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

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

COMMENTS OF DISCOVERY COMMUNICATIONS LLC

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Discovery Communications LLC ("Discovery") hereby submits these comments in the above-captioned proceeding in response to the issues raised by the Notice of Proposed Rulemaking released on March 3, 2011.[1/]

INTRODUCTION AND SUMMARY

The Commission's current retransmission consent rules, adopted almost two decades ago in the context of a vastly different video programming marketplace,[2/] are outdated and manifestly in need of reform. Today, these outdated rules are depriving consumers of the right to receive diverse programming at a reasonable cost.

The underlying communications landscape, which in the past may have supported a view that broadcasters needed regulatory advantages to ensure that stations and multichannel video programming distributors ("MVPDs") have equal incentives to reach a carriage agreement on fair and reasonable terms and conditions, has changed with the development of additional MVPD outlets for broadcasters to reach viewers. Broadcasters, no longer dependent on any single MVPD for carriage, have substantially increased their compensation demands in retransmission

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1/ *See Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (2011) ("*NPRM*").

2/ The initial statutory provisions of the retransmission consent and must carry regime were added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"). *See NPRM* ¶¶ 2, 4-7.

consent negotiations. Armed with increased leverage, they are more willing and able to withdraw consent if they do not receive the compensation they demand, in effect using their government-granted free broadcast licenses – an extraordinary benefit for which they are charged in return with protecting the public interest – instead as a means of increasing their personal profits, at the expense of the consumers they are meant to serve.

MVPDs, forced by their vulnerable negotiating position to accede to these demands, are devoting an increased percentage of their programming budgets to carriage of broadcasters and broadcast-affiliated programming. As a result, MVPDs have correspondingly less funds (and channel space) for independent programming networks not affiliated with "must have" programming.

The effect of this outdated retransmission consent regime is not only the disruption of broadcast programming and higher service rates for consumers, but the slow destruction of the independent programmers that consumers and the Commission rely on to create educational, informative, and diverse content for American families.

The Commission should reform its retransmission consent and other broadcast carriage rules. By injecting marketplace competition back into retransmission consent negotiations, the Commission can create an environment in which MVPDs are not forced to pay broadcasters more than the value of their programming, or for programming the MVPD does not want to carry. This will promote the continued viability of diverse programming voices that Congress and the American public value highly.

Specifically, the Commission should ban broadcasters from tying their retransmission consent to MVPD carriage of other programming networks, should repeal the network non-duplication and syndicated exclusivity rules, and should reject the broadcasters' self-serving notice proposal. These rules contribute to the imbalance in carriage negotiations; while broadcasters know that they can always turn to an alternative MVPD for carriage, MVPDs cannot turn to an alternate provider of that network programming if they cannot reach agreement with the local broadcaster holding the rights to that programming. Taking steps to restore balance in retransmission consent negotiations would benefit consumers by protecting their ability to continue to receive *all* the programming they value on their MVPD service, including the voices of independent programmers.

I. THE CURRENT RETRANSMISSION CONSENT REGIME IS ADVERSELY AFFECTING THE ABILITY OF INDEPENDENT PROGRAMMERS TO CONTRIBUTE DIVERSE PROGRAMMING TO MVPD SERVICE OFFERINGS

The outdated nature of the Commission's retransmission consent rules is undermining the long-term viability of independent programmers like Discovery. By failing to keep pace with the changing MVPD environment, today's regulatory scheme does not result in the balance of power between MVPDs and broadcasters that Congress envisioned would keep negotiations fair and reasonable. MVPDs today are forced to dedicate a disproportionate amount of programming dollars to carriage of broadcasters and their affiliated programming, leaving little support for the independent programmers that contribute diversity and innovation to the programming line-up.

A. The Retransmission Consent Rules' Failure To Keep Pace With The Changing MVPD Environment Has Led To Higher Retransmission Consent Fees And Increased Demands.

