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

In the Matter of	)	
	)	
Petition for Rulemaking to Amend the	)	**MB Docket No. 10-71**
Commission's Rules Governing	)	
Retransmission Consent	)	

REPLY COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION; IOWA ASSOCIATION OF MUNICIPAL UTILITIES; BRAINTREE ELECTRIC LIGHT DEPARTMENT (MA); CHELAN COUNTY PUBLIC UTILITY DISTRICT (WA); GREENVILLE ELECTRIC UTILITY SYSTEM (TX); CITY OF GLASGOW, KY; LAFAYETTE UTILITIES SYSTEM (LA); MUSCATINE POWER AND WATER (IA); SCOTTSBORO ELECTRIC POWER BOARD (AL); SOUTH GEORGIA GOVERNMENTAL SERVICES AUTHORITY; SPENCER MUNICIPAL UTILITIES (IA); AND CITY OF WADSWORTH, OHIO.

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The American Public Power Association, the Iowa Association of Municipal Utilities ("IAMU") and the public multichannel video programming distributors listed above (collectively "the APPA Group") submit these reply comments in the above-captioned proceeding. The current *Notice of Proposed Rulemaking* ("NPRM") grew out of a Petition for Rulemaking filed by a broad coalition of cable and satellite providers, non-profit entities, and public interest organizations requesting that the Federal Communication Commission initiate a proceeding to amend the rules governing the retransmission consent process under which multichannel video program distributors ("MVPDs") obtain the right to carry broadcast television stations.

As discussed below, a broad array of commenters, ranging from cable operators, public interest consumer groups, and small rural telephone companies, all agreed with the APPA Group that many of the proposals in the *NPRM* are a necessary first step in reforming a retransmission consent process that is badly broken. Indeed, the only commenters who opposed a reexamination and reform of the existing retransmission consent process were the broadcasters who increasingly benefit from the skewed manner in which the process has evolved.

Moreover, the broadcasters never address or even acknowledge the fact that the unfair practices occurring under the current retransmission consent structure are disproportionately harmful to small, competitive, facilities-based MVPD providers, such as the public entities in the APPA Group, and that such practices threaten the development and availability of advanced broadband in many areas of the country.

As members of the APPA Group have experienced first-hand, the retransmission consent process, as currently implemented, provides little, if any, incentive for broadcasters to do anything but hold MVPDs and their consumers hostage to ever increasing prices and unwanted services. This is particularly true for small, competitive, facilities-based MVPDs, such as the public entities in the APPA Group, that often have little choice but to comply with the ever-increasing demands of the broadcasters. As the APPA Group reiterates below, the Commission should move forward and adopt rules modifying the inherent inequities in the current retransmission consent structure and should remove the regulatory and other barriers that prevent the retransmission consent process from being truly competitive. In particular, given the strong support and evidence in the record that the combination of the retransmission consent rules and the network non-duplication rules have the practical effect of impeding competition for video programming, the Commission should modify its rules appropriately and preempt the contracts in question.

I. THE COMMENTS DEMONSTRATE BROAD SUPPORT FOR REFORM OF RETRANSMISISON CONSENT PROCESS

In issuing the *NPRM*, the Commission described its "primary objective" as follows:

> Our primary objective is to assess whether and how the Commission rules in this arena are ensuring that the market-based mechanisms Congress designed to govern retransmission consent negotiations are working effectively and, to the extent possible, minimize video programming service disruptions to consumers.[1]

As discussed below, an objective review of the record demonstrates that the answer to the Commission's question is an emphatic "No." No, the market-based mechanisms that Congress

[1] *NPRM* , at ¶ 1.

designed to govern retransmission consent negotiations are not working effectively, and No, consumer interests are not being protected to the extent possible.

A large and diverse group of commenters, including the American Cable Association ("ACA"), the Organization for the Promotion and Advancement of Small Telephone Companies ("OPASTCO"), Charter, Cablevision, Time Warner, Century Link, AT&T, Verizon, the Indiana Regulatory Commission, the National Consumer League, the Free State Foundation, and Public Knowledge/New America Foundation, all echo the APPA Group 's belief that the Commission's regulations governing retransmission consent – which are now nearly twenty years old – are severely outdated, are causing harm to consumers, and are counterproductive to the development of competition in the delivery of video programming. These commenters, as well as many others, note that the market conditions and circumstances that gave rise to the retransmission consent rules and policies in 1992 no longer exist. Simply put, the record in this proceeding reflects strong support for the Commission to update the retransmission consent rules to reflect the current realities of the video market.

