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

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

REPLY COMMENTS OF TIME WARNER CABLE INC.

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Time Warner Cable Inc. ("TWC") hereby submits these reply comments in response to opening comments filed in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

The opening comments filed in response to the NPRM reflect broad consensus in favor of sweeping reforms to the current retransmission consent rules and related provisions. MVPDs, independent programmers, and leading consumer groups and public interest organizations across the ideological spectrum—that is, nearly every stakeholder except broadcast interests—agree that the Commission should amend its rules to prevent anticompetitive conduct and protect consumers from programming blackouts and spiraling fees.

Broadcast groups attempt to whitewash the consumer harm caused by their brinkmanship tactics, arguing that the Commission should resist calls to interfere with what they characterize as a "market-based" regime. But as TWC's comments explained,[1] and as other commenters confirm,[2] there is nothing market-based about broadcasters' exploitation of the various

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[1] Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 5-7 (filed May 27, 2011) ("TWC Comments").

[2] *See, e.g.*, Comments of DIRECTV, Inc., MB Docket No. 10-71, at 8 (filed May 27, 2011) ("DIRECTV Comments"); Comments of American Cable Association, MB Docket No. 10-71, at 2 (filed May 27, 2011) ("ACA Comments"); Comments of Digital Liberty Americans for Tax Reform, MB Docket No. 10-71, at 3 (filed May 27, 2011) ("Digital

regulatory preferences conferred by the existing regime. Similarly, broadcasters' arguments that their hold-out threats and escalating fee demands actually *benefit* consumers do not pass the straight-face test.

In fact, in other contexts—such as in communications with Wall Street—broadcasters more candidly acknowledge that recent increases in retransmission consent fees stem from brinkmanship tactics facilitated by the Commission's rules. As CBS's CEO Les Moonves recently boasted, "going dark offers the 'ultimate leverage' in retransmission consent negotiations."[3] Recognizing that the existing rules fail to curb such tactics, and leaving no doubt that the Big Four networks now view retransmission consent as a shadow copyright regime—notwithstanding Congress's insistence that it remain entirely separate from copyright—Moonves added: "It really is the sky's the limit … [and] the weighting will get even more strong in our favor."[4]

As TWC stated in its opening comments, the optimal response to such heavy-handed and harmful conduct is to eliminate the regulatory provisions—including not only retransmission consent but must-carry and tier-placement requirements, among other broadcaster preferences—that enable it to occur. Pending the enactment of deregulatory legislation to make the necessary statutory changes, however, the Commission should do what it can to mitigate ongoing harms to consumers. TWC has advocated three principal types of reform, each of which has strong support in the record: (1) elimination of current rules that facilitate brinkmanship, such as territorial exclusivity provisions; (2) clarification of good-faith requirements and addition of new

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Liberty/Americans for Tax Reform Comments"); Comments of the National Taxpayers Union, MB Docket No. 10-71, at 2 (filed May 27, 2011) ("National Taxpayers Union Comments").

3 CABLEFAX DAILY, June 3, 2011, at 2.

4 *Id.*

per se prohibitions to deter and punish broadcasters' anticompetitive conduct; and (3) establishment of dispute resolution, rate-setting, and interim carriage procedures to protect consumers caught in the crossfire of retransmission consent disputes. In addition, the Commission should ensure that its notice and "sweeps" rules apply in an evenhanded and nondiscriminatory manner, not in a way that unfairly singles out cable operators. Such reforms, while not a complete fix, would help prevent the consumer harms associated with blackouts and escalating fees pending action by Congress to eliminate the artificial retransmission consent regime altogether.

DISCUSSION

I. THE RECORD POWERFULLY REFUTES BROADCASTERS' ARGUMENTS IN DEFENSE OF THE STATUS QUO

A. The Opening Comments Confirm That Retransmission Consent Is Not a Market-Based Mechanism, But Rather an Artificial Construct Born of Anachronistic Regulation.

As TWC explained in its opening comments, retransmission consent has never been a free market mechanism; rather, it has always existed as part of a complicated system of government-created rights designed to preserve free over-the-air television. Together with must-carry rights, territorial exclusivity rules, tier-placement obligations, and other broadcaster protections, the existing retransmission consent regime *precludes* actual market-based negotiations and is increasingly causing consumer harm.

Although broadcasters in other respects recognize that retransmission consent rights are closely tied to other regulations, they ignore this reality when urging the Commission to refrain from "intervening" or "interfering with" purportedly market-based negotiations.[5] These

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[5] *See, e.g.*, Comments of The Walt Disney Company, MB Docket No. 10-71, at 6 (filed May 27, 2011) ("Disney Comments") (opposing "government intervention" with respect

commenters fail to appreciate that the government intervened long ago when it established retransmission consent. As other commenters recognize, the artificial retransmission consent right—together with the concomitant negotiation process and the web of related rules—is a product of pervasive government intervention and thus could not be "shielded" from government involvement.[6] In short, retransmission consent is fraught with regulatory intricacies, not "private-market intricacies" as the CBS Affiliates claim.

While broadcasters attempt to paint the reforms at issue as "radical upheavals that would gut the system of marketplace negotiations that was carefully crafted by Congress,"[7] there is nothing remotely radical about adjusting the regulatory framework to make it better suited to achieve its intended purposes. Indeed, broadcasters seem to miss the irony of claiming that a system of rules "carefully crafted by Congress" and the Commission constitutes a "marketplace."[8] At any rate, broadcasters' avowed preference for market mechanisms simply cannot be squared with their insistence on clinging to market-distorting regulation, such as territorial exclusivity protections, must-carry and tier-placement rights, and the like.

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to retransmission consent); Comments of the CBS Television Network Affiliates Association, MB Docket No. 10-71, at 15 (filed May 27, 2011) ("CBS Affiliates Comments") (arguing that the Commission should not "interfere with the private-market intricacies of retransmission consent negotiations"); Comments of Fox Entertainment Group, Inc. and Fox Television Stations, Inc., MB Docket No. 10-71, at 3 (filed May 27, 2011) ("Fox Comments") (arguing that the Commission should not insert itself into "the marketplace negotiations envisioned by Congress").

6 *See, e.g.*, Comments of Discovery Communications LLC, MB Docket No. 10-71, at 3 (filed May 27, 2011) ("Discovery Communications Comments"); Comments of Starz Entertainment, LLC in Response to Notice of Proposed Rulemaking, MB Docket No. 10-71, at 8 (filed May 27, 2011) ("Starz Entertainment Comments"); Digital Liberty/Americans for Tax Reform Comments at 2-3.

7 Joint Comments of Barrington Broadcasting Group, LLC, Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Newport Television, LLC, Post-Newsweek Stations, Inc., and Raycom Media, Inc., MB Docket No. 10-71, at i (filed May 27, 2011) ("Joint Broadcasters Comments").

8 *Id.*

B. The Commission's Existing Rules Do Not Create a Level Playing Field, But Rather Tilt Negotiations Sharply in Broadcasters' Favor.

Broadcasters likewise cannot credibly argue that the special protections they enjoy under the existing rules "make possible a level playing field for retransmission consent negotiations."[9] To the contrary, those regulatory preferences unjustifiably tilt the playing field in broadcasters' favor. Thus, when the CBS Affiliates assert that the Commission should not "intrude in the market to give MVPDs [an] artificial and unwarranted advantage,"[10] they have it exactly backwards; the existing rules give broadcasters artificial and unwarranted advantages and cause significant harm to consumers as a result. Indeed, it is impossible to fathom how the *elimination* of regulatory preferences (including the Commission's territorial exclusivity provisions, tier-placement rules, and the like) could ever be characterized as "artificial." Broadcasters' sense of entitlement apparently runs so deep that they regard these measures as inalienable rights. They are not.

Congress established retransmission consent and the related regulatory preferences at issue two decades ago because it viewed "cable television as potentially harmful to local broadcast television service and the ability of these stations to serve the public interest."[11] Even assuming such preferences were appropriate when they were adopted decades ago (which is

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9 CBS Affiliates Comments at 9; *see also* Comments of the National Association of Broadcasters, MB Docket No. 10-71, at 28 (filed May 27, 2011) ("NAB Comments") (asserting that "Joint Negotiations also help level the playing field between broadcasters and MVPDs"); Comments of the NBC Television Affiliates, MB Docket No. 10-71, at 3 (filed May 27, 2011) ("NBC Affiliates Comments") (arguing that the territorial exclusivity rules "create a level playing field for retransmission consent negotiations"); Comments of Sinclair Broadcast Group, Inc., MB Docket No. 10-71, at 31 (filed May 27, 2011) ("Sinclair Comments").

