fatally impaired *its* ability to negotiate retransmission consent in good faith as required by Section 325.[119] While the Commission's existing good faith rules can be read to already prohibit this behavior,[120] ACA acknowledges that this is not how the Commission itself has applied the good faith standards. ACA maintains that the time has come for the Commission to broaden its interpretation of its existing good faith standards to make this prohibition explicit.

b. Intervening in the Network-Affiliate Relationship to Prohibit Network Interference With an Affiliate's Ability to Negotiate Retransmission Consent is in the Public Interest and Warranted on the Facts

The record conclusively shows that Commission intervention in the network-affiliate relationship to prohibit network interference with an affiliate's ability to negotiate out-of-market retransmission consent is in the public interest and warranted on the facts. Prohibiting network interference with a station's exercise of retransmission consent for out-of-market carriage will not disturb other benefits and obligations negotiated by the parties to a network affiliation agreement. All of the other terms and conditions of the network-affiliate relationship would remain intact under the prohibition sought by ACA: the sole target of the prohibition is network interference with the ability of affiliates to negotiate in good faith with an MVPD for out-of-market retransmission

[119] 47 U.S.C. § 325(b)(3)(C)(ii).

[120] 47 C.F.R. § 76.65(b)(vi) ("Execution of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a to negotiate retransmission consent agreement with any other television broadcast station or multichannel video programming distributor" is a per se violation of the duty of good faith); 47 C.F.R. § 76.65(b)(i) ("Refusal by a Negotiating Entity to negotiate retransmission consent" is a per se violation of the duty to negotiate in good faith).

consent.

Congress intended consumers to be able to receive distant signals, as evidenced by the geographic limitations on a local broadcaster's right to network and syndicated exclusivity, and these network-affiliate relationships are interfering with the ability of consumers to receive that programming.[121] Moreover, both Congress and the Commission intended retransmission consent and the good faith rules to apply on both sides of a DMA line, and network interference with the ability of a station to enter into carriage agreements with an out-of-market MVPD clearly frustrates the ability of the station and MVPD to enter into good faith negotiations for such carriage.[122]

As ACA has shown, any agreement that prevents or creates a disincentive for an affiliate to grant retransmission consent to cable operators outside the station's DMA, even where carriage of the signal would not violate another station's network non-duplication or syndicated exclusivity, is exactly the type of third party understanding that should be found to violate the good faith standards.[123] Moreover, on its face, nothing in the current good faith standard – prohibiting a broadcast station from entering into any agreement that prevents it from entering into a retransmission consent agreement with

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[121] *See* ACA Comments at 26-44; *see also*, Senate Report at 35-36 (acknowledging the interplay between cable payment of copyright royalties under the cable compulsory copyright license for distant signals carried on cable systems and the right of broadcaster stations to control redistribution of their signals under Section 325, as amended).

[122] ACA Comments at 29, 37-40.

[123] *Id.* at 49. This applies to both formal and informal agreements.

any MVPD[124] – should exempt provisions in network-affiliate agreements that effectively bar broadcast stations from granting retransmission consent to out-of-market MVPDs.[125] Restrictions emerging from the network-affiliate relationship that prevent or dis-incent a station from granting retransmission consent to an out-of-market MVPD cannot co-exist with the station's statutory duty to negotiate with an MVPD for retransmission consent of distant signals in good faith. Such restrictions are also inconsistent with longstanding federal policies that distant signals be available for carriage on MVPD systems under appropriate circumstances.

ACA members frequently cannot obtain carriage of out-of-market stations because of a formal or informal agreement between an affiliate and its network expressly prohibiting such carriage, even where the station is significantly viewed in the other market. The record shows how such deleterious network interference forced non-ACA member Suddenlink to drop a significantly viewed station that had previously granted retransmission consent when the station found itself pressured to withdraw consent by the network with which it was affiliated on the grounds that the station's network affiliation agreement did not allow it to permit out-of-market carriage.[126] Unfortunately, this is not an isolated case, but rather exemplifies the experience of

[124] 47 C.F.R. § 76.65(b)(vi) ("[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 per se violation of the duty of good faith).

[125] ACA Comments at 49.

[126] Joint Cable Comments at 10.

many smaller and rural MVPDs who are denied retransmission consent solely as a result of network interference.[127] Especially in instances where out-of-market carriage by an MVPD would not violate the exclusivity rights of an in-market local station affiliated with the same network there is simply no public policy goal to be furthered by a network's interfering with the ability of an affiliated station to strike a deal.

As ACA noted in its Comments, this practice, often coordinated by the networks, allows stations to effectively enlarge the zone of exclusivity protection beyond the geographic limits set by Congress and the FCC, thereby denying viewers access to station signals they desire.[128] MVPD subscribers are directly harmed by the loss of valued long-available signals. Moreover, there is no evidence today that permitting distant signal carriage in these instances would have a significant impact on the in-market broadcaster.

