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

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

REPLY COMMENTS OF CBS CORPORATION

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SUMMARY

As in the *Petition for Rulemaking* that initiated this proceeding, the comments filed by multichannel providers in response to the *NPRM* seek to cast MVPDs in the role of the consumer's champion. They repeatedly blame broadcaster demands for retransmission fees for cable rate increases, conveniently ignoring that cable rates were reliably outstripping inflation well before broadcasters were first successful in getting paid by operators for use of their signals. The MVPDs also studiously ignore the enviable profit margins enjoyed by cable operators and what SNL Kagan calls "the continued strong differential between the fees paid for certain cable networks versus what broadcast network O&O stations with significantly more viewers receive." This is the backdrop against which the Commission should consider MVPD entreaties that the current retransmission consent regime is unfair.

1. *The FCC has no authority to require binding arbitration or to order interim carriage in connection with retransmission disputes.*

Ignoring the Commission's categorical finding in its *Notice of Proposed Rulemaking* that it had "[no] authority to adopt either interim carriage mechanisms or mandatory binding dispute resolution procedures applicable to retransmission consent negotiations," the MVPDs continue to press for such rules. However, both the legislative history and commission precedent are crystal clear that the FCC has no authority to do either.

2. *The Commission has no authority to eliminate its network non-duplication and syndicated exclusivity rules as they apply to retransmission consent.*

Both the legislative history and Commission precedent are clear as to the centrality of the network non-duplication and syndicated exclusivity rules to the retransmission consent scheme. Thus, the Senate Report on the bill that became the 1992 Cable Act expressly indicated its "[reliance] on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules," stating that "[a]mendments or deletions of these rules in a manner which would allow distant stations to be sub[stitued] on cable systems for carriage o[f] local stations carrying the same programming would . . . be inconsistent with the regulatory structure [of the statute]." Further, the Commission has "refused to find that the network non-duplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system." The FCC has no authority to eliminate these rules as they apply to retransmission consent.

3. *The right of copyright owners and licensees to control distribution of their intellectual property through geographic restrictions on the grant of retransmission consent must be respected.*

In an effort to take advantage of the latitude the compulsory license affords cable operators to retransmit distant signals without regard to territorial restrictions imposed by a copyright owner, MVPD commenters seek a prohibition on network affiliation agreements that impose geographic limitations on the grant of retransmission consent by local stations. This proposal conflicts with Commission precedent. Thus, in its *Report and Order* implementing the reciprocal good-faith negotiation requirement enacted in the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), the Commission found that "neither the text nor the legislative history [of the good-faith negotiation requirement] indicate a congressional intent to restrict the rights of networks and their affiliates . . . to agree to limit an affiliate's right to redistribute [network] programming."

4. *There is No Basis for Precluding Retransmission Proposals Requiring an Operator's Carriage of Affiliated Broadcast and Non-Broadcast Channels.*

MVPDs claim that broadcasters have unfairly tied retransmission consent for highly popular, "must have" television stations to carriage of affiliated non-broadcast networks, or co-owned broadcast stations in the same or a distant market. But the Commission cannot prohibit a form of consideration for retransmission consent that Congress expressly contemplated. In enacting the retransmission consent provision in the 1992 Cable Act, the Senate Commerce Committee observed that broadcasters in retransmission negotiations might seek forms of consideration other than money, including "joint marketing efforts, the opportunity to provide news inserts on cable channels, *or the right to program an additional channel on a cable system*." In accordance with the legislative intent, the Commission has ruled that conditioning retransmission consent on carriage of an "affiliated cable programming service, or another broadcast station either in the same or a different market" is "presumptively . . . consistent" with its obligation to negotiate in good faith.

5. *There is No Basis for Prohibiting "Price Discrimination" in Retransmission Consent Negotiations.*

Cablevision and the ACA ask the Commission to bar "price discrimination" in retransmission negotiations. Once again, the cable interests are thwarted by the legislative history. Thus the statutory language mandating that broadcasters negotiate in good faith with multichannel providers makes expressly clear that the provision does not preclude broadcasters from entering retransmission agreements with different MVPDs "containing different terms and conditions, *including price terms*." As the Commission has noted, Congress considered and expressly rejected a comprehensive regulatory regime barring broadcasters from "discriminatory practices."

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As in the *Petition for Rulemaking* that initiated this proceeding, the comments filed by multichannel providers in response to the *NPRM* seek to cast MVPDs in the role of the consumer's champion. They repeatedly blame unreasonable broadcaster demands to be compensated for providing cable's most popular programming for rising cable rates, conveniently ignoring that those rate increases were reliably outstripping inflation well before broadcasters were first successful in getting paid by operators for use of their signals.[1] Here are some other facts the MVPDs studiously ignore:

- While implicitly claiming that they have no choice but to pass on retransmission fees to their subscribers, they enjoy enviable profit margins. Indeed, a recent study by Ernst & Young found that from 2006 to 2010, cable operators had the highest average profitability – 38 percent – of any segment of the media and entertainment industries.[2] By comparison, broadcast

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1 *See*, *Thirteenth Annual Report, In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 FCC Rcd 542, 544-45 (2009) ("*Thirteenth Annual Report*") ("While competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation, prices continue to outpace the general level of inflation."); Associated Press, "Consumers Union faults cable policy," *The Oakland Tribune* (Oakland, CA), July 25, 2002 (whether calculated by methodology used by Consumers Union or National Cable & Telecommunications Association, cable rate increases "dwarf[ed]" rates of inflation from December 1995 through March 1999).

