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
	)	

COMMENTS OF THE WALT DISNEY COMPANY

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Table of Contents

Executive Summary

The Walt Disney Company ("Disney") respectfully submits the instant comments ("Comments") in the above-captioned proceeding in which the Federal Communications Commission ("FCC" or "Commission") seeks comment on various proposals to modify its existing rules governing retransmission consent. Disney has addressed the issues raised in the NPRM in prior filings with the Commission and, accordingly, is filing these Comments, not to make any new points, but simply to reiterate that retransmission consent is functioning exactly as Congress intended. Specifically, these Comments make the following points:

- The Commission's conclusions that it lacks authority to mandate interim carriage and mandatory binding dispute resolution procedures are correct as a matter of law. The question of whether the FCC has authority to require interim carriage or binding arbitration has been fully considered and properly rejected by the Commission. Accordingly, there is simply no reason or basis to evaluate the validity of the Commission's conclusions on these issues in this proceeding or otherwise.

- The apparent concern by the FCC that the increase in competition among MVPDs – and the evolution of retransmission consent compensation which has resulted in isolated but highly publicized tension in negotiations between MVPDs and broadcasters – warrants government intervention into retransmission consent is not justified. The fact that there is competition among MVPDs does not mean that the retransmission consent system is "broken" but indicates instead that the process is operating as Congress intended.

- Given that, consistent with legislative intent, the current retransmission consent rules enable broadcasters and MVPDs to negotiate the terms and condition of carriage based on competitive conditions, there is no need to modify the good faith standard to specify conduct that would be deemed a *per se* violation of the FCC's rules. As explained in these Comments, the Commission (i) lacks authority to require negotiating parties to submit to non-binding mediation, which is an impractical and counterproductive means to resolve retransmission consent disputes; (ii) should not adopt rules that would interfere with the network-affiliate relationship because such rules likely would require the Commission to engage in a substantive review of affiliation agreements to resolve disputes between parties; and (iii) should refrain from adopting any other rules that seek to limit or regulate the nature and types of compensation that broadcasters may seek in exchange for retransmission consent.

- Disney appreciates the FCC's adherence to the importance of contractual exclusivity and its recognition of the importance of enforcement of the negotiated rights that flow from such contracts, and urges the FCC to retain the program exclusivity rules in their current form. The FCC's program exclusivity rules are part of the cable compulsory copyright licensing and retransmission consent regimes. So long as the cable compulsory copyright license exists, the exclusivity rules cannot be eliminated because they provide the means by which broadcasters and rights holders directly and efficiently can enforce their privately negotiated contractual rights to exclusivity.

- Disney supports increased consumer notification and agrees with the Commission’s proposal in the NPRM to extend its notice requirements to non-cable MVPDs. Disney remains committed to providing viewers with accurate information about potential disruptions in order to provide viewers adequate time to consider their options for viewing any broadcast programming that may be affected by an impasse, including steps they may take to view the signals directly over the air or to switch to alternative MVPDs. However, it is important that broadcasters retain discretion to determine how or whether to provide notifications to viewers.

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The Walt Disney Company ("Disney")[1] respectfully submits the instant comments ("Comments") in the above-captioned proceeding in which the Federal Communications Commission ("FCC" or "Commission") seeks comment on various proposals to modify its existing rules governing retransmission consent.[2] In this proceeding, the FCC seeks comment on several matters that have been raised previously by multichannel video programming distributors ("MVPDs") and appropriately rejected by the Commission as unnecessary as a matter of public policy or contrary to law. Indeed, in prior filings with the Commission, Disney has addressed the issues raised in the NPRM and, accordingly, is filing these Comments, not to make any new

[1] Disney files these comments on behalf of itself, as well as the following Disney-owned entities: ESPN (80% owned by Disney), Disney ABC Cable Networks Group, the ABC Television Network, and the ABC Owned Television Stations. The ABC Owned Television Stations are located in the following markets: New York (WABC-TV), Los Angeles (KABC-TV), Chicago (WLS-TV), Philadelphia (WPVI-TV), San Francisco (KGO-TV), Houston (KTRK-TV), Raleigh-Durham (WTVD(DT)), and Fresno (KFSN-TV).

[2] *See* Amendment of the Commission's Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 (rel. March 3, 2011) ("*NPRM*").

points, but simply to reiterate that retransmission consent is functioning exactly as Congress intended.[3]

Specifically, in these Comments, Disney demonstrates that, based upon Congress's intent to create retransmission consent negotiations based on competitive conditions, the Commission has appropriately recognized its lack of jurisdiction to mandate interim carriage or compulsory arbitration in the event of a retransmission consent impasse. Indeed, the increase in competition among MVPDs– and the evolution of the types of compensation broadcasters seek in exchange for retransmission consent – does not mean that the retransmission consent system is "broken" but rather is evidence of a competitive video programming marketplace. In these circumstances, there is no need to modify the good faith standard.[4] Moreover, the network non-duplication and syndicated program exclusivity rules cannot be eliminated because they provide the means by which broadcasters and rights holders directly and efficiently can enforce their privately negotiated contractual rights to exclusivity.