Virtually all commenters, including the broadcasters, agree that when the Commission initially developed regulations implementing the retransmission consent provisions of the 1992 Act, cable operators were the sole multichannel distributors of broadcast programming in almost all designated market areas. Commenters are also on common ground in recognizing that Congress was concerned about the ability of communities to ensure that their residents have a meaningful role in defining access to the video programming that was important to them – a fundamental value that is now commonly referred to as "Localism." Accordingly, the rules that the FCC developed and amended from time to time, were in substantial part intended to strengthen the ability of local broadcasters to survive and thrive in an environment dominated by increasingly large cable operators.

A. Broadcasters Arguments Against Reform Are Not Convincing.

1. The market-place mechanisms are not functioning and the current rules are unfairly stacked in favor of broadcasters

The Commission's first inquiry is whether the market-based mechanisms that Congress designed to govern retransmission consent negotiations are working effectively. The record clearly indicates that the answer is "No" – that the balance of power has now shifted so dramatically to national broadcasters that small, competitive, facilities-based cable system are threatened with extinction. Unless the Commission acts forcefully in this and other rulemakings to preserve and protect local choice, it can say goodbye to localism, which all sides agree to be one of Congress's critical goals in enacting and reinforcing the must carry-retransmission consent regime.

While the broadcasters grudgingly acknowledge that the MVPD market is more competitive than it was at the time of the enactment of the retransmission consent rules, they nevertheless argue that MVPDs have controlling market power in the retransmission consent process. For example, NAB contends that, if anything, changes in the market place (including cable system clustering, audience fragmentation, and a reduction in the share of viewers watching over-the-air television) have "*reduced* broadcasters' bargaining power relative to MVPDs."[2] In support of this startling statement, NAB's economic analysis argues that clustering reduces the number of cable systems in each local market, thereby increasing each remaining system's market share and bargaining power relative to local broadcasters. Further, while conceding that there have been many new competitive MVPD entrants since 1992, NAB would have the Commission believe that, overall, there is *less* competition, and the relative market power of broadcasters has actually decreased.

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2 NAB Comments, Attachment A, Declaration of Jeffrey A. Eisenach, and Kevin W. Caves of Navigant Economics, at 5 (*emphasis* in original).

> Thus, although it is true that the *variety* of MVPD modalities operating in local markets (e.g., DBS, telco as well as cable) has generally risen, this does not imply that the relative market power of cable MSOs vis-à-vis broadcasters has diminished. To the contrary, the number of agents negotiating for the right to retransmit broadcast signals has likely decreased in many markets since the advent of retransmission consent in 1992.[3]

The broadcasters' argument is belied by the facts. First, if the broadcasters' negotiating leverage were decreasing, as NAB claims, then one would expect their compensation for retransmission consent to be falling commensurately. In fact, precisely the opposite has occurred. Broadcasters not only have continued to demand in-kind compensation in the form of carriage of affiliated programming networks, but they have also been able to compel ever higher cash payments, prime channel locations, and costly tier placements, through the retransmission consent process, as documented in the comments of the APPA Group and others. Notably many of the commenters point to the chest-thumping statements by broadcasters themselves, projecting ever higher retransmission consent fees. For example, SuddenLink points to an October 25, 2010, letter from Mike Hopkins, Fox Affiliate Sales President, to William Lake, Chief, of FCC Media Bureau, indicating that it would be "reasonable" for the network to seek a retransmission consent fee of between five and six dollars.[4]

Second, in defending the current retransmission consent regime, the broadcasters would have the Commission believe that all that is at stake is the broadcasters' ability to withstand the effects of the ever growing concentration of the largest cable multisystem operators ("MSOs"). While that is a legitimate concern, it completely ignores the disproportionate harm that the broadcasters' practices have on small, competitive, facilities-based MVPDs.

For example, the United States Telephone Association ("USTA") cites to a 2007 study by the Congressional Research Service concluding that the current competitive MVPD marketplace

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3 *Id* ,

4 SuddenLink, at footnote 24.

has created an environment in which "the tables are somewhat turned, and broadcasters with must-have programming often can negotiate from a position of strength, especially with cable systems whose subscribers do not represent a significant portion of a broadcaster's audience."[5]

Yet, as CenturyLink correctly points out, not only are new entrants subject to the leverage broadcast stations have over all MVPDs to withhold key local programming and other must-have programming, but they are also subject to the additional leverage broadcast stations have over new entrants to demand even higher prices and more onerous conditions than those demanded from the incumbent.