2 Ernst & Young, "New study shows profitability and growth in media & entertainment," http://www.ey.com/US/en/Newsroom/News-releases/New-study-shows-profitability-and-growth-in-media-and-entertainment.

television ranked seventh of the ten media sectors studied, with 18 percent profitability between 2006 and 2010, and 16 percent last year.[3]

- MVPDs pay as much – or much more -- to leading cable networks than they do to broadcasters. According to SNL Kagan estimates, the average monthly subscriber fees currently garnered by some of the leading cable networks are as follows: ESPN, $4.76; TNT, $1.08; Disney Channel $0.94; NFL Network, $0.75; Fox News Channel $0.73; USA Network, $0.62; CNN $0.53; and TBS, $0.53.[4] By contrast, a study submitted by the American Cable Association estimated that the average per subscriber amount paid to retransmit the signal of a "Big Four" network affiliate during 2010 was $0.14 for cable operators, $0.25 for satellite carriers, and $0.30 for telco providers. [5]

- The ratings of none of these cable networks can match those of any of the major broadcast networks on a head-to-head basis. Indeed, even the fifth broadcast network – the CW – outperforms all but five cable networks.[6] Commenting on these facts, SNL Kagan recently noted "the continued strong differential between the fees paid for certain cable networks versus what broadcast network O&O stations with significantly more viewers receive."[7]

This is the backdrop against which the Commission should consider MVPD entreaties that the current retransmission consent regime is unfair. As we now show, their specific arguments have as little merit as that overarching theme of their filings.

1. *The FCC has no authority to require binding arbitration or to order interim carriage in connection with retransmission disputes.*

Ignoring the Commission's categorical finding in its *Notice of Proposed Rulemaking* that it had "[no] authority to adopt either interim carriage mechanisms or mandatory binding dispute

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3 *Id.*

4 SNL Kagan, Basic Cable Networks by Affiliate Revenue Per Avg Sub/ Month (2011).

5 Comments of American Cable Association, MB Docket 10-71, filed May 27, 2011, at 80, Table 2 (hereafter "ACA Comments").

6 *See,* Comments of CBS Corporation, MB Docket 10-71, filed May 27, 2011, at 6, n.14, citing Nielsen NPM, (9/20/10-5/22/2011) (hereafter "CBS Comments").

7 Mike Farrell, "Kagan: Retrans Revenue to Double by 2017; Cable Ops Will Pay Most of That Cash, Report Says," *Multichannel News,* May 30, 2011, p.22.

resolution procedures applicable to retransmission consent negotiations,"[8] the MVPDs continue to press for such rules.[9] Indeed, Time Warner Cable ("TWC") goes even further in its refusal to recognize established law, calling on the Commission to institute a "rate-setting mechanism."[10] The stubborn refusal of the MVPD parties to acknowledge what is settled necessitates discussing, yet again, the crystal clear legislative history and Commission precedent bearing on this issue.

In adopting the retransmission consent provision of the 1992 Cable Act, the Congress opted for compensation to be determined by marketplace negotiations, rather than by a rate-making agency or an arbitrator. Thus the report of the Senate Commerce Committee emphasized that the legislation was intended "to establish a *marketplace* for the disposition of the rights to retransmit broadcast signals" but did not intend "to dictate the outcome of the ensuing *marketplace negotiations*."[11] Based on this language, the Commission concluded in promulgating rules to implement the statute that "Congress did not intend that retransmission consent rates be directly regulated."[12]

Subsequently, the Commission found, in implementing the "good faith negotiation"

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8 MB Docket 10-71, *Notice of Proposed Rule Making*, FCC 11-31 (rel. Mar. 3, 2011), at ¶ 18 (hereafter "*Notice*").

9 *See, e.g.,* Comments of Time Warner Cable Inc., MB Docket 10-71, filed May 27, 2011, at 39-41 (hereafter "TWC Comments"); ACA Comments, *supra,* at 71-79; Joint Comments of Mediacom Communications Corporation, Cequel Communications LLC dba/Suddenlink Communications, and Insight Communications Company, Inc., MB Docket 10-71, filed May 27, 2011, at 29-30 (hereafter "Joint Cable Comments"); Comments of Surewest Communications, MB Docket 10-71, filed May 27, 2011, at 6-11 (hereafter "Surewest Comments").

10 TWC Comments at 41.

11 Senate Report 102-92 at 35-36 (emphasis added).

12 *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 3006 (1993) (hereafter "*Signal Carriage Order*").

requirement in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), that "Congress clearly did not intend the Commission to sit in judgement [sic] of the terms of every retransmission consent agreement executed between a broadcaster and an MVPD."[13] Rather, the FCC concluded that federal labor law provided the most appropriate source of guidance for interpreting the requirement, noting that Section 8(d) of the Taft-Hartley Act required the parties to "confer in good faith with respect to . . . [the] terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." The FCC cited NLRB precedent holding that the labor board could not "require agreement or impose terms or conditions on collective bargaining agreements." It then quoted the Supreme Court as making this point "with force and clarity":

> It was recognized from the beginning that agreement might be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.[14]

The rate-making proposal of TWC is thus made in outright defiance of congressional intent. Moreover, there is no material difference between the government's "step[ping] in, becom[ing] a party to the negotiations and impos[ing] its own views of a . . . settlement," and appointing an arbitrator to do precisely the same thing. Both the legislative history and authoritative FCC precedent interpreting it make clear that the Commission has no authority to do either.