10 CBS Affiliates Comments at 19.

11 S. REP. NO. 102-92 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1171 ("Senate Report").

debatable at best), it is abundantly clear that these rules cannot be justified in the current environment. Vigorous competition among MVPDs has undermined the rationale for giving broadcasters special regulatory protections. And broadcasters' exploitation of these protections to force MVPDs and their subscribers to pay higher and higher fees for "free" over-the-air programming—or else lose access to such programming—demonstrates that the current rules no longer serve the public interest.

In fact, the principal public interest threat today stems not from cable operators, as Congress believed would be the case in 1992, but from the power of major broadcast network conglomerates. In an era when broadcast executives openly boast about their "power to 'go dark'" and leave no doubt about their intention to continue exploiting this "ultimate leverage,"[12] it should be obvious to the Commission that its rules are being used to subvert the public interest. Indeed, broadcasters would be far less able to threaten blackouts or to demand unreasonable fees (which are inevitably passed through to consumers) without the leg-up afforded by network non-duplication and syndicated exclusivity protections, basic tier placement and the "must buy" nature of that tier, and the array of other regulatory preferences they enjoy. And although Congress may have believed that cable operators had the upper hand when it enacted retransmission consent in 1992, Congress also provided the Commission with the tools and responsibility to adjust its implementing rules to ensure its underlying goals would still be met if, as is now the case, those circumstances changed.

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[12] CABLEFAX DAILY, June 3, 2011, at 2.

C. The Rules Governing Retransmission Consent Are Not Working as Intended.

Despite the Commission's recognition of the mounting consumer harms associated with retransmission consent,[13] broadcasters inexplicably cling to the tired refrain that the system is "working as intended."[14] This claim is simply incredible. Congress intended that retransmission consent and must-carry would "advance the public interest" by preserving the public's access to free over-the-air television.[15] But the system is now working against Congress's stated policy goals, by creating an incentive and ability for broadcasters to threaten to withhold and actually withhold their signals in connection with their exercise of retransmission consent rights. By the same token, the existing rules have facilitated broadcasters' efforts to drive up the cost of supposedly "free" broadcast programming, notwithstanding Congress's directive to prevent retransmission consent fees from adversely affecting basic cable rates.[16]

To the extent that broadcasters argue that the "value" of network programming justifies these hikes in retransmission consent fees,[17] they overlook the fact that, as a matter of copyright law, MVPDs *already have* a license—independent of retransmission consent—to retransmit the

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13 NPRM ¶ 20 ("In recent times, the actual and threatened service disruptions resulting from increasingly contentious retransmission consent disputes present a growing inconvenience and source of confusion for consumers.").

14 Comments of Nexstar Broadcasting, Inc., MB Docket No. 10-71, at 13 (filed May 27, 2011) ("Nexstar Comments"); Joint Comments on behalf of The Named State Broadcasters Associations, MB Docket No. 10-71, at 12 (filed May 27, 2011); Fox Comments at 1-2; Disney Comments at 8.

15 Senate Report at 1168.

16 *See* 47 U.S.C. § 325(b)(3)(A).

17 *See, e.g.*, Comments of CBS Corporation, MB Docket No. 10-71, at 6 n.13 (filed May 27, 2011) ("CBS Comments") (arguing that "there is no justification for CBS Television Network programming being accorded a lesser value than that of the USA Network—which receives 62 cents per subscriber according to the latest SNL Kagan estimates—when some of USA's highest-rated shows are CBS reruns, including NCIS and CSI").

network programming embodied in the station's signal.[18] This license gives MVPDs all necessary copyrights to carry the local and distant signals. Moreover, the rates set for the compulsory license reflect Congress's judgment regarding the proper pricing and economics of network carriage in the context of cable retransmission of broadcast stations.

As TWC and other commenters have explained, Congress and the Commission both specified that, far from serving as a shadow copyright regime, the retransmission consent right established with respect to "the broadcaster's signal" (a right owned directly by the stations, not the networks) is "*entirely separate* from the programming contained in the signal."[19] Indeed, the Commission stated that, consistent with congressional intent as set forth in the 1992 Cable Act, its retransmission consent rules were "intend[ed] to maintain th[e] distinction" between "television stations' rights in their signals and copyright holders' rights in programming carried on that signal."[20] Thus, it is contrary to Congress's intent for stations and networks to attempt to justify rates for retransmission consent based on arguments about the value of copyrighted network programming.

Notably, when it suits their interests, broadcasters acknowledge that the retransmission consent regime was never intended to be used in this manner. In a recent court filing, the owners

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18 *See* 17 U.S.C. § 111.

19 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965 ¶ 173 (1993) ("*1992 Cable Act Report and Order*") (emphasis added); *see also id.* ("Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights.… [R]etransmission consent is a right created by the Communications Act that vests in a broadcaster's signal; hence, the parties to any contract must have bargained over this specific right, not a copyright interest."); 47 U.S.C. § 325(b)(6) ("Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 14, United States Code.").

20 *1992 Cable Act Report and Order* ¶ 173.

of approximately 1,200 local television stations—including each of the Big Four networks and *every* broadcast station group that filed comments opposing the retransmission consent reforms proposed in the NPRM[21]—quote Commission precedent in stating that "Congress made clear that copyright applies to the programming and is thus distinct from signal retransmission rights."[22] Accordingly, the broadcasters agree that "[a]s a matter of copyright law, the royalties distributed under Sections 111 and 119 are compensation in full to copyright owners for the retransmission of Applicants' broadcast signals, both inside and outside their local markets."[23] The broadcast networks and stations further agree that "[i]n enacting the compulsory copyright licensing regimes[,] … Congress expressed the view that copyright owners should not be entitled to any further royalties associated with cable or satellite retransmissions of television programming within each station's local market."[24] NAB has further admitted that "Congress has made it abundantly clear" that retransmission consent agreements, on the one hand, and copyright licenses, on the other, "are entirely separate and distinct."[25]

Nevertheless, in the context of *this* proceeding, broadcasters sing a very different tune. In particular, the Big Four networks try to justify their improper use of retransmission consent as a

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21 WPIX, Inc., *et al.*'s Petition for Determination of Reasonable License Fees for Local Television Stations at Exh. A, WPIX, Inc. v. Broadcast Music, Inc., No. 09-cv-10366 (S.D.N.Y. Dec. 21, 2009), ECF No. 1.

22 Notice of Retransmission Consent Fee-Related Adjudicative Facts at 8, WPIX, Inc. v. Broadcast Music, Inc., No. 09-cv-10366 (S.D.N.Y. Apr. 22, 2011), ECF No. 36 ("Statement of Retransmission Consent Fee-Related Facts") (Applicants' Paragraph No. 11) (quoting *1992 Cable Act Report and Order* ¶ 173 and citing Senate Report).

23 *Id.* at 5 (Applicants' Paragraph No. 4).

24 *Id.* (Applicants' Paragraph No. 5).

25 *Copyright Licensing in a Digital Age: Competition, Compensation and the Need to Update the Cable and Satellite TV Licenses; Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 12 (Feb. 25, 2009) (statement of David K. Rehr, President and CEO, National Association of Broadcasters).

vehicle to capture more value for programming *already licensed* to MVPDs under the compulsory copyright statute based on the very theories they disclaim elsewhere. Despite arguing in court that compulsory copyright license payments "are compensation in full" for broadcast programming, network executives argue in this context that the programming they supply somehow entitles them to additional compensation through the retransmission consent process.[26] Similarly, Sinclair asserts that it should be a violation of the good faith standards to "refus[e] … to consider the price of non-broadcast programming when negotiating retransmission rights."[27] But this proposal rests on the same erroneous, apples-to-oranges comparison between non-broadcast programming, for which MVPDs must purchase a copyright license, and broadcast programming, for which MVPDs *already have* a copyright license through the statutory licensing regime. Sinclair's proposal thus seeks, in essence, to force MVPDs to pay for a *second* copyright license for broadcast programming through the retransmission consent process.[28]

The Commission should not countenance such efforts, as they would turn congressional intent on its head. Rather, the Commission should reaffirm that paying compensation based on the asserted value of network (or other) programming is not a legitimate or permissible purpose

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26 *See, e.g., Les Moonves Insists That Retrans Cash Is Network Driven*, RADIO BUSINESS REPORT (June 3, 2011), *available at* http://www.rbr.com/tv-cable/les-moonves-insists-that-retrans-cash-is-network-driven.html ("[N]etwork programming is the main reason for retrans being paid … '[s]o we should have a fair share.'"). *See also* TWC Comments at 9 n.20.

