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

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

COMMENTS OF
SUREWEST COMMUNICATIONS

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SUMMARY

It is clear that developments subsequent to the enactment of Section 325 of the Communications Act in 1992, combined with the existence of network non-duplication and syndicated exclusivity rules ("Exclusivity Rules"), have resulted in a supra-competitive advantage to broadcasters in negotiations for retransmission consent ("RC"), all to the harm of consumers. Currently, MVPDs and their subscribers are paying what is nothing more than a monopoly premium for over-the-air TV programming. This is not a naturally-occurring phenomenon; rather, it is the direct result of Commission rules failing to keep pace with significant changes in technologies and market dynamics. The current RC and Exclusivity Rules insulate broadcasters from competition while providing them powerful leverage; MVPDs, especially small MVPDs, lack either advantage. Accordingly, the Commission should restore balance to RC negotiations by providing certain protections to MVPDs and their customers, namely: 1) revising good faith negotiation standards to require non-discriminatory pricing and transparency in RC agreements; 2) eliminating the Exclusivity Rules to enable fair and effective bargaining; 3) requiring mandatory arbitration when RC negotiations fail and providing interim carriage rights to preserve programming continuity for subscribers during negotiations and arbitration; and 4) clarifying that there is no statutory requirement for stations that elect RC to be placed in a cable operator's basic tier. The Commission should not, however, modify its subscriber notification rules.

<u>Mandatory Arbitration and Interim Carriage</u>: The *Petition for Rulemaking* that triggered this proceeding made an extensive and well supported case for the Commission to enact rule provisions for mandatory interim carriage while an MVPD negotiates in good faith, and mandatory commercial arbitration (and interim carriage) if negotiations have broken down just prior to or after the expiration of an existing RC agreement. Combined, these proposals would significantly limit, if not eliminate, the most explicit expression of bad faith by broadcasters, and the most immediately devastating impact on consumers: the threat to withdraw, and the withdrawal, of consent for an MVPD to retransmit a broadcast signal. SureWest believes that the Commission's *NPRM* was overly hasty in rejecting these proposals, and it should in fact enact them.

It appears that broadcast networks intend to enter directly into RC negotiations on behalf of their affiliates. SureWest believes that this development is contrary to the public interest, in part because it likely will result in badly unbalanced RC negotiations, and thus arbitrations, with small MVPDs who have significantly less resources to devote to arbitration than large national networks. However, if the Commission allows networks to negotiate on behalf of affiliates, then in enacting rules for mandatory arbitration, the Commission should look to provisions in the recent *Comcast-NBCU* merger order designed to ameliorate such imbalances in arbitrations, such as limits on payment of arbitration costs and legal fees by small MVPDs, and allowing small MVPDs to negotiate and arbitrate collectively.

Transparency Requirements and Prohibition on Price Discrimination: The Commission's good faith negotiation standards should be expanded and refined to establish a more concrete set of expectations. The Commission should consider as a *per se* good faith violation, any RC demand by a broadcaster for monetary compensation from one MVPD that is disproportionately greater than the compensation that broadcaster has obtained from a similarly-situated MVPD. The Commission's good faith negotiation standards should include a strong presumption that the per-subscriber rate paid to a broadcaster should be the same for every MVPD in a market that enters into an RC agreement with that broadcaster. Furthermore, an MVPD should be able to elect to pay that rate without being forced to accept any tie-ins requiring carriage of additional programming channels, or other provisions (such as requirements to purchase TV advertising or purchase broadcast programming for video-on-demand) which in effect constitute additional compensation to the broadcaster.

The most effective way to ensure that broadcasters do not discriminate in price to MVPDs is for the Commission to require *transparency* in RC agreements. That is, the Commission's good faith negotiation standards should provide that RC agreements, once executed, must be made available to the public. Accordingly, confidentiality provisions should be prohibited in RC agreements, at least as applied to per-subscriber rates and any other sort of compensation paid by the MVPD. Such a requirement would also likely reduce the time and resources devoted by broadcasters and MVPDs to RC negotiations, resulting in less costs that would have to be passed through to subscribers.

Elimination of the Exclusivity Rules: It is clear that the Exclusivity Rules harmfully distort RC negotiations by acting as a barrier to MVPDs obtaining programming for subscribers in situations where a local station is abusing its market power and refusing to grant RC to an MVPD. In such cases, the Exclusivity Rules can deny subscribers of the MVPD access to network and syndicated programming that they have come to rely on, and that is improperly being withheld from them by the local broadcast station. These rules should be eliminated. While SureWest believes that the Commission's concern about any resulting impact on broadcast localism is misplaced, the Commission could address that concern and still promote more balanced RC negotiations by *modifying* the Exclusivity Rules to provide that a station seeking to enforce exclusivity rights against an MVPD may *only* do so if its signal is carried by that MVPD.

Clarification That RC Stations are Not Required to be Placed in the Basic Tier: One additional step that the Commission could take to reduce impasses in RC negotiations would be to definitively clarify that there is no statutory requirement to place RC stations in a cable operator's basic tier. Such a clarification would give a small, but additional piece of negotiation leverage to cable operators, to help remedy the currently imbalanced environment. While Section 623 (b)(7) of the Act could be read at first blush to require carriage of RC stations on the basic tier, it must be noted that under Section 623(a)(2), rate regulations only apply where a cable system is not subject to effective competition. Therefore, when a cable system is subject to effective competition, the best reading of the statute is that the system is not under a statutory obligation to place RC stations in its basic service lineup.