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[13] *First Report and Order,* CS Docket No. 99-363, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, 5 FCC Rcd 5445, 5454 (2000) (hereafter "*Good Faith Order*").

[14] *Id.*, quoting *H.K. Porter v. NLRB,* 397 U.S. 99, 103-04 (1970).

Nonetheless, several MVPD commenters[15] maintain that Section 325(b) (3) (A) of the Communications Act somehow provides the FCC with authority to regulate retransmission fees. That argument is entirely disingenuous.

First, the cited provision of the 1992 Cable Act did no more than direct the Commission to commence a rulemaking proceeding, "[w]ithin 45 days" of the statute's enactment, to adopt rules to implement retransmission consent, and to "consider *in such proceeding* the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier and . . . ensure that the regulations prescribed under this subsection do not conflict with the Commission's obligation under section 623(b)(1) to ensure that the rates for the basic service tier are reasonable."[16] At the time, cable operators had no difficulty in understanding that Section 325(b)(3)(A) referred to the FCC's regulation of the rates for basic service charged by *cable operators* to *consumers*, and did not – as they now claim -- constitute a basis for Commission regulation of the amount that broadcasters could charge for retransmission consent. Thus, the predecessor entity of Time Warner Cable did not contest in the retransmission consent rulemaking proceeding that the proper forum for considering the effect on cable operators of the new law was in cable rate regulation proceedings; instead, it argued that "retransmission consent fees are a direct cost of providing basic service, and thus cable operators must be allowed to recoup these costs."[17] Only now does TWC purport to discover in Section 325(b) (3) (A) a basis for regulating retransmission fees.

In fact, the Commission expressly found that any effect of retransmission consent on

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15 Comments of Cablevision Systems Corporation, MB Docket 10-71, filed May 27, 2011, at 19-20 (hereafter "Cablevision Comments); TWC Comments at 9-10, 41-42; ACA Comments at 73; Surewest Comments at 6, 10, n.16.

16 47 USC § 325(b) (3) (A) (emphasis added).

17 *See, Signal Carriage Order, supra,* 8 FCC Rcd at 3006 and n.447, quoting Comments of Time-Warner Inc., MM Docket No. 92-259, at 59.

basic cable rates should be determined "in the rate regulation proceeding." Thus the Commission rejected proposals that it cap retransmission rates, either across-the-board or for small and/or rural systems, stating

> It appears that Congress did not intend that retransmission consent rates be directly regulated. . . . Moreover, while retransmission consent may have an effect on basic service tier rates, the record here provides no evidence that the effect may be significant, no credible analysis suggesting that *the effect cannot be dealt with in the rate regulation proceeding*, and, hence, no basis for considering such effect in the decisions we make herein. Accordingly, based on the record in this proceeding, we decline to adopt regulations specifically limiting retransmission consent rates here.[18]

In sum, it has been 18 years since the Commission discharged its obligation to consider, in implementing the 1992 Cable Act, the impact of retransmission consent on its regulation of the rates charged by cable operators for basic tier service. Section 325 (b) (3) (A) has no relevance to the present proceeding.

The Commission is also without authority to allow MVPDs to continue to carry a television signal once retransmission consent has expired. A similar position was urged on the Commission in the rulemaking proceeding to implement the good-faith negotiation requirement, in which a number of MVPDs urged the Commission to restrict a broadcaster's withdrawal of retransmission consent during the pendency of a complaint brought under the provision. Finding this approach "foreclose[d]" by the "unambiguous" language of the statute prohibiting retransmission "except . . . with the express authority of the originating station," the Commission held it had "no latitude . . . to adopt regulations permitting retransmission . . . where the broadcaster has not consented to such retransmission."[19] Nothing has changed since the FCC's

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18 *Signal Carriage Order, supra,* 8 FCC Rcd at 3006 (emphasis added).

19 *Good Faith Order, supra* 15 FCC Rcd at 5471.

adoption of the *Good Faith Order* that could possibly support the radical change in statutory interpretation pressed on the Commission by the MVPD interests.[20]

2. *The Commission has no authority to eliminate its network non-duplication and syndicated exclusivity rules as they apply to retransmission consent.*

None of the MVPD parties calling on the Commission to eliminate or eviscerate its network non-duplication and syndicated exclusivity rules[21] acknowledges – much less attempts to deal with -- the legislative history showing that Congress viewed these rules as an integral part of retransmission consent. Nor do they mention several Commission decisions expressly so holding. Once again, the MVPD arguments demonstrate nothing so much as a penchant for ignoring inconvenient law.