27 Sinclair Comments at 16.

28 Moreover, as the Commission recently acknowledged, in determining the fair market value of a broadcast station's retransmission consent, it is appropriate to compare "current or previous contracts between MVPDs and broadcast stations," not the terms of carriage agreements relating to *cable networks*. *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, App. A. § VII.B (2011) ("*Comcast-NBCU Order*").

of the retransmission consent rules. The Copyright Office is conducting a parallel review of the compulsory copyright regime,[29] and the broadcast networks should address any asserted shortcomings of that regime in that proceeding, rather than by hijacking the retransmission consent process. Indeed, as the broadcasters themselves put it in their court proceeding: "Copyright owners enjoy *no rights* under the 1992 [Cable] Act, as amended by STELA, and instead must look to Sections 111 and 119 of the Copyright Act for recompense for any uses of copyrighted works by cable operators or satellite carriers in relation to such retransmissions."[30]

II. THE RECORD FURTHER CONFIRMS THAT THE COMMISSION SHOULD ELIMINATE REGULATORY PROTECTIONS FOR BROADCASTERS THAT DISTORT CARRIAGE NEGOTIATIONS AND CAUSE CONSUMER HARM

A. The Commission Should Repeal the Exclusivity Rules and Affirmatively Prohibit Territorial Exclusivity Agreements.

Of all the reforms proposed in the NPRM, the elimination of the network non-duplication and syndicated exclusivity rules enjoys the broadest support among commenters. Traditional cable operators of all sizes,[31] DBS providers,[32] telco video providers,[33] independent

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29 Section 302 Report to Congress, Notice of Inquiry, 76 Fed. Reg. 11816 (Mar. 3, 2011) (U.S. Copyright Office Docket No. RM 2010-10).

30 Statement of Retransmission Consent Fee-Related Facts at 10 (Applicants' Paragraph No. 14) (emphasis added).

31 *See, e.g.*, Comments of Cablevision Systems Corporation, MB Docket No. 10-71, at 20 (filed May 26, 2011) ("Cablevision Comments"); Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC d/b/a Suddenlink Communications, and Insight Communications Company, Inc., MB Docket No. 10-71, at 15 (filed May 27, 2011) ("Mediacom *et al.* Comments"); Comments of SureWest Communications, MB Docket No. 10-71, at 14 (filed May 27, 2011) ("SureWest Communications Comments").

32 *See* DIRECTV Comments at 21; Comments of DISH Network L.L.C., MB Docket No. 10-71, at 27 (filed May 27, 2011) ("DISH Network Comments").

33 *See* Comments of AT&T, MB Docket No. 10-71, at 16 (filed May 27, 2011) ("AT&T Comments"); Comments of Verizon, MB Docket No. 10-71, at 11 (filed May 27, 2011).

programmers,[34] and public interest organizations[35] all agree that the exclusivity rules severely distort negotiations, strengthen broadcasters' already considerable bargaining power, and cause consumer harm.

Broadcasters, on the other hand—worried about losing the Commission's blessing for anticompetitive territorial exclusivity agreements—raise a number of objections to repealing these rules. *First*, they claim that territorial exclusivity rights are necessary under the compulsory copyright licensing system. In so doing, broadcasters ignore the fact that Congress considered the impact of, and expressly planned for, the repeal of the Commission's exclusivity rules when it enacted the compulsory copyright statute. *Second*, recognizing that private contractual exclusivity arrangements for retransmission consent likely would not be enforceable absent the regulatory blessing they currently enjoy, broadcasters seek to avoid the "difficulties [of] protecting" territorial exclusivity through the courts.[36] *Third* and finally, broadcasters assert, quite inexplicably, that providing MVPDs with the ability to avert the loss of network programming by importing distant signals during a blackout would somehow be contrary to the public interest. As discussed in more detail below, none of these objections has any merit.

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34 *See, e.g.*, Discovery Communications Comments at 12; Starz Entertainment Comments at 8.

35 *See, e.g.*, Digital Liberty/Americans for Tax Reform Comments at 3; National Taxpayers Union Comments at 3; Comments of Public Knowledge and New America Foundation, MB Docket No. 10-71, at 10-11 (filed May 27, 2011) ("Public Knowledge/New America Foundation Comments"); Comments of Sports Fan Coalition, Inc., MB Docket No. 10-71, at 5-10 (filed May 27, 2011) ("Sports Fan Coalition Comments").

36 Comments of Sony Pictures Television Inc., MB Docket No. 10-71, at 10 (filed May 27, 2011) ("Sony Pictures Television Comments").

1. Operation of the compulsory copyright regime does not depend on continued application of the exclusivity rules.

Several broadcasters argue that the exclusivity rules "are intertwined with the cable compulsory license," and that eliminating these rules would somehow derail the operation of the compulsory licensing regime.[37] While the two regimes indeed are related, the claim that territorial exclusivity rights are a necessary component of the compulsory license is wholly unfounded. Rather, the compulsory copyright statute *presupposes* that MVPDs would import distant signals, by specifying the royalty rates for programming contained in those distant signals.[38] In fact, value assigned to distant signals is the primary source of compensation for rights holders under the compulsory copyright regime.[39] Moreover, the copyright statute expressly contemplates adjustments to royalty rates should the Commission amend or repeal its exclusivity rules,[40] and the Copyright Royalty Tribunal has made such adjustments based on

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37 Disney Comments at 14-18; *see also*, *e.g.*, Sinclair Comments at 21-22 ("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 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.").

38 *See* 17 U.S.C. § 111(f)(5) (describing the royalty scheme for broadcast "programming carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programming").

39 *Id.* § 111(d)(5).

40 *See id.* § 801(b)(2)(B)-(C) (providing for adjustments to applicable royalty rates under Section 111 "[i]n the event that the rules and regulations of the Federal Communications Commission are amended … to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals" or "in the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity").

previous Commission action to repeal a prior version of the syndicated exclusivity rules.[41] Thus, elimination of territorial exclusivity protections and continued importation of signals from non-local suppliers of network programming would be entirely consistent with the compulsory licensing regime and congressional intent.

Disney attempts unsuccessfully to defend the exclusivity rules as a necessary "counter-weight to an imperfect compulsory licensing system" in which copyright holders are purportedly "not paid full value."[42] Even apart from the complete absence of any support for the assertion that licensing fees are too low, that claim flies in the face of congressional intent. As noted above, Congress made clear, and the Commission unequivocally has confirmed, that payments for retransmission consent are entirely distinct from copyright royalties.[43] The retransmission consent regime was never intended to be a shadow copyright regime that would allow stations to collect for the "value" of copyrights they do not own and then transfer those revenues back upstream to the networks.[44]

Disney also cites the 1988 *Program Exclusivity Report and Order* for the proposition that the exclusivity rules are "uniquely tied" to the compulsory copyright regime,[45] but that order

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41 *See Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry*, 47 Fed. Reg. 52146 (Nov. 19, 1982), *aff'd sub nom.*, *NCTA v. Copyright Royalty Tribunal*, 724 F.2d 176 (D.C. Cir. 1983) (adjusting the compulsory copyright royalty fee after the Commission's repeal of its syndicated exclusivity rules in 1980).

42 Disney Comments at 18.

43 *See supra* Section I.C.

44 138 CONG. REC. H6493 (daily ed. July 23, 1992) (statement of Rep. Chandler) (explaining during floor debate about the 1992 Cable Act that retransmission consent should not serve "as a subsidy for major networks").