Subscriber Notification Rules Should Not Be Modified: SureWest recognizes that subscribers need timely and accurate information regarding signal deletion, in order to make informed choices. The *NPRM* recognizes, however, that in quickly changing negotiations, it is difficult to make accurate predictions in advance as to the final result of those negotiations. Any mass notice requirement to all of an MVPD's subscribers requires days or weeks of preparation with many cycles of transmittals before it can be executed, and in many cases in the scenario being contemplated by the Commission, inaccurate notices would be sent to consumers, when RC negotiations are settled just as or after notices of signal deletion are sent out. The resulting confusion and agitation would harm consumers, rather than provide them a benefit. In addition, a revised notice requirement would also likely *reduce* the possibility of good faith RC negotiations, as the obligation on the MVPD to send out such a notice would be used by the broadcaster as additional leverage in the RC negotiation.

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COMMENTS OF SUREWEST COMMUNICATIONS

SureWest Communications ("SureWest") hereby files these Comments in response to the Commission's Notice of Proposed Rulemaking, 26 FCC Rcd 2718, released March 3, 2011, in the above-captioned proceeding ("*NPRM*"). In these Comments, SureWest urges the Commission to take the real substantial steps necessary to address the distorted market for television retransmission consent, and to remedy the resulting significant harms to consumers. While some of the proposals in the *NPRM* (such as changes to the "good faith" negotiation standards and elimination of network non-duplication and syndicated exclusivity rules) may provide incremental benefits, they are unlikely alone to provide the balance to the market necessary to prevent harm to consumers. Accordingly, the Commission should enact the mandatory arbitration and interim carriage proposals in the Petition for Rulemaking that triggered this proceeding,[1] as well as other proposals suggested herein, including enacting a prohibition on discriminatory price demands by broadcasters and a transparency requirement for retransmission consent agreements.

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[1] Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket 10-71 (filed Mar. 9, 2010) (hereinafter, "*Petition*").

I. <u>Introduction</u>

With almost a century of providing service in northern California, and three years of providing service in the Kansas City market, SureWest and its family of companies represent an integrated network of advanced communications products and services. While its origins are as an incumbent local exchange carrier and it continues to provide local and long distance voice services, SureWest now also provides fiber-based broadband data services with digital multichannel video ("MV") services over a number of different IP platforms using different technologies. SureWest's MV services are well-accepted by consumers. Currently, about 63,000 customers take MV services from SureWest, either alone or in combination with other services. In all of these cases, SureWest is acting as the "overbuilder" or the new competitor against the incumbent cable TV operator and satellite carriers.

As an overbuilder, SureWest is well aware of the challenges of competition, and yet it has succeeded where there is a fair competitive environment, through the offering of advanced high quality products, along with attentive customer service and reasonable prices. Customers win in this scenario, and thus the public interest is served. Where competition is <u>not</u> fair, however, especially where the provider of an essential input has nearly unbeatable market power leverage due to regulatory fiat, then customers lose and the public interest is harmed. That is certainly the case in regards to the market for retransmission of over-the-air television programming.

The *Petition* makes a compelling case, which SureWest will not recite in detail here, that developments subsequent to the enactment of Section 325 of the Communications Act in 1992, combined with the existence of network non-duplication and syndicated exclusivity rules ("Exclusivity Rules"), have resulted in a supra-competitive advantage to broadcasters in negotiations for retransmission consent ("RC"), all to the harm of consumers. Although Congress specifically required the Commission to ensure that the RC process did not result in harmful rate increases to consumers,[2] the Commission initially concluded that such harms were unlikely.[3] While that conclusion may have been valid in 1994, when the overwhelming majority of MVPD subscribers could obtain service only from an incumbent cable operator, the subsequent sizeable growth of direct broadcast satellite services and competitive wireline MV services provided by telephone companies has radically altered the dynamics of the market for over-air TV programming. Broadcast stations can use the existence of multiple MVPD competitors in a geographic market as "carriage insurance," allowing them to demand unreasonable rates from an individual MVPD by threatening to withhold RC from that MVPD, knowing that they can get at least some off-air "coverage" in a geographic area by granting RC to other MVPDs.[4] Of course, the natural market

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[2] Section 325(b)(3)(A) of the Act provides that in enacting RC rules, the "Commission <u>shall consider</u> in such proceeding the impact that the grant of retransmission consent by television stations may have on the <u>rates</u> for the basic service tier and shall <u>ensure</u> that the regulations prescribed under this sub-section do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable." (emphasis added).

[3] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues,* Memorandum Opinion and Order, 9 FCC Rcd 6723, at para. 115 (1994).

