

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 MEDIACOM COMMUNICATIONS CORPORATION**

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## SUMMARY

In the Notice of Proposed Rulemaking (“*NPRM*”) in this proceeding<sup>1</sup> the Commission notes that “[w]e do not believe that the Commission has authority to adopt either interim carriage mechanisms requirements or mandatory binding dispute resolution procedures applicable to retransmission consent”<sup>2</sup> but states that “[p]arties may comment on that conclusion.”<sup>3</sup> The purpose of these comments is to accept that invitation and seek reconsideration of the Commission’s conclusion by rebutting the arguments in its support made in the *NPRM* and submissions by some other filers in this proceeding.

The legislative history of the Senate bill (S.12) that was the source of the retransmission consent provisions contains the following statement by Senator Daniel K. Inouye, the bill’s manager and co-sponsor and the author of those provisions:

The retransmission consent provisions of S.12 were designed so as to avoid creating a complex set of governmental rules to promote the carriage of local broadcast signals. Instead, S.12 permits the two interested parties – the station and the cable system – to negotiate concerning their mutual interests. It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare. We should resist the urge to require formal, pre-established mechanisms that might distort the incentives of the marketplace. At the same time, there may be times when the Government may be of assistance in helping the parties reach an agreement. I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking

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<sup>1</sup> *Amendment of the Commission’s Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (rel. Mar. 3, 2011).

<sup>2</sup> *Id.*, at ¶18.

<sup>3</sup> *Id.*, at ¶19.

implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.<sup>4</sup>

There is nothing in the relevant statutory language itself or in the rest of the legislative history that expresses or mandates a different view of the Commission's authority. The Commission's position is, therefore, puzzling, particularly because the Commission does not explain why it disregards this clear statement by the law's author directly addressing the Commission's authority and, instead, relies upon two general statements from the legislative history that are not directly on point.

In a case decided less than a decade after enactment of the Communications Act, the Supreme Court, finding that Congress intended the Commission to have "not niggardly but expansive powers," rejected the notion that it "regards the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other."<sup>5</sup> Since then, the Commission has interpreted the Communications Act consistently with that view, including during the tenure of the current Chairman.

It is surprising, therefore, that the Commission takes the position that, even though it has jurisdiction over the broadcast and cable television industries, is charged with the duty of safeguarding the public interest and is armed with broad and sweeping powers, in the realm of

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<sup>4</sup> 138 Cong. Rec. S643 (Jan. 30, 1992)

<sup>5</sup> National Broadcasting Co. v. U.S., 319 U.S. 190 (1943)(holding Commission had power to issue regulations pertaining to relationship between broadcasting networks and affiliated stations, then referred to as "chain networks").

retransmission consent it has no more power than an ordinary citizen and cannot even write the equivalent of speeding tickets.<sup>6</sup>

The brevity of its explanation of its reasons for reaching its opinion and its apparent resignation to its powerlessness, are even more surprising in light of its past herculean and exhaustive efforts in other contexts to find a legal basis for regulatory initiatives that have a statutory foundation that in some cases most charitably can be called debatable—for example, its rulemaking regarding net neutrality, terrestrial programming services, data roaming, cell phone tower siting and timing of application decisions by local franchise authorities. To outsiders, it appears that, in other contexts where its authority is questionable, when the Commission thinks that the public interest requires it to act, it has jumped through analytical hoops to craft a legal basis for the rules it thinks are needed and has been willing to take its chances on prevailing in the inevitable judicial challenge. With rare exceptions, the courts have sustained its efforts. The fact that, in a few cases, courts have found that the Commission strained a bit too mightily has not deterred the Commission from trying again the next time it felt the need to act—often, it tries again in the same case, as in its recent efforts to find a different basis for net neutrality rules after its first try was rejected by the D.C. Circuit Court of Appeals.

Given the Commission’s articulated “concern regarding the service disruptions and consumer outrage that will inevitably result should MVPDs that are entitled to retransmit local

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<sup>6</sup> The *NPRM* notes that “[i]n previous retransmission consent disputes, the Commission has encouraged parties to engage in voluntary dispute resolution mechanisms as a means to reach agreement.” *NPRM* at ¶ 61. Unfortunately, broadcasters have simply ignored the Commission’s admonitions with impunity, even though numerous MVPDs have offered to submit disputes to arbitration or other dispute resolution procedures. A negotiator for broadcast stations once said to us that broadcasters have concluded that if an MVPD files a “good faith” complaint or otherwise seeks intervention by the Commission to prevent a service interruption, “those guys are not going to do anything to us.”

signals subsequently lose such authorization,”<sup>7</sup> we can only assume that the Commission has made the same efforts to construct a legal basis for finding that it has the authority to act on that concern and the same willingness to adopt the needed rules and take the risk that they would be overturned by a court. We presume, therefore, that the fact that it has, instead, publicly expressed the opinion that it lacks the requisite authority means that it believes that, unlike in the other situations, the statutory language and legislative history relevant to retransmission consent prevents construction of a case for the opposite conclusion that is even plausible.

We respectfully disagree. We think that a very plausible case for the opposite conclusion can be made—indeed, we think the case for concluding that the Commission does have the authority to take effective action to prevent harm to consumers in the form of service disruptions and price increases is far better than the case that it does not.

Under the standards established by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>8</sup> if the Commission adopted a rule that mandated or allowed retransmission without the express consent of the station under specified circumstances, the court considering a challenge to the rule as being beyond the Commission’s authority would engage in a potentially two-step analysis of the statutory language relating to retransmission consent. The first step would be to determine if the language clearly and unambiguously expresses the intent of Congress on the precise subject. If it does, then that intent would have to be given effect and there is no second step. In that sense, the Commission is correct in saying that efforts to establish that the Commission’s ancillary authority is broad enough to encompass

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<sup>7</sup> *Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order, 15 FCC Rcd 5445, 5458 (2000), at ¶ 61.

<sup>8</sup> 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

an interim carriage requirement put the cart before the horse.<sup>9</sup> That analysis is never reached if the more specific statutory provisions relating to retransmission consent make clear that Congress did not intend for the Commission to be able to allow carriage absent the consent of the broadcaster.

On the other hand, if the statutory language is ambiguous, then the second step would be to decide whether the rule is based on a permissible construction of that language. The court would be required to “defer at step two to the agency’s interpretation so long as the construction is ‘a reasonable policy choice for the agency to make.’”<sup>10</sup>

So, all that stands between the Commission and the adoption of an effective rule to prevent service disruptions and other undesirable fallout from retransmission consent negotiations is willingness on the part of the Commission and a demonstration that the meaning and intent of Section 325(b) of the Communications Act of 1934 is ambiguous.

We believe that the analysis presented in these comments convincingly demonstrates that the Commission has the authority to adopt interim carriage and other rules to protect consumers, at the very least we respectfully submit that we can establish that Section 325(b) is sufficiently ambiguous to move the issue to *Chevron’s* second-step, so that the Commission would have interpretative choice.

In choosing between the alternative interpretations, the Commission should pick the one that is most consistent with congressional intent, the goals underlying the creation of retransmission consent and the public purposes that the Communications Act is supposed to serve.

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<sup>15</sup> See *NPRM*, *supra* note, at ¶18 (“Contrary to the suggestion of some commenters, Section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act”).

<sup>10</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (quoting *Chevron*, 467 U.S. at 845).

In enacting the 1992 Act, one of Congress' goals was to ensure the "universal availability of local broadcast signals."<sup>11</sup> Correcting the marketplace "distortion" thought to flow from cable carriage of broadcast signals without consent or compensation was supposed to serve that goal. As the "findings" in the 1992 Act make clear, Congress did not want this solution to exacerbate the problem by disrupting or increasing the cost of watching broadcast television through a cable service. Congress expressly recognized the continued viability of the long-standing policy goal of ensuring that cable households could continue to receive local broadcast programming through cable carriage.

Read as a whole, as they must be, the findings set forth in Section 2 of the 1992 Act unequivocally establish that Congress, motivated by the desire to preserve local broadcast television out of concern for the public interest, rather than broadcasters' private interests, wanted to enhance the competitive status of local stations without, however, adversely impacting the millions of consumers who relied on cable service for reliable access to broadcast television programming. Those two goals may conflict in some cases, but they are not necessarily mutually exclusive. Congress thought that the market would provide sufficient incentives and disincentives to the negotiating parties to ensure that in the vast majority of cases the process would produce the right results. Recognizing that there might still be cases where the process did not work as intended, it expected the Commission to use its ancillary powers and its rulemaking authority conferred by Section 325(b)(3)(A) to intervene when a conflict did arise and to prevent retransmission consent from producing results contrary to those intended and expected.

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<sup>11</sup> 138 Cong. Rec. S667 (Jan. 30, 1992).

An interpretation by the Commission that gives it authority to adopt those rules mandating or requiring interim carriage in specified circumstances would be a reasonable policy choice and, therefore, entitled to judicial deference under *Chevron*.

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**INTRODUCTION**

The Notice of Proposed Rulemaking (“*NPRM*”) in this proceeding<sup>1</sup> expresses the view that the Commission lacks the authority, under any set of circumstance, to require or permit a cable system<sup>2</sup> to retransmit the signal of a local broadcast station without its express consent.<sup>3</sup> We respectfully disagree with that conclusion.

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<sup>1</sup> *Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71 (rel. Mar. 3, 2011).

<sup>2</sup> Although Section 325(b) applies to multichannel video programming distributions (“MVPDs”) generally, these comments address only cable operators.

<sup>3</sup> The Commission is also of the opinion that it may not require binding arbitration in the event of a negotiating stalemate. That view is not addressed in these comments, but the analysis and conclusions regarding interim carriage should be equally valid insofar as the issue concerns authority under the Communications Act, instead of the Administrative Dispute Resolution Act (ADRA). We believe, however, that the Commission, at a minimum, should consider whether, as part of its procedures for addressing retransmission consent complaints filed by a party to negotiations, it should borrow the concept of “settlement judge” from the Federal Energy Regulatory Commission (FERC), which does not seem to raise any ADRA issues. See description under “Settlement Judge Process” on FERC’s Website, at <http://www.ferc.gov/legal/adr/continuum/com-dra.asp>; and 18 C.F.R. §385.603, available at <http://www.gpo.gov/fdsys/pkg/CFR-2010-title18-vol1/xml/CFR-2010-title18-vol1-sec385-603.xml>.

The best way to begin is to assume that the Commission came to the opposite conclusion and adopted a rule imposing interim carriage requirements when a “good faith” complaint is pending, during some “cooling off” period after a negotiating stalemate is reached or in some other specified circumstances, despite the absence of the broadcaster’s consent (an “Interim Carriage Rule”). We need not worry, at this point, about the precise content of the rule—the critical assumption is that it allows a cable company to carry a station in defined circumstances without the broadcaster’s consent and for the ostensible purpose of preventing or delaying interruption in the ability of subscribers to view the station’s programs through their cable connection. Our goal is to demonstrate that Section 325(b) of the Communications Act of 1934, as amended<sup>4</sup> (the “Communications Act” or the “Act”), is not an absolute bar to the Commission’s requiring or allowing interim carriage in any of these circumstances, and if we can do that then there would be ample opportunity for interested parties to quibble over the exact content of the rule.

If a broadcaster challenged the Interim Carriage Rule in court as *ultra vires*, the standards established by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>5</sup> (“*Chevron*”) would govern.<sup>6</sup> *Chevron* requires a reviewing court to engage in a potentially two-step analysis of the statutory language in question. The first step is to consider whether the language clearly and unambiguously expresses the intent of Congress. If it does, then that intent must be given effect and there is no second step. On the other hand, if the

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<sup>4</sup> Communications Act of 1934, Pub. L. 416, June 19, 1934, 48 Stat. 1064, 73rd Congress. Section 325(b) was added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (1992), which is referred to in these comments as the “1992 Act” or “1992 Cable Act.”

<sup>5</sup> *supra*.

<sup>6</sup> See, e.g., *City of Dallas, Texas v. F.C.C.*, 165 F.3d 341 (5th Cir. 1999).

statutory language is ambiguous, then the court moves to the second step, which is deciding whether the agency's rule or action being challenged is based on a permissible construction of that language. The court must "defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.'"<sup>7</sup>

If the second step is reached, that necessarily means that there is more than one possible interpretation of the statutory language, and "the judicial task is limited to deciding whether the agency's specification of meaning is within the *range* of choice that [the language] . . . implies."<sup>8</sup> In determining whether the interpretation is within that range, the standard is generally one of reasonableness.<sup>9</sup> Obviously, it is easier to find that an interpretation is reasonable if it can be shown to be consistent with articulated congressional policies. It has been suggested that "step two would seem to set no particular limits on the means an agency uses to resolve statutory ambiguities, so long as the agency does not ignore congressionally prescribed criteria."<sup>10</sup>

Under *Chevron*, then, the first task in evaluating an Interim Carriage Rule would be to ascertain "whether Congress has directly spoken to the precise question at issue."<sup>11</sup> There is

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<sup>7</sup> Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) (quoting *Chevron*, 467 U.S. at 845).

<sup>8</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Columbia L. Rev. 612, 623 (1996); see also Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Columbia L. Rev. 1093, 1121 (1987) (agency interpretation must fall within permissible "range of indeterminacy").

<sup>9</sup> See Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 Va. L. Rev. 611, 621 (2009) (asserting there is "an emerging consensus that the 'arbitrary, capricious, and abuse of discretion' standard set forth in [the Administrative Procedure Act's (APA)] Section 706(2)(A) supplies the metric for judicial oversight at *Chevron*'s second step."); Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187, 191 (2006) (second step considers whether agency interpretation is "reasonable in light of the underlying law").

<sup>10</sup> Note, *How Chevron Step One Limits Permissible Agency Interpretations: Brand X and the FCC's Broadband Reclassification*, 124 Harv. L. Rev. 1017, 1025 (2011). See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .").

<sup>11</sup> 467 U.S. at 842 (emphasis added).

nothing in the Communications Act that directly and expressly speaks to the precise question of whether the Commission has the power to enact a rule allowing interim carriage in any circumstances.

The next inquiry, therefore, is whether the statutory language, although not providing a direct answer, constitutes “the unambiguously expressed intent of Congress” with respect to the question, for if it does, the Commission “must give effect” to that intent.<sup>12</sup> In that sense, the Commission is correct in suggesting that efforts to establish that the Commission’s ancillary authority is broad enough to encompass an interim carriage requirement put the cart before the horse.<sup>13</sup> That analysis is never reached if the more specific statutory provisions relating to retransmission consent make clear that Congress did not intend for the Commission to be able to allow carriage absent the consent of the broadcaster.

In the *NPRM*, as well as some prior pronouncements on the subject, the Commission has expressed the view that the statutory language does reveal Congress’s intent to deny the Commission the power to order carriage against the will of the broadcast station’s owner. Thus, in the *NPRM*, the Commission said the following:

[E]xamination of the Act and its legislative history has convinced us that the Commission lacks authority to order carriage in the absence of a broadcaster’s consent due to a retransmission consent dispute. Rather, Section 325(b) of the Act expressly prohibits the retransmission of a broadcast signal without the broadcaster’s consent. Furthermore, consistent with the statutory language, the legislative history of Section 325(b) states that the retransmission consent provisions were not intended “to dictate the outcome of the ensuing marketplace negotiations” and that broadcasters would retain the “right to control retransmission and to be compensated for others’ use of their signals.” We thus interpret Section

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<sup>12</sup> *Id.* 467 U.S.at 842-43.

<sup>13</sup> See *NPRM*, *supra* note 1, at ¶18 (“Contrary to the suggestion of some commenters, Section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act”).

325(b) to prevent the Commission from ordering carriage over the objection of the broadcaster, even upon a finding of a violation of the good faith negotiation requirement.<sup>14</sup>

Under *Chevron*, the relevant question is, in a very real sense, not so much whether this conclusion is right as whether it is unambiguously dictated by the statute, for “if the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute.”<sup>15</sup> In other words, if the Communications Act is ambiguous on the question of the power to require interim carriage, then the Commission, if convinced that requiring consent despite the lack of the station's consent in some instances was the best policy, could construe the statute as authorizing it to adopt an appropriate rule. In that event, assuming that the Commission could reasonably ground its rule in Section 325(b)(3)(A) of the Communications Act or its ancillary authority, then the court “[could] not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”<sup>16</sup> Instead, it would have to defer to the agency's interpretation unless “manifestly contrary to the statute.”<sup>17</sup> Those challenging the order or rule would “bear the ‘difficult burden’ of proving that the FCC's interpretation of an ambiguous statutory provision conflicts with the statutory scheme.”<sup>18</sup>

It is respectfully submitted that a rigorous analysis of all of the relevant facts and arguments demonstrates that the Commission does have the necessary authority. In any event, we believe that the relevant statutory provisions are sufficiently ambiguous regarding this issue

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<sup>14</sup> *NPRM*, *supra* note 1, at ¶18 (internal footnotes omitted).

<sup>15</sup> *Chevron*, 467 U.S. at 843.

<sup>16</sup> *Chevron*, 467 U.S. at 844.

<sup>17</sup> *Id.*

<sup>18</sup> *City of Dallas, Texas v. F.C.C.*, 165 F.3d 341, 347 (5th Cir. 1999).

to require construction by the Commission and that an interpretation that allows the Commission to order interim carriage in some circumstances would be reasonable and consistent with the statutory scheme and congressional intent.

We begin by demonstrating that there is, at the very least, considerable ambiguity and uncertainty in the relevant statutory language. In doing so, we proceed as courts generally do in applying *Chevron* step-one: analyzing the applicable statutory language, applying logic and consulting the legislative history.<sup>19</sup>

### **THE RELEVANT STATUTORY LANGUAGE DOES NOT FORECLOSE INTERPRETATIVE CHOICE**

#### ***Section 325(b)(1)(A) Does Not Limit the Commission's Authority***

Section 325(b)(1)(A) says that, with specific exceptions not relevant here:

No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station. . . .

