

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

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

To: The Commission

**JOINT REPLY 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.**

It is ironic that, while calling for “deregulation” and a “free market,” multichannel video programming distributors (“MVPDs”) in this docket actually seek unprecedented government intervention in private retransmission consent negotiations. In addition, MVPDs’ highly regulatory positions in this proceeding are strikingly at odds with positions that MVPDs have taken elsewhere—and at odds with the reality of the retransmission consent marketplace. 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. (the “Joint Broadcasters”) file these brief reply comments to highlight these inconsistencies in the positions taken by MVPDs and to emphasize that interference in the Congressionally-mandated retransmission consent marketplace would undermine our system of free, local television broadcasting that has served the American public so effectively.

Cable and satellite operators are seeking to ramp up government regulation and to thwart a free market—one that finally is starting to work as Congress intended. In their rhetoric,

MVPDs have taken up the mantle of “deregulation” and the “free market.”¹ But their highly regulatory proposals tell another story. The reality is that MVPDs seek a raft of new government regulations and would like nothing better than to undermine the free market that is still emerging with respect to retransmission consent. Among the many new, asymmetric regulations that MVPDs have asked for in this proceeding are:

- The establishment of rules permitting MVPD carriage of a broadcaster’s signal without the broadcaster’s consent or forcing the broadcaster to provide such consent, in direct contravention of § 325 of the Communications Act.²
- A prohibition on exclusivity clauses that form an essential basis for the private contracts between broadcasters and program suppliers.³
- Unprecedented regulation of retransmission consent rates.⁴
- Regulation of the substantive terms of retransmission consent agreements, such as a prohibition on seeking carriage of affiliated program streams⁵ and a rule prohibiting broadcasters from seeking both cash and in-kind compensation.⁶

¹ See, e.g., Comments of Time Warner Cable Inc. (May 27, 2011) (“Time Warner Comments”) at 2 (“TWC believes that a deregulatory approach to the carriage of broadcast signals on MVPD systems represents the preferred course, just as TWC favors market-based solutions more generally”); Comments of Cablevision Systems Corporation (May 26, 2011) (“Cablevision Comments”) at 3 (“In addition to implementing Cablevision’s proposed reforms, the Commission should adopt several other regulatory changes to promote a more market-oriented, balanced retransmission consent system”); Comments of DIRECTV, Inc. (May 27, 2011) (“DIRECTV Comments”) at 2 (urging the Commission to adopt a host of new rules to advance “free-market dynamics”).

² See, e.g., Time Warner Comments at 39-44; Comments of AT&T (May 27, 2011) (“AT&T Comments”) at 12-16; Comments of the American Cable Association (May 27, 2011) (“ACA Comments”) at 71-76; Cablevision Comments at 24. See also Comments of DISH Network L.L.C. (May 27, 2011) (“DISH Comments”) at 22-24.

³ See Time Warner Comments at 24-25.

⁴ See, e.g., Cablevision Comments at 9-10; Comments of Bright House Networks LLC (May 27, 2011) (“Bright House Comments”) at 6-8; Time Warner Comments at 41-42; ACA Comments at 87-91.

⁵ See, e.g., Time Warner Comments at 32-33; Cablevision Comments at 15-17.

⁶ See AT&T Comments at 18; Cablevision Comments at 11.

- A regulation prohibiting broadcasters—but not MVPDs—from engaging in joint negotiations.⁷
- A rule forcing broadcasters to grant waivers so that satellite operators can import same-network distant signals into the market.⁸
- A rule requiring stations to “synch up their retransmission consent contracts with all MVPDs so that all such contracts terminate at the same time” and a rule forcing broadcasters to extend carriage agreements on an “all or none” basis.⁹
- A requirement that “a broadcaster immediately build out to any unserved parts of the DMA... and provide free DTV converter boxes to all affected subscribers” if an MVPD and broadcaster have been unable to reach a mutually acceptable agreement for continued carriage.¹⁰

This is just a sampling of MVPDs’ lengthy regulatory wish list.

The new rules that MVPDs seek would interfere unreasonably with our current system of marketplace negotiations. They would be contrary to Congress’s intent that the Commission leave retransmission consent negotiations to the marketplace.¹¹ Indeed, the Commission previously has rejected imposing numerous items from MVPDs’ wish list on that basis. Most of all, the intrusive governmental regulation that MVPDs seek here would benefit MVPDs but harm local broadcasting and all viewers—those that rely on free broadcast service

⁷ See, e.g., Time Warner Comments at 35-37; Cablevision Comments at 20-22; ACA Comments at 5-8.