Congress could not have been more explicit on this subject. Thus, the Senate Report on the bill that became the 1992 Cable Act expressly indicated its "[reliance] on the protections which are afforded local stations by the FCC's network non-duplication and syndicated exclusivity rules," stating that "[a]mendments or deletions of these rules in a manner which

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20 As precedent both for requiring binding arbitration of retransmission disputes and allowing MVPDs to continue carriage of a television station during such proceedings, MVPD commenters point to a condition of the FCC's order approving the acquisition of DBS provider DIRECTV by News Corporation, which owned 35 television stations through its subsidiary, Fox Television Stations, Inc ("FTS"). TWC Comments at 42; ACA comments at 76. That condition permitted a competing MVPD to continue to carry an FTS owned television station that was the subject of a retransmission dispute pending completion of an arbitration proceeding that was also provided for by the Commission's order. The conditions placed on the FCC's approval of the DIRECTV transaction, pursuant to its authority over the transfer of radio licenses, *see* 47 USC § 310 (d), were found necessary by the Commission in light of "News Corp.'s existing control of MVPDs' access to a large number of local broadcast stations airing highly popular Fox network programming, *when combined with ownership of a nationwide DBS platform*." *Applications of General Motors Corporation et ano. and News Corporation Limited, for Authority to Transfer Control*, 19 FCC Rcd 473, 565 (2004) (emphasis added). The imposition of those conditions is accordingly without general application.

21 *See, e.g.*, TWC Comments at 22-27; Cablevision Comments at 23-26; Surewest Comments at 14-16; Joint Cable Comments at 15-18; ACA Comments at 76-81.

would allow distant stations to be sub[stitued] on cable systems for carriage o[f] local stations carrying the same programming would . . . be inconsistent with the regulatory structure [of the statute]."[22] Citing this statement, the Commission found in its 2005 report to Congress on retransmission consent that "[t]he legislative history of the 1992 Act indicates that the network non-duplication and syndicated exclusivity rules were viewed as integral to achieving congressional objectives."[23] Thus, the Commission noted, it had "previously . . . refused to find that the network non-duplication rules do not apply to stations that elect to exercise retransmission consent rights with respect to a cable system."[24] The Commission first reached that conclusion in promulgating rules to implement the retransmission consent law, finding that "Congress intended that local stations electing retransmission consent should be able to invoke network non-duplication protection and syndicated exclusivity rights, whether or not these stations are actually carried by a cable system."[25]

The Commission reiterated that decision on reconsideration, rejecting arguments by cable interests that the application of network nonduplication rights in conjunction with retransmission consent could result in the loss of network programming for cable subscribers, and leave operators with no alternative other than to " accede to broadcasters' demands."[26] As the Commission explained:

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22 Senate Report 102-92 at 38, and n. 71.

23 *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 FCC Lexis 4976 at ¶ 50 (released September 8, 2005) ("*FCC Report to Congress*").

24 *Id.*

25 *Signal Carriage Order*, *supra,* 8 FCC Rcd at 3006

26 *Memorandum Opinion and Order on Reconsideration,* MM Docket No. 92-259, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992,* 9 FCC Rcd 6723, 6747 (1994).

> Network non-duplication and syndicated exclusivity rights protect the exclusivity that broadcasters have acquired from their program suppliers, including their network partners, while retransmission consent allows broadcasters to control the redistribution of their signals. Both policies promote the continued availability of the over-the-air television system, a substantial government interest in Congress' view.[27]

The MVPD commenters continue in this proceeding to portray these same exclusivity rules as unwarranted government interference with marketplace negotiations, which unfairly tip the scales of bargaining power in broadcasters' favor. In so contending, they neglect the fact that the rules simply protect contractually negotiated exclusivity rights that would otherwise be rendered meaningless by the cable compulsory copyright license.[28]

The compulsory license, of course, relieves cable operators of the necessity of obtaining directly from copyright owners the right to retransmit (whether locally or in distant markets) the programs included in the broadcast signals they carry. Since the copyright negotiations made unnecessary by the compulsory license would normally provide the occasion for program owners to impose territorial restrictions necessary to protect the exclusivity rights granted to other licensees, the FCC's exclusivity rules do no more than partially correct for the interference with free market agreements inherent in the cable copyright regime.[29]

The Commission has expressly recognized that the effect of the rules is to *restore* conditions that would prevail in a free market absent the compulsory license. Thus, in proposing to reinstate syndicated exclusivity rules after an eight year hiatus following their 1980 repeal, the Commission observed:

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27 *Id. See also*, *FCC Report to Congress, supra,* 2005 FCC Lexis 4976 at note 172.

28 *See,* 17 USC § 111.

> While the Commission's earlier action in 1980 removing these rules was intended to be deregulatory, it appears to have reduced the ability of program producers and broadcasters to enter into enforceable contracts at market determined prices. Instead, the 1980 amendments . . . moved further *away* from a market situation. We now recognize that the ability of copyright holders and broadcasters (acting as exclusive exhibitors) to control the use of creative output may have been reduced by our actions. It is possible that deleting syndicated exclusivity, given the existence of the compulsory license, moved the marketplace *further away* from effective freedom of contract.[30]

In order to increase their bargaining leverage with broadcasters, cable operators want to import distant signals from far and wide to have a substitute to offer subscribers for popular broadcast network programming in the event of a retransmission impasse – an opportunity that does not exist when their contractual dispute is with a cable network.[31] Although that broadcast

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30 *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Notice of Inquiry and Notice of Proposed Rule Making, 2 FCC Rcd 2393 (1987) ("*Program Exclusivity NPRM*"), at ¶ 26 (emphasis in the original).