There is nothing in this language that directly addresses the issue of the power of the Commission to allow interim carriage without consent. Statutory silence does not divest the Commission of its authority under the Communications Act;<sup>20</sup> therefore, if one concludes that the statute restricts the Commission's authority to order or permit interim carriage, then that limitation must be found through a process of inference. If inference is required, for purposes of a *Chevron* analysis, the initial question is whether the relevant statutory language forecloses the possibility of more than one reasonable inference. The Commission, focusing solely on

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<sup>19</sup> For example, in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), the Supreme Court, in applying *Chevron* step one, found ambiguity in the statute by analyzing the statutory language in issue and considering the legislative history. 545 U.S. at 989-92.

<sup>20</sup> *Alliance for Community Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008).

325(b)(1)(A) and seemingly ignoring other relevant statutory provisions, seems to think that there is only one possible syllogism, which goes something like this:

1. Section 325(b)(1)(A) prohibits retransmission by a cable system of a station's signal without its consent
2. If the Commission ordered or allowed interim carriage against the station's will, the cable system would be retransmitting the signal without the station's consent.
3. Therefore, the Commission may not permit or require carriage without the consent of the station.

In our view, this is the wrong syllogism for several reasons. We begin by noting that although retransmission consent is typically referred to as a "right" of broadcasters, Section 325(b)(1)(A) is written as a restriction upon the behavior of certain specified actors, not as the creation of a right or benefit for broadcasters. The only actors whose behavior is affected by the statutory language are cable systems and other MVPDs, and there is no express restriction upon the behavior of or the grant of any enforceable right to any other actor.

This is an important point. Section 325(b)(1) does not give the station any directly enforceable right.<sup>21</sup> Moreover, the prohibition on carriage without consent applies only to cable systems and MVPDs and not to any other person in the world. Even if the provision were read as conferring a right upon broadcasters enforceable on their behalf by the Commission, that right is far less than "the right to control retransmission and to be compensated for others' use of their signals" referred to in the passage from the legislative history cited by the Commission in support of its position.

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<sup>21</sup> When Congress revised Section 325(b) to include DBS providers, it also added a new subsection 325(e), which established a complaint procedure through which broadcasters may seek redress for retransmission of local broadcast signals by satellite carriers allegedly in violation of the statute. No similar provision creating a complaint right or process for broadcasters objecting to carriage by a cable system was included in the 1992 Act or has been subsequently added.

When it comes to the Commission itself, Section 325(b)(1) does not expressly state that the Commission can or cannot order carriage against the station owner's will; indeed, it does not even mention the Commission.

Does statutory language that speaks explicitly only to the rights and obligations of the MVPD and, for the sake of argument, implicitly to those of the broadcaster mean that there is no role for the Commission? The answer is, of course, "no."

Frequently in the case of far-reaching federal statutes administered by an agency with extensive authority over regulated parties, some provisions contain language specifically regulating one or more private parties, without conferring authority as to the specific subject matter upon the agency. Other, more general statutory provisions give the agency powers and responsibilities, including rulemaking authority, and these general grants of authority are often read by the agency and courts as including the power to make rules that affect procedural and substantive aspects of the more specific provisions that refer only to regulated parties.<sup>22</sup> In other words, "[f]ederal administrative agencies generally enforce statutory mandates which are drawn in broad and ill-defined terms. Consequently, one of the central tasks of such agencies is to formulate policies which serve to elaborate and clarify the substantive law governing the conduct of regulated parties."<sup>23</sup> Thus, the fact that Section 325(b)(1)(A) refers to the regulated parties,

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<sup>22</sup> See, e.g., *Public Serv. Comm'n v. Federal Power Comm'n*, 327 F.2d 893, 897 (D.C. Cir. 1964) ("All authority of the Commission need not be found in explicit language. . . . While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail"; *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 368-74 (1973) (upholding Federal Reserve Board's authority to issue rules under the Truth-in-Lending Act); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) ("We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.")

<sup>23</sup> Note, *FTC Substantive Rulemaking Authority*, 1974 Duke L.J. 297 (1974)

and not to the Commission, is neither unusual nor necessarily dispositive of the issue of the Commission's authority or lack thereof.

In several instances, the Communications Act, as written and as interpreted by the Commission and courts, draws a clear distinction between the rights and obligations of regulated entities, local franchise authorities or other parties, on the one hand, and the jurisdiction and powers of the Commission, on the other. If a particular provision of the statute gives a regulated entity, whether a broadcast station, a telephone company or a cable company, a right or obligation *vis-à-vis* other non-governmental persons and entities, that does not mean that the Commission is totally precluded from affecting those rights or obligations by exercising its ancillary or other authority under other statutory provisions. If it were, then there would probably be many of the Commission's regulations, orders and rulings across the entire range of its jurisdiction that would be invalid. Notably, in situations other than retransmission consent where its authority to adopt rules affecting the rights or obligations of regulated parties under a specific statutory provision has been challenged because it does not expressly grant rulemaking authority, the Commission has recognized that silence does not negate or limit its authority derived from other provisions of the Communications Act.<sup>24</sup>

The Communications Act is extensive in its reach. There are few federal statutes that provide for such comprehensive regulation of entire industries and markets, or give the administering agency such vast responsibilities and power.<sup>25</sup> The communications and media businesses have always been characterized by rapid changes in technology, consumer tastes and

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<sup>24</sup> See, e.g., *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-86 (1999) (sustaining FCC's issuance of regulations permitting local competition by long-distance carriers); *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, 22 FCC Rcd 18013 (2007).

<sup>25</sup> The federal securities laws and the authority of the Securities and Exchange Commission to administer those laws are comparable, as one example.

preferences and competitive conditions. As the Supreme Court noted in a statement about broadcasting that has equal applicability to other fields regulated by the Communications Act, “[u]nderlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.”<sup>26</sup> The Commission plays the central role in achieving that flexibility. The Communications Act was “implemented for the purpose of consolidating federal authority over communications in a single agency to assure an adequate communication system for this country”<sup>27</sup> The Commission is given broad authority “to avoid the need for repeated congressional review and revision of the Commission's authority to meet the needs of a dynamic, rapidly changing industry [because] [r]egulatory practices and policies that will serve the ‘public interest’ today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future.”<sup>28</sup>

Federal courts have consistently taken an expansive view of the Commission’s power to regulate all forms of wireline and wireless communications. The Commission’s authority has not been confined to the matters specifically addressed in the Communications Act, such as preventing interference among radio and television broadcast stations. The leading example of just how expansively the Commission’s jurisdiction and powers have been viewed by the Courts came in 1968, when the Supreme Court held, in *U.S. v. Southwestern Cable*, 392 U.S. 157, 178 (1968), that even though “CATV” systems were nowhere mentioned in the Communications Act, the Commission had the authority to regulate the cable industry to the extent “reasonably

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<sup>26</sup> *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

<sup>27</sup> *Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 804 (D.C.Cir. 2002) (quoting S. Rep. No. 73-781, at 3 (1934)).

<sup>28</sup> *Washington Utils. & Transp. Comm'n v. FCC*, 513 F.2d 1142, 1157 (9th Cir.) (footnote and citation omitted), cert. denied, 423 U.S. 836, 96 S.Ct. 62 (1975).

ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.” The power of the Commission to exercise its ancillary jurisdiction to regulate the relationship between broadcasters and the cable industry had been repeatedly confirmed prior to 1992. For example, the Commission adopted rules imposing network program non-duplication, syndicated program exclusivity and sports blackout requirements on cable systems, even though none of these subject matters is mentioned in the Communications Act. The Commission continues to rely on its ancillary powers to justify rules or orders that lack an express statutory basis or to bolster its case where there is a pertinent statutory provision that does not unambiguously confer the authority to take the action in question.

Our purpose in mentioning the Commission’s ancillary authority is not to argue that it is an independent source for an Interim Carriage Rule. As noted, we agree with the Commission that its Title I general authority does not support adoption of a rule that is clearly inconsistent with a provision of the Communications Act that directly addresses the specific subject matter of the rule. Instead, our point is that whenever Congress adds a provision to the Communications Act affecting the behavior of regulated parties, but does not mention the Commission, there is a choice as to how the silence is to be interpreted. One interpretation is that silence forecloses any role for the Commission beyond the merely ministerial. An alternative is to say that silence is not sufficient to read the Commission out of the script or relegate it to a bit part; for that to occur, there must be an unambiguous affirmative statement to that effect in the statute itself or its legislative history.<sup>29</sup> The latter is the better policy choice, given the centrality of the Commission

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<sup>29</sup> This has consistently been the Commission’s position in instances involving matters other than retransmission consent. For example, in the Commission’s 2007 *Cable Franchising Order* proceeding, it interpreted a statutory provision Section 621(A)(1) of the Communications Act, which barred cable operators from providing cable service without a “franchise” – *i.e.*, an express written authorization for the cable operator to build and operate a cable

to the regulatory scheme and the decades-long history of court decisions recognizing the extensive and expansive nature of its authority.

In short, Congress enacted Section 325(b) in an historical context in which it was well-established that the Commission had broad ancillary authority that derived from pre-existing statutory provisions, as expansively interpreted by the Supreme Court. It is reasonable to believe that, given this context, Congress thought that the Commission already possessed the power to regulate the newly created retransmission consent process in order to insure that it served the public policy goals that the process, as well as the Communications Act in general, was intended to serve. There was no need to add anything to the statute expressly granting that power to the Commission—it already had it. Given the context, if Congress intended for the Commission’s ancillary authority to not extend to retransmission consent, then it would have made an affirmative statement to that effect in either the statute or the legislative history, rather than trusting that the Commission and courts would arrive at the right result through inference from the language of Section 325(b)(1) and construing general statements in the legislative history that do not directly speak to the Commission’s authority. In effect, the absence of a statement in Section 325(b) about the Commission’s authority to allow interim carriage in some circumstances does not imply that the authority does not exist, but, rather, that it does.

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system. Relying on language in Section 621(a)(1) prohibiting unreasonable denials of franchise applications – a provision that contains no reference to the Commission whatsoever – and on its ancillary authority under Sections 201(b), 303(r), and 4(i), the Commission concluded that it had the requisite legal authority not only to establish a time limit within which a franchise had to either grant or deny a franchise application, but also to adopt a rule under which a franchising authority’s failure to act within the specified term period would be deemed by operation of law to constitute a grant of the required franchise on an “interim” basis on terms and conditions set by the Commission. *Cable Franchising Order*, 22 FCC Rcd at 5134. In reaching this conclusion, the Commission noted that “[t]here is nothing in the statute or the legislative history to suggest that Congress intended to displace the Commission’s explicit authority to interpret and enforce provisions in Title VI, including Section 621(a)(1).” *Id.* at 5131-32. The Commission’s *Cable Franchising Order* was upheld by the United States Court of Appeals for the Sixth Circuit, which found that the absence of any express provision giving the Commission a role in the franchising process did not preclude the Commission from “filling the gap” in the statute through the exercise of its regulatory authority. *Alliance for Community Media v. FCC*, 529 F.3d 763.

In that regard, undoubtedly because of Congress's general intent to give the Commission broad and adaptable authority, there are few, if any, instances where the Communications Act establishes a hard and fast rule governing regulated entities and leaves no or only an insignificant role for the Commission. The fact that there are some instances is significant. When Congress wants to restrict the Commission's authority it says so, probably because there have been so many court decisions holding that silence about the Commission's authority in a statutory provision does not deprive the Commission of its full ancillary authority with respect to the subject matter of that provision. As noted in the Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC D/B/A Suddenlink Communications, and Insight Communications Company, Inc. filed in this docket:

When Congress intends to restrict or otherwise limit the scope of the Commission's authority to regulate, it knows how to express that intent. For example, in Section 623(a)(1) of the Communications Act (as amended by the 1992 Cable Act), Congress expressly declared that "No Federal agency . . . may regulate the rates for the provision of cable service except to the extent provided under this section and section 612." Similarly, Section 623(e)(1) states that "no Federal agency . . . may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts." And in Section 624A(b)(2), Congress used the following words to restrict the Commission from adopting certain rules relating to the use of scrambling or encryption technology: "the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders."

There is a world of difference between the provisions cited above and Section 325(b)(1)(A). The former are unambiguous restrictions on the Commission's regulatory authority. The latter most decidedly is not.<sup>30</sup>

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<sup>30</sup> Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC D/B/A Suddenlink Communications, and Insight Communications Company, Inc. (June 3, 2010), at 33-4 (internal footnotes omitted).

In sum, given the centrality of the Commission to national communications policy and law, the Commission should never be read out of the script unless that is unambiguously the congressional intent. The conclusion that the Commission is precluded from acting because of a provision that expressly speaks solely to the behavior of one or more market participants should be reached only if there is compelling evidence that Congress intended to preempt the Commission's authority.<sup>31</sup> That evidence does not exist. In fact, as discussed further below, the existing evidence leads to exactly the opposite conclusion: As discussed at greater length below, the only statements in the legislative history that directly and specifically relate to the Commission's authority to adopt an Interim Carriage Rule unanimously confirm that it not only has that authority, but also has a duty to exercise it to prevent harm to consumers.

### **Section 325(b)(3) Makes the Retransmission Consent Right Conditional, Not Absolute**

It is not necessary to rely on the Commission's pre-existing ancillary powers as the basis for concluding that it can act to prevent consumers from suffering from service disruptions because of breakdowns in retransmission consent negotiations. The 1992 Act included not just subsection 325(b)(1), but also the language now found in subsection 325(b)(3)(A), which authorizes and directs the Commission to "establish regulations to govern the exercise by television broadcast stations of the right to grant retransmission consent."<sup>32</sup> The two subsections have to be read together. If they are read as a whole, as they must be, what Congress really said,

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<sup>31</sup> *In re Permian Basin Area Rate Cases, supra*. ("We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes.").

<sup>32</sup> Congress's directive that the Commission adopt rules implementing Section 325 within 180 days of its enactment does not limit the Commission's discretion to update its rules in response to changing conditions. In a related context, the Commission recently found that there was "no merit" to the contention that such an initial implementation deadline somehow stripped the Commission of its power to amend its rules implementing Section 628 of the Act. *Review of the Commission's Program Access Rules and Examination of Program Tying Arrangements, First Report and Order*, 25 FCC Rcd 746 ¶ 11 n.23 (2010) ("2010 Program Access Order").

in effect, was that MVPDs may not retransmit a station's signal without the authority of the originating station given in accordance with the Commission's regulations governing the exercise of the retransmission consent requirement.

Note that there is a conceptual shift in moving from Section 325(b)(1)(A) to Section 325(b)(3)(A). As we have seen, Section 325(b)(1)(A) is phrased as a prohibition upon the behavior of MVPDs, not as a right of a broadcast owner. In Section 325(b)(3)(A), retransmission consent is presented as a right of broadcasters that is subject to regulation by the Commission. While this might seem at first glance a trivial distinction, it is actually critically important. The Commission's position that it lacks authority to order interim carriage depends upon the proposition that the law establishes an absolute, unqualified right of broadcasters to prevent carriage without consent. That proposition has no support in the statutory language. Section 325(b)(1)(A) creates a restriction upon certain behavior by cable companies, not a right of broadcasters, while Section 325(b)(3)(A) does refer to retransmission consent as a right of broadcasters, but only a conditional right subject to Commission rules, rather than an absolute right.

As a result, to accurately reflect the statutory language, the syllogism presented above as expressing the Commission's position has to be modified to read as follows:

- Section 325(b)(1) says that an MVPD may not retransmit a broadcast signal without the station's consent, Section 325(b)(3)(A) says that the Commission can and must adopt regulations governing the station's exercise of its right to grant or withhold consent and the Commission has pre-existing direct and ancillary authority to regulate broadcast stations and their relationship with cable systems that was not expressly negated by the 1992 Act.
- If the Commission orders interim carriage in the face of a denial of consent for retransmission by the station, the result is carriage by an MVPD without the station's consent.

- Therefore, a violation of the law occurs unless the order is pursuant to regulations within the scope of the rule-making authority granted to the Commission.

As this syllogism makes clear, the answer to the question of whether or not the Commission may order interim carriage is not found in Section 325(b)(1)(A) alone, but, rather, in Section 325(b)(1)(A) read in light of Section 325(b)(3)(A) and the rest of the Communications Act, as interpreted by the Commission and the courts.<sup>33</sup>

The issue, then, becomes whether the Commission's rulemaking authority is broad enough to encompass an interim carriage order of some kind under some circumstances. Initially, determining the scope of that authority depends upon figuring out what Congress meant by referring to rules that "govern the exercise of the [retransmission consent] right."

