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

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

COMMENTS OF SINCLAIR BROADCAST GROUP, INC.

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Sinclair Broadcast Group, Inc. ("Sinclair") hereby responds to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* ("NPRM") in the above-referenced proceeding.[1]

I. Introduction and Summary

This NPRM appears to have arbitrarily accepted the multichannel video program distributor ("MVPD") industry's self-serving argument that the FCC should protect consumers from rising cable subscription costs by handicapping broadcasters in their efforts to receive fair market value cash compensation for retransmission rights. But this argument suffers from several material flaws. First, it is built on a serious logical disconnect. Cable rates have been rising steadily for decades, since long before MVPDs paid cash compensation to broadcasters.[2] There is no reason to believe that

[1] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, FCC 11-31 (rel. Mar. 3, 2011) ("NPRM").
[2] One of the primary objectives of the 1992 Cable Act was to curb rampant cable rate increases. See, S. Rep. No. 102-92, at 7 ("Senate Report") ("for the past several years the average rate across the country has increased several times greater than the rate of inflation, and . . . rates in certain locations have increased dramatically, such that subscribers are being gouged by cable operators.") When Congress made these findings, retransmission consent did not yet exist.

governmental curbs on the price of one MVPD service input will stop MVPD rates from rising or even slow the rate of increase. Second, the argument flies in the face of Congressional intent that broadcasters be permitted to seek fair, market-based cash compensation for their signals just as non-broadcast network providers do. Third, the argument ignores the enormous harm to the public that would arise from a sweeping, government-imposed economic disadvantage on the one source of television that is available to consumers who cannot pay or who choose not to pay. The harms include the continued migration of high-value programming from free, over-the-air broadcast television to pay cable channels, the misallocation of the public's programming expenditures to support unpopular programming, and continued undermining of the business model that supports the only local television programming that is widely available.

It is important to read the MVPD rhetoric in context. During a fraction of one percent of negotiations, a few MVPDs have lost access, temporarily, to one or more broadcast signals.[3] Yet carriage has always been restored, and during the interruptions, most consumers have had at least three other options for receiving the broadcaster's programming. When carriage is restored, it is always because the parties have settled on a rate that severely under-compensates the broadcaster, as compared to non-broadcast programmers.[4] And while government has already established a process to adjudicate claims of bargaining abuse, the total number of complaints that have been filed can be

[3] With this stellar track record, it is unclear what sort of success rate the FCC is demanding of free market negotiations. Impasses are already statistically insignificant in number and good faith violations are nonexistent.

[4] MVPDs have previously presented various policy arguments as to why that broadcast channels should be worth less than cable networks. But, as discussed below, Congress left the determination of value up to the market. If the MVPD's arguments are true, those factors will be reflected in the market rate without governmental intervention.

counted on one hand. The government has *never* had occasion to call a foul on a broadcaster.

An objective observer, marginally sophisticated in the ways of the free market, would be hard pressed to conclude that broadcasters have any special systemic negotiating advantage in carriage negotiations, or that the retransmission rights market is so dysfunctional as to require government intervention to protect MVPDs.

Lacking any empirical or policy rationale, the NPRM appears to be a knee-jerk reaction to repeated but shallow claims by MVPDs. The MVPDs assert that the handful of program service interruptions that have occurred prove that the retransmission negotiating process is broken and consumers are taking the hit. The NPRM assumes without analysis that broadcasters are wholly or primarily responsible for the few interruptions that do occur, even though the outcome of "good faith" litigation suggests otherwise. While interruptions are obviously unfortunate, the market forces that already severely limit their occurrence sufficiently address the issue without the need for additional government intervention. Occasional and temporary carriage interruptions reflect an unavoidable consequence of a statutory scheme intended to result in free-market negotiations.

The FCC should resist the temptation to ride to the rescue of consumers who, in extremely rare circumstances, have to make alternative arrangements to view programming that is temporarily unavailable on a particular MVPD lineup or simply watch other programming. Congress plainly did not assign that role to the FCC and it did not authorize the FCC to assume it.[5] And the evidence suggests that the perceived

[5] The 1992 Cable Act contemplated that from time to time retransmission negotiations would fail altogether and a particular MVPD would cease carriage of a particular station at least for the duration of the election

promise of governmental aid has actually contributed to the rare past failure of such negotiations to be successfully completed.[6] We appreciate that the FCC has now clarified its inability to order continued carriage or binding arbitrations,[7] and believe that such clarity will reduce the number of retransmission consent impasses.

II. <u>The Intent of the 1992 Cable Act</u>

Congress established the retransmission consent regime in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[8] As noted by the FCC in the NPRM, in enacting the 1992 Cable Act, Congress recognized that the failure of cable operators to pay broadcasters for the right to carry the most popular programming on cable systems constituted an effective subsidy to cable operators.[9] Congress intended through the retransmission consent process for cable operators to treat broadcasters as they would owners of cable channels, *i.e.* to compensate them based on the relative popularity of the programming being provided:

> 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***. [10]

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cycle. It such cases it is indisputable that the FCC has no power to intervene. As the FCC found in 2007, "[e]ven with good faith, impasse is possible." *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc. Emergency Retransmission Consent Complaint and Complaint for Enforcement for Failure to Negotiate Retransmission Consent Rights in Good Faith*, Memorandum Opinion and Order, 22 FCC Rcd 47, at ¶ 24 (rel. Jan. 4 2007) (determining that Commission involvement in the dispute was improper because despite not reaching an agreement, Sinclair upheld its obligation to negotiate in good faith) ("*Mediacom*"). If the FCC cannot regulate permanent termination of service, it certainly cannot regulate temporary interruptions.

[6] *Cf.* Statement of Commissioner Robert M. McDowell, *Amendment to the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71.

[7] *See* NPRM at n. 6 ("The Commission does not have the power to force broadcasters to consent to MVPD carriage of their signals nor can the Commission order binding arbitration").

[8] Pub. L. No. 102-385, 106 Stat. 1460, codified at 47 U.S.C. § 543(k).

[9] *See* NPRM at ¶ 4.

[10] Senate Report at 35 (emphasis added); *cf. Mediacom* at ¶ 18 ("It seems reasonable that the fair market value of any source of programming would be based in large part on the measured popularity of such programming.")

As discussed below and in the attached economic analysis at Exhibit 1, broadcast programming is the highest value, lowest cost programming that MVPDs purchase. This is not a situation that begs for government intervention designed to further increase the bargaining advantage already enjoyed by the MVPDs.

The MVPDs argue that "must-carry," which was also created by the 1992 Cable Act, is evidence that the law favors broadcasters in retransmission consent negotiations.[11] This argument is a red herring meant to obfuscate the issue. Although the must-carry rules of the 1992 Cable Act do provide broadcasters with the benefit of being able to require carriage by cable and satellite operators, broadcasters desiring to take advantage of this benefit must do so by making an irrevocable election every three years - an election which precludes such broadcasters from seeking compensation or restricting carriage of a station by an MVPD.[12] Alternatively, broadcasters desiring to negotiate compensation for carriage must necessarily give up their must-carry rights for the ensuing three-year election period.

As a result of the mutually exclusive nature of a must-carry and retransmission consent election, a broadcaster electing retransmission consent gains no benefit whatsoever from the must-carry rules. The very nature of the election carries with it the risk of non-carriage. Were this not the case, broadcasters would have no incentive to ever make a must-carry election.

[11] As noted in the NPRM (at ¶ 13), in March, 2010, a number of MVPDs and others filed a Petition asking the FCC to amend its retransmission consent rules. *See* Time Warner Cable Inc. *et al.* Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71, at 1, 19 (filed Mar. 9, 2010) ("MVPD Petition"). The Petition was filed by: American Cable Association; Bright House Networks, LLC; Cablevision Systems Corp.; Charter Communications, Inc.; DIRECTV, Inc.; DISH Network LLC; Insight Communications Company, Inc.; Mediacom Communications Corp.; New America Foundation; OPASTCO; Public Knowledge; Suddenlink Communications; Time Warner Cable Inc.; and Verizon ("MVPD Petitioners").

[12] *See* 47 U.S.C. §§ 325(b), 338, 534.

III. History of Carriage

Prior to the enactment of the 1992 Cable Act, cable operators relied on copyright law to carry broadcast stations without consent or compensation.[13] Significantly, the copyright laws relied upon had been adopted in the early 1900s, well before cable or even broadcast television existed; in rejecting arguments that cable transmissions of broadcast programming constituted copyright infringement, the Supreme Court invited Congress to address the issue through legislation.[14] In 1976, Congress revised the copyright law and established a compulsory licensing scheme providing cable operators with the right to carry distant signals in exchange of payments to benefit copyright holders.[15] Significantly, however, Congress chose not to change the copyright law insofar as it permitted the carriage of local broadcast stations without consent or compensation.[16]

The 1992 Cable Act finally reversed the long-standing, government-created right under the Copyright Act of cable operators to carry broadcast stations without consent.[17] Although MVPDs point to the 1992 Cable Act as proof that the right of broadcasters to seek compensation was legislatively created, in fact the intent was simply to eliminate the legislatively created windfall that the cable industry had historically enjoyed. In other words, the intent of Congress in establishing the retransmission consent scheme was merely to place broadcasters in the same position as the owners of other programming channels (*i.e.*, cable channels) who had never been shackled in their efforts to be paid for

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[13] *See, e.g., Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974).
[14] *See, e.g., Fortnightly Corp. v. United Artists Television, Inc*., 392 U.S. 390 (1968)
[15] *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.
[16] Under the Copyright Act of 1976, Congress allowed cable systems to carry local television station signals without the consent of the broadcaster. *See, e.g., Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1146 (2d Cir. 1981) (discussing 17 U.S.C. § 111). Cable operators were required to pay a royalty fee based on the number of distant signals that a system carried and its gross revenues. *See id.*
[17] Section 325(b)(1)(A) of the Communications Act states that “No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except– (A) with the express authority of the originating station. . . .” 47 U.S.C. § 325(b)(1).

the use of their property.[18] In point of fact, the establishment of the retransmission consent scheme simply allowed broadcasters to be treated as would any other asset holder vis-à-vis another company which wished to use such asset in its business.

The action taken by Congress in 1992, as compared to the inaction taken with respect to the 1976 Copyright Act, reflected Congress's belief that by 1992 the cable business was sufficiently established to ensure that the playing field would be level in carriage negotiations between cable operators and broadcasters. Congress, however, misjudged how much power cable providers held in 1992 because of their position at that time as the only pay programming provider that carried local broadcast signals. As a result of this monopoly power, the intent of Congress was frustrated. For many years after the enactment of the 1992 Cable Act, broadcasters were unable to negotiate for compensation in exchange for granting retransmission consent.

IV. <u>The Rationales for the NPRM are Misguided</u>

The NPRM is based on the claim that since the retransmission consent regime was created in 1992, "there have been significant changes in the video programming marketplace."[19] The NPRM identifies only two changes though: an assertion that broadcasters are increasingly seeking and receiving cash payments rather than in-kind compensation from MVPDs and an increase in the number of competitive video programming providers.[20] The FCC believes that these marketplace changes have resulted in a rise in contentious and public disputes over retransmission consent, coupled

[18] *See* Senate Report at 35 (stating that "programming services which originate on a broadcast channel should not be treated differently" than those which originate on a cable channel).
[19] NPRM at ¶ 2.
[20] *Id.*

with an increase in negotiation impasses.[21] Although the FCC may be correct, to a point, about the changes in the marketplace, neither change warrants any of the new rules sought by the MVPD petitioners.

Clearly there has been an increase in the number of MVPDs since the enactment of the 1992 Cable Act. The telephone providers, primarily AT&T and Verizon, have entered the market recently. High power, small dish satellite providers DirecTV and Dish Network, launched service in 1994 and 1996, respectively. But they did not have the technical capability or the legal right to include local broadcast stations in their offerings until 1999.[22]

The FCC is less accurate in its belief that there has been a change recently in the form of compensation sought by broadcasters in exchange for granting retransmission consent.[23] Although it is true that broadcasters have only recently been successful in receiving cash payments, broadcasters have sought cash compensation since shortly after adoption of the 1992 Cable Act, where Congress announced its clear intent that broadcasters be treated the same as cable channels.[24] But cable operators, which were still MVPD monopolies at the time, refused to pay any cash compensation for the right to carry broadcast signals. They eventually offered to trade some broadcasters the right to program a cable-only channel in exchange for broadcast signal retransmission rights. Hundreds of such deals were signed. But the only a small handful of major companies (primarily those owning the broadcast networks) with substantial financial wherewithal and programming expertise were able to take advantage of the "extra channel". The vast

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[21] *Id.*
[22] *See* Pub. L. No. 106-113, 113 Stat. 1501, Satellite Home Viewer Improvement Act of 1999 (1999) ("SHVIA").
[23] *See* NPRM at ¶ 2.
[24] *See* Senate Report at 36.

majority of broadcasters which sought cash ended up with nothing of real value – deals that reflected the overwhelming market power of the cable systems.

Even if broadcasters' desire for cash compensation *is* a new trend, that fact does not justify FCC intervention in the retransmission rights market. First, as explained above, allowing broadcasters to stand on equal footing with cable network programmers in the sale of carriage rights was precisely the intent of the 1992 Cable Act's amendment of Section 325.[25] Congress *expected* some broadcasters to seek cash payments. It gave the FCC no authority to adopt regulations that would constrain either the form or amount of compensation that broadcast stations could seek in the free market. When Congress first applied retransmission consent to MVPDs in 1992, it stated that "it is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; *it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations*."[26] Based on this language, the Commission concluded in the *Broadcast Signal Carriage Order* that Congress did not intend that the Commission should intrude in the negotiation of retransmission consent.[27]

Although the FCC may not intrude in private market carriage negotiations or try to dictate their outcome, it is permitted, by virtue of the good faith bargaining requirements of SHVIA (enacted in 1999) and SHVERA (enacted in 2004),[28] to impose rules that ensure both parties negotiate in good faith. But the statutory good faith requirement means only that both sides show up, negotiate with a real intention of

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[25] 47 U.S.C. § 325(b).
[26] Senate Report at 36 (emphasis added).
[27] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 (1993) ("*Broadcast Signal Carriage Order*").
[28] Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004) ("SHVERA").

striking a bargain, and avoid demands that are not based on competitive marketplace considerations.[29] But the new rules proposed in the NPRM do not just penalize a broadcaster or a MVPD for making demands inconsistent with the competitive marketplace considerations. The proposed rules are expressly aimed at changing the marketplace itself by adopting substantive rules in the guise of good faith bargaining rules. The FCC does not have authority to do that.

Even if the FCC did have authority, there is no factual basis to support government intervention in this market. The fundamental premise of the MVPDs' petition for rulemaking, which the NPRM accepts without serious examination, is that the balance of power in retransmission consent negotiations has shifted towards broadcasters in recent years, leading to higher cash payments and a rise in negotiation impasses.[30] This is a contrived premise, intended to lever public policy to advance the private commercial interests of the proponents at the expense of their competitors and the public. And everything it suggests is wrong.