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[3] *See generally* Comments of the Walt Disney Company, MB Docket No. 10-71 (filed May 18, 2010) ("Comments to MVPD Petition") (incorporated herein by reference); Reply Comments of the Walt Disney Company, MB Docket No. 10-71 (filed Jun. 3, 2010) ("Reply Comments to MVPD Petition") (incorporated herein by reference).

[4] Importantly, the retransmission right is inextricably intertwined with the compulsory license that Congress gave cable companies to carry all local broadcast signals (but no other televised content). *See* Comments to MVPD Petition at 12-15. These two statutory mechanisms cannot somehow be pulled apart and modified in isolation. As the Commission explained in 2005, "when any piece of the legal landscape governing carriage of television broadcast signals is changed, other aspects of that landscape also require careful examination." FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004,* ¶ 33 (Sept. 8, 2005) ("*2005 FCC Retransmission Consent Report*"). For example, Congress could not reasonably curtail broadcasters' retransmission-consent rights without also eliminating the compulsory copyright license, which petitioners inexplicably appear to take for granted.

I. THE FCC HAS REPEATEDLY AND CORRECTLY DETERMINED THAT IT LACKS JURISDICTION TO MANDATE INTERIM CARRIAGE OR BINDING ARBITRATION IN THE CONTEXT OF RETRANSMISSION CONSENT NEGOTIATIONS

In the NPRM, the Commission concludes that Section 325(b) ("Section 325(b)") of the Communications Act of 1934, as amended ("Act"), prohibits an MVPD from carrying a broadcast signal unless it has obtained the express consent of the broadcaster.[5] Based upon this statutory mandate, the FCC further concludes that it does not have "authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations."[6] As explained briefly below, the Commission's conclusions relating to interim carriage and mandatory binding dispute resolution procedures are correct as a matter of law. The question of whether the FCC has authority to require interim carriage or binding arbitration has been fully considered and properly rejected by the Commission. Accordingly, there is simply no reason or basis to evaluate the validity of the Commission's conclusions on these issues in this proceeding or otherwise.

Section 325(b) provides that "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station . . . except . . . with the express authority of the originating station."[7] This language unambiguously precludes the Commission from mandating interim carriage, which would force a broadcaster to allow retransmission of its signal(s) over its objection during a pending negotiation or dispute. Similarly, mandatory binding arbitration would contravene the clear legislative directive of Section 325(b) because it would substitute an arbitrator's dictates for free-market negotiation and force a broadcaster to

[5] *See NPRM* at ¶¶ 17 & 18 ("Section 325(b) of the Act expressly prohibits the retransmission of a broadcast signal without the broadcaster's consent" and "the legislative history of Section 325(b) states the retransmission consent provisions were not intended to 'dictate the outcome of the ensuing marketplace negotiations'").

[6] *NPRM* at ¶ 18.

[7] 47 U.S.C. § 325(b)(1)(A).

permit retransmission of its signals on the basis of an arbitral decision with which the broadcaster disagrees. In short, as Disney and others have demonstrated extensively in Commission proceedings relating to retransmission consent, both interim carriage and binding arbitration would violate Section 325(b) because each would explicitly enable MVPDs to "retransmit the signal of a broadcasting station" *without* "the express authority of the originating station."

Like the statutory text, the legislative history confirms that Congress intended to preclude regulatory interference with the substance of retransmission consent agreements. In establishing the statutory retransmission consent regime, Congress intended "to establish a marketplace for the disposition of the rights to retransmit broadcast signals.[8] By mandating interim carriage or compulsory arbitration, the Commission would be doing precisely what Congress intentionally refused to do—"dictat[ing] the outcome[s] of" retransmission consent negotiations based on marketplace considerations.[9] Congress gave broadcasters absolute rights to deny retransmission consent because it understood that the prospect of regulatory intervention would tilt the playing field in favor of MVPDs. In particular, regulatory intervention to require interim carriage or mandatory arbitration would give MVPDs every incentive to refuse to come to an agreement, while maintaining a veneer of good faith bargaining, knowing that they can continue to carry the broadcast signal until any dispute is resolved, almost certainly on more favorable terms (for the MVPDs) than they could achieve in the free market.