> In retransmission consent negotiations between a broadcast station and a new entrant MVPD, the new entrant MVPD, given the massive capital investment required, is least likely to be able to survive if it is unable to obtain must-have programming from the local broadcast station. Meanwhile, the broadcast station has the least risk if the new entrant does not carry its signal, given its ability to continue to make its programming available to other video programming distributors as well as for free over the air and on the Internet.[6]

The scenario that CenturyLink describes is particularly true for smaller, facilities-based competitive MVPDs, such as the members of the APPA Group. As a practical matter, these systems cannot succeed without carrying the major networks, and they lack the ability of their large incumbent MSO and DBS competitors to negotiate substantial volume discounts or other concessions. As a result, small MVPDs often have little choice but to pay substantial premiums for retransmission consent and to pass these premiums through to their rural and small-market subscribers. This puts them at a significant competitive disadvantage to larger MVPDs in their markets.

As CenturyLink notes, the existence of competitive wireline MVPDs put significant downward pressure on incumbent cable provider rates, as well as often offering a less expensive

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5 USTA, at pp. 10-11, citing Congressional Research Service, Report to Congress, *Retransmission Consent and Other Federal Rules Affecting Programmer-Distributor Negotiations: Issues for Congress*, July 9, 2007, p. 56 (*CRS Retransmission Study*).

6 CenturyLink, at p. 2.

alternative for comparable video services in their markets. Indeed, the Commission's own studies bear out the beneficial effect of competitive MVPDs.

For example, CenturyLink cites to the Commission's most recent report on cable industry prices, which found that the lowest overall average price for expanded basic services occurred in communities in which there was "effective competition" between at least two wireline operators. At the same time, the average price for those services was higher in communities an FCC determination of "effective competition" was based on DBS penetration alone.[7] Small, competitive, facilities-based MVPDs can have an even greater impact on competition, but only if they are can obtain access to broadcast programming at competitive rates.

For their part, broadcasters argue that the compensation being demanded as part of retransmission consent carriage agreements is simply a reflection of the market-based negotiation process that Congress intended to preserve and protect. In contrast, the APPA Group and the overwhelming majority of non-broadcast interests contend that the current retransmission consent regime perpetuates obsolete regulatory preferences that are preventing normal market dynamics from functioning. Indeed, it is telling that several free-market advocates have come forward in this proceeding to make the point that the current retransmission consent process does <u>not</u> operate as a free market. For example, The Free State Foundation, a self-described "nonpartisan, free market-oriented" think tank, describes the primary purpose of its comments as being to "show that the current negotiation regime is not, in fact, a 'market-based' one," stating.

> [D]espite any suggestions to the contrary, negotiations between broadcasters and cable operators over retransmission consent do not take place in a 'free market' context. There are significant government-imposed conditions and constraints…that alter the claimed free market context. In crucial respects, the Commission's current retransmission consent and must-carry regulations foster an unfree market in video programming. Consequently, the review of the Commission's rules should take into account the ways in which those rules rest on

7 *Id.*, at p, 3, citing the FCC's *Report on Cable Industry Prices, In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, 26 FCC Rcd 1769, 1771-72.

restrictive, protectionist premises that limit private bargaining and ultimately limit video programming outputs to the detriment of consumers.[8]

Similarly, the National Taxpayers Union emphatically states, "[w]hile advocates of the current retransmission consent structure claim that these negotiations represent fair negotiations, they bear only a vague resemblance to a true free market."[9] Former FCC Chief Economist, Thomas Hazlett, a proponent of free market economics, characterizes the current process as providing broadcasters a "protected environment" in which "negotiations for retransmission consent are rigged."[10]

Simply put, the broadcasters' claims notwithstanding, the current retransmission rules do not reflect or foster a functioning free market, and the combination of retransmission consent and network non-duplication/syndicated exclusivity rules effectively limits MVPDs to a single source for programming that consumers most value.

2. Consumer interest is not being protected under the current rules

Turning now to the Commission's second inquiry – whether the current retransmission consent rules are protecting the consumer interest to the extent possible – the APPA Group believes that the record in this proceeding makes clear that the current retransmission consent rules are not in the public interest.

Throughout their collective comments, broadcasters argue that consumers are not significantly harmed by the increased costs that the current retransmission consent rules impose on them or by the increasing occurrence of station carriage blackouts. For example, Fox claims that the record confirms an "ineluctable truth" "retransmission consent works extraordinarily

8 Free State Foundation, at pp. 1-2.

9 National Taxpayers Union, p. 2.

10 *If a TV Station Broadcasts In The Forest, An Essay on 21st Century Video Distribution*, Thomas W. Hazlett, Arlington Economics, at 62.

well to provide consumers with access to the most sought after content on television while enabling broadcasters to earn a reasonable return on their investments."[11]

It is difficult to reconcile this statement with the market realities that the FCC has itself observed. As the Commission noted in the *NPRM*,

