



May 27, 2011

Hon. Julius Genachowski  
Chairman,  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington, D.C. 20554

**RE:**

- MB Docket No. 10-71: *Amendment of the Commission's Rules Related to Retransmission Consent*
- MB Docket No. 07-198: *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*
- GN Docket No. 10-25: *The Future of Media and Information Needs of Communities in a Digital Age*

Dear Chairman Genachowski:

The Joint Center for Political and Economic Studies (Joint Center) offers this formal response to the Commission's Notice of Proposed Rulemaking regarding reform of its retransmission consent rules.<sup>1</sup> Specifically, we seek to highlight the need for more data that would enable the Commission to empirically assess the effects of retransmission consent negotiations on minority consumers and new entrants to the media marketplace. Further, if reforms to the retransmission consent rules are necessary—and it appears that they are—the Commission should consider the extent to which its program access and program carriage rules require reform as well, since a substantial amount of non-broadcast cable programming is owned by broadcasters, whose dominance of channel lineups can make it difficult for new and independent minority programmers to find an audience.

The Joint Center also supports the Commission's proposed reforms of its reciprocal good faith negotiations requirements inasmuch as they would promote media ownership diversity and the interests of minority consumers. We view these proposed rules as the kinds of race-neutral mechanisms that should be exhausted before the Commission pursues the much more difficult

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<sup>1</sup> See Amendment of the Commission's Rules Related to Retransmission Consent, MB Docket No. 10-71, 76 Fed. Reg. 17071 (proposed March 3, 2011)(to be codified at 47 CFR pt. 76)(“NPRM”). See 47 C.F.R. §§ 76.64-65.

task<sup>2</sup> of implementing race-conscious approaches to fulfill the underlying goals of the Commission’s unambiguous diversity mandate.

As the Commission notes in the NPRM, every three years, broadcast owners are permitted to choose one of two regulatory frameworks under which they will obtain carriage of their broadcast stations by multichannel video providers (MVPDs): must-carry<sup>3</sup> or retransmission consent.<sup>4</sup> Must-carry entitles broadcast owners to guaranteed carriage of their owned-and-operated stations and affiliates, but not in exchange for compensation from MVPDs. The retransmission consent regime allows broadcast owners to negotiate with MVPDs for compensation in exchange for the right to distribute their “must-have” broadcast programming. This compensation is usually in cash or, in many cases, in the form of guaranteed carriage of the same broadcast owners’ *non-broadcast* programming, such as pay television networks like Showtime or ESPN. The parties are required by the rules to negotiate the terms of their retransmission consent agreements in good faith.<sup>5</sup>

The impetus for this proceeding was a petition filed last year by Time Warner Cable and several public interest organizations and MVPDs requesting that the Commission revise its retransmission consent rules.<sup>6</sup> The petition noted that the “emerging changes to the video programming landscape in recent years exacerbated by Commission rules that limit the ability of MVPDs to carry network and syndicated programming from other sources, have invited abuses of this artificially created right.”<sup>7</sup> Such practices may have the potential to operate as market entry barriers for minority owners. For example, conditioning retransmission consent on the exclusion from carriage of significantly viewed (“SV”) stations, some of which may be minority-owned, may also militate against minority media ownership. Further, the Commission seeks comment on whether it should be a *per se* violation of the good faith requirement for stations to negotiate on behalf of other stations or groups via local marketing agreements (LMAs) and joint sales agreements (JSAs).<sup>8</sup> This practice may lead to significant disparities between the retransmission consent fees the stations with such relationships are able to negotiate, compared to those which other stations in the market, including minority-owned stations, have the bargaining power to realize. The practice of requiring carriage of non-broadcast programming may also serve as a market entry barrier for minority-owned programmers seeking access to pay television channels. These budding entrepreneurs are not able to leverage the bargaining clout gleaned from access to stores of existing capital. We defer to the Commission to acquire and release data that are necessary to determine how these practices actually affect minority new entrants seeking to establish a presence in both broadcast and non-broadcast television.

<sup>2</sup> See *Adarand v. Peña*, 515 U.S. 200 (1995)(Racial classifications are “constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

<sup>3</sup> 47 U.S.C. §§ 325(b), 338, 534.

<sup>4</sup> 47 U.S.C. §§338, 614.

<sup>5</sup> 47 C.F.R. § 76.65(b)(1).

<sup>6</sup> Time Warner Cable, et al., Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent, MB Docket No. 10-71 (filed Mar. 9, 2010) *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020396623> (“Time Warner Cable Petition”)(last visited May 26, 2011).