45 Disney Comments at 16 (quoting *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 ¶ 153 (1988) ("*Program Exclusivity Report and Order*")).

nowhere suggests that the exclusivity rules should be set in stone because of the existence of the compulsory copyright license. Rather, the Commission concluded a few sentences later that, "[c]onsistent with our previous determination that the Cable Act does not modify the general regulatory scheme established by Congress in the Copyright Act, we think Congress intended to permit further amendments to our program exclusivity rules."[46] The fact that the Commission has declined to modify these rules in the past,[47] when disruptions and unreasonable fee demands were not nearly as prevalent as they are today,[48] should have no bearing on the Commission's analysis under current conditions.

Nor can the territorial exclusivity rules be justified, as CBS claims, as a way for "copyright owners … to control the distribution of their programming … by restricting the areas in which their licensees may grant [retransmission consent]."[49] Once again, retransmission consent is a right belonging to *stations*, not to networks or other copyright holders. Networks thus have no business using retransmission consent to "control" the distribution of programming on MVPD systems. Indeed, as explained in TWC's opening comments,[50] the increasing prevalence of network interference in retransmission consent negotiations is improper under both communications and copyright law. Such conduct should be barred by the Commission, not touted as a justification for retaining the exclusivity rules.

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46 *Program Exclusivity Report and Order* ¶ 153.

47 *See, e.g.*, Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004, 2005 WL 2206070, ¶¶ 50-51 (Sept. 8, 2005).

48 *See* NPRM ¶ 20.

49 CBS Comments at 28.

50 *See* TWC Comments at 18-19.

2. The Commission should repeal the exclusivity rules and ban the underlying contract provisions they protect, because such agreements are anticompetitive and causing harm to consumers.

Broadcasters also contend that the elimination of the exclusivity rules would leave them "with no administrative avenues to enforce [their] rights to program exclusivity" and would redirect such enforcement matters to the judicial system, which would prove "more difficult" for stations.[51] But, of course, eliminating administrative avenues of enforcement for these anticompetitive agreements is precisely the point of the NPRM's proposal.[52] Stations should no longer be permitted to wield network non-duplication and syndicated exclusivity provisions to shield themselves from competition with other distributors of the same content, especially given their avowed preference for a "market-based" regime. The less that stations can rely on territorial exclusivity regulations to make good on blackout threats and drive up fees, the better off consumers will be.

Indeed, that is why the Commission should not only repeal the network non-duplication and syndicated exclusivity rules, but also prohibit enforcement of the underlying territorial exclusivity provisions contained in stations' network-affiliation agreements to the extent they apply to retransmission consent. While years ago it may have made sense to allow broadcast networks and stations the right to limit stations' grant of retransmission consent to particular geographic areas, such agreements today impose far greater public interest harms than benefits.[53]

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51 Disney Comments at 16; *see also, e.g.*, CBS Affiliates Comments at 10 (arguing that, without the current rules, private enforcement of exclusivity rights would be "infeasible"); NBC Affiliates Comments at 10; Sony Pictures Television Comments at 11-12.

52 *See* NPRM ¶ 42 (noting, in the context of the proposal to eliminate the exclusivity rules, that the rules "provide a means for the parties to the exclusive contracts to enforce them through the Commission rather than through the courts").

53 *See* TWC Comments at 13-14.

Even if the Commission declines to prohibit exclusivity agreements, forcing broadcasters to defend them in court would allow the application of traditional antitrust principles to expose these agreements for what they really are: unreasonable restraints on trade. There is no legitimate basis for the Commission to shield territorial exclusivity from antitrust scrutiny, particularly in light of the market power possessed by the Big Four networks.[54]

3. *Repealing the exclusivity rules and affirmatively banning territorial exclusivity arrangements would better serve the public interest than the status quo.*

Finally, broadcasters argue that the elimination of these anti-consumer exclusivity provisions would be "contrary to the public interest," citing localism and the potential for consumer confusion.[55] As an initial matter, broadcasters can no longer rely on the "localism" talisman to justify blatantly anticompetitive practices when they themselves are *scaling back* local programming and leaving MVPDs like TWC to fill in the gaps. In fact, local content is the last thing on the stations' minds when they demand increases in retransmission consent fees.[56]

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[54] The mere fact that the Commission currently requires exclusivity contracts to contain "specific language referencing [the] rules in order for broadcasters to obtain network non-duplication and syndicated exclusivity rights," NBC Affiliates Comments at 10-11, has no bearing on whether the exclusivity rules serve their intended purpose and should be retained. The Commission's protection of contractual exclusivity through its rules only further highlights the facts that the entire regime is *not* market-based and, as discussed in TWC's opening comments, *see* TWC Comments at 13-14, broadcasters are exploiting these rules in ways that harm the public interest. Furthermore, regulatory requirements frequently change and stations are more than capable of revising their contracts with networks to reflect such changes.

[55] Disney Comments at 17.

[56] *See Les Moonves Insists That Retrans Cash Is Network Driven*, RADIO BUSINESS REPORT (June 3, 2011), *available at* http://www.rbr.com/tv-cable/les-moonves-insists-that-retrans-cash-is-network-driven.html ("If a station is really looking at what's bringing in the money, it's the NFL, it's 'American Idol,' it's 'CSI,' it's the primetime strength. It's not the local news or … 'Regis and Kelly' at nine am … that's bringing in the big bucks.") (quoting CBS CEO Les Moonves).

Retaining the current rules and allowing broadcasters to continue denying access to national network programming in the event of a blackout pose much larger threats to the public interest. Notably, when the Commission considered repealing the exclusivity rules in 1993, it dismissed as "speculative" concerns that broadcasters would use their retransmission consent and territorial exclusivity rights in tandem "to deprive subscribers of programming."[57] But as the NPRM recognizes, MVPD subscribers now face such blackouts and threats of blackouts with increasing regularity,[58] and the territorial exclusivity rules permit stations to maintain a blackout indefinitely by blocking other sources of network programming.

Moreover, there is no reason to expect that, in the absence of territorial exclusivity rules, there would be a spate of distant signal importations. MVPD subscribers generally prefer their local stations over non-local stations affiliated with the same network, and under the compulsory licensing regime, it is more expensive for an MVPD to carry a distant signal in place of a local signal, or to carry both at once. The carriage of multiple local and distant signals containing the same network programming also would consume additional bandwidth on capacity-constrained MVPD systems. The proposed reforms are designed to address situations where the local station *withholds* its signal in a retransmission consent dispute and prevents the MVPD from accessing national programming elsewhere, and would not lead to substitution in the normal course. Thus, there is no basis for Disney's claim that repeal of the exclusivity rules would cause "viewer disruption and confusion."[59] To the contrary, in the event of a blackout, repeal of the exclusivity rules would *prevent* such consumer harms by allowing MVPDs to continue providing network

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[57] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 FCC Rcd 6723 ¶¶ 114-15 (1994). *See also* Mediacom *et al.* Comments at 16.

[58] *See* NPRM ¶¶ 15-16.

[59] Disney Comments at 17.

programming to subscribers. Moreover, to the extent that MVPDs have the option of importing distant stations, it is far less likely overall that any drops of local stations or consumer disruption and confusion would ever occur.

If the Commission declines to repeal the exclusivity rules and ban agreements establishing exclusive territories for retransmission consent, it should at a minimum amend the rules to afford MVPDs *temporary* access to network and syndicated programming during unresolved or unsuccessful retransmission consent negotiations, as several parties suggest.[60] While TWC believes that the exclusivity rules can no longer be justified in light of their anticompetitive effects, it is especially inappropriate to allow a local station to block the importation of network and syndicated programming when that local station refuses to authorize carriage and thus deprives an MVPD's subscribers of access to such programming. The asserted justification for the territorial exclusivity rules—to shield local stations from competition with non-local stations for the sale of advertising slots[61]—has no application when the local station prevents an MVPD from delivering its signal to viewers. Accordingly, the exclusivity rules, if not eliminated altogether, should apply *only* in instances when the local station has granted retransmission consent to the MVPD and is actually carried on the MVPD's system.