⁸ See DIRECTV Comments at 11.

⁹ See AT&T Comments at 19.

¹⁰ See DISH Comments at 31.

¹¹ See S. Report No. 102-92 at 36 (1991) (indicating Congressional intent to create a free “marketplace for the disposition of the rights to retransmit broadcast signals” where the government would not “dictate the outcome of the ensuing marketplace negotiations”).

and those that, while subscribing to a pay-TV service, still make broadcast programming the most popular programming on television.¹²

Moreover, MVPDs stake out positions in this proceeding that are contradictory and are in conflict with reality. It is obvious that MVPDs do not want a level playing field: rather, they want to tip the playing field to their advantage. While the Joint Broadcasters do not seek to provide a comprehensive listing of the contradictions in MVPDs’ comments, we identify here several illustrative and telling examples:

THE MVPD ARGUMENT	THE FACTS
The FCC should regulate the retransmission consent rates that broadcasters can charge. ¹³	Even as they ask the FCC to impose rate regulation on broadcasters, MVPDs argue that the FCC/local franchise authorities should not regulate MVPD rates or fees. MVPDs routinely ask the Commission to release them from rate regulation, and they charge consumers exorbitant early termination fees. Cable per-subscriber revenue is predicted to rise 45 times more than retransmission consent fees between 2006 and 2015. ¹⁴

¹² “This TV season, Broadcast delivered 92 of the top 100 programs and 94% of the rating points.” TVB Local Media Marketing Solutions, available at: <http://www.tvb.org/>.

¹³ See, e.g., Cablevision Comments at 9-10; Bright House Comments at 6-8; Time Warner Comments at 41-42; ACA Comments at 87-91. MVPD commenters argue that 47 U.S.C. § 325(b)(3)(A) provides authority for the FCC to regulate retransmission consent rates, eliding key portions of that provision underscoring that it is not an open-ended authorization to regulate rates (much less in a manner that would *undermine* the retransmission consent framework), but a directive to complete a rulemaking “within 180 days after October 5, 1992.” This the Commission did, notably finding that “Congress did not intend that retransmission consent rates be directly regulated.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, at para. 178 (1993).

¹⁴ See Comments of the National Association of Broadcasters (“NAB Comments”) (May 27, 2011) at 13-15 and 41-47. See also DIRECTV Comments at 26 (calling ETFs “pro-consumer”).

THE MVPD ARGUMENT	THE FACTS
Broadcasters have “supracompetitive” advantages. ¹⁵ Retransmission consent rates are too high and raise MVPD subscription rates. ¹⁶	Broadcasters have no undue leverage. ¹⁷ Broadcasters get paid a <i>fraction</i> of what cable programmers receive for programming that is comprised largely of <i>repeats</i> of broadcast programming or that is substantially <i>less popular</i> than broadcast programming. ¹⁸ Below-market retransmission consent rates are not responsible for any meaningful portion of pay-TV bills. ¹⁹
The retransmission consent regime and exclusivity rights harm local viewers. ²⁰	Retransmission consent plays a critical role in supporting investments in the locally responsive programming that viewers value, and it is functioning as Congress intended. ²¹ The exclusivity rules are a cornerstone of localism. Indeed, the Commission flagged the possible impact on localism in its discussion of these issues in the NPRM. ²²

¹⁵ See Comments of Surewest Corporation (May 27, 2011), at iii; AT&T Comments at 6 (calling regime “highly lopsided”).

¹⁶ See AT&T Comments at 3; Cablevision Comments at 9.

¹⁷ See Attachment A to NAB Comments at 4-10. As we pointed out in our initial comments at 14, “the largest four MVPDs — Comcast, Time Warner Cable, DirecTV, and EchoStar/DISH — have nearly 70 percent of the nation’s MVPD subscribers. The largest 25 MVPDs control nearly 94 percent of the market.” The goliaths of the television industry—who are not subject to the numerous asymmetric obligations imposed only on broadcasters—need no special protection from the FCC.

¹⁸ See Comments of the CBS Television Network Affiliates Association (May 27, 2011) at 13-15.

¹⁹ See NAB Comments at 41-47.

²⁰ See, e.g., DISH Comments at 4; Time Warner Comments at 13.

²¹ See CBS Affiliates Comments at 2-4; NAB Comments at 3-9.

²² See CBS Affiliates Comments at 3-9; *Amendment of the Commission’s Rules Related to Retransmission Consent*, NPRM, FCC 11-31, para. 44 (rel. March 3, 2011).