Subscribers are also put at greater risk of disruption when MVPD and in-market network affiliate fail to come to agreement on retransmission consent because the operator has lost access to the alternative network programming feed, no other station

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[127] *See also*, Joint Cable Comments at 9 (describing a situation in which a Fox affiliate sought to reserve the right to revoke its retransmission consent to Mediacom if Fox so directed); *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71, Comments of DISH Network L.L.C. at 16 (filed May 27, 2011) ("DISH Comments") (describing a Fox affiliate's inability to agree to DISH's requested rate because Fox offered "no flexibility on the rates that [the affiliate has] to pass through to Fox"); ACA 2005 Petition; *In the Matter of: Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network v. Morris Network, Inc., owner of WMGT, Channel 41, Macon, Georgia and Morris Network, Inc., owner of WMGT, Channel 41, Macon, Georgia v. Monroe, Georgia Water Light and Gas Commission d/b/a Monroe Utilities Network*, Memorandum Opinion and Order, 19 FCC Rcd 13977 (2004).

[128] ACA Comments at 56.

is able to grant consent, and the consumer, in many cases, cannot receive the local station over-the-air.[129] Finally, as ACA explained in its Comments, the calculus of harm due to pulled signals in rural areas where over-the-air signals are not available is significantly worse than in areas where there is over-the-air service.[130]

The Commission has already recognized precisely this problem of consumer disruption and lack of alternatives when it originally declined to extend network non-duplication rights where the local station is not carried.[131] To be clear, for smaller operators, when broadcasters block access to other sources of network programming, it is precisely to threaten disruption and inconvenience to subscribers. Simply put, MVPDs ought to be able to engage in good faith negotiations for these out-of-market signals free from network interference with an affiliate's ability to grant retransmission consent.

c. The Commission Should Exercise its Authority to Regulate the Network-Affiliate Relationship Through the Good Faith Negotiating Standard.

Several broadcasters and affiliate groups argue that the scope of network involvement in affiliation matters, including retransmission consent, is appropriately

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[129] *Id.*

[130] *Id.*

[131] ACA Comments at 58 (citing *In the Matter of Amendment of Subpart L, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems; Amendment of Parts 21, 74, and 91 to Adopt Rules and Regulations Relating to the Distribution of Television Broadcast Signals by Community Antenna Television Systems, and Related Matters*, Docket Nos. 14895, 15233, and 15971, Second Report and Order, 2 FCC 2d 725, ¶¶ 19, 46 (1966)).

governed by the Commission's Part 73 rules governing the network-affiliate relationship, and that the Commission should not use this retransmission consent proceeding as a vehicle for regulating the relationship between networks and their affiliates.[132] The Joint Broadcasters, for example, argue that the Commission traditionally has not interjected itself into "the highly complicated and highly individualized contractual relationship between a network and its affiliates" "unless a clear public harm from doing so has been identified," and that it should not do so for the purposes of permitting MVPDs to gain additional leverage in retransmission consent negotiations."[133]

These arguments fail to provide an adequate basis for the Commission to refrain from taking action in this rulemaking to prohibit harmful network practices through the good faith rules.[134] As DirecTV observed: "[f]or over six decades, the Commission has regulated the relationship between television networks and their affiliated stations in order to ensure that licensees retain local control over station operations. Although questions have previously been raised specifically related to the implications of network control over retransmission consent rights, the Commission has never resolved the

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[132] *See, e.g.*, NBC Television Affiliates Comments at 13-14; CBS Affiliates Comments at 19; Joint Broadcasters Comments at 19-20.

[133] Joint Broadcasters Comments at 19-20.

[134] The Commission has previously adopted highly detailed rules governing the network-affiliate relationship in order to carry out its statutory mandate to ensure that its broadcast licensees operate in the public interest, consistent with the Commission's policy goals of localism, diversity and competition. *See* 47 C.F.R. §§ 73.658 (a), (b), (d), (e), (g) & (h) (Commission regulations regarding "[a]ffiliation agreements and network program practices; territorial exclusivity in non-network program arrangements," "exclusive affiliation of station;" "territorial exclusivity;" "station commitment of broadcast time;" "right to reject programs;" "dual network operation;" "control by network of station rates;" respectively). ACA submits that its proposed prohibition on network interference with its affiliate's ability to grant retransmission consent falls firmly within this class of regulations.

issue."[135] Prohibiting network interference with a station's exercise of retransmission consent for out-of-market carriage will not disturb other benefits and obligations negotiated by the parties to a network affiliation agreement.