Commenters in this proceeding have well established that due to today's highly competitive MVPD marketplace, broadcasters have significantly increased leverage in retransmission consent negotiations and are commanding substantially greater fees from MVPDs for their retransmission consent.[3/] As Chairman Genachowski has acknowledged,

[3/] *See*, *e.g.*, Comments of AT&T, MB Docket No. 10-71, at 7 (May 18, 2010) ("AT&T Comments") ("[B]roadcasters have been able to use increasing video competition to force MVPDs into "[r]etransmission consent negotiations have become more contentious recently, and consumers have gotten caught in the middle," necessitating a "fresh look" so that the Commission can "explore whether there are measures [it] can take to allow the market-based process contemplated by the retransmission consent laws to operate more smoothly, and serve consumers and the marketplace."[4/]

Today's rules do not protect consumers or diversity in the increasingly competitive MVPD market because they enhance broadcasters' bargaining position. Network broadcasting programming is widely recognized as "must have" programming that subscribers demand.[5/]

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paying ever increasing retransmission consent payments through the same sort of whipsawing tactics that the Commission elsewhere has condemned as anti-consumer and contrary to the public interest."); Comments of Bright House Networks LLC, MB Docket No. 10-71, at 7 (May 18, 2010) (noting that "Sinclair acknowledged that increased competition in the MVPD marketplace now enables broadcasters to demand cash payments that were unattainable during the first decade of retransmission consent."); *see also id*. at 8 ("Unfortunately, there is a critical flaw in the prevailing regulatory assumption. As it turns out, MVPD competition does *not* necessarily lead to lower consumer prices. Programmers generally, and broadcasters particularly, have discovered newfound leverage to extract dramatically higher fees from competing MVPDs, thereby turning MVPD competition into something that is inflating, rather than deflating, consumer pricing.") (emphasis in original); Reply Comments of Mediacom Communications, et al., MB Docket No. 1071, at 20-21 (June 3, 2010) ("[G]overnmental efforts to foster competition to cable by DBS and telcos have led to a dramatic decline in cable's share of the MVPD market. That decline has, in turn, substantially increased broadcasters' leverage in retransmission consent negotiations by making it possible for a local station to play off one competitor against another . . . .").

4/ *See NPRM*, Statement of Chairman Julius Genachowski, at 1.

5/ Steven C. Salop, et al., *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, ¶ 71 (June 3, 2010) ("Salop Study") (attached to the Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71 (June 3, 2010) ("Time Warner Reply Comments") ("A key bargaining advantage of the broadcasters stems from their ownership of broadcast and cable program services that are highly differentiated and considered 'must-have' by many MVPDs and their subscribers."); Congressional Research Service, *A Condensed Review of Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations*, at Summary (July 9, 2007) ("CRS Report") ("The recent increase in negotiating impasses appears to be the result of structural market changes that have given programmers with 'must-have' programming much greater leverage . . . . In particular, local broadcasters increasingly are using the statutory retransmission consent requirement to demand cash payment from small cable companies who could lose subscribers to the satellite providers and new telephone entrants if they reach an impasse with the broadcaster and can no longer carry the local broadcast signals."); *see also General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, Consolidated Application For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 202 (2004) (finding that "the

While broadcasters used to equally need carriage on the cable operator to reach viewers that did not receive their over-the-air signal, they now have an array of MVPDs through which they can obtain additional viewership. Competition thus "increases the magnitude of the MVPD's potential loss of subscribers in the event of a failure to reach a long term carriage agreement or a temporary blackout" because subscribers can move to a different MVPD that has an agreement with the broadcaster in place.[6/] Knowing this "places a severe constraint on the MVPD's bargaining position" and makes the MVPD "more likely to accept a broadcaster's demand for higher [retransmission consent] prices."[7/]

That MVPDs are paying higher fees for retransmission consent is confirmed by the fact that broadcasters report outstanding and rising retransmission consent revenues. Broadcasters experienced four straight quarters of double-digit gains in TV groups' retransmission revenue in 2010, averaging 23% year-over-year growth.[8/] Moreover, broadcasters' rising demands show no signs of ebbing. To the contrary, broadcasters boast that the ceiling for potential retransmission revenues is constantly rising. CBS recently estimated that its retransmission consent revenue would double over the next five years to $1 billion.[9/] News Corp. similarly expects that Fox

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signals of local television broadcast stations are without close substitutes") ("*General Motors/Hughes Order*").

6/ Salop Study ¶ 87.

7/ *Id.*; *see also id.* ¶ 47 ("In light of the increasing MVPD competition, the bargaining advantage of the broadcasters is no surprise. If a larger number of actual or potential subscribers would choose other MVPDs in the event that a carriage agreement is not reached, the broadcaster will gain further leverage over the MVPD; the MVPD has more to lose (and the broadcaster has less to lose) from failure to reach a carriage agreement.").