Importantly, the Commission itself has repeatedly and consistently reached the same conclusion regarding its lack of authority to mandate interim carriage or binding arbitration. For example, when the Commission adopted its good-faith bargaining rules in 2000, it found that

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[8] S. Rep. No. 92, 102d Cong., 1st Sess. at 36 (1991) ("Senate Report").
[9] *Id.*

Sections 325(b)(1)(A) and 325(e)(4)(A) each "clearly" and "unambiguously" preclude the Commission from mandating interim carriage during any impasse in negotiations.[10] With respect to compulsory arbitration, the FCC has determined consistently that Congress did not "contemplate an intrusive role for the Commission with regard to retransmission consent,"[11] including any role that would enable it to force a broadcaster to permit retransmission of its signals on the basis of an arbitral decision with which the broadcaster disagrees.[12]

In short, absent a Congressional amendment to Section 325(b), the FCC clearly lacks authority to mandate interim carriage or binding dispute resolution mechanisms as applicable to retransmission consent negotiations. Indeed, the Commission's conclusions are founded on sound legal analysis. This Commission precedent, combined with the plain language of Section 325(b) and its legislative history, close the door as to whether there is any legal basis for the FCC to adopt interim carriage or binding arbitration in the context of retransmission consent.[13]

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[10] *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report & Order, 15 FCC Rcd 5445, 5471 ¶¶ 59-60 (2000) ("*Good Faith Order*"). *See* Comments to MVPD Petition at 7-9 (summarizing the Commission's interpretation of the legislative history of Sections 325(b) and 325(e) (4), which provide "no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation" and did not "contemplate an intrusive role for the Commission with regard to retransmission consent as oversight of the terms broadcasters seek in negotiations where the broadcaster has not consented to such retransmission").

[11] *Good Faith Order* at ¶ 13; *see also id.* at ¶ 23 ("Despite the arguments of the satellite industry and other MVPDs, we find nothing supporting a construction of Section 325(b)(3)(C) that would grant the Commission authority to impose a complex and intrusive regulatory regime similar to the program access provisions or the interconnection requirements of Section 251[.]").

[12] For example, the Media Bureau stated unequivocally that the FCC lacks authority to mandate binding arbitration. *See Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 47, ¶ 25 (MB 2007) (stating that the "Commission does not have the authority to require the parties to submit to binding arbitration.").

[13] It is important to note that, as Disney has explained fully in its Comments to the MVPD Petition, Section 325(b)(3)(A) of the Act, which governs FCC regulations concerning retransmission consent and must-carry, does not trump the retransmission consent right contained in Section 325(b)(1)(A) and thus does not provide the Commission with authority to

II. THE CONTINUING EVOLUTION IN THE RETRANSMISSION CONSENT PROCESS AS COMPETITION AMONG MVPDS INCREASES AND THE FORM OF COMPENSATION CHANGES DEMONSTRATES THAT RETRANSMISSION CONSENT NEGOTIATIONS ARE WORKING AS CONGRESS INTENDED

In the NPRM, the Commission observes that, since the enactment of the retransmission consent statute, "there have been significant changes in the video programming marketplace" including "the rise of competitive video programming providers" and a change in "the form of compensation sought by broadcasters."[14] Although Disney agrees with the Commission's statement in the NPRM that Congress intended that retransmission consent negotiations be based upon "market-based mechanisms", the FCC nevertheless appears to believe that the increase in competition among MVPDs – and the evolution of retransmission consent compensation which has resulted in isolated but highly publicized tension in negotiations between MVPDs and broadcasters – warrants FCC concern and government intervention into retransmission consent negotiations.[15] As demonstrated below, however, such government intervention cannot be justified. Indeed, the fact that there is competition among MVPDs does not mean that the retransmission consent system is "broken" but indicates instead that retransmission consent is working as Congress intended.[16]

As an initial matter, Congress drafted Section 325(b) to apply to "any cable system or other multichannel video programming distributor,"[17] including direct broadcast satellite

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mandate interim carriage or compulsory arbitration. *See* Comments to the MVPD Petition at 9-11.

[14] *NPRM* at ¶ 2.

[15] *See id.* at ¶¶ 2-3 (stating that "disputes over retransmission consent have become more contentious and more public" and concluding that "it is appropriate for us to reexamine our rules relating to retransmission consent").

[16] *See* Comments to MVPD Petition at 15-24 (discussing in detail the evolving market dynamic and the important role of competition in marketplace negotiations).

[17] 47 U.S.C. § 325(b)(1)(A).

companies and cable overbuilders, regardless of their respective positions in the market.[18] Indeed, since the enactment of Section 325(b), increasing competition for viewers has affected broadcasters at least as much as, if not more than, increasing MVPD competition has affected cable incumbents. There are now four major broadcast networks, several additional broadcast networks, many independent local stations, and dozens of major cable networks, many of which have sprung up since 1992. Broadcasters thus face much more competition for viewers than they did in 1992, and their audience shares have declined accordingly.[19] Meanwhile, cable-only networks, many of which are owned by cable operators, have now surpassed broadcast networks in aggregate viewership and revenues, and the gap continues to widen.[20]

In addition to increased competition for viewers, other developments since 1992 have also tended to increase MVPD bargaining leverage in negotiations with broadcasters, including an increase in cable "clustering," an arrangement in which one operator obtains control of most, if not all, cable systems in a given television market and then negotiates with local broadcasters on behalf of the unified cluster.[21] Similarly, because MVPD subscribership has increased steadily since 1992—from less than 60% of television households to nearly 90% today—"the importance of multichannel distribution as a means of retransmitting broadcasting signals to a broad audience is substantially greater than it was when Congress enacted retransmission

[18] The status of those new MVPD entrants was also a key focus of the 1992 Act, which promoted MVPD entry by including a new ban on exclusive cable franchises, 47 U.S.C. § 541(a)(1), and the creation of new program access rules, 47 U.S.C. § 548.

