The Commission should adopt rules to prevent all forms of network interference in the exercise of retransmission consent.

Both the legislative history of Section 325(b) and contemporaneous statements by broadcasters urging the enactment of that provision make clear that retransmission consent was intended to give individual broadcast licensees, not the national networks, control over the use of a station's signal and that retransmission consent revenues were not meant to subsidize network programming. For example, discussing retransmission consent on the floor of the Senate, Senator Inouye, the provision's author, distinguished between the national broadcast networks and network affiliated stations, stating that retransmission consent will "permit local stations, <u>not national networks</u> ... to control the use of their signals."[15] Similarly, in documents distributed to members of Congress in an effort to drum up support for retransmission consent, NAB expressly stated that retransmission consent was "not a 'network TV' issue" and that "[t]he television networks will not play a role in negotiations between local stations and local cable systems."[16]

---

[15] 138 Cong. Rec. S562-63 (Jan. 29, 1992) (emphasis supplied). Other members of Congress echoed Senator Inouye's statement. *See, e.g.*, 138 Cong. Rec. H6491 (July 23, 1992) (Statement of Rep. Callahan) ("The right to retransmission consent ...is a local right. This is not, as some allege, a network bailout for Dan Rather or Jay Leno. <u>Networks are not a party to these negotiations, except in those few instances where they own local stations themselves</u>.") (emphasis supplied); 138 Cong. Rec. H6493 (statement of Rep. Chandler) ("<u>The intent of the [retransmission consent] amendment was to give bargaining power to local broadcasters</u> when negotiating the terms of cable carriage – <u>not to serve as a subsidy for major networks</u>.") (emphasis supplied).

[16] *See, e.g.*, Letter from Edward O. Fritts, President & CEO, NAB, to Jack Valenti, President, MPAA, dated October 7, 1991 ("NAB Oct. 7, 1991 Letter"); *see also* Letter from Edward O. Fritts, President & CEO, NAB, to Rep. Christopher H. Smith, dated August 9, 1991 (stating, in

Indeed, NAB not only proclaimed that the networks would have no right to participate in retransmission consent negotiations, it also declared that the networks would have "no right to dictate their terms, or to demand any part of the benefits which the local station might obtain from a cable system."[17]

Yet, the national broadcast networks increasingly are using the network/affiliate relationship to assert control over the terms on which a station may exercise its retransmission consent right (if at all). A recent example of this trend, announced after the Commission commenced the instant proceeding, is NBC's "tentative" arrangement with its affiliates under which NBC would hold its affiliates' proxies and negotiate retransmission consent deals on their behalf, with NBC pocketing as much as 50 percent of the revenues.[18] The NPRM proposes to address the growing influence of the Big 4 networks over their affiliates' retransmission consent decisions by defining as a *per se* violation of the good faith negotiation requirement an agreement between a broadcast station and a network with which it is affiliated that provides the network with the right to "approve" the station's retransmission consent agreement with an MVPD.[19] While Joint Cable Commenters support this proposal, it does not go far enough to provide meaningful relief from network interference in, and abuse of, the retransmission consent process.

---

attachment, that characterizations of retransmission consent as a "network plan" are "sheer nonsense" and that "Networks are not involved in any negotiations.") Copies of the relevant portions of these documents are attached hereto for inclusion in the record of this proceeding.

[17] *See* NAB Oct. 7, 1991 Letter (emphasis supplied).

[18] Harry A. Jessell, *NBC's Affiliate Retrans Plan is 50-50 Split,* TVNewsCheck, May 18, 2011 (available at http://www.tvnewscheck.com/article/2011/05/18/51322/nbcs-affiliate-retrans-plan-is-5050-split).

[19] NPRM at ¶ 22.

In particular, under the proposed rule, a network that did not expressly insist on the right to "approve" its affiliates' retransmission consent agreements could still control the exercise of retransmission consent by those affiliates through contractual provisions that generally define and limit the circumstances in which affiliates can grant retransmission consent. For example, a network could impose program-by-program restrictions on a local station's grant of retransmission consent or it could contractually limit the geographic area within which a station could consent to the carriage of its signal. Joint Cable Commenters have experience with both of these types of network interference.

For example, last year, Mediacom received a retransmission consent proposal from a group owner covering several Fox-affiliated stations asserting that, under the terms of the stations' affiliation agreements, the broadcaster could only grant Mediacom retransmission consent on a month-to-month basis for those portions of the broadcast day when Fox network programming was being aired. Consequently, the proposed agreement sought to reserve to the station the right to revoke its grant of consent insofar as it applied to Fox programming if directed to do so by the network. This and similar tactics that networks employ in order to control a station's exercise of its retransmission consent right are inconsistent with prior Commission rulings recognizing that a station's retransmission consent right resides in the station's signal, not the station's programming and that a station thus may not "bargain away" its retransmission consent right on a program-by-program basis; rather, stations only may enter into retransmission consent agreements that cover the "entirety" of the station's over-the-air broadcast signal and the programming schedule embodied therein.[20]

[20] *Retransmission Consent Implementation Order* at ¶ 170.

In Suddenlink's case, network interference was the reason that one of its systems had to drop a network affiliate from a significantly viewed neighboring market that the system was carrying in order to provide consumers with continued access to network programming after the local affiliate refused to extend its retransmission consent agreement with Suddenlink. Although the neighboring market station had given its consent to carriage in areas where it was significantly viewed, it subsequently informed Suddenlink that the network with which it was affiliated was pressuring it to withdraw its consent on the grounds that the station's network affiliation agreement did not allow it to permit out-of-market carriage.

Another network practice that is adversely impacting consumers is the insistence by the Big 4 networks on a guaranteed portion of their affiliates' retransmission consent revenues.[21] Although the NPRM suggests that the Commission does not intend to amend its rules to address this practice,[22] the networks' exploitation of their affiliates' retransmission consent rights for their own financial benefit plainly is contrary to the public interest objectives that Congress was pursuing when it created the retransmission consent right. Under the circumstances, the Commission cannot afford to sit on the sidelines.

---

[21] Josh Wein, *Fox Affiliates Eye Potentially Higher Fees for Network Programming*, Communications Daily, Feb. 10, 2011, at page 11; Michael Malone, *Moonves: Give Us Our Retrans Cut*, Broadcasting & Cable, March 1, 2010 (*available at* http://www.broadcastingcable.com/article/449429-Moonves_Give_Us_Our_Retrans_Cut.php); Harry A. Jessell, *NBC's Affiliate Retrans Plan is 50-50 Split,* TVNewsCheck, May 18, 2011 (available at http://www.tvnewscheck.com/article/2011/05/18/51322/nbcs-affiliate-retrans-plan-is-5050-split); Linda Moss, *ABC Seeks Half of Affiliates' Retrans Take*, TVNewsCheck, Jan. 6, 2010 (available at http://www.tvnewscheck.com/article/2010/01/06/38666/abc-seeks-half-of-affiliates-retrans-take).