8/ *See* Tony Lenoir, *Retrans Grows by Double-Digits for 4th Straight Quarter, Up Nearly 162% Annually Over 2007*, SNL Kagan (Apr. 12, 2011) (discussing results for the 17 television companies tracked by SNL Kagan). For the eight companies for which retransmission fee data was available for each year from 2007 to 2010, retransmission revenues rose more than 162% -- from nearly $119 million in 2007 to nearly $311 million in 2010.

9/ Mike Farrell, *CBS Raises the Retrans Bar, Says Retrans/Reverse Comp Fees Will Top $1B in Five Years*, MULTICHANNEL NEWS (May 24, 2011).

retransmission consent revenues will rise in 2012 and that News Corp.'s broadcast business will be a "billion dollar-plus business" within the next two years.[10/] Research firm SNL Kagan estimates that total retransmission consent revenue will more than double by 2017, with total fees reaching $3.61 billion, including a 28% increase in 2011 alone.[11/]

Despite the growing retransmission consent revenues, broadcasters are not contributing to local broadcast programming diversity. Indeed, media reports indicate that rather than support the local programming that Congress felt was important to preserve for the public, a significant percentage of the fees is going straight into the pockets of the broadcasting networks.[12/] The broadcast networks, in fact, tout that they are using a significant portion of local retransmission consent fees to support their national programming.[13/]

B. The Imbalance of Power Caused By Today's Outdated Regulations Harms MVPD Programming Diversity.

Under today's retransmission consent regime, "broadcasters use their bargaining power to demand both in-kind and cash payments" from distributors, with the in-kind payments typically taking the form of "agreements to carry additional networks owned by broadcasters."[14/]

10/ *Mass Media Notes*, COMMUNICATIONS DAILY, at 18 (May 6, 2011).

11/ Mike Farrell, *Kagan: Retrans Take To Reach $3.6B in 2017; Cable Operators Will Foot Most of the Bill,* MULTICHANNEL NEWS (May 25, 2011).

12/ Sam Schechner, *TV Networks, Local Stations Do Battle Over Cable Fees*, WALL STREET JOURNAL, at B4 (Dec. 14, 2009) (reporting that FOX, CBS, and ABC have all begun demanding from independent local affiliates "a cut"—as much as 50%—of the payments the stations get from cable, satellite and telecommunications companies); Michael Malone, *NBC, Affiliates Iron Out Blanket Retrans Deal*, BROADCASTING & CABLE (May 16, 2011) (reporting that "Fox is demanding affiliates come up with specific payment amounts per pay-TV subscriber, which escalate each year" and also noting that "NBC wants a percentage of affiliates' retrans earnings, as opposed to demanding a particular dollar amount.").

13/ *See* Ex Parte Notice of CBS Corporation, MB Docket No. 10-71, at 1 (April 19, 2011) (noting the "importance of retransmission consent to broadcasters as a means for our investing in high quality news and entertainment programming and for our competing for rights to professional sports programming.").

14/ *See*, *e.g.*, *See* Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, at 3 (Nov. 12, 2009) (filed as an

For each broadcaster that elects retransmission consent, an MVPD must pay the retransmission consent fees demanded by that broadcaster *and* devote channel space to carriage of the programmers affiliated with that broadcaster *and* pay above-market carriage fees associated with those broadcaster-affiliated programmers. Only then will the MVPD be able to consider how to allocate its remaining channels and the monies left in its programming budget to other programmers.[15/]

Faced with higher and higher retransmission fees, MVPDs are forced to make difficult decisions about offsetting costs. One such target for cost-cutting has been independent programming networks (*i.e.*, those that are not affiliated with "must have" programming), in the form of below-market affiliate fees or in some cases, no carriage at all.[16/] The independent

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attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (Dec. 16, 2009)); *see also* Salop Study ¶ 8 ("The evidence shows significant increases in program services fees – including [retransmission consent] fees – in the last few years and projections of even higher fees in the future. This reflects, in part, the fact that broadcasters have increasingly sought cash for carriage as well as carriage of other cable networks. It also reflects the fact that more broadcasters have shifted from must-carry status to the [retransmission consent] negotiation regime.").

15/ *See, e.g.*, Mike Farrell, *Rutledge: Cablevision Can Manage Retransmission Consent*, MULTICHANNEL NEWS (Nov. 3, 2009) (interviewing Cablevision Systems Corp. COO Tom Rutledge, who noted that the broadcasters' demands for steep retransmission consent fees come out of Cablevision's programming expense budget).