[19] *See* Comments to MVPD Petition at 16-17.

[20] *Id.* at 23-24; Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC, at 17-18 (Mar. 2009) ("2009 Eisenach Analysis), attached as Appx. A to Reply Comments for the National Association of Broadcasters in MB Docket No. 07-269 (filed Jun. 22, 2009).

[21] *See Annual Assessment of Competition in the Market for Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2507, 2521, 2550-51 (2006); *see also* Comments of the National Association of Broadcasters, MB Docket No. 07-29 at 14-15, 19-21 (filed Jan. 4, 2008) ("NAB 2008 Retransmission Comments").

consent."[22] For example, in many local markets, a single MVPD controls the vast majority of MVPD households in the market. Due to their market shares, MVPDs have significant leverage over broadcasters in retransmission consent negotiations. For these reasons, it would be incorrect for the Commission to assume that the increase in the number of broadcasters seeking cash compensation is due to a shift in the bargaining power of broadcasters (as compared to MVPD bargaining power) and to modify its retransmission consent rules based on this erroneous assumption.[23]

To the extent that some MVPDs have begun paying cash compensation for the carriage of some broadcast signals, that is evidence not that the retransmission consent process is "broken," but that it is operating as Congress intended. In enacting the retransmission consent statute, Congress always expected and intended that broadcasters would negotiate with MVPDs for various forms of compensation, both monetary and non-monetary.[24] As the FCC observes in the NPRM, in recent years, the nature of retransmission consent compensation has evolved such that

[22] Jeffrey A. Eisenach and Kevin W. Caves, *Retransmission Consent and Economic Welfare: A Reply to Compass Lexecon*, Navigant Economics, 6 (Apr. 2010) ("2010 Eisenach & Caves Analysis"), attached to Letter from Erin Dozier, National Association of Broadcasters, to Marlene Dortch, Secretary, FCC, MB Docket No. 07-198 (May 6, 2010).

[23] *See* Comments to MVPD Petition at 16-19 (discussing in detail the relative market power of broadcasters as compared to MVPDs).

[24] *See Senate Report* at 35-36 ("Cable operators pay for the cable programming services they offer to their customers; the Committee believes that programming services which originate on a broadcast channel should not be treated differently. . . . Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as . . . the right to program an additional channel on a cable system."); *See 2005 FCC Retransmission Consent Report* at ¶¶ 35, 44 ("Notably, Congress chose not to 'dictate the outcome of the ensuing marketplace negotiations.' Many expected that cable operators would compensate broadcasters with cash in return for retransmission consent. In reality, much of the compensation for retransmission consent has been in-kind, including carriage of an affiliated non-broadcast channel[.]") (footnote omitted); *see also id.* at ¶¶ 10-11.

an increasing number of broadcasters seek cash – rather than in-kind – compensation in exchange for retransmission consent.[25]

Several factors may explain the evolving nature of retransmission-consent compensation. To begin with, the quality and expense of much broadcast programming has increased substantially since 1992.[26] Of course, in well-functioning competitive markets, prices tend to rise with increases in quality and cost. Just as important, as the NPRM notes, cable companies faced very little MVPD competition in 1992 and face more now. They have therefore lost some of their power to avoid paying a competitive rate for programming.[27] Thus, to the extent that some broadcasters may now be able to recover more monetary compensation than they could recover before, this is not a sign that the process is "broken." To the contrary, it is a sign that the market is *working better*, now that cable companies are less capable of exploiting market power to deprive broadcasters of any monetary compensation for their programming, as they succeeded in doing until recently.

III. THE COMMISSION'S PROPOSALS TO DEEM CERTAIN CONDUCT A *PER SE* VIOLATION OF THE GOOD FAITH NEGOTIATION RULES CANNOT BE JUSTIFIED BY LAW OR PUBLIC POLICY

As explained above, retransmission consent is working exactly as Congress intended, namely, broadcasters and MVPDs negotiate the terms and conditions of carriage based on competitive market-driven conditions. Accordingly, there is no need to modify the good faith standard to specify conduct that would be deemed a *per se* violation of the FCC's rules. Specifically, as explained below, the Commission lacks authority to require negotiating parties to

[25] *See NPRM* at ¶ 2.

[26] Indeed, the cable industry's trade association has itself cited "a huge increase in output in terms of the number of channels" and both "the quality and quantity of programming." Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269, at 24 (filed May 20, 2009).