[22] NPRM at ¶ 22.

First, the networks' retransmission consent revenue-sharing demands unquestionably are driving up the cost of cable service.[23] If the broadcasters are to be believed, the aggregate per subscriber monthly retransmission consent fees for Big 4 affiliates – stations that are included in the mandatory basic tier that all subscribers must purchase – could top $20 in a few years.[24] Second, the networks' siphoning of retransmission consent revenues is inconsistent with Congress' understanding that retransmission consent was supposed to help preserve broadcasting as a source of local content, not subsidize national programming. As it stands, even with retransmission consent revenues spiraling upward at an unprecedented rate, a variety of platforms, including the Internet and cable, are quickly supplanting broadcasting as leaders in the creation and delivery of local content.[25]

Absent Commission intervention, the situation will only deteriorate further. It is unlikely that stations will be able to stand up to the networks, who have made it clear that they are willing to play "hardball" in order to get their way.[26] For example, Fox recently terminated several of its affiliate relationships with stations that resisted the network's retransmission consent revenue

---

[23] *See* Steve Pociask, American Consumer Institute, Center for Citizen Research, *Retransmission Consent: The Evidence of Market Power*, May 2010, at 2, filed May 17, 2010 in MB Docket No. 10-71 (retransmission consent is "undermining the consumer benefits of competition"). *See also* Charles B. Goldfarb, *A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations*, CRS Report to Congress, Congressional Research Service, No. RL334079 (July 9, 2007) at 11.

[24] *See, e.g.,* Letter of Mike 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) (indicating that it would be "reasonable" for the network to seek a retransmission consent fee of between five and six dollars).

[25] *See* Thomas W. Hazlett, *If a TV Station Broadcast in the Forest...An Essay on 21st Century Video Distribution*, at 11 (2011); *see also* Andrew Gauthier, *Time Warner to Produce WXLV Newscast as Part of Sinclair Retrans Deal*, TVSpy, Feb. 2, 2011 (available at http://www.mediabistro.com/tvspy/sinclair-finalizes-new-deal-with-time-warner-wxlv-gets-new-newscast_b6043).

[26] *See, e.g., Fox Demands to Affiliate Stations Point to Retransmission Fee Share Increase*, Fierce Cable, May 12, 2011 (available at http://www.fiercecable.com/print/node/4716).

sharing demands.[27] And last February, Fox executive Mike Hopkins told *Broadcasting & Cable* that "in certain markets of the country if the economics of broadcasting aren't able to support the broadcast network we may have to make a determination that we might be better off not being broadcasters in that market and be a cable channel."[28]

In addition, even if they could fight back against the networks, the current retransmission consent regime gives stations little incentive to do so. Nothing in the current rules stops stations from passing through the networks' revenue demands to MVPDs and their customers. As David Smith, CEO of Sinclair Broadcasting Group recently stated, demands for "reverse compensation" are "just going to be an on-going and continuing part of the business. Forever."[29] Mr. Smith then offered the following explanation of how broadcasters will deal with this new reality: "We just have to keep upping that number. We need to keep growing our side, and as we grow our side, they grow theirs."[30]

Just "growing" the amount that MVPDs and their customers are required to pay for retransmission consent may sound like a viable long-term solution to some broadcasters, but the effect of this new reality is to turn retransmission consent on its head. NAB recently stated that "a keystone of [the] local broadcast system is the continuing ability of local broadcasters to reach

---

[27] *See, e.g.*, 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). In December 2009, ABC similarly terminated its affiliation with WPGA, Macon, Georgia, because of the station's refusal to accept the network's "outrageous" retransmission consent payment demands. Andrew Gauthier, *Macon's WPGA Losing Affiliation, Cable Partner*, TVSpy, Dec. 15, 2009 (available at http://www.mediabistro.com/tvspy/macons-wpga-losing-affiliation-cable-partner_b4122).

[28] Melissa Grego, *Exclusive: Fox's Mike Hopkins Lays Out His Position With Stations*, Broadcasting & Cable, Feb. 10, 2011 (available at http://www.broadcastingcable.com/article/463807-EXCLUSIVE_Fox_s_Mike_Hopkins_Lays_Out_His_Position_With_Stations.php).

[29] Communications Daily, May 5, 2011 at page 5.

[30] *Id.*

television households throughout their local markets, including all of the households that subscribe to multichannel video programming distributor services."[31] Yet, in this proceeding, NAB supports the retention of a retransmission consent regime that now operates on the basis of threats against that very objective. Networks threaten to move their programming to low power stations or multicast streams with more limited audience reach in order to coerce their affiliates into giving them a piece of the action.[32] Stations threaten MVPD customers with a loss of access to their signals as a means of obtaining the revenues needed to satisfy their network masters. And all the while, investment by broadcasters in distinctive local content continues to be starved. The result makes a mockery of Senator Inouye's assertion that the ultimate goal of retransmission consent is to "ensure the universal availability of local broadcast signals."[33]

The examples cited above illustrate the variety of ways in which network interference in the retransmission consent process harms consumers by directly and indirectly driving up retransmission consent costs and by encouraging brinksmanship on the part of broadcasters. Thus, while the Commission's proposal to bar stations from agreeing to give a network the right to veto a particular retransmission consent agreement is a well-intentioned first step, meaningful relief requires that the Commission take the following additional steps to protect consumers.

First, the Commission can and should prohibit any agreement between a network and its affiliates that has the effect of interfering with or otherwise dictating the terms of an affiliate's grant of retransmission consent for carriage of its signal either inside or outside its local

---

[31] *In re Section 302 Report to Congress*, U.S. Copyright Office Docket No. 2010-10, Comments of the National Association of Broadcasters, page 6 (filed Apr. 25, 2011) (emphasis supplied).

[32] *See* note 21 *supra.*

[33] 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye).

market.[34] This prohibition would include a ban on "program-specific" restrictions in network/affiliate agreements that are inconsistent with the established principal that retransmission consent vests in the station's signal and must be granted with respect to that signal in its "entirety."[35] It also would prevent networks, whose copyright interests in the secondary transmission of their works by MVPDs are defined and limited by the compulsory license provisions of the Copyright Act, from circumventing those limitations by restraining their affiliates from granting consent to the carriage of their signals outside their local markets.[36]

Second, the Commission should bar networks from demanding, as a condition of entering into or continuing an affiliation agreement with a station, that the station pay the network a fixed portion of its retransmission consent fees. Such fee-sharing arrangements are on a par with agreements between networks and their affiliates that the Commission has long forbidden.[37] Moreover, Commission intervention is further justified by the fact that such arrangements provide broadcasters with a subsidy that is contrary to the intent of Congress and that is harming the public by fueling a rapid increase in retransmission consent fees and retransmission consent

[34] *See* 47 U.S.C. § 325(b)(3)(A) (directing the Commission to adopt regulations governing the exercise of retransmission consent and requiring that those rules protect against agreements that adversely affect consumer prices); 47 U.S.C. § 309(a) (giving the Commission broad authority to regulate broadcasters in the public interest, including the broadcaster-network relationship); and 47 U.S.C. §§ 201(b), 303(r), and 4(i) (giving the Commission ancillary authority to take action consistent with these objectives).