[4] *See, e.g.,* CHARLES B. GOLDFARB, CONGRESSIONAL RESEARCH SERVICE, RETRANSMISSION CONSENT AND OTHER FEDERAL RULES AFFECTING PROGRAMMER-DISTRIBUTOR NEGOTIATIONS: ISSUES FOR CONGRESS (2007) at pages 11 and 13 (hereinafter, "*CRS Retransmission Consent Report*"). ("As a result [of multiple new entrants to the MVPD market], programmers have more options available to them to reach audiences and are able to negotiate with distributors from a position of strength, often demanding terms, conditions, and rates that are more favorable to themselves and less favorable to distributors than those that have prevailed in the past …. Ironically, the market consequence of greater competition in the distribution of video programming appears to be greater negotiating leverage for programmers with popular -- and especially must have -- programming, resulting in higher programming prices that MVPDs tend to pass through at least partially to subscribers.").

dynamic for the MVPDs in this situation should be to obtain and import largely the same programming from broadcast stations in the adjoining geographic area. Yet the Exclusivity Rules form an artificial and arbitrary barrier to MVPDs exercising this sort of free market option to balance the negotiating leverage.

The *NPRM* (at para. 15) acknowledges some of the harmful impact on consumers from this distorted market dynamic, focusing primarily on incidents in which broadcasters have withheld grant of RC, forcing MVPDs to drop carriage of that signal. Unfortunately, the *NPRM* does not as directly acknowledge the perhaps less obvious, but even more damaging and on-going impact on consumers: the rapid rise in RC payments demanded by broadcasters, and the resulting rise in monthly MVPD service rates paid by consumers, as MVPDs struggle to recover these expenses. The *Petition* supplied data suggesting that MVPDs paid $738 million in RC fees in 2009, and estimating that those fees would climb to over $1.6 billion by 2015.[5] Clearly, broadcasters are using their supra-competitive leverage to increase their price demands: a recent review of data from Bernstein Research found that between 2004 and 2009, costs for local programming paid by Comcast and Time Warner Cable increased at four times the rate of inflation.[6]

In its specific markets, SureWest is in a challenging position of being the overbuilder generally competing against, in various service areas, two out of three of the nation's largest wireline MVPDs -- AT&T, Time Warner Cable, and Comcast. SureWest

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5 *Petition* at page 26, citing to Katz/Orszag/Sullivan Study filed by the National Cable & Telecommunications Association in MB Docket 07-269 on December 16, 2009.

6 Steve Pociask, *Retransmission Consent: The Evidence of Market Power*, at page 4, American Consumer Institute Center for Citizen Research, available at http://www.theamericanconsumer.org/wp-content/uploads/2011/05/retransmission.pdf (last visited May 20, 2011), *citing* Craig Moffett, *Retransmission Consent: Sizing Up the Battle between Broadcasters and Distributors,* Bernstein Research, *Whitebook*, May 2010.

also competes against national satellite MVPDs -- DirecTV and Dish. While confidentiality provisions limit SureWest's ability to verify the facts with certainty, SureWest believes that the RC rates paid by its giant competitors are significantly lower than the rates it pays. This combination of improper use of negotiating leverage by broadcasters, and smaller size than other MVPDs in same market, makes it even more difficult for SureWest to fairly compete.

These distorted market dynamics have directly harmed SureWest and its subscribers. In its California service areas, per-subscriber RC rates paid by SureWest to TV affiliates of the four major networks[7] increased by **229%** between 2008 and 2011. In its Kansas City markets, the increase in per-subscriber RC rates paid during that time period was **1,428%**. Rate increases of these magnitudes are stunning.

The Commission originally adopted rules requiring parties engaged in RC negotiations to bargain in "good faith" as a counterbalance to the growing leverage of television broadcasters. But it is clear from the recent cases where stations withdrew RC, as well as from the rapidly increasing costs of RC payments, that the good faith negotiation rules have not functioned as intended. While revisions to those rules may have an incrementally positive effect, and SureWest supports some such revisions (along with elimination of the Exclusivity Rules), much broader and more effective regulatory changes will be necessary in order to protect consumers, and healthy competition, in this market. The Commission should enact: (1) the mandatory arbitration and interim carriage proposals in the *Petition*; (2) a prohibition on discriminatory price demands by broadcasters; and (3) a transparency requirement for retransmission consent agreements, as discussed below. The Commission should also

[7] Those networks are ABC, CBS, NBC and Fox.

clarify that cable operators have no statutory mandate to carry stations that elect RC on the basic tier.

II. <u>The Commission Should Enact the Proposals in the *Petition*.</u>

The *Petition* made an extensive and well supported case for the Commission to enact rule provisions for mandatory interim carriage while an MVPD negotiates in good faith, and mandatory commercial arbitration (and interim carriage) if negotiations have broken down just prior to or after the expiration of an existing RC agreement. Combined, these proposals would significantly limit, if not eliminate, the most explicit expression of bad faith by broadcasters, and the most immediately devastating impact on consumers: the threat to withdraw, and the withdrawal, of consent for an MVPD to retransmit a broadcast signal. SureWest believes that the *NPRM* was overly hasty in rejecting these proposals, and it should in fact enact them.