31 Retransmission consent is, of course, not the only context in which television viewers may temporarily lose access to highly valued programming. Last year, more than three million Cablevision customers in New York, New Jersey and Connecticut lost access to the highly popular cable channels, HGTV and Food Network for three weeks due to a contract dispute between the MSO and programmer Scripps-Howard. *See,* Amanda Cuda, "Connecticut residents hungry for Food Network, HGTV," *Connecticut Post Online* (Bridgeport, Connecticut), January 6, 2010. On the previous New Year's Eve, parents worried that their offspring would wake the next morning to find "Dora the Explorer" and "SpongeBob Square Pants" gone from their televisions, casualties of contractual wrangling between Time Warner Cable and Viacom over suitable license fees for the latter's popular cable networks. *See*, "Viacom, TWC Dispute Makes SpongeBob Cry," (available at http://www.xchangemag.com/hotnews/viacom-twc-dispute-makes-spongebob-cry.html); Bill Carter, "Viacom and Time Warner Reach Deal," *The New York Times,* January 1, 2009. And thousands of football fans who were Comcast or Time Warner subscribers were long frustrated by their inability to watch Thursday night NFL games because of the prolonged inability of those providers to reach carriage deals with the League's cable channel, the NFL Network. *See,* Alan Pergament, "Battle line set in fight for fans on local TV; Time Warner and the NFL Network are playing an expensive game of chicken with their often frustrated football audience," *Buffalo News,* December

network programming would be effectively exclusive to the local affiliate were it not for the compulsory license -- provided by statute -- they nonetheless protest that the FCC's non-duplication and syndicated exclusivity rules unduly interfere with free market negotiations. Their protests are conclusively rebutted by the legislative history, Commission precedent and basic fairness.[32]

3. *The right of copyright owners and licensees to control distribution of their intellectual property through geographic restrictions on the grant of retransmission consent must be respected.*

In a related effort to take advantage of the latitude the compulsory license affords cable operators to retransmit distant signals without regard to territorial restrictions imposed by a copyright owner, MVPD commenters are virtually unanimous in seeking a prohibition on network affiliation agreements that impose geographic limitations on the grant of retransmission consent by local stations. Going beyond the *Notice*'s inquiry as to whether broadcast networks impose restrictions that would prevent a station from authorizing carriage in an area in which it is

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2, 2006, p. A-1; James Walker and Shawn Mitchell, "For many, game is no-see TV; NFL-cable dispute means few will get Browns-Steelers, *Columbus Post-Dispatch*, December 7, 2006, p. 01C; Toby Smith, "Local sports bars preparing for a blitz of Cowboys, Packers fans, " *Albuquerque Journal*, November 29, 2007, p. B1; Michael McCarthy, "Blackout rules; A dispute between the NFL and cable firms leaves fans in the dark ," *USA Today,* November 29, 2007. Even if there were a colorable legal basis for it, we suspect most people would find the idea of government intervention in these private business disputes to be absurd.

32 In an argument of striking circularity, the Joint Cable Commenters contend that the original rationale for the network non-duplication and syndicated exclusivity rules no longer exists. Thus, they assert, while the rules were adopted because "the Copyright Act permitted cable operators to import broadcast signals from one market into another without the consent of the broadcaster or program supplier," any resultant unfairness has now been remedied because "[t]oday . . . retransmission consent allows broadcasters to seek compensation to offset the loss of territorial exclusivity occasioned by the importation of a distant signal." Joint Cable Comments at 15-16. While broadcasters are indeed now entitled to "seek compensation" for use of their signals, they are likely to receive little without a means of barring the unrestricted importation of duplicating programming into their markets.

significantly viewed,[33] these commenters call for the outright prohibition of *any* limitation on an affiliate's grant of out-of-market retransmission consent.[34] Indeed, they argue that existing affiliation agreements containing such provisions should be abrogated by the FCC. [35]

Once again, the proposals advanced by the MVPD commenters conflict with Commission precedent. Thus, in its *Report and Order* implementing the reciprocal good-faith negotiation requirement enacted in the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"), the Commission found that "neither the text nor the legislative history [of the good-faith negotiation requirement] indicate a congressional intent to restrict the rights of networks and their affiliates . . . to agree to limit an affiliate's right to redistribute [network] programming." [36] To the contrary, the Commission noted, "Congress has consistently acknowledged and preserved the network-affiliate system," which depends on the local affiliate's exclusivity as the outlet for network programming in its market.[37]

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33 Although we strongly support the right of program owners to control the retransmission of their works as they see fit, we note that CBS affiliation agreements do not do this. Since the 1992 Cable Act was adopted, the standard CBS Television Network Affiliation Agreement has permitted stations to grant retransmission consent for network programming on an out-of-market basis where (1) the affiliate is significantly viewed in the relevant community or (2) the station has historically been carried on the cable system in question. In crafting this provision, CBS sought to protect its affiliates' network exclusivity within their markets, while at the same time not interfering with cable carriage where an affiliate could be received over the air or where such carriage was traditional.

34 ACA Comments at 49-55; TWC Comments at 24-25; Cablevision Comments at 24; Joint Cable Comments at 15.

35 ACA Comments at 61; TWC Comments at 25.

36 *In the Matter of: Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, 20 FCC Rcd 10339, 10354 (2005) (hereafter "*Reciprocal Bargaining Obligation*").