[35] *Retransmission Consent Implementation Order* at ¶ 170.

[36] Attempts by content owners to circumvent statutory limits on the scope of the rights granted them by copyright law is often considered a form of actionable "copyright misuse," particularly when such misuse is in furtherance of an anticompetitive course of conduct. *See generally*, 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 13.09 [A][1] (1992).

[37] *See, e.g.*, 47 C.F. R. § 73.658(h) (prohibiting a network and an affiliated station from entering into an arrangement whereby the station cedes control to the network with regard to the rates charged for the sale of broadcast time on non-network programs; *see also id.* at § 73.658(i) (barring stations from being represented for the sale of non-network time by a network organization, or an organization controlled by a network organization).

negotiation impasses. Under the circumstances, it is entirely appropriate for the Commission, consistent with its past recognition that retransmission consent is a right in the broadcast signal, not the programming embodied in that signal, to restrain networks from seeking to exploit their copyright-based performance right through their affiliates' retransmission consent rights.

B. The Commission should repeal its protectionist blackout rules and ban stations from seeking contractual protections against competition.

The NPRM identifies several ways in which local stations protect their leverage in retransmission consent negotiations. One way is through the invocation of the Commission's network non-duplication and syndicated exclusivity blackout rules.[38] Those rules effectively enshrine the local broadcaster as the sole source from whom an MVPD can obtain most of the programming that the station is transmitting via its over-the-air signal. Repealing or substantially scaling back these blackout rules, at least with respect to stations that elect retransmission consent, is a necessary step if the Commission is going to restore some semblance of competitive balance to the retransmission consent marketplace. However, to be effective, revisions in the blackout rules must be accompanied by other measures designed to prevent anticompetitive practices engaged in by broadcasters, such as the inclusion in retransmission consent agreements of provisions that prevent an MVPD from carrying an out-of-market affiliate of the same network.

As the NPRM points out, the network non-duplication and syndicated exclusivity rules allow program suppliers (including networks) to enforce "territorial exclusivity" agreements under which a broadcaster has obtained the right to be the sole over-the-air outlet for the program suppliers' content.[39] The rationale for adopting the network non-duplication and syndicated

[38] NPRM at ¶¶ 42-44.

[39] *Id.* at ¶ 42.

exclusivity rules was that, at the time, the Copyright Act permitted cable operators to import broadcast signals from one market into another without the consent of the broadcaster or program supplier.[40] Today, however, retransmission consent allows broadcasters to seek compensation to offset the loss of territorial exclusivity occasioned by the importation of a distant signal. As a result, there no longer is any need to give stations that elect retransmission consent the "belt and suspenders" protection afforded by the blackout rules.

Moreover, the situation today is markedly different than it was in 1993 when the Commission rejected suggestions that it adopt a rule barring stations electing retransmission consent from invoking network non-duplication or syndicated exclusivity protection.[41] At that time, the Commission defended its decision on the grounds that "allegations" that stations embroiled in retransmission consent disputes would assert their exclusivity rights in order to deny subscribers access to programming were "speculative" and that there was "no evidence that subscribers are being deprived of network programming."[42] Obviously, that is no longer the case. There is clear evidence that broadcasters are using these protectionist rules to prevent MVPDs from mitigating the effects of threatened or actual signal blackouts, thereby insulating themselves from competitive market forces that would temper their retransmission consent demands.[43] Consequently, whatever public interest benefits might flow from the continued

---

[40] *See Malrite T.V. of New York v. FCC*, 652 F.2d 1140 (2d Cir. 1981).

[41] *Retransmission Consent Implementation Reconsideration Order* at ¶ 114.

[42] *Id.* at ¶ 115.

[43] Indeed, broadcasters not only routinely invoke the network non-duplication rules in order to prevent cable operators from providing consumers with an alternative source of programming in the event of a retransmission consent dispute, but they also have become increasingly aggressive in seeking waivers of the "significantly viewed" exception to those rules, even when it results in subscribers losing access to signals that they have received for years. *See, e.g.*, *Providence TV Licensee Corp.*, DA 10-769 (MB 2010); *KXAN, Inc.*, 49 CR 1184, DA 10-589 (MB 2010); *WUPW Broadcasting, LLC*, 49 CR 1055, DA 10-460 (MB 2010).

operation of the territorial exclusivity rules plainly are outweighed by their anticompetitive impact on retransmission consent negotiations and the associated harm that they cause consumers.[44]

Under the circumstances, it would be entirely appropriate for the Commission to repeal the territorial exclusivity rules, at least insofar as they apply to stations that elect retransmission consent. In the alternative, the Commission (I) should allow a station electing retransmission consent to invoke the blackout rules only if the station's over-the-air signal is available to at least 85 percent of the local market households passed by the cable operator and (II) exempt cable operators from having to black out stations that place a Noise Limited Service Contour over any portion of the cable community or that were previously deemed "significantly viewed" in a community (notwithstanding changes in that station's current viewership levels).

Furthermore, as indicated, the Commission also should adopt rules addressing broadcast station practices that frustrate the ability of MVPDs to negotiate carriage agreements with out-of-market stations. One category of such practices involves network-imposed contractual restrictions that limit the geographic area within which a station may grant retransmission consent. Repeal of the blackout rules would be essentially meaningless unless, as discussed in the previous section, the Commission also prohibits networks and their affiliates from agreeing to such restrictions.

---

[44] The NPRM asks whether eliminating the territorial exclusivity rules would have an adverse impact on localism. NPRM at ¶ 44. The answer is no. MVPD customers generally prefer local stations over stations from a distant market. Moreover, importation of an out-of-market station can be costly: even if a cable operator carries a distant station on a "temporary" basis, it can result in the payment of copyright royalties for a much longer period. Consequently, the decision to carry a distant station instead of a local station is rarely an easy one and elimination of the exclusivity rules will bring balance to retransmission consent negotiations without tilting them in the favor of MVPDs.

Another practice that broadcasters employ to prevent MVPDs from importing an out-of-market station as an alternative source of programming to consumers is the inclusion in a retransmission consent agreement of a provision preventing the MVPD from importing an out-of-market station affiliated with the same network unless the local station also is being carried.

The NPRM discusses such agreements, but focuses its attention narrowly on efforts by broadcasters to prevent an MVPD from importing a "significantly viewed" station.[45] However, there is no reason for the Commission to prohibit exclusionary, anticompetitive retransmission consent provisions only when they restrain the carriage of a significantly viewed station. In order to allow the market to impose competitive discipline on retransmission consent terms and conditions, the Commission's rules should be modified to deem unlawful <u>any</u> agreement between a broadcaster and an MVPD that restrains the MVPD from dealing with a competing source of programming.

C. The Commission should address the anticompetitive impact of a single licensee engaging in retransmission consent negotiations jointly on behalf of multiple stations in a market.