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60 *See* NPRM ¶ 44 (proposing "revising the network non-duplication rule so that it does not apply to a television station that has not granted retransmission consent"); *see also*, *e.g.*, Comments of CenturyLink, MB Docket No. 10-71, at 9 (filed May 27, 2011); Sports Fan Coalition Comments at 5; DISH Network Comments at 27.

61 *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299 ¶ 62 (1988) (noting that a "cable transmission of a duplicative signal" would "reduc[e] the amount of advertising revenue [a local station] can garner").

B. Several Commenters Agree That the Commission Should Amend Its Rules To Allow Greater Flexibility in Tier Placement.

As noted in TWC's opening comments, the Commission should amend its rules to eliminate another regulatory distortion: the ability of fee-seeking stations to demand placement on a cable operator's basic tier in areas where the operator is subject to effective competition.[62] These demands allow broadcasters to inflict maximum damage on consumers, by forcing cable operators to build ever-higher retransmission consent fees into the mandatory basic cable rates that subscribers cannot avoid paying. And by inflating basic cable rates, broadcasters raise the "tax" that subscribers must pay before they can access programming from independent networks on higher tiers—thus further insulating themselves from competition.

While some broadcasters appear to take the position that Section 623 entitles them to automatic basic tier placement, it does not. Consistent with both D.C. Circuit and Commission precedent, the Commission should reaffirm that tier-placement obligations do not apply in areas subject to effective competition.[63] In addition, the Commission should amend its rules to make it a *per se* violation of the good faith negotiation standard for a fee-seeking broadcaster to bar carriage on an optional retransmission consent tier.

Several commenters endorse these proposals. For example, the American Public Power Association ("APPA"), which represents the interests of smaller MVPDs, urges the Commission to revise its good faith rules to address the "unfair" demands "for carriage conditioned on a

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[62] For similar reasons, broadcast stations should be barred from insisting on placement on the cable programming services tier ("CPST"). As with basic tier placement, demanding carriage on the CPST would illegitimately leverage Big Four affiliates' market power to force a large audience of cable customers to pay for access to broadcast stations, whether or not they seek to view them.

[63] *See Time Warner Entertainment, Inc. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995); *Carriage of Digital Television Broadcast Signals*, Report and Order, 16 FCC Rcd 2598 ¶ 102 (2001).

broadcaster obtaining channel positioning or tier placement rights."[64] Independent programmers raise similar concerns, noting that broadcasters "have a substantial advantage over independent programmers … through the 'must buy' provisions that guarantee broadcasters carriage on the most widely penetrated tier of service."[65] And public interest groups, including the Free State Foundation and the National Taxpayers Union, point out the harmful effects to consumers from rules that require basic tier placement for broadcast stations.[66]

Even some broadcasters recognize the distorting and harmful effects of mandatory tier placement. Nexstar Broadcasting, for instance, states that it "agrees with … the suggestion that broadcasters and non-broadcasters should be treated equally, with no subscriber required to take any programming in order to receive any other programming."[67] Noting that consumers "are forced to subscribe to and pay for programming they may not want,"[68] Nexstar urges the Commission to consider whether stations electing retransmission consent can be offered on an "opt-in basis."[69] In light of this growing consensus among cable operators, independent programmers, public interest groups, and even some broadcasters, the Commission should

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64 Opening Comments of the American Public Power Association; the Iowa Municipal Electric Association; Braintree Electric Light Department (MA); Chelan County Public Utility District (WA); Greenville Electric Utility System (TX); City of Glasgow, KY; Lafayette Utilities System (LA); Muscatine Power and Water (IA); Scottsboro Electric Power Board (AL); South Georgia Governmental Services Authority; and Spencer Municipal Utilities (IA), MB Docket No. 10-71, at 26 (filed May 27, 2011) ("APPA Group Comments"). *See also* SureWest Communications Comments at 18 (urging the Commission to "definitively clarify that there is no statutory requirement to place [retransmission consent] stations in a cable operator's basic tier").

65 Discovery Communications Comments at 8.

66 Comments of the Free State Foundation, MB Docket No. 10-71, at 2 (filed May 27, 2011); National Taxpayers Union Comments at 3.

67 Nexstar Comments at 30 n.59.

68 *Id.* at 30.

69 *Id.* at 30 n.61.

eliminate artificial barriers to tiering flexibility and allow cable operators to offer fee-seeking stations to subscribers on an optional basis, such as on a separate retransmission consent tier or on an á la carte basis.

III. COMMENTERS AGREE THAT THE COMMISSION SHOULD UPDATE ITS GOOD FAITH STANDARDS TO COMBAT ANTICOMPETITIVE PRACTICES

While a necessary and welcome first step, repealing the exclusivity rules, prohibiting territorial exclusivity arrangements, and limiting stations' tier-placement rights will not address many of the anticompetitive practices currently employed by broadcast networks and stations to extract exorbitant fees from MVPDs and their subscribers. As TWC explained in its opening comments, there are a number of other anticompetitive practices, some of which are expressly sanctioned under the current regime, that further obstruct retransmission consent negotiations. The record developed from the opening comments confirms that these practices—including but not limited to (1) broadcasters' tying of retransmission consent to carriage of affiliated programming; (2) network interference in independent affiliates' retransmission consent negotiations; and (3) joint negotiations involving ostensibly competing broadcast stations—are harming consumers and should be prohibited.

A. Broadcasters' Tying Practices Drive Up Programming Costs and Squeeze Out Independent Programming Options.

The Big Four networks' practice of tying retransmission consent for their owned-and-operated stations to the carriage of affiliated cable networks undermines the public interest in a number of ways. As Starz Entertainment explains, "[c]onsumers are harmed [when] [d]ecisions as to which cable program networks will be carried by MVPDs are not based on the merits, popularity, or quality of the cable program networks, but rather, in the first instance, by whether or not the cable networks are owned by broadcasters."[70] In the recent *Comcast-NBCU Order*, the Commission observed that the ability of one entity to bundle multiple video programming offerings "is a well-established concern in antitrust enforcement."[71] Such bundling often forces MVPDs and their subscribers to carry and pay for channels that they otherwise would not have chosen and leads to bloated programming tiers that do not reflect consumer demand.

A number of commenters join TWC in urging the Commission to prevent broadcasters from engaging in such behavior. For example, AT&T and others argue that the Commission should prohibit tying practices outright or "if a station elects to demand cash compensation for retransmission consent."[72] In the alternative, Public Knowledge and the New America Foundation argue that "tying purchase of other programming services to retransmission consent … should be considered [a] *per se* violation[] of good faith."[73] TWC believes that either path to reform would be appropriate.

Meanwhile, broadcasters muster no legitimate defense of the practice of bundling. For example, CBS merely points to the Commission's determination more than a decade ago that

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[70] Starz Entertainment Comments at 7.

[71] *Comcast-NBCU Order* ¶ 135.

[72] AT&T Comments at 18; *see also* Cablevision Comments at 15-17; SureWest Communications Comments at 13 (stating that an MVPD should have the ability to purchase carriage of a broadcast station on a standalone basis "without being forced to accept any tie-ins requiring carriage of additional programming channels").

[73] Public Knowledge/New America Foundation Comments at 8-9; *see also* Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies; the National Telecommunications Cooperative Association; the Independent Telephone and Telecommunications Alliance; the Western Telecommunications Alliance; and the Rural Independent Competitive Alliance, MB Docket No. 10-71, at 16-17 (filed May 27, 2011) ("OPASTCO *et al.* Comments"); APPA Group Comments at 25-26.

bundling practices are consistent with broadcasters' good faith obligations.[74] But as the NPRM acknowledges, there have been significant changes in the industry since the Commission first adopted its good-faith rules, and these changes justify reconsideration of these and other outdated rules.[75] Most notably, the current environment has allowed broadcasters to exert increasing market power in negotiations with MVPDs. Indeed, CBS recently boasted that "'[b]roadcast is kicking butt right now'" due to efforts to develop "retrans as a second revenue stream," and that, as a result, "smaller cable channels not tied to the big content companies" are particularly vulnerable in the current environment.[76]

B. Network Interference in Retransmission Consent Negotiations Impairs Parties' Ability To Reach Agreement and Harms Consumers.