> In the past year, we have seen high profile retransmission consent disputes result in carriage impasses. When Cablevision Systems Corp. ("Cablevision") and News Corp.'s agreement for two Fox-affiliated television stations and one MyNetwork TV-affiliated television station expired on October 15, 2010, and the parties did not reach an extension or renewal agreement, Cablevision was forced to discontinue carriage of the three stations until agreement was reached on October 30, 2010. The carriage impasse resulted in affected Cablevision subscribers being unable to view on cable the baseball National League Championship Series, the first two games of the World Series, a number of NFL regular season games, and other regularly scheduled programs. Previously, on March 7, 2010, Walt Disney Co. ("Disney") and Cablevision were unable to reach agreement on carriage of Disney's ABC signal for nearly 21 hours after a previous agreement expired. As a result, the approximately 3.1 million households served by Cablevision were unable to view the first 14 minutes of the Academy Awards through their cable provider. Most recently, we are aware of losses of programming resulting from retransmission consent carriage impasses involving DISH Network and Chambers Communications Corp., Time Warner Cable and Smith Media LLC, DISH Network and Frontier Radio Management, DirecTV and Northwest Broadcasting, Mediacom and KOMU-TV, and Full Channel TV and Entravision.[12]

Not only have blackouts become common nowadays, but the frequency of blackouts has also increased dramatically over the past two years. As the APPA Group noted, there have already been more blackouts this year than in any other in the past decade.[13]

The broadcasters' claim that the current retransmission consent rules do not harm consumers is refuted by the record in this proceeding. As reflected in the comments of the APPA Group and of various other consumer-oriented organizations, the broadcasters' core arguments simply do not work. In fact, all of the consumers and public interest groups

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[11] Fox, at p. 2.

[12] *NPRM*, at ¶ 15.

[13] APPA Group, citing Communications Daily, May 19, 2011.

commenting in this proceeding expressed the opposite view.[14] For example, the National Consumers League states,

> We believe that the record in this proceeding demonstrates the degree to which consumers are harmed when parties seek to use the rules to gain leverage in their retransmission consent negotiations. All too often, impasses at the negotiating table are only resolved by higher cable service rates for consumers, loss of programming, or both.[15]

Similarly, the National Black Caucus of State Legislators, et al, states,

> The undersigned groups represent ordinary consumers including minorities across the country. We write to express our support for comprehensive retransmission consent reform for no other reason than our steadfast belief that the current rules are broken and the result does not serve the public interest.[16]

Thus, in sharp contrast to the self-serving claims of the broadcast industry, virtually every other industry sector believes that the retransmission consent process does not serve consumers well.

B. Small New Competitive Entrants, Such as Public Providers, Are Particularly Vulnerable to Abuses of the Retransmission Process

Other commenters, such as the American Cable Association ("ACA"), reinforce the APPA Group's argument that small to mid-size MVPDs are particularly vulnerable to the unfair and discriminatory tactics of the broadcasters. The ACA submitted a detailed analysis demonstrating that smaller cable operators are paying, on average, retransmission consent fees that are at least double the amount of larger operators.

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14 The American Consumer Institute Center for Citizen Research; the Indiana Utility Regulatory Commission; the National Consumers League; Public Knowledge and the New America Foundation; the National Black Caucus of State Legislators; the National Conference of Black Mayors; the National Organization of Black Elected Legislative Women; the National Foundation of Women Legislators; the National Organization Black County Officials; the National Puerto Rican Chamber of Commerce; Women in Municipal Government; the League of United Latin American Citizens; the Hispanic Federation; and the Sports Fans Coalition.

15 National Consumers League, at p. 1

16 National Caucus of Black Legislators, et al, at p. 1.

Broadcasters often put forward the argument that price discrimination between larger and smaller MVPDs simply reflects economies of scale.[17] As ACA correctly notes, however, retransmission consent contracts typically specify that the MVPDs bear the cost of obtaining the broadcasters' signal. Thus, the difference in prices paid by large and small operators has no basis in broadcasters' cost of delivering the signal. Since the MVPD pays the cost of obtaining the signal, the additional cost to broadcasters of providing retransmission consent for all MVPDs is essentially zero. Accordingly, the only real reason for the disparate pricing is the difference in the relative imbalance of bargaining power of small MVPDs and broadcasters.[18] Recognizing this point, the NAB ultimately justifies the dramatic difference in charges for retransmission consent between small MVPD and large MSOs as akin to the discounts available for bulk purchasing at Sam's Club or Costco.[19] The APPA Group agrees with the ACA's point that an over-the-air broadcaster is not just any business, like Sam's Club or Costco.