37 *Id.*

Adoption of the proposal, pressed by the American Cable Association and others, to eliminate all contractual restrictions on affiliate redistribution of network programming to distant markets would effect a radical restructuring of everyday business expectations in the broadcast industry. Under such a regime, there would be nothing to prevent a cable operator from offering a New York City network affiliate to its subscribers in Los Angeles, for the purpose of allowing those subscribers to time shift their viewing of network programming or to watch out-of-market football games. The destructive effects of such an arrangement on the network-affiliate system are obvious, since viewers would be diverted from the Los Angeles affiliate to the distant signal, thereby affecting the local station's ratings and ability to sell advertising.[38] But the effects of a distant signal free-for-all would hardly be limited to the network-affiliate partnership. For example, any contractual commitments made by the network to sports leagues not to sanction the retransmission of game telecasts outside of the authorized broadcast territory would be compromised, as would typical arrangements as to broadcast rights between such leagues and their constituent teams. Similarly, the value of any rights granted to a multichannel service to offer packages of out-of-market games to their subscribers would be undercut.

Again, we stress that the legal structure of which MVPDs complain only restores, in part, what the compulsory license takes away. Congress adopted the cable and satellite compulsory copyright licenses to further the distribution of broadcast signals by relieving MVPDs of the

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[38] In an apparent reference to the practice of some network companies of conditioning the out-of-market grant of retransmission consent for their owned stations on the carriage of the network's local market affiliate, a number of MVPD commenters argue that this practice should be banned. *See, e.g.,* Cablevision Comments at 22. In so doing, they give short-shrift to a network owner's interest in having an affiliate body composed of strong stations with the financial resources to present local news and other programming that will build audiences for network programs. They also neglect the interest of any distributor of copyrighted programming to enhance its value by being able to offer its licensees market exclusivity. For the reasons discussed in the text, prohibiting network efforts to protect the local exclusivity of their affiliates would have a destructive effect on the network-affiliate system.

necessity of negotiating license fees with multiple copyright owners. Retransmission consent works to return to program owners a different, but no less essential, incident of copyright ownership – the right to control the manner in which one's intellectual property is distributed. The Commission should not interfere with private contractual arrangements built on retransmission consent (in lieu of copyright) at the behest of MVPDs seeking to protect their profit margins.[39]

4. *There is No Basis for Precluding Retransmission Proposals Requiring an Operator's Carriage of Affiliated Broadcast and Non-Broadcast Channels.*

Another common theme in the comments filed by MVPDs is that broadcasters have unfairly tied retransmission consent for highly popular, "must have" television stations to carriage of affiliated non-broadcast networks, or co-owned broadcast stations in the same or a distant market.[40] This alleged practice is said to increase cost and reduce choice to consumers, both by forcing cable operators to pay for unwanted services (the cost of which is then passed on to subscribers) and by requiring the allocation of limited channel capacity to their carriage,

39 The extent to which MVPDs seek to stretch the compulsory license beyond its intended purpose to gain an advantage in retransmission negotiations is illustrated by TWC's remarkable argument that broadcast exclusivity agreements should be banned as being akin to "vertical agreements establishing exclusive territories," which courts "have found … to be *per se* unlawful." TWC Comments at 24. Presumably, TWC understands that copyright – the essence of which involves the *exclusive* right to license and control the distribution of intellectual property – is not within the scope of the antitrust laws absent an attempt to extend that exclusivity beyond its legitimate scope (e.g., a copyright holder attempting to use a work over which it has market power to effect a tying arrangement). *See,* Matthew Bender & Company, Inc., Federal *Antitrust Law*, § 13.28 (copyright a "recognized exception[ ]" to antitrust laws because affording exclusive rights is deemed important to stimulate the creation of copyrighted works). TWC's argument can thus only be based on the theory that the compulsory license strips owners and licensees of broadcast programming of *all* incidents of copyright. At the same time, TWC maintains that the rights taken away by the compulsory license should in no event be replaced by rights that might be thought attendant to retransmission consent. This interpretation of copyright and communications law is transparently self-serving and should be accorded no weight.

40 TWC comments at 32-33; Cablevision Comments 15-17.

thereby displacing programming that subscribers might prefer. The MVPD comments therefore call for a rule precluding retransmission proposals that include such "tying" arrangements.

The Commission, however, can hardly prohibit a form of consideration for retransmission consent that Congress expressly contemplated. Thus, in enacting the retransmission consent provision in the 1992 Cable Act, the Senate Commerce Committee observed that broadcasters in retransmission negotiations might seek forms of consideration other than money, including "joint marketing efforts, the opportunity to provide news inserts on cable channels, *or the right to program an additional channel on a cable system*."[41] All these forms of consideration, the Committee's discussion clearly indicated, would be legitimate for broadcasters to seek in exchange for the right to retransmit their signals.

This Commission, too, has recognized that program carriage agreements are an appropriate type of consideration for retransmission consent. In adopting rules to implement the "good faith negotiation" requirement enacted as part of the Satellite Home Viewer Improvement Act of 1999, the Commission expressly stated that conditioning retransmission consent on carriage of an "affiliated cable programming service, or another broadcast station either in the same or a different market" is "presumptively . . . consistent" with its obligation to negotiate in good faith.[42] Finding "[nothing] to suggest that . . . requesting an MVPD to carry an affiliated channel [or] another broadcast signal in the same or another market . . . is impermissible or other than a competitive marketplace consideration," the Commission rejected the suggestion of certain MVPDs that such proposals be declared off-limits in retransmission negotiations. On the contrary, the Commission recognized that

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41 Senate Report 102-92 at 35-36 (emphasis added).