[27] *See generally 2005 FCC Retransmission Consent Report* at ¶¶ 10-11; NAB 2008 Retransmission Comments at 4-5.

submit to non-binding mediation, which, in any event, is an impractical and counterproductive means to resolve retransmission consent disputes. The Commission should also refrain from adopting any *per se* good faith negotiation standards or any other rules that seek to limit or regulate the nature and types of compensation that broadcasters may seek in exchange for retransmission consent.

A. The Commission Lacks Authority To Require Non-Binding Mediation And Such A Requirement Is Not Necessary, Is Counterproductive And Would Negatively Impact The Retransmission Consent Process

In the NPRM, the Commission proposes to deem it a *per se* violation of the good faith rules if a negotiating entity refuses to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of a retransmission consent agreement.[28] As an initial matter, as the NAB has explained fully in its comments in this proceeding, the Commission lacks authority under Section 325(b) to require parties to submit to non-binding mediation because Congress expressly prohibited the Commission from intruding into the substantive terms and conditions of retransmission consent negotiations, including the selection or use of a particular mechanism for resolving disputes involving retransmission consent agreements or renewals.[29]

Not only does the Commission lack authority to require parties to submit to non-binding mediation, such a requirement will be unnecessary in the overwhelming majority of cases, because retransmission consent negotiations very rarely end up affecting consumer viewing

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[28] *See NPRM* at ¶ 25.

[29] *See* Comments of the National Association of Broadcasters in MB Docket 10-71 at 35-36 (filed May 27, 2011) ("NAB Comments"). In addition, mediation would almost certainly take longer than 30 days, thus compelling continued carriage of a broadcast station, a measure that the Commission is not authorized to take. *See id.* at 38-39. Allowing carriage of signals without the express consent of the originating broadcast station would not only violate the unambiguous statutory mandate of Section 325(b), but also would be inconsistent with the statute's legislative history. *See Senate Report* at 34-35, 37 ("Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means" and "[c]arriage and channel positioning for such stations will be entirely a matter of negotiation between the broadcasters and the cable system").

options. Since 1992, broadcasters and MVPDs have concluded thousands of negotiations without incident, and impasses have led MVPDs to drop broadcast channels only in a handful of cases.[30] A typical viewer is far more likely to confront an electrical outage or complete cable-system outage than to lose access to his or her first-choice television channel because of a retransmission consent dispute.[31]

Disney also opposes any requirement that negotiated parties submit to non-binding mediation because non-binding mediation would be counterproductive to the Commission's goal of swiftly concluding retransmission consent negotiations. Specifically, mandated non-binding mediation would likely result in increased delays in the negotiation process because negotiating parties would have no incentive to reach an agreement where one party believes that it could achieve a better outcome--or simply delay-- through non-binding mediation. As a result, rather than expedite the negotiation process, required non-binding mediation could be used strategically as a delay tactic wherever a party views delay in its self-interest.

Importantly, even if it is not used as a strategic negotiating tactic, mandated non-binding mediation will inevitably impose significant delays into the negotiation process, as any mediation process is likely to take more than thirty days. For example, even the selection of a mediator qualified to address retransmission consent issues – and satisfactory to both parties – is likely to take more than thirty days. Even assuming that the parties select a mediator promptly, it is unlikely that a mediator would be able to address the numerous and complex issues present in a typical retransmission consent negotiation in a thirty day period.[32] Indeed, after the expiration of the thirty day period, the parties likely will be no closer to a resolution through non-binding

[30] *See* Comments to MVPD Petition at 5; *see also* NAB Comments 7-8.

[31] *See id*.

[32] Retransmission consent negotiations are complex and cover a variety of contractual provisions, including, *inter alia*, compensation, advertising, carriage of multicast channels, channel tiering, ancillary services, content protection. *See* NAB Comments at 36-37.

mediation than they otherwise would be if they pursued negotiations independently. In fact, the negotiation process likely would be slowed by the requirement to submit to non-binding mediation, since the parties would be required to focus time and resources not on reaching a mutually beneficial agreement but on finding a mediator and preparing for mediation. In short, should the Commission adopt its proposal, non-binding mediation would become the default standstill agreement in the event parties reach a negotiating impasse.

B. The Commission Should Not Adopt Rules That Interfere With Network-Affiliate Relations

In the NPRM, the Commission seeks comment on "whether it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval provision."[33] Disney appreciates that it is the FCC's stated intent not to adopt modifications to its retransmission consent rules that would "interfere with the flow of revenue between networks and their affiliates."[34] But, it is important to stress that network affiliation agreements contain a wide range of contractual provisions– including provisions that govern the geographic areas in which affiliates will have the right to negotiate retransmission consent. By imposing regulatory restrictions on the network-affiliate negotiating process, the Commission will necessarily be restricting a network's ability to "limit an affiliate's right to redistribute affiliated programming" in contravention of legislative intent and FCC precedent.[35] Moreover, enforcement of FCC regulations prohibiting specific provisions in network affiliation agreements would inevitably