> Broadcasters are entrusted with licenses to use the public's airwaves to provide their product in exchange for agreeing to operate in the public interest, and therefore stand in a special relationship to the government: federal law provides special support and protections to broadcasters in the public interest, and the government views itself as having a special interest in how its products are distributed and priced.[20]

Moreover, as discussed below, if the broadcasters truly believe that they should have the latitude to negotiate for access to their products like any other business, then they should not be allowed to claim the benefits of the special protections afforded to them under the non-duplication and network exclusivity rules. Members of the APPA Group have increasingly faced unreasonable retransmission consent demands, dictated by broadcasters with little, if any, interest

17 NAB, at p. 50.

18 ACA, at p. 83.

19 NAB, at p. 50.

20 ACA, at p. v.

in constructive negotiation and mutual accommodation. Where members of the Group have found broadcasters in neighboring markets that were willing to provide alternative programming, the Commission's network non-duplication and syndicated exclusivity rules and the broadcasters' contracts with national broadcast networks have precluded access to such alternative programming – or even the threat of obtaining it.

If the Commission is serious about protecting and preserving competition and localism in smaller markets, then it must act aggressively to give small MVPDs a fair opportunity to obtain content in the retransmission consent process, at rates and on terms and conditions similar to those available to large MVPDs.

C. Abuses Also Potentially Impact Viability of Broadband

Several commenters also joined the APPA Group in asserting that while the *NPRM* focuses on access to broadcast programming, it is important for the Commission to consider the impact of the current abuses and unfair practices that occur in the retransmission consent process in the broader context of the national goals of fostering greater broadband availability. For example, the Indiana Utility Regulatory Commission ("IURC") echoed the APPA Group's observation that in order to be economically viable competitive broadband systems must be able to provide, or support the provision, of all major communications services, including video services, and that therefore they must have fair and reasonable access to broadcast video programming.

> The ability to provision video with voice and broadband enables providers to make the business case to deploy needed infrastructure. [21]
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> ***
>
> The Indiana Regulatory Utility Commission submits that discrimination in the pricing of content does occur and that it is detrimental not only to the small network providers (cable companies and local exchange companies) involved and

[21] Indiana Utility Regulatory Commission, at p. 2.

> to their customers, but also to competition in the video market and the build out of Broadband, particularly in rural, unserved and high cost areas.[22]

The IRUC has called upon the Commission to take action to reform the current retransmission consent rules, so as not to hinder the deployment of broadband, citing the Commission's prior finding that "a provider's ability to offer video service and to deploy broadband networks are linked intrinsically."[23]The APPA Group agrees. As stated in its opening comments, several members of the APPA Group are *already* capable of providing ultra-fast broadband connectivity at 100 Mbps – a full decade ahead of the Commission's proposed national goal – and their fiber systems will be capable of offering 1 Gbps long before 2020. These systems can increasingly provide many other benefits to their communities and the Nation, including support for economic development and competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable modern health care, quality government services, and the many other advantages that contribute to a high quality of life. BUT, in order for all of this to occur, public providers, as well as all other broadband providers, must be able to operate their systems on an economically viable basis, which depends on their ability to obtain fair and reasonable access to broadcast video programming.

II. CONSESUS OF COMMENTERS SUPPORT THE PROPOSED RULE CHANGES AND URGE THE COMMISSION TO GO EVEN FARTHER IN SOME AREAS

As demonstrated above, the Commission's current retransmission rules have remained essentially unchanged for nearly two decades. As a result, having failed to keep up with changes in the MVPD marketplace, the Commission's rules are ill-suited to curbing the negotiating

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22 *Id*, at p. 1-2.

23 *Id*, at 6, citing the Commission's finding *Order, In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Docket No. 05-311, Released March 5, 2007, ¶ 62.

abuses utilized by broadcasters, which place MVPDs and consumers in a no-win position. In particular, the Commission should undertake the following rule changes to reform the retransmission consent process:

A. Commenters Support Amending the Rules to Curb the Anticompetitive Effects of the Network Non-Duplication and Syndicated Exclusivity Rules and the Exclusivity Clauses in National Network Agreements

Like APPA, a large and diverse group of commenters strongly support the elimination or modification of the non-duplication and syndicated exclusivity rules. As OPASTCO notes, there is ample evidence in the record that these rules currently provide broadcasters a "one-sided level of protection," as well as artificially-inflated bargaining leverage in retransmission consent negotiations.[24] Time Warner echoes this argument, contending that "[t]he net effect of the territorial exclusivity rules is to allow stations to insulate themselves from competition in retransmission consent negotiations, even where there is no reasonable policy justification for giving a station such protection."[25]

Virtually all commenters other than broadcast commenters are united in maintaining that the network non-duplication and syndicated exclusivity rules compound the flaws in the retransmission consent process by depriving MVPDs of competitive choices. Specifically, the inability of MVPDs to import a distant signal in instances where the local broadcaster and the MVPD are unable to reach a retransmission consent agreement denies the MVPD with a competitive alternative and effectively holds the MVPD hostage to the whims of the local station. This is particularly true in instances where the MVPD is a small, new entrant attempting to compete against a large incumbent MVPD that has been able to use its larger resources and scale to reach a carriage agreement with the local broadcaster. In such circumstances, with no

[24] OPASTCO, et al, at p. 21.