In regards to mandatory arbitration, the Commission apparently believes (per para. 18 of the *NPRM*) that such a requirement is inconsistent with the provisions of Section 325 suggesting that RC should be negotiated by private parties. However, commercial arbitration still involves the private parties, would be paid for by the private parties, and would be used to settle the dispute between those private parties. Furthermore, the Commission's view of its authority under Section 325 is unnecessarily narrow. Section 325(b)(3)(A) gives the Commission broad authority to draft rules for RC, without any mention of the limit suggested by para. 18 of the *NPRM.* Indeed, Section 325(b)(3)(A) *explicitly* requires the Commission to take into account the impact that RC rules may have on rates paid by consumers. Mandatory arbitration, once negotiations break down, would likely result in rates that are lower, thus fulfilling that consumer protection statutory mandate. Similarly, Section 325(b)(3)(C) *specifically* provides for Commission rules regulating good faith negotiations, and rules requiring mandatory arbitration would remedy the breakdown of such negotiations.[8]

The *NPRM* also states that requiring mandatory arbitration would be inconsistent with the Administrative Dispute Resolution Act ("ADRA"), which states in part that an agency is authorized to use arbitration "whenever all parties consent."[9] However, the Commission has apparently misread the import of those statutory provisions. SureWest believes that the ADRA can be fairly read to apply only to arbitrations where the government agency is <u>itself a party</u>, to prevent excessive government leverage against private parties. In contrast, SureWest is suggesting here that arbitration be mandated where there is an impasse between <u>two private parties</u> -- the broadcaster and the MVPD, and that the arbitration be done by an independent commercial arbitrator. Indeed, the Commission has previously sought comments as to whether arbitration should be mandated when an impasse is reached between the two private parties negotiating a cable program access agreement.[10] In the resulting Report and Order, while the Commission declined to impose mandatory arbitration, it conditioned that decision by stating that it would not impose such arbitration "at this time." The Commission went on to state, however, that it "would like to see how arbitration of program access disputes, either through a merger condition or through voluntary

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[8] At very least, the Commission would have the authority to enact such a requirement as *ancillary* (under Section 4(i) of the Communications Act) to its grant of authority under Section 325(b)(3)(C).

[9] 5 U.S.C. Section 575 (a)(1).

[10] *See, Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 22 FCC Rcd 4252 (2007) at ¶ 15.

arbitration, is working over time, to determine if modifications to the arbitration process are necessary *prior to imposing a mandatory requirement on all parties* to all program access complaints. Once there is a track record for arbitration of program access disputes, we will be able to determine which types of disputes lend themselves more readily to resolution by arbitration and which may be more judiciously resolved by the Commission in the first instance."[11]

Thus, it is clear that in 2007, the Commission contemplated requiring mandatory arbitration between the parties to program access negotiations and did not consider the ADRA an impediment to doing so.[12] Similarly, the Commission should not consider the ADRA an impediment in this proceeding either.[13]

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11 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791 (2007) at ¶ 112 (emphasis added).

12 SureWest finds it to be concerning and mystifying that while the Commission is demurring on imposing mandatory arbitration in the RC context, where it would likely be used to moderate the demands of broadcasters on cable operators and other MVPDs, it clearly contemplated use of mandatory arbitration in the program access context, where it would likely be used to moderate the demands of large cable operators. *Cf., CRS Retransmission Consent Report, supra* note 4, at page 64.

13 As the Commission knows, the broadcast networks will increasingly be entering directly into RC negotiations on behalf of their affiliates. *See, e.g.,* Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, Multichannel News, May 16, 2011. SureWest believes that this development is contrary to the public interest, in part because it likely will result in badly unbalanced RC negotiations, and thus arbitrations, with small MVPDs who have significantly less resources to devote to arbitration than large national networks. However, if the Commission allows networks to negotiate on behalf of affiliates, then in enacting rules for mandatory arbitration, the Commission should look to provisions in its recent Comcast-NBCU merger order designed to ameliorate such imbalances in arbitrations: 1) If an MVPD with 600,000 or fewer subscribers is the prevailing party in an arbitration against a national network, the MVPD shall be entitled to recover its legal fees and costs of arbitration; 2) If such an MVPD is not the prevailing party, it shall not be required to reimburse the network's corresponding fees and costs; and 3) MVPDs with 1.5 million or fewer subscribers should be allowed to appoint an independent bargaining agent to negotiate and/or arbitrate collectively on their behalf against a

The *NPRM* (at para. 18) also rejects the proposal to enact a rule providing for interim carriage during the pendency of negotiations or a dispute. Relying on Section 325(b)(1)(A) of the Act, the Commission states that RC must expressly originate with the broadcast station. Again, however, SureWest believes that the Commission is viewing its authority as unnecessarily narrow. Section 325(b)(3)(C) specifically provides for Commission rules regulating good faith negotiations, and rules requiring interim carriage would at least temporarily remedy the breakdown of such negotiations. Furthermore, the Commission would have the authority to enact such a requirement as ancillary (under Section 4(i) of the Communications Act) to its grant of authority under Section 325(b)(3)(C).

Lastly, SureWest notes that if the Commission enacts rules for interim carriage and/or mandatory arbitration, it has authority to abrogate provisions of existing retransmission agreements that are contradictory to those rules. It may also prohibit future contracts from including such provisions. For example, in 2007, the Commission responded to incumbent cable operators using exclusivity clauses in service contracts to "lock up" apartments and other centrally-managed real estate developments by prohibiting both *existing and future* exclusivity clauses in such contracts.[14] The

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national network. *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of*
[note continued next page]
Licensees, Memorandum Opinion and Order, FCC 11-4 (rel. January 20, 2011), at Appendix A, Sections D.1 and D.7. As an additional measure to protect small MVPDs with limited resources, the Commission should also mandate that any arbitration must occur in the market area where the carriage is at issue, unless mutually agreed otherwise by the parties. This would prevent small MVPDs from having to incur expenses to travel to the location of the Network's corporate headquarters.