The attached paper by Dr. Michael G. Baumann of Economists, Inc. at Exhibit 1, *Proposals for Reform of the Good Faith Bargaining Rules: An Economic Analysis*, deconstructs the premise of the NPRM. Dr. Baumann correctly explains that bargaining power, as distinguished from market power, is not a legitimate public policy concern. The exercise of market power restricts output and harms consumers. But bargaining power merely shifts the portion of the transaction gain enjoyed by each party. Placing

[29] *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶¶ 31-32 (2000) ("*2000 Good Faith Order*"); *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, ¶¶ 3-5, 13 (2005) ("*Reciprocal Bargaining Order*").
[30] *See* NPRM at 2.

constraints on broadcasters' ability to bargain would simply shift the balance of power in a negotiation. The shift may impact the price the broadcaster is able to negotiate for carriage, but is not likely to avoid impasse.[31]

Second, Dr. Baumann explains that even if the Commission succeeds in adopting rules that temper broadcasters' negotiating leverage, there is no assurance that lower prices for consumers would result.[32] Many factors beyond the control of the Commission, such as pressure on broadcasters to pay higher license fees to the networks with which they are affiliated and an increased need of broadcasters to compete with cable networks for premier programming, will likely continue to cause broadcasters to seek higher fees. Moreover, there is not necessarily a direct correlation between higher or lower retransmission rights fees and the price consumers pay for MVPD service.[33]

Most illuminating, though, is Dr. Baumann's evaluation of the fees that network affiliated broadcast stations would command in a free market unfettered by artificial forces such as government intervention.[34] Dr. Baumann calculates that the Big 4 networks, if sold on the same basis as basic cable networks, would each command estimated per subscriber, per month fees averaging \$2.48, while CW and MyNetwork signals would each be valued at an average of \$0.36.[35] And these figures understate the fair market value of broadcast stations, because they are based on the network signals alone. Local and syndicated programming, which are not taken into account in Dr. Baumann's analysis, materially increase the value of local broadcast signals.

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[31] *See* Exhibit 1, *Broadcast Television Retransmission Rights*, Dr. Michael G. Baumann, Economists Incorporated, May 27, 2001, at 7.
[32] *Id.*
[33] *Id.* at 32-34.
[34] *Id.* at 24.
[35] *Id.*

While broadcasters are collecting larger retransmission rights payments than they did in the past, those rights are substantially underpriced even at $1 or more per month for a Big 4 station. If broadcasters actually wielded excess bargaining power in retransmission rights negotiations they should be able to command *more* than the price imputed by basic cable comparables. The fact that broadcasters today receive far *less* compensation relative to non-broadcast networks that have lower programming costs and lower ratings, conclusively shows that broadcasters either do not have market power or they do not use it.

There can be no doubt that the erosion of cable's monopoly power over the last decade has enabled broadcasters to finally begin realizing the promise of the 1992 Cable Act. This is a development the FCC was bound to facilitate and one that it should cheer. Congress never intended or authorized the FCC to sit in judgment of the price of retransmission rights in any single negotiation or in the market generally. Authority aside, when broadcasters receive compensation that is disproportionately low compared to non-broadcast channels that are far less important to MVPDs' efforts to attract and retain paying subscribers, the FCC has no reason to further handicap the ability of broadcasters to receive fair and equitable compensation.[36]

V. FCC Should Act to Realize Congressional Intent

Rather than succumbing to the superficially attractive, but ultimately unsupported, argument of the MVPD Petitioners that handicapping broadcasters in retransmission consent negotiations will reduce consumer bills,[37] the FCC should take action to level the

[36] Indeed, in 2009 "only 3 percent of MVPD expenditures on programming went for retransmission consent payments. In contrast, 32 percent of the time spent viewing by MVPD households during the 2009-2010 television season was viewing broadcast television." *See* Exhibit 1 at 19.
[37] *See* MVPD Petition at 18.

playing field so that Congress's intent, as articulated in the 1992 Cable Act, may finally to be realized. As Dr. Baumann's study shows, and despite protestations of the MVPD Petitioners to the contrary, MVPDs continue to enjoy a significant negotiating advantage that is reflected in the paltry fees that broadcasters receive today. Dr. Baumann writes:

> even if there has been a shift in the balance as claimed by MVPDs, it does not mean that the balance is out of line or even currently favors broadcasters. One must not confuse levels and changes. The balance of power in negotiations clearly was (and still is) in favor of the MVPDs.[38]

The FCC should consider how adjustments to its good faith bargaining rules *that are consistent with the purpose of the rules* could help correct this market imbalance.

A primary goal of the 1992 Cable Act was to ensure the continued viability of broadcast stations, in part by eliminating laws that forced broadcasters to subsidize their cable competitors.[39] Unfortunately, the disproportionately high fees cable channels receive are interfering with this goal. Although MVPDs consistently argue that the sale of broadcast signal carriage rights is a separate market that should be valued differently than other linear television services, Dr. Baumann explains that broadcast and non-broadcast channels are both part of a single, unified market.[40]

Broadcasters also compete with non-broadcast outlets for the purchase of programming. Ample evidence exists of broadcasters being unable to compete for programming against cable networks which can use their superior, second revenue stream to bid up programming fees. The most prominent examples of the migration of premier programming away from *free* over-the-air television have occurred in sports, notably

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[38] Exhibit 1 at 17.
[39] *See* Senate Report at 35.
[40] *See* Exhibit 1 at 9 ("Programming from television stations is not a product market separate from other programming but rather is part of continuum of programming services that includes cable network programming.")

Monday Night Football, the *NCAA Bowl Championship* series, the *NCAA March-Madness* basketball tournament, NHL and NBA tournament games.[41] Program migration also occurs in non-sports as seen in programs such as *Law & Order* and Conan O'Brien. "Economic theory predicts that compensating television stations for retransmission will enhance the incentives of television stations and broadcast networks to increase investment in programming."[42] Normalization of the market for broadcast signal carriage with the rest of the television carriage market will naturally lead to higher broadcast station revenues, greater investment by local stations in programming, more and better local programming, and a slowing of the migration of programming from free-to-air television to pay-only MVPD services.

The NPRM professes concern over infrequent, short-lived interruptions of programming for subscribers of one of several MVPD outlets in each market. It is *extremely* ironic that that the FCC is unconcerned with the migration of programming from free television to pay television, which is continually driven by the vicious cycle of rising pay network fees and rising bids for programming. When a retransmission bargaining impasse results in a service interruption, service always resumes. Any consumer harm is minor and fleeting. When a marquee sporting event migrates from broadcast to a cable network, all over-the-air viewers – those who already have the fewest programming options of all – lose that programming for good. The consumer

[41] "We've seen more and more sports content show up on cable outlets, specifically ESPN, TNT and TBS," Brad Schultz [of ESPN] writes, noting that, "For the first time in its long history, the Rose Bowl will be broadcast on ESPN in 2011 rather than on ABC. Cable and satellite have become so ubiquitous . . . But what about the broadcast outlets that now lose these valuable sports properties? . . . Such actions make sense at the corporate level, but may eventually sound the death-knell of sports on broadcast television." Could sports migration to cable sound the death knell for broadcast television?, *Journal of Sports Media, Indiana University National Sports Journalism Center* (Feb. 15, 2010), *available at* http://sportsjournalism.org/sports-media-news/could-sports-migration-to-cable-sound-the-death-knell-for-broadcast-television/ *last visited* May 27, 2011.

[42] *See* Exhibit 1 at 27.

harm is substantial and permanent. Yet the FCC's efforts to minimize occasional, minor, transient harm would only make the real loss of programming far worse.[43]

Equally, if not more, symptomatic of the inability of broadcasters to receive appropriate licensing fees is the spate of recent bankruptcies by television broadcasters. Such bankruptcies have included Pappas Telecasting, Young Broadcasting, Tribune, Granite Broadcasting, New Vision and Communications Corporation of America.[44] This result is directly at odds with the intent of Congress in enacting the 1992 Cable Act, and it is caused in large measure by the refusal of MVPDs to pay compensation to local broadcasters that is consistent with the competitive marketplace considerations they use to price their purchases of non-broadcast programming.

The most important affirmative action the FCC can take to level the playing field is to establish a *per se* rule that the failure of an MVPD to take into account the entire market for linear video acquisition (*i.e.*, the acquisition of the right to carry cable channels, as well as broadcast stations) would constitute bad faith negotiations. It is this disconnect between broadcasters and MVPDs on whether rates paid by the MVPDs to cable channels are relevant to the rates that should be paid to broadcasters which constitutes the primary stumbling block in retransmission consent negotiations. In *Mediacom v. Sinclair* the Media Bureau agreed that it is reasonable that the fair market value of any source of programming would be based in large part on the measured

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[43] Many of the same parties that beg for the government to micromanage private market transactions with broadcasters are swift to explain the far greater damage that arises from gratuitous government meddling in private affairs in other contexts. See, e.g., *Preserving the Open Internet*, GN Docket 09-191, Comments of Time Warner Cable, dated Oct. 12, 2010 (*passim*).

[44] *See, e.g.*, *Wave of Bankruptcies Further Weaken TV Market*, Lauren Horwitch, The Wrap (Mar. 25, 2010) *available at* http://www.thewrap.com/tv/article/wave-bankruptcies-further-weaken-tv-market-2086 *last visited* May 27, 2011.

popularity of such programming.[45] By returning rationality to the negotiations with a clear finding that a single market for linear programming exists, the FCC could temper this controversy. The Bureau found that a broadcaster's effort "seeking compensation commensurate with that paid to other programmers of equal, or lower, ratings is not *per se* inconsistent with competitive marketplace considerations."[46] The FCC should now take the next step and determine that a refusal by either party to consider the price of non-broadcast programming when negotiating retransmission rights is a *per se* violation of the good faith bargaining rules.

The fundamental problem that permeates the retransmission consent process is that after years of using government fiat and monopoly power to avoid paying anything for the right to carry the vast majority of broadcast stations, MVPDs simply wish to maintain the status quo, or barring that, to pay below market rates for such rights. To rationalize this approach MVPDs routinely claim that amounts paid for the right to carry cable are completely irrelevant to what broadcasters should receive. There is no rational basis for this position.

MVPDs claim that broadcast stations are different from cable channels primarily because (i) MVPDs routinely receive the right to sell advertising on cable channels to third parties and (ii) broadcast stations are available for free over-the-air.[47] The lack of advertising avails, though, does not establish any material difference (and, in fact, many retransmission consent agreements actually include the provision of advertising for the MVPD's use). Rather, the price being paid for a channel of programming should take

[45] *Mediacom* at ¶ 18.
[46] *Id.*
[47] *See, e.g., Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.,* Retransmission Consent Complaint and Answer, CSR No. 8233-C (Oct. 22, 2009).

into account the revenue the MVPD expects to receive from salable inventory (or the value of the advertising received by the MVPD for its own use).[48] Even after netting down by fees paid by such value received, cable channels still routinely receive fees that far exceed their value to the MVPDs, as compared to what local broadcast stations receive.[49]

The argument related to the over-the-air nature of broadcast stations is equally unpersuasive. Depending on one's point of view, the fact that a broadcast station is available over-the-air may warrant either a pricing discount or a pricing increase relative to what would be paid to a cable network.[50] But the fact that broadcast stations are available over-the-air does not mean fees paid to cable stations for carriage are irrelevant to retransmission rights negotiations. Regardless of their availability over-the-air, local broadcast signals are critical elements of MVPD service offerings and directly influence the number of subscribers a MVPD can attract.[51] As Dr. Baumann states, "at any given subscription price, there will be more subscribers and more subscription revenue if local broadcast station signals are carried."[52]

The FCC should also establish guidelines for use by broadcasters and MVPDs in binding arbitration. Although we agree with the FCC that it has no right to order binding

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[48] *See* Exhibit 1, at 23-24.
[49] *Id.* at 23-25.
[50] A persuasive argument exists that free, over-the-air distribution actually increases the value of broadcast stations as compared to cable channels, given that it reduces the value received by stations simply from being carried. Cable channels are completely reliant on MVPD carriage to reach viewers (so they can sell advertising) and as a result are receiving higher compensation in the form of carriage.
[51] *See, e.g.,* Local into Local" Boosts Satellite Broadcasters, *Ultimate AV Magazine*, April 30, 2000 *available at* http://www.ultimateavmag.com/content/local-local-boosts-satellite-broadcasters *last visited* May 26, 2011.
[52] Exhibit 1 at 9.

arbitration on television stations,[53] the creation of guidelines would facilitate the use of this process in instances where the two parties to a negotiation are willing to *voluntarily* agree to such a process. In the absence of such guidelines, Sinclair's experience has shown that parties who are willing to commit to binding arbitration are hamstrung by an inability to agree on the parameters of the arbitration.

Should the FCC chose to establish arbitration guidelines, chief among the parameters to be established by the FCC should be (i) guidelines for selecting a neutral arbitrator, (ii) rules of discovery/evidence to include evidence relating to the entire market for video acquisition by MVPDs, (iii) continued carriage during arbitration and (iv) that the terms resulting from arbitration would be retroactive to the end date of the expired agreement.

The FCC should also provide guidance as to the meaning of the term "competitive marketplace considerations" with respect to the Commission's good faith negotiation requirements.[54] Section 325(b) of the Communications Act provides that agreements containing different terms and conditions, including price, are in and of themselves indicative of bad faith. And the FCC staff has consistently found that differences in price are presumptively consistent with competitive marketplace considerations.[55] MVPDs, however, have ignored this in routinely arguing that broadcasters should charge all MVPDs the same rate, which MVPDs conveniently assume should be the lowest fees charged by broadcasters. Such an approach, however, would simply cap the fees all

[53] *See supra* n. 7. Additionally, whether or not the FCC could order an MVPD to engage in binding arbitration is not entirely clear given the absence of a provision similar to Section 325(b)(1)(A) of the Communications Act prohibiting the FCC from ordering an MVPD to carry a television station. As a result, the FCC should consider requiring an MVPD to engage in binding arbitration under parameters established by the FCC, if requested by a broadcaster.
[54] *See* 47 U.S.C. § 325(b)(3)(C); Pub. L. No. 108-447, 118 Stat. 2809 (2004).
[55] *See, e.g., Echostar v. Young*, 16 FCC Rcd 15070 (2001) at ¶¶ 30- 31, citing *2000 Good Faith Bargaining Order* at 5467.

broadcasters receive at the amount paid by the MVPD with the most negotiating leverage. To avoid continued assertion of this specious position by MVPDs, the FCC should make clear that the "competitive marketplace considerations" standard allows broadcasters to take into account a variety of factors based on the different foot print overlap between a broadcaster and an MVPD (*e.g.*, stations mixes, percentage of subscribers per network affiliations, etc.).

VI. Network Non-duplication and Syndicated Exclusivity Rules

The right to market exclusivity via over-the-air transmission and retransmission by MVPDs is a cornerstone of the entire programming acquisition model of local broadcast stations. This is true with respect to both network affiliation and syndicated programming acquisitions. Such exclusivity is paid for by broadcast stations and any limitations to this right would dramatically impact the entire economic structure of the marketplace.

Interference with the historic practice of market exclusivity will also have serious consequences on the advertising market. Advertisers who purchase time on a local station are doing so to reach consumers in that station's market. Although broadcasters understand the impact on this dynamic from a retransmission consent impasse, carriage of distant signals by MVPDs is completely inconsistent with the advertising marketplace. Distant stations are not paid by their local, in-market advertisers for any out-of-market viewing the station may receive, because those local advertisers get no benefit from the out of market viewing. So when viewing of distant signals displaces viewing of local signals, the total advertising revenue flowing to broadcasters collectively is diminished.