[25] Time Warner, at p. 14,

ability to import a distant station, the competitive new entrant has no real choice but to also agree to carry that local broadcaster, even if it means acceding to the demands of the local station at prices many times higher than the incumbent MVPD.

As the APPA Group argued, allowing MVPDs to import distant station signals would provide a critical "safety valve" against unreasonable retransmission consent demands of local broadcasters. Other commenters agree with the APPA Group. For example, Verizon states that eliminating the non-duplication and syndication exclusivity rules would "encourage the parties to retransmission consent negotiations to temper their demands and, by providing some market based alternatives, reduce the likelihood of consumer harm in the event that such negotiations are unsuccessful.[26]

Many commenters also agree with the APPA Group's view that, to be effective, the Commission's elimination of the non-duplication rules would have to be coupled with concrete actions to block entry and enforcement of contracts between national networks and local affiliates that act to preclude the importation of distant duplicate signals.

> The Commission should not only rescind its rules authorizing exclusivity agreements, but affirmatively ban such agreements. In today's competitive environment, networks and broadcast stations should no longer be permitted to coordinate their efforts to prevent MVPDs that have lost a local signal from accessing network programming by carrying another affiliate's signal. Indeed, courts have recognized the anticompetitive effects of vertical agreements establishing exclusive territories, and have found similar restraints to be *per se* unlawful when insisted upon by downstream distributors (in this case, broadcast stations).
>
> Here, local stations invoke contractual exclusivity rights to shield themselves from competition from out-of-market stations, thus allowing them to drive up prices by credibly threatening to block an MVPD's access to network programming. As long as territorial exclusivity provisions continue to exist, broadcast stations will have a free hand to charge monopoly rents.[27]

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[26] Verizon, at p. 2.

[27] Time Warner, at pp. 24-25 (footnotes omitted).

The APPA Group reiterates its belief that the Commission has more than sufficient authority to take all appropriate steps to remedy this situation, including preempting the contract provisions at issue. Time Warner concurs, noting that in analogous circumstances, where the Commission has used its authority to prevent anticompetitive conduct, the Commission has also invoked its authority to prohibit enforcement of *existing* agreements. For example, when the Commission found multi-dwelling unit exclusivity agreements to be anticompetitive, it also barred the enforcement of existing agreements. In this context, the same considerations should apply, and the Commission should ban the continued enforcement of the underlying anticompetitive non-duplication and syndicated exclusivity agreements.[28]

B. Good Faith Negotiation Standards

The APPA Group and many other commenters have made the point that merely eliminating the network non-duplication and syndication exclusivity rules would not be enough to achieve the Commission's pro-competitive goals. The Commission should also adjust many of the regulatory standards governing what conduct violates the statutory requirement that broadcasters and MVPD engage in "good faith" negotiations.

1. Commenters support the Commission prohibiting stations from allowing affiliated networks to be involved in the retransmission consent negotiation approval process

The APPA Group reiterates its support for the Commission's proposal that it should be a *per se* violation for a station to agree to give a network with which it is affiliated the right to approve a retransmission consent agreement with an MVPD or to comply with such an approval

[28] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235 ¶ 55 (2007) ("[T]he law affords us wide authority to prohibit the enforcement of such clauses where, as here, the public interest so requires."), *aff'd sub nom Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

provision, indeed the Commission should prohibit affiliated networks from being involved in the retransmission consent negotiation process altogether.

The good faith rules currently require "the Negotiating Entity" to designate a representative with authority to make binding representations on retransmission consent and not unreasonably delay negotiations.[29]If a station has granted a network a veto power over any retransmission consent agreement with an MVPD, then it has impermissibly impaired its own ability to designate a representative who can bind the station in negotiations, contrary to the FCC's rules. Provisions in network affiliation agreements giving the network approval rights over the grant of retransmission consent by its affiliate represent an unreasonable exercise by a network of its distribution rights in network programming.