As the NPRM indicates, a number of parties previously have noted how the uneven bargaining power that favors broadcasters in retransmission consent negotiations is exacerbated further when those negotiations are conducted jointly on behalf of non-commonly owned stations.[46] For example, an economic analysis submitted by ACA cites a study prepared by Suddenlink that found a bump of more than 20 percent in the average retransmission consent fees paid for Big 4 stations where a single entity controls the retransmission consent negotiations

---

[45] NPRM at ¶ 27.

[46] *Id.* at note 75, *citing* Mediacom/Suddenlink Reply at v; Comments of American Cable Association ("ACA Comments") at 9; Pioneer, et al. Comments at 4. *See also* Comments of Time Warner Cable Inc., MB Docket No. 09-283 (filed July 23, 2010) (seeking relief from duopoly abuses in the context of Commission review of its broadcast ownership rules).

for more than one such station in a market.[47] Collusive negotiations on behalf of multiple stations in a market also have been challenged under the antitrust laws on the grounds that such behavior allows the stations to "extract…more favorable terms from the cable companies than they would have otherwise obtained."[48]

In the NPRM, the Commission proposes to address these concerns by specifying that it is a *per se* violation of the good faith rules for a broadcast station to agree to allow another, non-commonly owned station to negotiate or approve a retransmission consent agreement on its behalf.[49] Joint Cable Commenters support the adoption of such rule, which is consistent with the Commission's past declarations that "[c]onduct that is violative of national policies favoring competition" such as "proposals that result from agreements not to compete or to fix prices" are inconsistent with the good faith negotiation requirement.[50] However, we submit that the Commission must go beyond this rule in order to provide a more complete solution to the problem of duopoly (and even tri-opoly) control of retransmission consent rights.

First, even where stations ostensibly are negotiating separately, they may be engaging in collusion, particularly where the stations' operations have been combined under the terms of a

[47] *See* ACA Comments at 9-14 and Appendix B, MB Docket 10-71 (filed May 18, 2010) (discussing findings of study by William P. Rogerson entitled "Joint Control or Ownership of Multiple Big 5 Broadcasters in the Same Market and Its Effect on Retransmission Consent Fees"). *See also* Suddenlink Communications, "Ex Parte Comments of Suddenlink Communications in Support of Mediacom Communications Corporation's Retransmission Consent Complaint," *Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc., Defendant,* CSR No. 8233-C, 8234-M at 5 (filed Dec. 14, 2009).

[48] Competitive Impact Statement, *United States v. Texas Television, Inc., Gulf Coast Broadcasting Company and K-Six Television, Inc.*, Civ. No. C-96-64 (S.D. Tex. February 2, 1996) at 6; *see also id.* at 8 (stating that the antitrust laws require that broadcasters exercise their retransmission consent rights "individually and independently" and that coordination of retransmission consent negotiations by stations that compete with one another in the market "violates the Sherman Act.").

[49] NPRM at ¶ 23.

[50] *Good Faith Order*, 15 FCC Rcd 5445, ¶ 58.

local management agreement, joint sales agreement, or shared services agreement. Mediacom experienced this first-hand in the course of its 2009 retransmission consent dispute with Sinclair.[51] The Commission must make clear that there are no "magic words" that will serve as a fig leaf to protect stations from a finding of collusive behavior; rather, such determinations will be based on a searching, case-by-case review of the facts.

Second, the rule proposed in the NPRM would not apply to situations in which the stations involved are under common ownership. Although the Commission's rules purport to limit in-market common ownership of broadcast stations, in practice those rules have become riddled with exceptions and loopholes. For example, Fox recently announced that it was terminating its affiliation with KTRV in the Boise DMA and affiliating with KNIN, which currently is a CW affiliate owned by Journal Broadcast Group. Journal Broadcast Group, which also owns KIVI, the Boise DMA's ABC affiliate, acquired KNIN in 2009 after receiving a "failing station" waiver of the duopoly rule.[52] Now that "failing" CW affiliate is about to

[51] In its retransmission complaint against Sinclair in 2009, Mediacom argued that Sinclair was violating the good faith rules by negotiating jointly on behalf of KGAN, the Sinclair-owned CBS-affiliate in Cedar Rapids, IA and KFXA, the Fox-affiliate in that market that ostensibly was licensed to Second Generation of Iowa, but operated by Sinclair pursuant to a local marketing agreement. Sinclair responded by claiming that it had mooted the issue by offering Mediacom the right to negotiate separately with Second Generation for consent to carry KFXA. However, as Mediacom pointed out, there was substantial evidence that any "independent" negotiation by Second Generation would be a sham, citing a long-pending petition to deny the renewal of KGAN that raised the issue of Sinclair's *de facto control* over KFXA and the fact that the nominal and absentee owner of KFXA with whom Mediacom was invited to negotiate appeared to have no involvement with the station's operations and no financial stake in its performance. *Mediacom Communications Corp., Complainant v. Sinclair Broadcast Group, Inc., Defendant,* Reply, CSR No. 8233-C, 8234-M at 17-19 (filed Nov. 18, 2009).

[52] *See* Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, *Assignment of License for KNIN-TV, Caldwell, ID*, DA 09-69 (rel. Jan. 16, 2009).

become a FOX affiliate, giving Journal a Big 4 duopoly – and greatly increased retransmission consent leverage – in the Boise DMA.[53]

The current rules also do not address situations where a single licensee's multicast capacity allows it to affiliate with more than one Big 4 network. Such multicast duopolies (sometimes referred to as "virtual" or "D2" duopolies) are a rapidly growing phenomenon. According to one report, there are more than 80 multicast duopolies in which at least one stream is affiliated with a Big 4 network.[54] And while most of these duopolies combine one Big 4 station and at least one "second-tier" network affiliate, there are more than a dozen markets where there are multicast duopolies featuring two Big 4 affiliates and three markets where there are two Big 4 multicast duopolies (*i.e.*, two licensees control all four Big 4 stations in the market). Indeed, one of Fox's recent retransmission consent-related affiliation changes created a Big 4 virtual duopoly: Fox dropped WTVW as its Evansville DMA affiliate and signed up WEVV, the market's CBS affiliate, which will deliver Fox on channel 44.2.[55]

While we recognize that there may not be an immediate structural solution to joint negotiations where two or more stations are under common ownership, the Commission should move promptly to address this issue. As discussed above, one of the ways that networks are pressuring their affiliates to share retransmission consent revenues and to otherwise cede control over their retransmission consent rights is through threats to shift the network's affiliation to another station in the market; the fact that nothing in the Commission's rules prevents the

---

[53] *See* Price Colman, *Fox Playing Hardball With Balky Affils*, TVNewsCheck, May 11, 2011 (available at http://www.tvnewscheck.com/article/2011/05/11/51171/fox-signs-new-affiliate-in-boise-knin).