16/ *See, e.g.*, Comments of Cox Communications, MB Docket No. 10-71, at 6-7 (May 18, 2010) ("Cox Comments") (tying "impair[s] cable operators' discretion to construct channel lineups that best suit local needs," "put[s] upward pressure on cable rates by requiring cable operators to pay handsome licensing fees for networks that they otherwise would not carry (or, at least, would not carry at the 'tied' rates)" and "can lessen customer access to diverse cable programming because of the channel and financial capacity required to satisfy the demands of the networks, reducing available channels for programming offered by other programmers"); Comments of RCN Telecom Services Inc., MB Docket No. 10-71, at 17 (May 18, 2010) ("viewer choice and the public interest suffer" because of tying arrangements); Comments of The Africa Channel, MB Docket No. 10-71, at 2-3 (May 18, 2010) (viability of independent channels is threatened by programming tying practices); Comments of Starz Entertainment, MB Docket No. 10-71, at 3 (May 18, 2010) (noting, that "the Fox Television broadcast station group has used its leverage from withholding retransmission consent for carriage of its local television stations to extract carriage commitments and advantageous positioning of their non-broadcast Fox Movie Network and f/x channels on MVPDs' systems. Similarly, Viacom used its local CBS station ownership leverage to extract carriage and position advantages for many non-broadcast networks, such as MTV and VH1 that previously were commonly owned.").

programmer "has been singled out as the path of least resistance in recouping some of those rising retransmission fees charged by the network affiliates."[17/]

Without the carriage fees and widespread carriage they deserve, high-quality independent programmers like Discovery cannot continue to produce the programming that contributes innovation, creativity and diversity to the programming line-up. Programmers rely on carriage fees to fund and develop new programming. Indeed, MVPDs acknowledge that broadcasters' enhanced bargaining position "threatens the diversity of subscription programming" because "[h]igher payments to broadcasters can deplete an MVPD's programming budget and, in some instances, could lead to the exclusion of independent programming providers, which must accept reduced compensation for carriage on an MVPD's system."[18/] More generally, Media Access Project has expressed concern that "existing law does not provide adequate protection for independent programmers" and urged Congress to ensure against "squeez[ing] out independent programmers with diverse editorial perspectives."[19/]

The Commission is charged with protecting and promoting the greatest possible diversity in MVPD services and programming sources for the benefit of consumers.[20/] Broadcasters already have a substantial advantage over independent programmers – through the "must buy" provisions that guarantee broadcasters carriage on the most widely penetrated tier of service and

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[17/] Comments of Ovation, MB Docket No. 10-71, at 3 (May 18, 2010) (noting that "the deterioration of the balance between distributors and broadcasters has directly affected independent programmers' ability to negotiate business terms that allow us to thrive and continue to offer consumers programming they cannot get elsewhere.").

[18/] Comments of Time Warner Cable Inc., MB Docket No. 09-182, at 13 (July 12, 2010) (submitted as an attachment to Time Warner Cable Inc.'s ex parte presentation letter, MB Docket No. 10-71 (August 12, 2010)); Comments of Cablevision Systems Corporation, MB Docket No. 10-71, at 10-11 (May 18, 2010) ("Cablevision Comments").

[19/] Testimony of Andrew Jay Schwartzman, President and CEO, Media Access Project before the Committee on the Judiciary, United States House of Representatives (Feb. 25, 2010).

[20/] *See* Comments of Discovery Communications LLC, MB Docket No. 10-71, at 4-6 (May 18, 2010) ("Discovery Petition Comments").

the must-carry regime that ensures all broadcasters have a place in the MVPD channel line-up, regardless of the merit of their content.[21/] The retransmission consent rules should not further exacerbate this competitive disparity among content providers. In considering needed changes to its carriage rules, the Commission should accord equal weight to preserving diverse programming as to protecting consumers against disruptions in their broadcast programming.[22/]

II. THE COMMISSION SHOULD AMEND ITS RULES TO RESTORE BALANCE IN BROADCASTER-MVPD CARRIAGE NEGOTIATIONS

The record evidence suggests that several relatively modest amendments to the retransmission consent rules could go far to restore the balance in broadcaster-MVPD negotiations and assist in the continued viability of independent programming: banning broadcasters from requiring the carriage of affiliated programming networks as a condition of their retransmission consent, and repealing the network non-duplication/syndicated exclusivity restrictions. In contrast, the proposed revision of the notice requirements would tilt negotiation leverage even further in favor of broadcasters.