[14] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007), ¶ 35 (concluding that any rule that "left exclusivity

Commission found that it is permissible for its regulations to impact private contracts because the Contract Clause of the Constitution, by its terms, applies only to state, not federal, enactments.[15] Similarly, in the present proceeding, a decision requiring changes in the terms of RC agreements, applied prospectively to a new or even to an existing agreement, would not offend constitutional impairment principles.

Clearly, certain statutory responsibilities may enable or require the Commission to reach into private contracts to accomplish its statutory mandates, particularly where such contracts potentially harm consumers. In the case of RC, the Commission's statutory authority is established by Section 325 of the Communications Act. Under Section 325(b)(3)(C), the Commission must enact regulations to require broadcast stations and MVPDs to negotiate in good faith. This mandate establishes the Commission's direct authority to adopt rules to ensure good faith negotiations: including, if need be, abrogating existing contract terms that impede good faith negotiations, prohibiting such terms in future contracts, or mandating contract terms designed to ensure compliance. Further authority over contract terms, should any be necessary, lies in the broad mandate of Section 325(b)(3)(A) to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent."[16]

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clauses in effect would allow the vast majority of [competitive] harms caused by such clauses to continue for years.").

15 *Id.* at note 184, (citing Comments of Verizon, MB Docket 07-51, filed July 7, 2007 (citing *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1507 (D.C. Cir. 1984)).

16 47 U.S.C. § 325(b)(3)(A). In regulating retransmission consent, the Commission must "consider in such proceedings the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier." *Id*.

Similarly, the Commission would also have Section 4(i) jurisdiction ancillary to its authority under Section 325(b)(3)(A).

In sum, the Commission should enact rule provisions for mandatory interim carriage while an MVPD negotiates in good faith, and mandatory commercial arbitration (and interim carriage) if negotiations have broken down just prior to or after the expiration of an existing RC agreement. Combined, these proposals would limit the ability of broadcasters to abuse their market power and harm consumers.

III. The Commission Should Prohibit Price Discrimination and Enact Transparency Requirements.

SureWest asserts that two effective ways to recalibrate competition and reduce harm to consumers in the RC negotiation process would be to mandate interim carriage and arbitration. However, the Commission should also supplement its good faith negotiation standards to prohibit discriminatory demands for RC compensation and require transparency in RC agreements.

The current good faith standards have led to surprisingly few findings of violations, despite numerous accusations and complaints over the years, both on and off the record. SureWest is not aware of any Commission decisions where broadcasters have been found to have violated the standards. This lack of violations on the record does not indicate that broadcasters have always acted in good faith. Rather, it shows that the current standards are too vague to provide meaningful guidance to parties and too toothless to provide an adequate basis for enforcement by the Commission. Accordingly, as the Commission recognizes by the instant *NPRM*, the current good faith standards must be expanded and refined to establish a more concrete set of expectations. Improved standards will protect parties from needless uncertainty, wasted time, and expenditure and protect consumers from the unexpected loss of broadcast programming due to failures to reach agreement.

First, the Commission should consider as a *per se* good faith violation, any RC demand by a broadcaster for monetary compensation from one MVPD that is disproportionately greater than the compensation that broadcaster has obtained from a similarly-situated MVPD.[17] The fact is that some broadcasters demand (and receive) greater per-subscriber compensation from small MVPDs than from otherwise similarly-situated larger MVPDs. Generally there is no rational basis for such discriminatory rates: the broadcaster is distributing the same programming over-the-air regardless of how many MVPDs may or may not re retransmitting that programming, and there is no difference in cost to the broadcaster in providing that programming to different MVPDs.[18]

Comments filed by the American Cable Association ("ACA") on May 18, 2010 in this docket made a persuasive and well documented showing regarding this pernicious price discrimination, its causes, and the effects on subscribers. ACA demonstrated that broadcasters charge small and medium-sized cable companies more than twice as much as larger MVPDs pay for the same stations. *Comments of ACA* at pages 5-7. The cause of this discrimination is that smaller MVPDs have less bargaining power against the stations than larger MVPDs. *See* William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements* (May 18, 2010)

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[17] In addition, broadcaster demands for disproportionately greater compensation could be a "circumstance" for the Commission to consider in a "totality of the circumstances" good faith violation.

[18] If the MVPDs are receiving the broadcast programming off-air, there is no cost to the broadcaster (even the receive antenna is usually supplied by the MVPD in the case of RC). If the MVPDs are receiving the station's signal by fiber or satellite, again there should be no significant difference in cost of providing the signal to the different MVPDs.

at pages 5-6, attached as Appendix A to *Comments of ACA.* Ultimately, much of the discriminatory additional RC fees have to be passed along to subscribers. *Rogerson Paper,* at pages 14-16.

Accordingly, the Commission's good faith negotiation standards should include a strong presumption that the per-subscriber rate paid to a broadcaster should be the same for every MVPD in a market that enters into an RC agreement with that broadcaster. Furthermore, an MVPD should be able to elect to pay that rate without being forced to accept any tie-ins requiring carriage of additional programming channels, or other provisions (such as requirements to purchase TV advertising or purchase broadcast programming for video-on-demand) which in effect constitute additional compensation to the broadcaster.