[54] *See* Price Colman, *D2 Offers A1 Opportunity for Big Four Nets*, TVNewsCheck, April 20, 2011 (available at http://www.tvnewscheck.com/article/2011/04/20/50699/d2-offers-opportunity-for-big-four-nets).

[55] *Id.*

network from moving its affiliation to the multicast stream of a station affiliated with another Big 4 network encourages the use of such threats. At the very least, the Commission should consider changes to its ownership rules that would bar a network that terminates an existing affiliate relationship from entering into a new affiliation agreement using the multicast stream of a Big 4 station in the same market.

D. The Commission should define the circumstances under which discriminatory retransmission consent terms, including discriminatory short-term retransmission consent extensions, violate the good faith rules.

Section 325(b)(3)(C)(2) states that it is not a violation of the good faith rules for a broadcast station to enter into discriminatory retransmission consent agreements (*i.e.*, agreements containing different terms and conditions, including price terms) with different MVPDs, provided that the differences in the terms and conditions in the agreements "are based on competitive marketplace considerations."[56] This provision is of utmost importance, since the ability to discriminate among MVPDs is one of the most powerful tools in the broadcasters' retransmission consent arsenal. However, more than a decade after this provision was enacted, the Commission has offered virtually no guidance as to how it is to be applied.

Joint Cable Commenters are quite familiar with how broadcasters use their essentially unchecked ability to discriminate to drive up prices for all MVPDs. Broadcasters typically target the smaller and mid-sized operators that provide the easiest targets to be "rate leaders." After they coerce those operators into accepting rate increases, they then use the argument that "the market has changed" to justify pushing for greater increases from other operators. A key element of this strategy is the ability to discriminate not just with respect to price, but with respect to the duration and expiration date of retransmission agreements. For example, in late

[56] 47 U.S.C. § 325(b)(3)(C)(2).

2006 and early 2007, Sinclair twice granted Time Warner Cable last minute short-term extensions of their expiring retransmission consent agreement, thereby avoiding a disruption of service to Time Warner Cable's customers. However, Sinclair denied Mediacom's contemporaneous requests for similar extensions, resulting in more than 700,000 customers losing access to Sinclair's stations for more than a month.[57]

The Commission should now provide additional guidance to broadcasters, MVPDs, and the public with respect to what constitutes "competitive marketplace considerations" that justify discrimination among different MVPDs serving the same market. More specifically, the Commission should define a competitive marketplace for these purposes as one in which more than one station (either local or distant) affiliated with a particular network has the right to grant retransmission consent in the relevant geographic area and whose programming would not be subject to network non-duplication blackout.[58] And the Commission should specifically find that it is a violation of its rules for a station to refuse to offer comparable short-term extensions to all MVPDs in a market.

---

[57] Linda Moss, *Time Warner Gets Sinclair Extension*, Multichannel News, Jan. 16, 2007 (available at http://www.multichannel.com/article/88418-Time_Warner_Gets_Sinclair_Extension.php).

[58] As discussed above, the Commission should separately adopt rules exempting cable operators from having to comply with network non-duplication requests from stations electing retransmission consent or where certain conditions are met and should ban agreements that restrain an MVPD and an out-of-market station from entering into a retransmission consent agreement.

II. OTHER RETRANSMISSION CONSENT REFORMS AND REMEDIES.

A. The Commission should adopt enhanced notice and transparency rules designed to reduce consumer confusion and minimize the opportunity for broadcasters to use scare tactics as part of their strategy in retransmission consent negotiations.

In addition to seeking comment on the types of pro-competition, pro-consumer retransmission consent reforms discussed above, the Commission has proposed changing its current notice rules requiring cable operators to give advance notice to subscribers regarding the deletion of a broadcast signal from a system's line-up. Under the revised rule proposed in the NPRM, cable operators would be required to give subscribers notice of the "potential" deletion of a broadcast station if an agreement allowing continued carriage of the station has not been reached 30 days prior to the date on which carriage would otherwise terminate.[59]

Joint Cable Commenters have previously criticized as mere window dressing proposals suggesting that the Commission "reform" retransmission consent by imposing new notice requirements on cable operators. Such proposals would do nothing to deter broadcasters from sowing fear and confusion among consumers as a negotiating tactic.[60] The Commission's proposed revised notice rule, however well-intentioned, unfortunately falls into that same category.

For example, the proposed rule would not prevent the abusive notice practice that Mediacom encountered in one of its retransmission consent negotiations last year. In that instance, a broadcast group with whom Mediacom was negotiating for a retransmission consent

---

[59] NPRM at ¶ 37.

[60] Mediacom/Suddenlink Reply Comments at 30-32; Insight Reply Comments at 8. *See also* Letter from Seth Davidson, Counsel for Mediacom Communications Corporation to Chairman Genachowski, et al., MB Docket No. 10-71, dated August 12, 2010.

agreement began running crawls about the dispute not only on the stations covered by the expiring agreement, but also on a co-owned station covered by a separate agreement that was not scheduled to expire for more than five months. The broadcaster claimed that it was running the crawls on the latter station in order to keep viewers informed of the status of the station's agreement with Mediacom. In fact, the clear motivation for running the crawls so far in advance was to put additional pressure on Mediacom with respect to the agreement whose expiration was imminent by creating an atmosphere of fear and confusion that would induce some subscribers to unnecessarily seek alternative sources for a station that was in no danger of being dropped.

The NPRM itself acknowledges many of the reasons why the Commission's revised notice rule would be ineffective and, indeed, harmful.[61] It will promote, rather than prevent, the media campaigns that broadcasters typically launch during contentious retransmission consent negotiations in order to pressure cable operators into capitulating to the broadcasters' demands – campaigns that more often than not leave consumers scared, confused and even tricked into making a costly and often unnecessary decision to drop their existing MVPD service and to subscribe to a new provider or to purchase and install over-the-air reception equipment.

Rather than formalize and legitimatize the broadcasters' tactics by imposing an inflexible new notice requirement on cable operators, the Commission should consider adopting a meaningful set of changes to its notice rules that will protect and inform consumers. In particular, the Commission should adopt a notice rule that is triggered not by the mere "potential" for a service interruption, but rather applies only where such a loss of service is all but certain to occur. As the NPRM notes, "the cable operator does not know whether the negotiations will ultimately fail and it will be required to delete the broadcast signal until the

[61] NPRM at ¶¶ 36-37.

agreement actually expires."[62] In contrast, the broadcast station, by holding the power to grant consent (whether for a full term or on a temporary basis) is in the best position to know whether a signal will "go dark."

Joint Cable Commenters submit that the revised notice rule should bar both sides to a retransmission consent negotiation, as well as competitive providers of multichannel service that are subject to the Commission's jurisdiction, from formally or informally indicating to the public that a service interruption is imminent at any time more than 30 days prior to the date on which the current grant of consent is scheduled to expire. Moreover, this restriction would remain in place during the final 30 days before expiration of the current agreement unless the broadcaster gives formal written notice to the cable operator and the Commission that the broadcaster has made its last best offer and that it intends to withdraw its consent to the continued carriage of its signal if that proposal is not accepted. Concurrent with the service of this notice on the cable operator and Commission, the broadcaster would be required to notify the public of its decision to withhold consent to the retransmission of its signal.