[33] *NPRM* at ¶ 22.
[34] *Id*.
[35] *Good Faith Order* at ¶ 33. *See also Ex Parte* Comments of Fox Broadcasting Company in Response to Time Warner Cable's Comments, CSR No. 8233-C, 3 (filed Dec. 17, 2009) (noting that "the Commission repeatedly has recognized that the good faith bargaining rules do not preclude stations from entering into contracts that restrict their authority to grant retransmission consent to an MVPD.").

require the Commission to engage in any number of definitional disputes and a substantive review of other provisions in affiliation agreements to resolve disputes between parties. Accordingly, Disney opposes adopting any *per se* rules that seek to intervene in relationships between television networks and their affiliates.

C. The Commission Should Not Adopt Rules That Limit Broadcasters' Ability To Negotiate for Fees Or Other Compensation For Retransmission Consent

The Commission seeks comment in the NPRM on a number of issues relating to the nature of compensation broadcasters could request in retransmission consent negotiations, including, *inter alia*, (i) whether it should clarify or expand the good faith rules to include consideration of variances in retransmission consent fees paid by MVPDs in the same market;[36] whether it should consider "the ability of broadcasters to condition retransmission consent on the purchase of other programming" when evaluating compliance with the good faith rules;[37] and whether there is an impact on the basic service rate that consumers pay as a result of retransmission consent fees or disputes.[38] Disney has repeatedly and fully addressed all of these issues in previous filings with the Commission, which filings are hereby incorporated by reference.[39]

From the inception of the retransmission consent regime, Congress has *always* intended and expected that some broadcasters would receive cash compensation for their content; that others would receive compensation in kind, in the form of additional channel-carriage; and that still other broadcasters could receive both.[40] The Commission has rightly rejected previous

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[36] *NPRM* at ¶¶ 31-33.
[37] *Id*. at ¶ 29.
[38] *Id*. at ¶ 17.
[39] *See generally* Comments of The Walt Disney Company, MB Docket Nos. 07-29 *et al.* (filed Jan. 4, 2008); *see also* Comments to MVPD Petition; Reply Comments to MVPD Petition; 2010 Eisenach & Caves Analysis; 2009 Eisenach Analysis.
[40] *See supra* n. 25.

requests by the MVPD industry to regulate the types or magnitude of retransmission consent compensation: "Although some parties earnestly insist . . . that broadcasters should be entitled to zero compensation in return for retransmission consent or that the forms of compensation for carriage should be otherwise limited, this seems to us precisely the judgment that Congress generally intended the parties to resolve their own interactions and through the efforts of each to advance its own economic self-interest."[41] Importantly, economists have demonstrated that, despite claims to the contrary by the MVPD industry, although the retransmission consent regime has given rise to monetary compensation, the increased reliance on cash compensation does not substantially raise cable subscription fees, which do not significantly vary with such programming costs.[42] Thus, the Commission should continue to recognize Congressional intent to permit broadcasters to negotiate for the appropriate compensation for their content, and refrain from regulating in this area.

IV. RETENTION OF THE NETWORK NON-DUPLICATION AND SYNDICATED EXCLUSIVITY RULES MAINTAINS THE BALANCE STRUCK BY CONGRESS WHEN IT ADOPTED THE CABLE COMPULSORY LICENSE AND IS IMPORTANT FOR EFFICIENT AND DIRECT ENFORCEMENT OF PROGRAMMING RIGHTS NEGOTIATED IN THE MARKET

The FCC seeks comment in the NPRM on the "potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated program exclusivity."[43] As the Commission observes in the NPRM, the network non-duplication and syndicated program exclusivity rules ("Exclusivity Rules") do not create exclusive rights for broadcasters but rather establish a means for broadcasters and rights holders to enforce their

[41] *Good Faith Order* at ¶ 53; *see also id.* at ¶ 43 (finding that the good faith standard "does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signal").

[42] *See* Comments to MVPD Petition at 24-29 (explaining that there is no plausible basis to blame increases in retail cable rates on retransmission consent fees). *See also, e.g.*, 2010 Eisenach & Caves Analysis; 2009 Eisenach Analysis.

[43] *NPRM* at ¶ 42.

privately negotiated contractual rights to exclusivity at the Commission.[44] Disney appreciates the FCC's adherence to the importance of contractual exclusivity and its recognition of the importance of enforcement of the negotiated rights that flow from such contracts.[45] As explained below, however, in seeking comment on the elimination of the Exclusivity Rules, the NPRM appears to disregard that the Exclusivity Rules are part of the cable compulsory copyright licensing and retransmission consent regimes. Indeed, so long as the cable compulsory copyright license exists, the Exclusivity Rules cannot be eliminated as they provide the means by which broadcasters and rights holders directly and efficiently can enforce their privately negotiated contractual rights to exclusivity.