The concept of exercising a right is frequently used in everyday discourse. Sometimes the speaker refers to the procedure by which the election to pursue a right is made. For example, if we talk about the exercise of a right of first refusal for a parcel of real estate, we usually are

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<sup>33</sup> In support of its position that its ancillary authority does not extend to ordering interim carriage, the Commission states that "Section 4(i) of the Act does not authorize the Commission to act in a manner that is inconsistent with other provisions of the Act," and, in footnote 57, quotes *Shawnee Tribe v. U.S.*, 423 F.3d 1204, 1213 (10th Cir. 2005) for the principle that "[i]t is a fundamental canon of statutory construction that, when there is an apparent conflict between a specific provision and a more general one, the more specific one governs." According to the Commission, Section 325(b)(1)(A) is the specific provision and Section 4(i) is the general one. The cited principle applies, however, only when the two provisions cover the same subject, and Section 325(b)(1) and Section 4(i) are an apple and an orange. Section 325(b)(1)(A) does nothing more than prohibit certain conduct by MVPDs. It does not mention the Commission or its authority. Section 4(i), on the other hand, directly concerns the Commission's authority. When it comes to the Commission's authority, Section 4(i) is the specific statutory provision and Section 325(b)(1)(A) is actually not even the general one—it simply does not address the topic under consideration. The Commission is able to invoke the *Shawnee Tribe* principle only by reading into Section 325(b)(1)(A) words that are not there. Accordingly, the principle is not dispositive or even relevant to the fundamental inquiry as to whether the Commission has authority to order interim carriage. Actually, the principle is most relevant to the interplay of subsections 325(b)(3)(A), which is quite specific regarding the issue of the Commission's rule making authority, and 325(b)(1)(A), which does not even mention the Commission. The Commission's reading of Section 325(b)(1)(A) as foreclosing adoption of a rule allowing, under any circumstances, interim carriage absent the station's consent creates "an apparent conflict" with Section 325(b)(3)(A), which authorizes Commission rulemaking impacting retransmission consent and does not contain any limit on the scope of that authority. On the issue of the Commission's rulemaking authority, Section 325(b)(3)(A) is the more specific provision and, under the *Shawnee Tribe* principle, should govern.

referring to the mechanics by which the right is triggered. Often, however, we use the word “exercise” to refer to the enjoyment of the right, what we might call the “substance” of the right in question, as compared to its procedural aspects. For example, the First Amendment of the U.S. Constitution prohibits Congress from prohibiting the free “exercise” of religion and the reference is clearly to more than just mechanics.

This distinction between the procedural and substantive aspects of a right is real, but often blurry at the margins. Some aspects of the retransmission consent right are clearly mechanical and, therefore, procedural—for example, the timing of a broadcaster’s election of retransmission consent rather than must carry and the manner in which that election is communicated to affected MVPDs. In other cases, matters are not so clear cut. Moreover, rules that address matters that are undoubtedly procedural may affect the substance of the right.

Considering only the statutory language, it would appear that there can be little uncertainty about what Section 325(b)(3)(A) means: A broadcaster’s retransmission consent right is simply the right to say either “yes” or “no” to carriage of its signal by an MVPD, and so Section 325(b)(3)(A) means that the Commission may adopt regulations that govern the right of broadcasters to say “yes” or “no” to requests for carriage of their signals by MVPDs. There is nothing in the language that restricts the scope of the rulemaking to the merely procedural and, therefore, the Commission may regulate in ways that affect the substantive right granted, even though it may not negate that substantive right.

The conclusion that the rulemaking authority extends to substance as well as procedure is supported by the last sentence of Section 325(b)(3)(A), which directs the Commission, in adopting initial regulations governing the exercise of the retransmission consent right, to “consider . . . the impact that the grant of retransmission consent by television stations may have

on the rates for the basic service tier and shall ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under [Section 623 of the Communications Act] to ensure that the rates for the basic service tier are reasonable." For the sake of convenience, we can refer to this provision as the "Reasonable Rates Mandate."

As amended by the 1992 Act, Section 623 of the Communications Act directed the Commission to "by regulation, ensure that the rates for the basic service tier are reasonable" with the "goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."<sup>34</sup>

In rate regulated systems, all broadcast television station signals carried by a cable operator must be placed on the basic service tier. If, therefore, cable operators secured retransmission consent by paying cash or providing other consideration and passed the cost through to subscribers, basic service tier rates would increase. The Commission's regulations "governing the exercise of the retransmission consent right" would be inconsistent with the obligation to ensure reasonable subscriber rates only if they allowed a pass through of costs to a degree that resulted in basic tier rates becoming unreasonable. That result could be avoided in either or some combination of two methods:

- by prohibiting cable operators from passing through retransmission consent costs by an amount that would tip rates over the line of reasonableness; or
- by allowing cable companies to pass through retransmission consent costs while limiting the amount that broadcasters could charge for retransmission consent so that basic tier rates remained at the "reasonable" level.

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<sup>34</sup> Section 623(b)(1).

Reliance on the first method would mean that the Commission could accomplish the goal expressed in the Reasonable Rates Mandate by acting solely under the rate regulation rules promulgated under Section 623 of the Communications Act, and no separate rulemaking or other actions under Section 325(b)(3)(A) would be needed.<sup>35</sup> The fact that the Reasonable Rates Mandate directs the Commission to consider the impact on basic tier rates in the context of its retransmission consent rules means that Congress thought that protecting consumers from rate increases due to retransmission consent fees should not be handled entirely through regulation of subscriber fees for the basic tier. That conclusion is buttressed by the fact that Section 623 ordered the Commission, in formulating its rate regulation rules, to take into account “the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier . . . and changes in such costs.”<sup>36</sup> The Commission’s rules allowed cable companies to pass through the full amount of its increases in retransmission consent fees, assuming that the system’s “external costs” as a whole have risen by at least that amount.<sup>37</sup>

If Congress had meant for the rate regulation process to be the exclusive method for protecting against basic tier cost increases caused by retransmission consent fees, then it would have proceeded differently. In that case, the logical place to address the issue would be in the rate regulation provisions of the 1992 Act—perhaps by including language in Section 623 to the effect that although the Commission was charged to take into account increases in programming

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<sup>35</sup> In adopting its initial rules under Section 325(b), the Commission declined to adopt rules specifically addressing retransmission consent rates, but it did not claim that it lacked the authority to do so. Instead, it concluded that it had the ability to address the potential impact of retransmission consent fees on basic rates under Section 623(b)(2), if and when required, and that there was, at that time, “no specific regulatory action that the Commission need take pursuant to Section 325(b) concerning the impact of retransmission consent compensation on basic rates.” *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, ¶ 69 (1993) (“*Broadcast Signal Carriage Issues Order*”).

<sup>36</sup> Section 623(b)(2)(C)(ii).

<sup>37</sup> See 76 C.F.R. § 76.922.

costs, it was directed to insure that programming cost increases in the form of retransmission consent fees were not responsible for basic tier rate increases. If, despite logic, Congress chose to address the subject in Section 325(b), then the clearest way to express the concept that the Commission was to use its rate regulation power to prevent basic tier price increases due to retransmission consent would be to say something like “In carrying out its responsibility under Section 623, the Commission shall insure that cable operators do not increase rates because of their costs for retransmission consent to a degree that conflicts with the Commission’s obligation to ensure that the rates for the basic service tier are reasonable.” Instead, it identifies the dangers to be guarded against as excessive rates resulting from the Commission’s regulations under Section 325, rather than from pass through of costs by cable operators.

For these reasons, it is most reasonable to interpret the Reasonable Rates Mandate not as granting the Commission authority it already had under Section 623—the power to limit the right of cable companies to raise rates to cover retransmission consent fees—but, rather, the supplemental authority to ensure that its rules did not allow broadcasters’ demands to drive up cable operators’ costs to the point that basic subscribers’ monthly bills began to rise.

In the Report and Order promulgating its initial rules under Section 325(b), the Commission clearly thought that the Reasonable Rates Mandate gave it authority to deal with the impact of retransmission consent on basic rates that was different from its power under Section 623. The Commission concluded that it had the ability to address the potential impact of retransmission consent fees on basic rates under Section 623(b)(2), if and when that impact occurred, and that there was, at that time, “no specific regulatory action that the Commission need take pursuant to Section 325(b) concerning the impact of retransmission consent

compensation on basic rates.”<sup>38</sup> Although concluding that no action under Section 325(b) was then required, the Commission recognized that Section 325(b)(3)(A) was an independent grant of authority to make rules to deal with the impact of retransmission consent deals on subscriber costs, separate and apart from its rate regulation power under Section 623.

The legislative history supports this interpretation. For example, Senator Inouye, the manager of the Senate bill (S.92) that was the foundation for the 1992 Act and the author of its retransmission consent language that eventually became Section 325(b),<sup>39</sup> remarked that

S. 12 will not cause consumer rates to increase because the bill explicitly requires the FCC to consider the impact of retransmission consent on rates in implementing this provision, and the FCC must ensure that this provision complies with the requirement that subscribers' rates be reasonable.<sup>40</sup>

If Congress had intended that the Commission address the impact of retransmission consent on rates solely through its rate regulation power under Section 623, Senator Inouye’s statement would read much differently. It would say something along the lines of “In implementing its authority under Section 623, the Commission shall consider the impact of retransmission consent and ensure that it does not cause subscriber rates to become unreasonable.” Instead, the language focuses on the rules to be adopted under Section 325(b)(3)(A), not Section 623.

The use of the conjunction “and” in the Reasonable Rates Mandate and Senator Inouye’s statement clearly supports the notion that Congress intended to give the Commission dual

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<sup>38</sup> *Broadcast Signal Carriage Issues Order*, *supra* note 35, at ¶ 69.

<sup>39</sup> See Nicholas W. Allard, *The 1992 Cable Act: Just the Beginning*, 15 *Hastings Comm. & Ent. L.J.* 305, 334n.121 (1993).

<sup>40</sup> 138 Cong. Rec. S14222 (Sept. 21, 1992)(remarks of Sen. Inouye).

weapons for preventing consumers from suffering unreasonable rate increases. It armed the Commission with the power to regulate cable companies' rates under Section 623 and with the authority to regulate the demands of broadcasters under Section 325(b)(3)(A).<sup>41</sup> That reading is confirmed by the following statement by Senator Inouye:

[T]he FCC must ensure that local stations' retransmission rights will be implemented with due concern for any impact on cable subscribers' rates.

[T]o eliminate any doubt on this issue, we will soon be offering a managers' amendment to the bill to make certain that retransmission consent does not result in rate increases. In addition, the FCC is also required to regulate the rates for the basic tier—this is the tier that contains the broadcast signals—to make certain that those rates remain reasonable. Thus, the FCC has a clear mandate to ensure that retransmission does not result in harmful rate increases that we have seen flourishing throughout this Nation.<sup>42</sup>

The amendment referred to was introduced by Senator Inouye on the same day, and it added the Reasonable Rate Mandate to Section 325(b)(3). This statement unambiguously says that the addition to Section 325(b)(3)(A) created a source of authority to control rates “in addition” to the rate regulation power of the Commission under Section 623. There was no need to give a second source of authority if all that it did was the same thing as Section 623—allow the Commission to regulate cable company rates. The only reason to add it would be to give the Commission an additional power, which is to adopt rules limiting the ability of broadcasters to collect fees at such levels as to affect raise basic tier prices.

Of course, the price that can be collected for retransmission consent is a matter of substance, not mere procedure. If, as both Congress and the Commission apparently thought, the

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<sup>41</sup> For that reason, repeal of federal rate regulation in 1996 did not eliminate the Commission's authority or responsibility to ensure that basic rates are not increased inordinately because of retransmission consent fees. *See* FPC v. Texaco, 417 U.S. 380 (1974) (when Congress explicitly directs an agency to set the price of a commodity, the agency cannot ignore its charge and leave the price to market forces).

<sup>42</sup> 138 Cong. Rec. S564 (Jan. 29, 1992).

Reasonable Rate Mandate allowed the Commission to include provisions affecting pricing discretion in its rules governing retransmission consent, then Section 325(b)(3)(A) conferred substantive, as well as procedural rule-making authority. In any event, the Reasonable Rates Mandate definitely does direct the Commission to consider the impact on rates in its rulemaking under Section 325(b)(3)(A) and to insure that its rules adopted under that Section do not conflict with its then-extant obligation to assure that basic rates remain reasonable. If the rulemaking authority granted by Section 325(b)(3)(A) encompassed only tinkering with procedures, and not adopting rules that affect substance, there would be absolutely no need for the Reasonable Rates Mandate because it is impossible to imagine how merely procedural rules could have any impact that would affect basic rates, let alone kick them into the realm of the unreasonable.

At worst from the perspective of those who think the Commission has authority to allow interim carriage, the interplay of the grant of rulemaking power in Section 325(b)(3)(A) with the dictate of Section 325(b)(1)(A) creates sufficient ambiguity to shift the analysis into the *Chevron* second step. That means that if the Commission resolved the ambiguity in favor of an interpretation that validated an Interim Carriage Rule, its construction would be entitled to judicial deference, if reasonable and within the range of permissible choices.

Before leaving analysis of the statutory language, it is worthwhile to briefly consider another provision of the Act that the Commission has previously said supports its view that it lacks authority to order interim carriage, although it did not repeat that assertion in the *Notice*. In 2000, the Commission adopted rules implementing provisions of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") that required broadcasters to negotiate in good faith with satellite carriers and other MVPDs with respect to their retransmission of the broadcasters'

signals.<sup>43</sup> In doing so, the Commission rejected the urgings of MVPDs that it prohibit a broadcast station from forcing an MVPD to cease carriage, as long as the MVPD was prepared to continue negotiations or at least during the pendency of a good faith complaint filed with the Commission.<sup>44</sup>

The Commission cited the language of Section 325(b)(1) and Section 325(e) as supporting its conclusion that it lacked authority to order interim relief.<sup>45</sup> Section 325(e) was added to the Communications Act by SHVIA and establishes a streamlined complaint procedure through which broadcasters may seek redress for allegedly illegal retransmission of local broadcast signals by satellite carriers. The Commission noted that the provision allowed four, and only four, defenses by the satellite carrier, none of which include a grant of authority by the Commission.

A different position would be entirely consistent with the statutory language and the legislative history. Section 325(e)(1)(A) authorizes the filing of a complaint by a broadcaster, only if it “believes that a satellite carrier has retransmitted its signal to any person in the local market of such station in violation of subsection (b)(1) of this section.” Section 325(b)(2) creates certain statutory exceptions to the need for retransmission consent under Section 325(b)(1)—for example, consent is not required for retransmission of the signals of non-broadcast stations or,

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<sup>43</sup>SHVIA added Section 325(b)(3)(A)(C) to the Communications Act. It directs the Commission to adopt rules prohibiting a broadcasting station that elects retransmission consent from “failing to negotiate in good faith.” In 2004, Congress amended Section 325(b)(3)(A)(C) to direct the Commission to adopt rules extending the good faith negotiation obligation to MVPDs. Satellite Home Viewer Extension and Reauthorization Act of 2004, § 207, passed as part of Pub.L. 108-447, 118 Stat. 2809 (2004). On its face, this provision does not in any way constrain or otherwise limit the Commission’s exercise of the more general rulemaking authority previously granted it in Section 325(b)(3)(A).

<sup>44</sup> *First Report and Order, In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999 and Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, released March 16, 2000 (the “*Good Faith Order*”).

<sup>45</sup> *Id.* at ¶61

subject to specified conditions, of certain “superstations.” The analysis presented in the *Good Faith Order*, taken to its logical conclusion, means that a satellite carrier who retransmitted the signal of a qualifying superstation station without consent would be subject to sanctions under Section 325(e) because Section 325(e)(1)(A) authorizes a complaint based on a violation of “subsection (b)(1)” without reference to subsection (b)(2) and the “four defenses” also do not refer to the exceptions in Section 325(b)(2).

Clearly, taking that approach would be a mistake. The correct reading is that a “violation of subsection (b)(1)” cannot occur if the retransmission, even if not consented to by the station, is authorized by another provision of law. This same analysis should apply to rules adopted by the Commission under Section 325(b)(3)(A). A rule mandating or permitting interim carriage in certain events and upon certain terms would, in our view (which is supported by unambiguous legislative history), clearly be within the scope of the Commission’s authority under Section 325(b)(3)(A), particularly since shut-offs on the eve of popular television programs and events are used as a tactic by broadcasters to extract higher fees, which are passed through to subscribers. If the Commission exercised that authority, then a “violation of subsection (b)(1)” would not occur for purposes of Section 325(e) during the period of interim carriage in accordance with the rules adopted under Section 325(b)(3)(A), just as no such violation would occur if carriage were authorized by Section 325(b)(2) or otherwise by law.<sup>46</sup>

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<sup>46</sup> Of course, Section 325(e) only applies to “satellite carriers” and not to cable systems. Notably, there is no provision comparable to that Section that does cover cable companies. The extension to cable companies of whatever conclusions one may draw from the language of Section 325(e) is not mandated by logic or the conventions of statutory interpretation. Even if, contrary to the argument in the text, the “four defenses” really were meant to be absolutely the only ones available to satellite carriers, that does not mean that they are also the only ones available to cable companies. The fact that Congress expressly limited satellite carriers to the “four defenses” but chose not to impose a similar restriction on cable systems actually argues against the conclusion about interim relief drawn by the Commission in the *Good Faith Order* insofar as it applies to cable company negotiations with broadcasters.

## The Commission's Position Is Inconsistent with Its Past Actions

It has been observed that “[t]he regulations promulgated by an agency implementing legislation often give insight into legislative purposes”<sup>47</sup> because the agency was involved in, or at least acutely attentive to, that process and has fresh and sometimes first-hand knowledge of the thinking underlying the new law. As directed by Section 325(b)(3)(A), the Commission released its initial retransmission consent rules on March 29, 1993. In doing so, the Commission took a number of positions that clearly indicated that it thought that its authority under Section 325(b)(3)(A) extended to substance, as well as procedure, and that neither the seemingly simple command of Section 325(b)(1)(A) nor the legislative history prevented the Commission from imposing substantive restrictions on the retransmission consent right. The Commission found that it had the authority to take each of the following steps, even though, in virtually every case, there is nothing in the sparse language of Section 325(b)(1)(A) that remotely can be read as authorizing any of them and all of them are inconsistent with the Commission’s interpretation of the legislative history cited by the Commission to support its view that cannot authorize interim carriage:

- Ruled that areas where failure to reach agreement would leave a market without a channel affiliated with a national broadcast, network affiliated stations could not unreasonably withhold retransmission consent, even though owners of intangible property usually have complete discretion to allow others to use that property for any reason or no reason.<sup>48</sup>

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<sup>47</sup> Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 Fed. Comm. L.J. 99 (1996).