The rule changes ACA advocates are aimed at preventing interference with the right of MVPDs to negotiate in good faith with out-of-market broadcasters for the carriage of their distant signals valued by their subscribers. As ACA demonstrated in its Comments, consumers, particularly those not well served by their local stations for reasons of limited signal strength or otherwise, value out-of-market broadcast signals, and for this reason alone the Commission should act.[136] The clear public harm of network interference with good faith negotiations is well documented in the record of this proceeding: network prohibitions on a station's ability to grant retransmission consent turn retransmission consent from a vehicle created to ensure viewer access to broadcast signals negotiated for by MVPDs into weapon preventing such access.[137]

Moreover, it is evident from the Commission's Part 73 rules, that the Commission

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[135] DirecTV Comments at 15, n. 38 (*citing Rules Governing Television Broadcast Stations*, 11 Fed. Reg. 33 (Jan. 1, 1946); Network Affiliated Stations Alliance, Petition for Inquiry Into Network Practices, at 33 n. 95 (filed Mar. 8, 2001) ("One example of network dominance is ABC's refusing its affiliates the right to give retransmission consent to cable and satellite companies within the affiliate's local market."); *see Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 13610 (2008); *see also National Broadcasting Co.*, Public Notice, 44 FCC 2218 (rel. Jun. 1, 1972) (questioning whether NBC's interpretation of its contracts had led it to withhold approval of rebroadcast authority in violation of Section 3.658(b) of the Commission's rules).

[136] ACA Comments at 40-44.

[137] Time Warner Comments at 34-35; OPASTCO et al. Comments at 9-11; Joint Cable Comments at 9-15; DirecTV Comments at 13-18; US Telecom Comments at 24-26.

has in the past adopted significant restrictions on the network-affiliate relationship by restricting the ability of its broadcast licensees to enter into agreements in order to carry out its statutory mandate to ensure that its broadcast licensees operate in the public interest, consistent with the Commission's policy goals of localism, diversity and competition.[138] These restrictions include a licensee's ability to enter into contracts with networks concerning exclusive affiliation of station; territorial exclusivity; station commitment of broadcast time; right to reject network programs; dual network operation; and control by networks of station advertising rates).[139] ACA submits a prohibition on network interference with its affiliate's negotiations for retransmission consent for out-of-market carriage falls firmly within this class of regulations and should be adopted forthwith by the Commission in this proceeding.

The Commission's previous failure to address network interference through its retransmission consent regulations cannot provide sufficient reason for it to fail to address the matter now in the face of evidence that network interference (i) frustrates longstanding policies designed to protect the ability of MVPDs to negotiate in good faith for carriage of distant signals; and (ii) harms consumers. Network interference clearly harms the public by depriving MVPD subscribers of access to broadcast signals from neighboring television markets that have long been deemed "significantly viewed" in their communities; are available over-the-air; or otherwise carry programming of

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[138] 47 C.F.R. § 73.658 (Commission regulations regarding "[a]ffiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.").

[139] *Id.*

regional interest.[140]

Although the network non-duplication rules were specifically designed to protect a local affiliate from competition from an out-of-market station imported by a cable operator, such protection was specifically limited. Beyond the protected zone of exclusivity, no public policy goal ever recognized by Congress or the Commission is furthered by permitting networks to restrict the right of its affiliate to grant out-of-market retransmission consent. To repeat, the right to grant retransmission consent is a right of the local broadcast station under the Act, not the network, and network interference in the negotiations between a broadcaster and any MVPD for out-of-market carriage, whether through legally binding or non-legally binding restrictions or disincentives must not be tolerated. The Commission is therefore well within its rights to address network interference under the good faith negotiating standard.[141]

Finally, the NBC Television Affiliates request that the Commission leave undisturbed a comprehensive "framework" or cooperative agreement between networks and their affiliates concerning an affiliate's right to delegate to its network the ability to negotiate all retransmission consent agreements on behalf of participating local affiliates.[142] Time Warner Cable agrees that while networks should be prohibited from

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[140] ACA Comments at 40-44, 54-59.

[141] The Commission may also wish to amend its Part 73 rules governing the network-affiliate relationship in a separate rulemaking proceeding, but it should not let the possibility of this additional safeguard delay action on the matter. The instant retransmission consent rulemaking is the appropriate primary vehicle for addressing network interference, regardless of any subsequent regulatory changes in Part 73 the Commission may also wish to pursue.

[142] NBC Affiliates Comments at 13-14; *see* DirecTV Comments at 14-18 (arguing that the Commission

overriding their affiliates by injecting themselves into retransmission consent negotiations, certain consensual arrangements between MVPDs and networks should be permissible.