In defense of its renewed efforts to control the terms and price at which its independent affiliates grant retransmission consent, Fox claims that the Commission "would put over-the-air viewers' access to compelling content at risk" if it were to determine that network approval rights are a *per se* violation of a station's duty to negotiate in good faith.[77] In fact, quite the opposite is true; it is the network's ability to veto or set a price floor for an affiliate's grant of retransmission consent that all too often threatens to deprive MVPD subscribers of access to broadcast programming. Similarly, the Big Four networks cannot claim that taking over retransmission consent negotiations for their independent affiliates or demanding a veto right in

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74 CBS Comments at 25.

75 NPRM ¶ 20 ("When the Commission originally adopted the good faith standards in 2000, the circumstances were different from the conditions industry and consumers face today"); *see also id.* ¶ 29 (asking whether the Commission "should consider [tying practices] in evaluating whether broadcasters have negotiated in good faith").

76 *Les Moonves Insists That Retrans Cash Is Network Driven*, RADIO BUSINESS REPORT (June 3, 2011), *available at* http://www.rbr.com/tv-cable/les-moonves-insists-that-retrans-cash-is-network-driven.html (quoting CBS CEO Les Moonves).

77 Fox Comments at 14.

such negotiations is somehow an appropriate component of the network-affiliate relationship. A station's abdication of its retransmission consent rights to a network likely constitutes an unauthorized transfer of control,[78] making broadcast network complaints about purportedly unwarranted "interfere[nce] with the network-affiliate relationship" especially unavailing.[79] Indeed, the networks' "interference" argument is exactly backwards, given that the networks are improperly interfering in stations' relationship with MVPDs.

Network control of their affiliates' carriage negotiations also is at odds with congressional intent in the 1992 Cable Act, as the legislative history makes clear that "local stations, not *national networks* … control the use of [broadcast] signals."[80] The Commission's rules also are clear that the relationship at issue in retransmission consent negotiations is that

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78 *See Ex Parte* Comments of Time Warner Cable Inc. in Support of Mediacom Communications Corporation's Retransmission Consent Complaint, CSR Nos. 8233-C 8234-M, at 11-14 (filed Dec. 8, 2009) (explaining that "[a] station's control over its retransmission rights clearly falls within the ambit of Section 310(d)" and that a contractual restriction in a network affiliation agreement regarding a station's ability to grant retransmission consent would violate "[t]he prohibition against improper delegation of control").

79 Fox Comments at 18; *see also* Disney Comments at 12; CBS Comments at 19.

80 138 CONG. REC. S563 (daily ed. Jan. 29, 1992) (statement of Sen. Inouye, emphasis added). Fox's suggestion that either the legislative history of the 1992 Cable Act or Commission precedent supports its assertion that networks are permitted to interfere in the retransmission consent negotiations of their independent affiliates is misleading. In each of the cases cited in Fox's comments—in particular, the *Reciprocal Bargaining Order* and the complaint proceeding involving ATC Broadband LLC—the issue was whether the *geographic* restrictions in a station's affiliation agreement violated the Commission's good faith standards. *See* Fox Comments at 14-16 (citations omitted). But no one disputes that, under existing rules, a network's imposition of such restrictions is permissible. Such precedent has *no* bearing on the issue of whether other more onerous restrictions on independent affiliates' retransmission consent right not previously considered by the Commission, such as providing the network with veto authority, violate the Commission's rules. As the NPRM explains, such conduct "arguably" already violates the Commission's good faith standards. NPRM ¶ 22. Moreover, with regard to territorial exclusivity specifically, the discussion above makes clear that the Commission may prohibit inclusion and regulatory enforcement of these types of network-affiliate provisions, as well. *See supra* Section II.A.

between an MVPD and the station, not the MVPD and a network.[81] Accordingly, in the face of considerable evidence that networks increasingly are encroaching on the ability of independent stations' to enter into retransmission consent agreements—in ways that drive up consumer prices and increase blackout risks—it is appropriate for the Commission to clarify the boundaries of permissible network involvement.

Notably, numerous commenters, including at least two *broadcast station groups*, agree that when "networks attempt to siphon off portions of retransmission consent revenue," that practice "harms local broadcasting … [and] it harms consumers."[82] For example, Block Communications, which operates as a broadcaster and an MVPD, explains that "network demands … have the perverse effect of *hurting* stations' ability to produce local programming" while simultaneously placing "intense pressure on basic cable rates."[83] Nexstar Broadcasting likewise admits that barring network interference with stations' retransmission consent negotiations "is in the best interest of the retransmission consent [regime]."[84]

These comments provide anecdotal evidence that is consistent with the economic analysis already submitted in this docket. In particular, a team led by Professor Steven Salop determined that increasing network involvement in retransmission consent negotiations—whether by exercising veto rights or demanding a "cut" of stations' carriage fees—not only "could advantage the broadcasters' bargaining position in a number of ways and create potential

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81 47 C.F.R. § 76.65(b)(1) (requiring negotiating parties to "designate a representative with authority to make binding representations on retransmission consent").

82 Public Knowledge/New America Foundation Comments at 7; *see also* Comments of the National Consumers League, MB Docket No. 10-71, at 2 (filed May 27, 2011); APPA Group Comments at 22; CenturyLink Comments at 5-6; DIRECTV Comments at 13-18; OPASTCO *et al.* Comments at 9-10.

83 Comments of Block Communications, Inc., MB Docket No. 10-71, at 9-10 (filed May 27, 2011) (emphasis in original).

84 Nexstar Comments at 20.

antitrust concerns," but also could stymie negotiations and ultimately lead to "higher subscription prices for consumers."[85] Indeed, the projected consumer impact of broadcasters' anticompetitive behavior has only mushroomed since the Petition for Rulemaking was filed in this proceeding.[86] At that time, an economic study authored by Michael Katz, Jonathan Orszag, and Theresa Sullivan estimated that retransmission consent fees would grow to more than $1.6 billion by 2015.[87] These projections have since been revised significantly upwards. SNL Kagan now expects fees to hit $2.9 billion in 2015—nearly *twice* the amount projected in 2009—and to continue climbing to $3.6 billion by 2017.[88] As a result, many more households—even more than the one million plus projected by the Katz/Orszag/Sullivan Study—"likely [will] forego the benefits of MVPD services because of the higher subscription fees they face as a result of retransmission consent fees."[89]

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85 Steven C. Salop, Tasneem Chipty, Martino DeStefano, Serge X. Moresi, and John R. Woodbury, *Economic Analysis of Broadcasters' Brinkmanship and Bargaining Advantages in Retransmission Consent Negotiations*, at 54-56, MB Docket No. 10-71 (filed June 3, 2010).

86 The Commission should alleviate these growing consumer harms by setting rates for retransmission consent (through either a rulemaking or binding arbitration), as TWC suggests in its opening comments. TWC Comments at 41; *see also infra* Section IV.A. Notably, such a mechanism would ensure that retransmission consent fees are reasonable and thus would prevent stations from artificially inflating fees in order to satisfy the networks' demands. Relatedly, the Commission would obviate the need to prohibit stations from providing a "cut" of their carriage fees to the networks.

87 Michael L. Katz, Jonathan Orszag, and Theresa Sullivan, *An Economic Analysis of Consumer Harm from the Current Retransmission Consent Regime*, at 32 (Nov. 12, 2009), filed as an attachment to the Comments of the National Cable & Telecommunications Association, MB Docket No. 07-269 (filed Dec. 16, 2009) ("Katz/Orszag/Sullivan Study").

88 Robyn Flynn, SNL Kagan, *Updated Retrans Projections: Despite Fewer Projected Multichannel Subs, Higher Fees Boost Totals*, at 2 (May 17, 2011).

89 Katz/Orszag/Sullivan Study at 37; *see also Amendment of the Commission's Rules Related to Retransmission Consent*, Petition for Rulemaking of Time Warner Cable *et al.*, MB Docket No. 10-71, at 25-27 (filed Mar. 9, 2010).