At a minimum, the Commission should prohibit direct or indirect involvement of networks in the contractual approval process absent the approval of the MVPD. Such involvement hinders the negotiations process, as several commenters note there is ample evidence that the networks are increasingly dictating terms of retransmission consent agreements and demanding larger "cuts" from the agreements, and dropping stations that do not comply.[30]

As Time Warner notes, "the touchstone for determining whether a network's negotiation on behalf of its affiliates is permissible should be the consent of the MVPD."[31]

> If the MVPD is unable to discern any efficiencies from a network's proposal to negotiate on behalf of its affiliates—and believes the network's commandeering of negotiations will lead to substantially higher fees for consumers and a greater risk of a blackout—the MVPD should remain free to negotiate with individual stations in order to reach the most efficient deal for itself and its consumers.[32]

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29 47 C.F.R. § 76.65(b)(1)(ii)-(iii).

30 See, comments of SuddenLink, et al, and OPASTCO, et al.

31 Time Warner, at p. 19.

32 *Id.*, at, pp. 19-20.

2. **Commenters support a prohibition on a station granting another station or station group the right to negotiate or approve a retransmission consent agreement when the stations are not commonly owned**

The APPA Group joins other commenters in reiterating its support for the Commission's proposal to make it a violation for a station to grant another station or station group the right to negotiate, or the power to approve, its retransmission consent agreement when the stations are not commonly owned. As the *NPRM* observes, when a station relinquishes its responsibility to negotiate retransmission consent, there may be delays to the negotiation process, and negotiations may become unnecessarily complicated if an MVPD is forced to negotiate with multiple parties with divergent interests, potentially including interests that extend beyond a single local market. More importantly allowing unaffiliated broadcasters to band together enables them to manipulate their market dominance and exacerbates the negative impact on consumers.

The ACA has put detailed information into the record demonstrating the competitive harms of allowing unaffiliated stations to jointly negotiate a retransmission consent agreement. The ACA indicated that in a 2009 filing with the Commission, Suddenlink Communications reported the results of an internal analysis it conducted showing the effect that common control or ownership of broadcast stations has on the magnitude of retransmission consent fees. According to the ACA, Suddenlink reported:

> Suddenlink has examined its own retransmission consent agreements and has concluded that, where a single entity controls retransmission consent negotiations for more than one "Big 4" station in a single market, the average retransmission consent fees Suddenlink pays for such entity's "Big 4" stations (in all Suddenlink markets where the entity represents one or more stations) is 21.6% higher than the average retransmission consent fees Suddenlink pays for other "Big 4" stations in those same markets. This is compelling evidence that an entity combining the retransmission consent efforts of two "Big 4" stations in the same market is able to secure a substantial premium by leveraging its ability to withhold programming from multiple stations.[33]

[33] ACA, at p. 10.

The ACA goes on to indicate that subsequent to the SuddenLink study, three members of ACA – Cable America, USA Companies, and Pioneer Telephone Cooperative – reported the results of a similar analysis of the difference in prices between negotiations involving one Big 4 station and those involving coordinated negotiations of two Big 4 stations. According to the ACA, the cable companies reported that in their experience "retransmission consent fees are 161%, 133%, and 30% higher, respectively, in the same DMA that are subject to common control or ownership, than for separately-owned or controlled broadcast affiliates."[34]

3. It should be a *per se* violation for a negotiating entity to refuse to put forth *bona fide* proposals on important issues

The APPA Group reiterates its support for the Commission's proposal to make it a *per se* violation of the good faith standard for a negotiating entity to refuse to put forth *bona fide* proposals on important issues. Currently broadcasters are too easily able to evade the purpose, if not the letter, of the good faith negotiation requirement by essentially couching their "negotiation" terms in what essentially amount to *de facto* take it or leave it proposals.

4. It should be a *per se* violation for a negotiating entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement. In appropriate circumstances, the Commission should also order the parties to engage in mandatory arbitration

The APPA Group reiterates its supports for the Commission's proposal to make it a *per se* violation of the good faith rules for a negotiating entity to refuse to agree to non-binding mediation when the parties reach an impasse within 30 days of the expiration of their retransmission consent agreement. In previous retransmission consent disputes, the Commission has encouraged parties to engage in voluntary dispute resolution mechanisms as a means to reach agreement because a neutral third party may be able to facilitate agreement where the parties have otherwise failed.

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34 *Id.*, at p. 10.

If the parties are unable to reach agreement on their own and the expiration of their existing agreement is imminent, the Commission should consider it bad faith for one of the parties to refuse to participate in non-binding mediation.

5. Delaying tactics to gain advantage rather than out of necessity constitute bad faith

Currently, the rules provide that "[r]efusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations," constitutes a violation of the good faith negotiation standard.[35] The Commission seeks comment on what it means to "unreasonably" delay retransmission consent negotiations.