<sup>48</sup> *Broadcast Signal Carriage Issues*, *supra* note 35, at ¶147. The obligation to negotiate in good faith does not limit the right of the broadcaster, after having conducted good faith negotiations, to decide not to grant consent without cause.

- Adopted a specific rule barring local broadcasters and MVPDs from entering into exclusive retransmission consent agreements, even though participants in a “free” marketplace typically can negotiate over exclusivity.<sup>49</sup>
- Found that it had the authority to require that retransmission consent agreements cover an “entire program” day.<sup>50</sup> For example, a station could not offer one MVPD consent to carry its entire signal, but limit another MVPD to retransmission only of its non-network programs or offer different terms for carriage rights in different individual programs.
- Extended various requirements found in the must carry provision (Section 614 of the Act) to retransmission consent stations<sup>51</sup> despite the fact that Section 325(b)(4) expressly says that “the provisions of section 614 shall not apply to the carriage of the signal” of a station electing retransmission consent.

The first two items have the effect of requiring a broadcaster to allow carriage without its consent, something that the Commission now claims it lacks authority to do, and all of the items are directly counter to the notion that Congress intended to create a free market for retransmission consent, did not want the Commission to dictate the outcome and intended for broadcasters to control retransmission of their signals. For example, the position that the subsection 325(b)(1) creates a market for retransmission consent and precludes the Commission from altering the substantive outcome of marketplace negotiations is totally at odds with the belief that the Commission has the power to prohibit exclusive contracts. The prohibition of exclusive contracts before SHVIA also is completely counter to the view that Section 325(b)(1) precludes the Commission from ordering a broadcaster to allow a cable system to carry its signal even if the broadcaster does not wish to grant consent. Clearly, denying a broadcaster the right to grant a single MVPD the exclusive right to carry the station’s signal is tantamount to saying that the broadcaster must allow carriage by certain MVPDs whether it wants to consent to that

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<sup>49</sup> *Broadcast Signal Carriage Issues Order*, *supra* note 35, at ¶179. Congress subsequently codified the bar on exclusive retransmission consent agreements in Section 325(b)(3)(A)(C). However, that action was taken principally to place a “sunset” on the prohibition, not to address some perceived limitation in the Commission’s authority to have adopted it.

<sup>50</sup> *Id.* at ¶176.

<sup>51</sup> *Broadcast Signal Carriage Issues Order*, *supra* note 35, 8 FCC Rcd at 3004.

carriage or not. Broadcasters did not challenge this interpretation of rulemaking authority—nor did Congress.

In adopting the first rules related to retransmission consent in 1993, the Commission noted with favor its pre-existing position that in exercising its considerable power over broadcast licensees, it would take into account their behavior with regard to granting or withholding consent to retransmission of their signals. Specifically, the Commission quoted the following statement it made in a 1967 ruling in a matter under Section 325(a):

has declined to read Section 325(a) of the Communications Act (which requires the originating station's consent before another station may rebroadcast its programming) as sanctioning arbitrary refusals to grant such consent on the part of network affiliates and has stated that a refusal based upon no reason at all or upon unreasonable grounds would be a relevant consideration in determining whether the station was being operated in the public interest.<sup>52</sup>

The implication of this statement is that the Commission could take action against the station on the grounds that it was not operating in the public interest if it refused to grant retransmission consent authority.

In addition, the Commission's rules prohibit MVPDs from dropping carriage of a broadcast station during a ratings "sweeps" period, even with the consent of the broadcaster, and, in its 2005 report to Congress on the subject of retransmission consent, the Commission pointed out that the rule also prohibits broadcasters from withholding their signals from an MVPD during

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<sup>52</sup> *Broadcast Signal Carriage Issues Order*, *supra* note 35, at ¶147 (citing *KAKE-TV and Radio*, 10 R.R. 2d 799, 801 (1967)).

a “sweeps” period.<sup>53</sup> One looking to find the power to impose either limitation on the discretion of broadcasters will search the specific words of Section 325(b)(1) in vain.

The decision to impose Section 614 requirements in the retransmission consent context suggests that the Commission seems to believe that it has broad enough authority to create rights and obligations completely contrary to the clear, unambiguous language of Section 325(b)(4), yet lacks the authority to regulate substantively under the far looser language of subsection 325(b)(1)(A) read in conjunction with subsection 325(b)(3)(A). Frankly, this distinction is hard to justify in a principled manner and it may seem to the cynical to simply reflect a bias against cable operators or in favor of broadcasters when it comes to cable carriage of broadcast signals. Certainly, there is nothing in the statutory language that supports the distinction. Indeed, the position that broadcast stations are guaranteed their channel positions even if they elect retransmission consent is directly contrary to statements in the legislative history of the 1992 Act.

The Commission’s position regarding its authority to order interim carriage in the face of broadcasters’ threats to withdraw signals to the detriment of consumers seems to conflict with previous practices. The Supreme Court has long held that Sections 4(i) and 303(r) authorize the Commission to issue an order maintaining the *status quo* in cable carriage and other disputes whenever “the public interest demands interim relief.”<sup>54</sup> In contexts other than retransmission

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<sup>53</sup> See Federal Communications Commission, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 8, 2005) (“2005 FCC Retransmission Consent Report”), at 21n. 130 (citing 47 C.F.R. § 76.1601, Note 1).

<sup>54</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180 (1968).

consent, the Commission has made it clear that agrees with the Supreme Court that it has the authority to grant interim relief in form of “standstill order,” even if the specific statutory provision in issue does not expressly provide for, and, in a constrained reading, could be interpreted as precluding, that form of relief.

In deciding whether to grant an interim stay, the Commission usually simply cites *Southwestern Cable* and then applies the “Virginia Petroleum Jobbers” standards. For example, in 1998, the Commission ordered interim relief in a complaint proceeding initiated by AT&T Corp. (AT&T) and MCI Telecommunications Corporation (MCI) (together the “Petitioners”) against Ameritech Corporation (Ameritech) alleging that through its “teaming” agreement with Qwest Communications Corporation (Qwest), Ameritech was providing interLATA services in violation of section 271 of the Communications Act and its equal access and non-discrimination obligations under section 251(g) of the Act.<sup>55</sup> The Petitioners sought an order prohibiting Qwest from further marketing under the agreement, pending a final determination by the Commission of the agreement’s lawfulness. The Commission granted the requested standstill order after analyzing “the four criteria set forth in *Virginia Petroleum Jobbers* to evaluate requests for preliminary injunctive relief: (1) likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) that the issuance of the order will further the public interest.” The Commission noted that “[a]lthough not mandated by the Communications Act, the *Virginia Petroleum Jobbers* standard is consistent with the standard previously used by the Commission in the standstill order affirmed by the Supreme Court in *Southwestern Cable*, where the Commission assessed the

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<sup>55</sup> *In the Matter of AT&T Corp., et al. v. Ameritech Corporation and Qwest Communications Corporation*, File No. E-98-41 (rel. June 30, 1998).

seriousness of the legal questions and the interests of the public and the private parties involved.”<sup>56</sup>

In the *2010 Program Access Order*, the Commission cited its authority under Sections 4(i) and 303(r) of the Act to establish an interim carriage regime for program access complaints, in the form of “a temporary standstill of the price, terms, and other conditions of an existing programming contract.”<sup>57</sup> The Commission concluded that the “several benefits” of interim carriage—including “minimizing the impact on subscribers who may otherwise lose valued programming pending resolution of a complaint; limiting the ability of vertically integrated programmers to use temporary foreclosure strategies (*i.e.*, withholding programming to extract concessions from an MVPD during renewal negotiations); [and] encouraging settlement”—trumped the programmers’ asserted right under copyright law to withhold their programming. *Id.* In its April 2010 *Sky Angel* order, the Commission acknowledged that its standstill rules for program access disputes were not yet in force, but still found that it had “statutory authority to act on a standstill petition in program access cases pursuant to the authority granted to the Commission under Section 4(i) of the Act.”

The Commission has also issued an interim stay in a dispute between a broadcaster and a cable operator that temporarily prevented the broadcaster from enjoying a statutory right that was clear, unambiguous and, on its face, did not give the Commission the authority to deny or delay the exercise of that right. In 2000, the Cable Services Bureau issued an order granting a must-carry complaint by Brunson Communications, Inc. against RCN Telecom Services, Inc.

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<sup>56</sup> *Id.*

<sup>57</sup> *2010 Program Access Order*, *supra* note 32, ¶ 71.

seeking on-channel carriage of WGTW-TV in Burlington, New Jersey on RCN cable systems. The Bureau granted RCN's motion for a stay of the Bureau's order pending its appeal to the full Commission, relieving RCN, during the pendency of the proceeding, from complying with what the Bureau saw as its clear statutory obligation to carry the station on its assigned over-the-air channel.<sup>58</sup> In granting RCN's motion, the Bureau treated the motion as a routine filing for interim relief, noting the following:

The Commission evaluates petitions for stays under well settled principles. To support a stay, a petitioner must demonstrate: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay. The likelihood of success on the merits is an important element in a petitioner's showing. However, the degree to which a probability of success on the merits will be found varies according to the Commission's assessment of the other factors. When confronted with a case in which other elements strongly favor interim relief, the Commission may exercise its discretion in determining whether to grant a stay.

The stay was granted notwithstanding the broadcaster's assertion that the law and Commission precedent were clear that on-channel carriage was required, a conclusion with which the Bureau agreed by ruling in the station's its favor on the complaint. In other words, the Bureau read the law as mandating on-channel carriage and there was nothing in the text of Section 614 of the Act that would expressly permit the Bureau to order carriage, either permanent or temporary, of a station duly exercising its must-carry right other than on the assigned analog channel. Nonetheless, the Bureau thought it had the power to allow carriage in a manner other than that mandated by the express language of the statute pending a final decision on the merits of the proceeding by the full Commission. The stay continued for nearly a year

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<sup>58</sup> See *Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 (CSB 2000), available at <http://www.fcc.gov/Bureaus/Cable/Orders/2000/da001629.txt>

and a half, when the Commission finally denied RCN's petition for review. Even after denying review, the Commission granted RCN an additional 180 days to comply with the channel positioning requirement.

The statutory language of the channel positioning requirement for must-carry stations is as simple and unambiguous as the grant of the retransmission consent right and similarly devoid of any express language that would allow the Commission or any of its Staff to deny a station the positioning to which it is entitled for any length of time. If the Commission interprets Section 325(b)(1) as preventing it from temporarily staying loss of carriage of a broadcast station by an MVPD, then it should interpret Section 614 as similarly precluding it from permitting even temporary carriage of a station anywhere except on its over-the-air channel. Yet, in RCN, neither the Bureau nor the Commission expressed the slightest bit of doubt about their ability to issue an interim stay preserving the status quo, even though that meant that the broadcaster was not able to effectively enjoy a right clearly granted by simple, direct statutory language that did not provide for any exception on its face. The Commission and the Bureau thought, rightly in our view, that the Commission's ancillary authority and general remedial powers allowed it to issue an interim stay.

**THE LEGISLATIVE HISTORY CLEARLY SHOWS THAT CONGRESS INTENDED THE COMMISSION TO HAVE THE AUTHORITY TO PREVENT SHUTOFFS**

The conclusions we have reached based solely on analysis of the statutory language are confirmed by the legislative history, which establishes—irrefutably, it seems—that Congress did intend the Commission to have, and to exercise in the appropriate circumstances, the power to protect consumers from loss of carriage by their preferred MVPD and from price increases

caused by retransmission consent fees. At a minimum, the legislative history supports the conclusion that there is sufficient ambiguity on the point to create a choice of interpretations.

Of course, the Commission thinks that the legislative history supports a different conclusion. As already mentioned, in the *Notice*, the Commission says that “the legislative history of Section 325(b) states that the retransmission consent provisions were not intended ‘to dictate the outcome of the ensuing marketplace negotiations’ and that broadcasters would retain the ‘right to control retransmission and to be compensated for others’ use of their signals’” and indicates that those statements influenced its conclusion that it lacks authority to allow interim carriage. The quoted passages are from the *Senate Report*<sup>59</sup> on Senate Bill 102-92 (“S.92”), which was the source for the retransmission consent provision included in the 1992 Act.<sup>60</sup>

Neither of the passages directly addresses the issue under consideration: the power of the Commission to allow interim carriage without consent. Instead, they are slogan-like generalizations that speak to the retransmission consent process from the perspective of the two private parties conducting the negotiations, without reference to the Commission. Given the fact that they do not speak specifically to the Commission’s authority, the relevant question is

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<sup>59</sup> *Senate Report* No. 102-92 (June 28, 1991) (the “*Senate Report*”).

<sup>60</sup> Although it has a much more ancient lineage, the 1992 Act traces most immediately to S.92, which was first introduced by Senator John C. Danforth on January 14, 1991. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d102:SN12>: That bill, after several amendments, was adopted by the Senate by a vote on January 31, 1992. A conference committee was convened to reconcile differences between the bill and its House counterpart. The Cable Television Consumer and Protection Act of 1992 on October 5, 1992, after the House and Senate voted to override a veto by President George H.W. Bush. The House bill had no provision relating to retransmission consent, and the conference committee agreed to include in the final legislation the Senate’s language from S.92. See Conference Report on S.12, Cable Television Consumer Protection and Competition Act of 1992, 138 Cong. Rec. H8327 (Jan. 30, 1992), available at <http://thomas.loc.gov/cgi-bin/query/D?r102:12:./temp/~r102PYCG61:e209954>: For an exhaustive history of the 1992 Act, including its retransmission consent provisions, see Joel Rosenbloom, *Cable Television Amendments: The Cable Television Consumer Protection and Competition Act of 1992*, in *The Communications Act: A Legislative History of the Major Amendments, 1934-1996*, at 259 (Max D. Paglin et al. eds., 1999).

whether the language of the two passages dictates the Commission's conclusion about their meaning or is reasonably susceptible to an alternative interpretation that supports a finding that the Commission does have the authority to adopt an Interim Carriage Rule.

The answer is that not only is that alternative interpretation reasonable, it is more consistent with congressional intent than the Commission's interpretation, as we will hopefully demonstrate. For the sake of convenience, we can call the first quotation the "Outcome Statement" and the second the "Right to Control Statement."

Two quite different interpretations of the Outcome Statement are possible, depending upon how one views the retransmission consent negotiation process. Analytically, that process has four distinct phases or stages: the preliminaries to negotiations, the negotiations themselves, the results of the negotiations (*i.e.*, the deal terms agreed to by the cable company and the broadcaster) and the aftermath for the parties and the public. Logically, it is possible for a legislative regime for retransmission consent to treat some or all of the phases alike, or to approach some or all of them differently.

Congress clearly saw the first two phases as requiring discrete rules. It established some rules governing those phases in the statute itself. For example, the statute contains specific provisions regarding the preliminaries, such as those defining which broadcast stations are entitled to elect retransmission consent, creating exceptions to the requirement of consent and establishing a few basic rules like a three-year cycle for elections between must-carry and retransmission consent, basic rules. With respect to the negotiations phase, the statute imposes a requirement that negotiations be conducted in "good faith," although that was added after 1992.

It also is not disputed that Section 325b(3), whether or not it does more, grants the Commission the power to adopt rules governing procedures before negotiations begin and to

adopt rules defining the “good faith” negotiation requirement.

The rub is with the third and fourth stages. If the Outcome Statement applies to anything, it clearly would apply to the third element—the results of the negotiations, meaning the terms of the retransmission consent deal struck by the two negotiating parties. A corollary of the Commission’s view of its lack of authority to order interim carriage if there is a deadlock is that it also lacks the power to adopt rules that restrict or regulate the possible results of the negotiations.<sup>61</sup>

That corollary, however, does not unavoidably and unambiguously flow from the language of the Outcome Statement. With regard to that language, it is important to note that the Outcome Statement is a partial quote, and the Commission omitted an important part of the sentence in which it appears. What the Commission said in paragraph 19 of the *Notice* is this:

The legislative history of Section 325(b) states that the retransmission consent provisions were not intended “to dictate the outcome of the ensuing marketplace negotiations”

The implication of this statement, as used by the Commission, is that the “retransmission consent provisions” were not intended to result in dictation of outcomes either by interpretation of the language of those provisions or through their operation—in other words, because the Commission’s rulemaking authority is a part of the “retransmission consent provisions,” its adoption of rules that limit or control the results of negotiations would mean that the outcome has indirectly been dictated by those provisions, contrary to the Commission’s view of the

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<sup>61</sup> As discussed at greater length below, this position is inconsistent with the way in which the Commission has actually acted. For example, in its initial rules adopted in 1993, the Commission prohibited broadcasters from granting exclusive retransmission consent rights, despite the silence of the statute on this subject. That prohibition clearly was a limit on the possible outcomes of negotiations, not to mention a requirement that a broadcaster who otherwise was unwilling to give consent to one MVPD because it sold exclusivity to another allow carriage by the first MVPD essentially without its consent.

congressional intent. This would be an extremely strained reading, even if the Commission's quote was a full one.

What the *Senate Report* actually says is this:

It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.<sup>62</sup>

The actual language does not say that “the retransmission consent provisions” were not intended to dictate outcomes, as the Commission states, but only that the Committee did not intend to dictate outcomes “in this bill.” The passage, in other words, does not speak to the Commission's authority to adopt outcome-affecting rules under Section 325(b)(3)(A) or in reliance on its ancillary authority or state Congress's intention that it not have that authority. The passage can fairly be read as nothing more than a description of the retransmission consent provisions in S.92 and a statement of a limitation imposed by Congress upon itself—that is, all it does is inform the reader that the statute itself does not contain any provision that defines or limits the possible outcomes of negotiations for retransmission consent and that Congress itself did not want to dictate those terms in the statute. Under this reading, the statement does not speak at all to Congress's intentions with respect to the authority of the Commission to adopt rules affecting the results of the negotiations.