42 *Good Faith Order*, *supra,* 15 FCC Rcd. at 5469.

> arbitrarily limit[ing] the range or type of proposals that the parties may raise in the context of retransmission consent will make it more difficult for broadcasters and MVPDs to reach agreement. By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problem of reaching retransmission consent.[43]

The Commission again affirmed that bundled retransmission consent proposals are completely consistent with the obligation to negotiate in good-faith in rejecting a complaint by DISH Network that Young Broadcasting had violated the rule by failing meaningfully to negotiate about retransmission consent for its network-affiliated stations separately from the independent station it also owned.[44] The broadcaster's *a la carte* offer was not coercive, the Commission held, although its affiliates-only package was priced at four times the rate of one which included the independent station. Rather, the Commission opined that the offer "reflected Young's *legitimate desire* to have all three channels carried." [45]

TWC urges the Commission to "revisit" its conclusion that bundled offers are consistent with the good-faith negotiation rule, claiming that "in today's environment . . . these practices *do* result from the exercise of market power."[46] But TWC has failed to show that the exercise of such supposed "market power" by the owners of "must have" television stations – the putative "tying" product – has resulted in any diminution of competition in the so-called "tied" market – namely, the market for satellite-delivered cable programming. Indeed, any such claim is belied by the explosive proliferation of satellite-delivered cable networks – the total number of which

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43 *Id.*

44 *EchoStar Satellite Corp. v. Young Broadcasting Inc.*, 16 FCC Rcd 15070 (2001).

45 *Id.* at 15083.

46 TWC Comments at 33 (emphasis in the original).

was most recently determined by the FCC to be 565 national networks, [47] representing an increase of 34 networks over the 2005 total. These statistics reduce to absurdity any suggestion that bundled retransmission deals have had the effect of suppressing competition in the larger market for cable network programming.

Only such a showing of adverse effects on the broader market -- and therefore on the general public -- could conceivably justify promulgation of an across-the-board rule banning retransmission deals packaging together a number of stations or non-broadcast services. As one court observed in finding unpersuasive an operator's claim that a broadcaster's bundled retransmission proposal was anticompetitive, the "antitrust laws were passed for the protection of competition, not competitors." [48] Given the Commission's express disavowal of interest in the substance of retransmission negotiations except where a party seeks terms "designed to frustrate the functioning of a competitive market" – for example, through "exercise of market power in one market in order to foreclose competitors from participation in another market"[49] -- the same dictum manifestly applies here.

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47 *See, Thirteenth Annual Report, Assessment of the Status of Competition in the Market for the Delivery of Video Programming, supra,* 24 FCC Rcd at 550 (2009).

48 *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, 460 F. Supp. 2d 1012, 1020 (D. Iowa 2006) (internal quotations omitted). Earlier this month, a federal appeals court reached a similar conclusion, unanimously affirming the dismissal of a consumer suit against a large number of programmers and multichannel distributors alleging that the bundling of "must have" and less-popular cable networks violated the antitrust laws. The court found the complaint insufficient to state a claim because it "included no allegations that Programmers' sale of cable channels in bundles has any effect on other programmers' efforts to produce competitive programming channels or on distributors' competition on cost and quality of service." *Brantley, et al. v. NBC Universal, et al.*, No. 09-56785, 2011 U.S. App. LEXIS 11176 * (U.S Court of Appeals, Ninth Circuit, June 3, 2011).

49 *Reciprocal Bargaining Obligation, supra*, 20 FCC Rcd at 10341.

5. *There is No Basis for Prohibiting "Price Discrimination" in Retransmission Consent Negotiations.*

Both Cablevision and the ACA ask the Commission to bar "price discrimination" in retransmission negotiations.[50] According to the scheme envisioned by Cablevision, "[a] broadcaster could justify a difference in the rate offered different MVPDs in the same market only by demonstrating a cost-based distinction between the MVPDs, such as instances when a broadcaster can identify differences in transport costs for delivering the signal to different distributors."[51] Cablevision should make this proposal to Congress, and not to this Commission, since it is flatly inconsistent with existing statutory law.

Thus the statutory language mandating that broadcasters negotiate in good faith with multichannel providers makes expressly clear that the provision does not preclude broadcasters from entering retransmission agreements with different MVPDs "containing different terms and

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50 Cablevision Comments at 9-13; ACA Comments at 76-86. Notably, the provisions of the Robinson-Patman Act making it "unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality," where the effect would be to lessen competition or create a monopoly, 15 USC § 13(a), have been expressly held to be inapplicable to cable television services because they are not "commodities." *Rankin County Cablevision v. Pearl River Valley Water Supply*, 692 F. Supp. 691, 694 (D. Miss 1988); *H.R.M., Inc. v. Tele-Communications, Inc.*, 653 F. Supp. 645 (D. Colo. 1987); *Satellite T Associate v. Continental Cablevision of Virginia, Inc.*, 586 F. Supp. 973 (E.D. Va. 1982), aff'd, 714 F.2d 351 (4th Cir. 1983). *See also Tri-State Broadcasting Co. v. United Press International, Inc.*, 369 F.2d 268, 270 (5th Cir. 1966) (contract for sale of news information services held not to constitute sale of a commodity within contemplation of Act); *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.*, 295 F.2d 375, 378 (7th Cir. 1961) (violation of Act could not be predicated on theory of discrimination in regard to sale of television broadcast time); *National Tire Wholesale, Inc. v. Washington Post Co.*, 441 F. Supp. 81, 85 (D. D.C. 1977) (broadcast advertising not a commodity within Robinson-Patman Act).