The most effective way to ensure that broadcasters do not discriminate in price to MVPDs is for the Commission to require *transparency* in RC agreements. That is, the Commission's good faith negotiation standards should provide that RC agreements, once executed, must be made available to the public.[19] Accordingly, confidentiality provisions should be prohibited in RC agreements, at least as applied to per-subscriber rates and any other sort of compensation paid by the MVPD.

In the past, the Commission has occasionally protected RC agreements from public disclosure in transfer proceedings.[20] It also currently exempts RC agreements from FOIA production in Section 0.457(d)(1)(iv) of its Rules. However, these instances

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[19] The agreements could be placed in the public inspection files of the station and cable operator, and/or could be posted on the website of the station or cable operator. MVPDs that do not have a public inspection file requirement could post the agreements on their website.

[20] *See, e.g.*, *Applications for the Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation and its Subsidiaries to Time Warner, Comcast, et al. – Order Adopting Second Protective Order*, Order, 18 FCC Rcd 15198 ¶¶ 2-3 (2003).

of special treatment were based on the Commission's prior analysis of the potential competitive harms that could be caused by disclosure. As the record in this proceeding makes abundantly clear, however, the market dynamic has changed dramatically, and the greater public interest harm is now caused by keeping improperly discriminatory RC rates confidential.

There no longer remains a market reason to protect broadcasters from disclosure, and there are strong competitive and public policy reasons not to retain that protection. A transparency requirement would provide the necessary means for MVPDs to ensure that they are not subject to bad faith discriminatory demands for compensation. Such a requirement would also likely reduce the time and resources devoted by broadcasters and MVPDs to RC negotiations, resulting in less costs that would have to be passed through to subscribers, and thus, lower rates.[21] A transparency requirement would also provide a means for the viewing public to obtain the facts regarding the underlying sources of increases in MVPD rates. Lastly, a transparency requirement would give the Commission access to crucial RC price data, not only for resolving good faith negotiation disputes, but for broader purposes of tracking video competition and the impact on rates paid by consumers.

IV. The Exclusivity Rules Should Be Modified or Eliminated.

SureWest believes that it is clear that the Exclusivity Rules harmfully distort RC negotiations. Accordingly, such Rules should be eliminated, or modified to apply only in cases where the station seeking exclusivity protection is carried on the MVPD system where protection is sought.

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[21] As the Commission well knows, rapidly rising programming costs cannot be merely absorbed by MVPDs, and thus they are a major driver of the rates MVPDs charge consumers.

It is clear that subsequent to the Commission's enactment of the Exclusivity Rules, the dynamic of the relationship between MVPDs and broadcasters has changed significantly. Stations often demand exclusivity rights at the same time they seek RC negotiations, as a way of seeking additional leverage in those negotiations.[22] At this point, the Exclusivity Rules are often used as a barrier to MVPDs obtaining programming for subscribers in situations where a local station is abusing its market power and refusing to grant RC to an MVPD. In such cases, the Exclusivity Rules can deny subscribers of the MVPD access to network and syndicated programming that they have come to rely on, and that is improperly being withheld from them by the local broadcast station.

Elimination of the Exclusivity Rules would facilitate a freer market for programming that would benefit consumers in multiple ways. First, it would likely result in more balanced negotiations between MVPDs and broadcasters, leading to more speedy and successful resolutions of RC negotiations, thus ensuring that consumers have access to the programming they desire, at lower cost. In addition, elimination of the Rules could create an additional level of competition among broadcast stations, with viewers being the beneficiaries of that competition. Furthermore, the elimination of the Exclusivity Rules could lead to viewers having greater access to broader, more regional programming.

SureWest recognizes the theory that the Exclusivity Rules are designed to foster broadcast localism, and thus elimination of those Rules could harm the provision of local TV programming. *NPRM* at para. 43. However, the Commission well knows that

[22] *See, e.g., May 11, 2011 Letter From KXTV, Inc. to SureWest* (demanding network non-duplication protection) and *May 17, 2011 Letter from KXTV, Inc. to SureWest* (electing retransmission consent status), attached hereto in Appendix A.

many TV stations do not provide significant amounts of local programming. Furthermore, if the Commission is concerned that elimination of the rules could lead to loss of viewer access to local TV programming, it must be noted that such programming would continue to be available to viewers *over-the-air,* even if it were not available via an MVPD. In any case, the Commission could address that concern and still promote more balanced RC negotiations by *modifying* the Exclusivity Rules to provide that a station seeking to enforce exclusivity rights against an MVPD may *only* do so if its signal is carried by that MVPD. In this scenario, the modification of the Exclusivity Rules would not result in any loss of local broadcast programming, because either: 1) the local station is being carried on the MVPD and thus any local programming on that station is available to the MVPD's subscribers, or 2) the local station has chosen not to grant RC to the MVPD, and thus is voluntarily denying access to any of its local programming to that MVPD's subscribers.

SureWest also understands that elimination of the Commission's Exclusivity Rules would not by itself eliminate or modify the underlying contractual rights between stations on the one hand, and networks or syndicators on the other. But elimination or modification of the Rules would make it more difficult and costly for stations to execute and enforce those contractual rights, and thus provide some disincentive to stations to use, or threaten to use, those rights. This alone should reduce the improper use, or threat to use, exclusivity rights, in the context of RC negotiations.

Accordingly, the Exclusivity Rules should be eliminated, or modified to apply only in cases where the station seeking exclusivity protection is carried on the MVPD system where protection is sought.