This interpretation is supported by the fact that congressional reports on enacted legislation frequently are more descriptive than explanatory—they often merely summarize the legislation without elucidating Congress's intent or offering any interpretative gloss the statutory

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<sup>62</sup> *Senate Report*, *supra* note 59, at 29 (emphasis added).

language.<sup>63</sup> More significantly, the Outcome Statement does not mention the Commission and neither it nor the surrounding text address the Commission's authority to affect outcomes. If Congress had intended to restrict the Commission's authority, then it could have easily expressed that concept by simply adding a few words at the end of the Outcome Statement, so that it read "it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations or to authorize the Commission to do so." To repeat a point made earlier, given the critical role of the Commission in federal communications law policy and precedent establishing its extensive ancillary authority, if Congress intended to foreclose the Commission from adopting rules that affected outcomes, it would have said that more directly and clearly, particularly in light of the fact that the actual statutory language conferring rulemaking authority is not self-limiting.

Besides omitting part of the sentence in which the Outcome Statement appears, the Commission omitted other sentences in the same paragraph that give contextual meaning to the statement. The relevant language is the following:

It is true that broadcasters also benefit from being carried on cable systems, and many broadcasters may determine that the benefits of carriage are themselves sufficient compensation for the use of their signal by a cable system. Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing

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<sup>63</sup> As a prime example, the Conference Report covered the topic of the potential impact of retransmission consent on consumer prices by noting that "[in] the proceeding implementing retransmission consent, the conferees direct 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 shall ensure that the regulations adopted under this section do not conflict with the Commission's obligations to ensure that rates for basic cable service are reasonable." This is simply a rehash of the actual language of the last sentence of Section 325(b)(3)(A) and adds absolutely nothing in terms of understanding the intended meaning and scope of that sentence.

marketplace negotiations.<sup>64</sup>

The Outcome Statement is prefaced by a recitation of some of the different forms of compensation that a broadcaster might seek in return for retransmission consent, and it is clear that Congress wanted to allow the negotiating parties the freedom to reach whatever compensation arrangement made the most sense to them in the particular situation. Read in this context, it is apparent that all that the Outcome Statement means is that the Committee did not intend “in this bill” to limit that freedom of the negotiating parties in setting the terms of their deal. The paragraph talks only about the flexibility of the negotiating parties in arriving at compensation terms, and does not expressly refer to, and cannot fairly be read as addressing, the authority of the Commission in the event no deal is reached or if the contracting freedom allowed the two private parties produces a deal that harms consumers or the public interests that the Communications Act is supposed to serve. Indeed, the Commission is not even mentioned in the paragraph. Given the context, it is not reasonable to attempt to stretch the Outcome Statement into evidence for the proposition that Congress did not intend the Commission to have the power to order interim carriage or for any other proposition relating to the Commission’s authority.

This conclusion is supported by the following statement made by Senator Inouye, the manager of S.92, on the floor of the Senate:

[T]he bill is completely silent on what the negotiations between cable operators and broadcasters may entail. Mr. President, they may negotiate for money or for nonmonetary consideration, such as channel position. . . . .

It could also involve joint advertising, promotional opportunities, and other forms of [compensation].<sup>65</sup>

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<sup>64</sup> *Senate Report, supra* note 59, at 36.

<sup>65</sup> 138 Cong. Rec. S564 (Jan. 29, 1992)

This statement, which tracks the substance of the paragraph of the *Senate Report* in which the Outcome Statement appears, strongly indicates that the word “outcome” in the Outcome Statement refers to nothing more than deal terms and that the Outcome Statement says only that Congress did not include limits or restrictions on the freedom the negotiators to chose whatever deal terms were mutually acceptable, if, in fact, they reached a deal.

Although all of this seems compelling, let us assume for the sake of argument that the Outcome Statement does indicate intent to preclude the Commission from adopting rules that “dictate the outcome of the ensuring marketplace negotiations.” The meaning of that assumed restriction is by no means clear because the word “outcome” may refer any one or more of the following: the deal terms agreed to by the negotiating parties, whether the negotiations produced a deal or a loss of retransmission rights by an MVPD or the consequences to consumers of the results of the negotiations. Even if we assume that the Outcome Statement restricts the ability of the Commission to specify or control deal terms or impose a deal if the parties are deadlocked, does it necessarily follow that the passage also establishes that Congress meant it to preclude Commission intervention of any kind if the outcome of the deadlock or agreement reached was significant harm to consumers?

Of course, it does not. Logically, in reality and legally under most of federal communications law regulating the behavior of service providers, there is a meaningful difference between the outcome of negotiations to the private parties conducting them, on the one hand, and the impact of that outcome on consumers, on the other. There is no reason that Congress could not assign the Commission different roles in the two different situations. In fact,

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that happens often in federal regulation. Indeed, it is the case in most contract negotiations by parties regulated by the Commission under various provisions of the Communications Act.

In other words, it is one thing to say that Congress did not intend the Commission to sit in judgment of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD or watch over every negotiation of those terms, and quite another thing to say that, therefore, it also did not want the Commission to intervene if a breakdown in negotiations harmed or threatened to harm consumers or to adopt appropriate rules if the overall effect of the myriad deals struck was to increase basic cable rates.

In the Commission's view, however, that distinction is erased, and it reads the Outcome Statement to say, in effect, that Congress not only meant to deny the Commission any voice as to the deal terms agreed to by the parties or even the power to dictate deal terms if the parties do not reach an agreement, but also intended to strip it of any authority to protect consumers if the deals reached collectively caused monthly rates to increase dramatically or the failure to reach a deal resulted in consumers not being able to watch broadcast television through their preferred MVPD. That reading requires two brief statements in the legislative history cited by the Commission that do not even mention the Commission to bear a lot of weight, and it is not by any means the only reasonable interpretation. It is not even the most reasonable one.

Markets can fall anywhere on the scale from unregulated to completely regulated. In general, the degree of regulation is a function of the importance of the product or service in the estimation of legislators and the degree of risk that market freedom will produce results thought to be contrary to the public interest. Regulation of a market can be heavy handed, with the government intimately involved at all stages, or demonstrate a lighter touch, with no, limited or

graduated governmental oversight.

A regulatory scheme that is common in our political and economic system is for the government to allow market participants almost unfettered discretion in structuring their relationships, as long as the process does not produce undesirable results. This approach is based on the expectation that, in the vast majority of cases, the market itself will provide incentives or disincentives that lead participants to take the right path to the preferred destination, but reserves the possibility of government intervention in the rare cases when the parties go astray. As one observer has remarked, “[a] central planner [*i.e.*, the federal government] in a free society would rather design a mechanism that implements a certain outcome than impose the outcome directly. A proper mechanism provides the agents with the right incentive to choose actions (individually and voluntarily) that would dictate the desirable outcome.”<sup>66</sup> The mechanism may be the market itself or a combination of market forces and government created incentives and disincentives.

Frequently, a legislative scheme that establishes a “mechanism” that relies primarily on market forces to generate the desired outcome designates a governmental agency as the mechanic, with the authority to periodically tune up and adjust the mechanism so that it continues to work as designed. Sometimes the designers, although confident in their design, recognize that there is a risk that the mechanism will not function as intended, and so give the responsible agency the authority to intervene to assure that it does not run amuck.

There is every reason to believe that this regulatory scheme, so common in our society, is what Congress intended in the case of retransmission consent.—in other words, in saying that there was no intent “in this bill” to dictate the outcome of “marketplace negotiations”, the *Senate Report* was referring only to the results of the negotiations for the negotiating parties and

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<sup>66</sup> Chun-Hsiung Liao & Yair Tauman, *Implementation of the Socially Optimal Outcome*, 72 *The Manchester School* 618 (2004).

saying that the bill did not specify permissible and impermissible deal terms or even dictate to the private parties involved in the negotiation that a deal had to be reached. The language does not necessarily mean, however, that Congress intended to neuter the Commission if the deal struck, or the inability to strike a deal, had consequences that adversely impacted not just those private parties, but also consumers.

This analysis and conclusion are strongly supported by this statement made on the Senate floor by Senator Inouye, the author of the retransmission consent provisions of S.92:

The retransmission consent provisions of S.12 were designed so as to avoid creating a complex set of governmental rules to promote the carriage of local broadcast signals. Instead, S.12 permits the two interested parties – the station and the cable system – to negotiate concerning their mutual interests. It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare. We should resist the urge to require formal, preestablished mechanisms that might distort the incentives of the marketplace. At the same time, there may be times when the Government may be of assistance in helping the parties reach an agreement. I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem.<sup>67</sup>

For reasons that are not articulated in the *Notice*, this and other statements by Senator Inouye and other Senators and Representatives that are directly relevant to the issue of the Commission's authority are ignored by the Commission while general statements that are not

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<sup>67</sup> 138 Cong. Rec. S643 (Jan. 30, 1992).

specifically on point are elevated to a level of significance they do not merit.

In any event, whether or not the Commission agrees with our conclusions or the analysis leading to them, there should be no doubt that, at a minimum, there is a high degree of uncertainty about the meaning and intent of the Outcome Statement.

If we consider the Right to Control Statement, we reach similar conclusions. The Commission's opinion as to its lack of authority is shared by broadcast interests, and the bases for that opinion are the same as those relied upon by broadcasters. The Right to Control Statement is near and dear to the hearts of broadcasters, although not trotted out by them quite as frequently as the Outcome Statement.

Broadcasters love the Right to Control Statement because they think it validates their position that Congress intended Section 325(b) to confer (some would say "at long last, confirm") a legally protected property right that broadcasters could exploit as they saw fit in a largely unregulated marketplace for retransmission consent. For example, in a prepared statement delivered to the House Telecommunications Subcommittee in 2004, Ben Pyne, an executive of The Walt Disney Company ("Disney"), which owns the ABC television network and several broadcast stations, claimed that "retransmission consent is not regulatory intervention into the free market, but a Congressional recognition of free market principles, namely that broadcasters—like any other business—should be compensated for their product if sold by another entity."<sup>68</sup> Consistently with this perspective, broadcasters also argue, like the Commission itself, that Congress severely limited the Commission's authority in the realm of retransmission consent.

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<sup>68</sup>*Competition and Consumer Choice in the MVPD Marketplace—Including an Examination of Proposals to Expand Consumer Choice, Such as A La Carte and Themed Tiered Offerings: Hearings Before the Subcomm. On Telecommunications and the Internet of the House Comm. On Energy and Commerce, 108<sup>th</sup> Cong., 2d Sess. (2004)* (statement of Ben Pyne, Executive Vice President, Disney and ESPN Affiliate Sales and Marketing), available at [http:// archives.energycommerce.house.gov/reparchives/108/Hearings/7142004hearing1336/Pyne2140.htm](http://archives.energycommerce.house.gov/reparchives/108/Hearings/7142004hearing1336/Pyne2140.htm).

A succinct summary of the broadcasters' position can be found in the comments filed by NAB in the proceeding initiated the 2009 complaint by Mediacom alleging a violation of the good faith rules by Sinclair Broadcast Group, Inc. ("Sinclair"). In arguing that the Commission lacks the authority to mandate interim carriage while the complaint was pending, NAB said this:

Allowing carriage of signals without consent would violate Section 325 of the Communications Act and would be inconsistent with the statute's legislative history. Congress granted broadcast stations the right to control others' retransmission of their signals, and to negotiate the terms of such retransmission through private agreements. As the Commission has consistently and correctly concluded, Congress did not intend for it to intrude in retransmission consent negotiations, but for the terms and conditions of carriage to be negotiated by broadcasters and MVPDs, subject only to a mutual obligation to negotiate in good faith. There is nothing in the statute or its legislative history to suggest that Congress intended the Commission to suspend broadcasters' statutory retransmission consent rights for any length of time. Any proposal that would place the Commission in the position of enforcing a "status quo" that has not been negotiated by the affected parties would directly contravene the statute, its legislative history, and prior Commission decisions.<sup>69</sup>

In short, broadcasters would like us all to believe that Congress wanted to establish an unregulated market for retransmission consent in which broadcasters have total control over the right to retransmit their signals and, to that end, intentionally refrained from adding to the 1992 Cable Act any grant to the Commission of substantive regulatory power and foreclosed the Commission from intervening using its pre-existing and almost limitless authority over broadcast television licensees or its broad ancillary authority as the federal overseer of communications in this country. According to this interpretation, the intent of Congress in 1992 was for the Commission's role to be limited to setting timetables for making elections and performing a few other minor and ministerial responsibilities. While Congress later imposed a requirement to negotiate in good faith, broadcasters see that obligation as purely formalistic in nature, with the

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<sup>69</sup>Reply Comments of National Association of Broadcasters, *In re Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, CSR Nos. 8233-C, 8234-M (Jan. 7, 2010), at 5-6 (internal footnotes omitted).

Commission relegated to the ministerial task of setting procedural guidelines for conducting negotiations.

The broadcasters' arrive at their interpretation by focusing on Section 325(b)(1)(A) and ignoring other relevant statutory language, and by selectively quoting a couple of passages from the legislative history that are not really relevant to the issue at hand and ignoring or summarily dismissing legislative history directly on point.

The Right to Control Statement, like the Outcome Statement, fits nicely into the work of fiction that some broadcast interests have created. In the world according to Gordon Smith, assuming a few formalities are observed, the Commission has no power to intervene even if negotiations occasionally, or even often, have a result that is inconsistent with the historic goals of federal communications policy and the legislative history of the 1992 Act. The logic of the broadcasters' position is that if it could be conclusively established that consumers were experiencing rapidly escalating cost increases while the quantity and quality of locally produced broadcast television programs declined and were also enduring disruptions in their ability to view broadcast programming because of shut-offs used by stations as a negotiating tactic, there nonetheless would be absolutely nothing that the Commission could or should do about the situation.

This is a vitally important point: According to NAB, it would be entirely consistent with the law and congressional intent for retransmission consent fees for the local broadcast stations in a market to reach \$20 or more per subscriber per month<sup>70</sup> and for all of that money to flow to

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<sup>70</sup> The articulated goal of important broadcast interests is for retransmission consent fees for each station affiliated with one of the Big Four networks to reach levels that equal or exceed those of ESPN, which, according to some press reports, charges over \$4.00 per subscriber per month. The Big Four networks have started to demand that their local affiliates add up to \$1.00 or more for them, meaning that prices of \$5.00 or higher per channel are on the radar screens of broadcast interest. That is consistent with the target of \$4.50 per subscriber identified by Sinclair's CEO. See M. Farrell, *CBS, Sinclair Toss Fuel on Retrans Fire: Station Owners Say They Expect More Cash for Carriage*, Multichannel News, Mar 6, 2006, available at <http://www.multichannel.com/article/CA6313013.html>. The cost for

the corporate parents of the stations to fund dividends and bail out failing or underperforming non-broadcast business ventures, rather than being reinvested in local stations and local programming, even as more and more popular programming is shifted from broadcast to affiliated pay TV services and the quality and quantity of locally produced news and other programs is reduced. (Far from being a worst case nightmare, this scenario is actually being played out today.) Similarly, if by some confluence of events, 20 million MVPD subscribers simultaneously lost access to local television stations because of negotiating impasses, the broadcasters would say that the Commission would not have the authority to intervene to restore service, even temporarily.

The inescapable implication of the broadcasters' interpretation is that the retransmission consent law was enacted in order to enrich the corporate parents of broadcast stations by allowing them to extract as much money as possible from MVPD subscribers and use it for whatever purpose they desire, even as the quantity and quality of locally produced broadcast programs declines and service interruptions become a regular event.

This perspective should be suspect on its face. The 1992 Act, of course, was motivated largely by complaints about price increases and other alleged abuses by the cable industry, and Congress's remedy for the perceived problems was to enact a host of statutory restrictions on the operation of free market forces and to direct the Commission to adopt even more regulatory restrictions. Yet, the broadcasters would have us believe that when it came to retransmission consent, Congress reversed course and put into place a legislative scheme that validates whatever outcome the unregulated market produces, even if the result demonstrably causes the vast

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all of the Big Four stations in a market, therefore, would be at least \$20. If there are also CW, MyNetworkTV or independent stations in the market, the total cost of broadcast stations could be even higher.

majority of ordinary citizens to suffer exactly the same sorts of harms that motivated Congress to act in the first place. This is a peculiar interpretation of the statute and congressional intent.

Moreover, given that the fundamental reason Congress created retransmission consent was its belief that there is a strong public interest in ensuring that Americans—including those who relied on cable—have ready access to broadcast television, it is ludicrous to argue that it then created a system in which continued access by cable subscribers becomes solely a matter of private negotiations between two entities viewed in 1992 as monopolies (a cable company with little or no competition at the time and a broadcast station armed with network and syndicated program exclusivity), with no one representing the public during the negotiations or with the power to intervene if the negotiations broke down and resulted in a shut off.<sup>71</sup>

The broadcasters' position is even superficially sustainable only through an extremely selective and highly self-serving reading of the law and its legislative history. For example, subsection 325(b)(1)(A) does not stand alone—it is only one part of the language relevant to retransmission consent added to Section 325 by the 1992 Act and other parts of that language can reasonably be read as giving the Commission the authority to protect consumers. Moreover, that language was inserted into the pre-existing Communications Act and cannot be read in isolation from the decisions of the Commission and the courts interpreting the meaning and intent of the provisions of the Communications Act that regulate broadcast television and define the responsibilities, jurisdiction and powers of the Commission. Similarly, the few passages from the *Senate Report* beloved by broadcasters are partial quotes or taken out of context, and the

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<sup>71</sup> See Richard A. Gershon & Bradley R. Eagan, *Retransmission Consent, Cable Franchising, and Market Failure: a Case Study Analysis of Wood-TV 8 Versus Cablevision of Michigan*, *Journal of Media Economics* 201, 214 (1999). (Examining the 1996 retransmission consent dispute between WOOD-TV in Kalamazoo, Michigan and Cablevision Systems Corporation, and concluding that although “the broadcast spectrum can be considered a public resource,” because of the FCC’s refusal to intervene even after a negotiating deadlock causes a carriage disruption, “the public was powerless to effect change while the two parties worked out a dispute that substantially involved public property.”).

broadcasters prefer to ignore other, directly relevant legislative history that completely undercuts their position.