51 Cablevision Comments at 10.

conditions, *including price terms,* . . . if such different terms . . . are based on competitive marketplace considerations." [52]

Consistent with this legislative purpose, when the Commission later adopted rules to implement the good-faith negotiation requirement enacted by SHVIA, it expressly abjured "a substantive role in the negotiation of the terms and conditions of retransmission consent."[53] Noting that Congress had not intended it to "intrude" in retransmission negotiations, the Commission declined to scrutinize particular retransmission terms for their consistency with "competitive marketplace conditions," because to do so would effectively constitute the FCC as the arbiter of retransmission consent terms.

The Commission noted, in this connection, that "it is not practicably possible to discern objective competitive marketplace factors that broadcasters must discover" as the basis of negotiations and offers. Rather, "it is the retransmission consent negotiations that take place that are the market through which the relative benefits and costs to the broadcaster and MVPD are established." [54]

Thus the only retransmission terms cited by the Commission as being inconsistent with "competitive marketplace considerations" were those "designed to frustrate the functioning of a competitive market":

> Conduct that is violative of national policies favoring competition -- that is, for example, intended to gain or sustain a monopoly, is an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within

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52 47 USC § 325(b) (3) (C) (emphasis added).

53 *Good Faith Order*, *supra,* 15 FCC Rcd. at 5450.

54 *Id. at* 5448.

> the competitive marketplace considerations standard included in the statute.[55]

On the other hand, the *Good Faith Order* includes the following among examples of bargaining proposals that "presumptively are consistent" with competitive marketplace considerations and the good-faith requirement:

> 1. Proposals for compensation above that agreed to with other MVPDs in the same market;
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> 2. Proposals for compensation that are different from the compensation offered by other broadcasters in the same market;
>
> [and]
>
> 3. Proposals for carriage conditioned on carriage of any . . . affiliated cable programming service, or another broadcast station either in the same or a different market.[56]

In thus expressly endorsing broadcaster retransmission proposals that sought different levels or types of compensation from different operators, the Commission noted that Congress had considered -- and explicitly rejected -- a comprehensive regime that would have required the FCC to "prohibit television broadcast stations that provide retransmission consent from engaging in discriminatory practices, understandings, arrangements, and activities . . . that prevent a multichannel video programming distributor from obtaining retransmission consent from such stations."[57] In light of "the express congressional rejection of this anti-discrimination provision," the Commission declined "to adopt rules to recreate [it] by regulation."[58]

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55 *Id.*

56 *Id.* at 5469 (emphasis added).

57 *Id.* at 5450-51.

58 *Id.* at 5451

Notwithstanding this clear precedent, ACA complains that that smaller MVPDs and their subscribers are unfairly burdened with payment of grossly disproportionate retransmission consent fees,"[59] suggesting that its members lack sufficient bargaining leverage to resist these demands. But there is nothing invidious about the strategic use of bargaining power in a negotiation. Indeed, if taking advantage of bargaining leverage were considered impermissible, a broadcaster would be precluded from seeking significant cash compensation from a prospective new multichannel competitor – say a telephone company – to whom the ability to offer local broadcast signals was an indispensable prerequisite to market entry, simply because it had been unable to secure such payments from a nationally-dominant cable MSO which, at the time, enjoyed a monopoly over multichannel service in the community in question.

The Commission itself has recognized that a "no price discrimination" regime would preclude broadcasters from tailoring their retransmission proposals to changes in the competitive environment faced by multichannel providers. Thus, in the rulemaking proceeding leading to the *Good Faith Order,* satellite carriers urged that, in order to foster their competitiveness *vis-à-vis* cable operators whom they alleged enjoyed "market power," the consideration that broadcasters realized for retransmission consent from satellite providers should not exceed that received from the cable industry. The Commission rejected this argument, noting that its acceptance would mean that "broadcasters, already the hypothesized victims of an exercise of market power, would be obligated to continue in that role with other participants in the market."[60]

Moreover, it is clear that factors such as the absolute level of distribution and compensation that a large MSO is able to offer a broadcaster may enable that operator to negotiate a lower per subscriber rate. There is nothing wrong with this; in other businesses it is

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59 ACA comments at 87.

60 *Good Faith Order*, *supra,* 15 FCC Rcd at 5468.

called a "volume discount." It is difficult to imagine a more legitimate "competitive marketplace consideration."

At bottom, ACA and Cablevision would like retransmission consent to be treated as a kind of public utility for which a "reasonable" rate is set by the Commission. As the Commission has previously held, that is not the law Congress enacted. The ACA and Cablevision proposals regarding "price discrimination" must be rejected.

CONCLUSION

The "fixes" to the Commission's rules urged by the MVPD commenters in this proceeding are virtually all beyond its authority. The retransmission system is working as Congress intended, and no major changes to it are necessary.

Respectfully submitted,

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