> [N]othing should prevent MVPDs from consenting to a group deal for multiple stations as negotiated by a network when such an arrangement is beneficial for, and agreed upon, all parties.
>
> [T]he touchstone for determining whether a network's negotiation on behalf of its affiliates is permissible should be the consent of the MVPD. 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 consumers.[143]

ACA does not seek to prohibit a broadcast station from designating an agent to negotiate on its behalf, so long as such agent is obligated to negotiate in good faith with an MVPD.[144] At this time, ACA notes only that such an arrangement may, in certain

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must broadly prohibit *any* third party approval agreements, including network approval provisions, that require a station to seek approval from a third party in order to ratify its agreement to the terms for retransmission consent. In particular, DirecTV argues that the Commission should prohibit under the good faith standards even "voluntary" blanket retransmission consent proxy agreements by which an affiliated station would voluntarily divest its control over retransmission consent rights by vesting them in the network, by precluding the station from being able to negotiate in good faith).

[143] Time Warner Cable Comments at 34-35.

[144] Thus far, the NBCU-affiliate framework agreement appears to be unique. See Michael Malone, "NBC, Affiliates Iron Out Blanket Retrans Deal," Broadcasting & Cable (May 16, 2011). ACA, does not wish to prematurely raise concerns about such an arrangement, but reserves the right to judge its impact on MVPDs once additional details about how the framework would operate are made available and the arrangement is put into practice.

circumstances, implicate the key harm for smaller MVPDs that ACA has identified in the proceeding: network interference with the right of an affiliate to grant retransmission consent to an out-of-market MVPD.[145] Specifically, ACA would be concerned if an MVPD that was not subject to the network non-duplication rules, had to negotiate retransmission consent with a single entity, such as a network, for rights to carry both the local broadcast station and an out-of-market station. In such instances, competitive concerns arise and, accordingly, the better policy outcome is for the Commission to ensure that an MVPD retain the right, at its option, to negotiate individually with each affiliated station operating under such a framework agreement.

d. Prior Commission Interpretations of its Retransmission Consent Authority Are No Impediment to Adoption of Needed Reforms.

Fox argues that the Commission has specifically recognized that "neither the text nor the legislative history" of the Act "indicate[s] a congressional intent to restrict the rights of networks and their affiliates through the good faith or reciprocal bargaining obligation to agree to limit an affiliate's right to redistribute affiliated programming."[146]

To repeat, broadcast stations are not like Costco or other franchised businesses, but rather as broadcast television licensees under Title III of the Act, stand in special relationship to the government, which entails special rights and concomitant

[145] *See supra* n. 28.

[146] Fox Comments at 14-16 (*citing In re Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004: Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, 10345, 10354-55 (2005)); *In re Monroe, Georgia Water Light and Gas Commission D/B/A Monroe Utilities Network v. Morris Network, Inc.*,19 FCC Rcd 13977, 13980, n. 24 (2004); *In re ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television, Inc.*, 24 FCC Rcd 1645, 1648-49 (2009).

responsibilities.[147] Unlike other franchisors, such as fast food chains, broadcast networks are restricted by statute in key respects with regard to controlling how their franchisees may redistribute their products.[148] The compulsory license specifically provides for secondary transmission of both local and distant broadcast signals by MVPDs, thus limiting network control over an affiliated station's carriage negotiations with MVPDs.[149] Similarly, a station's obligation to negotiate in good faith for retransmission consent applies to all negotiations both for in-market and out-of-market carriage.[150]

All content owners, including the broadcast networks, understand that this is the policy set forth by Congress and the Commission when they determine how to distribute their video programming. The content owners know that as a result of making their video programming available to broadcast stations, cable operators may negotiate with the stations for out-of-market carriage, and subject to the network non-duplication rules, cable operators may offer their programming to their customers. Accordingly, content owners have two choices: (i) make their programming available to a broadcast station, and subject themselves to the compulsory license and retransmission consent rules of the road; or (ii) don't make their programming available to a broadcast station. Content owners remain free to distribute their programming through alternative means, including

[147] ACA Comments at iv-v, 2.

[148] See ACA Comments at 28-29.

[149] 17 U.S.C. § 111.