In a variation on the old saw about missing the forest for the trees, NAB and the broadcasters are trying to convince us that there can be no forest because there are only a couple of trees—Section 325(b)(1)(A) and a couple of dozen words from the legislative history. If, however, one looks at all of the relevant statutory provisions and the entire legislative history, a much different interpretation of what Congress did and what it intended emerges.

That alternative interpretation begins by noting that, from the beginning, federal communications law has been designed to further the public interest. In adopting the Communications Act in 1934, Congress stated that its objective was “to make available, so far as possible, to all people of the United states, a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges.”<sup>72</sup> As Commissioner Michael Copps has noted often, the term “public interest” appears 112 times in the Communications Act.<sup>73</sup> While opinions about what the public interest specifically entails and how it can best be served vary and evolve, Congress, the Commission and the courts have consistently defined the concept in terms of the perceived interests of the masses of American citizens who enjoy radio, television, telephone and other communications services. The foremost policy goal is to assure that television, telephone and advanced services are continuously available to all citizens throughout the country.

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<sup>72</sup> 47 U.S.C. § 151. That objective was reaffirmed in the most recent major amendment of the Communications Act, the 1996 Telecommunications Act, which calls upon the Commission to “encourage the deployment on a reasonable and timely basis advanced telecommunications capability to all Americans.” 47 U.S.C. § 706(a).

<sup>73</sup> *Remarks of Commissioner Michael J. Copps*, Everett Parker Ethics in Communications Lecture 14 (Sept. 24, 2002), available at <http://www.fcc.gov/Speeches/Copps/2002/spmjc211.pdf>

Of course, there can be no radio or television audience without programming producers and distributors and no telephone service or Internet access without service providers. Not surprisingly, given the conventional wisdom that ours is a “free enterprise” economic system, lawmakers and regulators typically believe that promoting the interests of the public requires due regard for the needs and concerns of privately owned producers and distributors. Sometimes the best way to advance the public well-being has been to expand or protect the interests of private companies; however, in the realm of federal communications policy, the advancement of private interests has always been viewed as a means to an end, rather than an end in and of itself. Rights and privileges given to private enterprises are expected to be matched by direct or indirect benefits to the public welfare.

Consistently with the approach that had guided federal communications law for over fifty years, in creating the must-carry and retransmission-consent rights in 1992, Congress was motivated by the desire to advance the public interest, rather than the private interests of broadcasters. In 1992, an estimated 40% of homes still relied on over-the-air reception for their television, and Congress believed that preservation of local broadcast stations was vitally important. It perceived that cable represented a serious and growing threat to the survival of local broadcast television. It saw that threat as twofold: First, because an increasing number of Americans relied on cable as their source for television, local stations would be severely damaged if denied cable carriage, and vertically integrated cable companies were thought to be motivated to deny carriage in order to benefit affiliated cable networks that competed for viewers and advertisers.<sup>74</sup> Second, Congress, rightly or wrongly, thought that broadcasters were unable

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<sup>74</sup>That belief, based on logic (some would say lobbying), rather than empirical evidence beyond anecdotal accounts of denial of carriage in a few isolated instances, turns out not to be true. Based on an empirical study, Professor Michael Yan concluded that vertical integration did not negatively impact local broadcast stations’ probability of being carried by cable operators, and that the stations most likely to be dropped were those with low ratings or

to effectively compete because they were reeling from a one-two economic punch delivered by cable. The advertising dollars that were their life's blood were increasingly being diverted to competitive cable networks, meaning that broadcasters had fewer resources with which to produce new and better programming. At the same time, cable systems, it was said, were profiting from the carriage of broadcast programs without compensation, in effect gaining competitive strength against broadcast stations by riding on their backs.<sup>75</sup>

Our personal opinions about the validity of those beliefs or the merits of the adopted solutions are irrelevant. Congress declared the threats to be real and, acting on its belief, created the must-carry right to deal with the first threat and the retransmission consent requirement to deal with the second.

It is clear from the record of the congressional debate that both must-carry and retransmission consent were intended to help local stations to survive and continue to produce news and other locally originated programming. The articulated goal for retransmission consent was to level the competitive playing field, which Congress thought had tilted toward cable because of the "subsidy" it enjoyed by being able to carry broadcast signals without consent or compensation. It is important to realize that shifting cash from cable companies to broadcasters was seen by Congress as one possible way in which the new right might restore competitive balance in some cases, but not as the only or preferred method. Indeed, several of the strongest supporters of retransmission consent expressed the view that most stations would elect must-carry and the minority of stations electing retransmission consent would bargain for non-cash

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originating in distant markets. Michael Zhaoxu Yan, *Vertical Integration and Local Station Carriage in the Cable Television Industry: Results from Logit Analysis*. Paper presented at the 31st Annual Telecommunications Policy Research Conference, September 19-21, 2003, available at <http://intel.si.umich.edu/tprc/papers/2003/224/CableVerticalIntegration.pdf>.

<sup>75</sup>This conclusion also was based on logic, rather than hard facts and cannot survive rigorous scrutiny.

consideration.<sup>76</sup> In any event, the ability of stations to obtain cash for carriage was not an end in itself, but, rather, the means to an end thought to be in the public interest—continued access by American households to local news and public affairs programming through the option of free over-the-air television.

There is absolutely no support in the legislative history for the assertion by broadcast interests that Congress’s primary intent in establishing the retransmission consent requirement was “to ensure that broadcasters receive the economically efficient level of compensation for the value of their signals.”<sup>77</sup> Indeed, the legislative history directly contradicts that notion. Congress thought that most broadcast stations would elect must-carry, rather than retransmission consent, which means that they would receive no compensation for the value of their signals. In the relatively few cases where cash was collected, it was believed that the amount would be insignificant and that consumer prices would not be affected either because cable companies would absorb the small sums involved or because the Commission would obey the directive in the last sentence of Section 325(b)(3)(A) and ensure that the amount of money did not rise to the level that impacted consumer rates.<sup>78</sup>

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<sup>76</sup> See note 78 below.

<sup>77</sup> Jeffrey A. Eisenach, *The Economics of Retransmission Consent*, Empiris, LLC, at 41 (Mar. 2009), attached as Appx. A to Reply Comments for the National Association of Broadcasters in MB Docket No. 07-269 (June 22, 2009 (“*First Eisenach Paper*”).

<sup>78</sup> Congress did not want retransmission consent to result in any, or at least any significant, pressure on cable subscribers’ monthly bills. See, e.g., 138 Cong. Rec. S14600 (Sept. 22, 1992) (statement of Sen. Fowler) (“the sponsors of this legislation do not intend for any costs associated with this legislation . . . to be passed on to the consumer”); 138 Cong. Rec. S14602 (Sept. 22, 1992) (statement of Sen. Bradley) (“rate increase resulting from these [retransmission consent and buy-through] provisions would turn the purpose of this bill on its head) During floor debate on the legislation that ultimately was enacted as the 1992 Act, a number of Senators stated their concern that retransmission consent might result in increases in subscriber rates. Supporters of the legislation argued that significant rate increases would not occur, in part because of a misplaced trust in broadcasters to act reasonably and in part based on assumptions that have not proven true, such as that negotiations would be conducted by local stations, not corporate parents, and that market conditions that in roughly equivalent bargaining power or an advantage for large MSOs would continue to exist. It was predicted that most broadcasters would elect must-carry, and that many or most of the broadcasters who did elect retransmission consent would settle for in-kind consideration such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right

Moreover, it was anticipated that any cash collected would be retained by the local station to support production of news and other locally originated programs. Representative Callahan, for example, said during the debate that the retransmission consent requirement “would give local broadcasters the opportunity to negotiate their terms of carriage with local cable operators and develop a second revenue stream which can help support the cost of local news and other programming.”<sup>79</sup> Note that he did not stop after “a second revenue stream,” as he would have if the legislation was simply a measure designed to create a property right for station owners or get money in their hands without regard to how it was spent. The goal was not to produce a windfall for the broadcast networks and other large station group owners in the form of a stream of additional revenues that flowed right to their bottom lines; rather, it was to provide the potential for revenues for local stations that would replace the local ad revenues presumed to have been lost to cable networks and cable systems and that would be spent to produce local programs. Representative Holloway, for instance, noted the “tremendous” cost of producing local news and argued that an additional revenue source was needed to replace a shrinking market for advertising “because the cables are getting part of it.”<sup>80</sup>

The legislative history simply does not support the proposition that Congress created retransmission consent so that, for example, Sinclair could collect \$154 million in retransmission consent fees over the course of a few years and pay out dividends to its stockholders of \$168 million during the same period, even as it cut and consolidated local news and operated dozens

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to program an additional channel on a cable system. Senator Bradley, for example, expressed his view that “most broadcasters will opt for must-carry while a significant number of other broadcasters will negotiate nonmonetary terms, such as channel position, for the use of their signal. Whatever terms are negotiated will only last for 3 years. Thus, the vast majority of cable operators will, in my opinion, not incur significant increases in cost due to the retransmission consent provision.” 138 Cong. Rec. S14603 (Sept. 22, 1992)(Statement of Sen. Bradley).

<sup>79</sup>138 Cong. Rec. H6487 (Jul. 23, 1992).

<sup>80</sup>138 Cong. Rec. (Jul. 23, 1992) (statement of Rep. Holloway).

of stations that offer absolutely no local news. Or that the purpose of retransmission consent was to allow Disney and CBS to collect millions in retransmission consent fees ultimately paid by consumers while simultaneously paying their CEOs over \$25 million a year each and distributing millions more in dividends even as their networks reduced funding for news production, laid off news staff, shift popular programming from free broadcast television to their affiliated pay TV networks and actually demand that local station affiliates transfer part of their retransmission consent money to ABC and CBS, further reducing the amount available to support locally produced programs.<sup>81</sup>

Instead, Congress was motivated by the desire to preserve an important resource for the American public, which it perceived to be in jeopardy. Congress created retransmission consent “to preserve local broadcast service to the community—specifically, to maintain the competitive position of local broadcast voices against vertically-integrated cable operators in local markets.”<sup>82</sup>

In other words, Congress believed that the economic interests of broadcasters dovetailed with the public interest. Congress thought that giving broadcasters rights that potentially increased their revenues would help secure the continued viability of local broadcast television. There can be no doubt, however, that giving broadcasters a potential new revenue stream was not a goal in and of itself, but simply a method for achieving Congress’s real goal, which was

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<sup>81</sup> See Brian Stelter, *Job Cuts at ABC Leave Workers Stunned and Downcast*, The New York Times, April 30, 2010, available at <http://www.nytimes.com/2010/05/01/business/media/01abc.html> (reporting that “ABC News, a unit of the Walt Disney Company, largely completed one of the most drastic rounds of budget cutbacks at a television news operation in decades, affecting roughly a quarter of the staff”); Brian Stelter, *CBS Lays Off Dozens in New Round of Cuts*, The New York Times, Feb. 3, 2010, available at <http://www.nytimes.com/2010/02/04/business/media/04cbs.html> (reporting that “[d]ozens of employees at CBS News were laid off in recent days amid a new round of budget cuts”).

<sup>82</sup> *Comments of Cox Enterprises Inc.*, Matter of 2002 Biennial Regulatory Review, MB Docket No. 02-277 (“Cox 2002 Comments”).

-serving the public interest. It is mistaken to say that Congress’s purpose in adopting the retransmission consent provisions of the Act was to create a marketplace for retransmission consent. Rather, the purpose was “to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services”<sup>83</sup> and it created the marketplace for retransmission consent as a tool for achieving those goals and not as an end in and of itself.

At the same time, Congress gave the Commission explicit authority to regulate that marketplace to ensure that the tool actually served its purpose, and it unambiguously stated in the legislative history its clear intention that the Commission would exercise that authority and its existing ancillary powers to protect consumers. The Commission’s role is not to allow the marketplace to function for the benefit of broadcasters, as some broadcast interests have claimed; rather, it is to serve the public interest by insuring that the marketplace functions to serve the public policies identified by Congress. Those policies are not confined to getting money to broadcasters, but clearly also recognize the public interest in insuring that cable subscribers continue to have uninterrupted access to broadcast station signals through MVPDs and that their monthly subscription charges do not increase significantly because of the rights granted to broadcasters.

Based on the foregoing, we believe that it could not be clearer that Congress did not intend retransmission consent to be an absolute right, but rather a qualified right subject to adjustment by the Commission in order to serve the articulated policy goals.

The 1992 Act itself supports these conclusions. Section 2 of the 1992 Act lists congressional “findings” that explain the policy reasons underlying its adoption (the

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<sup>83</sup> See 1992 Act, § 2(b)(9)

“Findings”).<sup>84</sup> Fully 14 of the 21 Findings relate to carriage of broadcast signals by cable systems. Findings 10, 11 and 12 confirm that, in creating the retransmission consent requirement, Congress acted because of its belief that there was a strong public interest in preserving the availability of “free” television through a local, rather than a national, broadcasting system:

(10) A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation. . . .<sup>85</sup>

(11) Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.<sup>86</sup>

(12) Broadcast television programming is . . . free to those who own television sets and do not require cable transmission to receive broadcast signals. There is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming.<sup>87</sup>

Other Findings pointed out that the growth of cable television had resulted in “a marked shift in market share from broadcast television to cable television services”<sup>88</sup> as well as “increasing compet[ition] for television advertising revenues,”<sup>89</sup> meaning that “proportionately more advertising revenues will be reallocated from broadcast to cable television systems.”<sup>90</sup>

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<sup>84</sup>*Id.* § 2(b).

<sup>85</sup>*Id.* § 2(b)(10).

<sup>86</sup>*Id.* § 2(b)(11).

<sup>87</sup>*Id.* § 2(b)(12).

<sup>88</sup>*Id.* § 2(b)(13).

<sup>89</sup>*Id.* § 2(b)(14).

<sup>90</sup> *Id.*

Finding 15 referred to the prior economic relationship between broadcast and cable that the retransmission consent requirement was intended to alter:

Cable systems . . . obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability. This has resulted in an effective subsidy of the development of cable systems by local broadcasters. While at one time, when cable systems did not attempt to compete with local broadcasters for programming, audience, and advertising, this subsidy may have been appropriate, it is so no longer and results in a competitive imbalance between the 2 industries.<sup>91</sup>

It is important to recognize what Finding 15 says and does not say. As the Finding states, the “great benefits” deriving from carriage of broadcast stations’ signals without consent or compensation had been enjoyed from the very first day of operation of the very first cable systems in the 1940s. According to the Finding, this situation had previously been entirely “appropriate.” Clearly, then, Congress did not, as NAB and other broadcast-interests like to say, act to end the subsidy because it was objectionable under free market principles, out of concern for protecting some purported property right of broadcasters or based on the notion that it is always unfair for one business to profit from use of another’s products or services. Logically, all of those sorts of objections would have applied even during the prior period when cable carriage without consent had been, in Congress’s view, entirely “appropriate.” By characterizing such past carriage as “appropriate” under prior conditions, Finding 15 represents explicit congressional recognition of the proposition that, when it comes to the rights of broadcast license holders, the public interest trumps the general tenets of a free-enterprise/private-property economic system. Retransmission consent was being created not because of moral outrage over cable’s alleged trespasses but, rather, because of the perceived harm to American citizens from

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<sup>91</sup> *Id.* § 2(b)(15).

allowing continuation of a practice that was no longer benign or neutral under changed circumstances.