Broadcasters often engage in foot-dragging delay tactics, in which they are either unresponsive or unwilling to engage in substantive negotiations until the eve of the current agreement's expiration. Such delaying tactics are antithetical to the goals of reaching an agreement and are more likely to reach an impasse that disrupts service to consumers. The APPA Group reiterates its support for a Commission finding that delaying the commencement or progress of a negotiation as a tactic to gain advantage rather than out of necessity constitutes bad faith. Specifically, the Commission should adopt a rebuttable presumption that a party's failure to meet and negotiate within thirty (30) days of a request is an unreasonable delay. Further, under normal circumstances a party should respond to any outstanding negotiation proposal at least five (5) days before the expiration of an agreement.

6. A requirement that a MVPD not carry an out-of-market "significantly viewed" station violates the FCC's rules

Consistent with its recommendation that the Commission eliminate the network non-duplication rules and preempt the continuing enforcement of network exclusivity agreements, the

[35] 47 C.F.R. § 76.65(b)(1)(iii).

APPA Group reiterates its support for the Commission's proposal to make it a violation of its rules for a broadcaster to request or require, as a condition of retransmission consent, that an MVPD not carry an out-of-market "significantly viewed" station. Section 76.65(b)(1)(vi) provides that "[e]xecution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor" is a violation of the Negotiating Entity's duty to negotiate in good faith.

As the *NPRM* notes, despite the existence of this rule, the Commission previously interpreted it narrowly, as involving collusion between a broadcaster and an MVPD. The APPA Group supports the Commission's proposal to interpret this rule more expansively to preclude a broadcast station from executing or seeking to enforce an agreement prohibiting an MVPD from carrying an out-of-market significantly viewed station that might otherwise be available to consumers as a partial substitute for the in-market station's programming, in the event of a retransmission consent negotiation impasse. Such a rule change more closely comports with the clear language of the regulation, the public interest and will provide a degree of relief for some MVPDs in negotiating with their local broadcasters.

7. The FCC should ban the tying of carriage of broadcast channels to other programming, including web-based programming

The APPA Group agrees with commenters advocating that the Commission amend its rules to prevent broadcasters from requiring carriage of additional content as part of the compensation for the underlying carriage of a broadcast station. Specifically, the FCC should amend 47 C.F.R 76.65 of the Commission's rules to make it a *per se* violation of the good faith negotiating obligation to insist on tying retransmission consent to carriage of other programming services. Public systems, which typically lack sufficient size to have comparative bargaining power, are particularly vulnerable to such "tying" arrangements.

8. The Commission should evaluate the impact of volume discounts when assessing "competitive marketplace considerations" in totality of circumstances test

As the *NPRM* observes, a key element in determining whether a party to a retransmission consent negotiation has acted in bad faith is whether it insisted on terms and conditions not based on "competitive marketplace considerations." The APPA Group agrees with other commenters that the Commission should evaluate the reasonableness of volume discounts offered during negotiations when assessing the competitive marketplace considerations at issue in a particular retransmission consent dispute.

As Cox notes, volume discounts are an accepted business practice and can be a legitimate component of market rates, but if such discounts become so significant that they do not reflect genuine economic benefit, they can unfairly increase smaller distributors' costs and undermine those providers' ability to compete in the video programming marketplace. Accordingly, the Commission should allow a party to challenge contract terms like volume-based pricing disparities in order to ensure that the rates truly represent the market value of carriage rather than an artificial price based on non-market considerations.

The APPA Group supports Cox's recommendation that the Commission look to the anti-discrimination provisions of the program access rules as guidance. While the program access rules permit volume discounts they only do so to the extent that such discounts are justified by [36]the factors listed in Section 76.1002(b) of the Commission's rules.[37] These factors include: economies of scale; cost savings, or other direct and legitimate economic benefits reasonably

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[36] Cox, at p. 9.

[37] 47 C.F.R. § 76.1002(b)(3).

attributable to the number of subscribers served by the distributor. As Cox notes, these standards could provide useful guidance in the retransmission consent context as well.

IV. CONCLUSION

The APPA Group commends and supports the Commission's issuance of the current *NPRM* as a necessary first step in reforming the retransmission consent process. As discussed above, the overwhelming majority of commenters other than broadcasters, concur that the current process is broken and is detrimental to the public interest. The APPA Group therefore urges the Commission to take actions consistent with the above comments in order to address some of the fundamental barriers that prevent the retransmission consent process from functioning in a manner that provides for greater parity in the negotiation process, including small to medium MVPDs.

Respectfully Submitted,

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