[150] ACA Comments at 42-66.

cable programming networks or online distribution systems, where they may retain more control over the secondary distribution of their programming. In 2005,, the Walt Disney Company that owns, the ABC Network, ABC broadcast stations, and national cable networks, including ESPN, and the NFL made just such a decision, when the parties entered into an agreement to move Monday Night Football from the ABC Network, which had aired the program for 35 years, to ESPN.[151]

Second, ACA has addressed Fox's argument concerning restrictions on the right of affiliates to redistribute affiliated programming in its Comments.[152] Two points bear repeating: (i) the obvious incompatibility between an interpretation of the good faith obligation that permits contractual or informal preclusion of a broadcaster's ability to grant out-of-market retransmission consent and the Commission's recognition of the broadcaster's reciprocal good faith bargaining obligation with regard to *all* MVPDs—in-market as well as out-of-market; and (ii) the fact that although the Commission did not find evidence that Congress, through the good faith and reciprocal bargaining obligations, specifically intended to restrict the rights of networks and their affiliates to agree to limit an affiliate's right to redistribute the network's programming, neither did it find that either *SHVIA* or *SHVERA*[153] prohibit the agency from restricting the ability of a

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[151] Leonard Shapiro & Mark Maske, *'Monday Night Football' Changes the Channel*, Washington Post, Apr. 19, 2005 (available at http://www.washingtonpost.com/wp-dyn/articles/A63538-2005Apr18.html.).

[152] ACA Comments at 46-54.

[153] SHVIA; SHVERA; *see also*, ACA Comments at 47-50 ("After passage of *SHVERA*'s reciprocal good faith obligation, the Commission found it expeditious to simply extend its existing good faith bargaining rules to MVPDs, while explicitly recognizing that the reciprocal bargaining obligation applies to retransmission consent negotiations between all broadcasters and MVPDs regardless of the DMA in

broadcaster station agree to limitations on its ability to grant retransmission consent to any MVPD.

Third, despite the Commission's earlier hesitancy to address questions of network interference with an affiliated station's retransmission consent rights, there is no statutory impediment, nor public policy justification, for failing to do so now. The evidence is clear that interference with out-of-market retransmission consent frustrates congressional and Commission policies preserving the ability of MVPDs to carry distant signals, particularly in areas of a DMA not otherwise served by broadcast service or where carriage would not violate the protected zone of network programming exclusivity of another station under Commission rules.

Fourth, it is well established that the Commission may change regulatory policy if it acknowledges that it is changing its policy, provides the courts a reasoned basis for the change, and takes account of the reliance interests stemming from the earlier policy.[154] The Commission's earlier interpretations of the Act as limiting its ability to regulate the network affiliate relationship through the retransmission consent and good faith regulations are policy decisions on the intent and scope of the statutory language that can be re-visited as circumstances change. In fact, the Commission has

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which they are located.")(emphasis in original).

[154] *FCC v. Fox Television Stations*, 129 S.Ct 1800 (2009); *see* Open Internet Order, ¶¶ 117-122 (reinterpreting the scope of its statutory charge under Section 706(a) of the Telecommunications Act of 1996 to "encourage the deployment of advanced telecommunications capability" as sufficient to support the imposition of affirmative regulatory obligations on broadband Internet access service providers, where the Commission had previously determined that the provision granted no additional regulatory authority beyond that contained in other provision of the Communications Act).

recognized its "obligation to consider, on an ongoing basis, whether its rules should be modified in response to changed circumstances."[155] It is pursuant to this authority, and in view of significant marketplace changes, that the Commission launched this rulemaking.

Network interference with the ability of an affiliate to grant retransmission consent to an out-of-market MVPD also further entrenches the market power of the in-market affiliated station. As ACA stated in its Comments:

> Today, as the Petition initiating this proceeding demonstrated, widespread MVPD competition means that broadcasters can afford to deny retransmission consent for extended periods of time; that "this dynamic gives broadcasters the incentive and ability to engage in brinkmanship by holding up the MVPD for ever-increasing retransmission consent fees;" and these tactics increase the likelihood that a dispute will result in a loss of programming for the MVPD's subscribers.[156] Ultimately, "this conduct harms consumers by driving up rates and imposing switching costs, harms advertisers by potentially decreasing the number of "eyeballs" available, and harms competition among MVPDs by undermining attempts to compete more effectively on price."[157]

The Commission itself raised the issue of whether third-party interference should be deemed a violation of the good faith in the NPRM, and in evaluating that question, it should take note of these changed market conditions as it re-examines the scope of its

[155] 2010 Program Access Order, ¶ 11 n. 23.

[156] *In the Matter of Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent,* Petition for Rulemaking at 35-36. (filed Mar. 9, 2010) ("Petition").

[157] ACA Comments at 72-73; Petition at 36.

authority under the Act generally and Section 325 specifically.[158] It has become increasingly clear that the retransmission consent framework is not working, bitter disputes involving loss of signals are becoming more frequent, and specifically, cable operators are unable to negotiate in good faith with broadcast stations for out-of-market carriage, thus requiring that additional consumer protection measures be adopted.