Indeed, if Congress had given statutory recognition to a supposed property right in broadcast signals, that would have been a radical departure from public policy in place since the dawn of federal regulation of users of radio spectrum. Under our nation's legislation and jurisprudence, broadcasters have no "natural" or common law right to broadcast spectrum and their interest in that spectrum or the signals they broadcast is not "private property" protected by the Fifth Amendment of the Constitution. Instead, the airwaves are property of the American people and broadcasters possess only a license to broadcast granted by the federal government. As the Supreme Court said shortly after the adoption of the Communications Act, "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license."<sup>92</sup>

The spectrum licensed to television broadcasters has been estimated to have a value of over \$50 billion.<sup>93</sup> Yet, commercial licensees are not required to pay an initial or ongoing fee for spectrum, even though they make billions from its use. It would be wrong to think, however, that Congress meant to give the spectrum away "for free." Congress saw the potential of broadcasting to bring citizens in every corner of the country entertainment, news and public affairs programming, and it wanted to assist and encourage broadcasters in serving that function by

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<sup>92</sup> *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475, 60 S.Ct. 693, 697, 84 L.Ed. 869 (1940). The form of written license granted by the Commission itself states as follows: "This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. See, e.g., Broadcast License for WFUM-TV, granted Jan. 29, 2010, available at <http://www.michigantelevision.org/aboutus/public-file/applications&related-materials/wfum-jan2010-signed-license.pdf>

<sup>93</sup> E.g., [http://www.broadcastingcable.com/article/366286-CEA\\_Study\\_Reallocating\\_Broadcast\\_Spectrum\\_Could\\_Yield\\_1\\_Trillion.php](http://www.broadcastingcable.com/article/366286-CEA_Study_Reallocating_Broadcast_Spectrum_Could_Yield_1_Trillion.php).

saving them the costs they would incur if they had to pay for licenses. Accordingly, Congress struck a bargain in which it granted exclusive licenses in return for non-cash consideration in the form of the obligation of broadcasters to serve the “public interest.” As one observer summarized this bargain, “[t]he trade of public airwaves for public interest obligations was the ‘social contract’ between broadcasters and the public.”<sup>94</sup>

The requirement that MVPDs obtain retransmission consent is in Section 325(b)(1)(A) of the Communications Act and restricts the conduct of MVPDs, rather than conferring a right upon the holders of broadcast spectrum licenses. If, in adopting Section 325(b)(1), Congress really intended to take the radical step of repealing or materially altering the fundamental approach to the so-called property rights of broadcasters that had guided law and public policy from the beginning of federal regulation, then one would have expected the statutory language to read quite differently and for the legislative history to reflect the heated debate that such a major change would have generated. In fact, the statutory language did not change one iota any of the provisions of existing law that governed ownership or use of the airwaves or the Commission’s extensive authority over broadcast television, and the legislative history contains no discussion of an intent that the few brief words of Section 325(b) be read as effecting any such change. As noted, Section 325(b)(1) is not even phrased as creating new rights on the part of broadcasters, but as a prohibition on certain conduct by MVPDs. The Section is best read as regulating the behavior of MVPDs, rather than conferring property rights upon broadcasters.

In this regard, it is significant that subsection 325(b) did not establish a universal prohibition upon retransmission without the station’s consent. Instead, it proscribes retransmission only by a single category of persons, namely “multichannel video programming

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<sup>94</sup> New America Foundation, *The Decline of Broadcasters’ Public Interest Obligations*, at . 1 (Mar. 29, 2004), available at [https://www.policyarchive.org/bitstream/handle/10207/6403/Pub\\_File\\_1518\\_1.pdf?sequence=1](https://www.policyarchive.org/bitstream/handle/10207/6403/Pub_File_1518_1.pdf?sequence=1)

distributors.” If a person retransmitting a broadcast station’s signal without the station’s permission is neither a multichannel video programming distributor subject to subsection 325(b) nor a broadcasting station subject to subsection 325(a), then there is nothing in the Communications Act that prohibits the retransmission. That fact is totally inconsistent with the idea that Congress thought that broadcasters had or should have a property right in their signals. Even if Section 325(b) were read as conferring a right upon broadcasters enforceable on their behalf by the Commission, that right is far less than “the right to control retransmission and to be compensated for others’ use of their signals” referred to in the passage from the *Senate Report* cited by the Commission in support of its position.

In short, after enactment of the 1992 Act, broadcast spectrum continued to be property of the nation, not the members of the NAB, and the rights and obligations of licensees continued to be defined by federal law and regulations that evolve over time. The concept that licensees have conditional usage rights as long as they serve the public interest, rather than the property rights claimed by broadcasters, continued to be “the cornerstone of the law of the land.”<sup>95</sup>

Given that the rights of broadcasters in their signals are simply what the law says they are, nothing more and nothing less, the debate over retransmission consent is really about what the government has said, or should say, they are; and, given the philosophical and policy underpinnings of federal regulation of communications, the answer should revolve around the concept of the public interest, not “free market principles” or our society’s philosophy or jurisprudence regarding private property.

Before 1992, what the law said was that cable systems did not need to obtain consent or pay broadcasters in order to receive signals that stations were required to transmit freely over-

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<sup>95</sup> *Id.*

the-air and distribute them to paying customers. As noted, the core reasons Congress ended the decades-long prior practice had little to do with the belief that carriage without consent was morally wrong because it conflicted with the sorts of property, copyright and other legal or moral rights enjoyed by individuals and companies that are not as dependent on government licenses or as heavily regulated as broadcasters. That conflict had always existed and was well-known to the relevant congressional committees, which for decades before 1992 declined to alter the situation despite the intense lobbying efforts of the broadcast industry.<sup>96</sup> Instead, Congress finally acted only when it appeared that the growth of the cable industry had reached a tipping point where a practice that had previously been beneficial (or at least not harmful) to the realization of policy goals was now viewed as a threat to the achievement of those goals—in particular, the goal of assuring the continued availability to as many Americans as possible of broadcast television programming produced by local stations.

Ironically, while Congress viewed vertically integrated cable companies as a threat to achievement of that goal, it also recognized that this goal could not be realized without cable, as the following Findings indicate:

(9) The federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services.

(15) A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. . . .

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<sup>96</sup> For a discussion of the history of retransmission consent, see Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision of the 1992 Cable Act*, 49 Fed. Comm. L.J. 99 (1996).

(17) Consumers who subscribe to cable television often do so to obtain local broadcast signals which they otherwise would not be able to receive, or to obtain improved signals. Most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services. . . .

(18) Cable television systems often are the single most efficient distribution system for television programming. A Government mandate for a substantial societal investment in alternative distribution systems for cable subscribers, such as the 'A/B' input selector antenna system, is not an enduring or feasible method of distribution and is not in the public interest.<sup>97</sup>

Read as a whole, as they must be, the findings set forth in Section 2 of the 1992 Act unequivocally establish that Congress, motivated by the desire to preserve local broadcast television out of concern for the public interest, rather than broadcasters' private interests, wanted to enhance the competitive status of local stations without, however, adversely impacting the millions of consumers who relied on cable service for reliable access to broadcast television

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<sup>97</sup>1992 Act. §§ 2(b)(9), 2(b)(15), 2(b)(17) & 2(b)(18). These findings were much overdue recognition, at least on the surface, of the critical contributions of cable to the favorable development of television in this country. Cable not only resulted in the launch of dozens of new cable networks vastly expanded viewing choices and improved the quality and quantity of broadcast television viewable by millions of Americans in reception-impaired locations, but also was the primary reason that a fourth national broadcast network based largely on UHF-affiliated stations was able to prosper. Nonetheless, cable was viewed with hostility by regulators. As Professor Yoo has written:

When cable television emerged as a technology, the relative scarcity of broadcast frequencies, and the concomitant restrictions on channel capacity were generally regarded as one of the central regulatory challenges facing television. As a result, one might have imagined that policymakers would have welcomed cable with open arms. Unfortunately, nothing could have been further from the truth. Even though cable television simultaneously eliminated the handicap in signal quality suffered by UHF and drastically expanded the channel capacity available to television viewers, the FCC initially responded to cable television with considerable hostility.

. . . [R]ather than embrace cable as a solution to the inability of a fourth [broadcast] network to reach substantial portions of the country [because of the limits of UHF and the scarcity of spectrum allowing better quality broadcasts], the FCC instead chose to impede cable's emergence in the name of protecting incumbent . . . broadcasters.

. . . In the end, true competition among television networks developed more from successful judicial challenges to the FCC's cable regulations than it did from FCC policies.

Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 Emory L.J. 1579, 1694-1695 (Fall 2003), available at [http://ssrn.com/abstract\\_id=333702](http://ssrn.com/abstract_id=333702).

programming. While these two goals may conflict in some cases, they are not necessarily mutually exclusive.

In fact, it is apparent from the legislative history of the 1992 Act that members of both houses who supported retransmission consent sincerely believed it possible to, in effect, have one's cake and eat it, too, so that the new rights given to broadcasters would simply endow them with sufficient countervailing power against cable operators to engineer a readjustment of the relationship with each other, without negatively impacting consumers. For example, there are several references to the expectation that the bulk of local stations would elect must-carry, rather than retransmission consent; that many of the stations electing retransmission consent would accept non-cash consideration; that, where cash payments were required, cable operators would absorb the costs rather than pass them through to consumers; that interruptions of cable carriage would be rare because cable systems, characterized as "local monopolies," and local broadcast stations, armed with program exclusivity rights in their markets, would have roughly equal bargaining power and would be equally motivated to reach a deal.<sup>98</sup>

During the floor debate over the 1992 Act, opponents of retransmission consent argued cogently that there is no such thing as a free lunch and that these expectations would probably not be realized, with the result that consumers would wind up paying more for their cable service.<sup>99</sup> Some of their concerns were shared by Representatives and Senators who were

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<sup>98</sup>For example, Senator Bradley expressed his view that "most broadcasters will opt for must-carry while a significant number of other broadcasters will negotiate nonmonetary terms, such as channel position, for the use of their signal. Whatever terms are negotiated will only last for 3 years. Thus, the vast majority of cable operators will, in my opinion, not incur significant increases in cost due to the retransmission consent provision." 138 Cong. Rec. S14603 (Sept. 22, 1992). *See also* 138 Cong. Rec. S643 (Jan. 30, 1992) (Statement of Sen. Inouye) ("It is of course in their mutual interest that these parties reach an agreement ... I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare.").

<sup>99</sup>For example, during the House debate on the Conference Report, Representative William J. Hughes of New Jersey warned that "[r]etransmission consent, my colleagues, if you vote for this, is going to come back to bite you, because it is going to cost consumers billions and billions of dollars." 138 Cong. Rec. H8671, 8679 (daily ed. Sept. 17, 1992) (remarks of Rep. Hughes). Nearly twenty years later, the biting has begun.

inclined to support the legislation, but wanted assurances that there were safeguards to protect consumers who relied on cable carriage from shut-offs and price increases. The bill manager and other sponsors of the legislation responded by pointing to the Commission new rulemaking authority specifically related to retransmission consent that had been inserted into the bill and by including in the record unambiguous and unequivocal statement that the Commission was expected—indeed, had a responsibility—to use a combination of this new authority and its pre-existing powers to ensure that if, contrary to expectations, customer rates increased or interruptions occurred, the Commission would intervene to protect consumers either in the specific case or through changes to its rules.

For example, Senator Sanford, directly addressed the possibility that retransmission consent would result in subscriber rate hikes by citing the following quote from a letter sent by Senator Hollings, the Chairman of the Senate Commerce Committee, to the *New York Times*:

It is flatly wrong to characterize the retransmission consent provision in the cable bill as “threatening subscribers with large rate hikes or diminished offerings. The bill expressly states that the Federal Communications Commission must consider the impact of retransmission consent on the rates for basic service and shall ensure that the regulations proscribed under this bill do not conflict with the Commission’s obligations to ensure that such rates are reasonable. . . . Thus, it would be a direct violation of the statute for the FCC to permit retransmission consent to result in large rate hikes.<sup>100</sup>

The distinction between viewing the “marketplace” for retransmission consent as an end in and of itself and seeing it as a tool for achieving consumer-oriented public policy goals is hugely important in terms of interpreting the relevant statutory provisions and determining if retransmission consent is working as Congress intended. We think that, upon consideration of the language of the 1992 Act, its entire legislative history (rather than just the few brief passages

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<sup>100</sup> 138 Cong. Rec. S14603-14604 (Sept. 22, 1992)(remarks of Sen. Sanford)(emphasis added).

cited by broadcasters) and other relevant information, there can be no doubt which interpretation is correct. In essence, Congress wanted balance. It thought that existing law tilted the scales too much in favor of cable and it created the retransmission consent requirement to restore balance. It did not, however, intend to tip the scales in the other direction. Congress also recognized that the new right might work in practice in an unintended fashion—to produce significant increases in cable rates or to disrupt the ability of cable subscribers to view broadcast television through their cable boxes. For that reason, it gave the Commission the power to adopt rules governing the retransmission consent process and to ensure that consumers did not suffer significant cost increases.

Unfortunately, many within and outside the government speak and act as though retransmission consent is a benefit conferred upon the corporate parents of broadcast stations and have forgotten, ignored or misinterpreted the Findings and legislative history that clearly show that Congress did not intend the right to impair the ability of consumers to access broadcast television through their cable system or to increase the price they paid for that access.

In relying on the Right to Control Statement and the Outcome Statement, the Commission seems to suggest that the undeniable desire of Congress to create a marketplace for retransmission consent is itself a limitation on the Commission's authority over that market, and Congress was prepared to live with whatever outcomes the unregulated market produced. Of course, the intent to create a market is not inherently inconsistent with the belief that it should be a regulated market. There are many regulated markets in our country, and they are usually ones that affect important public interests and it is believed that unfettered market forces cannot be relied upon to adequately, or consistently enough, further that interest. Of course, highly relevant examples of markets subject to extensive regulation because of their perceived

importance to the public welfare are those regulated by the Commission, including the markets for broadcast and cable television.

Notably, the statute itself does not mention the creation of a market—it merely contains a prohibition on certain behavior by MVPDs and gives the Commission the power to adopt regulations to govern the retransmission consent process. The reference to the goal of creating a marketplace is in the *Senate Report*, not in the enacted law. Those who give that reference paramount importance invariably ignore other statements that unmistakably show that Congress wanted the Commission to regulate the market to prevent two results that the Findings in the 1992 Act itself and statements by Senator Inouye and others clearly demonstrate Congress wanted to avoid—consumers seeing their rates rise because of retransmission consent and disruptions of service.

During the debate over the enactment of the retransmission consent provisions of the 1992 Act, Congressional leaders expressly discussed the issue of “what will happen if a local station is unable to reach an agreement with the local cable operator, which could result in the loss of local programming to cable customers.”<sup>101</sup> For example, during the Senate floor debate on the 1992 Cable Act in January 1992, legislators from both sides of the aisle posed questions to the bill’s manager (and author of the retransmission consent provision), Senator Inouye, regarding the possibility that negotiations between a broadcaster and cable operator might reach an impasse resulting in a loss of local programming to consumers. These questions, and Senator Inouye’s clear, direct and unequivocal answers, leave no doubt as to Congress’ beliefs and expectations regarding the benefits and risks of retransmission consent:

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<sup>101</sup> 138 Cong. Rec. S643 (Jan. 30, 1992) (Sen. Burdick); *see also id.* (“If a local broadcast station and a cable operator are unable to come to terms on an agreement to carry that station’s signal, some consumers may not be able to receive local programming...How can we be sure that consumers will continue to receive the signals of the local broadcast stations if the local broadcaster and the local cable operator cannot reach agreement on the terms of carriage?”) (Sen. Adams).

MR. LEVIN: Mr. President, I would like to engage the manager of S.12, Senator Inouye, in a brief colloquy regarding the retransmission consent provision in the bill....The bill directs the FCC to conduct a rulemaking proceeding to establish rules concerning the exercise of stations' rights to grant retransmission authority under the new section 325(b). But, the bill does not directly address the possibility that broadcasters and cable operators in a particular market may be unable to reach an agreement, resulting in noncarriage of the broadcast signal via the cable system. I strongly suggest, and hope that the chairman of the subcommittee concurs, that the FCC should be directed to exercise its existing authority to resolve disputes between cable operators and broadcasters, including the use of binding arbitration or alternative dispute resolution methods in circumstances where negotiations break down and noncarriage occurs, depriving consumers of access to broadcast signals.

MR. INOUE. The FCC does have the authority to require arbitration, and I certainly encourage the FCC to consider using that authority if the situation the Senator from Michigan is concerned about arises and the FCC deems arbitration would be the most effective way to resolve the situation.<sup>102</sup>

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MR. BURDICK. Mr. President, I would like to pose a question to my colleague, the distinguished Senator from Hawaii, the manager of S. 12 on the Democratic side, for the purpose of engaging in a colloquy....Concerns have been raised about what will happen if a local station is unable to reach an agreement with the local cable operator, which could result in the loss of local programming to subscribers. I am particularly concerned about those consumers who cannot receive all the local broadcast signals without cable. How can we be assured that if retransmission consent negotiations take place, consumers will not lose access to their local programming?

MR. ADAMS. Mr. President, I too am concerned about this possibility. If a local broadcast station and a cable operator are unable to come to terms on an agreement to carry that station's signal, some consumers may not be able to receive local programming. For example, in parts of Seattle, the signals of local Seattle stations are not viewable if they are not carried on cable, because of interference problems with over-the-air viewing of these signals. How can we be sure that consumers will continue to receive the signals of their local broadcast stations if the local broadcaster and the local cable operator cannot reach agreement on the terms of carriage?

MR. INOUE. Mr. President, I thank the Senators for raising this very important concern, inasmuch as universal availability of local broadcast signals is a major goal of this legislation. The retransmission consent provisions of S.12 were designed so as to avoid creating a complex set of governmental rules to promote the carriage of local broadcast signals. Instead, S.12 permits the two interested parties – the station and the cable system – to negotiate concerning their mutual interests. It is of course in their mutual interests that these parties reach an agreement: the broadcaster will want access

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<sup>102</sup>138 Cong. Rec. S667 (Jan. 30, 1992) (emphasis added).

to the audience served by the cable system, and the cable operator will want the attractive programming that is carried on the broadcast signal. I believe that the instances in which the parties will be unable to reach an agreement will be extremely rare. We should resist the urge to require formal, preestablished mechanisms that might distort the incentives of the marketplace. At the same time, there may be times when the Government may be of assistance in helping the parties reach an agreement. I am confident, as I believe other cosponsors of the bill are, that the FCC has the authority under the Communications Act and under the provisions of this bill to address what would be the rare instances in which such carriage agreements are not reached. I believe that the FCC should exercise this authority, when necessary, to help ensure that local broadcast signals are available to all the cable subscribers. In this regard, the FCC should monitor the workings of this section following its rulemaking implementing the regulations that will govern stations' exercise of retransmission consent so as to identify any such problems. If it identifies such unforeseen instances in which a lack of agreement results in a loss of local programming to viewers, the Commission should take the regulatory steps needed to address the problem. I assure my friend that my colleagues on the committee and I will make certain that the FCC uses its authority to prevent any such impasses from becoming permanent and frustrating the achievement of our goal to maximize local service to the public.<sup>103</sup>

Notably, not a single member of the Senate rose to offer a contrary view to Senator Inouye's statements. Moreover, during the subsequent debate on the 1992 Cable Act's Conference Report, several Senators made similar assertions, again without contradiction. During the debate over the Conference Report, Senator Wellstone cited assurances given by Senator Inouye and the Commerce Committee's legal counsel "that existing law provides the FCC with both the direction and authority to ensure that the retransmission consent provision will not result in a loss of local TV service."<sup>104</sup> He cited his reliance on those assurances as the basis for his decision not to offer an amendment that would have required the Commission to adopt additional rules to ensure that the exercise of retransmission consent does not result in a

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<sup>103</sup>*Id.* at S643 (emphasis added). The assurances given by Senator Inouye regarding the scope of the Commission's authority to address situations in which the exercise of retransmission consent was adversely impacting the public interest directly led Senator Wellstone to withdraw an amendment that he had intended to offer that would have expressly required the Commission's initial implementing regulations to ensure that the exercise of retransmission consent rights does not cause the loss of service or an increase in rates. *Id.* (Statement of Sen. Wellstone).