Viewers continue to see advertisements, but the advertising is not relevant to them, and no one is paid for that viewing. In a real sense, the pie is made smaller.[56]

As the FCC recognizes, contrary to the claims of the MVPD Petitioners,[57] no substantive advantage is provided to broadcasters by the FCC's network non-duplication rules. This is clear from the baseline requirement that to assert network non-duplication, a broadcaster must have a contractually created right to do so in the applicable affiliation agreement. In fact, as the FCC points out, the network non-duplication rules actually serve as a limitation on privately negotiated rights.[58] These limitations include substantive limitations, such as geographic limitations, exclusion of small cable systems, the exemption of significantly viewed stations, as well as procedural limitations prescribing the timing and form of notice that must be sent to MVPDs.[59]

Moreover, contrary to the position of the MVPD Petitioners,[60] broadcasters receive no advantage or substantive benefit from network non-duplication and syndicated exclusivity rules as compared to owners of cable channels. Because cable channels are available only on a national basis, an MVPD that is unable to complete a carriage agreement with a cable channel, has no alternative avenue to receive that channel's programming. The market exclusivity provided through private contractual negotiations simply places broadcasters in exactly the same position.

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[56] Moreover, cable and telephone MVPDs vigorously compete with local broadcast stations for a share of local advertising dollars and any increased opportunity for the carriage of distant signal will provide such MVPDs with an incentive to carry distant signals, with which MVPDs do not compete, in order to maximize their advertising revenue. *See* Exhibit 1 at 35-36, where Dr. Baumann explains that exclusive distribution territories address the "free rider" problem and give distributors an incentive to invest in local programming.

[57] MVPD Petition at 12-15.

[58] NPRM at n. 128.

[59] *Id.*

[60] MVPD Petition at 12-15.

We understand that the NPRM is not suggesting a restriction on privately negotiated, contractual exclusivity rights, but is simply asking whether the FCC should be involved in the enforcement of such rights through the network non-duplication rules.[61] For several reasons we do not believe it would be wise of the FCC to eliminate the network non-duplication rules at this time.

First, the legislative history of the 1992 Cable Act specifically addresses the question of FCC authority to modify its exclusivity rules in connection with its implementation of retransmission consent:

> [In connection with the FCC's implementation of retransmission consent and must carry], the 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 or local stations carrying the same programming would, in the Committee's view, be inconsistent with the regulatory structure created in S. 12.[62]

Second, even if Congress had not spoken directly on the subject, other factors suggest that the FCC should not disturb the exclusivity rules at this time. For example, the U.S. Copyright Office recently issued a Notice of Inquiry regarding the phasing out of the cable and satellite compulsory copyright licenses.[63] Although the network non-duplication rules would be less important if the compulsory copyright licenses were repealed, no certainty exists as to when or if that will happen. Because the network non-duplication rules were designed to work in conjunction with the compulsory copyright licenses, which MVPDs could rely on to import distant stations into markets where

[61] NPRM at ¶ 44.
[62] Senate Report at 38.
[63] *See In the Matter of Section 302 Report to Congress*, Library of Congress Copyright Office, Notice of Inquiry, Docket No. RM-2010-10 (Mar. 3, 2011).

carriage of a local station cannot be obtained (or to use as leverage in retransmission consent negotiations), repeal of compulsory copyright licenses could affect the non-duplication framework.

Third, even in the absence of network non-duplication rules, contractual exclusivity restrictions can limit issues that arise from the compulsory copyright licenses. But recent events have suggested that this may not provide adequate protection. In a recent retransmission consent impasse involving Time Warner Cable and Smith Broadcasting, Time Warner Cable imported distant signals from stations owned by Nexstar Broadcasting into the Smith Broadcasting markets.[64] Although Nexstar had no right under its network affiliation agreements to have granted such consent and asserted that it did not intend to do so, Time Warner Cable claimed that Nexstar had granted the right.[65] Time Warner Cable threatened to do the same thing if impasse were to occur in recent retransmission consent negotiations with Sinclair, (which it did not) in an attempt to gain leverage.

Cable networks are not subject to the risk broadcasters face that an MVPD will assert that it has received rights from a third party to carry programming exclusive to that network, because cable networks control their nationwide distribution, rather than having a chain of affiliates throughout the country. In contrast, consumers could suffer from loss of local broadcast programming, potentially for years, while a court of general jurisdiction adjudicated a claim that an a MVPD improperly displaced a local station with a distant signal under a colorable claim of contractual right.[66] Having no direct privity with the offending MVPD, the displaced local station would have to proceed against the

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[64] *See, e.g.*, *Nexstar to FCC: Stop TWC Signal Switch*, Harry A. Jessell, TVNewsCheck (Dec. 29, 2010).
[65] *Id.*
[66] *See* Exhibit 1 at 36.

network or the distant station that allegedly granted rights improperly, which, in turn, would have to proceed against the MVPD.

While this process might work to some degree, it is clearly not efficient. It would place broadcasters at a disadvantage vis-à-vis cable channels, harm the public by increasing the likelihood they will not receive local stations (and their local news, public affairs and emergency alert information) and would be directly at odds with Congressional intent which indicates that the FCC's exclusivity rules, like retransmission itself, are fundamental to the important policy goal of preserving localism.

VII. Negotiation on Behalf of Non-Owned Stations

For a number of reasons, the FCC should not restrict television stations from engaging other television stations to negotiate retransmission consent on their behalf.[67] Such a restriction would interfere with industry-wide arrangements used to create efficiencies in the broadcast industry, would create arbitrary restrictions based on spectrum allocations and market size and would unfairly target broadcasters who wish to provide such services to others. Moreover, restrictions on joint negotiations already exist in the form of antitrust laws. Those laws are better suited to determine when joint negotiations result in the concentration of too much market power, after taking into account the market power of MVPDs such as Comcast, Time Warner Cable, DirecTV and Dish Network, companies which dwarf most broadcasters in size (a fact that in and of itself provides such MVPDs with market power from their relative ability to absorb losses that would occur in an impasse) and which together serve approximately seventy

[67] *See* NPRM at ¶ 22.

million households, or about seventy percent of the total U.S. MVPD subscribers.[68] And critically, as with several other supposed "problems" cited to justify imposing new rules on broadcasters, the NPRM does not cite a basis for the conclusion that that the presence of JSAs, SSAs or LMAs has any effect whatsoever on the incidence of carriage interruptions.[69] Absolutely no evidence supports the FCC's view that joint negotiations cause "delays" or "unnecessary complications."[70] In fact, joint negotiations generally provide efficiencies in terms of reducing the overall number of negotiations required.

The broadcast industry has been for a number of years subject to significant decreases in advertising revenue. Not only was the industry severely impacted by the Great Recession, but it has also been under tremendous pressure from increased alternative advertising platforms, including the Internet and increases in ad sales by MVPDs.

As a result, consistent with law and FCC rules, a significant number of stations have entered into shared services agreements. Such arrangements, which are subject to compliance with antitrust law, create numerous efficiencies in terms of physical plant and equipment, as well as in personnel. Shared services may include sales, on-air operations and back office functions such as legal, human resources and accounting services. Included in such services are the negotiation of contracts, including, but certainly not limited to, retransmission consent agreements. Although the MVPD Petitioners object to such joint negotiations,[71] where permitted by antitrust laws there is simply no reason for

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[68] *See* CTIA, *Top 25 Multichannel Video Programming Distributors as of Dec. 2010, available at* http://www.ncta.com/Stats/TopMSOs.aspx *last visited* May 26, 2011.
[69] The number of carriage interruptions is so miniscule compared to the number of retransmission rights deals that it is unlikely any statistically meaningful correlation could be found.
[70] Nor does the NPRM explain how the FCC acquired jurisdiction to reduce "delay" and "unnecessary complications," whatever those terms refer to.
[71] *See, e.g.*, NPRM at n. 75.

the FCC to interfere with private negotiations intended to create efficiencies, which efficiencies allow the broadcast industry to continue to serve the public interest. As Dr. Baumann observes, the analysis "should turn on whether [the arrangement] would be permitted under the antitrust laws rather than some vague, unsubstantiated claim that joint negotiations lead to consumer harm."[72]

Moreover, the limitation proposed by the FCC would unfairly single out broadcasters who are located in markets having a specific number of television stations. This is so because in markets with a sufficient number of stations, duopolies are permitted, which should allow a broadcaster to negotiate on behalf of two co-owned stations. Similarly, in markets with few stations broadcasters often operate two network affiliates either on a secondary channel of its primary channel or through the use of low power television stations. Such differences between markets, which are based on nothing more than spectrum allocations issues, not only call into question the continued viability of the Commission's ownership restrictions, but clearly should not be the determinative factor on whether a single broadcaster can negotiate for carriage of two stations so long as such rules remain in place.

As noted above, antitrust law is better suited to determining whether too much market power exists with agreements to jointly negotiate. Such an analysis, rather than a blanket rule as proposed by the FCC, not only will take into account the relative market power of MVPDs versus broadcasters, but will also allow for the consideration of the unique characteristics of each situation, such as which affiliations are involved, the number of television stations in a market, the combined audience share of the subject stations, and other relevant factors.

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[72] *See* Exhibit 1 at 30.

The proposed restriction on joint negotiations also places undue restrictions on broadcasters as compared to, for example, outside consultants and lawyers who routinely negotiate on behalf of numerous broadcast or MVPD clients. Even when such negotiations may be undertaken on behalf of one client at a time, it is unrealistic to believe that the process and results of one negotiation do not impact another. For example, Cinnamon Mueller, the law firm that represents the American Cable Association, also routinely negotiates on behalf of numerous cable operator members of the ACA.

Finally, the FCC proposal is remarkably overbroad because it would prohibit a station in one market from engaging a station in another market to negotiate on its behalf.[73] Such a limitation may interfere not only with an affiliate's network relationships, such as the one just announced by NBC and its affiliate board, but would also unfairly handicap broadcasters as compared to cable networks, which always negotiate with respect to a national footprint. And, like other proposals, it would place a bargaining limitation on broadcasters while leaving MVPDs free to enter into similar relationships. This would directly violate Congress' decision to make the bargaining obligations reciprocal. And it would be persuasive evidence that the rule is intended to be a substantive restriction that is inconsistent with the purpose of the good faith obligation, which is simply to ensure that the parties bargain with a good faith intention of reaching a deal.

[73] *See* NPRM at ¶¶ 22- 23.

VIII. Additional Responses

The NPRM raises a number of issues and requests suggestions for improving the retransmission consent process. Some of these issues, as well as a few suggestions, are included below.

(a) Mediation - We do not believe the FCC's proposal to require mandatory, non-binding mediation should be implemented.[74] In our experience such mediation is not helpful to resolving retransmission consent impasses as the parties to the negotiations, unlike the parties to many litigations matters, fully understand the risks of not reaching agreement. This objective risk evaluation is the primary benefit of mediation and such benefit does not exist in business negotiations.

If, however, the FCC were to impose this requirement, in order to make it at least procedurally (if not substantively) viable, the FCC would need to establish parameters for the parties to follow in selecting a mediator and a location, as well as the procedural guidelines for the mediation process.

(b) Consumer Notice - We concur with the FCC's view that adequate notice of potential retransmission consent impasses is vitally important.[75] In the end, contrary to the impassioned claims by the MVPD Petitioners of tremendous harm to consumers from such impasses,[76] the reality is that the various alternative means for receiving television stations (i.e., from competing MVPDs or for free over-the-air) make such impasses more of an inconvenience than a tragedy. Consumers have choices and if one MVPD concludes it is not prepared to pay the price it takes to carry a station, the public simply

[74] *Id.* at ¶ 25.
[75] *Id.* at ¶ 34.
[76] MVPD Petition at 31-35.

needs adequate notice to allow those who care enough about the applicable station, to make arrangements to utilize one of such alternatives.

MVPDs unfortunately routinely refuse to engage in serious negotiations until just days before the termination date of an existing retransmission consent agreement. Although such delays may in part result simply from the common human characteristic of procrastination, the consistent pattern of behavior by MVPDs in this regard suggests that the real reason for delay is to gain a negotiating advantage. This advantage stems from the fact that unprepared viewers will not immediately switch providers when a station is removed without adequate warning, thus minimizing the immediate financial harm to MVPDs if an actual impasse occurs, while, in contrast, broadcasters will immediately suffer financial consequences upon an impasse because advertisers will immediately stop advertising or demand lower prices as a result of a decreased audience.

Although current FCC rules require MVPDs to provide at least 30 days notice to subscribers before dropping a station,[77] MVPDs appear to routinely disregard such requirement. In addition, even those MVPDs who nominally provide such notice, also intentionally send a mixed message to consumers that while such notice is being provided merely to comply with a government rule, the recipient should disregard such notice because impasse probably will not occur.

We believe that the FCC should eliminate such mixed messages to subscribers by prohibiting MVPDs from making any statement, whether in the 30-day notice, on air, on the Internet, etc. that indicates the MVPD's opinion on the likelihood of impasse. In this way, the 30-day notice will provide the intended service to consumers, namely to have adequate advance warning of channel line-up changes to make alternative arrangements.

[77] *See* 47 C.F.R. § 76.1601.

Although one might argue that such notice will be unfairly disruptive to consumers who receive notices about impasses which do not eventually occur, we believe that this new rule will instead reduce the number of such notices that need to be sent by providing MVPDs with an incentive to conclude negotiations before such notices need to be sent. The FCC should also substantially increase the penalty for failure to comply with the notice requirement and should be vigilant in enforcing such requirement.

(c) Termination Fees - One of the impediments to subscribers switching their service when their current MVPD drops a station is the use by many MVPDs of early termination fees.[78] Such fees are incredibly anti-consumer as they bind consumers to a particular MVPD even though they no longer want to subscribe to that service. Such a restriction is particularly problematic when the MVPD no longer provides the subscriber with an important component of the service for which they subscribed. Accordingly, the FCC should prohibit an MVPD from imposing any termination fee or similar penalty on a subscriber who chooses to terminate his service when an MVPD ceases to carry a local broadcast station. In this way, the inconvenience to the public from retransmission consent impasses will be minimized.

(d) Short-Term Extensions - In response to the FCC's request for comment on whether or not insisting on short-term deals should constitute a *per se* violation of good faith negotiating requirement,[79] clearly this should not be the case. As evidenced by the NPRM, retransmission consent negotiations are complicated and often contentious.[80]

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[78] *See,* NPRM at n. 50 ("The early termination fees imposed by some MVPDs may cause consumers faced with a potential retransmission consent negotiating impasse to be unwilling or unable to consider switching to another MVPD to maintain access to a particular broadcast station"). *See also,* Statement of Commissioner Michael J. Copps ("So, I am pleased we try to look at issues, such as Early Termination Fees, that influence the ability of consumers to change providers…").

[79] NPRM at ¶ 28.

[80] *Id.* at ¶¶ 3, 38.

Although longer term agreements certainly have the benefit of providing stability and predictability to consumers and to the parties to such agreements, often broadcasters and MVPDs are only able to reach agreement by limiting the term of the agreement to avoid long-term implication from the other aspects of the deal. Moreover, where progress in a negotiation continues to be made at the termination date of an existing agreement, short-term extensions which avoid disruption while the parties continue to attempt to reach agreement are clearly in the public interest.

(e) Sweeps Prohibition - The restriction on removing a television station from a cable system during the "sweeps period," was clearly intended to protect broadcasters from cable otherwise attempting to gain leverage by removing a broadcast station during a period vital to the station's advertising revenue. No corresponding benefit was intended for cable operators and as a result cable operators should not be allowed to use this provision to carry a station that has not consented to such carriage.[81] To do so would not only be contrary to the intent of the sweeps provision, but would be in direct contravention of the requirements of Section 325(b)(i)(A) of the Communications Act.[82]

The protection of the sweeps provision should be extended to all other MVPDs. No basis exists for the current exclusion of the sweeps provision from satellite and telephone providers; they simply didn't exist or didn't carry local stations at the time the provision was enacted.

[81] "A *cable operator* may not drop or reposition any such station during a 'sweeps' period when ratings services measure local television audiences." *See* S. Rep. No. 92, 102nd Cong., 1st Sess. 1991, at 86, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1219 (emphasis added).