C. The Practice of Local Stations' Jointly Negotiating Retransmission Consent Enables Collusion, Not Efficiency.

The NPRM expresses the well-founded concern that retransmission consent negotiations have become "unnecessarily complicated" and "delay[ed]" when multiple stations in the same DMA that are not commonly owned negotiate in tandem rather than in competition with one another.[90] A broad cross-section of commenters agree and provide even further evidence of the substantial consumer and competitive harm that results from such practice—in the form of increased fees and a heightened risk of programming blackouts.[91]

Not surprisingly, broadcast station groups, which rely heavily on joint negotiations to drive up the retransmission consent fees they receive, are the only parties to defend this blatantly anticompetitive practice. For example, NAB inexplicably claims that, because Congress supposedly intended negotiations for retransmission consent to be in a "marketplace," Congress did not intend to prohibit joint negotiations among competing broadcasters.[92] Leaving aside the point that retransmission consent is decidedly *not* a market, as discussed above, markets depend on antitrust principles to prevent collusion and other forms of anticompetitive behavior. Indeed, the idea that a preference for negotiations necessarily includes and requires a tolerance of blatant price-fixing is absurd. Congress had no need to expressly ban joint negotiations among competing stations when the antitrust laws and the Commission's touchstone of "competitive marketplace conditions" already do just that.

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90 NPRM ¶ 23.

91 *See, e.g.*, Public Knowledge/New America Foundation Comments at 8; DIRECTV Comments at 19; CenturyLink Comments at 5-6; APPA Group Comments at 22; ACA Comments at 9; Mediacom *et al.* Comments at 18-22; Cablevision Comments at 20-21; OPASTCO *et al.* Comments at 11-12.

92 NAB Comments at 24.

Sinclair apparently concedes this point and, indeed, argues that the Commission should simply leave the question of "when joint negotiations result in the concentration of too much market power" to antitrust law.[93] But that question already has been answered, as Sinclair effectively acknowledges.[94] As TWC and many others have pointed out, the Department of Justice filed suit to enjoin joint retransmission consent negotiations as a form of illegal price-fixing,[95] making clear its view that such conduct is impermissible.

The misguided attempts by Sinclair and others to sanitize their behavior by claiming that joint negotiations result in unspecified "efficiencies" are unpersuasive and, in the context of retransmission consent, simply wrong.[96] Indeed, the record contains multiple economic studies showing that MVPDs and consumers face higher rates and a greater likelihood of blackouts in DMAs where broadcasters negotiate jointly, without any countervailing increase in output or quality.[97] In particular, relying on the Commission's analysis in the *Comcast-NBCU Order*, the Commission's former Chief Economist William Rogerson observed in a new study that "[s]ince

93 Sinclair Comments at 23.

94 *See id.* ("[R]estrictions on joint negotiations already exist in the form of antitrust laws.").

95 TWC Comments at 35-36 (citing *United States v. Texas Television, Inc.*, Civil No. C-96-64, Competitive Impact Statement at 8 (S.D. Tex. Feb. 2, 1996), *available at* http://www.justice.gov/atr/cases/texast0.htm); *see also* Mediacom *et al.* Comments at 19 n.48; Comments of American Cable Association, MB Docket No. 10-71, at 13-14 (filed May 18, 2010).

96 Sinclair Comments at 23; Nexstar Comments at 20; NAB Comments at 24.

97 *See* William P. Rogerson, *Coordinated Negotiation of Retransmission Consent Agreements by Separately Owned Broadcasters in the Same Market* (May 27, 2011), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 27, 2011) ("2011 Rogerson Study"); Ex Parte Comments of American Cable Association, MB Docket No. 10-71, at 2-4 & Attach. A at 8-9 (filed Feb. 16, 2011); William P. Rogerson, *Joint Control or Ownership of Multiple Big 4 Broadcasters in the Same Market and Its Effects on Retransmission Consent Fees*, MB Docket No. 10-71, at 7 (May 18, 2010), filed as an attachment to the Comments of the American Cable Association, MB Docket No. 10-71 (filed May 18, 2010).

two broadcast networks should be at least as close substitutes for one another as a broadcast network and [an] RSN, the Commission findings imply *a fortiori* that combined ownership or control of two broadcast stations in the same market [would lead to] increased programming fees."[98] In light of the Commission's independent obligation to prevent anticompetitive conduct under its good faith rules, the Commission should take prompt action to prohibit and/or punish joint negotiations among competing broadcast stations.

D. The Commission Possesses Ample Legal Authority To Adopt These and Other Good Faith Rules.

Sinclair also claims that the Commission's proposed good faith rules discussed above are "substantive rules in the guise of good faith bargaining rules."[99] Sinclair's characterization is mistaken, but also irrelevant given the Commission's broad authority to adopt "substantive rules" *and* good faith bargaining requirements.

As TWC has explained in previous pleadings, Title III confers uncommonly broad authority on the Commission.[100] Section 325(b)(3)(A) not only authorizes but directs the Commission "to govern the exercise by television stations of the right to grant retransmission consent."[101] It also requires the Commission to consider "the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier" and to make sure that the Commission's rules are consistent with its obligation "to ensure that the

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98 2011 Rogerson Study at 22; *see also* ACA Comments at 12.

99 Sinclair Comments at 10.

100 *See, e.g.*, TWC Comments at 39-41; Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 16-26 (filed June 3, 2010); Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 11-13 (filed May 18, 2010).

101 47 U.S.C. § 325(b)(3)(A).

rates for the basic service tier are reasonable."[102] Section 309(a) also empowers the Commission to ensure that broadcast station licensees act in accordance with "the public interest, convenience, and necessity."[103] Based on these grants of authority standing alone, the Commission is on solid statutory ground to adopt the good faith rules it proposes in the NPRM.

Relying on its Title III authority, the Commission *has* adopted rules in the retransmission consent context that are unquestionably "substantive"; for instance, in its original retransmission consent implementation order, the Commission adopted a prohibition on "exclusive retransmission consent agreements between television broadcast stations and cable operators"—a rule that goes directly to the allowable "substantive" terms in retransmission consent agreements.[104] Therefore, the Commission's previous decision in the *Good Faith Order* declining to adopt "substantive" good faith rules in no way limits its ability to do so now.[105] The Commission was careful to reserve judgment regarding the need to adopt further good faith standards at a later time.[106] Moreover, in light of the conditions in which today's retransmission consent negotiations now take place, the Commission has correctly determined that the inadequacies of the current regime necessitate new, stronger, good faith negotiation standards.[107]

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102 *Id.*

103 *Id.* § 309(a).

104 *1992 Cable Act Report and Order* ¶ 179.

105 *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 ¶ 39 (2000).

106 *Id.* ¶ 47 ("We do not believe that we should *at this time* adopt further objective standards as proposed by commenters.") (emphasis added); *id.* ¶ 47 n.103 (citing, without comment, commenters' "*proposed* limitations on good faith negotiation") (emphasis added).

107 NPRM ¶¶ 20-21 ("We believe that additional *per se* good faith negotiation standards could increase certainty[,] … thereby promoting the successful completion of

Try as they may to dream up reasons for preserving the status quo, broadcasters have not identified a single compelling justification for the Commission to delay any longer in adopting these new good faith standards.

In light of this broad authority and the pressing need to curb broadcasters' brinkmanship tactics, TWC supports the recommendations made by some commenters that the Commission adopt additional *per se* prohibitions. For example, DIRECTV proposes to make it a *per se* violation of a broadcaster's duty to negotiate in good faith if it refuses to honor an MVPD's request for a standalone retransmission consent offer.[108] In addition, AT&T, Gator Nation, and others would prohibit the expiration of retransmission consent agreements shortly before significant and/or popular events, such as New Year's Day College Bowl games.[109] The Commission should give careful consideration to these and related proposals to reduce broadcasters' disproportionate bargaining leverage in retransmission consent negotiations and thereby protect consumers against the threat of higher fees and additional blackouts.

IV. THE COMMENTS REFLECT BROAD CONSENSUS THAT, ABSENT DEREGULATORY LEGISLATION, THE COMMISSION SHOULD ADOPT ADDITIONAL SAFEGUARDS TO PROTECT CONSUMERS

Absent truly deregulatory reform initiated by Congress, the reforms discussed above will not be enough to reverse the tide of consumer harm associated with the higher fees and blackout threats (and actual blackouts) that broadcasters use to secure such fees. As TWC emphasized in its opening comments, the Commission also should adopt further safeguards now to protect consumers against these harms pending the enactment of such legislation. Critically, the opening

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retransmission consent negotiations and protecting consumers from impasses or near impasses.").