In addition to regulating the timing of retransmission consent notices, the Commission's revised rule should address the form and substance of the notices. Notices from the broadcaster to the public would have to be given by means of on-screen announcements and/or newspaper advertisements reasonably calculated to reach the cable operator's subscribers. The broadcaster also would be required to adhere to a standard text promulgated by the Commission that eschews emotional appeals suggesting that one party or the other was threatening to deny the station's signals to viewers and instead directs viewers to the station's website, where the station would be obligated to post straightforward, accurate information about the current status of the

---

[62] *Id.* at ¶ 35.

retransmission consent negotiations, the dates on which the station's agreements with any other MVPDs serving the same community are scheduled to expire, and the technical specifications and cost of equipment that a consumer would need to receive the station's signal over-the-air. And while the principal notice obligation would be placed on the broadcaster (who, as noted, ultimately is responsible for the decision to terminate subscribers' access to its signal), once the broadcaster has given notice, cable operators (and any competing MVPDs) would be permitted, but not required, to provide consumers with written notice informing them of the impending termination of service and directing them to the broadcaster's website for more information.

The enhanced notice provision described above is broadly modeled on the "Consumer Advisory" that the Commission issued last fall in connection with the Cablevision/Fox retransmission consent dispute.[63] It also comports with the precedent that the Commission set when it promulgated and enforced rules mandating both the frequency and specific text of "consumer education" messages that broadcasters, MVPDs, and others (including entities that were not Commission licensees) were required to deliver to the public regarding the digital transition.[64] Together with other transparency requirements, the notice regimen proposed herein would go far towards addressing the Commission's valid concern that its notice rules not "merely serv[e] as a further front in the retransmission consent war."[65]

Finally, in addition to updating its notice rule, the Commission should impose a transparency requirement on broadcasters by requiring each station to place in its public file an

---

[63] *See* FCC Consumer Advisory, "What Cablevision Subscribers Should Know About Receiving Fox-Owned Stations WNYW (NY), WWOR (NJ) & WTFX (PA)" (available at http://transition.fcc.gov/DOC-302229A1.pdf).

[64] *DTV Consumer Education Initiative*, Report and Order, 23 FCC Rcd 4134 (2008); *Implementation of DTV Delay Act*, Third Report and Order and Order on Reconsideration, 24 FCC Rcd 3399 (2009).

[65] NPRM at ¶ 37.

unredacted copy of each of its current retransmission consent agreements with the MVPDs operating in the station's market. This will ensure that the public is aware of what "free" television actually costs and also would help deter broadcasters from discriminating between and among MVPDs.

B. The Commission should establish uniform retransmission consent election periods and expiration dates.

Congress mandated that retransmission consent elections and the subsequent negotiations would occur on a three-year cycle.[66] However, over time, this cycle has been corrupted by the proliferation of retransmission consent agreements with varying terms, including both short-term agreements as well as agreements that continue beyond the end of a cycle. As a result, the uniformity and certainty that Congress sought when it mandated that retransmission consent elections and negotiations occur on a standardized three-year cycle no longer exists.

Pursuant to its authority to establish rules governing broadcasters' exercise of retransmission consent, the Commission should adopt regulations mandating that retransmission consent agreements expire at the end of each three-year election cycle and providing for a transition of existing agreements to this new schedule. Specifically, the regulations adopted by the Commission should provide that in those instances where an agreement in place as of the effective date of the revised rules is scheduled to expire less than one year before the end of the current cycle, the agreement will be automatically extended until the end of the cycle (with an inflation-based adjustment in the retransmission consent fee for the extended period). If the agreement's expiration date is more than a year before the end of the current cycle, or any time after the end of the current cycle, the agreement would expire as a matter of law at the end of the current cycle.

---

[66] 47 U.S.C. § 325(b)(3)(B).

The goal of such a rule would be to prevent broadcasters from manipulating the expiration dates of their retransmission consent agreements in order to maximize their bargaining leverage. To this end, one element of the rule would be that stations would be prohibited from granting an extension to one MVPD in the market without offering the same extension to all of the other MVPDs in the market.

C. The Commission should adopt alternative remedies designed to encourage resolution of retransmission consent disputes.

The proposals discussed above include several measures that would restore a measure of balance to the retransmission consent negotiation process that is currently lacking and would place the exercise of retransmission consent back in the hands of individual stations, as Congress intended. However, the proposed changes in the rules can only have the desired pro-consumer, pro-competitive effect if there is an efficient mechanism for enforcing them in a timely manner and an effective, certain set of remedies to address violations when they occur.

The NPRM suggests that the rules proposed therein could be enforced by considering violations "in the context of license renewals."[67] Such an approach is consistent with Commission precedent under Section 325(a) and thus is entirely appropriate.[68] However, the license renewal process is a slow, uncertain mechanism that does not address the immediate harm caused to consumers by anticompetitive behavior that drives up costs or disrupts access to service. In order to address those concerns, a more immediate form of relief is needed as well.

As noted at the outset of these comments, Joint Cable Commenters disagree with the Commission's tentative conclusion that it lacks the statutory authority to direct a broadcaster to consent to interim carriage of its signal by operation of law or to require that the parties to a

[67] NPRM at ¶ 30.

[68] *See Channel Seven, Inc., KAKE-TV & Radio, Inc., and Roanoke Telecasting Corp., supra* note 6.

retransmission consent negotiation submit to mandatory, binding arbitration. At the very least, there can be no question that the Commission has the authority to impose such obligations on the parties as a remedy when retransmission consent negotiations have been tainted by a violation of the Commission's rules. Yet, if the Commission continues to be unwilling to adopt such remedial measures, it can and should consider other actions it might take in order to deter and correct such instances of regulatory non-compliance.

For example, the Commission could adopt a mechanism for establishing a "reasonable" retransmission consent rate that would not be binding on the parties and thus would not run afoul of its concern about "dictat[ing] the outcome" of retransmission consent negotiations.[69] In the alternative (and particularly if the Commission fails to adopt all of the reforms suggested herein), the Commission could adopt a "cooling off" mechanism that would protect consumers with a minimum of government intervention.

Under one such cooling off approach, either the MVPD or the broadcaster could give notice that the negotiations were deadlocked with five days or less left during the existing contract term. This notice would trigger a "cooling off" period during which the parties could either agree to an extension of the existing agreement or agree to submit the dispute to binding arbitration. If the broadcaster did not extend the agreement or agree to arbitration, it would be deemed to have waived its network non-duplication and syndicated exclusivity protection and any contractual provisions that would otherwise restrain an out-of-market station from entering into a retransmission consent agreement with the MVPD would be deemed abrogated for as long as the local station did not agree to allow its signal to be carried.[70]

[69] NPRM at ¶ 18.