The Exclusivity Rules are intertwined with the cable compulsory license by which cable is statutorily authorized to retransmit broadcast programming. Specifically, the Commission adopted the first syndicated program exclusivity rule in 1972 based upon a consensus agreement among the cable, broadcast, and programming industries to facilitate passage of legislation enacting a cable compulsory license.[46] Thus, the consensus agreement was the predicate for Congress's later enactment of legislation providing for a compulsory copyright license to enable cable operators to retransmit broadcast signals.[47] In other words, the ability for broadcasters to

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[44] *Id.* at ¶ 43.

[45] *See id.* at ¶ 43.

[46] *See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to the Community Antenna Television Systems, Cable Television*, Report and Order, 36 FCC 2d 143, ¶¶61-67 (1972). Prior to adoption of the 1972 syndicated program exclusivity rule, in 1965, the Commission adopted a predecessor to the network non-duplication program exclusivity rule. *See Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 FCC 683, fn. 37 (1972) (stating that "reasonable non-duplication requirements will serve, in part, to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed.").

[47] *See id.* at ¶ 64 ("[t]he provisions of the [consensus] agreement would add exclusivity protection for syndicated programming); *see also id.* at ¶ 65 (explaining that the consensus

enforce exclusive contractual rights through the initial program exclusivity rule was critical to the establishment of the compulsory licensing scheme. As the Commission has observed, the Exclusivity Rules are "uniquely tied by their relationship to the Copyright Act's compulsory license."[48]

Network non-duplication and syndicated exclusivity obligations arise not in the first instance from Commission rules, but from private contracts between rights holders and broadcast stations. The Exclusivity Rules provide the means through which broadcasters can efficiently and effectively protect privately negotiated rights to exclusive programming.[49] Indeed, if the FCC were to eliminate the Exclusivity Rules while the compulsory license remains intact, a broadcaster would be left with no administrative avenues to enforce its rights to program exclusivity.[50] But for the Exclusivity Rules, a cable operator could rely on the compulsory license to import into a local broadcaster's market duplicative programming for which the broadcaster has negotiated exclusivity.

In addition, in the absence of the Exclusivity Rules which enable administrative enforcement of the contractual arrangements between rights holders and broadcasters, it would be more difficult and inefficient for rights holders to use the judicial system to enforce their

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agreement will "facilitate the passage of copyright legislation"); 17 U.S.C. § 111(c) (1976); *Cable Television Syndicated Program Exclusivity Rules*, Report and Order, 79 FCC 2d 663, ¶ 193 (1980) ("as the result of a 'Consensus Agreement' between major elements of the cable television, broadcast television, and television program production industries, which the Commission adopted in order to facilitate the passage of copyrighted legislation, the syndicated exclusivity provisions were included in the rules").

[48] *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries,* Report and Order, 3 FCC Rcd 5299, ¶ 153 (1988) ("*Program Exclusivity R&O*").

[49] *See id.* (observing that "program exclusivity rules are the only means through which the Commission may permit broadcasters to enforce exclusivity provisions").

[50] 17 U.S.C. § 111(c)(1); *see Program Exclusivity R&O* at ¶ 129 ("section 111(c)(1) of the Copyright Act grants cable systems a compulsory license to retransmit broadcast signals the carriage of which is 'permissible under the rules, regulations or authorization of the Federal Communications Commission'").

intellectual property rights given the compulsory license. A rights holder's and station's ability to obtain relief (e.g., specific performance to prevent the MVPD from carrying the programming for which another broadcaster has exclusive rights) would be costly and time consuming.

Given the increased difficulty in enforcing exclusive programming rights, if the Exclusivity Rules are repealed, MVPDs would be tempted to, at least temporarily, act in conflict with the contractual provisions and retransmit duplicative programming into a broadcaster's local market.[51] During that time, viewers would, at a minimum, be confused (and potentially adversely affected) about the origin and accuracy of the "local" news, weather, sports and other locally originated information on which they were relying and would be receiving from the out-of-market broadcast signal. Such viewer disruption and confusion would be contrary to the public interest.

Importantly, as explained above, the Exclusivity Rules do not grant broadcasters exclusive rights but rather provide for the only procedural mechanism by which broadcasters can efficiently enforce privately contracted exclusive rights. There is simply no demonstrated harm from the rules themselves, which, in fact, "limit the circumstances in which the private contracts can be enforced."[52] Indeed, MVPDs are attacking not the procedural mechanisms created by the FCC's rules but rather the contractual relationships between rights holders and broadcasters. However, by eliminating the Exclusivity Rules as urged by MVPDs, the Commission not only

[51] *See, e.g.*, Emergency Petition for Prohibition of Carriage in Violation of the Commission's Rules, CSR-8382-C, 3 (filed Dec. 28, 2010) ("Nexstar and Mission now understand that Time Warner's decision to retransmit WBRE on the TW Utica System and WUTR on the TW Plattsburgh System without notification, consent or authority and without providing the statutorily required 30 days advance notice to Nexstar, Mission, its customers or its franchising authorities is part of its negotiating strategy to gain leverage in its retransmission consent disputes with Smith, the licensee of the local Utica NBC affiliate, WKTV, and Lambert, the licensee of the local Plattsburgh ABC affiliate, WVNY. Time Warner has dropped WKTV and WVNY and replaced them with WBRE and WUTR.").