A. The Commission Should Ban Broadcasters From Tying Retransmission Consent To The Carriage Of Non-Broadcast Networks.

Noting the many commenters arguing that broadcasters' exorbitant demands frequently come in the form of ultimatums for carriage of multiple affiliated programming services,[23/] the

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21/ 47 U.S.C. §§ 534, 535, 543(b)(7).

22/ *NPRM* ¶ 17 (stating that Commission's goal "is to take appropriate action . . . to protect consumers from the disruptive impact of the loss of broadcast programming carried on MVPD video services").

23/ *NPRM* ¶ 29, n.93. Programmers raising this issue demonstrated that such demands significantly hinder their ability to gain carriage. *See, e.g.*, Comments of Retirement Living TV, at 2 (May 17, 2010) ("RLTV Comments") ("Yet, no matter how compelling or innovative our content, programming networks that are not owned by or affiliated with major broadcast networks – particularly new ones like RLTV – are at a distinct disadvantage when competing for valuable 'shelf space' on MVPD systems. RLTV negotiates for carriage and subscription fees on a playing field that is tilted in favor of broadcasters that have the ability to threaten consumers with a loss of 'free' television as a way of forcing MVPDs to capitulate to their fee demands.").

NPRM asks whether the Commission should consider such demands in evaluating whether a broadcaster has negotiated in good faith.[24/] Such demands should not only be considered, but should be banned as a violation of good faith negotiation.

While the impact on consumers of broadcasters' tying retransmission consent to carriage of additional programming networks may originally have been small – and indeed, MVPDs may have welcomed the opportunity to add such channels to their programming line-ups to attract more subscribers – such demands today impose substantial adverse effects on consumers. MVPDs have confirmed that broadcaster demands for carriage of one or more affiliated networks are hampering their ability to carry programming channels that may be in greater demand or would offer subscribers an unrepresented viewpoint or topic, both by consuming channel capacity and programming budgets.[25/] Programmers not affiliated with "must have" programming regularly experience increased difficulties in negotiating reasonable terms and conditions, because MVPDs subject to broadcaster tying must devote a greater and greater

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24/ *NPRM* ¶ 29.

25/ *See* Cablevision Comments at 11 ("When broadcasters have the ability to leverage their broadcast interests to program multiple channels on the cable system with their affiliated programming networks, whether or not those channels are desired by subscribers, it reduces cable operators' ability to create a service composed of multiple voices, where each service responds to subscriber interests and contributes to a more diverse environment. Higher cash payments to obtain broadcasters' retransmission consent similarly limits diversity, by requiring cable operators to devote large portions of their programming budgets to those payments, so that they have less money available to strike carriage deals with owners of other programming that are not broadcast-affiliated..."); Cox Comments at 6-7 ("tying can adversely impact consumers in three distinct ways ... tying can impair cable operators' discretion to construct channel line-ups that best suit local needs ... tying can put upward pressure on cable rates by requiring cable operators to pay handsome licensing fees for networks that they otherwise would not carry ... [and] tying can lessen customer access to diverse cable programming because of the channel and financial capacity required to satisfy the demands of the networks.").

percentage of their programming budgets to fees for carriage of broadcasters and their affiliated programming networks.[26/]

MVPDs have no realistic opportunity of resisting broadcaster tying demands to minimize the impact on consumers and other programmers. While most programming services, even if highly valued by subscribers cannot gain carriage of multiple affiliated networks by threatening to withdraw their programming, broadcast programming is "must-have" for a distributor.[27/] The FCC has found that even the temporary withdrawal of a broadcast signal can cause subscribers to shift to another MVPD carrying the broadcaster, such that the broadcast signal regains many of the "eyeballs" needed to maintain advertising revenues (and that even the threat of such action is enough to win them a higher "price" for their retransmission consent).

Broadcasters already have a unique protected status in which they – unlike any other source of programming – are guaranteed carriage on MVPD networks, on the most widely distributed tier of carriage. They should not be able to abuse this special protected position by extending these protections to their non-broadcast affiliated programming networks to give those networks a definitive edge in gaining MVPD carriage. The Commission should put an end to this practice, to restore fair competition among programming networks and protect diversity in MVPD service offerings.