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In summary, the Commission should flatly prohibit network interference with a station's exercise of retransmission consent for out-of-market carriage. The Commission can accomplish this by either: (i) adopting and amending the rule proposed in the NPRM prohibiting both legally-binding and non-legally binding network-affiliate agreements that have the effect of limiting the ability of a station to grant retransmission consent to any MVPD, in-market or out-of-market amended in accordance with ACA's recommendations; or (ii) by re-interpreting the scope of the prohibition in Section 76.65(b)(vi) on agreements preventing a broadcaster from granting retransmission consent to an MVPD and the prohibition in Section 76.65(i) on refusal to negotiate to accomplish this end; or (iii) by doing both.[159] ACA submits that however the Commission chooses to accomplish this long-overdue rule change, it ensure that (i) broadcast stations negotiate retransmission consent under the exact same good faith

[158] NPRM, ¶¶ 22-23.

[159] 47 C.F.R. § 76.65(i) & (vi). ACA also notes that the record supports a finding that a station that has granted a network veto power or a say over any retransmission consent agreement with any MVPD has impermissibly impaired its own ability to designate a representative who can bind the station in negotiations, contrary to Section 76.65(b)(ii).

standard, applying the exact same "calculus" to in-market and out-of-market carriage negotiations; and (ii) prohibit broadcast stations from agreeing, whether formally or informally, to any requirement of an affiliated network that would lead to the station negotiating retransmission consent for out-of-market carriage any differently than it negotiates with an MVPD for in-market carriage. This would include provisions that create disincentives for the station to grant out-of-market carriage.

B. The Commission Should Prohibit a Broadcast Station from Conditioning its Grant of Retransmission Consent on an MVPD's Agreement Not to Carry an Out-of-Market Station.

Consistent with its analysis of network interference, ACA submits that it cannot be consistent with any plausible conception of "good faith" for a broadcast station to interfere with the right of an MVPD to negotiate a mutually agreeable arrangement with a "distant" signal to satisfy its subscriber needs and desires. The record also supports ACA's call for the Commission to flatly prohibit as a *per se* violation of the good faith obligation any request by a broadcast station that an MVPD refrain from carrying a distant broadcast station signal, whether embodied in a written agreement or suggested orally during negotiations. Joint Cable Commenters also call for a prohibition on provisions in retransmission consent agreements that prevent an MVPD from carrying an out-of-market affiliate of the same network.[160]

[160] Joint Cable Comments at 15, 18 (Joint Cable Commenters urge the Commission to go further and eliminate its exclusivity protections. "In order to allow the market to impose competitive discipline on retransmission consent terms and conditions, the Commission's rules should be modified to deem unlawful any agreement between a broadcaster and an MVPD that restrains the MVPD from dealing with a competing source of programming.").

Not surprisingly, the record is devoid of evidence and analysis supporting this practice. Indeed, it is difficult to imagine how a broadcaster could defend a practice that effectively amounts to a restraint on trade by a willing MVPD and out-of-market station to enter into a mutually agreeable set of terms for retransmission consent of the station's signal so that consumers served by the MVPD could benefit from its availability.

As ACA explained in its Comments, the Commission has steadfastly held that cable operators may carry a distant broadcast signal without deleting any of the network or syndicated programming carried in the signal outside of a broadcaster's protected zone of exclusivity.[161] So too, the Commission has consistently recognized that stations considered "significantly viewed" in a cable community should be treated as "local" signals. In light of these long-held policies, it is unconscionable that a local station during its retransmission consent negotiations with the MVPD should be permitted to deny access to such signals to the MVPD and its subscribers.[162] This practice directly harms consumers through loss of access to relevant regional programming and also by putting them at risk of significant service disruption if their cable operator no longer carries an out-of-market signal of the same network for which in-market affiliate negotiations have reached an impasse.

As with the forms of network interference discussed above, the Commission can

[161] ACA Comments at 59.

[162] ACA Comments at 59.

address this harmful station practice either by interpreting its current good faith standards more broadly, or by adopting its proposed prohibition, or by doing both. The current Section 76.65(b)(vi) prohibition against execution of an agreement not to enter into an retransmission consent agreement with any other station or MVPD can be easily interpreted more expansively to preclude a broadcast station from executing an agreement prohibiting an MVPD from carrying an out-of-market station that might otherwise be available to consumers as a partial substitute for the in-market station's programming. In the alternative, or in addition, the Commission can add an explicit prohibition on broadcast station practices that interfere with the ability of an MVPD to carry a distant significantly viewed station in the local broadcaster's market.

ACA urges the Commission to go further and prohibit a local broadcaster's interference with the carriage of distant signals in cases where the signal may not be deemed significantly viewed, but is nonetheless of interest to residents in the MVPD's service area. As ACA explained in its Comments, for subscribers of smaller rural MVPDs, the programming on stations considered "distant" under Commission rules, is nonetheless of regional interest, and MVPDs should be able to negotiate to include these stations in their programming line-up without interference by in-market stations.[163] Finally, consistent with its analysis of the means of carrying out coordinated negotiations, the Commission should prohibit all forms of broadcast station interference with the right of an MVPD to negotiate carriage of any out-of-market station whether embodied in a legally binding or non-legally binding agreement of the parties.