[82] 47 U.S.C. § 325(b)(1)(A).

IX. Conclusion

The MVPD Petition represents nothing more than an attempt by parties on one side of a private business negotiation to seek government intervention to provide them negotiating leverage in these negotiations. Although the MVPD Petitioners point to changes in the marketplace since the 1992 Cable Act was enacted to justify their plea for help, ironically those changes - especially the introductions of competition for cable providers - have simply and finally allowed broadcasters to begin realizing the promise of cash compensation for carriage rights that Congress established in 1992. As a result of past government fiat, MVPDs enjoyed the right to carry broadcast signals for free and without consent for many years, and they managed to extend that advantage through the exercise of market power even following Congressional efforts to arrest that power. It is almost obscene for these private businesses, which built their businesses on the back of government ordered subsidies from broadcasters, now to seek the FCC's help to avoid paying a fair market rate for broadcast signal carriage rights now that the playing field has begun to be leveled.

Frankly, if any party to these negotiations should be seeking assistance, it should be the broadcasters. The intent of Congress that broadcasters be treated the same as cable networks continues to be unfulfilled. Although the emergence of competitors to cable has finally allowed broadcasters to receive compensation, clearly they are not being treated equally with cable networks. MVPDs continue to pay far higher fees to cable programmers than they pay for broadcast stations that deliver far greater viewing.

The MVPD Petitioners cloak their self-serving, profit seeking motivation in a feigned concern for the public interest. Although it is possible that higher fees paid to broadcasters will result in higher costs for cable and satellite subscriptions, this is not necessarily the case,[83] and in any event no guarantee exists that continuing to artificially depress the market for retransmission consent will keep cable rates from continuing to rise rapidly.

The MVPD Petitioners' assertion that retransmission consent impasses harm consumers is equally unpersuasive. Although the free market negotiations favored by Congress may on very rare occasions result in a temporary inconvenience for some subscribers, they always have alternative means for receiving the station, either for free over-the-air or by switching to another MVPD. As in all negotiations, a chance exists that the parties may not be able to reach agreement, and it is reasonable for broadcasters to be unsatisfied with payments that compensate them for a fraction of their fair market value.[84] Given (1) the historical evidence that impasses are both extremely rare and short-lived, (2) the alternative sources of access to broadcast signals, (3) the recognition by Congress in enacting the retransmission consent regime that such impasses could occur, and (4) Congress' clear admonishment that the FCC should not involve itself in the substance of broadcast signal carriage negotiations, there is no basis for FCC interference with routine commercial transactions between private parties.

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[83] *See* discussion in Exhibit 1 at 32-34 as to reasons why such fees would not simply be passed on to subscribers.

[84] *Cf. Mediacom* at ¶ *18*. Given the exceedingly discounted rates MVPDs pay broadcasters the impasses have been remarkably infrequent.

Respectfully submitted,

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May 27, 2011

Exhibit 1

PROPOSALS FOR REFORM OF THE RETRANSMISSION CONSENT GOOD FAITH BARGAINING RULES: AN ECONOMIC ANALYSIS

BY

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MAY 27, 2011

ECONOMISTS INCORPORATED

WASHINGTON DC

EXECUTIVE SUMMARY

The Federal Communications Commission ("Commission") has issued a Notice of Proposed Rule Making ("NPRM") seeking comments on proposed reforms to the retransmission consent process pursuant to which multi-channel video programming distributors ("MVPDs") negotiate to obtain the right to retransmit the signals of local television broadcast stations. The Commission's interest in issuing the NPRM appears to be to achieve a goal of avoiding impasses in negotiations which cause disruption of service to consumers, as well as to avoid price increases to consumers from increasing fees paid by the MVPDs to the owners of the stations.

The FCC's proposals are seriously flawed for several reasons. In the first place, placing constraints on broadcasters' ability to bargain is very unlikely to lead to fewer impasses in negotiation as simply shifting the balance of power in a mutually beneficial negotiation may impact pricing, but will not avoid impasse. Secondly, lower prices are far from guaranteed as numerous forces beyond the control of the Commission, such as pressure on broadcast stations to pay higher license fees to the networks with which they are affiliated and the need of broadcasters to compete with cable networks for premier programming, will likely continue to cause broadcasters to seek higher fees. Additionally, economic analysis indicates that fees currently being sought by broadcasters are far below the rate they should be receiving (*i.e.,* almost $2.50 per month, per subscriber for each major network affiliate), which will continue to cause broadcasters to aggressively seek appropriate market-driven compensation.

The primary support that broadcasters should be receiving markedly higher fees in exchange for their retransmission consent are the fees received by cable channels, which generally are granting MVPDs the right to carry programming that is far less valuable to subscribers as measured by ratings. **Significantly and contrary to claims made by the MVPDs, economic theory does not support the view that programming**

from television stations is in a separate market from other programming such as that obtained from cable networks. MVPDs want to attract subscribers and do so by providing programming that is attractive to consumers. Local television stations play the same role as cable networks—MVPDs distribute them both in order to attract and retain subscribers. Programming from television stations is no different from cable programming; they are both part of a continuum of programming services that vary in their effectiveness in attracting subscribers. As a result, there is a single market for the acquisition of programming by MVPDs that includes both broadcast and non-broadcast programming.

All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. A firm may have market power but still only earn a competitive rate of return or profit due to competition from producers of competing, but somewhat differentiated, products. The market power that television stations possess is of the ordinary variety that many differentiated product firms have.

Before 1992 MVPDs gained great benefit from local broadcast signals that they were able to carry without broadcaster consent or copyright liability as a result of government mandate, and this benefit resulted in an effective subsidy to MVPDs. The retransmission consent rules established in 1992 did not eliminate this subsidy because at the time each local broadcast station had to negotiate with a single MVPD buyer, the local cable operator, and many stations had to rely on the cable operator to reach certain consumers. Indeed, at that time, cable operators provided the only multi-channel service carrying local broadcast stations and the vast majority of cable operators refused to pay for retransmission consent. In contrast to the monopsony power of cable operators as the only buyer of local broadcast programming for retransmission, numerous broadcast stations existed which a cable operator could retransmit in any particular market.

Even if there has been a shift in the balance of bargaining power it has not resulted in a situation where the balance is out of line or currently favors broadcasters. One must not confuse levels and changes. Substantial evidence indicates the balance of power in negotiations still favors the MVPDs. For example, in 2009, only 3 percent of

MVPD programming expenditures went for retransmission consent payments, whereas, 32 percent of the time spent viewing by MVPD households was of broadcast television. Moreover, the estimated fair market price affiliates of each of the four major broadcast networks should receive for their retransmission consent rights averages $2.48 per-subscriber per-month. In contrast, recently completed retransmission fee negotiations for the network stations are estimated to be around only $0.50 per-subscriber per-month (*i.e.*, just 20% of the fair market price).

Allowing broadcasters to continue to seek market driven consideration is not only consistent with the intent of Congress in enacting the retransmission consent regime, but is likely to lead to consumer benefits. Adequately compensating television stations for retransmission consent will enhance the incentives of television stations and broadcast networks to increase investment in attractive programming. The cost to consumers from not adequately compensating broadcasters for retransmission is a reduction in local broadcaster investment in news, public affairs and children's programming and the migration of programming from broadcast networks to cable networks, particularly sports programming.

Both MVPDs and television stations benefit when MVPDs carry the stations. It is not uncommon for parties to a mutually beneficial agreement to feel that they are not receiving a fair share of the benefits. With so many negotiations, some will reach an impasse. The mutual benefits to both parties in reaching agreement, however, indicate that not only will such impasses be rare, as has been the case, but that the vast majority of any such impasses which do occur are unlikely to be long-term situations, which has also been the case.

Public policy that aims to protect the consumer interest should focus on determining whether market power or other features potentially harmful to consumers infect the agreements in question. Bargaining power is not the same as market power. Whereas the exercise of market power reduces overall benefits to society because it restricts output, bargaining power does not restrict output. While market power is a matter of legitimate public policy concern, regulatory intervention that seeks to benefit one party at the expense of another may well inadvertently threaten the parties' ability to reach deals that increase economic welfare.

The Commission's interest in promoting the welfare of subscribers requires it to recognize that broadcast networks, stations, and MVPDs should be encouraged to enter into economically efficient arrangements (*i.e.*, arrangements which make the best use of resources) to provide service to consumers. The terms of the contractual arrangements, and especially the terms under which the profits are divided among the parties, need not concern the Commission, so long as the terms promote efficiency. Worse, attempting to regulate such terms is quite likely to reduce efficiency and thus harm the economy.

The Commission's proposal to allow MVPDs to negotiate for alternative access to network programming by eliminating the Commission's network non-duplication and syndicated exclusivity rules would seem to run afoul of network affiliation agreements and flies in the face of the Commission's concern for localism. An MVPD not being able to go out of market to get a broadcast network feed is no different than the MVPD having to negotiate for the right to a cable network. The MVPD cannot simply import the signal from somewhere else (e.g., Canada) if it doesn't reach an agreement for the rights in the United States.

The Commission's proposal to limit joint negotiation of retransmission consent agreements is equally misplaced. The proposal will result in arbitrary limitations based not on economic market power, but rather on ownership restrictions which are largely related not to market power, but rather are related to spectrum allocation. It also does not take into account the efficiencies from such joint negotiations or the relationships which lead to them. Existing antitrust law takes into account the specifics of such situations and already limits joint negotiations which should not be permitted.

INTRODUCTION

The Federal Communications Commission ("Commission") issued a Notice of Proposed Rulemaking ("NPRM") to consider whether certain changes in its retransmission rules are desirable or necessary given perceived changes in the video programming marketplace since the retransmission consent regime was enacted in 1992.[1] The NPRM arises out of a petition filed primarily by a coalition of multichannel video programming distributors ("MVPDs") arguing that the existing retransmission consent regulations are outdated and are harming consumers.[2] That petition claimed that there has been a recent shift in bargaining power to broadcasters that has resulted in retransmission consent negotiations in which MVPDs must either agree to the significantly higher fees requested by broadcasters or lose access to programming.[3]

I have been asked by Sinclair Broadcast Group, Inc. ("Sinclair") to analyze the claims made and several of the proposals contained in the NPRM and to estimate the fair market value of retransmission consent payments.

BACKGROUND

Retransmission consent rights were created by Congress in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). The 1992 Cable Act established two methods by which local broadcast stations can elect carriage on cable systems—must-carry and retransmission consent. Under must-carry, cable systems are not required to pay local broadcast stations for distributing the local broadcast station signals that they are required by federal law to carry. Alternatively, a local broadcast station may elect to exercise its right to grant retransmission consent. Under retransmission consent, cable systems are not required to carry the local broadcast station's signal, but they must negotiate compensation with the local broadcast station if

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

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

[3] Petition at 5.

they decide to carry the broadcast station's signal. Similarly, under the Satellite Home Viewer Improvement Act of 1999, satellite operators must negotiate with local television stations to carry their signals.

Both MVPDs and television stations benefit when MVPDs carry the stations. The MVPD benefits because, like other programming it carries, the programming from television stations helps the MVPD attract and retain subscribers, from which it derives subscription revenues. A station benefits because carriage increases the station's audience, and this tends to increase the revenues that the station can obtain from advertisers. Broadcasters and cable operators bargain over compensation for retransmission consent under rules established by the FCC. From that bargaining it is now typically the case that MVPDs have paid some compensation to the television station. Often the outcome of such bargaining is a complex agreement involving a package of rights.

Neither the broadcast station nor the MVPD wants the MVPD to drop the broadcast station's programming. The opposite is true. Each station benefits from carriage because its programming and advertising are likely to reach more households. If the MVPD does not carry the programming, the station loses any payment or other benefits it might have received from granting retransmission consent and the station loses advertising revenues because the station's audience would be reduced. The MVPD benefits from carrying the station because the station's programming makes the MVPD's service more attractive to subscribers. Clearly, these benefits are not available to either party if no retransmission agreement is reached. Thus, it is in the interest of both parties to reach agreement. Among so many negotiations, a few may reach an impasse. However, an impasse is not in either party's interest and in the rare instance where one occurs, it is unlikely to be a long-term situation.

Hence, both parties stand to gain from a transaction but haggle over the price. There does not appear to be any question that broadcast television stations (particularly those affiliated with the four major broadcast networks, ABC, CBS, FOX and NBC) opting for retransmission consent create substantial value for MVPDs; indeed, any dispute concerns how much a station should be compensated for that value.

MVPDs are claiming that the balance of power in retransmission negotiations has shifted toward broadcasters in recent years. The NPRM points to two changes in the video marketplace that the Commission feels have resulted in a rise in increased negotiation impasses: (1) broadcasters are increasingly seeking and receiving monetary compensation from MVPDs in exchange for consent to the retransmission of their signals, and (2) the number of competitive video programming providers has increased.[4]

Not all commentators believe that these changes have resulted in more frequent impasses. Indeed, the argument that a shift in bargaining power, if it occurred, should produce more impasses is flawed. It should simply lead to a different negotiated outcome. In fact, despite the large number of retransmission consent negotiations that occur, a very low percentage of negotiation stand-offs culminate in a TV station getting pulled from a multichannel distributor. During the last decade, out of what are literally tens of thousands of retransmission consent negotiations, only a minute number appear to have resulted in station blackouts.[5] The blackouts that do occur, however, result in a loud consumer outcry and attract the attention of lawmakers. Note that the consumer outcry that occurs when a broadcast station is dropped shows the importance and value of the TV station to consumers and therefore to MVPDs.

RELEVANT MARKET FOR ANALYSIS

In determining whether or not retransmission consent fees being sought by broadcasters reflect an anticompetitive level of market power, it is important to first define the market in which retransmission consent negotiations occur. Although MVPDs routinely claim that the market for such negotiations is limited to negotiations involving only broadcast stations, under standard economic principles such a claim draws the

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4 NPRM at ¶ 2.

5 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), pp. 5, 11, lists just eleven retransmission deals that resulted in dropped stations. In addition, there was the dispute between Cablevision and Fox in October 2010, which lasted only approximately two weeks. *See*, "World Series blackout ends for N.Y. cable customers," *CNNMoney* (October 30, 2010), http://money.cnn.com/2010/10/30/technology/fox_cablevision/index.htm.

market far too narrowly.[6] Instead, as discussed below, the market consists of all programming channels (both cable networks and broadcast stations) carried by MVPDs.

The United States Department of Justice and the Federal Trade Commission routinely determine what constitutes a market for purposes of determining whether or not proposed mergers would violate antitrust law by resulting in excess market power or by creating a threat to competition within a relevant market. To paraphrase the language of the Merger Guidelines used in this analysis, if a hypothetical monopolist of a group of products can raise prices profitably, then that group of products constitutes a relevant market.[7] It is not a relevant market if customers are able to substitute to other products not in group in sufficient quantity to render the price increase unprofitable. The determination of a market includes both a product market and a geographic market.[8]

Loosely, the market is determined by the range of products that can be held to be "reasonably close" substitutes.[9] To illustrate, "Gap Inc. is the only company that sells Gap jeans. But most people regard other brands of jeans as close substitutes for Gap jeans. Therefore, we would not say that Gap Inc. is a monopoly in the market for jeans because we would not define the market so narrowly as to include only 'Gap jeans.'"[10]

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6 Equally unfounded are claims by MVPDs that because each broadcast station carries unique programming each such station is a monopolist in a market consisting solely of such station. Such a claim is akin to claiming that each manufacturer of a consumer good, such as an automobile or a television, is a monopolist because they are the only seller of that particular brand of product. Economic theory does not support such a narrow definition of a market.