108 DIRECTV Comments at 25.

109 *See, e.g.*, AT&T Comments at 19; Comments of The Gator Nation, MB Docket No. 10-71, at 1 (filed May 27, 2011).

comments—with the exception of those submitted on behalf of broadcast interests—explain that the Commission possesses the requisite authority to enact additional prophylactic reforms, including rate-setting and dispute resolution mechanisms and an interim carriage requirement. A number of commenters also urge that the Commission ensure that its notice and "sweeps" rules are applied in a fair and nondiscriminatory manner and, most importantly, serve the public interest as Congress envisioned in the 1992 Cable Act.

A. The Commission Can and Should Exercise Its Authority To Prevent Inflated Fees and Blackouts by Adopting Rate-Setting and Dispute Resolution Mechanisms and by Providing for Interim Carriage.

Many of the opening comments take issue with the Commission's narrow reading of its statutory authority to engage in dispute resolution, rate-setting, and interim carriage, and urge the Commission to adopt more meaningful reforms that, in the absence of deregulatory legislative reform, would prevent blackouts, threats of blackouts, and excessive carriage fees.[110] These comments note the various statutory provisions on which the Commission could rely to adopt such reforms, including Sections 325(b), 309(a), 303(r), and 4(i).[111]

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110 *See, e.g.*, Starz Entertainment Comments at 4; Public Knowledge/New America Foundation Comments at 2-6; OPASTCO *et al.* Comments at 24-25; APPA Group Comments at 23; Mediacom *et al.* Comments at 3 n.6, 29-30; ACA Comments at 71-76; DIRECTV Comments at 2 n.4; Comments of Charter Communications, Inc., MB Docket No. 10-71, at 6 (filed May 27, 2011). *See also* Initial Comments of the Indiana Utility Regulatory Commission, MB Docket No. 10-71, at 6 (filed May 27, 2011) ("Indiana Utility Regulatory Commission Comments") (relying on Section 706 to argue that "[t]he FCC and State Commissions are [m]andated to [a]ct" and could use such authority to "permit[] video providers to adopt the terms and conditions negotiated with content providers by other providers").

111 47 U.S.C. §§ 325(b), 309(a), 303(r), 154(i). Some commenters also cite the Commission's authority under Section 706 of the 1996 Act as an additional statutory basis for retransmission consent reforms. *See, e.g.*, OPASTCO *et al.* Comments at 4-5; Indiana Utility Regulatory Commission Comments at 6.

In addition, a number of reform proponents also point to (while broadcasters ignore) the Commission's Title III discussion in the recent *Data Roaming Order*.[112] These commenters, like TWC, recognize that the Commission's findings in that analogous context provide further support for Commission action to compel interim carriage or adopt binding arbitration or other rate-setting and dispute resolution remedies.[113] In particular, the Commission found that the discretion conferred under Sections 301, 303, and 316 "to regulate 'radio communications' and 'transmission of energy by radio'" permits the adoption of rules "to manage spectrum … and modify[] spectrum usage conditions in the public interest."[114] The Commission should reach a similar conclusion here and recognize its statutory authority to set industry-wide rates (either through a rulemaking process or in the course of arbitrating disputes) and to order interim carriage. Indeed, the Commission will be on even stronger footing in the retransmission consent context, where it can rely on its broad public interest authority under Title III over broadcasters *and* the specific rulemaking authority granted in Section 325 with respect to broadcasters' exercise of retransmission consent rights.

The Commission's authority to "utilize its rulemaking powers to modify licenses when a new policy is based upon the general characteristics of an industry"[115] is especially compelling in the case of retransmission consent, where broadcast stations—which received their spectrum *for free* in exchange for the obligation to serve the public interest—increasingly are withholding

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112 *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 (2011) ("*Data Roaming Order*").

113 *See* Mediacom *et al.* Comments at 3 n.6 (noting that "[t]he Commission's defense of its adoption of these [data roaming] rules echoed many of the arguments made by Joint Cable Commenters in this proceeding."); ACA Comments at 74.

114 *Data Roaming Order* ¶¶ 66, 62.

115 *Id.* ¶ 62.

their signals from MVPD subscribers and causing significant frustration and confusion. Moreover, the public interest considerations leading the Commission to impose a data roaming obligation are equally applicable in the retransmission consent context. In particular, the Commission adopted its data roaming rule to "promote consumer access to seamless mobile data coverage" based on increasing "consumer expectations that such service will be available to them.[116] The same is true for MVPD subscribers; they expect to be able to turn on a television in their homes and have uninterrupted access to all broadcast channels available in their community, regardless of the particular MVPD service to which they subscribe.

Critically, as TWC explained in its opening comments, setting rates (whether through a rulemaking or binding arbitration) would *not*, as some broadcasters claim, compel carriage in violation of Section 325(b)(1)(A). The Commission instead would establish the price and other terms that would apply *in the event* each party agrees to carriage.[117] And the exercise of equitable authority to preserve the status quo while the Commission is engaged in such a process is well-established and has been invoked in analogous circumstances where defendants possess comparable "consent" rights.[118]

B. The Commission Should Ensure Its Notice Rules Do Not Enable Further Broadcaster Gamesmanship.

TWC shares the Commission's goal of ensuring that the notice rules strike the right balance between "providing consumers with sufficient time to obtain access to particular broadcast signals by alternative means" and avoiding unnecessary harm caused by unnecessary

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116 *Id.* ¶¶ 13, 15, 63.

117 TWC Comments at 43.

118 *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶¶ 71-72 (2010).

MVPD switching.[119] Accordingly, TWC agrees with Consumer Action and other parties that a lopsided notice requirement imposed only on MVPDs is not a viable solution, as "[s]uch [a] notice [requirement] would simply cause more disruption and anxiety, and cause customers to switch service, incurring unnecessary costs."[120]

TWC also opposes the notice proposals of some broadcasters that are transparent efforts to create new levers to exploit in retransmission consent disputes. For example, Sinclair would have the Commission violate MVPDs' First Amendment rights by prohibiting them from including in consumer notices any statements of opinion regarding the likelihood of a broadcast blackout.[121] Such a restriction on an MVPD's truthful speech would obviously benefit Sinclair, as it would allow Sinclair to induce MVPD switching and pressure MVPDs early on during carriage negotiations, without regard to the needless consumer fear and confusion that would result. But Sinclair's proposed "reform" would plainly violate the First Amendment by barring legitimate communications between businesses and their customers. Strict scrutiny would apply to such a prior restraint and could not possibly be satisfied.

C. The Commission Also Should Apply Its "Sweeps" Rule in a Non-Discriminatory Manner.

Likewise, TWC agrees with those that urge the Commission to consider ways to eliminate its "sweeps" rule.[122] In the alternative, the Commission should clarify that the rule applies to all MVPDs and broadcasters.[123] TWC agrees with DIRECTV, Mediacom, and others

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119 NPRM ¶ 36.

120 Consumer Action Comments at 1.

121 Sinclair Comments at 27.

122 *See* Comments of the United States Telecom Association, MB Docket No. 10-71, at 28 (filed May 27, 2011) ("USTelecom Comments").

123 *See, e.g., id.*; OPASTCO *et al.* Comments at 20.

that the Commission could take steps to impose reciprocal obligations on broadcasters and avoid discriminatory, unfair results.[124]

CONCLUSION

Most commenters agree that the Commission has strong legal bases and compelling policy reasons to adopt the reforms proposed herein to the retransmission consent system. Broadcasters' arguments to the contrary rest on fundamental factual and legal misconceptions, and these misconceptions only confirm the need for immediate Commission intervention. TWC therefore encourages the Commission to adopt the foregoing reforms swiftly in order to prevent further consumer harm from the next round of retransmission consent disputes.

Respectfully submitted,

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124 *See, e.g.*, DIRECTV Comments at 22 (proposing to make broadcaster de-authorization of carriage during "sweeps" a *per se* violation of the good faith standard); Mediacom *et al.* Comments at 30-31 n.70; USTelecom Comments at 28 (recommending the elimination of the "sweeps" rule or, in the alternative, its reciprocal application); OPASTCO *et al.* Comments at 20-21.