[163] ACA Comments at 26-62.

In summary, the Commission should flatly prohibit as a *per se* violation of the good faith obligation any request or requirement by a broadcast station that an MVPD refrain from carrying a distant broadcast station signal, whether embodied in a written agreement or suggested orally during negotiations, as a condition of granting retransmission consent for in-market carriage. The Commission additionally should prohibit all forms of broadcast station interference with the right of an MVPD to negotiate carriage of any out-of-market station whether embodied in a legally binding or non-legally binding agreement of the parties. Moreover, the Commission should immediately abrogate all provision in existing retransmission consent agreements that would prohibit an MVPD from carrying a distant broadcast station signal. Finally, the Commission can address this harmful station practice either by interpreting its current good faith standards more broadly, or by adopting its proposed prohibition, or by doing both. The current Section 76.65(b)(vi) prohibition against execution of an agreement not to enter into an retransmission consent agreement with any other station or MVPD can be easily interpreted more expansively to preclude a broadcast station from executing an agreement prohibiting an MVPD from carrying an out-of-market station that might otherwise be available to consumers as a partial substitute for the in-market station's programming. In the alternative, or in addition, the Commission can add an explicit prohibition on broadcast station practices that interfere with the ability of an MVPD to carry a distant significantly viewed station in the local broadcaster's market.

IV. THE COMMISSION MUST INVESTIGATE AND ADDRESS THE RAMPANT PRICE DISCRIMINATION AGAINST SMALLER MVPDS AS PART OF ITS RETRANSMISSION CONSENT REFORM EFFORT.

The record amply supports ACA's long-standing position that smaller MVPDs are the victims of widespread retransmission consent price discrimination, and that this discrimination ultimately leads to consumer harm and the depletion of valuable resources that could otherwise be used to deploy other advanced services and fund additional broadband deployment.[164] ACA has repeatedly asked the Commission to investigate this widespread practice,[165] and believes that once the Commission investigates and evaluates the widely disparate pricing levels between smaller and large MVPDs, it will arrive at the same conclusion as ACA: small and medium-sized operators serving rural and smaller markets suffer marked price discrimination at the hands of broadcasters, and pay disproportionately higher prices for retransmission consent without any public policy justification.[166]

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[164] ACA Comments at 76-91.

[165] *See, e.g., In the Matter of 2010 Quadrennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Inquiry, MB Docket No. 09-182 (rel. May 25,2010) Comments of the American Cable Association at 11-12 (filed July 12, 2010); *Media Bureau Announces the Release of Requests for Quotation for Media Ownership Studies and Seeks Suggestions for Additional Studies in Media Ownership Proceeding*, Public Notice, DA 10-1084, MB Docket No. 09-182 (rel. Jun. 16, 2010), Comments of the American Cable Association at 4 (filed July 7, 2010); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the American Cable Association, MB Docket No. 07-269, 5-10 (filed June 8, 2011); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Comments of the American Cable Association, MB Docket No. 07-269, 11-13 (filed May 20, 2009).

[166] ACA Comments at 87.

A. Retransmission Consent Price Discrimination Drives Up Prices and Harms Consumers

As ACA has documented in this proceeding, small and medium-sized operators pay, on average, *double* the retransmission consent fees of larger operators.[167] Professor Rogerson has calculated average per subscriber retransmission consent fees by MVPD type, and calculated the magnitude of price discrimination.[168] Based on Professor Rogerson's evaluation, "smaller MVPDs are typically forced to accept markedly higher prices than larger MVPDs."[169]

As ACA noted in its Comments, the differential in prices paid by large and small MVPDs have absolutely no basis in broadcasters' cost of delivering the signal.[170] ACA members pay the costs associated with *receiving* broadcast signals whether the signals are received off-air, or via satellite, microwave, or fiber.[171] This is particularly true for ACA members serving rural areas who cannot receive broadcasters' signals off-air, as they must pay per subscriber per signal per month transport costs to deliver the

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[167] ACA Comments at 78.

[168] William P. Rogerson, *The Economic Effects of Price Discrimination in Retransmission Consent Agreements* (May 18, 2010) (attached as Appendix A to Petition) at 12-13 ("It appears that the average retransmission consent fee paid by small and medium sized cable operators is more than twice as high as the average retransmission consent fee paid by large cable operators. Representatives of the ACA have told me that, based on anecdotal evidence from their membership, they agree that $.30 per subscriber per month is likely a conservative estimate of the retransmission consent fee that the average small or medium sized MVPD pays to a single Big 4 station. In fact they are aware of numerous instances where their members currently pay retransmission consent fees as high as $.75 per subscriber per month to individual Big 4 stations.").