26/ *See, e.g.*, Reply Comments of HDNet LLC, MB Docket No. 10-71, at 2 (June 2, 2010) ("HDNet Reply Comments") (noting "…cable companies often assert that they cannot carry more independent programming because space is scarce").

27/ *See*, *e.g*., *General Motors/Hughes Order* ¶ 4 (identifying broadcast television station signals as "must have" video programming); *id*. ¶ 367 ("News Corp.'s market power with respect to its . . . local broadcast station programming . . . could be used to force MVPDs to carry or use technologies such as its electronic and interactive programming guides as conditions of accessing its 'must have' programming."); *see also The News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee*, 23 FCC Rcd 3265, ¶ 142 (2008) ("[T]he Commission was concerned about the possible harms that could occur to MVPDs that compete with DIRECTV because of News Corp.'s control of 'must have' programming – Fox's broadcast television stations.").

B. The Current Network Non-Duplication And Syndicated Exclusivity Rules Falsely Limit MVPDs' Options And Distort The Competitive Balance In Retransmission Consent Negotiations.

In addition to guaranteeing broadcasters carriage rights, the Commission's rules give broadcasters "a host of powerful distribution controls," including network non-duplication protection, a rule that allows a local broadcast station to block network programming from being shown by other stations on the MVPD's local system, and the syndicated exclusivity rule, providing stations similar exclusive rights to syndicated programming within a local geographic area.[28/] Noting arguments about the competitive harm of these rules, the *NPRM* seeks comment on their possible elimination.[29/]

The network non-duplication regime creates tremendous difficulties for MVPDs, and thus for independent programmers. When broadcasters make unreasonable demands, MVPDs "cannot pursue effective alternative arrangements for carrying the broadcast signals that are the subject of negotiations because of the broadcaster's network non-duplication rights,"[30/] but must instead accede to broadcaster demands or face the inability to offer subscribers must-have broadcast network programming.[31/] The MVPD cannot seek an alternative source for a

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28/ *See Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71, at 12-15 (Mar. 9, 2010) ("Joint Petition") (describing the rules as providing broadcasters with a "one-sided level of protection" not needed in today's video programming marketplace); *see also* AT&T Comments at 6 (noting that the network non-duplication and syndicated exclusivity rules, when combined with the retransmission consent rules, "eliminate any meaningful constraint on broadcasters' bargaining power" and have "tipped the balance too far in broadcasters' favor"); Comments of Verizon, MB Docket No. 10-71, at 1-3 (May 18, 2010) ("Verizon Comments") (noting that eliminating these rules would encourage broadcasters to temper their demands because MVPDs would have the ability to obtain the programming from alternative sources).

29/ *NPRM* ¶¶ 42-45.

30/ *See* Verizon Comments at 3.

31/ *See, e.g.*, Letter from Matthew Brill, Counsel to Time Warner Cable to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 2 n.1 (Feb. 24, 2011) ("Because retransmission consent is a legislative construct and because many Commission rules (including network non-duplication and syndex provisions and the general obligation to carry broadcast stations on a compulsory basic tier) give preferences to broadcasters, retransmission consent negotiations do not occur in a genuine marketplace, network's programming from a broadcaster in another city that may be willing to sell the programming on different terms because the network non-duplication rules prevent the MVPD from delivering the programming to consumers even if the MVPD and station are both willing.[32/] As the *NPRM* recognizes, "[t]hus, a cable system negotiating retransmission consent with a local network affiliate may face greater pressure to reach agreement by virtue of the cable system's inability to carry another affiliate of the same network if the retransmission consent negotiations fail."[33/]

Limiting MVPDs' options for obtaining specific programming to a single source, when other sources are available, is not the best method for ensuring a competitive marketplace or meeting subscribers' diverse programming preferences. The Commission should modify its rules so that MVPDs may freely bargain for network and syndicated programming desired by their customers from distant stations in the event that a local station's demands are excessive. Merely allowing MVPDs to negotiate with distant stations would promote competition and help