7 *Horizontal Merger Guidelines,* U.S. Department of Justice and the Federal Trade Commission, (August 19, 2010), § 4.1.

8 No argument exists that cable networks and broadcast stations are not part of the same geographic market. Although rights to carry cable networks are typically sold to MVPDs with respect to all television markets in which an MVPD operates and the right to carry a broadcast station is only for the station's local television market, license fees are generally paid on a per subscriber basis and each MVPD is acquiring programming for purposes of selling that programming to subscribers in a single television market.

9 Robert E. Hall and Marc Lieberman, *Microeconomics: Principles and Applications,* 4th ed., Mason, Ohio: Thomson/South-Western (2008), p. 301.

10 Robert E. Hall and Marc Lieberman, *Microeconomics: Principles and Applications,* 4th ed., Mason, Ohio: Thomson/South-Western (2008), p. 258.

Programming from television stations is not in a product market separate from other programming but rather is part of a continuum of programming services that includes cable network programming. It is important to remember that the customers for broadcast rights are MVPDs, not consumers. MVPDs want to attract subscribers and do so by providing programming that is attractive to consumers. In order to generate subscriber and advertiser revenues, MVPDs distribute cable networks to their subscribers and pay monthly per subscriber fees to cable networks for such rights. Similarly, carriage of local broadcast station signals produces revenues for MVPDs. An MVPD may charge a higher subscription price for a package of programming networks if local broadcast station signals are included in the package.[11] Alternatively, at any given subscription price, there will be more subscribers and more subscription revenue if local broadcast station signals are carried.[12] Further, having more subscribers means that the cable operator can generate more revenue from the sale of local advertising and other services. In these respects, local broadcast station signals play the same role as popular cable networks and other sources of cable content.

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11 Although cable operators are required to include broadcast stations in the programming packages sold to all subscribers, satellite providers are not subject to this requirement. When DirecTV and DISH Network were introducing local broadcast station signals as part of their service they charged subscribers approximately $5 or $6 per month for the local broadcast signals in markets where they were available.

12 Evidence of this is provided by the extraordinary growth in satellite subscribers subsequent to adding carriage of local broadcast stations. *See*, for example, "'Local into Local' Boosts Satellite Broadcasters," UltimateAVmag, (April 30, 2000), http://www.ultimateavmag.com/content/local-local-boosts-satellite-broadcasters. The Commission has noted that the significant increase in DBS subscribership in 2000 was attributable in part to the authority granted to DBS providers in 1999 to offer "local-into-local" service. One study found that there was a 43 percent increase in the rate at which DBS operators added subscribers following the introduction of "local-into-local" service. *See,* Seventh Annual Report, Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, (rel. January 8, 2001), ¶¶ 68-69. DirecTV noted that the ability to offer local broadcast stations was a significant factor in DBS subscriber growth, with DirecTV's subscriber levels increasing by 20 percent from 2000 to 2001 due to local broadcast channel service. *See*, Eighth Annual Report, Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 01-129, (rel. January 14, 2002), ¶ 59. Similarly, EchoStar stated that the addition of local channels made DBS more competitive and led to an increase in DBS subscribership. *See*, Ninth Annual Report, Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 02-145, (rel. December 31, 2002), ¶ 61.

A useful way to think about the economics facing an MVPD with respect to programming purchases is to consider a list of the available program services ranked from most effective to least effective in attracting subscribers, per dollar of expenditure by the MVPD at prevailing prices, other things (e.g., transmission quality) being equal. Such a list today would have several hundred services. Programming retransmitted from any local broadcast television station has a place in the continuum. There likely would be some programming as or more attractive than the station's and some programming less attractive. There is no reason to believe that the "gap" between the station's programming and the next-most-attractive programming is so large as to cause broadcast stations to constitute a separate market. Moreover, potential substitutes for a local broadcast station include not only that programming adjacent to the station on the effectiveness spectrum, but aggregations or combinations of lower-ranked programs.

Programming from a television station is not a separate market because MVPDs can substitute other broadcast and non-broadcast programming, of similar effectiveness in attracting subscribers, and this serves as a competitive constraint on the price that can be charged for broadcast retransmission rights. No individual broadcast station's programming can be fairly characterized as uniquely important to MVPDs. In fact, based on comments of MVPDs, the failure to carry a broadcast station in a television market has not resulted in significant losses of subscribers.[13]

Some commentators have stated or implied that television stations, and in particular the television stations affiliated or owned by the four major broadcast networks, have a troubling level of market power.[14] It is useful to have an understanding of the term "market power." Under idealized conditions that economists call "perfect competition," competition forces the price at which a firm sells its product to be equal to

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13 For example, following a 5 week impasse with Sinclair affecting approximately 800,000 subscribers, Mediacom reported a loss of just 18,000 subscribers (i.e., 2.25%), which Mediacom attributed primarily, but not exclusively, to the failure to carry the Sinclair stations. *See* "Mediacom Ups Subscriber Base Despite Sinclair Feud" http://www.cedmagazine.com/mediacom-ups-subscriber-base-despite.aspx.

14 See, for example, Petition at 19.

marginal cost. Economists describe a firm that can consistently sell its product for a price higher than marginal cost as having "market power."

One condition for perfect competition is that there are many firms producing goods that are perfect substitutes for each other. Since firms in many sectors of the economy produce products for which there is no perfect substitute, many firms have some degree of market power. A firm may have market power but still only earn a competitive rate of return or profit due to competition from producers of competing, but somewhat differentiated, products.[15] A useful distinction, that is often not made and hence leads to confusion, is that "market power" describes a firm that earns only the competitive profit when it sets its price optimally above marginal cost whereas "monopoly power" describes a firm that makes more than a competitive profit if it sets its price optimally above marginal cost.[16]

Commentators based their claims that television stations have market power in retransmission consent negotiations on Commission statements in the News Corp./DirecTV decision.[17] But these commentators do not tell the whole story. To obtain a fuller view of the Commission's position, it is worth quoting the Commission's statement at length:

> Certain parties have argued that the Commission's analysis of the [News Corp/DirecTV] transaction bears some relevance on the present discussion. This represents a misunderstanding of the nature of the Commission's transaction review process as well as the specifics of the

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15 See, Carlton and Perloff, *Modern Industrial Organization*, Fourth Edition, Boston: Pearson (2005). "A [firm] can set its price above its marginal cost but does not necessarily make a supracompetitive profit. For example, if a [firm] incurs a fixed cost, its profit may be zero (the competitive level) even if its price exceeds its marginal cost." (p. 93); also see, Landes and Posner, "Market Power in Antitrust Cases," *Harvard Law Review*, Vol. 94, No. 5 (March 1981), pp. 937-983. "… each seller … may have had an average cost greater than its marginal cost, and possibly equal to its price, because each may have incurred (fixed) costs to develop brands that would enjoy the strong consumer preference reflected in [their] elasticity estimates. Even if firms succeed in reducing the elasticity of demand for their brands in this way, they will not have any monopoly profits if there is competition among firms, and consumers will benefit from the better quality and greater variety of products." (p. 957)

16 See, Carlton and Perloff, *Modern Industrial Organization*, Fourth Edition, Boston: Pearson (2005), p. 93.

17 See, for example, Petition at 19.

> transaction between News Corp. and Hughes Electronics. The transaction review process at the Commission is directed at examining *changes* in the competitive landscape that are a direct result of the transaction at issue. To the extent the Commission discussed the "market power" that might reside in the combined entity, it was not passing upon the competitive balance of negotiating power that normally exists between broadcasters/programmers and MVPDs. All differentiated products, such as video programming, possess some degree of market power in the sense that there are no perfect substitutes. The critical question in any analysis involving differentiated products is whether the existing degree of market power is sufficient to allow the firm to profitably engage in the hypothesized anticompetitive activity. In the News Corp. transaction, the potential refusal to sell to competing MVPDs, or vertical foreclosure, was the activity of concern. Commission staff rigorously measured News Corporation's incentive and ability post-transaction to engage in the hypothesized activity and determined that, while permanent foreclosure was unlikely, temporary foreclosure was a real public interest concern. *Thus, nothing in the analysis of the News Corp./DirecTV transaction should be read to suggest that the Commission has concluded that the market power of broadcasters is sufficient to lead to competitive harms in the absence of vertical integration.*[18]

As this quotation shows, the market power which the Commission has found that television stations possess is of the ordinary variety that many differentiated product firms have. The Commission has not concluded that this market power leads to competitive harm in the absence of vertical integration with an MVPD.

One indicator of any television station's market power would be its share of revenues in the sale of their programming rights to an MVPD. Data on such revenues are not available. As a proxy, however, one can look at the audience share that each station has, since audience size represents at least roughly the relative attractiveness of broadcast stations and cable networks to MVPDs. For the 2009-2010 television season, CBS affiliated stations on average received only about 9.2 percent of prime-time viewing, ABC affiliated stations about 7.1 percent, NBC affiliated stations about 6.8 percent, and Fox affiliated stations about 6.5 percent.[19] Such shares are well below the levels at which

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[18] FCC, *Report on the Packaging and Sale of Video Programming Services to the Public*, November 18, 2004, p. 70. Footnotes omitted. Emphasis added.

[19] Cabletelevision Advertising Bureau, *2011 TV Facts*, pp. 28-31.

economists expect to see anticompetitive market power.

A LEVELING OF THE PLAYING FIELD?

History

Following the 1976 Copyright Act, broadcasters had been uncompensated by cable operators retransmitting their signals.[20] In 1992, Congress recognized that "a substantial portion of the benefits for which consumers pay cable systems is derived from the carriage of the signals of network affiliates, independent television stations, and public television stations."[21] Congress also found that cable systems "obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability" and that this benefit "has resulted in an effective subsidy of the development of cable systems by local broadcasters."[22] Through the 1992 Cable Act, Congress adopted provisions to allow broadcasters to negotiate to receive compensation for the value of their signals.

Under the 1992 Cable Act, a television station has to elect every three years either the right to grant retransmission consent or the right to signal carriage under must-carry.[23] A station that opts for retransmission consent cannot change its decision and demand must-carry until the next election. It is a misconception that a television station can demand to be carried and also demand the cable system pay the station for carriage.

When retransmission consent took effect in October 1993, cable companies generally refused to pay a fee to broadcasters. A number of the largest MVPDs, including Tele-Communications Inc., Time Warner Inc. and Continental Cablevision, said they would not pay cash for retransmission consent.[24] The great majority of retransmission

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20 Thomas W. Hazlett and Matthew L. Spitzer, *Public Policy Toward Cable Television,* Cambridge: The MIT Press, 1997, at 60.

21 *See* 1992 Cable Act §2(a)(19).

22 *See* 1992 Cable Act §2(a)(19).

23 *See* 1992 Cable Act §6.

24 *See* http://www.highbeam.com/doc/1G1-14109682.html. Comcast Corp. CEO Brian Roberts said he also found the idea of paying cash "an uncomfortable notion."

deals were consummated without any payments at all. In certain cases, primarily involving broadcast stations owned by the television networks, in-kind consideration such as cross-promotion marketing agreements or new basic cable network carriage deals were provided by the MVPDs.[25]

The Fox-owned television stations, for instance, dropped retransmission consent fee demands in exchange for cable company agreements to carry (and pay a license fee for) a new basic cable network from Fox, FX.[26] Capital Cities/ABC and Hearst Broadcasting entered into retransmission-consent contracts with cable operators to carry their TV stations for free. In return, the cable operators agreed to a "substantial" rollout of ABC- and Hearst-owned ESPN2 on their systems nationwide.[27] After being unable to reach a deal, CBS granted cable operators a year-long extension to carry its seven owned stations on their systems for free. Then again in 1994, CBS said it would waive its right to collect retransmission consent fees from cable system operators for yet another year. CBS originally had hoped that it could use the rules to demand cash payments from cable system operators that carry its TV stations. But cable system operators refused to pay.[28] Typically, smaller, non-network owned television stations selected the must-carry option or completed agreements under retransmission consent elections without receiving compensation beyond carriage.[29]

At the time of the 1992 Cable Act it was clearly the case that cable operators reaped great benefit from local broadcast signals that they were able to carry without broadcaster consent or copyright liability, and this benefit resulted in an effective subsidy to cable operators. There is no evidence that the retransmission consent rules established

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25 Thomas W. Hazlett and Matthew L. Spitzer, *Public Policy Toward Cable Television,* Cambridge: The MIT Press, 1997, at 60.

26 Thomas W. Hazlett and Matthew L. Spitzer, *Public Policy Toward Cable Television,* Cambridge: The MIT Press, 1997, at 60, fn. 48.

27 *See* http://www.highbeam.com/doc/1G1-13216473.html and http://www.highbeam.com/doc/1G1-14236288.html.

28 See http://www.highbeam.com/doc/1G1-14296939.html and http://www.highbeam.com/doc/1G1-15671153.html.

29 Thomas W. Hazlett and Matthew L. Spitzer, *Public Policy Toward Cable Television,* Cambridge: The MIT Press, 1997, at 60.

in the 1992 Cable Act came close to eliminating this subsidy either initially or as of today.

Until 2005, many TV stations elected to be carried on cable systems on a must-carry basis. If they chose retransmission consent before then, they usually did not insist on cash payments. In contrast, DBS operators had been paying cash retransmission fees since the late 1990s. But then there was a change. TV station owners not only noticed that they were starting to reap significant retransmission dollars from DBS operators, who were increasing the number of local-into-local markets to compete with cable operators for subscribers. When satellite providers added the local broadcast stations in a television market they materially increased their subscriber base, not only validating the importance of the carriage of the local stations in attracting subscribers, but also dissipating the monopsony power of the cable operator in that television market. Additionally, when cable operators started charging extra for HD tiers, some broadcasters refused to grant consent to carry their high definition signals in the absence of receiving consideration. Broadcasters have increasingly begun to waive their rights to must-carry and, instead, have opted to negotiate retransmission consent agreements with MVPDs. These retransmission consent agreements often include per subscriber fees paid by MVPDs to stations, in addition to carriage rights for additional content (e.g., cable networks and multi-cast channels).

"The now standardized practice of MSOs paying TV stations for carriage … was a rational, needed, fundamental change to the economic relationships in the industry to bring broadcast networks more on par with cable networks, especially given the much higher viewing levels of broadcast networks."[30] It is not surprising that arm's length, free market negotiations between a station and an MVPD would result in compensation being paid to the television station. MVPDs pay for the other programming that they carry, so it is not remarkable for them to pay for local television stations' programming.

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30 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 3.

Bargaining Power

The division of the gains from a mutually beneficial deal might be said to reflect relative bargaining power whenever the mutual gains are not divided in some manner commensurate with the "contribution" of the parties. But bargaining power has more to do with the alternative opportunities available to the parties than with their contributions to the deal.[31] It is not uncommon for parties to a mutually beneficial agreement to feel that they are not receiving a fair share of the benefits.

Within a local television market there are several stations selling retransmission consent, but previously there was only one MVPD buyer. Each local broadcast station had to negotiate with a single buyer, the local cable operator. Moreover, the local cable operator was the only means through which the broadcast station was able to reach certain consumers. Significantly, by 1992, cable penetration reached 66 percent of all television households.[32] The cable operator's bargaining power was reflected in their refusal to pay retransmission fees for carriage.[33] While today there are several buyers—typically the local cable operator, two DBS providers, and possibly a telephone company—economic analysis of retransmission fees paid indicates that the increase in the number of buyers has served to simply make the playing field more level, albeit still in favor of MVPDs, rather than tip a previously level field.