[169] ACA Comments at 77.

[170] ACA Comments at 82.

[171] ACA Comments at 81-82.

broadcasters' signals *in addition* to retransmission consent fees. To be clear, ACA is not suggesting that smaller MVPDs should not pay for retransmission consent. Rather, ACA is stating that the marginal cost to broadcasters of providing retransmission consent to all MVPDs is essentially zero,[172] and smaller MVPDs should not pay unjustifiably higher costs for the same service received by larger MVPDs.

Many commenters corroborate this analysis. For example, OPASTCO agrees that "small MVPDs face substantial discrimination in prices for access to broadcast programming."[173] APPA confirms the existence of substantial price discrimination against smaller MVPDs.

> As a practical matter, these [providers] 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.[174]

WSureWest observes that broadcasters are able to get away with significant levels of price discrimination because smaller MVPDs are at an extreme bargaining disadvantage against broadcast stations as compared to larger MVPDs.[175] Joint Cable

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[172] Broadcast analysts confirm that retransmission consent "is still 100% margin cash flow" for stations. Price Coleman, TVNewsCheck, "Retrans Holding Back Station Sales", June 22, 2011 (quoting Bishop Cheen, Wells Fargo), http://www.tvnewscheck.com/article/2011/06/22/52045/retrans-sharing-holding-back-station-sales (last visited June 25, 2011).

[173] Rural MVPD Group Comments at 7-8.

[174] APPA Group Comments at 14.

[175] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of

Commenters explain the dynamic as follows:

> Broadcasters typically target the smaller and mid-sized operators that provide the easiest targets to be "rate leaders." After they coerce those operators into accepting rate increases, they then use the argument that "the market has changed" to justify pushing for greater increases from other operators.[176]

The Indiana Utility Regulatory Commission ("IURC") also acknowledges the existence of unjustified and detrimental price discrimination on smaller and rural MVPDs. Specifically, IURC states that "discrimination in the pricing of content does occur and that it is detrimental . . . to the small network providers (cable companies and local exchange companies) involved and to their customers...."[177] IURC concludes its comments by asking the Commission to:

> [R]ecognize that small and new entrant MVPDs are often forced to accept terms and pricing significantly less favorable than those given to larger MVPDs and . . . to act decisively to limit the ability of content providers to continue the practice of discrimination based on the size of the MVPD's service footprint, without regard to incremental costs, absent binding voluntary action by content providers.[178]

Proposed Rulemaking, MB Docket No. 10-71, Surewest Communications Comments at 12 (filed May 27, 2011) ("SureWest Comments").

[176] Joint Cable Commenters at 22.

[177] *In the Matter of Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, MB Docket No. 10-71, The Indiana Utility Regulatory Commission Comments at 2, 4 (filed May 27, 2011) ("IURC Comments") ("The American Cable Association ("ACA") has provided data in a previous FCC docket showing that prices, terms, and conditions for access to broadcast programming have increased substantially; that small MVPDs face substantial discrimination in prices for access to broadcast programming unrelated to actual marginal cost; that increasing demands of content providers result in subscribers of small and medium-sized operators losing access to content; and that these rising costs of retransmission consent raise the costs of multi-channel video, harm competition, and hinder the deployment of advanced services.")

[178] *Id.* at 7.

The record is clear: price discrimination against smaller MVPDs is both unfair and widespread. The ultimate harm falls on their customers, who pay increased cable rates when operators pass along a portion of the resulting and discriminatory retransmission consent price hikes.[179] Moreover, as ACA noted in its Comments, due to distressed economic conditions in many areas of the United States, smaller operators cannot always pass through retransmission consent price increases, and instead, must absorb these disproportionate cost increases either in whole or substantial part, adversely affecting smaller operators' financial stability.[180]

The Commission must recognize that neither provider nor consumer wallets are infinitely expandable. The time has come to investigate and address unfair price discrimination against smaller providers and to take appropriate action to remedy this unfair and costly practice.

B. Retransmission Consent Price Discrimination Depletes Smaller MVPD Capital and Diverts Limited Resources Away From Other Service Improvements and Broadband Infrastructure Investment.

A further consequence of the unjustified retransmission price discrimination demonstrated by ACA in its Comments is the depletion of smaller MVPDs capital resources that could otherwise be spent on improving service, networks, and the

[179] Rural MVPD Group Comments at 7-8; APPA Group Comments at 14; IURC Comments at 4-5.

[180] ACA Comments at 94.