[70] While not specifically a "remedial" provision, the NPRM asks for comment on its tentative conclusion that the statutory prohibition on the deletion of a local commercial station during a

CONCLUSION

Joint Cable Commenteres welcome the Commission's recognition of the fact that, in light of changes in the marketplace, its retransmission consent rules are out-of-date and that revisions to those rules are necessary in order to ensure that those rules are not exploited in ways that are contrary to the public interest. To this end, the NPRM sets forth a number of proposed modifications to its rules that would address such matters as network interference in the retransmission consent process; the adverse impact on competition of territorial exclusivity rules, collusive retransmission consent negotiations by competing broadcasters, and contractually-imposed restraints on the carriage of significantly viewed stations; and the abuse of consumer notice in retransmission consent disputes. Unfortunately, these proposals, while representing a step in the right direction, generally fall short of providing the meaningful change that is needed to protect consumers. In the foregoing comments, Joint Cable Commenters offer several suggestions for ways in which the Commission can and should expand on the proposals in the NPRM. Adoption of these suggestions will further the goal of restoring a semblance of balance

---

sweeps period only applies to cable operators and that broadcasters can elect to force cable operators to stop carrying their signals even during a sweeps period. *Id.* at ¶¶ 38-40. This tentative conclusion is based on a strained reading of the statute and produces absurd and unfair results that are inconsistent with the Commission's professed concern about disruption of viewer access to high value content. In particular, the construction of this provision offered in the NPRM is at odds with the Commission's previous determination that the statutory "no deletion during sweeps" rule "<u>absolutely</u> require[s] that no deletion of any local television station shall occur during a sweeps period." *Time Warner Cable*, 15 FCC Rcd 7882, ¶ 8 (CSB, 2000). Moreover, it produces absurd and unjustified results. For example, if a cable operator breaches a retransmission consent agreement during a sweeps period (*e.g.,* by failing to make a required payment), the broadcaster would be able to demand that the system cease its retransmissions as a means of forcing the operator to come into compliance; however, under the Commission's proposed reading of the rule, when a broadcaster breaches its end of the retransmission consent bargain, the operator must nonetheless continue to carry the station. There is no reason to believe Congress intended this rule to produce such a "heads I win, tails you lose" result. The better approach is to apply the rule so that it prevents deletions during sweeps regardless of what the broadcaster or the cable operator wants, thereby protecting the integrity of the sweeps system.

to the retransmission consent process and, in so doing, create conditions that will reduce the risk of negotiation impasses.

Respectfully submitted,

MEDIACOM COMMUNICATIONS CORPORATION, CEQUEL COMMUNICATIONS LLC D/B/A SUDDENLINK COMMUNICATIONS, AND INSIGHT COMMUNICATIONS COMPANY, INC.

By: ______________________________

Arthur H. Harding
Seth A. Davidson
Micah M. Caldwell

Edwards Angell Palmer & Dodge LLP
1255 23rd Street, NW
Eighth Floor
Washington, DC 20037
(202) 939-7900

Their Attorneys

May 27, 2011

ATTACHMENTS

National Association of
NAB
BROADCASTERS

Edward O. Fritts

President & CEO
1771 N Street, N.W.
Washington, D.C. 20036-2891
(202) 429-5444
Telex: 350-085

October 7, 1991

Mr. Jack Valenti
President
Motion Picture Association
of America
1600 Eye Street, NW
Washington, DC 20006

Dear Jack:

We are disappointed that MPAA has decided to oppose retransmission consent and S. 12, the Cable Consumer Protection Act. MPAA's public statement on this cable bill, however, raises more questions than it answers.

We began our talks with you at the suggestion of Chairman Inouye, in an effort to address MPAA's concerns regarding the retransmission consent provisions of S. 12. In spite of the many hours of discussions between our two associations, it appears that none of the distance between us was narrowed. Given the absolute antagonism to <u>any</u> cable legislation demonstrated by at least one of MPAA's members, perhaps MPAA's opposition to retransmission consent was inevitable. That, too, may explain MPAA's opposition to the rate regulation provisions in S. 12.

MPAA's public statement on the bill, however, goes well beyond resistance to retransmission consent and rate regulation. In declaring its opposition to S. 12, MPAA offers up a copyright "solution" -- repeal of the compulsory license -- as an alternative.

I am well aware of your long-standing personal opposition to the compulsory license, and that of many of MPAA's members. The present debate on cable legislation may appear to MPAA to be the first viable opportunity to advance this agenda. Your offer of this alternative, however, will find no takers at NAB. It seems to us that repeal of the compulsory license is a pallid substitute for the comprehensive approach to communications policy set forth by the drafters of the Cable Television Consumer Protection Act.

I have attached a memorandum that spells out in much greater detail NAB's views on retransmission consent, but let me summarize the principal points:

* NAB strongly believes that retransmission consent is necessary to the future vitality of the broadcasting industry. Our continued health also serves the best interests of MPAA's members, whose programs we purchase, as well as those of the ultimate consumers of both of our members' products -- the viewing public.

* Retransmission consent is not inconsistent with the copyright interests of programmers -- the compulsory license always has operated hand in glove with communications policy. Retransmission consent simply changes communications policy.

* Retransmission consent is not a new concept -- S. 12 merely extends settled legal principles to cable retransmissions of broadcast signals. It finally will allow a fair and functioning marketplace between local television stations and local cable systems.

* Retransmission consent applies only to local television stations, not to the television networks. The television networks will not play a role in negotiations between local stations and local cable systems.

* Repeal of the compulsory license will not address the communications policy rationales that underlie retransmission consent. Indeed, repeal of the compulsory license is inconsistent with must carry, for which MPAA expresses its support.

Jack, I am sorry that we could not reach some accommodation on these important issues. I would rather have MPAA's support than its opposition, but NAB will continue to work diligently to ensure the passage of the Cable Television Consumer Protection Act in this Congress.

Kindest personal regards,

Eddie

Enclosure

Retransmission Consent and Programmers

This memorandum speaks to the concerns voiced by the Motion Picture Association of America regarding the retransmission consent provisions of S. 12, the Cable Consumer Protection Act of 1991.

Before addressing some of the specific questions raised by MPAA, we wish to clear up a number of misconceptions, some of which have been fostered by the cable industry in its efforts to avoid legislation. First, retransmission consent is not a network issue. Section 325 of the Communications Act, as amended by S. 12, would give no rights whatever to broadcast networks. Instead, retransmission consent is a local station measure. The negotiations that would follow the enactment of S. 12 would take place between individual stations and the cable systems that wish to carry their signals. The broadcast networks would have no right to participate in these negotiations, to dictate their terms, or to demand any part of the benefits which a local station might obtain from a cable system.

MPAA has expressed concerns about NAB's view that a program license agreement between a program owner and a television network will not affect the ability of that network's affiliated stations to grant or withhold consent to retransmission of its signal to local cable systems. As noted, retransmission consent rights may be exercised by local stations only, not by the television networks. Furthermore, television networks cannot compel their affiliated stations to clear their programs. Nothing in S. 12 alters those FCC regulations.