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31 Bargaining power is "[t]he ability to obtain a large share of the possible joint benefits to be derived from any agreement. Bargaining power is partly dependent on the losses that failure to agree is likely to cause to the various parties to a negotiation. In the absence of agreement, each party has a fall-back position: the less uncomfortable this is, and the longer any party can afford to stay in it, the stronger is their bargaining power." John Black, et al., *A Dictionary of Economics*, 3rd ed., Oxford: Oxford University Press (2009), p. 29.

32 Cabletelevision Advertising Bureau, *1995 Cable TV Facts*, p. 7. Although subscribers to an MVPD often have the option of receiving broadcast stations not carried by the MVPD for free over-the-air, in practice many subscribers to a pay television service will not be willing to go to the difficulty of watching programming that is not integrated within the MVPDs programming options.

33 Even the MVPDs acknowledge that previously the playing field may have been tipped in favor of the single local cable operator. "The idea of a single MVPD in a given market … has become a thing of the past, along with any additional leverage that purported power may have provided MVPDs in negotiations with broadcasters." (Petition at 18)

In other words, even if there has been a shift in the balance as claimed by MVPDs, it does not mean that the balance is out of line or even currently favors broadcasters. One must not confuse levels and changes. The balance of power in negotiations clearly was (and still is) in favor of the MVPDs.

Consumer goods industries often can be analyzed through a dual-stage model in which manufacturers sell to independent “retailers” who resell to household consumers. The delivery of broadcast station programming through an MVPD to consumers can likewise be analyzed using a dual-stage model. In this case, the broadcast station “manufacturers” a stream of programming that it sells to MVPD “retailers” who resell to consumers. Robert Steiner has shown that in the typical dual-stage consumer goods industry with less than perfect competition in the manufacturing and retailing stages, there is horizontal competition among individual manufacturing firms and among individual retailing firms, and moreover, manufacturers and retailers compete vertically as well as horizontally. [34]

In such a dual-stage environment, the margins of an individual station or MVPD depend on both its horizontal competitive position against firms at the same level and its vertical bargaining power with firms at the other stage. A firm’s market share is a rough surrogate for the former. Vertically, stations and MVPDs vie with one another to increase their respective share of the retail “price” and thus to capture a larger portion of the available profit margin. Factors that intensify horizontal competition among firms at one stage can increase the share of the retail price going to firms at the other stage.[35] In particular, holding constant the vigor of competition at the broadcast station level, a station’s share of the margin will rise when competition among the MVPDs distributing the station intensifies.

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[34] Robert L. Steiner, “Intrabrand Competition—Stepchild of Antitrust,” *The Antitrust Bulletin,* Vol. XXXVI, No. 1 (Spring 1991), pp. 155-200, at 161-62.

[35] Robert L. Steiner, “The Inverse Association Between the Margins of Manufacturers and Retailers,” *Review of Industrial Organization,* Vol. 8 (1993), pp. 717-740, at 719-720.

Hence, to the extent that broadcast stations are now able to negotiate better retransmission consent terms it is likely due to their ability to capture a larger share of the retail profit margin as the retail sector has moved from a monopsony (i.e., a single buyer) to an oligopsony (i.e., a few buyers). This is a natural response to the introduction of competition among MVPDs. This does not mean that the playing field, which was likely tilted in favor of MVPDs, now favors broadcast stations—the playing field appears to simply favor MVPDs to a lesser extent. The MVPDs are seeking to get the Commission to deny stations the benefits of competition thereby maintaining the MVPDs ability to earn the prior level of profits.

An important point is that bargaining power is not the same as market power. The exercise of market power reduces overall benefits to society because it restricts output, injuring consumers. Therefore, market power is a matter of legitimate public policy concern. Bargaining power is very different. If two producers reach an agreement that creates an increase in social welfare, the division of a portion of the gain between them should be a matter of indifference to policy makers. One reason is that regulatory intervention that seeks to benefit one party at the expense of another may well inadvertently threaten the parties' ability to reach deals that increase economic welfare. Policies designed to "protect" the bargaining power of one party at the expense of another can create and preserve inefficiencies that weigh heavily on consumers. A second reason is that when regulators divide the "pie" among the participants, the participants have incentives to make expenditures on lobbying and similar nonproductive activities, some of which may support perpetuation of inefficient policies. Moreover, the potential for government intervention in the negotiating process also provides participants with an interest in such intervention (i.e., the MVPDs) with a perverse incentive to actually reach impasse in order to make their case for the need for intervention.

Retransmission Payments and Ratings

A quick examination of payments to cable networks and broadcast stations relative to the ratings that the two programming sources generate indicates the disparity in compensation and belies the notion that playing field has tipped in the direction of the broadcasters.

SNL Kagan estimates that there was $762 million paid in retransmission dollars in 2009.[36] For the same year, MVPDs paid $25.4 billion for non-broadcast cable network programming.[37] This means that in 2009 only 3 percent of MVPD expenditures on programming went for retransmission consent payments. In contrast, 32 percent of the time spent viewing by MVPD households during the 2009-2010 television season was viewing broadcast television.[38]

Looking at specific networks, in 2009, ABC and FOX each had 2.9 times the average prime-time TVHH delivery of ESPN/ESPN-HD. Yet ABC and FOX affiliated stations were not receiving anywhere near 2.9 times the fees received by ESPN or even the fess received by ESPN; they were getting just 12 percent of the monthly per-sub compensation as ESPN based on SNL Kagan's estimated $0.50/sub/month retransmission fee and $4.08 license fee received by ESPN.[39] This is clear indication of the continued disadvantage to which broadcasters are subject in retransmission consent negotiations.

VALUE OF BROADCAST STATION SIGNALS

Although cable systems now offer many other services, local broadcast stations, especially network affiliates, remain a key source of consumer demand for cable. This is not surprising. Local broadcast stations carry popular local news, weather and sports programming. Also, the national network entertainment, news and sports programming carried by network affiliates remains among the most popular programming on

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36 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 5.

37 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 4.

38 Cabletelevision Advertising Bureau, *2011 TV Facts*, p. 34.

39 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 8. This comparison is based on a $4.08/sub/month carriage fee for ESPN/ESPN-HD and a $0.50/sub/month retransmission fee for ABC and FOX together with an average prime-time TVHH delivery of 1,670 for ESPN/ESPN-HD, 4,895 for ABC, and 4,803 for FOX. Although the $4.08 figure for ESPN is a gross license fee figure and does not net out the value of the advertising MVPDs receive on cable networks such as ESPN for resale, neither does the retransmission fee estimate net out the value of advertising which broadcasters routinely provide to MVPDs in exchange for some or all of the fees paid by MVPDs in retransmission consent agreements.

television.[40] Actual and potential cable subscribers place a high value on this programming, and a substantial portion of the benefits for which consumers pay cable systems is derived from the carriage of the signals of network affiliates, independent television stations, and public television stations.[41]

Broadcasters and cable operators negotiate retransmission consent agreements under rules established by the FCC. The outcome of such bargaining may result in a complex agreement. Cable operators often choose to provide alternative consideration such as carriage of cable networks that are affiliated with the broadcaster in lieu of cash payment. Because the details of each negotiation vary from one cable operator to another, and because the specific details of these agreements are generally confidential, a market price for retransmission consent rights is not readily observable.

While it is hard to measure which side has more bargaining power, or to take a level to the playing field, it is possible to compare the retransmission payments asked for (and received) by broadcasters from MVPDs to payments cable networks receive from MVPDs. In order to attract subscribers, MVPDs purchase programming from local broadcast stations and cable networks in the programming market.[42] Therefore, one way to indirectly observe the retransmission consent playing field is to determine whether retransmission consent fee requests or payments are out of line with what MVPDs pay for other programming, controlling for various features of the programming.

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40 While cable networks combined deliver more TV households ("TVHHs") than the broadcast networks combined deliver, each of the four major broadcast networks delivers 2 to 3 times the number of TVHHs delivered by the top-rated cable networks. SNL Kagan reports that in 2009 the average prime-time TVHH delivery for the four major broadcast networks was ABC 4.9 million, CBS 6.5 million, Fox 4.8 million, and NBC 4.7 million. In contrast, the average prime-time TVHH delivery for the four top cable networks was USA Network 2.2 million, Disney Channel 1.8 million, ESPN/ESPN HD 1.7 million, and Nickelodeon 1.7 million.

41 *See* 1992 Cable Act §2(a)(19).

42 As discussed above, there is a single programming market in which purchases of local broadcast station programming and cable network programming occur.

Estimating the Fair Market Price for Retransmission Consent Rights

My approach to estimating the fair market value of local retransmission rights relies on what MVPDs pay for various cable networks. By fair market price I simply mean the price that would be observed if retransmission consent rights were traded in cash-only transactions in a market unconstrained by government regulations favoring one party to the negotiations over the other.

Benchmarks such as comparable transactions involving other parties usually are the most reliable basis for estimating a fair market price. It may be necessary to adjust the prices of the benchmark transactions to increase their comparability to the situation at hand. For example, adjustments must be made for differences in network quality and advertising time provided to the MVPD. When there are many potential comparable transactions, it is often advantageous to use formal statistical estimation methods, such as regression analysis, to describe the relationship between prices and the factors that influence prices.

Cable networks are paid an average of about $0.26/sub/month, but there is a very wide range, from $0.01 to over $4.00/sub/month.[43] The economic foundation of basic cable networks is the MVPD's ability to distribute cable networks to viewers for monthly subscription fees as well as to deliver audiences to advertisers. MVPDs pay license fees to distribute cable networks. These license fees (wholesale prices) are determined by free market competition.

Third-party data show what MVPDs pay on average in monthly per subscriber license fees for each basic cable network. Data also show the value of basic cable networks as measured by what each network spends on programming. With adjustments for several other variables, I use the license fee/programming expenditure relationship to estimate what the license fee would have been for the network-affiliated broadcast stations in 2010 if they were basic cable networks.

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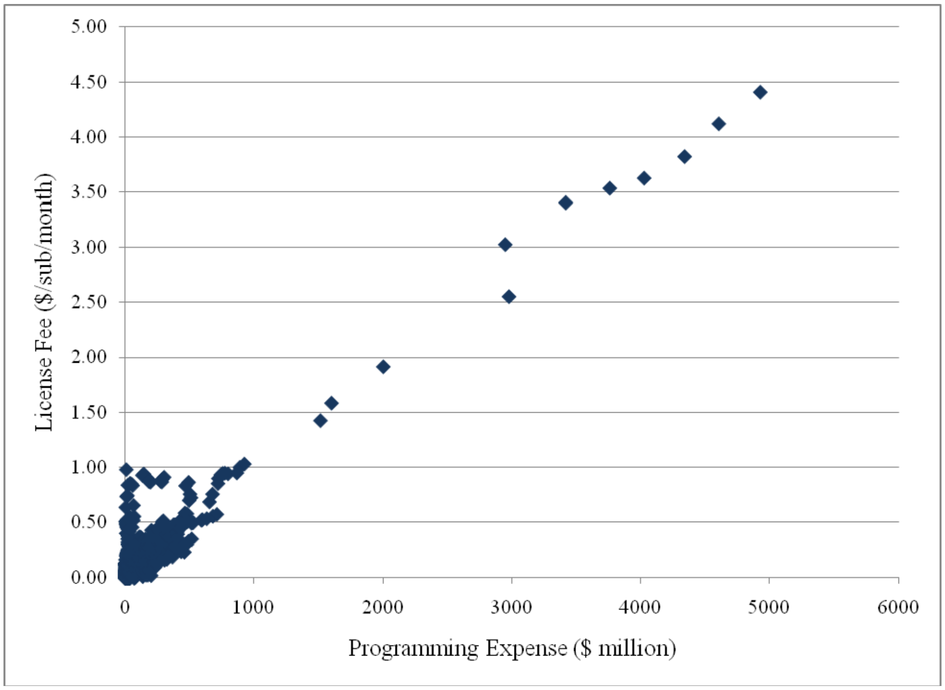
43 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 7.

Figure 1: Cable network license fees versus programming expenses, 2000-2010
(in real 2010 dollars)



There is a strong correlation between the license fees paid by MVPDs to cable networks and the level of programming expenditure by those cable networks as shown in Figure 1.[44] It is not surprising to find that more expensively-produced cable networks have more popular programming and as a result receive higher license fees than do less popular cable networks which spend less on their programming acquisitions. This relationship between cable network programming expense and cable network license fees is the principal basis used to predict the value of broadcast station signal retransmission consent rights based on broadcast network programming expenses.[45]

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44 Programming expenses and license fees expressed in real 2010 dollars using the GDP implicit price deflator. Programming expense and license fee data are from SNL Kagan, *Economics of Basic Cable Networks, 2010 Edition* (December 2010).

45 The fee MVPDs (and ultimately, viewers) are willing to pay for a program service depends on the quality or attractiveness of the programming provided. Higher perceived programming quality, in turn, is directly related to programming expense. This is so because competition among programmers drives up the prices of the most attractive program services. Although the popularity

Although very important, program expense is not the only factor that explains the license fees commanded by cable networks. Many cable networks receive not just license fees from MVPDs but also advertising revenues from national advertisers. Each cable network must decide how to trade off these two sources of revenue. Other things being equal, if a cable network's per subscriber wholesale license fee is lower, MVPDs will provide it to more subscribers than more expensive cable networks. Such more widely distributed cable networks will accordingly be more attractive to advertisers and could result in greater advertising revenue. In theory, this should tend to reduce license fees paid to cable companies. The analysis takes this tradeoff into account.

A related issue in understanding cable network license fees is the availability of local advertising spots. An MVPD will be willing to pay more, other things being equal, for a cable network that provides opportunities for the MVPD to sell advertising spots. In doing this, of course, the cable network gives up the opportunity to sell such spots to national advertisers. Although broadcast station signals do not typically provide such an opportunity to MVPDs[46], as part of the consideration included in retransmission consent agreements broadcasters often provide MVPDs with advertising for use in promoting the MVPDs products. Nonetheless, because of a lack of data on the amount of advertising provided by broadcasters to MVPDs, it has been assumed that unlike cable networks, broadcasters do not provide such advertising inventory for purposes of estimating the fair market value of broadcast retransmission rights. As a result, the estimate of fair market value likely understates the true value of such retransmission rights.

Finally, the network's ratings are taken into account in the analysis. While programming expenditure is a measure of quality, ratings captures non-pecuniary quality

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of programming does not always depend on the cost of such programming—clearly there are expensive flops and low-budget hits—in general one would expect that license fees per subscriber would increase as programming expenditures increase, other things equal. See B. Owen and S. Wildman, *Video Economics*, 144-150 (1992); B. Litman, *Predicting Success of Theatrical Movies: An Empirical Study,* 16 Journal of Popular Culture 159 (1983); and M. Blumenthal, *Auctions with Constrained Information: Blind Bidding for Motion Pictures*, 70 Review of Economics and Statistics 191 (1988).

46 Instances do exist where broadcasters have permitted MVPDs to resell advertising inventory provided to them by broadcast stations.

measures, such as creativity and originality. Moreover, ratings provide a measurable reflection of the value of the programming to the ultimate consumer, the target audience of the MVPDs' efforts to sell their service.

SNL Kagan's publication *Economics of Basic Cable Networks*, *2010 Edition* provides data regarding basic cable networks.[47] The analysis is based on data for 144 cable networks from 2000 through 2010 (not all cable networks were in operation in every year), as depicted in Figure 1.[48] I adjust these data for inflation using the GDP implicit price deflator and then use an econometric technique (regression analysis) to estimate the relationship between license fees and programming expenditures, accounting for the cable network's advertising revenue, the value of advertising time the cable network makes available to the MVPD, and the network's ratings. See Appendix A. I apply the resulting relationship to programming expenditures, advertising revenues and ratings of the broadcast networks in 2010 as reported by SNL Kagan. The result is an imputed monthly license fee that the broadcast networks could command as a basic cable network.[49] The estimated per-subscriber per-month fee averages $2.48 for the four major broadcast networks (ABC, CBS, NBC, and Fox) and averages $0.36 for the smaller broadcast networks (The CW and MyNetworkTV).