<sup>104</sup> 138 Cong. Rec. S14604 (Sept. 22, 1992) (emphasis added). *See also id.* at S.14224 (Sept. 21, 1992) (Statement of Sen. Inouye); *id.* at S14248 (Sept. 21, 1992) (Statement of Sen. Gorton); *id.* at S14615 (Sept. 22, 1992) (Statement of Sen. Lautenberg).

loss of local broadcast service.<sup>105</sup> Senator Lautenberg similarly stated on the floor of the Senate that it was his understanding, based on discussions with the Commerce Committee, that “if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC.”<sup>106</sup>

In a letter to then-Chairman Martin dated January 30, 2007, Senators Inouye and Stevens (the Chairman and Vice Chair of the Commerce Committee, respectively) reaffirmed that the Communications Act gives the Commission authority to prevent disruptions of service during retransmission consent disputes, including the authority to order alternative dispute resolution and interim carriage.<sup>107</sup> In that letter, Senators Inouye and Stevens pointed out that Congress expressly contemplated the use of such measures when it enacted Section 325(b), citing both to the debate referenced above and, specifically, the colloquy on the Senate floor between Senator Inouye and Senator Levin quoted above. Senators Inouye and Stevens concluded their letter to Chairman Martin by emphasizing that “[a]t a minimum, Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution].”<sup>108</sup>

Senator Inouye was not only the source of the statements quoted above, but also, as bill manager for S.92, had oversight over the drafting of the *Senate Report*. It is inconceivable that

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<sup>105</sup>*Id.* (Sen. Wellstone). *See also* 138 Cong. Rec. S14604 (Sept. 22, 1992) (Sen. Wellstone).

<sup>106</sup>*Id.* at S14615-16 (Sen. Lautenberg); *see also id.* at S.14224 (Sept. 21, 1992) (Statement of Sen. Inouye); *id.* at S14248 (Sept. 21, 1992) (Statement of Sen. Gorton).

<sup>107</sup>Letter from Sens. Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission (Jan. 30, 2007), attached as Exhibit A to Retransmission Consent Complaint, *Mediacom Commc'ns Corp. v. Sinclair Broad. Grp., Inc.*, CSR No. 8233-C (filed Oct. 22, 2009).

<sup>108</sup> *Id.*

he would allow the *Senate Report* to contain language relevant to the Commission's authority that was diametrically opposed to his unequivocal statements made on the Senate floor. That is yet one more reason for concluding that the passages relied on by the Commission were not intended to limit, or even speak to, the Commission's authority.

The Commission reaches its conclusion stated in the *Notice* by drawing inferences from general statements in the *Senate Report* that do not expressly address the Commission's authority and disregarding statements in the record that specifically address that issue and clearly and unequivocally state exactly the opposite conclusion. Its rationale for doing so is unknown, since the *Notice* does not explain why the contrary statements by Senator Inouye and others are disregarded.

If we speculate that the Commission for some reason believes that the *Senate Report* should be given dispositive weight over statements made on the Senate floor, then that belief is not required by canons of statutory interpretation and misguided.<sup>109</sup> The *Senate Report* was dated June 28, 1991,<sup>110</sup> and so was prepared before an amendment to S.92 that added the Reasonable Rates Mandate to Section 325(b)(3)(A) and, as discussed above, that addition impacts the analysis of the scope of the Commission's rulemaking authority.<sup>111</sup> It was also before key exchanges between Senator Inouye and other Senators on the Senate floor regarding service interruptions and the impact of retransmission consent on consumer prices. Those exchanges not only led to the referenced amendment, but also to assurances regarding the Commission's

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<sup>109</sup> Apparently, "American courts . . . have no formal rules as to what sorts of legislative materials they may or may not consult,"<sup>109</sup> nor as to the weight to give each different type. As a generalization, it seems that absent special circumstances, courts will look to committee reports, then floor statements by bill sponsors or managers and finally to floor statements by other Senators or Representatives.<sup>109</sup>

<sup>110</sup> The cover page of the *Senate Report* referenced the "Cable Television Consumer Protection Act of 1991" rather than the Cable Consumer Protection and Competition Act of 1992.

<sup>111</sup> The amendment can be found at Cong. Rec. S.609 (Jan 29, 1992)..

authority to intervene to prevent harm to consumers that led to the withdrawal of other amendments that would otherwise have been made to expressly confirm that authority. The amendment was introduced by Senator Inouye on January 29, 1992, over seven months after the date of the *Senate Report*. The Inouye Amendment added to Section 325(b)(3)(A) the statement regarding the Commission's responsibility regarding price as it appeared in the enacted version of the 1992 Act—prior to the Inouye Amendment, S.92 did not expressly address the potential impact of retransmission consent on consumer prices.

Arguably, the only reason that the *Senate Report* does not contain statements as to the authority of the Commission that mirror those made by Senator Inouye and Committee counsel is that it was prepared before the dialogues on the floor that revealed the need by some Senators for reassurance regarding the Commission's authority. That reassurance was given without doubt, hesitancy or qualification, and it is perfectly reasonable to conclude that views expressed by Senator Inouye on the floor were also held when the *Senate Report* was prepared, but express statements on the subject like those made on the floor were not included in the *Senate Report* because no one expressed any doubt on the subject until after the release of the *Senate Report*.

In any event, the Commission relies on general statements that do not address the specific issue and ignores statements that are directly on point. Even if there were a tendency in American jurisprudence to give committee reports more weight than sponsor statements and other floor statements, that priority should be reversed if the committee reports do not expressly address the interpretative issue in question, but the sponsor statements and floor debate do contain directly relevant statements.

In sum, we think that the legislative history unmistakably demonstrates that while Congress did want broadcasters and cable companies to have considerable freedom in their negotiations and did not want to dictate deal terms, it expected the Commission to engage in oversight of the retransmission consent process and take such action as might be necessary in order to protect the public interest if the failure to reach a deal or the deal actually struck harmed consumers either by producing service interruptions or increases in basic cable rates.

We respectfully submit that our interpretation is most consistent with the legislative scheme that has characterized communications law and policy from the inception and with the legislative history of Section 325(b). Last but not least, it reconciles the Outcome Statement and the Right to Control Statement with the opinions regarding the Commission's authority expressed on the floor, rather than creating a conflict with those opinions, and for that reason alone is a preferable interpretation from the perspective of the conventions of statutory interpretation.

## CONCLUSION

While we think it is virtually indisputable that Congress intended the Commission to have the power and the duty to prevent carriage disruptions for cable subscribers, the discussion to this point should, at the very least, leave no doubt but that the meaning and intent of Section 325(b) regarding the Commission's authority to adopt an Interim Carriage Rule is ambiguous. If nothing else, it seems reasonable to conclude that it is even uncertain whether the statute is ambiguous. Under *Chevron*, there are sufficient grounds for conferring interpretative choice upon the Commission.

The Commission's first choice, in other words, is to decide if it has any choice. The Commission can stick to its position expressed in the *NPRM* that there is no ambiguity and so no choice when it comes to the issue of its authority to create an Interim Carriage Rule, or it can agree that, for all the reasons addressed in these comments, there is sufficient interpretative uncertainty to allow adoption of an Interim Carriage Rule.

In choosing between those two alternatives, the Commission should pick the one that is most consistent with congressional intent, the goals underlying the creation of retransmission consent and the public purposes that the Communications Act is supposed to serve. As the Commission said in 1970, “[i]t appears to us that in reaching a decision as to how we are to exercise our discretion, we should look to the basic purpose of regulatory activity in the context of our general national policy, as well as the specific statutory guidelines given this agency.”<sup>112</sup>

Commissioner Michael Copps has remarked that “the Commission has not merely the discretion to consider the public interest in its decisions—it has the statutory obligation to take only actions that are in the public interest. I believe Congress made it abundantly clear that this is the prism through which we must look as we make our decisions.”<sup>113</sup> Of course, the Commission cannot act beyond the scope of its jurisdiction and authority conferred by law, but in choosing between two different plausible interpretations of that law, it should always select the one that best serves the public interest.

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<sup>112</sup> *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Tentative Decision (April 3, 1970).

<sup>113</sup> *FCC Process Reform*, Subcommittee on Communications and Technology, House Committee on Energy and Commerce, May 13, 2011 the Internet, May 13, 2011 (prepared testimony of FCC Commissioner Michael J. Copps), at 1, available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Telecom/051311/Copps.pdf>.

In enacting the 1992 Act, one of Congress' goals was to ensure the "universal availability of local broadcast signals."<sup>114</sup> Correcting the marketplace "distortion" thought to flow from cable carriage of broadcast signals without consent or compensation was supposed to serve that goal. As the analysis of the Findings set forth above demonstrates, Congress did not want this solution to exacerbate the problem by disrupting or increasing the cost of the availability of broadcast television through a cable service. Congress expressly recognized the continued viability of the long-standing policy goal of ensuring that cable households could continue to receive local broadcast programming through cable carriage. That goal was motivated not just by the desire to make broadcast television viewing easy and convenient for consumers, but also by the strong interest in preserving the broadcast television system. As an ever-growing percentage of the population relied on cable, carriage by cable systems was essential to assuring that broadcast stations maintained the viewership needed to continue to attract advertisers.

Read as a whole, as they must be, the findings set forth in Section 2 of the 1992 Act unequivocally establish that Congress, motivated by the desire to preserve local broadcast television out of concern for the public interest, rather than broadcasters' private interests, wanted to enhance the competitive status of local stations without, however, adversely impacting the millions of consumers who relied on cable service for reliable access to broadcast television programming. Those two goals may conflict in some cases, but they are not necessarily mutually exclusive. Congress thought that the market would provide sufficient incentives and disincentives to the negotiating parties to ensure that in the vast majority of cases the process would produce the right results. Recognizing that there might still be cases where the process did not work as intended, it expected the Commission to use its ancillary powers and its

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<sup>114</sup> 138 Cong. Rec. S667 (Jan. 30, 1992).

rulemaking authority conferred by Section 325(b)(3)(A) to intervene when a conflict did arise and to prevent retransmission consent from producing results contrary to those intended and expected.

The Commission has noted that the "overriding intent of the 1992 Cable Act was to increase—not reduce—availability of broadcast signals to the public."<sup>115</sup> For that reason, in instances where it has conceded that it does have a choice, the Commission has selected the alternative that maximizes consumer access and convenience.<sup>116</sup> These comments have largely been devoted to trying to showing that the Commission does have a choice when it comes to addressing shutoffs and threatened shutoffs resulting from negotiating stalemates, so that it has the opportunity to identify and make the choice on the same basis.

The fact that the Commission has previously expressed the view that Section 325(b)(1) prevents it from adopting interim carriage or dispute resolution rules in order to protect consumers does not inhibit it from finding that its conclusion was in error. The Supreme Court has said that an agency which changes its interpretation of a statutory provision, "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better . . . ."<sup>117</sup> Of course, *Chevron* itself involved the Environmental Protection Agency's departure from its prior interpretation of

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<sup>115</sup> *Broadcast Signal Carriage Issues Order*, *supra* note 35, at ¶147.

<sup>116</sup> For example, the Commission decided that failure to elect between must-carry and retransmission consent by the applicable deadline would result in a default to must-carry.

<sup>117</sup> *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)

the word “source”<sup>118</sup> and the Supreme Court held in that case that “an initial agency interpretation is not instantly carved in stone”<sup>119</sup> As the Commission recently observed in its *Terrestrial Program Access Order*, it is the Commission’s duty to consider varying interpretations and policy judgments on an on-going basis.<sup>120</sup>

Even if, for the sake of argument, we assumed that the Commission does not have authority to adopt an Interim Carriage Rule, that does not mean that it is powerless to protect consumers from the effects of service interruptions and price increases due to ever escalating retransmission consent fees. The Commission has extensive authority to regulate broadcasters in the public interest under Section 309(a) of the Communications Act, as well as pursuant to its ancillary authority under Sections 201(b), 303(r), and 4(i). It has comparable authority over cable systems. The charge to the Commission to base broadcast licensing and other decisions upon the “vague ‘public interest’ standard” has been “quite generously” read by the Supreme Court.<sup>121</sup>

The Commission can use this power to “design a mechanism that . . . provides the . . . [parties to retransmission consent negotiations] with the right [incentives and disincentives] to choose actions (individually and voluntarily) that would dictate the desirable outcome.”<sup>122</sup> In other words, the marketplace in which Congress placed such great reliance has changed to such a

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<sup>118</sup> *Chevron*, 467 U.S. at 856–58.

<sup>119</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

<sup>120</sup> *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746, 795 (2010).

<sup>121</sup> Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 Wm. and Mary L. Rev. 1463, 1478 (2000).

<sup>122</sup> Chun-Hsiung Liao & Yair Tauman, *Implementation of the Socially Optimal Outcome*, 72 The Manchester School 618 (2004).

degree that it can no longer be relied upon to make it in the mutual best interests of the parties to reach a deal without service interruptions and without requiring large cash fees ultimately borne by subscribers.<sup>123</sup> If the Commission really does lack the power to adopt rules requiring carriage without consent or binding arbitration (which we do not believe), the Commission can correct the marketplace's deficiencies through rules that encourage the parties to reach a reasonable and affordable deal without service disruptions—for example, adopting a rule that provided for broadcasters who refused to allow interim carriage or agree to arbitration to receive no or reduced protection under the Commission's network or syndicated exclusivity rules or to undertake whatever capital expenditures might be required to ensure that virtually everyone in its entire license territory can enjoy off-air reception.

The Commission could also take into account the behavior of broadcast stations in retransmission consent negotiations in deciding whether to renew broadcast licenses. In that regard, the Commission also has extensive power to affect the behavior of broadcast stations under various provisions of the Communications Act, including its authority over the grant, renewal and revocation of licenses. In adopting the first rules related to retransmission consent in 1993, the Commission noted with favor its pre-existing position that a station's behavior in

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<sup>123</sup> An important change has been the breaking of the rough market symmetry that existed in 1992, when the market for retransmission consent was best characterized as a bilateral monopoly. Cable companies, which then faced little competition within their markets, faced off against stations protected by network and syndicated program exclusivity rights. That symmetry was broken by the growth of DBS. MVPDs face competition, while stations still enjoy local monopolies because of the exclusivity rules. Broadcasters gain leverage from the ability to drive subscribers of an MVPD to its competitor if there is an interruption of service. MVPDs cannot match that leverage by holding out the prospect of carrying another station with the same network affiliation. The use of network non-duplication by retransmission consent stations to deny consumers an alternative source of programming in the event of a shut down has become a reality; indeed, in order to further increase their leverage in retransmission consent negotiations, broadcasters have begun pursuing relief from the "significantly viewed" exception to the network nonduplication rules with renewed vigor. *See, e.g., Providence TV Licensee Corp.*, DA 10-769 (MB 2010); *KXAN, Inc.*, 49 CR 1184, DA 10-589 (MB 2010); *WUPW Broadcasting, LLC*, 49 CR 1055, DA 10-460 (MB 2010)

ranting or withholding consent to re-broadcast of its signal is a relevant consideration in determining whether the station was being operated in the public interest.<sup>124</sup>

Along the same lines, the Commission, relying on Section 325(b)(3) or its ancillary authority, might adopt rules that do not mandate specific behavior, but instead create incentives and disincentives to steer broadcasters to behave more consistently with the interests of consumers. For example, the Commission might use the network non-duplication and syndicated exclusivity protections, which are purely constructs of the Commission, creatively to induce behavior on the part of broadcasters that is more aligned with congressional goals. There is nothing in the law that prevents use of that tool, for example, to give broadcasters incentives to agree, or disincentives to refusing to agree, to interim carriage or binding arbitration. Similarly, entitlement to continued non-duplication protection might be made contingent upon the degree to which stations comply with congressional intent and use retransmission consent revenues to preserve and enhance local origination of news and public affairs programming, rather than giving it to corporate parents to use for dividends, executive salaries and other non-broadcast purposes. A number of suggestions along these lines have been made by other filers in this docket that are worthy of consideration.

In any event, for the reasons outlined above and discussed at length in the comments of certain other parties in this proceeding, we think that the Commission has both the duty and ample authority to ensure that the balance between broadcasters and MVPDs is restored and consumers are protected from the twin harms that Congress feared might flow from the creation of the retransmission consent requirement and that they are, in fact, suffering today: service disruptions and rate increases.

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<sup>124</sup> *Broadcast Signal Carriage Issues Order*, *supra* note 35, at 147 (citing *KAKE-TV and Radio*, 10 R.R. 2d 799, 801 (1967)).

Respectfully submitted,

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