We believe that networks and program suppliers will continue to operate as they do today. The networks's program license fees are set at levels that reflect nationwide distribution of the program owners' programs. Today, cable systems can disrupt the expectations of both the networks and the program suppliers through their power to carry or not to carry the signals of local affiliated stations. These rights held by local cable systems do not appear to alter current licensing negotiations between networks and program suppliers. We see no reason why extending retransmission consent authority to local stations should alter these negotiations, either.

We are aware that the MPAA may have additional concerns with regard to how program suppliers and networks negotiate their program license fees. We believe, however, that these issues should be addressed in the context of the debate on financial interest and syndication rules, not within discussions on retransmission rights, which involve local stations and local cable systems.

Second, the cable industry has postulated the existence of some formula, stated or unstated, to determine the revenues which a television station might derive from exercising its right to retransmission consent. There is no formula; there is no number which broadcasters expect to receive. Many stations may elect not to negotiate for

National Association of
NAB
BROADCASTERS

Edward O. Fritts

President & CEO
1771 N Street, N.W.
Washington, D.C. 20036-2891
(202) 429-5444
Telex: 350-085

August 9, 1991

The Honorable Christopher H. Smith
U.S. House of Representatives
Room 2440
Rayburn House Office Bldg.
Washington, DC 20515

Dear Mr. Smith:

When Congress returns from the August recess, the Senate will be taking up important cable legislation to protect America's consumers from the monopoly activities of the cable industry. In addition, members of the House Energy and Commerce Committee likely will begin focusing some of their attention on cable legislation.

The cable industry has responded to this pending legislation by placing a number of newspaper ads around the nation, asking consumers to oppose the legislation. In addition, many cable systems are putting such information into cable consumers' bills and running TV ads against the legislation on their cable systems.

As a result of this misinformation campaign by the cable industry, your office may be receiving some constituent mail regarding the retransmission consent/must carry provisions which are included in S. 12, the Senate cable legislation. To help you better understand the issue and to respond to such mail, I have attached three items. One is called "How to Respond to Cable's Attacks on Retransmission Consent," and deals directly with the charges made in the cable advertisements. The second is called "A Primer on Retransmission Consent," which explains how this provision would work and how it will NOT raise consumers' cable rates. The third is a sample letter which you could use in responding to constituent mail on this issue.

I hope you will take just a few minutes to look over this material as you and your staff consider this important legislative issue. I believe you will find it extremely useful in responding to and alleviating constituents' concerns, which have been fanned by cable's scare tactics.

Kindest regards,

Eddie Fritts

EOF:mw
Enclosures

National Association of Broadcasters

HOW TO RESPOND TO CABLE'S ATTACKS ON RETRANSMISSION CONSENT

CABLE CLAIMS:

I. "RETRANSMISSION CONSENT/MUST CARRY OPTION IS ANTI-CONSUMER AND WILL RAISE CABLE RATES."

Cable claims that the retransmission consent option in S. 12 would provide the broadcast industry with an additional $3 billion in revenue. This allegedly would represent a 20% "surcharge" on the rates paid by each cable subscriber.

BROADCASTER RESPONSES:

o These charges are false and misleading. They refer to a 18-month-old press account of a two-year-old internal industry memo which refers to legislation previously rejected, and which <u>has no relationship</u> to S. 12.

o There is no reason to assume that cable consumers would see any increase in their monthly cable bills because of retransmission consent. The average monthly charge to cable operators for "cable only" programming on basic channels is between $2.84 and $3.25. Compare that with the retail cost of approximately $20.00 per month to the cable subscriber. The difference proves that the local cable operator has a great deal of flexibility in pricing decisions. Cable operators also have other highly profitable revenue streams, including pay cable, pay-per-view, as well as local and national advertising.

o In the extremely rare instances where local cable systems compete against each other, cable rates are cut by approximately one-half. For example:

a) In Georgia, there are two TCI cable systems located 25 miles apart. In Vidalia, Georgia, there is a competing system and TCI's monthly basic service rate is $10.95 for 30 channels. In Swainsboro, Georgia, with no competition, TCI's monthly rate is $18.40 for 31 channels. This $7.45 difference reflects a 68% increase between the Vidalia TCI system and the one in Swainsboro.

b) In central Pennsylvania, there are two cable systems owned by Warner Cable. In Pottsville, where there is a competing system, the monthly rate is $14.95 for 40 channels. In Chambersburg, the subscriber pays $18.95 for 33 channels.

These examples show that competition has the effect of driving down cable rates, competition which the cable industry has uniformly opposed. They also demonstrate that in systems where there is no competition, the subscriber is paying a "monopoly rent". Again, cable operators have great flexibility in setting rates for cable service.

- o It is not known how many local stations would attempt to secure financial compensation in a marketplace negotiation. Many stations may wish to joint-program a vacant channel on a local cable system or seek promotional consideration.

- o If cable is so worried about consumer reaction, NAB has already agreed to allow cable operators to publish their per-channel costs in the monthly bill sent to the ratepayer. Let the ratepayer see how much cable pays for local broadcast signals as well as those of TNT, ESPN, Lifetime and USA network.

- o If you believe the rate argument which cable makes, each system must operate on a profit margin so thin that every cost of business is reflected in its subscriber rates. If so, the cable industry is unlike any other business enterprise. Broadcasters often absorb higher program costs and salaries without automatically raising prices for advertising. To do so would force advertisers to look for other advertising mediums.

- o There are specific provisions within the legislative history of the retransmission consent/must carry option proposal directing the FCC to ensure that its enactment will not force cable rates to increase.

- o Cable says it is "unfair" for consumers to pay for signals which they can get for free over-the-air. But the fact is that cable has been charging consumers for years for those same signals. A retransmission consent option will not change that fact.

CABLE CLAIMS:

II. "RETRANSMISSION CONSENT IS A 'NETWORK PLAN'"

BROADCASTER RESPONSE:

- o This is sheer nonsense. Nowhere in S. 12 is there any mention of network participation whatsoever. Retransmission consent is a right granted to <u>local</u> stations in their local areas. Networks are not involved in any negotiations.

CABLE CLAIMS:

III. "RETRANSMISSION CONSENT IS A 'WIN-WIN' SITUATION FOR BROADCASTERS."

BROADCASTER RESPONSES:

- False. Broadcasters do NOT get both retransmission consent and must carry. They must choose one or the other. A simple reading of the bill proves that point.

- Even if a broadcaster chooses must carry, he or she is not guaranteed carriage, but is instead merely placed in the pool of eligible stations. Cable operators would never have to dedicate more than one-third of their channel capacity for must carry. Retransmission consent stations will count towards this cap.

- Must carry is necessary because not all stations are viable enough to bargain for carriage. Loss of these stations would make the marketplace even more tilted toward cable. Must carry also guarantees a diversity of local views within local communities, a long-time goal of the FCC in its licensing process.

7-31-91