V. <u>The Commission's Notice Requirements Should Not Be Modified.</u>

In paras. 34-37 of the *NPRM*, the Commission seeks comments as to whether the subscriber notice requirements of Section 76.1601 should be revised to require MVPDs to send out signal deletion notices when it is unclear if retransmission of a station's signal will continue, when negotiations are still occurring 30 days prior to the expiration of an RC agreement. SureWest believes that such a revision would be contrary to the public interest, and urges the Commission not to revise that rule.

SureWest recognizes that subscribers need timely and accurate information regarding signal deletion, in order to make informed choices. The *NPRM* recognizes, however, that in quickly changing negotiations, it is difficult to make accurate predictions in advance as to the final result of those negotiations. Any mass notice requirement to all of an MVPD's subscribers requires days or weeks of preparation with many cycles of transmittals before it can be executed, and in many cases in the scenario being contemplated by the Commission, inaccurate notices would be sent to consumers, when RC negotiations are settled just as or after notices of signal deletion are sent out. The resulting confusion and agitation would harm consumers, rather than provide them a benefit.

In addition to the potential for confusing subscribers, a revised notice requirement would also likely *reduce* the possibility of good faith RC negotiations. The obligation on the MVPD to send out such a notice would be used by the broadcaster as additional leverage in the RC negotiation, since compliance with the requirement has an out of pocket cost to the MVPD, and could trigger subscriber cancellations. This would just make the negotiations more contentious and difficult to manage, increasing the risk of loss of signal carriage, which would harm subscribers. In effect, a requirement to provide notice that a station's signal *might* need to be deleted could become a self-fulfilling prophecy.

Thus, as a result of the above factors, a revised notice requirement would likely cause more consumer harm than good, SureWest urges the Commission not to enact such a revision.

VI. The Commission Should Clarify That There is No Statutory Requirement for RC Stations to Be Placed in the Basic Tier.

One additional step that the Commission could take to reduce impasses in RC negotiations would be to definitively clarify that there is no statutory requirement to place RC stations in a cable operator's basic tier. If the Commission were to make that clarification, it would give a small, but additional piece of negotiation leverage to cable operators, to help remedy the currently imbalanced environment.

The issue of whether RC stations must be carried on a cable operator's basic tier is one that SureWest believes has never been definitively addressed by the Commission. The legal issue arises as follows: Section 623 of the Communications Act authorizes the Commission and state regulatory bodies to regulate certain cable TV rates. The Act divides cable services into two "tiers" for the purpose of allocating regulatory responsibility over cable rates: a "basic service tier" and a "cable programming service tier."[23] The "basic service tier" must include "any signal of any television broadcast station that is provided by the cable operator to any subscriber."[24]

[23] *See, e.g.*, *TCI Cablevision of Contra Costa County, Inc., Memorandum Opinion and Order,* 11 FCC Rcd 9223, 9224 (1996).
[24] 47 U.S.C. § 543(b)(7); 47 C.F.R § 76.901(a).

However, while this statutory provision could be read at first blush to *always* require carriage of RC stations on the basic tier, it must be noted that under Section 623(a)(2), rate regulations only apply where a cable system is not subject to effective competition.[25] Where the Commission has found that effective competition exists, none of the provisions of Section 623 apply,[26] and that would include the requirement for broadcast stations to be placed in the basic service tier. Therefore, when a cable system is subject to effective competition, the best reading of the statute is that the system is not under a statutory obligation to place RC stations in its basic service lineup.

In general, most cable systems are subject to effective competition. This is due to the ubiquitous national coverage by two direct broadcast satellite services -- DirecTV and Dish. Of course, there are other factors as well that can be used by a cable operator to demonstrate the presence of effective competition.

SureWest recognizes that even with the above statutory analysis, RC stations will usually negotiate for placement into the basic tier. Yet Commission clarification would give a small, but additional piece of negotiation leverage to cable operators, to help remedy the currently imbalanced RC negotiation environment.

VII. Conclusion

Currently, MVPDs and their subscribers are paying what is nothing more than a monopoly premium for over-the-air TV programming. This is not a naturally-occurring phenomenon; rather, it is the direct result of Commission rules failing to keep pace with significant changes in technologies and market dynamics. The current RC and

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[25] 47 U.S.C. § 543(a)(2).
[26] *Daniels Cablevision, Inc. v. United States*, 835 F. Supp 1, 7 (D.D.C. 1993).

Exclusivity Rules insulate broadcasters from competition while providing them powerful leverage: MVPDs, especially small MVPDs, lack either advantage. Accordingly, SureWest requests that the Commission restore balance to retransmission consent negotiations by providing certain protections to MVPDs and their customers, namely: 1) revising good faith negotiation standards to require non-discriminatory pricing and transparency in RC agreements; 2) eliminating or modifying the Exclusivity Rules to enable fair and effective bargaining; 3) requiring mandatory arbitration when RC negotiations fail and providing interim carriage rights to preserve programming continuity for subscribers during negotiations and arbitration; and 4) clarifying that there is no statutory requirement for stations that elect RC to be placed in a cable operator's basic tier. The Commission should not, however, modify its subscriber notification rules.