THE MVPD ARGUMENT	THE FACTS
Exclusivity rights and the retransmission consent regime are artificial. ²³	MVPDs enjoy a royalty free copyright for the retransmission of the programming in local broadcast signals. Prior to 1992, cable companies appropriated broadcast signals, and broadcasters were forced to subsidize their competitors. Retransmission consent corrects that artificial phenomenon and restores a balanced marketplace in the face of MVPDs' royalty-free carriage of the programming in local broadcast signals. ²⁴ The exclusivity rights help to restore balance to the market in the face of the artificially-created distant signal compulsory copyright license. MVPDs have emphasized in the copyright proceeding how intertwined the two regimes are. ²⁵
Broadcasters offer subpar programming. ²⁶	Even as they make this argument, MVPDs assert that broadcast programming is "must have" programming that gives the broadcasters who must invest in its creation unfair bargaining leverage in retransmission consent negotiations. ²⁷
Broadcasters should not be allowed to engage in joint bargaining. ²⁸	MVPDs engage in joint bargaining themselves, ²⁹ yet they are asking the FCC to prohibit broadcasters from doing so. Numerous broadcast commenters explained the value in such negotiations. ³⁰

²³ See AT&T Comments at 4; Time Warner Comments at 5.

²⁴ See S. Rep. 102-92, 35-36 (1991) (describing intent to "close a gap" in the law exploited by cable operators to "distort" the video programming marketplace); NAB Comments at 56-58.

²⁵ See Comments of the National Cable & Telecommunications Association before the Library of Congress Copyright Office, Docket No. RM 2010-10 (Section 302 Report to Congress), at 2 and 16-18 (April 25, 2011); Comments of the Rural MVPD Group before the Library of Congress Copyright Office, Docket No. RM 2010-10, at 9-10 and 19-21 (April 25, 2011).

²⁶ See DIRECTV Comments at 11 (claiming that stations "frequently" do not provide "programming of interest to" their communities); AT&T Comments at n.2 (arguing that the retransmission consent rules "reward" broadcasters only for distributing national network programming and not for stations' "own creative endeavors").

²⁷ See, e.g., Cablevision Comments at 6; see also *id.* at 24 (stating that "MVPDs would prefer local broadcast stations over out-of-market stations, because the local broadcast contains locally-generated content, especially news and public affairs, that will not be included in the out of market signal"); AT&T Comments at 2; *id.* at 8 and n.18 (noting that broadcasters' programming is "must-have" and "highly valued by consumers"); DIRECTV Comments at 2.

²⁸ See, e.g., DIRECTV Comments at 19-20; Cablevision Comments at 20-21; Time Warner Comments at 35.

²⁹ See Comments of LIN Television Corporation (May 27, 2011) ("LIN Comments") at 19.

THE MVPD ARGUMENT	THE FACTS
Broadcasters should not be allowed to seek short-term offers or non-disclosure agreements for rates and terms.	MVPDs themselves often insist upon short-term offers and non-disclosure clauses covering both terms and rates. In addition, MVPDs demand to know what rates broadcasters have offered to other MVPDs and want the benefit of rates negotiated by other MVPDs, regardless of how different the various agreements might be in other respects. ³¹
Increased MVPD competition is somehow bad for consumers. ³²	Increased competition provides consumers with more options, helps to control spiraling subscription costs, and—subject to MVPD-imposed early termination fees—can help consumers mitigate the effects of a loss in carriage on a particular system.
Transparency is important, but only if it benefits MVPDs.	MVPDs argue on the one hand that they should be able to know and take advantage of the rates and other terms of broadcasters' agreements with other MVPDs, ³³ but show no willingness to share with broadcasters or the FCC information with respect to the rates that <i>they</i> pay to cable networks or other broadcasters, and they resist proposals that would keep their subscribers better informed. ³⁴

³⁰ See, e.g., *id.* at 19-20; NAB Comments at 22-33.

³¹ See, e.g., Cablevision Comments at 10-11.

³² See, e.g., AT&T Comments 6-7 and 17-18 (describing trend away from monopoly cable market to increased MVPD competition as worrisome factor warranting increased protection for MVPDs); Cablevision Comments at 6 (noting that subscribers now have a choice of MVPDs).

³³ See, e.g., Cablevision Comments at 10 and 13-14.

³⁴ See, e.g., DISH Comments at 30-31; Cablevision Comments at 26-28; ACA Comments at 91.

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The Joint Broadcasters have engaged in thousands of successful negotiations, and we believe from experience that the system is working—and working as Congress intended. The Commission should reject MVPDs’ highly regulatory and self-serving proposals, which seek to tip the playing field in MVPDs’ favor at the expense of the viewing public.

Respectfully submitted,

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