The preceding analysis understates the value of the broadcast network affiliated station signals not only because it ignores the value of advertising provided by broadcasters to MVPDs in retransmission consent negotiations, but also because it omits any consideration of the local content and syndicated programming contained in the local

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47 The FCC regularly relies on the industry statistics and projections by SNL Kagan Research in its rulemaking decisions and analyses of the video industry. See, e.g., FCC, *Thirteenth Annual Report*, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, MB-Docket 06-189 (released January 16, 2009).

48 The *Economics of Basic Cable Networks 2010* lists subscribers, license fees, advertising revenue, advertising avails, and programming expense data for 177 cable networks. For various reasons, 36 networks were excluded from the analysis—34 were Spanish language, one was Asian, and one was a 3-D network.

49 The prediction relates to the average fee paid by all MVPDs. To apply this methodology to an individual MVPD one would need to know that MVPD's license fees for the cable networks it carries, that MVPD's advertising revenues per network, and the programming expenditures of the local broadcasters.

stations' signals. The cable networks used to estimate the value of retransmission rights generally do not offer local content. If it were possible to take into account the importance of such local programming, which often includes several hours of popular and important news programming each day, it would increase the license fee that a network affiliated broadcast station could command above the value associated with just the network programming.

Estimated Actual Retransmission Consent Payments

It is informative to compare these predicted fair market values to what broadcast networks are seeking in retransmission payments. CBS O&O stations reportedly negotiated retransmission payments in early 2009 of about $0.50/sub/month.[50] In late 2009, Fox negotiated retransmission fees with Time Warner Cable. While Fox was seeking $1/sub/month and Time Warner Cable was said to have been willing to pay $0.20/sub/month, the two were thought to have settled at an initial fee in the $0.50/sub/month range.[51] Around the same time, ABC sought fees of $0.75/sub/month from Cablevision.[52] Some reports put the final agreement in the $0.55-65 per sub range, while other reports put it in the $0.27-37 range.[53] CBS's recent retransmission deal with Comcast is estimated to start at $0.50/sub/month in 2012 and rise to more than $1/sub/month by 2020.[54]

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50 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 5 and "Networks Put The Squeeze On Cable," (October 21, 2009), http://www.forbes.com/2009/10/21/television-networks-cable-business-entertainmnet-retrans-fees.html.

51 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 8.

52 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 6.

53 SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 8.

54 "CBS, Comcast Sign 10-Year Contract to Carry TV Shows," (August 2, 2010), http://www.bloomberg.com/news/2010-08-02/cbs-signs-10-year-contract-allowing-comcast-to-carry-its-television-shows.html. *See also* "CBS Raises the Retrans Bar" (May 24, 2011) http://www.multichannel.com/article/468731-CBS_Raises_the_Retrans_Bar.php.

Figure 2: Cable network license fees and broadcast network retransmissions fees versus programming expenses, (2000-2010 for cable, 2010 for broadcast)

(in real 2010 dollars)

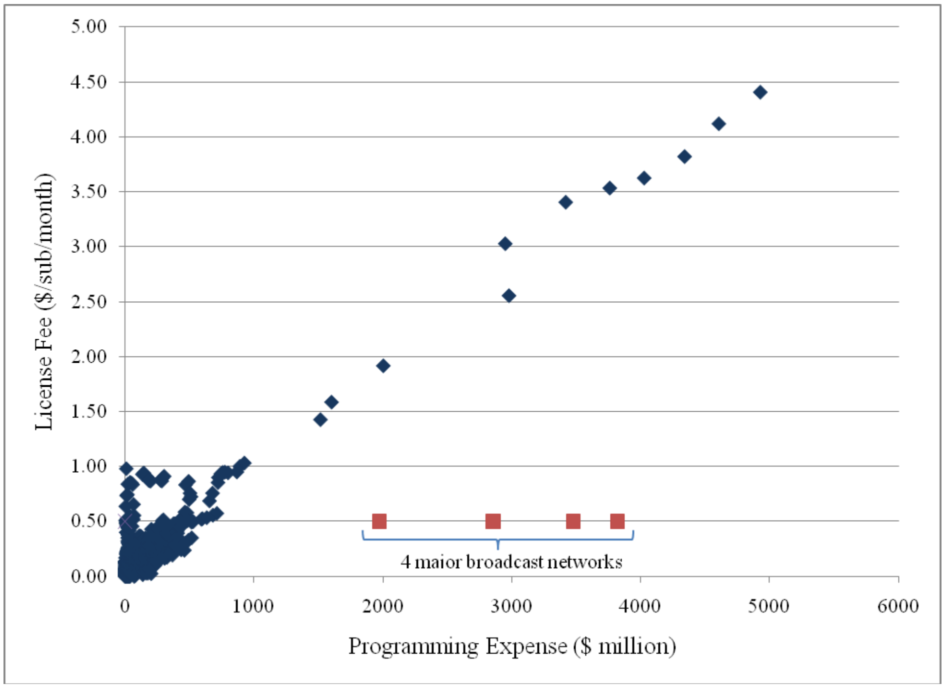

Figure 2 replicates Figure 1 but adds the 2010 programming expense and estimated retransmission consent fee payments for the four major broadcast networks.[55] As Figure 2 depicts, the four major broadcast networks invest as much (or more) in programming than the most expensive cable networks, but collect subscriber fess commensurate with or lower than the fees collected by the cable networks that invest far less in programming.[56]

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55 Programming expense data are from SNL Kagan. Retransmission consent fees for each network are assumed to be $0.50 per-subscriber per-month. *See*, SNL Kagan, "The Economics of Retransmission for Broadcasters and Cable MSOs," (June 2010), p. 8.

56 Figure 2 understates the discrepancy for a network-affiliated broadcast station, because, as compared to the cable networks where 100% of programming expenditures are accounted for, in the case of the broadcast stations the programming expense figure takes into account only the programming expenditures of the networks, but does not include the expenditures of the local affiliates in producing or acquiring additional programming aired during the non-network periods.

It is not possible to discern the precise reason or reasons that broadcasters do not receive payments for their programming that are commensurate with the value cable networks received for their programming. The substantial pricing discount likely reflects a combination of factors, including the historical government created right to carry local broadcast stations without compensation, the bargaining power of MVPDs when retransmission consent was established, and the fact that the market is still in a period of adjustment even though that bargaining power may have lessened. SNL Kagan reports that "O&O station execs very much see the growth of retrans fees as a work in progress and expect to get what they feel to be appropriate value for their stations over time."[57] However, one can observe conclusively that broadcasters do not have market power or an excess of bargaining power, or that they do not use it.

Retransmission Payments Improve Free Over-the-Air Program Quality

Economic theory predicts that compensating television stations for retransmission will enhance the incentives of television stations and broadcast networks to increase investment in programming. Stations' choices about the type and quality of programming to carry (including the network affiliation decision) are made to maximize their profits. A station makes investments in programming expenditures up to the point where the marginal expenditure on programming just equals the expected increased revenue from increasing the quality of the station's programming.[58] Prior to retransmission consent, stations derived the vast majority of their revenues from the sale of advertising. Hence, the decision to make a marginal programming expenditure was based on the expected increase in the appeal of the programming, as measured by ratings, leading to an increase in advertising revenues. Compensation for retransmission consent gives stations an additional way to contribute to their revenues. As with advertising revenue, a station's

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57 "Kagan: Retrans Take To Reach $3.6B in 2017," *Multichannel News*, (May 25, 2011), http://www.multichannel.com/article/468794-Kagan_Retrans_Take_To_Reach_3_6B_in_2017.php.

58 A firm will invest in a factor of production up to the point at which its marginal revenue product is equal to its marginal factor cost. *See*, Michael L. Katz and Harvey S. Rosen, *Microeconomics*, 2nd ed., Burr Ridge, IL: Irwin (1994), p. 320. In this case the factor of production is programming quality and the marginal revenue product is the addition revenues the station receives because of the increased programming quality.

benefit from retransmission consent will tend to increase with the appeal of its programming, holding other factors constant. So now, the decision to make a marginal programming expenditure will be based on the expected increase in advertising revenues and retransmission fees. This will lead the station to undertake some programming investments that previously would not have been profitable.

Networks providing programming to their affiliated stations can respond to the change in stations' incentives and provide higher quality programming. Networks also have a direct incentive to do so through the effect that improved network programming has on the compensation that their owned and operated stations receive for retransmission consent. Moreover, the broadcast networks are increasingly seeking to recapture some of the retransmission payments that their affiliates receive which will increase the networks' investment in programming.[59]

As the Commission has noted, over-the-air ("OTA") television provides significant public benefits.[60] It is a free service for those segments of the population that either cannot afford or do not desire paid television services, or cannot receive those services at their homes. Providing those Americans with access to free television is a core principle of the Commission's mass communications policy. Through broadcast television, the Commission has pursued longstanding policy goals such as localism and diversity of views. Additionally, OTA television comes with programming obligations that serve the public interest. These include children's educational programming, coverage of local community news and events, access for federal political candidates, closed captioning and emergency broadcast information. Similar public-interest obligations do not apply to cable networks, MVPDs or Internet-only media outlets.

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59 Fox is reportedly seeking rates that start at $0.15 and peak at $0.50 per local cable subscriber over the course of the contract, depending upon the size of the market. ABC, CBS, and NBC are seeking a percentage of the retransmission fee the affiliate receives. *See*, "Fox TV demands share of station's retransmission fees," *Los Angeles Times*,(February 12, 2011), http://articles.latimes.com/2011/feb/12/business/la-fi-ct-fox-affiliates-20110212. *See also* "CBS Raises the Retrans Bar" (May 24, 2011), http://www.multichannel.com/article/468731-CBS_Raises_the_Retrans_Bar.php.

60 Federal Communications Commission, *Spectrum Analysis*, OBI Technical Paper No. 3, June 2010, p. 10.

"Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."[61] Broadcast TV remains the primary news source for most viewers, cited by adults 18+ as the primary news source nearly three times as often as cable news networks.[62] Moreover, broadcast news is the leading source for local weather, traffic and sports, and broadcast television is the medium rated as most involved in the local community.[63] "There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."[64]

"A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming."[65] Retransmission consent increases the total return that a station can expect from its programming, and tends to increase the expenditure level on programming that the station will choose. The increased incentives for quality programming can be manifest in improved quality of the local programming that stations produce, in furtherance of the FCC's emphasis on localism. It will also increase the quality of the syndicated programming that they acquire.

JOINT NEGOTIATION

The Commission seeks comment on whether it should be a *per se* violation of good-faith negotiation for a station to grant another station or station group the right to negotiate or the power to approve its retransmission consent agreement when the stations are not commonly owned. Such consent might be reflected in local marketing agreements ("LMAs"), Joint Sales Agreements ("JSAs"), shared services agreements, or other similar agreements.

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61 *See* 1992 Cable Act §2(a)(11).

62 TVB, "TV Basics," (March 2011), p. 25.

63 TVB, "TV Basics," (March 2011), p. 26.

64 *See* 1992 Cable Act §2(a)(12).

65 *See* 1992 Cable Act §2(a)(10).

By no means did all of the very few service disruptions which have occurred involve negotiations where a station granted another station or group of stations the right to negotiate or the power to approve its retransmission consent agreement. Moreover, where non-owned stations were included in negotiations which resulted in impasses, there is no evidence to suggest that this inclusion was a contributing factor to such impasses. The Commission provides no details whatsoever on how many impasses occurred involving, or were in the Commission's view the result of, a station granting another station or group of stations the right to negotiate or the power to approve its retransmission consent agreement.

The Commission also does not provide a rationale for distinguishing between stations that are commonly owned and those that are in an LMA or JSA. While not under common ownership, in terms of the Commission's view of owning the license, the two government antitrust authorities, the Department of Justice and the Federal Trade Commission, treat LMAs and JSAs like a merger when evaluating competitive impacts in the marketplace. If the antitrust laws would permit common ownership, but the stations have not merged due to the Commission's "voice test" or for other reasons, then stations in an LMA or JSA should be able to negotiate jointly. The analysis should turn on whether it would be permitted under the antitrust laws rather than some vague, unsubstantiated claim that joint negotiations lead to consumer harm.

The proposed rules can lead to unusual results which would not occur under an antitrust type of standard. For example, Sinclair in San Antonio owns the Fox affiliate (KABB) and the CW affiliate (KMYS) and under the Commission's proposed rules could jointly negotiate retransmission rights for these two stations. However, in Baltimore, due to the limited number of stations in the DMA, Sinclair owns the Fox affiliate (WBBF) and programs the CW affiliate (WNUV) through an LMA. Under the Commission's proposed rules it could not jointly negotiate for these stations. Numerous real world examples of this sort of arbitrary result exist.

Under the proposed rules, a station that multicasts two or more broadcast networks could negotiate retransmission consent for the two networks jointly, but could not do so if it owned and operated a station that was affiliated with one of the networks but operated another station through an LMA or JSA that was affiliated with the other network. Such a result is equally arbitrary. For example, recently in Evansville, IN Fox pulled its affiliation from one station (WTVW) and gave it to another station (WEVV) that already is a CBS affiliate. Fox will be broadcast on the CBS affiliate's D-2 channel.[66] The station can now negotiate for both CBS and FOX, but if the two stations had entered into a JSA they could not. Similarly, in Boise Idaho Fox recently moved its affiliation to a company which also owns the ABC affiliate in Boise, allowing that company to negotiate for both the ABC and FOX affiliates, which it could not have done under a JSA.[67] The increasing demands by networks for higher license fees as a means for sharing in retransmission consent payments received by their affiliates is likely to lead to more, not fewer, instances of joint ownership of two network affiliates, and thus more examples of the arbitrariness of the proposed restriction. In addition, the Commission's spectrum reclamation actions may move more stations in the direction of multicast broadcast.

Moreover, benefits flow from allowing stations that are part of an LMA or JSA to negotiate jointly. Significant efficiencies exist from the joint operation of two television stations, including the cost savings from negotiating contracts (including retransmission consent agreements) just once with a jointly run and managed pair of stations. Also, the LMA station may not be set up (or be in a position) to negotiate. Consider the LMA that Sinclair has had in Columbus, OH for 15 years. Sinclair owns WSYX and is in an LMA with WTTE. Subject to the licensee's ultimate oversight and control, WSYX handles all aspect of all deals for WTTE, including acquiring programming, negotiating with

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66 "Fox switches affiliates in two markets," (May 11, 2011), http://www.rbr.com/tv-cable/fox-switches-affiliates-in-two-markets.html.

67 This recent affiliation switch, as well as others that have occurred such as the acquisition of an affiliation agreement by Raycom in Honolulu (*see*, "Execs explain TV swap, but some see it as blurry," *Honolulu Star Bulletin,* (August 20, 2009), http://archives.starbulletin.com/content/20090820_Execs_explain_TV_swap_but_some_see_it_as_blurry), point out not only the arbitrariness of the proposed restriction on negotiating retransmission consent agreements, but also the incongruity of the Commission's rules which would have prohibited the owner of the ABC affiliate in Boise from acquiring the FOX station, but allow it to do exactly the same thing simply through private negotiations over content acquisitions.