[52] *NPRM* at n. 128.

would interfere with contractual, free market relationships between rights holders and stations but also would run afoul of its own precedent by permitting MVPDs to violate with impunity or delaying enforcement of these negotiated programming agreements.[53] Indeed, elimination of the Exclusivity Rules would upset Congress's deliberate balancing of the compulsory copyright license and communications policy.[54] The Exclusivity Rules serve as a counter-weight to an imperfect compulsory license scheme, where copyright holders are not paid the full value for the right to publicly perform their works (i.e., copyright holders are paid a price not set by the marketplace.).[55] In short, there is no reason to repeal or revise the Exclusivity Rules, which create an efficient procedural mechanism to enforce exclusive rights and are necessitated by the existence of the cable compulsory license.

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[53] The Commission has rightly rejected similar requests to eliminate the Exclusivity Rules in the past on the ground that regulatory interference with those private relationships would violate congressional intent, undermine the Commission's own policies, and "risk[] . . . major disruption and possible unintended consequences." *2005 FCC Retransmission Consent Report* at ¶¶ 50-51.

[54] *See generally Program Exclusivity R&O.* The Exclusivity Rules also are integral to the retransmission consent regime and the effective operation of the video programming market. *See also* Senate Report at 38 ("[T]he Committee has relied on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules. Amendments or deletions of these rules in a manner which would allow distant stations to be submitted on cable systems for carriage of local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in [this legislation].").

[55] In fact, the Rural MVPD Group (comprised of the American Cable Association, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, and the Western Telecommunications Alliance) has stated recently that "[t]he compulsory license does not exist in isolation; it is inextricably linked to a complex web of broadcast signal carriage laws, regulations, and deeply rooted policies." *See* Reply Comments of the Rural MVPD Group, In the Matter of Section 302 Report to Congress, Library of Congress Copyright Office Docket No. RM-2010-10 (filed May 25, 2011).

V. VIEWERS SHOULD BE PROVIDED WITH ADEQUATE INFORMATION REGARDING A POTENTIAL IMPASSE IN RETRANSMISSION CONSENT NEGOTIATIONS

The Commission seeks comment in the NPRM on whether it should revise its rules to require cable and non-cable MVPDs to provide advance notifications of potential signal deletions to viewers.[56] Disney supports consumer notification and, accordingly, supports the Commission's proposal in the NPRM to extend its notice requirements to non-cable MVPDs.[57]

In addition, Disney remains committed to providing viewers with accurate information about potential disruptions in order to provide viewers adequate time to consider their options for viewing any broadcast programming that may be affected by an impasse, including steps they may take to view the signals directly over the air or to switch to alternative MVPDs. Such notice could include, where warranted, a notification in a crawl (or by some other method) that the station is within a 30-day contractual window, that its contract with the particular MVPD will expire at the end of that window, and that, if a new agreement is not reached with that MVPD, the station could no longer be available on that MVPD. Broadcasters also may decide that providing notice online or via other methods or media is more appropriate in certain circumstances, for example, if the MVPD only covers a segment of the broadcaster's coverage area. It is important that broadcasters retain discretion to determine how or whether to provide notifications to viewers. Indeed, broadcasters are in the best position to determine the means to provide information to their viewers, as they deem appropriate, in order to avoid causing confusion in circumstances where certain viewers may not be impacted by a potential signal deletion. Accordingly, the FCC should not extend the notice requirement to broadcasters.

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[56] *NPRM* at ¶ 37.

[57] Disney also supports any FCC efforts to ensure that future notifications are fair and accurate. For example, one cable operator last year "auto-tuned" all of its subscribers' television sets so that each time subscribers turned on their televisions they received a lengthy anti-broadcaster message that failed to provide relevant information.

VI. CONCLUSION

For the reasons set forth herein, Disney urges the Commission to once again recognize that the current retransmission consent rules have resulted in the successful completion of thousands of negotiations based on competitive conditions. In the NPRM, the Commission appropriately recognizes its lack of jurisdiction to mandate interim carriage or compulsory arbitration in the event of a retransmission consent impasse. In light of its limited authority to interfere with retransmission consent negotiations and the effectiveness of its current rules, Disney urges the FCC to refrain from modifying the good faith standard to specify conduct that would be deemed a *per se* violation of the FCC's rules. Disney also opposes the elimination of the network non-duplication and syndicated program exclusivity rules because these rules provide the means by which broadcasters and rights holders directly and efficiently can enforce their privately negotiated contractual rights to exclusivity.

Respectfully submitted,

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