Respectfully submitted,

SUREWEST COMMUNICATIONS

*/s/Greg Gierczak*_____________
Greg Gierczak
Executive Director - External Relations

SureWest Communications
8150 A Industrial Ave.
Roseville, CA
95678

May 27, 2011

APPENDIX A

Rcv'd 5/20/11
cc → J. Montes
M. Stephens
file

May 11, 2011

Mr. Scott Barber
Surewest Association
8150 A Industrial Avenue
Roseville, CA 95678

Re: Notification of Network Nonduplication Rights

Dear Mr. Barber,

KXTV Inc. licensee of KXTV, Sacramento/Stockton/Modesto, CA (the "Station"), located at 400 Broadway, Sacramento, CA, hereby gives notice to Surewest Association of Station's network nonduplication rights in connection with the Station's affiliation with the American Broadcasting Companies, Inc. ("ABC") network. These rights are effective immediately and extend until February 28, 2014. The Station holds the exclusive broadcast and cable carriage rights in a geographic area as specified by ABC that encompasses or may encompass your cable systems for the ABC programs broadcast by the Station.

The Station's network nonduplication rights apply with respect to all ABC programs, in any and all formats (whether digital, analog or otherwise), including those programs broadcast by the Station during the time periods set forth below. These time periods may be subject to change. In addition, the Station holds network nonduplication with respect to other programming that is not regularly scheduled but which is aired by the Station. These network non-duplication rights apply with respect to all ABC programs during the times that they are broadcast on the Station. Currently, ABC's regularly scheduled programs are scheduled to air on the following days and time periods (subject to change):

Monday–Friday	7:00-9:00 a.m., 10:00-11:00 a.m., 12:00–3:00 p.m., 5:30-6:00 p.m., 8:00 –11:00 p.m., 11:30–1:00 a.m., 2:30 –5:00 a.m.
Saturday	7:00–11:00 a.m., 1:00–4:00 p.m., 5:00-5:30 p.m.,8:00–11:00 p.m.
Sunday	7:00-9:00 a.m., 2:00–4:00 p.m., 5:00-5:30 p.m., 7:00-11:00 p.m., 2:00-5:00 a.m.

The Station hereby invokes its right under the network non-duplication rules of the Federal Communications Commission, 47 C.F.R. $$ 76.92 -76.94, to protection from any and all of the cable systems listed above or any others operated by you within 35 miles of Sacramento/Stockton/Modesto, in the simultaneous distribution to their customers of any of the programs referenced above, by any means other than by carrying the Station. As noted above, these rights are effective immediately. To the extent that these systems carry a signal that includes programming to which we are entitled to nonduplication protection, they must delete such programming. If you have any questions, please call me at (916) 321-3215.

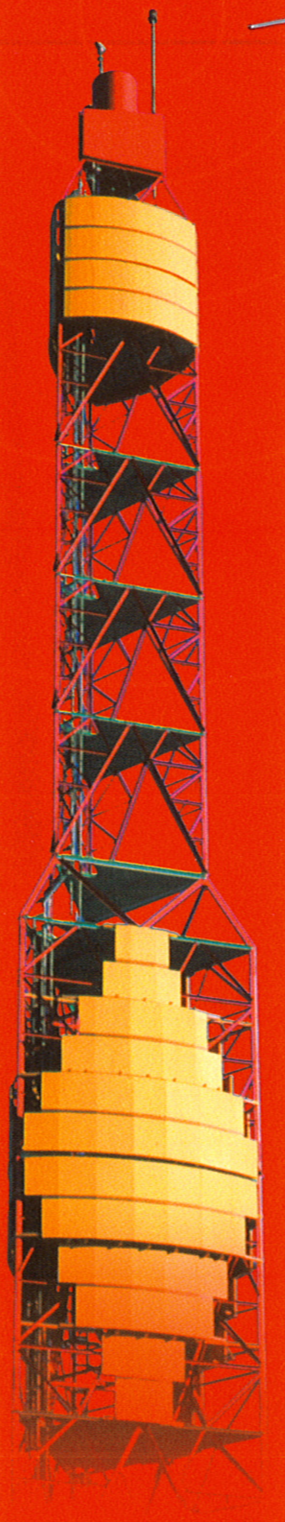
Sincerely,

Anita Helt

Anita Helt
President & General Manager

KXTV
400 Broadway
Sacramento, CA 95818
916.441.2345
news10.net
GANNETT

NEWS10 abc



Rcv'd 5/20/11
cc → J. Montes
M. Stephens
file

May 17, 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Scott Barber
Surewest Communication
8150 A Industrial Avenue
Roseville, CA 95678

Re: **Election of Retransmission Consent Status**

Dear Mr. Barber,

Pursuant to Section 325(b)(3)(B) of the Communications Act and § 76.64(f)(2) of the FCC rules, KXTV, Inc. licensee of television station KXTV, licensed to the Sacramento/Stockton/Modesto market, elects retransmission consent on your cable system serving the community of McClellan for the period beginning January 1, 2012 and ending December 31, 2014.

In order to ensure that your cable subscribers continue to receive the station, we would like to commence negotiations towards a new retransmission consent agreement.

We will be contacting you shortly to discuss a definitive retransmission consent agreement. In the interim, if you have any questions, our contact person for retransmission matters is Wendy Bright, and can be reached at (916) 321-3211.

Sincerely,

Anita Helt

Anita Helt
President & General Manager

KXTV
400 Broadway
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