<sup>7</sup> *Id.* at 4.

<sup>8</sup> See NPRM at 14, ¶23.

The Commission also lacks data on how retransmission consent negotiation impasses affect minority consumers. For example, data on the percentage of minorities who subscribe to basic service tiers may instruct us in determining how they are affected when programming blackouts occur. Further, data on how many minorities do not subscribe to pay television services at all may also inform us as to how to determine when retransmission consent negotiations have been “unreasonably” delayed, from the perspective of minority and low-income consumers.<sup>9</sup>

While changes to the retransmission consent rules are likely necessary, reforms to the Commission’s program access and program carriage rules may also be required. In its comments filed in response to the Time Warner Cable Petition, Media Access Project noted the Commission’s 2007 proceeding to address similar reforms to the Commission’s program carriage and program access rules.<sup>10</sup> The American Cable Association has found that large cable programmers segregate their minority brands, such as BET, from their “marquee networks for general audiences, such as Nickelodeon or MTV” when they negotiate the terms of their carriage agreements with MVPDs.<sup>11</sup> We ask the Commission to assess these rules from the perspective of new entrants, to ensure some level of meaningful carriage of minority-owned programming.

In its comments filed in response to the Time Warner Cable Petition, the National Association of Broadcasters, citing to the Supreme Court’s decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, stated that “it is axiomatic that, when Congress has ‘spoken to the precise question at issue,’ then ‘the agency,’ as well as a reviewing court, ‘must give effect to the unambiguously expressed intent of Congress.’”<sup>12</sup> We agree that Congress’ directive that the Commission must not affect the *outcome* of retransmission consent negotiations is unambiguous. And the Commission’s authority “to govern the exercise... of retransmission consent” is similarly precise.<sup>13</sup> However, the Commission’s diversity mandate<sup>14</sup> is no less clear: it resulted from thirty years of developments ignited by WLBT-TV’s refusal to broadcast

<sup>9</sup> See NPRM at 15, ¶26 (seeking comment on “what it means to ‘unreasonably’ delay retransmission consent negotiations.”).

<sup>10</sup> Comments of Media Access Project, Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent, MB Docket No. 10-71 at 2 (filed May 18, 2010) *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020461935> (last visited May 26, 2011) (“The [retransmission consent petition] raises several issues that are similar to those discussed in the 2007 NPRM, and on which the Commission already has sought comment, with respect to programming negotiations governed by the Commission’s program access rules and program access complaint procedures.”)(citing Implementation of the Cable Television Consumer Protection and Competition Act of 1992, MB Docket Nos. 07-29 & 07-198, *Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd 17791, ¶¶ 115-137 (2007) (“2007 NPRM”).

<sup>11</sup> *Id.* at 8 (citing Letter from Matthew M. Polka, President and CEO, American Cable Association, to Hon. Kevin J. Martin, Chairman, Federal Communications Commission, MB Docket No. 07-198, at 1 (filed Sept. 8, 2008) *available at* <http://fjallfoss.fcc.gov/ecfs/document/view?id=6520066035> (last visited May 27, 2011)).

<sup>12</sup> See Comments of CBS Corporation, Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent, MB Docket No. 10-71 at 80 (filed May 18, 2010)(citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

<sup>13</sup> 47 U.S.C. 325 (3)(A).

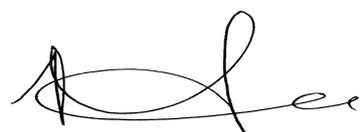
<sup>14</sup> See 47 U.S.C. §151 (The Act is intended for “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of ... promoting ... property ...”).

network programming discussing the civil rights movement.<sup>15</sup> Therefore, we respectfully ask the Commission to fully consider the effect of its proposed rules on minority consumers and new entrants.

Sincerely,

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Ralph B. Everett, Esq.  
President and CEO,  
The Joint Center for Political and Economic Studies

A handwritten signature in black ink, appearing to read "Nicol E. Turner-Lee", with a long horizontal line extending to the right.

Nicol E. Turner-Lee, Ph.D.  
Vice-President and Director,  
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<sup>15</sup> See *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 998 (D.C. Cir. 1966) (“UCC I”) (overturning WLBT-TV’s license renewal because the Commission did not grant a hearing); See also *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (“UCC II”) (vacating the renewal of WLBT-TV’s license and directing the Commission to auction the spectrum.).