Nielsen, and selling advertising. The LMA station is not set up to negotiate many aspects of its operation, let alone retransmission consent.

Additionally, it may not be possible to really separate the negotiations if one LMA partner can tell the other what it was paid. There may be implicit benchmarking by both sides.

Joint negotiations are a common feature in the market for programming. Many cable networks are commonly owned and marketed together. Indeed, there are often price incentives for the MVPD to purchase multiple networks. When the four major broadcast networks negotiate they generally do so for most or all of their cable networks and their owned and operated broadcast television stations.[68] The share of MVPD programming expenditures and the share subscriber viewership involved in these negotiations is greater than in joint negotiations resulting from an LMA or JSA. It is counter-intuitive to deny the efficiencies of joint negotiations to LMAs and JSAs while allowing larger combinations of programming content to enjoy those efficiencies.

Even if negotiating for an LMA or JSA were shown to provide a broadcaster with more bargaining power than they would have had separately, this is no evidence that it has tilted the balance of bargaining power in favor of the broadcasters for reasons discussed above. In the absence of such an illegal shift of bargaining power, a shift which can be held in check by existing antitrust laws, the Commission should not interject itself in arrangements which are permitted under antitrust law in reliance on a full analysis of market power and the efficiencies achieved through such arrangements.

COST TO CONSUMERS

MVPDs claim that any increase in retransmission costs must be passed on. But this is no different than any other increase in programming cost, such as those resulting

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68 For example, *see,* "Fox TV-pocalypse ended at Cablevision, averted at Dish Network," *The Washington Post,* (November 1, 2010), http://voices.washingtonpost.com/fasterforward/2010/11/fox_tv-pocalypse_ended_at_cabl.html. Fox's settlement with Dish Network involved its owned broadcast stations, FX, National Geographic Channel, and its regional sports networks. Its settlement with Cablevision involved its owned broadcast stations, Fox Business Network, National Geographic Wild, and Fox Deportes.

from license fee increases from ESPN, CNN, TBS, or Nickelodeon. Arguments that retail costs will rise or that other programming may be paid less or may be dropped, even if true, are not evidence of a market failure and the need for government intervention.

Furthermore, contrary to claims that any increase in retransmission consent fees will be fully passed through to subscribers, there are several reasons to believe this is will not be the case. First, in a competitive marketplace the greater the elasticity of demand, the less the cost increase is borne by consumers, *ceteris paribus*.[69] Increased competition in the MVPD market, through the growth of satellite and telephone providers, increases the elasticity of demand faced by any one MVPD. So, for example, this increased competition will limit a cable operator's ability to pass through to consumers any increase in retransmission fees.

Second, to the extent that MVPDs previously paid for and carried broadcast-network affiliated cable networks in exchange for retransmission consent of a broadcast network's owned and operated stations, MVPDs would be expected to re-evaluate their payments to these affiliated cable networks in light of now paying directly for retransmission consent.[70] In such earlier agreements, although substantial value was provided by the inclusion of retransmission consent rights for the owned and operated broadcast stations, typically none of the payments from the MVPDs was allocated to such rights. As the owners of these television stations now seek cash payments for these

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[69] Michael L. Katz and Harvey S. Rosen, *Microeconomics*, 2nd ed., Burr Ridge, IL: Irwin (1994), p. 370. In a competitive market the percent of the cost increase borne by consumers also depends on the elasticity of supply. In a monopoly market, the effect of cost changes on price depends not only on the elasticity of demand but also on the shape of the demand curve, and price can increase by less than the increase in cost. *See*, Jeremy I. Bulow and Paul Pfleiderer, "A Note on the Effect of Cost Changes on Prices," *Journal of Political Economy*, vol. 91, no. 1 (1983), pp. 182-185.

[70] A large number of cable networks are owned by the major broadcast networks which also own and operate broadcast television stations. For example, News Corporation, which owns the FOX television network and numerous broadcast stations which are FOX affiliates, also owns all or an interest in such cable networks as the Fox News channel, FX, FOX Business Network, Speed Channel, National Geographic Channel, Big Ten Network and numerous regional sports networks. The Walt Disney Company owns not only the ABC television network and numerous broadcast stations which are ABC affiliates, but also owns all or part of such cable networks as ESPN (numerous secondary ESPN channels), ABC Family, Soap Net, A&E, Lifetime and Lifetime Movie. NBC Universal (which was recently acquired by Comcast) owns not only the NBC television network and numerous broadcast stations which are NBC affiliates, but also owns all or part of such cable networks as Bravo, MSNBC, USA Network and Syfy Channel.

stations, the MVPDs would be expected to offer and pay a lesser amount for carriage of the cable networks included in the overall bundle of assets.

Finally, it seems that if MVPDs could simply pass through the full amount of any increase in retransmission consent fee payment to subscribers they would not be fighting the requested rate increases so vigorously.

The discussion so far has focused on the possible cost to consumers in terms of higher prices resulting from higher retransmission consent fees, but there are costs to consumers from not adequately compensating broadcasters for retransmission . These costs include a reduction in local broadcaster investment in news, public affairs and children's programming. Inadequate compensation also results in the migration of programming from OTA networks to cable networks, particularly sports programming. This migration includes the movement of the BCS games from Fox to ESPN, the movement of Monday Night Football from ABC to ESPN, the movement of NCAA "March Madness" basketball tournament games to Turner (TNT, TBS and truTV), the movement of MLB games to regional sports networks and the playoff games to TBS, the movement of NBA playoff games to TNT, the movement of NHL games to Versus, and the movement of NASCAR to ESPN.[71] Additionally, the NFL Network has started showing preseason and regular season professional football games. When these events migrate to cable, the cable networks raise their rates to the MVPDs, which may then be passed on to consumers as costs. The loss of sports programming for OTA adversely affects the 10 percent of households that do not subscribe to a pay service, as well as subscribers who might be considering cancelling their pay service.

EXCLUSIVITY

The commission also seeks comment on the potential benefits and harms of eliminating the Commission's rules concerning network non-duplication and syndicated

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71 "The great cable migration," (February 21, 2011), http://www.sportsbusinessdaily.com/Journal/Issues/2011/02/21/In-Depth/Media-story.aspx.

programming exclusivity.[72] The Commission's proposal to allow MVPDs to negotiate for alternative access to network programming by eliminating the Commission's network non-duplication and syndicated exclusivity rules would seem to run afoul of network affiliation agreements and flies in the face of the Commission's concern for localism.

In a typical distribution arrangement, several independent firms distribute a manufacturer's product. However, under such an arrangement each distributor benefits from the sales activities of the other. Hence, a distributor may engage in less sales activity than it is contracted to do in order to save money and "free rides" on the manufacturer's reputation. Free riding is said to occur when one firm benefits from the actions of another without paying for it. Where free riding is possible, each distributor has an inadequate incentive to engage in sales activities, since it cannot reap the full benefits of its efforts, to the detriment of the manufacturer. Establishing exclusive territories is one way that manufacturers deal with the free rider problem.[73]

In this case, the manufacturer is the broadcast network or the syndicated program supplier and the distributor is the local broadcast station. Part of the reason for establishing non-duplication and exclusivity is to encourage the local broadcast station to invest in advertising and promote the network programming and syndicated programming it acquires. Networks also want their affiliates to develop local programming to strengthen the station's position in the local market. The station makes investments in local originated programming (news and public affairs) based on being able to reach its local market audience. In addition, distributors generally pay a fee to receive such exclusivity. If MVPDs are allowed to replace a local broadcaster with an out-of-market broadcaster the local broadcaster will pay its affiliated network less and will have much less incentive to create or promote programming, to the disadvantage of the local audience, the network and the program syndicators.

72 NPRM at ¶ 42.

73 See, Carlton and Perloff, *Modern Industrial Organization*, Fourth Edition, Boston: Pearson (2005), p.421.

An MVPD not being able to go out of market to get a broadcast network feed is no different than the MVPD having to negotiate for the right to a cable network. The MVPD cannot simply import the signal from somewhere else (e.g., Canada) if it doesn't reach an agreement for the rights in the United States. The distinction between the business model for broadcast network programming (which utilizes separately owned affiliates, in part due to law which limits the percentage of the country which can be reached by broadcast stations owned by a single owner) and cable networks (which have one owner reaching the entire country) is not intended to have any difference in terms of market exclusivity. This exclusivity is simply provided by contractual agreement in the case of broadcast stations rather than by the mere circumstances of single ownership of cable networks. The Commission's network nonduplication rules merely provide a means for the enforcement of this consistent treatment of broadcast stations, as compared to cable networks.

Furthermore, the elimination of this enforcement mechanism would likely lead to more litigation. Rather than relying on the Commission to enforce exclusivity, broadcast stations would have to go through the court system to enforce their rights. Using the courts increases litigation costs for stations and MVPDs. This will likely take more time and may allow the MVPD time to circumvent the broadcast station's rights for a period of time.

INCREASED REQUESTS FOR CASH PAYMENT

The Commission asks if it should consider addressing the ability of broadcasters to condition retransmission consent on the purchase of other programming services, such as the programming of affiliated non-broadcast networks.[74]

This is an odd concern, considering that the Commission notes that today "broadcasters are increasingly seeking and receiving monetary compensation from MVPDs in exchange for consent to the retransmission of their signals" and that as a result

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[74] NPRM at ¶ 29.

of this change "disputes over retransmission consent have become more contentious." [75] Hence, on the one hand MVPDs (and the Commission) argue that the move from other forms of compensation to cash payments has given rise to more disputes but on the other hand MVPDs suggest eliminating some forms of non-cash compensation.[76]

When the first transactions concerning these rights were negotiated, leading cable operators insisted that they would make no cash payments to broadcasters and subsequently initiated discussions related to launching new cable networks as possible consideration for retransmission consent rights in lieu of cash payments. Eventually, agreements were reached between the broadcast networks and the major cable operators that provided for the cable operators to carry various new broadcast network-owned cable programming services in return for retransmission consent rights to local broadcast station signals. Today, it is a common practice for cable operators to carry cable networks as consideration for retransmission consent rights is a common practice. The FCC noted this practice in a 2000 order, and also observed that the practice is presumptively lawful.[77] Now MVPDs suggest the Commission adopt rules preventing broadcasters from seeking carriage of an affiliated cable network as compensation by making it a *per se* violation of good faith negotiating and require retransmission dispute resolution to "involve only stand-alone agreements for the broadcast signal."[78]

Permitting stations to offer deals that include carriage of cable channels in addition to or instead of cash doesn't change bargaining positions, but provides additional ways that a deal can be reached. Increasing the number of dimensions in which bargaining can take place expands the opportunity for welfare-enhancing agreements. It does so by increasing the chances that the parties place different values on particular terms, making a profitable trade possible. Eliminating such an option makes both parties

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75 NPRM at ¶ 2.

76 *See*, for example, Petition at 34.

77 FCC, First Report and Order, In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999 and Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, CS Docket No. 99-363, released March 16, 2000, ¶ 56, point 3.

78 Petition at 35.

worse off and increases the likelihood of an impasse. It seems contradictory that the FCC would consider narrowing the parties' options in negotiations, exactly what the "good faith" rule was designed to prevent.

Appendix A: A statistical model of broadcast station carriage fees

An appropriate statistical model relates cable network license fees to their main determinants—program expenditures, network advertising revenues, advertising avails provided to the MVPDs and network ratings. Once this relationship is estimated, the estimated model predicts a fair market value retransmission consent fee for the broadcast networks.

The fees MVPDs (and ultimately, viewers) are willing to pay for programs depend on the quality of the programs provided. Higher perceived program quality, in turn, is directly related to program expense. Therefore, one would expect that license fees per subscriber would increase as program expenditure increases.[79] License fees are measured as dollars/sub/month. Program expenditures are measured as billions of dollars per year.

Many cable networks also receive advertising revenues from national advertisers. If a cable network's per subscriber license fee is lower. MVPDs will provide it to more subscribers, other things equal. Wider distribution accordingly will be more attractive to advertisers and could result in greater advertising revenue. This should tend to reduce license fees. The analysis uses net advertising revenues which are measured as billions of dollars per year.[80]

The license fee is also likely to depend on the ability of the MVPD to insert advertising. An MVPD will be willing to pay more, other things being equal, for a network that provides the MVPD with advertising avails. In doing this, of course, the cable network gives up the opportunity to sell such spots to national advertisers and will require greater compensation. Hence, license fees should increase with the value of avails provided to the MVPD, other things equal. The value of avails provided to the MVPD is

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[79] Data on license fees, program expenditures, number of subscribers, advertising revenues, advertising avails, and ratings for basic cable networks are obtained from SNL Kagan, *Economics of Basic Cable Networks 2010*, December 2010. While data are provided for 177 cable networks, 36 networks were excluded from the analysis. See footnote 31.

[80] Gross advertising revenues are what the advertiser pays. Net advertising revenues are what the cable network receives after commissions are paid to advertising agencies.

measured as net advertising revenue times the ratio of local avails/year to national avails/year.

Finally, the network's ratings are taken into account in the analysis. While programming expenditure is a measure of quality, ratings captures non-pecuniary quality measures, such as creativity and originality. The measure of ratings used is average prime-time television households delivered in millions. Since ratings are based on a broadcast year, the ratings variable is lagged one period (i.e., for 2010 fees and expenditures the ratings for the 2009-2010 TV season are used).[81]

The general form of the statistical model is as follows:

$$\text{Fee}_{it} = \beta_1 \bullet \text{Program Expense}_{it} + \beta_2 \bullet \text{Advertising Revenue}_{it} + \beta_3 \bullet \text{Local Avails}_{it} + \beta_4 \bullet \text{Rating}_{it} + \beta_t \bullet \text{Year Dummy} + \varepsilon_{it}$$

where Fee is the average per-subscriber per-month licensing fee, Program Expense is the annual program expenditure, Advertising Revenue is the annual net advertising revenue, Local Avails is the annual estimated value of the advertising avails that the network makes available to the MVPD, Rating is the prime-time TVHH delivered, ε is a statistical error term, subscript *i* indicates network *i*, and subscript *t* indicates year *t*. The model allows for individual year-specific effects, β_t.

All monetary variables are expressed in real 2010 dollars, using the GDP implicit price deflator. Standard ordinary least squares estimation of the model produces the following results:[82]

81 Ratings data are not available for all cable networks for all years.

82 The last term in the model is an error term, which is the difference between the predicted results and the actual observation. Ordinary least squares ("OLS") is a procedure that minimizes the sum of the squares of the error terms—hence, the term "least squares." The OLS estimator is a standard statistical procedure that gives the best, straight-line, unbiased estimate of the relationship between the variables.

Model estimation results

F:	794.5	Pr > F:	<.0001	
R^2:	0.9483	Root MSE:	0.1005	
Parameter	Estimate	T-value for H_0:Parameter=0	Pr > |T|	Std. Error of Estimate
β_1	0.9669	73.68	<.0001	0.0131
β_2	–0.3682	–7.67	<.0001	0.0480
β_3	0.1498	0.73	0.4650	0.2049
β_4	0.1560	10.94	<.0001	0.0143
β_{2010}	0.0326	2.61	0.0093	0.0125

From the model results, it is possible to construct an estimate of the fair market value of retransmission of the broadcast networks. Data for the broadcast networks is from SNL Kagan. The estimated per-subscriber per-month fee averages $2.48 for each of the four major broadcast networks (ABC, CBS, NBC, and Fox) and averages $0.36 for each of the smaller broadcast networks (The CW and MyNetworkTV).

This is a conservative estimate of the value of retransmission since it ignores both expenditures on and the nature of local news, local sports, other locally originated programming and syndicated programming carried by local broadcast stations.