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and there is, therefore, no meaningful way for an arbitrator or regulator to determine 'market' rates for retransmission consent."); *see also* Reply Comments of Public Knowledge, MB Docket No. 10-71, at 2-3 (June 3, 2010) (noting that broadcaster "leverage is further strengthened by the Commission's non-duplication and syndicated exclusivity rules, which prohibit MVPDs from importing competing broadcast signals, removing a market-based incentive for broadcasters to price their retransmission consent competitively."); Reply Comments of Verizon, MB Docket No. 10-71, at 2 (June 3, 2010) ("As a result of the network non-duplication and syndicated exclusivity rules, for example, a provider faced with unreasonable demands from a broadcaster is denied the opportunity to seek out and negotiate for alternative sources for the programming. As a result, unlike in typical commercial negotiations, the government-granted regulatory preferences can have the effect of encouraging brinksmanship tactics, such as taking advantage of the timing of popular "must see" programming, to the detriment of consumers. The best way to address these concerns would be for policymakers to scrap the existing regime and allow the marketplace for broadcast programming to function like a normal market.").

[32/] *See* Letter from Leora Hochstein Executive Director, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 10-71, at 1 (Jan. 27, 2011) (Non-duplication and syndicated exclusivity rules "prevent MVPDs faced with unreasonable demands from a broadcaster from seeking out and negotiating alternative sources of programming. Eliminating these rules may provide additional partners with whom to negotiate to obtain broadcast programming.").

[33/] *NPRM* ¶ 42; *see also id.* n.131 (listing those commenters who argued that the exclusivity rules provide broadcasters with unfairly inflated bargaining leverage in retransmission consent negotiations).

restore balance to a system that has become off kilter. As AT&T noted, doing so "would not threaten the Commission's localism objectives insofar as an MVPD would not seek to carry a distant station except in exigent circumstances, since its subscribers undoubtedly would prefer the local station and because of the higher license fees associated with carrying a distant signal."[34/]

Moreover, a simple repeal of the existing rules is not enough to remedy the existing disparity in carriage negotiations. An important part of any such rule modification is not only to repeal the current network non-duplication and syndicated exclusivity rules, but to institute a rule prohibiting broadcast networks and stations from achieving the same result by private agreement. As Time Warner Cable aptly observes, "eliminating the network non-duplication and syndicated exclusivity rules would accomplish nothing without an affirmative ban on the underlying exclusivity agreements, as networks and broadcast stations would still be able to coordinate their efforts to prevent MVPDs that have lost a signal from accessing that programming elsewhere."[35/] The Commission cannot meaningfully carry out its duty to ensure good faith negotiation if it does not ban private practices that impact the good faith negotiations it is directed to oversee.

C. The Commission Should Not Require MVPDs To Give Notice Of Potential Losses Of Broadcast Programming.

The NPRM solicits comment on the broadcasters' proposal to require MVPDs to notify their subscribers in "anticipation of" the loss of a broadcast signal each time a retransmission consent agreement is not reached 30 days before an existing agreement expires.[36/] Such a requirement would only enhance broadcasters' bargaining leverage and so worsen the impact on MVPDs and the accompanying result on independent programmers.

34/ AT&T Comments at 12.

35/ Time Warner Reply Comments at 15.

36/ *NPRM* ¶¶ 34-37.

As the Commission recognizes, a notice requirement would be unnecessarily disruptive due to the potential to "create[] a false alarm" and "caus[e] unnecessary anxiety to consumers."[37/] More to the point, however, it would only serve to exacerbate the already substantial imbalance in negotiating power between broadcasters and MVPDs. MVPDs, knowing the significant consumer disruption that would inevitably result from such a notice – and the significant time and expense they would incur in addressing consumer inquiries stemming from an inclusive notice – would seek to avoid having to give such notice, and would thus be vastly more likely to accede to unreasonable broadcaster demands.[38/] Any proposal that makes it *more* likely that MVPDs must overpay broadcasters – and so have less programming funds available to pay independent programming networks, leading to a decrease in quality and innovation – cannot be in the best interests of consumers and must be rejected.

CONCLUSION

The Commission's retransmission consent scheme is working directly against the ability of Discovery and others to contribute to the enhanced diversity that Congress and the Commission have sought to promote. Rather than preserving a system in which broadcasters have first rights to channel space and programming budgets, the Commission should restore balance to retransmission consent negotiations so that independent programmers offering voice to independent producers have a better chance of providing diverse programming to a broad audience.

37/ *NPRM* ¶ 34.

38/ Reply Comments of Cablevision, MB Docket No. 10-71, at 8-10 (June 3, 2010).

Respectfully submitted,

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